

Pretrial detainees' rights and guarantees
undermined by the investigating
authorities



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Introduction

Pretrial detention is one of the most pronounced manifestations of the infringement of the personal freedoms of citizens; as it deprives the accused of his liberty during the stages of the investigation process in criminal prosecution, which results in the direct violation of the right to movement guaranteed by the Constitution, in contravention of the presumption of innocence embodied in a criminal trial. The concept of "pretrial detention" is not expressly mentioned in the Egyptian laws; rather it is referred to as a precautionary measure, also the Court of Cassation describes it as an abhorrent practice that contradicts the presumption of innocence which is an inherent and a non-derogable human right.

Furthermore, Dr. Ahmed Fathi Sorour said that pretrial detention is a measure that constitutes a severe violation of personal freedoms. It has a tainted past for being misused in many countries especially in the authoritarian regimes where the government's rights predominate the individuals' ones. Based on this measure, defendants can be held in prison during the whole investigation period- or part of it- and their human dignity, which they enjoy while they are free, can be violated, which makes it necessary to scrutinize the degree of proportionality between the pain of remand detention and the interest of society. (1)

The principle of the presumption of innocence of defendants is guaranteed and stipulated in all laws, constitutions and international charters and treaties;

- Article (96) of the Egyptian Constitution stipulates that "The accused person is presumed innocent until proven guilty in a fair legal trial in which the right to defend himself is guaranteed. The law shall regulate the appeal of judgments passed on felonies."

- Article (11) of the Universal Declaration of Human Rights states that "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense."

- Article (14) of the International Covenant on Civil and Political Rights states that "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

Since its promulgation in 1950, Egypt's Criminal Procedure Code regulates the provisions of pretrial detention; its conditions and the methods of its implementation. In 2006, the law witnessed a full amendments aimed at establishing adequate safeguards for pretrial detainees so that it wouldn't turn from a preventive measure that maintains the investigation proceedings to a tool of punishment to crackdown on defendants.

This paper aims to:

The paper aims to clarify how pretrial detention has been changed from a precautionary measure to a tool of punishment and harassment used by the Supreme State Security Prosecution against defendants; through explaining the legal guarantees stipulated in Law No. 145 of 2006 and how these guarantees are being violated, giving examples of cases considered before the State Security Prosecution.

Pretrial detainees' guarantees stipulated in Law No. 145 of 2006:

When amending the Criminal Procedure Law in 2006, Egypt's legislators provided safeguards for those held in remand detention in Article 134; to ensure that there is proportionality between protecting the individual's personal freedom and protecting the society in the interest of personal freedom and for the benefit of the investigation process, for which pretrial detention is initially enacted. ⁽²⁾

The newly-amended guarantees introduced to the law are as follows:

- Interrogating/questioning the accused before issuing a pretrial detention decision
- Hearing the Public Prosecution's statements regarding its request for pretrial detention
- Informing the accused of the reasons behind his remand detention
- Allowing pretrial detainees to hire a lawyer and enabling them to meet with him in a permanent manner
- Presenting the pretrial detention order to the Public Prosecutor
- Allowing lodging an appeal against a decision to order a pretrial detention or to extend its period

In the following lines, we will explain each of the abovementioned points separately and clarify how these guarantees are being wasted by the State Security Prosecution by citing some cases considered by the Prosecution.

1) It is not permissible to issue a pretrial detention order without interrogating the accused

- Judge Serri Mahmoud Syam, former vice-president of the Court of Cassation, defines interrogation as: "A detailed discussion with the accused by confronting him with the accusation being investigated and refuting the evidence submitted against him. It is one of the preliminary investigation's procedures carried out by the investigating judge or the Public Prosecution, which has an exclusive jurisdiction over the procedure, as no other party shall, under any circumstance, be mandated to do it." ⁽³⁾

Dr. Raouf Ebeid also defines interrogation as: "Interrogating the accused and not only questioning him; because besides facing him with the accusation, it is required to face him with the different

evidence submitted against him while discussing it with him in detail, so that he can refute it- in case he denies the accusation- or admits it in case he pleads guilty."⁽⁴⁾

Article 134 of the Criminal Procedure Code states that "The investigating judge, after questioning the accused or if he escapes in case the crime is a felony or a misdemeanor, shall punish him with imprisonment for a period of not less than one year, and if the evidence is sufficient, he shall order to hold the accused in pretrial detention".

The value of this guarantee has been amplified by the amendments made to the law pertaining to the provisions of interrogation, which are stipulated in Article 124 of the Criminal Procedure Code, which prohibits interrogating the accused in the absence of a lawyer in any offense punishable by mandatory imprisonment; an indigent defendant has a constitutional right to an appointed attorney, with no exceptions, before interrogating him or facing him with other suspects or witnesses.

Article 124 also obliges the investigator/prosecutor to appoint, of his own accord, an attorney for the accused in the pretrial stage if a lawyer is not already present. These guarantees were limited to felonies before the amendments were made to the law.

After the amendments, legislators put an exception in which the investigating authority is allowed to issue a pretrial detention order against the accused without interrogating him; and this would be in case of flagrante delicto or in case the suspect flees. In this case, the pretrial detention order shall be implemented against the accused right after his arrest.

The law also explains the difference between questioning the accused and interrogating him; as it grants the Public Prosecution the authority to interrogate the accused without his consent, whereas the court is only allowed to question the accused about the accusation pressed against him and is not permitted to interrogate him except with the consent of the accused and in the presence of his defense team.

However, the Supreme State Security Prosecution undermines this guarantee, when it orders hundreds of defendants appeared before it over hundreds of cases to be held in pretrial detention without conducting a true interrogation in accordance with the aforementioned article and provisions. The following case is an example.

- The detention of Moaaz El-Sharkawy pending Case No. 440 of 2018 State Security:

On 13 October 2018, the Supreme State Security Prosecution interrogated student Moaaz El-Sharkawy pending the Case No. 440 of 2018 State Security. The focus of the investigation, which lasted for 2 hours, was on the emergence of the student's religious and social life and his political affiliations. At the end of the investigation, the Prosecution charged the defendant with joining a terrorist group and publishing and broadcasting false news and statements, without questioning

him about such charges. Then it ordered to hold him in remand detention pending the case. El-Sharkawy continues to appear before the Prosecution to consider his detention renewal, and in each session- which doesn't exceed five minutes- he is asked about his response to the abovementioned charges which he denies each time. El-Sharkawy has served nearly one year and a half in custody pending the case, in a clear violation of the pretrial detention's guarantees stipulated in the law.

2) It is mandatory to hear the Public Prosecution and the defense's statements before issuing a pretrial detention order

Article 136 of the Criminal Procedure Code obliges the investigating judge to hear the Public Prosecution's statements on the reasons behind its request to hold the accused in remand detention, along with the defense's statements and response to the Prosecution's reasons, before issuing a detention order. The aim of this was for the investigating judge to stand on the views of both parties of the criminal litigation as a guarantee for the accused; given that the Prosecution is- supposedly- an honorable litigant that carries out its duties in accordance with the law even if it is in the interest of the accused.

But this guarantee is being wasted when the State Security Prosecution combines its investigating authority with the authority to renew detention during the first months since the accused is ordered to be held in remand detention. The Prosecution used to issue pretrial detention orders without giving or listing any reasons behind its request to extend the remand.

This is not confined to the State Security Prosecution, but it went beyond to reach the detention renewal circuits/ chambers in the Criminal Court convened at the court's deliberation room in many of the cases considered by the State Security Prosecution. The following is an example:

- Extending pretrial detention in Case No. 488 of 2019 State Security:

Following the fatal train crash in Cairo's Ramses Railway Station in March 2019, hundreds of citizens were arrested and referred to the Supreme State Security Prosecution, which accused them of abetting a terrorist group to achieve its goals, misusing social networking website "Facebook", publishing and broadcasting false news and statements pending the Case No. 488 of 2019 State Security. The defendants still continue to have their detention renewal renewed before the criminal courts, which rule to extend the remand detention without hearing the Public Prosecution's pleadings about the reasons for its request to extend the remand, in a clear infringement of one of the pretrial detention safeguards stipulated by law.

In addition to hundreds of citizens arrested from the Ramses Square area, this case includes a number of journalists such as: photojournalist Islam Mosadaq, journalist Muhammad Salah, journalist Solafa Magdi, journalist Israa Abdel-Fattah, labor leader Kamal Khalil, political science

professors Hazem Hosni and Hassan Nafaa and the two human rights lawyers Mahinour Al-Masry and Amr Imam.

3) The pretrial detention order must be reasoned:

Article 139 of the Criminal Procedure Code states that "Any person arrested or placed in temporary detention shall immediately be informed of the reasons thereof. Said person will be entitled to notify someone and to have an attorney. The person shall immediately be notified of the charges made thereagainst".

In the past, the investigating authority wasn't required to list specific reasons to justify its pretrial detention order, but in 2006, the Criminal Procedure Law was amended in accordance with Law No. 145 of 2006, making it mandatory to explain the reasons behind the remand decision and it cannot be issued unless one of these reasons is valid. The reasons mentioned in Article 143 of the law are exclusively represented in: the defendant being caught in flagrante delicto, the absence of a permanent and known place of residence within the Arab Republic of Egypt, fear of the defendant fleeing the country, fear of harming the interest of the investigation, whether by affecting the victims or witnesses, or fear of tampering with material evidence, and breaching of public security and order.

Therefore, it is clear that this article places a guarantee that pretrial detention order cannot be issued except by providing any of the aforementioned reasons; to balance between the interest of the investigation and the personal freedom of citizens, so that remand detention wouldn't be turned from a precautionary measure to a tool of punishment that is excessively used to crack down on detainees.

Nevertheless, the Supreme State Security Prosecution undermines this safeguard when it orders the detention of hundreds of those involved in hundreds of cases, by writing down some notes or statements on the detention renewal papers communiqué, without informing the accused of the reasons that led the Prosecution to extend his detention. Following is an example of these cases:

- Extending the pretrial detention into Case No. 1739 of 2018 State Security"

The case dates back to late December 2018 after media professional, based outside Egypt, launched an online anti-government campaign dubbed "Be reassured, you are not alone" urging Egyptians to whistle and bang pots to protest the economic situation in the country. In response, the security forces arrested hundreds of citizens and referred them to the Supreme State Security Prosecution, which in turn charged them with; colluding with a terrorist group to achieve its purposes, misusing social media, and spreading false news and statements. The Prosecution decided to hold them in pretrial detention and continues to extend their detention under no reason, as hundreds of citizens are still being held in custody till this moment.

4) Enabling pretrial detainees to appoint an attorney and to constantly communicate with him:

Enabling those held in remand detention to appoint a lawyer is one of the guarantees that enshrine the right to defense which spearheads the litigation and fair trial guarantees.

The Supreme Constitutional Court states that "The right to defense is closely related to the purpose of the criminal case in a way that it manifests its aspects, corrects its proceedings and presents the realistic and legal issues that reinforce the defendant's legal status to ensure its interdependence. It would be inconceivable to guarantee the effectiveness of the criminal proceedings without having the accused connected with his lawyer by contacting him, whether directly or indirectly, during or before the adjudication stage. The right of defense shouldn't also be limited to the stage where the court 's adjudication ; it should also cover the stage of investigation in which the focus is not on a crime whose facts and motives are still ambiguous, but rather on a specific person suspected of committing it".⁽⁵⁾

The main purpose of this guarantee is to provide an opportunity for the defendant's lawyer to arrange his pleadings, prepare exculpatory evidence, and refute the evidence submitted by the investigating authority.

Like other safeguards, this guarantee is wasted by the State Security Prosecution in many of the cases it currently considers; as it conducts the first investigation session with the accused in the absence of his lawyer and doesn't even give him the chance to appoint an attorney to present his defense pursuant to Article 12 of the Criminal Procedure Code. An example of this can be illustrated in the following case:

- Interrogating blogger Mohamed Oxygen pending Case No. 1356 of 2019 State Security in the absence of his lawyer:

On 21 September 2019, the Security forces arrested blogger Mohamed Oxygen from inside Al-Basateen Police Station, where he was carrying out his precautionary measures pending the Case No. 621 of 2018 State Security. He had been subjected to enforced disappearance for some days until he appeared on 8 October 2019 in the State Security Prosecution's headquarters and was interrogated over the Case No. 1356 of 2019 State Security. Although the blogger had requested to allow his lawyer, who was present at the time inside the Prosecution's building, to attend the investigation session with him, the Prosecution interrogated him in the absence of his lawyer and charged him with; colluding with a terrorist group to achieve its goals, misusing social media and spreading and broadcasting false news and statements, before it ordered him to be held in pretrial detention pending the case. Consequently, lawyers at the Arabic Network for Human Rights Information (ANHRI) filed a complaint with the Public Prosecutor and the Judicial Inspection Department to report the incident. ⁽⁶⁾

5) The detention order must be presented to the Public Prosecutor:

The second paragraph of Article 143 of the Criminal Procedure Code stipulates that "If decided that the person accused will be temporarily detained for a three-month period, the matter shall be presented to the Public Prosecution with a view to taking the measures deemed necessary to conclude the investigation."

This article provides for the necessity of presenting the investigations to the Public Prosecutor to value the justifications given for the pretrial detention orders and to determine the progress of the investigations and whether there is slackness or unjustified slowness in carrying out the case's proceedings.

The Supreme Constitutional Court affirmed this guarantee with the premise that "the right to a fair trial involves the right to a trial that is not marked by a slow speed of litigation, and since it is one of the fundamental rights, the trial shouldn't take a long period of time under no justification in a way that would make the accused be worried and hinder the implementation of his rights and freedoms guaranteed by the Constitution."⁽⁷⁾

Although Dr. Mamoun Salama asserted that "presenting the investigations to the Public Prosecutor is merely a regulatory rule or basis; meaning that if it is violated, the pretrial detention order will still be valid and binding, and that it is rather a guarantee that might only limit the prolongation of remand detention period ⁽⁸⁾, we on the other hand see that this point of view doesn't go in line with the provisions of the law for the following reasons:

- Article 143 of the Criminal Procedure Law expressly states that pretrial detention orders "shall" be presented to the Public Prosecution. The word "shall" has a particular connotation in the Arabic language meaning that the matter is obligatory, and therefore when it is disregarded or violated, the ensuing procedures are deemed null and void.

- The purpose for presenting the investigations to the Public Prosecutor is to refer to the genuine person who is constitutionally in charge of investigating people. We cannot consider referring the matter to him as absolute nonsense. Also the law identifies a significant role for the Public Prosecutor in his capacity by allowing him to take the measures he deems necessary to put an end to the investigations presented to him at any time.

However, the situation on the ground is totally different. In practice, the State Security Prosecution continues to extend its pretrial detention orders for a period exceeding two years, which is the maximum period stipulated in the Criminal Procedure Code. For example:

- Extending the pretrial detention period in Hisham Gaafar case:

In early October 2015, the security arrested Hisham Gaafar, journalist and head of "Mada"

Foundation for Media Development, after raiding his institution. He was then referred to the State Security Prosecution to be interrogated into the Case No. 720 of 2015 State Security on charges of; joining a terrorist group with knowledge of its purposes and receiving an international bribery. He had been held in pretrial detention for three years and a half until, on 27 March 2019, his detention was ordered to be replaced with precautionary measures, which he is still serving till the moment pending the case whose investigations haven't been completed yet.

6) Appealing against the pretrial detention and its renewal:

In Law No. 145 of 2006, legislators were keen on completing the guarantees of pretrial detention in a way that would ensure their effectiveness and the achievement of their goals and objectives. Following the amendments of the law, Articles 164 and 205 of the Criminal Procedure Code grant the accused the right to appeal against the decision to hold him in remand detention or extend his detention period, after the Public Prosecution was the only body that was granted the authority to appeal the decision, a move that aims at achieving the maximum degree of safety in pretrial detention.

However, in practice, and like other guarantees, the State Security Prosecution undermines the abovementioned guarantee in a strange way; sometimes it enables pretrial detainees to file an appeal against their detention orders and sometimes it halts the receipt of appeals without giving any reasons, but the declared pretext pertaining to "security reasons"⁽⁹⁾. Detainees might be prevented from filing an appeal against their detention for months in a clear violation of the guarantees stipulated in the law. The following case is an example:

- Preventing Rania El-Guili from appealing against her detention order:

On 12 May 2019, the security forces arrested citizen Rania El-Guili from her home at El-Rehab city. She had been missing for 4 days until she appeared at the State Security Prosecution on 16 May 2019. She was interrogated over the Case No. 741 of 2019 State Security on charges of abetting a terrorist group to achieve its goals, misusing social networking website "Facebook", publishing and broadcasting false news and statements, and the Prosecution ordered to detain her pending the case. El-Guili is still being held in pretrial detention. She hasn't been able to appeal against any of the decisions that extended her detention, at time the State Security Prosecution felt free to appeal against her release orders without any trouble, a matter which constitutes a flagrant violation of the guarantees and safeguards stipulated in the law.

Recommendations

The Arabic Network for Human Rights Information (ANHRI) calls on the investigating authorities to respect the pretrial detainees' guarantees stipulated in the law and to consider applying them when releasing the pretrial detention orders. It also calls on the Public Prosecutor to urge the

Public Prosecution and the investigating authorities on the necessity to achieve the principle of prompt and fair justice proceedings and to put an end to the prolonged pretrial detention, which has turned from a precautionary measure into a tool of punishment to crack down on opponents and dissidents.

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Footnotes:

(1)- Dr. Ahmed Fathi Sorour's introduction to Judge Serry Mahmoud Siam's book "Pre-trial detention in the Egyptian legislation", Page 8, Dar Al-Shorouk printing house.

(2)- Ibid., P. 7.

(3) Pretrial detention in the Egyptian legislation in light of the guarantees introduced by Law No. 145 of 2006 - Judge Serry Mahmoud, Page 55, Dar Al-Shorouk printing house.

(4) Criminal Procedures in the Egyptian Law - Dr. Raouf Obeid - Dar Al-Fikr Al-Arabi printing house - P. 461

(5) The ruling issued by the Supreme Constitutional Court - Case No. 64 of the year 17 Constitutional Judicial - Session of February 7, 1998 - Part VIII - p. 1108

(6) ANHRI's website, "A complaint with the Public Prosecutor and the Judicial Inspection Department", published on 10 October 2019, last accessed on 5 February 2020, <https://www.anhri.info/?p=11459>

(7) The ruling issued by the Supreme Constitutional Court - Case No. 64 of the year 17 Constitutional Judicial - Session of February 7, 1998 - Part VIII - p. 1108

(8) Dr. Mamoun Salama commenting on the Criminal Procedures Law, Judges Club, second edition, 2005, P. 449

(9) ANHRI's website, a report entitled "We apologize today we won't respect the law", last accessed on 5 February 2020, <https://www.anhri.info/?p=10398>