



The Arab Center for the Development of the Rule of law and Integrity

“Promoting the Rule of Law and Integrity in the Arab Countries” Project

Report on the State of the Judiciary in Egypt¹

Second Draft

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Chapter One: Contextual background

1- Landmarks of the Egyptian Judiciary and its Historical Evolution

1-1 Landmarks of the Judicial System

The legal and judiciary system in Egypt, like most of the Arab world systems, stems from the Latin legal systems whose basic characteristics and historical roots largely derive from the French system. Legislation is the prime source of law. Contrary to the Anglo-Saxon traditional judicial systems, the judges' apparent function in Egypt is implementing the law and not drafting the law. The ordinary judiciary in Egypt is divided into two main branches: the regular judiciary, on top of which is the court of cassation guaranteeing the uniformity and consistency of the law implementation and interpretation, and the administrative branch adjudicating in administrative disputes, represented by the State Council (*Majlis ad dawla*) which is in hierarchy higher than the Supreme Administrative Court.

In addition to the ordinary and administrative branches of the system, Egypt has known, throughout its modern history, various aspects of specialized judiciary which is not compliant with the judiciary independence norms and is, by some means, subject to the executive authority control. At the onset of the previous century, new committees were formed known by "*lijan an achkiya*" and "*mahakem al akhtat*", and later in the middle of the century, new courts were established "*al cha'b, al thawra, al ghadr*". Egypt today has military courts whose jurisdiction covers the trying of civilians for public law crimes. It also has State Security Courts, the Court of Ethics, a Socialist Public Prosecutor system, and the Parties Court. All these are aspects of the specialized or extraordinary judiciary, still present in the modern history of Egypt, and confirming the executive branch insistence in having specialized courts under its control, explicitly or implicitly executing its commands.

At the apex of the regular judicial hierarchy is the Court of Cassation. It is a court of law and not a trial court. In other terms, its mission is to control the sound implementation of the law. Courts of Appeal come after and are located in big cities. First Instance Courts or primary courts are spread in districts' capitals, and summary courts in centers, coastal towns and streets. The law established the jurisdictions of value and amount, as well as the territorial jurisdiction of each court.

The Supreme administrative Court tops the State Council Courts, followed by the administrative judiciary courts and various administrative and disciplinary courts.

The Egyptian legislator innovated in 1969 a new court, the Supreme Court, which was later called the Supreme Constitutional Court. This court is responsible for monitoring the laws constitutionality and it assumes the mandatory interpreting of legislative texts, upon the request of the Minister of Justice. It is also competent to decide on the disputes over the competent authority among the judicial authorities. The Supreme Constitutional Court is not part of the Egyptian Judicial System structure in its two ordinary and administrative branches. Its president is appointed by the President of the Republic without consultation of



the Higher Judicial Council. As to its members, they are also appointed pursuant to a decision by the President after consulting the Higher Judicial Council.

1-2 Historical evolution of the Judicial System

The Egyptian judicial system acquired its modern characteristics in the late 19th century, specifically in 1875 (establishment of mixed courts) and 1883 (establishment of civil courts). Before then, chaos was prevailing in the judiciary, along with lack of proficiency, absence of judicial independence norms, misinterpretation of legitimacy and secured rights in fair trials.

Religious courts were at the same time (public law) courts with competences not entrusted to other judicial councils. These courts were diversified according to the four Sunni confessions to which the Egyptian people belong. Religious courts during the Ottoman rule in Egypt were never bound by restrictions of jurisdictions of value and amount or territorial jurisdictions, as they did not follow a unified process for challenging sentences.² In addition to religious courts implementing the provisions of old Islamic jurisprudence, new courts were established since the reign of Mohammad Ali, deciding in disputes not falling within the religious courts jurisdiction and subject to positive legislations, such as the Tribunal of Merchants of Alexandria, the Jurists Association, and the *Ahkam* Council...etc. These councils increased throughout the 19th century until the jurisdiction of religious courts was restricted to personal status matters.

Moreover, Egypt, like all other regions dominated by the Ottoman rule, has know the Foreign Privileges system, by which, consuls of foreign countries are empowered to look into and decide on disputes in which a foreigner is involved as litigant. The Egyptians' struggle for the establishment of a modern state was strongly linked to their struggle for modernizing their legal and judicial system and imposing their national sovereignty over it. This was the main factor entailing the issuance of modern civil codes and the emergence of the modern judiciary which jurisdiction covers all litigations whatever the nationality of the litigants is. This movement culminated with the dissolution of foreign privileges according to Montero Treaty in 1937. The dissolution of religious courts and confessional councils in 1956 was the last step towards the realization of the Egyptian judiciary unification and cohesion.

2- The Socio-Economic and Cultural Context of the Egyptian Judiciary

2-1 The community of judges: between the liberal values and the authority of the state institution

The “community of judges” term refers to judges as a culturally distinguished community, and the “state institution” refers to the Egyptian State systems and institutions governed by very ancient political and administrative values, all axed around the concept of authority, which, in specific case, may turn into hegemony.

² See, Mohammed Nour Farhat, Social history of law in modern Egypt, Cairo, 1986, p. 347 and following pgs.



It goes without mentioning that the community of judges is an essential component of the Egyptian State authority. However, what differentiates it from all other components is its liberal culture acquired and deep rooted throughout the emergence and development of the modern Egyptian judiciary. The emergence of civil courts in 1883 and before them the mixed courts in 1875, occurred in the context of the Egyptian liberal project which was elaborated in the late 19th century, promoted by the first Egyptian liberals. The project is based on the principles of separate authorities, judiciary independence, rule of constitution and law and the existence of an elected cabinet responsible before the parliament which voices the nation's will. These elements constitute the pillars of the Egyptian Judiciary culture, a legacy inherited through generations.

However, the Egyptian judiciary, while being a liberal cultural community, is, primarily, one of the state authorities: it contributes to the reinforcement of the state supremacy and power and promotes the rule of law by which it voices its will. The “authoritarian” aspect of the judiciary is revealed in the practice of judicial offices entrusted to it by the constitution and the law, as well as in the implementation of the law and deciding in disputes or litigations. Therefore, the judicial community culture becomes cohesive with the state authority; one could even say that the said culture becomes an aspect of the state authority, being one of its essential branches.

However, many instances in the modern history of Egypt point out to a certain disparity or contradiction between the community of judges' culture and the state authority: the executive authority tends to surmount the constraints imposed by law and legitimacy, considering that the community of judges jeopardizes its identity and challenges its principal mission, i.e. safeguarding legitimacy and observing the law.

Egypt modern history is full of examples that clearly reveal this disparity between the community of judges and the demands of the state authority which sees in the liberal culture, a constraint hindering its action and a threat jeopardizing the elements of its security and stability.

Another example revealing this contradiction between the liberal culture and the State authority demands is found in the complaints that Lord Kremer mentioned in his journal regarding the Egyptian judiciary. In his journal, he justifies the recourse to specialized procedures beyond the legal constraints imposed by the ordinary judiciary, “because depending on the ordinary justice institutions (as he says) is not enough in a country that witnessed successive illegal and oppressive governments”. This was specifically a sufficient justification for post and pre revolution governments to undermine the ordinary judiciary and its liberal culture and work on forging judicial bodies under its control. Among the bodies, we mention the specialized courts for cases of attacking British Forces, “Danshaw”, the *Achkiya*' courts, martial courts, then the revolution court (during the revolution), the people's court, the *Al ghadr* Court, military courts, state security courts and finally the courts of ethics. The executive branch in modern Egypt always had its specialized judicial bodies allowing it to overcome the impediments and obstacles imposed by the liberal culture values of the community of judges.



Nevertheless, the judicial liberal culture of the judge community was able to contribute to the accumulation of a great liberal judicial legacy guaranteeing general liberties and human rights. This legacy consists of famous and various sentences pronounced by the court of cassation and the State Council and finally by the Supreme Constitutional Court. This legacy is the pride of the Egyptian judiciary and the source of its honor among other countries of the world.

Yet, the most clear and critical example of the contradiction between the judicial community liberal culture and the state authority is perceived when the authority of the Egyptian state jeopardizes the existence of the judicial community itself, or when the executive authority becomes unable to stand the rigid legal constraints and the judiciary adherence to these constraints and rules while deciding in disputes. Our history is full of examples demonstrating this insolvable contradiction which led to apparent clashes, in the majority of which, the executive branch was temporarily prevalent, because it represents the power of the state which is capable of undermining, when need be, all concepts of judicial independence, separate authorities, and even the legitimacy concept itself.³

Lately, at the moment of this report elaboration, the clash broke out again between the judicial community liberal values and the Executive authority hegemony trend. One more time, the conflict is about the liberal identity of the judicial community far from its authority of adjudication. The upcoming clash, even if it had different subject and parties, it has the same nucleus, the same essence: the controversial liberal identity of the community of judges.

However, this time the conflict is linked to two lines of reasoning: the first is the judicial authority draft law, prepared by the judges' club through a joint committee with the Ministry of Justice, and other alternative draft laws, and the judges' belief in that the elements provided by these draft laws will efficiently implement the independent judiciary concept, as acknowledged by democratic societies. The second is the judges' club criticism of the last parliamentary elections, their determination to unveil the reality and work on preventing flawed elections in the future, in addition to holding accountable all responsible parties, even if they were judges.

³ An example of such clashes occurred in 1954 when few members of the Revolution command board ordered to a group of demonstrators to invade the State Council Headquarters and attack its president Dr Sinhory, because the council and its resident are against the revolution. Afterwards, a decision was issued to reappoint the State Council members while Dr Sinhory and 20 other members of the State Council were removed from their judicial positions.

Another example, the most famous in the modern history of Egypt, is the so called "judges carnage": a dispute arose between judges' club and the political regime on the integration of judges into the Socialist Union, consequently, the judges adopted a firm stance in this regard. The clash occurred upon the issuance of a presidential decision No 83 of 1969, stipulating the reformation of judicial bodies, which led to the dismissal of tens of judges. The repercussions of this "carnage" were curtailed by the change of the political environment surrounding it. However, it is still a fact proving that when the judges' liberal culture clashes with the executive authority power, the latter reacts without hesitation by devastating all liberal virtues that accompanied the emergence of the modern State of Egypt.



The conflict parties are different this time. For the first time in the Egyptian judiciary history, the clash is between the executive authority allied to the apex of the official judiciary institution (the Higher Judicial Council) on one hand, and the judges as a professional and cultural community governed by liberal traditions represented and defended by the judges' club on the other hand. The developments of the last four decades (since the "Judges' carnage" in 1969) resulted in numerous conflicts within the judicial body, i.e. between the "pro state" official judicial institution and the professional judicial institution advocating for liberal values.

In fact, the most recent years have witnessed a trend that could not be understood through liberal logic: the official judicial institution (represented at the Higher Judiciary Council) was denouncing everything that might affect the direct interests of judges and their official institution, regardless of liberal values of democratic societies and regardless of the society's right to a transparent justice within the judicial institution. This was clearly revealed by the notifications submitted to the State Security prosecution against those criticizing practices thought to be breaching the concept of equality between citizens in judicial appointment, and against those trying to make the values of liberalism, transparency and equality prevail over narrow professional bias.

This fact does not shed light on the judiciary liberal aspect, yet it reveals the power it enjoys, being a one of the major influential branches of the state pillars. Even more, it shows the judges' community just like a professional community defending its members temporary interests even if they contradict the public society interest to have a sound judiciary.⁴ It is a trend that shows the judiciary in a double perspective: the solemn judiciary to be highly respected in court procedures and the judiciary as an active state institution whose entity and integrity is of great concern for every citizen, considering that caring for public affairs is a constitutional right.

Nevertheless, the environment surrounding the current conflict is totally different from what it used to be in the fifties and sixties. Liberal values and political reform adopted in the context of democratic development do not empower the executive authority to treat judges as it used to treat them in the fifties and sixties.

2-2 Problems of Judicial Reform in Egypt

While assuming its major mission of adjudication of disputes, the Egyptian judiciary works on achieving many social, economic and cultural goals. It protects human rights and freedoms from the public authority

⁴This may explain the results of the referendum on law experts including judges and lawyers who expressed different remarkable opinions about the judges' situation in Egypt. Lawyers showed more fears than judges about the situation of the judges. Among 65 questions: the judges marked 12 negative items whereas the lawyers gave 36 negative answers. It's worth mentioning that 10 items were classified as source of joint complaint between judges and lawyers in Egypt. The judges gave answers that focused more on judges' professions interests such as salaries, promotions, premiums, whereas the lawyers underlined problems that hinder judiciary efficiency, impartiality and integrity.



oppression, as it protects the society by the umbrella of legitimacy and rule of law, without which, social peace would be lost and the law of the jungle would prevail in the society, especially that Egypt is a unified society where the central authority is prominent giving a prominent power to the state judiciary since the role of martial judiciary is very limited in remote regions and in family litigations. There is no doubt in that a proficient, transparent and efficient judiciary is a major prerequisite to accelerate the pace of economic growth in the context of prevailing capitalism and globalization economies. From the cultural perspective, the judiciary plays a key role in protecting freedom of thought, belief, opinion and expression, as well as it safeguards intellectual property rights.

These missions undertaken by the judiciary generate problems when put into practice in society:

- a- Concerning the judiciary's mission of protecting public rights and liberties, the arising issue is related to the guarantee of judiciary independence from the executive authority and the judges' impartiality in adjudication and all pertinent issues such as the need to eliminate all forms of specialized courts which infringe upon the said rights and freedoms.
- b- Concerning the judiciary's mission of safeguarding legitimacy for all, the arising issue is related to the proficiency and efficiency of the judiciary in the light of the accumulation of visible cases and the deficient number of judges, and all pertinent issues such as delays and complexity in adjudication and obstacles in the execution of judicial sentences.
- c- Concerning the contribution of the judiciary to economic development in the context of market economy and globalization, the arising issue is related to the proficiency of judges and their knowledge of economic changes and their legal aspects. Tardiness and complexity of procedures impede the capital flow in the development process, the fact that led to the idea of establishing economic courts with prompt procedures undertaken by qualified and trained judges. This sheds light on the discriminatory hierarchical practices of the judiciary: will tardiness and complexity of procedures always occur in the cases of the poor, while the rich have the advantage of proficient, efficient and prompt procedures?

Another question arises concerning the restructuring policies and their influence on the integrity of the judiciary: have these policies led somehow to the deterioration of financial conditions of judges, which opens new opportunities of corruption that were nonexistent before?

These are the major problems highlighted in this report on the state of the judiciary in Egypt.

Chapter Two: Analysis of the principles of the judiciary

1- The Independence

1-1 The Principle of the Independence of the Judiciary



1-1-1 Meaning and scope of the principle

National and International texts all agree that the principle of the independence of the judiciary implies two interconnected meanings: the independence of the judiciary as institution, or the so called the judicial authority independence, and the independence of the judges while practicing their work in courts, i.e. subject to no influence or interference, and subject to no authority but the law.

The institutional judiciary independence supposes that the political system of the concerned state observes the principle of separate authorities (even if in a limited way). The judiciary could not be independent in a state where one party dominates all other authorities or in which the executive branch or military or religious or tribal communities control the various systems of the state.

On the other hand, the independence of judges requires constitutional, legislative and social guarantees, to be applicable.

International standards embrace the principle of independence of the judiciary in its two meanings with the following sub principles and sub requirements:

- 1- Full power of the ordinary judiciary over issues of judicial nature. It is the only body empowered to decide whether cases submitted to it fall within its jurisdiction.
- 2- The right to litigation and to resort to one's "natural judge" and prohibiting the formation of specialized courts.
- 3- Allotting sufficient resources for the judiciary (budget number one), and putting them under the control of judges alone through their higher council.
- 4- The courts general assembly alone is empowered to distribute work among its affiliated courts.
- 5- The right of judges to form associations and clubs advocating for their interests and their right to enjoy freedom of opinion and expression, not being considered as involvement in political work.⁵

Now we come to describe two aspects of the independence of the judiciary: the judiciary independence from the legislative authority and the judiciary independence from the executive authority.

1-1-2 The judiciary independence from the legislative authority

The legislative authority, represented by the parliament or the Head of State (in cases where he is empowered to issue decrees as law) shall not interfere by a legislative work to limit the judiciary independence. Equally, the legislative authority shall not issue laws for the reorganization of the judiciary in a way that might lead to judges removal from their offices by processes other than the usual disciplinary processes defined by the law⁶. The Supreme Constitutional Court considered that the legislator's

⁵ See: Adel Omar Sherif and Nathan Brown, the Independence of the Judiciary in the Arab World, a study published in a booklet for the workshop on capacity and knowledge building for the rule of law in the Arab world, Beirut, April 8, 2006.

⁶ This happened twice in the history of the Egyptian judiciary: the first was in 1955 when law number 165 was issued for organizing the State Council, it stipulated in its article 77 that a decision should be issued by the Prime minister for the reappointment of the State Council members and technical staff. The second happened when the presidential decision No 83 was issued in 1969 for restructuring the judicial authorities (see Mohammed Kamel Obeyd, *ibid*, p. 231, 236).



intervention to restrict, limit or remove the discretionary authority of a judge is interference in the judicial independence, which contradicts the constitution⁷.

One of the typical examples of legislative violations of the judiciary independence is the issuance of legislations immunizing specific administrative decisions against challenges before the law. The Egyptian constitution stipulated in its article 68 that laws should not immunize any act or administrative decision against the judiciary control. However, the constitutional legislator disregarded this text by the controversial and suspicious amendment that was recently made to article 76 of the constitution stipulating that the decisions issued by the committee supervising the president election are not challengeable before the judiciary. Therefore, the same constitution included two contradictory stipulations, the first prohibiting the immunization of administrative decisions and the second providing for the immunization of some of these decisions.

To give an example about the legislative violation of the judiciary independence (at the level of the constitution), article 93 of the constitution stipulated that the People Council is empowered to adjudicate, after investigation, on challenges brought to it about the validity of membership and the jurisdiction of the court of cassation. This text deprives the judiciary of its right to adjudicate on challenges brought to it about the council membership validity and gives the People Council powers it is not qualified to handle, being simultaneously a defendant and a referee, charged of adjudication on challenges authenticity. Most of the times, members of the governing party of whom the council is constituted in majority get the membership.

1-1-3 The judiciary independence from the executive authority

It means that the executive authority should abstain from interfering in the judiciary, whether in the framework of its affairs as an independent authority or in the justice affairs by attempting to influence the judges. This kind of interference was perceived through the role granted by legislations to the Head of State in presiding over judicial authorities and the role granted to the Minister of Justice to supervise, control and inspect the work of courts and move disciplinary actions⁸ against judges, as well as through the influence of the executive branch over the judicial authorities budget.

⁷ It stipulated that limiting the power of a judge by suspending the execution of a fining sanction is considered as a violation of the judiciary independence principle, case No 38, year: 15 judicial, see Adel Abed al Salam Jomaa and Nathan Brown, *ibid*, p.12.

⁸ While finalizing this report, the Egyptian Minister of Justice used his power stipulated in article 112 of the judicial authority law and called for the referral of two senior judges to the competence board, paving the way for a decision of no competence and dismissal against them, because they pointed out to electoral fraud in the last People's Council (*Majlis echaab*) elections, which implies a flagrant violation of the judiciary independence principle and the irrevocability of judges stipulated in the constitution.



Specialized courts that are directly or indirectly seconded to the executive authority, explicitly or implicitly following its instructions, are the more flagrant and frequent example of the executive branch interference in the judiciary in the Arab world in general, and Egypt in particular, as we will later describe.

1-1-4 Constitutional texts

The Egyptian constitution issued in 1971 reserved its chapter four for the judicial authority. Article 165 stipulates that the judicial authority shall be independent, exercised by courts of justice of different sorts and degrees which shall issue their judgments in accordance with the law. And this text indicates the independence of the judicial authority as one of the three state authorities. On the other hand, article 166 of the constitution discussed the independence of the judge: "Judges shall be independent, subject to no other authority but the law. No authority may intervene in judiciary cases or in the affairs of justice".

Subsequent articles touched on the principles of the judiciary independence. Hence, article 168 mentioned that the status of judges shall be irrevocable; article 169 mentioned that the sessions of the courts shall be public as a general procedure, and article 172 stipulated that the State Council shall be an independent judiciary organization qualified to take decisions in administrative disputes and disciplinary cases.

However, some articles of the constitution open the way for the violation of the judiciary independence in the internationally recognized sense. In this context, we mention that article 167 stipulated that the law shall determine judicial organization and jurisdictions and shall prescribe the way of their formation, and the conditions and measures for the appointment and transfer of their members. It is worth noting that the constitution used two different terms: the judicial authority exercised by the courts (article 165) and the judicial organizations determined by the law.

In Egypt, efforts are made to diffuse the concept of considering as "judicial organizations" the governmental bodies working in the law but not practicing judicial offices in the practical sense (i.e. adjudication) an example is the Administrative Prosecution. These bodies were joined to the judiciary in 1969 under one title: "the judicial organizations", when the state aimed at torturing judges and expelling the governing regime opponents, on the plea of reorganizing the judicial organizations, thus grouping all within the same category as those working in the law, headed by one council, the Supreme Council (article 173). We find it strange that the constitution codified this misleading item and empowered the ordinary legislator to determine and organize the judicial organizations and to determine the formation, the jurisdictions and the organization of the judicial organizations' Supreme Council.

The 1971 constitution included signs of the specialized judiciary such as the State Security Courts (article 171), the military courts (article 183) and the Socialist Public Prosecutor (article 179), which we will be later discussing.

Moreover, chapter four of the constitution under the title "the rule of law" stipulated several guarantees for a fair trial and one's right to litigation. The sanction is personal, no crimes or sanctions are decided upon outside the law (article 67), the accused is presumed innocent unless otherwise proved (article 67), the



right to litigation is guaranteed and all citizens have the right to resort to their "natural judge" (article 68) and the right to defense is secure (article 68). The text didn't deprive the citizen from the right to resort to his natural judge, and the constitution and the ordinary legislator to adopt some specialized judiciary provisions.⁹

1-1-5 Ordinary judiciary

The judicial authority in Egypt is governed by law No 46 of the year 1972. This law has been lately amended by law no 142 issued in 2006. The law has defined the courts in Egypt as follows: Court of Cassation, Courts of Appeal, Primary Courts and Summary Courts (article 1). Article 15 stipulated that save for administrative disputes which are vested with the State Council, the said courts are competent to look into all other disputes, unless exceptions are provided for in special texts. These last words imply that the ordinary judiciary jurisdiction will be to some extent limited in favor of the specialized judiciary, although article 67 of the constitution affirms the citizen's right to resort to the "natural judge". Chapter four of the same law was destined to the Public Prosecution, which was exclusively empowered to institute and set in motion the penal action unless otherwise provided by the law. The Public prosecution is originally an accusatory authority and not an investigational one; however, it combined the two accusatory and investigational authorities, pursuant to subsequent amendments made to the Code of Penal procedures, by which the system of the examining magistrate interference was cancelled. Today, many jurists and reformers are calling for the re adoption of the examining magistrate system for it provides many guarantees to the accused, and prevents the combination of two authorities (accusation and investigation) under one authority. Article 26 of the law stipulated, before amendment, that prosecutors are hierarchically seconded, according to their degrees, to their chiefs and then to the Minister of Justice. This text gives rise to doubt as to considering the public prosecution as a branch of the independent judicial authority. This text was amended by law no 143 of the year 2006. Thus, article 26 of the law stipulates that the prosecutors are seconded, according to their degrees, to their chiefs and then to the public prosecutor. Yet, this amendment isn't sufficient enough for the public prosecution independence as long as the public prosecutor appointment falls within the Head of State competence.

Many texts underline the principle of judiciary independence, such as texts on the formation and jurisdictions of the Higher Judiciary Council and of the courts' general assemblies and other texts on the irrevocability of judges. A great number of texts was amended because they undermine this principle, especially those giving the Minister and Ministry of Justice authority and power to effective supervision of judicial affairs. This was clearly revealed in article 93 of the law, stipulating that the Minister of Justice is

⁹ In the referendum with lawyers and judges, to the question to know if the constitutional texts stipulating the judicial authority independence are implemented, the result was : 44% yes against 40% no and 15 neutral. This means that a large proportion (40%) of lawyers and judges considers that the judiciary independence constitutional principles are not applied on both practical and legislative levels.



empowered to supervise all courts and judges. After the article latest amendment, "the Minister has the right to administrative supervision on courts" limiting its authority to the administrative supervision. . The latest amendment annulled the minister of justice right to warn presidents and judges of primary courts after hearing their statements (article 94 paragraph 4 before amendment). Thus the authority to warn judges about any contraventions they commit or obligations they fail to meet, belongs the president of the court, of his own accord, or pursuant to the court general assembly decision. The same right was imparted to the director of the judicial inspection directorate and a disciplinary action is moved against a judge by the public prosecutor, of his own accord, or on the proposal of the Minister of Justice or the Court president to which the judge is affiliated (article 99). The Minister of Justice notifies the judge about the sentence pronounced deciding his dismissal within 48 hours after the sentence's pronouncement, the judge's authority becomes null starting the date of notification (article 109). The Minister of Justice undertakes the execution of sentences pronounced by the disciplinary board and issues a presidential decree for the execution of the dismissal. Moreover, the Minister of Justice is entitled to request that a judge, who is not qualified for judicial office anymore, for reasons other than health, be transferred to the council mentioned in article 98. This council would decide the judge's retirement on pension or transfer to a non judicial office (article 111). The Minister of justice undertakes the execution of decisions related to judges' retirement on pension (article 115).

Furthermore, the law empowered the Minister of Justice to delegate temporarily or when need be, judges to work in another court after consulting the general assembly of the court in which the judge originally works, and after acquiring the approval of the Higher Judicial Council (articles 55, 56, 57, 58), as he is empowered to temporary delegate a judge to undertake additional or totally different legal and judicial works (article 62).

Among the most critical jurisdictions given to the Ministry of Justice and violating the judiciary independence is the inspection for judges. A judicial inspection directorate is formed within the Ministry of Justice, to inspect the work of judges and presidents in primary courts...The Minister of Justice prepares a list for judicial inspection approved by the higher council of judicial authorities (article 78). The judicial inspection system will be discussed in subsequent sections.

Concerning the public prosecution, article 119 of the law stipulated that the public prosecutor be selected from the vice presidents of Appeal Courts and counselors of the Court of Cassation or General Attorneys of first degree at least, by virtue of a presidential decision. The law did not include any obligation, in this appointment, to consult or seek the approval of the Higher Judicial Council. Consequently this appointment is exclusively decided by the Head of State, which raises doubts as to the independence of the public prosecution although it joins two authorities: accusation and investigation. Thus, there should be a separation of these authorities; accordingly, the public prosecution becomes responsible for accusation only, and investigation is undertaken by the judiciary which enjoys larger independence.

1-1-6 Specialized courts in the Egyptian judicial system



Specialized courts are courts that do not fall within the ordinary judiciary system and that partially or totally lack the fair trial guarantees. The first Conference of Justice organized by the judges' club in Egypt (21-24 April 1986) worked on defining the ordinary judiciary. Its recommendations included that what is meant by the ordinary judiciary is "that the judiciary shall be governed by objective legal rules set prior to the emergence of the action- which implies that every judicial authority established after the emergence of a dispute or commitment of a crime is considered as specialized judiciary- and that it shall fulfill all conditions and include all guarantees provided for by the constitution and the law. The most important of these conditions being that it be formed by judges specialized in law and practicing it, fulfilling all requirements of independence and irrevocability...and that all litigants be given all rights including the right to defense, and comprehensive guarantees...and that the law implemented by judges be consistent with the constitution in a framework of deep respect of human rights and guarantees".

Imposing this multi dimensional standard on the Egyptian judicial system, the specialized courts would be limited to three aspects: the State Security Courts, the Military Courts, and the courts which formation includes popular elements such as the Court of Ethics and the Parties' Courts.

1-1-7 State Security Courts

The constitution provides for the establishment of State Security Courts in its article 171: "The law shall regulate the organization of the State Security Courts and shall prescribe their jurisdictions and the conditions to be fulfilled by those who occupy the office of judge in them". Until recently, Egypt had a dual system of state security courts: the State Security Courts formed pursuant to the Emergency Law No 162 of the year 1958, and the Permanent State Security Courts formed pursuant to law No 105 of 1980. The latter have been dissolved and the first remained, but their existence is not anymore dependent on the declaration of a state of emergency, which is the case in Egypt since 1981.

The State Security Court- Emergency Section is competent to look into crimes violating the decisions of the Military governor under states of emergency. Paragraph two of article 7 of the Emergence Law stipulated that in every Primary court there should be a Summary State Security board formed by one of the court judges, and competent to try crimes sanctioned by imprisonment or fining. The Higher state security board is formed at the court of appeal of three counselors and is competent to try crimes sanctioned as penal crime, and other crimes specified by the Head of State or any person replacing him whatsoever the sanction is. The Head of State is exceptionally entitled to order the formation of a Summary State Security Board including one or two judges drawn from the armed forces officers holding the degree of captain or a higher degree, or any equivalent degree at least. He is also empowered to form a Higher State Security Board encompassing three counselors and two chief officers. In all cases, the State Security Courts members are appointed by virtue of a presidential decision after consulting the Minister of Justice regarding the judges and the counselors and taking the opinion of the Minister of Defense regarding the officers.¹⁰ Article 8 of the law granted to the Head of State the power to establish State Security Boards formed by officers as stipulated in article 7, within regions following a special judicial system and

¹⁰ The President did not until now use the power granted by the legislator to transfer privates to the courts as members.



for specific cases. In such cases, the court implements the procedures determined by the Head of State concerning their formation.

An induction of the provisions determining the State Security Courts- Emergency Section jurisdiction, reveals the presence of two main jurisdictions: A general jurisdiction: trying crimes of violation of the Emergency Authority orders, and an exceptional jurisdiction (stipulated in article 9 of the law) empowering the Head of State, or any person replacing him, to transfer crimes sanctioned by the General Penal Code to the State Security Court- Emergency section. The presidential decision No 1 issued in 1981, ordered the transfer of a number of the public law crimes to the State Security Court- Emergency section- the said crimes are defined by sections one and two and two *in bis* of chapter two and in articles 172, 174, 175, 176, 177 and 179 of the Penal Code in addition to crimes of transport disruption (articles 163 to 170) and crimes of weapons and munitions (law 394 of 1954) and crimes of public rallies, gatherings and demonstrations (law 14 of 1923) and crimes of nonobservance of the system in education institutions (law 85 of 1949) and crimes of violation of the National Unity (law 34 of 1972) in addition to other crimes violating the political parties' law.

The State Security Courts procedures are different from the regular courts procedures for the prejudiced party cannot institute legal proceedings as for civil cases. The Head of State might keep the action before transferring it to the court, as he is allowed to order the temporary release of the accused party arrested before transferring the case to the court and to object the court's decision as to the temporary release of the accused. He is also empowered, after the sentence pronouncement, to reduce the sanction, replace it by a sanction of a lower degree or even annul all or some of the sanctions or suspend their execution. The Head of State is entitled to annul the sentence while leaving the case on file or order the retrying the case before another court. If the sentence resulting from the second trial decides the innocence of the accused, it should be recognized in all cases.

It is obvious from all the previously mentioned texts that the legal system of State Security Courts- Emergency section violates the independence of the judiciary due to the large powers granted to the Head of State, including the formation of courts, determining their jurisdictions and interfering in their decisions and sentences. The most illustrious example of this violation is revealed in the stipulation that these courts' sentences are by no means challengeable.

1-1-8 Military Courts

The military court system is stipulated in article 183 of the Egyptian constitution: "The law shall regulate the organization of Military Courts and shall prescribe their jurisdictions pursuant to the principles set forth in the constitution". Even though the military court system is recognized by several legal systems considering it a professional judiciary competent to look into crimes of pure military character, the Egyptian legislator went too far in giving wide powers to these courts, whereby military courts have many aspects of civil courts jurisdictions in public law crimes. Article 6 of the law empowered the Head of State,



whenever a state of emergency is declared, (which is the case in Egypt since 1981, as previously mentioned) to transfer to Military courts any crime stipulated in the Penal Code.

Seen that the military court system jeopardizes rights and public freedoms, the most important of which is the right to a fair trial, we understand that it is not an independent judiciary: its judges are not subject to the guarantees of impartiality and autonomy, usually required in regular courts. The law did not stipulate that judges of military courts shall be legally qualified. They have no judicial immunity, and are revocable, not to forget that they abide by the instructions and orders of their leaders pursuant to military regulations. Litigation in military courts cannot be moved in two degrees, in other terms, their sentences are unchallengeable before a court of higher degree. Efforts have been deployed since the eighties to transfer armed violence cases and the Islamic Movement cases to military courts.

1-1-9 Courts of Ethics: (the Socialist Public Prosecutor System)

Article 179 of the constitution provided for a system of Socialist Public Prosecutor:" the Socialist Public Prosecutor shall be responsible for taking the appropriate procedures to guarantee the people's rights, the safety of the society and its political system, and to safeguard the socialist interests and the socialist conduct. The law determines the other competences of the Court of Ethics, under the supervision of the people council as prescribed by the law"

Then in 1980, the Ethics Protection Code no 95 was promulgated stipulating the establishment of the Court of Ethics of two levels: the Court of Ethics and the Supreme Court of Ethics. The Court of Ethics is formed (article 27) of seven members headed by one vice president of the Court of Cassation and three counselors of the Court of Cassation or Courts of Appeal as members, as well as three public personalities. The Supreme Court of Ethics is formed of nine members headed by one vice president of the court of cassation, four counselors of the court of cassation or courts of appeal, as well as four public personalities. In the beginning of every year, the Minister of Justice undertakes the formation of the Court of Ethics and issues a pertinent decision after seeking the approval of the Judicial Organizations Supreme Council. Prosecution before the Court of Ethics is represented by the Socialist Public Prosecutor or his deputy or one of his assistants; he is responsible for carrying out investigation, which is usually carried out by the public prosecution before the ordinary court system. The Court of Ethics is competent (article 34) to decide on all litigations submitted by the Socialist Public Prosecutor in addition to other precise jurisdictions. The Supreme Court of Ethics is competent to look into all challenges brought against sentences pronounced by the Court of Ethics.

The Ethics Protection Code determined the procedures to be followed before the Court of Ethics, which confirms that the latter represents a form of specialized or extraordinary court system. The same law specified for the Court of Ethics a special procedures system in its articles 35- 38. Article 35 prohibited the allegation of civil rights before the court and article 37 prohibited the opposition to sentences *in absentia*, in addition, article 38 gave the Court of Ethics all jurisdictions decided by the law for investigation authorities.

Considering the Courts of Ethics and the Socialist Public Prosecutor system as specialized or extraordinary judiciary is not only based on the nature of procedures followed in these courts, it is also attributed to the



nature of these courts formation and the absence of the principle of legality of crimes and sanctions in their judicial system.

The formation of the two-leveled Courts of Ethics includes public figures as members, and those do not enjoy the independence and impartiality of judges, not to mention that they do not have the legal and judicial experience. The general assembly of Cairo Court of Appeal considered in April 1973 that normal citizens cannot participate in adjudication with judges. It considered that article 170 of the constitution stipulating that citizens might participate in the establishment of justice means that they can participate in the phases preceding and following the sentence's pronouncement, because allowing citizens' participation in the pronouncement contradicts article 68 of the constitution stipulating that every person has the right to resort to his/her "natural judge".

As to the breach of the principle of legality of crimes and sanctions by the Courts of Ethics and the Socialist Public Prosecutor judicial systems, it is a political responsibility generating measures to be applied on acts (not previously determined) that violate the Socialist society values or on acts previously incriminated by the Penal Code. This reveals duality of the judiciary and the duality of sanctions for one sole act. The measures taken by the Court of Ethics, -although described as political- do sometimes attain the seizure of funds and deprivation of freedom, on the plea of "preservation in a safe place".

The electoral program of the Head of State during the last recently held presidential elections included the dissolution of the Socialist Public Prosecutor System and the Courts of Ethics.

1-1-10 Parties' Courts

Concerning the political parties' law and its amendments, Law No 40 of 1977 stipulated that a political parties' affairs committee shall be formed, with the Head of the Shura Council as president and Ministers of Justice and Interior and Minister of State for the People's Council Affairs as members in addition to three former judicial organizations presidents or their delegates (not affiliated to any political party) selected pursuant to a presidential decision. This board is competent to look into issues mentioned in the parties' law including: receiving and studying party foundation notifications, verifying the conditions stipulated in the law, approving or disapproving the foundation of a party, suspending the activities of a party after its foundation, suspending the publication of party bulletins, and blocking all party decisions and acts. The board is also empowered to call the Supreme Administrative Court to dissolve the party and liquidate its funds... challenges of sentences pronounced by this are brought before the first division of the higher administrative court headed by the President of the State Council, provided that it includes a similar number of the People's Council members selected by the council at the beginning of each session. This court is named the parties' court. It is characterized by popular representation and is not restricted to judges. These courts sentences are unchallengeable.

There is no doubt in that these courts are specialized or extraordinary, and cannot be classified under the regular courts to which the citizens could have recourse, according to the constitution. The membership of the People's Council members who might be affiliated to the ruling party, removes the impartiality aspect of these courts. The fact that these courts' sentences are unchallengeable deprives litigants from one of the most essential guarantees of the fair trial..



1-2 The Institutional Independence of the Judiciary

The requirements of the Institutional Independence of the Judiciary in a certain country are:

- a- The existence of an independent Higher Judicial Council, which supervises alone judicial affairs and takes appropriate decisions as to the appointment of judges, investigation, promotion, transfer in addition to taking disciplinary actions against them.
- b- The allocation of an independent budget for the judiciary, placed under the control of the Higher Judicial Council.
- c- The judiciary should enjoy freedom of expression and freedom of professional association.

1-2-1 The Higher Judicial Council in Egypt (historical overview)

The Higher Judicial Council was first mentioned in the Judiciary Independence Law No 166 of 1943 (articles 34-39). It was headed by the President of the Court of Cassation and included the membership of the permanent under secretary of the Ministry of Justice and the Presidents of the Court of Appeal and the Primary Court of Cairo. The membership of the permanent under secretary of the Ministry of Justice (representing the executive authority) was criticized by a number of judges considering that it violates the principle of independence.¹¹ The majority of the Council's powers were exclusively consultative: it has the power of recommending and is not empowered to issue decisions.

The judiciary laws promulgated during the July revolution¹² referred to the Higher Judicial Council and to the amendment made to its membership by the exclusion of the permanent Under Secretary of the Ministry of Justice (Law 43 of 1965). The Council was later dissolved due to the "Judges' carnage" arising from the crisis between the executive authority and the judiciary in 1969, which ravaged the entire judicial system and its apex the Higher Judicial Council. Law No 82 of 1969 replaced the Higher Judicial Council by the Judicial Organizations Higher Council which is formed by judges but also by representatives of a number of legal professions classified as judicial organizations which are the administrative prosecution and the Government Affairs Administration which defends the government in actions brought against it. This Council is presided by the Head of State and includes the Minister of Justice as vice president and the President of the Supreme Court (later called the Supreme Constitutional Court), the President of the Court of Cassation, the public prosecutor, the President of the Government Affairs Administration and the Administrative Prosecution Director, senior representatives of the State Council President and the President of Cairo First Instance Court (or Primary court).

¹¹ Mohammed Kamel Obeid, The Independence of the Judiciary, A comparative study, Cairo (the judges' club version) 1991, page 271.

¹² Law No 188 of 1952 and law No 56 of 1959 and law No 74 of 1963 and law No 43 of 1965.



The formation of this council clearly violates the independence of the judiciary by involving members who are not judges, appointing the Prime Minister (President of the executive authority) as president of the council and his deputy, (the Minister of Justice,) as member.

Judges often called in their seminars and general assemblies, for the dissolution of the Judicial Organizations Higher Council and the restoring of the Higher Judicial Council; however a middle solution decided to keep the first, stipulating a provision therein in the 1971 constitution, to give it a constitutional immunity. In addition, Law No 25 of 1984 restored the Higher Judicial Council.

1-2-2 Formation and Powers

The Higher Judicial Council currently present in Egypt is formed by judges only. It is headed by the President of the Court of Cassation and regroups as members, the President of Cairo Court of Appeal, the public prosecutor, oldest two representatives of the Court of Cassation President, and oldest two representatives of other courts of appeal president. The council enjoys general power over all judicial affairs. It was the judicial authority code before being amended by virtue of law no 142 of 2006 which stipulates that in some cases the council approval is imperative, whereas in other cases it provides opinions that have no binding character.¹³

But the last amendment cancelled this differentiation and the Judicial Higher Council approval became imperative in all cases submitted to it (article 1). Its approval is imperative for the appointment of vice presidents of the Court of Cassation President pursuant to the candidacy made by the court's general assembly, the appointment of the Court of Cassation Counselors, the Presidents of the Courts of Appeal, their representatives and counselors, the Presidents of the Primary Courts, the Assistant Public Prosecutor, as well as the first General Attorney and other members of the public prosecution, if the appointment involves promotion or concerns persons who are not judges, or members of the public prosecution. Its approval is also imperative in cases of delegation of the technical office President and members at the Court of Cassation, and the delegation of the President and members of the cassation prosecution, as well as in other cases related to delegation, transfer, specification of work locations, secondment, and judges' retirement to pension for health reasons and the dismissal of prosecution assistants or transferring them to non judicial offices.

The approval became, after the latest amendment, imperative as well for issues that only require the opinion of the Council including the appointment of the Court of Cassation President chosen the court vice presidents, the Minister of Justice assistants and under secretaries, the assistant public prosecutor, the general attorney and other members of the public prosecution when the appointment does not involve promotion, as well as the appointment of the prosecution administration director and members, and the appointment of members of judicial inspection in public prosecution through delegating judges and public prosecution members, in addition to defining the summary cases examined during summer vacation and the draft laws related to the judiciary and the public prosecution. The Supreme Judiciary Court can only

¹³ Ibid. p. 292 and subsequent pages.



give, for the appointment of the minister of justice assistants, a consultative opinion, even after the latest amendment. (Article 45).

Many other issues are also decided by the Council such as establishing a work list and deciding in the general assembly conclusions disapproved by the Minister of Justice, as well as transferring inspection cases to judges and deciding in complaints against judges in the proficiency reports prepared by the inspection division.

The Higher Judicial Council competence, according to law No 35 of 1984, and to the amendment of the judicial authority law in 2006, represents a positive progress towards achieving the institutional independence of the judiciary in Egypt, however, its formation obviously does not guarantee the representation of all categories of judges, and the interference of the executive authority in judicial affairs is still noticed. This appears in the definition of competence.

Although the council formation includes senior judges, the representation of courts' general assemblies is still deficient, contrary to what was the case in the Judiciary Independence Law No 66 of 1943.

1-2-3 The Judiciary Budget

The judicial authority law No 46 of 1972 did not include, before its latest amendment, special texts on the judiciary budget; it only included an annexed table of salaries, judges' remunerations, prosecution members and rules for the table implementation. The law last amendment remedied this deficiency and stipulated the addition of article 77 *in bis* 5 providing for an independent annual budget in Egypt in concordance with the state fiscal year beginning and expiration.

1-2-4 Last amendment of the Judicial Authority Law, and its impact on the judiciary independence in Egypt

The last amendment of the judiciary court law in Egypt achieved noticeable and palpable steps towards the judiciary institutional independence as an authority in conformity with the constitution provisions and the international principles of the judicial authority independence.

One of its major positive impacts is that it made the Supreme Judiciary Council approval imperative in most of the judiciary cases, and restricted to a large extent, the authority of the minister of justice in judiciary cases, more particularly, the courts control, and put an end to the dependency of the public prosecution on him. It stipulated the judiciary right to have an independent budget under the custody of the Higher Judiciary Council. It granted additional guarantees to judges in disciplinary issues.

However, the judiciary authority legislative system is still unable to ensure comprehensive independence to the judiciary according to international criteria. The last amendment of the judicial authority law preserved to the ministers of justice powers to interfere in judiciary cases. The Minister is still entitled, for instance, to delegate the members of the Court of cassation technical Office (article 5), establish summary courts,



determine their locations and jurisdictions (articles 11 and 13), render his decision about the inspection list of the Higher Judiciary Council relative to the members of the cassation prosecution (article 24), raises objections to the decisions of the general assemblies and the committees of temporarily affairs (article 36), puts up as a candidate counselors in the court of cassation (article 44), and the minister assistant for judicial inspection affairs, representatives and administration members (article 46), suggests the institution of disciplinary action against the judge (article 99) requests the judge retirement to pension or transfer to another non-judicial office, if ever it appears that the judge has become incompetent to execute his duties (article 111). He is entitled to carry out monitoring and administrative supervision on the prosecution and its members (article 125). The judicial inspection is still affiliated to the minister of justice (article 78) and the minister should propose to the public prosecutor to move disciplinary action against the judges.

The last amendment didn't respond to the demands of the judges' club regarding for instance that the law stipulates in its provisions about the judges' club and its powers to safeguard judges and secure the law independence. The law maintained the possibility to delegate judges for non judicial acts though the executive authority may submit judges to seduction and influence, with the possibility to mandate presidents of the court general assemblies to divide work in the courts (article 30), thus judges are entrusted personally with specific cases.

1-2-5 Financial Properties of Judges and their influence on Impartiality

No documented information is available on the financial resources given by the executive authority to judges, and the influence this has on their impartiality in judicial offices and other offices assigned to them such as supervision of elections. However, a number of important indicators could be monitored for this purpose.

For instance, article 62 of the judicial authority law stipulated that a judge could be temporarily delegated to undertake additional judicial or legal work pursuant to a decision rendered by the Minister of Justice.....Article 65 of the same law stipulates that judges could be seconded to (or transferred to) foreign governments or international bodies, pursuant to a decision issued by the president, and after taking the opinion of the general assembly of the court to which the judge is affiliated, and acquiring the Higher Judicial Council approval.

Article 63 of the judicial authority law authorizes the delegation of a judge, after the approval of the Higher Judicial Council for arbitration, whether its parties are in the public law or the private law.

All the above described assignments and delegations are for the judges, sources of additional financial income, that could be used through the executive authority (in cases of ill intention) to influence the judges and affect their impartiality.

On the other hand, there has been an effort aiming at appointing judges, immediately after the expiry of their judicial term, in high administrative state offices such as governors.

In principle, one cannot assert that delegating a judge to undertake additional work or transferring him to foreign governments or international body or appointing him in high positions after his term expiry influence his independence at work. However, this influence is not totally improbable, even theoretically:



delegation, secondment or promising a high position after judicial term expiry might be used as means to stimulate judges and draw them to the side of the executive authority, especially when the latter has interests in actions presently observed in court or other expected actions.

Generous remuneration of judges when they assume responsibilities determined by the law, such as supervising elections, and granting them abundant premiums, whether having achieved their work or not being on the list of reserve, raise doubts about the executive authority's intention to attract judges and have influence over the elections in the interest of its candidates, without worrying about the effectiveness of influence in few cases or its failure among the multitude of judges.

Therefore, we understand that the judiciary budget shall be separate from the executive authority budget, considering that such a measure would consolidate the judiciary independence and protect it from influence.^{١٤}

1-3 Independence of Judges

What we mean here by judges' independence is their individual independence and avoidance of any influence when assuming their judicial office pertaining to adjudication of disputes. For this reason, the Judicial Authority Law determined the responsibilities of judges keeping them away from suspicions, declination and partiality. The law also guaranteed a special immunity for judges, enabling them to practice their work without being subject to external influence. In addition, the Egyptian Penal Code considered as crime any interference in the judges' work or influence on their work. The individual independence of judges is linked to the implementation of their irrevocability principle and their disciplinary system giving them special guarantees for independence. These two elements will be later discussed in this report in the section on the "Guarantee of Employment Stability for Judges".

1-3-1 The Obligations of judges

Article 72 and subsequent articles of the law determined the obligations of judges as follows:

- Judges are prohibited from undertaking any trading business and any activities that contradict the independence and dignity of the judiciary. The Higher Judicial Council can prohibit the judge from starting any work that contradicts the judicial office obligations and good performance.

^{١٤} In the same context, the Supreme Administrative Court issued a new judgment in April 2006 stipulating that "members of the Political Parties Court (being counselors) shall not be given remunerations and premiums that distinguish between them and their colleagues (state council counselors) for attending court sessions. This is to keep the state council counselors away from any suspicion or doubt that might influence justice. If the judicial authorities' higher council decides to grant financial reward to the political parties' court members, the same financial reward should be given to all persons occupying the same judicial office, so that the reward would not be perceived as personal distinction".



- Judges are prohibited from working in politics and running for the People's Council (or *Shura*), local councils or political organizations elections without having submitted their resignation before. The courts are prohibited from declaring political views.
- Judges are not supposed to disclose confidential deliberations.
- Judges are supposed to reside in the region where they practice their judicial office. The Minister of Justice may authorize a judge- for exceptional reasons- to reside in the primary court premises, to which he is affiliated or in any other place near the court in which he practices his judicial office.
- Judges are not allowed to be absent from the court without prior notification to the president of the court.
- Judges are not allowed to interrupt work for other than extraordinary reasons without having a written consent to leave.¹⁰

1-3-2 Judicial Immunity

The judicial immunity means the procedural rules that the law granted to judges for possible crimes they might commit, representing a breach to public rules, in order to protect them within a framework that guarantees the judiciary independence and the judges' impartiality.¹¹ The judicial immunity is granted for judges and prosecution members.

The Judicial Authority Law, after its amendment by law no 35 in 1984, stipulated that unless caught in *flagrante delicto*, judges cannot be arrested and put in preventive detention without the authorization of the Higher Judicial Council. When a judge is caught in the very act, the public prosecutor should notify the council within 24 hours after the judge is arrested or detained. The council decides whether the judge shall remain in prison or be released. The judge has the right to ask the Council to hear his allegations, when the case is brought before it. The council determines in a decision, the imprisonment duration. No investigation procedures shall be done with the judge, no criminal action shall be moved against him for misdemeanor or felony, unless authorized by the council and upon the request of the public prosecutor. Judges are imprisoned in separate jails, not with other prisoners and deprived of their freedom. (Article 96)

The Higher Judicial Council issued a decision on April 5, 1984, to form a tripartite committee including: the Higher Judicial Council president, the president of Cairo Court of Appeal and the public prosecutor. This committee is delegated to decide in cases falling within the Council's competences, except for those related to appointment, promotion or transfer. Consequently, the authorization stipulated in article 96 of the Judicial Authority Law falls within the competence of this committee, delegated by the council.¹²

Concerning the trying of judges who commit crimes, the legislator ruled out of the territorial jurisdiction system to avoid trying the judge before the court in which he used to work. The Higher Judicial Council,

¹⁰ See, Atieh Mehanna, Guarantees of judges' disciplinary obligations, National Penal Magazine "The Judicial Authority Independence and the Judiciary Independence" Volume 38, March/ November 1995, p. 530.

¹¹ D. Abed El Azim Wazir, Criminal Responsibility of Judges, National Penal Magazine, *ibid.* p. 537 and subsequent articles

¹² Abed El Azim Wazir, *ibid.* p. 550



upon the request of the public prosecutor, determines the court deciding in felonies and misdemeanors, before which the judge shall be tried.

1-3-3 Crimes against Justice and Influence on Judges

Many texts of the Penal Law aim at safeguarding justice and protecting the judge from external influence. Article 120 sanctions by imprisonment or fining, every employee acting as mediator before a judge or a court, in favor of or against one of the litigants. Article 121 imposes the same sanctions in addition to judges' dismissal, on every judge abstaining from pronouncing, or pronouncing a verdict that disagrees with justice for one of the reasons stipulated in the previously stated article. Article 122 stipulates that judges abstaining from pronouncing a sentence for reasons other than those previously stated are sanctioned by dismissal and fining. Equally, article 123 sanctions by imprisonment or dismissal, any official who uses his position to stop the execution of orders issued by the government or law provision or delay in funds and tax collection or stop the execution of a verdict or an order rendered by the court or any other competent authority. Officials who deliberately abstain from executing a verdict or an order are imprisoned and dismissed.

Other texts of the same law aim at protecting judges and courts. Paragraph 2 of Article 133 of the Penal law, sanctions by imprisonment and fining whoever insults a judicial court or any of its members during a court session. Article 186 sanctions by imprisonment and fining (or one of them) whoever abuses publicness of court procedures to insult or violate the judge's standing or authority in a certain action. Article 187 of the penal law imposes the same sanctions on whoever publishes or makes public, through any of the aforesaid means, information that might influence judges responsible for deciding in an action submitted to any judicial authority in the country or judge or prosecution members or other officials delegated to undertake investigation, or influence witnesses in the said action or investigation, or preventing any person from disclosing information to the concerned authorities, or influencing public opinion in favor of or against one of the litigants in the action or investigation.

1-4 Judges' Freedom of Expression and Freedom of Association

1-4-1 Prohibition of Judges' Work in Politics

The Judicial Authority Law and the State Council Law both included an explicit provision banning judges and the State Council members from working in politics (article 73 of the first law and article 95 of the second). Both laws also banned judges from candidacy in the elections of People's Council or regional associations or political organizations before having declared their resignation from judicial office. These provisions guarantee the independence of the judiciary, its integrity and transparency. These guarantees are also provided for in article 72 of the Judicial Authority Law stipulating that a judge is not entitled to undertake any commercial business or any other work not in line with the judiciary independence and



dignity. This prohibition is an implementation of the principle of separate authorities. A judge is responsible for deciding in litigations, which requires impartiality and integrity, however, political work is reserved for members of the executive and legislative authorities or other political authorities.

Nevertheless, questions arise about the limits of this prohibition. Article One of the Political Parties' Law No 40 of 1977 stipulated that Egyptians have the right to found parties and that every Egyptian citizen has the right to adhere to any political party, and this is the general principle stemming from the principle of equal rights and responsibilities. However, article 6 of the same law stipulated – among other conditions - that members of any political party cannot be members of judicial organizations. This text relies on traditions and customs in stipulating that the judges' membership in political parties is totally prohibited, considering it as a political work. Judges are also prohibited from running for membership in the Legislative Council, "the People's Council", or any other political organizations, unless they declare first their resignation.

It is worth noting that the law did not absolutely prohibit judges from candidacy in elections, it rather required their resignation first. Therefore, the adherence to a political party or the candidacy for membership in the legislative council or in other political organizations (popular and local councils...etc) is explicitly considered by the law as a political work in which judges are prohibited from involving themselves.

But, is this prohibition applied to other political rights, mainly the freedom of opinion and expression and declaration in the election of the President of the Republic and the Legislative authority members? Are these considered as political work?

Article one of the Political Rights Law No 73 of 1956 stipulated that all Egyptian citizens, men and women, who attain 18 years of age shall start practicing their political rights, to enumerate: opinion in all constitutional referendums, presidential elections, People's Council and *Shura* Council or legislative authority members elections, as well as other popular and local councils elections. The law did not exclude judges from the practice of these rights as it excluded officers, armed forces and police forces, knowing that paragraph two of article one exempted them from this obligation during their service in the armed forces or the police. Therefore, judges, like all other citizens, enjoy these rights, which are not considered as political work- considering that political work requires certain professionalism. However, expressing an opinion is a contribution to or a participation in public life, and is a national obligation or duty: article 62 of the constitution stipulated this right in section three on public freedoms, rights and obligations. In conclusion, there should be a differentiation between political work and participation in public life. Participating in public life is one of the public rights equally enjoyed by judges and other citizens pursuant to the principle of "equality under the law" stipulated in article 40 of the Egyptian constitution. We could even say that judges have priority in practicing these rights, seen their cultural background, experience, wisdom and capacity of discernment. This definitely does not contradict the judges' independence, impartiality and transparency; it rather complies with the recommendations of international declarations on the judiciary independence such as "Montreal Declaration" in 1983 and "Milano Declaration" in 1985.



Judges' work as professionals in politics is prohibited in Egypt - and many other countries worldwide - for it jeopardizes the judges' independence, impartiality and transparency. Working in politics involves the adoption of specific stances, partial opinions, and loyalty to particular ideologies and principles, which removes the impartial character of the judge and undermines confidence in the judiciary.

Since 2005, 2006, Egypt has been witnessing controversy about the limits of judges' right to participation in public affairs and whether aspects of this participation are considered as prohibited political work or fall within the framework of participation in public life, which is legitimate for judges. This controversy emerged when the judges' club called for the amendment of the Judicial Authority Law pursuant to a draft law the club had prepared few years ago, guaranteeing the judiciary independence and fair representation of judges in the Higher Judicial Council, and suggesting the amendment of article 76 of the constitution related to the appointment of the president, making it by direct elections among many candidates instead of nominating one candidate and holding a referendum to get the citizens' opinion. The amendment also included the judges' supervision over presidential elections and the People's Council members' elections. The Club of Alexandria judges followed by the Main Club of Judges in Cairo or the "original club" have issued many recommendations- after several general assembly meetings which gathered a great number of judges and public prosecution members (the club of judges bulletin mentioned that the 13/5/2005 meeting at the Cairo center gathered 5500 judges and prosecution members). The recommendations called for the promulgation of the judges' club draft law amending the judicial authority law, after this draft law was disregarded and neglected for many years. The draft law guarantees a real independence of the judiciary; it limits the Ministry of Justice competences and puts the judiciary budget as well as the judicial inspection division under the control of the Higher Judicial Council instead of the Ministry of Justice. The judges also called for the amendment of the Political Rights Law by adding guarantees for a real and efficient judicial supervision of presidential elections and the People's Council elections, as well as guarantees of elections transparency. The judges also decided to form a committee for the evaluation and the follow up of elections, as they called for the annulment of the Emergency Law, the Socialist Public Prosecutor system, the courts of ethics and the judicial authorities Higher Council headed by the President of the Republic (replaced if need be by the Minister of Justice). Moreover, the judges set a date for the general assembly to be held before the People's Council elections to assess the possibility of judges' participation in supervision which depends on taking their demands and suggestions into consideration. Thus, the general assembly was held in September 2005 and reached the approval on judicial supervision of elections after the demands and suggestions of judges were taken into consideration and after they called for the immediate adoption of the draft law prepared by the judges' club for the amendment of the judicial authority law. A number of International TV stations broadcasted these meetings and hosted several judges from the court of cassation and the courts of appeal, who declared their demands regarding the judicial authority law and their opinions regarding many public issues. Some people even said that these declarations reveal involvement in political work and interference in the affairs of the two other state authorities. However, the majority of writers, journalists and civil society organizations and a number of political parties considered that judges, just like other citizens, have the right to participate in the public life of their country, a great part of which is related, in a way or another, to the judicial authority situation, jurisdiction, independence and the citizens'



confidence in their impartial and transparent judiciary. Another reasonable group said that judges have the right to participate in public issues by giving their opinions and suggestions and declaring their stances within the framework of freedom of expression, but should, on the other part, choose the right channels and means that concur with and preserve the dignity of the judiciary and its traditions, and safeguard its independence away from involvement in political conflict among different currents- this could be achieved through the judges' clubs and councils and not through the media. This is also linked to the judges' right to freedom of expressing their opinions as judges "in issues related to the judiciary", and as citizens in public issues.

Article 47 of the Egyptian constitution guarantees freedom of opinion and expression by all means and for all, including judges. Judges usually practice this right through the Higher Judicial Council which publishes information on issues related to the judiciary or that might interest judges or even including feedback on claims opposing the judiciary or judges as well as defending the judiciary. They also practice this right through the judges' club, the general assembly or the Administrative Board of the club, elected by the assembly to represent judges and defend their interests. The club has frequently practiced this right: in 1968 during a general assembly for the judges' club, the judges rejected the state invitation it extended to them to join the socialist system, the only prevailing political system at that time. They expressed their stance regarding a number of public issues after Egypt's defeat in 1967 through a declaration issued by the club known by "the 28th of March Declaration", which was welcomed and acclaimed by many syndicates, unions and people communities. The State Council judges also practiced this right on the 30th of March 1954 after the attack on the State Council president at that time, *Dr. Abed El Razzak Sanhuri*, by a group of demonstrators in the council's garden. The attack was orchestrated by the government believing that the council counselors are against July revolution. The State Council general assembly was held and decided to denounce this terrible act and send a secret letter to the Prime Minister, in which they stated that those who committed the attack should be punished and those who failed to assume their responsibilities in preventing this attack should be tried.

In the past two years, the judges' club and the state council club practiced their right to free expression seen that Egypt is witnessing various events and changes. Judges declared their opinions regarding current public actual issues in several meetings and seminars and general assemblies, they also voiced their demands and suggestions related to the judiciary and laws organizing it. Previously, the majority of judges used always to have reservations as to appearing on TV, especially on international channels- to reveal their opinions, moreover, TVs and international channels rarely hosted judges to talk about issues related to judicial or public affairs. This attitude of judges is a tradition in the judiciary, safeguarding its image and standing before citizens and preserving its independence and impartiality, away from taking sides in political and social conflicts, which might expose the judiciary and judges to criticism, contestation or comments. However, a change has been noticed lately: a number of judges started to overcome these constraints by appearing on TV, writing newspaper articles and expressing their opinion in many public issues and even entering into debates. This progress is the outcome of changes and developments at the external and internal levels including the growing power and influence of media and the incredible development of communication technologies in addition to the increase of young judges and prosecution



members due to the appointment of thousands of new public prosecution members during the last ten years. There is no doubt in that the judiciary contributes to the development of the society, and is influenced by its events. The judges' club will always remain the safe place and natural haven for judges' deliberations, discussions and opinions, in a framework of respect to the judiciary position and importance in Egypt. In the months of February and March 2006, the Higher Judicial Council took a decision to approve the public prosecutor's request to question three vice presidents at the court of cassation- including the president of the Alexandria judges' club- on their public accusation against other colleagues (judges) of falsification in the last People's Council elections, provided that the Supreme State Security Court Prosecution be informed. This revolted judges, civil society organizations, parties and many people communities. Consequently, the public prosecutor recently called the Minister of Justice to delegate an investigation counselor instead of the mentioned prosecution, and indeed, two counselors were delegated to undertake investigation in these accusations. In a sudden development, the Minister of Justice issued a decision to transfer two senior correctional judges to the Competence Board (formed by virtue of the Judicial Authority Law), paving the way to decide their incompetence and their dismissal from the judiciary. This decision instigated large reactions in the judges' society and the public opinion, the turmoil was still prevailing until these lines were written.

1-4-2 The role of the Judges' Club in Providing Social Support for Judges

The Judges' Club was founded in Egypt in February 1939. Article two of its statute stipulated that the aim of establishing this club is to consolidate the brotherhood and solidarity bonds among all judges, safeguarding their interests, providing opportunities of meeting and acquaintance, establishing a cooperative fund, saving for the benefit of members and providing help to practicing members who leave the club. Founding this club has been a quantum leap towards confirming the judges' right to enjoy freedom of expression and reunion and their right to form associations that safeguard their interests and voice their demands and opinions and takes all necessary measures to protect the judiciary's independence. Therefore, the club, since its foundation, follows the private associations' law. It was registered and made public through the Ministry of Social Affairs which is responsible for supervising these associations. Judges have been calling, for years ago, for their club liberation from the control and supervision of the Ministry of Social Affairs, its consideration as one of the judges' affairs and mentioning it in the Judicial Authority Law (many decisions pronounced by the Court of Cassation adopt this view) - which is also one reason behind the judges' club suggestion to amend the Judicial Authority Law. However, since its foundation, this judges assembly was not meant to be in the form of a professional union or syndicate, as for other professions such as law, medicine, and others, for the belief that the judiciary enjoys a special status and that its role and mission require the non association of judges in syndicates- which consequently implies that judges, while practicing their judicial office, should not be put under the supervision, guardianship or review of any body affiliated to the executive authority. These are the considerations currently adopted by the judges to liberate their club from the framework of implementing the private associations' law, thus safeguarding their independence and freedom from any supervision or control by any other authority.



The club is run by an Administrative Board elected for a three years mandate. This board formation is based on the representation of judges from the court of cassation, courts of appeal, primary courts and public prosecution members as well as retired judges. One third of the board members are re-elected on an annual basis. The club has been able throughout its history, to constitute a center where judges gather, meet each other, voice their demands, concerns and opinions, defend their interests, and protect their independence. The club also provides many cultural and educational services, as it provides social support in cooperation with the Ministry of Justice which grants financial allowances for the club activities on a yearly basis. Throughout the last twenty years, sub clubs were established in capitals of other districts. Alexandria was the first city to witness the establishment of a sub club, being the second big city of Egypt after Cairo and seen the great number of judges and prosecution members living and working in it. Other sub clubs were established later in other cities.

Equally, an independent club for the State Council judges was founded, following the organization and activities of the Judges' club. Thus, it became a center where state council judges meet, defend their interests, discuss their affairs and voice their opinions.

As previously stated, the judges' club defends the independence of the judiciary: for this reason, the club opposed in 1969 the executive authority determination to integrate judges within the only political framework existing at that time: "the Socialist Union". The club opposed this idea considering that it undermines the judiciary independence and impartiality and opens the way for the two other authorities to interfere in the judicial affairs. Consequently, the executive authority withdrew this project but decided to take revenge from the judges, especially after the candidates of the movement opposing this project won the club's administrative board elections in March 1969 against the electoral roll joining the majority of judges who occupy major offices in the Ministry of Justice and the Public Prosecution as well as those who support the executive authority and denounce the 28th of March declaration. Hence, a presidential decision was issued for the dissolution of the club administrative board and the formation of a new one including members appointed pursuant to their offices. In addition, another presidential decision stipulated the re-formation of judicial organizations, which entailed the dismissal of a great number of judges (details will be discussed in subsequent sections). During 1983 and 1984, the club led a campaign for the amendment of the judicial authorities' law, namely to expand the scope of judicial irrevocability to cover public prosecution members, the same way as for the judges. The campaign was successful and consequently, law No 35 of 1984 was issued including a stipulation of this irrevocability of prosecution members. In 2005 and 2006, the judges' club voiced a clear and strong stance regarding the judges' supervision of general elections: it called for the availability of all guarantees ensuring the effectiveness of this supervision, as it called for the adoption of the draft law it had submitted for the amendment of the judicial authority law to guarantee the independence of the judiciary.

1-5 Guarantee of Employment Stability for Judges



1-5-1 Irrevocability of Judges

Egyptian constitutions since the 1923 constitution- the first modern Egyptian constitution – and constitutions of 1930, 1956, 1958, 1964 and the currently applied 1971 constitution, all state the principle of irrevocability of judges, although all of them left to the regular laws the determination of the principle limits, scope and implementation mechanism. The 1971 constitution is the best as to formulation and terminology; it stipulates that judges are irrevocable and that the law regulates their disciplinary accountability. Since 1923 and until 1943, the date of promulgation of the first law regulating the judiciary, issues of judges' appointment, dismissal, transfer, and disciplinary accountability...etc were still subject to high orders, decrees, and draft laws which did not make any difference between judges and other state officials in matters of irrevocability, but rather differentiated between mixed courts judges and civil courts judges as well as between counselors and other judges. It distributed guarantees of irrevocability on an unfair basis. These conditions prevailed until the judiciary independence law No 66 of 1943 was enacted. This law was seen as a quantum leap and a peak in lawmaking compared to previous years, it underlined, guaranteed and activated the judiciary independence principle and the judges' irrevocability principle, encompassing all judges of all degrees, save for primary courts judges appointed from less than three years. However, the law required the Higher Judicial Council approval on their dismissal, a provision which undermines the value of the irrevocability guarantee being the corner stone of the judiciary independence principle, and especially that newly appointed judges need this guarantee more than others, to be protected from influence- be it threat or incitement- by the executive authority which had the great role in appointing them. The same conditions persisted in all following judicial laws: Law No 147 of 1949, Law No 188 of 1952, Law No 56 of 1959 and law No 43 of 1965) until the presidential decision of Law No 46 was issued in 1972, on the judicial authority and granting the irrevocability guarantee to Primary courts judges: article 67 stipulates: "Counselors of the Court of Cassation and Courts of Appeal and presidents and judges of Primary Courts are irrevocable". It is worth mentioning in this framework that the judicial laws enacted after the revolution of 23 July 1952 were all issued pursuant to presidential decisions and were not discussed within the parliament. Therefore, all judges enjoy irrevocability from the moment of their appointment pursuant to article 168 of the currently applied 1971 constitution.

Equally, efforts have been deployed to regulate the affairs of public prosecution and its members within the judicial law, thus confirming its consideration as an integral part of the judicial authority in Egypt, or as the Egyptian Court of Cassation perceives it "an authentic division of the judicial authority" especially that the majority of texts in the judicial authority law target judges and public prosecution members together. However, public prosecution members before the amendment of the Judicial authority law by Law No 35 of 1984 did not enjoy irrevocability: They were revocable or transferable to non judicial offices by non disciplinary procedures. This was used against judges too, for the law authorizes transfer from public prosecution to judicial office and vice versa, and therefore, a judge might be appointed in public prosecution and consequently loses his immunity. As to the public prosecutor, the common controversial question was: "is it possible that a public prosecutor be dismissed or transferred to another office via non disciplinary procedures, pursuant to a decision rendered by the president who solely appoints him in line



with article 44/2 of the Judicial Authority Law without consulting the Judicial Council? (article 119). In fact this happened in the seventies, when a presidential decision transferred the public prosecutor then to the position of administrative prosecution director and replaced him by another counselor. This means that public prosecution members of all degrees were all exposed to dismissal or transfer to non judicial offices, although the Egyptian law empowered them to undertake primary investigation in penal cases, which is a judicial work that requires irrevocability as a major immunity. For this reason, judges and other categories of citizens called for the guarantee of this immunity for all public prosecution members. This was finally achieved through the issuance of Law No 35 of 1984 related to the amendment of a number of provisions of the judicial authority law by law No 46 of 1972 and its amended article 67, by which the immunity covered all judges and public prosecution members, save for the prosecution assistants (being the lowest in the hierarchy of judicial offices). The law uses the term "men of the judiciary" and not "members of the judiciary" to confirm the fact that the Egyptian judiciary has no women judges or women public prosecution members till now, although the constitution and the law do not prohibit this, rather it stipulates equality. The said amendment of the Judicial Authority Law included a new provision in article 199/2, empowering the public prosecutor to request his return to judicial office, and in this case, he returns to the judicial corps and to where he was before being appointed public prosecutor.

This is how judicial immunity was granted to all public prosecution members since its institution in 1883, including the public prosecutor himself.

The State Council Law No 47 of 1972 stipulated the irrevocability of Council members from the degree of attorney and higher and their benefit from guarantees enjoyed by judges (article 91 of the law).

Although the principle of irrevocability of judges has been adopted many years ago pursuant to constitutions and judicial laws, the judiciary witnessed two incidences of violation of this principle and undermining of irrevocability immunity, the first happened to the State Council judges or the "administrative judiciary" and started when the prominent legal scholar Dr. Abed El Razzak Ahmad Sanhuri was dismissed in April 1954- after a group, induced by the government, attacked him in the Council's courtyard, in March 1954. The government justified that he had previously occupied the post of minister and that he was affiliated to a political party before the revolution of 23 July 1952, and consequently undermined his irrevocability mentioned in the State Council law. In 1955, twenty judges, of the elite, were dismissed by retirement to pension or transfer to non judicial offices by the State Council law No 165 of 1955, under the pretext of reappointment of present State Council members. Other judges not included in the abovementioned decision, were appointed in posts similar to their previous offices in the judiciary, or other public offices. But in fact, this was an implicit dismissal of those judges, without any guilt, and for the only reason that they did not cooperate with the government and issued many provisions guaranteeing personal freedoms and public rights.

The principle of irrevocability of judges has known another violation, the "judges' carnage", that affected a great number of regular courts judges and State Council Courts judges in 1969. The violation took place under the pretense of the re-formation of judicial organizations: a presidential decision for Law No 83 was issued in 1969 within a set of presidential decisions called by the ruling authority "laws of judicial reform" which were issued by the end of August, in the absence of the legislative authority and pursuant to the



power delegation law No 15 of 1967 which empowers the president to issue decisions by virtue of laws regarding many issues. The said decision stipulated the re-formation of judicial organizations within 15 days starting the date of issuance. The president issued during this period the necessary decisions to reappoint judicial organizations' members in their usual offices, or in similar offices in other judicial organizations. It also stipulated that all judges not included in the reappointment decisions are retired to pension by virtue of the law. The law empowered the president to appoint any judicial organization member, not included in the reappointment decisions in any other equivalent office in the government or the public sector. Moreover, the decision granted to the president (head of the executive authority), for the said period of 15 days, all the competences of councils, associations and other bodies stipulated in the laws regulating judicial organizations, in matters of appointment, promotion and transfer. Upon the legal issuance of this presidential decision, a number of presidential decisions followed for the reappointment of judges, public prosecution members and state council judges. These decisions excluded 127 judges and public prosecution members, including the president of the Court of Cassation and 14 of the same court counselors as well as the president and members of the Judges' club administrative board (a presidential decision led to the dissolution of its administrative board) and 13 State Council judges.

In brief, the main reasons behind this decision are:

- 1- The declaration issued by the Judges' Club general assembly on the 28th of March 1968, which included much criticism of the general situation and the judges' opinion regarding it and their rejection of efforts attempting to join them to the Socialist Union, the only prevailing political system.
- 2- The issuance of a number of judicial sentences (in cases of political dimensions) which contradicted the orientations and policies of the ruling authority.
- 3- The results of the Judges' Club Administrative Board elections on the 21st of March 1969: the victory of the movement defending the March 28 declaration and the judiciary autonomy and independence from political work.

Evidently, all standards and anonymous opinions of intellectuals, professors, judges and other professionals consider these incidences as blatant violation of the principle of irrevocability and the judiciary independence. This violation was not restricted to one person; it rather affected a great number of most proficient and transparent judges. Consequently, a decision for law No 85 was issued in 1971 approving the reappointment of some judicial organizations' members, seen that procedures followed in the 1969 reappointments were hasty and based on reports that turned to be inaccurate and barely credible. However, this decision only stipulated the reappointment of a restricted number of judges who were dismissed and omitted 46 judges. In 1972, the court of cassation issued a historical decision (request No 21 of the judicial year No 39/ judges' requests, session of the 21st of December 1972) annulling Decision No 83 of 1969 for it is based on illegitimate grounds and has been issued with a blatant defect rendering it ineffective for it surpasses the scope of the subjects determined by the power delegation law No 15 of 1967. Furthermore, decision of law No 43 was issued in 1973, stipulating the return of the remaining judges, unless they attained the age of retirement, to their previous offices. This decision considered the



period extending from the date of issuance of the decision/ Law No 83 of 1969, until the date of issuance of the "return" decision, as a period of service in judiciary organization.

Nevertheless, implementing the irrevocability principle does not remove the disciplinary accountability of judges and the possibility of transferring them to retirement when they reach the age specified by the law (68 years old) or if they show health problems preventing them from practicing their judicial office, or when they show lack of proficiency and aptitude- based on the judicial inspection report-. It is worth noting that the judicial authority law stipulated that retirement requests for health reasons are to be submitted to the Minister of Justice, even if it sets the approval of the Higher Judicial Council as precondition.

The judicial authority law includes in its article 111 a provision that, if arbitrarily implemented, would empty the principle of judges' irrevocability of its meaning. The article states the following: "if at any time, a judge seems to have lost all credits of competence for judicial office, and that for reasons other than health, a request for his retirement to pension or transfer to another non judicial office is moved by the Minister of Justice himself, or upon the request of the court president, to the Board mentioned in article 98.

^{1^} If the said board perceives a possibility to continue in the procedures, it delegates, if necessary, one of its members to carry out the required investigations, as it calls the Judicial Council to appear before it within three days. After hearing the public prosecution representative claims and the defense of the judge or any other of his substitutes, the board issues a decision including all relevant grounds that led to the approval of the request (and transfer of the judge to pension or another non judicial office), or its rejection.

The article obviously implies that the transfer of a judge to the Disciplinary Board for non competence is not strictly linked to administrative infractions or penal crimes that the transferred judge might have committed. The non competence decision is not bound by any norms or standards: the Minister of Justice solely decides whether a judge is competent or incompetent for a judicial office, without relying on any clear cut basis. What is worse is that investigations with the concerned judge are left for the absolute judgment of the disciplinary board, which might eventually lead to the judge dismissal by non disciplinary procedures.

1-5-2 Rules for the Transfer of Judges

Article 52 of the judicial authority law No 46 of 1972 stipulated the general principle governing the transfer, delegation or secondment of judges, stating that such procedures are only possible in the limits and cases mentioned in the law. This stipulation confirms the observance of irrevocability and guarantees the self-assurance of judges in their work, as it prevents any attempt to use the authority to transfer- by

^{1^} The Disciplinary Board, which is headed by the president of the court of cassation and includes the three oldest presidents of courts of appeal and three oldest counselors at the court of cassation (article 98)



threat or incitement- to compliment and stimulate some judges or revenge others. Article 53 and subsequent articles stipulated the rules governing transfer as follows:

1. Presidents of departments and counselors at the Cairo Courts of Appeal shall not be transferred to another court unless they voluntarily desire to get transferred, and the Higher Judicial Council approval is required.
2. Counselors of other courts of appeal (being 7 courts) can be transferred to Cairo Court of Appeal, according to the seniority of appointment. The transfer from one court of appeal to another is carried out according to a certain procedure specified by the legislator in the law. The transfer decision is issued by the Head of State after the approval of the Higher Judicial Council. Nevertheless, a counselor may ask to stay in the court where he works, upon his personal request and after the approval of the Higher Judicial Council- the norm governing transfer from a court to another, including *Assiout* Court of Appeal, is the seniority of the appeal counselor among his equals.
3. Primary courts judges are transferred pursuant to a presidential decree and upon the approval of the Higher Judicial Council. The law divided primary courts into zones, and specified different tenures for judges in each of them: for example, Cairo, Alexandria, Giza and Benha constitute zone one where judges' tenure is of 5 years; Bani Suef, Alfyoum and Alminia and other courts constitute zone two where judges' tenure is of four years, and three years is the tenure of judges in zone three.

The judge himself can ask, after the approval of the Higher Judicial Council to remain in zone two or three instead of being transferred to zone one courts, or he can even ask not to be transferred to zone two courts and to remain in zone three. However, all judges of Cairo and Alexandria courts who have acquired a proficiency recognition degree in their latest proficiency evaluation and have had a degree above the average in the previous evaluation are exempted from this tenure rule. This contributes to the motivation policy whose adoption is underlined by the judicial authority law in order to advance the proficiency level and encourage the most proficient judges as stipulated in the explanatory memorandum.

It is obvious that the law specified the Higher Judicial Council approval as condition for all transfer cases, which constitutes a crucial guarantee for judges, especially that the council is formed by the oldest and more experienced judges. Moreover, the legislator considered that the fundamental rule is that a judge is not supposed to remain in the same court for a long period or for good, for the intention of safeguarding his impartiality and transparency and preventing him from building relationships (of whatever nature) with the citizens of the region where he works, seen the influence these relations might have on him. The Higher Judicial Council observes these rules in most of the cases, and avoids issuing exceptional decisions unless for rare cases and valid reasons requiring such decisions. However, the council might in some cases, decide to keep a judge in the courts of a certain zone- other than zone one- upon the judge's request to consider the housing issue and his family stability and life conditions. We also note that the transfer of appeal courts counselors was more closely controlled than transfers of judges and public prosecution members; this is because it is not subject to the judgment of the Higher Judicial Council and only follows the law provisions as mentioned before. The law stipulated that a judge or public prosecution member



might be delegated to work in another court or prosecution to which he is not affiliated, and that a counselor from appeal courts might be delegated to work in the court of cassation when practical needs imply such procedures. The law assigned this competence to the Minister of Justice, yet it determined the tenure at 6 renewable months and established the condition of taking the opinion of the court general assembly as well as the approval of the Higher Judicial Council regarding the delegations of judges. The law authorized, under the same conditions, the temporary delegation of judges to carry out additional judicial or legal functions outside the framework of his judicial office, provided that the period of delegation does not exceed three years. The Judges' club and other categories of people criticized this provision for it was used to delegate judges to work in ministries, state institutions as well as companies, enterprises and banks- in addition to teaching in universities- all these delegations negatively impact the situation of the judiciary and its judges as they jeopardize independence and transparency. Consequently, many people, including judges called for the removal of all forms of delegation- except for teaching in universities- and the raise of judges' salaries, because the reason behind delegations in most of cases is the judge's need to additional income to face the increasing burdens of life. However, the Higher Judicial Council was not capable until now to set strict rules in this regard. One should mention that a number of judges were delegated to work in the Ministry of Justice departments, pursuant to a decision by the Minister of Justice who was also empowered by the law to delegate counselors of appeal courts to preside over primary courts by a decision he issues after acquiring the approval of the Higher Judicial Council. This fact raises sometimes many doubts about the interference of the executive authority and its possible influence on judges by attracting them to be delegated to work in one of the previously said positions. The Higher Judicial Council deployed efforts to limit the influence of this authority by limiting the delegation period to a maximum of five years and requiring its approval of the delegation.

Concerning transfer within the same court, the judicial authority law assigned this competence to the general assembly of each court: general assemblies meet before the beginning of the judicial year to elaborate the project of management and formation of various divisions previously prepared by the court president after consultations he had undertaken with the judges and the judicial inspection administration. The court president is empowered to practice this competence throughout the judicial year, consequently, he is entitled to introduce changes in the formation of certain departments or assign cases to specific ones. However, this competence was intensely criticized for it leads to suspicions regarding influence on the judiciary.

1-5-3 Accountability and Disciplinary Punishment of Judges ¹⁹

¹⁹ According to the referendum, a small proportion approves that the disciplinary punishment is conducted independently (37%) As for the fair decisions of the disciplinary board, proportions are : 37% positive, 27% negative, 36% neutral). This shows that persons who participated in the referendum do not have confidence in the disciplinary process.



The law stipulated that the Minister of Justice is entitled to exercise administrative supervision on all courts (article 93). The same article also stipulated that the president of each court and the general assembly have the right to supervise the judges who are affiliated to it. It prescribed as well that the court president of his own accord or by virtue of the general assembly decision is entitled to warn the judges, after hearing their statements (article 94/4). It also stipulated that disciplinary actions are moved by the public prosecutor of his own accord or upon the request of the Minister of Justice or the court president to which the judge is affiliated (article 99), and that the Minister of Justice submits requests for judges' retirement on pension or transfer to a non judicial office. This request is done either by an initiative of the Minister himself or upon the request of the competent court president, if it appears that the judge in question has lost his competence for judicial office (article 111). All these powers and competences granted by the law to the Minister of Justice in the framework of judges' accountability, even after the last amendment of law, are source of criticism for many judges, law professors and others because of their implication of possible interference in the judicial and judges' affairs and influence on the judges' work and independence. In addition they infringe upon the competences of the Higher Judicial Council which is responsible for looking into all judges' affairs. Concerning prosecution members, the law stipulated that they are seconded to their presidents and to the public prosecutor, and that the Minister of justice has the right to supervise and control the prosecution and its members (article 125).

As to penal accountability, judges and public prosecution members are tried before ordinary courts for penal crimes they are accused of, although the law had given to the Higher Judicial Council the task of determining the court before which a judge shall be tried for misdemeanors and infractions save for **public provisions** (article 99). When the accused judge is not caught in *flagrante delicto*, the law requires the authorization of the Judicial Council before arresting him or keeping him in preventive detention. However, when the judge is caught in *flagrante delicto*, the two above procedures are brought before the Council, within 24 hours and after notifying the public prosecutor, consequently, the council decides to extend the detention or release the accused judge. The law required the authorization of the council before taking any investigation procedure with the judge or moving a penal action against him (article 96). Moreover, the law stipulates that the detention of a judge pursuant to an order or a sentence results in the suspension of his judicial office during his imprisonment, as it empowered the Disciplinary Board to order the suspension of the judge's work during investigation processes or trial, however this does not deprive him from his salary (article 97). Nevertheless, legislators immunize judges against any procedure taken against him when accused of misdemeanor or felony, and mandated the Higher Judicial Council to protect the judge from arbitrary procedure taken against him for vengeance, revenge, political reasons or others.

The Egyptian legislator underlines the disciplinary responsibility of judges and public prosecution members which might lead to their dismissal. This responsibility is based on the idea that a fault is deviation in conduct: the judicial office is not a cluster of characteristics and privileges enjoyed by the judge; it is instead a cluster of duties and obligations that the judge shall undertake and assume. Positive obligations include the works a judge must assume and negative obligations include prohibited actions. A disciplinary action is brought against judges who fail to observe their positive or negative obligations; this



occurrence is called disciplinary contravention and is different from penal crimes characterized by specific and limited scopes.

Judges' liability for disciplinary contraventions is based on supreme virtues and rules of conduct, because the solemnity of judicial office and its sublime mission undoubtedly require strict accountability and stringent retribution, and because judges are supposed to adopt virtues and stay away from sources of suspicion. The Judicial Authority Law No 46 of 1972 determined the rules for disciplinary accountability of judges in several articles (93-115). It stipulates that disciplinary cases are the responsibility of a special Disciplinary Board formed by judges according to their positions, headed by the president of the court of cassation. The law granted a number of guarantees concerning disciplinary actions, the most important of which is that: a disciplinary action is not instituted unless brought before the court but by the public prosecutor, upon the request of the Minister of Justice or the president of the court in which the accused judges works. However, these procedures cannot be achieved before an administrative or criminal investigation undertaken by a judge (whose degree is determined based on the accused judge degree). The disciplinary board has the right to undertake investigations with the accused judge or delegate one of its members to assume this charge. A disciplinary action leads to the resignation of the judge or his retirement to pension, however this is not applicable to civil or criminal actions. The court sessions and pronouncement of verdicts are carried out secretly, the judge might appear before the disciplinary board and submit his defense claims by writing or orally, he has the right to appoint a judge to defend him. It is impossible to determine in advance occurrences that might lead to a disciplinary accountability against a judge; however the law has specified a number of obligations that judges should observe such as residing in the region of his work, presence at work, avoidance of unjustified absence, abstention from engaging in any commercial activity or any other activity not in line with the judiciary independence and dignity, abstention from working in politics and disclosing confidential deliberations. Even in his private life, a judge must avoid any behavior – even if it is legal in nature - that contradicts the judiciary dignity and the solemnity of judges; this is because there is no clear cut separation between the judicial office and the judge's private life in all cases. If the judge's fault is trivial and does not require a disciplinary action, a warning by the court president or the Minister of Justice is sufficient, however, when the fault is significant, he is transferred to the disciplinary court - the law determined two disciplinary sanctions: censure and dismissal. Nevertheless, the fact that disciplinary contraventions are under the control of the Higher Judicial Council is a sufficient guarantee that disciplinary accountability cannot be used as a means to make judges subject to threat or revenge.

2- The Integrity

2-1 Institutional Guarantees

2-1-1 The Judicial Competence System and its Contribution to Impartiality



The Egyptian constitution of 1971 guaranteed to all citizens the right to litigation as well as to resort to their "natural judge" (article 68). However, the constitution did not stipulate the jurisdiction of the regular judiciary to judicial jurisdiction i.e. to look into all kinds of cases and disputes; it rather stipulated the competence of the state council as an independent judicial organization to decide in administrative disputes and disciplinary actions. Article 15 of the Judicial Authority law No 46 issued in 1972 stipulated that "save for administrative disputes which fall within the competence of the state council, courts are competent to look into all disputes and crimes unless considered as exceptions by virtue of a special text. This means that the law has given to regular courts a general competence to look into all disputes, yet it stipulated the principle of exceptions. In fact, the Egyptian legislator often implements this exceptions' principle through removing a number of disputes from time to time from the regular judicial competence and bringing them before specialized courts or extraordinary courts, which violates the principle of impartiality of the judiciary and the right to resort to the "natural judge" as well as it leads to duality and plurality of judicial references. For instance, the Ghadr Court (the betrayal court) was established in 1952 followed by the the Thawra Court (the Revolution Court) in 1953: the first was competent to try state and public institutions' officials considered by the "purge committees" as corrupters, whereas the second was competent to try those accused of working against the benefit of the country and against the revolution. The Egyptian constitution also stipulated the establishment of a special court for trying the Head of State and another court for trying ministers, but no pertinent law has been issued yet. Article 183 of the constitution stipulates the establishment of the military judicial system but left to the law the task of organizing it and determining its competences. Consequently, Law No 25 of 1966 granted to military courts the competence to look into public crimes committed by members of the military against the public law, it had also, without any justification, expanded this competence to include citizens in few cases. The Egyptian legislator introduced the Courts of Ethics by law No 95 of 1980; these courts are competent to look into political responsibility actions set in motion by the Socialist Public Prosecutor. By the same way, the Egyptian legislator instituted the state security courts by virtue of the Emergency Law No 162 of 1958: these courts are special courts established upon the declaration of emergency states in exceptional conditions; they are usually submitted to special procedural decisions that often lack to ensured guarantees. Furthermore, they might include judges from outside the regular judiciary, or even legally and judicially unqualified judges. For these reasons, the majority of judges and specialists call for unifying all judicial references and giving regular courts jurisdiction over all disputes. Concerning the competence system in the regular judiciary, the legislator, subjected it, in the Egyptian procedures law, to two distinct norms: the first is the subject of the action, or the jurisdiction of value, and the second is the location of the court or the territorial jurisdiction. These two norms are applicable to first instance courts (or primary courts). As to the courts of appeal jurisdictions, they are directly determined according to the first instance court which issued the challenged decision. This is because every court of appeal has a number of primary courts seconded to it, to which it transfers its challenged decisions. Alternatively, cassation challenges are all brought before the court of cassation.



Determining the competence required for a certain action should not be based on what the litigants bring before the court but on what the court deems appropriate pursuant to the facts of the judicial action. Articles 28 to 62 of the procedures law determined the rules of competence and categorization of actions in cases implying a jurisdiction of value, as well as they determined the territorial jurisdiction in cases where each court has a different competence according to its geographical location. The said law also described the different instances of disputes and their respective competent courts. Efforts are being deployed to implement these provisions in all judicial decisions, in order to guarantee the principle of judicial impartiality.

One should note that the Egyptian legislator places a number of cases within the competence of one-judge courts, when the value of the action is very low or when the location in which the dispute occurred is close to that court in order to facilitate the access of litigants to the court, and places other cases within courts formed of three judges, when their value is considerable or when the dispute is important.

2-1-2 System of Inspection of Judges and its Contribution to Fighting Corruption

The Current Judicial Authority Law stipulated in chapter 6, the principle of Judges' Inspection, moreover, its article 78 stipulates the formation of a judicial inspection administration within the Ministry of Justice, to carry out inspection on the works of judges and primary courts presidents. - However, the Egyptian legislator did not include presidents of the Courts of Appeal in the inspection system-. The law also stipulated that this administration shall be composed of a director and a representative both chosen from the counselors of the court of cassation or the courts of Appeal, in addition to a sufficient number of primary courts counselors and presidents. Moreover, the law empowered the Minister of Justice to prepare a bill for judicial inspection after the approval of the Higher Judicial Council- this bill was issued in 1965, and evidently, this administration is seconded to the Minister of Justice who supervises it, appoints its director and the rest of its members, knowing that the law has set as condition the approval of the Higher Judicial Council on this appointment. All previous appointments related to this administration were being decided through delegation from courts. The Judicial Authority Law and the bill of inspection organized the inspection system and its degrees, and the means by which judges may oppose it. Primary courts judges will be subject to periodical inspection while at work: this is achieved through specifying a limited period (three months usually) during which all the cases of the judge in question are defined and examined, a report on his work is drafted and evaluated to underline positive as well as negative points and faults. This inspection is usually carried out by a senior judge, older than the judge under inspection. The report is then submitted to a sub committee in the inspection administration, which assesses the level of the work and sends a copy of the report to the judge. Accordingly, the judge has the right to object on some points mentioned in the report or object on the evaluation degree; a special committee headed by the director of inspection or his representative looks into this objection and decides in it. The judge is entitled to resort after the said committee, to the Higher Judicial Council which gives a final decision in this regard.



The Judicial Inspection Bill stipulated that there shall be no examination of any judicial act in actions which are still looked into before the judge under inspection. The inspection includes the examination of all actions falling within the period specified by the Director of Inspection as stipulated in the inspection report sections. The report is kept in the judge's confidential file, a copy of the report is sent to him, and he has the right to object within 15 days as of the receipt of the copy.

The bill also stipulated that all complaints brought before any administration within the Ministry of Justice, pertinent to judges or primary courts' presidents are transferred to the judicial inspection administration and the Director of inspection transfers them to the concerned court presidents to examine and verify them and give them the result to the inspection. Furthermore, the bill mentioned that no procedure related to a complaint against a judge shall be taken unless it holds the name and address of the person who submitted the complaint, in addition to other facts that the director of inspection deems significant and worth investigating or examining. The director of inspection can decide that any complaint related to the personal conduct or administrative conduct of the judge shall be kept out of his confidential file or transferred after investigation to the inspection committee whose proposal binds the judge - An internal administration for complaints has been established to receive complaints against judges, submit them to the director of inspection, examine them if he orders to, and finally expose the results before him, the competent committee, and before the Minister of Justice. There is no doubt in that the jurisdiction of the Judicial Inspection Administration in looking into the complaints against judges and primary courts presidents, as well as examining their work, enables it to contribute in fighting corruption in its multiple facets that some judges might commit, through transferring them to the disciplinary board which decides to impose one of the two sanctions: censure or dismissal.

2-1-3 Judiciary traditions and their role in achieving impartiality and integrity

The Judicial authority law included a number of provisions determining the responsibilities of judges and activities they are prohibited from undertaking such as commercial works or any other works that contradict the principle of the judges' independence and dignity, or political work or running for legislative elections or disclosing confidential deliberations. The procedures law also stipulated cases of judges' incompetence, recusal and dismissal. Article 184 of the law stipulated the causes of judges' recusal, which all revolve around guaranteeing the impartiality of judges and their integrity. The law empowered the judge to retire, of his own accord, if any of the said causes is discovered, after bringing the case before the primary court president or the Chamber of consultancy. Moreover, the law organized the procedures of submitting, examining, and deciding in the recusal request, in addition to the sanctions imposed on the litigant who misuses the recusal request. All these issued will be further developed later.

Furthermore, the judicial traditions which have taken roots from more than 100 years or since modern judicial systems were established in Egypt, are considered as part of the judicial heritage in Islam and constitute in their totality, a cluster of fine ethical and high behavioral rules which aim at guaranteeing the impartiality and integrity of judges, protecting them from sources of slip or suspicion as well as consolidating the citizens' confidence in the judiciary. Generation after generation, the judges safeguarded



these traditions and virtues and transferred them to their successors, to the youth generations. Equally, the judicial institute persevered in consolidating these virtues and traditions among the public prosecution members and new judges: trainers taught these virtues and embodied them in their behavior and practice until they became a part of their personality- The said traditions are not restricted to the judges' conduct while practicing their job, they rather embrace many aspects of their lives and personal behavior.

2-2 Integrity and Impartiality of judges as individuals

2-2-1 Delegating judges to work in the executive authority or appointing them in it after their retirement

Article 62 of the judicial authority law authorized the temporary delegation of a judge to work in judicial or legal works, outside his usual office, or in parallel with it, by a decision of the Minister of Justice, and after taking the opinion of the general assembly of the court to which he is affiliated and having the approval of the Higher Judicial Council. Cases of judges' delegation to work in the executive and legislative authorities have increased in particular periods, but have always exposed the impartiality of judges to influence. For this reason, the Higher Judicial Council attempted to limit as much as possible, the instances of delegations, even though the numbers of judges delegated to work in the executive and legislative authorities, companies, institutions and banks are reaching high percentages, which influences the performance and quality of work in judicial offices in addition to jeopardizing the judges' impartiality in some cases.

However, few were the cases in which judges were appointed after their retirement in the executive authority posts, especially that the retirement age of judges exceeds that of the government members. Nevertheless, senior judges were, in very limited cases, appointed after their retirement in one of the two legislative councils (the People's Council and the *Shura* Council) - The optimal solution for this phenomenon would be improving the judges' fees and salaries.

2-2-2 Distribution of work in courts of appeal and its influence on the judges' impartiality

The distribution of work in courts of appeal- or even in all degrees of courts- is undertaken by the court's general assembly at the beginning of each judicial year. Usually, the court president prepares a draft for the distribution of cases before the beginning of each judicial year, submits it to the court judges, considers their preferences of work, and consults the inspection administration in order to establish a final project to be submitted before the general assembly of his court at the beginning of the judicial year. The project includes the number of divisions, different categories of cases, competences and names of judges of each division. The general assembly usually agrees on this project. Moreover, the court president might be delegated to assume some jurisdictions of the general assembly, including the formation of divisions,



distributing cases among them throughout the judicial year. This delegation is supposed to be applied in states of emergency like the absence or illness of a judge, or other reasons occurring in the course of the judicial year. However, this delegation might be misused for other than its purposes. In courts of Appeal, every division is competent to look into cases falling within a certain summary prosecution division or cases that start with specific numbers determined before the beginning of the judicial year. However, the court president might transfer cases to divisions other than its original one, and this practice, although very limited, raises criticism and contradicts the principle of judicial impartiality.

2-2-3 The Authority of Primary Courts Presidents and its Influence on the Judges' Impartiality

Article 9 of the Judicial Authority Law determined the geographical distribution of primary courts: one in each capital of the Republic districts, as it stipulated that each court includes a number of presidents and judges, and that one counselor of the court of Appeal is delegated to preside over the court, pursuant to a decision by the Minister of Justice, and after taking the opinion of the Higher Judicial Council. Usually, the delegation period extends to 5 years and might exceptionally extend for more than that as determined by the Higher Judicial Council in its latest decisions. Furthermore, the judicial authority law empowered the courts presidents to undertake specific authorities including: supervision of courts presidents (article 93), notification of judges about any fault in their judicial work (article 94), motion of disciplinary action against any of the judges (article 99) and the right to request the retirement of a judge to pension, or his transfer to a non judicial office for reasons other than health problems (article 111). The president of a primary court is responsible for preparing the draft and specifying divisions at the beginning of every judicial year. He is also competent to investigate the facts of actions transferred to him from the inspection administration- all these competences and authorities give a certain privileged position to a primary court president, still, this does not empower him to interfere in the cases looked into by the judges.

However, the same question arises: is this applied in reality? Is the work of courts presidents limited to the management of administrative and financial affairs of their court or are they interfering in judicial affairs? Another controversial issue is that the status and powers of the primary court president might allow him to influence the judges and thus violating the principle of impartiality, yet, this depends on the judges' adherence to their independence and impartiality and their rejection of any interference in their technical work at least. In fact, this rejection of interference is one of the judicial traditions to which the majority of judges are attached, before becoming a general principle governing judicial work and a text in the Egyptian constitution prohibiting interference in justice. And finally, the proper solution for interference might be in reconsidering the status and powers of the primary court president.

2-3 The procedural system and its contribution to achieving impartiality and integrity

The Egyptian judicial procedural law includes many legal rules which aim at achieving impartiality and integrity. The most important rule therein stipulated: the principle of freedom and guarantees of defense, the principle of confrontation in argument, publicness of court sessions and the principle of challengeable sentences before higher judicial authorities.



2-3-1 The principle of freedom and guarantees of defense

This is a major principle in the procedural system: no judgment for or against a person can be pronounced before hearing the defense allegations. The law allows the plaintiff to explain the action in his initiatory pleading as well as in his oral and written defense in the courts sessions and until the argument is closed. The defendant is empowered to respond to the plaintiff and present his own defense, pleas and cross motions as well as other means of rebuttal.

Examples of freedom of defense are: oral argument for litigants (Article 102 procedures law), written argument, submission and rebuttal of proofs. Any violation of the right to defense leads to the annulment of the sentence.

2-3-2 The principle of confrontation between litigants

This principle is strongly linked to the principle of freedom of defense; it allows each of the litigants to know the motions and defense of the other party, and adds to the procedures the possibility for litigants to discuss their respective pleas and motions before the judge "so that the judge may discern the reality of the action through the contradictory indications revealed in the discussion".^{٢٠}

The implementation of this principle requires addressing the judicial motion to the other party of the dispute. Oral address of cross motions within the court require the presence of the litigants (article 122 procedures law), the content of issued sentences shall be declared to litigants who did not attend the session, through a corroborative procedure (article 5 of the corroboration law). Moreover, a litigant shall be enabled to view documents and memos submitted by the other party (article 168).^{٢١}

2-3-3 The principle of equality between litigants

Equal treatment of litigants is a vital principle for the integrity and impartiality of the judiciary. Equal rights for both litigants in defense shall be recognized. This principle is the practical implementation of judges' impartiality. Its implementation aspects are stipulated in many texts of the procedures law such as the right of a party to respond to the pleas and cross motions of the opposing party (article 97/2) and the right to have defense witnesses facing corroborative witnesses (article 69 corroborative law). In addition to article 102 -procedures law which stipulates that the defendant is the last one to speak in the court session in order to give him and the plaintiff equal right to speak.^{٢٢}

^{٢٠} See, Wajdi Ragheb Fahmi, Principles of the Civil Judiciary, Cairo, Al Fikr El Arabi Publishing house, First version 1986/1987. p. 394.

^{٢١} Ibid. p. 294.

^{٢٢} Ibid, p. 295.



2-3-4 Publicness of Sessions

This means that the public is allowed to follow the development of the court sessions and publish them. This principle is important since it provides the "control" of the public over the judicial procedures, which consolidates the judiciary standing and the public confidence in it. Nevertheless, this principle does not remove the possibility of holding secret sessions decided by the court or upon the request of the litigants, to maintain public order or by respect of ethics or the family intimacy. (Article 101/ procedures law). However, judgments are always pronounced in public sessions, otherwise they are considered null and void.^{٢٢}

2-3-5 Legal guarantees of judges' integrity and impartiality

The Egyptian law provides for many procedural guarantees ensuring the integrity of a judge when looking into an action and deciding in it. These procedures could be divided into four categories: 1- employment guarantees related to the appointment of judges and safeguarding their institutional and individual independence, 2- guarantees related to the competence of a judge to look into specific actions, 3- rules and procedures determining judges' responsibility, 4- penal and disciplinary protection of judges' work.^{٢٤}

Here, we emphasize on the second category related to competence including the absolute or relative incompetence of judges. We will also highlight the civil responsibility of judges for their faults or what is called the "action of litigation". Other guarantees will be discussed in subsequent sections of this report.

2-3-6 Absolute incompetence of judges

Articles 146, 165 and 498 of the procedures law, article 247 of the code of criminal procedures and article 75 of the judicial authority law determined cases of incompetence of judges, which aim first at guaranteeing the integrity and impartiality of judges and preventing judges from looking into cases surrounded by conditions that might jeopardize their impartiality in judgment. The cases as determined by the legislator could be divided into three categories: Considerably imperative conditions rendering the judge absolutely incompetent to look into the action, conditions that are not of that big importance, in this case, the judge is discharged of looking in the action if any of the litigants requests his recusal for incompetence, and conditions in which, it is upon the judge's conscience to withdraw from looking into the action, if he feels that the situation is critical.

1- Incompetence in the Code of Criminal Procedures:

Article 247 of the Code of Criminal Procedures stipulated that a judge shall abstain from looking into an action if the crime is against him personally or if he had acted (in the action procedures) as law officer,

^{٢٢} Ibid. p. 396

^{٢٤} See Wajdi Ragheb, *ibid*, p. 183 and subsequent pages.



public prosecutor or defended any of the litigants or testified or undertook the work of experts. He shall not participate in the sentence pronouncement if he had undertaken investigation or transfer (for the action), as he is prohibited from participating in the cassation if the challenged judgment was issue by him.

2- Incompetence in Procedures Law:

The cases of incompetence are: when the judge is related by direct family or kinship until the fourth degree to any of the litigants, when the judge or his wife has a current dispute with one of the litigants or their wives, when the judge is the representative in personal affairs, guardian, custodian, or possible inheritor of any of the litigants, when he is related by family or affinity until the fourth degree to the guardian or custodian of any of the litigants or any member or the president of the administrative board of the company in question, if the member or the president has personal interests in the action, when the judge or his wife or any of his relatives or brothers and sisters-in-law or any person he represents has an interest in the action in court, when the judge had given legal opinion or pleaded for any of the litigants in the action, even if this happened before working in the judiciary, or when he had looked into the action as judge or legal expert or as arbitrator, or had testified in the action, when a request for the judge's recusal is moved or a complaint against him is submitted to the competent authority and the judge consequently brings a claim of compensation against the party requiring his recusal and then becomes incompetent to look into the action, and when an action of litigation is brought against the judge and approved, the judge becomes incompetent to look into the action that caused the litigation.

3- Incompetence in the Judicial Authority Law:

Article 75 of the law stipulated that cases of incompetence are "when judges of the division looking into the action are related by direct family or kinship until the fourth degree, or when the judge, the prosecution representative or any of the litigants' representative or lawyer are related by direct family or kinship until the fourth degree.

2-3-7 Relative Incompetence of judges (cases of judges' incompetence)

Cases of relative incompetence are less critical than the previously described cases as to their influence on the judge's impartiality and integrity. Therefore, they do not lead to the incompetence of a judge to look into an action, unless any of the litigants requires so. These cases of incompetence were stated in the procedures law (article 148): "when the judge or his wife has an action similar to the one he is looking into and when a litigation arises between the judge or his wife and any of the litigants or their wives after the action is brought before him, the judge is considered incompetent, unless the litigant deliberately caused the litigation between him and the judge to render the judge incompetent to look into his action. Other cases are: when a judge's divorcee from whom he has a child, relatives, brothers or sisters in law have litigation before the judiciary with any of the litigants or their wives, unless the litigant deliberately caused the litigation between him and the judge to recuse the latter from looking into his action, and when one of the litigants works as servant for the judge or his wife, or when the judge is previously used to eating and living with any of the litigants or received a present from any of them whether before or after the action



was brought to court, and when there is any enmity or friendliness between the judge and any of the litigants, which consequently implies that the judgment will not be totally impartial.

Article 149 of the procedures law and article 249 of the code of criminal procedures stipulate that every judge presenting any of the above cases shall, seeing the circumstances, notify the consultative chamber or the primary court president, - to authorize his recusal. In case the judge fails to notify the court, the litigants may call for the recusal of the judge according to the procedures stipulated by the law.^{٢٥}

2-3-8 The optional refusal of judges from looking into an action

In addition to the cases of incompetence or refusal described above, article 150 of the Egyptian procedures law empowered the judge to abstain from looking into an action, in case it puts him, for any reason whatsoever, in a critical situation. The judge, in this case, shall submit his recusal decision to the consultative council or the court president, to look into his decision and verify the presence of a valid justification for recusal, although the law does not bind the judge to declare the reason of his refusal.^{٢٦}

2-3-9 Disputes with judges (civil responsibility of judges)

An action of litigation is an action brought by the litigant according to procedures stipulated by the law against a judge or a member of the public prosecution, claiming for compensation of the damage caused by the fault of any of them while assuming their judicial office.^{٢٧}

- Articles 494-500 of the procedures law regulated these litigations. The civil responsibility of judges is restricted to cases in which the judge or the public prosecutor engages in treachery, deceit, perfidy or commit a significant professional mistake (article 494), or when the judge abstains from responding to a petition submitted to him, or deciding in a legitimate action after being excused twice by the process server, in addition to other cases in which the law requires the responsibility of the judge and his obligation to pay compensations.

2-3-10 Integrity of the Judiciary and Structural Economic Changes in Egypt

Since the early 1970s, Egypt has been witnessing structural changes in its economic system. Legislative frameworks led to a shift from the central planned economic system to the market economy based on entrepreneurship and ventures. This transformation entailed several essential changes in the class structure

^{٢٥} Attieh Mehanna, The Incompetence of Judges, study on the independence of the judicial authority and the independence of the judiciary, National Criminal Magazine, p. 453 and subsequent pages.

^{٢٦} Wajdi Ragheb Fahmi, *ibid*, p. 202

^{٢٧} Attieh Mehanna, guarantees of civil responsibility of judges- litigation with judges, national criminal magazine, *ibid* p. 493 and sub. pages



of the Egyptian society: the emergence of the class of wealthy businessmen, the decline of the middle class and the deterioration of the financial situation of stable income earners including employees who earn their wages from the state and are prohibited from engaging in private business. The development of private economic projects also led to the spread of capitalist dealings which entailed judicial disputes of unprecedented high economic value. The same phenomenon was witnessed in Egypt during the late 18th century and paved the way for the restructure of the judiciary in progressive phases that started in the 19th century and reached its apex at the end of the same century.

One can not simply argue that the structural changes that occurred in the Egyptian economy and their impacts on the social fabric and the wage system have negatively influenced the Egyptian judicial system, seen its deep rooted traditions and inherited values which confirm impartiality and integrity. Nevertheless, the living conditions of judges have certainly declined due to the successive flows of inflation and despite the successive raises in their wages. Avoiding the influence of money and business power on judges is not easy; consequently, the Egyptian public opinion witnessed from time to time deviations of few judges, but the judicial system always reacted to limit these deviations through the available disciplinary and even penal procedures. This issue underlines the need to reconsider the regular raise of judges' salaries to protect them from corruption and influence or pressure by the executive authority.

3- Competence

3-1 Appointment in the Judicial Body^{٧٨}

Legislations regulating judges' affairs in Egypt adopt appointment for the occupation of judicial offices. Appointment is decided through the executive authority, pursuant to a presidential decision (previously pursuant to a royal decree) and after consultations with the Judicial Council or after its approval. Egypt never resorted to election system for this purpose.

In the past, the Egyptian Judicial System did not include objective and clear cut rules for selecting judges. Their appointment used to be decided by virtue of a Royal decree, issued after the approval of the Council of Ministers and upon a motion submitted by the Minister of Justice. Besides the general conditions required by the legislator for all those appointed in judicial offices, such as the law degree, the age, the enjoyment of civil rights and the absence of convictions- no other restrictions limit the authority of the Minister of Justice or prevents the executive authority interference in the appointment. This situation prevailed even after the issuance of the 1923 law- which stipulated in its article 126 that the appointment of judges shall be done according to the terms and conditions of the law- because it was not published but after twenty years (in 1943) by law No 66 and was called the Judiciary Independence Law. This law was

^{٧٨} Most of the experts participating in the referendum expressed that they are satisfied to have such an appointment system in the judicial body, so that only 30% consider that the judges are appointed on the basis of objective and transparent criteria, whereas 41% see the opposite.



the first to organize the judiciary and include clear cut rules and conditions for the selection and appointment of judges, the most important of which, besides general conditions, were: that that candidate should not be convicted by courts or disciplinary boards for having committed an act of dishonor, that he has good reputation, and that his qualifications and proficiency for judicial office be examined. The law also specified the categories from which judges may be chosen, as it required the opinion of the Higher Judicial Council before the appointment. These conditions and terms were adopted throughout the successive judicial organization laws until the currently applied law No 46 was issued in 1972 stipulating that the occupation of judicial offices is possible via appointment or promotion pursuant to a presidential decision (article 44) and after the approval of the Higher Judicial Council, save for the president of the Court of Cassation, whose appointment, according to the law, only requires the opinion of the Higher Judicial Council. According to the law clear cut conditions, a judge should: have an Egyptian nationality and be above 30 of age for the appointment in primary courts, 38 for the appointment as appeal courts counselors and 41 for the appointment as cassation courts counselors, have a law diploma, in addition to good reputation and no convictions (article 38). The law also stipulated that candidates should have a specific period of work experience determined according to the court degree in which they are appointed; it also determined that appointment of former judges in judicial offices: 1- depends on the degree of the concerned court he will be appointed in or promoted to and 2- could choose the public prosecutor representatives, members of the state council or the administrative prosecution, the state affairs committee, lawyers, law school professors or those working in offices similar to judicial offices. Moreover, the law includes specific conditions related to the experience and employment level of any of the above, to be appointed according to the degree of the concerned court (primary, appeal or cassation) (articles 39-43) - As for the court of cassation counselors, the law required their presentation to its candidacy by the general assembly of the court or by the Minister of Justice. The court of cassation president is nominated among the vice president after the approval of the Higher State Council. Throughout long years of practice, the oldest vice president of the court of cassation was chosen for the post of president of the court of cassation. If he suffers from health problems, the next of seniority is chosen. The vice presidents of the Court of Cassation are appointed after the approval of the Higher Judicial Council upon the proposal to candidacy by the court of cassation general assembly.

As for public prosecution members, the law stipulated the same general conditions set for judges, however it added a condition concerning the age of candidates, being 19 for associate prosecutors and 20 for assistant prosecutors (article 116). The law provided for appointment in other public prosecution offices by direct promotion or by choosing from the judicial staff, as well as it provided for the appointment in the post of public prosecutor representative by choosing from other categories, from members of the state council, state affairs committee, administrative prosecution, law schools professors and lawyers. However, the law stipulated that appointment of practicing lawyers should not be less than one quarter of the total appointments in positions like public prosecutor representative or lower degree positions or associate or assistant public prosecution^{٧٩}. The law stipulated that the judge appointed as public prosecutor should be

^{٧٩} This law is not implemented to date for reasons interpreted as professional fanaticism showed by judges against lawyers



chosen from the courts of appeal vice presidents or the court of cassation counselors or first degree general attorneys in public prosecution, and that his appointment is decided by a presidential decision, however, it did not require the approval or opinion of the Higher Judicial Council. Hence, the president becomes the exclusive appointing authority in this regard.

The law stipulated that the president of the Court of Cassation and the public prosecutor shall take the legal oath before the President of the Republic, whereas other public prosecution members take this oath before the Minister of Justice. As for other counselors and judges, the oath is taken before the general assembly of the court of cassation or one of its divisions or any division of the appeal courts, depending on the judge's office. The State Council law stipulated for the state council judges the same general conditions set for judges, however it added a condition: two diplomas of higher studies diplomas from law schools are required for delegates (minor judicial office in the State Council) (article 73). The State Council members, including the president are appointed pursuant to a decision rendered by the President of the Republic, and the president is chosen from the council's vice presidents after taking the council's special board (similar to the Higher Judicial Council) opinion. The council's vice presidents and president representatives are nominated by the general assembly of the council after the approval of the council's board, whereas the appointment of other members including deputies, assistant delegates, requires the council's board approval.

Regarding appointment in the judicial personnel, the law did not stipulate for regular judges or state council judges, any standards or criteria guaranteeing the good choice of proficient, transparent judges: the law did not stipulate that they shall be holders of a certain degree or academic distinction when studying or graduating from law schools, neither did it require an admission test like few Arab and European systems do, nor did it mention training or preparatory programs for judicial offices (with the exception of state council judges whose appointment requires two diplomas of higher studies from law schools). The Higher Judicial Council and the State Council board adopt the personal interview system to choose candidates for minor judicial offices in the public prosecution or the State Council (associate prosecutor or assistant delegate) after having collected information, through security agents, on the applicant, his family, his reputation, a possible engagement in political work and possible precedents (judicial sentences against the applicant or any of his family members) in an implementation of the two conditions being 1- absence of convictions for crimes against honor, and 2- good reputation.

Throughout years of practice, appointments used to target top law school graduates according to their degrees of graduation. However, throughout the past fifteen years, successive judicial councils acquired permissions and appointed great numbers of law students who graduated with a "good" degree as associate public prosecution, assistant delegate in the State council. In an earlier period, appointment of law students was very restricted to a small number of outstanding students having previously worked and acquired experience as lawyers or in governmental bodies or institutions or banks. However, today, appointment is even including children of judges without taking into account their total degrees, which violates the principle of equality before the law. Policemen are also being appointed in positions like associate or assistant public prosecutor in the State Council, considering that they had studied law in the



police school and have a BA, still, their appointment is being highly criticized and objected for it contradicts the principle of equality and has negative impact on the future, proficiency, transparency and impartiality of the judiciary. Consequently, all specialized national councils and experts recommendations call for the necessity to restrict appointment to top outstanding law students having achieved years of education with a minimum of "good" degree and after passing an admission contest with transparency and respect for the principle of equality, in order to enter the training and preparatory programs and pass the graduation test before being appointed in judicial offices. In this perspective, the draft law for the transformation of the National Center of Judicial Studies into a law academy, prepared by an ad-hoc committee in the Ministry of Justice caused a great turmoil, at high levels, although it has not seen the light yet.

Appointments now only involve an interview with the applicant: the president and members of the Higher Judicial Council or the special board in the state council ask him few simple questions, the whole interview takes few minutes, and based on its results, the applicant is selected without any clear cut standards for selection. The President of the Republic issues the appointment decision based on the nominations of the Higher Judicial Council or the special board without interfering in the details. The proficiency of persons appointed in the judiciary and the State Council and their merit to such appointment, has been greatly controversial and caused turmoil. Many questions have been raised concerning the merit or entitlement of the appointed elements and whether special considerations or privileges are being taken into account.

Concerning the appointment of judges or public prosecution and State Council members in degrees higher than associate and assistant public prosecutors, it is carried out through the promotion of public prosecution members or judges or State Council members of lower degrees –

From many years to date, no judges or public prosecution members were appointed from the other categories mentioned in the law such as lawyers, university professors and other similar categories....which prevents the judiciary of richness of experience and reinvigoration of the spirit and dynamism.

There is a new remarkable phenomenon consisting of an incessant increase in the number of the police faculty graduates and previous police officers appointed in judicial posts. Undoubtedly this has a negative effect on judiciary traditions for they bring to the military body, military police traditions which fall short of independence and do not greatly valorize public freedoms and human rights. These traditions contradict judiciary deep-rooted values.

3-1-1 Women's rights in judicial appointment

The current Egyptian constitution and previous constitutions and laws governing the judiciary do not include any stipulation prohibiting the appointment of women in the judiciary. However, the current constitution stipulates the principle of equality of citizens before the law, their equal rights and public obligations. It prohibits discrimination between them on the basis of gender, origin, language, religion or belief (article 40) as it also stipulates that the state guarantees harmonization between women's obligations



in their families from one side and in their work in the society from the other, not to forget their equality with men in political and social fields of life (article 11),..... Nevertheless, not one woman was appointed in judicial offices and public prosecution until January 2003, when the first woman was appointed as judge in the Supreme Constitutional Court after being chosen among practicing judges. However, no other woman was appointed after that although Egyptian women, since the beginning of the modern age, work in all other fields of law as lawyers, legal counselors, and teachers in law schools. Moreover, the state affairs committee (government lawyers) and the administrative prosecution committee (affiliated to the Ministry of Justice, and undertakes investigation in administrative violations of state employees) include a considerable number of women, graduates of law schools. It is worth mentioning that members of the said committees enjoy many privileges granted to judges in addition to the irrevocability immunity. The Egyptian public opinion is divided into two groups; the first assumes that preventing the appointment of women is related to historical reasons and other reasons related to usages and traditions and practical difficulties- according to some jurisprudential ideologies, women are not supposed to be appointed in the judiciary or the public prosecution- whereas the other group believes that women should be appointed because other jurisprudential ideologies and opinions have no prohibitions in this regard (not all jurisprudences prohibit women's appointment in the judiciary). Moreover, the Egyptian State Council has issued two decisions in the 1950s recognizing women's rights to occupy judicial offices and attributed the prohibition of their appointment to the element of convenience decided solely by administrations within the framework of their discretionary authority.

3-1-2 Promotion of judges

The judicial authority law and the State Council Law recognized the judges' promotion system although they added limits and restrictions to it, the most important of which are the rules of seniority, proficiency and qualification as stipulated in the law. The promotion of judges means the appointment of a judge or a member of the public prosecution in a position of higher degree. The law established the positions of judges in successive degrees so the promotion would be done according to direct successive positions; whether in judiciary or in the public prosecution. It has also established a chart or "cadre" containing all names of judges and their judicial offices according to their seniority in appointment. The upgrading of judges is subject to the following guarantees:

1. The promotion decision is issued by the President of the Republic after the approval of the Higher Judicial Council or the ad-hoc committee in the State Council: The President of the Republic does not interfere in promotion and only approves the decision of the said bodies.
2. The promotion follows the criteria of seniority and proficiency: the seniority of a member is the major factor for his promotion; hence, the "oldest" in previous appointment are promoted according to the higher vacant positions, provided that the promoted judges fulfill all conditions of proficiency evaluated through the technical inspection report on the judge's work, carried out by the Judicial Inspection Directorate at the Ministry of Justice.
3. The law considered that the promotion of a judge or a public prosecution member enters in force from the date of the Higher Judicial Council approval and not from the date of issuance of the



presidential decision to preserve the judges' interests because the delay of this decision deprives judges from the salary raise until the presidential decision is declared.

4. For the aim of safeguarding the stability of judges and the judiciary, the promotion of judges occurs once every year during the judicial vacation, unless required for exceptional circumstances.
5. The law authorized the promotion to "excellent" proficiency in the judges' offices and primary courts presidents, provided that they had spent two years in their offices and were evaluated as proficient in the two last assessments of proficiency.

Moreover, the Judicial Inspection Directorate at the Ministry of Justice or the one affiliated to the public prosecution (it depends on whether the member works as judge or as member in the public prosecution) undertakes the evaluation of the member's work during a specific period ranging from two to three months, through studying the cases he is looking into and grading his work according to grades specified by the inspection bills. The inspection report is submitted before an internal committee in the directorate which rates the proficiency, informs the judge about it and gives him a copy of the report. The judge is empowered, for a limited period, to protest against this report, or give his remarks regarding its content before the Higher Judicial Council, which takes the relevant decision. The law bound the Minister of Justice to inform judges and members of the public prosecution who acquire a low evaluation grade (defined by the law as average, or below average) about his proficiency grade and empowered the judge to protest against this evaluation before the Judicial Council, which takes the final decision. Moreover, the law bound the Minister of Justice to inform judges who deserve promotion but were not promoted for reasons not related to their proficiency reports, so that they may protest before the said council. In brief, the Higher Judicial Council holds the final decision regarding promotion issues, and the judges' inspection and evaluation of work is restricted to the primary courts judges (i.e. judges and presidents in primary courts), as well as those occupying similar offices in the public prosecution (i.e. public prosecution assistants, representatives and presidents), and does not cover counselors in courts of appeal or other equivalent degrees such as general attorneys in public prosecution. The same applies in the state council: inspection is restricted to assistant delegates, delegates and deputies and does not cover counselors. The debate arises from time to time concerning the feasibility of inspecting counselors at the appeal courts although the majority of judges are against such procedures.

Inspection often includes the review of cases, judgments and verification of their soundness; however, it does not evaluate the way by which the judge practices his job, or his relations with colleagues and his behavior towards other parties whether litigants, other people working in the court or lawyers, it does not consider the evaluation of his physical appearance, sessions management or his work in general and his aptitude as to doing legal research. Not linking promotion to training is a negative aspect in the promotion system; therefore, it should be eliminated by clearly stipulating the importance of this link in the judicial authority law- safeguarding the judiciary efficiency and proficiency in judicial work.

3-2 Training Judges

3-2-1 Judges' Training System



The current Judicial Authority Law and previous laws did not include any stipulation regarding the training of judges. The Egyptian judiciary did not have any specific strategy or clear cut landmarks for training judges (save for few attempts to hold training sessions for new judges) until the National Center for Judicial Studies was established by virtue of the presidential decision No 347 of 1981. This center is affiliated to the Ministry of Justice and its Administrative board is headed by the Minister of Justice and includes as members the president of the court of cassation, the Public Prosecutor, the State Council President and the center Director as well as other members chosen from outside the judiciary. The objective of establishing such a center is what article 2 of the presidential decision stipulated: forming and training members of judicial bodies, providing them with theoretical and practical knowledge and qualifications to practice judicial work and improve the professional level of judicial assistants and others working as assistants of judicial bodies, as well as collecting, publishing, and keeping legal documents, legislations, researches, studies and legal principles. The Administrative Board establishes the general policy of the center, follows-up its implementation and approves the training plans... the director of the center is chosen among the court of cassation or courts of appeal counselors by way of delegation. The educational body and the trainers are chosen among practicing or retired judicial authorities' members, a number of law school professors as well as experts on a part time basis, knowing that the center is not a permanently open law school. The center's budget comes mainly from allocations given by the Ministry of Justice in the framework of the judicial authorities' budget, which is a very limited budget (does not exceed 1.5 million Egyptian pounds). The center launched its activities by holding training sessions of 12 months for public prosecution new members, immediately after the declaration of their appointment and not before appointment like is the case for almost all similar training institutes on the top of which is the French Law School. The training program includes theoretical lectures in selected topics required by the work in public prosecution such as the penal law, procedures law, forensic medicine issues, as well as values and traditions of the judiciary and criminal investigation...etc in addition to studying all kinds of criminal cases within small working groups and through real cases to provide trainees with the skills of investigation and pleading and writing notes or memos and conducting legal research as well as learning English or French. The center, since its foundation and until now, continues to hold the "Basic training sessions for new members of the public prosecution" which duration varies between 6 months to one year. Since 1995, the center holds basic training sessions for new judges chosen among public prosecution members who reached 30 years of age and attained the degree of prosecution representative from the highest category. This training session is also held for 6 weeks during the judicial vacation in summer, when trainers and trainees are able to participate. The sessions include theoretical lectures, case study within small workshops, legal research, judgment grounding, court sessions management and legal action management. Since 1997, the center holds basic training sessions for new state council members (assistant delegates). In the framework of basic training for judges and public prosecution members, the center also holds many specialized sessions (of three days to two weeks) for different kinds of cases such as personal status, family, commercial affairs, and criminal cases...etc, as it holds training sessions related to skills in judicial work such as summary courts management and sessions management and presidency of the three judicial divisions. Furthermore, the training center holds throughout the judicial year, many conferences, seminars



and workshops on the most important legal and judicial themes, for the benefit of a great number of judges from all court degrees. However, the efficiency of the training sessions is weakened by the absence of follow up of trainees after the sessions and the absence of evaluation of the extent to which they have benefited from the training. This requires the establishment of a mechanism of cooperation with the presidents of various courts and the judicial inspection directorate. Moreover, the annual transfer and promotion of judges and consequently the change of work they are qualified to practice or for which they have been trained, weaken the efficiency of training sessions due to the constant change in the nature of work and cases.

On the other hand, employees in courts and public prosecutions including judicial assistants, investigation clerks, and court sessions secretaries and trustees and process servers...etc have no training sessions, whether to the newly established or to those already operating, which is a negative point influencing the efficiency of the judicial work. Moreover, the mentioned workers are chosen without any specific standards and criteria, the fact that resulted in the decline of performance and delay in adjudication for several years, which became source of complaint for litigants and judges.

In a reform initiative, the project for the transformation of the National Center for Judicial Studies into a Judicial Academy included the establishment of three specialized institutes: the judges' institute, the judicial assistants' institute and the experts' institute. The project also included the adoption of the open contest system for those wishing to work in the public prosecution or the state council or the state affairs committee or the administrative prosecution, as it decided that appointment in judicial offices shall not be reached unless the candidate has attended the basic 18 months training sessions and passed the graduation test. The project adopted the same system for the selection, appointment and training of judicial assistants.

The judicial training needs today to be developed in order to promote periodically and continuously the proficiency of the judges in order to fulfill requirements of efficient judiciary practice.

4- Efficiency of the Judiciary

4-1 Concept and elements of efficiency

The efficiency of the judiciary is its effective influence on the reality of the society, an influence that leads to the achievement of the goal sought from the establishment of the judicial authority. This goal embraces the spread of justice, settling disputes with proficiency and within pre-set objective and procedural limits, in addition to restituting and providing rights to their holders in time. Tardy justice is not but tyranny and unjustified hasty and rushed justice, is not but an amputated and narrow justice. Hence, the judiciary is considered as efficient when it succeeds in consolidating the value of legitimacy in the society, promoting the rule of law and the safeguard of rights and public freedoms and spreading confidence in a sovereign judiciary for no right is lost for those who seek it.



The efficiency of the judiciary entails the following questions:

- Does the judicial system contribute to settling disputes and achieving justice?
- Do judicial procedures contribute to achieving the efficient judiciary or do they hinder it? (procedures of litigation, execution problems and challenges of judgments)
- Does the role of the administrative system of the courts contributes to achieving the efficient judiciary or does it hinder it?
- Are the courts logistics adequate for achieving the judiciary mission?

4-2 Reality of problems in the judicial efficiency

This report attempts to shed light on various aspects of this reality through an analytical study of the available judicial statistics.

4-2-1 Accumulation of cases and delay in adjudication

One of the important indicators for measuring the efficiency of the judiciary is the time taken to reach a final decision in litigation. Moreover, the number of cases handled by a judge during a specific period and the percentage of amended or annulled or challenged decisions are significant indicators of the judiciary efficiency. This information is mainly available through the judicial statistics issued by the Ministry of Justice, which reveal the number of cases looked into before every degree of litigation, their proportion to the number of judges, the number of challenges and their proportion to the number of cases in study, the number of judgments annulling previous judgments of courts of lower degrees and their proportion to the number of these judgments, the average time taken to reach a decision regarding a litigation, and the proportion of cases executed in a reasonable time.

The number of cases brought before the Egyptian courts in 2000/2001 (civil, criminal and personal status) was 14394351 including 2249605 civil cases, 10813167 criminal cases and 1331577 personal status cases. The number of judges in Egypt in the same year was 3466 judges, among whom 219 counselors at the court of cassation, 1569 counselors at the courts of appeal and 1678 presidents and judges in primary courts and their affiliated summary courts.

If we divide the number of cases in 2000/2001 by the number of judges (taking into consideration the inequality in the number of cases between courts), the result shows that every judge was in charge of more than 4100 cases or 520 cases per month of the 8 months of the judicial work in Egypt. This implies the impossibility that a judge could decide in the dispute brought before him with carefulness, proficiency and insight, according to the recognized international standards for judges' work.

The inability of the judge to look into this huge number of cases leads to the delay of cases from one year to another, without looking into them.

For instance, if we consider the total number of cases delayed in all courts in 2001 we see: 1499357 civil and commercial cases, 1142022 criminal cases and 809083 personal status cases.



Therefore, the number of delayed cases is considerable and the proportions of cases adjudicated have declined as such: 33.35% of civil and commercial cases, 39.24% of personal status cases, which means that two thirds of cases looked into by civil, commercial and civil status court divisions are not settled but postponed for the next year.

The problem of accumulation of cases and delay in adjudication is more apparent in the court of cassation: the number of civil and commercial cases looked into in the judicial year 2000/2001 reached 100986: 11064 new cases and 89922 delayed cases from previous years, the court only decided in 1531 cases (or 1.5%) and 99455 were left for the next years. This problem is due to the limited number of counselors at the court of cassation: 303 counselors in all divisions in 2001 while the number of civil cases challenges was 105251 in addition to 21348 criminal cases challenges and 198963 challenges of appeal decisions. This means that the total number of challenges brought before the court of cassation amounted to 325562, or more than a thousand cases per counselor.

It is worth mentioning that the proportion of adjudication in summary criminal cases is noticeably increasing exceeding that of civil, commercial and personal status cases: 80.8% in 2000 and 71.23% in 2001. The reason why criminal cases proportion of adjudication is high lies in the fact that such cases do not pose legal problems faced in civil and commercial cases, not to forget that in such cases, the accused and injured rather need a prompt adjudication, especially for the accused who is put in preventive detention and consequently, the litigants do not seek to delay the case as they do in civil and commercial cases.

However, the increasing rate of adjudication in criminal cases despite their huge number and frequency leads to an important question regarding the guarantee of rights to defense and procedural rights of the accused, and the time taken by a judge to reach a decision with insight and carefulness. The proportion of subsequent challenged decisions could be a reliable indicator of the proficiency of judicial work in courts of first phases.

If we consider the number of criminal cases submitted before some summary courts, we perceive the huge number of cases that a judge must decide on during each session. In *Shabra* criminal court in Cairo for example, the number of new coming cases of misdemeanors reached 7675 in 2001: none of them was delayed until the following year, moreover, 6995 accused were found guilty and 680 were found innocent. This means that the court delivered a condemnation judgment in more than 92% of the cases submitted to it.

If we consider that each division (for misdemeanors) holds one session weekly in summary courts (summary judges are assigned to undertake many works in different divisions), and that the judicial year is of 9 months according to article 86 of the judicial authority law, we understand that the number of sessions held by the summary judge annually to look into misdemeanors is 36 sessions (9 months of work × 4 sessions per month), which means that the judge decides in 213 cases per session.

In the New Court of Egypt, for example, misdemeanors amounted to 11542 in the same year, none of them was delayed until the following year, 11462 accused were found guilty and 80 were found innocent.



If we assume that the judge of misdemeanors holds one session weekly, we understand that he looks into and adjudicates in more than 320 cases per session on an annual basis.

These examples on the amount of misdemeanor cases brought before courts in Egypt give rise to a legitimate question: how courts are being able, with this huge number of cases handled in each session, to ensure the right to defense in litigation and the rights to rebuttal and claims and assume the consideration of rebuttal and claims and listening to witnesses and refutation and consideration of technical proofs as well as all other procedures required to reveal the truth in criminal justice and in the light of the fair trial guarantees? Another question is: how judges are being able to found their judgments with insight, carefulness and thorough examination of the proofs with this huge amount of cases handled daily? A practice has become widespread nowadays: judges in summary courts of misdemeanors use the "causes templates" or forms which are causes of judgments engraved on a pre-prepared printing plate or "cliché" to be stamped on the case papers and filled with the required data specific for each case such as the name of the accused, number of the case...etc. This practice implies that judges are not considering cases each according to its requirements and consequential implications or special sanctions in the framework of the discretionary authority granted by the law to the judge, but are rather considering them as entries of categories of cases, all handled using one formula, taking no notice of the crucial differences between them.

This overwhelming burden born by judges in misdemeanors cases and criminal infractions is undoubtedly revealed through the growing number of sentences annulled or amended when challenged by appeal or cassation.

The total of default judgments or judgments *in absentia* issued by Cairo summary courts of misdemeanors in 2001 amounted to 168507 cases, 22720 of which were amended and 1153 were annulled (around 20% of the issued cases), knowing that challenges of default judgments are brought before the same court issuing them. However, appeals of misdemeanor courts' judgments brought before a higher degree court (misdemeanors' appeal division in the primary court) record a higher number of amended or annulled judgments. For instance, in the North Cairo Court, 967 appeals led to judgments of innocence and annulment of first degree court judgments, in addition, 2348 appeals out of 14240 led to the remission of penalty, which means that about 23% of first degree courts judgments were amended. In *Demenhour* court, 8551 appeals led to remissions of penalty and 785 led to judgments of innocence, i.e. 9309 cases out of 23075 or 40 % of the total cases were amended. In *Zaqaziq* court, 3688 cases led to remissions of penalty and 2840 led to judgments of innocence, i.e. 6228 cases out of 11033 or 60% of the total cases were amended. Furthermore, in *Assouan* court 357 cases led to remissions of penalty and 57 led to judgments of innocence, i.e. 414 out of 1893 cases or 21% of the total cases were amended. Therefore the percentage of criminal judgments amended in courts of appeal varies between 20% and 60%, but if we add judgments that are amended by annulment or remission in the opposition of default judgments being about 20%, the percentage of criminal summary courts annulled judgments ranges between 40 and 80%, which cannot be explained but by the overwhelming and accumulated cases before judges in summary courts.



Moreover, if we consider the reasons behind the annulment of these judgments (appeals of misdemeanor courts judgments) when challenged in cassation, we become sure that a judicial judgment issued by a judiciary overwhelmed by burdens does not necessarily reveal the truth. The number of challenges (submitted by defendants) objectively adjudicated by the court of cassation and leading to the approval of the challenge or the annulment of the challenged judgment in the judicial year of 2000/2001 amounted to 8633 out of 9096 challenges^{٢٠}, or 94% of the total challenges approved in form. This means that the majority of appealed judgments issued by misdemeanor courts contain many defects that should be refuted for violating the law or misinterpreting it or for flaws in the grounding or corruption in factual investigation or other reasons necessitating the cassation of judgments. Knowing that the court of cassation decisions concerning judgments of short term sanctions are often issued after the expiry of the sanction term due to the long time taken for adjudication and the massive amount of cases, and that challenging by cassation does not stop the implementation of the sanction unless by an order by the court of cassation, we become aware of the danger jeopardizing justice in the judiciary and the rights of the accused.

4-2-2 Procedural and administrative issues and their negative impact on justice

Litigants often resort to procedural authorizations stipulated in the law to paralyze adjudication in actions brought against them. Also, many plaintiffs take legal actions for spiteful purposes: they do not seek justice, but only wish to win their disputes with other parties by forcing them to appear before courts, considering that judicial fees are not a big burden born by litigants.^{٢١}

Hence, the judiciary in Egypt became the solution for conflicts between married couples, neighbors, colleagues and others who have filled courts with trivial actions overwhelming judges and preventing them from focusing on serious disputes related to the implementation of the law.

Moreover, lawyers sometimes act arbitrarily while defending in actions, by bringing lawsuits in which they have no interest, just for the aim of drawing the attention of the public opinion, or by resorting to several ways to paralyze adjudication in the action of their clients, such as requesting the postponement for notification and re-notification, observation and preparation, or documents submission and consideration. Sometimes, they do not refrain from raising objections for falsification in documents submitted by their opposing party for the only reason of exhausting their opponent, as they do not refrain from resorting to the court, if this could delay the adjudication in a case apparently won by the other party. These tricks do not face the strict negative response of judges seen their need to alleviate the overwhelming burden of cases submitted to them, consequently, they postpone the adjudication for the trivial reasons alleged by the lawyers. Many stipulations in the procedures law try to limit the recourse to different ways of paralyzing justice; however, these texts remain inefficient as to preventing spiteful actions or putting an end to the litigants and lawyers tactics for delaying adjudication. Even experts who are often consulted by courts for civil, commercial and criminal actions do take their part in paralyzing adjudication through tardiness or

^{٢٠} Ministry of Justice, Annual Judiciary Statistics Report 2000/2001, p. 197

^{٢١} Refer to cases studies carried out by the American researcher Nathan Brown on a sample of Egyptian litigants in his book: The Rule of Law, Courts in Egypt and the Gulf States, Cambridge University Press, 1998, translated by Dr. Mhammad Nour Farhat under the title The law at the service of whom? Soutour publications, Cairo 2004.



stalling in preparing their reports which are surrounded by suspicions due to many rumors related to the experts' integrity and impartiality.³²

Despite the overwhelming burden born by the administrative system in courts, large portions of its employees are playing an extremely negative role and violating justice. A big number of trustees and process servers and other employees in prosecutions and courts do not rely on their negligible wages earned from the state but on bribery from litigants whether for doing their official duties they get paid for or in return of their interference and violation of the law to put the other litigants at disadvantage.

The execution of final judgments issued for civil and commercial actions is not an easy task. Often, the defendant, after having used all challenge means, resorts to the execution problems for spiteful purposes, and for the only aim of paralyzing execution. Although the fact of raising problems, except for the first problem, doesn't have a reliable effect, nevertheless, many defendants urge non defendants to raise problems for the aim of paralyzing execution, by the simple evocating of such problems. Moreover, the huge number of final verdicts issued in misdemeanors and infractions burden the police verdicts execution units which undertake their work under the supervision of the public prosecution with heavy unbearable charges.

Chapter Three: Conclusion and Recommendations

After having given an overview of the state of the judiciary in Egypt, the report leads us to a cluster of general conclusions based on the need to differentiate between the judiciary as institution and the judges as individuals when evaluating the Egyptian judiciary. Judges in Egypt have professional traditions of liberal roots, inherited through generations since the emergence of the modern Egyptian judiciary at the late 19th century. However, this does not eliminate the influence of social, economic and cultural changes that occurred in Egypt on the said traditions. Despite these changes, impartiality, independence and integrity remain deep-rooted in the minds of Egyptian judges, consolidated by a predominant sense they have of social individualism.

However, the legislative system governing the judicial authority promotes the domination of the executive authority over the judicial institution. Specialized courts are stipulated in many parts of the constitution, which deprives the regular courts from having comprehensive competence over all disputes and deprives citizens from their right to recourse to their "natural judge". Moreover, the constitution joins the judicial work with other legal professions under the so called Higher Council for judicial organizations, headed by

³² The judicial statistics of 2000/2001 indicate that the experts department data for 2001 are as such: late cases from previous years 162902 case, new cases 984959, total no of cases: 1147861, among which 313378 were finished and presented in a report (i.e. less than one third) and 29176 cases were finished without being put into reports and 805307 cases were delayed for the following years (i.e. more than two thirds of the cases). See previous reference, p. 263.



the President of the Republic. But the Supreme Constitutional Court does not fall within the regular judiciary system. Furthermore, the regular legislations in Egypt consolidate the domination of the executive authority over the judicial authority: appointment in high judicial positions (president of the court of cassation, public prosecutor, President of the State Council) falls within the powers of the Head of State, and the Minister of Justice enjoys large authorities as to judges, courts, prosecutions and public prosecution members, whether in administrative supervision, inspection or disciplinary accountability. The irrevocability of judges, though stipulated in the constitution and in the judicial authority law, remains theoretical and undermined when need be pursuant to stipulations of the same constitution and law, especially when the conflict between the executive authority and the judicial authority regarding the independence of the judiciary becomes critical. The Judiciary budget is part of the Ministry of Justice budget.

The domination of the executive authority over the judicial authority in Egypt, allows the first authority to use financial pressure to influence judges by way of delegation, secondment or generous financial rewards. Moreover, the large authorities enjoyed by primary courts and appeal courts presidents jeopardize the independence of the judiciary and instigate suspicions about the latter assignment of few cases- of special importance to the executive authority- to specific judges.

The Egyptian judicial law penalizes interference in the work of judges or influence on them, as it safeguards their personal security and provides judges with a judicial immunity and a special system for penal accountability.

Although the law and judicial traditions prohibit judges from engaging in political work, judges enjoy rights of expression and opinion not contradicting their judicial office. Today, the judges' right of expression and association are a hot controversial topic in Egypt because of the growing debate between the judges' club, the government and the Higher Judicial Council on the role of judges in the supervision of elections and on the new judicial authority draft law lost in official and governmental complicated procedures due to the government fear of giving more independence to judges.

The law in Egypt provides many guarantees ensuring the impartiality and integrity of judges from the institutional and individual perspectives. Moreover, the procedural system includes many principles guaranteeing integrity and impartiality. Nevertheless, the structural changes that occurred in the Egyptian economy as well as the social transformations in the Egyptian community in the last three decades have had a negative influence on a number of judges.

There are clear cut standards for measuring the proficiency of judges, their promotion and disciplinary accountability, although the domination of the executive authority over promotion and disciplinary measures is very obvious through the powers granted to the Minister of Justice.

Egypt enjoys a training system for judges which needs to be developed. The appointment in the judicial staff (starting from the lowest degrees) was greatly flawed in previous years: excellence in university studies was not considered as the major standard for appointment, many social and personal preferential considerations appeared, consequently, all law students, sons of judges, holding a law degree, were



automatically appointed in judicial bodies, although this appointment contradicts the principle of equality in job opportunities.

The proportion of appointment of policemen and graduates in judicial offices increased. Texts relative to lawyers and university professors' appointment in judicial offices are premeditatedly lost and wasted.

Although the state appointed a female judge in the Supreme Constitutional Court (which does not fall within the regular judiciary system, as previously noted), things didn't go further, and the state is still refraining from appointing women in judicial offices of first degrees, and no valid and explicit reason justifies discrimination between men and women in appointment.

However, the major challenge facing the Egyptian judiciary is the efficiency of the judicial system. The huge numbers of cases of all degrees and kinds of courts delay adjudication. The accumulation of these cases leads to the overlooking of multiple procedural rights such as the right to defense and the presumption of innocence in criminal cases. A significant number of cases, particularly in first degree courts, are not duly considered and studied, the fact that is later revealed in the high percentages of amendments or annulations of challenged judgments. Litigants often misuse their procedural rights and do not refrain from resorting to procedural authorizations to prevent their opponents from recovering their rights. The execution of judgments is also facing many problems: the absence of proficiency and integrity of the administrative system in courts paralyze the achievement of justice.

Therefore, reforming the judiciary in Egypt necessitates an extensive cluster of legislative, administrative and logistic measures. The amendment of legislations impeding the institutional independence of the judiciary has become an urgent need: the constitution shall be amended to eliminate all forms of specialized courts systems, and the judicial authority law shall be amended to ensure the judiciary independence from the executive authority according to the applied international standards. The authority of the Ministry of Justice in judicial affairs shall be terminated and appointment in high judicial positions (public prosecutor, president of the court of cassation or the state council) shall be decided based on objective criteria instead of the exclusive discretion of the Head of State. The judicial council, which includes high judicial figures and other members representing judges, shall undertake the appointment, transfer, promotion and disciplinary accountability of judges.

Two major points are worth underlining concerning the current conflict between the judges' club from one side and the Higher Judicial Council and the executive authority from the other. We previously mentioned in this report that the conflict is about the judges' criticism of violations occurring in the legislative elections. We note first here that the judges' club struggle until now only involved the call for an independent judiciary and did not include any demands to modernize the whole judicial system and solve the issues of efficiency, accumulation of cases, insufficient number of judges, problems of judgments execution as well as other issues highlighted in this report. Moreover, the judges' club did not declare any stance regarding the objective criteria for the appointment of public prosecution assistants (the first degrees of judicial offices). The fact that the demands of the judges' club are restricted to the independence of the



judiciary and neglect all other problems, limits its activity within the framework of professional demands which do not involve the judicial reform in general. Furthermore, the analysis presented in this report for the most important aspects of the judicial authority draft law prepared with the participation of the judges' club indicates that the club's perception of an independent judiciary was far from meeting the recognized international standards. The draft law has achieved a considerable yet limited progress towards achieving the independence of the judiciary. Moreover, it still has many aspects of domination of the executive authority despite the fact that it is showing a considerable progress but it is far from reaching and independent judiciary.