



The State of the Judiciary Report in Egypt

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General introduction: Historical synopsis¹

Justice and right were always present in the Egyptian society since the pharaohs. The pharaonic civilization has, in fact, known the judiciary organization based on the multiple degrees of courts, their specialization and protection from any interference and has also known the arbitration system.

During the Greek domination, then the Romans, in the eight and ninth centuries, courts were divided between Egyptians and foreigners giving birth to the mixed courts.

All through the Islamic era, the Islamic law (Al Chari'a) was exclusively applied on both Moslems and non-Moslems. The judiciary during this era was conducted by judges sitting anywhere, issuing judgments which were recorded in registers and executed by the police force.

Not so long ago, and with the French military campaign, Egypt has had specialized courts, such as the commercial courts. General Minaud, Napoleon successor, who ruled Egypt, has established on 3/10/1800 the first comprehensive organization of the judiciary which included the basis followed in nominating judges and in selecting justice auxiliaries. It also allowed contesting judicial decisions and prohibited interference in the judge's duties and regulated several other matters such as judge's accountability and court fees.

This judicial organization scheme was, however discontinued as soon as the French expedition left Egypt. The Wali of Egypt, Ali Diwan El Wali, then instituted the "Royal Higher Council, and issued the procedural ordinance to be followed before the said council. The said council was competent to examine litigations between individuals, Egyptians and foreigners.

The system followed was not much different during the reign of the descendants of Mohammed Ali and their successors over Egypt and up to the last quarter of the Nineteenth century.

The mixed courts were instituted in 1875, a matter which narrowed the scope of jurisdiction of the domestic courts which were restricted to religious (Shari'i) and probate courts, having jurisdiction over guardians, tutors, curators and, the Majlis Melli having jurisdiction in personal status matters for non-Moslems. This deplorable fact made Egypt more determined to abolish these courts and unify the judiciary all over the country.

This was achieved with the 1937 Montreux Treaty pursuant to a transitory period which lasted twelve years. This treaty is considered the first in the history of the judiciary in modern Egypt.

The twentieth century has witnessed the issuance of the 1923 constitution which provided for an independent judicial power and a court of cassation was

¹ Dr. Mohammad Fathi Najib – Judicial Organization in Egypt, 2003 ed, p.16 ss;
Salim Hassan, Encyclopedia of Pharaonic Egypt, I.

established in 1931 followed by the State Council in 1946. The constitution abolished the Chari'I courts and the probate courts thus putting an end to the diversity of courts. The Supreme Court was instituted in 1968 which became later on the Supreme Constitutional Court. Consequently, the judiciary organization reached its present status.

Part one: Background and Methodology

I- The political, economical and social frameworks

The 1971 Egyptian constitution includes several principles on which is based the political, economical and social legal structure.

1.1- The Political Framework

The political system is based on plurality of political parties, regulated by law no 40/77 on political parties, which stressed on the right of Egyptians to form political parties and the right of all nationals to join any of these parties.

The president of the state is the cornerstone of the state administration. He is elected, under specific conditions provided for in articles 75 and 76 of the constitution; on an indirect basis by the members of the people's Council then the name of the eligible who obtained the trust of the council shall be subject to a plebiscite.

The constitution has in addition specified the different powers of the state including the judicial power to which the fourth chapter there of has been consecrated. The first chapter of Book seven, added later on deals with the State Council and commanded to seek its opinion for the amendment of the constitution.

1.2- The Economical Framework

The Egyptian community is based economically on principles set by the constitution and in conformity with a development scheme guaranteeing. The increase of the national income, justice in its repartition, increase the standard of living, eradicating unemployment and increasing job opportunities ... (article 23 of the constitution).

The constitution emphasized the people's domination over production means (art: 24), recognized the right to individual property, prohibiting its expropriation but for public interest and against a just remuneration, (art: 25), it also prohibited confiscation without a court decision (art: 26), made reference to cooperative property (art: 31) and the individual property which is protected and may not be subject to sequestration for reasons other than those mentioned in the law and pursuant to a court decision.

The year 1974 witnessed an important economical turn point towards liberal free economy through the enactment of law no 43 of 1974 on investment which gives the opportunity to Arab and foreign capital to operate in Egypt under a much stronger protection, prohibiting expropriation and confiscation, granting considerable tax exemptions and other economical facilities, thus opening the era of open economy.

Legislations have successively been enacted to accompany this period, whether concerning joint-stock companies, import and export, customs, stock exchange and the monetary market ...etc.

This was followed by a new period of more liberalization in the economical field, linked to the world economy, and this period was called the stage of privatization or, in other words, transfer public property projects to the private sector whether by offering it for sale locally or internationally. Legislations and regulations also accompanied this period covering all fields of basic structure projects such as roads, commutations and communications and the different means available to Arab and foreign money.

1.3- The Social Framework

The economic crisis has strongly affected the social field in the relationship between the state and the citizens namely in the sharp erosion of the middle class – cornerstone of the society – which has joined in majority the needy class. Despite the evident development of the basic structure in the fields of education, health, communication, and data technology; the increase of unemployment levels and the consequent problems arising therefrom including the raise in age of marriage, the insufficiency of income to meet the basic necessities in addition to the increasing tendency of employing mature persons under pretext of protecting skills and experience whether by raising the age of retirement or extending the employment contract, for five years over and above the age of retirement, has caused the decrease in opportunities to young persons to work, to gain experience or even to be promoted and to seriously participate in the development of the nation.

Although the government has increased its expenditure on education, still the problem of private lessons constitutes the biggest burden on the budget of the Egyptian family occupying the prime priority on all other expense items in the said family budget.

Judges who are members of the community are living economic and social conditions which affects them as it does with other members of the community. The judge who has extended the age of retirement to 68 years is at the same time father of a student, in one of the different education stages, and suffers the burden of private lessons, from unemployment of his son after graduation from the university and from marriage of his son or daughter at a later age. The depreciation of the Egyptian pound has caused the erosion of his income and consequently his inability in facing the increasing needs, bearing in mind that most judges belong to the middle class.

Part Two: The Legal Basis of the Actual Judiciary System

A- Law Provisions

I – The Constitution

The actual permanent constitution, in its chapter four untitled "The Judicial Power", has organized the judiciary as an independent power endowed with independent judges irrevocable from their office and has prohibited immixion in court actions and in matters concerning justice.

The constitution made reference to the State Council and its jurisdiction in deciding administrative litigations. It also referred to the Supreme judiciary council, presided by the president of the Republic, who is consulted on draft legislations organizing the judiciary. This council was instituted by law no 82/79 which organized its jurisdiction.

In chapter five thereof, reference was made to the supreme constitutional court and exclusively reserving for it the judicial control of the constitutionality of laws and regulations and the interpretation of law provisions.

The constitutional court as well as the state council being instituted by provisions in the constitution itself makes them constitutional institutions part of the judicial power on equal stand with both the executive and the legislative powers and prevents the latter from dominating the two other powers under pretext that it is the higher authority.

The writers of the constitution have taken care to mention in the declaration deed that "the supremacy of the law is not only a prerequisite for the liberty of the individual but also the only basis for legitimacy of the governing authority". Book one of the constitution entitled "Supremacy of the law" made reference that this supremacy is the basis of governing the state and that the independence of the judiciary and its immunity are two basic guarantees for the protection of rights and freedoms, a warrant of the right of all persons to go to court, a guarantee of the right of defense and an incrimination of the public servants who refuse to implement court decisions.

The independence of the judiciary, ever since the constitutional declaration in 1953, is a constant principle.

It is noticed also, in reading the different provisions of the different constitutions that the official role of the judiciary power is nothing but to settle disputes², it is indepenence the guarantee for the protection of rights and freedoms.

These constitutions have mentioned that the law determine the jurisdiction of this power which means that the judiciary is bound by the law provisions and cannot move outside the scope of these provisions.

² Dr. Ali Zahran – Who rules Egypt; 1993 ed., p. 208, for more details.

The truth of the matter is that the different powers interfere in the acts of the judicial power which limits such independence. Article 167 of the constitution stipulates that "the law determines the judiciary bodies and their jurisdiction and regulates the method of their formation and specifies the conditions and procedure of nomination transfer of their members".

It would have been better that the constitution itself specifies the criteria of using such right³.

II- The Law on the Judiciary and the Laws on the Different National Judicial bodies

- Law no. 82/79 establishing and organizing the state council.
- Law on the judicial power no. 46 of 1972 with its amendments.
- Law no. 47 of 1972 on the state council.
- Law no. 48 of 1979 amended by law no. 168 of 1998 instituting the supreme constitutional court.
- Law no. 95 of 1980 establishing the court of values.
- Law no. 25 of 1966 and its amendments on military rule.
- Law no. 40 of 1977 on the organization of political parties and establishing the court of political parties.
- Law no. 10 of 1986 on the state legal department.
- Law no. 12 of 1989 concerning the general administrative prosecution.
- Law no. 82 of 1969 establishing and organizing the supreme council of judicature by application of article 173 of the constitution.

III- Treaties and international conventions

A part from bilateral treaties and the judicial agreements with the different Nations, Egypt has adhered to the following agreements:

1. The Universal declaration of Human Rights, approved by the United Nations in 1948, namely article eight thereof.
2. The United Nations declaration to eradicate all kinds of racial discrimination, issued in 1963, article 7/2.
3. Abolition of slavery agreement of 1926.
4. International convention on the prevention and punishment human genocide.
5. International conventions on forced labor for the years, 1930 and 1957.
6. International convention against the trade of persons and prostitution (1950).
7. International convention on the elimination of all forms of raced discrimination (1966).
8. The United Nations International convention on the prevention and punishment of racial exclusion (1973).
9. International convention on the status of refugees (1951).
10. The protocol amending the international convention on the status of refugees (1967).

³ The Arab Center for the independence of the judiciary and lawyers, a study on the website of prof Atef El Chahat, www.acijlp.org/23a.html

11. The international covenant on civil and political rights (1966).
12. The international covenant on economic, social and cultural rights (1966).
13. The international convention on the elimination of all forms of discrimination against women (1967).
14. The international convention on political rights to women (1953).
15. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
16. The international convention on children rights (1990).
17. The international convention against racial discrimination in sport events(UN 1985) .
18. The international convention on the rights on migrant workers and their families.
19. The African chart of human and population rights (1980).
20. The Arab chart of child rights (1983).
21. Agreement on notifications and judiciary mandates (Arab league 52).
22. Agreement on extradition of criminals (Arab league 1952).
23. Agreement on enforcement of judgments (Arab league 1952 and 1959).
24. Agreement on prevention of non-national organized crimes (UN 2000).

B- Judiciary Organization

I- The Ordinary Courts

1- The Supreme Constitutional Court

Article 3 of law no. 49/79 stipulates that the court shall be composed of a president and a sufficient number of assessors. The quorum required for its judgments and decisions is seven members. The meetings shall be presided by the president or the oldest member. The court's jurisdiction is restricted to:

- 1) Judicial control over the constitutionality of laws and regulations;
- 2) Settle conflicts of jurisdiction by designating the competent authority;
- 3) Settle disputes arising from the implementation of two opposed judgments, one issued by any judiciary body or one of judicial competence and the other from any other authority.

The court's jurisdiction includes also the interpretation of law provisions enacted by the legislative power as well as the decree-laws issued by the president of the Republic in compliance with the constitution provisions, should there arise a conflict in their application and are of such importance as it requires a uniform interpretation (art: 26).

The court's committee of provisional matters or the general assembly sitting as a disciplinary court is competent to examine the charges imputed to one of the members which may impair confidence or prestige or may constitute a breach of his duties (art: 19).

2- Civil, Commercial and Criminal Tribunals

Article one of law no. 46/72 provides that courts are composed of:

- A court of cassation.
- First instance courts.
- Courts of appeal.
- Courts of summary jurisdiction.

Each court has jurisdiction to examine matters submitted to it, in compliance with the law. These courts, of whatever degree, are competent to examine all litigations and crimes except those excepted by a special law provision (art: 15). The code of civil and commercial procedure and the code of criminal procedure shall fix the rules of the courts' jurisdiction (art: 15/2).

3- State Council Courts

Law no. 47/72 has regulated the judicial section of the state council. Article 3 thereof stipulates that the judicial body shall be composed of:

- The supreme administrative court.
- The court of administrative jurisdiction.
- The administrative courts.
- Disciplinary courts.
- The state commissioners' body.

Courts of the state council shall, to the exclusion of all others, have jurisdiction to settle all matters specified in article 10 which includes 13 paragraphs to which was added a 14th paragraph: "all administrative disputes". Article 11 has excepted all claims relating to sovereignty.

Articles 13 to 23 have allowed jurisdiction between the different courts in the state council.

II- Courts of Extraordinary Jurisdiction

1- Military Courts

Law no. 25 of 1966 instituting martial law, has organized Military courts as follows:

- 1) The supreme military court.
- 2) The central military court with supreme authority.
- 3) The central military court.

The supreme military court is composed of three judges presided by the older (art: 44).

The central military court with supreme jurisdiction is composed of a single judge (art: 45).

The central military court is composed of a single judge (art: 46).

In special circumstance and by order of the competent officer, the supreme military court may be composed of five officers, the central military court with supreme authority of three officers (art: 47).

Jurisdiction is attributed by law, however the law referred to above includes a peculiar provision stipulating that "the military judicial authority shall exclusively decide whether the crime falls, or not, within its jurisdiction (art: 48).

The supreme military court shall have jurisdiction on (1) all crimes perpetrated by an officer or to which he participated, (2) felonies falling within the jurisdiction of the military courts in accordance with this law (art: 5). The central military court with supreme authority shall be competent to examine all felonies included, by law, in the jurisdiction of the military courts which maximum penalty does not exceed imprisonment (art: 52). The central military court shall by virtue of the law be competent to examine misdemeanors and contraventions.

2- Courts of Values

Law no. 95/80, on protection of values, provides in article 27 that "the court of values shall be composed of seven members presided by one of the vice-presidents of the court of cassation, and the membership of three counselors of the court of cassation or the courts of appeal and three public personalities.

The supreme court of values shall be composed of nine members presided by one of the vice presidents of the court of cassation and the membership of four counselors of the court of cassation or the courts of appeal and four public personalities. The formation of the court shall be regulated, at the beginning of each judicial year, by decision of the minister of justice after approval of the supreme council of judicature ..."

The court of values shall have jurisdiction on:

- (1) settling all claims submitted by the attorney general in accordance with article 16 of law no. 95/80;
- (2) All courts of jurisdiction of the court as prescribed by law no. 34/71 on imposing security and safety of the people.
- (3) Deciding upon orders and guarantees issued or submitted in accordance with this law.
- (4) Settling disputes in the instances mentioned in paragraph 2 of article two of law no. 53/72 on liquidation of sequestrations.
- (5) Settling complaints against the measures taken in accordance with article 74 of the constitution.

The supreme court of values shall have jurisdiction to examine the appeals from the decisions given by the court of values.

3- Political Parties Court

This court has been established by virtue of article 8 of law no. 40 of 1977 relative to the organization of political parties. The court is formed of the first.

Chamber of the supreme administrative court presided by the president of the state council and the membership of an equal number of public personalities appointed by decision of the minister of justice after approval of the supreme council of judicature.

This court shall have jurisdiction on appeals, submitted by the person requesting the foundation of a political party, against the rejection of his request.

Part Three – Scrutiny of the position of the judiciary in the light of the ten probity principles

1. The Guarantee of Judicial Independence
2. Institutional and Personal/Decisional Independence of the Judges
3. Adequate Training and Continuing Legal Education
4. Adequate Qualifications and Objectives and Transparent Selection Process
5. Income and Asset Disclosure
6. Conflict of Interest Rules
7. The Right to a Fair Trial, Equality Under the Law and Access to Justice
8. Fair and Effective Enforcement of Judgments
9. Public Access to Legal and Judicial Information
10. Judicial Access to Legal and Judicial Information

These are divided into two basic parts, the first concerns the judiciary system and the second is relative to the person of the judge.

A- Principles Relating to the Independence of the Judicial Power

1- The Guarantee of Judicial Independence

The Egyptian constitution has guaranteed the independence and immunity of the judiciary (art: 65) as well as the equal rights of all before the law (art: 40). The constitution further guarantees the right to go to court and prohibits the immunity of any act or administrative decision from judicial control (articles 68 and 69) and approves the principle that each accused is innocent until he is found guilty by virtue of a due legal process (art: 67).

Law no. 81 of 1969 has been issued organizing the Supreme Court thus guaranteeing the supremacy of law and the right to have recourse to court even at the level of attacking the constitutionality of laws.

The supreme constitutional court has replaced the Supreme Court in accordance with law no. 48/79 which guaranteed the right to go to court at any judicial level. The text of article 15 of the law on the judicial power, however, needs review since it provides that "Except for the exclusions of administrative litigations

falling within the jurisdiction of the state council, courts are competent to decide upon any litigations or crime except those excluded by a special provision".

These exclusions were left to the discretion of the court to determine, a matter which constitutes a wide discretionary power going beyond the scope of the judiciary thus trespassing on the rights of the citizens.

The same could be said about law no. 25 of 1966, known as the martial law whose application should be restricted to strictly military crimes and the approval of lodging appeals against the military judgments which obey to the system of objection and confirmation. This matter constitutes an infringement to the principle of the multiplicity of litigation degrees. This law, however, authorizes the submission of a plea of review before the confirmation of the judgment. This plea is not admitted unless it is based on a motive of violation of the law or a misapplication or wrong interpretation thereof or the existence of a procedural deficiency entailing an injustice to the accused (art: 113).

While mentioning that the constitution guaranteed the independence of the judiciary still it must include an express provision emphasizing the independence of military courts.

It is worthwhile mentioning the increasing importance of the role of the court of cassation and of the Supreme Court, followed by the constitutional court, in guaranteeing rights and condemning any attempt by the executive or legislative powers or individuals to interfere with such constitutional rights or violating same. It may be cited as an example, the judgment given by the supreme constitutional court, on 22/9/2002, declaring the unconstitutionality of article 4 of the decree – law no. 165/60, organizing the press, in relation with the provision considering that the decisions of the committee deciding the indemnity to be paid to newspapers, owners is final and without recourse.

Article 9 of the law on emergency allowed the president of the republic to refer to the supreme state security courts, crimes sanctioned by the public law thus violating article 40 of the constitution which provides for the principle of equality between citizens, from which derives the right of every citizen to have recourse to his ordinary judge, and prohibits all kinds of exceptional courts.

With reference to the above, it is worthwhile mentioning the basic amendment which occurred in 1998 on paragraph three of article 49 of law no. 48/79 relative to the constitutional court.

This amendment introduced by law no. 168/98 stipulates that "the decision of the unconstitutionality of a provision in a law or regulation entails its non-application on the day following the publication of the judgment, unless another date is specified therein.

The judgment declaring unconstitutional a tax provision shall, in all circumstances, have immediate effect without impairing the right of the claimant to benefit from the judgment declaring this provision unconstitutional".

This amendment constitutes a violation to the function of the constitutional court by assigning to it political functions which are totally incompatible with its status. Moreover, this amendment violates the constitutional principle of equality and constitutes a violation to the independence of the judicial power and to interests of individuals by giving precedence to the interests of the opposing party, which is the State, over those of the other party, the individual, in addition to the fact that it grants provisional legality to unconstitutional legislations.

B- Principles Relating to the Person of the Judge

2-Institutional and Personal/Decisional Independence of the Judges

The constitution guarantees independence and immunity of the judiciary as being two basic guarantees for the protection of rights and liberties (art: 65). Article 165 of the constitution further provided that "The judicial power is independent and is exercised by courts of all degrees ..."

Article 166 stipulates that "Judges are independent and are subject to no other power but that of the law. No other authority may interfere in court actions or in the affairs of justice".

The matter, however, is different in practice. In fact, the independence of the judiciary witnesses different sorts of violations, the most important of which is maintaining the exceptional tribunals in function by allowing non judges to participate in the formation of these tribunals such as the court of values, the supreme court of values instituted by law no. 95/80, being a court having a political character, the supreme court while examining the objections to the decisions of the committee of political parties affairs or, as mentioned above, referring civilians to military courts and granting the public prosecution a large jurisdiction in provisional detention or in interdiction of traveling abroad in the absence of a law regulating such interdiction.

This in addition to the violations perpetrated by the executive power represented by the unlimited authority given to the minister of justice by law no. 46 of 1972 on the judicial power, or the authority of the administrative president of the court.

2.1- Authority of the Minister of Justice

The following authorities are mentioned, inter alia but not exclusively:

- One of the two authorities charged with the nomination of the counselor to be appointed with the court of cassation (art: 44/4).
- Nomination of the vice-minister for judicial inspection (art: 46).
- Provisional delegation of one of the counsels of the court of appeals to sit in the court of cassation after approval of the supreme committee and the

general assembly from which he depends and the court of cassation (art: 55).

- Provisional delegation of one of the appeal counselors to sit in another court of appeal, after approval of the general assembly from which he depends and the supreme council (art: 56).
- Licensing a judge to reside in district of the court of first instance from which he depends (art: 76).
- The right to convene the supreme council of judicature (art: 77, bis 3).
- Prepare the list of judicial inspection with the approval of the supreme council (art: 78/2).
- Organizing the sanitary social services by decision of the minister of justice after approval of the supreme council (art: 92).
- The right of supervision over all courts and judges.
- The right to reprimand the president and judges of the courts of first instance.
- Take disciplinary legal action.

Violations originate also from the impact of publishing in newspapers pending investigations and actions in court. The rule adopted by the Egyptian legislator in this respect is that measures and court hearings and public unless the court decides, at its discretion, the secrecy of having. However, taking into consideration the oppressive effect of newspapers and information on the society and its unlimited influence on the orientation of the different situations and opinions, courts did not escape such influence. In fact, newspapers and magazines publish news about investigations and court actions, in the first or the most important page, together with the pictures and names of public prosecutors and judges, a matter which helps a lot, some of them to become famous paving the way to become members in social clubs or ready to exercise, later on, the law profession; while others go even further by accepting to comment on some pending crimes. That is how the expression "Public opinion cases" emerged and produced negative effects on some judges and consequently on their decision in the case at hand, thus impairing the independence of the judiciary.

It was necessary therefore to deal with this matter and restore the balance between the right of the public to information and the protection of the criminal case from the adverse effects of publication, specially that the Egyptian legislator⁴ did not define the matters which may affect the litigation and left the burden of this matter on the concerned individuals. The crisis seems to be in the tendency of the press in publishing these investigations to provoke and exaggerate in order to attract more readers and may precondemn the accused, a matter which participates in forming the public opinion which expects the judgment to be as channelled by the press otherwise it will cause a shock to the public opinion thus loosing confidence on which judgments should be based as an instrument of truth.

2.2- Authorities of the Administrative President

The major violation is directed from inside through the authorities and prerogatives given to the administrative president of the court, namely the

⁴ Dr. Jamal El Din El Oteify – Protection of the criminal case from the impact of publishing.

pecuniary advantages, which contradicts equality between those of the same standing.

In fact, the delegation to arbitration committees, to the directorates in charge of illicit profits, added to overtime, the unilateral expenses without limits, the multiple monetary advantages which takes several denominations such as treatments allowances, telephones, evening gatherings, production incentives, payments in lieu of leave ... etc and the different delegations to work in the different ministries of the executive power, which occurs more often in the state council, all these affects severely the independence of the judges. This is more so because the matter is most of the time in the hands of the administrative Body which unilaterally makes his choice, determines the period and the remunerations, in addition to the appointment of some judges to administrative positions as governors or fixes an exceptional retirement bonus when they reach the age of retirement without limits or control of the supreme council of judicature. The danger reaches its peak when "important" cases are submitted to the administrative president for opinion and recommendation!!

The decision given by the court of cassation in one of the oppositions to the elections of the people's council is only a sample of the interference from the president of the court where the president of the court of cassation appealed the decision of the court despite the fact that he is not legally entitled to do so and the court dismissed the appeal for lack of capacity to lodge the appeal.

3-Adequate Training and Continuing Legal Education

Towards the end of the last century, Egypt has given much attention to the habilitation and preparation of judges and, in this connection, the memorandum issued by the Egyptian minister of justice on December 7, 1882 mentioned that "they must have independence in giving their opinion which cannot be achieved unless they have more knowledge and cognizance than all other public servants". The habilitation of the judge before exercising his duties as well as the continuity in habilitation and training is a major requisite due to the fact that the judge is one of the fillers of justice and equity. Studies in law schools require more development in order to be adequate to the proper preparation of a legal practitioner whether he be a judge or a lawyer⁵.

Needless to dig deeply in historical details to corroborate this fact, we are only concerned with the republican decree no. 347/1981 enacted on 24/6/1981, establishing the national center for judicial studies scheduled to operate as of 1/10/1981 performing the following:

- (1) Prepare and train members of the judiciary and habilitate them theoretically and practically to exercise the judicial duties.
- (2) Raise the technical and practical standards of assistants.
- (3) Group, publish and conserve documents, legislations, researches, legal information and principles and other material which may assist in the good performance of justice. In accordance with article 19 of the decree

⁵ For more details, habilitation of judges – counselor Samir Naji, an essay submitted to the convention for developing legal studies and professional preparatory of judges and lawyers, October 2002.

referred to above, the duration of studies is twelve months for assistants and auxiliaries of the public prosecution and other judicial bodies. The center is presided by the minister of justice and aims to be transformed to a judicial academy⁶ qualified within the limits of the resources available, to meet its responsibilities in preparing judges, prosecutors and other judicial bodies, adequately to perform their duties and responsibilities.

This requires an adequate budget which is not, to our knowledge, yet available in view of the huge size of the project, hoping that it will be soon available in order that the prosecution and the judiciary shall give access to assistants unless they spend a full year at least in the center and pass successfully the examinations. These assistants shall not be promoted as judges or members of the prosecution unless they have spent a minimum of one month in a serious training program, passed successfully, in addition to the specialized training sessions. The training programs are prepared by the persons in charge of the center for judicial studies who are judges but they are not consulted on the program which is deplorable and can be remedied specially that there are new domains in law which require preparation and training namely intellectual property laws, subsidies and damping, commercial arbitration, human rights conventions and their effect on the local legislations ...etc.

- The center for judicial studies is actually preparing special programs for each judicial body. The subjects instructed to members of the public prosecution comprise the following: some selected subjects of the criminal code and criminal procedure code due to its practical importance and the problems raised in implementation thereof.
- A survey of some crimes in the private section of the criminal code.
- A survey of some laws complementing the criminal code.
- Applied criminal investigation and characteristics of the investigator.
- Motivation of decisions and incarceration.
- Doctrinal principles.
- Judicial logics.
- The organizational structure of the public prosecution, the prosecution instructions, schedules and registers.
- The Moslem criminal law and its application personal status and custody on person and property.
- Law on juveniles.
- Forensic medicine, material evidence and studies on counterfeiting and forgery.
- Criminal psychology.
- Criminal science.
- Criminality law (law on prisons).
- Pleadings deontology.
- Judicial deontology.
- Judicial values and traditions.

In addition to teaching the French language, some juridical terms and principles of computer science.

⁶ Article (2) of the republican decree 437/1981, establishing the national center for judicial studies.

The program was divided into two equal parts in time, one for the public lectures in the above items and the other for practical training on factual cases dispensed to small groups and includes the different kinds of crimes, training of incoming daily cases. The session also comprised some open interview taking the form of seminars, debates and discussion of doctorate thesis.

As to the new judges, training comprises the following subjects:

- Applied aspects of civil and commercial pleadings.
- Applied aspects of criminal procedure and practical problem.
- Applied aspects of the civil code.
- Criminal in civil matters.
- Selected subjects in commercial law.
- Criteria and defects of motivation of judgments.
- Personal status.
- Custody on property.
- Method of conducting hearings and deliberations and issuing judgments.
- The judge in charge of execution.

The above subjects and the contents of each have been selected by a number of the highly ranked judges of the courts of cassation and appeals who have taken in charge the burden of teaching in the center, each according to his specialization.

Evaluation of the students shall take place at the end of the cycle and the administration of judicial inspection shall be kept informed of the result.

It goes without saying that a huge development awaits the studies center, nevertheless it plays an important role in raising the standard of judges but it is necessary to believe in the policy of continuous training and should include newly appointed judges of higher standards.

4-Adequate Qualifications and Objectives and Transparent Selection Process

The code of civil and commercial procedures regulates the appointment of judges in ordinary courts, their promotion, delegation, fixing their salaries and remunerations.

The law has charged the administration of judicial inspection at the ministry of justice to subject the judges to inspection and control in accordance with a regulation to be issued by the minister of justice with approval of the supreme council of judicature (art: 78). Article 93 has empowered the minister of justice to supervise all courts and judges.

As concerns judges of the state council, law no. 72/47, organizing the judicial section of the said council has provided for the appointment, promotion, transfer, delegation and secondment of said judges. Article 99 of this law provided for the organization of inscription measures on members of the state council taken by the administration of the technical inspection presided by one of the vice-presidents of the council. A disciplinary council, provided for in article 112, and presided by the president of the council, shall be in charge of taking disciplinary measures against the council members, if need be.

The republican decree-law no. 46/72 on the judicial authority has regulated the accountability of judges and their subjection to disciplinary measures.

I- Authority of the President of the Court

Article 94 has given the president of the court, by his own motion or pursuant to a decision of the general assembly of the court, the right to warn the judges, of whatever acts taken by them which are in violation of their duties and the requirements of their functions, after hearing their statements. This warning may be oral or in writing and, in the latter case, the minister of justice should be informed.

II- Authority of the Minister of Justice

The minister of justice, in accordance with paragraph 4 of article 94 has the right to warn the presidents of the first instance courts and the judges thereof, after hearing their statements, and in case of recurrence of the infringement in the two above mentioned instances or in case of continuity after the final warning, a disciplinary action shall be instituted.

The same article allowed the judge to file an objection with the committee provided for in paragraph 2 of article six of the law no. 82/69, concerning the supreme council of judicature, which stipulates that: "The council shall determine the rules which it shall follow in the exercise of its jurisdiction. The council shall form a committee of five members for each of the judicial bodies which shall be competent to study appointments, promotions, transfer and complaints in matters falling within the jurisdiction of the council, prior to submitting same to it. The formation of the special committee for each judicial body shall include all its representatives in the council then the oldest member ..."

Article 98 stipulates that "disciplinary action against the judges of all degrees shall be within the jurisdiction of the disciplinary council which shall be formed as follows:

- The president of the court of cassation president.
- The oldest of the presidents of the court of appeal.
- The oldest of the counselors of the court of cassation members.

The disciplinary action shall be instituted by the public prosecutor upon request from the minister of justice, on his own motion or upon recommendation of the president of the court of which the judge depends.

Such request shall be submitted after a criminal or administrative investigation taken by one of the vice-presidents of the court of cassation or the president of the court of appeals delegated by the minister of justice, with respect to counselors, or a counselor of the administration of judicial inspection, with respect to presidents and judges of the court of first instance ... (art: 99).

Articles from 100 to 115 regulate the disciplinary trial which should be kept secret (art: 106). The resignation of the judge or his referral to retirement shall terminate the trial (art: 104). The trial shall be attended by the judge in person and he may submit his defense in writing or appoint for his defense one of the members of the judiciary other than the counselors of the court of cassation (art: 106). The sentence should be recorded in writing and include the reasons on which it is based (art: 107). This sentence is not subject to any appeal and the sanctions to be taken against the judge are admonition and discharge (art: 108).

Article 127 regulates the disciplinary action against the members of the council of prosecutors in the same manner as provided in article 98 concerning judges.

The decree issued by the president of the Egyptian Republic no. 47 of 1972 on the State council has regulated, in article 112, the disciplinary action to be taken against the members of the State council. This article stipulates that "shall be competent to take disciplinary action against the members of the State council, a disciplinary council formed as follows:

- The president of the State council president.
- Six of the vice presidents of the council by order of seniority members.

The disciplinary action shall be instituted by the vice-president of the State council for the administration of technical inspection on basis of a criminal or administrative investigation taken by one of the vice-presidents of the council, with respect to counselors, and a counselor with respect to all other council members (art: 113).

The disciplinary action shall terminate by the resignation of the member or this referral to retirement (art: 117). The trial hearings shall be secret (art: 118). The member shall be present in person and he may submit his defense in writing or appoint for his defense one of the council members (art: 118). The sentence should include the reasons on which it is based and shall be given in a secret hearing. The judgment given in the disciplinary action is final and not subject to any mode of appeal (art: 119). The disciplinary sanctions are admonition and discharge (art: 120).

Article (19/20) of law no. 48 of 1979 establishing the supreme constitutional court regulates the disciplinary action to be taken against the members of the courts. Article (19) stipulates that "if it is imputed to one of the court members a charge which may affect confidence or esteem or if it concerns a serious break of duties or requirements of his function, the president of the court shall refer the matter to the committee of provisional affairs in the court.

Should the committee, pursuant to convocation of the member to appear in order to hear his statement, decide that there is a ground to pursue the proceedings, it delegates one of its members or "committee of three of them to investigate".

The member referred to investigation shall be considered on forced leave with full salary from the date of this decision.

After closing the investigation, it shall be referred to the general assembly sitting as a disciplinary court, excepting those who have participated in the investigation or indictment, in order to issue, after hearing the defense of referring him to retirement from the date of said judgment. The judgment is final and is not subject to any form of appeal.

Article (20) of the said law stipulates that "the general assembly of the court shall have the jurisdiction given to the committee provided for in article 95 and 96 of the law on the judiciary as well as the jurisdiction of the disciplinary council provided for in article 97 of the said laws". Once the disciplinary charge is established, the sanction shall be restricted to referral to retirement (art: 19/3).

It is to be noted that the legislator has attributed the judicial nature on the process before the disciplinary council, and has considered as judicial judgments, the sentence issued by the council which, consequently, is not considered an administrative decision subject to appeal.

The legislator distinguishes the investigation from the criminal trial stages on account of a crime committed by the judge. The disciplinary council may, on his own motion or upon request of the ministry of justice or the president of the court or upon a resolution of the general assembly, decide to suspend the judge from resuming his functions or deprive him from half of his salary and the council may review any of these two sanctions in accordance with article (97) of the law on the judiciary.

The council may during the disciplinary trial review either or both of those sanctions, at any time, in accordance with article (103) of the law referred to above and, at this stage, the council may not deprive the judge from half of his salary since the legislation did not give him this authority, as is the case according to article (97).

The law on the judiciary no. 46/72 has provided for the appointment, transfer, and taking disciplinary measures against the members of the public prosecution who cannot be discharged from office (art: 67 replaced by law no. 35/84).

The law also provided for the institution of an administration for judiciary inspection, depending of the ministry of justice, to evaluate the work of judges (art: 78) and granted in article 93, the ministry of justice, the right of supervision on all courts and judges.

As concerns military judges, law no. 25/67 (martial law) provided that they be appointed from the armed force officers (art: 55) for a renewable period of two years.

Article 38 of the law on the judiciary has restricted the appointment of judges on Egyptian nationals having full civil capacity, attaining thirty years of age, with respect to first instance judges; thirty eight, with respect to counselors at the court of appeals; and forty three as concerns counselors at the court of cassation. This in addition to technical habilitation in law i.e., the obtention of a license in law from one of the law faculties of Egyptian universities or from a foreign university subject to a decision from the supreme council of universities considering the license issued by it equivalent to that issued by Egyptian universities and after passing successfully the equivalence test.

Furthermore, the judge should be of good morality not condemned for a dishonorable act, even if rehabilitated, and be of good reputation.

Precise inquiries shall be made by employees of the ministry of interior covering the morality of the family and relatives of the candidate. This means that the result of these inquiries is not sometimes immune from positive or negative moody judgment.

Article 167 of the Egyptian constitution stipulates that. "The law shall determine the judicial organizations and the jurisdiction, the mode of formation thereof as well as the conditions and procedure of appointing and transferring their members".

Law no. 46 of 1972, known as the law on judiciary amended by law no. 35/1984 concerning judges, has provided in article 44 that the filling of judicial functions, whether by appointment or promotion, shall be made by decree of the president of the republic. It further provided that the president of the court of cassation shall be appointed from among the vice-presidents of the court, after consulting the supreme judiciary council, and the counselors at the court of cassation shall be appointed with the approval of the supreme judiciary council, from the two candidates of whom one is proposed by the general assembly of the court of cassation and the other by the minister of justice. The appointment of the presidents of the court of appeals as well as their deputies and counselors as well as the presidents of the first instance courts and the judges shall be made with the approval of the supreme council of judicature. The appointment shall take effect as of the date of approval or the date of obtaining the opinion of the supreme council of judicature.

The law does not include any provision standing as an obstacle towards the nomination of women to the different judicial functions. As a matter of fact, the president of the republic has issued a decree appointing counselor Tahani El Jubali as counselor at the supreme constitutional court in 2003 as the first female judge. This is only a first step still awaiting subsequent ones in the other judicial organizations.

Law no. 46/72 (law on the judiciary) allowed the appointment of judges from among lawyers (articles 39/5 – 4/c – 41/first/c – second/c – third/c, fourth/c and 43/c).

Article 47 provides that "when appointing to the function of judge at the court of first instance, the appointment of lawyers exercising their profession may not, in proportion, fall below one quarter".

Likewise, law no. 47/72 concerning the state council, articles 75/5 – 76/d – 77/d – 78/d – 79/5 – 80/d; or members of the teaching staff in law faculties (articles 39/f – 41/first/f – second/f – third/f – fourth/f – 43/b of the law on the judiciary) and (articles 75/c – 76/c – 77/c – 78/c – 79/c – 80/c and article 4/d of law no. 48/79 establishing the constitutional court).

Members of the public prosecution shall be appointed by a presidential decree upon nomination from the minister of justice and after consulting the general public prosecutor and the approval of the supreme council of judicature. The law allowed the appointment of lawyers in the functions of the public prosecution should they fulfill

the conditions required and pass successfully the required examinations. The proportion of appointment from among the lawyers should not, however, fall below one quarter for the function of deputy general prosecutor of below (art. 118 of the law on the judiciary).

The provisions concerning the appointment of lawyers in the different judicial functions mentioned in the law on the judiciary are still not operative. The proportion provided above is however reached from the assistant prosecutors whose appointment is delayed since most of them have joined the Bar Association but did not exercise the law profession as required by article 47 of the law on the judiciary.

It is to be noted that a considerable member of police officer are chosen to work at the general prosecution department and the choice is made according to a lesser criteria as far as the objective conditions are concerned.

It is also noticed that the appointment of sons of judges and counselors, whether in the general prosecution department or the state council and the other judicial organizations, has spread out despite the fact that they do not fulfill the required conditions to the exception of the general evaluation on graduation. This phenomenon is due to lack of organizational provisions and it did expand to reach the judiciary after spreading out to large sectors of the society.

All judicial organizations and the courts are employing a considerable member of assistants, employees, secretaries and administrative personnel a matter which constitutes a net and tangible increase in the administrative labor force while all these organizations, with the exception of the supreme constitutional court, accuse a shortage in the member of judges and prosecutors despite the increase in the number of appointees in the last five years.

Another phenomenon to be noticed is the reliance on handwork in courts instead of computers despite the economy in effort and the other considerable advantages. A law has been issued in 1990 to this effect but it did not yet come into effect.

5-Income and Asset Disclosure

I- Income

The salaries of judges constitute a problem difficult to solve necessitating a comprehensive confrontation. Law no 46 of 1972, known as the law on the judiciary, has included provisions on schedules of functions, salaries and allowances. This law was however replaced by law no 32 of 1983 which fixed the salaries of judges of all degrees such as, for example, the salary of the presidents of the court of cassation and of the Cairo court of appeal and the general public prosecutor (top of the schedule) to 2868 Egyptian pounds as representation allowance with a yearly increase at a fixed percentage of the salary. The salary of the assistant prosecutor (bottom of the schedule) is 516 Egyptian pounds in addition to an amount of 108 Egyptian pounds as judicial and yearly allowances.

As concerns the State council, the schedule annexed to law no. 47/77 fixes the salary of the council's president (top of the schedule) to 2500 Egyptian pounds per year plus 2000 pounds as a yearly representation allowance while the salary of the deputy assistant (bottom of the schedule) varies between 648 and 900 Egyptian pounds in addition to 129.60 pounds as judicial allowance and 36 pounds as yearly allowance.

The schedule, annexed to the law concerning the constitutional court, fixes the salary of the court's president by decree of the president of the republic. Such a decree has been issued sub no. 230 of 2003 appointing the actual president and fixing his degree as a minister and his salary does not exceed that of the president of the court of cassation or that of the president of the state council. The salary of a judge member of the court varies between 2200 Egyptian pounds and 2500 pounds per year in addition to an amount varying between 1500 pounds and 2000 pounds as a yearly representation allowance.

If we take into consideration that the parity of the dollar to the Egyptian pound is approximately 6.20 this means that the salary of an employee of first degree in addition to the representation bonus equals an amount of U.S. \$ 785.16 per year or about \$ 65.50 per month. These figures are mentioned without comment and indicate the importance of the other allowances such as health care, telephones, books, production incentives and additional bonuses and others.

II- Income Declaration

Article one of law no. 62/75, on illicit profits, provides that "are subjected to this law the following categories: (1) those assuming the burden of public authority ..." and since the judicial organizations constitute the basic element in the judicial power, which is one of the public authorities provided for in the constitution; and since those in charge of it are considered among those assuming the burden of public authority; therefore clause (1) of paragraph (1) of article one applies to them.

The above statement indicates that each of the above mentioned has, upon appointment to submit what is called "Declaration of assets" including his assets and those of his spouse and minor children. The undertakes, in January which follows the lapse of the five years subsequent to the submission of the first declaration and thus every five years to submit a further declaration (art: 3). Should the committee in charge of examining the declaration have strong suspicions indicating an illicit profit, the documents shall be referred to the competent body to start the investigation and may delegate to the public prosecution the investigation on specific points (art: 10) should the investigation reveal that there is evidence as to an illicit profit, the matter shall be referred to the competent court for trial.

The practice reveals that there is in fact an administration at the ministry of justice in charge of this matter still several of the members of judicial organizations do not persevere in submitting these declarations. There has not been a single referral of any such case, even if some of the bribed judges have been arrested, to the administration of illicit profit despite the fact that they have been subjected to criminal investigation and even condemned. Likewise none of the persons refraining from submitting the declaration was referred to investigation or have been subject to

any measures in spite of the existence of indications that there is an unjustified increase in their assets, a matter which is contrary to the principles of honesty and integrity and affects adversely the general view of the society towards such judges and may be also to the judiciary as a whole.

6-Conflict of Interest Rules

Article 72 of law no. 46/72, on the judiciary, provides that "A judge may neither perform any commercial act or any act which is incompatible with the independence and dignity of the judiciary. The supreme judiciary council may decide to prevent the judge from exercising any act which it deems that performance of such act is inconsistent with the duties of his function and good performance thereof".

Article 72 stipulates that "It is forbidden to courts to express political opinions and it is also prohibited for judges to do any political activity. They may not submit their candidature to the elections of the people's council or the regional or political organizations before they submit their resignation".

Article 75 provides that "Judges who are linked with each other by ties of parenthood or alliance by marriage up to the fourth degree may not sit in the same judicial circuit. The representative of the public prosecution or of one of the parties as well as the person in charge of his defense, may not be one who is tied up by such relationship with any of the judges examining the case. The proxy of an attorney at law, who entertains such relationship with the judge, shall be disregarded unless the proxy was given after examination of the case by the judge".

Articles 94 and 95 of the law on the state council reiterate the same provisions as those referred to in articles 72 and 73 of the law on the judiciary.

C- Principles relating to justice in trial and to the protection of rights

7-The Right to a Fair Trial, Equality Under the Law and Access to Justice

Article 18 of the law on the judiciary and article 268 of the code of criminal procedure provide that "hearings shall be public, nevertheless the court may, for public policy considerations or for preserving morality, order to hear the case, in total or in part, in a closed (secret) hearing or may prevent certain categories of persons to assist".

The press is allowed to photograph or record the hearings unless the court decides otherwise. Most judges welcome such matter and we can see complete hearings telecasted. The public is also allowed to attend the hearing.

Article 269 of the code of criminal procedure has imposed as a condition the attendance of one of the public prosecution members the hearings at the criminal court. The court shall listen to his statements and decide upon his claims. The accused shall attend the hearings uncuffed and unchained and he may not be excluded from the hearings during the examination of the case unless he caused a disorder necessitating such measure. In this case, the proceedings shall continue until it is

possible to resume them in his presence. The court may keep him informed of the procedures taken in his absence (art: 270).

The law also allowed the public prosecution, the victim and the civil claimant in the case to interrogate the witnesses but the accused may not be interrogated unless he consents.

Article 125/2 of the code of criminal procedure stipulates that "in all instances the victim may not be separated from his attorney present with him during the investigation". This principle is based on the fact that the victim and his attorney are two sides to the same coin and since the procedures take place publicly they bind both the victim and his attorney. Any departure from this principle entails a violation to the rights of defense guaranteed to the accused by the constitution. Consequently, the principal is allowed to attend the investigation and he is entitled to seek assistance of this attorney and therefore there is interest in separating the principal from his attorney in any of the investigation procedures.

The Egyptian constitution, article (71), allows "the notification, of the arrested incarcerated person, of the motives of such arrest or incarceration and this person has the right to contact whoever he wants to inform him of what happened or to seek his assistance within the law and the accused should promptly be notified of the charges against him ..."

The supreme constitutional court decided that "every arrested or incarcerated person shall have the right to contact third persons to inform him of what happened or to seek his assistance in the manner regulated by law, which means guaranteeing his right to obtain the legal opinion of the lawyer of his choice which opinion is necessary to give him confidence and effective assistance required to eradicate any suspicion and make him face the conditions imposed upon him by the public authority on his personal freedom, thus justifying that he may not be separated from his attorney whether during the preliminary investigation or before it".

The law has imposed the presence of a lawyer with each accused of a felon and, in case the accused is unable to appoint a lawyer, the court shall delegate to him a lawyer and shall fix his fees.

It is advisable that this protection extends to misdemeanors since some of these are serious enough and necessitates the presence of a lawyer to guarantee to the accused the right of defense which is one of the essential rights.

In civil litigations, the right of defense is undoubtedly a sacred right since its object is to ensure equality in the procedural positions of the litigants in front of the judge. Should this principle be upset, the idea of justice itself shall be shaky. The principle of confrontation, which is one of the most important applications of the right of defense, necessitates notification as to the existence of litigation indoors or abroad.

The code of civil procedure has given sufficient importance to notification and has subjected it to judicial control.

The law also required from the judge to be impartial, to refrain from judging in accordance with his personal knowledge, to admit the right of the parties to the litigation to take knowledge of the documents submitted to the court (art: 52 of the law concerning lawyers). The law also requires, in most first instance cases to obtain the signature of the lawyer on the document introducing the case to court as well as the appeal report.

8-Fair and Effective Enforcement of Judgments

Procedural laws (the code of civil and commercial) procedures and the code of criminal procedures) have regulated the execution of judgments given by the different judicial organs. We are going to review each of these two codes successively.

I – Execution of judgments according to the code of civil and commercial procedures

The procedural code has given much attention to the execution of judgments and has devoted for this purpose book two of the procedural code from article 212 and on, in its four chapters. Chapter one is entitled general provisions divided into six sections: the judge of the execution, the executive title, summary execution, enforcing foreign judgments, place of execution and objections to execution. Chapter two is entitled arrestation. Chapter three deals with distress and regulates distraint and attachments of real property then some specific sales and ended with the distribution of execution proceeds.

In addition to this general regulation of the forced execution, the code dealt with execution on the State and juristic persons, in law no. 308 of 1955 modified by laws no 44/58, 181/58, 27/71 and 30/72 concerning administrative execution. It also dealt with execution on sea vessels in law no. 8 of 1990 issuing the Maritime Commercial law and execution on air vessels registered in Egypt, in law no. 16 of 1976. The provisions of the procedural code are considered of general application in the absence of a special law to this effect. This principle has been applied on judgments issued by the state council since the law on the state council contains no provision concerning the enforcement of its judgments.

Procedures concerning execution on movable or immovable property is subject to the general principle which is the simplicity of the procedures and their different applications, and rapidity, except that summary procedures in the execution on immovable property is not allowed due to the traditional theory concerning immovable property being of bigger value whether from a social or economic point of view.

In actual practice there is a struggle between the two points of views concerning execution as it was prior to the issuance of the judgment. Despite the fact that the legislator has instituted the office of the judge of execution still the objections to execution, such as deceit in notification, introducing new litigants who have nothing to do with the judgment subject of execution; in addition to the failure of reaching a satisfactory solution to the problem of persons in charge of execution, the manipulation of notifications and the tendency not to execute the judgment if it is given against the State or one of its organs constitute the majority of judgments

remaining without execution despite the existence of article 123 of the criminal code which stipulates that "shall be punished by imprisonment or discharge, every public servant intentionally refraining from executing a judgment, or any order referred to above, after the lapse of eight days from the date of his official notification by a court bailiff should the judgment or the order falls within the jurisdiction of the said public servant".

This provision reiterates the principle included in article 72 of the constitution providing that "judgments are issued and enforced in the name of the people. The refusal to execute the judgments or hindering their execution from the part of the competent servants constitute a crime sanctioned by law. The party who benefits from this judgment shall, in this case, have the right to institute directly a criminal action with the competent court".

The above provision of the criminal code has never been applied in practice since its appearance in the Egyptian legislation in 1937. This is due to the fact that the government is reticent to its application by putting some obstacles such as the necessity of notifying the minister at his residence, which is practically impossible and several other obstacles of that kind.

II- Execution in accordance with the code of criminal procedure

The code of criminal procedure consecrated book IV, articles 459 to 527 to execution. The first chapter deals with judgments which have to be executed (articles 459 to 469); the second chapter is reserved for execution of the death penalty (articles 470 to 477); the third chapter deals with enforcing the penalties restricting freedom (articles 478 to 490); the fifth chapter deals with execution of judgments condemning payment of specified amounts (art. 505 to 510); chapter six concerns bodily coercion (art. 511 to 523); chapter seven deals with objections to execution (art. 524 to 527) chapter four which was reserved to conditional release has been cancelled by article (90) of the decree – law no. 326/56, on prisons, issued by the president of the republic.

The rule referred to in article 460, criminal procedure, stipulated that "Unless otherwise provided by this law, judgments issued by criminal courts shall be enforced when they become final".

Article 463 provides that "judgments condemning to payment of a fine and expenses have to be immediately executed even if they are subject to appeal. The same applies to imprisonment in case of larceny or an accused recidivist if he has no fixed residence in Egypt, and in the other instances where the sanction included in the judgment is imprisonment unless the accused submits a guarantee engaging himself, in case of appeal, to be present at the hearings and undertakes not to escape from the execution of the judgment which shall be issued ...".

The law admits the issuance of judgments, in misdemeanors or felonies, in the absence of the condemned person, several problems arose due to the number of cases where there is no effort made to know the real address of the condemned during investigation and trial. This is also due to the fact that the prosecution refrains from notifying the judgments given in the absence of the condemned, and fails from

sending the list of executory judgments and the description of persons to be arrested to the police stations.

The increasing number of criminal judgments issued and requiring execution, whether they be rendered in absentia and not subject to opposition or final and should be executed, has made the ministry of interior to form a special group of people specialized in enforcing judgments but the number of criminal judgments awaiting execution, and despite the absence of precise statistics, exceed several thousands.

III- Death penalty

The Egyptian criminal legislation has provided for death penalty and referred to it in article (13) of the penal code issued by law no. 58 of 1937 by stipulating that "every person condemned to death penalty shall be hanged". Article (77) of the same code provides that "shall be sentenced to death penalty every person perpetrating intentionally an act leading to violation of its independence or the integrity of its territory".

Article 77 (a) stipulates that "shall be condemned to the death penalty every Egyptian joining, in whatever manner, the armed forces of a country in a state of war with Egypt".

Article 77 (b): "shall be sentenced to the death penalty, every person seeking in a foreign country or contacting it, or those working for its interest, to perform hostile acts against Egypt".

Article 77 (c): "shall be sentenced to the death penalty every person seeking in a foreign country, or contacting it or those working for its interest, to assist the said country in its military operations or to prejudice military operations of the Egyptian State".

Likewise, shall be condemned to death penalty every person perpetrating one of the crimes provided for in article 78 (a, b, or c) and article 80.

Article 83 (a) stipulates that "Death penalty applies to any crime provided for in chapter two - entitled felonies and misdemeanors perpetrated from abroad against the state security - should it impair the independence of the country, its unity or territorial security of if perpetrated in time of war with the intention to assist the enemy or to prejudice the war operations of the armed forces and if these acts aim at realizing the said objectives.

Death penalty is also applicable for any felony or misdemeanor nor provided for in the chapter whenever the perpetrator has the intention to assist the enemy or prejudice war operations of the armed forces and if theses acts aim at realizing the said objectives".

The same applies to article (86) bis (a) Terrorism, and articles 88 bis/4 and 88 bis (a) 3, 89, 91, 93, 102 (b) and 230". Any person committing murder, intentionally and with premeditation or observance shall be sentenced to death"; also articles 233,

234, 257 and 295 concerning the rapt of a female person with rape and the specific crimes provided for in the special criminal laws such as importing narcotics.

In view of the dangerous nature of this penalty, the legislation has encompassed it with certain guarantees in lieu of providing for its cancellation.

The code of criminal procedure in the articles from 470 to 477 has put a comprehensive scheme to these procedures among which the necessity to submit the matter through the minister of justice to the president of the republic whenever the death sentence becomes final. The president may issue an order of pardon or substitute the penalty (art. 470).

The execution of the death penalty must take place in the presence of the deputy public prosecutor, the prison warden, the doctor and lawyer of the condemned person. An official report to this effect shall be made and the condemned person has the right to record his statement (art: 474).

The execution of the death penalty sentence on a pregnant woman shall be suspended until two months after delivery (art; 475).

In most cases, the courts do not pronounce the death sentence unless the circumstances of the crime are of such danger and magnitude that the sentence becomes adequate to the crime perpetrated. Should the death sentence be given in the presence of the condemned, the public prosecution shall have the duty to submit the case to the court of cassation with its comments on the judgment, within the 60 days period allowed for appeal in cassation, then the court shall decide the case.

The judgment pronouncing the death penalty must be issued by a unanimous decision (art: 381/2 criminal procedure) otherwise it shall be considered null and void. The documents of the case shall then be referred to the Mufti of the republic for his opinion in the light of the facts established before the court.

A prevailing opinion in Egyptian criminal doctrine tends towards maintaining the death penalty on grounds that the divine laws in the different religions admit this penalty, in addition to the fact that these are crimes constituting such danger as to justify the application of this penalty.

D- Principles concerning the publication of legal data

9-Public Access to Legal and Judicial Information

The difficulty encountered by judges and lawmen to reach the legal data, whether it takes the form of a judgment or legislation, is much more present for the public since the media coverage is restricted to important legislations and judgments. The ordinary men supposed to abide by the rule "None is supposed to ignore the law" have to seek the information required amidst the irregularity of publication of the official gazette, a matter which made the first convention on justice of the judge's club to issue these recommendations:

- (1) The publication of the official gazette shall be restricted to issues having serial numbers without allowing supplements or issues bearing a repeated number.
- (2) Regular monthly all legislations, orders and regulations.
- (3) Establishing appropriate places all through the republic to sell the official gazette and the legislative publication as well as all other compendiums of legislations and orders.

10-Judicial Access to Legal and Judicial Information

The last statistics (January 2004) reveals that the number of legislations issued in Egypt has reached 232849 legislations among which 55106 are in force. This fact alone indicates the volume of effort spent to follow-up these legislations specially that the only means adopted is to acquire the issues of the official gazette in which these laws or government decisions are published. These two publications: the official gazette and the Wakaeh Al Masria despite the fact that they are regularly published still they are different to follow because of the issuance of more than one issue daily under different numbers such as "bis or bis (a), (b), (c) ... etc.

The judges' club has made available to judges a number of computer machines at an affordable price with facility of payment and has also signed an agreement with one of the software companies publishing these judgments and legislations on the internet to offer this service to all interested judges at a reduced price. Judges who are computer literate are keen to buy the C.D's containing such legislations from private companies at special reduced prices. The majority nevertheless are still depending on traditional means to search for legislations and judgments at the courts' libraries which are not up-to-date most of the times whether as concerns judgments, legislations or reference books.

It is worthwhile mentioning that the president of the court of cassation has notified the public prosecution of a company – with which the judges' club has signed a contract – having trespassed on the copyright of the technical office in charge of classifying and publishing the judgments and thus violated the intellectual property law. The case is still pending in courts (case no. 5894/2003 – Abdin, judgment to be given on 30/3/2004).

The educational committee at the judges' club has also made available law reference books and doctrinal studies at a reduced price. The ministry of justice is sponsoring such activity.

Laws concerning the judges themselves, such as those regulating discipline, transfer, delegation, appointment and pecuniary dues, are all distributed to them in form of circulars or advertisements delivered at their place of work or at the judges' clubs in the different governorates. Moreover, the club is actually printing a book to this effect which undoubtedly facilitates the search.

IV- A general analytical view of the most important violations of the principles of judiciary honesty

A detailed judicial debate on the judgment given by the court of cassation in the appeals nos 949 and 959 of the year 2000 issued on 12/5/2003, concerning the elections in the Karm El Zeitoun area, mentions that "giving the description Independent Judiciary Organ" on both the administrative prosecution, by law no. 21/89, and the State judicial body, by law no. 10/1986, violates the constitution because these two bodies are branches of the administration depending of the executive power represented by the minister of justice and from whom they depend".

This judgment is still under discussion despite the soundness of the motives on which it is based. This emphasizes the link between independency and the existence of this judicial body. The constitutional court, in a request for interpretation submitted by the minister of justice, has reached on opposite opinion by considering these two bodies judicial institutions.

The constitutional court decided that "the constitutional guarantee to the right to go to court means that all people, a group or even one of them, should not be prevented to have access to a judicial body guaranteeing, by its structure, and rules of organization as well as the contents of the substantive and procedural rules applicable, a minimum of rights, not to be denied, to those who have recourse to it in order to have a fair trial.

Preventing them from exercising these rights is a violation of the protection guaranteed by the constitution to such right. This being the case, there is no contradiction between the right to go to court, being a principal constitutional right, and its legislative organization on condition that the legislation does not consider this organization a means to deny such right.

The principle in having the legislator organizing such rights is that it exercises a discretionary power unless the constitution imposes some limits to this power which the legislator cannot transcend.

The legislator, in implementing the right to go to court, is not bound by specific forms of procedure extending to all litigations even if they have different objects because the procedural regulation of the judicial litigation cannot reflect uniform forms to be followed. He must be always able to compare between these forms in order to choose the best form suitable to the litigations relating thereto and their procedural requirements in order to have the choice between different forms required to implement the right to go to court as long as it does not surpass the constitutional limits imposed since the procedural form imposed by the legislator aims at carrying out a social interest worthy of protection (the constitutional case no. 181, judicial year 19, on 4/3/2000).

It is true that the constitution cannot regulate all the details of a certain matter; we prefer to leave this matter to the supreme council of judicial organization, established by republican decree no. 82/1969 in implementation of article 173 of the constitution, presided by the president of the republic. We consider such presidency inconsistent with the constitutional principle of preserving the independency of the

judicial power even though the presidency of the president of the republic is provided for in the constitution.

Therefore, it is a must to cancel this presidency and leave the judges take care of themselves in addition to the fact that the jurisdiction of this council needs a review because it impairs the independence of each individual judicial organization⁷.

The Egyptian ministry of justice is considering introducing amendments to the law on the judiciary no. 46 of 1972 in order to strengthen the independence of the judiciary such as transferring the dependency of the judicial inspection from the ministry of justice to the supreme judicial council and give this council jurisdiction in matters concerning the promotion of judges and their transfer.

We, and many others, would have hoped to extend the jurisdiction of the council to other matters such as transfer the judges on loan basis, their delegation to occupy certain positions in the executive or legislative power and allocation of an independent budget to the judicial organization beyond the reach of the executive power, thus strengthening the independence of the judiciary.

The letter addressed by counselor Yehia El Rifai, former president of the judges' club, to the Bar Association informing it of his retirement from the profession at the end of 2003 has emphasized the effective role of the minister of justice granted to him by the law on the judiciary, allowing him to delegate from among the counselors of the court of appeals those who shall preside the courts of first instance. This position allows the minister to exercise his control from a legal and practical point of view on the judges, in addition to the advantages in kind and in cash allotted to him.

The most dangerous practice is to submit the important cases to the president of the court thus constituting a violation of the constitution and the law. The letter also referred to the distinction, in terms of money, between the members of the judiciary, exercised by the ministry of justice through the incentives, overtime bonuses, arbitration cycles, work in the administration and controlling the illicit profits in addition to medical care and the social and monetary advantages, allotment of a deposit to be distributed on the judges of one of the judicial organizations, to the exclusion of others, all these jeopardize the independence in its core.

Although the Egyptian constitution provides in article 68 thereof that (every citizen has the right to resort to his natural judge ...) still this means that there should be a classification of the judges objectively and not according to their person or in consideration of a specific case.

It also means that a specific judge should not be chosen for a specific case or determined in person after determining the case itself as to the parties or the object thereof.

Should the designation of the competent court be an undisputed criterion to say that there is "a natural judge"; this matter however has accused, in the last three

⁷ Dr. Mohammed Kamel Obeid – Independence of the judiciary, comparative study, 1991 ed.

years, a public and express departure from the principle of territorial competence of the criminal court in Cairo, for example. So the president of the Cairo court of appeals in determining the competent circuit to examine the case after referral from the competent public prosecution office, casts a shadow of doubt on the possibility of reaching impartiality and independence and, consequently, we propose to return to the previous system by fixing the territorial competence at the beginning of the judicial year.

The factual situation has revealed in practice a serious violation to the principle of the "natural judge" whether by referring civilians to military courts (the syndicates' case) or to the courts of values established by law no. 95/1980 in which participates public personalities who are not judges.

Military courts are considered the normal courts for militaries and for those enumerated in article four of the martial law. These courts, however, are not so as concerns civilians.

It is in our view important to refer to article six of this law which stipulates that "the provisions of this law shall apply on the crimes provided for in the first and second chapter of book two of the criminal code and to related crimes which shall be referred to the military courts by order of the president of the republic.

The president of the republic, upon declaration of the state of emergency, shall refer to the military courts any of the crimes punished by the criminal code or any other law. This is in violation of the constitution and the provisions of the international declaration of the civil and political rights and of all international criteria concerning independence of the judiciary and the right of the accused to resort to their natural judge and the prohibition of all sorts of exceptional courts or state security courts established by law no. 105/80 and cancelled by law no. 95/2003. If the cancellation of these latter courts in 2003 is considered an important step towards a return to the natural judge, still the cancellation of the (penal servitude) and its replacement by life or severe imprisonment, as the case maybe, did not result in an increased return to the natural rules.

The modification includes granting members of prosecution, of a rank of chief prosecutor at least, the authorities of the examining magistrate and allowing the courts of appealed misdemeanors to sit in chamber in some crimes which means more authority beyond the control of the judiciary thus raising several objections from those concerned with human rights⁸. We can also notice the exaggerated use by the public prosecution of its authority concerning provisional detention, interdiction to travel and other restrictions on liberty of individuals in the stages of investigation without restriction and in the absence of a law regulating this dangerous machinery far from judicial control in a legal system which does not admit the payment of an indemnity in case these measures do not result in indicting the accused.

These laws organizing the said rights are not free of restrictions jeopardizing this right. The constitution court has set a rule providing that "the organization of

⁸ The Egyptian organization of Human Rights, 2002, website of the organization, www.cohr.org.ar/annual/2003.

rights is entrusted to the legislator". The use of his authority in this respect is a license to be used whenever public interest so requires and at the moment he deems appropriate. His intervention, however, may result in violating the right to resort to court which is unconstitutional (constitutional case no. 193/19 judicial, on 6/5/2000).

Part five – the most important proposed solutions and development projects

In part two of this study we have mentioned that despite the fact that the constitution has guaranteed the independence and immunity of the judiciary still several violations have been noticed, namely the continuous existence of courts of exceptional jurisdiction which should be abolished, and the referral of civilians to military courts, a matter which should be discontinued through the amendment of the martial law and restrict the jurisdiction of military courts to militaries.

Moreover, the right given to the president of the republic to refer ordinary crimes to the military courts, in case the state of emergency as declared, should be withdrawn.

In addition to the above, reference should be made to the unlimited and unjustified authority given to the minister of justice by law no. 46/77, on the judiciary, or through the authority of the administrative president of the court.

Among the matters impairing the independence of the judiciary, the non existence of an independent budget for it. Judges have, since a long time, claimed that they should have an independent budget to be prepared by the supreme council of judicature which shall be given, in this respect, the same authority given to a minister.

It is necessary to transfer of the dependency of the judicial inspection administration from the ministry of justice to the president of the supreme council of judicature and the cancellation of the provision stipulating the dependency of the public prosecution and the public prosecutor to the minister of justice.

This, in addition to the fact that both government and individuals are obstructing the execution of judgments issued by the state council courts through filing oppositions to its implementation before civil courts despite the fact that the supreme administrative court has given, in many of its decisions, jurisdiction to the administrative courts to settle such oppositions. Upon filing the opposition, the executory force of the judgment is suspended until a decision is given in its respect, a matter which may take a long time depending on the resourcefulness of the lawyers in charge to extend as much as possible the litigation. This was the course indirectly followed by the ministry of interior when a judgment issued by the supreme administrative court invalidating the decision of the minister of interior to reinstate the period fixed for submitting candidacy of members of the house of representatives, who have evaded military service, to the people's council and to the consultative council by inciting some citizens to file opposition to this judgment.

Likewise, we can notice the government's refusal to execute the judgment issued in the case no. 5206 of the judicial year 56, invalidating the decision of the minister of interior declaring the election of one of the candidates to the Cairo 12th circumscription. The same could be observed in case no 10388/57j against the minister of agriculture, and case no. 6694/40j against the Cairo governor, and case no. 769/48j against the minister of labor force, and case no. 23480/57j against the minister of social affairs, and case no. 1628/56j against the prime minister, the minister of housing and the Cairo governor, and many other cases. This prompted one of the opposition newspaper to announce to its readers that it is going to open the file

of non execution of judgments and invited the readers to provide the newspaper with their judgments for publication and prompted the government to implement these judgments thus embarrassing it before the public opinion who has lost faith in court judgments.

The judiciary did not stand as a spectator opposite to the obstruction of the execution of judgments, in fact, the recommendations of the first justice convention organized by the judge's club in 1986, and which was inaugurated by the president of the republic, has emphasized the refusal of manipulating judgments and recommended:

- 1) Observance of good implementation of the judge of execution system and consider this judge as a court composed of one or more judges in each court of summary jurisdiction working on a full-time basis all days of the week to pre-supervise execution procedures, following it up and decide on all litigations and remove all obstacles hindering the execution. He may, to this effect, have recourse to the civil prosecution and police force.
- 2) Review the means of facing the procrastinating debtor in order to ensure execution.
- 3) Keep under control execution procedures and oppositions thereto in order not to use them for the purpose of delaying execution.
- 4) Enlarge the scope of application of article 123 of the criminal code to include those working in the public sector, those in charge of a public service and those who have a parliamentary capacity.

Finally, we should not forget the role played by the medias, namely the newspapers, in influencing the course of judgments and we can consider the Egyptian press as being the most important authority – if we may use this expression - due to its diffusion in the different sectors.

We can rightly observe the increase of spaces in newspapers for opinions in addition to the emergence of a great number of party and independent newspapers despite the legal publishing obstacles. Nevertheless, the spaces allotted by the newspapers - daily governmental, independent or concerning the opposition – for cases and investigations may have negative effects to the extent that the expression "public opinion cases" started to be used in judicial circles. This may raise an important issue which is the effect of publication on the litigation, namely criminal, in influencing the judges in the case or in making the public accept the judgment issued whether condemning or innocentizing the accused. Although the Egyptian punitive legislations condemn, in article 187 of the criminal code, such influence, none of the newspapers who have perpetrated this crime have been brought to justice despite the influence felt by the public as a result thereof. It can be mentioned as an example the recent litigations concerning banks in general which have been given utmost attention by publishing the investigations of the control authorities or the pleadings of the prosecution without paying attention to the publication of the pleadings of the defense.

Moreover, the method of dealing with indictment is contrary to the provisions of article 66 of the constitution which stipulates that "the accused is innocent until his incrimination is established".

Newspapers deal with the judgments invoking the accused with lesser attention than those condemning him due to the fact that the latter are more exciting than the former. This fact has castled some shadows on some judgments which have exceeded the limits of the case by addressing the legislator, at times, and the public opinion, at other times, such as asking the legislator, in of these judgments, to aggravate the sanction. The courts, if not bound by the limits put by the legislation to the penalty, would have sentenced the accused to a more severe penalty.