

**Towards Establishing a Vision for the  
Independence and Impartiality  
of the Egyptian Judiciary**

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and Impartiality of the Egyptian Judiciary**

Reform Issues (28)

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## **Towards Establishing a Vision for the Independence and Impartiality of the Egyptian Judiciary**

**Seminar in cooperation between the Cairo  
Institute for Human Rights Studies (CIHRS)  
and the Euro-Mediterranean Human Rights  
Network (EMHRN)**

**16-17 April 2011  
Cairo, Egypt**

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Cairo Institute for Human Rights Studies

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The Cairo Institute for Human Rights Studies (CIHRS) is an independent regional non-governmental organization (NGO) founded in 1994. It aims at promoting respect for the principles of human rights and democracy, analyzing the difficulties facing the application of international human rights law and disseminating human rights culture in the Arab region as well as engaging in dialogue between cultures in respect to the various international human rights treaties and declarations. CIHRS seeks to attain this objective through the developing, proposing and promoting policies, legislations and Constitutional amendments. CIHRS works on human rights advocacy in national, regional and international human rights mechanisms, research and human rights education – both for youth and ongoing professional development for human rights defenders. CIHRS is a major publisher of information, a magazine, an academic quarterly, and scores of books concerning human rights.

A key part of CIHRS' mandate is to help shape the understanding of the most pressing human rights issues within the Arab region and then to coordinate and mobilize the key players and NGOs from across the region to work together to raise the public awareness about these issues and to reach solutions in line with international human rights law.

CIHRS enjoys consultative status with the United Nations ECOSOC, and observer status in the African Commission on Human and Peoples' Rights. CIHRS is also a member of the Euro-Mediterranean Human Rights Network (EMHRN) and the International Freedom of Expression Exchange (IFEX). CIHRS is registered in Egypt, France and Geneva, has its main offices in Cairo, an office in Geneva for its work at UN human rights mechanisms and an institutional presence in Paris. CIHRS was awarded the French Republic Award for Human Rights in December 2007.

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## Forward

The Cairo Institute for Human Rights and the Euro-Mediterranean Human Rights Network organized a conference on April 16 and 17, 2011, titled “Towards Establishing a Vision for the Independence and Impartiality of the Egyptian Judiciary.” The conference was part of years-long efforts by both organizations, in cooperation with the judiciary, to strengthen judicial independence. Held in Cairo at the Shepherd Hotel, the conference was attended by numerous judges, legalists, and representatives of political parties and groups and civil society, as well human rights defenders, writers, researchers, and several Arab and international experts. Minister of Justice Mohammed Abd al-Aziz al-Gindi prepared the inaugural speech at the conference, delivered by Judge Wael Abu Eita in his stead.

The major themes of the conference included the nature of guarantees judges deem necessary to secure an independent and impartial judiciary. Participants discussed interventions by the executive branch, represented by the Justice Ministry, into judicial affairs and the mechanisms by which court panels are formed and judges appointed and promoted. Proposals were made for achieving financial independence for the judiciary and guaranteeing the implementation of court rulings, in the context of a discussion of a report issued by the EMHRN in 2010 about judicial independence in Egypt. The report was prepared by Egyptian researchers Dr. Futouh al-Shazli, a professor of criminal law at Alexandria University, and Karim al-Shazli, who is preparing a doctorate in law at the University of Paris I Pantheon-Sorbonne.

Participants also examined the role of the judiciary in transitional justice following the January 25 revolution, making use of international experience in this field, and discussed the problem of civilians being tried before military courts. As Egyptians are preparing to write a new constitution, the conference also discussed the need for the rules of the new constitution to conform to international norms of justice.

This publication contains the final conference report, which includes participants' recommendations for the Cabinet, the Minister of Justice, and the Supreme Council of the Armed Forces, which is administering the country's affairs in the transitional phase. The draft of the final report was written by the conference reporter, Medhat al-Zahed, a journalist and judicial editor.

This publication also includes the research papers presented and discussed at the conference, including:

1. "Guarantees for Financial Independence for the Judiciary," written by Judge Zaghoul al-Balshi, vice president of the Court of Cassation.
2. "Towards Guarantees for the Implementation of Judicial Rulings," written by Dr. Judge Ayman al-Wardani, the chief justice at the Court of Appeals.

3. “The Public Prosecutor between the Executive and the Judiciary,” written by Abdullah Khalil, an attorney at the Court of Cassation and formerly an independent expert with the UNDP.

4. “The Road to Transitional Justice in Egypt after the January 25 Revolution,” written by Mervat Rashmawi who is a Palestinian independent human rights consultant. She is the former legal adviser to the Middle East and North Africa region at the International Secretariat of Amnesty International. She is currently a fellow at the Human Rights Center of the University of Essex, and the Human Rights Law Center of the University of Nottingham, United Kingdom.



# **Towards Establishing a Vision for the Independence and Impartiality of the Egyptian Judiciary**

(the final Report)

Prepared by/ Medhat ElZahed\*

The Cairo Institute for Human Rights Studies and the Euro-Mediterranean Human Rights Network organized a conference “Towards Establishing a Vision for the Independence and Impartiality of the Egyptian Judiciary” as part of their years-long efforts, in cooperation with judges, to support an independent judiciary. The conference was attended by prominent judges involved in the judicial independence movement in Egypt, civil society organizations concerned with strengthening judicial independence, human rights defenders, lawyers, political actors, and Arab and international experts, as well as representatives of youth groups who took part in the January 25 revolution. In particular, we would like to note the participation of the Minister of Justice Mohammed Abd al-Aziz al-Gindi, whose speech to the inaugural session of the conference was delivered by Judge Wael Abu Eita, a member of the Ministry’s Human Rights Directorate.

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\*Writer and Journalist (Egypt).

In the inaugural session, the conference organizers expressed their optimism at the golden opportunity provided by the January 25 revolution to institute fundamental changes that will ensure a separation of powers and grant the judiciary the genuine independence for which so many have struggled for years. The goals of the revolution, after all, were not simply to remove the symbols of the old regime, but to build a new system based on freedom, equality, and human dignity through the establishment of a state of justice and law, of which an independent judiciary is an integral component.

This conference represents a continuation of previous efforts and conferences, in which the judicial independence movement was a primary partner, which focused on the justice system in Egypt and offered recommendations and alternatives to a regime in which the executive had usurped all other authorities. Indeed, this conference will inevitably be followed by more conferences and efforts aimed at reaching those with the largest vested interest in judicial independence—to wit, Egyptian society and judges. It is hoped that this and other conferences will benefit from the current climate of freedom to communicate with and influence decision makers on the issue of judicial independence in Egypt. Perhaps one sign of change already underway was illustrated in the Minister of Justice's speech, which contained an explicit pledge to end the Judicial Inspection Directorate's dependence on the Ministry of Justice and place the body under the authority of the Supreme Judicial Council. The speech also paid respect to the independence and status of the judiciary, and expressed interest in convening a second justice conference.

Some participants expressed reservations about unrealistically high hopes for change when the Presidential Elections Commission still wants greater independence and immunity and in light of the continued application of the judiciary law from 1972, the state of emergency and military trials. Participants agreed on the need to make judicial independence the first priority on the agenda of the Minister of Justice, the Supreme Judicial Council, and the Judges' Club, and to begin preparing for the second justice conference at the soonest possible opportunity.

The call for a second justice conference more than 20 years after the first—convened in 1986—comes after the success of the January 25 revolution and its aspiration to build a cultural system based on full judicial independence and a new constitution. This is perhaps why it raised some differences on issues of transitional justice. In connection with the revolution, the conference reiterated the need to provide a fair trial for those accused of political and financial corruption. It stressed the fact that demands for a new constitution and a second justice conference are related to the call for a national, democratic, society-wide debate—something the participants were keen to stress—in order to reach a consensus on the governing principles for a democratic, civil state that excludes or marginalizes no citizen or social segment, guarantees an independent judiciary and public liberties, social justice, a just distribution of wealth, as well as the constitutional protection of the State.

Several participants approached the same issues from different perspectives. Most importantly, they highlighted the need for the constituent assembly to be elected and for the constitution to include legal protection for its provisions as well as mechanisms to hold accountable and punish those who violate them. They also pointed to the need for a reiteration of religious identity and guarantees to ensure that the vote on the constitution effectively embodies the hopes and aspirations of all segments of the population.

Beyond discussions of a second justice conference, a national democratic debate, and necessary constitutional guarantees, conference participants made several recommendations and observations on discrete issues.

**State of emergency, emergency law, and military trials:**

The papers and discussions at the conference noted that Egypt was ruled for decades by the emergency law, without legal or constitutional support, with the goal of impeding public liberties, and weakening and undermining the judiciary and its sovereignty through the creation of exceptional courts that deny defendants the right to

appear before their natural judge in a fair trial. The state of emergency provided a screen for the seizure of authority by the executive and security apparatus and a cover for crimes of torture. As a matter of course, these and other factors led to the eruption of the revolution of rage on January 25, 2011.

Participants concurred that the state of emergency and all it entails no longer has any justification, particularly after the authorities announced they had released detainees, stopped harassing dissidents, and would respect the independence and sovereignty of the judiciary.

The conference discussed various aspects of the justice system after the January revolution, including the police powers newly invested in the military police, the referral of defendants to military trials, which denies them their right to appear before their natural judge, the use of violence or torture against defendants, and infringements on the right to self-defense by denying defendants the right to view their case files, convening trials near or during the curfew, or convening collective trials in one session. In this regard, the conference recommended:

1. Lifting the state of emergency and abolishing Emergency State Security courts.

2. Amending the emergency law in consideration of the inadequacy of the exceptional measures the law permits in times of natural disasters, epidemics, war, or similar circumstances. Exceptional measures should be limited to the arrest of persons or the seizure of property in particular incidents, without extending to public liberties, the rights of defendants, and due-process guarantees, even during a state of emergency.

3. Prohibiting the referral of civilians to military courts and limiting the jurisdiction of these courts to crimes in the barracks.

**International conventions:**

Egypt has ratified several human rights conventions. This is a laudable action, but in order to derive the full benefits, the following conditions must be observed:

1. Provisions of Egyptian law must be consistent with international conventions ratified by Egypt related to judicial independence.
2. Provisions of Egyptian law must be consistent with these conventions, which have acquired the force of law.
3. Action must be taken to familiarize judges with the provisions of international conventions and apply them in Egyptian courts.
4. Other international human rights conventions must be ratified, specifically the optional protocols of the International Covenant on Civil and Political Rights.

**Constitutional reforms:**

1. Explicitly provide for the Supreme Judicial Council's full independence, both administrative and financial, from the executive and legislative authorities and ensure that judges alone choose the heads of judicial councils.
2. Make all administrative decrees subject to judicial review without exception, including decrees from the Presidential Elections Commission, which is named in Article 76 of the 1971 constitution and Article 28 of the constitutional declaration.
3. Uphold fundamental guarantees necessary to enact constitutional principles and rights, such as judicial independence, the separation of powers, and public liberties, and include these guarantees in the text of the constitution itself, so that the expression "as defined by the law," is not used as a tool to restrict or erode rights.

4. Guarantees for constitutional rights do not obviate the need for the constitution to provide legal protection for its own articles, as well as mechanisms to hold to account and punish those who violate them.

5. Articles of the constitution should be internally consistent and not contradict one another, as was the case with Articles 76 and 11 of the constitution preceding the constitutional declaration.

**Legislative reforms:**

1. Amend laws regulating the judiciary to ensure full independence for the judicial authority and judges.

2. Uphold the principle of direct elections for a majority of members on the Supreme Judicial Council by judges themselves.

**Supreme Constitutional Court:**

1. Restrict the President's discretionary power to appoint the chief justice of the Supreme Constitutional Court.

2. Stipulate that the chief justice shall be selected from among the court's sitting justices.

3. facilitate the contestation of the constitutionality of legal provisions.

**Supreme Judicial Council:**

1. Include members elected by judges on the council such that the majority of members are elected.

2. Bring the Judicial Inspection Directorate under the authority of the Supreme Judicial Council.

3. Invest the authority to transfer, assign, or detail judges solely with the Supreme Judicial Council.

4. Make the investigating authority wholly independent from all branches of the executive; abolish restrictions on filing criminal suit against civil servants and those with police powers; and compel the Prosecution to announce the findings of investigations, particularly into crimes of torture, mistreatment, and the abuse of power. The Public Prosecutor should be selected with the approval of the Supreme Judicial Council, or elected from among members of the general assembly of the Court of Cassation and the Cairo Appellate Court.

5. In furtherance of judicial independence, institute an independent budget for the judiciary, with its revenue source defined by law, in addition to any allocations from the state budget. The Supreme Judicial Council shall assume the task of:

- Reviewing, discussing, and approving the budget prior to its inclusion in the state budget as a line-item expenditure. The state shall provide the judiciary with the financial resources required to administer justice conscientiously and properly, without restriction by government regulation, following the system in force in the People's Assembly.
- Allocating a specific sum in the independent budget to the Judges' Club in support of its role in serving judges and defending judicial independence.

**Judgeship system:**

1. Appointment and promotion in judicial positions shall be based on transparency, equality, and fairness and be subject to all standards of merit and qualification, without exception for those with influence or connections. These standards necessarily entail the principles of justice and equality, which includes the right of qualified women to judgeships. In turn, this ensures that the judicial system is effective and can benefit from all qualified human resources, as is consistent with the constitution and international conventions.

2. The party charged with enforcing rights should be the judicial authority itself, and the executive must not intervene with decisions from on high.

3. It is the duty of judicial agencies to work to develop the capacities and professional skills needed for judicial positions through the establishment of a specialized judicial institute, study at which is a prerequisite for any judicial position.

4. The judicial system must guarantee to its members the freedom of transfer, which is inconsistent with the “yellow-card” system, and the right of defense in disciplinary proceedings. A judge involved in disciplinary proceedings shall not be considered on open-ended leave, as is consistent with the principle of innocent until proven guilty.

**Assignments:**

1. Internal assignments or details (to the Ministry of Justice or its subsidiary judicial bodies) shall be subject to clear, transparent rules and under the sole supervision of the Supreme Judicial Council.

2. Assignments or details to external bodies should be abolished, whether to ministries, government agencies or departments, or prosecutorial councils.

3. Regulations setting time limits on internal assignments should be enforced.

**Right to a fair trial:**

1. Create a second level court for criminal litigation.

2. Abolish or reduce court fees to nominal levels and improve the legal aid system.

3. Facilitate litigation procedures and speed up adjudication by closing legal loopholes that permit extended lawsuits. Rulings issued by the Administrative Court should not be subject to appeal before

regular courts, and technical and human resources should be developed to ensure fair, speedy verdicts, in furtherance of due-process guarantees.

4. There must be periodic supervision and inspection of prisons and detention facilities and just arrangements should be made for the execution of penalties. Proposals in this regard included either enforcing current laws and ensuring the Public Prosecution plays its proper role, or creating a directorate for the execution of rulings in the Ministry of Justice to take the necessary measures for the implementation of rulings.

5. The media should respect and comply with judicial norms and customs, including the principle of innocent until proven guilty.

6. The executive should refrain from attempts to pressure or influence the judiciary, particularly in regard to the trial of former regime figures. If verdicts are issued in trials that do not meet due-process standards, it will be difficult to retrieve the assets of these figures abroad.

#### **Judges' Club:**

Judges as individuals and a collective have the right to expression, association, movement, and the freedom to form and join associations in a way that comports with the stature and traditions of the judiciary, which does allow expressions of opinion in public affairs, particularly professional affairs, but does not permit partisanship. When the judicial independence movement was in a leadership position in the Judges' Club, the organization played an enormous role in defending the interests of judges and judicial independence. As a result, the club was embattled and treated unjustly by the executive, which at times even denied the club's legitimacy. As such, the status of the Judges' Club should be legalized and its legitimacy officially recognized in provisions of the judiciary law, which should also recognize its right to cooperate with any regional, international, or other judicial unions. A sum in the Supreme Judicial Council's budget should be set aside to

support the club's activities, without the club or its activities being subject to the oversight of the council or any other body.

## **Guarantees for the Financial Independence of the Judiciary**

Judge/ Zaghloul al-Balshi\*

The Arab world is now moving in various directions, but most prominently, it is moving towards justice, respect for human rights and liberties, the peaceful rotation of power through free and honest elections, and the need to set limits for presidential terms. The promise this direction holds can only be fulfilled through a strong and independent Judiciary. Thus, the independence of the Judiciary emerges as a strongly held belief and a firm faith, upheld by divine laws even before it was enshrined in international conventions and treaties or national constitutions and laws. Indeed, it is imposed by the nature of judicial work itself, and it is imposed by the will of free peoples, an embodiment of the highest ideal of justice and a manifestation of their march towards democracy, progress, and a free and dignified existence. If justice is the foundation of sovereignty, then an independent Judiciary is the foundation of justice, a

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\* Vice-President of the Court of Cassation (Egypt).

fundamental guarantee of citizens' rights and liberties, and the need to protect the sovereignty of law.

A civilized political system that respects human rights and liberties cannot be established without a strong and independent judicial authority, and this independence must extend to administrative and financial matters.

The most important feature of administrative independence is the elimination of any role for the executive branch in the affairs of the Judiciary, including in the appointment and dismissal of judges, their promotion or transfer, their deputation and censure, as well as the criminal, disciplinary, or civil mechanisms to hold them to account. The Judiciary must have its own mechanisms for the constitution of the Supreme Council of the Judiciary, the appointment and dismissal of judges, their promotion or transfer, deputation or censure, and accountability, without any intervention by another branch of government. The Judiciary must operate without any external influence, whether direct or indirect, that may weaken the resolve of its members and lead them away from truth, whether through inducement or compulsion, enticement or intimidation, threats or promises.

The goal of the separation of powers first called for by Montesquieu in 1748 entails restraining the Executive from manipulating judicial affairs, leaving the Judiciary independent and sovereign. No other authority should have power over it. Saad Zaghloul's warning that the judicial system in Egypt encourages the Executive to intervene in its affairs in various legitimate ways still rings in our ears. This is unfortunate. Nonetheless, every judge has his dignity. I am proud that I can say that Egypt has judges who have spoken the truth and have stood tall with their heads raised high even in the darkest, most unjust days, when there has been no law to protect their dignity, let alone their freedom.

Constitutional and legal texts uphold the independence of the Judiciary, but at times, in both their provisions and in their application, they contradict the true spirit of their content and undermine their

ultimate goal. They may encroach on judicial matters and undermine or impair judicial independence. There may also be inconsistencies between the fact of judicial independence and its guarantees on the one hand, and the state's understanding of this independence on the other, such that each has a particular conception of the independence of the Judiciary, its guarantees, needs, and the interests it serves.

The more a regime's legitimacy erodes, the more it will clash with the Judiciary and take action to undermine its independence because it recognizes its weakness before it.

The independence of the Judiciary, in its objective and its end goal, cannot be separated from the constitutional and legal provisions that guarantee it, as they are the tools for its realization. The law cannot be fair unless it has guarantees and means for achieving its objectives. If the legislator turns a blind eye and thwarts the goals to which these provisions aspire, it hinders the application of the law and defeats the value of its existence, and thus must be changed or abolished.

Article 165 of the Egyptian constitution states that the judicial authority shall be independent and its authority vested in courts of all levels that issue rulings in accordance with the law. Article 166 states that judges shall be independent, subject to no authority but the law, and that no other authority may intervene in cases or in matters of justice. The independence of the Judiciary is thus a fundamental guarantee without which justice cannot be achieved. The constitution guaranteed independence for the Judiciary and immunized it against any interference, influence, or corruption, or encroachment on its components.

The danger is that the ruler who seeks to undermine judicial independence never lacks legal scholars and philosophers to plot ways for him to achieve his objectives through devilish means and contorted methods that make his assault on the Judiciary seem less flagrant. Deception and loopholes are employed to attack the judicial authority and undermine its independence. This is the job of those whom Egyptians have dubbed "legal tailors." Thus, the independence of the

Judiciary is caught between the laws and legislation that protect and uphold it, and the reality that contradicts these same laws and legislation.

As such, the ties between the judicial and executive authorities must be severed with strict, explicit constitutional provisions that contain no uncertainty or ambiguity and leave no room for interpretation. The Judiciary's administrative independence must be complete and safe from interference by the executive. The Judiciary itself, without executive interference, must regulate the dismissal, promotion, transfer, deputation, censure, and retirement of judges, as well as mechanisms for criminal or disciplinary accountability.

The financial independence of the Judiciary is considered one of the primary indicators of genuine independence, without which the Judiciary enjoys no real ability to operate freely, make decisions, and implement them without obstacles imposed by the executive and administrative branches.

If the Judiciary does not possess sufficient financial resources to manage its own affairs, its ability to make and implement decisions is limited and restricted, and bound by the need for an entire chain of approvals and consent, which in many cases may lead the Judiciary to hesitate or abstain from taking certain measures. Financial independence gives the Judiciary freedom of operation and the ability to take rapid action to remedy shortcomings and loopholes, determine its needs, arrange its priorities, establish pay grades, and grant bonuses.

Furthermore, judges' salaries may foster their independence and stature. Judges must be given a salary sufficient to provide for the necessities of life, shield them from the vagaries of time, and remove all doubts and the disgrace of want. This would allow them to appear to the public in a way appropriate to their position and to devote themselves to their work with assurance and calm, unperturbed by life's burdens and the cost of living. This would also prevent them from turning to other less demanding and more remunerative

professions, leading to an exodus of experienced, capable judges from the bench.

Financial coercion is one of the most significant forms of executive pressure brought to bear on the Judiciary, as it may withhold funds for urgent needs, establish pay grades at will, and grant or abstain from granting bonuses.

Until the issuance of Law 142/2006, the state budget had no independent line item for the Judiciary. Allocations for the Judiciary came out of the budget of the Ministry of Justice, as if the Judiciary was a subsidiary department of the ministry, and the Judiciary was compelled to lodge its financial claims with the ministry. The Executive, represented by the Justice Ministry, thus controlled the Judiciary through financial pressure, and as a result played a substantial and dangerous role in judicial affairs. The interference of the Minister of Justice was tangible. Unfortunately, the current judiciary law fosters and facilitates interference in judicial affairs as it does not specify the boundaries between the Ministry of Justice and the Judiciary, and does not establish guidelines to prevent the Minister of Justice from intervening in judicial affairs. This gives the Minister the opportunity to control and contain the Judiciary through the heads of primary courts (whom he appoints), judicial inspection, and financial coercion.

Therefore, financial independence and an independent budget for the Judiciary was an urgent demand, the subject of ceaseless debate between legal and judicial circles and the executive, and the source of constant struggles between the Minister of Justice and the Supreme Council of the Judiciary. This depended in part on the minister and how strong his belief in judicial and financial independence. However, despite some variation between them, Justice Ministers shared the tendency to hold on tightly to the Judiciary's finances, claiming budget deficits and spending pressure, even as state institutions were showered with generous benefits and state largesse.

An independent budget is an important guarantee for judicial independence and a safeguard against financial coercion and

manipulation by the Executive. The more independent financial resources the Judiciary has, the less able the executive is to influence or pressure it.

Under pressure from Egyptian judges and their insistence on an independent budget, the legislature issued Law 142/2006 amending some provisions of the Judiciary law (Law 46/1972) and adding Article 77(5), which states, “The Judiciary and the Public Prosecution shall have an independent annual budget, starting at the outset of the fiscal year and ending with it. The Supreme Council of the Judiciary, in agreement with the Minister of Finance, shall draft the budget before the fiscal year, taking care to include all revenue and spending in one number. The draft budget shall be presented to the Finance Minister. Immediately upon approval of the state budget, the Supreme Council of the Judiciary, in coordination with the Finance Minister, shall assume responsibility for the distribution of the Judiciary’s budget to the relevant categories, groups, and items, pursuant to the state budget rules. The Supreme Council of the Judiciary shall exercise the powers vested in the Minister of Finance in the rules and regulations governing the implementation of the budget for the Judiciary and the prosecution within the limits of the allocated sums. The chair of the council shall exercise the powers vested in the Minister of Administrative Development and the chair of the Central Agency for Organization and Administration. The Supreme Council of the Judiciary shall prepare the final budget for the Judiciary and the Public Prosecution by the stipulated date and refer it to the Minister of Finance for inclusion in the state budget. Unless otherwise specified in this law, the budget for the Judiciary and the Public Prosecution and the final account shall be subject to the provisions of the law governing the state budget and the final state calculation.”

This article did not ensure financial independence for the Judiciary and the Public Prosecution. While upholding the principle of budgetary independence at the outset, it later robs this principle of any real meaning by stipulating that the budget shall be prepared in agreement with the Minister of Finance. Neither does the article mandate resources for the budget, which allows the Finance Ministry

to determine the size of the budget and limits the Supreme Council of the Judiciary to the distribution of the allocated funds to the various budget items and headings. It thus denies the Council the freedom of action and operation and the power to take and implement decisions, determine appropriate needs, and arrange priorities. The article also states that the final budget shall be submitted to the Finance Minister, which gives him oversight of the Supreme Council. To achieve financial independence, oversight must come from within the Council itself, as is the case with the People's Assembly. Article 35 of Law 38/1972 on the People's Assembly states, "The Assembly shall have an independent budget as a line item in the state budget. The Assembly bylaws shall elucidate the manner of preparing, discussing, and approving the draft of the Assembly's annual budget, as well as the method of preparing, regulating, and monitoring the Assembly's accounts and the preparation and approval of the final annual accounts, without restriction by government regulations." The People's Assembly thus drafts, discusses, and approves its own budget, determining how to maintain, organize, and monitor its accounts, as well as prepare and approve its final accounts. With this article, the legislator gave the People's Assembly full financial independence, whereas it withheld it from the Judiciary in Article 77(5) of the amended Judiciary law.

The law must mandate an independent budget for the Judiciary and give the Supreme Council of the Judiciary responsibility for examining, proposing, discussing, and approving the budget before its inclusion as a line item in the state budget. The state must provide the Judiciary with sufficient financial resources that allow it to administer justice without restrictions by government regulations. Anything else is merely a facade of independence.

The law must also specify the resources for the independent judicial budget, including the sum allocated to the Judiciary in the state budget, judicial fees, and criminal fines, to prevent the executive from controlling the size of the judicial budget. Otherwise, the stipulation of an independent budget is meaningless. At the same time, a specific amount of the Judiciary's independent budget must be

allocated for annual aid to the Judges Club to enable it to perform its role in the service of judges.

The United States enjoys the highest level of judicial financial independence in the world, with the courts administering their own financial affairs pursuant to allocations from the Congress, far from the Department of Justice, which is prohibited from intervening in court affairs.

An independent Judiciary is the strongest guarantee of justice, equality, and social stability, and the best means of protecting legitimacy and state institutions. It is the greatest force for deterring injustice, resisting tyranny and oppression, and protecting and preserving rights and liberties. It is thus not a luxury or a choice, but a necessity imposed by the nature of life and human rights.

## **Guarantees for the Implementation of Court Rulings and the Proposed Establishment of a Judicial Police Force**

Judge Dr/ Ayman al-Wardani\*

All court rulings issued in Egypt are preceded by a phrase noting that the ruling was issued “in the name of the people,” meaning that the people, the source of the three branches of government (executive, legislative, and judicial), have authorized the judge to issue his ruling in all cases and disputes that appear before him. Thus, it is inconceivable that the implementation of a ruling so issued in the name of the people would be obstructed for any reason, and it is impermissible for any person, regardless of his authority in the state, to hinder the execution of court orders.

This introduction raises the issue of the need for effective and strong guarantees that ensure the implementation of court rulings,

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\* Judge at the Court of Appeal (Egypt).

particularly since disregard for, or delay in, the execution of these orders has become a serious phenomenon in several states that suffer from political authoritarianism and economic underdevelopment. It is also does great harm to the state's reputation in its dealings with others. Primarily, it is a fundamental breach of the constitution, domestic laws, and international conventions that all mandate the need to implement court rulings without delay or hesitation insofar as they are tokens of the truth.

Perhaps the fundamental distinguishing characteristic of the modern civil, institutionalized state is effective state guarantees for the implementation of court orders. States even boast about their degree of devotion and submission to the law and the principles and rulings of the Judiciary. As such, compliance with court rulings has become a badge of the modern civil state (a nation of laws), while a state's refusal to execute court orders fosters chaos and the loss of confidence in the sovereignty of the law. This carries grave consequences for all areas of life in the state, as the lack of effective guarantees for the execution of court rulings emboldens the political authority and instills political officials with a sense that there is no legal deterrent to violations and abuses that constitute punishable crimes. The refusal to implement court orders also has grave economic consequences, leading to the flight of capital and national and foreign firms which seek to invest in an environment in which the sovereignty of court rulings and an independent Judiciary provide security and incentive for investment. It also has ramifications for the general policies of the modern state, whose economic role is manifested in a set of laws and regulations passed to encourage investment and attract capital to revive the national economy and spur progress towards a free, flourishing economy. Moreover, both litigants and legalists become concerned and apprehensive when court orders are not consistently implemented, whether they are simply disregarded or interpreted in contravention of their spirit to enable the ruling to be circumvented.

A refusal to implement court orders is a type of administrative corruption that harms the general order. The spread of various forms

of corruption among state agencies leads to frustration, desperation, and a loss of confidence among citizens in that they are living under the sovereignty of the law.

The implementation of a court ruling is one of the most complex issues facing a litigant who has won his claim. In many cases, he may be unable to obtain his right and have the ruling in his favor implemented easily. The execution procedures may take a year or more, or it might be suspended indefinitely or permanently. These delays and obstructions are often attributable to the legal means the state has granted to losing litigants to legally delay the execution of a sentence, on the grounds of preserving justice. This time can be shortened, however, because the law does not prohibit taking measures that prevent these delays and postponements.

To uphold the sovereignty of the law, all government ministries, directorates, and agencies must be ordered to execute court rulings without delay or disregard, and they should issue clear directives that no such orders are subject to discussion as they are a token of the truth. All people must be instilled with the values and ideal of justice and understand that everyone must respect the law, for it preserves the dignity of the citizen from the state and the dignity of the state from the citizen, and guarantees the freedom of the individual and of others.

The point of the existence of the Judiciary is to give those with claims their due, so that justice may prevail in society. If the provisions of court rulings go unimplemented, then what use are they? What benefit will a citizen gain if he obtains a court order that the administration or individuals refuse to implement? What remains of the sovereignty of the law and the institutional state if the administration disregards the practical provisions of the law? Where is the dignity of the Egyptian people if rulings issued in their name have no value, and the administration and sentenced persons are not compelled to respect them?

These questions have all been the focus of serious discussions at several conferences given the massive accumulation of court rulings

that have gone unimplemented, including final rulings that are not subject to further appeal.

Another pertinent issue is the relationship between the implementation of court rulings and legitimacy. The two are intimately linked because an erosion of the principle of respect for court orders nullifies the principle of legitimacy.

Whether the body charged with implementing court orders lacks the will or intention to do so, or whether it intentionally refrains from executing orders issued against itself or others, it undermines the authority of court rulings, whose force exceeds that of the law itself. Court orders are a badge of truth, reached by the Judiciary regardless of criticisms or challenges, and they must be implemented.

All laws around the world include clear instruments in their texts to ensure the implementation of court rulings. These range from the dismissal or incarceration of public servants who refuse to implement final rulings, to provisions that grant the injured party the right to claim compensation from those who wrongfully refrain from implementing such rulings.

The question that presents itself here is: "what if orders punishing those who obstruct or refuse to implement final court rulings also go unimplemented?" This is clearly a complex, difficult issue for which we legalists at this conference must devise an effective proposal to establish clear instruments in order to ensure the implementation of final court rulings.

One proposal for an effective guarantee for the implementation of court orders is the establishment of a judicial police force. I shall be brief here in consideration of the limited time available.

The proposal involves the creation of a judicial police force directly linked with the Public Prosecutor. Its mission is to take all possible legal measures to ensure the implementation of final court rulings where a delay has no legal basis. Other duties include implementing orders issued directly to it by judicial agencies and bodies, without recourse to the military leadership, including the body

charged with preserving order in prisons or security in courtrooms and prosecutors' offices, as well as securing the implementation of judicial decrees and orders. This should be extended to include the military police in military courts, who shall be given badges to distinguish them from members of the military police who are not subordinate to the military Judiciary. A strict policy must be adopted to compel the military, security, and administrative leadership to engage with members of the judicial police and facilitate their tasks. The investigation and discipline of members of the judicial police must rest with the Public Prosecutor and his deputy such that the Judiciary oversees, monitors, and directs the judicial police to guarantee its role in executing any directives or orders issued to them that preserve the independence and stature of the Judiciary and guarantee the implementation of final court orders.

Ultimately, it seems to me that these brief, modest proposals cannot be implemented on the ground except through absolute faith and firm intention to sincerely and faithfully implement the values and principles of judicial independence and impartiality; In order for the Judiciary to be a guarantor for all and the faithful embodiment of the battle to develop and modernize state legal institutions that strive to entrench the values of justice, freedom, and equality.



## **The Independence of the Public Prosecutor Between the Executive and the Judiciary**

Prepared by/ Abdullah Khalil\*

### **Introduction\*\***

Since the initial establishment of the office of the Public Prosecutor in 1875, the British occupation and the Executive authority both realized the importance and seriousness of the office and hence sought to control it through loyalist elements. The English aspired to control the office to ensure itself of the appendages needed to achieve their aims, specifically, continued English control over life in the Egyptian street, which the Public Prosecution, with its authority to charge and investigate, helped keep in check. The Executive authority sought to make the Public Prosecution an intrinsic part of the Executive and subordinate to it, first and foremost to the Khedive, but also to the Minister of Justice, who had the authority to supervise, oversee, reprimand, and suspend members of the office. Indeed, by

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\*\*Note: The cases cited in this paper are merely for the purpose of providing examples. For additional information and case citations consult *The Public Prosecutor: Counsel for Society or Adjunct to the Executive*, by Abdullah Khalil, published by the Cairo Institute for Human Rights Studies (CIHRS) in 2006.

1895, the Public Prosecution could make no decision without first consulting the security director or the governor.

From 1952 and until the issuance of Law 46 in 1972, the government had the authority to dismiss any member of the Public Prosecution through disciplinary measures. Even after 1972, members of the prosecution did not possess sufficient guarantees against dismissal, until the issuance of Law 35/1984 revising provisions of the Judiciary law. However, the administrative subordination of the office and the prerogatives of the Minister of Justice remained unchanged.

### **I. Appointment of the Public Prosecutor**

Since the establishment of the Public Prosecution and until today, the post of Public Prosecutor has been a political appointee. The appointment has been at the discretion of the political authority, starting with the Khedive and later by presidential decree with no need for the approval of the Supreme Council of the Judiciary. The Public Prosecutor possessed no guarantees against dismissal from office until the issuance of Law 35/1984 revising provisions of the Judiciary law, and he was administratively subordinate to the Minister of Justice, a representative of the Executive, until the issuance of Law 142/2006. As such, the Executive was able to control the top of a hierarchical structure that enjoyed both the power to charge, as part of the Executive, and the power to investigate, a function that falls within the purview of the judicial authority.

Since 1932, the Court of Cassation has upheld the Public Prosecution's subordination to the Executive, considering it an integral part of that authority. Although the court has affirmed that Egyptian laws render the Public Prosecution a judicial authority in matters of investigation, it has nevertheless upheld the office's administrative independence from the Judiciary in the performance of its duties. Thus, the Judiciary has no authority to directly reprimand or censure the Public Prosecution in the performance of its duties. Rather, if the Judiciary believes some irregularity has occurred, it must turn to the official directly responsible for prosecutors (the Public

Prosecutor) or the supreme head of the prosecution (the Minister of Justice). This exercise is to be conducted in secrecy in consideration of the necessary respect for the Public Prosecution, which requires refraining from impugning its dignity before the public.<sup>1</sup>

In essence, this means that in exercising its prerogatives to accuse and investigate, the Public Prosecution operates as a division of the Executive, under the supervision of the Minister of Justice and the Public Prosecutor and their administrative oversight. This stands in utter contradiction with the prosecutor's judicial duties, for no authority can carry out a judicial task independent from the Judiciary and without its oversight over the performance of this task. This is the flaw in the conventional assumption that the Public Prosecutor and the Public Prosecution combine functions of the Executive and the judicial branches. A correct reading of the situation reveals that the Public Prosecutor and the prosecution are a division of the Executive in the exercise of all its duties. Its intermediate status between the Executive and the Judiciary is merely an imaginary thread created by the Public Prosecution to enable it to undertake its tasks under the protection of successive Judiciary laws.

Ultimately, it must be said that the Public Prosecution is an integral part of the Executive, which the law has singled out for a judicial function—investigation—to enable the political authority to control the investigation of political crimes through one of its own divisions operating independently from the Judiciary. This does not mean that it is part of, or connected to, the Judiciary.

## **II. Appointment to the Public Prosecution**

Since the establishment of the office, appointments to the Public Prosecution have been a point of contestation due to the lack of objective rules governing the process, which permits a degree of

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<sup>1</sup> Court of Cassation ruling on March 31, 1932, no. 1444 of the second judicial year, published as no. 206 in the official collection of rulings from judicial year 33, p. 408.

interference by the political authority or the supreme leadership of the courts.

On March 25, 2005, poet and writer Farouq Guweida published an article in *al-Ahram* discussing the appointment of the children of judges to the Public Prosecution despite claims of entitlement by others. The Supreme Council of the Judiciary asked the Public Prosecutor to investigate Guweida, also the managing editor of *al-Ahram*, on charges of defaming the Judiciary. Guweida was questioned for five hours, after which he had a coronary thrombosis. He was taken to the Dar al-Fouad Hospital where he had a catheter and stent inserted.

### **III. Presidency of the investigating and charging authority**

From the outset, the political authority sought to control the investigating and charging authority and invest these prerogatives with the Public Prosecution, as a division of the Executive, administratively subordinate to the Minister of Justice and the Public Prosecutor – himself a political appointee. As such, the British occupation issued a decree on May 8, 1895, abolishing the system of investigating judges and made the prosecutor's office responsible for investigation. Later, the July 1952 movement betrayed its principles, among them the elimination of colonialism, which entails not only the elimination of the material colonial presence, but also the elimination of the colonial legacy, which had thoroughly permeated the Egyptian legal system. The 1952 regime also invested the power of investigation with the prosecution, issuing Law 353/1952 abolishing the investigating judge system stipulated in the Code of Criminal Procedure that was operative as of November 15, 1951. The regime also made fundamental changes to the Code of Criminal Procedure that eroded individual guarantees and granted protection to civil servants similar to that which existed under the 1895 decree. It started by establishing the State Security Prosecution to tighten control over the investigation of political crimes and prohibit the commission of an investigating judge to investigate crimes against civil servants and police. It also

imposed restrictions on litigation against them, the ability to appeal decisions not to file criminal charges, and the ability to file suits directly. The authorities of the Public Prosecution were expanded in matters pertaining to the interrogation of suspects, provisional detention for political crimes, and violations of privacy.

Particularly important was Article 125 of Law 46/1972, which gave the Minister of Justice, a member of the Executive, the right to supervise members of the Public Prosecution. Later, Article 126 of Law 46/1972 gave the Minister of Justice the right to reprimand any member of the prosecution, while Article 129 of the same law gave him the right to suspend members of the office.

#### **IV. Prosecutorial Inspection Agency**

The goal of the establishment of the Inspection Agency for the Public Prosecution and the Judiciary was to control and weaken the prerogatives of the Public Prosecution to limit its power. Initially, this was linked with increased authority granted to governors, security directors, and their agents, to strengthen the power of the police in the face of the prosecutor's office. Some administrative authorities were granted judicial police powers—that is, the power to accuse—and, along with the members of the Public Prosecution, were placed under one oversight authority, the Public Prosecutor. This situation continues under the current Code of Criminal Procedure. Members of the Public Prosecution, their aides, police officers who enjoy judicial police powers, mayors, building and food inspectors, tax inspectors, and others, operate under the Public Prosecutor. Through these offices, the political authority works to control the daily life of Egyptian citizens, using these administrative authorities that are directly subordinate to it. As a result, through these various arms, the political authority is able to charge any citizen. The Public Prosecution receives the reports and refers them directly to the competent court without a technical investigation. As such, these powers can be used for political retribution or social or economic influence, exploited to achieve the

goals of special interest groups. This role, first designed by the British occupation and its legal consultants, still exists today.

## **V. Deputation**

Deputation for judicial or non-judicial tasks is often exploited by the Executive as a means of inducement and to extend the arms of the Executive into the work of the Public Prosecution. A review of presidential orders for deputation from 2000 to 2005 reveals that members of the Judicial Inspection Agency for the Public Prosecution were repeatedly deputized and detailed to the State Security Affairs Bureau. The gravity of these deputations lies in that the State Security Affairs Bureau was established under Emergency Law 162/1958 and is responsible for ratifying rulings issued by the Emergency State Security courts. It is directly subordinate to the President, in his capacity as the military governor.

## **VI. Impact of subordination on political cases and crimes of torture**

For its entire history the Public Prosecution has been in the political firing line because of its negligence in investigating incidents of torture and its interrogations of political dissidents in political cases. It has been accused of issuing decisions biased to the ruling party and acting as a tool to settle political accounts due to its obvious subordination to the Executive, both in the person of the Minister of Justice and through the political authority's appointment of the Public Prosecutor.

### ***1. Crimes of torture***

a. The Public Prosecution's negligence and failure to conduct serious investigations into crimes of torture is reflected in observations by the United Nations Committee against Torture, which has noted the

slow pace of prosecution for those accused of torture. This has also been noted in reports issued by human rights organizations.

b. There have been high-profile cases in which the defendants were tortured and where the Public Prosecution did not announce the findings of investigations or refer those responsible to trial. For example, in December 1989 the Egyptian Organization for Human Rights (EOHR) filed a criminal complaint with the Public Prosecutor against those responsible for torture in the Abu Zaabal Prison following the arrest and detention of several activists and others on the grounds of alleged membership in the Egyptian Communist Workers Party. Two of the activists were at that time on the board of trustees at the EOHR (Dr. Mohammed al-Sayyed Said and Amir Salem). Several of the detainees were seriously injured by brutal beatings and by being dragged across the prison floor. Lawyer Hisham Mubarak<sup>1</sup> sustained internal bleeding in his right ear and a temporary loss of hearing, in addition to bruising on his back and head. He was also unable to move his right leg because of blows to his spinal cord. Engineer Kamal Khalil sustained severe bruising on his shoulders, buttocks, and thighs, as well as cracks in his rib cage as a result of beatings with batons, cattle prods, hands, and feet. One officer jumped up and down on his back for several minutes while he was lying prone in his cell. Although the Public Prosecution and the forensic specialist confirmed evidence of torture on these and other detainees, and although the perpetrators were known, no criminal charges were brought against any of them.

c. There have been cases of death under torture, and the Public Prosecution has not announced findings of the investigations. One of the most notorious cases was the death of lawyer Abd al-Hareth Madani, known for his defense of Islamist groups. He was arrested on the evening of April 26, 1994, and declared dead without cause on May 5, 1994, at the Manyal University Hospital. A senior forensic physician noted in his report the existence of bruising and abrasions

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<sup>1</sup> The late Hisham Mubarak was later the executive director and head of the field operations' unit at the EOHR. One of the most prominent human rights activists in Egypt, he then established and directed the Association for Human Rights Legal Aid.

on his head, chest, stomach, and limbs, along with surface blood clotting. The incident sparked protests organized by human rights groups and the Lawyers Syndicate, followed by international efforts by the American Bar Association and the Center for the Independence of the Judiciary and the Bar in Geneva, which dispatched fact-finding missions. Nevertheless, Madani's death remains a mystery, and the investigating authorities have still not released the findings of the investigation.

The same is true of the investigation into the death of Mohammed Musaad Qutb, the accountant at the Engineers Syndicate, who died four days after his detention at a State Security headquarters. The Public Prosecution ordered his body turned over to his family and he was buried under heavy guard on November 6, 2003. A similar case is that of engineer Akram Abd al-Aziz al-Zuheiri, who allegedly died under torture after being detained in State Security headquarters.

## ***2. Political cases***

a. The referendum of May 25, 2005: During the referendum to amend Article 76 of the Egyptian constitution on presidential elections, held on May 25, 2005, many Egyptian and foreign journalists were subjected to sexual harassment, kicking, and beatings with batons by supporters of the National Democratic Party (NDP) while security forces turned a blind eye. Abd al-Halim Qandil, the executive editor of *al-Arabi* at the time, was attacked, along with Mohammed Abd al-Qudous, an officer with the Liberties Committee at the Journalists Syndicate; Shayma Abu al-Kheir, a journalist with *al-Dostor*; Abir al-Askari, a journalist with *al-Dostor*; Hani al-Aasar, a journalist with *al-Dostor*; Wael Tawfiq, a journalist with *al-Dostor*; Nawal Ali, a journalist with *al-Jil*; and Iman Taha Kamel, a freelance journalist.

The Public Prosecution ruled not to file criminal charges for these abuses on the grounds that the perpetrator was unknown, which sparked angry reactions among all opposition political forces and civil society groups. Some suggested turning to international instruments to

investigate these crimes, noting that the prosecution's decision was flawed insofar as no serious investigation was conducted although the perpetrators of these crimes had been identified and were known to security. In fact, it was stated that security bodies were covering for them, as security was charged with investigating and apprehending the perpetrators and bringing them to justice. Unfortunately, the Public Prosecution's decision did not compel these bodies to turn over the perpetrators, and the office's subordination to the Executive, affected this decision.

b. Attacks on judges in the 2005 parliamentary elections: The Public Prosecution took no serious measures to investigate allegations of assault, including armed assault, by security forces on judges overseeing the 2005 elections. Although judges and judicial bodies submitted 139 complaints regarding these violations, the Public Prosecution brought only two security personnel to trial.

c. Libel and slander of Alaa and Gamal Mubarak: Alaa and Gamal Mubarak filed a complaint (no. 6271/1997/Abdin) against *Asharq Alawsat* and *al-Jadida* on May 31, 1997, claiming that the London-based *Asharq Alawsat* had made false allegations in its issue published on May 27, 1997, about their connection to deals, commission, monopolies, and about having obtained millions. Their statements were taken at the technical office of the Public Prosecutor at 5 – 9 pm on June 1, 1997 by Chief Prosecutor Omar Marwan (currently the judge commissioned on the fact-finding committee formed to investigate the crimes of January 25, 2011). Alaa Mubarak stated that he was a businessman while Gamal Mubarak noted that he was the executive director of a financial consulting firm. Yet, they were treated as civil servants or public office holders, for the Public Prosecution referred the case to court, although the norm in cases against specific persons is that the case is filed directly by the complainants. The defendants were convicted in a first-degree court and handed prison terms of six months to one year. On appeal, the criminal case ended with reconciliation (on December 10, 1997, in appeal 4783/1993/Central Cairo) without the presence of the

defendants, an exception to the general rule which requires the Judiciary not to accept an appeal if the defendant is not present.

The situation was entirely different after January 25, 2011, when the Public Prosecution quickly investigated, and oversight bodies examined, similar allegations. Even graver matters were exposed, and real estate assets were confiscated and accounts frozen.

d. Cases involving former minister Mohammed Ibrahim Suleiman: The North Cairo Court, 46th circuit of compensation, heard two compensation cases involving Dr. Mohammed Ibrahim Suleiman, former minister of housing, and independent MP Alaa al-Din Abd al-Moneim. Suleiman sued Abd al-Moneim for compensation of LE500,000, due to statements he had made about Suleiman on the television program “Ten O’clock” on February 27, 2007. Abd al-Moneim countersued for LE1 million from Suleiman for abusing the right to litigation (see *al-Masry al-Youm*, October 27, 2008).

The court rejected Abd al-Moneim’s suit and accepted that of Suleiman. It further ordered Abd al-Moneim to pay LE20,000 in compensation, although the statements he made were supported by official documents issued by the Ministry of Housing.

Since March 2010, the Public Prosecution has been investigating complaint no. 408/2009/Public Funds, filed by several MPs, among them Alaa Abd al-Moneim. In the wake of the complaint, the Public Prosecution asked that former minister Suleiman’s immunity be waived. The complainants had previously called the minister in for questioning regarding abuses including the receipt of bribes worth millions from several businessmen in exchange for the allocation of large tracts of land in new cities for paltry prices, which cost the national economy billions of pounds. The minister was also accused of allocating several villas and land to his wife, children, relatives, and friends (see *al-Ahram al-Misai*, April 1, 2010).

No arrest warrant was issued for the former minister until April 6, 2011, following investigations conducted by the Public Prosecution into information provided from oversight bodies after February 11, 2011, after former president Hosni Mubarak stepped down from

office. The information indicated that the heads of some oversight bodies were involved in the violations as well.

## **VII. Involuntary disappearance**

Recently, disappearances have increased. A report from the Association for the Assistance of Prisoners and the EOHR noted 48 cases of involuntary disappearance between 1992 and the present day. The Public Prosecution has not announced the fate of any of the disappeared thus far.

### **Recommendations:**

1. End any role for the political authority in the appointment of the Public Prosecutor; grant the General Assembly of the Court of Cassation the exclusive right to submit nominees for the office; and make the Public Prosecutor subordinate to the Supreme Council of the Judiciary.

2. End the Public Prosecutor and prosecutors' administrative subordination to the Minister of Justice, and abolish its prerogatives over them, including the right to reprimand them orally or in writing; the right to launch disciplinary proceedings against prosecutors; and the right to suspend members of the prosecution pending the adjudication of disciplinary suits. These prerogatives should be vested exclusively in the Supreme Council of the Judiciary or the disciplinary council.

3. If the Public Prosecution continues to function as a judicial body, its budget must be part of the Judiciary's independent budget. If it does not continue to function as a judicial body, the Public Prosecution should have an independent budget as a line item in the state budget in order to preserve the role of the Public Prosecution and the status of its members, and guarantee the fair, transparent distribution of the budget among members of the prosecution.

4. Abolish the deputation of members of the Public Prosecution for non-judicial positions subordinate to the Executive, including the State Security Affairs Bureau, the cabinet, government agencies and departments, and ministries, in order to dispel any suspicion of influence over them.

5. Abolish inspections by the Minister of Justice. The Supreme Council of the Judiciary should be the sole body with the authority to assess the performance of the Public Prosecution and determine the promotion, transfer, or area of residence of members of the prosecution.

6. Annul the Public Prosecutor's authority to transfer members of the Public Prosecution and determine their area of residence, and make such decisions conditional on the approval of the prosecutor and the Supreme Council of the Judiciary while establishing objective norms and guidelines for such measures.

7. Abolish restrictions on the ability to file criminal suits against civil servants and police personnel.

8. Give members of the Public Prosecution the right to make decisions and operate independently without recourse to directives from a higher body.

9. Require the Public Prosecutor to announce the findings of investigations conducted by the Public Prosecution against civil servants and police personnel in crimes, incidents of torture, and the arbitrary exercise of authority, for the purpose of general deterrence and to ensure public oversight on its actions.

# **Transitional Justice Period in Egypt and Beyond Lessons from Other Experiences\***

Mervat Rishmawi\*\*

## **Introduction: Need for a comprehensive approach**

From the states' obligations to respect, protect and fulfil human rights of victims of human rights violations stems the integral right to an effective remedy. This obligation includes three elements:

- Truth: establishing the facts about violations of human rights that occurred in the past;

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\* This short paper is a compilation of some main ideas that were primarily extracted from the many available publications on the subject and which can be very useful for the Egyptian authorities and civil society in its future efforts. It will be essential to learn from experiences and lessons, and benefit from the creative ideas in other parts of the world, which many of these publications highlight. Some of these publications are included at the end of this document.

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- Justice: investigating past violations and, if enough admissible evidence is gathered, prosecuting the suspected perpetrators;
- Reparation: providing full and effective reparation to the victims and their families, in its five forms: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.

Egypt will therefore be passing through a difficult phase in the coming months or years where the different institutions and civil society will have to deal with issues related to past violations as well as focusing on reform of laws and institutions for the future. In terms of the violations, there needs to be clear process that deals with past violations under the previous regime, the violations during the 25<sup>th</sup> of January revolution, as well as the violations that have followed this period.

This multifaceted challenge following the fall of the authoritarian regime will require a comprehensive approach. Such an approach will need to incorporate elements that relate to establishing the truth, prosecutions, reparations, vetting, and institutional reform. In addition, cooperation with United Nations expert bodies will play a very important role in this endeavour, as detailed below. There is a need for strategies and clear plans regarding these elements, including one that takes into account and elaborates the inter-relations between them.

With respect to past human rights violations, states must ensure that the truth is told, that justice is done, and that reparation is provided to all victims. In this sense, truth, justice and reparation are three aspects of the struggle against impunity. Therefore, judicial measures may be combined with non-judicial measures, including truth commissions, effective procedures for granting reparation and mechanisms for vetting armed and security forces.

Through this, Egypt can address the violations of the past in order to ensure that there is no impunity for violations, and that such violations will not occur in the future; and that if they do, they will not

go unpunished. This is the message that the political leadership of Egypt now needs to send in a clear way.

### **Establishing the truth: A Truth Commission?**

Truth commissions offer some form of accounting for the past. They can have particular importance when there is a large number of violations and where prosecutions for these large numbers of cases are impossible or unlikely for various reasons, including the lack of capacity of the judicial system.

However, it is essential to note from the start that truth commissions do not replace the need for prosecutions. The value of truth commissions is that they are created not with the presumption that there will be no trials, but to constitute a step towards knowing the truth and ultimately, allowing justice to prevail.

Truth commissions have been defined as “official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law, usually committed over a number of years”. (Updated Set of principles for the protection and promotion of human rights through action to combat impunity, Addendum to the Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, Definitions, page 6).

The importance of having a truth commission is that it reaches out to thousands of victims in an attempt to understand the extent and the patterns of past violations, as well as their causes and consequences. The questions of *why* certain events were allowed to happen can be as important as explaining precisely *what* happened. The truth commission is therefore an important voice to the victims of human rights violations and their families; and helps to prevent violations from re-occurring, through specific recommendations for institutional and policy reforms.

Although the commission may potentially face a huge number of cases, all properly documented human rights violations placed before it should be investigated and clarified. While the desire for an

expeditious process inevitably imposes limits on the scope of the investigation, the right to a complete and faithful account of past human rights violations cannot be restricted to a limited number of cases selected because of the prominence of the victim or because of the effect the violations had on a national or international level.

While the respective functions of truth commissions and courts are complementary, they are different in nature and should not be confused. Truth commissions are not intended to act as substitutes for the civil, administrative or criminal courts. In particular, truth commissions cannot be a substitute for a judicial process to establish individual criminal responsibility. Prosecutions must accompany the work of a truth commission.

While the identification of perpetrators of human rights violations is an important part of the obligation to respect, protect and fulfil the victims' right to truth, justice and reparation, a truth commission is not a judicial body and cannot determine guilt or innocence. Therefore, persons alleged of having committed human rights violation before a truth commission have the right to be presumed innocent until proven guilty beyond a reasonable doubt according to law in a fair criminal trial.

Some past truth commissions have decided to publicly "name and shame" alleged perpetrators.

However, this approach violates the right to be presumed innocent, may endanger the safety of both alleged perpetrators and witnesses (including the victims themselves) and ultimately is counter-productive to the interests of justice.

In carrying out their inquiry, truth commissions should bear in mind the rules and conditions for the admissibility of evidence in the criminal process and should ensure that they produce admissible evidence for later criminal proceedings. At the same time, experience have shown that truth commissions should not be bound by as strict rules of evidence as a court, and can consider reliable evidence of any kind (including, for example, hearsay/secondary evidence) for the purposes of their own investigations. However, obviously, a truth

commission can in no case consider evidence produced as a result of torture or other ill-treatment, except against the suspected perpetrator.

In addition to its own inquiries, the commission should review other proceedings that could provide relevant information. In particular, it should review evidence collected in the vetting process of the armed and security forces (see below), earlier police investigations, and the findings of any relevant inquiry to determine if they were conducted thoroughly and impartially.

If a truth commission decides to adopt specific procedures to promote individual reconciliation, these must fully respect the rights and dignity of both victims and alleged perpetrators. In particular, victims and their families should not be forced to meet alleged perpetrators or to engage in any act of reconciliation. Such engagement must come out of their free will.

### **Prosecutions:**

The modalities for a truth commission to recommend prosecutions vary. The commission may decide to forward possibly incriminating information and evidence to the relevant authorities as soon as it receives it.

If a truth commission decides to compile a list of suspected perpetrators, it should decide in advance, at the outset of its work, a clear policy defining the criteria for doing so, including standards of proof, consistent with international law. Those included in the list should be given, as a minimum, the possibility to respond to the allegations before the list is finalized.

To safeguard the right of suspected perpetrators to be presumed innocent until proven guilty beyond a reasonable doubt according to law, the list should be kept confidential and should not be available to the general public. The names should be handed over to the national prosecution authorities on a confidential basis so that, where there is sufficient evidence, those concerned can be prosecuted.

In the context of Egypt, as in many other countries, the main strategic challenges for prosecution are that:

- A large number of crimes will have been committed and it will only be possible to investigate a small number; and
- Hundreds, if not thousands, of people may have been involved in the crimes and not all can be prosecuted.
  
- A strategy to deal with this could involve the following steps:
- *A mapping exercise*: this can assist preparation of prosecutorial initiatives by providing a sense of what kinds of crimes occurred, when and where, who the victims were, and the likely identity of the perpetrators
- *Criteria of prosecution*: establishing a transparent set of criteria to explain the strategy of identifying suspects to be investigated and prosecuted will ensure transparency, efficiency, and the budgeting of available resources.

Such clear criteria and strategy will enable the public and civil society to be fully aware of who is to be prosecuted and therefore cooperate with the system. To ensure that the best prosecution strategy is reached, it is essential that the authorities carry out full consultation with the civil society.

#### **Vetting:**

Vetting is essential for several reasons, including regaining public trust in institutions and mechanisms that were used for oppression and that created public fear. It ensures that those who were involved in human rights violations are not in a position to repeat these violations or allow them to happen. It bridges the gap that results from the lack of ability to prosecute everyone involved in human rights violations.

Vetting officials who were or are currently in service must take place to determine their suitability for continuing in office or for

appointments. This is perhaps the most natural bridge between transitional justice and institutional reform. Removing people who should not be in the police, the military, the prison service, or the judiciary because of their past behaviour, not only addresses their accountability for past behaviour, but also ensures that they will not engage in misconduct again. Their removal simultaneously reforms the institution in which they serve.

Vetting can be defined as “assessing integrity to determine suitability for public employment.” Integrity refers to an employee’s adherence to international standards of human rights and professional conduct, including a person’s financial propriety. Public employees who are personally responsible for gross violations of human rights or serious crimes under international law revealed a basic lack of integrity and breached the trust of the citizens they were meant to serve. The residents of the country, in particular the victims of abuses, are unlikely to trust and rely on a public institution that retains or hires individuals with serious integrity deficits, which would fundamentally impair the institution’s capacity to fulfil its mandate.

Institutional reform efforts require the inclusion of a vetting process to exclude from public institutions persons who lack integrity. This is to ensure that integrity of public personnel, which is dependent on possession of qualities that enable them to fulfil the mandate of their duties in accordance with fundamental human rights, professional and rule-of-law standards.

The fact that only a few perpetrators can be prosecuted creates the challenge of what to do with the remaining perpetrators (and their victims): the so-called impunity gap. The fact that many people will not be investigated or prosecuted should not mean that they should escape any form of accountability. Complimentary measures like vetting and community service should be considered. This requires coordination between the different institutions involved in the process.

While the vetting process also requires significant resources, it is procedurally less complex than criminal prosecutions. Under circumstances of limited or delayed criminal prosecutions, the

exclusion from public service of human rights abusers may help to fill the impunity gap by providing a partial measure of non-criminal accountability. Exclusions from public service have a punitive effect as they take away or pre-empt employment, public authority, and other privileges and benefits.

Excluding abusers should, however, not be used as a pretext for not pursuing criminal prosecutions. Not only is there a duty to prosecute serious human rights crimes, but a transitional justice strategy will also be more effective and legitimate if the various transitional justice initiatives, in particular prosecutions, truth-telling, reparations and institutional reform, complement each other.

It is essential that the vetting process is fair and is seen to be fair. It should be based on assessments of individual conduct and not on the basis of group or party affiliation.

### **Reparations :**

States have obligations under international law to ensure the availability of adequate, effective, prompt and appropriate remedies, including reparation, for human rights violations. The state should therefore develop procedures to allow groups of victims to present claims for reparation and to receive reparation.

Principle 15 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law provides that “Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian

law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.”

Full and effective reparation, as laid out in principles 19 to 23 of the Basic Principles, include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Throughout the process, a truth commission or a similar institution should collect views from victims about what forms of reparation they require to rebuild their lives. The state should ensure the right of victims to access relevant information concerning violations and reparation mechanisms.

As with vetting and any other non-judicial process, any recommendation made for reparation should never be seen as a substitute for bringing those responsible to justice or preclude victims also seeking compensation through the courts.

#### **Institutional reform:**

The justice sector will be required to advise or assist in addressing alleged serious past human rights violations. But at the same time, there needs to be plans for reforming the justice sector itself. Such institutional reform will require considerable time and resources, and therefore a high level commitment from the government, the various authorities, civil society, and the international community.

Institutional reform therefore contributes to enabling the public institutions, in particular in the security and justice sectors, to provide criminal accountability for past abuses, and ensures that fair and efficient public institutions play a critical role in preventing future abuses. Following a period of massive human rights abuse, preventing

its recurrence must constitute a central goal of a legitimate and effective transitional justice strategy.

Judges are the guardians of liberty and human rights, and therefore it will be essential for the Judiciary to re-establish its leading role in this regard. However, one of the problems that the justice system may face is the public perception of the judiciary and its role and independence. While the judiciary of the civilian system was largely independent and played an important role in protecting people's rights, the persistence of human rights violations may lead the public to question its trust in the role of Judiciary. Therefore, it is important that the Judiciary plays a role in preserving rights, including in relation to obvious areas like arrest and detention, treatment of prisoners and detainees, access of lawyers to their clients, access of medical professionals and family members to the detainees, and fair trial standards. Other important areas where the Judiciary will need to make its mark will include demonstrations, freedom of the press and media, and laws on organizing associations or non-governmental organizations.

Institutional reform measures may include, for example:

- The creation or strengthening of oversight, complaint and disciplinary procedures;
- The reform or establishment of legal frameworks;
- Commitment to international human rights law and standards;
- The development or revision of ethical guidelines and codes of conduct; changing symbols that are associated with abusive practices; and
- The provision of adequate salaries, equipment and infrastructure.

Reform of the justice system will be a major contribution to the return to respect for human rights. Supporting the judges with knowledge, resources, and infrastructure is essential. Making the justice system accessible is also essential. Court clerks and

administrative personnel are often overlooked. These officers make the justice system work. They keep track of case files and dockets, schedule hearings and ensure order and safety in the courtroom. The administration of the courts and its needs must therefore be assessed. It may be in dire need of support: files have been lost or destroyed, basic office equipment is lacking. Understanding the importance of these individuals cannot be underestimated. Because of their typically low status and prestige, corruption is rife, favouritism in treatment, and many abuses of power occur at this level.

Another major obstacle will be in relation to access to justice, which is often limited to the wealthy, the politically connected, and urban dwellers. It is very important to assess if the population has had meaningful access to the courts, and if not, what were the hindrances. Is it the fees, the complication of the system, the lack of physical accessibility to courts which are found only in major urban areas, or all these and many other factors? It is important to assess where people go in order to achieve justice, and how these systems relate to the formal justice system, or undermine it.

In addition to the formal justice sector, procedures and actors based on customary laws and traditions play an important role. These have the typical benefit of being “close” to the people, affordable and quick, while enjoying great legitimacy. Yet some of these traditional justice models may have serious defects concerning, for example, gender equality, children’s rights, equality and non-discrimination in relation to social status, and forms of punishment that are prohibited under international law. While society generally knows and acknowledges the existence of these forms, little has been done to understand how such systems work and to analyse them. It is essential that there are thought through, elaborated projects that analyse such systems and elaborate strategies on ways of interacting with them. This is an essential, integral part of the reform of the justice sector.

Finally, due attention must be paid to economic, social and cultural rights. While there is much to be done about civil and political rights violations, it is important that economic, social and cultural rights are not ignored in the reform process.

**The role of the UN:**

Cooperation with the UN human rights mechanisms and the special expert bodies will contribute to the reform stage, ensuring justice is done, and the transition is carried out in the most successful way. Mandate holders of the Human Rights Council stated that they stand ready to provide the necessary expertise to the Council. They stated that their priority is that the interests of justice are served and to assist in ensuring that all human rights are protected. The review, expertise and technical assistance that these expert bodies can provide will help in the process of achieving justice through identifying problems and gaps, providing recommendations for reform, and providing concrete assistance for that reform to take place. Such a role for the UN bodies can therefore contribute to the dealing with past violations as well as the reform process.

Egypt can take many steps now in that regard, including:

- Review UPR recommendations and the commitments by Egypt, and ensure more commitments to human rights
- Issue open invitations to the UN Special Procedures. Egypt must swiftly extend invitations to those Special Procedure mandate holders who wish to conduct country visits, including technical assessment missions.
- Report to the UN Treaty Bodies. This contributes to revealing the truth and ensuring that violations do not occur again. Many reports to Treaty Bodies have been overdue for many years now: CAT (overdue since 2004), CCPR (overdue since 2004), CERD (overdue since 2006).
- Develop a plan of action to implement recommendations by Treaty Bodies and Special Procedures, for example recent ones by the Special Rapporteur on Terrorism and the

Committee on the Elimination of Discrimination against Women.

**The Role of the International Community :**

International actors could advise domestic authorities in designing a transitional personnel reform programme, assist in its implementation through training, advising, monitoring and providing resources, or on the reform of personnel and the establishment of an internationalized personnel reform process. In general, personnel reform processes under domestic leadership will be preferable to internationalized processes. But the role of international expertise (for example the UN Special Procedures, OHCHR) must be recognised and protected.

Typically, many international actors take interest in these issues and tasks. It is very important therefore to ensure that such efforts are not fragmented, that there is adequate coordination, and that they are carried out in full consultation with the national partners. Encouraging the State to formulate a plan and budget can alleviate some of the strain, waste and duplication. The civil society movement can play an essential role in this by identifying needs, and in the provision of expertise, advising, and essential monitoring.

The tasks ahead will be challenging and will require resources. It will be essential that concrete ideas, based on past experiences of other countries, are formulated. For example, the state budget may not be in a position to provide full reparation immediately. It is essential that a reparation fund is established. Until enough funds are secured from the state, some countries have called on the international community to contribute to that fund, or have decided to allocate to this fund a certain percentage of all international aid received.

**Conclusion:**

As was stated by the UN experts: "If Egyptians are to trust the State and its institutions, authorities must remain vigilant and ensure full respect for human rights." The authorities should show leadership by showing tangible results of the efforts to combat past abuses and impunity and to ensure accountability on all levels, so that justice is both done and perceived to be done across the board.

One cannot emphasise enough the need for the authorities, the international community, and civil society to give adequate attention to all human rights, civil, political, economic, social and cultural rights.

The authorities must ensure the broadest possible dialogue through the organization of national consultations during this transitional period. It is important that the expertise and capacity of the civil society and the international community is utilized at this stage.

The International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims is commemorated on 24 March. Let this date next year be a mark for progress made in this regard.

*Selected Resources on Transitional Justice and Truth Commissions*

- Amnesty International: Truth, justice and reparation- Establishing an effective truth commission, 11 June 2007, AI Index: POL 30/009/2007, available on <http://www.amnestv.org/en/library/info/POL30/009/2007>
- United Nations Office of the High Commissioner for Human Rights (OHCHR), Rule-of-law tools for post-conflict States - all available in Arabic on <http://www.ohchr.org/EN/PublicationsResources/Pages/SpecialIssues.aspx>
- Truth commissions (HR/PUB/06/1)
- Mapping the justice sector (HR/PUB/06/2)
- Monitoring legal systems (HR/PUB/06/3)
- Prosecution initiatives (HR/PUB/06/4)
- Vetting: an operational framework (HR/PUB/06/5)
- Reparations programmes (HR/PUB/08/1)
- The legacy of hybrid courts (HR/PUB/08/2)
- Amnesties (HR/PUB/09/1)
- National Consultations on Transitional Justice (HR/PUB/09/2)
- International Center for Transitional Justice. Many information is available on the website including on “Transitional Justice Approaches”, and “What is Transitional Justice”, see <http://www.ictj.org/en/tj>
- Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, available on <http://www2.ohchr.org/english/law/remedy.htm>
- United Nations Commission on Human Rights: Updated Set of principles for the protection and promotion of human rights through action to combat impunity, Addendum to the Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005

