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# Separating Law and Politics: Challenges to the Independence of Judges and Prosecutors in Egypt

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Report of the International Bar Association Human Rights Institute (IBAHRI)  
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# Glossary of Acronyms

ACIJLP	Arab Center for the Independence of the Judiciary and the Legal Profession
AfCHR	African Commission on Human and Peoples' Rights
ANHRI	Arabic Network for Human Rights Information
CCP	Code of Criminal Procedure (Law 23 of 1971, as amended)
CoE	Council of Europe
ECtHR	European Court of Human Rights
FJP	Freedom and Justice Party (political party representing the Muslim Brotherhood)
HRW	Human Rights Watch
IAP	International Association of Prosecutors
IBA	International Bar Association
IBAHRI	International Bar Association's Human Rights Institute
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
JAL	Judicial Authority Law No 46/1972
MCJ	Military Code of Justice
NCHR	National Council for Human Rights
OPP	Office of the Public Prosecutor
SCAF	Supreme Command of the Armed Forces
SJC	Supreme Judicial Council
<i>Tafteesh</i>	Judicial Inspection Committee
UNHRC	UN Human Rights Committee

# Executive Summary

Today, Egypt's Acting President is a judge: former head of Egypt's Supreme Constitutional Court, Adly Mansour. The nation's last two presidents – Mohamed Morsi and Hosni Mubarak – are on trial, facing the death penalty. Since President Morsi's ouster in July 2013, Egypt's judges have played a central role in drafting the country's new constitution. They also supervised a referendum in early 2014 which approved this new constitution (the '2014 Constitution') and paves the way for the transition to presidential and parliamentary elections. There is no dispute: in practice and in process, judges have been at the centre of Egypt's political life.

Judges are an important force in any political transition. At a time when a country's political leaders are being replaced, its constitution and laws rewritten, and former officials standing trial, judges can safeguard – or undermine – positive change. Judges who are competent and independent can be the most important guardians of individual freedom, reining in malignant political forces when they encroach on human rights. Judges who are in the government's pocket will instead be used as a conduit for the state's abuses. When the International Bar Association's Human Rights Institute (IBAHRI) visited Cairo in June 2013, it found that Egyptians recognised the importance of the judiciary, but were divided on how to judge their judges.

The presidency of Mohamed Morsi, the 2012 candidate for the Muslim Brotherhood's (the 'Brotherhood') Freedom and Justice Party (FJP), was characterised by frequent verbal clashes with the judiciary, as well as a series of high-profile court decisions that polarised opinions about Egypt's judges. Judgments promulgated by the highest courts in the land invalidated each step of Morsi's planned transition: the courts held the Brotherhood-dominated parliament to be unconstitutional, and then prevented Morsi from holding elections to replace it expeditiously. The courts found the two parliamentary committees – established by Morsi to draft a new Egyptian constitution – to be illegal. They reversed the President's appointment of Talaat Abdullah as the new Prosecutor General. Supporters of Morsi have tended to see these judgments as cynical political blows to democracy by anti-Brotherhood judges. Others consider them proof of judicial independence and a necessary safeguard for freedom in the face of a government that clearly overreached.

In this report, the independence of the judiciary is examined with reference to Egypt's laws and practice, as well as amendments to the existing law that have been proposed (Chapter Three). It finds that, although independence is constitutionally protected and the highest courts frequently rule against the government, the Ministry of Justice is given wide powers over judges which provide scope for abuse. These include the right to assign judges to courts around the country, the ability to decide which judges are seconded to work in government ministries and the right to initiate disciplinary actions against judges. These powers threaten independence as they allow the Minister to reward or punish serving judges, and therefore provide an incentive for judges to please the government.

The legal framework also gives a role to the executive branch in the appointments system, particularly at the higher judicial level, allowing scope for politicised decision-making. A lack of transparency and the absence of public examinations for appointments also leads to a perception – if not a reality – of nepotism.

Other challenges for the judiciary include the underrepresentation of female judges, the need for increased professionalism and resources, and the continued use of military and other exceptional courts. It is deeply concerning that Egypt's new constitution still allows military courts to try civilians, even though the judges in these courts lack independence and the courts have been shown to lack fundamental due process guarantees. This report also concludes that proposed amendments to the law put forward by certain political parties that would apply retroactively to remove certain judges from office should not be pursued.

The report considers the crucial role played by public prosecutors in Egypt's judicial system (Chapter Four). The IBAHRI delegation also learned of several ways in which prosecutorial independence can be compromised in Egypt. The direct appointment of the Prosecutor General by the President has led to allegations of politicisation and reduced public confidence in the independence of this office. The IBAHRI therefore welcomes the introduction in the new 2014 Constitution of a provision that will move this authority to the judge-led Supreme Judicial Council (SJC). But the 2014 Constitution still allows the Minister of Justice to have a role in appointing investigating judges and transferring prosecutors to other posts, which has led to fears of politicised prosecutions of government opponents and an unwillingness to hold the government to account for abuses.

The record of prosecutions over the last three years in Egypt suggests that this fear is not hypothetical. Since Egypt's 2011 revolution, the crimes committed by security forces under the watch of each successive government have remained largely unaddressed – while political opponents have been enthusiastically pursued.

Three distinct prosecutorial trends are discernible. First, under the short period of military rule that followed the 2011 revolution, more civilians were prosecuted for 'crimes' against the military – such as the crime of 'insulting the military' – than had ever been prosecuted during 30 years of Mubarak rule. Secondly, under Morsi's Brotherhood presidency, those who insulted Islam or insulted the President himself were targeted. According to some sources, the number of prosecutions brought for 'insulting the president' in the Morsi period exceeded the number of such prosecutions brought over three decades under Mubarak and the number of persons who were sentenced to imprisonment for insulting Islam also increased dramatically. Finally, in the post-Morsi era during the second half of 2013, a startling number of prosecutions were initiated against Brotherhood figures, including the former President himself, the Brotherhood's entire senior leadership and thousands of others.

This record of selective prosecutions undermines the potential for a peaceful transition and reconciliation between communities in Egypt, as well as the right to freedom of expression in a new democracy. It is therefore suggested that a transitional justice process be put in place, ideally with international involvement to guarantee independence and impartiality. This would honour the rights of the many victims of serious crimes that have been committed in Egypt and combat impunity for government abuses.

In this report, the IBAHRI sets out a series of recommendations that it believes will enhance safeguards for the independence of the judiciary and prosecution service (Chapter Five). Despite the enormous challenges, Egypt is turning a corner in 2014, and the 2014 Constitution provides a solid basis for this fresh start. With appropriate safeguards in place, Egypt's judges and prosecutors can ensure that they play a key and positive role in the transition to a new democratic state that accounts for the violations of the past and is better able to protect the rights of all citizens.

# Chapter One: Terms of Reference and Methodology

This report has been prepared following an IBAHRI fact-finding mission to Egypt in June 2013.

The mission's terms of reference were as follows:

1. to follow-up on the IBAHRI's recommendation's contained in its November 2011 report, *Justice at a Crossroads: The Legal Profession and the Rule of Law in the New Egypt*, with a particular focus on the independence of the judiciary;
2. to write and publish a report containing its findings; and
3. to make recommendations.

Findings are primarily based on the 25 individual and group interviews, and consultations conducted by IBAHRI delegates in Cairo, Egypt, from 24–28 June 2013. During the week-long mission, the IBAHRI held over 20 meetings with more than 45 key stakeholders comprised of: a cross-section of the Egyptian Judiciary including judges of the Cairo Court of Appeal, the Supreme Judicial Council (SJC) and representatives of the Judges' Club; representatives of the Ministry of Justice; a legal advisor to the Presidency; legal advisors to the government; a representative of the Egyptian Bar Association; representatives of the Al-Wasat Party, the National Salvation Front, and the Social Democratic Party; representatives of the National Council for Human Rights (NCHR), the Egyptian Organisation for Human Rights, the Arab Center for the Independence of the Judiciary and the Legal Profession (ACIJLP); youth activists; and members of the diplomatic community.

However, the rapidly changing landscape during subsequent weeks in Egypt led the IBAHRI to extend its investigation to assess whether the developments had impacted the initial findings. It therefore undertook interviews, either in-person or remotely, between August and November 2013 with: the British Embassy in Cairo; Nasser Amin of the ACIJLP; Dr Muhammad Soudan and Dr Amr Mustafa of the Brotherhood; Mona Zulficar, lawyer and member of the 2013 constitutional drafting committee; and Gamal Eid of the Arab Network for Human Rights Information (ANHRI). In addition, delegates attended events focusing on developments in Egypt at Chatham House and elsewhere. The IBAHRI also requested an interview with a representative from the Ministry of Justice under Egypt's interim administration; however, this request was turned down.

An analysis of applicable domestic and international legal instruments, secondary sources, including NGO and UN human rights reports, academic articles and media reports was also undertaken and the report was compiled in accordance with the Guidelines on International Human Rights Fact-Finding Visits and Reports (the 'Lund-London Guidelines').



## Delegation members

The IBAHRI would like to express its gratitude to the members of its fact-finding delegation. They were:

### *Amal Alamuddin, Rapporteur*

Amal Alamuddin is a barrister specialising in international law and human rights. She has represented clients in cases before the International Criminal Court (ICC), the International Court of Justice and the European Court of Human Rights (ECtHR), as well as in domestic courts in the UK and US. She also provides advice to governments and individuals on international law, and has been appointed to a number of United Nations commissions including as adviser to the UN Special Envoy on Syria, Kofi Annan, and as Counsel to the Inquiry launched by the UN Special Rapporteur on Counter-Terrorism and Human Rights on the use of drones in armed conflict. Alamuddin has worked on a number of cases involving Middle Eastern countries, including the prosecution of those responsible for the assassination of former Lebanese Prime Minister Rafiq Hariri; the investigation led by the Bahrain Independent Commission of Inquiry on human rights violations committed by security forces in 2011; and the *Libya* case alleging crimes against humanity committed by Saif Gaddafi and Abdallah Senussi at the ICC. She studied law at Oxford University and has an LL.M in International Law from New York University School of Law. She is also a qualified US lawyer and speaks fluent French and Arabic.

### *Nadia Hardman*

Nadia is a Programme Lawyer at the IBAHRI and manages projects in Azerbaijan, Egypt and Tajikistan. She is a UK-qualified lawyer with a Masters in Human Rights from University College London, and has worked in the Prosecutor's Office at the ICC, several London-based human rights NGOs and as an International Legal Consultant for an anti-human trafficking NGO in Cambodia where she implemented several access-to-justice projects. Prior to working for the IBAHRI, Nadia was Deputy Head of Partnerships and Legal Services at the London-based development charity, Advocates for International Development, where she managed an international pro bono project.

# Chapter Two: Background Information

Today, Egypt's acting President is a judge: the former head of Egypt's Supreme Constitutional Court Adly Mansour. The nation's last two presidents – Mohamed Morsi and Hosni Mubarak – are on trial, facing the death penalty. Since President Morsi's ousting in July 2013, Egypt's judges have played a central role in drafting the country's new 2014 Constitution and supervised a referendum in early 2014 that brought this constitution into force, paving the way for fresh presidential and parliamentary elections.

It has been three years since Egypt became the second country to join the democratic 'Arab Spring' movement, following Tunisia, in January 2011. The people of Egypt, led by a youth movement active on social networking websites, took to the streets demanding change from the regime of President Hosni Mubarak. At least 840 Egyptians lost their lives and some 6,467 were injured as a result of clashes between protesters, security forces and pro-Mubarak supporters. As a result, President Mubarak stood down, and is now involved in a lengthy retrial for his alleged role in the killing of hundreds of protesters during the 2011 uprising against him.

The 2011 revolution was largely peaceful but managed to topple a dictatorial military regime that had survived for six decades (three under its last President) in just 18 days: 'it was an extraordinary beginning'.<sup>1</sup> When the IBAHRI visited Egypt in June 2011, Egypt was run by the Supreme Command of the Armed Forces (SCAF) and the authorities were preparing for parliamentary elections later that year. The plan at the time was 'first, a new parliament, then a new constitution, and finally a new president.'<sup>2</sup>

What followed was a more chaotic sequence of events. Parliamentary elections were held in November 2011 and the parliament, dominated by the Brotherhood's political party – the Freedom and Justice Party (FJP) – appointed a committee to draft a new constitution. But on 10 April 2012, the activities of this drafting committee were suspended by the Supreme Administrative Court on the basis that its members did not represent the full spectrum of Egyptian society. Shortly afterwards, on 14 June 2012, Egypt's Supreme Constitutional Court also declared the Parliament's lower house unconstitutional and called for new parliamentary elections to be held.

Ahead of these new parliamentary elections, Mohamed Morsi became Egypt's first democratically elected President. On 24 June 2012, Morsi beat Ahmed Shafiq, a retired air force commander who served as the last prime minister of former President Mubarak, with 51.7 per cent of the vote. The polarising election run-off was widely considered to represent a choice between 'change or no change', and the Brotherhood emerged as the most organised group. But by the time Morsi came into power, there was neither a constitutionally legitimate lower house nor a valid constitution defining his right to govern.

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1 Conversation with Professor Cherif Bassiouni at the International Bar Association Annual Conference in Boston, October 2013, available at <http://vimeo.com/76852034>. Unless otherwise specified, all URLs last accessed 14 January 2014.

2 International Bar Association's Human Rights Institute (IBAHRI), *Justice at a crossroads: The legal profession and the rule of law in the New Egypt* (November 2011) para 10, available at [www.ibanet.org/Document/Default.aspx?DocumentUid=981DD862-B07F-4E6F-8A17-EDC9E9D07D64](http://www.ibanet.org/Document/Default.aspx?DocumentUid=981DD862-B07F-4E6F-8A17-EDC9E9D07D64), last accessed 17 January 2014.

Morsi came in to power promising that as President he would build a ‘democratic, civil and modern state’ that guaranteed the right to freedom of religion and peaceful protest. ‘The presidency will be an institution’, he said, because ‘[t]he Superman era is over’.<sup>3</sup> But on 22 November 2012, amid considerable controversy around the composition of a new committee established by Morsi to draft the constitution,<sup>4</sup> Morsi promulgated an even more controversial interim ‘constitutional declaration’ that had two important effects.<sup>5</sup>

The first was to remove Abdel Meguid Mahmoud as the country’s chief prosecutor and replace him with Talaat Abdullah.<sup>6</sup> The second removed Morsi’s decisions from the scope of judicial scrutiny. It made presidential acts ‘final and unchallengeable by any individual or body until a new constitution has been ratified and a new parliament has been elected’.<sup>7</sup> It also explicitly revoked the power of the Constitutional Court to declare Parliament or the constitutional drafting committee unconstitutional (as it had previously done).<sup>8</sup> The declaration was widely condemned as a power-grab, both in Egypt and abroad.<sup>9</sup> It was also perceived by many judges to be a direct attack on their independence as it placed presidential decrees outside the scope of judicial review and sought to limit the sphere of influence of the Constitutional Court.<sup>10</sup>

Although the 22 November declaration was later diluted,<sup>11</sup> it crystallised feelings that there was an ideological clash between the government and the judiciary. One of the reasons for Morsi’s declaration appears to have been to prevent the judges from derailing the timetable for a new constitution by questioning the constitutionality of the drafting process.<sup>12</sup> Ultimately the controversial drafting committee rapidly agreed on a draft constitution, publishing it on 30 November 2012.

Two days after this draft was published, the Constitutional Court was to issue a decision about whether the drafting committee – which had been established by a parliament previously declared unconstitutional – could in fact create a valid constitution for the people to approve. But, as crowds surrounded the court, with Islamist demonstrators reportedly carrying banners denouncing the Court and some of its judges, the Court issued a statement explaining that the judges decided against

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3 ‘Egypt Islamist candidate Mursi promises broad coalition’ (*BBC News*, 29 May 2012) available at [www.bbc.co.uk/news/world-middle-east-18252938](http://www.bbc.co.uk/news/world-middle-east-18252938).

4 Following talks between members of Parliament – including those in the lower house that had been declared unconstitutional by the Constitutional Court – and other representatives of Egyptian society, a new constitutional drafting committee was established in June 2012. Although this committee was seen as more representative than the first, there was strong opposition to the majority Islamist composition of this committee, and the Constitutional Court received 42 separate challenges to it in the period between June and November 2012. See ‘Q&A: Egypt Constitutional Crisis’ (*BBC News*, 24 December 2012) available at [www.bbc.co.uk/news/world-middle-east-20554079](http://www.bbc.co.uk/news/world-middle-east-20554079).

5 22 November Decree, English text available at <http://english.ahram.org.eg/News/58947.aspx>. See Art 5 (explicitly prohibiting the Constitutional Court from dissolving Parliament’s upper house or the committee selected to draft the constitution).

6 *Ibid*, Art 3. The new requirement included in the declaration was that a Prosecutor serve a single 4-year term and was to apply retroactively meaning that Abdel Maguid, who had served six years at the time, would be required to step down.

7 Presidential Decree No 28 of 2012.

8 22 November Decree, Art 5.

9 ‘Egypt: Morsi decree undermines rule of law’ (*Human Rights Watch*, 26 November 2012), available at [www.hrw.org/news/2012/11/26/egypt-morsy-decree-undermines-rule-law](http://www.hrw.org/news/2012/11/26/egypt-morsy-decree-undermines-rule-law); see also ‘Egypt: President Morsi changes to the constitution trample rule of law’ (*Amnesty International*, 23 November 2012), available at [www.amnesty.org.uk/press-releases/egypt-president-morsi-changes-constitution-trample-rule-law](http://www.amnesty.org.uk/press-releases/egypt-president-morsi-changes-constitution-trample-rule-law).

10 22 November Decree, Art 2.

11 President Morsi cancelled parts of this constitutional decree on 8 December 2012, following protests by the judiciary and some opposition groups. US State Department, *Country Report on Human Rights Practices: Egypt* (19 April 2013), available at [www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm](http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm).

12 There had been rumours circulating in Egypt in November 2012 that the Constitutional Court was preparing to give judgment on several of the challenges to the Constituent Assembly’s constitutionality.

entering the building because they feared for their safety – and therefore they could not deliver their verdict. The statement called the occasion ‘the blackest day in the history of the Egyptian judiciary’.<sup>13</sup>

Professor Cherif Bassiouni, an expert in international law and Egyptian affairs, explains this low-point in the following manner:

‘By the time the Constitutional Court was going to decide on this the Muslim Brotherhood sent people to surround the court to prevent the court from entering its decision. And in the meantime [the Presidency] submitted that [constitution] to a referendum. They [the Muslim Brotherhood] were able to get their people to vote. Those in opposition stayed home and so the referendum was passed. So you had a referendum that validated a constitution adopted by a committee whose composition was declared unconstitutional. [And] the parliament was still not in existence... [This resulted in] a legal mish-mash.’<sup>14</sup>

The constitution was ultimately adopted on 26 December 2012, making it Egypt’s first complete, post-Mubarak constitution (the ‘2012 Constitution’).

The 2012 Constitution introduced new conservative and Islamic-orientated statements. Article 44 banned insults of religious ‘messengers or prophets’ and Article 11 provided that the state should protect morals and ‘decency’. Articles 2 and 219 also specified that the main source of legislation should be Sharia Islamic principles as interpreted by ‘a committee of theocrats [aligned with the Islamic] Hannafi school’. As Bassiouni put it: ‘I don’t think you can get more narrowly theocratic than that.’<sup>15</sup>

The adoption of the 2012 Constitution came at a time of increasing tension between the Brotherhood’s popular support base and the judiciary. On 22 December 2012, the head of the Judges’ Club, Judge Ahmad Al-Zind, was physically attacked as he left the club’s premises in Cairo. Judge Al-Zind publicly blamed the attack on ‘bearded’ individuals, a barely-veiled allusion to the Brotherhood, and claimed that ‘judges in Egypt are targeted by a faction that thinks it is an Egyptian monarchy [and] works to prejudice the Egyptian judicial authorities.’<sup>16</sup>

By the beginning of 2013, President Morsi had a constitution but no constitutionally approved Parliament. So, on 22 February 2013, Morsi issued a decree setting a first round of parliamentary elections on 22 April, with three further rounds to follow. But less than two weeks later, on 6 March, an administrative court declared Morsi’s decree null and void, and referred the Election Law to the Constitutional Court for a further review. Morsi announced that he respected the court’s ruling and deferred to the outcome of the judicial process.<sup>17</sup>

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13 ‘Egypt court halts all work amid Islamist “pressure”’ (*BBC News*, 2 December 2012), available at [www.bbc.co.uk/news/world-middle-east-20571718](http://www.bbc.co.uk/news/world-middle-east-20571718). The Court still issued its verdict later, holding this drafting committee unconstitutional (as it had held the first one to be). See ‘SCC deems Shura Council and Constituent Assembly unconstitutional’ (*Daily News Egypt*, 2 June 2013) available at [www.dailynewsegyp.com/2013/06/02/scc-deems-shura-council-and-constituent-assembly-unconstitutional](http://www.dailynewsegyp.com/2013/06/02/scc-deems-shura-council-and-constituent-assembly-unconstitutional).

14 Conversation with Professor Cherif Bassiouni at the IBA, from 57:00 (See n 1 above).

15 *Ibid*, from 58:55.

16 ‘Unknown individuals attack the head of the Judges’ Club’ (*BBC Arabic*, 23 December 2012), available at [www.bbc.co.uk/arabic/middleeast/2012/12/121223\\_egypt\\_judges.shtml](http://www.bbc.co.uk/arabic/middleeast/2012/12/121223_egypt_judges.shtml).

17 See tweet posted to online social networking site Twitter ‘The Presidency respects Administrative Court ruling to suspend Lower House Elections & refer Elections Law back to the Constitutional Court’, 6 March 2013, available at [www.twitter.com/EgyPresidency/status/309362527417012224](http://www.twitter.com/EgyPresidency/status/309362527417012224). See Annex A.

The upper house of the Egyptian Parliament, the Shura Council, then passed amendments to the electoral laws<sup>18</sup> so that new parliamentary elections could now be called. The Shura Council sent these amendments to the Constitutional Court for a ruling on their constitutionality. But again, on 26 May, the Constitutional Court returned a decision holding several of their provisions unconstitutional and referring them back to the Shura Council for reconsideration. In light of the Constitutional Court's decision, President Morsi and other high-ranking members of the FJP announced that parliamentary elections might now be delayed until 2014.

On 2 June 2013, the Constitutional Court issued another controversial ruling, unconnected with deliberations over the electoral laws, on the constitutionality of the process by which the Shura Council had itself been elected (the lower chamber had already been declared unconstitutional in 2012). This judgment held that the Shura Council had also been elected on the basis of an unconstitutional electoral law and that it should therefore also be dissolved, though it found that the chamber could continue in session until a replacement was elected.<sup>19</sup>

At the same time, President Morsi's appointment of a new Prosecutor General was invalidated in the lower courts (and, later, the highest court of appeal).<sup>20</sup>

These court decisions became the culmination of a string of high-profile rulings that polarised opinion about Egypt's judiciary. Judgments promulgated by the highest courts had invalidated the FJP-dominated lower and upper chambers of Parliament; prevented Morsi from holding elections to replace them expeditiously; found the two parliamentary committees established to draft the constitution to be illegal. And they reversed the President's appointment of Talaat Abdullah as the Prosecutor General.<sup>21</sup> Many Morsi supporters saw these judgments as cynical political blows to democracy by anti-Brotherhood judges. Others considered them proof of judicial independence and the only guarantor of freedom in the face of a government that had clearly overreacted.

By the time the IBAHRI conducted its fact-finding mission in late June 2013, there was a palpable revolutionary fervour amongst a large segment of the population and a severe polarisation in views. Most interviewees were decisively pro- or anti-Morsi and many critics underlined the economic and security crisis in the country, as well as the clash between Morsi and the judiciary, as the critical areas of frustration.

Under Morsi's tenure, the economy had almost collapsed,<sup>22</sup> while the crime rate skyrocketed.<sup>23</sup> The IBAHRI was also told that Morsi had made unpopular decisions that were perceived by many to be indicative of a policy of 'islamicisation' and a usurpation of power. As Bassiouni has put it, 'it was very

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18 These were a 1972 law on the election and performance of parliament's lower house, and a 1956 law on the exercise of political rights.

19 It also held that the second drafting committee was unconstitutional. See, 'SCC deems Shura Council and Constituent Assembly unconstitutional' (*Daily News Egypt*, 2 June 2013), see n 13 above.

20 On 2 July 2013, the Court of Cassation ruled in favour of Abdel Meguid Mahmoud in a case he had brought against his dismissal as Public General. The Court of Cassation held that his dismissal and Morsi's appointment of Talaat Abdullah in his place were unconstitutional, and ordered that Mahmoud be reinstated to his former post.

21 'Court of Cassation rules Mubarak-era prosecutor general to return to post' (*Daily News Egypt*, 2 July 2013), available at [www.dailynewsegyp.com/2013/07/02/court-of-cassation-rules-mubarak-era-prosecutor-general-to-return-to-post](http://www.dailynewsegyp.com/2013/07/02/court-of-cassation-rules-mubarak-era-prosecutor-general-to-return-to-post).

22 'Egypt crisis: Army ousts President Mohammed Morsi' (*BBC News*, 4 July 2013), available at [www.bbc.co.uk/news/world-middle-east-23173794](http://www.bbc.co.uk/news/world-middle-east-23173794).

23 'Egypt's Crime Rate Skyrockets, Institutions "aren't stable" under Morsi' (*World Tribune*, 6 May 2013), available at [www.worldtribune.com/2013/05/06/egypts-crime-rate-skyrockets-institutions-arent-stable-under-morsi](http://www.worldtribune.com/2013/05/06/egypts-crime-rate-skyrockets-institutions-arent-stable-under-morsi).

obvious that the Morsi regime was moving the country towards a “theocracy” from which it would have been extremely difficult in the years to come to pull back’.<sup>24</sup>

Individuals interviewed by the IBAHRI also complained that Morsi encouraged animosity towards the judiciary by verbally attacking them and even naming individual judges he alleged to be corrupt. For instance, during the IBAHRI’s visit on 26 June 2013, Morsi gave a long speech, watched in packed cafés and homes across the country, in which he claimed that Judge Ahmad Al-Nimr was a ‘fraudulent judge’ and that he, along with 22 other judges, had been part of a network that had falsified election results under Mubarak.<sup>25</sup>

On the last day of June – the one-year anniversary of Morsi’s election to office – everything changed again. Egyptians took to the streets once more. Protestors led by the *tamarrod* (rebellion) youth movement organised what were reported to be the biggest demonstrations in human history to demand the resignation of the Morsi government.

In a televised address three days later, General Abdulfattah Al-Sisi, Commander-in-Chief of the Egyptian Armed Forces, announced that the army had intervened to remove President Morsi from office and suspend the 2012 Constitution in light of overwhelming public pressure.<sup>26</sup> In Morsi’s place, Adly Mansour, the head of the Constitutional Court, was appointed as interim president. People in opposing camps disputed whether this was a military coup or a second revolution. As Bassiouni told the IBA, ‘[t]he people... said how do I get around [the Morsi constitution]? I can’t go to the Constitutional Court; there is no parliament; I can’t go through an impeachment process; I can’t go through a recall process; I can’t go through new elections... the only thing I can do is I can go to the street... it was a military coup but it was a military coup which had some legitimacy to it.’<sup>27</sup>

Within a week President Mansour promulgated a constitutional decree,<sup>28</sup> set out a rough plan for political transition.<sup>29</sup> The first step was to establish a committee to draw up a new constitution that would be submitted to a referendum in 2014 – followed by parliamentary elections one to two months later and then presidential elections on a date to be set during the first week in which the new parliament convenes.<sup>30</sup>

In the period between the appointment of Mansour and 14 August, the security situation in Egypt deteriorated rapidly. Members of the Brotherhood and other Islamist parties clashed violently with security forces, resulting in hundreds of deaths and the paralysis of large parts of Cairo and other cities. Meanwhile some militants also reportedly attacked and killed members of the security forces.

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24 See n 1 above, from 58:00.

25 Speech by President Mohammed Morsi, 26 June 2013, from 0:32, available at [www.youtube.com/watch?v=uMEb4aTOvcl](http://www.youtube.com/watch?v=uMEb4aTOvcl).

26 ‘Egypt Army topples president, announces transition’ (*Reuters*, 3 July 2013), available at [www.reuters.com/article/2013/07/03/us-egypt-protests-idUSBRE95Q0NO20130703](http://www.reuters.com/article/2013/07/03/us-egypt-protests-idUSBRE95Q0NO20130703).

27 See n 1 above, from 59:00.

28 Constitutional Declaration of 8 July 2013. See ‘The full text of the 8 July Constitutional Declaration’ (Arabic), (*Almasryalyoum*, 9 July 2013) available at [www.almasryalyoum.com/node/1930526](http://www.almasryalyoum.com/node/1930526).

29 8 July Declaration, Arts 28–30.

30 *Ibid*, Arts 28 and 30.



This rise in violence resulted in the declaration of a state of emergency on 14 August 2013, restoring the draconian powers that were used in Egypt from 1967 to 2012,<sup>31</sup> despite the fact that certain parts of the Emergency Law were ruled unconstitutional by Egypt's Constitutional Court in June 2013.<sup>32</sup>

That same day, the security forces allegedly perpetrated what Human Rights Watch (HRW) called the 'most serious incident of mass unlawful killings in modern Egyptian history'<sup>33</sup> when they violently dispersed pro-Morsi protesters at Rabaa al-Adawiya mosque and at al-Nahda Square in Cairo.<sup>34</sup> The deaths of more than 30 detained protesters in police custody four days later also sparked nationwide outrage.<sup>35</sup>

Following the violence, Mohamed ElBaradei, Vice President for International Relations and the interim government's most high-profile liberal, resigned. At the same time a number of secular and liberal political forces<sup>36</sup> released a statement that blamed the Brotherhood for violence but also warned against the return of an oppressive police state that Hosni Mubarak's men were 'seeking to rebuild'.<sup>37</sup>

Violence against Brotherhood supporters has taken place in parallel with a prosecutorial crackdown on the Brotherhood that has led to the arrest of almost the entire Brotherhood leadership, including that of former President Morsi. Egyptian defence lawyers informed Amnesty International that in the two-month period following Morsi's ouster, approximately 3,000 supporters and members of the Brotherhood's political party were arrested.<sup>38</sup> The Brotherhood was also later designated a terrorist group by the government.

As Morsi's trial began, his predecessor Hosni Mubarak was released from prison pending a retrial on the charges he faces.<sup>39</sup> Egyptians reportedly tell a joke that sums this up:

'When you get elected here, they tell you, you serve two terms: one in the presidential palace, then one in prison.'<sup>40</sup>

Meanwhile, a drafting committee of 50 members, few of whom were Islamists,<sup>41</sup> began work in September on amending the constitution that was passed by Morsi in late 2012.

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31 Emergency Law (Law No 162/1958), as amended by Law No 50/1982.

32 'Egypt court rules upper house of parliament elected illegally' 2 June 2013, *The Guardian*, available at [www.theguardian.com/world/2013/jun/02/egypt-court-rules-parliament-illegally](http://www.theguardian.com/world/2013/jun/02/egypt-court-rules-parliament-illegally). This state of emergency was eventually lifted on 14 November 2013.

33 'Egypt Security Forces Used Excessive Lethal Force,' (HRW, 19 August 2013) available at [www.hrw.org/news/2013/08/19/egypt-security-forces-used-excessive-lethal-force](http://www.hrw.org/news/2013/08/19/egypt-security-forces-used-excessive-lethal-force).

34 Reports state that the violence resulted in the deaths of at least 300 persons, including a large number of women and children. Government pronouncements indicate that 43 police officers were also killed.

35 'Too Little, Too Late' (*Carnegie Endowment for International Peace*, 17 September 2013), available at <http://m.ceip.org/suda/?fa=f3008>.

36 The statement was signed by the Constitution Party, the Popular Alliance Party, the Strong Egypt Party, the Tagammu Party, Tamarrod, the April 6 Movement, and a number of political activists.

37 'Political bodies warn against the return of the "police state" and ask the "brotherhood" to stop demonstrating' (*Al Masr Al Youm*, 26 August 2013), available at [www.almasryalyoum.com/node/2064086](http://www.almasryalyoum.com/node/2064086).

38 'Egypt: Detained Morsi supporters denied their rights' (*Amnesty International*, 12 September 2013), available at <http://www.amnesty.org/en/news/egypt-detained-morsi-supporters-denied-their-rights-2013-09-12>.

39 On 21 August, a Cairo criminal court ordered Hosni Mubarak released from detention in a corruption case. The court ruling removed the last remaining legal grounds for his imprisonment in connection with the case. Mubarak still faces a retrial over his involvement in the killing of protesters during the uprising of 2011.

40 See n 22 above.

41 According to Amr Moussa, head of the drafting committee for the 2014 Constitution, 'an invitation was extended to all Islamic groups, including the Muslim Brotherhood. Of the parties of political Islam, only the Salafist Al Nour responded (the Brotherhood did not).' See 'Blueprint for a New Egypt' (*New York Times*, 8 January 2014), available at [www.nytimes.com/2014/01/09/opinion/blueprint-for-a-new-egypt.html?\\_r=0](http://www.nytimes.com/2014/01/09/opinion/blueprint-for-a-new-egypt.html?_r=0).

The text of this latest constitution (the 2014 Constitution) was released on 4 December 2013. It sets out the key provisions on the judiciary at articles 184–199. These include provisions protecting judicial independence;<sup>42</sup> criminalising interference with judicial affairs;<sup>43</sup> and providing for immunity of defence counsel.<sup>44</sup> Many judges have also welcomed the articles on assigning the role of choosing the Prosecutor General to the SJC<sup>45</sup> and setting a single figure for judicial bodies' budgets.<sup>46</sup>

Many of the provisions relating to human rights are an improvement on the 2012 Constitution. Many rights or freedoms, for instance the rights to freedom of movement and freedom of religious practice, continue to be subject to regulation by law.<sup>47</sup> Encouragingly, however, a greater number of freedoms are expressed to be absolute. Freedom from torture,<sup>48</sup> freedom from discrimination<sup>49</sup> and freedom of thought<sup>50</sup> are all expressed to be absolute. Even freedom of expression is framed in absolute terms,<sup>51</sup> even though under international law it is subject to some exceptions. It remains to be seen how this language will be applied in practice.

Although the 2014 Constitution still provides that 'principles of Islamic Sharia' are the main sources of legislation, the new text has removed some of the religious provisions criticised in Morsi's 2012 Constitution. The 2012 Constitution, for example, had given a quasi-judicial role to Sharia scholars at Al-Azhar University in Cairo,<sup>52</sup> who were 'to be consulted on matters of religious law'.<sup>53</sup> This role has been entirely removed from the new draft.<sup>54</sup> Of particular concern in the 2012 Constitution was Article 11, which provided that '[t]he state promotes morality, decency and public order' and was criticised for potentially paving the way for 'morality police' to patrol the streets of Cairo. This provision has been entirely removed from the 2014 Constitution, which no longer uses the term 'decency' at all. Article 74 also introduces stricter language forbidding the formation of political parties on the basis of religion.

The 2014 Constitution also has more robust protections for women and minorities. In Article 11 it provides that the 'state commits to achieving equality between women and men' and specifically protects women's rights to be 'appointed to judicial bodies and entities without discrimination'. This is a significant step forward given the Brotherhood's publicly stated opposition to the idea of 'equality' for women.<sup>55</sup>

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42 2014 Constitution, Article 186.

43 *Ibid*, Article 184.

44 *Ibid*, Article 198.

45 *Ibid*, Article 189.

46 *Ibid*, Article 185. See 'Judges divided over judicial power materials in draft constitution' (*Egypt Independent*, 20 November 2013), available at <http://www.egyptindependent.com/news/judges-divided-over-judicial-power-materials-draft-constitution> ('The committee has maintained the relationship between the three state authorities and the independence of the judiciary,' said Counselor Mahmoud Helmi al-Sherif, spokesperson for Egypt's Judges' Club').

47 2014 Constitution, Articles 62 and 64.

48 *Ibid*, Article 52.

49 *Ibid*, Article 53.

50 *Ibid*, Article 65.

51 *Ibid*, Article 65.

52 Al-Azhar is both a mosque and religious university in Cairo of great historical and religious importance to Sunni Muslims. Its scholars are considered an authoritative source of fatwas, or religious edicts, in Sunni Islam, but have not had any official role in the modern Egyptian state.

53 2012 Constitution, Article 4.

54 2014 Constitution, Article 7 (referring to Al-Azhar without mention of a consultative role).

55 See, "'Misleading and deceptive": Egypt's Islamists slam UN women's rights resolution' (*RT*, 15 March 2013) available at <http://rt.com/news/muslim-brotherhood-rejects-women-rights-290>.



The 2014 Constitution was approved by a referendum in early 2014 and represents an important milestone for the new Egypt. When the IBAHRI visited Cairo in 2011, it was after the first revolution – and the transition plan was first a new parliament, then a constitution, then a President. Mona Zulfikar, a prominent Egyptian lawyer and member of the post-Morsi constitutional drafting committee, sees a change in the transition plan as giving cause for hope. The plan now was to agree on a new constitution first, then plan for elections. ‘This time’, she told an audience in London in October 2013, ‘we are doing it right’.

# Chapter Three: The Independence of the Judiciary

## 3.1 Relevant international standards

Judicial independence is one of the fundamental building blocks of a free and democratic state, ‘a pre-requisite to the rule of law and a fundamental guarantee of a fair trial’.<sup>56</sup>

The right to a fair trial is enshrined in Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR), Article 13(1) of the Arab Charter on Human Rights and Article 26 of the African Charter on Human and Peoples’ Rights.<sup>57</sup> This means that the rules regulating the court system – including the procedure and requirements for the appointment of judges, their security of tenure, the conditions governing their promotion, transfer and suspension, and the rules on judicial immunities – must guarantee judicial independence.

Standards on judicial independence are found in UN instruments including the United Nations Basic Principles on the Independence of the Judiciary, published in 1985 (the ‘UN Principles’). The UN Principles state that the ‘independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country.’<sup>58</sup> The IBA has also promulgated IBA Minimum Standards of Judicial Independence.<sup>59</sup> In addition, judicial ethics and professionalism are the subject of a multitude of national, regional and international instruments.<sup>60</sup>

Regional standards have also been developed, including the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (the ‘African Union Principles’). A further set of standards is the Bangalore Principles, which are a product of several years of work by the Judicial Group for the Strengthening of Judicial Integrity (JGSJI) comprising ten Chief Justices from Asia and Africa. These Principles were endorsed by the UN Commission on Human Rights in 2003.<sup>61</sup> These sources provide guidance on a number of issues relating to judicial independence as summarised below.

### *Independence from interference by executive*

The hallmark of judicial independence is that the judiciary operates without any improper restrictions, influences, inducements, pressures, threats or interferences from the executive branch of government, to ensure that individual judges are not subject to executive control.

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56 The Bangalore Principles on Judicial Conduct (2002) adopted by the Judicial Integrity Group in 2001 and subsequently endorsed by several UN organs.

57 These treaties, ratified by Egypt, have legal force domestically under Art 151 of the 1971 Egyptian Constitution.

58 United Nations Basic Principles on the Independence of the Judiciary (1985), Art 1.

59 IBA Minimum Standards of Judicial Independence, adopted 1982 and available at [www.ibanet.org/Document/Default.aspx?DocumentUid=bb019013-52b1-427c-ad25-a6409b49fe29](http://www.ibanet.org/Document/Default.aspx?DocumentUid=bb019013-52b1-427c-ad25-a6409b49fe29).

60 See, eg, ICC Code of Judicial Ethics (2003); Code of Judicial Conduct by the House of Delegates of the American Bar Association (1972).

61 UN General Assembly, *Report of the Human Rights Council, A/HRC/Res/19/36*, 23 March 2012, para16(b).

National legal systems differ greatly in how they structure their judicial and other branches of government and there is no single way to achieve the right balance. Nevertheless ‘the mechanism chosen must guarantee judicial independence, both institutional and individual, and impartiality, both objective and subjective.’<sup>62</sup>

States should therefore adopt legislation and measures to ensure that there is a clear demarcation between the competences of the executive and judicial branches of government so that the former cannot interfere in matters for which the judiciary is responsible. In addition, judges may not, during their term of office, serve in executive functions – such as ministers of the government – nor as a general rule may they serve as members of the legislature or of municipal councils.

### *Impartiality*

Judges are also required to be impartial – meaning that a judge should not sit in a case where there is a reasonable suspicion of bias or an appearance of bias towards one of the parties. Judges should not hold positions in political parties and any business dealings should not compromise the dignity of his/her office and the impartiality and independence of the judiciary as a whole.

### *Appointments based on merit*

The appointment of judges must be based on merit.

Although some participation in judicial appointments and promotions by the executive or legislature is not necessarily inconsistent with judicial independence, appointments and promotions of judges should be based on objective factors, in particular ability, integrity and experience, and should generally be vested in a judicial body in which members of judiciary and the legal profession form a majority.

### *Immunity and security of tenure*

Judicial appointments should generally be for life.

The power to transfer a judge from one court to another should be vested in a judicial authority and preferably should be subject to the judge’s consent.

A judge should also enjoy immunity from legal actions and from any obligation to testify concerning matters arising in the exercise of his official functions.

### *Disciplining and removal*

The power to discipline or remove a judge must be vested in an institution that is independent of the executive. The grounds for removal of judges shall be fixed by law and shall be clearly defined. As a result, the dismissal of judges by the executive, other than for serious misconduct and in compliance with fair procedures provided for by law, has been held to violate Article 14(1) of the ICCPR.<sup>63</sup>

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62 International Commission of Jurists, *Egypt’s new Constitution: A flawed process; uncertain outcomes*, November 2012, 39. Available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/11/EGYPT-CONSTITUTION-REPORT-w-COVER.pdf>.

63 UNHRC, *Mr Mikhail Ivanovich Pastukhov v Belarus*, Communication No 814/1998, UN Doc CCPR/C/78/D/814/1998 (2003), para 7.3; UNHRC, *Adrien Mundy Busyo et al v Democratic Republic of the Congo*, Communication No 933/2000, UN Doc CCPR/C/78/D/933/2000 (2003), para 5.2.

## *Freedom of expression and association*

Members of the judiciary are, like other citizens, entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

## *Ethics and professionalism*

The core values of the judiciary include integrity, propriety, equality, competence and diligence, in addition to independence and impartiality.<sup>64</sup>

The importance of continuous professional training and rigorous evaluation for judges has also been noted by the UN Special Rapporteur on the Independence of Judges and Lawyers, who has stated that judges:

‘Should receive continuing education on human rights principles, norms, jurisprudence, declarations, guidelines and rules as a means of strengthening the national systems of administration of justice. [Moreover,] the specific role of judges within the State structure confers upon the judiciary the obligation to provide for stringent entry exams for admission as judges and subsequently for a continuing scheme of legal education.’<sup>65</sup>

In addition, judicial salaries and pensions should be adequate and should be regularly adjusted to account for price increases independent of executive control. Court services should also be adequately financed by the relevant government authorities.

## *International standards relating to military or ‘emergency’ courts*

Although the ICCPR does not prohibit the establishment of either military or special courts per se, the UN Basic Principles guarantee the right to trial ‘by ordinary courts or tribunals using established legal procedures’ and prohibit the creation of tribunals not meeting fair trial requirements to displace ordinary courts. The UN Human Rights Committee (UNHRC) has also found that even during a state of emergency, ‘the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception’.<sup>66</sup> Trials of civilians by emergency or military courts should therefore be exceptional and limited to cases in which a state can prove both that regular civilian courts are unable to conduct the trial as well as that the fairness of proceedings will be guaranteed.<sup>67</sup> Fairness includes the right to independent and impartial judges.<sup>68</sup>

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64 See Bangalore Principles of Judicial Conduct (2002). For regional standards see, eg, African Commission on Human and People’s Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission on Human and People’s Rights in 2001, available at: [www.afrimap.org/english/images/treaty/ACHPR\\_Principles&Guidelines\\_FairTrial.pdf](http://www.afrimap.org/english/images/treaty/ACHPR_Principles&Guidelines_FairTrial.pdf).

65 UNHRC, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, 9 April 2010, UN Docs A/HRC/14/26, para 36. See also Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle I(a).

66 UNHRC, *González del Río v Peru*, Communication No 263/1987, UN Doc CCPR/C/46/D/263/1987 (1992), and see also UNHRC, *CCPR General Comment No 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, UN Doc CCPR/C/21/Rev.1/Add.11, para 11, available at [www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/71eba4be3974b4f7c1256ae200517361?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/71eba4be3974b4f7c1256ae200517361?Opendocument).

67 UNHRC, *General Comment No 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32, 23 August 2007, para 22, available at [www.refworld.org/docid/478b2b2f2.html](http://www.refworld.org/docid/478b2b2f2.html).

68 UNHRC, *CCPR General Comment No 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, 13 April 1984, available at [www.refworld.org/docid/453883f90.html](http://www.refworld.org/docid/453883f90.html). See also, 4. UNHRC, *Concluding Observations of the Human Rights Committee: Chile* 03/30/1999, UN Doc No CCPR/C/79/Add.104, para 9; *Concluding Observations: Poland*, 29 July 1999, CCPR/C/79/Add.110, para 21; *Concluding Observations: Cameroon*, 4 November 1999, UN Doc No CCPR/C/79/Add.116, para 21. UNHRC, *Abbassi Madani v Algeria*, Comm No 1172/2003 (2007); *Akwanga v Cameroon*, Comm No 1813/2008 (2011).

Regional courts have reached similar conclusions. The Inter-American Commission on Human Rights has reminded member states that ‘their citizens must be judged pursuant to ordinary law and justice and by their natural judges’.<sup>69</sup> The ECtHR has found that ‘the power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation and if so only on a clear and foreseeable legal basis’.<sup>70</sup> The African Commission on Human and Peoples’ Rights has taken an even stronger stand, stating that ‘[military courts] should not, in any circumstances whatsoever, have jurisdiction over civilians. Similarly, Special Tribunals should not try offences that fall within the jurisdiction of regular courts’.<sup>71</sup>

In 2002, the UNHRC stated in relation to Egypt that ‘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>72</sup> The UN Special Rapporteur on terrorism also warned against trying civilians in military courts in Egypt, noting 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>73</sup>

### 3.2 Relevant provisions of Egyptian law

The general principle of judicial independence has been constitutionally guaranteed in Egypt for decades. The Egyptian Constitution of 1971 provided for the independence of the judiciary in several articles.<sup>74</sup> The Constitutional Declaration issued in the wake of the 2011 revolution had similar provisions,<sup>75</sup> as did the 2012 Constitution<sup>76</sup> and the July 2013 Constitutional Declaration.<sup>77</sup> The latest constitution, adopted by a referendum in early 2014, also provides that ‘[t]he judiciary is independent’ in Article 184. The same article makes interference in judicial affairs a criminal offence to which the statute of limitations does not apply.

The Supreme Constitutional Court has also delivered a number of decisions emphasising the importance of judicial independence as a binding constitutional principle and the necessity of maintaining a separation of powers between the executive and the judiciary.<sup>78</sup>

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69 Inter-American Commission of Human Rights, *Annual Report of the Inter-American Commission of Human Rights 1998*, available at [www.cidh.oas.org/annualrep/98eng/Chapter%20VII.htm](http://www.cidh.oas.org/annualrep/98eng/Chapter%20VII.htm).

70 *Ergin v Turkey* [2006] App, Application No 47533/99, [46]–[49].

71 ACHPR, *Media Rights Agenda (on behalf of Niran Malaolu) v Nigeria, African Commission on Human and Peoples’ Rights*, Comm No 224/98 (2000), para 62.

72 UNHRC, *Concluding Observations of the Human Rights Committee: Egypt*, 28 November 2002, CCPR/CO/76/EGY, para 16(b).

73 UNHRC, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: Egypt*, 14 October 2009, A/HRC/13/37/Add.2, para 32.

74 It provided at Art 65 that ‘... the independence and immunity of the judiciary are two basic guarantees to safeguard rights and liberties’. It also provided at Art 165 that ‘[t]he judiciary is independent’. Moreover, it provided in Art 166 that ‘[j]udges are independent. In their performance, they are subject to no authority but that of the law. No authority can interfere in cases or judicial affairs’.

75 Judicial independence is guaranteed under Arts 46 and 47 of the March 2011 Constitutional Declaration. Under Art 47 of that Declaration, ‘Judges are independent, cannot be expelled (removed) and the law regulates their disciplinary accountability (liability). In their judgments judges are subject to no authority but that of the law and no authority can interfere in cases or judicial affairs.’

76 Judicial independence is guaranteed under Arts 168 and 170 of the 2012 Constitution.

77 Judicial independence is guaranteed under Art 16 of the July 2013 Constitutional Declaration. Art 16 states simply that ‘[t]he judiciary is independent’.

78 See, eg, Case No 34 for the 16th Judicial Year, decided on June 15, 1996, published in Official Gazette No 25, 27 June 1996. See also *Judicial Independence in the Arab World*, prepared by Adel Omar Sherif and Nathan J Brown for UNDP-POGAR (2002), English version, para 9.

The protection and guarantees of judicial independence provided by the Constitution are, however, expressed to be subject to other laws. The principal legislation governing Egypt's judiciary is the Judicial Authority Law No 46/1972 (JAL), most recently amended by Law No 17/2007. Key provisions of this law are described in the section below.

### 3.3 Challenges to independence of the judiciary

In 2011, the IBAHRI recommended that Egyptian legislators should closely examine the provisions that currently allow for executive influence over the appointment and transfer of judges to determine how the role of the executive could be minimised so as not to threaten judicial independence. It also condemned the trials of civilians before military and emergency courts and concluded that these courts failed to respect judicial independence.<sup>79</sup>

Following a more detailed examination in 2013, the IBAHRI has identified a number of further challenges to judicial independence in Egypt. These include: the manner of appointing judges; the system for assigning judges to particular courts and cases; the influence of the Minister of Justice over judges; the under-representation of women in the judiciary; the reduction in the number of Constitutional Court judges; the need for increased professionalism in the judiciary; and the continued use of military and other exceptional courts. The IBAHRI has also examined various draft amendments to the principal law governing the judiciary – the JAL – that have been proposed by various parties and were being debated at the time of its mission to Egypt in June 2013. It provides its assessment of these amendments below.

#### *Role of the executive in judicial appointments*

The system for appointing judges in Egypt – on paper at least – generally leaves it to judges to appoint other judges. There is a role for the executive – through the President or Minister of Justice – in some senior appointments, but this is not *per se* incompatible with international standards. There is, however, some cause for concern in practice.

#### SYSTEM FOR APPOINTING JUDGES

A law graduate who joins Egypt's Public Prosecution is eligible for appointment as a sitting judge in the lowest courts once he reaches the age of 30<sup>80</sup> and if his grade is between 65 and 100 per cent (that is, 'good' or above). Prosecutors who are chosen to become judges are selected by the SJC – a body comprised exclusively of judges and prosecutors<sup>81</sup> – after an interview. This is the process for all courts other than State Council (administrative court).<sup>82</sup> In the State Council it is the Special Council of that court – also composed of judges – that decides initial appointments instead.<sup>83</sup>

79 IBAHRI, *Justice at a Crossroads* (2011), paras 35–38, 42–47 and 69–78.

80 See Euro-Mediterranean Human Rights Network, 'Egypt: The Independence of the Judiciary', July 2010, 17. The requirement of 30 years of age as the minimum to be appointed judge is set out in Article 38(2) JAL, No 46 of 1972.

81 The SJC is a seven-person board of the country's most senior judges and two most senior prosecutors, presided over by the Chief Justice of the Court of Cassation. JAL, Art 77.

82 For the ordinary judiciary, see JAL No 46/1972 as amended by Law No 35/1984. Art 119 of the JAL also provides that the appointment of other members of the prosecution shall be by virtue of a decree to be issued by the President of the Republic after the agreement of the SJC.

83 See Law No 47/1972 as amended by Presidential Decree No 136/1984.

In theory it is possible to be appointed as a judge in the lower courts without having served in the prosecution; Article 41 of the JAL allows lawyers with relevant advocacy experience, as well as legal academics, to be appointed judges.<sup>84</sup> Indeed, Article 47 *requires* that a quarter of the judges appointed to the courts of first instance, and a tenth of the presidents of the same courts, should be selected from amongst ‘practising lawyers’. It is not clear what nomination and selection process would be involved in such appointments and whether the executive could play a significant role. The query is, however, of limited relevance for the time being, given that the vast majority of judges or perhaps even *all* judges (opinions differed on this and it was not possible to obtain official statistics) – are promoted from the ranks of the public prosecution.<sup>85</sup>

Procedures for appointments to higher courts vary depending on the type of court involved. For almost all courts other than the State Council, the president of the court makes this selection from names on a list drawn up by the senior judges of that court. This choice is reviewed and approved by the SJC.<sup>86</sup> In the State Council it is the Special Council of that court that decides on promotions instead.<sup>87</sup> The process is also different for the Supreme Constitutional Court, as described below.

#### THE LEGAL FRAMEWORK FOR APPOINTMENTS

Although the system of judicial appointments is judge-led, Egyptian law does allow a role for the executive in appointing judges. This includes the following:

- a) ***The President appoints the Chief Justice of the Supreme Constitutional Court*** from among three of its most senior members<sup>88</sup> after consulting the SJC and obtaining the agreement of the General Assembly of the Court.<sup>89</sup> The Chief Justice not only sits on the Constitutional Court but also chairs the SJC, which in turn selects all prosecutors and most judges in the country.
- b) ***The Minister of Justice appoints presidents of the high courts*** from among the judges at the appeals courts.<sup>90</sup>

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84 Chapter I of JAL No 46/1972, in particular Art 41(c) and (d).

85 In a statement issued on 25 May 2013, a Lawyers’ Union-organised conference on ‘The Rights and Demands of Egyptian Lawyers’ demanded that the judiciary begin to apply the provisions of Article 47. See ‘Demands for the appointment of 25% of judges from the legal profession’ (*Al-Masry AL-Youm*, 26 May 2013), available at [www.almasryalyoum.com/node/1786066](http://www.almasryalyoum.com/node/1786066).

86 For the Supreme Constitutional Court, see the Law governing the Supreme Constitutional Court (No 48 of 1979). The exception to this procedure is the presidency of the Supreme Constitutional Court. In this case, the President of the Republic can choose the appointee without input from other judges provided the candidate has appropriate training and professional experience.

87 JAL, Arts 39–43.

88 See Law No 48/1979, as amended by Law 168/1998, Arts 4 and 5. On 18 June 2011 Decree Law 48/2011 was passed to restrict the president’s choices for the position of Chief Justice to the Court’s three most senior members and requires the agreement of the General Assembly of the Court for the appointment to proceed.

89 Under Art 193 of the 2014 Constitution the President’s role is reduced to a purely functional one, with the choice now being made by the General Assembly of the Constitutional Court from among the three most senior vice presidents.

90 JAL Art 9.



- c) *The President appoints the Prosecutor General* from among the vice-presidents of the appeal courts, the counsellors at the Court of Cassation or senior prosecutors.<sup>91</sup> The Prosecutor sits on the SJC, which in turn selects the prosecutors and most judges in the country.<sup>92</sup>
- d) *The Minister of Justice appoints investigating judges*. A criminal prosecution in Egypt – initiated through a complaint by a private individual or an investigation by the public prosecution – is initially led by prosecutors but can later be transferred to an investigating judge at the Prosecutor General’s discretion.<sup>93</sup>

Despite the fact that these provisions allow for some executive role, the system is not necessarily incompatible with international standards, so long as the SJC itself is considered to be independent and professional. In some developed systems, the executive (or legislature) maintains an even more direct role in the appointment process for some judges, but this is deemed acceptable so long as safeguards such as life tenure and the immunity of judges from punitive disciplinary or other measures are secured.<sup>94</sup>

In the Egyptian system the President’s role in the appointment process for the Constitutional Court is dependent on the agreement of the SJC and general assembly of the court. Moreover, since 2011 the choice has been limited to three senior judges and the 2014 Constitution makes clear that the President’s role is a formality.<sup>95</sup> Indeed, interviewees informed the delegation that, in practice, even before the 2014 Constitution, the President simply ‘rubber stamps’ this choice. When asked whether they were aware of any instance when the President had ever vetoed this choice, the answer was uniformly ‘no’. Similarly when it comes to the power of the Minister of Justice to appoint presidents of the high courts, the law restricts the choice to the judges of the appeal court and requires the agreement of the SJC. This would therefore be problematic only if in practice the Minister sought to unreasonably withhold his consent.

What is more problematic is the provision in the 2012 Constitutional Declaration that allowed the President to appoint the Prosecutor General of the country who, in addition to his prosecutorial role is himself a member of the SJC and able to initiate disciplinary actions against judges.<sup>96</sup> The law that allows the Minister of Justice to appoint investigating judges also provides scope for abuse, as described in Chapter Three.

The 2012 Constitution adopted under President Morsi transferred the President’s power to appoint the Prosecutor General to the SJC but the temporary 2013 Constitutional Declaration reverted back to the system outlined in Article 219 of the JAL which gives unfettered appointment power

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91 JAL Art 119(1). Art 116 of the JAL also provides that the appointment of other members of the prosecution shall be by virtue of a decree to be issued by the President of the Republic after the agreement of the SJC.

92 According to the JAL, this comprises the President of the Court of Cassation, the President of the Court of Appeal of Cairo, the Prosecutor General, the two most senior deputies at the Court of Cassation, as well as the two most senior Presidents of other Courts of Appeal, making a total of seven members. JAL, Art 77 bis(1).

93 CCP, Art 64.

94 International guidance does not prescribe the means by which judges should be appointed. However, Principle 10 of the UN Basic Principles on the Independence of the Judiciary emphasises that the process should be strictly merit-based: ‘Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.’

95 See, n 89 above.

96 See Chapter 4 of this report at 39.



to the President. Fortunately, the 2014 Constitution improves the position again by returning this appointment power from the President to the SJC, with no constitutional role remaining for the President in the appointment of the Prosecutor General.<sup>97</sup> The 2014 Constitution also limits Prosecutor Generals to one term of four years, which provides a further safeguard for independence.<sup>98</sup> This should therefore be seen as a positive step.

#### JUDICIAL APPOINTMENTS IN PRACTICE

In addition to the scope for executive interference in the appointment and promotion of judges, the IBAHRI was informed by many practising lawyers and judges that the appointment process is not fully meritocratic and that it is well known in Egypt that judges' sons will often become judges even if their academic record makes them ineligible for appointment. In other words, even if the law looks acceptable on paper, this is not how it works in practice.

Although it is difficult to obtain direct evidence of such practices, many interviewees provided anecdotes to support this assertion. For instance, it was reported that the President of the Tanta Court has 21 sons and nephews (his brother's sons) who are either judges or prosecutors. Certain high-profile members of the judiciary and prosecution were also singled out as having several sons in the legal profession and the judiciary although this was not justified academically. Some judges also complained that an excessive number of former policemen (presumably with law degrees) had been appointed as judges. There was also information to suggest that judges themselves have used their influence to ensure that friends and relatives were given jobs at the Ministry of Justice.

The IBAHRI recommended in 2011 that Egypt – which has an extraordinarily large number of lawyers per capita – should introduce a bar exam. Additional publicly administered tests and other measures – such as publishing the results of the examination process for prosecutors who apply to become judges – would raise standards and improve the transparency of the process. Such transparency will make it more difficult both for nepotism to occur and also for those who are wrongfully accused of obtaining unmerited posts to defend themselves against any such claim.

#### *Influence of the Minister of Justice on the work of judges*

According to the Deputy Chief Justice of the Supreme Constitutional Court:

'The executive in Egypt, represented in this context by the Minister of Justice, continues to exercise considerable authority over the judiciary, especially the civil, criminal and administrative courts. In comparison to the role of the Attorney General in the United States – the post most analogous to Egypt's Minister of Justice – the Minister of Justice has tremendous involvement in judicial affairs.'<sup>99</sup>

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97 2014 Constitution, Art 189.

98 *Ibid.*

99 A O Sherif, 'Separation of Powers and Judicial Independence in Constitutional Democracies: The Egyptian and American Experiences', in E Cotran and A O Sherif (eds), *Democracy, the Rule of Law and Islam* (London: Kluwer Law International, 1999), 36.

More specifically under the JAL as it stands, the Minister of Justice is given the right to assign judges geographically to posts around Egypt<sup>100</sup> and the ability to decide which judges are seconded to work in the Ministry of Justice or any other government ministry,<sup>101</sup> as well as the power to initiate disciplinary proceedings against judges.

#### ASSIGNMENTS AND SECONDMENTS FOR JUDGES

There is, however, scope for executive control over the process in Egypt in the following ways:

- a) ***Minister of Justice can assign judges to specific courts.*** Under Egyptian law, the SJC and the President must agree on the assignment of judges to specific courts, and this occurs once a year on the basis of a proposal by the Ministry of Justice.<sup>102</sup> The delegates were informed that in practice, the Deputy Minister of Justice will propose judicial assignments to geographical areas and in practice the SJC does not say ‘no’. This is legal under Article 9 of the JAL, which provides that ‘designation [of a judge] is determined by the Minister of Justice in conjunction with the Supreme Judicial Council for a renewable tenure of one year.’<sup>103</sup> It is unclear from the original Arabic version of the text whether the designation is to courts or cases, rendering the provision open to wide-ranging readings. Interviewees pointed out that this provision enables the Minister of Justice to move the judges he wants to the courts where specific lawsuits will be examined or to banish judges to remote, less prestigious courts if he disagrees with their choices.
- b) ***Minister of Justice can assign judges to specific cases.*** Articles 30–31 of the JAL prescribe that all courts should have a ‘General Committee’, which is composed of all the judges in a court. This committee assigns cases to particular judges’ offices. However, under Article 36 of the JAL, decisions of general committees and temporary committees must be notified to the Minister of Justice who may then send them back to the committee for reconsideration. Once he approves a decision, he must show it to the SJC, which then publishes it.<sup>104</sup> (Judges also told the IBAHRI that at some courts, such as the Cairo Appeals Court, the committee delegates the task of distributing cases to the President of the appellate court – and that this person is connected to the Minister of Justice as it is the Minister who chooses which of the presidents of the appellate court should be promoted to the highest courts.)<sup>105</sup>
- c) ***Minister of Justice can transfer judges to non-judicial posts in Egypt.*** Articles 62 to 64 of the JAL also authorise the Minister of Justice to decide on the temporary transfer of a judge to work in a non-

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100 JAL, Art 36 gives the Minister of Justice the final say in the allocation of judges. See also JAL, Art 62. The JAL also provides at Art 93 that ‘The Minister of Justice has the right to supervise all the courts and judges’. However, the text of this Article was amended in 2006 to specify that the supervision of courts by the Minister of Justice is purely administrative. After amendment, the Article reads: ‘the Minister has the right to administrative supervision on courts’. See the Arab Center for the Development of the Rule of Law and Integrity, *Promoting the Rule of Law and Integrity in the Arab Countries Project Report on the State of the Judiciary in Egypt* (2007), available at [www1.umn.edu/humanrts/research/Egypt/Egypt\\_FinalReportP2S4\\_En.pdf](http://www1.umn.edu/humanrts/research/Egypt/Egypt_FinalReportP2S4_En.pdf).

101 It has also been alleged that ‘although the retirement age of judges is specified by law, there are exceptions to extend the retirement age given by the executives’. Euro-Mediterranean Human Rights Network, ‘The reform of judiciaries in the wake of the Arab Spring’ (11–12 February 2012), 20, available at [www.refworld.org/pdfid/515009ac2.pdf](http://www.refworld.org/pdfid/515009ac2.pdf).

102 JAL, Arts 9 and 62.

103 The JAL notes that this article was ‘[r]ectified as per the disclaimer published in the official gazette issue 17 on 26/04/1984, and was replaced with Law No 35 for 1984 that is published in ‘[t]he official gazette in the iterative issue 13 in issue 31–3 for 1984’.

104 JAL, Art 36: ‘The decision of the General Committees and the Temporary Affairs Committees shall be notified to the Minister of Justice and the Minister may return to the General Committees of Courts of First Instance and to Temporary Affairs Committees those of its decisions with which he does not agree for reconsideration. He may then ask the Supreme Judicial Council for the promulgation of the decision he considers to be suitable.’

105 See section on the legal framework for appointments in this report (p 23).

judicial post in Egypt for a three-year period, after hearing – but not necessarily following – the opinion of the SJC.<sup>106</sup> For instance, some judges are appointed as governors either during their tenure or post-retirement. Government ministries also need legal experts, and judges are allowed to take up these positions while maintaining their position as a judge.<sup>107</sup> Many interviewees highlighted the fact that such transfers are often considered ‘carrots’ for judges as the salary they receive for executive advisory posts is approximately EGP20,000 per month more than what they receive for their judicial role. Others suggested the ‘carrot’ could be a ‘stick’ for those who did not want to be moved. One judge who was interviewed, for instance, stated that he did not consent to a redeployment and ‘did not know why they moved me from [being a] judge to be[ing] an employee in another ministry’.

- d) **Minister of Justice can assign judges to the disciplinary panel.** The Minister of Justice can also decide who will be seconded to the *tafteesh* (disciplinary department) to investigate other judges accused of ethical violations. Judges serve in this capacity as civil servants in the Ministry of Justice. According to the law,<sup>108</sup> the SJC has the right to reject the list of Judges put forward by the Minister of Justice for such a transfer, but delegates were informed by some interviewees that in practice ‘no one ever says no’.
- e) **President’s assignment of judges to foreign bodies.** Judges may be seconded to foreign governments and international bodies by a decision from the President of the Republic, ‘after consulting with the general assembly of the court to which the judge.... is affiliated... and approval of the Supreme Judicial Council’.<sup>109</sup> The President can however extend this foreign placement at his discretion beyond the first four years.<sup>110</sup>

These provisions provide scope for abuse of executive power and potential interference by the Minister of Justice (or President, when it comes to foreign postings) in the judiciary.

Delegates were given examples of how this power had been abused in the past. For instance:

- a) The IBAHRI delegates were informed by several judges that, in the case that determined the legality of President Morsi’s replacement of the Prosecutor General in 2012, the judge was punitively transferred to another court.<sup>111</sup> According to interviewees, after the Court of First Instance Judge, Mahmoud Hamza, ruled that the Prosecutor’s removal was illegal (later confirmed by two appeals courts), he was moved from his Cairo post to a Sharia court as in another region. Judge Hamza had reportedly been on secondment to the Cairo court but the IBAHRI was told that his secondment was – highly unusually – cancelled in the middle of the year, suggesting that the move was punitive.<sup>112</sup>

106 An exception in Art 67 of the JAL is that a judge of the court of cassation cannot be transferred to lower courts or to the Prosecutor General’s office without his consent.

107 JAL, Art 62.

108 *Ibid*, Art 78. See also Arts 46 and 98.

109 *Ibid*, Art 62.

110 *Ibid*, Art 65 provides that ‘...[t]he duration of secondment may not be longer than four consecutive years. However, the period may be longer than this if it is in the national interest as determined by the President of the Republic.’

111 For a description of this case see Chapter 2 of this report, ‘Background Information’ at p 10.

112 Press reports at the time of the decision suggested that Judge Hamza’s decision itself may have been motivated by a long-standing clash between him and Egypt’s Office of Public Prosecution. In the aftermath of Judge Hamza’s 2012 decision he was referred to the ‘tafteesh’ for investigation, a decision he denounced publicly, describing it as ‘unprecedented’. See ‘Judge Mahmoud Hamza: it is unprecedented that a judge should be transferred to the Taftish’ (*Tahrir News*, 12 December 2013), available at <http://tahrirnews.com/news/view.aspx?cdate=12122012&id=7f25d8a6-47b6-4391-86ba-b64cbb73541>. Delegates were also informed that the inspection department found he had committed an error but the Court of Cassation cancelled this.

- b) In the Ahmad Douma case,<sup>113</sup> a journalist was put on trial for insulting President Morsi. Interviewees suggested that he was tried by the Tanta court, rather than the court where the alleged crime took place, as a result of executive interference.

Although this practice could not be verified, the legal framework itself is problematic from the perspective of judicial independence. Judicial assignments to particular courts and cases should be done in a transparent manner based on expertise or at random in order to ensure that there can be no scope for ‘fixing’ the judge that is to hear a particular case. Moreover, the selection by the Minister of Justice of which judges can be transferred to a more lucrative government post, or be transferred against his will to a less attractive one, creates a system where judges have an incentive to ‘please’ the Minister, which also threatens independence.

According to the IBA Minimum Standards of Judicial Independence, ‘[t]he power to transfer a judge from one court to another shall be vested in a judicial authority and preferably shall be subject to the judge’s consent’. The current system does not comply with these recommendations. In addition, according to Article 14 of the UN Principles, ‘the assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.’<sup>114</sup> Allowing a judge to retain his judicial post while also serving in the executive creates a situation that in itself violates judicial independence given that under international rules, ‘Judges may not, during their term of office, serve in executive functions’.<sup>115</sup> There is therefore considerable scope for reform in this area.

#### DISCIPLINING OF JUDGES

Egyptian law allows the Minister of Justice to supervise the performance of judges and initiate disciplinary action against them.<sup>116</sup>

According to Adel Omar Sherif, the Deputy Chief Justice of the Supreme Constitutional Court of Egypt,<sup>117</sup> ‘[w]hile the laws regulating the Supreme Constitutional Court and the State Council do not permit the Minister of Justice to interfere in the disciplining of their own judges,<sup>118</sup> his control over the disciplinary process in the Ordinary Courts... is indisputable’.<sup>119</sup>

More specifically, the Minister of Justice can request the Prosecutor General to initiate disciplinary proceedings against particular judges,<sup>120</sup> which can ultimately lead to the judge’s dismissal.<sup>121</sup> The Minister of Justice also nominates members of the *tafteesh* – judicial inspection department – upon approval by the SJC.<sup>122</sup> He is also responsible for enforcing removal decisions.<sup>123</sup>

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113 For a description of this case, see section on prosecuting political opponents (p 48).

114 UN Principles, Art 14.

115 IBA Minimum Standards, Art 35.

116 See Arts 93–94 JAL.

117 A O Sherif, ‘Separation of Powers and Judicial Independence in Constitutional Democracies: The Egyptian and American Experiences’, in E Cotran and A O Sherif (eds), *Democracy, the Rule of Law and Islam* (London: Kluwer Law International, 1999), 41.

118 The disciplinary process for the Supreme Constitutional Court is handled by its members through the Court’s General Assembly.

119 JAL, Art 107 prevents judges from appealing disciplinary rulings.

120 *Ibid*, Art 99 as amended by Art 2 of Law No 142/2006: ‘Disciplinary proceedings shall be instituted by the Prosecutor General on its own or upon the proposal of the Minister of Justice or the President of the court to which the judge is affiliated...’.

121 Art 2 of Law No 142/2006 amending Art 99 of the JAL, Art 108.

122 See section on assignments and secondments for judges in this report (p 26).

123 The State Cases Agency is the agency that represents the government in civil litigation and is made up of the state attorneys. The Minister also regulates the internal affairs of this agency, including by initiating a disciplinary action against its members.

During both of its visits to Egypt, the IBAHRI was briefed on an infamous instance in April 2006 in which the Minister of Justice referred Judges Mahmoud Mekki and Hisham Bastawisi, Vice-Presidents of the Court of Cassation, to a disciplinary panel in Cairo. The decision was taken after the judges had publicly criticised irregularities in the parliamentary elections of 2005 and suggested that an inquiry should be held into alleged electoral fraud in which a number of judges close to the government were allegedly complicit. There were fears that the disciplinary action was linked to the two judges' criticism of the authorities and the fact that they had called for reforms of the law governing the judiciary. While Mekki was eventually cleared, Bastawisi was reprimanded, meaning that he could be dismissed from the judiciary if he committed another transgression.<sup>124</sup>

The IBAHRI delegation was also told that on 29 May 2011, during the SCAF-led era in Egypt, the Minister of Justice Abdel-Aziz El-Guindi issued a decree referring three judges – Alaa Shawqi and Hassan El-Naggar and Ashraf Nada – for investigation. The judges were accused of insulting the military when they stated on television that military courts did not guarantee the rights that were provided by civilian courts. They were also accused of talking to the media without first obtaining the permission of the SJC.<sup>125</sup> The Ministry of Justice initiated a criminal prosecution against them, and the judges were detained.<sup>126</sup>

The Chief Justice of the SJC at the time of IBAHRI's June 2013 fact-finding mission, Chief Justice Momtaz Metwally, told the IBAHRI delegation that 'there is no interference by the executive branch in disciplining judges'. However, anecdotes shared by other judges and lawyers during the mission suggested that an inspection is sometimes initiated to punish a judge for ruling 'the wrong way'. In one example, the inspection department is said to have come to the judge's office while he was not there and found over 20 handwritten draft judgments. The inspectors then allegedly threatened to file a disciplinary action against him on the basis that his judgments were not signed – even though he had intended to have them typed up and sign the final version. Some judges are said to accept a deal under such circumstances in which they ask the inspectors to 'close the file' in exchange for their resignation.

Some interviewees suggested that there had already been a decision approximately a year ago in a Ministry of Justice decree to move the premises of the inspection department from the Ministry to the SJC. This has not yet happened, nor would a physical move be sufficient to address the scope for executive interference that the law currently allows. International standards require that '[t]he power to discipline or remove a judge must be vested in an institution, which is independent of the Executive',<sup>127</sup> and this is clearly not currently the case. More substantial reform is therefore needed in this area.

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124 'Human rights experts concerned over attacks on Egyptian Judiciary' (*OHCHR News*, 14 June 2006), available at [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=1756&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=1756&LangID=E). Hisham Bastawisi is reported to have said at the time that in private, the government was harassing him and tapping his phones. He ultimately left the country and he later became a candidate in the 2012 presidential elections. Mahmoud Mekki served as Vice President under the Morsi government.

125 Mona El-Nahas, 'Judges up in arms' (*Al-Ahram Weekly*, 9–15 June 2011), available at: <http://weekly.ahram.org.eg/2011/1051/eg60.htm>.

126 The IBAHRI delegation was told that, ultimately, the prosecution authorities 'had to close the file' as a result of public opinion that found such action to be an inappropriate interference with the independence of the judiciary, not to mention freedom of expression. See also 'Justice Minister denies referring judges to judicial inspection over media statements' (*Daily News Egypt*, 5 June 2011), available at [www.dailynewsegyp.com/2011/06/05/justice-minister-denies-referring-judges-to-judicial-inspection-over-media-statements](http://www.dailynewsegyp.com/2011/06/05/justice-minister-denies-referring-judges-to-judicial-inspection-over-media-statements).

127 IBA Minimum Standards, Art 4(a).



## *Under-representation of women in the judiciary*

The representation of women and minorities in the judiciary is not strictly a question of independence, but it does call into question the ability of the judiciary as a whole to be or appear to be impartial vis-à-vis these communities. Although international standards do not tend to refer explicitly to gender equality and minority rights, they do insist that the '[s]election of judges shall be based on merit' and free from discrimination.<sup>128</sup>

While almost half of Egyptian law students are female and there are many female law professors and lawyers,<sup>129</sup> women face continued discrimination in the judiciary. The IBAHRI's attempts to obtain official statistics from the Egyptian authorities as to the exact number of women and religious minorities in the judiciary did not prove fruitful. However, media sources suggest that of Egypt's approximately 12,000 judges, 42 are female.<sup>130</sup>

The first female judge in Egypt was Tahani al-Gebali, who was appointed to the Constitutional Court in 2003 under President Mubarak.<sup>131</sup> The SJC then appointed the remaining women to judicial positions from the pool of eligible state prosecutors.

At the State Council, the highest administrative court, there are 2,200 judges, none of whom are women. Originally, the Egyptian State Council voted to ban women from sitting as judges in the administrative courts on the basis that women could not be expected to rotate geographically from court to court as men were required to do. However, in 2010 the Constitutional Court ruled that women *can* sit as judges in Egypt's administrative courts, including the State Council, overturning the State Council's own earlier decision.<sup>132</sup> But as yet no women have been appointed to administrative courts.

As for religious minorities, it is estimated that approximately ten per cent of judges are Christian, which – unlike the situation of women – roughly equates to the proportion of Christians in Egyptian society. This could not, however, be officially verified.

The IBAHRI delegates were told that during the Morsi era, not only women but also Coptic Christians were in danger of being side-lined in the judiciary because of a policy – both overt and covert – of Islamicisation. Certain key articles in the 2012 Constitution entrenched the relevance of religious principles to be applied by judges<sup>133</sup> and delegates were told that this could present a problem for the judiciary in the future as one such principle is that a Christian cannot exercise authority over a Muslim and that women should not judge men.

Although interviews conducted by the IBAHRI did not highlight women's rights as having been *directly* attacked under Morsi's presidency, the Muslim Brotherhood made it clear during Morsi's

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128 IBA Minimum Standards, Art 26.

129 'Egypt: battle for women judges half won' (*Third World Network*, March 2010), available at [www.twinside.org.sg/title2/resurgence/2010/235/women1.htm](http://www.twinside.org.sg/title2/resurgence/2010/235/women1.htm).

130 'Egypt wrangles over whether women should be judges' (*The Telegraph*, 25 February 2010), available at [www.telegraph.co.uk/expat/expatnews/7314826/Egypt-wrangles-over-whether-women-should-be-judges.html](http://www.telegraph.co.uk/expat/expatnews/7314826/Egypt-wrangles-over-whether-women-should-be-judges.html); other estimates say there are 17,000 judges.

131 See, 'Egypt: Battle for Women Judges Half Won,' (*AllAfrica*, 3 April 2010), available at <http://allafrica.com/stories/201004040002.html>.

132 In early 2010, Egypt's State Council voted against the appointment of women to the State Council (administrative courts) by 334 votes to 42. The then Prime Minister, Ahmed Nazif, called for Egypt's Constitutional Court to rule on the validity of the ban. The State Council argued that the six-month maternity leave granted to women under Egyptian law rendered females inefficient appointees. The Constitutional Court overturned the ban on 15 March 2010, stating that no constitutional or legal restriction existed to prevent the appointment of female judges.

133 See Chapter 2, 'Background Information'. Amongst others, Art 2 of the 2012 Constitution provides that Islam is the state's religion and that the principles of Islamic law form the main source of legislation; and Art 4 gave a consultative role to Islamic scholars at Al-Azhar.

presidency, that women's place in society should not be equal to that of men. In a strongly worded statement issued in March 2013, the Brotherhood condemned a declaration made by the UN Commission on the Status of Women on equal rights for men and women. According to the Brotherhood's official website, the offending provisions of the UN declaration included 'Giving wives full rights to file legal complaints against husbands accusing them of rape'; 'Equal inheritance'; 'Replacing guardianship with partnership, and full sharing of roles within the family between men and women such as: spending, child care and home chores'; 'Full equality in marriage legislation such as: allowing Muslim women to marry non-Muslim men, and abolition of polygamy'; 'Removing the authority of divorce from husbands and placing it in the hands of judges'; and 'Cancelling the need for a husband's consent in matters like: travel, work, or use of contraception'. The Brotherhood's statement concludes that 'These are destructive tools meant to undermine the family as an important institution; they would subvert the entire society, and drag it to pre-Islamic ignorance'.<sup>134</sup>

It is therefore not surprising that the role of women in the judiciary did not improve during Morsi's tenure. The text of the 2014 Constitution, however, now confirms beyond doubt that women should be equal and have the right to be appointed to all judicial bodies under Egyptian law.<sup>135</sup> This is a step in the right direction, but needs to be matched by increased appointments for women in practice.

### *Reduction in the number of constitutional court judges*

According to Egypt's JAL, the Constitutional Court has no minimum or maximum number of judges, just a 'sufficient' number of members.<sup>136</sup> For years the number of judges on the Constitutional Court has been fixed at 18, but under the 2012 Constitution this was reduced to a maximum of 11.<sup>137</sup>

When the IBAHRI asked judges and lawyers about this reform, the responses were polarised. Those interviewees who supported the change pointed out that reducing the number of judges was rational as a 'cost-cutting' measure and that it would bring Egypt's highest court in line with the number of judges at equivalent courts in other countries. According to one of President's Morsi's principal legal advisors, 'all the courts in the world' have fewer than 18 judges so it is unsurprising that Egypt should reduce the number of judges on its highest court as well.

Those who opposed the amendment, on the other hand, called it 'Tahani Gebali's law'. They considered that there was no immediate or justifiable reason to decrease the composition of the Constitutional Court to 11 members, and argued that more members allowed for better debate and more diverse legal opinions. Many also said that the reform was intentionally introduced in order to expel judges the majority Islamists did not support. Of the seven outgoing members, some were outspoken critics of the government, like Judge Tahani el-Gebali, the only female judge on the court. Gebali was the 12th member according to seniority, and many interlocutors believed that the reform was introduced specifically to remove her from the Court.

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<sup>134</sup> See n 55, above.

<sup>135</sup> 2014 Constitution, Art 11.

<sup>136</sup> Law governing the Supreme Constitutional Court (No 48 of 1979), Art 3.

<sup>137</sup> 2012 Constitution, Art 176: 'The Supreme Constitutional Court is made up of a president and ten members. The law determines judicial or other bodies that shall nominate them and regulates the manner of their appointment and the requirements to be satisfied by them. Appointments take place by a decree from the President of the Republic.'

In the IBAHRI's view, regardless of the motives for the amendment, it does not comply with international standards as it is *retroactive* in effect and therefore has the effect of undercutting a judge's life tenure, a key safeguard for judicial independence. Even if the reasons for reducing the number of judges are cogent, the IBAHRI was not told of any reason why this change could not have been introduced *prospectively*, for future judges, so as to counter the suspicion that it was being used to expel specific individuals from the Constitutional Court. As the IBA Minimum Standards of Judicial Independence make clear, '[l]egislation introducing changes in the terms and conditions of judicial services *shall not be applied to judges holding office at the time of passing the legislation unless the changes improve the terms of service*'.<sup>138</sup> This is a consequence of the general principle that '[j]udicial appointments should generally be for life, subject to removal for cause and compulsory retirement at an age fixed by law at the date of appointment'.<sup>139</sup>

The IBAHRI welcomes the provision in the 2014 Constitution, which restores the legal position to what it was before the amendment. Under Article 193 of the 2014 Constitution (as under the 2012 Constitution and the JAL), '[t]he Court is made up of a president and a sufficient number of deputies to the president'. Egyptian authorities should, however, ensure that any future legislation relating to this provision should comply with the international standards and best practices set out above.

### *Professionalism and resources*

According to international standards, 'it is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions'.<sup>140</sup> An independent judiciary needs to be professional to be effective.

During its 2011 mission, the IBAHRI was concerned to hear that many judges in Egypt are overworked and undertrained. These comments were repeated by interviewees during the June 2013 mission.

The IBAHRI was told of consistent backlogs and inadequate technology that limits judges' ability to dispense efficient justice. The Chief Justice of the Cairo Court of Appeals spoke of this backlog as being a 'big challenge' and others commented that the judicial system was too slow.

Although the IBAHRI's efforts to obtain official statistics from the Ministry of Justice were not fruitful, the delegation was informed that judges can deal with up to 300–400 cases per day, a shocking number by any standard. This is exacerbated by the fact that they generally work alone, without the support of law clerks or assistants that are frequently used in other jurisdictions.

Legal materials are not widely available online. Court transcripts are handwritten, and legislation and case law are dispersed. The Ministry of Justice has recently launched a new e-government initiative in cooperation with Google.<sup>141</sup> The site aims to collect legal texts and statutes in an easily accessible format online, as well as making draft laws available to the public. The project is still at an early stage, but several texts have already been uploaded, including the proposed text of the controversial new law on public demonstrations. This is a welcome initiative, but much remains to be done; a Google

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138 IBA Minimum Standards, Art 20(a). (Emphasis added.)

139 *Ibid.*, Art 22. See also Art 24: 'The number of the members of the highest court should be rigid and should not be subject to change except by legislation'.

140 UN Principles, Art 7.

141 Available at <https://sites.google.com/site/mojconsultations> (in Arabic).



representative informed the delegation that there have been 400,000 judgments issued since 1800 and that the vast majority of these are yet to be made available online.

Some interviewees also pointed to an insufficient budget and a lack of security for judges at a time when they have come under frequent political fire and even physical attack. The IBAHRI was told that courthouses have frequently been surrounded and judges' cars set alight in the context of politically sensitive cases. One example given was of the case involving a judgment against President Morsi, accused of escaping from prison with several other Brotherhood members, in which the judge who ruled against the President was said to have been threatened and harassed and did not have any protection from the state.

Another challenge that was highlighted is the fact that judges' salaries are not commensurate with the nature and complexity of their work. This issue was said to exacerbate the influence of the Ministry of Justice over judges, since he can transfer them to non-judicial positions that are much more lucrative than their regular posts.<sup>142</sup>

Many judges also told the delegation that they would appreciate additional training on international law and human rights.

The concerns related to judicial professionalism and resources are long-standing and serious. But they can be addressed in large part through funding and training initiatives, including by international assistance.

### *Military and emergency courts*

Judicial independence can be seriously compromised by the use of the exceptional courts – either military or 'emergency' courts that operate outside the ordinary constitutional system. In 2011, the IBAHRI reported that since Mubarak's ouster, there had been a dramatic increase in the number of civilian suspects being brought before military courts by the transitional military authorities, the SCAF.<sup>143</sup> The IBAHRI also reported concerns in relation to the use of emergency courts.<sup>144</sup>

Egyptian law grants military courts jurisdiction where a crime is committed in a place operated by or for the military, or in relation to property owned by the military.<sup>145</sup> And military judges themselves decide whether an offence is within their jurisdiction or not.<sup>146</sup> According to Article 3 of the Military Code of Justice (MCJ),<sup>147</sup> military judges are independent and irremovable. But military judges are appointed by the Deputy Head of the Armed Forces and, as such, are subject to the disciplinary procedures of the armed forces. Further, under Article 6 of the MCJ any crime in the Penal Code can potentially be tried by military courts if so decided by the President.

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142 See Section on assignments and secondments for judges in this report (p 26).

143 IBAHRI, *Justice at a Crossroads* (2011), identified the use of military courts as one of the key challenges facing the judiciary, paras 42–47, 20–21. Previously, under Mubarak, the use of military courts had reportedly been reserved for trials of persons arrested in military zones, individuals who criticised the military or high-profile political cases, including those which had no clear connection to terrorist acts. UNHRC, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: Egypt*, 14 October 2009, A/HRC/13/37/Add.2, para 32.

144 IBAHRI, *Justice at a Crossroads* (2011), paras 42–47.

145 MCJ, Art 5.

146 MCJ, Art 48.

147 Law No 25/1966 as amended by Law No 16/2007.

In addition, under Egypt's Emergency Law, emergency courts are granted jurisdiction over a wide range of crimes, including crimes specifically provided for by the President and crimes relevant to cases referred to them by the President.<sup>148</sup> And their judges are also appointed directly by the President.

Not surprisingly, the IBAHRI found in 2011 that the use of both military courts and emergency courts to try civilians undermines Egypt's ordinary judicial system and fails to meet international standards guaranteeing the right to an independent and impartial judiciary. Military officers who assume the role of judges while at the same time being subject to the command structure of the armed forces lack independence from the executive. Emergency courts present the same concerns, since their judges are appointed by the executive, and verdicts are subject to review by the President. Exceptional courts were also found to violate due process and the rights of the defence.

Since the end of military rule – both under President Morsi and more recently under President Mansour – the use of 'exceptional courts' remains a problem.

In July 2012, President Morsi allegedly pardoned over 500 individuals who had been convicted by military courts and released others. However, under Morsi's presidency, and since that time, there continue to be allegations that civilian cases have been heard before military courts. And although the state of emergency was lifted in June 2012, before he came into power, emergency courts also allegedly still functioned, with President Morsi appointing new judges at these courts.

After Morsi's ouster, Egyptian Foreign Minister Nabil Fahmy, assured his American counterpart John Kerry that civilians arrested during the protests across Egypt would not face military trials.<sup>149</sup> And interim President Mansour said in a television interview that 'no civilian was recently tried by a military tribunal'.<sup>150</sup> This is, however, contradicted by widespread reports by NGOs and journalists who affirm that such trials continue, although one commentator has suggested that they are taking place outside Cairo so that they get less attention.<sup>151</sup>

A recent example is that of Mr Ahmed Abu-Draa, a journalist accused of circulating lies about the military, whose trial began in Suez on 15 September 2013, and was reportedly taking place before a private military tribunal.<sup>152</sup> In separate proceedings also taking place in Suez, 64 prominent members of the Muslim Brotherhood reportedly began a joint military trial on 26 August 2013.<sup>153</sup> Several Egyptian human rights organisations have condemned the military trials of civilians, saying that around 60 convictions have been passed by army tribunals since Morsi's ouster on 3 July 2013.

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148 Emergency Law No 162/1958, arts 7 and 9.

149 See, 'Egyptian Civilians held over unrest will not face military trial: Fahmy' (*Oman Tribune* 23 September 2013), available at [www.omantribune.com/index.php?page=news&id=152117&heading=Middle%20East](http://www.omantribune.com/index.php?page=news&id=152117&heading=Middle%20East).

150 'Egypt rights groups denounce military trial of civilians' (*Ahram Online*, 10 September 2013), available at <http://english.ahram.org.eg/NewsContent/1/64/81252/Egypt/Politics-/Egypt-rights-groups-denounce-military-trials-of-ci.aspx>.

151 'Egypt: a political Road Map: Transcript Q&A' (*Chatham House*, 18 October 2013) transcript available at [www.chathamhouse.org/sites/default/files/public/Meetings/Meeting%20Transcripts/181013EgyptQA.pdf](http://www.chathamhouse.org/sites/default/files/public/Meetings/Meeting%20Transcripts/181013EgyptQA.pdf), per Jonathan Rugman at 13.

152 'Ahmed Abu-Draa, Egyptian Journalist, Goes On Trial In Military Court' (*Huffington Post*, 15 September 2013), available at [www.huffingtonpost.com/2013/09/15/ahmed-abu-draa-egypt-military-court\\_n\\_3929955.html](http://www.huffingtonpost.com/2013/09/15/ahmed-abu-draa-egypt-military-court_n_3929955.html).

153 'Military trial of 64 Morsy supporters starts in Suez' (*Egypt Independent*, 26 August 2013), available at [www.egyptindependent.com/news/military-trial-64-morsy-supporters-starts-suez](http://www.egyptindependent.com/news/military-trial-64-morsy-supporters-starts-suez).

In November 2013 it was also reported that in the previous month, three journalists, including Mohamed Sabry, had been convicted by military courts ‘on charges related to their work’.<sup>154</sup>

In the 2012 Constitution that was adopted under Morsi, the jurisdiction of military courts was potentially narrowed through Article 198, which stated that civilians should not to be tried before military courts except for certain crimes that ‘harmed’ the armed forces.<sup>155</sup> But in the words of Mona Zulficar, a lawyer and member of the 2013 constitutional drafting committee, allowing military trials for any crime that caused ‘harm’ to the armed forces meant that ‘everything under the sun could go to military trials’.<sup>156</sup> Zulficar stated that, for the committee drafting the 2014 Constitution, the objective was not to allow civilians to face military trials at all. Instead, military courts should be only concerned with crimes committed by members of the armed forces, with the possible exception of situations when individuals attack military institutes or vehicles.

Ragia Omran, an Egyptian human rights lawyer from the NGO No to Military Trials has, however, stressed that her group is vehemently against any ‘exceptions’, as they are used to legitimise the military trials of civilians. Omran added that her NGO had requested a new article is added to the 2014 Constitution to grant compensation to civilians who have faced military trial since the rule of Hosni Mubarak.

Ultimately, however, the 2014 Constitution contains no provision granting compensation, and provides for broader-than-anticipated exceptions to the ban on civilians facing military trials. At Article 204, the 2014 Constitution provides that:

‘Civilians cannot stand trial before military courts *except for crimes that represent a direct assault against military facilities, military barracks, or whatever falls under their authority*; stipulated military or border zones; its equipment, vehicles, weapons, ammunition, documents, military secrets, public funds or military factories, crimes related to conscription; *or crimes that represent a direct assault against its officers or personnel because of the performance of their duties*’. [Emphasis added.]

While this is more specific than Article 198 of the 2012 Constitution, its protections will still very much depend on how narrowly the law and practice interpret the exception. Article 204 also gives the military judiciary jurisdiction over all crimes ‘related’ to the military, with, for instance, no exclusion of cases involving human rights violations committed by members of the armed forces. The wide scope of this provision potentially paves the way for the legislature to increase the jurisdiction of military courts and falls far short of abolishing their use for civilians completely. This provision has therefore been criticised by prominent commentators such as Nasser Amin

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154 According to the Egyptian Initiative for Personal Rights (EIPR), ‘On 5 October, a military court convicted Ahmed Abu Deraa, a correspondent for *al-Masry al-Yom* and ONTV in Arish, giving him a six-month suspended prison sentence and fining him LE200 on charges of publishing inaccurate news about military operations in Sinai. On 29 October, the North Cairo Military Court sentenced Hatem Abu al-Nour, a journalist with the daily *al-Watan*, to one year of hard prison on charges of impersonating a member of the military in order to obtain information’. The EIPR also stated that 26-year-old Sabry, a freelance journalist, was arrested on 4 January 2013 while working on an investigative piece for Reuters on the decree banning private ownership of land in the Sinai border zone after being detained by the Border Guard. He was referred to the North Sinai Military Prosecution for questioning the following day, and the prosecutor’s office referred him to the misdemeanor military court (case no 3/2013) the same day *on charges of being present in a military zone from which civilians are barred* without a permit from the military authorities and taking photographs of things and places to which the military authorities have banned entry and photographs. They concluded that ‘Mohamed Sabry should not have been prosecuted at all in connection with a job-related incident where there was no suspicion that any crime had been committed’. See, ‘Third conviction of journalist in military court in less than a month: Reuters journalist Mohamed Sabry given six-month suspended sentence for doing his job’ (*EIPR*, 10 November 2013), available at <http://eipr.org/en/pressrelease/2013/11/10/1868>.

155 The ACIJLP indicates that the referral of civilians to military court in the era of Mubarak’s regime was done according to the provisions of the Art 6 of the MCJ, Law No 25/1966, which was declared unconstitutional after the January Revolution.

156 See n 151 above.

of the ACIJLP.<sup>157</sup> He points out that the existence of this provision in the context of ordinary legislation would be preferable to its inclusion in a constitutional document, where its amendment or cancellation will require complex procedures and approvals. There is therefore still a need for reform in this area, but doing so may be difficult to achieve.

### 3.4 Proposed amendments to the Judicial Authority Law

At the time of the IBAHRI's visit to Egypt, discussions were ongoing about a number of amendments to the JAL that had been proposed by three 'islamist-leaning' groups: the Al-Wasat Party, a party considered to be close to the Muslim Brotherhood; the FJP, the party representing the Muslim Brotherhood; and the Construction and Progress Party, founded in the aftermath of the 2011 revolution by the Egyptian Islamic Group. Meanwhile, another group – the Judges' Club – had also prepared some draft amendments. These proposed amendments to the key law regulating the judiciary are summarised and compared in the attached chart at Annex B and discussed further below.

The presentation of the Al-Wasat Party's proposed amendments to the JAL led to the resignation of the Minister of Justice at the time, Ahmad Mekki, who had different views on the amendments that were needed.<sup>158</sup> Nevertheless they were submitted to the Shura Council for enactment. In May 2013, the Shura Council provisionally approved the amendments, which were then sent to a special committee for further consideration.

This process has now been overtaken by events in Egypt. Nevertheless the conflicting amendments that were proposed by the various groups are likely to come up again now that the new constitution has been adopted in 2014. It is therefore useful to assess the most significant ones being discussed.

As can be seen in the attached chart (Annex B), key amendment proposals relate to: (i) reducing the retirement age for judges; (ii) requiring judges to supervise elections and not to engage in political speech or protest; (iii) reducing the role of the Minister of Justice in judicial affairs; and (iv) increasing judges' salaries. These will be considered in turn below.

#### *Reducing retirement age*

All three Islamist parties (Al-Wasat, the Construction and Progress Party and FJP) proposed an amendment that reduces the age of retirement set out in the JAL from 70 to 60 years old. This proposal was mentioned by almost all the interviewees who the IBA met with, and was clearly the most controversial.

Although it was not possible to obtain official statistics to confirm this, a large number of judges informed the IBAHRI that this proposed amendment would lead to the removal of nearly 3,000–3,500 judges who were over 60 from office, representing close to a third of the judiciary.<sup>159</sup> It was also argued that lowering the retirement age for judges was an attempt by the Brotherhood to exert more

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157 'The provision of the military trial of civilians in accordance with the constitutional provisions undermine the independence of the judiciary and prejudice guarantees of fair and equitable trial' (ACIJLP, 25 November 2013), available at [www.acijlp.org/main/en/art.php?id=2&art=187](http://www.acijlp.org/main/en/art.php?id=2&art=187).

158 Delegates were informed that prior to this initiative the former Minister of Justice Ahmed Mekki had proposed certain amendments to the JAL, but these had not been presented to any legislative body. It was not possible for the IBA to obtain a copy of the draft amendments that Mekki was to propose.

159 The delegation was told that for the State Council this would lead to the forced retirement of 100 out of 4,500 judges.

control over judicial institutions by removing those who have been there the longest and may be most loyal to the former regime.

Supporters of the amendment denied that there was any intention to remove or replace particular judges. They pointed to the fact that in other industries and ministries in Egypt the retirement age is 60 and that the position of the judiciary should be consistent with this in the name of equality. They also stated that the figure of 3,000–3,500 was grossly inflated as many of the judges concerned were not ‘sitting’ judges anymore.

As with the constitutional provision that lowered the number of constitutional court judges – leading to the forced resignation of the seven most junior judges on that court – those advocating the amendment could not explain why the proposed amendment could not be presented as a *prospective* one, rather than a retroactive one which would lead to the forced resignation of those currently serving as judges.

The IBAHRI is of the view that the proposed amendment to the retirement age for judges, in its current retroactive form, violates international standards for the same reasons as the reduction in the number of judges at the Constitutional Court, which is that generally ‘[l]egislation introducing changes in the terms and conditions of judicial services *shall not be applied to judges holding office at the time of passing the legislation unless the changes improve the terms of service*’.<sup>160</sup> This is a consequence of the general principle that ‘[j]udicial appointments should generally be for life, subject to removal for cause and compulsory retirement at an age fixed by law at the date of appointment’.<sup>161</sup>

### *Other proposed amendments*

***Limiting right to strike and political speech, and the non-supervision of elections.*** The Islamist groups proposed that judges should be prohibited from participating in strikes. They also proposed an amendment that would require judges, under threat of criminal or disciplinary sanctions, to supervise elections.<sup>162</sup> In addition, the Judges’ Club proposes an amendment to Article 73 of the JAL that would prohibit judges from not only ‘undertaking political work’, as is currently provided in the law, but also from ‘expressing political opinions in any forum or to be present at any political or party gathering or to speak on behalf of a media organisation or to comment on judicial and judges’ affairs, and all transgressions shall be treated as a neglect of duties and a diminution of the job’s dignity requiring disciplinary proceedings’.

Although it is correct that judges should be required to maintain a distance from political stances that might compromise their independence or (actual or perceived) impartiality, the view of the IBAHRI is that these proposed amendments go too far. For instance, the language in the Judges’ Club amendments subjecting a judge to disciplinary proceedings for ‘expressing political opinions in any forum’ is very vague and broadly drafted. It is therefore clearly open to abuse and threatens a judge’s right to exercise their civil and political rights. It also calls into question judges’ immunity

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160 IBA Minimum Standards, Art 20(a). (Emphasis added.)

161 IBA Minimum Standards, Art 22. See also Art 24 (‘The number of the members of the highest court should be rigid and should not be subject to change except by legislation’).

162 See Annex B chart. See, eg, FJP JAL Art 72 (bis) (‘It is prohibited for a judge or member of the Public Prosecution to call for the courts to strike, or to call for them to stop working, or to partake in any such action or to respond to it. Anyone that takes such actions shall be transferred to the disciplinary council... and he shall be denied his financial remuneration... without prejudice to any criminal responsibility which might be applicable to his acts’); Construction and Progress Party, JAL Art 76 (bis), in almost exactly the same terms.



in relation to their work. As the UN Principles make clear, '[m]embers of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary'. This should be the guiding principle for any future legal regulation in this area.

*Reducing the role of the Minister of Justice over judges.* There are numerous Judges' Club amendments which would transfer powers currently given to the Minister of Justice to the SJC. For example, the Judges Club would amend Article 62 of the JAL to provide that:

'it is not possible to second [judges] to work [in a capacity] other than their own judicial work which is within their jurisdiction according to the provisions of the constitution and the law. Their secondment for legal and administrative work for the executive and legislative authorities or for public and private bodies is prohibited.'

They would also reform Article 70 of the JAL to provide that a judge's resignation should be validated by the SJC, rather than the Minister of Justice.<sup>163</sup>

The IBAHRI is in full agreement with such proposals, for reasons explained in other parts of this report.<sup>164</sup> In addition, the IBAHRI considers that banning secondments, as per the Judges' Club revisions to Article 62 of the JAL, is preferable to the FJP suggestion that such secondments be more limited. According to the FJP proposal, Article 62 would continue to allow secondments but only 'to the state's departments and public bodies in order to undertake judicial or legal work'. This alternative would still leave room for significant influence from the Ministry of Justice and is therefore less effective.

*Increasing salaries.* The Judges' Club proposals include an initiative to raise the salaries of judges. Similarly, the Islamist parties propose that all judges should receive the same remuneration as members of the Constitutional Court.<sup>165</sup> The IBAHRI believes that salaries should be commensurate with the complexity and requirements of judges' work and should be raised to the level necessary to guarantee a high standard of professionalism (and possibly to remove incentives for secondments to executive agencies).

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163 The Judges' Club also proposes to amend the following provisions, replacing the role of the 'Minister of Justice' with the 'Supreme Judicial Council' as per the bolded text in the following: 'Article 11 – Sub-courts may be created within the jurisdiction of a court of first instance, their locations allocated and their competencies defined **by a decision of the Supreme Judicial Council**. The sub-court may sit in another location within its jurisdiction or outside it, as necessary, **pursuant to a decision of the Supreme Judicial Council** on the basis of a request from the head of the court.'

164 See section on assignments and secondments for judges in this report (p 26).

165 See Annex B.

# Chapter 4: Challenges to Prosecutorial Independence

Respect for human rights and the rule of law requires a strong prosecutorial authority in charge of investigating and prosecuting criminal offences with independence and impartiality. A prosecutor who is a puppet of the ruling politicians is a threat to freedom and democracy because he can be used to go after political opponents of those in government. A prosecutor has considerable discretion in determining which cases to pursue and the system should guarantee that this discretion is exercised professionally and fairly in a manner that inspires public confidence.

Courts around the world have long recognised that prosecutorial independence is central to the basic notion of a democracy. As the ECtHR has put it, ‘in a democratic society both the courts *and the investigation authorities* must remain free from political pressure’<sup>166</sup> and that ‘it is in the public interest to maintain confidence in the independence and political neutrality of the prosecuting authorities of a State’.<sup>167</sup>

Prosecutorial independence is also necessary to guarantee human rights, including the rights of suspects and defendants in criminal trials. As the Council of Europe’s (CoE) committee of European Prosecutors has put it:

‘The role of the prosecutor in asserting and vindicating human rights, both of suspects, accused persons and victims, can best be carried out where the prosecutor is independent in decision-making from the executive and the legislature and where the distinct role of judges and prosecutors is correctly observed. In a democracy based on the rule of law, it is the law that provides the basis for prosecution policy.’<sup>168</sup>

Despite wide-ranging consensus on the importance of the issue, relatively few instruments have been elaborated at either the international or regional level setting forth uniformly applicable standards of prosecutorial independence. There are, however, some relevant UN standards,<sup>169</sup> guidelines promulgated by the International Association of Prosecutors (IAP), as well as regional principles that are relevant.

## 4.1 Relevant international standards

### *Qualifications, appointment and promotion*

International standards require that the system of selection, training, appointment and promotion of public prosecutors should ensure that ‘individuals of integrity and ability, with appropriate training and qualifications’ are appointed and promoted. Security of tenure and conditions of service,

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166 ECtHR, *Guja v Moldova*, Application No 14277/04, Judgment, 12 February 2008, para 86 (emphasis added).

167 *Ibid*, para 90.

168 CoE, Opinion No 4 (2009) of the Consultative Council of European Judges and Consultative Council of European Prosecutors, on Judges and Prosecutors in a Democratic Society’ (the ‘Bordeaux Declaration’), para 10, available at <https://wcd.coe.int/ViewDoc.jsp?id=1560897&site=CM>.

169 The UN Guidelines on the Role of Prosecutors were formulated to assist states ‘in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings’.

including appropriate remuneration, should be ‘set out by law or published rules or regulations’.<sup>170</sup>

For instance, the UN Guidelines on the Role of Prosecutors (the ‘UN Guidelines’) provide that the appointment process for prosecutors should be free of partiality, prejudice and discrimination.<sup>171</sup>

The IAP’s Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors’ (1999) (the ‘IAP Standards’) also emphasise that the recruitment and promotion of prosecutors should be ‘based on objective factors, and in particular professional qualifications, ability, integrity, performance and experience, and decided upon in accordance with fair and impartial procedures’.<sup>172</sup> The CoE has reached the same conclusion.<sup>173</sup>

The UN Special Rapporteur on the independence of judges and lawyers has warned against an appointment process for prosecutors that is dominated by the executive, recommending instead:

‘A public competitive selection process (an examination) [as] an objective way to ensure the appointment of qualified candidates to the profession. Both selection and promotion processes should be transparent in order to avoid undue influence, favouritism or nepotism. Recruitment bodies should be selected on the basis of competence and skills and should discharge their functions impartially and based on objective criteria. This body should be composed by a majority of members from within the profession in order to avoid any possible political or other external interference.’<sup>174</sup>

The UN Special Rapporteur ultimately recognises that, although ‘it is understandable that Governments wish to retain some control over the appointment of the Prosecutor General, it is important that the method of selection maintains public confidence and the respect of the judiciary and the legal profession’. She therefore recommends that the ‘appointment of a Prosecutor General resulting from cooperation among different governmental bodies is preferable to one appointed by a single body, in which case expert advice should be sought.’<sup>175</sup>

### *Conditions of service and discipline*

The UN Guidelines,<sup>176</sup> the IAP Standards,<sup>177</sup> the CoE Recommendations<sup>178</sup> and the African Commission on Human and Peoples’ Rights Principles and Guidelines,<sup>179</sup> all provide that prosecutors should enjoy ‘reasonable conditions of service’ and adequate remuneration. International standards also state that matters of tenure, pension and retirement age should be regulated by law.

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170 UN Guidelines, Art 6.

171 UN Guidelines, Art 2.

172 IAP Standards, (1999), Art 6.

173 CoE Recommendation Rec (2000)19, Art 5.

174 UNHRC, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, 7 June 2012 (UN Doc A/HRC/20/19), at para 62 [footnotes omitted], available at [www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A.HRC.20.19\\_En.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A.HRC.20.19_En.pdf)

175 *Ibid*, at para 64 [footnotes omitted].

176 UN Guidelines, Art 6.

177 IAP Standards, Art 6.

178 CoE Recommendation Rec (2000)19, Art 5(d).

179 AfCHR’ Principles and Guidelines, Art F(a).



Disciplinary proceedings for prosecutors should be governed by law or regulations and prosecutors are entitled to an expeditious, fair and impartial disciplinary process.<sup>180</sup> The UN Special Rapporteur on the independence of judges and lawyers specifies that ‘[t]here should be a framework for dealing with internal disciplinary matters and complaints against prosecutors, who should in any case have the right to challenge – including in court – all decisions concerning their career, including those resulting from disciplinary proceedings.’<sup>181</sup>

### *Independence from the judiciary*

In a number of civil law countries, including Egypt, the prosecution authority forms part of the judiciary. ‘In this structure, there is usually a higher judicial council or a similar independent body that regulates the careers of both prosecutors and judges. Judges and prosecutors may have the possibility of switching between the respective careers, which in some cases is limited by law.’<sup>182</sup>

In such states, it is especially important that prosecutors are functionally independent from the judiciary. The UN Guidelines stipulate that ‘[t]he office of prosecutors shall be strictly separated from judicial functions.’<sup>183</sup> The applicable provision in the African Commission’s Principles and Guidelines is identically worded.<sup>184</sup>

This means that an individual cannot perform the duties of prosecutor and judge at the same time.<sup>185</sup> Prosecutors and judges should be – and should be seen to be – independent of each other. Accordingly:

‘Any attribution of judicial functions to prosecutors should be restricted to cases involving in particular minor sanctions, should not be exercised in conjunction with the power to prosecute in the same case and should not prejudice the defendants’ right to a decision on such cases by an independent and impartial authority exercising judicial functions.’<sup>186</sup>

This has been confirmed by the ECtHR.<sup>187</sup>

### *Independence from the executive and legislature*

Prosecutors must be functionally independent from the legislative as well as the executive branch. This means that prosecutors should be able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.<sup>188</sup> This includes according prosecutors and their families’ physical protection when their safety and wellbeing is threatened by the discharge of the prosecutor’s professional functions.<sup>189</sup>

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180 See, UN Guidelines, Arts 21–22; IAP Standards, Art 6; CoE Recommendation Rec (2000)19, Art 5(e)–(f); AfCHR Principles and Guidelines, Art f(e)–(f).

181 UNHRC, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, 7 June 2012 (UN Doc A/HRC/20/19), at para 70.

182 *Ibid*, at para 31.

183 UN Guidelines, Art 10.

184 AfCHR Principles and Guidelines, Art f(e).

185 CoE Recommendation Rec (2000)19, Art 17.

186 CoE, Opinion No 12 (2009) of the Consultative Council of European Judges (CCJE) and 2009 Bordeaux Declaration para 7.

187 ECtHR, *Schiesser v Switzerland*, Application No 7710/76, Judgment, 4 December 1979.

188 UN Guidelines, Art 4; IAP Standards, Art 6; CoE Recommendation Rec (2000)19, Art 11; 2005 Budapest Guidelines, Article II(d); 2009 the Bordeaux Declaration (2009), Art 8; AfCHR Principles and Guidelines, Article F(a) (2).

189 UN Guidelines, Art 5; IAP Standards, Art 6.

In a number of states, the prosecution service is dependent on the executive to a greater or lesser degree, and the executive may have influence over the appointment, promotion, remuneration or training of prosecutors and the organisation of the prosecution service. The IAP Standards, however, make clear that this should not impact their core functions: ‘[t]he use of prosecutorial discretion... should be exercised independently and be free from political interference’.<sup>190</sup>

The Inter-American Commission on Human Rights has also affirmed that in order to carry out its essential function, ‘the Office of the Public Prosecution must be an organ independent of the executive branch and must have the attributes of irremovability (security of tenure) and other constitutional guarantees afforded to members of the judicial branch’.<sup>191</sup>

This means that if the executive has the right to issue instructions to prosecutors, such instructions must be ‘transparent, consistent with lawful authority [and] subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence’.<sup>192</sup> The CoE’s Recommendations confirm that government instructions must be transparent and must respect the principle of equality of arms between the prosecution and the defence.<sup>193</sup> Crucially, this applies to the right of any non-prosecutorial authority ‘to direct the institution of proceedings or to stop legally instituted proceedings’, which should be exercised in line with these principles.<sup>194</sup>

## 4.2 Relevant provisions of Egyptian law

The Office of the Prosecutor is a hierarchical structure under Egyptian law, with assistant public prosecutors, first attorney-generals, attorney-generals, chief prosecutors, prosecutors, assistant prosecutors and associate prosecutors – all being subject to the supervision of the Prosecutor General. The Prosecutor General, sitting at the top of this pyramid, exercises very significant powers in Egypt.

There are various provisions in the JAL designed to ensure that members of the public prosecution adhere to a minimum level of independence and impartiality. As with judges, members of the public prosecution are required to demonstrate political impartiality. Members of the public prosecution are required to swear the same oath required of judges;<sup>195</sup> they are prohibited from taking on work that conflicts with the values of their office, including all political work;<sup>196</sup> and they are forbidden from undertaking work involving close relatives.<sup>197</sup>

Individuals in the Public Prosecutor’s office also enjoy the same employment protections as judges: they cannot be dismissed from their post without their consent;<sup>198</sup> and they enjoy the same immunity from prosecution as members of the judiciary.

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190 IAP Standards, Art 2(1).

191 Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Mexico*, OEA/Ser L/V/II.100, Chapter V, paras 372 and 381.

192 IAP Standards, Art 2(2).

193 CoE Recommendation Rec (2000)19, Art 13(d).

194 IAP Standards, Art 2(3).

195 JAL, Arts 71 and 120.

196 *Ibid*, Arts 72 and 73 (read in conjunction with Art 130).

197 *Ibid*, Art 75.

198 *Ibid*, Art 67.

Despite these protections, the Minister of Justice plays a crucial role in the careers of members of the public prosecution, including in relation to: appointing ‘investigating judges’; transferring prosecutors to other posts; and disciplining prosecutors. These challenges are described more fully in the section below.

Other challenges to prosecutorial independence arise from the system of appointment. Article 38 of the JAL contains general conditions and qualifications required for appointment to the public prosecution, including legal qualifications. According to some interviewees and commentators, however, in practice these requirements were not always met, including in the case of the Prosecutor General.<sup>199</sup>

The role of the President in appointing the Prosecutor General has been one of the divisive legal issues in Egypt in recent years. Under the JAL, the Prosecutor General is appointed directly by the President from among the heads of the appeal courts or the head of the Court of Cassation or the two most senior prosecutors. And unlike with more junior prosecutors, there is no need for approval from the SJC.<sup>200</sup> The 2014 Constitution, however, reverses this position, and provides that the Prosecutor General is to be selected by the SJC instead.

### *Challenges to prosecutorial independence*

#### ROLE OF THE MINISTER OF JUSTICE IN SELECTING, TRANSFERRING AND DISCIPLINING INVESTIGATING JUDGES

The Minister of Justice plays a crucial role in the careers of members of the Public Prosecution.

First, under the JAL, a Minister of Justice chooses the investigating judges and can request the President of the Court of Appeal to appoint an investigating judge to investigate specific crimes.<sup>201</sup> The IBAHRI was informed that, as a consequence, a Minister who was, for instance, pro-Brotherhood could omit to appoint independent investigating judges to investigate cases against their members.<sup>202</sup> And, although this could not be verified, delegates were also informed by one interviewee that in the well-known case against NGOs accused of receiving illicit foreign funding,<sup>203</sup> the Minister of Justice chose investigative judges whose views he deemed favourable to the prosecution.

Although Egyptian law does not allow the Minister of Justice to instigate disciplinary proceedings directly against an employee, a function which is reserved for the Prosecutor General and the two highest ranking prosecutors beneath him, the Minister of Justice may nevertheless request that proceedings are commenced,<sup>204</sup> and he exercises a supervisory role over the Public Prosecution and

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199 See, n 62 above, at n 123: ‘Former Prosecutor General Mahir Abd Al-Wahid, appointed in 2000, is a pertinent example, since he was neither a senior judge at the Court of Appeal or Court of Cassation, nor a Public Attorney and instead was serving as an assistant to the Minister of Justice.’

200 JAL, Art 119 . The remaining members of the OPP are appointed by a decision of the President after getting the approval of the SJC.

201 CCP Art 65.

202 HRW has highlighted allegations of politicisation in the judiciary’s approach to investigations: see ‘Egypt: Protester Killings Not Being Investigated’ (*HRW*, 2 November 2013), available at [www.hrw.org/news/2013/11/02/egypt-protester-killings-not-being-investigated](http://www.hrw.org/news/2013/11/02/egypt-protester-killings-not-being-investigated).

203 See ‘All defendants in NGO foreign funding case found guilty’ (*Daily News Egypt*, 4 June 2013), available at [www.dailynewsegypt.com/2013/06/04/all-defendants-in-ngo-foreign-funding-case-found-guilty](http://www.dailynewsegypt.com/2013/06/04/all-defendants-in-ngo-foreign-funding-case-found-guilty).

204 JAL, Arts 128-129 . See also Arts 63 and 232(2) of the CCP, in conjunction with Art 123 of the Penal Code. The Minister of Justice is also empowered to reprimand prosecutors (Art 126) or even to suspend them (Art 129). Some amendments were introduced to the JAL through subsequent laws with a view to limiting the control of the executive over prosecutors. Law 35/1984 also amended Art 67 of the JAL to ensure the irremovability of public prosecutors. And Law 142/2006 imposed various limitations on the powers of the Minister of Justice as regards the public prosecution. For example, prosecutors are now subordinated to their immediate superiors and the Prosecutor General only.

its members.<sup>205</sup> The Minister of Justice also decides whether members of the Public Prosecution may be transferred to other parts of the government, and decides whether or not to accept resignations.<sup>206</sup>

#### ROLE OF PRESIDENT IN APPOINTING PROSECUTOR GENERAL

In November 2012, President Morsi issued a Constitutional Declaration, as a result of which Abdel Meguid Mahmoud was to be removed as Prosecutor General and replaced with Talaat Abdullah.<sup>207</sup> The Declaration imposed a new requirement that a prosecutor should serve a single four-year term and was to apply retroactively meaning that Mahmoud, who had served six years at the time, would be required to step down.

Mahmoud initially accepted his removal and subsequent appointment as Egypt's Ambassador to the Vatican but then withdrew his acceptance and, at the time of the IBAHRI mission to Egypt in June 2013, he had instead been reassigned as a judge at the Cairo Court of Appeal.

Talaat Abdallah's assumption of office enraged some members of the Public Prosecution itself. Prosecutors reportedly waved their membership cards in and around the offices during a protest demanding Abdallah's resignation. Having approximately 1,500 prosecutors demonstrating in front of their boss for his removal was a dramatic sight and, days later, Abdallah resigned.

A series of challenges to Abdallah's appointment was ultimately adjudicated in the courts. On 27 March 2013 the High Court found that Morsi's appointment of Talaat Abdullah as Prosecutor General was invalid and it ordered the Ministry of Justice to reinstate its previous appointment of Abdel Meguid Mahmoud.<sup>208</sup> This was ultimately confirmed by the Court of Cassation.

The 2012 Constitution provided that the Prosecutor General was to be selected by the SJC rather than by the President, who had previously exercised unfettered discretion in making his choice. Under Article 173 of the 2012 Constitution:

'The... General... is appointed by the President of the Republic, who chooses from among the deputies to the President of the Court of Cassation, the presidents of the appeals courts, and the assistant public prosecutors. The appointment is made upon recommendation from the Supreme Judicial Council. It is valid for four years or until the appointee reaches retirement age, whichever happens sooner. He may only be appointed once during his professional life.'

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205 JAL, Art 125.

206 JAL, Arts 62 and 70.

207 Maguid was first 'removed' in October 2012 but then reinstated. He was removed again in November 2012 after Morsi's controversial constitutional declaration of the same month.

208 In December 2012 the Azbakiya Misdemeanor Court also declined a case on the basis that it had been referred by Talaat Abdullah, who it did not recognise as Prosecutor General. See 'In another blow to Morsy, court does not recognize Prosecutor General' (*Egypt Independent*, 11 December 2012), available at <http://www.egyptindependent.com/news/another-blow-morsy-court-does-not-recognize-prosecutor-general>.

However, the move to appoint Abdallah in place of Mahmoud was made by the President directly, before the system of SJC appointments was brought into force. The language in the 2014 Constitution, makes even clearer than the 2012 version that the Prosecutor General is selected by the SJC, with the Presidential Decree being a mere formality for the appointment.<sup>209</sup>

In the IBAHRI's view this system of single-term appointments by the SJC in the 2014 Constitution is welcome, as it removes the role of the President in selecting the Prosecutor General, as well as removing any incentive for him to act in a way that is perceived to increase his chances of reselection.

#### APPLICATION OF PROSECUTORIAL INDEPENDENCE IN PRACTICE

Anecdotal evidence provided to the IBAHRI suggests that it is accepted that the President or executive will sometimes attempt to influence the Office of the Public Prosecution by 'suggesting' that they should either drop an investigation or start one against a particular individual. One senior diplomat suggested that this situation has indeed deteriorated since Mubarak because at least under Mubarak, the 'prosecutor would sometimes say "no"'. Others suggested that the pressure a prosecutor might face is more subtle, with no direct command received but a clear understanding of what he is expected to do. A review of prosecutorial trends since Egypt's 2011 revolution suggests that, in practice, prosecutors have not been immune from such pressures.

According to international standards, a complete separation between the prosecution services and the executive is not necessary to ensure independence. As with the independence of the judiciary, the precise mechanism and structure for securing an independent prosecution is for the state in question to decide. However, states have a duty to provide safeguards so that prosecutors can conduct investigations impartially and objectively. The system should maintain public confidence and the process of selecting and promoting prosecutors needs to be transparent and based on objective criteria. If the executive has the right to issue instructions to prosecutors, such instructions must be 'transparent, consistent with lawful authority [and] subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence'.<sup>210</sup> This applies equally to the right of any non-prosecutorial authority to 'to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in similar fashion'.<sup>211</sup>

The practice of Egyptian prosecutors since 2011 suggests that there is at least a perception – if not also a reality – that prosecutions in Egypt are politicised.

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209 2014 Constitution, Art 189.

210 IAP Standards, Art 2(2).

211 *Ibid*, Art 2(3).

## Case study: lack of accountability for crimes committed by security forces

Under international standards, prosecutors should ensure that abuse committed by state officials is properly investigated. More specifically, prosecutors should ‘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>212</sup> But under each of the governing regimes since 2011, accountability for the acts of government forces has been limited.

In the words of one report, even before 2011, ‘[t]he failings of the [Office of the Public Prosecutor] in Egypt have severely undermined the rights of victims of human rights violations to effective remedies and to reparation, as most investigations into such violations either did not result in trials or did not result in the conviction of the perpetrators’.<sup>213</sup> This conclusion reached by the UN before the 2011 revolution in relation to crimes such as torture that were allegedly perpetrated – but not adequately investigated and prosecuted – in Egypt.<sup>214</sup>

Since Egypt’s 2011 revolution, the crimes committed under the watch of each successive government have remained largely unaddressed, while political opponents have been enthusiastically pursued.

The three successive regimes that have followed Mubarak – the military regime, the Morsi government and then the post-Morsi interim administration – have largely failed to prosecute cases of human rights violations.

Under the transitional military rule in 2011, the recommendations of a fact-finding group resulted in little prosecutorial action.<sup>215</sup> As Bassiouni has stated, ‘despite a strong tradition of rule of law and independence of the judiciary in Egypt... there has been no transitional justice [and] no sense of accountability’ since 2011. In his view, Mubarak-era officials were not held accountable because ‘[a]ll of the trials which had been initiated... [were led] by a Prosecutor General who was very close to the Mubarak regime [and] were all flimsy cases which resulted in the acquittal of Mubarak and possibly the acquittal of his two sons’ and ‘[a]lmost all of the other trials that are going on are falling apart’.<sup>216</sup> The US State Department also reported that ‘[s]ome civil society activists and politicians claimed that some prosecutors and judges held biases in favor of the security forces and Mubarak government that caused them to acquit some police officers and high-profile political figures associated with the Mubarak government’.<sup>217</sup>

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212 UN Guidelines, Art 15.

213 International Commission of Jurists, *Egypt’s new Constitution: A Flawed Process; Uncertain Outcomes* (November 2012), 40.

214 UNHRC, *Report of The Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism: Egypt*, A/HRC/13/37/Add.2, 14 October 2009, para 56.

215 See n 2 above, at para 167.

216 See n 1 above.

217 ‘2012 Human Rights Reports: Egypt’, US State Department, Bureau of Democracy, Human Rights and Labor, 19 April 2013.



President Mubarak was convicted of failing to stop the killing of protesters and sentenced to life imprisonment. But an appeal was filed and a retrial ordered. He also faces separate charges on corruption and embezzlement cases, which have so far led to acquittals.

This situation did not change once Morsi came to power. As noted by HRW in January 2013, ‘prosecution failings, security agency cover-ups, and a failure of political will have conspired to deny justice to victims of government abuse’.<sup>218</sup> A fact-finding committee appointed by Morsi in July 2012 found dozens of instances of excessive use of force and other abuses of human rights against protesters; however the IBAHRI understands that this has not yet led to prosecutions against perpetrators and many of that committee’s findings have remained unpublished.<sup>219</sup>

Just over a month before the end of Morsi’s presidency, the UN High Commissioner for Human Rights therefore concluded that:

‘At the same time as... proceedings [targeting protesters, journalists and other activists] are underway, people – including members of the security forces – responsible for very serious human rights abuses, such as the killing, torture, rape and other forms of sexual attacks on protesters, and ill-treatment of detainees, have in many cases not been properly investigated by the General Prosecutors, let alone brought to justice.’<sup>220</sup>

Sadly the record of impunity for government abuses also continued after Morsi’s ouster. Prominent human rights groups have released a list of 13 incidents in which they claim that security forces have killed protesters since January 2011 but which have not been investigated or prosecuted.<sup>221</sup> Another group has attempted to file a complaint with the ICC on behalf of the former regime. But ultimately, according to HRW:

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218 ‘Egypt: Publish Fact-Finding Committee Report’ (HRW, 24 January 2013), available at [www.hrw.org/news/2013/01/24/egypt-publish-fact-finding-committee-report](http://www.hrw.org/news/2013/01/24/egypt-publish-fact-finding-committee-report).

219 *Ibid.*

220 ‘Egypt risks drifting further away from human rights ideals that drove revolution – Pillay’ (OHCHR, 8 May 2013), available at [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13306&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13306&LangID=E).

221 See ‘Egypt: No Acknowledgment or Justice for Mass Protester Killings’ (HRW, 10 December 2013), available at <http://www.hrw.org/news/2013/12/10/egypt-no-acknowledgment-or-justice-mass-protester-killings>. The list of the 13 NGOs is available in this same report and the reported incidents are as follows: (1) 6 October 2013, at least 57 protesters killed in dispersal of marches headed from Dokki and Ramsis towards Tahrir Square, police and armed forces deployed, no reported police deaths, no investigation of security forces wrongdoing; (2) 16 August 2013, at least 120 people and two police killed in clashes at the epicenter of protests in Ramsis Square and in marches en route, police deployed, no investigation of police for wrongdoing; (3) 14 August 2013, Muslim Brotherhood sit-ins Nahda and Rabaa al-Adawiya, police deployed, up to 1,000 protesters according to the prime minister and nine police killed, no investigation of police for wrongdoing; (4) 27 July 2013, on Nasr Street in Cairo, police deployed, 95 protesters and one policeman killed, no investigation of police for wrongdoing; (5) 8 July 2013, outside the Republican Guard Club headquarters in Cairo, military deployed, 61 protesters, one military and one police officer killed, no investigation of military for wrongdoing; (6) 5 July 2013, outside the Republican Guard Club headquarters in Cairo, military shoots five protesters dead, no investigation of any military personnel. (7) January 2013, outside Port Said prison, police killed 46 people over three days, two policemen killed, investigation started but no one referred for trial. Police killed nine people in Suez. No prosecution of any officers. (8) January 2013, police kill two protesters during protests, one outside the presidential palace and one downtown. No prosecution of any officers. (9) November 2012, Tahrir Square area, two killed during Mohamed Mahmoud anniversary; (10) December 2011, outside Cabinet in Cairo, military deployed, 17 killed, no investigation; (11) November 2011, Mohamed Mahmoud Street, police deployed, 51 protesters killed, one police officer serving three-year sentence after being captured on video shooting protesters in the eye, no other investigation of security forces; (12) October 2011, Maspero, 27 Coptic Christian protesters killed, three soldiers sentenced by military tribunal to two and three-year sentences for driving APCs that killed protesters, no investigation of shooting deaths of 13 protesters; and (13) January 2011, Cairo, Alexandria, Suez and other cities, 846 protesters killed in squares and near police stations, according to the most conservative estimates, two policemen serving time.

‘Since 2011, the courts have convicted and sentenced to prison only three low-level security officers. Almost three years after the overthrow of Mubarak, only two police officers are serving time for the killing of at least 846 protesters in January 2011. Only one police officer is in prison, serving a three-year sentence for shooting at protesters during the protest on Mohamed Mahmoud street in November 2011, when police killed 51 protesters over five days. The public prosecutor has not prosecuted any other police official for the death of the 51 protesters.’<sup>222</sup>

HRW therefore concludes that, ‘[e]fforts to prosecute security forces and senior government officials for the unlawful killing of protesters, including holding accountable those in senior decision-making positions in the chain of command, have... overwhelmingly failed’.

#### PROSECUTING POLITICAL OPPONENTS

While the record on accountability for crimes committed by security forces has been disappointing under the three successive regimes that have been in power since 2011, prosecutions of opponents of those in power have been pursued enthusiastically. Indeed, three distinct prosecution trends are discernible. First, under the short period of military rule that followed the 2011 revolution, more civilians were allegedly prosecuted for ‘crimes against the military’ – including such crimes as ‘insulting the military’ – than had ever been prosecuted during 30 years of Mubarak rule.<sup>223</sup>

Then, under Morsi’s Brotherhood presidency, those who insulted Islam or insulted the President himself were targeted. According to the ANHRI, the number of prosecutions brought for ‘insulting the President’ under Morsi in the period from 30 June 2012 to 20 January 2013 exceeded the number of such prosecutions brought during Mubarak’s 30 years in power.<sup>224</sup>

Finally, in the post-Morsi era, during the second half of 2013, a startling number of prosecutions were initiated against Brotherhood figures, including the President himself and the Brotherhood’s entire senior leadership.

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222 *Ibid.*

223 See, for example, ‘Egypt: Retry or Free 12,000 After Unfair Military Trials’, (*HRW*, 10 September 2011), available at: [www.hrw.org/news/2011/09/10/egypt-retry-or-free-12000-after-unfair-military-trials](http://www.hrw.org/news/2011/09/10/egypt-retry-or-free-12000-after-unfair-military-trials).

224 See ‘More “insulting president” lawsuits under Morsi than Mubarak’ (*Ahram Online*, 20 January 2013), available at <http://english.ahram.org.eg/News/62872.aspx>. As the US State Department noted in a report on Egypt’s human rights record, ‘direct criticism of the SCAF or the military was criminalized while the SCAF was in power, and the government pursued several cases against reporters it accused of insults to public officials or publishing false information under President Morsy’. See n 11 above. See also Egyptian Initiative for Personal Rights, ‘Besieging Freedom of Thought : Defamation of Religion Cases in Two Years of the Revolution’ (11 September 2013). According to the Egyptian Initiative for Personal Rights, there were increasing prosecutions ‘against those who express an opinion about controversial religious issues’ both under both the rule of the SCAF and President Morsi.

## Phase 1: prosecuting those who insult the military

As noted by the IBAHRI in its 2011 report, *Justice at a Crossroads*, there was ‘a dramatic increase in the number of civilian suspects being brought before military courts by the SCAF in the months immediately after the revolution’.<sup>225</sup> Indeed, between February and November 2011, ‘more than 12,000 civilians [were] brought before hasty military trials and... the overwhelming majority were convicted’.<sup>226</sup>

For instance, as documented by the US State Department, in January 2012, the SCAF released blogger Maikel Nabil Sanad, following nine months in a military prison for ‘insulting the military institution and distributing false news that disturbs public security’. Then, in October 2012, Sanad claimed in an online commentary that he was again under investigation for insulting Islam.

## Phase 2: prosecuting those who insult Islam or the President

As the UN High Commissioner for Human Rights Navi Pillay commented, during Morsi’s presidency Egyptian prosecutors initiated ‘legal action targeting protesters, journalists and other activists, including the prominent political satirist, Bassem Youssef’.<sup>227</sup> The UK Foreign Office also commented during this period that there was an ‘increase in prosecutions of bloggers and activists, closing of satellite television stations, and lack of clarity on the definition of blasphemy, which is illegal under the 2012 constitution’.<sup>228</sup> And, according, to the US State Department:

- In April 2012, a Cairo court sentenced a 17-year-old Christian boy to three years’ imprisonment for publishing cartoons on his Facebook page that ridiculed Islam and the Prophet Muhammad.
- In September 2012, police arrested blogger Alber Saber for allegedly posting a link to a film ridiculing Islam and the Prophet Muhammad on his Facebook page, and in December 2012 a misdemeanour court sentenced him to three years in prison for insulting Islam.<sup>229</sup>

The *Bassem Youssef* case is one of the most high profile cases in which a defendant was accused by prosecutors of insulting the president and his religion. Youssef is the host of a popular television programme in Egypt, called *El-Bernameg*, which regularly satirises Egyptian politics and political figures, attracting domestic audiences of millions. He also became known internationally as ‘Egypt’s John Stewart’ – a reference to the influential political satirist in the US who hosts *The Daily Show*, and publicly supported Youssef’s work.

On 1 January 2013, following a programme in which Youssef mocked Mr Morsi while holding a pillow bearing the President’s image, an Islamist lawyer named Ramadan Abdel-Hamid Al-Oqsori filed a complaint with the Public Prosecution alleging that Dr Youssef’s behaviour breached Egyptian law. Prosecutors quickly launched an investigation into Youssef, alleging that he may have breached

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<sup>225</sup> See n 2 above, at para 42.

<sup>226</sup> *Ibid*, para 43.

<sup>227</sup> See n 220 above.

<sup>228</sup> British Foreign and Commonwealth Office, *Human Rights and Democracy: The 2012 Foreign & Commonwealth Office Report* (2012), p 30.

<sup>229</sup> US State Department, *Country Report on Human Rights Practices: Egypt* (19 April 2013). The report noted that at year’s end he was released pending an appeal.

provisions forbidding insults against the President.<sup>230</sup> On 30 March 2013, prosecutors concluded their investigation and issued an arrest warrant for Youssef on the basis that, on separate occasions, he had breached Egyptian law by insulting both the President and Islam.<sup>231</sup> In April 2013, new investigations covered ‘spreading false news’ and ‘breaching the peace’<sup>232</sup> as well as allegations that Youssef was guilty of ‘spreading atheism’ and ‘insulting Pakistan’.<sup>233</sup> The latter charge was based on a segment in Dr Youssef’s show in which he had mocked an academic hat worn by Morsi while receiving an honorary doctorate from a Pakistani university.<sup>234</sup>

Another case that was highlighted by the IBAHRI interviewees is that of Egyptian blogger and activist Ahmed Douma. Mr Douma was investigated by prosecutors in Tanta after giving an interview to the Sada Al-Balad television network in which he said, amongst other things: ‘I don’t see a president ruling Egypt. I see someone called Mohammed Morsi, a criminal evading justice, who is hiding in the presidential palace.’<sup>235</sup> As a result Mr Douma was questioned on 30 April 2013 and subsequently charged with inciting violence and other crimes, and detained. He was released from jail after Morsi’s administration was removed from power.<sup>236</sup> In December 2013, however, he and three fellow bloggers were sentenced to three years’ imprisonment.<sup>237</sup>

Other prosecutions of this nature initiated during Morsi’s presidency included:

- cases against a newspaper editor investigated for insulting the President;<sup>238</sup>
- a case against Coptic lawyer Romani Murad Saad who was sentenced in absentia to one year in prison for contempt of Islam;<sup>239</sup>
- a case against television announcer Mahmoud Saad, psychiatrist Dr Manal Omar, and the Al-Nahar channel for ‘spreading false information’ during a show in which Saad and Omar questioned President Morsi’s sanity;<sup>240</sup>

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230 ‘Host of Egyptian ‘Daily Show’ investigated after being accused of insulting President Morsi’ (*National Post*, 1 January 2013), available at <http://news.nationalpost.com/2013/01/01/host-of-egyptian-daily-show-investigated-after-being-accused-of-insulting-president-morsi>.

231 ‘Egypt satirist Bassem Youssef faces arrest warrant’ (*BBC News*, 30 March 2013), available at [www.bbc.co.uk/news/world-middle-east-21980343](http://www.bbc.co.uk/news/world-middle-east-21980343).

232 See tweet by Dr Bassem Youssef on Twitter, ‘A new investigation against me is to be started because of last episode. Accusations include spreading rumors and disturbing the “Peace”’, 1 April 2013, available at [www.twitter.com/EgyPresidency/status/318838999055728640](http://www.twitter.com/EgyPresidency/status/318838999055728640). See Annex A.

233 See ‘The Prosecution opens investigations in the case against Bassem Youssef into “insulting Pakistan” and “spreading atheism”’ (*Al-Tahrir*, 9 April 2013), available at <http://tahrirnews.com/news/view.aspx?cdate=09042013&id=929af386-b59e-4fab-901f-eae69c106408>.

234 Contemporaneously with the cases against Dr Youssef personally, a lawyer working for the Brotherhood, Mahmoud Abul Enin, filed an application with the Administrative Court requesting that it rule Albarnameg unlawful and shut it down. On 6 April 2013 the Administrative Court returned a verdict in favour of El-Barnameg, dismissing the Brotherhood’s claim and refusing to issue a ban. See ‘Investment department at Administrative Court dismisses charges against Bassem Youssef’s Albarnameg’ (*Daily News Egypt*, 6 April 2013), available at [www.dailynewsegypt.com/2013/04/06/investment-department-at-administrative-court-dismisses-charges-against-bassem-youssefs-al-barnameg](http://www.dailynewsegypt.com/2013/04/06/investment-department-at-administrative-court-dismisses-charges-against-bassem-youssefs-al-barnameg). See also Twitter, ‘@DrBassemYoussef: The Administrative Court refuses to halt Albarnameg. Many congratulations to us’ (English translation from Arabic), 6 April 2013. See Annex A.

235 ‘Activist to be tried for insulting Egypt president’ (*Associated Press*, 2 May 2013), available at <http://bigstory.ap.org/article/activist-be-tried-insulting-egypt-president>.

236 ‘Activist Ahmed Douma released from jail, remains on trial’ (*Egypt Independent*, 6 July 2013), available at [www.egyptindependent.com/news/activist-ahmed-douma-released-jail-remains-trial](http://www.egyptindependent.com/news/activist-ahmed-douma-released-jail-remains-trial).

237 ‘Egypt jails Ahmed Maher and other secular activists’ (*BBC News*, 22 December 2013), available at [www.bbc.co.uk/news/world-middle-east-25484064](http://www.bbc.co.uk/news/world-middle-east-25484064).

238 ‘Egypt journalist probed for “insulting” Morsi’ (*Al-Akhbar English*, 2 January 2013), available at <http://english.al-akhbar.com/node/14547>.

239 ‘Romani Murad imprisoned for charges of blasphemy... A new violation to freedom of expression of belief’ (*ANHRI*, 3 June 2013), available at [www.anhri.net/en/?p=12615](http://www.anhri.net/en/?p=12615).

240 ‘Presidency criticises Egyptian media’ (*Daily News Egypt*, 6 January 2013), available at [www.dailynewsegypt.com/2013/01/06/presidency-criticises-egyptian-media](http://www.dailynewsegypt.com/2013/01/06/presidency-criticises-egyptian-media).

- a case against journalists Tawfiq Okasha, Islam Afifi, Abdel Halim Qandeel, and Adel Hamouda on charges of incitement to violence and ‘insulting’ President Morsi;<sup>241</sup>
- a ‘defamation of Islam’ conviction against actor Adel Imam, in connection with three comedic films he made in the 1990s;<sup>242</sup>
- a case against Bishoy Kamel who was convicted for a variety of Facebook posts and comments;<sup>243</sup> the court sentenced Kamel to three years for blasphemy, two years for defamation of President Morsi, and one year for defamation of a public prosecutor; and
- a case against the owner of Al-Fareen, the independent satellite television station, for a broadcast which was said to threaten Morsi’s safety.<sup>244</sup>

While Morsi allegedly pardoned individuals who were convicted of insulting him,<sup>245</sup> and prosecutions for insulting Islam may have dropped since Morsi’s ouster, the prosecution service continues to go after Youssef for criticising the current regime. In November 2013, Egypt’s Prosecutor General reportedly took action in relation to 30 complaints filed against Youssef, including for offending army chief Abdel-Fattah El-Sisi, opening the door to further prosecutions and convictions.

This has led Youssef himself to declare that he is ‘not with the [Islamists], who attacked us and declared us apostates... At the same time, I am not with hypocrisy, deification of individuals and creation of pharaohs... We are afraid that fascism in the name of religion will be replaced with fascism in the name of nationalism.’<sup>246</sup>

### Phase 3: prosecuting the Muslim Brotherhood

The persistence of prosecutors in pursuing claims against members of the Brotherhood since 3 July 2013 has been evident. Egyptian defence lawyers informed Amnesty International that approximately 3,000 supporters and members of the FJP were arrested between July and September 2013.<sup>247</sup> This has included the arrest of almost the entire Brotherhood leadership, including former President Morsi himself and the leader of the Brotherhood, Mohammed Badie, whose arrest drew strong condemnation from the US State Department.<sup>248</sup> Additionally, certain Salafists and Islamists who had been acquitted in trials held in 2012 have had their files reopened or new charges pressed against them, including Mohamed Al-Zawahiri and Mostafa Hamza.<sup>249</sup>

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241 ‘Mohamed Morsi “intends” to use legal powers to pardon press critics’ (*The Guardian*, 23 August 2012), available at [www.theguardian.com/world/2012/aug/23/mohamed-morsi-press-critics-egypt](http://www.theguardian.com/world/2012/aug/23/mohamed-morsi-press-critics-egypt).

242 US State Department, *Country Report on Human Rights Practices: Egypt* (19 April 2013), 13. The lower court conviction was in April and it was overturned on appeal on 12 September 2013.

243 *Ibid.*, 11.

244 ‘Egypt investigating popular TV host over presidential satire’ (*NBC News*, 2 January 2013), available at [http://worldnews.nbcnews.com/\\_news/2013/01/02/16296855-egypt-investigating-popular-tv-host-over-presidential-satire](http://worldnews.nbcnews.com/_news/2013/01/02/16296855-egypt-investigating-popular-tv-host-over-presidential-satire).

245 According to a legal advisor to President Morsi who met with the IBAHRI. The IBAHRI was however not able to verify this.

246 Noah Rayman, ‘Amid Censorship, Egypt’s John Stewart Is Without a Show’ (*Time*, 20 November 2013), available at <http://time100.time.com/2013/11/20/amid-censorship-egypts-john-stewart-is-without-a-show>, which cites Youssef’s column in the independent newspaper *Al-Sharouk*.

247 ‘Egypt: Detained Morsi Supporters Denied Their Rights’ (*Amnesty International*, 12 September 2013), available at [www.amnesty.org/en/news/egypt-detained-morsi-supporters-denied-their-rights-2013-09-12](http://www.amnesty.org/en/news/egypt-detained-morsi-supporters-denied-their-rights-2013-09-12).

248 ‘US may cut aid to Egypt after army arrests Islamist leader’ *The Telegraph* (London, 20 August 2012), available at [www.telegraph.co.uk/news/worldnews/africaandindianocean/egypt/10255692/US-may-cut-aid-to-Egypt-after-army-arrests-Islamist-leader.html](http://www.telegraph.co.uk/news/worldnews/africaandindianocean/egypt/10255692/US-may-cut-aid-to-Egypt-after-army-arrests-Islamist-leader.html).

249 ‘Egyptian prosecutors charge El-Zawahiri, Hamza with joining terror group’ (*AhramOnline*, 19 August 2013) available at <http://english.ahram.org.eg/News/79412.aspx>.



In November 2013, Morsi went on trial alongside 14 senior Brotherhood figures.<sup>250</sup> After almost two months in detention at a secret location, state prosecutors announced on 1 September 2013 that Morsi would stand trial for inciting murder and violence.<sup>251</sup> The charges relate to the deaths of at least seven people during clashes between opposition protesters and Brotherhood supporters outside the Ittihadiya presidential palace in Cairo in December 2012.<sup>252</sup> The deposed president also faces prosecution over his escape from prison during the uprising that forced Mubarak from power, allegedly with assistance from Palestinian militant group Hamas and the Shia militant group Hezbollah.<sup>253</sup>

The charges against senior Brotherhood leaders reportedly allege that they met in secret a few days before the anti-Brotherhood protests on 30 June 2013 and decided to place armed men to fire on protesters if their headquarters were attacked. Leaders deny these charges completely.

Egyptian authorities also allegedly arrested Mahmoud Al-Khudeiry, a retired judge and former Vice President of the Court of Cassation, who is known for his support for Morsi.<sup>254</sup>

Even judicial organisations appear to have been involved in the crackdown. On 25 July 2013, 75 judges who had signed a statement supporting the legal legitimacy of Morsi's presidency were expelled from the Judges' Club.<sup>255</sup> The Judges' Club then filed reports against these individuals with the SJC, meaning they are subject to disciplinary action for 'inappropriate' political behaviour. And, on 2 September 2013, an extraordinary judicial panel appointed by the government recommended that the Brotherhood's status as an NGO be revoked.

Severe jail sentences handed down by an Alexandria Misdemeanour Court to 21 female Islamist protesters in the Mediterranean city also sparked outrage in Egypt. The court sentenced 14 female protesters to 11 years in prison each for destruction of private property, attacking security forces and stirring violence. The ANHRI stated that the ruling was politicised, warning that such rulings raised 'doubts over the future of justice in Egypt' and presaged a return to the use of 'justice institutions as a tool against the opposition.'

More generally, the zeal with which the Brotherhood has been prosecuted, as contrasted with the impunity that has been evident in relation to alleged crimes of security forces, has led to accusations that prosecutions in Egypt have – as under previous governments – been selective and politicised.<sup>256</sup>

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250 'Trial begins of Egypt's Morsi' (*Aljazeera*, 4 November 2013), available at [www.aljazeera.com/news/middleeast/2013/11/egypt-morsi-court-trial-201311464734581519.html](http://www.aljazeera.com/news/middleeast/2013/11/egypt-morsi-court-trial-201311464734581519.html).

251 'Egypt to try ex-President Morsi for inciting murder' (*BBC News*, 2 September 2013), available at [www.bbc.co.uk/news/23924145](http://www.bbc.co.uk/news/23924145).

252 'Egypt: Ousted President Mohamad Morsi must be brought to court and granted a lawyer' (*Amnesty International*, 4 November 2013), available at [www.amnesty.org.uk/press-releases/egypt-ousted-president-mohamed-morsi-must-be-brought-court-and-granted-lawyer](http://www.amnesty.org.uk/press-releases/egypt-ousted-president-mohamed-morsi-must-be-brought-court-and-granted-lawyer).

253 'Egyptian prosecutors to investigate if Hamas helped Mohammed Morsi escape from prison during 2011 revolution' (*National Post*, 11 July 2013), available at <http://news.nationalpost.com/2013/07/11/egyptian-prosecutors-to-investigate-if-hamas-helped-mohammed-morsi-escape-from-prison-during-2011-revolution>.

254 'Egypt: Former Judge Faces Torture Accusation, ANHRI Demands the Release of "Mahmoud Al-Khudairi"' (*ANHRI*, 28 November 2013), available at [www.anhri.net/en/?p=14534](http://www.anhri.net/en/?p=14534).

255 'Egypt's Judges' Club expels 75 pro-Morsi members' (*AhramOnline*, 25 July 2013), available at <http://english.ahram.org.eg/NewsContent/1/64/77369/Egypt/Politics-/Egypys-Judges-Club-expels-proMorsi-members.aspx>.

256 Amira Abo el-Fetouh, 'Making a mockery of justice in the trial of the century' (*Middle East Monitor*, 14 November 2013), available at [www.middleeastmonitor.com/blogs/politics/8315-making-a-mockery-of-justice-in-the-trial-of-the-century](http://www.middleeastmonitor.com/blogs/politics/8315-making-a-mockery-of-justice-in-the-trial-of-the-century).



In December 2013, 13 Egyptian and international human rights organisations<sup>257</sup> called on the Egyptian authorities to acknowledge, and seriously and thoroughly investigate ‘the killing of up to 1,000 people by security forces dispersing Muslim Brotherhood sit-ins on August 14, 2013’. In this and other incidents, the NGOs said:

‘Prosecutors have selectively investigated only protesters on charges of assault after clashes with security forces and ignored the steadily rising death toll among protesters... Prosecutors have detained over 1,104 protesters and bystanders in pre-trial detention for the past three months, pending interrogation on charges of assaulting security officers and other acts of violence on August 14 and 16, but have failed to investigate or hold accountable any security officer on charges of killing protesters.’<sup>258</sup>

The groups also allege that while prosecutors have referred former president Mohamed Morsi and other Brotherhood members to trial on charges relating to the killing of three and torture of 54 protesters near the presidential palace on 5 December 2012, they have failed to investigate or indict anyone for the killing of at least seven protesters on the Brotherhood side that same evening.

Interim President Adly Mansour set up a fact-finding committee to investigate the 8 July 2013 Republican Guard headquarters violence – the first major documented incident of excessive and unlawful use of force following Morsi’s overthrow.<sup>259</sup> But it appears that the committee has taken little action so far. The NCHR, Egypt’s government-appointed national human rights commission, also announced in September that it had appointed fact-finding teams to produce reports about the events of 14 August. However, the NCHR can only request information from the Interior Ministry and has no authority to compel access to its documents or to summon security officers for questioning, and is therefore no replacement for a robust fact-finding committee or prosecutorial investigation process.

The prosecutorial record over the last three years shows a persistent lack of accountability in relation to crimes allegedly committed by public security forces, alongside selective prosecutions targeting government critics or opponents. The IBAHRI considers this to be a significant area of concern that requires legal action and institutional and cultural reform, where necessary with international assistance.

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257 These are HRW, Amnesty International, The Egyptian Initiative for Personal Rights, Alkarama Foundation, The Center for Egyptian Women Legal Assistance (CEWLA), The Nadim Center for Rehabilitation of Victims of Violence and Torture, ANHRI, The Association of Freedom of Thought and Expression (AFTE), The Cairo Institute for Human Rights Studies (CIHRS), Nazra for Feminist Studies, Warkom Beltaqrir- The National Community for Human Rights and Law (NCHRL), The International Federation for Human Rights (FIDH), The Egyptian Center for Economic and Social Rights.

258 See n 221 above.

259 On 17 September 2013, the cabinet website announced that the latest cabinet meeting had agreed to establish a fact-finding committee to look into the ‘events that have occurred since June 30’.

# Chapter Five: Recommendations

These recommendations are respectfully submitted to the Egyptian Presidency and government, the Ministry of Justice, the future parliament, the SJC and appropriate judicial and prosecutorial authorities:

## 5.1 On the appointment of judges

Introduce a bar examination for all members of the legal profession, and publicly administered tests for lawyers wishing to become prosecutors or judges to improve professionalism and increase transparency in relation to the appointment of members of the judiciary; and take other measures necessary to combat the perception that positions in the judiciary can be obtained through nepotism.

Promotion in judicial offices should be merit-based and generally based on examinations.

End the involvement of the Minister of Justice in the appointment of investigating judges.

Ensure that non-prosecution lawyers are given an equal opportunity to enter the judiciary based on merit. The process for selecting judges who are not prosecutors should be transparent and judge-led.

Take proactive steps to ensure that women with the requisite qualifications and experience are appointed to judicial positions.

## 5.2 On the assignment of judges

End the involvement of the Ministry of Justice in the assignment of judges and empower a judicial body to assign judges to courts and ensure that the allocation of individual cases is undertaken based on judicial specialisms or on a random, transparent basis to the extent possible.

Ban judges from undertaking secondments or positions in non-judicial agencies unless they have retired and consider imposing a minimum period post-retirement before such posts can be awarded.

Prohibit judges from retaining judicial posts while also serving in governmental positions.

Remove the role of the President in extending judicial secondments abroad.

## 5.3. On the disciplining of judges

Create a body, independent of the executive, responsible for disciplining judges or transfer any disciplining powers currently exercised by the Ministry of Justice to the SJC.

## 5.4. On the role of the Minister of Justice

Adopt measures to remove any other influence by the Minister of Justice over judicial work including any role he may have in setting budgetary allocations relating to the judiciary.

End the involvement of the Minister of Justice in accepting the resignation of judges and transfer this role to a non-executive body such as the SJC.

## 5.5. On increasing resources for judges

Address judges' concerns regarding their income by raising salaries to the level necessary to guarantee judges' professionalism.

Take steps to ensure that judges have assistants and technological resources that are sufficient for the efficient disposition of their cases and consider embedding international experts for certain periods where additional resources or training are required.

Establish a Judicial Academy to train judicial assistants and forensic doctors.<sup>260</sup>

Provide a regular, comprehensive programme of training to judges on international law, including international criminal law and international human rights law and best practices, involving international experts where relevant.

## 5.6. On proposed amendments to the Judicial Authority Law

Ensure that any amendments to the JAL (including the amendments to the mandatory retirement age for judges) that would result in the removal of judges from their posts are made prospectively (not retroactively) and that they are not passed as a means of targeting specific judges.

## 5.7. On military trials of civilians

Amend the law to clearly restrict the jurisdiction of military courts to military personnel.

Review all convictions of civilians handed down by military courts since January 2011 and grant the right to a retrial in a civilian court in full accordance with international fair-trial standards as well as compensation to the victims, where appropriate.

## 5.8. On the prosecution service

Remove or reduce the role of the Minister of Justice in supervising public prosecutors' substantive work including his role in deciding whether members of the Public Prosecution may be transferred to other parts of the government and whether or not to accept resignations.<sup>261</sup>

Ensure that public prosecutors have adequate training on international standards relating to prosecutors including on the importance of independence from the government.

With international assistance if necessary, adopt a series of published guidelines governing the use of prosecutorial discretion to initiate cases. These should include consideration of when a prosecution is in the public interest and should clarify that prosecutions that violate freedom of expression should not be pursued. Consideration should also be given to publishing explanations about action taken – or not taken – in controversial and politically sensitive cases.

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260 See Coalition for the International Criminal Court, *Recommendations on the Conference "Transitional Justice and Institutional Reform"*, (3 November 2013) available at [www.iccnw.org/documents/Recommendations\\_on\\_the\\_Conference\\_Transitional\\_Justice\\_and\\_Institutional\\_Reform.pdf](http://www.iccnw.org/documents/Recommendations_on_the_Conference_Transitional_Justice_and_Institutional_Reform.pdf).

261 JAL, Arts 62 and 70.

## **5.9. On accountability**

Establish a transitional justice process including a fact-finding commission, ideally with international involvement, to determine responsibility for crimes, including by security forces that have resulted in a large number of deaths since 2011. Any such commission should be independent and be given adequate resources and cooperation to enable it to achieve a comprehensive and credible result and that its recommendations for future accountability are properly and expeditiously pursued.

# Annex A

Original screen-grabbed images taken from online social networking site Twitter.

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**Egyptian Presidency** @EgyPresidency

6 Mar

The Presidency respects Administrative Court ruling to suspend Lower House Elections & refer Elections Law back to the Constitutional Court

Retweeted by [د.محمد مرسي](#)

Expand

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**Dr Bassem Youssef** @DrBassemYoussef

1 Apr

A new investigation against me is to be started because of last episode. Accusations include spreading rumors and disturbing the "Peace"

Expand

[Reply](#) [Retweet](#) [Favorite](#) [More](#)

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**Dr Bassem Youssef** @DrBassemYoussef

6 Apr

محكمة القضاء الاداري ترفض وقف البرنامج. الف مبارك علينا.

Expand

# Annex B

Table comparing proposed amendments to Judicial Authorities Law (JAL) to international standards. [Endnotes on p 70.]

UN Basic Principles on the Independence of the Judiciary <sup>1</sup>	IBA Minimum Standards of Judicial Independence	Judicial Authorities Law (current text)	Egyptian Constitution 2014	Judges' Club Amendments to the JAL	AI-Wasat Amendments to the JAL	Construction and Progress party Amendments to the JAL	FJP Amendments to the JAL
<p>1. Impartiality and independence from interference by executive</p> <p><b>Independence of the judiciary</b></p> <p>2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.</p> <p>3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.</p> <p>4. There shall not be any inappropriate</p>	<p><b>A – JUDGES AND THE EXECUTIVE</b></p> <p>1 a) Individual judges should enjoy personal independence and substantive independence.</p> <p>b) Personal independence means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control.</p> <p>c) Substantive independence means that in the discharge of his judicial function a judge is subject to nothing but the law and the commands of his conscience.</p> <p>(...)</p>	<p><b>Article 71</b></p> <p>A judge shall – before taking on his office – swear the following oath:</p> <p>I swear by almighty God that I will pass judgment on people justly and that I will respect the law.</p> <p>(...)</p> <p><b>Article 72</b></p> <p>It is prohibited for a judge to undertake commercial work. It is also prohibited for a judge to undertake any work which does not accord with the independence and dignity of the judiciary.</p> <p>The Supreme Judicial Council may ban any judge from undertaking work</p>	<p><b>Article 184</b></p> <p>The judiciary is independent. It is vested in the courts of justice of different types and degrees, which issue their judgments in accordance with the law. Its powers are defined by law. Interference in judicial affairs or in proceedings is a crime to which no statute of limitations may be applied.</p>	<p><b>Article 72</b></p> <p>(...)</p> <p>The Supreme Judicial Council may ban any judge from undertaking work <b>which conflicts</b> with the obligations of his work and the good reputation of the office.<sup>2</sup></p> <p><b>Article 73</b></p> <p>(...)</p> <p>It is also forbidden for judges <b>and members of the Public Prosecution</b> to undertake <b>political work or to express political opinions in any forum or to be present at any political or party gathering or to speak on behalf of a media organization or to comment</b></p>	<p>No relevant amendments proposed.</p>	<p>No relevant amendments proposed.</p>	<p><b>Article 72 (bis)</b></p> <p>It is prohibited for a judge or member of the Public Prosecution to call for the courts to strike, or to call for them to stop working, or to partake in any such action or to respond to it. Anyone that takes such actions shall be transferred to the disciplinary council provided for in article 98 of this law, and he shall be considered to have been absent from work without excuse for the duration of his suspension, and he shall be denied his financial remuneration throughout this period, without prejudice to any criminal responsibility which</p>



	<p>or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.</p> <p>5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.</p> <p>6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are</p>	<p>43. A judge shall enjoy immunity from legal actions and the obligation to testify concerning matters arising in the exercise of his official functions.</p> <p>A judge shall not sit in a case where there is a reasonable suspicion of bias or potential bias.</p> <p>(...)</p> <p>45. A judge shall avoid any course of conduct, which might give rise to an appearance of partiality.</p>	<p>which it considers to conflict with the obligations of his work and the good reputation of the office.</p> <p><b>Article 73</b></p> <p>It is forbidden for courts to express political opinions.</p> <p>It is also forbidden for judges to undertake political work and they cannot stand for election to parliament or to national councils or to political organisations except after they have handed in their resignation.</p> <p><b>Article 75</b></p> <p>It is forbidden for multiple judges to sit in one court where there is a relationship (by blood or marriage) between them which is closer than four degrees.</p>	<p><b>on judicial and judges' affairs, and all transgressions shall be treated as a neglect of duties and a diminution of the job's dignity requiring disciplinary proceedings.</b></p> <p>...</p> <p><b>Article 75</b></p> <p>No amendment proposed.</p>		<p>might be applicable to his acts.</p>
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<p>2. Impartiality – Lack of bias towards a party or political or business interest</p>	<p>conducted fairly and that the rights of the parties are respected.</p> <p><b>Independence of the judiciary</b></p> <p>1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.</p> <p>(...)</p> <p>4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.</p>	<p>3 a) Participation in judicial appointments and promotions by the executive or legislature is not inconsistent with judicial independence provided that appointments and promotions of judges are vested in a judicial body in which members of judiciary and the legal profession form a majority.</p> <p>(...)</p> <p>4 a) The Executive may participate in the discipline of judges only in referring complaints against judges, or in the initiation of disciplinary proceedings, but not the adjudication of such matters. The power to discipline or remove a judge must be vested in an institution, which is independent of the Executive.</p>	<p><b>Article 11</b></p> <p>Sub-courts may be created within the jurisdiction of a court of first instance, their locations allocated and their competencies defined by a decision of the <b>Minister of Justice</b>.</p> <p>The sub-court may sit in another location within its jurisdiction or outside it, as necessary, pursuant to a decision of the <b>Minister of Justice</b> on the basis of a request from the head of the court.</p> <p><b>Article 17</b></p> <p>Courts shall not examine directly or indirectly the work of the authorities and they may, without undermining administrative decisions or stopping their application:</p>	<p><b>Article 186</b></p> <p>Judges are independent, cannot be dismissed, are subject to no other authority but the law, and are equal in rights and duties. The conditions and procedures for their appointment, secondment, delegation and retirement are regulated by the law. It also regulates their disciplinary accountability.</p> <p>They may not be fully or partly delegated except to bodies and to perform tasks that are identified by law, provided that all the foregoing maintains the independence and impartiality of the judiciary and judges and prevents conflicts of interest. The rights, duties and guarantees granted to them are specified by law.</p>	<p><i>[Author's note: There are numerous Judges' Club Amendments which transfer powers currently given to the Minister of Justice to the Supreme Judicial Council – this is one of the stated aims of the amendments. The below are the most notable.]</i></p> <p><b>Article 11</b></p> <p>Sub-courts may be created within the jurisdiction of a court of first instance, their locations allocated and their competencies defined by a decision of the <b>Supreme Judicial Council</b>.</p> <p>The sub-court may sit in another location within its jurisdiction or outside it, as necessary, pursuant to a decision of the <b>Supreme Judicial Council</b> on the basis of a request from</p>	<p>No relevant amendments proposed.</p>	<p><b>Article 76 (bis)</b></p> <p>Supervision of elections is a national and constitutional duty of the judge or member of the public prosecution when called upon. It is not permitted to shirk this duty except for a satisfactory, strong reason, or personal circumstances which are assessed by the Supreme Judicial Council, and which do not prejudice complete judicial oversight of the elections.</p> <p>Any member of the judiciary or the judicial bodies and departments that fails, in bad faith, to supervise elections without an acceptable excuse, shall be guilty of the crime of obstructing the application of the constitution, and this shall be in addition to his questioning for disciplinary purposes.</p>	<p><b>Article 17 (bis)</b></p> <p>All the constitutional declarations promulgated by the SCAF and the President of the Republic from 11 February 2011 until 28 December 2012 shall be considered 'works of authority' as referred to in Article 17 of this law, and no court of any level may look into these declarations in order to undermine them, or cancel them or prevent their application or hinder it and all related effects [of these declarations] until the date of the present law shall remain in effect.</p> <p><b>Article 76 (bis)</b></p> <p>Supervision of elections is a national and constitutional duty of the judge or member of the public prosecution when called upon. It is not permitted</p>
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	<p>(...)</p> <p>7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.</p>	<p>6. Rules of procedure and practice shall be made by legislation or by the Judiciary in co-operation with the legal profession subject to parliamentary approval.</p> <p>(...)</p> <p>16. The ministers of the government shall not exercise any form of pressure on judges, whether overt or covert, and shall not make statements, which adversely affect the independence of individual judges or of the Judiciary as a whole.</p> <p>(...)</p> <p>19. The Legislature shall not pass legislation, which retroactively reverses specific court decisions.</p>	<p>(i) settle civil and commercial disputes between individuals and the government or public bodies in relation to movable or immovable assets except for those cases which are prohibited by the law;</p> <p>(ii) examine all other questions which the law grants it the right to examine.</p> <p><b>Article 62</b></p> <p>Judges may be seconded temporarily to judicial or legal work which is other than their own or in addition to their own by a decision of the Minister of Justice after taking the opinion of the General Committee and the approval of the Supreme Judicial Council.</p> <p><b>Article 70</b></p> <p>...a judge's resignation is considered accepted from the date of its presentation to the <b>Minister of Justice</b> if it is not associated with other matters or connected with conditions.</p>	<p>the head of the court.</p> <p><b>Article 62</b></p> <p>Judges and members of the Public Prosecution are free to undertake their own work and it is not possible to second them to work other than their own judicial work which is within their jurisdiction according to the provisions of the constitution and the law. Their secondment for legal and administrative work for the executive and legislative authorities or for public and private bodies is prohibited.</p> <p><b>Article 70</b></p> <p>...a judge's resignation is considered accepted from the date of its presentation to the <b>Supreme Judicial Council</b> if it is not associated with other matters or connected with conditions.</p>		<p>to shirk this duty except for a satisfactory, strong reason, or personal circumstances which are assessed by the Supreme Judicial Council, and which do not prejudice complete judicial oversight of the elections.</p> <p>All judges or members of the Public Prosecution who fail to supervise elections without an acceptable reason shall be considered to have committed a violation demanding a disciplinary inquiry. This is without prejudice to any criminal responsibility which might apply.</p>
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3. Standards of conduct	See Bangalore Principles of Judicial Conduct).	<p>35. Judges may not, during their term of office, serve in executive functions, such as ministers of the government, nor may they serve as members of the Legislature or of municipal councils, unless by long historical traditions these functions are combined.</p> <p>36. Judges may serve as chairmen of committees of inquiry in cases where the process requires skill of fact-finding and evidence taking.</p> <p>37. Judges shall not hold positions in political parties.</p> <p>38. A judge, other than a temporary judge, may not practice law during his term of office.</p> <p>39. A judge should refrain from business activities, except his personal investments, or</p>	<p><b>Article 76</b></p> <p>No mention in this provision of judicial supervision of elections.</p> <p><b>Article 62</b></p> <p>Judges may be seconded temporarily to judicial or legal work which is other than their own or in addition to their own by a decision of the Minister of Justice after taking the opinion of the General Committee and the approval of the Supreme Judicial Council.</p> <p>(...)</p> <p><b>Article 64</b></p> <p>A judge may not be seconded to a job other than his own under article 62 for longer than three uninterrupted years.</p>	<p><b>Article 186</b></p> <p>(...)</p> <p>They may not be fully or partly delegated except to bodies and to perform tasks that are identified by law, provided that all the foregoing maintains the independence and impartiality of the judiciary and judges and prevents conflicts of interest. The rights, duties and guarantees granted to them are specified by law.</p>	<p><b>Article 62</b></p> <p>Judges and members of the Public Prosecution must be free to undertake their own work and it is not possible to second them to work other than their own judicial work which is within their jurisdiction according to the provisions of the constitution and the law. Their secondment for legal and administrative work to the executive and legislative authorities or for public and private bodies is prohibited.</p> <p>(...)</p> <p><b>Article 64</b></p> <p>DELETED.</p>	No relevant amendments proposed.	No relevant amendments proposed.	<p><b>Article 62</b></p> <p>Judges may only be seconded full-time to the state's departments and public bodies in order to undertake judicial or legal work. This must be done by a decision of the Minister of Justice after considering the opinion of the judge's group and getting the approval of the Supreme Judicial Council. All this must preserve the independence of the judiciary and its ability to complete its work.</p> <p>The Supreme Judicial Council shall set the remuneration to be received by the judge for this work, and the budget of the body to which he is seconded be responsible for financial allocations to the member of the judiciary who is seconded.</p>
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	4. Qualifications, selection and training	ownership of property. 40. A judge should always behave in such a manner as to preserve the dignity of his office and the impartiality and independence of the Judiciary.						<p>(...)</p> <p><b>Article 64</b></p> <p>A judge may not be seconded to a job other than his own under article 62 for longer than four uninterrupted years.</p>
<p>10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country</p>	<p>26. Selection of judges shall be based on merit.</p>	<p><b>Article 38</b></p> <p>Those taking on the role of a judge must:</p> <ol style="list-style-type: none"> <li>1. hold Egyptian nationality and be of full capacity.</li> <li>2. not be less than 30 years old if he is to be appointed to the courts of first instance and 38 years old if he is to be appointed to the appeals courts and 41 years old if he is to be appointed to the court of cassation.</li> <li>3. hold a licence to practice law from an Egyptian university or equivalent foreign qualification but in the latter case he must have passed equivalency exams in accordance with the laws and regulations on the subject.</li> </ol>	<p><b>Article 186</b></p> <p>(...)</p> <p>The conditions and procedures for their appointment, secondment, delegation and retirement are regulated by the law.</p> <p>(...)</p>	No relevant amendments proposed.	No relevant amendments proposed.	No relevant amendments proposed.	<p><b>Article 38</b></p> <p>Those taking on the role of a judge must:</p> <ol style="list-style-type: none"> <li>1. [No amendments]</li> <li>2. not be less than 29 years old if he is to be appointed to the courts of first instance and 37 years old if he is to be appointed to the appeals courts and 40 years old if he is to be appointed to the court of cassation.</li> </ol> <p><b>Article 44</b></p> <p>Judicial employment shall be on <b>the basis of competence, without favouritism or intercession and in line with the principles of efficiency and academic appropriateness, and, in this way,</b></p>	

5. Immunity and Security of Tenure	concerned, shall not be considered discriminatory.		4. not have any judgments against him from the courts or disciplinary tribunals even if he is considered to have been rehabilitated. 5. be a person of good conduct and reputation. <b>Article 44</b> Judicial employment, both in terms of appointment and promotion, shall be given by a decision of the president of the republic. <b>Article 67</b> Judicial personnel and those in the Attorney General's office – including associates of that office – cannot be dismissed and an adviser of the court of cassation cannot be demoted to the appeals courts or to the Attorney-General's Office except by their consent.	<b>Article 186</b> Judges are independent, cannot be dismissed, are subject to no other authority but the law, and are equal in rights and duties. The conditions and procedures for their appointment, secondment, delegation and retirement are regulated by the law. It also regulates their disciplinary accountability.	No relevant amendments proposed.	No relevant amendments proposed.	No relevant amendments proposed.	shall be granted by a decision of the president of the republic, taking into consideration the fact that merit shall be a basic condition for continuing one's work in the judiciary.
	<b>Conditions of service and tenure</b> 11. The term of office of judges, their independence, security, adequate remuneration, and conditions of service, pensions and the age of retirement shall be adequately secured by law. 12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their	12. The power to transfer a judge from one court to another shall be vested in a judicial authority and preferably shall be subject to the judge's consent, such consent not to be unreasonably withheld. (...) 20 a) Legislation introducing changes in the terms and conditions of judicial services shall not be applied to judges						



	<p>term of office, where such exists.</p> <p>13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.</p> <p>14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.</p> <p><b>Professional secrecy and immunity</b></p> <p>15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.</p> <p>16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State,</p>	<p>holding office at the time of passing the legislation unless the changes improve the terms of service.</p> <p>b) In case of legislation reorganizing courts, judges serving in these courts shall not be affected, except for their transfer to another court of the same status.</p> <p>(...)</p> <p>22. Judicial appointments should generally be for life, subject to removal for cause and compulsory retirement at an age fixed by law at the date of appointment.</p> <p>(...)</p> <p>23 a) Judges should not be appointed for probationary periods except for legal systems in which appointments of judges do not depend on having practical experience in the profession as a condition of the appointment.</p>						
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6. Disciplining, suspension and removal	in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or missions in the exercise of their judicial functions.	24. The number of the members of the highest court should be rigid and should not be subject to change except by legislation.	4 a) The Executive may participate in the discipline of judges only in referring complaints against judges, or in the initiation of disciplinary proceedings, but not the adjudication of such matters. The power to discipline or remove a judge must be vested in an institution, which is independent of the Executive. b) The power of removal of a judge should preferably be vested in a judicial tribunal. c) The Legislature may be vested with the powers of removal of judges, preferably upon a recommendation of a judicial commission.	<b>Article 69</b> Notwithstanding the provisions of the laws relating to pensions, it is prohibited for anyone over the age of seventy to remain in the position of judge or to be appointed a judge. <b>Article 93</b> The Minister of Justice has the right to oversee the courts, and the heads of courts along with the "General Committee" have the right to oversee judges in those courts. <b>Article 98</b> The disciplining of judges at all levels is undertaken by a committee composed of the most senior heads	<b>Article 186</b> Judges are independent, cannot be dismissed, are subject to no other authority but the law, and are equal in rights and duties. The conditions and procedures for their appointment, secondment, delegation and retirement are regulated by the law. It also regulates their disciplinary accountability.	<b>Article 69</b> No amendment proposed. <b>Article 93</b> No amendment proposed. <b>Article 98</b> The disciplining of judges at all levels is within the competency of a council in the Cairo Court of Appeal, composed of the five most senior heads of the Cairo Court of Appeal.	<b>Article 69</b> The words 'sixty years' shall be substituted for the words 'seventy years' in article 69 and 130 of [the Judicial Authorities Law]... <i>[Author's note: Article 130 makes the age limit in Article 69 applicable to members of the Public Prosecution.]</i>	<b>Article 69</b> Notwithstanding the provisions of the laws relating to pensions, it is prohibited for anyone over the age of sixty to remain in the position of judge or to be appointed a judge. <b>Other articles</b> No further amendments proposed.
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	<p>19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.</p> <p>20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.</p>	<p>27. The proceedings for discipline and removal of judges should ensure fairness to the judge and adequate opportunity for hearing.</p> <p>28. The procedure for discipline should be held in camera. The judge may however request that the hearing be held in public, subject to final and reasoned disposition of this request by the disciplinary tribunal. Judgments in disciplinary proceedings, whether held in camera or in public, may be published.</p> <p>29 a) The grounds for removal of judges shall be fixed by law and shall be clearly defined.</p> <p>b) All disciplinary actions shall be based upon standards of judicial conduct promulgated by law or in established rules of court.</p> <p>30. A judge shall not be subject to removal unless by</p>	<p>of appeals courts (other than the members of the Supreme Judicial Council), as well as the two most senior judges in the Court of Cassation and the two most senior deputy heads of appeals courts.</p>					
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<p>7. Freedom of expression, association and assembly</p>	<p><b>Freedom of expression and association</b></p> <p>8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct</p>	<p>reason of a criminal act or through gross or repeated neglect or physical or mental incapacity he has shown himself manifestly unfit to hold the position of judge.</p> <p>31. In systems where the power to discipline and remove judges is vested in an institution other than the Legislature the tribunal for discipline and removal of judges shall be permanent and be composed predominantly of members of the Judiciary.</p> <p>41. Judges may be organized in associations designed for judges, for furthering their rights and interests as judges.</p> <p>42. Judges may take collective action to protect their judicial independence and to uphold their position.</p>	<p><b>Article 34</b></p> <p>The decisions of the general [judicial] assemblies shall be promulgated by an absolute majority of the members present and if there is an equality of votes then the side on which the president [of the assembly] votes shall prevail.</p> <p><i>[Author's note: under Article 30 the 'general assemblies'</i></p>	<p><b>Article 186 Judicial independence</b></p> <p>Judges are ... subject to no other authority but the law, and are equal in rights and duties. The conditions and procedures for their appointment, secondment, delegation and retirement are regulated by the law.</p> <p>(...)</p>	<p><b>Article 74</b></p> <p>Judges may not reveal their private deliberations or <b>publicise their opinion on cases which are under investigation or sub justice or comment on judicial decisions in any media publication. All breaches shall be considered a neglect of professional duties and a</b></p>	<p>No relevant amendments proposed.</p>	<p>No relevant amendments proposed.</p>	<p><b>Article 34</b></p> <p>(...)</p> <p>(2) General Assemblies in Courts may not take decisions which are intended to influence the course of justice or prevent courts from undertaking their constitutional responsibilities to deal with cases expeditiously, or to hinder or to block the courts' work</p>
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	<p>themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.</p> <p>9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.</p>		<p>are <i>bureaucratic assemblies made sitting in each court which examine certain logistical issues – eg, assigning cases to different chambers, setting the number of hearings and the hours for which they will last etc.]</i></p> <p><b>Article 74</b> Judges may not reveal their private deliberations.</p>	<p>The rights, duties and guarantees granted to them are specified by law.</p>	<p><b>failure to uphold the dignity of the position requiring disciplinary measures.</b></p>			<p>and any decision contrary to this shall be null.</p> <p><b>Introduction of Article 72 (bis)</b></p> <p>It is prohibited for a judge or member of the Public Prosecution to call for the courts to strike, or to call for them to stop working, or to partake in any such action or to respond to it. Anyone that takes such actions shall be transferred to the disciplinary council provided for in article 98 of this law, and he shall be considered to have been absent from work without excuse for the duration of his suspension, and he shall be denied his financial remuneration throughout this period, without prejudice to any criminal responsibility which might be applicable to his acts.</p>
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8. Financial matters	<p><b>Conditions of service and tenure</b></p> <p>11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.</p>	<p>10. It is the duty of the State to provide adequate financial resources to allow for the due administration of justice.</p> <p>(...)</p> <p>13. Court services should be adequately financed by the relevant government.</p> <p>14. Judicial salaries and pensions shall be adequate and should be regularly adjusted to account for price increases independent of executive control.</p> <p>15 a) The position of the judges, their independence, their security, and their adequate remuneration shall be secured by law.</p> <p>b) Judicial salaries cannot be decreased during the judges' services except as a coherent part of an overall public economic measure.</p>	<p><b>Article 68</b></p> <p>The salaries of judges at all levels shall be set in accordance with the Schedule to this law. It is prohibited for any salary to be decided on the basis of personal reasons or for any of them to be treated exceptionally in any way.</p>	<p><b>Article 185</b></p> <p>All judicial bodies administer their own affairs. Each has an independent budget, whose items are all discussed by the House of Representatives. After approving each budget, it is incorporated in the state budget as a single figure, and their opinion is consulted on the draft laws governing their affairs.</p>	<p><b>Article 68</b></p> <p>Same substantive provision suggested but amendments to the Schedule would raise judges' salaries.</p>	<p><b>Article 68 / Salary Schedule</b></p> <p>The salaries of members of the judiciary and judicial bodies shall be set by a unified schedule of salaries without discrimination between judicial bodies or departments. From the date of this law until the date of promulgation of a new law containing a unified salary schedule for members of the judiciary, the schedule setting out the salaries of the higher constitutional court in force at the time of [promulgation of] this law shall apply...</p>	<p><b>Article 68</b></p> <p>Introduction of a second sub-paragraph containing the following text:</p> <p><b>The guarantees and rights and advantages and obligations set for their equivalents in the membership of the Constitutional Court shall apply to judges and members of the Public Prosecution with the effects they have.</b></p>	<p><b>Article 68</b></p> <p>Introduction of a second sub-paragraph containing the following text:</p> <p><b>(2) The financial provisions and terms which apply to their colleagues in the membership of the higher constitutional court and the state council shall apply to judges and members of the public prosecution.</b></p> <p><b>Article 70</b></p> <p>(new sub-paragraph)</p> <p>A judge's salary shall not remain less than the salary of an individual who was made a judge after him provided the length of service which is considered for the purposes of the salary is the same. Salaries will be equalized on a yearly basis in accordance with the provisions of this law...</p>
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**Notes**

- 1 Available at [www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx](http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx), last accessed 14 January 2014.
- 2 Emphasis author's own throughout.



# Annex C

Table comparing international standards for the independence of prosecutors against domestic Egyptian standards. [Endnotes on p 85.]

UN Guidelines on the Role of Prosecutors <sup>1</sup>	IAP's Standards of Professional Responsibility <sup>2</sup>	AfCHR Principles and Guidelines <sup>3</sup>	Judicial Authority Law (unamended) <sup>4</sup>	Judges' Club Amendments to the JAL	Al-Wasat Amendments to the JAL	Construction and Progress party Amendments to the JAL	FJP Amendments to the JAL
<p>1. Impartiality and independence from interference by executive</p> <p>13. In the performance of their duties, prosecutors shall:</p> <p>(a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination.</p> <p>(...)</p> <p>14. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.</p>	<p><b>1. Professional Conduct</b></p> <p>Prosecutors shall (...) strive to be, and to be seen to be, consistent, independent and impartial.</p> <p><b>2. Independence</b></p> <p>2.1 The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.</p> <p><b>3. Impartiality</b></p> <p>Prosecutors shall perform their duties without fear, favour or prejudice. In particular they shall: (i) carry out their functions impartially; (ii)</p>	<p><b>F. Role of Prosecutors:</b><sup>5</sup></p> <p>(h) In the performance of their duties, prosecutors shall:</p> <p>1. carry out their functions impartially and avoid all political, social, racial, ethnic, religious, cultural, sexual, gender or any other kind of discrimination;</p> <p>(...)</p> <p>(a) Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.</p>	<p><b>Article 71</b></p> <p>A judge shall – before taking on his office – swear the following oath:</p> <p>I swear by almighty God that I will pass judgment on people justly and that I will respect the law.</p> <p>(...)</p> <p><b>Article 120</b></p> <p>Members of the Public Prosecution shall, prior to taking their work, swear the oath set out in Article 71 of this law.</p> <p><i>[Author's note: Several of the provisions on independence and impartiality applicable to judges are also applicable to prosecutors by</i></p>	<p><b>Article 72</b></p> <p>It is prohibited for a judge to undertake commercial work. It is also prohibited for a judge to undertake any work which does not accord with the independence and dignity of the judiciary.</p> <p>The Supreme Judicial Council may ban any judge from undertaking work <b>which conflicts</b> with the obligations of his work and the good reputation of the office.</p> <p><b>Article 73</b></p> <p>It is forbidden for courts to express political opinions. It is also forbidden for judges and members of the</p>	<p>No relevant amendments proposed.</p>	<p><b>Article 27</b></p> <p>The Prosecutor General and the members of the Public Prosecution above the level of “Prosecutorial Agent” of excellent standing shall undertake the oversight of prisons and other places in which criminal judgments or decisions or orders are carried out in relation to the deprivation of liberty. They shall also carry out inspections of these places at least once a month and put together a report on this.</p>	<p><b>Article 72 (bis)</b></p> <p>It is prohibited for a judge or member of the Public Prosecution to call for the courts to strike, or to call for them to stop working, or to partake in any such action or to respond to it. Anyone that takes such actions shall be transferred to the disciplinary council provided for in article 98 of this law, and he shall be considered to have been absent from work without excuse for the duration of his suspension, and he shall be denied his financial remuneration throughout this period, without prejudice to any criminal</p>

		<p>remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest; act with objectivity; (iii) have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect; (iv) in accordance with local law or the requirements of a fair trial, seek to ensure that all necessary and reasonable enquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the suspect; (v) always search for the truth and assist the court to arrive at the truth and to do justice between the community, the victim and the accused according to law and the dictates of fairness.</p>		<p><i>virtue of Article 130, below.]</i>  <b>Article 130</b>  The provisions of article 39, 62, 63, 64, 65, 66, 69, 70, 71, 72, 73, 73 bis, 77, 76, 90, 91, 95, 96, 97 shall apply to members of the Public Prosecution.  The following articles on independence and impartialism therefore also apply to prosecutors.  <b>Article 72</b>  It is prohibited for a judge to undertake commercial work. It is also prohibited for a judge to undertake any work which does not accord with the independence and dignity of the judiciary.  The Supreme Judicial Council may ban any judge from undertaking work which it considers to conflict with the obligations of his work and the good reputation of the office.</p>	<p>Public Prosecution to undertake political work or to express political opinions in any forum or to be present at any political or party gathering or to speak on behalf of a media organization or to comment on judicial and judges' affairs, and all transgressions shall be treated as a neglect of duties and a diminution of the job's dignity requiring disciplinary proceedings.  It is forbidden to stand for election to the presidency of the Republic or for elections to parliament or to the Shura Council or to national bodies or to political organisations except after they have handed in their resignation.  <b>Article 75</b>  No amendment proposed.</p>			<p>responsibility which might be applicable to his acts.</p>
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<p>2. Impartiality – lack of bias towards a party or political or business interest</p>	<p>15. 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</p>	<p><b>2. Independence</b> 2.1 The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.</p>	<p><b>F. Role of Prosecutors</b> (b) 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</p>	<p><i>[Author's note: many of the provisions in the current text of the Judicial Authority Law give a role to the Minister of Justice – the below are some examples; there are others above in this table.]</i></p>	<p><i>[Author's note: there are numerous Judges' Club Amendments which transfer powers currently given to the Minister of Justice to the Supreme Judicial Council – the below are the most notable.]</i></p>	<p>No relevant amendments proposed.</p>	<p><b>Article 76 (bis)</b> Supervision of elections is a national and constitutional duty of the judge or member of the public prosecution when called upon. It is not permitted to shirk this duty except for a satisfactory, strong</p>	<p><b>Article 76 (bis)</b> Supervision of elections is a national and constitutional duty of the judge or member of the public prosecution when called upon. It is not permitted to shirk this duty except for a satisfactory, strong</p>
<p><b>4. Role in Criminal Proceedings</b> 4.2(d) In the institution of criminal proceedings, they will proceed only when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence; throughout the course of the proceedings, the case will be firmly but fairly prosecuted; and not beyond what is indicated by the evidence.</p>	<p><b>Article 73</b> It is forbidden for courts to express political opinions. It is also forbidden for judges to undertake political work and they cannot stand for election to parliament or to national councils or to political organisations except after they have handed in their resignation.</p> <p><b>Article 75</b> It is forbidden for multiple judges to sit in one court where there is a relationship (by blood or marriage) between them which is closer than four degrees.</p>	<p><b>Article 73</b> It is forbidden for courts to express political opinions. It is also forbidden for judges to undertake political work and they cannot stand for election to parliament or to national councils or to political organisations except after they have handed in their resignation.</p> <p><b>Article 75</b> It is forbidden for multiple judges to sit in one court where there is a relationship (by blood or marriage) between them which is closer than four degrees.</p>	<p><b>Article 76 (bis)</b> Supervision of elections is a national and constitutional duty of the judge or member of the public prosecution when called upon. It is not permitted to shirk this duty except for a satisfactory, strong</p>	<p><b>Article 76 (bis)</b> Supervision of elections is a national and constitutional duty of the judge or member of the public prosecution when called upon. It is not permitted to shirk this duty except for a satisfactory, strong</p>	<p><b>Article 76 (bis)</b> Supervision of elections is a national and constitutional duty of the judge or member of the public prosecution when called upon. It is not permitted to shirk this duty except for a satisfactory, strong</p>	<p><b>Article 76 (bis)</b> Supervision of elections is a national and constitutional duty of the judge or member of the public prosecution when called upon. It is not permitted to shirk this duty except for a satisfactory, strong</p>		

	<p>or consistent with local practice, the investigation of such offences. (...)</p> <p>20. In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions.</p>	<p>2.2 If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be:</p> <p>transparent; consistent with lawful authority; subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.</p> <p>2.3 Any right of non-prosecutorial authorities to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in similar fashion.</p> <p><b>5. Co-operation</b></p> <p>In order to ensure the fairness and effectiveness of prosecutions, prosecutors shall: co-operate with the police, the courts, the legal profession, defence</p>	<p>by international law and, where authorized by law or consistent with local practice, the investigation of such offences. (...)</p> <p>(d) In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, judicial bodies, the legal profession, paralegals, non-governmental organisations and other government agencies or institutions.</p>	<p><b>Article 62</b></p> <p>Judges may be seconded temporarily to judicial or legal work which is other than their own or in addition to their own by a decision of the Minister of Justice after taking the opinion of the General Committee and the approval of the Supreme Judicial Council.</p> <p><b>Article 70</b></p> <p>... a judge's resignation is considered accepted from the date of its presentation to the <b>Minister of Justice</b> if it is not associated with other matters or connected with conditions.</p>	<p><b>Article 62</b></p> <p>Judges and members of the Public Prosecution are free to undertake their own work and it is not possible to second them to work other than their own judicial work which is within their jurisdiction according to the provisions of the constitution and the law. Their secondment for legal and administrative work for the executive and legislative authorities or for public and private bodies is prohibited.</p> <p><b>Article 70</b></p> <p>...a judge's resignation is considered accepted from the date of its presentation to the <b>Supreme Judicial Council</b> if it is not associated with other matters or connected with conditions.</p>		<p>reason, or personal circumstances which are assessed by the Supreme Judicial Council, and which do not prejudice complete judicial oversight of the elections.</p> <p>Any member of the judiciary or the judicial bodies and departments that fails, in bad faith, to supervise elections without an acceptable excuse, shall be guilty of the crime of obstructing the application of the constitution, and this shall be in addition to his questioning for disciplinary purposes.</p>	<p>reason, or personal circumstances which are assessed by the Supreme Judicial Council, and which do not prejudice complete judicial oversight of the elections.</p> <p>All judges or members of the Public Prosecution who fail to supervise elections without an acceptable reason shall be considered to have committed a violation demanding a disciplinary inquiry. This is without prejudice to any criminal responsibility which might apply.</p>
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2.1 Relationship with the rest of the judiciary.	<p><b>Role in criminal proceedings</b></p> <p>10. The office of prosecutors shall be strictly separated from judicial functions.</p> <p>(...)</p> <p>20. In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions.</p>	<p><b>5. Co-operation</b></p> <p>In order to ensure the fairness and effectiveness of prosecutions, prosecutors shall co-operate with the police, the courts, the legal profession, defence counsel, public defenders and other government agencies, whether nationally or internationally; and render assistance to the prosecution services and colleagues of other jurisdictions, in accordance with the law and in a spirit of mutual co-operation.</p>	<p><b>F. Role of Prosecutors</b></p> <p>(...)</p> <p>(e) The office of prosecutors shall be strictly separated from judicial functions.</p>	<p><b>Article 21</b></p> <p>The Public Prosecution shall pursue the competencies which are given to it by law. The Public Prosecution along may press criminal charges and pursue them unless the law states otherwise.</p>	<p><b>New Article 21 bis</b></p> <p>A civil prosecution headed by the head of the relevant court shall be established in the jurisdiction of each court of first instance and appeal and it shall prepare civil and commercial cases in the way set out in the law of pleadings.</p>	<p><b>New Article 115 bis</b></p> <p>The Public Prosecution is an indivisible part of the judiciary. It undertakes investigations and presses criminal charges within the limits set out by law and the law shall specify its other competencies.</p>	No relevant amendments proposed.	No relevant amendments proposed.
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<p>3. Standards of conduct</p>	<p>3. Prosecutors, as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession.</p>	<p><b>1. Professional Conduct</b> Prosecutors shall: (i) at all times maintain the honour and dignity of their profession; (ii) always conduct themselves professionally, in accordance with the law and the rules and ethics of their profession; (iii) at all times exercise the highest standards of integrity and care; (iv) keep themselves well-informed and abreast of relevant legal developments; (v) strive to be, and to be seen to be, consistent, independent and impartial; (vi) always protect an accused person's right to a fair trial, and in particular ensure that evidence favourable to the accused is disclosed in accordance with the law or the requirements of a fair trial; (vii) always serve and protect the public interest; (viii) respect, protect</p>	<p><b>F Role of Prosecutors</b> (h) In the performance of their duties, prosecutors shall: 1. carry out their functions impartially and avoid all political, social, racial, ethnic, religious, cultural, sexual, gender or any other kind of discrimination; 2. protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect; 3. keep matters in their possession confidential, unless the performance of duty or needs of justice require otherwise; 4. consider the views and concerns of victims when their personal</p>	<p><b>The following articles are applicable to prosecutors by virtue of Article 130</b> <b>Article 62</b> Judges may be seconded temporarily to judicial or legal work which is other than their own or in addition to their own by a decision of the Minister of Justice after taking the opinion of the General Committee and the approval of the Supreme Judicial Council. (...) <b>Article 64</b> A judge may not be seconded to a job other than his own under article 62 for longer than three uninterrupted years.</p>	<p><b>Article 62</b> Judges and members of the Public Prosecution must be free to undertake their own work and it is not possible to second them to work other than their own judicial work which is within their jurisdiction according to the provisions of the constitution and the law. Their secondment for legal and administrative work to the executive and legislative authorities or for public and private bodies is prohibited. (...) <b>Article 64</b> DELETED</p>	<p>No relevant amendments proposed.</p>	<p>No relevant amendments proposed.</p>	<p>No relevant amendments proposed.</p>
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		<p>and uphold the universal concept of human dignity and human rights.</p> <p><b>4. Role in criminal proceedings</b></p> <p>4.1 Prosecutors shall perform their duties fairly, consistently and expeditiously.</p>	<p>interests are affected and ensure that victims are informed of their rights in accordance with the provisions below relating to victims.</p>	<p><b>Article 38 (applicable by virtue of article 116 – see below)</b></p> <p>Those taking on the role of a judge must:</p> <ol style="list-style-type: none"> <li>1. hold Egyptian nationality and be of full capacity.</li> <li>2. not be less than 30 years old if he is to be appointed to the courts of first instance and 38 years old if he is to be appointed to the appeals courts and 41 years old if he is to be appointed to the court of cassation.</li> <li>3. hold a licence to practice law from an Egyptian university or equivalent foreign qualification but in the latter case he must have passed equivalency exams in accordance</li> </ol>	<p><b>Article 116</b></p> <p>A person appointed an associate in the Public Prosecution shall fulfill the following conditions:</p> <ol style="list-style-type: none"> <li>(1) He must hold Egyptian nationality and must have all his civil rights.</li> <li>(2) He must not be younger than 19 years old.</li> <li>(3) He must hold a legal qualification from one of the law faculties in the universities of the Arab Republic of Egypt OR he must hold an equivalent foreign qualification having gained at least a merit and eventually pass an equivalency exam in accordance with the specific laws and regulations</li> </ol>	<p><b>Article 119</b></p> <p>The Prosecutor General shall be appointed by the President of the Republic on the basis of the selection of the Supreme Judicial Council. The selection shall be from any one of the head of the Court of Cassation, the heads of the Courts of Appeals and the two Prosecutorial Assistants. The appointment shall be for a period of four years or until such time as he reaches retirement age, whichever is the shorter, and he shall only be appointed once.</p> <p>(..)</p> <p>The appointment of the Assistant Prosecutor and the</p>	<p><b>Article 119</b></p> <p>The Prosecutor General shall be appointed by a decision of the President of the Republic and with the approval of the Supreme Judicial Council and chosen from the two most senior prosecutors in the Court of Cassation, the three most senior heads of Courts of Appeal – provided they are not members of the Supreme Judicial Council – and the two most senior Prosecutorial Assistants.</p> <p>The person selected for this position must have spent at least four consecutive years in the judiciary and the same in the Public Prosecution</p>	<p><b>Article 38</b></p> <p>Those taking on the role of a judge must:</p> <ol style="list-style-type: none"> <li>1. [No amendments]</li> <li>2. not be less than 29 years old if he is to be appointed to the courts of first instance and 37 years old if he is to be appointed to the appeals courts and 40 years old if he is to be appointed to the court of cassation.</li> </ol> <p>(...)</p> <p>6. Those appointed an associate in the Public Prosecution must not be younger than 19 years old and that he passes the competitive process created for this purpose successfully, and that his university</p>
<p>4. Qualifications, selection and training</p>	<p><b>Qualifications, Selection and Training</b></p> <ol style="list-style-type: none"> <li>1. Persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications.</li> <li>2. States shall ensure that: <ul style="list-style-type: none"> <li>(a) Selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, Language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status,</li> </ul> </li> </ol>	<p><b>6. Empowerment</b></p> <p>In order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with these standards, prosecutors should be protected against arbitrary action by governments. In general they should be entitled</p> <p>(...)</p> <p>to recruitment and promotion based on objective factors, and in particular professional qualifications, ability, integrity, performance and experience, and decided upon in accordance with fair and impartial procedures.</p>	<p><b>F. Role of Prosecutors</b></p> <p>(a) States shall ensure that:</p> <ol style="list-style-type: none"> <li>1. Prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law, including the Charter.</li> <li>(...)</li> <li>(d) Prosecutors shall be free to form and join professional associations or</li> </ol>					

	<p>except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned.</p> <p>(...)</p> <p>9. Prosecutors shall be free to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status.</p>	<p>(...)</p> <p>to form and join professional associations or other organisations to represent their interests, to promote their professional training and to protect their status; and to relief from compliance with an unlawful order or an order which is contrary to professional standards or ethics.</p>	<p>other organizations to represent their interests, to promote their professional training and to protect their status.</p>	<p>with the laws and regulations on the subject.</p> <p>4. not have any judgments against him from the courts or disciplinary tribunals even if he is considered to have been rehabilitated.</p> <p>5. be a person of good conduct and reputation.</p> <p><b>Article 116</b></p> <p>A person appointed an associate in the Public Prosecution must satisfy the conditions set out at article 38, except that he must not be younger than 21 years old.</p> <p><b>Article 119</b></p> <p>The Prosecutor General shall be appointed by a decision of the President of the Republic and chosen from amongst the deputy heads of the Courts of Appeal or the advisers of the Court of Cassation or, at minimum, the two most senior Prosecutors.</p>	<p>OR he must hold a legal qualification from one of the law faculties in the Arab republic of Egypt in addition to a diploma in higher studies from one of the law branches having gained at least a "merit".</p> <p>In all cases the only sufficiently reliable estimate of academic credentials is the qualification or degree which he obtained from university which shall be evidence of its contents with no other evidence accepted to establish the opposite.</p> <p><b>Article 119</b></p> <p>The Prosecutor General shall be appointed by a decision of the President of the Republic and with the approval of the Supreme Judicial Council and chosen from the two most senior prosecutors in the Court of Cassation, the three most senior heads of Courts of Appeal</p>	<p>First Prosecutorial Lawyer and the remaining members of the Public Prosecution shall be by a decision of the President of the Republic having obtained the approval of the Supreme Judicial Council...</p>	<p>grade is not less than a 'good' with a cumulative tally of not less than 73%.</p> <p><b>Article 44</b></p> <p>Judicial employment shall be on the basis of competence, without favouritism or intercession and in line with the principles of efficiency and academic consideration the fact that merit shall be a basic condition for continuing one's work in the judiciary.</p> <p><b>Article 119 (new sub-paragraph)</b></p> <p>A decision of the Supreme Judicial Council shall be promulgated within three months of the date of this law specifying the manner, the conditions and the standards on the basis of which the Prosecutor General will be chosen, appropriateness, and, in this way, shall be granted by a decision of the president of the republic, taking into account</p>
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				<p>(...) The appointment of the Public Prosecutor's Assistant and the First Prosecutor and the remaining members of the Public Prosecution shall be by decision of the President of the Republic after getting the approval of the Supreme Judicial Council.</p>	<p>– provided they are not members of the Supreme Judicial Council – and the two most senior Prosecutorial Assistants. The person selected for this position must have spent at least four consecutive years in the judiciary and the same in the Public Prosecution.</p> <p><b>Article 119 (bis)</b> The two Assistant Public Prosecutors shall be appointed by decision of the President of the Republic on the basis of the nomination of the Prosecutor General with the approval of the Supreme Judicial Council.</p> <p>The First Prosecutor and the remaining members of the Public Prosecution shall be appointed by a decision of the President of the Republic with the approval of the Supreme Judicial Council (...).</p>			<p>the opinions of the general assemblies of the Court of Cassation and the Courts of Appeal and members of the Public Prosecution of at least the seniority of the Assistant Public Prosecutors ...</p> <p><b>Article 119 (bis)</b> The individual nominated to be Prosecutor General shall have worked in the judiciary for a period of at least five years in the judiciary and at least five years in the Public Prosecution and he must be of acknowledged efficiency and impartiality and academic excellence.</p>
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5. Immunity and security of tenure	<p><b>Status and conditions of service</b></p> <p>3. Prosecutors, as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession.</p> <p>4. States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.</p> <p>5. Prosecutors and their families shall be physically protected by the authorities when their personal safety is threatened as a result of the discharge of prosecutorial functions.</p> <p>6. Reasonable conditions of service of prosecutors, adequate remuneration and, where applicable,</p>	<p><b>6. Empowerment</b></p> <p>In general, Prosecutors shall be entitled:</p> <p>to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability;</p> <p>together with their families, to be physically protected by the authorities when their personal safety is threatened as a result of the proper discharge of their prosecutorial functions.</p> <p>to reasonable conditions of service and adequate remuneration, commensurate with the crucial role performed by them and not have their salaries or other benefits arbitrarily diminished (...).</p>	<p><b>F. Role of Prosecutors</b></p> <p>(...) (a) Reasonable conditions of service of prosecutors, adequate remuneration and, where applicable, tenure, housing, transport, conditions of physical and social security, pension and age of retirement and other conditions of service shall be set out by law or published rules or regulations.</p> <p>(b) Promotion of prosecutors, wherever such a system exists, shall be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures.</p>	<p><b>Article 67</b></p> <p>Judicial personnel and those in the Attorney General's office – including associates of that office – cannot be dismissed and an adviser of the court of cassation cannot be demoted to the appeals courts or to the Attorney-General's Office except by their consent.</p>	<p><b>Article 129 (bis)</b></p> <p>All members of the Public Prosecution at all levels are entitled to a weekly holiday unless they work in one of the remote areas.</p> <p>Those who work in the remote areas are entitled to a monthly cumulative holiday of not less than one week.</p>	No relevant amendments proposed.	No relevant amendments proposed.	No relevant amendments proposed.
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6. Disciplining, suspension and removal	tenure, pension and age of retirement shall be set out by law or published rules or regulations.	<p><b>Disciplinary proceedings</b></p> <p>21. Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review.</p> <p>22. Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and</p>	<p><b>6. Empowerment</b></p> <p>In general, they should be entitled:</p> <p>(...)</p> <p>to expeditious and fair hearings, based on law or legal regulations, where disciplinary steps are necessitated by complaints alleging action outside the range of proper professional standards;</p> <p>to objective evaluation and decisions in disciplinary hearings.</p>	<p><b>F. Role of Prosecutors</b></p> <p>(...)</p> <p>(e) Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors, which allege that they acted in a manner that is inconsistent with professional standards, shall be processed expeditiously and fairly under appropriate procedures prescribed by law. Prosecutors shall have the right to a fair hearing including the right to be represented by a legal representative of their choice. The decision shall be subject to independent review.</p> <p>(f) Disciplinary proceedings against prosecutors shall guarantee an</p>	<p><b>Article 69 (applicable to members of the public prosecution by virtue of article 130)</b></p> <p>Notwithstanding the provisions of the laws relating to pensions, it is prohibited for anyone over the age of seventy to remain in the position of judge or to be appointed a judge.</p> <p><b>Article 125</b></p> <p>Members of the Public Prosecution are subject to their managers and the Prosecutor General and the Prosecutor General shall monitor and supervise the Public Prosecution and its members.</p> <p><b>Article 126</b></p> <p>No relevant amendments except to allow appeal by members of the Public Prosecution to the SJC instead of to the Mol.</p> <p><b>Article 127</b></p> <p>The disciplining of members of the Public Prosecution of all levels is within the jurisdiction of the disciplinary council referred to in Article 98 of this law.</p> <p><b>(Article 98)</b></p> <p>The disciplining of judges at all levels is undertaken</p>	<p><b>Article 125</b></p> <p>The words 'sixty years' shall be substituted for the words 'seventy years' in article 69 of the Judicial Authority Law...</p>	<p><b>Article 69</b></p> <p>The words 'sixty years' shall be substituted for the words 'seventy years' in articles 69 and 130 of [the Judicial Authority Law]...</p> <p>Note: article 130 makes the age limit in article 69 applicable to members of the Public Prosecution.</p>	<p><b>Article 69</b></p> <p>Notwithstanding the provisions of the laws relating to pensions, it is prohibited for anyone over the age of sixty to remain in the position of judge or to be appointed a judge.</p>
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	<p>other established standards and ethics in the light of the present Guidelines.</p>		<p>objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics.</p>	<p>perform his duties in a minor way. (...) If the same breach continues or if it persists after the giving of a final warning, disciplinary proceedings shall be brought.</p> <p><b>Article 127</b> The disciplining of members of the Public Prosecution of all levels is within the jurisdiction of the disciplinary council referred to [MW: no indication of where this reference is – see Judges' Club amendment].</p> <p><b>Article 128</b> The disciplinary penalties which may be applied to members of the Public Prosecution shall be the same as the penalties applied to judges.</p> <p><b>Article 129</b> The Prosecutor General may, of his own accord or on the basis of a suggestion by the Minister of</p>	<p>by a committee composed of the most senior heads of appeals courts (other than the members of the Supreme Judicial Council), as well as the two most senior judges in the Court of Cassation and the two most senior deputy heads of appeals courts.)</p> <p><b>Article 129</b> The Prosecutor General may, of his own accord after obtaining the assent of the Supreme Judicial Council, commence disciplinary proceedings.</p> <p>The Prosecutor General may suspend a member of the Public Prosecution from work pending completion of an investigation after obtaining the consent of the Supreme Judicial Council.</p>			
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7. Freedom of expression, association and assembly	<p><b>Freedom of expression and association</b></p> <p>8. Prosecutors like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional disadvantage by reason of their lawful action or their membership in a</p>	<p><b>6. Empowerment</b></p> <p>(...)</p> <p>In general, Prosecutors shall be entitled:</p> <p>(...)</p> <p>to form and join professional associations or other organisations to represent their interests, to promote their professional training and to protect their status; and to relief from compliance with an unlawful order or an order which is contrary to professional standards or ethics.</p>	<p><b>F. Role of Prosecutors</b></p> <p>(...)</p> <p>(c) Prosecutors like other citizens are entitled to freedom of expression, belief, association and assembly. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession.</p> <p>(d) Prosecutors shall be free to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status.</p>	Justice, commence disciplinary proceedings. The Prosecutor General may suspend a member of the Public Prosecution from work pending completion of an investigation.	No relevant amendments proposed.	No relevant amendments proposed.	No relevant amendments proposed.	<p><b>Introduction of Article 72 (bis)</b></p> <p>It is prohibited for a judge or member of the Public Prosecution to call for the courts to strike, or to call for them to stop working, or to partake in any such action or to respond to it. Anyone that takes such actions shall be transferred to the disciplinary council provided for in article 98 of this law, and he shall be considered to have been absent from work without excuse for the duration of his suspension, and he shall be denied his financial remuneration throughout this period, without prejudice to</p>
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8. Financial matters	lawful organization. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession. 9. Prosecutors shall be free to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status.	<p><b>6. Empowerment</b></p> <p>In general, they should be entitled:</p> <p>(...)</p> <p>to reasonable conditions of service and adequate remuneration, commensurate with the crucial role performed by them and not to have their salaries or other benefits arbitrarily diminished; to reasonable and regulated tenure, pension and age of</p>	<p><b>F. Role of Prosecutors</b></p> <p>(...)</p> <p>(a) Reasonable conditions of service of prosecutors, adequate remuneration and, where applicable, tenure, housing, transport, conditions of physical and social security, pension and age of retirement and other conditions of service shall be set out by law or published rules or regulations.</p>	<p><b>Article 123</b></p> <p>The remuneration of employees of the Public Prosecution at all levels shall be set according to the table appended to this law.</p>	<p>No relevant amendments. Note: c/f the amendments increasing salary for judges – the Judges' club does not seem to be seeking a</p>	<p><b>Article 68 / Salary Schedule</b></p> <p>The salaries of members of the judiciary and judicial bodies shall be set by a unified schedule of salaries without discrimination between judicial bodies or departments. From the date of this law until the date of promulgation of a new law containing a unified salary schedule for members of</p>	<p><b>Article 68</b></p> <p>The salaries of judges at all levels shall be set in accordance with the Schedule to this law. It is prohibited for any salary to be decided on the basis of personal reasons or for any of them to be treated exceptionally in any way. (addition of the following): The guaranteees and rights and advantages and</p>	<p>any criminal responsibility which might be applicable to his acts.</p> <p><b>Article 68</b></p> <p>Introduction of a second sub-paragraph containing the following text: (2) The financial provisions and terms which apply to their colleagues in the membership of the higher constitutional court and the state council shall apply to judges and members of the public prosecution.</p>
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						retirement subject to conditions of employment or election in particular cases.				the judiciary, the schedule setting out the salaries of the higher constitutional court in force at the time of [promulgation of] this law shall apply...	obligations set for their equivalents in the membership of the Constitutional Court shall apply to judges and members of the Public Prosecution with the effects they have.	
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**Notes**

- 1 United Nations, 'Guidelines on the Role of Prosecutors, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders', UN Doc A/CONF 144/28/Rev 1 (1990) at 189, available at [www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx](http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx), last accessed 14 January 2014.
- 2 International Association of Prosecutors, 'Standards of professional responsibility and statement of the essential duties and rights of prosecutors', (1999), available at, [www.coe.int/t/dghl/monitoring/greco/evaluations/round4/IAP1999\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/IAP1999_EN.pdf), last accessed 14 January 2014.
- 3 African Commission on Human and People's Rights, 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa', available at, [www.achpr.org/instruments/fair-trial](http://www.achpr.org/instruments/fair-trial), last accessed 14 January 2014.
- 4 Judicial Authority Law No 46/1972 (JAL), most recently amended by Law No 17/2007.
- 5 Note that the numbering within Article F is illogical; there appear to be typographical mistakes in this regard.
- 6 Emphasis author's own throughout.







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