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EGYPT

The independence of the Judiciary



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Introduction

I. The Euro-Mediterranean Human Rights Network and its working groups

The Euro-Mediterranean Human Rights Network (EMHRN) was created in 1997 by a number of human rights organizations, from both north and south of the Mediterranean, in response to the establishment of the Euro-Mediterranean Partnership. Based in Copenhagen with branch offices in Brussels, Rabat, Amman, Cairo and Paris, the EMHRN comprises 77 member organisations from more than 30 countries. The EMHRN's mission is to promote and strengthen human rights and democratic reform within the framework of the Barcelona process and EU-Arab cooperation. The Network seeks to develop and strengthen partnerships between NGOs in the EuroMed region by facilitating the development of human rights mechanisms, disseminating the values of human rights and strengthening capacities in these fields at the regional level.

To achieve its goals, the Network has established seven working groups in order to address specific human rights issues in the EuroMed region: Justice; Freedom of Association; Women's Rights and Gender; Migrants, Refugees and Asylum Seekers; Palestine, Israel, the Palestinians; Human Rights Education and the Solidarity Project. Each of the working groups comprises the member organisations most active in the field concerned, chosen following a call for participation and a selection process based on a series of qualitative criteria. The task of each working group is to design and implement specific policies and programmes with respect to the field concerned, to advise the EMHRN executive bodies within their respective fields of expertise and to ensure the effective delivery of the EMHRN's mandate and agenda.¹

II. The EMHRN Working Group on Justice

The EMHRN Working Group on Justice was first created in 2002 and re-established twice, in 2006 and 2009, following a call for participation to all EMHRN members². In order to gain an overview of the situation of justice in the EuroMed region, the working group entrusted in 2003 two legal experts³ with the task of researching the main problems and challenges faced by the judiciaries of the region. This process led to the publication in 2004 of a comprehensive report entitled *Justice in the South-East Mediterranean region*⁴.

In 2006, building on the conclusions and recommendations of this regional report, the Working Group launched a regional project focusing specifically on the issue of the independence and impartiality of the judiciaries in the south and east of the Mediterranean (except for Israel).

¹ Detailed information on the EMHRN and its Working Groups is available at www.euomedrights.net.

² Since February 2009, the EMHRN Justice Working Group comprises: Bérangeère Pineau (Solida, Lebanon); Nouredine Benissad (LADDH) Zaha Al-Majali (Amman Centre for Human Rights Studies, Jordan); Emilio Gines (Federacion de asociaciones de defensa y promocion de los derechos humanos, Spain); Houcine Bardi (Comité pour le respect des libertés et droits de l'Homme, Tunisia); Merwat Rishmawi (Amnesty International); Amine Sidhoum (Collectif des familles de disparus, Algeria); Radwan Ziadeh (Damascus Centre for Human Rights Studies, Syria); Mette Appel Pallesen (Danish Institute for Human Rights, Denmark); Walid Nakib (Institut des droits de l'Homme, Beirut Bar Association, Lebanon); Nicola Colacino (Intercenter, Italy); Orlane Varesano (OMCT); Karim El Chazli (Cairo Institute for Human Rights Studies, Egypt); Asma Khader (SIGI, Jordan) Mohamed Amarti (Organisation marocaine des droits de l'Homme, Morocco); Kirsty Brimelow (Bar Human Rights Committee of England and Wales, UK); Mokhtar Trifi (Ligue tunisienne de défense des droits de l'Homme, Tunisia); Michel Tubiana (Ligue française des droits de l'Homme, France). More detailed information on the Working Group and its members is available at www.euomedrights.net under 'Themes/Justice'.

³ Mohammed Mouaqit and Siân Lewis-Anthony.

⁴ Available at: http://en.euomedrights.org/index.php/about_the_network/working_groups/justice/4304.html

In its first phase (2006-08), this project focused on four of the region's countries: Morocco, Tunisia, Jordan and Lebanon.

In a second phase, the EMHRN decided to cover other countries of the region and to broaden its field of activities. Thus, the Justice Working group naturally looked into the case of Egypt and Algeria.

The EMHRN then decided to write a report on the main problems affecting the independence of the judiciary in Egypt as well as on likely future challenges and the reforms which have been – or still need to be – undertaken in order to strengthen the independence of justice⁵. The Working Group selected two Egyptian experts, Foutouh El Chazli, Lecturer in Law at the University of Alexandria, and Karim El Chazli, PhD Student in Law at the University of Paris 1 Panthéon-Sorbonne, to draft a national report on the independence of the Egyptian judiciary⁶.

III. Report on the Independence of the Judiciary in Egypt

A. Background and objectives

The report on the "Independence of the Judiciary in Egypt" describes in detail the main features of the Egyptian judiciary, with particular focus on the fundamental problems affecting its independence. The examples cited in the report illustrate the practical consequences that a lack of independence can have on the rights of individuals. It includes a series of detailed recommendations concerning the constitutional and legal changes that are required in order to achieve a level of judicial independence in accordance with international standards. The recommendations are primarily directed towards the Egyptian authorities who are urged to demonstrate genuine political will in order to achieve real and substantial progress in this area. Other recommendations are directed towards civil society, whose role should not be underestimated.

The report is designed to become a resource tool for all actors in the judicial system, and for Egyptian civil society organisations that wish to engage actively in the process of promotion and strengthening judicial independence. Having been involved in the drafting of this report, these organisations should now start or continue to promote the reform process.

B. Methodology

In addition to their own experience, the authors of the report have taken into consideration reports already published when conducting their research. The report was initially drafted in French, and subsequently translated into Arabic and English. The three versions are available on the EMHRN website⁷.

⁵ In parallel, the EMHRN co-organised a regional seminar "Building bridges amongst judges", held in Cairo in May 2009. The discussions concerned the current situation of the Egyptian judiciary and ways to strengthen cooperation and solidarity amongst judges in the MENA region. The minutes of the seminar are available at: http://en.euromedrights.org/index.php/about_the_network/working_groups/justice/3035.html

⁶ A similar project was undertaken in Morocco, Tunisia, Jordan and Lebanon. The national reports on these four countries are also available at http://en.euromedrights.org/index.php/about_the_network/working_groups/justice/3040.html. A national report on Algeria will be published in 2010.

⁷ www.euromedrights.net

C. Definitions

As with any intellectual endeavour, it's important to define the subject's terms of reference in order to set clear boundaries.

Two aspects of the phrase «independence of the Egyptian judiciary» merit definition: "independence" and «the Egyptian judiciary». We shall begin with the latter.

To understand the meaning of the Egyptian *judicial* system (judiciary), we first require a brief introduction to the Egyptian *legal* system; the latter encompasses intellectually the Egyptian judicial system.

Although Egypt was once occupied by Great Britain, the Egyptian legal system forms part of the civil-law tradition. As a result, written law plays a primary role. Egypt has therefore equipped itself with various codes governing the principal branches of the law. These codes, like the Egyptian civil code, have been heavily influenced by French law.

The influence of the French model also makes its presence felt in the judicial system and, more precisely, its judicial authority. Egypt is a highly centralised State with judicial authority organised into a hierarchy of professional judges who have been appointed to their posts on the basis of their technical abilities (degrees).

The centralisation and hierarchy of the Egyptian judicial authority is manifested in the existence of supreme jurisdictions comprising the country's most experienced judges. Alongside the Supreme Constitutional Court (SCC), there are two supreme jurisdictions namely the Court of Cassation and the State Council, which possess a number of characteristics of the French model in terms of their remit and modes of functioning. These two supreme courts are situated at the apex of two orders of jurisdiction, civil and criminal jurisdiction on the one hand and administrative jurisdiction on the other.

The civil and criminal law *system* is not just limited to the judicial authority; a judicial system is more than the sum of its judges and courts. It also encompasses what are called the auxiliary legal professions, i.e. lawyers, legal experts and bailiffs, amongst others. A far-reaching interpretation of the civil and criminal law *system* might also include the people who appear before the courts, since without them, the existence of judges and lawyers would serve no purpose.

How, then, to define "judiciary" for the purposes of our report? The main emphasis will be on judges, for *two* reasons.

The first reason is because of the central and indispensable position occupied by the judge in any judicial system; it is the judge who delivers the ruling in a dispute and who metes out justice; judges are without doubt the key element of the judiciary. One might imagine a judiciary without lawyers, with everyone pleading their own case, but a judiciary without judges is unimaginable.

The second reason is because, in the main, the issue of independence and impartiality only relates to judges. For judges, independence is a *sine qua non* condition. It could even be argued that a judge who isn't independent isn't a judge at all, since independence belongs to the very definition of a judge. For different reasons, the issue of independence is not as critical for others working within the judiciary such as lawyers or legal experts.

Thus, the expression "Egyptian judiciary" will cover judges in the main but not solely. In fact, the judges' independence or, more generally, the independence of the judiciary, can only become a *concrete* reality if others working in the system carry out their jobs properly; for example, if they function properly. This is why we will look at the problems of the auxiliary legal professions in a second section after we have dealt with the problems concerning the judges' independence in part one.

Now that we have introduced what is meant by the Egyptian judiciary for the purposes of this Report, we need to define what we expect to understand by the term "independence".

The frequency with which this term is used, especially in association with the expressions "judicial authority" or "judicial system", might lead us to believe that there is unanimity surrounding its definition. The reality is that no such unanimity exists⁸. Indeed there are various definitions of the term. We will mention these before clarifying the sense of the term 'independence' that we shall be using.

In a strict interpretation, independence, taken at the institutional level, would signify "the situation of a public body whose status guarantees it the possibility of making decisions in complete freedom, safe from any instructions or pressure"⁹. The accent here is placed on laws, on objective norms. Since the public body is composed of individuals, it is also possible to envisage judges' "personal" independence. This type of independence, which can be defined as a spirit of excellence, is more about education. It depends more upon subjective factors than objective norms. Therefore it is harder to grasp.¹⁰

Impartiality can also be included, which is more the frame of mind of a judge, characterised by the absence of any prejudices, preferences or preconceived ideas. In a much broader interpretation of independence, other notions such as effectiveness, efficiency and competence would be encompassed.

An independent legal system would necessarily be a legal system that was competent (with judges of a high standard), effective (with rulings delivered within a reasonable time frame, rulings enforced) and accessible (with low cost fees and expenses).

For the purposes of this report, a strict definition of independence will be retained for reasons of space. Keeping to a broad definition of independence and still wishing to deal with the subject exhaustively would involve hundreds of pages. For the same reasons, the report will concentrate more on the *problems* with the Egyptian judiciary's independence.

Before detailing the problems of independence, a preliminary section is called for to clarify the general context of the Egyptian judiciary's independence.

⁸ Defining judges' independence and determining the criteria for doing so is no simple task. The International Association of Judges devoted its 2009 annual meeting to the subject «Ways of identifying and classifying objective and subjective criteria by reference to which the independence of the judiciary may be assessed » and will devote its 2010 conference to the same theme. For a report on the 2009 meeting and the principal strands of debate planned for the 2010 meeting, see http://www.iaj-ujm.org/site/modules/mastop_publish/index.php?tac=853&lang=fr (accessed on 30 December 2009).

⁹ Legal vocabulary, PUF, 2006, p. 472

¹⁰ On the distinction between institutional and personal independence, see T. Elbishi, *La justice égyptienne entre indépendance et endiguement*, Maktabet ElShorouk ElDawleya, 2006, p. 9 (*Egyptian Justice Between Independence and Containment*).

Part One: General context of the Egyptian judiciary's independence

In this preliminary section, the various norms relating to the independence of the judicial authority will first be identified (I). The Egyptian judiciary will then be introduced (II). Finally, the specificity of the Egyptian experience in relation to the legal system's independence will be underlined (III).

I. Identifying the norms governing the question of the Egyptian judiciary's independence

Norms of international origin will be outlined first (A) followed by norms of national origin (B).

A. Norms of supranational origin

a) Legally binding instruments

In accordance with article 151 of the Constitution of 1971, international treaties, after ratification, have legal force in domestic law. It is significant that whilst international conventions have legal value they are rarely invoked by judges as a basis for their decisions. Egypt, anxious to maintain a good reputation abroad, is party to several international and regional conventions, some of which relate to the independence of the judicial authority.

1. International Conventions

Egypt is party to the International Covenant on Civil and Political Rights. Article 14 protects the judicial authority's independence, stating that "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law».

2. Regional Conventions

Egypt is party to the African Charter on Human and Peoples' Rights adopted on 27 June 1981 in Nairobi. Article 7-1 of the Charter provides that "every individual shall have the right to have his cause heard. This comprises:

- a / The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
- b / The right to be presumed innocent until proved guilty by a competent court or tribunal;
- c / The right to defence, including the right to be defended by counsel of his choice;
- d / The right to be tried within a reasonable time by an impartial court or tribunal".

b) Non-legally binding instruments

Article 10 of the Universal Declaration of Human Rights of 1948, declares that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".

Over recent years, the practice has developed of drawing up codes of conduct, declarations, principles with no legally binding force but which can serve as a model or guide for national legislators. This soft law sometimes originates from international organisations and sometimes from professional associations.

Comment [s1]: I would want to add something of substance here – but not sure I am permitted to do so. This statement is very weak and does not convey the importance of these instruments

1. The Basic Principles on the Independence of the Judiciary (BPIJ)

At the close of the seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan from 26 August to 6 September 1985, the UN Basic Principles on the Independence of the Judiciary (BPIJ) were adopted. These principles were confirmed by the General Assembly in its resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. The BPIJ have been invoked on occasion by Egyptian judges from the reforming tendency to justify their freedom of expression.

The advantage of these principles is two-fold compared to international conventions. Firstly, they relate specifically to the independence of the judicial authority. Their relatively detailed character can help to provide responses to concrete issues. Secondly, they originate from the UN, an organisation which, in spite of its shortcomings, retains certain credibility on a global scale. This credibility gives the BPIJ a considerable degree of legitimacy.

2. The Universal Charter of the Judge

The International Association of Judges (IAJ) developed the Universal Charter of the Judge which was approved unanimously by the Central Council of the International Association of Judges at its meeting in Taipei (Taiwan) on 17 November 1999¹¹. Although the Egyptian Judges' Club is not a member of the IAJ, what is interesting about the "Universal Charter of the Judge" is that it was drafted by judges from many different cultures.

3. The Bangalore Principles of Judicial Conduct

More recently (in 2002), "The Bangalore Principles on Judicial Conduct"¹² were adopted. The Bangalore principles are an interesting innovation in the reflective space on the independence of the judiciary. This instrument consists of 6 articles; each article sets out a value in the form of a principle and is followed by its various applications. The six values identified are the values of independence, impartiality, integrity, propriety, equality and competence & diligence.

In their first article, these principles affirm that "Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects".

4. UN Guidelines on the Role of Prosecutors

Concerning the Role of Prosecutors, Guidelines were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. These Guidelines were formulated to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal

¹¹ This document can be found at : <http://www.iaj-uim.org/site/modules/smartsection/category.php?categoryid=48&lang=fr>

¹² These principles can be found on this site dedicated to judicial ethics www.deontologie-judiciaire.umontreal.ca/fr/textes%20int/codes%20et%20enonces.html

proceedings. They should be respected and taken into account by Governments within the framework of their national legislation and practice.

Article 8 of these Guidelines states that "prosecutors are entitled, like any other citizens, to freedom of expression, belief, association and assembly. In particular, they have the right to take part in public discussions regarding the law, the administration of justice as well as the promotion and protection of human rights, and to join or form local, national or international organisations and attend their meetings, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful organisation. In exercising these rights, prosecutors shall always abide by the law and the acknowledged standards and ethics of their profession".

5. Basic Principles on the Role of Lawyers

These Basic Principles were also adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. This instrument covers topics including access to lawyers and legal services, duties and responsibilities of lawyers and guarantees for the functioning of lawyers.

Article 19 states that "No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles".

B. Norms of national origin

a) Constitutional clauses (norms)

The Egyptian Constitution¹³ of 1971 devotes chapter four of its fifth heading to the Judicial Authority. This chapter contains several norms on the independence of the legal system.

Article 165 states that the Judicial Authority is independent.

Article 166 declares that "Judges are independent and subject to no other authority but the law as regards their judicial competences. No authority may intervene in trials or matters of Justice".

Article 167 specifies that "the law determines judicial bodies and their competences and composition, and prescribes the conditions and procedures governing the appointment and transfer of their members".

Article 168 sets out the principle of judges' permanence, ruling that "Judges cannot be dismissed".

Article 169 sets out the principle of public hearings, stating that "Court hearings are public, unless a court decides to hold sessions in camera, for considerations of public or moral order" and that "in all cases, rulings shall be pronounced in public sessions".

Article 172 provides for the Egyptian administrative jurisdiction, stating that "the State Council is an independent judicial body. It rules on administrative disputes and in disciplinary cases. The law determine its other competences".

Article 174, in the fifth chapter of the fifth heading of the Constitution, declares that "the Supreme

¹³ Translation of these articles of the Constitution can be found, in principle, on the site <http://aceproject.org/en/regions/mideast/EG/Egyptian%20Constitution%20-%20english.pdf/view> However, because this translation does not take account of the 2007 amendments and because the translation is sometimes lacking in clarity in our opinion, the translation of constitutional articles has been done by the authors of this report.

Constitutional Court is an independent and autonomous judicial body”.

Other clauses of the Constitution, found in chapters other than those devoted to the judicial authority, contribute to guaranteeing the judicial authority’s independence. Article 68 sets out the basic principle of the right to be judged by one’s natural judge: “The right to litigation is an inalienable right for all, and every citizen has the right to refer to his natural judge. The State guarantees all litigants access to judicial bodies and that their cases will be heard quickly. Provisions stipulating that an act or administrative decision is immune from the control of the judicial body are prohibited”.

Article 69 specifies that “the right of a person to defend himself in person or by mandate is guaranteed. The law shall grant citizens without funds the means to access justice and defend their rights”.

The Egyptian Constitution provides for much more than simply articles guaranteeing the independence of the judicial authority, however. There are articles which might endanger it too. Article 171 sets out a constitutional basis for courts with exceptional jurisdiction, hereinafter referred to as “exceptional courts”, specifying that “the law regulates the organisation of State Security Courts, prescribes their competences and the conditions to be fulfilled by those who occupy the office of judge in them”.

Article 173, amended in 2007, concerns Council of the judicial bodies¹⁴, an organ presided over by the President of the Republic whose function is to address “matters of common concern amongst the various judicial bodies”.

Article 183 concerns military Justice and specifies that “a law shall organise military Justice and prescribe its competences within the framework of the principles set out in the Constitution”.

b) Legislative norms

The constitutional clauses go no further than stating principles. It falls to the legislator to clarify the principles guaranteeing the judicial authority’s independence that are set out in the Egyptian Constitution. What may be ascertained, *prima facie*, and what we shall be returning to throughout this report, is that the Egyptian legislator has, at times, misread constitutional directives and laid down rules which serve to endanger the judicial authority’s independence.

Clauses relating to judges and civil and criminal courts can be found in law number 46 of 1972 on the judicial authority. This law was recently amended with law n° 142 of 2006, then again with law n° 17 of 2007.

The administrative jurisdictions and the status of their judges are regulated by law n° 47 of 1972 on the State Council.

The SCC is regulated by law n° 48 of 1979. This law was recently amended with law n° 184 of 2008.

Military Justice is regulated by law n° 25 of 1966, amended with law n° 16 of 2007.

State Security Courts are regulated by law n° 162 of 1958 on the State of Emergency.

Meanwhile prosecutors are instructed by the Public Prosecutor. These instructions prescribe the rules of conduct for preparing the cases brought before prosecutors. These texts have statutory authority.

Comment [s2]: He needs to explain this a little more. Does he mean that they have the same authority as a piece of legislation? If so, he needs to comment on this – it is an extraordinary assertion

¹⁴ Not to be confused with the High Judicial Council

c) The Judges' Club Plan for Reform

The Judges' Club plays a principal role in the fight for the legal system's independence in Egypt. In the firm belief that Egyptian laws do not sufficiently guarantee the judicial authority's independence, it has developed various draft laws. The last draft dates back to 2004. Some of its proposals were enshrined in the 2006 legislative amendments.

II. Introduction to the Egyptian Judiciary¹⁵

Before we introduce the Egyptian judiciary of the present, a brief historical overview is called for. The meaning of judicial body will then be clarified.

Brief historical overview of the Egyptian Judiciary¹⁶:

At the beginning of the 20th Century, the Egyptian judicial system was fairly complex. This complexity resulted from the political situation in Egypt. Firstly, courts for foreigners operated alongside courts for Egyptians. Meanwhile, there were various types of Egyptian jurisdictions; thus the judicial system was not unified.

The co-existence of courts for foreigners and courts for Egyptians: The European presence, and especially the European influence, resulted in the creation of consular courts which could deal with cases uniquely involving foreigners. The consular courts were purely foreign, capable of handling disputes arising amongst their nationals.

The Egyptian nationalist movement, dissatisfied with not being able to apply Egyptian law to foreigners and benefiting from the political climate, pushed for the establishment of mixed courts¹⁷. These were created in order to restrict the competence of the consular courts on the one hand, and to launch the foundations of a national and sovereign judicial system on the other.

Thus, in civil and commercial cases¹⁸, if two foreigners were of different nationality or if the case was mixed, i.e. there was a lawsuit pitting a foreigner and an Egyptian against each other, the mixed courts were able to handle the case. These courts, the nature of which wasn't clear¹⁹, applied mixed legal codes, drawing upon French codes. Foreign judges sat in session alongside Egyptian judges in these courts. French was the language used before these courts, and sometimes Italian.

After the Montreux Convention, which put an end to the privileges of foreign powers, the consular courts disappeared in 1937 and the mixed courts in 1949. Appeal courts and the State Council were created²⁰.

¹⁵ For a detailed introduction to the Egyptian legal and judicial systems, see N. Bernard-Maugiron, B. Dupret, *Egypt and its laws*, Kluwer Law International, 2002.

¹⁶ For a more complete introduction to the history of the Egyptian judiciary and the reasons for its evolution, see N. Brown, *The Rule of Law in the Arab World, Courts in Egypt and the Gulf*, Cambridge University Press, 1997.

¹⁷ On the reasons for setting up these courts, see, N. Brown, *op. cit.*, p. 26

¹⁸ It is important to clarify that consular courts retained their ability to handle criminal cases and cases involving personal status until they were abolished in 1937.

¹⁹ For the doctrine of mixed law, the issue of whether mixed courts were Egyptian courts was controversial, and for the authors of national law, only the national courts were Egyptian. See I. Lendrevie on this issue, "L'évolution de la relation entre les tribunaux mixtes et le pouvoir exécutif en Egypte de 1875 à 1949", in *les juges et la réforme politique*, 2006, Cairo Institute for Human Rights Studies (CIHRS), ["the evolution of the relationship between mixed courts and the executive authority in Egypt from 1875 to 1949" in *judges and political reform*, 2006] p. 49. This work gathers together several very useful articles on the issue of the independence of the judicial authority in Egypt and Arab countries. These articles were presented at a conference in Cairo from 1st – 3rd April 2006, organised jointly by CIHRS, IRD and FIDH. A revised English version containing fewer articles than the Arabic version appeared in 2009, American University in Cairo Press (AUC Press) under the direction of N. Bernard-Maugiron, entitled "*Judges and Political Reform in Egypt*".

²⁰ The Court of Cassation had been set up previously in 1931.

The Egyptian nationalist movement, having "Egyptianised" the legal system, then had another issue to tackle, namely its unification.

The Diversity of Egyptian Courts: At the end of the 19th Century, the judicial system was not unified. National courts were set up in 1883. These courts applied national legal codes drawing inspiration from mixed codes, which, in turn, drew upon French law.

Courts dealt with personal status cases following religious specifications. *Shari'a* courts handled cases between Muslims. Non Muslims had their cases decided by confessional courts, the *Magales meleya*.

By doing away with "religious" courts with the law n° 462 of 1955, the Egyptian judicial system was unified as regards personal status. Since then, and apart from the creation of the Supreme Constitutional Court and various exceptional courts, together with some specialised courts, there have been any no other major changes to the structure of the Egyptian judicial system.

What is a judicial body?²¹

Before we look at the issue of the Egyptian judiciary's independence, we need to know what the judiciary consists of. In other words, we need to understand what constitutes the Egyptian judicial authority, and what a judicial body is.

The answer to this - *a priori* simple - question has been a cause of controversy. For some "judicial bodies", the answer is not too difficult, given that they are referred to in the Egyptian Constitution. The civil and criminal courts (art. 165), the State Council (art. 172) and the Supreme Constitutional Court are without question part of the Egyptian judiciary.

The question is whether there are any other judicial bodies apart from those referred to in the Constitution. It is tempting to say, like certain authors, that the answer to this question is no. However, this is not the opinion of the Supreme Constitutional Court since, in 2000, it deemed that the Administrative Prosecution (a body charged with the task of preparing cases and taking disciplinary action against civil servants) and the State Litigation Authority (a body charged with the task of representing the State in the trials it is involved in) were also part of the judicial authority. Despite this debatable assimilation of the Administrative Prosecution and State Litigation Authority into the judicial bodies, we will stop at the reference made to them above because neither of these two entities have any jurisdictional function and therefore do not directly relate to the purpose of our study. As for the exceptional courts, there isn't any place for them in a presentation of judicial bodies (strictly speaking they aren't judicial bodies because the minimum structural independence isn't guaranteed). Exceptional courts will be dealt with elsewhere in the section on the problems of the legal system's independence.

Following this introduction, a description of the various courts is called for (A) before we look at the different organisations representing the judges (B).

A. The Various Courts of the Egyptian Judicial System

a) The Supreme Constitutional Court (SCC)

The Egyptian legal system has borrowed from the French legal system in respect of various institutions and concepts. However, there is a marked difference in terms of controls over the constitutionality of laws.

Whilst in 1958, after hesitating, France adopted an *a priori* system of control over the constitutionality of laws, Egypt equipped itself in 1969 with a Supreme Court with the task of operating an *a posteriori*

²¹ On this issue, see T. AlBishri, *op. cit.*, p. 75.

control over the constitutionality of laws²². In 1979, the Supreme Constitutional Court (SCC) was set up to replace the Supreme Court²³.

1. Competences

The fifth chapter of the fifth heading of the Constitution entitled "Supreme Constitutional Court" contains summary clauses on the SCC. After declaring that the SCC is an independent judicial body, article 175 specifies that control over the constitutionality of laws and regulations and interpreting legislative texts are among the competences of the SCC. Its other competences are set out in law n° 48 of 1979. According to article 25 of this law, one understands that the SCC acts as the court of competence conflicts, i.e. it delivers rulings in cases where there is a conflict of competences between different jurisdictional orders; it also rules on conflicting judgments originating from different jurisdictional orders. Article 26 specifies that the SCC is competent to interpret laws and legal orders.

2. Composition

The only reference to members of the SCC in the Constitution is in article 177 which states that they are permanent members. Thus it falls to the law to specify how members are appointed, and what their rights and immunities are.

Article 3 of the law on the SCC specifies that it is composed of a president and a "sufficient" number of members.

Members chosen from among experienced lawyers, not just judges but also advocates and law lecturers from the universities – although it is extremely rare for members who are not judges to be appointed. They are appointed by presidential decree upon the recommendation of the Council of Judicial Bodies²⁴, from a list of two names, one put forward by the general assembly of the SCC and the other put forward by its president.

The relatively supervised way in which members of the SCC are appointed contrasts with the discretionary authority of the President of the Republic when it comes to appointing the President of the Court. Indeed article 5 imposes no restrictions on the authority of the President of the Republic when he appoints the President of the SCC. This presidential prerogative will be examined in more detail later on when the issue of the executive authority's power is discussed in relation to appointments to high judicial posts.

Members of the SCC have the same rights and obligations as the judges at the Court of Cassation. They can be judged only by their peers in disciplinary and criminal affairs.

3. Budget

The SCC has an annual independent budget at its disposal (article 56 on the law on the SCC of 1979).

²² If creating constitutional courts in general, aims to make the rule of law a reality and guarantee freedoms, this has not been the case in Egypt, where the creation of the Supreme Court apparently aimed to deny other courts any power to control the constitutionality of laws. Once one knows that all the members of this Court were appointed by the President of the Republic, it becomes clear that the executive authority saw in this court an instrument in its fight to control the judicial authority. See N. Bernard-Maugiron and B. Dupret on this, *op. cit.*, p. XXXV. For more details on the composition and the competences of the SCC, see the thesis of N. Bernard-Maugiron, *Le politique à l'épreuve du judiciaire : la justice constitutionnelle en Egypte*, [politics tested by the judiciary: constitutional justice in Egypt], Bruylant, Brussels, 2003.

²³ It is worth noting that the creation of the SCC was anticipated by the Constitution of 1971. What delayed the setting up of the SCC was the delay in adopting the law on the SCC, a law complementing the very summary clauses contained in the Constitution.

²⁴ Not to be confused with the High Judicial Council. Article 173 of the Constitution makes provision for the Council of judicial bodies.

b) Ordinary Courts

1. Civil and criminal jurisdictions

Whilst prosecutors do not form part of the judiciary, we must not fail to mention the prosecution. This is because in Egypt, virtually all judges are prosecutors before they are judges²⁵. Strictly speaking, on the issue of civil and criminal jurisdictions, there are two types: non-specialised jurisdictions and specialised jurisdictions.

i) Non-specialised jurisdictions

▪ District Courts

Article 11 of the law on the judicial authority makes provision for the setting up of district courts, called summary courts (*Mahkama Goz'eya*), within the jurisdiction of each High Court. These courts are created by a Ministry of Justice decree determining their jurisdiction. The judgments of the district courts are delivered by a sole judge (article 14).

District courts handle civil cases and have jurisdiction over minor criminal offenses.

▪ High Courts

According to article 9 of the law on the judicial authority, there is a high court in the capital of each governorate²⁶. Every high court, called *Mahkama Ebtada'ya*²⁷, is presided over by a judge from the Court of Appeal. Its rulings are made by a group of three judges. Each high court contains enough chambers for there to be a chamber of criminal appeals competent to hear appeals in the case of misdemeanours and contraventions. The most serious crimes are referred to the assize court. There are assize courts within the jurisdiction of every appeal court (article 7). Assize courts hold their sessions in all towns where there is a high court (article 8).

The assize court is composed of three judges alone²⁸ from the Court of Appeal and must deliver rulings by majority, except in relation to capital cases, which requires unanimity. Assize court rulings can be only challenged before the Court of Cassation but cannot be appealed before courts of appeal.

▪ Appeal Courts

There are eight appeal courts in Egypt (article 6). Decisions are made by three judges. Currently, as it was said before, there is no appeal against rulings of the assize courts. However, discussions on the issue of the creation of an appellate assize court are currently ongoing in Egypt.

▪ The Court of Cassation

The Egyptian Court of Cassation, created in 1931, is at the apex of the civil and criminal jurisdictional order. It does not constitute a third level of jurisdiction because it only adjudicates matters of law and not matters of law and fact. Its task is to ensure that there is uniformity in the interpretation of the law. Rulings of the Court of Cassation are made by five judges. The law number 57 of 1959 organises the appeal procedure before the Court of Cassation.

²⁵ The law states that a judge has to be 30 years old, although judges are generally named at the age of 23; this means that any judge, before becoming a judge, spends around seven years as a prosecutor.

²⁶ There are 28 governorates in Egypt at the present time.

²⁷ The literal translation would be "first court".

²⁸ Which signifies the absence of a jury in the Assize court in Egypt.

ii) Specialised Jurisdictions

▪ **Family Courts**

Law n° 10 of 2004 provides for family courts within the jurisdiction of each high court. Family courts are each composed of three judges, assisted by two experts, one a sociologist and the other a psychologist and at least one of these must be a woman. Family courts are competent to hear all personal status cases. Most of their rulings can be appealed against at a specialised chamber at the Court of Appeal²⁹.

▪ **Juvenile Courts**

Juvenile courts established pursuant to law n° 12 of 1996 Protecting Childhood. Juvenile courts are competent to hear cases involving a child between the ages of 12 and 18 who has committed an offence or if a child is in danger. These courts are each composed of three judges assisted by two experts, at least one of who must be a woman; its rulings can be appealed.

▪ **Economic Courts**

Law n° 120 of 2008, created an economic court within the jurisdiction of each appeal court. Economic courts are formed of three judges, both at first instance and at the level of appeal. Economic courts are competent in two areas: criminal matters and economic matters.

The economic courts alone are competent to hear public actions arising from economic offences listed exhaustively by article 4 of the aforementioned law. By way of example, economic courts can rule on offences relating to bankruptcy referred to in the penal code, on offences referred to in the law protecting the consumer, on offences referred to in the law protecting competition, and on offences referred to in the law protecting intellectual property rights.

The court of first instance deals with economic offences and its judgements can be appealed against before the appeal chambers. These appeal chambers are competent to handle economic crimes. The rulings of both can be appealed against before the Court of Cassation.

In accordance with article 6, economic courts are also competent in economic matters to deal with certain civil actions arising from laws listed exhaustively. By way of example, the economic courts can deal with actions arising from the law on financial markets, as well as from the law protecting competition, the law on limited companies, joint stock companies and limited liability companies. The courts of first instance have jurisdiction over cases involving amounts less than five million Egyptian pounds. The appeal courts can handle cases involving amounts beyond five million Egyptian pounds and cases involving a dispute which hasn't had a value placed on it.

▪ **Labour Courts**

In accordance with law number 180 of 2008³⁰, labour courts (*Almahakem el'ommaleya*)³¹ are competent to rule on labour conflicts. Labour courts are composed of three High Court judges and its decisions can be appealed.

²⁹ Certain judgments cannot be appealed against, such as Khul'judgments

³⁰ According to law number 23 of 1992, the district courts were competent to rule on disputes involving workers' salaries. The Labour Code of 2003 gave the competence to rule on labour conflicts to a five-year commission formed of two judges, a representative from the Ministry of Labour, a member of the workers' trade union and a representative from the employers' organization. This commission had to come to a decision within 60 days.

³¹ Before proceedings go before the labour court, a boss or worker has the possibility of requesting a tripartite commission, composed of a representative from the Ministry of Labour, a trade union representative and an employers' representative, to settle a dispute amicably. For further details, see A. Hendi, *Droit de la procédure civile et commerciale*, [Law on civil and

2. Administrative jurisdictions (the State Council)

Alongside the civil and criminal jurisdictional order in Egypt, there is an administrative jurisdictional order. Article 172 of the Constitution specifies that the State Council is an independent judicial body, competent to rule on administrative disputes and on disciplinary actions taken against government officials. The same article adds that the law describes the other competences of the State Council. This is law n° 47 of 1972. In its article 2, this law states that the State Council is subdivided into three sections: a jurisdictional section (litigation), a consultative section (advice) and a legislative section.

The jurisdictional section of the State Council, according to article 3, is composed of the Supreme Administrative Court (*AlMahkama AlIdareya AlUlya*), the Court of Administrative litigation (*Mahkamat AlQada' AlIdari*), administrative courts (*AlMahakem AlIdaria*), disciplinary courts (*AlMahakem AITa'dibeya*), and a corps of public rapporteurs (*Hay'et Mofawadi Addawla*). Thus, and unlike France, the State Council in Egypt brings together the entirety of administrative jurisdictions; administrative courts, courts of first instance, are integrated therein.

The competences of the State Council are itemized in article 10. Article 11 states that the State Council courts cannot rule on acts of sovereignty. Articles 12 to 23 state the competences of the State Council's courts. The consultative section of the State Council is composed of specialised departments for the presidency of the Republic, the presidency of the council of Ministers, the ministries and public organisations. The task of these departments is to offer advice at the request of the aforementioned authorities. In certain cases, the advice of the State Council is necessary (article 58).

The legislative section drafts or revises instruments of a legislative nature (laws, decrees of the president of the Republic), as provided for by article 63.

c) Exceptional courts

The Egypt of today, especially since the 1952 revolution, has a long history of exceptional courts. Some of them have disappeared in recent times. The permanent state security courts were abolished in 2003. The 2007 constitutional amendments put an end to the function of the Socialist Public Prosecutor³², which led to the disappearance of the courts of social values. The task of these courts was to protect society's basic values.

From then on, there have been three main exceptional courts³³ : military courts with jurisdiction over civilians, state security courts in accordance with the state of emergency, and what are called the "political parties' court". The existence of these courts has a constitutional basis (in articles 171 and 183 respectively) except the last, which is referred to in the Law on Political Parties.

An anti-terror law, mentioned by article 179 of the Constitution as recently modified, is in the process of being developed. It's possible that it will lead to the setting up of new exceptional courts and it's probable that it will give wider powers to the courts already in existence.

B. How justice and the judges are organised

For the sake of simplicity, one could say that the HJC is the body that manages matters of justice and the Judges' Club represents the judges. However it must be clarified that the task of representing the judges has been the object of a struggle between the HJC and the Judges' Club.

commercial procedure] 2009, p. 86 If an amicable decision has not been reached 21 days after the request was made, each party has the right to go before the labour court within 45 days.

The labour court is formed of three high court judges (article 71 of the labour code). Its judgments can be appealed .

³² See Art 179 of the Constitution for the role of this body

³³ The exceptional courts will be further dealt with in the part on the problems of the independence and impartiality of justice.

Note that these two bodies are only concerned with the civil and criminal jurisdictional order. Other judges from the administrative jurisdictional order have their own institutions. The body akin to the HJC is the Special Council; the body akin to the Judges' Club is the State Council Judges' Club. In the following explanation, we are essentially referring to the judicial judges' bodies, and this for two reasons. Firstly, from the quantitative point of view, the judicial judges make up the largest group by far, nine tenths of all Egyptian judges. Secondly, the fight for the legal system's independence has mainly been led by the judicial Judges' Club.

There is also a body called the High Council of Judicial Bodies (HCJB) which was set up to replace the HJC when Nasser dissolved it in 1969. The HCJB has a constitutional basis since it is referred to article 173. A law n° 192 of 2008 has just replaced directive n° 82 of 1969 organising the HCJB. From now on, the HCJB will be called the Council of Judicial Bodies (CJB)³⁴. The first article of this new law specifies that the role of the CJB is to deal with common affairs between the various judicial bodies. The CJB is presided over by the President of the Republic and composed of the Minister of Justice, the president of the SCC, the president of the Court of cassation, the president of the State Council, the president of the Cairo Court of Appeal, the Public Prosecutor, the president of the State Litigation Authority, and the Administrative Prosecution (article 2). Article 3 of the same law specifies that in case of the absence of the President of the Republic, the Minister of Justice will preside over meetings of the CJB. Although the HJC has been reinstated, the CJB, heir of the HCJB, remains in existence and retains certain competences.

The danger as regards the independence of the judicial authority consists in the fact that the competences of the CJB can interfere with those of other bodies that are supposed to be responsible for the affairs of Justice (such as the HJC). This fear is all the more justified given that the CJB, unlike other bodies, is not solely composed of judges.

a) How the judicial authority is organised: The High Judicial Council and the State Council Special Council.

According to the Egyptian Constitution, the judicial authority is independent. Hence the need to set up a judges' organisation to deal with matters of justice. This body is the High Judicial Council (HJC). Initially set up in 1943, this body disappeared in 1969 following confrontations opposing the political power. A decree in 1984 reinstated the HJC. It has recently celebrated 25 years in existence. In the intervening period, the HJC was replaced by the High Council of Judicial Bodies (HCJB) just referred to above.

1. Composition

The HJC is composed of the president of the Court of Cassation, the Public Prosecutor, the president of the Cairo Court of Appeal, the two most senior vice-presidents of the Court of Cassation and the two most senior presidents of the other appeal courts (article 77 bis on the Law on Judicial Authority). The HJC is presided over by the president of the Court of cassation. The composition of the HJC has been the object of disagreements between the reforming trend and other trends. This will be discussed later. In 2009, the Minister of Justice attempted to amend the composition of the HJC, widening it to include the president of the North Cairo High Court and the president of the South Cairo High Court. The plan met with great resistance from virtually all judges because they were aware that the only objective in widening the HJC's composition was to increase the executive authority's stranglehold over matters of justice, given that the High Court presidents are appointed by the Minister of Justice. The plan is currently on hold.

In accordance with article 68 bis of the Law on the State Council n° 47 of 1972, the State Council Special Council (*Magles Khas*) is composed of the president of the State Council and the six most senior vice-presidents of the State Council.

Comment [s3]: Author needs to clarify by which law and why he says « reinstated » the reason is, *dont* recall him referring to the HJC's abolition before this. He mentions it later on – on this very page. BUT, there is a great deal of confusion between the HJC (a statutory body as far as I can recall) and the other body which has a constitutional status – Art 173

³⁴ *Magles Elhay'at Elqada'eya.*

2. Competences

The powers of the HJC were strengthened with the 2006 amendments to the law on the judicial authority. The HJC is competent to deal with everything concerning the appointment, promotion, transfer and secondment of judges (art. 77 bis 2). The various competences of the HJC will be considered as this study goes along.

As for the competences of the State Council Special Council, they are specified in article 68 bis of the Law on the State Council n° 47 of 1972. In line with this article, it is competent to deal with matters relating to the appointment of State Council members, to determine seniority, promotion, transfer, placements, secondment and any other competence mentioned in the law on the State Council. It has to be consulted about any legal project involving the State Council.

In carrying out its duties, the Special Council of the State Council must, in some way, acknowledge the existence of the State Council general assembly (*Algam'eya el'omoumeya*). This body is composed of all the judges of the State Council and is presided over by the president of the State Council. There has recently been a disagreement between the two organisations over the issue of appointing women to the State Council.

b) How the judges are organised: the Judges' Club³⁵³⁶ and the State Council Judges' Club

On 10 February 1939, 59 judges and prosecutors met at the headquarters of the Cairo Court of Appeal and decided to set up a judges' association that later came to be called the "Judges' Club". The original objective was to "forge links of fraternity and solidarity amongst judges and to facilitate gatherings and enrich members' understanding"³⁷. It also aimed to promote the judicial authority's independence at a time when the mixed courts (a symbol of the foreign presence in Egypt) had just been abolished. The Club, finally set up in 1943, played a very important role when the first law on the judicial authority was developed in 1943.

It should be noted that none of its bodies are mentioned in law. Their legal existence is based on their own statutes.

1. Composition

A member of the Judges' Club can be anyone with the status of judge in a civil or criminal court, meaning that any judge from any civil or criminal court can request membership. Prosecutors can do so too. Retired judges and prosecutors are also members of the Club.

In practice, all judges have enrolled in the club and according to the club's figures of 1st June 2006, it had 9557 members.

The Club is made up of a general assembly which chooses an administrative council. This is composed of 15 members: 5 cassation and appeal judges, 5 high Court judges and 5 prosecutors. These are elected for a mandate of 3 years and can be re-elected. Every year, a third of members is renewed.

³⁵ Given that this Club also includes prosecutors it would be more exact to call it the « Magistrates' Club ». However, because the name « Judges' Club » is more widespread, we will keep it to avoid confusion.

³⁶ The following drew largely for inspiration on an unpublished article presenting the Judges' Club that was written by the vice-president of the Court of Cassation, Judge Hossam ElGheriani, presented at a conference in Beirut in 2006, organised by *Heinrich Boll*, on the theme of judges' associations in the Arab World. For more details on the history of the Judges' Club, its legal status and competences, see F. El Chazli, "Le mouvement collectif des juges en Egypte" in *Lorsque les juges se sont rassemblés*, Sader, Beirut, 2009 ["the collective judges' movement in Egypt" in *When the judges got together*] (a work gathering together various studies that were presented at the conference following up the first meeting in October 2008).

³⁷ Article 2 of the Judges' Club statutes.

Branches of the Judges' Club: The Judges' Club has a central office in the centre of Cairo located next to the Court of Cassation and the public prosecutor's office.

There are also various branches in the other governorates. These branches are not autonomous compared to the Judges' Club in Cairo. The Alexandria Judges' Club, set up in 1946, is the only one with autonomy similar to the Judges' Club.

The State Council Judges' Club is composed of all the State Council judges.

2. Activities

Like any Club, the Judges' Club offers its members consumer products at a reduced price; it organises tours.

A solidarity fund has been set up to lend necessary assistance to members suffering from serious illness. The Club makes sure that books and journals, as well as legal software, are accessible at a token price. It also has its own publications such as the journal *AlQodat*.

However, the main activity of the Club is to bring members into contact with each other and enable them to get to know each other and share different viewpoints on matters involving the magistracy.

3. Judges' Club subsidies

The Judges' Club is not funded continuously: the custom is for the Ministry of Justice to subsidise it but subsidies are insufficient and cuts in assistance are a constant threat. Moreover, the government recently cut subsidies for several months because of conflicts with judges.

4. The present situation of the Judges' Club

For several years, the Judges' Club has been turning into a place of confrontation between, to borrow the terminology of the press, the "reforming" tendency and the "government" tendency. The former believes that the judicial authority's independence is incomplete and that its role is to drive forward demands and challenge things. In the quest to do so, some judges are quick to approach the media as a means of publicising their cause and attracting supporters from both different political forces and the Egyptian people.

The "government" tendency groups together judges who, whilst still asserting their belief in the judicial authority's independence, refuse to follow the methods of the "reforming" tendency. They would prefer debate to be kept amongst the judges without appearing in the media or involving political forces from outside.

After being at the helm of the judges Club from 2002 to 2008, the "reforming" tendency lost in elections and the "government" tendency regained leadership of the Club. The third and last section of this study will attempt to assess these recent developments.

The State Council Judges' Club has also played a part in the struggle for the legal system's independence but its appearance on the public stage has been less conspicuous probably because the independence of the Council of State is better guaranteed than the independence of other courts. Indeed, the Justice Minister has few powers regarding the judges in administrative jurisdictions. The State Council is managed by organs exclusively formed of judges.

III. The specificity of the Egyptian experience in relation to the judiciary's independence

Compared to neighbouring judicial systems, the Egyptian judiciary has a long tradition of independence. It was familiar with independence even before there was a law guaranteeing it. This was probably because of the significant role played by the Judges' Club, a role which continues to be played to this day. Thus there is the specificity of the history of the Egyptian judiciary's independence (A) and, consequently, the specificity of the Egyptian experience in relation to the legal system's independence. However, the specificity of the Egyptian experience does not just relate to history, it also relates to the specific issues at stake surrounding the Egyptian legal system's independence (B).

A. The specificity of the history of the Egyptian judiciary's independence

History is useful in helping us to understand the present and anticipate the future. The independence of the Egyptian judiciary provides a perfect affirmation of this. To understand the issue of the judges' independence, we will need to look back over the past.

For the sake of clarity, this historical overview will be divided into two parts: the first part will deal with the relatively distant past, before the 1952 revolution, the monarchical period. Thereafter, we will look at the more recent past after the 1952 revolution, the republican period.

a) The legal system's independence during the monarchical period due to the balance of powers

Those with an interest in matters of justice know that a distinction has to be made between the personal independence of judges and institutional independence. Whilst the latter depends on how far advanced the rule of law is, the former is more a question of education, what the judge learns and accomplishes himself or herself. Since the national courts were set up (1883) a certain judicial tradition based on independence of spirit and self-sacrifice seems to have arisen³⁸.

As for institutional independence, this too existed after a fashion. Admittedly, the judicial authority's independence prior to this period wasn't codified in law but it was "based on customs and the weight of public opinion"³⁹. Therefore it was a *de facto* independence.

This independence was the result of several factors: the political, social and cultural climate of the era guaranteed certain independence for the magistracy and the courts. The judiciary's stability and independence also in fact resulted from the weakness of the Ministry of Justice, which was in a continual state of flux⁴⁰. The political forces in Egyptian society were multiple: there were the forces surrounding the King, the forces of the nationalist movement presided over by the party of Al Wafd, the influence of British occupation on Egyptian territory, along with various parties allied to one force or another. This situation meant for a continual change of political cabinets and repeated dissolutions of Parliament and this rendered the judicial authority the most stable, separate from the Ministry of Justice.

It was only in 1943 that the first law was decreed relating to the independence of the judicial authority, but this law only enshrined practices and realities that were already in existence⁴¹. It is important that our study on the independence of the Egyptian judiciary understands this historical

³⁸ T. Elbishri, *op. cit.*, p. 10

³⁹ T. Elbishri, *op. cit.*, p.12

⁴⁰ The monarchical period is known for its governmental instability.

⁴¹ "For this reason, the law on the judicial authority's independence, decreed in 1943, did not in fact create the independence that was lacking but crystallised, regulated and codified the independence that was already a reality, being experienced", T. Elbishri, *op. cit.*, p.17

reality because it shows us that whilst Egyptian justice is experiencing certain problems in terms of independence today, this doesn't prevent it from enjoying a certain degree of independence or mean that it cannot function fairly satisfactorily⁴². The demands of the judges and of civil society today are not aimed at establishing a judicial authority's independence which doesn't exist but strengthening a more or less existing independence. The goal of the demands made today is to complete an existing independence, one which is more the result of historical circumstances than political will.

Unfortunately, the independence of the judicial authority that was gained during the monarchical period came to be undermined during the republican period.

b) The legal system's independence during the republican period due to the Judges' Club

With the revolution of 23rd July 1952 and the advent of the Republic, the Egyptian political system found itself in a novel position, completely unlike anything that had existed before. This new situation influenced the issue of the judicial authority's independence. Although there has been a certain continuity during the republican era, there are two discernible periods within it: the Nasser era and the post Nasser era.

1. The Nasser era

i) The imbalance of powers

Before 1952, there were three forces on the political scene and none of them was able to neutralise the other forces: the first was the King and the various state organs; the second was the occupying British army; the third and final force was that of the Nation, embodied in the party of Al Wafd⁴³.

The Revolution of the 23 July 1952 overthrew King Farouq and then abolished the monarchy. The Command Council of the revolution replaced the King until the promulgation of the 1956 Constitution which established the Presidential regime

The revolutionaries fused executive and legislative powers together in a single apparatus until the promulgation of the Constitution in 1956. Parliament was then subject to the total control of the executive authority; for many years the parliament actually disappeared. The hegemony of the executive authority did not stop short of the legislative authority; it applied to the judicial authority.

To bring the judicial authority under its control, but without resorting to taking direct control over it, the political authority sought to by-pass the independent legal system.

ii) Means used to weaken the judicial authority

Because of their absolute control over the legislative and executive authorities, the revolutionaries were able to decree exceptional laws restricting access to the courts if it was in their political interest to do so⁴⁴. Meanwhile, exceptional courts were set up to try their political adversaries⁴⁵.

The judicial authority was therefore isolated from anything to do with politics. The judges retained the same status that they had before the Revolution: the system followed by the 1952 Revolution avoided confrontation with the judicial authority and allowed the judges to get on with their job as

⁴² Particularly if you compare the judicial authority to other Egyptian State institutions.

⁴³ T. Elbishri, *op. cit.*, p. 14

⁴⁴ On this issue, see T. Elbishri, *op. cit.*, p. 15

⁴⁵ These adversaries might be the former heads of political parties like the leaders of Al Wafd or the members of groups such as the Muslim Brotherhood.

long as this didn't involve straying into the area of politics⁴⁶.

However, even in this limited framework, the judicial authority's independence and the status of judges suffered some direct attacks: during the period between 1954 and 1955 there was a violent confrontation⁴⁷ between the Command Council of the Revolution and the State Council. The latter wanted to submit the activities of the revolutionary regime to constitutional legality⁴⁸.

After the military defeat of 1967, the regime weakened and started seeking support from the judicial authority to shore up the legitimacy of its decisions.

However, the judicial authority did not provide this support, resulting in the appearance of what was called at the time "the draft judicial reforms". These plans had two objectives in mind⁴⁹.

On the one hand, an attempt was being made to integrate the judges into the Arab Socialist Union, the only political party at that time⁵⁰. On the other, there was a desire to see the courts include non-professionals in order to render justice "popular".

Both initiatives were categorically rejected by the Judges' Club, which published a statement on 28 March 1968 declaring its refusal to join the Socialist Union and its rejection of the idea of "popular justice"⁵¹. Consequently, the confrontation between the regime and the judges was renewed. At the end of 1969, the "judges massacre" took place⁵²: three laws were decreed, in accordance with which all judicial bodies were dissolved and then reformed, and 200 judges were discharged, including, amongst others, the president of the court of cassation and various counsellors of the same court⁵³.

One of reactions of the regime to this desire for independence on the part of the judges was to set up a constitutional court under the name of "the supreme court". The unspoken objective of this court was to forbid civil and administrative courts from examining the constitutionality of laws⁵⁴. Similarly, a "High Council of Judicial Bodies" was set up, presided over by the President of the Republic.

This Council, replacing the HJC, was composed of non-judges such as the president of the Administrative Prosecutor's office and the president of the State Litigation Authority.

2. The post-Nasser era

The post Nasser era – which began in 1970 and continues to this day – has retained the exceptional laws and the exceptional courts of the Nasser era. So there is a certain continuity between the two

⁴⁶This is an important clarification because it demonstrates the difference between the methods used by Nasser and his successors. See Elbishri, *op. cit.*, p. 16. For further clarification, see A. Mekki, "La confrontation entre les juges et le régime nassérien" in *Les juges et la réforme politique*, ["the confrontation between the judges and the Nasser regime" in *The Judges and Political Reform*] *op. cit.*, p. 79 and especially p. 88 where the author cites Nasser's speech explaining his "strategy" regarding matters of justice.

⁴⁷ A demonstration took place on 29 March 1954, during which the State Council building and the office of its president AbdElRazak AlSanhoury were attacked. The demonstrators attacked AlSanhoury in his office, then a law was decreed forbidding him from carrying out his public functions on the pretext that he had belonged to a political party in the Forties. On the supposed reasons for this incident, see A. Mekki, *op. cit.*, p. 90. The State Council was reorganised by law number 165 of 1955 in order to weaken its independence and purge it of certain judges known for their independence (T. Elbishri and Mekki). This incident was known as "the minor judges massacre" and is considered to be one of the first signs of judges' resistance to their oppression by the executive authority. According to a shrewd expert on the State Council, the practice of secondment for young state members of the State Council to government departments was initiated to avoid any new confrontations between State Council and the executive authority, T. Elbishri, *op. cit.*, p. 17.

⁴⁸ A ruling on 10th February 1948 recognized the right of the judicial authority to control the constitutionality of laws.

⁴⁹ T. Elbishri, *op. cit.*, p.19.

⁵⁰ Integrating judges into the party this way might well be seen as politicising judges but this idea has been refuted by pro-government groups, whose argument is that the Arab Socialist Union was the only form of party there was and that it served to represent all popular forces. However, the regime intended to involve the judges in the political hierarchy in order to influence their thinking and decisions.

⁵¹ It should be noted that the Judges' Club elections were marked by the victory of candidates favouring this tendency, and the failure of pro-government candidates.

⁵² The judges massacre of 1969 is also known as "the major judges massacre".

⁵³ T. Elbishri, *op. cit.*, p. 21

⁵⁴ T. Elbishri, *op. cit.*, p. 21 ; N. Bernard-Maugiron and Dupret, *op. cit.*, p. XXXV

periods. However, new tendencies have appeared.

Whilst Nasser attempted to weaken the judicial authority by resorting to exceptional laws and courts, his successors have gone beyond using these means alone and have tried to use what might be termed the "carrot and stick" method with the judges. In other words, the regime has tried to infiltrate the judicial body in an attempt to win certain judges over to its positions. To this end, the government has devised various techniques and methods in order to influence and reward certain judges. For example, the techniques of secondment and having a supply of judges available for placements have been used, enabling a judge to earn in a matter of months what it would take one of his colleagues who was not on secondment years to earn. Several judges, only just retired or even still working have been appointed to gubernatorial or Ministerial posts. Some say that the majority of judges accused of rigging legislative elections have been judges on secondment to the government.

The judges, sensing that their institutional independence was under threat, tried to retaliate with a Justice Congress, organised by the Judges' Club in 1986, and with a conference on the role of judges in supervising the 1990 elections. These events gave rise to various recommendations aimed at strengthening the judicial authority's independence.

From 2005 to 2008 and on the occasion of various elections⁵⁵, the Judges' Club has been at the forefront of a national movement – not wishing to use the term revolt - pushing for elections to be honest in the first place, and subsequently, for any irregularities to be denounced and the authors of such punished.

It could be said, then, that throughout the republican period, during which time there has been no balance or separation of powers because of the supremacy of the executive authority over the legislative authority, the Judges' Club has endeavoured to prevent the judicial authority from being taken over by the executive authority. The Judges' Club has succeeded in its goal thanks to the legitimacy that comes from having a great many members. Its words are heard by the political authority, even if they are not followed.

Without any exaggeration, it can be said that looking back over the history of the Judges' Club is akin to recounting the history of the struggle for the judicial authority's independence in Egypt.

B. Specific issues surrounding the Egyptian judiciary's independence: the supervision of elections by the judges

The judicial authority's independence is necessary for the rule of law to exist and in order to guarantee human rights. On this point, what happens in Egypt is no different from what happens anywhere else. The importance of the Egyptian legal system's independence, and what is at stake surrounding it, is exactly the same as it is for other countries. However, there is specificity in relation to the issues surrounding the independence of the Egyptian judiciary. If we don't understand this specificity, we won't be able to understand recent confrontations between the political authority and the judges represented by the Judges' Club.

The Egyptian specificity resides in the fact that up until 2007 the Egyptian Constitution, in its article 88⁵⁶, stated that the law made provisions for the rules and norms governing elections and that elections had to be run by people belonging to a judicial body⁵⁷. In other words, one of the conditions

⁵⁵ Constitutional referenda, presidential elections and parliamentary elections.

⁵⁶ Which was amended in 2007

⁵⁷ This disposition, which might seem unusual, can be explained by the fact that, in Egypt, judges are probably the only group of people who benefit both from a certain independence in relation to the political authority and the confidence of the people. If government officials, other than judges, were responsible for supervising elections, the political authority would, via the security services, have no difficulty in forcing through any election results it wanted. Unfortunately, this clause was modified with the 2007 constitutional amendments. It is not too much of an exaggeration to say that getting rid of the judicial supervision of elections, together with constitutionalising the anti-terror law, were the two main objectives, unspoken of course, of revising the constitution. For more details about the way in which article 88 of the Constitution evolved, see N.

for the legality of elections was that elections were supervised by judges. However, in spite of its apparent simplicity, this article aroused numerous hesitations when it came to being interpreted.

Comment [s4]: Footnote 58 seems to suggest that the amendment to the Constitution has meant that the Js no longer supervise the presidential elections. I am confused. This needs to be clarified

What interests us most here relates to the extent of the control: Does there need to be a judge standing next to every ballot box or would it be enough to have simple presidency over a central voting office? Would the judges have to keep control over the whole electoral process (drawing up electoral lists, updating them, vote-counting, keeping order outside polling stations, even dividing up the electoral districts...)?

During the various elections that have been organised since article 88 came into force, the custom has been for the judges' supervising role to be incomplete, a formality, which explains the electoral frauds that have taken place in spite of the judges' supposed supervision. The judges were only really in charge of the vote-counting whereas other State officials had the job of supervising the polling stations. It is often too late to intervene at the vote-counting stage because irregularities generally take place when the votes are being cast.

On 8 July 2000, in one of its most well known rulings, the SCC decided that article 88 did not authorise the legislator to organise its content and introduce possible restrictions, and declared the article to be aimed at the whole electoral process, designed to guarantee its integrity. According to the SCC, judges had to operate a practical supervision over elections; this could not just be a formality. That way the electorate could choose their representatives in an objective environment. They also had to supervise the vote-casting process itself in order to guarantee its credibility and exactitude. With the same ruling, the SCC invalidated the 1995 parliamentary elections for not having been organised according to the rules set out in article 88 of the Constitution.

The fact that the judges were under a constitutional obligation to supervise the various elections as reaffirmed by the SCC provoked two - rather opposite - main reactions from judges within the reforming tendency.

Some judges felt that the falsification of electoral results makes people lose confidence in their judges; it would not, they felt, result in the government being undermined; paradoxically, it would result in people's confidence in the judges themselves being undermined. This is why some judges asked the political authority to discharge them from the task as soon as they no longer had full control over the electoral process.

Other judges saw in the supervision of elections an opportunity to prevent electoral fraud; this is why they asked to be given full control over the electoral process. In the government's need for a judicial presence at elections, some judges also saw a means of exerting pressure on the government to get it to modify the law on the judicial authority. The Judges' Club multiplied its general assemblies and statements in support of their demands. The response from the executive authority was not immediate. In 2006, the Law on the Judicial Authority was amended slightly. What interests us here is that in 2007, article 88 of the Constitution was amended in order to restrict judicial supervision⁵⁸. The political authority "depoliticised" the issue and deprived the judges of an important means of putting pressure on the government to have make their voices heard.

After this first section, we now need to look at the problems relating to the judicial authority's independence (Part Two) and the problems relating to the independence of the auxiliary legal professions (Part Three). By way of conclusion there will then be a brief discussion of the reality of the judiciary and its prospects of reform.

Comment [s5]: As mentioned earlier - the effect of the Constitutional amendment relating to judicial supervision of elections is far from clear. You need to ask authors precisely what happened. Does the amendment restrict or completely eliminate judicial supervision of elections? What is the effect of this, in legal/political terms

Bernard-Maugiron, "Nouvelle révision constitutionnelle en Egypte : vers une réforme démocratique?", *Revue française de Droit constitutionnel* 2007, p. 843 ["New Constitutional Revision in Egypt : towards democratic reform?" *French Journal of Constitutional Law*].

⁵⁸ So we are back to the situation prior to the year 2000 when judicial supervision was a formality.

Part Two. The concrete problems of the Egyptian judicial authority's independence

For there to be full independence of the judicial authority, several problems need to be resolved. The executive authority must cease interfering in matters of justice (I). The independent legal system must not be by-passed, notably by means of exceptional courts (II). Judges must be selected in a manner that is more transparent (III). Attacks on the rights and liberties of judges must cease (IV). Finally, we will look at the problems associated with the lack of democracy in the way the courts are run (V).

I. The executive authority's interference in matters of justice

In countries where there is little democracy, the executive authority is the strongest authority. It has force (the police) and it has money, which it often uses to assert its supremacy over other authorities. Since the advent of the Republic in Egypt, the powerful political authority has had control over the legislative authority. As previously pointed out, the executive authority has attempted to bring the judicial authority under its control but it has not been able to fully achieve this end. However, the executive authority has not given up hope. It is still attempting to bring this third authority under its control.

Thus, when it comes to the judicial authority's independence, the issue often concerns its independence in relation to the executive authority. It is no exaggeration to say that the majority of attacks on the judicial authority's independence stem from the executive authority⁵⁹. Even if the executive authority does not interfere in recruiting judges, a judge, once appointed, becomes a target for the executive to try and influence and win over.

The ideal solution to this problem would involve changing the composition of the HJC to strengthen its powers by transferring over to it the powers granted to the Ministry of Justice, or at least by rendering its advice obligatory. The powers of the President of the Republic, like those of the Minister of Justice or the public prosecutor should not be discretionary. The 2006 legislative amendments were headed in this direction but these improvements were still a long way off the improvements called for by the Judges' Club.

In this section, we will only be dealing with direct attacks⁶⁰ on the judicial authority's independence carried out by the executive authority. Indirect attacks will be dealt with in other sections⁶¹.

We can distinguish between two categories of attack on the judicial authority's independence: first, *obligatory* attacks meted out by the law when it gives the President of the Republic the discretionary

⁵⁹ The corruption of judges, by the parties, will not be looked at in this report. To our knowledge, the corruption of judges in Egypt is rare; it isn't at all like the phenomenon it is in the government departments where corruption is the rule. See an article in Almasry-Alyoum of 19 March 2010, "Dans un rapport international: la corruption des petits fonctionnaires est devenue une partie de la vie quotidienne en Egypte". [« In an international report: the corruption of petty government officials has become part of daily life in Egypt »] International reports also acknowledge that the Egyptian judicial authority is the least corrupt and most independent of the public organs in Egypt. See the report by transparency international, *Strengthening good governance in Egypt*, published in 2010, which can be downloaded from this site www.transparency.org/news_room/latest_news/press_releases/2010/2010_03_20_nis_egypt_english

⁶⁰ For example, when the Minister appoints the president of a High Court, the appointment is directly attributable to him. This is, therefore, a direct attack.

⁶¹ When Parliament decides to increase the age of retirement for judges so that a judge occupying the position of HJC president can stay in his post, the act is directly attributable to Parliament. However, parliamentary elections not conducted in the best of circumstances, as demonstrated by Judges' Club reports, Parliament is more an expression of the executive power than it is an expression of the people; as a result, what is directly attributable to Parliament is indirectly attributable to the executive authority.

power to appoint the president of the SCC; second, attacks committed by the executive authority *on its own initiative* (when a judge, by way of a reward, is appointed to a governmental post or high administrative office whilst there is nothing imposing the appointment).

For the sake of clarity, we will look first at the executive's powers in the appointment of certain high judicial posts (A); we will then look at the means used to put pressure on judges (B) ; finally, we shall examine the issue of legal rulings not being executed (C).

A. The executive authority's power over the appointment of certain high judicial posts

The simplest way of ensuring that the judicial power maintains a certain loyalty towards the executive authority, or at least of ensuring that it does not rise up as an opposition force, is to have a stranglehold over the judges in the highest posts. The very best way of turning this into a reality is to control the process which puts judges into these high posts in the first place. Thus we shall now examine the executive authority's power over the composition of the HJC, the executive authority's power over the appointment of the high judicial posts of president of the SCC, president of the Court of cassation and president of the State Council, Public Prosecutor, High Court presidents, and deputies at the Ministry of Justice. Once it has appointed them, the executive authority can keep these judges in their posts at the apex of the judicial bodies by raising the age of retirement for judges.

a) The executive authority's power over the composition of the HJC

The 2006 amendment to the law on the judicial authority strengthened and broadened the *competences* of the HJC⁶². Competences previously belonging to the HCJB⁶³ and the Justice Minister were transferred to the HJC. On this issue, the political authority rather proved itself to be listening to the judges' demands. However, the political authority was much less willing to accede to the judges' demands when it came to the *composition* of the HJC.

Article 77 bis (1) of the Law on the Judicial Authority states that the HJC is composed of the president of the Court of cassation, the president of the Cairo Court of appeal, the public prosecutor, the two most senior vice-presidents of the Court of Cassation and the two most senior presidents of the appeal courts.

The problem is the fact that none of the members of the HJC are elected, whilst some of them such as the public prosecutor are appointed in a quasi-discretionary manner by the executive authority. Regarding the other members of the HJC who accede to their posts on seniority grounds, it's possible that the executive authority, knowing who is going to be appointed to the HJC⁶⁴, tries to influence these judges by offering them various advantages (such as secondment).

This is why one of the principal demands of the Judges' Club to have elected members on the HJC alongside appointed members⁶⁵. Indeed there really isn't much point in strengthening the competences of the HJC if its composition remains undemocratic. A statement released by the Judges' Club on 16 June 2006 made the point that the absence of elected members had resulted in the HJC's "systematic endorsement"⁶⁶ of all the executive authority's decisions.

⁶² On this amendment and the powers that were transferred to the HJC, see N. Bernard-Maugiron, "Vers une plus grande indépendance du pouvoir judiciaire en Egypte?", *Revue internationale de droit comparé*, ["Moving towards a greater independence for the judicial authority in Egypt?", *International Review of Comparative Law*] 2007, p. 85

⁶³ From now on called the CJB (Council of Judicial Bodies).

⁶⁴ Several judges, HJC members, are promoted based on seniority.

⁶⁵ Which wouldn't be a novelty because the first law organising the Egyptian judicial authority states that the HJC be composed of elected members. It was Nasser who got rid of elections for HJC members before getting rid of the HJC itself in 1969.

⁶⁶ Expression employed by N. Bernard-Maugiron in her aforementioned piece.

b) Appointment of the president of the SCC

As pointed out earlier, the president of the SCC is appointed in a discretionary manner by the President of the Republic as provided for in article 5 of law number 48 of 1979 on the SCC. This complete freedom of the President of the Republic contrasts with his relatively restricted power when it comes to appointing the members of this court. Indeed when he appoints a member of the SCC, other than the SCC president, the President of the Republic is enabled by article 5 to choose from between two names, one of which has been proposed by the general assembly of the SCC and the other by the president of the SCC. He then has to be advised by the CJB.

The disposition relating to the appointment of the president of the SCC is increasingly coming in for criticism because, in recent years, a new practice has emerged which consists in not selecting the SCC president from amongst its members. Some SCC presidents have been promoted to their prestigious posts after spending the vast majority of their careers as prosecutors⁶⁷ (i.e. having exercised no jurisdictional function, having made no rulings, for years) or after spending years sitting in session at the exceptional courts⁶⁸, whose independence is far from guaranteed. This practice is all the more questionable because according to article 76 of the Constitution recently modified, it is the SCC president who presides over the Presidential Election Commission, a commission which supervises presidential elections and which regulates all challenges in relation to these elections. It makes you wonder whether the SCC president is not in a position where there is a conflict of interests⁶⁹.

Consequently, the President of the Republic's authority in appointing the president of the SCC needs restricting for two reasons: to enable the SCC to revert to audacious jurisprudence and to better guarantee the integrity of the presidential elections⁷⁰. The post of president of the SCC must in no event be used as an instrument for rewarding certain judges.

c) Appointment of the posts of president of the Court of Cassation and president of the State Council

In accordance with article 44, paragraph 2, of law number 46 of 1972 on the Judicial Authority, the President of the Republic appoints the president of the Court of Cassation from amongst the vice-presidents of this court, with the agreement of the HJC. In theory, his power is fairly extensive, but it must be acknowledged that the rule of seniority has always been respected. In spite of the fact that the President of the Republic uses his power of appointment reasonably, the law should restrict his powers because these quasi discretionary powers constitute a temptation for anyone who possesses them. A proposal by the Judges' Club suggested that the Court of Cassation's general assembly should choose its president from among the five most senior vice-presidents who had sat in chambers over the past three years.

As regards the appointment of the president of the State Council, things are different. In accordance with article 83 of law n° 47 of 1972 on the State Council, the agreement of a special assembly of the

⁶⁷ Such as Judge Maher Abdel Wahed who was a public prosecutor at the time of the significant events that took place in 2005.

⁶⁸ Information cited by Nathan Brown, "Why did the Egyptian regime appoint a new chief justice?", article consulted 31 December 2009 at: http://lynch.foreignpolicy.com/posts/2009/07/21/why_did_the_egyptian_regime_appoint_a_new_chief_justice In relation to the appointment of the current president of the SCC Farouq Sultan, N. Brown writes that "the appointment, as much as it violates all kinds of norms and traditions, is perfectly legal".

⁶⁹ It is not rare, especially in Egypt, for a President of the Republic to put himself forward as a candidate, to succeed at presidential elections. In this case, the president of the SCC would be poorly positioned to punish any possible abuses benefiting the presidential candidate who would have appointed him a few years previously. Some observers see a connection between the feeble responses of the SCC president in the face of accusations of fraud relating to the 2005 presidential elections and his appointment shortly afterwards to the post of justice minister.

⁷⁰ Even if the 2007 constitutional amendments took the responsibility of supervising parliamentary elections away from the judges, they still have a role to play, or rather, the president of the SCC does, in guaranteeing that free elections will be held, with the Presidential Election Commission, set up by article 76 of the Constitution, remaining in place.

State Council is necessary before the President of the Republic can proceed to appoint the person who will be at the head of the administrative jurisdictions.

d) The appointment of the post of Public Prosecutor

Article 119, first paragraph of the law on the judicial authority states that the President of the Republic appoints the Public Prosecutor from amongst the vice-presidents of the appeal courts, the counsellors at the Court of Cassation, and prosecutors.

Here, the power of the President of the Republic is not controlled by the rule of seniority, so he can "choose" whomever he wishes from amongst a great number of judges. By choosing someone who isn't worthy of the post of "representative of society" or someone who wasn't expecting to be chosen, the President of the Republic secures the gratitude of the person in the post.

This disposition contrasts with paragraph 3 of the same article which states that, for the appointment of all other members of the prosecution, the President of the Republic must gain the agreement of the HJC. This confirms what was said previously about there being the political desire to control judges in the highest positions.

Several voices have spoken up to demand that the authority of the President of the Republic be restricted. These are voices not just originating from the judicial sphere but from political opposition and more generally from civil society. In the past few years a great many cases against the political authority have been dropped. The Public Prosecutor has sometimes appeared to be closer to the political authority than he is to his judge colleagues.

There is no shortage of examples.

During the legislative elections, there were numerous electoral frauds and some judges were physically attacked by the police and security forces. No court case was launched by the authorities. The judges accused the Public Prosecutor of working to serve the Government and of shutting his ears to various protests. An extraordinary meeting of the Judges' Club was held on 16 December 2005 and demanded that the law on the judicial authority be reformed in relation to the appointment of the Public Prosecutor. The fact that he had been appointed by the President of the Republic was, according to the report, the main reason for the "laxity" he demonstrated.

According to some judges and journalists, during the confrontation between the Judges' Club and the executive authority in 2006, a police officer attacked a judge in front of the Judges' Club premises. No investigation was launched in order to verify the matter.

e) Appointment of High Court presidents by the Justice Minister

In line with article 9 of the law of 1972, the Justice Minister appoints, from among the judges of the appeal courts, presidents of the High Courts with the agreement of the HJC. The law uses the term "judges who are available" but it is clear that this is just as much a matter of appointment. Appointments are made for a period of one year, renewable.

What is dangerous about the power accorded to the Justice Minister here in relation to the legal system's independence can be correlated with the importance of the powers held by the presidents of the High Courts. The High Court president can, at his own initiative, or with the agreement of the general assembly of the High Court, administer a warning to a judge (article 94 of the law on the judicial authority). He can also suggest initiating disciplinary proceedings to the Public Prosecutor (article 99 of the same law).

It was not for nothing that, in his plan for "reform", the Justice Minister suggested including two High Court presidents on the HJC.

f) Appointments to high administrative posts at the Ministry of Justice

In accordance with article 45 of the law of 1972, the President of the Republic can place judges – from amongst the vice-presidents of the Court of Cassation, the presidents of the appeal courts and deputy public prosecutors – into the posts of premier deputy or deputies of the Justice Ministry. Since the 2006 amendments, the President of the Republic must take advice from the HJC. On a case by case basis, these deputies can have a certain influence over the careers of judges.

B. Means of exerting pressure on judges

There are various powers which the executive authority can use to influence the careers of judges and which, therefore, it could also use to damage the judicial authority's independence. These powers are sometimes powers of persuasion, sometimes powers to dissuade. Some speak of the carrot and stick method. Before we tackle the different powers, we need to mention that the 2006 amendment to law n° 46 of 1972 has, in a manner that is welcome, diminished, but not abolished, the powers of the Justice Minister that might be used to put pressure on judges.

a) The power to exert pressure to persuade judges

The rule of seniority governs access to certain high judicial functions. For example, the President of the Republic always appoints the most senior judge at the Court of Cassation head of this jurisdiction⁷¹. It is not rocket science working out whose turn it will be to next to be president of this prestigious jurisdiction, or other high judicial functions which submit to the rule of seniority. This is why certain judges sometimes become the object of special attention on the part of the executive authority, and more precisely, of the Ministry of Justice. At the end of their career, some judges are appointed to high civil service positions.

1. Placements and secondment

i) Placements

Placing judges in posts (*Elnadb*) generally means the possibility for a judge to take up a position, judicial or non-judicial, at one of the Egyptian State agencies. Various functions can be carried out by a judge who is thus placed. This might involve a judge being placed in the post of legal adviser at the Ministry of Justice (article 45). Or it might involve the case of an appeal court judge being placed to preside over the High Court for a period of one year, renewable (article 9). We have looked at these two ways of positioning people in relation to the executive authority's appointments to high judicial and administrative posts, but we can also regard these placements as a means of seducing certain judges, especially if one considers the financial advantages associated with the moves

Comment [s6]: I think the author should indicate the sort of financial advantages at stake here, for greater clarity

There are other ways in which people can be placed in positions apart from being appointed to high judicial functions or high administrative posts at the Ministry of Justice.

Firstly, a judge can be moved to an administrative management post at the Ministry of Justice (article 45). Secondly, a judge can be placed in any ministry. The latter situation is made possible by article 62 which states that the Justice Minister can, after consulting with the general assembly of the relevant court and agreeing with the HJC, place a judge in order to carry out pro term judicial or "legal" tasks.

⁷¹ The same is true for the presidents of the appeal courts.

Since the 2006 amendments, the Justice Minister has to obtain the agreement of the HJC in order to place a judge in a position, which constitutes a relative improvement. This is an improvement because previously, the HJC was not consulted (in the case of administrative management posts at the ministry of Justice) or, if it was consulted, its agreement was not necessary (in the case of High Court president appointments). Nevertheless, it's only a relative improvement because the composition of the HJC remains undemocratic.

Some judges want to restrict recourse to placements, which they feel is damaging to their independence. They believe that placements are a means of showing gratitude to certain judges; the incomes of judges placed in positions are significantly higher than the incomes of other judges. The fact that a judge knows there is the possibility of being placed in a post and the financial advantages it would bring, might incite him to show more leniency in relation to the political authority in the hope of being moved.

There is another drawback associated with placements. After spending years at a ministry, a judge will have got into the habit of being part of a hierarchy and receiving orders. This prevailing spirit of public office is incompatible with the spirit of independence that goes with being a judge and could have consequences for this independence. From this point of view, placements are damaging to the independence and impartiality of the judge, as is secondment.

We should point out that the same problem exists with State Council judges. In this case the issue might be considered more serious because the function of these judges is to hold the administration accountable under the law.

ii) Secondment to an authority abroad

Article 65 of the Law on the Judicial Authority allows judges to be seconded to governments abroad or to international organisations. Secondment (*Eli'ara*) is decided by the President of the Republic after taking the advice of the general assembly of the court to which the judge belongs or the advice of the Public Prosecutor, whichever is appropriate, and after the agreement of the HJC. The same article specifies that the overall duration of the secondment cannot exceed four consecutive years and that if the President of the Republic deems exceeding this period to be in the national interest, it can be.

There are fewer disadvantages with secondment than there are in relation to placements. The secondment initiative stems from the foreign authority, so there is no suspicion of an underlying desire on the part of the government to reward the judge on secondment⁷². Nor are there the disadvantages associated with placing judges within the Egyptian governmental structure.

Moving towards greater supervision of placements and secondment?

Should placements and secondment be banned, pure and simple? Probably not, and for several reasons.

Firstly, both these mechanisms can be beneficial to the *judges*. They give judges a way of improving their financial situation and can provide an opportunity for them to get to know better the workings of the administration (useful for State Council judges) or gain valuable experience within an international organisation.

Secondly, these mechanisms benefit the *Egyptian State*. When judges are placed in posts, different ministries benefit from their experience and advice, and it is conceivable that having judges within the ministries will improve the way in which the Egyptian government functions. When a judge goes on secondment, the secondment affords the Egyptian legal culture an influence beyond Egypt.

Comment [s7]: I utterly disagree..... only those Js whom the President wishes to favour have this opportunity - usually anyway !

Comment [s8]: EMHRN might want to distance itself from this conclusion

⁷² Sometimes, it is in interest of the executive authority that a judge goes on secondment. When the presence of a judge causes inconvenience, it is preferable if the judge is outside Egypt.

The ideal would be to rationalise these mechanisms by establishing clear and transparent rules. Issues relating to placements and secondments should be managed, exclusively, by a judges' organisation, such as the HJC.

iii) Other means of influencing judges

There are other means of putting financial pressure on judges. Article 63 states that a judge can be an arbitrator on condition that the HJC agrees.

The supervision of elections also provides an opportunity to undermine judges' independence. The political authority selects certain judges to supervise elections, which takes several days, and pays the judges handsomely.

In accordance with law n° 7 of 2000 on Conciliation Procedures Within the Framework of Disputes Between Public Law Entities, the Justice Minister can select certain judges to sit on "conciliation committees". These jobs are often very well paid. In choosing these judges, the Justice Minister has to gain the agreement of the CJB. Now, as one author has wisely observed⁷³, whilst CJB agreement is needed to *choose* a judge, the same agreement is not needed to *exclude* a judge from being on one of these lucrative committees. This is a very effective way of influencing judges⁷⁴.

2. Appointments to high public office

An executive authority wishing to attack the personal independence of judges has various means at its disposal. We have already looked at the appointment of judges to high judicial functions; this type of appointment could be considered an early reward for the judge appointed. A reward can also be made when a judge's legal career has ended.

In the last few years, several judges have been appointed to the posts of governors, ministers or members of parliament⁷⁵. These appointments made by the President of the Republic have been perceived by some as a form of reward for certain judges for services rendered to the political authority.

One might think there is nothing dangerous about a reward that is "a posteriori", because once a judge has been appointed a governor, he cannot damage the judicial authority's independence because he is no longer part of that judicial authority.

We are reluctant to share this view. The fact that a judge even knows these "a posteriori" rewards exist might result in him being overzealous and trying too hard to be "rewarded". This eagerness would be especially noticeable in the case of judges dealing with matters which closely affected the political authority; judges may be tempted to try to render rulings that would please the political authority⁷⁶. Moreover, other judges would see how there may be an advantage in having an understanding with the political authority.

This is why we should consider a possible temporal ban⁷⁷ on the appointment of judges to high public office.

⁷³ Fathi Wali, *Droit judiciaire privé*, [Private Judicial Law] Dar AlNahda AlArabeya, 2009, p. 868.

⁷⁴ *Ibid.*

⁷⁵ In Egypt, the President of the Republic can appoint 10 people to the People's Assembly (*Magles Asha'b*) and a third of the Consultative Assembly (*Magles Ashoura*).

⁷⁶ There is an old saying: "un bon magistrat ne reçoit pas d'ordres, il les devine" ["a good judge does not take orders from anyone; he guesses them"]

⁷⁷ For example, by requiring that a minimum amount of time (3 years) has to pass before a judge at the end of his career can be appointed to high public office.

b) The power to sanction judges

The executive authority has indirect means of putting pressure on judges at its disposal. This power is manifested in the system of placements, in disciplinary matters and especially in matters of judicial inspection.

1. Placements

Article 62 authorises placing judges in posts to carry out judicial or legal tasks. This disposition can serve to reward a judge, as we have already mentioned. It can also serve to sanction a judge by taking him away from his judicial function and moving him into a non-judicial legal post.

2. The Minister's powers in disciplinary matters

Disciplinary procedures, supposed to sanction judges for disciplinary wrongdoing, can be transformed into a means of exerting pressure on judges who have committed no such wrongdoing. Admittedly, the executive authority does not hold any special powers over disciplinary matters, but this statement requires a double qualification.

Firstly, the Public Prosecutor, appointed in a discretionary manner by the President of the Republic, has the power to take disciplinary action. He does so at his own initiative, or at the suggestion of the Justice Minister or of the president of the jurisdiction which the judge belongs to (article 99).

Secondly, despite the recent reforms, the composition of the disciplinary bodies is still open to criticism regarding the impartiality of its members. What is to be feared here is that disciplinary procedures automatically result in sanctions.

It is worth pointing out that the 2006 amendments transferred the right to administer warnings to High Court judges from the Justice Minister to the judicial inspectorate's director of administration. The presidents of the civil and criminal courts also have this prerogative, which can be exercised at their own initiative or by decision of the general assembly (article 94).

3. The Justice Minister's guardianship over the Office of Judicial Inspection

The Office of Judicial Inspection is the body which controls the good functioning of Justice and supervises the judges' execution of their tasks. It is the body which grades the work of judges and carries out technical appraisals. The professional activity of every judge must undergo evaluation at least once every two years. There is a dossier for each judge containing all the documents pertaining to his/her official situation. Apart from any disciplinary action, inspectors can administer a warning and this will appear in the dossier.

It's clear that the Office of Judicial Inspection plays a major role as regards all the rules relating to judges' careers. It also has the task of drawing up an annual plan for promotion and movement within the judiciary.

This administrative department, with these wide powers at its disposal, is only one of the administrations of the Ministry of Justice. Article 78 of the law on the judicial authority provides for the setting up of an authority to inspect the judiciary within the Ministry of Justice and enables the Justice Minister to establish the regulations of the judicial inspection with the agreement of the HJC.

Such a clause can only serve to compromise the independence of the judicial authority because it grants the Ministry of Justice, a member of the executive authority, powers of control over the administrative department charged with supervising judges. It sanctions the executive authority's interference in the judicial authority's internal affairs.

To compensate for these failings, the plan put forward by the Judges' Club favoured HJC guardianship over the Office of Judicial Inspection. Judges' professional activities should only be inspected by an independent authority.

Finally, it is important to emphasise that the problem surrounding judicial inspection only relates to judges from the civil and criminal courts. Indeed, for judges from the administrative jurisdictions, the problem doesn't arise; the Ministry of Justice exercises no authority over the composition or functioning of the technical inspection administration (article 99 of the Law on the State Council). If an appraisal made by this department is contested by the judge being appraised, it falls to the Special Council to settle the matter (article 102).

C. The executive authority and the issue of rulings not being executed

a) The problem

As was pointed out at the European Court of Human Rights in its 1997 *Hornsby* ruling, the right to take a case to court would be illusory if a final and binding judicial decision remained inoperative to the detriment of one party. The problem of legal decisions not being carried out is one of the great challenges for Egyptian Justice. The judges are aware of this and see therein an attack on their independence because the executive authority, by refraining from carrying out their decisions, cancels out years of work on the part of the judges and the parties involved.

But there is not only the "independence of justice" aspect. The failure to execute legal rulings also damages the effectiveness of the judiciary. What is the use of spending years sitting in courts if, in the end, legal decisions are not acted upon? This anomaly, if a survey is to be believed⁷⁸, is one of the principal problems facing the Egyptian judiciary. It is perhaps the only problem that is pointed out equally by judges, lawyers and citizens. Citizens are aware of it and the fear here is that they are dissuaded from taking cases to state courts because they are afraid of wasting their time. It's interesting to note that even some of the exceptional courts' decisions are not being respected.

To delay acting upon legal rulings, the executive authority resorts to an unhealthy practice which consists in bringing appeals against decisions of the administrative jurisdictions before judicial jurisdictions. These appeals automatically bring legal decisions to a standstill and deprive them of their effect.

This practice has been condemned by the CJB. According to the CJB, given that the judicial and administrative orders of jurisdiction are independent, it is not legally permissible to appeal against the decision of one type of jurisdiction before the court of a different type.

Sometimes, the executive authority refrains from executing legal rulings whilst simultaneously escaping the sanctions (imprisonment) provided for in article 123 of the Egyptian penal code for any government official who voluntarily refrains from executing a legal ruling. Several ministers, important ministers especially, are members of Parliament and indeed this gains them immunity from judicial proceedings. For example, the Minister of the Interior will never see article 123 of the Penal Code applied to him because he enjoys parliamentary immunity. In view of this situation, the beneficiary of a ruling is left with nothing, and years spent in court turn into a material failure with no decision being acted upon.

⁷⁸ This survey comes from a book on justice in Arab countries, originating from several studies carried out under the aegis of the Arab Center for the Development of the Rule of Law and Integrity (ACRLI), based in Lebanon. The work is entitled "Judiciary in the Arab Countries: monitoring and analyzing" and can be downloaded online at www.arabruleoflaw.com/publicationsListing.aspx?categoryID=1&postingID=327. The results of the survey can be found on page 70.

b) Recent developments

1. Administration for the enforcement of judgements

Law number 76 of 2007 modifying the Code of civil procedure (CPC) created an administration for executing judgements. This added to the system of enforcement judge that the CPC has provided for since 1968. The executing administration replaces the judge in terms of some competences but it does not do away with the judge⁷⁹.

Executing administrations have been set up within the jurisdiction of each High Court. Branches can also be set up within the jurisdictions of the district courts if so decided by the Minister of Justice (article 274 of the CPC).

The executing administration is presided over by an appeal court judge, assisted by a sufficient number of appeal judges seconded by the Justice Minister with the agreement of the HJC, and High Court judges chosen by the general assembly of the court.

Comment [s9]: What amounts to a »sufficient no » ?

The specialist family, economic and labour courts have a specialist judge or executing administration⁸⁰.

2. Bailiffs responsible for executing judgements

Law number 76 of 2007 created a new category of bailiff responsible for executing legal decisions (*Mo'aweny Eltanfiz*).

They are competent to enforce procedures for carrying out judgements and executory legal decisions under the control of the executing administration set up within the jurisdiction of each High Court.

II. Techniques seeking to by-pass independent justice or restrict its field of action

A. Techniques seeking to restrict the field of action of independent justice

Taking away the ability of courts to hear certain significant cases and the existence of exceptional laws are amongst the techniques which seek to restrict the field of action of independent Justice.

a) Taking away the ability of courts to hear certain cases

At times, the Egyptian executive authority attempts to arrange things so that its activities elude the control of other authorities. Parliament, as it is controlled by the executive authority, is often by-passed.

In the absence of any real opposition in Egypt, the judicial authority alone is capable of exercising any control over the deeds of the executive authority. The executive authority attempts to protect certain significant cases from the courts' intervention.

Article 76 of the Constitution, as recently modified, prohibits courts from recognizing any appeals against the decisions of the Presidential Election Commission. This disposition contradicts article 68 of the Constitution which prohibits the immunity of administrative decisions from the control of the

⁷⁹ T. Dowidar, *La théorie générale de l'exécution*, [General Theory of Execution] 2010, p. 164

⁸⁰ T. Dowidar, *op. cit.*, p. 158

judiciary. It is also contrary to article 3 of the BPIJ which states that “the judiciary shall have jurisdiction over all issues of a judicial nature”.

Article 93 of the Constitution states that Parliament alone is competent to judge on the validity of its members’ mandate and that the Court of Cassation is competent to investigate invalidation requests submitted to Parliament, at the request of its president. The same article adds that the result of the investigation and the decision reached by the court will be put before Parliament and that the judgement can only be invalidated upon a decision of the Assembly, adopted by a two-thirds majority.

This poses the question as to why the Court of Cassation would settle for delivering non obligatory rulings. Firstly, it is not its role. Secondly, the separation of powers is not a strong enough argument for the Parliament to escape the conclusions of the Court of cassation regarding the illegality of its members’ mandate. If the Member of Parliament whose mandate is being contested belongs to the parliamentary majority, there is hardly any chance that the decision of the Court of Cassation will be followed, assuming it is requested.

In conclusion, it can be said that article 93, like article 76, are in contradiction with article 68 of the Constitution which guarantees the right to be heard by a judge.

Whilst on this subject, we should point out that, according to article 11 of the Law on the State Council, sovereign acts do not fall within the competence of administrative jurisdictions⁸¹. Recently, regarding a case involving exporting natural gas to Israel, the government ruling was deemed a sovereign act which did not come under the jurisdictional authority (*welaya*) of the Egyptian courts.

Comment [s10]: Can you ask authors for the source - so you can put the authority for this assertion in a footnote ?

b) The existence of exceptional laws limiting judicial independence

1. From the Emergency Law...

Egypt, like the majority of States, has emergency laws. What distinguishes Egypt from other countries is that the declaration of a state of emergency, normally an exceptional situation, has become the norm. Indeed, since 1981, Egypt has been governed by a state of emergency. This has certainly had consequences for human rights and also for the functioning of the judiciary. Every three years, the Egyptian Parliament renews the state of emergency.

The Emergency Law puts in place various exceptional courts such as the state security courts. In accordance with article 6 of law n° 25 of 1966 on military Justice, the State of Emergency authorises the referral of civilians to military courts.

The question of the constitutionality of the Emergency Law has been posed for several years at the SCC. An answer to this question cannot be relied upon any time soon.

2. ... to the anti-terror law?

Since the attacks of 11 September 2001, there has been tremendous enthusiasm for anti-terror laws, at the expense of civil liberties and human rights, in several countries, some of which have a reputation for protecting human rights.

The Egyptian government decided to ride this wave by declaring that an anti-terror law was being devised to replace the Emergency Law. Time and again, Mofid Shehab, the Minister in charge of drawing up this law, declared that the new anti-terror law would ensure a balance between protecting the rights of individuals on the one hand, and protecting public safety against the threat of terrorism

⁸¹ For an analysis of positive law, see M. Abou El Einein, “Les actes politiques et les actes de souveraineté devant le juge du droit public : une excuse pour échapper au contrôle juridictionnel” in *Les juges et la réforme politique*, [“political acts and acts of sovereignty before the public law judge: an excuse to elude jurisdictional control” in *judges and political reform*] p. 157

on the other. However, we are afraid that the new anti-terror law will include clauses attacking basic rights. Underlying this fear is the 2007 amendment to article 179 of the Constitution. This article states that, henceforth, "the State shall work to safeguard security and public order in the face of the dangers of terrorism. The law shall regulate specific measures relating to the methods of investigation necessary to combat these dangers. The fight against the dangers of terrorism, all conducted under legal control, cannot be impeded by the dispositions of articles 41 paragraph 1, 44 and 45 paragraph 2 of the Constitution. The President of the Republic can refer any terror crime to any judicial body mentioned in the Constitution or the law".

So the Constitution has been modified to conform to the new anti-terror law! This begs the question of whether the Egyptian Constitution really is at the apex of the hierarchy of norms when it is substantially amended in order not to contradict a proposed exceptional law.

Judges, like civil society, are right to ask questions about the Government's strong proactive stance when it comes to cutting back public freedoms, when the Constitution is often presented by the same Government as a sacred, untouchable document - especially in relation to article 77, putting no limits on the number of times the President of the Republic can be elected...

Article 179 means in concrete terms that, with the anti-terrorist law, the prior judicial authorisation, hitherto required by the three articles⁸² cited in article 179, will no longer be necessary in order to arrest and detain a person (thus paving the way for arbitrary arrest and detention), to carry out a search or violate the secrecy of communications. In line with article 179, the President of the Republic can send civilians for trial before any court of his choosing. This could be an existing exceptional court or a new court created by the anti-terror law or any other law⁸³.

As various observers have pointed out, the new article 179 of the Constitution seeks to "normalise" the state of emergency. States of emergency are, by their nature exceptional, and are supposed to be temporary; and yet, the Egyptian State of Emergency will become all the more entrenched when it is granted a constitutional basis protecting it from any possible action before SCC.

Two consequences are to be feared in relation to the judicial authority's independence: (1) new exceptional courts being set up by the anti-terror law, and (2) especially, the normalisation of exceptional laws. This would mean that normal courts, obliged by the letter of the Constitution, will have to apply a law violating human rights whereas before it was only exceptional courts that applied this type of law. We are afraid that the methods used for terror cases will affect normal cases. A person subject to trial will be entitled to his "natural judge" but not to his "natural rights".

Comment [s11]: I don't agree with this conclusion. Need to clarify with authors. My conclusion is that the person is neither entitled to his natural judge nor his natural rights.

B. Techniques seeking to by-pass independent justice

There are two different ways of by-passing independent justice: by-passing independent courts, and by-passing independent judges.

⁸² Art. 41 (individual freedom as a natural right), Art. 44 (sanctity of home) and Art. 45 (inviolability of the private life of citizens).

⁸³ Awad Mohamed, "Une lecture impartiale de l'article 179 de la Constitution", *Revue AlQodat* ["An impartial reading of article 179 of the Constitution", *AlQodat Journal*], year 24, October-December 2008, p. 15

a) How independent courts are by-passed or the proliferation of exceptional courts⁸⁴

Exceptional courts prevent persons on trial from being judged by their natural judge, a right guaranteed by article 68 of the Egyptian Constitution.

The legislative authority has created various exceptional courts which were listed in the introduction. These courts enable "sensitive cases" to avoid going through the normal courts; in a way this constitutes an admission that the normal courts are independent because the political authority deems it necessary to sidestep the normal courts in order to secure the rulings it wants⁸⁵.

Comment [s12]: I don't agree with this – exceptional courts just make it more certain that the executive will achieve the result it wants!

Exceptional courts suffer from several anomalies reflected in their composition and procedures, resulting in unfair trials. These courts are often composed of people who are not professional judges and who do not, therefore, offer the benefit of judges' guarantees of independence or their experience (e.g. political parties court, military courts). Proceedings are often very quick, if not cursory.

We will look at three courts: State security courts, military courts, and the Political Parties Court.

1. State security courts

We immediately need to distinguish between normal, ordinary state security courts and those set up in accordance with emergency law. The former having been abolished in 2003, we are only dealing here with the latter.

First, we need to clarify that these courts are "constitutional"⁸⁶. They are referred to in article 171 of the Constitution, which states that the law specifies the competences of the state security courts and determines the conditions which have to come together for people to bring cases before them. Law n°162 of 1958 on the State of Emergency provides us with the details regarding the composition, functioning and competences of these courts.

These courts are in operation when a state of emergency is declared. In Egypt there has been an uninterrupted state of emergency in force since 6 October 1981, the date of the assassination of the former president of the Republic, Anwar El Sadat.

These courts should be abolished when the state of emergency is lifted once the anti-terror law has been decreed.

i) Composition

We need to distinguish between the primary state security courts and the high state security courts.

The former, which hear less serious crimes, are composed of a High Court judge to which the President of the Republic can attach two officers of the armed forces (article 7).

The latter are composed of three appeal court judges, to which the President of the Republic can attach two army officers.

⁸⁴ Exceptional jurisdictions are a subject which deserves expounding at length. Its presentation here will be basic. For more details, see N. Bernard-Maugiron, "Les tribunaux militaires et juridictions d'exception en Egypte" Lambert E. (dir.), *Les tribunaux d'exception – étude comparée*, collection «Actualités francophones», Editions des archives contemporaines, AUF, pp. 191-230. ["Military courts and exceptional jurisdictions in Egypt" in Lambert e. (dir.) *Exceptional courts – A Comparative Study*, collection "Francophone News"]. This article can be downloaded from: <http://recherche-iedes.univ-paris1.fr/spip.php?article267> See also the article by H. Abou Se'da published in the collection cited above on "judges and political reform" and the article by A. Seif el-Islam in "Egypt and its laws".

⁸⁵ Some see in this a mistrust of certain judges who would be close to the Muslim Brotherhood.

⁸⁶ The courts provided for in article 171 might be considered the ordinary state security courts that were abolished in 2003. According to this interpretation, the state security courts would not have any constitutional basis. However the counter-argument could be made that, because of the generality of terms used, where the Constitution does not make a distinction, there is no reason to do so.

The members of these courts are appointed by the President of the Republic after consultation with the Justice Minister (when it comes to appointing a judge) or the Defence Minister (when it comes to appointing an officer). It appears that the President of the Republic has never made use of this right (attaching military personnel to judges)⁸⁷.

Article 12 specifies that the rulings of these courts cannot be appealed against, which constitutes a violation of the principle of a double degree of jurisdiction. The same article also states that decisions are only final after authorisation, endorsed by the president of the Republic.

Comment [s13]: « double degree of jurisdiction » - he needs to explain what is meant and whether or not it is protected in domestic law. There is no obligation in international law.

ii) Competences

These courts have two principal competences.

Firstly, they are generally competent to hear offences on the orders⁸⁸ of the president of the Republic or his deputy, orders which were adopted within the framework of implementing article 3 of the 1958 Emergency Law.

Secondly, they hear crimes referred to them by the president of the Republic or his deputy in accordance with article 9. Any offence can be referred. In accordance with this article, a presidential military order n°1 of 22 October 1981 transferred certain common law crimes to these courts. In this event, the state security courts compete with the ordinary courts.

The president of the Republic has numerous powers in relation to these courts' proceedings, even if these are not always exercised. His powers undermine the state security courts' institutional independence.

The same criticism applies to the military courts.

2. Military Courts

Like the state security courts, the military courts have a constitutional basis. Article 183 of the Constitution makes provision for the law to organise military Justice and specifies its courts' competences within the framework of the principles set out in the Constitution. Military Justice is regulated by law n° 25 of 1966. This law was amended by law n° 16 of 2007, stating that military jurisdictions are independent (new first article) and that military judges are independent (article 3). Generally speaking, the new amendments have attempted to normalise military Justice by comparing it to ordinary Justice.

The main function of military courts is to hear offences committed by military personnel. On this point, Egypt is no different from the majority of countries.

The Egyptian specificity is that civilians can be brought before these exceptional courts, where the judge does not enjoy the same guarantees of the independence as an ordinary court's judge. This is a situation made clear when we look at these courts' composition and competences.

i) Composition

Unlike the state security courts, the military courts are exclusively composed of military personnel.

Article 43 describes the different types of military tribunals. There are 4 of them: the Superior Court for the Military Power, the Higher Military Court, the Central Military Court for Crimes, and the Central Military Court for misdemeanours.

⁸⁷ M. Nour Farahat and A. ElSadeq, Report on the judicial system in Egypt, in *La situation de la justice dans le monde arabe*, [The situation of justice in the Arab world] 2007, p. 608. This comprehensive and in-depth report on the independence and effectiveness of the Egyptian judiciary was written within the framework of comparative research between several Arab countries carried out by the "Arab Centre for the Rule of Law and Integrity". The report can be downloaded from: http://www.arabruleoflaw.org/publicationsListing_ar.aspx?categoryID=1&postingID=311

⁸⁸ Which can be verbal according to article 3.

The role of the Superior Court for the Military Power is similar to the role of the High Court in relation to the lower criminal courts. The Superior Court is chaired by the highest authority of the military justice. Its decisions are rendered by 5 military judges.

The Superior Military Court is composed of three officers (article 44) or five (article 47) depending on the case.

The Central Military court is made up of one (article 45) or three (article 47) officers depending on the case. These military "judges" are selected from amongst officers of the armed forces (article 55) by the Defence Minister at the proposal of the Director of Military Justice (article 54). The latter, necessarily a lawyer, is also a government official at the Ministry of Defence.

Until recently, the law did not require anyone sitting at the military courts to have any legal knowledge. However, as some observers have pointed out,⁸⁹ it appears that in practice, people chosen to sit at the military courts did have legal training. A recent 2007 amendment states that military judges must now meet the conditions set out in article 38 on the law on the judicial authority, requiring legal training (article 3).

ii) Competences

The attributions of the Superior Court for Military Power need to be distinguished from the ones of the other military courts. The former, in accordance with article 43 bis of the Law on the Military Justice, are appeal courts and thus rule on the decisions rendered by the other military courts. This tribunal is also competent to re-examine the cases heard by the military Courts.

Regarding the other military tribunals, three types of competences can be distinguished.

In general, the competence criteria are subjective; it depends on who has committed the crime or who the victim is. Thus, military courts are competent to hear crimes committed by or against persons subject to military law, provided the crime was committed when military duties were being carried out. Members of the armed forces, prisoners of war and students at the military institutes and faculties, amongst others, are subject to military law.

At times, the competence criteria are objective. Article 5 of law n° 25 of 1966 states that military courts will be competent if a person commits crimes against security, of crimes against the interests of the armed forces. In line with the same article, they are also competent to hear crimes against military equipment, arms, munitions, documents and secrets.

The most questionable use of the military courts is without doubt when cases are brought before them on the basis of article 6. Paragraph 1 of this article authorises the President of the Republic to refer crimes against state security to the military courts.

Paragraph 2 of article 6 provides that it is to the President of the Republic, when a state of emergency is in force, to refer to military courts any crime punishable by the Penal Code or any other law.

Compared with paragraph 1, this paragraph is both more general and more specific. It is more specific because it only grants the President of the Republic the ability to refer civilians or service personnel to the military courts in a state of emergency. It is more general because any crime, even a common law crime, can be referred. The president can refer a category of crimes or particular cases. For such crimes, the president can choose between ordinary jurisdictions, state security courts or

Comment [s14]: Does the author mean « common law » or minor crime ? Or something else. I wasn't aware that there were such things as common law crimes in Egypt. Egyptian criminal law is modelled on the French system

⁸⁹ The aforementioned article by N. Bernard-Maugiron on exceptional courts, p. 217.

military courts. Article 6 contradicts article 68 of the Egyptian Constitution which states that every citizen has the right to be judged by his natural judge⁹⁰.

Despite the existence of this clear constitutional text, civilians are relatively often tried before the military courts. Members of the Muslim Brotherhood are frequently sent for trial before the military courts. Recently, several members of this movement – which is prohibited but tolerated – have been tried by a military court.

What human rights defenders are demanding in Egypt is – not the abolition of the military courts because these fulfil a legal function amongst military personnel – that these courts only hear cases relating to military personnel, i.e. and do not have the power to try civilians.

3. The Political Parties Court

The setting up of political parties is strictly controlled by law number 40 of 1977 on Political Parties. Several rather difficult conditions have to be met in order for a political party to be set up and for it to function⁹¹. Once these conditions have been met, a request for authorisation (article 8) is made to the Political Parties Affairs' Committee, a body composed of 3 members from the ruling party (president of the consultative assembly who also presides over this Committee, Minister of the Interior, the Minister in charge of Parliamentary affairs) and 6 members appointed by the President of the Republic (three senior judges and three public figures). Given the composition of this committee, authorisation is generally refused, especially when it comes to a political party that is likely to be genuinely politically active.

In this event, the solution is to lodge an appeal - within 30 days of the refusal - to request that the decision of the Party Political Affairs' Committee be annulled. This appeal is not brought before the State Council, the natural judge to which an appeal against an administrative act would go, but before an exceptional court. It has become the custom to call this court the "Political Parties Court".

Article 8 of the law on political parties of 1977, as amended by law 177 of 2005⁹², states that this court is presided over by the president of the State Council and composed of judges and an equivalent number of public figures chosen by the Minister of Justice after agreement by the HJC. In accordance with article 17 of the Law on Political Parties, this court is also competent to pronounce the dissolution of a party at the request of the political affairs committee.

It is hard to understand why administrative judges alone would be incapable of applying the law on political parties and why the addition of public figures is needed at the parties court. It is clear that the object of this court's non judicial composition is to enable some significant administrative cases to evade the courts' full control.

Comment [s15]: And I would add, to exert political control over others !

b) How independent judges are by-passed or the frequent changes to the retirement age for judges

Judges are not government officials, so the retirement age for government officials does not apply to them. In 2007, the retirement age for judges was raised from 68 to 70. To explain the frequent raising of this retirement age, appreciably higher in comparison to the common law retirement age, the government has said that the skills of experienced judges were required and that it would be a shame to do without their skills when the Egyptian legal system needed them so much. It is doubtful whether this official reason is the real reason for raising the retirement age for judges, for several reasons. Firstly, it's hard to believe that the government which has supported a law

Comment [s16]: I don't find this objectionable ; this is common practice elsewhere including the UK and USA. What about France ?

⁹⁰ Article 6 of law n° 25 of 1966 also contradicts article 5 of the BPIJ which states that "everyone shall have the right to be tried by ordinary courts using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts".

⁹¹ These conditions are mentioned in article 4 of the law on political parties.

⁹² One author has pointed out that a purely judicial composition would result in the creation of parties undesirable to the executive authority, hence the integration of public figures in the court. H. Abou Se'da, *op. cit.*, p. 260

preventing university lecturers from teaching after the age of 60 would wish to allow judges to pursue their careers until the age of 70; there is a patent lack of coherence between these two laws.

Secondly, and above all, it is a fair and honest assumption that the main reason for increasing the age of retirement for judges has been to keep certain judges at the apex of the high courts, meanwhile ensuring that other judges, whose views might not be appreciated by the executive authority are not promoted to the posts of presidents of the high jurisdictions.

The Judges' Club rejects this excessively high retirement age for judges. It is difficult at the age of 69 to fulfil the functions of a judge satisfactorily. In the view of the Judges' Club, anyone wishing to work beyond the age of 60 should not occupy an administrative post. If the real reason for raising the retirement age was a genuine need for the judges' experience, judges should be presiding over hearings, drawing up rulings; this is the way in which they should be passing on their experience to younger judges.

Comment [s17]: This is not clear. What is the point? What precisely should Js be doing to pass on their experience – ie what activities that are different from the ones they are currently engaged in?

This high retirement age causes a breakdown in equality between judges older than 60 and judges younger than 60. One judge has intelligently pointed out that since turning 60 he had only been on half pay because at 60 he was entitled to the pension to which he had contributed, a pension he should draw but did not.

Comment [s18]: This point is not clear

To resolve this problem, law n° 183 of 2008 allowed judges aged between 60 and 70 to combine their pension and their salary. This is a privilege accorded uniquely to judges.

III. The problem of the selection criteria for judges

An independent, effective judicial authority needs to recruit the best. To do this, selection criteria must not exclude one category of citizens who could make a positive contribution to the Egyptian judicial authority. Article 10 of the BPIJ states that: "Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory".

In Egypt, two types of discrimination are practised when it comes to selecting judges. Firstly, there is discrimination against women (A) in certain legal professions and secondly, there is positive discrimination towards the children of judges (B).

A. The problem of discriminatory criteria: Moving towards opening up the judiciary to women?

The problem of excluding women from the judiciary can be looked at in two different ways. Firstly, it can be looked at in terms of discrimination against women. Secondly, it can be looked at in terms of being an obstacle to the better functioning of the judicial authority. By excluding women from judicial posts, the judicial authority is being deprived of the skills and abilities it needs.

Since the advent of an Egyptian judicial system and until 2007, women were refused access to judges' posts although the regulations in force did not stand in their way. This poses the question as to the real reasons behind the refusal to grant women access to posts.

Be things as they may, recent developments have brought the problem of women's access to the judiciary to the fore of the current political and legal scene in Egypt.

a) Norms permitting women's access to judges' posts

Article 40, the Egyptian Constitution – often cited but quite rarely applied – enshrines equality between men and women. Egypt is also party to the Convention on the Elimination of all Forms of Discrimination Against Women. This was ratified by Egypt on 17 December 1981 by Presidential Decree n° 434 of 1981.

The Law on the Judicial Authority and the law in relation to the State Council do not specify that the position of judge has to be occupied by a person of the male sex⁹³. The SCC has ruled that the term "Egyptian", the condition for being a judge, encompasses both male and female Egyptians. Women acceding to judges' posts is more a matter of applying the law properly than amending it.

In spite of all the texts authorising – or at least not opposing – women's access to judicial' posts, established practice has been to misinterpret these texts.

b) Practices denying women access to judges' posts: moving towards a new development?

1. Unconstitutional practices

Until recently, no woman occupied the position of judge. Some women attempted to become involved in this profession but their efforts were doomed to fail. We should qualify this comment slightly, however. Women have, in fact, long had the right to accede to positions within the Administrative prosecution and the State Litigation Authority. However, although these organisations have been absorbed within the judiciary (wrongly so in our view), the women lawyers of the Administrative Prosecution, like the women lawyers of the State litigation Authority, are still not judges.

2. Recent Developments

In 2003, by Presidential Decree n° 26 of 2003, Tahani ElGebali was appointed the SCC's first female judge in the history of modern Egypt.

It took until April 2007 for her to be joined by other women. Indeed, against all expectations, Presidential Decree n° 95 of 2007 appointed 30 women judges chosen from amongst the 124 members of the administrative prosecution in the running for these posts. 12 women were appointed thereafter. From then on, there have been 42 women judges⁹⁴ in Egypt⁹⁵.

Recently, discussions have taken place within the State Council about opening the doors of the administrative jurisdiction to women. In a public advertisement on 28/8/2009, the State Council, still advertising for young male law faculty graduates, also advertised for female graduates to apply for the position of auditor. Apparently, this advertisement displeased judges in the State Council because they had organised a general assembly in order to air their opinion on the issue of women judges⁹⁶. It

⁹³ That said, some judges of the State Council, backed up by barely convincing texts, do attempt to demonstrate that the law on the State Council does not allow women to accede to the position of State Council judge. For example, article 73 has been invoked for this purpose. This article states that in order to be appointed to the State Council, one cannot be married to a foreigner. Some people maintain that the grammatically feminine form of « foreigner » used in this text is proof that the law on the State Council does not envisage a woman becoming a State Council judge. It should be pointed out that this text is no longer part of Egyptian legal arrangements since being judged anti-constitutional by the SCC in 1990. Nevertheless, some judges, such as a former president of the State Council, are quick to base their arguments on this nonexistent text in order to justify the incompatibility of appointing women judges with the law on the State Council.

⁹⁴ 43 judges including female judge Tahani ElGebali.

⁹⁵ For more details, see F. El Chazli, *Les droits humains de la femme entre les législations nationales et les conventions internationales* [Women's human rights between national legislation and international conventions], Dar Elgam'a Elgedida, Alexandria, 2010, p. 98 and following.

⁹⁶ It is regrettable that the State Council general assembly held a vote on the right of women to be a judge when there were other issues more worthy of a collective burst of energy (such as the issue of recruitment criteria being flexible for the sons of

was no great surprise – at least for those familiar with the Egyptian judiciary - when a vast majority of 87% voted against granting women access to judges' posts within the State Council. There were various reactions in the wake of this vote. Feminist NGOs demonstrated in front of the State Council building and spoke about a "dark day in the history of the Egyptian legal system".

The official reaction came from the Egyptian Prime Minister. He asked the SCC to interpret the Law on the State Council to determine whether the [grammatically masculine] term "Egyptian" mentioned in article 73 as a condition of appointment to the State Council, referred to male Egyptians alone or encompassed both male *and* female Egyptians. The SCC was also asked about which body was competent to recruit judges: was it the special council or the general assembly?

The SCC, through a ruling interpreting the law that was delivered on 14th March 2010, implicitly confirmed the right of women to become a State Council judge and deemed that the Special Council was the only body competent to recruit judges. Whilst some have seen a victory for women in this ruling, State Council judges have minimised the ruling's importance⁹⁷.

The significance of the crisis engendered by this vote will be discussed below.

Some observers regret that this opening up of the judiciary to women should have originated from the executive authority and not from the reforming tendency of judges, some of whom opposed the appointment of women. Some people say that⁹⁸ "women might end up being the main beneficiaries of the conflict between the executive authority and the Judges' Club, with the appointment of women judges perhaps having been decided upon by the government by way of retaliation against the presiding judges opposed to it".

3. The reasons why women are refused access to the magistracy by judges and society

Several reasons and arguments are put forward to explain the refusal of judges and Egyptian society to grant women access the judiciary.

There is the religious argument. According to some people, it would go against Islamic law for a woman to be a judge. This is not a position shared by everyone, notably by some religious experts⁹⁹ who believe, backed up by historical arguments, that women can be judges without any religious texts being contravened¹⁰⁰. Nor is the argument which allows discrimination against women shared by other countries¹⁰¹ whose populations are mostly Muslims and who do have women judges. Nevertheless, there are judges who reject appointing women judges by basing their arguments, at least officially, on religious grounds. In Egyptian society, this authoritative opinion is the main argument advanced in order to justify why it is impossible for a woman to be a judge.

There is the psychological argument, which posits that a woman is a sensitive creature unsuited to presiding over criminal courts. In terms of personal status affairs, she couldn't be impartial because she would often be biased towards the woman in a case. This argument is widespread in Egyptian society. Some judges think that admitting women as judges might be a means for the executive

judges). It is also regrettable that basic rights, guaranteed in the constitution, can be voted on by people who - let us not forget - have no democratic legitimacy. However, the general assembly vote can be put in a certain context. The State Council judges were unhappy about the Special Council deciding to open up the doors of the State Council to women without consulting the general assembly, the most democratic organ of the State Council. So the State Council judges' vote would not just have been a vote against women but also a vote against an attempt to undermine their independence by imposing a decision to which they were not party. Some judges regret that this aspect of the legal system's independence was not in evidence in the media. Be that as it may, whilst we understand the thought process of the State Council judges, we cannot share their position. If the fight for the independence of justice is a noble cause, it must not justify the taking of women's rights hostage. The battle will have to take place elsewhere.

⁹⁷ Alshorouk Journal, 15 March 2010. <http://www.shorouknews.com/ContentData.aspx?id=193462>

⁹⁸ N. Bernard-Maugiron, "Vers une plus grande indépendance du pouvoir judiciaire en Egypte" ["Moving towards the judicial authority's greater independence in Egypt"], RIDC, 2007, p. 104

⁹⁹ Notably, this was the position of Cheikh d'Al Azhar Mohamed Sayyed Tantawi deceased March 2010.

¹⁰⁰ The position of the Hanafite School, established for more than a thousand years

¹⁰¹ Like Tunisia, Algeria, Yemen, Sudan, Libya, Pakistan, Iran and Djibouti.

authority to protect itself from rulings that would otherwise go against it. Shying away from confrontation with the executive authority, Egyptian women would deliver rulings that the executive authority would welcome.

There is the conservative argument. This, in our view, is the most crucial. There are two aspects to it: material and formal. On the one hand, the conservatism of Egyptian society, of which judges are part, leads to a denial that women have any role to play in society. A woman's only job is to raise children and her place is in the home. Meanwhile, to be conservative simply means to refuse change, and if necessary, to resist it. Now on this point, Egyptian society serves as an example. Egyptian society has been stagnating for thirty years or so – even if some try to see as stability in this - and this has meant that any attempt to change things has been doomed to fail.

Alongside these “cultural” arguments, there are some more or less objective arguments.

Some people criticise the fact that women are not being recruited in the same way as men. When the 42 women were recruited as judges, the traditional recruitment process was not followed. In fact the women were recruited as presiding judges whereas men are obliged to work their way through the prosecution¹⁰². Moreover, the women judges were appointed in Cairo and Alexandria, leaving men with governorates further away from their places of residence. If this “positive discrimination” persists, associated with an increased number of women, men will be compelled to work in far-flung governorates.

Some judges point out that the working conditions are too difficult for women. The staff rooms (*Esterahat*) allocated to judges wouldn't be appropriate for women; nor would the working hours, often late because of deliberations, suit women. Some judges think that women should have the right to be judges but that circumstances would be against them. The reasons for denying women access to judges' posts wouldn't be legal or religious but to do with pure appropriateness (*Mola'ama*). This is the official position of many judges.

4. The State Council crisis: causes and solutions

By refusing to grant women access to State Council judges' posts, the State Council general assembly sparked off a crisis which, we feel, reveals several realities about Egyptian society. This is why it is interesting to examine the vote of the State Council general assembly, attempting to identify what caused the vote and avenues for reflection for resolving the crisis it generated.

i) The deep causes of the crisis

In our view, two deeper reasons¹⁰³ need analysing if we are to understand the causes of the State Council vote.

▪ The crisis in terms of women's rights

State Council judges are part of a slowed-down, conservative society, fearful of change. In this environment of opposition to change, any development being rejected is unsurprising.

Moreover, the women's rights issue especially is looked upon negatively, probably because the political authority, at its highest level, is very closely implicated. Although it is pursuing a policy that favours women's rights, the political authority has seriously damaged the cause, and for two reasons.

Firstly, promoting women's rights, to some extent, is just a formality. It involves a tiny minority of women and a limited number of rights. What about working class women and women in rural areas?

¹⁰² The executive authority might have deemed working conditions at the prosecutor's office too difficult and thought it better if women missed out this stage.

¹⁰³ We shall not be examining the legal aspects of this crisis here. It has been said that the legal texts do not go against appointing women. The legal arguments of those who are against women being appointed are, in our view, merely a pretext (at least, they are not the real reasons for denying women access to posts).

What about women's rights to free elections, to a good education system, to physical and mental well-being? There are women who are not bothered about the State Council vote, firstly because they think women need more basic rights and secondly, because they know that gaining access to high positions would mean confronting discrimination of a different type, class.

The second reason is that the women's rights cause has been sullied by Egyptian political life not functioning properly. Admittedly there have been advances, but they have not been made under the best circumstances. For example, the law on *Eikhul'* of 2000, a mechanism allowing women to bring about the end of marriage, was adopted by a Parliament whose composition, according to the SCC, was illegal. The quota of women at the Egyptian parliament was won by a constitutional referendum of 2007 that was organised without full judicial supervision and which introduced into the Constitution a reference to the anti-terror law. Also worth mentioning is the appointment of 42 women judges which was not preceded by any general debate. One can conclude that, even if women's rights have moved a step forward, the way in which this has happened has provoked people and even strengthened their aversion to the women's rights issue.

Admittedly, the laws are important, if not necessary, for any development in the situation but they must be preceded by and accompanied by a debate in society and by people being made aware of and educated about women's rights issues. By imposing laws without any debate, the executive authority has advanced some women's rights but at the same time it has created within Egyptian society a force of resistance to and rejection against any future advances. Not only judges are responsible for the fact that there are so few women judges; the political authority too is responsible. This is why, today, it might be said that the women's problem is less in relation to the State than to society.

▪ **The crisis in terms of the legal system's independence**

In the political authority's willingness to allow women to become judges, some people see an attack on the legal system's independence. Although we do not share this view, we should try to follow the judges' line of reasoning in order to understand it.

In fact, some judges say they didn't realise women judges would be imposed upon them without their having any say in the matter; it would go against their independence¹⁰⁴. We think this has to be understood in the context of two related issues. Firstly, there is the natural reticence that confronts women's rights in Egypt, mentioned above. Secondly, it is understandable that judges were utterly bewildered by the political authority, which had refused most of their demands for the legal system's independence and which did not always execute legal rulings, especially State Council rulings. In this context, we have to view the State Council vote against appointing women judges as just one episode in a long-lived confrontation between the judges and the political authority. It is regrettable that women's rights have been made the victim of this confrontation, but it cannot be denied that for many judges, the overriding issue is the independence of the legal system. It also explains why judges who had previously expressed themselves in favour of appointing women judges at the first general assembly¹⁰⁵ rallied around a majority position that went against appointing women at the time of the second general assembly.

As complex as the deep causes of the crisis as they may, it is important that we seek avenues of reflection in order to resolve it.

ii) Possible solutions to the crisis

Set in context, the position of the State Council judges is understandable, although we in no way share the same view. For the moment, we have to censure this position because it contradicts Egyptian Constitutional texts and Egypt's international engagements. We do, however, need to ensure that those who censure this position, whilst exercising a right to do so, are not being used by

¹⁰⁴ One might counter-argue that while judges are independent, they are still subject to the law and, of course, the Constitution.

¹⁰⁵ Considerations regarding the legal system's independence were present even at this first general assembly.

the political authority in its quest to deny the legal system independence¹⁰⁶. Moreover, rejecting the position of the State Council must be coupled with criticism of the political authority for bringing about a situation which has made women's rights very unpopular¹⁰⁷. In no event must the State Council judges alone be held responsible for this crisis.

From the time the State Council general assembly vote was announced until the time of writing, the majority of reactions on all sides were overly emotional and insufficiently rational. We should probably wait a while for people's views to calm down before we revive the issue by trying to set up a debate, not only with the judges but with the whole of society, not just on the question of appointing women to the State Council but more generally about the place of women in Egyptian society. This debate – we hope and believe – will lead to an internal ruling¹⁰⁸ on the part of the State Council judges in favour of admitting women to the State Council, and more generally, to a reconciliation of women's rights with the issue of the legal system's independence.

B. The problem of criteria not being properly applied: Moving towards greater transparency in the recruitment process?

The judicial authority's independence in relation to itself: It might seem a strange thing to do to examine the judiciary's independence in relation to itself. More common is to look at the independence issue in relation to others. The danger usually comes from outside: e.g. from the executive authority, and/or the legislative authority. However, the judicial authority must guard against abuses from within. Having a judiciary that is independent from other authorities but arbitrary in the way it functions does not constitute progress. The Egyptian judiciary must work on itself, especially in relation to the issue of selecting and recruiting new judges.

The Egyptian legal system enjoys a rather more positive image than other organs of the State. Nevertheless, public opinion levels three main criticisms at it: the length of time trials take, the fact that legal rulings are not executed and, what we are interested in here, the lack of transparency surrounding the procedure for recruiting judges.

a) Initial recruitment

As is the case with many professions in Egypt, the custom is for children to enter the same profession as their parents. It isn't uncommon to see a doctor's son become a doctor and a police officer's son become a police officer. Judges are not exempt, and many judges have "inherited" their father's careers - which wouldn't arouse any suspicions if the judges' sons recruited had obtained the best degrees as students. However, as far as we can tell, at times it's the father-son link that counts for more than the class of degree obtained. The only objective selection criteria required – class of degree – does not need to be met if the candidate is the son of a judge¹⁰⁹. These practices have arisen because the admission criteria are unclear. There is no specific exam which everyone has to

¹⁰⁶ According to some people, the political authority might have an interest in weakening the image of the legal system in order to justify attacking it. This crisis could be used, on both the international and domestic plane, to make the political authority appear to be the great proponent of women's rights in opposition to reactionary judges and society.

¹⁰⁷ For religious and cultural reasons, popular rejection of the women's rights cause cannot be blamed on the judges. Conservative public opinion has been caused by those at the helm of the cultural, media, religious and education policy in Egypt over the past few decades. This cannot be the responsibility of judges.

¹⁰⁸ In this regard, see F. El Chazli, "Les raisons non juridiques du refus de la nomination de la femme au Conseil d'Etat" ["non-legal reasons for rejecting the appointment of women to the State Council"], Al Ahrām journal, 19 February 2010, p. 11.

¹⁰⁹ A second class degree (mention "bien") is enough to gain entry to the public prosecutor's office and a first class degree (mention « très bien ») is required to gain entry to the State Council. Before the 2007 reforms, a pass grade was enough for the son of a judge. This special dispensation was not based on any legal texts but on practice justified by the fact that these judges' sons would have been brought up in a legal environment, which compensated for their poor degrees. This special dispensation is no longer possible.

take; there is just one interview ¹¹⁰ which, lasting 5 – 10 minutes, is not long enough to put candidates properly through their paces.

The negative consequences of these practices are various. Firstly, it constitutes a breakdown in equality, with citizens being treated differently in a way that cannot be justified. Candidates in possession of good degrees but who have been rejected because they do not have the right family connections or the right contacts will find it difficult to comprehend such discrimination.

Secondly, people who do not possess the right qualities and competencies will accede to positions they don't deserve and won't be able to exercise their noble profession as well as this could be done. The legal system's effectiveness and the people who go before the courts will suffer as a result.

Above all, however, a judge, who is supposed to be independent and fight corruption, will be badly placed to do so if he himself has landed his post on the basis of corruption. He might, statutorily, be independent from the executive authority, but he will be dependant on corruption, which is also very damaging for the legal system's independence and impartiality.

A call for much-needed internal reform here was not one of the reforming judges' priority demands.

Paradoxically, it was the government which took the reforming initiative and, with law n° 17 of 2007, set out that to be appointed to the post of deputy public prosecutor, a candidate must have obtained a second class degree at least (article 38 on the law on the judicial authority).

This - welcome - reform has been seen as being motivated by the government's desire to weaken the position of the reforming judges. By taking this retaliatory measure, the government would set all judges against the reforming judges. The reforming judges, with their confrontations with the government, would have led the government to "avenge" itself against the judges and punish them by taking away one of their privileges.

Meanwhile, some judges find it very difficult to accept this strict new rule governing the selection of judges. The current president of the Alexandria Judges' Club, Ismail AlBassiouni¹¹¹, wished that the profession of judge was "inherited" because judges' sons have grown up in a "judicial environment", affording them a certain wisdom which rendered them more suitable to exercise the profession of judge. Therefore he suggests introducing a *quota* for judges' sons¹¹².

From now on, new judges will be selected in a way that is more transparent and apparently, without exceptions.

Should it be demanded that new judges have to pass an exam and compete to improve selection? We think not. Whilst the current system relies solely on the result of a degree obtained over four years at university, it seems the less arbitrary option because it leaves the least room for assessment on a personal level. This is why it is probably the fairest way of doing things and should be preserved.

b) Lateral recruitment

Two problems, admittedly less important than the problem of favouritism, have still not been resolved. These are the quasi-automatic admission of police officers to the judicial body and the ongoing refusal to appoint university lecturers and lawyers to the posts of judge or deputy public prosecutor (called an outside tour).

For many years, the HJC has accepted applications from police officers for the post of deputy public prosecutor on the grounds that they have had legal training. It may be the case that some of them

¹¹⁰ The interview is a group interview and not an individual interview, speeding things up and thus accentuating the interview's superficiality.

¹¹¹ This judge is not part of the reforming tendency.

¹¹² AlMasry Alyoum journal 31 December 2009. The article can be read at www.almasry-alyoum.com/article2.aspx?ArticleID=238534&IssueID=1636

have enough legal knowledge for the post but there are still two problems. Firstly, it is doubtful that the majority of police officers have a solid enough legal knowledge and understanding, given that their training revolves less around the law than the training offered by the University law faculties. Secondly, police academy training, based on hierarchy, obedience and carrying out orders, is hardly compatible with the liberal and independent thinking that a judge should display.

Whilst the judicial body has opened up to police officers, there has been reluctance to welcome university lecturers and lawyers into the judiciary.

In fact, article 41 on the law on the judicial authority states that lawyers and Egyptian university law lecturers can be appointed judges. Article 47 requires that the percentage of lawyers appointed to the post of High Court judge must not be less than a quarter of the number of judges appointed. As for the post of High Court president or appeal court judge, the percentage of lawyers appointed must not be less than a tenth of judges appointed.

These articles have gone unheeded for years¹¹³; the HJC has not appointed any lawyer or university professor to the post of judge or public prosecutor. Some people emphasise the importance and necessity of this type of lateral recruitment; it can breathe fresh air into the judiciary and bring in new ideas¹¹⁴. The HJC's refusal to appoint lawyers and lecturers represents a certain disdain on the part of the judges towards lawyers, the expression of an entrenched corporate mentality even.

Judges should show greater openness on the issues surrounding the recruitment of judges for the benefit of the Egyptian judicial system.

IV. The infringement of judges' rights and freedoms

The infringement of judges' rights and freedoms can also constitute an infringement of the judicial authority's independence. It is so when freedoms such as freedom of expression or association are infringed upon. We should look at how individual rights are infringed upon (A) before we examine how collective rights are infringed upon (B).

A. The infringement of individual rights

The infringement of judges' rights can relate to their freedom of expression or their freedom to travel. It can happen during disciplinary procedures.

a) The infringement of freedom of expression

Before they are judges, judges are human beings who enjoy various human rights. The BPIJ points this out in its article 8, which states that "in accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression [...]; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office as well as the impartiality and the independence of the judiciary". This article tells us that freedom of expression is the principle and that the only restriction placed upon this freedom would be restraint on the part of the judges to preserve their impartiality and independence.

¹¹³ The president of the Egyptian Bar, in an interview with the President of the Republic, requested that article 47 of the law on the judicial authority be respected. Almasry Alyoum, 28 December 2009 consulted on 28 December 2009 at www.almasry-alyoum.com/article2.aspx?ArticleID=238246&IssueID=1633

¹¹⁴ M. Nour Farahat and A. ElSadeq, *op. cit.*, p. 659

The issue of judges' freedom of expression has been hotly debated since 2005 for two reasons. Firstly, there were numerous elections in 2005 during which electoral frauds were committed. Some judges, responsible for supervising the elections – at least officially – wanted to denounce the electoral frauds in order to make it clear to society that they were not responsible for them and moreover, that they were unequivocally opposed to falsifying the wishes of the electorate.

Secondly, some judges, tired of their words falling upon the deaf ears of the government and parliament, controlled by the government, thought they would go for it and try to get their voices heard not only by the political authority but also by the whole of society at a time when certain "political bubbling-up" were being talked about in Egypt.

With these events happening at the same time, certain judges decided to exercise their freedom of expression, using print media, audiovisual media, having sit-ins, etc.

Thus the question arose of what restricts a judge from expressing himself freely, or in more concrete terms, whether a judge has the right to appear on various television channels, and whether the Judges' Club has the right to invite the media to its general assemblies.

The official response of the HJC and the government press was negative on the grounds that, by talking to the media, the judges were being political. Article 73 of the law of 1972 states that judges are prohibited from carrying out any political activity. Defining what political activity might be has turned out to be very difficult.

For the government and its press, the fact that judges had gone to the media to publicise their demands, the fact that they had conducted sit-ins and organised meetings at the Judges' Club with national and international political groups, constituted political activity prohibited by law. It was argued that by going to the media and adopting a critical discourse with the government, judges would diminish their "prestige" and damage their image in Egyptian society.

As for the judges, they didn't just sit with their arms folded in the face of government attacks; they defended their freedom of expression. Firstly, they denied that they were being political because, in their opinion, politics meant belonging to a political party or standing in national or local elections. In addition, the judges' demands did not just relate to themselves but to the well-being of the whole society; in the words of the Judges' Club spokesperson, the law on the independence of the judiciary guarantees the citizen dignity and serenity.

Little by little, judges have begun to assert their right to *speak* in the political arena because they are after all, citizens who enjoy the freedom of expression guaranteed by the Constitution and who have the right to say what they think about the issues that concern them. Some judges have made reference to international instruments such as the BPIJ, which guarantee judges' freedom of expression as long as it preserves "the dignity of their office and the impartiality and the independence of the judiciary" (article 8).

For some observers, such as the former vice-president of the State Council Tareq ElBishri, the judges' demands, especially their demands in relation to supervising elections, cannot be regarded as political. The Constitution ordered judges to supervise elections; therefore, demanding better conditions for that supervision could not be deemed a political demand unless supervising elections in itself was deemed a political activity.

Finally, recent events have shown that some judges do not even seek to justify the fact they are speaking out politically; some have even gone further than the framework of their demands (proper supervision of elections and a new law on the judicial authority's independence) to speak out about general themes¹¹⁵ such as the lack of democracy and the lack of freedom of expression in Egypt. It is worth pointing out that some judges have not minced their words in relation to the government.

¹¹⁵ For example, Judge Khodeiry, in an article published in *Almasry alyoum* on 15\6\2006, wondered – alluding to Ahmed Nazif, the Egyptian Prime Minister – how a person with no political experience could be appointed prime minister, the most important position after the post of President of the Republic ; the lack of democracy and lack of transparency which prevailed in Egypt were also denounced.

From now on, judges from the reforming tendency giving interviews in the media will be common. Going so often to the media has perhaps had a negative impact on the reforming tendency of judges, as we shall clarify in part three.

b) The infringement of judges' freedom to travel

For a judge to travel abroad, he needs what has come to be called a "yellow slip", official authorisation, without which he cannot leave Egyptian soil. Recently, the EMHRN invited two Egyptian judges, one of who is vice-president of the Court of Cassation, to attend a meeting in Brussels on the independence of the legal system. In accordance with Egyptian law, the judges applied for the necessary authorisation but the HJC refused to grant one of the judges' permission. The other judge received no response and therefore could not travel to Belgium.

In an open letter¹¹⁶, on 7 February 2008, addressed to the Egyptian authorities, the EMHRN protested against this decision.

More recently, a judge was unable to travel to Jordan to take part in a conference on the HJCs in Arab countries. The president of the appeal court from which he hailed, felt that he could only permit the judge to travel after consulting the HJC. He did this knowing full well that the conference would be over by the next meeting of the HJC¹¹⁷.

c) The infringement of the right to a fair trial in disciplinary procedures

The nobility of the judge's office does not prevent disciplinary action from being taken against him if it turns out that he has committed a disciplinary misdemeanour. The disciplinary procedures system is very important in guaranteeing the legal system's independence. When abuses and misdemeanours are punished, the judiciary's effectiveness increases and the image of the legal system within society improves. However, if sufficient guarantees are not in place at disciplinary proceedings, proceedings may be hijacked for other ends.

Article 17 of the BPIJ enshrines the judge's right to a fair disciplinary hearing and states that "a charge or complaint made against a judge in his/her judicial or professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing". Article 20 makes an important precision relating to the double degree of jurisdiction, stating that "decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings".

It is doubtful whether Egyptian law wholly conforms to the BPIJ. Indeed article 99 of the law of 1972 states that it is up to the public prosecutor to bring disciplinary action, at his own initiative or at the initiative of the Justice Minister. This might be deemed problematic given the relative freedom that the President of the Republic has in appointing the Public Prosecutor.

As regards disciplinary procedure, we should point out that the 2006 amendments introduced the ability to appeal against the rulings of the disciplinary council at the high disciplinary council¹¹⁸. The Judges' Club levels two main criticisms against the current disciplinary procedure.

Firstly, it wants an amendment to article 106 prohibiting judges from being represented by lawyers. The Judges' Club believes that the right to a lawyer is a right guaranteed by the Egyptian Constitution. Secondly, judges are demanding an amendment to article 103, whereby a judge is considered to be on enforced leave until disciplinary proceedings against him come to an end.

¹¹⁶This is an open letter and can be read at www.euromedrights.net/pages/511/news/focus/50987

¹¹⁷ On this issue, see the article written by vice-president ElGheriany on "the independence of the High Judicial Council" presented within the framework of the similar conference.

¹¹⁸ Composed of, amongst others, certain HJC members like the President of the Court of Cassation (article 107).

Admittedly, the judge retains all his financial rights as proceedings unfold but being forced to stop work could be viewed as a punishment given that no case has been examined, and moreover, that culpability is unproven. This goes against the presumption of innocence.

One case illustrating how the disciplinary procedure is being used as a political instrument is the case of Bastawissi and Mekki. These judges, who spoke out against electoral frauds, were brought before the Council of Discipline. The Council took the view that by speaking out against the judges involved in the electoral frauds, the two had tarnished the image of judges and the legal system, for which they deserved to be punished. The Council of discipline found one of the judges guilty and the other innocent.

B. The infringement of collective rights: the question of the right of association

Judges' right of association is a right with recognized legal value, the practical necessity of which is proved and illustrated by the experience of the Judges' Club.

a) The legal value of the right of association

Different legal instruments recognize the importance of the right of association. The ICCPR, in its article 22-1 states that "everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests". Judges, like all other groups of people, have the right to associate to defend their interests.

However the right of association also has its place in legal instruments pertaining specifically to judges. The BPIJ proclaim in article 9 that "judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training, and to protect their judicial independence". According to this article, the practical importance of this right is understood.

b) The importance in practice of the right of association

The right of association is not an ends but a means of turning into a reality certain objectives specified in the BPIJ. Firstly, the right of association is a means of defending professional and personal interests such as salary increases and the sale of legal books at reduced prices; it is also a way for judges to forge links of fraternity and solidarity, facilitate gatherings and share ideas. This role has always been fulfilled by the Judges' Club, be it controlled by the so-called reforming tendency or by other tendencies.

Secondly, in the words of the BPIJ, the right of association serves to "protect the independence of the judiciary". In this regard, judges can be seen to diverge. The reforming tendency accuses other tendencies of wishing to transform the Judges' Club into a mere social club and simply a place for judges to meet, and of trying to ensure that the Judges' Club doesn't serve as the headquarters for promoting and protecting the legal system's independence. When the reforming tendency was at the helm of the Judges' Club, the Club turned into a bastion of the legal system's independence.

The right of association offers many advantages for the protection of the judicial authority's independence. Compared to individual freedom of expression, it has the advantage of protecting a judge who might otherwise hesitate to take centre stage because of his special position. The collective aspect of the right of association complements and reinforces freedom of expression.

Recently, at the initiative of some Egyptian judges, an appeal was launched to create an Arab union of judges. The goal of this association would be to reinforce links between different Arab judges and to share experience and good practice.

c) Concrete problems arising from the experience of the Judges' Club

1. Legal problems: The Judges' Club submitting to the Egyptian Law on Associations

In Egypt, associations are regulated by a law of 2002. The Judges' Club almost yielded to this law but, rightly, rejected it. In fact, the purpose of the 2002 law is not to encourage associative work but rather to prevent associations from being created and to impede the functioning of associations once they have been set up.

If the Judges' Club came to be under the guardianship of the Social Affairs Ministry, there would be various detrimental consequences for the independence of the legal system. The ministry might interfere in elections and dissolve the administrative council of the Judges' Club.

2. Financial problems: Funds blocked by the Justice Minister

During confrontations between the political authority and the Judges' Club in 2005 – 2006, the Justice Minister tried to exert pressure on the Judges' Club, blocking subsidies from the Ministry of Justice to support the activities of the Judges' Club. These activities were numerous and diverse, including, for example, providing loans for judges to buy cars and apartments. Such services and advantages provided by the Judges' Club compensated for the judges' low salaries, and this is why judges were attached to them.

In order to cope with this financial crisis, the Judges' Club had to increase members' subscriptions; the decision to do so was contested by some judges and later annulled as a result. Currently, the Judges' Club receives subsidies from the HJC.

It is also worth asking whether financial issues haven't had an influence over the result of Judges' Club elections. This isn't to say that the political authority has "bought" the judges; it just means that many judges were more sensitive to financial issues – issues which affected them directly – than more general issues about the legal system's independence.

V. Lack of democracy in organising matters of justice or the concentration of powers in the hands of the jurisdictional presidents

Because judges are part of Egyptian society, they are familiar with what plagues it. Democracy in Egypt is deficient and power is centralised in the hands of presidents of the Republic. This situation is also true of the courts. We need to distinguish between two scenarios.

a) Concentration of powers based on the law

Firstly, the law grants various unilateral prerogatives to the presidents of the courts. For example, article 94 of the law of 1972 grants important powers to the presidents of the courts, who can administer warnings to the judges attached to their courts, at their own initiative or upon the decision of the general assembly. In accordance with article 99 of the same law, the court president can make a proposal to the public prosecutor that disciplinary action be taken against one of the judges of his court. It falls to the president of the Court of Cassation to propose to the HJC the names of judges who will be seconded to the court's prosecution.

All these prerogatives would be entirely normal if they were shared by the general assembly of a court or if the president was chosen collectively. The collegiality principle must not only reign in the ruling of disputes; it must also reign in the way the courts are run.

b) Concentration of powers through convention

Secondly, certain anti-democratic practices can be observed in the way the courts are run. It often happens that a court's general assembly delegates all or some of its powers to its president. The powers delegated to him are numerous, involving how the different chambers are composed, changing their competences, and above all controlling how cases are distributed. Recently, and in an effort to modernise the legal system, it appears that cases have been distributed electronically. This objective way of distributing cases has the effect of reducing the stranglehold of a court's president and contributes to greater transparency in the way cases are handled.

These legally and conventionally extensive powers have to be shared with the general assembly of the court. The demands of the Judges' Club go in this direction.

Part Three. The problems for other people working within the judicial system

Whilst judges occupy a central place in any judiciary, the judiciary is not just limited to them. Moreover, it would be hard for the courts' and judges' independence to become a reality and make its presence felt within society if others working within the judicial system were unable to carry out their work properly. This is why the problems of others working within the judicial system have to be resolved. We suggest distinguishing between the problems of professionals (I) and of "consumers", i.e. persons who go before the courts (II).

I. Professionals

We will examine the problems of lawyers (A), experts (B), bailiffs and clerks of court (C).

A. Lawyers

a) A historical outline and how the profession is organised today:

According to authorised doctrine, the profession of lawyer is the oldest legal profession¹¹⁹.

The Lawyers' Union was set up in 1912. During the 20th Century, the Lawyers' Union had an important political role. Many influential politicians were lawyers. Over the past few years, the Lawyers' Union has been controlled by the Muslim Brotherhood and the Nasserian tendency.

There are around 400 000 lawyers in Egypt, most of whom are in private practice, given the unemployment on the jobs' market in Egypt, which applies to lawyers as much as it does other professions. To be a lawyer, it is not necessary to take an exam as it is in most countries. The result is that enrolment with the Law Society is virtually automatic, following completion of a law degree.

b) The importance of lawyers' independence:

When a judge studies a case, the lawyer is his eyes. The technical nature of the law renders lawyers practically indispensable. They play a vital role in ensuring that the rights of the litigant are respected. The presence of a lawyer, combined with the judicial authority's independence, contributes to making a trial fair.

Accordingly, the preamble of the UN Basic Principles on the Role of the Lawyers recall that ¹²⁰ "adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession".

¹¹⁹ R. Perrot, *Institutions judiciaires* [Judicial Institutions] Monchrestien, 2008, p. 327

¹²⁰ Adopted by the Eighth UN Congress for the Prevention of Crime and Treatment of Offenders, which took place in Havana (Cuba) from 27 August – 7 September 1990.

c) The significance of lawyers' independence

Whilst no-one contests the usefulness of the concept of judge's independence, the concept of the lawyer's independence has found it harder to permeate consciousness and take hold. Admittedly, the lawyer is not supposed to be as impartial as the judge but, like a judge, she or he must still be free from pressure and outside interference. This "independence" is essential for the confidence of people who go before the courts, both in their lawyers and, more generally, in the legal system.

d) The right to a lawyer; how far it extends

In article 69, the Constitution guarantees people the right to defend themselves or be defended by a third party. The same article orders the State to provide a lawyer for those who cannot afford a lawyer. In accordance with the law, the State must provide a lawyer when a person accused of a crime cannot afford a lawyer to represent him/her. The same holds true for when minors are accused of crimes or misdemeanours.

e) The problems confronting lawyers

Lawyers face various problems.

First is the problem of training. There is no training institute for lawyers in Egypt, unlike in the majority of countries.

Once a person has become a lawyer, working conditions are tough. Because there are so many practising lawyers in Egypt, competition increases, resulting in a fall in revenues. Lawyers also suffer the inconveniences of the Egyptian legal system, notably the length of time it takes the legal system to work. With the system taking such a long time, it means fees are paid late.

Lawyers representing indigent parties are paid patently low sums in the form of grants. Needless to say, lawyers also suffer because of the increasing cost of living in Egypt.

The Law Society fails to provide lawyers with adequate social or professional services. This is probably because of State interference in the Law Society's internal affairs, paralysing elections. This phenomenon of state interference in internal affairs is common amongst various professions in Egypt.

Some laws prevent lawyers from carrying out their job to the best of their ability. This is the case with article 245 of the Code of Criminal Procedure setting out courtroom infractions for lawyers.

Of course it is important that every court keeps good order, but cracking down on infractions committed by lawyers constitutes interference by the judicial authority in the work and role of lawyers, which essentially requires freedom. The system for handling courtroom infractions must respect the rights of legal representation. It is theoretically the case because article 245 states that judges from the court in which the infraction occurred cannot hear the case. However, there is a risk that the Judges have excessive recourse to the courtroom infraction.

Lawyers face the problem of the law being badly applied to them by certain public bodies. Despite texts authorising lawyers to assist clients in all judicial and administrative proceedings (article 52 of the law on the profession of lawyer), it often happens that the authority conducting the preliminary enquiry (the police) refuses the presence of a lawyer.

B. Experts

Unlike the French system, the profession of legal expert exists in Egypt. A legal expert is a government official from the Ministry of Justice. The number of experts has risen to 3000.

Article 131 on the Law on the Judicial Authority mentions experts amongst the "auxiliary legal professions". Article 134 sets out that the status of experts – rights, duties and discipline – is governed by a law. This dates from 1952.

In 2009, a number of experts organised a sit-in lasting more than one month, on the steps of the Ministry of Justice, demanding promulgation of a new law that would improve their financial status and working conditions. The experts were criticising the system of remuneration that puts quantity above quality. Because their basic salary is low, bonuses make up most of their monthly income. To earn bonuses, one has to work on a great many trials. The system does not take into account the complexity of some trials which might require more time than others.

Current working conditions are also in need of a review. Experts want the right to take files to their private offices so that they can examine cases more effectively. Until recently, it was tacitly agreed that they could do so. Recently the Justice Minister decided ¹²¹ to put a stop to this practice. From now on, experts will have to look at files in rooms that will be set up for this purpose in the courts.

The conflict causing trouble between experts and the Minister of Justice was resolved with promises from the president of the people's assembly and the Justice Minister to amend the law regulating their professional and financial status.

C. Bailiffs and court clerks

Bailiffs play a very important role in any judicial system. It is through them that legal documents such as notification of summons are served and through them that legal rulings are carried out. The profession of bailiff is regulated in articles 148 to 155 on the Law on the Judicial Authority. They are government officials recruited on the basis of competition. The profession of bailiff comes up against a serious problem in Egypt, namely corruption. Because bailiffs' salaries are low, some bailiffs and court clerks regard illicit payments from other parties as extra income.

Court clerks are also government officials recruited on the basis of competition. Their status is regulated by articles 137 to 147 of the law on the judicial authority.

In general, bailiffs and court clerks do not make direct requests to parties for money; the proposal comes from the other parties, who know that by paying money they will get the service they want quicker, be it legal or illegal.

A reform to the status of government officials is needed. If judges' independence were one day to turn into a reality, the ordinary citizen wouldn't know it as long as there is still the problem of corruption within the courts and as long as he has to pay an official to do his job. This is where the independence of the judicial system is closely linked to the working conditions of the auxiliary legal professions.

¹²¹ The Ministry of Justice justified this decision by saying that the new system would avoid files being carried here, there and everywhere by experts and would prevent sensitive documents from potentially going missing.

II. Consumers/ persons who appear before the courts

A. Access to justice: legal aid

Article 69 of the Constitution states that the right to a defence is guaranteed and that the law must guarantee poor people the means to access justice.

Article 3 of the law of 2000 relating to Certain Procedural Aspects of Personal Status makes financial assistance available in the form of exemption from costs pertaining to alimony petitions and suchlike.

Article 3 of the aforementioned law does not require a lawyer's signature for the writ initiating the legal action to be in order at court, meaning that representation by a lawyer is not necessary. If the court deems it necessary, it can make a lawyer responsible for defending to the petitioner, paid for by the State.

In addition, law number 17 of 1983 on the Profession of Lawyer, amended by law 197 of 2008, provides in its article 64 that a lawyer must provide services to citizens who cannot afford to engage a lawyer under the hypothetical circumstances specified by this law. Articles 93 to 97 of this law deal with the question of legal aid. A legal aid office has been set up within each regional branch of the law society (article 93). Legal aid covers implementing legal actions, attendance at, preparing for a trial, legal advice and the writing of contracts.

B. The length of time justice takes

Various human rights instruments provide that one of the essential requirements of the right to a fair trial, is the right to a hearing within a reasonable time frame. The European Court of Human Rights believes, rightly, that having a reasonable time frame for proceedings is a means of guaranteeing the effectiveness and credibility of the legal system¹²².

In Egypt, the length of time taken by the legal system is a major problem for Justice. The main victims of this problem are the people who go to court. This phenomenon is caused by multiple factors. First of all, there is an ever-increasing number of trials. The high number of trials is due to several factors, one of which is the existence of laws *creating* conflicts which require judicial intervention (such as the law on rents). The bureaucracy of public sector organisations pushes individuals to call upon the legal system to claim their recognized rights (e.g. holiday pay owed for retired government officials). Thus, the legal system suffers because of the dysfunctions of State organs.

Secondly, the necessary means for the legal system to function properly are absent, be this a question of personnel or material means.

Finally, there is the complexity of proceedings which enables the parties, and more specifically lawyers, to extend the length of trials, abusing the privileges granted to them by law.

¹²² H. v. France, judgement of 24 October 1989

Conclusion. Reform of the Egyptian Judiciary: Reality and prospects

I. The reality of the judicial authority's independence: Independence... but not complete independence.

A. Independence...

In spite of all the attacks on the judicial authority's independence highlighted in this report, it still cannot be denied that the judicial authority in Egypt enjoys some independence.

Three reasons, of unequal weight, can be invoked to explain this relative independence.

First of all, arrangements in the Egyptian Constitution guarantee the judicial authority's independence and the right to be judged by one's natural judge. However, this constitutional argument needs qualifying, firstly because other constitutional arrangements appear to legitimise exceptional courts and secondly, because the authority in charge of interpreting the constitution, the SCC, has shown caution in the rulings it has made in recent years, understandably so for several reasons.

Secondly, judicial history and tradition can be invoked. Indeed it is often claimed that the judicial authority was independent before even the first law on the judicial authority's independence was enshrined. The "judicial body" has retained the values of independence and impartiality and transmitted them down the generations. It must be remembered that independence is not just about legal rules but is also a personal matter, a question of education. Even during difficult times for the judiciary, when the executive authority has tried to damage its independence, judges have managed to pull through, perhaps emerging even stronger as a result.

Finally, the role of the Judges' Club cannot be overlooked in turning some of the judicial authority's independence into a reality and in the fight for full independence. There are several advantages to judges working together: the collective movement legitimises the claims they make as originating from everyone affected by the issue of the judicial authority's independence. The fact that the Judges' Club groups together thousands of judges protects the few activist judges working to promote the legal system's independence by "drowning" them in a great sea of judges. Activist judges do not act under their own personal steam but as the representatives of all judges. It would be hard for the political authority to attack a few activist judges, and if they did, the attack would be perceived as an attack on all judges.

These different factors have managed to guarantee the Egyptian judiciary certain independence.

It is true that things are better for the judicial authority's independence in Egypt than in most neighbouring countries and at times perhaps better in Egypt than in some democratic countries in some respects¹²³.

However we must not compare Egypt with other countries but with international norms relating to the legal system's independence. A reading of these norms leads us to conclude that the judiciary's independence remains incomplete.

¹²³ Democratic countries do not always set a good example, especially concerning the fight against terrorism or the independence of the public prosecutor.

B. ... but not complete independence

Throughout this report, we have highlighted both legal arrangements and practices that serve to damage the Egyptian judiciary's independence.

Arrangements fail to supervise properly the executive authority in appointing people to high judicial office; arrangements are in place for the setting up of exceptional courts which do not enjoy sufficient guarantees of independence.

However the problem isn't just with the law; there are also practices that hamper the legal system's independence. These practices can originate from the judges themselves with favouritism in the way judges are recruited. Or they can come from the fact that the executive authority tries to influence the careers of judges, to sidestep independent justice by sending civilians to appear before military courts, by failing to execute definitive legal rulings...

Are things developing? If so, in what sense have things developed?

We are minded to say that the recent reforms of 2006 of the law on the judicial authority have led to greater independence for the Egyptian judicial authority. The reforms reduced the powers of the Minister of Justice and strengthened the role of the HJC. These are welcome reforms, but they are insufficient - rather than saying virtually insignificant - in the absence of any reform to the way in which the HJC is composed.

Unfortunately, the reforms carried out in Egypt over these past years will never be followed through; to put things more bluntly, they take away with the left hand what they give with the right. The formal reforms, often meant as an international window display, aren't just about the legal system's independence. This has been borne out in recent constitutional reforms; whilst Parliament's powers have been increased, guarantees relating to integrity of parliamentary elections have been reduced, opening the door to electoral fraud.

Meanwhile alongside these incomplete reforms, civilians are being brought before military courts, and rulings, even rulings handed down by the state security courts, are not being respected.

II. Assessing the experience of the Judges' Club

The Judges' Club, or more precisely its reforming tendency, has shown itself to be the prime defender of the judiciary's independence, especially in recent years. Will it, in the coming years, continue to fight for greater independence? Does the reforming tendency still have a future given that it recently lost the Judges' Club of Egypt elections and the Alexandria branch elections?

To answer this question we briefly need to review recent events bringing it in conflict with the political authority. Judges, feeling that the political authority didn't care about their demands for greater independence and that they were using them to cover up electoral frauds, decided to turn against the political authority and approach society. Firstly, judges organised sit-ins and threatened strikes; secondly, they opened the doors of the Judges' Club to various media and political groups.

This new discourse and change in tactics brought about positive and negative results:

Positive results: The judges and their demands became popular. The 2006 legislative amendments took up some of the judges' demands. Egypt witnessed large-scale demonstrations in 2006 against a Council of Discipline ruling on two judges from the reforming tendency. Various political groups have incorporated the judges' demands in their plans. In brief, the judges' movement, which rose up against electoral fraud, was a source of hope for whole of society. In other words, the judges' demands turned into Egyptian society's demands. The judges reignited hope for the better future the Egyptian people deserve.

Negative results: By adopting a confrontational discourse with the political authority instead of the customary dialogue, the Judges' Club lost the support of certain judges who, without being opposed to the demands made by the reforming tendency, did not like the strategy of some reforming judges. The reformers angered certain state powers even though judges are part of the state as the third power. Having recourse to the media, at times inappropriately, against judicial tradition, shocked some judges. The reforming tendency had not properly taken into account the conservatism of some judges.

In any event, the executive authority, through the Minister of Justice, started exerting pressure on the Judges' Club. One of the ways it did this was by blocking funding to the Judges' Club in an attempt to pressurise it and send a message to all judges that confronting the executive authority was not the best way of getting what they wanted.

This message was relatively successful in getting through to judges because the reforming tendency lost the Judges' Club elections, first in Alexandria (2008) and then in Cairo (2009). If the reformers want to lead the Judges' Club again and turn it into a stronghold for fighting for the legal system's independence, they will have to find a more "diplomatic" discourse that does not stray from the expectations of the entirety of judges or bring them into direct confrontation with the executive authority. The discourse will also have to be more organised because judges from the reforming tendency were not always on the same wavelength.

The judges' greatest loss wasn't the Judges' Club elections but that of the amendment to article 88 of the Constitution, imposing upon them the total supervision of the electoral process. From now on, electoral frauds will be easier to commit and probably more frequent. Above all judges have lost an important playing card that they used to put pressure on the regime. This leads us to think that the political authority is going to pay less attention to the judges' demands.

With the Judges' Club not being able to conduct the fight for the legal system's independence alone, other political groups will have to take up the baton, not only in order to complete the judiciary's independence but also to address the other challenges within the Egyptian legal system.

Comment [s19]: This is not clear. Why is it that total supervision of elections is so bad for the Js ????? Needs to be explained both here and earlier on in this report

III. Prospects of reform for the Egyptian judicial system

There are several challenges in store for the Egyptian legal system.

A. The independence challenge

Changes in the law will not be enough to overcome this challenge. What's needed is political will because attacks on independence do not just stem from the law but also from practices carried out by the political authority.

B. The competence challenge

The Egyptian judiciary does not just need to be independent, it needs to be competent. To achieve this, the judiciary needs to be able to recruit the best. The truth is that judges are recruited from amongst graduates from Egyptian law faculties and that these graduates are rarely in possession of the best qualifications. Initial and ongoing training for judges and prosecutors must be improved.

C. The efficiency and modernity challenge

The Egyptian legal system suffers from inefficiency. To rectify this, the status of the auxiliary legal professions has to be improved, especially bailiffs, and a solution must be found to the very serious problem of legal rulings not being executed.

Setting up specialist courts might be welcome because it would respond to specific needs. This is why the setting up of the economic court can be seen as a good thing. However, the desire to make the legal system more efficient and modern must not just be confined to the economic sphere ; a two-tier legal system operating at different speeds must not be set up; one legal system for the rich and one for the poor.

The Egyptian legal system must tackle the challenge of modernity by attempting to take advantage of new technologies to improve the quality of Justice and speed up proceedings. It's important to modernise the courts but this must be accompanied by progress in the areas of independence and competence; otherwise, speedy Justice would simply become iniquitous summary Justice.

Recommendations for the Egyptian judiciary's independence

Full and complete independence of the judicial system can only be achieved through fundamental constitutional and legislative reforms driven by a real political will to ensure that guarantees of independence are not just adopted but also respected in practice.

The 2004 report by the EMHRN entitled Justice in the South and East of the Mediterranean Region contains a series of general recommendations, still current, which are worth repeating here¹²⁴:

The independence of Justice vis-à-vis the political system, religious denominations and all other powers must be expressly stated and recognised in the Constitution. The status of judges must form the object of an organic law to guarantee that it complies with the constitution.

Above and beyond this institutional recognition, members of the judiciary must enjoy specific guarantees:

- Judges must be recruited in conditions of equal access to posts through competitive examinations and appointed exclusively on the basis of their competence.
- They must be remunerated by the state at a satisfactory level.
- Their careers must be managed by an independent body consisting of fellow judges but also of persons not from the judicial system and without any interference by the legislature or the executive.
- Judges must enjoy the benefits of further training and education and must have the right to join or form trade unions.
- Ordinary judges must be irremovable, except in the event of disciplinary measures taken by an independent body.
- The judges in the public prosecutor's office must have an independent status on the same way as ordinary judges. They must be subject to rules necessary for the proper application of the criminal procedures adopted by the executive power.

Conscious of the fact that there can be no proper Justice without an effective and independent defence, it is recommended that:

- The training of lawyers should at least be identical to that of judges.
- The independence of lawyers and of their professional associations should be legally recognised and protected.

These requirements entail the abolition of all courts with exceptional jurisdiction, either by virtue of their composition or by the rules applicable to them.

Finally, a fair system of Justice develops under the scrutiny of society. The role of civil society should therefore be recognised and promoted.

¹²⁴ EMHRN, 2004, pp. 17-19, available at www.euromedrights.net

Bearing in mind these general recommendations, with regard to the Egyptian judiciary, the EMHRN recommends:

I. Recommendations for the attention of the Egyptian Authorities

A. International conventions

Egypt has ratified the principal human rights conventions, which is a very positive thing. We therefore recommend that the Egyptian authorities continue with their efforts in this area, and in particular:

1. Ratify other human rights instruments and especially ,the Convention on the Rights of the Child, and the Optional Protocols to the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination against Women,
2. Harmonise national legislation with the international and regional human rights treaties Egypt has ratified, in the field of the independence of justice.
3. Guarantee, through consciousness-raising activities and regular training, that Egyptian judges have a thorough knowledge and understanding of international human rights instruments and their applicability in Egyptian law domestic law.

B. Constitutional reforms

We recommend that the Egyptian authorities amend the Egyptian Constitution to bring it in line with international norms relating to the judiciary's independence, doing the following:

4. In the Constitution, explicitly provide for the High Judicial Council's (HJC) complete independence from the executive and legislative powers.
5. Affirm the principle of direct election by the judges of at least half the members of the HJC.
6. Amend article 76 of the Constitution which renders certain administrative acts immune from judicial control, such as the decisions of the Presidential Election Commission.
7. Amend article 88 of the Constitution in order to set up full judicial supervision of the entire electoral process for various referenda and elections.
8. Amend article 93 of the Constitution so that the courts have control over the regularity of parliamentary elections.
9. Scrap article 171 of the Constitution establishing state security courts.
10. Amend article 173 of the Constitution to abolish the Council of Judicial Bodies (CJB).
11. Amend article 179 of the Constitution authorising the legislator to bring civilians before the special courts for offences against the future anti-terrorist law.
12. Amend article 184 of the Constitution to restrict the competences of military jurisdictions so that

under no circumstances are they able to try civilians.

These amendments will go to establish a solid constitutional basis for the judicial authority's independence. They should be complemented by a series of legislative reforms aimed at implementing these principles.

C. Legislative Reforms

The laws relating to the organisation and functioning of the judicial system must be amended to secure the complete independence of the judicial system as an institution and of the judges as its protagonists. For this purpose, the following amendments are recommended:

The Supreme Constitutional Court (SCC)

13. Amend the law on the SCC to give the SCC jurisdiction to supervise the discretionary power of the President of the Republic in appointing the president of the SCC.
14. Arrange that the president of the SCC is chosen from amongst its members.

The High Judicial Council (HJC)

15. Modify the composition of the HJC so that its members include judges representing all categories and levels of jurisdictions. At least half its members should be elected by the judges.
16. Place the Administration of Judicial Inspection (AJI) under the supervision of the HJC.
17. Make the HJC responsible for matters relating to judges' placements and secondments.
18. Supervise the power of the President of the Republic in appointing the Public Prosecutor by involving the HJC.

The status of judges

19. Amend the law on the judicial authority so that judges' placements and secondments are strictly supervised, subject to clear and transparent rules.
20. Limit the placement of judges in government administrations.
21. Exercise strict supervision over, if not prohibit, the ability of the courts' general assemblies to delegate their powers to their presidents.
22. Expressly enshrine Egyptian judges' right to freedom of expression, association and assembly, in line with Principle 8 of the Basic Principles for the Independence of the Judiciary.
23. Include, in the Law on the Judicial Authority, the Judges' Club as well as its role in promoting the independence of justice and arrange a means of regular funding that is not subject to the authority of the HJC.
24. Grant the Judges' Club the right to co-operate or affiliate freely with other federations or unions, at both the national and international level.
25. Improve training for judges by setting up an Institute of Judicial Studies and require judges or deputy public prosecutors to submit to training.

Comment [s20]: This is a very weak word ; check the french/arabic. What would the precise role of the HJC be ? Would it be advisory ? Or would the President be legally bound to accept the HJC's nomination ?

Comment [s21]: I would have thought there should be 2 recommendations here. One, that aspiring Js and prosecutors should have initial training, and two that all Js and Prosecutors should be required to undergo in-service training on a regular basis. Check with authors

Reforming the military courts

26. Restrict the competences of military jurisdictions so that under no circumstances are they able to try civilians.

Access to a fair trial

27. Establish the double degree of jurisdiction for criminal cases by setting up a court of appeal against rulings of the Assize Court.
28. Abolish or reduce to a symbolic amount judicial expenses and put in place an effective system of legal aid.
29. Establish a department for supervising the execution of sentences within the Ministry of Justice with the task of supervising the application of sentences, controlling all penitentiary establishments and detention centres and taking emergency measures whenever there is an obstacle in the way of a sentence being applied.

Comment [s22]: Not sure what is meant here by » judicial expenses ». Needs explaining – especially, as I dont recall reading about it in the main part of the report

D. Government Policy in Matters of Justice

In their relations with civil society, it is recommended that the Egyptian Authorities :

30. Re-establish dialogue between the Ministry of Justice and the judges on matters concerning the good functioning of justice. The judges must be consulted and listened to on all the issues which involve them.
31. Put an end to the various ways in which direct and indirect pressure is exerted on judges.
32. Increase judges' and administrative staff salaries so that these, at the minimum, keep pace with rises in the cost of living.
33. Improve working conditions for the ancillary legal professions to fight corruption and improve their effectiveness.
34. Co-operate closely with lawyers' organisations generally, prior to preparing any legislative reform in the justice field.
35. Refrain from interfering in the internal affairs of the bar association.

II. Recommendations for the attention of civil society

It is recommended that Egyptian civil society organisations:

36. Support judges who promote the independence of justice.
37. Oppose attacks on the independence of justice by denouncing them and bringing them to light.

38. Get involved in setting up a constructive debate on the issues relating to the independence of justice and especially on the issue of women's access to judicial posts.
39. Develop and implement joint actions and programmes aimed at raising public awareness of the issue of the independence and impartiality of justice and promoting its importance as an essential instrument protecting the rights of all individuals.
40. At the time of the next legislative and presidential elections, stress the independence of justice issue in candidates' programmes and campaigns.

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