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Reject 'Exceptional' Criminal Procedure Code

Legal Commentary on Law Proposed by Egyptian Parliament

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Introduction

The importance of the Criminal Procedure Code lies in its complementary role to the constitution, as it establishes general standards for the integrity of procedures in criminal matters and regulates all litigation processes before criminal courts. This legislation also precisely defines the authorities of public officials, the prosecution, and judicial bodies, ensuring their effectiveness and operational efficiency. The law is also expected to serve as the primary guarantee of citizens' rights, including their right to defend themselves in a fair criminal trial if accused, and utilise all legal means to prove their innocence. Furthermore, the law is intended protect against the misuse of authority by public officials to harm the accused, and it establishes penalties for such misconduct.

In general, the texts of criminal procedure codes and the mechanisms for their implementation reflect the extent of a government's commitment to international human rights standards. Criminal procedure codes form the fundamental legal backbone that ensures justice and equality before the law, rendering them prominent among laws guaranteeing fundamental rights according to generalised values. Citizens' trust in the neutrality of government institutions is heavily shaped by the manner in which these institutions apply such laws and the scope of their application. Criminal procedure legislation also informs citizens' trust in the government's ability attain and sustain social peace, an overarching aspiration of all laws.

The recently proposed draft Criminal Procedure Code, submitted by the Committee on Constitutional and Legislative Affairs of the Egyptian Parliament, comes after years of intensifying violations of defendants' rights amid an absence of justice and fairness in criminal proceedings. It also follows several attempts by the Egyptian authorities to legalise exceptional measures through legislative amendments and new laws that encroach upon individual rights and freedoms. This has amplified the demands and recommendations from lawyers, politicians, journalists, and stakeholders in the public sphere for fundamental amendments to Egypt's entire legislative framework. With the launch of the Egyptian National Human Rights Strategy in September 2021 and the May 2023 commencement of the Egyptian National Dialogue sessions, the authorities have increasingly stated their intent to amend the Criminal Procedure Code^[1], ostensibly aiming to reform flawed provisions that enable the widespread violation of Egyptian citizens' rights.

Instead of addressing the current criminal code's shortcomings, the proposed Criminal Procedure Code instead widens provisions that enable violations and authoritarian overreach. Rather than indicating genuine official movement towards reform, the draft code demonstrates that there is no retreat from the path of repression. If enacted, the proposed criminal code would critically undermine any potential to address the country's human rights crisis. On top of constituting yet another weapon to be added to an ever-bloating arsenal of fascistic legislation, the proposed criminal code would confirm the centrality of the post-2013 'exceptional' situation to Egypt's legislative framework, shaping a governing vision of the relationship between a nation and its people as one founded upon repression and draconian regulation.

For example, while the new draft Criminal Procedure Code sets a maximum duration for pre-trial detention, it does not provide any guarantees to limit the current practice of ‘recycling’ detainees. This practice entails renewing detention by initiating new cases against detainees as soon as their maximum pre-trial detention period in the preceding case expires, often under similar or even identical charges as those brought previously. This allows the authorities to circumvent the maximum duration permissible under law and extend detention indefinitely. Additionally, the draft criminal code permits indefinitely denying detainees visits and allows prosecutors, without a judicial order, to engage in authoritarian overreach that includes raids on homes, the monitoring of communications, and arbitrary detainment. The proposed law further authorises prosecutors to issue orders preventing travel and freezing assets for an indefinite number of periods they deem appropriate, without a court ruling.

The proposed criminal procedure code also institutionalises the crime of torture and ensures its perpetrators evade accountability. It permits the use of torture-coerced ‘confessions’ and protects perpetrators of the crime of torture. The draft law further facilitates egregious infringement upon the rights of defence, including by allowing for investigations to be conducted without either the accused or their lawyer present, denying the defence access to case documents, and exposing lawyers to retaliatory actions from the court.

From the outset, the Egyptian Parliament’s procedures for drafting the criminal code greatly unmasked its intent. Despite the importance of the Criminal Procedure Code and its impact on the fundamental rights of all Egyptian citizens, there was no community dialogue with relevant stakeholders such as lawyers and legal professionals, unions, and civil society organisations. To the contrary, there was only a sudden emergence

of reports about the formation of a subcommittee in the House of Representatives to prepare the draft code. This committee ^[2] conducted its work in secrecy, confirming the Egyptian authorities' intent to pass the law without genuine public dialogue.

The hasty and clandestine procedures culminated in the Constitutional and Legislative Affairs Committee of the House of Representatives approving most provisions of the submitted draft law without announcing which articles were amended. This prompted National Dialogue participants to disavow the version presented by the committee, declaring that they had been unaware of it or had not discussed it. The Lawyers' Syndicate, the Journalists' Syndicate, and the Judges' Club issued statements objecting to the proposed law and its furtive preparation.^[3]

The current draft of the Criminal Procedure Code fundamentally contradicts the Egyptian Constitution and Egypt's international commitments. This is evident in the law's complete disregard for the principle of separation of powers and its unprecedented expansion of the powers of the Public Prosecution. Its articles go as far as to directly violate the constitutional sanctity of private life by authorising the monitoring of communications and private correspondence and the recording of conversations in private spaces. Furthermore, it infringes upon the rights of defence by denying the accused's lawyer the right to speak during the investigation without the permission of the prosecutor.

The proposed criminal code transforms some exceptional precautionary measures implemented during the COVID-19 pandemic into legal provisions, such as remote trials and remote pretrial detention renewals. Additional unconstitutional amendments will be discussed in detail in this legal commentary. Overall, these developments confirm that the Egyptian

government exploits demands to reform specific arbitrary laws as a tool to introduce structural changes to the criminal legislative framework, legitimising illegal procedures that undermine fair trial guarantees.

This legal commentary examines the multiple ways in which the draft Criminal Procedure Code proposed by the Constitutional and Legislative Affairs Committee (subcommittee) of Parliament violates both the Egyptian Constitution and the International Covenant on Civil and Political Rights (ICCPR), which Egypt ratified in 1982. We also highlight how the proposed law disregards all fair trial guarantees and due process rights, starting from its definition of a crime and its designation of the authority responsible for investigating it, continuing throughout the proceedings and trial, and culminating in issuance of verdicts and the right to appeal. If enacted, the law would facilitate violations through the expansive powers given to the Public Prosecution and judicial officers; allowing infringements in regards to investigation, detention, and pretrial detention procedures and conditions, and other precautionary measures.

At every stage, the proposed Criminal Procedure Code clearly undermines the rights of the accused and the defence, and the sanctity of citizens' private lives. It eliminates any opportunity to challenge potential abusive or arbitrary acts of investigative bodies, public officials, or enforcement officials, granting them additional immunity that ensures they are not held accountable for any shortcomings or violations of citizens' rights.

Undermining Separation of Powers

The draft Criminal Procedure Code's infringements upon fair trial guarantees begin with the procedures for appointing an investigating judge. Article 173 of the proposed law allows the Minister of Justice to request the Court of Appeals to appoint an investigating judge to conduct investigations into a specific crime or type of crime.^[4] This entails permitting a member of the executive authority (the Minister of Justice) to intervene in judicial processes solely on the basis of personal discretion in regards to which crimes 'necessitate' the appointment of an investigating judge.

According to the text of Article 173, the investigating judge's appointment is made by a decision from the court's general assembly or by an official authorised by it. By delegating this authority to the court president, the appointment of judges becomes confined to the authority of two individuals (the Minister of Justice and the court president). This puts citizens at risk of abuse of power and opens a backdoor for exceptional investigations that violate the principle of separation of powers, the right to a fair trial, and the principle of protection from abuse of power, as safeguarded by articles 5, 53, 94, and 97 of the Egyptian Constitution, as well as Article 14 of the International Covenant on Civil and Political Rights.

Moreover, Article 175 of the draft criminal code restricts the authority of the investigating judge to conduct investigations into a specific crime or type of crime, except upon request from the Public Prosecution or referral from other authorities. This means that if the investigating judge discovers during their investigation of a specific crime that another related crime has occurred, that judge is not permitted to investigate it; instead, another

investigating judge is appointed either through a special court order or at the request of the Minister of Justice. The original investigating judge must refrain from continuing the investigation and refer the matter to the newly appointed judge.

Subjecting defendants selectively to special procedures constitutes a violation of their right to equality before the law and their right to a fair and impartial trial. These rights safeguard persons from the arbitrary use of authority and are protected under articles 53, 94, and 96 of the Constitution, and Article 14 of the ICCPR.

Special Immunity for Public Officials, Law Enforcement Officers, and Prison Officials

Article 9 of the draft Criminal Procedure Code prohibits the filing of criminal charges against a public employee, government worker, or any law enforcement officer for any misdemeanour committed during the performance of their duties or as a result of them.^[5] By granting these officials special legal immunity, the article denies citizens their fundamental right to file a direct lawsuit in cases where a public employee or law enforcement officer oversteps their authority. The article's vague wording also extends legal immunity to crimes committed by these officials outside the scope of their duties. Article 9 clearly undermines principles established in successive Egyptian constitutions, including the current one.^[6] It infringes upon citizens' right to litigate and violates the principle of the rule

of law and equality before it without exception. It also directly contradicts Article 14 of the ICCPR concerning the right to a fair trial and equality before courts and judicial bodies.^[7]

Article 45 of the proposed Criminal Procedure Code also provides similar protection for prison officials. The first paragraph organises the right of prisoners to submit a written or verbal complaint to the prison administration, and from there it must be relayed to the Public Prosecution.^[8] However, it does not grant the detainee's lawyer or family the right to directly inform the Public Prosecution of their complaint and request an investigation. This puts prisoners at risk of retaliation if their complaints are against prison officials themselves. Moreover, the article does not specify any controls or procedures in the event that prison officials fail to relay the complaint to the Public Prosecution.

Human rights and civil society organisations have reported on the routine dismissal or disregard of grievances from detainees, particularly those directed against prison officials. In many instances, complainants face ill-treatment or torture in retaliation for filing such complaints. This has led detainees to protest or conduct hunger strikes with the aim of pressuring the administration to investigate their grievances or refer them to the prosecution for inquiry, several cases of which have been documented by rights organisations. Even amid protests and hunger strikes, complaints are typically not addressed or considered until the health of the hunger strikers critically deteriorates. Grievances submitted by the prisoner's lawyer or family members are often ignored, with prison authorities deliberately refusing to receive, investigate, or forward them to the prosecution.

Article 45 of the proposed law violates the fundamental right of prisoners to file grievances against anyone, including prison officials, who commit violations against them in places of detention, and to have such complaints reach the prosecution and be impartially investigated.

Judicial officers, public authorities, and their subordinates are granted further immunity in Article 27 of the draft Criminal Procedure Code. This article removes the penalty of invalidating the procedures such officials undertake without disclosing their identities or official capacities.^[9] This clearly violates due process, which executive authorities are mandated to follow, while the judiciary is responsible for overseeing their legality. This represents a clear violation of the right of the defendant and their lawyer to challenge the invalidity of such actions and their consequences.

Of further concern is the draft criminal code's definition of public officials as: 'Every person legally entrusted with maintaining public order, security, and morals, protecting lives, honour, and property, particularly preventing and apprehending crimes'. This broad and elastic definition extends immunity (specifically by exempting officials from disclosing identity when taking any action) to most employees of the Ministry of Interior. In other words, the law shields them from judicial oversight of their actions and procedures, preventing assessment of these acts' legality and validity. In turn, challenges by the defence to the validity of any evidence resulting from such acts is foreclosed. Accountability for any acts constituting violations or abuses is also foreclosed.

Expansion of Public Prosecution Powers

Article 62 of the draft Criminal Procedure Code obligates the Public Prosecution to investigate only felony crimes, while granting it discretion to investigate misdemeanours or other offences ‘as it deems appropriate’. Based on its discretionary power, the Public Prosecution has the right to decide not to investigate misdemeanours or infractions. This constitutes a serious violation of fair trial guarantees and undermines the defendant’s right to be heard, present a defence, and clarify the facts of the alleged incident—this being the primary purpose of the investigation. The Public Prosecution is thus granted the power to restrict the freedom of citizens and punish them without any investigation.

In the absence of legal mechanisms to ensure direct oversight of the Public Prosecution’s decisions, this provision opens the door to potential abuse of this discretionary power, in violation of Article 96 of the Egyptian Constitution, which stipulates that the accused is presumed innocent until proven guilty in a legal trial ensuring the defendant’s right to defend themselves. It also contradicts Article 54, which protects personal liberty and sets specific limits on its restriction, as well as Article 9 of the International Covenant on Civil and Political Rights, which guarantees every individual the right to defend themselves, and undergo a fair trial.

Article 147 of the draft Criminal Procedure Code grants the Public Prosecutor or the investigating judge, or any delegate, the authority to put defendants on ‘watch lists’ or prevent defendants from travelling. The article does not specify a maximum duration for such restrictions;^[10] it merely notes that the restriction can last for one year, renewable for similar periods.

The drafting of Article 147 of the proposed code has expanded the authority to issue travel restrictions beyond the Public Prosecutor alone to include ‘anyone authorised by the Public Prosecutor’. This effectively allows any entity—some of which may not meet the necessary standards of impartiality and integrity—to take such measures, further undermining the right to freedom of movement. It should be noted that restrictions on movement must be issued by a judicial order, as per articles 54 and 62 of the Constitution, which protect personal liberty and sets specific limits for its restriction and guarantees freedom of movement. Furthermore, this provision violates Article 12 of the ICCPR, which relates to the right to freedom of movement and the conditions under which it may be restricted.

Article 116 of the proposed Criminal Procedure Code also expands the Public Prosecution’s authority to monitor communications, a power that under the current law belongs to the magistrate. It broadens the Public Prosecution’s authority to extend pretrial detention for specific crimes, which is currently within the jurisdiction of the Court of Misdemeanour Appeals sitting in chambers (a judicial body that reviews detention decisions after the Public Prosecution’s initial detention period has expired).

Article 116 of the draft criminal procedure law fails to include any mechanism to appeal prosecutorial decisions that infringe upon citizens’ rights to privacy and the sanctity of their private lives. This effectively legitimises the restriction of individual freedoms without ensuring the right to judicial oversight or supervision of such measures. The article permits members of the Public Prosecution to issue orders for monitoring wire and wireless communications and recording conversations conducted in private spaces for a period of thirty days. It grants the prosecution the authority to renew such orders for successive periods indefinitely, thereby conferring ‘unrestricted authority’ on the Public Prosecution to invade individuals’

privacy. This constitutes a blatant violation of the principles of separation of powers and judicial independence, as enshrined in articles 57 and 59 of the Constitution and articles 14 and 17 of the ICCPR. Notably, the second and third paragraphs of Article 116 replicate provisions of the unconstitutional Anti-Terrorism Law (94 of 2015), alarmingly rendering the violation of private life a default principle within the Egyptian legal framework.

It is worth noting that, over the past decade, numerous incidents have been reported involving the recording of phone calls and messages of political activists and human rights defenders without judicial authorisation, which were later broadcast on television programmes. In many cases, orders authorising such recordings were issued retroactively by security agencies to use them in criminal trials against activists or to tarnish their reputations, with no accountability for those committing these violations. Article 116 of the proposed Criminal Procedure Code appears to formalise and legalise such practices.

Article 49 of the proposed code expands the powers of judicial officers, granting them the right to take arresting measures as they deem appropriate or based on their discretion, without a judicial warrant, against any individual present in a residence during a search.^[11] This provision allows for overstepping the specific objectives outlined in the search warrant, enabling officers to search for anything they consider unlawful. In contrast, the current legal framework limits the authority of judicial officers to search residences and private spaces strictly within the boundaries set by the judicial search warrant. Of further concern is the fact that under the proposed article, judicial officers' authority would be no longer restricted to arresting the suspect following a search. They are also permitted to detain any person found in the residence during the search, without judicial oversight or any of the legal conditions for *flagrante delicto* being met. This

effectively legalises the detention of individuals and the imposition of precautionary measures against them for simply being present at the search location.

In light of the unjustified expansion of the definition of public officials in Article 47 of the draft Criminal Procedure Code, and the broad discretionary powers granted to them to enter residences and inhabited premises,^[12] the law allows a wide range of Ministry of Interior security personnel to enter, search, monitor, or wiretap homes without a judicial warrant in cases of alleged danger. The proposed code grants public officials unchecked discretion to determine whether a situation constitutes a state of danger, without specifying the nature or type of such danger, or whether it sufficiently justifies actions that violate the sanctity of private life without awaiting judicial approval.

This unwarranted expansion clearly contravenes articles 54 and 99 of the Egyptian Constitution, as well as articles 9 and 17 of the ICCPR. According to the Human Rights Committee, which interprets the ICCPR provisions: ‘Surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited. Searches of a person’s home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment’.

In juxtaposition to the absolute powers granted to the Public Prosecution, Article 245 of the draft law further undermines due process rights for defendants. The current Criminal Procedure Code regulates the right to challenge members of the Public Prosecution or judicial officers when proven that they have a vested interest in securing a conviction or that they are likely to lack neutrality. The proposed Criminal Procedure Code, in

contrast, deprives defendants of their fundamental right to request the disqualification of members of the Public Prosecution or judicial officers if such officials have committed a crime or violation against the accused, or if it is proven that such officials were involved in defending one of the parties, giving testimony in the case, or performing expert work related to the subject of the case.^[13]

Thus, Article 245 of the proposed law grants an additional immunity to these officials, abolishing the right of litigants to challenge their impartiality. The article unjustifiably violates the principle of impartiality in investigations and undermines the principle of equality before the law, as enshrined in articles 53 and 97 of the Egyptian Constitution and Article 14 of the ICCPR.

Violation of Defence Rights and Procedural Safeguards

Article 69 of the proposed Criminal Procedure Code permits members of the Public Prosecution to proceed with investigative measures in the absence of the accused, litigants, or their legal representatives ‘whenever it deems such action necessary’ to uncover the truth, provided they are ‘later’ allowed to review the proceedings ‘once that necessity has ended’.

The article does not define or establish any criteria for this ‘necessity’, leaving the determination entirely at the discretion of the Public Prosecution. It also fails to specify a timeline for granting the accused and their representatives access to the proceedings and investigation records. Moreover, it does not impose any penalty or consequence if the prosecution

refuses to uphold this due process right. In practice, Article 69 legitimises exceptional measures that the State Security Prosecution and exceptional courts (state security courts and terrorism circuits) have frequently employed in recent years. These measures have been a recurring subject of complaints by lawyers and defendants, particularly regarding their deprivation of the right to access case files and investigation records.

In the absence of mechanisms to challenge decisions made by the Public Prosecution, this situation facilitates violation of the defendant's right to legal defence and access to counsel and obstructs the defence's ability to review the investigation proceedings and all case documents. Consequently undermined is the defendant's right to a fair trial with sound procedural safeguards, as protected by articles 54, 96, 98, and 198 of the Constitution and articles 9 and 14 of the ICCPR.

Article 73 of the proposed Criminal Procedure Code grants members of the Public Prosecution the authority to deny defendants and their lawyers' access to copies of case documents under the pretext of protecting the 'interests of the investigation'.^[14] However, the article imposes no obligation on the prosecution^[15] to clarify or justify what constitutes these 'interests'. This not only infringes on the right to defence but also deprives defendants of the ability to challenge such decisions. Practically, it allows the prosecution to conduct the entire investigation without providing the defendants or their representatives with copies of case documents. It also permits the initiation of the defendant's interrogation without enabling their lawyer to review the investigation.

According to Article 105 of the proposed law, the ability of the defendant's lawyer to review the investigation one day before the interrogation is conditioned on the approval of the Public Prosecution. This constitutes a

blatant violation of the defendant's rights, the rights of defence, and the guarantees of a fair trial, as well as a severe breach of procedural integrity. The provision explicitly contravenes articles 54, 58, 96, 98, and 198 of the Constitution and Article 14 of the ICCPR.

In a significant infringement on defence rights, Article 242 of the proposed law authorises the presiding judge to refer the defendant's lawyer to the Public Prosecution if the lawyer engages in conduct that could be deemed as 'disruptive to order or warranting criminal accountability' during the session. This grants broad and undefined powers to the presiding judge over the lawyer while performing their duty to defend, potentially undermining their ability to practice their profession due to fear of abuse or misuse of authority by the judge. The presiding judge is not legally authorised to discipline lawyers, as this makes the judge simultaneously an adversary and an arbiter. This represents a severe violation of the defendant's right to legal representation and a fair trial, undermining the constitutionally guaranteed protection of lawyers, as the legal profession is an integral partner of the judiciary in achieving justice. This provision of the proposed Criminal Procedure Code contravenes articles 53, 54, 97, and 198 of the Constitution and articles 14 and 26 of the ICCPR.

The right of defendants and their defences to summon and cross-examine witnesses to ascertain the truth and refute the charges is fundamental and essential to ensuring a fair trial. However, Article 289 of the proposed law reduces this inherent right to a secondary request subject to the court's discretion.^[16] This contradicts the principles of justice, which obligate the court to hear witnesses directly and grant the defendant and their defence the right to cross-examine them to clarify the facts of the case under trial. The wording of this article reflects the legislator's intention to allow judicial officers (who are typically among the prosecution witnesses in criminal

cases) to avoid being challenged by defendants and their defence. The article also appears to aim at shielding police reports and investigations from challenges based on contradictions in the testimony of officers or investigators who prepared the reports. This article deprives the defendant of their right to defence and a fair trial, as guaranteed by articles 96 and 97 of the Constitution and Article 14 of the ICCPR.

Article 334 of the proposed code abolishes the right of the accused to contest the validity of the unprocedural acts related to evidence collection and preliminary investigations, or in misdemeanour and felony sessions, if these unprocedural actions had taken place in the presence of the defendant's lawyer and were not contested on the spot.^[17] The article even considers invalid procedures valid if the defendant does not object to them. This violates the legal principle that the defendant and their defence have the right to invoke procedural nullity at any stage of the criminal proceedings, as a nullified procedure invalidates all that follows from it.

Thus, dismissing the right to challenge procedural validity after a certain stage or merely due to the presence of the defendant's lawyer opens the door to overlooking flawed and unlawful procedures that may undermine the basis of the case and the charges, and consequently, the resulting judgments and decisions. The defendant may end up bearing the consequences of an incompetent lawyer or one who fails to notice the error at the appropriate time, with the law then closing the door on rectifying the situation or later challenging the validity of the procedure. In many cases, especially during interrogation, defendants may be subjected to torture or duress to coerce them into signing confessions in investigation records; they then are detained under the authority of those who coerced their confessions. In such situations, the defendant may fear reporting the coercion or violation until they are transferred to another detention facility,

fearing retaliation or abuse. Two options are then faced by the accused: either to report the violation during the preliminary investigation and risk further mistreatment at the place of detention or refrain from documenting the violation during the investigation phase, thus losing their right to challenge the validity of the procedures and the confessions made under duress. Ultimately, these flawed procedures under the proposed Criminal Procedure Code leads to the punishment of innocent persons for crimes they did not commit.

All trial procedures should be conducted lawfully and correctly to uphold citizens' trust in judicial rulings, on the basis of sound and valid rules and procedures. Correcting errors at any stage of the proceedings ensures that every defendant has the right to challenge accusations against them in the context of a fair trial based on lawful and proper procedures.

When considering Article 334 alongside Article 72 of the same draft code—which prohibits defence lawyers from submitting requests or presenting arguments during investigations without the prosecution's permission—the ability of a defendant's lawyer to challenge null procedures becomes contingent on the prosecution's approval. This could severely hinder the ability to contest invalid procedures or raise objections during the investigation phase. Moreover, Article 72 assumes that defendants have full knowledge of criminal procedure rules, as they are required to object to invalid procedures for correction to occur. This presumption may also shield procedures conducted under coercion or pressure that prevent the defendant from contesting their validity, thus representing a grave violation of defence rights and providing unwarranted protection to 'unlawful interference' in the administration of justice through invalid actions.

As for procedures that have been found to be null, Article 336 of the proposed Criminal Procedure Code grants the judge the authority to 'correct' them.^[18] This provides protection for invalid or unlawful procedures and actions carried out by judicial officers and public prosecutors, reinforcing disregard for procedural integrity during the execution of their duties. It renders such errors as normal and acceptable occurrence, as long as they can be 'corrected later' if the judge deems them invalid, regardless of the legal consequences of such flawed procedures.

Additionally, this denies the defendant their inherent right to assert innocence, as the criminal case under the proposed Criminal Procedure Code would be based on legally invalid procedures. An invalid procedure, in principle, nullifies all subsequent actions and evidence derived from it, which serves as a strong basis for challenging the entire case from the outset. This is a right that the defendant and their lawyer may invoke at any stage of the criminal proceedings, as it relates to procedural legitimacy.

The grave violation of procedural safeguards represented by the articles of the draft Criminal Procedure Code undermines all defendant rights to a fair trial and violates the Constitution's articles 52, 96, 97, 99, 54, 55, 69, 98, 184, and 186 and articles 7, 9, and 14 of the ICCPR.

Indefinite Administrative Detention, Pretrial Detention, and Denial of Visitation

Human rights organisations and political activists have long called for amendments to the Criminal Procedure Code articles concerning pretrial detention, after witnessing tens of thousands of political activists being held in pretrial detention for long periods over the past decade. Although the current law stipulates that a defendant may not be held in pretrial detention for more than two years, authorities have routinely circumvented the law by adding the detainee to a new case with the same or similar charges, ensuring the continuation of their detention without adhering to the legal limit for pretrial detention. This illegal practice, known as ‘recycling’ detainees, has transformed pretrial detention from an exceptional (emergency) measure used by investigators in specific cases into a routine practice used to punish political opponents and dissenting voices.

The proposed Criminal Procedure Code does not provide any guarantees to limit the practice of recycling detainees. On the contrary, it reinforces the use of pretrial detention as a punitive measure. Article 112 introduces a new justification for holding defendants in pretrial detention, using vague and overly general expressions such as ‘preventing serious disruption to public security and order that may result from the severity of the crime’. ^[19] The wording served as the basis for the administrative detention decisions that were prevalent in the past, and it has now been incorporated into the justifications for pretrial detention, making administrative detention a decision of the prosecution.

International standards establish specific criteria and circumstances under which pretrial detention is lawful. This includes having a reasonable suspicion of the individual's involvement in a crime, and the detention must be necessary and proportionate to prevent the accused from fleeing, committing further offences, or interfering with the administration of justice. Therefore, pre-trial detention is not justified if these objectives can be achieved through alternative measures. The justifications in the proposed law, which are subject to wide and subjective interpretation and assessment, could provide a pathway for transforming pretrial detention from a precautionary measure limited to specific cases into a punitive action decided by the prosecution merely for the sake of 'preventing' what it perceives as a 'breach of public order or safety'.

Article 113 of the proposed criminal procedure law restricts to the public prosecution alone the authority to determine necessary precautionary measures, including pre-trial detention.^[20] This contrasts with current law, which allows any legally competent authority (the public prosecution, the magistrate, or the advisory chamber) to issue precautionary measures, as they are responsible for assessing the legality of the decision regarding such measures, regardless of their involvement in the investigation of the case itself. This framework previously enabled the accused to challenge precautionary measures issued by one authority before another. In contrast, the proposed draft code limits the power to issue precautionary measures to the public prosecution handling the investigation, and the accused cannot appeal or contest its decision before any other authority.

The deprivation of the accused's right to challenge the prosecution's decisions under Article 113 of the proposed Criminal Procedure Code constitutes an infringement on their right to protection against arbitrary abuses of power by the prosecution in terms of implementing legally

unjustified precautionary measures that restrict personal freedom. This immunity of the prosecution's decisions from appeal contravenes articles 54 and 97 of the Constitution and articles 9 and 12 of the ICCPR.

Furthermore, Article 116 of the proposed law effectively grants the public prosecution unlimited authority and discretion to indefinitely prolong the duration of surveillance measures monitoring correspondence. The article allows the prosecution to extend pre-trial detention by 'recycling' detainees in new cases to ensure their continued detention. Such practices violate the right to protection against arbitrary detention and the right to privacy, which are constitutionally guaranteed under articles 54, 57, and 97 of the Constitution, together with articles 9 and 14 of the ICCPR.

Over the past decade, the National Security Agency has employed illegal tools to pressure detainees in political cases,^[21] primarily through denial of visitation and solitary confinement. Article 119 of the proposed law grants any member of the public prosecution the authority to implement these measures 'in all cases',^[22] without any mechanisms to appeal such decisions.

The deprivation of a pretrial detainee's right to communicate with other detainees or to receive visits raises concerns of torture and constitutes an additional punishment. The law does not define the justifications, reasons, duration, or the means of contesting or appealing these measures. This situation violates articles 52, 54, 55, 56, 95, and 96 of the Egyptian Constitution, as well as articles 7, 10, and 14 of the ICCPR.

Expansion of Court Powers to Punish Critics

Article 15 of the proposed Criminal Procedure Code contains a concerning expansion of the powers and authority of the courts beyond the scope of the cases they are adjudicating. It grants criminal courts and the Court of Cassation the right to initiate criminal proceedings against anyone who commits ‘acts outside the session that the court deems to violate its orders or the respect due to it’. ^[23]

These vague terms, such as ‘acts’ and ‘the respect due,’ leave it to the courts’ discretion to determine the nature of the acts they consider to be violations of their orders or ‘the respect due’ to them. Furthermore, extending the court’s authority to include actions that occur outside of sessions, without precise definition, grants the judiciary absolute power to pursue citizens, journalists, and public opinion holders, including by monitoring their comments and positions regarding the cases and requests before the courts or related to them.

As a result, the court becomes both an adversary and an arbiter, placing citizens at risk of the court’s abuse of power, which contradicts Article 96 of the Constitution concerning guarantees for achieving criminal justice.

Legalisation of Remote Trials and Renewals

In response to the COVID-19 pandemic, several countries implemented exceptional measures to curb the spread of infection. Egypt was among the nations that utilised electronic tools for remote detention renewals and trials as a means to prevent the virus from spreading through courtrooms and interrogation halls. However, despite the end of the pandemic threat and the cessation of all related precautionary measures in public and private institutions, Egyptian authorities continue to apply the rules for remote trials.

Remote trials create a separation between the defendant, their lawyer, and the judge, with the defendant remaining in their place of detention under the oversight of public security and national security officers, while their lawyer is situated at the prosecution or court. This situation may cause the defendant to fear retaliation or arbitrary treatment in their place of detention if they disclose any violations they experience during their detention or interrogation, especially in front of those responsible for such violations.

Article 526 of the proposed law permits the investigating authority or competent court to conduct all or some investigative or trial proceedings remotely without restriction, leaving the decision entirely to their discretion. This transforms an exceptional and unconstitutional measure intended for an extraordinary situation (the pandemic) into a normalised and fundamental procedure.

Violation of Right to Public Hearings and Regulations on Absentee Verdicts

Article 266 of the proposed Criminal Procedure Code infringes upon the community's fundamental right to public hearings. The law would grant the court the authority to exclude specific categories of individuals from attending sessions^[24] without stipulating any criteria regarding how and why these categories are determined. The court is not required to provide reasons for their exclusion and the draft law also does not indicate any mechanism to appeal the court's decision to exclude individuals from attendance.

Articles 368 and 370 legitimise the enforcement of rulings related to asset freezing, if issued in the absence of the accused.^[25] This contradicts established legal principles that consider absentee verdicts as coercive, compelling the accused to appeal as soon as they are aware of the ruling. An absentee judgment is nullified once the accused is present at the court and presents their defence contesting the charges.

Such practices that would be enabled by the proposed law undermine the presumption of innocence until proven guilty. When an absentee verdict, which restricts the accused from accessing their assets, is enforced, it results in a de facto conviction without evidence. The accused are accordingly punished without due process, as their statements are neither heard nor their defences presented before the court prior to the verdict.

The application of ‘enforceable penalties’ from absentee verdicts, as stated in Article 370 of the proposed code, constitutes a clear violation of the principles of presumption of innocence, the right to defence, and the protection of private property. These rights are enshrined in articles 33, 35, 92, and 96 of the Constitution; Article 5 (paragraph 2) and Article 14 of the ICCPR, and Article 17 of the Universal Declaration of Human Rights.

Conclusion

Tens of thousands of Egyptians are incarcerated on the basis of their peaceful exercise of fundamental rights, ranging from political opposition or participation in political life or elections to the free expression of opinion, including on social media. After hollow pledges to reconsider the files of political detainees, the proposed Criminal Procedure Code would instead crystallise into legislation the authoritarian worldview and repressive practices of the Egyptian authorities, further legitimising the unremitting violation of Egyptians’ right to justice, which has intensified acutely throughout the over a decade-long period following President Abdel Fattah al-Sisi’s ascendance to power.

The Egyptian authorities are urged to withdraw the proposed Criminal Procedure Code and commence drafting a new code in consultation with all relevant parties and independent human rights organisations, within a public and transparent dialogue and process. The new law should consider all critiques and objections raised by various stakeholders regarding the current draft, and should specifically include the following:

Affirmation that pretrial detention is a measure of last resort, limited by a maximum duration without exception, issued solely by a judicial authority and only utilised when it cannot be replaced with other precautionary measures.

- 1 Judicial authorities should have the right to substitute pretrial detention with any other precautionary measure. Clear guarantees must be established to limit the practice of detention renewal and the use of pretrial detention as a punitive measure.

- 2 Separation of the investigative authority from the prosecutorial authority, to ensure that investigations aim to uncover the truth, rather than being directed solely towards establishing charges.

- 3 Explicitly specifying the right of lawyers to access and obtain case files and copies thereof without exception, while guaranteeing the right of defendants to meet with their lawyers.

4 Limiting the issuance of surveillance and search orders to courts only, ensuring that such orders are based on specific suspicion and limited to a defined period, with renewal permitted for a limited number of successive terms.

5 Clearly stating the right of the defendant and their lawyer to challenge the validity of procedures and the consequences arising therefrom, without exception, at any stage of the criminal proceedings.


6 Enhancing victims' access to justice and redress for violations, including ensuring the right of their lawyers and family members to lodge complaints against violators.

Footnotes

Al Youm El Sabe, Legislative Committee of the House of Representatives:

- [1] Preliminary Approval of the Draft Criminal Procedure Code, December 4, 2022. 

[2] The committee was composed of 24 members, including 7 representatives from the executive authority, a representative from the Supreme Judicial Council, 6 members from parties affiliated with security agencies in the House of Representatives, 2 members from the Senate, 2 legal experts, and a member from the National Council, without any representation from professional syndicates, civil society organizations, or any opposition party.

- [3] The Lawyers' Syndicate issued its statement following an urgent joint meeting between the General Syndicate Council and the branch syndicates on August 26, 2024. The Head of the Journalists' Syndicate also issued a solidarity statement with the Lawyers' Syndicate on August 27, 2024. The Journalists' Syndicate formed a committee to discuss the draft code and prepare its observations. Additionally, a statement from the Judges' Club warned of constitutional flaws in the draft code on September 18, 2024. Rights activists and journalists criticised the draft code, with the Cairo Centre stating: 'The proposal reflects the current phase, and its philosophy is based on undermining constitutional guarantees for rights and freedoms and legitimizing exceptions,' on September 17, 2024. 

- [4] Article (173): 'The Minister of Justice may request the Court of Appeals to appoint a judge to investigate a specific crime or crimes of a certain type. The appointment shall be made by a decision from the court's general assembly or by someone authorised by it at the beginning of each judicial year. In this case, the appointed judge shall be exclusively responsible for conducting the investigation from the moment he begins his work.'

The second paragraph of Article (9): "Except for the crimes referred to in Article (123) of the Penal Code, no criminal charges may be brought against [5] a public employee, a government worker, or any law enforcement officer for a misdemeanour committed during the performance of their duties or as a result of them, except by the Head of the Public Prosecution at a minimum."

[6] Particularly, Articles 53, 94, 97, and 99 of the current Constitution.

Article (14): "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and [7] obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

Article (45): "Any detainee in a rehabilitation and correctional centre or any of the places referred to in Article (37) of this Law may, at any time, submit a [8] written or oral complaint to the person in charge of the administration of the facility. The detainee may request that the complaint be forwarded to the Public Prosecution. The person in charge must accept the complaint and promptly forward it after recording it in a designated register."

Article (27): "Judicial officers, their subordinates, and public authority officials must present proof of their identity and official capacity when carrying out any action or procedure prescribed by law. Failure to comply with this obligation shall not result in the invalidity of the action or procedure, without [9] prejudice to the imposition of disciplinary penalties. For the purposes of this Law, public authority officials are defined as anyone legally entrusted with maintaining public order, security, and morals, protecting lives, honour, and property, particularly preventing and apprehending crimes, and carrying out the duties imposed on them by laws and regulations."

Article (147): "The Public Prosecutor, or any delegate authorised by them, may on their own initiative or upon the request of concerned parties, and the competent investigating judge, if there is sufficient evidence indicating the seriousness of the charge in a felony or misdemeanour punishable by imprisonment, issue a reasoned order preventing the defendant from travelling abroad or placing their name on the watchlist for up to one year, renewable for the same or similar periods, when necessary for the

[10] investigation or to ensure the proper conduct of legal proceedings and to guarantee the execution of any potential penalties. The Public Prosecutor, or any delegate authorised by them, may on their own initiative or upon the request of concerned parties, issue a reasoned order to include individuals on the lists of those prohibited from travelling or on the watchlist for individuals subject to a judgment that requires enforcement, as well as those accused or convicted who are requested by foreign judicial authorities for extradition or prosecution."

Article (49): "If, during the search of the suspect's residence, strong indications arise that the suspect or any individual present in the residence is concealing something that could assist in uncovering the truth, the judicial officer may take appropriate precautionary measures and must immediately inform the Public Prosecution to take whatever action they deem appropriate."

[11]

Article (47): "By way of exception to the provisions of Article (46), public authority officers are granted the power to enter residences and inhabited premises in cases of danger or distress."

[12]

Article (245): "The litigants may request the disqualification of judges from adjudicating in the cases stipulated in Article 244 of this law and in all other cases of disqualification outlined in the Code of Civil and Commercial Procedures. However, members of the Public Prosecution and judicial officers may not be disqualified. The victim shall be considered a litigant in the case concerning the request for disqualification."

[13]

[14] Article (73): "The defendant, the victim, the civil claimant, and the parties responsible for them, as well as their legal representatives, may, at their own expense, obtain copies of the documents of any kind during the investigation, unless the interests of the investigation dictate otherwise. In all cases, they may obtain copies of such documents of any kind after the conclusion of the investigation, provided the investigation was conducted in their absence, based on a decision issued to that effect or unless the interests of the investigation dictate otherwise."

[15] Article (105): "The defendant's lawyer must be allowed to review the investigation at least one day before the interrogation or confrontation, unless otherwise decided by the Public Prosecution member."

[16] Article (289): "The court may decide to read the testimony given during the preliminary investigation, in the evidence collection report, or before an expert if hearing the witness is not possible for any reason. If the defence insists on hearing the testimony of a prosecution witness and the court does not find it necessary, the court must include the reason for its refusal in its ruling."

[17] Article (334): "In cases other than those mentioned in Article 333 of this law, the right to challenge the validity of procedures related to evidence collection, preliminary investigation, or trial investigation in misdemeanours and felonies is forfeited if the defendant has a lawyer and the procedure was conducted in their presence without objection. As for minor offenses, the procedure is deemed valid if the defendant does not object to it."

[18] Article (336): "The judge may, even on his own initiative, correct any procedure that he finds to be invalid."

Article (112): "If, after the interrogation of the accused, it is established that the evidence is sufficient, and the offense is a felony or a misdemeanour punishable by imprisonment for no less than one year, a member of the Public Prosecution, at least of the rank of Deputy Public Prosecutor, may issue a reasoned order for the provisional detention of the accused, for a maximum period of four days following the arrest of the accused, or to surrender them to the Public Prosecution if they were already in custody. This is permissible if one of the following conditions or grounds is met:

- [19]
- If the crime is in a state of flagrante delicto and the judgment must be enforced immediately upon issuance.
 - There is a fear of the accused fleeing.
 - There is a concern for the integrity of the investigation, such as influencing the victim or witnesses, tampering with evidence or material clues, or colluding with co-perpetrators to alter the truth or conceal its aspects.
 - To prevent serious disruption to public security and order that may result from the severity of the crime.

In all cases, provisional detention of the accused is permissible if they do not have a fixed and known residence, and the offense is a felony or a misdemeanour punishable by imprisonment."

Article (113): "In the circumstances specified in Article 112 of this law, and also in other misdemeanors punishable by imprisonment, a member of the public prosecution may issue a reasoned order for one of the following precautionary measures instead of pre-trial detention:

- [20]
- Requiring the accused to remain at their residence or place of domicile.
 - Requiring the accused to present themselves at the police station at specified times.
 - Prohibiting the accused from entering specified locations."

For example, refer to Amnesty International's report titled "Solitary

- [21] Confinement: The Latest Means of Torture in Egyptian Prisons," published on [May 7, 2018](#). 

[22] Article (119): "A member of the public prosecution may, in all cases, order the pre-trial detainee not to communicate with other detainees and to prohibit visits, without prejudice to the detainee's right to always communicate with their lawyer in the absence of any other person."

[23] Article (15): "The criminal court, in both its levels, or the Court of Cassation, may, if acts occur outside the session that could violate its orders, undermine the respect due to it, or influence its judgment or witnesses, and this pertains to a request or case under its consideration, initiate criminal proceedings against the accused in accordance with Article 13 of this law."

[24] Article (266): "The hearing must be public; however, the court may, in consideration of public order or to maintain decency, order that the case be heard in whole or in part in a private session or exclude certain categories of individuals from attendance. The proceedings of the hearings may not be recorded or broadcast in any manner without written consent from the presiding judge after consulting with the public prosecution."

[25] Article (368): "Any conviction issued in the absence of the accused necessarily entails the prohibition of the accused from managing their assets, conducting any transactions, or filing any lawsuits in their name. Any transaction or obligation undertaken by the convicted person shall be null and void by its nature. The primary court in whose jurisdiction the convicted person's assets are located shall appoint a guardian for their management, based on a request from the public prosecution or any interested party. The court may require the appointed guardian to provide a bond and shall oversee all matters related to the guardianship and accounting." Whereas Article (370) states that: "All penalties that can be enforced from an absentee judgment shall be executed."
