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10) The right to be tried without unjustified delay under the Egyptian legal system, especially for the most serious crimes, requires improvement. Although the right is enshrined under the Egyptian Constitution, and the whole regime of timing in criminal proceedings has been the subject of great enhancement in recent years, unjustified delays still a possibility. It is thus recommended that specific time limits are outlined and introduced in the Criminal Procedures Law. Such time limits must be respected by all levels of criminal courts including the Court of Cassation, otherwise a procedural sanction, such as the automatic dropping of the case, shall be imposed. The system articulated by the Supreme Court of Canada could offer a viable guide in this regard.

exist as soon as possible. The sweeping powers that the executive authority claims under the State of Emergency Law, the special procedural rules regarding the remand, composition of the SSEC and endorsement of their decisions, and the referral of ordinary crimes to those exceptional courts, all of this characterizes those procedures with illegitimacy and contradiction with the natural judge principle. It is thus highly recommended that the State of Emergency in Egypt shall end along with the State Security Emergency Courts, especially that all of the crimes that have been referred to the SSEC could be easily prosecuted before ordinary courts under the current Combating Terrorism Law.

9) The prosecution of civilians by the Military Judiciary in Egypt marks the weakest point that the ICC could invoke to declare the unwillingness of the Egyptian judicial system to prosecute and thus assert its jurisdiction. The Military Judiciary is a special judiciary for the prosecution of military personnel only, and thus should not have any jurisdiction over civilians as the Constitution provides. Despite the rationale behind recalling the military, as the most powerful and functioning institution in Egypt, to protect vital civilian institutions, buildings, and highways, especially with the inability of the civil authorities, such as the municipalities and the police, to offer effective protection to such civilian institutions, it is, nevertheless, submitted that the Military Judiciary should never be involved in the prosecution of civilians, as such prosecutions certainly violate the text and spirit of the current Constitution, as well as relevant international instruments, and would likely render the Egyptian judiciary unwilling to prosecute under the Rome Statute.

most importantly; the regular review of the performance of judges that leads to their promotion, in addition to its power of outlining the annual transfer of judges within the judiciary, and investigate complaints concerning the malpractice of judges submitted even from the public.

5) The power given to the Minister of Justice to refer any judge to the Judges Discipline Council that might decide to sack the judge or transfer him to a non-judicial job shall be abolished. Despite the final decision in this regard will be that of the Judges Discipline Council, which is composed of senior judges, the fact that such significant motion is initiated by the Minister of Justice who represents the executive authority warrants reconsideration.
6) The establishment of summary courts under Article 11 of the Judicial Authority Law through a decision by the Minister of Justice is considered a breach to the Natural Judge Principle, and thus shall be abolished; rather the composition and scope of jurisdiction of such courts should be explicitly mentioned in the Judicial Authority Law similar to the provisions on the establishment of first instance courts and courts of appeal (assize courts).
7) The assignment of cases within the legally established courts should be carried out in accordance with general and absolute rules, otherwise it would constitute a breach of the Natural Judge Principle. Thus, the practice of delegating the chief judge of the court to assign cases to specific chambers shall be abandoned through excluding such delegation from Article 30 of the Judicial Authority Law.
8) The State Security Emergency Courts that are established once the State of Emergency is proclaimed are exceptional courts that should cease to

outlining the annual budget of the judiciary; rather the budget shall be prepared by the SJC and submitted to the Parliament directly, similar to the rule followed in outlining the budget of the Military under the Constitution.

3) The power given to the Minster of Justice to appoint the chief judges of the courts of first instance shall be abolished. Despite the fact that the approval of the SJC to such appointment is required, the proposed names always originate from the Ministry of Justice, as well as the appointment decision. This process will render the appointed chief judge beholden to the Minister of Justice who is member of the executive authority and implements its agenda. Notably, this is considered a serious challenge to judicial independence, especially that the chief judge of the court of first instance has several powers over all judges working in the court the he presides, for instance, he can issue a warning against a judge, which is considered an administrative sanction, in addition to his power to suggest to the Public Prosecutor to initiate an administrative disciplinary case against a judge. It is thus recommended that the appointment of the chief judges of the courts of first instance shall be conducted through a decision by the SJC without the involvement of the Ministry of Justice in such purely judicial affair.
4) The affiliation of the Judicial Monitoring Branch to the Ministry of Justice shall be reconsidered, especially that neither the selection nor the appointment of its members is conditional on the approved of the SJC. This situation certainly constitutes a breach of judicial independence from the executive authority, as the Judicial Monitoring Branch possess under the Judicial Authority Law very significant powers over judges,

instruments. Having said that, the discussion has also revealed several legal shortcomings and deficiencies that warrant legislative amendments. Such amendments once adopted will enhance the willingness of the Egyptian judicial system and accordingly help Egypt to assert its primary jurisdiction over any alleged international crime that is committed in Egypt or by an Egyptian, rather than allowing the ICC to invoke its complementary jurisdiction on the basis that the Egyptian judicial system was found unwilling to prosecute.

The proposed amendments include the following:

1) The Supreme Judicial Council, which is the sole arbiter on almost all of the affairs of the judiciary, should encompass elected members beside the appointed ones. The Chief Justice, specifically, shall be elected rather than selected by the President as the Law no. 13/2017 provides. In addition to enhancing the independence of the judiciary from the executive authority, this proposal will strike some balance within the SJC between seniority and political considerations, on one side, and efficiency and the sense of belonging to the mainstream of judges, on the other. Despite the serious concerns raised regarding the unfortunate outcomes that might result from elections, especially causing sectarianism among judges and allowing a political or religious sect to control the judiciary, democracy is a practice that rectifies itself overtime, and judges are by definition a highly educated and national group that acts in the interest of the judiciary as well as the public at large.
2) The fact that the judiciary has an independent budget is a very significant guarantee for judicial independence, especially from the executive authority. It is, however, recommended that the Minister of Finance shall not be involved in the process of

as a candidate in municipal or national elections, except after resigning from his post as a judge, and the adoption of the Multi-Judges Composition of criminal courts in more serious crimes.

In section four, one of the most significant principles of due process has been highlighted which is the Natural Judge Principle. This section has demonstrated that for a court to be considered the natural judge of the case its should be established by the law and not any other tool, the jurisdiction of the court shall be general and absolute and thus accused must know in advance the court that will adjudicate his case, finally, the court has to be permanent, and thus ad hoc courts that are established to decide on single criminal cases shall not exist. Unfortunately, the Egyptian legal system recognises especially two types of exceptional courts, the State Security Emergency Courts that are established once the State of Emergency is proclaimed, and the Military Judiciary which is a special judiciary that becomes exceptional once it has jurisdiction over civilians.

The final section of the Article discussed the due process guarantee that criminal prosecution should be conducted without unjustified delay. In this section, the issue of timing in criminal proceedings has been examined in details, whether in the preliminary investigation phase, where the power to remand the accused is limited to three months in misdemeanours and five months in felonies, or in the Prosecution Phase, where the general rule is that the remand shall not exceed 1/3 of the maximum potential imprisonment prescribed for the crime.

In light of the aforementioned discussion, it is safe to argue that the Egyptian Constitution and pertinent laws recognise the fundamental due process guarantees enshrined under the principle international human rights

the Egyptian legal system, the Public Prosecution possess the power to investigate as well as the power to accuse. Despite the criticism, it has been argued that this situation does not constitute an infringement of the impartiality guarantee of the accused, especially that the Public Prosecution in Egypt is considered part of the Judicial authority rather than the executive authority, and thus enjoys the same guarantees of independence and impartiality. On the other hand, the separation between the power to prosecute, which is conducted by the criminal courts, and the other two powers that are practiced by the Public Prosecution, is absolute inasmuch as no judge who investigated or referred the case to the criminal court is allowed to adjudicate the case.

In addition to the guarantees against internal influences, the Egyptian legal system protects the judiciary from the external influences that might render the impartiality of the sitting judge in doubt. These guarantees include the absolute disqualification of the judge in specific cases that is considered a public order rule, and thus any judgment issued in violation of any of such cases shall be perceived null and void, even if accepted by the parties to the case. Furthermore, there are the less serious cases of recusing the judge that have to be invoked by the parties to a case once they become aware of it, otherwise their petition will be rejected. In addition to these two types of guarantees against internal and external influences on the judge, the Egyptian legal system encompasses other relevant guarantees that the Article deemed of great significance in ensuring the impartiality of the sitting judge, including; the prohibition imposed on judges to practice any other job that might put their impartiality at stake as well as the prohibition to pursue a political career in particular to run

government on all residents and to circumvent the abuse of the system by the imperial powers. This national judiciary which enjoyed from the outset a considerable degree of independence from the government, and even the occupier, has instilled a culture of independence and pride in members of the judiciary that could be sensed until today, and that fortified the Egyptian judiciary against several attacks that occurred in the past, and will occur in the future.

Accordingly, the Article in the second section elaborated on the constitutional and legal guarantees for judicial independence in the Egyptian legal system. It first highlighted the guarantees for the institutional independence of the judiciary whether from the legislative authority, which is monitored by the Supreme Constitutional Court, or the executive authority, which provoked some concerns that outlined below, or finally from the media, which is enforced by the judiciary itself. Furthermore, the Article elaborated on the individual independence of the judiciary, that covered the constitutional and legal guarantees that protect the individual judge from the abuse of mainly the executive authority. These guarantees include the irrevocability of judges, their procedural immunity when they commit a criminal act, the special rules that govern their discipline, and the fact that they enjoy personal immunity from civil cases that might be brought against them for profession related torts.

In section three, the impartiality of the Egyptian judiciary was discussed. This section highlighted legal guarantees against two types of influences; internal influence, and external influence. The guarantees against internal influence related to the separation of judicial functions; namely, the investigation, accusation, and prosecution. It has been demonstrated that under

ICC itself,[1] and the *ad hoc* international criminal courts, provide the most illustrative example for the prolonged criminal proceedings required in prosecuting the core crimes due to their complexity. For instance, Jean-Pierre Bemba Gombo was on remand in the ICC's custody since July 2008, and was not convicted until June 2016,[2] a decision that he has challenged before the Appeals Chamber of the ICC which eventually accepted his appeal and order his acquittal on 8 June 2018.[3] This means that it took the ICC ten long years to issue a final decision in the case of Bemba.

Concluding Remarks: Observations and Proposed Amendments

This Article *offers a contemporary analysis of the current Egyptian Constitution of 2014 and all pertinent laws on due process guarantees deemed relevant under Article 17 of the Rome Statute*. In doing so, the Article started by providing an overview for the contemporary history of the Egyptian judicial system. Such overview was necessary, as it provided the background against which the current Egyptian judicial system will be assessed and understood. It has been shown in this section that the contemporary judicial system in Egypt was introduced in the last quarter of the 19th Century as part of a national project to strengthen the authority of the national

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[1] See, Federica Gioia, 'The Complementary Role of the International Criminal Court: Are there any Time-limits?' in Mauro Politi and Federica Gioia (eds.), The International Criminal Court and National jurisdictions (Ashgate Publishing Limited, Hampshire 2008) 71.

[2] *Prosecutor v. Jean-Pierre Bemba Gombo*, Situation in the Central African Republic, ICC-01/05-01/08, Case Information Sheet, 8 June 2018. Available online at: https://www.icc-cpi.int/car/bemba/Documents/bembaEng.pdf (Last visited on 15 June 2018).

[3] Ibid.

of Interior can object within fifteen days. In such case, the detainee' petition is heard anew by another district of the court within fifteen days of the date of the objection. If the second district rejects the petition, the detainee is entitled to submit a new petition after thirty days.[1]

Significantly, the fact that the detainee under the State of Emergency Law could stay in remand for very long periods awaiting trial might constitute a very flagrant violation of the right to be prosecuted without undue delay and thus would render the Egyptian judicial system unwilling to prosecute according to Article 17 (2) (b).

It is however noted that, although, the remand system under the current State of Emergency Law grants the police and the Public Prosecution exceptional powers to detain any person who they suspect to pose a threat to the public order, one cannot deny the fact that those powers are given and practiced in exceptional circumstances. Moreover, the current system of remand according to Article 3, as amended by the Law no. 12/2017, offer more guarantees to the detainee than before such amendment, where the police had the power to arrest any person without having to inform, let alone acquire the approval of the Public Prosecution.[2]

4) The seriousness, gravity and complexity attached to the ICC like crimes would certainly warrant more time for investigation and prosecution than ordinary crimes that are being committed on daily basis. Probably the

[1] State of Emergency Law amended by the Law no. 50/1982, Article 6.
[2] For more details on the situation before the amendments of 2017 *see*, Hafez Abu Seada, *supra* note 257, 170.

assize, until it issues its final decision on the case.[1] Yet this possibility is within the absolute discretion of the Court of Cassation, if it wishes, a suspension will be ordered, otherwise, the defendant will remain in custody for as long as it takes the Court of Cassation to issue its final decision.

3) According to the State of Emergency Law no. 162/1958, once the state of emergency is proclaimed, the police could detain any suspect of committing a felony or a misdemeanour for 24 hours, within such period the police has to inform the Public Prosecution.[2] Furthermore, the police, in order to finalise its investigations, could keep the detainee in its custody for a maximum period of 7 days upon the approval of the Public Prosecution.[3] Interestingly, the Emergency State Security Summary Court, which is usually established once the state of emergency is proclaimed, could, upon a request from the Public Prosecution, extend or approve the detention of any person who constitutes a threat to the public order for a period of one month, which could be renewed indefinitely by the same court.[4]

The detainee has the right, however, to challenge the decision to be arrested before the Emergency High State Security Court at least thirty days after the date of his detention.[5] This court has to issue its decision within fifteen days after receiving the detainee's request to challenge his arrest decision. If the court decides to release the detainee, the Minister

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[1] Article 36 *bis* of the Law on Cases and Procedures of Review before the Court of Cassation no. 57/1959 as amended by the Law no. 7/2016.

[2] Ibid Article 3 *bis B*(1), as introduced by the Law no. 12/2017.

[3] Ibid Article 3 *bis B*(2).

[4] Ibid Article 3 *bis* C, as introduced by the Law no. 12/2017.

[5] State of Emergency Law no. 162/1958, Article 3 *bis.*

required an *inordinate amount of trial time or preparation time.*

Where the Crown cannot rebut the presumption of unreasonableness, the charges against the accused will be dropped.[1]

Interestingly, even in cases where a presumptive ceiling has not been exceeded, an accused may still establish that the delay is unreasonable by establishing that despite making a sustained effort to expedite the proceedings; the case took markedly longer than it reasonably should have. Here also, the charges against the accused will be dropped.[2]

2) The remand period is calculated from the point at which the Public Prosecution issues its decision ordering the accused's remand, until the point at which the criminal court renders its judgment. This period does not cover the time the Court of Cassation takes to decide whether to endorse the judgment of the court of assize or to revoke it. During this time, the defendant would be executing the imprisonment sentence he had received and challenged before the Court of Cassation. This process before the Court of Cassation could take years without any obligation on the Court of Cassation to render its decision within a specific period.

In 2016, however, an amendment to the Law on Cases and Procedures of Review before the Court of Cassation made it possible that the Court of Cassation, upon request of the defendant, suspends the imprisonment decision rendered by the court of

[1] Ibid
[2] Ibid

Although it is not common practice that criminal jurisdictions set a specific time limit for the conclusion of criminal proceedings and the issuance of a final decision, it is recommended to consider the recent approach taken by the Supreme Court of Canada. In *R. v. Jordan*,[1] the Supreme Court of Canada made broad and sweeping changes to the framework that determines whether an accused has been tried within a reasonable time. The decision established a presumptive ceiling of 18 months on the length of a criminal case in provincial courts, from the charge to the end of trial, and a presumptive ceiling of 30 months on criminal cases in superior courts, or cases tried in provincial courts after a preliminary inquiry. According to the decision, delays that are attributable to, or waived by, the defence do not count toward the presumptive ceiling. Nevertheless, institutional delays that are not the fault of the Crown do count toward the presumptive ceiling.[2]

If the abovementioned ceiling is exceeded, it is automatically presumed that the delay is unreasonable. The Crown may, however, rebut this presumption by establishing one of the following exceptional circumstances:

- A discrete event occurred that was *reasonably unforeseen and reasonably unavoidable.* The delay attributable to such an event is subtracted from the total delay.
- The case was *particularly complex* in that the nature of the evidence or the nature of the issues

[1] *R. v. Jordan*, Supreme Court of Canada, Case no. 36068, 8 July 2016. Available online at: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16057/index.do (Last visited on 3 April 2018).
[2] Ibid

the country, which refer to acts of terrorism and acts that aim at destabilize the country. Furthermore, Article 270 *bis,* states that the trial of the aforementioned crimes should be initiated in two weeks.

The relevance of Article 276 *bis* to the ICC crimes is that many of the acts covered by war crimes, crimes against humanity and even genocide are subsumed under acts that could jeopardize the external or internal security of the country. However, the article does not cover many other acts such as torture or mass murder if they were not committed as part of a terrorist attack.

In sum, the legal provisions in the Egyptian legal system that organize the issue of timing or duration of the criminal process have adopted the general rule that the accused should be prosecuted without undue delay. Furthermore, there are specific and detailed rules identifying deadlines for pre-trial detention as well as a swift initiation of trial in the more serious crimes.

The Possibility for Delays

Despite the abovementioned rules that regulate the issue of timing in the criminal proceedings and thus seeks to achieve prosecutions without unjustified delays, there are four significant concerns that would cause delays in criminal proceedings, as follows:

1) There are no time limits for the completion of the criminal process in whole. Although, there are time limits for remand in custody and the initiation of the most serious cases, the criminal proceedings when the accused is at large or under other restrictions other than the remand system, have no clear time limits. In addition, the Constitutional provision that proclaims speedy trials offer a mere moral obligation, rather than a legal one that would invoke legal consequences in case a time limit was breached.

misdemeanours should be revoked.[1] Thus, according to this amendment, the Court of Cassation is not allowed to return the case back to the court that issued the impugned decision, but it has to decide on the facts of the case. This amendment, although puts a great burden on the Court of Cassation, which is by definition a court of law, will significantly speed up criminal proceedings and ensure that a final decision is rendered timely.

Another amendment that will relatively speedup the procedures before the ordinary criminal courts is the amendment to the Criminal Procedures Law that granted the criminal court more discretion in deciding whether to hear a requested witness by a party to a criminal case. According to this amendment, the criminal court could through a reasoned decision decline a request to hear a specific witness if it reckons it unnecessary.[2] Before this amendment, the court was somehow obliged to hear every requested witness, even if the party to the criminal case requested the hearing of hundreds of witnesses,[3] which had certainly result in a prolonged process.

Interestingly, putting the ICC crimes in the context of the Egyptian Legal System, and specifically the issue of timing in criminal proceedings, one should also refer to Article 276 *bis* of the Criminal Procedures Law, which stipulates clearly that specific crimes should be prosecuted promptly. These crimes include, but are not limited to, crimes against the external security of the country, which refer to collaborating with an enemy and similar crimes, and crimes against the internal security of

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[1] Ibid Article 39.

[2] Criminal Procedures Law, Article 277 as amended by the Law no. 11/2017.

[3] In one of the criminal cases after the 2013 popular uprising, the defendant requested the hearing of 300 witnesses. See, http://www.youm7.com/3214445. (Last visited: 15 May 2018) (In Arabic)

would also be kept in remand until a final judgment is issued by the Court of Cassation.[1]

It is, however, essential to point out that the two years maximum period for remand in case of crimes punishable by death penalty or life imprisonment is still applicable when the defendant is on trial before the court of assize for the first time and the latter has not issued its final decision yet. Nevertheless, once the court of assize sentences the defendant with either death penalty or life imprisonment, the court of review for that decision, which is the Court of Cassation acting as a court of facts, will not be bound by the two years bar.

Noticeably, the amendments of the Criminal Procedures Law, especially the remand system, has set compulsory deadlines for the Public Prosecution and the criminal courts for the term of pre-trial detention that cannot be exceeded; the longest of these, with the exception of the accused who receives a death penalty or life imprisonment and challenges his decision before the Court of Cassation, is two years. This restraint would encourage the conclusion of criminal proceedings without undue delays, otherwise the Public Prosecution and the criminal courts would be obliged to release the accused, and thus run the risk of him escaping justice.

Significantly, in 2017, a long-waited amendment to the Law on Cases and Procedures of Review before the Court of Cassation was introduced.[2] This amendment obliges the Court of Cassation to decide on the facts of the case if it decided that the decision that has been issued by the court of assize or the court of

[1] Criminal Procedures Law, Article 143 as amended by the Law no. 83/2013.

[2] Law on Cases and Procedures of Review before the Court of Cassation, Law no. 57/1959 as amended by the Law no. 11/2017.

regarding this case. One of these decisions is whether to extend the remand of the accused or replace it by any other precautionary measure, including, *inter alia*, releasing him on bail. Significantly, Article 143, before the amendment in 2006, used to give the court an absolute power to renew the remand of the defendant until his detention covers the maximum potential term of imprisonment prescribed for his alleged crime.[1]

Nevertheless, after the amendment, Article 143 established the significant rule that the remand has an end. According to Article 143, as it stands today, the remand throughout the criminal proceedings, including the trial phase, should not exceed 1/3 of the maximum potential imprisonment prescribed for the alleged crime, inasmuch as it never exceeds 6 months for misdemeanours and 18 months for felonies and two years in the case when the prescribed punishment is life imprisonment or execution.

However, in 2007 Article 143 was amended to add an exception to the previous deadlines in the case of an accused who receives a death penalty judgment by a court of assize that was challenged by the defendant before the Court of Cassation. In this case, if the Court of Cassation revokes the court of assize's judgment and initiated a retrial, the defendant would be remanded in custody and his remand would be renewed for periods of 45 days each until he receives the final judgment.[2] Moreover, in 2013, another exception was introduced for the defendant who receives a life imprisonment sentence from a court of assize. According to such exception, he

[1] Abdel Raouf Mahdy, Remand in the light of Laws no. 145/2006 and 153/2007, 2007, pp. 20-21.

[2] Criminal Procedures Law, Article 143 as amended by the Law no. 153/2007.

the arrested person has committed a felony or a misdemeanour punishable by at least one-year imprisonment, the Public Prosecution could order the remand of this person for specific periods, as detailed below.[1]

Significantly, the issue of remand or pre-trial detention is one of the most controversial issue as far as the period of criminal proceedings is concerned. Before 2006, according to Article 143 of the Criminal Procedures Law, the accused could have been remanded in custody for a maximum period of six months before being referred to the court or before his trial starts.[2] As a result of severe criticism,[3] the whole system was amended by Law no. 145/2006.

The amendment introduced several rights to the accused, both on the substantive as well as procedural levels. On the substantive guarantees, the accused has now the right to challenge any decision to extend or renew his remand in the preliminary investigation phase.[4] As for the procedural guarantees, Article 143, after the amendment in 2006, has reduced the period of remand in the preliminary investigation phase to three months instead of six months if the alleged crime is a misdemeanour, and in the case of a felony the maximum period of remand is five months.[5]

The Trial or Prosecution Phase

Once the criminal case is referred to the criminal court, the court would be the sole arbiter of any decision

[1] Criminal Procedures Law, Article 134
[2] Ibid Article 143 before the amendment of 2006.
[3] See for example, Ahmed Fathey Sorror, *supra* note 165, 1065; Abd Al-Raouf Mahdy, *supra* note 88, 508; Mohamed Eid Al-Ghareeb, *supra* note 62, 895.
[4] Ibid Articles 164 & 205
[5] Ibid Article 143

defendant, hamper the practice of his constitutional rights and freedoms ... furthermore, the delayed prosecution of the accused ... is always accompanied by hazards that would jeopardize the access to witnesses or their disappearance, and even if they are available, there would still be the risk of forgetting the details of the crime. All of these hassles would result in deep and constant insecurity for the accused, who would feel that he is in a vicious circle. And eventually, he might be released on the basis that his accusation was unfounded'.[1]

On the ordinary law level, the issue of timing in criminal proceedings is thoroughly organized by the Criminal Procedures Law no. 150/1950 and other pertinent laws. Thus, in order to have a comprehensive understanding of how the Egyptian legal system operates in this respect, the issue of timing throughout the criminal proceedings will be discussed on two distinctive phases; the preliminary investigation phase, and the prosecution phase. Then, the possibility for delays will be highlighted in the last section.

The Preliminary Investigation Phase

In this phase, the Criminal Procedures Law has limited the period of arrest available for the police in the case of flagrant *delicto* to 24 hours; within this period the police, after questioning the person, has to refer the arrested person to the Public Prosecution. The Public Prosecution, on its side, has another 24 hours, within which the arrested person should be interrogated, before deciding whether to detain him on remand or to be released.[2] If there was sufficient evidence to support that

[1] Supreme Constitutional Court, Cases No. 64/17, 7 February 1998.
[2] Criminal Procedural Law, Article 36.

against him'.[1] Finally, Article 14 (3) (c) sets the general principle that the trial shall be carried out '*without undue delay*'.

Since Egypt has signed the ICCPR on August 4, 1967 and ratified it on January 14, 1982, it thus became a national law.[2] This puts a burden on the Egyptian legislator to make sure that national laws reflect and respect the abovementioned parameters and guarantees to the right to be tried without undue delay. In this respect, the Constitution of 2014 sets a general rule that 'Litigation is a safeguarded right that is guaranteed to all. The state shall ... *endeavor to dispose of cases promptly*...".[3]

In this meaning, and more specifically with respect to the prompt adjudication of criminal proceedings, the Supreme Constitutional Court of Egypt stated clearly that:

> 'the *prompt adjudication of cases is part of the right to a fair trial*, that the accusation should not be upheld for a long time in a way that would worry the

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[1] The promptness of the proceeding shall not justify a swift proceedings which violate the accused's right to prepare his or her defense. Thus, Article 14 (3) (b) of the ICCPR requires the accused to be offered enough time to prepare his defense. This right is an important aspect of the principle of "equality of arms": the defence and the prosecution must be treated in a manner that ensures that both parties have an equal opportunity to prepare and present their case. The ECHR has clarified that the right to adequate time and facilities to prepare a defence implies that the accused must have the opportunity to organize their defence appropriately and be allowed "to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings". See, Amnesty International, supra note , p. 74.

[2] Egyptian Constitution of 2014, Article 93 provides that 'The state is committed to the agreements, covenants, and international conventions of human rights that were ratified by Egypt. They have the force of law after publication in accordance with the specified circumstances'.

[3] Egyptian Constitution of 2014, Article 97.

decision.[1] In this regard, the HRC stresses that '... the accused shall be tried without undue delay. This guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all stages must take place "without undue delay". To make this right effective, a procedure must be available in order to ensure that the trial will proceed "without undue delay", both in first instance and on appeal...'.[2]

This understanding is upheld by the ICCPR, first in Article 9 (2), which states that 'anyone who is arrested shall be informed at the time of arrest of the reason of his arrest and shall be *promptly informed* of any charges against him', then Article 9 (3) requires the arrested person 'to be brought promptly before a judge or other officers authorized by law to exercise judicial power and shall be entitled to trial *within a reasonable time* or to be released'. Once the arrested person is before the criminal court, Article 14 (3) (a) requires him to be '*informed promptly* and in detail, in a language which he understands, of the nature and cause of the charges

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[1] See, HRC General Comment 32, para. 35; *Mwamba v Zambia*, UN Doc. CCPR/C/98/D/1520/2006 (2010) para. 6.6; *Kennedy v Trinidad and Tobago*, UN Doc. CCPR/C/74/D/845/1998 (2002) para.7.5; *McFarlane v Ireland* (31333/06), European Court Grand Chamber (2010) paras.143-144. In this case, the ECHR Grand Chamber stated that 'The Court reiterates that in criminal matters, the "reasonable time" referred to in Article 6 (1) begins to run as soon as a person is "charged". "Charge", for the purposes of Article 6 (1), may be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence" '; Amnesty International, Fair Trials Manual, Second Edition, February 2014, p. 70. Available online at: https://www.amnesty.org/en/documents/POL30/002/2014/en/ (Last visited on 13 April 2018).

[2] Human Rights Committee (HRC) at the UN, General Comment no. 13, on 13 April 1984, Subparagraph 3 (c).

already been adopted by the Anti-Terrorism Law, which provides that all terrorism cases shall be disposed of by special chambers, and that such chambers should render their judgments promptly.[1] Furthermore, to speed up the process before the ordinary judiciary, several most requested amendments to the Criminal Procedures Law and other related laws have also be introduced, as discussed in the following section.

In sum, although one can understand the rationale behind recalling the military, as the most powerful and functioning institution in Egypt, to protect vital civilian institutions, buildings, and highways, especially with the inability of the civil authorities, such as the municipalities and the police, to offer effective protection to these civilian institutions, it is though submitted that Military Judiciary should never be involved in the prosecution of civilians, as such prosecutions certainly violate the text and spirit of the current Constitution, as well as relevant international instruments, and might render the Egyptian judiciary unwilling to prosecute under the Rome Statute.[2]

Prosecution without Undue Delay

One of the indicators for the unwillingness of national judicial systems under the Rome Statute is when national criminal proceedings are tainted by 'unjustified delays which in the circumstances is inconsistent with an intent to bring the person concerned to justice'.[3] The term proceedings here refers to the period of time from the moment the national authorities discover the crime, and continues throughout the investigations and prosecution process, ending by the issuance of a final

[1] Anti-Corruption Law, Law no. 94/2015, Article 50.
[2] See *supra.*
[3] Rome Statute, Article 17 (2) (b)

The Presidential Decree aims to remove any illegal constructions built on these lands as well as prevent the future emergence of slums on the newly paved highways. Accordingly, the Military held a press conference that was attended by several leaders, to announce that military law would be directly applied to violators, the land they illegally acquired will be withdrawn, and their crimes will be prosecuted by the Military Judiciary,[1] as they will be considered crimes against military property and thus fall within the jurisdiction of the Military Judiciary according to its Law.

To conclude, the Military Judiciary, which is supposed to be a specialized judiciary for military personnel, and should not have any jurisdiction over civilians according to the Constitution, has been, in the recent years, increasingly involved in the prosecution of civilians, as the ordinary judiciary is seen to be ineffective, protracted and less deterrent.

While after the popular uprisings in 2011 and 2013 the ordinary judiciary in Egypt utilizes less than ordinary procedures to face extraordinary circumstances, this extremely sophisticated judiciary could be revived rather than substituted by the military judiciary. There are many other alternatives to referring civilians to the military judiciary that could ensure efficiency of the ordinary judiciary without compromising the rights of the accused person to be prosecuted before his natural judge. One of these alternatives is to refer all terrorism crimes to special chambers within the ordinary judiciary, similar to the special economic chambers. An alternative that has

[1] See, Sahar Aziz, 'The Expanding Jurisdiction of Egypt's Military Courts', The Cairo Review of Global Affairs Journal, The American University in Cairo, 13 October 2016. Available online at: https://www.thecairoreview.com/tahrir-forum/the-expanding-jurisdiction-of-egypts-military-courts/ (Last visited on 15 February 2018).

Accordingly, right after the killing of around 30 Egyptian military personnel in two terrorist attacks in Sinai in 2014, the President issued a Decree on the Security and Protection of Main and Vital Establishments.[1] This Law states that the military shall collaborate and coordinate with the police forces to secure and protect all vital establishments including electricity stations and networks of electricity towers, gas lines, oil fields, railway, road networks, bridges and other facilities.[2]

Interestingly, the Law considered all the aforementioned vital establishments, which were the subject of several terrorist attacks, as military establishments, and thus any attack against them shall be considered a crime that falls within the jurisdiction of the Military Judiciary, and not ordinary judiciary.[3] And although the life span of this Law was expected to be just two years since October 2014,[4] it has been extended until October 2021 by the Parliament,[5] on the justification that the terrorism threat is persistent.

Moreover, in June 2016, another Presidential Decree was issued to assign all state-owned lands located within 2 kilometers on either side of the new national network of roads, which includes 21 highways, to the Ministry of Defence.[6] According to this Decree, those lands are considered strategic and of military significance, and thus cannot be privately owned by any person or entity.[7]

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[1] The Security and Protection of Main and Vital Establishments Law, Law no. 136/2014.
[2] Ibid Article 1.
[3] Ibid Article 2.
[4] Ibid Article 3.
[5] Ibid Article 3 as amended by the Law no. 65/2016.
[6] The Dedication of Desert Lands to the Ministry of Defence Law, Law no. 233/2016.
[7] Ibid Article 1.

vehicles, weapons, ammunition, documents, secrets, public funds, or factories; or crimes related to conscription; or crimes that represent a direct assault against military officers or personnel that relates to the exercise of their official duties".[1]

As the Country faced some heinous acts of terrorism that have resulted in the deaths of hundreds of innocent persons, including the killing of military and police personnel in Sinai, the assassination of the Public Prosecutor, and the killing of Egyptians in churches and mosques, the government felt that ordinary laws and judiciary fell short to supress this terrorism or deter its perpetrators, especially that almost no one of the alleged perpetrators of terrorism acts that occurred in the aftermath of the 2011 popular uprising has received a final and irrevocable judgment from the ordinary courts.[2]

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[1] Ibid Article 204 (2).

[2] After the terrorist attacks that took place in the USA on 11 September 2001, George W. Bush issued on 13 November 2001, a military order entitled "Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism". Pursuant to this Military Order, the United States established military commissions to prosecute terrorists for violations of the laws of war and other applicable laws. The Military Order was justified on the basis that '... to protect the United States and its citizens,... it is necessary for *noncitizen suspects designated by the president under the order* ... to be tried for violations of the laws of war *and other applicable laws by military tribunals* ...'. See, Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (Nov. 13, 2001), 66 Fed. Reg. 57,833 (Nov. 16, 2001). This Military Order has grasped intense debate among scholars, and it was practically criticized on two grounds; 'First, the Military Order undermines the United States' perceived commitment to the rule of law and national confidence in U.S. judicial institutions at precisely the time when that commitment and confidence are most needed. Second, by failing to deliver justice that the world at large will find credible, the Military Order undermines the U.S. ability to lead an international campaign against terrorism under a rule-of-law banner'. See, Harold Hongju Koh, 'The case against military commissions' (2002) 96 American Journal of International Law.2, 338.

here is self-evident,[1] since a person could be prosecuted before the ordinary courts for a specific crime, while another person who commits the same exact crime would be referred to the military courts just because the president of the republic so wishes, bearing in mind that there were no objective criteria which govern the referral decision.[2]

Significantly, the prosecution of civilians by the Military Judiciary has always been a highly contentious topic in Egypt. Before the 2011 popular uprising, the call was that civilians should never stand trial before military courts. Thus, after the 2011 popular uprising, the Military Judiciary Law was among the first laws to be thoroughly discussed before the newly elected parliament, and after long debate, Article 6 of this Law was abolished altogether in 2012.[3]

Furthermore, the current Constitution provides a prolonged article on Military Judiciary that defines the contour of its competency and jurisdiction. According to the Constitution, the Military Judiciary "... is an independent judiciary that has the exclusive jurisdiction over all crimes that relate to the armed forces, its officers, personnel, and the crimes committed by general intelligence personnel during and because of their posts".[4]

Most importantly, the Constitution confirms that "*Civilians cannot stand trial before military courts*, except for crimes that constitute a direct assault against military facilities, military barracks, ... or the official borders of the country; or crimes against military equipment,

[1] Mohamed Eid Al-Ghareeb, *supra* note 62, 1098.
[2] Seri Seyam, *supra* note 293, 112.
[3] Military Judiciary Law, Law no. 25/1966 as amended by the Law no. 21/2012.
[4] The Constitution of 2014, Article 204 (1).

legislators to '[Restrict] the power of military courts to hear military cases only'.[1]

In Egypt, exceptions to the above-mentioned principle have always been in place, as the military judiciary was granted the power to prosecute civilians for ordinary crimes that should have been prosecuted before the ordinary judiciary. Thus, under the notorious Article 6 of the Military Judiciary Law, the President *had* the power to refer any civilian who has allegedly committed any of the crimes against the internal or external security of the Country, to the military judiciary. Moreover, once the state of emergency is proclaimed, the power of the President to refer civilians to the military judiciary *was* absolute inasmuch as he had the power to refer any crime, whether penalized by the Penal Code or any other law, to the Military Judiciary.

Notably, Article 6 was perceived as an infringement to international instruments that enshrine the right to a fair trial and equality before the law, most importantly the ICCPR. That, under the ICCPR 'all persons shall be equal before the courts and tribunals ... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'.[2] Article 6 was seen as a violation to the equality before the law as the President was allowed under such Article to arbitrarily choose specific cases after the crimes were committed,[3] and refer them to the military courts, instead of being prosecuted by the natural judge. The inequality

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[1] The Cairo Declaration on Judicial Independence, the Second Arab Justice Conference 'Supporting and Promoting the Independence of Judiciary', Cairo – February 21-24, 2003, para. 11.

[2] ICCPR, Article 14 (1).

[3] Seri Seyam, Natural Judiciary and Equality before the Judiciary (Al-Markaz Alqawmi Llbohos Al-Igtmaaia wa AlGenaaia, Cairo 1991) 104. (In Arabic)

the proper administration of justice in accordance with the requirements of Article 14'.[1]

The Inter-American Court of Human Rights, on the other hand, has explicitly declared that 'In a democratic Government of Laws, *the penal military jurisdiction shall have a restrictive and exceptional scope* and *shall lead to the protection of special juridical interests, related to the functions assigned by law to the military forces*. Consequently, *civilians must be excluded from the military jurisdiction scope* and only the military shall be judged by commission of crime or offenses that by its own nature attempt against legally protected interests of military order'.[2] Moreover, the Cairo Declaration on Judicial Independence has called upon all Arab

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[1] Ibid.

[2] See, Inter-American Court of Human Rights, Durand and Ugarte Case, 16 August 2000, para. 117. In another judgment, the Court noted that '... several pieces of legislation give the military courts jurisdiction for the purpose of maintaining order and discipline within the ranks of the armed forces. Application of this functional jurisdiction is confined to military personnel who have committed some crime or were derelict in performing their duties, and then only under certain circumstances. This was the definition in Peru's own law (Article 282 of the 1979 Constitution). Transferring jurisdiction from civilian courts to military courts, thus allowing military courts to try civilians accused of treason, means that the competent, independent and impartial tribunal previously established by law is precluded from hearing these cases. In effect, military tribunals are not the tribunals previously established by law for civilians. Having no military functions or duties, civilians cannot engage in behaviours that violate military duties. When a military court takes jurisdiction over a matter that regular courts should hear, the individual's right to a hearing by a competent, independent and impartial tribunal previously established by law and, a fortiori, his right to due process are violated. That right to due process, in turn, is intimately linked to the very right of access to the courts. See, *Apitz Barbera et al v Venezuela*, Inter-American Court of Human Rights, (2008), Para. 128.

Outside the above parameters, however, it is widely proclaimed that military judiciary shall not have any jurisdiction over civilians,[1] as it does not fulfil the natural judge requirement.[2] In this regard, the UN Human Rights Committee (HRC) pointed to the fact that the prosecution of civilians before military courts presents 'serious problem as far as the equitable, impartial and independent administration of justice is concerned', since 'quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice'.[3] Furthermore, the Committee stressed that 'such military and special courts do not afford the strict guarantees of

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Twenty-First Century' (2009) 199 Military Law Review. 49; Heniarti, Dini Dewi. "Military Court's Jurisdiction over Military Members Who Commit General Crimes under Indonesian Military Judiciary System in Comparison with Other Countries', (2015) World Academy of Science, Engineering and Technology, International Journal of Social, Behavioural, Educational, Economic, Business and Industrial Engineering 9.6, 2190-2196.

[1] See, *Media Rights Agenda v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 224/98, 6 November 2000, para. 62. In this judgment, the African Commission on Human and Peoples' Rights has noted that '*the purpose of military courts is to determine offences of a pure military nature committed by military personnel.* While exercising this function, military courts are required to respect fair trial standards. *They should not in any circumstances whatsoever have jurisdiction over civilians*'.

[2] See for example, Pauline Therese Collins. *Civil-military 'legal Relations: where to from Here?: The Civilian Courts and the Military in the United Kingdom, United States and Australia* (Brill, 2018); Moira Lynch, 'The Constitutional Court, Military Jurisdiction, and Human Rights Prosecutions in Colombia, in *Human Rights Prosecutions in Democracies at War* (Palgrave Macmillan, 2018); Cham Robinson O. Everett, 'Military Jurisdiction over Civilians' (1960) 3 Duke Law Journal. 366;

[3] Human Rights Committee, General Comment 13/21, para. 4; See also, *Findlay v. The United Kingdom*, European Court of Human Rights, 25 February 1997, paras. 74-77.

notion that Egypt is a country that respects the rule of law.

The Military Judiciary

In 1966, the Law on Military Judiciary was enacted to replace the Law on Military Rules (Judgments) of 1893.[1] Since then the Military Judiciary has been in place as a specialized judiciary with a principal jurisdiction of prosecuting military personnel for profession related crimes, or prosecute the perpetrators, whether civilians or military officers, for any crime against the military establishments, barracks, documents, ammunition, and equipment ...etc.[2]

Interestingly, the fact that there is a military judiciary to prosecute military personnel, or even civilians who commit crimes against military possessions or within the military premises, is well justified,[3] on the basis that military judges in this respect would be more competent and aware of the military profession related rules and interests than ordinary judges.[4] Within these limits, the military judiciary would be considered the natural judge for persons bound by military rules, and thus would be perceived as a specialized judiciary,[5] which is known to several countries around the world.[6]

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[1] The Military Judiciary Law, the Law no. 25/1966. The original name of the Law was the Military Rules Law, but was changed in 2007 by the Law no. 16/2007 to the current name.

[2] Ibid Article 5. See generally, Ahmed Fathey Sorror, *supra* note 165, 1228-1237.

[3] Hugo Relva, 'The implementation of the Rome Statute in Latin American states' (2003) 16 Leiden Journal of International Law. 2, 347; Mohamed Eid Al-Ghareeb, *supra* note 62, 1099.

[4] Maamoun Salama, Military Rules Law (Dar Al-Fekr Al-Arabi, Cairo 1984) 6. (In Arabic)

[5] Abd Al-Raouf Mahdy, *supra* note 88, 1269.

[6] For more details see, Fansu KU, 'From Law Member to Military Judge: The Continuing Evolution of an Independent Trial Judiciary in the

In sum, although the SSEC are in fact part of the ordinary judicial system, and thus enjoys the same degree of independence and impartiality, the sweeping powers that the executive authority claims under the State of Emergency Law, the special procedural rules regarding the remand, composition of the SSEC and endorsement of their decisions, and the referral of ordinary crimes to those exceptional courts, all of this characterizes those procedures with illegitimacy and contradiction with the natural judge principle, especially that all of the crimes that have been referred to the SSEC could be easily prosecuted under the Combating Terrorism Law. It is thus advisable that Egypt lifts the State of Emergency sooner than later, and depends on ordinary laws, applied by ordinary and natural judges, as enshrined in the Constitution, in order to sustain the

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requirements mentioned in Art 151 of the Constitution .... And after consulting the Presidential Decree no. 537 of the year 1981 on the ratification of the International Treaty on Economic, Social and Cultural Rights, which has been published in the volume 14 of the Official Gazette on 8 April 1982, it appears clearly that the Presidential Decree has referred to Art 151 of the Constitution, which assumes the approval of the parliament, since the concerned treaty relates to the sovereignty of the Country. And in accordance with Art 151 of the Constitution and the established principles of the jurisprudence and the case law, international treaties which were promulgated and ratified according to the established constitutional principles and published in the Official Gazette, are considered national laws, and thus the national courts have to implement them as such .....and since the Treaty was published after the Penal Code, then Article 124 of that Code, the Penal Code, should be considered implicitly nullified (abolished) by Article 8/d of the aforementioned Treaty in accordance with Article 2 of the Civil Code which stipulates that "any legal provision cannot be abolished except by a later legal provision which explicitly expresses this effect, or if the later provision encompasses a rule which contradicts with that mentioned in the earlier provision, or if the later provision organises the same issue organised by the earlier provision ....". High State Security Court, Cairo District, Case No. 4190/1986, 16 April 1987, p. 21.

Terrorism Law" in 2015,[1] which gives the Police, the Public Prosecution and the President considerable degree of power to tackle this crime, though under the supervision of the ordinary judiciary.

Objectively though, the SSEC, as a result of the very prolonged state of emergency, have become part of the ordinary judiciary, manned by ordinary judges who believe and benefit from the aforementioned guarantees of judicial independence and impartiality. This explains the landmark judgments that have been issued by the SSEC which were against the claimed interests of the executive authority,[2] without fear or influence exerted upon them by the latter.

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[1] Combating Terrorism Law, Law no. 94/2015.

[2] For instance, in April 1987 the summary State Security Emergency Court in Cairo issued a landmark decision that exonerated railway drivers who were prosecuted for going on strike the previous year. In this case, the court based its judgment on the grounds that "... concerning the plea raised by the defendants that Article 124 of the Penal Code, which prohibits the right to strike, has been implicitly abrogated by the International Covenant for Economic, Social, and Cultural Rights, it should be mentioned that Egypt has signed this Treaty, and according to Art 2 of the treaty "the Covenant", member states to the treaty are obliged to guarantee .... d. The right to strike ....etc. This provision refers clearly to the obligation imposed on every state member to secure the right to strike as an enshrined right, and thus it is not acceptable to absolutely prohibit it, as this will be considered a confiscation of the right itself ... and since Art 124 of the Penal Code, on the other hand, states that "if at least three workers left their job, even in the form of a resignation, or if they agreed on not doing their duties to achieve a common purpose, every one of them should be imprisoned for at least three months and maximum one year and a fine which does not exceed one hundred Egyptian pounds'. Thus, it appears from comparing the two provisions that there is a clear contradiction between the treaty and the penal code. This contradiction must be resolved by identifying which one has priority over the other. Accordingly, we should first identify the status of the international treaty in comparison to national laws.....that the national judge does not apply the international treaty on the basis that his country is obliged to respect it under international law, rather he applies the international treaty as part of the national laws, on the condition that it fulfils the

the Cairo Declaration on Judicial Independence has called on all Arab legislators to '[Abolish] the exceptional laws or measures that *prevent challenging certain judgments, and guaranteeing the right to resort to a higher court*'.[1]

To conclude, emergency laws are supposed to be exceptional laws proclaimed for a limited period to face an imminent threat to the life of a nation, as Article 4 of the ICCPR stipulates.[2] In Egypt, however, a state of emergency has been proclaimed for decades, without any clear justification, such as a war, or an internal civil war. The consecutive governments have always justified the continuing renewal of the state of emergency in the Country by referring to its necessity to maintain pubic security and to suppress terrorist attacks, despite the fact that all terrorist attacks were carried out while emergency law was in force. This reason does not justify the sweeping powers given to the executive authority, especially after the enactment of the new "Combating

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[1] Cairo Declaration on Judicial Independence, the Second Arab Justice Conference 'Supporting and Promoting the Independence of Judiciary', Cairo – February 21-24, 2003, para. 9.

[2] Ibid Article 4 provides that 'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. 2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision. 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation'.

4. The procedural law applied before the SSEC, generally, is the ordinary Criminal Procedures Law applicable before ordinary courts. Having said that, the presidential decree referring crimes to the SSEC could, under the State of Emergency Law, prescribe specific procedural rules that should be followed instead.[1]
5. The President has sweeping powers to decide on any criminal case that emerges under the State of Emergency Law. According to this Law, the President, or whomever he delegates, can order the Public Prosecution to dismiss any such case before referring it to the SSEC.[2] Furthermore, all judgements of the SSEC must be endorsed by the President, who can, at this stage, commute, change or dismiss the sentence, or cancel the judgment along with dismissing the case, or even to order a retrial before another chamber of the SSEC, and in such a case, he should provide detailed justification.[3]
6. The decisions of the SSEC are final and irrevocable before any other court,[4] including the Court of Cassation.[5] This provision contradicts with Article 14 (4) of the ICCPR, which enshrines the right of every convicted person to have his sentence reviewed by a higher tribunal according to law.[6] In the same vein,

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[1] Emergency Law no. 162/1958, Article 10.
[2] Ibid Article 13.
[3] Ibid Article 14.
[4] Ibid Article 12.
[5] See for example, Court of Cassation, Case no. 34345, 4 February 2002, Judgments Compilation, p. 207; Court of Cassation, Case no. 14804, 3 March 2012, Judgments Compilation, p. 249; Court of Cassation, Case no. 6814, 21 April 1983, Judgments Compilation, p. 580. (In Arabic)
[6] The ICCPR, Article 14/4 states that 'Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law'.

crime to the jurisdiction of the SSEC, nor his decision is subjected to the review of any judicial authority, even if the added crimes have no clear relation with the state of emergency.[1]

The Court of Cassation in Egypt, in a response to the Presidential Decree no. 1/1981, which had referred several ordinary crimes to the SSEC, stressed that this decree cannot deprive the ordinary courts from their general competence, even over all crimes referred to the SSEC by the presidential decree.[2] Departing from this argument, the Court of Cassation turned down the ordinary criminal court's decision to decline to prosecute a crime on the basis that it lies within the exclusive jurisdiction of the SSEC according to Presidential Decree no. 1/1981.[3]

The Court of Cassation based its decision on the understanding that the ordinary courts have the absolute authority to prosecute all ordinary crimes, and as the Presidential Decree no. 1/1981 did not limit the jurisdiction to prosecute the crimes prescribed herein to the SSEC, then the ordinary courts still share the jurisdiction over those crimes with the SSEC. Therefore, if the Public Prosecution referred any of the crimes under the Decree no. 1/1981 to the ordinary courts, they have to proceed with the prosecution, on the basis that the SSEC is an exceptional judiciary, whereas the ordinary courts are the default fora for all crimes.[4]

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[1] Hafez Abu Seada, *supra* note 257, 169.
[2] Court of Cassation, Case no. 128/44, 18 October 1993, Judgments Compilation, p. 829.
[3] Court of Cassation, Case no. 21231, 6 February 2006, Judgments Compilation, p. 198.
[4] Court of Cassation, Case no. 49/42, 19 February 1991, Judgments Compilation, p. 363.

appearance, if not actual lack, of impartiality. It thus violates Article 7.1.d'.[1]

3. The SSEC competence should be limited to crimes committed in violation of presidential decrees issued by the President of the Republic pursuant to the State of Emergency Law, whereas all ordinary crimes should be kept within the sole jurisdiction of the ordinary courts.[2] This restriction on the SSEC competence would be consistent with the natural judge principle, as the accused would know in advance that any crime under the State of Emergency Law will be prosecuted by a specific court.

   Nevertheless, under the State of Emergency Law the President of the Republic, or whoever he delegates, can refer to the SSEC any other crime penalized by ordinary laws.[3] In accordance with this provision, the Prime Minister, who has been delegated all the powers of the President under the State of Emergency Law, issued a decree that referred to the SSEC several ordinary crimes, most importantly; all crimes under chapters 1, 2 and 2 *bis* of book 2 of the Penal Code, on internal and external security, crimes under Law no. 394/1954 on weapons and ammunition, crimes under Law no. 107/2013 on organizing public gatherings and peaceful demonstrations, and crimes under Law no. 94/2015 on combating terrorism.[4]

   Significantly, the President of the Republic is not required to provide any reasoning for adding any

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[1] *The Constitutional Rights Project v. Nigeria*, African Commission on Human and Peoples' Rights, Communication No. 87/93, 31 October 1998, para. 14.

[2] Emergency Law no. 162/1958, Article 7.

[3] Ibid Article 9.

[4] Prime Minister Decree no. 2165/2017, Official Gazette, 7 October 2017.

the verdict was delivered remedied the situation, the Court considers ... that the question whether a court is seen to be independent does not depend solely on its composition when it delivers its verdict. In order to comply with the requirements of Article 6 regarding independence, *the court concerned must be seen to be independent of the executive and the legislature at each of the three stages of the proceedings*, namely the investigation, the trial and the verdict'.[1]

The same concern has been voiced by the African Commission on Human and Peoples' Rights which stressed that 'The Robbery and Firearms [Act] ... describes the constitution of the tribunals, which shall consist of three persons; one Judge, one officer of the Army, Navy or Air Force and one officer of the Police Force. Jurisdiction has thus been transferred from the normal courts to a tribunal chiefly composed of persons belonging to the executive branch of government, ... Article 7.1.d of the African Charters requires the court or tribunal to be impartial. *Regardless of the character of the individual members of such tribunals, its composition alone creates the*

[1] *Öcalan v Turkey*, European Court Grand Chamber, Application no. 46221/99, 12 May 2005, paras. 112-118. In another judgment the ECHR stressed that 'The fact that a civilian had to appear before a court composed, even if only in part, of members of the armed forces. It follows that the applicant could legitimately fear that because one of the judges of the İzmir National Security Court was a military judge it might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. The Court of Cassation was not able to dispel these concerns, as it did not have full jurisdiction'. See, *Incal v. Turkey*, ECHR, Application no. 22678/93, 9 June 1998, para. 72.

situation supposedly gives the President the absolute power to choose specific judges to achieve a specific goal, such as choosing a judge who is known for his harsh or lenient judgments, as the case may be.

2. In general, judges of the SSEC are selected from the ordinary judiciary. However, it is possible under the State of Emergency Law that the President adds military officers to its bench,[1] or even compose the SSEC solely from military personnel.[2] While in practice, it never happened that military personnel sat on the bench of a SSEC, whether beside ordinary judges, or solely, the possibility, however, of military representation to these civil courts sheds a considerable degree of doubt concerning its legitimacy, let alone its contradiction with the natural judge principle.

In this regard, the ECHR has expressed unequivocally that 'certain aspects of the status of military judges sitting as members of the *National Security Court* made their independence from the executive questionable ... It is understandable that the applicant – prosecuted in a national security court for serious offences relating to national security – should have been apprehensive about being tried by a bench that included a regular army officer belonging to the military legal service. On that account, *he could legitimately fear that the National Security Court might allow itself to be unduly influenced by considerations that had nothing to do with the nature of the case* ... As to whether the military judge's replacement by a civilian judge in the course of the proceedings before

[1] Ibid Article 7.

[2] Ibid Article 8. The composition that combines civil and military judges in the same court exists in the Jordanian State Security Court. For more details see, Abd Al-Ellah Al-Nawaisah, *supra* note 236, p. 78.

In the following lines, these two exceptional courts will be discussed, as they are likely to hear cases that involve ICC like crimes, in order to assess the extent to which they violate the natural judge principle, and thus could render the Egyptian judicial system unwilling to prosecute according to the Rome Statute standards.

State Security Emergency Courts (SSEC)

According to the State of Emergency Law no. 162/1958, once the President declares the emergency state, the SSEC shall be established to prosecute those who breach any of the presidential orders issued according to this Law.[1] The SSEC are of two types: Summary State Security Courts, and High State Security Courts. Each type enjoys a special level of competence according to the severity of the crimes under its jurisdiction.[2]

Significantly, a reading through the State of Emergency Law reveals the unequivocal contradiction between the SSEC and the principle of the natural judge. These contradictions could be highlighted in the following points:

1. The judges of the SSEC are appointed through a Presidential Decree, after consulting the Minister of Justice,[3] and without the involvement of the Supreme Judicial Council in this process, different from the procedures followed to appoint ordinary judges. This

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Similarly, *special tribunals should not try offences which fall within the jurisdiction of regular courts*'. See, African Commission on Human and Peoples' Rights, Declaration and Recommendations on the Right to a Fair Trial in Africa, approved by the Dakar Seminar on the Right to a Fair Trial in Africa, para. 3.

[1] The State of Emergency Law no. 162/1958, Article 7.

[2] Hafez Abu Seada, 'Exceptional Courts and the Natural Judge' in Nathalie Bernard-Maugiron (ed.), *Judges and Political Reform in Egypt* (American University Press, Cairo 2008) 168.

[3] Emergency Law no. 162/1958, Article 7.

January 2011 popular uprising in Egypt,[1] the state of emergency has swayed between suspension, under the influence of public calls, and proclamation, usually in response to terrorist attacks and unrest in the Country.[2]

The relevance of the State of Emergency Law to the current research is self-evident, if one knows the extraordinary powers given to the executive authority under this law, including the establishment of exceptional courts. In addition to the State of Emergency Law, the Law of Military Judiciary includes another form of judiciary that could violate the natural judge principle. These two forms of exceptional courts have been openly criticized by the HRC in its comments on Egypt stating that 'The Committee ... expresses concern at the long duration of the state of emergency in Egypt. Moreover, under the Emergency Act, the President of the Republic is entitled to refer cases to the State Security Courts, to ratify judgments and to pardon ... On the other hand, military courts should not have the faculty to try cases which do not refer to offences committed by members of the armed forces in the course of their duties'.[3]

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[1] For more details see, Nathan J. Brown, Egypt is in a state of emergency. Here's what that means for its government, 13 April 2017, The Washington Post. Available online at: https://www.washingtonpost.com/news/monkey-cage/wp/2017/04/13/egypt-is-in-a-state-of-emergency-heres-what-that-means-for-its-government/?utm_term=.88dc4dbe3e21. (Last visited on 10 December 2017).

[2] Recently, President Al-Sisi proclaimed the state of emergency all-over the Country for three months that start on 14 April 2018. See, Presidential Decree no. 168/2018, 14 April 2018.

[3] Human Rights Committee, Comments on Egypt, U.N. Doc. CCPR/C/79/Add.23, 9 August 1993, para. 9. In this regard, the African Commission on Human and Peoples' Rights has also stated that '*the purpose of military courts is to determine offences of a pure military nature committed by military personnel.* While exercising this function, military courts are required to respect fair trial standards. *They should not in any circumstances whatsoever have jurisdiction over civilians.*

authorities to mobilize Egyptian resources to an impressive degree and maintain an often rough order in the country – all without concern that transgressions of Egyptian laws would be brought to the mixed or national courts.[1]

Ironically, all the subsequent Egyptian governments learnt a lesson from this; they have even developed new name for martial law, which is the State of Emergency Law.[2] The new name has guaranteed that the government is able, first, to arbitrarily decide the occurrence of the emergency state, and second, to arbitrarily invoke emergency law in peace times regardless of the existence of war. In a country where the separation of powers, especially between the execution authority and legislative authority is questionable, due to the fact that the ruling party usually seizes more than 2/3 of the parliament seats, the invocation and resort to emergency law would be the rule whereas the ordinary laws and state would be the exception.

Accordingly, Egypt has been under the constant rule of emergency laws since its introduction in 1914 until today, except for some years of break. One of the important breaks was from 15 May 1980, after thirteen years of a continuous state of emergency; the break lasted for less than five months before the state of emergency was proclaimed again on 6 October 1981, by the former president Hosni Mubarak, after the assassination of president Anwar al-Sadat, and it lasted for the full 30 years of Mubarak's time in power. After the

[1] Ibid.
[2] State of Emergency Law, Law no. 162/1958, last amended by the Law no. 12/2017.

Lord Cromer, the Consul-General in Egypt, expressed publicly and flagrantly that the extraordinary measures were necessary because reliance on the regular instruments of justice was sometimes insufficient in a country accustomed, in his eyes, to lawless and despotic government.[1]

The idea of establishing special tribunals for sporadic incidents, in a violation to the natural judge principle, was not the only novelty of the British occupation in the Egyptian judicial system. In 1914, after declaring protectorate over Egypt, the British immediately introduced martial law, which marked the first modern system of martial law since the establishment of the Egyptian judicial system. Later in 1923, the British insisted that a provision which allows the declaration of martial law in emergencies must be added to the country's first Constitution of 1923. The same request was repeated in the 1936 Anglo-Egyptian treaty, where the British insisted that they should have the right to require the Egyptian government to declare martial law to support British military efforts.[2]

It was later revealed that the reason the British insisted on the inclusion of martial law in the constitution was that it gave them the necessary freedom of movement in the country. This was proved especially true during World War I, when martial law allowed British

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[1] Ibid 281. In his words, Cromer, falsely, stated that 'It is absurd to suppose that a nation which has for centuries been exposed to the worst form of misgovernment at the hands of a succession of rulers, from Pharaohs to Pashas, can suddenly, on the strength of a superficial education imparted to a few youths at the Government schools, acquire all the qualities necessary to the exercise of full rights of autonomy with advantage to itself or to those interested in its welfare'. A statement by a burglar who seeks to justify all the crimes committed by an imperial army against a robbed nation.

[2] Nathan J. Brown, *supra* note 23, 111.

proved that they were frustrated by their inability to exercise greater control in the national courts.[1] As a result of this frustration, the British tried to avoid the national courts, especially in matters deemed extremely sensitive; an obvious example of these matters was offences involving British military forces in Egypt.

To circumvent the national courts, the British pushed for the issuance of a Khedivial Decree that would allow the establishment of a special tribunal. According to this Khedivial Decree, that was issued on 25 February 1895, the special tribunal could be formed, upon the request of the Consul-General and the commanding general of the army of occupation to the Minister for Foreign Affairs, from both Egyptian and British officials. Interestingly, the special tribunal had the absolute power to determine the necessary punishments without being bound by the national Penal Code, furthermore, its judgments were final and must be carried out immediately.[2]

Significantly, one of the most notorious special tribunals to be established under the Khedivial Decree of 1895 is the one established in 1906 in the village of Dinshway to prosecute some of the residents after they had clashed with pigeon hunting British troops. Ironically, the tribunal, which convened on 24 June, issued its decision on 27 of June. The decision involved punishing four men to death by hanging at Denshawai village, nine men were sentenced to penal servitude, three other men received sentences of one year imprisonment with hard labour as well as fifty lashes to be given at Denshawai, and finally, five others were sentenced to receive fifty lashes at Denshawai.[3]

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[1] Ibid 110.
[2] Kimberly Luke, 'Order or Justice: The Denshawai Incident and British Imperialism', (2007) 5 History Compass. 2, 281.
[3] Ibid 279.

Furthermore, on the national level, the newly established centralized judiciary, which has the competence to rule over every judicial issue as the natural and default judiciary, was used by the state to impose the rule of law in order to achieve social stability as well as sustain the power of the state.

However, although the existence of independent judiciary is inevitable to attain the aforementioned goals, a clash could occur between this independent judiciary, with all of its civil virtues and goals, on one side, and the interest of the ruling authority, on the other. The clash usually occurs, when the ruling authority feels that the natural judiciary falls short, with its ordinary rules, of protecting the society from internal and external threats.[1] Once this clash occurs, particularly in a state where the principle of the separation of power is not absolutely respected, the executive authority would resort to establishing its own judiciary in a breach of the natural judge principle, in what is usually known as the exceptional or extraordinary judiciary.

As far as Egypt is concerned, the establishment of exceptional judiciary is as old as the existence of the contemporary Egyptian judicial system itself. It was first introduced by the British occupiers who never felt comfortable with the national court system.[2] And, although they infiltrated the national courts through the appointment of some British judges and legal advisors to the Egyptian Minister of Justice, the British actions, when their influence was at its peak between 1890s and 1922,

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https://www.washingtonpost.com/archive/politics/1997/09/01/egyptian-court-convicts-israeli-arab-as-spy/f4cc5511-2215-4278-8e67-f7c46adf0e94/?utm_term=.3a9cb95f0550 (Last visited on: 2 February 2018).

[1] Mohamed Nour Farahat and Ali AlSadek, *supra* note 43, 594.

[2] Nathan J. Brown, *supra* note 23, 109.

created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals'.[1]

Exceptions to the Natural Judge Principle in the Egyptian Legal System

The contemporary Egyptian judicial system was established in the last quarter of the 19th Century as part of the process of centralizing the authority of the Country, mainly to circumscribe imperialism and reduce the European abuse of the system.[2] To attain this goal, the new judicial system was built on a European model and applied civil law codes mainly derived from the French Codes. Furthermore, the new judicial system enjoyed from the very beginning a considerable degree of independence and impartiality in a way that helped the newly established judiciary to gain the confidence of the European creditors.[3]

This role of the Egyptian judiciary as a shield from external influence is still present until today, as international criticism directed to any judgment by Egyptian courts is usually backlashed by reference to the independence and impartiality of the judiciary.[4]

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[1] Ibid

[2] Nathan J. Brown, *supra* note 23, 115

[3] Ibid 116

[4] Patrick Kingsley, 'Egyptian president ignores Obama call for clemency over Al-Jazeera journalists', The Guardian, 24 June 2014. Available online at: https://www.theguardian.com/media/2014/jun/24/al-jazeera-journalists-sisi-egypt-denied-celemency (Last visited on: 2 February 2018). This journal article cites the President of Egypt stating clearly that 'We will not interfere in judicial rulings ... We must respect judicial rulings and not criticise them even if others do not understand this'. In another incident, the President of the State, who was requested to pardon an Israeli spy who was on trial before ordinary courts, referred to the independence of the judiciary and that he cannot intervene in the course of justice. See, John Lancaster, 'Egyptian Court Convicts Israeli Arab as Spy', The Washington Post, 1 September 1997. Available online at:

C. The Court is Permanent

This condition means that the court, which has been established by law to render justice according to general and absolute rules, does not have a limited life span and its jurisdiction is not limited to a specific period of time or specific occasion such as a situation of war.[1] This sort of temporary or *ad hoc* court, even when it is established by law, cannot be considered a natural court, except for the specific crimes it has been established to prosecute and within its limited life span. Thus, temporary courts or exceptional courts should have no jurisdiction whatsoever over ordinary crimes, whereas ordinary courts, that represent the natural judge, should have the absolute right to decide whether the crime is within its competence or not.[2]

These principles and requirements are enshrined in the 'Basic Principles on the Independence of the Judiciary', which were adopted by the United Nations General Assembly on December 1985.[3] The third of these principles states that 'The judiciary shall have jurisdiction over all issues of a judicial nature and *shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law*'.[4] Furthermore, the fifth principle stipulates that 'Everyone shall have the right to be *tried by ordinary courts or tribunals using established legal procedures*. Tribunals that do not use the duly established procedures of the legal process *shall not be*

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[1] Ahmed Fathey Sorror, Constitutional Criminal Law, *supra* note 100, 397; Abd Al-Ellah Al-Nawaisah, Specific Rules of the Jordanian State Security Court, Alhoquuq Journal, Kuwait University, Vol. 2 2006, 73-121, p. 111. (In Arabic)

[2] Ibid.

[3] UN Basic Principles on the Independence of the Judiciary (1985), UN. Doc. A/conf.121/22/RV.1

[4] Ibid

In this regard, the Special Rapporteur on the Independence of Judges and Lawyers has expressed, in his visit to the Russian Federation, serious concerns that 'The distribution of cases among the judges is *left to the discretion of the court chairperson.* It appears that there is no system for ensuring that cases are allocated according to objective criteria. Instances have been reported in which more sensitive cases are allocated to 'certain' judges or where a criminal case was transferred to another judge during the ongoing trial because the judge in question refused to be influenced'.[1]

Nevertheless, the natural judge principle would not be violated in the case of establishing specialized courts within the ambit of the ordinary judiciary. For instance, the court of juveniles, which has jurisdiction to prosecute perpetrators under the age of 18, is the natural judge for juveniles, although it offers them special treatment, but applies general and absolute rules to all juvenile defendants. A second example of specialized courts in the Egyptian legal system is the military courts, which have jurisdiction to prosecute military personnel when they commit crimes within their military premises,[2] or generally prosecute persons who commit a crime against military establishments.[3]

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drawing of lots or a system for automatic distribution according to alphabetic order. A second one could be done through pre-determined court management plans which should incorporate objective criteria according to which cases are to be allocated. These plans need to be as detailed as to prevent manipulation in the allocations of cases'.

[1] See, Report of the Special Rapporteur on the Independence of Judges and Lawyers, Mission to the Russian Federation, UN Doc. A/HRC/11/41/Add.2, 23 March 2009, para. 61.

[2] Military Judiciary Law, Law no. 25/1966, Article 4.

[3] Ibid Article 5.

the court in some of its authorities.[1] This situation has been criticized by the Judges' Club on the basis that it could jeopardize the accused's right to be prosecuted before his natural judge,[2] through transferring the case from its natural chamber to another chamber, which is known to be harsh or lenient, as the case may be.[3] Although, this situation has only been invoked in a handful of cases, it is still a potential breach of the natural judge principle,[4] and thus should be organized by general and absolute rules.[5]

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[1] Judicial Authority Law, Article 30.

[2] Fatouh AlShazly, *supra* note 66, p. 58.

[3] In this regard, the Special Rapporteur on the Independence of Judges and Lawyers noted that 'The method for assigning cases within the judiciary is paramount for guaranteeing the independent decision-making of judges. The Basic Principles stipulate that such assignment within the court is an internal matter of judicial administration. This means that there must be no interference from the outside. Furthermore, *there needs to be a mechanism of allocation that also protects judges from interference from within the judiciary.* During several country visits, the Special Rapporteur pointed to practices of allocation of court cases hampering the independence of judges. *For example, assignment of court cases at the discretion of the court chairperson may lead to a system where more sensitive cases are allocated to specific judges to the exclusion of others... in some Member States, court chairpersons, in specific cases, retain the power to assign cases to or withdraw them from specific judges which, in practice, can lead to serious abuse.* Therefore, the Special Rapporteur recommends to Member States to *establish a mechanism to allocate court cases in an objective manner.* One possibility could be drawing of lots or a system for automatic distribution according to alphabetic order. A second one could be done through pre-determined court management plans which should incorporate objective criteria according to which cases are to be allocated. These plans need to be as detailed as to prevent manipulation in the allocations of cases'. See, Special Rapporteur on the Independence of Judges and Lawyers, UN Doc. A/HRC/11/41, 24 March 2009, paras. 46-47.

[4] Mohamed Nour Farahat and Ali Al-Sadek, *supra note* 43, 647

[5] See, Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Doc. A/HRC/11/41, 24 March 2009, para. 47. The report suggested that '... Member States shall *establish a mechanism to allocate court cases in an objective manner.* One possibility could be

B. The Jurisdiction of the Court is General and Absolute

The generality and absoluteness of the jurisdiction of a court means that everyone should know his judge in advance. Accordingly, it would be a severe breach of the natural judge principle if the person, after committing a crime, was snatched from his natural judge and sent to another court that has been established especially for his case, or an existing specialized court like military courts, without general and absolute rules.[1] In this regard, the Inter-American Court of Human Rights held that '*the transfer of jurisdiction over civilians charged with treason from civilian to military courts violated the right to trial by a competent, independent and impartial tribunal previously established by law.* It underscored that states should not create tribunals that do not use duly established procedures to displace the jurisdiction of the ordinary courts'.[2]

The natural judge principle dictates also that the assignment of cases within the legally established courts should be carried out in accordance with general and absolute rules. In this respect, one should refer to Article 30 of the Judicial Authority Law, which vests the general assembly of every court with decision making powers on many issues, one of them being the assignment of cases among the chambers of the court. Usually this process takes place according to general rules, such as every chamber of the court would be entitled to adjudicate on the crimes committed in a specific district or according to the registration number of cases, regardless of the crime itself or the perpetrators.

However, this same article gives the general assembly of the court the right to delegate the chief of

[1] Ahmed Fathey Sorror, *supra* note 165, 191.

[2] *Apitz Barbera et al v Venezuela*, Inter-American Court of Human Rights, (2008), para. 119.

committee, and its decisions are therefore not considered judicial acts'.[1]

Interestingly, a reference should be made to Article 11 of the Judicial Authority Law, which gives the Minister of Justice the power to establish summary courts. This Article has been criticized on the basis that such summary court will not be considered a natural court, since it has not been established by law, rather by a ministerial decree. Thus, it has been suggested that Article 11 shall be amended to make the establishment of summary courts through an ordinary law,[2] similar to other criminal courts, namely; courts of first instance, and courts of appeal (assize courts).[3] In this regard, the the *UN Basic Principles* provide that 'The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration'.[4]

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[1] The Supreme Constitutional Court of Egypt, Case no. 13 for the judicial year no. 24, 13 January 2008. In another judgment the SCC stressed that 'The committee established by the legislator and entrusted with the mandate of adjudicating individual disputes that may arise between the worker and the employer is a committee that is composed of two judges and three members, one of whom is the director of the competent manpower department or his deputy, and the second representative of the General Union of Egypt Trade Unions, and the third is a representative of the employers' organization concerned. The members of the committee who are not judges do not have, in most cases, the requirement of legal qualification that would allow them to understand the defense of the adversaries and to assess their evidence. In addition to the fact that the Director of the competent Manpower Directorate, who is the head of the administrative body that seeks to settle the dispute amicably before presenting it to the committee, has had a previous knowledge of the case and expressed an opinion. Therefore, he may not sit in the Judicial Council afterwards to settle the same dispute'. See, The Supreme Constitutional Court of Egypt, Case no. 26 for the judicial year no. 27, 13 January 2008.

[2] Abd Al-Raouf Mahdy, *supra* note 88, 1200.

[3] Judicial Authority Law, Article 10.

[4] UN Basic Principles on the Independence of the Judiciary, Principle 14.

jurisdiction belonging to the ordinary courts or judicial tribunals'.[1]

Accordingly, if the executive authority established an exceptional court that would run parallel to the ordinary courts, this established court would not certainly fulfil the natural judge principle,[2] and any trial before such exceptional court would not be considered a fair trial, whether according to universal or national standards of due process.

Significantly, to decide whether an institution impinges on the jurisdiction of the ordinary courts one should consider its actual jurisdiction, rather than the name given to it. For instance, it would be a breach of the natural judge principle if the executive authority established a body to settle disputes between people or impose sanctions, which is the jurisdiction of ordinary courts, even if it was named an administrative commission.[3] In this regard, the Supreme Constitutional Court of Egypt has stated that '... the jurisdiction of any entity entrusted by the legislator to adjudicate in a particular dispute shall be defined by law ... and its members shall fulfil certain guarantees that ensure their efficiency, impartiality and independence. Thus, the Disciplinary Board for faculty members and employees of private higher institutes, which is not composed of judges, and does not follow the procedures expected before a court of law, cannot be considered a court. Rather, it is no more than a mere administrative

[1] Ibid. Para. 129.
[2] Abd Al-Raouf Mahdy, *supra* note 88, 1201.
[3] Ahmed Fathey Sorror, Constitutional Criminal Law, *supra* note 100, 394.

infringe this essential principle within the Egyptian legal system.

Conditions of the Natural Judge

Generally speaking, the natural judge by definition is a person who enjoys real independence from the executive and legislative authorities, in addition to being impartial, as explained earlier.[1] Specifically though, for the court to be considered the natural judge of a case, it should fulfil three main conditions, namely; it must be established by law, its jurisdiction should be general and absolute, and it has to be a permanent court.[2]

A. The Court is Established by Law

For the court to be considered a natural judge, this court should have been established by law.

To meet this requirement a tribunal should be established by the Constitution or other legislation passed by the legislative authority. The aim of this requirement in criminal cases is to ensure that trials are not conducted by special tribunals which do not use duly established procedures and displace the jurisdiction belonging to ordinary courts, or by tribunals set up to decide a particular individual case.[3]

In this regard, the Inter-American Court of Human Rights stressed that 'A basic principle of the independence of the judiciary is that every person has the right to be heard by *regular courts*, *following procedures previously established by law.* States are not to create "[t]ribunals that do not use the duly established procedures of the legal process [...] to displace the

[1] Mohamed Eid Al-Ghareeb, *supra* note 62, 1096.
[2] Ahmed Fathey Sorror, *supra* note 165, 190.
[3] *Apitz Barbera et al v Venezuela*, Inter-American Court of Human Rights, (2008), Para. 50.

displace the jurisdiction belonging to the ordinary courts or judicial tribunals'.[1]

On the constitutional level, the Egyptian Constitution refers explicitly to the principle of the natural judge in the article on the right to litigation, which stipulates that 'Litigation is a protected right guaranteed to all ... Individuals may only be tried before their *natural judge* ...",[2] and the provision goes on to confirm that '... *exceptional courts are forbidden*'.[3]

The Supreme Constitutional Court of Egypt has reiterated on many occasions that '*everyone should be prosecuted before his natural judge as a constitutional right*, and that this right indicates two issues; First, everyone shall have his case prosecuted by a competent judge. Second, people are equal in terms of their right to resort to their natural judge, and to the procedural and substantive rules applicable to their legal case'.[4]

From the abovementioned provisions, one could argue that the natural judge principle requires, in addition to the independence and impartiality of the judiciary, the fulfilment of other conditions, where the absence of any of them would render the judge unnatural for the defendant and thus jeopardise his right to a fair trial. Accordingly, the discussion of the natural judge principle will, first, identify the conditions required for the natural judge, and then, highlight the exceptions that could

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[1] The United Nations Commission on Human Rights, Resolutions no. 2002/37 of 22 April 2002, para. 2. The United Nations Commission on Human Rights (UNCHR) was a functional commission within the overall framework of the United Nations from 1946 until it was replaced by the United Nations Human Rights Council in 2006.

[2] The Egyptian Constitution, Article 97.

[3] Ibid.

[4] Supreme Constitutional Court, Case No. 9/16, 15 August 1995, Compilation of Judgments, Part 7, p. 113

principle requires that every accused person shall be tried by an ordinary, pre-established, competent court.[1]

On the international level, the UDHR refers implicitly to the right to be prosecuted by the natural judge by requiring that 'everyone is entitled in *full equality* to a fair and public hearing by *an independent and impartial tribunal*, in the determination of his rights and obligations and of any criminal charges against him'.[2] This provision refers to the two main principles upon which the principle of the natural judge rests, namely judicial independence and impartiality, as well as full equality before the judiciary.[3]

In addition to the above general conditions, the ICCPR, in the context of listing the general requirements for a fair trial, states that 'all persons shall be equal before the courts and tribunals ... Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal *established by law*'.[4] This provision adds to the general requirements mentioned in the UDHR for fair trial, the condition that the court should be 'established by law'.

Furthermore, the United Nations Commission on Human Rights had stressed, in a decision on the integrity of the judicial system, that 'everyone has the right to be tried by *ordinary courts or tribunals using duly established legal procedures* and that tribunals that do not use such procedures should not be created to

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[1] International Commission of Jurists, International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors – A Practitioners Guide, (2nd edn Geneva, 2007) 23.

[2] UDHR, Article 10.

[3] Ahmed Fathey Sorror, Constitutional Criminal Law, *supra* note 100, 392.

[4] ICCPR, Article 14 (1).

public, [1] especially those complaints that relate to the abuse of powers by a judge. It also carries out regular review of the performance of all judges up to the rank of a chief of court of first instance,[2] prior to promoting them to the higher judicial rank. Furthermore, the Judicial Monitoring Branch is responsible for drafting the annual map of transferring judges within the judiciary, before being finally approved by the SJC. This map is outlined according to settled rules that endeavour to guarantee the impartiality of judges through, for instance, barring them from working in their place of birth or permanent residency.[3]

The main criticism that could be levelled against the Judicial Monitoring Branch is that this branch follows the Minister of Justice, and neither the selection nor the appointment of its members is conditional on the approved of the SJC.[4] This situation certainly constitutes a breach of judicial independence from the executive authority in light of the very significant powers that the Judicial Monitoring Branch possess over judges under the Judicial Authority Law.[5]

The Natural Judge Principle and its Exceptions in the Egyptian Legal System

The principle of the natural judge *juez natural* is a fundamental guarantee of the right to a fair trial.[6] The

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[1] Judicial Authority Law, Article 99.
[2] Ibid Article 78.
[3] Ibid Article 77 *bis* 4.
[4] Judicial Authority Law, Article 78.
[5] Fatouh AlShazly, *supra* note 66, p. 54.
[6] For more details on the natural judge principle, see, Fatouh Al-Shazly, The equality in criminal procedures (Dar Al-Matbouaat Al-Gameaaia, Alexandria 1990) 93 (In Arabic); Abd Al-Raouf Mahdy, *supra* note 88, 1199; Mohamed Eid Al-Ghareeb, *supra* note 62, 1095; Ahmed Fathey Sorror, *supra* note 165, 189.

1968 when the Club issued a very strong announcement that rejected and resisted all the attempts of the political regime to interfere in the judicial affairs and impinge on their independence.[1]

As truly described by one of the distinguished judges in Egypt 'it is not a mere social club that provide social and cultural services to its members; nor its concerned with affairs similar to those of syndicate which defend its members rights ... the Judges' Club is concerned with all such issues in addition to a more vital role; *It is a distinctive entity whose member's rights and independence are of identical nature to the larger public's interests, that is, independence of judges and the judiciary*'.[2]

Moreover, the Judicial Authority Law has adopted *the principle of the Multi-Judges Composition* in the more serious crimes, such as felonies.[3] Undoubtedly, the existence of more than one judge in the chamber is a further guarantee for the impartiality of the judiciary, since it is less likely that all judges would be biased, than if a single judge were in charge of the case.[4]

It is also worth mentioning that, under the Judicial Authority Law the Judicial Monitoring Branch plays a very significant role in ensuring the impartiality of the individual judges, especially as it is widely known to be very firm and decisive concerning any malfunctions or *bona fide* complaints against judges.[5] In this respect, the Judicial Monitoring Branch is entitled to investigate any complaint against a judge, including complaints from the

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[1] For more details see, Fatouh AlShazly, *supra* note 66, p. 36.
[2] Tarik Albishry, The Egyptian Judiciary between Independence and Containment (Alshourouq Aldawlia, Cairo 2006) p. 91. (In Arabic)
[3] Ibid Article 8.
[4] Mohamed Eid Al-Ghareeb, *supra* note 62, 1100.
[5] Mohamed Nour Farahat and Ali AlSadek, *supra note* 43, 643.

except after resigning from their posts as judges.[1] This prohibition, however, does not prevent judges as a professional group from forming their own associations,[2] or expressing their opinions whether as individuals or groups regarding profession related issues or even public issues, otherwise they will be deprived from a basic right that they themselves as judges are expected to guarantee and protect for the public against any alleged infringement.[3]

In this regard, *the Judges' Club*, which was established in 1939 to enhance solidarity among members of the judiciary,[4] has played and continues to play an extremely significant role in safeguarding judicial independence.[5] The sever clash that occurred between the Political regime in the 1960s and the Judges as a liberal group shows the great role played by the Judges' Club in mobilizing Egyptian judges to protect judicial independence. This role was especially noticeable in

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[1] Ibid Article 73

[2] According to the 8th and 9th UN Basic Principles on the Independence of the Judiciary, '... members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary. [furthermore] Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence'. Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[3] Fatouh AlShazly, *supra* note 66, p. 74.

[4] Fatouh AlShazly and Kareem Alshazly, *supra* note 19, p. 268.

[5] Atef Shahat Said, 'The role of the Judges' Club in Enhancing the Independence of the Judiciary and Spurring Political Reform' in Nathalie Bernard-Maugiron (ed.), *Judges and Political Reform in Egypt* (American University Press, Cairo 2008) 112.

mentioned cases, if he felt that his impartiality would be at stake.[1]

Interestingly, the fact that the parties to a case are allowed to request the disqualification or recusation of the judge serves a very significant role. As the Inter-American Court of Human Rights has observed '...the institution affording the right to challenge judges has a twofold purpose; on one hand, it works as a guarantee for the parties to the proceedings, and on the other hand, it aims at providing credibility to the role performed by the Jurisdiction. [Thus] *Challenging should not necessarily be seen as putting on trial the moral rectitude of the challenged official, but rather as a tool to build trust in those turning to the State in quest for action by bodies that are and appear to be impartial*'.[2]

In addition to the above safeguards against the potential influences on judges, whether internal or external, the Judicial Authority Law bars judges from *practicing any other job* that might threaten their impartiality and independence.[3] Furthermore, the law has prohibited judges from *participating in any political activity*, particularly to run as candidates in any elections,

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[1] Criminal Procedures Law, Article 249 (2); Civil Procedure Law, Article 150; In this regard, the Bangalore Principles of Judicial Conduct has stressed that 'A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially'. See, The Bangalore Principles of Judicial Conduct, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002. Available online at: https://www.un.org/ruleoflaw/blog/document/the-bangalore-principles-of-judicial-conduct/ (Last visited on 20 March 2018).

[2] *Apitz Barbera et al v Venezuela*, Inter-American Court of Human Rights, 5 August 2008, para. 63.

[3] Judicial Authority Law, Article 72.

judge or his wife, and any of the litigants after the initiation of the case at hand, except if this new case was initiated for the mere purpose of recusing him from hearing the case at hand.

- His ex-wife, which he shares a child with, or any of his relatives, has a dispute with any of the litigants, except if this dispute was initiated for the mere purpose of recusing him.
- If one of the litigants was his servant, friend or had received a gift from him before or after the initiation of the case.
- There was enmity or affection between the judge and any of the litigants, which makes it likely that he would not be able to decide on the case without tendency or bias".[1]

Interestingly, if any of the above-mentioned grounds for recusing the judge is established, the defendant has to invoke them in the beginning of the proceedings, even before filing any request, except if the ground for recusing the judge occurred later on in the prosecution, or he was not aware of its existence except at a later stage.[2]

Furthermore, both the Criminal Procedures Law,[3] and the Civil Procedures Law[4] give the judge the right to request the chief of the court to recuse him, if he believes that any of the recusation grounds do exist. Moreover, the law gives the judge the right to request his recusation in any other case, even outside the pre-

[1] Ibid Article 148.
[2] Ibid Article 151.
[3] Criminal Procedures Law Article 249 (1).
[4] Civil Procedures Law Article 149.

- He or his wife or any of his relatives have any interest in the dispute at hand.
- He had made a public statement or issued an article concerning the case even if that was before his appointment as a judge, or had acted as a judge, expert, arbitrator or had been a witness in the case.[1]

Significantly, the abovementioned grounds for the disqualification of judges are considered a public order rule, which means that they could be invoked by the defendant at any stage of the proceedings, even before the Court of Cassation for the first time. Moreover, the judgment rendered in violation of those prohibitions would be null and void, even if it was accepted by the parties to the case.[2] In this regard, the HRC has observed that '"Impartiality" of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties. *Where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider ex officio these grounds and to replace members of the court falling under the disqualification criteria.* A trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair or impartial within the meaning of article 14'.[3]

B. Recusation of Judges

Under the Civil Procedures Law, the judge could be recused, if:

- "He or his wife has a similar case to the case before him, or if a case was initiated between the

[1] Civil Procedures Law, Article 146.
[2] Ibid Article 147.
[3] *Karttunen v. Finland*, HRC, Communication No. 387/1989, U.N. Doc. CCPR/C/46/D/387/1989, 5 November 1992, para. 7.2.

Guarantees against External Influence (The Judge's Personal Relations)

This set of guarantees seek to negate any relationship between the judge and others, in order to allow him to render justice solely according to the law.[1]

These guarantees are scattered between three laws, namely the Judicial Authority Law, the Criminal Procedures Law, and the Civil Procedures Law, as follows:

First: The *Judicial Authority Law* considers the judge disqualified to hear the case if he or she is a relative to any of the other judges in the chamber or a member of the Public Prosecution up to the fourth degree.[2]

Second: The *Criminal Procedures Law* prohibits the judge to hear a case if 'the crime was committed on him ... or he acted as the defence in this same case'.[3]

Third: The *Civil Procedures Law* differentiates between the cases for the disqualification of the judge and cases for his recusation, as follows:-

A. Disqualification of Judges

According to the Civil Procedures Law, the judge shall be considered disqualified and thus not allowed to hear the case, if:

- He was a relative or has a marital relationship to any of the parties of the case up to the fourth degree.
- He or his wife has an existing dispute with any of the litigants.
- He was an agent of any of the litigants or was the guardian or the heir of the litigant or was a relative to the guardian of any of the litigants up to the fourth degree.

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[1] Abd Al-Raouf Mahdy, *supra* note 88, 1234.
[2] Judicial Authority Law, Article 75.
[3] Criminal Procedures Law, Article 247.

On the separation of the accusation function and the prosecution function, the rule is also absolute. Thus, the judge who is set to decide on a case should not be the same person who has indicted the defendant and referred the case to the court. Under the Criminal Procedures Law, the judge is prohibited from hearing a case that he had considered before as a member of the public prosecution, a witness, an expert, or had decided to refer the case to the court.[1]

Interestingly, the separation between the accusation function and the prosecution function is relevant to the prohibition mentioned in Article 307 of the Criminal Procedures Law, which restrains the discretion of the court to prosecute the defendant for a crime other than that mentioned in the referral decision or to prosecute someone other than the defendant. However, as an exception to the abovementioned rule, Articles 11 and 12 of the same Law give the court the right to accuse the defendant for other crimes or to accuse other persons if the investigations, conducted by the court at the prosecution phase, revealed new facts that justify this action. This right, however, is limited to the investigation and accusation powers. Thus, it does not allow the court to prosecute the emerging case; rather the court is obliged by the Law to refer the emerging case to another chamber that is constituted from different judges, other than its members, in order to guarantee their impartiality.[2]

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[1] Criminal Procedures Law, Article 247.

[2] Ahmed Fathey Sorror, Constitutional Criminal Law, *supra* note 100, 385.

judicial power'.[1] This provision clearly considers the 'other officer authorized by law to exercise judicial power', which is the Public Prosecution in this case, to be equivalent to a judge.[2]

To sum up, it could be argued that the situation in Egypt regarding the separation between the power to investigate and the power to accuse does not constitute a threat to the accused's right to a fair trial, bearing in mind the status of the Public Prosecution as a branch of the judicial authority, which enjoys the same independence and impartiality guarantees assigned to judges.

On the question of the separation between the investigation and accusation functions, on one side, and the prosecution function, on the other, the situation is different. Under Egyptian laws, there is an absolute separation between the investigation function and the prosecution function. This means that the judge who is entitled to decide on a case should be different from the person who investigated the case; otherwise, he would have a specific prejudice regarding the case, a situation that would undermine the very basis of judicial impartiality.[3] Accordingly, Criminal Procedures Law prohibits the judge who had investigated the case as a prosecutor or an investigatory judge to adjudicate it.[4]

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[1] The ICCPL, Article 9 (3)

[2] Ahmed Fathey Sorror, Constitutional Criminal Law, *supra* note 100, 382.

[3] In this regard, the ECHR has iterated in several occasions that '... the fear that the trial court was not impartial stemmed from the fact that two of the judges sitting in it had previously sat in the chamber that had upheld the auto de procesamiento on appeal. That kind of situation may give rise to misgivings on the part of the accused as to the impartiality of the judges'. See, *Castillo Algar v. Spain*, ECHR, 28 October 1998, Application no. 79/1997/863/1074, paras 46.

[4] Criminal Procedures Law, Article 247 (2).

remand for more than four days,[1] and before searching someone other than the accused or his house or monitoring the phone calls.[2]

Frankly speaking, the rationale behind criticizing the situation in Egypt after the Law no. 353/1952 which granted the Public Prosecution the right to investigate in addition to its original power to accuse, was based on the argument that the Public Prosecution at that time was part of the executive authority rather than the judicial authority. Thus, members of the Public Prosecution were revocable; even the Public Prosecutor himself was transferable without his consent. Nevertheless, this argument does not stand true after the Law no. 35/1984, which made all members of the Public Prosecution irrevocable, including the Public Prosecutor who cannot be transferred even within the judiciary without his consent.[3] This independence from the executive authority was even sustained by the amendments of the Judicial Authority Law that took place in 2006,[4] where many of the forms of intervention by the Minister of Justice in the administrative affairs of the Public Prosecution were revoked.[5]

It is also worth mentioning that, the fact that the Public Prosecution in Egypt carries out the investigation as well as the accusation powers does not contradict with international instruments in this respect. For instance, the ICCPR stipulates that 'anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise

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[1] Ibid Article 202.
[2] Ibid Article 206.
[3] See *supra*
[4] See *supra*
[5] See *Supra*.

general rule, does not exist. According to the Criminal Procedures Law, Public Prosecution has the power to investigate as well as to accuse.[1] This situation was criticized on the basis that the investigation power requires absolute impartiality in collecting evidence whether to the advantage of the accused or to his disadvantage, whereas it is not necessary that the accusation power is impartial, as its ultimate goal is to secure a guilty disposition against the accused.[2]

Significantly, though, while the Egyptian legislator vested the Public Prosecution with the power to investigate and accuse, this rule is not absolute.[3] For example, the Criminal Procedures Law allows, by a decision of the Chief Justice of the Court of First Instance, and after a request from the Public Prosecution or the accused, that a judge be delegated to carry out the preliminary investigations in any felony or misdemeanour.[4] Furthermore, the Minister of Justice has the power to request the Chief Justice of the Court of Appeal to appoint an investigative judge to investigate a specific crime, or crimes of specific type.[5]

Moreover, the Criminal Procedures Law obliges the Public Prosecution to acquire the approval of a magistrate before taking serious decisions related to the freedom of the accused or the public. For instance, the approval of a magistrate is required before extending the

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[1] The power of accusation was assigned to the Public Prosecution by the amendment law no. 353/1952

[2] Mahmoud Naguib Hossny, Textbook on Criminal Procedures Law (Third edn Dar Al-Nahda Al-Arabia, Cairo 1996) 508. Abd Al-Raouf Mahdy, *supra* note 88, 1218. (In Arabic)

[3] Ahmed Fathey Sorror, Textbook on Criminal Procedures Law (10th edn Dar Al-Nahda Al-Arabia, Cairo 2016) 874. (In Arabic)

[4] Criminal Procedures Law, Article 64 as amended by the Law no. 138/2014.

[5] Ibid Article 65 as amended by the Law no. 138/2014.

power), and guarantees against external influences (The judge's personal relations).

Guarantees against Internal Influences (The Separation of Judicial Powers)

These guarantees are related to the constitutional principle of the separation of judicial functions, namely the investigation, the accusation and the prosecution. The relationship between the principle of the separation of judicial functions and judicial impartiality is unequivocal. In criminal justice, if one entity seizes all three functions, it would definitely be in a position to harm or otherwise favour the accused without being effectively monitored by any other entity. Thus, the separation of judicial functions would guarantee that each of the three powers monitors the work of the other, a situation that would eventually consolidate the impartiality of the judiciary.[1]

The ECHR has noted that '... a lack of judicial impartiality arises ... where the judge's personal conduct is not at all impugned, but where, for instance, *the exercise of different functions within the judicial process by the same person*, or *hierarchical or other links with another actor in the proceedings, objectively justify misgivings as to the impartiality of the tribunal*, which thus fails to meet the Convention standard under the objective test'.[2]

As far as the situation in Egypt is concerned, the separation between the power of prosecution, on one side, and the other two powers of investigation and accusation is absolute. Nevertheless, the separation between the investigation and accusation powers, as a

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[1] Ahmed Fathey Sorror, 'Judicial Independence as a Human Right in Egyptian Law' (1983) 50 Law and Economy Journal. 136. (In Arabic)

[2] *Kyprianou v Cyprus*, ECHR Grand Chamber, Case no. 73797/01, 15 December 2005, para. 121.

the judge, who is hearing a specific case, should have had no previous exposure to the same case. For instance, if he is a judge of appeal, he should not be the judge who issued the judgment at the first instance.[1]

The external influence, on the other side, refers to the judge's experience as one of the public, and thus his private life should not influence his judicial decisions. For instance, if one of the parties to the case is a relative, like his son or wife, then his impartiality would be at stake, and thus he should be ineligible to stand as a judge in this specific case, in order to negate any doubt concerning his impartiality.[2]

The following lines discuss the legal guarantees for judicial impartiality under the Egyptian legal system against both types of influences, namely; guarantees against internal influences (The separation of judicial

[1] In this regard, the ECHR has noted that '... the impartiality of the Oudenaarde court was capable of appearing to the applicant to be open to doubt. Although the Court itself has no reason to doubt the impartiality of the member of the judiciary who had conducted the preliminary investigation, it recognises, having regard to the various factors discussed above, that *his presence on the bench provided grounds for some legitimate misgivings on the applicant's part.* Without underestimating the force of the Government's arguments and without adopting a subjective approach, the Court recalls that a restrictive interpretation of Article 6 para. 1 (art. 6-1) - notably in regard to observance of the fundamental principle of the impartiality of the courts - would not be consonant with the object and purpose of the provision, bearing in mind the prominent place which the right to a fair trial holds in a democratic society within the meaning of the Convention'. See, *De Cubber v. Belgium*, ECHR, Application no. 9186/80, 26 October 1984, para. 30; See also, *Ekeberg and Others v Norway*, (11106/04 et al), European Court (2007) paras. 34-44; *Hauschildt v Denmark,* (10486/83), European Court (1989) paras. 43-53; *Fatullayev v Azerbaijan,* (40984/07), European Court (2010) paras. 136-139; *Hanif and Khan v United Kingdom*, (52999/08, 61779/08), European Court (2011) paras. 138-150.

[2] For more details see, Abd Al-Raouf Mahdy, *supra* note 88, 1233.

Article on judicial independence states clearly that "Judges are independent ... *subject to no other authority but the law* ... They may not be fully or partly delegated except to bodies and to perform tasks that are identified by law, provided that all the foregoing *maintains the independence and impartiality of the judiciary and judges* and prevents conflicts of interest ...'.[1] These provisions does not protect judicial independence only by negating any external influence over the judge, but it also protects the defendants and society at large from the subjectivity of the judges themselves, through the establishment of an objective criterion for adjudication, which is the law.[2]

Accordingly, any attempt to separate, in terms of the constitutional significance, the independence of the judiciary from its impartiality should be perceived illegal. In this meaning, the SCC affirms that 'the importance of *the two safeguards of judicial independence and its impartiality* in the efficiency of rendering justice assumes their unity, since it is unimaginable that the Constitution has preserved the judiciary from external influences which might demolish its sacred message, though this same Constitution does not protect the public from the impartiality of the judge'.[3]

On the ordinary law level, the Judicial Authority Law, the Civil Procedures Law and the Criminal Procedures Law include detailed rules that protect the judiciary from two types of influences that might jeopardise the impartiality of the judiciary, namely; internal and external influences. The internal influence refers to the fact that

[1] The Egyptian Constitution, Article 186.
[2] Supreme Constitutional Court, Case no. 152/20, 3 June 2000.
[3] Supreme Constitutional Court, 15 June 1996, Compilation of Supreme Constitutional Court judgements, Seventh Part, p. 780; Supreme Constitutional Court, 16 November 1996, Judgments Compilation, Part 8, p. 169

that 'The judiciary shall decide matters before them *impartially, on the basis of facts and in accordance with the law*, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason'.[1]

In this regard, the ECHR has stressed that '... it is of fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused'. That, according to the ECHR, 'Impartiality ... denotes the absence of prejudice or bias'.[2] Interestingly, the ECHR has developed a two-tier test to ascertain whether the judge was impartial. The first tier of the test is objective in nature, as it relates to the availability of sufficient guarantees for the impartiality of the judge that would exclude any doubt to the opposite. The second tier of the test is subjective, as it depends on the personal impartiality of a judge, which would be implied from his behaviour and attitude towards the parties. Thus, the personal impartiality of the judge will be seriously questioned if it could be proven that the judge expressed hostility against the parties, or arranged to have a case assigned to himself for personal reasons.[3]

On the domestic level, the Egyptian Constitution of 2014 refers to judicial impartiality in the Article on the rule of law, which provides that 'The rule of law is the basis of governance in the state. The state is subject to the law, and *the independence, immunity and impartiality of the judiciary* are essential guarantees for the protection of rights and freedoms'.[4] Furthermore, the

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[1] UN Basic Principles on the Independence of the Judiciary, Principle 2.
[2] *Kyprianou v Cyprus*, ECHR Grand Chamber, Case no. 73797/01, 15 December 2005, paras. 118.
[3] Ibid para. 119.
[4] The Egyptian Constitution, Article 94.

or emotions.[1] If judicial independence, as mentioned above, saves the judiciary from any external influence that might be exerted by the other two authorities or the public, judicial impartiality, on the other hand, saves the judiciary from the possible subjectivity of the judge himself. Accordingly, for the judge to be impartial, he or she should decide on cases without any partisan, whether with one of the parties or against any of them. This means that he must take his decision solely according to the law, and without any bias, caprice or prejudice.[2]

Significantly, the importance of judicial impartiality has elevated it to the same level of judicial independence. Both principles are a prerequisite requirement to rendering justice, where the absence or even scant doubts regarding their fulfilment would definitely affect the whole process of rendering justice. For this reason, all human rights instruments concerned with the right to a fair trial enshrine judicial impartiality alongside judicial independence, hence their intertwined relationship. For instance, the UDHR provides that 'everyone is entitled in full equality to a fair and public hearing by *an independent and impartial tribunal*, in the determination of his rights and obligations and of any criminal charge against him'.[3] Moreover, the ICCPR states that 'everyone shall be entitled to a fair and public hearing by a competent, *independent and impartial tribunal* established by law'.[4] Furthermore, the UN Basic Principles on the Independence of the Judiciary assures

[1] Mohamed Asfour, 'The Independence of the Judicial Authority' (1968) 3 Judges Journal. 300. (In Arabic)
[2] Mahmoud Nagib Hosni, Criminal Procedures Law (2nd edn Dar Al-Nahda Al-Arabia, Cairo 1988) 785. (In Arabic)
[3] UDHR, Article 10.
[4] ICCPR, Article 14 (1).

absolute immunity even if he or she caused harm to the parties wilfully or recklessly.[1] Thus, to strike the required balance between these two seemingly contradicting interests, the Egyptian Civil Procedures Law[2] limits the civil responsibility of judges for their profession related torts to the following cases:

1. If the judge was cheating or deceiving for the benefit of one party, and against the other.[3]
2. If the judge makes a severe professional mistake,[4] such as not being aware of the basic legal rules applicable to the case before him or issuing his judgment without reading the case file.[5]
3. If the judge commits the crime of denying justice to the parties by refraining, without any sound justification, from responding to a petition submitted to him or from ruling in a valid case.[6]
4. When the law establishes explicitly the responsibility of the judge.[7] For instance, the Civil Procedures Law establishes the civil responsibility of the judge who fails, within the time specified by the law, to submit the reasoned judgment in writing, if such omission on the judge's side has 'resulted in the nullification of the judgment'.[8]

The Impartiality of the Egyptian Judicial System

The judiciary is usually symbolized by a blindfolded statue holding a scale. For these scales to be balanced they should be independent from any personal interests

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[1] Abd Al-Raouf Mahdy, *supra* note 88, 1215.
[2] Civil Procedures Law, Law no. 13/1968.
[3] Ibid Article 494 (1).
[4] Ibid.
[5] Mansoura Court of Appeal, 2 February 1978, the Government Lawyers Journal (1978) 197.
[6] Civil Procedures Law, Article 494 (2).
[7] Ibid Article 494 (3).
[8] Ibid Article 175.

This safeguard for judicial independence is not meant to protect the judge from the executive authority, as the previous three safeguards do, rather the protection here is from the defendants or the parties to a case before the judge. This safeguard, accordingly, grants the judge a civil immunity from being sued by the parties if he makes a mistake in the course of rendering justice.[1] Thus, if the general rule for civil responsibility is that every tort that causes harm to others the wrongdoer should be set responsible for a compensation;[2] this rule, generally speaking, should not apply to the judicial profession.[3] In this regard, the UN Basic Principles on the Independence of the Judiciary establishes that 'Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, *judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions*'.[4]

Interestingly, this safeguard, which aims to provide judges with the necessary calmness to render justice without the fear of being sued by the parties to a case, should not indicate that the judge would benefit from

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[1] In this regard, the Special Rapporteur on the Independence of Judges and Lawyers noted that 'The Basic Principles stipulate that *judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.* According to the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, judicial officers shall also not be criminally liable for such acts or omissions. The Human Rights Committee emphasized that judges should not be held criminally liable for handing down "unjust judgments" or committing legal errors in their decisions'. See, Special Rapporteur on the Independence of Judges and Lawyers, UN Doc. A/HRC/11/41, 24 March 2009, para. 65.

[2] Civil Law, Law no. 131/1948, Article 163.

[3] Ahmed Al-Said Sawey, Al-Waseet in Civil and Commercial Procedural Law (Dar Al-Nahda Al-Arabia, Cairo 1981) 108. (In Arabic)

[4] UN Basic Principles on the Independence of the Judiciary, Principle 16.

'Judges Discipline Council', chaired by the Chief Justice of the Court of Cassation.[1] This certainly offers a further guarantee for judges who face discipline procedures. This guarantee has been proclaimed by the UN Basic Principles on the Independence of the Judiciary which stressed that 'Decisions in disciplinary, suspension or removal proceedings *should be subject to an independent review ...*'.[2]

Nevertheless, under Article 111 of the Judicial Authority Law, the Judges Discipline Council, upon a request from the Minister of Justice, might consider revoking the judge or transferring him to a non-judicial job. This request by the Minister of Justice could be based on any ground other than the health status of the judge. Although the final decision in this regard will be that of the Judges Discipline Council, the fact that such significant motion is initiated by the Minister of Justice who represents the executive authority warrants reconsideration of the provision.[3]

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[1] Judicial Authority Law, Article 107 after the amendment by the Law no. 142/2006.

[2] UN Basic Principles on the Independence of the Judiciary, Principle 20; The European Charter on the Statute for Judges has stated that 'The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a *tribunal or authority composed at least as to one half of elected judges*, within the framework of proceedings of a character involving the full hearing of the parties, in which *the judge proceeded against must be entitled to representation*. The scale of sanctions which may be imposed is set out in the statute, and their imposition is subject to the principle of proportionality. *The decision of an executive authority, of a tribunal, or of an authority pronouncing a sanction, as envisaged herein, is open to an appeal to a higher judicial authority*'. See, European Charter on the Statute for Judges, Council of Europe, Activities for the development and consolidation of democratic stability, Themis Plan Project no. 3, Strasbourg, 8 - 10 July 1998.

[3] Fatouh AlShazly, *supra* note 66, p. 57.

performing one of the most sacred professions in the society, and thus entitled to several safeguards to help him achieving his role, his discipline should be very strict to amount to the significance of his role'.[1]

In this regard, the UN Basic Principles on the Independence of the Judiciary provides that 'A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge',[2] it follows that '*Judges shall be subject to suspension or removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties*'.[3]

As far as the situation in Egypt is concerned, the rules that govern the discipline of judges are mentioned in detail in Articles 93 to 115 of the Judicial Authority Law. The discipline of judges is carried out by a special council called the 'Judges Discipline Council'. This special council is composed solely of judges, namely; the most senior chief of a court of appeal, other than members of the SJC, in addition to the two most senior judges of the Court of Cassation and the two most senior deputies of the chief of a court of appeal.[4]

Significantly, before the amendment of the Judicial Authority Law in 2006, decisions of the Judges Discipline Council were final and cannot be challenged before any other chamber. In 2006, the amendment established a higher council to review the decisions rendered by the

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[1] Supreme Administrative Court, Hearing of 15 December 1962, Year 8 Judiciary, 251.
[2] UN Basic Principles on the Independence of the Judiciary, Principle 17.
[3] Ibid Principle 18.
[4] Judicial Authority Law, Article 98.

discovering the crime until identifying the district court that will prosecute the case.[1]

Discipline of Judges

In addition to the irrevocability and judicial procedural immunity, the judicial independence requires a special regime for disciplining judges and members of the Public Prosecution. This regime shall endeavour to accommodate two main concerns, as follows:

First: The executive authority should not be involved in the process of disciplining judges; otherwise, it would undermine all the aforementioned safeguards for judicial independence. As not being able to revoke the judge, the executive authority could intimidate him through a disciplining process that might end up with his revocation.[2]

Second: The fact that a special regime is followed to discipline judges does not mean that judges are unquestionable or in a favourable position than other professions, it is exactly the opposite.[3] As the Supreme Administrative Court of Egypt stated 'The judge, who is

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[1] Judicial Authority Law, Article 96. Article 96 provides that "Other than in cases of *flagrante delicto*, it is not allowed to arrested a judge and remand him or her except after obtaining a permission from the Supreme Judicial Council.
Though, in cases of *flagrante delicto*, the General Prosecutor would be obliged to refer the matter to the Supreme Judicial Council within the following twenty-four hours, in this case the Council shall decide whether to release the judge or continue the detention, and the judge shall be allowed to give his or her testimony before the Council.
The Council shall determine the term of imprisonment in its decision, and it is not allowed to take any investigative measures with the judge or to refer the case to the court in a felony or a misdemeanour, except after acquiring the permission of the Council and after the request of the General Prosecutor.
Inevitably, detaining judges shall be executed in separate places other than that designated for the incarceration of other prisoners'.

[2] Alaa Mohamed Al-Sawey, The Right to a fair Trial for the Accused, PhD Thesis, Cairo University, 2001, p.68. (In Arabic)

[3] Mohamed Nour Farahat and Ali Al-Sadek, *supra note* 43, 640.

This has been considered a serious challenge to judicial independence, especially that the chief judge of the court of first instance has several powers over all judges working in the court the he presides,[1] for instance, he can issue a warning against a judge, which is considered an administrative sanction,[2] in addition to his power to suggest to the Public Prosecutor to initiate an administrative disciplinary case against a judge.[3] It is thus recommended that the appointment of the chief judges of the courts of first instance shall be conducted through a decision by the SJC without the involvement of the Ministry of Justice in such purely judicial affair.

Judicial Immunity

Judges in Egypt benefit from immunity when they commit a criminal act. This immunity, however, is not substantive, rather it is a procedural immunity, which means that judges are certainly held responsible for any criminal act that they allegedly commit, however, special procedures have to be followed in such instances.

The adoption of this procedural immunity is justified by the need to provide a guarantee that the executive authority would not intimidate judges, and thus undermine the judicial independence at large.[4]

The Judicial Authority Law identifies the special procedures that should be followed in the case of suspicion that a judge might be involved in a crime or even when he is caught in a flagrant *delicto* state. The noticeable safeguard in this respect is the absolute control of the SJC over the procedures; from the point of

[1] Fatouh AlShazly and Kareem Alshazly, *supra* note 19, p. 288.
[2] Judicial Authority Law Article 94.
[3] Judicial Authority Law Article 99.
[4] Ibid, p. 620.

prescribed in the law'.[1] Departing from that rule, Articles from 52 to 66 elaborate on the objective rules that govern the issue of transferring judges, and their secondment whether nationally or internationally.[2] Significantly, the central safeguard that guarantees objectivity in transferring judges within the judicial branch or seconding them is the fact that such transfer or secondment has to be approved by the SJC, which is composed solely from judges,[3] without the intervention of the executive authority.[4] This certainly constitutes an important safeguard for judges that enhance their independence from the executive authority and sustains their irrevocability guarantee.

The main concern in this respect relates to the power given to the Minster of Justice to appoint the chief judges of the courts of first instance after the approval of the SJC.[5] Thus, despite the fact that the approval of the SJC is required, the proposed names originate from the Ministry of Justice, as well as the appointment decision.

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[1] Judicial Authority Law, Article 52.

[2] The secondment of judges to entities other than the judiciary has been criticized by the majority of judges as it has adverse effects on the independence and impartiality of the judge who works for such entities. *This was the driving force for adopting Article 239 of the Constitutional of 2014 that directs the parliament to pass a law within five years of the date the Constitution is inforce (expected in 2019) that prohibits full-time and part-time secondments of judges to non-judicial entities.*

[3] For example, according to Article 54 of the Judicial Authority Law 'Judges of the Cairo Court of Appeal may not be transferred to another court except with their consent and with the approval of the Supreme Judicial Council. Judges of other courts of appeal shall be transferred to the Cairo Court of Appeal according to their seniority of the appointment ... Nevertheless, Judge could stay in the court in which he works at his request and with the approval of the Supreme Judicial Council ...'.

[4] Mohamed Nour Farahat and Ali Al-Sadek, *supra* note 43, 637.

[5] Judicial Authority Law Article 9. Article 9 calls the appointment of the chief judge of the court of first instance secondment as it is done within the judicial body.

Judicial Affairs, which considered the presidential decree null and void, and ordered that the sacked public prosecutor shall return to office. After returning office, the Public Prosecutor resigned voluntarily from his post as a Public Prosecutor and requested to work as a practicing judge.[1]

B. The Transfer of Judges within the Judicial Profession (Secondment)

Irrevocability safeguard is not just to protect judges from being arbitrarily sacked from their sacred profession, rather it covers also the prohibition against the subjective transfer of judges within the judicial branch or even the same court. The significance of this broad notion of irrevocability is self-evident. That, if a narrow notion of irrevocability is to be adopted, that would mean that the executive authority, despite being unable to sack judges, it would transfer those who act against its interest to remote courts in order to humiliate them, or, in the opposite case, transfer those who act according to its interests to favourable places.[2] Accordingly, the prohibition of subjective transfer of judges is a corollary notion to the irrevocability safeguard specifically, and judicial independence in general.

As a result of the importance attached to the prohibition of subjective transfer of judges, the Law of Judicial Authority, which is considered a complementary legislation to the Constitution, stresses that 'it is prohibited to transfer judges or to second them, whether nationally or internationally, except in the cases

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[1] For more details see, Egypt court overturns Morsi sacking of top prosecutor, BBC, 27 March 2013, available online at: http://www.bbc.com/news/world-middle-east-21953418. (Last visited on 23 May 2017).

[2] The Travaux Preparatoires of the Law no. 66/1943 on Judicial Independence [Mentioned in: Ahmed Fathey Sorror, Constitutional Criminal Law, *supra* note 100, 361]. (In Arabic)

President transcended the delegation given to him by the Parliament according to the Law no. 15/1967 or acted *ultra vires*. Later on, in 1973, the Parliament issued Law no. 43/1973, which returned all those who were sacked to their judicial positions to end a very bad example of the transgression of the executive authority over, not only the judicial authority, but also the legislative authority.[1]

Another recent incident that included a breach of the irrevocability safeguard of judges as individuals and the independence of the judiciary as an institution occurred when the ousted president Mohamed Morsy issued in November 2012, what was called a constitutional declaration, that granted him absolute powers, including issuing laws and decrees that cannot be challenged or reviewed by any other authority in the Country, including the SCC.[2] This constitutional declaration, provided in its third article that 'The Public Prosecutor shall be appointed from among members of the judiciary by a decision of the President of the Republic for a term of four years beginning from the date of office and shall be subject to the general conditions of judges, and not less than 40 calendar years. *This provision applies to the incumbent public prosecutor with immediate effect*'. In accordance with this provision, the ousted President issued a presidential decree that included the sacking of the incumbent public prosecutor at that time and appointing another one.[3]

Interestingly, this decree was challenged by the sacked public prosecutor before the Special Chamber on

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[1] For more details see, Ibid 360.

[2] Constitutional Declaration, 22 November 2012.

[3] Egypt's President Morsi assumes sweeping powers, BBC, 22 November 2012, available online at: http://www.bbc.com/news/world-middle-east-20451208. (Last visited on 23 May 2017).

of the judiciary or to shield them when they behave inappropriately.'[1]

Although the contemporary history of the Egyptian judiciary shows that the irrevocability principle has always been respected by both the legislative and the executive authorities, this history records with sorrow an appalling incident that took place in 1969, and became known as 'The Judiciary Massacre'.[2] In this incident, the head of the executive authority, the President of the Country, Mr Abd El-Nasser, acting according to a legislative delegation no. 15/1967 to issue decrees in limited matters that would have the power of a law, issued Presidential Decree no. 83/1969 to reorganize the judicial institutions. This illegitimate decree granted the President the right to reappoint all members of the judicial institutions, which he did by the Decree no. 1603/1969.

Surprisingly, the President omitted 127 individuals, who had to implicitly consider themselves sacked. Among those 127 was the Chief Justice of the Court of Cassation and 14 of his chief deputies.[3] This legal farce was carried out because those revoked judges were the revolting force against the affiliation of judges to the only party at the time, the communist party of the President, in addition to issuing many acquittals for political opponents of the regime.[4]

Expectedly, this scandalous decree was turned down by the Court of Cassation in 1972, which considered the Decree no. 83/1969 illegal on the basis that the

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[1] Supreme Constitutional Court of Egypt, Case No. 31/10, 7 December 1991.

[2] For more details see, Fatouh AlShazly, *supra* note 66, p. 26.

[3] Mohamed Nour Farahat and Ali Al-Sadek, *supra* note 43, 634.

[4] Ahmed Fathey Sorror, Constitutional Criminal Law, *supra* note 100, 359.

discipline are regulated by the law ...'.[1] Furthermore, the Law on Judicial Authority reiterates the same principle by assuring that 'Judges and members of the Public Prosecution, except auxiliary prosecutors, are *irrevocable*'.[2] This safeguard puts a significant restriction on both the executive and the legislative authorities concerning the term of judges in office.[3] According to this safeguard, all judges and members of the Public Prosecution are immune from being sacked, transferred into other professions, or forced to retire.[4]

The irrevocability, however, does not mean that judges have owned their positions and no one would be able to question them, even if they behaved inappropriately. Rather, it means that his revocability should be carried out according to the law in order to avoid any abuse by the other two authorities.[5] In this meaning the SCC has stressed that 'The irrevocability safeguard is enshrined in both the Constitution and the ordinary law to protect the judiciary from external influences ... However, there is no doubt that this safeguard is not meant to provide a shelter for members

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[1] The Egyptian Constitution, Article 186. The consecutive constitutions of Egypt have adopted the irrevocability of judges as a general principle and referred to the ordinary law for details.

[2] Judicial Authority law, Article 67.

[3] In this regard, the Special Rapporteur on the independence of Judges and lawyers has stated that 'it is crucial that tenure be guaranteed through the irremovability of the judge for the period he/she has been appointed. The irremovability of judges is one of the main pillars guaranteeing the independence of the judiciary. Only in exceptional circumstances may the principle of irremovability be transgressed. One of these exceptions is the application of disciplinary measures, including suspension and removal'. See, Special Rapporteur on the Independence of Judges and Lawyers, UN Doc. A/HRC/11/41, 24 March 2009, para. 57.

[4] Ahmed Fathey Sorror, Criminal Legitimacy (Dar Al-Nahda Al-Arabia, Cairo 1977) 173. (In Arabic)

[5] See *infra* for the rules of disciplining judges.

members, their term of office, *the existence of guarantees against outside pressures, and the question whether the body presents an appearance of independence*'.[1]

Nationally, the Egyptian legal system encompasses several safeguards for the individual independence of judges that would allow them to decide on cases before them without fear from any external influence. Such safeguards include; Irrevocability, Judicial immunity, Discipline, and Civil responsibility.

Irrevocability

The irrevocability of judges refers to two basic safeguards, namely; judges should not be sacked or transferred to other non-judicial professions, and they should not be transferred within the judicial branch except according to established rules.[2] The significance of the irrevocability safeguard is self-evident, as the judge who fears being revoked would not render justice.[3] Accordingly, the irrevocability safeguard would act here as a shield for the judge to protect him or her from the abuse of power practiced by the executive authority.[4]

A. Professional Irrevocability

Under the Constitution of Egypt 'Judges are independent, *irrevocable*, shall not be subjected to any other authority but the law, and they are equal in rights and duties. The conditions and procedures for their appointment, secondment, delegation, retirement and

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[1] *Bryan v. the United Kingdom*, ECHR, Application no. 19178/91, 22 November 1995, para. 37; *Findlay v the United Kingdom*, ECHR, Application no. 22107/93, 25 February 1995, para. 73.

[2] Ahmed Fathey Sorror, Constitutional Criminal Law (2nd Edition Dar Al-Shorouq, Cairo 2002) 355. (In Arabic)

[3] Ibid 356.

[4] Fathey Wally, Al-Waseet in the Civil Judiciary Law (Dar Al-Nahda Al-Arabia, Cairo 1981) 198. (In Arabic)

opinion in favour of a party to a case or against him or her.[1] Finally, while as a general rule criminal trials are open to the public, and could thus be attended by any interested person without discrimination,[2] or broadcasted by different media outlets, the Law empowers the presiding judge to order holding the proceedings *in camera*, if he believes that this will serve the interests of public order or morals.[3] If such judicial order is violated, a punishment of a maximum of one-year imprisonment could be imposed on the violator.[4]

The Individual Independence of the Judiciary

The individual judicial independence refers to the legal safeguards available for judges and members of the Public Prosecution, as individuals, to protect them from, mainly, the pressure that the executive authority might exert upon them when they adjudicate cases before them. Thus, the individual judicial independence seeks to provide a safe environment for the judge to allow him or her to reach a judicial decision without any external influence but the law and his or her own conscience.[5]

Interestingly, judicial independence, as a human right, is unique in the sense that those who enjoy it, judges, are not those who benefit from it, the people. Thus, judges are granted independence to enable them to fulfil their duty in serving the society, rather than as a privilege granted to judges for their personal advantage.[6]

Significantly, the ECHR has highlighted in several occasions indicators for judicial independence. Such indicators include 'the manner of appointment of its

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[1] Ibid

[2] For more details on the publicity of criminal trials guarantee, see, Abd Al-Raouf Mahdy, *supra* note 88, 1508-1514.

[3] Criminal Procedures Law, Article 268.

[4] Penal Code, Article 189.

[5] Adel Omar Sherif and Nathan J. Brown, *supra* note 59, pp. 2, 15.

[6] Ibid.

number of viewers and followers, broadcast or publish baseless information or unfounded legal opinions that direct the public towards a specific outcome, discourage witnesses from appearing before the court, or even direct the judge to adopt a specific perception of the facts of the case.[1]

This, unfortunately, common practice by the media, in addition to infringing the accused's presumption of innocence, has detrimental effect on the credibility of the judiciary, as it might cause the public to lose trust in the judiciary if it renders a judgment that differs from the outcome indicated by the media.[2]

Thus, without the independence from the media safeguard, there will be considerable doubt regarding the fairness of the judiciary. This situation would definitely impose a huge burden on the judiciary, which should reach its decision based on the merits and facts of the case at hand as well as the rule of law, without any external influence.[3]

It is thus a crime under the Egyptian Penal Code to publish information for the mere purpose of influencing judges, public prosecutors or witnesses of a specific case.[4] Furthermore, it is a crime to publish any material that would discourage any person from revealing significant information to the judiciary or the prosecution.[5] The Law also proscribes publishing any material for the mere purpose of directing the public

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[1] Wagdy Abd Al-Samad, 'Judicial Independence', *The Judiciary Journal* (March and April 1986) Vols. 3 & 4. 19 (In Arabic); Abd Al-Raouf Mahdy, Textbook on Criminal Procedures Law (Dar Al-Nahda Al-Arabia, Cairo 2013) 1213. (In Arabic)

[2] Ibid.

[3] Gamal Al-Otaify, 'The Criminal Safeguard of the Dispute from Publishing Influence', (Dar Al-Maaref, Cairo 1964) 248. (In Arabic)

[4] Penal Code, Article 187.

[5] Ibid

It is thus advisable that in the process of reviewing the composition of the SJC, as previously discussed, the possibility of introducing elections to the Chief Justice post, rather than the current practice of being appointed by the President shall be seriously considered. Whether the electorate will be the incumbent members of the SJC, or all judges of the Court of Cassation, or even all judges and public Prosecution members is certainly one of the most controversial issues that will need thorough discussed. It is, however, believed that electing the Chief Justice will undoubtedly enhance the independence of the Judiciary from the executive authority, since the elected Chief Justice will have a stronger sense of belonging to the judiciary that elected him, rather than the head of the executive authority. This will in turn be reflected in the decisions taken by the Chief Justice and the whole SJC that will appeal to the needs of the judiciary rather than the government.

Judicial Independence from the Media

Media is a double-edged sword, while it could sustain judicial independence and accountability through its role as a watchdog; it might also influence judges, witnesses and the public, to the extent that jeopardises the independence of the judiciary. Since media is not usually fully aware of the factual or legal background of cases before the judiciary, as it does not have access to all the evidence available to courts, unprofessional or market-driven media might, in their quest for maximizing the

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of the Congress, Available online at: http://www.loc.gov/law/foreign-news/article/egypt-parliament-approves-an-amendment-to-the-judicial-authority-law/ (Last Visited: 19 June 2017). See also, Mahmoud Aziz, Egypt judges voice strong objections to draft law regulating appointment of heads of judicial bodies, Ahram online, Available online at: http://english.ahram.org.eg/NewsContentP/1/261808/Egypt/Egypt-judges-voice-strong-objections-to-draft-law-.aspx (Last Visited: 19 June 2017). (In Arabic)

of the SJC. The Judicial Authority Law, however, provided that the chair of the SJC shall be appointed by the President of the Republic from one of the deputies to the Chief Justice of the Court of Cassation. Although, theoretically the President, according to this provision, could select the Chief Justice from any of his deputies, who are in the hundreds, factually though, the Chief Justice was usually the most senior deputy to the leaving Chief Justice due to resignation or retirement.

Recently, though, the parliament has passed an amendment to the Judicial Authority Law that has, seemingly, limited the discretion of the President in selecting the Chief Justice to only three deputies to the Chief Justice nominated by the SJC.[1] Implicitly, however, this amendment has been considered controversial and even unconstitutional, as it allowed the President of the Republic to circumvent the customary practice of appointing the most senior deputy to the Chief Justice, and rather appoints a politically favorable alternative among the three nominees.[2]

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[1] The Law no.13/2017 that amended Article 44 of the Law no. 46/1972 on Judicial Authority.

[2] This has been voiced by the Legislative and Constitutional Affairs Committee of the State Council, which stated in its own report to the Parliament that 'The suggested amendment may be deemed unconstitutional on the basis of article 185 of the Constitution of 2014. Article 185 provides that the judicial bodies must be consulted concerning any draft laws governing their respective affairs, which did not happen in this case'. Egypt's Judges' Club, representing Egyptian judges nationwide, has also opposed the suggested amendment. They considered the amendment a blow to the independence of the judiciary. The Club also stated that the amended Judicial Authority Law provides that the chiefs of judicial bodies are selected based on seniority by the Supreme Judicial Councils and that the President of Egypt ratifies the councils' selections. However, the new amendment enhances the power of the Executive authority by permitting the President to select the justices directly, based on the nomination of the Supreme Judicial Council. See, Egypt: Parliament Approves an Amendment to the Judicial Authority Law, Global Legal Monitor, Library

Interestingly, this constitutional provision provides a significant guarantee for the independence of the public prosecution from the executive authority, as it limits the powers of the latter to the issuance of the presidential decree that appoints the Public Prosecutor who has been independently selected by members of the judiciary. Before the Constitution of 2014, and under Article 119 of the current Law on Judicial Authority, the appointment of the Public Prosecutor was within the absolute authority of the President without even consulting the SJC.[1]

Notably, Article 119 of the Judicial Authority Law, which provides that 'The Public Prosecutor is appointed by virtue of a presidential decree among the chiefs of a court of appeal, or the judges of the Court of Cassation, or the most senior members of the Public Prosecution "Senior General Attorneys", shall be amended to conform to Article 189 of the Constitution; otherwise, it will be challenged and eventually declared unconstitutional if applied by the President in appointing new public prosecutors.

Notwithstanding the abovementioned guarantee for judicial independence that relates to the appointment of the Public Prosecutor, the current Constitution does not have a provision that regulates the appointment of the Chief Justice of the Court of Cassation, who is the chair

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perceived as an honour to be appointed by a presidential decree. Thus, the appointment is practically attributed to the SJC, whereas the presidential decree is a mere executive decision thereto.

[1] Article 119 of the Judicial Authority Law provides that "The public prosecutor is appointed by virtue of a presidential decree among the chiefs of the Court of Appeal, or the Judges of the Court of Cassation, or the most senior members of the public prosecution "Senior General Attorneys". This provision needs to be amended to be in conformity with Article 189 of the Constitution; otherwise, it will be challenged and eventually declared unconstitutional if applied by the president in appointing new public prosecutors.

minimizing the acts of corruption.[1] It has however been suggested that the involvement of the Minister of Finance in the process of outlining the annual budget of the judiciary is questionable, as it places him in the same position that the Minister of Justice had before the amendment. It is thus advisable that the budget is prepared by the SJC and sent to the Parliament directly, similar to the ruled followed in outlining the budget of the Military under the Constitution, and without any involvement of the executive authority represented by the Ministry of Finance.[2] This proposal was actually put forward by the Judges' Club before the amendment in 2006,[3] but was never endorsed by the government.

Fourth: The Constitution of 2014 entrusts the SJC with the power to select, not just nominate, the Public Prosecutor from the Deputies to the President of the Court of Cassation, the Presidents of the Courts of Appeal, or the Deputy Public Prosecutors. Once selected, the appointment is made by virtue of a presidential decree for a period of four years, or for the period remaining until retirement age, whichever comes first, and only once during a judge's career.[4]

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[1] See, Policy Framework for Preventing and Eliminating Corruption and Ensuring the Impartiality of the Judicial System, ICJ's Centre for the Independence of Judges and Lawyers (CIJL), CIJL Yearbook 2000, p. 131.

[2] The Constitution of Egypt, Article 203 provides that '... [The National Defence Council] is entitled to discuss the annual budget of the Military, that is listed as a one number in the annual budget of the Country ...'. Obviously, neither the Minister of Finance nor any other entity is not involved in the process of outlining the annual budget of the Military.

[3] Fatouh AlShazly, *supra* note 66, p. 48.

[4] The Constitution of Egypt, Article 189. It is worth mentioning that all members of the judiciary, including the public prosecution, and other judicial institutions and entities are appointed and promoted by a presidential decree that follows a decision, not just a recommendation, of the SJC. Thus, the decree is not considered a form of intervention from the executive authority into the judicial affairs, rather it is

from elections, especially causing sectarianism among judges and allowing a political or religious sect to control the judiciary, democracy is a practice that rectifies itself overtime, and judges are by definition a highly educated and national group that would act for the interest of the judiciary and the public at large.

Third: The Law no. 142/2006 granted the judiciary an *independent budget* from the budget of the Ministry of Justice. According to the amendment Law no.142/2006, 'The judiciary and Public Prosecution shall have annual independent budget that is concurrent with the fiscal year of the State. The SJC, in collaboration with the Minister of Finance, shall prepare the budget so that it includes both revenues and expenditures as a single figure. Once endorsed by the Parliament, the SJC, in collaboration with the Minister of Finance, shall distribute the fund on the different sections as followed in the public budget of the state. In spending the budget, the SJC will possess the same powers of the Minister of Finance ...'.[1] Interestingly, the independent budget guarantee is now of constitutional value, as the current Constitution states clearly that 'All judicial bodies administer their own affairs. *Each has an independent budget, which is discussed by the House of Representatives. After approving each budget, it is incorporated in the state budget as a single figure* ...'.[2]

Undoubtedly, the fact that the judiciary outlines and administers its own budget constitutes an indispensable safeguard for the judiciary that would protect it from the domination of the executive authority,[3] in addition to

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[1] Ibid Article 77 (5) *bis*.
[2] The Constitution of Egypt, Article 185.
[3] Mahmoud Al-Khudayri, *supra* note 66, 55.

all issues under its jurisdiction or referred to it. Thus, the distinction, which had existed before the amendment between issues where the Council's approval was binding to the executive authority and others where the Council's opinion was advisory, has been abolished, and all issues now referred to the SJC must be approved by the Council.[1]

The main criticism that has been levelled against the SJC itself relates to its composition. The SJC constitutes of 7 members, the chair of the SJC is the Chief Justice of the Court of Cassation, in addition to the chief of the Cairo Court of Appeal, the Public Prosecutor, the two most senior deputies to the Chief Justice, and the two most senior chiefs of the other courts of appeal (other than the Cairo Court of Appeal).[2] All of those members, except the Public Prosecutor and the Chief Justice, are appointed based solely on their seniority. Whereas the Public Prosecutor and the Chief Justice are both appointed by the President of the Republic who represents the executive authority.[3]

The suggestion that has been proposed by the Judges' Club is that some members of the SJC shall be elected by all judges rather than the current situation,[4] as this will strike some balance within the SJC between seniority and political considerations, on one side, and efficiency and the belonging to the mainstream of judges, on the other. Despite the serious concerns raised regarding the unfortunate outcomes that might result

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[1] Law no. 142/2006. According to Article one of this law "The statement "After the approval of the Supreme Judicial Council" shall replace the statement "After consulting the Supreme Judicial Council" wherever it is mentioned in the Judicial Authority Law, or in any other law that applies to members of 'the ordinary judiciary or public prosecution'.".

[2] Judicial Authority Law Article 77 bis (1).

[3] Fatouh AlShazly and Kareem Alshazly, *supra* note 19, p. 284.

[4] Ibid.

deputies to the Minister of Justice, as Articles 93 and 125 of the Law after the amendment respectively provide that 'The Minister of Justice has administrative supervision over courts. Whereas, each chief justice and general assembly of a court have a supervisory power over all judges affiliated to their respective court', 'All members of the Public Prosecution follow their superiors, and they all follow the Public Prosecutor'. The significance of these amendments is that they sustained the independence of the Public Prosecution in many aspects.[1] One of these aspects is curtailing the authority of the Minister of Justice to issue warnings to judges or members of the Public Prosecution when they fail to perform their duties,[2] in addition to revoking his past right to file a disciplinary case against members of the Public Prosecution,[3] and to suspend any member who is subject to investigations pending its settlement.[4] After the amendment by Law no. 142/2006, all of these authorities of the Minister of Justice were revoked, and it is now the authority of the chief justice or the Public Prosecutor to suspend members of the Public Prosecution who are subject to investigations, or to warn them.[5]

Second: The Law no. 142/2006 has placed the *Supreme Judicial Council as the sole arbiter of all issues that relate to the judiciary and Public Prosecution.* According to the inaugural Article of this law, the authority of the Supreme Judicial Council (SJC) has become absolute in

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[1] Abdallah Khalil, 'The General Prosecutor between the Judicial and Executive Authorities' in Nathalie Bernard-Maugiron (ed.), *Judges and Political Reform in Egypt* (American University Press, Cairo 2008) 65.

[2] Judicial Authority Law no. 46/1972, Articles 94 and 126 before the amendment.

[3] Ibid, Article 129 (1) before the amendment.

[4] Ibid, Article 129 (2) before the amendment.

[5] Ibid, Article 129 (1) and (2) after the amendment.

Justice.[1] Noticeably, these provisions were the subject of serious criticism, as they shed a considerable degree of doubt on the independence of both the judiciary and the Public Prosecution from the executive authority.

Since the beginning of the 1990s,[2] judges have been endeavouring to push forward many amendments to the Judicial Authority Law in order to consolidate their independence. To this end, they have held private meetings and convened in the general assembly of the Judges' Club. They have even entered into bargains with the government,[3] which ended in 2006 by the adoption of Law no. 142/2006 that amended many articles of the current law on Judicial Authority.[4] Furthermore, after the popular uprising in 2011, further guarantees for judicial independence were introduced in the Constitution itself, and not just in the judicial authority ordinary law.

Both the Law no. 142/2006 and the current Constitution have sustained, to a considerable degree, the notion of judicial independence, which could be noticed in several aspects, most importantly are the following:-

First: The *Law no. 142/2006 revoked the fellowship of both the judges, and the Public Prosecutor and his*

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[1] The Judicial Authority Law, Article 93 before the amendment in 2006 provided that "The Minister of Justice has a supervisory power over all the courts and judges", and Article 125 before the amendment in 2006 stated that "Members of the public prosecution follow their superiors, and they all follow the minister of justice".

[2] For a comprehensive account of the process the Judicial Authority Law has been through since 1984 until 2007 see, Fatouh AlShazly, The collective Action of Judges in Egypt, AlHuqooq Journal for Legal Economic Studies, Faculty of Law, Alexandrea University, Vol.1, 2009, 23-83, p. 27. (In Arabic)

[3] Mahmoud Al-Khudayri, 'The Law on Judicial Authority and Judicial Independence' in Nathalie Bernard-Maugiron (ed.), *Judges and Political Reform in Egypt* (American University Press, Cairo 2008) 46.

[4] Law no. 142/2006 amending the Law no. 46/1972 on Judicial Authority. The law came into force on 1 October 2006.

Judicial Independence from the Executive Authority

The degree of independence that the judiciary enjoys from the executive authority in a given country is judged, generally, by the extent to which the Ministry of Justice is allowed to intervene in the affairs of the judiciary; through, for instance, the appointment of its members and their discipline, promotion, budget, distribution and revocation.[1] While, as has been mentioned above, several articles of the Constitution behold the general notion of judicial independence, the devil always lies in the details. The Law no. 46/1972, which organizes the Judicial Authority, includes many aspects of intervention by the Minister of Justice in mainly the administrative affairs of the judiciary.[2] This situation was and still poses a continuous source of resistance and tension between the judges, as a liberal group, and the executive authority, and has been the driving force for many amendments to the current Law on Judicial Authority.

The first important amendment took place in 1984 by the Law no. 35/1984. This Law amended, among others, Article 67, which granted members of the Public Prosecution an irrevocability safeguard similar to their counterparts in the judicial authority, i.e. judges.[3] The amendment, however, kept Articles 93 and 125 of the Law unchanged. These two article, and other articles that followed both of them, provided that judges and members of the Public Prosecution follow the Minister of

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[1] See generally, Mohamed Eid Al-Ghareeb, Textbook on Criminal Procedures Law (2nd edn Al-Nesr Al-Zahabi, Cairo 1997) 1064-1066. (In Arabic)

[2] The Judicial Authority Law, Law no. 46/1972. This Law applies to the ordinary courts only which encompass the civil and criminal courts, but does not apply to the Supreme Constitutional Court or the State Council Courts which have their own laws.

[3] With the exception of the auxiliary prosecutors who are the most junior rank in the public prosecution.

regard, the European Court of Human Rights (ECHR) reiterated that 'the adoption of a law by the parliament concerned in which it declared that certain cases could not be examined by the courts and ordering the ongoing legal proceedings to be suspended, constituted a violation of the independence of the judiciary'.[1]

Nationally, the Supreme Constitutional Court of Egypt (SCC), acting as the guard of constitutional principles, where judicial independence is at the core, has turned down many laws that were perceived as a breach of the principle.[2] In this vein, the SCC considered any law that offers a restriction on the discretion of judges to be a threat to judicial independence and a violation of the separation of powers.[3] In criminal matters specifically, the SCC stressed that 'while the Legislature has the power to define crimes and the appropriate punishment for such crimes, a presumption of liability, in any case, unconstitutionally infringes upon the power of the courts to determine whether or not a crime has been committed, and thus violates both the principle of judicial independence as well as that of the separation of powers'.[4]

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[1] *Papageorgiou v. Greece*, ECHR, 22 October 1997.

[2] Adel Omar Sherif and Nathan J. Brown, 'Judicial Independence in the Arab World' (2002) Program of Arab Governance of the United Nations Development Program, p. 11.

[3] See for example, The Supreme Constitutional Court, Case no. 196, Judicial year no. 35, 8 November 2014; Case no. 31, Judicial year, 20 May 1995; and Case no. 59, Judicial year no. 18, 1 February 1997. (Mentioned in Ibid). In another case, the SCC examined legislation that restricted judicial discretion by preventing judges from issuing injunctions with regard to judicial decisions which levy fines in particular cases. The SCC turned this legislation down as violating the principle of judicial independence. See, The Supreme Constitutional Court, Case no. 37, Judicial year no, 15, 3 August 1996.

[4] The Supreme Constitutional Court, case no. 5, Judicial year no. 15, 20 May 1995.

separation of powers is *a sine qua non* [indispensable] for a democratic State ...'.[1]

Accordingly, the discussion over the institutional independence of the judiciary requires analysis of the relationship between the judiciary, on one side, and the other two authorities, on the other. In addition to the legislative and executive authorities, the judiciary should also be independent from the influence that might be exerted by the media.

Judicial Independence from the Legislative Authority

This form of independence means that the legislator, whether the parliament, or the president of the state, in case he could issue bills that have the force of law, should not issue a law that impinges on the independence of the judiciary. This understanding is justified by the fact that judicial independence as a constitutional principle, shall not be breached, whether explicitly or implicitly, by any ordinary law.[2] In this respect, under the current Constitution any draft law that relates to the organisation of the judiciary, its independence, or any other judicial affair has to be referred first to the SJC for consultation before being discussed and finally endorsed by the Parliament.[3]

Accordingly, it would be considered a violation of judicial independence if the legislator passed a law that restricts the discretionary powers of the criminal courts, or make some governmental acts immune from judicial review, or reorganised the judiciary in a way that resulted in the implicit exclusion of some of the judges. In the this

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[1] Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN document E/CN.4/1995/39, para. 55.

[2] Mohamed Nour Farahat and Ali Al-Sadek, *supra* note 43, 601.

[3] The Egyptian Constitution, Article 185.

judiciary. Accordingly, 'Independence' requires that neither the judiciary nor the judges be subordinate to the other public powers or to other members of the judiciary itself or the society.[1]

In the following lines, judicial independence guarantees under the Egyptian relevant laws will be discussed. The discussion will be conducted on two different levels, namely; the institutional independence of the judiciary, and the individual independence of the judiciary.

The Institutional Independence of the Judiciary

The independence of the judicial institution in any state presupposes that the state concerned adopts and respects the principle of 'separation of powers'. It is thus inconceivable to speak of judicial independence in a totalitarian state where all the powers are claimed by the executive or legislative authority.[2] In this regard, the Council of Europe's Recommendation on the Independence of Judges stresses that '... the executive and legislative powers should ensure that judges are independent and that steps are not taken which could endanger the independence of judges'.[3] The same notion was reiterated by the Special Rapporteur on the Independence of Judges and Lawyers who emphasised that 'the principle of the separation of powers ... is the bedrock upon which the requirements of judicial independence and impartiality are founded. Understanding of, and respect for, the principle of the

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[1] International Commission of Jurists, International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors – A Practitioners Guide, (2nd edn Geneva, 2007) 21.

[2] Mohamed Nour Farahat and Ali Al-Sadek, *supra* note 43, 600.

[3] Council of Europe, Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, 13 October 1994, Principle 2 (b).

Constitution[1] states that 'The state is subject to the law, and *the independence, immunity and impartiality of the judiciary* are essential guarantees for the protection of rights and freedoms'.[2] In another provision, the Constitution emphasises that '*The judiciary is independent.* It is vested in the courts of justice of different types and degrees that issue their judgments in accordance with the law. Its powers are defined by law. *Interference in judicial affairs or in proceedings is a crime* to which no statute of limitations may be applied'.[3] The Constitution also asserts the independence of judges as individuals when it stresses that '*Judges are independent*, and they cannot be dismissed, or subjected to any other authority but the law ...'.[4]

Noticeably, the notion of judicial independence is not limited to the independence of the judiciary as an institution, but also covers the independence of judges themselves as individuals. The institutional independence refers to the autonomy of a tribunal to decide on cases by applying the law to the facts without interference by other branches of power. The individual independence of a particular judge, on the other hand, denotes independence from other members of the

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sorts and competencies, and judgments are issued in accordance with law'. Finally, the 1971 Constitution cuts any doubt as to the independence of the judiciary by asserting in Article 166 that 'judges are independent, subject to no other authority but the law and no authority may intervene in legal cases or in the affairs of justice.'

[1] The current Constitution of the Arab Republic of Egypt was first endorsed in a public referendum that was held on 24 and 25 of December 2012, and was then amended in a later referendum that was held on 14 and 15 of January 2014, and came into force on 18 of January 2014. [Hereinafter the Constitution of Egypt, the Constitution of 2014, or the Constitution].

[2] Ibid Article 94.

[3] Ibid Article 184.

[4] Ibid Article 186.

The importance of judicial independence is inarguable to the extent that elevates it to be one of the fundamental human rights. In this regard, the Universal Declaration of Human Rights (UDHR) provides clearly that 'Everyone is entitled in full equality to a fair and public hearing by an *independent* ... tribunal'.[1] Furthermore, the International Covenant on Civil and Political Rights (ICCPR) asserts that 'Everyone shall be entitled to a fair and public hearing by a competent, *independent* ... tribunal established by law'.[2] These two international instruments are considered as part of a customary international law that binds every state in the world.[3]

Domestically, the importance of judicial independence dictated that the consecutive constitutions of Egypt had to explicitly uphold the principle.[4] Thus, the current

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[1] Universal Declaration of Human Rights, adopted by the United Nations General Assembly at its third session on 10 December 1948, Article 10.

[2] International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly with resolution 2200A (XXI) on 16 December 1966, and entered into force on 23 March 1976, Article 14 (1).

[3] See, United Nations Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. [hereinafter UN Basic Principles on the Independence of the Judiciary]. The UN Basic Principles on the Independence of the Judiciary stipulates in the first Principle that 'The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary'.

[4] For example, the Constitution of 1971, which was in force for 40 years, provided in Article 65 that 'The state is bound by law, and judicial *independence* and immunity are two fundamental guarantees to safeguarding rights and liberties'. In Article 165, the 1971 Constitution emphasised the previous meaning when it stated that 'The judicial authority is independent and justice is carried out by courts of different

Basically, nowadays the Mixed Courts are only talked of in a brief historical context. Nevertheless, nobody can deny their invaluable contribution to the whole process of reforming and developing the current legal and judicial systems of Egypt. It is not overstating to say that the Mixed Courts established the rule of law in Egypt, developed a truly Egyptian court system and provided the base upon which the modern Egyptian Legal System rests. They have created a strong culture of independence and pride among members of the judiciary that could be sensed until today. Their direct influence has waned and receded, but without their existence and work between 1875 and 1949, and without their conscientious and dedicated development and operation, the Egyptian legal and judicial systems of today would have been quite different.[1] The pride and believe in independence that has been instilled in the judiciary as an institution and judges as individuals in this heroic era has acted as a fortified shield against the very strong attacks on judicial independence that occurred in the aftermath of the 1952 revolution,[2] and continues.

The Independence of the Egyptian Judiciary

The judicial institution in Egypt is one of the three main authorities of the Country, alongside its legislative and executive authorities. The Egyptian judiciary prides itself for its liberal culture that has been proclaimed, reinforced and inherited by the consecutive generations of judges throughout the contemporary history of the judiciary.[3]

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[1] Ibid, 67-68.

[2] For more details see, Fatouh AlShazly and Kareem Alshazly, *supra* note 19, pp. 274, 342.

[3] Mohamed Nour Farahat and Ali Al-Sadek, 'Judiciary in Egypt' in 'Judiciary in the Arab Countries (Jordan- Lebanon- Morocco- Egypt) Monitoring and Analysing' (The Arab Centre for the Development of the Rule of Law and Integrity, Beirut 2007) 594. (In Arabic)

jurisdiction of the Mixed Courts could not by any means cover all cases where all parties were Egyptians and where the 'mixed interest' theory couldn't be applied. Thus, there was a need to establish national courts to adjudicate on cases limited to nationals.

Inspired by the success of the Mixed Courts, the decision to establish the National Courts in 1884 represented a shift in several ways, since it created an independent professional judiciary and a hierarchy of courts that has since been supplemented *but never replaced.*[1] Since the authors of the legal and judicial reform which led to the establishment of the Mixed Courts were the same Egyptian elite who called for the establishment of the National Courts, the latter were closely modelled on the Mixed Courts and their codes were based on the Mixed Codes of 1875. Even the judges, who were also a mix of Egyptian and European, tended to follow the Mixed Courts' interpretation of the law.[2]

Thus, as both the Mixed Courts and the National Courts were considered Egyptian Courts applying Egyptian codes, their merge was inevitable. In 1937, the Montreux Treaty was concluded, according to which 'a transition period of 12 years' was given to the Mixed Courts, after which they were to cease to exist and their powers were to be absorbed into that of the purely national courts.[3] By the closure of the Mixed Courts on October 24, 1949, the new judges and lawyers in the years to come tended to resort to the written law. The past jurisprudence of the Mixed Courts was abandoned as a result of the fact that it was written in French.

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[1] Nathan J. Brown, *supra* note 23, 109.
[2] Mark S W Hoyle, *supra* note 34, 60.
[3] Jasper Y. Brinton, 'The Closing of the Mixed Courts of Egypt' (1950) 44 American Journal of International Law 303, 303.

3) Regardless of the origin of the Mixed Codes, they were interpreted by judges employed by Egypt in an Egyptian context. The judiciary had four sources of law: the mixed codes, precedent, custom, and natural law and equity. This variety of sources made it easy for precedents to develop as in English common law. These flexibilities helped to fill in the gaps in the Mixed Codes, especially with the difficulty attached to passing laws applicable to foreigners, as it required complicated agreements. The role of the judges to make law was thus essential. The result of this vibrant and creative role of the judges made the codes of 1875 a framework that was adapted to the needs of Egyptian society. Accordingly, the law in use in the mixed Courts was Egyptian law, not a pale shadow of the foreign law received from abroad, despite of course the open and voluntary acceptance of much foreign legal theory and the practice of retaining leading European lawyers on very important cases.[1] Thus, one of the reasons why the judgments of the Mixed Courts were respected was that they were not seen by Egyptians as foreign entities, but national ones applying national laws.

However, it should be borne in mind that the jurisdiction of the Mixed Courts was limited to conflicts including a foreign party, which meant not Egyptian or Othman. Although the Mixed Courts tried to stretch its jurisdiction to cover every case where 'mixed interest' was to be found, even when the actual parties to the suit were both Egyptians, and although this principle of 'mixed interest' was applied absolutely in corporate law where all Egyptian companies were brought under the subject matter jurisdiction of the mixed Courts,[2] the

[1] Ibid 64.
[2] Gabriel M. Wilner, *supra* note 31, 414.

government and even later the British occupiers of the country.[1] The several attempts to paralyse the regular operations of the courts or to hinder the execution of their judgments were aborted. Their firmness in dealing with the government even reinforced their independence. That is why, in 1926, the general Prosecutor of the mixed Courts, Leon Pongola, called the period of tension between the government and the occupiers, on one side, and the Courts, on the other, a 'heroic age'.[2]

On the political arena, the Mixed Courts were considered Egyptian courts which rendered justice in the name of Egypt, and thus reduced the foreign abuse of the Egyptian system. Furthermore, on the legal arena, the Mixed Courts could be considered the milestone and the origin of modern judicial system in Egypt. Their role can be summarized in the following points:

1) Justice depends on the merits of the case and not on the power of the litigant. In many incidents, the mixed Courts proved to be independent even from the khedive himself. For example, the khedive Ismail was removed from power in 1879 after he refused to pay certain debts.[3]

2) The judiciary could not be pressured or introduced into a particular decision, whether directly or indirectly. Cases were decided for reasons explained in the judgment, which was declared in public. The nationality of the judge rarely mattered since his loyalty was to the court and the law.[4]

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[1] See *infra*.

[2] Isabelle Lendrevie-Tournan, *supra note* 25, 28.

[3] Mark S W Hoyle, 'The Mixed Courts of Egypt: An Anniversary Assessment' (1985) 1 Arab Law Quarterly 60, 62; For more details and examples see Isabelle Lendrevie-Tournan, *supra note* 25, 40-43.

[4] Ibid 63.

'independent and powerful'.[1] He wanted absolute control of the Egyptian judiciary and law over legal conflicts taking place in Egypt, regardless of the nationality of the parties. That ambitious plan needed the endorsement of not only the khedive but also the foreign powers, mainly Europeans.[2] To achieve his goal, Nubar's proposal included the following two features:

1) The establishment of mixed courts located in Egypt and manned by Egyptian as well as European judges.
2) The adoption of new codes mainly derived from a European model.

In July 1875, after eight long years of negotiations, the 14 capitulatory powers agreed to the reforms which were embodied in the charter of the Mixed Courts. In the same year, the Egyptian government published the six 'Mixed Codes', inspired and closely copied from European continental legislations, notably the Napoleonic Code,[3] which the Mixed Courts were to apply. In February 1876, the various Mixed Courts, summary courts, courts of first instance, and the mixed courts of appeal in Alexandria, held their first sessions.[4]

The first result of the establishment of the Mixed Courts was the suspension of the capitulatory privileges and the limitation of the jurisdiction of the consular courts to a considerable degree.[5] Furthermore, the 'Mixed Courts' or 'Courts of the Reform' enjoyed from the outset a considerable degree of independence from both the

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[1] Isabelle Lendrevie-Tournan, *supra* note 25, 30.
[2] Ibid.
[3] For more details on the reasons why Egypt opted for a Civil Law rather than a Common Law System, see Nathan J. Brown, *supra* note 23, 115.
[4] Isabelle Lendrevie-Tournan, *supra note* 25, 28.
[5] Gabriel M. Wilner, 'The Mixed Courts of Egypt: A study o the Use of Natural Law and Equity' (1975) 5 Georgia Journal of International and Comparative Law 407, 410.

With the construction of the Suez Canal (1859–1869), the Nile delta region became an international crossroads. During the reigns of Viceroy Said Pasha (1853–1863) and khedive Ismail (1863–1879), Egypt experienced an economic boom as a result of an increased volume of commercial transactions between Egypt and Europe, an extensive influx of European capital, mainly French, and the settlement of numerous Levantines and Europeans in Egypt.[1] Accompanying this economic boom there was a need for an advanced legal and judicial system instead of the sporadic old one, or as described by Nubar Pasha 'Judicial Babel'.[2]

Nubar Pasha, the Prime Minister and Foreign Minister of Egypt, proposed to khedive Ismail in 1867 that legal and judicial reforms of the country should be carried out in order to put an end to the 'secular arbitrariness' of Egyptian government and to enable Egypt to become

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privileges in Egypt, or what were known as capitulations. These capitulations were granted to them by the Caliph of Egypt in the 12th century and by Othman Sultan at Constantinople from the 16th to 18th centuries to encourage foreign commerce. The most important and relevant of these capitulations relates to legal and judicial jurisdiction, according to which, in the 19th century the foreigner was entitled to two kinds of capitulations; First, jurisdictional immunity: where the foreigner was free from the jurisdiction of all but the courts of his own country according to the maxim *actor sequitor forum rei.* Second, legislative immunity: as a result of the jurisdictional immunity, the foreigner also enjoyed legislative immunity, since Egyptian law was not applied before his own country's court. These forms of immunity were practiced in Egypt by what were called consular courts, which, by the beginning of the 18th century, all the European states had already established as part of their own diplomatic and consular service in the whole Othman empire, including Egypt.

[1] Isabelle Lendrevie-Tournan, 'The Development of Relations between the Mixed Courts and the Executive Authority in Egypt (1875-1904)' in Nathalie Bernard-Maugiron (ed.), *Judges and Political Reform in Egypt* (American University Press, Cairo 2008) 27.

[2] James Henry Scott, *supra* note 24, 386.

model with limited Islamic *sharia* influence. When the Islamic conquest came to Egypt in the 7th century, the legal and judicial systems of Egypt were, mainly, based on the Islamic *sharia* legal system.[1] However, when the rule of the Mohamed Ali family begun in the early 19th Century, 1805, the Egyptian legal and judicial systems underwent a gradual, though significant, transformation towards the western European model.[2]

First, Mohamed Ali embarked on restricting the jurisdiction of *sharia* courts, which were operating at the time, through the creation of specialized councils to decide on certain types of disputes. Notably, these specialised councils kept growing over time.[3] Thus, later there were councils for criminal, commercial, administrative and military matters, which by the end limited the jurisdiction of *sharia* courts to personal status issues. In 1856, the already limited jurisdiction of *sharia* courts was restricted even more when an act was passed establishing fourteen new councils to handle family status matters for every non-Muslim group within the state. Interestingly, the abovementioned national judicial system was, as a whole, restricted by the fact that its jurisdiction was limited to the disposition of cases that occur between nationals, and thus whenever a foreigner, mainly European, is party to a dispute, the jurisdiction to hear the case was given to the consular courts of his or her own country.[4]

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[1] Ibrahim Awad, *The Judiciary in Islam: Its History and Organisation* (Islamic Research Institute Publications, Cairo 1975) 101. (In Arabic)

[2] Adel Omar Sharif, 'An Overview of the Egyptian Judicial System, and its History' (1999) 5 Yearbook of Islamic and Middle Eastern Law. 3, 12.

[3] Nathan J. Brown, 'Law and Imperialism: Egypt in Comparative Perspective' (1995) 29 Law and Society Review. 103, 109.

[4] James Henry Scott, 'The Judicial System of Egypt' (1906-1907) 18 Juridical Review 386, 386; Before 1876, Europeans enjoyed special

principle that might raise concerns regarding the willingness of the judicial system. Finally, this Article will highlight the rules that govern the issue of timing in criminal proceedings within the Egyptian legal system and the possibility for delays.

However, before examining the willingness of the Egyptian judicial system, it is important to offer a brief introduction on the origin and development of the contemporary legal and judicial systems of Egypt. The significance of this introduction to the overall research is that it provides the background against which this legal and judicial systems are judged and understood.[1]

Accordingly, the outline of this Article is as follows:

1. Overview of the Contemporary Judicial and Legal Systems of Egypt
2. The Independence of the Egyptian Judicial System
3. The Impartiality of the Egyptian Judicial System
4. The Natural Judge Principle and its exceptions under the Egyptian Legal System
5. The Prosecution without Undue Delay
6. Concluding Remarks: Observations and Proposed Amendments

Overview of the Contemporary Judicial and Legal Systems of Egypt

The existence of an organised judicial system has always been a firmly established feature in the Egyptian society, which goes back to the early years of the ancient Egyptian state.[2] The contemporary legal and judicial systems of Egypt, however, mainly follow a continental

[1] For the same view see, Fatouh AlShazly and Kareem Alshazly, The Independence of the Egyptian Judicial System: Reality and Aspirations, AlHuqooq Journal for Legal Economic Studies, Faculty of Law, Alexandrea University, Vol.2, 2010, 239-254, p. 271. (In Arabic)

[2] Fathy Al-Marsafawy, *The History of Egyptian Law* (Dar Al-Fekr Al-Arabi, Cairo 1982) 161. (In Arabic)

Significantly, in assessing the unwillingness of the national jurisdictions, several factors may be taken into account, *inter alia* , flawed or lack of constitutional safeguards for the independence and impartiality of the judiciary; institutional deficiencies regarding the independence and impartiality of the judiciary, which might occur when an investigative, prosecutorial or judicial branch is subjected to the influence of the political authority, or when it is established that there is systematic interference of the executive power in judicial affairs. Unwillingness could also be established in the case of resorting to special courts and tribunals or extrajudicial commissions of enquiry, the lack of mechanisms ensuring adequate protection of witnesses, or the obstruction or unjustified delay in criminal proceedings, especially when it is attributed to the involvement of political authorities.[1]

Accordingly, having this understanding in mind, this Article, first, conducts an in-depth analysis of the legal foundations and principle requirements for the independence and impartiality of the judiciary as enshrined in the Egyptian legal system. The goal of this analysis is to examine the extent to which the Egyptian legal system respects the principles of due process recognised in international law generally and enshrined under Article 17 (2) of the Rome Statute specifically. Then, the natural judge principle, which is a closely related concept to the requirements of independence and impartiality, is examined. The relevance of the natural judge principle to the current discussion becomes double-folded if one knows that the Egyptian legal system encompasses exceptions to this significant

[1] Representing Victims before the International Criminal Court: A Manual for legal representatives, ICC, The Office of Public Counsel for Victims, 4th edn, December 2014, p. 15.

(c) The *proceedings were not or are not being conducted independently or impartially*, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice".[1]

Accordingly, it could be clearly noticed from the abovementioned indicators of unwillingness that they have been introduced to achieve a principal goal, which is to circumvent the national procedures that aim exclusively at shielding the person concerned from being held responsible before the ICC. The other two indicators of unwillingness are in fact routs that lead to the same outcome, which is shielding the concerned person, whether through unjustified delays, or conducting proceedings that do not satisfy the requirements of being independent and impartial.[2]

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[1] Ibid Article 17 (2).

[2] For a detailed discussion of the unwillingness test see, Kevin Jon Heller, 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process' (2006) 17 Criminal Law Forum. 255, 261, 277. Federica Gioia, 'State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court' (2006) 19 Leiden Journal of International Law. 1095, 1110-1113. Enrique Carnero Rojo, 'The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From 'No Peace without Justice' to 'No Peace with Victor's Justice'?' (2005) 18 Leiden Journal of International Law. 829, 835. Federica Gioia, 'Comments on Chapter 3 of Jann Kleffner' in Jann K. Kleffner and Gerben Kor (eds.), Complementary Views on Complementarity (TMC Asser Press, The Hague 2006) 110-113. John T. Holmes, 'Complementarity: National Courts versus the ICC' in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds.), The Rome Statute of the International Criminal Court: A Commentary (OUP, Oxford 2002) 675. Harmen van der Wilt and Sandra Lyngdorf, 'Procedural Obligations under the European Convention on Human Rights: Useful Guidelines for the Assessment of 'Unwillingness' and 'Inability' in the Context of the Complementarity Principle' (2009) 9 International Criminal Law Review. 39, 64.

case,[1] or if the person that the ICC seeks to prosecute for a crime under the Statute has already been tried nationally for the same act, as such prosecution by the Court will contradict with the well established principle of *ne bis in idem* or double jeopardy.[2]

Interestingly though, not all national investigations or prosecutions of persons who supposedly committed crimes under the jurisdiction of the Court will inevitably result in excluding such cases from reaching the docket of the ICC, since the same article, Article 17, contemplates situations where national criminal proceedings will not be recognised by the Court as valid procedures that would bar its jurisdiction. Such situations occur when the national criminal procedures reveal the unwillingness of that state to genuinely carry out the investigations or prosecutions.

Being aware of the uncertainty and vagueness of the term unwilling, the second paragraph of Article 17 provides a definition thereto. According to such definition, the Court shall consider the state unwilling, having regard to the principles of due process recognized by international law, if one or more of the following situations exist:-

"(a) The proceedings were or are being undertaken or the national decision was made *for the purpose of shielding the person concerned* from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5;

(b) There has been an *unjustified delay in the proceedings,* which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

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[1] Rome Statute, Article 17 (1).

[2] Ibid Article 20.

purpose, the research proposes number of amendments to the national laws that would bar the jurisdiction of the ICC over future core crimes that might occur in Egypt, which at the end would ensure the primacy of the Egyptian judiciary over the ICC.

In order to set *the parameters of this article*, it is important to stress that this research does not intend to focus on the historical foundations or the theoretical examination of the jurisdiction of the ICC, nor the definition of the core crimes under its Statute, as these issues have been the subject of massive literature.[1] Rather, the article endeavours specifically to examine the willingness of the Egyptian judicial system as a model for a country that has signed the Statute, and seeks to sustain due process guarantees nationally before it decides to ratify it. Certainly, whether such ratification will ever occur is not purely a legal question, but it depends heavily on political considerations.

Significantly, before examining the willingness of the Egyptian judicial system, a brief introduction of the willingness ground of admissibility as defined under the Rome Statute is warranted. That, under the Statute, a case would be considered inadmissible by the Court, if it is being investigated or has already been investigated by any state in the world that has jurisdiction over such

[1] See for example, William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP, Oxford 2010); Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (OUP, Oxford 2008); Michael A. Newton, 'Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court' (2001) 167 Military Law Review. 20; Johan D. van der Vyver, 'Personal and Territorial Jurisdiction of the International Criminal Court' (2000) 14 Emory International Law Review. 1; Timothy L H McCormack and Sue Robertson, 'Jurisdictional Aspects of the Rome Statute for the New International Criminal Court' (1999) 23 Melbourne University Law Review. 635.

developed and influential judicial and legal structures in the Arab world,[1] has signed the Rome Statute,[2] yet it has not ratified it. Thus, many of the questions concerning the willingness of its judicial system are still unanswered, especially after the legal revolution that followed the popular uprising in 2011, and continues until today. This legal revolution has left its significant impact, not only on the Constitution of the Country which has changed several times since 2011, but also on pertinent ordinary laws that have been widely amended to sustain due process guarantees and the right to a fair trial.

This Article, thus, *is one of the first pieces of research in the English language, to offer a contemporary analysis of the current Egyptian Constitution of 2014 and all pertinent laws on due process guarantees deemed relevant under Article 17 of the Rome Statute.* The research aims from this analysis to *acclaim and recognise due process guarantees enshrined and practiced by the sophisticated and advanced criminal judiciary of Egypt.* Furthermore, the research seeks to *pinpoint loopholes and deficiencies of the current Egyptian laws that might render the Egyptian judiciary unwilling to prosecute under the Rome Statute.* For this

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[1] Nathan J. Brown, 'Arab Judicial Structures', A study presented to the United Nations Development Program:
Programme on Governance in the Arab Region (POGAR), p. 16. Available online at:http://www.deontologie-judiciaire.umontreal.ca/fr/textes%20int/documents/ONU_STRUCTURE_JUDICIAIRE_ARABE.pdf (Last visited on 31 October 2017). The reason behind the importance and influence status of the Egyptian legal and judicial systems in the Arab region is that the modern judicial and legal reforms in Egypt began much earlier than other countries in the region, and thus many Arab countries have drawn on Egyptian models or resorted to Egyptian experts when embarking on their own programmes of judicial reform.

[2] Status of the Rome Statute of the International Criminal Court, *supra* note 2. Egypt signed the Rome Statute on 26 December 2000.

community.[1] Thus, under the Statute, the ICC cannot declare any criminal case admissible except after being certain that national jurisdictions are not truly *willing* to exercise their jurisdiction.[2] Interestingly, the Statute sets fairly objective criteria for the willingness of national proceedings, yet it remains the responsibility of each state to sufficiently fulfil such criteria in order to assert its primary jurisdiction, and the ICC, as widely upheld, has an obligation to proactively assist states in their efforts to prosecute the perpetrators of the core crimes,[3] rather than pinpointing their deficiencies to prey on a case.[4]

This research examines the *willingness* of the Egyptian judicial system to prosecute the core crimes within the parameters of the Rome Statute. Notably, the Egyptian model offers an important case study in this regard. That, Egypt, which has one of the most highly

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[1] Rome Statute, Article 1 provides clearly that 'An International Criminal Court ('the Court') is hereby established ... and *shall be complementary to national criminal jurisdictions* ...'.

[2] Ibid Article 17.

[3] See for example, William W. Burke-White, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice' (2008) 19 Criminal Law Forum. 59; Lisa J. Laplante, 'The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court's Sphere of Influence' (2010) 43 John Marshall Law Review. 635; Susan Sacouto and Katherine Cleary, 'The Katanga Complementarity Decision: Sound Law but Flawed Policy' (2010) 23 Leiden Journal of International Law. 363; Rod Rastan, 'Testing Co-operation: The International Criminal Court and National Authorities' (2008) 21 Leiden Journal of International Law. 431; Carsten Stahn, 'Complementarity: A Tale of Two Notions' (2008) 19 Criminal Law Forum. 87, 102.

[4] In the words of the Office of the Prosecutor of the ICC '... *much of the work done to achieve the goals of the Statute may take place in national judiciary around the world.* Thus, the number of cases that reach the Court is not a positive measure of effectiveness. *Genuine investigations and prosecutions of serious crimes at the domestic level may illustrate the successful functioning of the Rome system*'. See, ICC, Office of the Prosecutor, Prosecutorial Strategy 2009-2010 (Feb. 1, 2010) para. 79.

Article 5 of the Statute, the core crimes under the Court's jurisdiction are namely; the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.[1]

Unlike, the International Criminal Tribunals for the former Yugoslavia and Rwanda, which had primacy over national judicial systems,[2] the Statute unequivocally stipulates that the ICC is established as a court of last resort in order to complement national criminal jurisdictions in their endeavour to prosecute the most serious crimes of concern to the international

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Genocide Convention and Geneva Conventions. *The International Law Commission also recognized their punishability* in Articles 17, 18 and 20 in the 1996 Draft Code of Offences against the Peace and Security of Mankind. Furthermore, *core international crimes involve the violation not only of rules of conventional law, but also of customary international law*. Accordingly, domestic courts or international tribunals can prosecute such crimes pursuant to customary international law, even if a state has not ratified any international instrument regarding the prosecution of core international crimes'. For more details *see*, Morten Bergsmo, Mads Harlem and Nobuo Hayashi, *Importing Core International Crimes into National Law* (Torkel Opsahl Academic EPublisher, Oslo 2010); Steffen Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case'. (2002) 13 European Journal of International Law. 4, 877-893; Kotzeva, Anna, Natasha Vicary, and Manuel J. Ventura, 'Incorporating core crimes under the Rome Statute into domestic legislation: temporal jurisdiction', Papers Presented at the 10th Commonwealth Association of Legislative Counsel Conference, 9-11 February 2011, Hyderabad, India. 2012.

[1] The Rome Statute, Article 5 (1) states under the title 'Crimes within the jurisdiction of the Court' that 'The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression'.

[2] See, Article 9 (2), Statute of the International Criminal Tribunal for the former Yugoslavia; and Article 8 (2), Statute of the International Criminal Tribunal for Rwanda.

Introduction

July 17th, 1998 marked the adoption of the Rome Statute,[1] that established the first Permanent International Criminal Court (ICC) in the history of mankind. The Statute, which was adopted in 1998 by 120 states, and entered into force in July 2002, has, as of March 2016, acquired the signature of 138 states, and been ratified by 123 states that thus became members to the ICC.[2]

According to the Statute, the ICC is established to prosecute persons who commit the most serious crimes of concern to the international community.[3] These crimes are explicitly enumerated in the Statute to reflect the four core crimes in international criminal law.[4] Pursuant to

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[1] The Rome Statute of the International Criminal Court, signed on 17 July 1998 in Rome and entered into force on the 1st of July 2002. [hereinafter the Statute or the Rome Statute].

[2] Status of the Rome Statute of the International Criminal Court, United Nations Treaty Collections, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en (last visited on 18 January 2018).

[3] The Rome Statute, Article 1 provides that 'An International Criminal Court ('the Court') is hereby established. It *shall be a permanent institution* and shall have the power to *exercise its jurisdiction over persons for the most serious crimes of international concern*, as referred to in this Statute ...'.

[4] As correctly described in Ruth A. Kok, *Statutory limitations in international criminal law* (TMC Asser Press, The Hague 2007) 16-17. Core international crimes are distinguished by specific characteristics. '*They have been defined in Statutes of various international tribunals*, such as the Charters of the Nuremberg International Military Tribunal, the Military Tribunal for the Far East, the Statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the 1998 ICC Statute, and *in specific international instruments*, such as the

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