

**The Role and Significance of Judges
in the Arab Middle East:**

An interdisciplinary and empirical study

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Declaration: 'I, Sara Saosan Razai, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.'

Abstract

Judges and courts play a vital role in the development of law and politics in the countries of the Arab Middle East. But, despite their importance, there is a gap in legal scholarship about the significance and function of judges across the region. The small amount of previous research on Arab judiciaries has focused primarily on formal descriptions of the judicial role, particularly from a comparative perspective with Western judiciaries. This research aims to address this gap in scholarship by:

- (1) Developing a new typology of judicial systems in the Arab Middle East, reflected in the judicial systems Saudi Arabia, Lebanon, Egypt and Jordan;
- (2) Surveying Arab judges across the region about their role perceptions, attitudes to law and politics and their personal experiences as judges.
- (3) Profiling Arab judges, based on information on LinkedIn, to assess their educational background and professional experiences prior to appointment.

The thesis encompasses three inter-related studies. The first study draws on primary and secondary material to map and create a typology of representative judicial systems in the region. This draws on existing typologies of judicial systems in Western democracies but develops this further by identifying whether there are unique elements to judicial systems in the region. The second study is an online survey of 65 judges from six Arab countries exploring their judicial role. This is believed to be the first-ever survey of Arab judges to explore these issues. The third study profiles the educational and professional experiences of 112 judges based on their profiles obtained from the online professional platform, LinkedIn.

The three studies provide for an initial insight into the significance of an important group in the Arab region that has traditionally not been the subject of empirical research. The thesis explores Arab judicial systems and judicial roles through an interdisciplinary prism, drawing on methods found in political

science, sociology, social psychology and law. The thesis also explores how the role and significance of Arab courts and judges fit within the wider scholarship on judicial behaviour and role perceptions.

Impact Statement

Despite their essential societal role in imparting justice, little is known about judges in the Arab Middle East, in particular, how judges perceive their role and how this perception might affect their decision-making. What little previous research there is on judges in the region has not focused on judicial role conceptions, and there has been little to no work that takes a comparative and interdisciplinary perspective on this topic. Exploring the judicial role therefore provides for a broader understanding in an otherwise under-developed area of judicial studies and Arab Middle Eastern law.

This research is an inter-disciplinary and empirical work on judges in the Arab Middle East and the findings offer a first insight into the role of Arab judges. It is believed that the knowledge, analysis, discovery and insight provided in this thesis could be put to a beneficial use within academia and beyond. This study is able to:

- Describe the interactions between judges, including their interactions with other parts of the political system;
- Explore possible behavioural regularities within the community of judges, as well as the formal and informal requirements of behaviour.
- Provide an understanding of the differences and similarities that judges have in the perception of their role;
- Provide an understanding of Arab judges' role outside the legal system;
- Shed light on the similarities and differences of judicial role perceptions within the Arab region and between judges in the Arab region, in civil law jurisdictions and common law jurisdictions.

Academic impact

The insights provided in this research highlight the need to promote, deepen and widen academic scholarship on the judiciary in the Arab region that is empirically grounded. This research significantly advances academic knowledge of Middle Eastern law and society from an inter-disciplinary approach. The research begins to build the necessary evidence-based

knowledge to further judicial studies in the Arab region and beyond. Specifically, this research will help to enhance academic links between the Arab Middle East and the West on judicial research.

Wider impact

Generally, this research will help to further intercultural dialogue and increase understanding of the justice sector in the Arab region. This research also has the potential for impact, regionally and internationally. From a policy perspective, the research will enable those interested in the region to understand the values, attitudes and significance of the judges in the region.

This research will also equip policy-makers, third sector organisations and practitioners with solid and evidence-based knowledge about judges and courts that can guide future policy making and activities in the region. The findings from this research will be disseminated beyond academia through policy-papers, briefing reports and articles in the mainstream media.

Table of Contents	
Abstract	3
Impact Statement	5
List of Tables	1
List of Figures	1
Glossary	1
Acknowledgments	1
Chapter 1. Introduction	2
Judges as political actors	2
“Judicialisation of Politics”	4
Judicialisation beyond Western liberal democracies	6
Research questions	8
Assessing the political significance of judges	9
Judicial system	9
Judicial selection and career	11
Judicial role conceptions	13
Are judges human? The development of judicial behaviouralism	14
Understanding the role of judges in the Arab Middle East	16
Western conceptions of the Arab judge	17
Thesis aims and organisation	19
Chapter 2. Judicial role conceptions and the political significance of judges	23
Judicial roles	23
Three key studies	26
Judicial role categories used in this study	28
Executor judge	29
Delegate judge	30
Guardian judge	31
Political judge	31
The ideal Arab judge	32
Relationships with other judges	37
Speaking with one tongue	38
Actors beyond the legal community	39
Judges and the public	41
Judges and the media	44
Judicial links to the government	46
Summary	47
Chapter 3. Judiciaries in the Arab Middle East: A complex history	49
Law and legal systems in the Arab Middle East: beyond binary terms of traditionalism and modernity	50
Part 1: Origins of the Arab judge: tribal, Islamic and non-Islamic influences	52

Age of the Arab-Muslim Caliphates	54
The Umayyads (661 – 750 AD)	56
Introduction of foreign legal concepts and maxims into Islamic society	57
The ‘Abbāsids (750- 1258)	59
Doctrinal schools of law	59
Development of the Islamic judge	61
Significance of the Arab-Muslim Caliphates on the role of the Arab judge	62
Part 2: Western influences on the development of the Arab judge	62
The Ottoman judicial reforms (1839 -1876)	63
Influence of Ottoman Tanzīmāt in the Arab region	65
Significance of the Ottoman period on the role of the Arab judge	67
Influence of British and French hegemony and post-colonial legal reforms	68
The quest for Arab (legal) unity	70
Four different Arab approaches to law and judges	71
Summary	72
Chapter 4. Research approach and methods	74
Research approach	74
General obstacles to accessing data from the region	76
Elite groups	76
Security risks and political instability	77
Study 1: Factors in Arab judicial systems likely to affect the political significance of judges	78
Study 1 approach: Creating a typology and mapping judicial systems in the region	79
Limitations of comparative study	80
Reliability and Accuracy	81
Advantages	81
Study 2: Profiling Arab judges’ education and career experiences	82
Study 2 approach: LinkedIn and Arab Judges Survey	83
LinkedIn analysis	83
Limitations of LinkedIn data	85
Study 3: Arab judges’ view of the judicial role	86
Study 3 approach: Judicial attitudes and role perceptions (Arab Judges Survey)	88
The Survey	89
Survey languages	89
Survey recruitment	90
Survey questions	91
Survey timeline	92
Sampling method	93
Survey responses	96
Limitations of the survey	97
Representativeness	97
Limitations in the survey question approach	98
Social desirability bias	100
Benefits of the survey findings	101
Summary	102
Chapter 5. Four judicial systems in the Arab Middle East	103

The role of judicial systems in judicialisation	103
Identifying four types of judicial systems in the Arab Middle East	105
A new approach to understanding Arab judicial systems	105
Egypt: Fragmented constitutional system	107
Mixed system history	107
Ordinary courts	110
Court of Cassation	110
Administrative courts	111
Courts with special jurisdiction	112
The Supreme Constitutional Court	113
Judicialisation and the Egyptian judicial system	113
Saudi Arabia: Dual religious court system	115
Use of Ijtihād in Saudi courts	115
Sharī‘a Courts	119
Board of Grievances	120
“A system within a system”	120
Saudi model: one end of the Arab judicial spectrum	121
Lebanon: Highly fragmented but hierarchical system	122
“A house of many mansions”	122
Ordinary Courts	125
Administrative Court branch	126
Religious courts	126
Specialised tribunals	127
Constitutional Council	128
Lebanese model: The other end of the Arab judicial spectrum	129
Jordan: A quasi unitary – constitutional system	130
Ordinary courts	133
The new administrative courts	134
Religious courts	134
Jordanian Constitutional Court	134
Arab judicial structures and the political significance of courts	135
Centripetal and Centrifugal Dynamics: Judicial Review	137
Constitutional and judicial review in Egypt, Jordan, Lebanon and Saudi Arabia	139
Summary	144
Chapter 6. Arab judges: selection, career and status	146
Judicial socialisation from within	146
Two distinct patterns of judicial selection and recruitment	148
Judicial recruitment in Egypt, Jordan, Lebanon and Saudi Arabia	149
Formal and informal judicial selection requirements	149
Egypt: Quasi professional and bureaucratic judiciary	150
Lebanon: largely bureaucratic judiciary	152
Jordan: interweaved bureaucratic and professional judiciary	153
Saudi Arabia: largely professional judiciary	154
Judicial training in in Egypt, Jordan, Lebanon and Saudi Arabia	155
Institutional socialisation in Egypt, Jordan, Lebanon and Saudi Arabia	156
Judicial career patterns and socialisation post-appointment	158
Judicial career patterns in Egypt, Jordan, Lebanon and Saudi Arabia	159
Career advancement for Egyptian Jordanian, Lebanese and Saudi judges	161

Judicial evaluation and discipline in Egypt, Jordan, Lebanon and Saudi Arabia	164
Promotion as a means of judicial socialisation	167
Summary	168
Chapter 7. Pre-appointment socialisation of Arab judges	170
Professional socialisation and sources of individualisation	170
Pre-appointment socialisation	171
Legal education	171
Types of law degrees	174
Career experiences	176
Prior education and legal practice	180
Lateral professional mobility	181
Individual judges' personalities	183
Summary	187
Chapter 8. Judicial role conceptions	189
Exploring Arab judicial role orientations	189
Survey approach to understanding Arab judicial role conceptions	190
First approach: ranking the importance of judicial roles	190
Second approach: comparing judicial roles between jurisdictions	195
Third approach: the importance of precedent and the public	198
Judicial role conceptions: Arab and Western judges compared	205
Comparing the relative importance of decision factors	206
Arab judges' orientations to precedent and the public	210
Summary	214
Chapter 9. Arab judges' relationships with judicial peers and non-judicial actors	215
Existing norms of judicial behaviour	215
Inter-judicial relationships	216
Qualities of a good judge	217
Arab judges' views of the qualities needed to do their job well	218
Arab judges' perceptions of how their colleagues view judicial qualities	220
Level of consensus amongst Arab judges on norms of behaviour	222
Judicial norms of cooperative working	223
External relationships	225
The executive	227
Arab judges and religious authorities	229
Judges relationship to the public	230
Summary	234
Chapter 10. Discussion	235
Arab judiciaries as institutions	235
Institutional structures of Arab judiciaries	236
The institutional career of the Arab judge	237
Arab judges' prior personal experiences	239

The mind of the Arab judge	240
Four judicial role perceptions	241
The executor judge	243
Beyond the “mouthpiece of the law”	244
Arab judicial norms of internal and external behaviour	249
Judicial peers	249
Non-judicial actors	253
Judges and public perceptions	254
Does judicialisation exist in the Arab Middle East?	254
Future research	255
Assessing the impact of judicial reform projects	256
Public perceptions of judges and justice	256
Conclusion: The reality of “Qāḍī justice”	257
BIBLIOGRAPHY	259
Appendices	282
Appendix 1: Judicial Structures in Bahrain, Syria, Tunisia and United Arab Emirates according to official laws	283
Appendix 2: English translation of cover letter for Survey questionnaire	294
Appendix 3: Arab Judges Survey (English version)	295
Appendix 4: Country-based from the Arab Judges Survey	309

List of Tables

Table 1. Judicial role orientations and terminology used in three studies	28
Table 2. Sharjah Convention on Judicial Ethics 2007 (unofficial translation).....	36
Table 3. Average trust in informal justice and Courts on a score range of 1-5 (HiIL).....	43
Table 4. Perceptions of courts in Jordan and Lebanon (HiIL).....	43
Table 5. Doctrinal schools in Sunni Islamic law	60
Table 6. Sample of LinkedIn profiles and Jordanian Constitutional Court judges (n=112)85	
Table 7. Number of respondents according to language of the Arab Judges Survey....	90
Table 8. Sample profile in Arab Judges Survey (n=91)	97
Table 9. Classification of four Arab judicial structures	105
Table 10. Characteristics of Constitutional courts/councils in Egypt, Jordan, Lebanon and Saudi Arabia.....	140
Table 11. Entry requirements to the judiciary in Egypt, Jordan, Saudi Arabia and Lebanon	150
Table 12. Judicial Training in Egypt, Lebanon, Jordan and Saudi Arabia.....	155
Table 13. Elements of judicial career advancement in Egypt, Jordan, Lebanon and Saudi Arabia	160
Table 14. Evaluation and discipline of judges in Egypt, Jordan, Lebanon, and Saudi Arabia	165
Table 15. Region where Egyptian, Jordanian and Lebanese judges obtained their law degrees (n=112, LinkedIn)	173
Table 16. Arab judges' ranking of roles in order of importance (n=60).....	193
Table 17. Questions examining precedent orientation (Arab Judges Survey)	200
Table 18. Questions examining judges' public orientation (Arab Judges Survey).....	200
Table 19 Arab judges' assessment of the influence of precedent on their judicial decision-making (n=48).....	201
Table 20. Proportion of Arab judges that agree with precedent oriented statements (n=48)	202
Table 21. Arab judges' agreement with narrowly worded statements on social and personal factors in decision-making (n=48).....	203
Table 22 Arab judges' agreement with broadly worded statements on public and social factors in judicial decision-making (n=48).....	204
Table 23. Comparison of judges' perceptions of the most important factors influencing judicial decisions (Arab region, Switzerland, Austria and Hawaii).....	207
Table 24. Comparison of judges' responses to judicial role statements (Arab Judges Survey, Switzerland and Austria)	209
Table 25. Categorisation of Arab judges' precedent orientation	211
Table 26. Categorisation of Arab judges' public role orientation (n=48).....	212
Table 27 Arab judges' view of important qualities to do their job well (n=52).....	219
Table 28. Judges' view of qualities valued by their colleagues (n=52).....	220
Table 29. Questions about the Public (Arab Judges Survey).....	231
Table 30 Arab judges' assessment of the influence of precedent on their judicial decision-making, by jurisdiction (n=48).....	312
Table 31 Proportion of Arab judges that agree with precedent oriented statements, by jurisdiction (n=48).....	313

Table 32 Arab judges' agreement with narrowly worded statements on social and personal factors in decision-making, by jurisdiction (n=48).....	314
Table 33 Arab judges' agreement with broadly worded statements on public and social factors in judicial decision-making, by jurisdiction (n=48)	315
Table 34 Arab judges' view of important qualities needed to do their job well, by jurisdiction (n=52).....	318
Table 35 Arab judges' view of qualities valued by their colleagues (n=52).....	319

List of Figures

Figure 1. Judicial role orientations by elements of judicial creativity.....	26
Figure 2. Timeline of Muslim Caliphates.....	55
Figure 3. Sources of historical influence on current judicial roles in the Arab region.....	72
Figure 4. Conceptual categories in judicial role theory.....	87
Figure 5. Facebook post inviting Tunisian judges to participate in Survey (30 November 2017).....	96
Figure 6. Organisation of Courts in Egypt.....	109
Figure 7. Organisation of Shari'a and Administrative courts in Saudi Arabia.....	118
Figure 8. Organisation of Courts in Lebanon.....	124
Figure 9. Organisation of Courts in Jordan.....	132
Figure 10. Where judges in 3 Arab countries obtained law degrees (LinkedIn, n=112).....	174
Figure 11. Highest legal degree obtained by Arab Judges (LinkedIn, n=112).....	175
Figure 12. Lebanese, Jordanian and Egyptian judges' professional experience prior to joining the judiciary (LinkedIn, n=112).....	177
Figure 13. Arab Judges' prior experience before becoming a judge (Arab Judges Survey; n=78).....	179
Figure 14. Arab judges' view of how well prior work prepared them for their judicial role (Survey n=61).....	180
Figure 15. Lateral professional mobility in Jordan, Lebanon and Egypt judiciaries (n=48, LinkedIn).....	182
Figure 16. Extent to which Arab judges feel they provide an important service to society (Arab Judges Survey, n=65).....	185
Figure 17. Responses to "Belonging to the judiciary is an important part of my self-image" (Arab Judges Survey; n=65).....	186
Figure 19. Where judicial roles fall on judicial activism/restraint spectrum.....	192
Figure 19. Arab judges' view of most important judicial roles (top 3 preferences combined) (n=60).....	194
Figure 20. Arab judges' view of whether their role is different than the role of the judge in other Arab countries, all responses combined (n=63).....	196
Figure 21. Arab judges' view of whether their role is different than the role of the judge in Western countries, all responses combined (n=63).....	197
Figure 22. Precedent orientation scale for Arab judges (n=48).....	213
Figure 23. Public orientation scale for Arab judges (n=48).....	213
Figure 24. Degree of importance attached to colleagues and senior figures in the judiciary (n=48).....	217
Figure 25. Comparison of Arab judges' view of qualities important for judges to have and response of qualities valued by judicial colleagues (n=52).....	221
Figure 26. Arab judges' ranking of most important qualities for working in a group (n=52).....	224
Figure 27. Importance Arab judges attach to various groups (n=44).....	226
Figure 28. Influence Arab judges attach to government recommendations in their decision-making (n=55).....	228
Figure 34. Arab judges' view of the role of state judges and religious laws (n=55). Error! Bookmark not defined.	
Figure 30. Arab judges' view of the role of state judges and religious laws (n=55).....	230
Figure 31. Judicial vs public perceptions of the judiciary (n=65).....	231
Figure 32. Arab judicial perceptions of public attitudes to the judiciary (n=55).....	233

Figure 33 Four conceptually distinct judicial role orientations	242
Figure 34 Arab judges' responses to "judges are merely instruments of the law and can and will nothing" (n=48)	246
Figure 35 Arab judges' level of consensus on accepted norms of judicial behaviour (in order of hierarchy).....	251
Figure 36 Arab judges' view of most important judicial roles, by jurisdiction (top 3 preferences combined) (n=60).....	309
Figure 37 Arab judges' view of whether their role is different than the role of the judge in other Arab countries, by jurisdiction (n=63).....	310
Figure 38 Arab judges' view of whether their role is different than the role of the judge in Western countries, by jurisdiction (n=63)	311
Figure 39 Degree of importance attached to judicial colleagues, by jurisdiction (n=48)	315
Figure 40 Degree of importance attached to senior figures in the judiciary (n=48)	317

Glossary

Arabic Term	English translation
Maḥakem al-ta'dibīah	Disciplinary Courts
Maḥakem al-'amaliyah	Labour courts
Maḥakem al-'amma	General courts
Al-Majlis al-'adli	Lebanese Supreme Judicial Council
Maḥakem al-aḥwal al Shakhsīa	Courts of personal status
Al Qaḍā' al-'adi	The ordinary judicial branch
Al-khilāfa al-Rāshidah, "Al-Rāshidun"	(lit. "The rightly guided caliphs"). The first of the four major caliphates established after the death of Prophet Muḥammad.
Maḥakem al-'askariyah	Military Courts
Banū 'Umayya	Clan of the Quraysh tribe descended from Umayya ibn Abd Shams
Maḥakem al-Beaeyah	Environmental Courts
Dawa'er	(lit. "circuits"). such as the appeal circuits in Saudi Arabia
Maḥakem al-dīniyah	Religious courts
Dīwān al-mazalem	(lit. the "Board of Grievances"). Refers here to the Saudi administrative judicial branch
Maḥkamah al-dostoriah al-'ulīah	The Egyptian Supreme Constitutional Court
Maḥakem al-ibtida'iah	Courts of first instance
Maḥakem al-eqtisadīah	Economic Courts
Ghoraf al-ibtida'iah	Primary court chambers in Lebanon
Ḥadīth	Prophetic traditions; reports of what the Prophet had said, done and or tacitly approved. Constitutes the second source of Islamic law and after the authority of the Qur'ān, the holy book of Islam.
Haīya al-qaḍā'īa al-dawla	The State Lawsuit Authority (as in Egypt)
Ḥakam (pl. Ḥukkam)	(lit. "arbiter", "umpire", "judge"). Also referred to the pre-Islamic tribal arbiter

	whose decision, was usually accepted by the two parties to a conflict.
Ḥanafī	One of the four Islamic Sunni Islamic schools of jurisprudence named after the scholar Abū Ḥanīfa al-Nu‘mān (699 – 767)
Ḥanbalī	One of the four Islamic Sunni Islamic schools of jurisprudence named after the scholar Aḥmad bin Muḥammad bin Ḥanbal (780–855)
Hatt-ı hümayûn (Turkish)	An official document or note composed by an Ottoman Sultan
Ḥukum ‘ashaīrī	Bedouin tribal law
Maḥkamat al-idarīah al-‘Ulīah	The High Administrative Court in Saudi Arabia and Egypt
Maḥakem al-idarīah	Administrative courts
Ijtihād	Islamic legal term referring to the process of legal reasoning and hermeneutics through which the jurist (mujtahid) derives or rationalises law on the basis of the Qur’ān and the Sunnah.
Maḥakem al-isti’naf al-Idarīah	Administrative Courts of Appeal
Maḥakem- al-isti’nafīah	Ordinary Courts of Appeal
Maḥakem isti’naf al-jamarek	Jordanian courts of appeal dealing with custom and income tax disputes.
Istiḥsān	(lit. “to approve”, “to deem preferable” Relates to the juristic preference of exercising personal opinion in order to avoid rigidity and unfairness that may result from literal enforcement of the existing law
Maḥkamat al-Jenaīat	Criminal courts
Maḥakem al-khassa	Special courts
Madhhab	Referred here as a doctrinal school of Sunni Islamic Law
Majlis al-dostori	The Constitutional Council (as in Lebanon)
Majlis al-shura	The Advisory Council (as in Lebanon)

Majlis al-qādā	A court or place where judicial activity is performed.
Mālikī	One of the four Islamic Sunni Islamic schools of jurisprudence named after the scholar Mālik ibn Anas 711–795 CE
Mecelle-’i Aḥkām-ı ‘Adliye, “Mejelle” (Turkish)	Civil code of the Ottoman Empire entered into force in 1877. The Mejelle was the first attempt to codify a part of the Sharī‘a - based law
Moḥafazat	Lit. Districts
Maḥākim al-mukḥṭaliṭah	Egyptian Mixed courts 1875-1949 in which international judges and heard disputes by Egyptians and foreigners. The Mixed Court Codes were mainly based on civil law.
Nā’ib	Lit. “Representative,” “delegate”, “deputy”
Maḥkamat al-naqth	Egyptian Court of Cassation
Maḥakem al-Nizamyieh	Ordinary (“secular”) courts (as in Jordan)
Nizamyieh Courts	The secular court system introduced within the Ottoman Empire in 1864 as part of the Ottoman reforms, the Tanẓīmāt.
Qaḍā’	Judgeship, encompassing the entire range of a judge’s judicial activities.
Qāḍī	Arabic word for a judge
Qāḍī al-Quḍāt	Chief justice
Qiyās	A fourth source of Islamic law often referred to be the process of deductive analogy in Islamic jurisprudence.
Maḥkamat al-quthaa al-idari	The Egyptian Court of Administrative Justice
Ra’y	(lit. “opinion”). In Islamic law, refers to a discretionary opinion or reasoning based on precedent

Shafi'ī	One of the four schools of Sunni Islamic law and jurisprudence named by Muḥammad ibn Idrīs al-Shāfi'ī (767-820)
Maḥakim al-sharī'a	Sharī'a Courts (as in Saudi Arabia)
Sharī'a	Islamic law
Sunnah	Second most important source of authority for Muslims and which the bulk of Islamic law derives from. Sunnah refers to the practices, customs and traditions of the Prophet Muḥammad <i>See also</i> Ḥadīth
Maḥakem al-sulḥ	Jordanian Magistrate Courts
Maḥkamat al-tamwīz	Supreme Courts (as in Lebanon, Jordan and Saudi Arabia)
Tanzīmāt-i Hayriye, "Tanzīmāt" (Turkish)	(lit. "the auspicious reorganisation"). A series of reforms promulgated in the Ottoman Empire between 1839 and 1876. The reforms were influenced by European ideas and intended to fundamentally modernise the Empire from an old theocratic system to a modern state.
Maḥakem al-tejareeya	Commercial courts
Al-Maḥkama al-'uliyah	The High Court (as in Saudi Arabia)
Maḥakem al-usra	The Family Courts (as in Egypt)
Uṣūl al-fiqh	(lit. "roots of legal philosophy, law"). The body of principles and investigative methodologies through which practical legal rules are developed from the foundational sources of Islamic law (the Qur'ān , the Sunnah (Ḥadīth), Ijmā' (scholarly consensus), and Qiyās (analogy).

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Peace to all,
Sara

Chapter 1. Introduction

Judges in the Arab region (like any judges) are not mechanical appliers of the law.¹ By virtue of the social roles they occupy, they are inextricably linked with their societies. This is especially true for states with complex social and political histories; judges cannot be regarded as de-historicised figures of authority “when the rule of law is infused with rival visions of social relations”.² It is against this backdrop that this thesis examines the nature of the judicial role in Arab countries, and the extent to which “judicialisation” is occurring in the Arab Middle East. This thesis presents an inter-disciplinary inquiry into the roles Arab judges occupy, their background and experiences, their own views and perceptions of the power and significance of judges in the Arab Middle East.

Judges as political actors

The fundamental objective of this thesis is to embark on an agenda of empirical research that is oriented towards a better understanding of Arab judges. Specifically, the aim is to unite well-established theories of judicial politics and empirical data in order to explore Arab judicial roles and their political significance. This study relies primarily on judicialisation of politics from which hypotheses can be deduced and empirical data against which to test the validity of these hypotheses. A central purpose of this research is to take a phenomenological approach where subjective perceptions, in addition to formal descriptions, of judicial roles are considered. With this approach, the thesis aims to arrive at a more systematic and realistic understanding of the judicial functions in the Arab region.

Judicial politics³ is concerned with the study of courts and judges as political actors. Early 20th scholars, most notably in the US, began to argue that since

¹ Ibid. p.150.

² Ibid. p.152

³ Judicial Politics is one of several labels that refers to the role and political significance of judges See Whittington KE, Kelemen RD and Caldeira GA, *Overview of Law and Politics the Study of Law and Politics* (Oxford University Press 2011)

courts and judges are part of the government, they are naturally part of the country's political process: "*the court is part of politics even if it is a court of law, because all law is part of politics*".⁴ The basic premise of judicial politics adopts the Aristotelian definition of politics, i.e. politics is understood as the affairs of the community in which citizens participate. Along these terms, politics does not refer to ideologies or rationalisations of the will of the majority.⁵ Rather, politics is understood as involving the creation and the pursuit of a moral community where law becomes an instrument and a product of this pursuit⁶:

"The political jurist begins with what any fool could plainly see if his eyes were not beclouded by centuries of legal writing, that judges and courts are an integral part of government and politics [...] and are, therefore, first and foremost political actors and agencies".⁷

From this premise, law and legal institutions are understood as cogs of the political apparatus; and its actors - judges - are conceived of as political actors. Judges' functions' and outputs, therefore, are of importance as they directly or indirectly participate in the political sphere, because "law is a product of politics and judges are governors".⁸ This participation is magnified at the highest courts since supreme (or apex) courts are the "titular head of the legal-political apparatus of the government".⁹ It would therefore be erroneous to understand judges as mere mouthpieces of the law since they are part and parcel of the political process. Even if we were to perceive judges as law-interpreters, the judge will nonetheless participate in creating it. As Kelsen writes: "judicial decisions are not and can never be purely declaratory of the law".¹⁰

⁴ Martin Shapiro, (1988) *Morality and the Politics of Judging*, 63 Tul. L. Rev. p.1556

⁵ Ibid. See also Dyevre A, (2010) 'Unifying the Field of Comparative Judicial Politics: Towards a General Theory of Judicial Behaviour', 2 *European Political Science Review* 297

⁶ Brian Z. Tamanaha, (2012) 'The Several Meanings Of "Politics" In Judicial Politics Studies: Why "Ideological Influence" Is Not "Partisanship"', 61 *Emory L.J.* 759, 4 See also Martin Shapiro, (1988) *Morality and the Politics of Judging*, 63 Tul. L. Rev. p. 1558

⁷ Shapiro MM and Stone Sweet A, *On Law, Politics, and Judicialization* (Oxford University Press 2002), p.22

⁸ Martin Shapiro, (1988) *Morality and the Politics of Judging*, 63 Tul. L. Rev. p. 1559

⁹ Brian Z. Tamanaha, (2012) 'The Several Meanings Of "Politics" In Judicial Politics Studies: Why "Ideological Influence" Is Not "Partisanship"', 61 *Emory L.J.* 759, 4, p.773

¹⁰ Kelsen, H. (1926), *Grundriß einer allgemeinen Theorie des Staates*. Wien: R. M. Rohmer.

Studies of courts and judges have grown rapidly in recent years and have begun to acquire international dimensions. According to Whittington et al., questions similar to those previously asked in the American judicial context are now being asked in democratic and non-democratic regimes alike: how do law and courts fit into the political and social environment?¹¹ Although researchers have traditionally focused on explaining variation in judicial decision-making, contemporary judicial research is increasingly taking a broader approach to understand the political character of courts. Judicial politics research now involves analysing macro, meso and micro factors (both legal and extra-legal) that may have an impact on judicial activities (political significance). This thesis fits with this research trend in order to explore judicial functions and their political significance (in Aristotelian terms). It seeks to explore Arab judicial functions by utilising the theoretical framework of judicialisation of politics.

“Judicialisation of Politics”

“Judicialisation” of politics (or the politicisation of the judiciary) refers in general to the involvement of judges in regulating, influencing and creating political decisions. According to Vallinder, judicialisation has two core meanings. The first sees judicialisation as the process by which the powers of courts and judges expand and increasingly begin to dominate the making of public policies (that have previously been made by other branches of government).¹² The second meaning refers to the process by which non-judicial decision-making forums become dominated by legal/judicial terminology, rules and procedures.¹³ Both meanings are a type of judicialisation that is “inextricable from law’s capture of social relationships and popular culture, and its expropriation of social conflicts”.¹⁴ As a consequence, courts and associated legal processes become a preferred venue for and are relied upon to offer solutions to the public. When the right circumstances exist, courts will have the

¹¹ Whittington KE, Kelemen RD and Caldeira GA, *Overview of Law and Politics the Study of Law and Politics* (Oxford University Press 2011) p. 6

¹² C Neal Tate and Torbjörn Vallinder (eds), *The Global Expansion of Judicial Power*. (NYU Press 1995) p.13.

¹³ Ibid. p.13.

¹⁴ Ran Hirschl, ‘The New Constitutionalism and the Judicialization of Pure Politics Worldwide’ (2006) 75 *Fordham Law Review* 721, p.723.

upper hand when the legislature is too fragmented to react.¹⁵ According to the “rights hypothesis”¹⁶, courts can protect a wide range of values against political abuse mainly through “ordinary” constitutional rights jurisprudence.¹⁷

While judicialisation may have first been explored in the American context, the social and political significance of the judiciary has now used to analyse the role of courts in contemporary modern democracies.¹⁸ Similarly, judicialisation appears to be a phenomenon in states with a transitional democracy. For instance, several high courts in Latin American states have in recent years cast themselves as defenders of rights and chosen to intervene in significant political controversies.¹⁹ As for non-democratic states, the prevailing view seems to suggest that judicialisation is difficult to imagine. While recognising that the expansion of judicial power is on the rise around the world, Tate and Vallinder hold steadfast to the idea that a democracy is a prerequisite: “Perhaps the most important of these conditions is the presence of liberal democracy.”²⁰ The belief is that in authoritarian regimes, it would be highly unlikely to even nominally allow independent judges to increase their participation in the making of major public policies or to tolerate judicial decision-making processes which place emphasis on legalistic procedural rules.

¹⁵ John Ferejohn, “Judicializing Politics, Politicizing Law” (2002) 65 *Law and Contemporary Problems* 41, p.55.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ For instance Guarnieri and Pederzoli write that “a democracy with strong judicial power is unquestionably a stronger democracy, since it is a polity where the rights of citizens are better protected[...] while it is not a new phenomenon in the United States, in recent years it has taken on increasing significance in European democracies, such as Britain and Germany, and especially in Latin European Countries such as France, Portugal, Spain, and Italy see Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002) p.78.

¹⁹ Although judicialisation unfolds in a context that is in important ways different from that of developed countries with longer histories of centralization of power, resort to courts has been increasingly used by activists throughout the region as a “portal through which to import favorable international norms” see Rachel Sieder, Line Schjolden and Alan Angell (eds), *The Judicialization of Politics in Latin America* (Palgrave Macmillan 2005). p.5

²⁰ Torbjörn Vallinder “When the Courts Go Marching in” C Neal Tate and Torbjörn Vallinder (eds), *The Global Expansion of Judicial Power* (New York University Press 1995), p.526.

The presence of democratic government therefore appears to be a necessary condition for the judicialisation of politics.²¹ The existence of written constitutional provisions for example, would facilitate judicialisation in terms of judicial protection of rights and liberties. This is because the effectiveness of rights provisions in contributing to social change in any given polity is largely contingent upon the existence of a support structure for legal mobilisation, and more generally, socio-cultural conditions that are hospitable to judicialisation. These are usually understood to prevail only alongside democratic governments.

Judicialisation beyond Western liberal democracies

Recent literature suggests that judicialisation may in fact be regarded as a worldwide phenomenon and may exist despite the authoritarian character of some states.²² According to Hirschl, there is an increasing reliance on judges and courts to deal with core political controversies, including in non-democratic states.²³ He terms this the “judicialisation of mega-politics”, where he distinguishes between judicial involvement relating to procedural justice issues (basic “judicialisation”) and judicial involvement in substantive moral dilemmas affecting the whole nation (“mega-politics”).²⁴ “Judicialisation of mega-politics” is a type of judicialisation that takes on an extreme shape that “exceeds any previous limit”.²⁵ Hirschl calls this a “juristocracy” in which courts decide on watershed political questions that face a nation. Hirschl’s concepts arguably describes a form of judicialisation that is un-democratic in character. Hirschl’s concept of “juristocracy” or “mega-politics” may capture *some* cases of judicialisation in the Arab Middle-East, particularly the role played by Egyptian

²¹ See generally Martin M Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford University Press 2002); C Neal Tate and Torbjörn Vallinder (eds), *The Global Expansion of Judicial Power* (New York University Press 1995).

²² Peter H Solomon, “Courts and Judges in Authoritarian Regimes” (2007) 60 *World Politics*, p.122

²³ Hirschl lists subcategories of this type some of which relates to a judicialization of electoral processes; judicial scrutiny of executive branch prerogatives; Judicialization of formative collective identity, Hirschl argues that this is the most problematic type of judicialisation from a constitutional theory standpoint. See Ran Hirschl, “The New Constitutionalism and the Judicialization of Pure Politics Worldwide” (2006) 75 *Fordham Law Review* 721,

²⁴ *Ibid.* p.723

²⁵ *Ibid.*

courts during the so-called Arab Spring. Brown for example describes the Egyptian judiciary along the lines of Hirschl's juristocracy where:

“the judiciary went beyond resisting partisan oversight and tried to make itself self-perpetuating to a degree that undermined democratic mechanisms. Judges had the means not merely to defend against encroachments on judicial turf by parliament and the presidency, but to undermine these institutions by striking at their legal basis.”²⁶

The recent political and social conflicts in many Arab states did not arise in a vacuum, nor were they the first instances of protest in the region. Historical experiences of occupation and colonialism, followed by varying efforts of independence, have made a lasting impact on the political and legal orders of a number of Arab states. Although the political character of courts may have been exacerbated during the Arab Spring, their political role and significance was not a phenomenon arising out of it.²⁷ The impression that the Arab Spring constituted a judicial rupture fails to capture the complexity of judicial roles in the region.

A critical question examined in this study is whether there are other less controversial examples of judicialisation that can be seen in Arab states. Specifically, the aim is to explore whether or not judges and courts in the Arab Middle East have “political” dimensions attached to them as a result of the historical, religious, social and cultural developments of the region. In doing so the thesis explores the following questions about judicialisation in the Arab Middle East:

- Is the judicial role in Arab jurisdictions different from Western judges?
- Have courts in the Arab region always been a preferred venue for and relied upon to offer solutions to the public?

²⁶ Nathan Brown, 'Tracking the Arab Spring: Egypt's Failed Transition' (2013) 24 *Journal of Democracy* 45, p.53.

²⁷Sultany for example, argues that there was no qualitative change in terms of judicial tasks before and during the Arab Spring, and that the difference has been one of “*degree rather than kind*” Nimer Sultany, *Law and Revolution: Legitimacy and Constitutionalism after the Arab Spring* (First edition, Oxford University Press 2017, p.150

- Is it possible that the socio-cultural conditions in Arab states have always been hospitable to judicialisation, *despite* the lack of a liberal democratic government?
- If so, does this suggest that judicialisation is not exclusively a trait of contemporary democracies or is it a new phenomenon arising out of the “rights hypothesis”?

This thesis sets out to examine the various strands of judicialisation that may operate within the Arab region, the sources of such powers for courts and judges in the region and whether the way Arab judges view their role provides further evidence of judicialisation in the Arab Middle East.

Research questions

As mentioned above, this thesis is intended to contribute to our understanding of Arab judicial roles as political actors. It draws on established research procedures found in judicial studies that has sought to study courts as part of the political system and to investigate individual behaviour of judges. In other words, the thesis sets out to explore judges and courts in the Arab region by using three modes of analysis found in judicialisation of politics: institutional, functional and behavioural. The foundational research questions of this research are as follows:

1. Does the composition and organisation of courts in Egypt, Saudi Arabia, Lebanon and Jordan indicate a judicialisation of politics?
2. Does judicial selection, training, career, and discipline in the Egyptian, Saudi Arabian, Lebanese and Jordanian judiciaries promote or impede judicial activism?
3. What are judges prior (and concurrent) career experiences and sources of individualisation?
4. How may these affect judicial role perceptions of Arab judges?
5. What norms and expectations might Arab judges have about their jobs as judges?
6. To what extent does individual judges identify themselves as part of a judicial collective?

7. What norms and expectations might Arab judges have towards their peers within the judicial community and towards non-judicial actors?

Assessing the political significance of judges

It has been argued that three key elements affect the political significance of the courts: (1) the structure of the judicial system in which judges operate²⁸, (2) judicial career structures²⁹ and (3) judicial role conceptions.³⁰ This thesis provides the first detailed examination of each of these three elements in relation to the Arab Middle East.

Judicial system

The aim of this thesis does not seek to explore judicial roles in isolation, but rather, Arab judicial roles *in context*. In order to do so, the context in which judges are found, the judicial system must also be considered. In particular, how the institutions are arranged and the limits placed on judicial activities:

“Institutions typically have formal and relatively explicit informal expectations that are reinforced through incentive and sanctioning mechanisms. Institutional expectations always serve to limit choice and discretion on the part of the members of the institution”.³¹

According to Guarnieri and Pederzoli, a political system can use two different sets of instruments to exert influence on courts.³² One mechanism is an indirect strategy aimed at reducing the impact of judicial decisions by limiting court jurisdiction, and thereby restricting judges’ role in the resolution of political disputes.³³ The second element that affects judges’ scope for political participation is the actual organisation of the judicial system.³⁴ For instance, the greater power supreme (or apex) courts have in promoting greater

²⁸ See Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002)

²⁹ Ibid.

³⁰ Ibid.

³¹ James L Gibson, “From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior” (1983) 5 *Political Behavior* 7, p.17

³² Ibid. p.79

³³ Ibid.

³⁴ Ibid.

coherence in the judicial system, the greater the likelihood is of that court being politically significant.

Generally, jurisdiction over cases can be described as either concentrated into a **unitary** system of courts or **fragmented** into a plurality of different courts with their own separate hierarchical structures.³⁵ Rather than a unified system of courts with far-reaching jurisdictional scope, fragmented systems have exceptional courts running alongside the regular courts in which politically sensitive cases are channelled.³⁶ As Guarnieri and Pederzoli explain, this type of fragmentation strategy usually limits the sphere of judicial action and is often adopted by authoritarian regimes to prevent ordinary judiciaries from direct involvement in political cases.³⁷ In these types of situations, judicial autonomy only exists alongside a lack of political significance. The fragmentation of the judicial system can therefore be seen as a means of politically neutralising ordinary courts while preserving their institutional independence. As Toharia notes, here judges become “independent, because they are powerless”.³⁸

A second element affecting judges’ scope of political participation relates to the actual organisation of the judicial system, including the existence (or non-existence) of judicial review of legislation.³⁹ Conventionally, there are two models for the organisation of courts: (1) **co-ordinate systems** where lower and intermediate courts make the majority of decisions, and (2) **hierarchical systems**, where a substantial proportion of lower court decisions are re-examined by a final appellate court.⁴⁰ The two models highlight the role of supreme (or apex) courts and the institutional mechanisms in place to reinforce

³⁵ Ibid.

³⁶ Shapiro, Martin. "Appeal". *Law & Society Review* 14.3 (1980), p.629.

³⁷ Toharia, José J., "Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain". *Law & Society Review* 9.3 (1975), p.475.

³⁸ Ibid.

³⁹ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002) p.81.

⁴⁰ Damaška, Mirjan. "Structures Of Authority And Comparative Criminal Procedure". *The Yale Law Journal* 84.3 (1975), p.480.

their authority.⁴¹ A strong decision-making court at the top that is **centripetal** in nature will be better equipped to ensure the consistency of judicial decisions, and therefore the final court is more likely to be politically significant.⁴² By contrast, a court of final appeal with a **centrifugal** dynamic tends to reduce internal consistency by promoting autonomy of lower and intermediate courts – but resulting in lower political significance for the apex court itself.⁴³

This thesis maps the approaches to the jurisdiction and organisation of courts in four Arab Middle Eastern countries as a first step in exploring whether the actual structure of the judiciary may indicate a form of judicialisation.

Judicial selection and career

A second element that may affect the growth of judicial power relates to individual judges themselves, including the actors that may influence their guarantees of judicial independence. These are known in Western democracies to have a direct bearing on the interactions between the judiciary and its political environment.⁴⁴ The institutional position of those in charge of selecting, training, and promoting judges will also have a bearing on the guarantees of judicial independence and thus the extent to which courts have political significance. Judicial selection and career patterns have an impact on judicial growth in at least two ways. First, the way judges are recruited affects the social and professional composition of the bench. Second, the structure of judicial recruitment can indicate as to what relationships the judiciary has with actors outside the judiciary.⁴⁵ Here, emphasis is placed on the institutional mechanisms governing elements important for the independence of judges.

⁴¹ As will be discussed in Chapter 5, the relationship between courts and the relative strength of the highest courts in each of the four countries explored reflect different, but equally important, forms of political significance. A prime example of this in the Western context is the UK and France. Although the organization of courts and the interrelationship between courts in each country is structured differently, they reflect, albeit different, forms of judicialisation.

⁴² Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002) p.81.

⁴³ Ibid.

⁴⁴ Ibid. Chapter 2 “*Legal System*”.

⁴⁵ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002) p.18

In the Western context, a distinction is generally made between two patterns of judicial recruitment: the **bureaucratic** model and the **professional** model of recruitment.⁴⁶ The two patterns are said to reflect the continental European (civil law) and Anglo-American (common law) approaches, respectively.⁴⁷ The bureaucratic model tends to recruit young candidates into the judiciary with little or no prior professional experience.⁴⁸ In the bureaucratic model, socialisation is described as achieved almost exclusively from within. Upon entry into the judiciary candidates will learn the required norms and approved organisational behaviours in order to effectively participate in the judiciary.⁴⁹ Career advancement under the bureaucratic model is competitive and granted according to formal criteria of seniority and merit where hierarchical superiors have a wide discretion.⁵⁰ By contrast, in the professional model, entry into the judiciary is usually confined to individuals with extensive professional practice and experience in the law. Under the professional model, candidates have been socialised outside the judiciary and, although a degree of “resocialisation” can occur within the judiciary, candidates are more likely to bring values and experiences from outside the judiciary into their working life as judges. Candidates are also likely to maintain ties with their former colleagues in the legal profession.⁵¹ Under the professional model, there are no formal criteria for advancement and they occur less frequently compared to career advancement under the bureaucratic model. In addition, higher-ranking judges tend to exert influence in the promotion of judges from lower ranks.⁵²

⁴⁶ Ibid. p.81

⁴⁷ See generally Mirjan R Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale Univ Press 1986).

⁴⁸ C Neal Tate and Torbjörn Vallinder (eds), *The Global Expansion of Judicial Power* (New York University Press 1995), p.158.

⁴⁹ Giuseppe Di Federico, “The Italian Judicial Profession and Its Bureaucratic Setting” (1976) Part 1, *Law Journal of Scottish Universities*, pp. 40, p.47.

⁵⁰ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002) p.20.

⁵¹ Ibid.

⁵² Ibid. p.66.

Guarnieri and Pederzoli argue that in both models courts are not insulated from the political environment.⁵³ For a professional judiciary, “influence of the political system is channelled primarily through the appointment process”⁵⁴, whereas in a bureaucratic judiciary, the “political influence is filtered through the hierarchical structure and procedures for career advancements”.⁵⁵ To gain a fuller understanding of judicial selection and career patterns, this thesis sets out, for the first time, the variety of approaches used in four Arab Middle Eastern judiciaries. The two traditional models of recruitment are compared and contrasted with those in the region in order to assess whether they can be accurately used in the region.

Judicial role conceptions

Judges’ willingness to take on a politically significant role is also a key factor in the political significance of courts. This third element falls under the framework of role theory, and it relates to individual judges themselves and how they conceive of their roles as judges. It includes individual judges’ beliefs about the qualities, behaviours and characteristics suitable for a judicial role.⁵⁶ Within this framework, judges’ role perceptions relate to the subjective aspect found in the mind of the individual judge.

In this study, how Arab judges subjectively understand and conceive of their roles is explored in three ways. The first element examines judges’ own **personalities and capacities**, which relates to the processes through which attitudes, values and role conceptions are acquired.⁵⁷ The second element involves an examination of the possible **objectives** judges perceive as important in the performance of their judicial roles. Included in these objectives

⁵³ Ibid. p.64.

⁵⁴ Ibid. p.66.

⁵⁵ Ibid.

⁵⁶ Central to role theory is the idea of role expectations which is understood to be the beliefs concerning the qualities, behaviours, and characteristics suitable to a specific social role. See generally Bruce J Biddle, *Role Theory: Expectations, Identities, and Behaviors* (Academic Press 1979)

⁵⁷ James L Gibson, “From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior” (1983) 5 *Political Behavior* 7, p.26

are norms that guide their behaviour. By extension, they also include the individual judge's internalised impressions of societal norms and expectations of what constitutes the role of a judge.⁵⁸ The third element relates to individual judges' **expectations** of what constitutes proper judicial behaviour in relation to other judges (**judicial peers**) and other politically significant people outside judiciary (**non-judicial actors**). In this thesis all three elements are examined for the first time from the individual Arab judge's viewpoint as a further step in seeking insight into the political significance of judges and courts in the region.

Are judges human? The development of judicial behaviouralism

This thesis fits within the body of judicial scholarship that sees judges not as mechanical appliers of the law but as human beings. During the first half of the 20th century, American legal and political scholars increasingly began to challenge the traditional understanding of judges as "value-free technicians who do no more than discover the law".⁵⁹ Early works viewed the judicial process as "situated in a political context and saw judicial decision-making as influenced by overtly political factors".⁶⁰ This view was based on the premise that the unique features of the American common law tradition rendered judges and courts susceptible to political pressure.⁶¹

⁵⁸ "Generalised other" is George Herbert Mead's term for the collection of roles and attitudes that people use as a reference point for figuring out how to behave in a given situation. See generally George Herbert Mead, Charles W Morris and George Herbert Mead, *Mind, Self, and Society: From the Standpoint of a Social Behaviorist* (Univ of Chicago Press 2000).

⁵⁹ Walter F Murphy and Joseph Tanenhaus, *The Study of Public Law* (1st ed, Random House 1972) p.13.

⁶⁰ Nancy Maveety (ed), *The Pioneers of Judicial Behavior* (University of Michigan Press 2003), p.2.

⁶¹ For Haines who was a legal realist, judicial decisions were political acts by virtue of the law itself which was a 'process for constructing political values and legal interpretation was always influenced by dee political forces that shaped judicial attitudes at the affective and cognitive level' Because elected institutions 'believe they may be able to achieve their aims through judicial decisions, often on much better terms than via other branches'. See Cornell W Clayton and Howard Gillman (eds), *Supreme Court Decision-Making: New Institutional Approaches* (University of Chicago Press 1999), p. 21.

Early empirical studies, such as those of Haines and Pritchett⁶² drew inspiration from psychological and sociological theories on human behaviour in order to challenge the mechanistic model of judging espoused by legal formalism.⁶³ As Haines wrote:

“And a complex thing like a judicial decision involves factors, personal and legal, which carry us to the very roots of human nature and human conduct. Political prejudices, the influences of narrow and limited legal training with antiquated legal principles and traditions, or class bias having little or no relation to wealth or property interests, are more likely to affect the decisions of judges than so-called ‘economic interests’.”⁶⁴

The “behavioural revolution” of the 20th century generated numerous studies of judicial and court behaviour in the U.S, exploring whether policy preferences and partisan influences were related to judicial voting behaviour”.⁶⁵ In analysing U.S Supreme Court decisions, scholars began to recognise that “decisions made by judges appeared to be correlated to extra-legal attributes such as background, training and personality”.⁶⁶ Maveety argues that this behavioural revolution of the 1940s and 1950s was the most important point in the development of the discipline of political science.⁶⁷ This new movement endeavoured to understand judges as political actors and centred around “judges’ concern with the content of their decisions” aimed at discovering

⁶² See for example Pritchett’s “the Roosevelt Court”, his seminal work on U.S judicial politics. C Herman Pritchett, *The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947* (2014).

⁶³ Nancy Maveety (ed), *The Pioneers of Judicial Behavior* (University of Michigan Press 2003), p.2.

⁶⁴ Haines, Charles Grove, “General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges,” (1922) 17 *Illinois Law Review* 96, p.116.

⁶⁵ American judges have been affected by the evolution of the American political system. The unique features of the American common law judicial system, and in particular the political nature the judiciary, have made the judiciary susceptible to political pressure because elected institutions “believe they may be able to achieve their aims through judicial decisions, often on much better terms than via other branches. Nancy Maveety (ed), *The Pioneers of Judicial Behavior* (University of Michigan Press 2003), p.9.

⁶⁶ *Ibid.* p.3.

⁶⁷ The “behavioural political science” movement was directed towards a more scientific and positivist practice of political inquiry. It marked a break from the traditional doctrinal school of thought that sought to emphasise theory and method and was, in Dahl’s words, “a protest movement against traditional political science”. See Robert A Dahl, “The Behavioral Approach in Political Science: Epitaph for a Monument to a Successful Protest” (1961) 55 *American Political Science Review*, p.763.

“political values that underlie judicial decisions”.⁶⁸ Scholars have taken different approaches and used different methods in seeking to explore what judges do and why they do it. Although this has contributed towards scholarly understanding of judicial decision-making, no single approach or comprehensive theory has emerged as definitive in explaining the role and significance of judges.

Understanding the role of judges in the Arab Middle East

Social constraints and the types of expectations society will have on judges are partly determined by the particular attributes of the society in which the judge works. In other words, the judge’s role is determined by his/her society’s reality.⁶⁹ Understanding the social context in which Arab judges operate is a complex endeavour. Behind the impression of a seemingly homogenous region, Arabic-speaking countries are both diverse and similar. The region is usually characterised by two common attributes: the dominant use of the Arabic language and the predominant adherence to the Islamic religion. However, on closer inspection, these attributes are themselves diverse. Islam varies widely across the region in several respects, such as practice, legal and theological orientation.⁷⁰ Moreover, the religion’s role and significance in government and society differs from one Arab society to the next.⁷¹ The Arabic language spoken by 250 million people across the world is also dialectically different in its everyday usage.⁷² Modern “Arab countries” are divided along ethnicities, religious beliefs and culture. They are a result of a mixture of African, Hellenic, Roman, Ottoman and European influences.⁷³ And the legal environment in the region reveals a similar complexity. Arab legal systems have never remained static: they have been subject to constant transformation

⁶⁸ Nancy Maveety (ed), *The Pioneers of Judicial Behavior* (University of Michigan Press 2003), p.8.

⁶⁹ Peter L Berger, *The Social Reality of Religion* (Penguin 1973) p.20.

⁷⁰ See generally Farhad Daftary, “Varieties of Islam” in Robert Irwin (ed), *The New Cambridge History of Islam* (Cambridge University Press 2010).

⁷¹ Ibid.

⁷² James Lane, “The 10 Most Spoken Languages In The World” [2016] *Babbel Magazine*.

⁷³ Leila Rezk, “Monde Arabe et Diversité Culturelle -Les Enjeux de La Diversité Culturelle Au Nord et Au Sud” p.4

and re-development.⁷⁴ To explore the political significance of Arab judges and courts requires an understanding of this diversity of legal approaches and histories in the region.

Western conceptions of the Arab judge

The Arabic word for a judge is *Qāḍī*,⁷⁵ and for over 1400 years the *Qāḍī* has occupied an important social role in Arab societies⁷⁶. But Western conceptions of the Arab judge have often been clouded by a false perception of the Muslim *Qāḍī*. In 1906 American legal scholar Roscoe Pound⁷⁷, warning of the implications of widening judicial discretion, wrote:

“The judge, bound hand and foot by a code and the maxim that law is best which leaves least to the discretion of the judge, is our natural goal, not the oriental *cadi* administering justice at the city gate by the light tempered by the state of his digestion for the time being.”⁷⁸

In 1949, US Supreme Court Justice Felix Frankfurter invoked a clearly pejorative view of the *Qāḍī* to argue that the Supreme Court was a court of review and not a tribunal unbounded by rules: “We do not sit like a *kadi* under a tree dispensing justice according to considerations of individual expediency”.⁷⁹

This image of the Muslim *Qāḍī* dispensing “oriental justice” as whimsical and unbound by rules is not uncommon. Throughout the 19th century and well into the present century, the *Qāḍī* has served as a yardstick for assessing the nature of judicial discretion. When Western jurisprudence shifted away from concern with natural law to emphasise procedure, code, and appellate

⁷⁴ This transformation and re-development of Arab legal systems is discussed in detail in Chapters 3 and 5.

⁷⁵ There are different Latin spellings of *Qāḍī* such as “*cadi*”, “*kadi*”, “*kazi*”. The study however will use *Qāḍī* throughout.

⁷⁶ The history and significance of the Islamic *Qāḍī* is discussed in detail in Chapter 3.

⁷⁷ Roscoe Pound (1870 –1964) was one of the leading figures of 20th century American legal and jurisprudential thought.

⁷⁸ Roscoe Pound, “The Decadence of Equity” (1905) 5 *Columbia Law Review* 20, p.21.

⁷⁹ 337 U.S. 1 (69 S.Ct. 894, 93 L.Ed. 1131) *Terminiello v. City of Chicago*. No. 272. (1949). Here Frankfurter was echoing Lord Justice Goodard of the English Court of Appeal.

hierarchy, so too did the idea of natural justice.⁸⁰ Perhaps the most famous usage of “Qāḍī-Justice” was attributed to Max Weber.⁸¹ Surveying other forms of law and legal thought, Weber found in Islamic law a failure to generate a system of general rules and, in Qāḍīs, a lack of resort to an established body of legal doctrine. Qāḍī-justice, in other words, had no rational rules of decision, and predictability was at a minimum.⁸²

The term “Qāḍī-Justice” still appears in use today in legal scholarship. Klabbers writes that the use of the term “Kadi justice” usually carries a pejorative meaning. It is thought of as the “impoverished cousin of true justice”⁸³, whereas true justice has something to do with the rule of law:

“whatever its contents, [true justice] has to be rule-based. The Kantian legacy exercises a strong hold on legal and philosophical minds alike. Kadi justice, by contrast, is explicitly not rule-based, and therewith considered somehow less useful in our day and age.”⁸⁴

The colouring of the Qāḍī in a negative hue is an unfortunate description of judges’ work in the Arab region, and it results in the role of Qāḍī being erroneously portrayed. It ignores more than five centuries of judicial practice that is characterised by diversity in opinion as well as practice. Not all Western jurists have ignored this rich history. In “Are Judges Human?” Jerome Frank noted that the use of “Kadi-justice” has become something of a curse. He admitted that while he knew little about the administration of justice by Qāḍīs, he knew that:

“[R]ules and the like play much the same part in the theory of Mohammedan justice as in our own; that no more than in France, Germany, England or the United States, is the judge in Mohammedan countries supposed to decide cases arbitrarily.”⁸⁵

⁸⁰ Lawrence Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society* (Cambridge University Press 1989), p.58

⁸¹ See Weber, M., Roth, G. and Wittich, C. (2013). *Economy and society*. Berkeley: Univ. of California Press

⁸² *Ibid*, p.823

⁸³ Jan Klabbbers, “Kadi Justice at the Security Council?” (2008) 4 *International Organizations Law Review* 293, p.7.

⁸⁴ *Ibid*. p.7.

⁸⁵ Frank continues “...and if someone happens to say in his presence that of course judges are incurably human and that their background and personality affect all their thinking and therefore their decisions, the Dicksonian will pronounce with Pound and Dickinson, the fatal

“Rules and the like” have been, and continue to be, equally important in dispensing justice in the Arab Middle East, including for Qāḍīs, whether they are religious or state judges. On this basis, this thesis aims to offer a more nuanced view of judicial roles in the region, including how they perceive their functions.

Thesis aims and organisation

The main aim of this thesis is to develop an understanding of the political significance of judges and courts in the Arab Middle East. In order to do so it has three more specific objectives:

- To develop a typology of judicial systems in the Arab Middle East that highlights the political significance of courts and judges, and explore the extent to which this typology differs from existing typologies of judicial systems in Western democracies;
- To understand how the selection, training and careers of Arab judges may affect their political significance, drawing not just on formal explanations of these processes but also on the actual experiences of Arab judges based on new empirical research; and
- To develop an understanding of Arab judicial role conceptions (including their political role) through the first survey undertaken of judges across the Arab Middle East on this topic.

The next chapter, Chapter 2, considers literature on judicial role conceptions and how judicial role conceptions can be important for the political significance of judges. The chapter also explores “ideal” qualities and attributes of Arab judges found in the region’s cultural, religious and legal principles.

Chapter 3 provides a historical overview of the development of the judicial role and function in different countries of the Arab Middle East. The chapter

words: ‘you are seeking a reversion to Cadi or oriental justice!’”. Jerome M. Frank, “Are Judges Human? Part One: The Effect on Legal Thinking of the Assumption That Judges Behave Like Human Beings” (1931) 80 *U. Pa. L. Rev.* 17, p. 24.

explores distinct long-term historical processes of judicial development that eventually resulted in the adoption and accommodation of two main judicial role conceptions: a religious-based conception of the judge and a “secular” based conception.⁸⁶ With varying degrees, both role conceptions have contributed to the present judicial function in the region. Two formative phases in the evolution of the judicial role in the region are covered. The first phase traces the historical development of Islamic-based conceptions of the judicial role. The second phase explores the evolution of the Arab judicial role during the Ottomans and the colonial and post-colonial periods. The two phases are important historical factors for understanding the origins of the concept of a judge in the region, and they set the stage for the following chapters which explore current Arab judicial roles.

Chapter 4 outlines the different elements of the mixed methods approach adopted in this thesis. First, it sets out how the unique mapping and characterisation of Arab judicial systems was developed in this thesis. The chapter then sets out the empirical methods used in profiling the background of judges in the region, and it then explains the conceptual basis for and the empirical methods used in the survey of judicial attitudes on role conceptions in the Arab Middle East.

Chapters 5, 6, 7, 8 and 9 all present results of the research. Chapter 5 sets out a new typology of Arab judicial systems. It focuses primarily on the judiciary in four Arab states: Egypt, Saudi Arabia, Lebanon and Jordan. The chapter argues that these four judicial systems reflect the range of different judicial models in the region that affect the political significance of judges and courts.

Focusing on the four Arab states identified in Chapter 5 as judicial system “models”, Chapter 6 examines judicial selection, career and discipline in Egypt, Saudi Arabia, Lebanon and Jordan as a means of exploring socialisation

⁸⁶ A “secular” judicial role is in itself a problematic concept, particularly in the Arab region where secularism is often associated with Western legal thought. However, in this study, a secular based conception of the judge encompasses several concepts that originate within the Arab region as well as those influenced from the West.

patterns that occur within these judiciaries. To understand the nature of judicial selection and career for Arab judges, the chapter draws on primary source documents from the region. But given the limited nature of official information sources on this topic, the chapter also draws on additional information gathered specifically for this thesis through an analysis of over one hundred Arab judges' professional profiles obtained from the online professional social network, LinkedIn.

Chapter 7 explores the personal background of Arab judges; in particular, their prior education and professional experience before entering the judiciary. The chapter uses primary data from the analysis of Arab judges' professional profiles on LinkedIn. The results in this chapter are meant to provide an initial insight into the educational and professional background of Arab judges in the absence of any other sources of information on this issue.

Chapters 8 and 9 examine Arab judicial role perceptions, predominantly of judges from Saudi Arabia, Egypt and Lebanon, based on findings from an online survey of Arab judges (the Arab Judges Survey) conducted for this thesis. Chapter 8 focuses on how Arab judges perceive their role in relation to the law and public policy, exploring the extent to which these judges appear to adopt positions of judicial activism or judicial restraint. This chapter also compares these findings from the Arab Judges Survey with similar studies of judicial role perceptions in common and civil law jurisdictions.

Chapter 9 further explores Arab judicial role conceptions by examining Arab judges' views of what constitutes the "proper" behaviour of a judge towards two key groups in their respective countries: (1) their judicial peers and (2) important non-judicial actors such as the executive, religious authorities and the public. The findings in this chapter are from the Arab Judges Survey conducted for this research.

The final chapter (Chapter 10) attempts to synthesise all the research findings to address the central question in this thesis: how can we begin to understand the role and significance of judges in the Arab Middle East?

Chapter 2. Judicial role conceptions and the political significance of judges

Judges have a social function that is interdependent with their society.⁸⁷ This manifests itself in complex arrangements such as judicial systems, judicial roles and judicial identities.⁸⁸ Therefore, any understanding of the judge and the judicial function (in the Arab Middle East and elsewhere) ought to consider the assumptions widely held within a particular society about judges.⁸⁹ This chapter explores how and why the way judges' see their role (judicial role conceptions) are important for the political significance of judges.

Judicial roles

Like any jurisdiction, there are social norms, rules and demands that prescribe the role of judges in the Arab Middle East. The judicial systems across the region exercise a degree of institutional control over judges.⁹⁰ Despite this control, roles are occupied by individuals who play an active part in the innovation and creation of their own judicial roles.⁹¹ An individual judge's own

⁸⁷ According to the sociologist, Berger, society is understood as a product of human activity that has eventually attained the status of objective reality. See Peter L Berger, *The Social Reality of Religion* (Penguin 1973) p.21.

⁸⁸ Berger writes that, by extension, social roles and institutions are representations of these objectivised meanings. They are also manifested in the roles that the individual is expected to play because "the objective description of the role so dictates". Peter L Berger, *The Social Reality of Religion* (Penguin 1973) Ibid.

⁸⁹ According to anthropologist Ruth Benedict, this is because "human behaviour will take the forms those institutions suggest, even to extremes of which the observer, deep-dyed in the culture of which he is a part, can have no intimation." See Ruth Benedict, *Patterns of Culture* (1st Mariner Books ed, Houghton Mifflin 2005) 207. See also Bruce J Biddle, *Role Theory: Expectations, Identities, and Behaviors* (Academic Press 1979) p.98

⁹⁰ These can relate to institutionally set procedures, norms and cultures, which effectively allow for judicial systems to shape individuals' attitudes and behaviours in the performance of their judicial roles. See Jennifer H Waldeck and Karen K Myers, "Organizational Assimilation Theory, Research, and Implications for Multiple Areas of the Discipline: A State of the Art Review" (2007) 31 *Annals of the International Communication Association* 322, p.324.

⁹¹ The term "socialisation" is often understood as referring to the ongoing process by which individuals learn "the values, norms, and required behaviours that allow them to participate as members of organizations". However, this definition is narrow in scope and fails to account for individuals who actively innovate and create roles for themselves within the organisation. See Porter et al., for instance, coin the term "individualization" where socialisation experiences "result in creativity, innovation, and contributions to the organization (as opposed to passive

personal attributes and experiences may therefore help to shape his/her judicial role. For instance, the values and knowledge judges acquire from educational and professional experiences before entry to the judiciary may affect the extent to which an individual judge actually shapes his/her judicial role.

Part of the judicial role conception includes those objectives individual judges perceive as important for the judicial office. Included in these objectives are all the norms that guide individual judges' behaviour. By extension, they also include judges' internalised impressions of societal norms and expectations of what constitutes the role of a judge. These impressions are the individual judge's own understanding of the kind of behaviour they should exhibit in the performance of their duties. In other words, they relate to a judge's subjectively held beliefs of what he/she "ought to do" as a judge.⁹²

These judicial objectives and role conceptions are important to explore because of the insight they may provide into the inner workings of a court. For instance, judges often work in groups where they must agree on basic norms in order to carry out their judicial functions. At the minimum, there must be a "singularity of purpose" among judges in a court, which would be disrupted without the existence of some acceptance of rules regulating an individual judge's treatment of his/her judicial colleagues.⁹³ Judicial role conceptions may also influence judges' interactions with other people external to the judicial system. As Glick points out: "believing that one of his purposes as a judge is to be active in community affairs, for example, may predispose a judge to develop a close relationship with certain non-court personnel".⁹⁴

acceptance of existing organizational norms)", See Lyman W Porter, Edward E Lawler and J Richard Hackman, *Behavior in Organizations* (McGraw-Hill 1974).

⁹² James L Gibson, "From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior" (1983) 5 *Political Behavior* 7, p.9.

⁹³ Henry Robert Glick, *Judicial Role Perceptions and Behavior: A Study of American State Judges* (PhD Tulane University 1967), p.114.

⁹⁴ *Ibid.* p.47.

Individual judges' objectives may also provide insight into what methods they deem appropriate in the realisation of those objectives. This goes back to what is assumed to constitute the core element of any judicial function: adjudication and case-disposition. Judges' decisions through adjudication are the activities that have the greatest tangible effect outside the legal system.⁹⁵ And it is, therefore, crucial to identify what the main criteria are for a judge in reaching his/her decision in court:

“Judges invariably feel constrained by previous decisions taken by other judicial decisionmakers. Some judges, however, feel more constrained than others. Some believe that adequate precedents exist for all potential problems that may be brought to them. Others feel that they must use additional considerations in order to make their rulings, including such factors as the needs of society as well as their own sense of justice.”⁹⁶

Judges' value preferences during decision-making are assumed to be inextricably linked with their overall objectives, and the factors they consider as important during the decision-making process may have tangible effects outside the justice sector. Glick, for instance, argues that judicial decisions are vital channels through which the court interacts with actors in the political process.⁹⁷ This means it is important to identify what values direct and influence judges' decision-making for two reasons. First, they may uncover what objectives they have as judges and, second, because they set the tone for judicial interaction in the political process.

One prevalent approach to studying the judicial role has been to measure judges' role orientations on the basis of specific role perception categories. The underlying purpose behind the role orientation categories is to identify the degree of judicial creativity judges may afford themselves in the performance of their roles. The orientations are distributed along a continuum (see Figure

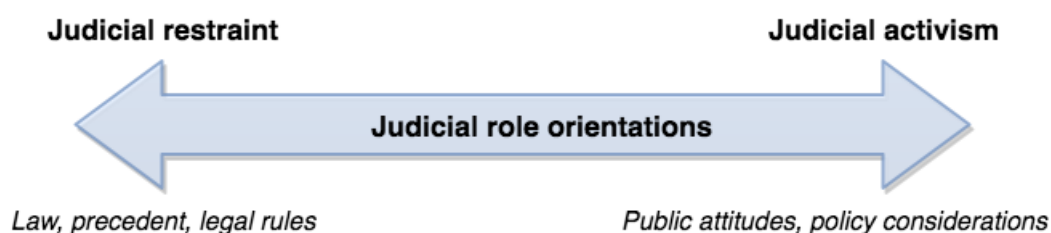
⁹⁵ John C. Wahlke , Heins Eulau , William Buchanan , LeRoy C. Ferguson, *The Legislative System: Explorations in Legislative Behavior* (John Wiley & Sons 1962) p.12.

⁹⁶ Victor Eugene Flango, Lettie McSpadden Wenner and Manfred W Wenner, “The Concept of Judicial Role: A Methodological Note” (1975) 19 *American Journal of Political Science* 277, p. 277.

⁹⁷ Henry Robert Glick, *Judicial Role Perceptions and Behavior: A Study of American State Judges*. (PhD Tulane University 1967), p.99.

1) that ranges from judicial restraint at one end of the spectrum (following precedent, strict construction of constitutions and deference to legislative intent) to judicial activism at the other end of the spectrum (insubordination of precedents, statutes, and deference to personal attitudes, values, and goals).⁹⁸

Figure 1. Judicial role orientations by elements of judicial creativity



Three key studies

The study of Arab judges' role conceptions in this thesis draws on three earlier studies of judicial roles: Ungs and Baas;⁹⁹ Flango et al.;¹⁰⁰ and Guarnieri and Pederzoli.¹⁰¹ What these studies have in common is that they disregard the traditional distinction between civil and common law judges. In particular, the results of empirical studies by Ungs and Baas and Flango shows that different role orientations are found in judges in both civil and common law jurisdictions. This challenges the view that some role orientations are particular to the civil tradition and others are particular to the common law tradition.

In a 1975 study, Ungs and Baas examined judicial role perceptions among lower court judges in the American state of Ohio. The authors assessed judges' role orientations based on four distinct categories they derived from analysing literature and judicial opinions. These were: "Law interpreter",

⁹⁸ J. Woodford Howard Jr., *Role Perceptions and Behavior in Three U.S. Courts of Appeals* (1977) 39 University of Chicago Press, p. 916.

⁹⁹ Thomas D Ungs and Larry R Baas, "Judicial Role Perceptions: A Q-Technique Study of Ohio Judges" (1972) 6 *Law & Society Review*.

¹⁰⁰ Victor Eugene Flango, Lettie McSpadden Wenner and Manfred W Wenner, "The Concept of Judicial Role: A Methodological Note" (1975) 19 *American Journal of Political Science* 277. Herein referred to in the main text as "Flango".

¹⁰¹ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002)

“Administrator”, “Adjudicator” and “Law maker”. They found all four orientations among their sample of American state judges, but they found that the “law-interpreter” role was the dominant orientation.¹⁰²

With the aim to widen the field of judicial behaviour beyond the common law traditions, Flango et al. conducted a (postal) survey of 97 German-speaking mid-level appellate judges in Austria (48 judges) and Switzerland (49 judges). In the survey the authors repeated questions from a number of previous role theory studies of American judges. In their analysis of the survey findings, the authors identified two clearly distinguishable orientations for judges: (1) toward precedent and (2) toward the public judges serve.¹⁰³ The Flango study found that both dimensions appeared to be present among the Swiss and Austrian judges that took part in the survey. The authors also combined these two dimensions to create four distinct role orientations among their sample of European civil law judges: “Law-applier”, “Law-extender”, “Mediator” and “Policy maker”. Austrian and Swiss judges demonstrated both similar and different role orientations to American common law judges, and the findings called into question “the traditional assertion that civil and common law judges regard their functions differently”.¹⁰⁴

A more recent study by Guarnieri and Pederzoli on the power of judges in Western liberal democracies argues that the trend towards expanding the political significance of courts (judicialisation) has helped to weaken traditional judicial role conceptions.¹⁰⁵ In their view, the trend towards judicialisation has

¹⁰² Through their analysis, the authors "discovered" two other orientations not included in the original typology: the "trial judge" and the "peacekeeper", which according to Scheb is a hybrid containing features of several of the originally posited types. See John M Scheb, "Merit Selection, Role Orientations and Legal Rationalization: Q- Technique Study of the Florida State District Courts". p.93

¹⁰³ Victor Eugene Flango, Lettie McSpadden Wenner and Manfred W Wenner, "The Concept of Judicial Role: A Methodological Note" (1975) 19 *American Journal of Political Science* 277, p. 277.

¹⁰⁴ Manfred W Wenner, Lettie M Wenner and V Eugene Flango, "Austrian and Swiss Judges: A Comparative Study" (1978) 10 *Comparative Politics* 499, p.511

¹⁰⁵ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002) p.76.

made it more difficult to disregard the growing freedom judges enjoy in relation to the law and the legal system. With the aim to examine the relationship between courts and the broader political system, the authors set out a typology of four judicial role orientations based on two distinct dimensions. The first dimension, “judicial creativity”, relates to the extent to which judicial decisions are taken “on the basis of pre-existing substantive laws”.¹⁰⁶ The second dimension relates to the degree of judicial autonomy from political institutions.¹⁰⁷ From these two dimensions, Guarnieri and Pederzoli identify four distinct judicial role orientations, which they argue are useful for identifying the range of roles found inside any Western judiciary: the “Executor”, “Delegate”, “Guardian” and “Political” judge.

Judicial role categories used in this study

Guarnieri and Pederzoli’s terminology is adopted in this study of Arab judges’ role orientations. Although the judicial role orientations are labelled differently by the three key studies, they remain conceptually similar. This section describes the conceptual basis of the distinct judicial role orientations used by Unga and Baas, Flango, and Guarnieri and Pederzoli, and Table 1 below shows how the different role terminologies compare.

Table 1. Judicial role orientations and terminology used in three studies

Role Orientation		Guarnieri & Pederzoli (and this thesis)	Flango et.al	Unga & Baas
Judicial Roles	Restraint	Precedent		
	↕	↕	“Executor”	“Law interpreter”
			“Delegate”	“Administrator”
	Activism	Public	“Guardian”	“Adjudicator”
		“Political”	“Policy maker”	“Law maker”

¹⁰⁶ Ibid. p.69.

¹⁰⁷ Ibid.

Executor judge

The first role orientation is considered as an ideal conception of the judge. Flango describes this judge as a “Law applier” and defines it as someone who does not consider the societal needs or the social consequences of judicial decision-making.¹⁰⁸ For this judge, the judicial task “is expected to be focused on the legal prerequisites and skills of a judge”.¹⁰⁹ Flango’s orientation is conceptually similar to Guarnieri and Pederzoli’s “Executor” judge. The “Executor” judge is described best according to Montesquieu’s definition of a judge: a passive executor of the legislative will or a mouthpiece of the law (*bouche de la loi*).¹¹⁰ This orientation is traditionally associated with judges in civil law traditions.¹¹¹

According to Guarnieri and Pederzoli, this judicial role was historically developed in conjunction with the institutional transformations of the French revolution and Napoleonic legal reforms.¹¹² But the “Executor” role has also been found in common law jurisdictions. In their study of US state judges, Ungs and Baas label this role “Law interpreter”, meaning a judge who characterises the judicial function as “involving only the interpretation of the law”.¹¹³ Moreover, the “Law interpreter” takes the view that legal precedent is the major criteria in decision-making and therefore “advocates judicial self-restraint as a necessary control over reading personal predilections into law”.¹¹⁴

¹⁰⁸ Victor Eugene Flango, Lettie McSpadden Wenner and Manfred W Wenner, "The Concept of Judicial Role: A Methodological Note" (1975) 19 *American Journal of Political Science* 277, p.282.

¹⁰⁹ Ibid. p.282.

¹¹⁰ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002) p.69.

¹¹¹ Scheb M John, (1982), *Merit Selection, Role Orientations and Legal Rationalization: A Q-Technique Study of The Florida State District Courts* (PhD, University of Florida) p.9.

¹¹² Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002) p.79.

¹¹³ Thomas D Ungs and Larry R Baas, "Judicial Role Perceptions: A Q-Technique Study of Ohio Judges" (1972) 6 *Law & Society Review*, p. 345.

¹¹⁴ Ibid. p. 346.

Delegate judge

Guarnieri and Pederzoli's "Delegate" judge recognises the existence of judicial creativity, but this is only exercised "within the space left open by the political branches".¹¹⁵ They describe this judicial role as a more realistic version of the "executor" judge; arguing that while a "mechanistic" judicial role might be desirable, it does not reflect an accurate nature of present judicial roles:

"[L]egal norms are not independent from the process of interpretation: they do not pre-date interpretation but assume meaning through the very process of interpretation, a process in which the judge obviously plays a strategic role."¹¹⁶

The "Delegate" judge is similar to Flango's "Law extender". This type of judge, like the "Law applier", "believes that nearly all cases can be decided using clear and relevant precedents as guides."¹¹⁷ However, the "Law extender" is also conscious of the societal consequences of his/her judicial decisions. Seen in this way, the "law extender" is both "public regarding" and "law regarding."¹¹⁸ The "Delegate" and "Law extender" judge are also closely aligned with Ungs and Baas' "Administrator" judge. This type of judge pays close attention to judicial procedures, since they are as important as the decisions themselves.¹¹⁹ Ungs and Baas describe the "Administrator" judge as someone who "disclaims reliance on abstract ideas of right and justice".¹²⁰ And while the "Administrator" judge recognises that precedent is significant: "its importance is measured less as the required criteria for decision than as a means to assure reliability and certainty in decisions so that litigants can have faith in the continuity of the law".¹²¹

¹¹⁵ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002) p.71.

¹¹⁶ *Ibid.*

¹¹⁷ Victor Eugene Flango, Lettie McSpadden Wenner and Manfred W Wenner, "The Concept of Judicial Role: A Methodological Note" (1975) 19 *American Journal of Political Science* 277, p. 282.

¹¹⁸ *Ibid.* p. 282.

¹¹⁹ Thomas D Ungs and Larry R Baas, "Judicial Role Perceptions: A Q-Technique Study of Ohio Judges" (1972) 6 *Law & Society Review*, p. 347.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

Guardian judge

The “Guardian” judge is closer to the “judicial activism” end of the spectrum than the “judicial restraint” end. This orientation describes the role of a judge as a “moral force in the community”.¹²² For Guarneri and Pederzoli, this orientation exists where courts have powers of judicial review, and “where the main task of the judge is to defend individual or minority rights from abuses by the political branches and the majorities in control of them.”¹²³ Flango calls this role a “Mediator”, and describes it as someone who places less confidence in the possibility of finding a clear and relevant precedent for every case encountered.¹²⁴ The “Guardian” judge is also similar to Unga and Baas’ “Adjudicator” judge, where the “prototype goals” of the judge are to balance contending principles, evaluate the conditions in society, and act as a decision maker to achieve the welfare of society.¹²⁵ In achieving these goals, the “Adjudicator” judge seeks to understand and appreciate the changing social forces and environments that guide the judge in his/her decisions.¹²⁶

Political judge

The “Political” judge is clearly positioned at the judicial activism end of the spectrum. Guarneri and Pederzoli describe the “Political” judge, as someone who is independent from both the political and legal system, and this strengthens his/her capacity for political intervention.¹²⁷ Judges belonging to

¹²² This role conceives the judge as someone who protects the people from external threats or unwise values. According to Glick, the judge will at times even protect the people from themselves. The general justification for this orientation is that social peace and constitutional government require a judicial orientation in which the judge performs a function as a protector of social norms and, where necessary, is a creator of them by using the procedural mechanisms available. See Henry Robert Glick, *Judicial Role Perceptions and Behavior: A Study of American State Judges*. (PhD Tulane University 1967), p. 60.

¹²³ Carlo Guarneri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002) p.72.

¹²⁴ Victor Eugene Flango, Lettie McSpadden Wenner and Manfred W Wenner, "The Concept of Judicial Role: A Methodological Note" (1975) 19 *American Journal of Political Science* 277, p.284.

¹²⁵ Thomas D Unga and Larry R Baas, "Judicial Role Perceptions: A Q-Technique Study of Ohio Judges" (1972) 6 *Law & Society Review*, p. 346.

¹²⁶ Ibid. p. 347.

¹²⁷ Carlo Guarneri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002) p. 74.

this role “act as true policy-makers developing rules based on judgments of social benefit”.¹²⁸ The qualitative distinction between the “Guardian” judge and the “Political” judge is that the “Guardian” relies on available procedural mechanisms in deciding cases, whereas the decision-making of the “Political” judge often involves the judge’s personal views. Flango labels this orientation as a “Policy-maker”, where the judge is unfettered by deference to precedent:

“Because precedents are often available to support both sides of any controversy, this type of judge may believe that he cannot help ‘making law’, and in doing so must necessarily be guided, in part, by a personal conception of justice.”¹²⁹

Ungs and Baas label this judicial role orientation the “Law-maker”, where attitudes and experiences of the individual judge form part of the judge’s primary function (judicial decision-making and case-disposition).¹³⁰ Ungs and Baas describe this judge’s goals as usually defined “in terms of the pursuit of his own conception of justice as applied to particular cases”.¹³¹

The ideal Arab judge

An important part of official laws associated with the judicial role is the basis they create for an “ideal judge”. According to Glick, they form an important part of consensual norms because they “establish fundamental personal characteristics which are the bases of more specialized interactions on the court”.¹³² The four Arab countries examined in detail in this thesis have laws and official provisions that regulate judicial conduct within and outside the legal system. Formal enactments provide for skeletal definitions for judges in the Arab region, and there are also informal “but no less important rules” of judicial

¹²⁸ Ibid.

¹²⁹ Victor Eugene Flango, Lettie McSpadden Wenner and Manfred W Wenner, "The Concept of Judicial Role: A Methodological Note" (1975) 19 *American Journal of Political Science* 277, p. 284.

¹³⁰ Thomas D Ungs and Larry R Baas, "Judicial Role Perceptions: A Q-Technique Study of Ohio Judges" (1972) 6 *Law & Society Review*, p. 346.

¹³¹ Ibid.

¹³² Glick, H. (1967). *Judicial role perceptions and behavior: A study of American state judges*. Ph.D. Tulane University p.115.

conduct.¹³³ While little empirical information exists about Arab judges' views of their appropriate relationships with each other or with important political non-judicial actors, there are numerous sources that set out the principles of ideal judicial behaviour.

Cultural and religious principles provide an important source of information about qualities and ideal attributes of Arab judges. One principle which is still in use and is quoted by judges and judiciaries extensively relates to the message of the Second Caliph of Islam, 'Umar ibn al-Khaṭṭāb, conveyed to his governor, Abū Musā al-Ash'arī, on the conduct of a judge.¹³⁴ The letters were written around 17-29 years after the Prophet Muḥammad's death and remain a template for judges in the Arab region:

“Act impartially between the people in your audience-room and before you, so that the man of noble status be not greedy for your partiality and the man of inferior status despair of justice from you;

Let not a judgment which you judged yesterday, but over which you re-consulted yourself and were guided to your rectitude, prevent you from retracting to justice, for nothing can invalidate justice. You must realise that retraction to justice is better than long persistence in a thing invalid;

Have care to avoid [anger] [concern] and annoyance with the litigants in the battlefields of justice in which God confers reward and makes goodly store [...]"¹³⁵

These are only some of 'Umar's instructions, which today are still highly esteemed and often quoted and adhered to by judges across the Arab region and in the wider Muslim communities.¹³⁶ In this way, principles of equality,

¹³³ John C. Wahlke, Heins Eulau, William Buchanan, LeRoy C. Ferguson, *The Legislative System: Explorations in Legislative Behavior* (John Wiley & Sons 1962), p.141

¹³⁴ According to Serjeant, 'Umar ibn al-Khaṭṭāb (581– 644 AD) wrote the letters sometime between 17-29 years after the Prophet's death. See by Serjeant, R. (1984) "The Caliph 'Umar's Letters to Abu Musa Al-Ash'ari and Mu'awiya", *Journal of Semitic Studies*, XXIX(1), pp.65-79.

¹³⁵ Translation by Serjeant, R. (1984) "The Caliph 'Umar's Letters to Abu Musa Al-Ash'ari and Mu'awiya", *Journal of Semitic Studies*, XXIX(1), pp.65-79. p.66

¹³⁶ The authenticity of 'Umar's letters is a source of contention among historians. Regardless of their origin, they are often referred to and used as a basis for judicial conduct in the Arab region. For example, the letters form part of the preamble to the 2007 Sharjah Convention. In

impartiality and justice can be said to be deeply entrenched in the Muslim and Arab legal history that regulates judicial conduct.¹³⁷

In addition to the national codes that regulate judicial ethics, the 2007 Sharjah Convention is a regional document intended to be a morally guiding document for judges.¹³⁸ The Convention was drafted by a five-member committee composed of Heads of Judicial Inspectorates in Jordan, the United Arab Emirates, Algeria, Lebanon and Egypt. Part of the preamble translates as follows:

“Society has accorded the judiciary with dignity and a certain degree of sanctity. Judges are given important and serious powers where they issue binding decisions that impact the social order, the lives of individuals and their freedoms, dignity, property, money, obligations and duties. [...]”¹³⁹

According to the Convention, with the evolution of the judiciary’s competences and powers, “norms, values, customs and traditions have been developed and broadened in order to strengthen their independence from other branches in the State.”¹⁴⁰ The Convention also draws inspiration from international instruments on judicial conduct, pre-dominantly from the 2002 Bangalore Principles of Judicial Conduct.¹⁴¹ Intended to establish standards for the ethical conduct of judges, the Bangalore Principles include six core values:

addition, ‘Umar ibn al-Khaṭṭāb’s message was often quoted in Arabic by Arab judges and lawyers that were consulted for this research.

¹³⁷ Similarly, “Letter 53” of the fourth Caliph, Imam ‘Ali Bin Abi Talib (601 – 661 CE) contains specific advice on the selection of judges to Egypt’s governor, Malik al-Ashtar: “Beware! The utmost carefulness is to be exercised in its selection: for it is this high office which adventurous self-seekers aspire to secure and exploit in their selfish interests. After the selection of your chief judge, give careful consideration to the selection of other officers. Confirm them in their appointments after approved apprenticeship and probation. Never select men for responsible posts either out of any regard for personal connections or under any influence, for that might lead to injustice and corruption.” See generally Ali Paya and Hamid Tehrani, “Imam ‘Ali’s Theory of Justice Revisited” (2013) 6 *Journal of Shi’a Islamic Studies* 5.

¹³⁸ “Sharjah Convention on the ethics and behaviour of the judge” [wathīqat ash-shārja: ḥawl “akhlaqiat wasolok al-Qāḍī al-muṭamar al-ḥadi ”ashr li-ruasa’ ’ajhizat al-taftish al-Qaḍā’ī fi al-dawal al-’arabiah]’ 11th Conference of Heads of Judicial Inspection Bodies in Arab States, Sharjah (2007). Hereinafter “Sharjah Convention 2007”.

¹³⁹ Preamble, Sharjah Convention 2007.

¹⁴⁰ Ibid.

¹⁴¹ ‘The Bangalore Principles of Judicial Conduct’ E/CN.4/2003/65 (2002).

Independence, Impartiality, Integrity, Propriety, Equality, Competence and Diligence. The Sharjah Convention list all of these values with the exception of “Equality”. In addition to the Bangalore Principles, the Sharjah Convention include four more principles: Courage, Humility, Honesty and Honour.¹⁴² In the Sharjah Convention, each of the 8 values consist of several subcategories and descriptions. These are set out in Table 2.¹⁴³

¹⁴² The values in the Sharjah Convention are further reflected in some of the national codes of ethics, particularly for Jordan and Lebanon. The Jordanian Code of Judicial Ethics was issued by the Judicial Council in 2017 and replaced the 2014 Code of Judicial Ethics. The Code forms part of the Judicial Independence Law No. 29 of 2014. Lebanon’s Code of Judicial Ethics was adopted by the Ministry of Justice in 2005 as part of Resolution No 77/1.

¹⁴³ An additional source of judicial ethics and behavior that is relevant in the region is in Chapter 1, Book 16 of the Ottoman *Mejellel al Ahkam al Adilya* (1876)

Table 2. Sharjah Convention on Judicial Ethics 2007 (unofficial translation)¹⁴⁴

Principle	Definition
Principle 1: <i>Independence</i>	<ul style="list-style-type: none"> • Strengthen the laws of the judiciary; • Strengthen the confidence in the judiciary; • Exercise the judicial functions in a way that promotes confidence; • Refrain from, and confront external pressures and influences; • Knowledge and application of the law; • Have personal freedom
Principle 2: <i>Impartiality and Neutrality</i>	<ul style="list-style-type: none"> • Impartial and neutral treatment of litigants, lawyers, fellow judicial colleagues; • Endeavour to enhance confidence in the judicial role; • Recusal when there are serious grounds to believe that impartiality and fairness is compromised; • Respect the principles of fair trial and the right to defence; • Refrain from engaging in financial and commercial activities that may impair impartiality and integrity; • Do not step down during the course of a trial or seek to withdraw judicial colleagues sitting in the same court; • Monitor personal behaviour and practice strict self-control, in court and in public.
Principle 3: <i>Integrity</i>	<ul style="list-style-type: none"> • Possess integrity; • Take every effort to ensure that behaviour is free from suspicion; • Strive to be a role model for fellow colleagues; • Always stay alert and cautious for anyone seeking to benefit from the judge because of the judicial tasks exercised.
Principle 4: <i>Propriety</i>	<ul style="list-style-type: none"> • Respect the prestigious nature of the judicial role and make sure that behaviour will not undermine trust in the judicial institution; • Refrain from expressing personal, religious and political views; • Refrain from publicly commenting on judicial decisions issued that would undermine the court's judgment; • Preservation of personal reputation and personality; • Refrain from complaining about the nature of the judicial work; • Keeping court deliberations secret.
Principle 5: <i>Courage</i>	<ul style="list-style-type: none"> • Be self-confident in declaring the law; • Possess conscience and wisdom; • Look to senior judges and jurists as models for behaviour; • Confront difficult and complex cases courageously.
Principle 6: <i>Humility</i>	<ul style="list-style-type: none"> • Distancing oneself from vanity, arrogance and hypocrisy; • Avoid strong emotions such as anger, rage, and enthusiasm; • Continuously strive to acquire more knowledge; • Refrain from boasting about the judicial office.
Principle 7: <i>Honesty and Honour</i>	<ul style="list-style-type: none"> • Stay committed to the content of the judicial oath; • Be honest towards colleagues, (particularly senior judges) and the parties to a dispute; • Avoid misinformation and exaggeration
Principle 8: <i>Competence and Diligence</i>	<ul style="list-style-type: none"> • Qualified to perform his duties; • Development of general knowledge beyond the law; • Continually engage in legal research; • Ensure that all judicial tasks are completed in the best possible manner; • Be active in judicial role

¹⁴⁴ The Sharjah Convention is translated from Arabic. To view the document in its original language: <https://carji.org/sites/default/files/sharjah_document.doc>/> accessed 30 August 2018.

Relationships with other judges

One theme that arises from the Sharjah Convention concerns judges' appropriate relationships with other judges. According to the Convention, judges must strive to be role models for their colleagues. Judges have a duty to encourage integrity among their peers and confront them when their integrity falters.¹⁴⁵ A judge must be honest towards his/her judicial colleagues, particularly senior judges.¹⁴⁶ Similarly, the Jordanian Judicial Code states that a judge must interact with superiors, colleagues and subordinates with respect and cooperation "that reflects the prestige of the judiciary and its reputation."¹⁴⁷

In addition to integrity, according to the Convention, Arab judges must self-monitor their behaviour in their professional and private lives. They must practice strict self-control within the court as well as in public in order to gain the confidence and respect of litigants, their agents (lawyers) and the public.¹⁴⁸ Because judges are representatives of the judiciary, they must make sure that the judiciary is not distrusted or questioned. Judges should be careful not to place themselves in precarious situations and engage in behaviour that harms the judge's and the judiciary's reputation. This includes the judge expressing opinions on political, religious and ideological matters. Judges must also refrain from publicly commenting on judicial decisions.¹⁴⁹ Judges are expected to be purely objective in the decision-making process at all times. The duty to maintain objectivity extends beyond the court, and judges are expected to isolate themselves from influences that might affect the image of justice and the dignity of the judicial profession.

These principles are not confined to the Arab region only; they form part of internationally accepted norms on judicial ethics. For instance, the Bangalore Principles endorses strong statements of impartiality and unbiased judging

¹⁴⁵ "Principle 3: Integrity", Sharjah Convention 2007

¹⁴⁶ "Principle 7: Honesty and Honour", Ibid.

¹⁴⁷ Art. 30, "Code of Judicial Conduct" 2017 (Jordan)

¹⁴⁸ "Principle 2: Impartiality and Neutrality", Ibid.

¹⁴⁹ "Principle 4: Propriety", Ibid.

inside the courtroom and in the wider public. A judge "shall ensure that his or her conduct maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary."¹⁵⁰

Although the national, regional and international codes of judicial conduct are laudable aspirations, there is a fundamental problem with them. They promote an unrealistic vision of judicial activity, and this is a vision that fits the conceptual role of the "Executor" judge as mere mouthpieces of the law.¹⁵¹ As discussed earlier, the "Executor" is an ideal conception of the judicial role. It espouses a well-defined and acceptable role conception of what a judge ought to be, that is: someone who does not consider the societal needs or the social consequences of judicial decision-making.¹⁵² The "Executor" judge "advocates judicial self-restraint as a necessary control over reading personal predilections into law".¹⁵³ This role is, however, widely recognised as unrealistic. This thesis attempts to empirically assess the extent to which Arab judges can in reality be categorised as "Executor", "Delegate", "Guardian" or "Political" judges.

Speaking with one tongue

Because judges often work in groups where members share the same role, there must be some minimal level of "working consensus".¹⁵⁴ Such working consensus may be based on two norms. The first set of norms relate to written prescriptions such as laws and rules of procedure that direct judges about how they are expected to act in certain situations. The second norm relates to unwritten but informally understood rules, which Wahlke et al. call "rules-of-the-game".¹⁵⁵ Taken together, these two norms indicate what the expected

¹⁵⁰ "Principle 2: Impartiality and Neutrality", Ibid.

¹⁵¹ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002) p.69

¹⁵² Flango, V., Wenner, L. and Wenner, M. (1975) "The Concept of Judicial Role: A Methodological Note" *American Journal of Political Science*, 19(2), p.282

¹⁵³ Baas and Unga "Judicial Role perceptions: A Q-Technique", p.345

¹⁵⁴ John C. Wahlke, Heins Eulau, William Buchanan, LeRoy C. Ferguson, *The Legislative System: Explorations in Legislative Behavior* (John Wiley & Sons 1962) p.145

¹⁵⁵ Ibid. p.144

relationship with the individual judge vis-à-vis her/his colleagues should be according to the judicial collective.

Judges' working in a group such as collegial court must agree on basic norms in order to carry out their judicial functions. According to Glick:

“The actual internal workings of the court could be disrupted, though, without the existence of some acceptance of rules regulating an individual's treatment of his fellow court members. With disagreement here, it might be very difficult for judges to move to the more specific area of agreeing on the way decisions should be reached.”¹⁵⁶

Although the true internal workings of collegiate courts may be hidden from view by an artificial image of court unity (often promoted by the judiciary as a whole), judges sitting in the same court must agree on basic norms of conduct. “[Group norms] serve as points of reference or anchors from which [judges] can evaluate events”.¹⁵⁷

Actors beyond the legal community

Other types of actors can play an important part in how judges think about their own role. In order to fully explore the judicial roles (and their significance) in the region, how judges perceive of those actors they are in frequent interaction with is also important. In role-theory, the relationship between role-holders (judges) and those holding counter-positions (“non-judges”) is taken into account. Just as judges may have expectations of their judicial colleagues and these help form their own role orientations, judges may also have expectations of other (non-judicial) actors and these also form part of judges' role orientations.¹⁵⁸

¹⁵⁶ Glick, H. (1967). *Judicial role perceptions and behavior: A study of American state judges*. Ph.D. Tulane University p.114

¹⁵⁷ Ibid. p.113

¹⁵⁸ A full exploration of judicial roles in the region would also seek to understand the expectations non-judicial actors have of judges' role and function. This however is beyond the scope of this thesis.

An important characteristic of role theory is that it assumes the existence of interpersonal relations.¹⁵⁹ While the overwhelming bulk of a judge's work is within the confines of court and with his/her judicial colleagues, no judge is isolated from the outside world. Judges' relationships with actors in the legal community is supposed to be conducted according to strict legal standards. According to Glick, judges are expected to decide the case in purely objective terms.¹⁶⁰ Furthermore, judicial objectivity is also supposed to operate when judges are not sitting on the bench and judges are expected to "isolate themselves from influences which might affect their image of justice incarnate or which might skew their determination of a case".¹⁶¹ As seen in the Sharjah Convention, judges are considered representatives of the judiciary and must therefore make sure that the dignity of the judiciary is not compromised when interacting outside court.¹⁶² However, contrary to the myth of absolute judicial isolation, judges do interact with actors beyond the legal community, through their decision-making and other activities. This is particularly true for judges in Arab states that have witnessed social and political upheavals in recent years. In Sultany's view:

"The judiciary that upholds the rule of law is not an impartial arbiter because it is divided along political and professional lines that relate to political disputes and competing visions of the social order and the revolution. Thus although the judiciary provides a form of institutional continuity, given the lack of judicial reform, the law is intertwined with politics, and *the judicial resolution of political disputes is contestable and not merely contested* ... [emphasis added]."¹⁶³

For Sultany, judges in states with revolutionary upheavals cannot be neutral because they form part of the social and political struggles they are supposed to regulate. While the type of external non-judicial actors may vary from

¹⁵⁹ John C. Wahlke, Heins Eulau, William Buchanan, LeRoy C. Ferguson, *The Legislative System: Explorations in Legislative Behavior* (John Wiley & Sons 1962), p.10

¹⁶⁰ Glick, H. (1967). *Judicial role perceptions and behavior: A study of American state judges*. Ph.D. Tulane University, p.233

¹⁶¹ Ibid. p.233

¹⁶² Under the third principle of integrity, integrity is described as the judge's effort to strive to strengthen people's confidence of the judiciary which is a top priority. "Principle 3: Integrity", Sharjah Convention 2007.

¹⁶³ Sultany N, *Law and Revolution: Legitimacy and Constitutionalism after the Arab Spring* (First edition, Oxford University Press 2017) p.199.

country to country and the importance judges place on their relationships with external actors may also vary, three types of non-judicial actors are in particular considered and explored in this study: the wider public, religious authorities and the executive branch.

Judges and the public

An important relationship for judges that forms part of their core duties is their interaction with the public. In principle, judges are required to keep a distance from the community. For instance, under the fourth principle of the Sharjah Convention, judges are instructed to maintain a balance between their judicial duties and their engagement in society.¹⁶⁴ According to Guarnieri, a judge cannot "deny justice", and in principle every citizen has the possibility to go to court with the legitimate expectation of receiving a judgment.¹⁶⁵ Theoretically, this makes the judiciary a more accessible institution than the political branches. A recent study by the World Justice Project in 2018 found that 49% of 1000 Lebanese and 46% of 1001 Tunisians had experienced a legal problem in the past two years.¹⁶⁶

How non-judicial individuals and groups perceive judges and the utility of courts can be an important factor in regulating interactions between the two.¹⁶⁷ For instance, social and economic costs of litigation, delays in processing complaints and the existence of quasi-judicial institutions that can effectively process conflicts may foster court avoidance and thus promote a negative view of judges and courts. Although not true of all the Middle East, this may be particularly relevant where, in addition to the state courts, tribal mediators are

¹⁶⁴ "Principle 4: Propriety", Sharjah Convention 2007

¹⁶⁵ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002) p.98.

¹⁶⁶ Global Insights on Access to Justice Findings from the World Justice Project General Population Poll in 45 Countries' (World Justice Project 2018)
<https://worldjusticeproject.org/sites/default/files/documents/WJP_Access-Justice_April_2018_Online.pdf>. p. 31 and p.50

¹⁶⁷ Glick, H. (1967). *Judicial role perceptions and behavior: A study of American state judges*. Ph.D. Tulane University, p.29. See also Friedmann, W. (1961), "Legal Philosophy and Judicial Law-making". *Columbia Law Review*, 61: 821–45.

used for dispute resolution. In some countries, they also complement the civil legal system in several countries.¹⁶⁸

A 2017 study conducted by the Hague Institute for Innovation of Law (Hiil) surveyed the public about its confidence in judges and courts in three countries in the Arab Middle East. Data included responses from approximately 6000 participants in each of three studies in Tunisia¹⁶⁹, Jordan¹⁷⁰ and Lebanon.¹⁷¹ Table 3 below presents Hiil's findings on the overall level of trust in courts across the three countries.¹⁷² In Jordan and Lebanon, respondents had similar levels of trust in informal justice mechanisms. In Jordan, trust in informal justice mechanisms such as tribal justice scored 3.9 out of 5 among the respondents and courts scored 3.8 out of 5. In Lebanon, trust in informal justice mechanisms scored 2.82 out of 5, and trust in courts scored 2.85 out of 5. In Tunisia there were higher levels of trust in courts (3.27 out of 5) than in informal justice mechanisms (2.84 out of 5).

¹⁶⁸ For instance, tribal principles and processes of dispute resolution are used across Jordan, both in rural and urban areas. Among 6000 Jordanians surveyed for the Hiil report in 2017, the majority indicated that their solutions were achieved via a mediator/ conciliator or a decision of an adjudication authority.

¹⁶⁸ For instance, the Bedouin populations in Syria, Palestine, and Jordan tribal dispute resolution is still practiced upon. For a discussion on how tribal dispute resolution is still used see Jessica Watkins, "Seeking Justice: Tribal Dispute Resolution And Societal Transformation In Jordan" (2014) 46 *International Journal of Middle East Studies* 31; Dawn Chatty, "The Bedouin in Contemporary Syria: The Persistence of Tribal Authority and Control", 64 *Middle East Journal*, 1

¹⁶⁹ Rodrigo Núñez, Martin Gramatikov, Sam Muller, Kavita Heijstek Ziemann, Martijn Kind, Nadja Kernchen, Roger El Khoury, Nicoleta Balau, "Justice Needs and Satisfaction in Tunisia" (The Hague Institute for Innovation of Law (Hiil) 2017) Data and Impact

¹⁷⁰ Rodrigo Núñez, Martin Gramatikov, Sam Muller, Kavita Heijstek Ziemann, Martijn Kind, Nadja Kernchen, Roger El Khoury, Nicoleta Balau, "Justice Needs and Satisfaction in Jordan" (The Hague Institute for Innovation of Law (Hiil) 2017) Data and Impact.

¹⁷¹ Martijn Kind, Martin Gramatikov, Rodrigo Núñez, Roger El Khoury, Nadja Kernchen, "Justice Needs in Lebanon: Legal Problems in Daily Life" (The Hague Institute for Innovation of Law (Hiil) 2017) Data and Impact

¹⁷² In the three studies by Hiil, respondents were asked to rate five institutions by indicating to what extent they agreed with the following statement: "I trust [INSTITUTION] in [COUNTRY]". The score range was from 1 ("Disagree strongly") to 5 ("Agree strongly").

Table 3. Average trust in informal justice and Courts on a score range of 1-5 (Hiil)

	Jordan ¹⁷³	Tunisia ¹⁷⁴	Lebanon ¹⁷⁵
Informal Justice Mechanisms	3.9	2.84	2.82
Courts	3.8	3.27	2.85
	(n=6001)	(n=6770)	(n=6000)

The same study also explored perceptions of courts across the three countries. Findings from Jordan and Lebanon are illustrated in Table 4 below where answers of “Agree strongly” and “Agree” are combined.

Table 4. Perceptions of courts in Jordan and Lebanon (Hiil)¹⁷⁶

	Jordan	Lebanon
Courts generally protect the interests of the rich and powerful	48%	33%
Courts generally treat the people with respect	67%	50%
Courts make fair, impartial decisions based on the evidence before them	59%	47%
Courts generally explain their decisions and actions when asked	54%	49%
	(n=6001)	(n=6000)

The public perception of courts in Jordan was more positive than in Lebanon, with two-thirds of respondents (67%) agreeing the courts generally treat the people with respect, over half (59%) agreeing courts are fair and impartial and explain their decisions (54%) and just under a majority (48%) agreeing that courts protect the interests of the rich and powerful above those of ordinary people.¹⁷⁷ In Lebanon, perceptions of courts were less positive with only a

¹⁷³ (n 160) p.146

¹⁷⁴ (n 159) p.178

¹⁷⁵ (n 161) p.96

¹⁷⁶ Hiil’s study in Tunisia did not explicitly indicate whether these three statements were part of the survey as in Jordan and Lebanon. Tunisia is therefore not included in Table 4.

¹⁷⁷ Rodrigo Núñez, Martin Gramatikov, Sam Muller, Kavita Heijstek Ziemann, Martijn Kind, Nadja Kernchen, Roger El Khoury, Nicoleta Balau, “Justice Needs and Satisfaction in Jordan” (The Hague Institute for Innovation of Law (Hiil) 2017) Data and Impact. p.148

minority saying that courts treat people with respect, make fair decision and explain decisions.¹⁷⁸

This thesis provides an additional perspective on the relationship between the public and judges in the Arab Middle East, by exploring the role of the public in judicial decision-making from the perspective of Arab judges themselves.

Judges and the media

Another (perhaps more controversial) relationship judges may have is with the media. Maintaining the dignity of the judiciary is a cornerstone in several Arab states. For example, a central theme in the Sharjah Convention focuses on the preservation of the dignity of the judicial community vis-à-vis the public and other branches of government.¹⁷⁹ Under the third principle of integrity, judges must not “be drawn into futile arguments that are ill-suited to the honour of the judiciary”.¹⁸⁰ Some national judicial codes of conduct in the region include similar principles. The Jordanian Code of Judicial Conduct allows judges to exercise freedoms, provided that such activities do not compromise the reputation of his/her fellow judges and the dignity of the profession of the judiciary and its independence.¹⁸¹ In Egypt, judges must avoid any behavior (even if it is legal) that contradicts the dignity of the judiciary, privately and in his/her official capacity.¹⁸²

Several high judicial councils in the region have taken a strict approach to judges and the media, often under the guise of upholding the dignity of the judicial office. In Lebanon, the High Judicial Council has assumed the responsibility for scrutinising media outlets and issuing instructions in relation

¹⁷⁸ Martijn Kind, Martin Gramatikov, Rodrigo Núñez, Roger El Khoury, Nadja Kernchen, “Justice Needs in Lebanon: Legal Problems in Daily Life” (The Hague Institute for Innovation of Law (HiiL) 2017) Data and Impact. p.97

¹⁷⁹ “Principle 3: Integrity”, Sharjah Convention 2007.

¹⁸⁰ “Principle 7: Honesty and Dignity”; Resolution No 77/1 “Code of Judicial Ethics”, 2005 (Lebanon) and; Chapter 1, Book 16 of the Ottoman *Mejellel al Ahkam al Adilya* (1876)

¹⁸¹ Art 27, “Code of Judicial Conduct” 2017 (Jordan)

¹⁸² Art. 72 Law No 35/1984 (which amended Law No. 46 of 1972 (Judicial Authority Law), Egypt

to the coverage of the judiciary. For instance, the Council issued a statement calling for “necessary action” to be taken by the Public Prosecutor's Office in response to comments made by a satirical television show that, according to the statement, offended the Public Prosecutor and the judiciary.¹⁸³ The Council stated that the show's remarks were “an insult” to the judiciary and had the greatest repercussions on the reputation and prestige of the judiciary. The Council added that the protection of the dignity, reputation and prestige of the judiciary is paramount.¹⁸⁴ According to Saghieh, this will “pave the way for broad interpretations based on impeding freedom and transparency in the name of dignity, and for turning the [Judicial Council] into the guardian of judges' reputations”.¹⁸⁵

The Egyptian Constitution states that interference in judicial affairs or in its proceedings is a crime to which no statute of limitations may be applied.¹⁸⁶ The provision has been applied on several occasions particularly in relation to negative media coverage of the judiciary. In 2017, the Egyptian Judicial Council ordered a restriction on the publication of news related to judges and the judiciary in media outlets. Violating this decision, the Council stated, would lead to “disciplinary measures” and possible referral to other government entities. The Council has so far referred three violations to the prosecutor for alleged judicial misrepresentation.¹⁸⁷ Senior Egyptian judges have also on occasion adopted a confrontational attitude towards media outlets. One notable example is the statement made by the chairman of the Egyptian

¹⁸³ “LBCI Host's Song Leads Judiciary to Call for Further Prosecution” *The Daily Star Lebanon* (2 February 2018) <<http://www.dailystar.com.lb/News/Lebanon-News/2018/Feb-02/436555-lbci-hosts-song-leads-judiciary-to-call-for-further-prosecution.ashx>>. Accessed 8 July 2018.

¹⁸⁴ Ibid.

¹⁸⁵ Nizar Saghieh, “Intra-Judicial Interference: The Case of Lebanon's Supreme Judicial Council Secretariat” *The Legal Agenda* (Beirut, 7 August 2014) <<http://legal-agenda.com/en/article.php?id=3016#>> accessed 30 August 2018.

¹⁸⁶ Article 184, Constitution of the Arab Republic of Egypt (2014). See also David Risley, “Egypt's Judiciary: Obstructing or Assisting Reform?” (2016) <https://www.mei.edu/sites/default/files/publications/Risley_Egyptjudiciary.pdf> accessed 1 August 2018.

¹⁸⁷ Daily News Egypt (2017) “Supreme Judicial Council imposes gag order on news related to judges and judiciary” [online] Available at: <https://dailynewsegypt.com/2017/01/09/609368/> [Accessed 7 Apr. 2018].

Judges' Club, Ahmed el-Zind, in 2015. When asked in a television interview about a protest in which images of judges were burned, el-Zind commented: "We [judges], on the soil of this nation, are masters, while others are slaves. We will burn the heart of anyone who burns a judge's photograph."¹⁸⁸

Judicial links to the government

The final actor that has generated considerable scholarly interest in the Arab region is judges' relationship with the executive branch. Particularly, judicial reform projects that seek to modernise the administration of justice have often been of the view as having strong relationships with the executive. For instance, in its report on Arab judiciaries following the Arab Spring, the Euro-Mediterranean Human Rights Network summarises the nature of eight Arab judiciaries as follows:

"The hegemony of the executive authority over judicial authority: in spite of the fact that the constitutions of all the countries of the region have stipulated an article or more on the independence of judiciary [...] The legal mechanisms of this hegemony take place via the prerogatives given to the Ministry of Justice over the role of judicial councils in most of the countries (notably Egypt, Syria, Jordan, Tunisia, and Morocco)".¹⁸⁹

Despite the existence of formal statements of judicial independence from the political branches in the Arab region, there appears to be a general understanding that Arab judges, in comparison with Western judiciaries, enjoy less independence.

¹⁸⁸ El-Zind later became the Minister of Justice but was discharged from the ministry within a year following a controversial remark that drew public outrage. Asked about a case involving journalists accused of defaming him and whether he would jail journalists that defamed him, he said he would imprison anyone, including the Prophet Muhammad himself. Hendawi, H. (2015). 'Anti-Brotherhood judge named justice minister in Egypt'. *San Diego Union Tribune* Available at: <http://www.sandiegouniontribune.com/sdut-anti-brotherhood-judge-named-justice-minister-in-2015may20-story.html> [Accessed 7 Apr. 2018].

¹⁸⁹ The report continues: "In this relationship, we find the executive authorities, mostly through the role of Minister of Justice, controls appointment, disciplinary actions against judges, judicial inspection, salaries, promotion, retirement, transfer or permission to work abroad (especially that the rich Gulf area countries 'borrow' judges from Egypt, Lebanon and Jordan in particular) or permission to be seconded to work as legal advisors with other government bodies; this situation gives the executive authorities a huge leverage on the judges' economic and professional situation." Euro-Mediterranean Human Rights Network (EMHRN), *The Reform of Judiciaries in the Wake of Arab Spring* (2012), p.8

For Guarnieri and Pederzoli, judges often play a significant role in Western democracies by virtue of how the judicial system is organised, how judges' conceive of their role and the increasingly political role assigned to judges by virtue of the structural set up of the judiciaries.¹⁹⁰ In civil law judiciaries, the Higher Judicial Councils are intended to be self-governing bodies, but they have provided a conduit through which the judiciary's representatives may develop new relationships with the political system.¹⁹¹ When this happens, according to Guarnieri and Pederzoli: "the connections between judges and the political system do influence judges' reference groups, their conception of their judicial role, and therefore their decisions".¹⁹²

This thesis explores the relationships between Arab judges and the political system through an assessment of court powers (Chapter 5) and socialisation processes, such as selection, training, evaluation and disciplinary proceedings (Chapter 6), educational and professional experiences obtained before joining the judiciary (Chapter 7), and Arab judges' views of the importance of and appropriate role of government in judicial decision-making (Chapter 9).

Summary

Little is currently known about judicial roles in the Arab Middle East or about inter-judicial and extra-judicial relationships. As discussed in Chapter 1, Western perceptions of "Qāḍī justice" have long implied that Arab judges have little concern for precedent or legal rules in their decision-making, and that their decision-making is arbitrary, personal and expedient. This thesis sets out to understand the reality of the judicial role in the Arab Middle East, and this chapter has set out the conceptual background to understanding judicial role conceptions. Chapter 4 sets out the methodology this thesis adopts in attempting to understand judicial role conceptions in the Arab Middle East, and how these compare with what is already known about judicial roles in civil and

¹⁹⁰ See generally Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002)

¹⁹¹ Ibid.p.52

¹⁹² Ibid.p.68

common law judiciaries. It also sets out the methodology used in this study to examine the expectations Arab judges have about the appropriate nature of their relationships with other judges and important non-judicial actors in their countries. Before discussing the methodology used to analyse the Arab judicial role, the next chapter provides important historical background information about the evolution of the role of the judge in the Arab region.

Chapter 3. Judiciaries in the Arab Middle East: A complex history

This chapter examines the historical evolution of the judicial role in the Arab Middle East in order to highlight the possible influences that exist today on judicial roles in the region. Drawing on secondary source materials, two phases in the evolution of the judicial role are covered in this chapter. The first phase traces the historical development of Islamic-based conceptions of the judicial role. The second phase explores the evolution of the Arab judicial role under the Ottomans, and the period following the independence of Arab states from primarily British and French colonial rule.

The chapter situates present judicial roles within an historical context and sets the stage for the following chapters in this thesis.¹⁹³ In this chapter, focus is placed on the Arab Sunni legal tradition and its contribution to the judicial role in the Arab Middle East. The thesis is concerned with developments that are directly concerned with the origins of law and judicial practice in four countries whose judiciaries are examined in greatest detail in this thesis: Saudi Arabia, Jordan, Lebanon and Egypt. The chapter's focus on the Sunni legal tradition also means there is less attention paid to the contribution of the Shi'a (and other) schools of Islamic law to judicial roles during the course of legal history in the Middle East.

The legal history of the Arab region spans over a millennium and any attempt to cover this in one chapter cannot capture all the historical complexities and will necessarily be limited and to a large degree, superficial. Islamic (and other) legal developments have been vast and have extended beyond the Arabic-speaking region. There were also equally important non-Arab developments and periods (such as the Mamluk Sultanate of Cairo between 1261 – 1517)

¹⁹³ The literature in this area is vast with diverging opinions on the historical development of law and judicial function in the Arab region. The aim of this chapter is limited to introduce and situate present Arab judicial roles within a historical context. It does so by focusing on overarching regional trends that, are considered by most scholars in this field to have had an impact on present law and judicial practice arising from internal developments as well as those factors stemming from outside the region (with particular focus on the West).

that made their own marks on the Islamic conceptions of the judicial office (e.g., the Safavids and Mughals amongst others) that are not covered in this chapter. In addition, the chapter only briefly covers the historical role of tribal judges (particularly in relation to early pre-Islamic arbitration). In many parts of the Middle East *Ḥukum ‘ashaīrī*, tribal laws and customs (albeit Islamized¹⁹⁴), continue to operate and coexist alongside the state’s judiciary. As Watkins rightly points out, the lack of scholarly attention paid to the contemporary application of tribal laws in the Middle East encourages the impression that it is archaic.¹⁹⁵ However, this is far from the truth. But tribal law and adjudication is a complex topic which deserves full exploration on its own and is beyond the scope of this thesis.¹⁹⁶

Law and legal systems in the Arab Middle East: beyond binary terms of traditionalism and modernity

In light of the above, a core purpose of this chapter is to provide for a more nuanced insight into the historical development of judicial culture in the Arab region:

“A large number of societies view law with indifference and many, particularly those we term primitive, consider the birth and development of law as a misadventure. In these societies, which set themselves against law, law appears with difficulty, evolves but little, and if one attempts to transfer law born and nourished elsewhere, the result is usually failure”¹⁹⁷

¹⁹⁴ See for instance, Layish A, 2002. “The Qāḍī’s Role in the Islamization of Sedentary Tribal Society.” In *The Public Sphere in Muslim Societies*. Ed. Miriam Hoexter, Shmuel N. Eisenstadt, and Nehemia Levtzion. New York: SUNY, 83-107.

¹⁹⁵ See for instance, Layish A, ‘Islamic Law in the Modern World: Nationalization, Islamization, Reinstatement’ (2014) 21 *Islamic Law and Society* 276

¹⁹⁶ This omission should not be regarded as the author’s failure to acknowledge that tribal justice continues to operate in the region today, sometimes alongside state judges and courts. The role and use of tribal justice and their adjudicator deserves a full exploration, as it is part of a rich legal heritage, but this is not within the scope of this study. See generally Jessica Watkins, “Seeking Justice: Tribal Dispute Resolution And Societal Transformation In Jordan” (2014) 46 *International Journal of Middle East Studies* 31; Frank H Stewart, “Tribal Law in the Arab World: A Review of the Literature” (1987) 19 *International Journal of Middle East Studies* 473; “The Bedouin in Contemporary Syria: The Persistence of Tribal Authority and Control”, 64 *Middle East Journal*, 1

¹⁹⁷ Norbert Rouland, *Legal Anthropology* (Athlone Press 1994) p.293

Descriptions of the evolution of law and legal systems in the Arab region tend to be described in binary terms of “modernity” and “tradition”.¹⁹⁸ On the one hand, modernisation efforts are often the focus of scholarship which is concerned with the desire to move towards a more Westernised legal conception based on “contractual relationship between free individual wills”.¹⁹⁹ On the other hand, a focus on “tradition” in Arab law is concerned to highlight legal systems based on kinship where the community “defines the individual”.²⁰⁰ Alliot for instance considered that “man is a servant of the past in traditional societies, and forges the future in Western societies”.²⁰¹ But to describe the evolution of law and judiciaries in the Arab region using binary terms is factually misleading.²⁰² Efforts at modernising judicial practice in line with Western legal influences form only one historical aspect of the region’s legal history. Similarly, looking at the role of tradition in law and judicial practice will only provide for a partial picture, in part because there is no uniform understanding of tradition across the region. What constitutes as “traditional” is contested and there are several competing values which have been established as legitimate traditional values within each Arab country as well as in the region. The present role of the Arab judge is complex and cannot be understood simply through the narrow lens of modernisation and traditionalism.

¹⁹⁸ Usually underlying this distinction is Max Weber’s binary distinction between two concepts, “traditional authority” and “rational-legal authority”. These are refuted in this thesis because they are simplistic and generalising.

¹⁹⁹ Nimer Sultany, *Law and Revolution: Legitimacy and Constitutionalism after the Arab Spring* (First edition, Oxford University Press 2017) p.293.

²⁰⁰ Norbert Rouland, *Legal Anthropology* (Athlone Press 1994) p. 301.

²⁰¹ For Rouland, the reconciliation between these binary concepts can only be achieved with difficulty: “The transfers of law from modern to traditional societies are unlikely to be fully accomplished without serious repercussions. When they take place willy-nilly, imposed by colonialism and taken up by newly independent states, it is at the price of an acculturation in which the state may ultimately be the loser”. Norbert Rouland, *Legal Anthropology* (Athlone Press 1994) p.295.

²⁰² The tendency to view history as an “opposition between the European contractual state and Oriental despotism is no more than a scholarly fiction”. See Sultany, *Law and Revolution: Legitimacy and Constitutionalism after the Arab Spring* (First edition, Oxford University Press 2017) p.20.

This chapter is set out in two parts. **Part one** traces the historical development of conceptions of the Islamic judicial role by briefly discussing three historical periods:

1. Pre-Islamic judicial practice of arbitration among the Arab Bedouins (-622 AD) from which the institutionalised, Islamic judge would emerge;
2. Umayyad Caliphate (661-750 AD) and the formal creation of the Islamic judicial office;
3. Abbasid Caliphate (750-1258 AD), which allowed the Islamic judicial function to mature.

These three periods are important for understanding the origins of the concept of a judge from the perspective of early Islamic legal developments and transformations of the judicial role.²⁰³

Part two explores the judicial role in the region from the 19th century, focusing on the impact of the Western law to the region with emphasis on the Ottoman legal reforms in the Arab region between 1839 – 1876 and the period following the Ottoman decline in the 20th century. The chapter then explores how these two historical phases have contributed to current understandings of the judicial role in the four main Arab countries analysed in this thesis (Egypt, Jordan, Saudi Arabia and Lebanon).

Part 1: Origins of the Arab judge: tribal, Islamic and non-Islamic influences

The term *Qāḍī* is used primarily in two contexts in Arabic. First, it refers to the generic function of any judge anywhere (within and outside the region). A *Qāḍī* is concerned with *Qaḍā'*, encompassing the entire range of a judge's judicial activities including the engagement with "the art of adjudication". The second

²⁰³ As explained above, the legal history of the Arab region spans over a millennium which cannot be captured in one single chapter. The purpose of this chapter is simply to shed some light on the complexity of law and judicial practice in the region through the broad historical lenses of western and islamic developments in two periods. This does not suggest that other periods such 1258-19th did not make important contributions or influences.

use specifically refers to a judge in the Islamic religion. A *Qāḍī* in the religious sense is a revered religious figure whose office is a symbol of divine justice (*Sharīʿa*), pre-dominantly occupied by men.²⁰⁴

But the origins of the *Qāḍī* predates Islam. The context from which Islam emerged was deeply rooted in the traditions of the Bedouins in the Arabian Peninsula (which today corresponds to the whole Gulf region, Yemen and parts of Jordan and Iraq). The Arab Bedouins were in possession of two sets of laws: one set served sedentary, agricultural and commercial needs, and the other set supported nomadic tribal conditions.²⁰⁵ Both sets of laws were heavily dependent on normative legal custom, which was reinforced and legitimised by public opinion.²⁰⁶ The intercessor (both female and male) between parties to a dispute was called *Ḥakam* (lit. “arbiter”, “umpire”, “judge”).²⁰⁷ Although not binding in the strict legal sense, the *Ḥakam*’s verdict (*Ḥukm*) was normally considered to be authoritative and final. The role and function of the *Ḥakam* was not only confined to issuing verdicts; the *Ḥakam* was also a lawmaker. With no centralised judicial system, the *Ḥakam* applied and developed legal custom.

²⁰⁴ When the role of *Qāḍī* became institutionalised, opinions differed on whether women could act as judges. Although women did act as tribal adjudicators in pre-Islamic Arabia, the issue has been a point of contestation. The majority of Islamic legal scholars have held the view that women cannot be judges. However, a strong minority of famous jurists such as Imam Abu Ḥanifa (the “founder” of the Ḥanafīte school of law), Ibn Ḥazm, and Imam al-Tabari are of the opinion that women can be judges. Despite this, there have been a few notable female *Qāḍīs*. One historical example was the mother of the Abbassid Caliph Muqtadar Billah who acted as an appeal judge. See Nadia Sonneveld and Monika Lindbekk (eds), *Women Judges in the Muslim World: A Comparative Study of Discourse and Practice* (Brill 2017); Noriani Nik Badli Shah and Yasmin Masidi, *Women as Judges* (Rev ed, Sisters in Islam 2009). Recent developments in Saudi Arabia suggests that this may change See (n516).

²⁰⁵ Wael B Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge University Press 2004) p.18.

²⁰⁶ Ibid.p.18. See also Nathalie Najjar, *Arbitration and International Trade in the Arab Countries* (Brill Nijhoff 2018) p.31.

²⁰⁷ *Ḥakam* comes from the root Ḥa - kaf- mem ح ك ف which refers to the attribute of judging, being wise, passing a verdict and preventing or restraining people from wrongdoing. (pl. *Ḥukkam*).

The Islamic Prophet, Muḥammad, was very much part of this society and was a *Ḥakam* himself.²⁰⁸ In later years, Muḥammad's actions as a *Ḥakam* became an ideal model for the Islamic judge,²⁰⁹ and the *Ḥakam*'s function continued throughout the Prophet's lifetime.²¹⁰ Instead the aim was to remind and teach men and women the moral obligations required to pass the reckoning of judgment day.²¹¹ By the time of Muḥammad's death in the year 632, Islam had a large following, but concepts of law and judicial practice in accordance with the newly established religion remained undeveloped.²¹²

Age of the Arab-Muslim Caliphates

Substantial developments in the judicial role occurred during the next 500 years, which is generally referred to as the age of the Arab-Muslim Caliphates and is illustrated in Figure 2 below.

²⁰⁸ In the year 622, Muḥammad was invited to be an impartial arbiter, *Ḥakam*, between Medina's warring factions that had lasted for around a century. He was to settle their disputes on the basis of tribal custom. See PM Holt and others, *The Cambridge History of Islam* (2008) p.39

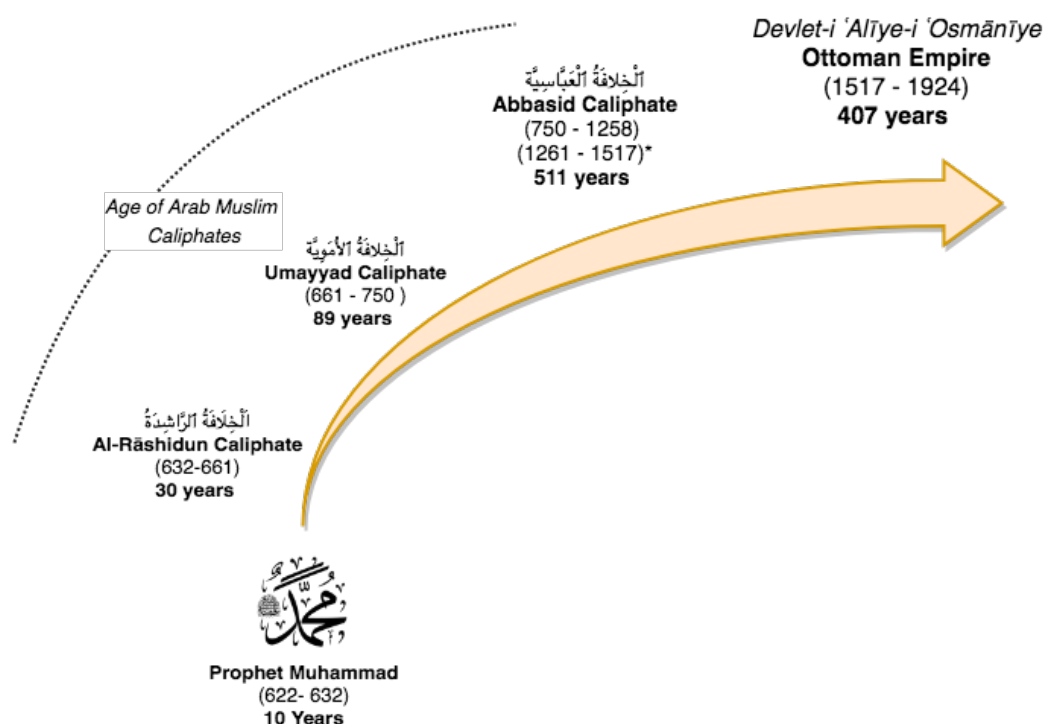
²⁰⁹ Muḥammad Khalid Masud, Rudolph Peters and David Stephan Powers (eds), *Dispensing Justice in Islam: Qāḍīs and Their Judgements* (Brill 2006) p.7

²¹⁰ Wael B Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge University Press 2004) p.36-36

²¹¹ Khadduri, M. and Liebesny, H. (2008). *Origin and development of Islamic law*. Clark, NJ: Lawbook Exchange, p.31

²¹² *Ibid.*

Figure 2. Timeline of Muslim Caliphates²¹³



During the greater part of the first century, technical aspects of law were a matter of indifference to the early Muslims. The pre-Islamic system of arbitration and custom continued under the first successors of Prophet Muḥammad, the Caliphs of Medina (“*Al-Rāshidun*” in 632–661). Judicial appointments were made mostly of men deemed to be in possession of experience in arbitration, wisdom and charisma to whom tribesmen could resort to adjudicate their disputes.²¹⁴ With the ensuing military (and later cultural and religious) expansion of Islam, the monotheistic religion found in the Arabian Peninsula eventually transitioned into a politico-religious Islamic

²¹³ Following the Siege of Baghdad by the Mongol Empire in 1258, the Abbāsids’ power was drastically reduced. The Abbāsids would later rule, albeit superficially, under the Mamluk Sultanate of Cairo between 1261 – 1517 until they were finally overthrown by the Ottomans in 1517

²¹⁴ According to Hallaq, qāḍīs under the first Caliphs were recruited from ranks of pre-Islamic arbitrators. Wael B Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge University Press 2004), p.35-37.

Empire.²¹⁵ In order to adapt to Islam's new political reality, the *Ḥakam*'s role would have to be redefined in order to accommodate this new reality.

The Umayyads (661 – 750 AD)

The *Banū 'Umayya*, ("Umayyads"), were a prominent Meccan clan of the Quraysh tribe to which the Prophet Muḥammad also belonged.²¹⁶ Before Muḥammad's death, the clan converted to Islam and several members of the clan would hold leadership roles: 'Uthman ibn 'Affan became the third Caliph of Medina between 644-656 AD, and Mu'awiyah ibn Abi Sufyan; (602 – 680 AD) became the second Caliph from the Umayyad clan.

At its height, the Umayyad Caliphate claimed dominion over North Africa, Central and South Asia, the Middle East, Iberian Peninsula and Sicily. The centralisation of Umayyad legal administration appears to have begun during the last years of the first century, and this marked a change in the nature of judicial appointments.²¹⁷ Although the Umayyad legal system was a patchwork of legal sources, law had begun to acquire its own independent character separate from tribal arbitration. The Arab *Ḥakam* was supplanted by an institutionalised Islamic judge who was a deputy of the governor. In addition to rendering judgments, Umayyad judges performed a multitude of functions such as collecting taxes and acting as police chiefs, and this led to subsequent descriptions of them as "proto-*Qāḍīs*".²¹⁸ Tyan, for example, describes the

²¹⁵ Immediately after Muḥammad's death, Islam experienced significant splits in its polity over the issue of political authority. The majority Sunnis believed that sovereignty passed to those caliphs who were companions of the Prophet and elected from the leadership of the Quraysh, the Prophet's tribe. But others, those who became the Shi'a Muslims, insisted that 'Ali, Muḥammad's nephew and son-in-law, was the rightful caliph and that rulership should pass after 'Ali to the children born of his wife Fatima, the Prophet's daughter. See generally PM Holt and others, *The Cambridge History of Islam* (2008).

²¹⁶ The Prophet Muḥammad belonged to the Banu Hashim clan of the Quraysh tribe.

²¹⁷ Wael B Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge University Press 2004), p.57

²¹⁸ Lena Salaymeh, *The Beginnings of Islamic Law: Late Antique Islamicate Legal Traditions* (Cambridge University Press 2016) p.150.

Islamic judge under the Umayyads as a delegate and representative (*Nā'ib*) rather than a judge in his own right.²¹⁹

According to Tyan, under the Umayyads, there was no distinction between judicial activity in litigation and activities outside litigation.²²⁰ The court (*Majlis al-qādā*) was not confined to a physical space. Rather, it was a manifestation of the judge himself (or herself) and an extension of the judicial personality. Hallaq contrasts this with civil and common law systems in Western countries, where the court tends to be less dependent on the judge and more on the purpose of the law. In the West, the court is a building occupied and appropriated according to the law for the holding of trials. Whereas Hallaq explains that the Islamic judge was not obliged to conduct his sessions in a specific place. Hearings were frequently held in the mosque, but they could also be held in the judge's private residence, in the market place and even in the public streets.²²¹

Introduction of foreign legal concepts and maxims into Islamic society

The Umayyad's were influenced by conquered territories and legal knowledge from non-Arab converts to Islam. Hallaq describes this as a "process of infiltration"²²², where the introduction of non-Islamic and non-Arab legal concepts and maxims into Islamic society was made possible through non-Arab converts to Islam. In addition, the Umayyads adopted concepts and principles from Byzantine (Roman), Sassanian (Persian) and Hellenic (Greco-Macedonian) laws, and they also drew inspiration from religious legal practices found in Canonical and Rabbinical laws.²²³ Islamic judges favoured local custom in their judicial interpretations by reinforcing and preserving local

²¹⁹ Émile Tyan, *Histoire de l'organisation judiciaire en pays d'Islam*, 2nd edition (Leiden: E.J. Brill, 1960) p.101

²²⁰ *Ibid.* p.236

²²¹ Wael B Hallaq, "The Qāḍī's Dīwān (Sijill) before the Ottomans" (1998) 61 *Bulletin of the School of Oriental and African Studies* 415, p.418.

²²² Wael B Hallaq, *Sharī'a: Theory, Practice, Transformations* (Cambridge University Press 2009) p.37

²²³ Jokisch B, *Islamic Imperial Law: Harun-Al-Rashid's Codification Project* (de Gruyter 2007) p. 3

traditions.²²⁴ More specifically, they were expected to give judgment according to sound opinion (*ra'y*). Judges based their decision-making on the customary practice of the community under their jurisdiction, as well as combining it with the letter and spirit of the Qur'ān.²²⁵ Through this judicial practice, Byzantine and Sassanian laws (amongst others) came to be integrated into Islamic legal practice, introducing considerable legal diversity within which religion was “secondary”.²²⁶

The variety of functions attached to the Umayyad *Qāḍī* had drawbacks that were further aggravated by the judge's subordination, not only to the central executive authority, but also to various regional authorities. Judgeship was considered an extension of caliphal authority, where a judge was only a delegate of the person who had appointed him.²²⁷ Suspicion of political power and those associated with the judicial function grew particularly strong during the late Umayyad Caliphate. The Umayyads were blamed for the loss of religious ethos in Islamic jurisprudence by focusing on worldly ends. For Islamic jurists, judicial appointment entailed a moral risk and a calamity for anyone who received it because the role was an inherently political, “worldly” and “secular” in function. Asserting the truth, God's truth, was in direct eschatological opposition with the judicial functions prescribed by the Umayyads. The judicial role involved determining right and wrong, and taking rights from some and granting it to others, involved a delicate and sacrosanct activity. Failure to judge by God's command and instead relying on temporal laws amounted to unbelief and oppression.²²⁸

²²⁴ Layish for example writes that the early Umayyad *qāḍīs* “filled local practices and customs with Islamic religious and ethical norms” Layish A, ‘Islamic Law in the Modern World: Nationalization, Islamization, Reinstatement’ (2014) 21 *Islamic Law and Society* p. 283. See also Schacht, Joseph. 1964. *An Introduction to Islamic Law*. Oxford: The Clarendon Press.

²²⁵ Émile Tyan, *Histoire de l'organisation judiciaire en pays d'Islam*, 2nd edition (Leiden: E.J. Brill, 1960) pp. 49-50

²²⁶ Jokisch B, *Islamic Imperial Law: Harun-Al-Rashid's Codification Project* (de Gruyter 2007) p. 54

²²⁷ Hallaq, W. (2011). *The origins and evolution of Islamic law*. Cambridge: Cambridge Univ. Press, p.79

²²⁸ Jurists were reported to have avoided judicial appointment even at the cost of punishment by the authorities. See Frank Vogel, *Islamic Law and Legal System Studies of Saudi Arabia* (Harvard University 1993) p.139.

Following unrest and several rebellions, the Umayyads were overthrown in the year 750 by the 'Abbāsids, a rival clan to the Umayyads. The 'Abbāsids shared the same clan of the Prophet Muḥammad, the Banu Hashim clan, and claimed caliphal authority by virtue of the closer bloodline than of the Umayyads.²²⁹ In addition, the 'Abbāsids distinguished themselves from the Umayyad's who were criticised as an "Arab Kingdom" because of the secular nature of the Umayyad state:²³⁰

"The ideology of a restoration of primitive Islam, with variants reflecting different trends, had conquered the masses, and, with the support of a majority of the learned men, became part of the programme of all, or nearly all, the leaders of parties. It triumphed when the 'Abbāsids adopted it as their slogan."²³¹

The 'Abbāsids (750- 1258)

Despite the new rulers' promise to inaugurate a new era of justice and piety, the 'Abbāsīd Caliphs, like their predecessors, had to administer and rule a complex, multi-cultural realm. Two important legal developments took place under the 'Abbāsids which would make a lasting mark on the Arab judicial role. The first development was the creation of jurisprudential schools of Islamic law (*Madahib*). The second development was the creation of the Islamic judicial office, which in part was due to the new jurisprudential schools and in part to the increasing power of Islamic jurists granted by the new caliphs.

Doctrinal schools of law

By the early Abbāsīd period, law had become more comprehensive in coverage and jurists began to develop their own legal assumptions and legal methodology. Unlike the Umayyad's who had given leeway to local customs, under the Abbāsids laws became the exclusive domain of jurists to interpret and formulate. The emergence of Islamic jurisprudence influenced by the 8th

²²⁹ The Abbāsids descended from their founder, Al-Abbas ibn Abd al-Muttalib (566–653 CE), who was one of Muḥammad's uncles. The Banu Hashim clan, the Hashemites now rule Jordan under King Abdallah II.

²³⁰ Asma Afsaruddin, 'Umayyad Dynasty' (Encyclopædia Britannica 2018) <www.britannica.com/topic/Umayyad-dynasty-Islamic-history> accessed 12 August 2018.

²³¹ PM Holt and others, *The Cambridge History of Islam* (2008), p.103

century jurist, Shafi'ī's, principles of Islamic Jurisprudence (*Uṣūl al-fiqh*).²³² Shafi'ī formulated the fundamental paradigm for Islamic law between the years 815 and 820. Of the several juristic schools that existed, only four from the Sunni branch were raised to the level of doctrinal schools during the 'Abbāsīd era. The schools were named after their respective "founders": Shafi'ī, Abū Ḥanīfa, Mālikī and bin- Ḥanbal.²³³ According to Vogel, the survival of these doctrinal schools was "influenced by communal and regional conformities, as well as official endorsement through financial and political support."²³⁴ Table 5 below summarises the key characteristics of each of the schools.

Table 5. Doctrinal schools in Sunni Islamic law

Doctrinal school	Characteristics	Period ²³⁵	Present reach
Ḥanbalī	The most source-oriented of the four schools with the least room for analogical reasoning.	780–855 AD to Present	The Gulf, predominantly in Saudi Arabia and Qatar
Mālikī	Places special emphasis on the actions of the people of Madinah shortly after the Prophet's death as a source of law (thinks of the residents of Madinah as "living Ḥadīth").	711–795 AD to Present	Popular in North and West Africa
Shafi'ī	Slightly less emphasis on analogical and reasoning; more focused on evidences and methodological approaches. Traditionalist inspired. "Prefers a weak tradition to a strong analogy"	767-820 AD– to present	Popular in Egypt, and Malaysia.
Ḥanafī	Use of Analogy (Qiyās) and Taqlid (lit. imitation) is central to the Ḥanafī school. It is the method in conforming to legal precedent, traditional behaviour and doctrines often set or used by mujtahids.	699 – 767 AD to present	The most widespread school in Islamic law, followed by roughly one-third of the world's Muslims.

²³² Shafi'ī was born around 767 and died in 820 AD.

²³³ Other "schools" eventually died out or were subsumed by the four surviving ones. The survival of the four Sunni schools was, in addition to popularity, influenced by communal and regional conformities as well as official endorsement through financial and political support. See Frank Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Brill 2000); Abd-Allah, U. (2013). *Mālik and Medina*. Leiden: Brill, p.510

²³⁴ See Frank Vogel, *Islamic law and legal system studies of Saudi Arabia* Ph.D. Harvard University, 1993, p.126

²³⁵ Because these schools were tied to their respective founders, the years indicated relate to the lives of each of the four founders.

The three other schools found ways to accommodate Shafi'i's dogma, combining interpretation and application of legal principles they claimed could override the authority of the *Ḥadīth*. For the **Ḥanafī school**, this was the strength of "juristic preference" (*Istiḥsān*). According to Kamali, this is a rationalist doctrine that consists of giving preference to one over many possible solutions to a particular problem, and "the choice of one or the other of these solutions is mainly determined by the jurist in the light of considerations of equity and fairness"²³⁶ The **Mālikī school's** benchmark was the credibility of "the consensus of the Medina scholars"²³⁷ because the city of Medina was the centre of Islamic teaching and where the Prophet Muḥammad's companions resided. The Mālikī school would, therefore, come to be characterised by its reliance on the customary practice of Medina as a source of law.²³⁸ The adherents of the **Ḥanbalī school** remained strictly traditionalist, but would later accept the jurisprudential necessity of analogy.

Development of the Islamic judge

The second important development under the 'Abbāsīd rule was the evolution of the judicial role. Unlike the Umayyad period, judges increasingly distinguished themselves from political power.²³⁹ During the 'Abbāsīds, the office of a chief justice was established (*Qāḍī al-Qudat*).²⁴⁰ His role was to act primarily as an adviser to the Caliph in the appointment and dismissal of judges. Through the increasing institutionalisation of the judicial office during this period, a clear role for judges had begun to emerge:

"Judges established themselves as the intercessors between the populace and the rulers. Even outside the courtroom, jurists and judges felt responsibility toward the common man, and on their own often initiated action without any petition being made."²⁴¹

²³⁶ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (3rd rev and enl ed, Islamic Texts Society 2003), p.4

²³⁷ Ibid.

²³⁸ Ibid. p.372

²³⁹ Majid Khadduri and Herbert J Liebesny (eds), *Origin and Development of Islamic Law* (Lawbook Exchange 2008) p.260

²⁴⁰ Hallaq, W. (2011), *The origins and evolution of Islamic law*. Cambridge: Cambridge Univ. Press, p.79-80

²⁴¹ Ibid. p.183

While the responsibility of the Islamic judge was primarily judicial, he was also charged with certain quasi and non-judicial responsibilities.

Significance of the Arab-Muslim Caliphates on the role of the Arab judge

Prior to the Arab expansion in the name of Islam, disputes in the Arabian Peninsula were largely settled with arbitration based on legal custom.²⁴² The role of the Ḥakam made important contributions to the development of the Islamic judge. With Islam's territorial expansion and the establishment of an Islamic polity, the Islamic judicial office began to take shape. Its development, however, was not confined within the framework of Arab formulated Islamic principles. It would have been difficult if not impossible for the Arab caliphs to administer a complex, multicultural realm without the advantages offered by conquered territories. For the Umayyads, the advantages included assistance in establishing and laying the groundwork for the judicial office, drawing inspiration from neighbouring judicial systems as well as monotheistic religious laws. Their contribution, however, did not escape criticism and suspicion. Islamic jurists disapproved of the Umayyad rule in several respects, particularly in relation to the Umayyad tendency towards executive interference. They also disapproved of the infusion of secular laws with the early developments of Islamic law. Under the 'Abbāsids, this changed substantially, and the judicial function became more autonomous and distinct from the ruling class. Judges began to rely on established bodies of law formulated by jurists in accordance with the newly established schools of Islamic jurisprudence.

Part 2: Western influences on the development of the Arab judge

The end of the Arab Muslim Caliphates marked a new beginning for the development of the judicial role. Earlier developments had refined and developed a judicial role that was religiously legitimised, only to undergo

²⁴² See Hallaq, W. (2011), *The origins and evolution of Islamic law*. Cambridge: Cambridge Univ. Press

further refinements throughout the later centuries. This time, its development would be overseen and authorised by neither ethnically nor linguistically Arab Muslim rulers:

“In the seventh century the Arabs created a new world into which other peoples were drawn. In the nineteenth and twentieth, they were themselves drawn into a new world created in Western Europe.”²⁴³

Secular notions of law and justice from predominantly civil legal traditions made their mark on the Islamic judge. Two important periods are associated with the introduction and eventual synthesis of Islamic laws with ideas from different Western legal cultures. All of this would have a marked effect on the judicial office. The first period relates to the final years of the Ottoman rule (1839-1922), and the second, to the establishment of Arab independence following the British and French mandates (mid-20th century). For Saudi Arabia, Jordan, Lebanon and Egypt, these two periods of regional legal trends set the course for the development of their present-day legal systems, including the role of judges in their respective countries.

The Ottoman judicial reforms (1839 -1876)

The Ottoman dynasty was founded in the late 13th century in north-western Anatolia. Under Selim I (1470 –1520), the Empire rapidly expanded into the Middle East. Following the seizure of the holy Islamic cities of Mecca and Medina, Ottoman claim of caliphal authority was solidified. The Ottoman stronghold would remain, at least officially, until the Caliphate’s defeat and loss of its territories in the Middle East to the Allied Powers in the aftermath of the first World War.²⁴⁴

By the late 19th century, the Ottoman empire officially controlled all of the Levant region (Lebanon, Syria, Jordan, Palestine) and Iraq. The Ottomans also claimed dominion over most of North Africa, Egypt and the Arabian

²⁴³ Hourani, A. (1992), *A history of the Arab peoples*. London: Faber and Faber, p. 249.

²⁴⁴ The conquered Middle Eastern territories were divided between the United Kingdom and France under the “Asia minor Agreement” in 1916, also referred to as the Sykes – Picot Agreement.

Peninsula. In practice, however, the regions enjoyed varying degrees of self-rule. The territory that now corresponds to Saudi Arabia was under the direct rule of Arab tribal leaders. Despite Ottoman claims to the entire Peninsula, central rule was limited to strategic areas such as Hijaz, the two Islamic sanctuaries of Mecca and Medina. In the 19th century, Egypt was technically an Ottoman province but in practice enjoyed a degree of autonomy.²⁴⁵ Modern day Lebanon dates back to the Ottoman Mount Lebanon Principality.²⁴⁶ In 1860, Mount Lebanon became part of the Ottoman province, with political institutions based on power sharing among its various religious groups under an Ottoman-European consortium protectorate.²⁴⁷

The Ottomans began an unprecedented period of reforms between 1839 – 1876.²⁴⁸ The empire sought to reform and modernise its institutions and society in line with the prevailing cultural, legal and political dominance of Europe. Libertarian ideas of the French Revolution found a favourable milieu among educated urban Ottomans, and the empire was called on to give way to the new philosophy of the Age of Enlightenment. Between 1839 and 1876, a series of reforms were promulgated in the Ottoman empire. These reforms, called the *Tanzīmāt*, were intended to modernise the empire from an old theocratic system into a modern state similar to European states.²⁴⁹

The *Tanzīmāt* reforms would require universality and a direct contact with the Ottoman citizen without regard to religion or ethnicity. As Hanioglu describes,

²⁴⁵ Jasmine Moussa, *Competing Fundamentalisms and Egyptian Women's Family Rights: International Law and the Reform of Sharī'a-Derived Legislation* (Brill 2011), p.120

²⁴⁶ Zahar writes: "The principality's autonomy was premised on subservience to its Ottoman masters; the *Emir* (prince) was required to maintain social order and deliver required taxes and other obligations to the Sultan in Constantinople". See Roeder PG and Rothchild, DS (eds), *Sustainable Peace: Power and Democracy after Civil Wars* (Cornell University Press 2005) p.219

²⁴⁷ *Ibid.* p.219

²⁴⁸ 'Tanzimat' (Encyclopædia Britannica 2016) <<https://www.britannica.com/event/Tanzimat>> Last accessed 9 September 2016

²⁴⁹ *Ibid.* Ahron Layish writes that "The "Young Ottoman" constitutional movement and the ideological struggle between the Westernist, Islamist and Turkish schools of thought of the "Young Turk" movement in the 19th century – both under the impact of the West – prepared the ground for the complete abolition of sharī'a." Layish A, 'Islamic Law in the Modern World: Nationalization, Islamization, Reinstatement' (2014) 21 *Islamic Law and Society* p. 278.

the vision “was a significant first step toward the transformation of hitherto Muslim, Christian, and Jewish subjects into Ottoman”.²⁵⁰ To achieve this, law and legal administration required substantial reforms, especially the *Sharī‘a* dominated courts which were run by Islamic judges. Mirroring Western legal developments, Ottoman Islamic law and practice would have to move away from natural justice and to emphasise procedure, code and appellate hierarchy. The dominant judicial paradigm was legal formalism, and the Ottomans wished to introduce this to their own empire. This required replacing doctrinal interpretation, custom and, more importantly, judicial discretion with a rigid and mechanical application of a comprehensive set of laws.²⁵¹ To achieve this, a series of centralised reforms were inaugurated, including the introduction of the *Nizamiyeh* courts chiefly modelled on Napoleonic laws and judicial structures.

The *Nizamiyeh* courts were three tiered and covered civil, criminal and commercial disputes. The civil *corpus juris*, the *Mejelle*, was a comprehensive compendium of Islamic law and was also codified in with western structures in mind. The *Mejelle* was to be administered in the new civil courts and applied by judges trained in secular legal methodologies.²⁵² Penal law, traditionally based on Islamic law (and codified in early 19th century), gave way to an adaptation of the French penal code of 1858, also applied by the new criminal courts. *Sharī‘ah* courts continued to operate alongside the *Nizamiyeh* courts, but their jurisdiction was reduced to adjudicating on endowments and personal status laws for Muslims only.

Influence of Ottoman Tanzīmāt in the Arab region

Despite these centralising reforms, Ottoman suzerainty in the Arab region was implemented in a piecemeal fashion. By the start of the 19th century, Ottoman hegemony ranged from existent to non-existent in the jurisdictions covered in

²⁵⁰ M. Şükrü Hanioglu., *A Brief History of the Late Ottoman Empire*, Princeton University Press (2008) p.74

²⁵¹ Avi Rubin, “Legal Borrowing and Its Impact on Ottoman Legal Culture in the Late Nineteenth Century” (2007) 22 *Continuity and Change* 279, p.284. See also Rubin A, *Ottoman Nizamiye Courts: Law and Modernity* (Palgrave Macmillan 2011)

²⁵² The “*Mejelle al Ahkam al Adilya*” was issued in 1876

this research. The *Tanzīmāt* influenced some places profoundly, and others only superficially. For instance, Egypt, technically an Ottoman province, managed to acquire a degree of autonomy in the law throughout the 19th century. Even if the country generally followed Ottoman legal developments, such as the *Mejelle*, the pace and content of the *Tanzīmāt* were largely informed by the country's own juridical developments.²⁵³ The establishment of the Egyptian Mixed Courts in the 19th century had an international dimension that went beyond the modelling of the *Nizamiyeh* courts. Dictated by foreign powers, the Mixed Courts were a hybrid series of courts, particularly established to deal with disputes between foreigners and Egyptians. Judges sitting in the Egyptian Mixed courts had considerable experience and came from a variety of nations, including France, England, Italy, Scandinavia and the USA, as well as Egypt. The increasing number of British and American judges serving in the Egyptian courts, especially after the British Occupation in 1882, resulted in the, albeit limited, introduction of Anglo-American common law elements which came to be a source of influence on Egyptian judicial decision-making in later years.²⁵⁴ Central Arabia (present day Saudi Arabia and Yemen) and rural areas inhabited by Bedouin tribes also saw little of Ottoman legal influence. Instead, Shari'a, tribal law and custom remained in full practice, and an Islamic version of *Hakam* remained the intercessor in disputes.

Despite the varying degrees of influence of the *Tanzīmāt*, the Ottoman reforms had – directly or indirectly – made an influence in the Arab region in one important respect: the *Mejelle*. The *Hanafī*-based Islamic law had been the official school of law throughout the centuries-long Ottoman rule, and by the late 19th century this school acquired a new status once it became codified. Legal norms were no longer valid merely because eminent Muslim jurists had developed them. In the new context, the validity of Islamic jurisprudential

²⁵³ Nathan J. Brown, "Reining in the Executive," in *Judges and Political Reform in Egypt*, ed. Nathalie Bernard-Maugiron (Cairo: The American University in Cairo Press, 2008) p.27-32

²⁵⁴ Hamad., M. *When the Gavel Speaks: Judicial Politics in Modern Egypt*, Ph.D., Department of Political Science, University of Utah, (2008) Introduction chapter.

norms “came to depend on the fact that they were state law, legalized by state legislation.”²⁵⁵

Some regions however, managed to evade this development completely. It was wholly rejected in parts of the Arabian Peninsula. Prior to the conquest of Hijaz in 1926, the judicial systems of the various Saudi regimes in the Arabian Peninsula were simple and largely based on the *Ḥanbalī* school of Islamic law and tribal custom. On the verge of extinction, the *Ḥanbalī* school was revived in the 18th century with the help of a religious and political movement brought together by a tribal alliance headed by a judge, Muhammad ibn ‘Abd al-Wahhab and Muhammad ibn Sa’ud (this alliance eventually led to the creation of the Saudi Arabian Kingdom).

Significance of the Ottoman period on the role of the Arab judge

In the pre-modern period, Islamic judges had jurisdiction over an entire gamut of legal norms.²⁵⁶ Following the Ottoman caliphal claim, Islamic judicial practice would be conceptualised according to the Ottoman favoured *Ḥanafī* school of Islamic law for centuries. With the diminishing of Islamic law in favour of secular laws in the 19th and 20th century, the Islamic judge’s jurisdiction were reduced and replaced by those of secular Ottoman judges. The Ottoman embrace of modernism, inspired by European thought, envisioned that law and the judiciary would eventually move away from the “old” and make way for the “new”. Instead, a certain duality of legal culture ended up characterising the legal system across the region. The western civil courts in many areas of the region came to coexist uneasily side-by-side with the traditional Islamic law courts, a phenomenon that would later imbed itself in many Arab jurisdictions.²⁵⁷ The dual character of religious judges and secular judges also

²⁵⁵ Masud, M., Peters, R. and Powers, D. (2012). *Dispensing justice in Islam*. Leiden: Brill., p.171

²⁵⁶ "Qadi (Kadi, Kazi)." Encyclopedia of Islam and the Muslim World. Retrieved August 30, 2018 from Encyclopedia.com: <http://www.encyclopedia.com/religion/encyclopedias-almanacs-transcripts-and-maps/qadi-kadi-kazi>

²⁵⁷ M Şükrü Hanioğlu, *A Brief History of the Late Ottoman Empire* (Princeton University Press 2008). p.105.

continued to serve as a framework for, and inform the development of the judicial role in several Arab states following independence.

Influence of British and French hegemony and post-colonial legal reforms

In the late 19th and early 20th century, following the fall of the Ottoman empire, the Arab Middle East underwent critical changes that affected the region's legal systems. Ottoman rulers were replaced by European rule. Territories taken from the Ottomans were divided between the United Kingdom and France as per the "Asia Minor Agreement" in 1916 (also referred to as the Sykes – Picot Agreement).

Although the extent of European colonial hegemony in Arab legal systems varied across the region. The imposition, adoption and imitation of European models of legislation varied across the region. For instance, the British applied a diverse body of laws during their mandate in Iraq (1920 -1932), which Lowry writes was "culled from Ottoman, French, and Anglo-Indian colonial laws, while tribal customary law was applied in the countryside".²⁵⁸ In Transjordan and Iraq, Ottoman legislation remained partly in effect. In Palestine (1922-1948), English judges applied the Mejlle as well as British law.²⁵⁹

Following the French and British mandates, newly established Arab nation-states renewed their efforts at modernising their respective laws and judiciaries.²⁶⁰ Egypt was at the forefront of this process through the work of the French-educated Egyptian jurist, 'Abd al-Razzāq al-Sanhūrī. Al-Sanhūrī was a member of all three legislative committees charged with the revision of the Egyptian Code in 1930s.²⁶¹ Sanhūrī developed a deliberate reformist agenda

²⁵⁸ Ibid. p.79

²⁵⁹ Ibid.

²⁶⁰ In addition to the British and French colonies, Italy colonised modern day Libya (taken by the Ottomans in 1912), and it remained Italian until it was replaced by French and British occupation until Libya's independence in 1951. In relation to judicial practice and legal system, the Italians had a minor influence. Libya is not one of the main countries that form the focus of this study.

²⁶¹ Together with Edouard. Lambert, a French scholar in comparative law, as the only other member of the third committee formed in 1938, proposed a completed draft of the new code

by conceptualising Egypt's law in a more progressive and egalitarian way. He modernised Islamic law by "applying the insights of sociological critiques of classical legal thought."²⁶² His scholarship was motivated by a desire to harmonise and develop the Ottoman codifications of Islamic law with modern positivist conceptions of law inspired from the West (primarily from Swiss, French, English and American laws). Islamic law and Western laws, Sanhūrī believed, were not antithetical.²⁶³ Rather, Islamic law had a "contemporary relevance in other than a fundamentalist or recidivistic sense."²⁶⁴ Sanhūrī incorporated both Islamic and Western legal values in the 1949 Egyptian Civil Code which "became the basis of a new standard of legal justice".²⁶⁵ The new Code devised a unique, empowered role for Egyptian judges. According to Bechor, Sanhūrī's code expanded judicial discretion beyond the limits of classic French law.²⁶⁶ In his explanatory notes to the proposed Egyptian Code, Sanhūrī wrote:

"Let no one imagine that a judge who rules in accordance with a frozen basis and whose hands are shackled by a narrow text can adapt the legal provisions for just application in changing circumstances. For he will then either bring justice, but break the shackles of the law, or remain committed to the limits of the law, and bring only partial justice."²⁶⁷

for discussion in 1942. Eventually, the proposed became the blueprint for Egypt's new Civil Code of 1949. al-Qanun al-Madani: Majmutat al-A'mal al-Tahdhriyya (Cairo: Ministry of Justice, n.d-).

²⁶² Nimer Sultany, *Law and Revolution: Legitimacy and Constitutionalism after the Arab Spring* (First edition, Oxford University Press 2017)., p.22

²⁶³ According to Sanhūrī: "As regards the application of the principles of Islamic law, we have seen that this great legal system has fallen into a state of stagnation because it has not undergone the necessary changes. It therefore seems indispensable to us, before we can think of putting the principles into practice, to bring about a revival of Islamic law, distinguishing between its religious part and its temporal part. The current state of civilization demands a continuous relaxation of the last of these two parts so that all the citizens, Muslim or not, are in presence of rules of law which can also be applied to them.", 'Abd al-Razzaq al Sanhuri (Sanhoury), *Le Califat* (Librairie Orientaliste Paul Geuthner 1926).p.571

²⁶⁴ Hill, E. (1988). "Sanhūrī and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of 'Abd al-Razzaq Ahmad Sanhūrī, Egyptian Jurist and Scholar", 1895-1971. *Arab Law Quarterly*, 3(1) p.38

²⁶⁵ Majid Khadduri, *The Islamic Conception of Justice* (Johns Hopkins University Press) p.207

²⁶⁶ Ibid. p.296.

²⁶⁷ Guy Bechor, *The Sanhuri Code, and the Emergence of Modern Arab Civil Law (1932 to 1949)* (Brill 2007).p.209; 'Abd al-Razzāq al-Sanhūrī 'Al-Wasīt fi Sharḥ al-qānūn al-Madani' (Cairo: Dār al-Nahda al- 'Arabiyya, 1988), volume 1, p. 104.

For Sanhūrī, the Code required flexible criteria that could anticipate future developments and change. Developing this idea, Sanhūrī wrote that the provisions of the Code became tools in the hands of the judge “so that he can develop the Code on an ongoing basis, and, with the help of these tools, meet changing circumstances and conditions.”²⁶⁸ For this reason, Bechor argues, the Egyptian code brought about a dual loyalty for the Egyptian judge.²⁶⁹ The first loyalty was owed to society that granted the judge power and authority. The second loyalty was to the Code itself, which granted the judge discretion within the designed limits.²⁷⁰ Where tensions between the code and society emerged, the judge was required to “adjust, weigh and balance his steps”.²⁷¹

The quest for Arab (legal) unity²⁷²

Although the Egyptian Civil Code influenced several civil codes in the region²⁷³ for the next three decades, the three other countries under study were (with varying degrees) an exception.²⁷⁴ In Lebanon, the Mejlle was repealed under the French Mandate and replaced with the 1932 Lebanese Code. The Code

²⁶⁸ Ibid. p.293

²⁶⁹ Ibid.

²⁷⁰ Ibid. p.160-161

²⁷¹ Ibid. p.293

²⁷² In 1962, Sanhūrī wrote: “I believe that Arab unity is a natural thing as the Arab peoples are one nation; . . . the strongest support of Arab unity is cultural unity, and the most important basis for unifying culture is a unified legal culture”. al-Sanhūrī "al-Qanun al-madani al-'Arabi" ("The Arab Civil Code"), al-Qada' (Baghdad) 20(1) (1962), p. 7. Translation provided by Hill, E. (1988), "Sanhūrī and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of 'Abd al-Razzaq Ahmad Sanhūrī, Egyptian Jurist and Scholar", 1895-1971. *Arab Law Quarterly*, 3(1) [part II] 207, (Sanhūrī, (1952), p.207

²⁷³ Arabi describes Sanhūrī as “the principal architect of the present Civil Codes of Egypt, Iraq and Syria: “As a major figure of the intersection of traditional Islamic culture with modernity, al-Sanhuri has left an indelible mark on contemporary Arab societies. Besides his pioneering work in lawmaking and codification and its far-reaching consequences, al-Sanhūrī’s colossal efforts extended to the critical explication and justification of legal precepts, resulting in decisive contributions to modernist Arab and Islamic jurisprudence.” OUSSAMA ARABI , Al-Sanhuri's reconstruction of the Islamic law of contract defects *Journal of Islamic Studies* 6:2 (1995) p. 154. See also Amr Shalakany, *Sanhuri and the Historical Origins of Comparative Law in the Arab World (Or How Sometimes Losing Your Asalah Can be Good for You)*, in *Rethinking the Masters of Comparative Law* 152 (Annelise Riles ed., 2001).

²⁷⁴ For example, Sanhūrī began working on the Syrian Civil code in 1946 which was enacted in 1949, In 1943 Sanhūrī completed his draft for a revision of the Iraqi Civil Code which was enacted in 1951. According to Stigall, In the case of the Libyan and Syrian Civils were directly drawn from Sanhūrī’s work and the codes echoe “of Sanhūrī and each contains much of the substance and structure that are the hallmarks a Sanhūrī code.” See Dan E. Stigall, *The Civil Codes of Libya and Syria: Hybridity, Durability, and Post–Revolution Viability in the Aftermath of the Arab Spring*, 28 *Emory Int'l Rev.* 283 (2014)

was drafted by a French jurist and later revised by Lebanese jurists to reflect local legal culture (including the incorporation of some provisions of Ottoman and Islamic law).²⁷⁵ Jordan continued to apply the whole of the Ottoman *Mejelle* until 1976, when the Jordanian Code was introduced.²⁷⁶

Four different Arab approaches to law and judges

Placed in this historical context, particularly from the late 19th century, Saudi Arabia, Lebanon, Egypt and Jordan responded differently to the overarching legal developments in the region which came to shape the legal systems and set the judicial role onto distinct paths of developments. In 1962, Sanhūrī wrote that there were three types of legal experiences in the Arab region. First were states that continued with an uncodified version of the Islamic *Sharī‘a* best exemplified by Saudi Arabia and the Ḥanbalī school. Second were states under Ottoman control during the second half of the 19th century, where the *Mejelle* was applied and remained after the fall of the Ottoman Empire and the advent of the French and British mandates. Third were those jurisdictions which borrowed French law, such as Lebanon.²⁷⁷ With Sanhūrī’s own contributions, a fourth type of legal experience emerged in the region.

These four different legal experiences shed some light on today’s diverse legal cultures in the region. These have also had an impact on the judicial role (illustrated in figure 3 below).

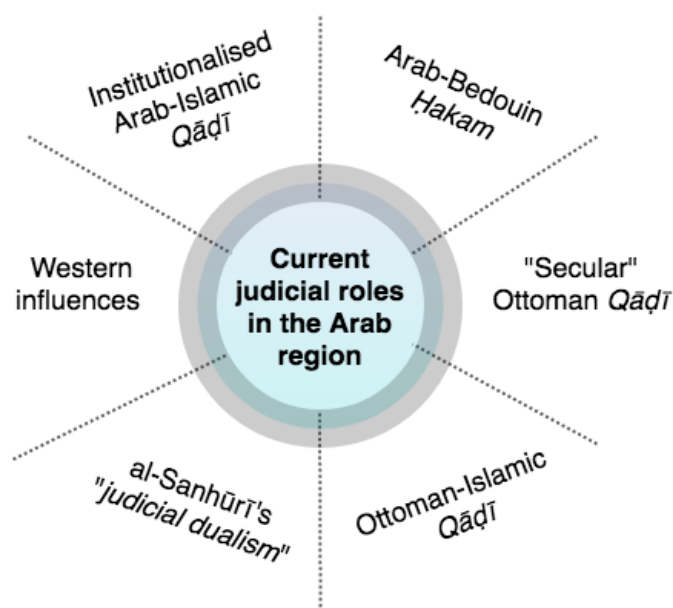
²⁷⁵ Chibli Mallat, ‘The Lebanese Legal System’

<<http://rocket.asoshared.com/~mallatco/sites/default/files/The%20Lebanese%20Legal%20System.pdf>> Last accessed 1 November 2017

²⁷⁶ Saleh, N., (1993), “Civil Codes of the Arab Countries: The Sanhūrī Codes”. *Arab Law Quarterly*, 8(2), p.164

²⁷⁷ 'Abd al-Razzāq al-Sanhūrī "al-Qanun al-madani al-'Arabi" ("The Arab Civil Code"), al-Qada' (Baghdad) 20(1) (1962), p.8-10; Hill, E. (1988), “Sanhūrī and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of 'Abd al-Razzaq Ahmad Sanhūrī, Egyptian Jurist and Scholar”, 1895-1971. *Arab Law Quarterly*, 3(1)[part II] 207, (Sanhūrī, (1952), p.207-208.

Figure 3. Sources of historical influence on current judicial roles in the Arab region



Each historical influence conceived a particular role for the Arab judge. Early Islamic-based conceptions of the judge adopted a different notion of what the judicial role should be compared to the mechanical judicial function favoured by the Ottoman *Tanzīmāt*. Even Sanhūrī’s conception of the Egyptian judicial role sought to reconcile two seemingly contradictory ambitions of “socialising modern law” and “modernising Islamic law”.²⁷⁸

Summary

This chapter sought to situate present judicial roles in the Arab region within an historical context. This brief historical review reveals a complex interaction of competing notions of law and judicial practice in the region. To classify the historical periods as an interaction between religious and secular notions of law and judicial practice would be an oversimplification. The conception of the Islamic judge, or *Islamic Qāḍī*, evolved from pre-Islamic Arab Bedouin judicial practice.²⁷⁹ The different schools of Islamic law also devised different roles for the Islamic *Qāḍī*. The Islamic judge would eventually be replaced with the

²⁷⁸ Nimer Sultany, *Law and Revolution: Legitimacy and Constitutionalism after the Arab Spring* (First edition, Oxford University Press 2017)., p. 21

²⁷⁹ Simonsohn, U. (2011). *A Common Justice: The Legal Allegiances of Christians and Jews Under Early Islam*. University of Pennsylvania Press. p.75

secular Ottoman judge, only to be later replaced with Sanhūrī's conception of the judicial role. It is in this context that the present day Arab judge operates. How these historical experiences inform the way today's Arab judges perceive their roles (and whether they consider it within their role to be political) forms the main focus of the research in this thesis.

Chapter 4. Research approach and methods

This chapter explains the analytical approaches and research methods used in this multi-part study of judicial power and role conceptions in the Arab Middle East. An overall research approach used here can be described as “law in practice”. This thesis adopts an approach that not only considers formal laws and legal rules, but also examines what actually happens in practice. Information arising out of empirical research into the reality of the role of Arab judges forms an important element of the thesis, as it provides details about the judicial role that cannot be found in official legal documents about Arab judiciaries.

Research approach

Based on the unique characteristics of Arab states it was decided that this research would focus on three main themes which may affect the political significance of courts and judges. The first was the institutional, that is, the extent to which the composition and organisation of courts in Egypt, Saudi Arabia, Lebanon and Jordan would indicate a judicialisation. This also includes the prescribed judicial role, i.e. the formal and informal expectations, mechanisms and procedures that facilitate or impede judicial activism within the judicial organisations particularly in relation to factors that directly affect the professional status of the judge. The second theme was pre-appointment attributes i.e. career experiences and sources of individualisation of Arab judges and whether such extra-legal attributes have an impact on their current functions. The final theme was the subjective, i.e. understanding the expectations individual judges perceive as applicable to their judicial function including their expectations towards actors within the judicial community and outside. The three themes were decided to provide for a window through which to better understand Arab judicial roles and the extent to which they may be politically significant. In relation to these themes, this study attempted to answer the following questions:

Legal system and individual status within the judiciary

- 1) Does the composition and organisation of courts in Egypt, Saudi Arabia, Lebanon and Jordan indicate a judicialisation of politics?
- 2) Does judicial selection, training, career, and discipline in the Egyptian, Saudi Arabian, Lebanese and Jordanian judiciaries promote or impede judicial activism?

Career experiences and sources of individualisation

- 3) What are judges prior (and concurrent) career experiences and sources of individualisation?
- 4) How may these affect judicial role perceptions of Arab judges?

Expectations and attitudes of the judicial role

- 5) What norms and expectations might Arab judges have about their jobs as judges?
- 6) To what extent do individual judges identify themselves as part of a judicial collective?
- 7) What norms and expectations might Arab judges have towards their peers within the judicial community and towards non-judicial actors?

The research primarily consisted of two main components. The first component was to textual analysis of legal documents to identify the structure, operation and powers of the judiciary in Egypt, Jordan, Lebanon and Saudi Arabia. The second component was to empirically explore and obtain information and insight from Arab judges about their: a) background and experiences as judges and; b) their attitudes to their judicial role including their attitudes towards actors within and outside the broader judicial community. Based on this general approach, three studies were conducted to understand the role and political significance of Arab judges:

1. A **mapping** of judicial systems in the region to assess the political significance of Arab courts and judges (**Research questions 1 and 2**);

2. A **profiling** of Arab judges' education and career experiences based on empirical research (**Research questions 3 and 4**);
3. A **survey** of Arab judges' attitudes to being a judge and their judicial role conceptions (**Research questions 5,6 and 7**).

General obstacles to accessing data from the region

The Arab Middle East carries significant complexities for any one that wishes to undertake research. While each country poses different challenges, the following sections discuss risks and obstacles that relate to the whole region that may occur when trying to conduct empirical research.

Elite groups

Individuals belonging to an elite group are understood to hold some form of leadership position in powerful public institutions. According to Hoffmann-Lange, elites can be found in any social system and are defined by their influence on decisions that shape living conditions in a society:²⁸⁰

“Elite research is devoted to studying the characteristics of politicians and other holders of leadership positions in powerful public institutions and private organizations who are distinguished by their regular participation in (political) decision-making.”²⁸¹

Because members belonging to the elite are in high profile positions, their actions are typically subject to public scrutiny, which according to Nir, “may harbor justifiable fears of injuring their reputations or public personas”.²⁸² This is particularly true in relation to Arab judges who have traditionally shied away from academic research.

Judges are moreover legally obliged to abide by rules of judicial independence and seek to uphold the dignity of the judiciary at all times. Like judges in several

²⁸⁰ Ursula Hoffmann-Lange, *Methodological Developments in Elite Research* (Dept of Political Science, University of Bamberg, Germany 2006), p.1

²⁸¹ Ibid.

²⁸² Esther Nir, “Approaching the Bench: Accessing Elites on the Judiciary for Qualitative Interviews” (2018) 21 *International Journal of Social Research Methodology* 77, p.77

jurisdictions, Arab judges can be said to be hidden behind a “purple curtain” that obscures their decisional processes and perpetuates the myth of judicial objectivity.²⁸³ The judicial systems examined in this thesis, Saudi Arabia, Jordan, Egypt and Lebanon, tend to emphasise that judges “speak with one tongue”.²⁸⁴ The Higher Judicial Councils in these countries, in particular, have taken on a paternalistic role and made considerable efforts to conceal judges from media and academic research. Further complexities can also arise in relation to Arab judges, such as social and cultural barriers, general suspicion towards Western research and security concerns.

Security risks and political instability

Security concerns can exist for the elite group as well as for the researcher. Especially since the “Arab Spring”, the political situation in the region has heightened the security risks in conducting academic research. In Egypt, the country seems to be tightening its control on any research related to governmental branches, and the tragic death of Cambridge PhD student Giulio Regeni highlighted the risks posed to anyone who conducts field research in the country.²⁸⁵ In addition, the Egyptian Ministry of Interior in 2016 warned Egyptian citizens against taking part in surveys or polls by stating it was a threat to national security.²⁸⁶

²⁸³ The metaphor relates to the closed system of the judiciary where judges hide behind a “purple curtain” in order to obscure decisional processes and “sustain the myth of judicial objectivity which permeates the American judicial system”. Theodore L. Becker, “Surveys and Judiciaries, or Who’s Afraid of the Purple Curtain?” *Law & Society Review*, Vol. 1, No. 1 (Nov., 1966), p.134.

²⁸⁴ See Chapters 2 and 9 for a fuller discussion.

²⁸⁵ Stephanie Kirchgaessner, Ruth Michaelson, “Why Was He Killed? Brutal Death of Italian Student in Egypt Confounds Experts” *Guardian* (Cairo, 24 February 2016) <<https://www.theguardian.com/world/2016/feb/24/why-was-he-killed-brutal-death-of-italian-student-in-egypt-confounds-experts>>. accessed 30 August 2016.

²⁸⁶ The law on Non-Governmental Organisations passed by the Egyptian Parliament on 29 November 2016 adds a further obstacle to any fieldwork. While it specifically targets NGOs banning them from conducting fieldwork or polls without the approval of the government, the understanding is that *any* type of research conducted within the country needs a security approval which can only be obtained on-site. Amina Ismail, “Egypt Warns Citizens from Participating in Foreign Polls” (Cairo, 29 November 2016) <<https://af.reuters.com/article/africaTech/idAFKCN1LF21C-OZATP>> accessed 30 August 2016.

In Saudi Arabia, judges are almost exclusively men, and difficulties can arise due to the society's strict gender separation policy, which poses practical difficulties for female researchers. An added difficulty particularly in the Saudi context relates to the political and religious tensions between Iran and Saudi Arabia, which have in recent years heightened significantly. This means that a researcher's name that is Iranian or Shi'a sounding is likely to generate caution or suspicion.

All of these factors had to be taken into consideration in deciding how to go about conducting the empirical parts of this research into the political significance of judges in the Arab region.

Study 1: Factors in Arab judicial systems likely to affect the political significance of judges

In their analysis of Western judicial systems, Guarnieri and Pederzoli argue that two structural variations found in judicial systems may be conducive to political significance of courts and judges (i.e., the judicialisation of politics).²⁸⁷ The first variation relates to the territorial dimension of court systems and whether these are diffused. The second relates to the relationship between the different layers of courts, their internal dynamics and the role of the supreme courts in each country. This framework provided by Guarnieri and Pederzoli possesses a unifying capacity for explaining judicialisation of politics in general, and allows for the concept of the judicialisation of politics to be used comparatively. In light of this, two research questions were set for this first study:

1. Whether Arab judicial structures are fundamentally different from Western democratic structures?
2. Whether Arab judicial structures fit within any existing typology of judicial structures that are known in Western states to either promote or hinder judicialisation?

²⁸⁷ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002) – Chapter 2 - *Judicial Systems*.

Study 1 approach: Creating a typology and mapping judicial systems in the region

The judicial structures in Arabic-speaking states are set out in formal legal texts. Therefore, the first stage of the study was devoted to mapping the judicial structures of a wide range of Arab states, based on readings of original legislative texts and other official documents. The research began with eight countries in the Arab region, looking at their respective legal history, regional trends, the concept of the judiciary in each country and possible dimensions that may indicate judicial activism.²⁸⁸ The initial analysis was descriptive in order to establish the scope of basic differences and similarities amongst Arab states. It was felt that to omit this descriptive research would make for uninformed assumptions.²⁸⁹ Specifically, the following factors were considered:

- Jurisdictional scope of officially recognised courts;
- Interrelationship between courts;
- Legal history and legal adaptations, primarily from Western legal traditions;
- Political system.

A detailed tabulation was produced with key information relating to structural and institutional facts for eight Arab countries: Bahrain; Egypt; Jordan; Lebanon; Saudi Arabia; Syria; Tunisia; and the United Arab Emirates. This created an outline of the key similarities and differences between countries. What emerged from this initial mapping exercise were four distinct models of judicial structures that seemed best represented by four Arab states: Egypt, Jordan, Lebanon and Saudi Arabia. (Appendix 1 provides a table with key variables for the remaining four countries).

²⁸⁸ The following countries were considered: Bahrain; Lebanon; Jordan; Egypt; Saudi Arabia; Syria; Tunisia, and United Arab Emirates.

²⁸⁹ See generally Daniele Caramani, "Of Differences and Similarities: Is the Explanation of Variation a Limitation to (or of) Comparative Analysis?" (2010) 9 *European Political Science* 34.

Following the creation of this typology, an in-depth analysis of the structural set ups of the judiciaries in these four countries was undertaken. The data derived from primary sources of laws in Arabic, and secondary sources where official information was not available. The inquiry was done in three stages. The first stage set out the jurisdictional scope of courts. The second stage, evaluated the interrelationship between the various courts. Based on this inquiry, the final stage sought to analyse the extent to which judicialisation of politics might be promoted. The results are presented in Chapter 5 and include descriptions of each country's judicial system along with detailed diagrams of the four archetypal judicial systems, which were constructed specifically for this research, and represent the first attempt to create a typology judicial systems in these Arab states.

Limitations of comparative study

The principal function of comparison is that of developing, testing and refining a theory.²⁹⁰ Comparative approaches usually allow for two types of analysis, the “explorative type” which aims at identifying relationships which may be conducive to theory formation, and “theory type” which aims at testing causal relationships and corroborate and develop theories further. This study is exploratory in nature and aims to further formulate the theory of judicialisation.

Although diversity, “historical particularity, specificity and locality”²⁹¹ have been taken into account in the study, there may be limitations in terms of generalisation. The legal systems under review are not identical, but they are considered to be similar to the extent that they can be analysed using the variables as established by the conceptual framework employed in this research. Conscious efforts to consider every unit (judicial system) was made in light of the four factors described above, and initially in isolation from each other. However, like any other study, this study “begins with certain, tacit or

²⁹⁰ See generally Adam Przeworski Henry Teune "The Logic of Comparative Social Inquiry. (1970): New York, Wiley.

²⁹¹ Marsh, David, and Gerry Stoker. *Theory and Methods in Political Science*. Basingstoke: Palgrave Macmillan, 2010. Print. p. 250

outspoken, assumptions about comparability of the chosen units”.²⁹² Another important limitation relates to the issue of representation (a limitation that is relevant for the whole thesis). In relation to Study 1, the comparative study is confined to a small number of jurisdictions and therefore constitutes a limitation and should not be considered representative of the region as a whole.

Reliability and Accuracy

The judicial structures in Arab states are set out in formal legal texts, and this study was devoted to mapping the judicial structures of a wide range of states based on readings of original legislative texts and other official documents. Attempts were made to keep up to date with new developments in the four legal systems and ensure that the information provided was accurate and most recent. However, there may be new developments that have not been covered because the four states are currently undergoing several reforms in the justice sector.

In terms of the illustrative figures created for this study, the purpose was to provide for a broad overview of the judicial structures in Egypt, Jordan, Lebanon and Saudi Arabia, especially in relation to the elements thought to be conducive to judicialisation. Although the figures have been reviewed and approved by judges from the four countries under study, they have not been officially approved by the judiciaries in the countries, and they must therefore be considered as unofficial.

Advantages

Despite these limitations, the classification of the various judicial systems in the region into four judicial “families” provides for a useful taxonomy. It helps to explain the diversity of Arab judicial systems and serves as a way of understanding the organisation of the various courts and their jurisdictional scope in each country.²⁹³ Moreover, Egypt, Jordan, Lebanon and Saudi Arabia

²⁹² Reza Azarian, “Potentials and Limitations of Comparative Method in Social Science” (2011) 1 *International Journal of Humanities and Social Science* 113, p.120

²⁹³ An additional purpose in classifying Arab legal systems into four models is to provide for an understanding of legal culture from a comparative point of view.

share sufficient similarities and differences that would make a regional comparative study viable.²⁹⁴ Specifically, the legal and judicial systems under review are not identical, but considered to be similar to the extent that they can be analysed using the variables as established by the conceptual framework employed in the study. This in turn helps to provide a reliable comparative framework within which to pose questions about judicialisation.

Study 2: Profiling Arab judges' education and career experiences

The judiciary, like any institution, has mechanisms aimed at assimilating new appointees. According to Waldeck and Myers, traditional approaches to socialisation view new members as “blank slates, ready to be written upon by institutional procedures, norms, and existing culture that effectively allows organizations to shape their attitudes and behaviors”.²⁹⁵ In this approach, the individual is conceived as a recipient, where a set of institutionally prescribed behaviours are induced.²⁹⁶ However, this approach fails to account for individual judges being active in creating roles for themselves within the judicial organisations.²⁹⁷ For instance, judges may attempt to individualise and influence as well as negotiate their role throughout their judicial career, drawing on values and knowledge acquired from prior professional and educational experiences.²⁹⁸

According to Gibson, research about judges tends to rely on “implicit assumptions about the nature of the linkages between demographic attributes, attitudes and values”.²⁹⁹ In order to understand the role and potential

²⁹⁴ Comparative study usually allows for two types of analysis: (1) the explorative type, which aims at identifying relationships which may be conducive to theory formation, and (2) theory type, which aims at testing causal relationships and is necessary to corroborate existing theories and develop them further. The latter type is employed in this research.

²⁹⁵ Jennifer H Waldeck and Karen K Myers, “Organizational Assimilation Theory, Research, and Implications for Multiple Areas of the Discipline: A State of the Art Review” (2007) 31 *Annals of the International Communication Association* 322, p.329

²⁹⁶ *Ibid.*, p.324

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*, p.329

²⁹⁹ James L Gibson, “From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior” (1983) 5 *Political Behavior* 7., p.21

significance that Arab judges play, it is important to consider the processes through which judges' attitudes, values and role orientations are acquired. The second study is an empirical exploration of Arab judges' professional and academic backgrounds; it treats social and professional background attributes of Arab judges as "surrogates for other variables", which help in understanding their judicial role perceptions (then examined in Study 3).

Study 2 approach: LinkedIn and Arab Judges Survey

Access to information about the personal background of Arab judges is limited. No such information is available from any official government or judicial organisation in the Arab states covered in this thesis. As a result, two sources of information were used to provide an initial assessment of the personal and professional backgrounds of Arab judges: LinkedIn and a voluntary online survey (the "Arab Judges Survey" explained in detail below under "Study 3").

LinkedIn analysis

The first source of data on the personal and professional background of Arab judges was obtained through biographical information freely available from judges on the online platform LinkedIn. LinkedIn is an online business and employment-oriented service.³⁰⁰ With over 500 million members, the platform is intended to connect professionals with colleagues, and to increase the number of business connections and networks within an industry.³⁰¹ Users of LinkedIn provide professional, resume-like profiles on their LinkedIn page showing their professional and educational experience in order to allow other site members to learn more about their professional background.³⁰² LinkedIn operates through a "gated-access approach", which means that contact with any professional requires either an existing relationship or the intervention of

³⁰⁰ The basic functionality of LinkedIn allows users (workers and employers) to create online profiles that typically consist of a curriculum vitae (CV), which describes and outlines work experience, education and training, and skills.

³⁰¹ Josh Gallant, "45 Eye-Opening LinkedIn Stats Every B2B Marketer Needs to Know" [2018] *Foundation Inc.* <<https://foundationinc.co/lab/b2b-marketing-linkedin-stats/>> accessed 30 August 2018.

³⁰² Chad Brooks, "What Is LinkedIn?" [2012] *Business News Daily* <<https://www.businessnewsdaily.com/2489-linkedin.html>> accessed 30 August 2018;

a third party as contact. This system is intended to build trust among the service's users.

LinkedIn does not provide information on the total number of members that are judges, in part because of the global and decentralised nature of the platform. In light of this, a non-probability snowball sampling technique was used.³⁰³ Three steps were taken in order to investigate the profile of Arab judges' on the platform:

1. Identify judges' profiles through open search on LinkedIn in French, Arabic and English.
2. Once a potential profile was identified, an invitation to connect was sent to the user.
3. If accepted, the professional network of the new connection was explored in order to identify further potential judicial profiles to connect with.

For a profile to be included in the primary investigation, it was considered that the following information had to be available:

- Country of origin and current residence
- Current judicial status
- Type of court
- Gender
- Domestic and/or foreign education

On this basis, 163 profiles on LinkedIn were reviewed. Because the main purpose of the study was to explore the social and professional attributes of Arab judges, the 163 profiles were analysed for the following additional background characteristics of the judges:

- Professional experience prior to joining the judiciary
- Prosecutorial experience (if any)
- Whether any non-judicial job held concurrent with a judicial post

³⁰³ Noy C, 'Sampling Knowledge: The Hermeneutics of Snowball Sampling in Qualitative Research' (2008) 11 International Journal of Social Research Methodology 327, p.330

Indications of lateral professional mobility and lateral recruitment were also taken into account. For lateral mobility, judicial secondment, extra judicial-activities, and professional experiences made in between the judicial office were considered. For lateral recruitment, experiences prior to judicial appointment was considered.³⁰⁴

In total, 112 profiles were considered to have sufficient elements to make an analysis viable. These profiles of judges were in a mix of Arabic, English and French. Most judges in the LinkedIn study came from Egypt, Jordan and Lebanon.³⁰⁵ Table 6 below presents a breakdown of the 112 profiles by country, types of judges, years in post and gender.

Table 6. Sample of LinkedIN profiles and Jordanian Constitutional Court judges (n=112)

Gender		Country		Type of court		Years in judicial office	
Male	93	Egypt	62	Trial Only	58	Less than 1 year	1
Female	19	Lebanon	28	Specialised	24	1-6 years	23
		Jordan	22	Appellate and Trial	17	7-11 years	34
				Appellate	12	12-16 years	16
				Trainee	1	17-20 years	11
						21- 30 years	5
						More than 30 years	2
						Not listed/Not clear	20

Limitations of LinkedIN data

There are several limitations to the data available on LinkedIN. First and foremost, not all Arab judges are on LinkedIN, so this cannot be considered a representative sample of all Arab judges. In addition, data is not consistent for all judges, with some judges providing more information than others.

³⁰⁴ The Jordanian Judicial Council website also provided some information on this issue for current members of the Jordanian Constitutional Court as well as the educational and professional experience of each member of the Court. Hashemite Kingdom of Jordan - Constitutional Court, "Constitutional Court Members" <<http://www.cco.gov.jo/en-us/Constitutional-Court/Court-Members>> accessed 30 August 2018.

³⁰⁵ In addition, nine other profiles were considered from judges in Bahrain, Palestine, UAE, Tunisia and Sudan. Because of the scarcity of judicial profiles from these countries, these were omitted from the analysis.

Furthermore, it is not possible to verify whether the information posted on LinkedIn is accurate in terms of judges' actual educational and professional experience. Because LinkedIn is an employment led website, there may be incentives on the part of users to misrepresent their actual experiences in order to appear more attractive to employers.³⁰⁶ Despite these limitations, LinkedIn provided a source of information on the background of Arab judges in the absence of any other sources. As such the results presented in Chapter 6 should be seen as a limited, initial attempt at exploring the background attributes of judges in the region, and not as a definitive assessment.

Study 3: Arab judges' view of the judicial role

Role theory emphasises the controlling power of an individual's immediate social environment.³⁰⁷ It also examines how behaviour is shaped by the demands and rules of others, as well as by the individual's own understanding and conceptions of what his/her behaviour should be:³⁰⁸

“A role conception is determined by social norms, demands and rules; by the role performances of others in their respective positions; by those who observe and react to their performance and by the individual's particular capabilities and personality”.³⁰⁹

Central to role theory is the idea of role expectations; these are beliefs about the qualities, behaviours, and characteristics suitable to a specific social role.³¹⁰ Judges are part of an identifiable social group, the judiciary, and they

³⁰⁶ Social desirability bias may be an additional limitation of this sample. As discussed in relation to the Arab Judges Survey below, there is a strong likelihood that the profiles used in this study have been overreported by the judges to appear in a more favourable light.

³⁰⁷ Rather than one theory, role theory is a set of concepts and interrelated theories found in anthropology, social psychology and sociology. Its agreed-upon set of core ideas is that human beings behave in ways that are different and predictable *depending on their respective social identities and the situations*. The theory aspires to understand, predict and control particular phenomena included in its domain of study. See for example, B. J. Biddle, “Recent Developments in Role Theory”, *Annual Review of Sociology*, Vol. 12 (1986), pp. 67-92; James L Gibson, “From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior” (1983) 5 *Political Behavior* 7; Bruce J Biddle, *Role Theory: Expectations, Identities, and Behaviors* (Academic Press 1979); Bruce J Biddle (ed), *Role Theory: Concepts and Research* (Nachdr, Wiley 1970).

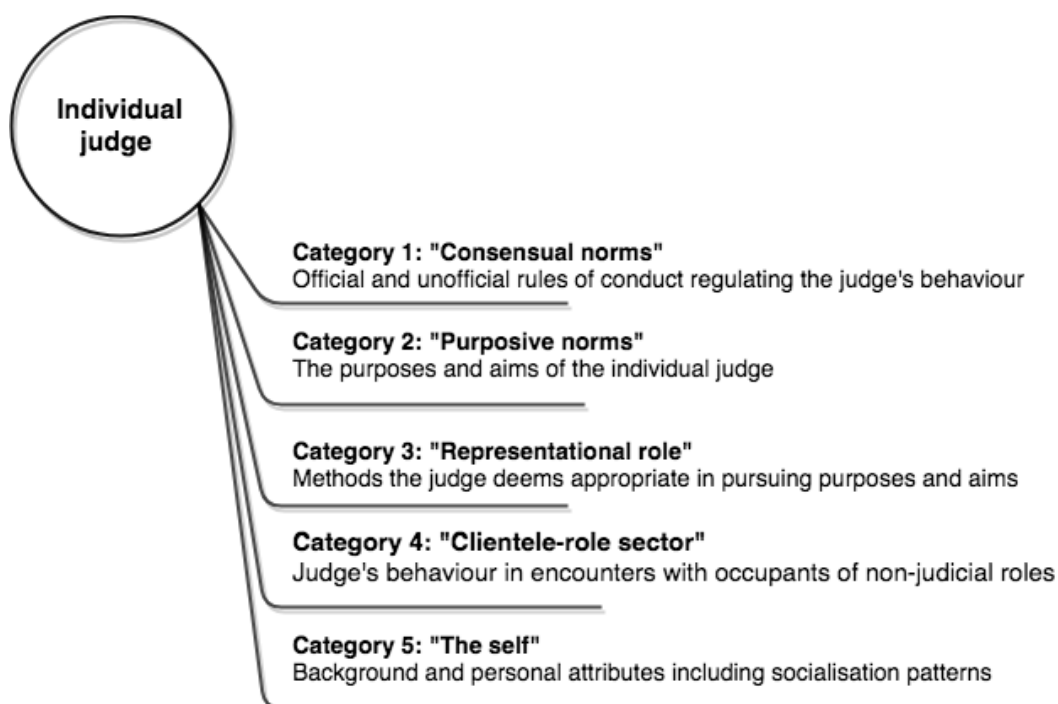
³⁰⁸ Bruce J Biddle (ed), *Role Theory: Concepts and Research* (Nachdr, Wiley 1970)., p.4

³⁰⁹ Ibid.

³¹⁰ According to Nugent, role expectations are understood as “beliefs concerning the qualities, behaviors, and characteristics suitable to a specific role; [they] could be conveyed to the role's

therefore have social roles. Judges, like others with social roles, can change their behaviour to fit the expectation both of themselves and other judges.³¹¹ Study 3 attempts to examine the role conceptions and expectations of Arab judges. It does this by directly asking Arab judges their views about the judicial role, based on five conceptual categories.³¹² These categories are based on an existing framework in judicial role theory provided by Wahlke et al., and they are illustrated in Figure 4 below.

Figure 4. Conceptual categories in judicial role theory



holder by other individuals within their group, or put in place by the holder themselves." See Nugent, Pam M.S., "Role Expectations" (*PsychologyDictionary.org*, 28 April 2013) <<https://psychologydictionary.org/role-expectations/>> accessed 30 August 2018.

³¹¹ McLeod, S. A. (2008). "Social roles" retrieved from <https://www.simplypsychology.org/social-roles.html>

³¹² Biddle categories roles into three categories. The first category is written rules and conduct. The second category is spoken injunctions that provide for models of behaviour. Rules of conduct amongst small-group members, for example, prescribe certain norms and members may be judged by either conforming to them or not conforming to the injunctions that have been stated for their behaviour. The final extension of the dramaturgical analogy involves the concept of the "mind of the performer". Here the role-holder acts the in a particular way: "not because written instructions have been given to him [her], nor because of injunctions spoken by others, but rather of his [her] own internalised standards". According to Biddle, the last category involves a difficult assumption: that individual role-holders are aware of their expectations and can state them if asked. Bruce J Biddle, *Role Theory: Expectations, Identities, and Behaviors* (Academic Press 1979) p.117

The first category, “**consensual norms**”, includes all those formal as well as informal “rules of the game” that judges work within. The second category, “**purposive norms**”, are those objectives judges perceives are important for judges. The third category, the “**representational role**”, is interlinked with the purposive norms. The representational role is understood as an instrument that judges use in order to realise their purposive norms. A clear example of when the representational role is being used is through judicial decision-making. Exploring the methods and decisional criteria judges’ resort to during the process of decision-making may indicate what purposive norms are being pursued.³¹³ The fourth category, “**cliente-role sector**”, is the relationship between judges and the judiciary as an institution, and all relevant persons, groups and events outside the judiciary. This can have an important effect on how judges think about their own role.³¹⁴ Finally, individuals occupy roles and in order to arrive at a complete understanding of the judicial role, individual judges’ own backgrounds and personal attributes should also be taken into account. This is referred to here as “**the self**” and was covered above in the discussion of “Study 2”.

Study 3 approach: Judicial attitudes and role perceptions (Arab Judges Survey)

In order to develop an understanding of Arab judicial role conceptions within the framework of role theory, an online survey, the Arab Judges Survey, was created. As far as is known, this is the first survey undertaken of judges across the Arab Middle East. The survey explored judicial roles primarily in Egypt, Lebanon, Jordan and Saudi Arabia, and explored these judges’ own interpretation and understanding of their judicial roles in their respective countries.

³¹³ John C. Wahlke, Heins Eulau , William Buchanan , LeRoy C. Ferguson, *The Legislative System: Explorations in Legislative Behavior* (John Wiley & Sons 1962) p.12

³¹⁴ Flango, V., Wenner, L. and Wenner, M. (1975). “The Concept of Judicial Role: A Methodological Note” *American Journal of Political Science*, 19(2), p.286

The survey was created and administered via the online survey tool, Opinio, UCL's online survey research tool. Opinio is freely available to UCL researchers, is generally thought to be reliable and provides several reporting functions that made it preferable to other web-based survey tools.³¹⁵

In order to measure Arab judges' internalised impressions of their roles, a closed-question survey was considered the best approach. This was corroborated by the fact that similar survey techniques have been used by previous studies in this field. For example, Unga and Baas, Flango et al., Glick and Becker amongst others used forced-response questions in order to measure how judicial roles may operate in individual judges mindsets and to determine which types of roles dominated in the courts they investigated.³¹⁶ The Arab Judges Survey drew on many of the questions used in these previous surveys in order to carry out the first comparative assessment of judicial roles amongst Arab judges and judges in a range of other jurisdictions.

The Survey

Survey languages

The survey was drafted first in English and then translated by the researcher into Arabic and French.³¹⁷ Although the working language in Arab courts is always Arabic, English and French are used interchangeably with Arabic in court and in society.³¹⁸ Bearing in mind the sensitive nature of the topic and the research population, translating the Arab Judges Survey in the local language was also thought to have a symbolic effect which according to

³¹⁵ A useful function of Opinio is that surveys can be delivered by invitation to a specified list. In addition, Opinio supports surveys in several languages which was crucial for this study.

³¹⁶ See for example: Thomas D Unga and Larry R Baas, "Judicial Role Perceptions: A Q-Technique Study of Ohio Judges" (1972) 6 *Law & Society Review* 343; Theodore L Becker, "A Survey Study of Hawaiian Judges: The Effect on Decisions of Judicial Role Variations" (1966) 60 *American Political Science Review* 677; Manfred W Wenner, Lettie M Wenner and V Eugene Flango, "Austrian and Swiss Judges: A Comparative Study" (1978) *Comparative Politics* 499; Henry Robert Glick and Kenneth N Vines, "Law-Making in the State Judiciary: A Comparative Study of the Judicial Role in Four States" (1969) 2 *Polity* 142.

³¹⁷ I speak, read and write French, Arabic and English fluently. My translations were later reviewed and approved by trilingual and bilingual judges and academics.

³¹⁸ This is in part due to the legacy of the British and French colonial presence in the region.

Harzing et al. may influence response rates as it demonstrates to the respondent that the researcher has gone through the effort and expense to make responding as easy as possible.³¹⁹ In order to ensure that the meaning of concepts in the translated questionnaire were conceptually equivalent to the original version, simple sentence structures as well as clear and familiar wording was used much as possible.³²⁰ Furthermore, the translations were reviewed and approved by bilingual and trilingual judges and academics during the pilot testing. Despite this, some key concepts may have been “lost in translation” and the different survey versions may compromise the comparability between the countries and the survey versions.³²¹

Judges in the survey used the different languages in their responses. As listed in Table 7 below, out of all of those who participated in the survey, 42 used Arabic version, 42 used the English version and 7 judges used the French version in their responses

Table 7. Number of respondents according to language of the Arab Judges Survey

	N=91
Arabic	42
English	42
French	7

Survey recruitment

In a cover letter to the survey, the reason for conducting the survey was explained to judges (Appendix 3). The survey was described as seeking to explore individual judges’ experiences and views of being a judge in order to

³¹⁹ Harzing A.W., Reiche S., Pudelko M. Challenges in International Survey Research: A review with illustrations and suggested solutions for best practice, *European Journal of International Management*, 2013 Vol.7 No.1, p. 17

³²⁰ See Sekaran, U. (1983) ‘Methodological and Theoretical Issues and Advancements in Cross-Cultural Research’, *Journal of International Business Studies*, Vol. 14 No. 2, pp. 61-73.

³²¹According to Ackerman and Harzing the language of the questionnaire can impact respondents’ attitudes and behaviours and give rise to systematic bias. The authors argue that it is therefore crucial to ensure an overall conceptual equivalence and also consider vocabulary, idiomatic and syntactical equivalence. These were seriously considered in the drafting of the English version of the Arab Judges Survey. Akkermans, D., Harzing, A.W., and Witteloostuijn, A. van (2010) ‘Cultural Accommodation and Language Priming. Competitive versus Cooperative Behavior in a Prisoner’s Dilemma Game’, *Management International Review*, Vol. 50 No. 5, pp. 559-584.

help increase understanding and knowledge of the work of judges in the Arab region. In addition, judges were told that the survey was voluntary and completely anonymous, and participants were assured that any information provided in the survey could not be traced back to any participant. This assurance was given in writing by the researcher and UCL, with an explanation of how anonymity was ensured through the security settings in Opinio. To further protect their anonymity, judges were specifically asked not to include their name anywhere in the survey. In order to reach as many Arab judges as possible respondents were encouraged to share the survey link with judges they thought would be interested in participating. A shorter version of the cover letter was also included in e-mail requests sent to judges. (An English version of the e-mail is provided in Appendix 3.)

Survey questions

The survey questions mainly contained closed single choice, multiple choice, rating and ranking questions. The survey included 33 questions covering the following general themes:

- Current judicial post
- Background questions including judges' professional and educational experience
- Being a judge in the respondent's country
- Judicial qualities
- Judicial decision-making
- Judges and the law

All 33 questions had a comment section for judges to elaborate on their choices/answers should they wish to.

In order to explore Arab judges' purposive norms and representational roles Survey questions 12-14, 19-26 and 28 covered:

- Judges' characterisation of their judicial role
- Judicial attitudes towards the public
- Judicial attitudes towards precedent

- Judges' views of justice and the rule of law

Since role theory places value on the role-holders' expectations, the survey examined judges' expectations of what is proper judicial behaviour for themselves and what their relationship was with both judicial colleagues and other non-judicial actors. This relates to the "consensual norms" and the "clienteles-roles sector". Survey questions 9-11, 15-18, and 27 covered:

- Arab judges' expectations about what constitutes proper behaviour on his/her part toward other judges in the same position;
- Arab judges' perceptions of what other judges' expectations are of the judicial role;
- Arab judges' perceptions of what constitutes a proper relationship with the public, media and the executive;
- Arab judges' perceptions of what the public, the media and the executive's expectations are of the judicial role;
- How Arab judges perceive the judiciary; and
- How Arab judges feel they are perceived by the public.

The survey was constructed so that judges were not required to answer all the survey questions. Taking into consideration the sensitivity of surveying Arab judges, especially on some difficult and controversial issues, it was felt that by allowing the judges the freedom to choose what questions they wanted to answer they might be more inclined to take part. As a result, some questions will have a higher response rate than others. This is made clear in the findings in the following chapters by including response rates in all results.

Survey timeline

The survey period was between October 2017 – May 2018. This included both the piloting stage and the full survey stage. The piloting stage occurred in early October 2017. The stage included a general review of the questions and their relevance by judges from the region. Second, the piloting stage also included a review of the translated versions of the survey in order to make sure that they were correct.

A number of judges and professionals from Jordan, France and Saudi Arabia were asked to review the survey and comment on the questions and provide feedback to further improve the survey, particularly in relation to the translated versions in Arabic and French. The piloting stage was very helpful for this study particularly in relation to Saudi judges. During this stage, it became clear that Saudi judges were apprehensive to participate. It was previously assumed that this was due to the strict gender separation in Saudi culture. However, this turned out to be a misconception. The apprehension, as explained by one senior Saudi judge who promised to distribute the survey among his colleagues, was due to my surname (“Razai”) which is a common Iranian name. The view was that judges would be suspicious of a survey being run by someone with this name, considering the political and religious tensions between the two countries. To mitigate this factor, I was advised to use a (Sunni Muslim) surname. Thus, an identical copy of the Arab Judges Survey was created for the Saudi judge to share with his colleagues where with a more Sunni sounding surname.

The survey was launched on 17th of October 2017 and closed on the 1st of May 2018. The survey was open to all judges from across the Arab region.

Sampling method

As described earlier in this chapter, the research conditions were suboptimal because of the politically sensitive nature of the region coupled with the elite nature of judges as a research population. This meant that choosing a research methodology that conformed to the conventional notions of random selection and representativeness was inapplicable. Nonetheless, Arab judicial attitudes was considered an important topic to explore even if access to information is limited.³²² In light of this, a snowball sampling method was

³²² According to Kirchherr and Charles, researchers grounded in quantitative thinking may consider non-probability sampling methods, such as snowball sampling, “when confronted with difficult-to-reach populations, particularly if the dismissal of snowball sampling would mean that no research could be conducted at all” Kirchherr J, Charles K (2018) Enhancing the sample diversity of snowball samples: Recommendations from a research project on anti- dam movements in Southeast Asia. PLoS ONE 13 (8): e0201710., p.3

deemed the only feasible method to find participants for the Arab Judges Survey.³²³

Snowball sampling is defined by Atkinson and Flint as a technique for gathering research subjects through “the identification of an initial subject who is used to provide the names of other actors”.³²⁴ The snowball sampling method is used as a method where the research population is hidden, hard to reach and when other preferred methodologies are not feasible because of obstacles found in the research environment.³²⁵ The method therefore is usually not “and should not be the first choice of research methodology when a more representative sampling method is available”.³²⁶

The conceptual framework of judicialisation of politics, including the research questions stemming from it, was the central strategy used for the sampling method. Furthermore, in the absence of a sample frame, the following pathways were taken to ensure a degree of sample diversity.³²⁷ Personal and professional contacts of judges and key figures in the judiciary; academia; legal profession and local and international organisations collaborating with Arab judiciaries and judges. These contacts helped to generate new contacts throughout the distribution of the Arab judges Survey. Distribution of the survey through different avenues in order to ensure that the initial set of respondents were sufficiently varied.³²⁸ The survey was distributed via the following avenues:

³²³ Although the intent of the study is not to generalise Arab judges, but to explore whether there may be a variety of judicial role conceptions in the region, the conclusions made in this research cannot be claimed to constitute valid and reliable research findings as required by quantitative principles.

³²⁴ Lewis-Beck M, Bryman A and Futing Liao T, *The SAGE Encyclopedia of Social Science Research Methods* (Sage Publications, Inc 2004)
<<http://methods.sagepub.com/reference/the-sage-encyclopedia-of-social-science-research-methods>> accessed 27 April 2019

³²⁵ Cohen N., Arieli T., (2011) Field research in conflict environments: Methodological challenges and snowball sampling *Journal of Peace Research*, 48(4) p.427

³²⁶ Ibid.

³²⁷ Kirchherr J, Charles K (2018) Enhancing the sample diversity of snowball samples: Recommendations from a research project on anti- dam movements in Southeast Asia. *PLoS ONE* 13 (8): e0201710., p., 12

³²⁸ According to Kirchherr and Charles, “the best defence’ against a lack of sample diversity is to begin the sample with seeds that are as diverse as possible.” Similarly, Etikan et al argue that it is “compulsory for the researcher to ensure that the initial set of respondents is

- LinkedIN
- Suggestions from academics and professionals with contacts in the judiciary in the region
- Organisations contacted with requests to distribute the survey through their mailing lists
- Judicial Councils (Yemen, Palestine and Lebanon)
- Key figures within the Arab judiciary identified by the researcher
- Arab judges already known to the researcher

Reminders were sent after three weeks from initial contact. Out of all the avenues, LinkedIN, suggestions from individuals with contacts in the judiciary, and existing relationship with judges proved the most successful. This was in part because many judges who were contacted had already accepted my invitation to connect on LinkedIN as part of Study 2 of this thesis. As anticipated, the Judicial Councils in the three countries refused to distribute the survey. With the help of the International Bar Association (IBA), the Tunisian Team for the International Legal Assistance Consortium (ILAC) posted a link to the survey on 30 November 2017 to one of ILAC's private Facebook groups, which has almost 600 judges from Tunisia (Figure 5).

Given the subjectivity of the selection mechanisms inherent in this sampling method, there are limitations in relation to the data obtained, its analysis, interpretation and presentation. In this study, judges were not collected randomly as expected by pure sampling principles. Participation in the Arab Judges Survey depended on referrals from other judges as well as their willingness to participate. Therefore, the sample of judges in this study may be more biased towards more cooperative participants.

sufficiently varied' See Kirchherr J, Charles K (2018) Enhancing the sample diversity of snowball samples: Recommendations from a research project on anti- dam movements in Southeast Asia. PLoS ONE 13 (8): e0201710., p.3; Etikan I, Alkassim R, Abubakar S. Comparison of Snowball Sampling and Sequential Sampling Technique. Biometrics Biostat Int J. 2016; 3(1), p.55

Figure 5. Facebook post inviting Tunisian judges to participate in Survey (30 November 2017)



Survey responses

In total, 91 judges participated in the survey. These were represented by: Egypt (28); Saudi Arabia (25); Lebanon (22); Tunisia, (9); Jordan (4); Palestine (2) and; Syria (1). Table 7 below presents a breakdown of the 91 judges according to gender, country, status, type of court and years of experience.

Table 8. Sample profile in Arab Judges Survey (n=91)

Gender ³²⁹		Status		Type of court		Country		Years in court ³³⁰	
Female	7	Full time	81	Trial only	48	Egypt	28	Less than 1 year	3
Male	42	Retired	3	Trial and Appellate	32	Saudi Arabia	25	1-6	19
		Other	7	Appellate	5	Lebanon	22	7-11	19
				Other	6	Tunisia	9	12-16	21
						Jordan	4	17-20	14
						Palestine	2	21- 25	6
						Syria	1	26-29	6
								More than 30 years	2

Out of the 91 judges, 48 judges fully completed the survey.³³¹

Limitations of the survey

Representativeness

This study was a first explorative attempt to obtain the views and experiences of Arab judges about their role as judges. For the reasons explained earlier in this chapter, the working assumption was that the survey would not generate large numbers of responses from judges across the Arab Middle East. For reasons also explained at the outset of the chapter, the size and the nature of the sampling used in this study meant that it would not be possible to assess the representative nature of the responses.

The relatively small number of responses to the survey (91 responses, with 48 complete responses) was, therefore, not surprising. Although many previous surveys of judges in other jurisdictions have also had small numbers of responses, these earlier studies were usually confined to a few courts in one

³²⁹ Forty-two 91 respondents did not indicate their gender in the Arab Judges Survey.

³³⁰ One respondent from Jordan did not state how many years of court experience he/she had.

³³¹ These were represented by Egypt (15 judges), Saudi Arabia (15 judges), Lebanon (11 judges), Tunisia, (3 judges), Palestine (2 judges) and Jordan and Syria with one judge each.

jurisdiction.³³² Judges that participated in this survey come from across the Arab Middle East, mostly represented by Egypt, Lebanon and Saudi Arabia. In addition, the respondents came from different courts within their respective judicial systems. Therefore, the single variable that unites them is that they hold a judicial post in the Arab region, and that they come from the region. And although judges constitute a peculiar, homogeneous subgroup within any national population, the issue of representation is a significant methodological limitation of this study.³³³

Limitations in the survey question approach

There are basically two types of survey questions that could be used in a survey such as this: open-ended and closed-ended questions. Both pose reliability and validity problems. One method used in defining the judicial role has been to ask the participants (judges) to define their own roles by using open-ended questions. An issue that arises of this approach is that it inevitably involves some subjectivity on the part of the researcher and respondent. Nisbett for example, argues that the accuracy of subjective reports is so poor that any introspective access is limited because:

“[S]ubjects sometimes cannot report on the existence of influential stimuli and as a result, any verbal report by subjects about the cause of their responses would be at least partially in error.”³³⁴

³³² Flango surveyed 48 Austrian and 49 Swiss mid-level appellate court judges. Glick and Vines' 1969 study surveyed 26 state Supreme Court judges from four U.S states. Similarly, Becker surveyed 22 judges from the Hawaiian state courts. Manfred W Wenner, Lettie M Wenner and V Eugene Flango, "Austrian and Swiss Judges: A Comparative Study" (1978) 10 *Comparative Politics* 499; Henry Robert Glick and Kenneth N Vines, "Law-Making in the State Judiciary: A Comparative Study of the Judicial Role in Four States" (1969) 2 *Polity* 142; Theodore L Becker, "A Survey Study of Hawaiian Judges: The Effect on Decisions of Judicial Role Variations" (1966) 60 *American Political Science Review* 677.

³³³ Leslie, for instance, argues that: "researchers surveying issues directly related to homogeneous groups should not be overly concerned about the percentage of questionnaire returns. Representativeness will most likely be excellent. This presumes, of course, that enough responses are gained to meet statistical assumptions." Larry L Leslie, "Are High Response Rates Essential to Valid Surveys?" (1972) 1 *Social Science Research* 323., p.332

³³⁴ Nisbett, Richard E.; Wilson, Timothy DeCamp, "Telling More than We Can Know: Verbal Reports on Mental Processes" (1977) 84 *Psychological Review* 231. p.255

To overcome the problems of open-ended questions, some researchers have used closed-option questions when surveying judges. This presents the judge with a finite list of possible answer options, and responses may present more limited information than the open-ended approach. One way that this survey attempted to address this was to also provide the answer option of “other” and provide judges with the opportunity to write in another answer or elaborate on their closed-option answers.

In studying judicial role conceptions, a number of researchers have used the closed-option questions in order to categorise judges into specific judicial role types. But Flango, early on, acknowledged that some limitations also exist with this approach:

“[W]e do however, wish to point up the difficulties experienced in the past in defining judicial role through a neat categorization of judges into distinct ideal types with arbitrary labels. There is a general problem of getting direct information about judicial attitudes and orientations that might work as determinants of judicial decisions.”³³⁵

The Arab Judges Survey had the aim of exploring and comparing Arab judges’ role orientations with previous research on this topic, and as a result the survey included many of the same questions used in previous surveys of judges in the US and Europe. This means it is possible that some of the survey questions might have been understood differently by Arab judges. This possibility is heightened by the availability of the online survey in three different languages. Efforts were made to word the questions in a simple and concrete manner as well as avoiding ambiguous words. While the translations were reviewed and approved by French and Arabic speaking judges, some key elements may have been “lost in translation”. As Ungs and Baas acknowledged in their study:

³³⁵ Flango, V., Wenner, L. and Wenner, M. (1975). “The Concept of Judicial Role: A Methodological Note” *American Journal of Political Science*, 19(2), p.287. For a detailed discussion about the limits of this approach and others seeking to explore judicial role orientations, see James L Gibson, “Judges’ Role Orientations, Attitudes, and Decisions: An Interactive Model” (1978) *72 American Political Science Review* 911.

“In the final analysis, it is the judge who, in ranking the statements, gives them meaning...”.³³⁶

Furthermore, the Arab Judges Survey drew on many of the questions used in previous surveys in order to carry out a comparative assessment of judicial roles amongst Arab judges and judges in a range of other jurisdictions. The chosen approach carries some important limitations particularly in terms international comparisons. As mentioned above, this was a first attempt at studying the role perceptions of judges in the Arab Middle East. It was therefore considered important to follow the same pattern of earlier studies by borrowing their questions (that had the same explorative purpose) and follow precedent where possible.

Furthermore, although these precedents relied are now decades old, they have been, and continue to be used by judicial behaviourists to measure the several aspects of potential role orientations and to understand judicial decision-making. The questions are reflective of recent studies into the role of judges: they are designed to investigate judges’ expectations about the purposes or objectives they should adopt and how they perceive decision-making to operate on the court.³³⁷

Social desirability bias

In addition to the limitations discussed above, another nuisance factor of the survey responses relates to social desirability bias. The bias is understood to arise when sensitive topics are assumed to generate response errors and have an effect on the data quality.³³⁸ Unpopular answers such as executive

³³⁶ Thomas D Unga and Larry R Baas, "Judicial Role Perceptions: A Q-Technique Study of Ohio Judges" (1972) 6 *Law & Society Review*, p.351

³³⁷ See Carman RV, 'The Development of the Judicial Role Orientation' in Raymond V Carman, *Making Good Law or Good Policy?* (Springer International Publishing 2017); Lee Epstein, Stefanie A. Lindquist 'The Oxford Handbook of U.S. Judicial Behaviour', *Oxford Handbooks of American Politics* (Oxford University Press 2017)

³³⁸ Social desirability bias occurs when respondents distort their answers by either underreporting socially undesirable behavior and/or overreporting socially desirable behavior in order to maintain a socially favourable self-presentation. Respondents willingness to provide truthful answers therefore may be compromised in surveys if the topic is perceived to be undesirable, intrusive, sensitive or if the answers carry the risk of being disclosed to third

interference with judicial work may have been under-reported by the judges who participated in the survey. Equally, favourable answers such as impartiality, judicial independence and strict adherence to the law may have been overreported. Despite attempts at containing the situational determinants that may exacerbate the bias (such as embedding sensitive questions with more general questions and assuring participants of confidentiality and data protection)³³⁹, there is a strong likelihood that judges may have overreported or underreported on some of their answers to appear in a more positive light.

Benefits of the survey findings

The limitations of comparative analysis by using a partial and nonprobability sample cannot be overstated. The intent of the study was not to generalise Arab judges. Rather, the objective was to explore whether there may be a variety of judicial role conceptions in the region. Therefore, the conclusions made in this research cannot be claimed to constitute valid and reliable research findings as required by quantitative principles. This study does not include all judges, nor does it assess the probability of the data because of the small and partial sample size. Despite these limitations, the Arab Judges Survey still provides important and unique information about judicial role conceptions in jurisdictions where this issue has not been empirically explored before. The survey is a first of its kind in the Arab region and as a result, it

parties. Wlömert N and others, 'Multidimensional Assessment of Social Desirability Bias: An Application of Multiscale Item Randomized Response Theory to Measure Academic Misconduct' [2018] *Journal of Survey Statistics and Methodology* p.2

³³⁹ Social desirability bias could be reduced by appropriately tailoring the survey design. According to Krumpal "The literature review of the recent research indicates that cognitive psychologists, social scientists and survey statisticians have made some progress in reducing measurement errors due to deliberate misreporting on sensitive topics, principally by increasing the anonymity of the question and answer process (e.g. via the randomized response technique or self-administered interviews), by decreasing the respondent's concerns in admitting to some taboo (e.g. via confidentiality assurances or clever wording and framing of the sensitive item)" , Krumpal I, 'Determinants of Social Desirability Bias in Sensitive Surveys: A Literature Review' (2013) 47 *Quality & Quantity*, p.2041. See also See Anton J. Nederhof, Methods of coping with social desirability bias: a review, *European Journal of Social Psychology*, Vol. 15, 263-280 (1985); Robert J. Fisher, Social Desirability Bias and the Validity of Indirect Questioning, *Journal of Consumer Research*, Vol. 20, No. 2 (Sep., 1993), pp. 303-315

helps to begin to shed initial insight of Arab judges' understanding of their role within the framework set by earlier Western judicial studies.³⁴⁰

Summary

The three studies conducted in this thesis aim to examine the role and political significance of Arab judges by:

1. Mapping the jurisdiction and powers of courts and judges in 8 Middle East countries, which resulted in the identification of a new typology of judicial systems in the region centred around 4 main types of judicial systems, exemplified by Egypt, Jordan, Lebanon and Saudi Arabia;
2. Profiling of the educational and professional backgrounds of Arab judges across the region, primarily through an analysis of 112 LinkedIn profiles of Arab judges and supported by additional information obtained through a voluntary online survey of Arab judges; and
3. Undertaking an assessment of judicial role conceptions of Arab judges through the first ever survey of Arab judges. This survey explores the experiences and attitudes to being a judge, relationships with other judges, the public, media and government. The Arab Judges Survey, in turn, enabled a comparative analysis of judicial role conceptions in the Arab region compared with previous empirical work with American and European judges.

³⁴⁰ The study also offers initial insights into how Arab judges understand their judicial roles, including how these judges perceive both the formal and informal norms within which they operate.

Chapter 5. Four judicial systems in the Arab Middle East

This chapter undertakes an assessment of Arab judicial systems by looking at the official laws regulating the organisation, composition and jurisdiction of courts in four Arab states. In this chapter, focus is placed on two structural variations that, according to Guarnieri and Pederzoli, are conducive to the judicialisation of politics (at least in Western legal systems).³⁴¹ The first variation relates to the **territorial dimension of court systems**. The second variation relates to the **relationship between the different levels of courts**, their internal dynamics and the role of apex courts in each country. This chapter applies these principles to four Arab judicial systems, assessing how the organisation of courts may affect the political significance of the judiciary in Egypt, Jordan, Lebanon and Saudi Arabia. Although diversity, “historical particularity, specificity and locality”³⁴² have been taken into account in the choice of the four countries, there may be limitations in this mapping exercise. The legal systems under review are not identical, but they are considered to be similar to the extent that they can be analysed using the variables as established by the conceptual framework employed in this research.³⁴³

The role of judicial systems in judicialisation

In order to explore Arab judicial roles as fully as possible, both macro and micro influences are important to consider: “What judges prefer to do and what they think they ought to do are not necessarily compatible with what they are encouraged or allowed to do”.³⁴⁴ This chapter (and the next chapter) explores the formal institutional machineries of the Egyptian, Lebanese, Jordanian and Saudi Arabian judiciaries. The chapters sets the stage for the following

³⁴¹ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002) Chapter 2 - *Judicial Systems*.

³⁴² Marsh, David, and Gerry Stoker. *Theory and Methods in Political Science*. Basingstoke: Palgrave Macmillan, 2010. Print. p. 250

³⁴³ Conscious efforts to consider every unit (judicial system) was made in light of the four factors described above, and initially in isolation from each other. The comparative study is confined to a small number of jurisdictions and therefore constitutes a limitation and should not be considered representative of the region as a whole.

³⁴⁴ James L Gibson, “From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior” (1983) 5 *Political Behavior* 7, p. 27

chapters (Chapters 7, 8, and 9) which aims to explore what Gibson refers to as judges' "informal norms that lubricate" the institutional machineries.³⁴⁵ As explained in Chapter 1, a political system can use two different elements to exert influence on courts.³⁴⁶ The first element aims at limiting court jurisdiction so that the impact of judicial decisions (and therefore a judge's role in the political process) remains restricted.³⁴⁷ The second element which may affect judges' scope of political participation relates to the actual organisation of the judicial system and the interrelationship between courts.³⁴⁸

Jurisdiction over cases in Western democracies are generally described as either concentrated into a **unitary** system of courts, or **fragmented** into a plurality of different courts with their own separate hierarchical structures.³⁴⁹ In contrast with a unitary system of courts with a wide dispersal of jurisdictional powers, fragmented systems tend to have exceptional courts that run parallel alongside regular courts.³⁵⁰ The actual organisation of the judicial system may also influence judicial participation in the political process.³⁵¹ Two models are used to describe the organisation of courts: **co-ordinate systems** where lower and intermediate courts make the majority of decisions, and **hierarchical systems** where a substantial portion of lower court decisions are re-examined by a final appellate court.³⁵² Both models highlight the role of supreme (or apex) courts. A strong decision-making court at the top that is characterised as **centripetal** is assumed to be better equipped to ensure that judicial decisions are consistent, and therefore the final court is more likely to be

³⁴⁵ Ibid. p.28

³⁴⁶ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002) Chapter 2 - *Judicial Systems*. p.78.

³⁴⁷ Ibid.p.79

³⁴⁸ Ibid.p.80

³⁴⁹ Ibid.p.80

³⁵⁰ See Damaška's Chapter "Organization of Authority: The Hierarchical and the Coordinate Ideals", in *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale Univ Press 1986).

³⁵¹ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002) p.81

³⁵² Damaška, Mirjan R., "Structures of Authority and Comparative Criminal Procedure" (1975) 84 *Yale Law Journal* 480., p.484

politically significant.³⁵³ By contrast, a court of final appeal with a **centrifugal** dynamic tends to reduce internal consistency by promoting the autonomy of lower and intermediate courts – which lowers the political significance for the apex court itself.³⁵⁴

Identifying four types of judicial systems in the Arab Middle East

As described in Chapter 4, the research began by examining eight countries in the Arab region.³⁵⁵ Each country was examined in light of three elements: the jurisdictional scope of courts; the interrelationship between courts; and the nature of the political system.³⁵⁶ On the basis of these elements, a taxonomy of four legal systems was constructed that arguably represents four distinct models of judicial structures in the Arab region within the framework of judicialisation of politics. The four judicial structures are represented by Egypt, Jordan, Lebanon and Saudi Arabia as illustrated in Table 8 below.

Table 9. Classification of four Arab judicial structures

Classification based judicial structures	Political System	Country
Dual religious court system	Monarchy	Saudi-Arabia
Highly fragmented and hierarchical system	Republic	Lebanon
Fragmented constitutional System	Republic	Egypt
Quasi-unitary constitutional System	Monarchy	Jordan

A new approach to understanding Arab judicial systems

Arab Middle East jurisdictions are often categorised by legal scholars as inherently similar in terms of legal and judicial culture. States within the region

³⁵³ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002) p.81

³⁵⁴ Ibid.p.81

³⁵⁵ The following countries were considered: Bahrain, Egypt, Jordan, Lebanon, Saudi Arabia, Syria, Tunisia and the UAE.

³⁵⁶ The legal and judicial history was – albeit broadly- also considered (See Chapter 4)

are said to reveal “strong trans-religious legal patterns”.³⁵⁷ To a certain degree, there is an inter-connected legal heritage that deserves attention (some of which was explored in Chapter 2). However, there are also important national differences across the Arab countries and these extend to their legal systems. The judicial systems assessed in this chapter reveal a complex organisation of different, contrasting and unique institutional arrangements. This also illustrates a spectrum of variations present in the Middle East court systems under study.

Having identified the four Arab countries that are models of the range of judicial systems present in the region, the remainder of this chapter focusses on these four judicial systems. The analysis are presented in two ways. First, textual descriptions of each country’s courts are derived from the original laws in Arabic (and secondary sources where necessary). Second, detailed diagrams were constructed specifically for the purposes of this research, which are also drawn directly from the primary legal source material in Arabic.³⁵⁸

Comparing and contrasting the four different court structures with each other in this way, enables characteristics which shape contemporary judicial structures in the Middle East to be identified. It also allows for a comparative analysis of Middle East judicial systems in relation to the existing research on Western judiciaries. The result of this diagrammatic mapping exercise and the analysis of court jurisdiction is the creation of a new typology of judicial systems in the Arab Middle East. It draws on the conceptual framework from Guarnieri and Pederzoli’s work, *The Power of Judges*.

The analysis in this chapter includes a preliminary assessment of the extent to which Guarnieri and Pederzoli’s framework is applicable to judiciaries in the Arab Middle East, and therefore the extent to which the judicialisation of politics exists in these countries. The focus here is on three main factors which

³⁵⁷ Chibli Mallat, *Introduction to Middle Eastern Law* (Oxford University Press 2007). p.23

³⁵⁸ The purpose of the illustrative figures presented in this chapter is to provide for a broad overview of the judicial structures in Egypt, Jordan, Lebanon and Saudi Arabia, especially in relation to the elements thought to be conducive to judicialisation.

Guarnieri and Pederzoli argue are likely to influence the political significance of courts:

- Legal provisions that relate to the composition and organisation of courts;
- The manner in which the four legal frameworks grant jurisdiction to courts; and
- A basic overview of the judicial structures.

The three factors help to illustrate the interrelationship between the different layers of courts within each Arab legal system. The factors also help to shed some light onto the internal dynamics of each judicial system, including the degree of importance attached to courts at the apex of the judicial pyramid(s) in each country.

Egypt: Fragmented constitutional system

Egypt's court system retains much of the fragmented civil law system design from the Ottoman and colonial period, with four distinct set of courts: ordinary, administrative, military and specialised courts. However, this is only partially accurate. The Egyptian court system (Figure 6) reveals additional features typically found within a unitary court system, particularly in relation to the tools and jurisdictional scope granted to the highest courts in the country. The wide reach of decisions rendered by these courts may, in part, be explained by Egypt's distinct legal and judicial history.

Mixed system history

Although Egypt was technically under Ottoman sovereignty, in practice it enjoyed a degree of autonomy.³⁵⁹ For instance, the pace and content of Egyptian legal reform differed from the overarching Ottoman Tanzīmāt reforms especially after the 19th century.³⁶⁰ One notable example was the foreign introduction of "Mixed Courts" (*Maḥākīm al-mukḥḥaliḥah*) in 1875, which

³⁵⁹ M Şükrü Hanioglu, *A Brief History of the Late Ottoman Empire* (Princeton University Press 2008). p.7.

³⁶⁰ Nathan J. Brown, "Reining in the Executive," in Nathalie Bernard-Maugiron (ed), *Judges and Political Reform in Egypt* (The American University in Cairo Press 2015). p.29.

made an important impact on the modern Egyptian legal system.³⁶¹ The Mixed Courts were a hybrid series of courts, established to deal with civil and commercial disputes between foreigners and Egyptians. Judges in these courts came from a variety of Western nations, including France, England, Italy, Scandinavia countries and the US.³⁶² This international dimension went beyond the model of Napoleonic and French courts.³⁶³ According to Hamad, this also introduced the principle of judicial discretion when the National Courts were established in 1883:

“The Egyptian judiciary developed beyond the strict application of the law that usually characterizes the civil law and bureaucratic judiciaries to include the latitude in the decision-making process which common law judges usually enjoy”.³⁶⁴

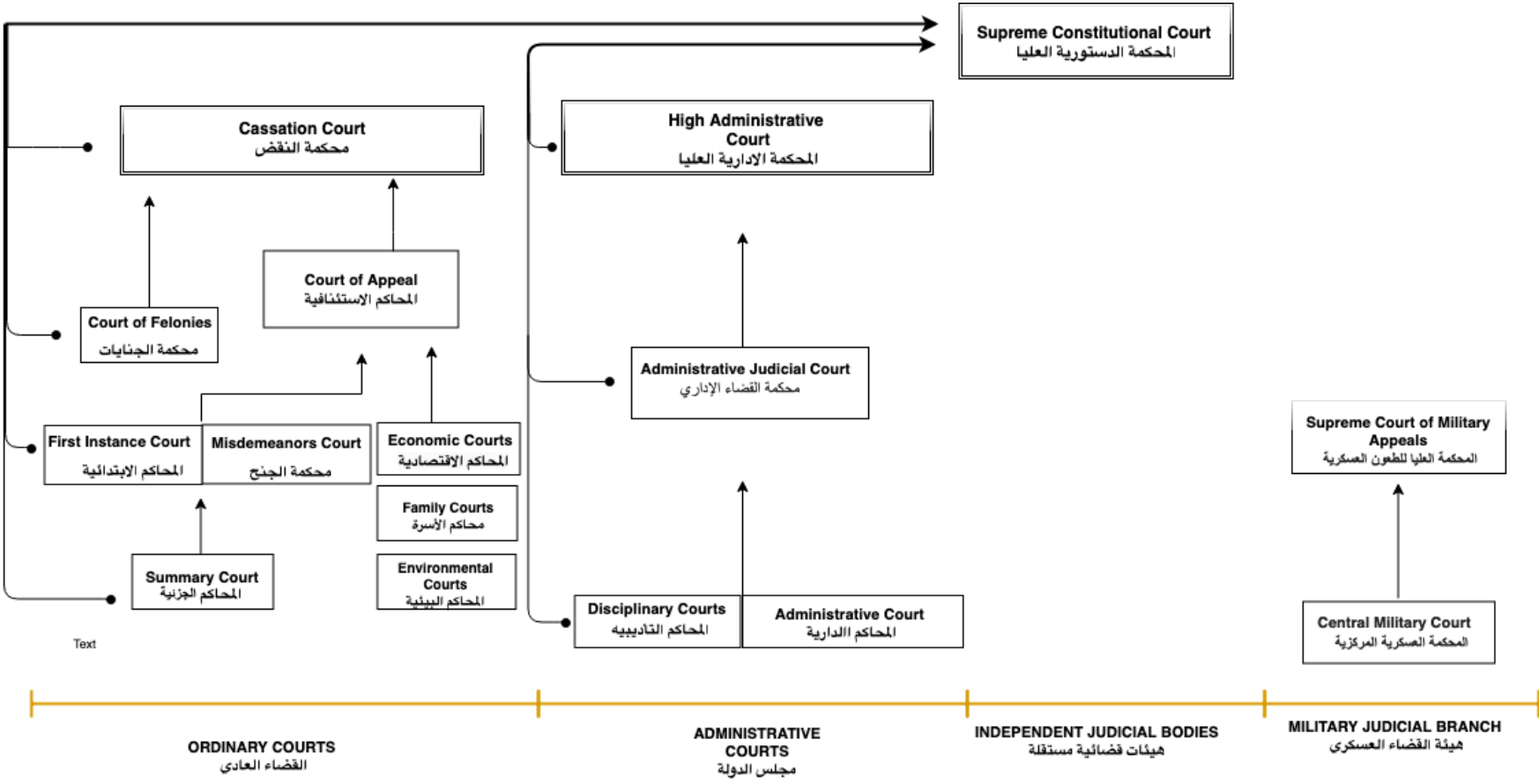
³⁶¹ Hoyle for instance argues that it is impossible to understand the modern Egyptian legal system without a knowledge of the Mixed Courts, Mark SW Hoyle, *Mixed Courts of Egypt* (Graham & Trotman 1991), p.83

³⁶² Judge Brinton, who himself was an American appellate court judge in the Egyptian Mixed Courts, wrote that “each of the seven great Powers, the United States, Great Britain, Italy, Russia, Germany, France and Austria, should be entitled always to one seat in the upper court” see Jasper Y Brinton, “The Mixed Courts of Egypt” (1926) 20 *American Journal of International Law* 670, p.626.

³⁶³ Hamad., M., *When the Gavel Speaks: Judicial Politics in Modern Egypt* (University of Utah 2008). p.60

³⁶⁴ Ibid.

Figure 6. Organisation of Courts in Egypt



Other courts:
 the Ethics Court,
 the State Security Court,
 the Emergency Court

Ordinary courts (*Al-Qaḍā' al-'adi*)

Today, the “ordinary judicial branch” in Egypt is three-tiered and deals primarily with civil and criminal matters. The lower tier of the ordinary courts are divided into summary courts (*Maḥakem al-ibtida'iah*). In each court of first instance, there are a number of divisions headed by a presiding judge.³⁶⁵ And there are also a number of summary courts,³⁶⁶ where one judge hears cases of contraventions, misdemeanours and less serious civil issues.³⁶⁷

Egypt's courts of appeal (*Maḥakem- al-isti'nafiah*) have three main powers:

- Examine and review awards issued by lower courts;
- Review and examine questions of fact and law; and
- Act as a court of first instance for capital crimes (*Maḥkamat al-Jena'iat*).

They are located in Egypt's largest cities³⁶⁸, and each court of appeal is divided into a number of divisions with each responsible for handling specific disputes. If found necessary, cases may be convened in another place within or outside the territorial jurisdiction (following the request of the chief judge of the court of appeal and subject to approval by the Minister of Justice).³⁶⁹

Court of Cassation

The highest court in the ordinary court structure is the Court of Cassation (*Maḥkamat al-naqth*), which in principle, is only accessible if a breach of law is claimed as a basis of final appeal. The Court has over 30 divisions to review criminal, civil, personal status laws and other cases flowing from the courts of appeal. The Court has over 400 judges, with roughly 100 out of these 400 judges seconded to other countries in the Arab Middle-East, primarily to the Gulf region.³⁷⁰ The Court is headed by the Chief Justice, who also serves as

³⁶⁵ Art 14, Law No. 46/1972 “Judicial Authority Law” (Egypt)

³⁶⁶ For example, the North Cairo Court of First Instance has 169 summary divisions with each division responsible for reviewing specific types of legal disputes.

³⁶⁷ Art 14, Judicial Authority Law (Egypt)

³⁶⁸ Art 6, Judicial Authority Law (Egypt)

³⁶⁹ Art 8, Judicial Authority Law (Egypt)

³⁷⁰ David E. Risley, “Court of Cassation: The Supreme Court of Egypt's Common Court System” (*The Egypt Justice Project*) <<https://egyptjustice.com/court-of-cassation/>> accessed 11 July 2018.

the President of the Supreme Judicial Council, along with a number of Deputy Chief Justices and Associate Justices. A special panel of 11 senior judges decides cases involving jurisdictional conflicts between two or more circuits. Similarly, in felony trials where the Court has earlier reversed criminal court judgments on two occasions, a third and final trial can be conducted by a special panel of five judges.³⁷¹ In addition to considering disputes by parties (or disputes presented by the Public Prosecutor), the Court is also entrusted to review lawsuits based on a judge's actions. The law grants the Court the power to revise court decisions and to set out general principles and rules relating to the interpretation of laws. In addition, the Court of Cassation is empowered to review the legitimacy of membership of the House of Representatives and the Consultative Assembly.³⁷² Article 87 of the 2012 Egyptian Constitution states that: "The Court of Cassation decides on the validity of membership for the members of both chambers; any challenge is to be submitted within thirty days."³⁷³

Administrative courts

Separate and parallel to the Egyptian ordinary courts are the administrative courts introduced in 1946. Article 190 of the Egyptian Constitution defines the administrative branch as an independent judicial body exclusively competent to adjudicate in administrative disputes, disciplinary cases and appeals. The administrative judicial body is also competent: "to issue opinions on the legal issues of bodies to be determined by law, review and draft bills and resolutions of a legislative character, and review draft contracts to which the state or any public entity is a party".³⁷⁴ The administrative judicial branch is composed of:

- Administrative Courts (*Maḥakem al-idarīah*);
- Disciplinary Courts (*Maḥakem al-ta'dibīah*);
- Courts of Administrative Justice (*Maḥkamat al-quthaa al-idarī*); and
- Supreme Administrative Court (*Maḥkamat al-idarīah al-'Ulīah*).³⁷⁵

³⁷¹ Ibid.

³⁷² Art. 82, Part three "The Public Powers", Constitution of the Arab Republic of Egypt of 2012.

³⁷³ Art. 87, Ibid.

³⁷⁴ Art. 190, Egypt's Constitution of 2014

³⁷⁵ Law no.47/1972, "The State Council Law", (Egypt)

The Administrative Courts serves as a first instance court and have exclusive jurisdiction over administrative disputes involving government personnel and disputes involving administrative contracts. The Administrative Courts of Justice are composed of circuits, each with three judges. Similar to the courts of appeal in the ordinary judicial branch, they serve as an appeals court from the Administrative Courts and Disciplinary Courts.³⁷⁶ They have jurisdiction over the validity of administrative decisions concerning public officials. The Administrative Court of Justice also acts as a court of first instance for disputes that falls outside the jurisdictions of Administrative and Disciplinary Courts. There are two types of Disciplinary Courts: one court deals with disputes involving high-ranking public officials and the other with lower ranking public officials. Both are courts of first instance.

The Supreme Administrative Court (*Maḥkamat al-idarīah al-'Ulīah*) sits at the top of the administrative judicial hierarchy and is chaired by the President of the State Council. The Court has jurisdiction over challenges against decisions issued by Administrative Courts of Justice, the Administrative Courts and the Disciplinary Courts, and there is no possibility for appeal from the Supreme Administrative Court. The Court is composed of several divisions, each chaired by five judges.

Courts with special jurisdiction

In addition to Egypt's ordinary and administrative judicial branches, there are several courts with specialised jurisdictions:

- Family Courts³⁷⁷ (*Maḥakem al-usra*);
- Economic Courts (*Maḥakem al-eqtisadīah*);
- Military Courts (*Maḥakem al-'askariyah*)³⁷⁸

³⁷⁶ Ibid.

³⁷⁷ The family courts are embedded in the ordinary court branch.

³⁷⁸ Egypt had, until recently, a dual system of State Security Courts; one formed under the Emergency Law No. 162 (1958) and the and another which was regulated by Law No. 50 (1980). The Permanent Court was competent to look into crimes violating the decisions of the military governor under the state of Emergency. As stipulated by law, individuals tried were not entitled to due process. Although the state security courts were formally abolished in 2003,

- Environmental Courts (*Maḥakem al-Beaeīah*); and
- The Supreme Constitutional Court (*Maḥkamah al-dostoriah al-'ulīah*).

The Supreme Constitutional Court

The Supreme Constitutional Court (SCC) has the sole power of judicial review, provided that any court of merit forwards the case to the SCC on a question of constitutionality. If any court in the course of deciding a concrete case finds that a law being applied may be unconstitutional, it can suspend proceedings and forward the case to the SCC for review. Alternatively, a party in a lawsuit can challenge the constitutionality of legislation, provided that the lower court finds the challenge plausible. If so, the lower court will allow the party a three-month period to file a case before the SCC.³⁷⁹

In addition to the traditional powers of review of legislation, the SCC has the authority to resolve conflicts of jurisdiction between different judicial bodies.³⁸⁰ It is also empowered to provide a definitive interpretation of legislation and legal decrees if a divergent interpretation has emerged during the course of their application.³⁸¹ Following the constitutional amendments in 2005, the SCC is now empowered by law to review legislation prior to its promulgation, which effectively grants it wide powers of judicial review.³⁸² The SCC is composed of a court president, who is officially nominated by the President of the Republic, and a number of judges.

Judicialisation and the Egyptian judicial system

Egypt can be characterised as a **fragmented constitutional system** in the sense that it has two or more judicial pyramids coexisting and forming autonomous subsystems.³⁸³ Despite the shared characteristics of a

they now operate under the umbrella of military courts, which have acquired broad jurisdictional powers in relation to terrorism.

³⁷⁹ Law. No. 48/1979 "Supreme Constitutional Court Law" (Egypt)

³⁸⁰ Art. 25 Ibid.

³⁸¹ Ibid.

³⁸² Nimer Sultany, *Law and Revolution: Legitimacy and Constitutionalism after the Arab Spring* (First edition, Oxford University Press 2017). p.93

³⁸³ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002) p.81

continental civil law system, Egypt differs in several respects, especially in relation to the role played by the highest courts in the country. The horizontal nature of the judicial system, the strong role played by the three top courts in the country (Supreme Administrative Court, SCC, and the Cassation Court) is best described as a hybrid between the two models that traditionally describe Western legal systems. The jurisdictional scope of the highest courts in the country are not strictly distinct from each other and have in the past engaged in “inter-court” dialogue. For instance, at the request of the legislature, the Court of Cassation has in the past ruled on the legitimacy of the People’s Assembly, and in turn requested the Supreme Administrative Court to determine the legality of political parties under the Political Parties Law.³⁸⁴ Both these Courts may also refer a political party to the Constitutional Court on the basis of contested constitutionality. The role played by these courts in particular appears to promote judicialisation in Egypt, where a number of important political issues are delegated by the legislature to the final decision-making bodies of the judiciary.³⁸⁵

³⁸⁴ Law No. 40 of 1977, “The Political Parties Law” Amended by Law No. 177/2005 (Egypt)

³⁸⁵ Nimer Sultany, *Law and Revolution: Legitimacy and Constitutionalism after the Arab Spring* (First edition, Oxford University Press 2017)., p.94

Saudi Arabia: Dual religious court system

The judicial system in Saudi Arabia is unique in several respects, particularly within the region. The country's judicial system is perhaps best characterised as a **dual religious system**. The organisation and composition of both judicial pyramids are set out in the Judicial Authority Law and the Law of the Board of Grievances, promulgated in 2007 as part of the Kingdom's legal reforms.³⁸⁶ While the internal dynamics of these courts might also be characterised as hierarchical, the majority of cases seem to be heard by the intermediate and lower courts, which indicates a centrifugal dynamic where a small number of complaints reach the top of the judicial pyramid.³⁸⁷

Although the judicial system in Saudi Arabia has some similar features to the civil law system, the Kingdom's legal system makes it unique to the Arab region. According to Article 7 of the Saudi Basic Law of Governance (1992):

“The government in the Kingdom of Saudi Arabia derives its authority from the Book of God and the Sunnah of the Prophet (PBUH), which are the ultimate sources of reference for this law and the other laws of the State.”³⁸⁸

Saudi courts and judges predominantly rely on *Hanbalī* jurisprudence, and the judicial process reflects a classical form of Islamic adjudication.³⁸⁹

Use of *Ijtihād* in Saudi courts

As discussed earlier, the doctrine of *stare decisis* is not widely practiced in Saudi Arabia, in part because of the concept of *Ijtihād*. As described in Chapter

³⁸⁶ Royal Decree No. M/78 on 19 Ramadan 1428H (October 1st, 2007), “Law of the Judiciary 2007” (Saudi Arabia).

³⁸⁷ Ibid.

³⁸⁸ Art. 7, The Basic Law of Governance, Royal Order No. A/90, (27/8/1412H, Mar. 1, 1992). (Saudi Arabia). Furthermore, Article 44 of the Basic law provides that the three branches of government “will cooperate in the performance of their functions, according to this Law or other laws. The King is the ultimate arbiter for these Authorities.”

³⁸⁹ The Hanbali school of law is the predominant school of the judiciary, as it was selected to be considered as first among all the schools. Saudi Arabia created its own methodology for judicial analysis in 1928, and the laws in Sharī'a Courts remain un-codified. See Al-Hay'a al-Qaḍā'iyya [Judicial Board] Decision No.3 (17/1/1347/ June 25, 1928), approved by the Royal Decree of 24/3/1347 - Sept. 8, 1928. A translated version is provided by Haitham H. Osta, “Modernization, Codification and the Judicial Analysis: Exploring Predictability in Law in Sharī'a Courts in Saudi Arabia” (University of Washington 2016).

3, *Ijtihād* forms part of one of the four sources of Islamic law and is used where the two primary sources, the *Qur'ān* and *Sunnah*, are silent on a legal issue. Although authority is primarily sought within the Ḥanbalī school of thought, Saudi judges are free to practice the creative power of *Ijtihād* – independent legal reasoning. According to Hanlon, the Saudi legal system supports a judge's freedom of *Ijtihād* which in turn restricts the scope of appellate review.³⁹⁰

In Saudi Arabia, *Ijtihād* operates under the principle of “mutual acceptance”; that is, all *Ijtihāds* are equal and no *Ijtihād* “weighs more than the other”.³⁹¹ The scope and decentralised nature of “judicial *Ijtihād*” was implemented by the High Court of Mecca in 1962 where the Court stated that, provided a judge's decision does not differ with the sources of law, judgments cannot be reversed and must be respected: “... [N]o judgment requiring reversal shall be reversed except by the trial judge who issued it, as long as he does not refuse; if he refuses, the appeal court has to reverse it.”³⁹²

According to Hanlon, Saudi judges' independence and law-making powers are thoroughly respected in the Saudi legal system, even if this entails a slowing down of the decision-making process. The relationship with the lower courts are characterised by dialogue and guidance in order to seek clarification “to encourage and broaden the *ijtihād* of the trial courts”.³⁹³ In Hanlon's view, “the Saudi appeal system differs from any continental (French) court of appeal system”.³⁹⁴ Though there have been several attempts at codifying the Hanbali

³⁹⁰ Gayle E. Hanlon, “Saudi Arabia” in James R Silkenat and others (eds), *The ABA Guide to International Business Negotiations: A Comparison of Cross-Cultural Issues and Successful Approaches* (3rd ed, Section of International Law and Practice, Law Practice Management Section, American Bar Association 2009).

³⁹¹ Haitham H. Osta, “Modernization, Codification and the Judicial Analysis: Exploring Predictability in Law in Sharī'a Courts in Saudi Arabia” (University of Washington 2016)., p.72

³⁹² Royal Decree No. 16-3-3136, Articles. 6 and 7, and quoted in Frank E Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Brill 2000). p.95.

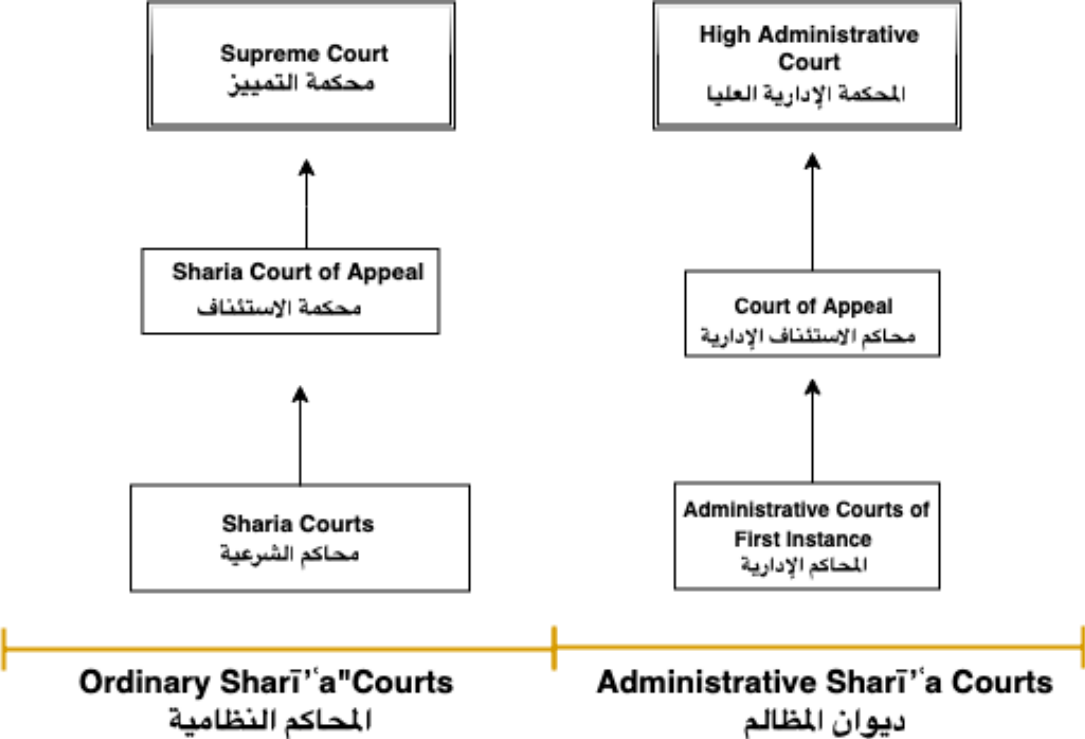
³⁹³ Gayle E. Hanlon, “Saudi Arabia” in James R Silkenat and others (eds), *The ABA Guide to International Business Negotiations: A Comparison of Cross-Cultural Issues and Successful Approaches* (3rd ed, Section of International Law and Practice, Law Practice Management Section, American Bar Association 2009)., p.874

³⁹⁴ *Ibid.* p.877

Islamic Law by progressives, the prevailing view has been that codifying it would lead to an abandonment of Sharī‘a and “kill the creativity of judges”.³⁹⁵

³⁹⁵ According to Osta, this opposition has a political dimension that relates back to the foundation of the Saudi Kingdom, which was formed under the tribal alliance between the political ruling house of Al Sa‘ud and the religious house of al-Shaykh: “the governance in Saudi Arabia is understood, although silently, to be similar to a Catholic marriage between the two wings. Sa‘ud rules the country in political and administrative matters while paying respect to the family of al-Shaykh, who rules in matters related to religion, such as the judiciary... Within this understanding, codification can be looked at as a limitation of a power that has been enjoyed by one of the two ruling wings –that is the power of judiciary.” See Haitham H. Osta, “Modernization, Codification and the Judicial Analysis: Exploring Predictability in Law in Sharī‘a Courts in Saudi Arabia” (University of Washington 2016),p.86

Figure 7. Organisation of Shari'a and Administrative courts in Saudi Arabia



Sharī' a Courts (*Maḥakem al-sharī' a*)

In the Saudi system, the Sharī' a courts are the ordinary courts that deal predominantly with civil and criminal matters. Under the Judicial Authority Law, first-degree courts are divided according to the type of dispute at hand:

- General courts (*Maḥakem al-'amma*)
- Criminal, courts (*Maḥkamat al-jenaīa*)
- Courts of personal status (*Maḥakem al-aḥwal al shakhsīa*)
- Commercial courts, (*Maḥakem al-tejareeya*)
- Labour courts (*Maḥakem al-'amaliah*)

Decisions rendered by first level courts may be appealed to appeal circuits (*Dawa'er*), each circuit corresponding to the given jurisdictions of the first instance courts. The appeals circuits usually review cases without holding hearings.³⁹⁶ Final judicial authority lies with the Supreme Court (*Maḥkamat al-tamwīz*), located in Riyadh and performing several legislative, consultative and judicial roles. Under the 2007 law, the Supreme Court replaced the Supreme Judicial Council's primary role as the highest authority in the ordinary Sharī' a branch. In addition to hearing legal disputes, the Supreme Court supervises the implementation of the Kingdom's laws and regulations. The Court is also empowered to review the following:

- Judgments issued by the intermediate courts that involve cases of serious crime and/or the death penalty;
- Court of Appeal judgments alleged to be contrary to Islamic Sharī' a or any other laws; and
- Matters relating to jurisdiction, impropriety of court and/or decisions.³⁹⁷

³⁹⁶ Abdullah F. Ansary, "A Brief Overview of the Saudi Arabian Legal System" <http://www.nyulawglobal.org/Globalex/Saudi_Arabia1.html> accessed 20 February 2018.

³⁹⁷ Law of Judiciary and the Board of Grievances promulgated by Royal Decree No. M/78 on 19/09/1428H corresponding to 1 October 2007 (Saudi Arabia).

Board of Grievances (*Dīwān al-mazalem*)

Parallel to the Ordinary/Shari'a court system is the administrative judicial pyramid, or Board of Grievances. The administrative judicial branch is three-tiered and consists of the following:

- High Administrative Court (*Maḥkamat al-idarīah al-'ulīah*)
- Administrative Courts of Appeal (*Maḥakem al-Isti'naf al-idarīah*)
- Administrative courts (*Maḥakem al-idarīah*)

The 2007 law created the High Administrative Court (composed of a president holding the rank of minister, being appointed directly by a royal decree or on the recommendation by the Administrative Judicial Council).³⁹⁸ The High Administrative Court exercises its jurisdiction through specialised circuits. In addition, the Court has a General Council, presided over by the chief of the High Administrative Court, and including all sitting judges within the administrative judicial branch.³⁹⁹ If an administrative circuit deems it necessary to depart from an interpretation (adopted by either the same or a different circuit of the same court), the case is referred to the chief of the High Administrative Court who will then refer it to the General Council for a decision.⁴⁰⁰

“A system within a system”

Like several other states in the region, Saudi Arabia there are specialised tribunals external to the ordinary judicial system.⁴⁰¹ For instance, in mid-2017, the Ministry of Justice launched the opening of Commercial Courts in three commercially important cities. The establishment of these courts is intended

³⁹⁸ Ibid.

³⁹⁹ Ibid.

⁴⁰⁰ Abdullah F. Ansary, “A Brief Overview of the Saudi Arabian Legal System” <http://www.nyulawglobal.org/Globalex/Saudi_Arabia1.html> accessed 20 February 2018.

⁴⁰¹ Ahmed A Altawyan, “The Legal System of the Saudi Judiciary and the Possible Effects on Reinforcement and Enforcement of Commercial Arbitration” (2017) 10 Canadian International Journal for Social Science and Education. p.283.

to serve as a forum for dispute resolution and to “increase judicial efficiency and enhance investor confidence”.⁴⁰² But according to Marar:

“[...] a duality in the legal system has been created because the general Islamic law [was] by no means displaced in whole by these laws. Instead, a “system within a system” has been created contributing to the inefficiency of the financial system.”⁴⁰³

Saudi model: one end of the Arab judicial spectrum

In relation to its neighbours, Saudi Arabia can be placed at one extreme end of the judicial continuum in the Middle East. Judicial decisions of Saudi judges are valid law to the parties and cannot be overruled unless they conflict with a plain meaning of the primary sources. In the event the judge of the lower court persist with the original judgement, final decision will fall to the appellate courts to refer the case to another judge or panel of judges in the lower court level.⁴⁰⁴ On the one hand this type of individual autonomy downplays the internal consistency of the judiciary to a certain degree and may reduce the political impact of the judiciary as a whole,⁴⁰⁵ particularly because the King sits at the top of the legal system and “acts as the final court of appeal and as a source of pardon.”⁴⁰⁶ On the other hand, this approach elevates the importance of decisions of individual judges and therefore provides the conditions that can promote the politicisation of individual judges.⁴⁰⁷ One potential exception to this relates to the newly rearranged courts and tribunals as part of the ongoing legal and judicial reforms in the kingdom. Although it is too early to assess the practical implications of these specialised courts, their creation will at the very least, promote the fragmentation of Saudi courts.

⁴⁰² John Balouziyeh, “Judicial Reform in Saudi Arabia: Recent Developments in Arbitration and Commercial Litigation” (*Kluwer Arbitration Blog*, 31 December 2017) <<http://arbitrationblog.kluwerarbitration.com/2017/12/31/judicial-reform-saudi-arabia-recent-developments-arbitration-commercial-litigation/>> accessed 8 November 2018.

⁴⁰³ Amr Daoud Marar, “Saudi Arabia: The Duality of the Legal System and the Challenge of Adapting Law to Market Economies” (2004) 19 *Arab Law Quarterly* 91. p.112

⁴⁰⁴ Royal Decree No M/1 of 22/1/1435 H (corresponding to 25 November 2013 G)

⁴⁰⁵ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002), p.81

⁴⁰⁶ “Legal and Judicial Structure” (*U.S Embassy of the Kingdom of Saudi Arabia*).

⁴⁰⁷ *Ibid.*

Lebanon: Highly fragmented but hierarchical system

The judiciary in Lebanon is fragmented into four main court systems, with each branch having a hierarchical structure (Figure 8). The judicial structure has a secular ordinary court system, but it places emphasis on religious diversity within this system. The Lebanese judicial system has an elaborate system of religious courts for each religious confession. These are deeply embedded in the judicial system and combine with other elements derived primarily from the French civil law system.

“A house of many mansions”⁴⁰⁸

Lebanon’s judicial system reflects the country’s multi-confessional society, which dates back for centuries.⁴⁰⁹ Following the collapse of the Ottoman Empire, Lebanon was placed under the French mandate (1920-1943). According to Mallat, it was under French control that Lebanon acquired the main elements of its legal and judicial systems: “The system is dominated legally by the centrality of codes, following the pattern of the so-called ‘civil law family’, as opposed to common law as in the United Kingdom and the United States.”⁴¹⁰

Still in force today, the Lebanese Code of Obligations and Contracts was promulgated in 1932 (during the French Mandate). While largely patterned on the French Civil Code, the Lebanese Code differs in one important respect: legal matters related to personal status and family are governed by a separate

⁴⁰⁸ The expression comes from Kamāl aṣ-Ṣalībī, *A House of Many Mansions: The History of Lebanon Reconsidered* (Repr, Tauris 2003).

⁴⁰⁹ Following the first Lebanese civil war in 1860, the *Règlement Organique* transformed the principality into a fully autonomous Ottoman province. The province’s political institutions were based on power sharing among the various confessional sects under an Ottoman-European consortium protectorate. The legal system applied in Lebanon was similar to the rest of the Empire: Islamic law as formulated by the Hanafi School and separate religious courts for non-Muslims in matters of family and personal status. See Zahar., M-J., “Power sharing in Lebanon: foreign protectors, domestic peace, and democratic failure” in Philip G Roeder and Donald S Rothchild (eds), *Sustainable Peace: Power and Democracy after Civil Wars* (Cornell University Press 2005). p.29

⁴¹⁰ Chibli Mallat, “The Lebanese Legal System”

<<http://rocket.asoshared.com/~mallatco/sites/default/files/The%20Lebanese%20Legal%20System.pdf>> accessed 1 November 2017.

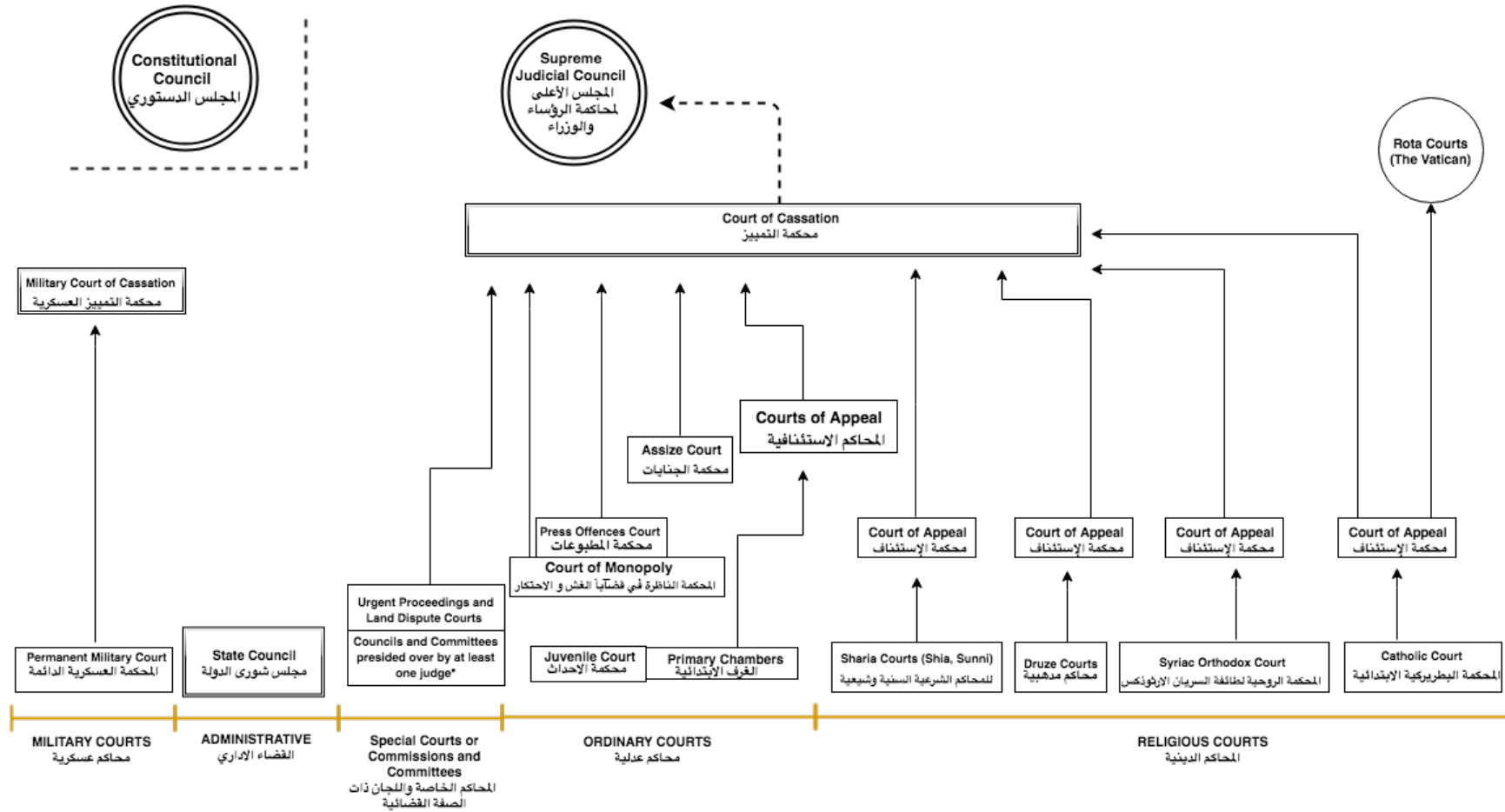
set of laws for the different sectarian communities.⁴¹¹ The Lebanese Code was initially drafted by a French jurist, but was subsequently revised by Lebanese jurists to incorporate some provisions of Ottoman and Islamic law and “to reflect local legal culture”.⁴¹² The structure and scope of the Lebanese judicial system is primarily governed by the “Judicial Organisation law”.⁴¹³

⁴¹¹ Dwight F Reynolds, *The Cambridge Companion to Modern Arab Culture* (2015). p.78

⁴¹² *Ibid.* p.79

⁴¹³ Decree Law No. 7855 of 1961 (Lebanon)

Figure 8. Organisation of Courts in Lebanon



Ordinary Courts

Ordinary courts in Lebanon are arranged in a three-tiered hierarchy and are subdivided into criminal and civil departments. At the base of the structure are the courts of first instance (*Ghoraf al-ibtida'iah*), where cases are heard either by a single judge or a three-judge panel. These first instance courts examine all civil, criminal and commercial disputes of minor importance and/or value.⁴¹⁴

Judgments from the courts of first instance can be appealed to the Lebanese Courts of Appeal (*Maḥakem- al-isti'nafiah*), which are also empowered to examine requests for dismissing judges in the lower courts.⁴¹⁵ There are six courts of appeal in the country, located in six different districts (*Moḥafazat*). The courts are composed of specialised chambers, with each chamber presided over by a chief judge. In addition, each court has a public prosecution department headed by an attorney general.⁴¹⁶

The Court of Cassation, (*Maḥkamat al-tamwīz*), located in Beirut, sits at the apex of the ordinary courts and reviews points of law. The Court is comprised of several chambers, and each chamber has a specific jurisdiction headed by a president and two consultative judges.⁴¹⁷ In its entirety, a "First President" heads the Court of Cassation. The Court is entrusted to settle any jurisdictional conflicts arising between:

- Two judicial courts;
- A judicial court and a religious court; and
- Between two religious courts.

The Court also has the authority to object to a final judgment issued by a religious court, its jurisdiction or the merit of the decision.⁴¹⁸ In circumstances

⁴¹⁴ Article 86 Civil Code on Procedure (Lebanon)

⁴¹⁵ Ibid.

⁴¹⁶ Law No. 150 1983 (Lebanon)

⁴¹⁷ Chibli Mallat, "The Lebanese Legal System"

<<http://rocket.asoshared.com/~mallatco/sites/default/files/The%20Lebanese%20Legal%20System.pdf>> accessed 1 November 2017.

⁴¹⁸ The Lebanese Court of Cassation has often intervened in reconciling between individual rights and rights of the religious communities. See "Extending the Power of the Constitutional

of jurisdictional conflict between the administrative and civil jurisdictions, a tribunal is formed called a “Court of Conflict Resolution”. The tribunal is composed of judges from the Cassation Court and the State Council, and solves the issue of competence.⁴¹⁹ The First President of the Court of Cassation also heads a specialised court, the “Supreme Judicial Council” (*Al-Majlis al ‘Adli*),⁴²⁰ which has final and original jurisdiction over sensitive criminal offences of a political nature.

Administrative Court branch

Following the abolition of the Special Administrative Tribunal in Lebanon in 1975,⁴²¹ a new law provided for the establishment of first instance administrative tribunals in each region of the country.⁴²² However, the legal provisions relating to these courts are yet to be implemented.⁴²³ In effect, the only administrative court in the country in operation is the State Council (*Majlis al-Shura*), which sits in Beirut.⁴²⁴ The State Council has five “judicial chambers”⁴²⁵; it supervises and monitors the functioning of administrative courts and also adjudicates administrative disputes.

Religious courts

The Lebanese judicial system includes an elaborate system of religious courts for each confession, and the religious court branch is subdivided according to the State’s officially recognised denominations.⁴²⁶ Ecclesiastical Courts

Council - Catching up with the Global and Arab Changes in Constitutional Justice” (2016) <http://www.cc.gov.lb/en/node/5808>.

⁴¹⁹ See the Lebanese Ministry of Justice website: <https://www.justice.gov.lb/index.php/court-details/21/1>

⁴²⁰ The First President heads the Supreme Council of Justice, the Judicial Council, the General Assembly of the Court of Cassation, the Disciplinary Council for judges and the Supreme Council for prosecuting presidents and ministers. Lebanese Ministry of Justice: <<https://www.justice.gov.lb/index.php/court-details/6/1>>

⁴²¹ Article 144 of Law No. 10343/75 and amended by Law No 227/2000 (Lebanon)

⁴²² Amendment Law No. 227 (2000) (Lebanon)

⁴²³ Lebanese Ministry of Justice: <<https://www.justice.gov.lb/index.php/court-details/20/1>>

⁴²⁴ Created in 1924, and currently regulated by Law No.10434/75 (Lebanon)

⁴²⁵ Lebanese Ministry of Justice: <<https://www.justice.gov.lb/index.php/court-details/20/1>>

⁴²⁶ Article 4 of Legislative Decree No. 60 (1936) recognises the existence of all religions to freely organise and manage their own affairs within the limits set by the law. Furthermore, Article 9 of the National Reconciliation Accord “Ta’ef Agreement” (1989) ensures its citizens freedom of conscience, and grants the heads of legally recognised communities the right to

consist primarily of Christian Courts, and are established by decrees issued by the religious authorities of each Christian denomination.⁴²⁷ These Courts chiefly decide matters related to Personal Status and Family laws. Judges sitting on these courts are religious lay judges and do not have the same status as civil judges, placing them outside the statutes that govern the judiciary and the authority of the High Judicial Council.⁴²⁸ Catholic courts are made up of a unified first instance tribunal for the entire Lebanese territory and one Court of Appeal.⁴²⁹ Final appeals either are presented before the civil division of the Cassation Court, or before the Rota courts in the Vatican.⁴³⁰ Similarly, Christian Orthodox courts have a unified first instance tribunal in each region and one court of appeal for the entire Lebanese territory.⁴³¹ Final appeals may be presented before the civil division at the Cassation Court.

Unlike Ecclesiastical courts, Shari'ah⁴³² and Madhabi Courts⁴³³ can decide on matters relating to succession. For each of the three denominations (Shi'a, Sunni and Druze), there is a first instance tribunal in each district and a separate appeal court in Beirut. Final appeals are heard by the Plenary Assembly of the civil chamber of the Court of Cassation. Judges at Shari'ah Courts are appointed by a decree of the Council of Ministers, but they too are not subject to the authority of the High Judicial Council.

Specialised tribunals

In addition to the religious courts in Lebanon, there are a number of specialised tribunals, including Labour Courts, State Audit Courts, Juvenile Courts, Financial Courts and the Supreme Judicial Council. As described earlier, the

consult an autonomous council, the Constitutional Council, to examine the constitutionality of laws related to personal status, the freedom of belief and religious practice. The Ta'ef Agreement brought a formal end to the Lebanese civil war (1975-1991) and was an amendment to the 1926 Constitution.

⁴²⁷ Law on the Powers of Christian and Jewish Religious Authorities (1951) (Lebanon)

⁴²⁸ Lebanese Ministry of Justice: <<https://www.justice.gov.lb>>

⁴²⁹ Catholic Courts Law No.1 (1991) (Lebanon)

⁴³⁰ Ibid.

⁴³¹ Orthodox Law No. 1 (2003) (Lebanon)

⁴³² Law for Sunni and Shi'a (1963) (Lebanon)

⁴³³ Decree No. 3473 (1960) (Lebanon)

Supreme Judicial Council is a specialised tribunal tasked with reviewing serious crimes of a political nature. Lebanon also has a separate military judicial branch, which deals with matters involving the armed forces.⁴³⁴

Constitutional Council (*Majlis al-dostori*)

The Constitutional Council is described as “an independent constitutional body of judicial nature”.⁴³⁵ The Council was established in 1993 and is tasked with reviewing constitutional challenges as well as challenges relating to electoral matters involving the President of the Republic and Parliamentary elections.⁴³⁶

The Council is a ten-member committee that consists of judges (ordinary, administrative and financial); academics (in law, political science, or administration) and; lawyers.⁴³⁷ Five members are appointed by the Parliament and the other five by the Cabinet.⁴³⁸

The Council has the sole jurisdiction to review the constitutionality of draft laws.⁴³⁹ No other court has the jurisdiction regardless of whether a challenge is based on an indirect or direct claim. In contrast with several Arab states, the powers of the Constitutional Council of Lebanon are limited, particularly in terms of access.⁴⁴⁰ First, the Council cannot act on its own initiative and individuals cannot refer a case to the council, nor can a court in any of the court branches. Those who can file a constitutional review is are the heads of

⁴³⁴ The branch consists of the Military Cassation Court, the Permanent Military Court and courts presided over by individual judges in the Lebanese provinces. Lebanese Ministry of Justice: <<https://www.justice.gov.lb/index.php/court-details/20/1>>

⁴³⁵ Art. 19, Lebanese Constitution 23 May 1926 (Lebanon)

⁴³⁶ Art. 19 the Lebanese Constitution, Law No. 250, 14 July 1993, amended by: Law No. 305, 21: March 1994; Law No. 150, 30 October 1999; Law No. 650, 4 February 2005; Law No. 9 June 2006; Law No. 43, 3 November 2008; and Law No. 242, 22 October 2012 (Lebanon)

⁴³⁷ All members of the constitutional council must have had at least 25 years' experience. Art 3, Law No. 43 of 3 November 2008 (Lebanon)

⁴³⁸ Georgi Azar, 'Lebanon Elections: 17 Appeals Submitted to Constitutional Council' *An-Nahar* (Beirut, 6 June 2018) <<https://en.annahar.com/article/814847-lebanon-elections-17-appeals-submitted-to-constitutional-council>> accessed 9 August 2018.

⁴³⁹ According to Articles 1 and 18 of the law establishing the Council, and Article 1 of its internal statutes.

⁴⁴⁰ See generally Antoine Nasri Messara, “Rapport national du Conseil constitutionnel du Liban” (2017).

the government (President of the Republic, the Prime Minister); the Chief of Parliament, or a minimum of 10 members of Parliament and; the heads of religious communities for challenges involving a religious nature.

Lebanese model: The other end of the Arab judicial spectrum

Lebanon can be characterised as hierarchical to the extent that the country's legal system have two or more judicial pyramids coexisting, forming autonomous subsystems. Administrative cases follow their own appeals structure, while the remaining special courts - ordinary, military and religious - may be appealed to the Court of Cassation. There are also several judicial bodies operating within the ordinary judicial structure of Lebanon.⁴⁴¹ The jurisdictional boundaries of the Lebanese courts, councils and committees are broad in nature, but the law can be appealed before the courts of appeal and finally, before the Court of Cassation. Despite the unique nature of the Lebanese legal system, particularly in relation to the religious branch, it resembles the fragmentation strategy as seen in the French model.

However, the hierarchical model fails to incorporate the institutionalisation of religious courts that in some instances goes beyond the judicial structure. The Ta'ef Agreement that put an end to the second civil war sought to accommodate the several religious groups in the Republic. The organisation of courts in Lebanon is a clear reflection of an attempt to ensure the representation of each religious group in the country – not only in the form of religious courts but also within the secular judicial branches. The Lebanese judicial structure highlights a secular ordinary court system but places emphasis on religious diversity. As opposed to the Saudi judicial structure where religious minorities are subject under the Islamic laws, Lebanese courts have an elaborate system of religious courts for each confessional minority. The mix of hierarchy and fragmentation on the one hand appear, to hinder the

⁴⁴¹ Some of these bodies are regulated under the Urgent Proceedings and Land Court Law No. 186/1926; Arbitration Council Decree No. 54/422; The Customs Committee Decree No. 59/2868; Labour Arbitration Council Labour Law (1946); Expropriation Commissions Law No. 58/1991; Customs Court Customs Law (1974); Court for Liquidation Matters Decree No. 79/1663; and High Banking Committee Decree No. 67/28.

politicisation of the judiciary among the judicial branches to a certain extent particularly in relation to constitutional rights and the limited powers of the Constitutional Council. On the other hand, the Court of Cassation's wide powers in relation to settling jurisdictional issues, particularly in relation to the religious courts may foster politicisation. The Cassation Court is furthermore empowered to create a council for ministers for grave crimes.

Jordan: A quasi unitary – constitutional system

Similar to Lebanon, Jordan's judicial system can be characterised as hierarchical as has two or more judicial pyramids forming autonomous subsystems (Figure 9).⁴⁴² Furthermore, while there courts are divided into three branches, which may appear hierarchical, the branches are not completely separate from each other, as the Court of Cassation is the final court of appeal for all of them.

Jordan is a constitutional monarchy and bases its governance on the 1952 Constitution, its subsequent amendments (including most notably the 2011 amendment following a series of popular unrests) and other laws that establish specialised courts⁴⁴³. Following the promulgation of the Jordanian Civil Code in 1976, Islamic *Hanafi* jurisprudence remains a part of the Code.⁴⁴⁴ Article 99 of the Jordanian Constitution divides courts into three categories: ordinary courts (*Maḥakem al-Nizamyieh*), religious courts (*Maḥakem al-dinīah*) and

⁴⁴² Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002) p.81

⁴⁴³ Another aspect of law widely practiced in (but not exclusive to) Jordan is the exercise of tribal dispute resolution. Although the Jordanian tribal courts were officially abolished in 1976, tribal custom still continues to complement the civil legal system and is subject to state oversight. Tribal customs are undertaken with the agreement and on the initiative of the conflicting parties without the intervention of the state.

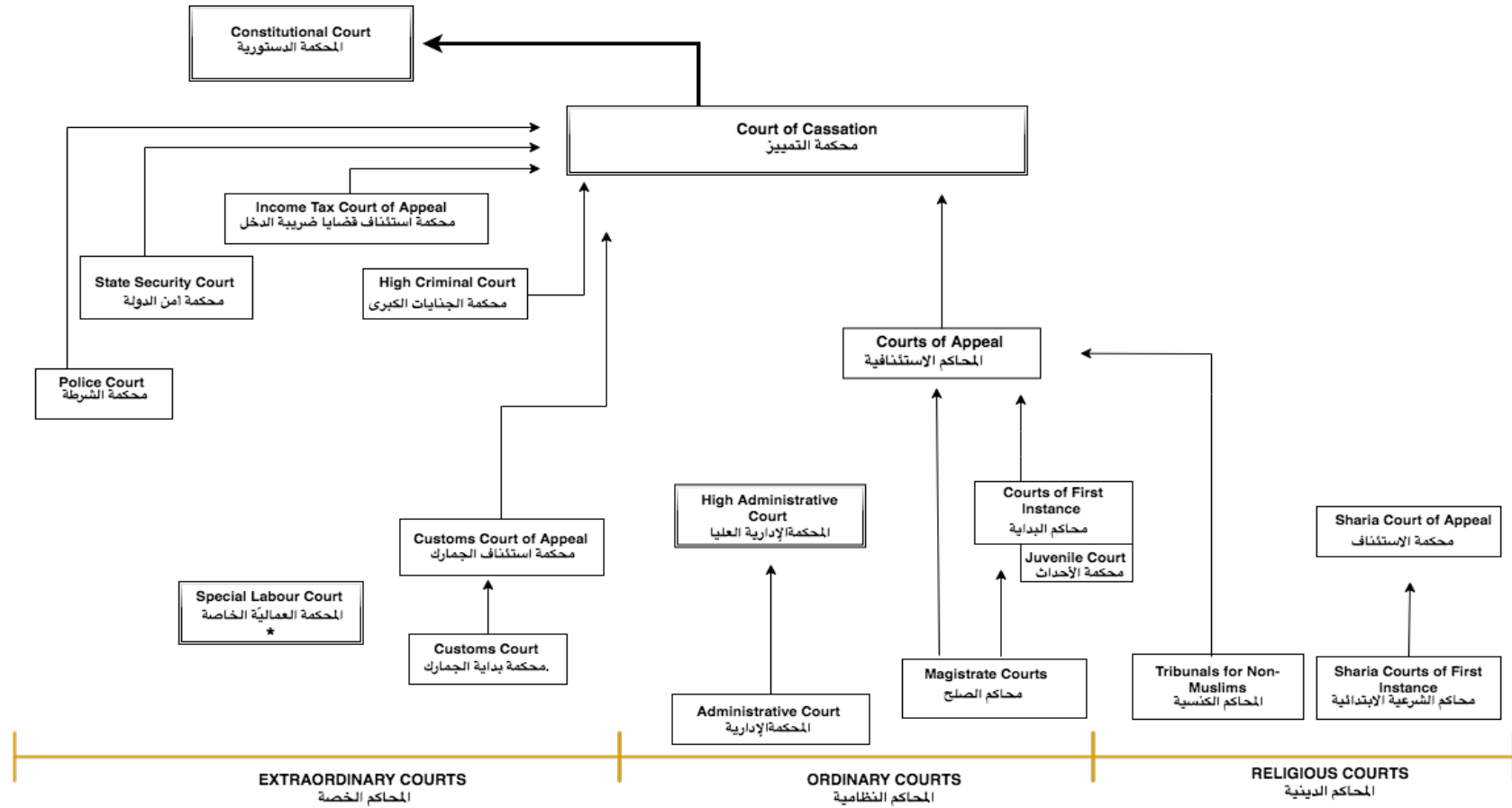
⁴⁴⁴ Saleh writes that the drafters of the Code elevated Islamic jurisprudence "to a more pervading and active role". They, Saleh writes, "have rendered the code unique compared to earlier civil codes of the area by enhancing the position and status of the Sharī'a based on the Mejjelle". Nabil Saleh, "Civil Codes of Arab Countries: The Sanhuri Codes" (1993) 8 Arab Law Quarterly 161. p.164

special courts (*Maḥakem al-khassa*).⁴⁴⁵ Religious courts form part of the special courts.⁴⁴⁶

⁴⁴⁵ Article 99 Jordanian Constitution (1952) and amended in 2012

⁴⁴⁶ Law of non-Muslim religious denominations No. 22/1938 (Jordan); Law of the Composition of Sharīʿa Courts No. 19/1972 and amended in 2001 (Jordan)

Figure 9. Organisation of Courts in Jordan



Ordinary courts

Ordinary courts are three-tiered with the magistrate courts (*Maḥakem al-sulḥ*) and courts of first instance (*Maḥakem al-ebtida'iah*) at the bottom of the judicial hierarchy. The magistrate courts are presided over by one single judge for civil cases and two judges for criminal cases. They adjudicate on all civil, commercial and criminal cases of minor monetary value or possible sentence not exceeding two years. First Instance Courts have also the capacity to act as a primary court of instance for misdemeanour cases, and it receives appeals against magistrate court rulings.⁴⁴⁷

There are three regular courts of appeal (*Maḥakem- al-isti'nafiah*) and two courts of appeal specifically dealing with custom and income tax disputes (*Maḥakem isti'naf al-jamarek*). Each court is presided over by a three-judge panel of civil judges. The courts adjudicate primarily on questions of law and fact and have jurisdiction over appeals submitted against rulings issued by the lower courts.

The Jordanian Court of Cassation (*Maḥkamat al-tamwiz*) is the highest judicial body in the country.⁴⁴⁸ The Court is composed of 24 judges and 67 administrative officers. The President of the Court serves as the country's Chief Justice. All seven judges of the court sit in full panel in cases deemed sensitive or important. For most appeals, however, only five judges rule on the cases. The Court primarily considers appeals of felonies in criminal cases where the law gives a right of appeal, and in civil cases where the sum exceeds a certain amount. The Court may consider cases regardless of amount if deemed complex, concerns the public or authorised by the Chief Justice.⁴⁴⁹

⁴⁴⁷ Article 8, Law on the Establishment of Regular Courts No. 17/2001 (Jordan)

⁴⁴⁸ Law on the Establishment of Regular Courts No. 17/2001 (Jordan)

⁴⁴⁹ Art. 10 Law on the Establishment of Regular Courts No. 17/2001 (Jordan)

The new administrative courts

Until 2014, there was only one administrative court in Jordan, the High Court of Justice.⁴⁵⁰ The Court was abolished by the Administrative Courts Law of 2014 and was replaced with a two-tiered court system for administrative disputes. The new courts are the Primary Administrative Court and the High Administrative Court located in Amman.⁴⁵¹ According to the new law, administrative judges in the two courts fall under the Jordanian Judicial Council and are bound by the same laws as judges in the ordinary and judicial branches.⁴⁵²

Within the ordinary and specialised judicial branches are several autonomous courts, which further diffuses the judicial structure. While decisions of the High Criminal Court and the Juvenile Courts may be appealed to the Court of Cassation, other courts do not have the option of appeal.

Religious courts

Similar to Lebanon, the Jordanian religious courts deal with matters relating to personal status and family law. Each religious denomination has its own court system (except for Christian Protestants whose matters are dealt with by civil courts). Sharīʿa Courts comprise a Sharīʿa Court of first instance and the Sharīʿa court of final appeal. Similarly, Catholic and Orthodox Courts are made up of a first instance and appellate court. Depending on the case at hand, the case may be appealed to any civil court in the ordinary court structure.⁴⁵³

Jordanian Constitutional Court

A recent addition to the special court branch is the Jordanian Constitutional Court, issued by law No. 15 of 2012. Following protests in 2011, King Abdullah

⁴⁵⁰ Article 26(b) Law No. 12/1992 (Jordan)

⁴⁵¹ Law No. 27 /2014 (Jordan)

⁴⁵² Art. 40 Law No. 27 /2014 (Jordan). For a concise description of the Administrative Courts see: Steven Schaaf, "The Administrative Judiciary in Jordan" (American Center of Oriental Research 2017) <<https://www.acorjordan.org/2017/12/21/administrative-judiciary-jordan/>> accessed 8 November 2018.

⁴⁵³ Art. 15, Law of non-Muslim religious denominations No. 22/1938 (Jordan)

II promulgated the constitutional amendments in a decree establishing a new Constitutional Court, with all nine members directly appointed by the King. The Court is described as an independent and separate judicial body, and it oversees the constitutionality of laws.⁴⁵⁴ The Court of Cassation is the only judicial body entrusted with the exclusive power to raise the question of constitutionality.⁴⁵⁵ Similar to several European constitutional courts, the Jordanian Constitutional Court may be described as having a hybrid role between justice and politics in which the “guardians are mainly chosen by the very institutions they have to guard”.⁴⁵⁶

Somewhat similar to Lebanon, Jordan can be characterised as hierarchical to the extent that its court system has two or more judicial pyramids coexisting alongside each other. Albeit separate, the judicial pyramids are not entirely autonomous from each other and it appears that cases from these judicial branches can be a matter for the ordinary civil courts, particularly the Court of Cassation.

Arab judicial structures and the political significance of courts

Continental European systems usually have clear divisions between ordinary, administrative and specialised courts with the purpose of containing the potential reach for judicial-decision making. In the French model, the judiciary is not intended to limit the power of the popular majority. According to Guarnieri and Pederzoli, popular sovereignty and parliamentary supremacy, instituted in the wake of the French Revolution, were intended to act as powerful checks over external controls over legislation, particularly for judiciaries:

“continental systems have often presumed that the judiciary itself is a power to be checked. The memory of the abuses committed by the courts of the *ancient régime* and the general fear of ‘government by judiciary’ have helped to shape constitutional

⁴⁵⁴ Art. 4, Law Creating the Constitutional Court No. 15/2012 (Jordan)

⁴⁵⁵ Nimer Sultany, *Law and Revolution: Legitimacy and Constitutionalism after the Arab Spring* (First edition, Oxford University Press 2017), p 271

⁴⁵⁶ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002) p 138

frameworks based on a rigid separation of powers, rather than on checks and balances”.⁴⁵⁷

In addition, a limited court jurisdiction may also be the result of the executive branch seeking to reduce the potential impact of judicial decisions. The more fragmented the judicial system, the more likely courts are to be “politically neutralised”.⁴⁵⁸ Solomon calls this type of executive control the “Spanish Solution”; during the later decades of the Franco regime, ordinary courts were independent because they lacked power and the government created a special set of tribunals staffed with politically appointed judges.⁴⁵⁹

Regardless of any formally stated goals, the creation of a separate autonomous set of courts inevitably curtails the scope of “ordinary” courts, especially over politically sensitive issues.⁴⁶⁰ Although this type of jurisdictional fragmentation is typically attributed to continental European judiciaries, similar patterns are found in the Arab context. The Arab judicial systems covered in this chapter roughly resemble the European continental judicial systems, with separate and autonomous judicial pyramids. Considering the historical influence of the French civil law model on the region (particularly during the late 18th to 19th century), it is perhaps not surprising that the following characteristics are (to varying degrees) visible in the judicial systems of Egypt, Jordan, Lebanon and Saudi Arabia:

- A three-tiered hierarchy of ordinary courts hearing both criminal and civil cases;
- A set of separate administrative courts, dividing the judicial community; and
- Specialised courts for issues that are considered to be exceptional (religious, military or national security).

⁴⁵⁷ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002), p 88–89.

⁴⁵⁸ Peter H Solomon, “Courts and Judges in Authoritarian Regimes” (2007) 60 *World Politics* 122. p.126

⁴⁵⁹ *Ibid.*

⁴⁶⁰ Quoted from Guarnieri, C. “L’ordine pubblico e la giustizia penale”, in R. Romanelli (ed.) *Storia dello Stato in Italia*. Rome: Donzelli, 367.

However, reviewing *how these characteristics are manifested* in each of the four Arab judicial systems helps to explain why the nature of the judicial system in each country can have a bearing on the political significance of courts.

Centripetal and Centrifugal Dynamics: Judicial Review

As described in the beginning of this chapter, in Western democracies the organisation of courts has been described by two judicial system models: coordinate and hierarchical systems. The difference between the two models relate to the system's internal dynamics and the role supreme courts play in ensuring consistency in judicial decisions. According to Guarnieri and Pederzoli, a centrifugal dynamic often described as a feature of continental judicial systems, tend to promote autonomy of lower and intermediate courts and thereby reduces the internal consistency of the judiciary as a whole. While this may undermine the certainty of law and the coherence of the system, such "pluralist jurisprudence" may also strengthen the perception that individual and lower-ranking judges are impartial and less influenced by supreme court ruling.⁴⁶¹ This in turn may enhance the political significance of individual judges. In contrast with a centrifugal dynamic are judicial systems that have a strong decision-making court at the top have a **centripetal dynamic** which may increase the political significance of the judiciary. This dynamic is often represented by the English and American judicial systems.

One way in which the centripetal dynamic of a judicial system is manifested relates to judicial review of legislation. Generally, the most visible difference between European continental and Anglo-American court systems relates to judicial review, "which in continental Europe is entrusted to separate constitutional courts" and tends to be limited.⁴⁶² According to Guarnieri and Pederzoli, at least three elements need to be taken into account in order to assess whether the institutional position of organs entrusted for judicial review have scope for politicisation:

⁴⁶¹ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002), p.81

⁴⁶² Ibid.

- Whether constitutional adjudication is “centralised” or “diffused”;
- The actors allowed to initiate constitutional litigation and the instruments available to them and;
- The point at which constitutional adjudication can be initiated, i.e. whether the review is *a priori* or *a posteriori*.⁴⁶³

In Western legal systems, the differences between centralised and diffuse review often relate to the divisions between the common and civil law legal traditions. In several civil law jurisdictions, centralised review is entrusted to a single and separate court “in order to remove inherently political issues from ordinary courts”.⁴⁶⁴ By contrast, “diffuse review” is spread across the entire judicial system and all courts can declare a law unconstitutional. This type of review is represented by the U.S court system where any court can review legislation on the basis of constitutionality. However, only the U.S Supreme Court has the power to null and declare a law void.

The second element relates to accessibility and what actors are allowed to present challenges directly before the constitutional courts. At least three forms of access are important for the political significance of courts. The first relates to “incidental proceedings” where litigants may challenge the constitutionality of the law applied in their case. In these circumstances, the court in which the dispute is being heard must assess whether there are sufficient grounds to refer the challenge to the constitutional court. According to Guarnieri and Pederzoli, this approach allows the ordinary judiciary to become “an unavoidable part of the process of constitutional review”⁴⁶⁵, even if the initial purpose was to confine constitutional issues to a separate specialised court:

“[O]rdinary courts may raise constitutional issues on their own volition in the course of a particular case, and such proceedings can then become a vehicle for ‘judicial politics’. By asking for a constitutional court ruling, such actions can be a means of

⁴⁶³ Ibid.

⁴⁶⁴ Ibid. p.143.

⁴⁶⁵ Ibid. p.144

promoting the personal values of individual judges and even those of their reference groups.”⁴⁶⁶

The third element which indicates the degree to which judges may intervene in the political process relates to the point in time where review may be initiated. Courts that have *a priori* review can only review legislation in a short time span between the law’s passage by parliament and its promulgation whereas *a posteriori* review allows for the constitutional court’s intervention to review and validly enacted laws on the basis of constitutionality.⁴⁶⁷ For instance, the French Conseil Constitutionnel can only engage in *a priori* review (e.g. review the law’s passage by parliament but before it is promulgated by the President of the Republic).⁴⁶⁸ By contrast, *a posteriori* review allows for a greater scope of political intervention because the constitutional court can protect constitutional rights against their alleged violation by a validly enacted law.

Constitutional and judicial review in Egypt, Jordan, Lebanon and Saudi Arabia

The four Arab countries studied in this research demonstrate differences in relation to constitutional and/or judicial review. The most visible differences relate to the three elements of constitutional review discussed above. With the exception of Saudi Arabia, all countries assessed here have constitutional courts in the legal system. These are presented in Table 9 below.

⁴⁶⁶ Ibid.

⁴⁶⁷ Ibid. p.143

⁴⁶⁸ Ibid. p.89

Table 10. Characteristics of Constitutional courts/councils in Egypt, Jordan, Lebanon and Saudi Arabia

	Egypt	Jordan	Lebanon	Saudi Arabia
	Supreme Constitutional Court	Jordanian Constitutional Court	The Constitutional Council	N/A
Created	1979	2012	1993	N/A
Number of members	Ten, all of which are judges	Ten sitting members (Cassation judges, professors of law, and senior lawyers) ⁴⁶⁹	Ten-member committee (judges, academics and lawyers)	N/A
Appointment	Since 2017, SCC selected its own chief justice and other justices, and even decides how many justices will serve on the court. ⁴⁷⁰	Directly appointed by the King	Five members appointed by Parliament and five members by the Cabinet	N/A
Type of judicial review	<i>A posteriori</i>	<i>A posteriori</i>	<i>A priori</i>	<i>Decentralised judicial review</i>
Direct appeal by individuals	Partly	No	No	Yes
Indirect appeal through judiciary	Yes, cases transferred from courts of merit	Courts can only refer through Court of Cassation	No	Yes
Institutions able to initiate review	Courts of merit	The Court of Cassation, the Senate, the House of Representatives and the Council of Ministers	The President of the Republic, the Chief of Parliament, the Prime Minister, at least 10 MPs and the heads of religious communities	All courts

⁴⁶⁹ Art 6, Law Creating the Constitutional Court No. 15/2012 (Jordan)

⁴⁷⁰ Law No. 13 of 2017 amending Law No. 46 of 1972, 5 Oct. 1972 “Judicial Authority Law” (Egypt). See Chapter 5 for a fuller discussion of this implication.

In Egypt, the SCC can engage in a *posteriori* review, which allows the constitutional court to review validly enacted law.⁴⁷¹ This power, absent in the French context, accords constitutional courts greater scope for political intervention. According to Sultany, this renders Egypt one of the “most developed instances of judicial review in the Arab world.”⁴⁷²

Although not as pervasive as in Egypt, the powers of the Jordanian Court of Cassation appear wide. Decisions rendered by the Jordanian State Security Court are subject to appeal before the Jordanian Court of Cassation,⁴⁷³ and the Court of Cassation has a gate-keeping role in relation to constitutional challenges. The Court of Cassation is the only judicial body empowered to assess whether there are grounds to refer a case to the Jordanian Constitutional Court. This suggests a possibility in which the Court itself may

⁴⁷¹ One notable example relates to the recent legal and political controversy with regards to the executive’s decision to transfer the sovereignty of the strategically important Islands of *Sanafir* and *Tiran* to Saudi Arabia in 2016. The decision sparked a judicial controversy and involved the Ordinary and Administrative Courts and the SCC. Since the executive decision was made public, the various courts have adjudicated on the legality of the decision with court cases filed back and forth across the judicial branches. The recent judgment of the SCC put an end to the case, which has been described as a “tense, multilayered political and legal battle that has been waged in both the [ordinary] and administrative court systems.” The SCC ruled in favour of the executive decision and wrote that: “no judicial body should interfere in the procedures for the conclusion of treaties. Once a treaty is issued and has passed into law, judicial oversight then falls under the purview of the SCC”. “Tiran and Sanafir: Developments, Dynamics, and Implications” <<https://timep.org/wp-content/uploads/2017/08/Tiran-and-Sanafir-Developments-Dynamics-and-Implications-web.pdf>> accessed 1 September 2018.

⁴⁷² Nimer Sultany, *Law and Revolution: Legitimacy and Constitutionalism after the Arab Spring* (First edition, Oxford University Press 2017), p.93

⁴⁷³ The military court also prosecutes military personnel for all categories of offenses. See Maya Mansour and Carlos Daoud, “The Independence and Impartiality of the Judiciary-Lebanon” (Euro-Mediterranean Human Rights Network 2010) <http://www.constitutionnet.org/sites/default/files/the_independence_and_impartiality_of_the_judiciary_in_lebanon.pdf> accessed 5 January 2016.

For instance, in 1993, the Court of Cassation reversed a State Security Court judgment on the grounds that their confessions were abstracted under torture: Decision No. 74/1994 of the Court of Cassation, issued on 13 March 1995. The case related to a decision of the State Security Court convicting a group of army cadets of conspiring to murder the late King Hussein Bin Talal. See Sufian Obeidat, “Rule of Law Quick Scan Jordan” (The Hague Institute for Innovation of Law (HiIL) 2012) <http://www.hiil.org/data/sitemanagement/media/QuickScan_Jordan_191212_GK.pdf> accessed 3 June 2015.

become a vehicle for judicial politics: “by asking for a constitutional court ruling, such actions can be a means of promoting the personal values of individual judges and even those of their reference groups”.⁴⁷⁴ By virtue of its direct access to the Constitutional Court, the Court of Cassation constitutes a direct channel into Jordanian politics.

In contrast, the Lebanese Constitutional Council, although described as judicial, is separated from the legal system and access to it is limited. According to Messarra (a member of the Lebanese Constitutional Council), despite efforts by the Council, the powers of the Council are constrained; which is contrary to the general trend in the world and even in the surrounding Arab countries.⁴⁷⁵ Constitutional adjudication in Lebanon is likened to the French *Conseil Constitutionnel*, in that its powers are narrow (abstract review only) and constitutional challenges cannot be initiated by citizens. Despite this, judicialisation may still be fostered through the Constitutional Council. As Shapiro notes in the French context, abstract review has in the French context, enabled the transfer of political conflicts from the Parliament to the judiciary which has tended to act “as a true third chamber”.⁴⁷⁶ According to Guarnieri and Pederzoli, this has changed the relationship dynamic between parliamentary forces:

“The mere possibility, if not the open threat, that a law will be referred to the *Conseil Constitutionnel* has forced the parliamentary majority to pay much more attention to legal implications when drafting bills in order to head off potential constitutional challenges”.⁴⁷⁷

⁴⁷⁴ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002) p. 144.

⁴⁷⁵ “[L]es attributions limitées du Conseil constitutionnel du Liban, contrairement à la tendance générale dans le monde et même dans les pays arabes environnants, et malgré des efforts constants et confirmés du Conseil, ne favorisent pas la promotion et l’extension de l’Etat de droit.” Antoine Nasri Messara, “Rapport national du Conseil constitutionnel du Liban” (2017)., p.14-15

⁴⁷⁶ Martin M. Shapiro, “Judicial Review in France” (1989) 6 *J.L. & Pol.*, p.538

⁴⁷⁷ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002) p.145.

In Lebanon, constitutional challenges raised by both the Parliament and the executive have changed the political landscape. The possibility that a law may be referred to the Council means more attention is paid to constitutional issues and political discourse increasingly adopts legal language.⁴⁷⁸ As discussed in Chapter 1, one of the key indications of judicialisation according to Vallinder is when non-judicial decision-making forums become dominated by legal/judicial terminology, rules and procedures.⁴⁷⁹

Unlike other Arab countries, Saudi Arabia does not have a formal written constitution. Instead, the Saudi government adopted basic laws in 1993 where the judicial, executive and regulatory authorities “cooperate in the performance of their functions” and where “the King is the ultimate arbiter for these Authorities”.⁴⁸⁰ Unlike other Arab countries that have constitutional provisions that declare Islamic Sharī‘a as a source of legislation, governance in the Kingdom is based on Islamic Sharī‘a and Shura (consultation).⁴⁸¹ Courts apply rules of the Islamic Sharī‘a in cases that are brought before them, according to the sources of Islamic law.⁴⁸² At the top of the legal system is the King, who acts as the final court of appeal and as a source of pardon.

⁴⁷⁸ One recent example relates to the parliamentary elections held on 6 May 2018, where 17 appeals were submitted to the Constitutional Council seeking to overturn the electoral results. See Georgi Azar, “Lebanon Elections: 17 Appeals Submitted to Constitutional Council” *An-Nahar* (Beirut, 6 June 2018) <<https://en.annahar.com/article/814847-lebanon-elections-17-appeals-submitted-to-constitutional-council>> accessed 9 August 2018.

⁴⁷⁹ C Neal Tate and Torbjorn Vallinder, *The Global Expansion of Judicial Power*. (NYU Press 1995) p.13.

⁴⁸⁰ “The Authorities of the State consist of: The Judicial Authority; The Executive Authority; The Regulatory Authority. These Authorities will cooperate in the performance of their functions, according to this Law or other laws. The King is the ultimate arbiter for these Authorities” Art. 44, No: A/90, “Basic Law of Governance”, 27th Sha’ban 1412 H (1 March 1992)

⁴⁸¹ Article 8 states that: “Governance in the Kingdom of Saudi Arabia is based on justice, Dhura (consultation) and equality according to Islamic Sharī‘a.” In the other three countries in this study, the importance of Sharī‘a law is different. For example, Article 2 of the Egyptian Constitution (2014) provides that “The principles of Islamic Sharī‘a are the principal source of legislation”. Article 2 of the Jordanian Constitution (1952 and its amendments through 2016) states that Islam is the religion of the State. Islamic Sharī‘a, however, is a matter for the specialised Sharī‘a courts for Muslims. (Article 103). In Lebanon, Article 9 of the Constitution guarantees absolute freedom of religion and conscience (1926 and its amendments through 2004).

⁴⁸² Art. 48 “Basic Law of Governance” (Saudi Arabia)

According to Al-Jarbou, constitutional review in Saudi Arabia does not follow a decentralised model in which all courts participate in constitutional review.⁴⁸³ Nor does it follow a centralised model, where review is exercised by a separate constitutional court.⁴⁸⁴ Statutes and laws cannot be directly challenged before the Sharīʿa Courts or the Administrative Courts. Despite this, a form of judicial review exists by virtue of the powers of Sharīʿa and the ability of the Administrative Courts to apply and review Sharīʿa law. According to Al-Jarbou, this is a form of judicial review exercised by courts “to maintain the supremacy of the Islamic Sharīʿa.” Saudi courts have no powers to nullify laws or regulations: “They may only notify the legislative authority vested jointly in the King, the Council of Ministers and the Shura Council, and recommend amending the regulations.”⁴⁸⁵

A centrifugal dynamic can be said to exist in Saudi Arabia by virtue of the unique nature of the law applied in the two court systems and the available judicial tools. As described earlier, the nature of *ijtihad* tends to reduce the internal consistency of the judicial system as a whole. The recent judicial reforms have sought to change this by introducing separate courts that apply codified laws. For the Sharīʿa and Administrative courts, however, this may undermine the certainty of law and the coherence of the system as a whole by virtue of a “pluralist” jurisprudence. With regards to the political significance of judges, individual and lower-ranking judges are afforded more autonomy and are less influenced by the Saudi Supreme Court who in theory acts as an advisor.

Summary

The purpose of this chapter has been to highlight key features in these four Arab judicial systems where the political significance of courts may be

⁴⁸³ Ayoub M. Al-Jarbou, “Judicial Independence: Case Study of Saudi Arabia” (2004) 19 Arab Law Quarterly 5, p.50

⁴⁸⁴ Ibid.

⁴⁸⁵ Ibid.p 51

promoted based on court jurisdiction and the relationship between courts. The chapter is largely based on a formal legal analysis of judicial structures, interpreted in the light of existing theories of judicialisation. The next chapter explores more judge-specific aspects of the judicial systems in the Arab region, particularly the way judges are selected and trained, and how their careers are managed. This is the second element that may help to explain the political significance of judges in the Arab region.

Chapter 6. Arab judges: selection, career and status

This chapter describes socialisation patterns of judges in Egypt, Jordan, Lebanon and Saudi Arabia. Socialisation patterns are important forms of control exercised by the judicial systems in each country. The forms of institutional controls may, in turn, constrain judicial activism and affect the role perceptions of Arab judges.

In this chapter, focus is placed on four types of socialisation patterns for Arab judges: (1) judicial selection and recruitment; (2) judicial training; (3) career advancement and (4) judicial discipline and sanctions. As well as official laws and secondary materials that set out the judicial selection and career advancement process, this chapter includes information gathered directly from Arab judges about their personal experiences of selection and training as part of the Arab Judges Survey conducted for this thesis. The analysis in this chapter will in turn provide a basis for exploring judicial role perceptions of judges in the four countries in subsequent chapters.

Judicial socialisation from within

Alpert, Atkins and Ziller define socialisation for judges as “the adjustment to life on the bench, including the adoption of new roles in response to new environmental demands.”⁴⁸⁶ It is a form of adaptation where the judge is integrated into the judicial organisation. In this regard, socialisation is understood from an institutional aspect: the institution that the individual enters into has a set of mechanisms aimed at assimilating him/her. The individual is conceived as a recipient, where a set of institutionally prescribed behaviours

⁴⁸⁶ Alpert, Lenore, Burton M. Atkins and Robert C. Ziller, “Becoming a Judge: The Transition from Advocate to Arbiter” (1979) 62 *Judicature* 325, p.325.

are induced.⁴⁸⁷ At the individual level, conformity to the “collective reality” of judges often stems from a social obligation or professionalisation.⁴⁸⁸

Furthermore, it might be in the individual judge’s self-interest to conform to the behaviour of the organisation.⁴⁸⁹ For example, disregard of well-established rules set by the judiciary may alienate judges who fail to conform to the rules and may hamper ambitions of career advancement or, in worse cases, result in sanctions.⁴⁹⁰ The institutional norms that guide judges may furthermore affect the *willingness* of judges to intervene in the political process.⁴⁹¹ Glick suggests that criticism by colleagues, legal organisations and other groups can be viewed as sanctions “which limit the adventures of certain judges”.⁴⁹²

⁴⁸⁷ Jennifer H Waldeck and Karen K Myers, “Organizational Assimilation Theory, Research, and Implications for Multiple Areas of the Discipline: A State of the Art Review” (2007) 31 *Annals of the International Communication Association* 322, p.324.

⁴⁸⁸ See generally: Kimberly A Wade-Benzoni and others, “Barriers to Resolution in Ideologically Based Negotiations: The Role of Values and Institutions” (2002) 27 *Academy of Management Review* 41.

⁴⁸⁹ Whether judges obey a social norm generally depends on two types of expectations: empirical and normative. Empirical expectations relate to the individual judge’s expectation that the norm is to be followed by the majority of judges in the appropriate circumstances. Empirical expectations to conformity are necessary but may not be a sufficient or compelling reason for individual compliance. According to Biccheri, this is because social norms usually prescribe behaviour that may be in conflict with narrow self-interested motives. For judges, a straightforward reason may relate to career advancement. This introduces the second type of expectation, that is a normative expectation which involves the individual judge’s belief that he/she has an obligation to comply. Provided empirical and normative expectations are met, individuals must in addition have a conditional preference for following a particular norm. For some individuals, recognising the legitimacy of others’ expectations might be enough (when combined with empirical expectations) to induce a preference for conformity. Others might require further inducements, such as the threat of sanctions by those who expect and want their conformity, such as the judicial collective. See Cristina Bicchieri and Erte Xiao, “Do the Right Thing: But Only If Others Do So” (2009) 22 *Journal of Behavioral Decision Making* 191.

⁴⁹⁰ Henry Robert Glick, *Judicial Role Perceptions and Behavior: A Study of American State Judges* (PhD Tulane University 1967) p.248.

⁴⁹¹ Guarnieri and Pederzoli for example relate this to the degree of independence judges enjoy within the system. For the authors, it is impossible to speak of judicial intervention in the political process without judicial independence. Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002) p.18.

⁴⁹² Henry Robert Glick, *Judicial Role Perceptions and Behavior: A Study of American State Judges* (PhD Tulane University 1967), p.248.

Two distinct patterns of judicial selection and recruitment

To become a judge generally requires the approval of the judicial system. Biddle calls this a social selection, where the organisation exercises a degree of control over those who are allowed entry.⁴⁹³ Entry requirements, such as educational qualifications and work experience, are “filters” that are put in place and are especially relevant for roles in a society that are considered important and difficult to perform, like judging.⁴⁹⁴

A distinction is generally made between two patterns of judicial recruitment: the “**bureaucratic model**” and the “**professional model**” of recruitment, often represented by the continental European (civil law) and Anglo-American (common law) respectively.⁴⁹⁵

The bureaucratic model tends to recruit members into the judiciary with little or no prior professional experience. Candidates enter the competition shortly after graduation from law school, and are selected through written and oral examinations aimed at testing their legal knowledge.⁴⁹⁶ In theory, socialisation under this model is achieved almost exclusively from within: candidates are generally young and inexperienced. Upon entry, they will learn the required norms and approved organisational behaviours in order to effectively participate in the judiciary.⁴⁹⁷ Candidates are placed at the bottom of the judicial pyramid, and are regularly supervised by senior judges who exercise a degree of power over their professional status. Furthermore, professional training and experience are often acquired within the judicial organisation, where judges are expected to remain until their retirement.⁴⁹⁸

⁴⁹³ Bruce J Biddle, *Role Theory: Expectations, Identities, and Behaviors* (Academic Press 1979) p.316.

⁴⁹⁴ Ibid.

⁴⁹⁵ See generally Mirjan R Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale Univ Press 1986).

⁴⁹⁶ C Neal Tate and Torbjörn Vallinder (eds), *The Global Expansion of Judicial Power* (New York University Press 1995) p.158.

⁴⁹⁷ Giuseppe Di Federico, “The Italian Judicial Profession and Its Bureaucratic Setting” (1976) Part 1 *Law Journal of Scottish Universities* pp. 40, p.47.

⁴⁹⁸ Ibid.

By contrast, in the professional model, entry into the judiciary is usually confined to individuals with an extensive amount of prior legal professional experience, which means that those who become judges are often at the middle to end of their careers in legal practice. Although a degree of “re-socialisation” can occur within the judiciary, these individuals are more likely to bring values and experiences from outside the judiciary into their working life as judges, and continue to maintain ties with their former colleagues in the legal profession.⁴⁹⁹

Judicial recruitment in Egypt, Jordan, Lebanon and Saudi Arabia

The judicial systems in Egypt, Jordan, Lebanon and Saudi Arabia include elements of both the professional and bureaucratic models. In all the four countries, young inexperienced individuals as well as individuals with extensive legal experience may be admitted to the bench. Value is placed on previous professional legal experience such as legal advocacy and legal scholarship. In each country, Judicial Councils formally govern judicial recruitment, transfer, discipline and career. In practice, however, judicial selection also involves other actors external to the judicial branch. The following sections describe the methods of recruitment and training in each of the four jurisdictions based both on official laws and evidence of what actually happens in practice obtained from empirical research.

Formal and informal judicial selection requirements

Table 10 below sets out the official qualifications and entry requirements for judges in each of the 4 Arab jurisdictions. All require formal legal qualifications and have age restrictions.

⁴⁹⁹ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002), p 20.

Table 11. Entry requirements to the judiciary in Egypt, Jordan, Saudi Arabia and Lebanon

	Age restriction	Educational Requirement	Exam	Probation
Egypt ⁵⁰⁰	Not younger than 30	Bachelor's degree in Law and the license to practice law	No	No
Jordan ⁵⁰¹	Not older than 40	Bachelor's degree in law and license to practice law, or an awarded Judicial Diploma	Yes	Yes
Saudi Arabia ⁵⁰²	Not younger than 22	Bachelor's degree in Law	No	Yes
Lebanon	Not older than 35	Bachelor's degree in Law	Yes	Yes

However, the official process of judicial selection and recruitment in the four countries provides for only a partial picture. In addition to formal requirements, entry into the judiciary is also facilitated (or impeded) by extra-legal backgrounds, status and personal relationships with those who can influence the decision-making process. The judiciary may exercise certain forms of control by requirements or practices that are not made explicit. Individuals that belong to a particular social group, for example, may find it easier (or more difficult) to be selected to the judiciary.

Egypt: Quasi professional and bureaucratic judiciary

The approach to judicial appointment in Egypt is neither strictly bureaucratic, nor strictly professional. Judicial recruitment in Egypt reveals a hybrid system with a strong preference for individuals who have prior prosecutorial experience. To a certain extent, Egypt is similar to Italy and France where judges and members of the public prosecution coexists within the same organisation,⁵⁰³ and judges and prosecutors can move between the two

⁵⁰⁰ Art. 38 of Royal Decree No. M / 78, date 19/9/1428 "Law of the Judiciary" (Saudi Arabia)

⁵⁰¹ Art. 10 of Law No. 15 of 2001 "Independence of the Judiciary Law" (Jordan)

⁵⁰² Art. 31 of Royal Decree No. M / 78, date 19/9/1428 "Law of the Judiciary" (Saudi Arabia)

⁵⁰³ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002), p 66.

professions.⁵⁰⁴ Law graduates that join the Egyptian Public Prosecution are eligible for judicial appointment once they reach the age of thirty,⁵⁰⁵ and judges are free to work as public prosecutors even after they have worked in the judiciary.

There are no public competitions or examinations to become a judge in Egypt. Applicants are required to submit a written dossier that sets out their educational, professional and social background. Once checked and cleared by security organs⁵⁰⁶, applicants are invited for an interview with the Judicial Council's "Seven Board Committee".⁵⁰⁷ Those that pass the necessary requirements are appointed by the Judicial Council (followed by a Presidential decree).⁵⁰⁸ For administrative judges, the State Council is in charge of appointments with a similar procedure of dossier submission followed by an interview. In addition, there are also lateral forms of judicial recruitment in Egypt; the Judicial Authority Law requires that a quarter of judges in Egypt are appointed without any prior prosecutorial experience but with previous legal experience.⁵⁰⁹

In practice, according to Sultany, judicial appointments in Egypt are based on connections rather than just formal qualifications and merit. Such connections include "hereditary judicial offices" where judges "bequeath" their judicial office

⁵⁰⁴ This also applies to prosecutors wishing to become judges. See Art. 15 of Law No. 46 of 1972, 5 Oct. 1972 "Judicial Authority Law" (Egypt).

⁵⁰⁵ In the Survey conducted for this research, one Egyptian judge explained that "one of the path[s] to become a judge in Egypt is to first be appointed as a public prosecutor and when you reach age of 30 you get the post of a Judge". Comment from Judge 2081484 (Arab Judges Survey).

⁵⁰⁶ According to Al-Hajjaj, the National Security Agency investigates candidates' and their families' political affiliations. Moreover "The SJC and the Ministry of Justice practice a zero-tolerance policy regarding political history, specifically with regard to any affiliation with Islamist or liberal parties or groups". Shams Al Din Al Hajjaji, "The Dilemma of Judicial Appointment in Egypt Questions of Gender Equality, Elimination of Political Opposition and Underprivileged Citizens" (2018) 11 *DePaul Journal for Social Justice*.

⁵⁰⁷ The "Seven Board Committee" [*Lagna-al-Sobaiya*] consists of Egypt's most senior judges, including two of the most senior prosecutors and is presided over by the Chief Justice of the Court of Cassation. See Art. 77 of Law No. 46 of 1972, 5 Oct. 1972 "Judicial Authority Law" (Egypt)

⁵⁰⁸ Ibid.

⁵⁰⁹ Ibid.

to their relatives.⁵¹⁰ The preference for individuals from favourable social and economic backgrounds has also been reflected in public statements made recently by two former Egyptian Ministers of Justice, Mahfouz Saber, and his successor, Ahmed el-Zind. In 2015, Saber publicly stated that the judiciary was not a suitable career option for the “offspring of rubbish collectors and other modest occupations” because “a judge must hail from an appropriate environment”.⁵¹¹ His successor as Minister, Ahmed el-Zind, has also been reported to favour individuals from a particular social standing. According to Hendawi, the now former Minister has defended a “decades-old practice” that favours and prioritise children of judges and other members of the judiciary.⁵¹²

Lebanon: largely bureaucratic judiciary

Judicial recruitment in Lebanon aligns itself closer to the European continental bureaucratic model, even though some lateral forms of recruitment exist. Most judges in Lebanon are recruited at a very early age by examination⁵¹³ run by a board of examiners of the Judicial Council.⁵¹⁴ This board, made up exclusively of judges,⁵¹⁵ reviews applications and invites successful applicants to take a written examination, followed by an interview. For candidates that apply to administrative judicial posts, similar procedures apply except that the relevant body in charge is replaced by the Council of State. Occasionally, a lateral form of recruitment exists where candidates are chosen from the

⁵¹⁰ Nimer Sultany, *Law and Revolution: Legitimacy and Constitutionalism after the Arab Spring* (First edition, Oxford University Press 2017) p.165.

⁵¹¹ Khaled Diab, “Egypt’s Justice Minister Tells It like It Is” *Al Jazeera* (12 May 2015) <<https://www.aljazeera.com/indepth/opinion/2015/05/egypt-justice-minister-mahfouz-saber-150512115245779.html>> accessed 8 November 2018.

⁵¹² “Anti-Brotherhood Judge Named Justice Minister” *San Diego Union Tribune* (20 May 2015) <<http://www.sandiegouniontribune.com/sdut-anti-brotherhood-judge-named-justice-minister-in-2015may20-story.html>> accessed 8 November 2018. Anecdotal evidence suggests that the dossier application is devised in order to help with the selection of candidates from favourable social and familial backgrounds. Comments from several judges that took part in an exploratory stage of this research suggested that this practice was also visible in relation to lateral recruitment, where positions are often allocated to individuals that have connections within the judiciary.

⁵¹³ Individuals with a doctorate in law are exempt from the general entrance examinations. Article 68 of Decree Law No.150/83 (Lebanon)

⁵¹⁴ Art. 59 Ibid.

⁵¹⁵ Art. 60 Ibid.

members of the Lebanese Bar.⁵¹⁶ One Lebanese Appeal Court judge, who had been a practicing lawyer before being recruited this way, described his selection process as a “tough examination”.⁵¹⁷

In practice in Lebanon, the selection of judges is also dependent on the religious denomination of the candidate.⁵¹⁸ If a certain religion or sect is under-represented in the judiciary, a candidate’s religion will be considered in the selection process. This reflects the sensitive nature of power sharing between the Muslim, Druze and Christian communities.⁵¹⁹

Jordan: interweaved bureaucratic and professional judiciary

Unlike the Egyptian and Lebanese judicial recruitment process, it appears that there is an equal opportunity for both inexperienced law graduates and experienced legal professionals to enter the Jordanian judiciary. Judges in Jordan are officially appointed by a royal decree, but the appointment process is overseen and managed by the Judicial Council.⁵²⁰ For those that are recruited without any legal practice experience (bureaucratic model), applicants are required to have obtained at least a bachelor’s degree in law.⁵²¹ An application form is submitted where the candidate is required to list three references. If successful, applicants are invited to take an entry examination. Those that are recruitment from practice (professional model) must be

⁵¹⁶ It is a practice occasionally exercised by the Judicial Council to fill vacant judicial positions due to retirement or resignation.

⁵¹⁷ Comment from Judge 2077935 (Arab Judges Survey)

⁵¹⁸ “The Lebanese High Judicial Council in Light of International Standards” (2017) Briefing paper <<https://www.icj.org/wp-content/uploads/2017/03/Lebanon-Memo-re-HJC-Advocacy-Analysis-Brief-2017-ENG.pdf>> accessed 2 August 2018. See also Antoine Nasri Messara, “Rapport national du Conseil Constitutionnel du Liban” (2017).

⁵¹⁹ Article 95 of the Lebanese Constitution (1926) states that “the principle of confessional representation in public service jobs, in the judiciary, in the military and security institutions, and in public and mixed agencies shall be cancelled in accordance with the requirements of national reconciliation”. This has, however, not yet been achieved: see International Commission of Jurists, “The Lebanese High Judicial Council in Light of International Standards” (2017) Briefing paper

⁵²⁰ Art 14 of Law No. 15 of 2001 “Independence of the Judiciary Law” (Jordan)

⁵²¹ Art 10 Ibid.

practicing lawyers with at least four years' experience, and these applicants are exempt from taking an entry examination.⁵²²

Saudi Arabia: largely professional judiciary

In Saudi Arabia both inexperienced law graduates and experienced legal professionals may be selected for the bench. One of the main prerequisites to become a judge in Saudi Arabia is the level of education obtained from one of the Shari'ah colleges in the Kingdom. Candidates must demonstrate adequate knowledge and understanding of Islamic jurisprudence. Candidates are also required to have a good comprehension of socio-cultural issues.⁵²³ Lateral recruitment exists, and usually depends on the candidate's previous experience in teaching Islamic jurisprudence and the level of education obtained.⁵²⁴

Although the Saudi judiciary system does not specify gender in the requirements to be appointed judge in practice, judicial posts in Saudi Arabia are almost exclusively held by men. The increasing societal and political changes in the Kingdom and recent reports suggest that this might change in future. In 2016, Shaimaa Sadeq Al-Jibran was the first female appointed as a commercial judge.⁵²⁵ Her appointment was based on the recommendation of and request from a prominent legal advisor. Despite opposition to her appointment from senior figures in the judiciary because of her gender, her appointment was upheld by the Administrative Appeals Court.⁵²⁶ There are further indications of Saudi women joining the judiciary in the near future with the recent Shura Council issuing a statement in this regard.⁵²⁷

⁵²² Ibid.

⁵²³ Art. 33 of Royal Decree No. M / 78, date 19/9/1428 "Law of the Judiciary" (Saudi Arabia)

⁵²⁴ Art. 35 Ibid.

⁵²⁵ "First Female Commercial Judge Appointed" *Arab News* (Dammam, 2 August 2016) <<http://www.arabnews.com/node/963446/saudi-arabia>> accessed 8 November 2018.

⁵²⁶ "Saudi Appoints First Female Commercial Judge" *Gulf Business* (2 August 2016) <<http://gulfbusiness.com/saudi-appoints-first-female-commercial-judge/>> accessed 2 August 2018.

⁵²⁷ Recently, the Shura Council issued a recommendation "to empower competent Saudi women who are legally and religiously qualified to hold judging positions". According to Habib,

Judicial training in in Egypt, Jordan, Lebanon and Saudi Arabia

Acceptance of an individual's application to become a judge is not always unconditional, and may not guarantee direct entry into the judiciary. As indicated in Table 10 above, judicial appointees in Jordan, Lebanon and Saudi Arabia all undergo a probationary period after appointment. In addition, in all four countries, judicial education or training for new recruits is mandatory. The mode and methods of judicial training differ across the jurisdictions and span the spectrum from relatively short induction training (Saudi Arabia) to in-depth training programmes that last many years (Lebanon and Jordan). Table 11 below sets out the basic judicial training requirements in each of the 4 different Arab judiciaries.

Table 12. Judicial Training in Egypt, Lebanon, Jordan and Saudi Arabia

	Institution	Duration of formal training course	Compulsory for new recruits	On the job training
Egypt	Cairo's national centre for Judicial Studies	1-year course (officially)	Yes	Yes
Jordan	Judicial Institute in Jordan	3 years	Yes	No
Lebanon	Lebanese institute for Judicial Studies	3 years	Yes	No
Saudi Arabia	Judicial Academy, the Institute of Public Administration	8 weeks	Yes	Yes

the recommendation was issued by members within the Islamic Affairs and Judicial Committee and called upon the justice ministry to help with the appointment of women as judges stating that there were competent Saudi women to perform the judicial function especially in light of the general shortage of judges in the Kingdom. According to the members "Not appointing women in the judiciary is incompatible with the Kingdom's Vision 2030 which calls for empowering women and investing in their potential and aptitudes". Habib writes that the recommendation also cited scholarly references that argue that there are no religious texts that bars women from becoming judges. Reference were made to other Arab and Islamic countries that had appointed women as judges such as Tunisia, Algeria, Morocco and Sudan "since the 1960s while Jordan appointed its first woman judge in 1996, Egypt in 2003 and Bahrain in 2006". See Habib, T. "Saudi Arabia could soon appoint women as judges- Shura members argue no "male requirement" for appointment" *Gulf News* (6 August, 2018) <<https://gulfnews.com/news/gulf/saudi-arabia/saudi-arabia-could-soon-appoint-women-as-judges-1.2262252>> [Accessed 7 September 2018]

Similar to most European civil law and Anglo-American common law countries, almost every entry-level judge is required to complete some form of training.⁵²⁸ This was corroborated by data derived from the Arab Judges Survey where, 62 of 72 judges from Saudi Arabia, Egypt and Lebanon indicated that they had received judicial training when first appointed to the judiciary. However, the mode and manner is more variable among the four countries. For Jordan and Lebanon, new recruits undergo an initial period of probationary training at the Judicial institute. By contrast, in Saudi Arabia and Egypt judicial training appears to be carried out on the job and is generally supervised by senior judges.

Institutional socialisation in Egypt, Jordan, Lebanon and Saudi Arabia

For the four Arab jurisdictions, judicial socialisation takes place within and is controlled by members of the judiciary. However, the members in charge differ. For Jordan and Lebanon, socialisation is primarily under the auspices of the judicial institutes. For Saudi Arabia and Egypt, socialisation is through senior judges, which constitutes a less institutionalised relationship.

In Lebanon, successful candidates undergo a salaried three-year traineeship at the Lebanese Judicial Institute which is regulated by the Lebanese Judicial Council. Training includes attending hearings, examining case files and preparing draft decisions that are evaluated by the presiding judge of the court where the candidate is trained. Subject to completion of the training course, the board of the Judicial Institute nominates successful candidates to the Judicial Council.

Similar training occurs in Jordan, where successful candidates undergo a non-academic qualification program for three years at the Judicial institute of Jordan. Established in 1988, the Judicial Institute forms part of the Judicial Council and is the only body responsible for training new recruits in Jordan.⁵²⁹

⁵²⁸ See "CA Thomas, *Review of Judicial Education and Training in Other Jurisdictions* Judicial Studies Board of England and Wales (May 2006).

⁵²⁹ The Jordanian Judicial Institute also trains new judicial recruits from abroad, predominantly judges from the Palestinian Territories. See the Institute's website: <http://www.jij.gov.jo/>

Upon completion, candidates are awarded a diploma that qualifies them for the judicial office.⁵³⁰

In Saudi Arabia, where there are no public competitions for judicial posts and initial selection is by application, successful applicants to the ordinary and administrative courts undergo a training course provided by the Judicial Academy.⁵³¹ Although mandatory, training is brief and appears to run between one or two months. Upon completion, recruits become assistant judges and work under an initial probation period before they receive a permanent position within the judiciary. The probation period is officially for two years, during which time assistant judges shadow senior judges in their work. In the Arab Judges Survey, one Saudi judge described his judicial training as a “three-year on-the-job training”.⁵³² According to Al-Najjar, their work is under strict and regular supervision by higher-ranking judges and includes the review and approval of judgments by senior judges.⁵³³ During the probation period, if assistant judges are considered unfit for the role, they are dismissed for lack of competence.⁵³⁴

In Egypt, judicial training is offered by the National Centre for Judicial Studies where prosecutors and judges are trained together. While the official training period is for one year, in practice this can be from a few weeks to a few months.⁵³⁵ The variability in judicial training in Egypt was corroborated by a number of Egyptian judges that participated in the Arab Judges Survey. One explained that he underwent three months’ training at the Judicial institute

⁵³⁰ Admission to the Judicial Institute Diploma program is not limited to Jordanian students, with a proportion of places provided for students of Arab and Islamic countries. Arts 61 and 64 Decree Law No.150/83, (Jordan)

⁵³¹ Established by the Royal Decree No. 4 of 3/12/1385 AH (Jordan)

⁵³² Comment from Judge 2013369 (Arab Judges Survey)

⁵³³ Nathalie Najjar, *Arbitration and International Trade in the Arab Countries* (Brill Nijhoff 2018).

⁵³⁴ Arts 44 and 69 Royal Decree No. M / 78, date 19/9/1428 “Law of the Judiciary” (Saudi Arabia). See also Usa Int’L Business Publications, *Saudi Arabia Criminal Laws, Regulations and Procedures Handbook: Strategic Information: Regulations, Procedures*. (Intl Business Pubns Usa 2015).

⁵³⁵ David Risley, “Egypt’s Judiciary: Obstructing or Assisting Reform?” (2016) p.10 <https://www.mei.edu/sites/default/files/publications/Risley_Egyptjudiciary.pdf> accessed 1 August 2018.

once appointed to the judiciary.⁵³⁶ But another Egyptian judge wrote that he underwent a “training course for just two weeks”.⁵³⁷ Furthermore, an administrative judge commented that he “had training twice as a criminal prosecutor and as a judge at the Egyptian Conseil D’état”.⁵³⁸

Generally, individuals entering organisations will learn from within the organisation as they interact with one another, and apprehend the norms and the day-to-day contextual nuances.⁵³⁹ According to Biddle, older members will often be observed “showing the ropes” to, or frowning at, inappropriate judicial behaviour in the neophyte.⁵⁴⁰ All four countries subject new judicial recruits to some form of supervision and evaluation by senior judges. This may constitute an additional, albeit less institutionalised, selection process controlled by senior members of the judiciary. This is especially true for younger graduates with little experience. New judges will have to undergo repeated evaluations, which can provide a strong incentive to comply with the norms set by superior judges. This is notably true where career advancement is facilitated or conditioned by the approval of senior judges. This can be an additional form of social control which continues throughout the individual’s professional judicial career.⁵⁴¹

Judicial career patterns and socialisation post-appointment

Once appointed, judges must rise through the ranks in order to obtain a position with greater authority and responsibility.⁵⁴² Career advancement is generally considered competitive: judges are regularly monitored and

⁵³⁶ Comment from Judge 2030119 (Arab Judges Survey)

⁵³⁷ Comment from Judge 2078119 (Arab Judges Survey)

⁵³⁸ Comment from Judge 1980070 (Arab Judges Survey)

⁵³⁹ Jennifer H Waldeck and Karen K Myers, "Organizational Assimilation Theory, Research, and Implications for Multiple Areas of the Discipline: A State of the Art Review" (2007) 31 *Annals of the International Communication Association* 322, p.323.

⁵⁴⁰ Biddle BJ, *Role Theory: Expectations, Identities, and Behaviors* (Academic Press 1979), p.318.

⁵⁴¹ *Ibid.*

⁵⁴² *Ibid.* p.316.

promotions are granted according to formal criteria which combine both seniority and merit.⁵⁴³

In the strictly bureaucratic model, promotions are the most important way to reach the higher rungs in the career ladder. The longer the judge stays within the career hierarchy, turnover opportunities tend to become fewer. According to Mestitz and Pederzoli, the assumption is that any opportunity would require a basic reconversion of one's professional knowledge and abilities which tends to diminish over time.⁵⁴⁴ In other words, judges' careers appear to be exclusively regulated by the "mere passing of time".⁵⁴⁵ By contrast, under the professional model, career advancement is less structured and promotions are usually less widespread.⁵⁴⁶ But while the professional model tends to have less formal provisions of advancement, higher-ranking judges may exert some influence over the promotion of lower-ranking judges.⁵⁴⁷

Judicial career patterns in Egypt, Jordan, Lebanon and Saudi Arabia

Career advancement in Egypt, Jordan, Lebanon and Saudi Arabia is, in principle, under the auspices of the Higher Judicial Councils. In all cases, however, promotion tends to reflect elements from both the bureaucratic and professional models. On the one hand, merit and seniority appears to be a condition for advancement, at least in principle.⁵⁴⁸ On the other hand, hierarchical superiors play a fundamentally important role for any judge that hopes to rise up the ranks.

Relationship structures such as the newcomers' relationships with supervisors and colleagues appears to be another important aspect of promotion. Of

⁵⁴³ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002), p 66.

⁵⁴⁴ Anna Mestitz and Patrizia Pederzoli "Training the Legal Professions in Italy, France and Germany" in C Neal Tate and Torbjorn Vallinder, *The Global Expansion of Judicial Power*. (NYU Press 1995) p.169.

⁵⁴⁵ Ibid.

⁵⁴⁶ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002), p 67.

⁵⁴⁷ Ibid.

⁵⁴⁸ Ibid. p 38.

particular relevance is the relationship with judicial supervisors and the existence of informal mentoring. But there are also those beyond the judicial branch that are empowered to supervise and evaluate the work and conduct of individual judges. In all four countries, promotion is closely linked with satisfactory evaluations often made by actors both within and outside the judiciary (Table 12).

Table 13. Elements of judicial career advancement in Egypt, Jordan, Lebanon and Saudi Arabia

	Institution officially in charge of career advancement	Official criteria for career advancement	Role of senior judges/presiding judges	Role of Inspectorates
Egypt	Supreme Judicial Council	Seniority and merit	Presiding judge in court nominates judges for advancement	Evaluations for low-ranking judges.
Jordan	Judicial Council, Ministry of Justice and Royal Decree	Seniority and merit, once promoted probation for 3 years (higher grades)	Presiding judges in each court exercise administrative oversight over judges in their courts	Judicial council and Inspectorate (part of Ministry of Justice) evaluate judges annually ⁵⁴⁹
Lebanon	Higher Judicial Council and Minister of Justice	Rank based with automatic advancement every 2 years	Presiding judge in court will submit reports to Judicial Inspectorate for review	Judicial Inspectorate, (part of the Ministry of Justice) reviews monthly reports submitted by presiding judges
Saudi Arabia	Supreme Judicial Council	Seniority and merit (teaching experience)	Reviews are made on a yearly basis, and relate to proficiency and competency made by presiding judges	Promotions are subject to mandatory review by Judicial Disciplinary Committee (For first and appellate levels). ⁵⁵⁰

The focus here is on two elements that are likely to influence a judge's aspirations for career advancement. The first element relates to how judges are supervised, which also includes the potential impact hierarchical superiors

⁵⁴⁹ Except for assessment of first instance judges.

⁵⁵⁰ According to Article 55 of the Law of the Judiciary "A department for judicial inspection shall be set up at the Supreme Judicial Council" Royal Decree No. (M/78) 19 Ramadan 1428H - 1 October 2007 (Saudi Arabia).

have on judicial promotions. The second element relates to the role played by inspectorates empowered to supervise and discipline judges. The following sections explore career patterns in each jurisdiction in light of these two elements.

Career advancement for Egyptian Jordanian, Lebanese and Saudi judges

In Egypt, career advancement for administrative and state judges is officially based on age and experience.⁵⁵¹ To move up the career ladder, judges are required to have accrued specific work experience based on their level of court. Generally, when a vacancy arises, the presiding judge in a court will select a judge from a list drawn up by the court's senior judges. The nominee is reviewed by the Judicial Council and, if the nomination is approved, the Council prepares a decree of appointment (which is signed by the President of the Republic).

At the appellate levels, promotions in Egypt appear to be more political in nature, and there is a degree of executive interference. Under the recent 2017 amendment to the Judicial Authority Law⁵⁵², the President of the Republic can directly appoint chief justices to all the highest courts without approval or review from the Judicial Council or the Ministry of Justice. Prior to this amendment, the relevant law empowered the Judicial Council to choose their own judges and placed the onus of disputing their decision on the President.⁵⁵³ While seniority and merit typically played a large part in the decisions under the old law, the new amendment does not provide the same clear guidance on appointments.⁵⁵⁴ The amendment has been described as an alien

⁵⁵¹ The same applies to Administrative judges: see Law no. 47 of 1972 as amended by law no.136 of 1984. (Egypt)

⁵⁵² Law No. 13 of 2017 amending Law No. 46 of 1972, 5 Oct. 1972 "Judicial Authority Law" (Egypt)

⁵⁵³ Brad Youngblood, "Tipping the Scales: Egypt's New Judicial Authorities Law" (*Tahrir Institute for Middle East Policy*, 28 April 2017) <<https://medium.com/tahrir-institute-for-middle-east-policy/tipping-the-scales-egypts-new-judicial-authorities-law-1c45b21af181>>.

⁵⁵⁴ Sufian Obeidat, "Jordan's 2016 Constitutional Amendments: A Return to Absolute Monarchy?" *Constitutionnet* (27 May 2016) <<http://www.constitutionnet.org/news/jordans-2016-constitutional-amendments-return-absolute-monarchy>> accessed 8 November 2018.

development within the Egyptian judiciary that will further foster partisanship and factions among high-ranked judges.⁵⁵⁵

In Saudi Arabia, judges at the bottom of the judicial hierarchy will usually be required to satisfy additional requirements in order to be promoted. They need to have obtained training degrees from the Judicial Academy, teaching experience in Islamic law and work experience in court.⁵⁵⁶ Subject to satisfactory reports of judges, the Judicial Council usually follows the principle of absolute seniority. When two or more judges have served for equal periods of time, the decision is determined on the basis of the proficiency reports of each candidate. Promotions for lower courts and appellate levels are subject to mandatory review by the Judicial Disciplinary Committee, which forms part of the Saudi Judicial Council.⁵⁵⁷ Judges may not be promoted unless their work has been inspected at least twice.⁵⁵⁸ Reviews are made on a yearly basis, they relate to proficiency and competency and are made by both presiding judges and the Judicial Disciplinary Committee. Judges who receive a “below average” rating in three consecutive reports are placed on mandatory retirement.

Similar to Egypt, promotions to the higher courts in Saudi Arabia appear to be more political in nature. The King directly appoints higher-ranking judges by virtue of his constitutional role in overseeing the implementation of Islamic law in the Kingdom.⁵⁵⁹ But in practice, the King’s promotion powers appear to be

⁵⁵⁵ Yussef Auf, “The Escalating Battle over Appointing Judges in Egypt” *The Daily Star (Lebanon)* (20 January 2018) <<https://www.pressreader.com/lebanon/the-daily-star-lebanon/20180120/281702615130484>> accessed 15 June 2018.

⁵⁵⁶ Usa Int’L Business Publications, *Saudi Arabia Criminal Laws, Regulations and Procedures Handbook: Strategic Information: Regulations, Procedures*. (Intl Business Pubns Usa 2015).

⁵⁵⁷ According to Article 55 of Law of the Judiciary Royal Decree No. (M/78) 19 Ramadan 1428H - 1 October 2007 (Saudi Arabia), a department for judicial inspection shall be set up at the Supreme Judicial Council.

⁵⁵⁸ Usa Int’L Business Publications, *Saudi Arabia Criminal Laws, Regulations and Procedures Handbook: Strategic Information: Regulations, Procedures*. (Intl Business Pubns Usa 2015).

⁵⁵⁹ Article 55 of the Saudi Basic Law of Governance states that: “... the policy of the nation, a policy in accordance with the provisions of Islam; the King oversees the implementation of Islamic Sharī‘ah, the system of government, the state’s general policies and the protection of the defense of the country”.

more pervasive and include lower courts. For example, in late 2017 and coinciding with an anti-corruption crackdown, the King issued a royal order that promoted twenty-six judges and appointed thirty others at different levels of the judiciary.⁵⁶⁰

In Lebanon, career patterns are officially rank-based. Judges at the bottom of the judicial pyramid are automatically granted first rank after successful completion of their traineeship at the Judicial Institute. Subject to satisfactory reports, they will be automatically transferred to a higher rank every two years. No further distinction exists between judges regardless of their functions, specialisations or experience. Promotions are also based on the reports of the Judicial Inspectorate, which is part of the Ministry of Justice.⁵⁶¹ The Inspectorate has a legal mandate to monitor the conduct of judges in administrative and ordinary courts.⁵⁶² They review monthly reports submitted by each court. Based on these reports, the Inspectorate also advises the Ministry of Justice on the number of judges needed in the country. The Ministry uses the information to assign new judges and rotate existing judges.⁵⁶³ But appointments to senior judicial positions are, in practice, subjected to a religion-based power sharing agreement. As a matter of established practice, the top judicial positions are shared by religious denominations. For example, at present the First President of the Court of Cassation is a Maronite Christian, the Public Prosecutor of the Court of Cassation and President of the Judicial

⁵⁶⁰ Dahlia Nehme, "Saudi King Appoints 30 Judges, Promotes 26 amid Anti-Graft Purge" *Reuters* (9 November 2017) <<https://www.reuters.com/article/us-saudi-judges/saudi-king-appoints-30-judges-promotes-26-amid-anti-graft-purge-idUSKBN1D91NX>> accessed 10 July 2018.

⁵⁶¹ Under Decree-Law No. 150/83, the Judicial Inspectorate works under the supervision of the Minister of Justice. The Judicial Inspectorate is composed of a president, four inspectors general and six inspectors, all appointed by Cabinet decree on the proposal of the Minister of Justice, and from among various judicial grades (depending on the position).

⁵⁶² Under Decree-Law No. 150/83 (Lebanon)

⁵⁶³ Maria Dakolias et al., "Lebanon, Legal and Judicial Sector Assessment" (World Bank 2005) Working Paper 32144 <<http://documents.worldbank.org/curated/en/478751468056940276/pdf/321440LE0Legal010judicial0.pdf>> accessed 11 July 2017.

Inspectorate are Sunni Muslim, and the Director of the Institute of Judicial Studies is Shi'a Muslim.⁵⁶⁴

In Jordan, the promotion of a judge to a higher rank is officially based on competence and qualification.⁵⁶⁵ Judges are promoted to higher levels based on credentials and excellence of service that are assessed by the Judicial Council and according to the reports of inspectors. For promotions in higher courts, judges are required to submit a self-authored legal paper which is reviewed by the Judicial Council. Once a judge is appointed to a higher rank for the first time, they are on probation for a period of three years.⁵⁶⁶ Following constitutional amendments in 2016, the King now has the sole power to appoint the Chief Justices and other members of the Jordanian Constitutional Court without any countersignature by the relevant government officials (which was the previous practice).⁵⁶⁷

Judicial evaluation and discipline in Egypt, Jordan, Lebanon and Saudi Arabia

Another aspect closely linked to career advancement is how judges are supervised and disciplined. The nature of judicial discipline can also hamper the political significance of judges. According to Shetreet, judicial disciplinary proceedings are important to explore because they relate to the extent to which individual judges are protected from undue pressures from within the judiciary (fellow judges and, above all, superiors) or externally.⁵⁶⁸ In the four Arab

⁵⁶⁴ International Commission of Jurists, "The Lebanese High Judicial Council in Light of International Standards" (2017) Briefing paper <<https://www.icj.org/wp-content/uploads/2017/03/Lebanon-Memo-re-HJC-Advocacy-Analysis-Brief-2017-ENG.pdf>> accessed 2 August 2018.

⁵⁶⁵ "Royal Decree Approves Promotion, Appointment of Judges" *The Jordan Times* (2 January 2017) <<http://www.jordantimes.com/news/local/royal-decree-approves-promotion-appointment-judges>> accessed 11 August 2018.

⁵⁶⁶ Art. 20 of Law No. 15 of 2001 "Independence of the Judiciary Law" (Jordan)

⁵⁶⁷ Sufian Obeidat, "Jordan's 2016 Constitutional Amendments: A Return to Absolute Monarchy?" *Constitutionnet* (27 May 2016) <<http://www.constitutionnet.org/news/jordans-2016-constitutional-amendments-return-absolute-monarchy>> accessed 8 November 2018.

⁵⁶⁸ Shimon Shetreet and International Association of Judicial Independence and World Peace (eds), *The Culture of Judicial Independence: Rule of Law and World Peace* (Brill Nijhoff 2014) 637–638.

judiciaries analysed here, supervision and discipline is greatly dependent on evaluation of individual judges. Hierarchical superiors as well as actors external to the judiciary can play an important supervisory role. There are inspectorates in all four countries that are empowered to hear grievances against individual judges. According to the respective laws of each country, the evaluations take place periodically, and can be initiated on an impromptu basis. Table 13 below summarises how the evaluation and discipline of judges is conducted in the four Arab judiciaries, and it highlights the role of non-judicial actors in judicial evaluation, especially in Egypt and Saudi Arabia.

Table 14. Evaluation and discipline of judges in Egypt, Jordan, Lebanon, and Saudi Arabia

	Groups responsible for evaluation of judges	Frequency of evaluation	Groups responsible for judicial Discipline
Egypt	<ul style="list-style-type: none"> • Inspection Board (HJC) (only first tier court judges) • Ministry of Justice • Senior judges 	Impromptu	Discipline of judges at all levels undertaken by a “Disciplinary Committee” composed of senior heads.
Jordan	<ul style="list-style-type: none"> • Senior judges, • Inspectorate (HJC) • Ministry of Justice 	Annually	Disciplinary Council composed of at least three judges from Judicial Council
Lebanon	<ul style="list-style-type: none"> • Senior judges, • Inspectorate (HJC) • Minister of Justice 	Monthly reports	Disciplinary Council by the Judicial Inspectorate is composed of presiding judge and two judges of the same court. Also, presidents of the Court of Cassation and Court of Appeal
Saudi Arabia	<ul style="list-style-type: none"> • Senior judges • Judicial Disciplinary Committee. (HJC) 	Annually	Senior judges, Judicial Council

In Egypt, both the Minister of Justice and the General Assembly are empowered to supervise judges and courts,⁵⁶⁹ and the heads of courts have the right to evaluate judges at their will. They are furthermore empowered to

⁵⁶⁹ Art. 93 of Law No. 46 of 1972, 5 Oct. 1972 “Judicial Authority Law” (Egypt)

warn individual judges on their own accord.⁵⁷⁰ All three bodies can also refer an individual judge to the public prosecutor for disciplinary actions. The Inspection Board has the right to take undertake investigations in relation to first tier court judges,⁵⁷¹ but judges at the appeal level and higher are exempt from investigations. Disciplinary actions can be brought against judges who fail to observe obligations associated with the judicial office, and the discipline of judges at all levels is undertaken by a committee composed of the most senior judges.⁵⁷²

In Saudi Arabia, the president of each court is empowered to supervise and warn judges if they suspect that a judge has acted contrary to his judicial duties. The president of the court may also alert the Saudi Judicial Council to any concerns.⁵⁷³ Inspection of members of the judiciary is carried out annually.

The Lebanese Judicial Council can dismiss any judge if it considers that the individual judge is no longer entitled to exercise his/her judicial functions. Provided that eight of the ten members of the Council agree, the Council can dismiss a judge without the need to consult or obtain approval of the Minister of Justice. In Lebanon, the Inspectorate is entitled to take actions on its own initiative, such as visiting courts and examining the work of judges.⁵⁷⁴ Judges can be brought before the Disciplinary Council for “any breach of professional duty, honour, dignity or courtesy”.⁵⁷⁵

⁵⁷⁰ All three organs can refer to the public prosecutor for disciplinary actions see “Judicial Authority Law” (Egypt)

⁵⁷¹ Article 78 the Inspection Board appeals to only evaluate lower court judges

⁵⁷² Art. 98 of Law No. 46 of 1972, 5 Oct. 1972 “Judicial Authority Law” (Egypt)

⁵⁷³ Article 58 states that: “Without prejudice to the impartiality and independence of the judiciary and the right of the Supreme Judicial Council to supervise courts, judges and their work, the chief judge of each court shall have the right to supervise the judges of his court and notify them of all acts violating their duties or requirements of their positions after hearing their statements” Art. 58 Royal Decree No.: M / 78, date 19/9/1428 Judicial Authority Law (Saudi Arabia)

⁵⁷⁴ Elias Chalhoub, “State of the Judiciary in Lebanon” (The Arab Center for the Rule of Law 2004) 30–31.

⁵⁷⁵ According to the relevant law, breaches include unjustified absence, delay in the adjudication of pending cases, unjustified discrimination between the parties, and delay in delivering judgement.

In Jordan, inspection of members of the judiciary is carried out annually.⁵⁷⁶ The Jordanian Inspectorate issues recommendations and submits them to the Minister of Justice and the Chief Justice of the Court of Cassation.⁵⁷⁷ Judges in Jordan may be disciplined for "any violation of duty and any act that relates to the dignity and honour of the position".⁵⁷⁸

Promotion as a means of judicial socialisation

Promotion illustrates a powerful tool of social control that is both centralised and decentralised in Arab judiciaries. Officially, promotion is under the auspices of the Judicial Councils. However, courts also exercise a degree of influence over their judicial colleagues. Similar to the bureaucratic model, salary, prestige and personal influence in the four Arab judiciaries depend on a judge's position in the hierarchical ladder, which can only be improved by seniority and merit. However, the existence of evaluation reports of judicial conduct and work performance allows for an influence which is similar to the professional model. Promotion relies on these reports that are usually written by senior and presiding judges of the same court, which are in turn reviewed by the judicial inspectorates.

The fusion between the two models will inevitably produce strains in how judges seek career advancement. It also demonstrates a difference of status between lower court judges and high court judges in relation to career advancement. Lower court judges are subject to several evaluations and written reports. This might compel ambitious persons to conform to the established social norms prevalent in the judiciary in order to climb the ranks. For higher court judges, career advancement is not automatic but is more

⁵⁷⁶ See for example Jordanian Judicial Council, "The Strategy of Building" Annual Report for Judicial Strategy 2012–2014 <<http://www.jc.jo/sites/default/files/ja-sp-low.pdf>> accessed 3 August 2018.

⁵⁷⁷ Article 41 states "the judicial inspection staff is considered related to the Ministry and inspectors present their reports about judges to the Chairman and the Minister." Law No. 15 of 2001 "Independence of the Judiciary Law" (Jordan)

⁵⁷⁸ These include: delays in rendering judgments; failure to set a date for judgment; discrimination between the parties; breach of confidentiality; absence without excuse; and failure to abide by work hours Article 37 of Law No. 15 of 2001 "Independence of the Judiciary Law" (Jordan)

political in nature, which may incentivise ambitious judges to seek support from outside the judicial branch.

As mentioned above, because promotions are according to official standards rooted in seniority and merit, proliferation of extra-judicial activities may be an issue. This is seen in Italy and France, where automatic promotion has encouraged the proliferation of part time and fulltime extra-judicial activities. According to Guarnieri, this has grown substantially because such activities do not prevent judges from being promoted or reassigned to their previous position.⁵⁷⁹ This appears to also occur in the Arab context, in particular for Egyptian, Jordanian and Lebanese judges. The nature of automatic promotions means that, provided the reports are satisfactory, judges may establish relations with other institutions and the broader social and economic environment. Since promotion within the judiciary is “almost always certain”⁵⁸⁰, this may foster informal links between courts and politics. This in turn, can undermine the autonomy of the judiciary vis-à-vis the other branches of government and increase the political significance of courts.

Summary

The analysis in this chapter sets out the first process of socialisation for Arab judges in four judiciaries. The processes of judicial selection, training and career advancement for judges are all forms of social control exercised over individual judges. These mechanisms of control take on different forms and may involve those who can influence the status of individual judges, such as senior members of the judiciary and the executive. The processes further reveal that such social controls in Arab judiciaries are not strictly confined to either the Western bureaucratic or professional models. Both models fail somewhat to accurately represent the way judges are socialised (and controlled) in the four countries. Each Arab judicial system discussed here is

⁵⁷⁹ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002), p 58.

⁵⁸⁰ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002), p 58

perhaps best described as somewhere in the middle of the bureaucratic-profession continuum depending on the type of control explored. While none perfectly fits the Western-based models, the models provide the basis for understanding some important differences in institutional socialisation across these four countries in the Arab region. The next chapter explores a second source of socialisation for Arab judges: their educational and professional experiences prior to joining the judiciary.

Chapter 7. Pre-appointment socialisation of Arab judges

Professional socialisation and sources of individualisation

The previous chapter explored socialisation through judicial institutions primarily through four types of processes: judicial selection; training; discipline and; career advancement. However, the judicial role in Arab countries cannot be accounted for by only considering institutional socialisation.⁵⁸¹ The reason is that the concept of institutional socialisation conceives of the individual as a recipient rather than an initiator or co-participant. Institutional socialisation is premised on the notion that the individual's socialisation is successful to the extent that role expectations or behaviours are induced.⁵⁸² According to Waldeck and Myers, such traditional understandings of socialisation view new members as "blank slates", "ready to be written upon by institutional procedures, norms, and existing culture" which effectively allows organisations to shape individual attitudes and behaviours".⁵⁸³ But this fails to account for the active part individuals can play in innovating and creating roles for themselves within the organisation.⁵⁸⁴ For instance, judges may use values and knowledge acquired from their experiences before entering the judiciary to individualise, influence or negotiate their roles throughout their judicial careers.⁵⁸⁵ This in turn may shed some light into whether judicialisation of politics is a product of the judge's individual experiences as opposed to the structural set up of the legal system the judge operates within (Chapter 5); and/or because of institutional socialisation (Chapter 6).

⁵⁸¹ Jennifer H Waldeck and Karen K Myers, "Organizational Assimilation Theory, Research, and Implications for Multiple Areas of the Discipline: A State of the Art Review" (2007) 31 *Annals of the International Communication Association* 322, p.324.

⁵⁸² Biddle BJ, *Role Theory: Expectations, Identities, and Behaviors* (Academic Press 1979), p.283.

⁵⁸³ Jennifer H Waldeck and Karen K Myers, "Organizational Assimilation Theory, Research, and Implications for Multiple Areas of the Discipline: A State of the Art Review" (2007) 31 *Annals of the International Communication Association* 322, p.329

⁵⁸⁴ Ibid. p.324.

⁵⁸⁵ Ibid. p.329.

This chapter looks at the socialisation of Arab judges based on pre-appointment attributes of individual judges, in particular, their education and professional experience before entering the judiciary. The chapter also offers some preliminary analysis of judges' personalities that relate to the processes through which attitudes, values and role conceptions are acquired through the lens of self-esteem and the degree to which judges consider belonging to the judiciary is important.⁵⁸⁶ The chapter uses primary data derived from analysing 112 Arab judges' professional profiles obtained from LinkedIn as well as data from the Arab Judges Survey conducted for this thesis. As discussed in Chapter 4, this empirical research is not meant to provide a representative sample of Arab judges in all Middle East countries. Instead it provides an initial insight into the background of some Arab judges in the absence of any other source of direct information about judges in the region. This in turn provides a basis for exploring judicial role perceptions of judges in the four countries in subsequent chapters.

Pre-appointment socialisation

Legal education

For many judges, entry into the judiciary is the last step on a path that usually begins as a law student and progresses through different legal professional environments. As a result, the acquisition of experiences and norms may have occurred in the "pre-bench" period.⁵⁸⁷ One of the major types of socialisation outside of the judiciary is law school. Similar to civil-law countries, one of the distinctive features of higher education in Arab states is the weight given to

⁵⁸⁶ James L Gibson, "From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior" (1983) 5 *Political Behavior* 7, p.26

⁵⁸⁷ Atkins identifies four major stages of socialisation for judges. The first relates to professional socialisation, the period where individuals learn the basic legal norms and values. The second stage involves initiation as well as the stages of adjustment to the specific demands of the new role. The third stage is defined as "establishment", which Atkins describes as a period of "settling into the judicial institution including the important decision of whether to make a career out of being a judge". The fourth and final stage relates to commitment, the point at which the decision to remain a judge is made. These stages should be treated as amorphous and by no means static. Yet they help in exploring the nature of individuals that enter into the judicial office. Alpert, Lenore, Burton M. Atkins and Robert C. Ziller, "Becoming a Judge: The Transition from Advocate to Arbiter" (1979) 62 *Judicature* 325, p.325.

purely theoretical learning with little emphasis on experiential learning. This is notably true for legal degrees where practical legal training is limited in scope.⁵⁸⁸

Moreover, relatively recent trends in the region opens up questions about the type of law degrees obtained. Legal education abroad is becoming increasingly common among young Arab students. With perceptions of the benefits of international degrees in law, there has been a marked increase in individuals that complete at least part of their university education abroad. In addition to self-funded students from the region, the trend has been fuelled by government sponsorship schemes, primarily from the richer Gulf countries.⁵⁸⁹ With Arab law students increasingly being educated in other legal systems (and in foreign languages), questions arise as to what types of legal knowledge are being imported back into the judiciary once law students enter the judicial profession. This complexity is further enhanced with post-graduate law degrees that are more research oriented and require advanced skills in analysis, critical evaluation and the student's ability to solve complex legal problems and concepts.

As discussed in Chapter 6, the four Arab countries analysed here require judicial applicants to have obtained at least an undergraduate degree in law in order to be considered for a judicial post. Table 14 below, presents the results of an analysis of 112 Arab judges' educational profiles obtained through an analysis of their LinkedIn profiles.

⁵⁸⁸ Anna Mestitz and Patrizia Pederzoli "Training the Legal Professions in Italy, France and Germany" in C Neal Tate and Torbjorn Vallinder, *The Global Expansion of Judicial Power*. (NYU Press 1995) in C Neal Tate and Torbjorn Vallinder, *The Global Expansion of Judicial Power*. (NYU Press 1995) p.163

⁵⁸⁹ Laura Bridgestock, "Middle Eastern Students Abroad: In Numbers" *QS Top Universities* (10 April 2015) <<https://www.topuniversities.com/blog/middle-eastern-students-abroad-numbers>> accessed 31 August 2018.

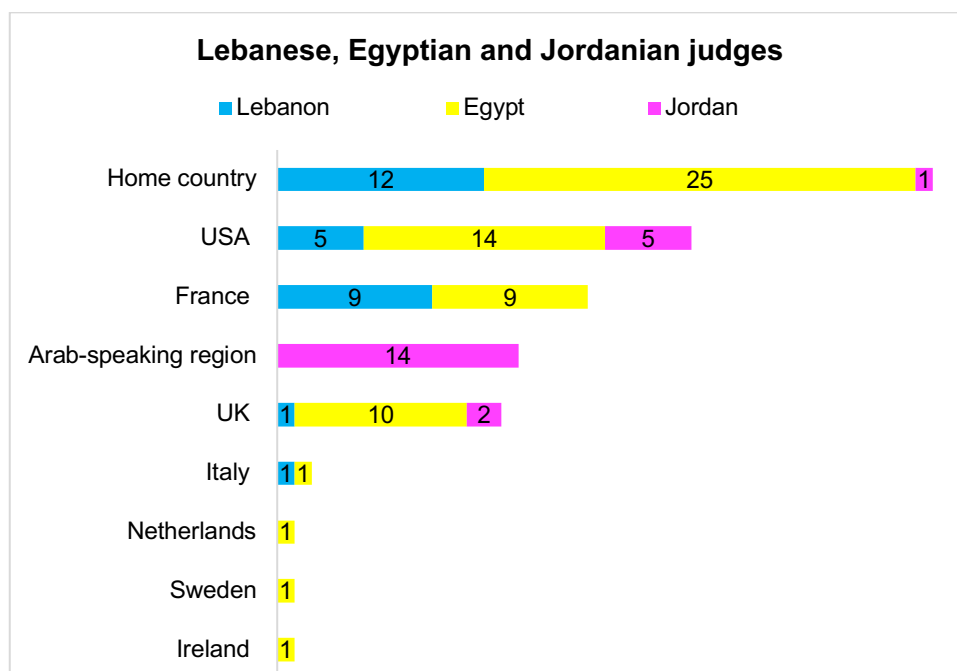
Table 15. Region where Egyptian, Jordanian and Lebanese judges obtained their law degrees (n=112, LinkedIn)

	Home university	Other university in the Arab region	University outside the Arab region
Egypt	25	0	37
Jordan	1	14	7
Lebanon	12	0	16

The clearest difference overall in terms of where law degrees were obtained is between judges from Jordan compared with judges from Egypt and Lebanon. Egyptian and Lebanese judges in the sample had law degrees only from their own jurisdiction (37) and jurisdictions outside the Arab region (52). In contrast, most Jordanian judges in the sample (14 of 22) had law degrees from a university outside their jurisdiction but in the Arab region.

Figure 10 breaks this sample down further by the specific jurisdiction where the law degree was obtained. Amongst the 112 judges in the sample that obtained a law degree outside their home jurisdiction, law degrees from American universities (24) and French universities (18) were the most prevalent, followed by degrees from other Arabic-speaking countries (14) and the UK (13).

Figure 10. Where judges in 3 Arab countries obtained law degrees (LinkedIn, n=112)

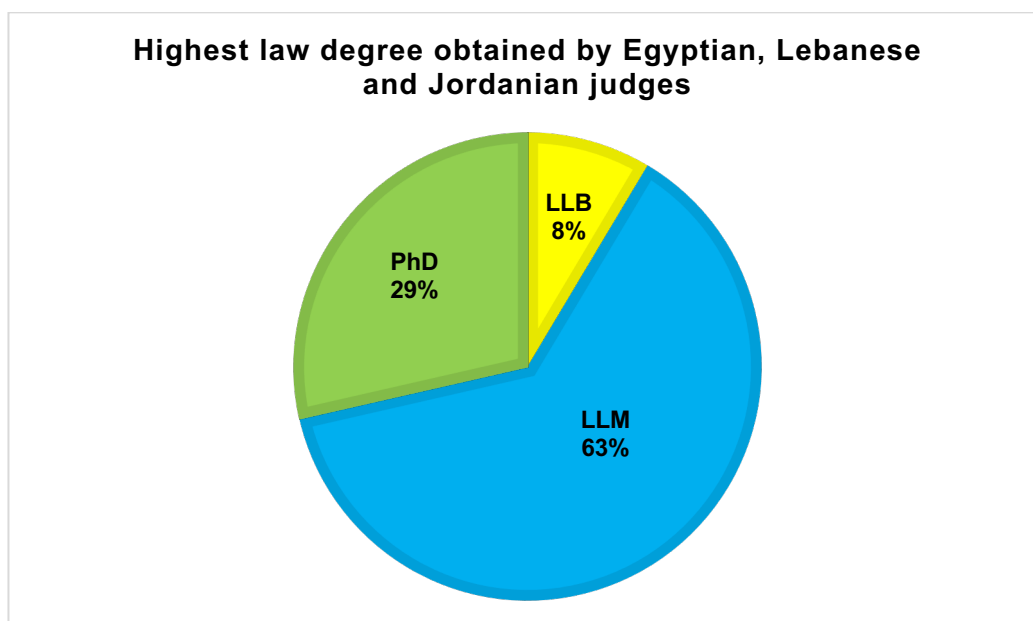


Types of law degrees

The majority of Arab judicial profiles analysed indicated a postgraduate degree obtained before becoming a judge. Figure 11 below, shows that of the 112 Arab judges examined on LinkedIn, almost two-thirds (63%) had obtained an LLM (post-graduate law degree), 29% had PhDs and only 8% had an LLB as their highest law degree. However, given the source of the information (LinkedIn), this could reflect a higher education status amongst Arab judges choosing to be on LinkedIn.⁵⁹⁰

⁵⁹⁰ In addition, a more international outlook among judges could also be a reason why so many judges had obtained a post-graduate degree. As discussed in Chapter 4, this further reduces the representativeness of this sample.

Figure 11. Highest legal degree obtained by Egyptian, Lebanese and Jordanian Judges (LinkedIn, n=112)



Looking at the LinkedIn sample by country, most Egyptian judges (53 out of 62) had at least one post-graduate degree, 11 of whom had received doctoral degree in law. In Lebanon, almost half of the sample (13) had obtained a post-graduate degree before they became trainee judges; the other half (15) obtained it during the course of their judicial post. In Jordan, 4 had a doctoral degree, all of which are judges of the Constitutional Court, and these PhDs were all obtained from universities in Egypt.

The fact that a large proportion of the judges in the sample obtained a foreign post-graduate degree may indicate that many of the judges in the sample come from favourable economic background and/or had government support in pursuing costly studies abroad. In addition, legal education is usually specific to the country/region where it is obtained, and the high proportion of Egyptian, Lebanese and Jordanian judges that obtained law degrees outside of their own jurisdiction introduces another possible channel of influence on the judiciary. This is of particular relevance for individuals who obtain their law degrees in American and British universities, where legal education is based on common law doctrines such

as *stare decisis*. Such post-graduate experiences may have an influence over how judges perceive their role.

Career experiences

Judges may also bring in external values to the judiciary as a result of their professional experiences prior to joining the judiciary. This will usually be in legal practice as advocates, but it could also be experience in other areas of law such as academia or in government service.⁵⁹¹ According to Gibson, career experiences have a significant impact on the substantive values of judges which they will use once they enter the judiciary.⁵⁹² In addition, a prior legal career may weaken the capacity for internal control by the judiciary, as individuals are likely to maintain ties with their former profession. This may suggest that judges are more likely to bring values into the judiciary from other environments and, according to Guarnieri and Pederzoli, can become “an important point of reference for the judiciary as a whole”.⁵⁹³ Therefore, the relationship between the judiciary and other legal professions, including possible channels that foster professional mobility between judges and other professions need to be considered.⁵⁹⁴

Figure 12 below shows the prior professional experience of the 112 Arab judges in the LinkedIn sample. Judges who were prosecutors make up the single largest group (34) amongst the sample of judges, followed by private lawyers (30) and academics (23). There were also a number of judges in the sample who had served in a government (18) or international regional advisory role (17) before joining the judiciary.

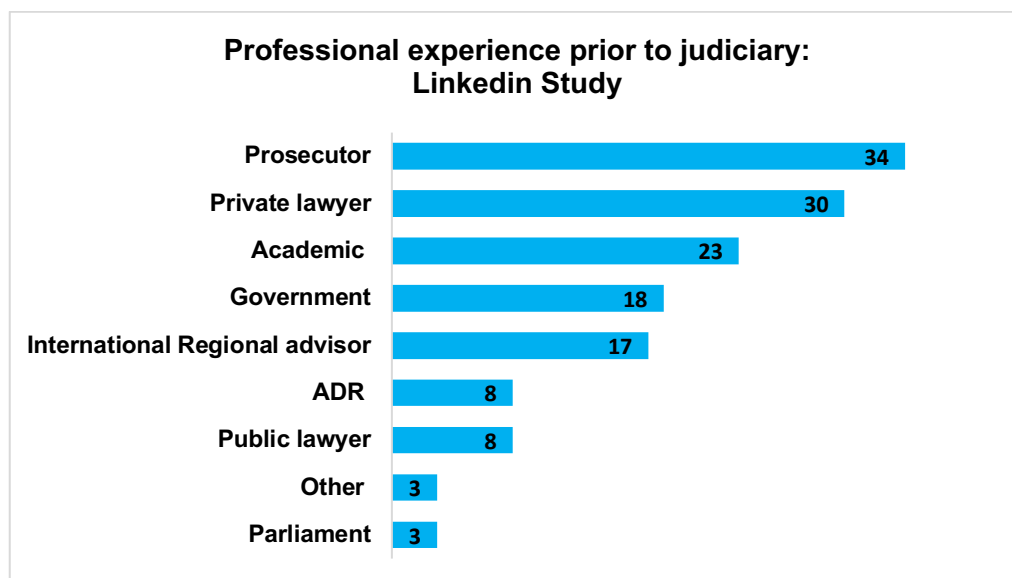
⁵⁹¹ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002)

⁵⁹² James L Gibson, “From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior” (1983) 5 *Political Behavior* 7, p.21

⁵⁹³ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002),p. 20

⁵⁹⁴ *Ibid.*

Figure 12. Lebanese, Jordanian and Egyptian judges' professional experience prior to joining the judiciary (LinkedIn, n=112)⁵⁹⁵



Amongst the 62 judges from Egypt in the LinkedIn sample, prosecutorial experience was the most commonly held profession prior to becoming a judge (29). The prosecutorial experience ranged from a few months to nine years. A number of the Egyptian judges (11) had experience in private legal practice before joining the bench, primarily in corporate and banking. A few judges (8) had worked as public legal advisors for government branches, and a few (5) judges indicated they had worked with government branches such as the Egyptian Ministry of Interior, Education and Tourism. Two indicated that they had previously been police officers before entry to the judiciary.

Amongst the 28 number of judges from Lebanon in the LinkedIn sample, almost half (11) had academic teaching experience before becoming a judge, and a quarter (7) said they have continued to teach at universities and judicial institutes on a part-time basis since joining the judiciary. Similar to Egypt, prior experience for judges in Lebanon also included work with other branches of

⁵⁹⁵ Some of the 112 judges profiled had several different professional roles before joining the judiciary, which is why the total number of judges with professional experience (144) is greater than the sample size (112).

government, such as Parliament, Ministry of Energy and Ministry of Religious Affairs.

In Jordan, amongst the 22 judges in the LinkedIn sample, professional experience was mostly related to private law and legal academia. For instance, of the two-thirds of judges (15) who currently sit on the Constitutional Court, five had previously held ministerial positions and the other half were academics and private lawyers.

Several Lebanese, Jordanian and Egyptian judges listed work experience with their home Ministry of Justice prior to joining the bench. This work ranged from research assistance to legal advice.⁵⁹⁶

Information about judges' professional experience before joining the judiciary was also explored in the online Arab Judges Survey, where judges were asked to indicate what their previous professional experiences encompassed. Judges were asked to select from a list of four options (private lawyer, public lawyer, legal academic, appointed directly from law school), but they were also given the opportunity to write in any other profession. Figure 13 below shows the results of the online survey of Arab judges, which includes responses from 78 judges that were predominantly from Egypt (24); Saudi Arabia (22); and Lebanon (20). Other countries were Tunisia (6), Jordan (3), Palestinian Territories (2) and Syria (1). The majority of judges who answered this survey question (50 out of 78) had some professional experience before joining the judiciary.

⁵⁹⁶ One Lebanese judge had previously been a member at the legislative and consultative body of the Ministry of Justice. He described his work as primarily "advisory in nature" to the ministers.

Figure 13. Arab Judges' prior experience before becoming a judge (Arab Judges Survey; n=78)⁵⁹⁷



The most prevalent pre-appointment experience was as a private lawyer (22 of 50 judges), but a substantial number also chose the “Other” category. Experiences here included work in the executive branch. For instance, one Lebanese judge wrote that he held a senior position at the Sharī‘a Council. Two Egyptian judges wrote that they were police officers, one of which explained how he had become a judge after serving as a police officer: “In Egypt, police officers get a law degree and they can apply to join the judiciary (prosecutors first then judges at a later stage)”.⁵⁹⁸

The survey was particularly helpful in understanding the professional background of judges from Saudi Arabia because there were no profiles from Saudi Arabian judges on LinkedIn. Of the 25 judges from Saudi Arabia that completed the online Arab Judges Survey, the overwhelming majority (22) were directly appointed to the judiciary following law school. Only two Saudi judges indicated that they had previously worked as private lawyers, and one judge indicated that he had been a legal advisor before entering the judiciary.

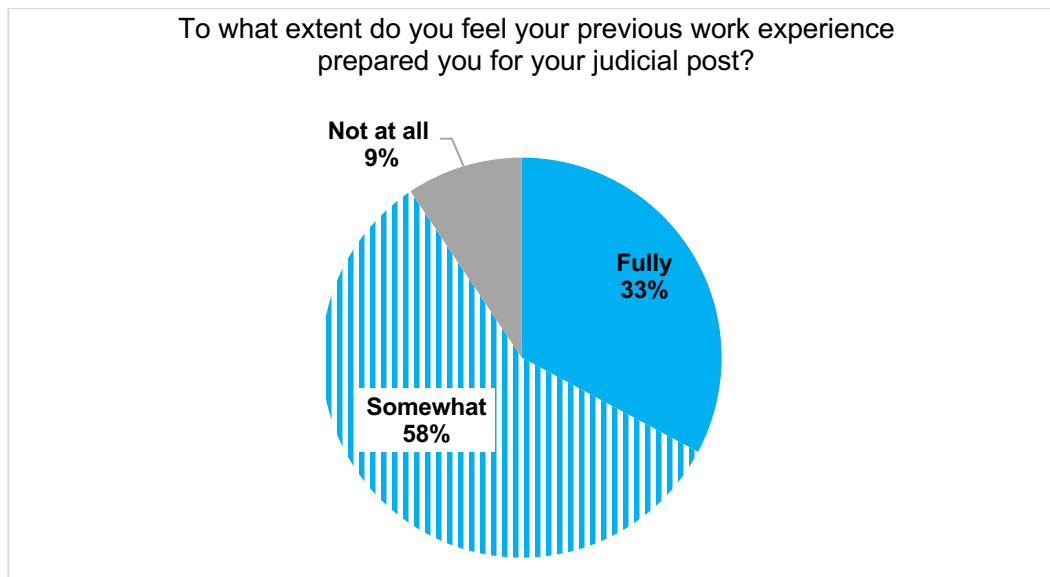
⁵⁹⁷ In the Survey, 4 judges indicated that they had two prior experiences before joining the judiciary, which is why the total number of professional experience (85) is greater than the sample size (78).

⁵⁹⁸ Comment from Judge 2030119 (Arab Judges Survey)

Prior education and legal practice

According to Heumann, law school and prior civil court experiences do not provide "a realistic perspective on the operations of the criminal court."⁵⁹⁹ He concludes that most newcomers to the bench are "not well prepared for their jobs in the court."⁶⁰⁰ To explore whether prior education and legal practice was sufficient preparation for Arab judges in their work in court, the survey asked judges to indicate the extent to which they felt their previous professional background prepared them for their judicial role.⁶⁰¹ Figure 14 below presents responses from the 61 Arab judges who answered this question on the survey.

Figure 14. Arab judges' view of how well prior work prepared them for their judicial role (Survey n=61)



More than half of the judges (35 or 58%) said that their previous work experience had prepared them to some extent. A third (21 or 33%) thought that it had "fully" prepared them, while only 6 (9%) judges did not consider that their prior experiences had prepared them at all. One Egyptian judge commented that his prior experience had given him "great exposure to the

⁵⁹⁹ Milton Heumann, *Plea Bargaining: The Experiences of Prosecutors, Judges and Defence Attorneys* (University of Chicago Press 2006), p.153

⁶⁰⁰ Ibid.

⁶⁰¹ Participants were asked to indicate on a 3-point scale of "fully", "somewhat" or "not at all".

legal practice from the perspective of a lawyer”.⁶⁰² Another Egyptian judge wrote that beginning his judicial career as a public prosecutor “was significant to prepare me for the duties of a judge”.⁶⁰³

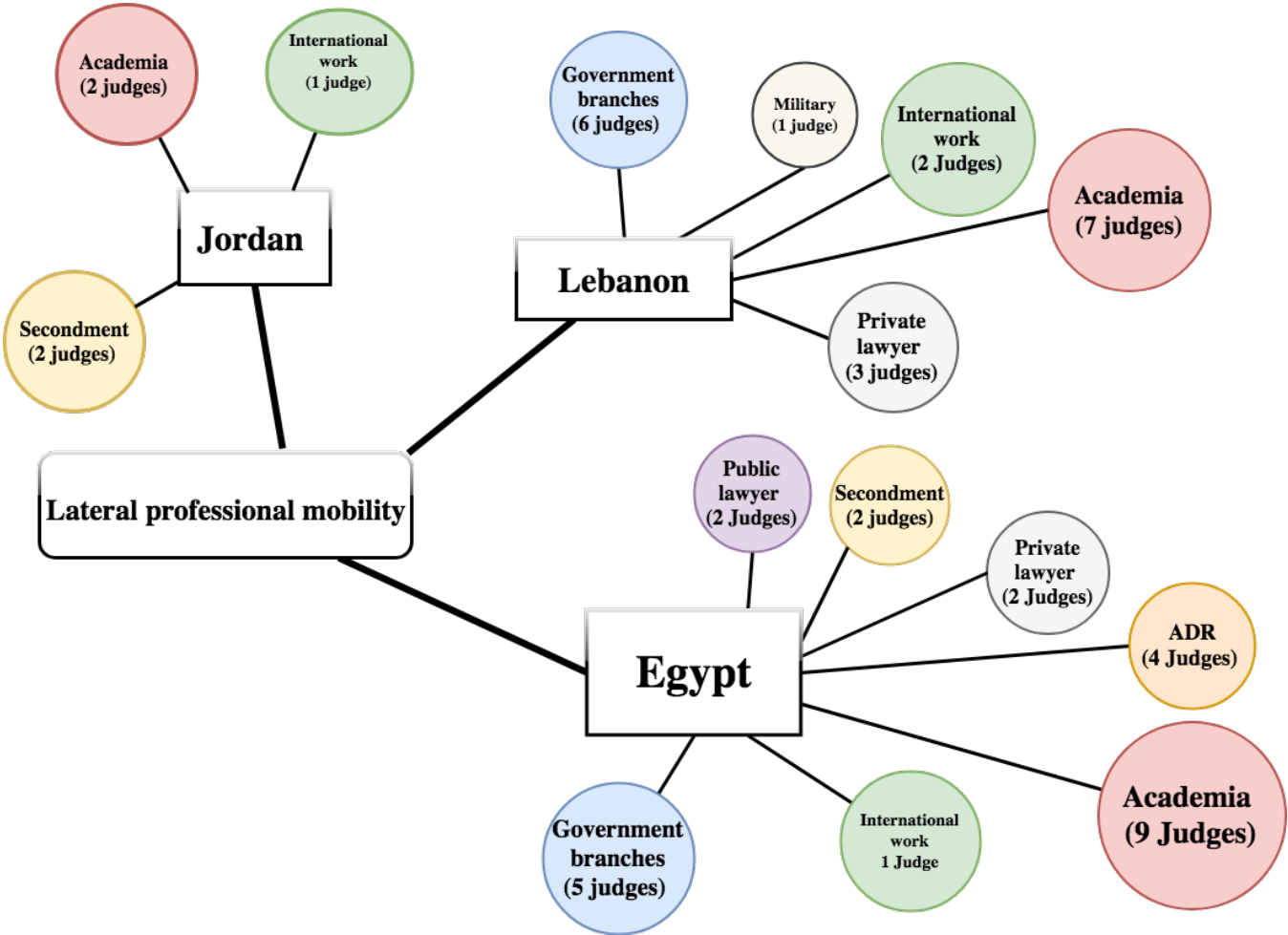
Lateral professional mobility

Another important feature in terms of individualisation for judges is lateral mobility - the professional mobility a judge may have throughout his/her career as a judge and the networks he/she establishes as a result of simultaneously holding jobs inside and outside the judiciary. Based on the information generated from LinkedIn, continued lateral professional mobility was found in 48 out of the 112 Arab judges profiled, especially among senior judges (see Figure 15)

⁶⁰² Comment from Judge: 2077920 (Arab Judges Survey)

⁶⁰³ Comment from Judge: 2081484 (Arab Judges Survey)

Figure 15. Lateral professional mobility in Jordan, Lebanon and Egypt judiciaries (n=48, LinkedIN)



The greatest lateral professional mobility was found amongst Egyptian judges, with 25 of 62 holding another job addition to their judicial post. The most common jobs were in academia, government branches and ADR. One Egyptian judge presiding over a first instance court continued to work for the Ministry of Justice. He described his job as helping to "create fields of cooperation and signing protocols with international institutions and organisations".⁶⁰⁴ Six of the 28 judges from Lebanon worked for various governmental branches and three were private lawyers. In addition, 7 judges were continuing to teach at universities and at the Lebanese Judicial Institute. One senior judge at the Lebanese State Council listed two additional jobs beyond being a judge: government advisor and professor at a Beirut university. There was some mobility within judiciaries in the region, with four judges (2 from Egypt, 2 from Jordan) seconded to other Arab countries (mostly in the Gulf region).

Individual judges' personalities

Another factor which forms part of the judicial role relates to how individuals internalise the expectations associated with the judicial role. While socialisation is easy to operationalise, exploring such covert expectations is next to impossible for a researcher. It would involve an exploration of the "real" self of the individual judge that may be different from those sets of identities or expectations the individual judge consciously or subconsciously chooses to reveal. However, some judicial behaviourists have argued that there may be certain elements that might provide some insight into how individual judges internalise the judicial role and how it may manifest itself in their performance and interactions within the judiciary and in the broader political system.⁶⁰⁵ For

⁶⁰⁴ Judge EG50 (LinkedIn)

⁶⁰⁵ See for example Burton Atkins, Lenore Alpert and Robert Ziller, "Personality theory and judging: a proposed theory of self-esteem and judicial policy-making" (1980) 2 *Law & Policy* 189; Alpert, Lenore, Burton M. Atkins and Robert C. Ziller, "Becoming a Judge: The Transition from Advocate to Arbiter" (1979) 62 *Judicature* 325; James L Gibson, "From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior" (1983) 5 *Political Behavior* 7; James L Gibson, "Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model" (1978) 72 *American Political Science Review* 911.

instance, the impact of personality on behaviour may influence several aspects of judging and the perceived role of a judge. Atkins et al. argue that the influence of personality is mediated by a number of other individual situational and contextual variables:

“[T]he conceptual utility of personality theory in a political context, as in all other personal interactions, lies in the extent to which it provides partial explanations of how an individual’s psychological characteristics facilitate or impede interactions with those persons who form the subsystems of politics within which he or she operates.”⁶⁰⁶

Judges' personality attributes determine the manner in how judges deal with expectations and obligations that are associated with the judicial role.⁶⁰⁷ According to Gibson, one important dimension of judicial personality is self-esteem.⁶⁰⁸ For instance, willingness to make innovative decisions (“risky shifts”) and to dissent may be a function not only of the institutional context of decision-making, but also of the self-esteem of the judges.⁶⁰⁹ For Gibson, substantive values and role orientations may be, in part, a function of self-esteem where “activist” judges are more likely to have a higher self-esteem than judges that practice judicial restraint.⁶¹⁰

In order to explore Arab judges’ personalities and capacities, judges were asked to indicate whether they agreed or disagreed with two questions in the Arab Judges Survey:

- *"As a judge, I feel I provide an important service to society."*
- *"Belonging to the judiciary is an important part of my self-image."*

Both statements were intended to assess the degree to which individual judges distinguished between themselves and the judicial role they occupied in line

⁶⁰⁶ Burton Atkins, Lenore Alpert and Robert Ziller, “Personality Theory and Judging: A Proposed Theory of Self-Esteem and Judicial Policy-Making” (1980) 2 *Law & Policy* 189., p.190

⁶⁰⁷ James L Gibson, “From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior” (1983) 5 *Political Behavior* 7., p.22

⁶⁰⁸ Ibid. p.26

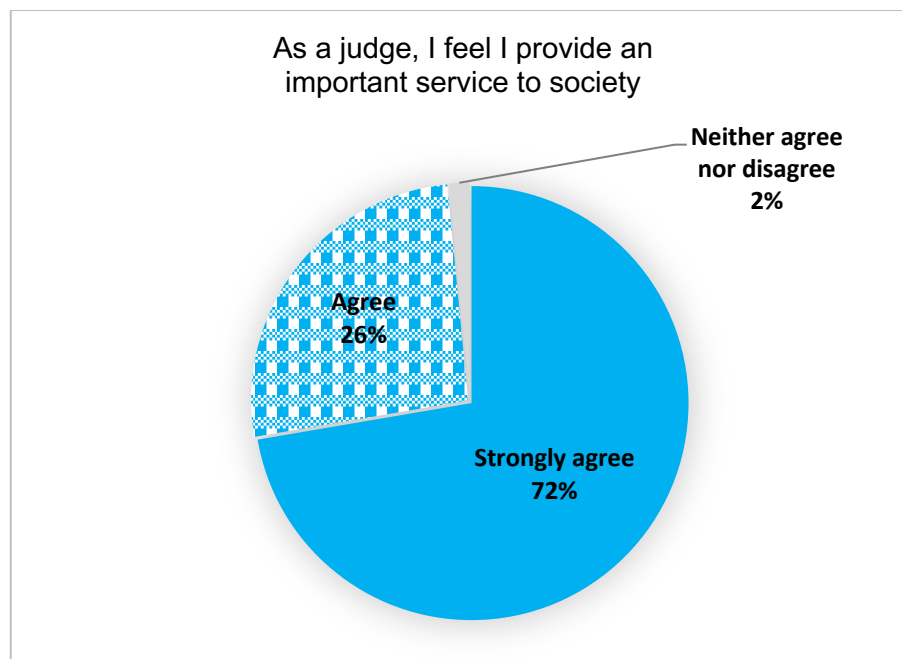
⁶⁰⁹ Ibid. p27

⁶¹⁰ Ibid. p.26

with Gibson's argument that self-esteem may indicate judicial activism. The statements relate to self-esteem in the sense that they asked individual judges to evaluate their personal contribution in relation to the judicial role.

The answer options were on a 5 point Likert scale from "Strongly Agree" to "Strongly Disagree". In total, 65 Arab judges responded to both statements, and they came from Saudi Arabia (21 judges), Egypt (20 judges), Lebanon (14 judges), Tunisia, Syria and Jordan (10 judges). Figure 16 below presents judges' responses to whether they agreed that as judges, they felt that they provided an important service to society.

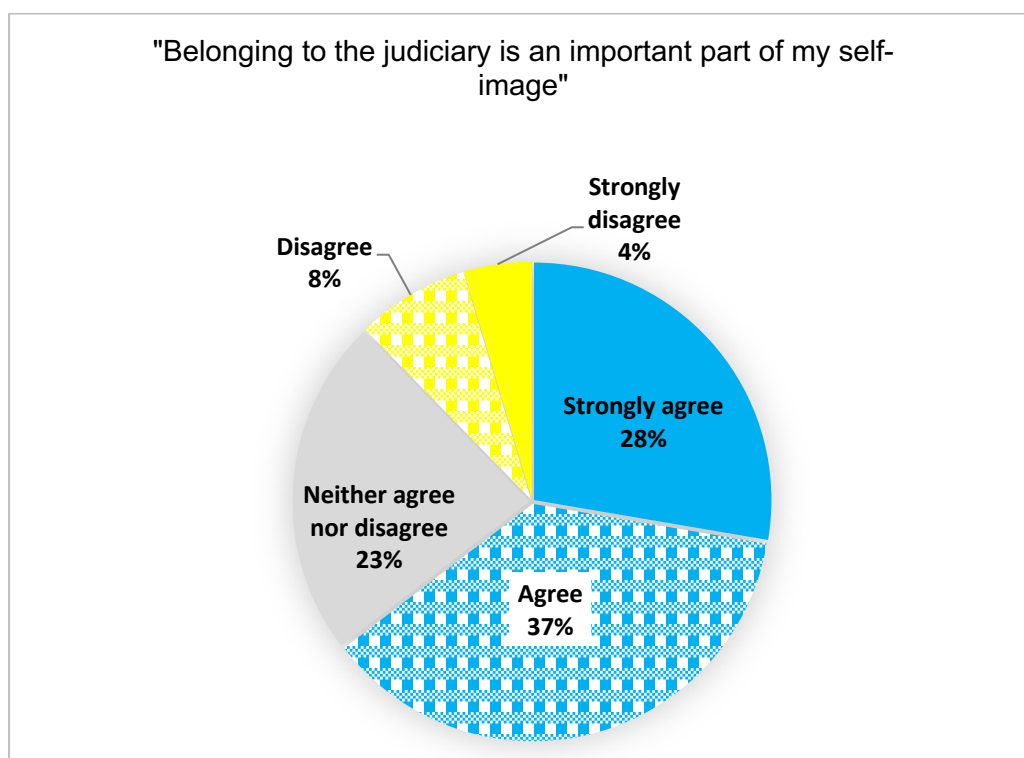
Figure 16. Extent to which Arab judges feel they provide an important service to society (Arab Judges Survey, n=65)



Out of 65 responses, nearly all judges agreed with the statement, with 47 judges indicated that they "strongly agreed" and 17 judges "agreed". Only 1 Egyptian judge indicated that he "neither agreed nor disagreed".

Judges' responses were more varied in relation to the second statement ("*Belonging to the judiciary is an important part of my self-image*") which is illustrated in Figure 17 below.

Figure 17. Responses to "Belonging to the judiciary is an important part of my self-image" (Arab Judges Survey; n=65)



Of the 65 responses to this statement, more than half (42 judges) agreed, with 18 judges indicating that they strongly agreed with the statement. Eight judges disagreed with the statement, 3 of whom strongly disagreed. Just under a quarter (15 judges) neither agreed nor disagreed.⁶¹¹ A few judges offered to explain their choice. For instance, one Egyptian judge wrote that belonging to the judiciary was not important: "It is not very important for my self-image in my case as my status in the Arab legal sphere depends mainly on my publications in the UK, Germany and the MENA region."⁶¹² Another Egyptian judge commented that "One makes his own image, by his manners, intelligence, and then his profession".⁶¹³ One Tunisian judge, who also

⁶¹¹ Most judges in Saudi Arabia (14 of 21), Egypt (13 of 20) and Lebanon (8 of 14) agreed or strongly agreed with the statement. Three judges from Saudi Arabia and three from Egypt disagreed or strongly disagreed with the statement.

⁶¹² Comment from Judge 1980070 (Arab Judges Survey)

⁶¹³ Comment from Judge 2078058 (Arab Judges Survey)

disagreed with the statement, commented that self-esteem is not only relevant to the function of the judiciary, “but about any job that will benefit the people”.⁶¹⁴

Summary

Becoming a member of the judiciary involves at least two processes of socialisation. The first process relates to how the individual judge acquires the knowledge, skills and sense of occupational identity that are characteristic of a member of that profession. The second process of judicial socialisation (individualisation) focuses on the the extent to which the individual judge contributes to the judiciary, as opposed to someone who passively accepts existing norms that the judicial institution provides or imposes.⁶¹⁵ Individualisation involves a process where the individual is active in the definition of his/her judicial role within the judicial system.⁶¹⁶ Through this process another important element needs to be considered: the individual's own behaviour and self-conception. Taken together with chapter 6, both processes of socialisation demonstrate how several factors, mechanisms and processes, are intertwined and may help to shape how Arab judges perceive their judicial roles:

“When a man [or a woman] becomes a judge he does not forget all that he has done or learned or been exposed to in the past. Judges used to be law student and many used to practice law. they have been trained in the values and expectations which their profession espouses”.⁶¹⁷

The information generated from Egyptian, Lebanese and Jordanian judges' LinkedIn profiles and the online Arab Judges Survey reveals a diverse set of background attributes for Arab judges based on education, as well as their prior and simultaneous professional experiences that are external to the judiciary. Some of these background attributes and experiences may help to

⁶¹⁴ Comment from Judge 2085655 (Arab Judges Survey)

⁶¹⁵ Porter et al uses the term “individualisation” to describe socialisation experiences in which the individual is active in contributing towards the organisation. See Lyman W Porter, Edward E Lawler and J Richard Hackman, *Behavior in Organizations* (McGraw-Hill 1974).

⁶¹⁶ Jennifer H Waldeck and Karen K Myers, “Organizational Assimilation Theory, Research, and Implications for Multiple Areas of the Discipline: A State of the Art Review” (2007) 31 *Annals of the International Communication Association* 322, p. 324.

⁶¹⁷ Glick, H. (1967). *Judicial role perceptions and behavior: A study of American state judges* Ph.D. Tulane University, p.32

shape the judicial role beyond institutional controls. What this suggest is that despite these controls, judges are diverse individuals contrary to the idealised picture of mechanical appliers of the law as espoused by the institutions. The next chapter presents the findings of the empirical study of judicial role conceptions in the Arab Middle East, and it explores how these compare with prior studies of judicial role conceptions in the common and civil law worlds.

Chapter 8. Judicial role conceptions

This chapter explores how Arab judges perceive their role based on findings from the online Arab Judges Survey conducted for this research. The main aim of the research presented in this chapter is to gain preliminary insight of Arab judges' normative expectations about how a given judicial office should be performed".⁶¹⁸ As discussed in Chapter 2, previous studies of judicial role conceptions have been motivated by a desire to correlate judicial role orientations to specific types of judicial decision-making. The Arab Judges Survey is the first study of judicial role conceptions in the Arab region. As such the findings are of intrinsic value in themselves, but this chapter also places the findings within the context of earlier studies of judicial role conceptions and approaches to judicial decision-making outside the Arab region. The first part of this chapter presents the results of the Arab Judges Survey. The survey included a number of the same questions about judicial roles that have been asked in earlier studies with European and American judges. The second part of this chapter compares the findings from the Arab Judges Survey with the earlier studies of judicial role perceptions in common and civil law jurisdictions.

Exploring Arab judicial role orientations

Empirical research on Arab judicial attitudes appears non-existent, especially within the framework of role theory.⁶¹⁹ This chapter aims to begin to fill this gap and to add to the existing body of research on judicial role conceptions in other jurisdictions. Despite the fact that the survey group of Arab judges is methodologically limited (as discussed in Chapter 4), the survey findings presented in this chapter are able to empirically explore role perceptions amongst Arab judges for the first time and compare these findings with existing scholarship on this issue with judges in other jurisdictions.

⁶¹⁸ See generally J. Woodford Howard Jr., "Role Perceptions and Behavior in Three U.S. Courts of Appeals" (1977) 39 University of Chicago Press 916.

⁶¹⁹ Following a detailed search, no previous work on judicial role conceptions of judges in the Arab Middle East was found in English language based scholarship or in Arabic scholarship.

Earlier empirical studies have considered three elements as crucial to exploring judicial role orientations: how judges characterise their judicial role; what purposes/goals judges believe they do/should pursue as judges and; the degree to which judges believe legal precedents and public attitudes are important criteria for them in reaching judicial decisions.⁶²⁰ The three elements are collectively referred to as the “purposive role sector” in role theory, and are described as expectations judges have about their own particular position.⁶²¹ With focus on the purposive role sector, this initial study of Arab judges aims to understand the normative expectations of judges in the region and whether they fit within the framework of four judicial role orientations identified by earlier scholarship: the “executor”, “delegate”, “guardian” and “political” judge.⁶²²

Survey approach to understanding Arab judicial role conceptions

Three approaches were used in the survey to enable Arab judges to express their views about how they conceive of their judicial role: (1) ranking judicial roles in order of importance, (2) comparing their judicial role to judges in other jurisdictions and (3) stating their view of the importance of precedent and the public in judicial decision-making.

First approach: ranking the importance of judicial roles

In the Arab Judges Survey, judges were asked to rank the following judicial roles in order of importance:

- Applier of the law;
- Administrator of justice;
- Guardian of the community;
- Architect in the country’s body of law;
- Enforcer of legal rules;
- Arbiter of morality.

⁶²⁰ Thomas D Unga and Larry R Baas, “Judicial Role Perceptions: A Q-Technique Study of Ohio Judges” (1972) 6 *Law & Society Review* 343. p.345

⁶²¹ As Unga and Baas observe, the focus in this chapter is only on the “purposive sector”, but there are other aspects of the judicial role that deserve attention (some of the other aspects will be explored in Chapter 8). Ibid. p.345

⁶²² See discussion of these four judicial role conceptions in Chapter 1

Each answer option presents a distinct conceptual role for judges that was considered relevant to the Arab context. The roles were, in part, based upon closely examining existing literature on judicial role perceptions in other jurisdictions and also in part tailored specifically to Arab judges. The first set of roles (“Administrator of justice” and “Applier of the law”) were considered as generic functions of any judge in any context. It was assumed that “administering justice” and “applying the law” are understood and accepted as principal judicial functions regardless of context. The two roles exclude the non-behavioural characteristics of those holding the judicial post (gender, race, nationality, and religion) as well as the concepts, attitudes, norms, values, sanctions and reactions of individual judges.⁶²³

The second set of roles (“Guardian of the community” and “Architect of the country’s body of law”) are borrowed from Glick’s seminal study of American state judges’ role perceptions.⁶²⁴ The two roles conceive of judges as being potentially active and political.⁶²⁵

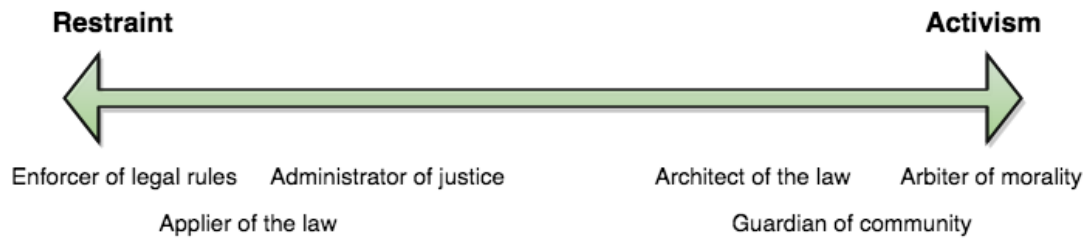
The third set of roles (“Arbiter of morality” and “Enforcer of legal rules”) were created for this study as possible conceptual roles specifically relevant to the Arab region. These two roles take into consideration the existence of different judicial cultures in the region, dominated to varying degrees by religion, custom and Western influences (as discussed in detail in Chapter 3). These two conceptual roles were broadly defined and sit at opposite ends of the spectrum: at one end is the activist, political, public-regarding role of “Arbiter of morality” and at the other end is the passive “Enforcer of legal rules” (Figure 19).

⁶²³ Biddle BJ, *Role Theory: Expectations, Identities, and Behaviors* (Academic Press 1979)

⁶²⁴ Glick, H. (1967). *Judicial role perceptions and behavior: A study of American state judges* Ph.D. Tulane University, p.48

⁶²⁵ For instance, Glick describes the “community Guardian” as a judge who acts as a moral force in the community: “he protects the people from outside threats or unwise values, and he may seem fatherly in his attitude toward the people in his jurisdiction. The judge is looked upon as a chaperone who acts to . . . protect the people from themselves.”. *Ibid.*, p.60

Figure 18. Where judicial roles fall on judicial activism/restraint spectrum



Most important judicial roles among Arab judges

In order to establish a hierarchy of judicial role conceptions in Arab countries, judges were asked to rank all the six options in terms of importance (where “1” is the most important role and “6” is the least important role).⁶²⁶ Table 16 below presents 60 Arab judges’ assessment of the judicial roles they considered most important in their country.

⁶²⁶ The question in the Survey read: *Which of the following roles do you think are most important for judges in your country? Rank the following in terms of which roles are most important for judges in your country (where 1 = MOST IMPORTANT and 6 = LEAST IMPORTANT)*

Table 16. Arab judges' ranking of roles in order of importance (n=60)

Judicial role conceptions						
Restraint		Generic		Activism		
Rank	Enforcer of legal rules	Administrator of justice	Applier of law ⁶²⁷	Guardian of community	Arbiter of morality	Architect of the law
1	7	27	20	10	3	2
2	13	8	19	14	3	2
3	12	12	12	13	4	8
4	9	6	5	9	12	15
5	12	5	0	9	16	14
6	5	2	3	5	21	17

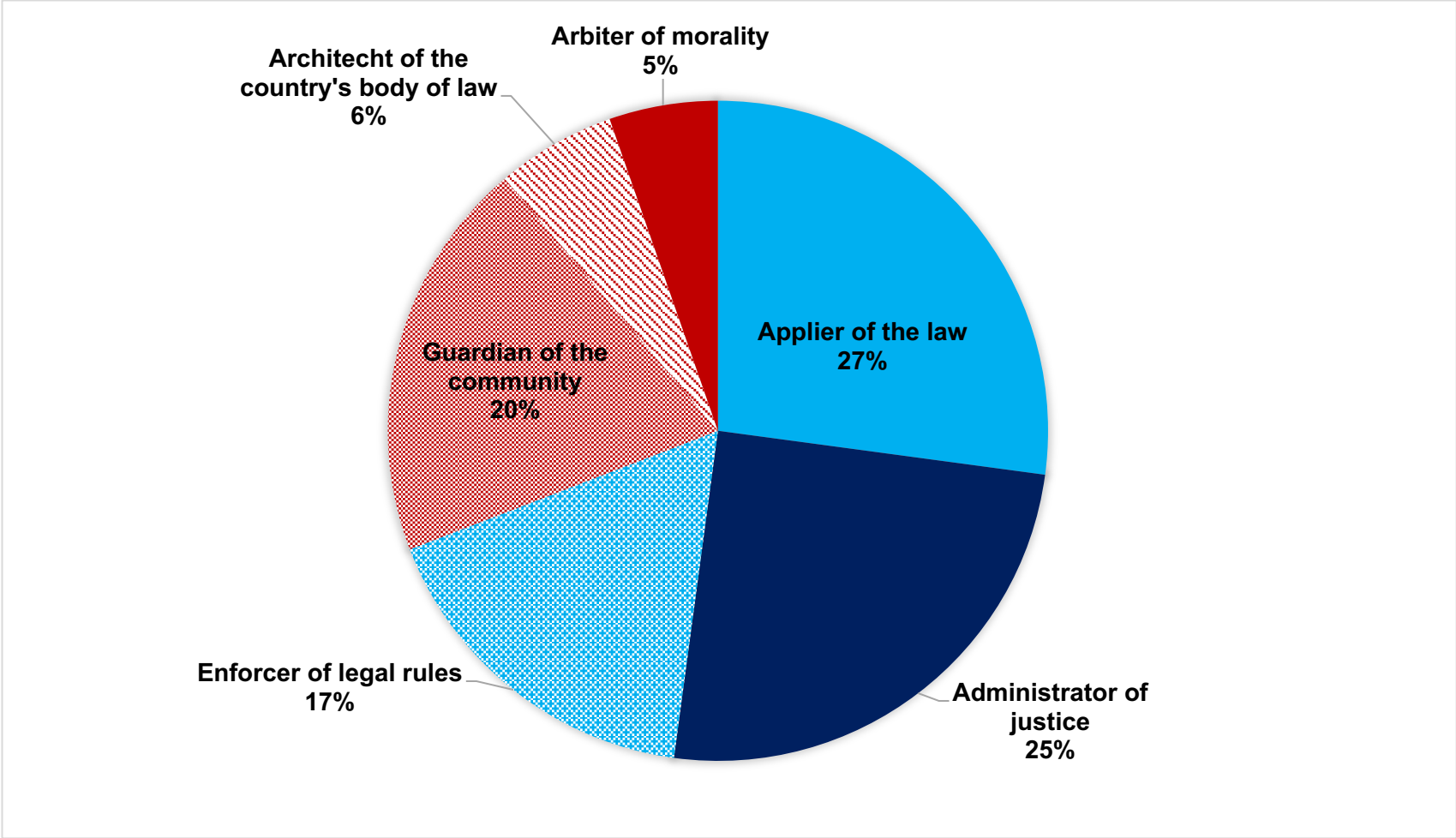
Amongst all Arab judges combined, the role that was considered the most important (ranked most frequently as 1) was the more generic role of “Administrator of justice” (27 judges), followed by the other generic role of “Applier of the law” (20 judges) and the more activist role of “Guardian of the community” (10 judges). Twenty-one judges considered the most activist role, “Arbiter of morality”, as the least important role (ranked as 6). When only the top three highest ranked roles are considered, “Applier of the law” was selected most frequently (51 judges). This was followed by “Administrator of justice” (47 judges) and “Guardian of the community” (37 judges). Based on the total sample, roles that were least frequently ranked in the top three were the activist roles of “Arbiter of morality” (10 judges) and “Architect of the country’s body of law” (12 judges).

Figure 19 below presents the top three ranked roles. The roles that correspond to a more activist orientation are presented in different shades of red. Those roles that are more generic/restraint-oriented in nature are presented in blue shades.⁶²⁸

⁶²⁷ Because the generic roles are broadly defined, “Applier of the law” may also be considered a more passive, restraint-oriented role. However, this is doubtful for reasons discussed in Chapter 10.

⁶²⁸ Given the small number of responses and thus the lack of reliability, a country based analysis in the main text is not provided. Details by country can be seen in Appendix 4

Figure 19. Arab judges' view of most important judicial roles (top 3 preferences combined) (n=60)



According to Glick, the “community guardian” is generally a judge who acts as a moral force in the community and someone who protects the people from outside threats or unwise values.⁶²⁹ Whether judges conceived the “Guardian of the community” in line with this description cannot be definitely established. Nonetheless, the fact that the role was ranked high by many respondents indicates that, at minimum, the guardian role (however understood) was considered as an important role to have.⁶³⁰

Second approach: comparing judicial roles between jurisdictions

The survey also asked Arab judges to consider judicial role conceptions from a comparative perspective. This serves a number of purposes, including understanding how judges evaluate and understand their own role. It has been claimed that there are little differences in judiciaries across the Arab region and that the region has strong “trans-religious legal patterns” which renders it more or less the same in terms of law and legal culture.⁶³¹ Similarly, Mattei’s classification of the “Western legal tradition” treats the traditional distinction between common law and civil law as a subdivision “within a highly homogenous family of legal systems”.⁶³² To explore whether Arab judges themselves perceive such similarities, judges were asked whether they agreed or disagreed that their own judicial role was different from the judicial role: (1) in other countries in the Arab region and (2) in Western countries.

Comparing judicial roles within the Arab region

The survey asked Arab judges to agree or disagree with the statement: “*The role of a judge in my country is different than the role of the judge in other Arab*

⁶²⁹ Glick, H. (1967). *Judicial role perceptions and behavior: A study of American state judges*. Ph.D. Tulane University, p.60

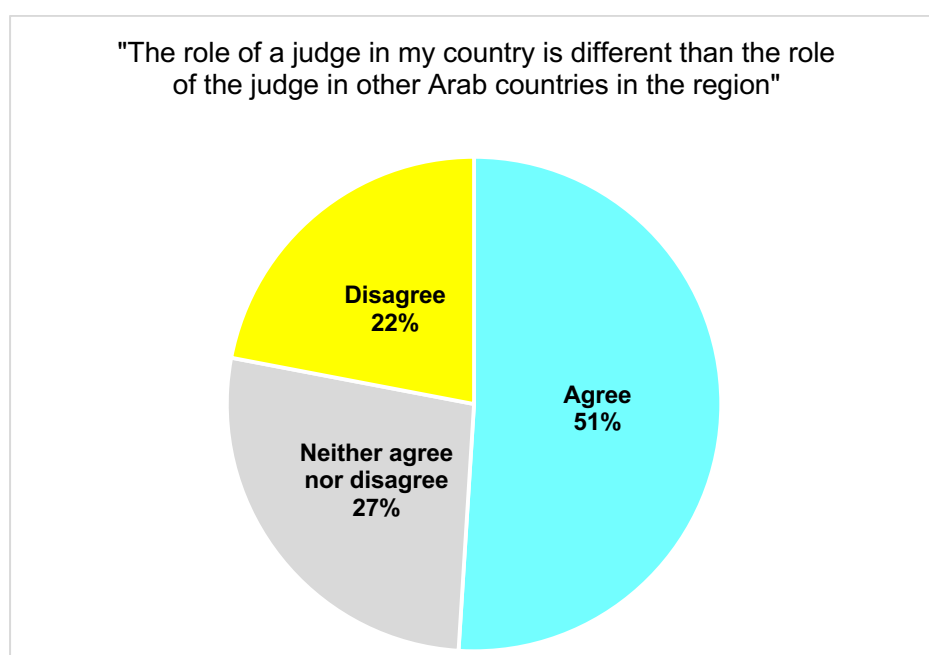
⁶³⁰ The limitations of this was discussed in Chapter 4. As Ungs and Baas acknowledged: “In the final analysis, it is the judge who, in ranking the statements, gives them meaning...”. Thomas D Ungs and Larry R Baas, “Judicial Role Perceptions: A Q-Technique Study of Ohio Judges” (1972) 6 *Law & Society Review*. p.351

⁶³¹ One reason often mentioned is that the region reveals strong “trans-religious legal patterns”, which renders it more or less the same in terms of law and legal culture. See generally, Chibli Mallat, *Introduction to Middle Eastern Law*, Oxford: Oxford University Press 2007 (reprinted 2009), p.23

⁶³² Ugo Mattei, “Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems” (1997) 45 *American Journal of Comparative Law* 5, p.23.

countries in the region". The answer options were on a 5-point Likert scale from "Strongly Agree" to "Strongly Disagree". Of the 63 responses to this question, just over half (32 judges) agreed that the judicial role in their country was different from judicial roles in the Arab region; just under a quarter (14 judges) disagreed with the statement and just over a quarter (17 judges) neither agreed nor disagreed (see Figure 20 below).⁶³³ One Lebanese judge explained that the judicial role is the same in all Arab countries, but because the laws and procedures differ, "the role of the judge look[s] different in each country".⁶³⁴ Similarly, one Egyptian judge commented that "the Egyptian legal system has affected most of the Arab legal systems".⁶³⁵

Figure 20. Arab judges' view of whether their role is different than the role of the judge in other Arab countries, all responses combined (n=63)



⁶³³ In Figure 20 the category "agree" includes both "Strongly agree" and "Agree" responses and the category "disagree" includes both "Strongly Disagree" and "Disagree" responses.

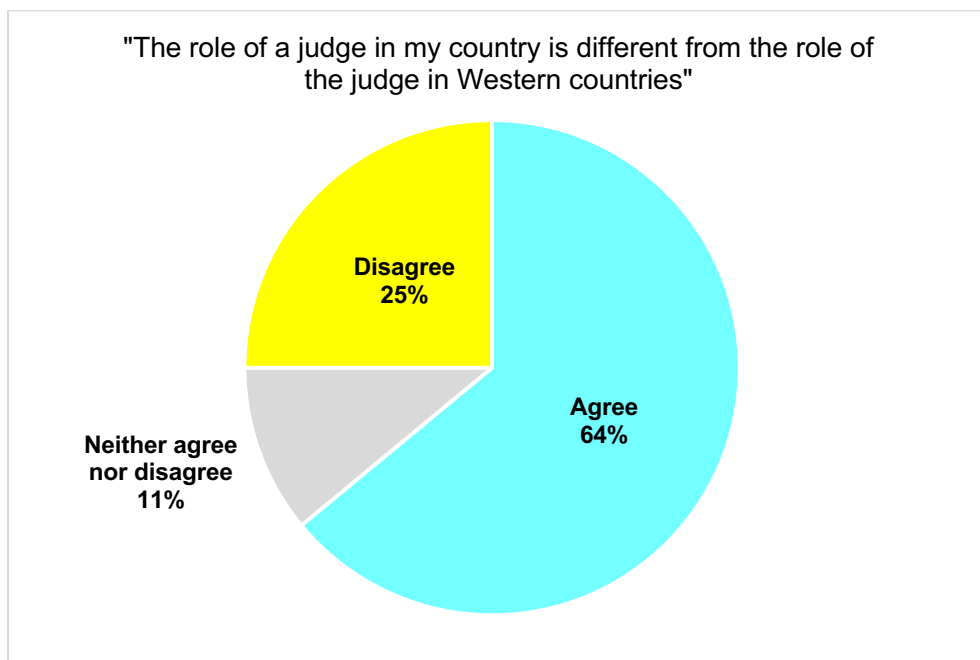
⁶³⁴ Comment from Judge: 2003039 (Arab Judges Survey)

⁶³⁵ This comment reflects the view of Sanhuri's contributions to the region as discussed in Chapter 3. Comment from Judge: 2030119 (Arab Judges Survey)

Comparing judicial roles in Arab countries to those in the West

There was more agreement amongst Arab judges when asked how the judicial role in their country compares with the role of judges in the West (see Figure 21 below). Almost two-thirds of all the Arab judges who answered this question (40 out of 63) agreed that the judicial role in their own country was different from the judicial role in Western countries, with a quarter disagreeing (16 of 63).

Figure 21. Arab judges' view of whether their role is different than the role of the judge in Western countries, all responses combined (n=63)



The results indicate that the judicial role in many Arab countries is generally perceived of as unique in relation to Western judiciaries. But despite the common view that judiciaries in the Arab region have been historically and similarly influenced by the French civil law tradition, the judges surveyed here do not necessarily share this view. One Egyptian judge commented that there was a general difference in judicial role in Arab systems compared with civil and common law systems.⁶³⁶ Another Egyptian judge saw his role as a hybrid

⁶³⁶ Comment from Judge: 2081484(Arab Judges Survey)

of civil and common law judges. He explained that while the Egyptian legal system tends to operate within the framework of a civil law tradition, “there are also similarities to a common law system”.⁶³⁷ One Lebanese judge felt that “there are multiple similarities, especially with countries applying written laws or what we call the romano-germanique legal system”.⁶³⁸ Other judges commented that that the differences related to the manner and mode of the judicial function in their country vis-à-vis Western judges. For instance, one Tunisian judge expressed the view that the workload in Tunisia was more burdensome than Western judges, and that affected the judicial role:

“In view of how the judge works in terms of quantity and quality, the Tunisian judge works with large number of cases beyond the normal size of the Western judge. Often the weekly case- load exceeds a hundred. Due to this, work has become difficult for us in Tunisia”.⁶³⁹

Third approach: the importance of precedent and the public

The Arab Judges Survey also included a series of questions that were designed to compare Arab judges’ role perceptions with previous findings on judicial role conceptions amongst three groups of Western judges. This included Becker’s 1966 study of common law state judges in Hawaii and Flango’s 1975 study of civil law judges in Austria and Switzerland.⁶⁴⁰ To carry out this direct comparison, the Arab Judges Survey asked judges to respond

⁶³⁷ Comment from Judge: 2078058 (Arab Judges Survey)

⁶³⁸ Comment from Judge: 2077935 (Arab Judges Survey)

⁶³⁹ Comment from Judge 2085655 (Arab Judges Survey), translated from comment in Arabic.

⁶⁴⁰ The now decades-old questions were chosen in order to provide for continuity in terms of empirical investigation into the role of judges. Since this was a first attempt at studying the role perceptions of judges in the Arab Middle East, it was considered suitable to use questions of studies that had the same explorative purpose and follow the same pattern of earlier studies. As discussed in Chapter 4, there are substantial limitations particularly when seeking to compare the results with international studies. However, the questions have been, and continue to be used by judicial behaviourists to measure the several aspects of potential role orientations and to understand judicial decision-making. The questions are moreover reflective of recent studies into the role of judges, i.e. the questions are devised and designed to investigate judges’ expectations about the purposes or objectives they should adopt and how they perceive decision-making to operate on the court. See Carman RV, ‘The Development of the Judicial Role Orientation’ in Raymond V Carman, *Making Good Law or Good Policy?* (Springer International Publishing 2017); Lee Epstein, Stefanie A. Lindquist ‘The Oxford Handbook of U.S. Judicial Behaviour’, *Oxford Handbooks of American Politics* (Oxford University Press 2017)

to 14 statements drawn from Becker's and Flango's studies.⁶⁴¹ The 14 statements are split into two categories: (1) those that explore judges' "precedent orientation" and how this influences their judicial decision-making (6 statements), and (2) those that explore the "public dimension" of judging and reflect judges' views of the appropriate role of judges in society (8 statements).

Similar to Flango's approach, the answer options provided to judges in the Arab Judges Survey were categorised into "narrow" and "broad". For the narrowly-worded options, judges were asked to say how influential a factor was on a four-point Likert-scale ("Very influential", "Influential", "Somewhat influential", and "Not at all influential"). For the broadly worded options, judges were asked to say whether they agreed or disagreed with each statement on a five-point Likert-scale ("Strongly agree", "Agree", "Neither agree nor disagree", "Disagree", "Strongly disagree").

The survey questions and answer options that explore Arab judges' "**precedent orientation**" are presented in Table 17 below. Although the questions were translated for the Arab Judges Survey, the questions reflect the questions used in Flango's study.

⁶⁴¹ Theodore Becker "A Survey Study of Hawaiian Judges: The Effect on Decisions of Judicial Role Variations" (1966) 60 *American Political Science Review* 677.; Victor Eugene Flango, Lettie McSpadden Wenner and Manfred W Wenner, "The Concept of Judicial Role: A Methodological Note" (1975) 19 *American Journal of Political Science* 277, p.277. See also

Table 17. Questions examining precedent orientation (Arab Judges Survey)

Precedent orientation questions and answer options	
Narrowly worded	Broadly worded
<i>How influential are these to you as a judge?</i>	<i>To what extent do you agree with the following?</i>
“Decisions closest in facts to the present case”	“Judges are merely instruments of the law and can will nothing”
“Past decisions of the supreme court”	“It is possible for a judge always to be politically neutral and nonpartisan in deciding cases”
“Precedent, when clear and directly relevant”	“Adherence to precedent must be the rule rather than the exception if litigants are to have faith in the continuity of law”

The survey questions and answer options that explore Arab judges’ **“public orientation”** are presented in Table 18 below.⁶⁴²

Table 18. Questions examining judges' public orientation (Arab Judges Survey)

Public orientation questions and answer options	
Narrowly worded	Broadly worded
<i>How influential are these to you as a judge?</i>	<i>To what extent do you agree with the following?</i>
“What the public expects”	“Judges should use their knowledge of social and political factors, as well as the law, in making their decisions”
“The social consequences of the decision”	“Through cases brought to the courts, judges must constantly balance conflicting interests in society”
“Requirements of law and order”	“It is important that judges keep in constant contact with changing social mores in order to make their decisions relevant to the community”
“Judges’ view of justice in the case”	“It is more important that judicial decisions be just than that the letter of the law be adhered to”

⁶⁴² The 6 statements were also deliberately framed as “narrow” and “broad”. For the narrowly worded statements, judges were asked to respond on a four point Likert-scale ranging from “Very influential” to “Not at all influential”. For the broadly worded statements, a five point Likert-scale was used ranging from “Strongly agree” to “Strongly disagree”.

In total, 48 Arab judges responded to all precedent orientation and public orientation questions the survey: 15 from Egypt, 14 from Saudi Arabia, 11 from Lebanon, 4 from Tunisia, 2 from Jordan, and 2 each from Syria and Palestine.

Judicial attitudes to precedent and judicial decision-making

Table 19 below shows Arab judges' responses to the narrowly-worded statements on the importance of precedent in their judicial decision-making. It shows results for all Arab judges combined.

Table 19 Arab judges' assessment of the influence of precedent on their judicial decision-making (n=48)

<i>How influential are the following factors to a judge in deciding a case?</i>	Judges saying very influential or influential	
	No.	%
"Precedent, when clear and directly relevant"	40	83.3
"Past decisions of the supreme court"	38	79.1
"Decisions closest in facts to the present case"	36	75.0
	n=48	

All of the narrowly-worded statements on precedent produced general agreement among the Arab judges that these were influential in their decision-making. At least three-quarters of all the 48 Arab judges combined said that the three different aspects of precedent were influential. The most explicit reference to precedent ("Precedent, when clear and directly relevant") had the highest proportion of all Arab judges combined saying it was influential (83.3%).

Looking further at Arab judges' view of the importance of precedent, Table 20 shows the number and percentage of Arab judges who agreed with the broadly-worded precedent-oriented statements on how judges approach judicial decision-making. The results are for those Arab judges who said they strongly agreed or agreed with each statement.

Table 20. Proportion of Arab judges that agree with precedent oriented statements (n=48)

	Level of agreement	
	No.	%
“It is possible for a judge always to be politically neutral and nonpartisan in deciding cases”	34	70.8
“Adherence to precedent must be the rule rather than the exception if litigants are to have faith in the continuity of law”	13	27.0
“Judges are merely instruments of the law and can will nothing”	4	8.3
	n=48	

In comparison to the narrowly-worded statements on precedent, there were much lower levels of support for these broadly-worded statements about judicial decision-making. Looking at the responses for all Arab judges combined, only one statement was supported by a majority of the judges: 71% agreed that “*It is possible for a judge always to be politically neutral and nonpartisan in deciding cases*”. There were much lower levels of agreement amongst all the Arab judges for the statement “*Adherence to precedent must be the rule rather than the exception if litigants are to have faith in the continuity of law*” (27%). The lowest agreement among judges was for the statement “*Judges are merely instruments of the law and can will nothing*”.

Judicial attitudes to the role of the public & society in decision-making

Table 21 below shows how the Arab judges who took the survey responded to the narrowly-worded statements about what factors are influential in judicial decision-making, including public and personal views in cases as well as the social consequences of decisions. The results are presented as the proportion of Arab judges combined who said each factor was influential in their judicial decision-making.

Table 21. Arab judges' agreement with narrowly worded statements on social and personal factors in decision-making (n=48)

<i>When a judge decides a case, how influential do you think the following factors are for a judge?</i>	Level of influence	
	No.	%
"Requirements of law and order"	47	97.9
"Judge's view of justice in the case"	37	77.0
"The social consequences of decision"	26	54.1
"What the public expects"	6	12.5
	n=48	

Nearly all judges regardless of jurisdiction felt that "*the requirements of law and order*" were influential in their decision-making. There were also high levels of support for the idea that "*the judge's view of justice in the case*" was influential (77%). By contrast, few judges considered public expectations as influential (12.5%). Just over half of the 48 respondents said that the *social consequences of a decision* were influential.

In comparison to the narrowly-worded statements on public and social factors in decision-making, there were more consistent levels of agreement amongst Arab judges across jurisdictions on the more broadly-worded statements about public and social factors in judicial decision-making. Table 22 below shows the proportion of Arab judges combined who said they either strongly agreed or agreed with the statements

Table 22 Arab judges' agreement with broadly worded statements on public and social factors in judicial decision-making (n=48)

Please indicate whether you agree or disagree with the following statements:	Level of agreement	
	No.	%
"It is important that judges keep in constant contact with changing social mores in order to make their decisions relevant to the community"	40	83.3
"It is more important that judicial decisions be just than that the letter of the law be adhered to"	39	81.2
"Judges should use their knowledge of social and political factors, as well as the law, in making their decisions"	30	62.5
"Through cases brought to the courts, judges must constantly balance conflicting interests in society"	32	66.6
	n=48	

A majority of judges in all Arab countries that took part in the survey agreed with each of the 4 statements, but certain statements had more consistent levels of agreement across the jurisdictions than others. Amongst all Arab judges combined, the highest level of agreement (83%) was for the statement *"It is important that judges keep in constant contact with changing social mores in order to make their decisions relevant to the community"*. More than two-thirds of all 48 judges agreed that it is important to be in contact with *"changing social mores"*. The next highest levels of support amongst Arab judges was for the statements *"it is more important that judicial decisions be just than that the letter of the law be adhered to"*. Most judges across the jurisdictions (81%) agreed with this view. There was greater variability between Arab jurisdictions on the two remaining statements: *"Through cases brought to the courts, judges must constantly balance conflicting interests in society"* (67%) and *"Judges*

should use their knowledge of social and political factors, as well as the law, in making their decisions” (62.5%).

Judicial role conceptions: Arab and Western judges compared

Earlier findings from role perception studies of American and European judges show that judicial roles are more complex than the traditional distinction between judges in civil law traditions and common law traditions suggests. Researchers found that judges in both types of legal systems tend to perceive themselves as “executor judges”, a role commonly associated with the European civil law tradition.⁶⁴³ For instance, even though Austria and Switzerland shared a civil law tradition in contrast to the American common law tradition, the differences between these European and American judges were less marked than was anticipated.⁶⁴⁴ In particular, Austrian and Swiss judges tended to respond in patterns very similar to American judges:

“[...] nearly all of the surveys of judicial role completed to date, except those with very small sample sizes, report that nearly half of the judges interviewed are classified as Law Appliers. *This would seem to indicate that the proportion of judges taking this role is not peculiar to the civil law countries of Austria or Switzerland [emphasis added].*”⁶⁴⁵

This thesis set out to examine this idea of shared judicial role conceptions further. This section compares the results of the Arab Judges Survey on precedent orientation and public orientation with findings from the study by Becker of Hawaiian judges and Flango’s findings for Austrian and Swiss

⁶⁴³ Scheb writes that the “executor” role draws on an ideal Weberian model within the civil law framework: “Under code law and the administration of justice within the civil law tradition, judges are expected to espouse a well-defined role conception. Like the ideal judge in the Weberian model, the civil law judge is expected to function as a bureaucrat - decisions are to be based strictly on legal principles without the taint of personal predilection or bias.” John M Scheb M John, (1982), *Merit Selection, Role Orientations and Legal Rationalization: A Q-Technique Study of The Florida State District Courts* (PhD, University of Florida) p.9

⁶⁴⁴ Manfred W Wenner, Lettie M Wenner and V Eugene Flango, “Austrian and Swiss Judges: A Comparative Study” (1978) 10 *Comparative Politics* 499, p. 509

⁶⁴⁵ Glick and Vines, for instance, found that a little more than half of the judges they surveyed were “executors”. Similar findings were reported by Renstrom, Schubert, and Becker. See Flango, V., Wenner, L. and Wenner, M. (1975) “The Concept of Judicial Role: A Methodological Note” *American Journal of Political Science* 19(2), p.286

judges. The nature of Austrian, Swiss and American judicial roles was expected to be different from judicial roles in the Arab region, primarily because of the traditional distinction between common law and civil law and because Arab legal systems have historically been influenced more by the civil law tradition (see Chapter 3). Comparing the findings from the Arab Judges Survey on precedent and public dimensions with the studies by Flango and Becker, some clear differences do emerge between Arab judges and American and European judges but there are equally as many similarities.

Comparing the relative importance of decision factors

Generally, most Arab judges tended to regard precedent as important and influential, which is similar to the findings of earlier studies with European and American judges (Table 23 below). Similar to Austrian (72.4%), Swiss (93.6%) and Hawaiian judges (92.0%), most Arab judges (83.3%) said that precedent when clear and relevant was an important factor in their judicial decision-making.

For the two other precedent-related factors, the views of Arab judges correspond to the views of non-Arab judges. Arab judges, like Austrian and Swiss judges, also said that “*Superior court decisions*” were important to judicial decision-making, although Swiss judges were most likely to consider this factor important (97.9%), followed by Austria judges (85.1%) and Arab judges (79.1%).⁶⁴⁶ A majority of Arab, Swiss and Austrian judges also said that “*Decisions made in analogous cases*” were more important and influential to their decision-making. But Arab judges were slightly more likely to say this (75.0%) than Swiss judges (70.3%) and both sets of judges were more likely to say this than Austrian judges (54.3 %).

⁶⁴⁶ “*Superior court decisions*” was not included in the questionnaire in Becker’s study on Hawaiian judges.

Table 23. Comparison of judges' perceptions of the most important factors influencing judicial decisions (Arab region, Switzerland, Austria and Hawaii)

Decisional guide	All Arab judges combined	Switzerland ⁶⁴⁷	Austria ⁶⁴⁸	Hawaii ⁶⁴⁹
	%	%	%	%
Relevant and clear precedent	83.3	93.6	72.4	92.0
Judges' perception of justice in the case	77.0	79.9	85.2	79.2
Public needs (requirements of law and order)	97.9	12.5	36.1	29.2
Public expectations and demands	12.5	4.3	10.6	0.0
Social consequences of decision	54.1	60.4	68.1	--
Superior court decisions	79.1	97.9	85.1	--
Decisions in analogous cases	75.0	70.3	54.3	--
	n=48	n=49	n=48	n=25

Beyond the precedent factors, a majority of all four groups of judges said a *judge's perception of justice in a case* was an important factor influencing judicial decision-making. But clear differences emerged between Arab judges and the three other groups of judges about the importance of "*Public needs (requirements of law and order)*" when making decisions. Most Arab judges (97.9%) viewed public needs as important but only a minority of Austrian, Hawaiian and Swiss judges (36.1%, 29.1% and 12.5% respectively) felt this was an important factor in judicial decisions.

Further contrasts are found in relation to these different judges' attitudes to **judicial roles**. The mean score for Swiss, Austrian and Arab judges in relation

⁶⁴⁷ Flango et al used a 5 point Likert scale ranging from "extremely important" to "irrelevant". The table includes the authors' findings on "extremely important" (=5), "very important" (=4) and "important" (=3). Flango, V., Wenner, L. and Wenner, M. (1975) "The Concept of Judicial Role: A Methodological Note" *American Journal of Political Science* 19(2).

⁶⁴⁸ Ibid.

⁶⁴⁹ Three judges are included in this table that were not included in the article from which this data has been extracted because they did not answer a simulated judicial case. (Theodore Becker, "A Survey Study of Hawaiian Judges: The Effect on Decisions of Judicial Role Variations," *American Political Science Review* LX [September 1966], 677-80.)

to seven statements are presented in Table 24 below.⁶⁵⁰ Arab judges tended to agree “*It is important that judges keep in constant contact with changing social mores in order to make their decisions relevant to the community*” (4.12) more than Swiss and Austrian judges (3.31 and 3.31 respectively). Arab judges were also more likely to agree that “*Judges should use their knowledge of social and political factors, as well as the law, in making their decisions*” (3.39) compared to their Austrian and Swiss counterparts (2.97 and 2.97 respectively). The starkest difference relates to the statement that “*judges are merely instruments of the law and can will nothing*” (statement number 7). Arab judges were far less likely to agree with this than their European counterparts. The mean score for Arab judges (1.87) was significantly lower than the Swiss and Austrian judges (3.66 and 3.62 respectively).

⁶⁵⁰ Mean scores were used here in order to allow for direct comparison of results across the three separate studies.

Table 24. Comparison of judges' responses to judicial role statements (Arab Judges Survey, Switzerland and Austria)

Statement	Arab Judges Survey	Mean score	
		Switzerland	Austria
1 "It is more important that judicial decisions be just than that the letter of the law be adhered to"	4.14	4.31	4.5
2 "It is important that judges keep in constant contact with changing social mores in order to make their decisions relevant to the community"	4.12	3.31	3.31
3 "It is possible for a judge always to be politically neutral and nonpartisan in deciding cases"	4	4.12	4.16
4 "Through cases brought to the courts, judges must constantly balance conflicting interests in society"	3.85	3.34	3.60
5 "Judges should use their knowledge of social and political factors, as well as the law, in making their decisions "	3.39	2.97	2.97
6 "Adherence to precedent must be the rule rather than the exception if litigants are to have faith in the continuity of law"	3.22	4.38	4.00
7 "Judges are merely instruments of the law and can will nothing"	1.87	3.66	3.62
	(n=48)	(n=48)	(n=48)

In terms of comparability, the expectation was that Arab judges' responses would be substantially different from common law and civil law judges, particularly in relation to precedent orientation.⁶⁵¹

Areas where significant differences emerge between Arab and non-Arab judges are in factors that relate to the appropriate role of judges in society. The Arab judges surveyed here are more cognisant of social considerations in their decision-making than Western judges. Arab judges are also more likely than their Western counterparts to feel that judges should keep in constant contact with changing social mores. They are also more likely to consider that the requirements of the social order are significant to their decision-making than their Swiss, Austrian and Hawaiian counterparts. Finally, while Arab judges tended to disagree with the description of judges as "*merely instruments of the law*", this was a description that Swiss and Austrian judges tended to agree with.

Arab judges' orientations to precedent and the public

In order to further explore these findings, the following section analyses how each Arab judge responded to all statements in the public dimension (8 statements) and the precedent dimension (6 statements).⁶⁵² Because the statements in this area seek to measure a particular orientation, it was assumed that the more statements a judge responded positively to the higher the judge's orientation would be to that specific type of role.

For the 6 precedent statements, it was assumed that if an individual judge responded positively ("Agree" and/or "Influential") to 4-6 statements, they would have a **high precedent orientation**. By contrast, if the judge only

⁶⁵¹ It was hypothesised that precedent orientation, particularly among Saudi judges, would score relatively low because *stare decisis* is not as prevalent in the country (as discussed earlier in Chapter 5). However, most Saudi judges surveyed in this study appear to attach significant importance to precedent and it was also considered important by most Egyptian and Lebanese judges. Statements that specifically defined precedent such as decisions in "analogous cases", "superior court decisions" and "precedent (where clear and directly relevant)" generally invoked agreement among the 14 Saudi judges surveyed.

⁶⁵² A similar type of analysis was used by Flango et al to measure judges' orientations towards precedent and public by using the 14 statements.

responded positively (“Agree” and/or “Influential”) to 0-2 statements, the precedent role orientation would be **low**. Agreement with 3 of the 6 statements was considered to only indicate a **moderate orientation**. Table 25 below presents the number of statements that the 48 judges agreed with and/or found to be influential in relation to precedent.⁶⁵³

Table 25. Categorisation of Arab judges' precedent orientation

	Number of statements that were agreed with and/or found to be influential	Number of judges
High orientation toward precedent	All 6 statements	3
	5 statements	8
	4 statements	19
Moderate – neither higher nor lower	3 statements	5
Low orientation towards precedent	2 statements	10
	1 statement	3
	No statements	0
		n=48

Most (30 of 48) Arab judges appear to have a **high orientation towards precedent**. Three judges agreed with or found all 6 statements to be influential. This was followed by 8 judges who responded positively to 5 statements and 19 judges agreed with and/or responded to at least 4 out of 6 statements as influential. Five judges agreed with or found 3 statements as influential. By contrast, only a minority (13) of Arab judges appear to have a low orientation towards precedent. Only 3 judges agreed with or considered one statement as influential, and 10 judges agreed with and/or found at least 2 statements to be influential.

A similar analysis was undertaken in relation to the 8 statements that form the public role orientation. It was hypothesised that if judges responded positively to 5-8 statements, their **public role orientation** would be **high**. By contrast, if

⁶⁵³ These results combine “very influential” and “influential” as well as “strongly agree” and “agree.”

judges only agreed/found influential with 0-3 statements, their orientation to public would be **low**. Judges who responded positively to 4 statements were assumed to have a **moderate orientation** towards the public. Table 26 below, presents the total number of public statements the 48 judges agreed with and/or found to be influential.

Table 26. Categorisation of Arab judges' public role orientation (n=48)

	Number of statements that were agreed with and/or found to be influential	Number of judges
High orientation towards public	All 8 statements	4
	7 statements	11
	6 statements	11
	5 statements	7
Moderate- neither high nor low	4 statements	6
Low orientation towards public	3 statements	6
	2 statements	2
	1 statement	1
	No statements	0
		n=48

Based on the data from the survey, it appears that most Arab judges appear to have a **high orientation towards the public** (33 of 48 judges). Four judges agreed with or found all 8 statements to be influential. This was followed by 11 judges who responded positively to at least 7 statements. By contrast, only a minority of Arab judges (15) appear to have a low public role orientation. In this group, most judges responded positively to 3 statements. Only one judge agreed with or considered one statement to be influential. Finally, 6 judges can be considered as having a moderate public role orientation.

Based on this analysis, those judges that participated in the survey can be placed somewhere along two continua of precedent role orientation and public role orientation (Figures 22 and 23).

Figure 22. Precedent orientation scale for Arab judges (n=48)

No. of statements	1	2	3	4	5	6
No. of judges	3	10	5	19	8	3
	LOW	←————→				HIGH

Figure 23. Public orientation scale for Arab judges (n=48)

No. of statements	1	2	3	4	5	6	7	8
No. of judges	1	2	6	6	7	11	11	8
	LOW	←————→						HIGH

It appears that among those who participated most Arab judges are found somewhere in the middle of the precedent role orientation spectrum. Furthermore, three judges have a high orientation towards precedent and three judges have a low orientation towards precedent, and most judges are found somewhere in the middle of the spectrum which renders them **neither “high precedent-regarding” nor “low precedent-regarding.**⁶⁵⁴ In relation to the 8 public-oriented statements, most judges supported to statements suggesting that public aspects of decision-making were important to Arab judges; most (33) Arab judges can be placed somewhere towards the higher end of public-regarding spectrum and 8 judges appear to clearly have a **very high orientation towards the public.** By contrast, only 1 judge can be said to have a **very low public orientation.** In both the precedent orientation and public orientation scale, judges’ overall responses present a nuanced picture, more so in relation to the precedent orientation scale. How this translates into the four judicial role perceptions of “Executor”, “Delegate”, “Guardian” and “Political” is further discussed in Chapter 10.

⁶⁵⁴ Where 15 judges agreed with (or found influential) at least 2-3 statements, and 27 judges agreed with 4-5 statements.

Summary

This chapter explored how Arab judges perceive their role in relation to the law and public policy, and the extent to which these Arab judges appear to adopt positions of judicial activism or judicial restraint through three elements referred to as the “purposive role sector”. The findings presented in this chapter relate to how Arab judges characterised their roles from a comparative perspective. Based on their Survey responses, many Arab judges tended to agree that their roles were less similar to the West, including judicial roles in neighbouring jurisdictions. Second, based on the analysis made, those judges that participated in the survey can be placed somewhere along two continua of precedent role orientation and public role orientation. While the findings reflect some variability in judicial role conceptions amongst judges in each Arab jurisdiction that took part in the survey, perhaps most notably the high proportion of judges that also identified themselves with the non-generic “Guardian role”.

The chapter also compared the findings from the Arab Judges Survey with similar earlier studies of judicial role perceptions in common and civil law jurisdictions. A clear difference emerges in relation to public consideration. For instance, the Arab judges surveyed here were more likely to consider society in their decision-making compared to Western judges. The findings made in this chapter provides a distinct and novel insight into Arab judicial roles, which are further discussed in Chapter 10. The next chapter operates within the same framework of role theory and explores how Arab judges see their roles in relation to two sets of actors: their judicial colleagues and non-judicial actors that are influential in the political system.

Chapter 9. Arab judges' relationships with judicial peers and non-judicial actors

The previous chapter sought to explore Arab judicial role perceptions on the basis of how they view precedent and more public, personal and societal factors in their decision-making. While this analysis provided some new insights about Arab judges and their role conceptions, to understand the judicial role in the Arab region it is also necessary to examine the normative expectations that exist between judges and other key actors. One set of expectations involves a judge's relationship with his/her judicial colleagues. Another set relates to relationships with those outside the judiciary, for instance legislators and government officials. This can have an important effect on judges' thinking about their own role, particularly where there is a high level of judicial deference to law-making bodies.⁶⁵⁵

This chapter begins by examining the normative expectations Arab judges have of each other. It then examines Arab judges' perceptions of the relationship between themselves and non-judges important to the political process. The findings are based on the Arab Judges Survey. Two approaches were used in the survey. The first approach was to explore what Arab judges feel are important qualities for judges to have and those they think their judicial colleagues feel are important. The second approach was to explore Arab judges' views on how much influence non-judges (legal community, public, media and government) do or should have in the judicial decision-making process. For non-judicial actors, this study confines itself to actors that are most important for judges in terms of the political system.

Existing norms of judicial behaviour

As discussed in Chapter 2, there are existing norms of judicial behavior for Arab judges that are based on formal international, regional and national documents. These reflect a myth in which judges are expected to be totally

⁶⁵⁵ Flango, V., Wenner, L. and Wenner, M. (1975) "The Concept of Judicial Role: A Methodological Note" *American Journal of Political Science* 19(2), (conclusion).

objective arbiters who always act impartially towards everyone. However, as Glick says, this “myth does not reflect reality”.⁶⁵⁶ Norms about the ideal conduct of judges often simplify the judicial role to the mechanical application of the law. But as Herndon explains, judicial decision-making will depend upon the kinds of interactions taking place between the judiciary and other parts of the political system.⁶⁵⁷ Therefore an examination of the links between judges and other elements of the political system is necessary.

One way of doing this is to consider the judiciary within a broader structural-functional framework. This was done in Chapter 5, where the organisation of the judicial system and the interrelationship between courts in four Arab states were considered in order to explore judges’ scope for political involvement. An additional way of looking at this is through role theory, exploring judges’ own subjective understanding of links within the judicial community and links in the wider political system. This chapter presents the findings of the Arab Judges Survey, which show how Arab judges perceive their roles in relation to two categories of actors under the framework of role theory: judicial colleagues and non-judicial actors that are politically important.

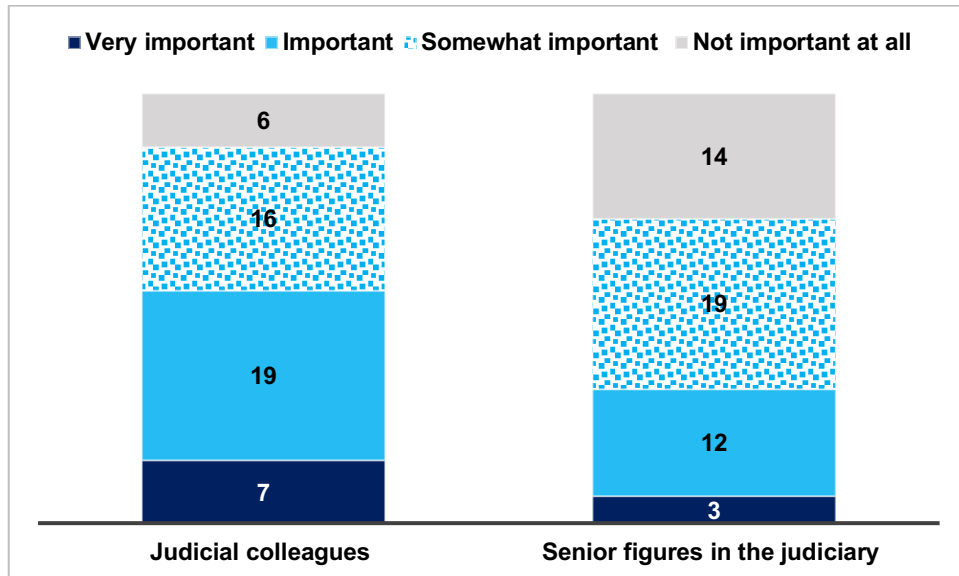
Inter-judicial relationships

The Arab Judges Survey attempted to investigate what judicial norms were important to the judges surveyed. First, the survey explored the relative importance Arab judges attached to other judges. Judges were asked to indicate how important their immediate judicial colleagues and senior figures in the judiciary were to them in their job. A 4-point Likert scale was used (“Extremely important”, “Important”, “Somewhat important” and “Not important at all”). Figure 24 below presents the findings from the 48 Arab judges that answered both of these questions.

⁶⁵⁶ Glick, H. (1967) *Judicial role perceptions and behavior: A study of American state judges*. Ph.D. Tulane University, p.233

⁶⁵⁷ James Herndon “The Role of the Judiciary in State Political Systems” in Glendon Schubert (ed), *Judicial Behavior: A Reader in Theory and Research*. (Rand McNally and Company 1964). p. 153-61.

Figure 24. Degree of importance attached to colleagues and senior figures in the judiciary (n=48)



Almost all judges considered their immediate judicial colleagues important (19) or somewhat important (16) to them in doing their job. Seven judges considered judicial colleagues as very important. More Arab judges felt their senior judicial colleagues were important (12) or somewhat important (19) to them in their work than judges who felt they were not important (14). Overall, Arab judges attached more importance to their immediate judicial colleagues than to senior figures in the judiciary.

Qualities of a good judge

The survey next examined the rules of consensus which govern Arab judges' behavior towards each other by examining two key dimensions:

- Arab judges' views of what constitutes proper behaviour on their part toward other judges who occupy the same judicial position;
- Arab judges' views of their colleagues' expectations about the proper judicial role.

The survey questions focused on **judicial qualities** on the assumption that the qualities judges considered most important would in turn indicate what norms form part of the group. Two survey questions drew on the principles found in

the Sharjah Convention on judicial ethics, and the survey presented judges with the following ten categories of “ideal judicial qualities”:

- Personal integrity
- Knowledge of the law
- Strong moral principles
- Dealing impartially with parties to cases
- Intellectual honesty
- Personal conduct in public
- Objectivity in decision-making
- Efficient work habits
- Decision-writing abilities
- Awareness of broader social and political issues

First, judges were asked: “*To what extent do you feel the following qualities are important for a judge to have to do their job well?*”. Here judges were asked to indicate the level importance for each of the 10 qualities on a four point Likert-scale (“Extremely important”, “Important”, “Somewhat important”, “Not important at all”).

Judges were then asked in relation to these 10 qualities: “*To what extent do you feel the following qualities are valued by the judges you work with?*”. A four point Likert-scale was used here to indicate value levels (“Valued highly”, “Valued”, “Valued a little”, “Not valued at all”).

Arab judges’ views of the qualities needed to do their job well

Table 27 presents the results of the survey for the question that asked Arab judges which of the 10 stated qualities were important for a judge to have to do their job well. Answers of “Extremely important” and “Important” are combined in the Table.

Table 27 Arab judges' view of important qualities to do their job well (n=52)

Judicial Qualities	Total
	%
Personal integrity	100
Dealing impartially with parties to cases	100
Strong moral principles	98
Knowledge of the law	98
Objectivity in decision-making	92.3
Decision-writing abilities	90.3
Intellectual honesty	84.6
Efficient work habits	82.6
Personal conduct in public	76.9
Awareness of broader social and political issues	75
	n=52

The qualities that were considered by all 52 judges as important were “dealing impartially with parties to cases” and “personal integrity”. Nearly all judges also indicated that “strong moral principles” and “knowledge of the law” were important. Although more than half of the respondents considered “awareness of broader social and political issues” and “personal conduct in public” as important, overall these qualities were ranked lower by Arab judges as qualities important to do their job well.

To varying degrees, a majority of judges said that all 10 qualities were important for a judge to have. As all 10 qualities are recognised in the Sharjah Convention as important judicial qualities, it is perhaps not surprising that all the qualities were considered more or less important to all the Arab judges who took part in the survey. As such, the findings merely corroborate the prevailing idea of the qualities an “ideal judge” should possess. It was hypothesised that since all qualities listed were more or less important for any judge, there would be little variation in terms of importance. However, the other key objective in asking this question of Arab judges was to determine whether Arab judges also thought their judicial colleagues would value these qualities and to the same extent.

Arab judges' perceptions of how their colleagues view judicial qualities

Arab judges' views on which qualities were valued by their judicial colleagues and to what extent are presented in Table 28 below.

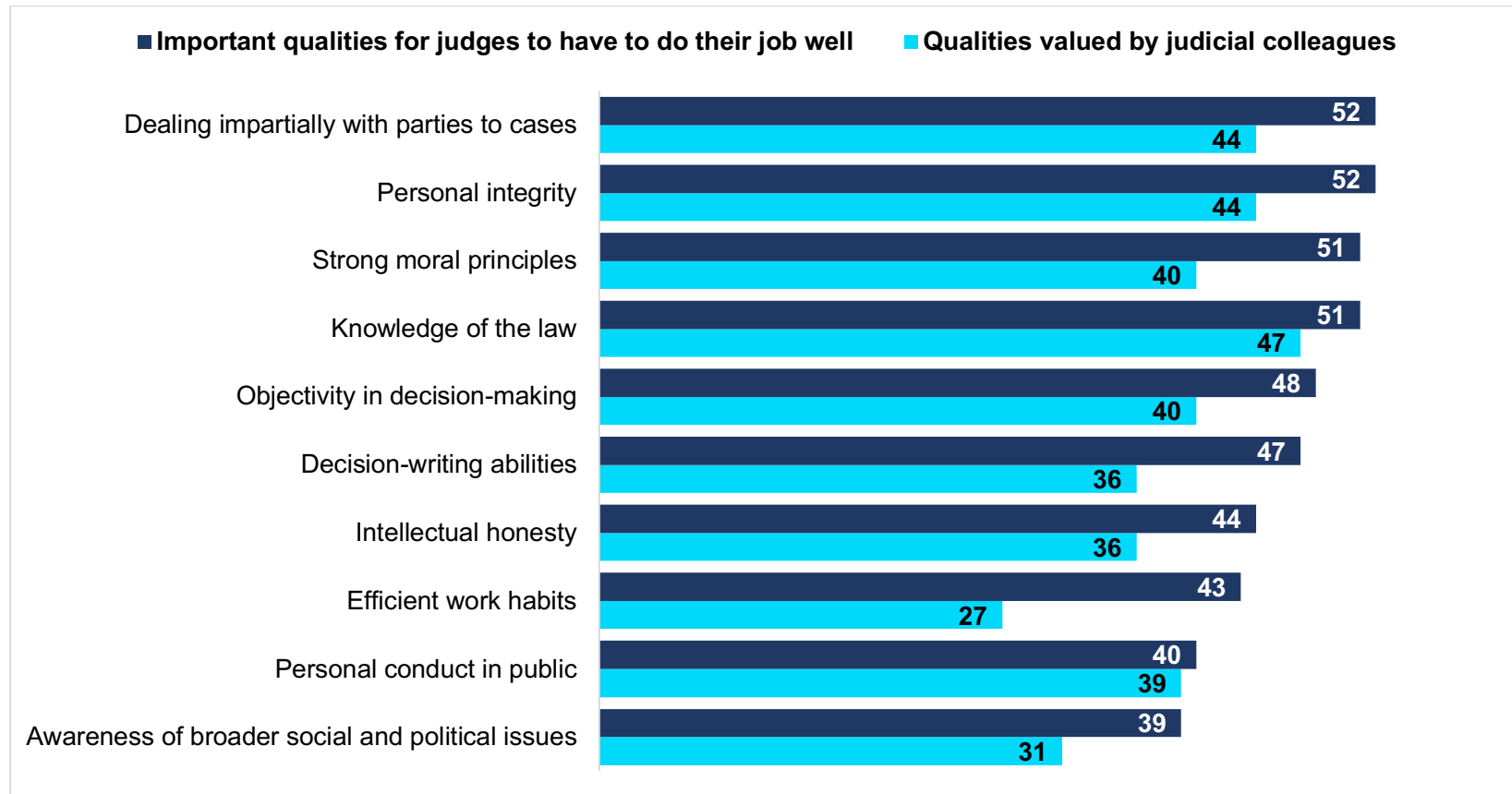
Table 28. Judges' view of qualities valued by their colleagues (n=52)

Qualities valued by Judicial peers	Total
	%
Knowledge of the law	90.3
Dealing impartially with parties to cases	84.6
Personal integrity	84.6
Strong moral principles	76.9
Objectivity in decision-making	76.9
Personal conduct in public	75
Intellectual honesty	76.9
Decision-writing abilities	63.4
Awareness of broader social and political issues	59.6
Efficient work habits	51.9
	n=52

Although there was more variety among the 52 respondents in relation to this question, the qualities most Arab judges thought were valued by their judicial colleagues were “knowledge of the law”, “dealing impartially with parties to cases”, “personal integrity” and “strong moral principles”. In addition to these four qualities, most Arab judges also thought their colleagues valued “objectivity in decision-making”.

Viewing the findings for the two questions side-by-side provides for some useful comparisons between what qualities judges feel are important for themselves and which ones they think their colleagues feel are important (see Figure 25 below).

Figure 25 Comparison of Arab judges' view of qualities important for judges to have and response of qualities valued by judicial colleagues (n=52)



One obvious difference in the results viewed in this way is that the Arab judges in the survey had lower expectations of their judicial colleagues: they consistently ranked each judicial quality higher in value than the value they felt their colleagues would place on those same qualities. The greatest difference between what judges themselves felt were important qualities and what they thought their judicial colleagues valued were: “Efficient work habits” (83% of judges valued this v 52% of judges thinking their colleagues valued it), “Decision-writing abilities” (90% v 63%), “Strong moral principles” (98% v 77%), “Intellectual honesty” (85% v 77%) and “Awareness of broader social and political issues” (75% v 60%).

Level of consensus amongst Arab judges on norms of behaviour

Because judges often work in groups there should be some minimal level of “working consensus”.⁶⁵⁸ And there must be some acceptance of norms that regulates individual judges’ treatment to one another. These norms are also important because they may serve as a point of reference from which judges can evaluate events. Based on these findings, several qualities appear to be considered by Arab judges as the most important to do a good job as a judge and most likely to be valued by their judicial colleagues.

The following could be seen as among the more **highly valued and clearly accepted norms** of behaviour for Arab judges:

- **Knowledge of the law:** 98% of judges said it was important and 90% said it was valued by colleagues.
- **Dealing impartially with parties to cases:** 100% of judges said it was important and 85% said it was valued by colleagues.
- **Personal integrity:** 100% of judges said it was important and 85% said it was valued by colleagues.

Other qualities appear to be **generally accepted norms** of behaviour amongst Arab judges, but with some variability between how much judges value them

⁶⁵⁸ John C. Wahlke, Heins Eulau, William Buchanan, LeRoy C. Ferguson, *The Legislative System: Explorations in Legislative Behavior* (John Wiley & Sons 1962), p.145

as important to do their job and the extent to which they think their judicial colleagues value them:

- Objectivity in decision-making
- Decision-writing abilities
- Intellectual honesty
- Personal conduct in public

A few qualities are perhaps **less widely accepted** as both important by judges and valued by judicial colleagues in comparison to the other qualities examined in the survey:

- Efficient work habits
- Awareness of broader social and political issues

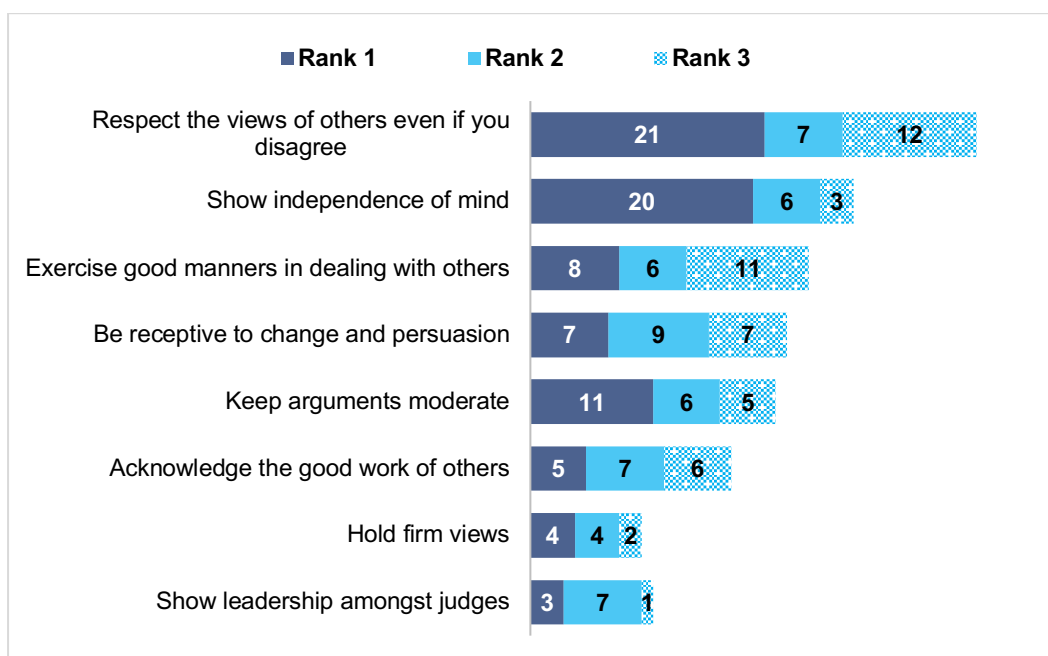
Judicial norms of cooperative working

As revealed in Chapter 5, many if not most Arab judges sit on multi-member panels in deciding cases. The Arab Judges Survey, therefore, also explored judges' views of the qualities judges need to work well with other judges. In one question in the survey, judges were asked to rank 8 qualities specific to working with other judges in terms of their importance. The question was phrased: *Which of the following are important qualities for a judge to have when working with other judges* (where "1" is the most important quality and "8" is the least important quality). The 8 qualities were:

- Hold firm views
- Show leadership amongst judges
- Respect the views of others even if you disagree
- Acknowledge the good work of others
- Be receptive to change and persuasion
- Show independence of mind
- Exercise good manners in dealing with others
- Keep arguments moderate

As Glick writes, the qualifications for an ideal judge include “practically an unlimited variety of attributes”.⁶⁵⁹ Following discussions with judges in the region during the survey design, the above qualities were considered the most relevant. An added justification is that they are based on the principles found in the Sharjah Convention.⁶⁶⁰ Figure 26 below shows how Arab judges ranked the importance of these 8 qualities of cooperative judicial working; the figure presents the results in terms of how often each of the 8 qualities was ranked in the top three of importance by Arab judges.

Figure 26 Arab judges' ranking of most important qualities for working in a group (n=52)



Judges’ ranking of qualities provides further insight into the informal norms that operate for judges in a collegial setting. For the 52 judges who participated in this question, two qualities emerged as clearly most important to judges in terms of cooperative working and appear to be **clearly accepted norms of behaviour** were:

- “Respect the views of others” (which had the highest ranking)

⁶⁵⁹ Glick, H. (1967), *Judicial role perceptions and behavior: A study of American state judges*. Ph.D. Tulane University, p.115

⁶⁶⁰ “Sharjah Convention 2007”

- “Show independence of mind”

Other qualities that showed more **moderate consensus** were:

- “Exercise good manners in dealing with others”
- “Be receptive to change and persuasion”
- “Keep arguments moderate”
- “Acknowledge the good work of others”

The qualities that appeared to have the **lowest level of consensus** amongst the Arab judges and were ranked least often in the top three:

- “Hold firm views”
- “Showing leadership amongst judges”

This provides further insight into the informal norms that may operate amongst Arab judges, particularly for judges that work in collegial courts in the Arab region. The findings also illustrate what type of norms individual judges must conform to in order to become part of the group.

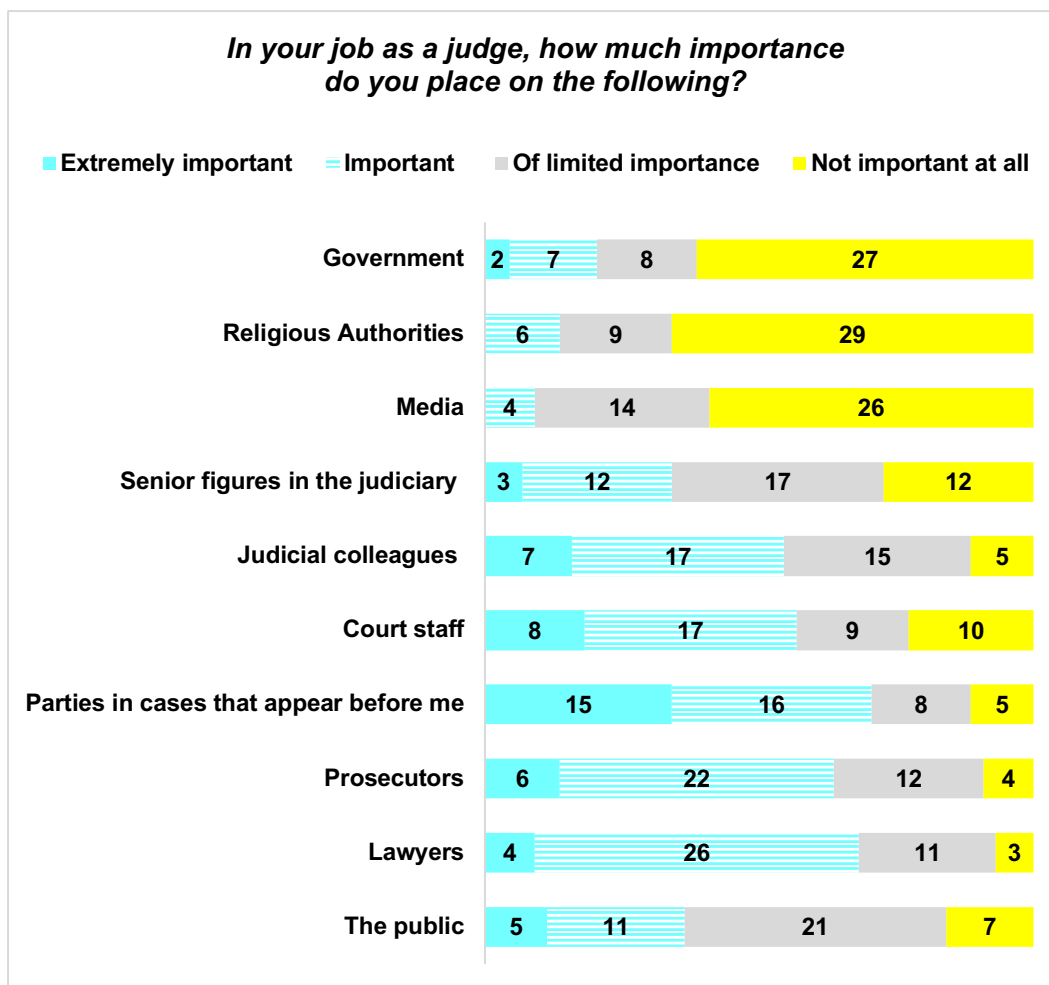
External relationships

The second element of judicial role conceptions and norms of behavior explored in the Arab Judges Survey was judges’ relationships with important actors outside the judiciary. This group of “non-judges” includes the legal community, court staff, parties in cases, the public, media, government and religious authorities. The survey explored the following:

- How much importance Arab judges say they place on non-judges when performing their judicial role
- How influential the public and the government are in judicial decisions
- Arab judges’ perception of their role in religious affairs
- How Arab judges think that they are perceived by the public
- What Arab judges believe the public expects of the judiciary

Figure 27 below shows the extent to which the Arab judges say they value specific non-judicial groups in the performand of their job as a judge. In total, 44 judges responded to this question.

Figure 27. Importance Arab judges attach to various groups (n=44)



“Religious authorities” were the group that most Arab judges (29) said was not important at all to them in doing their job as a judge. Only 6 judges considered religious authorities as “important”. The next group that were considered by more than half of Arab judges as not important at all, were “Government” (27 judges) and “Media” (26 judges). Only 2 considered the government as “extremely important” in their job as judges. Eight judges considered the government of limited importance. For the media, the largest group of judges (14) said it was of limited importance. No judge who participated in the survey considered the media as “extremely important”.

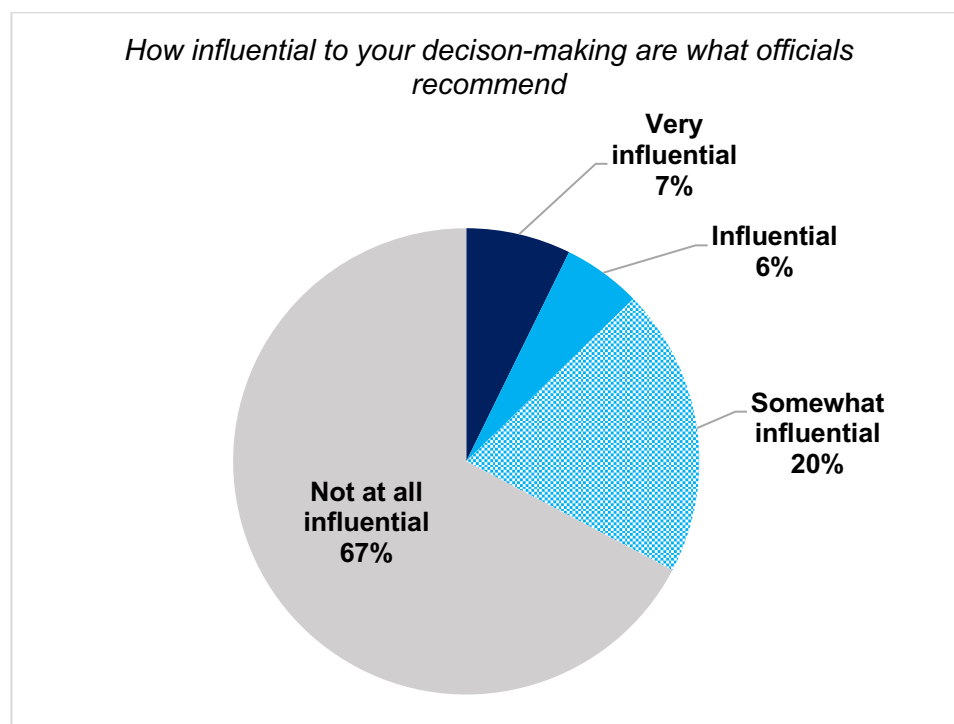
The largest group that was considered by judges as “extremely important” or “important” in doing their job as a judge was “Parties that appear in cases before me” (31 judges). This group was considered by 15 judges as “extremely important”. Judges also tended to consider “Lawyers” (30 judges) and “Prosecutors” (28 judges) as “extremely important” or “important”. This was followed by “Court staff” and “Judicial colleagues” (25 and 24 judges respectively).

There is a clear trend that shows that judges tend to consider non-judicial actors within the broader legal community as more important than those outside the legal community. The two groups with the most equivocal results were “Senior figures in the judiciary” and “the Public”. With regards to senior judicial figures, 12 judges considered it to be important and 12 did not consider them important at all; only 3 judges considered senior judges as “extremely important” and many judges considered senior figures to have a limited importance (17). Arab judges were also divided over the importance of the public to them in their job: while 16 judges considered the public to be extremely important or important, 21 judges considered the public to be of limited importance and 7 judges did not consider the public to be important at all.

The executive

In the survey, judges were asked two questions that explored their relationship with the government directly. Because the survey was anonymous and could not be traced back to any participant, it was hoped that judges would feel able to express their honest views of a difficult topic. As discussed above, when asked how much importance they placed on the government in their job as a judge, more than half answered that it was not important at all (27 judges.) To further explore judges’ perceptions of the role of government in their judicial role, the survey went on to ask Arab judges how influential they felt the recommendations of government officials were for a judge when deciding a case. The results are presented in Figure 28 below.

Figure 28. Influence Arab judges attach to government recommendations in their decision-making (n=55)



Overall, two-thirds of the Arab judges in the survey said that the recommendations of officials were of no influence at all when deciding cases. Only 7 judges considered recommendations as very influential or influential; 11 judges indicated that they considered official recommendations as “somewhat influential”.

For the purposes of this chapter, the aim was to explore whether or not the executive had an influence on judges primarily through the prism of judges’ normative expectations. As mentioned in Chapter 2, the executive has been an actor that has traditionally been considered to exercise influence on the role and work of judges in several Arab states. Literature on judges and courts in the Arab Middle East tends to emphasise the role of executive hegemony on the work of judges.⁶⁶¹ But the findings above appear to illustrate a different picture. Although a number of judges appeared to attach some importance or

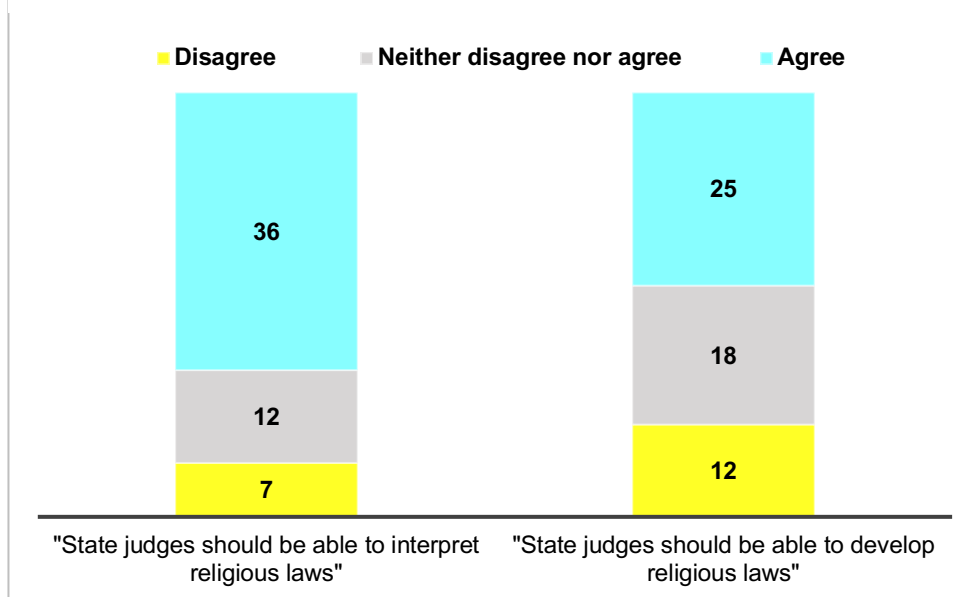
⁶⁶¹ See for example Moustafa’s discussion of the Egyptian judiciary in Ginsburg T and Moustafa T, *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press 2008). See also the Euro-Mediterranean Human Rights Network (EMHRN), “*The Reform of Judiciaries in the Wake of Arab Spring*” (2012).

influence to the executive, they were in the minority. Most judges in the survey indicated that the executive had little impact on their job as judges. The exception was one Syrian judge who agreed that he did serve the community “but the intrusion of the executive branch and the intelligence services” made his work as a judge burdensome and pressured. Drawing on judges’ own answers, it appears that either judges do not want to admit that the executive has influence on judicial decision-making or they may honestly believe that officials do not (whether in fact they do or not).

Arab judges and religious authorities

As Figure 27 above illustrates, the group that was considered by Arab judges as the least important in doing their job was “Religious authorities”. Two-thirds of Arab judges in the survey indicated that religious authorities were not important at all. Considering the relevance of religion in the region and the existence of religious based courts in a number of Arab countries, additional questions were included in the Arab Judges Survey about judicial decision-making and religion. Judges were asked the degree to which they agreed or disagreed that: (1) *state judges should be able to interpret religious laws*; and (2) *state judges should be able to develop religious laws*. The results are presented in Figure 30 below (answers of “Strongly Agree” and “Agree” are combined and answers of “Strongly disagree” and “Disagree” are combined).

Figure 29. Arab judges' view of the role of state judges and religious laws (n=55)



Fifty-five judges answered these two questions and overall, most judges agreed that state judges should be able to **interpret religious laws**. Responses were more varied in relation to whether state judges should be able to **develop religious laws**. While the largest group (25 of 55 judges) agreed with the statement, a large number (18) were not certain and 12 disagreed.

Judges relationship to the public

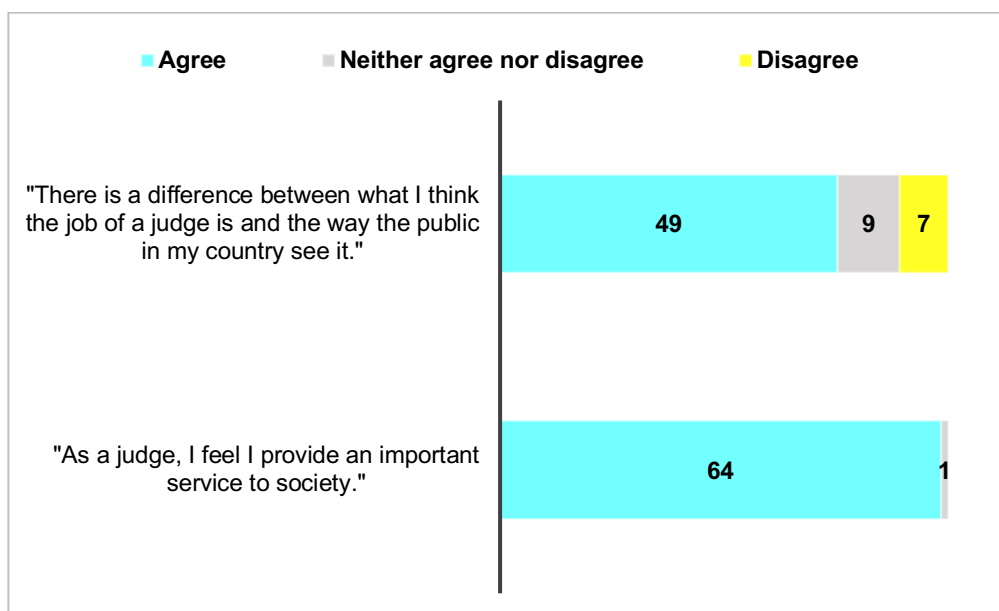
How judges think they are perceived by the public is an important element in understanding the judicial role. To explore this specific issue further, judges were asked to indicate how much they agreed with a series of statements about the judiciary and the public (see Table 29). The statements relate to Arab judges' overall perceptions of how the public perceive the judiciary and also what public/societal role judges see for themselves. Judges could respond to each statement on a 5-point Likert scale (from "Strongly agree" to "Strongly disagree").

Table 29. Questions about the Public (Arab Judges Survey)

Please indicate whether you agree or disagree with the following statements:	To what extent do you agree with the following statements?
"As a judge, I feel I provide an important service to society."	"The judiciary in my country is admired by the public"
"There is a difference between what I think the job of a judge is and the way the public in my country see it."	"The judiciary in my country is thought to be ineffective compared to other branches of government"
	"The public respect the judiciary in my country"
	"The public think that the judiciary needs to change"

Figure 31 below shows the extent to which Arab judges agreed that (1) as a judge, they provide an important service to society and (2) there was a difference in how they as judges perceived the role of a judge and how the public perceives it in their respective countries. (In Figure 31 answers of "Strongly Agree" and "Agree" are combined and answers of "Strongly disagree" and "Disagree" are combined).

Figure 30. Judicial vs public perceptions of the judiciary (n=65)



Arab judges in the survey, regardless of country, clearly feel they provide an important service to society. With the exception of one, all judges agreed with this statement. But Arab judges' views were more varied when it came to

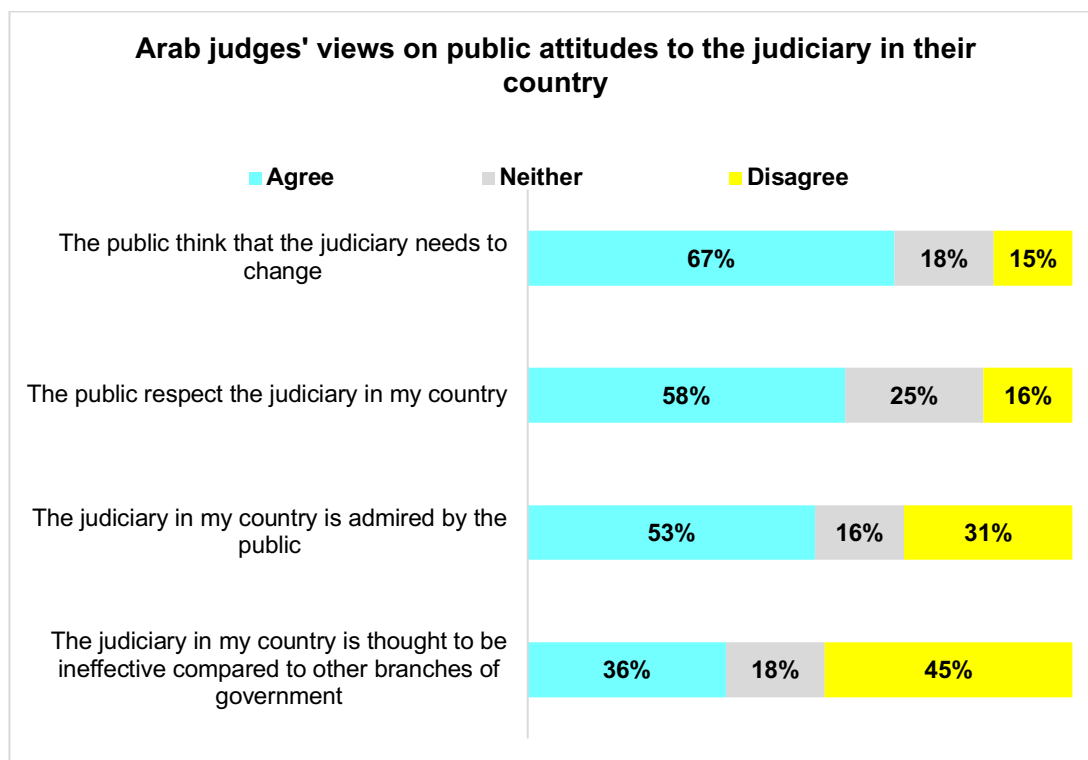
assessing whether the public in their country viewed the job of a judge in the same way as judges did. Three-quarters of judges in the survey (49 of 65) said they felt there was a difference between how they as judges perceived the job of a judge and how the public saw it. One senior judge from Tunisia commented that while the judge adjudicates a dispute within the framework of restrictive procedural laws, the litigant seeks justice and nothing else.⁶⁶² Another Tunisian judge commented that the job of a judge is inconsistent with the public's view: "There is always scepticism about the judge's job and people dislike the rulings".⁶⁶³

To examine this issue further, the survey asked Arab judges to respond to four more specific statements about how the public in their country views the judiciary. Figure 32 below presents the results for all 55 judges combined (with "Strongly Agree" and "Agree" combined as "Agree" and "Strongly disagree" and "Disagree" combined as "Disagree").

⁶⁶² Comment from Judge 1938201 (Arab Judges Survey)

⁶⁶³ Comment from Judge 2085655 (Arab Judges Survey)

Figure 31 Arab judicial perceptions of public attitudes to the judiciary (n=55)



Judges tended to generally agree with statements that related to positive traits of the judiciary, with just over half of the judges in the survey agreeing that the judiciary was respected by the public in their country (58% and 53% respectively). For the statements that depicted the judiciary in a negative light, responses were more varied. There was little consensus amongst the 55 judges on the issue of whether the judiciary in their country was thought to be ineffective compared to other branches of government. Roughly 45.5% of respondents (25 judges) disagreed and 36% (20 judges) agreed with the statement. The statement that most Arab judges in the survey agreed with was that the public in their countries thought the judiciary needed to change (67%). One Saudi judge wrote that the judiciary “needs more support”.⁶⁶⁴ One senior Lebanese judge said that: “I think that people are not content with the work of the judiciary. The judiciary's work is not ideal. But unfortunately the other branches of the government are even worse”.⁶⁶⁵ And a Tunisian judge

⁶⁶⁴ Comment from Judge 2013392 (Arab Judges Survey)

⁶⁶⁵ Comment from Judge 1944358 (Arab Judges Survey)

commented that while Tunisia is currently undergoing a democratic transition, the importance of the judiciary as an independent authority has not yet been emphasised to the public.

Summary

Apart from the institutional rules and structures that aim to regulate the actions of judges, there are “unofficial norms” that have an impact on judges’ role conception. Judges are a part of the society in which they work, and they are not devoid of an awareness of how they are perceived by members of that society. Based on the survey findings, Arab judges appear to have an awareness of relationships with judicial and non-judicial external actors.

In terms of their judicial colleagues, the survey findings show that Arab judges (at least those in the survey) felt that “knowledge of the law”, “dealing impartially with parties to cases” and “personal integrity” were among the most highly valued and clearly accepted norms of behaviour amongst Arab judges. In addition, the findings strongly indicate that “respect the views of others” and “show independence of mind” were among the accepted norms of behaviour among judicial colleagues. Arab judges tend to consider their immediate judicial colleagues and non-judicial actors within the broader legal community (lawyers, parties to cases, court staff and prosecutors) as more important to their work as judges than those outside, particularly the executive branch, media and religious authorities. Despite the fact that Arab judges did not see religious authorities as important to their work, many did feel that as judges they should be able to interpret and develop religious laws.

Chapter 10. Discussion

The main purpose of this research has been to begin to fill a knowledge gap about the role of judges in the Arab Middle East. This research combined three levels of investigation in order to understand the role and political significance of judges in the Arab Middle East: the social, the cultural and the personal. To do so, an interdisciplinary approach was used drawing on methods from law, political science, sociology, social psychology and anthropology.

Arab judiciaries as institutions

Judges and judicial institutions in Arab states are a product of long and slow growth over time, creating a “maze of rules, procedures, privileges, duties, etiquettes, rituals, informal understandings and arrangements”.⁶⁶⁶ Added complexities arise when the judiciaries are placed in a historical perspective. Several historical micro and macro trends have come to shape the way Arab judges operate today. Chapter 3 sought to situate present judicial roles in the Arab region within a broad historical context. The purpose was to offer a more nuanced insight into the historical development of judicial culture in the Arab region. Placed in this context, judicial practices in the region embody at least four legal traditions, with each tradition creating a unique role for the judge. The historical review also illustrates the limits of classifying the historical periods as a binary interaction between religious and secular notions of law and judicial practice. In particular, exploring judicial and legal roles in the region as a battle between “modernity” and “traditionalism” is an oversimplification.

Against this historical review, the remaining chapters sought to explore present judicial roles in the Arab Middle East through the concept of “judicialisation”, examining the extent to which Egyptian, Jordanian, Lebanese and Saudi judges may play a political role. This was done by focusing on the present institutional arrangements in place that regulate the power of courts, the status

⁶⁶⁶ John C. Wahlke , Heins Eulau , William Buchanan , LeRoy C. Ferguson, *The Legislative System: Explorations in Legislative Behavior* (John Wiley & Sons 1962). p.50

of Arab judges within the institution of the judiciary, and the subjective understandings of individual Arab judges that occupy a judicial role.

Institutional structures of Arab judiciaries

First, the institutional settings in which judges operate were explored. In each Arab country, formal boundaries are placed on the functions of judges and courts: “what judges prefer to do and what they think they ought to do are not necessarily compatible with what they are encouraged or allowed to do”.⁶⁶⁷ By mapping and analysing the structural set up of the various courts in Egypt, Jordan, Lebanon and Saudi Arabia it was possible to explore whether the structural variations found in individual judicial systems were conducive to the political significance of courts and judges. The four legal systems share similarities, albeit superficial, with European civil law judicial systems, including separate and autonomous judicial pyramids. However, their structural set up illustrates potentially different manifestations of judicialisation compared to each other, and compared to Western countries.

In Egypt, the three superior courts in particular are argued in this thesis to play an important political role. This is a feature that does not exist elsewhere in the Arab region. Similarly, the powers of judicial review granted to the Egyptian Supreme Constitutional Court are significantly wider than courts in continental civil systems.

In Jordan, the Court of Cassation is equipped with broad jurisdictional powers in accordance with the relevant law discussed in Chapter 5. This also includes jurisdiction over the separate judicial branches. The Court is the only judicial body empowered to assess whether there are grounds to refer a case to the Jordanian Constitutional Court, making it an instrument for judicial politics.

⁶⁶⁷ J Gibson, “From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior” (1983) 5 *Political Behavior* 7; James L Gibson, “Judges’ Role Orientations, Attitudes, and Decisions: An Interactive Model” (1978) 72 *American Political Science Review* 911., p.27

The initial impression was that the Lebanese judicial structure appear to hinder “judicialisation” because of the fragmented character of courts. But the powers granted to the Court of Cassation through the appeals process as well as the its powers to create a judicial council equips the Court with significant political powers. In addition, the ability of both the parliament and the executive to raise constitutional challenges means that constitutional issues are part and parcel of political life and dialogue, which is a defining feature of judicialisation. The possibility that a law may be referred to the Constitutional Council means that more attention is paid to constitutional issues within the political sphere.

In Saudi Arabia, a unique form of judicialisation can be said to exist despite the fact that judges work in courts typified by the classic continental legal structure, and *despite the absence of a strict separation of powers*. Judges are accorded a political role by virtue of the significance of Saudi culture and religion. The following description by Vogel captures this unique role of Saudi judges:

“[F]or a Saudi qāḍī, a judgment is not conceptualized as merely a legal outcome triggered by proof of certain physical (and psychological) facts. A qāḍī’s judgment is at once legal and religious (in our terminology), so the facts and their characterization must sound not only in a physical and legal but also in an ethical and religious realm. *In this larger realm are necessarily dimensions of judicial activity to which our Western senses are not attuned; only after a certain exposure do we begin to discern those dimensions and that the qāḍī and parties are acting within them*”. [Emphasis added].⁶⁶⁸

The institutional career of the Arab judge

Looking only at the official rules of a judicial system is not sufficient to appreciate all of the complexities of the institution. This thesis argues that it is also necessary to consider the internal institutional mechanisms that affect Arab judges, specifically the way judges are selected and trained and how their career and status were determined. All of these factors help to explain the

⁶⁶⁸ Frank Vogel, *Islamic Law and Legal System Studies of Saudi Arabia* (Harvard University 1993)., p. 324

political significance of judges in the region, and may affect the willingness of judges to intervene in the political process.

The thesis sought to explore the institutional controls of the four Arab jurisdictions through two models of judicial selection and career: the “professional model” and the “bureaucratic model”. The two models are commonly used in Western democracies and have been argued to affect the political significance of the judiciary in different ways.⁶⁶⁹ The mechanisms of control in relation to judges’ status in the four Arab countries take on different forms and involve actors found within and outside the judiciary. The processes further reveal that such social controls in Arab judiciaries are not strictly confined to either the Western bureaucratic or professional models. Judicial selection, training, career and control in Egypt, Jordan, Lebanon and Saudi Arabia are perhaps best described as somewhere in the middle of the bureaucratic-profession continuum, depending on the type of control explored.

Several factors appear to affect Arab judges’ political significance in relation to informal rules and practices that govern who becomes a judge and the future prospects of judges. In Egypt, there appears to be a preference for individuals who have social and family ties within the judiciary, which is further exacerbated by the vetting of candidates’ applications by the Ministry of Justice and the National Security Agency. In Saudi Arabia, a prerequisite is a good comprehension of social and cultural issues by virtue of the religious nature of the judicial office. And in Lebanon the need to ensure religious representation appear to act as an informal qualification for judicial office.

Indications of judicialisation were also found in relation to career advancements. Although all four Arab countries officially adhere to principles

⁶⁶⁹ For a professional judiciary, “influence of the political system is channelled primarily through the appointment process” whereas in a bureaucratic judiciary the “political influence is filtered through the hierarchical structure and procedures for career advancements”. Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002) p.64-66.

of seniority and merit, in practice promotions illustrate the power of different actors internal and external to the judiciary. Hierarchical superiors play an important role for Arab judges' career advancement, and promotion is closely linked with how they are evaluated by senior judges. Varying degrees of executive interference also appear to exist, especially for senior judicial posts. In Egypt, this is a recent development with a new amendment to the law of the judiciary formalising external political involvement. In Lebanon, religious representation also plays an important part in the advancement of judges, particularly for senior positions. In Saudi Arabia, royal support plays a major part in judges' career advancement.

Arab judges' prior personal experiences

Although judiciaries carefully select, train and control judges to meet the institutional requirements of judges, the influence exercised by judiciaries is limited in at least one important respect. Judicial roles are occupied by individuals who may bring prior experiences to the job or hold other positions simultaneously. Predispositions developed and acquired through education and prior professional experiences are important factors which could be powerful influences on how judges act in their roles.⁶⁷⁰

The findings made from Arab judges' LinkedIn profiles and the Arab Judges Survey showed that Arab judges have a diverse set of background attributes based on education, as well as prior and simultaneous professional experiences. The findings illustrate several predispositions that may be important for the political significance of judges. For instance, out of the LinkedIn sample, a high proportion of Egyptian, Jordanian and Lebanese judges obtained post-graduate law degrees from abroad, and in many cases these degrees were obtained in jurisdictions significantly different from their own (in Europe and the US). Legal values obtained through these educational experiences prior to joining the bench (and also during the judicial office) may impact the judicial role if the individual judge believes they are important:

⁶⁷⁰ Glick, H. (1967). *Judicial role perceptions and behavior: A study of American state judges* Ph.D. Tulane University., p. 147

“Judges may decide cases because of predispositions developed through their own socialization and they may adhere to certain legal philosophies for the same reason. Legal orientations internalized as a result of law school training may reinforce previous predispositions”.⁶⁷¹

The possibility of social variables affecting Arab judicial role perceptions and practices is further illustrated by the findings on prior professional experiences of Arab judges. The judges surveyed and profiled in this study illustrate a variety of prior professional experiences, such as prosecution, private law practice, academia and in some cases governmental positions. And because lateral recruitment of legal practitioners into the judiciary exists in Egypt, Jordan, Lebanon and Saudi Arabia, this can foster greater connections with those outside the judicial branch. Arab judges’ education and professional experiences indicate a diverse set of socialisation patterns, which in turn heighten the possibility of judges being politically significant in their judicial functions. Taken together, Chapter 6 and Chapter 7 helped to shed light on who Arab judges are, how they may be controlled by their judicial institutions and how individual experiences may shape the judicial role.

The mind of the Arab judge

Even within formal legal boundaries that set out the judicial role, judges have some room to define their own objectives. Within the framework of judicial role theory, this thesis explored individual Arab judges’ beliefs about the qualities, behaviours and characteristics suitable for the role they have to perform.⁶⁷² Judicial roles can be categorised into three stages. The first stage involves formal written rules of judicial conduct.⁶⁷³ The second stage involves spoken norms about proper judicial behaviour.⁶⁷⁴ The final stage involves the concept of the “mind of the performer”.⁶⁷⁵ Here the judicial role-holder acts in a

⁶⁷¹ Ibid.

⁶⁷² Central to role theory is the idea of role expectations, which is understood to be the beliefs concerning the qualities, behaviours and characteristics suitable to a specific social role. See generally Bruce J Biddle, *Role Theory: Expectations, Identities, and Behaviors* (Academic Press 1979)

⁶⁷³ Ibid. p.117

⁶⁷⁴ Ibid.

⁶⁷⁵ Empirical research suggests that members whose roles provide for a high level of salience are more likely to adopt normative group beliefs than others.

particular way: “not because written instructions have been given to him [her], nor because of injunctions spoken by others, but rather of his [her] own internalised standards”.⁶⁷⁶

In this study, how judges subjectively understand and conceive of their roles was explored in several ways. First, Arab judges’ **personalities and capacities** were examined, including whether individual judges’ personalities and capacities predispose them to be more political. In Chapter 7 it was argued that judicial activism may be linked to individual judges’ self-esteem, and the empirical research explored how individual judges evaluated their contribution to the judicial role. The research showed that nearly all Arab judges who participated in the survey felt they provided an important service to society, and many of them also felt that being a judge was an important part of their self-image. The findings indicate a general pattern of agreement amongst Arab judges that the judiciary was an important part of the individual. Provided that a judge has other values he/she believes are equally important such as “justice”, “fairness” or “equality”, the combination of the two may serve as a powerful motivation for the judge to be more activist in his/her decision-making. The likelihood of this was further reinforced when the objectives of Arab judges’ was explored.

Four judicial role perceptions

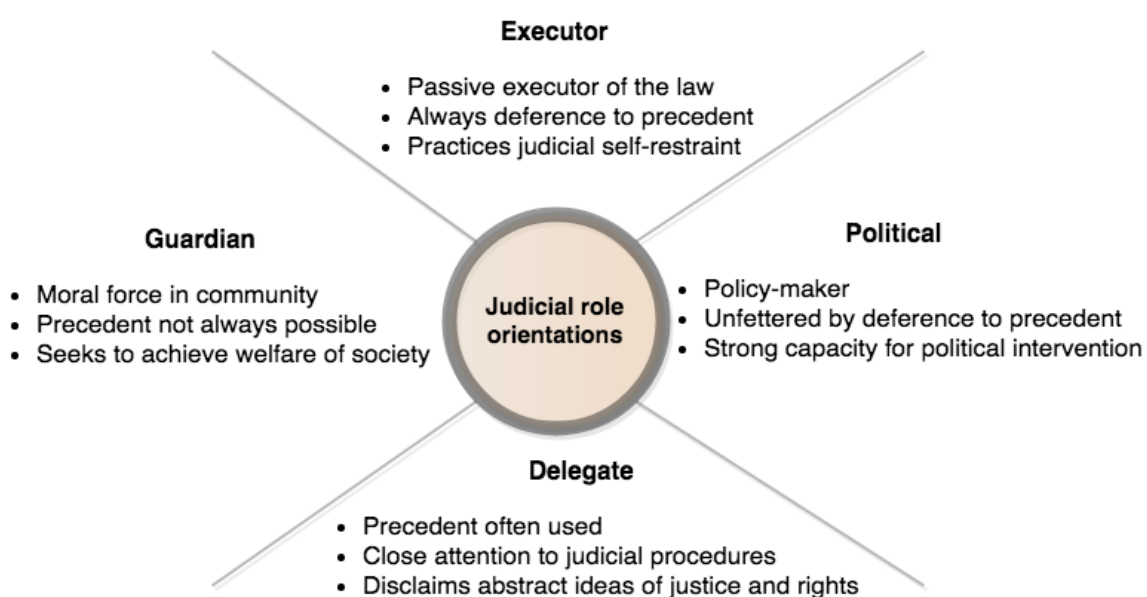
As described in Chapter 2, a frequent approach used in judicial research seeks to measure judges’ role orientations on the basis of four distinct judicial role perception categories.⁶⁷⁷ The underlying purpose behind these categories is to understand the degree of judicial creativity judges may afford themselves in the performance of their roles. The roles are distributed along a continuum that ranges from judicial restraint (following precedent, strict construction of constitutions and deference to legislative intent) to judicial activism

⁶⁷⁶ The last stage involves a difficult assumption, that is, that individual role-holders are aware of their expectations and can state them if asked. See *generally* Nisbett Nisbett, Richard E.; Wilson, Timothy DeCamp, ‘Telling More than We Can Know: Verbal Reports on Mental Processes’ (1977) 84 *Psychological Review* 231

⁶⁷⁷ See discussion of the different role orientations in Chapter 2.

(insubordination of precedents, statutes, and deference to personal attitudes, values, and goals).⁶⁷⁸ There are four distinct judicial role orientations that reflect an individual judge's approach to adjudication. Figure 33 below illustrates the key features of each of the 4 judicial role categories. Although the role orientations are sometimes labelled differently by researchers, they remain conceptually similar in that they all fall within the continuum of judicial activism and restraint.⁶⁷⁹

Figure 32 Four conceptually distinct judicial role orientations



Objectives judges perceive as important in the performance of their judicial roles include norms that guide their behaviour. By extension, they also include individual judges' internalised impressions of societal norms and expectations of what constitutes the role of a judge.⁶⁸⁰ The findings on judicial role orientations in Chapter 8 help to place Arab judges within these four

⁶⁷⁸ J. Woodford Howard Jr., *Role Perceptions and Behavior in Three U.S. Courts of Appeals* (1977) 39 University of Chicago Press, p. 916.

⁶⁷⁹ As discussed in Chapter 2, the four judicial role orientations are: "executor"; "delegate"; "guardian"; and "political".

⁶⁸⁰ "Generalised other" is George Herbert Mead's term for the collection of roles and attitudes that people use as a reference point for figuring out how to behave in a given situation. See generally George Herbert Mead, Charles W Morris and George Herbert Mead, *Mind, Self, and Society: From the Standpoint of a Social Behaviorist* (Univ of Chicago Press 2000).

established judicial role orientations. Based on the survey data, Arab judges' responses indicated that at least two role orientations are prevalent in the region: **the “executor”** and the **“guardian” judge**.

The executor judge

The “executor” role orientation reflects a well-defined and widely accepted role conception of what a judge “ought to be”. The executor judge is someone who does not consider the societal needs or social consequences of judicial decision-making. He/she considers precedent as a major factor in decision-making, and therefore advocates for “judicial self-restraint as a necessary control over reading personal predilections into law”.⁶⁸¹ In other words, the executor judge is a passive executor of the legislative will, a mere mouthpiece of the law.⁶⁸²

Some of responses made by Arab judges in the survey indicate that they perceive their roles in terms of the executor role, where a judge's purpose is simply “to apply codified law”⁶⁸³ and “administer justice according to law”.⁶⁸⁴ As one Tunisian judge commented: “the judge is obliged to apply the legal texts and not the conflicting interests of the community”.⁶⁸⁵ Overall, Arab judges' responses tended to favour and rank formalistic and generic roles such as “Administrator of justice” and “Applier of the law”, over roles such as “Arbiter of morality” and “Architect in the country's body of law”. This tendency was found across the Arab countries represented in the survey, particularly in Saudi Arabia, Tunisia, Egypt and Lebanon.

Formal roles such as the “executor role” are not unique to the Arab judges surveyed, nor is it unique to civil law jurisdictions. One possible reason why so many judges adhered to this role is that it is straightforward and that activities

⁶⁸¹ Thomas D Unga and Larry R Baas, “Judicial Role Perceptions: A Q-Technique Study of Ohio Judges” (1972) 6 *Law & Society Review*, p. 346.

⁶⁸² Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002) p.69.

⁶⁸³ Comment from Judge 1944358 (Arab Judges Survey)

⁶⁸⁴ Comment from Judge 2085655 (Arab Judges Survey)

⁶⁸⁵ Comment from Judge 2085655 (Arab Judges Survey)

such as “*the application of the law*” and “*administration of justice*” constitute directly observable behaviour. As Glick points out:

“Unlike legal scholars, who do not discuss adjudication because it is so obvious to them, judges are constantly confronted with their formal task. When asked to describe their job, they reply with this formal purpose because it is the one most readily apparent.”⁶⁸⁶

At a minimum, judge’s activity is first and foremost about adjudication which is the most straightforward and undisputed role of a judge. Common descriptions of judges such as the “interpreter of the law” and “applier of the law” are the easiest to identify with, which may explain why such a large proportion of judges tend to choose this role. This would also explain why the “executor” role is not peculiar to any legal tradition, it is simply the most straightforward description a judge can provide for a layman.

According to Guarnieri and Pederzoli, while a “mechanistic” judicial role might be desirable and the most straightforward description, it does not necessarily reflect a complete picture of the judicial role. Judges, by virtue of applying the law, engage in interpretation: “legal norms do not pre-date interpretation but assume meaning through the very process of interpretation, a process in which the judge obviously plays a strategic role.”⁶⁸⁷ This research has shown that Arab judges, as well as American, Swiss and Austrian judges, tend to identify this core-role function as the most straightforward and visible purpose they can have.

Beyond the “mouthpiece of the law”

In the Arab Judges Survey, generic roles were ranked by Arab judges as the most important roles to have. However, other findings from the survey cast some doubt on whether the “executor role” really holds true for all Arab judges. For instance, judges’ responses to statements about precedent demonstrate

⁶⁸⁶ Glick, H. (1967). *Judicial role perceptions and behavior: A study of American state judges*. Ph.D. Tulane University. p 73

⁶⁸⁷ According to the authors, the “delegate” judge is a more realistic version of the “executor” judge. Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002) p.70

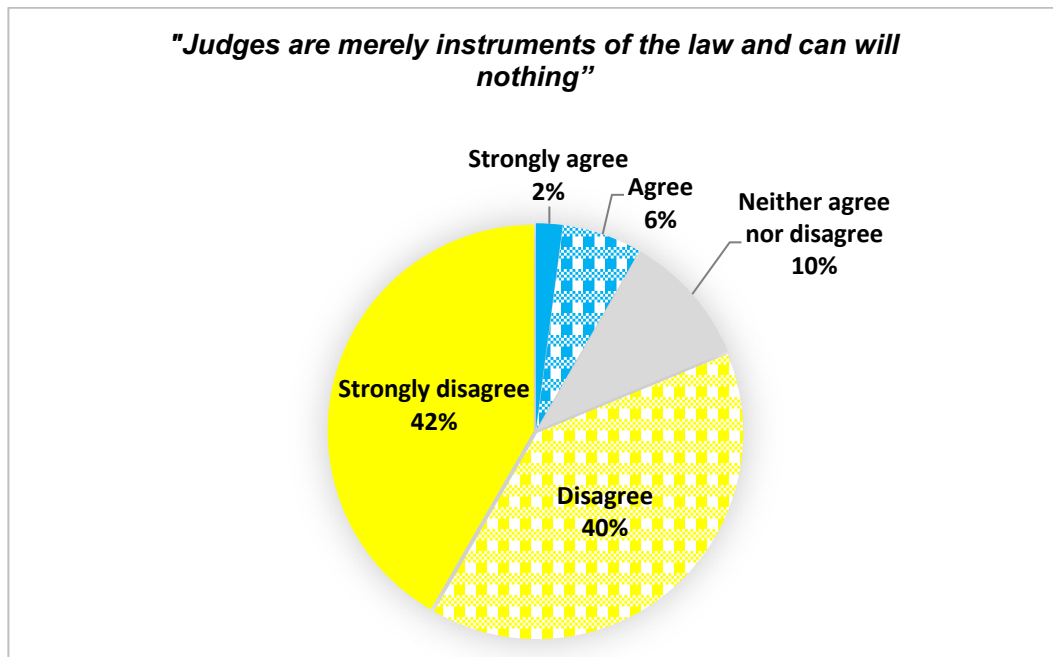
a more nuanced picture. Nearly all Arab judges in the survey said that precedent was influential, but judges' responses to the number of precedent statements tended to vary.

It appears that most Arab judges are found somewhere in the middle of the precedent role orientation spectrum. A minority of the Arab judges (3) were found to have a **very high orientation** towards precedent and a minority (3) were found to have a **very low orientation** towards precedent. Drawing on the role concept of the "executor judge", this would mean that only three Arab judges in the survey may properly be described as "executor" judges. Most judges are found somewhere in the middle of the spectrum which renders them neither "**high precedent-regarding**" nor "**low precedent-regarding**".⁶⁸⁸

An additional factor which further cast doubt on the executor role for Arab judges relates to judges' answers to whether they agreed that "*judges are merely instruments of the law*". Out of 48 Arab judges, only 4 judges agreed with the statement. Figure 34 below shows the overall distribution of judges' responses to this statement.

⁶⁸⁸ Where 15 judges agreed with (or found influential) at least 2-3 statements, and 27 judges agreed with 4-5 statements.

Figure 33 Arab judges' responses to "judges are merely instruments of the law and can and will nothing" (n=48)



According to Glick, judges and courts are “claim granting agencies” that manage demands of individuals and interest groups amongst other.⁶⁸⁹ This is particularly true in light of the findings from Chapter 8 on judicial role perceptions. For those Arab judges that were surveyed for this study, a high number indicated that they would incorporate community standards into their decision-making. Comparing Arab judges with judges from three Western civil and common law countries, the Arab judges tended to be more cognisant of social considerations than the Western judges (or at least more willing to admit to this).⁶⁹⁰ This also challenges the myth that Arab judges are “executor” judges and are purely mechanical objective appliers of the law.

The survey results also did not provide a strong indication that a “**political**” **role orientation** exists among Arab judges (at least those surveyed). This may be attributed to several factors, including the controversial nature of this

⁶⁸⁹ Glick, H. (1967) *Judicial role perceptions and behavior: A study of American state judges*. Ph.D. Tulane University, p.3

⁶⁹⁰ See Chapter 8 for a fuller comparison of responses between Arab and Western judges.

particular role orientation. Glick argues that even if judges conceived their roles as political, they would “find it necessary to pay deference to the concept of precedent when questioned by laymen”.⁶⁹¹ Nevertheless, there are clear indications that both judicial “activism” and judicial “restraint” exist among the Arab judges surveyed for this study. They tended to regard both the public and precedent as important in their judicial roles (albeit with more importance attached to the public aspect).

In light of the research findings, another possible role orientation for Arab judges is the “**guardian judge**”. Contrary to the executor judge, whose sole purpose is to apply the law, the guardian judge acts as a “moral force” in the community.⁶⁹² The guardian judge’s goals are to balance contending principles, evaluate the conditions in society and act as a decision maker to promote the welfare of society.⁶⁹³ In achieving these goals, the guardian judge seeks to understand and appreciate the changing social forces and environments in making his/her decisions.⁶⁹⁴ According to Flango et al., the public dimension relates to the difference between judges who rely on their own judgment in making decisions and judges who incorporate community standards into their decision-making.⁶⁹⁵

A substantial number of Arab judges who took the survey indicated that community standards were important to their decision-making. For instance, Arab judges tended to rank “guardian of the community” among the top three important roles for a judge to have in their country.⁶⁹⁶ The importance of the public and the community was also reflected in the specific comments Arab

⁶⁹¹ Henry Robert Glick, *Judicial Role Perceptions and Behavior: A Study of American State Judges*. (Tulane University 1967), p.285

⁶⁹² Glick, H. (1967) *Judicial role perceptions and behavior: A study of American state judges*. Ph.D. Tulane University, p.60

⁶⁹³ Thomas D Unga and Larry R Baas, “Judicial Role Perceptions: A Q-Technique Study of Ohio Judges” (1972) 6 *Law & Society Review*. p.347

⁶⁹⁴ Ibid.

⁶⁹⁵ Flango, V., Wenner, L. and Wenner, M. (1975) “The Concept of Judicial Role: A Methodological Note” *American Journal of Political Science*, 19(2), (Concept), p.282

⁶⁹⁶ 10 judges ranked this role as number 1 (i.e., the most important role) and 25 judges ranked this role either “2” or “3”.

judges provided in the survey. For instance, one Lebanese judge said that keeping up with social mores was acceptable when the “change is objectively for the better future of the society”.⁶⁹⁷ Similarly, one Tunisian judge explained that a judge “should bear in mind the effect of his/her judgment”.⁶⁹⁸ In a similar vein, several judges agreed that decisions should be just rather than adhering to the letter of the law. One Lebanese judge, for instance, wrote that law and justice “must be balanced as much as possible” in judges’ judgments and decisions.⁶⁹⁹

Furthermore, most Arab judges responded favourably to all 8 public-orientation statements, many of which suggested that the public aspects of judicial decision-making were important. Most Arab judges in the survey (33 of 48) have a high orientation to the public. Along this public-oriented spectrum, a minority of Arab judges (4 of 48) appear to have a **very high orientation towards the public**. By contrast, 6 judges can be said to have a **moderate orientation** and only 1 judge to have a **very low public orientation**. Based on the public-orientation dimension, this would arguably place Arab judges somewhere between the “**guardian role**” and the “**delegate role**”.

While the two roles are conceptually distinct from each other and can in many respects be seen as two opposites, the research findings suggest that both role conceptions may not be mutually exclusive. It appears that both orientations can operate simultaneously in the minds of Arab judges. This is supported by the findings from the ranking question, where judges were not required to rank all roles, only those they considered most important in their respective countries. Most judges chose to rank all roles, and as one judge commented “ranking might differ from one case to another”.⁷⁰⁰ A similar comment was made by one senior judge from Tunisia:

“If the law (which is the main source of legitimacy) carries fair and equal human rights and justice, the judiciary will be safe in practice. But application of the law assumes that judicial

⁶⁹⁷ Comment from Judge 1920801 (Arab Judges Survey)

⁶⁹⁸ Comment from Judge 1938201 (Arab Judges Survey)

⁶⁹⁹ Comment from Judge 1924649 (Arab Judges Survey)

⁷⁰⁰ Comment from Judge 1920801 (Arab Judges Survey)

institutions working with human and material resources are capable of providing the judge with the best conditions for the application of the law, so that the law will not remain a prisoner of obstruction of justice”.⁷⁰¹

Provided the law is just and fair, the judge’s primary objective will be to apply it. But should that not be the case, different judicial roles might be assumed in order to achieve what the law is lacking: justice and fairness. In ideal circumstances, the default purpose of the judge is to be an “objective applier of the law”. Nevertheless, seen within the often politically fraught contexts in which Arab judges operate, their formal purpose may change and assume a more guardian role for the public *when necessary*. Judges are part and parcel of the political and social reality in which they adjudicate. On this basis, it may very well be necessary for Arab judges to have several role orientations in order to address particular situations.

Arab judicial norms of internal and external behaviour

The research also examined individual Arab judges’ **expectations** of what constitutes proper judicial behaviour in relation to other judges (**judicial peers**) and other politically significant people outside judiciary (**non-judicial actors**). These expectations can also affect the political significance of judges.

Judicial peers

Arab judges clearly have expectations concerning what constitutes proper behaviour on their part towards other judges who occupy the same role. Similarly, other judges have expectations regarding what a judge should or should not do in dealings with judicial colleagues. As Glick writes, “the sum of the interactions of these two sets of normative expectations taking place between the judge and his/her judicial colleagues defines the judge’s role”.⁷⁰²

The Arab Judges Survey showed that Arab judges think their judicial colleagues expect them to possess strong knowledge of law, be impartial with

⁷⁰¹ Comment from Judge 1938201 (Arab Judges Survey)

⁷⁰² Glick, H. (1967). *Judicial role perceptions and behavior: A study of American state judges*, Ph.D. Tulane University, p.18

parties to a dispute and hold strong moral principles. Arab judges, on the other hand, mostly expect their colleagues to respect the views of others, even when they disagree, but also to show an independence of mind. One Lebanese judge commented on the relationship between the two qualities as follows:

“When a judge is part of a panel it is important to discuss and be receptive to arguments and persuasion. But in the end, if the judge is still convinced with his/her views he should not change his attitude towards the decision to take”.⁷⁰³

According to Scheb, political scientists have traditionally preferred to explore potential conflicts among judges rather than consensus: “Given that their main task has been to explain variation in decision-making”.⁷⁰⁴ Contrary to common law countries, judicial dissent is not publicised in Arab countries; for instance, courts routinely use one single judgment. However, the lack of split decisions does not mean that there is no variation in view among judges. By exploring what norms of consensus are amongst Arab judges, the research provides for yet another insight to the role of judges in the region. It primarily shows that judges do not act alone and will often need to adhere to certain qualities in order to perform the tasks that comes with the judicial office. The findings also illustrate what type of norms individual Arab judges feel they must conform to in order to become part of the group.

At the outset of this study, it was argued that formal codes of judicial conduct promote an unrealistic vision of judicial activity. They usually seek to limit the role of the judge to the conceptual role of the “executor” judge as mere mouthpieces of the law.⁷⁰⁵ Based on the research findings, Arab judges appear to categorise some principles higher than others (Figure 35). The most highly valued and clearly accepted norms among Arab judges were: dealing

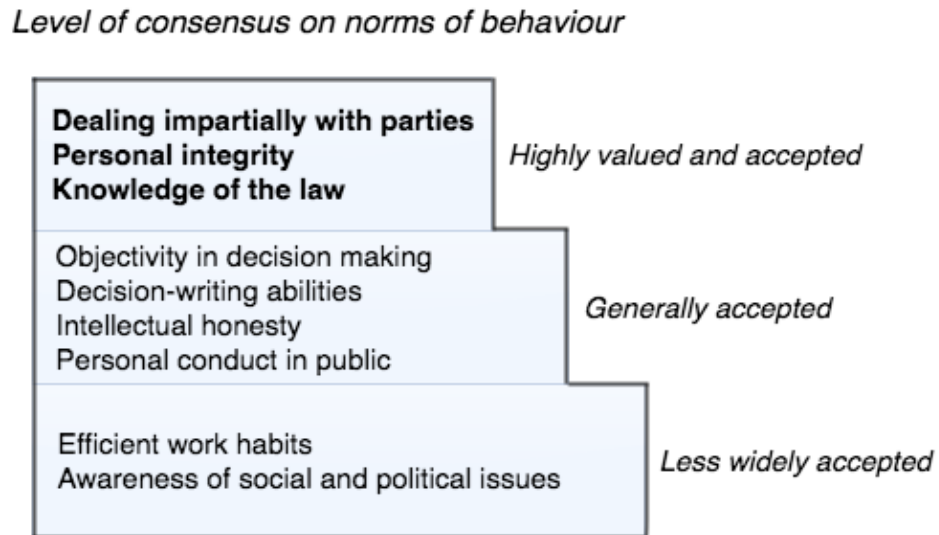
⁷⁰³ Comment from Judge 1944358 (Arab Judges Survey)

⁷⁰⁴ Scheb M John, (1982), *Merit Selection, Role Orientations and Legal Rationalization: A Q-Technique Study of The Florida State District Courts* (PhD, University of Florida), p.85

⁷⁰⁵ Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, edited by CA Thomas (Oxford Univ Press 2002) p.69

impartially with parties to cases,⁷⁰⁶ personal integrity,⁷⁰⁷ and knowledge of the law.⁷⁰⁸

Figure 34 Arab judges' level of consensus on accepted norms of judicial behaviour (in order of hierarchy)



Dealing impartially with parties to cases forms part of the second principle of the Sharjah Convention⁷⁰⁹. In relation to the impartial treatment of parties, judges are instructed to exercise their functions based on their professional appreciation of the facts and the appropriate legal reasons, without external influence, incitement, pressure, threat or interference from anyone. Judges must conduct investigations confidently, respecting the litigant's right to legal counsel. They must also avoid making remarks that may be harmful, whether in office or during trials. A judge should recuse him/herself from a case if he/she believes that a fairness and impartially may be compromised.⁷¹⁰ According to the Sharjah Convention, practice of equal treatment is manifested when judges are aware that their respective societies include diverse

⁷⁰⁶ 100% of judges said it was important and 85% said it was valued by colleagues (n=52, Arab Judges Survey)

⁷⁰⁷ 100% of judges said it was important and 85% said it was valued by colleagues, (n=52, Arab Judges Survey)

⁷⁰⁸ 98% of judges said it was important and 90% said it was valued by colleagues, (n=52, Arab Judges Survey)

⁷⁰⁹ Principle 2: Impartiality and Neutrality "Sharjah Convention 2007".

⁷¹⁰ Ibid.

individuals and groups that have different religions, sects, races, nationalities, sex, age, civil status, physical and psychological capacities.⁷¹¹

Personal integrity falls under the third principle of the Sharjah Convention. The principle refers to a judge's ability to hold him/herself to constant moral and ethical standards. Judges should ensure that their conduct is above reproach in the view of a reasonable observer and that their behaviour and conduct must reaffirm the people's faith in the integrity of the judiciary.⁷¹² Judges with integrity are described to be role models for their colleagues, and they consider themselves as having a duty to encourage integrity amongst their peers and confront them when their integrity falters.⁷¹³

Finally, **Knowledge of the law** falls under the eighth principle of the Sharjah Convention and also reflects the relevant provisions in the Bangalore Principles of Judicial Conduct.⁷¹⁴ A judge possessing knowledge of the law is described as someone who constantly strives to learn and improve their legal knowledge through research.

The importance of these three qualities may also indicate that should judges fail to conform to them, they will disrupt the working consensus. Because judges often work in groups where members share the same role, there must be some minimal level of "working consensus" where formal and informal norms indicate what is the expected relationship among judicial colleagues.⁷¹⁵ Although the true internal workings of collegiate courts may be hidden from view by an artificial image of "court unity" (reflected in the single judgement), the findings of this research indicate that certain norms may serve as points of reference for judicial conduct among Arab judges.

⁷¹¹ Ibid.

⁷¹² Principle 3: Integrity "Sharjah Convention 2007".

⁷¹³ According to the principle of Integrity "a judge must maintain integrity because it is intertwined with the integrity of the judiciary as a whole" Ibid.

⁷¹⁴ Principle 8: Competence and Diligence "Sharjah Convention 2007"; 'The Bangalore Principles of Judicial Conduct' E/CN.4/2003/65

⁷¹⁵ John C. Wahlke, Heins Eulau, William Buchanan, LeRoy C. Ferguson, *The Legislative System: Explorations in Legislative Behavior* (John Wiley & Sons 1962) p.145

Non-judicial actors

A critical issue in assessing the political significance of the judiciary in any jurisdiction is how judges view their relationships with non-judicial actors. Judges' relationships with actors in the legal community are supposed to be conducted according to strict legal standards. Generally, rules of judicial conduct emphasise judicial objectivity, where judges are expected to "isolate themselves from influences which might affect their image of justice incarnate or which might skew their determination of a case".⁷¹⁶ Judges are considered as delegates of the judiciary and must therefore make sure that the dignity of the judiciary is upheld in relation to their personal and professional conduct.

Here again, absolute judicial isolation presents a skewed picture of reality. Judges do interact with actors beyond the judicial community, primarily through decision-making. While the types of relationship judges have with non-judicial actors may vary from country to country, this research explored how Arab judges viewed their relationships with a wide range of non-judicial actors. And it examined Arab judges' relationships with the wider public, religious authorities and the executive branch in more detail.

The survey findings showed that Arab judges tended to consider non-judicial actors from outside the broader legal community as less important than actors within the broader legal community. Generally, judges considered parties to cases, lawyers and prosecutors as important. Court staff and judicial colleagues were also considered by many judges as important. In terms of judges' relationship with the executive, most judges indicated that the executive had little impact on their job as judges. Religious authorities were also considered by judges of minor importance, particularly for their judicial roles. But more varied responses were found when Arab judges were asked about the judicial application and development of religious laws. Most Arab judges agreed that state judges should be able to interpret religious laws and many agreed that judges should develop religious laws.

⁷¹⁶ Glick, H. (1967) *Judicial role perceptions and behavior: A study of American state judges*. Ph.D. Tulane University, p.233

Judges and public perceptions

Finally, an important relationship for judges that forms part of their core duties is their interaction with the public. In principle, judges are required to keep a distance from the community. For instance, under the fourth principle of the Sharjah Convention, Arab judges are instructed to maintain a balance between their judicial duties and their engagement in society.⁷¹⁷ However, in practice judges are not insulated from society: they remain part and parcel of it primarily because of their accessibility. The most visible relationship is through disputes. The two studies made by Hiil in Jordan and Lebanon showed that the public perceptions of courts were divided, and individuals from both countries tended to have different expectations, attitudes, values and beliefs about the judiciary.⁷¹⁸

The findings from the Arab Judges Survey provided an additional perspective on the relationship between the public and judges in the Arab Middle East. Arab judges tended to feel that the judiciary was respected and admired by the public, but most also thought the public in their countries wanted the judiciary to change and saw the judiciary as ineffective. The findings corroborate the idea that judges are not isolated from or unaware of public perceptions. While Arab judges who took part in the survey were strongly of the view that they performed an important role in society, they were consciously aware that the public tends to perceive their judicial role differently.

Does judicialisation exist in the Arab Middle East?

At the outset of this study, it was hypothesised that judges and courts in the Arab Middle East have “political” dimensions attached to them as a result of the historical, religious, social and cultural developments of the region. Judicial roles in Egypt, Jordan, Lebanon and Saudi Arabia carry important political dimensions which are manifested in the institutional, functional and

⁷¹⁷ “Principle 4: Propriety”, Sharjah Convention 2007

⁷¹⁸ See Martijn Kind, Martin Gramatikov, Rodrigo Núñez, Roger El Khoury, Nadja Kernchen, “Justice Needs in Lebanon: Legal Problems in Daily Life” and “Justice Needs and Satisfaction in Jordan” (The Hague Institute for Innovation of Law (Hiil) 2017) Data and Impact

behavioural characteristics explored in this study. Based on the insights offered in this thesis, judicialisation is not a new phenomenon arising according to the “rights hypothesis”, nor is it a trait unique to contemporary democracies. Rather, the socio-cultural conditions in Arab states have *always been hospitable* to judicialisation, *despite* the lack of a liberal democratic government. It should be noted that although judicialisation can be claimed to exist in the Arab region, this study does not seek to either promote judicialisation or argue against it. The main purpose of this thesis has been to explore whether the phenomenon exists in the Arab region and to test the theory of judicialisation beyond its traditional boundaries of liberal democracies. Whether it is a *good* or *bad* judicialisation is beyond the scope of this research.

Future research

The exploratory nature of this research was ambitious in its approaches but modest in its aims: and the limitations of the findings cannot be stressed enough. In light of the sampling methods of all three studies and the size of samples, the conclusions drawn in this study are therefore methodologically limited. Despite these limitations, the three studies provide for important information about judges and courts in jurisdictions where this issue has not been systematically and empirically explored. The findings therefore offer initial insights into the several topics such as role perceptions, background and attitudes of judges. Although such insights are valuable in of themselves, it is hoped that future research will be able to overcome some of the methodological limitations of in this study.

Furthermore, empirical research of the justice sector in the Arab region is scarce and often riddled with value-based analysis. A primary aim of this study was to contribute towards filling the knowledge gap about judicial roles and the administration of justice in the Arab region. The findings of the research in this thesis highlight several areas where future research on Arab judges and justice systems is needed, particularly studies that are empirically oriented and seek to understand how Arab legal systems and judges actually operate.

Assessing the impact of judicial reform projects

Legal cultures are increasingly being imported, most notably through the rise of externally influenced judicial reform projects across the Arab region. Recent decades demonstrate an institutionalist revival of judicial reform projects in several Arab legal systems, often based on international legal models, terminologies and legal cultures. These have materialised into a myriad of initiatives led by international governmental organisations, non-governmental NGOs and trans-national organisations.⁷¹⁹ These projects are often based on a “democracy promotion” approach, with the purpose of enhancing institutional capacity and promoting greater transparency and efficiency in Arab judicial sectors. For instance, the United Nations Office on Drugs and Crime Prevention (UNODC) lists 32 ongoing projects of “Promoting Integrity and Building Justice” in the Arab region.⁷²⁰ It would be useful to investigate how Arab judges see these projects by exploring how Arab judges perceive the principles underlying the reform agendas, and what their professional and personal attitudes are towards them. More specifically, research is needed in relation to the actual impact these reform projects have on key actors in Arab judicial systems and whether they do bring about a change.

Public perceptions of judges and justice

This thesis provides an insight into how Arab judges understand their role and how they think the public see their roles. An important next step would be to expand this to encompass how citizens themselves in the Arab Middle East see the role of judges and courts in their societies. Further research in this field could continue to explore the judicial sector in the Arab region, but to shift focus from judges to the general public⁷²¹ and other important actors in each

⁷¹⁹ See for instance ‘MENA-OECD Governance Programme’ (OECD 2017) <<https://www.oecd.org/mena/governance/mena-oecd-governance-programme-2017.pdf>>.

⁷²⁰ UNODC, ‘Project Summary’ (*United Nations Office on Drug and Crime Prevention*)<<https://www.unodc.org/middleeastandnorthafrica/en/resources/projects-summary.html>> accessed 11 September 2018.

⁷²¹ As noted earlier, the World Justice Project study was only able to include two Arab states in its 2018 survey: Lebanon and Tunisia. Global Insights on Access to Justice Findings from the World Justice Project General Population Poll in 45 Countries’ (World Justice Project 2018) https://worldjusticeproject.org/sites/default/files/documents/WJP_Access-Justice_April_2018_Online.pdf

jurisdiction in order arrive at a greater understanding of how Arab judicial institutions and judges are perceived. The findings from the research conducted for this thesis, in particular data from the Arab Judges Survey, indicate that judges in many Arab states feel there is a difference between how they see their judicial function and how the public in their country see it. Empirical research with the public in the Arab region could say whether Arab judges are or are not correct about this. Building on recent empirical studies such as the WJP and HiiL on legal experiences and satisfaction of individuals, future research endeavours should deepen the inquiry about public perceptions of judges and seek to understand the link between the two groups.⁷²²

Conclusion: The reality of “Qāḍī justice”

This thesis has sought to shed some insight into the judicial role in the Arab Middle East, which has often been erroneously portrayed as “unbounded as to appear arbitrary and even tyrannical”.⁷²³ The thesis has sought to address these misconceptions through three approaches. The mapping of Arab judicial systems highlights the rich and complex nature of judicial power in different Arab states. This showed that there is no singular “qāḍī” justice system, but a multitude of systems informed by complex structural, functional and behavioural elements. Furthermore, the survey of Arab judges also demonstrates that judges in the Arab region have as much concern for rule-based decision-making as their Western counterparts. It is clear that rules and procedures are important, *even for Qāḍīs*.

For the legal anthropologist Rosen, the Qāḍī was one of those striking “oriental” figures used in the West to measure judicial discretion:

⁷²² See for instance Global Insights on Access to Justice Findings from the World Justice Project General Population Poll in 45 Countries’ (World Justice Project 2018) https://worldjusticeproject.org/sites/default/files/documents/WJP_Access-Justice_April_2018_Online.pdf; ‘Justice Needs and Satisfaction in Jordan’ (The Hague Institute for Innovation of Law (HiiL) 2017) Data and Impact <[http://www.hiil.org/data/sitemanagement/media/JNS%20Jordan%202017_EN%20\(Online\)\(1\).pdf](http://www.hiil.org/data/sitemanagement/media/JNS%20Jordan%202017_EN%20(Online)(1).pdf)>

⁷²³ Lawrence Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society* (Cambridge University Press 1989), p.58

“As in so many other instances the image of the exotic has thus come to serve westerners as a standard against which we measure our supposed advance along the enviable road of civilization”.⁷²⁴

It is hope that this thesis has helped to shed some light onto why the flawed image of the Qāḍī as a whimsical figure in dispensing “Qāḍī-justice” should be abandoned, and that questions about the political significance of judges are as important and complex in the Arab region as they are in Western states.

⁷²⁴ Ibid.

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- Law No. 17 of 2007
- Law No. 13 of 2017

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- Law No.136 of 1984.

Law No. 40 of 1977, “The Political Parties Law”

Amendments:

- Law No. 177/2005

Law. No. 48 of 1979 “Supreme Constitutional Court Law”

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Appendices

List of appendices

- **Appendix 1:** Judicial Structures in Bahrain, Syria, Tunisia and United Arab Emirates according to official laws
- **Appendix 2:** English translation of cover letter for Survey questionnaire
- **Appendix 3:** Arab Judges Survey (English version)
- **Appendix 4:** Findings for individual countries from the Arab Judges Survey (Chapters 8 and 9)

Appendix 1: Judicial Structures in Bahrain, Syria, Tunisia and United Arab Emirates according to official laws

SYRIAN ARAB REPUBLIC

Directly influenced by the Ottoman Tanzimat. The Majalla served as a civil code in Syria until 1949, when it was replaced by the Syrian Civil Code of 1949. Largely patterned on the Egyptian Code.

First degree courts	Courts of Peace Courts of First Instance Court of Assize	Courts of First Instance are divided into criminal and civil branches and hears claims that cannot be heard by the Court of Peace either because of the dispute at hand is urgent or it is concluded to be too complex. Hears cases in which sentence exceeds three years.
Courts of appeal	Thirty Courts of Appeal, three criminal courts and four civil courts located in Damascus and one in every district.	Hears appeals from lower courts. The verdicts can however be nullified by the Cassation court
Apex courts	The Court of Cassation is located in Damascus and is at the apex of the ordinary Judiciary.	The Court is divided into four chambers, each chamber composed of a three-judge panel. Chamber for Canonical, Military, Civil and Commercial, and Criminal. Hears appeals on points of Law and may nullify lower court verdicts. Judgments handed down by the Court of Cassation set precedent for lower courts to apply and has the right to overrule lower court judgments.
Administrative	Administrative court system is stipulated in the constitution. Both are separate from the courts of general jurisdiction.	There are two levels of courts that hear administrative cases. The Council of State which includes advisory as well as judicial functions and a court of First Instance
Special courts		
Religious	The Sharī'a (Muslim), Doctrinal (Druze) and Spiritual Courts (Christian and Jewish) specialised jurisdiction in	The Religious court system is separated into three-tier hierarchies. Each court has its own appellate court, and the final appeal lies within the Doctrinal and Religious branch at the Court of Cassation

<p>Constitutional</p>	<p>relation to Personal status and family laws The Supreme Constitutional Court (SCC)</p>	<p>Mandate to decide on the constitutionality of Laws, review challenges arising from the election of the members of the People’s Council and the President of the Republic, and try the President of the Republic for treason.</p> <p>The SCC is composed of 11 members appointed by the President of the Republic. The duration of the term for the judges is set for a renewable period of four years. Judges at SCC are not entitled to hold office at the People’s Council or the Council of Ministers.</p>
<p>Military & Security</p>	<p>There are a number of other courts with specialised jurisdictions over certain cases.</p>	<p>Military field courts. The Military may establish field courts and try cases referred by the minister of Defence and prosecuted by the Military Prosecutor.</p> <p>Supreme State Security Court Hears cases related to national security. Its judgments cannot be appealed and are not bound by the same procedures of the ordinary courts.</p> <p>Economic Security Courts. Established to look into cases involving economic crimes. jurisdiction because they do include civil judges. Judgments may be appealed before the Court of Cassation.</p>
<p>Appointment</p>	<p>The court system is overseen by the Supreme Judicial Council (SJC) is the main organ responsible for the organisation of the judiciary and the court system. The SJC is headed by the Minister of Justice and 7 members including the Head of State.</p>	<p>The selection process is based on academic merit and examination. Degree in law is required but no explicit requirement of having practiced as a lawyer. Two year training programme for successful applicants and if successful, candidates are appointed as judges to the lower courts, as deputy public prosecutors or investigating judges.</p> <p>Seniority and merit is the official criteria for career advancement in the judiciary. Court of Cassation judges are appointed by the SJC.</p>

KINGDOM OF BAHRAIN

Characterised as a dual court system where courts are divided into two branches: The Civil Law Courts and the Sharī'a Law Courts.

The legal system of Bahrain is based on several sources, including customary tribal law and schools of Islamic Sharī'a law (both Shi'a and Sunni schools) and Civil law which has been influenced by British common law.

First degree courts

Court of Minor Causes
Court of Urgent Matters
Court of Execution

Hears cases under of minor value and or misdemeanour cases. Also hears cases concerning repossession of property expropriated in any way. May assist with specific responsibility to hear urgent matters on all claims that need urgent attention except for cases falling under the jurisdiction of Sharī'a courts. Court is empowered to execute judgments issues by the Courts of all types and degrees.

Courts of appeal

Bahrain has two Courts of Appeal; Greater Civil Court and the Higher Appeals Court.

The **Greater Civil Court** is empowered to examine appeals from lower courts. Any judgment issued by this court in its appellate capacity may only be challenged before the Court of Cassation and not to the High Court of Appeal. The Greater Civil Court has jurisdiction-through an administrative department-in settling administrative disputes arising between individuals and between the government or public institutions or organisations, except in cases where the law stipulates otherwise. Serves as a Court of First Instance disputes concerning the Personal Status of Non- Muslims.

The **Higher Appeals Court** hears appeals from the Court of Minor Causes and the Greater Civil Court

Apex courts

The Court of Cassation was established in 1989

The Court serves as the final court of appeal for all civil, criminal, civil, commercial and Personal Status of Non-Muslims. Hears appeals on points of Law from judgments passed in the High Court of Appeal and the Court of Appeal, resolve jurisdictional disputes between Sharī'a and civil courts as well as conflicting judgments.

Administrative Bahrain does not have an administrative judicial body. Instead, the civil division at the greater Civil Court has an administrative chamber that hears matters arising from administrative disputes.

Religious Sharīʿa courts are the second, autonomous branch within the judicial structure regulated by Law No.13 (2002). Courts are divided into three tiers and further divided into Shiʿa Divisions and Sunni Divisions. Any matter relating to the Personal Status of Muslims, including matters of Family Law is within the competence of the Sharīʿa Courts.

Special courts

Constitutional The Constitutional Court was established by the Bahraini Constitution of 2002

Other Bahrain Chamber for Dispute Resolution was established in 2009 with a judiciary arm and an arbitration arm. In the event of a jurisdictional dispute, the Court of Cassation decides.

First Instance Court hears all types of maintenance, child support, child custody and conservation, inheritance deeds, and other deeds.

Sharīʿa High Court hears disputes that fall outside the First Instance Court. It is in addition empowered to hear appeals. Any judgment issued by this Court in its appellate capacity is final and cannot be challenged.

Sharīʿa High Court of Appeal: A three-judge panel. Examines awards issued in the first instance by a Sharīʿah High Court against which an appeal is made. Final Court of appeal in respect of Muslims. (The Court of Cassation does not have the authority to entertain any appeal against any judgment issued by this Court).

The Court supervises laws on the basis of the constitution. Legislators, members of the government may bring a challenge to the court on the basis of constitutionality. The Court consists of a president and six members, appointed by royal decree for a specified time period

Military & Security	Military Courts are divided into four tiers: (Special Military Courts; Lower Military Courts; Higher Military Courts; Military Appeals Court).	The National Safety Court was established in 2011
Judges status	The Higher Judicial Council oversees the courts and judges. It recommends the nomination of judges, who are formally appointed by a royal decree.	The King chairs the Council, while other members consist of the Chairman of the Court of Cassation, the Attorney General, and at least five members from the judiciary appointed by royal decree, for a membership of three year
Appointment	Law degree from an officially recognised Arab or foreign university is a prerequisite or, an Islamic Shari'ah authorization that qualifies candidates to Shari'ah judgeship. Legal experience is also needed ranging from 4 – 10 years depending on the level of court.	Court of Cassation judges appointed by royal decree and serve for a specified tenure; Constitutional Court president and members appointed by the Higher Judicial Council, a body chaired by the monarch and includes judges from the Court of Cassation, Shari'ah law courts, and Civil High Courts of Appeal; members serve 9-year terms.

REPUBLIC OF TUNISIA

Similar to the Egyptian move away from the Ottoman Legal impact, Tunisia had a similar experience but less of an impact. At the time the Majalla was promulgated, Tunisia was fully immersed in its own legislative initiatives. With the Treaty of Marsa in 1883, Tunisia became formally under the French Protectorate which in legal terms meant that France was permitted to undertake legislative reforms. The codification of the Tunisian Civil Law was instead drawn from a plurality of legal sources and a synthesis of diverse sources of continental civil law with Islamic law and Tunisian custom headed by the Italian-Tunisian Jurist David Santillana that helped to inform the judicial structure. Tunisian legal development is characterized as a thematic codification as opposed to Sanhuri's "dual codalism". It is a synthesis of diverse codes of continental civil laws with Islamic law and Tunisian custom. This was replicated in Morocco and Mauritania. Following the Tunisian Revolution, the judiciary has undergone several reforms.

First degree courts	District Courts Courts of First Instance	District Courts hears cases regarding alimony claims, possessor actions, and urgent reports amongst other. First instance Courts serve as appellate courts for District courts (final instance with regards to alimony and possessor actions on purely principal grounds). Cases appealed from the District Courts can be appealed to the Court of Cassation. The courts hears all commercial and civil cases regardless of monetary value of claim. These courts also rule on rules on the constitution of companies, dissolution, liquidation, bankruptcy and rectification.
Courts of appeal	Three Courts of Appeal in Tunisia. Each Court have a criminal and civil division	The Courts of Appeal is competent to hear appeals of judgments rendered in first instance by the courts of first instance in its district in relation to civil matters. The courts hear appeals of a criminal nature flowing from the court of first instance. Each court of appeal comprises of at least one indictment chamber with an investigating judge. The courts of appeal are also competent to hear appeals against the decisions of professional bodies such as the Bar Association.
Apex courts	The Court of Cassation is Located in Tunis and serves as the final Court of Appeal with civil and criminal divisions.	In addition to serving as a final instance court for civil and criminal matters, the Court of Cassation has also jurisdiction over the settlement of judges and the dismissal from one court to another. It is also empowered to ensure the unity of jurisprudence and hears issues that involves conflicting jurisprudence of the lower courts.

<i>Administrative</i>	Pursuant to the new constitution of 2014, Tunisia has an elaborate judicial structure dealing with administrative disputes, administrative courts, and courts dealing with the State budget and abuse of State power.	<p>The Administrative Courts have the jurisdiction to rule on disputes involving the administration and appeals for excessive powers to annul the acts of the central, regional and local administrative authorities, local public authorities and administrative public institutions.</p> <p>The Court of Auditors have the power to examine the accounts and the management of the state of local authorities, public industrial and commercial establishments as well as all bodies.</p> <p>The Court of Finance has the jurisdiction to review mismanagement of State funds by public institutions.</p>
<i>Special courts</i> <i>Religious</i>	There are specialised sections in the civil courts handle personal Status laws and Family laws.	
<i>Constitutional</i>	Following the Tunisian Revolution, the Constitutional Council underwent several reforms.	The Tunisian Constitutional Court has the exclusive jurisdiction to rule on questions of on the basis of the Constitution. Lower courts may refer a constitutional issue to the Constitutional court during the course of its proceedings. The court has <i>a priori</i> powers in that it can review the constitutionality of draft legislation within three months (subject to an additional three month extension if there is a valid justification). Upon the request of the President, the Prime Minister, or thirty members of parliament the court can review draft laws, which are referred to the court within seven days of parliament's adoption of the bill.
<i>Other</i> <i>Military & Security</i>	The Military has its own judicial body and managed by the National Defence Ministry.	<p>Under legislation there are three courts in the military branch:</p> <p>The Military Court of Appeal</p> <p>The Permanent Military Tribunal of 1st Instance of Tunis</p> <p>The Permanent Military Court of Kef</p>
<i>Judges status</i>	Judges and prosecutors are part of the same corps. Similar provisions are applicable to both judges and prosecutors in relation to selection, appointment,	Candidates wishing to become judges or prosecutors take the same entry examination, and graduate from the same school, the Higher Institute for Magistrates

Appointment performance, promotion and discipline.
Judges are appointed by presidential decree with the assent of the High Judicial Council.

The promotion of judges is currently based on the principle of seniority. Appointments to senior positions are made by presidential decree after consultation with the Prime Minister, based on a list of candidates prepared by the High Judicial Council. Judges of the Constitutional Court are appointed by the President of the Republic, the Assembly of People's Representatives, and the High Judicial Council, who each appoint four members for a single six-year term.

UNITED ARAB EMIRATES (UAE)

The law of the UAE is largely codified and operates under a dual legal system based on Sharī‘a Law, Custom and legal principles influenced by the Egyptian and French civil laws. In the absences of provisions in the UAE codified law, Islamic principles are applied. With the exception of the Emirates of Dubai and Ras al-Khaimah, the federal system has jurisdiction in the Emirates. There are three main branches within the court structure: civil, criminal and Sharī‘a, or Islamic, law. Two layers of civil courts exist: the federal system and the local systems. The Sharī‘a courts are in parallel with the civil and criminal courts. There are also “free zone areas” in the federation where other legal entities operate autonomously such as the DIFC Courts intended to attract foreign investors and businesses.

Federal Courts	Seated in the capital of the Union, the UAE has federal courts of First Instance	As specified by the UAE Federal laws, appeals against judgements by the local judicial authorities in penal, civil, commercial and other cases may be made before the federal courts of First Instance. All or part of a local emirate court's jurisdiction to be referred to the federal courts of first instance. The Courts hear crimes committed within the boundaries of the permanent capital of the Federation personal status actions, civil actions, commercial actions and other actions between individuals which arise in the permanent capital of the Federation.
Federal courts of appeal	The Federacy have circuits of appeal for hearing criminal, civil, commercial matters amongst other.	The Circuits hear appeals lodged against judgments from the federal courts of First Instance and the local judicial authorities.
Apex courts	The Federal Supreme Court is the highest court in the federal court structure for all Emirates (except for Dubai and Ras Al Khaimah)	The Federal Supreme Court acts as an appellate court with respect to the decisions of lower courts, and also supervises lower courts to ensure that they are applying and interpreting the law in a consistent manner. Lower courts must abide by the legal principles set down by this Court. The Court also adjudicates on jurisdictional conflicts between federal judicial authorities and the local judicial authorities as well as jurisdictional conflicts arising from two or more Emirates. In addition, the Court has the jurisdiction to hear disputes between the Emirates, or between Emirates and the Federal Government. It also examines the constitutionality and legality of federal and local laws and Interrogates Ministers

		and senior federal officials on the basis of a request by the Federal Supreme Council. The Court hear crimes directly affecting the interests of the federation; such as crimes relating to internal or external security of the Federation. The judgements of the Federal Supreme Court are final and binding.
Administrative	No separate Administrative judicial branch. Heard by the Civil Courts.	
Religious	Sharīʿa or Islamic courts work alongside the civil and criminal courts in the UAE. The Sharīʿa court is the Islamic court in the UAE and is primarily responsible for civil matters between Muslims only.	Sharīʿa courts have the exclusive jurisdiction to hear family disputes, including matters involving divorce, inheritances, child custody, child abuse and guardianship of minors. The Sharīʿa court may, at the federal level only (excluding Dubai and Ras Al Khaimah). The courts also hear appeals of certain criminal cases.
<u>Special courts</u>		<p>Labour Courts handle cases filed by private sector employees or employers against one another. Labour cases can be appealed depending on the value that is being claimed.</p> <p>Commercial courts handle commercial contracts and commitments, banking processes, commercial papers, bankruptcy and its reconciliation issues.</p>
Military & Security		Courts for military personnel and tried in a separate court system.
Judges status	At the federal level, Ministry of Justice oversees the courts and prosecution departments across the UAE.	<p>The Ministry of Justice appoints judges and deals with matters connected with the federal courts of the first instance in respect of their organisation, formation, departments, local jurisdiction, procedures and conditions of judicial service.</p> <p>Judges are appointed by the federal president following approval by the Federal Supreme Council, the highest executive and legislative authority consisting of</p>

the seven emirate rulers. Judges serve until retirement age or the expiry of their appointment terms

Appendix 2: English translation of cover letter for Survey questionnaire

Dear Justice X

My name is Sara Razai and I am a doctoral student in Law at University College London (UCL)'s Judicial institute. I am conducting a research in order to **help increase understanding and knowledge of the work of judges in the Arab region**. I am inviting you to take part in a brief survey. The survey **explores your experience and views of being a judge**. The survey is **strictly anonymous** and the information provided cannot be traced back to any participant.

To access the survey please choose and click on your preferred version below:

<https://opinio.ucl.ac.uk/s?s=47482> (English version)

https://opinio.ucl.ac.uk/s?s=47482&lang=fr_FR (French version)

<https://opinio.ucl.ac.uk/s?s=47482&lang=ar> (Arabic version)

Thank you for taking the time to consider my request. Your participation will be extremely helpful to my research and to help understand the valuable work judges in the Arab region do.

Kind regards,
Sara



Sara Razai
PhD Candidate / Teaching Fellow
Judicial Institute, Faculty of Laws
University College London
sara.razai@ucl.ac.uk

Please consider the environment before printing this e-mail. This email, including any attachments, is confidential. If you are not an intended recipient, please inform the sender immediately and destroy this email. Do not use, copy or disclose this email.

Appendix 3: Arab Judges Survey (English version)

English



UCL JUDICIAL INSTITUTE

The Role of Judges in the Arab Middle East

I would like to **invite you** to take part in a short survey about the judiciary in the Arab Middle East.

Why I am conducting the survey.

My name is Sara Razai and I am a doctoral student in law at **University College London (UCL)**'s Judicial Institute. I am conducting this research in order to help **increase understanding and knowledge of the work of judges in the Arab region.**

What the survey is about

The survey explores your **experience and views of being a judge.** I am inviting all judges in the Arab region to take part, and **everyone's views are welcome.**

The survey

The survey will take about 5 minutes of your time. It is available in **Arabic, French and English** - you can choose your preferred language on the top right corner of this page.

Protecting your anonymity

This survey is voluntary and completely **anonymous.** Your participation in the survey and none of the information you provide in response to any survey question **cannot be traced back to you in any way.** UCL and I have undertaken in writing to ensure the complete anonymity of any one taking part in this survey. To further ensure your anonymity please **do not include your name** in any responses to any of the questions in the survey.

Sharing the survey

I am trying to reach as many judges in the Arab Middle East as possible, and if **you know of any other judges** who may be interested in doing the survey, please feel free to **share this invitation** to do the survey with them. You can do this by sharing the survey link, which is: <https://opinio.ucl.ac.uk/s?s=47482>

Thank you for taking the time to do the survey. Your participation will be **extremely helpful** to my research and is **very much appreciated.**

If you have any questions about the survey, please feel free to contact me at the email address below.

Yours sincerely,
Sara Razai
PhD candidate
Faculty of Laws
UCL Judicial Institute
University College London
London
WC1H 9BT
Email: sara.razai@ucl.ac.uk

Information about the UCL Judicial Institute

The UCL Judicial Institute is the United Kingdom's first and only centre of excellence devoted to research, teaching and policy engagement about the judiciary. For more information about the UCL Judicial Institute please see: www.ucl.ac.uk/laws/judicial-institute

Start

Section 1 - Your Judicial Post

Q1: In which Arab country do you hold a judicial post? If you hold a judicial post in more than one Arab country, please tick the country which you consider to be where you hold your main judicial post

- | | | | |
|----------------------------------|-------------------------------------|---------------------------------------|---|
| <input type="checkbox"/> Algeria | <input type="checkbox"/> Kuwait | <input type="checkbox"/> Oman | <input type="checkbox"/> Syria |
| <input type="checkbox"/> Bahrain | <input type="checkbox"/> Lebanon | <input type="checkbox"/> Palestine | <input type="checkbox"/> Tunisia |
| <input type="checkbox"/> Egypt | <input type="checkbox"/> Libya | <input type="checkbox"/> Qatar | <input type="checkbox"/> United Arab Emirates |
| <input type="checkbox"/> Iraq | <input type="checkbox"/> Mauritania | <input type="checkbox"/> Saudi Arabia | <input type="checkbox"/> Yemen |
| <input type="checkbox"/> Jordan | <input type="checkbox"/> Morocco | <input type="checkbox"/> Sudan | <input type="checkbox"/> Other |

If you have chosen "other", please specify:

Please feel free to provide any further comments in the box below

Q2: What is your current employment status as a judge?

- Active (full-time) Retired Other (Please specify)
 Active (part-time)

If you have chosen "other", please specify:

Please feel free to provide any further comments in the box below

Q3: In what type(s) of court(s) have you served as a judge?

- Trial only Appellate only Other (Please specify)
 Trial and Appellate

If you have chosen "other", please specify:

Please feel free to provide any further comments in the box below

(1/13)

Q4: What type of legal matters do you deal with in your current judicial role?(Please tick as many options as apply to you)

- | | | |
|-----------------------------------|---|---|
| <input type="checkbox"/> Civil | <input type="checkbox"/> Administrative | <input type="checkbox"/> Military |
| <input type="checkbox"/> Criminal | <input type="checkbox"/> Religious | <input type="checkbox"/> Other (please specify) |
| <input type="checkbox"/> Family | <input type="checkbox"/> Constitutional | |

If you have chosen "other", please specify:

Please feel free to provide any further comments in the box below

Q5: How many years in total have you served as a judge?

- | | | | |
|--|-------------------------------------|-------------------------------------|--|
| <input type="radio"/> Less than 1 year | <input type="radio"/> 7 - 11 years | <input type="radio"/> 17 - 20 years | <input type="radio"/> 26 - 30 years |
| <input type="radio"/> 1 - 6 years | <input type="radio"/> 12 - 16 years | <input type="radio"/> 21 - 25 years | <input type="radio"/> More than 30 years |

Section 2- Becoming a Judge

Q6: Before being appointed to the judiciary, did you hold any of the following legal posts? (Please tick as many options that apply to you)

- Public Lawyer (e.g., government lawyer, prosecutor, etc.)
- Private Lawyer
- Law Professor
- I was appointed to the judiciary directly from law school
- Other (Please specify)

If you have chosen "other", please specify:

Please feel free to provide any further comments in the box below

Q7: Looking back, to what extent do you feel your previous work experience prepared you for your judicial post?

- Not at all Somewhat Fully

Please feel free to provide any further comments in the box below

Q8: Did you have any judicial training when you were first appointed as a judge?

- Yes No

Please feel free to provide any further comments in the box below

(3/13)

Section 3 - Being a Judge

Please indicate whether you agree or disagree with the following statements:

Q9: "As a judge, I feel I provide an important service to society."

- Strongly Agree Neither agree nor disagree Strongly Disagree
 Agree Disagree

Please feel free to provide any further comments in the box below

Q10: "There is a difference between what I think the job of a judge is and the way the public in my country see it."

- Strongly Agree Neither agree nor disagree Strongly Disagree
 Agree Disagree

Please feel free to provide any further comments in the box below

Q11: "Belonging to the judiciary is an important part of my self-image."

- Strongly Agree Neither agree nor disagree Strongly Disagree
 Agree Disagree

Please feel free to provide any further comments in the box below

Q12: The role of a judge in my country is different than the role of the judge in other Arab countries in the region.

- Strongly Agree Neither agree nor disagree Strongly Disagree
 Agree Disagree

Please feel free to provide any further comments in the box below

Q13: The role of a judge in my country is different than the role of the judge in Western countries.

- Strongly Agree Neither agree nor disagree Strongly Disagree
 Agree Disagree

Please feel free to provide any further comments in the box below

Q14: Which of the following roles do you think are most important for judges in your country? Rank the following in terms of which roles are most important for judges in your country (where 1 = MOST IMPORTANT and 6 = LEAST IMPORTANT)

	Rank
Applier of the law	<input type="text"/>
Guardian of the community	<input type="text"/>
Administrator of justice	<input type="text"/>
Architect of the country's body of law	<input type="text"/>
Enforcer of legal rules	<input type="text"/>
Arbiter of morality	<input type="text"/>

Please feel free to provide any further comments in the box below

(5/13)

Section 4 - Qualities of judges

Q15: To what extent do you agree with the following statements?

	Strongly Agree	Agree	Neither disagree nor agree	Disagree	Strongly Disagree
The judiciary in my country is admired by the public	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The judiciary in my country is thought to be ineffective compared to other branches of government	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The public respect the judiciary in my country	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The public think that the judiciary needs to change	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Please feel free to provide any further comments in the box below

Q16: To what extent do you feel the following qualities are important for a judge to have to do their job well?

	Extremely important	Important	Of limited importance	Not important at all
Personal integrity	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Knowledge of the law	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Strong moral principles	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Dealing impartially with parties to cases	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Intellectual honesty	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Personal conduct in public	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Objectivity in decision-making	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Efficient work habits	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Decision-writing abilities	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Awareness of broader social and political issues	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

(6/13)

Please feel free to provide any further comments in the box below

Q17: Which of the following do you think are the most important qualities needed by a judge when working with other judges?(Rank the following qualities in terms of their importance where 1 = MOST IMPORTANT and 9 = LEAST IMPORTANT)

Hold firm views	<input type="text"/>
Show leadership amongst judges	<input type="text"/>
Respect the views of others even if you disagree	<input type="text"/>
Acknowledge the good work of others	<input type="text"/>
Be receptive to change and persuasion	<input type="text"/>
Show independence of mind	<input type="text"/>
Exercise good manners in dealing with others	<input type="text"/>
Keep arguments moderate	<input type="text"/>

Please feel free to provide any further comments in the box below

Q18: To what extent do you feel the following qualities are valued by the judges you work with?

	Valued highly	Valued	Valued a little	Not valued at all
Personal integrity	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Knowledge of the law	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Strong moral principles	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Dealing impartially with parties to cases	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Intellectual honesty	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Personal conduct in public	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Objectivity in decision-making	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Efficient work habits	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Decision-writing abilities	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Awareness of broader social and political issues	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Please feel free to provide any further comments in the box below

(7/13)

Section 5 - Judicial Decision-Making

Please indicate whether you agree or disagree with the following statements:

Q19: "Through cases brought to the courts, judges must constantly balance conflicting interests in society"

- Strongly Agree Neither agree nor disagree Strongly Disagree
 Agree Disagree

Please feel free to provide any further comments in the box below

Q20: "It is important that judges keep in constant contact with changing social mores in order to make their decisions relevant to the community"

- Strongly Agree Neither agree nor disagree Strongly Disagree
 Agree Disagree

Please feel free to provide any further comments in the box below

Q21: "It is more important that judicial decisions be just than that the letter of the law be adhered to"

- Strongly Agree Neither agree nor disagree Strongly Disagree
 Agree Disagree

Please feel free to provide any further comments in the box below

Q22: "Judges should use their knowledge of social and political factors, as well as the law, in making their decisions. "

Strongly Agree Agree Disagree Strongly Disagree

Please feel free to provide any further comments in the box below

Q23: When a judge decides a case, how influential do you think the following factors are for a judge?

	Very influential	Influential	Somewhat influential	Not influential at all
Requirements of law and order	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Judges' knowledge of social and political factors	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
What the public expects	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Judges' view of justice in the case	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Fair application of law	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Social consequences of the decision	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
What officials recommend	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Following previous decisions	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Please feel free to provide any further comments in the box below

Q24: To what extent do you agree with the following statements?

	Strongly Agree	Agree	Neither Disagree nor Agree	Disagree	Strongly Disagree
State judges should be able to interpret religious laws	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
State judges should be able to develop religious laws	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

(9/13)

Section 6 - Judges and the Law

Q25: To what extent do you agree or disagree with the following definitions of the rule of the law?

	Agree	Disagree
The rule of law means that a government abides by existing laws	<input type="radio"/>	<input type="radio"/>
The rule of law means that a government respects judges' rulings	<input type="radio"/>	<input type="radio"/>
The rule of law means ensuring law and order to protect the lives and property of citizens	<input type="radio"/>	<input type="radio"/>
The rule of law means equality between citizens	<input type="radio"/>	<input type="radio"/>
The rule of law means efficient and predictable justice	<input type="radio"/>	<input type="radio"/>
The rule of law is based on the protection of human rights	<input type="radio"/>	<input type="radio"/>
The rule of law is based on divine justice	<input type="radio"/>	<input type="radio"/>
The rule of law does not have a fixed and precise meaning	<input type="radio"/>	<input type="radio"/>
The meaning of the rule of law can differ between different legal traditions	<input type="radio"/>	<input type="radio"/>
Other (Please specify in box below)	<input type="radio"/>	<input type="radio"/>

Please feel free to provide any further comments in the box below

(10/13)

Q26: How influential are the following factors to a judge in deciding a case?

	Very influential	Influential	Somewhat influential	Not influential at all
Decisions closest in facts to the present case	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Past decisions of the higher courts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Previous decisions, when clear and directly relevant	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Please feel free to provide any further comments in the box below

Q27: In your job as a judge, how much importance do you place on the following groups?

	Extremely important	Important	Of limited importance	Not important at all
The public	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Lawyers	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Prosecutors	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Parties in cases that appear before me	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Court staff	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Judicial colleagues	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Senior figures in the judiciary	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Media	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Religious Authorities	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Government	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Please feel free to provide any further comments in the box below

Q28: To what extent do you agree or disagree with the following statements:

	Strongly Agree	Agree	Neither disagree nor agree	Disagree	Strongly Disagree
Judges are merely instruments of the law and can will nothing	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
It is possible for a judge always to be politically neutral and nonpartisan in deciding cases	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Adherence to past decisions must be the rule rather than the exception if litigants are to have faith in the continuity of law	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Please feel free to provide any further comments in the box below

Section 7 - About you

Q29: Are you:

- Female Male

Q30: Please indicate your age group:

- Under 25 31 - 35 41 - 45 51 - 55 61 - 65 66 - 70 Over 70
 26 - 30 36 - 40 46 - 50 56 - 60

Q31: What is your country of nationality?

- | | | |
|----------------------------------|---------------------------------------|---|
| <input type="checkbox"/> Algeria | <input type="checkbox"/> Libya | <input type="checkbox"/> Sudan |
| <input type="checkbox"/> Bahrain | <input type="checkbox"/> Mauritania | <input type="checkbox"/> Syria |
| <input type="checkbox"/> Egypt | <input type="checkbox"/> Morocco | <input type="checkbox"/> Tunisia |
| <input type="checkbox"/> Iraq | <input type="checkbox"/> Oman | <input type="checkbox"/> United Arab Emirates |
| <input type="checkbox"/> Jordan | <input type="checkbox"/> Palestine | <input type="checkbox"/> Yemen |
| <input type="checkbox"/> Kuwait | <input type="checkbox"/> Qatar | <input type="checkbox"/> Other (Please specify) |
| <input type="checkbox"/> Lebanon | <input type="checkbox"/> Saudi Arabia | |

If you have chosen "other", please specify:

Q32: What is your religious affiliation?

- None I prefer not to say Please specify

If you have chosen "other", please specify:

Q33: Finally, is there anything you would like to say about your role as a judge that has not been covered in the survey?

Thank you very much for taking the time to share your views. Your contribution has been very valuable and is very much appreciated.

Should you wish to see the results of this survey please send an e-mail to Sara.razai@ucl.ac.uk and I will share the findings with you when the survey has ended and the results have been analysed

Appendix 4: Country-based from the Arab Judges Survey
 (Chapter 8)

Figure 35 Arab judges' view of most important judicial roles, by jurisdiction (top 3 preferences combined) (n=60)

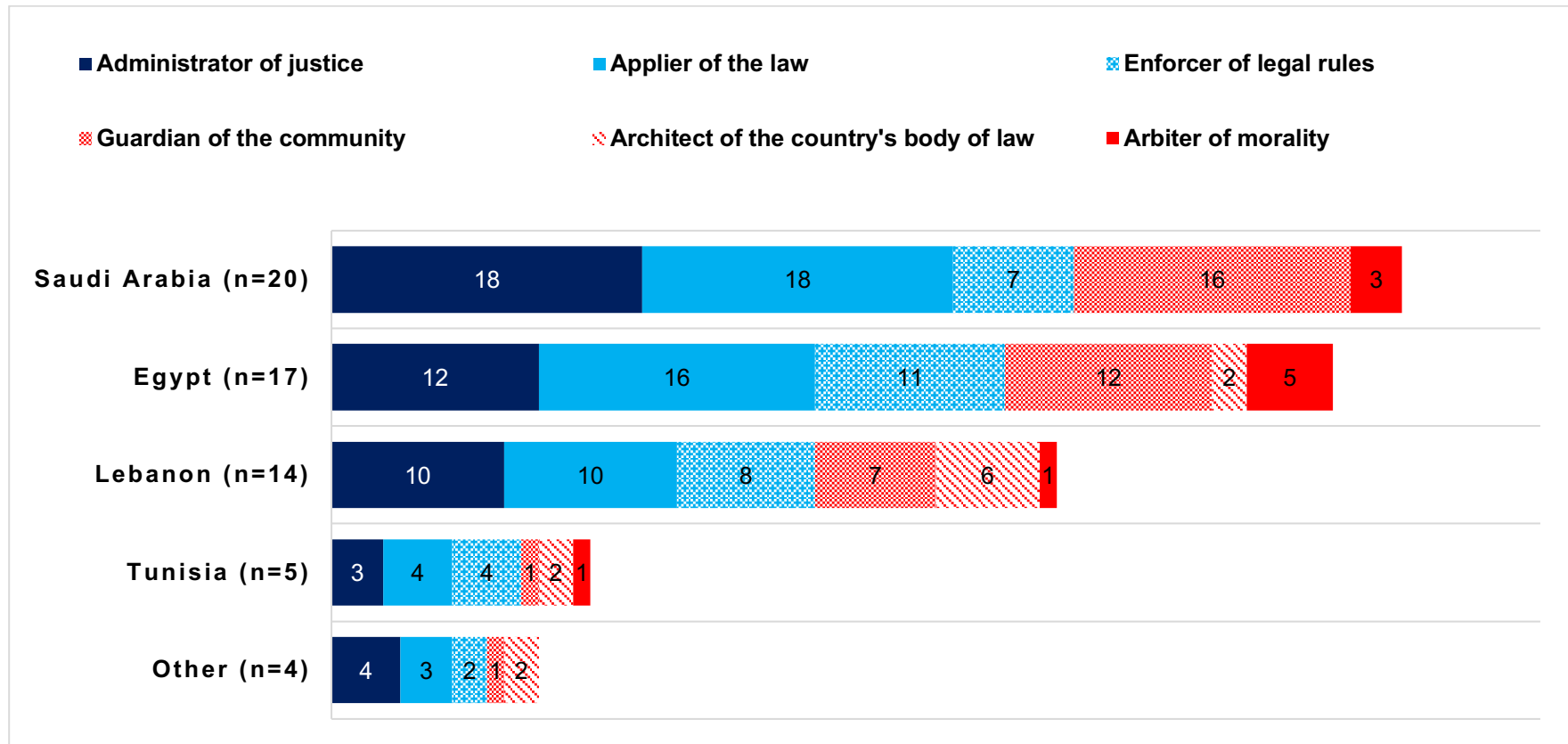


Figure 36 Arab judges' view of whether their role is different than the role of the judge in other Arab countries, by jurisdiction (n=63)

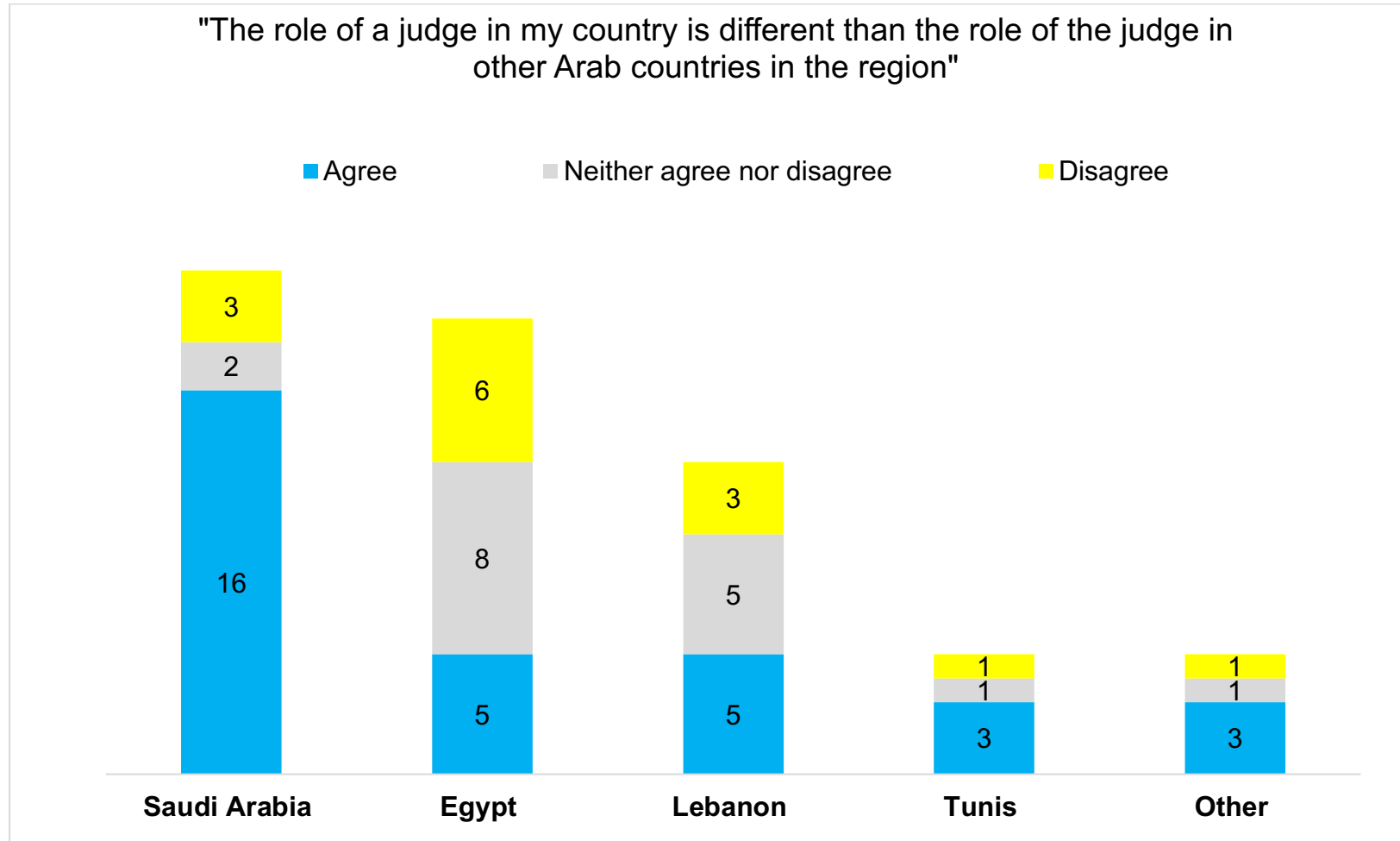


Figure 37 Arab judges' view of whether their role is different than the role of the judge in Western countries, by jurisdiction (n=63)

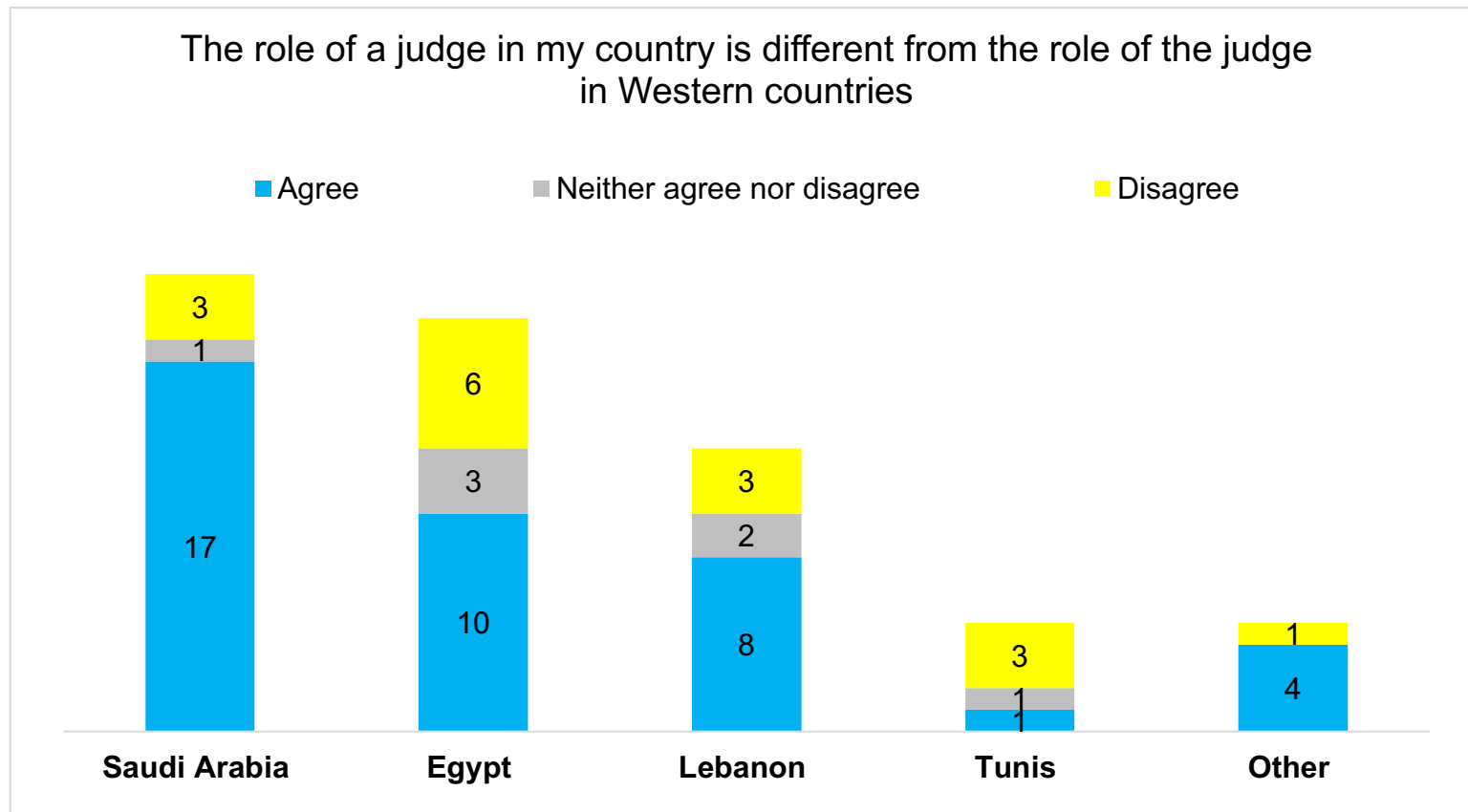


Table 30 Arab judges' assessment of the influence of precedent on their judicial decision-making, by jurisdiction (n=48)

How influential are the following factors to a judge in deciding a case?	Judges saying very influential or influential									
	Egypt		Saudi Arabia		Lebanon		Other ⁷²⁵		All Arab Judges combined	
	No.	%	No.	%	No.	%	No.	%	No.	%
"Precedent, when clear and directly relevant"	13	86.6	13	92.8	9	81.8	5	62.5	40	83.3
"Past decisions of the supreme court"	14	93.3	11	78.5	8	72.7	5	62.5	38	79.1
"Decisions closest in facts to the present case"	12	80.0	12	85.7	6	54.5	6	75	36	75.0
	n=15		n=14		n=11		n=8		n=48	

⁷²⁵ Tunisia (n=4), Palestine (n=2), Syria (n=1) and Jordan (n=1)

Table 31 Proportion of Arab judges that agree with precedent oriented statements, by jurisdiction (n=48)

<i>Please indicate whether you agree or disagree with the following statements:</i>	Egypt		Saudi Arabia		Lebanon		Other ⁷²⁶		All Arab Judges combined	
	Level of agreement									
	No.	%	No.	%	No.	%	No.	%	No.	%
“It is possible for a judge always to be politically neutral and nonpartisan in deciding cases”	10	66.6	9	64.2	8	72.7	7	87.5	34	70.8
“Adherence to precedent must be the rule rather than the exception if litigants are to have faith in the continuity of law”	4	26.6	5	35.7	1	9.0	3	37.5	13	27.0
“Judges are merely instruments of the law and can will nothing”	2	13.3	0	0.0	1	9.0	1	12.5	4	8.3
	n=15		n=14		n=11		n=8		n=48	

⁷²⁶ Tunisia (n=4), Palestine (n=2), Syria (n=1) and Jordan (n=1)

Table 32 Arab judges' agreement with narrowly worded statements on social and personal factors in decision-making, by jurisdiction (n=48)

<i>When a judge decides a case, how influential do you think the following factors are for a judge?</i>	Egypt		Saudi Arabia		Lebanon		Other⁷²⁷		All Arab Judges combined	
	Level of influence									
	No.	%	No.	%	No.	%	No.	%	No.	%
"Requirements of law and order"	14	93.3	14	100	11	100	8	100	47	97.9
"Judge's view of justice in the case"	12	80.0	12	85.7	7	63.6	6	75	37	77.0
"The social consequences of decision"	7	46.6	8	57.1	7	63.6	4	50	26	54.1
"What the public expects"	3	20	0	0.0	2	18.1	1	12.5	6	12.5
	n=15		n=14		n=11		n=8		n=48	

⁷²⁷ Tunisia (n=4), Palestine (n=2), Syria (n=1) and Jordan (n=1)

Table 33 Arab judges' agreement with broadly worded statements on public and social factors in judicial decision-making, by jurisdiction (n=48)

<i>Please indicate whether you agree or disagree with the following statements:</i>	Egypt		Saudi Arabia	Lebanon		Other ⁷²⁸		All Arab Judges combined		
	Level of agreement									
	No.	%	No.	%	No.	%	No.	%	No.	%
"It is important that judges keep in constant contact with changing social mores in order to make their decisions relevant to the community"	12	80.0	14	100	9	81.8	5	62.5	40	83.3
"It is more important that judicial decisions be just than that the letter of the law be adhered to"	13	86.6	13	92.8	9	81.8	4	50.0	39	81.2
"Judges should use their knowledge of social and political factors, as well as the law, in making their decisions"	8	53.3	11	78.5	6	54.5	5	62.5	30	62.5
"Through cases brought to the courts, judges must constantly balance conflicting interests in society"	13	86.6	8	57.1	7	63.6	4	50.0	32	66.6
	n=15		n=14		n=11		n=8		n=48	

⁷²⁸ Tunisia (n=4), Palestine (n=2), Syria (n=1) and Jordan (n=1)

Chapter 9

Figure 38 Degree of importance attached to judicial colleagues, by jurisdiction (n=48)

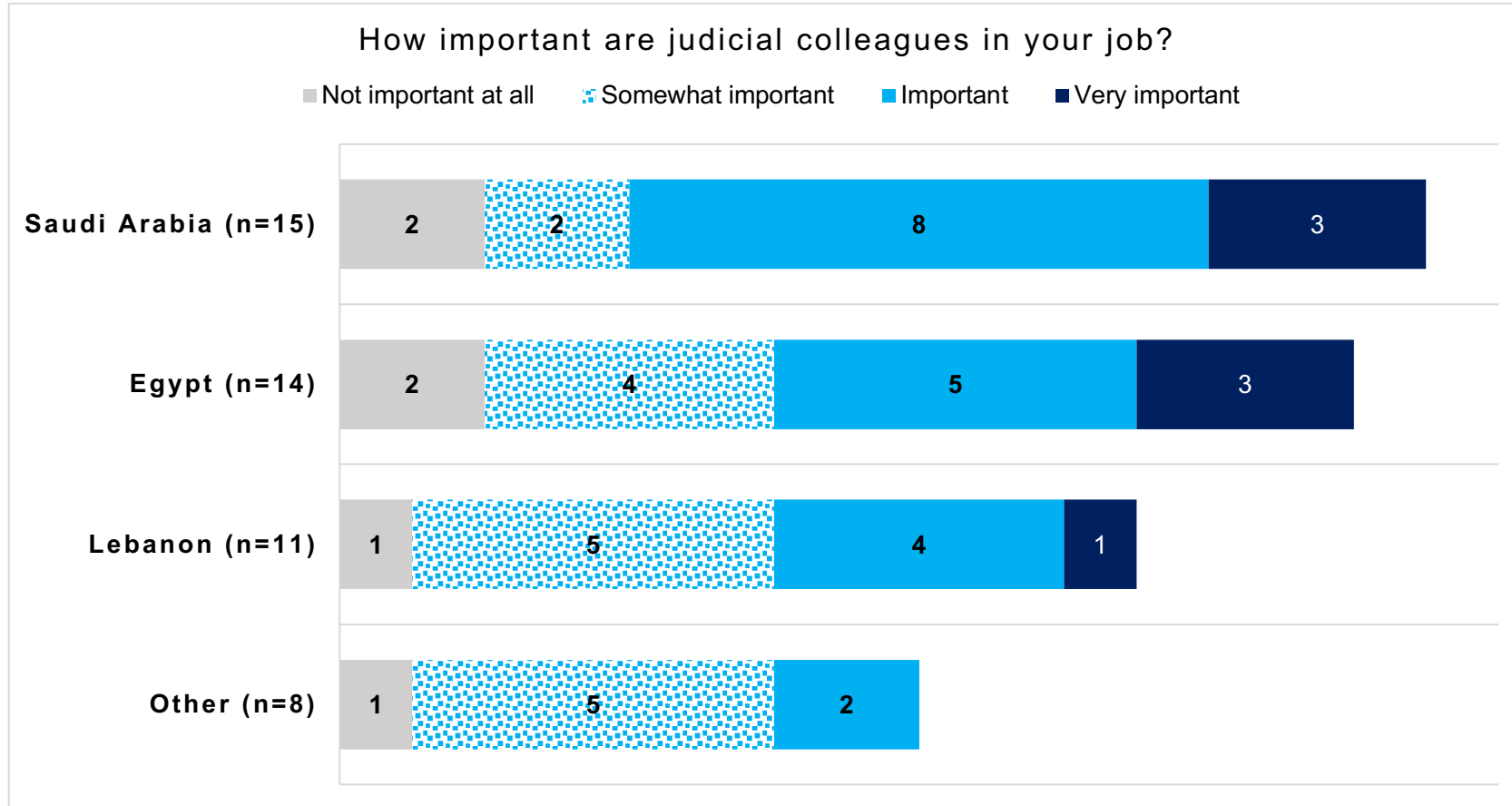


Figure 39 Degree of importance attached to senior figures in the judiciary (n=48)

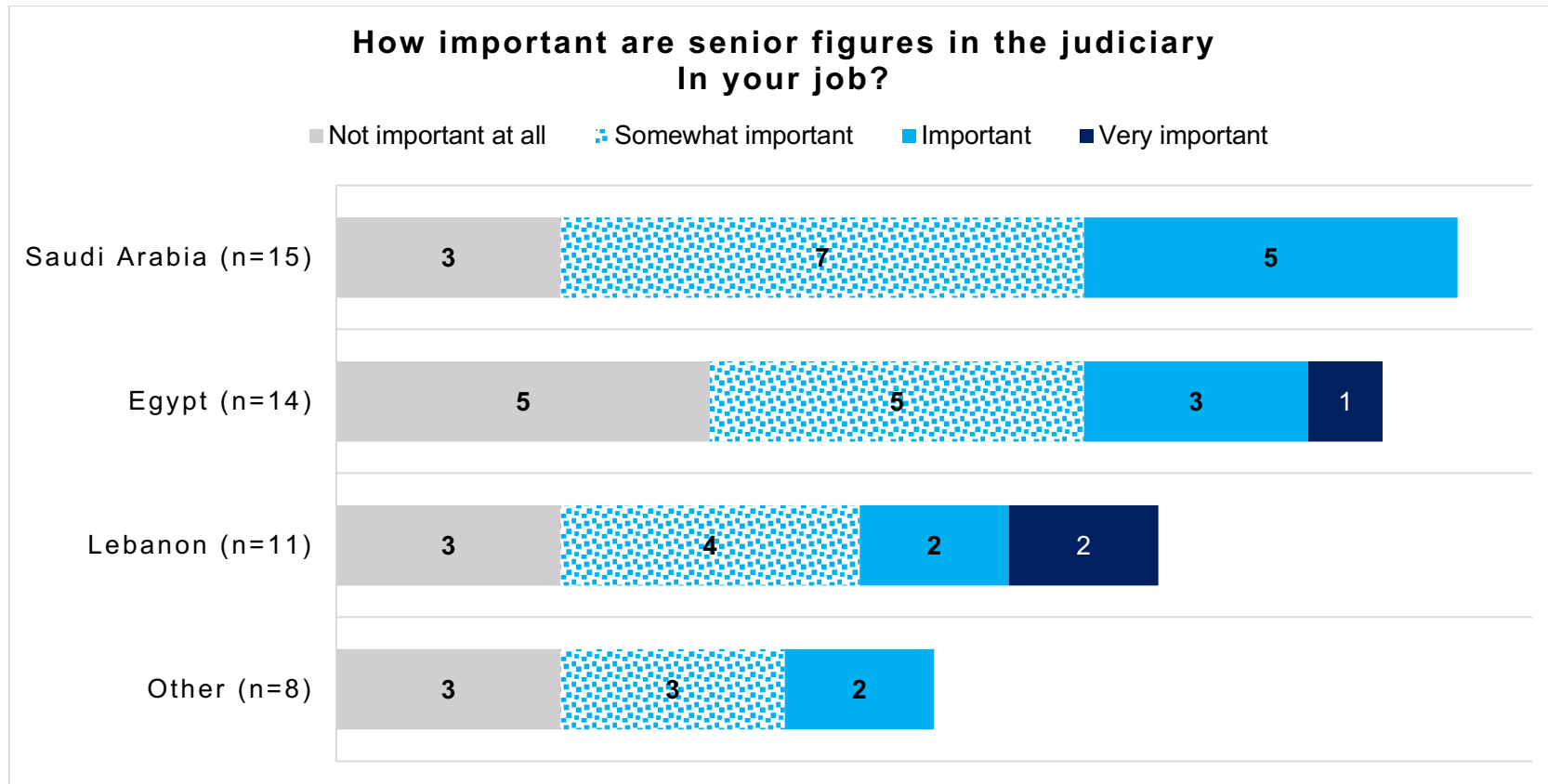


Table 34 Arab judges' view of important qualities needed to do their job well, by jurisdiction (n=52)

Judicial Qualities	Egypt	Saudi Arabia	Lebanon	Other	Total
					%
Personal integrity	16	17	13	6	100
Dealing impartially with parties to cases	16	17	13	6	100
Strong moral principles	16	17	12	6	98
Knowledge of the law	16	17	13	5	98
Objectivity in decision-making	16	14	12	6	92.3
Decision-writing abilities	16	14	12	5	90.3
Intellectual honesty	16	10	12	6	84.6
Efficient work habits	14	14	10	5	82.6
Personal conduct in public	16	11	9	4	76.9
Awareness of broader social and political issue	14	10	11	4	75
	n=16	n=17	n=13	n=6	n=52

Table 35 Arab judges' view of qualities valued by their colleagues (n=52)

Qualities valued by Judicial peers	Egypt	Saudi Arabia	Lebanon	Other	Total
					%
Knowledge of the law	13	16	12	6	90.3
Dealing impartially with parties to cases	14	16	8	6	84.6
Personal integrity	13	17	11	3	84.6
Strong moral principles	11	15	11	3	76.9
Objectivity in decision-making	11	15	9	5	76.9
Personal conduct in public	12	12	11	4	75
Intellectual honesty	12	15	9	4	76.9
Decision-writing abilities	9	12	8	4	63.4
Awareness of broader social and political issue	8	11	8	4	59.6
Efficient work habits	8	10	6	3	51.9
	n=16	n=17	n=13	n=6	n=52