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REFORM OF JUDICIAL INDEPENDENCE RULES IN EGYPT

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This paper argues that judicial independence role in Egypt lacks any form of checks and balance, which reinstates the role of judicial autonomy over judicial independence. The judicial independence is a debatable issue in the contemporary history in Egypt. Judges, lawyers, and activists called for judicial reform after the success of the 2011 Revolution. In response, the paper presents the concept of judicial independence in Egypt, which reflects an understanding of autonomy rather than independence. More specifically, there is a clear lack of understanding of checks-and-balances in theory and practice of judicial independence. In this regard, the question of separation of powers and between the judiciary, the legislative and the executive imposes a call for reform for the role of the Minister of Justice, the Judicial Inspection Department, and the president of the primary court over judges. For that matter, this paper answers several questions regarding the formulation, organization, and separation of power in the Egyptian judiciary.

Keywords: Judiciary; Judicial independence; Judicial Autonomy; Judicial Reform; Islamic Law.



I. INTRODUCTION

The judiciary is a cornerstone in protecting liberty and impartial justice against executive oppression and other forms of executive or bureaucratic abuse.¹ The Egyptian Supreme Constitutional Court (hereinafter SCC) maintains that judicial independence is the primary foundation of the supremacy of the law.² It protects both individuals and institutions against legislative and executive violations of fundamental rights.³ Usually, there is a mixture of judicial independence and judicial autonomy. While the former is based on checks and balances between executive, legislative and judicial authorities, the latter is based on putting up barriers between the three authorities.⁴

Judicial independence and judicial autonomy have different characteristics that distinguish one from the other. Judicial independence involves four main issues. Firstly, that judges are free from any form of external pressure.⁵ They shall be free from any commitment except to justice. Secondly, court decisions are subject to amendment only through a judicial adjudication, rather than executive or legislative methods, unless there is a constitutional amendment.⁶ Thirdly, the law shall be the only source to determine judicial decisions, rather than any form of political pressure.⁷ Fourthly, the independent

1. Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 DAYTON L. REV. 565, 567 (1995-96).
2. The Supreme Constitution Court Judgment no. 27 states “the meaning and the effects of judicial independence are not only a guarantee against interference of the executive authority in justice affairs, but it is also a guarantee against executive interference in its administration. Judicial Independence is introduction to the supremacy of law”.
3. Cox, *supra* note 1, at 571.
4. Rafael La Porta, Florencio Lopez de Silances, Cristian Pop Eleches, & Andrei Shleifer, *Judicial Checks and Balances*, 112 J. POL. ECON. 445, 447-449 (2004); *see also*, the reform shall come from within the judiciary, David Risley, *Egypt’s Judiciary: Obstructing or Assisting Reform*, 1 MIDDLE EAST INSTITUTE POLICY FOCUS 4, 10-11 (2016).
5. La Porta et al., *supra* note 4. at 566.
6. *Id.*
7. *Id.*

judiciary is subject to checks and balances with the executive and legislative authority. It is not above the other two authorities; instead, it is equal and accountable to both. Nonetheless, the form of checks and balances differs from one country to another. Hence, the first three issues are core issues of judicial independence, while the fourth raises the question of separation of powers.

Judicial autonomy, on the other hand, is an extreme form of judicial independence. It indicates that there is no form of supervision of checks and balances between the judiciary, the executive, and the legislative authorities. In addition, factors that identify judicial independence and judicial autonomy have four unique features. Firstly, the judicial budget does not fall under any supervision from legislative authorities, nor is it publicly discussed. Secondly, judges perform administrative duties and tasks of the judiciary. It may be argued that the Minister of Justice (hereinafter MoJ) interferes in the judicial administration. However, as indicated in this research, the MoJ is a judge who has been chosen by the Supreme Judicial Council (hereinafter SJC). Even though the MoJ is part of the executive authority, the MoJ also enjoys the approval of most of the members of the judiciary. Thirdly, members of the judiciary manage the judicial appointment process.

Even though the executive authority interferes with the security checks, this has a negative impact on the process. The executive authority has the capacity to exclude certain candidates who have political or criminal records. However, it is unable to propose any candidate for appointment. Fourthly, judges are accountable to their peers/judges rather than to the two other authorities. Judicial independence has repeatedly been implemented in the constitutional history of the Egyptian judiciary throughout different periods, except during the period of socialism.⁸ Even though the 1923 and 1930 Constitutions did not mention this independence, there was a separate judicial independence law, which formed the foundation for the concurrent judicial authority laws.⁹ After the 1952 Military Coup, the 1956, 1958, 1963 and 1971 Constitutions maintained the judicial independence of the bench. They did not, however, provide any form of independence

8. AMR SHALAKANY, *IZDIHAR WA-INHIYAR AL-NUKHBA AL-QANUNIYYA AL-MISRIYAA* 277 (Cairo: Shorouk Publisher 2013).

9. Judicial Independence Law (1943) and Judicial Independence Law (1952).

to the institution. After the 2011 Revolution, judges sustained an unprecedented form of independence that reflected their understanding of full autonomy of the institution. The 2013 Constitution confirmed judicial independence.¹⁰ This is also addressed in section three under the title “The Judicial Authority.” Article 186 of the Constitution includes a separate article to ensure judicial independence.¹¹ The 2014 Constitution takes a similar approach to that of 2013 with regard to judicial independence.¹²

The discussion is divided into three main sections. The first discusses judicial independence in Egypt, which has two major features. Firstly, judicial independence on the bench is concerned with individual judges. This includes judges’ immunity and the irrevocability of their status and positions. Secondly, judicial independence of the institution in Egypt is considered a complicated issue, especially after the formulation of the present Constitution. The SCC, the State Council, the Public Prosecution Bureau, the military judiciary, the Administrative Prosecution, the State Cases’ Authority, and aides to the judiciary were granted autonomy from executive and legislative authorities. The second section tackles the role of the separation of powers between the judicial and executive branches. This issue takes a different turn as a result of judicial autonomy being applied. It ignores any form of checks and balances between these authorities and bans any form of interference in judicial affairs.¹³ The judiciary monopolizes

10. The 2013 Constitution, art. 94 states “the state is subject to the law, while the independence, immunity and impartiality of the judiciary are essential guarantees for the protection of rights and freedoms”.
11. The 2014 Constitution, art. 186 states “judges are independent, cannot be dismissed, are subject to no other authority by the law, and are equal in rights and duties. Law regulates the conditions and procedures for their appointment, secondment, delegation, discipline and retirement. They may not be fully or partly delegated except to bodies and to perform tasks that are identified by law, provided that all the foregoing maintains the independence and impartiality of the judiciary and judges and prevents conflicts of interest. The rights, duties and guarantees granted to them are specified by law”.
12. *Id.* art. 184 states “the judiciary is independent. It is vested in the courts of justice of different types and degrees, which issue their judgments in accordance with the law. Law defines its powers. Interference in judicial affairs or in proceedings is a crime to which no statute of limitations may be applied”.
13. *Id.* art. 185.

the accountability and appointment of its members.¹⁴ The third and final section proposes reform for the previous dilemma presented in this research.

II. JUDICIAL INDEPENDENCE IN EGYPT

A. The Present State of Judicial Independence in Egypt

The 2014 Constitution has arguably granted the judiciary unprecedented privileges towards its full independence to reach the level of judicial autonomy. These steps are considered a setback for the checks and balances system and the principle of public transparency.¹⁵ The 2014 Constitution grants independence of administration, budget, and personnel. Article 184 states that “the judiciary is independent. It is vested in the courts of justice of different types and degrees, which issue their judgment in accordance with the law. Its powers are defined by law.”¹⁶

As far as the independence of the administration is concerned, Article 185 states, “All judicial bodies administer their own affairs.”¹⁷ In terms of budget independence, the same Article, paragraph 2 states that “each judicial body 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.”¹⁸ For the independence of the judges on the bench, the constitution lays out the general rule related to such independence in Article 186.¹⁹ It

14. *Id.* art. 189.

15. *Id.* art. 185/1 states “[a]ll judicial bodies administer their own affairs. Each has an independent budget, whose items are all discussed by the House of Representatives”.

16. *Id.* art. 184.

17. *Id.* art. 185/1.

18. *Id.* art. 185/2.

19. *Id.* art. 186.

states “judges are independent, cannot be dismissed, are subject to no other authority but the law, and are equal in rights and duties.”

Even though the 2014 Constitution grants full independence to the judicial body, in reality, this independence is not absolute. In developed countries, independence is not absolute due to the typically enforced principle of separation of powers. In such relations, each power plays its role in the checks and balances to maintain the full independence of each power. The MoJ plays the central role in choosing members of the judiciary, their promotion, their accountability, as well as the nomination of the chairpersons of the primary courts. These are in effect the core of the ordinary judiciary. This role will be further discussed in the next few sections. In reference to the nature of the MoJ, the judiciary as an institution is autonomous, but not independent.

B. Judicial Independence on the Bench

The independence of judges on the bench entails four factors, which are judicial non-transferability, judicial tenure, judicial immunity, and judicial review. Firstly, judges cannot be transferred to another position, unless they themselves agree to the said transfer.²⁰ Similarly, members of the court (chief justice, associate justices, or the commissioners) cannot be transferred from their offices. There are two exceptions to this rule. Firstly, when a judge has spent the maximum period in a specific district, which varies between three to five years. At this point, a judge must be transferred to another district. This exception is only applied to the ordinary judiciary, and recently to the administrative judiciary. The SCC judges are not subject to this exception.²¹ Article 67 of the JAL states that “members of the judiciary and public prosecution, except aids to the district attorney, are irremovable. Judges of the court of cassation cannot be transferred to the courts of appeal or public prosecution unless with their consent.”²²

Secondly, members of the judiciary are tenured, as they cannot be removed from office. This rule applies to all four judicial institutions. Article 11 of the SCC maintains that members of the court cannot

20. The Supreme Constitutional Court Law 48/1979, art. 11.

21. *Id.* art. 24.

22. The Judicial Authority Law 46/1972, art. 97.

be removed from position. The age of retirement for judges, who are members of the ordinary judiciary, is 70.²³ This age has vacillated between 60 and 70 several times. During this period, judges cannot be removed from position, unless they voluntarily resign, or are dismissed as a result of disciplinary action. The JAL manages the two ways in which judges can be removed from office. The first process is impeachment. The second is resignation, in which case the law provides for full retirement benefits for life in the event they wish to terminate their appointment as judges. Members of the Public Prosecution Bureau also follow the same rules as ordinary judges.²⁴ The only exception applies to the position of “an aide to district attorney.” Prosecutors of this rank can be dismissed from office by a decision of the attorney general.

Thirdly, members of the judiciary, including the ordinary judiciary, and the Court of Cassation enjoy immunity. Article 15 of the SCC law extends the protection granted to members of the Court of Cassation to members of the SCC.²⁵ In the case of committing a crime, judges cannot be arrested or taken into custody unless a warrant has been issued by the SJC. The SJC has the right to issue a warrant to arrest any judge if members of the council ascertain any violation of criminal law—with the exception of one case. Article 96 regulates that if a judge is caught in the act of committing an illegal act or crime, there is no need to wait for a warrant for his/her arrest.

After concluding the investigation, the SJC is the competent authority to decide whether to keep the judge in custody or release him/her on bail.²⁶ In the event of the judge being taken into custody, he/she is placed on mandatory leave during this period. If the SJC decides to release the judge, he/she will serve a mandatory suspension until the end of the investigation and trial. During such time, the judge cannot execute his/her duties, despite receiving his/her salary regularly until the end of the investigation period.²⁷

Fourthly, judicial decisions are made without interference of any

23. *Id.* art. 69.

24. The 2014 Constitution, art. 189.

25. The Supreme Constitutional Court Law 48/1979, art. 24.

26. The Judicial Authority Law 46/1972, art. 97.

27. *Id.*

external authority.²⁸ The authority of the MoJ in judicial decision is indirect. The MoJ does not directly interfere with judges' decisions. The MoJ's rights, duties, and methods of interference are discussed in detail in the next section.

C. Judicial Independence: Judicial Administration

Judicial administration differs from the SCC, ordinary courts (including the PPO), the State Council (administrative courts), and the APO.

1. *The First Body is the Supreme Constitutional Court (SCC)*²⁹

It is the competent judicial body that has the ultimate power over constitutional disputes. However, litigants cannot resort directly to the constitutional court. They must first get the approval of the regular or administrative courts to resort to the supreme constitutional court. The establishment of the SCC underwent two phases during Sadat's era. The first was the legal articulation of the basis of the SCC, while the second involved the establishment of the court. The actual process of establishing the SCC, however, started after the first constitution in 1923. In 1924, the Felony Court of Alexandria was approached with a request to rule on the unconstitutionality of Article 151 of the Criminal Code. The court did not approve the request.³⁰

The first time the Egyptian courts recognized the unconstitutionality claim was in 1926.³¹ The courts did not declare the unconstitutionality of the law; rather they maintained their right not to apply the law. Banning Egyptian courts from handling the constitutionality of the laws is based on many reasons. Firstly, even though the Egyptian civil legal system is based on the French system, the application of the laws turned into a monarchy. This was a system that excludes the King's

28. The 2014 Constitution, art. 184/2 states "interference in judicial affairs or in proceedings is a crime to which no statute of limitations may be applied".

29. Tamir Moustafa, *Law Versus the State: the Judicialization of Politics in Egypt*, 28 L & SOC INQUIRY 886 (2003).

30. 'an al-Mahkamah, lamha tarikhayah' [Supreme Constitutional Court] Egypt (2014), <http://hccourt.gov.eg/Pages/About/history.aspx> last access 21/02/2017.

31. *Id.*

acts, which include the constitutionality of the law, from the judicial authority. Secondly, there was a lack of a legal foundation, which would have been more realistic, for such authority from 1883 to 1971. There was no legal foundation to grant courts the right to deal with the constitutionality of law.³²

The first time the constitutionality of the laws was legalized was in 1953. This took place right after the 1952 Coup.³³ This legal endeavor had initially failed because members of the army refused any judicial supervision.³⁴ The second legal attempt took place after the 1971 Constitution. This constitution included five new articles, numbered 174 to 178 that regulate the formulation of a specialized constitutional court. Firstly, 1971 Constitution stated that the SCC is an independent judicial body.³⁵ Secondly, the constitution addressed the tackling of constitutional questions. Article 175 of the 1971 Constitution—amended in 2007—states that the SCC “has the exclusive competence to control the constitutionality of laws and regulations and to interpret the legislative texts in the manner prescribed by the law. The law shall determine other competences of the court, and regulate the procedure to be followed.”

Finally, there is the time gap between the first articulation of the SCC and the SCCL. It took eight years (from 1971 to 1979) to establish the court. One of the reasons for this was the fear of an independent judiciary that would deal with the constitutionality of the law.³⁶ Furthermore, there was a need, after the shift to a market-based economy in Egypt, to have the SCC in order to oversee the legality of the laws. There was a need to ensure the rule of law in the country to attract foreign investment.³⁷

32. *Id.*

33. *Id.*

34. *Id.*

35. The 2014 Constitution, art. 174 states “The Supreme Constitutional Court shall be an independent judicial body with a distinct legal nature in the Arab Republic of Egypt, and shall have its seat in Cairo”.

36. Tamir, *supra* note 29 at 886.

37. *Id.* at 889.

The SCC is an independent judicial body.³⁸ The 2014 Constitution ensures the independence of its seat, budget and general assembly. The SCC consists of three main bodies. The first is the Chief Justice of the Court, who is the head of the court. He has many other constitutional responsibilities, including the impeachment of justices.³⁹ In the case of both the absence of a President of State and/or the disseverment of parliament, the Chief Justice takes charge of the country until a new President has been nominated.⁴⁰ The Chief Justice of the SCC Adly Mansour replaced President Mohamed Morsi as interim President after the Military Coup of July 2013.⁴¹ He ruled Egypt for nine months until Field Marshal Abdel Fatah al-Sisi won the presidential elections in March 2014.⁴²

The second body is the People's Assembly, which is responsible for the administrative affairs of the court. The People's Assembly is "responsible for governing the Court's affairs, and is consulted during law drafting of issues related to the Court's affairs."⁴³ The People's Assembly also has additional functions. Article 144 of the Constitution states "[i]n case of the absence of the House of Representatives, the oath is to be taken before the General Assembly of the SCC."⁴⁴ It is also the institute that oversees the acceptance of the resignation of the President, in the event of the People's Assembly being dissolved.⁴⁵

The third body is the commissioner authority, which consists of the judges, advisors and assistant advisors.⁴⁶ Members of the commission

38. The 2014 Constitution, art. 191 states "[t]he SCC is an independent judicial body... [I]t has independent budget, the items of which are discussed by the House of Representatives, after it is approved, it is incorporated in the state budget as a single figure."

39. The 2014 Constitution, art. 159/3.

40. *Id.* art. 160/3.

41. *Profile: Interim Egyptian President Adly Mansour*, BBC (Jul. 4, 2013), <http://www.bbc.com/news/world-middle-east-23176293> (last visited Feb. 21, 2017).

42. *Egypt Abdel Fattah al-Sisi Profile*, BBC (May 16, 2014), <http://www.bbc.com/news/world-middle-east-19256730> (last visited Feb. 21, 2017).

43. The 2014 Constitution, art. 191.

44. *Id.* art. 144.

45. *Id.* art. 158.

46. *Id.* art. 193/2.

are ranked as chancellors.⁴⁷ Their role is to prepare the cases for the SCC judges. They have the right to contact any governmental or non-governmental entities within the country to request information pertaining to certain cases.⁴⁸ The Commissioner Authority plays the role of the investigator in the case, in order to produce a report or opinion to the court about the case in question.⁴⁹ In this report, the commission presents constitutional and legal issues and offers its legal opinion.⁵⁰ The court has jurisdiction over certain types of cases. The Constitution lays down the general line of the jurisdiction of the court, while the SCC law lays down the details.⁵¹ In short, the SCC is responsible for answering the following issues.

1. the judicial supervision of the constitutionality of the law and regulations (Art. 25);⁵²
2. the conflict of law and the conflict of jurisdiction among judicial institutions (Art. 25);⁵³
3. the conflict raised as a result of contradictory judgments between two different judicial institutions (Art. 25);⁵⁴
4. the interpretation of the laws and regulations (Art. 26);⁵⁵ and

47. The Supreme Constitutional Court Law 48/1979, art. 41.

48. *Id.* art. 39.

49. *Id.* art. 40.

50. *Id.*

51. The 2014 Constitution, art. 192 states “the court is: exclusively competent to decide on the constitutionality of laws and regulations, interpret legislative texts, and adjudicate in disputes pertaining to the affairs of its members, in disputes between judicial bodies and entities that have judicial mandate, in disputes pertaining to the implementation of two final contradictory rulings, one of which is issued by any judicial body or an agency with judicial mandate and the other issued by another body, and in disputes pertaining to the implementation of its rulings and decisions.”

52. The Supreme Constitutional Court Law 48/1979, art. 25.

53. *Id.*

54. *Id.*

55. *Id.* art. 26.

5. the unification of the interpretation of the laws (Art. 26).⁵⁶

2. *The Second Body is the Ordinary Judiciary, which is the Main Judicial Body*

It is the competent judiciary for all types of cases except two. Firstly, administrative cases fall under the State Council jurisdiction.⁵⁷ Article 15 of the Judicial Authority Law (hereinafter JAL) states that “except administrative disputes, which the State Council is in charge of, courts are competent of every type of disputes and crimes.”⁵⁸ Secondly, constitutional disputes fall under the jurisdiction of the SCC.⁵⁹ Moreover, the ordinary judiciary consists of the Public Prosecution Office (hereinafter PPO) and three different types of courts, which are the Court of Cassation, the Court of Appeal, and the Court of First Instance (Primary Court and Partial Court).⁶⁰

Firstly, the Court of Cassation is the highest court, and the only one of its kind in the ordinary judiciary, as shown in Figure (2). It was established in 1931 and is located in Cairo.⁶¹ It consists of four bodies. The first is the Court of Cassation Public Assembly, which consists of all the members of the court, including those of the Court of Chief Justice, Associate Justices and Junior Justices. The work of the Court of Cassation is based on the principle of seniority. The most senior member takes charge of the court. The presidency term of the court is just one judicial year, which starts in October and concludes at the end of September the following year. The Court Chief Justice also serves as president of the Supreme Judicial Council {hereinafter SJC}. The second entity is made up of the Criminal Law General Committee

56. *Id.*

57. The Judicial Authority Law 46/1972, art. 15.

58. Article 188 of the constitution states that “The judiciary adjudicates all disputes and crimes except for matters over which another judicial body is competent. Only the judiciary settles any disputes relating to the affairs of its members, and its affairs are managed by a higher council whose structure and mandate are organized by law.”

59. The 2014 Constitution, art. 192.

60. The Judicial Authority Law 46/1972, art. 1.

61. The 2014 Constitution, art. 2.

and the Civil Law General Committee.⁶² Each Committee consists of 11 judges, chosen by members of the People's Assembly.⁶³ The third body is the court circuits, a total of 33 circuits, of which 16 deal with criminal cases, and 17 with civil, commercial, family and labor cases.⁶⁴ The fourth entity is the Court of Cassation Technical Office. This office specializes in the administrative affairs of the court.⁶⁵

The Court of Cassation is not a court of facts, but rather a court of law. This means that parties cannot bring new additions to their cases. The Court of Cassation only rules whether the lower Court of Appeal has applied a correct understanding of the law.⁶⁶ Additionally, the Court of Cassation is responsible for determining general legal rules that are followed in any given dispute. It offers a unified understanding of the law, which all lower courts must follow. The process of developing these rules is restricted. It goes through three main stages. Firstly, one of the 33 circuits has to establish a new rule or overrule an existing one. This circuit must then transfer its new rule to the competent General Committee to determine the applicability of the new rule. Seven members of the competent committee must agree on the new rule to be able to proceed to the next step. Secondly, if seven members of the competent committee accept the new or overruled ruling, the new rule is then transferred to the two General Committees together for approval. A majority of 14 out of 22 judges must agree to consider a new legal rule.⁶⁷ Thirdly, the technical office of the court shall follow a procedural rule. This office is responsible for publishing the new rule to the general public.

Secondly, Egypt is home to eight Courts of Appeal.⁶⁸ These are located in Cairo, Alexandria, Tanta, Mansoura, Ismailia, Bani Swaif, Assiut and Qena governorates.⁶⁹ Previously, there were only six courts,

62. The Judicial Authority Law 46/1972, art. 3.

63. *Id.* art. 4.

64. *Id.*

65. *Id.* art. 5.

66. The Court of Cassation (2013), <http://www.cc.gov.eg/index-4.html#>.

67. *Id.*

68. The Judicial Authority Law 46/1972, art. 10.

69. *Id.* art. 6.

before those in Qena and Ismailia were introduced in 2006. The circuits in the court of appeal consist of three judges.⁷⁰ All of them have the rank of “Judge at the Court of Appeal.” The Court of Appeal has jurisdiction over civil and criminal cases. For civil law jurisdiction, it is restricted to appeal cases that are worth more than 40 thousand Egyptian pounds. These types of cases are under the jurisdiction of the primary court (in the court of first instance jurisdiction).⁷¹ As for the criminal law jurisdiction, the Court of Appeal is responsible for felony cases only. To this day, felony cases have no specialized appeal court. The current form of appeal for felonies is to resort to the Court of Cassation, which is a process that takes place over various stages. In the first stage, the Court of Cassation, since it is a court of law, does not deal with the facts of the case. If it finds a wrongful legal interpretation, it orders a retrial at a different circuit of felony courts. In the second stage, the defendant has the right to appeal the second felony court’s judgment in front of the Court of Cassation. In the second appeal, the Court of Cassation either sustains the second felony court judgment or rules in the case by itself. In the latter case, the Court of Cassation acts as a court of equity. It will hear all witnesses, excluding new evidence, and all factual pleadings. As a result of this complicated process, many lawyers and politicians request a legal amendment to include an appeal level for felony courts. The 2014 Constitution has included an article that mandates an appellate court for felony judgments.⁷² To date, however, there is no regulation governing the appeal of felonies.

Thirdly, the Court of First Instance is divided into two different courts namely the primary courts and the partial courts. Firstly, the primary court is the upper court of the Court of First Instance. There is one primary court in each governorate.⁷³ It consists of several circuits. Each is made up of three judges.⁷⁴ In civil law cases, the primary court has unique value jurisdiction. It is considered the court of first instance for cases worth more than 40 thousand Egyptian pounds. However, it is considered a court of appeal for cases worth less than 40 thousand

70. *Id.*

71. The Judicial Authority Law 46/1972, art. 4.

72. *Id.* art. 96 states “the law shall regulate the appeal of felony sentences”.

73. *Id.* art. 9.

74. *Id.* art. 7.

pounds.⁷⁵ In criminal law matters, the primary court is considered an appeal court for misdemeanor cases. Secondly, the partial court is the lower court within the Court of First Instance, with one in every district in the governorate.⁷⁶ The partial court consists of one judge. It has jurisdiction over civil and criminal matters. For civil law jurisdiction, it has non-appealable jurisdiction over civil cases that are worth less than five thousand pounds. In cases worth less than 40 thousand pounds and more than five thousand pounds, the partial court acts as a court of first instance.⁷⁷ As for criminal law jurisdiction, it is restricted to misdemeanor cases only, which are crimes that are punishable by a sentence of fewer than three years.⁷⁸

Fourthly, the Public Prosecution Office (hereinafter PPO) is considered an integral part of the regular judiciary. Contrary to widespread understanding, the role of the prosecution is considered part of the executive authority.⁷⁹ The Egyptian PPO, during the Republic Era, underwent three stages of developments that eventually led to giving prosecution a judicial characteristic, which is the status of the prosecution. In the first stage, the PPO was a member of the executive authority (1951-1952).⁸⁰ Judges were responsible for investigations, while the public prosecutors' work was limited to the prosecution of cases. In the second stage, the PPO enjoyed a mixed role, both executive and judicial, as a result of the Criminal Procedures Law amendment in 1952. This amendment gave the PPO the power and privileges of an investigative judge. Article 199 of the Criminal Procedures Law gave prosecutors the right to investigate any case. Even though the prosecution enjoyed the privileges of an investigative judge, the nature of the prosecution was still unclear, whether it was executive or judicial. The Court of Cassation dealt with this question in 1961. It emphasized the mixed nature of the public prosecution. The judicial

75. Civil and Commercial Procedures Law no. 13/1968, art. 42.

76. The Judicial Authority Law 46/1972, art. 13.

77. Civil, *supra* note 75.

78. Criminal Law no.58 /1937, art. 11.

79. Stephanie Dangel, *Is prosecution a core Executive Function? Morrison v. Olson and the Framers' Intent*, 99 YALE L.J. 1069-70 (1990). See also, Saikrishna Prakash, *Chief Prosecutor*, 73 GEO. WASH. L. REV. 521-89 (2004-05).

80. Criminal Procedure Code no 50/1950.

nature of the prosecution consisted in it performing the role of an investigative judge, while its executive nature involved all the other tasks of the prosecution.⁸¹ In the third stage, the prosecution was considered a purely judicial authority. After a long debate over the nature of the prosecution, Article 189 of the 2014 Constitution considered the PPO members an integral part of the judiciary.⁸²

Part of the judicial nature of the PPO is the judicial nature of the position of the Attorney General, which is not yet reflected in the present JAL. Before 2014, the President of the Republic had the ultimate authority to appoint the Attorney General.⁸³ However, the 2014 Constitution transferred this authority over to the SJC.⁸⁴ After the assassination of the Attorney General Hesham Barakat in 2015,⁸⁵ the appointment of a new Attorney General was put on hold for more than six months.⁸⁶ 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.⁸⁷ Following this struggle, the SJC successfully appointed the new Attorney General Nabil Sadek. As for the judicial oath, it must still be taken before the President of the

81. Court of Cassation, Case no. 1551, Judicial Year 30.

82. The 2014 Constitution, art. 189 states “the public prosecution is an integral part of the judiciary. It is responsible for investigating, law exempts pressing charges and prosecuting all criminal cases except what. The law establishes the public prosecution’s other competencies”.

83. The Judicial Authority Law 46/1972, arts 44 and 119.

84. The 2014 Constitution, art. 189/2 states “public prosecution is carried out by a Prosecutor General who is selected by the Supreme Judicial Council from among the Deputies to the President of the Court of Cassation, the Presidents of the Court of Appeals or the Assistant Prosecutor Generals, by virtue of a presidential decree for a period of four years, or for the period remaining until retirement age, whichever comes first, and only once during a judge’s career”.

85. *Egypt Prosecutor Hisham Barakat Killed in Cairo Attack*, BBC NEWS (Jun. 29, 2015), <http://www.bbc.com/news/world-middle-east-33308518> (last visited Feb. 21, 2017).

86. Mariam Jabal, *Khlaf Dostori Yoajal Iktiar al-Na’b al-Am*, ALBAWABA NEWS (Sept. 11, 2015), <http://www.albawabhnews.com/1493128> (last visited Feb. 21, 2017).

87. The 2014 Constitution, art. 189/ 2.

Republic.⁸⁸

3. The Third Body is the Administrative Court, which is Represented in the State Council

From 1949 to 1984, administrative courts were part of the executive authority. The first law on the State Council was law number 9 for the year 1949. Article 1 stated that the State Council was an institute affiliated to the Ministry of Justice.⁸⁹ After the 1952 Military Coup, the army issued a new law that made the State Council an independent body under Cabinet supervision.⁹⁰ In 1972, the new State Council law transferred the supervision from the Cabinet back to the Ministry of Justice. In August 1984, the law was amended to give the State Council full independence from the executive authority. The current formulation of Article 1 of the State Council law states: “the State Council is an independent judicial authority.”⁹¹ The 2014 Constitution and the State Council law thus give the administrative courts exclusive jurisdiction over administrative disputes.⁹²

The State Council consists of three different branches. These branches are the judicial, legislative and advisory bodies. Firstly, the judicial branch has exclusive authority over administrative disputes. It consists of the Supreme Administrative Court, the Administrative Courts, the Disciplinary Courts, and the State Commission Board.⁹³

Additionally, the State Council Law excludes some administrative

88. Nabil Sadek, *Sworn In by Sisi as Egypt's New Prosecutor General*, AHAM ONLINE, (Sept. 19, 2015), <http://english.ahram.org.eg/NewsContent/1/0/141872/Egypt/0/Nabil-Sadek-sworn-in-by-Sisi-as-Egypt-s-new-prosecu.aspx> (last visited Feb. 21, 2017).

89. The State Council Law no 9/1949, art. 1.

90. The State Council Law no 165/1955, art. 1.

91. The State Council Law no 47/1972, art. 1.

92. The 2014 Constitution, art. 190 states “State Council is exclusively competent to adjudicate in administrative disputes, disciplinary cases and appeals, and disputes pertaining to its decisions. It is solely competent to issue opinions on the legal issues of bodies to be determined by law. It reviews and drafts bills and resolutions of a legislative character, and reviews draft contracts, to which the state or any public entity is a party. Other competencies are to be determined by law”.

93. The State Council Law no 47/1972, art. 3.

disputes from its jurisdiction, like acts of sovereignty.⁹⁴ Secondly, the legislative branch is the competent authority for revising and passing any proposed law, regulation, or legal amendment that the government (either the President or the Cabinet) wishes to issue. It prepares and submits any new legal text upon request by the government.⁹⁵ The president of the legislative branch is also the Chief Justice of the State Council.⁹⁶ Thirdly, the advisory branch is the competent body for providing legal advice to the President, the Cabinet, ministers and public institutions.⁹⁷

Moreover, any governmental agency has to seek the acceptance of the advisory branch of the State Council, in case of taking on, accepting, or validating any contract, reconciliation, or arbitration award.⁹⁸ To avoid any hassle from the government with the State Council advisory, the law gives the government the right to hire an advisory branch of the State Council to work as legal advisors to the President, the Cabinet, ministers and public institutions.⁹⁹

4. The Administrative Prosecution Office (hereinafter APO) was Established in September 1954

The explanatory memorandum of the APO lists the reasons necessitating the establishment of the APO. Firstly, the APO aims to face all forms of interference in the administrative investigation against senior public officials.¹⁰⁰ Secondly, the APO is a replacement of several legal departments that are established in each governmental agency or ministry. It is the sole body responsible for investigating violations by governmental officials. Thirdly, the APO is responsible for providing technical and legal training and education to its members. The agency ensures that all its members obtain the necessary and required training

94. *Id.* art. 11.

95. *Id.* art. 59/1.

96. *Id.* art. 70.

97. *Id.* art. 63.

98. *Id.* art. 58/3.

99. *Id.* art. 59/1.

100. The Administrative Prosecution Office Establishment Law no 480/1954, explanatory memorandum.

and education. Previously, each legal department was responsible for providing the required legal training to its members.¹⁰¹

The development of the APO has undergone three stages. The first took place between the years 1954 and 1958 when the APO was still an affiliate body of the Cabinet.¹⁰² The second stage unfolded from 1954 to 2014, a period during which the APO was under the supervision of the Ministry of Justice.¹⁰³ In the third stage, from 2012 onwards, APO members started to lobby for their independence from the executive authority. They sought to eliminate any interference by the Ministry of Justice. The APO finally achieved independence.¹⁰⁴ It was also given exclusive authority over “financial and administrative irregularities. Regarding these irregularities, it has the authorities vested in the administration body to inflict disciplinary penalties ... it also initiated and conducted proceedings and disciplinary appeals before the State Council courts in accordance with the law.”¹⁰⁵

D. Judicial Institution Independence: Case Assignment

A) *The SCC Grants Certiorari in Two Cases*

Firstly, any court or tribunal can transfer a case to the SCC to answer a matter regarding the constitutionality of a law. This right is granted to ordinary courts, the State Council or arbitrary tribunal. If the court identifies a likelihood of unconstitutionality of a certain law, the issue is then referred to the SCC.¹⁰⁶ Secondly, parties can request a transfer of the case directly to the SCC. The party claiming the unconstitutionality of the law is able to request a transfer of the claim to the SCC. The SCC deals only with cases of constitutionality, without touching on any of the dispute questions. The second case is not unfailingly right. The competent court must recognize the validity of the party claim.

101. *Id.*

102. *Id.*

103. The Administrative Prosecution Office Establishment Law no 1985, art. 1.

104. The 2014 Constitution, art. 197/1 states “the Administrative Prosecution is an independent judicial body”.

105. *Id.* art. 197/2.

106. The Supreme Constitutional Court Law 48/1979, art. 29/1.

The court must first acknowledge the base for the unconstitutional defense.¹⁰⁷ When the case is transferred to the SCC, the SCC's Public Assembly is responsible for assigning the case to the court. However, the court depends on the motions and memos submitted by both parties.¹⁰⁸

2. Ordinary and administrative courts have different rules regarding case assignment based on the court type and level.

Generally, there are four types of case assignment, which are adopted in the justice administration system.

Firstly, both the MoJ and the president of the court enjoy great discretion in assigning certain types of cases to certain courts, or certain circuits. In 2008, the MoJ introduced the new economic courts in Egypt.¹⁰⁹ The definition of these economic courts was left to the MoJ to determine. This definition opens the door to include several laws that are not related to each other like the IP laws, electricity laws, and consumer protection laws.¹¹⁰ Moreover, presidents of the courts have the ultimate right to assign cases to certain judges.¹¹¹ This can happen either through assigning certain type of cases to certain circuit or directly assign a certain case to a certain judge.¹¹²

Secondly, case assignment is based on jurisdiction. In this type of case assignment, each case has monetary, spatial, or personal jurisdictions. Each court has its monetary jurisdiction limit. This is common in civil or commercial cases. For instance, the monetary limit of partial courts is less than 10,000 Egyptian Pounds, while that of the primary court is greater than 10,000 Egyptian Pounds. As for special jurisdiction, each court specializes in cases that take place within its domain. There is only one exception to this rule, which is the necessity to transfer the

107. *Id.* art. 29/2.

108. *Id.* art. 44.

109. Mohamed Ghanem, *Reasons for Establishing the Economic Courts in Egypt*, 3 *MACRO-THEME REV.* 167, 174 (2014).

110. *Legal Research Guide: Egypt*, LIBRARY OF THE CONGRESS (Sept. 06, 2015), <https://www.loc.gov/law/help/legal-research-guide/egypt.php>>last access 21/2/2017.

111. *Id.*

112. *Id.*

trial from one district to another.¹¹³ The competent judge is responsible for determining such a necessity. As for personal jurisdiction, this is related to the age of the defendant, like minors and adults.

Thirdly, case assignment is based on the case type and a court's area of specialization. The case type is a debatable issue in the Egyptian judiciary, especially in the lower courts. This debate is related to the unclear rules regarding the specialization of judges in the lower courts.¹¹⁴ In theory, Article 12 of the JAL grants the judge the right to ask for specialization after four years of his nomination.¹¹⁵ In practice, however, this is not the case. For instance, most of the courts of first instance judges are assigned to both civil and criminal circuits, in addition to labor and criminal circuits.

Moreover, the MoJ has full authority to set the rules regarding judges' specializations, an occurrence that is rarely practiced. It is in the MoJ's best interest to maintain the *status quo* in order to maintain its influence over the judges. The MoJ wants to ensure that judges comply with the MoJ's rules. The MoJ, through the chairperson of the court, assigns certain judges, who are well known to have a certain inclination in certain cases, to certain types of cases. The reason for doing this is to apply pressure on the loyalty of the judges to their chairperson, to either transfer them to better districts or assign them to their specialized areas of law.

Furthermore, the limited number of judges compared to the number of cases limits the scope of specialization. Many judges have thousands of cases to review each month.¹¹⁶ They are expected to finish about 300 cases a day. Usually, the average caseload in a misdemeanor court ranges from 150 to 250 a day. In the felony court, the average is around 25-40 cases.¹¹⁷ As for the PPO, prosecutors in Egypt deal with

113. The Judicial Authority Law 46/1972, art. 11.

114. *The Egyptian Legal System*, GLOBAL ETHICS OBSERVATORY, LEGISLATION AND GUIDELINES, UNESCO, <http://www.unesco.org/shs/ethics/geo/user/?action=-Geo4Country&db=GEO4&id=9&lng=en>.

115. The Judicial Authority Law 46/1972, art. 93.

116. Mohamed Gahem, *The Negative Consequence of the Phenomenon of Slow Pace of Litigation in Egypt: Economic and Commercial Issues*, (Nov. 7-8, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2456091.

117. *Id.*

all types of cases. This is due to two reasons. One is the limited number of prosecutors compared to the number of cases. In districts like Santa Clara, California, there are about 45,000 cases a year. There are also about 188 prosecutors and more than 500 employees within the same district.¹¹⁸ A district like Embaba, Giza, has about 50,000 cases a year, with about 12 prosecutors and 35 employees. Two is the lack of the specialized training and education on both the university level and judicial level. The result is therefore slow justice, more so given the lack of specialized judges.¹¹⁹

Fourthly, cases are assigned based on case numbers. Each case has a judicial number. Each judge or circuit is assigned to a certain number. Usually, this type of case assignment is limited to the lower courts. For example, if there are five judges working in criminal cases in a certain district, each judge will be assigned two “judicial numbers.” The distribution of cases is as follows: Judge 1, the most senior judge, takes cases ending with judicial numbers 0 and 1. Judge 2, the second most senior, takes cases ending with judicial numbers 2 and 3, Judge 3 takes cases ending with judicial numbers 4 and 5, Judge 4 takes cases ending with judicial numbers 6 and 7, and Judge 5, the junior of them all, takes cases ending with judicial numbers 8 and 9. This way of distributing cases has evolved into a tradition in the judiciary work of the courts. Each year, the People’s Assembly distributes the numbers based on the seniority of the members of the office.

E. The Judicial Institution Independence: Remuneration and Resources

1. *The SCC has a Fully Independent Budget*¹²⁰

It guards its budget against interference from either the executive authority or any other judicial body. Article 12 states the rules that

118. *Frequently Asked Questions*, OFFICE OF THE DISTRICT ATTORNEY, COUNTY OF SANTA CLARA (Nov. 22, 2016), <http://www.sccgov.org/sites/da/aboutus/Pages/faq.aspx>.

119. Gahem, *supra* note 106.

120. The Supreme Constitutional Court Law 48/1979, art. 8.

determine the salaries of members of the judiciary.¹²¹ The SCC law establishes an independent body attached to the SCC responsible for ensuring the SCC's financial independence. This body is responsible for maintaining the necessary fund for salaries, health insurance, and social activities of the members of the court and its commissioners.¹²² Moreover, the 2014 Constitution ensures a non-transparent policy with regard to the SCC budget. The policy maintains that the budget of the judicial institutions should not be announced to the public. Article 191 states that the SCC "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."¹²³

2. The 2014 Constitution Maintains the Independence of the Budget of the Ordinary Courts, the State Council, the APO and the PPO

Each type of court or office has its own budget. The Supreme Council of each is responsible for allocating the required funds and supervising expenditure. The only exception to this rule is in the ordinary judiciary. The PPO in each partial, primary or appeal court is responsible for supervising all financial issues of the court. Article 28 of the JAL states that the PPO takes over the supervision of the issue related to court expenditure.¹²⁴ The revenue for the courts comes from fines, fees, and bails, which are also handled by the PPO.¹²⁵

Article 68 of the JAL regulates the salaries of prosecutors, judges and chancellors. It states that their salaries are in accordance with the table attached to the law. As for the SCC, it enjoys full independence over any dispute regarding the salaries of court members.¹²⁶ It has the right to determine the compensation and the salaries of its members

121. *Id.* art. 12.

122. *Id.* art. 18.

123. The 2014 Constitution, art. 191. This rule applied to the whole judicial bodies including the ordinary courts, the state council, PPO, and APO".

124. The Judicial Authority Law 46/1972, art. 28.

125. *Id.* art. 29 states fines and other types of fees required in criminal, civil, or personal status (family law), as well as deposits and safe-boxes shall be collected, saved and spent by court employees under direct supervision of both the Public Prosecution Bureau and the Minister of Justice".

126. The Supreme Constitutional Court Law 48/1979, art. 16.

based on the table of salaries attached to the law.

No judge can receive any salary on a personal or exceptional basis.¹²⁷ Since the age of retirement has been fixed at 70 years,¹²⁸ judges receive monetary compensation from their retirement plan at the age of 60. The ten years between the ages of 60 to 70 are not part of the retirement plan. The reason is that the age of 70 was never the age of retirement for judges. It increased from 60 to 65, then from 65 to 67, and finally from 67 to 70. The government wanted to increase the age for political reasons, without adding any financial burdens.¹²⁹

III. THE SEPARATION OF POWERS IN EGYPT

A. The Role of the MoJ

The nature of the position of MoJ is rather vague and unclear. It is not known whether he is an executive or a judicial authority.¹³⁰ The MoJ is a member of the Cabinet. However, precedents in appointing the MoJ indicate that he has to be a former judge from the ordinary judiciary.¹³¹ This is due to the lack of a serious separation of powers. In addition, all the senior officers and employees in the Ministry of Justice are judges, on either full or partial secondment to the Ministry. In the past ten years, six justices have assumed the position of MoJ.¹³² Three out of six were members of the Court of Cassation, while the other three were members of the Cairo Court of Appeal. The judges who were members

127. The Judicial Authority Law 46/1972, art. 68.

128. *Id.* art. 69.

129. Nora Elbially & Miguel A. Garcia- Rubio, Assessing Judicial Efficiency of Egyptian First Instance Courts A DEA Analysis, https://www.uni-marburg.de/fb02/makro/forschung/magkspapers/19-2011_elbially.pdf.

130. Adel Ramadan, *Who Enforces Egypt's Laws?*, THE TAHRIR INSTITUTE FOR MIDDLE EAST POL'Y (Jun. 5, 2016), <https://timep.org/tjp-analysis/who-enforces-egypts-laws/>.

131. *Id.*

132. *Id.*

of the Court of Cassation are Neir Osman (the ex-vice president of the Court of Cassation, February 2014 – present), Adel Abdel Hamid (ex-president of the Court of Cassation, July 2013 – February 2014 and December 2011 – August 2012), and Ahmed Mikky (ex-vice president of the Court of Cassation, August 2012 – May 2013).

The judicial nature of the MoJ allows interference in judicial affairs, especially judicial administration. This is clear in the role the MoJ plays in administrating and supervising courts and judges.¹³³ In theory, the JAL recognizes three sources of court administration: the MoJ, the court chairperson, and the court public assembly.¹³⁴ In practice, the MoJ is granted—ultimately—two-thirds of the administration of the court in Egypt. The first third is due to the role of the MoJ as the court administrator. The second third is associated with his right to nominate the chairperson of the primary courts. Article 9 of the JAL states that the MoJ has the right to nominate the chairperson of the primary courts, with the approval of the SJC, for a renewable term of one year.¹³⁵ The court chairperson has full authority to administer both the judicial and administrative affairs of the court. The authority of the court chairperson to administer the court's judicial affairs comes from the delegation of power from the court public assembly, as will be shown in the next paragraph. As for the administrative power, the court chairperson derives his power from the power of the MoJ, who appoints him in the first place.¹³⁶

133. The Judicial Authority Law 46/1972, art. 93/1 states “the MoJ has the right to administrative supervision over the courts, and the president of each court and its public assembly has the right to supervision”.

134. *Id.* art. 93/2 grants the MoJ and the president of the court, who is appointed by the MoJ, the right to supervise courts and judges. The president of each court and its public assembly had the right to supervise the judges of such court. This article was amended in 2006, with the new amendment eliminating the authority of the Ministry of Justice over judicial supervision, while maintaining its direct supervision over the administration of the court.

135. *Id.* art. 9 states “Each (primary) court is made up of an adequate number of judges and chancellors. A judge from the appeal court is nominated to be its presidency... The Minister of Justice issues the nomination decree after the acceptance of the SJC of such nomination. The duration of the nomination is for a renewable period of one year”.

136. *Id.*

The final third is assigned to the public assembly of the court, which usually delegates its power to the chairperson of the court, who is appointed by the MoJ. Each court's public assembly has to delegate its power to the chairperson of the court. This is due to the impossibility to make the public assembly convene to discuss administrative and judicial court issues. Each court consists of junior and senior judges. While junior judges work three days a week (either Saturday to Monday, or Tuesday to Thursday),¹³⁷ senior judges work only one week a month. It is rather hard to coordinate their schedules, unless for exceptionally urgent matters. As a result, a court tradition has evolved that sees the public assembly gather only once at the beginning of the judicial year. In their first meeting, assemblies delegate their power to the chairperson of the court. This delegation occurs on the first day of each new judicial year, starting in October.

B. The Role of Judicial Organization in Sustaining Judicial Autonomy

There are three forms of organizations in the judiciary: formal, semi-formal, and informal. Firstly, the SJC is the only formal organization in the ordinary judiciary. The process of formulating the SJC underwent several stages until it reached its current status. The first stage occurred in 1943. The Independent Judiciary Law (hereinafter IJL) assigned the SJC to handle judicial issues such as judicial appointments, transfers, and public judicial issues.¹³⁸ The SJC consists of eight members: the president of the Court of Cassation, the representative of the MoJ, the president of the Cairo Court of Appeal, the Attorney General, an elected member from the public assembly of the Court of Cassation, elected members from the public assembly of the Cairo Court of Appeal, as well as the president of the Cairo Primary Court.¹³⁹

The second stage occurred after the amendment of the IJL in 1952, upon the success of the Military Coup.¹⁴⁰ The amended Article 34

137. *Id.* art. 14.

138. *Id.* art. 36.

139. *Id.* art. 34.

140. Shalakany, *supra* note 8, at 278.

abolished any form of election in the formulation of SJC.¹⁴¹ The elected members were replaced with appointed members. Instead of electing two members—one member from the public assembly of the Court of Cassation and one member from the public assembly of the Cairo Court of Appeal—the two elected members were the president of the Alexandria Court of Appeal and the first vice president of the Court of Cassation.¹⁴² In 1956, a new amendment of the SJC was introduced to reflect the unification between Egypt and Syria. The new SJC formulation doubled its membership to include both Egyptian and Syrian judges.¹⁴³ After the dissolution of the union, a new law was issued in 1965. It returned the formulation of the council to its old form. This form continued to be in force until 1969.

The third stage occurred in 1969. President Nasser unified the SJC with the State Council board. This new Council was the Supreme Council for Judicial Institutes (hereinafter SCJI). The main role of the SCJI was to supervise both the ordinary and administrative judiciary. The aim of the new council was the cooperation between the judicial institutions, to advise judicial institutes, and to propose judicial legislation to reform the judiciary. The SCJI included members from the ordinary judiciary, the State Council, the PPO, the APO and the State Case Authority. Even though the administrative judiciary was under Cabinet supervision, the ordinary judiciary was an independent entity. As a result, this new formulation meant compromising judicial independence through the introduction of dependent institutions to the independent judiciary.

The last—and current—stage started in 2008. A new amendment was introduced to the JAL to replace the SCJI with the SJC. The current formulation of the SJC is similar to that after the 1952 Coup. It consists of seven members, who represent the various entities inside the regular judiciary. They are the president of the Court of Cassation, the first vice president of the Court of Cassation, the Cairo Court of Appeal president, the Alexandria Court of Appeal president, the Mansoura Court of Appeal president (instead of the representative of the MoJ), as

141. *Id.*

142. The Judicial Authority Law 188/1952, art. 34.

143. *Id.* art. 82.

well as the Attorney General.¹⁴⁴

Secondly, the Judges' Club (hereinafter Club), established in 1939, is the only semi-formal organization within the judiciary. Its semi-formal nature is due to two reasons. Firstly, there is no formal judicial assignment or law that underpins the Club. Secondly, the Club includes all members of the judiciary, both judges and prosecutors.

Additionally, the Club's nature is controversial, since it incorporates legal, social, and political aspects. In legal terms, the Club has no special law, nor is it mentioned in the JAL. The Club was established as a non-governmental organization. It has its own bylaws, which were negotiated and set by judges and prosecutors. They include the rules of election to the Club board, as well as administrative and financial issues. The Club's principal focus is its social aspect. The main club is located in Cairo, with several other clubs located in various governorates. The administration of these clubs is non-centralized, as each of them has its own board. Any judge or prosecutor can be a member of one or more of these clubs. As for its political role, the Club has on numerous occasions interfered in politics.¹⁴⁵ This role, however, is exceptional. The JAL bans judges and courts from pursuing any form of political involvement.¹⁴⁶ In the past decade, this type of interference has occurred twice.¹⁴⁷ The first time was after the election fraud in 2005, while the second time was during the period of rule of the Muslim Brotherhood {hereinafter MB}.

Thirdly, the Egyptian judiciary—in its contemporary history—identifies three informal organizations. They are the Secret Organization *Tanzim Sarie al-Tali'I* (hereinafter Tanzim), the Independent Judicial Movement *Qoda' al-Istqlal* (hereinafter IJM), and the Judges for Egypt, known as *Qoda' men-ajl-Misr* (hereinafter JFE). The informal nature of these organizations is also based on two reasons. Firstly, they have no legal status, and secondly, not all judges are members of such organizations. The first organization was established during the period of President

144. *Id.* art. 77 bis 1.

145. Atef Shahat Said, *The Role of Judge's Club in Enhancing the Independence of the Judiciary and Spurring Political Reform*, in *JUDGES AND POLITICAL REFORM IN EGYPT* 115 (Nathalie Bernard-Maugiron ed., 2008).

146. *Id.*

147. *Id.*

Nasser. It included several judges, who held leading positions within the Ministry of Justice and the Public Prosecution Office. For example, Judge Ali Nour Al-Din was appointed as the Attorney General.¹⁴⁸ Judge Sadak al-Mahdi was appointed as Vice Minister of Justice.¹⁴⁹ President Sadat dissolved the Tanziem. Due to its secretive nature, there is a lack of official data regarding its current status.

The second informal organization is the JIM, which was established after the judicial massacre in 1969. From 1970 through to 2010, many judges formed the JIM. They organized secret meetings to support their goal of judicial reform. The leading figures of this movement were El Gheriani,¹⁵⁰ Mikky,¹⁵¹ and Genenia.¹⁵² They were, however, unable to enforce any judicial reform and blacklisted by the government. After the January 25 Revolution, many of the IJM members were appointed to high-ranking judicial and political positions, as a symbol of the political will to reform the judiciary.

The third informal organization is the JFE. This organization was established after the January 25 Revolution. There are allegations that the JFE is connected to the MB. Waled Sharabi, one of the group's leaders, was photographed leaving the MB headquarters. After ousting ex-President Mohamed Morsi, Waled Sharabi was impeached. The JFE furthermore condemned the 2013 Military Coup in a written statement. This statement was read out in public in Rab'a Square. As a result, members of the group were either impeached or are still awaiting impeachment proceedings.

C. Inappropriate Interference in the Judiciary

The improper influence on judicial decision-making takes—in the majority of cases—two forms. Firstly, the MoJ has the power to appoint

148. Ayman Gazi, *al-mustashar Rafeat al-Said: Haikal sa'ad Abdel Nasser fi-mazbahat al-qodah*, ROSE AL-YŪSUF NEWSPAPER (Apr. 22, 2010), <http://www.massress.com/rosadaily/58440>.

149. *Id.*

150. Gheriani headed the Supreme Judicial Council from June 2011 to July 2012. He was appointed as the President of the Constituent Assembly 2012.

151. Previous Minister of Justice in the Muslim Brotherhood Government 2012

152. President of Central Auditing Organization 2012 till present

the president of the primary courts. This right of the MoJ is a legal right. However, this right has been commonly and continuously misused. The MoJ has the upper hand in choosing the president of the primary courts, who has the right to assign judges to certain circuits. Each court has circuits that specialize in certain types of cases, such as high-profile commercial cases or cases of a political nature. Some cases are also deemed sensitive, due to the parties involved.

The sensitive circuits are assigned to certain judges whose tendencies in certain types of cases are known.¹⁵³ In 2012, Judge Mahmoud Shokri was the judge assigned to the “illegal foreign fund against NGOs” case. He was forced to resign from the case because he refused to comply with the request of the president of the Cairo Court of Appeal, Judge Abdel Moez Ibrahim, to release the defendant on bail.¹⁵⁴ The case was assigned to another judge from the technical office of the court. As a consequence, some judges brought a motion to sack Ibrahim, but they were not successful.¹⁵⁵

Secondly, the MoJ has the ultimate power over the Judicial Inspection Department (hereinafter JID). This is also a legal right.¹⁵⁶ The 2014 Constitution gives the judiciary the right to regulate the accountability rules of its members.¹⁵⁷ The problem with the JID and the MoJ lie in the arbitrary nature of its decisions. This arbitrariness became clear after the 2013 Military Coup. Many judges supported the coup, while others supported ex-President Mohamed Morsi. Even though both groups violated the JAL rules regarding the ban on political participation by the judges, the JID impeached only judges who supported ex-President

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

154. *Al-Mostashar Mahmoud Shokri Yabki 'al hal alqodah ma' Mahmoud Said*, YOUTUBE (Mar. 28, 2012), https://www.youtube.com/watch?v=iZ0v_MXkB44 (last visited Feb. 21, 2017).

155. Mai Shams al-Din, *Appeals Court Judges move to sack Abdel Moez Ibrahim*, DAILY NEWS EGYPT (Mar. 23, 2012), <http://www.dailynewsegyp.com/2012/03/23/appeals-court-judges-move-to-sack-abdel-moez-ibrahim/>.

156. There were some endeavors to transfer the inspection department from the ministry of justice to the SJC during Chancellor Ahmed Mikky period as minister of justice.

157. The 2014 Constitution, art. 84.

Mohamed Morsi.¹⁵⁸

The problem of the improper influence on the judiciary is based on a lack of comprehensive understanding of the principle of separation of powers. The successive Egyptian constitutions have not mentioned the principle of separation of powers explicitly.¹⁵⁹ It was the rule of the judiciary that set the boundaries between the state authorities. The Supreme Administrative Court based the principle of separation of powers on Article 23 of the 1923 Constitution.¹⁶⁰ Nonetheless, the court's understanding of separation of powers is always based on the separation between the judiciary and executive powers only, for three reasons. Firstly, Article 24 of the 1923 Constitution delegates the legislative authority to the King in collaboration with both parliaments.¹⁶¹ Secondly, Article 29 delegates the head of the executive authority to the King.¹⁶² Thirdly, Article 30 delegates the judicial authority to the courts.¹⁶³ Hence, the separation designated at the time by the Supreme Administrative Court was the separation between the King and the Courts.

In past decades, the separation of powers has also meant the separation between the executive and the judicial powers. The legislative authority was always representative of the government. Since 2005, four successive Parliaments have been sworn in as legislative bodies. They represent the conflict between the military and Islamist figures. The first one was in effect between 2005 and 2010. The National Democratic Party {hereinafter NDP}, which was the President's party, won the election with an 82% majority.¹⁶⁴ The MB came in second

158. *Egypt refers 60 pro-brotherhood judges to disciplinary board*, AHAM ONLINE (Oct. 20, 2014), <http://english.ahram.org.eg/NewsContent/1/64/113517/Egypt/Politics-/Egypt-refers--proBrotherhood-judges-to-disciplinar.aspx>.

159. Sahar Aziz, *Independence without Accountability: The Judicial Paradox of Egypt's Failed Transition to Democracy*, 120 PENN ST. L. REV. 667, 670 (2015-16).

160. The 1923 Constitution, art. 23. It states "people are the source of all authorities, and the execution of authorities shall follow the rule of constitution".

161. *Id.* art. 24.

162. *Id.* art. 29.

163. *Id.* art. 30.

164. Yoram Meital, *The Struggle over Political Order in Egypt: The 2005 Election*, 60

place, winning 76 seats out of 454.¹⁶⁵ The new Al-Wafd Party came in third with a total number of 6 seats.¹⁶⁶ The second election took place in November 2010. The NDP won more than 95% of the total seats. There were several allegations of election fraud from all the political parties against the NDP.¹⁶⁷ This parliament was very short-lived, as it was dissolved in 2011. The third election occurred in 2012 and dominated by the Islamists. The MB managed to win more than 45% of the total seats in the parliament, while the remaining Islamic parties won the majority with 30% of total seats.¹⁶⁸ The fourth election was held in 2015. The number of military generals in the current parliament is 71.¹⁶⁹

D. Proposed Reform to Judicial Independence in Egypt

There are three proposed amendments to the current judicial independence. Firstly, the power of the MoJ to appoint chairpersons of the primary courts should be suspended. This authority gives the MoJ the ability to interfere in the outcomes of certain cases through assigning them to certain judges. Instead, the public assembly of each primary court should decide the choice of chairperson. Members of the People's Assembly of the primary court should be able to choose their chairperson through general elections. The election should furthermore be discreet to respect the conservative nature of the judiciary and to avoid the disadvantage of the electoral system in the United States. Discreet elections mean that candidates are not allowed to advertise their campaigns; instead, candidates rely only on their presentation

MIDDLE EAST J. 257, 257 (2006).

165. Sharon Otterman, *Muslim Brotherhood and Egypt's Parliamentary Elections*, COUNCIL ON FOREIGN RELATIONS (Dec. 01, 2005), <http://www.cfr.org/egypt/muslim-brotherhood-egypts-parliamentary-elections/p9319>.
166. *Wafed Party*, EGYPTIAN ELECTIONS WATCH, AHRAMONLINE (Nov. 18, 2011), <http://english.ahram.org.eg/NewsContent/33/104/24940/Elections-/Political-Parties/Wafd-party.aspx>.
167. *Id.*
168. *Profile: Egypt's Muslim Brotherhood*, BBC NEWS (Dec. 25, 2013), <http://www.bbc.com/news/world-middle-east-12313405>.
169. *Belasma' ta'araf 'al 71 lawa jaysh we-mokhabarat fi albarlaman al-'skari, nafazat Parlamen*, EGYPT WINDOW (Dec. 5, 2015), http://old.egyptwindow.net/news_Details.aspx?News_ID=90772.

to the public assembly of their qualifications. As a result, the People's Assembly would vote for a candidate standing for the position of chairperson of the primary court

Secondly, it has been argued that the authority of the MoJ should be transferred to the SJC. However, this proposal increases the judicial autonomy. This proposal implies a transfer of the authority of the MoJ from one judge (MoJ) to seven judges (SJC). Any transfer of authorities to the SJC should be done only after its reformulation. The current formulation is prejudiced against a fair representation of all members of the judiciary or judicial ranks, and public representation. A full public representation in the judiciary involves two steps, interim and permanent reforms.

The interim reform can be between five to ten years. It aims to pave the road for full public participation in judicial administration. During this period, not only should the SJC include elected members from the judiciary, as was the case before 1952, but the new formulation should also include senior law professors, who represent the conscience of the public as an interim period. The proposed temporary formulation is as follows: three representatives from the primary courts, three representatives from the courts of appeal, three representatives from the court of cassation, two representatives from the junior prosecution representatives, two representatives from the senior prosecution representatives (including the Attorney General) and five senior law professors chosen from the oldest four law schools (Cairo, Alexandria, Assiut, Ain Shams).

The permanent reform would occur at a later period, once both the judiciary and the public have accepted the idea of lay people, lawyers and professors in the judicial administration. The formulation of the SJC—during this period—will include elected judges, lawyers, prominent public figures and emeritus professors. The manner and method of choosing them shall be tackled in separate research dealing with a later period of Egyptian judicial history.

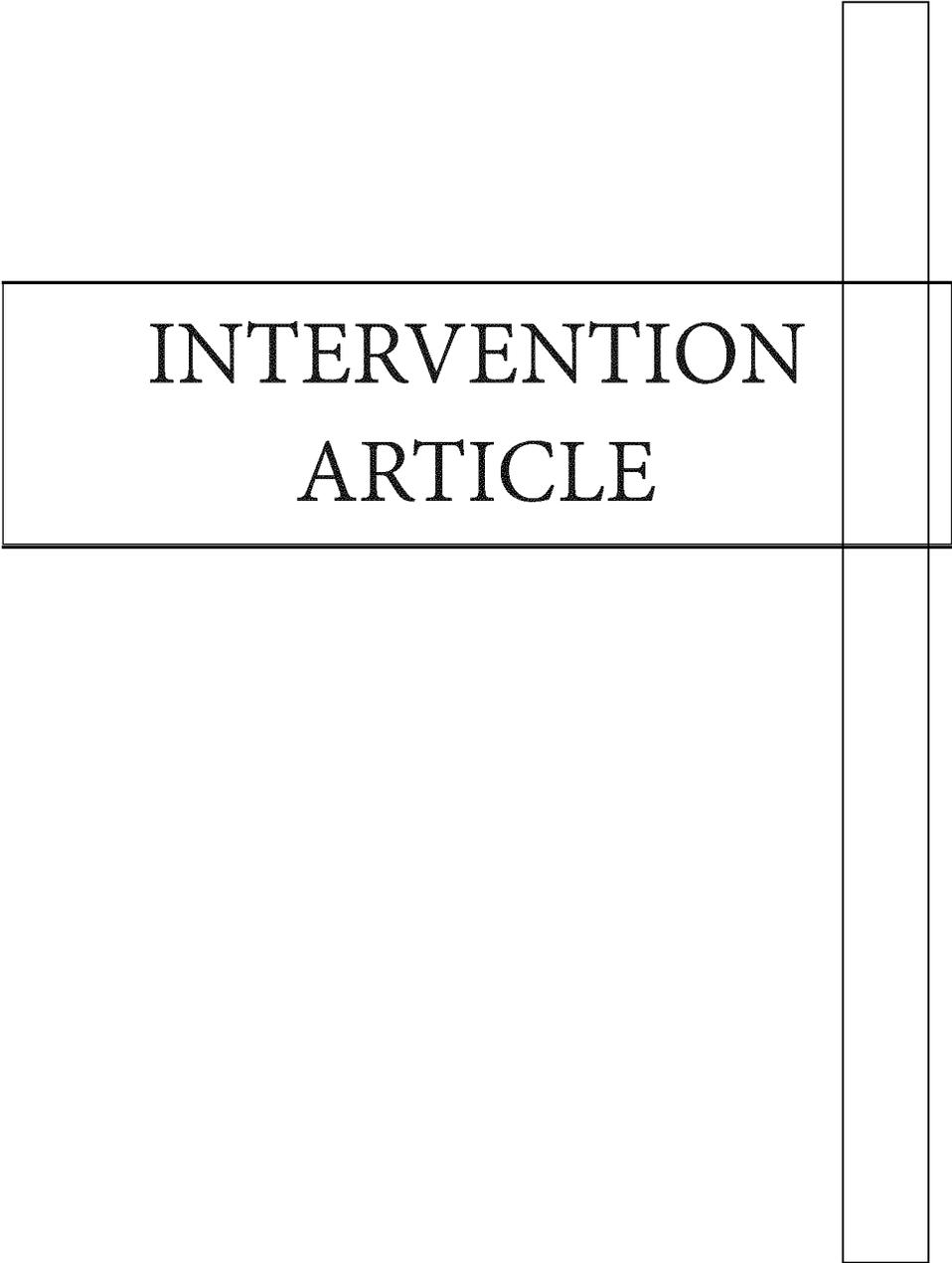
Thirdly, there must be a clear ban on intervention by the Attorney General from the interference in judicial investigations. In dependent prosecutions, interference by the Attorney General or his assistant in investigations is acceptable. However, in independent prosecutions interference by the Attorney General or his assistant in investigations is not acceptable. This can be easily achieved through a legislative

amendment that would consider such intervention a crime.

IV. CONCLUSION

The Egyptian judiciary enjoys a comprehensive form of independence from both executive and legislative authorities. However, this independence has reached a level of autonomy in many aspects, as it disregards the borders between the three authorities. As for the question regarding the authority of the MoJ, it is best illustrated in the judicial nature of the MoJ and the fact that its senior officers are judges. This question raises the concern that there is a clear misunderstanding of the rule of separation of powers and checks and balances between the three authorities. The elimination of the authority of the Ministry of Justice would not increase the judiciary's independence. Rather, it would lead to a judiciary that is unaccountable to either the public or other authority.

Finally, this research recommends four points. Firstly, the judiciary must adopt clear rules of political participation and issue sanctions for violations. It is unacceptable that rules of banning political participation apply only to opponents of the political regime. The JID must apply rules equally; they are not a tool of retribution against political rivals. Secondly, the judiciary must be excluded from the electoral process to fulfill its main role of protecting the legality of the process, instead of protecting the process itself. Thirdly, the judiciary must accept the political responsibility of its acts. It is unacceptable for an independent judiciary to be above political participation. Fourthly, a new formulation of the Supreme Judicial Council must be introduced to reflect a democratic and accountable judiciary to the public, who is the source of its authority.



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