



Concept Note

The independence of the judiciary in Egypt in light of the constitutional reform process and international standards

An independent judiciary is crucial to upholding the rule of law and ensuring the effective enforcement of human rights. In Egypt, the independence of the judiciary has been undermined under the ruling of President Mubarak and during the transitional period.

Although the 1971 Egyptian Constitution contained provisions for an independent judiciary, including Articles 165 and 166,¹ other provisions of the 1971 Constitution and the Judicial Authority Law 46/1972, ensured that the executive branch was able to influence, to varying degrees, judicial appointments, transfers, inspections, and the administration of justice.²

In law and in practice, the appointment of judges is an Executive prerogative. The President appoints the President and members of the Supreme Constitutional Court and the Chief Justice of the Court of Cassation,³ who is also the head of the High Judicial Council (HJC). The Minister of Justice appoints the Presidents of the High Courts, after consultation with the HJC,⁴ and can also transfer judges to another judicial or legal post.⁵ As the Minister of Justice also oversaw judicial inspections, judges were considered to be under the authority and oversight of the Ministry of Justice. This has opened the way for potential abuse such that amenable judges have been transferred for lucrative assignments and as a reward for compliance, while judges who have challenged the executive's control over the judiciary have been subjected to disciplinary or even criminal proceedings.

In addition, the independence of the judiciary has been further undermined by the existence of an extensive exceptional court system running parallel to the ordinary court system. These exceptional courts include State Security Courts and Military Courts.

¹ Article 165 states in part, "The Judiciary Authority shall be independent," while Article 166 affirms "Judges shall be independent, subject to no other authority but the law. No authority may intervene in cases or in justice affairs."

² Article 173 of the 1971 Constitution, allows the President to chair a council of chiefs of judicial bodies to administer common affairs.

³ Article 5 of the Supreme Constitutional Court Law No.48/1979; and Article 44(2) of Judicial Authority Law No. 46/1972, as amended by Law No 142/2006 and Law No 17/2007

⁴ Article 9 of Law 46/1972

⁵ See, in particular, Art 55-58 and 62 of Judicial Authority Law No. 46/1972

These courts were set up pursuant to the Emergency Law 162/1958 and the Military Code of Justice 25/1966, and do not meet the necessary requirements of independence and impartiality under international law and standards, due to the extensive control exercised over them by the President and the Minister of Defence, respectively. Proceedings before these courts also fall short of international standards of fair trial, including the right to the presumption of innocence, to defence and to equality of arms.

Another key factor that has contributed to undermining the independence of the judiciary in Egypt is the influence exercised by the Executive over the Office of the Public Prosecutor (OPP). Under international standards, prosecutors, as essential agents in the administration of justice, play a crucial role in upholding human rights and ensuring due process. Only independent and impartial prosecutors can carry out these functions fairly. In Egypt, according to law 46/1972, the General Prosecutor is appointed by Presidential Decree (Article 119), while the Minister of Justice sets the criteria for selecting other prosecutors (Article 116) and retains control over their transfer. In practice, the executive exercised effective control over the work of the OPP leading, in particular, to impunity in cases of human rights abuses. Indeed, the exclusive competence granted to the OPP in the Criminal Code of Procedure, with regard to the initiation of prosecutions and the investigation of crimes, has prevented victims of human rights violations from pursuing their rights to effective remedies and to reparation as most of their legal claims were either dismissed or not properly prosecuted.

While the uprising that resulted in the ouster of Mubarak was underpinned by a strong aspiration for comprehensive constitutional and legal reforms, the rule of law and the independence of the judiciary have continued to be undermined during the transitional period. Although the March 2011 Constitutional Declaration reaffirmed the independence of the judiciary and judicial organs,⁶ it removed the Constitutional basis for the HJC without ensuring an adequate replacement. Furthermore, while a special committee was appointed in 2011 by the then head of the HJC, Hossam Al Gheriyani, to reform the Judicial Authority Law, the recommendations of the committee are yet to be translated into lasting legal reforms.

Furthermore, under the SCAF, the state of emergency remained in force until 31 May 2012. Upon its expiration it was immediately replaced with Ministerial Decree No.4991 of 2012, extending the jurisdiction of the military police, although the Decree was suspended by the Administrative Court, on 26 June 2012. In addition, the use of special and military courts during the revolution has intensified and continued to undermine the proper administration of justice.

The drafting of the new Constitution offers a unique opportunity to secure in the Constitution a genuine separation of powers, including an independent judiciary in accordance with international law and standards. Such constitutional guarantees will also pave the way for further legal reforms to subsidiary legislation, which will reinforce this independence and remove obstacles that prevent its full realisation.

In particular, the new legal framework should remove executive control over the judiciary, and provide instead for independent oversight in the form of an independent High Judicial Council. The law should also provide for: conditions of selection,

⁶ Art. 46-49

recruitment, training, nomination and other elements relating to the career development of judges; guarantees for the independence of judges, including their security of tenure; guarantees for their impartiality, including the conditions under which they should recuse themselves for perceived or actual bias or prejudice; and conditions to ensure their accountability.

Similarly, an independent OPP should be given a Constitutional basis outlining its duties and responsibilities. Provisions in the Judicial Authority Law and the Code of Criminal Procedure concerning the OPP should be reformed to ensure that the executive does not control the appointment and transfer of prosecutors, or give instructions to prosecutors during the prosecution process.

Both the new Constitution and subsidiary legislation should unequivocally confirm the right to be tried by a competent, independent and impartial court established by the law. To this end, the Egyptian authorities should annul the Emergency Law and reform the Military Code of Justice to limit military courts' jurisdiction strictly to cases involving military personnel and relating only to military offences. Military or exceptional courts should not be used to try civilians, or used to try military or other law enforcement officers accused of serious human rights violations, including cases of torture and ill-treatment and extrajudicial killing.

In order to uphold the principles and rights enshrined in the Constitution, including the independence of the judiciary, an independent Supreme Constitutional Court should be empowered to ensure the conformity of the laws with the Constitution and to protect the rights and principles embodied in it. The President and members of the current Supreme Constitutional Court are all Mubarak-era appointees. Their independence has been called into question, including in relation to decisions taken in the transitional period regarding the Parliamentary and Presidential elections. The Supreme Constitutional Court law 48/1979 should be reformed to secure the independence of the Supreme Constitutional Court, in particular by ensuring that the process for appointing members of the Court conforms to democratic principles. The Constitution, as well as subsidiary legislation, should guarantee the right of individuals to have access to the Supreme Constitutional court.

The International Commission of Jurists, the Egyptian Organization for Human Rights and the Hisham Mubarak Law Center will organise an international conference on the guarantees of the independence of the judiciary in Egypt. International, regional and national experts, as well as representatives of the Constituent Assembly, the local legal community and civil society will debate the following:

I. The independence of the judiciary

- i. The independence of the judiciary in the new Constitution
- ii. Legal reforms, including the Judicial Authority Law
- iii. Independence and transition: proposals for an independent judiciary
- iv. The independence of the judiciary in light of international standards and experiences

II. The High Judicial Council

- i. Requirements for an independent HJC: financial, administrative and functional independence
- ii. The composition of a new HJC

- iii. The competence and functions of a new HJC
- III. The Statute for Judges**
- i. Security of tenure and other guarantees for the independence of judges
 - ii. Guarantees of impartiality
 - iii. Accountability of judges
 - iv. A statute for judges: international standards and practices
- IV. Military and security courts and the independence of the judiciary**
- i. The use of military and security courts: international standards
 - ii. The jurisdiction of military and security courts in Egypt: the Military Code of Justice and the Emergency Law
 - iii. Military and security courts and the right to an independent and fair trial
- V. The Supreme Constitutional Court (SCC) in Egypt**
- i. The role of the SCC in upholding the Rule of Law and human rights
 - ii. The SCC in the transitional period
 - iii. Access to the Constitutional Court
 - iv. Reform of the Constitutional Court
- VI. The Office of the Public Prosecutor: independence and impartiality**
- i. Independence of the OPP in light of international norms and experiences
 - ii. The Executive and the functioning of the OPP in Egypt, in law and in practice
 - iii. The role of the OPP in upholding human rights
 - iv. Constitutional and legal reform for an independent OPP