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ATTACKS ON JUDGES IN EGYPT: July 2013 Statement Case

The Egyptian authorities have undertaken a widespread crackdown since August 2013 against judges that are perceived to be opposed to the regime. This crackdown has mainly consisted of flawed disciplinary proceedings that have resulted in the forcible retirement and dismissal of a dozens of judges. The International Commission of Jurists (ICJ) has characterized these proceedings “arbitrary and unfair”, including in response to the forcible retirement of more than 47 judges in March 2016 in the case of mass unfitness proceedings, known as the ‘July 2013 Statement Case’ and the ‘Judges for Egypt Case’.¹ These and other flawed proceedings have targeted eminent voices in the judiciary who have fought in favour of judicial independence. The premature termination of judges’ careers that have followed such action by members of the judiciary have dealt a severe blow to the independence of the judiciary in Egypt.

DISCIPLINARY PROCEEDINGS IN THE JULY 2013 STATEMENT CASE

The July 2013 Statement Case is one of the largest disciplinary cases against judges in recent years in Egypt. This case was initiated in response to a public statement reportedly endorsed by 75 judges and read out on 24 July 2013 by the deputy president of the Court of Cassation, Mahmoud Mahieddine, in Rabaa Square, Cairo, following the ouster of President Morsi (the July Statement).

The July Statement noted the removal of Egypt’s elected President, the suspension of the Constitution, the dissolution of the elected Parliament, the closure of media outlets without judicial decisions and the thousands of deaths and injuries to individuals. It also reaffirmed the role of judges in upholding and protecting “citizens’ rights and freedoms” from every infringement and it declared that the judges endorsing the statement:

- were not involved in politics and did not support any particular side, they supported only righteousness, justice and legitimacy;
- rejected the destruction of the democratic gains since the revolution of 2011, including removal of the President as well as the suspension of the Constitution without a fair and transparent popular vote;
- called for the reinstatement of the Constitution;
- called on the State and all political factions and parties to engage in a dialogue within the framework of constitutional legitimacy; and
- called for respect of the right to peaceful demonstration while rejecting violence in all its forms.²

¹ International Commission of Jurists, ‘Egypt: arbitrary and unfair removal of judges must be reversed’, Press Release, 28 March 2016. Available at: <http://www.icj.org/egypt-arbitrary-and-unfair-removal-of-judges-must-be-reversed/>.

² The signatories included vice presidents of the Court of Cassation; presidents of the prosecution at the Court of Cassation; presidents, vice-presidents and judges from courts of appeal; and presidents and judges of first instance courts. The statement can be found at: <http://gate.ahram.org.eg/News/375922.aspx>.

The following day, a separate complaint was made by Judge Abdel Jawad Moussa, President of the technical chamber of the Court of Cassation, who referred the incident – the reading of the July Statement during the Rabaa sit-in – to the Court of Cassation and the High Judicial Council (HJC) on the grounds that the judges had violated article 73 of Egypt’s Judicial Authority Law and were thereby “unfit” to continue to serve as justices.

On 28 July 2013, the HJC referred the matter to the Minister of Justice to delegate an investigative judge to examine the complaint. As a result, the Minister of Justice requested the President of Cairo’s Court of Appeal to select an investigative judge.

On 2 August 2013 a travel ban was issued by the investigative judge against thirteen of the judges who had signed the July Statement.

On 13 November 2014, the investigation closed and 56 judges from various courts across Egypt were referred to the Disciplinary Board for “unfitness” proceedings pursuant to article 73 of Egypt’s Judicial Authority Law.³ On 14 March 2015, the Board found that 31 of the 56 judges were not fit to hold judicial office, the effect of which was to remove them from office by forcing them into retirement.⁴ The remaining 25 judges were found not to have been involved in any impropriety and were not subject to any disciplinary measures,⁵ although the grounds for the dismissal of these claims remain unknown.

On 12 April 2015, the judges who had in effect been dismissed, as a result of the Board’s decision, lodged an appeal before the Supreme Disciplinary Board. The Prosecutor appealed the acquittal of the other judges. On 28 of March 2016 the Supreme Disciplinary Board confirmed the decision of the Disciplinary Board. The ICJ has called for the reversal of the Supreme Disciplinary Board’s decision.⁶

EVALUATION OF THE DISCIPLINARY PROCEEDINGS

These proceedings have severely undermined international standards on the independence of the judiciary.

Judges are entitled to the right to freedom of expression and opinion under international standards. The UN Basic Principles on the Independence of the Judiciary and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa recognize specifically for judges the rights to freedom of expression, belief, association and assembly.⁷

Furthermore, in order to preserve the security of their tenure and the independence of the judiciary, judges can only be removed for reasons of incapacity or behaviour that renders them unfit to discharge their duties.⁸ Similarly, the Principles and Guidelines on the Right to a Fair Trial in Africa state that judicial officials may only be removed or suspended from office

³ “Unfitness” proceedings are provided for under article 111 of the Judicial Authority Law, Law No. 46 of 1972 as amended, and are distinct from disciplinary proceedings. Under the Judicial Authority Law if a judge is alleged to be “unfit” to perform judicial functions for reasons unrelated to his or her health, he or she can be referred by the Minister of Justice or by the head of the relevant court to the Disciplinary Board for an “unfitness” hearing.

⁴ Following a finding that a judge is “unfit” for office, the disciplinary board can either require the judge to retire or transfer the judge to perform non-judicial functions.

⁵ Case No. 1 of judicial year 9, Unfitness, Judgment of 14 March 2015.

⁶ ICJ, ‘Egypt: arbitrary and unfair removal of judges must be reversed’, op cit.

⁷ Similarly, principle 4(s) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa recognizes judges’ right to freedom of expression, belief, association and assembly that have to be exercised in accordance with the law and the recognized standards and ethics of their profession.

⁸ UN Basic Principles on the Independence of the Judiciary, principle 18.

for gross misconduct incompatible with judicial office, or for physical or mental incapacity that prevents them from undertaking their judicial duties.⁹

International standards also guarantee the right to a fair hearing for judges subject to disciplinary proceedings.¹⁰ All disciplinary proceedings, including those related to suspension or removal, shall be determined in accordance with established standards of judicial conduct.¹¹ Furthermore, a disciplinary charge or the complaint should be processed expeditiously.¹² These guarantees include “the right to be represented by a legal representative of their choice and to an independent review of decisions of disciplinary, suspension or removal proceedings.”¹³

The ICJ takes the view that the decision to remove the 31 judges by forcing them into retirement violated their right to freedom of expression and assembly. The proceedings in the July 2013 Statement Case also contravened the judges’ right to a fair hearing guaranteed under international standards, and the sanction of forced retirement imposed following flawed proceedings, tantamount to removal, was thus inconsistent with international standards safeguarding the independence of the judiciary.

Disciplinary action in the absence of misconduct

The referral of the judges to investigation and unfitness proceedings and their removal from office for supporting the July Statement amounts to a violation of their rights to freedom of expression, assembly and association. Rather than amounting to misconduct, the July Statement was consistent with the judges’ rights to expression, assembly and association. The disciplinary action thereby also violated the independence of the judiciary.

Egypt is a party to the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and People’s Rights. Therefore, it is bound to respect and protect the rights of all persons, including judges, to freedom of expression, belief, association and assembly.¹⁴ The UN Basic Principles on the Independence of the Judiciary confirm this and state that, in exercising these rights, judges must conduct themselves in such a manner as to “preserve the dignity of their office and the impartiality and independence of the judiciary”.¹⁵ Indeed, given the primary role of judges in the protection of human rights and the rule of law,¹⁶ respect for and protection of these rights for judges is particularly important. Furthermore, judges have a duty in times of crisis to ensure that rights are respected and that the Rule of Law and the principle of legality are guaranteed.¹⁷ The European Court of Human

⁹ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle 4(o). Similarly, European standards affirm that permanent appointment should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law: see Council of Europe, Committee of Ministers’ Recommendation No. R(2010)12 on judges, article 50.

¹⁰ UN Basic Principles on the Independence of the Judiciary, principle 17; and Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle A.4(q).

¹¹ UN Basic Principles on the Independence of the Judiciary, principle 19.

¹² UN Basic Principles on the Independence of the Judiciary, principle 17; and Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle A.4(r).

¹³ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle A.4(q).

¹⁴ ICCPR, articles 18, 19, 21 and 22; African Charter on Human and Peoples’ Rights, articles 8, 9, 10 and 11; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle A.4(s) and (t).

¹⁵ UN Basic Principles on the Independence of the Judiciary, principle 8; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle A.4(s); European Charter on the Statute for Judges, paragraph 1.7.

¹⁶ ICJ, ‘Legal Commentary to the ICJ Geneva Declaration – Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis’, 2011, p.4.

¹⁷ Office of the High Commissioner for Human Rights in cooperation with the International Bar Association, ‘Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers’, United Nations, New York and Geneva, 2003, p. 884.

Rights has found that in certain circumstances speaking up on matters of Rule of Law is not only a right of the judge but also a duty.¹⁸

The judges in this case were referred to disciplinary proceedings for allegedly violating article 73 of Egypt's Judicial Authority Law. Article 73 prohibits judges from engaging in 'political activity'. The disciplining authorities have given this article an expansive interpretation. The Disciplinary Board found that this provision prohibits a judge from "discussing or commenting on legislative and governmental decisions as long as it does not pertain to a case that he is looking into as part of his judicial function".¹⁹ The Supreme Disciplinary Board also found that judges "must not give [their] opinion about public affairs in the country" and should "refrain from appearing in the media".²⁰ The Supreme Disciplinary Board added that judges must not carry out activities beyond their judicial function.²¹ The reason for this, according to the Board, is that such activities undermine the independence and impartiality of judges.²²

The ICJ considers the July Statement to have been made consistent with the judges' right to freedom of expression and association, exercised in a manner that preserved the dignity of their office and the impartiality and independence of the judiciary. Article 73 of the Judicial Authority Law and the broad interpretation given to it by the Board could result in further arbitrary limitations to judges' right to freedom of expression, assembly and association, well beyond restrictions that could be justified and would be consistent with international standards. Judges are entitled to exercise rights far broader than merely being allowed to discuss and comment only on the cases before them. Rather, judges have to exercise these rights in a manner that preserves the dignity of their office and the impartiality and independence of the judiciary. The July Statement was an exercise of fundamental rights and freedoms in a manner that respects these limitations.

Finally, contrary to what the Board claimed, the early termination of a judge's tenure as a result of his or her exercise of fundamental rights undermines the judiciary's independence. As explained by the European Court of Human Rights, "a State Party cannot legitimately invoke the independence of the judiciary in order to justify a measure such as the premature termination of the mandate of a court president for reasons that had not been established by law and which did not relate to any grounds of professional incompetence or misconduct".²³

To be in line with international standards, all disciplinary, suspension or removal proceedings should be determined in accordance with the established standards of judicial conduct.²⁴ The judges, in this case, were subjected to unfitness proceedings in the absence of an established standard of judicial conduct. The apparent subjectivity and arbitrariness of the standards being applied in the "unfitness" proceedings raise concerns that the proceedings are not based on established standards of judicial conduct. Egypt's Judicial Authority Law is unclear about the grounds that allow the referral of a judge to disciplinary proceedings. Such absence grants broad discretion to the authorities to refer judges to disciplinary proceedings and facilitates the unwarranted referral to disciplinary proceedings, such as in this case regarding the judges of the July Statement. Furthermore, the Judicial Authority Law does not provide criteria to determine what constitutes "unfitness".

Furthermore, and as previously mentioned, international standards allow the removal of judges only in the case of gross misconduct or incapacity. The lawful exercise of fundamental rights and freedoms cannot be considered to be gross misconduct.

¹⁸ *Baka v. Hungary* (2016), European Court of Human Rights (ECHR) 568, para 125.

¹⁹ Case No. 1 of judicial year 9, Unfitness, Judgment of 14 March 2015, pp. 55-56.

²⁰ Appeal No. 4/2015, Unfitness, Judgment of 28 March 2016, p. 8.

²¹ Appeal No. 4/2015, Unfitness, Judgment of 28 March 2016, p. 8.

²² Case No. 1 of judicial year 9, Unfitness, Judgment of 14 March 2015, p. 57.

²³ *Baka v. Hungary* (2016) ECHR 568, para 156.

²⁴ UN Basic Principles on the Independence of the Judiciary, principle 19.

Despite this, the essence of the Board's findings was that exercise by the judges of their rights to freedom of expression and the peaceful participation of a judge in a demonstration warranted disciplinary action, with the imposition of sanctions amounting to removal. The Board's decision appears not to have taken into account the fact that the July Statement expressly declared that the judges were not supporting any side and called for the Rule of Law and human rights to be upheld.²⁵ Instead, in reaching its decision, the Board appears to have made political findings regarding the nature of the ousting of President Morsi by describing the incident as "after he was expelled by his people in a large revolution that removed him and his regime".

The Board's assessments of "fitness" or misconduct drastically fell short of the UN Basic Principles on the Independence of the Judiciary, whether in terms of standards for suspension or removal from office, or in terms of the scope for freedom of expression, association and assembly of judges within the bounds of dignity of the judicial office, and the impartiality and independence of the judiciary. As such, the judges should not have been subject to the proceedings and forcibly removed from office as a result of supporting the Statement.

Investigation

A further matter of concern is the existence of several flaws in the investigation and examination of the allegations against the judges in this case.

Even at the investigatory stage, it is necessary that the proceedings operate in line with international standards. As previously mentioned, the UN Basic Principles on the Independence of the Judiciary provide that complaints against judges should be processed expeditiously and fairly under an appropriate procedure in which the judge enjoys the right to a fair hearing,²⁶ which, according to the Draft Universal Declaration on the Independence of Justice, requires that: "the judges shall have the opportunity to comment on the complaint at the initial stage. The examination of the complaint at its initial stage shall be kept confidential, unless otherwise requested by the judge."²⁷

The manner in which the investigative judge was appointed was unlawful under Egyptian law. The Minister of Justice requested the President of Cairo's Appeal Court Aymen Abass to appoint an investigative judge. The latter appointed Mohamed Shirin Fahmy. The decision to appoint an investigative judge is a prerogative of the General Assembly of the Court and not the President of the Court of Appeal.²⁸ Such violation of Egypt's law is even more problematic given that Aymen Abass, who appointed the investigative judge, would later take part in the disciplinary proceedings by being one of the judges sitting on the Supreme Disciplinary Board.

Additionally, the judges were not formally informed of the investigation against them and initially learned of the proceedings from the media, despite the gag order imposed on the investigation. Likewise, they learned from the media, not the court, of the travel ban that the investigative judge had imposed on some of them.

The judges had restricted access to information about the investigations while they were on-going. Furthermore, their ability to make submissions during the investigations was severely

²⁵ This is not to say that merely adding a clause claiming to be apolitical is sufficient to depoliticize a claim; however, in the particular case of the July Statement the judges' claims were regarding the theoretical underpinnings of the Egyptian Government, not expressly calling out a particular party, or promoting a particular party platform.

²⁶ UN Basic Principles on the Independence of the Judiciary, principle 17.

²⁷ Draft Universal Declaration on the Independence of Justice, article 26(a).

²⁸ Code of Criminal Procedure, article 67.

restricted during the proceedings. In some instances, the investigative judge did not acknowledge the judges' submissions and did not address them.

Independence and Impartiality

The July 2013 Statement Case involves various elements undermining the independence and impartiality of the judiciary in Egypt. As concluded above, the disciplinary action against the judges undermined their independence because the judges had not engaged in misconduct and because the sanction imposed amounted to their unjustified removal from office. Additionally, serious concerns are raised about the independence and impartiality of the disciplinary body.

Lack of independence of the Disciplinary Board

Disciplinary proceedings must be conducted before a body that meets the requirement of impartiality and independence under international law and standards. When discussing impeachment proceedings against judges, the Inter-American Court of Human Rights has held that "any State organ that exercises functions of a materially jurisdictional nature has the obligation to adopt decisions that are in consonance with the guarantees of due legal process in the terms of Article 8, on the right to a fair trial, of the American Convention".²⁹ Similarly, the European Court of Human Rights has held that article 6 on the right to a fair trial of the European Convention on Human Rights applies under its civil head to disciplinary proceedings against judges.³⁰ The Human Rights Committee has also emphasised that "judges may be dismissed only... in accordance with fair procedures ensuring objectivity and impartiality".³¹ This means that the body in charge of disciplining the judges, particularly in the current case which effectively led to the dismissal of the judges, must itself meet, *inter alia*, the condition of impartiality and independence required from a normal tribunal.

In normal circumstances, this is consistent with the notion that the judiciary should have exclusive competence to manage the careers of judges, including their discipline. In the current context, however, executive control and influence over judicial appointments and performance undermines the independent character of the Disciplinary Board.

In Egypt, the executive has a strong role in the career of judges and is involved in both the inspection of judges' performance and disciplinary processes. For example, the Minister of Justice nominates two judges to sit on the Cassation Court and can assign judges in courts of appeal to preside over a court of first instance or assign judges to administrative positions.³² The Minister of Justice can also independently trigger unfitness proceedings against judges.³³ In the July 2013 Statement Case, the Minister of Justice was the authority that referred the judges to unfitness proceedings. Similarly, there is a general, executive influence over the assignment of cases and in relation to prosecutors' appointment, transfer and discipline. In addition, the Executive oversees the administration of the Office of the Public Prosecutor (OPP).

The Human Rights Committee and the Special Rapporteur on the independence of judges and lawyers have both regularly expressed concerns about systems in which legislative or

²⁹ *Case of the Constitutional Court v. Peru*, Inter-American Court of Human Rights, Judgment of January 31, 2001, para 71.

³⁰ *Gerovska Popčevska v. the former Yugoslav Republic of Macedonia* (2016), ECHR 17, para 38.

³¹ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc CCPR/C/GC/32 (2007), para 20.

³² Respectively, articles 44, 9 and 45 of the Judicial Authority Law. The decisions are subject to the approval of the High Judicial Council.

³³ Judicial Authority Law, article 111.

executive branches play a role in disciplining judges.³⁴ Similarly, the International Bar Association Minimum Standards on Judicial Independence provides that “[t]he power to discipline or remove a judge must be vested in an institution, which is independent of the Executive”, preferably with the power of removal “vested in a judicial tribunal”.³⁵

The general lack of independence of the judiciary in Egypt, including the OPP, impacts the very independence of the judges sitting on the Disciplinary Board and also the OPP’s capacity to have objectively examined and pursued the unfitness proceedings of the judges concerned. Such lack of independence flouts the requirement of independence and objectivity. In fact, the Disciplinary Board and Supreme Disciplinary Board are composed exclusively of judges.³⁶ Furthermore, unlawful appointments in judicial positions also cast doubt on the independence of the appointee. This is so in the case of the investigative judge who carried out the investigation against these judges, seeing as he was not appointed by an authority competent to do so under Egyptian law.

Lack of impartiality of the Disciplinary Board

The Human Rights Committee has explained that, pursuant to the requirement of impartiality, judges must not allow their judgment to be influenced by personal bias or prejudice and that the adjudicating body must also appear to a reasonable observer to be impartial.³⁷ In the current context, the requirement of impartiality has likely been breached seeing as members of the Disciplinary Board were also involved at the investigatory level and were thereby not necessarily impartial

The Supreme Disciplinary Board included members who had previously given their opinion about the case, including Judge Ahmed Jamal Din Abdel Latif and Ayman Abass. Furthermore, Judge Ahmed Jamal Din Abdel Latif eventually presided over the Supreme Disciplinary Board when previous president Mohamed Hossam Abdel Rahim retired.

The Egyptian Judicial Authority Law does not allow the commencement of an investigation against judges unless the High Judicial Council authorizes it.³⁸ In the case at hand the High Judicial Council granted its authorization to start the investigation on 28 July 2013. On 11 August 2014 it authorized the continuation of the proceedings after receiving the case file following the completion of the investigation. The two abovementioned judges sat on the High Judicial Council when, on 28 July 2013, the Council authorized the investigation by requesting the Minister of Justice to appoint an investigative judge to investigate the allegations against the judges of the July Statement. The High Judicial Council’s authorization is not a formality; it includes weighing in on the allegations and evidence against the judges.

Furthermore, as mentioned previously, Judge Aymen Abass was involved in the investigation stage when he appointed Mohamed Shirin Fahmy as an investigative judge to investigate the allegations against the judges that led later to the proceedings before the Supreme Disciplinary Board on which he sat. Judge Ahmed Al Minchawy also sat on the Supreme Disciplinary Board during the hearing held on 14 December 2015, although he later recused himself from looking into the case. The judges subject to the disciplinary proceedings had

³⁴ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc A/HRC/11/41 (2009), para. 60; *Pastukhov v. Belarus*, Human Rights Committee Communication No. 814/1998, UN Doc CCPR/C/78/D/814/1998 (2003), para. 7.3; *Adrien Mundy Busyo et al. v. Democratic Republic of the Congo*, Human Rights Committee Communication No. 933/2000, UN Doc CCPR/C/78/D/933/2000 (2003), para. 5.2.

³⁵ International Bar Association (IBA), ‘Minimum Standards’, adopted by the IBA Council in 1982, Standard A(4)(a) & (b).

³⁶ Judicial Authority Law, article 111.

³⁷ General Comment No. 32, op cit , para 21.

³⁸ Judicial Authority Law, article 96.

requested his impeachment, arguing that Al Minchawy was among the judges who had submitted a complaint at the time of the statement. The Supreme Disciplinary Board nevertheless claimed that it was not aware that Al Minchawy had lodged the complaint against the judges of the July Statement.

The composition of the Supreme Disciplinary Board appears to fall short of the requirement of impartiality. The European Court of Human Rights has found a breach of the requirement of impartiality in disciplinary proceedings against a judge when a member of the Supreme Court gave a favourable opinion as to whether any professional misconduct occurred before the commencement of the proceedings and later was among the judges sitting on the disciplinary panel.³⁹ The July Statement case is similar to the European Court case just mentioned, insofar as the two judges mentioned above were members of the Supreme Disciplinary Board that looked into the case of the judges and ruled in favour of their forcible removal after at least sitting on the HJC when the HJC gave a favourable opinion as to the well-foundedness of the charges against the accused. Since a tribunal must also appear to a reasonable observer to be impartial, the Supreme Disciplinary Board has failed to meet the requirement of impartiality given the presence of these two judges on the bench.

Right to defence and equality of arms

In order to be in line with international standards, the judges in this case were entitled to, but did not enjoy, guarantees of a fair hearing including the right to be represented by a legal representative of their choice and to an independent review of decisions of disciplinary, suspension or removal proceedings.⁴⁰

Also, judges undergoing disciplinary proceedings must be afforded the right to defence and equality of arms under international standards. According to the Human Rights Committee, in order for a State to fulfil its obligations under the ICCPR the judicial body entrusted with deciding on the imposition of disciplinary measures against judges must “respect the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee”.⁴¹ In the course of the proceedings against them, however, the judges’ rights of defence were undermined in a variety of ways.

In particular, not all of the judges were given prior notice of the hearings. In one case, a judge was notified by phone during the first instance proceedings even though such means of notification is not considered valid under Egyptian law. As a result of the lack of communication from the court, many of the judges resorted to waiting outside the hearing room every day in case a hearing in the case took place.

In addition, the judges were denied adequate time and facilities to prepare the case; in particular, despite requests, access to the case file was not provided in advance of the hearings.

During the hearings, pursuant to Egyptian law, the judges were restricted in their choice of counsel: they could only be represented by a judge or former judge – not a lawyer, thereby severely limiting their ability to be represented by an experienced advocate.⁴² While one judge

³⁹ *Gerovska Popčevska v. the former Yugoslav Republic of Macedonia* (2016), ECHR 17, paras 47-56.

⁴⁰ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle A.4(q).

⁴¹ *Paul Perterer v. Austria*, Human Rights Committee Communication 1015/2001, UN Doc CCPR/C/81/D/1015/2001 (2004), para. 10.7.

⁴² Judicial Authority Law, article 106. The judges challenged article 106 on the basis that it amounts to discrimination contrary to the 2014 Constitution. This argument was rejected by the Disciplinary Board since it took the view that the rules put in place by the Judicial Authority Law are objective, serve the general interest of preserving the judicial function and does not arbitrarily compromise the rights and

initially began representing the accused judges before the Disciplinary Board, he withdrew his counsel after receiving a written warning regarding his conduct.⁴³ After that, some judges had no legal representation and had to defend themselves before the Disciplinary Board.

The right to equality of arms was also undermined. Of the 56 judges, only one was permitted to make oral submissions during the first instance proceedings, and the Board restricted the permissible scope of such submissions to procedural matters. The other judges were permitted only to make written submissions.

Similarly, during the appeal proceedings the judges were restricted in submitting their defence. The majority of the judges were only able to make one oral pleading and these pleadings were subjected to unreasonable time constraints.

The judges were also restricted in their written submissions as they were only allowed to submit a document not exceeding two pages. In the case of one judge, the Board refused to accept further submission of evidence regarding facts that were used against him in the first instance judgment.

After being informed of the closure of the hearing the judges requested to be heard again. The Supreme Disciplinary Board rejected the requests because "it did not include anything new that might lead [the Supreme Disciplinary Board] to change its mind about the case".⁴⁴ As a result, the Supreme Disciplinary Board dismissed the requests even before hearing of the nature of what the judges proposed to say.

That being said, during the proceedings before the Supreme Disciplinary Board judges were in some instances heard individually despite their requests to all be present during the hearing. The judges would wait outside the courtroom until called individually to attend before the Supreme Disciplinary Board.

CONCLUSION AND RECOMMENDATIONS

The magnitude of the July 2013 Statement Case in terms of the number of judges involved in unfair disciplinary proceedings as a result of the legitimate exercise of the rights to freedom of expression, association and assembly is indicative of the seriousness of the attack on the independence of the judiciary and the rule of law in Egypt. All the more worrying is the fact that similar proceedings have previously taken place and continue.

The ICJ has previously raised concerns regarding the alarming level the attacks against individual judges has reached.⁴⁵ Attacks through such arbitrary proceedings are facilitated by significant shortcomings in the Egyptian legal framework that fall short of international standards on the independence of the judiciary, undermine standards of impartiality and that involve serious procedural inadequacies. The Egyptian authorities must comply with their obligations under international law and put an end to their attacks on the independence of the judiciary in Egypt.

In the particular case at hand, **the Egyptian authorities must reverse the disciplinary decision to forcibly retire 31 judges in the July 2013 Statement Case and reinstate all judges that have been removed from their office as a result of unfair and**

freedoms guaranteed by the Constitution. See Case no. 1 of judicial year 9, Unfitness, Judgment of 14 March 2015, pp. 53-54.

⁴³ While the purported misconduct was an alleged statement made about a law two years previously, without permission from the HJC, the effect of the warning was to prompt the judge to withdraw his counsel and to warn other judges from representing the accused.

⁴⁴ Appeal No. 4/2015, unfitness, Judgment of 28 March 2016, p. 7.

⁴⁵ ICJ, 'Egypt: arbitrary and unfair removal of judges must be reversed', op cit.

arbitrary proceeding. Furthermore, Egyptian authorities must align the legal framework governing the disciplining of judges with international standards.

To this end, the ICJ calls on the Egyptian authorities to:

- i. Ensure that the executive does not have a role in the disciplining and removal of judges, in particular through removing the authority of the Minister of Justice to trigger disciplinary proceedings against judges;**
- ii. Ensure that the Disciplinary Board and Superior Disciplinary Board are overseen by the High Judicial Council;**
- iii. Guarantee that a code of ethics and judicial conduct that is consistent with international standards is developed and adopted by the judiciary and used as the basis on which judges are disciplined and subject to removal from office;**
- iv. Specify that sanctions against judges are proportionate to the misconduct in question and, in the case of removal from office, imposed only based on proven grounds of incapacity or behaviour that renders the judge unfit to discharge the duties of his or her judicial office;**
- v. Guarantee that the rights of judges to freedom of expression, association and peaceful assembly, are exercised in a manner that is consistent with the preservation of the dignity of their office and the independence and impartiality of the judiciary, be respected and protected;**
- vi. Guarantee that judges are afforded all due process guarantees during the investigation and examination of alleged misconduct;**
- vii. Ensure that disciplinary proceedings are held before an independent and impartial body consistent with international standards; and**
- viii. Guarantee that disciplinary proceedings afford the judge concerned a fair hearing that is consistent with international standards of due process, including by guaranteeing the right of adequate time and facilities to prepare and present a defence and the right to be represented by counsel of choice.**