

Shams Al Din Al Hajjaji*

A Call for Judicial Reform in Egypt

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Abstract: The social contract in Egypt has changed dramatically five times in the past decade. Mubarak made substantial amendments in 2005 and 2007, the Supreme Council of the Armed Forces (SCAF) ratified the 2011 Constitutional Declaration, the Muslim Brotherhood adopted the 2012 Constitution and, finally, Al-Sisi/Mansur proclaimed the 2014 Constitution. Currently, Egypt faces social, economic, political and legal problems. The Egyptian judiciary plays a vital role in the inability to respond to these problems. This research argues that the call for judicial reform should be revived to face contemporary challenges. These challenges are the result of the absence of serious judicial reform in the past four decades. The 1973 Judicial Authority Law was a result of the social contract presented in the 1971 Constitution. The research lists the reasons for adopting a new judicial authority law. In the first section, the social aspect is embodied in the protection of freedoms, judicial transparency and judicial legitimacy. The second section dealing with economic reasons for reform is divided into two parts. The first deals with Independent Bodies and Regulatory Agencies. The second issue reveals the role of the judiciary in the successive failures of the IBRA. The third section deals with the role of the judiciary in political life. The fourth section presents the legal reasons for judicial reform.

Keywords: Judicial Reform, Egypt, Judicial Independence, Judicial Accountability, Judicial Transparency, Judicial Legitimacy

1 Introduction

One of the major constitutional philosophies is that a constitution is a mutual social contract between the ruler and the people.¹ In Egypt, however, the contemporary constitutional philosophy is based on a unilateral social contract between the ruler and the people. President Nasser promulgated the 1956

¹ Ernest Baker, *Social Contract, Essays by Locke, Hume and Rousseau*, (Oxford University Press 1960) 10.

***Corresponding author: Shams Al Din Al Hajjaji**, Judge, North Cairo Primary Court, Esch-sur-Alzette, Egypt, E-mail: salhajjaji@aucegypt.edu

Constitution,² President Sadat issued the 1971 Constitution and its amendment in 1980,³ President Mubarak made substantial amendments in 2005 and 2007,⁴ the Supreme Council of the Armed Forces (SCAF) ratified the 2011 Constitutional Declaration,⁵ the Muslim Brotherhood adopted the 2013 Constitution⁶ and, finally, Al-Sisi/Mansur proclaimed the 2014 Constitution.⁷ This contemporary constitutional philosophy is based on two pillars. Firstly, Egypt's constitutional history has not witnessed any refutation of any constitutional referenda. All constitutional referenda have been unanimously agreed on by the Egyptian people.⁸ Secondly, all the constitutional referenda have been initiated by rulers or regimes.⁹ As a result, this constitutional philosophy highlights several social, economical, political and legal challenges.

The successive constitutions placed pressure on the judiciary to cope with their social, political and economical philosophy. Contemporary challenges

2 The 1956 Constitution, *see also*, James Feuille, 'Reforming Egypt's Constitution: Hope for Egyptian Democracy?' (2012) 47 Texas Int'l LJ 238, 239–240.

3 The 1971 Constitution. The 1980 Amendment was introduced for two issues. Firstly, it increases the presidential term from two periods to unlimited period. Secondly, it added Islamic Sharia'a as the principle source of legislation. Shannon Roesler, 'Modern Legal Reform in Egypt: Shifting Claims to Legal Authority' (2006) 14 Cardozo J Int'l & Comp L 393, *see also*, Mohamed Abdelaal, 'Religious Constitutionalism in Egypt: A case Study' (2013) 37 Fletcher F World Aff 36, 37.

4 *ibid*, The 2005 Amendment replaced the referendum system of presidential appointment with presidential election system. The 2007 Amendment introduced 43 constitutional articles. *See in that regard*, Kristen Stilt, 'Constitutional Authority and Subversion: Egypt's New Presidential Election System' (2007), 16 Ind Int'l & Comp L Rev 335, 336, and Nathalie Bernard Maugiron, 'The 2007 Constitutional Amendments in Egypt, and the Their Implications on the Balance of Power' (2008) 22 Arab LQ 398, 400.

5 The 2011 Egypt Constitutional Declaration, *see also*, Jakob Skovgaard Petersen, 'Egypt's Ulama in the State, in Politics and the Islamist Vision' in Said Amir Arjomand and Nathan Brown (eds) *Rule of Law, Islam and Constitutional Politics in Egypt and Iran* (2013), 289.

6 The 2012 Constitution, *See also*, Mohamed Abdelhamied Arafa, 'President Mursi' Egypt Arab Spring: Does Egypt Will Continue to be Civil State or Under the Umbrella of Islamic Law and Islamism?' (2012) 9 US Chain L Rev 530, 531.

7 The 2014 Constitution, *see also*, Lorianne Updike, 'Mapping the Constitutional Process' (2014) 3 Cambridge J Int'l & Comp L 1282, 1283.

8 The highest 'no' voters were 40% in 2012 Constitutional referendum, *see in that regard*, 'Egypt's Constitutional Referendum: A dubious Yes' *The Economist Middle East and Africa* (Cairo, 22 December 2012) <<http://www.economist.com/news/middle-east-and-africa/21568756-flawed-constitution-will-be-endorsed-argument-far-over>> accessed 18 February 2017.

9 George Sadek, 'Egypt: President Issues New Constitutional Declaration' *Library of Congress* (Washington, 15 August 2012), <www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403282_text> accessed 18 February 2017.

highlight the gap between *de facto* (practice of political regimes) and *de jure* (constitutional rights).¹⁰ This is the case in particular with major laws that have never undergone any substantial amendments, such as the 1948 Civil Law and the 1937 Penal Code.¹¹ Despite all these constitutions, the judiciary still applies laws that do not reflect the different social contracts that each constitution includes.¹² The inability of the judiciary to face such discrepancies has a major effect on issues such as freedom, transparency and property protection. Additionally, the 1973 Judicial Authority Law (JAL) does not reflect the current social contract. The JAL was set for reform after the 2014 Constitution. The current 1973 JAL reflects the 1971 constitutional philosophy. Even its two amendments of 2005 and 2007 were superseded by two amendments to the 1973 JAL. Consequently, this research argues that the call for judicial reform should be revived to face contemporary challenges.

The scope of this research lies on the contemporary social, economical, political and legal challenges that the judiciary – both judges and judicial institutions – have failed to solve.¹³ The judiciary is not the source of the problems Egypt is facing. Nonetheless, the judiciary still fails to effectively address social, economic, political and legal problems the Egyptian society is facing.¹⁴ Judicial reform is the best way to tackle societal challenges. This research aims to draw the connection between these challenges and judicial reform, as well as to establish the cause for judicial reform. Moreover, this research addresses some of the major internal challenges (such as institutional transparency)¹⁵ and the failure of the judiciary to adequately respond to external challenges (such as the protection of freedoms and the fight

10 *ibid.*

11 Mohamed Fadel, *Judicial Institutions, the Legitimacy of Islamic State law and democratic transition in Egypt: Can a Shift toward a Common Law model of adjudication improve the prospects of a successful democratic transition?* (2013) 11 *Int'l J Cont L* 670, 673, *See also*, Gabriel Bear 'Tanzimat in Egypt: The Penal Code' <<http://www.jstor.org.proxy.bnl.lu/stable/pdf/611305.pdf>> accessed 18 February 2017.

12 Mohamed Serag, 'Legal Education in Egypt' (2001–2002) 43 *S Tex L Rev* 615, 616.

13 Judges and Judicial system in Egypt is yet a strong institute. Their strength can be clearly shown in their alliance with the Army in 2013 Military Coup. The transition president between 2013–2014 was Chief Justice Adly Mansour, in that regard refer to Nathan Brown, 'Egypt: A Constitutional Court in an Unconstitutional Setting' in Justin Fronsini and Francesco Biagi (eds), *Political and Constitutional Transitions in North Africa: Actors and Factors* (1st edn 2015), 46.

14 Regarding economical, political, social, and legal role of judiciary *see in* Tom Gerald Daly, *The Judiciary and Constitutional Transitions* (IDEA 2014), 23–25.

15 Cynthia Alkon, 'Lost in Translation, Can Exporting ADR Harm Rule of Law Development?' (2011) 2011 *J Disp Resol* 179, 179–180.

against corruption).¹⁶ It proposes a call for judicial reform after its suspension following the 2013 Military Coup.¹⁷ This is considered an initial step to effectively address these challenges.¹⁸ It urges the Egyptian as well as the Arab legal community to reform their judicial laws.

This research offers four major reasons for reform, which are social, economic, political and legal in nature. In the first section, the social aspect is embodied in the protection of freedoms, judicial transparency and judicial legitimacy. This section outlines the inability of the judiciary to protect three major freedoms, namely the freedom of expression, the freedom of assembly and the freedom of religion. It reveals the gap between constitutional rights and judicial practices. It also highlights issues such as the lack of transparency in the judiciary. This is the result of a lack of both legal and political judicial accountability.¹⁹ If the judiciary lacks both legal and political transparency, the question of its legitimacy is pivotal. The second section is divided into two parts. The first deals with Independent Bodies and Regulatory Agencies (IBRA), and their inability to fight corruption in state and capital markets. The second issue reveals the role of the judiciary in the successive failures of the IBRA.²⁰ The third section deals with the role of the judiciary in political life. The political situation manifests two contradictory interests. The first is the prohibition of judges from participating in political life, while the second is the constitutional mandate requiring judges and courts to supervise elections.²¹ The first role annuls the second.²² The fourth section presents the legal reasons for judicial

16 The President of CAO – Judge Hesham Genanah – states that the cost of corruption in Egypt in the last few years is 600 Billion Pounds. ‘Egypt’s Corruption losses exceed \$76.6 billion’, *Middle East Monitor* (Egypt, 15 December 2015) <<https://www.middleeastmonitor.com/20151215-egypts-corruption-losses-exceed-76-6bn/>> accessed 18 February 2017.

17 Nathan Brown, ‘Tracking the “Arab Spring”: Egypt’s Failed Transition’ (2013) 24 *J Democracy* 50, 51.

18 *ibid.*

19 Egypt’s Judiciary: A tool of Repression: Lack of effective Guarantees of Independence and Accountability, International Commission of Jurists, 2016, 45 <<https://www.icj.org/wp-content/uploads/2016/10/Egypt-Tool-of-repression-Publications-Reports-Thematic-reports-2016-ENG-1.pdf>> accessed 5 May 2017.

20 Brown (n 13) 47.

21 The Judicial Authority Law 46/1972, Article 239 states ‘the House of Representatives issues a law organizing the rules for delegating judges and members of judicial bodies and entities to ensure cancelling full and partial delegation to non-judicial bodies or committees with judicial competence, or for managing justice affairs or overseeing elections, within a period not exceeding five years from the date on which this Constitution comes into effect.’

22 Nathan Brown, *Constitutions in a non-constitutional world, Arab Basic Laws and the prospects for accountable Government*, (State University of New York 2002), 143- 146.

reform. These reasons are inequality before the law and the lack of efficient legal education for judges and prosecutors.

2 Social reasons for reform

2.1 Inefficient protection of freedoms

Article 73 of the 2014 Constitution guarantees the protection of the citizens' freedom of assembly.²³ Courts were supposed to support the 2014 Constitution. Instead, they have applied both the 1937 Penal Code and the unconstitutional protest law or *Qanun al-Tazahor*.²⁴ Al-Sisi issued the protest ban law for two reasons. Firstly, to curb increasing protests against overthrowing ex-President Mohamed Morsi,²⁵ thus banning Muslim Brotherhood supporters from protesting.²⁶ Secondly, the law was used to oppress opponents of the regime. The regime is so fragile it cannot tolerate any form of opposition.

The second freedom right is the freedom of expression. Article 65 of the 2014 Constitution guarantees the freedom of thought.²⁷ The judiciary has been unable to grant children, along with many other categories, their basic right to freedom of expression. The regime has taken several young people into custody for exercising their right to freedom of speech. The law criminalizes those who criticize the regime.²⁸ Under the terrorist law, a child (aged 16) wearing a T-shirt with a slogan against arbitrary detention was arrested and detained for

²³ The 2014 Constitution, Article 73 states 'citizens have the right to organize public meetings, marches, demonstrations and all forms of peaceful protests, while not carrying weapons of any type, and upon providing notification as regulated by law. The right to peaceful, private meetings is guaranteed, without the need for prior notification.'

²⁴ Egypt: law Students Protest Ban on Being Hired as Prosecutors, *Global Legal Monitor* Library of Congress (Washington, 31 October 2014), <<http://www.loc.gov/law/foreign-news/article/egypt-law-students-protest-ban-on-being-hired-as-prosecutors/>> accessed 18 February 2017.

²⁵ *ibid*.

²⁶ Tara Vassefl, 'An Arab Winter: Threats to the Rights to Protest in Transitional Societies, Such as Post-Arab Spring Egypt' (2013–2014) 29 Am U Int'l L Rev 1100, 1101.

²⁷ The 2014 Constitution, Article 65 states 'freedom of thought and opinion is guaranteed. All individuals have the right to express their opinion through speech, writing, imagery, or any other means of expression and publication.'

²⁸ 'Egypt: Deeply Restrictive New Assembly Law' *Human Rights Watch* (New York, 23 November 2013, <<https://www.hrw.org/news/2013/11/26/egypt-deeply-restrictive-new-assembly-law>> accessed 18 February 2017.

more than two years.²⁹ The only charge laid against him was wearing a T-shirt with a logo saying 'A Nation without Terror'.³⁰

The third right is freedom of religion. Courts have not been able to protect the rights and freedom of religious practice, which have a constitutional basis.³¹ Article 64 of the 2014 Constitution guarantees freedom of religion for all citizens.³² Yet there have been several incidents in which the judiciary has been unable to protect the freedom of people expressing Shi'a, Bahai, Christian, or atheist beliefs. Christians, for instance, have a legal right to build and renovate churches, according to Article 235 of the 2014 Constitution.³³ Nevertheless, president and Mayors of governorates have hardly granted the building or restoring of churches.³⁴ This right is granted only by permission from the national security agency. Christians have never practice their constitutional right to build churches freely.³⁵ The discriminatory policy against the freedom of religion is a policy that was developed decades ago, and it continues to be in effect to the present day.³⁶

2.2 Inefficient transparency questions

The judiciary often withholds necessary information concerning judicial administration from the public. Each circuit and prosecution district office issues its own

²⁹ *ibid.*

³⁰ Farid Farid 'Egyptian Student still in Jail Because of T-Shirt' *Middle East DW* (Cairo, 30 September 2015), <<http://www.dw.com/en/egyptian-student-still-in-jail-because-of-t-shirt/a-18747704>> accessed 18 February 2017.

³¹ Oren Kessler, 'Egypt's Religious Freedom Farce' (*The National Interest*, 21 May 2015) <<http://nationalinterest.org/feature/egypts-religious-freedom-farce-12935>> accessed 18 February 2017.

³² The 2014 Constitution, Article 64 states 'Freedom of belief is absolute. The freedom of practicing religious rituals and establishing places of worship for the followers of revealed religions is a right organized by law.'

³³ The 2014 Constitution, Article 235 states that 'in its first legislative term after this Constitution comes into effect, the House of Representatives shall issue a law to organize building and renovating churches, guaranteeing Christians the freedom to practice their religious rituals.'

³⁴ In 2015, al-Sis and the army promised to restore all the burned church as arson. See in that regard 'Egyptian president promises to restore Egypt's burned Churches' *Barnabas Fund* (London, 1 December 2015), <<https://barnabasfund.org/news/Egyptian-President-promises-to-restore-Egyptys-burned-churches>> accessed 18 February 2017.

³⁵ Scott Kent Brown 'The Coptic Church in Egypt: A Comment on Protecting Religious Minorities from Non-state Discrimination' (2000) 2000 BYU L Rev 2, 2-3.

³⁶ Patrick Alexander Younan, 'The Coptic Christians of Egypt: Dhimmitude and Discrimination' (2014) 2000 BYUL Rev 1, 2.

statistics. This data is sent monthly to the Ministry of Justice (MoJ) and the Attorney General. None of this data is made available to the public. There is no public institution within the judiciary that releases judicial data in reference to the number or type of cases. This is a violation of Article 68/1 of the 2014 Constitution, which regulates access to information and official documents. It states that ‘information, data, statistics and official documents are owned by the people. Disclosure thereof from various sources is a right guaranteed by the state to all citizens. The state shall provide and make them available to citizens with transparency.’³⁷

The lack of transparency within the judiciary takes on three forms. Firstly, the Attorney General has the ultimate authority to ban media coverage in certain cases to protect the confidentiality of those involved.³⁸ This right is criticized, given that the Attorney General is empowered with an authority that is undisputed and unverified by any national independent body. Between 2013 and 2015, the Attorney General banned the publication of 15 cases, all related to police or judicial violations.³⁹ Secondly, judges and prosecutors prepare statistics related to their districts, which are subsequently sent to both the MoJ and the Attorney General.⁴⁰ They believe that the publication of such data leads to interference with the administration of justice, which is mainly the responsibility of the MoJ.⁴¹ Thirdly, neither the judiciary nor the Public Prosecution Office (PPO) appoints a spokesperson to inform the public about judicial and public concerns.⁴² This problem is also related to the legitimacy of the source of information. The judiciary believes it is the legal elite⁴³ and does not pay any attention to public demand for information.⁴⁴

³⁷ The 2014 Constitution, Article 68/1.

³⁸ ‘Freedom of Press in Egypt’ Freedom House, (Egypt, 2013) <<https://freedomhouse.org/report/freedom-press/2013/egypt>> accessed 18 February 2017.

³⁹ Ahmed al-Bahnasawi, ‘Qadaia hazr alnashr monzo 30 July le-elrashowh aljansayah’ *Al Watan News* (Cairo, July 2015) <<http://www.elwatannews.com/news/details/777221>> accessed 18 February 2017.

⁴⁰ The website of the Ministry of Justice does not include any information regarding the ministry except news of the Minister of Justice and his assistance. The Ministry of Justice website, <http://www.jp.gov.eg/ar/Default.aspx> accessed 18 February 2017.

⁴¹ *ibid.*

⁴² Deputy Attorney General Mustafa Suleiman held only one public press conference. This press conference was about the murder of the Italian Researcher Giulio Regeni, see in that regard, ‘Regeni Murder: Egypt Denies Italy Phone Record Request’ *BBC News* (Middle East, 9 April 2016) <<http://www.bbc.com/news/world-middle-east-36007876>> accessed 18 February 2017.

⁴³ Nancy elshami, ‘The Egyptian Judiciary; Current Divisions and Historical Contexts’ *Muftah* (Cairo, 9 January, 2013), <http://muftah.org/the-egyptian-judiciary-current-divisions-and-historical-contexts/#.V_J4TfTV6Xk> accessed 18 February 2017.

⁴⁴ Mustafa Suleiman states ‘such conference is the first of its kind. It is not to answer any question regarding the investigations, rather it is to answer question related to PPO’s delegates

As a result, it is rare to come across public statements regarding popular cases, either from the judiciary or the PPO.⁴⁵

There are two reasons for this lack of transparency within the judiciary: the lack of legal responsibility and the lack of political responsibility. In terms of legal responsibility, even though there is a constitutional mandate to ensure the transparency of the state agencies, the JAL and the judicial practice take a stand against this right. On the one hand, the 2014 Constitution stipulates that there should be a forum in which citizens can file complaints regarding access to public data being withheld. It also maintains that responsibility must be taken in cases of non-conformity.⁴⁶ On the other hand, the JAL protects the judicial administration from any redress sought by the public.⁴⁷ Members of the public cannot force the judiciary to disclose such data. Article 84 of the JAL limits the right to complain against judicial administrative decisions, including the request to disclose judicial data, to judges and prosecutors.⁴⁸ The Judges' Circuit at the Cairo Court of Appeal, which is responsible for all cases relating to the annulment of judicial administrative decisions, will not hear any case related to a constitutional mandate unless the plaintiff is a judge or prosecutor. Members of the public are not able to seek legal redress before the Judges' Circuit, even if individuals have been harmed by the judicial administrative decision.⁴⁹ Consequently, the current

visit to Italy.' To see the full press conference please visit, Mutamar Suhafi le-na'eb al'am almusa'd, OnE, (Youtube, 9 April 2016) <<https://www.youtube.com/watch?v=enHZ1up5a5U>> accessed 18 February 2017.

45 The Supreme Judicial Council has issued a decision to ban all judges and prosecutor from making public statements, which include writing on social media. The violators of such decision are subject to disciplinary proceedings.

46 The 2014 Constitution, Article 68/2 states 'law shall organize rules for obtaining such, rules of availability and confidentiality, rules for depositing and preserving such, and lodging complaints against refusals to grant access thereto. The law shall specify penalties for withholding information or deliberately providing false information.'

47 Mohamed Farhat and Ali Sadek, 'Promoting the Rule of Law and Integrity in the Arab Countries' <http://hrlibrary.umn.edu/research/Egypt/Egypt_FinalReportP2S4_En.pdf> accessed 18 February 2017.

48 The Judicial Authority Law 46/1972, Article 84 outlines the process of seeking legal redress against judicial administrative decisions, judicial appointment, transfer of judges, judicial organization, regulation and finances of the courts.

49 This applies to the candidates who got rejected from appointing in the judiciary. These candidates try to litigate such case at the civil circuit in Cairo Court of Appeal the circuit would rule that they are not competent personal for such cases based on The Judicial Authority Law 46/1972, Article 83.

formulation of the JAL constitutes an obstacle in enforcing the constitutional right, resulting in its inapplicability.

In terms of political responsibility, no responsibility falls to either the judiciary or the Attorney General when it comes to publishing judicial data.⁵⁰ This is due to two reasons. Firstly, there is no consultation of the public in the appointment process of the SJC, the Minister of Justice or the Attorney General. As far as the SJC is concerned, all its seven members are appointed based on the principle of seniority. These seven members are the president of the Court of Cassation, the first two vice presidents of the Court of Cassation, the Cairo Court of Appeal president, the Alexandria Court of Appeal president, the Mansoura Court of Appeal president as well as the Attorney General.⁵¹ For the Minister of Justice, there is a great ambivalence regarding this position, ie whether it is a purely executive authority, or somewhere between an executive and judicial authority. This has given rise to the term ‘sovereign ministries.’⁵² The President of the Republic has the right to appoint ministers for ‘sovereign ministries’ upon consultation with the Prime Minister.⁵³ This term does not have a specific legal definition. Rather, it denotes the practice followed before the formulation of the 2014 Constitution. In July 2013, the President of the Republic made an attempt to appoint Judge Mohamed Mahdi, a former judge at the Egyptian State Council and the ICTY. This suggestion was rejected by most of the judges of the ordinary courts. One of the judges said, ‘the club, as well as the judges, will boycott the ministry if Mahdi is chosen to be the Minister of Justice.’⁵⁴ The President was consequently forced to appoint him as Minister of Transitional Justice instead of Minister of Justice.⁵⁵ As for the appointment of the Attorney General, the current

50 Nabil Abdel Fattah, ‘The Political Role of the Egyptian Judiciary’ in Nathalie Bernard-Maugiron (ed), *Judges and Political Reform in Egypt* (2008), 73.

51 The Judicial Authority Law 46/1972, Article 77 bis.

52 The term sovereign ministries include Ministry of Defense. The Appointment of this minister is taken directly from the President of the Republic. Article 234 of the 2014 Constitution states ‘Minister of defense is appointed upon the approval of the Supreme Council of the Armed Forces. The provisions of this article shall remain in force for two full presidential terms starting from the date on which this Constitution comes into effect.’

53 The 2014 Constitution, Article 146/3 states ‘In the event that the government is chosen from the party or the coalition that holds a plurality of seats at the House of Representatives, the President of the Republic may, in consultation with the Prime Minister, choose the Ministers of Justice, Interior, and Defense.’

54 ‘Al qodah yad’own ljam’yah ghair ‘adayah ‘tradan ‘la almahdi waziran lel’dl’ *moheet.com* (Cairo, 16 July 2013).

55 Ahmed Morsy, ‘Transition Justice: Egypt’s Way Forward’ *Middle East Institute* (Cairo, 26 July 2013) <<http://www.mei.edu/content/transitional-justice-egypts-way-forward>> accessed 15 February 2017.

competent authority is the SJC. Previously, the President of the Republic was the competent authority to appoint the Attorney General. At the time, the political accountability of the Attorney General was part of the executive accountability. The recent transfer of the appointment power from the President of the Republic to the SJC, however, turned a blind eye to the political accountability issues of the Attorney General.⁵⁶ Hence, a reformulation of the appointment process of the SJC, the Minister of Justice and the Attorney General must be addressed in the upcoming JAL.

Secondly, there is an issue of sensitivity among the executive in dealing with the SJC, the Minister of Justice or the Attorney General. While the MoJ is a member of the Cabinet, the Prime Minister cannot request that data be made available to the public.⁵⁷ This is because the Cabinet fears executive interference in judicial affairs.⁵⁸ As a result, both legal and political responsibilities of the judiciary must be established. The JAL can work on establishing the legal responsibility of the judiciary. The political responsibility is part of judicial legitimacy, which also needs to be addressed.

2.3 Judicial legitimacy

The question of judicial legitimacy refers to the source of the judicial authority. There are three forms of authority: the King in the monarchic system, God in the theocratic system, and the people in the republic system. In the first two systems, the judge either rules 'in the name of the King' or 'in the name of God.'⁵⁹ No doubts are raised regarding the source of the judge's legitimacy. It is hard to dispute the authority of the judge in these systems.⁶⁰ In Egypt, during the monocracy period, judges settled their judgments pursuant to the source of legitimacy, that being the King. Article 28 of the Egyptian Judicial Regulation Law of 1949 states 'judgments are issued in the name of the King.'⁶¹ The role of

⁵⁶ After the assassination of the Attorney General Hesham Barakat in 2015, the appointment of a new Attorney General was put on hold for more than six months. The reason for the delay was that the President wanted to appoint the new Attorney General, while the SJC upheld its constitutional right to do so itself. Following this struggle, the SJC successfully appointed the new Attorney General Nabil Sadek.

⁵⁷ Tamir Moustafa, 'Law Versus the State: the Judicialization of Politics in Egypt' (2003) 28 L& Soc Inquiry 883, 886.

⁵⁸ *ibid.*

⁵⁹ Jasper Brinton, 'The Mixed Courts of Egypt' (1929) 20 Am J Int'l L 670, 671.

⁶⁰ Hugh Bellot, 'Some Early Law Courts and the English Bar' (1922) 38 LQ Rev 168, 178.

⁶¹ Judicial Regulation Law 1949, Article 28.

the court is limited to the interpretation and enforcement of the King's laws. Hence, courts had no legitimacy to challenge the constitutionality of laws.

In the republic system, while the judge rules in the name of the people,⁶² the definition of the actual role of the people is rather challenging.⁶³ This definition varies with the role of the people in the appointment process, which can be either direct or indirect. In the direct form, judges are directly elected by the people. As for the indirect form, judges are appointed by an elected authority, either the President,⁶⁴ or both the President and parliament.⁶⁵ In Egypt, Article 20 of the 1973 JAL states 'judgments are issued in the name of the people'⁶⁶ but it left out the definition of the people. There was no clear definition of the 'people' during successive republican eras.⁶⁷ The socialist/communist-based rule of Nasser defined the people as 'a category of people, who are members of the Socialist Union'.⁶⁸ During the Sadat and Mubarak eras, the concept of the people became even more vague than during Nasser's era.⁶⁹ Instead of rectifying the concept of the people to reflect a democratic form of government, Sadat and Mubarak maintained their authority over the judicial appointment process. The 2014 Constitution granted the judiciary full independence in the appointment process.⁷⁰ The judiciary is the competent authority for appointing judges. Even though such an act represents – in the judges' view – a protection of their judicial independence, it lacks any form of checks-and-balances between judiciary, executive and legislative.⁷¹ As a result, the definition of the people, who are the purported source of the judge's legitimacy, is still not clear. It also raises the question as to who members are accountable to if they consider themselves the source of legitimacy.

⁶² Egypt: law No 89 of 1986 Regarding the organization of Certain Cases of Public Invitations for General Subscription, (1985–1986)1 Arab LQ 579, 580.

⁶³ Thomas Cooley 'The Fundamentals of American Liberty' (1894) 3 Mich LJ 149, 150.

⁶⁴ Egypt Example.

⁶⁵ US Example.

⁶⁶ The Judicial Authority Law 46/1972, Article 20.

⁶⁷ Peter Mansfield 'Nasser and Nasserism' (1972–1973) 28 Int'l J 670, 675.

⁶⁸ Amr Shalakany, *Izdiyar wa-Inhiyar Al-Nukhba Al-Qanuniyya Al-Misriyaa* (Al Shorouk Publishers, 2013) 277.

⁶⁹ *ibid.*

⁷⁰ For the first time of the Egyptian constitutional history, Article 100 of the 2014 Constitution states that 'Court decisions shall be issued and implemented in the name of the people.'

⁷¹ Sahar Aziz, 'Independence without Accountability: The Judicial Paradox of Egypt's Failed Transition to Democracy' (2006) 120 Penn State L Rev 100, 104–105.

3 Economic reasons for reform: The Court's failure to deal with corruption

3.1 IBRA and their failures

Successive constitutions have established IBRA to fight corruption.⁷² The main aim of these agencies is to identify and eliminate corruption in various sectors of the government. The current agencies, according to Article 215/2, include 'the Central Bank, the Egyptian Financial Supervisory Authority, the Central Auditing Organization, and the Administrative Control Authority.'⁷³ Firstly, the Central Bank (CB) and the Financial Supervisory Authority (FSA) are responsible for fiscal and monetary policies in the country. The CB is responsible for 'developing and overseeing the implementation of monetary, credit and banking policies, and for monitoring banks.'⁷⁴ The FSA is responsible for 'monitoring and supervising markets and non-banking financial tools including capital markets, future exchanges, insurance activities, real estate funding, financial leasing, and factoring and securitization, in the manner organized by law.'⁷⁵ These policies have faced unprecedented crises since 2014. The CB and the FSA have been unable to enforce regulations on foreign currency exchange and availability and the banking system including commercial money and transfers. Initially, fund transfer was a complicated issue. Merchants used the black market not only to obtain foreign currency, but also to transfer their funds. Merchants reverted to paying in foreign currency from a middleman, who smuggled money from abroad to pay for their goods.⁷⁶ The foreign currency black market has become a national problem. Newspapers publish both governmental and black-market exchange

⁷² The 2014 Constitution, Article 218 states 'the state is committed to fighting corruption, and the competent control bodies and organizations are identified by law. Competent oversight bodies and organizations commit to coordinate with one another in combating corruption, enhancing the values of integrity and transparency in order to ensure sound performance of public functions, preserve public funds, and develop and following up on the national strategy to fight corruption in collaboration with other competent control bodies and organizations, in the manner organized by law.'

⁷³ *ibid* Article 215/2.

⁷⁴ *ibid* Article 219.

⁷⁵ *ibid* Article 221.

⁷⁶ CB ban the exchange of the US 100 bills to face the increasing number of money smuggling, to read more visit, al-Masry al-Youm, CBE bans exchange of US 100 Bills to counter smuggling, *Egypt Independent* (Cairo, 30 March 2015) <<http://www.egyptindependent.com/news/cbe-bans-exchange-us100-bills-counter-smuggling>> accessed 18 February 2017.

rates on a daily basis.⁷⁷ The CB has failed to offer foreign currency on a free market basis. The discrepancies between the two markets reached up to 10 % in early 2016, and 60 % in late 2016.⁷⁸ Additionally, the recent decision to limit foreign currency bank deposits to \$10,000 a day and \$50,000 a month for companies greatly restricts export potential.⁷⁹ There is a growing crisis in Egypt's financial market.⁸⁰

Secondly, the Central Auditing Organization (CAO) monitors and reviews the final accounts of the state, public figures and other public bodies.⁸¹ Since the 2013 Military Coup, there has been major conflict between the CAO president Genena and president Al-Sisi. Ex-President Morsi appointed Judge Genena president of the CAO in 2012. Genena is one of the prominent members of the Judicial Independence Movement (JIM), which has been fighting for judicial independence since the 1980s.⁸² During the January 25 Revolution in 2011, many JIM members gathered in *Tahrir Square* to support the people's legitimate demands for freedom and social justice. After the 2014 Military Coup, ousting Genena was a side fight that the military did not wish to engage in at the time. This was due to the popularity of both the JIM and Genena. Nonetheless, Genena's impeachment process started immediately.⁸³ After Field Marshall Al-Sisi assumed the presidency in 2014, he took two steps to remove Genena from office. In the first step, Al-Sisi appointed Judge Badawi as Genena's vice president.⁸⁴ Badawi is well known for his closeness to the executive ranks. During Mubarak's era, he was the District Attorney of the National Security Prosecution Office. In the second step, Al-Sisi issued a law granting him the right to impeach IBRA presidents. This law was drawn up to allow him to impeach Genena, who was appointed by Al-Sisi's predecessor

⁷⁷ Asma Alsharif, 'Egypt's Pound Weakens on black amid Devaluation talk' *Reuters* (Cairo, 25 July 2016), <<http://www.reuters.com/article/egypt-currency-blackmarket-idUSL8N1AB39R>> accessed 18 February 2017.

⁷⁸ *ibid.*

⁷⁹ Mohamed Ahmed, 'Foreign Companies Face difficulties in transferring profits overseas' *Daily News Egypt* (Cairo, 21 September 2015), <<http://www.dailynewsegypt.com/2015/09/21/foreign-companies-face-difficulties-in-transferring-profits-overseas/>> accessed 18 February 2017.

⁸⁰ *ibid.*

⁸¹ The 2014 Constitution, Article 219.

⁸² Atef Shahat Said, 'The Role of the Judges' Club in Enhancing the Independence of the Judiciary and Spurring Political Reform' in Nathalie Bernard-Maugiron (n 50) 111.

⁸³ 'Egypt's Top Auditor Faces Backlash Over Corruption Findings' *Voanews* (Cairo, 28 January 2016), <<http://www.voanews.com/a/egypt-corruption/3167068.html>> accessed 18 February 2017.

⁸⁴ Judge Hesham Badawi was the previous District Attorney of the national security prosecution office.

Morsi. As a result, Al-Sisi successfully impeached Genena in 2016, and Badawi assumed the role of CAO director.⁸⁵

Thirdly, the Administrative Control Authority ACA was established in 1958. It was part of the administrative prosecution until 1964. It then became an independent body responsible for exposing administrative, technical and financial crimes.⁸⁶ There are many doubts surrounding the political neutrality of the ACA, even though it is supposedly an independent agency. ACA members failed to solve several corruption cases. The only case of corruption against ex-President Mubarak was conducted by ACA investigator Colonel Mo'tasam Fathi.⁸⁷ The ACA as an agency still faces many challenges regarding its independence, as discussed in the following section.⁸⁸

3.2 Judicial inability to protect IBRA from executive authority

The judiciary plays a major role in the independence of IBRA and their role in fighting corruption. Firstly, the 2014 Constitution maintains the independence of IBRA from the executive authorities.⁸⁹ It protects IBRA employees to ensure their neutrality and independence.⁹⁰ However, while the 2014 Constitution grants the President unrestricted authority to appoint IBRA directors, it limits his authority to remove them. Article 216/2 specifies the authority of the President of the Republic over IBRA directors. It states 'the President of the Republic appoints the heads of independent bodies and regulatory agencies upon the approval of the House of Representatives with a majority of its members, for a period of four years, renewable once. They cannot be relieved from their posts except in cases

85 'Egypt appoints new anti-corruption Chief as predecessor faces trial' *Reuters Africa* (Cairo, 12 June 2016) <<http://af.reuters.com/article/commoditiesNews/idAFL8N194ODY>> accessed 18 February 2017.

86 Shafik Shawky, 'Administrative Control Authority Egypt' *Administrative Control Authority* (Egypt, 2002) <<http://www.icac.org.hk/news/issue12eng/button4.htm>> accessed 18 February 2017.

87 Mo'tasam Fathi, 'Saqr alraqabah aladarayah allazi sajan Mubarak be-alqosowr alarasayah' *Tahrir News* (Cairo, 9 January 2016) <<http://www.tahrirnews.com/posts/365590>> accessed 18 February 2017.

88 'The Administrative Control Authority Really Fight Corruption in Egypt' *Mada Masr* (Cairo, 15 September 2015) <<http://www.marsad.eg/en/2015/09/12/can-the-administrative-control-authority-really-fight-corruption-in-egypt/>> accessed 18 February 2017.

89 The 2014 Constitution, Article 220/2.

90 *ibid* Article 216/2 states, 'They [heads of the independent bodies] cannot be relieved from their posts except in cases specified by law.'

specified by law.⁹¹ In 2015, the President issued a new IBRA impeachment law, law number 89 for 2015. Even though such a law is a clear violation of Article 216/2 of the 2014 Constitution, the President used his legislative authority to issue this law in absence of the parliament.⁹²

Judge Genena was the first – and last – IBRA director to be impeached under this law. This step was taken following his statement about corruption levels in Egypt. He stated that the level of state corruption is estimated to have exceeded EGP 600 billion (USD 95 billion) during the period between 2012 and 2015.⁹³ He also stated that the CAO was in possession of all the documents required to prove this level of corruption.⁹⁴ Al-Sisi suspended him for making these statements. He was subsequently impeached, and his vice president Badawi took over.

The judiciary was not able to protect Genena against such an unconstitutional law. This is due to personal and institutional conflicts with Genena, who blamed the judiciary for being part of the state corruption. He presented corruption cases against the Judges' Club and its ex-president Al-Zend.⁹⁵ He also stated that the CAO was in possession of documents incriminating Judge Al-Zend for claiming public land below the market value. As a result, there are many pending cases regarding these allegations that have yet to be settled.

Secondly, the judiciary has failed to build any corruption cases except that of ex-President Mubarak.⁹⁶ This case is known as the 'Presidential Palaces Case.' In this case, Mubarak was convicted of embezzlement for using public funds to renovate personal presidential palaces.⁹⁷ The Court of Cassation maintained the Felony Court ruling of 3 years' imprisonment and repayment of EGP 125.8 million

⁹¹ *ibid.*

⁹² *ibid.*

⁹³ Sam Magdy, 'Egypt Puts former auditor on trial for exposing corruption' *Bigstory* (Cairo, 7 June 2016), <<http://bigstory.ap.org/article/20b8da2234fa4144a9f7e286c41a9bf0/egypt-puts-former-auditor-trial-exposing-corruption>> accessed 18 February 2017.

⁹⁴ 'Egypt's Sisi appoints committee to investigate corruption claims' *Ahram online English* (Cairo, 27 December 2015), <<http://english.ahram.org.eg/NewsContent/1/64/177487/Egypt/Politics-/Egypts-Sisi-appoints-committee-to-investigate-corr.aspx>> accessed 18 February 2017.

⁹⁵ Shorouk Genena, 'Adfa' thaman al-sara' byan-aazend we-abi', *al-Wafd* (Cairo, 15 June 2016).

⁹⁶ Randa Ali, 'Egypt's Revolution Continues: One Chant at a Time' *Ahram online English* (Cairo, 23 January 2012) <<http://english.ahram.org.eg/NewsContent/1/114/32335/Egypt/-January-Revolution-continues/Egypt-Revolution-continues-One-Chant-at-a-Time.aspx>> accessed 18 February 2017.

⁹⁷ Aswat Masriya, 'Court of Cassations rejects Mubarak's appeal in presidential Palaces case' *Egypt Independent* (Cairo, 9 January 2016) <<http://www.egyptindependent.com/news/court-cassations-rejects-mubarak-s-appeal-presidential-palaces-case>> accessed 18 February 2017.

(USD 16 million).⁹⁸ Colonel Mo'tasam Fathi was the investigating officer of the case. He was later impeached, with the judiciary unable to protect him from the executive authority. The inability of the judiciary, including the PPO, to fight corruption allows the political regime to protect corruption cases. Hence, it allows the political regime to protect corruption cases, which stands in the way of judiciary transparency.

4 Political reasons for reform: Politics and judicial law

The history of the JAL strictly prohibits both judges and courts from participating in political activities. Article 17 of the 1943 JAL states that 'courts are prohibited from expressing political opinions and tendencies, and judges are prohibited from engaging in politics.'⁹⁹ In 1952, a new amendment to the previous article was introduced. The amendment banned judges from running for public election. The article states 'judges are prohibited from engaging in politics, or nomination for public elections.'¹⁰⁰ The 1972 JAL reiterates the successive ban on the political participation of judges, though the 1971 Constitution opened the doors for pluralistic political participation.¹⁰¹

In theory, judges and courts were banned from any political participation. In practice, however, judges were forced to enter the political arena.¹⁰² Judicial participation in politics was due to two factors. Firstly, judges were forced to supervise elections.¹⁰³ Before 2000, the interpretation of Article 88 of the 1971 Constitution maintains partial judicial supervision of elections.¹⁰⁴ The government's opinion was to limit judicial supervision to general committees only, without extending it to sub-committees. The elections of both 1990 and 1995 fell under the previous interpretation. Candidates who lost the election

⁹⁸ Tarek al-Tablawy, 'Egypt's Mubarak Gets 3 years in Palace Funds Embezzling Case' *Bloomberg Business* (Cairo, 21 May 2014) <<http://www.bloomberg.com/news/articles/2014-05-21/egypt-s-mubarak-gets-3-years-in-palace-funds-embezzling-case>> accessed 18 February 2017.

⁹⁹ The 1949 Judicial Independence Law, Article 17.

¹⁰⁰ The 1952 Judicial Independence Law, Article 16.

¹⁰¹ The Judicial Authority Law 46/1972, Article 77.

¹⁰² Jeremy Sharp, 'Egypt: 2005 Presidential and Parliamentary Elections, CRS Report for Congress' *The Library of Congress* (Cairo, 21 September 2005), <<http://fpc.state.gov/documents/organization/54274.pdf>> accessed 18 February 2017.

¹⁰³ *ibid.*

¹⁰⁴ The 1971 Constitution, Article 88.

brought forward cases regarding the interpretation of Article 88. On 8 July 2000, the Supreme Constitutional Court (SCC) overruled the governmental interpretation of Article 88. This judgment was called ‘a judge for every election box’ (*Qadi le-kol Sandowq*). It stated that Article 88 indicated full judicial supervision over elections for both general and sub-committees. The court concluded it was only admissible to appoint the chief of the election sub-committees from the judiciary.¹⁰⁵ As a result, the government found itself obliged to hire a judge for each sub-committee, leading to an estimated total of 15,000 judges.¹⁰⁶

Secondly, judges were unable to stop election fraud from occurring during Mubarak’s regime.¹⁰⁷ Before 2000, the regime committed election fraud to sustain its political legitimacy. It used to perform election fraud under mock judicial supervision.¹⁰⁸ Such supervision was limited to the general electoral committee. After 2000, the regime did commit blatant fraud during the parliamentary election, despite it being under full judicial supervision. Hence, it leads the judiciary to be involved in the political arena.¹⁰⁹

On 24 November 2005, Judge Noha al-Zaini presented her testimony regarding what happened in the elections as a sub-committee chair in Damanhour Governorate.¹¹⁰ She called the article *Tazwear tahat ishraf al-qada*, ‘election fraud under judicial supervision.’¹¹¹ In her testimony, al-Zaini confirmed that upon her arrival, she noticed that the government candidate had won fewer votes compared with the independent candidate.¹¹² Her colleagues informed her that the independent candidate was leading.¹¹³ However, when the results were publicly announced, they were in favor of the governmental candidate. She was convinced that acts of fraud had been committed within the Primary Electoral Committee of Damanhour. She wrote her testimony declining any responsibility for the election’s outcome. 160 judges, who were responsible

105 Supreme Constitutional Court, Case no 11, Judicial Year 13.

106 Shams Al Din Al Hajjaji, ‘The Egyptian Judiciary in the Age of the Republic: The Role of Internal Conflicts in Controlling the Judicial System’ (2017) 4 *Indon J Int’l & Comp L* 363, 378.

107 *ibid.*

108 *ibid.*

109 *ibid.*

110 Noha al-Zaini, *Tazwear tahat ishraf al-qada, Masry al-Youm* (Cairo, 25 November 2005) <<http://today.almazryalyoum.com/article2.aspx?ArticleID=41680>> accessed 18 February 2017.

111 *ibid.*

112 *ibid.*

113 *ibid.*

for the sub-committees in the Damanhour Governorate, came together to prove that the election was indeed fraudulent.¹¹⁴

On 25 November 2005, the Judges' Club formed a Fact-Finding Committee. The committee investigated al-Zaini's allegations of electoral fraud. The committee started with contacting the 160 judges who supervised the Damanhour Governorate sub-committees. It requested a copy of the reports that they submitted to the Primary Electoral Committee and was able to secure 137 out of a total of 160 reports (one report=one judge). The committee found that the governmental candidate had won only 8,606 votes, while the other independent candidate had obtained 24,611 votes. As a result, it announced the governmental candidate had lost the elections.¹¹⁵

The committee had no formal powers, since it had not been established by either the Supreme Electoral Committee SEC or the MoJ. When the committee sent its report to the SEC and the MoJ, the Attorney General started investigations against al-Zaini and the 160 judges who had exposed the fraud. As for the MoJ, it transferred the case to the inspection department within the Ministry to punish the judges who had exposed the fraud. As a result, judges found themselves having to choose between two options. Firstly, if they respected the JAL's stand of prohibiting any political participation, they would be considered accomplices in the election fraud. Secondly, if they condemned the fraud, they would be charged with political participation in violation of the JAL. The majority of judges thus chose the second option.

Full judicial supervision has gone through two stages. Firstly, the Mubarak regime did not wish to continue with the impeachment process of the previous judges. In 2007, Mubarak called for a major constitutional amendment of 34 articles, which included Article 88 regarding full election supervision. The 2007 amendment of Article 88 reflects the old governmental interpretation of the article. It limits judicial supervision to the general electoral committees only, while the sub-committees remain under executive supervision. The only election under the new amendment was in 2010, which was nullified in 2011 for outrageous election fraud. Secondly, two months after the swearing in of the new parliament, the January 25 Revolution broke out. Participants in the Revolution

114 *ibid.*

115 Al-Mostashar Ashraf, 'al-Barowdi 'odw lajant taqasi al-haqaiq benadi qodat al-askandar-ayah: intkhabat damanhour shahadat tajawazat [...] we 'la al-qodah a-taharok fawran' *Masry al-Youm* (Cairo, 26 November 2005).

demanded full judicial supervision of elections.¹¹⁶ People agreed that the elections should not be in the hands of the executive, due to the previous history of election fraud. The request was based on the SCC ruling of ‘one box, one judge.’ As a result, the 2011 Constitutional referendum was under full judicial supervision.

The 2014 Constitution maintains full judicial supervision until 2024.¹¹⁷ After that, the election supervision will fall to the National Electoral Commission NEC, and its director will be the chief justice of the Court of Cassation.¹¹⁸ As for members of the election sub-committees, Article 210/1 mandates ‘voting and counting of votes in referenda and elections run by the Commission is administered by its affiliated members under the overall supervision of the Board.’¹¹⁹ The current status of the NEC is in favor of bringing back previous practices of election fraud. In order to replace the judiciary, strong bodies are required to make that shift from judicial supervision to an NEC. The judiciary is likely to maintain its role of supervising the election if the newly appointed commission is not fully successful or in the event of a collapse of the current regime. The former case would occur if the Al-Sisi regime remained in power and it was incapable of building an independent NEC. The latter case is likely to occur in the event of a collapse of the regime. The 2014 Constitution was drawn up excluding Islamist¹²⁰ and liberal politicians.¹²¹ Hence, judges are more likely to be engaged in the political arena as long as such an NEC is not in effect.¹²² The previous process of

116 ‘Egypt: 2011–2012 Supreme Judicial Commission for Elections’ *African Democracy Encyclopedia Project* (Cairo, January 2012) <<https://eisa.org.za/wep/egy3a.htm>> accessed 18 February 2017.

117 The 2014 Constitution, Article 210/2 states ‘the voting and counting of votes in elections and referenda in the 10 years following the date on which this Constitution comes to effect are to be overseen by members of judicial bodies and entities in the manner set out in the law.’

118 *ibid*, Article 209 states the commission consists of ‘10 members selected equally from among the vice-presidents of the Court of Cassation, the presidents of the Courts of Appeal, the vice-president of the State Council, the State Affairs and Administrative Prosecution, who are to be selected by the Supreme Judicial Council and special councils of the aforementioned judicial bodies.’

119 *ibid*, Article 210/1.

120 ‘Egypt’s Islamist Parties win elections to Parliament’ *BBC News* (Middle East, 21 January 2012) <<http://www.bbc.com/news/world-middle-east-16665748>> accessed 18 February 2017.

121 ‘Egypt: Year of Buses under al-Sisi’ *Human Rights Watch* (Beirut, 8 June 2015) <<https://www.hrw.org/news/2015/06/08/egypt-year-abuses-under-al-sisi>> accessed 18 February 2017.

122 Eric Trager, ‘Sisi’s Fracturing Regime’ *Foreign Policy* (Cairo, 22 January 2016), <<http://foreignpolicy.com/2016/01/22/sisis-fracturing-regime/>> accessed 18 February 2017.

election fraud, judicial election supervision, judicial political participation and independent electoral committee is illustrated in Figure 1.

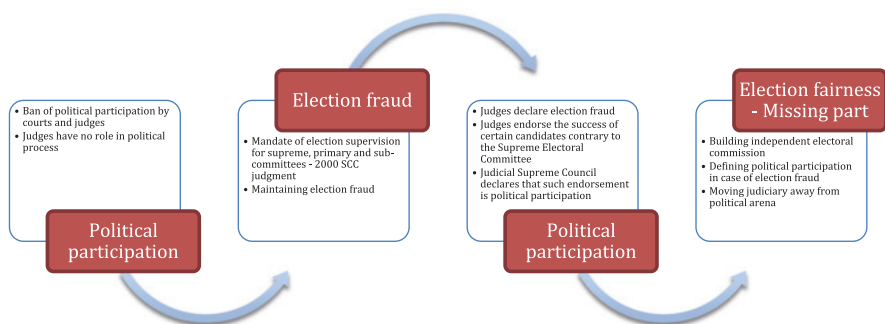


Figure 1: The cycle of judicial political participation.

5 Legal reasons for reform

5.1 Judicial law and internal issues

There are four major internal issues that the new JAL has to address effectively to ensure justice. These issues are: the interference of the MoJ in the judiciary, the judicial budget, judicial immunity and inequality in judicial appointment. Firstly, the improper influence on judicial decision-making, in the majority of cases, takes on two forms. Initially, the MoJ authority enjoys the ultimate authority over the appointment of the primary court's chief justice, who has the authority to assign judges to certain circuits.¹²³ The MoJ's legal right has been commonly and continuously abused. Each court has circuits that are specialized in various types of cases, like high-value commercial cases, or cases of a political nature. These cases are labeled 'sensitive' due to the nature of the parties involved in them. High-profile circuits are assigned to certain judges.¹²⁴ In 2012, Judge Mahmoud Shokri was the judge assigned to a case entitled 'illegal foreign fund against NGOs.' He was forced to resign from the case because he refused to respond to a request by the president of the Cairo

¹²³ Yussef Auf, 'Challenges Facing Egypt's Judiciary' *Middle East Institute* (Washington, 1 May 2013) <<http://www.mideasti.org/content/challenges-facing-egypts-judiciary>> accessed 10 July 2016.

¹²⁴ *ibid.*

Court of Appeal, Judge Abdel Moez Ibrahim.¹²⁵ The case was assigned to one of the judges in the technical office of the court.¹²⁶ As a consequence of this action, some judges lobbied to have Ibrahim dismissed, but their endeavors proved unsuccessful.¹²⁷ Besides, the MoJ has the ultimate power over the judicial inspection department, which is also a legal right. The 2014 Constitution gives the judiciary the right to regulate the accountability rules of its members.¹²⁸ The problem with the inspection department and the MoJ lies in the arbitrary nature of their decisions. Many judges supported the coup, while others supported ex-President Mohamed Morsi. Even though both groups have committed the same violation of the judicial authority law that bans any political participation of the judiciary, the inspection department impeached many of the judges who supported ex-President Mohamed Morsi, but overlooked the offense committed by those supporting the military coup.¹²⁹

Secondly, the independent judicial budget reflects the independence of the judiciary from the executive authority while a transparent budget reflects an accountable judiciary.¹³⁰ However, although the judiciary has an independent budget, it has never been made public.¹³¹ Full independence of the judicial budget was granted to the judiciary in 2008 after judges fought for the independence of their budget.¹³² Once granted, they overlooked the judicial accountability aspect of their budget.¹³³ There were many proposals, prohibiting the budget from being made public.¹³⁴ These proposals finally reached a

125 'Al-Mostashar Mahmoud Shokri Yabki 'al hal alqodah ma' Mahmoud Said' *YouTube* (Egypt, 28 March 2012), <https://www.youtube.com/watch?v=iZ0v_MXkB44> accessed 10 July 2016.

126 *ibid.*

127 Mai Shams al-Din, 'Appeals Court Judges move to sack Abdel Moez Ibrahim' *Daily News Egypt* (Cairo, 23 March 2012) <<http://www.dailynewsegypt.com/2012/03/23/appeals-court-judges-move-to-sack-abdel-moez-ibrahim/>> accessed 10 July 2016.

128 Egypt 2014 Constitution Article 184.

129 'Egypt: refers 60 pro-brotherhood judges to disciplinary board' *Ahram Online* (Cairo, 20 October 2014) <<http://english.ahram.org.eg/NewsContent/1/64/113517/Egypt/Politics-/Egypt-refers-proBrotherhood-judges-to-disciplinar.aspx>> accessed 10 July 2016.

130 Vicki Jackson, 'Judicial Independence in Comparative Analysis' in Anja Seibert-Föhr (ed) *Judicial Independence in Transition*, (Springer 2012) 71.

131 *ibid.*

132 Atef Shahat Said, 'The Role of the Judges Club in Enhancing the independence of the Judiciary and Spurring Political Reform' in Nathalie Bernard-Maugiron (n 50) 72.

133 *ibid.*

134 There is a general understanding that some institutes shall not present their budget to the public. These institutes are army and judiciary. For the judiciary, Article 185 of the 2014 Constitution states 'all judicial bodies administer their own affairs. Each has an independent budget, whose items are all discussed by the House of Representatives. After approving each budget, it is incorporated in the state budget as a single figure, and their opinion is consulted

compromise in that the legislative would discuss the budget of the judiciary while maintaining it hidden from the public.¹³⁵ This rule applies to the SCC, the State Council¹³⁶ and the ordinary judiciary.¹³⁷

Thirdly, judicial immunity, globally, protects judges from civil damages that result from their judgments.¹³⁸ This is limited to civil damages with no reference to criminal liability.¹³⁹ However, judicial immunity in Egypt covers both civil and criminal liabilities. As far as civil immunity is concerned, there are two types of civil accountability. The first is related to the judicial work of both judges and prosecutors. The general rule in this type of civil accountability is that judges are immune, while their accountability is an exception, as will be discussed in the following paragraphs. Article 494 of the Civil Procedure Law grants judges and prosecutors legal immunity from any civil damages that may arise from their work.¹⁴⁰

The second type of civil accountability applies to non-judicial actions and is called Non-Judicial Civil Liability (NJCL). In theory, judges should not derive any form of civil immunity from their non-judicial work. The JAL does not regulate such form of NJCL of judges and prosecutors. Despite this, the Judicial Inspection Department (JID) has developed certain practices for NJCL, leading to comprehensive civil immunity for judges and prosecutors in reality. On the one hand, the JID must express its consent for any civil procedures to be launched against a certain judge. Without this consent, the plaintiff will not be able to sue a judge or a prosecutor in court. On the other hand, the JID cannot

on the draft laws governing their affairs.' As for the army, Article 203 states the national defense council is 'responsible for looking into matters pertaining to the methods of ensuring the safety and security of the country, for discussing the armed forces' budget, which is incorporated as a single figure in the state budget.'

135 Ibid.

136 Ibid, Article 191 states Supreme Constitutional Court 'has an independent budget whose items are all discussed by the House of Representatives. After it is approved, it is incorporated in the state budget as a single figure.'

137 Ibid, Article 184 states 'all judicial bodies administer their own affairs. Each has an independent budget, whose items are all discussed by the House of Representatives. After approving each budget, it is incorporated in the state budget as a single figure, and their opinion is consulted on the draft laws governing their affairs.'

138 Vicki Jackson, 'Judicial Independence: Structure, Context, Attitude' in Anja Seibert-Föhr (n 130) 52.

139 Ibid.

140 Judges and prosecutors have to tackle all the cases, as long as they have a legal cause. If any plaintiff claims that certain judge or prosecutor committed one of the previous two exceptions, the plaintiff can resort to the competent Court of Appeals. The Court assigns the case to a special circuit to determine the virtue of the plaintiff claim.

take any civil action against a judge. If the JID believes that there is NJCL, it will transfer the case to the competent civil court. The court will then hear all parties, including the judge. In other cases, if the JID cannot find any cause for NJCL, the JID will not transfer the case to the competent civil court. As a result, the plaintiff in the non-judicial civil case will not have his/her case heard.

NJCL jeopardizes the trust in the judiciary in general, especially in judges and prosecutors. It is legally unacceptable to add an extra judicial barrier with the aim of protecting certain classes in society. If a plaintiff claims that a judge has refrained from paying the rent, the plaintiff must first resort to the JID to obtain approval to sue the judge. The JID has thus imposed an extra-judicial procedure on the plaintiff to be able to resort to the 'natural justice.' Neither the CPL nor the JAL regulates non-judicial civil liability. The practice of the JID, however, has helped develop a form of immunity for judges. As a result, there is now a need to abolish non-judicial civil immunity.

As for criminal immunity, the 2014 Constitution and the JAL provide judicial immunity to all judicial institutions, including the SCC, and the ordinary and the administrative judiciary.¹⁴¹ The 1972 JAL mandates such immunity to judges and prosecutors to protect them from the executive authority. Judges and prosecutors enjoy a special status regarding their criminal liability, especially arrest, search and seizure procedures.¹⁴² No criminal action can be initiated against judges unless through a special judicial committee. This committee includes chief judges of the Court of Cassation, the Cairo Court of Appeal, the Alexandria Court of Appeal, and the Attorney General. There are two exceptions to this rule. Firstly, both the JID and the SJC permit criminal procedures to be launched against a judge or prosecutor. The SJC has to issue an arrest warrant or authorize the process of investigation, search or seizure.¹⁴³ Secondly, if a judge or a prosecutor is caught engaging in illegal conduct, a judicial investigator or police officer can arrest said judge or prosecutor.¹⁴⁴ In this case, the Attorney General must notify the SJC of the issue within 24 hours, and decide on whether to arrest the judge or to release him on bail.¹⁴⁵

The rules of criminal immunity need to be redefined to reflect their real objective.¹⁴⁶ The rules of criminal immunity should not be extended to include a

141 The Supreme Constitutional Court 48/1979, Article 24.

142 The Judicial Authority Law 46/1972, Article 52.

143 *ibid.*

144 *ibid.*

145 *ibid.*

146 Sophie Turenne, 'Judicial Independence in England and Wales' in Anja Seibert-Föhr (n 130) 184.

special status for judges and prosecutors. Granting a special status to judges and prosecutors leads to an abuse of judicial power.¹⁴⁷ This immunity leads to social and legal inequality. Firstly, a judge who commits a crime is prosecuted and tried by his/her colleagues.¹⁴⁸ Secondly, the special judicial committee is made up of senior judges.¹⁴⁹ This committee will convene for serious crimes only, such as murder, while the committee undoubtedly deems less serious crimes a lesser – or no – priority. This understanding leads the prosecution, for instance, to refrain from prosecuting judges for traffic law violations. Hence, there is a growing consensus among the public that judges are above the law.

Fourthly, the judicial appointment process shows clear discrimination against women and lower socioeconomic status (SES) candidates.¹⁵⁰ As for women, the 2014 Constitution settled the debate on the discretion of the administration to appoint women in judicial vacancies. Firstly, Article 9 eliminates any form of discrimination against women. It states ‘the state ensures equal opportunity for all citizens without discrimination.’¹⁵¹ To this day, however, women are banned from joining the bench.¹⁵² Women cannot join either the State Council or the PPO.¹⁵³ As for underprivileged citizens, the 2014 Constitution guarantees full equality based on social class.¹⁵⁴ However, there are many obstacles surrounding their appointment. Ex-MoJ Mahfouz Saber was asked during a television interview whether ‘the son of a garbage collector stands a chance of being appointed as a public prosecutor.’ He replied, ‘the judge shall

147 *ibid.*

148 ‘Egypt: arbitrary and unfair removal of judges must be reversed’ *International Commission of Jurists* (Geneva, 28 March 2016) <<http://www.icj.org/egypt-arbitrary-and-unfair-removal-of-judges-must-be-reversed/>> accessed 10 July 2016.

149 *ibid.*

150 The 2014 Constitution Article 11 states ‘the state commits to achieving equality between women and men in all civil, political, economic, social, and cultural rights in accordance with the provisions of this Constitution.’

151 *ibid.*, Article 9. This was not efficient to ensure that women will secure positions in the judiciary. The same article existed when *al-Sanhori* stated that it is no prejudice against women in the appointment of certain posts, as long as there is no misuse of discretionary power of the administration. Article 3 of the 1923 Constitution stipulates ‘Egyptians are equal. They are equal in practicing civil and political rights and duties. Discrimination based on ethnic origin, language, or religion is prohibited.’

152 Ahmed Sayed, ‘Female Judges in Egypt’ (2006–2007) 13 YB Islamic & Middle E L 135, 136.

153 *ibid.* 138.

154 The 2014 Constitution Article 53 states ‘Citizens are equal before the law, possess equal rights and public duties, and may not be discriminated against on the basis of religion, belief, sex, origin, race, color, language, disability, social class, political or geographical affiliation, or for any other reason.’

be from a proper social class [...] with all due respect to the garbage collector and to those who are below or above him [...] a proper environment, and a good social class are necessary [...] I am not saying it should be the aristocracy [...] I am saying the class should not be very low.’¹⁵⁵ These inequalities serve the undeclared quota for judges’ sons and relatives.¹⁵⁶ The president of the Judges’ Club and ex-MoJ Ahmed al-Zend asserts that ‘appointing children of judges will continue [...] there is not a single force in Egypt that can stop such a practice.’¹⁵⁷ This statement was considered to be the first official statement regarding this practice. In 2013, more than 114 out of 475 appointees within the prosecution bureau were the relatives of judges.¹⁵⁸ In 2014, this percentage increased from 25 % to 35 %.¹⁵⁹

5.2 Consequences of inefficient judicial education and training

The question of the validity of two or more laws that regulate the same legal behavior reveals two different drawbacks. In common law countries, this is a frequent problem. In the US, the Supreme Court has recognized the prosecution right to choose between two laws, whichever the prosecutor prefers. In civil law countries, the existence of two or more rules that govern one behavior is considered a legal problem. This is due to the codification nature of the law, which ensures the right of parties in legal predication.¹⁶⁰

It has been argued that Article 2 of the Egyptian Civil law states that ‘a provision of a law can only be repealed by a subsequent law expressly providing for such repeal, or containing a provision inconsistent with a provision of the former law or regulating anew a matter previously regulated by a former law.’

155 ‘albayt baytak – wazear al-‘adl ya yomkan an ya’mal ibn ‘amal anzafah be-qada’ *TEN TV Network YouTube* (Cairo, 10 May 2015), <<https://www.youtube.com/watch?v=7H8mPdTJUWw>> accessed 10 July 2016.

156 Mohamed al-Isaawii, ‘al-Zend: Ta’yeen abna al-Qodah sayastmeer, we lan tastati’ qah fi Misr Iqaf haza elzafh al-moqasas’ *Ahram Newspaper* (Cairo, 9 March 2012), accessed 10 July 2016.

157 *ibid.*

158 Ahmed Sa’d, ‘Abna al-Qodah yastahowzown ala rob’ ta’ynat dof’at al-nayabah al-gedidiah’ *Shorouk* (Cairo, 7 December 2013) <http://shorouknews.com/news/view.aspx?cdate=07122013&id=32b2ce69-695b-484d-b358-2214a8cdc824> accessed 10 July 2016.

159 Ahmed Said, ‘Bel-asma [...] abna al-qodah yastohwazown ala 35 % men ta’yanat elnayabah al-gedidiah’ *Shorouk*, (Cairo, 17 July 2014) <http://www.shorouknews.com/news/view.aspx?cdate=17072014&id=52446ae9-860f-4183-8c4c-31818a678860> accessed 10 July 2016.

160 Peter Manning, ‘Reflections on Risk Analysis, Screening and Contested Rationalities’ (2006) 48 *Canadian J Criminology & Crim Just* 453, 460.

However, the judiciary repeals such rules. The public prosecution would still apply any of the two laws, unless the law did explicitly repeal the previous law. This problem exists in Egypt not only due to the codification nature of the 1937 Penal Code, but also due to the lack of efficient legal training for both judges and prosecutors.¹⁶¹ The following table includes five examples of two contradicting

Laws:	First law	Contradictory law
Registration of new born	The Civil Status Law deems any violation a misdemeanor, resulting in fine of 200 pounds ¹⁶²	The Child Law deems it an infraction, resulting in a fine of 10 pounds ¹⁶³
Forgery of Identification Card	<p>Article 213 of the Criminal Code states a punishment of temporary hard labor or imprisonment shall be inflicted on any civil servant at a public administration or a court who alters, with the aim of committing a forgery, the subject or status of the documents¹⁶⁴</p> <p>Reading article 213 of the criminal code, this has to be read in conjugation with article 215. Article 215 states that 'any person (including the husband) who commits a forgery in the written acts of an individual by any of the aforementioned methods (include articles 213, 214 and 214bis) or uses a forged paper while knowing of its forgery, shall be punished with penal servitude.'¹⁶⁵</p>	Article 23 bis of the Personal Status Law states that 'A husband shall be punished with detention for a period not exceeding six months or a fine not exceeding two hundred pounds or either penalties, if the husband submitted incorrect data regarding his marital status.' ¹⁶⁶
Crime of Midwifery	The Midwifery Law mandates a license for women practicing midwifery. Article 15 states the punishment for not having such a license, which is a fine not exceeding one hundred pounds each for the demise of the profession of obstetrics in contravention of the provisions of this law and punishment will be doubled in case of recurrence ¹⁶⁷	Article 8 of the Child Law includes midwives in the non-physicians practice ban. It states that 'it is not permissible for non-physicians to practice the profession of obstetrics, in any capacity, whether public or private, only those whose names are recorded in the registers of midwives, assistant midwives, or doulas of the Ministry of Health can do so.' ¹⁶⁸ Article 13 of the Child Law stipulates imprisonment for a period not exceeding six (6) months and a fine of no less than two hundred (200) Egyptian pounds and not exceeding five hundred (500) Egyptian pounds, or by one of the two penalties, whoever practices the midwifery profession in violation of the provisions of this Law. In case of recurrence, the perpetrator shall be liable for both penalties jointly. ¹⁶⁹
Smoking related crimes	Article 46 of the Environmental Law states 'smoking is prohibited in means of public transport.' Article 87 states that 'it shall be fined of no less than ten pounds and no more than fifty pounds.' ¹⁷⁰	Even though the same provision was stated in the Tobacco Act no 52 of 1981, it states a different punishment, which is a minimum of ten pounds and a ceiling of one hundred pounds ¹⁷¹
Crime of littering in public streets	Article 37/4 of the Environmental Law punishes the dumping of garbage and solid waste with a fine of no less than one thousand pounds and no more than twenty thousand pounds. ¹⁷²	Article 9 of the Public Sanitation Law requires a fine of no less than twenty pounds and no more than fifty pounds ¹⁷³

Figure 2: Contradictory valid laws.

¹⁶¹ *ibid.*

¹⁶² Civil Status Law (1994).

¹⁶³ Child Law (1996).

¹⁶⁴ Criminal Code, Article 213.

laws. The first column presents the name of the crime and the other two columns illustrate two different punishments for the same act.

6 Conclusion

The 2013 Military Coup succeeded in suspending all calls for judicial reform under the guise of security concerns. The Egyptian judicial system, however, faces an interconnected web of serious problems. This research attempts to answer the question as to why judicial institutions are in need of reform. It lists the judicial failures in facing serious economic, social, legal and political challenges. The contemporary challenges facing Egypt are not secluded from the judicial challenges. Legal activists, including lawyers, judges and NGO members, have long called for reform. This research endeavors to shed light on the importance of judicial reform in Egypt. The inability of the judiciary to respond to ongoing challenges continues to prevent the progress of society as a whole. Strong governmental institutions need an independent and accountable judiciary to reinforce the law. The research presents these challenges and the role of the judiciary in protecting freedoms, fighting corruption and ensuring transparency. The judiciary is facing a crisis that is obstructing any effective progress of the economy.

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165 *ibid* Article 215.

166 Personal Status Law, Article 23 bis.

167 Midwifery law (1954), Article 64.

168 Child (n 158) art 8.

169 *ibid*, Article 13.

170 Environmental law 1994, Article 46/2.

171 Tobacco Act no 52 of 1981.

172 Environmental (n 166) Article 37/4.

173 Public Sanitation Law (1967), Article 1.