



Egypt Constitutional Amendments: Unaccountable Military, Unchecked President and a Subordinated Judiciary

April 2019

The proposed [amendments](#) to some articles of the 2014 Constitution will significantly expand the authority of the military and grant the executive authority, particularly the President, broad and unchecked supervisory powers over the judiciary and the Public Prosecutor, in contravention of fundamental rule of law principles concerning the separation of powers, civilian oversight over the military, the independence of the judiciary and the right to a fair trial by a competent, independent and impartial tribunal.

Amendments to articles 185, 189 and 193 of the Constitution severely undermining judicial and prosecutorial independence

Under amended article 185, the President will have the authority to appoint the heads of judicial bodies and authorities from their seven most senior deputies. The President will be the head of a "Supreme Council for Judicial Bodies and Authorities" (Supreme Council) that will consist of the Chief Justice of the Supreme Constitutional Court, the heads of judicial authorities and bodies, the President of the Cairo Court of Appeal, and the Prosecutor General. The Supreme Council will be a top body supervising the judiciary and whose independence is vital for the overall judicial independence. The amendment provides this "Supreme Council" with the authority to determine the conditions of appointment, promotion and delegation of members of the judicial bodies, as well as a consultative role on draft laws organizing the affairs of judicial bodies and authorities. Decisions of the Supreme Council shall be taken with the approval of a majority of its members, including the President of the Council.

Under article 193, paragraph 3, the President will have the authority to select the Chief Justice of the Supreme Constitutional Court (SCC) from the five most senior Deputies of the President of the Court, and to select every Deputy President from two nominees (one nominated by the SCC's General Assembly and the other by its President). The President will also have the authority to appoint the head and members of the Commissioners'

Authority upon nomination by the Chief Justice of the SCC and after consulting with the SCC's General Assembly. The Commissioner's Authority is a body composed of judges who provide opinions to the Chief Justice on constitutional and legal issues arising in cases pending before the SCC.

The amendment to article 189, paragraph 2, will also grant the President the power to appoint the Prosecutor General based on a list of three individuals nominated by the Supreme Judicial Council from the Deputies of the President of the Court of Cassation, the Presidents of the Court of Appeal and the Assistants Prosecutor General.

In recent years, President al-Sisi approved several laws that further undermined judicial independence. For example, under Law No. 13 of 2017, the President gave himself the power to choose the Presidents of the Court of Cassation, the State Council, the Administrative Prosecution Authority and the State Lawsuits Authority. Law No. 13 of 2017 is currently subject to a constitutional challenge before the SCC.

The amendments to articles 185 and 193 of the constitution, together with Law No. 13 of 2017, will grant the President and thereby the executive almost complete control over the judiciary.

The proposed constitutional amendments will be non-compliant with the right to a fair trial by a competent, independent and impartial tribunal, which is guaranteed by article 14 of the International Covenant on Civil and Political Rights (ICCPR), articles 7 and 26 of the African Charter on Human and Peoples' Rights (the African Charter), and articles 12 and 13 of the Arab Charter of Human Rights (the Arab Charter), all ratified by Egypt, and which require the separation of powers between the executive and judicial branches of government.

Independence of the judiciary

Article 12 of the Arab Charter places a legal obligation on Egypt to guarantee the independence of the judiciary. This incorporates the prescriptions of the United Nations Basic Principles on the Independence of the Judiciary (UN Basic Principles) which affirm that all governmental and other institutions must respect the independence of the judiciary and as well as the African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (AU Fair Trial Principles) (principle A(4)(g)).

The UN Special Rapporteur on the Independence of Judges and Lawyers, and numerous courts and international and regional guidelines have emphasized that the separation of powers between the executive and judicial branches of government and the

independence of the judiciary are mutually interdependent principles.¹ Independence requires procedures for the selection, appointment, promotion, transfer and discipline of judges to be transparent and free from overall executive control. International standards, monitors and experts, including the Human Rights Committee, the UN Special Rapporteur on the Independence of Judges and Lawyers and AU Fair Trial Guidelines all underline the importance the establishment of an independent body for the selection and supervision of judges, which should be constituted of at least a majority of judges elected by their peers, and free from executive interference. The UN Basic Principles (principle 10) and of the AU Fair Trial Principles (principle A(4)(h),(i) and (k)) indicate that the process for the appointment of persons to judicial office should also be transparent and subject to strict selection criteria based on merit.

In *Egypt's Judiciary: A Tool of Repression*, the ICJ previously reported on the current framework governing the judiciary and prosecutors in Egypt and its non-compliance with the right to a fair trial under international law.² The report explained that the Supreme Judicial Council (SJC) is composed of judges determined by seniority rather than election by their peers, and has no autonomous decision-making power over judicial careers, including over the appointment of some judges or the assignment and disciplining of judges.

The amendments will give the powers under Law No. 13 of 2017 constitutional status; grant the President the power to appoint judges at the head of all judicial bodies, including the SCC, without any judicial involvement other than SJC's nomination of a pool of judges who are selected by seniority rather than merit; and determine the conditions under which all judges are appointed and promoted and the organization of judicial bodies and authorities. The amendments will also give the President power to influence the outcome of cases studied by the SCC through determining the composition of the Commissioners' Authority that advises members of the judiciary deciding on them.

Independence of the Public Prosecutor

The right to a fair trial also requires that the Prosecutor act independently and without undue influence from the executive. Article 2 of the United Nations Guidelines on the Role of Prosecutors (UN Guidelines) makes clear that States must ensure selection criteria for prosecutors "embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of ... political or other opinion." Article 4 of the UN Guidelines, as well principle F of the AU Fair Trial Principles,

¹ Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, A/HRC/11/41, 24 March 2009
<https://undocs.org/en/A/HRC/11/41>

² International Commission of Jurists, *Egypt's Judiciary: A Tool of Repression Lack of Effective Guarantees of Independence and Accountability*, 2016
<https://www.icj.org/wp-content/uploads/2016/10/Egypt-Tool-of-repression-Publications-Reports-Thematic-reports-2016-ENG-1.pdf>

affirms that prosecutors must be able to perform their professional functions without *inter alia* intimidation or improper interference.

The Public Prosecutor is currently selected by the SJC and appointed by Presidential Decree. The Minister of Justice already exercises authority over the Office of the Public Prosecutor (OPP), including by removing prosecutors from specific investigations and assigning them to investigative judges and by determining whether certain cases involving crimes committed against the “State” should be investigated and prosecuted.³ There is also a lack of objective and merit-based criteria for the appointment of more senior prosecutors and promotion within the OPP, no provision for addressing discriminatory practices in the appointment of prosecutors, no clear and transparent procedure set out in law for the promotion of prosecutors and no code of conduct governing the OPP. Prosecutors in Egypt have consistently failed to effectively investigate and prosecute gross human rights violations and other serious crimes committed by State actors in particular, and the rare criminal investigations against law enforcement officers are often protracted and inconclusive.⁴

The Presidential power under the proposed amendment to article 189 of the Constitution would increase the executive’s interference in the role of the Public Prosecutor and entrench the impunity that has been the rule for alleged crimes by State actors. The Special Rapporteur on the independence of judges and lawyers has already noted with concern the lack of clear separation between the prosecution and the executive in Egypt.⁵ The additional power of the President to appoint the Public Prosecutor will facilitate appointments based on political or other improper objectives and, in turn, likely risk unduly influencing decisions taken by the Prosecutor and subordinates acting upon their authority, including by refraining from investigating and prosecuting cases involving the commission of crimes by members of the executive, the President or other State officials or associated private persons. Moreover, judicial officers seeking appointment as the Public Prosecutor may be unduly influenced to decide cases favourably to the President and the executive with a view to gaining promotion or favourable assignments or other conditions of work.

³ International Commission of Jurists, *Egypt’s Judiciary: A Tool of Repression Lack of Effective Guarantees of Independence and Accountability*, 2016, pp. 114-130

<https://www.icj.org/wp-content/uploads/2016/10/Egypt-Tool-of-repression-Publications-Reports-Thematic-reports-2016-ENG-1.pdf>

⁴ Human Rights Watch, *Egypt: No Justice for Rab’a Victims 5 Years on - Impunity for Officers; Unfair Mass Trials for Survivors*, 13 August 2018.

<https://www.hrw.org/news/2018/08/13/egypt-no-justice-raba-victims-5-years>

⁵ UN Office of the High Commissioner for Human Rights, *Human Rights Expert Concerned Over Law on the Judiciary In Egypt*, 2006.

<https://newsarchive.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=2854&LangID=E>

Amendments to articles 200, 204 and 234 of the Constitution expanding military powers

These amendments will significantly expand the authority of the military in violation of rule of law principles and the right to a fair trial by a competent, independent and impartial tribunal.

Military interference in civilian affairs

Under article 200, paragraph 1, the military will have the duty to “protect the constitution and democracy, and safeguard the basic components of the State and its civilian nature, and the people’s gains, and individuals rights and freedoms,” in addition to its current mandate to “protect the country, and preserve its security and territories.” Under amended article 234, the currently temporary role of the Supreme Council of the Armed Forces’ (SCAF) in approving the appointment of the Minister of Defence, who is also Commander of the armed forces, will also be made permanent.

The amendments appear designed to enable the military to intervene in civilian governance, and public and political spheres that are the responsibility of law enforcement agencies. In the context of the 2013 military coup – deemed unconstitutional by the African Union (AU), which temporarily suspended Egypt from AU activities – they also appear designed to justify any future removals of the head of State by the military or canceling the results of free elections and interrupting the democratic process.⁶ The amendments could also have the effect of shielding members of the military from accountability for human rights violations and other crimes, including those involving the use of excessive force, dispersal of peaceful protests and other violations committed in the name of maintaining the constitution and democracy.

It is a fundamental principle of the rule of law that the military should be subject to civilian oversight and should not have any direct or indirect interference in governance. The UN Human Rights Council, in reaffirming that civilian authority of the military is a key component of human rights, democracy and the rule of law, has called on States to ensure that “the military remains accountable to relevant national civilian authorities.”⁷ The UN Human Rights Committee has persistently highlighted the need to subject armed forces to effective control by civilian authorities.⁸

⁶ Aaron Maasho, “African Union suspends Egypt”, in *Reuters*, 5 July, 2013.

<https://www.reuters.com/article/us-egypt-protests-africa/african-union-suspends-egypt-idUSBRE9640EP20130705>

⁷ UN Human Rights Council, Resolution on Human rights, democracy and the rule of law, A/HRC/RES/19/36, para 16 (j)(vi)

<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G12/131/66/PDF/G1213166.pdf?OpenElement>

⁸ UN Human Rights Committee (HRC), Concluding Observations: Romania, 1999, CCPR/C/79/Add.111

<https://undocs.org/CCPR/C/79/Add.111>

see also: UN Human Rights Committee (HRC), Concluding Observations: El Salvador, 1994, CCPR/C/79/Add.34

Egypt's military already has expansive powers to determine policies and intervene in civilian affairs without civilian oversight.⁹ The Constitution does not provide for civilian oversight over the military, and the amendments would accordingly place the military in a position in which it has significant authority to act without restriction and, likely, with impunity. The military also has a history of exercising its authority arbitrarily and outside the framework of the rule of law, with blanket impunity for violence against women¹⁰, the killing of hundreds of protestors¹¹, and the demolition of homes¹² in the name of fighting terrorism. Such practices are in clear conflict with Egypt's obligation under international law to investigate and prosecute gross human rights violations and other serious crimes.

Trial of civilians by military court

The military's increased power would be coupled with an unprecedented expansion of the jurisdiction of military tribunals. Under amended article 204, paragraph 2, military tribunals will have jurisdiction over crimes committed by civilians "that represent an *assault*" against military facilities, equipment, weapons, documents, and public funds, among many other things, removing the pre-amendment requirement that such assaults be "*direct*." Moreover, the range of facilities subject to such assaults will also be expanded to include those that have "the same nature or the facilities that the military protects," instead of facilities that fall "under their authority" or "stipulated military or border zones." The amendment will, in effect, make the expansion of the military court's jurisdiction over public universities and other public places in Law 136/2014 on Protecting and Safeguarding Public and Vital Facilities constitutional.

This amendment "constitutionalizes" Decree No. 136 of 2014 that President al-Sisi issued in October 2014, which has expanded the subject matter jurisdiction of military courts to include any crimes committed on public properties or vital facilities. Since that decree was issued, over 15,500 civilians, including scores of children, have been referred to military prosecution.¹³

<https://undocs.org/CCPR/C/79/Add.34>

⁹ International Commission of Jurists, *Submission to the Universal Periodic Review of Egypt*, March 2014 <https://www.icj.org/wp-content/uploads/2014/03/ICJ-UPR-EGYPT-STAKEHOLDER-SUBMISSION-FINAL-14-MARCH-2014.pdf>

¹⁰ Human Rights Watch, *Egypt: Military Impunity for Violence Against Women*, 7 April 2012 <https://www.hrw.org/news/2012/04/07/egypt-military-impunity-violence-against-women>

¹¹ Human Rights Watch, *Egypt: No Justice for Rab'a Victims 5 Years on*, 13 August 2018, <https://www.hrw.org/news/2018/08/13/egypt-no-justice-raba-victims-5-years>

¹² Human Rights Watch, *Egypt: Army Intensifies Sinai Home Demolitions*, 22 May 2018, <https://www.hrw.org/news/2018/05/22/egypt-army-intensifies-sinai-home-demolitions>

¹³ Human Rights Watch, *Egypt: Events of 2017*, January 2018, <https://www.hrw.org/world-report/2018/country-chapters/egypt>

In addition, the way this decree has been interpreted in practice is not only very broad and can theoretically include any crime, but the Military Prosecutor has the authority to decide whether a certain crime falls within military jurisdiction as well.

Under international law and standards, including article 14 of the ICCPR, principle L of the AU Fair Trial Principles, principles 5 and 8 of the Draft principles governing the administration of justice through military tribunals (Decaux Principles), and principle 29 of the Updated set of Principles for the protection and promotion of human rights through action to combat impunity, the jurisdiction of military courts should generally be limited to military offences, in particular disciplinary offences, committed by military personnel.¹⁴ Military courts should not have jurisdiction over civilians or over gross human rights violations, including but not limited to torture, extrajudicial executions and enforced disappearances.

Military courts are not independent judicial authorities for the purposes of a fair trial under article 14 of the ICCPR. In its Resolution on the Right to a Fair Trial and Legal Assistance in Africa, the African Commission on Human and Peoples' Rights stated that "military courts should respect the norms of a fair trial" and that "[t]hey should in no case try civilians."¹⁵ The Human Rights Committee stated that trying civilians in military courts is only permissible in very exceptional circumstances¹⁶ and has called on States to prohibit the use of military courts to try civilians.¹⁷ The Special Rapporteur on the independence of judges and lawyers and the Working Group on Arbitrary Detention have also emphasized that military courts are incompetent to try civilians.¹⁸

¹⁴ International Commission of Jurists, *Legal Commentary to the ICJ Geneva Declaration, Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis*, 2011

<https://www.icj.org/wp-content/uploads/2011/05/ICJ-genevadeclaration-publication-2011.pdf>

¹⁵ *Law Office of Ghazi Suleiman v. Sudan, Communications 222/98 and 229/99*, African Commission on Human and Peoples' Rights, 33rd Ordinary Session, May 2003. Para. 65.

<http://hrlibrary.umn.edu/africa/comcases/222-98.html>

¹⁶ UN Human Rights Committee, General Comment No. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, UN Doc. CCPR/C/GC/32, para 22.

https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f32&Lang=en

¹⁷ UN Human Rights Committee, Concluding observations of the Human Rights Committee: Chile UN Doc. CCPR/C/CHL/CO/5, para 12.

UN Human Rights Committee, UN Human Rights Committee: Concluding Observations: Lebanon, 5 May 1997, UN Doc. CCPR/C/79/Add.78, para 14

<https://www.refworld.org/docid/3ae6b03214.html>

¹⁸ UN General Assembly, Note by the Secretary-General on the Independence of judges and lawyers, 7 August 2013, A/68/285

<https://undocs.org/A/68/285>

Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/1999/63, para. 80.

<https://undocs.org/E/CN.4/1999/63>

As discussed in detail in *A Tool of Repression*¹⁹ and HRW's report on *Egypt: Children on Trial*²⁰, since coming to power in February 2011, the SCAF has referred over 12,000 civilians, including children, to military courts, for "assaults against the military" or in cases in which one of the victims was a member of the military. This has included referrals for crimes such as "defaming the armed forces," for leaking videos of current President Abdel-Fattah al-Sisi. Since Presidential Decree No. 136 was passed in 2014, which expands the subject matter jurisdiction of military courts to include any crimes committed on any public property or vital facility, thousands of civilians have already been prosecuted in military courts.

Military trials in Egypt are inherently unjust. Military judges are serving military officers appointed by Minister of Defense, and are not required to have the same legal training as civilian judges and are subject to the military chain of command including in the course of their judicial functions, and are, as such, not independent. In the conduct of trial proceedings, accused persons are not afforded adequate time and facilities to prepare a defence, and are also not guaranteed the right to communicate confidentially with counsel of their choice, in both law and practice. Military trials are also closed to the public, and the use of "confessions" or other information obtained through torture or other ill-treatment as evidence is routine.

¹⁹ International Commission of Jurists, *Egypt's Judiciary: A Tool of Repression Lack of Effective Guarantees of Independence and Accountability*, 2016
<https://www.icj.org/wp-content/uploads/2016/10/Egypt-Tool-of-repression-Publications-Reports-Thematic-reports-2016-ENG-1.pdf>

²⁰ Human Rights Watch, *Egypt: Children on Trial. Stop Sending Juveniles Before Military Courts*, 27 March 2012
<https://www.hrw.org/news/2012/03/27/egypt-children-trial>