

1. Since Egypt's 2010 Universal Periodic review, the country has undergone some dramatic changes both politically and socially that will remain engrained in the country's history. At a time when a country's political leaders are being replaced, its constitution and laws rewritten, and former officials standing trial, judges can safeguard – or undermine – positive change.
2. Judges are a vital force in any political transition. Judges who are competent and independent can be the most important guardians of individual freedom reining in malignant political forces when they encroach on human rights. However, judges who are in the government's pocket will instead be used as a conduit for the state's abuses, countering efforts for genuine political reform and thwarting the exercise of individual human rights.
3. Judicial independence is one of the fundamental building blocks of a free and democratic state, 'a pre-requisite to the rule of law and a fundamental guarantee of a fair trial'¹. The hallmark of judicial independence is that the judiciary operates without any improper restrictions, influences, inducements, pressures, threats or interferences from the executive branch of government, to ensure that individual judges are not subject to executive control.
4. The right to a fair trial is enshrined in Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR), Article 13(1) of the Arab Charter on Human Rights and Article 26 of the African Charter on Human and Peoples' Rights.² This means that the rules regulating the court system – including the procedure and requirements for the appointment of judges, their security of tenure, the conditions governing their promotion, transfer and suspension, and the rules on judicial immunities – must guarantee judicial independence.
5. Today, Egypt's Acting President is a judge: former head of Egypt's Supreme Constitutional Court, Adly Mansour. The nation's last two presidents – Mohamed Morsi and Hosni Mubarak – are on trial, facing the death penalty. Since Morsi's ouster in July 2013, Egypt's judges have played a central role in drafting the country's new constitution. They also supervised a referendum in early 2014, approving the new constitution (the '2014 Constitution') and paved the way for presidential and parliamentary elections. There is no dispute: in practice and in process, judges have been at the centre of Egypt's political life.
6. Both prior to and after Egypt's revolution, the International Bar Association's Human Rights Institute (IBAHRI) has played an active role in Egypt, investigating the challenges to the independence of the judiciary that hinder the ability of the legal profession to carry-

¹ The Bangalore Principles on Judicial Conduct (2002) adopted by the Judicial Integrity Group in 2001 and subsequently endorsed by several UN organs.

² These treaties, ratified by Egypt, have legal force domestically under Art 151 of the 1971 Egyptian Constitution.

out their professional responsibilities in the administration of justice. More importantly, the IBAHRI has also provided targeted and specific recommendations to remedy impediments to the independence of Egypt's judiciary.

7. In the years following the country's first UPR review, the IBAHRI carried-out two in-depth fact-finding missions in Cairo. The fact-finding missions were performed in accordance with the *International Human Rights Fact-Finding Guidelines* (The Lund-London Guidelines).³ The IBAHRI's 2011 fact-finding mission examined the challenges facing the legal profession prior to and in the months immediately after Egypt's revolution. The IBAHRI's June 2013 fact-finding mission was implemented in order to follow-up on the IBAHRI's 2011 recommendations and focused upon the independence of the judiciary in the aftermath of Egypt's revolution. Subsequently, an IBAHRI report was produced detailing the findings of the each respective mission.⁴
8. Mission findings are primarily based on individual and group interviews, and consultations conducted by IBAHRI delegates during the mission in Cairo. The most recent delegation met with numerous stakeholders including a cross-section of the Egyptian Judiciary (including judges of the Cairo Court of Appeal, the Supreme Judicial Council (SJC) and representatives of the Judges' Club); the Ministry of Justice; legal advisors to the Presidency and the government; the Egyptian Bar Association; the Al-Wasat Party, the National Salvation Front, the Social Democratic Party; the National Council for Human Rights, the Egyptian Organisation for Human Rights, the Arab Center for the Independence of the Judiciary and the Legal Profession; the Muslim Brotherhood; a member of the 2013 constitutional drafting committee; the Arab Network for Human Rights Information youth activists; and members of the diplomatic community among others.
9. The delegation noted that the presidency of Mohamed Morsi, the 2012 candidate for the Muslim Brotherhood's Freedom and Justice Party, was characterised by frequent verbal clashes with the judiciary, as well as a series of high-profile court decisions that polarised opinions about Egypt's judges. Judgments promulgated by the highest courts in the land invalidated each step of Morsi's planned transition: the courts held the Brotherhood-dominated parliament to be unconstitutional, and then prevented Morsi from holding elections to replace it expeditiously. The courts found the two parliamentary committees – established by Morsi to draft a new Egyptian constitution – to be illegal. They reversed the President's appointment of Talaat Abdullah as the new Prosecutor General.

³ *International Human Rights Fact-Finding Guidelines* (The Lund-London Guidelines), <http://www.factfindingguidelines.org/>.

⁴ See International Bar Association's Human Rights Institute (IBAHRI), *Justice at a crossroads: The legal profession and the rule of law in the New Egypt* (November 2011), available at www.ibanet.org/Document/Default.aspx?DocumentUid=981DD862-B07F-4E6F-8A17-EDC9E9D07D64 and *Separating Law and Politics: Challenges to the Independence of Judges and Prosecutors in Egypt* (February 2-14), available at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=b30a63ae-8066-4b49-8758-c1684be5e9b9>

Supporters of Morsi have tended to see these judgments as cynical political blows to democracy by anti-Brotherhood judges. Others consider them proof of judicial independence and a necessary safeguard for freedom in the face of a government that clearly overreached.

10. The IBHARI examined the independence of the judiciary with reference to Egypt's laws and practice, as well as amendments to the existing law that have been proposed. It finds that, although independence is constitutionally protected and the highest courts frequently rule against the government, *the Ministry of Justice and in particular the Minister of Justice himself, is given wide powers over judges which provide scope for abuse*. These include the right to assign judges to courts around the country, the ability to decide which judges are seconded to work in government ministries and the right to initiate disciplinary actions against judges. These powers threaten independence, by allowing the Minister to reward or punish serving judges, therefore providing an incentive for judges to please the government.
11. The legal framework also gives a role to the executive branch in the appointments system, particularly at the higher judicial level, allowing scope for politicised decision-making. A lack of transparency and the absence of public examinations for appointments also leads to a perception – if not a reality – of nepotism.
12. The report also considered the crucial role played by public prosecutors in Egypt's judicial system. The IBAHRI delegation also learned of several ways in which prosecutorial independence can be compromised in Egypt. The direct appointment of the Prosecutor General by the President has led to allegations of politicisation and reduced public confidence in the independence of this office. The IBAHRI therefore welcomes the introduction in the new 2014 Constitution of a provision that will move this authority to the judge-led SJC. But the 2014 Constitution still allows the Minister of Justice to have a role in appointing investigating judges and transferring prosecutors to other posts, which has led to fears of politicised prosecutions of government opponents and an unwillingness to hold the government to account for abuses.
13. The record of prosecutions over the last three years in Egypt suggests that this fear is not hypothetical. Since Egypt's 2011 revolution, the crimes committed by security forces under the watch of each successive government have remained largely unaddressed – while political opponents have been enthusiastically pursued.
14. Three distinct prosecutorial trends are discernible. First, under the short period of military rule that followed the 2011 revolution, more civilians were prosecuted for 'crimes' against the military – such as the crime of 'insulting the military' – than had ever been prosecuted during 30 years of Mubarak rule. Secondly, under Morsi's

Brotherhood presidency, those who insulted Islam or insulted the President himself were targeted. According to some sources, the number of prosecutions brought for ‘insulting the president’ in the Morsi period exceeded the number of such prosecutions brought over three decades under Mubarak and the number of persons who were sentenced to imprisonment for insulting Islam also increased dramatically. Finally, in the post-Morsi era during the second half of 2013, a startling number of prosecutions were initiated against Brotherhood figures, including the former President himself, the Brotherhood’s entire senior leadership and thousands of others.

15. This record of selective prosecutions undermines the potential for a peaceful transition and reconciliation between communities in Egypt, as well as the right to freedom of expression in a new democracy. It is therefore suggested that a transitional justice process be put in place, ideally with international involvement to guarantee independence and impartiality. This would honour the rights of the many victims of serious crimes that have been committed in Egypt and combat impunity for government abuses.
16. Other challenges for the judiciary include the underrepresentation of female judges, the need for increased professionalism and resources, and the continued use of military and other exceptional courts. It is deeply concerning that Egypt’s new constitution still allows military courts to try civilians, even though the judges in these courts lack independence and the courts have been shown to lack fundamental due process guarantees. This report also concludes that proposed amendments to the law put forward by certain political parties that would apply retroactively to remove certain judges from office should not be pursued.
17. Ten tailored recommendations were made in the 2013 report and were submitted to the Egyptian Presidency and government, the Ministry of Justice, the future parliament, the SJC, and relevant judicial and prosecutorial authorities. The IBAHRI respectfully also submits this specifically tailored summary of the mission’s findings and its recommendations to the Office of the High Commission for Human Rights for the 2014 review of Egypt:

17.1 **On the Appointment of Judges:**

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

through nepotism.

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

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

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

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

17.2 On the assignment of judges

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

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

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

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

17.3 On the disciplining of judges

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

17.4 On the role of the Minister of Justice

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

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

17.5 On increasing resources for judges

17.5.1 Address judges' concerns regarding their income by raising salaries to the

level necessary to guarantee judges' professionalism.

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

17.5.3 Establish a Judicial Academy to train judicial assistants and forensic doctors.

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

17.6 On proposed amendments to the Judicial Authority Law

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

17.7 On military trials of civilians

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

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

17.8 On the prosecution service

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

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

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

cases.

17.9 **On accountability**

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

18. Despite the enormous challenges, Egypt is turning a corner in 2014, and the 2014 Constitution provides a solid basis for this fresh start. The UPR represents an ideal opportunity to engage with the recommendations of the IBAHRI report in this important moment of transition for the country. In an address to the UN Human Rights Council in March 2014 an Egyptian ambassador publicly stated the new Egyptian state's commitment to 'building democratic institutions and providing human rights protection in respect to the rule of law and judiciary independence'⁵. With appropriate safeguards in place, Egypt's judges and prosecutors can ensure that they play a key and positive role in the transition to a new democratic state that accounts for the violations of the past and is better able to protect the rights of all citizens.

⁵ 'Egyptian State Committed to Build Democratic Institutions' (*AllAfrica*, March 2014) available at <http://allafrica.com/stories/201403120497.html>