

**REPORT ON PROSPECTS FOR ACCELERATED REFORM OF THE
JUSTICE SYSTEM OF JORDAN AND A STRATEGY FOR USAID SUPPORT
AUGUST 2011**

Introduction

This is a report on research conducted in June and July 2011 to explore the prospects for accelerated justice reform in Jordan. The question arises in the context of ongoing popular demands for economic, social, and political reform throughout the Middle East and North Africa, including in Jordan.

Reports by observers have confirmed a major emphasis in the region on justice and concerns about the independence, competence, and integrity of national justice institutions as important element of the widespread demands for reform.¹ The international community has taken note of this prominence being given to rule-of-law issues in what has come to be known as the Arab Awakening.

The European Union announced in March 2011 its “Partnership for Democracy and Shared Prosperity with the Southern Mediterranean,” an initiative intended to support a shared commitment “to democracy, human rights, social justice, good governance, and the rule of law.” The Partnership will be built on, among other elements, “democratic transformation and institution building, with a particular focus on fundamental freedoms, constitutional reforms, reform of the judiciary, and the fight against corruption.”² In his May 19 address on the Middle East and North Africa US President Barack Obama made reference to universal rights, including “equality for men and women under the rule of law,” and described United States support for political and economic reform in the region as “a top priority that must be translated into concrete actions, and supported by all the diplomatic, economic and strategic tools at our disposal.”³ While less specific, the G-8 Deauville Partnership Initiative also includes a commitment to support political and economic reform in the region.⁴

A notable nongovernmental response to this strong interest from the region in issues of justice has been the joint initiative by the Hague Institute for the Internationalization of Law and the Arab Center for the Development of the Rule of Law and Integrity. Together they have created a “Rule of Law Spring Group,” with broad regional and international participation. The Group organized a major conference in May

¹ See, e.g., Khouri, Rami, “The Egyptian Citizen Won’t Stay Silent,” *The Daily Star*, Beirut, July 6, 2011, <http://www.dailystar.com.lb/Opinion/Columnist/2011/Jul-06/The-Egyptian-citizen-wont-stay-silent.ashx#axzz1U3v92Sfm>; Dubai, Carolyn, “Morocco’s ‘Arab Spring’ and Judicial Independence,” *International Judicial Monitor*, April 2011, <http://www.judicialmonitor.org/current/sectorassessment.html>; Spencer, Clair, “Domestic Development in North Africa and the Middle East,” *European Movement Annual Seminar*, July 2011, [http://www.sussexineurope.org/events/29\(Jly11\).htm](http://www.sussexineurope.org/events/29(Jly11).htm),

² See Joint Communication, March 10, 2011, http://eeas.europa.eu/euomed/docs/com2011_200_en.pdf.

³ Remarks by the President, May 19, 2011, <http://www.whitehouse.gov/the-press-office/2011/05/19/remarks-president-middle-east-and-north-africa>.

⁴ See Declaration of the G8 on the Arab Spring, May 27, 2011, <http://www.g8.utoronto.ca/summit/2011deauville/2011-arabsprings-en.html>.

2011 on recent events in the Arab countries that focused on “horizons, challenges and consequences for the rule of law and justice reforms.” It has now developed a work program for the coming year.⁵

Against this regional background, and taking into account its long involvement in the justice sector in Jordan, USAID has commissioned the present examination in order to inform its programming in the evolving national environment.

Over the past decade there has been a substantial Jordanian effort to modernize and improve the performance of the nation’s justice system. In particular, the Ministry of Justice inaugurated a comprehensive judicial upgrading strategy (JUST) in 2004. JUST was updated in 2007 and again in 2010. It remains in operation.⁶ The international community has supported the implementation of JUST and other Jordanian reform efforts. USAID has been, and remains, the leading international partner in the justice sector, acting primarily through a contract with Tetra Tech DPK and a cooperative agreement with the American Bar Association.

Significant progress has been made in modernization of the courts. Yet, there remains a widely recognized need for fundamental policy and structural reforms to institutionalize the independence, accountability, integrity, competence, and fairness of the judicial system.⁷ The current political ferment and public demand for democratic reform in the Middle East and North Africa have had an impact on thinking about these issues in Jordan. Skepticism has begun to give way to expectations of change.

According to the terms of reference, the consultant, James Michel, was asked to conduct research in Jordan, including the collection of documents, interviews, and meetings with representatives of various stakeholder constituencies to address key issues of justice reform. On the basis of this research, the consultant was asked to explore with key stakeholders a suggested synthesis of their highest priorities, possible implementing actions, and interest in one or more participatory conferences or other means to help develop a broadly shared justice reform agenda with civil society collaboration. This report sets forth the consultant’s findings and recommendations with respect to these activities.

⁵ This initiative is described at <http://www.hiil.org/news/latest-news/2011/06/10/hiil-launches-initiative-to-promote-rule-of-law-in-the-mena-region> and at <http://www.acrli.org/activitiesListing.aspx?postingID=363&categoryID=5&ld=227>.

⁶ As approved by the Second Judicial Conference of Jordan in February 2010, the current strategy is based on five pillars: enhance judicial independence and integrity; improve efficiency; increase effectiveness of litigation procedures; upgrade court services and infrastructure; and improve channels of communication with partners and stakeholders. JUST objectives were integrated into the 2006-2015 National Agenda, now undergoing a mid-term review.

⁷ Resistance in Jordan to political reform intended to democratize governance and consolidate the rule of law has been the subject of extensive commentary. See, e.g., Muasher, Marwan, “A Decade of Struggling Reform Efforts in Jordan: The Resilience of the Rentier System,” Carnegie Endowment for International Peace, May 2011, http://www.carnegieendowment.org/files/jordan_reform.pdf. Judicial reform has not been exempt from the tension between reformers and traditionalists.

Overview of the Justice System

Jordan compares favorably with other countries in the Middle East and North Africa in its adherence to the rule of law as a foundation of democratic governance.⁸ Moreover, Jordanian efforts of the past decade have achieved impressive modernization of court management systems and procedures, automation of case records and statistics, substantially improved recruitment of well qualified judicial candidates on the basis of merit, adoption of a judicial code of ethics, the introduction of court-annexed mediation, and strengthened judicial training.

At the same time, the performance of Jordan's justice system falls far short of the standard set by countries that have the highest scores on international indices of performance.⁹ There is broad agreement within the Jordanian legal community that a number of fundamental policy and structural problems inhibit the justice system's ability to play an optimum role in the distribution of power and rights – to mediate conflict, resolve disputes, sustain order, and advance broadly based economic and social development.

The issues have been analyzed in assessments conducted for USAID in 2008 and 2011 and in many other studies cited in the bibliography annexed to this report. The challenges most often cited by Jordanian and international analysts as being of greatest concern fall generally into the following categories:

Lack of Institutional Independence and Accountability:

- The judiciary is excessively dependent on the executive branch of government, especially the Ministry of Justice, for financial, administrative, and – of particular importance – human resource management, increasing the vulnerability of the judicial institution and individual judges to political influence;
- Judges do not enjoy a guaranteed security of tenure and can be dismissed from judicial service without cause or through nontransparent disciplinary action or involuntary early retirement; some judges are believed to avoid responsibility for wrongdoing while others appear to be punished for asserting their independence.
- Support staff in the judiciary is made up of employees of the Ministry of Justice, inhibiting the development of a cadre of career judicial management professionals.
- The judiciary does not have express authority to nullify executive and legislative branch measures on grounds of their inconsistency with the constitution; this limitation is compounded by the unilateral adoption of temporary laws by the executive when Parliament is not in session.

⁸ The 2010 Rule of Law Index ranks Jordan above the regional average on most factors and sub-factors that the Index measures to assess adherence to the rule of law: limited government powers, absence of corruption, order and security fundamental rights, open government, regulatory enforcement, access to civil justice, and effective criminal justice. World Justice Project, "Jordan Country Profile," in *Rule of Law Index*, page 72, June 2011, <http://www.worldjusticeproject.org/rule-of-law-index>. The World Bank's worldwide governance indicators rank Jordan in the upper half of countries in the region. See Worldwide Governance Indicators, http://info.worldbank.org/governance/wgi/mc_countries.asp.

⁹ For example, the World Bank's *Doing Business* report ranks Jordan 129th in the time, cost, and number of procedures required to enforce a civil contract claim. World Bank, *Doing Business 2011*, November 2010, page 172, <http://www.doingbusiness.org/reports/global-reports/doing-business-2011>.

- Special courts outside the judiciary provide alternative forums sanctioned by law; the executive has broad discretion to remove cases from the jurisdiction of the regular courts and refer them to the State Security Court where the majority of judges are military officers.
- The judicial code of ethics has not been fully integrated into the processes of selection, training, career development, inspection, and discipline of judges.
- The accountability of judges is diminished by limited capacity for systematic inspection of their performance and for responding to complaints of misconduct or poor performance through transparent standards for promotion and disciplinary processes.
- There is little public monitoring of justice system performance.

Inadequate Institutional Capacity and Competence

- The principal justice institutions are hampered by a lack of continuity in leadership, impeding the consistent implementation of long-term reform efforts.
- The judiciary has not developed the management skills needed for internal planning, participation in management of financial and human resources, and systems development (the Judicial Council has recently initiated efforts to overcome this weakness).
- There is no association of judges (the law discourages one) to stimulate sharing of experience and broadening the base of participation in efforts to encourage improved performance.
- Legal education has relied primarily on lectures and learning the law rather than on learning how to solve problems and serve the public; continuing legal education is not well developed.
- Judges serve as prosecutors during relatively brief assignments, inhibiting the development of needed specialized knowledge and professional skills to expedite cases, assure their effective presentation, and manage complex investigations and prosecutions.
- The distinct roles of the several organizations responsible for the administration of criminal justice are not well coordinated.

Insufficient Access to Timely and Nondiscriminatory Justice

- The public lacks adequate access to knowledge about the law and its application.
- Discrimination based on gender, religion, economic status, origin, and tribal identity is found in the law and in its application.
- Legal aid services to inform and assist the poor and disadvantaged are insufficient to meet demand.
- The legal structure for effective alternatives to litigation leaves those alternatives as entirely discretionary options which are seldom chosen by litigants.
- Judges tolerate adjournments and delays in cases before them, thereby diminishing incentives for settlement and increasing backlogs of pending cases.
- The law denies the appellate courts the discretion to decline to accept appeals, thereby further increasing backlogs and delaying the final disposition of litigation.
- Once a final decision is reached in the courts, implementation of the decision is often frustrated by a cumbersome process for the execution of judgments.
- Defendants in criminal proceedings often spend extended periods in pre-trial confinement because the courts are not able to expedite their cases and bring them to conclusion; individuals subjected to administrative detention in the name of crime prevention add to the population of those incarcerated without a determination of their guilt (those not convicted are estimated to be about 75 percent of the prison population).
- Implementation of reforms in juvenile justice has been slow and inconsistent.

Obviously, these three major categories of principal challenges overlap and are interconnected. Judicial dependence on the executive compounds, and is compounded by, inadequate institutional capacity. Institutional limitations, in turn, play an important role in the ability of the system to provide access to justice. The challenge is to decide which of the various manifestations of these concerns warrant priority attention in a systematic effort to increase independence and accountability, improve competent performance with commitment to high standards, and provide excellent service to the public. Meeting that challenge will require careful research, thoughtful cost-benefit analysis, and nuanced political judgments about what are the most important and most urgent problems and which of these are most susceptible to reform efforts.

Priorities for Reform

From extensive research and wide ranging consultations with a variety of stakeholders, it seems evident that the current environment in Jordan is not conducive to an all-encompassing justice-sector-wide reform initiative. Jordan faces many economic, social, and political challenges that compete for attention and resources. And within the justice sector there are simply too many differences of opinion about too many issues and about what the priorities ought to be. However, a number of individual reforms now under consideration hold significant potential for strengthening the rule of law. There are also opportunities to enhance the prospects for additional reforms that may not yet be ripe for bringing to fruition, but that will be important for the long-term evolution of the rule of law in Jordan. These considerations suggest a selective, focused approach to reform with respect to both national efforts and coordinated international support for those efforts.

Jordanians have identified several priorities with respect to the interrelated factors of independence and accountability, institutional capacity and competence, and access to justice. Prominent among them are the constitutional issues that are referred to in the May 2011 report of the National Dialogue Committee and addressed specifically in the August 2011 report of the Royal Commission on Revising the Constitution. These reports reflect responses by the government to popular demands and, therefore, have strong prospects for leading to the adoption of important reforms. (The discussion in this report of the content of the Royal Commission's report is based on the texts of the Commission's recommendation published in advance of the formal report.)

In particular, three of the proposed constitutional amendments could lead to major improvements in the structure of Jordan's justice system. These proposals would elevate the Judicial Council to the status of a constitutional body with broad responsibilities for oversight of the judiciary, create a constitutional court empowered to review legislative and executive acts, and expand the jurisdiction of the civil courts while eliminating the quasi-military State Security Court which has had jurisdiction over civilians in sensitive criminal cases. These three constitutional revisions, together with the necessary implementing and complementary measures, would constitute far-reaching reforms.

Building on these three amendments to achieve major reforms will be a gradual and difficult process, requiring the accommodation of strongly opposed views. And yet, the political environment that has generated the idea of constitutional revision will also give momentum to the implementation of the proposed amendments. In this moment of historic opportunity, sensitive and effective international cooperation can make a valuable contribution.

In addition to the three suggested reform priorities derived from the proposed amendments to the Constitution, there is an important issue of concern to civil society that is not directly addressed in any current government-led initiative. That is the lack of knowledge of the law by many Jordanians, especially the poor, and the absence of an effective system to provide legal advice and representation to those who lack the means to engage the services of a lawyer. It is said that many distrust the justice system and assume that the courts decide cases on the basis of influence rather than by objective analysis of the facts and the law. Extending the reach of legal knowledge and services and thereby increasing the number of Jordanians who have a stake in a fair and effective justice system is integral to broadly participatory economic, social, and political development.¹⁰

¹⁰ Concern for the remoteness of formal justice systems from the lives of poor and disadvantaged people has given rise to increasing emphasis on how justice reforms can improve access to justice for the world's poor. See

There follows a summary of these key priority issues and related proposals.

Status of the Judicial Council

Under the 2001 Judicial Independence Law, the Judicial Council is made up of 11 judges who hold certain specified positions. The Chief Justice presides and the other members include two senior members of the Court of Cassation, the Chief Judges of the three Courts of Appeals, the Chief Judge of the High Court of Justice, the Chief Judge of the Amman Court of First Instance, the Chief Public Prosecutor of the Court of Cassation, and the Chief Inspector and Secretary General of the Ministry of Justice.

Because judges do not have guaranteed security of tenure and because the Chief Justice has substantial power over the assignment and retention of judges (including power over who occupies most of the seats on the Council), the Chief Justice, as President of the Council, can assure that most members share his views. There are two principal constraints on this concentration of power over the judiciary. The first is that, like other judges, the Chief Justice does not have security of tenure and incumbents tend not to remain long in office. The second constraint is that the Minister of Justice retains considerable influence, especially with regard to the appointment of judges and the budget of the judiciary. (The Justice Ministry is also the administrative home of the Judicial Inspection Unit.) The combination of concentrated power within the judiciary and external constraints by the Ministry of Justice that diminish that power may serve to balance competing institutional interests, but it serves neither judicial independence nor accountability.

Judicial councils became widespread in Europe, and then elsewhere, as instruments to diminish historic dependence of the judiciary on the executive and to enhance judicial independence. The Council of Europe's Consultative Council of Judges has developed suggested standards for judicial councils "entrusted with the protection of the independence of judges, as an essential element in a state governed by the rule of law and thus respecting the principle of separation of powers." Also, IFES has published international best practices for judicial councils as "a tool to strengthen judicial independence and integrity."¹¹ A regional conference in Amman in November 2008 took note of differences between the recommended international best practices and the operation of the Judicial Council in Jordan.

Questions abound about possible changes to the Council. They concern its composition, its openness to the views of members of the judiciary, the transparency of its proceedings, and its specific powers and capacity to exercise those powers effectively on the basis of objective criteria and established procedures. Reform should enable the Judicial Council to recruit, train, promote, assign, and discipline judges and support staff in the courts and to have a prominent voice as to the budget and working

"Making the Law Work for Everyone," Report of the Commission on Legal Empowerment of the Poor, UNDP, 2008, [http://www.undp.org/publications/Making_the_Law_Work_for_Everyone%20\(final%20rpt\).pdf](http://www.undp.org/publications/Making_the_Law_Work_for_Everyone%20(final%20rpt).pdf).

¹¹ See Consultative Council of European Judges, "Council for the Judiciary at the Service of Society," Opinion no. 10, November 2007, <http://www.rechtspraak.nl/English/Publications/Documents/opinion-10-2007.pdf>; Autheman, Violane, and Sandra Elena, "Global Best Practices: Judicial Councils – Lessons Learned from Europe and Latin America," IFES, April 2004, http://www.ifes.org/~media/Files/Publications/White%20PaperReport/2004/22/WhitePaper_2_FINAL.pdf. See also USAID, "Guidance for Promoting Judicial Independence and Impartiality," revised January 2002, http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacm007.pdf.

conditions of the judiciary. It should also assure that the Judicial Council acts transparently; that it provides voice to the broad membership of the judiciary; that its authority for financial and administrative management of the judicial system will be expanded, but will not impede the impartiality of individual judges or influence individual cases; and that it is accountable to the other branches of government and to the people.

The Royal Commission has recommended that the Judicial Council be given constitutional status in recognition of the role of the judiciary as a co-equal and independent branch of government. The Commission envisages a Judicial Council that will have broad powers with respect to personal status matters through the integration of religious courts into the regular judiciary, including the appointment of Shari'a and canonical judges. The Council will also nominate the members of the new Constitutional Court. However, the proposed constitutional amendments do not address the Council's structure and operating systems. The proposed Article 100 of the revised Constitution would leave these matters to be addressed in a special law to establish the courts.

The increased importance and additional authorities of the Judicial Council under the proposed constitutional revision warrant a careful review of the Council's organic law and implementing regulations. The structure of the Judicial Council, its management systems, and its capacity to use those systems to good effect will determine whether elevating this institution to constitutional status is a true reform or merely a preservation of the *status quo*. Thus, the constitutional amendments should be followed by amendments to the 2001 Judicial Independence Law, the adoption of internal standards and procedures, and the development of sound management practices and safeguards in order to reflect the principles of judicial independence and accountability that the Judicial Council should serve.

A very recent development suggests reason for optimism that the Judicial Council and the government are increasingly ready for reform. On July 26, 2011, the Council approved long pending bylaws to give formal status to the three administrative units the Council had established in 2010.¹² The Council added to the proposed bylaws an important provision for a Secretary General to provide high-level management direction for all three units and then forwarded the amended bylaws to the Minister of Justice. The Minister immediately endorsed the bylaws and forwarded them to the Council of Ministers for final approval and publication. This is a potential foundation on which the Council can build the capacity for increased judicial independence and accountability.

Judicial review of executive and legislative acts

International practice varies widely in the way states organize institutions for judicial review of government actions and legislation. Some leave constitutional questions to be resolved by all courts like any other question of law, with appeals moving up to the highest level where definitive rulings are

¹² The three units will give the Council enhanced management capacity in the following areas:
Judges' Affairs: records and information on matters relating to judicial appointments, salaries, transfers, discipline, leave, and other administrative matters relating to judges.
Training and Specialization: Liaison with the Judicial Institute; maintaining a data base of training opportunities; managing appointment of judges as civil or criminal case specialists; recommendations on civil and criminal specialization assignments.
Development Planning: review court statistical reports and prepare reports on judiciary performance; strategic planning; legal studies; and media and communication planning and dissemination.

made. Other states designate a chamber within the Supreme Court to hear and resolve constitutional questions. Still others, indeed the majority, have established separate constitutional courts.¹³

At present, the civil courts in Jordan have the authority to rule on challenges that may be presented in litigation to the constitutionality of executive or legislative actions. For example, in 1998 the High Court of Justice upheld a challenge by journalists to enforcement of a restrictive press and publications law. However, such rulings are relatively rare and have effect only for the particular case before the court. They do not affect the general validity of the executive or legislative act in question.

The idea of a constitutional court for Jordan has been raised from time to time for several decades. The Royal Commission has now recommended such an institution. The Commission proposes a court consisting of a Chief Judge and ten other judges. The ten will be nominated by the Judicial Council: five from among sitting judges on the Court of Cassation and five citizens with constitutional expertise. The Constitutional Court, as proposed, will interpret the Constitution and decide on the consistency of laws, treaties, and other legal texts with the Constitution. It will also decide on conflicts of laws, conflicts of jurisdiction, and conflicting final judgments issues that do not necessarily involve constitutional questions. The jurisdiction of the Court could be invoked by the Prime Minister, by the speaker of either house of Parliament, by a group of senators or deputies, or by a judge with a pending case presenting a constitutional issue. Judgments of the Constitutional Court will be published and have the force of law.

This new institution would replace the existing High Tribunal to Interpret the Constitution which is made up of legislators and judges, thus considerably strengthening the role of an independent judicial process to interpret the law and safeguard basic rights and duties. The proposed constitutional amendment would also eliminate the separate constitutional tribunal for interpreting at the request of the Prime Minister “the provisions of any law which have not been interpreted by the courts.” This tribunal, like that for interpreting the Constitution, is made up of both judges and executive officials. Its elimination, as proposed, will further enhance the authority of the courts under the separation of powers doctrine.¹⁴

There has been widespread enthusiasm for the proposed Constitutional Court in the legal community. On the other hand, some influential voices have expressed concern that concentrating power to interpret the constitution in a small group of judges would threaten rather than enhance democracy. The judges of the constitutional court, they argue, would be vulnerable to manipulation by powerful forces. If the constitutional court lacked credibility, this would undermine public confidence in all public institutions.

¹³ See Horowitz, Donald, “Constitutional Courts: A Primer for Decision Makers,” *Journal of Democracy*, Volume 17, Number 4, October 2006, page 126, National Endowment for Democracy and The John Hopkins University Press, 2006. Links to constitutional courts throughout the world can be found on the website of the Bahrain constitutional court, <http://www.constitutional-court.org.bh/CCB/en/Usefullinks/Others.htm> and that of the Minerva Research Group on Judicial Independence of the Max Planck Institute, http://www.mpil.de/ww/en/pub/research/details/projects/minerva_jud_indep/domcourts.htm.

¹⁴ Article 122 of the Constitution presently authorizes the High Tribunal that tries charges against Ministers to interpret the constitution upon request from the executive or the legislative branch. This tribunal, according to Article 57, is made up of four members of the Senate and five judges. Under the proposed constitutional revision, trials of Ministers will now be before a tribunal made up entirely of judges. Section 123 of the Constitution now provides for the special tribunal (proposed to be abolished) for the interpretation of laws, made up of three judges and two executive officials.

The specific mandate of the Constitutional Court is to be elaborated in legislation. This will present several questions requiring careful analysis of alternative approaches, taking into account the experience of other countries. Should the court have jurisdiction with respect to pending legislation? Will the court provide advisory opinions? Will it review decisions by the Court of Cassation? What protections, such as long tenure and salary guarantees, will safeguard the independence of the judges and what constraints will assure their accountability? Whatever approach is taken, extensive preparations will be necessary, including training of judges and support personnel as well as members of the legal community and a campaign for informing the general public. If the new court is established, there will also be a need to create operating systems and procedures as well as a system for broadly disseminating its authoritative and legally binding interpretations of the Constitution.

Another aspect of judicial review concerns the remedies available to challenge administrative decisions by public entities. The existing High Court of Justice is the principal forum for this purpose. Compared to the civil courts which annually handle many thousands of cases, the High Court of Justice considers only a few hundred cases each year. This low volume is an indication of the dissatisfaction expressed by some members of the legal community. The Royal Commission has now recommended that the High Court be reorganized to have two divisions: first instance and appellate. As in the case of the Constitutional Court, the details are to be specified in legislation. More analysis will be needed to determine what additional measures can be made to make judicial review of administrative decisions more effective. Ideally, that analysis will precede and inform the development of the authorizing legislation.

Expanded jurisdiction of the civil courts to include cases heard by the State Security Court.

At present, the prosecution service is a weak link in the criminal justice system. Jordan has only 1.6 prosecutors per 100,000 inhabitants, and only one prosecutor for every five judges. These ratios are among the lowest in the region.¹⁵ For the most part, prosecutors are drawn from the junior ranks of the judiciary and serve no more than a few years before returning to judicial duties. They receive little in the way of specialized training. It is reported that they have limited ability to supervise police investigations and that they lose many cases through inadequate preparation and faulty presentation.

A constitutional reform proposed by the Royal Commission, if adopted, will place additional demands on the civil courts to manage the often complex and high-profile criminal cases previously heard by the State Security Court. This change will place significant new demands on the civil courts, and especially on the prosecutors, to manage challenging cases of unusual complexity and often involving high-profile defendants. Among other things, there will be needs for training of judges and other personnel, procedures to assure timely proceedings with an appropriate balance of transparency and security, and the development of a specialized group of skilled prosecutors with nation-wide jurisdiction and secure tenure for an extended period.

Access to Justice

The foregoing priorities – status of the Judicial Council, judicial review of governmental and legislative acts, and jurisdiction over major and sensitive criminal cases – all relate to independence and accountability and to institutional capacity and competence. These important measures do not address directly the subject of access to justice. And yet, consultations in the legal community suggest that

¹⁵ Euromed, “Access to Justice and Legal Aid in the Mediterranean Partner Countries,” May 2011, pages 26-27, http://euromed-justice.eu/files/site/English_book_Study_Access_to_Justice.pdf.

access to justice is a priority in Jordan, as it has been in other countries in the Middle East and North Africa that are experiencing popular demands for social, economic, and political reform.

Leadership for moving forward with the proposed amendments to the Constitution will rest with the government, the courts, and Parliament. However, those public institutions appear unlikely to be in the forefront of an effort to extend access to justice to those who are disadvantaged in the present operation of the legal system. This is not to say that the public authorities will be hostile to increased access to justice. Rather, the principal enthusiasm for this set of issues rests primarily in the civil society organizations concerned with protecting the rights of the disadvantaged, enhancing legal awareness, disseminating legal information, and providing legal counsel and representation to those who otherwise lack the means to obtain them.

Preliminary consultations suggest that there is readiness on the part of several civil society organizations to take the lead on a bold proposal to institutionalize a system of community-level centers for providing legal information, services, and representation. These centers throughout Jordan, perhaps linked to municipal councils, would be supported by some public resources and some volunteer services. The objective would be to create a sustainable system. The development of this concept would necessarily involve dialogue with several ministries, the Judicial Council, the Bar Association, and international partners. Universities with clinical programs for law students might also play an important role. One leading NGO is already engaged in a national survey to determine needs and service availability with a view to creating a data base that can inform such a dialogue.

With regard to international partners, it should be noted that access to justice is a prominent theme in programs of the European Union, UNDP, and now the World Bank. Bringing the various national and international efforts together would be a challenge, but a significant measure of coordination could bring substantial momentum to the effort.

Obstacles to Reform

As observed above, resistance to reform in Jordan has been the subject of extensive commentary and analysis.¹⁶ Those who believe their interests would be severely and negatively affected cannot be expected to join a consensus for reform. In addition, there is always skepticism about proposed reforms and Jordanian society has often been described as inherently skeptical. It seems useful, therefore, to reflect on plausible arguments frequently expressed by members of the legal community that might impede reform in the justice system. In particular, two arguments were repeated in many conversations throughout the present consultancy.

The argument that judicial reform must await political reform.

This argument is that the political environment will not be conducive to judicial reform until reformed election and political parties laws are enacted, new elections are held under those laws, and a government is formed by the leader of the winning majority. That sequence will lead to a government with an interest in being reelected and, therefore, responsive to popular demand for justice reform.

It seems entirely reasonable that a democratically elected government would provide an improved enabling environment for judicial reform. In this regard, it is encouraging that the most prominent recommendations in the report of the National Dialogue Committee are for reform of the laws on elections and political parties, with draft legislation included in the report. There appears to be momentum toward new rules and new elections. However, this is hardly a reason for delaying judicial reform. To the contrary, the judiciary should be as independent, competent, and accessible as possible by the time elections are held, recognizing that reform is a long-term process. If anything, the need for progress is made more urgent by the inclusion in the Royal Commission's report of a recommendation that parliamentary election disputes be resolved by the judiciary. Progress toward judicial reform and progress toward electoral reform can proceed simultaneously and be mutually reinforcing elements of building a democratic society based on the rule of law.

The argument that the influence of the Ministry of Justice serves as a necessary check against the concentration of power in the hierarchy of the judiciary.

This argument has several strands. It suggests, first, that the leadership of the judiciary is less trustworthy than the leadership of the Ministry of Justice; second, that an unconstrained judicial leadership might exercise independence in an irresponsible manner, to the detriment of the quality of justice; and finally, that the judiciary lacks the capacity to put in place safeguards, standards, and procedures to assure against irresponsible behavior by the judicial leadership.

The conclusion of this argument is that a weak judiciary, dependent on and subject to the influence of the executive, is preferable to the risks of judicial independence. This judgment clearly underestimates the value of judicial independence and the potential harm of continued dependence by the judiciary on the Ministry of Justice. It discounts the possibility that a capable judiciary could operate under safeguards to assure accountability in the exercise of independence. And it disregards the fact that judicial independence is a fundamental and universally recognized principle of democratic governance

¹⁶ See, e.g., Muasher, note 7, *supra*; Lucas, Russell, "Jordan," in *Countries at the Crossroads*, Freedom House, 2010, <http://freedomhouse.org/template.cfm?page=140&edition=9&ccrpage=43&ccrcountry=189>.

and the rule of law. It is not a foreign or inappropriate notion. It is imbedded in Jordan's Constitution, in the objectives of the National Agenda, and in international declarations to which Jordan is a party.¹⁷

A particular aspect of this argument concerns the proposed creation of the Constitutional Court. The argument by some opponents of this court that its small group of judges would be subject to irresistible pressure from powerful interests is a variation of the theme that judges cannot be trusted to use independence responsibly. Therefore, the opponents contend, the influence of the executive is needed to constrain the judiciary and thereby minimize this risk.

Other Obstacles

The USAID assessments and other studies of Jordan's justice system recite as impediments many characteristics of cultural tradition, limited operational capacity, lack of leadership continuity, inadequate media and public interest, and other factors. All of these concerns certainly contribute to a challenging environment. However, none of them rises to the level of an insurmountable obstacle. Reform efforts need to take this local context fully into account, as in any major change of policy and structure, and the impediments will need to be addressed in the framework of each specific objective and action plan.

¹⁷ See Articles 97 and 101 of the Constitution of Jordan; recommendations of the National Agenda on the theme of "Justice"; the 2008 Arab Declaration on Human Rights, which obliges the States parties to "guarantee the independence of the judiciary and protect magistrates against any interference, pressure or threats"; the 2003 Cairo Declaration on Judicial Independence, which recognized "that an independent judiciary is the pivotal pillar that guarantees public freedoms, human rights, comprehensive development processes, the reform of trade and investment system and trade cooperation between Arab countries and other countries, and establishment of democratic institutions," while acknowledging with clearly implied disapproval "the interference of the executive powers in functions and affairs of the judicial authority including issues concerning appointing, transference, mandating, promotion, discharging, and management of judges' professional affairs."

Strategic Framework for USAID Support

Lists of concerns about Jordan's justice system fill many pages of the studies cited in this report's bibliography. A number of them are mentioned above in the report's Overview section. Donors could easily defend investing in any number of themes, such as juvenile justice, commercial dispute resolution, anti-corruption, human rights, and legal education. All have appeal as important issues and all have local champions. Yet, it is clear that Jordan needs to give priority to the fundamental policy and structural issues that it has identified for reform. Progress achieved on these basic challenges will help to make progress on particular issues more likely and more sustainable.

The updating of the National Agenda, scheduled to be completed by the end of 2011, provides an opportunity to catalogue major challenges, document progress, and build consensus on long-term goals. However, it seems clear that the practical course at this time is to concentrate on the most important issues that are ripe for action and capable of achieving transformational impact.

The selective reform agenda that seems to have the best prospects for success at this time of political ferment is one drawn from the above-described initiatives for reform that the government, the judiciary, and civil society have set in motion. It is important to emphasize that the reform agenda will be set by Jordanians and is likely to evolve over time. What is proposed here is a set of objectives that seem likely to be included in that agenda and that USAID might support. That support needs to be offered in a spirit of true partnership that advances shared interests in strengthening the rule of law as a foundation of a stable, just, prosperous, and democratic Jordanian society in which people benefit from increased freedom, security, and rising standards of living.

The recommendations in this report are necessarily based on imperfect knowledge of an evolving local context. From the starting point of local ownership, specific objectives, approaches, and program activities for USAID (and other international partners) need to be carefully tested with stakeholders and periodically validated. USAID will need to dedicate technical staff, reinforced by a diplomatic dialogue, to engage with local stakeholders and international partners on a continuing basis.¹⁸ As recently observed by Nancy Birdsall and Francis Fukuyama, "effective institutions have to evolve indigenously, reflecting a country's own political, social, and cultural realities....Institutions such as the rule of law will rarely work if they are simply copied from abroad; societies must buy into their content."¹⁹

Within the present context, possible objectives of a Jordanian reform agenda which USAID might support include the following:

- **Restructure the Judicial Council as a constitutional body with a mandate, to be further elaborated in law, to recruit, train, assign, evaluate, promote, and discipline the judges and support staff of the judiciary and with the capacity to carry out that mandate.** Creation of the restructured Council will require decisions on the membership, manner of selection (possibly including election of some members), and security of tenure. Also to be decided are how to formulate the Council's control over internal administration and the budget of the judiciary, the establishment of clear standards,

¹⁸ Possible channels for multilateral engagement might include the initiatives to support economic, social and political reform in the Middle East and North Africa cited in notes 2, 3, 4, and 5, *supra*.

¹⁹ Birdsall, Nancy, and Francis Fukuyama, "The Post-Washington Consensus," *Foreign Affairs*, Volume 90, Number 2, March-April 2011, pages 45-53.

transparent procedures, and appropriate safeguards of integrity and prudent management. Extensive capacity building will be needed within the Council and it will be necessary to familiarize the entire legal community and the general public about this important development.

- **Establish a constitutional court empowered to review the constitutional validity of acts of the executive and legislative branches of government.** Creating this new constitutional body will require decisions on the tenure of judges, the precise scope of the court's jurisdiction, implications of initiating a proceeding in the constitutional court for related proceedings in other courts, and the precise effect of a finding by the court of unconstitutionality. As in the case of the restructured Judicial Council, a new constitutional court will involve considerable capacity building and education efforts.
- **Expand the criminal jurisdiction of the civil courts to include cases previously in the jurisdiction of the State Security Court and assure that the civil courts and the prosecution service are well prepared for this challenge.** The expansion of criminal jurisdiction will necessitate a strengthening of the civil courts, with special attention to the capacity of prosecutors. This will include having a sufficient number of prosecutors with adequate tenure and specialized training, able to act independently to supervise investigations and present evidence competently. Decisions will be needed about how to structure an independent prosecution service, including a cadre of specially trained experts with national jurisdiction to handle major and complex cases.
- **Create an institutionalized system to provide legal information, counsel, and representation to the poor and disadvantaged.** The development of this new system will require decisions about the financing of legal services, the identity of service providers to participate in the program, a public sector focal point for the system's administration, an organizational structure, standards of eligibility for services, possible financial contributions from beneficiaries, conveniently located facilities, and measures to make the service known to the public. This will require collaboration among a number of ministries, civil society organizations, the bar association, universities, and, perhaps, municipal authorities around the country.

It should be emphasized that these notional objectives are intended to suggest areas where Jordanian initiatives and USAID support might most productively converge in the area of policy and structural reform. There are certainly other worthwhile reform areas that Jordan may pursue without USAID support and other collaborative activities where USAID will want to help Jordanian counterparts to consolidate progress through ongoing development cooperation. Indeed, as discussed below, ongoing USAID programs and activities which are not within the scope of this consultancy may well have significant implications for the success of the proposed policy and structural reform issues addressed herein.

Objectives and Implementing Actions for USAID

The four above-suggested reform priorities – a strengthened judicial council, a constitutional court, improvement in criminal justice, and a system of legal services for the poor and disadvantaged – are based on the information obtained in the course of this consultation. It remains necessary for USAID to engage in dialogue with stakeholders to verify that the four suggested reform initiatives, in fact, represent Jordanian priorities. The question then arises as to what USAID can contribute to those initiatives in furtherance of judicial independence and accountability, institutional capacity and competence, and access to justice. All of these sensitive issues will require care in defining the role of USAID or other international partners, and all will involve long-term sustained effort. There follows a set of recommendations concerning approaches to stakeholders, possible objectives for USAID support, and proposed implementing actions toward those objectives.

Judicial Council

There are widely differing stakeholder views about the Judicial Council. Some who benefit from the existing structure will want to preserve it. Those who want change do not agree on what the precise change should be. The best approach for USAID would appear to be engaging the judges in a search for common ground among themselves. Once there is a broadly shared vision within the judiciary the judges will be in a strong position to influence others, including in the government and Parliament.

An initial objective of USAID support, then, might be to promote a shared understanding within the judiciary of the potential role of a reformed Judicial Council in fostering judicial independence and accountability. Actions might include exposure to international experts (perhaps representatives of several European judicial councils), inclusion of the role of the Judicial Council in training courses for judicial candidates as well as sitting judges, and promotion of dialogue through judges' workshops.

A second objective for USAID could be to enhance the capacity of the Judicial Council to carry out increased responsibilities. Actions toward that objective might include the continued development of the Council's three new administrative units, the evolution of those units toward becoming a secretariat for the judiciary, and a self-evaluation by judges themselves of how the existing system performs.²⁰

Third, USAID could address the existing well founded concern that enhanced judicial independence must be accompanied by increased judicial accountability. This might involve, for example, familiarizing judges with international standards and judicial integrity systems, support for operationalizing the judicial code of ethics that was adopted with assistance from the American Bar Association, and integrating ethics and accountability factors more fully into the work of the Inspection Unit and the Judicial Institute of Jordan. Work on this subject would provide an opportunity to reinforce the strong association between independence and accountability.²¹

²⁰ The design for judicial self-examination might draw upon existing models, such as that of the International Consortium for Court Excellence, <http://www.courtexcellence.com>, or the American Bar Association's Judicial Reform Index, http://apps.americanbar.org/rol/publications/judicial_reform_index.shtml.

²¹ The association between independence and accountability is emphasized extensively in international materials such as those collected by the International Commission of Jurists in its handbook on international principles on the independence and accountability of judges, lawyers, and practitioners, http://www.icj.org/IMG/PG-J_L-ENG.pdf.

Reform of the Judicial Council is fundamental. It merits USAID's highest priority attention. USAID's activities concerning the Judicial Council should be undertaken with an eye to the timeframe for adopting the proposed constitutional reforms and developing the implementing legislation that will be needed to give effect to those reforms.

Constitutional Court

If an amendment to the Constitution to establish the proposed Constitutional Court proceeds, it is likely that the government will establish a commission to study the complex policy issues presented by this initiative and prepare recommendations for the new court's legislative charter. Like any other reform, the danger of unintended consequences will be present. The United States has no need to take a position on any particular issue involved in this process, but could be helpful in assuring that the study commission makes well informed choices. One possibility for useful assistance would be to contribute to a highly professional study by a respected neutral international body. For example, the highly regarded Max Planck Institute for Comparative Public Law and International Law has done comprehensive studies to inform the deliberations of other countries and could provide a valuable service to the designers of Jordan's constitutional court. USAID might consider joining with other international partners in shared financial support for such a study as a gesture of international support for Jordan's reform initiative.

In addition, as the Constitutional Court moves forward USAID could provide support to training, integration of this major development into legal education and public awareness activities, facilitation of the dissemination of constitutional court decisions (which will have the force of law), and adaption of court automation software developed under USAID auspices for use by the new court.

Criminal Justice

Because Jordanian prosecutors are all drawn from the judiciary and retain their status as judges, the starting point for engaging stakeholders is again the judiciary. USAID's objective could be to help professionalize the prosecution service, increasing its efficiency and effectiveness. Activities might include intensified training for prosecutors, with emphasis on major and complex crimes (including cases formerly tried in the State Security Court). Training in the oversight of criminal investigations and managing relations with the police while assuring respect for human rights seem especially important. In addition, accelerated installation of case tracking software and related technical assistance can contribute to improved case management.

It will be important to reach an understanding with the leadership of the judiciary that focused assistance to strengthen the prosecution service needs to be accompanied by a policy of extended assignments for those judges who are designated to serve as prosecutors. Otherwise, the provision of specialized training could be largely wasted due to rapid turnover of the recipients of that training.

Should the initial effort prove successful, including longer tenure for prosecutors, this might provide a foundation of experience on which to base reconsideration of legislation to institutionalize an independent, professional career prosecutor service within the judiciary. (A previous legislative proposal passed the lower house of Parliament, but was rejected by the Senate over concerns about whether the proposed law would have permitted undue risk of political interference in prosecutions.)

Access to Justice

Access to justice is not addressed in the official proposals for reform, but is a subject of high priority for civil society groups concerned with economic, social, and political rights. Many of these organizations focus on particular constituencies – women, persons with disabilities, those incarcerated in the criminal justice system, juveniles in conflict with the law, journalists, nascent civil society organizations trying to meet legal requirements. And some are focused on particular issues – human rights, pre-trial detention, the informal economy. However, they all share an interest in expanding the availability of information about the law and legal services to the poor and disadvantaged segments of Jordanian society. Extending the protection of the rule of law to the many now effectively excluded by lack of knowledge or representation is essential to the very purpose of justice reform.

Because this issue is not the subject of a current initiative by the government, the judiciary, or the organized bar, the logical entry point for USAID is to engage the civil society community. With USAID encouragement, there appears to be readiness by a number of organizations to work together to form a consortium to raise the visibility of this subject and to develop a plan for engaging other stakeholders.

The focus of USAID's dialogue with the civil society organizations should be on establishing an institutionalized system of community-based legal services centers. The civil society consortium would be expected to develop a plan for engaging the many stakeholders whose cooperation will be needed. Ultimately, a successful effort might be expected to result in a structure with government support, community participation, and volunteer service that would substantially meet the demand for legal knowledge and assistance on a sustainable basis. Such a system could extend the relevance of the justice system to the majority of the Jordanian people.

Activities might include a grant to several organizations to join together and form a consortium of like-minded groups to develop a strategic plan for an institutionalized legal services system. This grant would undoubtedly require intensive management attention by USAID, given the breadth of alternative approaches, numerous stakeholder organizations to be involved, and the diversity of particular interests among the various concerned organizations. Nevertheless, planning, execution, and advocacy from within the civil society seems a far more likely way to achieve this highly desirable result than for USAID to take the lead directly with the numerous parties and interests at play.

As the process moves forward, USAID could consider additional support, such as exposure to legal aid systems in other countries, comparative data from the region, and international best practice.²² Other international partners might also be interested in participating in support of the work of the consortium. Technical assistance might well be needed in the preparation of a legal charter, establishing operating systems, creating standardized materials, and putting into operation the new system. Ongoing work by USAID with legal education can also contribute by engaging the law schools in clinical educational efforts to protect the rights of the underrepresented. For the longer term, consideration might be given to the possible value of adapting case management software in use by the courts for use by the legal services system as well.

²² The Legal Aid Reformers Network, supported by the Open Society Institute, has compiled voluminous information on these subjects. See the Network's website, <http://www.legalaidreform.org>. The European Union has collected data from all countries in the region, compiled in a May 2011 report entitled "Access to Justice in Mediterranean Partner Countries," note 15, *supra*.

While keeping the focus on establishing a sustainable legal assistance system, the possibility should not be overlooked that a broadly based consortium dedicated to this objective could over time become a network that would engage in justice policy advocacy, monitor the performance of justice institutions, and generate learning to stimulate future justice reforms. For example, the consortium might look beyond the formal court structure to consider possibilities of integrating community-based alternative dispute resolution processes based on custom and tradition into the justice system.

USAID can draw on its own considerable research and experience in working to enhance legal empowerment of the poor, which have emphasized such themes as:

- Rights enhancement: ensuring that the poor are able to influence the development of policy and law and enhance their rights through democratic and transparent political processes.
- Rights awareness: making sure that the poor understand their rights and the processes by which they can be exercised and enforced.
- Rights enablement: ensuring that the poor are able to overcome bureaucratic and cost barriers that broadly affect their access to economic opportunity and wealth generation.
- Rights enforcement: making sure that the poor have access to affordable and fair mechanisms for enforcement of rights and dispute resolution.²³

Integrating the Current USAID Program with the Reform Agenda

The new opportunities to support policy and structural reform in the justice system arise against a background of important work by USAID that has made major contributions to the system's efficiency and effectiveness. These contributions have helped to expand the range of opportunities now present in an environment that is more conducive to policy and structural reform. It is worth noting that USAID's ongoing and planned activities can be used, in some cases with adaptations, to reinforce the reform agenda. The choice for USAID is not whether to continue current efforts to consolidate important gains that have been realized or to turn instead to a focus on reform. These are interrelated aspects of strengthening the rule of law. The challenge for USAID is how to balance the continuation of unfinished efforts that have good potential with an increased focus on reforms that can lead to transformational change.

Experience has shown that interim achievements can be very important in sustaining the momentum of reform toward long-term goals. Some ongoing or planned efforts in the current program, such as those to improve the efficiency of the enforcement of civil and criminal judgments and to increase the use of court-annexed mediation can provide valuable interim measure of progress. For example, this report suggests an emphasis on an institutionalized system of legal services for the poor and disadvantaged in USAID's support for Jordan's justice reform agenda. The poor are disproportionately disadvantaged by costly and prolonged delays in the enforcement of judgments in order to realize the practical benefits of successful litigation. Likewise, the poor are the most disadvantaged by the limited acceptance of court-annexed mediation as an alternative to

²³ See Bruce, John W., Omar Garcia-Bolivar, Tim Hanstad, Michael Roth, Robin Nielsen, Anna Knox, and Jon Schmidt, "Legal Empowerment of the Poor, From Concepts to Assessment," USAID, March 2007, http://pdf.usaid.gov/pdf_docs/PNADM500.pdf.

litigation. Similarly, in the criminal justice field, the duty of collecting fines from minor violators who do not appear in court is a tedious burden for overworked prosecutors. It is also a loss of needed revenue for the state and a demonstration of an ineffective judicial system. USAID work in this area can give an added boost to the reform objective of professionalizing the prosecution service and gain recognition of increased effectiveness in the justice system.

Conclusions

This consultation has confirmed that the Arab Awakening is arousing interest in economic, social, and political reform in Jordan. Issues that once were not openly discussed are now the subject of public recommendations. In this context, there are new opportunities for progress on policy and structural changes, some of which have long been discussed but now are moving into concrete proposals for action.

Issues of justice reform have featured prominently in the region and are receiving serious attention in Jordan. Among the areas identified for reform in the Jordanian political process are measures to enhance the independence and accountability of the judiciary, strengthen institutional capacity and competence in the administration of justice, and increase access to timely and nondiscriminatory justice. There are many issues that could be addressed under each of these broad themes. A principal task of this consultancy has been to try to identify specific priorities where progress is both important and achievable and where USAID can make a significant contribution.

The consultant's recommendations draw from ongoing movement toward amending the Constitution to provide an elevated status for the Judicial Council, create a constitutional court empowered to review acts of the executive and legislative branches of government, and expand the jurisdiction of the civil courts in matters previously directed to more political bodies. In addition, the consultant has recommended support for civil society in extending the reach of the rule of law through a system for providing legal information and services to the poor and disadvantaged. This final recommendation is responsive to the rising popular expectation of a voice and respect for rights in a more democratic society.

The identified priorities on the reform agenda all involve highly political issues about which Jordanian stakeholders are divided and hold strong views. This consideration places a premium on diplomatic support and adherence to the aid effectiveness principles of inclusive partnership which have been adopted as US policy in development cooperation: respect for local ownership, alignment with local strategies, harmonization with other international partners, managing for results, and mutual accountability.²⁴ Also, the outcome of initiatives on the reform agenda will depend in large part on the confidence of decision makers about the enabling environment for the adoption and effective implementation of the proposed reforms. In this regard, integrating a continuation of ongoing support for long-term improvements in the administration of justice with USAID's reform activities can mitigate risks and contribute to the effectiveness of the overall program.

Finally, the recommendations in this report are offered in a spirit of optimism that Jordanians are moving forward with their own reform agenda, a spirit of hope that the reforms they address will progress, and a spirit of confidence that USAID's knowledge and experience with rule of law issues in Jordan will add considerable value to the reform effort.

²⁴ See the OECD website on the Paris Declaration and Accra Agenda, http://www.oecd.org/document/18/0%2C2340%2Cen_2649_3236398_35401554_1_1_1_1%2C00.html; see also, White House Fact Sheet on US Global Development Policy, September 22, 2010, <http://www.whitehouse.gov/the-press-office/2010/09/22/fact-sheet-us-global-development-policy>.

Annexes:

1. Bibliography of principal documents reviewed.
2. Persons interviewed.