

IFES STATE OF THE JUDICIARY REPORT SERIES

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# STATE OF THE JUDICIARY REPORT:

EGYPT 2003

*April 2004*

*Editors*

ACRLI

IFES

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The author of this State of the Judiciary Report for Egypt chose to remain anonymous.

This State of the Judiciary report was commissioned by the Arab Center for the Rule of Law and Integrity (ACRLI), a Lebanese non-governmental organization founded to strengthen the Rule of Law, fight societal and governmental corruption and build the foundations of fair, efficient and independent justice systems within the Arab world.

This State of the Judiciary Report for Egypt was edited by Professor Keith Henderson, IFES Senior Rule of Law Advisor, and Violaine Autheman, IFES Rule of Law Advisor, who are also the sole authors of the Executive Summary and of Chapter 1 of this Report. They are also entirely responsible for the analytical conclusions in the Judicial Integrity Principles Index (JIP), which attempts to evaluate the level of compliance with the Judicial Integrity Principles, included in the Executive Summary and in Annex 2. It should be noted they are also solely responsible for edits made to the English version and thus accept full responsibility for any inadvertent errors or misinterpretations of the Report from Arabic to English.



**STATE OF THE JUDICIARY REPORT  
EGYPT, 2003**

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**EXECUTIVE SUMMARY AND ANALYTICAL EVALUATION,  
STATE OF THE JUDICIARY, EGYPT, 2003**

The 2003 State of the Judiciary Report represents a first for Egypt and the Middle East region in several important respects.

First and foremost, it establishes, within a strategic regional framework and clear set of indicators, baseline information concerning Egypt's efforts to comply with key international and constitutional obligations related to judicial independence. In future years, progress or regression on judicial reforms can now be systematically reported on and monitored by both governments and civil society, on an annual basis. At the same time, this Report can be used as model for other Arab countries and as a tool for various reformers and advocacy groups to highlight reforms and important problems that need immediate attention. It incorporates many of the essential democratic ingredients for creating the legal enabling environment for a Rule of Law culture in Egypt within a Middle East context.

This Report is also important because it builds upon constitutional consensus principles and priority reforms that have emerged in the region over the years, including the *Beirut Declaration* and *Cairo Declaration on Judicial Independence* in 1999 and the *Cairo Declaration on Judicial Independence* in 2003. Both of these important Arab legal milestones chart the path and highlight the need for judicial independence and they, along with the State of the Judiciary Report, serve as important tools to promote the actual implementation of the judicial independence provisions enshrined in the Egyptian Constitution. Since most Arab constitutions also embrace the principle of judicial independence, they should likewise benefit from this country report and the regional tools that preceded it.

The analysis in this Report makes it clear that implementing the principle of judicial independence in Egypt is not going to be an easy task in the current political environment. However, it is also clear that even under very problematic political circumstances some progress has been made over the years. Some of the key fundamental rights of citizens appear to be somewhat intact and alive in Egypt, such as the right to an attorney and the right to a public hearing. Moreover, the original legal and constitutional framework is in many respects sound, although the subsequent passage of various conflicting laws and decrees has posed high hurdles to its actual implementation.

Some of the most important barriers are the laws and decrees that establish a series of exceptional tribunals and military courts that have sometimes been used to usurp the constitutional powers of the regular courts and the constitutional rights of Egyptian citizens to a fair, speedy trial before an independent judge. In this regard, the role of the Minister of Justice and the military courts appear to be particularly problematic issues that need immediate attention. The report includes an examination of twelve universal and constitutional judicial independence principles. Because our analysis leads us to conclude that Egypt has not implemented most of them in practice, Egypt's overall compliance is deemed to be unsatisfactory.

IFES hopes this Report represents just the initial outlines of a country and regional judicial portrait that reformers will continue to capture in the years ahead. At a minimum, we believe it is an important first step to implementing the Constitution and to providing all Egyptian citizens their universal and constitutional right to justice.

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*State of the Judiciary Report*

*Egypt, 2003*

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## Egypt State of the Judiciary: Analytical Evaluation of the Level of Compliance with the Judicial Integrity Principles, JIP

JIP	SCOPE OF THE JIP (NAME OF THE PRINCIPLE)	COMPLIANCE <sup>1</sup>
1	Constitutional guarantee of judicial independence	Gray
	Guarantee of the right to a fair trial	Black
2	Institutional independence of the judiciary	Black
	Personal/decisional independence of judges	Gray
3	Clear and effective jurisdiction of ordinary courts	Black
4	Adequate judicial resources and salaries	Black
5	Adequate training and continuing legal education	Gray
7	Fair and effective enforcement of court judgments	Gray
9	Objective and transparent selection and appointment process	Black
11	Fair, effective, objective and transparent disciplinary process	Black
13	Conflict of interest rules	White
14	Income and asset disclosure	Black
17	Judicial access to legal and judicial information	Black
18	Public access to legal and judicial information	Black

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1 The level of compliance with each Judicial Integrity Principle (JIP) or each subcategory of a JIP is coded as follows: white corresponds to "satisfactory"; gray to "partially satisfactory"; and black to "unsatisfactory". There is an additional nuance in the assessment of the level of compliance as arrows pointed upwards or downwards indicate, respectively, improvement or regression within one category.

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## CHAPTER 1

### STATE OF THE JUDICIARY REPORT, A TOOL FOR MONITORING AND REPORTING ON PRIORITY JUDICIAL INTEGRITY REFORMS

#### I. Judicial Integrity Consensus Principles and Best Practices

Both the IFES Judicial Integrity Principles and the IFES Model State of the Judiciary Report were prepared over the course of a two-year timeframe during which IFES organized country and regional workshops and conferences in virtually all regions of the world. It was first presented formally during a Workshop on Judicial Integrity at the 11<sup>th</sup> Transparency International Global Conference held in Seoul, South Korea, May 25-28, 2003. Panelists and participants at various workshops and conferences, including judges, international and national human rights monitoring groups, donors and the business community, all strongly endorsed the need for a systematic monitoring and reporting framework as an effective tool to promote judicial integrity, priority transparency and accountability reforms, and more public confidence in the judiciary.<sup>2</sup>

#### **IFES Rule of Law Tools: Judicial Integrity Principles, JIP**

- JIP.1** Guarantee of judicial independence, the right to a fair trial, equality under the law and access to justice
- JIP.2** Institutional and personal/decisional independence of judges
- JIP.3** Clear and effective jurisdiction of ordinary courts and judicial review powers
- JIP.4** Adequate judicial resources and salaries
- JIP.5** Adequate training and continuing legal education
- JIP.6** Security of tenure
- JIP.7** Fair and effective enforcement of judgments
- JIP.8** Judicial freedom of expression and association
- JIP.9** Adequate qualification and objective and transparent selection and appointment process
- JIP.10** Objective and transparent processes of the judicial career (promotion and transfer processes)
- JIP.11** Objective, transparent, fair and effective disciplinary process
- JIP.12** Limited judicial immunity from civil and criminal suit
- JIP.13** Conflict of interest rules
- JIP.14** Income and asset disclosure
- JIP.15** High standards of judicial conduct and rules of judicial ethics
- JIP.16** Objective and transparent court administration and judicial processes
- JIP.17** Judicial access to legal and judicial information
- JIP.18** Public access to legal and judicial information

The JIP represent high priority consensus principles and emerging best practices found in virtually all global and regional governmental and non-governmental instruments and key international case law related to the independence and impartiality of the judiciary. They attempt to capture the current state-of-the-art meaning of the term “judicial independence”, since this fundamental principle is found in virtually all democratic constitutions and many international treaties, guidelines and documents. The JIP also attempt to incorporate and build upon the principles and information contained in important monitoring tools and reports, such as the American Bar Association’s Judicial Reform Index; the Open Society Institute Judicial Independence Accession Reports; the International Commission of Jurists Reports; the US State Department’s Annual Human Rights

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<sup>2</sup> These panelists and participants included judges; parliamentarians; representatives of civil society organizations, such as human rights groups and the media; representatives of international organizations, such as the World Bank, the Inter-American Development Bank and the Council of Europe; bilateral donors; legal scholars; lawyers.

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Reports, the United Nations, OAS and Council of Europe Human Rights and Anticorruption instruments; and the work of Amnesty International and Human Rights Watch.

More than anything else, however, the JIP global framework is geared towards prioritizing judicial reforms and democratizing judiciaries. Global lessons learned tell us that this is one of the key challenges confronting most established and emerging democratic countries over the next several decades and that this is the best way to establish broad-based support for more independent, accountable judiciaries worldwide. The JIP are intended as a global analytical tool designed to annually assess technical and actual compliance with core, judicial integrity principles and to promote a regional and global strategic judicial reform agenda on a country-by-country basis.

The JIP promote best practices, lessons learned and comparative, systematic research by focusing on and emphasizing a reform agenda aimed at fostering an enabling environment and legal culture necessary for the Rule of Law to take root. For purposes of this paper, “judicial integrity” covers a wide range of independence and accountability issues related to both the institution of the judiciary and judges as individual decision-makers. IFES believes using the term “judicial integrity” to capture the contemporary, full meaning of judicial independence, and then developing a strategic framework around that evolving definition, will help promote the concrete implementation of a fundamental constitutional principle. We believe it will also serve to emphasize how important it is to carefully balance independence and accountability issues and to simultaneously promote prioritized, inextricably linked reforms that also need to be undertaken.

## **II. IFES Rule of Law Toolkit**

The JIP represent the core framework principles that should be included in any country State of the Judiciary Report. The JIP and this annotated outline for a State of the Judiciary Report are components of the IFES Rule of Law Toolkit, which has been designed to provide civil society, reformers and other stakeholders with standardized and flexible tools to promote and undertake reform. While well-conceived regional and global indexes and reports provide necessary guidance and support to those using them, the key to their proper interpretation is that they take into account the country context within which they are developed.

The guidance provided by the IFES tools is considered to be a work in progress, and the tools are designed to integrate and promote evolving regional and international consensus principles. IFES has now formed a small, informal advisory group, the IFES Judicial Integrity Working Group, to refine these tools and methodology. Distinguished members of the working group include Judge Sandra Oxner of Canada, Judge Clifford Wallace of the United States, Chief Justice Hilario Davide, Jr. of the Philippines and Judge Luis Fernando Solano, President of the Constitutional Chamber of the Supreme Court of Costa Rica.

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### III. A Model State of the Judiciary Report: Multiple Purposes; Multiple Constituencies

#### IFES Rule of Law Tool:

#### Multiple Uses of the Annual State of the Judiciary Report

- (i) Making judicial integrity and justice sector reforms, particularly those related to human rights higher-priority reform issues across regions;
- (ii) Developing broad-based coalitions and judicial reform strategies around a common justice reform agenda within countries and across regions;
- (iii) Developing strategic concrete action plans designed to implement prioritized justice reforms based on global, regional and country best practices;
- (iv) Presenting prioritized recommendations for the development of strategies and policies and for a legal and judicial reform agenda;
- (v) Providing the public, the media and the broader indigenous and international legal communities with the essential information they need to promote justice reforms and develop public trust in the Rule of Law;
- (vi) Reporting on justice reform progress or regression through uniform but flexible indicators and monitoring standards that could be used to justify more resources domestically and increased donor and technical assistance;
- (vii) Promoting higher quality empirical research, monitoring and reporting as well as coordinated, strategic action among reformers and international organizations and donors and more peer pressure among all actors in the reform process;
- (viii) Enhancing the importance of the judiciary and the status of judges;
- (ix) Increasing the quality of information on the judiciary and key judicial integrity principles and access to that information;
- (x) Increasing the public understanding of and respect for the judiciary;
- (xi) Providing judges, the legal community, reformers and civil society with the tools and information necessary to advocate for reform and funding domestically and internationally; and
- (xii) Qualifying for donor assistance through the new Millennium Challenge Account and meeting terms of conditionality through the international financial institutions and development banks, such as the IMF, World Bank, IDB, ADB and EBRD, and free trade and anti-corruption conventions and protocols.

After IFES reviewed a number of judicial reports from around the world, including those promulgated by various judiciaries or human rights groups, the need to design a standardized, structured framework for an annual report assessing the state of the judiciary became very clear. IFES found no model State of the Judiciary Report in any country in the world, including the United States. It also found minimal lessons learned, best practices or comparative information or research, including underdeveloped and non-prioritized judicial and legal reform measurements of progress, such as those under consideration by the new Millennium Challenge Account in the United States.

IFES believes the JIP may be used by civil society organizations and judges to prepare an annual State of the Judiciary Report that could serve to promote high-priority reforms and as a baseline monitoring, reporting and implementation tool for establishing the enabling legal environment to globalize the Rule of Law. These country-

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specific reports should be written in a participatory process, including the input of civil society organizations, judges and legal practitioners. A country's annual report should be as "national" a product as possible, in order to be useful to the local judiciary and local civil society groups. It should also be understandable and accessible to all local stakeholders and include both a technical and applied analysis of the law and practice. At a minimum, IFES hopes the analysis and framework offered here will spark more debate and attention to what has been the most neglected and probably least appreciated institution in the democratizing world.

## IV. Cairo Declaration

In February 2003, IFES co-organized and provided technical and financial support to *The Second Justice Conference: towards Supporting and Promoting the Independence of the Judiciary* in Cairo, Egypt. IFES partnered with an Egyptian NGO, the Arab Center for the Independence of the Judiciary and the Legal Profession, which is one of the most respected organizations working on judicial issues in the Middle East. The Program on Arab Governance (POGAR) of the United Nations Development Program, the United Nations High Commissioner for Human Rights and the Ford Foundation also provided financial support. The conference brought together current and retired judges as well as NGOs, human rights groups and academics from throughout the Middle East and North Africa.

The conference aimed primarily at exploring "the status of the independence of the judiciary in the Middle East and North Africa." More specifically, the conference was organized "to further examine the requirements of an independent judiciary at international law in order to draft a 'covenant of independence' through which progress regarding independence of the judiciary in the region can be implemented, measured and monitored." While discussion of the research and lessons learned in the IFES/USAID publication *Guidance for Promoting Judicial Independence and Impartiality* was a significant element of the conference, the event was also used to establish a high-priority judicial reform agenda and analytical framework for monitoring and reporting on reforms and the state of the judiciary, which was captured in the *Cairo Declaration*. The *Cairo Declaration* was the first consensus document in the region to provide a living framework for monitoring and reporting on the reforms underway with participation from civil society and representatives of the executive, the legislature, and the judiciary.

### Highlights of the *Cairo Declaration*

- Building a coalition to promote and support judicial independence;
- Promoting a commitment by the three branches of the State;
- Ensuring participation of civil society;
- Adopting a code of conduct for judges;
- Increasing transparency in the judicial career and its rules;
- Promoting judicial training; and
- Guaranteeing the fair and effective enforcement of judgments.

The agreement reached by representatives of various constituencies throughout the Middle East and North Africa to support the strengthening of judicial independence and the Rule of Law has the potential to change, over time, the judiciary as an inefficient and often impotent institution that is neither independent nor accountable. The monitoring and reporting process advanced is designed to promote the actual implementation of constitutional provisions related to the independence of the judiciary and the protection of human and property rights in countries in the region.

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## V. Methodology of the State of the Judiciary Report

The IFES Model State of the Judiciary Framework is built around the need to implement and link up key reforms embedded in the JIP. The State of the Judiciary Report is developed through a multifaceted methodology that incorporates an array of information resources, including users of the legal system, necessary to assess the level of JIP compliance. The JIP and their accompanying Indicators serve as the guideposts with which to regularly measure implementation progress or regression. In partnership with another well-respected regional NGO, the Arab Center for the Rule of Law and Integrity (ACRLI), based in Lebanon, IFES identified an eminent Egyptian jurist to author the Egyptian State of the Judiciary Report. His work was supported through the ACRLI and IFES's Rule of Law Division in Washington.<sup>3</sup>

While all the JIP are important and their relevance in the country context varies, IFES's working assumption for the State of the Judiciary Report is that certain mutually supportive principles are essential to establishing the legal enabling environment necessary to build an independent, accountable judiciary and a Rule of Law culture. We also believe that for purposes of capturing global issues, lessons learned, model programs across borders, it is also important for all country reports to uniformly cover a specific set of principles. We also knew that preparing the first reports would require more time and resources than IFES alone could manage.

While one could debate exactly which principles should be part of any global, regional or country analysis, our research and experience pointed us to the following seven core principles: **JIP.1 (judicial independence guarantees); JIP.2 (institutional and personal independence); JIP.9 (selection); JIP.13 (conflict of interests); JIP.14 (asset disclosure); JIP.17 (judicial access to information); and JIP.18 (public access to information)**. IFES believes every country report has to include an analysis of at least these issues since they are essential to forming the foundation for a rule of law enabling environment. Having country reports focused on at least one set of issues will also help us develop some comparative information and to identify country lessons learned and best practices across countries and regions. However, the authors were encouraged to place as much emphasis on these issues as they deemed appropriate and to include additional issues and JIP principles if the country context and need demanded it. Accordingly, the Egyptian author believed it was also important to include the following additional JIP issues and principles in the country analysis: **JIP.3 (court jurisdiction); JIP.4 (resources); JIP.5 (training); JIP.7 (enforcement); and JIP.11 (discipline)**.

An assessment of the level of compliance with each of the JIP is guided by an examination of relevant laws and practices identified through a survey of legislation and jurisprudence and interviews of key stakeholders in the justice sector. There are three degrees of compliance:

- Formal compliance (laws and decrees);
- Compliance in practice (effective implementation of laws and decrees as well as of constitutional and conventional principles); and
- Quality and integrity of the compliance in practice (fair implementation for all).

The Report outlines, in the country context, the legal and institutional framework within which the judiciary operates. The Indicators<sup>4</sup> serve as guideposts for the analysis of the level of compliance with each of the JIP. This analytical process guides IFES, in close consultation with the Report's author, to make an overall judgment as to whether there is a "satisfactory", "partially satisfactory" or "unsatisfactory" compliance with the possible nuance of "improving" or "regressing" and to present prioritized reform recommendations.

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3 IFES is currently finalizing Guidelines for the completion of State of the Judiciary Reports in a standardized Handbook for use by any country or groups of reformers, jurists or civil society activists.

4 The Indicators for a State of the Judiciary Report are available at IFES upon request.



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## CHAPTER 2

### GENERAL COMMENTS AND CONTEXT FOR THE STATE OF THE JUDICIARY REPORT, EGYPT, 2003

#### I. General Comments

The concepts of justice and rights were already present in Egyptian society under the Pharaohs. Ancient civilization had, in fact, created a judiciary with multiple degrees of courts, with well defined jurisdiction and assurances of independence, as well as an arbitration system. Under Greek and then Roman domination, in the 8<sup>th</sup> and 9<sup>th</sup> centuries, court jurisdiction was divided between Egyptians and foreigners, which gave birth to a mixed court system of justice.

All through the Islamic era, Islamic law (*Al Shari'a*) was exclusively applied on both the Muslim and non-Muslim populations. Judicial functions were conducted by all sitting judges, issuing judgments that were recorded in registers and executed by the police force.

Shortly after the French military assumed control of the state apparatus in Egypt in the late 18<sup>th</sup> century, specialized courts, such as the commercial courts, were introduced. General Minaud, Napoleon's successor as Egypt's ruler, first organized the judiciary in 1800, establishing criteria for nominating judges and selecting justice auxiliaries. The right to challenge judicial interference, a prohibition against judicial interference, the regulation of court fees and the principle of judicial accountability were also established during this time frame.

This judicial organization scheme was, however, discontinued as soon as the French were defeated in 1801. The Wali of Egypt, Ali Diwan ElWali, then instituted the Royal Higher Council, and issued a procedural ordinance to be applied before this Council. The Council was competent to adjudicate cases between individuals, Egyptians and foreigners. The system remained the same during the reign of the descendants of Mohammed Ali and their successors over Egypt, up to the last quarter of the 19<sup>th</sup> century.

Mixed courts were instituted in 1875, a matter which narrowed the scope of jurisdiction of the domestic courts. Religious (*Shari'a*) and probate courts had jurisdiction over guardians, tutors, curators and the *Majlis Melli* had jurisdiction in personal status matters for non-Muslims. Because the proliferation of courts during this era became unacceptable and practically unworkable, the courts were unified in 1937. This was achieved through passage of Montreux Treaty, which included a 12-year transition period during which the religious and probate courts were abolished. This treaty is considered a first in the history of the judiciary in modern Egypt.

The 20<sup>th</sup> century witnessed several constitutional developments, including the adoption of the 1923 Constitution, which provided for an independent judiciary. The Court of Cassation was established in 1931 and the institution of the Council of State in 1946. The Supreme Court was created in 1968, which later became the Supreme Constitutional Court.

#### II. Political, Social and Economic Context

The 1971 Egyptian Constitution includes several principles upon which the political, economic and social legal structures are currently based.

## **A. The Political Framework**

The political system is based on a plurality of political parties, which are regulated by Law no.40/1977. This law stresses the right of Egyptians to form political parties and the right of all nationals to join them. The President is the cornerstone of the State administration. He is elected, under specific conditions outlined in articles 75 and 76 of the Constitution. An indirect election by the members of the People's Council is then subject to a plebiscite. The Constitution also defines various powers of the State, including the powers of the judiciary in Chapter 4. The first chapter of Book 7 should be considered alongside Chapter 4, since they both relate to the Council of State.

## **B. The Economic Framework**

Egyptian society is based economically on principles established by the Constitution, in conformity with the development of a society with goals designed to increase the national income, dispense justice, increase the standard of living, eradicate unemployment and increase job opportunities.<sup>5</sup>

The Constitution emphasizes the people's right to contract and own property, including the right to individual property, the right against expropriation except in cases of public interest with just remuneration, the right against confiscation without a court decision, and rights related to cooperative and individual property.<sup>6</sup> It also provides that property may not be subject to sequestration for reasons other than those mentioned in the law and pursuant to a court decision.

In 1974, the enactment of Law no.43/1974 on investment marked an important economic turning point for businesses operating in Egypt. Arab and foreign businesses were given stronger legal protection, such as prohibiting expropriation and confiscation and the granting of considerable tax exemptions. Additional laws were successively enacted to support these changes, such as those relating to joint-stock companies, import/export, customs, the stock exchange and the monetary market.

A new period of economic liberalization followed, which was linked to the evolution of the world economy. This period was the stage of privatization during which public property projects were transferred to the private sector whether by offering it for sale locally or internationally. Legislation and regulations during this period covered all fields of basic infrastructure projects such as roads, commutations and communications and the different means available to Arab and foreign money.

## **C. The Social Framework**

The economic crisis has strongly affected the relationship between the State and the citizens and there has been a sharp erosion of the middle class -- which is the cornerstone of society. The depreciation of the Egyptian pound has also caused the erosion of incomes and consequently an inability to face increasing needs. Judges are particularly affected by this situation since most of them belong to the eroding middle class.

Although the government has increased its expenditure on education, the problem of private education still constitutes the biggest burden on the budget of the Egyptian family. For most Egyptians it is the largest item of all expenses in the family budget. Judges also live under the same adverse economic and social conditions as other members of the community. In short, it is extremely difficult for the majority of Egyptians, including judges, to make ends meet on a day-to-day basis.

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5 Egyptian Constitution, article 23 (1971)

6 Egyptian Constitution, articles 24 through 31 (1971)

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### III. Legal and Institutional Framework

#### A. Legal Framework

Chapter 4 of the current Constitution, entitled “The Judicial Power”, organizes the judiciary as an independent power endowed with independent judges that can not be removed from office, except under exceptional procedures, and it prohibits any outside interference in court actions or matters concerning justice.

The Constitution references the Council of State and its jurisdiction in deciding administrative cases (i.e. cases to which the State is a party). It also specifically refers to the Supreme Council of the Judiciary, which is chaired by the President of the Republic, and states that it must be consulted on any draft legislation affecting the judiciary. The jurisdiction of the Council of State is outlined in the law that created it (no.82/1979).

Chapter 5 of the Constitution relates to the Supreme Constitutional Court which has exclusive jurisdiction and ultimate control of the constitutionality of laws and regulations and the interpretation of all laws.

Because the Constitutional Court and the Council of State were created as part of the judicial power under the Constitution itself, they have equal standing with both the Executive and the legislative branches. This means the Executive can not dominate the two other branches under the pretext that it is the higher authority.

The writers of the Constitution in the declaration deed noted: “the supremacy of the law is not only a prerequisite for the liberty of the individual but also the only basis for legitimacy of the governing authority.” Book 1 of the Constitution, entitled “Supremacy of the Law”, makes reference to this supremacy as the basis of government.

Book 1 of the Constitution also states that the independence of the judiciary and its immunity are two basic guarantees for protecting the rights and freedoms of all Egyptian citizens. The right of all persons to a hearing before an impartial judge in a court of law, the protection against self-incrimination and the responsibility of public servants to enforce court decisions are all mandated in this section of the Constitution. The independence of the judiciary has been a constant principle under Egyptian law since the Constitutional Declaration of 1953.

A close look at different provisions of Egypt’s Constitution also highlights the fact that the official role of the judiciary is not to just settle disputes.<sup>7</sup> It must guarantee the protection of all constitutional rights and freedoms.

All of these provisions expressly refer to the law as the determinant of judiciary’s power and jurisdiction, which means that the judiciary is bound by the law and that it cannot venture outside the scope of these provisions.

The truth of the matter is that different external powers interfere in the internal decisions and processes of the judiciary. This limits judicial independence and the legal power of the courts in practice. For example, article 167 of the Constitution stipulates, “The law determines the judiciary bodies and their jurisdiction and regulates the method of their formation and specifies the conditions and procedure of nomination transfer of their members.” It would have been preferable for the constitution itself to have specified the criteria of exercising these rights.<sup>8</sup>

There are many relevant laws and international obligations relevant to the independence of the judiciary. These laws and obligations are listed in more detail in Annex 1.

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7 Dr. Ali Zahran – Who rules Egypt; 1993 ed., p. 208, for more details

8 The Arab Center for the Independence of the Judiciary and Lawyers, a study on the website of professor Atef El Chahat, [www.acijlp.org/23a.html](http://www.acijlp.org/23a.html)

## **B. Institutional Framework: Brief Overview of Court Structures**

- 1. Supreme Constitutional Court** – The Supreme Constitutional Court is regulated by Law no.48/1979. It has jurisdiction over: (i) the control of the constitutionality of laws and decree-laws; (ii) the settlement of conflicts of jurisdiction and (iii) the settlement of conflicting disputes between the judiciary and other government authorities. The Court is in charge of the discipline of its own members.
- 2. Civil, Commercial and Criminal Tribunals** – The ordinary courts of the judiciary are regulated by Law no.46/1972. In criminal matters, these courts are competent for all crimes except those falling under a special law provision. Ordinary courts are composed of: (i) courts of summary jurisdiction; (ii) courts of first instance; (iii) courts of appeals and (iv) a Court of Cassation.
- 3. Administrative Courts** – The judicial section of the Council of State is regulated by Law no.47/1972. Administrative courts have exclusive jurisdiction over “administrative disputes”, except claims related to sovereignty.

Under Egyptian law, there are also a number of courts of extraordinary jurisdiction:

- 4. Military Courts** – Law no. 25/1966 instituting martial law has organized military courts into (i) the central military court; (ii) the central military court with supreme authority and (iii) the supreme military court. The law reserves the right of military courts to decide their own jurisdictional limits.
- 5. Courts of Values** – The Court of Values and Supreme Court of Values were created by Law no.95/1980. The Court of Values has jurisdiction over (i) all claims submitted by the attorney general in accordance with article 16 of Law no.95/1980; (ii) all claims as prescribed by Law no.34/1971 on imposing security and safety of the people; (iii) orders and guarantees issued or submitted in accordance with this law; (iv) disputes in the instances mentioned in article 2, paragraph 2 of Law no.53/1972 on the liquidation of sequestrations and (v) complaints against measures taken in accordance with article 74 of the Constitution.
- 6. Political Parties Court** – This court was established by article 8 of Law no.40/1977 on the organization of political parties. This court has jurisdiction on all appeals relating to cases where the creation of a political party has been denied.

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## CHAPTER 3

### LEVEL OF COMPLIANCE WITH THE JUDICIAL INTEGRITY PRINCIPLES

An extensive judicial debate recently arose in a case regarding the Karm El Zeitoun elections rendered by the Court of Cassation. This litigation raised the issue as to whether a decision by the Council of State represented an independent judicial decision as required by the Constitution (May 12, 2003, appeals no.949/2000 and no.959/2000), wherein the Court stated:

*“...the description ‘Independent Judicial Organ’ of both the administrative prosecution, by Law no.21/89, and the Supreme Judicial Council, by Law no.10/1986, violates the Constitution because both are agencies of the Executive power represented by the Minister of Justice”.*

The Court’s decision highlights the problematic link between judicial independence and the powers of the Council of State. In another earlier case involving similar issues, another court, the Supreme Constitutional Court, acting upon a request from the Minister of Justice for an interpretation of the constitution, reached the opposite opinion and held that these two bodies were judicial institutions (March 4, 2000, case no.181). The Supreme Constitutional Court held that:

*“the constitutional guarantee of the right to go to court means that no one, as a group or as an individual, should be prevented from accessing a judicial body which guarantees by its structure and rules of organization, as well as by the contents of the substantive and procedural rules applicable, a minimum of rights, not to be denied, to those who have recourse to it in order to have a fair trial.*

*Preventing them from exercising these rights is a violation of the protection of these rights guaranteed by the Constitution. This being the case, there is no contradiction between the right to go to court, being a principal constitutional right, and its legislative organization, provided that the legislation does not consider this organization a means to deny such right.*

*The principle in having the legislation provide for such rights is that it exercises a discretionary power unless the Constitution imposes some limits to this power, which the legislation cannot transcend.”*

While it is true that the Constitution cannot regulate the details of every case, the Supreme Council of the Judiciary is the more appropriate entity to decide these cases (established by Decree no.82/1969) and not the Council of State (in implementation of article 173 of the Constitution).

It is important to note that the Council of State is chaired by the President of the Republic. The practice of the President chairing the Council is inconsistent with the constitutional principle of judicial independence, even though this is what the Constitution now provides. Therefore, the Constitution needs to be amended if the principle of judicial independence is to ever be implemented in practice. Moreover, the full jurisdiction of the Council needs to be thoroughly reviewed since it also impairs the independence of each individual court.<sup>9</sup>

The Egyptian Ministry of Justice is considering amendments to Judicial Law no.46/1972, which would strengthen the independence of the judiciary. These amendments would include transferring the responsibilities for judicial inspection from the Ministry of Justice to the Supreme Judicial Council (SJC) and they would give the SJC jurisdiction in matters concerning the promotion of judges and their transfer.

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9 Dr. Mohammed Kamel Obeid – *Independence of the Judiciary*, comparative study, 1991 ed.

# IFES Rule of Law State of the Judiciary Report Series

*State of the Judiciary Report  
Egypt, 2003*

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Many would hope to extend the jurisdiction of the Council to other matters, such as the temporary transfer of judges, their ability to decide whether to assign judges to certain positions in the Executive or Legislature and the allocation of their own independent budget. These measures would help make the judiciary more independent and beyond the current reach of the Executive and Legislative branches. In addition, the judicial appointment power of the Minister of Justice is also very problematic within the Egyptian political context.

In a relatively recent retirement letter to the Judges Bar Association, counselor Yehia El Rifai, its former president, noted the inappropriate role the Minister of Justice exercised over the functions of the judiciary. Indeed, under the law the Minister of Justice is allowed to decide which judges should be assigned to preside over the First Instance Courts (he or she chooses from among the various counselors of the Court of Appeals). This effectively allows the Minister to exercise legal and practical control over these courts, without due consultation with the SJC, in addition to the opportunities this unilateral procedure invites for offers of in-kind and cash under the table payments.

The most dangerous practice concerns the President's submission of important cases to the President of the Court, which clearly constitutes a violation of the Constitution and the law. Other questionable practices relates to additional discretionary powers of the Ministry of Justice, such as, overtime bonuses, arbitration cycles, assignments related to the work in the administration and control of illicit profits, the provision of medical care and judicial association financial allotments. All these jeopardize the independence of judiciary to its core.

Although article 68 of the Egyptian Constitution provides that "every citizen has the right to resort to his natural judge". There should be an objective classification of judges rather than one based upon personal evaluations of individual judges or regardless of a specific case. Toward this end, the designation of the competent court should be one undisputed criterion of whether "a natural judge" has been selected. This issue has proven to be problematic within the last three years. For example, in Cairo, the President of the Court of Appeals cast doubt on the impartiality and independence of the court by deciding which circuit court was competent to examine a case after referral from the competent public prosecution office. Consequently, we propose to return to the previous system of fixing territorial competence at the beginning of the judicial year.

The factual situation has also revealed a serious violation of the "natural judge" principle, through the practice of referring civilians to military courts (the syndicates' case) or to the Courts of Values in which public personalities who are not judges participate.

Military courts are considered the normal courts for military personnel and for those enumerated in article 4 of the martial law. These courts, however, have no legal mandate concerning civilians. It is therefore important to refer to article 6 of this law, which stipulates that "the provisions of this law apply to the crimes provided for in the first and second chapter of book two of the Criminal Code and to related crimes referred to the military courts by order of the President of the Republic."

According to this law, the President of the Republic, upon declaration of a state of emergency, may refer to the military courts any of the crimes punished by the Criminal Code or any other law. This is in clear violation of the Constitution and of the provisions of the International Covenant on Civil and Political Rights. This is also in violation of all international criteria concerning the independence of the judiciary and the right of the accused to have a "natural" judge hear their case, not to mention the prohibition against exceptional or state security courts (established by Law no.105/1980 and cancelled by Law no.95/2003).

Additional violations occur during the pre-trial detention phase of the investigation, because the public prosecutor's actions are not always subject to sufficient judicial review. This is particularly problematic since the current legal system does not allow the accused to seek damages or indemnity when he or she is not indicted.

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The laws organizing these rights are not free of restrictions, which jeopardizes their application in practice. The Supreme Constitutional Court, for example, has set a rule providing that “the organization of rights is entrusted to the legislator.” The use of his authority in this respect is a license to impose restrictions whenever the public interest so requires and at the moment he deems appropriate. His intervention, however, may result in violations of the right to resort to court, which is unconstitutional.<sup>10</sup>

This first State of the Judiciary Report centers on an assessment of the level of compliance with twelve JIP, seven of which were selected by IFES as core principles for the establishment of the legal environment necessary to build an independent, accountable judiciary and a Rule of Law culture: **JIP.1 (judicial independence guarantees); JIP.2 (institutional and personal independence); JIP.9 (selection); JIP.13 (conflict of interests); JIP.14 (asset disclosure); JIP.17 (judicial access to information); and JIP.18 (public access to information)**. The other five were identified by the author as particularly worthy of analysis within the Egyptian context: **JIP.3 (court jurisdiction); JIP.4 (resources); JIP.5 (training); JIP.7 (enforcement); and JIP.11 (discipline)**. All of these principles are divided into four thematic sections.

The first section studies the degree of effectiveness of the JIP as they guarantee the independence of the judiciary as an institution. The second section analyzes the level of compliance with the JIP guaranteeing the independence of individual judges. The third section provides insight into the respect for JIP guaranteeing the fairness of judicial proceedings and the fundamental rights of litigants. The fourth and last section studies the level of compliance with the JIP guaranteeing freedom of expression and access to information rights.

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10 Constitutional case no.193, judicial year 19, June 6, 2000



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## SECTION 1

### **LEVEL OF COMPLIANCE WITH THE JUDICIAL INTEGRITY PRINCIPLES GUARANTEEING THE INDEPENDENCE OF THE JUDICIARY AS AN INSTITUTION**

This Section studies the independence of the Egyptian judiciary as an institution. As set-forth in succeeding sections of this report, while the Egyptian Constitution expressly supports the principle of judicial independence, a number of laws and decrees have served to undermine the implementation of this constitutional provision in practice. Legislation and Executive decrees such as those creating extraordinary courts, expanding the jurisdiction of the military and security courts, limiting the judicial review powers of the courts and creating councils with decision making power over the judiciary, collectively raise many questions as to just how independent the Egyptian judiciary is in practice.

Thus, while the constitutional framework is in large part sound, a number of barriers to institutional independence have been steadily raised by both the legislative and executive branches over time. For these reasons, the overall implementation of this principle, under either Egypt's international or constitutional obligations, has been in large part unsatisfactory to date.

This Section centers on the analysis of three closely-related Judicial Integrity Principles:

- JIP.1 Guarantee of Judicial Independence (subcategory)
- JIP.2 Institutional Independence of Judges (subcategory)
- JIP.3 Clear and Effective Jurisdiction of Ordinary Courts (subcategory)

### JIP.1: Constitutional Guarantee of Judicial Independence

**Partially satisfactory:** The Constitution guarantees the independence of the judiciary as an institution. There are, however, conflicting laws and decrees that place restrictions on, and seriously infringe upon, the constitutional independence of the judiciary in practice.

The Egyptian Constitution contains a number of guarantees affecting the judiciary, especially:

- The independence and immunity of the judiciary (article 65)
- Equal rights under the law for all citizens (article 40)
- Right to go to court and prohibition of immunity from judicial control for any act or administrative decision (articles 68 and 69)
- Presumption of innocence (article 67)

While the Constitution guarantees the independence of the judiciary, it still includes an express provision emphasizing the independence of military courts.

Law no.81/1969 organized the Supreme Court, guaranteeing the supremacy of law and the right to a judicial action to challenge the constitutionality of laws. The Supreme Constitutional Court has now replaced the Supreme Court, in accordance with Law no.48/1979 which guarantees the right to court at any judicial level.

Article 15 of the law on the judiciary, however, provides that “Except for the exclusions of administrative litigation falling within the jurisdiction of the Council of State, courts are competent to decide upon any litigation or crime except those excluded by a special provision.” While these exclusions were left to the discretion of the courts to determine, they constitute a wide discretionary power going beyond the scope of the judiciary that trespasses on citizens’ rights. Therefore, Article 15 needs to be reviewed and perhaps clarified in both theory and practice.

The same could be said of Law no.25/1966, known as the martial law. Its application should be strictly restricted to military crimes and the approval of appeals against military judgments. This law’s application constitutes an infringement of the constitutional principle against multiple prosecutions for the commission of the same illegal offense. While this law authorizes a request for a plea of review before the judgment is final, this plea is not admitted unless it is based on the violation of the law, a misapplication or wrong interpretation thereof, or the existence of a procedural deficiency leading to a denial of justice for the accused.<sup>11</sup>

The role of the Court of Cassation and of the Supreme Court (now, the Supreme Constitutional Court) in guaranteeing rights and in condemning any attempt by the Executive or legislative powers or individuals to interfere with and violating these constitutional rights is important to note. For example, the Supreme Constitutional Court, in a judgment of September 22, 2002, declared unconstitutional article 4 of Decree-Law no.165/1960 organizing the press, which provided that decisions of the Executive committee deciding the indemnity to be paid to newspapers and their owners is final and without recourse.

Article 9 of the Emergency Law allowed the President of the Republic to refer crimes sanctioned by the public law to the Supreme State Security Courts. This law violates article 40 of the Constitution, which prohibits exceptional courts and provides for the principle of equality between citizens and their right to have a “natural” judge hear their case.

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<sup>11</sup> See, article 113

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## JIP.2: Institutional Independence of Judges

**Unsatisfactory:** While the Constitution guarantees the independence of the judiciary as an institution, the structural and institutional independence of judges is threatened in practice. The most problematic of these violations is the existence of a variety of exceptional tribunals in which non-judges adjudicate cases. In practice, the judiciary is also under continuous attack from the Executive, due in part to the wide-ranging powers given to the Minister of Justice under the law, as described in Section 2 herein.

Article 65 of the Constitution guarantees the independence and immunity of the judiciary as two basic guarantees for the protection of rights and liberties. Article 165 further provides that the “judicial power is independent and is exercised by courts of all degrees.”

The situation, however, is different in practice. In fact, the institutional independence of the judiciary is subject to various violations, the most significant of which relate to the overlapping of powers of the exceptional tribunals and to allowing non-judges to participate in the formation of these tribunals. For example, the Court of Values and the Supreme Court of Values, instituted by Law no.95/1980, are courts that have a political not legal character. Other types of interferences include the decisions of the committee of political party affairs, the referral of civilians to military courts and the extensive jurisdiction of the public prosecution over provisional detention or the interdiction of traveling abroad in the absence of a law regulating such interdiction.

### JIP3: Clear and Effective Jurisdiction of Ordinary Courts

**Unsatisfactory:** The different types of special courts contravene the general principles of the independence of the judiciary, be it with regard to the establishment of these courts or to their jurisdiction or to the official or presidential authorities to which they must report.

**Civil, Commercial and Criminal Tribunals** – Article 1 of Law no.46/1972 organizes the judiciary into (i) courts of summary jurisdiction; (ii) first instance courts; (iii) courts of appeals; and (iv) a Court of Cassation. These courts have jurisdiction to examine matters submitted to them, in compliance with the law. These courts are competent to examine all litigation and crimes except those excepted by a special law provision. The Code of Civil and Commercial Procedure and the Code of Criminal Procedure establish the rules of the courts' jurisdiction.<sup>12</sup>

**Administrative Courts** – The judicial section of the Council of State is regulated by Law no.47/72. Administrative courts include: (i) the State commissioners' body; (ii) disciplinary courts; (iii) administrative courts; (iv) the court of administrative jurisdiction; and (v) the Supreme Administrative Court or Council of State. Administrative courts have exclusive jurisdiction over all matters specified under the 14 paragraphs of article 10, including "administrative disputes", except claims related to sovereignty. Articles 13 to 23 organize the jurisdiction of the different courts.

Under Egyptian law, there are a number of Courts of Extraordinary Jurisdiction, some of which are described here.

**Supreme Constitutional Court** – The Supreme Constitutional Court is composed of a president and assessors.<sup>13</sup> The quorum required for its judgments and decisions is seven members. Meetings are chaired by the president or the longest serving member. The Court's general assembly sits as a disciplinary court and is competent to examine charges that one of its members has violated his or her responsibilities, prestige or a breach of duty.<sup>14</sup>

The Court's jurisdiction includes jurisdiction over the constitutionality of laws enacted by the legislative power as well as decree-laws issued by the President. If there is a conflict in their application, the Court is also responsible for the interpretation of the provisions of laws and decrees.<sup>15</sup>

**Military Courts** – Law no.25/1966 instituting martial law has organized military courts into (i) the central military court; (ii) the central military court with supreme authority; and (iii) the supreme military court. The law reserves the right of military courts to decide the limits of their own jurisdiction.<sup>16</sup>

The supreme military court is composed of three judges with the longest serving judge presiding. The central military court with supreme jurisdiction and the central military court are both composed of a single judge. In special circumstances and by order of the competent officer, the supreme military court may be composed of five officers and the central military court with supreme authority three.<sup>17</sup>

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12 Article 15 of Law no.46/1972

13 Article 3 of Law no.49/1979

14 Article 19 of Law no.49/1979

15 Article 26 of Law no.49/1979

16 Article 48 of Law no.25/1966: "the military judicial authority shall exclusively decide whether the crime falls, or not, within its jurisdiction."

17 Articles 44 to 47 of Law no.25/1966

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The supreme military court has jurisdiction over all crimes perpetrated by an officer and all felonies falling within the jurisdiction of the military courts (in accordance with Law no.25/1966). The central military court with supreme authority is also competent to examine all felonies within the jurisdiction of the military courts, with some limitations depending on the length of imprisonment. The central military court shall by virtue of the law only be competent to examine misdemeanors and contraventions.

**Courts of Values** – The Court of Values and Supreme Court of Values were both created by Law no.95/1980. The Court of Values has jurisdiction over (i) all claims submitted by the attorney general in accordance with article 16 of Law no.95/1980; (ii) all claims as prescribed by Law no.34/71 on imposing security and safety of the people; (iii) orders and guarantees issued or submitted in accordance with this law; (iv) disputes related to instances noted in article 2, paragraph 2 of Law no.53/1972 on the liquidation of sequestrations; and (v) complaints against measures taken in accordance with article 74 of the Constitution. The Supreme Court of Values has jurisdiction over all appeals from the decisions of the Court of Values.

Composition of the Courts of Values<sup>18</sup>

**Court of Values**

- One Vice-President of the Court of Cassation
- Three Counselors of the Court of Cassation or Courts of Appeals
- Three public personalities

**Supreme Court of Values**

- One Vice-President of the Court of Cassation
- Four Counselors of the Court of Cassation or Courts of Appeals
- Four public personalities

**Political Parties Court** – This court has been established by article 8 of Law no.40/1977, which is the law organizing and regulating political parties. The court is formed of the first Chamber of the Council of State and is presided over by the President of the Council of State, and includes an equal number of public personalities appointed by decision of the Minister of Justice after approval of the Supreme Council of the Judiciary. This court has the jurisdiction to hear appeals submitted by persons requesting but denied the creation of a political party.

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18 Article 27 of Law no.95/1980



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## SECTION 2

### LEVEL OF COMPLIANCE WITH THE JUDICIAL INTEGRITY PRINCIPLES GUARANTEEING THE INDEPENDENCE OF JUDGES

This Section studies the independence of judges as individual members of the judiciary. While there are many rules regulating the status of judges, this Section takes into account those essential to the fair and effective administration of justice. An analysis of the application of this all important principle, as well as other closely related principles analyzed in this report, reveals serious compliance issues exist in practice. Thus, the overall implementation of this principle, as judged against both international and constitutional obligations, norms and practices, has been largely unsatisfactory to date.

This Section centers on the analysis of these closely-related Judicial Integrity Principles:

- JIP.2 Personal, Decisional Independence of Judges (subcategory)
- JIP.4 Adequate Judicial Resources and Salaries
- JIP.5 Adequate Training and Legal Education of Judges
- JIP.9 Adequate Qualifications and Objective and Transparent Selection and Appointment Process
- JIP.11 Fair, Effective, Objective and Transparent Disciplinary Process
- JIP.13 Conflict of Interests Rules
- JIP.14 Income and Asset Disclosure

## JIP.2: Personal, Decisional Independence of Judges

**Partially satisfactory:** According to the Egyptian Constitution, judges act independently in deciding cases. They are not subject to any authority other than that of the law. No power shall interfere with judicial proceedings. There are, however, laws which give power over the judiciary to other authorities, especially to the Executive and the Minister of Justice, in what constitutes a serious legal infringement upon the independence of the judiciary.

Article 65 of the Constitution guarantees the independence and immunity of the judiciary as two basic guarantees for the protection of rights and liberties. Article 166 stipulates that “judges are independent and are subject to no other power but that of the law. No other authority may interfere in court actions or in the affairs of justice.”

The matter, however, is different in practice. Judges are subject to a variety of interferences with respect to the adjudication of cases -- from the Executive, the media and even the Administrative President of the Court. Of the numerous violations perpetrated by the Executive power, the unlimited authority given to the Minister of Justice under Law no.46/1972 on the judiciary is among the most flagrant.

### I. Interference by the Minister of Justice

The vast powers of the Minister of Justice over the judiciary may lead to interferences with the decision-making powers of judges. Examples of these powers include:

#### Powers under Law no.46/1972 on the Judiciary

- Nomination of Court of Cassation counselors (article 44(4));
- Nomination of the vice-minister for judicial inspection (article 46);
- Provisional delegation of Court of Appeals counselors to sit in the Court of Cassation, upon approval by the supreme committee and the general assembly from which he depends and the Court of Cassation (article 55);
- Provisional delegation of Court of Appeals counselors to sit in another Court of Appeal, upon approval by the general assembly from which he depends and the supreme council (article 56);
- Licensing a judge to reside in district of the court of first instance from which he depends (article 76);
- Call for the Supreme Council of the Judiciary to convene (article 77 bis 3);
- Preparation of the list of judicial inspection with the approval of the Supreme Council of the Judiciary (article 78(2));
- Organization of sanitary social services by decision of the Minister of Justice upon approval of the Supreme Council of the Judiciary (article 92);
- Supervision of courts and judges;
- Right to reprimand the president and judges of the courts of first instance; and
- Right to take disciplinary legal action.

### II. Interference by the Media

The independence of judges is also threatened when certain information related to pending investigations and court actions is published in the newspapers, often at the instigation by prosecutors or judges. While the rule

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adopted by the Egyptian legislature is that court measures and hearings are public unless the court orders, at its discretion, their secrecy, this rule is often abused by both the prosecutors and the press within the Egyptian political context.

In fact, newspapers and magazines often publish news about investigations and court actions prominently, along with the pictures and names of public prosecutors and judges. This publicity helps some judges and prosecutors become well known which paves their way into social clubs or lucrative private practice. Other judges and prosecutors abuse this rule further by commenting publicly on pending crimes. This effort to bias and engender public opinion in specific cases sometimes influences judicial decisions and it impacts the public's perception of the independence of the judiciary.

Addressing these kinds of issues is important to restoring the balance between the right of the public to information and the protection of the rights of criminal defendants to a fair trial and privacy. This is especially true since the Egyptian legislature<sup>19</sup> did not clearly define the matters which may affect litigation. The crisis seems to feed into the tendency of some in the press to publish investigative information in a provocative and exaggerated manner in order to attract more readers and/or to influence the outcome of the case.

### **III. Interference by the Administrative Court President**

A major violation of the independence of the judge comes from within the judiciary through the wide ranging authority and prerogatives of the administrative president of the court.

Decisions related to: (i) assignments to arbitration committees; (ii) assignments to directorates in charge of illicit profits; (iii) overtime and bonus pay; (iv) unlimited unilateral expenses; (v) multiple monetary advantages, such as allowances, telephones, social events, production incentives, payments in lieu of leave; and (vi) assignments to work in the different ministries of the Executive and the Council of State, all severely affect the independence of the judges. Most often these matters are within the control of the Administrative President of the Court. The danger of interference reaches its peak when "important" cases are submitted to the Administrative President of the Court for his opinion and recommendation.

A unilateral decision made by the President of the Court of Cassation to appeal a recent election case is only one example of abuse of judicial authority. The court dismissed the appeal noting that the Administrative President of the Court did not have the legal authority to file an appeal under the law.

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19 Dr. Jamal El Din El Oteify – Protection of the criminal case from the impact of publishing.

#### JIP4: Adequate Judicial Resources and Salaries

**Unsatisfactory:** Judges' salaries are modest as measured against their purchasing power, and normal benefits are largely insufficient. There are, however, special allowances for judges holding specific offices. These allowances tend to make judges vulnerable to pressure from the authority responsible for delegations or appointments, such as the Minister of Justice or the Administrative Chief of the Courts.

The method of compensating judges constitutes a large problem that is difficult to solve very easily. Law no.46/1972, known as the Law on the Judiciary, provides a schedule of functions, salaries and allowances. These provisions were later replaced by Law no.32/1983, which establishes the salaries of all judges.

##### Sample Salaries of Judges under Law no.32/1983

- Presidents of the Court of Cassation and of the Cairo Court of Appeals (top of schedule): 2,868 Egyptian pounds per year, with a yearly increase at a fixed percentage of the salary;
- General Public Prosecutor: (top of schedule): 2,868 Egyptian pounds per year, with a yearly increase at a fixed percentage of the salary;
- Assistant Prosecutor (bottom of schedule): 516 Egyptian pounds per year, in addition to 108 Egyptian pounds as judicial and yearly allowances.

The full schedule of salaries for judges of the Council of State is annexed to Law no.47/1977.

##### Sample Salaries of Judges under Law no.47/1977 (Council of State)

- Council of State President (top of schedule): 2,500 Egyptian pounds per year plus 2,000 pounds as a yearly representation allowance;
- Deputy Assistant (bottom of schedule): between 648 and 900 Egyptian pounds per year, in addition to 129.60 pounds as judicial allowance and 36 pounds as yearly allowance.

The schedule of salaries annexed to the Law on the Supreme Constitutional Court provides salary information for these judges. The salary of the Court's President is fixed by decree of the President of the Republic.

##### Sample Salaries for Supreme Constitutional Court Judges

- Decree no.230/2003 appointing the actual President and fixing his degree as a minister and his salary not to exceed that of the President of the Court of Cassation or that of the President of the Council of State;
- Judge of the Court: between 2,200 and 2,500 Egyptian pounds per year, in addition to 1,500 to 2,000 pounds as a yearly representation allowance.

If we take into consideration that the parity of the dollar to the Egyptian pound is approximately 6.20, this means that the salary of a high court judge only makes approximately US\$785.16 per year or about \$ 65.50 per month, in addition to representation allowances. These salaries are mentioned without comment and indicate that other allowances such as health care, telephones, books, production incentives and additional bonuses and others are an important element of the overall compensation package.

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## JIP.5: Adequate Training and Continuing Legal Education

**Partially satisfactory:** Attention has been given to the training of judges since the late 19<sup>th</sup> century. All judicial training is currently carried out by the National Center for Judicial Studies. The Center, however, lacks adequate resources to fully undertake its mission. There are training programs for assistants entering the public prosecution and the judiciary. While judges do not contribute to the training program for public prosecutors, they have significant input in the program for future judges. The Center plays a significant role in raising the quality of judges entering the profession, but improvements are still needed as well as the policy for continuing education.

Towards the end of the 19<sup>th</sup> century, the training of judges began receiving more attention. A memorandum issued by the Egyptian Minister of Justice on December 7, 1882, noted that “[judges] must have independence in giving their opinion, which cannot be achieved unless they have more knowledge and cognizance than all other public servants.” The training of judges before they take office, as well as continuing legal education, is a major requisite for judicial independence and competence, since judges are the ultimate guarantors of justice and equity. Serious law school curricula reform is needed in order to adequately prepare legal practitioners and judges for the practice and application of the law in the 21<sup>st</sup> Century.<sup>20</sup>

Decree no. 347/1981 of June 24, 1981 established the National Center for Judicial Studies.

### Responsibilities of the National Center for Judicial Studies

- Prepare and train members of the judiciary, theoretically and practically, to exercise their judicial duties;
- Raise the technical and practical standards of assistants; and
- Group, publish and conserve documents, laws, research studies, legal information and principles, and other material which may assist in the good performance of justice.

In accordance with article 19 of the abovementioned decree, the study program is twelve months for assistants and auxiliaries of the public prosecution and other judicial bodies. The Minister of Justice is the head of the Center, which will later become a Judicial Academy<sup>21</sup> within the limits of available resources.

Meeting its responsibilities of preparing judges, prosecutors and other judicial bodies to perform their duties and responsibilities adequately requires an adequate budget, which to date has not been allocated. We hope that the necessary resources will soon become available so that the assistants entering the prosecution and judiciary will have undergone training for at least a full year and passed their examinations successfully. These assistants should not be promoted as judges or members of the prosecution unless they have spent a minimum of one month in a serious training program and passed their examinations successfully – in addition to having had specialized training sessions.

The training programs are prepared by those in charge of the Center. Judges are not consulted on the content or nature of this program. This situation is unacceptable and should be remedied, especially with regard to training in new domains of the law, including: (i) intellectual property laws; (ii) subsidies and dumping; (iii) commercial arbitration and (iv) human rights obligations.

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20 For more details, training of judges – counselor Samir Naji, an essay submitted to the convention for developing legal studies and professional preparatory of judges and lawyers, October 2002.

21 Article (2) of Decree no. 437/1981 establishing the National Center for Judicial Studies

The Center for Judicial Studies prepares special programs for each judicial body and teaches French, legal terminology and principles of computer science.

## Subjects Taught to Members of the Public Prosecution

Members of the Public Prosecution are trained on selected subjects of the Criminal Code and Code of Criminal Procedure, as well as the problems raised in implementation, including:

- A survey of crimes in the private section of the Criminal Code and of laws complementing the Criminal Code;
- Applied criminal investigation and characteristics of the investigator;
- Motivation of decisions and incarceration;
- Doctrinal principles and judicial logics;
- The organizational structure of the public prosecution, the prosecution instructions, schedules and registers;
- The Muslim criminal law and its application personal status and custody on person and property;
- Juvenile law;
- Forensic medicine, material evidence and studies on counterfeiting and forgery;
- Criminal psychology and criminal science;
- Correctional law (prisons);
- Pleadings practices; and
- Judicial practices, values and traditions.

The training program is divided into two modules of equal time: (i) lectures and (ii) case studies including those focused on various types of crimes and case management. The program also includes open discussions and theoretical debates in seminar settings.

## Subjects Taught to New Judges

- Applied aspects of civil and commercial pleadings;
- Applied aspects of criminal procedure and practical problems;
- Applied aspects of the civil code;
- Criminal and civil matters;
- Selected subjects in commercial law;
- Criteria and errors in deciding cases;
- Personal status;
- Property Custody;
- Methods of conducting hearings and deliberations and issuing judgments; and
- The role and duties of the enforcement judge.

These subjects and the contents of each session are selected by a number of the highly-ranked judges of the Court of Cassation and Courts of Appeals who teach at the Center, each according to his or her specialization.

The evaluation of the students takes place at the end of the cycle and the administration of judicial inspection is kept informed of the result.

While significant improvements still await the Center, it plays an increasingly important role in raising the standard of practicing and newly appointed judges.

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## JIP9: Objective and Transparent Selection Process

**Unsatisfactory:** The Constitution refers to the legislator for the adoption of rules regulating the appointment of judges. Under the existing legal framework, the judicial selection process does not meet the standards of objectivity and transparency required to guarantee judicial independence. Indeed, the laws grant excessive powers to the Executive, not only to appoint judges, but also to control their qualifications and morality. Moreover, it appears that in practice, the laws have still not been fully implemented and that the appointment of family members (without qualifications) is not uncommon.

Article 167 of the Egyptian Constitution stipulates that “the law shall determine the judicial organizations and the jurisdiction, the mode of formation thereof as well as the conditions and procedure of appointing and transferring their members.”The Code of Civil and Commercial Procedure regulates the appointment of judges in ordinary courts, their promotion, delegation, fixing their salaries and remunerations.<sup>22</sup>

Law no.46/1972, known as the Law on the Judiciary, outlines in its article 38 the requirements to be appointed as a judge:

- Be an Egyptian national;
- Enjoy full civil capacity;
- Be 30 years of age for first instance judges, 38 for Counselors at the Court of Appeals and 43 for Counselors at the Court of Cassation; and
- Hold a License in Law from one of the law faculties of Egyptian universities or from a foreign university, subject to a decision of equivalence from the Supreme Council of Universities (and after passing successfully the equivalence test).

To become judges, candidates must also be of good morality and reputation. Employees of the Ministry of Interior will undertake detailed inquiries into the morality of the candidate and his or her family. These inquiries are largely discretionary and are, therefore, not immune from positive or negative subjective judgment.

The Law on the Judiciary, as amended by Law no.35/1984 on judges, provides the rules for appointing judges to various positions within the judiciary. Under article 44, all judicial functions are filled by decree of the President of the Republic, whether by appointment or promotion. Appointments take effect as of the date of approval or the date of the opinion of the Supreme Council of the Judiciary.

### Selection and Appointment to Selected Judicial Functions

- The President of the Court of Cassation is appointed from among the Vice-Presidents of the Court, after consultation of the Supreme Council of the Judiciary;
- The Counselors at the Court of Cassation are appointed, with the approval of the Supreme Council of the Judiciary. There are two candidates for each post, one proposed by the general assembly of the Court of Cassation and the other by the Minister of Justice; and
- The Presidents of the Courts of Appeals, their Deputies and Counselors, as well as the Presidents and judges of First Instance Courts, are appointed with the approval of the Supreme Council of the Judiciary.

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22 Law no.72/1947 organizing the selection of the Council of State regulates the appointment, promotion, transfer, delegation and secondment of these judges. Law no.25/1967 (martial law) provides for the appointment of military judges among officers of the armed force officers for a renewable period of two years.

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There are no obstacles in the law preventing the nomination of women to the courts. Recently, the President of the Republic issued a decree appointing Counselor Tahani El Jubali as Counselor at the Supreme Constitutional Court in 2003, its first female judge. This is only a first step that should be followed by subsequent appointments to other courts.

Law no.46/1972 (Law on the Judiciary) allows the appointment of judges from among lawyers.<sup>23</sup> Article 47 provides that “when appointing to the function of judge at the First Instance Court, the appointment of lawyers exercising their profession may not, in proportion, fall below one quarter.” However, these provisions have not been implemented in practice. Rather, the one quarter appointment requirement is attained through the delayed appointments of assistant prosecutors even though most of them are non-practicing members of the Bar Association, as required by article 47 of the law on the judiciary.

Members of the public prosecution are appointed by a presidential decree upon nomination from the Minister of Justice and after consultation of the General Public Prosecutor and approval of the Supreme Council of the Judiciary. The law also allows the appointment of lawyers in the functions of the public prosecution should they fulfill the conditions required and successfully pass the required examinations. The proportion of appointment from among the lawyers should not, however, fall below one quarter for the function of deputy general prosecutor or below.<sup>24</sup>

It is to be noted that a considerable number of police officers are chosen to work at the General Prosecution Department. Unfortunately, the criteria for these appointments are not as objective as for the judges and prosecutors outlined above.

Another worrisome phenomenon is the appointment of sons of judges and counselors, whether in the General Prosecution Department, Council of State or other judicial organizations. This practice has spread despite the fact that they often do not meet the required general evaluation conditions upon graduation. This phenomenon arose from the lack of clear organizational employment procedures for public servants in general, which over time spread to the employment practices of the judiciary.

All judicial organizations and the courts employ a considerable member of assistants, employees, secretaries and administrative personnel, which together constitutes a tangible net increase in the administrative labor force. At the same time, all judicial organizations, with the exception of the Supreme Constitutional Court, complain there is a shortage in the number of judges and prosecutors, despite their increase over the last five years.

Another troubling phenomenon is the reliance on handwritten court records instead of computers. A law was passed in 1990 to require computerized court records but it has not been implemented.

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23 Law no.46/1972, articles 39/5 – 4/c – 41/first/c – second/c – third/c, fourth/c and 43/c. Likewise, law no. 47/1972 on the Council of State, articles 75/5 – 76/d – 77/d – 78/d – 79/5 – 80/d; or members of the teaching staff in law faculties (articles 39/f – 41/first/f – second/f – third/f – fourth/f – 43/b of the Law on the Judiciary) and articles 75/c – 76/c – 77/c – 78/c – 79/c – 80/c and article 4/d of Law no.48/1979 on the Supreme Constitutional Court.

24 Law no.46/1972, article 118

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## JIP.11: Fair, Effective, Objective and Transparent Disciplinary Process

**Unsatisfactory:** A cursory review of the laws regulating the judicial disciplinary process reveals that even if the system was applied as stipulated under the law the powers given to the Minister of Justice and the Executive constitute a serious violation of the independence of the judiciary. Other factors affect the fairness and objectivity of the process, including the secrecy of the disciplinary process and the lack of a uniform disciplinary procedure for all judges.

Law no. 46/1972 on the judiciary regulates the accountability of judges and their subjection to disciplinary measures. The Judicial Inspection unit of the Ministry of Justice is responsible for the inspection and control of judges in accordance with a regulation by the Minister of Justice and with the approval of the Supreme Council of the Judiciary. Under article 93 of Law no.46/1972 on the Judiciary, the Minister of Justice has the right to supervise all courts and judges. The law also gives the Judicial Inspection unit the power to evaluate the work of all judges.

Article 99 of Law no.72/1947 outlines the measures that can be taken against members of the Council of State. A disciplinary council, provided under article 112 is in charge of taking disciplinary measures against the Council members, if the need arises.

### A. Authority of the President of the Court

Article 94 of Law no.46/1972 gives the President of each court, by his or her own motion or pursuant to a decision of the general assembly of the court, the right to serve judges an official rebuke or warning for acts in violation of their duties, after they have been given the opportunity to respond to the charge. This warning may be oral or in writing. In the latter case, the Minister of Justice must be informed.

### B. Authority of the Minister of Justice

The Minister of Justice, in accordance with paragraph 4 of article 94 of Law no.46/1972, has the right to issue an official rebuke or warning to the Presidents and judges of First Instance Courts, after they have been given the opportunity to respond to the charge. After the rebuke or warning, a disciplinary action can be instituted for further infringements or recurring violations.

The same article allows the accused judge to file an objection with a committee of the Supreme Council of the Judiciary. Paragraph 2 of Article 6 of Law no.82/1969 on the Supreme Council of the Judiciary states:

*“The Council shall determine the rules which it shall follow in the exercise of its jurisdiction. The Council shall form a committee of five members for each of the judicial bodies, which shall be competent to study appointments, promotions, transfer and complaints in matters falling within the jurisdiction of the Council, prior to submitting them to it. The formation of the special committee for each judicial body shall include all its representatives in the Council ...”*

Article 98 states that disciplinary action against the judges of all degrees is within the jurisdiction of a disciplinary council formed as follows:

- The President of the Court of Cassation;
- The oldest of the Presidents of the Court of Appeal; and
- The oldest of the counselors of the Court of Cassation.

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Disciplinary action is initiated by the public prosecutor upon request from the Minister of Justice, on his own motion or upon recommendation of the President of the court to which the judge belongs. Such a request shall be submitted after a criminal or administrative investigation by one of the Vice-Presidents of the Court of Cassation or the President of the Court of Appeals and delegated by the Minister of Justice, or by a counselor of the administration of judicial inspection unit for cases related to Presidents and Judges of the Court of First Instance.

Articles 100 to 115 of Law no.46/1972 regulate disciplinary trials that must be kept secret. The resignation of the judge or his or her referral to retirement terminates the trial. The judge in person attends the trial and may submit his or her defense in writing. For his or her defense the accused can appoint a member of the judiciary other than the counselors of the Court of Cassation. The final decision of the disciplinary action must be recorded in writing and it must present the rationale upon which it was based. This sentence is not subject to appeal and the sanctions to be taken against the judge can result in dismissal.

Under these procedures, the legislature has made the process before the disciplinary council semi-judicial in nature. Indeed, under the law disciplinary decisions of the council are considered judicial judgments, and, consequently, not administrative decisions subject to appeal.

The legislation distinguishes between investigations of crimes committed by judges versus other citizens. The disciplinary council may, on its own motion, or upon request of the Ministry of Justice, or the President of the Court, or upon a resolution of the general assembly, decide to suspend the judge from resuming his or her functions and half of his or her salary. The council may review either of these two sanctions in accordance with article 97 of the Law on the Judiciary.

During the disciplinary trial the Council may review either or both sanctions at any time, in accordance with article 103 of the Law on the Judiciary. However, at this stage the council may not deprive the judge from half of his or her salary since the legislation did not give the Council this authority (as is the case under article 97).

Article 127 regulates the disciplinary action against the members of the Council of Prosecutors in the same manner as provided in article 98 concerning judges.

Presidential Decree no.47/1972 on the Council of State regulates the disciplinary action against the members of the Council of State (article 112). This article stipulates that disciplinary action against the members of the Council of State is within the jurisdiction of a disciplinary council formed as follows:

- The president of the Council of State; and
- Six of the Vice-Presidents of the Council, by order of seniority.

For disciplinary action relating to one of the Vice-Presidents of the Council, a Vice-President of the Council of State institutes the disciplinary action; for all other Council members a counselor institutes the action.

Articles 117 to 120 of Decree no.47/1972 regulate disciplinary trials, which must be kept secret. The disciplinary action is terminated by the resignation of the member or his or her retirement. The accused has the right to be present in person, may submit his or her defense in writing and may appoint a Council member as defense counsel. The final decision, which is rendered in secret, must include the rationale upon which it is based. The judgment given in the disciplinary action is final and not subject to any appeal. The disciplinary sanctions are admonition and discharge.

Articles 19 and 20 of Law no.48/1979 on the Supreme Constitutional Court regulate disciplinary actions

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against the members of the Court. Article 19 stipulates that “If a charge which may affect confidence or esteem or concerns a serious breach of duties or requirements of his function is imputed to one of the Court members, the President of the Court shall refer the matter to the committee of provisional affairs in the Court.”

If after hearing from the accused the committee decides that there are grounds to pursue the proceedings it will delegate one of its members or “a committee of three members to investigate”. The accused member is then considered on forced leave with full salary.

Once the investigation is completed the case is referred to the general assembly, excepting those members who participated in the investigation or indictment. The general assembly then sits as a disciplinary court, which issues, after hearing from the defense, an order of requiring the member to retire. Once the disciplinary charge is established, the only sanction under the law is retirement. The judgment is final and is not subject to any form of appeal.

Article 20 stipulates that “the general assembly of the Court has the same jurisdiction given to the committee provided for in article 95 and 96 of the Law on the Judiciary, as well as the jurisdiction of the disciplinary council provided for in article 97 of said law.”

Law no.46/1972 on the Judiciary provides for the appointment, transfer and discipline of public prosecutors. However, public prosecutors cannot be discharged from office.<sup>25</sup>

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25 Law no.46/1972, article 67, as replaced by Law no.35/1984

### **JIP.13: Conflict of Interest Rules**

**Satisfactory:** The legal framework regulating conflicts of interest is sufficiently comprehensive to address the key sources of potential conflict. There are no significant violations of these rules in practice.

Article 72 of Law no.46/1972 on the Judiciary provides that “a judge may not perform any commercial act or any act incompatible with the independence and dignity of the judiciary. The Supreme Council of the Judiciary may decide to prevent the judge from exercising any act deemed inconsistent with the duties of his function and good performance thereof.”

Article 72 further stipulates that “courts are forbidden to express political opinions and judges are prohibited to undertake any political activity. They may not submit their candidacy for election to the People’s Council or to regional or political organizations before they submit their resignation.”

Article 75 provides that “Judges who are related to each other by ties of parenthood or alliance by marriage, up to the fourth degree, may not sit in the same judicial circuit. Further, the public prosecutor, or one of the parties to the case or defense counsel in charge of his defense may not be one who is tied up by such relationship with any of the judges examining the case. The proxy of an attorney at law, who entertains such relationship with the judge, shall be disregarded unless the proxy was given after examination of the case by the judge.”

Articles 94 and 95 of the Law on the Council of State reiterate the same provisions as those referred to in articles 72 and 73 of the Law on the Judiciary.

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## JIP.14: Income and Asset Disclosure

**Unsatisfactory:** The law requires judges to disclose periodically their personal assets to a special directorate of the Ministry of Justice. However, most judges neglect to comply with this requirement. Moreover, competent authorities have shown no interest in enforcing the law, and no judges have been prosecuted for illicit enrichment.

Article 1 of Law no.62/1975 on illicit profits, provides that “this law applies to the following categories: (1) *those assuming the burden of public authority ...*” Since the courts constitute the core of the judiciary, which is one of the public authorities provided for in the Constitution, and since those in charge of it are considered among those assuming the burden of public authority, article (1), paragraph (1), clause (1) also must apply to judges.

Judges must therefore, upon appointment, submit a “declaration of assets” including their assets and those of their spouse and minor children. An updated declaration must be submitted in January, five years after the initial submission, and then periodically every five years.<sup>26</sup> If the committee in charge of examining the declaration has strong suspicions indicating an illicit profit, it refers the documents to the competent body to start the investigation, which may be delegated to the public prosecution on specific issues. If the investigation reveals evidence as to an illicit profit, the matter is referred to the competent court for trial.

The practice reveals that there is in fact an administration at the Ministry of Justice in charge of this matter. Still, several members of judicial organizations do not persevere in submitting these declarations. There has not been a single referral of any such case, even if a judge has been arrested for bribery, has been under criminal investigation, or has been found guilty. Likewise, none of the persons who failed to submit a declaration was investigated or subject to any measures despite indications of an unjustified increase in their assets. The lack of enforcement of this law is a serious issue contrary to the principles of honesty and integrity and this practice adversely affects the public perception of individual judges and of the judiciary as an institution.

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26 Law no.62/1975, article 3



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## SECTION 3

### LEVEL OF COMPLIANCE WITH THE JUDICIAL INTEGRITY PRINCIPLES RELATED TO GUARANTEES OF THE FAIRNESS OF JUDICIAL PROCEEDINGS AND THE FUNDAMENTAL RIGHTS OF LITIGANTS

The right to a fair trial, the aim of true justice, requires not only the independence of the judge, but also respect for the fundamental rights of litigants, such as the rights to equality under the law, due process and the fair and effective enforcement of judgments. This Section examines the independence of the judiciary from a fairness and rights perspective.

The analysis presented in this section does not cover the full range of issues or practices necessary to properly evaluate compliance with this principle. However, the paper generally presents a picture that is both satisfactory and unsatisfactory. It is satisfactory in-so-far as compliance with some of the specific rights of the accused are concerned, such as the right to an attorney and to a public hearing, but unsatisfactory with regard to the fair and effective enforcement of judgments, as well as gender representation within the judiciary. Indeed, the report notes that only very recently have any women been appointed to one of the high courts even though discrimination is forbidden under the constitution.

This Section centers on an analysis of these closely-related Judicial Integrity Principles:

- JIP.1 Guarantee of the Right to a Fair Trial (subcategory)
- JIP.7 Fair and Effective Enforcement of Judgments

### **JIP.1: Guarantee of the Right to a Fair Trial**

**Partially Satisfactory:** Some of the essential elements guaranteed under the right to a fair trial, including the right to an attorney and a public hearing are analyzed in this section and others are not. At least with respect to those analyzed in this section, compliance appears to be satisfactory. However, since this right includes a number of other guarantees, many of which are discussed throughout the report and not necessarily in this section, overall compliance with this key right appears to be only partially satisfactory.

Article 18 of the Law on the Judiciary and article 268 of the Code of Criminal Procedure provides for public hearings. The court may, however, decide to hear the case, in full or in part, in a closed (secret) hearing. It may prevent certain categories of persons from attending for public policy considerations or for preserving morality. The press is allowed to photograph or record hearings unless the court decides otherwise. Most judges welcome press coverage and often complete hearings are telecast.

Article 269 of the Code of Criminal Procedure orders the presence of a member of the public prosecution at all criminal court hearings. The court must listen to his or her statements and decide upon all claims. The accused attends hearings, without handcuffs and unchained, and may not be excluded from hearings during the examination of the case, unless he or she causes disrupts the orderly proceedings of the court. Under these circumstances, even then the proceedings shall continue until it is possible to resume them in his or her presence. In that event, the court must keep the accused informed of all procedures and decisions taken in his or her absence.

The law also allows the public prosecution, the victim and the civil claimant in the case to interrogate the witnesses, but the accused may not be interrogated unless he or she consents to it.

Article 125(2) of the Code of Criminal Procedure stipulates that “in all instances, the accused may not be separated from his attorney present with him during the investigation.” This principle is based on the fact that the accused and his or her attorney are two sides to the same coin. Any departure from this principle entails a violation of the constitutional right to an attorney. The accused also has the right to attend the investigation and is entitled to seek legal assistance of an attorney throughout the investigative procedure.

Article 71 of the Egyptian Constitution requires that the accused official notified of the charges and the rationale for the charges: “the notification, of the arrested incarcerated person, of the motives of such arrest or incarceration and this person has the right to contact whoever he wants to inform him of what happened or to seek his assistance within the law and the accused should promptly be notified of the charges against him.”

The Supreme Constitutional Court has ruled that the accused also has the right to an attorney at every step of the investigation: “every person arrested or incarcerated has the right to contact a third person in the manner regulated by law to inform him of what happened or seek his assistance, which means guaranteeing the right to obtain the legal opinion of a lawyer of his choice whose opinion is necessary to give him confidence and effective assistance to eradicate any suspicion and make him face the conditions imposed upon him by the public authority on his personal freedom, thus justifying that he may not be separated from his attorney whether during the preliminary investigation or before it.”

The law also requires an attorney for any person accused of a felony. If the accused is unable to appoint a lawyer, the court delegates a lawyer and establishes his or her fees. It would be advisable to extend this protection to misdemeanors, some of which are serious enough to guarantee the right to legal representation.

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In civil cases, the right of defense is undoubtedly a sacred right since its object is to ensure equality in the procedural positions of the litigants in front of the judge. If this principle is upset, the idea of justice itself becomes shaky. The principle of confrontation, which is one of the most important applications of the right of defense, necessitates notification as to the existence of litigation domestically or abroad.

The Code of Civil and Commercial Procedure has given sufficient importance to notification and has subjected it to judicial control.

The law also requires the judge to be impartial, to refrain from judging in accordance with his personal knowledge and to acknowledge the right of the parties to litigate by making the documents submitted to the court official.<sup>27</sup> The law also requires, in most first instance cases, the signature of the attorney bringing or appealing the case.

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<sup>27</sup> See, Law on Lawyers, article 52

## JIP7: Fair and Effective Enforcement of Judgments

**Partially Satisfactory:** The framework and institutions to ensure the fair and effective enforcement of civil judgments appears to be partially satisfactory. However, the enforcement of judgments against the State or an administrative entity and the enforcement of criminal judgments appear to be unsatisfactory. More information on these subjects is needed before any firm conclusions can be drawn.

Two codes regulate the enforcement of judgments: (i) the Code of Civil and Commercial Procedure and (ii) the Code of Criminal Procedure.

### I. Enforcement of Civil and Commercial Judgments (Code of Civil and Commercial Procedure)

This Code gives a significant amount of attention to the enforcement of judgments in three chapters of Book 2, article 212:

- Chapter 1 is entitled “general provisions” and is divided into six sections: the enforcement judge, the executive title, summary execution, enforcement of foreign judgments, place of enforcement, and objections to enforcement.
- Chapter 2 is entitled “provisional seizures”.
- Chapter 3 deals with distress and regulates the attachment of real property, specific auctions and the distribution of proceeds.

In addition to this general regulation of compelled enforcement, the Code deals with enforcement against the State and legal persons.<sup>28</sup> It also deals with enforcement on sea vessels<sup>29</sup> and enforcement on aircrafts registered in Egypt.<sup>30</sup> The provisions of the Code are of general application in the absence of a special law. This principle has been applied on judgments issued by the Council of State since the Law on the Council of State contains no provision relating to the enforcement of its judgments.

In general, the enforcement on movable or immovable property is subject to the general principles of civil procedure; however summary procedures are not allowed for the enforcement of immovable property.

In practice, there two legal points-of-view as to how to proceed with the enforcement process when certain due process objectives are raised prior to the final judgment. Many objections can be raised, including fraudulent or defective personal notification or the introduction of new litigants into a case (often these additional litigants have nothing to do with the judgment to be enforced). In addition, even though the legislature created and mandated that an enforcement judge be in charge of the enforcement process, some litigants also raise jurisdictional issues that often lead to prolonged debate.

Finally, there is a general tendency not to enforce judgments against the State or a State entity. Judgments against the State constitute the majority of judgments that are not enforced, even though article 123 of the Criminal Code states that “every public servant who intentionally refrains from enforcing a judgment ... eight days after the date of his official notification by a court bailiff shall be punished by imprisonment or discharge, if the judgment falls within his jurisdiction.”

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28 See, Law no.308/1955 on administrative enforcement, modified by Laws no.44/1958, 181/1958, 27/1971 and 30/1972

29 Law no.8/1990 on Maritime Commercial Law

30 Law no.16/1976

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This provision reiterates the principle included in article 72 of the Constitution which provides that “judgments are issued and enforced in the name of the people. The refusal to enforce judgments or the hindrance their enforcement by the competent public servant constitutes a crime sanctioned by law. The party who benefits from the judgment has the right to institute directly a criminal action before the competent court.”

Even though criminal contempt of court penalties are sanctioned in the Constitution, as well as Egyptian legislation passed in 1937, it has never been applied in practice. The government simply refuses to impose these sanctions for non-compliance. Indeed, the government often introduces obstacles to its very implementation, such as the requirement of notifying the Minister at his residence, which often proves to be impossible.

## **II. Enforcement of Criminal Judgments (Code of Criminal Procedure)**

The Code of Criminal Procedure, Book 4, articles 459 to 527, pertains to the enforcement of judgments:

- Chapter 1 relates to the enforcement of judgments (articles 459 to 469);
- Chapter 2 relates to the enforcement of the death penalty (articles 470 to 477);
- Chapter 3 relates to the enforcement penalties for restricting freedom (articles 478 to 490);
- Chapter 4, originally related to conditional prison releases, but it was abrogated by article 90 of the Presidential Decree-Law no.326/56;
- Chapter 5 relates to enforcement of judgments prohibiting payments of specified amounts (art. 505 to 510);
- Chapter 6 relates to bodily coercion (art. 511 to 523); and
- Chapter 7 relates to objections to the enforcement process (art. 524 to 527).

Under article 460, the rule governing the enforcement of criminal judgments is that “unless otherwise provided by this law, judgments issued by criminal courts are enforced when they become final.”

Article 463 provides that “judgments condemning payment of a fine and expenses are immediately enforced, even if they are subject to appeal. The same applies to imprisonment in the case of larceny or imprisonment of an accused recidivist if he has no fixed residence in Egypt and in the other instances where the sanction included in the judgment is imprisonment, unless the accused submits a guarantee to participate in all hearings and appeals and to abide by any enforcement order.”

The law also allows judgments to be issued, in both misdemeanors and felonies, if the condemned person is absent. Several due process problems have been raised in a number of cases, however, when there was no effort to identify the real address of the condemned during the investigation and trial. These problems often relate to the fact that the prosecution does not ever issue notices for those it can not locate and it often fails to send the police a list of enforceable judgments or a description of persons to be arrested.

The number of cases raising the question as to how to handle cases *in absentia* has been increasing and has led to the establishment of a special group, within the Ministry of Interior, composed of people specialized in enforcing judgments. While precise statistics are not available, the number of criminal judgments awaiting enforcement is estimated to be in the thousands.

## **III. Death penalty**

The Egyptian criminal law provides for the death penalty under article 13 of the Criminal Code, issued by Law no.58/1937, and states that “every person condemned to death penalty shall be hanged.”

Many articles of the Criminal Code provide for the death penalty, including in case of:

- Intentional violation of the independence or integrity of the Egyptian territory (article 77);
- Enrollment in the armed forces of a country in a state of war with Egypt (article 77(a));
- Performance of hostile acts against Egypt by working with a foreign country or seeking to contact it or those working for its interest (article 77(b));
- Assistance of a foreign country in its military operations or prejudice to military operations of Egypt by working with a foreign country or seeking to contact it or those working for its interest (article 77(c));
- Crimes provided by article 78 or 80;
- Crimes provided in Chapter 2, “felonies and misdemeanors perpetrated from abroad against State security”, if they impair the independence, unity or territorial security of the country or are perpetrated in times of war with the intention to assist the enemy or prejudice war operations of the armed forces (article 83(a));
- Any felony and misdemeanor not provided in Chapter 2, whenever the perpetrator had the intention to assist the enemy or prejudice war operations of the armed forces (article 83(a));
- Terrorism (article 86 bis (a));
- Murder, committed intentionally and with premeditation or observance;
- Kidnapping of a female with rape; and
- Drug trafficking.

In recognition of the serious nature of the death penalty, the Egyptian legislature has created a number of procedural safeguards in lieu of abolishing it. Articles 470 to 477 of the Code of Criminal Procedure establish comprehensive procedures for handling death penalty cases. For example, article 470 requires that any final death sentence be submitted to the President of the Republic for review, through the Minister of Justice. The President has the authority to order a pardon or substitute another penalty.

The execution of the death penalty must take place in the presence of the deputy public prosecutor, the prison warden, the doctor and lawyer of the condemned person. An official report to this effect shall be made and the condemned person has the right to record his statement.

The execution of the death penalty sentence on a pregnant woman is suspended until two months after delivery of the baby.

In most cases, the courts do not impose a death sentence unless the circumstances of the crime are of such danger and magnitude that the sentence becomes adequate in view of the crime perpetrated. If a death sentence is ordered, the public prosecution has the duty to submit the case to the Court of Cassation with its comments on the judgment, within the 60-day period allowed for an appeal in cassation, in the presence of the accused.

The judgment pronouncing the death penalty must be issued by a unanimous decision, otherwise it shall be considered null and void.<sup>31</sup> The documents of the case shall then be referred to the Mufti of the Republic for his opinion in the light of the facts established before the court.

It should be noted that the prevailing opinion in Egyptian criminal doctrine supports the death penalty on the grounds that the divine laws in different religions sanction this penalty and that these are crimes that justify the application of this penalty.

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31 Code of Criminal Procedure, article 381(2)

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## SECTION 4

### LEVEL OF COMPLIANCE WITH THE JUDICIAL INTEGRITY PRINCIPLES GUARANTEEING EXPRESSION AND INFORMATION RIGHTS

It would not be possible to paint a clear picture of the state of the Egyptian judiciary without an examination of the level of access to relevant information available to the public and to judges. An analysis of these two principles reveals that judicial and public access to legal and judicial information in Egypt is quite limited, particularly to the public. However, since it is possible for those with both the access and capacity to obtain some of this information via computer software and at least one official publication, the Daily Gazette, compliance appears to border on being partially satisfactory.

This Section centers on the analysis of two closely-related Judicial Integrity Principles:

- JIP.17 Judicial Access to Legal and Judicial Information
- JIP.18 Public Access to Legal and Judicial Information

### JIP.17: Judicial Access to Legal and Judicial Information

**Partially satisfactory:** Judges have difficulties accessing legal and judicial information. The Official Gazette, which is the sole source of information, is not published regularly. The judiciary has, however, initiated a program to computerize all legal information, which would make it easier for judges to access the laws, assuming they have access to computers, software and training. No other solutions have been envisioned.

The latest statistics reveal that as of January 2004, the number of laws issued in Egypt totaled 232,849 and that 55,106 of these were in force. The sheer number of laws that exists makes it all the more important to make all of them accessible to the judges and the public. At present, the only way to access them now is through issues of the *Official Gazette* and the *Wakaeh Al Masria*. However, even accessing the laws under these two publications is problematic because of the issuance of more than one daily issue.

The judges' association has made a number of computers and a range of software available to judges at an affordable price. Judges who are computer literate are keen to buy CD's containing laws from private companies at special reduced prices. However, the majority of judges are not computer literate and still therefore relies upon traditional means to search for laws and judgments at the courts' libraries, which are usually outdated. It is worth noting, however, that the President of the Court of Cassation has recently notified the Public Prosecution that this company may have violated intellectual property laws. The case was still pending in court at the time of this Report.<sup>32</sup>

The educational committee of the judges' association has also made law reference books and doctrinal studies available at a reduced price -- with the support of the Ministry of Justice.

Laws affecting the judges themselves, such as those regulating discipline, transfer, delegation, appointment and pecuniary dues, are all distributed to them in form of circulars or advertisements delivered at their place of work or at the judges' associations. In addition, the judges' association is currently printing a book that includes all of this information.

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32 Case no. 5894/2003 – Abdin, judgment to be given on March 30, 2004

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### JIP.18: Public Access to Legal and Judicial Information

**Partially satisfactory:** Egyptian citizens have limited access to legal and judicial information. The only source of legal information is the Official Gazette, which is not published regularly or easily usable for this purpose. Information relating to outstanding court judgments is not readily available in the press or in official publications.

The difficulty encountered by judges and legal professionals to access legal information, whether it is a judgment or a law, is even more problematic for the public, since media coverage is restricted to important laws and judgments. Ordinary citizens who are required to abide by the rule that “no one is supposed to ignore the law” have to rely on their ability to access the law through the Official Gazette, which sometimes is not published or available on a regular basis. This problem of accessing the laws led the judges’ association to issue these recommendations:

- Restrict publication of the Official Gazette to issues having uniform serial numbers, without allowing supplements or issues bearing the same number;
- Require monthly publication of all legislation, orders and regulations; and
- Establish specific places throughout the Republic to buy the Official Gazette and the legislative publication, as well as all other compendiums of legislation and orders.



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## CHAPTER 4

### CONCLUSIONS

Even though the Egyptian Constitution guarantees the independence and immunity of the judiciary, these guarantees have been violated over many years in a number of ways. Some of the most egregious examples include the unconstitutional existence of courts of exceptional jurisdiction and trying civilians in military courts. This includes the right given the President of the Republic to refer civilians to the military courts under a state of emergency.

In addition to the above, reference should be made to the unlimited and unjustified authority given to the U.C. Minister of Justice by Law no. 46/1972 on the Judiciary.

Another matter impairing the independence of the judiciary is the lack of an independent court budget. Judges have been seeking but have not obtained the right to prepare an independent budget, through the Supreme Council of the Judiciary. The Minister of Justice has refused their request many times.

This report also outlines the reasons why it is necessary to transfer the Judicial Inspection unit within the Ministry of Justice to the President of the Supreme Council of the Judiciary, as well as the need to guarantee the independence of public prosecutor from the Minister of Justice.

This report also notes that both government and individuals obstruct the fair and effective enforcement of Council of State judgments by filing numerous objections before the civil courts, even though the Council of State has repeatedly stated that the administrative courts had jurisdiction over these matters. Here, we take notice of the government's refusal to enforce the judgment issued in the case no.5206, judicial year 56, which invalidated a decision of the Minister of Interior pertaining to an election. Similar cases involving government officials include: (i) case no.10388, judicial year 57, against the Minister of Agriculture; (ii) case no.6694, judicial year 40, against the Cairo governor; (iii) case no.769, judicial year 48, against the Minister of Labor; (iv) case no.23480, judicial year 57, against the Minister of Social Affairs; (v) case no.1628, judicial year 56, against the Prime Minister, the Minister of Housing and the Cairo governor and (vi) many other cases. This prompted one of the opposition newspapers to announce that it was going to create a file of all judgments that had not been enforced and that it would invite its readers to provide the newspaper with their judgments for publication. The paper hoped that the publication of a long public list of unexecuted judgments would shame and prompt the government to implement these judgments.

The judiciary did not stand as a spectator in the face of obstruction against the enforcement of judgments. In fact, the recommendations of the first justice convention organized by the judge's association in 1986, which was inaugurated by the President of the Republic, emphasized the refusal to manipulate judgments and recommended:

- Monitoring the effective implementation of an enforcement system that is overseen by full-time enforcement judges in every court of summary jurisdiction; these judges should also have civil recourse rights and access to a police force.
- Reviewing the means available to ensure effective enforcement against reluctant debtors.
- Executing enforcement procedures and resolving objections in a timely way so as not prevent undue delays.
- Expanding the scope of application of article 123 of the Criminal Code to include sanctions against those working in the public sector, those in charge of a public service and those who have a parliamentary capacity.

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Finally, it is critical not to forget the role played by the media, namely the newspapers, in influencing the course of judgments. Indeed, the press in Egypt may serve as the most important mechanism for enforcing judgments, since collectively it represents many diverse political and economic societal interests.

That said, it is important for the press to act responsibly and to cease its efforts to influence public opinion through articles and editorials that disclose confidential or preliminary investigative information, especially in criminal matters. Even though such practices are criminally prosecutable under article 187 of the Egyptian Criminal Code, no newspaper that has committed this crime has been prosecuted. One example of recent press abuse relates to recent litigation concerning a bank that published prosecutorial investigative information from an indictment without also publishing information that had been submitted by the accused. This violates article 66 of the Constitution that states that the accused is considered innocent until guilt is clearly established.

Balancing the constitutional interest of a free press against the constitutional rights of all Egyptian citizens to a fair trial, due process and privacy is an important issue that needs to be addressed in Egypt.

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## ANNEX 1

### CONVENTIONAL AND LEGAL NORMS REGULATING THE EGYPTIAN JUDICIARY

#### **Egyptian Laws**

Law no.25/1966 on military rule (as amended)

Law no.82/1969 establishing and organizing the Supreme Council of the Judiciary, in application of article 173 of the Constitution

Law no.46/1972 on the judiciary (as amended)

Law no.47/1972 on the Council of State

Law no.40/1977 on the organization of political parties and establishing the Court of Political Parties

Law no.48/1979, as amended by Law no.168/1998, instituting the Supreme Constitutional Court

Law no.82/1979 establishing and organizing the Council of State

Law no.95/1980 establishing the Court of Values

Law no.10/1986 on the State Legal Department

Law no.12/1989 on the general administrative prosecution

#### **International Conventions Ratified by Egypt**

A part from bilateral treaties and legal agreements with foreign States, Egypt has adhered to the following conventions:

Abolition of Slavery Agreement (1926)

International Conventions on Forced Labor (1930 and 1957)

Universal Declaration of Human Rights (1948), especially article 8

International Convention against the Trade of Persons and Prostitution (1950)

International Convention on the Status of Refugees (1951)

Arab League Agreement on Notifications and Judicial Mandates (1952)

Arab League Agreement on the Extradition of Criminals (1952)

Arab League Agreement on the Enforcement of Judgments (1952 and 1959)

International Convention on the Political Rights of Women (1953)

United Nations Declaration to Eradicate All Kinds of Racial Discrimination (1963), especially article 7(2)

International Convention on the Prevention and Punishment of Genocide (1948)

International Covenant on Civil and Political Rights (1966)

International Covenant on Economic, Social and Cultural Rights (1966)

International Convention on the Elimination of All Forms of Racial Discrimination (1966)

International Convention on the Elimination of All Forms of Discrimination against Women (1967)

Protocol Amending the International Convention on the Status of Refugees (1967)

International Convention on the Prevention and Punishment of Racial Exclusion (1973)

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)

African Charter of Human and People's Rights (1980)

Arab Charter on the Rights of Children (1983)

International Convention against Racial Discrimination in Sport Events (1985)

International Convention on the Rights of Children (1990)

International Convention on the Rights on Migrant Workers and their Families (1990)

United Nations Agreement on the Prevention of Transnational Organized Crime (2000)

ANNEX 2

ANALYTICAL EVALUATION OF THE LEVEL OF COMPLIANCE WITH THE JIP IN EGYPT

JIP	SCOPE OF THE JIP (NAME OF THE PRINCIPLE)	COMPLIANCE*
1	Constitutional guarantee of judicial independence	
	Guarantee of the right to a fair trial	
	Guarantee of equality under the law	
	Guarantee of access to justice	
2	Institutional independence of the judiciary	
	Personal/decisional independence of judges	
3	Clear and effective jurisdiction of ordinary courts	
	Clear and effective judicial review powers	
4	Adequate judicial resources and salaries	
5	Adequate training and continuing legal education	
6	Security of tenure	
7	Fair and effective enforcement of court judgments	
8	Judicial freedom of expression and association	
9	Adequate qualification	
	Objective and transparent selection and appointment process	
10	Objective and transparent judicial career processes	
11	Objective, transparent, fair and effective disciplinary process	
12	Limited immunity from civil and criminal suit	
13	Conflict of interest rules	
14	Income and asset disclosure	
15	High standards of judicial conduct	
	Rules of judicial ethics	
16	Objective and transparent court administration	
	Objective and transparent judicial processes	
17	Judicial access to legal and judicial information	
18	Public access to legal and judicial information	

\*The level of compliance with each Judicial Integrity Principle (JIP) or each subcategory of a JIP is coded as follows: light gray corresponds to “satisfactory”; dark gray to “partially satisfactory”; black to “unsatisfactory”; and white to “not analyzed”. There is an additional nuance in the assessment of the level of compliance as arrows pointed upwards or downwards indicate, respectively, improvement or regression within one category.