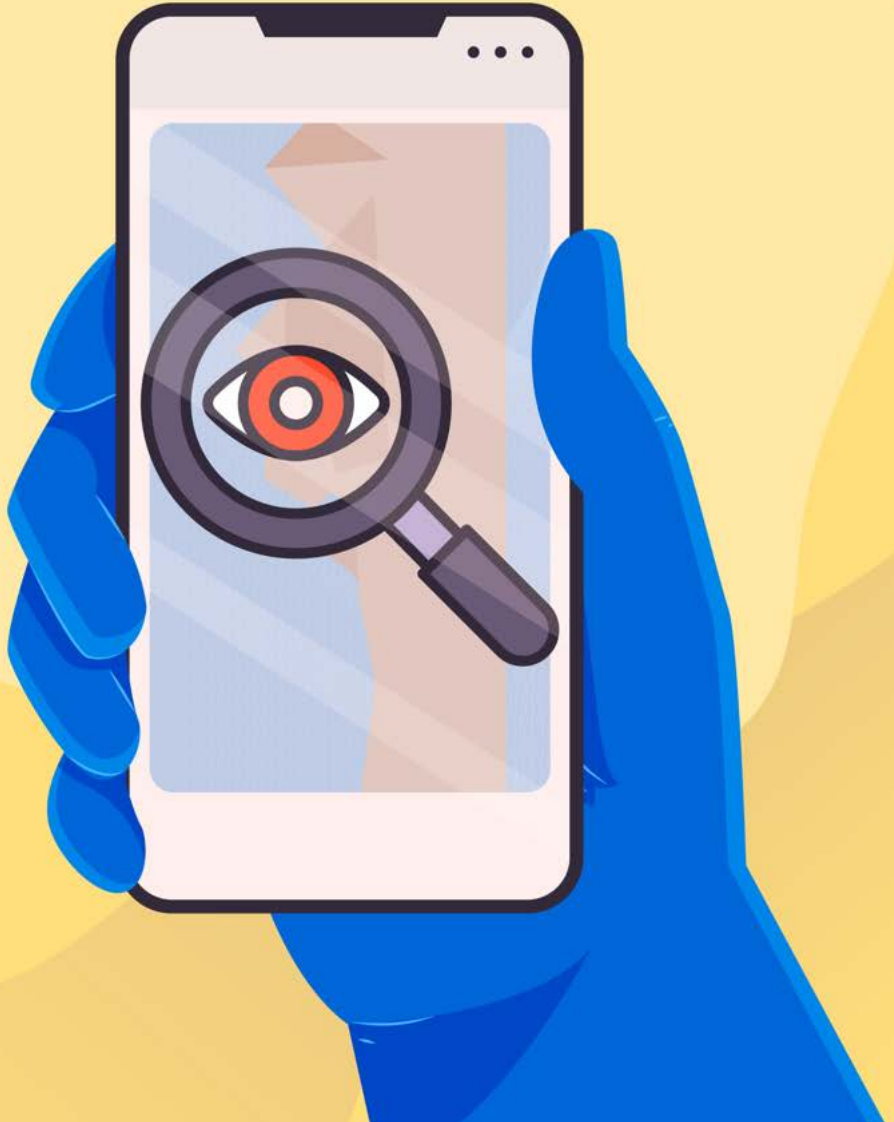




## **Routine Infringement of Privacy**

Denying citizens constitutional rights and protections as a preemptive security measure

# **"Your phone and ID, Pleaset"**



## **Routine Infringement of Privacy:**

Denying citizens constitutional rights and protections as a preemptive security measure

### **Paper one: “Your phone and ID, Please”**

Stop and search operations targeting mobile phones and the emergence of a new set of routine violations of laws governing police powers.

First Edition in Arabic 2019

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In the second week of the expansive security crackdown that followed the wake of small demonstrations on 20 September, K.A. related a scene he witnessed while walking in Mahmoud Bassiouni Street. Amid the heavy presence of security forces and high-ranking policemen around Talaat Harb Square and Mahmoud Bassiouni Street, there suddenly appeared two desks on the sidewalk across from the Franciscan School. Two officers in civilian dress sat at the desks surrounded by police personnel, across from them on the other side of the desks were two long lines of people. According to K.A., dozens of citizens were queuing--waiting for their turn to be searched after being arbitrarily stopped on the street. When their turn came, each person turned over their identity card to the officer at the first desk then gave their telephone to the officer at the second. The second officer made a detailed examination of the phone, looking at all social media account apps, private text messages, and often photos as well, according to numerous testimonies, all in search of "political content"--basically any content that made them a "political suspect" in the eyes of the officers.<sup>1</sup>

For nearly two months, this practice—a flagrant violation of the most basic privacy rights—became a routine, daily part of police work, particularly though not exclusively in Downtown Cairo. Dozens of citizens were arrested in September and October 2019-- and to a lesser degree in January 2020--after being arbitrarily stopped and searched on the street for any content on their telephone suggestive of a political leaning.

This was not the first time that security had treated mobile phones as a source of danger or as evidence against their users. The police obsession with mobile phones has grown in tandem with the evolution of phones' documentation and communication capabilities, since they were first used in Egypt to film a number of incidents of torture in police stations.<sup>2</sup> As a result, it became customary to ban mobile phones from security offices and even some government and judicial offices, such as the High State Security Prosecution, despite the lack of any clear legal basis for it. The practice persisted for nearly ten years before gradually declining; and with surveillance cameras now installed in some police stations, citizens were allowed once again to bring their phones with them to the station.

As mobile phone capabilities developed and social media platforms evolved from simply one type of communication and documentation tool to a primary medium for social communication, the transmission and spread of news, and access to information, the security apparatus's obsession with mobile phones mounted accordingly. But what happened between 20 September and late October

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1 The term "political suspect" is a direct translation of a phrase widely cited by police personnel and increasingly so in the last 6 months. For example, when responding to queries from lawyers for people in police custody about the basis of their arrest. But as this paper will show, stopping someone on the basis of "ishtibah" has no basis in law. When "political" is added to ishtibah, It typically means that the person in custody was stopped in a public place and questioned, which led the police to suspect that they had some association with politics or public affairs in general. In the majority of recent cases, such assessments were made following a search of the person's mobile phone that turned up "political content," which could be as innocuous as work- or party-related text messages, a snarky social media post, or even engagement with other social media content that was judged to be "too political". When a person was deemed "politically suspicious", they were typically taken into custody pending questioning by National Security Investigations, although in December and January the.

2 Like the torture of Emad al-Kabir. See <https://www.youm7.com/story/2009/3/26/%D8%A7%D9%84%D8%A5%D9%81%D8%B1%D8%A7%D8%AC-%D8%B9%D9%86-%D8%A7%D9%84%D8%B6%D8%A7%D8%A8%D8%B7-%D8%A7%D9%84%D9%85%D8%AA%D9%87%D9%85-%D9%81%D9%89-%D9%82%D8%B6%D9%8A%D8%A9-%D8%B9%D9%85%D8%A7%D8%AF-%D8%A7%D9%84%D9%83%D8%A8%D9%8A%D8%B1/82956>.

2019 was an unprecedented development as far as police practice in Egypt and in terms of the magnitude of violation of citizens' privacy. It seems to have been occasioned by the temporary spread of the videos and live feeds of contractor and actor Mohammed Ali before the demonstrations of 20 September. During this period, the principal purpose of police presence on the streets was to search the mobile phones of citizens, who were arbitrarily stopped and forced to unlock their phones for an examination of text messages and social media apps, in search of content that might reveal political leanings. Although such conduct was seen sporadically in the past, it was only after the 20 September 2019 demonstrations that it began to be practiced on such an unprecedentedly large scale, and again in January 2020.

From 21 September to the end of October 2019, stops and forced phone searches accompanied a widespread police crackdown and mass arrest campaign. In most cases in which police found political content on phones, no matter how trivial—satirical comics, for example—and no matter how personal—private messages or personal photos, for example—the inevitable result was the arrest of the person being searched.

It was not a small number of people or a few exceptional cases in which people were arrested. On the contrary, it was the principal purpose and most likely outcome of en masse stop-and-search operations in the five weeks from 20 September to the end of October. Lawyers estimate that a large proportion of the more than 3,000 people arrested in connection with case no. 1338/High State Security, case no. 1413/High State Security, and other cases opened in September and October 2019—some 950 of whom remain in custody<sup>3</sup>—were detained solely on the basis of political content found on their phones. It is difficult to make an accurate count of phone-based arrests because of the almost identical nature of charges filed in these cases and because phone content is not cited in evidence reports or arrest reports given the unlawfulness of the procedure.

In order to illustrate the nature and circumstances surrounding the normalisation of this practice, this paper provides a brief narrative of its development based on cases documented during the security crackdown in September–October 2019, and later during the preventive crackdown to pre-empt what police claimed were planned demonstrations to mark the anniversary of 25 January. We also review the solitary statement issued by the Interior Ministry on the measure and then detail an extensive rebuttal of all legal pretexts cited by the MoI to legitimize this arbitrary, unjustifiable and unlawful practice -- a practice which can have serve no purpose but that of intimidating and terrifying citizens.

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<sup>3</sup> Accurate as of February 1st, 2020.

## I. Official positions on the violation

Numerous concerns and condemnations were voiced by different parties around the phone searches, clearly labelling them unlawful and unconstitutional. Some citizens also resisted by refusing to allow their phone to be searched, a response typically met with their arrest. On 3 October, the National Human Rights Council (NHRC) issued a statement affirming the unlawfulness and unconstitutionality of the arbitrary stops and searches<sup>4</sup>, the statement for instance said:

Firstly, the unjustifiable expansion of the practice of stopping and arresting passersby in streets and squares without legal basis, without enabling them to contact their families, and without informing them of the charges against them constitutes an assault on rights enshrined in the constitution and in law.

Secondly, the second practice of stopping citizens walking down the street and forcing them to let policemen see and peruse their mobile phones violates numerous provisions of the constitution that protect private life and shield citizens' correspondence and communications, including electronic communications and devices.

This statement contained a strong and rare condemnation considering the NHRC's recent history, which rarely includes outright criticism of police practice. This clearly reflects the gravity of expanding security forces' authority to infringe the most basic rights of citizens to walk down the street unmolested without being subjected to a compulsory search.

The Interior Ministry responded the same day with a brusque statement<sup>5</sup> on its official Facebook page. In the statement, the ministry claimed that its procedures were lawful and that "all cases of arrest accorded with the law, including cases *in flagrante delicto*, (caught in the act of committing an offence) which permit the search of persons and their movable possessions (mobile phones or otherwise, in accordance with the law)." The statement added, "The statement of the National Human Rights Council is based on unreliable information that seeks to foment discord in the Egyptian street."

This statement is not merely inaccurate on the law; it is completely divorced from stop and search regulations set forth in the Criminal Procedure Code, and from constitutional provisions.

Until 21 December, and before the renewed wave of stops and arrests based on political suspicion, EIPR lawyers and other lawyers had never encountered a case in which a suspect was referred to trial as the direct result of a telephone search in which the arresting police personnel recorded their search of the suspect's telephone in the arrest report. This is because it is patently unlawful. Nevertheless, it appears that such procedures, which are too crude to even be described as exceptional measures—for even exceptional measures are governed by regulations and bound by a specific timeframe—have become an acquired right since they are re-deployed every time security bodies anticipate demonstrations.

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4 The statement can be found at <https://www.cairo24.com/2019/10/03/%D8%A7%D9%84%D9%82%D9%88%D9%85%D9%8A-%D9%84%D8%AD%D9%82%D9%88%D9%82-%D8%A7%D9%84%D8%A5%D9%86%D8%B3%D8%A7%D9%86-%D8%AA%D9%81%D8%AA%D9%8A%D8%B4-%D9%87%D9%88%D8%A7%D8%AA%D9%81-%D8%A7%D9%84%D9%85/>.

5 <https://www.facebook.com/MoiEgy/photos/a.181676241876047/2524156997627948/?type=3&theater>.

In order to prevent these violations from evolving from an arbitrarily acquired right with no basis in law into a routine police tool used in ordinary circumstances with no public resistance; as was the case with the ban on mobile phones in police stations or the common, but unlawful practice of searching citizens' cars at nighttime checkpoints, the relationship between these measures and the Egyptian constitution and laws must be demonstrated. We will also attempt to preempt any further legal arguments that can be advanced by the Ministry of Interior and refute, in detail, any legal basis for the existence for such measures.

This paper will examine the legal framework governing all types of searches, distinguish between different types of searches in the law, explain and the legal status of mobile phones and mobile companies, and provide a narrative of the evolution of this new illegal practice based on some documented cases.

## II. Legal framework and the lawfulness of phone searches

Before going into detail about the legal framework governing phone searches, it could be useful to understand certain definitions in Egyptian law relevant to mobile phones, definition pertaining to the information and data stored on these phones, and the legal protections given to such information and data.

### What is the legal definition of a mobile phone?

The law considers it a computer, which is defined as any device capable of storing or recording data or information or performing logical and mathematical operations used for storing and processing data or simply for communication, in accordance with Article 1 of Law 175/2018 on the suppression of cybercrimes:

"In applying the provisions of this law, the following phrases shall refer to their appended meaning:

Computer: any technological device or equipment capable of storing and performing logical or mathematical operations and which is used to record, store, convert, synthesize, retrieve, arrange, process, develop, exchange, or analyze data or information or for communications.

### What is the legal definition of information and data found on telephones?

Under the law, it is either personal data or electronic information. This includes photos, sound files, and otherwise, including the data or information on social media accounts, which the law terms "private accounts."

Article 1 of the cybercrime law defines data, information, and private accounts as:

In applying the provisions of this law, the following phrases shall refer to their appended meaning:

Electronic data and information: anything that can be created, stored, processed, synthesized, transferred, shared, or replicated using information technology, such as numbers, codes, ciphers, letters, symbols, signals, images, sounds, and the like.

Personal data: any data associated with a natural person whose identity is known or can be determined directly or indirectly by linking such data with other data.

Private account: a set of private information of a natural or legal person that gives him the exclusive right to access or use available services through a website or information system.

The law establishes special protection for information and data on telephones, specifying that it is confidential and cannot be disclosed or released by internet service providers except pursuant to a judicial order stating cause. This protection extends to personal data and private accounts on social media, as stated by Article 2(2) of the cybercrime law (175/2018):

First, without prejudice to any provision in this law and Law 10/2003 regulating telecommunications, service providers are obligated to do the following:

1. [...]
2. Maintain the secrecy of data they preserve and store and not reveal or disclose it except pursuant to an order stating cause issued by the competent judicial body. This includes the personal data of any user of its service or any data or information associated with the websites and private accounts accessed by users or the persons and bodies with whom they communicate.

## What are the conditions and prerequisites that may allow searches of phones or computers ?

Egyptian legislators, in both the constitution and ordinary law, has sought to protect correspondence generally, both conventional or archaic types such as mail and telegrams and new types of correspondence like electronic correspondence, telephone conversations, and other types of communication. Article 57 of the Egyptian constitution states:

Private life is inviolable; it is protected and may not be infringed. Postal, telegraphic, and electronic correspondence, telephone calls, and other means of communication are inviolable and their confidentiality is guaranteed. They may not be confiscated, examined, or monitored except pursuant to a judicial order stating cause, effective for a defined period of time, and in cases defined by law.

The state shall be obligated to protect citizens' right to use all forms of public means of communication. They may not be interrupted or suspended, and citizens may not be arbitrarily deprived of them. This shall be regulated by law.

Under this provision, correspondence is part of private life, and state bodies or others may not infringe this confidentiality and privacy except with a time-bound judicial order stating cause.

In line with the constitutional protections for private life and privacy, Article 6 of Law 175/2018 on the suppression of cybercrime establishes conditions for the search and seizure of information, devices, and computers, which, as noted above, includes telephones. The article states:

The competent investigating body, depending on the case, may issue an order stating cause to the competent authorized law enforcement personnel for a period not to exceed 30 days, renewable once, when it has some benefit in exposing the facts of the commission of a crime punishable under the provisions of this law, to carry out one or more of the following:

1. Seize, extract, collect, or confiscate data and information or information systems or track them in any place, system, program, electronic support, or computer where they are present. The digital evidence shall be submitted to the body issuing the order, provided it does not affect the continuity of systems and service provision if necessary.
2. Examine, search, enter, or access computer programs, databases, and other devices and information systems in pursuance of seizure.



3. Order a service provider to submit data or information in its possession related to an information system or technological device under its control or stored by it, as well as the data of its service's users and the traffic data present on that system or technological device.

In all cases, the order of the competent investigating body must be justified (cause stated).

Appeals of the aforementioned orders shall be made before a panel of judges of the competent criminal court<sup>6</sup>, in accordance with the deadlines and procedures set forth by the Code of Criminal Procedure.

Accordingly, judicial investigative bodies (the prosecution or the investigating judge) alone are competent to issue an order for the search and seizure of mobile phones and the examination of the information and data on them, provided such search is useful in exposing facts as part of an ongoing investigation of a crime. Prosecution orders may not exceed 30 days, renewable only once, and the person against whom the order is issued may appeal it before a judicial panel of the competent criminal court, in accordance with the deadlines and procedures stipulated in the Code of Criminal Procedure.

None of this has any relation to the power that the Interior Ministry seem to have vested in itself to search phones as a preemptive measure to determine the "political identity" of persons that they profiled and deemed suspicious solely on the basis of their age or presence in the vicinity of Tahrir Square "at the wrong time", the wrong time being a period that might be as long as a full month (as has been the case from late December to late January).

## Is it lawful to search telephones in cases of flagrante delicto, as the Interior Ministry claimed in its statement?

Responding to the rights criticisms and the NHRC statement affirming the unlawfulness of telephone searches, the Interior Ministry said in its own statement that when a crime is caught in the act, it permits the police to search the person and their personal belongings, including their telephone.

To understand the legality of telephone searches in cases of flagrante delicto, we must first define the term. Article 30 of the Code of Criminal Procedure states:

A crime is flagrante delicto when it is committed or shortly thereafter.

A crime is flagrante delicto if the victim pursues the perpetrator or the public pursues him the perpetrator while screaming after its commission, or if the perpetrator is found shortly thereafter carrying implements, weapons, belongings, papers, or other items that indicate he is the perpetrator or an accessory, or if at that time signs or marks are found on him indicating this.

In other words, a case of flagrante delicto occurs when the suspect in a crime is arrested while in the act of the crime or shortly thereafter.

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<sup>6</sup> The common term in Egyptian legal parlance and in legislation for such a panel is "a panel convened in a deliberative chamber", which connotes a higher level judicial panel of more than one judge.

Of course, for a crime to be apprehended in the act of commission, there must first be a crime, which is not evidently not the case with the people who were subjected to the unlawful search of their phones. All testimonies, including from witnesses who spoke to EIPR, agree that the searches were arbitrary, took place at police checkpoints, and tended to target specific demographic groups. In no way can such a situation be described as “caught red-handed.” Being caught in the act is necessarily related to a crime, while a police “stop and search”, as will be explained below, must be related to the person subject to the stop’s placing himself in a situation that gives rise to suspicion.. Hence, the stop of hundreds of citizens on a daily basis for a period of nearly a month in the same geographic location cannot be justified on the basis of *flagrante delicto*. Nor can they be justified by the reasonable cause for suspicion which forms the basis for stop and search, since no crimes were committed in that geographic location to begin with, and it cannot be claimed that the hundreds of citizens subject to stops were acting suspiciously or questionably simply by being young or walking in the general vicinity of Tahrir Square.

Moreover, legally speaking, being caught in the act does not permit police to conduct a phone search, even if it is the tool used to commit the crime. In such cases, police are only legally permitted to conduct a preventive search to deprive the suspect of any implement that could be used to assault them while in custody. If a suspect is apprehended in the act, the police may arrest them—if the crime is punishable by imprisonment of more than three months—and seize their phone, which is then taken into custody and brought before the Public Prosecution with the suspect within 24 hours.

All of this is regulated by Articles 31, 32, and 34 of the Criminal Procedure Code, which state:

#### Article 31

The law enforcement official (with powers of arrest), in apprehending a felony or misdemeanor in the act of commission, must immediately deploy to the incident scene, examine and preserve the physical traces of the crime, identify places and people and anything useful in exposing the facts, and take the statements of persons who were present or persons who can provide clarifications about the incident and its perpetrator.

He must inform the Public Prosecution immediately upon moving, and the Public Prosecution, upon receiving notification of a felony caught in the act, must immediately move to the scene of the incident.

#### Article 32

The law enforcement official (with powers of arrest), upon deploying to the scene in the case of crimes caught in the act, may prevent persons present from leaving or moving away from the scene of the incident until the incident report is completed. The law enforcement official may summon at once any person who may provide clarifications about the incident.

#### Article 34

The law enforcement official, in cases of felonies or misdemeanors caught in the act of commission and punishable by more than three months in prison, may order the arrest of the suspect present for whom sufficient evidence exists to charge him.

Based on this, it is clear that according to the letter of the law, stopping people at police checkpoints does not necessarily qualify as apprehending a person in the act, and even if a person is caught in the act, the police may only send the suspect to the Public Prosecution with their mobile phone. Only the Public Prosecution has the right to search the phone, and only if that is legally justified.

## What does "Ishtibah" or "suspicion" mean? Can police arrest a person solely on the basis of suspicion?

"Ishtibah" (roughly translated as suspicion) is a term common in security parlance, which seems to have originated in Law 98/1945 on vagrants and persons under suspicion. The law defined two categories of suspicious persons: 1) people who had been convicted more than once for one of several crimes (exhaustively listed by the same law), and 2) people known, for reasons left to the discretion of the police, to be habitual criminal offenders.

Prior to its repeal, Article 5 of Law 98/1945 stated:

A person under suspicion is any person over the age of 15 who has more than once been convicted for one of the following crimes or who is reasonably known to habitually commit these crimes:

1. Attacking persons or property or threats thereof.
2. Brokering the return of abducted persons or stolen goods.
3. Obstructing means of transportation or communication of public utility.
4. Trafficking in or purveying toxic or narcotic substances.
5. Counterfeiting, replicating, or circulating counterfeit and/or replicated coinage, government currency, or banknotes of legal tender in the country.

The judiciary has defined suspicion as:

"...a dangerous condition latent in a person based on being known among people as a person who habitually commits crimes and acts. It is a condition for which the legislator has prescribed accountability and punishment. It may be evidenced by statements, precedent and/or previous convictions, or security reports after it is assessed that all of the above are demonstrative of a link between his present and his past and are unequivocal in establishing his danger.<sup>7</sup>

Law 98/1945 permitted police to punish persons under suspicion with preventive measures, in line with Article 6 of the law, which states:

Suspicious persons shall be punished by placement under police monitoring/surveillance for a period not less than six months and not more than five years.

In the case of a repeat offense, the penalty shall be imprisonment and a period of police monitoring not less than one year and not more than five years.

Under this legal regime, police could arrest persons classified as suspicious and examine their criminal record. If they qualified as suspicious persons under the law, they could be placed under police monitoring as stipulated by Article 6. This is the source of the fame of the practice of being "arrested on suspicion", and of the common practice among police officers of holding someone for a "background check"; which means that someone was stopped for suspicion and is having his background checked, if the check turned up nothing incriminating, the suspicious person would be released.

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<sup>7</sup> Case no. 3/10JY, 2 January 1993, Technical Library 5, part 2, p. 103.

But since the Supreme Constitutional Court (SCC) overturned provisions on suspicion, the concept no longer has any presence in the laws, and police do not have the right to arrest a person solely on unqualified suspicion.

On 14 January 1993, the SCC ruled in appeal no. 3/10CJY<sup>8</sup> that Article 5 of Law 98/1945 was unconstitutional and thus invalidated that article as well as related Article 6 on penalties for suspicion.

In ruling suspicion arrests unconstitutional, the court relied on several fundamental principles, most importantly the presumption of innocence and the prohibition on punishing a person twice for the same act. The court said in its ruling:

When suspicion is of the two types set forth in the contested Article 5, it is not an act that assumes an external, tangible form. Nor does it (the provision) restrict personal freedom with due regard for legal means that are procedurally or substantively consistent with provisions of the constitution, or comply with the safeguards and stipulations established by this court for fair trial, among them the presumption of innocence, as an inarguable fact dictated by criminal principles of rule of law. Moreover, suspicion in that form, as based on prior convictions, results in punishing a person twice for a single act. Thus, Article 5 contravenes Articles 66, 41, and 67 of the constitution, and this requires its annulment and the voiding of Articles 6, 13, and 15 of the law by decree in question, which are subsequent to it, have no basis without it, cannot be enforced in its absence, and would not be enacted by the legislator in its absence.<sup>9</sup>

Subsequent to this ruling, “suspicion” became defunct as a legal term, and no longer has legal force or a basis in Egyptian law—it is unconstitutional according to the SCC. It nevertheless persisted as a security practice and was frequently used unlawfully. The most glaring evidence of its unlawfulness is the fact that no arrest report ever uses the term.

## If suspicion has no legal basis, when do police have the right to stop people at police checkpoints?

Court rulings have conventionally called this “*istiqaf*” (which translated into “stop” as in stop and search), which is a power afforded to the police. The term describes what police may do when a person actively engages in questionable or “dubious” conduct, such as running or fleeing and ridding themselves or tossing aside a bag when seeing police; or such as being seen more than once “loitering” around a particular residence. Only in this case do police have the right to approach the person, who has actively made himself suspicious, and ask to see identification. Courts have ruled that in such cases a person must actively do something questionable or dubious in order for the measure to be justified.

It is for this reason that the Court of Cassation has overturned criminal sentences against drivers who were randomly stopped and given drug tests at police checkpoints, reasoning that the arbitrary stop was unlawful because the drivers did not actively engage in questionable conduct as stipulated to stop them.<sup>10</sup>

As such, free-floating, groundless suspicion, whether political or criminal, has no basis in law or the

<sup>8</sup> Constitutional Judicial Year.

<sup>9</sup> SCC decision in appeal no. 3/10JY in January 1993.

<sup>10</sup> See for example the ruling in appeal no. 4527/87JY issued by the fifth circuit on 10 March 2019.

constitution. In fact, the SCC has ruled that it is unconstitutional, and any stop, arrest, or search made solely on the basis of unsupported suspicion is illegal and prohibited.

As for the police practices recently observed and documented in the surroundings of Tahrir Square and other locations, which will be addressed in the next section, these have no relation - not even remotely - to any of these legal concepts, neither the ones still on the books nor those that have been repealed.

## What is the legal meaning of "search"?

Jurists concur that legally a search is the examination of a certain individual's secrets and confidential items for evidence to aid the investigation into a specific crime when serious evidence indicates that the individual in question committed the crime. The location of the search could be the individual themselves or their protected private spaces such as their home, their correspondence, or their telephone.<sup>11</sup>

As an isolated procedure, without the context of an investigation, a search is unlawful and is the exception to the rule, where the rule here is the protection of private life. There are therefore specific conditions governing searches, first of all that the person must be suspected of committing a violation of the law, and that there be a warrant for the search issued by a judicial body. These are general rules, applicable to the search of homes, persons, or telephones.

## Can the police search sealed or locked items? Who has the right to search them?

Even if the conditions for a search are met—when the police have a warrant from the prosecution or in the case of a crime caught red-handed—police may not search sealed or locked items. In this case, a search may be conducted pursuant to a specific judicial order. This rule applies to mobile phones because they are typically locked with a password. In addition, phones contain correspondence which is protected as private, as noted above.

If locked items are found in the possession of a defendant during a personal search or the search of his home pursuant to a search warrant from the Public Prosecution, the law requires police to forward these locked items to the prosecution as seized evidence. Under Articles 52 and 97 of the Code of Criminal Procedure, only the prosecution may order them searched and in the presence of the defendant. Those articles state:

### Article 52

If in the home of the defendant papers are found that are sealed or locked in any way, the law enforcement official may not open them.

### Article 97

Only the investigating judge shall view letters, correspondence, and other seized papers, provided this takes place, if possible, in the presence of the defendant who possesses them or received them, while his remarks on the seized items are recorded.

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<sup>11</sup> See for example, Omar Mohammed Abu Bakr, al-Jara'im al-Nashi'a 'an Istikhdam al-Internet, PhD thesis, Faculty of Law, Ain Shams University, 2004, p. 961.

When necessary, the judge may task a member of the Public Prosecution to screen the aforementioned papers. Based on what the examination reveals, he may order the papers appended to the case file or return them to the person who possesses them or to whom they were sent.

## Do I have the right to object to a telephone search or refuse to give the password for my telephone or social media accounts?

Yes, you do!

If police arbitrarily stop a person on the street or at a checkpoint, they have no right to force the person to open their mobile phone or even ask for the password. The law grants this authority solely to the Public Prosecution or investigating judge, under specific conditions and with the consent of the phone's owner. Thus, the answer to this question is unequivocally yes: every citizen has the right to refuse to have their mobile phone searched or to open their accounts. Legally, police cannot compel any citizen to do so.

If a person is faced with potential charges by the Public Prosecution, during questioning, the constitution and law guarantee them the right to refuse to give the password to their phone or personal accounts because citizens are not compelled or required to disclose their secrets or cooperate with the prosecution or courts in a way that incriminates themselves.

This right is grounded primarily in the presumption of innocence and the corollary right to remain silent. Which means that if the Public Prosecution demands incriminating information, you can assert your right to remain silent. This response is not punishable and cannot be used against you according to the last paragraph of Article 55 of the constitution, which states:

The accused has the right to remain silent. Every statement proven to have been made by a detainee under any of the foregoing conditions, or threat thereof, shall be disregarded and not relied on.

Applying these rules to the question of passwords to your mobile phone or social media accounts, you can exercise your right to remain silent during questioning and refuse to submit your passwords.

## Do the police have the right to search mobile phones under a state of emergency?

When a state of emergency is declared—in response to a natural disaster, exceptional security conditions, or extraordinary conditions—law enforcement officials who have the powers of arrest are temporarily authorized to use a set of legal procedures and powers, but the right to search phones is not one of them. This has been affirmed by the SCC when in 2013 it overturned Article 3(1) of the Emergency Law, which had previously allowed personal searches without regard to the rules set forth in the Code of Criminal Procedure (when emergency is declared).<sup>12</sup>

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<sup>12</sup> <https://eipr.org/en/press/2019/09/eipr-government-must-respect-right-peaceful-assembly-and-right-privacy-and-cease-grave>.

### III. Documentation of cases in which police forcibly searched mobile phones

After the demonstrations of 20 September 2019, there were numerous reports of passersby who were stopped and had their phones searched. Many citizens refrained from walking in the downtown area altogether to avoid being compelled to open their phones. Many testimonies described arbitrary searches on the street lasting up to a half hour, during which time the police were withholding the person's identification card, thereby compelling them to cooperate and open their phone. This was confirmed by K.A., cited at the outset of this paper, when he described the scene he witnessed on 25 or 26 September (he does not remember the exact date) of a long line of citizens waiting to have their phones searched on Mahmoud Bassyouni Street. The EIPR and other rights organizations received successive calls for legal assistance, most of them associated with stops and searches and later with the arrest of suspects charged in case no. 1338 or one of the other major political judicial cases launched around that time. One case that received wide media coverage at the time involved activist Sanaa Seif, who was arrested for her refusal to submit to an illegal search of her phone on 6 October 2019 in the Bab al-Louq area<sup>13</sup>; she was released a few hours after she was detained. A few days earlier, on Thursday, 3 October 2019, a rights researcher<sup>14</sup> was stopped on Qasr al-Aini Street heading toward Manyal between 4 and 5 pm at a makeshift State Security checkpoint. He was forced to open his phone, the contents of which were closely scrutinized. When a questionable personal photo was found, the State Security official detained him and took him to the Qasr al-Nil police station and from there to a security forces camp, where he was held for 30 hours before being released; no police report was filed.

The witness/victim said that the State Security officer who stopped him asked for his ID and then questioned him about the nature of his work, a photo of him posted on Facebook, and some of the people pictured in the photo and his relationship to them. He then proceeded to read in detail all the witness's Facebook posts, stopping at a comment he had posted on the private account of a work colleague informing him that he had sent a response to the colleague's email account. The officer then demanded to see the witness's private email account, which was not accessible on his phone.

He was taken to the Qasr al-Nil police station for a security inquiry, but the precinct chief decided to detain him for further questioning as "a political suspect," after which he was questioned by multiple people. During this time, the witness asked more than once to contact his family, but his request was denied on the grounds that "he was now under the purview of State Security." He spent two hours in the precinct's lockup before being moved to the Central Security Forces (CSF) camp in Aboud, where he was placed in what seemed to be a dedicated administrative detention room, with people of various ages: minors, young adults, and elderly people, all of them men and all of whom were questioned by various State Security officers. The witness said that some people who refused to provide their passwords to personal accounts were subjected to violence and torture, but he himself suffered no physical harm. He was released early in the morning on Saturday, 5 October.

Although the witness was detained for two days simply because an officer forced him to open his phone in the street and deemed him politically suspect due to a personal photo and a comment on a friend's private account, he was luckier than many others who were arrested and then charged in

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<sup>13</sup> <https://www.asiatimes.com/2019/10/article/arb-egypt-sanaa-seif-police-crackdown-arrests/>.

<sup>14</sup> The person prefers to remain anonymous.

case no. 1338/Supreme State Security case and other cases opened during this period in which hundreds of protesters or perceived protesters were charged. Typically people who resisted and refused to submit to a personal and phone search were “roughed up” in order to cooperate and in some cases faced physical assault or were arrested and detained.

Perhaps the most violent incident documented was the one filmed using a mobile camera in Shebin al-Kom on 20 October: when a passerby refused to turn over her phone for a search, police forces surrounded and collectively assaulted her, seizing her telephone and smashing it in the street.<sup>15</sup> The footage shows that she was then arrested and taken to a CSF vehicle.

It must be noted that in all cases observed by lawyers with the EIPR and other rights organizations in which people were stopped and searched and then referred to the prosecution, no defendants were officially questioned at the prosecution about the posts or text messages turned up by the search and instead faced other “standard” charges.

The spread of the practice was not limited to Downtown Cairo. As evidenced by the video referenced earlier, it extended beyond that and even outside Cairo. One of the first cases documented in the second security sweep—after the practice of stop and search had waned but only to regain momentum in December of the same year—was the arrest of Ayman Salah<sup>16</sup> in the Nasr City area on 19 December 2019.<sup>17</sup> Salah was stopped with others while on a microbus; they were all forced to open their phones after which he was detained, a police report filed, and he was referred to the prosecution. The police report did not note that he was stopped arbitrarily or that the microbus was stopped at a nighttime checkpoint. This was followed by additional cases and renewed appeals for legal assistance from people who had been searched in the street and cafes in December and January, as it became clear that this was an attempt to intimidate citizens and deter them from assembly that security forces believed or feared would take place in the run-up to the anniversary of the 25 January revolution.

In one case documented by the EIPR in December, Mohammed Eid was arrested at a café on a street off Tahrir Square at approximately 9 pm on Wednesday, 25 December 2019—exactly one month before the 25 January anniversary. Typically and as has become common over the past few years, security measures gradually escalated as that date approached. In this case, a force from nearby police station raided the café while Eid was there with a group of friends then examined the IDs and phones of every person present in the small café at the time.

Eid says the force was made up of six or seven officers and several policemen, all of them in civilian clothes:

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15 [https://twitter.com/Cairo67Unedited/status/1185963337143799809?ref\\_src=twsrc%5Etf-w%7Ctwcamp%5Etweetembed%7Ctwterm%5E1185963337143799809&ref\\_url=https%3A%2F%2Fnwafez.com%2F%25d8%25b6%25d8%25a7%25d8%25a8%25d8%25b7-%25d8%25a3%25d9%2585%25d9%2586-%25d9%258a%25d8%25b9%25d8%25aa%25d8%25af%25d9%258a-%25d8%25b9%25d9%2584%25d9%2589-%25d9%2581%25d8%25aa%25d8%25a7%25d8%25a9-%25d8%25b7%25d8%25a7%25d9%2584%25d8%25a8%25d8%25aa-%25d8%25a8%25d8%25a5%25d8%25b9%25d8%25af%25d8%25a7%25d9%2585\\_%25d8%25b1%25d8%25a7%2F](https://twitter.com/Cairo67Unedited/status/1185963337143799809?ref_src=twsrc%5Etf-w%7Ctwcamp%5Etweetembed%7Ctwterm%5E1185963337143799809&ref_url=https%3A%2F%2Fnwafez.com%2F%25d8%25b6%25d8%25a7%25d8%25a8%25d8%25b7-%25d8%25a3%25d9%2585%25d9%2586-%25d9%258a%25d8%25b9%25d8%25aa%25d8%25af%25d9%258a-%25d8%25b9%25d9%2584%25d9%2589-%25d9%2581%25d8%25aa%25d8%25a7%25d8%25a9-%25d8%25b7%25d8%25a7%25d9%2584%25d8%25a8%25d8%25aa-%25d8%25a8%25d8%25a5%25d8%25b9%25d8%25af%25d8%25a7%25d9%2585_%25d8%25b1%25d8%25a7%2F)

16 The names of those who provided statements have been changed to protect their identity.

17 Police Report no. 606/209/State Security misdemeanour Nasr City 2.



They spent five minutes collecting everyone's ID. It was the first time I'd been in a situation like that and I was nervous. I didn't know what would happen and what they were looking for. I quickly got on my phone and deleted a few things. After they collected everyone's ID, they called out some random names, among them mine, to submit to a phone search. An officer told me to open Facebook and I told him I didn't have it. He said, "How come, is there anyone these days who doesn't have Facebook? Get on with it." But I really did not have Facebook on my phone. He asked me where I worked then he would go check up on other people's phones and come back to me later and say, "You sure you don't have Facebook?" He looked through my phone for about ten minutes while they were doing background checks on the IDs. After the check, they gave everyone back their IDs and phones except for me and three others. They took me and the others away. My friends asked where we were going and they told them it'd just be 10 or 15 minutes at the most and I'd be back.

At the police station, they were questioned by State Security; one of their group was released while Eid and the others were detained until the following day. He was questioned at length by State Security while blindfolded, asked general questions about his political activity and whether he had participated in any previous demonstrations. He was held in the station lockup until late the next day, when he was released with the others who had been arrested in the café in late December.

Stop and search returned with a vengeance in the Tahrir Square area around that time. Just by walking in the general environs, a person faced more than a 50 percent chance of being stopped and searched. At times, the practice extended to people in cars or taxis. Omar Mustafa, a 30-something administrative employee at a civic association in Garden City, related that he was stopped while in a taxi on the way to work on the morning of 12 January by a police checkpoint at the entrance to the Qasr al-Nil Bridge on the Opera House side. The officer made him get out of the taxi and asked to see his ID and then his phone. Omar Musatfa. complied and the encounter was quick; a few minutes later he was given back his belongings and permitted to leave.

The sight of "search queues" again became common, particularly around Tahrir Square. Another rights researcher, Mohammed Farid, was subjected to an attempted search of his phone late in the day on 21 January 2020. He was taken to a makeshift checkpoint near Tahrir, where seven or eight State Security officers and criminal investigations personnel were gathered around a plastic table examining the phones of dozens of citizens who had been stopped and brought to the checkpoint. Mohammed Farid says that while he was waiting for a decision about whether to hold or release him—about 45 minutes—no less than 20 people, if not more, were brought to the checkpoint, most of them between 20 and 30 years old, although some were older; some were non-Egyptian, Arab nationals. All of them waited at least ten minutes while an officer examined their IDs and the contents of their phones. In most cases, they were then taken to one of three nearby police stations or further examination. Only a few people who had been stopped and searched were released.

Aside from public stops and searches, in December and January another stranger practice appeared, even more flagrant in its violation of the law and privacy (or even common decency): the homes of citizens living Downtown were raided and they were forced to open their phones and private devices to examination by police in their homes, in another grave violation of the law and private life. (This practice will be addressed in a forthcoming paper.) The presence of police checkpoints and security forces declined somewhat after the anniversary of the 25 January passed without incident.

## IV. Recommendations

### To the Public Prosecutor:

- Issue a circular to members of the Public Prosecution and police officers under your supervision with directives to prohibit the search and examination of mobile phones except by the Public Prosecution or investigating judges and with the consent of suspects, in accordance with the Code of Criminal Procedure, the constitutionally guaranteed right of privacy, and international human rights conventions to which Egypt is a party.
- Issue a circular to members of the Public Prosecution with directives to inform suspects and defendants of their right to remain silent, a fundamental right guaranteed in Article 55 of the constitution, and their subsidiary right to refuse to disclose passwords for their mobile phones and devices, informing them that this will have no impact on their legal status, since the Public Prosecution - as an investigative authority - is an impartial authority committed to suspects' rights under law, the constitution, and international conventions.
- Open investigations into publicly known cases in which citizens were stopped and detained and forced to open their mobile phones for a search of their contents in violation of the law; such cases should be considered crimes not subject to a statute of limitation under Article 99 of the constitution, which states:

Any violation of personal freedom or the sanctity of the private life of citizens, or any other civil rights and freedoms which are guaranteed by the constitution and law, is a crime not subject to a statute of limitations for the purposes of criminal or civil lawsuits. The affected party shall have the right to bring direct criminal action against its perpetrators.

### To the Interior Minister:

- Issue directives to police officers and law enforcement personnel necessitating compliance with the law while performing their duty to protect citizens' security, and prohibiting the search of mobile phones except by the Public Prosecution or investigating judges and with the consent of suspects, in accordance with the Code of Criminal Procedure, the constitutionally guaranteed right of privacy, and international human rights conventions to which Egypt is a party
- Open internal administrative investigations into publicly known cases in which citizens were stopped and detained and forced to open their mobile phones for a search of their contents; take disciplinary action as set forth in the Police Act and refer such violations to the Public Prosecution for further action; and encourage citizens to report such violations in the future.
- Issue directives to police officers and personnel affirming the unlawfulness of suspicion as cause, informing them that they may not stop or arrest citizens solely on the basis of unqualified suspicion, pursuant to the ruling of the SCC in appeal no. 3/10JY.