

Rule of Law Quick Scan

Egypt

Prospects and Challenges

Hiil Rule of Law Quick Scan Series

This document is part of Hiil's Rule of Law Quick Scan Series. Each Quick Scan provides a brief overview of the status of rule of law in a country.

April 2012

The writing of the Quick Scan was finalized in December 2011

Foreword

This document is part of HiiL's *Rule of Law Quick Scan Series*. Each Quick Scan provides a brief overview of the status of rule of law in a country.

The Quick Scan Series is primarily meant for busy practitioners and academics who want to have a snapshot of the rule of law in a country, particularly with a view to understanding what the main trends and challenges regarding the rule of law are and where local and international stakeholders can possibly make a positive difference.

Each Quick Scan is written by a reputable rule of law expert from academia and/ or practice, who is either from the concerned country or has spent many years living and working there.

The Quick Scan Series aims to be neutral and balanced. To achieve this aim, the authors have consulted sources from a wide range of stakeholders, including the government, (inter)national NGOs, academia, and international organizations. They present differences of opinion or analysis, but do not pronounce judgment on which view is correct. In the context of their work on the Quick Scan they have visited the country and talked to different stakeholders, presented drafts and revised in view of the comments they received.

All Quick Scans have the same format. Part A describes relevant historical, social, political and economic context. Part B analyses positive trends and challenges. Part C is an overview of relevant indicators on rule of law. To identify relevant trends and challenges in rule of law, the Quick Scans are guided by the conception of the rule of law developed by the World Justice Project Rule of Law Index.

This Quick Scan on the rule of law in Egypt has been prepared in partnership with the Arab Center for the Development of the Rule of Law and Integrity (ACRLI). In particular, ACRLI organized national level meetings to generate input and feedback from a wide variety of stakeholders. ACRLI's outstanding professionalism in identifying and committing stakeholders, leading the workshops, assisting the authors and organizing outreach activities has been invaluable.

The Series is made possible by generous funding of the Dutch Ministry of Economic Affairs for the Innovative Rule of Law Initiative.

The Hague,

Ronald Janse
Hague Institute for the Internationalisation of Law

April 2012

The writing of the Quick Scan was finalized in December 2011

The Hiil Rule of Law Quick Scan Series is published by Hiil.

Content & realisation Quick Scan on the rule of law in Egypt:

- Hiil, The Hague, The Netherlands
- Arab Center for the Development of the Rule of Law and Integrity (ACRLI), Beirut, Libanon

Editor in chief:

- Ronald Janse, Hiil, The Hague, The Netherlands

Author:

- Tamir Moustafa, Associate Professor of International Studies, Simon Fraser University in Vancouver, Canada

Photography cover and on page 7, 21, 44:

- Ms. Diana Kobayter

Published April 2012

Feedback, comments and suggestions: info@hiil.org

© 2012 Hiil

All reports, publications and other communication materials are subject to Hiil's Intellectual Property Policy Document, which can be found at www.hiil.org

About the Author | Tamir Moustafa

Tamir Moustafa (B.A. University of California, San Diego; Ph.D. University of Washington) is Associate Professor of International Studies and Stephen Jarislowsky Chair at Simon Fraser University in Vancouver, Canada. He is a visiting fellow at Harvard Law School for the 2011-2012 academic year.

Tamir Moustafa is the author of *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (Cambridge University Press, 2007) and he is co-editor of *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, 2008). He has authored a dozen articles and book chapters on diverse aspects of Egyptian politics including judicial politics, religion and politics, and various facets of state-society relations.

Moustafa received numerous awards for his academic writing on judicial politics in Egypt, including the Corwin Award from the American Political Science for the best dissertation in the field of public law and the best dissertation prize from the Western Political Science Association.

Since earning his Ph.D. in 2002, he has taught Middle East politics at U.C. Berkeley, the University of Wisconsin, and Princeton University before arriving at his current position in Vancouver, Canada.

Table of contents

Part A: Overview of the Rule of Law in Egypt	7
Introduction	8
1. Historical Context: Development of the Egyptian Legal and Political System	9
1.1 From Muhammad Ali to British Occupation	9
1.2 Arab Socialism under Gamal Abdel Nasser (1952-1970)	9
1.3 Increased Judicial Autonomy under Anwar Sadat (1970-1981)	10
1.4 Rule by Law under Husni Mubarak (1981-2011)	11
2. Organisation, Functions, and Jurisdictions of the Judiciary	12
2.1 Alternative Dispute Resolution	14
3. Legal Framework	16
3.1 International Treaties and Conventions	16
3.2 The 1971 Constitution	16
3.3 Laws, Regulations, and Court Rulings	16
3.4 The 2011 Interim Constitution	17
4. Political Institutions	18
4.1 The President of the Republic	18
4.2 Supreme Council of the Armed Forces (SCAF)	18
4.3 The People's Assembly (Maglis al-Sha'ab)	18
4.4 The Cabinet of Ministers	19
4.5 The Shura Council	19
4.6 National Council for Human Rights (NCHR)	19
4.7 Sub-National Government	19
4.8 Lawyer's Syndicate (niqabat al-muhamin)	20
4.9 Judges Association (nadi al-quda)	20
Part B: Positive Trends and Challenges Regarding the Rule of Law	21
Introduction	22
Positive Trends	23
1. Invigorated NGO Community	23
2. Political Rights	25
3. New Constitution	26
4. Women's Rights	28
Challenges	30
1. Fundamental Rights	30
A. Due Process of Law and Rights of the Accused	30
B. Right to Life and Security	33
C. Labour Rights	35
D. Freedom of Expression and Freedom of the Press	36
E. Equal Treatment and Non-Discrimination	37
2. Effective Limits on Government Power	39
A. Horizontal Checks on Executive Power	39
B. Vertical Checks on Executive Power	40
3. Challenges for Commercial and Civil Dispute Resolution Processes	40

Table of Content

Part C: Relevant Indicators in Rule of Law	44
1. Freedom House, 'Countries at the Crossroads: Country Report Egypt'	45
2. Bertelsmann Transformation Index	46
3. Transparency International: Corruption Perceptions Index	46
4. Failed States Index	47
5. World Bank (Doing Business)	48
6. World Bank Governance Indicators	49
7. Cingranelli-Richards (CIRI) Human Rights Dataset	50
8. Ibrahim Index	53
9. ANNEX	54
Appendix World Justice Project Rule of Law Index™ 3.0 Factors	55

Part A: Overview of the Rule of Law in Egypt



Introduction

With the fall of the Mubarak government in February 2011, Egyptians have a historic opportunity to rebuild their legal and political system from the ground up. Egyptians will elect a new government and draft a new constitution that will go before voters in a national referendum. Myriad other laws and legal institutions will be reshaped over the next several years; indeed they are already being rewritten. The moment is appropriate, therefore, to take stock of the positive trends and challenges in strengthening the rule of law in Egypt.

With a population of 83 million, Egypt is by far the most populous country in the Arab World and arguably the most important in terms of regional politics, commerce, and security. This fact alone makes Egypt worthy of our sustained attention. But in the area of law and legal institutions, in particular, Egypt has served as a model of sorts. Egyptian legal professionals work throughout the Arab World and a number of Arab countries that have mimicked Egyptian legal institutions and practices. As a result of this influence, prospects for the rule of law in Egypt have regional and not only domestic implications.

This section of the report sets the context for a closer analysis of the positive trends and challenges regarding the rule of law in Egypt, which is presented in Part B of the report.

1. Historical Context: Development of the Egyptian Legal and Political System

1.1 From Muhammad Ali to British Occupation

As in other countries, the development of the modern Egyptian legal system was driven by the twin engines of state-building and the advance of trade and capitalism. Beginning with the rule of Muhammad Ali (1805-1848), new legal codes and modern legal institutions were rapidly deployed to regulate commerce and extend the reach of the state. The first unified legal code, *al-Muntakhabat*, was promulgated in 1829, the Mixed Courts were established in 1876 to arbitrate business disputes involving foreigners, and the National Courts were established in 1883. The civil, commercial, penal, and procedural codes for the National Courts were built on a foundation of primarily French law.

In the political realm, Egypt lost its independence in 1882 with the beginning of occupation by Britain. Although formal independence was reached in 1922, Britain retained political and military control of the country until they were ousted by a military coup d'état in 1952.

1.2 Arab Socialism under Gamal Abdel Nasser (1952-1970)

The 1952 military coup (dubbed a “revolution” by the incoming junta) was led by Gamal Abdel Nasser, a young officer who left a monumental mark on Egyptian and Arab political life.¹ Within a few months of seizing power, Nasser made a decided shift away from the established legal and political order. The liberal 1923 Constitution, which provided for multi-party politics and fundamental rights in theory, if not in practice, was annulled by executive decree on December 10, 1952. Another decree dissolved all political parties, making way for a one-party state. Although Egypt returned to multiparty politics in the 1970s, the regime and the state became indistinguishable until 2011.

Egyptian legal institutions were also weakened significantly under Nasser. Dozens of high-ranking judges were dismissed and the courts were stripped of their power to annul administrative acts. The government established a series of exceptional courts, including *Mahkamat al-Thawra* (Court of the Revolution) in 1953 and *Mahakim al-Sha'b* (The People’s Courts) in 1954. These courts had sweeping mandates, few procedural guidelines, no appeal process, and were staffed by loyal supporters of the regime, typically from the military. Court cases were also regularly transferred from the civil courts to both military and state security courts, which afforded few procedural protections.

In the economic sphere, a vast nationalisation program was carried out that affected every sector of the economy. Some detail is provided here to illustrate the insecurity of property rights and the manipulation of law in that period. Law 117 of 1961 nationalised all private banks and forty-four companies in a variety of industries. Law 118 of 1961 gave the regime a controlling interest in a further eighty-six companies engaged in commerce and manufacturing. Finally, Law 119 of 1961 forcibly transferred the shares owned by individuals in excess of 10,000 Egyptian Pounds (USD \$23,000) for 147 medium-sized enterprises to the state, with the remaining shares fully expropriated in 1963. A total of approximately 3,000 square kilometres of farmland were also confiscated in two rounds. In October 1961, the assets of 167 citizens were sequestered, and 7,000 citizens were deprived of the right to participate in political life. In 1963 and 1964 the nationalisation of industry was extended still further and incomes above 10,000 Egyptian Pounds (USD \$23,000) per year were taxed at a 90 percent rate.

¹ Mohammad Naguib was the figurehead of the new junta from 1952-1954, but Nasser was the clear leader of the Free Officers, the group that carried out the 1952 coup.

By the early 1960s, Nasser had nationalised virtually the entire private sector, with only small workshops and shop-owners still in control of their property.²

Nasser's preference for an expansion of executive powers at the expense of autonomous rule-of-law institutions continued into the late 1960s. The final and most significant blow to Egyptian judicial institutions came in the 1969 "massacre of the judiciary." In the wake of military defeat in the 1967 war, and with increasing calls from both the Judges Association and the Lawyers' Syndicate for political and judicial reform, Nasser dismissed over 200 judicial officials, including the board of the Judges Association and a number of judges on the Court of Cassation. To ensure that resistance to executive power would not easily re-emerge, Nasser created the Supreme Council of Judicial Organisations, which gave the regime greater control over judicial appointments, promotions, and disciplinary action.³ In short, the rule of law suffered a profound setback under Nasser.

1.3 Increased Judicial Autonomy under Anwar Sadat (1970-1981)

Anwar Sadat assumed the presidency upon Nasser's premature death from a heart attack in 1970. Seeking to distance himself from the excesses of the Nasser era, Sadat restored much of the institutional autonomy that the judiciary once enjoyed. A new constitution was issued in 1971. Although not a thoroughly liberal document, the 1971 Constitution contained a number of positive provisions that strengthened the rule of law. Sadat also restored the strength and autonomy of the administrative courts in 1972 and further in 1984 by returning substantial control over appointments, promotions, and internal discipline, which had been stripped by presidential decree in 1959. Sadat also expanded the institutional capacity of the administrative courts by establishing additional courts of first instance and mid-level appellate courts throughout the country. These new judicial channels increased the ability of citizens to challenge state agencies, thereby increasing the accountability of government bureaucrats. Sadat also established a new Supreme Constitutional Court, which, among other duties, was provided with the power of judicial review.

Sadat used the new Constitution, the new Supreme Constitutional Court, and the reformed administrative courts as centrepieces of a new legitimating ideology focused on the importance of "*sayadat al-qanun*" (the rule of law) and of Egypt as "*dawlet mo'asasat*" (a state of institutions). Institutional reforms were used by Sadat to distance his regime from the substantive failures of the Nasser regime and to build a new legitimating narrative that was distinct from the populist foundations of the state.

On the domestic political front, Sadat engineered a tightly controlled process of political liberalisation. A new political parties law, in combination with an assortment of legislation regulating political activity, established a tightly bounded political system with abundant levers for the executive to control nascent opposition parties.

In the international realm, Sadat oriented Egypt away from the Soviet Union, towards the West and the United States in particular. In the economic realm, Sadat initiated a policy of "economic opening" (*al-infitah al-iqtisadi*) in 1974 in an effort to attract foreign investment back to Egypt. Anwar Sadat was assassinated in 1981 and was succeeded by his Vice-President, Husni Mubarak.

² For more on the political context in this period, see John Waterbury, *The Egypt of Nasser and Sadat: The Political Economy of Two Regimes*, 1983.

³ Nathan Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf*, 1997.

1.4 Rule by Law under Husni Mubarak (1981-2011)

Mubarak positioned himself as a political reformer who would slowly but surely advance democracy and the rule of law. Political liberalisation progressed in a number of areas through the 1980s, but the government reversed these tentative moves towards political reform in the 1990s. The government expanded its ability to exercise preventive detention and to try civilians in military courts through Law 97/1992; professional syndicates were increasingly regulated and threatened with state sequestration by Law 100/1993; Law 26/1994 mandated that the village *umda* (mayor) and *shaykh al-balad* (deputy mayor) were to be appointed rather than elected; democratic institutions at universities were undermined by Law 142/1994; further controls were placed over the press by Law 93/1995; and the emergency law was periodically extended throughout the decade.⁴

The declared objective of these actions was to root out militant Islamist groups that posed a serious, if not direct, threat to the stability of the state.⁵ The government made extensive use of legal institutions to confront radical Islamist groups throughout the 1990s, but the government also targeted liberals, leftists, moderate Islamists, and human rights advocates.

On the economic front, the Mubarak regime initiated a program of structural adjustment and privatisation of the public sector through Law 203 of 1991. The government also reversed Nasser-era land reform measures in the countryside by liberalising landlord-tenant laws in the agricultural sector through Law 96 of 1992. Although many economists hailed these reforms as long overdue, others noted the emergence of crony capitalism, where businessmen with government connections managed to corner markets and reap fantastic sums of wealth. Although Egypt's gross domestic product and per capita income increased at a brisk rate in the last years of Mubarak's rule, new wealth accrued almost exclusively to the upper income strata, with 40% of Egyptians living on a mere two dollars or less per day.

⁴ For a good overview of these developments, see Eberhard Kienle, *A Grand Delusion: Democracy and Economic Reform in Egypt*, 2000.

⁵ Fighting between Islamists and state security forces claimed the lives of over 1,200 citizens between 1992-1997 and the Egyptian tourist industry lost tens of billions of dollars.

2. Organisation, Functions, and Jurisdictions of the Judiciary

Modelled on the French judicial structure, the bulk of the Egyptian judiciary is composed of two separate hierarchies, one focused on civil and criminal law and the other dealing with administrative law. Additional judicial bodies include the Supreme Constitutional Court (SCC) and exceptional courts.⁶ The organisation and functions of the judiciary are detailed in articles 165-178 of the 1971 Constitution and additional legislation for each arm of the judiciary further governs appointments and disciplinary procedures.

The Court of Cassation (mahkamat al-naqd) sits at the apex of the ordinary court system and acts as the final appellate court for all matters of civil and commercial law, personal status law, and criminal law. Judges in the regular judiciary are appointed by decree of the President of the Republic with the approval of the Supreme Judiciary Council. The Supreme Judiciary Council is made up of the President of the Court of Cassation, the President of the Cairo Court of Appeal, the Attorney General and the two most senior presidents of the Courts of Appeal. Judges “may not be dismissed, suspended or sent to retirement before the legal age. Moreover, they may not be transferred to a non-judicial function.”⁷ Disciplinary proceedings are presided over by the President of the Court of Cassation, the three most senior heads of the Courts of Appeal and the three most senior councillors of the Court of Cassation. The ordinary judiciary is generally considered to be independent of the direct control of the executive branch of government, although there have been occasions in which reform-minded judges faced disciplinary hearings.

The Supreme Administrative Court (al-mahkama al-idariyya al-'uliya) sits at the apex of the administrative court system and acts as the final appellate court for all matters of administrative law. The administrative courts serve as an important forum in which citizens can challenge executive actions or any agency within the state bureaucracy. Citizens can challenge state agencies on the grounds that they violated administrative laws or that administrative laws themselves contradict the Constitution. The Administrative Courts regularly rule against the executive authority.⁸ The functions of the Administrative Courts are governed by article 172 of the 1971 Constitution and Law 47 of 1972. These regulations provide the administrative courts with substantial independence in matters of appointments, promotions, and other internal functions.

The Supreme Constitutional Court (al-mahkama al-dusturiyya al-'uliya, SCC), established in 1979, plays a leading role in the Egyptian judiciary.⁹ It has exclusive authority to perform three important roles:

- issue binding interpretations of existing legislation when divergent views emerge;
- resolve conflicts of jurisdiction between different judicial bodies; and
- perform judicial review of legislation.

⁶ For detailed treatments of the Egyptian legal system, see Nathalie Bernard-Maugiron and Baudouin Dupret (eds.), *Egypt and Its Laws*, 2002. See also Adel Sherif, ‘The Origins and Development of the Egyptian Judicial System’, in Boyle and Sherif (eds.), *Human Rights and Democracy, The Role of the Supreme Constitutional Court of Egypt*, 1996.

⁷ A. el-Sawi, ‘Law Professionals’, in Bernard-Maugiron and Dupret (eds.), *Egypt and its Laws*, 2002.

⁸ A comprehensive treatment of Administrative Court rulings and the political context can be found in Farouq Abd al-Bur, *Dor Majlis al-Dawla al-Misri fi Hamayit al-Haqq wa al-Hurriyat al-'Ama [The Role of the State Council in Protecting Public Rights and Freedoms]*, 1991.

⁹ For more on the SCC and the political context that it operates within, see Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt*, 2007. The official website for the Supreme Constitutional Court can be found at <http://hccourt.gov.eg/>, last accessed October 7, 2011.

Articles 174-178 of the Constitution and Law 48/1979 govern the activities of the Supreme Constitutional Court. Article 29 of Law 48/1979 specifies that the SCC is empowered to perform judicial review when it receives cases transferred from courts of merit. If any court, in the course of deciding a concrete case finds that a law being applied may be unconstitutional, it can request judicial review by the Supreme Constitutional Court. In most cases, petitions for judicial review are initiated at the request of litigants themselves. However, judges also have the right to initiate petitions for judicial review if they question the constitutionality of the laws they are applying. In technical terms, judicial review in Egypt is centralised rather than diffused, the timing of judicial review is *a posteriori* rather than *a priori*, and the SCC practices concrete review rather than abstract review, with legal standing restricted to litigants engaged in real legal controversies. The SCC struck down many laws, particularly through the 1980s and 1990s. It was much less assertive vis-à-vis the executive after 2005.

Justices on the Supreme Constitutional Court are appointed by the President from among two candidates, one chosen by the General Assembly of the Court and the other by the Chief Justice. The President of the Republic formally appoints the Chief Justice of the SCC, but for the first two decades following its establishment, the President appointed the most senior justice serving on the SCC to the position of Chief Justice. Mubarak eventually departed from this norm in 2001, asserting direct and exclusive control over selection of the Chief Justice of the SCC.

SCC Justices cannot be removed, although they are subject to the mandatory retirement age for state employees. The General Assembly of the SCC is the only body empowered to discipline members of the Court. Articles 56-60 of Law 48/1979 also give the SCC full control of its own financial and administrative matters.

Exceptional Courts - Running parallel to the regular judiciary are exceptional courts. As one study explains, "The procedural organisation of the exceptional courts is different from that of ordinary and special courts. The accused does not enjoy the same guarantees. He has no right to challenge sentences, the prosecution has more power than in ordinary circumstances and the executive power plays an important role in the ratification of the judgments, in the composition of the courts and in distribution of jurisdictions."¹⁰ The two exceptional courts now in operation in Egypt are the Emergency State Security Courts and the Military Courts.

Emergency State Security Courts - Law 162 of 1958 governs the activities of the state security courts, which applies sanctions for violations of the Law on the State of Emergency. Article 9 of that law authorises the President to transfer trials of ordinary crimes from the regular judiciary to the Emergency State Security Courts. The President is not required to give justifications for his request and the grounds need not have any tie to the reasons for which the state of emergency was originally declared. Three ordinary judges staff the emergency state security courts. Two of these judges may be replaced by military judges appointed by the President.¹¹ There are far fewer procedural protections in place at the emergency state security courts as compared with regular courts. A state of emergency has been in effect in Egypt for all but 18 months since 1967, essentially making the Emergency State Security Courts a permanent feature of the Egyptian judiciary.

Military Courts - Law 25 of 1966 provides for military courts (*al-mahakim al-'askariyya*). These courts have jurisdiction over matters within the ranks of the military, but article 6 of Law 25/1966 additionally provides for military trials of civilians during a state of emergency. As with the emergency state security courts, there are many fewer procedural protections as compared with the regular judiciary.

¹⁰ A. Seif el-Islam, 'Exceptional Laws and Exceptional Courts', in Bernard-Maugiron and Dupret (eds.), *Egypt and Its Laws*, 2002, p. 369.

¹¹ See Law 162 of 1958. See also United Nations Human Right Council, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism', 14 October 2009, p. 13.

Judges are military officers appointed directly by the Minister of Defence and the President for a two-year renewable term. Judges are not required to have training in law, and they are under the jurisdiction of the Ministry of Defence rather than the Ministry of Justice. Finally, there are fewer procedural safeguards in the military courts, trials may be held in secret, and there is no right to appeal.¹²

2.1 Alternative Dispute Resolution

The Cairo Regional Centre for International Commercial Arbitration (CRCICA) - CRCICA was established in Cairo in 1979 according to the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL). The Centre provides an Alternative Dispute Resolution (ADR) mechanism for Egyptian companies, foreign companies operating in Egypt, or any other international parties wishing to use the CRCICA for dispute resolution.¹³

Informal Mediation and Dispute Resolution Through Religious Institutions - Religious institutions provide Egyptians with an avenue for mediation and dispute resolution outside of the formal judicial system through informal consultations or through fatwas. While fatwas are often incorrectly understood as 'religious decrees' in the West, they are in fact non-binding opinions from religious scholars, provided in response to questions posed by lay Muslims. Although some fatwas address high profile political affairs, the vast majority of fatwas are issued in response to specific questions that the lay public brings to local religious leaders concerning their personal affairs. Lay Muslims who wish to receive guidance are free to consult with religious scholars and to seek their opinion on matters of Islamic law.

A prominent example of this informal mediation is the fatwa council of al-Azhar, the most prestigious religious institution in Egypt. An anthropologist's account of the Azhar fatwa council described the scene as such: "Its spacious room, located at the main entrance of al-Azhar mosque, is dimly lit; lined along all four of its darkened walls are leather couches, and spread out on them sit several aged Azhari sheikhs. These are the muftis who provide fatwas freely for any one who asks. Facing the muftis are several plain wooden chairs; on the chairs sit people who are either conversing with a mufti or patiently waiting their turn."¹⁴ Anthropological work suggests that by providing guidance to lay Muslims on relevant points in Islamic law, religious officials act as mediators, helping to resolve interpersonal disputes and ethical dilemmas of various sorts.¹⁵ These often relate to marital or other family problems.

Interestingly, Hussein Agrama, a leading researcher on this topic, has observed that, "the fatwas of the council...have no identifiable institutionalized enforcement mechanisms yet are taken very seriously by those who receive them."¹⁶ Indeed, although most mosques delivering fatwas, including al-Azhar, are part of the state, their fatwas carry no legal weight in the Egyptian legal system. Those who seek fatwas from religious figures do so at their own will, and they are not bound by law to abide by their guidance.

Despite the fact that fatwas are not legally binding, Agrama explains that the al-Azhar fatwa council "...remains immensely popular today, frequented by people from all walks of life as attested to by the steady stream of people who enter the council from the moment it opens at 9:30 a.m. until after it closes at 2 p.m. And people continue to come to the mosque late into the afternoon and early evening seeking fatwas about the myriad issues that affect their lives. The bustling activity of the fatwa council is just one expression of the growing interest in fatwas within Egyptian society and the Muslim world more generally."¹⁷

¹² Center for Human Rights Legal Aid, 'al-Qada' al-'Askary fi Misr: Qada' Bighayr Damanat...Qada' Bidun Hasana Mathamun Bila Haquq' ['The Military Judiciary in Egypt: Courts without Safeguards, Judges without Immunity, and Defendants without Rights'].

¹³ The website for the Cairo Regional Centre for International Commercial Arbitration can be accessed at <http://www.crcica.org.eg/>.

¹⁴ Hussein Agrama, 'Ethics, Tradition, Authority: Toward an Anthropology of the Fatwa', 37 *American Ethnologist*, pp. 2-18.

¹⁵ Hussein Agrama, 'Law Courts and Fatwa Councils in Modern Egypt: An Ethnography of Islamic Legal Practice', Ph.D. Dissertation, Johns Hopkins University, 2005.

¹⁶ Agrama, 'Toward and Anthropology of the Fatwa', p. 5.

¹⁷ Agrama, 'Toward and Anthropology of the Fatwa', p. 3.

In addition to addressing many thousands of disputes each year in person, the Azhar fatwa council provides consultation by telephone and provides fatwas via the Internet. The activities of the Azhar fatwa council are matched by many thousands of mosques and local religious leaders nation-wide that dispense similar, non-binding advice to lay Muslims seeking guidance. Religious institutions therefore play an important role in informal mediation and dispute resolution.

Agrama's qualitative findings suggesting that religious leaders perform important roles in dispute resolution are confirmed by quantitative studies such as the survey of low-income women in Cairo slums conducted by Belge and Blaydes. Here, the researchers find that women are much more likely to seek out local religious leaders than to engage with state institutions.¹⁸

¹⁸ Ceren Belge and Lisa Blaydes, 'Surviving the Slums: Social Capital and Dispute Resolution in Cairo and Istanbul', Unpublished manuscript.

3. Legal Framework

3.1 International Treaties and Conventions

Under article 151 of the 1971 Constitution, international treaties assume the force of law once they are ratified by the People's Assembly and published in the Official Gazette. The courts have drawn upon Egypt's international treaty commitments in their deliberations and rulings.

International treaties and conventions signed and ratified by the Egyptian government include the following:

- International Declaration of Human Rights
- International Covenant on Economic, Social and Cultural Rights
- International Covenant on Civil and Political Rights
- International Convention on the Elimination of all Forms of Discrimination
- Convention on the Elimination of all forms of Discrimination against Women
- Convention on the Rights of the Child
- Freedom of Association and Protection of the Right to Organise Convention
- Right to Organise and Collective Bargaining Convention

The Supreme Council of the Armed Forces confirmed in their third statement, issued 12 February 2011 that "the Arab Republic of Egypt is committed to all regional and international obligations and treaties."¹⁹

3.2 The 1971 Constitution

The Egyptian Constitution, now suspended by the Supreme Council of Armed Forces, contains a curious mix of liberal and illiberal elements. Liberal provisions include protections on the freedom of speech (article 47), freedom of the press (article 48), freedom of assembly (article 54), and freedom of association (article 55), among others. The Constitution also protects the independence of the judiciary (articles 65 and 165), the independence of judges (article 166), and the division of powers between the executive and the legislative branches. The state is also subject to the law (article 65) and citizens are guaranteed access to their rights in a court of law (article 68).

However, these liberal aspects of the 1971 Constitution were hemmed in by illiberal provisions, including article 88 (which governed the supervision of elections), article 93 (which prevented the courts from invalidating membership to the People's Assembly as a result of election irregularities), and article 179 (which provided broad powers to a Socialist Public Prosecutor). Additionally, an extensive web of illiberal legislation governing all aspects of political and social life effectively hollowed out the liberal provisions that were enshrined in the Constitution. Finally, the emergency law, state security courts, and military courts further contained opposition.²⁰

3.3 Laws, Regulations, and Court Rulings

Egyptian laws, regulations, and court rulings can be accessed online at www.tashraat.com.

An examination of laws and regulations and their implication for the rule of law in Egypt are examined throughout this report and in section two under "challenges" in particular.

¹⁹ This pledge was repeated the following day in the fourth public statement wherein SCAF suspended the Constitution, dissolved the People's Assembly, and assumed power. According to that statement, "The State is committed to implementing all international treaties and covenants to which it is a party."

²⁰ The 1971 Constitution can be found at: <http://www.constitutionnet.org/files/Egypt%20Constitution.pdf>, last accessed October 19, 2011.

3.4 The 2011 Interim Constitution

The Supreme Council for Armed Forces suspended the 1971 Constitution by decree on February 13, 2011. In place of the 1971 Constitution an interim constitution was issued in the form of a "Constitutional Declaration" on March 23, 2011. The Constitutional Declaration is composed of 63 articles. It serves as an interim constitution until such time that a constitutional assembly can draft a new constitution.²¹

²¹ The text of the Constitutional Declaration of 2011 can be found at <http://www.egypt.gov.eg/english/laws/constitution/default.aspx>, last accessed October 19, 2011.

4. Political Institutions

4.1 The President of the Republic

Under the 1971 Constitution, the President of the Republic was elected every six years with no term limit. The powers of the President were laid out in articles 73-85 and 137-152 of the 1971 Constitution. Under the Interim Constitution, Presidential terms are reduced to four years with a two-term limit. The office of the president has remained unoccupied since Husni Mubarak's fall from power on 11 February 2011.

4.2 Supreme Council of the Armed Forces (SCAF)

The Supreme Council of the Armed Forces is composed of 20 senior officers from the Egyptian military. Field Marshal Mohamed Hussein Tantawi, the former Minister of Defence under Mubarak, heads SCAF. The Supreme Council of the Armed Forces has effectively taken the role of the executive branch of government following Mubarak's fall from power.²²

Article 56 of the Interim Constitution defines the powers of the Supreme Council of the Armed Forces as follows:

The Supreme Council of the Armed Forces deals with the administration of the affairs of the country. To achieve this, it has the following direct authorities:

- Legislation;
- Issuing public policy for the state and the public budget and ensuring its implementation;
- Appointing the appointed members of the People's Assembly;
- Calling the People's Assembly and the Shura Council to enter into normal session, adjourn, or hold an extraordinary session, and adjourn said session;
- The right to promulgate laws or to object to them;
- Represent the state domestically and abroad, sign international treaties and agreements, and be considered a part of the legal system of the state;
- Appoint the head of the cabinet and his/her deputies and ministers and their deputies, as well as relieve them of their duties;
- Appoint civilian and military employees and political representatives, as well as dismiss them according to the law and to accredit foreign political representatives;
- Pardon or reduce punishment, though blanket amnesty is granted only by law;
- Other authorities and responsibilities as determined by the president of the republic pursuant to laws and regulations. The Council shall have the power to delegate its head or one of its members to take on its responsibilities.

4.3 The People's Assembly (*Maglis al-Sha'ab*)

The People's Assembly serves as the lower house of the legislative branch. Articles 86-136 of the 1971 Constitution set out the powers of the People's Assembly, which was elected every five years. Ever since multiparty elections were introduced in Egypt in the 1970s, the ruling National Democratic Party dominated the People's Assembly and never lost its two-thirds majority. Opposition parties managed to secure only token representation. The People's Assembly was dissolved as one of the first acts of Supreme Council of Armed Forces on 13 February 2011. Elections for a new People's Assembly began on November 28 and will be completed by January of 2012.

²² Decrees from the Supreme Council of the Armed forces can be accessed at <http://www.cabinet.gov.eg/Decrees/PresidentialDecrees.aspx>, last accessed October 30, 2011.

4.4 The Cabinet of Ministers

A Cabinet of Ministers plays the role of a caretaker government until new parliamentary elections can be held.²³ Prime Minister Essam Sharaf was appointed by SCAF to lead the Cabinet of Ministers during the transition period.²⁴

Article 57 of the Interim Constitution assigns the following duties to the Council of Ministers:

- Participate with the Supreme Council of the Armed Forces to put in place public policies of the state and supervise their implementation, according to the laws and resolutions of the republic;
- Direct, coordinate, and follow the work of the ministries and their related fronts, in addition to public institutions and bodies;
- Issue administrative and executive orders according to laws, regulations, and decisions, and see to their implementation;
- Prepare draft legislation, regulations, and decisions;
- Prepare a draft public budget for the state;
- Prepare a draft public plan for the state;
- Contract and grant loans according to constitutional principles;
- Note the implementation of laws, preservation of state security, and protection of citizen rights and state interests.

4.5 The Shura Council

The Shura Council (*Maglis al-Shura*), or Consultative Council, serves as the upper house with elections every six years. The Shura Council was established as the result of a constitutional amendment in 1980. Articles 194-205 of the 1971 Constitution set out the functions of this body. The Shura Council must be consulted in a number of instances, the most important being for proposed amendments to the constitution, for draft laws that touch on fundamental rights, and for peace treaties. It is composed of 264 members, two-thirds of whom are elected representatives and one-third of whom are appointed directly by the President of the Republic. The role of the Shura Council is also addressed in articles 35-37 of the Interim Constitution.

4.6 National Council for Human Rights (NCHR)

The National Council for Human Rights was established in 2003 according to Law 94/2003. The NCHR is charged with promoting human rights values in the country. It produces an annual report and advises the government on how to strengthen human rights protections in Egypt. The Council serves in an advisory capacity and the government appoints members of the body.²⁵

4.7 Sub-National Government

Egypt is comprised of 27 governorates, but subnational institutions have little measure of real autonomy. Governors are appointed directly by the President of the Republic and they enjoy little or no financial independence. Similarly, the positions of village *umda* (mayor) and *shaykh al-balad* (deputy mayor) became appointed rather than elected by Law 26/1994. Articles 162-163 of the Constitution spell out the role for local People's Councils.

²³ Minutes of Cabinet of Ministers meetings can be accessed at: <http://www.cabinet.gov.eg/default.aspx>, last accessed October 30, 2011.

²⁴ Essam Sharaf and his cabinet resigned from office as this report was going to press in late November 2011 to protest SCAF's handing of the political crisis demonstrations that erupted in November 19-26, 2011. Kamal al-Ganzouri, a former prime minister under Mubarak, was subsequently appointed by SCAF to lead the caretaker government.

²⁵ The website for the National Council for Human Rights can be found at: <http://www.nchregypt.org/en/>

Legal Professional Associations:

4.8 Lawyer's Syndicate (*niqabat al-muhamin*)

Established in 1912, the Lawyer's Syndicate has a long and storied history of political engagement. It acts as the professional association for the legal profession, but perhaps more importantly, it has played a leading role in pushing for political liberalism in Egypt.²⁶

4.9 Judges Association (*nadi al-quda*)

Judges are similarly organised into a "Judges Club," a label that downplays the degree to which the Club has acted as a political force in its own right. Founded in 1939, the Judges Club has been active throughout its history in pushing for increased judicial independence.

²⁶ For further background and context on the Lawyer's Syndicate, including their central role in Egyptian political life, see Donald Reid, *Lawyers and Politics in the Arab World*, 1981 and Farhat Ziadeh, *Lawyers, the Rule of Law and Liberalism in Modern Egypt*, 1968 . For details on the contemporary ideological splits in the legal profession between liberals and Islamists, see Tamir Moustafa, 'The Islamist Trend in Egyptian Law', in *Politics and Religion*, vol. 3, 2010, p. 610.

Part B: Positive Trends and Challenges Regarding the Rule of Law



Introduction

Examining the positive trends and challenges regarding the rule of law in Egypt at this moment in time presents unique challenges. Most obviously, Egypt is a “moving target” with important new laws and regulations being issued daily. Changes to the legal framework governing elections, political parties, the media, and other important institutions are in constant flux. The timeline for elections, the drafting of the new constitution, and other major aspects of law and legal institutions have shifted, for example, during the preparation of this report. Equally important, the political context and the unwritten rules of how laws and legal institutions are deployed are also fluid.

Nevertheless, this section of the report seeks to identify the positive trends and challenges for the rule of law in Egypt based on data from both before the political rupture of February 2011 and since that time. Such a comparison provides the necessary context with which to understand current developments and -- equally important -- to assess the extent to which the rule of law has been strengthened, weakened, or remained the same in the nine months since the fall of the Mubarak government.

Positive Trends

1. Invigorated NGO Community

Non-governmental organisations focused on rights advocacy have proliferated over the last two decades. NGOs are active in areas as diverse as women’s rights, labour rights, peasant rights, free speech rights, prisoner rights, and environmental rights. For example, the Center for Women’s Legal Aid, established in 1995, provides free legal aid to women dealing with a range of issues including divorce, child custody, difficulties securing alimony, and various forms of discrimination. The Land Center for Human Rights joined the ranks of legal aid organisations in 1996 and dedicated its energies to providing free legal aid to peasants. The Human Rights Center for the Assistance of Prisoners similarly provided legal aid to prisoners and the families of detained individuals by investigating allegations of torture, monitoring prison conditions, and fighting the phenomenon of recurrent detention and torture through litigation. The Hisham Mubarak Center for Legal Aid was particularly successful in providing free legal aid and in successfully challenging regime legislation in the Supreme Constitutional Court. The Arab Center for the Independence of the Judiciary and the Legal Profession (ACILJP) organises conferences and workshops that bring together legal scholars, human rights advocates and important figures from the Lawyers’ Syndicate and Judges’ Association. Below is a partial list of rights groups by year of establishment:

Selected Human Rights Organisations by Year of Establishment	
1985	Egyptian Organisation for Human Rights
1988	Ibn Khaldun Centre
1992	Legal Research and Resource Center for Human Rights
1993	Nadim Center for the Management and Rehabilitation of Victims of Violence *
1994	Cairo Institute for Human Rights Studies
1994	Center for Human Rights Legal Aid *
1995	Center for Women’s Legal Aid *
1996	Land Center for Human Rights *
1997	Human Rights Center for the Assistance of Prisoners *
1997	Arab Center for the Independence of the Judiciary and the Legal Profession
1999	Hisham Mubarak Center for Legal Aid *
2002	Egyptian Initiative for Personal Rights *
2002	Egyptian Center for Children’s Rights *
2002	South Center for Human Rights *
2004	Habi Center for Environmental Rights *
2004	Egyptian Association for Developing Legal Awareness *
2004	Arab Penal Reform Organization
2004	South Center for Human Rights
2004	Egyptian Center for Housing Rights *
2004	Egyptian Association to Support Democratic Development
2005	Ma’at Center for Juridical and Constitutional Studies *

*Human Rights Organisations Engaged in Public Interest Litigation

Many NGOs play a critical role in documenting and highlighting human rights conditions in Egypt through reports, workshops and conferences focused on their respective issue-areas. Most of the data compiled by international organisations such as Human Rights Watch, Amnesty International, the International Commission of Jurists, and the work of U.N. agencies such as the Office of the High Commissioner for Human Rights are based upon the research and data collected by Egyptian non-governmental organisations. The most active NGOs, such as the Egyptian Organisation for Human Rights and the Cairo Institute for Human Rights, also have formal consultative status with the U.N. Economic and Social Rights Council (ECOSOC).

Finally, NGOs play an important role in election monitoring. The Egyptian Alliance for Monitoring the Elections, the Independent Coalition for Monitoring the Election, and the Monitor and Learn campaign are three of the largest coalitions of civil society organisations, led by some of the most important Egyptian human rights groups such as the Egyptian Organisation for Human Rights and the Cairo Institute for Human Rights Studies. Together, the three coalitions are training and fielding over 20,000 election observers for the 2011 People's Assembly elections.²⁷ For all of the above reasons, the increased capacity of local NGOs can therefore be characterised as a positive trend in advancing the rule of law in Egypt.

Additional non-governmental organisations that are better classified as grassroots political groups rather than human rights organisations include the 6th of April Youth Movement and the Egyptian Movement for Change (*Kefaya*). Since the fall of the Mubarak presidency, Egypt has witnessed the rapid proliferation of many more non-governmental organisations working to advance human rights and the rule of law.

Concerns

In light of these positive developments and the critical role that NGOs play in advancing the rule of law in Egypt, it is important to examine the current legal environment governing the activities of non-governmental organisations. NGOs are regulated by Law 84/2002, which imposes government oversight of their activities, requires them to seek government approval before working with or receiving funding from international actors, and provides a mechanism by which the government can close NGOs.²⁸

According to Human Rights Watch, "Law No. 84 on Associations of 2002 ... violates article 22 of the ICCPR. It authorizes the government to interfere with the registration, governance and operation of nongovernmental organizations and impedes the right of Egyptians to form and operate independent associations. Article 42 of the law gives the social solidarity minister unacceptably wide grounds to dissolve groups and even to order the imprisonment of nongovernmental organization members for otherwise legitimate activities, including receiving foreign funds or affiliating with foreign organisations without prior permission, conducting what the authorities might consider to be political or trade union activities, and violating 'public order or morals.' The law also requires, in article 76, that all non-profit groups of 10 members or more working in social development activities register with the Social Solidarity Ministry or face criminal penalties, including up to a year in prison. Article 17 of the law states that 'no association shall collect funds from abroad ... except with the permission of the Minister of Social Solidarity' and failure to abide by this provision is considered grounds for dissolution of the association under Article 42."²⁹

Representatives of SCAF have made numerous public statements that are reminiscent of the Mubarak era policy towards civil society, when NGOs were depicted as threatening Egyptian national interests. For example, on 28 July 2011 Field Marshall Hussein Tantawi, the head of the SCAF, explained that "There are foreign players who feed and set up specific projects that some individuals carry out domestically... it is possible that there is lack of understanding, that foreign players are pushing the people into inappropriate directions" and "do not want stability for Egypt." Two weeks later, Major General Hassan el-Roweini, another member of the ruling council stated that NGOs pushed a "foreign agenda."³⁰ On September 14, 2011, the Egyptian cabinet announced that "a Justice Ministry report had identified more than 30 NGOs that are receiving foreign funding and are not registered with the Social Solidarity Ministry as required by the Associations Law and that it had submitted this information to the prosecutor."³¹

²⁷ 'Who's Afraid of Monitors?', *Al-Ahram Weekly*, 24-30 November 2011.

²⁸ See the text of Law 84/2002.

²⁹ Human Rights Watch, 'Egypt: Margins of Repression – State Limits on Nongovernmental Organization Activism', HRW vol. 17/8.

³⁰ Associated Press, 11 August 2011.

³¹ Human Rights Watch, 'Egypt: Government Moves to Restrict Rights and Democracy Groups', September 26, 2011.

Forty Egyptian NGOs submitted a formal written appeal to the U.N. Human Rights Council detailing the various ways that the Supreme Council of Armed Forces has impaired their work.³² There is little by way of a formal response from SCAF aside from statements that certain NGOs seek to undermine national unity.

2. Political Rights

Emerging Political Parties, Renewed Political Rights

One of the most striking developments in post-Mubarak Egypt has been the emergence of dozens of new political parties. Fifty political parties had registered by September 18, 2011, the day that the election process officially opened in Egypt.³³ Among the new parties vying for support were several religiously inspired parties, the most significant being the Freedom and Justice Party, which was launched by the Muslim Brotherhood. Religiously inspired groups had been denied formal party status under the Mubarak presidency by way of Law 44/1977 and by article 5 of the Egyptian Constitution, as amended in 2007.

Elections for the People's Assembly are scheduled over three rounds on November 28, December 14, and January 3, with run-offs for constituencies where no candidate secures a majority of the vote. Two thirds of parliamentary seats will be contested according to the proportional representation list system and one third will be contested through the single member district system, with one seat per district being allocated to "workers" and one seat per district being allocated to "professionals."

Article 39 of the Interim Constitution and an amended Law 73 of 1953 empowers a High Election Commission (HEC) to organise election for the People's Assembly and Shura Council elections. The HEC is composed of the head of the Cairo Court of Appeal, who also serves as chair, in addition to the two highest ranking deputies of the Court of Cassation, the two highest ranking deputies of the State Council, and the two highest ranking members of the Cairo Court of Appeal in line after the President of the Court.

The High Election Commission is empowered to organise all election activities, including organising and appointing the committees that manage voter lists, oversee monitoring activities, and tabulate the final vote tallies. The composition and mandate of the High Election Commission is regarded by domestic and international NGOs as a considerable improvement over past elections wherein the Minister of Interior played the lead role in overseeing the organisation of elections.

Article 28 of the Interim Constitution provides for a separate Presidential Elections Commission (PEC) with a different composition and mandate. The PEC is composed of the President of the Supreme Constitutional Court as the head, and a membership made up of the President of the Cairo Appeals Court, the most senior deputies of the Supreme Constitutional Court, the most senior deputies of the Court of Cassation and the most senior deputies of the State Council.

The Supreme Council of the Armed Forces rejected the possibility of formal international monitoring, citing the need to protect national sovereignty.³⁴ Instead, Egyptian judges will monitor polling stations to guard against election irregularities.

Concerns

Although the political playing field is more open today than at any time in the past six decades, domestic and international NGOs are voicing concern over a draft law being prepared that threatens to curtail political rights.

³² Joint written statement submitted by the Cairo Institute for Human Rights Studies - CIHRS, the Egyptian Organization for Human Rights - EOHR, the Center for Egyptian Women's Legal Assistance, and non-governmental organisations in special consultative status.

³³ Marina Ottaway, 'The Emerging Political Spectrum in Egypt', 10 October 2011.

³⁴ 'Egypt Refuses International Election Monitor'. *Al-Masry Al-Youm*, 21 July 2011.

According to Human Rights Watch, the proposed “law of corruption” is being modelled on the “treachery law” number 344 of 1952, which empowered a Court of Treason to imprison and deprive political rights from opponents of the Nasser regime. Human Rights Watch has reported that, if implemented, “the law would allow the authorities to imprison anyone convicted of vaguely defined crimes of ‘political corruption’ and to deprive them of the right to vote or run for office. Such a law would set the stage for mass political exclusion based on vague allegations of association rather than criminal responsibility... The overly broad provisions would also invite arbitrary restrictions by future governments on legitimate peaceful political activity.”³⁵

The draft law for a revived treachery law was discussed and approved in a meeting of the Cabinet of Ministers on August 17, 2011. At that meeting, the Minister of Justice, Mohamed al-Guindy, was reported to have said that “the law is still in effect, since no law was created to cancel it” and that the law could be used in the future.³⁶ The draft law with minor procedural amendments is now under review for promulgation by the Supreme Council for Armed Forces.³⁷

3. New Constitution

As detailed in Part A of this report, the 1971 Constitution, now suspended, contained a curious mix of liberal and illiberal articles. One of the principal demands of protesters in the January 25th movement was to replace the 1971 Constitution with a new constitution that will better secure and safeguard political rights and fundamental liberties. The constitution writing process now presents a unique opportunity for Egyptians to rewrite this most fundamental legal document that defines political powers, enshrines fundamental rights, and outlines processes of governance. However, a number of concerns relating to the timeline, process, and substance of the new constitution are already being voiced by a variety of actors.

Concerns

- **Timeline**

The timeline for drafting of a new constitution has been in flux for the past several months. As of October 2011, People’s Assembly elections were to be completed by January 2012 and Shura Council elections were to be completed by early March 2012. According to article 60 of the Interim Constitution, the newly elected members of the People’s Assembly and the Shura Council will then “meet in a joint session following an invitation from the Supreme Council of Armed Forces within 6 months of their election to elect a provisional assembly composed of 100 members which will prepare a new draft constitution for the country to be completed within 6 months of the formation of this assembly.” At that point, “the draft constitution will be presented within 15 days of its preparation to the people who will vote in a referendum on the matter.”³⁸ According to this timeline, a draft constitution will not be voted on in a national referendum before April 2012 and as late as March of 2013. Presidential elections were scheduled for 2013 or 2014, but in the face of political pressure and public criticism, particularly in the midst of intense clashes between police and protesters on 19-26 November 2011, SCAF agreed to move the Presidential elections forward to June of 2012 in order to speed the transition to civilian government. Uncertainty around the timeline of the constitution drafting process remains, fuelling speculation about the interests and calculus of SCAF in the process.

³⁵ Human Rights Watch, ‘Egypt: Draft “Political Corruption” Law Invites Abuse’, October 26, 2011 . See *also* the statement from the Cairo Institute for Human Rights Studies, ‘The Treachery Law: A Return to the Ways of the Former Regime’, August 8, 2011.

³⁶ ‘Treason Law Approved by Egyptian Cabinet’, Ahram Online, 18 August 2011. <http://english.ahram.org.eg/News/19186.aspx>, last accessed October 30, 2011.

³⁷ Minutes of the 23rd meeting of the Cabinet of Ministers, August 17, 2011 available at <http://www.cabinet.gov.eg/Media/NewsDetails.aspx?id=2622>, last accessed October 30, 2011.

³⁸ The Interim Constitution, available at <http://www.egypt.gov.eg/english/laws/constitution/default.aspx>, last accessed October 19, 2011.

- **Process**

Of still more concern is the ambiguous and incomplete guidelines surrounding the constitution drafting process itself. In mid-November, the Supreme Council of the Armed Forces unveiled a “supraconstitutional principles” document to govern the constitution drafting process. The document addressed the concerns of liberals who are apprehensive about the possibility of an Islamist led government that may seek to impose a conservative vision on Egyptian politics and society. However, the document simultaneously contained language suggesting that the military would not be subject to civilian oversight. Moreover, the document suggested a role for non-elected figures in the Constitutional Assembly. Faced with indignation and intense popular protest in November, SCAF retracted this language. However, similar announcements suggesting that the military would play a direct role in shaping the new constitution were repeated after the first round of the elections,³⁹ only to be retracted a second time days later.⁴⁰ These and other incidents suggest that the constitution drafting process itself is still uncertain.

- **Substantive Issues**

As might be expected, conflict over the new constitution started taking shape almost immediately following the suspension of the 1971 Constitution. A first substantive concern shared by all political parties and civil society groups is the role of the military in the new constitutional order. A second point of friction is the extent to which Islamic law will be embedded in the new constitution. Article 2 of the 1971 Constitution declared that “Islamic jurisprudence is the principal source of legislation” (*mabadi’ al-shari’a al-Islamiya al-masdar al-r’isi li al-tashri’*). This phrase similarly exists in the Interim Constitution and it will almost certainly be enshrined once again in the new constitution given the fact that most liberals and leftists are either inclined, or resigned, to the fact that this article or something very close to it is non-negotiable for the Islamist political trend, and indeed for most Egyptians.

An open question, however, is what such an article will mean in practice in the new political context. Until now, Islamic law informed personal status law. Family laws in particular were based on a codified version of Islamic jurisprudence. While Islamic jurisprudence is by no means inherently in tension with liberal rights guarantees, the specific mode of codification of Islamic law in Egyptian family law has systematically discriminated against women (see section 1E below). A reinstated article two, declaring Islamic jurisprudence as the principal source of legislation may also carry negative implications for other fundamental rights in the new Egyptian legal system, but this will depend almost completely on the weight of various political forces, the specific interpretations of Islamic law that are brought into state law, and the ability of courts to harmonise Islamic law provisions with liberal rights guarantees in the Egyptian constitution.

It should be noted that aside from a handful of illiberal articles, the 1971 Constitution was a liberal document. It was at the level of *substantive laws* governing elections, political party activity, the media, labour unions, professional syndicates, and other areas of political and social life that the most repressive tools of “rule by law” were found. A flaw in the 1971 Constitution (also in the Interim Constitution) is that fundamental rights provisions are undermined by qualifying phrases such as “according to the law” and “as provided by the law.” For example, article five of the 1971 Constitution states that “citizens have the right to establish political parties *according to the law.*” Meanwhile, the substantive legislation that governed elections, Political Parties Law 44/1977, allowed the regime to tightly control the political playing field. These problems must be addressed in the new constitution.

³⁹ ‘Military Flexes Its Muscles as Islamists Gain in Egypt’, *The New York Times*, 7 December 2011.

⁴⁰ ‘Egypt’s Military Retracts Plan to Extend Influence over Constitution’, *The New York Times*, 9 December 2011.

4. Women's Rights

Egypt has made progress in some respects over the past decade in advancing equal rights for women. Advances include: 1) increased representation in existing state institutions, 2) new state organs focused on women's rights and welfare, and 3) substantive laws promoting equality of citizenship.

Increased Representation in State Institutions

Women play an active role in Egyptian political and social life. They are present in large numbers in the Egyptian work force, including state agencies. But until 2003, not a single woman served as a judge in the Egyptian judicial system. A new precedent was set in 2003, however, with the appointment of Tehani al-Gibali to the Supreme Constitutional Court. A second advance came in 2007, when 31 women were appointed to the civil courts for the first time in the nation's history. Finally, in 2010, 25 women applied for positions in the administrative court system, the last bastion of the regular judiciary that did not have women serving as judges. The General Assembly of the State Council voted by a wide margin to bar the appointment of women judges, a move that was condemned by Egyptian and international rights organisations.⁴¹ Prime Minister Ahmed Nazif requested that the Supreme Constitutional Court review the matter. In February of 2010 the SCC ruled that such a policy violated constitutional protections guaranteeing equality of citizenship.

For a brief time, women also gained a stronger presence in the People's Assembly. Law 149 of 2009 established a minimum quota of 64 seats for women. However, this quota was removed in September of 2011 with the issuance of the new election law.

New State Organs Focused on Women's Rights and Welfare

The National Council for Women was established in 2000 with the following objectives, among others:⁴²

- To draft a National Plan for the advancement of women and to solve their problems;
- To monitor and evaluate the general policies related to women and formulate its recommendations and observations to the concerned parties;
- To advise on the draft laws and decrees related to women before submission to the competent authorities. Recommend the adoption of proposed laws and decrees that contribute to reinforcing the enhancement of women status;
- To represent women in international fora dealing with women's issues;
- To organise training sessions to raise awareness of the role, rights and duties of women.

Some women's rights NGOs criticised the National Council for Women as little more than a public relations initiative for the Egyptian government rather than a serious initiative for advancing equality for women. However, some of the substantive advances in women's rights are at least partially credited to the work of the National Council of Women.

Substantive Laws Promoting Women's Rights and Equality of Citizenship

According to the Nationality Law 26 of 1975, Egyptian citizenship could only be transferred from father to child. As a result, Egyptian women married to foreign men could not secure citizenship for their children, violating their rights and impacting tens of thousands of their offspring, most of who were born and raised in Egypt yet were considered foreigners in their own country. A new nationality law was issued in 2004 to secure equality between Egyptian mothers and fathers in their ability to pass citizenship to their children.⁴³ Additionally, both fathers and mothers now have the right to register the birth of a child and to request copies of birth certificates.

⁴¹ Human Rights Watch, 'Egypt: Open All Judicial Positions to Women', 23 February 2010.

⁴² The National Council for Women website can be found at <http://www.ncwegypt.com/>.

⁴³ Law 154 of 2004.

Law 126 of 2008 raised the minimum age of marriage from 16 to 18 years for both males and females. The same law additionally criminalises female genital mutilation.

The government also implemented a new Family Court Law in 2004, which established specialised family courts and family mediation centres “to help promote a non-adversarial legal process that serves the best interests of the family and promotes access to justice for women, who comprise the majority of claimants in family law cases.”⁴⁴

The United States Agency for International Development (USAID) supported these efforts through a five year Family Justice Project (FJP) that initiated operations in 2006. According to the Family Justice Project documentation, “the FJP’s overall objective is to strengthen access to justice, enhance family stability, and protect the rights of children. The FJP works closely with both the Ministry of Justice (MOJ) ... to execute two main tasks: (1) strengthen family mediation, and (2) improve access to and information about family court services. To accomplish these goals the FJP instituted a broad technical assistance and training program for the family mediation centres, including extensive infrastructure projects in three pilot jurisdictions in Egypt (Giza, Port Said, and Minya), and also implemented a large grants program for non-governmental organisations (NGOs) in those same pilot areas to raise awareness of the family courts and encourage the use of family mediation services.”⁴⁵ Grants from USAID supported the work of 27 NGOs that worked with 29,000 parties and reached settlements in 16,000 cases.⁴⁶

While many consider the mediation program a success, it is important to note that ethnographic studies reveal a more complex story; women face distinct problems and dilemmas associated with mediation.⁴⁷ It is for this reason that Egyptian women’s rights groups and international organisations underline the fact that mediation should not be considered a substitute for access to equal rights in Egyptian family law. Notwithstanding the positive developments examined here, structural inequalities are built into the legal system that denies women equal rights with men, particularly in the area of family law. These challenges to women’s rights are examined in Section 1E, below.

⁴⁴ Law 10 of 2004.

⁴⁵ USAID, Family Justice Project Evaluation Report, June 2009.

⁴⁶ USAID, Family Justice Project Evaluation Report, June 2009.

⁴⁷ See Hind Ahmed Zaki, *Law as a Tool for Empowering Women within Marital Relations: A Case Study of Paternity Lawsuits in Egypt* Vol. 31(2). See also Nadia Sonneveld, *Khul’ Divorce in Egypt: Public Debates, Judicial Practices, and Everyday Life*, Ph.D Dissertation.

Challenges

1. Fundamental Rights

A. Due Process of Law and Rights of the Accused

Articles 66-72 of the 1971 Constitution guarantee extensive and explicit due process rights to the accused. For example, article 71 guarantees that:

- Any person arrested or detained should be informed promptly of the reasons for his arrest or detention.
- He has the right to communicate, inform, and ask the help of anyone as prescribed in the law.
- He must be confronted, as soon as possible, with the charges brought against him. Any person may lodge a complaint to the courts against any measure taken to restrict his individual freedom.
- The law regulates the right of complaint in a manner that ensures that a decision is issued within a fixed time. If no decision is issued within that time, release is imperative.

Articles 7, 20, 21, and 23 of the Interim Constitution guarantee similar due process rights. However, various U.N. Special Rapporteurs and international and domestic human rights organisations find that the Emergency Law and exceptional courts circumvent the regular judiciary and therefore sidestep due process guarantees.

The Emergency Law

According to the United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms, the Emergency Law 162/1958 enables the authorities to conduct operations "without restrictions by ordinary legislation which would guarantee, for example, that searches, seizures and surveillance as well as arrest and detention require judicial authorization, and that detention is limited in accordance with specific legal criteria that regulate its duration." The UN Rapporteur also observes that the President can "restrict a number of rights pertaining to freedom of assembly and expression and may, in addition to crimes concerning State security, refer offences involving public demonstrations and gatherings for prosecution in so-called Emergency Supreme State Security Courts, the establishment of which is provided for by the same law."⁴⁸

While recognising the right of states to declare a state of emergency for a limited time under extraordinary circumstances, the Special Rapporteur "is concerned that Egypt has been almost continuously governed by emergency law, which includes far-reaching restrictions on fundamental rights and freedoms, for more than 50 years." Therefore, while the Special Rapporteur notes that "Egyptian authorities have justified this long-standing state of emergency predominantly by referring to a range of permanent "destabilizing factors" which are perceived as posing a threat the country's national security..." he was nonetheless "troubled by the frequency and range of practices allowed for and facilitated by the wide powers established by the Emergency Law..." As in past reports, the Special Rapporteur "reiterates his concern that the state of emergency seriously hinders the full consolidation of the rule of law in the country."⁴⁹ The Special Rapporteur concludes that "A state of emergency almost continuously in force for more than 50 years in Egypt is not a state of exceptionality; it has become the norm, which must never be the purpose of a state of emergency."

Similar criticisms have been forthcoming from the International Commission of Jurists, Human Rights Watch, Amnesty International, and other international organisations. In particular, Human Rights watch notes that the emergency law has been used to suppress peaceful political activities.

⁴⁸ United Nations Human Right Council, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism', 14 October 2009, pp. 5-6.

⁴⁹ United Nations Human Right Council, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism', 14 October 2009.

The Emergency Law under SCAF

In the aftermath of Mubarak's fall from power, the Supreme Council of the Armed Forces vowed to rescind the Emergency Law before elections for a new government. The U.N. High Commissioner for Human Rights was also reassured during his visit to Cairo in March 2011 that the state of emergency would be lifted before September 2011.⁵⁰ However, more recent statements indicate that SCAF intends to extend the law through June of 2012. Egyptian and international rights organisations have also noted that application of the emergency law has expanded under military rule by way of SCAF decree number 193 issued on September 10, 2011.⁵¹ According to Amnesty International, under this decree "the emergency law has now reverted to its original scope and been expanded to cover offences that include disturbing traffic, blocking roads, broadcasting rumors, possessing and trading in weapons, and 'assault on freedom to work' according to official statements."⁵²

Administrative Detention, Recurrent Detention, and Violations of Court Orders

The U.N. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms also noted the problem of administrative detention in Egypt, whereby individuals considered a national security threat can be held for up to thirty days during a state of emergency without charges or a trial.⁵³ The Special Rapporteur noted that the Egyptian government failed to provide an exact number of those being held by the government under administrative detention. However, Egyptian human rights organisations have documented thousands of cases.

For example, in the period between 1991 and 1996 the Egyptian Organisation for Human Rights (EOHR) documented 7,891 cases of administrative detention and the EOHR noted that the actual number of cases of administrative detention is likely much higher. The EOHR furthermore reported that in 90 percent of the cases investigated, the detained subjects were tortured and most were denied the right to legal representation or family visits. The EOHR further documented a pattern of collective punishment, with government harassment of family members and even the detention of whole families.⁵⁴

The U.N. Special Rapporteur also found a "widespread practice that persons are not actually released after a release order is given, but are transferred by State Security Investigation (SSI) officers to non-official premises or police stations where they are held illegally until a new detention order is given. "The Rapporteur noted that "as a consequence, an unspecified number of persons have been held for years, sometimes over a decade, using this mechanism. Especially worrying in this regard is the fact that prisoners who protested against such measures and continued challenging the legality of their detention often faced reprisals such as transfers to remote prisons, where the conditions are harsher, or stripping the detainee of his/her right to be visited by his/her relatives, lawyer or psychologist."⁵⁵ Other studies note that the administrative courts issued a number of rulings attempting to define and limit the application of the emergency law, but their rulings had no effect.⁵⁶

Military Courts

Human rights groups have criticised the government, both during and after the Mubarak presidency, for using military courts to try civilians. As described in the first section of this report, judges in the military courts are military officers who are appointed directly by the Minister of Defence and the President for two-year renewable terms. There are fewer procedural safeguards in the military courts, trials may be held in secret, and there is no right to appeal.⁵⁷

⁵⁰ Office of the United Nations High Commissioner for Human Rights, 'Report of the OHCHR Mission to Egypt 27 March – 4 April 2011.'

⁵¹ See Freedom House press release, 'Freedom House Condemns Extension of Egypt's Emergency Law', September 15, 2011.

⁵² Amnesty International, 'Egypt: Emergency Law Biggest Threat to Rights since "25 January Revolution"', 16 September 2011.

⁵³ United Nations Human Right Council, 'Report of the Special Rapporteur', 9.

⁵⁴ Egyptian Organisation for Human Rights, *Recurrent Detention: Prisoners without Trial*.

⁵⁵ United Nations Human Right Council, 'Report of the Special Rapporteur', 9.

⁵⁶ Moustafa, *The Struggle for Constitutional Power*, p. 176. See also EOHR, *Recurrent Detention*, 41-45.

⁵⁷ El-Islam, 'Exceptional Laws and Exceptional Courts', p. 372.

According to international and domestic human rights organisations, trials of civilians in military courts were relatively infrequent through the late 1990s. However, military trials increased in frequency over the last decade of Mubarak's presidency and they spiked further with the initiation of military rule in February 2011.

5,600 civilians were sentenced in military tribunals during the first two and a half months of military rule with another 1,300 trials in process.⁵⁸ In a news conference on September 5, 2011, General Adel Morsy of the SCAF updated these figures by announcing that in the first seven months of SCAF control, the number of civilians tried in military tribunals had risen to a total of 11,879 civilians, with 8,071 convictions, 1,836 suspended sentences, and 1,225 convictions awaiting ratification by the military.⁵⁹ Human Rights Watch noted that these figures translate into a 93 percent conviction rate. Human Rights Watch also noted that the trial of civilians before military tribunals violates the due process rights that are provided for in article 14 of the International Covenant on Civil and Political Rights (ICCPR), of which Egypt is a party.⁶⁰

Government Response under Mubarak

Generally speaking, the Egyptian government under Mubarak responded to these criticisms by highlighting threats to public safety from terrorism. For example, in its report to the United Nations Human Rights Council in 2009, the government explained that, "A state of emergency was declared because the country and the public were facing a genuine terrorist threat, including the threat of political assassinations. Later, terrorists began to target foreign tourists in order to destabilize the situation and to deprive Egypt of a major source of income – tourism. There have been many incidents over the years ... together with attempts to stir up sectarian strife."⁶¹ These accounts, it might be noted, do not accord with the documentation of human rights organisations, which suggest that the Emergency Law was mostly used to try non-violent civil society and political activists.

The second mode of response to these criticisms is to reference the formal protections that are stated in law. For example, in its report to the U.N. Human Rights Council, Egyptian government representatives explained the following:

"Administrative detention is a measure taken by the Ministry of the Interior during a state of emergency to deprive persons who manifestly constitute a threat to public security and public order of their liberty. It is a temporary and an exceptional measure for which provision is made in article 71 of the Constitution and it is accompanied by the following guarantees:

- The person must be informed of the reasons for the arrest and allowed to telephone a person of his or her choosing to tell them what has happened. Access to a lawyer must also be guaranteed;
- The person in administrative detention is treated like a person in pretrial detention;
- The detention is subject to judicial scrutiny. If the administration took the decision arbitrarily, then compensation will be awarded for the injury caused;
- The Emergency Act grants the right of appeal against administrative detention, and the Ministry of the Interior must release arrested persons on health grounds, if warranted, without waiting for a formal court decision;
- Persons in administrative detention are held in the prisons designated for the purpose by the Prisons Act. These facilities are monitored by the Office of the Public Prosecutor, the members of which are entitled to see documents and to hear and investigate prisoners' complaints.

⁵⁸ Human Rights Watch, 'Egypt: Military Trials Usurp Justice System', 29 April 2011.

⁵⁹ Egyptian human rights advocates are working to document the extent and nature of military trials of civilians. One such focused effort is the Campaign to End Military Trials of Civilians, which operates the website <http://en.nomiltials.com/>, last accessed 6 December 2011.

⁶⁰ Human Rights Watch, 'Egypt: Retry or Free 12,000 After Unfair Military Trials', September 10, 2011.

⁶¹ United Nations Human Rights Council, Working Group on the Universal Periodic Review, Seventh session, 8-19 February 2009, National Report, 12.

The Office of the Public Prosecutor inspects prisons and custodial facilities in order to ensure compliance with orders issued by the Prosecutor-General, by investigating judges in cases under their purview and by the courts. The Office also makes sure that no one is imprisoned or detained illegally and that different categories of prisoners, including children, are held in separate quarters and are afforded the treatment appropriate for their category.⁶²

Government Response under the Supreme Council of Armed Forces

As noted in the previous section, the Supreme Council of Armed Forces has come under increasing fire for extending the emergency law, broadening its scope, and especially for trying civilians in military courts. SCAF has reiterated on many occasions that it intends to end the emergency law and to stop trials of civilians in military courts once public order is secure. In some public statements, particularly since May 2011, SCAF additionally justifies the need for exceptional justice in order to confront "suspicious foreign elements who claim to be patriots."⁶³

The Supreme Council of the Armed Forces responded to criticism of military tribunals by explaining that they are necessary to maintain order and security at a time of national emergency and that they will be discontinued when security has been restored.

B. Right to Life and Security

The right to life and security is guaranteed in article 42 of the 1971 Constitution, which reads, in part, "Any person arrested, detained, or his freedom restricted shall be treated in a manner compatible with the preservation of his dignity. No physical or moral harm is to be inflicted upon him." Similarly, article 8 of the Interim Constitution states, in part, that "Every citizen who is arrested or detained must be treated in a way that preserves his/her human dignity. It is forbidden to be abused, psychically or morally, and forbidden to be detained in places outside of those designated by the prisons law."

According to Human Rights Watch, the death of Khaled Said at the hands of police, an event that helped spark the January 25th revolt, exemplifies the failure of the Egyptian government to fulfil these commitments and to protect the life and security of its citizens. Human Rights Watch explained "law enforcement officials have used torture and ill-treatment on a widespread, deliberate and systematic basis over the past two decades to glean confessions and information, or to punish detainees..."⁶⁴

Similarly, the U.N. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms cited the U.N. Human Rights Committee and the Committee against Torture as reporting that, "'recourse to such practices appears to display a systematic pattern.' This includes, inter alia, beatings, suspension in painful positions for long periods, electric shocks including on the genitals, rape and threats to kill the victim or members of the family, all of which aim at bringing the victim into a state of complete intimidation, including compelling him to confess to any charges brought against him/her."⁶⁵

Government Response under Mubarak

The Mubarak government typically responded to concerns about torture by reaffirming the government's international treaty commitments and Egyptian constitutional guarantees. The government also elaborated on the legal channels available to Egyptian citizens. For example, in its national report to the United Nations Human Rights Council, the Egyptian delegation reported that: "The Office of the Public Prosecutor investigates every complaint which it receives about torture or cruel treatment. In 2008, it decided to refer 38 cases of cruel treatment and torture to the criminal courts and 1 to a disciplinary tribunal. It also asked the administrative authorities to impose administrative sanctions on defendants in 27 cases.

⁶² United Nations Human Rights Council, National Report, 11.

⁶³ SCAF statement #56, issued May 22, 2011.

⁶⁴ Human Rights Watch, 'Work on Him until He Confesses: Impunity for Torture in Egypt', January 2011, p. 1.

⁶⁵ United Nations Human Right Council, 'Report of the Special Rapporteur', 12.

In 2009, the Office of the Public Prosecutor decided to refer 9 cases of cruel treatment to the criminal courts and 1 case to a disciplinary tribunal. It furthermore sought administrative sanctions in 10 cases. The Ministry of the Interior enforces judgments awarding damages to injured parties, as soon as the relevant legal procedures are completed.”

Finally, the Egyptian delegation reported that a human rights training program was being pursued to address the problem of torture. “In addition to ensuring ‘accountability’ for the offence of torture, the Government, through the Ministry of the Interior, has been taking steps for some time now to teach human rights concepts to officers and ordinary members of the police. This process begins with the curricula in the Police Academy and includes regular human rights training programmes for all members of the police, both officers and men. In addition, a human rights capacity-building project was established by the Egyptian Government and the United Nations Development Programme (UNDP) to offer training to nearly 10,000 police officers, as well as over 2,000 members of the ranks.”⁶⁶

Violations of the Right to Life and Security under SCAF

Domestic and international NGOs have reported a number of violations of the right to life and security under the rule of the Supreme Council of the Armed Forces. In particular, domestic and international rights organisations documented the use of “excessive force” against peaceful protests on June 28 and 29 when the Central Security Forces injured 1,114 people.⁶⁷ Similar use of excessive force was documented on March 9, April 9, August 1, October 9, and November 19-26, resulting in thousands more injuries and dozens of deaths.

One of the most violent assaults on protesters occurred in Cairo on 9 October 2011, leading to the death of at least 25 protesters. According to multiple reports, the Egyptian military acted with excessive force to put down a peaceful demonstration by mostly Coptic Christians (and their Muslim supporters) in the wake of the burning of a church on September 30 in the Upper Egyptian village of al-Marina. Troops used live ammunition to put down the protest. According to forensic medical doctors from the Ministry of Health, eight deaths were the result of gunshot wounds and at least 13 more deaths were the result of armoured personnel vehicles being driven into the crowd.⁶⁸ Although civil society organisations demanded an independent investigation, it was refused by SCAF.⁶⁹ Military commanders at the scene have not faced disciplinary action thus far.

Another striking report from the March 9 protest includes allegations that 18 female protesters were “beaten, given electric shocks, subjected to strip searches while being photographed by male soldiers, then forced to submit to ‘virginity checks’ and threatened with prostitution charges.”⁷⁰

Government Response under SCAF

SCAF denied allegations that the military tortured 18 women and subjected them to virginity tests, yet SCAF members report that there is an internal military investigation. There is no transparency in the investigative process, underlining the problems with the military’s new role in policing activities and the lack of judicial oversight.⁷¹

In the wake of the deaths of 25 protesters on 9 October 2011, SCAF defended the actions of the military forces involved in the incident, explaining that military units had used force only because they faced a hostile crowd and soldiers were worried for their own safety. SCAF again refused to accommodate requests for an independent investigation into the incident.⁷²

⁶⁶ United Nations Human Rights Council, National Report, 8.

⁶⁷ Human Rights Watch, ‘Egypt: Cairo Violence Highlights Need to Reform Riot Police’.

⁶⁸ Human Rights Watch, ‘Egypt: Investigate Violence against Coptic Christians’, 10 October 2011.

⁶⁹ Human Rights Watch, ‘Egypt: Don’t Cover up Military Killings of Copt Protesters’, 24 October 2011.

⁷⁰ Amnesty International, ‘Egyptian Women Protesters Forced to Take “Virginity Tests”’, 23 March 2011.

⁷¹ Human Rights Watch, ‘Egypt: Military “Virginity Test” Investigation a Sham’, 9 November 2011.

⁷² Human Rights Watch, ‘Egypt: Don’t Cover up Military Killings of Copt Protesters’, October 24, 2011.

As described below in section E of this report, however, SCAF also sought to placate public anger at the incident by issuing a new law (125/2011) which imposes fines and prison sentences for discrimination against citizens on the basis of race, gender, or religion. The government also committed itself to issuing a unified code governing the construction of new houses of worship, long a demand among the Coptic community and one of the grievances animating the 9 October protest.

C. Labour Rights

Throughout 2011, workers mobilised for improved wages and working conditions in practically every sector of the Egyptian economy. Factory workers, public transit workers, teachers, lawyers, police, and others went on strike. In reaction, the Supreme Council of the Armed Forces issued Decree Law 34 of 2011, which mandates a prison sentence and fine for up to 50,000 Egyptian Pounds (USD \$8,400) for anyone taking part in an activity that prevents, delays, or disrupts the work of public or private institutions. Law 34 of 2011 further stipulates a fine of 500,000 Egyptian Pounds (USD \$84,000) and a minimum of a year in prison for destruction of public or private property or harm to “national unity and public security and order.”

Amnesty International and other rights organisations protest that such vaguely worded provisions are in breach of article 8 of the International Covenant on Economic, Social and Cultural Rights, of which Egypt is a state party.⁷³ A number of NGOs also note that aside from this new law, labour activists have been arrested and tried in emergency state security courts and military courts.

Government Response

The Supreme Council of the Armed Forces defends its policy towards labour strikes and demonstrations by explaining the need to maintain order and security at a moment of national emergency. While recognising the legitimate grievances of workers in their statements, SCAF repeatedly urges protesters not to resort to civil disobedience for the sake of the economy.

For example, in the 6th statement issued by military on 15 February 2011, SCAF reasoned that “...demonstrations have been organised even though normality has been restored, and under conditions where it is expected that all groups and sectors of society would work together to support this positive progress and the efforts of the Supreme Council of the Armed Forces to realise the ambitions and aspirations of the people. Honourable Egyptians regard these demonstrations taking place at a critical moment as leading to negative consequences, including:

First: Harming national security by disturbing all the institutions and the agencies of the state;

Second: Negatively impacting the ability to supply the public with necessary goods;

Third: Disturbing and disrupting production and operations in the State;

Fourth: Delaying the public’s day-to-day life;

Fifth: Negatively impacting the national economy;

Sixth: Creating an atmosphere that gives the opportunity to irresponsible persons to commit illegitimate acts, a situation that requires that all citizens to work together to stabilise the country and prevent further impacts on the national economy and its development.

⁷³ Amnesty International, ‘Egyptian Authorities Must Allow Peaceful Protest and the Right to Strike’, press release on 30 April 2011.

The Supreme Council of the Armed Forces with a view to achieving the security and stability of the nation and the people, and to guarantee the restoration of operations in all institutions of the state, calls on citizens and both professional and labour unions to fulfil their respective duties, while recognising the difficulties which they have long faced. We hope that everyone will work to create the necessary conditions to deal with this critical phase until authority is transferred to a legitimate and popularly elected civilian authority that will be responsible for democratic and developmental progress.”⁷⁴

D. Freedom of Expression and Freedom of the Press

Articles 47 and 48 of the 1971 Constitution guarantee freedom of expression and freedom of the press:

“Freedom of the press, printing, publication and mass media shall be guaranteed.

Censorship of newspapers as well as their control, suspension or suppression by administrative methods is prohibited.

In a state of emergency or in time of war a limited censorship may be imposed on the newspapers, publications and mass media in matters related to public safety or purposes of national security in accordance with the law.”⁷⁵

However, domestic and international rights organisations have detailed many challenges that Egyptian journalists faced in Mubarak’s Egypt. According to Human Rights Watch, “Egypt’s penal code includes numerous provisions that violate international law by providing criminal penalties of imprisonment for ‘insulting’ public officials and institutions, including the president (article 179), public officials (article 185), ‘foreign kings or heads of state’ (article 180), or foreign diplomats (article 182). The Penal Code provides the authorities with the power to censor expression and to seize publications.”⁷⁶

The international NGO, Article 19, which focuses on freedom of the press, has additionally noted that the Emergency Law provides further powers to censor newspapers and that the Press Authority Law 96 of 1996 provides additional mechanisms for restricting the print media.⁷⁷

NGOs monitoring press freedom have also noted that restrictions tightened significantly in 2010, coinciding with Egyptian Parliamentary elections. For example, Freedom House had categorised the Egyptian press as “partly free” prior to 2010, but downgraded Egypt to the category of “not free” in their 2011 report. Freedom House explained that, “the country’s media environment had opened in recent years due to the greater availability of internet-based news sources and satellite television stations, as well as a greater willingness among journalists to risk punishment by engaging in critical coverage.” However, they based their later assessment on the grounds that, “the authorities pursued a broad-based crackdown prior to and during the November 2010 parliamentary elections, causing Egypt’s score to decline from 60 to 65.”⁷⁸ Freedom House noted “journalists and bloggers faced numerous instances of legal harassment, spurious arrests, and violations of due process. The pre-election period also featured the suspension of satellite television transmissions and mobile-phone-based news services, as well as an attempt to impose official restrictions on live coverage of the elections, including the censoring of certain television programs and editors.”⁷⁹

⁷⁴ Statement 6 of the Supreme Council for the Armed Forces, issued February 15, 2011.

⁷⁵ Similarly freedoms are guaranteed in articles 12 and 13 of the Interim Constitution.

⁷⁶ Human Rights Watch, ‘Egypt: Military Intensifies Clampdown on Free Expression’, August 17, 2011.

⁷⁷ Article 19, ‘Egypt: Article 19 and the Justice Initiative Submission to the UN Universal Periodic Review’.

⁷⁸ Freedom House, ‘Press Freedom in 2010: Signs of Change Amid Repression’, 9.

⁷⁹ Freedom House, ‘Press Freedom in 2010’, 10.

With the fall of the Mubarak Presidency in February of 2011, the Egyptian press experienced a rebirth of sorts. Analysts noted the rapid proliferation of new media outlets and an immediate shift in tone among the state-owned media. The new government replaced Mubarak appointees at some of the major state-owned newspapers.⁸⁰ Journalists and non-governmental organisations such as the National Coalition for Media Freedom also pushed for the reform of existing media laws.⁸¹

However, non-governmental organisations note that the liberalised media environment in the immediate wake of President Mubarak's departure has given way to the imposition of more stringent controls over the past several months. NGOs were critical of the appointment of a new Minister of Information in July 2011, after the government had made tentative moves earlier in the year to disband the Ministry of Information.⁸² On September 12, 2011, the Ministry of Information began to withhold new licenses for private satellite TV stations.⁸³

But more striking examples of interference in freedom of expression include the raid on the local Al Jazeera television station in September 2011. The Arab Network for Human Rights Information reported that "Egyptian security services raided the office of Al Jazeera Mubasher Misr channel ... and seized the broadcasting equipment, as well as having arrested a technical engineer who works for the channel..."⁸⁴ The Arab Network for Human Rights Information additionally noted that this raid was conducted without a judicial order.

Similar raids were conducted on television channels *al-Hurra* and *25TV* during the Maspiro incident of October 9, again without judicial order. According to Human Rights Watch, at the same time that these raids were being conducted, state media outlets announced that military officers had been killed and citizens were urged to "defend the army against attack."⁸⁵

Human Rights Watch and other NGOs have also documented the prosecution of Egyptian bloggers and journalists under SCAF control.⁸⁶ Military prosecutors questioned at least nine journalists and activists on charges of defaming SCAF. Maikel Nabil was sentenced to three years in prison by a military court for "insulting the military," as were Ayman Mansour and prominent blogger and political activist, Alaa Abdel Fattah.⁸⁷

The Committee to Protect Journalists (CPJ) has also reported that journalists have been subjected to abuse while reporting on recent events in Egypt. In a two-day period during November clashes between protesters and police, the CPJ cited at least 17 assaults against journalists, "including a shooting, detentions, and a beating by unidentified security personnel while in custody."⁸⁸

E. Equal Treatment and Non-Discrimination

Both the 1971 Constitution and the 2011 Interim Constitution guarantee equality of citizenship, which is an important aspect of the rule of law. Article 40 of the suspended Constitution states that, "All citizens are equal before the law. They have equal rights and duties without discrimination between them due to race, ethnic origin, language, religion or creed." Similarly, article 6 of the Interim Constitution states that, "Law applies equally to all citizens, and they are equal in rights and general duties. They may not be discriminated against due to race, origin, language, religion, or creed."

⁸⁰ 'Egypt's Premier Removes Gamal's Men from State-run Press', Al-Masry Al-Youm, 30 March 2011.

⁸¹ The National Coalition for Media Freedom, <http://ncmf.info/>, last accessed October 31, 2011.

⁸² Press release from the Arab Network of Human Rights Information, July 11, 2011.

⁸³ Human Rights Watch, 'Egypt: Curbs on Free Press, Assembly before Poll', 27 November 2011.

⁸⁴ Press release from the Arab Network for Human Rights Information, September 12, 2011.

⁸⁵ Human Rights Watch, 'Egypt: Don't Cover up Military Killings of Copt Protesters', 24 October 2011.

⁸⁶ Human Rights Watch, 'Egypt: Military Intensified Clampdown on Free Expression', August 17, 2011.

⁸⁷ Human Rights Watch, 'Egypt: Curbs on Free Press'.

⁸⁸ Committee to Protect Journalists, 'At Least 17 Journalists Assaulted During Egypt Clashes', 21 November 2011.

Despite these Constitutional guarantees reports from domestic and international human rights organisations suggest that discrimination against women and religious minorities persists both in the letter of the law and in its application.

Discrimination Against Women

Domestic and international non-governmental organisations highlight aspects of the Egyptian legal system that systematically discriminate against women, particularly in the area of family law. Family law in Egypt varies depending upon religious affiliation. Muslims are subject to family law that is based upon a codified form of Islamic law. Although minor amendments to family law were introduced over the past decade, such as introducing the possibility of *khul'*, divorce for Muslim women seeking to unilaterally end a marriage, human rights organisations have highlighted the formidable challenges that remain.

According to a Human Rights Watch report, "The Egyptian government has created two widely disparate systems for divorce, one for men and one for women. Egyptian men have a unilateral and unconditional right to divorce. They never need to enter a courtroom to end their marriages. Egyptian women, on the other hand, must resort to Egypt's notoriously backlogged and inefficient courts to divorce their spouses. In the courts, women face procedural and evidentiary hurdles to divorce that are inherently discriminatory. Men, who can divorce their spouses at will with an oral renunciation later registered by a religious notary, can simply sidestep these procedures. Obtaining a divorce can also take years as men manipulate the many defences and tactics Egyptian law reserves only for them. As a result, many Egyptian women...avoid the courts and are left with two equally distressing options: either remain in an unwanted marriage and possibly endure physical and psychological abuse, or beg their husbands to divorce them, giving up everything they own and cherish in return. The consequences of this two-tiered system are often financially and emotionally devastating for women."⁸⁹ Moreover, when pursuing a *khul'* divorce, women must abandon any claim to alimony or the division of matrimonial assets.

Echoing the findings of this Human Rights Watch report, the U.N. Committee on the Elimination of Discrimination Against Women, in its concluding observations of Egypt's review for compliance with CEDAW, stated that "the Committee is concerned at the persistence of a number of discriminatory laws and provisions, including in the Penal Code and the personal status law, that deny women equal rights with men."⁹⁰

Both the 1971 Egyptian Constitution and the 2011 Interim Constitution state in article 2 that, "Islam is the religion of the state and...Islamic jurisprudence is the principal source of legislation." These commitments to Islamic law may give the impression that discrimination against women is an inevitable result. However, a growing body of scholarship suggests that the codification of Islamic law in Egypt was both selective and partial.⁹¹ Legal codification narrowed the range of rights that women could claim in classical Islamic jurisprudence.⁹² Contemporary women's rights activists explain that the Islamic legal tradition is not a uniform legal code, but rather a diverse body of jurisprudence that affords multiple guidelines for human relations, some of which are better suited to particular times and places than others. At times, they have advanced women's rights through this framework.⁹³ Still, as a practical matter, the infusion of a codified version of religious law in the legal system compounds the resistance to family law reform.

⁸⁹ Human Rights Watch, 'Divorced from Justice: Women's Unequal Access to Divorce in Egypt', December 2004.

⁹⁰ Concluding observations of the Committee on the Elimination of Discrimination against Women, seventh report of Egypt, 28 January 2010, 3.

⁹¹ Asifa Quraishi and Frank Vogel (eds.), *The Islamic Marriage Contract: Case Studies in Islamic Family Law*, 2008.

⁹² Amira El-Azhary Sonbol, 'A History of Marriage Contracts in Egypt', in *The Islamic Marriage Contract: Case Studies in Islamic Family Law*, Asifa Quraishi and Frank Vogel (eds.), p. 87 .

⁹³ Diane Singerman, 'Rewriting Divorce in Egypt: Reclaiming Islam, Legal Activism, and Coalition Politics', in *Remaking Muslim Politics: Pluralism, Contestation, Democratization*, Robert Hefner (ed.), pp. 161-188.

Government Response

The Egyptian government under Mubarak typically responded to criticisms of discrimination against women by referring to the legal advances that were detailed in section A/4 of this report. Since Mubarak's fall from power, the new government has reaffirmed its commitment to achieve full equality for women. Ambassador Maged Abdel Aziz, the Permanent Representative of the Arab Republic of Egypt to the United Nations assured the U.N. Committee on the Advancement of Women that "The road map of the new government for the forthcoming period to further promote women's rights shall include...harmonizing our international and regional obligations related to women's rights and gender equality with the national legislations, in order to eliminate all forms of discrimination against women in law and practice."⁹⁴

Discrimination Against Religious Minorities

Just as family law for Muslims is based upon a codified version of Islamic law, family law for Coptic Christians is also based on the doctrine of the Coptic Church. As a result, Coptic Christians are denied the right to divorce that is extended to non-Coptic Egyptians. Furthermore, Copts face formal discrimination in other aspects of state law, such as the 1934 law that imposes restrictions on the construction or repair of churches that do not exist for mosques. Human Rights Watch and the Egyptian Initiative for Personal Rights detail additional barriers to freedom of religion in Egyptian law in addition to discrimination against followers of the Baha'i faith.⁹⁵

Government Response

In the aftermath of an assault by Egyptian military forces on a group of predominantly Coptic protesters in which twenty-five people were killed, the new government faced a significant public outcry. In response, the Supreme Council of the Armed Forces issued Decree 125/2011, which imposes fines of up to 100,000 Egyptian Pounds (USD \$16,778) and a prison sentence of up to three months for any civil servant who discriminates against citizens on the basis of race, gender, or religion. Ordinary citizens committing the same crimes can be fined up to 50,000 Egyptian Pounds (USD \$5,033) and be sentenced up to three months in jail. The new government also committed itself to issuing a unified code for mosques and churches that will guarantee the same process and criteria for the construction of new houses of worship.

2. Effective Limits on Government Power

A. Horizontal Checks on Executive Power

Executive Power vis-à-vis the Legislature

The People's Assembly, Egypt's lower house of parliament, was weak vis-à-vis the executive branch for the past four decades, despite the formal trappings of a multi-party system. The former ruling National Democratic Party (NDP) never lost its two-thirds majority in the People's Assembly. As a result, the President could always count on passing any legislation that he wished. Indeed, the legislation that was issued throughout the four-decade period of NDP rule was consistently designed with one objective in mind: to provide the executive with the legal tools it required to maintain hegemony over Egyptian society.

⁹⁴ Statement of Ambassador Maged Abdel Aziz, the Permanent Representative of the Arab Republic of Egypt to the United Nations on item 28, Advancement of Women, <http://www.un.org/womenwatch/daw/documents/ga66/Egypt.pdf>, last accessed October 16.

⁹⁵ Human Rights Watch and the Egyptian Initiative for Personal Rights, 'Prohibited Identities: State Interference with Religious Freedom', November 2007, Vol. 19/7.

An extensive web of illiberal legislation governing all aspects of political and social life effectively hollowed out the liberal provisions that were enshrined in the Constitution. Liberal provisions including protections on the freedom of speech (article 47), freedom of the press (article 48), freedom of assembly (article 54), and freedom of association (article 55), among many others were hollowed out by the illiberal laws and regulations detailed throughout this report. Nowhere was this dynamic more clear than in the election laws which gave the Ministry of the Interior the ability to tamper with elections and maintain the near monopoly powers of the NDP in the People's Assembly. A central challenge going forward is to reform these myriad laws and regulations, which are stacked in favour of executive power.

Executive Power vis-à-vis the Judiciary

The Egyptian judiciary and the 1971 Constitution provided the only formal constraints on the exercise of executive power during the Mubarak presidency. Liberal articles in the Constitution provided activists with openings to challenge the executive in the Supreme Constitutional Court. When all other avenues of political activism were closed, it was the courts to which human rights lawyers, opposition parties, leftists, liberals, Islamists, and everyday citizens flocked to challenge the state.⁹⁶ Citizens frequently prevailed, at least when the stakes were low. But even in politically charged cases, activists occasionally scored major victories against the executive. Given the absence of horizontal constraints on the executive, however, more illiberal legislation was always forthcoming.

More importantly, although the Constitution protected the independence of the judiciary (articles 65 and 165) and the independence of judges (article 166) in the ordinary judiciary, the emergency law, state security courts, and military courts effectively formed a parallel judicial track that further hollowed out any fundamental rights provisions guaranteed by the Constitution.

B. Vertical Checks on Executive Power

Although Egypt has sub-national political bodies according to the formal letter of the law, they enjoy little independence from the central government. As described in the first section of this report, Egypt is comprised of 27 governorates but governors are appointed directly by the President of the Republic and they enjoy little or no financial independence. Similarly, the village *umda* (mayor) and *shaykh al-balad* (deputy mayor) are now appointed rather than elected because of Law 26/1994.⁹⁷ Finally, Law 145 of 1988 and further amendments to that law in 1994 deprived local governing institutions of any meaningful rule on local governance.⁹⁸

3. Challenges for Commercial and Civil Dispute Resolution Processes

Corruption

A further set of challenges that Egypt faces in advancing the rule of law is corruption in state agencies. According to Transparency International, the corruption problem improved between the late 1990s and 2003 when Egypt's score improved from 1.1 to 3.3 (on a scale of 1 to 10, with a lower score denoting higher levels of corruption). However, Transparency International noted that since 2003 the level of corruption has stayed consistent, without much improvement.

⁹⁶ These dynamics are examined in detail in Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt*.

⁹⁷ Kienle, *A Grand Delusion*, 2000.

⁹⁸ James Mayfield, *Local Government in Egypt: Structure, Process, and the Challenge of Reform*, 1996.

In the most recent Corruption Perceptions Index by Transparency International, Egypt received a 3.1 out of 10.⁹⁹ Egypt's rank vis-à-vis other countries was 98 out of 178.¹⁰⁰ In other words, on balance Egypt's level of corruption is higher than average.

The Global Integrity Report corroborates these findings, placing Egypt at 54 on a scale of 1 to 100 in their integrity index, a "very weak" rating.¹⁰¹ The Global Integrity Report gives Egypt a rating of 70 out of 100 on the "legal framework" score, but 34 out of 100 on the "actual implementation" score, leaving an "implementation gap" of 36. This suggests that Egypt does not necessarily lack the formal legal framework to address the problem of corruption, but rather lacks effective enforcement mechanisms in practice.

Government Response and Reform Efforts

Steps were taken by the Egyptian government to address corruption, including the establishment of a Transparency and Integrity Committee under the Minister of State for Administrative Development as well as a transparency division within the Ministry of Investment in 2007. Egypt also signed the new United Nations Convention against Corruption in December 2003, with full ratification in February of 2005. Egypt has not yet signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

A number of non-governmental organisations also focus on the problem of corruption. In addition to the organisations noted in Section 1A of this report, NGOs explicitly focused on addressing the problem of corruption have formed in the past several years, including the Egyptian Transparency Network¹⁰² and Egyptians Against Corruption.¹⁰³

Constraints

Despite these initiatives, Transparency International points to the political, and not simply administrative, conditions that contribute to the proliferation of corruption. In their 2009 National Integrity System Study, Transparency International explained that, "it is worth emphasizing that fighting corruption cannot be achieved and sustained only by punishing corrupt parties and undertaking more stringent measures, without tackling the roots of corruption. There must be fundamental changes in the bureaucratic system and machinery of the society. In Egypt there exist several agencies that deal with corruption and fraud, as corruption in Egypt is considered a criminal act. Nevertheless, *the roots of corruption are embedded in the weak system of checks and balances, weak procedures for public reporting on corruption, an absence of measures tackling nepotism and favouritism, a lack of full independence of anti-corruption agencies, an absence of whistle-blowing mechanisms, weak if any legal protection provided for whistle-blowers, and a proliferation of conflicts of interest...*"¹⁰⁴

⁹⁹ Transparency International, 'Corruption Perceptions Index 2010', www.transparency.org, last accessed October 26, 2011. "Transparency International (TI) defines corruption as the abuse of entrusted power for private gain. This definition encompasses corrupt practices in both the public and private sectors. The *Corruption Perceptions Index* (CPI) ranks countries according to perception of corruption in the public sector. The CPI is an aggregate indicator that combines different sources of information about corruption, making it possible to compare countries. The 2010 CPI draws on different assessments and business opinion surveys carried out by independent and reputable institutions. It captures information about the administrative and political aspects of corruption. Broadly speaking, the surveys and assessments used to compile the index include questions relating to bribery of public officials, kickbacks in public procurement, embezzlement of public funds, and questions that probe the strength and effectiveness of public sector anti-corruption efforts."

¹⁰⁰ A lower number denotes a lower level of corruption.

¹⁰¹ Global Integrity Report: Egypt, 2010, found at: <http://www.globalintegrity.org/report/Egypt/2010>, last accessed October 26, 2011. "The Global Integrity Report is an essential guide to anti-corruption institutions and mechanisms around the world, intended to give policymakers, advocates, journalists and citizens a common set of facts with which to debate. The Report is prepared by local researchers, journalists and academics using a double-blind peer review process...The Report evaluates both anti-corruption legal frameworks and the practical implementation and enforcement of those frameworks."

¹⁰² <http://www.nazaha-eg.net>.

¹⁰³ www.nadafa.org.

¹⁰⁴ Transparency International, 'National Integrity System Study', 2009, emphasis added.

The National Integrity System Study emphasised that many other rule of law issues examined in this paper -- constraints on freedom of expression, the media, NGOs, and lack of effective checks on executive power -- all contribute to an environment where corruption can flourish.

The Egyptian court system, the lynchpin for combating corruption, is also implicated in corrupt practices, according to some reports. While the judiciary in Egypt is held in higher regard than most other public institutions, the courts are not free of corruption. A public survey conducted by the Arab Center for the Development of the Rule of Law and Integrity (ACDRLI) in 2006 revealed that 59.5% of respondents had paid or been asked to pay bribes to court staff and 11.3% indicated that they had been asked to pay a bribe to the judge.¹⁰⁵ Corruption inside the judiciary and throughout the state apparatus is considered one of the principle problems confronting business in Egypt.

Capacity of the Judiciary and Slowness of Dispute Resolution

An additional problem for both individuals and businesses is the slowness of dispute resolution in Egyptian courts. As a report by the Arab Center for the Development of the Rule of Law and Integrity reported, this is the result of a court system that is terribly overstretched. According to the ACDRLI, "The number of cases brought before the Egyptian courts in 2000/2001 (civil, criminal and personal status) was 14,394,351 including 2,249,605 civil cases, 10,813,167 criminal cases and 1,331,577 personal status cases. The number of judges in Egypt in the same year was 3,466 judges, among whom 219 counselors at the court of cassation, 1,569 counselors at the courts of appeal and 1,678 presidents and judges in primary courts and their affiliated summary courts. If we divide the number of cases in 2000/2001 by the number of judges (taking into consideration the inequality in the number of cases between courts), the result shows that every judge was in charge of more than 4,100 cases or 520 cases per month of the 8 months of the judicial work in Egypt."

The ACDRLI report rightly noted, "the impossibility that a judge could decide in the dispute brought before him with carefulness, proficiency and insight, according to the recognized international standards for judges' work. The inability of the judge to look into this huge number of cases leads to the delay of cases from one year to another, without looking into them."¹⁰⁶ Although these figures are now out-dated by over a decade, the caseloads faced by the courts have only risen higher and the number of judges has not kept pace. As the Egyptian courts struggle to keep pace with an ever-increasing caseload, cases last years or even decades before final rulings are delivered.¹⁰⁷

The Egyptian government has initiated a number of programs, often in partnership with international donor agencies, to address William Gladstone's classic concern that "justice delayed is justice denied." Notable projects include the U.S. Agency for International Development decade long Administration of Justice Support Project which assisted the Egyptian government to streamline caseload dockets through computerisation, expand court facilities, and increase the quality and capacity of training programs that judges receive.

The Commercial Arbitration Alternative – Capacity and Constraints

An alternative to lawsuits in the overburdened and slow Egyptian court system is commercial arbitration through the Cairo Regional Centre for International Commercial Arbitration (CRCICA). As described in part one of this report, the CRCICA provides arbitration services according to the rules of the United Nations Commission on International Trade Law (UNCITRAL). The Centre provides an Alternative Dispute Resolution (ADR) mechanism for Egyptian companies, foreign companies operating in Egypt, or any other international parties wishing to use the CRCICA for dispute resolution.

¹⁰⁵ Arab Center for the Development of the Rule of Law and Integrity, 'Egypt Public Opinion Survey Report 2006', available at http://www.arabruloflaw.org/Files/PDF/Media/English/P1/Egypt_POSurveysP1S3_En.pdf, last accessed October 19, 2011.

¹⁰⁶ The Arab Center for the Development of the Rule of Law and Integrity, 'State of the Judiciary in Egypt', 57.

¹⁰⁷ A comprehensive report that diagnosed the emergence of this problem is John Bentley, *Egyptian Legal and Judicial Sector Assessment*, US Agency for International Development, Egypt, 1994.

In 2010, 66 new cases were filed in disputes related to construction, telecommunications, finance, media and entertainment, international sale of goods, attorneys' fees, hotel management, petroleum, manufacturing, marketing, and real estate, among others. The cases involved parties from Egypt, Canada, Germany, India, Italy, Japan, Jordan, Libya, Qatar, Saudi Arabia, Spain, Switzerland, the United Arab Emirates, the United Kingdom, the United States of America, and others. The total caseload since its establishment in 1979 is 756 cases.¹⁰⁸ Beginning in 2009, the International Finance Corporation (IFC) and CRCICA initiated a number of programmes to train and certify master mediation trainers in Egypt in order to build local capacity.

Despite these positive developments, it is clear that commercial arbitration does not have the capacity to compensate for deficiencies in the Egyptian court system. Commercial and civil dispute resolution are seriously affected by both corruption in the judiciary and by the slowness of the courts. Finding long-term solutions to these problems thus constitutes a major challenge for consolidating the rule of law in Egypt.

¹⁰⁸ The Cairo Regional Centre for International Commercial Arbitration, *CRCICA Annual Report, 2010-2011*.

Part C: Relevant Indicators in Rule of Law



Please note: These indicators measure the status of the rule of law in Egypt prior to Egypt's political rupture in 2011. This section was prepared by HiiL.

1. Freedom House, 'Countries at the Crossroads: Country Report Egypt'

The influential Freedom House index, used widely in the works of international and academic organizations, is composed by regional experts who review an extensive collection of data, primarily newspaper reports as well as analysis by think-tanks and NGO's. The index measures the quality of democratic governance reflected by 4 core categories – Accountability and Public Voice, Civil Liberties, Rule of Law, and Anticorruption and Transparency. The rule of law is measured with respect to four sub-areas of government performance: independent judiciary; primacy of rule of law in civil and criminal matters; accountability of security forces and military to civilian authorities; and protection of property rights. On the basis of this information, separate reports are written for individual countries, which subsequently lead to a score on the Freedom House indicators. The Freedom House report is based on numerical rating on a scale from 1 to 7, assigned to each country, where 1 stands for a free society and 7 for the lowest regard for civil and political freedoms.

Egypt was assessed in 2005, 2007 and 2011 reports, scoring consistently poorly on all categories with an overall average score of 2.2. In each category, the country's scores have shown a slight but steady decline. Its position in the country ranking decreased over the years, ranking 4th of six covered MENA countries in 2011.¹⁰⁹ Egypt's results reflect the particularly autocratic governance of Mubarak's 30-year regime and weak rule of law. The country received its lowest scores on accountability and public voice (1.7 in 2011) due to the lack of electoral transparency and participation as well as violent suppression of the political opposition. Civil liberties (1.91 in 2011), although partly recognized in the law, were subject to systematic violations. The weakening in the rule of law (2.68 in 2011) was not as sharp as in other areas and remained Egypt's strongest category. However, under the former regime, independence of courts was compromised. Corruption and lack of transparency have been the weakest aspect of governance in Egypt (1.69 in 2011), pervading most aspects of daily life.

¹⁰⁹ Stronger relative to Libya and Syria but weaker than Tunisia, Algeria and Morocco.

2. Bertelsmann Transformation Index

The Bertelsmann Transformation Index measures the progress of 128 countries towards full democracy based on the rule of law and a market economy protected by sociopolitical safeguards. It has been calculated for years 2003, 2006, 2008 and 2010. In contrast to minimalist definitions of electoral democracy, the BTI's understanding of democracy includes the rule of law and representativeness. It focuses on 3 dimensions: democracy, market economy and political management. The composite index relates to both a description of their democratic and market economic state and the country's leadership management performance to steer it on a course of solid transformation.

For 128 states, individual reports are written by a country expert, which is then subject to peer review by another expert. This narrative report deals with the whole chain of issues mentioned above. Subsequently, scores (1-10) are given by country experts on 49 questions. For the present purpose, the political transformation dimension of the index is particularly useful, with a focus on the rule of law sub-category. The latter consists of four aspects: separation of powers, independent judiciary, prosecution of abuse of office, and ensuring civil rights.

Egypt's consistently poor performance on the rule of law category continues to bear hard on its process of democratization. The overall score has never gone above the medium value of the scale, reaching 4.3 in 2011. There has been, however, a slight improvement in the overall score from 2.0 in 2003 to 4.3 from 2008 onwards. The Constitutional powers were not sufficiently separated, which resulted in the absence of checks and balances on the government (the score improved from 3 in 2006 to 4 in 2008). Independence of the judiciary again stands as the strongest point, assessed at 5.0 since 2008. Judicial independence, although constitutionally guaranteed, experienced setbacks in form of constitutional amendments of 2007 that withdrew the judiciary's right to supervise elections; and the creation of special courts governed by the executive and passing arbitrary judgments.¹¹⁰ While office abuses have been actively prosecuted since the anti-corruption campaign in 2003, it is mostly members of the opposition that were primary target. Due to the strong political motivation behind the prosecution Egypt's score has kept still at 4.0 since 2006. Identically assessed was the civil rights situation. Although a number of them were guaranteed in the constitution, civil liberties were regularly violated in practice, with systematic use of torture during police investigations and the ineffectiveness of the government-funded National Council of Human Rights.

3. Transparency International: Corruption Perceptions Index

The Corruption Perceptions Index (CPI) indicates the perceived level of public-sector corruption in a country or territory. The CPI table indicates a country's ranking compared to other countries in the index. The index is based on data from 13 independent surveys and 10 independent institutions. These sources measure the prevalence of corruption in the public and political domains. This assessment is carried out for virtually all of the world's countries.

The index includes a country's ranking and score, the number of surveys used to determine the score, and the confidence range of the scoring. Scores range between 1 to 10, with 1 indicating the highest perceived level of corruption and 10 the lowest. The rank shows how one country compares to others included in the index. The reliability of the CPI scores is determined by the confidence range.

Egypt has been featured in CPI reports since 1996, showing generally a very high level of perceived corruption in public and political life. The data from 14 years shows a series of fluctuations, with the most recent high point in 2005 (3.4) that coincided with the start of the governmental anti-corruption campaign.

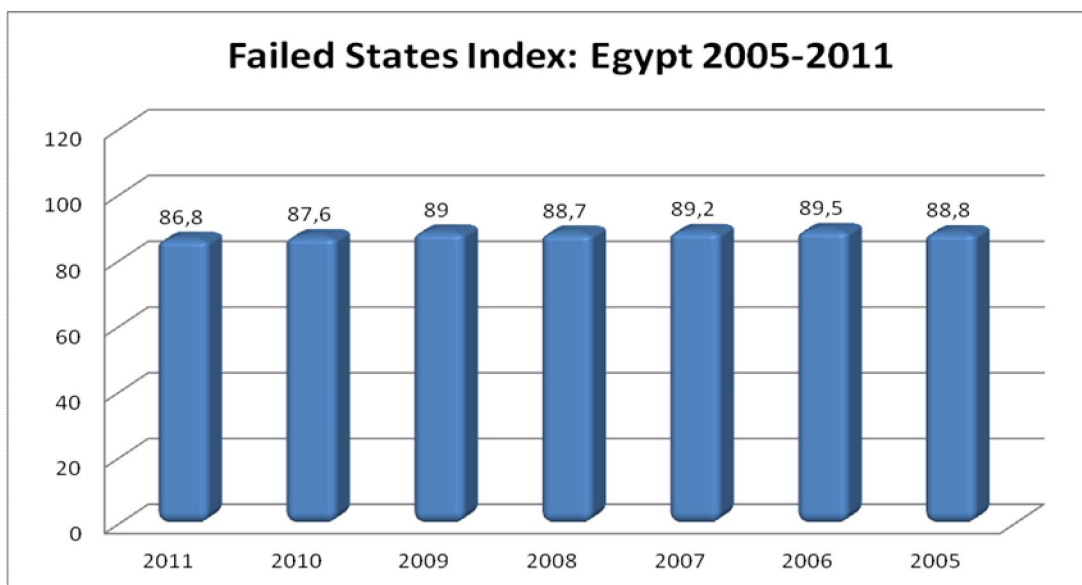
¹¹⁰ Bertelsmann Stiftung, *BTI 2010 — Egypt Country Report*. Gütersloh: Bertelsmann Stiftung, 2009.

Since then, public perceptions continued to decline (reaching 3.1 in 2010), pointing to ineffectiveness and politically motivated prosecutions. Although ranking 6th among 19 countries in the MENA region, Egypt's score shows that there remains much room for improvement in anti-corruption enforcement.

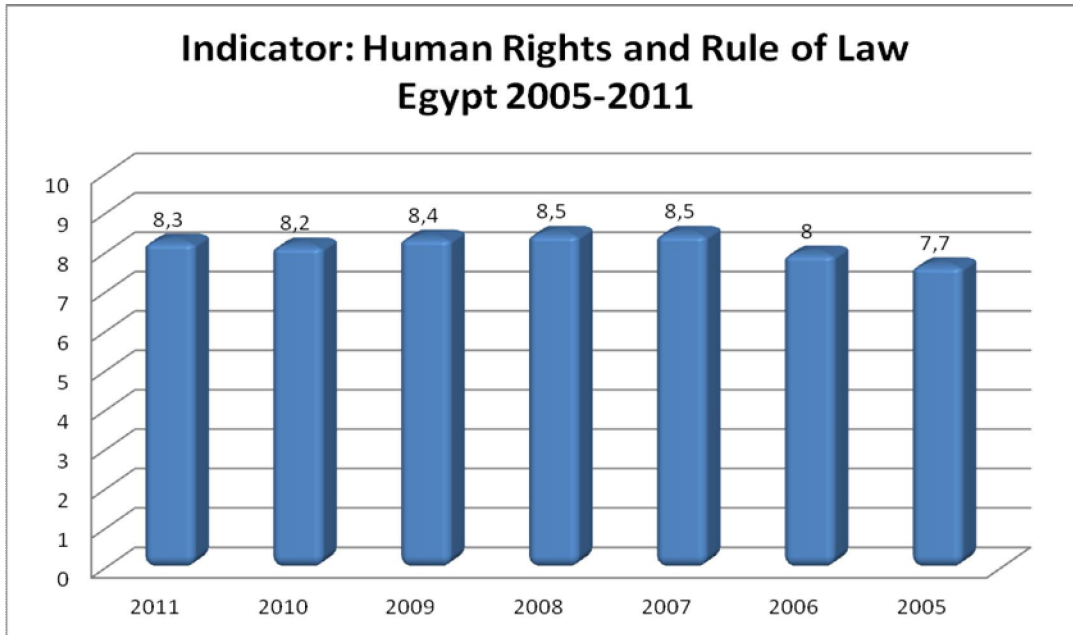
4. Failed States Index

Published since 2005 by the Fund for Peace and the Foreign Policy magazine, the Failed States Index is composed of twelve indicators of vulnerability to collapse or conflict over 3 distinct dimensions (social, political and economic). The indicators include: Demographic Pressures, Refugees/IDPs, Group Grievance, Human Flight, Uneven Development, Economic Decline, Delegitimation of the State, Public Services, Human Rights and the Rule of Law, Security Apparatus, Factionalised Elites, and External Intervention. For each indicator, the ratings are determined on the basis of quantitative analysis of publications and newspaper articles on a scale of 0 to 10 (where 0 indicates the highest degree of stability and 10 the lowest). The total country score is the sum of the 12 indicators and ranges from 0 to 120.

Over the past six years, Egypt has ranked routinely among a host of nations experiencing a large degree of democratic deficit. Its overall ranking, oscillating around 40th, falls within the category of states 'in danger' but practically bordering on the most vulnerable, 'critical' zone. This score classifies it among countries such as Syria, Yemen or Iran but lower than other hotbeds of the Arab Spring, Libya and Tunisia.



The weak scores on the rule of law and human rights, consistently above the threshold of 8.0, have been of particular concern. Ensuring the implementation of and respect for laws remains one of the major challenges for the forthcoming government.



5. World Bank (Doing Business)

The World Bank's "Ease of Doing Business" index ranks 183 economies on 10 categories: starting a business; dealing with construction permits; registering property; securing credit; protecting investors; paying taxes; trading across borders; enforcing contracts; resolving insolvency; and securing electricity. Each country's ranking is calculated as the simple average of the percentile ranking on each of the categories. The higher the country's ranking, the simpler its regulations and the stronger its protection of property rights, which results in a more favourable business climate. Although the index has no immediate bearing on the rule of law, transparent and efficient regulation as well as effective implementation to enable businesses to operate within the rule of law and benefit from protections and opportunities provided by the law.¹¹¹

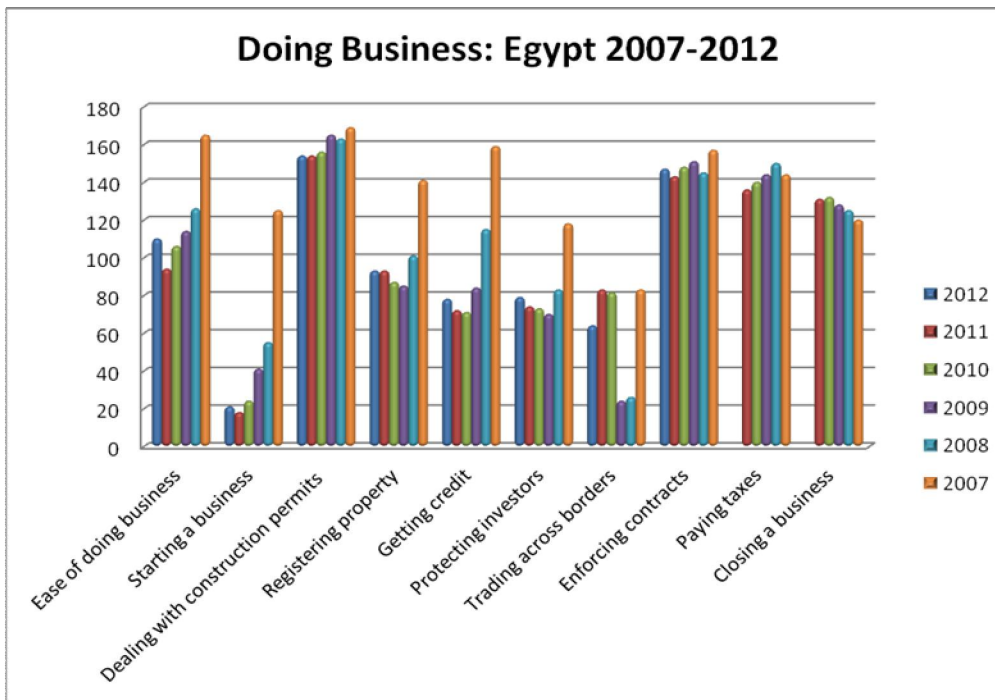
Egypt has been included in the index since 2007, presenting with results varying across categories, from relatively high to very weak. The overall ranking on the ease of doing business, although low, has visibly improved from 141st in 2007 to 110th in 2012. The only two areas standing out as attractive for entrepreneurs is the ease of starting a business (ranking 21st) and partly also of trading across borders (64th). However, Egypt's performance in most areas, and mostly those related to the rule of law, falls well towards the bottom end of the ranking. Among them are the dealing with construction permits (ranking 154th in 2012), enforcing contracts (ranking 147th in 2012) and paying taxes (ranking 136th in 2011).

?

?

?

¹¹¹ World Bank Group, "Doing Business 2011 – Making a Difference for entrepreneurs", World Bank Publications, 2010, [www.doingbusiness.org], last visited on November 14, 2011.



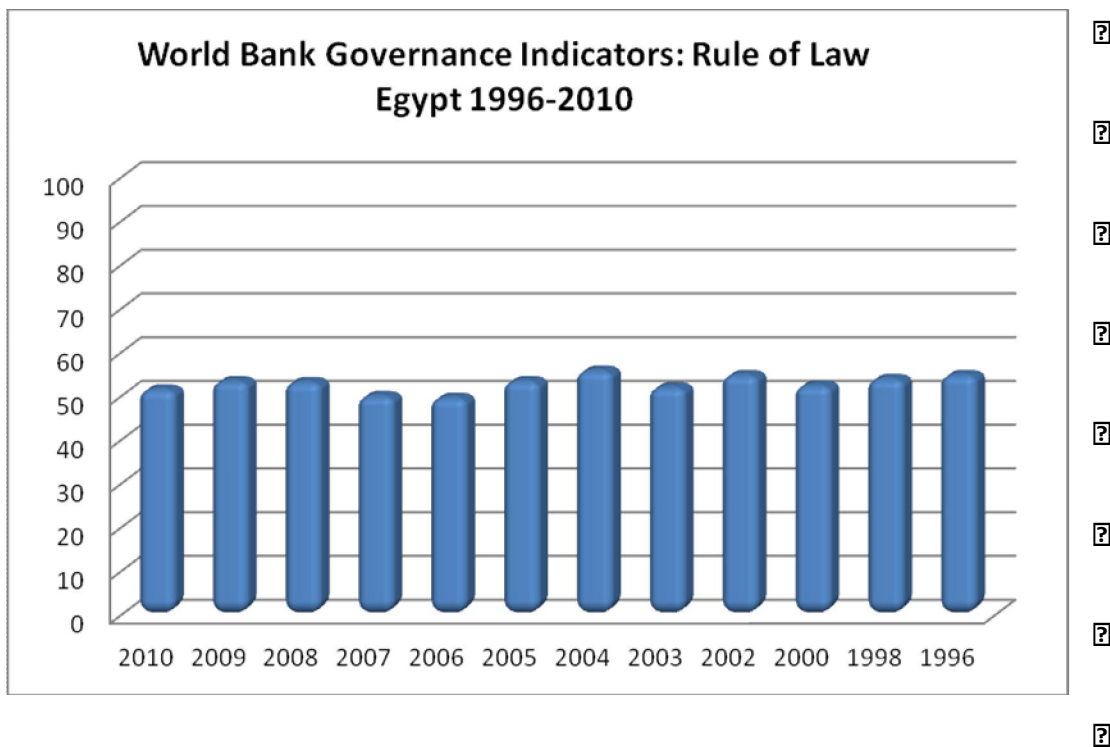
6. World Bank Governance Indicators

An authoritative indicator in the field of law and governance is the World Bank Governance Indicators. Instead of working with its own data, the World Bank Governance Indicators Project compiles statistics from various other indices (among which are some of the indicators used in this study). Data are statistically rescaled to a score from 0 to 1, with a score of 0 indicating a low result on a particular variable. Six different dimensions are measured; (1) voice & accountability, (2) political stability and lack of violence/terrorism, (3) government effectiveness, (4) regulatory quality, (5) rule of law, (6) control of corruption.

The World Bank Governance indicators are measured as a percentile for each of the six dimensions. Thus, a percentile rank of 20 on any certain dimension means that only 20% of the world's countries have a worse score. Likewise, when a state scores 90, only 10% of the world's countries do better. Therefore, a high percentile rank indicates better government performance.

Over 14 years, Egypt's ranking on the rule of law dimension showed stability rather than improvement, oscillating around the middle of the table. With the average percentile rank of 53, Egypt was outperformed by some 47% of the world's countries. Slightly lower than in the remaining years was the score of 2006, reflecting the 34 undemocratic amendments to the constitution, proposed by President Mubarak in the late 2006 and approved by the Parliament in 2007.¹¹² In 2010, the country's percentile rank of 51.7 was only slightly higher than the regional average (48.1) but high above the income group average (33.5).

¹¹² The amendments were accused by many human rights organizations of legitimizing some of the aspects of the emergency law and obstructing political opposition. See: Freedom House, *Countries at the Crossroads 2007 - Egypt*, available at: [<http://freedomhouse.org/template.cfm?page=140&edition=8&ccrpage=37&ccrcountry=154>]



7. Cingranelli-Richards (CIRI) Human Rights Dataset

One of the largest human rights data sets in the world, the CIRI consists of standards-based quantitative data for years 1981-2009 on government respect for 15 internationally recognized human rights in 195 countries. Human rights are classified into three categories.

The first set, physical integrity rights, includes the right not to be tortured, summarily executed, disappeared, or imprisoned for political beliefs. Country performance is measured for each of these on a scale of 0-2 (where 0 signifies the least observance and 2 virtually no violation of a right in a given year), and for the overall respect for the set of rights on scale 0-8 (where 0 represents no government respect for the four rights and 8 stands for high level of government respect for the four rights).

The second set, empowerment rights, include that to free speech, freedom of association and assembly, freedom of movement, freedom of religion, and the right to participate in the selection of government leaders. Alike the previous category, countries score on each separate right on a scale 0-2, as well as on the entire set of rights – here a scale ranges from 0 (no government respect for these seven rights) to 14 (full government respect for these seven rights).

Another set includes women’s rights to equal political, economic, and social treatment, evaluated on a scale from 0 to 3. A score of 0 indicates that a given women’s right was not enshrined in the law or that the law was characterized by discrimination based on sex. A score of 1 means that while recognized in the law, a given right lacked effective enforcement. A score of 2 indicates that although the government effectively enforced a given women’s right recognized under law, women would continue to experience a low level of discrimination. Lastly, a score of 3 stands for a full realization of a given right, protected by law and enforced by the government in practice, by nearly all women.

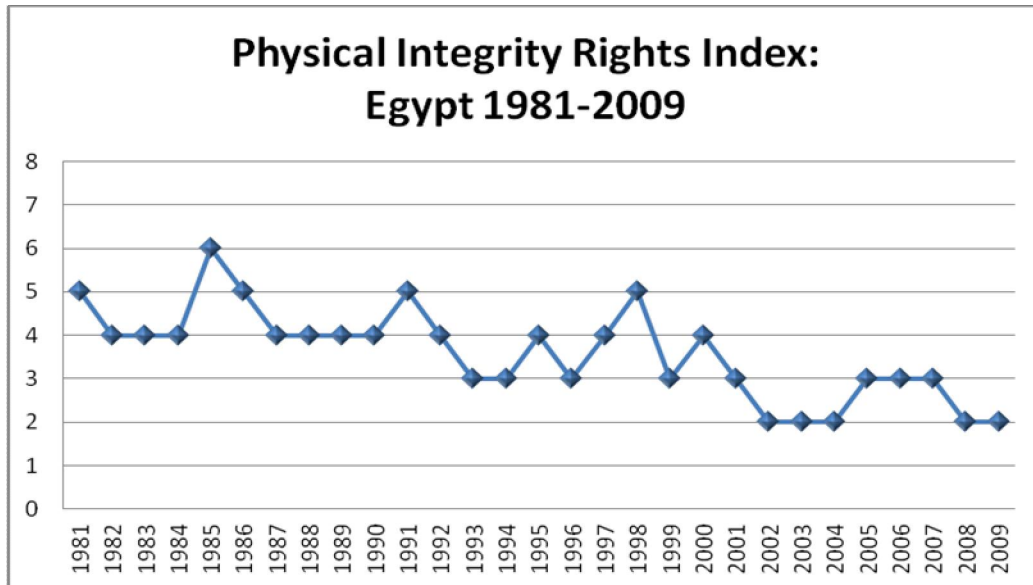
Finally, like the rights included in the first two sets, the remaining workers’ rights and independence of the judiciary are measured with scores 0-2.

The CIRI index holds particular relevance for Egypt, being the only indicator spanning nearly the entire Mubarak dictatorship, since his predecessor Anwar Sadat's 1981 assassination. Over the period of 28 years, there had been a general downward trend on each dimension of Egypt's performance, leading to very poor scores. This trend is particularly discernible in the Political Integrity and Empowerment Rights indices, with only minor fluctuations. The consistently weak performance on the former, assessed at 2 since 2008, is the result of forced disappearances, political imprisonment and use of torture by the security apparatus. The empowerment rights index, reaching 3 out of 14 in 2009, was adversely affected by the failure of the government to guarantee religious diversity and electoral self-determination.

?

?

?



The CIRI Index also shows deterioration in the status of women’s rights, despite the government initiatives to advance women’s rights that were discussed earlier in this report. Although for a number of years the government’s enforcement effort had been recognized in the area of women’s political rights, since 2001 the score had been downgraded to 1.



As for workers’ rights, despite receiving a score of 2 in the CIRI Index in 1999, they were evaluated at the worst possible score of 0 in 2009. The CIRI Index score for judicial independence also suggests that the Egyptian judiciary has also been compromised in recent years.



8. Ibrahim Index

The Ibrahim Index combines several indicators to evaluate the quality of governance in African countries. As with the WJP Rule of Law Index, it is centered on the citizen's perception of four dimensions that together comprise the definition of governance: Safety and Rule of Law, Participation and Human Rights, Sustainable Economic Opportunity, and Human Development. Data for the index is gathered from 23 separate institutions and standardized on a scale of 0-100, where 100 indicates the best performance.

Since 2006, Egypt's overall score on the Safety and Rule of Law Dimension was slightly above the medium score, averaging 60. In 2011, the latter and partial scores on each sub-category were way above the average for Africa. Egypt noted its highest score (87) on national security, which characterizes autocratic regimes with strong security apparatus. The lowest scores were given to personal safety (49) and accountability (52) due to the abuses by the authorities, with common use of torture by the police and repression of the political opposition.



?

?

9. ANNEX

Failed States Index

201 1	45	86,8	8,3
201 0	49	87,6	8,2
200 9	43	89	8,4
200 8	40	88,7	8,5
200 7	36	89,2	8,5
200 6	31	89,5	8
200 5	38	88,8	7,7

?

The WJP Rule of Law Index™, version 3.0

Version 3.0 of the *Index* is composed of 10 factors derived from the WJP's universal principles. These factors are divided into 49 sub-factors which incorporate essential elements of the rule of law.

Factor 1: Limited Government Powers

- 1.1 Government powers are effectively limited by the fundamental law
- 1.2 Government powers are effectively limited by the legislature
- 1.3 Government powers are effectively limited by the judiciary
- 1.4 Government powers are effectively limited by independent auditing and review
- 1.5 Government officials are sanctioned for misconduct
- 1.6 Freedom of opinion and expression
- 1.7 The State complies with international law
- 1.8 Transition of power occurs in accordance with the law

Factor 2: Absence of Corruption

- 2.1 Government officials do not request or receive bribes
- 2.2 Government officials exercise their functions without improper influence
- 2.3 Government officials do not misappropriate public funds or other resources

Factor 3: Clear, Publicized and Stable Laws

- 3.1 The laws are comprehensible to the public
- 3.2 The laws are publicized and widely accessible
- 3.3 The laws are stable

Factor 4: Order and Security

- 4.1 Crime is effectively controlled
- 4.2 Civil conflict is effectively limited
- 4.3 People do not resort to violence to redress personal grievances

Factor 5: Fundamental Rights

- 5.1 Equal treatment and non-discrimination are effectively guaranteed
- 5.2 Right to life and security of the person is effectively protected
- 5.3 Due process of law and rights of the accused are effectively protected
- 5.4 Freedom of opinion and expression is effectively protected
- 5.5 Freedom of belief and religion is effectively protected

- 5.6 Freedom from arbitrary interference with privacy is effectively guaranteed
- 5.7 Freedom of assembly and association is effectively protected
- 5.8 Fundamental labor rights are effectively protected

Factor 6: Open Government

- 6.1 Administrative proceedings are open to public participation
- 6.2 Official drafts of laws and regulations are available to the public
- 6.3 Official information is available on request

Factor 7: Regulatory Enforcement

- 7.1 Government regulations are effectively enforced
- 7.2 Government regulations are applied and enforced without improper influence
- 7.3 Due process is respected in administrative proceedings
- 7.4 The Government does not expropriate private property without adequate compensation

Factor 8: Access to Civil Justice

- 8.1 People are aware of available remedies
- 8.2 People can access and afford legal counsel in civil disputes
- 8.3 People can access and afford civil courts
- 8.4 Civil justice is impartial
- 8.5 Civil justice is free of improper influence
- 8.6 Civil justice is free of unreasonable delays
- 8.7 Civil justice is effectively enforced
- 8.8 ADR systems are accessible, impartial, and effective

Factor 9: Effective Criminal Justice

- 9.1 The criminal investigation system is effective
- 9.2 The criminal adjudication system is timely and effective
- 9.3 The correctional system is effective in reducing criminal behavior
- 9.4 The criminal system is impartial
- 9.5 The criminal system is free of improper influence
- 9.6 Due process of law and rights of the accused are effectively protected

Factor 10: Informal Justice

- 10.1 Informal justice systems are timely and effective
- 10.2 Informal justice systems are impartial and free of improper influence
- 10.3 Informal justice systems respect and protect fundamental rights

HiiL is an independent research and advisory institute devoted to promoting a deeper understanding and more transparent and effective implementation of justice and the rule of law, worldwide. It pursues this mission in several ways. First, it conducts both fundamental research and empirical evidence-based research. Second, it serves as a knowledge and networking hub for organisations and individuals in both the public and the private sector. And third, it facilitates experimentation and the development of innovative solutions for improving legal systems and resolving conflicts at any level. HiiL aims to achieve solutions that all participants in the process perceive as just. In line with its evidence-based approach, HiiL is non-judgemental with regard to the legal systems it studies.

HiiL works in a joint venture with Tisco at Tilburg University.

www.hiil.org

HiiL
Anna van Saksenlaan 51, P.O. Box 93033
2509 AA The Hague, The Netherlands

T +31 70 349 4405
F +31 70 349 4400
info@hiil.org

© 2012 HiiL

All reports, publications and other communication materials are subject to HiiL's Intellectual Property Policy Document, which can be found at www.hiil.org

