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EGYPT

COURTING CHAOS AND CONTROVERSY

THE CIRCUMVENTION OF THE RULE OF LAW, HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS BY THE EGYPTIAN JUDICIARY

THIS REPORT HAS BEEN PREPARED BY THE GUERNICA GROUP (TGG)

EXECUTIVE SUMMARY, INTRODUCTION AND CONCLUSION.
FULL REPORT AVAILABLE ONLINE - WWW.THECORDOBAFOUNDATION.COM



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EXECUTIVE SUMMARY

EGYPT – COURTING CHAOS AND CONTROVERSY: THE CIRCUMVENTION OF THE RULE OF LAW, HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS BY THE EGYPTIAN JUDICIARY

1. Over the past two years, the Egyptian State Litigation Authority have commissioned a number of reports to examine a number of issues, including the history of the Muslim Brotherhood and its involvement in Egyptian politics.
2. The reports have sought to demonise the group and cast them as the catalyst behind a number of concerns that Egypt has faced, both historically, and more latterly, following the ‘Arab Spring’; specifically, post Tahrir Square protests and the election of President Mohammed Morsi.
3. Guernica 37 International Justice Chambers have been instructed by The Cordoba Foundation to assess those reports and undertake an independent investigation into the issues raised therein.
4. Two reports have already been published.¹
5. This is the third report in the series, and is arguably, the most important as it examines the Egyptian legal system in response to the State Litigation Authority’s report that seeks to deny the suggestion that the rule of law in Egypt has been undermined.
6. In short, the State Litigation Authority’s report is propaganda, and seeks to justify the fact that the protections provided by the Egyptian Constitution, domestic legislation and international law, are ignored to such an extent that the Egyptian legal system is now merely another tool of the State to silence opposition and further oppress a people whose democratic rights are already seriously curtailed.
7. Addressing by way of critical analysis specific issues raised in the State Litigation Authority’s report, this piece of research provides an objective overview of the historical development of the Egyptian legal system, with an emphasis on the criminal justice system.
8. It is notable that historically, as is highlighted in the initial chapters of this report, the Egyptian system was seen as a ‘beacon’ in the legal landscape of the Middle East, to such an extent that it was replicated, on an almost universal basis, throughout the region.
9. However, this example to others wasn’t to last, and it wasn’t long before ‘military rule’, or at least its significant involvement in the political system, began in Egypt.
10. This involvement, in what ought to be a citizen-led system, was to further develop so as to permeate all aspects of Egyptian life; a position that despite the Tahrir Square protests and the removal of the autocratic regime of Hosni Mubarak, continues today.

“*[There] appears to be a deliberate tactic on the part of the executive, the prosecution and the judiciary, one being utilised to circumvent procedural safeguards.*”

11. This is despite free and pluralistic democratic elections being held and the Egyptian populace electing President Mohammed Morsi.
12. As has been discussed in previous reports, Morsi won office following a process that independent international experts determined was free, inclusive and fair.
13. Despite the introduction of democracy to Egypt, and therefore to a degree, its citizens securing what it demanded in the demonstrations, the first democratically-elected President was removed by way of military *coup d'état*, and therefore the status quo was maintained insofar as the ruling class was concerned.
14. Not only was it maintained, but with the drafting of a new constitution the military provided itself with significant opportunity to further its own power, and did so with the explicit intention of removing the reforms brought about by Morsi which limited the military's influence within the political sphere.
15. In one of its first actions and as soon as the opportunity arose, the post-Morsi regime immediately limited the democratic rights and freedoms of citizens.
16. Further, this report looks at the elements of Egyptian domestic legislation, including its constitution, and considers those protections that look to guarantee fundamental rights and freedoms, and offer relevant fair trial protections.
17. These domestic provisions are considered alongside Egypt's international obligations, including those under treaties such as the Universal Declaration on Human and Peoples Rights, and the International Convention on Civil and Political Rights – treaties that are often viewed as the foundation for the international observance of human rights.
18. This report considers the rights that purportedly exist in Egypt and how they are protected; starting with one of the most fundamental systems of protection – the judiciary, and therefore, an independent judiciary. It is only through a fiercely independent judiciary that both the principle of the separation of powers can exist and a system of protection can develop.
19. The State Litigation Authority claims that Egypt's judiciary is independent; however, as will be observed in later chapters, the fact that a court makes an appropriate decision does not mean that the court in question, or for that matter, the wider judiciary is legitimate.
20. The report relies on a handful of justifiable decisions to defend its position; however, as the analysis in later chapters of this report demonstrates, a legitimate decision does not

legitimate an otherwise illegitimate decision – and as the plethora of decisions considered below shows, the Egyptian judiciary is anything but independent.

21. This fact, however, is entirely at odds with the constitution which clearly guarantees the position as it also guarantees fair trial rights.
22. The position espoused in this report is that the degree of influence exercised by the executive, the entirety of the judiciary is under its influence and beholden to its whims.
23. This report therefore asks, whether on an objective basis, does the judicial system respect the principles of the Universal Declaration on Human Rights (UDR), the International Covenant on Civil and Political Rights (ICCPR) and the African Charter etc. As we demonstrate, the short answer is that it does not, and therefore it cannot be said to be independent or have any respect for the fair trial principles that we go on to consider, with the background of a number of recent criminal cases that have come before the courts and are discussed accordingly.
24. As has been alluded to, an essential feature of any democracy is an individual's right to a fair trial.
25. The State Litigation Authority report suggests that the fact that there are examples where an individual has successfully appealed a sentence or conviction is evidence of the system working properly. Further, that fair trial rights are respected as where there are issues these can be duly rectified on appeal.
26. This report contends the above position is not sustainable as this is yet another example of the State manipulating facts to suit a particular narrative.
27. We devote a full chapter to fair trial rights: what they are and how they should operate in practice. In pursuit of objectivity, cases cited by the authority are considered here, as are those the authority conveniently ignores such as the mass trials at Mina where hundreds were convicted in a matter of hours. In this instance, the accused were prevented from adducing evidence in their defence or even challenging allegations made against them by the prosecution.

28. Further, the chapter on fair trials examines the legality of trials in absence, something that we have seen used with increasing frequency in Egypt since the unlawful removal of President Mors. This appears to be a deliberate tactic on the part of the executive, the prosecution and the judiciary, one being utilised to circumvent procedural safeguards. An example of this being the trial, conviction and sentencing of individuals for offences, despite the fact that they were imprisoned in other countries during the relevant time, or even, on occasion, dead.
29. We seek to take this position further and refer to the mass incarcerations of what the authority would have us believe are terrorists, but in reality, are either political opponents, or merely individuals who have sought to advance a position that may be different, or contrary, to that maintained by the government.
30. These individuals are not only subjected to a judicial system that has no respect for their rights, but they are forced to endure inhumane and degrading treatment, including the systematic use of torture.
31. The report from the authority would suggest that torture is not used, much less used on a systematic basis. However, it fails to answer the complaints of those victims, and further, it has refused to commence any investigation to those allegations of torture made.
32. This report concludes that the current judicial system in Egypt is part of an assembly line of abuse comprising of a manipulation of the judicial system, the crackdown of fundamental rights and freedoms, therefore the erosion of democracy and its foundation pillars.
33. The following pages shed light into the Egyptian judicial system today. It highlights serious ignorance of its own constitutional and legislative protections, and further, its ignorance of international law. This is all designed, it would appear, to strengthen the state's grasp on power currently held by President Sisi and his supporters.

INTRODUCTION

- 34.** On January 17, 2017, 9 Bedford Row Barristers Chambers published the fourth release in their series of reports commissioned by the 'State Litigation Authority' of Egypt.
- 35.** The previous three publications have already been addressed, and thus, this report seeks to address the fourth, entitled '*Egypt Courts and Some Recent Challenges*'.
- 36.** The report suggests that it will "*address a number of headline issues concerning human rights in Egypt*" and that the report will demonstrate "*...the developing state of the human rights programme of the government in today's Egypt that has had to cope with problems of the past and turbulence in recent years, as it establishes a modern democracy.*"²
- 37.** With all due respect to its authors, who are acting within the parameters of their instructions, the report does nothing of the sort.
- 38.** '*Egypt Courts and Some Recent Challenges*' is merely propaganda that seeks to attempt to justify the crackdown on human rights, the imprisonment of anyone who dares to disagree with the ruling autocracy, and the removal of those fundamental rights and freedoms that we would expect to be respected in any democracy.
- 39.** It is accepted that there are fair trial protections within the statutory framework of the Egyptian criminal justice system and its constitution; further, the safeguards that are suggested to be in place also go some way to guarantee the independence of the judiciary. However, protections and principles are meaningless if they are not adhered to or ignored.
- 40.** This is the prevailing situation in Egypt vis-à-vis its criminal justice system because safeguards that purported to act as guarantees are simply ignored. Individuals are held in pre-trial detention longer than the two-year maximum. Furthermore, rules of evidence are ignored, fair trial protections dispensed with, and it is clear that the judiciary is influenced by the ruling autocracy.
- 41.** This report, by way of background, commences with discussion concerning the relevant history of the Egyptian legal system, and how it has been developed to the position that we see today.
- 42.** It then goes on to consider relevant international treaties to which Egypt is a State Party, and thereafter, the relevant elements of domestic legislation that compliments the principles of those international treaties with a specific focus on fair trial, and due process, rights and guarantees.
- 43.** These chapters underpin that which is noted in paragraph 6 above, in that those rights that we expect to see are expressly guaranteed either by the domestic statutory and constitutional

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framework, or guaranteed by inference through Egypt’s position as a State Party to the International Covenant on Civil and Political Rights (ICCPR) etc. and therefore, there is expectation that they would be adhered to.

44. It is after these preliminary introductory chapters that the reality of the position in Egypt is considered, as opposed to that which ought to happen in ‘theory’.

45. Chapters 4, 5, and 6 below consider whether the Egyptian judiciary is truly independent, whether fair trial rights are adhered to, and whether the rights and freedoms of those detained in custody are respected.

46. The short answer to the three questions above is that the judiciary is anything but independent, and the rights that individuals would expect, either before the court at trial or during detention, are roundly ignored.

47. Chapter 7 deals with the catalyst behind the recent undermining of the criminal justice system and re-visits a common theme throughout the three previous reports drafted by the authors of this, namely, that having seized power through a military coup d’état, President Sisi’s regime has sought to restrict and remove all opposition to his rule through the use of various tactics, including the removal and/or criminalisation of democratic

rights and their associated fundamental freedoms.

48. In today’s Egypt, there is no such thing as ‘free speech’ or ‘free expression’; merely voicing an opinion can result in arrest and imprisonment for a number of years.

49. The suggestion therefore in paragraph 1 of ‘Egypt Courts and Some Recent Challenges’ that the state is establishing “...a modern democracy”, is quite frankly nonsensical.³

50. Where individuals are tried *en masse*, or thousands have been detained for merely expressing an opinion, and many more subjected to unlawful and abhorrent practice of ‘enforced disappearance’, Egypt cannot claim to be a democracy since no democracy would have any part in such practices.

51. This report was produced using open-source material, considering news reports from numerous outlets, as well as a plethora of reports from NGOs, INGOs and relevant departments of State organs of a number of different countries, as well as the European Union, the European Parliament and the UN.

52. All sources used are freely available for consideration and have been appropriately referenced where required.

CONCLUSION

53. The report that this seeks to respond to, is the fourth in the series published by the Egyptian State Litigation Authority, and much like the previous three reports, it seeks to justify the policies of oppression, and the removal of fundamental democratic rights and freedoms, that we have seen become apparent in Egypt following the removal of its first democratically elected president, President Morsi.
54. *'Egypt Courts and Some Recent Challenges'* states that it will "address a number of headline issues concerning human rights in Egypt", and that it will demonstrate "...the developing state of the human rights programme of the government in today's Egypt that has had to cope with problems of the past and turbulence in recent years, as it establishes a modern democracy".
55. It is correct to say that the report does address a number of the 'headline issues'; however, the manner in which it seeks to address those issues, rather than allay any concerns that may exist, does in fact exacerbate the problem.
56. The report purposely ignores the true extent of the problems facing Egypt, and specifically its legal system, and rather than give a true objective analysis of those concerns that have been highlighted internationally, it merely manipulates the position to suit its own ends, by way of the selective use of facts, and thus it hopes to mislead the reader by its deliberate obfuscation.
57. The truth of the matter, is that the Egyptian legal/judicial system, is broken, and rather than exercising its function - namely the interpretation and implementation of the law, as well as providing a mechanism for the resolution of dispute - it now exists as an arm and a weapon of the State.
58. The judiciary, and therefore the judicial system, is one of the three branches of State, and as per the principle of the 'Separation of Powers', part of its function is to exist as part of the system of 'checks and balances' against any over-reaching or attempted over-reach of the executive.
59. The opposite of this principle now exists in Egypt however, rather than existing as a system of protection - as this report has shown - in Egypt undergoing a system and period of oppression more acute than that which has gone previously, including that under Mubarak. The judicial system is, in fact, its main protagonist.
60. Importantly however, on a superficial analysis of the position, the Egyptian system does not immediately give rise to a concern, given that, its constitution, enacted domestic legislation, and its position as a state party to a number of international human rights instruments,

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purportedly provides for fair trial guarantees and protections.

61. It is a superficial analysis however that the State Litigation Authority has undertaken, and relied on the theoretical position, rather than the reality of it.
62. As this report has demonstrated, there mere existence and acceptance of these rules does not guarantee that they are complied with.
63. The State Litigation Authority report advances the position that the Egyptian judiciary is independent, and further, that fair trial rights are guaranteed and observed, on the basis that the Supreme Constitutional Court has taken certain decision that may be deemed to be detrimental to the interests of the executive, and thus is indicative of independence; and further, that the appeals mechanisms in the lower courts have on occasion overturned what it has deemed to be unfair convictions on appeal, and thus again, the systems in place are independent; and where right trial rights may not necessarily have been upheld initially, the appellate courts have done so, and therefore exercised their function.
64. This is however, not a justifiable conclusion to be drawn, and further, the evidence points to the exact opposite.
65. Egyptian courts are not independent from the executive interests; and further, appointments to the higher courts are evidently highly politicised, and fulfil the interests of the current military-led government.
66. We need to look closely at the process, and consider all of that evidence available, rather than seize upon a singular example that may support an espoused position.
67. Having regard to the evidence available, including the use of mass trials, the ignorance of evidential standards, and ordinary fair trial rights; such as the right to call evidence, the right to challenge evidence, and the right to take an active part in proceedings; the argument that the judicial system in Egypt has been corrupted and manipulated for political ends - and is therefore partisan and unfair - is irrefutable.
68. The Judicial Authority Law No. 46 of 1972 is acknowledged by the State Litigation Authority to “allow the executive a role in judicial appointments, transfers, inspections and the administration of justice, which impacts upon the courts independence.”
69. The position has not developed for the better since its enactment.
70. In February 2014, the International Bar Association Human Rights Institute, in its report “Separating

Law and Politics: Challenges to the Independence of Judges and Prosecutors in Egypt, concludes that despite the protections previously referred to, the *"Ministry of Justice is given wide powers over judges which provide scope for abuse."*

71. This position was followed in September 2016 by the ICJ which notes that the Egyptian regime, by virtue of its law, policies and practices, *"impede the ability of the judiciary to function in an independent and impartial manner."*
72. The central conclusion to both those reports, and indeed this, is that the Egyptian executive occupies an overwhelming role in those key aspects that affect the independence of the judiciary, including judicial appointments, assignments, promotions, secondments, disciplinary proceedings, and the normal functioning of the courts. It is a natural progression therefore to conclude that given the level of influence within these spheres, such influence would also hold a substantial position in the very functioning of those judges, and therefore their respect for fair trial rights or otherwise.
73. The fact that this report has drawn a similar conclusion on issues that have been also been considered by various NGOs and governmental institutions, is likely, for some, to give rise to a suggestion of bias, as this would appear to be the 'stock' reaction of the Egyptian Government to any form of criticism. The international community, however, ought not to buy in to what is an obvious attempt to switch the focus from the actual issue, but continue to look at the evidence and draw its conclusions accordingly.
74. The tactic of misinformation is one that is utilised regularly by dictatorial and oppressive regime.
75. This use of misinformation and misdirection is the basis upon which the entire State Litigation Authority report appears to be predicated; perhaps the starkest example being the position it adopts concerning fair trial rights, and whether such rights are observed in Egypt.
76. The only conclusion that can be drawn in respect of fair trial rights, is that they are not observed; and further, despite the relevant constitutional and legislative protections in place, the judiciary, and therefore the 'system' as a whole, appear to be deliberately ignoring a defendant's right to a fair trial; particularly for those before the courts who have, or are perceived to have, an association with a political group other than that of President Sisi; and therefore again, demonstrative of the pervasiveness of executive interference with the judicial system.
77. The State Litigation Authority report in what appears to be an effort to be seen as transparent, and prepared to acknowledge where there are problems, accepts that there have on occasion, been breaches of fair trial rights; however, it suggests, that due to the complexity of the analysis, the situation must be assessed on a 'case by case' basis.
78. In approaching it on this basis however, it demonstrates an abject failure to acknowledge the serious and systematic failure of the judicial system to maintain, and uphold the fair trial, and due process rights of those that appear before it.
79. Further, the report goes on to suggest that the evidence would lead to the conclusion that where there are procedural irregularities, these are being /corrected' during appeal proceedings, as *"the Court of Cassation has acted to quash convictions and order retrials."* This position however, fails to acknowledge the systematic breach of fair trial rights, that the right to compensation for miscarriages of justice has not been afforded in the majority of cases, and that despite there being 'some' acquittals, hundreds, if not thousands of citizens continue to be imprisoned, and in a number of cases, having been sentenced to death, following unfair trials. Moreover, in violation of international norms, civilians are being systematically tried before military courts, courts that have been constantly criticised for falling short of international standards of fairness.
80. A common theme of this report, and a position referred to throughout, is that a legitimate decision does not legitimise an otherwise illegitimate process.
81. These fair trial rights are being infringed at their most basic level, even before the trial begins, namely the 'right to be presumed innocent'.
82. Article 14.2 of the ICCPR notes that everyone

charged with a criminal offence has the right to be presumed innocent until proven guilty, and that this presumption is 'one of the most *fundamental principles of fair trial*', and that accordingly, as per General Comment No. 32, the UN Human Rights Committee explicitly stated all public authorities must refrain

"from prejudging the outcome of a trial e.g., by abstaining from making public statements affirming the guilt of the accused," and therefore, defendants should "not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals."

83. Despite this clear position, various defendants in Egypt have been forced to stand trial whilst being held in opaque and soundproof cages, including former president Morsi, and thus, such individuals are prevented from taking an active part in proceedings, as well as having the principle of the presumption of innocence infringed upon them.
84. From this position, the majority of other fair trial standards are ignored; defendants are prevented from accessing their legal counsel, they are prevented from challenging evidence, and thus they are prevented from putting their defence before the court.
85. It also ought to be noted, that even where defendants have been allowed to instruct legal counsel, those counsel are often intimidated, detained, investigated, prosecuted, and made subject to physical assaults, merely for acting in accordance with their professional obligations.
86. Again therefore, a fair trial in which a defendant is allowed to take an active part in proceedings, is albeit impossible.
87. The question therefore, is what conclusions can be drawn from the evidence discussed in this report? On a simplistic basis, the only conclusion to be drawn, is that to suggest that Egypt adheres to any form of fair trial standards is nonsensical; such a position cannot be maintained following any form of objective assessment of the available of evidence.
88. The truth of the matter, is that the judicial system behaves at the whim of the executive, who,

following the coup d'état to remove President Morsi, have ensured that they wield influence and power, over all elements of State, including those that ought to be fiercely independent, such as the judiciary.

89. This in turn, has allowed the executive to turn the judiciary, and therefore the Egyptian legal system, into a weapon for it to wield against those it deems as its enemies, namely, any citizen who may dare to subscribe to a different position than that adopted by the Government.
90. To suggest that Egypt subscribes to the rule of law, and recognised standards of fairness, in the manner espoused by the State Litigation is deliberate manipulation, and in essence, is nothing more than an exercise in propaganda in an effort to deflect attention and mask the true position.

ENDNOTES

1. Muslim Brotherhood and the Myth of Violence and Terrorism, Report no. 1, September 2015 – The Cordoba Foundation and TMC Advisory Group (TMC); *Egypt's Stolen Democracy: Understanding the Motivations and Key Actors*, Report no. 2, September 2015 – The Cordoba Foundation and TMC Advisory Group.
2. 9 Bedford Row International (2017): "Egypt Courts and Some Recent Challenges", 16th January 2017, par. 1, available at: <http://egyptevidence.com/egypt-courts-and-some-recent-challenges/>.
3. Ibidem.



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