

## Legal Briefing Paper

### The Draft Egyptian Constitution in Light of International Law and Standards

#### Introduction

Egypt's draft Constitution, approved by the Constituent Assembly on 30 November 2012 (the Draft Constitution), will be put to referendum on 15 and 22 December 2012.

The procedure for drafting and adopting the Constitution has failed to meet international standards of inclusive participation, representation and transparency. It has been undermined by the exclusion of large sectors of the Egyptian society,<sup>1</sup> political discord and uncertainty concerning the legal framework governing the transition process.<sup>2</sup>

The process was further tainted by the resignation of members of the Constituent Assembly, with many citing insufficient guarantees for democratic debate and procedures.

Further, the time for drafting the Constitution has been inadequate to allow for the genuine participation of the Egyptian people in the constitution-making process. The Constituent Assembly was selected on 12 June 2012 and completed the Draft Constitution in five and a half months. Although the bylaws of the Constituent Assembly allowed individuals to submit comments and information to the Assembly, there was insufficient time for information received to be meaningfully taken into account.

In addition, the two weeks provided from the approval and publication of the Draft Constitution until the referendum is insufficient to assess the Draft Constitution, which contains 236 articles.<sup>3</sup> In order for the public to make an informed decision, sufficient information must be provided about these provisions, including through holding public debate about them and by ensuring access to the media for individuals from all viewpoints, including those opposing the Draft Constitution.

There has been a lack of clarity and timely publication of the procedures for the referendum itself, including how people will vote, oversight of the referendum and appeals regarding irregularities. Information in this respect has not been forthcoming,

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<sup>1</sup> For example, only 7 women were elected to the Constituent Assembly

<sup>2</sup> In particular, Article 60 of the March Constitutional Declaration on the selection of the members of the Constituent Assembly, led to various political conflicts and judicial proceedings about whether or not, or under which conditions, Parliament had the authority to select the 100 members of the Constituent Assembly.

<sup>3</sup> Guidance provided by the United Nations on constitution drafting suggests that it is necessary to provide sufficient time, opportunity, and transparent procedures to allow for a comprehensive public dialogue that can include all stakeholders without any exclusion, and which may lead, consequently, to a consensus-based constitution.

with a Presidential Decree on the voting procedure not published until 12 December 2012.

These elements, combined with the holding of a referendum in the midst of large-scale protests and violence, undermines the right of all Egyptians to take part in the conduct of public affairs, including the drafting and adoption of a new constitution.

Consequently, the Draft Constitution should be withdrawn. The Egyptian authorities should provide for the establishment of a representative and democratically elected constituent assembly in full conformity with international standards of inclusivity, participation and transparency. Sufficient time must be granted to allow for the drafting of a new constitution that fully represents the views of Egyptians. Provision must also be made to ensure that women and people belonging to minority groups play an active role in the constitution-making process.

This paper examines key provisions of the Draft Constitution in light of international law and standards and, in particular, provisions relating to human rights, the rule of law and civilian oversight of the army, separation of powers and the independence of the judiciary. These provisions are fundamental to meeting the aspirations of all Egyptians expressed during the uprising and to securing a genuine transition to democracy in Egypt.

## **Human Rights in the Draft Constitution**

### ***Definition and Scope of Human Rights Provisions***

Egypt's Draft Constitution expands on rights provided for in the 1971 Constitution, and broadly acknowledges additional rights.<sup>4</sup> Additions to the Draft Constitution include the right to adequate housing, clean water and food,<sup>5</sup> the right of access to information<sup>6</sup> and the provision of services for individuals with disabilities.<sup>7</sup>

However, the Draft Constitution does not fully conform to international human rights law and standards. Certain rights have been excluded and others have been elaborated or defined in a restrictive or imprecise way.<sup>8</sup>

For example, the right to life is not included in the Draft Constitution. Further, an opportunity was also lost to indicate a commitment to prosecute and punish the most serious crimes under international law, such as war crimes, crimes against humanity,

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<sup>4</sup> For example, Article 35 of the Draft Constitution, expands on the rights of individuals arrested and detained, Article 67 on the provision of an adequate pension for all that do not have access to the social insurance system

<sup>5</sup> Article 68

<sup>6</sup> Article 47

<sup>7</sup> Article 72

<sup>8</sup> Egypt is party to most human rights Conventions, including The Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, Egypt ratified it on 8 February 1952; International Convention on the Elimination of All Forms of Racial Discrimination, New York, 7 March 1966, Egypt ratified it on 1 May 1967; International Covenant on Economic Social and Cultural Rights, New York, 16 December 1966, Egypt ratified it on 14 January 1982; International Covenant on Civil and Political Rights, New York, 16 December 1966, Egypt ratified it on 14 January 1982; International Convention on the Suppression and Punishment of the Crime of Apartheid, New York, 30 November 1973, Egypt acceded to it on 13 June 1977; Convention on the Elimination of all Forms of Discrimination Against Women, New York, 18 December 1979, Egypt ratified it on 18 September 1981; The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, Egypt acceded to it on 25 June 1986; The Convention on the Rights of the Child, New York, 20 November 1989, Egypt ratified it on 6 July 1990; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, New York, 18 December 1990, Egypt acceded to it on 19 February 1993; Convention on the Rights of Persons with Disabilities, New York, 13 December 2006, Egypt ratified it on 14 April 2008

genocide, and enforced disappearance. Further, while Article 36 prohibits and criminalizes torture, it does not define it. Instead, Article 36 states: *"Any person arrested, detained or whose freedom is restricted in any way, shall be treated in a manner preserving human dignity. He shall not be tortured, intimidated, coerced or be physically or morally harmed. Only places that are humanely and hygienically fit, and subject to judicial supervision, may be used for detention. The violation of any of the above is an offence punishable by law. Any statement proved to have been made under any of the aforementioned or under the threat thereof, shall be considered invalid and futile."* This does not contain a definition that conforms to Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT).<sup>9</sup> In particular, Article 36 could allow for a more restrictive definition of torture under national law, including: the exclusion of mental pain or suffering; the restriction of conduct falling within the ambit of torture to that undertaken for more limited purposes than the non-exhaustive list contained at Article 1 of the CAT; and the restriction of acts of torture to exclude acts inflicted by or at the instigation of or with the consent or acquiescence of public officials or persons acting in an official capacity.

Similarly, Articles 33 and 9 provide for, respectively, equality before the law and non-discrimination, and equal opportunity. Both Articles only specifically extend this equality to "citizens". The Draft Constitution therefore continues to exclude non-citizens who are under the jurisdiction of Egyptian law from such equality, contrary to international law.<sup>10</sup> Furthermore, specific protection against non-discrimination is not set out in the Draft Constitution, including non-discrimination on the grounds of *"colour, sex, political or other opinion, national or social origin, property, birth or other status"*.<sup>11</sup> Instead, Article 33 states, *"All citizens are equal before the law. They have equal public rights and duties without discrimination"*. While Article 9 states, *"The State shall ensure safety, security and equal opportunities for all citizens without discrimination."* The lack of specific recognition of grounds for discrimination is particularly problematic in light of other provisions of the Draft Constitution. For example, as regards women's rights, Article 10 grants the State a role in *"enabling the reconciliation between the duties of a woman toward her family and her work"*. These specific restrictions could therefore be used to undermine the general protections contained in Articles 33 and 9.<sup>12</sup> The failure to ensure equal protection for women contravenes Egypt's obligations under the Convention on the Elimination of Discrimination Against Women (CEDAW). In particular, Article 1 of the CEDAW states, *"discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field"*.

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<sup>9</sup> Article 1 of the CAT defines torture as *"any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."*

<sup>10</sup> Article 2 of the ICCPR requires States to respect and to ensure *"to all individuals within its territory and subject to its jurisdiction"* the rights recognized in the Convention. More specifically, Article 26 of the ICCPR requires equality of the law for all, including without distinction on the grounds of national origin.

<sup>11</sup> Article 26 of the ICCPR

<sup>12</sup> Principle 5 of the preamble provides for *"equality and equal opportunity for citizens, men and women"*. Although, operative articles might be read in light of the Preamble to the Constitution, there is no guarantee that the more specific provisions of Article 10 would not be applied over and above Principle 5. Further, Principle 5 continues to refer to citizens only.

In addition, while Article 43 of the Draft Constitution provides, "*Freedom of belief is an inviolable right. The State guarantees freedom to practice religious rites and to establish places of worship for the monotheistic religions, as prescribed by the law,*" this provision continues to discriminate against people who practice non-monotheistic religions, and thus falls short of Egypt's obligations under international law relating to freedom of thought, conscience and religion. In particular, Article 18 of the ICCPR, states: "*i) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching... iii) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*"

The Draft Constitution also maintains the phrasing of the 1971 Constitution: "*Islam is the religion of the State and Arabic is the official language. Principles of Islamic law (Shari'a) are the principal source of legislation.*" This is supplemented by Article 219, which states: "*The principles of Islamic Sharia include general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines and by the larger community.*"

By declaring Islam the religion of the State and the principles of Islamic Shari'a the main source of legislation, the Draft Constitution perpetuates a system whereby all Egyptians, irrespective of their religious or non-religious beliefs, are subject to the same laws, even when they are inspired by, or based on Shari'a principles. For example, when draft Article 3 provides that "*the principles of Judaism and Christianity are the main source of legislation for Egyptians belonging to these religions on issues relating to their personal status, religious affairs, and the selection of their spiritual leaders*", it is clear that these individuals may be subject to laws inspired by the Shari'a principles on issues not relating to personal status and religious affairs. Individuals who do not practice the monotheistic religions are similarly subjected to such laws. Further, on personal status and religious affairs issues, individuals not practicing the monotheistic religions are subject to laws inspired by Islamic Shari'a principles, regardless of their religious beliefs.

Moreover, these provisions taken together with other Articles relating to religion in the Draft Constitution, because they are overly broad and vague, may lead to the imposition of severe restrictions on the enjoyment and exercise of various universally recognized human rights. For example, draft Article 44 prohibits "*any attack or abuse of all religious messengers or prophets*". It remains unclear what type of conduct, writing, speech or action might constitute an "attack" for the purposes of these Constitutional provisions and to what extent these provisions can limit the enjoyment and exercise of basic human rights and freedoms, including the right to freedoms of expression, conscience or belief.

In addition, although various provisions are included regarding the right of defence, the right to litigate and the prohibition of exceptional courts,<sup>13</sup> there is no explicit provision recognising the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.<sup>14</sup> This right is guaranteed under Article 14 of the ICCPR.

### ***Limitations and Derogations on Human Rights***

Another source of concern regarding the human rights provisions in the Draft Constitution is that numerous rights are subject to "*the limits of the law*" or "*as defined by the law*". For example, these or similar restrictions are imposed on

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<sup>13</sup> Articles 75-79

<sup>14</sup> Article 14 of the ICCPR

provisions relating to, among others, the freedom to practice one's religion, freedom of the press, freedom of assembly, freedom of association, the right to strike and the right not to be subject to forced labour.<sup>15</sup> Furthermore, Article 81 continues by subjecting all rights and freedoms in Part II of the Draft Constitution to a general requirement that they "*be practised in a manner not conflicting with the principles pertaining to State and society*" set out in Part I of the Draft Constitution.

The restriction at Article 81 that rights "*shall not be subject to disruption or detraction*" and "*no law that regulates the practice of the rights and freedoms shall include what would constrain their essence*" is narrower than that provided for by the ICCPR. Restrictions on the exercise of rights must be precise, free of ambiguity and necessary in a democratic society.<sup>16</sup>

In addition, the Draft Constitution contains no provision for rights from which no derogation is permitted, including in times of emergency and in a situation of internal or external armed conflict. These are, among others: the right to life; the right to be free from torture or other ill-treatment; the right not to be subjected to enforced disappearance; and the principle of legality.<sup>17</sup> Article 148 of the Draft Constitution sets out the procedure for the declaration of a state of emergency and, while there are certain procedural requirements limiting the declaration itself, there is no explicit restriction on the circumstances in which a state of emergency can be declared or on what measures can be taken under it.

Under international law and standards, states of emergency and any derogation to rights pursuant to such emergency must be of an exceptional and temporary nature. Thus, Article 4 ICCPR, to which Egypt is a party, provides: "*In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law.*"<sup>18</sup> In addition, any measure undertaken that derogates from a provision must not impair the essence of the right. It may only reduce the scope of application of the right to the extent strictly necessary to meet a threat to the life of the nation: "*the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party.*"<sup>19</sup>

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<sup>15</sup> Articles 43, 49, 50, 51, 64

<sup>16</sup> In addition to the relevant provisions of the ICCPR, see "*The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*". The Principles were adopted in May 1984 by a group of international human rights experts convened by the International Commission of Jurists, the International Association of Penal Law, the American Association for the International Commission of Jurists, the Urban Morgan Institute for Human rights, and the International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy, to consider the limitation and restriction provisions of the ICCPR. The Sub-Commission subsequently recognised them (E/CN.4/1984/4, 28 September 1984)

<sup>17</sup> See Article 4(2) of the ICCPR. Other non-derogable rights include the prohibition on slavery and servitude, the prohibition on imprisonment solely for failure to fulfil a contractual obligation, the right to legal recognition and freedom of thought, conscience or religion. See also Human Rights Committee, *General Comment 29, States of Emergency (article 4)*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, paras. 7-9

<sup>18</sup> Article 4(1), International Covenant on Civil and Political Rights, available at <http://www2.ohchr.org/english/law/ccpr.htm>, last accessed 10 March 2012.

<sup>19</sup> Human Rights Committee, *General Comment 29, States of Emergency (article 4)*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para.4

The Draft Constitution also falls short of international law and standards in terms of providing for a comprehensive mechanism for dealing with the legacy of human rights violations. In particular, Article 65 provides only for limited reparation mechanisms and does not provide full rights of remedy and reparation for past human rights violations in accordance with international standards<sup>20</sup> or the prosecution and punishment of perpetrators of gross human rights violations.<sup>21</sup> The right to a remedy and to reparation encompasses: the right to vindicate one's rights before an independent and impartial body; the right to a prompt, impartial, thorough and independent official investigation; the right to know the truth about past events;<sup>22</sup> the right to cessation and guarantees of non-repetition;<sup>23</sup> and the right to, restitution, compensation, rehabilitation and satisfaction.<sup>24</sup>

### **Enforcement of Human Rights**

In terms of enforcement of human rights, the Draft Constitution does not contain any provision recognising the supremacy of international law, including international human rights law, over domestic law, nor the direct applicability of human rights treaties in Egypt. On the contrary, Article 145 states, "*no treaty contrary to the provisions of the Constitution shall be approved*".

Furthermore, specific enforcement mechanisms are also lacking. For example, there is no right of individual access to the Supreme Constitutional Court, explicitly set out. Moreover, although the National Council for Human Rights (NCHR) is given the authority to inform the Office of the Public Prosecutor of the violation of rights enshrined in the Draft Constitution (Article 80), the draft article does not specify if the Prosecutor is obliged to open an investigation. More broadly, the competencies and mandate of the NCHR are not specified in the Draft Constitution.

### **The Rule of Law and Civilian Oversight of the Army and the Separation of Powers in Egypt**

Civilian oversight of the armed forces is vital for the establishment and preservation of the rule of law. Moreover, a military with comprehensive autonomy over its own affairs, which may include direct or indirect interference in a country's political life, raises serious concerns in respect of the rule of law and separation of powers.

### **The Rule of Law and Civilian Oversight of the Armed Forces**

As noted by the United Nations Secretary General, the rule of law requires "*measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers,*

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<sup>20</sup> The right to remedy and reparation is recognized various international treaties, including Article 2, ICCPR; Article 2, CERD; Article 2 CEDAW; Article 2 CRC; Article 1 ACHPR; and international jurisprudence, and is considered an obligation under customary international law. See also, General Comment No.3 of the Committee Against Torture, Implementation of article 14 by States parties CAT/C/GC/3 16 November 2012.

<sup>21</sup> Updated Set of Principles for the protection and promotion of human rights through action to combat impunity, 8 February 2005, E/CN.4/2005/102/Add.1, recommended by the Commission on Human Rights resolution 2005/81 of 21 April 2005, Principle 1 and Principle 19. See also, Security Council Resolution on the question concerning Haiti, S/RES/1529 of 29 February 2004, para.7; Resolution on the situation in Côte d'Ivoire, S/RES/1479 of 13 May 2003, para.8

<sup>22</sup> Updated Set of Principles for the protection and promotion of human rights through action to combat impunity, 8 February 2005, E/CN.4/2005/102/Add.1, recommended by the Commission on Human Rights resolution 2005/81 of 21 April 2005, Principle 2. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement> last accessed 12 October 2012

<sup>24</sup> See also, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/Res/60/147, 16 December 2005, Principles 18 and 19 Available at: <http://www2.ohchr.org/english/law/remedy.htm>, last accessed 12 October 2012

*participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.*"<sup>25</sup>

Under such a system, the armed forces must be subordinate to legally constituted civilian authorities. The Draft Constitution does not fully provide for this subordination. For example, under Article 195 no civilian can be appointed as the Minister of Defence. In addition, while Article 197 of the Draft Constitution permits the National Defence Council (NDC) to discuss the budget, the extent of oversight and ability of the NDC to supersede policies of the armed forces remains in question.

In this respect, the UN Human Rights Council recently established, in Resolution 19/36, the need to ensure that *"the military remains accountable to relevant national civilian authorities"*.<sup>26</sup> The UN Human Rights Committee has also persistently highlighted the necessity of subjecting the armed forces to effective control by civilian authorities. In respect of one country, the Committee expressed its concerns at *"the lack of a clear legal framework, defining and limiting the role of the security forces and providing for effective civilian control over them."*<sup>27</sup> In another, the Committee expressed similar concerns *"over the lack of full and effective control by civilian authorities over the military and the security forces."*<sup>28</sup>

### **Separation of Powers**

Although the principle of separation of powers was clearly spelled out in the 1971 Constitution, the independence and functioning of both the legislature and the judiciary suffered under the ruling of President Mubarak. The powers of these branches were either insufficient, particularly in light of the Emergency Law provisions, or lacked the clarity to ensure the adequate delimitation and separation of power in practice. The result was the heavy predominance of the executive over both the legislative and judicial branches.

The Draft Constitution outlines the powers and competencies of each of the three branches of government. However, numerous articles in this respect are subject to qualification or clarification by subsidiary legislation. This is particularly the case in respect of the judicial branch. For example, the powers of the judiciary are to be *"defined by law"* (Article 168) while *"conditions and procedures for their appointment and disciplinary actions against them"* are *"defined and regulated by law"* (Article 170). Further, Article 173 grants the OPP the ability to investigate, pursue and press charges in all criminal cases *"except what is exempted by law"*. The State Council and Supreme Constitutional Court's competencies are limited in similar ways (Article 174 and 175). Such limitation may effectively grant the legislature authority to undermine the role of the judiciary and could infringe on the notion of separation of powers. As the Human Rights Committee has noted, a *"lack of clarity in the delimitation of the respective competences of the executive, legislative and judicial authorities may endanger the rule of law and a consistent human rights policy"*.<sup>29</sup>

The experiences of Egypt during the Mubarak regime, SCAF's actions during the transitional period and the 22 November 2012 Constitutional Declaration whereby

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<sup>25</sup> The rule of law and transitional justice in conflict and post-conflict societies, Security Council, S/2004/616\*, para. 6

<sup>26</sup> Human Rights Council, A/HRC/Res/19/36, 19 April 2012, para.16(j)(vi) See also a similar statement by its predecessor the UN Commission on Human Rights in Resolution 2000/47

<sup>27</sup> Concluding Observations of the Human Rights Committee: Romania, doc CCPR/C/79/Add. 11, 29 July 1999; paragraph 9. Available at:

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.79.Add.111.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.79.Add.111.En?Opendocument)

<sup>28</sup> Concluding Observations of the Human Rights Committee: El Salvador, doc CCPR/C/79/Add. 34, 18 April 1994; paragraph 9. Available at:

<http://www.unhchr.ch/tbs/doc.nsf/0/013a57379e3ccd57c12563ed0046d4c4?Opendocument>

<sup>29</sup> Concluding Observations of the Human Rights Committee on Slovakia, CCPR/C/79/Add.79, para.3

President Morsi granted himself broad, unchecked powers all serve to reinforce the compelling need for the Egyptian Constitution to provide for safeguards that entrench the principle of separation of powers in all circumstances.

As noted by the Special Rapporteur on the independence of judges and lawyers: *"Understanding of, and respect for, the principle of the separation of powers is a sine qua non for a democratic State and is, therefore, of cardinal importance for countries in transition to democracy- which heretofore have been typically characterized by precisely the absence of a separation of powers."*<sup>30</sup>

### **The Independence of the Judiciary in Egypt**

It is a cornerstone of the rule of law that States must guarantee the independence of the judiciary. This principle is affirmed in the United Nations Basic Principles on the Independence of the Judiciary (UN Basic Principles), which provide that it is the responsibility of all institutions, governmental and others, to respect the independence of the judiciary.<sup>31</sup> In Egypt, despite the consecration of the principles of separation of powers and the independence of the judiciary in the 1971 Constitution, judicial independence was undermined by the executive's systematic and arbitrary interference in judicial matters.

#### **The High Judicial Council**

The High Judicial Council (HJC), also known as the Supreme Judicial Council, is the primary body tasked with oversight of the ordinary judiciary. The 1971 Constitution did not provide for the establishment of the HJC. Rather, its legal basis is found in the Judicial Authority Law (JAL).

The HJC has competence over judicial appointments, promotions, transfers and disciplinary proceedings for the ordinary judiciary. However, the Minister of Justice's residual powers undermine the independence of the HJC and therefore the judiciary as a whole. In particular, under the JAL the Minister of Justice is granted specific powers regarding the appointment, disciplining, retirement and secondment of judges.<sup>32</sup> The UN Human Rights Committee has emphasized that the exercise of power by the Ministry of Justice over judicial matters, including the disciplinary appeal process and its powers of inspection of the courts, constitutes an interference by the executive and a threat to the independence of the judiciary.<sup>33</sup>

The Draft Constitution only mentions the HJC in the context of its power to select a Public Prosecutor and provides no basis for its establishment. In order to prevent further abuse and interference by the Ministry of Justice and executive in judicial affairs, the composition, competencies, and independence from the executive of the HJC should be clearly detailed in the Draft Constitution.

#### **The Office of the Public Prosecutor (OPP)**

Prosecutors play a crucial role in the administration of justice and in the proper functioning of the criminal justice system. The UN Guidelines on the Role of Prosecutors affirm that States should *"ensure that prosecutors are able to perform*

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<sup>30</sup> Report of the special Rapporteur on the independence of judges and lawyers, UN document E/CN.4/1995/39, Para. 55, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G95/106/00/PDF/G9510600.pdf?OpenElement>, last accessed 7 May 2012.

<sup>31</sup> Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 1

<sup>32</sup> Articles 9, 99, 111, and 55-62 of the JAL, respectively

<sup>33</sup> *Concluding Observations of the Human Rights Committee on Romania*, CCPR/C/7 9/Add.111, para. 10



*their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability*".<sup>34</sup> Moreover, the African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa state: "Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences."<sup>35</sup>

The Draft Constitution takes a positive step in granting the OPP greater independence from the executive, by calling for the Prosecutor General's appointment by the President based on the selection of the HJC.<sup>36</sup> Previously, the president did not require the consent of the HJC in such appointment. However, although the 24 October 2012 draft of the Constitution included the irremovability of all judicial officers, including the public prosecutor, the Draft Constitution fails to provide such a provision. The principle of irremovability is a unique guarantee to protect prosecutors and judges from outside influence.

### ***The Supreme Constitutional Court***

International law and standards do not prescribe a particular mechanism for the enforcement of the Constitution. However, in order not to undermine the separation of powers, it is essential that this mechanism is independent from the executive and legislative branch. In addition, in order to ensure that the provisions of the Constitution are realised in practice, full access to this mechanism must be guaranteed.

In Egypt, although the 1971 Constitution provided for an independent Constitutional Court (Article 174) with Constitutional guarantees of irremovability for its members, these guarantees of independence were undermined by the executive's comprehensive control over the selection and appointment of the members of the courts.

Similarly, while Articles 175 to 178 of the Draft Constitution provide for a Supreme Constitutional Court (SCC) as an "*independent judicial body, seated in Cairo, which exclusively undertakes the judicial control of the constitutionality of the laws and regulations*", it maintains that appointments take place by decree from the President.<sup>37</sup>

Given the role played by a Constitutional Court in terms of guaranteeing constitutional principles, including the rule of law and separation of powers, as well as upholding human rights such a Court must be afforded sufficient guarantees of independence.

Further, the Draft Constitution does not ensure full access for individuals to the SCC. Although Egypt is not unique in not granting to individuals direct access to the Constitutional Court, such access would help ensure the protection and enforcement of individual rights and freedoms enshrined in the Draft Constitution.

### ***State of Emergency and the Use of Military and Security Courts***

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<sup>34</sup> Guidelines on the Role of Prosecutors, adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana (Cuba), 27 August – 7 September 1990, Guideline 4, available at: <http://www2.ohchr.org/english/law/prosecutors.htm>.

<sup>35</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Guideline F(k), African Union, [http://www.afrimap.org/english/images/treaty/ACHPR\\_Principles&Guidelines\\_FairTrial.pdf](http://www.afrimap.org/english/images/treaty/ACHPR_Principles&Guidelines_FairTrial.pdf), last accessed 1 April 2012.

<sup>36</sup> Article 173

<sup>37</sup> Article 176

Constitutional and legislative provisions providing for emergency state security courts and military courts have created a parallel judicial system that has further undermined the independence of the judiciary in Egypt.

The imposition of a decades-long state of emergency legitimated the widespread use of emergency state security courts. While the Draft Constitution largely maintains the power of the President to declare a state of emergency, it only permits an extension through a public referendum.<sup>38</sup> Although such a safeguard may prevent continued renewals as previously seen under Mubarak, the Draft Constitution does not provide for the end of the use of emergency state security courts.<sup>39</sup>

Trials before state of emergency courts fail to meet due process guarantees, including the right "to a fair and public hearing by a competent, independent, and impartial tribunal established by law" (Art. 14(1)) and the right "to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing" (Art. 14(3)(b)). Such guarantees are provided for by the ICCPR, to which Egypt is a party. The continued use of emergency courts is in contravention with these provisions.

Further, the Draft Constitution fails to prohibit the trial of civilians before military courts. Article 198 permits the trial of civilians "for crimes that harm the Armed Forces", where such crimes are defined by law. The wording of this article is broad and has the potential to perpetuate the expanded jurisdiction of military courts.

The use of such courts also fails to meet international standards of due process and is in contravention of the UN Principles Governing the Administration of Justice Through Military Tribunals (the Decaux Principles).<sup>40</sup> Principle 5 of the Decaux Principles states: "Military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts". While principle 8 affirms that: "The jurisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel. Military courts may try persons treated as military personnel for infractions strictly related to their military status".

In 2002, the Human Rights Committee stated in relation to Egypt: "The Committee notes with alarm that military courts and State security courts have jurisdiction to try civilians accused of terrorism although there are no guarantees of those courts' independence and their decisions are not subject to appeal before a higher court (article 14 of the Covenant)."<sup>41</sup> The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism noted in 2009, in the context of Egypt, that "military courts should not have the faculty to try cases which do not refer to offences committed by members of the armed forces in the course of their duties."<sup>42</sup>

Furthermore, the Draft Constitution also does not prohibit the use of military courts in cases involving human rights violations. "The jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to

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<sup>38</sup> Art. 148

<sup>39</sup> The new Constitution expressly prohibits exceptional courts in Article 75. However, it is unclear as to whether emergency state security courts are considered 'exceptional'.

<sup>40</sup> U.N. Doc. E/CN.4/2006/58 at 4 (2006)

<sup>41</sup> Concluding observations of the Human Rights Committee on Egypt, CCPR/CO/76/EGY, 28 November 2002, para.16(b)

<sup>42</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Human Rights Council, para. 32, 14 October 2009, A/HRC/13/37/Add.2, available at , <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-37-Add2.pdf>, last accessed 16 May 2012.

*the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in case of serious crimes under international law, of an international or internationalized criminal court*".<sup>43</sup> Military courts can be a source of impunity, as the same system that condoned the human rights violations is responsible for determining its legality.

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<sup>43</sup> Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Commission on Human Rights, 8 February 2005, Principle 29, available at <http://www.derechos.org/nizkor/impu/principles.html>, last accessed 9 April 2012. See also Principle 9 of the Decaux Principles.