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Shams Al Din Al Hajjaji  
*Judiciary Egypt*

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## THE DILEMMA OF JUDICIAL APPOINTMENT IN EGYPT QUESTIONS OF GENDER EQUALITY, ELIMINATION OF POLITICAL OPPOSITION AND UNDERPRIVILEGED CITIZENS

*Shams Al Din Al Hajjaji*

### I. INTRODUCTION

The judicial appointment process involves several legal, political, and social aspects.<sup>1</sup> Inconsistency between these aspects can lead to discrimination and inequality, eating away at the core of the judicial system.<sup>2</sup> Both the legal and political aspects of judicial appointment have a great impact on society.<sup>3</sup> This is manifested in discrimination against political opponents, underprivileged citizens, and women. In terms of gender inequality in judicial appointments in Egypt, presently only 68 out of 15,000 judges are female,<sup>4</sup> indicating a clear lack of female representation in all three supreme courts (the Court of Cassation, the State Council, and the Supreme Constitutional Court).<sup>5</sup> Equally, underprivileged and political minorities rarely have an equal chance in the appointment process.<sup>6</sup> This paper argues that a balance must be sought between judicial qualifications and judicial appointment powers in order to eliminate any discrimination in the appointment process.<sup>7</sup> In summary, the ideal situation in judicial appointment involves striking a balance between appointment qualifications and relevant appointment powers in order to remove any form of discrimination in the appointment process.

The judicial appointment process covers two aspects: judicial legitimacy and judicial qualification.<sup>8</sup> Judicial legitimacy refers to the source of the judicial authority. In the republic system, although the judge rules in the name of the people,<sup>9</sup> defining the actual role of the people can be challenging.<sup>10</sup> It may take on a direct form of legitimacy, in that the judge is directly elected, or it can take on an indirect form, in which the judge is appointed by an elected authority: either the president<sup>11</sup> or both the president and Parliament (Congress).<sup>12</sup> In

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<sup>1</sup> See generally Peter Webster, *Selection and Retention of Judges: Is there one "Best" Method?* 23 FLA. ST. U. L. REV. 1, 3-5 (1995), <http://ir.law.fsu.edu/cgi/viewcontent.cgi?article=1455&context=lr>.

<sup>2</sup> Theresa Beiner, *The Con Law Professor with Judicial Appointment Power*, 14 J. APP. PRAC. & PROCESS 6 (2013); see

Daniel Nadler, *An Opportune Moment: The Judicial Appointment Reforms and the Judicial Credentials Demanded by the Charter*, 15 CONST F. 131 (2006).

<sup>3</sup> See generally David Williams, *The Judicial Appointment Process*, 2004 N.Z.L. REV. 49 (2004).

<sup>4</sup> Dalia G., *Egypt swears in 26 new female judges*, EGYPT STREET, (July 17, 2005), <https://egyptianstreets.com/2015/06/17/egypt-swears-in-26-new-female-judges/>.

<sup>5</sup> See generally Mahmoud Hamed, *Egypt: The Lingering Battle for Female Judgeship*, 23 in GENDER AND THE JUDICIARY IN AFRICA FROM OBSCURITY TO PARITY? (Gretchen Bauer & Josephine Dawuni ed., 2016).

<sup>6</sup> See generally Lobna Monieb, *Egyptian law graduates denounce class based job discrimination*, AHARAM ONLINE, (Oct. 20, 2014), <http://english.ahram.org.eg/NewsContent/1/0/113461/Egypt/0/Egyptian-law-graduates-denounce-classbased-jobdis.aspx>; see Sarah Moawad, *Egypt's Poor Revolution*, MUFTAH, (Oct. 24, 2014), <https://muftah.org/egypts-poor-revolution/#.WdIr0GhSziU>.

<sup>7</sup> See generally Dominc O'Sullivan, *Gender and Judicial Appointment*, 19 U. QUEENSLAND L. J. 107 (1996); See also Rosalind Dixon, *Female Justices, Feminism, and the Politics of Judicial Appointment: A Re-Examination*, 21 YALE J. L. & FEMINISM 297 (2009).

<sup>8</sup> *Id.*

<sup>9</sup> Law No. 89 of 1986 (Regarding the organization of Certain Cases of Public Invitations for General Subscription), 1 ARAB L. Q. 579, 1986, (Egypt).

<sup>10</sup> See generally Thomas Cooley, *The Fundamentals of American Liberty*, 3 MICH L. J. 149, 149-151 (1894).

<sup>11</sup> Law No. 46 of 1972 (Judicial Authority Law), al-Jarīdah al-Rasmīyah, 5 Oct. 1972, art. 71 (Egypt).

Egypt, Article 20 of the 1973 Judicial Authority Law (JAL) states that “judgments are issued in the name of the people.”<sup>13</sup> The definition of the people, however, was left out. There were no clear definitions of the people during successive republican eras. The socialist/communist system of former President Gamel Nasser defined the people as only one category of people—those who were members of the Socialist Union.<sup>14</sup> Under former presidents Anwar Sadat and Hosni Mubarak, the concept of the people became even more vague than during Nasser’s era.<sup>15</sup> Instead of fixing the concept of the people to reflect a democratic form of government, they maintained their authority over the judicial appointment process.<sup>16</sup> The Egyptian Constitution of 2014 grants the judiciary full independence in the appointment process.<sup>17</sup> The judiciary is the competent authority for appointing judges. Even though such an act ensures, in the judges’ view, independence of the appointment process, such process lacks any form of checks and balances between the judiciary, executive, and legislative branches. As a result, the definition of the people—who are the purported source of judicial legitimacy—remains unclear. It also raises the question as to who the judiciary is accountable to if they are considered their own source of legitimacy.

Judicial qualification starts once a candidate enters law school.<sup>18</sup> Any law student is a potential candidate for a judicial career. Holding a law degree is, in most world jurisdictions, the first requirement towards a judicial appointment. A judge in a district court is a potential judge for one of the courts of appeal, and, similarly, a judge in one of courts of appeal is a potential candidate for the Supreme Court.<sup>19</sup> The judicial appointment process reaches its peak when the candidate holds a position in the Supreme Court.<sup>20</sup> Judicial qualification covers three aspects: general judicial requirements, judicial education requirements, and judicial training requirements. General judicial requirements concern the nationality of the judge.<sup>21</sup> Education requirements can vary across states, with some preferring more than a law degree.<sup>22</sup> There are only three countries that require nothing but a law degree to become a judge: the United States, the United Kingdom, and Egypt.<sup>23</sup> Many states, such as Germany,

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<sup>12</sup> John Tunney, *Judicial Appointment process*, 34 PEPP L. REV. 275, 275-277 (2006-2007), *see also*, David Law, *Appointing Federal Judges: The President, the Senate and the Prisoner’s Dilemma*, 26 CARDOZO L. REV. 479, 482 (2005).

<sup>13</sup> Former laws, which were also during the republic period, the article used the word “nation” instead of the “people”. The using of the word nation reflected the regime understanding to the Arab Nation. Is also reflected the union between Egypt, Syria and Yemen during that time. *See* Law No. 46 of 1972 (Judicial Authority Law), al-Jarīdah al-Rasmiyah, 5 Oct. 1972, art. 20 (Egypt).

<sup>14</sup> *See generally* Peter Mansfield, *Nasser and Nasserism*, 28 INT’L J. 675 (1973).

<sup>15</sup> AMR SHALAKANY, IZDIHĀR WA-INHIYĀR AL-NUKHBA AL-QĀNŪNIYYA AL-MIṢRIYYA 1805-2005, 277 (Dar Al-Shorouk, 2013).

<sup>16</sup> *Id.*

<sup>17</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 100, 14 Jan. 2014, (stating that “Court decisions shall be issued and implemented in the name of the people.”).

<sup>18</sup> *See generally* Juan Mayoral, Urszula Jaremba, & Tobias Nowak, *Creating EU law judges: the role of generational differences, legal education and judicial career paths in national judges’ assessment regarding EU law knowledge*, 21 J.

EUROPEAN PUB. POL. 1123 (2014).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> The nationality requirement is not exclusive requirement in Egypt. It is a general requirement in most of the universal

jurisdictions like the United States. *See* U.S. COURTS, *Citizenship Requirements for Employment in the Judiciary*, <http://www.uscourts.gov/careers/search-judiciary-jobs/citizenship-requirements-employment-judiciary>.

<sup>22</sup> *See generally* Lorne Sossin, *Judicial Appointment Democratic Aspirations, and the Culture of Accountability*, 58 U.N.B.L.J. 25 (2008).

<sup>23</sup> *Id.*

require a master's degree in law as a prerequisite for judicial appointment.<sup>24</sup> Judicial training requirements come in two forms. The first is that of pre-appointment training, while the second concerns continuing education and training. Pre-appointment training is a common requirement in France, Germany, and Egypt;<sup>25</sup> other states, including the United States, do not require such training.

The comparison between various jurisdictions serves several purposes.<sup>26</sup> First, it highlights two conflicting aspects of judicial appointment: prioritizing either judicial appointment qualifications or judicial appointment powers.<sup>27</sup> Second, the comparison aims to form the legal basis for the proposed solution, which is outlined in the last section of this paper.<sup>28</sup> This paper addresses a pressing challenge in Egyptian society dealing with discrimination against women, political minorities, and underprivileged people.<sup>29</sup>

The comparison is limited to the practices of four countries and the applicability of these practices to the Egyptian case. These countries are the United States, the United Kingdom, France, and Germany. Practices of these four jurisdictions fall under three general approaches. The first approach places more importance on the competent authority over judicial appointment qualifications (the US Example).<sup>30</sup> The second approach places less weight on the competent authority, while attaching more importance to judicial appointment qualifications (French Example).<sup>31</sup> The last approach balances judicial appointment requirements and judicial appointment powers (German Example).<sup>32</sup>

The founders of modern Egypt adopted the French legal system in the early 1880s.<sup>33</sup> The German legal system is the next closest to the French and Egyptian systems.<sup>34</sup> Egypt adopted the French legal system while it was still a British colony.<sup>35</sup> However, the British system indirectly influences the practices of the Egyptian legal system.<sup>36</sup> The US legal system is based

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<sup>24</sup> See generally Barbara Hamilton, *Criteria for Judicial Appointment and Merit*, 15 QUEENSLAND U. TECH. L. J. 12 (1999).

<sup>25</sup> See Luis Muniz-Arguelles & Migdalia Fraticelli-Torres, *Selection and Training of Judges in Spain, France, West Germany and England*, 8 B. C. INT'L & COMP. L. REV. 1, 9-15 (1985).

<sup>26</sup> See generally David Clark, *Comparative Law Methods in the United States*, 16 ROGER WILLIAMS U. L. REV. 135 (2011); see Thera Dieleman & Lotte Meurkens, *Jaakko Husa: A New Introduction to Comparative Law*, 22 MAASTRICHT J. EUR. & COMP. L. 640 (2015); see also Edward J. Eberie, *Method and Role of Comparative Law*, 8 WASH. U. GLOBAL STUD. L. REV. 475 (2009).

<sup>27</sup> See generally Terence Lau, *Judicial Independence: A Call for Reform*, 9 NEV. L. J. 79 (2008); see W.H. Huriburt, *Appointment of Judges*, 6 ALTA. L. REV. 175 (1968); see also, Timothy Youdan, *Powers of Appointment*, 27 EST. TR. & PENSIONS J. 268 (2008).

<sup>28</sup> See generally Max Rheinstein, *Teaching Comparative law*, 5 U. CHI. L. REV. 623 (1938); see Pierre Legrand, *Negative Comparative Law*, 10 J. COMP. L. 435 (2015).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See generally Geoffrey Samuel, *Comparative law and Jurisprudence*, 47 INT'L & COMP. L. Q. 825 (1998).

<sup>32</sup> *Id.*

<sup>33</sup> Bryon D. Cannon, *A Reassessment of Judicial Reform in Egypt, 1876-1891*, 5 INT'L J. AFR. HISTORICAL STUD. 51, 55 (1972).

<sup>34</sup> See Luis Muniz-Arguelles & Migdalia Fraticelli-Torres, *Selection and Training of Judges in Spain, France, West Germany and England*, 8 B.C. INT'L COMP. L. REV. 1, 37 (1985).

<sup>35</sup> See generally Mary Daly, *What Every Lawyer Needs to Know About the Civil Law System*, PROF. LAW SYMP. ISSUES 38 (1998).

<sup>36</sup> See generally Fernando Orrantia, *Conceptual Differences between the Civil Law System and the Common Law System*, 19 SW. U. L.REV. 1161(1990).

on the principles of separation of power and checks and balances.<sup>37</sup> Thus, in addition to French and English influences, there is the influence of the US legal system with regard to the method of appointment.<sup>38</sup> Despite these influences, the Egyptian legal system still lacks some of these principles. The purpose of this paper is to present the variations and differences within various legal jurisdictions.

This paper is divided into four main sections. The first section presents the judicial formulation of the Egyptian judiciary, which includes judicial administration and judicial organization. The second is a case study on Egyptian judicial appointment methods. It includes two key aspects related to judicial qualification requirements and judicial appointment powers. This part illustrates the difference between de facto and de jure in the judicial appointment system in Egypt. These differences pave the road to a deeper understanding of legal and political aspects of discrimination within the appointment process. The third section discusses contemporary challenges in judicial appointment. These challenges can be summarized as gender inequality, elimination of political minorities, and underprivileged citizens. The fourth section proposes a solution for problems identified in this paper.

## II. JUDICIAL FORMULATION OF THE EGYPTIAN JUDICIARY

### A. *Judicial administration:*

A) The first body is the Supreme Constitutional Court (hereinafter SCC).<sup>39</sup> It is the competent judicial body with ultimate power over constitutional disputes. However, litigants cannot resort directly to the SCC. They must first get the approval of the regular or administrative courts to resort to the SCC.

The establishment of the SCC underwent two phases during Sadat's era. The first was the legal articulation of the basis of the SCC, while the second involved the establishment of the Court. The actual process of establishing the SCC, however, started after the first Egyptian constitution was ratified in 1923.

The first time the Egyptian courts recognized the unconstitutionality claim was in 1926.<sup>40</sup> The courts did not declare the unconstitutionality of the law; rather they maintained their right not to apply the law. Banning Egyptian courts from handling the constitutionality of the laws is based on many reasons. First, even though the Egyptian civil legal system is based on the French system, the application of the laws turned into a monarchy. This was a system that excluded the King's acts, which include the constitutionality of the law, from the judicial

<sup>37</sup> See generally Peter Quint, *Implications of the President's Appointment Power*, 73 MD. L. REV. 87 (2013); see William Smith, *Reflections on Judicial Merit Selection, the Rhode Island Experience, and Some Modest Proposals for Reform and*

*Improvement*, 15 ROGER WILLIAMS U. L. REV. 668 (2010); see also Geoffrey McNutt, *Formal and Functional Approaches to Separation of Powers: The Political Cost of Checks and Balances in Nixon v. United States and Morrison*

*v. Olson*, 2 GEO. MASON L. REV. 301(1995).

<sup>38</sup> See generally Rachel Brand, *Judicial Appointment: Checks and Balances in Practice*, 33 HARV. J. L. & PUB. POL'Y 55 (2010); see Cheryl Saunders, *Separation of Powers and the Judicial Branch*, 11 JUD. REV. 337 (2006); see also Harold Laski, *Technique of Judicial Appointment*, 31 Com. L. League J. 447 (1926).

<sup>39</sup> See generally Tamir Moustafa, *Law Versus the State: the Judicialization of Politics in Egypt*, 28 L. & SOC. INQUIRY 886 (2003).

<sup>40</sup> Ahmed Abdel Fattah, Mostafa Mohi & Moetaz Nadi, *Al-Mahkamah Al-Dostoryah Al-a'lya: Tarikh men-al-Qada we-al-Syasyah*, Al-Masry Al-Youm (July 30, 2013), <http://www.almasryalyoum.com/news/details/151535>.

authority. Second, there was a lack of a legal foundation — which would have been more realistic — for such authority from 1883 to 1971. There was no legal foundation to grant courts the right to deal with the constitutionality of law.<sup>41</sup>

The first time the unconstitutionality of the laws was legalized was in 1953. This took place right after the 1952 coup.<sup>42</sup> This legal endeavor had initially failed because members of the army refused any judicial supervision.<sup>43</sup> The second legal attempt took place after the 1971 Constitution. This constitution included five new articles, numbered 174 to 178 that regulate the formulation of a specialized constitutional court. First, the 1971 Constitution stated that the SCC is an independent judicial body.<sup>44</sup> Second, it addressed the tackling of constitutional questions.

There is also the time gap between the first articulation of the SCC and the SCC Law. It took eight years (from 1971 to 1979) to establish the court. One of the reasons for this was the fear of an independent judiciary that would deal with the constitutionality of the law.<sup>45</sup> Furthermore, there was a need, after the shift to a market-based economy in Egypt, for the SCC to oversee the legality of the laws. There was a need to ensure the rule of law in the country to attract foreign investment.<sup>46</sup>

The SCC is an independent judicial body.<sup>47</sup> The 2014 Constitution ensures the independence of its seat, budget, and general assembly. The SCC consists of three main bodies. The first is the chief justice of the Court, who is the head of the Court. The chief justice has many other constitutional responsibilities, including the impeachment of justices.<sup>48</sup> In the case of both the absence of a president, and/or the dismemberment of parliament, the chief justice takes charge of the country until a new president has been nominated.<sup>49</sup> The current chief justice of the SCC, Adly Mansour, replaced President Mohamed Morsi as interim president after the military coup of July 2013.<sup>50</sup> He ruled Egypt for nine months, until Field Marshall Abdel Fattah al-Sisi won the presidential elections in March 2014.<sup>51</sup>

The second body is the People's Assembly, which is responsible for the administrative affairs of the court. The People's Assembly is "responsible for governing the Court's affairs and is consulted during law drafting of issues related to the Court's affairs."<sup>52</sup> The People's Assembly also has additional functions. Article 144 of the Constitution states "[i]n case of the ab-

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 174, 14 Jan. 2014 (stating that "The Supreme Constitutional Court shall be an independent judicial body with a distinct legal nature in the Arab Republic of Egypt, and shall have its seat in Cairo.").

<sup>45</sup> See generally Tamir Moustafa, *Law versus the State: The Judicialization of Politics in Egypt*, 28 L. & SOC. INQUIRY 883, 886 (2003).

<sup>46</sup> *Id.* at 889.

<sup>47</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 191, 14 Jan. 2014 (stating that "[t]he SCC is an independent judicial body... [I]t has independent budget, the items of which are discussed by the House of Representatives, after it is approved, it is incorporated in the state budget as a single figure.").

<sup>48</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 159, 14 Jan. 2014 (stating that in case of impeachment of the president, a special tribunal is formulated to prosecute Chief Justice of the SCC).

<sup>49</sup> *Id.* at art. 160.

<sup>50</sup> BBC NEWS, *Profile: Interim Egyptian President Adly Mansour* (July 4, 2013), <http://www.bbc.com/news/world-middle-east-23176293>.

<sup>51</sup> BBC NEWS, *Egypt Abdel Fattah al-Sisi Profile*, (May 16, 2014), <http://www.bbc.com/news/world-middle-east-19256730>.

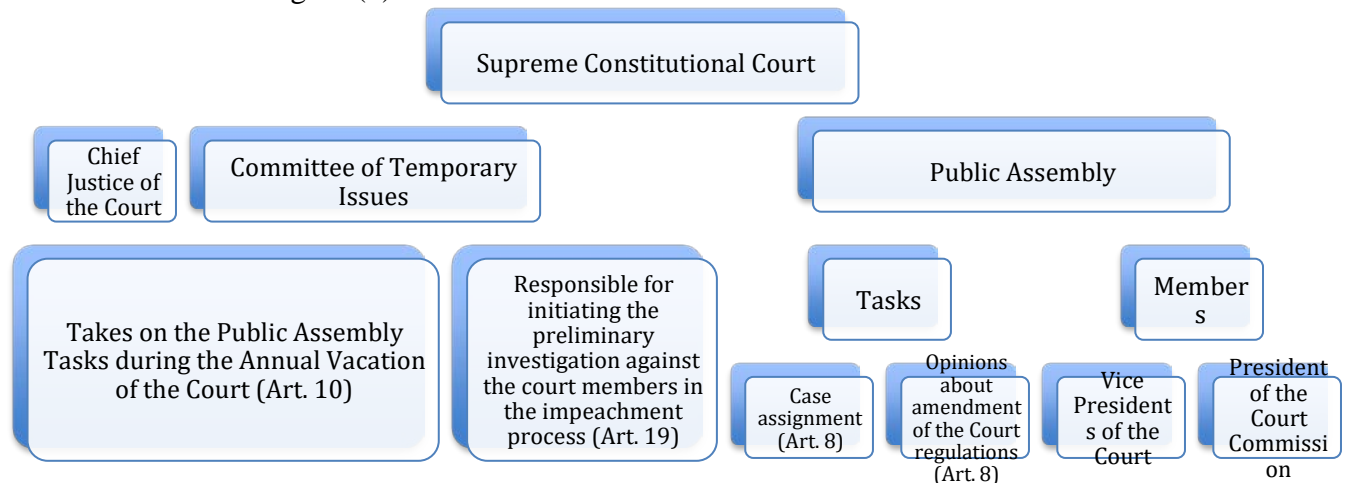
<sup>52</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 191, 14 Jan. 2014.

sence of the House of Representatives, the oath is to be taken before the General Assembly of the SCC.”<sup>53</sup> It is also the body that oversees the acceptance of the resignation of the president in the event of the People’s Assembly being dissolved.<sup>54</sup>

The third body is the Commissioner Authority, which consists of the judges, advisors, and assistant advisors.<sup>55</sup> Members of the Commission are ranked as chancellors.<sup>56</sup> Their role is to prepare the cases for the SCC judges. They have the right to contact any governmental or nongovernmental entities within the country to request information pertaining to certain cases.<sup>57</sup> The Commissioner Authority plays the role of the investigator in the case in order to produce a report or opinion to the SCC about the case in question.<sup>58</sup> The report presents constitutional and legal issues and offers its legal opinion.<sup>59</sup>

The SCC has jurisdiction over certain types of cases. The Constitution lays down the general line of the jurisdiction of the SCC, while the SCC law lays down the details.<sup>60</sup> In short, the SCC is responsible for overseeing the following issues: the judicial supervision of the constitutionality of the law and regulations (Art. 25),<sup>61</sup> the conflict of law and the conflict of jurisdiction among judicial institutions (Art. 25),<sup>62</sup> the conflict raised as a result of contradictory judgments between two different judicial institutions (Art. 25),<sup>63</sup> the interpretation of the laws and regulations (Art. 26),<sup>64</sup> and the unification of the interpretation of the laws (Art. 26).<sup>65</sup> Figure (1) presents the entities of the SCC and their main functions:

Figure (1): SCC formulation and administration



<sup>53</sup> *Id.* at art. 144.

<sup>54</sup> *Id.* at art. 158.

<sup>55</sup> *Id.* at art. 193.

<sup>56</sup> Law No. 48 of 1979 (Supreme Constitutional Court), *al-Jarīdah al-Rasmīyah*, 1979, art. 21 (Egypt).

<sup>57</sup> *Id.* art. 39.

<sup>58</sup> *Id.* art. 40.

<sup>59</sup> *Id.*

<sup>60</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 192, 14 Jan. 2014 (stating that the court is: exclusively competent to decide on the constitutionality of laws and regulations, interpret legislative texts, and adjudicate in disputes pertaining to the affairs of its members, in disputes between judicial bodies and entities that have judicial mandate, in disputes pertaining to the implementation of two final contradictory rulings, one of which is issued by any judicial body or an agency with judicial mandate and the other issued by another body, and in disputes pertaining to the implementation of its rulings and decisions).

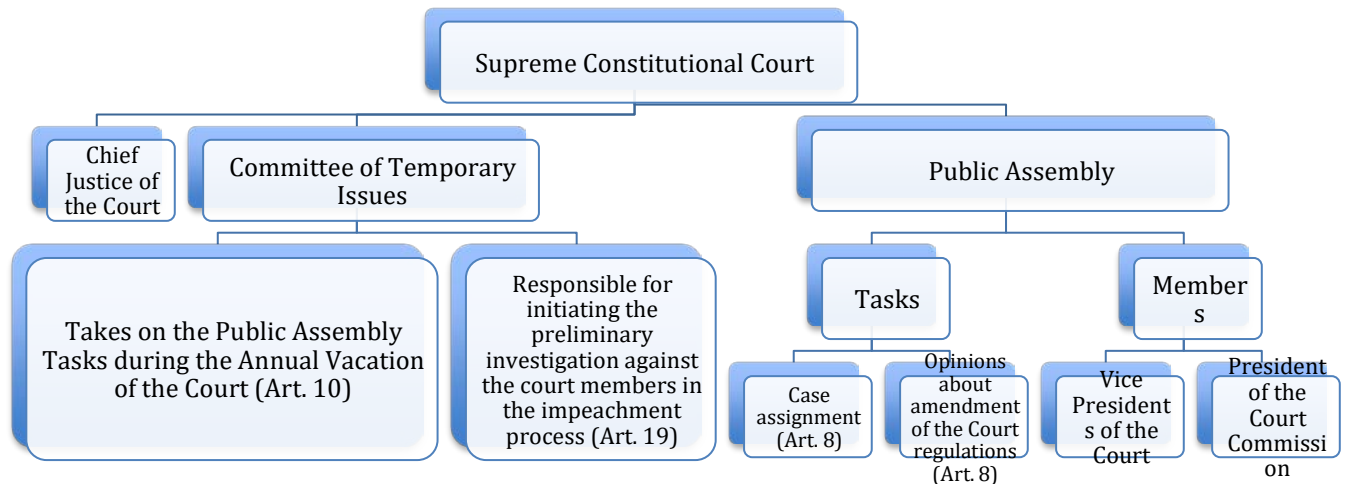
<sup>61</sup> Law No. 48 of 1979 (Supreme Constitutional Court), *al-Jarīdah al-Rasmīyah*, 1979, art. 25 (Egypt).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

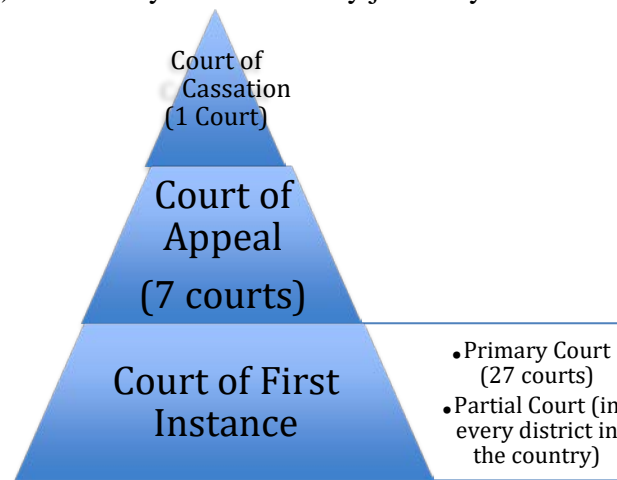
<sup>64</sup> *Id.* art. 26.

<sup>65</sup> *Id.*



B) The second body is the ordinary judiciary, which is the main judicial body. It is the competent judiciary for all types of cases except two. First, administrative cases fall under the State Council jurisdiction.<sup>66</sup> Article 15 of the Judicial Authority Law (hereinafter JAL) states that “except administrative disputes, which the State Council is in charge of, courts are competent of every type of disputes and crimes.”<sup>67</sup> Second, constitutional disputes fall under the jurisdiction of the SCC.<sup>68</sup> Moreover, the ordinary judiciary consists of the Public Prosecution Office (hereinafter PPO) and three different types of courts: the Court of Cassation, the Court of Appeal, and the Court of First Instance (primary courts and partial courts).<sup>69</sup> Figure (2) shows the hierarchy of the ordinary judiciary.

Figure (2): Hierarchy of the ordinary judiciary



<sup>66</sup> Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 15 (Egypt).

<sup>67</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 188, 14 Jan. 2014 (states that the judiciary adjudicates all disputes and crimes except for matters over which another judicial body is competent. Only the judiciary settles any disputes relating to the affairs of its members, and its affairs are managed by a higher council whose structure and mandate are organized by law).

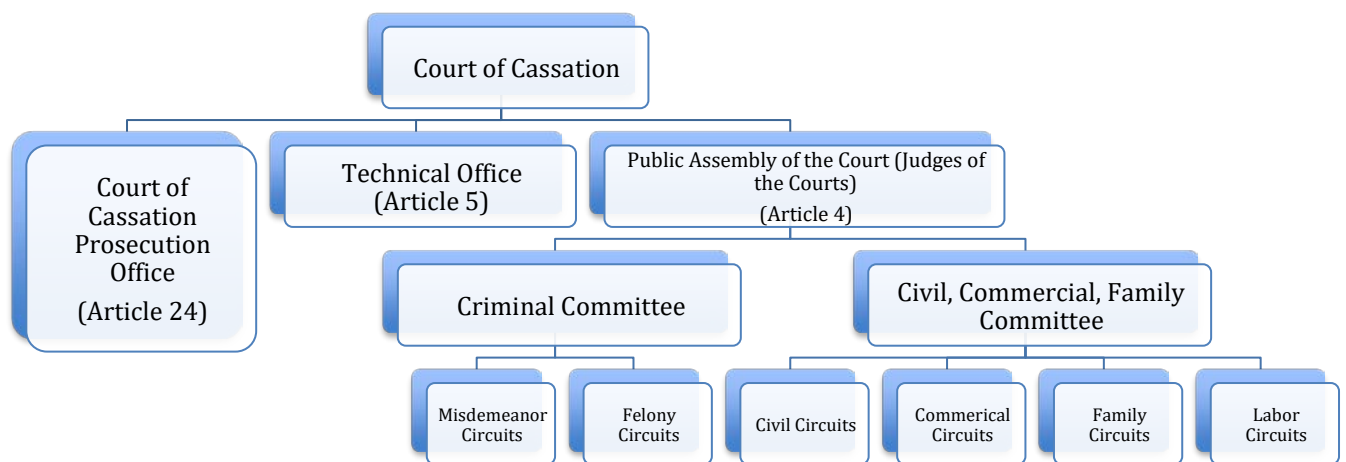
<sup>68</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 192, 14 Jan. 2014.

<sup>69</sup> Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 15 (Egypt).



The Court of Cassation is the highest court and the only one of its kind in the ordinary judiciary, as shown in Figure (2). It was established in 1931 and is located in Cairo.<sup>70</sup> It consists of four bodies. The first is the Court of Cassation Public Assembly, which consists of all the members of the court, including those of the chief justice, associate justices, and junior justices. The work of the Court of Cassation is based on the principle of seniority. The most senior member takes charge of the court. The presidency term of the court is just one judicial year, which starts in October and concludes at the end of September the following year. The chief justice also serves as president of the Supreme Judicial Council (hereinafter SJC). The second entity is made up of the Criminal Law General Committee and the Civil Law General Committee.<sup>71</sup> Each committee consists of 11 judges chosen by members of the People's Assembly.<sup>72</sup> The third body is the court circuits. There are a total of 33 circuits, of which 16 deal with criminal cases and 17 with civil, commercial, family and labor cases.<sup>73</sup> The fourth entity is the Court of Cassation Technical Office. This office specializes in the administrative affairs of the court.<sup>74</sup> Figure (3) illustrates the formulation of the Court of Cassation.

Figure (3): Formulation of the Court of Cassation



The Court of Cassation is not a court of facts but rather a court of law. This means that parties cannot bring new additions to their cases. The Court of Cassation only rules on whether the lower court of appeal has applied a correct understanding of the law.<sup>75</sup> Additionally, the Court of Cassation is responsible for determining general legal rules that are followed in any given dispute. It offers a unified understanding of the law, which all lower courts must follow. The process of developing these rules is restricted. It goes through three main stages. First, one of the 33 circuits has to establish a new rule or overrule an existing one. This circuit must then transfer its new rule to the competent general committee to determine the applicability of the new rule. Seven members of the competent committee must agree on the new rule to be able to proceed to the next step. Second, if the new or overruled ruling is accepted by seven members of the competent committee, the new rule is then transferred to the two general committees together for approval. A majority of 14 out of 22 judges must agree to consider a new legal rule.<sup>76</sup> Third, a procedural rule must be followed by the technical of-

<sup>70</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 2, 14 Jan. 2014.

<sup>71</sup> Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 3 (Egypt).

<sup>72</sup> *Id.* at art. 4.

<sup>73</sup> *Id.*

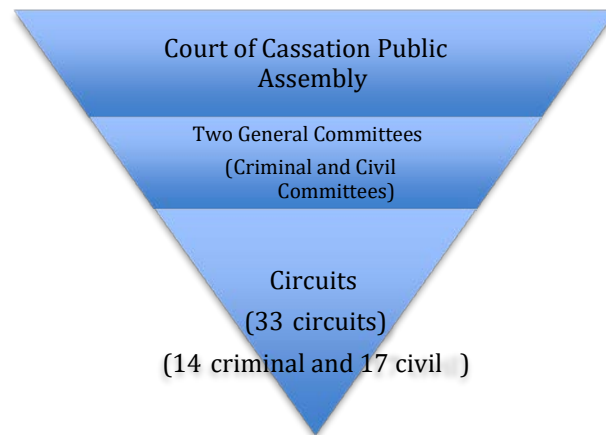
<sup>74</sup> *Id.* at art. 5 (stating that it specializes in “supervision of the case row of the court, present similar and connected cases, or these cases that need single legal principle to execute a judgment.”).

<sup>75</sup> EGYPT JUSTICE, *Court of Cassation: The Supreme Court of Egypt's Common Court System*, <https://egyptjustice.com/court-of-cassation/>.

<sup>76</sup> *Id.*

office of the court. This office is responsible for publishing the new rule to the general public. This process is summarized in Figure (4)<sup>77</sup>

Figure (4): Establishing a legal rule by the Court of Cassation



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<sup>77</sup> Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 5 (Egypt).

Egypt is also home to eight courts of appeal.<sup>78</sup> These are located in Cairo, Alexandria, Tanta, Mansoura, Ismalia, Bani Swaif, Assiut and Qena governorates.<sup>79</sup> Before the courts in Qena and Ismalia were introduced in 2006, there were only six courts. The circuits in the Court of Appeal consist of three judges.<sup>80</sup> All of them have the rank of “Judge at the Court of Appeal.”

The Court of Appeal has jurisdiction over civil and criminal cases. For civil law jurisdiction, it is restricted to appeal cases that are worth more than forty thousand (40,000) Egyptian pounds. These types of cases are under the jurisdiction of the primary court (in the court of first instance jurisdiction).<sup>81</sup> As for the criminal law jurisdiction, the Court of Appeal is responsible for felony cases only. To this day, felony cases have no specialized appeal court. The current form of appeal for felonies is to resort to the Court of Cassation, which is a process that takes place over various stages. In the first stage, the Court of Cassation, because it is a court of law, does not deal with the facts of the case. If it finds an incorrect legal interpretation, it orders a retrial at a different circuit of felony courts. In the second stage, the defendant has the right to appeal the second felony court’s judgment in front of the Court of Cassation. In the second appeal, the Court of Cassation either sustains the second felony court judgment or rules in the case by itself. In the latter case, the Court of Cassation acts as a court of equity. It will hear all witnesses, excluding new evidence, and all factual pleadings. As a result of this complicated process, many lawyers and politicians request a legal amendment to include an appeal level for felony courts. The 2014 Constitution includes an article that mandates an appellate court for felony judgments.<sup>82</sup> To date, however, there is no regulation governing the appeal of felonies.

As shown in Figure (2), the Court of First Instance is divided into two different courts, namely the primary courts and the partial courts. First, the primary court is the upper court within the Court of First Instance. There is one primary court in each governorate.<sup>83</sup> It consists of several circuits. Each is made up of three judges.<sup>84</sup> In civil law cases, the primary court has unique value jurisdiction. It is considered a court of first instance for cases worth more than forty thousand (40,000) Egyptian pounds. However, it is considered a court of appeal for cases worth less than forty thousand (40,000) pounds.<sup>86</sup> In criminal law matters, the primary court is considered an appeal court for misdemeanor cases. Second, the partial court is the lower court within the Court of First Instance, with one in every district in the governorate.<sup>87</sup> The partial court consists of one judge. It has jurisdiction over civil and criminal matters. For civil law jurisdiction, it has non-appealable jurisdiction over civil cases that are worth less than forty thousand (40,000) pounds. In cases worth less than forty thousand (40,000) pounds and more than five thousand (5,000) pounds, the partial court acts as a court of first instance.<sup>88</sup> As for criminal law jurisdiction, it is restricted to misdemeanor cases only, which are crimes that are punishable by a sentence of less than three years.<sup>89</sup>

<sup>78</sup> *Id.* at art. 10.

<sup>79</sup> *Id.* at art. 6.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at art. 4.

<sup>82</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 96, 14 Jan. 2014 (stating “the law shall regulate the appeal of felony sentences”).

<sup>83</sup> Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 9 (Egypt).

<sup>84</sup> *Id.* at art. 7.

<sup>86</sup> Act No. 81 of 1996 (To Amend Provisions of the Code of Civil and Commercial Procedure, Law No. 13 of 1968), *al-Jarīdah al-Rasmīyah*, vol. 19 bis, 22 May 1996, art. 42 (Egypt).

<sup>87</sup> Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 13 (Egypt).

<sup>88</sup> Act No. 81 of 1996 (To Amend Provisions of the Code of Civil and Commercial Procedure, Law No. 13 of 1968), *al-Jarīdah al-Rasmīyah*, vol. 19 bis, 22 May 1996, art. 42 (Egypt).

<sup>89</sup> Law No. 58 of 1937 (Criminal Code), 5 Aug. 1937, art. 11 (Egypt).

The PPO is considered an integral part of the regular judiciary. Contrary to widespread understanding, the role of the prosecution is considered part of the executive authority.<sup>90</sup> The Egyptian PPO, during the Republic Era, underwent three stages of developments that eventually led to giving prosecution a judicial characteristic, which is the status of the prosecution. In the first stage, the PPO was a member of the executive authority (1951-1952).<sup>91</sup> Judges were responsible for investigations, while the public prosecutors' work was limited to the prosecution of cases. In the second stage, the PPO enjoyed a mixed role, both executive and judicial, as a result of the Criminal Procedures Law amendment in 1952. This amendment gave the PPO the power and privileges of an investigative judge. Article 199 of the Criminal Procedures Law gave prosecutors the right to investigate any case. Even though the prosecution enjoyed the privileges of an investigative judge, the nature of the prosecution — whether it was executive or judicial — was still unclear. The Court of Cassation dealt with this question in 1961. It emphasized the mixed nature of the public prosecution. The judicial nature of the prosecution consisted in it performing the role of an investigative judge, while its executive nature involved all the other tasks of the prosecution.<sup>92</sup> In the third stage, the prosecution was considered a purely judicial authority. After a long debate over the nature of the prosecution, Article 189 of the 2014 Constitution considered the PPO members an integral part of the judiciary.<sup>93</sup>

Part of the judicial nature of the PPO is the judicial nature of the position of the attorney general, which is not yet reflected in the present JAL. Before 2014, the president had the ultimate authority to appoint the attorney general.<sup>94</sup> However, the 2014 Constitution transferred this authority over to the SJC.<sup>95</sup> After the assassination of Attorney General Hesham Barakat in 2015,<sup>96</sup> the appointment of a new attorney general was put on hold for more than six months.<sup>97</sup> The reason for the delay was that the president wanted to appoint the new attorney general, while the SJC upheld its constitutional right to do so itself.<sup>98</sup> Following this struggle, the SJC successfully appointed the new Nabil Sadek. As for the judicial oath, it must still be taken before the president.<sup>99</sup>

<sup>90</sup> Stephanie Dangel, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent*, 99 YALE L. J. 1069, 1070 (1990); see also Saikrishna Prakash, *Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 589 (2005).

<sup>91</sup> Law No. 150 of 1950 (Criminal Procedures Law), *al-Jarīdah al-Rasmīyah*, 15 Oct. 1951 (before amendment art. 63, 64 and 199) (Egypt).

<sup>92</sup> Mahkamat al-Naqd [Court of Cassation], case no. 1551, session of 9 Jan. 1961, year 30.

<sup>93</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 189, 14 Jan. 2014 (stating that the public prosecution is an integral part of the judiciary. It is responsible for investigating, law exempts pressing charges and prosecuting all criminal cases except what. The law establishes the public prosecution's other competencies).

<sup>94</sup> Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, arts. 44 and 119 (Egypt).

<sup>95</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 189, 11 Jan. 2014 (stating that "public prosecution is carried out by a Prosecutor General who is selected by the Supreme Judicial Council from among the Deputies to the President of the Court of Cassation, the Presidents of the Court of Appeals or the Assistant Prosecutor Generals, by virtue of a presidential decree for a period of four years, or for the period remaining until retirement age, whichever comes first, and only once during a judge's career").

<sup>96</sup> BBC NEWS, *Egypt Prosecutor Hisham Barakat Killed in Cairo attack*, (June 29, 2015), <http://www.bbc.com/news/world-middle-east-33308518>.

<sup>97</sup> Mariam Jabal, *Khlaḡ Dostori Yoajal Iktiar al-Na'b al-Am* ("Constitutional Dispute Delaying the Selection of Attorney General"), ALBABA NEWS, Sept. 11, 2015, <http://www.albawabnews.com/1493128>.

<sup>98</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 189, 14 Jan. 2014.

<sup>99</sup> *Nabil Sadek Sworn in by Sisi as Egypt's New prosecutor general*, AHRAM ONLINE, (Sept. 19, 2015), <http://english.ahram.org.eg/NewsContent/1/0/141872/Egypt/0/Nabil-Sadek-sworn-in-by-Sisi-as-Egypt-s-newprosecu.aspx>.

C) The third body is the administrative court, which is represented in the State Council. From 1949 to 1984, administrative courts were part of the executive authority. Article 1 of the State Council Law stated that the State Council was an institute affiliated with the Ministry of Justice.<sup>100</sup> After the 1952 military coup, the army issued a new law that made the State Council an independent body under cabinet supervision.<sup>101</sup> In 1972, the new State Council law transferred the supervision from the cabinet back to the Ministry of Justice. In August 1984, the law was amended to give the State Council full independence from the executive authority. The current formulation of Article 1 of the State Council law states: “The State Council is an independent judicial authority.”<sup>102</sup> The 2014 Constitution and the State Council law thus give the administrative courts exclusive jurisdiction over administrative disputes.<sup>103</sup>

The State Council consists of three different branches, as shown in Figure (5). These branches are the judicial, legislative, and advisory bodies. The judicial branch has exclusive authority over administrative disputes. It consists of the Supreme Administrative Court, the Administrative Courts the Disciplinary Courts, and the State Commission Board.<sup>104</sup> Additionally, the State Council Law excludes some administrative disputes, such as acts of sovereignty, from its jurisdiction<sup>105</sup>

The legislative branch is the competent authority for revising and passing any proposed law, regulation, or legal amendment that the government (either the president or the cabinet) wishes to issue. It prepares and submits any new legal text upon request by the government.<sup>106</sup> The president of the legislative branch is also the chief justice of the State Council.<sup>107</sup>

The advisory branch is the competent body for providing legal advice to the president, the cabinet, ministers and public institutions.<sup>108</sup> Moreover, any governmental agency has to seek the acceptance of the advisory branch of the State Council in order to take on, accept, or validate any contract, reconciliation, or arbitration award.<sup>109</sup> To avoid any hassle from the government with the State Council advisory, the law gives the government the right to hire an advisory branch of the State Council to work as legal advisors to the president, the cabinet, ministers and public institutions.<sup>110</sup>

<sup>100</sup> Law No. 9 of 1949 (Law of the State Council), *al-Waqa'a al-masrayah*, 1, Aug. 1949, art. 11 (Egypt).

<sup>101</sup> Law No. 165 of 1955 (Law of State Council), *al-Jarīdah al-Rasmīyah*, 29 Mar. 1955, art.1 (Egypt).

<sup>102</sup> Law No. 47 of 1972 (Law of State Council), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 1 (Egypt).

<sup>103</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 190, 14 Jan. 2014 (stating that State Council “is exclusively competent to adjudicate in administrative disputes, disciplinary cases and appeals, and disputes pertaining to its decisions. It is solely competent to issue opinions on the legal issues of bodies to be determined by law. It reviews and drafts bills and resolutions of a legislative character, and reviews draft contracts, to which the state or any public entity is a party. Other competencies are to be determined by law).

<sup>104</sup> Law No. 47 of 1972 (Law of State Council), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 3 (Egypt).

<sup>105</sup> *Id.* at art. 11.

<sup>106</sup> *Id.* at art. 59/1.

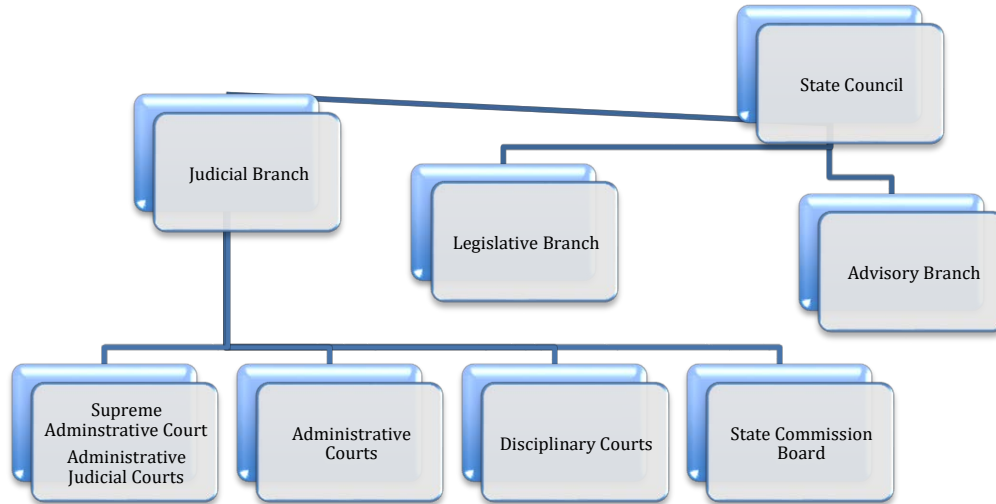
<sup>107</sup> *Id.* at art. 70.

<sup>108</sup> *Id.* at art. 63.

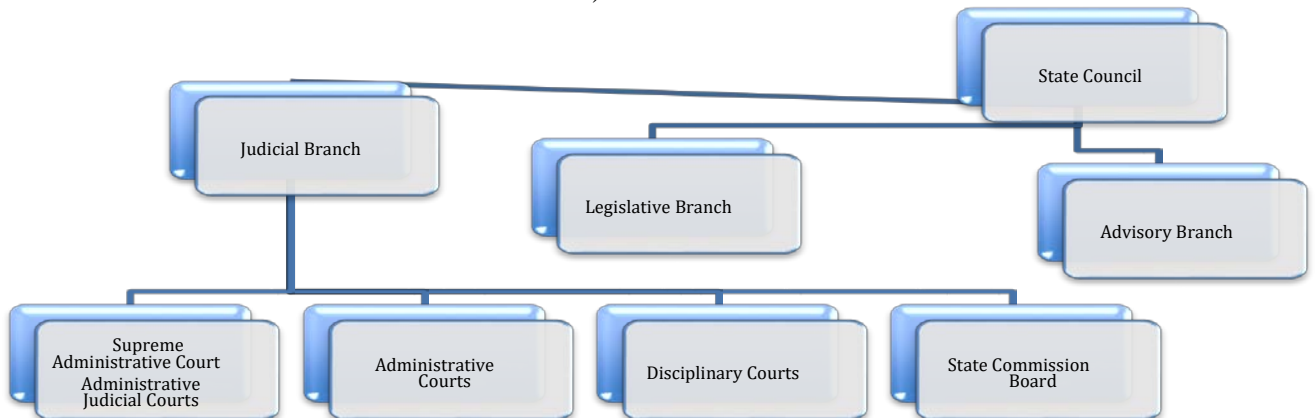
<sup>109</sup> *Id.* at art. 58/3.

<sup>110</sup> *Id.* at art. 59/1.

Figure (5):  
 Formulation of the State Council



D)



(C) The Administrative Prosecution Office (hereinafter APO) was established in September 1954.

The explanatory memorandum of the APO lists the reasons necessitating the establishment of the APO. First, the APO aims to face all forms of interference in the administrative investigation against senior public officials.<sup>111</sup> Second, the APO is a replacement of several legal departments that are established in each governmental agency or ministry. It is the sole body responsible for investigating violations by governmental officials. Third, the APO is responsible for providing technical and legal training and education to its members. The agency ensures that all its members obtain the necessary and required training and education. Previous-

<sup>111</sup> Law No. 480 of 1954 (Administrative Prosecution Bureau Law), *al-Jarīdah al-Rasmīyah*, 16 Sept. 1954, art.1 (Egypt).

ly, each legal department was responsible for providing the required legal training to its members.<sup>112</sup>

The development of the APO has undergone three stages. The first took place between the years 1954 and 1958, when the APO was still an affiliate body of the cabinet.<sup>113</sup> The second stage unfolded from 1954 to 2014, a period during which the APO was under the supervision of the Ministry of Justice.<sup>114</sup> In the third stage, from 2012 onwards, APO members started to lobby for their independence from the executive authority. They sought to eliminate any sort of interference by the Ministry of Justice.<sup>115</sup> The APO finally achieved independence.<sup>116</sup> It was also given exclusive authority over “financial and administrative irregularities. Regarding these irregularities, it has the authorities vested in the administration body to inflict disciplinary penalties . . . . It also initiated and conducted proceedings and disciplinary appeals before the State Council courts in accordance with the law.”<sup>117</sup>

### B. Judicial organizations

There are three forms of organizations in the judiciary: formal, semi-formal, and informal. The SJC is the only formal organization in the ordinary judiciary. The process of formulating the SJC underwent several stages before it reached its current status. The first stage occurred in 1943. The Independent Judiciary Law (hereinafter IJL) assigned the SJC to handle judicial issues such as judicial appointments, transfers, and public judicial issues.<sup>118</sup> The SJC consists of eight members: the president of the Court of Cassation, the representative of the Ministry of Justice, the president of the Cairo Court of Appeal, the attorney general, an elected member from the public assembly of the Court of Cassation, elected members from the public assembly of the Cairo Court of Appeal, as well as the president of the Cairo Primary Court.<sup>119</sup>

The second stage occurred after the amendment of the IJL in 1952, upon the success of the military coup.<sup>120</sup> The amended Article 34 abolished any form of election in the formulation of SJC.<sup>121</sup> The elected members were replaced with appointed members. Instead of electing two members — one member from the public assembly of the Court of Cassation and one member from the public assembly of the Cairo Court of Appeal — the two elected members were the president of the Alexandria Court of Appeal and the first vice president of the Court of Cassation.<sup>122</sup> In 1956, a new amendment of the SJC was introduced to reflect the unification between Egypt and Syria. The new SJC formulation doubled its membership to include both Egyptian and Syrian judges.<sup>123</sup> After the dissolution of the union, a new law was issued in 1965. It returned the formulation of the council to its old form. This form continued to be in force until 1969.

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Law No. 11 of 1989 (Administrative Prosecution Bureau and Disciplinary Courts Law), *al-Jarīdah al-Rasmīyah*, 20 April 1989, art.1 (Egypt).

<sup>115</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 197 § 1, 14 Jan. 2014 (stating that the Administrative Prosecution is an independent judicial body).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at art. 197 § 2.

<sup>118</sup> Law No. 66 of 1943 (Judicial Independence Law), *al-Jarīdah al-Rasmīyah*, 12 July 1943, art.36 (Egypt).

<sup>119</sup> *Id.* at art. 34.

<sup>120</sup> AMR SHALAKANY, *IZDIHĀR WA-INHIYĀR AL-NUKHBA AL-QĀNŪNIYYA AL-MIṢRIYYA 1805-2005*, 277 (Dar Al-Shorouk, 2013).

<sup>121</sup> *Id.*

<sup>122</sup> Law No. 66 of 1943 (Judicial Independence Law), *al-Jarīdah al-Rasmīyah*, 12 July 1943, art. 36 (Egypt).

<sup>123</sup> *Id.* at art. 82.

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

The last — and current — stage started in 2008. A new amendment was introduced to the JAL to replace the SCJI with the SJC. The current formulation of the SJC is similar to that after the 1952 coup. It consists of seven members who represent the various entities inside the regular judiciary. They are the president of the Court of Cassation, the first vice president of the Court of Cassation, the Cairo Court of Appeal president, the Alexandria Court of Appeal president, the Mansoura Court of Appeal president (instead of the representative of the Ministry of Justice, as well as the attorney general).<sup>124</sup>

The Judges' Club (hereinafter Club), established in 1939, is the only semi-formal organization within the judiciary. Its semi-formal nature is due to two reasons. First, there is no formal judicial assignment or law that underpins the Club. Second, the Club includes all members of the judiciary, both judges and prosecutors. Additionally, the Club's nature is controversial because it incorporates legal, social, and political aspects. In legal terms, the Club has no special law and is not mentioned in the JAL. The Club was established as a nongovernmental organization. It has its own bylaws, which were negotiated and set by judges and prosecutors. They include the rules of election to the Club board as well as administrative and financial issues. The Club's major focus is its social aspect. The main club is located in Cairo, with several other clubs located in various governorates. The administration of these clubs is non-centralized, as each of them has its own board. Any judge or prosecutor can be a member of one or more of these clubs. As for its political role, the Club has, on numerous occasions, interfered in politics.<sup>125</sup> This role, however, is exceptional. The JAL bans judges and courts from pursuing any form of political involvement.<sup>126</sup> In the past decade, this type of interference has occurred twice.<sup>127</sup> The first time was after the election fraud in 2005, while the second time was during the period of rule of the Muslim Brotherhood.

In its contemporary history, the Egyptian judicial system identifies three informal organizations. They are the Secret Organization *Tanzim Sarie al-Tali'I* (hereinafter Tanzim), the Independent Judicial Movement *Qoda' al-Istqlal* (hereinafter IJM), and the Judges for Egypt, known as *Qoda' men-ajl-Misr* (hereinafter JFE). The informal nature of these organizations is also based on two reasons. First, they have no legal status, and, secondly, not all judges are members of such organizations.

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<sup>124</sup> *Id.* at art. 77.

<sup>125</sup> Atef Shahat Said, *The Role of Judge's Club in Enhancing the Independence of the Judiciary and Spurring Political Reform*, 115 in *JUDGES AND POLITICAL REFORM IN EGYPT* (Nathalie Bernard-Maugiron ed., 2015).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*



The first organization, Tanziem, was established during the period of President Nasser. It included several judges who held leading positions within the Ministry of Justice and the PPO. For example, Judge Ali Nour Al-Din was appointed as the attorney general.<sup>128</sup> Judge Sadak al-Mahdi was appointed as vice Minister of Justice.<sup>129</sup> President Sadat dissolved the Tanziem. Due to its secretive nature, there is a lack of official data regarding its current status.

The second informal organization is the Judicial Independence Movement (JIM), which was established after the judicial massacre in 1969. From 1970 through to 2010, many judges formed the JIM. They organized secret meetings to support their goal of judicial reform. The leading figures of this movement were Hossam El Gheriani,<sup>130</sup> Ahmed Mikky,<sup>131</sup> and Hesham Genenia.<sup>132</sup> They were, however, unable to enforce any judicial reform and black-listed by the government. After the January 25 Revolution, many of the IJM members were appointed to high-ranking judicial and political positions, as a symbol of the political will to reform the judiciary.

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

### III. JUDICIAL APPOINTMENT IN EGYPT

#### A. *Qualifications for Judicial Appointment*

The required judicial qualifications in Egypt are relatively few, compared with German or French requirements of judicial education.<sup>133</sup> Even though the Egyptian legal system is greatly influenced by the French system,<sup>134</sup> judicial requirements in Egypt are similar to those of

<sup>128</sup> Ayman Gazi, *Counselor Rifat al-Sayed: The Structure Helped Abdel Nasser in the Massacre of Judges*, ROSALIEOUF DAILY, April 22, 2010, <http://www.masress.com/rosadaily/58440>.

<sup>129</sup> *Id.*

<sup>130</sup> Gheriani headed the Supreme Judicial Council from June 2011 to July 2012. He was appointed as the President of the Constituent Assembly in 2012. David Kipkpatrick, *Egyptian Islamists Approve Draft Constitution Despite Objections*, NY TIMES, November 29, 2012, <http://www.nytimes.com/2012/11/30/world/middleeast/panel-drafting-egypts-constitution-prepares-quick-vote.html>.

<sup>131</sup> Sayed Gamaledine, *Egypt's Justice Minister Ahmed Mekki Resigns: Judicial Source*, AHRAM ONLINE, (April 21, 2013), <http://english.ahram.org.eg/NewsContent/1/64/69781/Egypt/Politics-BREAKING-Justice-minister-Ahmed-Mekki-resigns-Judi.aspx>.

<sup>132</sup> Khaled Hassam, *Egypt's Former Top Auditor Says his Trial is Political*, AL-MONITOR, (June 23, 2016), <http://www.al-monitor.com/pulse/originals/2016/09/egypt-corruption-hisham-geneina-sentence-interview.html>.

<sup>133</sup> Lee Epstein, Jack Knight & Olga Shvetsova, *Comparing Judicial Selection Systems*, 10 WM. & MARY BILL RTS J. 7, 11 (2001); see also Harold Laski, *The Technique Appointment*, 24 MICH L. REV. 529, 524 (1926).

<sup>134</sup> Mohamed Abdelaal, *Religious Constitutionalism in Egypt: A Case Study*, 37 FLETCHER F. WORLD AFF. 35, 43 (2013); see Ahmad Alshorbagy, *On The Failure of a Legal Transplant: The Case of Egyptian Takeover Law*, 22 IND. INT'L & COMP. L. REV. 237, 239 (2012); see also Enid Hill, *Comparative and Historical Study of Modern Middle Eastern Law*, 26 AM. J. COMP. L. 278, 279 (1978).

the United States, and the United Kingdom.<sup>135</sup> In the past, judicial education in Egypt was influenced by the British system of appointment. In the monarchic systems, the king had absolute authority over the choice of judges.<sup>136</sup> This is no longer the case in contemporary judicial appointment requirements. Many educational requirements have been introduced without having a legislative mandate. The current form of judicial education requirements is based on three major aspects: judicial education, pre-appointment judicial training, and post-appointment judicial training.

The first aspect of judicial qualification is judicial education. The Judicial Authority Law (JAL) does not require any form of training beyond the required law degree.<sup>137</sup> Nonetheless, the law grants the right to certain categories of lawyers to apply for judicial positions. In theory, Article 39 stipulates a category for those claiming the right for appointment in the judiciary. Potential candidates should fulfill one of the following conditions:

1. have previous work experience as a judge or have worked in a similar position according to the law;
2. be a senior public prosecutor;
3. be a public prosecutor with four years' experience;
4. be a junior judge with the State Council, a junior lawyer at the state litigation authority, or a senior administrative prosecutor;
5. as a lawyer, be eligible to work at the Court of Appeal for four years, and have a working experience of nine years; or
6. be a law professor, having held this position for at least nine years.<sup>138</sup>

In practice, however, judicial appointment in the primary courts is restricted to senior public prosecutors who have reached the age of 30.<sup>139</sup> This is a tradition based on Article 49.<sup>140</sup>

As for the Court of Appeal, the only way to appoint judges is by way of seniority: Judges must be at least 43 years old and have at least 10 years of experience working in lower courts.<sup>141</sup> This discrepancy between theory and practice goes back to the authority in charge of appointment, — the Supreme Judicial Council (SJC). In the last 20 years, the SJC has never opened the door to any other category except, on two occasions, to appoint female judges.<sup>142</sup> There are currently only 68 female judges.<sup>143</sup> The SJC has neither issued a state-

<sup>135</sup> See Godfrey Philips, *Dominions and the United Kingdom*, 4 CAMBRIDGE L. J. 164, 164-65 (1932); see also Sally Kenney, *United Kingdom's Judicial System Undergoes Major Reform*, 87 JUDICATURE 79, 81 (2003).

<sup>136</sup> John Dodd et. al, *The Case for Judicial Appointment*, THE FEDERALIST SOC'Y, (2003), <http://www.fedsoc.org/publications/detail/the-case-for-judicial-appointments>.

<sup>137</sup> See generally Adel Omar Sherif, *Overview of the Egyptian Judicial System, and its History*, 5 Y.B. ISLAMIC & MIDDLE E. L. 3, 12 (1998) (stating that a law degree is required to appoint as a prosecutor, which is the only practical path to be appointed as a judge).

<sup>138</sup> Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 39 (Egypt).

<sup>139</sup> Joining the Public Prosecutor Bureau is usually the first step for judicial appointment. Article 38 of the JAL mandates only one educational requirement: a Bachelor of Laws. Judicial candidates must be: 1) an Egyptian national, 2) not less than 30 years old, 3) holding a Bachelor of Laws from a law school in Egypt, or a foreign comparable degree, 4) without a criminal or disciplinary record, even if the candidate is participating in any criminal rehabilitation process, and 5) be of good standing and reputation. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 38 (Egypt).

<sup>140</sup> Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 49 (Egypt) (stating that “the selection of court judges of first instance of class (B) [is] by way of promotion from members of the prosecution on the basis of their seniority, work and inspection reports.”).

<sup>141</sup> *Id.* at art. 116.

<sup>142</sup> Ahmed El Sayed, *Female Judges in Egypt*, 13. Y. B. ISLAMIC & MIDDLE E. L. 135, 135-36 (2006).

<sup>143</sup> *Id.* at 136.

ment prohibiting the appointment of other categories nor opened up applications to these categories.<sup>144</sup> As a result, appointment is restricted to senior public prosecutors.

The second aspect concerns pre-appointment judicial training. The National Center of Judicial Studies (hereinafter NCJS) is the body responsible for providing training to judges and prosecutors.<sup>145</sup> It was established in 1981.<sup>146</sup> It is the principal institute in charge of providing specialized training to judges throughout their professional careers.<sup>147</sup> It falls under the supervision of the Ministry of Justice, which is the competent authority for appointing the NCJS director, following approval by the SJC.<sup>148</sup> The NCJS director is also the chair of the its board, which consists of the director, attorney general, four judges, and four experts appointed by the Minister of Justice.<sup>149</sup>

There is no formal mandate for pre-appointment training in judicial appointment.<sup>150</sup> Law schools and the judiciary do not recognize judicial internships, even though the judiciary suffers from financial problems and a severe shortage of judges and prosecutors.<sup>151</sup> In practice, some law firms do hire law students on an informal basis to help them acquire legal expertise. Law students are not authorized to formally appear in courts, even under the supervision of a senior attorney. The judicial systems in the United States and Germany, by contrast, are based on providing judicial externships to law students.<sup>152</sup>

Judicial pre-training for judges differs from that for prosecutors.<sup>153</sup> In theory, the JAL does not mandate any pre-academic or professional training, and judges do not require any additional training.<sup>154</sup> The JAL implicitly requires these types of training by limiting the appointment to certain categories of lawyers. It requires training by virtue of the appointment of judges from diverse backgrounds. In practice, the JAL provides equal opportunity to other candidates — including law professors, administrative prosecutors, and lawyers — to ensure diversity in legal training.

Limiting the appointment process to senior public prosecutors triggers a necessity for pre-judicial training. Public prosecution training is limited to criminal law.<sup>155</sup> All prosecutors in Egypt lack the necessary training in other legal fields — such as civil law, commercial law, and labor law. The Ministry of Justice and the SJC mandate such training for new judges. The aim of this training is to fill the gap between theory and practice. The entire pool of candidates is obliged to undergo a one-month training program during their last summer at the Public Prosecution Bureau (PPO).

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<sup>144</sup> *Id.* at 137.

<sup>145</sup> Mohamed Serag, *Legal Education in Egypt*, 43 S. TEX. L. REV. 615, 617 (2002).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> Law No. 347 of 1981 (National Center for Judicial Studies Law), *al-Jarīdah al-Rasmīyah*, 2 July 1981, art. 4 (Egypt).

<sup>149</sup> *Id.* art. 3.

<sup>150</sup> Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 116/1 (Egypt).

<sup>151</sup> *Id.*

<sup>152</sup> STATE BAR OF CALIFORNIA, *Practical Training of Law Students*, <http://www.calbar.ca.gov/Admissions/Special-Admissions/Practical-Training-of-Law-Students>

<sup>153</sup> See generally ALAA AL-DIN ARAFAT, THE MUBARAK LEADERSHIP AND FUTURE OF DEMOCRACY IN EGYPT, 232 (2009) (“stating that shortage of judges will be filled with prosecutors and government lawyers”); See generally, AL ARABIYA NEWS, *Egypt to hold referendum in two stages due to shortage of judges*, (Dec. 11, 2012), <https://english.alarab.ia.net/articles/2012/12/11/254547.html>.

<sup>154</sup> *Id.*

<sup>155</sup> Mohamed Arafa, *Towards a Culture for Accountability: A New Dawn for Egypt*, 5 PHOENIX L. REV. 1, 35-36 (2011).

The absence of pre-appointment training — such as judicial clerkships — at law schools is due to law schools do not coordinate with the Ministry of Justice or private law firms to offer legal training to their students.<sup>156</sup> This approach by law firms, while seemingly inexplicable, may be attributed to a tradition of centralized decisions of educational policies in Egypt.<sup>157</sup> There are two institutions that govern the totality of the educational structure in Egypt. The first is the Ministry of Education, which supervises “all post-secondary education, planning, policy formulation, and quality control activities.”<sup>158</sup> The second is the Supreme Council of Universities, which formulates “the overall policy of university education and scientific research in universities, and determines the number of students to be admitted to each university, each year.”<sup>159</sup> As a general rule, these two entities never coordinate with the Ministry of Justice or the Supreme Judicial Council to offer legal education to judges. The Ministry of Justice and the SJC only depend on the NCJS to offer legal education to their members.

The third aspect is post-judicial appointment training. The PPO believes that “the best way to learn how to fight is to have one.” New prosecutors start their careers without any training until the end of the first two years of their appointment.<sup>160</sup> During these years, each district attorney aide is assigned to a senior public prosecutor for supervision and guidance.<sup>161</sup> The role of the NCJS starts at the end of the first two years of appointment, when junior prosecutors undergo a three-month training period at the NCJS. Training provides major help in rectifying various common mistakes that are committed during the first two years of practical experience.<sup>162</sup> As far as judges are concerned, there is no requirement for formal continuing education, except for judges at the State Council, who are required to hold a master’s degree. As for professional training, the NJSC offers training courses to junior and senior judges that are not mandatory. Other types of training are largely unregulated and depend mainly on funding provided by the Ministry of Justice.<sup>163</sup>

### *B. The Authority of Appointment*

The SJC and the president share the power of appointment for new judges and prosecutors. Article 44 of the JAL authorizes the president to assign judicial appointment following approval by the SJC.<sup>164</sup> Nevertheless, the borderline between the authority of the

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<sup>156</sup> The National Center for Judicial Studies’ (“NCJS”) webpage does not include any cooperation with any Egyptian or foreign university. See NAT’L CENT. FOR JUDICIAL STUD., <http://www.jp.gov.eg/ncjs/21.aspx>; The only cooperation between NCJS occurs on ad-hoc basis with private or international educational centers. For example the mutual cooperation between NCSJ and European Union. See, EUROPEAN UNION EXTERNAL ACTION, *European Experts Share experience with the national Center for Judicial Studies and Judicial Information Center Staff on E-Learning Capacity building*, (Feb. 8, 2016), <https://eas.europa.eu/headquarters/headquarters-homepage/8214/european-experts-share-experiences-national-centre-judicial-studies-and-judicial-information>.

<sup>157</sup> See generally Jamie Boex, *Democratization in Egypt: The Potential Role of Decentralization*, URBAN INSTITUTE CENTER ON INTERNATIONAL DEVELOPMENT & GOVERNANCE, POLICY BRIEF, (Feb. 2011), <https://www.urban.org/sites/default/files/publication/27151/412301-Democratization-in-Egypt-The-Potential-Role-of-Decentralization.PDF>.

<sup>158</sup> EDUCATION, AUDIOVISUAL AND CULTURE EXECUTIVE AGENCY, *Higher Education in Egypt*, (2004), [http://eac.ea.ec.europa.eu/tempus/participating\\_countries/impact/egypt.pdf](http://eac.ea.ec.europa.eu/tempus/participating_countries/impact/egypt.pdf).

<sup>159</sup> *Id.*

<sup>160</sup> Judicial Instruction Manual for Prosecutors, art.795.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 44 (Egypt) (stating that “the appointment of judicial positions, either through appointment or promotion, is a matter of decision of the President of the Republic ... after taking consulting with SJC.” The article further stipulates “appointment

president and the SJC remains unclear.<sup>165</sup> The following paragraphs aim to illustrate the role of each in the appointment process. They show how the executive body enjoys some advantages over the SJC in the appointment process. This process can be divided into six stages. The first starts with the announcement of the SJC vacancy in the local media, which is meant to induce fresh graduates to join the public prosecution. A public call for candidates is published in two widely distributed national newspapers, as shown in Figure (1). The advertisement states the terms and conditions for the application. It specifies when application forms will be made available as well as the deadline for submitting the application. After submitting the application, the SJC selects candidates, who meet the minimum requirement, primarily a law degree with a general grade of “Good,”<sup>166</sup> and sets a date for interviews.

Figure (1): Advertisement of judicial appointment in public newspapers.<sup>167</sup>

<p>The Arab Republic of Egypt The Public Prosecution Bureau announces it is accepting applications for the vacancy of <b>Aide to District Attorney</b> Graduating class of 2012 Overall grade of “Good”</p>
<p>Applications can be obtained between 14/12/2013 to 24/12/2013 The application submission period is from 1/1/2014 to 24/1/2014</p>
<p>Candidates must submit all required credentials mentioned on the advertisement board in the Court of Cassation. If requirements are not met, applications will not be accepted. Applications submitted either before or after the deadline will not be considered.</p>

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of the heads of the courts of appeal, and the deputies and consultant, presidents of primary courts, judges is finalized after the approval of SJC.”).

<sup>165</sup> *Id.*

<sup>166</sup> The advertisement can be found on public printed newspapers.

167. The only legal exception is in the case of appointing assistant public prosecutors. Since 2006, no one has been directly appointed to be an assistant public prosecutor. The SJC has never disclosed the reason why this employment method is not used. This appointment process is based on Article 116 of JAL. It states “no one can be appointed in the position of assistant public prosecutor, except the aide of district attorney, unless the candidate passes a comprehensive exam.” Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 116 (Egypt).



The second stage is the exam or SJC interview stage. In theory, the JAL does not stipulate any entrance test requirement.<sup>168</sup> In practice, however, the SJC schedules interviews for all applicants with the aim of deliberating over the candidates' legal ability. Candidates are asked three criminal law questions, one of which they have to address correctly. At the conclusion of the interview stage, the SJC does not reveal the results to candidates; only successful candidates are informed about their success. The whole process takes place over a period of 12 months starting from the date of the interview. The SJC sends names of potential candidates to the Ministry of Justice to commence the third stage.

The third stage starts once the Ministry of Justice is in possession of the names of all the successful applicants. During this stage, the Ministry of Justice carries out all the required security and background checks. It coordinates with the Ministry of the Interior to obtain criminal and political record clearances, which make up the fourth stage. The JAL does not clearly specify which crimes have the potential to block a candidate's appointment. In general, however, candidates should have no criminal, disciplinary, or rehabilitating records.<sup>169</sup> Candidates should be of good standing and reputation.<sup>170</sup> The connotation of "good and bad" reputation is left to the discretion of the SJC and the security agencies.<sup>171</sup>

If the candidate's record is cleared, the application goes through the second step in the background check process, which involves the candidate's family's criminal record.<sup>172</sup> In theory, the background check is limited to that of the candidate only. In practice, however, the SJC and the Ministry of Justice extend their securities check to include all the candidate's family members up to the fourth degree of kinship (second cousins and their spouses).<sup>173</sup> In their application, candidates are required to fill out a family-tree form. This form includes the names, addresses, and employment statuses of family members up to the fourth degree. It includes parents, grandparents, siblings, uncles, and cousins, as well as their respective

<sup>168</sup> *Id.*

<sup>169</sup> Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct.1972, art. 38 (Egypt) (states that a candidate should not have a criminal record and have a good reputation).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Shams Al Din Al Hajjaji, *A Call for Judicial Reform in Egypt*, 11 VIENNA J. INT'L CONST. L. 257, 280 (2017).

<sup>173</sup> *Id.*

spouses.<sup>174</sup> Both the candidates and their fathers are required to submit fingerprints to verify their criminal history. In the event of a crime having been committed by a member of the candidate's family, the SJC immediately eliminates the candidate from its pool of appointees.<sup>175</sup>

The fourth stage gives the National Security Agency (NSA) the authority to investigate the candidates' — as well as their families' — political affiliation. The SJC and the Ministry of Justice practice a zero-tolerance policy regarding political history, specifically with regard to any affiliation with Islamist or liberal parties or groups.<sup>176</sup> In theory, there is no direct legal foundation calling for candidates to be checked by the NSA; however, it has been argued that Article 73, regarding the prohibition of political participation of both judges and courts, also applies to potential members of the judiciary. In practice, the Ministry of Justice is the only competent authority for coordinating between the SJC and the NSA. This step is not made public by the SJC to the candidates. However, if a candidate chooses to challenge the requirement of a security check of his relatives, he is instantly eliminated from the list of candidates.<sup>177</sup> Automatic exclusion is thus applied without any justification.

The fifth stage is a required medical examination involving blood and urine sampling, the aim of which is to ensure that candidates are free of alcohol and drug dependencies. In theory, the JAL does not mandate such a test for potential candidates.<sup>178</sup> However, in practice, the SJC and the Ministry of Justice require such tests for each candidate. Even though the law does not stipulate such a requirement, candidates cannot refuse to take the test. Candidates who fail the tests are excluded from the list of candidates.<sup>179</sup> This medical test is for first-time appointees only; when prosecutors are promoted to judges, there is no such requirement. The same applies if a junior judge is promoted to work at the Court of Appeal, the Court of Cassation or the SCC.

In stage six, a presidential appointment decree is issued for the appointment of new appointees. The JAL gives the President the ultimate authority to issue the decree of appointment of judges and aides to public prosecutors.<sup>181</sup> The names of the accepted candidates are published in “two widely distributed newspapers.”<sup>182</sup> Moreover, candidates have to take the judicial oath before the Minister of Justice. The oath reads: “I swear by the almighty God to judge among people with justice and respect to laws.” This oath will next be sworn when a senior prosecutor is promoted to judge. An oath is required only when a judge is appointed

<sup>174</sup> Appendix 3 of the Public Prosecution Bureau Appointment Application contains chats of the applicant's family members. Each candidate must complete this appendix at the best of his knowledge. It is important to know that such

appendix also exists in the police and army academies to ensure that no police or army officer has any political affiliations. The application is not available to the public.

<sup>175</sup> *Id.*

<sup>176</sup> See VETO, *Judicial Source: Exclusion of the Brotherhood from appointment movement in the Attorney General*, (July 7, 2013), <http://www.vetogate.com/447110>.

<sup>177</sup> This information is required in the application for the aide to the district attorney. The application asks about a lot of

information with regards to the candidate and his family's history. It also requires disclosure of any travel or relation with international organizations. See Maysar Yassin, *al-watan tanshor shorowt al-taqadam lewazefat ma'awn al-nayabah*, WATEN NEWSPAPER, <http://www.elwatannews.com/news/details/602292>.

<sup>178</sup> Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 118 (Egypt).

<sup>179</sup> See Tarek Hafez, *Wokala al-nayabah aljodod yodown al-kashf al-tabī we-yanhown ijrahāt t'ynahom*, MASRESS, (July 13, 2014), <http://www.masress.com/elfagr/1641454>.

<sup>181</sup> Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 44 (Egypt).

<sup>182</sup> *Id.*

attorney general, president of the Court of Cassation, or judge at the SCC.<sup>183</sup> In each of these cases, the appointee takes the oath before the president.<sup>184</sup>

When prosecutors are promoted to judges at the age of 30, there is no requirement of passing the previously described five stages — only stage six applies.<sup>185</sup> The SJC forwards the names of the successful prosecutors to the president to issue the presidential appointment decree. New judges are then sworn in before the SJC. This is because the Court of Cassation is the competent authority for selecting and appointing new judges to the court.<sup>186</sup> The Court of Cassation is the supreme court for the ordinary judiciary, except for administrative and constitutional disputes. The same rule applies to the SCC.<sup>187</sup> As far as the appointment of the attorney general is concerned, the SJC is the competent authority for appointment.

Before 2014, the president had ultimate authority over appointing the attorney general.<sup>188</sup> However, the 2014 Constitution transferred this authority over to the SJC.<sup>189</sup> After the assassination of Attorney General Hesham Barakat in 2015,<sup>190</sup> the appointment of the new attorney general was delayed for more than six months.<sup>191</sup> The reason for the delay was that the president wished to appoint the new attorney general, while the SJC upheld its constitutional right to do so itself.<sup>192</sup> Following this struggle, the SJC successfully appointed the new attorney general, Nabil Sadek. As for the judicial oath, it still has to be taken before the president.<sup>193</sup>

#### IV. CONTEMPORARY CHALLENGES IN JUDICIAL APPOINTMENT

##### A. Exclusion based on Class

The first category of candidates excluded from the appointment process is candidates from humble backgrounds. The history of this exclusion dates a long way back—even to before

<sup>183</sup> *Id.* at art. 71.

<sup>184</sup> *Id.* at art. 44.

<sup>185</sup> The 2014 Constitution considers Public Prosecution Bureau as an integral part of the judiciary. Thus, SJC plays a major role in the appointment of new prosecutors. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art.189 § 1, 14 Jan. 2014 (stating that “the public prosecution is an integral part of the judiciary. It is responsible for investigating, pressing charges and prosecuting all criminal cases except what is exempted by law. The law establishes the public prosecution’s other competencies.”).

<sup>186</sup> Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct.1972, art. 44 (Egypt).

<sup>187</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 193 § 3, 14 Jan. 2014 (stating that “the General Assembly chooses the Court’s President from among the most senior three vice-presidents of the court. It also chooses the vice-presidents and the members of its Commissioners Authority, who are appointed by a decree from the President of the Republic. The foregoing takes place in the manner defined by the law.”).

<sup>188</sup> Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 44 and 119 (Egypt).

<sup>189</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 189 § 2, 14 Jan. 2014 (stating that “public prosecution is carried out by a Prosecutor General who is selected by the Supreme Judicial Council from among the Deputies to the President of the Court of Cassation, the Presidents of the Court of Appeals or the Assistant Prosecutor Generals, by virtue of a presidential decree for a period of four years, or for the period remaining until retirement age, whichever comes first, and only once during a judge’s career.”).

<sup>190</sup> BBC NEWS, *Egypt Prosecutor Hisham Barakat Killed in Cairo attack*, (June 29, 2015), <http://www.bbc.com/news/world-middle-east-33308518>.

<sup>191</sup> Mariam Jabal, *Khlaf Dostori Yoajal Iktiar al-Na’b al-Am*, ALBAWABA NEWS, Sept. 11, 2015, <http://www.albawab hnews.co m/1493128>.

<sup>192</sup> *Id.*

<sup>193</sup> AHARAM ONLINE, *Nabil Sadek Sworn in by Sisi as Egypt’s New prosecutor general*, (Sept. 19, 2015), <http://english.ahram .org.eg/NewsContent/1/0/141872/Egypt/0/Nabil-Sadek-sworn-in-by-Sisi-as-Egypt-s-newprosecu.aspx>.



the beginning of the Republic era. During the monarchy, the king had ultimate authority to appoint judges. Article 7 of the 1947 Judicial Independence Law states that “the appointment of judges is carried out through a monarchical decree.”<sup>194</sup> The 1952 coup overthrew the monarchy.<sup>195</sup> It proposed that the domination of the upper class in society should come to an end. One of the promises of the revolution was to increase the appointment of less-privileged social classes within the army, the police, and the judiciary — a promise that still remains to be fulfilled.<sup>196</sup>

The lower classes have faced great obstacles for decades. Successive regimes have covertly inhibited the underprivileged from obtaining equal access to public jobs, especially judicial appointments. Even if candidates are high-achieving students of law, they still face major challenges in joining the judiciary.<sup>197</sup> In 2011, 138 candidates claimed they were rejected from the appointment process because their parents did not hold a university degree.<sup>198</sup> Exclusion of the underprivileged has been brought to the attention of the SJC several times. The issue, however, has not been overtly acknowledged or justified in any official statement.<sup>199</sup>

Even though the SJC has never declared its reason for this type of elimination, the Minister of Justice recently set forth his position. In May 2015, the Minister of Justice, Judge Mahfouz Saber, was asked during a television interview whether “the son of a garbage collector stood any chance of appointment as a public prosecutor.”<sup>200</sup> He replied that “the judge should be from a proper social class ... with all due respect to garbage collectors, and to those below or above him ... a proper environment, and a good social class is necessary ... I am not saying he should be an aristocrat ... I am saying the class should not be very low.”<sup>201</sup> As a result of this statement, Saber resigned from office a week later.

The SJC did not deny the above statement.<sup>202</sup> It is common knowledge that underprivileged citizens do not have an equal chance in the appointment process. Saber’s resignation was not the result of an untruthful statement by the Minister; rather, it was for expressing in public a truth that has for decades remained unspoken. Members of the lower social classes find it difficult to secure judicial or prosecution jobs.

Such inequality favors judges’ sons and other relatives, who make up an undeclared quota.<sup>203</sup> The president of the Judges’ Club, Judge Ahmed Al-Zend, asserts that “appointing judges’ children will continue ... there is no single force in Egypt that can stop such a practice.”<sup>204</sup> The Club is the only democratic organization within the Egyptian judiciary.<sup>205</sup> His statement

<sup>194</sup> Law No. 66 of 1943 (Judicial Independence Law), *al-Jarīdah al-Rasmīyah*, 12 July 1943, art.7 (Egypt).

<sup>195</sup> F.R.C. Bagley, *Egypt Under Nasser*, 11 INT’L J. 193, 195 (1956).

<sup>196</sup> TAREQ AL-BASHRI, AL-HARAKAH AL-SAYASIYAH FI MISR, 539-542 (Dar al-Shorouk 2nd ed., 2002).

<sup>197</sup> See Mahmoud Al-masry, *Istba’ad Ta’ynat al-nayabah besabab mo’hel al-waladiyn aw al-faqr*, ALBAWA NEWS (Dec. 19 2013) <http://www.albawabhnews.com/275627>.

<sup>198</sup> Lobna Moneib, *Egyptian law graduates denounce class-based job discrimination*, AHRAM ONLINE (Oct. 20, 2014), <http://english.ahram.org.eg/News/113461.aspx>.

<sup>199</sup> Shams Al Din Al Hajjaji, *A Call for Judicial Reform in Egypt*, 11 VIENNA J. INT’L CONST. L. 257, 280 (2017).

<sup>200</sup> albayt baytak – wazear al-‘adl ya yomkan an ya’mal ibn ‘amal anzafah be-qada, YouTube, (May 10, 2015) <https://www.youtube.com/watch?v=7H8mPdTJUWw>.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> Mohamed Al-Isamwi, *al-Zend: Ta’yeen abna al-Qodah sayastmeer, we lan tastati’ qah fi Misr Iqaf haza elzahf almoqasas*, AHRAM (Sept. 3, 2012), <http://gate.ahram.org.eg/News/182259.aspx>.

<sup>204</sup> *Id.*

<sup>205</sup> El-sayed Gamel el Din, *Complaint against prominent judge Ahmed El-Zend referred to judicial council*,

was considered the first official statement from an official member in the judiciary with regard to this hidden quota. Prior to Al-Zend's statement, there was a covert consensus of giving preference to children and relatives of members of the judiciary. It was not until later that the press tracked down the appointees and their relatives. Successive reports were published in the local newspaper, *Al Shorouk*. The first report came out in 2013,<sup>206</sup> and revealed that more than 114 out of 475 appointees (24%) in the Public Prosecution Office were relatives of members of the judiciary.<sup>207</sup> In 2014, this percentage increased from 25% to 35%: Out of 485 district attorney aide appointees, 168 were relatives of judges.<sup>208</sup> The report showed that 87 candidates had parents working in the Court of Appeal, 11 candidates had parents working in the Court of Cassation, and 55 candidates had parents who were judges or prosecutors.<sup>209</sup> Both reports revealed the names of the candidates and their kinship to members of the judiciary.<sup>210</sup>

### B. Exclusion based on Gender

In theory, there is no legal barrier to the appointment of women as judges or prosecutors. Furthermore, successive judicial laws have not prohibited women from joining the bench. The language of the JAL is very clear in referring to candidates in a gender-neutral form. Moreover, advertisements for judicial vacancies never state that positions are restricted to male candidates.<sup>211</sup> In practice, however, women have limited access to joining the bench as judges or criminal prosecutors. The question of appointing women in the judiciary was raised for the first time in 1951. Professor Aisha Rateb, who went on to become Egypt's first female ambassador, was the first woman to apply for the position of judge on the State Council.<sup>212</sup> Her request was denied. She sued the State Council's administration for denying her request. She fought her case all the way to the Supreme Administrative Court.<sup>213</sup> Abdel Razzak Al-Sanhuri, the founder of modern administrative and civil laws, also denied her appeal as president of the Supreme Administrative Court.<sup>214</sup> He stated that there were no barriers against the appointment of women, except on administrative grounds. Hence, the decision to exclude the applicant was sustained as long as there was no evidence of misuse of power against the claimant.<sup>215</sup> The ban on women joining the bench continued until 2007, with two

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AHRAM ONLINE (Mar. 6, 2014), <http://english.ahram.org.eg/News/96037.aspx>.

<sup>206</sup> Ahmed Sa'd, *Abna al-Qodah yastahowzown ala rob' ta'ynat dof'at al-nayabah al-gedidiah*, SHOROUK, (Dec. 7, 2013), <http://shorouknews.com/news/view.aspx?cdate=07122013&id=32b2ce69-695b-484d-b358-2214a8cdc824>.

<sup>207</sup> *Id.*

<sup>208</sup> Ahmed Said, *Bel-asma ... abna al-qodah yastohwazown ala 35% men ta'yanat elnayabah al-gedidiah*, SHOROUK, (July 17, 2014), <http://www.shorouknews.com/news/view.aspx?cdate=17072014&id=52446ae9-860f-4183-8c4c-31818a678860>.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> See Figure (1).

<sup>212</sup> EARL SULLIVAN, *WOMEN IN EGYPTIAN PUBLIC LIFE: CONTEMPORARY ISSUES IN THE MIDDLE EAST*, 82 (Syracuse U. Press, 1986).

<sup>213</sup> Ahmed el-Sayed, *Female Judges in Egypt*, 13 Y.B. ISLAMIC & MIDDLE E. L. 135, 135-36 (2006-2007).

<sup>214</sup> Supreme Administrative Court, case no. 30, session of 2 Feb. 1952 (stating that "the limitation of some jobs—ordinary judiciary and state council—to men only, and excluding women, is based on administration's discretion. Administration enjoys discretion over determining the suitability of any candidate, according to the nature of a certain appointment. The administration can also base its decision on the customs and surrounding environment. This shall not be interpreted as underestimating the value of women and their dignity. It shall not also underestimate their intellectual, cultural, and educational level. It shall not also prejudice their rights. However, it is the choice of the administration to determine the suitability of certain jobs, per the administration discretionary authority. The administration shall not prejudge the principle of legal equality.")

<sup>215</sup> *Id.*

exceptions. First, women were allowed to join the administrative prosecution bureau, where they make up 25%.<sup>216</sup> Second, Justice Tahani Al-Gebali was the first and last justice to join the SCC.<sup>217</sup> In 2007, the exception extended to a new initiative to open the door for women to join the bench.<sup>218</sup> This initiative was limited to female administrative prosecutors who wished to join the ordinary judiciary. As a result, 31 female administrative prosecutors were able to join the ordinary judiciary as judges.<sup>219</sup>

One of the major drawbacks affecting the progress of women's appointment in the judiciary was the refusal of the State Council to recognize their right to be appointed. In 2010, the State Council announced it would be accepting nominations of female applicants to join the bench. However, this decision triggered major opposition from the Public Assembly. The Public Assembly called for an urgent meeting to challenge the decision of the board. In the meantime, 24 female candidates filled out their applications. Before the closing date and during the submission period, the State Council Public Assembly (compromising the entirety of the judges working at the State Council) held an urgent session to nullify the decision of the State Council board to appoint women. This decision led to innumerable debates surrounding the reasons and motives behind such a step.<sup>220</sup> It has instigated many protests from the feminist movement in Egypt, many of which have expressed concern about the future of equality in the country. The movement has thus far succeeded in imposing its demands.

Justice Adel Farghaly, a member of the Public Assembly of the State Council, summarized the argument in favor of excluding women from judicial appointment. First, he distinguished between rights and obligations. He considered the joining of the judiciary an obligation rather than a right.<sup>221</sup> He maintained that Egyptian men have obligations, such as mandatory military service, that women are exempt from.<sup>222</sup> He stated that the "refusal to appoint women to senior judicial positions has always been based on the fact that Egyptian women are not asked to perform military service and 'offer sacrifice' like men." He went on to say that women occupy judicial functions in western countries because they perform military service and perform jobs equal to those of men, including acts of physical labor."<sup>223</sup> Second, judges and prosecutors are required to relocate to different districts every three to five years. This continuous relocation process would not suit the nature of women. He stated that "judicial

<sup>216</sup> Nancy Messieh & Suzanne Gaber, *A Win for Women in Egypt's Courts*, ATLANTIC COUNCIL, (July 22, 2015), <http://www.atlanticcouncil.org/blogs/menasource/a-win-for-women-in-egypt-s-courts>.

<sup>217</sup> Tahany el-Gebali, *Muslim Women: Past and Present*, WOMEN'S ISLAMIC INITIATIVE IN SPIRITUALITY AND EQUALITY, (2015), [http://www.wisemuslimwomen.org/muslimwomen/bio/tahany\\_el-gebali/](http://www.wisemuslimwomen.org/muslimwomen/bio/tahany_el-gebali/); see also Amina Elbendary, *Tahani El-*

*Gebali: No winding pathways for Egypt's first woman judge*, AL-AHRAM ONLINE, (Feb. 19, 2003), <http://weekly.ahram.eg/2003/625/profile.htm>.

<sup>218</sup> *Id.*

<sup>219</sup> Nancy Messieh & Suzanne Gaber, *A Win for Women in Egypt's Courts*, ATLANTIC COUNCIL, (July 22, 2015), <http://www.atlanticcouncil.org/blogs/menasource/a-win-for-women-in-egypt-s-courts>.

<sup>220</sup> Eman Hashim, *The Ball in the Egyptian State Council's Court: Female Judges*, (March 1, 2010), <http://www.path eos.com/blogs/mmw/2010/03/the-ball-in-the-egyptian-state-councils-court-female-judges/>; see also Hadeel Al-Shalchi, *Women judges stir up old debate in Egypt*, BOSTON, (April 6, 2010), [http://www.boston.com/news/world/middleeast/articles/2010/04/06/women\\_judges\\_stir\\_up\\_old\\_debate\\_in\\_egypt/](http://www.boston.com/news/world/middleeast/articles/2010/04/06/women_judges_stir_up_old_debate_in_egypt/).

<sup>221</sup> See generally Yousuf Ali, *Appointment of Muslim Women as Judges in the Courts: A Textual Analysis from Islamic Perspective*, 2011 INT'L CON. HUM. HIS. & SOC. SCI. 200 (2011).

<sup>222</sup> *Id.* at 201.

<sup>223</sup> Eman Hashim, *The Ball in the Egyptian State Council's Court: Female Judges*, (March 1, 2010), <http://www.path eos.com/blogs/mmw/2010/03/the-ball-in-the-egyptian-state-councils-court-female-judges/>; see also Hadeel Al-Shalchi, *Women judges stir up old debate in Egypt*, BOSTON.COM, (April 6, 2010), [http://archive.boston.com/news/world/middleeast/articles/2010/04/06/women\\_judges\\_stir\\_up\\_old\\_debate\\_in\\_egypt/](http://archive.boston.com/news/world/middleeast/articles/2010/04/06/women_judges_stir_up_old_debate_in_egypt/).

work in Egypt is not suitable for women, as they cannot balance their work and personal life duties. They have always been the major care providers for their families, unlike men.”<sup>224</sup>

Currently, there is a constitutional mandate for the judicial appointment of women, opening doors for women to join the bench. Nevertheless, by late 2016, the SJC had not appointed any new female candidates to join the PPO or the bench.<sup>225</sup> The 2014 Constitution leaves the debate to the discretion of the administration to appoint women to fill judicial vacancies. Article 9 eliminates any form of discrimination against women. It states that “the state ensures equal opportunity for all citizens without discrimination.”<sup>226</sup> Additionally, Article 11 mandates that the administration appoint women in the judiciary. It explicitly states the right of women to secure official judiciary posts. This inhibits any argument by the administration that it cannot accommodate women in certain posts.<sup>227</sup>

### C. Exclusion based on Political Affiliation

The JAL bans both courts and judges from both declaring their political opinions and participating in any political forum.<sup>228</sup> This ban is restricted to judges and courts. Nevertheless, the SJC and the Ministry of Justice have extended the ban to judicial candidates. Their practice continues to exclude any candidates with a political affiliation. Even though political orientation is not a crime, there is a marked tendency to exclude candidates for their or their families’ political affiliation. This tendency allows the NSA to interfere in the appointment process, as it can exclude any candidate for these reasons.

The NSA, which carries out the security check on candidates, is notorious for its ambiguity and lack of transparency in the background check process. It is widely known that police performance is corrupt and lacks transparency.<sup>229</sup> Moreover, candidates have no access to their security files and are unable to appeal their security status in the case of exclusion.<sup>230</sup> The NSA does not reveal to candidates the content of their files, which are treated with a great

<sup>224</sup> See Hadeel Al-Shalchi, *Women judges stir up old debate in Egypt*, BOSTON.COM, (April 6, 2010), [http://archive.boston.com/news/world/middle\\_east/articles/2010/04/06/women\\_judges\\_stir\\_up\\_old\\_debate\\_in\\_egypt/](http://archive.boston.com/news/world/middle_east/articles/2010/04/06/women_judges_stir_up_old_debate_in_egypt/).

<sup>225</sup> Mariam Rizk, *Egypt Interview female judges for positions in different courts*, AL-AHARM ONLINE, (March 29, 2015) <http://english.ahram.org.eg/NewsContent/1/64/126401/Egypt/Politics-/Egypt-interviews-female-judges-for-positions-in-di.aspx>.

<sup>226</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 9, 14 Jan. 2014 (ensures that women will secure positions in the judiciary). The same article existed when *al-Sanhori* stated that it is no prejudice against women in the appointment of certain posts, as long as there is no misuse of discretionary power of the administration. See CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT art. 3, 1923 (stating that “Egyptians are equal. They are equal in practicing civil and political rights and duties. Discrimination based on ethnic origin, language, or religion is prohibited.”).

<sup>227</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 11 § 2, 14 Jan. 2014, (stating that the “state commits to taking the necessary measures to ensure appropriate representation of women in the houses of parliament, in the manner specified by law. It grants women the right to hold public posts and high management posts in the state, and to appointment in judicial bodies and entities without discrimination.”).

<sup>228</sup> Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 119 (Egypt).

<sup>229</sup> Mohamed Arafa, *Towards a Culture for Accountability: A New Dawn for Egypt*, 5 PHOENIX L. REV. 1, 9 (2011).

<sup>230</sup> See Emad El Din Shahin, *Brutality, torture, rape: Egypt’s crisis will continue until military rule is dismantled*, THE GUARDIAN, (March 6, 2014), <http://www.theguardian.com/commentisfree/2014/mar/06/brutality-torture-rape-egypt-military-rule>.

deal of confidentiality.<sup>231</sup> There has never been a comprehensible reason why these reports are handled in such a manner.

While having family NDP affiliations does not stop candidates from joining the bench, any affiliation to Islamist group — like the Muslim Brotherhood — is considered a political affiliation, resulting in instant elimination from candidacy. Currently, the ban on political participation is restricted to Islamist political affiliation.<sup>232</sup> The absence of real political parties in Egypt before the 2011 revolution has resulted in the Muslim Brotherhood being the only serious political competitor of the National Democratic Party (NDP).<sup>233</sup> NDP-affiliated officials banned the Muslim Brotherhood both before January 2011 and after July 2013.<sup>234</sup> The dominant political parties in the country were either the NDP or the Muslim Brotherhood.<sup>235</sup>

The meaning of politics in socialist and post-socialist countries is always vague.<sup>236</sup> It is based on an ideology that bans the coexistence of other ideologies.<sup>237</sup> During the socialist era, there was always just one political party — first the Arab Socialist Union, established in 1962, and later the NDP, which was established in 1978.<sup>238</sup> They were the major dominant parties that no other political party dared challenge.<sup>239</sup> The NDP has always won the majority of seats in both houses. The dominant political parties in the country were either the NDP or the Muslim Brotherhood.<sup>240</sup> In 1995, the NDP won 415 out of 520 seats,<sup>241</sup> and in 2000 it won 388.<sup>242</sup> In

<sup>231</sup> Tarek Masoud, *Egyptian Democracy: Smothered in the Cradle or Stillborn*, 20 BROWN J. WORLD AFF. 3, 5 (2014).

<sup>232</sup> *Id.*

<sup>233</sup> See Ash Bali, *From Subjects to Citizens: The Shifting paradigm of Electoral Authoritarianism in Egypt*, 1 MIDDLE E. L & GOVERNANCE 38, 57 (2009).

<sup>234</sup> Sharon Otterman, *Muslim Brotherhood and Egypt's parliamentary elections*, COUNCIL ON FOREIGN REL., (Dec. 1, 2005) <http://www.cfr.org/egypt/muslim-brotherhood-egypts-parliamentary-elections/p9319>.

<sup>235</sup> Kristen Stilt, *Islam is the Solution: Constitutional Visions of the Egyptian Muslim Brotherhood*, 46 TEX INT'L J. 73, 74-75 (2010); see Eric Trager, *Unbreakable Muslim Brotherhood: Grim Prospects for a Liberal Egypt*, 90 FOREIGN AFF. 114, 121 (2011); see also Elizabeth Iskander Monier, *Arab Spring and Coptic Muslim Relations: From Mubarak to the Muslim Brotherhood*, 11 EUR. Y. B. MINORITY ISSUES 169, 170-71 (2012).

<sup>236</sup> Gunter Frankenberg, *Stranger than Paradise Identity & Politics in Comparative Law*, 2 UTAH L. REV. 259, 261 (1997); see James Ruiz, Sung Eun Byun, *Corruption and Politics within the South Korean Government*, 9 INT'L J.

POLICE & MGMT 226, 230 (2007).

<sup>237</sup> JANOS KORNAI, *THE SOCIALIST SYSTEM THE POLITICAL ECONOMY OF COMMUNISM*, 48-49 (Princeton U. Press 1992).

<sup>238</sup> L.M. Kenny, *Aftermath of Defeat in Egypt*, 23 INT'L J. 97, 101 (1968); see also, Peter Mansfield, *Nasser and Nasserism*, 28 INT'L J. 670, 675 (1973).

<sup>239</sup> *Majlas al\_Qad'a Yasb'ed 73 'dow be-mahzora men ta'ynat al-nayabah*, WN.COM, (Oct. 9, 2013), <http://article.wn.com/view/W NAT974eb3f4eb762745d9deee508ac0bf21/>.

<sup>240</sup> Kristen Stilt, *Islam is the Solution: Constitutional Visions of the Egyptian Muslim Brotherhood*, 46 TEX INT'L J. 73, 74-75

(2010); see Eric Trager, *Unbreakable Muslim Brotherhood: Grim Prospects for a Liberal Egypt*, 90 Foreign Aff. 114, 121 (2011); see also, Elizabeth Iskander Monier, *Arab Spring and Coptic Muslim Relations: From*

*Mubarak to the Muslim Brotherhood*, 11 EUR. Y. B. MINORITY ISSUES 169, 170-71 (2012).

<sup>241</sup> *Id.*

<sup>242</sup> Muhammad Chami, *Egyptian Muslim Brotherhood Organization Sources and Activities*, 12 US-CHINA L. REV. 334, 342 (2015).

2005, it won 311 seats, while the Muslim Brotherhood won 88 seats.<sup>243</sup> In the 2010 elections — the last before it was dissolved — the NDP won a total of 473 seats.<sup>244</sup> The absence of real political parties in Egypt before the 2011 Revolution has resulted in the Muslim Brotherhood being the only serious political competitor of the NDP.<sup>245</sup> The Muslim Brotherhood won the majority after NDP members were banned from running for election in the first elected parliament after the 2011 revolution.<sup>246</sup>

#### V. PROPOSED REFORM OF EGYPTIAN JUDICIARY

This paper recommends the following three major reforms to the appointment system. First, the SJC must be reformed. The need for a reform of the SJC is primarily due to a lack of checks and balances, as shown in the comparative cases of the United States and Germany. Historically, the Egyptian judiciary has never accepted the interference of the president in choosing its members, as illustrated by the example of the dispute that arose between the SJC and the president surrounding the appointment of the attorney general in 2015.

Moreover, the new SJC shall not include any members of the legislative authority until the idea of public participation is widely accepted among judges. Egypt has no independent House of Representatives. In the 2015 parliamentary elections, allegations emerged that the Egyptian General Intelligence Directorate (GID) had interfered. Hazem Abdel Azim, a former member of President Abdel Fatah al-Sisi's presidential campaign, stated that the "For the love of Egypt" political alliance, which won all 120 closed-list seats, was established under the supervision of the GID and that meetings surrounding its establishment were held at GID headquarters.<sup>247</sup> As a result, any reform based on the participation of either executive or legislative authority would face major resistance from the judicial community.

Second, the SJC is the competent authority for appointing judges and prosecutors.<sup>248</sup> As indicated earlier, it is not democratically formulated. The appointment authority should be separate from the SJC. The judicial appointment process should be assigned to an independent body that includes judges, lawyers, law professors and representatives from the public. The role of this body would be to separate the authority of impeachment from that of appointment. The new appointment authority would ensure equal treatment for diverse candidates and counter discrimination.<sup>249</sup> As shown previously, there is a long history of discrimination against women and the underprivileged in particular, despite such discrimination being unlawful and prohibited.<sup>250</sup> Potentially, this reform will impact and promote the inclusion of women, the underprivileged, and political minorities.

<sup>243</sup> CARRIE ROSEFSKY WICKHAM, *MUSLIM BROTHERHOOD: EVOLUTION OF AN ISLAMIST MOVEMENT*, 118 (Princeton U. Press 4th ed., 2015).

<sup>244</sup> CARNEGIE ENDOWMENT FOR INT'L PEACE, *Egypt Elections: National Democratic Party*, (Nov. 13, 2011), <http://www.aucegypt.edu/gapp/caireview/pages/articleDetails.aspx?aid=122>.

<sup>245</sup> Ash Bali, *From Subjects to Citizens: The Shifting paradigm of Electoral Authoritarianism in Egypt*, 1 MIDDLE E. L. & GOVERNANCE 38, 57 (2009).

<sup>246</sup> Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, arts. 44 and 119 (Egypt).

<sup>247</sup> Ahmed Fouad, *Did Egyptian intelligence meddle in recent elections?* AL-MONITOR (Jan. 1, 2016), <http://www.almonitor.com/pulse/originals/2016/01/egypt-parliament-accusation-interference-intelligence.html#>.

<sup>248</sup> Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 77 (Egypt).

<sup>249</sup> See generally Peter Webster, *Selection and Retention of Judges: Is there one "Best" Method?* 23 FLA. ST. U. L. REV. 1, 3-5 (1995), <http://ir.law.fsu.edu/cgi/viewcontent.cgi?article=1455&context=lr>.

<sup>250</sup> *Id.*

As far as gender equality is concerned, the 2014 Constitution mandates the appointment of women in the judiciary.<sup>251</sup> However, in the past two years, women have not had an equal chance of appointment in both the ordinary and the administrative judiciary.<sup>252</sup> The SJC continues to ban women from joining the judiciary, as it has done before with quotas for lawyers in appointments.<sup>253</sup> The JAL stipulates two quotas for lawyers to be appointed as judges and prosecutors. Article 47 states that the yearly quota should be no less than 25% for the appointment of judges in primary courts and 10% for appointments in the Court of Appeal.<sup>254</sup> Article 118 states that the quota of lawyers shall be no less than 25% of the total appointees each year for the Prosecution Bureau.<sup>255</sup>

With regard to candidates who are underprivileged and/or political minorities, the SJC would include members of the legal community, such as law professors and lawyers. The underprivileged and political minorities who meet the appointment requirements would obtain support from non-judge members of the SJC, while judges would be more objective in their rejection of underprivileged candidates. Both professors and lawyers would represent the conscience of the legal profession. Even though disagreements exist between lawyers and judges, there is still a great deal of mutual respect among members of the legal community in Egypt. The underprivileged and political minorities, along with other members of the judiciary, would benefit from increased diversity in the SJC.

Third, there are three new judicial requirements that should be added to the current appointment requirements, namely raising education standards,<sup>256</sup> introducing judicial internship programs for law graduates,<sup>257</sup> and banning any political reports from appointment requirements.<sup>258</sup> Education standards need to be improved.<sup>259</sup> Stipulating only minimum education requirements leaves the door open for mediocre candidates, especially given the increasing number of law graduates in Egypt.<sup>260</sup> Including higher educational standards — such as a legal diploma or LLM — can improve the appointment requirements, such as a legal diploma or LLM.<sup>262</sup> This will not result in an added financial burden for candidates, as the cost of one diploma at Cairo University is less than \$100.<sup>262</sup>

As far as training prior to appointment is concerned, this must be introduced to the Egyptian legal system. The implementation of this system would achieve four purposes. First, it would provide law students with a deeper perspective on the intricacies of the court system.<sup>263</sup> Second, law interns would contribute to judges' efforts in research, data collection, editing and writing. Third, interns would come at no additional cost to the judiciary, because they gain

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<sup>251</sup> *Id.*

<sup>252</sup> Thomas Cooley, *The Fundamentals of American Liberty*, 3 MICH L. J. 149-50 (1894).

<sup>253</sup> *Id.*

<sup>254</sup> Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 47 (Egypt).

<sup>255</sup> *Id.* at art. 118.

<sup>256</sup> Daniel Nadler, *An Opportune Moment: The Judicial Appointment Reforms and the Judicial Credentials Demanded by the Charter*, 15 CONST. F. 121, 123 (2006).

<sup>257</sup> *Id.* at 124.

<sup>258</sup> *Id.*

<sup>259</sup> See generally Juan Mayoral, Urszula Jaremba, & Tobias Nowak, *Creating EU law judges: the role of generational differences, legal education and judicial career paths in national judges' assessment regarding EU law knowledge*, 21 J.

EUROPEAN PUB. POL. 1123 (2014).

<sup>260</sup> *Id.*

<sup>262</sup> *Id.*

<sup>262</sup> Mohamed Serag, *Legal Education in Egypt*, 43 S. TEX. L. REV. 615, 617 (2002).

<sup>263</sup> *Id.* at 617-18.

knowledge in exchange for their services.<sup>264</sup> And finally, at the end of their internships, interns are and would be given assessment reports that could later be used as additional references during the appointment process.<sup>265</sup> As for the political reports requirement, banning such reports would end the executive authority's influence on the nomination process. Active political affiliation of judicial members can be legally handled through an impeachment process,<sup>266</sup> while executive intervention cannot be rectified later.<sup>267</sup>

## VI. CONCLUSION

The judiciary faces major challenges in the appointment process. Antiquated methods, which are no longer in practice in modern judiciaries, are still enforced. A new system needs to be formulated to work out the challenges and improve the development in judicial appointment. As far as the various requirements are concerned, two steps pave the way towards improvement. One involves mandating postgraduate studies (like Germany), and the other involves introducing specialized judicial education (like France). These should go hand in hand, not in isolation of one another. The improved level of education requirements will increase the level of competency and collaboration among candidates.

As for the appointment process, there must be transparency, justice, and equality for and before the public to ensure discrimination against women and the underprivileged is eliminated. This research shows implicitly that there is a gap between *de facto* and *de jure*. There is discrimination against women and candidates from a lower socioeconomic status, preventing them from joining the judiciary. In order to illuminate this gap, my recommendations can be summarized in the following points. First, a new formulation of the SJC must be introduced to reflect a democratic and accountable judiciary to members of the general public, who are the source of judicial authority. The judiciary has to adopt clear methods of transparency. The inability to adopt such rules will continue to generate the question about the ability of the judiciary to face corruption, both internal and external. The SJC must include new members in the appointment committee to reflect the democratic process of appointment and the legitimacy of its members. These new members can be senior professors, who enjoy great respect within the judicial community. Second, the elimination of all discriminatory requirements in the appointment process — such as social class, political affiliation, and gender — is called for. It is no longer accepted that, while the law does not recognize any form of discrimination among individuals, the judiciary still continues to exercise such discrimination. Finally, it must raise the standard of appointment to include more educational and post-appointment training programs, such as internships. In the interim, the additional education requirement could include a postgraduate degree.

This research was an attempt to explain and detail the appointment process in Egypt. It tried to overcome these challenges that hinder the efficiency of the Egyptian judiciary. The challenges that face a large number of law school graduates in securing judicial appointment. Among the most important categories that are excluded from this process are: women, the underprivileged, as well as those of political minority. It is largely illogical that an individual is excluded based on being one of these previously mentioned categories. This research has

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<sup>264</sup> *Id.*

<sup>265</sup> Jamie Boex, *Democratization in Egypt: The Potential Role of Decentralization*, URBAN INSTITUTE CENTER ON INTERNATIONAL DEVELOPMENT & GOVERNANCE, POLICY BRIEF, (Feb. 2011), <https://www.urban.org/sites/default/files/publication/27151/412301-Democratization-in-Egypt-The-Potential-Role-of-Decentralization.PDF>.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*



offered a number of solutions, which can alleviate the severity of this exclusion. It followed the comparative law method to improve judicial efficiency through all possible means.