

The Independence of the Judiciary

The Truth as it is!

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“The Minister of Justice has the right

to supervise all the courts and judges".

Article 93 of the Law of the Judicial Authority no. 46 of the year 1972.

“

Politics and justice are against each other and cannot meet. When they do meet, they do not intertwine. In fact, they differ in nature, method and objective, as justice is from the spirit of God, while politics is the creature of people. Justice weighs issues in a balance while politics takes interests into consideration. Their objectives also differ, as while the objective of justice is to call for rights, that of politics is pursuing interests, whether the interests are right or wrong. The most dangerous thing about politics is that the best politics is executed by masking the pursuit of interests with a permanent veil of rights and deceiving people into believing that it is justice.”¹

¹ Makram Ebeid, *The Lawyers' Journal* year fifty four, issues no 3 and 4 of March and April 1947,

The deceased Makram Ebeid Basha, Former Head of the Bar Association

Dedication

For two persons who taught me that the independence of judiciary is the only guarantee for the freedom of citizens and without it there will be no guarantee. My mother, the lawyer Dr. Karima Ali Hussein, was the first Egyptian woman to ask to be appointed in the civil judiciary but was prevented from doing so because social norms are stronger than Articles of the law. The Head of the Judges, judge and counselor, Yehia Al Refa'I, who defends the independence and freedom of judges and received the Fathi Radwa Award for Human Rights. He is the vice President of the court of cassation and the head of the Judges' Association.

This background paper is dedicated to them with appreciation and thanks, as well as a promise to follow the same path.

Thanks

I wish to thank all those who reviewed this study and remarked upon it, and to particularly mention the counselor Nagi Derbala, the vice President of the court of cassation and the Deputy of the Judges Association. I am grateful for the valuable assistance provided by Mr. Abdel Mone'm Moslem from the Arab Center for the Independence of the Judiciary and the Legal Profession and the known judiciary editor Tharwat Shalabi. That said, the thoughts and remarks in this study are the responsibility of the researcher alone.

Introduction

This paper cannot cover the state of the judiciary in Egypt completely as the current legal situation of the Egyptian judiciary would itself need an additional detailed study. This additional study is very much needed, but is beyond the scope of this paper. In brief, the Egyptian judiciary is going through a new phase of development as the State is now using a policy of 'containment' instead of open challenge in dealing with it. This policy is highly cunning, and has far worse consequences.

It is important to refer to the fact that the judiciary institution is one of the most respected institutions in Egypt, despite attempts of defamation and intentional corruption as well as the stress put upon it. Moreover, in general judges are well respected by the public as the Egyptian citizen feels that they are able to depend on them in administering justice in Egypt.

This background paper aims to broach the subject of the independence and situation of the judiciary in Egypt. It is divided into 6 basic sections as follows:

- 1- The political atmosphere and environment surrounding the judiciary in Egypt.
- 2- To what extent the Constitution and the law support the independence of the judiciary and judges.
- 3- The Egyptian judiciary and the executive authority; the policy of challenge and attempts at containment.
- 4- To what extent corruption reaches the judicial institution.
- 5- The rehabilitation of the judiciary – the pros and cons
- 6- Women and the judiciary, can women be judges in practice?

It is important to point out that the judiciary that we refer to here is the regular judiciary involving qualified judges and includes three degrees; first instance, appeals and cassation. We are also concerned with the administrative judiciary and its three degrees; the administrative courts, the state's council and the high administrative court. The constitutional judiciary is represented in the Supreme Constitutional Court. In this regard, we will not approach all those specified in the Egyptian Constitution as courts such as the courts of values, the Supreme courts of values and the courts that are formed by laws such as the Political Parties Law. These kinds of courts are in fact administrative committees that have a judicial specialization as the judges there are

not only the judicial members but also other public figures including engineers or public servants or doctors appointed by the minister of justice and referred to as “public figures”. In this context, it must be noted that the Supreme courts in Egypt agreed jointly that in order to allow the judicial institution to be independent, each member of it shall be independent in assessing cases and taking the correct decision according to the law. Moreover, they agreed that the hearing of the issues shall be conducted by specialized judges and shall be referred to by the expression “an administrative institution which has a judicial specialization” because each judicial formation includes other figures as well as judges, even if the legislator called it a court or if he labeled its decision judgments.²

This paper will also not approach the military or police courts because they are courts of a special structure and their members do not enjoy any kind of independence as they are under the control of the Minister of Defense or Minister of Interior directly, receiving their orders from one of them (depending on the circumstances). The Minister of Defense has the power to transfer them to non-judicial positions at anytime, according to the Law of Military Rulings. In addition, this Law dictates that in these courts there is no right to appeal and no right to civil compensation.

1- The Political Environment concerning the Judiciary in Egypt³.

The Egyptian Constitution issued on September 11 1971 and amended by a decision of the People’s Assembly issued on April 30 1980, defines the main characteristics and features of the ruling system in Egypt. This is located in Chapter 5 of the Constitution. The Constitution includes ten chapters under the following headings:

1. The Head of State; 2. The Legislature; 3. The Executive (which includes four sections: a) The President of the Republic b) The Government c) Local Administration d) The Specialized National Councils) 4. The Judiciary; 5. The

² The judgment of the Egyptian court of cassation in challenge no. 275 of the judicial year no. 32, which was issued in the session dated 16 December 1967, and the judgment of the Supreme Administrative Court in challenge no. 249 of the judicial year no. 22, which is issued in the session dated 27 December 1983; in addition, the judgment of the Supreme Constitutional Court on challenge no. 10 of the judicial year no. 1 in the session dated 16 May 1982.

³ For more details on the political environment in Egypt, please review *A Door to the Desert – the Egyptian Parliament Elections of 2000*, Negad El Bora'i, Dr. Gehad Ooda and Hafez Abou Se'da- A Study in Arabic with a Summary in English - published by the United Group, Attorneys-At-Law, Legal

Supreme Constitutional Court; 6. The Socialist Public Prosecutor; 7. The Armed Forces and the National Defense Council; 8. The Police; 9. The Shoura Assembly; and 10. The Press.

A thorough examination of the Articles of Chapter 5 of the Constitution shows that, when compared with other branches of the government, the Head of State enjoys exceptional powers:

- The Head of State is the President of the Republic, who shall maintain the boundaries between authorities, safeguard the national unity and socialist gains, in a manner aimed at ensuring that each shall perform its role in the public service.⁴ Article 127 of the Constitution explains the meaning of the boundaries between authorities.⁵
- The President of the Republic shall appoint not more than 10 members in the Peoples' Assembly and he shall appoint one third of the members of the Shoura Assembly.⁶
- The President shall convoke the People's Assembly in its ordinary annual sessions and shall declare the ordinary sessions closed. He may also call for an extraordinary meeting⁷ and, when necessary, has the right to dismiss both branches of the parliament, the People's Assembly and the Shoura Assembly.⁸
- The President of the Republic has the right to promulgate laws or object to them, whether under normal or under exceptional circumstances.⁹
- The President of the Republic shall assume the executive power.¹⁰

Advisors – Cairo 2001.

⁴ Article 73 of the Egyptian Constitution.

⁵ The People' Assembly shall determine the responsibilities of the Prime Minister, on a proposal by one-tenth of its members. Such a decision should be taken by the majority of the members of the Assembly. It may not be taken except after an interpellation addressed to the Government and after at least three days from the date of its presentation. In the event that such responsibility is determined, the Assembly shall submit a report to the President of the Republic including the elements of the subject, the conclusions reached on the matter and the reasons behind them. The President may return such a report to the Assembly within ten days. If the Assembly ratifies it once again, the President may put the subject of disagreement to a referendum. Such a referendum shall be held within thirty days from the date of the last ratification of the Assembly. In such a case the Assembly sessions shall be terminated. If the result of the referendum is in support of the Government, the Assembly shall be considered dissolved, otherwise, the President shall accept the resignation of the Cabinet.

⁶ Article 87 and 196 of the Egyptian Constitution

⁷ Article 101 and 102 of the Egyptian Constitution

⁸ Articles 204 and 136 of the Egyptian Constitution.

⁹ Articles 112 and 147 of the Egyptian Constitution

¹⁰ Article 137 of the Egyptian Constitution.

- The President of the Republic, in conjunction with the cabinet, shall lay down the general policy of the State.¹¹
- The President of the Republic appoints the Prime Minister, his deputies, the Ministers, their deputies, and has the right to relieve them of their posts.¹²
- The President of the Republic has the right to proclaim a State of Emergency.¹³
- The President of the Republic is the head of the Supreme Council of Judicial Organizations, which shall supervise the affairs of the Judiciary.¹⁴
- The President of the Republic is the Supreme Commander of the Armed Forces. He has the authority to declare war and conclude treaties. He is also the head of the National Defense Council and as such is responsible for the safety and security of the country.¹⁵
- The President of the Republic is the Supreme Chief of the Police.¹⁶

The above defines the powers and jurisdiction of the President of the Republic, who heads the executive branch of the Government. He has the power to issue laws and to revoke them. He also sets the general policy for the State. In a democratic system, these powers would fall under the jurisdiction of parliament. Moreover, the President has the right to appoint a number of parliament members both in the People's Assembly and in the Shoura Assembly (where he appoints one third of the members), thus creating a political bloc there that can enable him to play a role within the parliament. In addition he is the arbiter of functions of the Government, a role, normally carried out by the Judiciary. He also heads the Supreme Council of Judicial Organizations, which governs all judiciary organizations.

Being the head of the Police and the National Defense Council, as well as the high commander of the Armed Forces, the President of the Republic has absolute decisive power. This contrasts with the legislative and the judicial branches of the government, which have limited functions and have to share these with the President of the Republic. The close relationship between the President and the Armed Forces on the one hand, and between the President and the Government, on the other, allows

¹¹ Article 138 of the Egyptian Constitution.

¹² Article 141 of the Egyptian Constitution.

¹³ Article 148 of the Egyptian Constitution.

¹⁴ Article 173 of the Egyptian Constitution.

¹⁵ Articles 150 and 182 of the Egyptian Constitution.

¹⁶ Article 184 of the Egyptian Constitution.

for more concentrated powers in the hands of the President of the Republic, i.e. places him at the top of the executive function.

Based on the above, the Egyptian political system exhibits the following features:

1. An incorporation of the function of the President of the Republic in most aspects of the political system.
2. An only partial independence of the legislative and judiciary functions, which is limited when compared to that of the executive function, headed by the President of the Republic.
3. The existence of institutional powers outside those that reside in the triangle of functions (executive, judiciary and legislative)¹⁷.

These features become clear upon reviewing the rights and functions assigned in the Constitution to the President of the Republic. Out of a total of fifty-five Articles of the Constitution, the President is recognized by thirty-five Articles (63%), the Ministers by four (2%), the Judiciary by four (2%), and the Legislative branch with its two subdivisions by fourteen (25%). The function of the Socialist Public Prosecutor is dealt with by one Article, as is and the Supreme Press Council¹⁸. The following diagram illustrates the hegemony of the function of the President of the Republic.

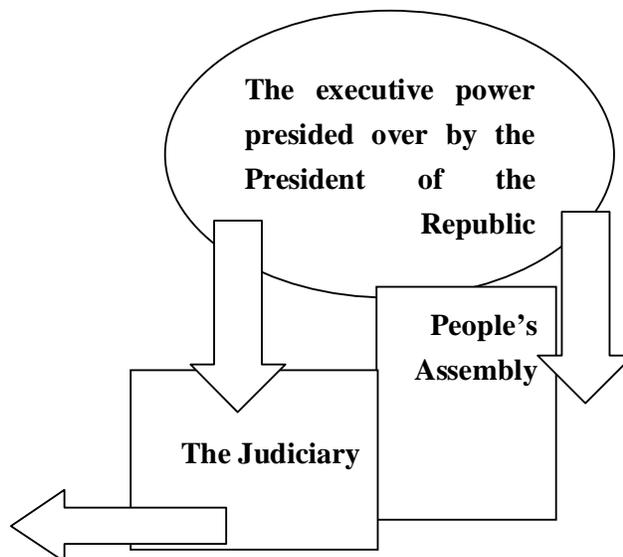


Figure 1. the structure of the ruling system in Egypt

¹⁷ It can be said that the armed forces and the police, with their organization and qualitative and quantitative superiority, are two of the decisive elements for political matters in Egypt. This point will be developed when discussing the role played by the military forces on the internal front.

¹⁸ It should be noted that some Articles of the Constitution include powers for more than one body.

From this diagram, we can observe the following:

1. The relationship between the executive and judiciary branches of the government is different from the relationship between the executive and legislative branches. The executive branch practices higher institutional power over the judiciary as evidenced by the powers enjoyed by the President, and by the Minister of Justice and the Minister of the Interior in their dealings with the judiciary branch.¹⁹

The roles played by the President and by the Minister of Justice (which are essential in appointing judges and taking disciplinary measures against them) will be clarified later on when we approach the Judiciary Authority Law. Regarding the legislative authority, it is related to the executive authority through the control of the methods and tools which guarantee that the majority of those who benefit are from the executive body. In this regard, several methods are used such as:

A- The method of local ruling. B- The hegemony of the State's party. C- Protecting the legislative authority vis-à-vis the judiciary rulings²⁰. D- Monopoly of the organization of political life regarding methods of candidacy, elections, practicing political rights and the establishment of parties and others.

2. According to the Constitution, the Legislative branch has little power vis-à-vis the Executive branch. For example, Article 115 of the Constitution states that: “...*The People’s Assembly may not affect any modification in the draft budget except with the approval of the government.*” It should be noted that according to Article 133 of the Constitution, “*the People’s Assembly is entitled to discuss the government’s program*”. So while their discussion of the program is permitted, their approval is not necessary. As for the Shoura Assembly, the President appoints one third of its members, but the government is not accountable to this advisory

¹⁹ Here we can refer to how the Ministry of the Interior, for instance, deals with judicial rulings revoking detention orders. The Ministry first challenges the ruling, then transfers the detainee to a police station, and re-detains him by a new detention order. For more details, please see *Prisoners Without Trial* by the Egyptian Organization for Human Rights (EOHR), Cairo, 1996.

²⁰ The deceased Dr. Refa't Al Mahgoub has a slogan “The Peoples' Assembly is its own decision-maker” and thus it has the right not to implement the judiciary rulings.

council. According to Article 195 of the Constitution, the Shoura Assembly is a body to be “*consulted*” only.

Article 127 of the Constitution presents an accurate picture of the institutional weakness of the Legislative function vis-à-vis the Executive function. In case of conflict between the People’s Assembly and the Prime Minister, the report of the Assembly shall not be valid prior to its approval by the President of the Republic, who can reject the report and send it back to the Assembly. If the Assembly insists on its report, the President may put the subject to a referendum. If the result of the referendum is in support of the government, the Assembly shall be considered dissolved. If it turns out to be in support of Assembly, the President shall accept the resignation of the cabinet.

3. Article 165 of the Constitution affirms that the judicial authority shall be independent and Article 166 of the Constitution states that Judges shall be independent, subject to no other authority but the law. No authority may intervene in judiciary cases or in the affairs of justice. However, this kind of independence is restricted by certain factors and other considerations.

Strikingly, the President of the Republic, with all his powers and mandates, holds no political accountability, whether before the parliament or in a regular court of law, except in case of the commission of high treason or other serious crimes. The Constitution states that no impeachment shall be issued except upon the approval of two-thirds of the members of the Assembly.²¹ It should be noted that, so far, no law has been issued to allow for preparations of a trial of the President of the Republic, of the Prime Minister, or of the Ministers.

The dominance of the executive authority over other authorities led to the natural decrease of the independence of the latter – particularly the judiciary authority - and reduces their abilities to take free and effective procedures towards the former. This leads us to the conclusion that there is no independent judiciary authority although there are sometimes independent judges. Conclusions can not be deducted

²¹ Article 85 of the Egyptian Constitution.

now as we will later consider the role played by the President of the republic and then the role of the Minister of Justice who are from the executive authority within the Egyptian judiciary body.

2. The Independence of the Egyptian Judicial Authority According to the Constitution and Related Law.

The Judicial authority is covered by chapter 4 of the Egyptian Constitution. This chapter deals in general with the guarantees of the independence of the judicial authority including both the normal judiciary and the administrative judiciary. Chapter 5 of the Constitution deals with the guarantee of the independence of the Supreme Constitutional Court. On this issue, the legislator only mentioned many rights and guarantees in brief, leaving the laws to deal with the Articles of the Constitution in detail. Thus, law no. 46 of the year 1972, referred to as the Law of the Judicial Authority, was issued in order to regulate and organize the state of the normal judiciary, while law no. 47 of year 1972, which is known as the State Council Law, regulates and organizes the administrative judiciary. The Supreme Constitutional Court was regulated by Law no. 48 of year 1979, known as the Law of Supreme Constitutional Court.

1- The judicial authority according to the Egyptian Constitution issued in 1971.

The Judiciary authority falls under Chapter 4 of the Egyptian Constitution. This chapter deals with the guarantee of the independence of the judicial authority in general, tackling both the standard judiciary and the administrative judiciary. Chapter 5 of the Constitution deals with the guarantees of the independence of the Supreme Constitutional Court.²²

²² The following are the Articles of Chapters 4 and 5 of the Constitution which include the guarantees of the judiciary authority and the Supreme Constitutional Court in Egypt. It should be noted that the judiciary authority which is referred to in chapter 4 are the standard and administrative judiciaries and that the Constitutional judiciary is dealt with separately by the legislator in another chapter.

Chapter 4

The Judicial Authority

Article 165: The Judiciary Authority shall be independent. It shall be exercised by courts of justice of different kinds and competences. They shall issue their judgments in accordance with the law.

The first observation to make in regard to the regulation of the Constitution as mentioned above is that the judges of the Constitutional court are less independent

Article 166: Judges shall be independent, subject to no other authority but the law. No authority may intervene in judiciary cases or in the affairs of justice.

Article 167: The law shall determine the judiciary organizations and their competences, organize the way of their formation and prescribe the conditions and measures for the appointment and transfer of their members.

Article 168: The status of judges shall be irrevocable. The law shall regulate the disciplinary actions with regard to them.

Article 169: The sessions of courts shall be public, unless a court decides to hold them in camera review for considerations of public order or morality. In all cases, judgments shall be pronounced in public sessions.

Article 170: The people shall contribute to maintaining justice in accordance with the manner and within the limits prescribed by law.

Article 171: The law shall regulate the organization of the State Security Courts and shall prescribe their jurisdiction and the conditions to be fulfilled by those who occupy the office of judge in those courts.

Article 172: The State Council shall be an independent judiciary organization competent to take decisions in administrative disputes and disciplinary cases. The law shall determine its other competences.

Article 173: A Supreme Council, presided over by the President of the Republic shall supervise the affairs of the judiciary organizations. The law shall prescribe its formation, its competences and its rules of action. It shall be consulted with regard to the draft laws organizing the affairs of the judiciary organizations.

Chapter 5

The Supreme Constitutional Court

Article 174: The Supreme Constitutional Court shall be an independent judiciary body in the Arab Republic of Egypt, and have its seat in Cairo.

Article 175: The Supreme Constitutional Court alone shall undertake the judicial control in respect of the Constitutionality of the laws and regulations and shall undertake the interpretation of the legislative texts in the manner prescribed by law. The law shall prescribe the other ability of the court, and regulate the procedures to be followed before it.

Article 176: The law shall organize the way of formation of the Supreme Constitutional Court, and prescribe the conditions to be fulfilled by its members, their rights and immunities.

Article 177: The status of the members of the Supreme Constitutional Court shall be irrevocable. The Court shall call to account its members, in the manner prescribed by law.

Article 178: The judgments issued by the Supreme Constitutional Court in constitutional cases, and its decisions concerning the interpretation of legislative texts shall be published in the *Official Gazette*. The law shall organize the effects subsequent to a decision concerning the unconstitutionality of a legislative text

than the judges employed in the standard and administrative judiciary authority. Article 166 of the Egyptian Constitution states that “Judges shall be independent, subject to no other authority but the law. No authority may intervene in judiciary cases or in the affairs of justice.” The Article is a decisive one, guaranteeing the independence of judges. However, there is no similar Article for the Constitutional Court. Article 174 of the Constitution states “The Supreme Constitutional Court shall be an independent judiciary body in the Arab Republic of Egypt, and have its seat in Cairo”, affirming the independence of the Supreme Constitutional Court but not necessarily ensuring the independence of its judges, as an organization can be independent while its employees are under the power of another authority.

Furthermore, the legislator approaches the subject of the Supreme Constitutional Court in a separate chapter not under the title “The judicial authority” and does not cover the independence of its judiciary here. Moreover, it does not state that those judges shall be subject to no other authority but the law, nor does it state that no authority may intervene in judiciary cases or in the affairs of justice. Thus, it is clear that the legislator intends the Constitutional Court to be under the power of a certain authority, which we will later see is the executive authority headed by the State of the republic.

The second observation is that Article 165 clearly confirms the independence of the judicial authority while Article 166 asserts the independence of judges, stating that no authority may intervene in judiciary cases or in the affairs of justice. However, this independence is restricted occasionally by several factors, led by the fact that the Egyptian judiciary is not a judiciary of legislation. In other words, judges implement the law issued by the legislative authority. Because of this, the executive authority, which has power over the legislative authority, can issue laws related to the affairs of justice including laws that regulate the judicial authority and decrease its independence. It can be said that all the protection and guarantees for the judges stated in Articles 165, 167, 168, 170, 171, 172 and 173 of the Constitution refer to the laws for more details. Thus, in this way, the Executive authority can deprive the judges of their rights and Constitutional guarantees by using the law and by using their majority in parliament.

The third observation is that Article 173 of the Constitution states that “a Supreme

Council, presided over by the President of the Republic shall supervise the affairs of the judiciary organizations. The law shall prescribe its formation, its abilities and its rules of action. It shall be consulted with regard to the draft laws organizing the affairs of the judiciary organizations”. It is clear that the Constitution puts the judiciary authority under the power of the executive authority which is headed by the President and in particular that the Constitution states that the Supreme Council shall be consulted in regard to the draft laws which organize the affairs of the judiciary organizations. It is worth mentioning here that, there is a new law issued after the issuance of the last Constitution of 1971, which shall organize how this council shall be formed and its powers. Thus, Law no. 82 of the year 1969, which states in Article 3 that the President shall be in charge of the Council, is still in force. According to this Law, the Minister of Defense is the deputy of the President/Vice President and presides over the council in the event of the President’s absence. In addition, out of 14 members of the Council, the executive authority has direct and indirect power over 6. They are the Minister of justice, the Head of the Institution for Cases filed against the State, the Head of the Administrative Prosecution and the Public Prosecutor, as well as two members appointed by the President. They are all acting in the interests of the Government in one form or another for example, one is a member of the Executive authority – the Minister of Justice – another is under the direct power of the Minister of justice, the Public Prosecutor. Others defend the Government in the cases filed by others- the Institution for Cases filed against the State– or, as in the case of the administrative prosecution, are responsible for interrogations with the governmental officers in the interests of the government. In addition there are those who are themselves appointed by the President, the experienced members. Thus, it is clear that the Executive authority has power over all the judiciary organizations.

The fourth observation is that the constitutional legislator mentioned the State Security Courts, which are exceptional courts in the essence of the Egyptian judiciary system, when he states in Article 171 of the Constitution that “The law shall regulate the organization of the State Security Courts and shall prescribe their ability and the conditions to be fulfilled by those who occupy the office of judge in those Courts”. This constitutes an attack on the standard judiciary and blurs the exceptional judiciary

system within the structure of the judiciary authority by virtue of the Constitution.²³

It can be asserted that as he approaches the conception of the independence of the Judiciary, this conception is vague in the mind of the Egyptian legislator. It is not fully discussed. For example, he states that the Constitutional Court is an independent judiciary organization without mentioning the independence of the judges of this court and when he approaches what relates to the guarantee of independence, he refers to other laws issued by the Peoples' Assembly, which is in turn under the power of the Executive authority. Another example is evident in Article 167 of the Constitution, which leaves the determination of the judiciary organization and their ability as well as the conditions and measures for the appointment and transfer of their members to the law. And Article 168 of the Constitution leaves regulation of the disciplinary actions with regard to judges to the law. He also mixes the exceptional judiciary system within the structure of the judiciary authority, which decreases the independence of judiciary.

2. The Legal System that Rules the Judicial authority.

2.1 The Judiciary of Interpretation and Censorship - To What Extent the Supreme Constitutional Court Enjoys Independence.

The Egyptian Constitution clearly does not consider the Supreme Constitutional Court part of the judicial authority as it deals with it in a separate chapter (Chapter 5), while the judicial authority is approached in Chapter 4. However, it is considered part of the judiciary authority in Law no. 48 of 1979 and has a similar content and to the judicial authority.

According to this law, which was issued on 29 August 1979, the Supreme Constitutional Court is considered independent from the Ministry of Justice and its

²³ It is known that in the middle of this year the Egyptian government abolished Law no. 105 of year 1980 concerning the establishment of the State Security Courts, but Article 171 of the Constitution enables the Government to promulgate new laws for the State Security Courts. The State Security Courts are considered, by virtue of the Constitution, as a part of the Egyptian Judicial System although military judges can conduct the hearings of the cases.

judiciary organizations and is not related to the Supreme Council of the judiciary organizations presided over of the President. We can note that Article 4 and 5 of the law of the court's formation unified the task of appointing both the Head of the Court and his counselors. However, they are appointed by Presidential decree. Despite this, the counselors of the court are not appointed except after consulting the High Judiciary Council, while the appointment of the Head of Court is done directly by the President without consulting the High Judiciary Council. Nevertheless, this does not constitute a major difference to the appointment of the counselors of the court. The High judiciary Council is consulted on their appointment but the law does not require its agreement.

In light of the above, it is clear that the head and members of the Supreme Constitutional Court are appointed by a Presidential decree. Some jurists believe that this process takes place because the head of the High Constitutional Court plays a clear political role as in the case of the vacancy of the Presidential office or the permanent disability of the President and when the People's Assembly is dissolved at such a time the President of the Supreme Constitutional Court shall take over the Presidency temporarily by virtue of Article 84 of the Constitution. Thus, the appointment of the head of this court by the President of the republic has political implications.²⁴

However, we disagree with this opinion because if the President of the republic is the one who has the power to appoint the head of the Supreme Constitutional Court for the political role he may play, why has he also the absolute power to select the counselors of the court as the law did not put the condition of the necessity of the agreement of the Supreme Judiciary Council? In our opinion, the idea is that the President of the state has power over other the State's Authorities particularly the Supreme Constitutional Court. This court - because of the idea of compromise in which it believes - has played very important political roles for the sake of the stability of the political system. Doctor Sa'd Asfor supports this by saying that these kind of exceptions are created by Article 5 of the Preamble of the Law, which is related to the appointment of the Head of the Court by a presidential decree, and thus

²⁴ Dr. Mohamed Kamel Ebeid , *The Independence of Judiciary: A Comparative Study*, published by the

it is clear that the exhibited authority has more and broader powers in this regard.²⁵

The President does not use specific criteria in order to select the head of the Supreme Constitutional Court. It is a high judiciary position and the person who holds this position has broad powers and advantages in the court. Also the law does not obligate the President to use specific criteria for the appointment of the head of this court.

The President does not usually choose the head of the Supreme Constitutional Court from one of his experienced deputies of the Head of the Supreme Constitutional Court or from among the counselors of the Court. Moreover, the laws of the court do not include disciplined rules for the appointment of the head of the court. However, the President can select any head of the court of appeals to take this position even if the one chosen lacks experience. This has occurred previously on two occasions with the President selecting two pro-governmental figures to take this position.

The first was in September 2001, when the President appointed the Counselor Dr. Fathi Nageeb, the Head of the Legislation Directorate in the Ministry of Justice to be the head of the court, disregarding the most senior deputy of the head of Supreme Constitutional Court. This was done in order to have control over the Court as it seemed to stray from the right path at that time. The appointment of the Counselor Dr. Fathi Nageeb is dangerous not only because he was from outside the court but also because of his former position as the Head of the Legislation Directorate in the Ministry of Justice being as he was responsible for legislating draft laws that were then challenged to be unconstitutional before the court. In this situation, the lawyers asked him not to head the sessions in which they deemed the laws he had drafted as unconstitutional.

After the counselor Dr. Fathi Nageeb passed away in July 2003, the President purposefully selected the counselor Mamdouh Mohyi El Deen Mar'I, the former head of Cairo Court of Appeals. He was appointed on 26 August 2003 as Head of the Supreme Constitutional Court, completely disregarding the rules of selecting the most senior and experienced among the counselors of the court or the most senior deputies

Judges' Association, Cairo, 1991, p. 140 and 141

²⁵Dr. Saad Asfor, *the Egyptian Constitutional System*, the Institution of Knowledge in Alexandria, print of 1980, page no. 305 and 306

of the Head of the Supreme Constitutional Court. Thus, for the second time in three years the President appointed the head of the Supreme Constitutional Court away from the Court itself.

The Executive Authority has used the Supreme Constitutional Court many times in order to grant legislative status to the decrees it issues, to settle political dispute within the Association or to define the role of the President in comparison with the Parliament and to prepare the way for him to use his power in legislation. For example, the Supreme Constitutional Court issued a judgment in the Constitutional case no. 55 of the Constitutional legislative judicial year no. 5 which required a legislative amendment no. 50 of 1980. By this judgment, the power of the hearings of the decisions to arrest people which are issued by the military ruler according to the emergency law, is removed by the government, from the hands of the administrative judiciary (the usual official authority for this) and given to State Security Courts formed by the Emergency Law. These courts are exceptional courts related to the emergency state, which is not permanent, and their judges can be from the armed forces. Thus it breaches Article 40 of the Constitution concerning the equality of citizens before the judiciary and is in conflict with Article 69 of the Constitution concerning procedures which guarantee the right to defense. It also breaches Article 68 of the Constitution concerning the right of the individuals to have their cases heard by a standard judge²⁶. Moreover, it breaches Article 172 of the Constitution which considers the State Council responsible for taking decisions in administrative disputes.

In the economic field, the Government played a prominent role in granting legislative status to the unconstitutional economic procedures that it initiated. This is clear in the two judgments which were issued by the court in constitutional cases no. 17 of the Supreme Constitutional Judiciary year no. 14 and no. 30 of the Supreme Constitutional Judiciary year no.16. These give the Government the right to sell the economic properties owned by the Government itself without any restrictions or rules,

²⁶ *The Annual Report on the State of Justice and of the Judiciary Authority in Egypt*, 1997, published by the Arab Center for the Independence of Judiciary and the Legal Profession, page no. 29

despite the fact that Article 30 of the Constitution states “The public sector shall be the vanguard of progress in all spheres and shall assume the main responsibility in the development plan”. Furthermore, Article 33 of the Constitution states "Public ownership shall have its sanctity. Its protection and support shall be the duty of every citizen". The Constitutional Court in this regard has unprecedented and dangerous judiciary rule which gives the Government the right to contravene the Articles of the Constitution itself when it explains the reason of this judgment as “The Articles of the Constitution shall not be interpreted as final and permanent for the economic situation as they may be out-dated. Thus, adopting and insisting on imposing these Articles is like trying to cultivate crops on barren ground. However, they shall be understood according to other high values aiming at liberating the country and citizens economically and politically. Also, forcing the Articles of the Constitution under a specific philosophy hinders their freedom to realise the new developments of which Association dreams and thus the Constitution, instead of guaranteeing these developments, impedes the attainment of them.”²⁷

In the political arena, there was a judgment issued in case no. 131 of the Supreme Constitutional Judiciary year no. 6 on 16 May 1987 which affirmed the unconstitutionality of Article 5 (repeated), paragraph 1 of Article 6 and paragraph 1 of Article 17 of law 38 of 1972 concerning the Peoples' Assembly which is amended by law no. 114 of 1983 concerning the necessity of candidates being from the parties' lists. In addition to the judgment that was issued on 19 May 1990 in case no. 37 of the Supreme Constitutional Judiciary year no.9. This judgment also affirmed the unconstitutionality of Article 5 (repeated) of law no. 38 of 1972 concerning the Peoples' Assembly which is amended by law no. 188 of 1986. This Article states that in each constituency, there shall be one member who is elected by individual voting. The other members shall be elected according to the parties lists' elections.²⁸

According to the above two judgments, two Peoples' Assemblies of years 1984 and 1987 were dissolved because they were elected according to the laws which are considered unconstitutional. However, the Supreme Constitutional Court affirmed for

²⁷For more information, see Hisham Mohamed Fawzi *Monitoring the Constitutionality of Laws: A Comparative study of USA and Egypt*, Cairo Center for Human Rights Study, p.197-206.

²⁸ For more information, review Hisham Mohamed Fawzi, *Monitoring the Constitutionality of Laws: A Comparative study of USA and Egypt*, Cairo Center for Human Rights Study, p. 167 – 188.

the first time in the history that the dissolving of the above mentioned two assemblies does not require the abolishing of the decisions and laws taken by them.²⁹

Many Egyptian jurists are against this. One is Dr. Mahmoud Atef El Bana, who believes that “The principle for the judgments – the judgments of the Peoples' Assembly – is announced not created so the judgments of the Supreme Constitutional Court announced (and did not create) the voiding of those two assemblies. Therefore, the legislations issued by those two councils are considered void as what is built on a void is itself void.”³⁰ One of the Egyptian constitutional jurists, Dr. Abdel Menem Mahfouz, said that the court carried out a clear and prominent political role “as the last paragraph in the reasons for the issuance of the judgment reveals that the court is using double-measures. It used the measure of voiding the formation of the Peoples' Assemblies from when they were elected and simultaneously the measure of legislating all the laws, decrees and measures which are issued by the People's Assemblies – those that were voided- from when its members was elected until the publishing of the judgment in a formal magazine.”³¹

It is also noted that the two assemblies which have been dissolved – by a court judgment- without abolishing the laws issued by them - included many members who were affiliated to the Islamic alliance. The assembly of 1987, for example, included 60 members who were affiliated to the Islamic alliance, which constitutes 13% of the total number of the members of the Peoples' Assembly³².

²⁹What affirms the nature of those political judgments concerning the validity of laws that were issued by the Peoples' Assembly although the formation of the two assemblies was said to be void, is that the jurists of the court reached the conclusion that the judgment of the unconstitutionality shall be retroactive. So the ruling of the constitution shall be applied in the incidents when the legislation said that they are unconstitutional. For more information on this matter, see Dr. Adel Omar El Shereef, *The Judiciary of the Constitutional*, Al Shaab Printing house, Cairo, 1988, page 471 and the following pages.

Dr. Mahmoud Atef Al Bana, *Basic Concepts on the Judgment of Canceling the Peoples' Assembly*,³⁰ the *Judges' Journal*, January – June issue, 1990.

Abdel Monem Mahfouz, *the Constitutional Judiciary in Egypt*, (not published, first version) 1991,³¹ page no. 372 and the flowing pages, taken from Hisham Moahemd Fawzi, the Censorship on the constitutionality of laws, a reference mentioned before, page 180.

³² Amr Al Shabki, the organizing structure of the political parties in Egypt- The transformation of the reality and the stability of structure, A study published by the political parties in Egypt, the Reality and the Future, Edited by Ahmed El Mosalamani and the Democratic Development Group, Cairo, 1999, page 105.

From our point of view, the judgment that was issued by the Supreme Constitutional Court in case no. 11 of the Supreme Constitutional Judiciary year no. 13 resulted in putting the electoral process under the supervision of judges. This is considered an example of the political role played by the court in enabling the President to use his exceptional power in legislation in order to get the acceptance of Association.

The court was notified of this case on 27 November 1990 before the Parliamentary Elections of 1990 but the case was kept in the files of the court – despite of its importance- for more than 10 years, during which the Parliamentary Elections were held and were considered the worst in the history of the country.³³ The court did not conduct the hearing of the case until the summer of 2000 at the time of the parliament vacation. At that time, the President of the republic issued a decree to Law no. 167 of 2000 to amend the ruling of the Law of Participating in Political Rights. This decree by the power of the President, given to him by Article 147 of the Egyptian Constitution, confirmed the complete judicial supervision of election, thus overriding parliament. The head of the Peoples' Assembly, Dr. Fathi Soroor, admitted this point when he said to Rose Al Yousef magazine that “it is acceptable to issue a judgment to deem the Law of the Participation in Political Rights unconstitutional in what related to the judiciary supervision over the elections. The report of the delegations of the state was prepared 6 years ago concerning the unconstitutionality of this law and that during the closed meetings with the President Hosni Mubarak discussing the right timing for the issuance of the judgment considering that the Supreme Constitutional Court cared for the political stability and the public interests.³⁴

Though the Egyptian judges do not consider the constitutional court an independent one, they criticized it for intervening by playing political roles in the interests of the state. In this regard, one of the recommendations of the first conference of justice, which is organized by the Judges' Association in 1986, was “to monitor the constitutionality of the laws and regulations by one of the two institutions of the Cassation Court mentioned in Article 4 of the Law of the Judiciary Authority. And to

³³ The parliament elections of 1995

³⁴ A speech by the head of the Peoples' Assembly by the Rose Al Yousef journal said by the Counselor Yehia Al Refa'ai, the independence of judiciary and the crisis of elections, a reference mentioned before, page no. 108.

return all the power of the Supreme Constitutional Court to the judiciary which would require the abolishing of Chapter 5 of the Constitution as well as the Law of the Supreme Constitutional Court no. 48 of 1979 as there is no reason for establishing this court in a state that has a united legal system.³⁵

2.2. The Applied judiciary - both normal and administrative – and to what extent it seems to be independent.

In order to measure the extent of the independence of the judicial authority we must measure the guarantees available to its members in selecting the judges and the authority in charge of supervising them, suspending them from their work and the disciplinary methods to be used for them. We must also measure the extent of their independence in managing their financial and administrative affairs. These three guarantees give clear indicators for the independence of the judiciary of any country. When the process of selecting judges is specific and has clear criteria and when they are not under any other authority in relation to the area of supervision, or being guided and subject to disciplinary measures; and when they are enjoying self- management for a stable and suitable financial system, then the judiciary organization is considered an independent one. The degree of its independence decreases when it lacks one this factors.

The Egyptian judiciary – both normal and administrative – is, in fact, an applied judiciary, as the judge applies the laws issued by the legislative authority, which is in turn under the control of the Executive Authority. Moreover, the judge is prevented from suggesting the laws or regulations are unconstitutional or from refusing to apply them. However, those who are of the opinion that one of the Articles is unconstitutional, can refer the case to the Supreme Constitutional Court or ask the claimants to file a case to this effect.

³⁵ The head of the judges, counselor Yehia Al Refa'i, the independence of judiciary and the crisis of elections, the modern Egyptian office, the version of 2000, p. 280

2.2.1. What the Selection and Appointment of Judges Assists in Reveals about the Independence of the Judiciary.

The Executive Authority – controlled and presided over by the President of the Republic – is responsible for the appointment of judges. The law of Judiciary Authority, no. 46 of 1972, affirms that a judiciary position is filled either by appointment or promotion by presidential decree.³⁶

The law affirms that the appointment of the counselor in the Court of Appeals is done through the Supreme Council of Judiciary Organizations which is presided over by the President. The President is also the head of the Executive Authority that appoints this counselor out of a choice of two persons, one being recommended by the General Assembly of the Counselors of the Court of Appeals and the other one by the Minister of Justice who is a member of the Executive Authority who may misuse his powers in order to satisfy political interests and considerations³⁷. This is the process is for all judges who at different levels of seniority.

It is clear that the Executive Authority wholly controls the appointment of judges by controlling the appointment of all the members of the public prosecution. The judiciary tradition obligates that the first step of joining the judiciary authority is being appointed as an assistant in the prosecution and followed by promotion to Assistant Prosecutor and then to Deputy of the Public Prosecutor. From those who reach this position, a few are selected as judges of *B* level in the first instance courts and the others are selected to be prosecutors. According to the law of the judiciary authority, those who are appointed in the judiciary field, can return to work, at their original levels, in the public prosecution and those who are promoted in the public prosecution can reach the position of the Attorney General to work in the competent courts. Article no. 49 of the judicial authority states that “the selection of the judges of *B* level should be by promotion of members of the public prosecution according to seniority and achievements, as well as the reports that have been written about

³⁶The Independence of judiciary, a reference mentioned before, page no. 131.

³⁷ The Counselor Yehia Al Refa'i – The legislation of the Judiciary authority – the prints of Ros Al Yousef Association in Cairo, 1981, page no. 44-45

them/their records.”

In general, the known legal rules state the possibility of moving from the public prosecution to the judiciary and the reverse. This is clear in Articles 39, 40, 49, 60, 117 and 119 of the judiciary authority. Article 39 of the law of the judiciary authority states that there are other categories of persons apart from the public prosecutors who can take the judiciary positions in the first instance courts. However, in practice, the judiciary position is only taken by those who work in the public prosecution as the number of those who are accepted can cover the judiciary needs.

Also, Article 119 of the judiciary authority on the method of appointing the public prosecutor and his assistants as well as the rest of the members of the public prosecutor states that the appointment of the Public Prosecutor is done by presidential decree who is appointed among the deputies of the heads of the courts of appeals or the counselors of the court of cassation or one of the Attorney Generals and the rest of the members of the Public Prosecution by a decree of the President of the republic after consulting the Supreme Council of Judiciary"

It is evident that the President of the State has the only power of appointing the Public Prosecutor among specific categories determined by law. In this regard, the Supreme Judiciary Council has no role in appointment of the person who has the highest judiciary position in the public prosecution as the Council does not give their consent or even their opinion in the matter.³⁸ Moreover, the President is the one who appoints all members of the public prosecution without any restrictions on his powers except consulting the Supreme Judiciary Council without any obligation to follow the opinion or even consider it. Also, Association complains about the cases of corruption and the necessity of having connections in order to be able to join the prosecution. An Article published in the semi- formal Al-Ahram entitled “Angry Youth” included a profile of Abdel Hamid Fayege a young person from Detryout, Asyout governorate in South Egypt who, the article said, “is one of those who graduated from the Faculty of Law and who achieved the grade ‘very good’”. He applied to take an exam for the members of the judiciary organizations in order to work as an assistant in the

prosecution. However, he was surprised to find that he had to have connections in order to reach this position. He gave a lot of examples of this, such as a new group of graduates appointed to the Public Prosecutor who only had 'Fair' grade but who were the sons and relatives of people of power. This group is treated as if they have high grades and their results appear along with the high grade applicants and so they become equals when getting promotion. It is funny – Abdel Hamid said – that they appoint four groups, three who have connections and only one group of high grade applicants.”³⁹ The young people criticized the method of the appointment in the public prosecutor labeling it a method in which bribes are encouraged and connections used. The Egyptian press also criticized it, saying that it is unfair and leads to corruption.⁴⁰ The judiciary men themselves confirm reports of this kind of corruption in the judiciary.⁴¹

The biggest problem is that the Public Prosecutor and his assistants as well as all the members of the public prosecution are under the direct power of the Minister of Justice due to Article 125 of the Law of the Judicial Authority. The Article states that “The members of the prosecution are under the power of their bosses and the public prosecutor who are all under the power of the Minister of Justice. The minister has the right to monitor and supervise all the members of the prosecution”. There is no doubt that a new member of the prosecution who began his career as a follower of the Minister of Justice – who is a member in the executive authority- used to have his instructions from the executive authority and its representatives. He is promoted to the position of a judge particularly when there is nothing that prevents him from returning again to work in the public prosecution and so returns again to be a follower to the executive authority. Similarly, law no. 47 of 1972 concerning the State Council which is amended by law no.136 of 1984 states the appointment or promotion in the State Council is done by a decree from the President of the republic. The executive authority has the basic role in appointing the members of the State Council as the role

³⁹ Al Ahram, 24/10/2003, The Article " free margins", Farouk Geweda, An angry young person.

⁴⁰ Al Ahaly newspaper, 9/7/2003, an Article named “A blatant aggression on the rules of appointing the assistant of the prosecution”. The same published an Article on 23/7/2003 named “The humorous story of the appointment in the public prosecution – appointments and distributions of non-eligible persons”. This Article approaches the phenomena of having connections in appointing the new members of the public prosecution which breaches the public rules in this regard. The *Mosowar* journal approached the same issue from another point of view in its issue dated 25/7/2003

⁴¹ The counselor Mostafa AnourAbou Zeed- contemplation in how to select judges – the *Judges'*

of the General Assembly is confined to recommend names only and the role of the State Council is confined to giving opinion only as well as the law does not obligate the President of the republic to follow the recommendations of the General Assembly or to listen to the opinion of the Supreme Council. This is clear in Article 83 of the law of the State Council which states that "The appointment of the head of the State Council is carried out by a decree from the President of the republic among the vice Presidents of the Council after taking the opinion of the Supreme Council of the Judiciary Organizations. Also, the vice Presidents of the council and its deputies are appointed by a decree from the President of the republic according to a recommendation from the General Assembly of the Council and after taking the opinion of the Supreme Council of the Judiciary Organizations". This takes place although that the State Council plays a decisive role in organizing the relation between the State and the individuals as it is responsible in taking decision in regard to the relations between the State and the individuals. For this reason, it is supposed that the appointment of the head of the State Council and his deputies shall not be left to the President without any restrictions.

The appointment of the members of the Egyptian State Council - the administrative judiciary - does not differ from that as according to Article 83 of law no. 47 of 1971 which is amended by law no. 17 of 1976 and law no. 136 of 1984 states that the appointment or promotion in the State Council is done by a decree from the President of the republic. The head of the State Council is appointed by a decree from the President of the republic after taking the opinion of a special General Assembly. This General Assembly is made up of the Head of the State Council, his deputies and representatives as well as those who hold the position of counselors for two years. It should be noted that the opinion of this special General does not mean the necessity of following this opinion and so the executive authority represented in the President of the republic has the upper hand in selecting the head of the State Council who presides the Supreme Administrative Court. This court is responsible for the hearings of the challenges on the judgments issued by the administrative judiciary courts and the disputes of the individuals and the state. In addition to that, the head of the State Council presided the parties' court which is responsible for the challenges of the

decrees of the committee of political parties affairs in the cases of refusing to establish parties or any other decisions taken by the committee.

In this regard, the jurists and the judiciary employees in Egypt believe that “The executive authority has a basic role in appointing the judges to the State Council. Thus the legislator shall not be content with only consulting the General Assembly when appointing the head of the Council but the General Assembly shall agree before the issuance of the decree of the appointment by the President in order to avoid the tyranny of the executive authority in appointing anyone in this very important position.”⁴²

The men of the judiciary expressed their resentment towards the method of appointment. In the First Conference of Justice, the conference recommended that “the appointment of the head of the court of cassation, the public prosecutor and all the judiciary men as well the public prosecution shall be done in all cases with the consent of the Supreme Judiciary Council and according to the public, regulatory rules put by the Council in this regard.”⁴³

2.2.2 The effect of the delegation and transferal of judges on their independence.⁴⁴

The delegation and transferal of judges are addressed in the second section of the

⁴² Dr. Mohamed Kamel Ebeid, the independence of judiciary – a comparative study, page 143

⁴³ The recommendations of the first conference of justice, the original documents, the documents of the opening and closing sessions, page 49, the publications of the judges club.

⁴⁴ The counselor Nagi Derballa and other Judiciary members discussed together the issue of transferring and delegating judges (leaving out the delegation of first instance judges, which is under the powers of the Minister of Justice). The delegation is one of the absolute powers of the Supreme Judiciary Council and the President does not play any role in this regard. His role is confined to issuing decrees without intervening. They believe that the problems related to the transferal and delegation are that the Supreme Judiciary Council does not put specific rules in this regard but they are changeable rules. On the other hand the formation of this Supreme Judiciary Council has defects as most of its members worked previously as assistants to the Minister of Justice for a long time and so they are attached to the executive authority. In order to change this viewpoint, the judges and the counselor agree that there shall be two kinds of membership in the High Judiciary Council. Firstly membership by position, which means that the Head of the cassation court presides over the council and the rest of the members of this court shall be members in this council. Secondly, the council shall include some members who are appointed by the General Assembly of the cassation court and of different courts of appeals. The number of the elected members from the judges shall be more than the number of appointed judges. On the other hand, some of the judges believe in the necessity of the distribution of power, as the Judges’ Association shall have an independent budget and shall be recognized as the Judges’ Syndicate. It shall also defend the interests of judges against the Supreme Judicial Council (or the Minister of Defense depending on circumstances).

Judiciary authority law no.6 of 1972, the second chapter of which contains 14 Articles regulating this matter. The delegation and the transference of the State Council judges are mentioned in the second chapter of the fourth section of the decree of law no. 47 of 1972, amended by law no. 17 of 1976 and law no. 36 of 1984. This law includes 4 Articles.

We note that among the 14 Articles which regulate the delegation and the transference of the judges of normal judiciary degrees, the President and the Minister of Justice who are members in the Executive authority are mentioned 7 times (i.e. in 50%) Also, we note that the transference of heads and judges in the first instance (Primary) courts is carried out by the President according to Article 53. Moreover, according to Article 55, the Minister of Justice can temporarily delegate one of the counselors of the court of appeals to work in the court of cassation for 6 months, which can be renewed. According to Article 65 of the same law the Minister of Justice can temporarily delegate one of the counselors of the Court of Appeals to work in another court for 6 months (which can be renewed). Moreover, according to Article 57, he can temporarily delegate one of the counselors of the Court of Appeals to work in the Public Prosecution for 6 months (again with the possibility of renewal). Also, Article 58 of the same law dictates that the Minister of Justice can delegate the heads and the judges of the First Instance courts to work in other courts for a period 6 months, which is renewable. Furthermore, according to Article 62, the Minister of Justice can delegate the judge to carry out legal or judiciary duties other than his work. Finally, the judges can be delegated to work for foreign governments or international institutions by a decree from the President.

It can be seen that these Articles allow the Executive Authority to intervene in even the minor affairs of the judiciary. Although the law demands that the Supreme Judiciary Council shall consent, the transference and delegation is in the hands of the President or the Minister of Justice who are both members of the Executive Authority and who usually have the financial and physical power over all the employees of the judicial authority along with the members of the judiciary council which we will explain later in this paper.⁴⁵

There is also a dangerous role of the executive authority in the process of delegation which can affect the judiciary work of delegating the counselors to work as the heads

⁴⁵ Review the criticism in the delegation and transference system by the counselor Ibrahim El Tawela, the vice President of the Egyptian Cassation Court – An Article entitled “A Judge’s thoughts” – the *Judges’ Journal*, the Issue of January/August 2003, page 105.

of the first instance court. On this issue, we refer to Article 9 of the Judiciary Authority Law, which states “Each first instance court is composed of sufficient heads of judiciary. One of the counselors from the Court of Appeals located in the constituency of the first instance court or from any nearby Court of Appeals is delegated to head one of these first instance courts according to the numeration and sequences which were given in the first paragraph of Article 54. The delegation takes place by a decree from the Minister of Justice after consultation of the Supreme State Council for one year (which is renewable). By Article 94 of the Judiciary Authority Law, the delegated head of the court is given the power to preside over all the judges of the court including issuing warning notices to judges. On this subject, the counselor Hussam El Gharyani, the Vice President of the court of cassation, commented that “This Article broadens the powers of the Minister of Justice in selecting the head of the first instance court and decreases the power of the Supreme Judiciary Court in monitoring the selection. Although the Supreme Judicial Council puts rules on the delegation of judges, including the rule that the delegation cannot exist for more than 4 years, the Ministry of Justice delegated some of them for a longer periods. The Supreme Council agreed, saying that the Minister of Justice had the power of delegation despite the refusal of the Council and thus there is no use opposing this opinion.”⁴⁶

The counselor El Gheryani explained the undesirable consequences of absolute power for the Minister of Justice in delegating the Head of the first instance court, stating that “the Ministry selects to head the court those who are believed to be able to organize the role of the General Assembly and prevent the judges from discussing public affairs. Then we heard that the judges talked about the heads of the courts who intervene in the hearings of the cases to the extent that one of the heads of the court welcomed one of the ministers during a visit to the court and he received him with musical bands and songs and the shouts of female employees in the court.”⁴⁷

The situation seems better in the State Council as the joining of the members of this council with its different sections is carried out by a decree from the head of the Council. However Article 88 of the State Council Law states “The members of the State Council can be sent at any time or at a time outside the formal working period to do legal or judiciary works in the governmental ministries or public institutions or bodies. They are delegated by a decree from the Head of the State Council after the

⁴⁶ The counselor Hossam El Gheryani – the vice President of the court of Cassation – *The Judges’ Journal* – the issue of January/ December 2002, p. 3.

⁴⁷ The counselor Hossam El Gheryano, *Ibid*, page 5

consent of the Supreme Council of Judicial Institutions has been given. This latter Council is the one that determines the amount of payment for the delegated member.”

In light of the above, we have some comments on this Article. Firstly, though the delegation of the administrative judge is carried out by a decree from the State Council, it requires the consent of the Supreme Council of Judiciary institution which is presided over by the President, with the the Minister of Justice as his deputy. Without this consent, the decree of the head of the State Council for the delegation becomes useless. Moreover, Article 88 gives only the Supreme Council of Judiciary the absolute power to determine the payment for the delegated member. This in turn affirms the control of the Executive Authority over this issue as the delegation decree is useless without the consent of the Executive Authority. It is also the Executive Authority that determines the amount of payment for the delegated member.

A second observation is that the judges of the State Council are delegated to carry out judiciary and legal works for governmental ministries or for public institutions or bodies. Because the State Council judge is responsible for the hearings of the cases of disputes between the citizens and the governmental ministries or public institutions or bodies, there is a conflict of interests in this regard which lead to shaking confidence in the independence and neutrality of the judiciary.

The third remark is that the delegation of State Council judges to do legal and judiciary works for the State's ministries and giving them special payments – without any rules concerning the issue of these payments - or imposing penalties on other judges in the lack of general rules for delegations or determining the payments, leads to frightening the judges who shall be the arbitrators between the individuals and the administration and to protect the rights of the individuals. Thus it can be said that even in the affairs of delegation, the Egyptian judges suffer from interference in their work affairs.

2.2.3. Making judges redundant (both with and without disciplinary intention) - its limits and the effect on the independence of judiciary.

The Constitution of 1971 is an improvement on the preceding Constitutions in stating the principle of the inability of protection against being made redundant. Article 127 of the Constitution of 1923 states that “The judges shall not be isolated or transferred except by the law which determines the method and the limits of that.” The same is offered Article 116 of the Constitution of 1930. However, Article 168 of the 1971

Constitution states that “The status of judges shall be irrevocable. The law shall regulate the disciplinary actions with regard to them”. Thus, the legislator differentiates between making judges redundant through disciplinary action, leaving this matter to the law, and between through non-disciplinary action, as he prohibits the latter. It seems that the fact that the legislator put an Article which prohibited the redundancy of judges through non-disciplinary action has historical roots as the principle of immunity from redundancy has already been violated twice before. On 29 March 1954, the Egyptian government incited some plain-clothed the security men to break into the building of the State Council and assault the Head of the Council which at that time was Dr. Abdel Razek ElSanhori. Then on 15 April 1954, a decree isolating him from his position was issued, although Article 26 of the Law of Establishing the State Council (no. 112 of 1946) states that “the Head of the State Council, his deputies and counselors are immune from redundancy”. Following that the Egyptian government issued law no. 165 of 1955 in order to re-establish the structure of the State Council which led to the removal of about 20 members, who were judges of the State Council, from their positions either by retirement or being transferred to other non- judiciary positions. This action took place because of their refusal to cooperate with the Executive Authority when it requested the disregarding of the legal standards because the country at that time was going through the phase of revolution. However, the judges believed that the State Council is the refuge for the individuals, protecting them against the aggression of the executive authority⁴⁸.

A similar incident took place in 1969 as the Egyptian government tried to persuade the judges as individuals and institutions to affiliate to the Arab Socialist Union – the only political organization at that time. The Egyptian judges met together in the Judges’ Association in the form of a General Assembly and issued a statement on 28 March 1968 expressing their rejection of the idea: “The judiciary and prosecution members decided in order to keep the independence of the judiciary and to safeguard guarantees for justice they should be prevented from participating in any political organization in the Arab Socialist Union on any levels.” Moreover, some judges challenged the wish of the Government to issue specific judgments in some political cases which indicates the tension in relations between the attacks of the Executive Authority and the judiciary which was defending its independence.⁴⁹

⁴⁸ For more information about this “Massacre”, review *The Role of the State council in Protecting Public Rights and Freedom*, Counselor Farouk Abdel Al Bar, Part One, El Nehda publishing house. Also, review Dr. Mohamed Kamal Ebeid, *Ibid*, p. 233.

⁴⁹ For more information see Counselor Momtaaz Nasar, *The Struggle for Justice in Egypt*, El Shorouk publishing house, Cairo 1974, p. 86 and the followings.

In this context, the President issued a decree of Law no. 83 of 1969 which stated that the structure of the judiciary organizations shall be re-established. It also stated that the President shall issue, within 15 days, the necessary decrees in order to re-appoint the members of the judiciary institutions in their positions or counterpart positions in other judiciary institutions and that those who were not included in the appointment decrees were considered to be retired by the rule of law. Those people shall receive their retirement payments or final payment up to the last salary they received. This law gave the President all the powers of the Judiciary Institution's General Assembly during the 15 days mentioned above.⁵⁰

The law and its subsequent decrees are known as the Judiciary "Massacre" as they led to the removal of 189 judges from their positions including the head of the court of cassation, 14 counselors of this court as well as the elected head and the member of the Judges' Association and the vice President of the State Council and his two deputies plus 10 of the counselors, members of the Council and others. The humorous part of this incident was that the explanatory note to the decree of Law no. 83 of 1969 justified these procedures stating that "it was necessary to re-establish the structure of the judiciary institution in order to guarantee that the judiciary reform achieve its objective of consistency in the application of judiciary judgments. It was also necessary to guarantee the rights of the State and the citizens during the socialist transformation, requiring that the judiciary should be a tool for such a transformation because of the principles and judgments according to the ruling of the Constitution and the law."⁵¹ It is not logical that playing with the judiciary system structure is a method of reforming it. However, this is the Executive Authority in Egypt which always uses bright slogans as a curtain for achieving illegitimate results.

2.2.3.1. Non-disciplinary dismissal

The principle of immunity to redundancy for reasons other than disciplinary action is considered one of the important principles protecting the independence of judiciary. However, this principle faces some restrictions when the power of the Executive Authority is imposed over the judiciary.

- According to paragraph 1 of Article 91, the judge can be referred for retirement if he cannot continue his work because of illness if it is discovered at anytime that he cannot, for health reasons, do his work properly. Thus, a Presidential decree is issued in this regard for his retirement after a request

⁵⁰ The formal newspaper, issue no.36 issued on 4 September 1969

⁵¹ The explaining note for the decree of law no.83 of 1969.

from the Minister of Justice and consent from the Supreme Judiciary Council. It should be noted that the Minister of Justice can request the dismissal of a judge because of his weak health without confirmation from a specialized medical institution. A medical institution should be determine technically if the judge is able to do his work or not. In addition, the Minister of Justice can request the dismissal of the judge for that reason without consulting the General Assembly of the court in which the judge is appointed, which could assign him duties which are suitable for his health condition. Therefore, the condition of a judge's health can be used as justification to violate the Principle of the Inability to isolate judges.

- The Minister of Justice – one of the members of the Executive Authority – can request by his own will that a judge be referred for retirement before he has reached the retirement age or that he be transferred to a non-judiciary position if it is discovered at anytime that he becomes ineligible to continue in his judiciary position for reasons other than his health condition. Article 111 of the Judiciary Law (no. 46 of 1972) which is amended by Law no.35 of 1984, dictates that this kind of request is submitted to the Disciplinary Council for judges which is established due to Article 98 of this law. It should be noted that there is a difference between being deemed non-eligible and being subject to disciplinary measures because the reasons of being eligible are related to status of the judge as whole, including his behavior, personal life, and his relations with others. The decree which is issued in this regard may be based on behavior of the judge even if information about his behavior is not verified. However, disciplinary measures must be carried out according to specified incidents and deeds. Thus, a judge may become “unfit” for his job on the basis of unverified rumors or statements. The dangers of this Article are clear and are as follows:

Firstly, the Minister of Justice – who is from the executive authority- can use the request for the referral for retirement to make the judge unfit as a method of defaming the judge or forcing him to do (or stop doing) specific tasks. Referral to a disciplinary judiciary council, saying that someone is no longer fit for his role is considered a way of insulting and psychologically harming the judge, whatever the decision of the disciplinary committee will be.

- Secondly, giving the Minister of Justice the right to request the referral of a judge for retirement without the occurrence of specific incidents means that the judge does not enjoy any kind of immunity against the aggression of the Minister – maybe even the Disciplinary Council itself- as false rumors and statements are used to condemn a judge and assert his unsuitability for his post which is a breach of the conditions of

fair trials as the evidence should depend on verifications not on doubts and suspicions.

According to Article 112 of the Judiciary Authority, the Minister of Justice can request that the Disciplinary Council refer a judge for retirement (or transfer him to a non-judiciary position) if it is discovered that his skills are not suitable to his judiciary position according to the reports of the Judiciary Inspection Directorate. This Article is another one of the dangerous Articles used to violate the principle of inability to be isolated. As according to Article 78 of the Judiciary Authority Law, the Judiciary Inspection Directorate is under the control of the Minister of Justice and is also part of the Ministry. The Minister of Justice is the one who write down the regulation of the judiciary inspection It is responsible for enforcing the inspection judiciary regulation – with the consent of the Supreme Judiciary Council – and submits the inspection reports to the Minister personally. He then refers the reports to the Supreme Judiciary Council. According to Article 79, it is the Minister of Justice who notifies the judiciary and prosecution's members, of judicial degrees lower than intermediate, of their unsuitability shortly after the official inspection directorate finish their evaluation report.⁵²

According to the judiciary inspection regulation issued by the Minister of Justice which entered into force on 28 October 1963,⁵³ the Judiciary Inspections Directorate is under the power of the ministry of Justice. It is responsible for inspecting the judiciary duties and the Heads of first instance courts in order to collect the data which lead to evaluate their degree of eligibility and their commitment to their work, in addition to investigating any the complaints filed against them. Moreover, it is responsible for collecting the necessary data on candidates who apply for judiciary positions as well as submitting general recommendations for the Minister of Justice regarding the judiciary management and creating a secret file for each judge which includes the reports of inspections and complaints filed against him and complaints filed by him as well as the warning notices he has been issued. In addition, the file includes the disciplinary actions taken against him and any related documents that can assist in forming a correct opinion about him. This Directorate also assists the Minister of Justice in supervising over the courts and judges as well as preparing a draft report on the judiciary promotions and transference.

It should be noted also that this Directorate's duty is to assist the Minister of Justice in

⁵² *Review the Criticism on the Nature of Judicial Inspection*, the counselor Yehia El Refa'I, *Comments on the Legislation of the Judicial Authority*, Rose Al Yousef printing house, Cairo 1981, p. 44-45

⁵³ *The Egyptian Facts*, addendum to issue no. 84 dated 28/10/1963

supervising judges. It also produces reports on the evaluation of the judges, which may be negative and lead to their retirement because of their alleged unsuitability. That the Minister of Justice controls the Directorate, which in turn has power over the fate of judges, is a blatant violation to the principle of the independence of the judiciary. The control of this Directorate must be reviewed and it should be given to the Supreme Judiciary Council rather than the Minister of Justice. There should be a restricted, fair and declared criteria for determining the date of inspection in order to provide equal chances and conditions for all judges. There should also be statistics collected on the number of cases pending in order to avoid unfair comparisons of the reports of different judges (who may have vastly different caseloads), during the inspection. Some judges are overburdened with the hearings of a high number of cases during the inspection period while in other constituencies, their colleagues have far less.⁵⁴ Lastly, the head of the Supreme Judicial council alone should have the right to refer for retirement a judge whose technical skills have decreased.

The situation seems better in the administrative judiciary than the normal judiciary as according to Article 99 of the State Council law no. 47 of 1972, the technical inspection directorate is an independent directorate which is under the control of the State Council. The head of the State Council is the one who notifies of the reports of the members who are in positions below intermediate degree. Thus it seems that the situation is better in the administrative judiciary but it remains that the Head of the State Council is appointed by the Executive Authority.

2.2.3.2 Dismissal as a disciplinary measure.

Dismissal by disciplinary measures is covered in general in Egyptian law for all State employees including judges as the legislator is careful that they are accountable for any illegal acts they commit and that these acts lead to their dismissal. The Judicial Authority Law no. 46 of 1972 deals with the issue of imposing disciplinary acts on judges and Section 2 of Chapter 9 of the law breaches completely the principle of the Independence of the Judiciary. Article 93 of the law states that “The Minister of Justice has the right to supervise all courts and judges.” This Article gives the representative of the Executive Authority the legal right to supervise the courts and judges.

The law has formed a special committee presided over by the head of the Cassation

⁵⁴ Dr. Mohamd Kamel Ebeid, the independence of judiciary, *ibid*, page 248.

court and the membership of the three most senior Heads of the courts of appeals and three most experienced the Cassation counselors. This court is responsible for disciplining judges. The law states that these disciplinary courts shall be secret in order to protect and keep the dignity of the judge. However, the disciplinary system itself has many negative aspects which affect the independence of the judiciary.

The first comment to make on the disciplinary actions taken against the judges is that, according to the fourth paragraph of Article 94 of the Judiciary Authority Law, the Minister of Justice can impose the penalty of issuing warnings to the Heads of the first instance courts and its judges after hearing their statements. It is clear that, according to the same Article, the penalty can not be imposed except by a boss on his employees particularly if this penalty was imposed before. Undoubtedly, the Minister of Justice's power to impose penalties on the judges enables the Executive Authority to affect the neutrality and independence of the Judicial Authority or the principal part of it, namely the Heads and the judges of the first instance courts.

Secondly, according to Article 99 of the Judiciary Authority Law, the case requesting disciplinary action is filed by the Minister of Justice himself or by a recommendation from the Head of the court in which the judge is appointed. According to Article 125 of the Judiciary Authority, the Public Prosecutor is under the control of the Minister of Justice. So the case of taking disciplinary action is filed as a result of a request from the Minister of Justice, who is a member in the Executive Authority, and this case is followed up and motivated by the Public Prosecutor, who is also under the control of the Executive Authority.

The third comment is that the Minister of Justice is the one who notifies the judge of the disciplinary penalty and it is he who supervises the implementation of it according to Articles 109 and 110 of the Judiciary Authority Law. We believe that keeping in force Judiciary Authority Law, Article 93, which states that the Minister of Justice has the right to supervise courts and judges breaches the principle of the independence of the judiciary. As does the retaining Article 125 of the same law, which states that the members of the prosecution are under the control of their bosses and they are all under the control of the Minister of Justice who has the power to monitor and supervise over prosecutions and its members. The fourth paragraph of Article 94 and the first paragraph of Article 126 that enable the Minister of Justice to have the right in imposing the penalty of issuing a warning to the judge or the member of the prosecution after investigating him prove, as with the other articles, that there is no independence of justice in Egypt or, at least, prove that it is not completely

independent.

The situation in the administrative judiciary is better as the State Council Law does not include articles like Articles 93 or 125 above. In addition to that, filing a case against an administrative judge requesting that disciplinary actions should be taken against him, shall be conducted by the Vice President in the technical inspection directorate of the State Council, according to Article 113 of the State Council law. The Article also dictates that this first should involve a criminal or administrative investigation by one of the Vice Presidents of the Council if the case is against a counselor or by a counselor if the case is related to the other members of the council. A decree from the Head of the State Council is issued to appoint the person who shall carry out the investigation and thus guarantee the independence of the members of the council as the disciplinary procedures are taken by the counselors of the council without the direct intervention of the Minister of Justice or his followers.

2.2.4. The Financial System of Judges – does it lead to justice or injustice?

The salary of the judge is a guarantee that he will achieve justice as the judge is a human being who should not be preoccupied by how he can cover the costs of his daily life. Thus the salary of the judge, along with the body that determines this salary as well as the bonuses that are given to him, is one of the guarantees for the independence of the judiciary. His salary is particularly important because he is not allowed to practice any activity or do other work that affects his dignity as a judge or his independence such as working as in trading. As according to Article 72 of the Judiciary Authority Law “The judge shall not practice any commercial activity, nor shall he carry out any activity that is inconsistent with his independence and dignity. The Supreme Council for Judiciary Institutions has the right to prevent any judge from practicing any activity that it believes to be against his position or duties or may affect his performance”. The Executive Authority, represented by the Minister of Justice, controls the salaries of the judges and thus the judges call for the budget of the judiciary to be under the control of Supreme State Council. This would include both the determination of the resources of this budget and how they will be spent and would see this budget as a priority amongst the general budget of the State. In this regard, the Supreme Judiciary Council shall be the official authority as is the Minister of Finance in the legislative authority.

This requires that the determination of the salary of the judiciary and the prosecution men be under their Supreme Councils without restrictions from the rules that are

stated in all other laws that regulate non-judiciary authorities. These salaries should be sufficient and suitable for their status and the responsibilities of their positions and they should be amended regularly according to inflation.⁵⁵

The Egyptian legislator included in the Law of the Judiciary Authority (no. 46 of 1972) a table of the salaries and allowances of the judges in the normal judiciary. In the Law of the State Council (no. 47 of 1972) he included a table of the salaries and allowances of the judges in the administrative judiciary. It should be noted that these salaries were determined 30 years ago and remained as they were without any increase until now. Although the increase in the exchange rate of the U.S. dollar. The U.S. dollar in 1972 was equal to 65 Egyptian pounds (L.E.) while now it is equal to 7 Egyptian pounds. The total monthly salary (including allowances and the rewards) of the counselor in the cassation court or the head of the court of cassation (both high judiciary positions) is 4000 L.E./month. This is less than 600 U.S. dollars. Meanwhile the Head in a court, which is an intermediate judiciary position, receives 2000 L.E. (including allowances and rewards) which is less than 300 U.S. dollars. Other salaries are similar.

Regarding the salaries of the judges who work in the administrative judiciary, according to the table given in the State Council Law, the counselors' salaries range from 1400 L.E. and 1800 L.E., plus 420 L.E. as a monthly allowance. At a time when the salaries of those of the judiciary who are responsible for implementing actual justice are so modest, the Egyptian government is notably generous with the judges of the Supreme Constitutional Court (the role it played for the interests of the Executive Authority in the Egyptian political system was explained previously). In an article named "The Reform of Salaries and Retirement Payments – A Suggested Viewpoint" counselor Nagi Derbala, the Vice President of the Head of the cassation court explains "the counselor of the Supreme Constitutional Court receives the same salary as the Vice President of the Court of Cassation in addition to 1200L.E. as the so-called allowance of attending the General Assembly, plus an extra 3000 L.E. so they do not have to do other, supplementary work. Their salary therefore totals 12000 L.E. in addition to a new car and 200 L.E. for the petrol!"⁵⁶ Thus we see that that the salary of the counselor in the Supreme Constitutional Court equals 3 times than his counterpart

⁵⁵ The recommendations issued in the fist justice conference, 1968, the fifth section, the judiciary affairs, second, taken from the counselor Yehia El Refa'I, the independence of judiciary and the crisis of the elections, *ibid*, page no.283

⁵⁶The counselor Nagi Derbala, the vice President of the cassation court " the reform of the salaries and the retirement payments – a suggested viewpoint", *The Judges' Journal*, issue of January/August 2002, p. 102

in the court of cassation despite the fact that the counselors in the Court of Cassation or the Court of Appeals have to exert far more effort than their colleagues in the Supreme Constitutional Court.

The poor financial status of the judges increases the government's control over them as it distinguishes between the judges. It can give some judges, such as members of the Supreme State Security Prosecution – that investigate cases of political nature – higher salaries and advantages to encourage them to continue with their work while their colleagues in other prosecutions are treated much more poorly financially. Also the Counselors, who are appointed by the Minister of Justice to be Heads of the first instance courts or to work in the legislation Directorate and the judiciary inspection in the Ministry of Justice, are treated better than their colleagues who work in the courts. Those counselors are given more financial advantages under the guise of 'allowance' for the nature of the work and the risks involved, as well as being given cars and other advantages. Thus, this leads the Egyptian Government to be a fundamental partner in the attempts at corrupting the judges by means of the salaried table and by having control over granting rewards and advantages to those who they believe are eligible for them.

The Head of the judges, the counselor Yehia El Refa'I, who is involved in the struggle for the defense of the judiciary's independence and who received the Fathi Radwan Award for Human rights asserts that "Judges are human beings who are sometimes weak, sometimes strong, as with all other human beings. And although the Law of Judiciary Authority in Egypt views judges equally and bans the special treatment of any one of them, the Egyptian authority granted the Ministry of Justice control over the interests of the judges which include salaries, rewards as well as medical, housing and travel advantages. This Ministry can use discriminatory treatment between judges. If the interests of judges are under the Ministry's control, then the interests of the Government, though in the hands of the judges, are also under the control of the Ministry of Justice. Therefore, the Ministry as part from the Ministry has to take care of these interests of the Government by handling the judges, appeasing one judge and warning another, as well as by reminding the judges that they are always under the influence of the government which has the upper hand over them."⁵⁷

3- The Egyptian judiciary and the executive authority; the policy of challenge and

⁵⁷ The counselor, Yehia Al Refa'I, the former vice President of the court of cassation and the honor head of the judges' Association, the independence of judges and the crisis of elections, the publisher the Modern Egyptian house, p.102

attempts of containment.

Since the establishment of the revolution on 23 July 1952, the relationship between the executive authority and the judges is characterized by periods of both tension and calm. As the government is trying to show its powers and to have control over the will of judges in Egypt when some of them try to defy the power of the Government and not give up in to the government's will, while the policy of the judges is to defy the government and the executive authority's attempts to contain them. Between these policies, unhealthy relations arise between the Executive Authority and the Judiciary Authority. So by the balance of power and the control of the legislative and judiciary authorities by the Executive Authority, which it is afforded by virtue of the Constitution, the victory in this struggle is always for the Executive Authority but at least the honor of trying to be independent is registered for the Judiciary Authority.

3.1 The Policy of Defiance

Some of the basic stances taken by the judges in trying to keep their independence and to deflect the public policies of the state towards achieving freedoms are as follows:

3.1.1 The Argument over the Supervision of Elections

The most important way in which the judiciary defies the powers of the Government is in their struggle to have elections under the real and complete supervision of the judiciary. This controversy reached its climax in the decree that was issued by the criminal constituency of the Egyptian Court of Cassation in the two electoral contestations no. 949 and 959 of 2000 in relation to the constituency of Al Zaytoun. The importance of this constituency is that it is the constituency of Dr. Zakarya Azmi, the head of the office of the President and others who are so close to him. The report come to accept the contestation and to cancel the elections in this constituency. The reason being that "The phases of elections and the conducting the ballot in this constituency breaches Article 24 of the law of practicing political rights no. 167 of 2000. This law states that the members of the judiciary institutions that are judges shall preside over the public and sub-committees. However, that did not happen in this constituency as those who supervise over it were from the institution of State cases and the administrative prosecution". The Government replied to the contestation that Article 167 of the Constitution states "The law shall determine the judiciary organization and their competences, shall organize the way of their formation and prescribe the conditions and measures for the appointment and transfer of their

members”. This Article delegates the legislator to establish different judiciary organizations, consequently it is the right of the legislator to define the characteristics of being a judiciary organization so that the Institution of State Cases and the administrative prosecution fall into this category. As a result these institutions are included in the judiciary organizations that can be delegated to supervise over the elections.

The Court of Cassation refused this explanation stating that “it is illogical that the description ‘judiciary organization’ is granted except to a body that is specialized in the hearings and settling of disputes and which provides to its members the guarantees of neutrality and independence which are necessary for them to carry out their duties. The court concluded that the Institution of State Cases and the administrative prosecution are two institutions that are under the power of the Executive Authority. Thus, including them in the judiciary authority by the legislator as well as appointing representatives of them to the Supreme Council for Judiciary Organizations is an aggression on the independence of the judiciary. The members of the Institution of State Cases are lawyers in the government who provide defense in the cases filed against the government. The members of the administrative prosecution are the one who are responsible for the administrative investigation for the executive authority with its employees under the supervision and monitoring of this authority through the ministry of justice.”⁵⁸

This issue was discussed before the legislative elections in 2000 concerning the supervision of the electoral process. The Egyptian Government insisted on appointing the Institution of State Cases members and the administrative prosecution to supervise over the elections stating they were to be considered as members of the judiciary organization, which would mean by Article 88 of the Constitution that they could supervise over the elections. At that time the judges insisted that their delegation was void and so the elections should be considered void. Also counselor Yehia El Refa'I, a prominent judge and the honorable Head of the judges' Association and recipient of the Fathi Radwan Award for Human Rights said, “The executive authority did not wish to leave the judges to completely supervise the elections even though the Egyptian Constitution, in the fourth and fifth chapters of the part concerning the System of the Government, specifies that the Judiciary organizations are the normal courts, the State Council and the Supreme Constitutional Court. However, the

⁵⁸ Review this report which is issued by the criminal constituency of the cassation court presided over by the counselor Mohamed Hossam El Deen El Ghryani, the vice President of the court and the membership of the vice Presidents of the court the counselors Mohamed Shata, Abdel Rahman Heikal and Hisham Al Bastawisi. This report is published in *The Judge's Journal*, the issue of January/August 2003, page 46.

Egyptian government added two other organizations to those supervising the electoral process according to the judgment of the Supreme Constitutional Court. These two organizations cannot be added to the judiciary organizations mentioned in Article 88 of the Constitution because they are the Institution of State Cases and the Administrative Prosecution. Those two institutions cannot be included in the judiciary organization because they are the lawyers of the Government and as such defend the Government's viewpoint and its interests, as well as the interests of its employees, before the courts. They therefore cannot be neutral. However, the members of the Administrative Prosecution Organization are responsible for the administrative investigation in the interest of the Executive Authority and this investigation is carried out by the members of this authority and so they can not be neutral. Thus, there delegation to supervise over the electoral process depending on their being members of the judiciary organization is, firstly, a breach to the Principle of the Separation of Powers and secondly, an incorrect interference in a duty that should be carried out by judges according to the Constitution."⁵⁹ Consequently, their delegation is void particularly because the members of the public prosecution are followers of the Minister of Justice by virtue of Article 26 of the Judiciary Authority **Law** no. 46 of 1972.⁶⁰

This report led to puzzlement and the Egyptian government was confused not only because of the importance of El Zaytoun constituency but also because in the majority of the electoral constituencies supervision of the elections was under the control of members of the Administrative Authority and the Institution of the State Cases. This matter threatens the annulment of the Egyptian People's Assembly. The Head of the Egyptian Cassation Court and the Head of the Supreme Judiciary Court immediately replied to this report stating that these two institutions are from the judiciary

⁵⁹ The counselor Yehia Al Refa'I, the independence of judiciary and the crisis of election, *ibid*, page 33.

⁶⁰ This is what led the counselor Yehia El Refa'i warned against the consequences of that in his reference which is mentioned before as he said " Every Egyptian citizen must know that the decree of the new law is not issued except to increase the number of judges who are under the power of the body that is responsible for the managing the election either if it is the ministry of interior or the Minister of Justice who are in tern part of the executive authority. As well as the current situation of the Articles of the law that regulates the practicing the political rights do not allow the supervision of the judges over the elections as they are considered individuals who are followers to the ministry of interior. In addition to the involvement of thousands of judges in the coming electoral contest under the power of the executive authority and the followers of it, shake the confidentiality in judges and judges. The counselor believes that the solutions of this issue is to amend the law of the judiciary authority and the law of practicing the political rights and thus preventing the occurrence of the repetition of similar incidents. This also requires the issuance of a decree of a law on the guaranteeing of the financial and administrative independence of the judges and judiciary as well as that the judiciary inspection directorate must be under the control of the Supreme Council of Judiciary and that the whole management of the electoral process shall be given to an independent judiciary committee not the ministry of interiors.

organizations and thus their supervision over the election is correct based on previous judgments of the Court of Cassation. Then, the prominent figure in struggle for the independence of judiciary, counselor Ahmed Meki who is Head of the Civil Constituency in the Cassation Court and respected among the judges gave his opinion in a specialized study on the conception of the judiciary organizations which was published in some newspapers and celebrated by the Judges' Association. He concluded in his study that the members of the Administrative Prosecution and the Institution of the State Cases are not judiciary organizations and thus the elections that were supervised by these two institutions are void. The Board of Directors of the Judges' Association supported their members in their opinion that including the members of the Institution of the State Cases and the Administrative Prosecution in the structure of the judiciary organizations is a threat to the independence of the judiciary. The Board issued a statement which was signed by its head, Zakarya Abdel Azeez on 29 May 2003. This statement concluded that, with due respect to the members of the State Cases Institution and the Administrative Prosecution, they were not judges but participate in establishing justice in a way similar to policemen and lawyers and therefore must not intervene in the structure of the judiciary organizations.⁶¹

This dispute has not yet been settled as the Egyptian government is trying to form a frontline from the members of the Institution of State Cases and the Administrative Prosecution against the attempts of the judiciary authority to keep its independence. However, the general indication is that, whatever the outcome of the dispute, it sends a clear message that the Egyptian judges are still able to defend the remaining independence that they have.

3.1.2 The Struggle for Implementation of the Administrative Judiciary Judgments Concerning the Elections of the Peoples' Assembly.

The last legislative elections in November 2000 witnessed a battle between the legislative and judiciary authorities. The tension between the executive authority and the Supreme Administrative Court over these elections led to unprecedented judiciary judgments, which constituted a major setback on the attempts of the Egyptian government to interfere with elections. It also showed the defiance of the State Council in its contact with government authorities and its wishes. Moreover, the way that the Executive and the Legislative Authorities dealt with the judiciary rulings heightened tensions. These two authorities only implemented the judiciary rulings that

⁶¹ For more information on the dispute of the judiciary organization, review *The Judge's Journal*, the issue of Janaury/ August 2003 as there is a whole Article on it, p. 45 -70.

were consistent with their wishes, leading to a lack of confidence in the Principle of the Separation of Powers.

The issue of the first part of this battle was who should have the power over hearings and decisions in electoral contestations. The Egyptian Government holds that the State Council does not have the right to make decisions in these contestations. It also believes that whatever judgments are issued that cancel the election of an individual member of parliament are useless if the individual was sworn in and became an actual member. The Government asserts that according to Article 93 of the Constitution only the People's Assembly has the authority to decide the validity of its members.

However, this opinion is incorrect, and inconsistent with the guarantees of judiciary authority independence. According to Articles 93 and 172 of the 1971 Constitution, the State Council is able to make decisions in all kinds of administrative disputes and disciplinary cases. Furthermore, although Article 93 of the Constitution states that the People's Assembly shall be competent to decide the validity of its members after the Court of Cassation carries out investigations. This role does not affect the specialization of the State Council, which is considered the competent authority in decision-making in the pre-elections procedures (the accurate technical meaning of the electoral elections). This was affirmed by the Head of the Administrative Judiciary Court Ra'fat Yousef, who commented in a press conference,

The Administrative Judiciary Court is the authority in charge of decision-making in the electoral contestation, including all the procedures and the administrative actions that precede the acquisition of the Peoples' Assembly membership. This monitoring is not related to the validity of the membership that is included in the specialization of the Peoples' Assembly. Any statement other than this means an assault on the Principle of the Separation of Powers, as this principle prevents the Legislative authority from penetrating the permanent specialization of the State Council as an administrative judiciary organization by virtue of the Constitution and the law.⁶²

In the period from 1 October to the end of December 2000, the first constituency of the Supreme Administrative Court⁶³ decided 23 judiciary appeals. The court accepted 13 and cancelled the contested judgments of the Administrative Judiciary Court and

⁶²A press statement by the counselor who is the head of the administrative judiciary court. *Al- Ahram* newspaper, 30 November 2000, the statement of accounts of elections, 2000

⁶³ It should be noted that some judgments issued by the Administrative Judiciary Court do not reach the Supreme Administrative Court because these judgments are not contested.

suspended the judgments that were issued in this regard. It also rejected three other contestations. Furthermore, it rejected an appeal on a judgment issued by the same court. It also rejected two separate challenges filed against the implementation of judgments issued by the court. The constituency of examining the contestations in the same took decisions in 18 contestations, accepted 10 of them and rejected 8.

The above-mentioned judgments all concerned the invalidity of electing certain members of the Peoples' Assembly due to defects in electoral procedures, processing ballots and announcing results. The most prominent judgment was issued by the Administrative Judiciary Court and then the Supreme Administrative Court regarding the issue of dual nationality (a candidate should not have more than one nationality). The court said in its judgment, "Article 5 of Law No. 38 of 1972 concerning the Peoples' Assembly gives the condition that members of the Peoples' Assembly must have just one nationality and that it should be Egyptian nationality.⁶⁴ Therefore, the court gave the judgment that the individual with dual nationality does not have the right to candidacy in the Peoples' Assembly because being of nationality other than Egyptian means that he does not have complete and absolute loyalty to Egypt, his loyalty being legally divided in two, for Egypt and a foreign country".⁶⁵ This judgment came as a blow to the government as some of its candidates, including ministers, have dual nationality.

It is vital to implement the State Council judgments concerning the conditions of the validity of the candidacy otherwise there will be some of the members of the Peoples Assembly who shall be members even though the conditions of membership do not apply to them. The Executive Authority, however, resorts to legal tricks either directly through the Institution of State Cases, or indirectly by encouraging those who received such judgments to challenge those judgment in other courts, in order to hamper the implementation of the judgments until the elections are over. In this way, the Executive Authority and its candidates are able to achieve a fabricated victory in the elections.⁶⁶

⁶⁴ The collection of legal principles issued by the Supreme Administrative Court concerning the electoral contestations, the first October 2000 to the end of December 2000. The technical office of the head of the State Council and the head of the Supreme Administrative Court, The State Council, Cairo 2001. p. 210.

⁶⁵ The judgment banning the candidacy of those with dual-nationality was one of the most important judgments issued by the council as some government ministers and prominent candidates were discovered to have dual nationality. Ibid. Pg. 212.

⁶⁶ For example, the ruling concerning the changing of the description of the candidate' seat of the National Democratic Party in the Qasr El-Nil Constituency, Abdel Azeez Mostafa, from the seat of laborers to the seat of categories. However, the candidate challenged the implementation of the ruling and his success in obtaining the labor seat was announced, although it was not true and the judicial ruling was final.

The Head of the Administrative Judiciary Court in the State Council Ra'fat Yousef expected that judgments of the State Council, against which challenges were submitted and the People's Assembly refused to implement, will cause a constitutional crisis when the matter gets out of control as those candidates have already joined the Peoples' Assembly, despite the contestations against them because of their nationality. The military and the Peoples' Assembly⁶⁷ announced that they are the only competent authorities that have the right to decide the validity of its members according to Article 93 of the Constitution.

Counselor Hamdi Yassin Okasha, the Vice President of the State Council, explained the essence of the battle when he said, "The judicial supervision of the electoral process is useless when the judicial judgments relating to elections are worthless because judiciary supervision completes the democratic picture of the electoral process, which depends on respect of the judiciary judgments and the commitment to implement them. Thus, carrying out the elections using the list of candidates who are excluded from candidacy by the judiciary and so voiding the electoral process, even if the candidate against which the contestation is filed was not the one elected. It is in the best interests of the Peoples' Assembly that it rid itself of any candidate who used legal tricks or any other illegal methods to become a member⁶⁸."

The judiciary did not win this battle as the Government disregarded the issued verdicts and the Peoples' Assembly insisted on ignoring them. The most important point is that this battle reveals there is a judiciary determined to fiercely defend its powers and a Government that is continually trying to curtail the authority of the judiciary.

3.1.3 Is the Judges' Association a Non-Governmental Organization (NGO) falling under the jurisdiction of the Ministry of Social Affairs?

On 10 February 1939, before the issuance of any law that regulates civil work and NGOs in Egypt, there were attempts to establish the Judges' Association. Fifty-nine members of the judiciary legislated the Association's laws and then the first General Assembly of the Association. After the assembly on 28 December 1939 presided over by the Head of the Court of Cassation, there were a series of meetings of the General Assemblies of the Judges' Association. This Association had a similar role to the

⁶⁷ A dialogue between counselor Rafat Yousef and Mr. Mohamed Zayed. The page of the interests of people. *Al-Ahram* newspaper. 24 November 2000.

⁶⁸ The statement of accounts of the elections of 2000. *Al-Ahram* newspaper. 30 November 2000.

professional syndicate in defending the interests of the judges and being the bridge between them and the State. The General Assemblies of the Association confirmed that all the discussions were of a professional nature as the General Assembly, which was held on 19 February 1948, discussed the system of the promotion of the judiciary members and its consistency with justice. Moreover, the General Assembly of the Association which was held on 23 February 1961 discussed the salaries of the judiciary members and called for an increase, as well as providing them with a suitable allowance to cover needs and burdens of their positions.⁶⁹

Thus, the Judges' Association continued in the role of a professional syndicates; a role beyond that of an NGO and which has more effective influence. The General Assembly of the Association is presided over by the head of the Cassation Court, who is also the head of the Supreme Judiciary Court.

The Ministry of Social Affairs attempts to allege that the Judges' Association is an NGO and that as such it is subjected to the NGO Law. It called upon the Association, as it called other NGOs, to make the appropriate changes to conform to the NGO Law No.84 of 2002.

These attempts to label the Association an NGO are rejected by the judiciary members. The head of the Judges' Association stated that the Association shall not be placed under the NGO Law No. 84 of 2002 which would lead it to be under the Ministry of Social Affairs. This act would be a breach to the Constitution and the law, as the independence of the Judges' Association is indistinguishable from the independence of the judges themselves and the affairs of the Association are the same as those of the judges.

The General Assembly of the Judges' Association held on 21 June 2002 and presided over by the head of the Cassation Court and the head of the Supreme Judiciary Council affirmed that the Association is not subject to the NGO Law. It stated that the Association deals with the affairs of the judges that no one can interfere with. Thus, the judges achieved another victory over the Executive Authority by keeping their independence from the Ministry of Social Affairs.

3.1.4 The battle against extending the age of retirement to 68.

⁶⁹ The counselor Nagi Derbala border on the text, a study on the development on the basic role of Judges' Association – the Judges' Association, the issue of January August 2003, page 20

According to the Judiciary Authority Law No. 69, “There shall not be any person in a judiciary position who exceeds the age of 60 years according to the European calendar”. However, in 2002 the executive authority amended the retirement age for judges to 66 years, as the Minister of Justice said it is a way of benefiting from the distinguished judiciary experiences. Then suddenly and unexpectedly during the Peoples' Assembly holiday, the President issued the decree of Law No. 159 of 2003 stating that the retirement age of the judiciary authority members and other members of the judiciary authority shall be 68 years old. He issued an explanatory note stating that the reason for the increase of the retirement age is that judges are a national wealth that should be kept and maintained, and the workload of cases is it impossible to work through without the experiences of those judges.

The reason for the extension of the retirement age is really an attempt by the Executive Authority to keep the leadership in the judiciary field as long as possible. The battle between the Executive Authority and the judges on the extension of the retirement age developed as follows:

Firstly, the decree of the law was issued by the President in an unnecessary situation, as he could have waited until the Peoples' Assembly returned from holiday to discuss the issue.

Secondly, the decree was not discussed with the Judges' Association, although the Association is the legitimate channel through which discussion of such issues takes place. Presenting different viewpoints is one of the duties of the Association.

Thirdly, extending the retirement age of judges denies the younger generations their chance to reach high judiciary positions and further delays the promotion of judges.

The Judges Association organized seminars on this issue and there were serious protests against the Government passing this law without it being presented before the Peoples' Assembly. Moreover, the judges claimed that the extension of the retirement age was imposed to keep specific leaders in their positions. One well-known counselor confronted the head of the Cassation Court, who is also the head of the Supreme Judiciary Court, and told him harshly that he presided over a specific council in the government. He meant, by describing him as such, that he has not any power over an elected council like the Board of Directors of the Judges' Association.⁷⁰

⁷⁰ From the documents of the abnormal General Assembly of the Judges' Association on Friday 17 October 2003, *El-Tagammu* newspaper, Friday 19 October 2003 "The anger autumn in the Judges'

Furthermore, some judges requested that the General Assembly of the Association, held on 17 October 2003, to call upon the President to cancel the decree concerning the extension of the retirement age of the judges. They asked that the General Assembly be continually held until the canceling of the decree. However, a majority of the members of the General Assembly were against this request and called for governmental guarantees to keep promotions and create financial degrees for the judges.

Although the decree concerning the extension of the retirement age in the Judiciary has already entered into force, the consequences are not concluded and it is hard to predict its effects on future relations between the judges and the Executive Authority. It can be said that this crisis and the previous crisis led the Government to change its policy towards judges to be one of containment as we shall see now.

3.2 The Attempts to Contain

It can be said that the attempts of the Egyptian government to challenge the judges have failed in both the short and the long-term. The judiciary “Massacre”, which took place in 1969, was the last attempt and it ended with the defeat of the Executive Authority. After less than two years, the Executive Authority issued Law No. 85 of 1971, allowing the re-appointment of some members of the Judiciary Authority who were included in the judiciary “Massacre”. The explanatory note of this law characterized the procedures that followed Law No.83 of 1969 – which was issued to isolate judges – as being hasty and rushed and were based on unfounded and incorrect reports. Thus, it concluded, some the members of the judiciary authority had been done an injustice and the only way to restore their name was to re-appoint them.

Furthermore, the Cassation Court issued an important verdict over contestation No. 21 of the judiciary year No. 39, as it decided that the decree of Law No. 83 of 1969 was illegitimate as it was issued while containing a gross defect.

Thus the Executive Authority was defeated after less than two years and the Government had to search for another method, resulting in the policy of containment.

It can be argued that the Government used the policy of containment when the judges elected their current Board of Directors on 21 June 2002. The Association continued to be under a board which had pro-governmental tendencies for about 10 years, until a

group of quick-witted judges succeeded in getting all the seats on the board. Those judges were the friends and students of the counselor Yehia Al Refa'I, the former head of the Judges' Association and the Vice-President of the Cassation Court as well as one of the defenders of the independence of the judiciary and freedom in Egypt. They were also judges who were known for their defense for the independence of the judiciary and wish to free the judiciary from the bonds of the Executive Authority and to end its power over the judiciary. It is important to mention that ending discrimination between judges in regard to rewards and advantages was the main topic of discussion in the General Assembly meeting mentioned above. This kind of discrimination is continually carried out by the Executive Authority so that the judges who work in places such as the State Security Prosecution, the Directorates of the Ministry of Justice or the delegated judges – such as the heads of the first instance courts – are granted more advantages and become distinguished among their colleagues.

The Egyptian Government tries to contain the discontented by giving judges financial advantages. The judiciary magazine that is issued by the Judges' Association reveals the new policies of the Government. The magazine stated that after the election of the new Board of Directors, the Minister of Justice agreed during a meeting with the board to conduct a collective life insurance certificate for the sake of the families of deceased judges and he announced that the social care fund that is related to the Ministry of Justice will be responsible for the installments instead of judges. Also, he agreed to a project for judges' transportation as he gave them the right to use all transportation means for free and the ministry will cover the fees. Moreover, he supported the library of the Association financially by allocating LE 500,000, in addition to LE 50,000 for providing the judges' Societies in the other governorates with computers and LE 500,000 for the emergency fund of the Judges Association. LE 200 shall be paid for the telephones of each judge as a way to support the judges' communications. Furthermore, he provided the Association with LE 250,000 to support its activities. Regarding the housing project for judges, the Ministry of Justice will guarantee this project with the bank instead of the Association so the bank will release LE 3,000,000 which was taken as a guarantee for the project.

Also, the Minister agreed to increase pay for over-time done by judiciary members of different degrees since 1 December 2002 in order to reach LE 130 for counselors, LE 125 for the heads of the courts and LE 90 for judges and prosecutors.⁷¹

⁷¹ For more information about these political trends review *The Judge's Journal*. The cover of the June – December 2002 issue included a statement of what the judges agreed to give to the Association.

In the urgent General Assembly which was held to discuss the issue of extending the age of retirement for the judiciary, the Ministry of Justice made efforts to quell the anger of judges after its announcement concerning a decree issued by the Minister of Justice to cover the flight costs for the judges from the Sohag, Qena, Luxor, Aswan, Hurghada and Sinai governorates. The statement of the Minister of Justice concerning this issue was distributed in the General Assembly. This statement was dated 15 October 2003 and it was in the form of a letter sent from the first assistant of the Minister of Justice to the counselor who is head of the Judges' Association.

Although we believe that the judges receive less than they need, the way they are granted such advantages, which come directly from the Executive Authority, seems to be semi-attempts of corruption or containment. The Executive Authority can succeed in doing so if the budget of the judges continues to be part of the budget of the Ministry of Justice and the Minister of Justice has control over it. Also, if the table of the judges' salaries continues to be related to the Judiciary Authority Law, it cannot be amended until the law itself is amended, which is under the control of the Executive Authority. A complete evaluation of the policy of containment is beyond the scope of this article, but it can be said that if a complete movement is conducted in order to improve the financial situation of the judges away from the gifts and grants of the Minister of Justice, this movement may achieve some results.

4. To what extent the corruption reaches the judiciary organization

As a rule, Egyptian judiciary organizations in general are the organizations most protected against corruption. They are also one of the few organizations in Egypt that are trying, despite the difficulties surrounding them⁷², to keep a reasonable amount of independence, fairness and professionalism. The judge is considered a public servant, so he is subjected to the penal code like any other public servant. However, in order to protect the judges from public humiliation or from being subjected to procedures of a vengeful nature, the procedures of arresting him, in the event that he was involved in breaching the law, are different from the procedures of arresting other public servants. The judges are not to be subjected to the determination of specific courts for the hearings of the cases as are other citizens.

According to Article 95 of the Judiciary Authority Law, “The committee that is mentioned in Article 6 of Law No. 83 of 1969 decided, according to a request from the Public Prosecutor, that the official court carrying out the hearings of a crime committed by judges, even if this act is not related to their work. Thus, this is an exception as judges are not subjected to the determination of specific courts for the hearings of their cases as other citizens are.”

This article is one of the articles that breach a judge’s rights (as a defendant) to a fair and impartial trial because a specific constituency is selected to try him, thus breaching the conditions of the fair and impartial trials of the judge.

Moreover, according to Article 96 of the Judiciary Authority Law, the judge shall not be arrested nor subject to pre-trial detentions (in cases other than a judge being arrested at the time of committing the act) unless permission is given by the committee mentioned in Article 6 of the Law No. 83 of 1969 concerning the Supreme Council for Judiciary Organizations. In the case of one who is arrested while committing an illegal act, the public prosecutor shall refer the issue to the above mentioned committee within 24 hours, which will then decide if the judge should continue to be held in pre-trial detention or if he should be released. The judge can ask to be questioned before the committee to which his case is presented. This committee makes the decision in extending the pre-trial detention of the judge and so there are no procedures other than his questioning and the filing of a criminal case against him, except through this committee or by a request from the Public Prosecutor. According to the same Article, the judge shall be detained in a place away from where other detainees are held.

There are no reliable statistics of the number of judges who are charged in criminal cases relating to a breach of duty and whose acts are eligible for criminal penalty. However, the head of the Cassation Court and the head of the Supreme Judiciary Council announced in *Al-Mosawar* semi-formal magazine (November 2001) that there were 30 cases of corruption by judges during the past five years; six corruption cases per year.⁷³

During the 9-month period between 1 December 2002 and 30 September 2003 there were 27 charges against members of the judiciary of receiving bribes, and the prosecution published the information in newspapers. Accusations of accepting bribes

⁷³ *Al-Mosawar Journal*, 9 November 2001. A dialogue between the counselor Fathi Khalifa and the journalist Ahmed Ayoub.

were also made against five administrative prosecution members and the lawyers of the State Cases Institution – who are members in the Judiciary organization. There are 4 cases of bribery per month.

It can be said that there are other cases of corruption that are too minor to reach the level of a criminal trial, but can receive disciplinary penalties according to the Judiciary Authority Law. Again, these crimes are not announced according to Article 104 of the Judiciary Authority Law. The disciplinary suit is dropped when the judge resigns or retires, and most judges prefer to resign before the issuance of their dismissal as a disciplinary measure.

Over the three last years no formal charges of corruption, or participation in corruption, were brought against a prominent judiciary figure. However, broad press campaigns were initiated against the former Public Prosecutor by some semi-formal and independent newspapers who accused him and some of his assistants of being involved in corruption cases; in particular, how the Public Prosecutor's office managed the capital of some of the money-investing companies which were put under his power. Moreover, a journalist accused him of assisting some defendants involved in corruption cases by giving them permission to travel (as they were legally prevented from doing so), so they could escape from the country. Raga'a El Arabi was appointed after he exceeded the retirement age as Head of the Supreme State Security Prosecution and then the Public Prosecutor in the Shoura Council.⁷⁴

The Supreme State Security Prosecution was also charged with leaking sexual films of a famous businessman and a famous dancer. These films were kept by the prosecution during the investigation of the businessman, as he was interrogated on several charges of an economic nature. It was said that the prosecution leaked the films to defame the defendant; a move the current Public Prosecutor denied. The Public Prosecutor claimed that the circulated film was not the same as the film in the prosecution's possession. The Public Prosecutor noted the clothes of the people who participated in the film and the location of the film were different. Another

⁷⁴ Review Rose El-Yousef, issue no. 3721 on 2 – 8 October 1999. Pg. 84 and the following pages. An article by the journalist Wa'el Al-Ibrashi on the former Public Prosecutor named. "The former Public Prosecutor kept in files the case of Lossy Arteen days before his retirement ". This Article included tens of the cases that the public prosecutor involved in assisting them. Also, Rose El-Yousef, issue no. 3710 on 17-30 July 1999. An article by Ibrahim Khalil, "Aleya Al-Etewi escaped by a personal permission by the retired Public Prosecutor" Pg. 30 and the following pages. In addition to the Economic *Al-Ahram*, issue No. 1733 on 25 March 2002 on "The people who invested their monies in the companies of investing monies, the announcement of war between Al-Shereef and Al-Arabi". Pg. 36 and the following pages.

investigation is being carried out, and the results have not yet been announced.⁷⁵

Generally, the available cases do not give the impression of an increase of corruption, rather of the deterioration of the status of the judiciary. Take for example the case of the three judges charged in bribery cases. They accepted to stay for two weeks in a flat in Alexandria during the summer and a gift of dining table implements. Two of them were accused of doing favors by delaying the hearings of cases. It is worth mentioning that the three judges were acquitted because the authority that was responsible for monitoring their telephones was not the competent authority and was not delegated to do so. The largest amount that was received as a bribe was LE 600,000 (US \$85,000.00) while the smallest amount was LE 10,000 (US \$1500).⁷⁶

That aside, the above mentioned acts committed by judges are a result of their weak financial status. They cannot keep up with living expenses in the country and, in addition, are susceptible to the financial temptations that surround them. These acts resulted from the misuse of power and doing favors. These acts can be eliminated by imposing rules to select judges instead of the current method of selection, and by using other methods of rehabilitating judges. They should also not be under any power, particularly the Executive Authority.

5. Rehabilitation of Judges – Pros and Cons

The rehabilitation of judges is considered one of the issues that makes them independent and impartial. The National Center of Judiciary Studies was established in 24 June 1981, by the decree of the President No. 347 of 1981, and actual work in this center began in 1981.

According to Article 2 of the decree mentioned above, the center's objectives are as follows:

- 1- Training the members of the judiciary institution, rehabilitating them academically and preparing them to practice judiciary work.
- 2- Promoting the technical and academic level of the Judge's assistants and those that assist the judiciary organizations.
- 3- Collecting, publishing and keeping documents, legislation, research,

⁷⁵ The Egyptian political newspaper, 29 February 2003. a press statement by the current Public Prosecutor.

⁷⁶ This information was taken by the following: newspapers: *Al-Wafd* 18 September 2003 and 17 March 2003, *Al-Ahram* 25 August 2003, *Al Akhbar* 7 July 2003, *Al-Ahrrar* 6 July 2003 and 3 June 2003.

information and legal principles that assist in the better implementation of justice.

The activity of the center can be extended to include the rehabilitation and training of the members of the judiciary organizations and the assistance of bodies to the judiciary organization in Islamic and Arab countries and others. It is responsible for the exchange of documents and judicial and legal knowledge with International and Arab organizations engaged in similar activities.

This center is managed – according to Article 3 of the presidential decree mentioned above – by a Board of Directors, which is formed by the presidency of the Minister of Justice, the membership of the head of the Court of Cassation, the head of the State Council, the Public Prosecution, the head of the Council of State Cases, the head of the Administrative Prosecution, the head of the center and four of those who have experience and who are selected by the Minister of Justice for one year (which is renewable). The meetings of the board of directors are held at least once every 6 months according to an announcement given by its head. The board meeting shall not be valid except by the attendance of at least 5 of its members, including the head of the board or his deputy. The meetings shall be secret.

According to Article 5, the center's Board of Directors shall draw up the general policy of the center and determine educational programs in accordance with the executive regulations of the center issued by the Minister of Justice on 16 August 1981 by decree No. 2782 of 1981.

It should be noted that Executive Authority plays a broad role even in training judges. As the Minister of Justice is the head of the Board of Directors of the center and selects by decree four of the other experienced members, the Executive Authority controls 10 of 12 seats on the Board. These seats are for the Minister of Justice, the head of the administrative prosecution, the State Cases Institution, the Head of the Center and the Public Prosecutor, as well as the four experienced persons who are appointed by the Minister of Justice. Thus, the program of rehabilitating judges can be controlled as they wish, particularly according to Article 4 of the above-mentioned decree which states that the head of the center shall be selected from the most skillful and experienced counselors and a decree of the appointment of the head and his delegation is issued by the Minister of Justice after consulting the Supreme Council for Judiciary Institutions. Moreover, the head of the center is responsible for the activities of the center and its works, as well as supervising the implementation of its

programs as explained in the general policy which is laid out by the Board of Directors.

The rehabilitation course does not exceed 4 months at present as decided by a decree from the Board of Directors, although in the past it has lasted for 12 months for the assistants of the Public Prosecution and their counterparts in the other judiciary organizations. The curriculum of each course has two aspects: the first being the rehabilitation and preparing, and the second the training. Reviewing the subjects that the student shall study in the institution, the impossibility of covering all the subjects in 4 months is evident and thus it is clear that the rehabilitation of the judges is only formal and ostensible.⁷⁷

It can also be said that judges do not receive actual training, and the formation of the Board of Directors of the center and those who are in control of it make a new judge realize that the Executive Authority is among the judges and is surrounding them: the head of the Board of Directors of the center, the Director of the center, his deputy, the members of the Board and the selected experts are all either members of the Executive Authority or are selected by it. Thus, the kind of information that the judges are given can be decided upon and the new judges do not receive any information about the independence of the judiciary, the international covenants or the declarations on the guarantees of the independence of judges. Nor do they receive information about the international covenants on human rights or the situation of the

⁷⁷These subjects include:

The study of the criminal subjects which are in the public section and the private section of the Penal Code and the complementary Penal Code and the criminal Procedures Code.

The study of the organizing structure of the public prosecution

The study of applied criminal investigation.

The rules of the giving reasons for the issuance of decrees and the rules of giving proof and criminal evidences.

Jurisprudence in the criminal field.

The logic and the methods of the academic research.

The study of the rulings of the criminal Islamic legislation, including its main topics on crime, the penalty and the Islamic Criminal evidence.

The study of juveniles from the subjective and procedural viewpoint.

The study of the personal affairs of Muslims, non-Muslims and foreigners.

The assisting subjects that are so important for the prosecutors during their work which include the forensic medicine and its branches, the physical evidences, the psychological and mental diseases, the criminal subject, the prisons subject, the values and traditions of the judiciary authority, the specifications of the criminal investigators, the judiciary morals and the defense rules.

French and legal French terminology

Training course includes an open day at the middle of each week and the topics varies and change weekly and include: A presentation of one of the P.H researches include the criminal science, seminar in which intellectuals discuss one of the topics determined by the center. In addition to presenting one of the cultural films which are related to the judiciary life, a field work visits to prisons, the forensic medicine and the sections of forgery researches as well as the criminal labs.

Egyptian judiciary in comparison with the judiciary in developed countries. They are not even taught the history of the Egyptian Judiciary, which includes prominent figures who have defended the judiciary's independence.

6. Women and the Judiciary; can we see women as judges?

In 1961, the female lawyer Karima Ali Husein presented a request to the Minister of Justice Fathi El-Sherkawi to appoint her to the civil judiciary. She based her request on the Egyptian Constitution and law, as well as the National Charter, which was issued the same year. This Charter affirms the complete equality between men and women in rights and duties. At that time, this request seemed rather odd and met equal support and opposition, but Al-Azhar stated subsequently that the request did not comply with Shari'a law. It is worth mentioning that Dr. A'asha Rateb had tried before to be appointed to the administrative judiciary in the 1940s, but she could not attain this position for the same reasons.

There is nothing in the Judiciary Authority to prevent women from attaining a judiciary position, and likewise there is nothing in the Egyptian legal system in general that prevents women from attaining a high position in the Government including the position of President.

It can be said that the main obstacle that bars women from holding judiciary positions is the judges themselves who predominantly agree – except some of the more open-minded – that they reject this idea. The judges' magazine featured frequent caricatures mocking the idea of allowing women to obtain judiciary positions.⁷⁸

The belief of some judges that a woman cannot be a judge stems from religious considerations and the feeling that Association will not accept her as a judge. Some judges commented, “Our Association will feel worried when a woman becomes a judge and these kind of worries may lead to unpleasant social and cultural consequences.”⁷⁹

The judges' magazine has issued an addendum to the June-December 2002 issue on the woman and the judiciary. This addendum included many viewpoints against the holding of judiciary positions by women ranging from the assertion that they are ineligible, to incompatibility with Shari'a Law, to the concern that if women work in

⁷⁸ For example the January – August 2003 issue, the cover of the journal.

⁷⁹ Dr. Kamel Ebeid – The independence of Judiciary – Ibid page 155.

Judiciary, there will be unemployment among men in a Association where the man is still the provider for the family. The addendum ended with a dialogue with the Republic's Mufti at that time (the official expounder of the religious law), Dr. Ahmed Al-Tayeb who stated frankly, "There is not a religious obstacle that prevents women holding judiciary positions, but the eastern woman is so emotional and kind and cannot be a judge where the Association itself refuses this idea."⁸⁰

Although the Administrative Judiciary Court is a castle for freedom, its stance towards the admittance of women to judiciary is not always decisive. This issue was presented before the Administrative Judiciary Court and then to the Supreme Administrative Court but they eventually refused the appointment of a woman in judiciary due to the considerations of suitability. They admitted that there is nothing in the law that prevents the woman from holding judiciary positions. However, the appointing body can delay this issue if it discovered that this step is not suitable for Association.⁸¹

From our point of view, this judgment is against the principles of the administrative judiciary as the administrative judge is the judge of illegitimacy not of suitability, which means that the judge searching for the illegitimacy of the decision presented before him and to decide if it complies with the Constitution and the law and thus he does not search for the extent of the fitness of the decision to the social situation.

By our evaluation, the holding of judiciary positions by women in Egypt will not become a reality in the near future because of the increasingly fundamental and conservative attitudes among the judges, even the younger ones. In addition to the increase of the restrictive religious interpretations as well as the worries that if women hold judiciary positions it will lead to the decrease of the employment opportunities for men, this issue will increase the extent of the campaign against the appointment of the woman while the country's unemployment increases. However, a courageous

⁸⁰ Dr. Ahmed Al-Tayeb, A press dialogue in *October Journal*, the issue of 1362 of 1Decemebr 2002. This dialogue was with the journalist Mahmoud Fawzi and was re-published in the addendum of *The Judge's Journal* mentioned above.

⁸¹ The lawsuit No. 33 of the judiciary year No. 4 filed by Aa'sha Rateb and this suit was refused claiming that the Association is not ready to accept this step. The odd part of the story is that Aa'sha Rateb was appointed in the 1970s as the social affairs Minister and an Egyptian Ambassador which is extraordinary. The details of this suit and other similar suits are in the addendum of *The Judge's Journal* of June-December 2002, the addendum of the woman and the judiciary, page 10 and the following pages among a study titled "The extent of the holding of the woman of judiciary positions - a comparative study" Dr. Mohamed Zahri Mahmoud, the counselor in the Administrative Judiciary Court.

stance on the part of the government might assist in breaking down the worries barriers against taking this step.

7. Conclusion

It can be said that the judicial authority in Egypt is not an independent, but despite that we still have independent judges. It can also be said that the normal judiciary is less independent than the administrative judiciary although the Executive Authority imposes its hegemony over the whole judiciary and controls in general its fate and directions and can sometimes influence its decisions.

It can also be said that Egyptian judges do not submit to this situation, but try when they can to contest the powers of the government. Irrespective of whether these attempts succeed or fail, they meet with the appreciation of public opinion. It can be concluded that the judiciary organization is the least corrupted of State institutions and is the most respected by the public.

The judges believe that they will not be able to guarantee their independence without essential changes in the law of the judiciary authority. It is worth mentioning that on 18 January 1991, the General Assembly of the Judges' Association – at which time the presidency of its Board of Director's was held by the counselor Yehia Al Refa'I – agreed on the draft law to amend some of the ruling of the law of the judiciary authority . This draft law was put forward by a committee that was formed by the Judges' Association for this purpose. The committee was comprised of the Head of the Court of the Cassation at that time, two of the senior judges, two of the members of the Board of Directors of the Judges' Association and two from the legislation Directorate in the Ministry of Justice, as well as the counselor Magdy Abdel Samad, the former Head of the Judges' Association.⁸²

The judges went through struggles with the government in order to legislate this draft law without any results, but hope has returned again after the election of the board of directors of the Judges' Association as the new board's members are friends and students of the Counselor Yehia El Rafa'i who revived the draft law. A new campaign, launched in the June-December 2002 issue of the judges' magazine, has started in order to legislate this law, and calls those who work in the judiciary to open a public dialogue.

The draft law ensures that the judiciary authority and the assistants of the judges from

⁸² This committee is presided over by the counselor Wagdi Abdel Samad and the memberships of the counselor Ibrahim Radwaan and Yehia El Refa'I, as well as the counselor Dr. Fathi Nageeb and the counselor Seri Seyam, the counselor Ahmed Meki and the counselor Abdel Mone'm Hasheesh

the administrative body in the prosecution and the courts shall have an independent budget from the income of the judiciary fees and the fines and the other confiscated money and the State's funds. The draft law also calls for the Supreme Judiciary Council to have the right to recommend amendments to the salaries table. Moreover, it supports the Supreme Judiciary Council by including two members of the Cairo Cassation Court and the Appeals Court who are selected by the General assembly of the judges of the two courts. In addition it necessitates the consent of the Supreme Judiciary Council in all the affairs of the judges, including their delegations or promotion, dismissal etc., it attaches the Judiciary Inspection Directorate with the Supreme Judiciary Council instead of being attached to the Minister of Justice. It also regulates the delegation of judges and requests that it shall be under strict rules due to obligatory decrees issued by the Supreme Judiciary Council. The draft law also includes guarantees for taking disciplinary actions towards judges, including that the decrees of such actions shall be contested before a special selection of the constituencies of the court of Cassation and removing any power from the Minister of Justice over disciplinary actions concerning judges.⁸³

It can be said that the battle of amending the Judiciary Authority Law is a decisive battle as it will affirm the independence of the judiciary, if the Egyptian judges succeed in making this draft law and guarantee the independence of judiciary on one hand. On the other hand, they will guarantee the freedom for their Association as there is no freedom without the independence of judiciary as an organization and the independence of judges as individuals.

⁸³ For more information on this draft law, review the *Judges' Journal*, June – December 2002 issue, p. 29 and counselor Yehia Al Refa'i – *The Independence of the Judiciary and the Crisis of Elections*, Ibid, p. 302.