

## Clash of the Titans:

### A Comparative Approach to Reform of Judicial Accountability in Egypt

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#### ABSTRACT:

This Article argues for the reform of judicial accountability rules in Egypt. The lack of a real separation of powers and “checks and balances” between the three powers often leads the judiciary to become a periphery in the executive body, rather than an independent authority that invigilates and monitors any violation of the law. Judges who refuse to comply with executive wishes are often subjected to persecution from the Ministry of Justice and its Judicial Inspection Department, which can reach up to the level of impeachment. The Ministry of Justice uses judicial accountability as a tool of retribution over disobedient and inconsistent judges. Currently, the executive authority monopolizes the judicial accountability process and its outcomes. Reformation towards a transparent democratic judiciary requires major participation by the public in the judicial accountability process. This participation aims not only to exclude the authority of the Ministry of Justice over the judiciary and the judges, but it also aims to increase public participation in a democratic judiciary.

#### CONTENTS

INTRODUCTION .....	62
I. THE JUDICIAL MASSACRES OF 1969 AND 2016 .....	68

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\* The author wishes to extend his deep gratitude and appreciation to Michael Mullen, Brett Harris, Drew Sena, Courtney Olson, Mylla Dawson, Claire Weyland, Laurent Mayali, Mark Bevir, and Luc Heuschling for their constructive comments and helpful edits, and his wife for her continuous help and support.

II. ARBITRARINESS AND VAGUENESS OF JUDICIAL ACCOUNTABILITY RULES IN EGYPT .....	71
A. <i>Judicial Accountability of Individual Judges</i> .....	71
1. Judicial Conduct .....	71
2. Procedures .....	76
a. <i>Political Accountability Procedures</i> .....	76
b. <i>Disciplinary Accountability Procedures</i> .....	76
c. <i>Criminal Accountability Procedures</i> .....	79
d. <i>Civil Accountability Procedures</i> .....	80
3. Disciplinary Actions .....	80
B. <i>Accountability of the Judiciary</i> .....	82
III. THE CURRENT CHALLENGES REGARDING JUDICIAL ACCOUNTABILITY IN EGYPT .....	85
A. <i>Accountability of Judges</i> .....	85
1. The New Policy of Forced Resignation of Judges .....	85
2. Political Participation .....	87
3. Lack of Transparency .....	90
4. Current Endeavors to Transfer the JID to the SJC .....	93
B. <i>Accountability of the Judicial Institute</i> .....	94
1. Accountability of the Minister of Justice .....	94
2. Accountability of the SJC .....	97
3. Accountability of the Attorney General .....	99
IV. PROPOSED REFORM FOR JUDICIAL ACCOUNTABILITY IN EGYPT .....	101
A. <i>Proposed Reform for Accountability of Judges</i> .....	101
1. Clear Criteria for Non-Disciplinary Behavior .....	101
2. Transparent Disciplinary Processes .....	104
3. Limited Civil and Criminal Accountability .....	105
B. <i>Proposed Reform for Judicial Accountability</i> .....	106
1. Reformulation of the SJC .....	106
2. Transfer of the JID to the SJC .....	107
3. Reform of the Position of the Minister of Justice .....	109
CONCLUSION .....	110

## INTRODUCTION

Judicial reform ensures full protection of individuals' rights.<sup>1</sup> The judiciary is the last resort against outrageous aggression by the executive

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1. Pierre Elliott Trudeau, *Constitutional Reform and Individual Freedoms*, 8 W. ONTARIO L. REV. 1, 1-2 (1969); see also Edward Gurney, *Toward Judicial Reform*, 6 U. RICH. L. REV. 83, 83 (1971).

authority against citizens' rights.<sup>2</sup> In this respect, the lack of an independent and accountable judiciary is a hindrance. Independence and accountability are two indispensable factors required for judicial reform. They both form the core of solemn judicial reform.<sup>3</sup> Furthermore, the lack of judicial accountability and independence could potentially jeopardize human rights and liberties.<sup>4</sup> For example, interference by the Minister of Justice in judicial decision-making compromises judicial independence.<sup>5</sup> On the other hand, a complete lack of judicial oversight and accountability could have the opposite effect—resulting in judicial corruption.<sup>6</sup> Hence, this Article argues for reform of the judicial accountability process.

The topic of judicial accountability raises three main questions. Who is accountable? To whom? And for what? In a democratic system, the answer to the first question, “who is accountable,” is the judiciary, either institutionally or as judges individually.<sup>7</sup> This Article, however, chooses not to address that question for two reasons. First, the definition of the judiciary is rather vague in Egypt.<sup>8</sup> This ambiguity stems from nonjudicial bodies being judicial in nature, such as the Administrative Prosecution Office (APO),<sup>9</sup> the Public Prosecution Office (PPO),<sup>10</sup> the military

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2. See George Wickersham, *Judicial Function*, 60 U. PA. L. REV. 601, 604 (1912).

3. See Paul Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW CONTEMP. PROBS. 79, 79–80 (1998); Frances Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. CAL. L. REV. 625, 635 (1999); see also Hiram Chodosh, *Reforming Judicial Reform Inspired by U.S. Models*, 52 DEPAUL L. REV. 351, 365 (2002).

4. Shayonee Dasgupta & Sakshi Agarwal, *Judicial Accountability and Independence: Exploring the Limits of Judicial Power*, 2 NUJS L. REV. 779, 779–80 (2009).

5. See *Judicial Councils Reforms for an Independent Judiciary. Examples from Egypt, Jordan, Lebanon, Morocco and Palestine*, INT'L FED'N FOR HUM. RIGHTS 7 (May 2009), <http://www.refworld.org/docid/4a83c4420.html>.

6. See Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 104, 104–05 (2009).

7. Colin Scott, *Accountability in the Regulatory State*, 27 J. L. & SOC. 38, 46 (2000).

8. Ali Mokhtar, *An Egyptian Judicial Perspective*, 80 DENV. U. L. REV. 779, 779–80 (2003).

9. Article 197 of the Constitution of the Arab Republic states:

The Administrative Prosecution is an independent judicial body. It investigates financial and administrative irregularities, and those referred to it. Regarding these irregularities, it has the authorities vested in the administration body to inflict disciplinary penalties. Challenging its decisions takes place before the competent disciplinary court at the State Council. It also initiates and conducts proceedings and disciplinary appeals before the State Council courts in accordance with the law. All the foregoing is organized by law.

CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 197.

10. *Id.* art. 189 (“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.”).

judiciary,<sup>11</sup> the State Case Authority (SCA),<sup>12</sup> as well as the delegates in the Supreme Constitutional Court (SCC).<sup>13</sup> Second, the judiciary is the competent authority for holding its members accountable.<sup>14</sup> It is not clear, however, who has the right to hold the institution accountable for its actions.<sup>15</sup> This approach needs reform.<sup>16</sup>

The answer to the second question, “to whom is the judiciary accountable,” is debatable. There are three general bodies to whom the judiciary can be held accountable. First, the judiciary can be held accountable directly to the public.<sup>17</sup> This system is based on judicial appointment through elections.<sup>18</sup> The public is considered the cornerstone of judicial independence because it is the source of judicial power and judicial accountability—it has the power to eliminate judges through elections.<sup>19</sup> Second, the judiciary can be held accountable to executive authorities (authoritarian or monarchical regimes),<sup>20</sup> legislative authorities

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11. *Id.* art. 204 (“The Military Judiciary is an independent judiciary that adjudicates exclusively in all crimes related to the armed forces, its officers, personnel, and their equals, and in the crimes committed by general intelligence personnel during and because of the service.”).

12. *Id.* art. 196 (“The State Cases Authority is an independent judicial body. It undertakes the legal representation of the state in lawsuits and disputes to which the state is party. It may propose settling of disputes at any stage of litigation in accordance with the law. It also conducts technical supervision the cases undertaken by the departments of legal affairs at the state’s administrative body. It authors the draft contracts referred to it by administrative bodies and to which the state is party. The foregoing is organized by law.”).

13. *Id.* art. 194 (“The President and the vice-presidents of the Supreme Constitutional Court, and the head and members of its Commissioners Authority are independent, cannot be dismissed, and are subject to no other authority but the law. The law sets out the conditions that they must meet. The Court is responsible for their disciplinary accountability as set out by law. They are entitled to all the rights, duties and guarantees granted to other members of the judiciary.”).

14. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 186.

15. *Id.*

16. Shams Al Din Al Hajjaji, *A Call for Judicial Reform in Egypt*, 11 VIENNA J. INT’L CONST. L. 256, 256–59 (2017).

17. See Roger Handberg, *Judicial Accountability and Independence: Balancing Incompatibles*, 49 U. MIAMI L. REV. 127, 131 (1995); Maartje De Visser, *Judicial Accountability and New Governance*, 37 LEGAL ISSUES OF ECON. INTEGRATION 41, 59 (2010); see also Stephen Burbank, *Judicial Independence, Judicial Accountability and Interbranch Relations*, 95 GEO. L.J. 909, 912 (2007).

18. See Harlod Laski, *Technique of Judicial Appointment*, 24 MICH. L. REV. 529, 530 (1926); J.E. Penner, *Common Law Cognition and Judicial Appointment*, 38 ALTA. L. REV. 683, 702 (2001); see also Stephanie Seymour, *Judicial Appointment Process: How Broken Is It?*, 39 TULSA L. REV. 691, 695 (2004).

19. William P. Marshall, *Judicial Accountability in a Time of Legal Realism*, 56 CASE W. RES. L. REV. 937, 937–38 (2006).

20. See Michael Traynor, *Judicial Independence: A Cornerstone of Liberty*, 37 GOLDEN GATE U. L. REV. 487, 493 (2007); see also Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31, 31–32 (2000).

(the U.S. example),<sup>21</sup> or both (the German example).<sup>22</sup> These methods ensure the principle of checks and balances between the judiciary on the one side and the executive and legislative authorities on the other.<sup>23</sup> Third, the judiciary can be accountable to itself. This is an unconventional method that the Egyptian judiciary employs, and it is reflected in its Constitution.<sup>24</sup>

As for the third question of “what holds a judge accountable,” there are three types of actions that judges are held accountable for: disciplinary, political, and legal actions.<sup>25</sup> In terms of disciplinary actions, Egypt’s Constitution grants each judicial institution the right to oversee disciplinary procedures involving its own members.<sup>26</sup> In theory, the executive and the legislative authorities do not have any right to participate in such a process.<sup>27</sup> In practice, the Ministry of Justice (MoJ) and its Judicial Inspection Department (JID) are the competent authorities that initiate disciplinary procedures against judges, prosecutors, and members of other judicial institutions.<sup>28</sup> This incongruity is because the Minister of Justice and JID members are judges, who are selected with the approval of the Supreme Judicial Council (SJC).<sup>29</sup>

In the United States, the judiciary is part of the political process.<sup>30</sup> This is because U.S. judges are either politically affiliated or they run for

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21. See Marjorie Cohn, *Open-and-Shut: Senate Impeachment Deliberation Must Be Public*, 51 HASTINGS L.J. 365, 377 (2000); Francis Kieran, *Dueling with Dworkin: Political Morality in Constitutional Adjudication*, 6 U. C. DUBLIN L. REV. 30, 30 (2006).

22. See David Clark, *The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat*, 61 S. CAL. L. REV. 1795, 1832–44 (1988); Jörg Philipp Terhechte, *Judicial Accountability and Public Liability—The German “Judges Privilege” Under the Influence of European and International Law*, 13 GERMAN L. J. 313, 317 (2012).

23. See J. Denny Moffett, *The Birth of the United States Constitution: June 15, 1215*, 11 TULSA L. J. 504, 508 (1976).

24. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 186 (“Judges are independent, cannot be dismissed, are subject to no other authority but the law, and are equal in rights and duties. The conditions and procedures for their appointment, secondment, delegation and retirement are regulated by the law. It also regulates their disciplinary accountability.”).

25. NATHAN BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD: ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT 143–46 (2002).

26. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 186.

27. *Id.*

28. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 73 (Egypt).

29. With respect to the Minister of Justice, see Saher Aziz, *Independence Without Accountability: The Judicial Paradox of Egypt’s Failed Transition to Democracy*, 120 PENN. ST. L. REV. 669, 702 (2016).

30. See Evan Barret, *Representation Reinforcement Revisited: Citizens United and Political Process Theory*, 38 VT. L. REV. 445, 476 (2014); Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 SUP. CT. REV. 95, 95–96 (2002); see also Michael Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 814 (1991).

election.<sup>31</sup> They are permitted to participate in the political process, regardless of whether they are state or federal judges.<sup>32</sup> This is due to the role played by politics and the public in the judicial independence process, and its accountability and appointment processes.<sup>33</sup> In Egypt, the Judicial Authority Law (JAL) bans judges and the court from declaring their political affiliation.<sup>34</sup> The law does not, however, specify a disciplinary action for violating this ban.<sup>35</sup> This opens the door to arbitrary punishments for judges, as shown in the following sections. This is due to the lack of integration in the political process, and as a result, judges have been forced to participate in politics.

In terms of legal violations, it is widely accepted that judges enjoy a limited amount of immunity from civil procedures that result from their work as judges.<sup>36</sup> There is disagreement regarding criminal immunity of judges for crimes committed during court sessions,<sup>37</sup> but there is widespread consensus that judges are not immune from civil and criminal liability for actions committed in their personal lives.<sup>38</sup> However, the Constitution and the JAL provide judicial immunity for all judicial institutions, including the SCC and the ordinary and administrative judiciary.<sup>39</sup> In the event of having committed a crime, judges will not be arrested or held on remand unless the SJC issues a warrant for their arrest.<sup>40</sup> The SJC has the right to issue an arrest against any judge, if members of the council ascertain that a judge has committed a criminal violation.<sup>41</sup> The SJC is the competent authority that decides whether a judge should be remanded in custody or released on bail.<sup>42</sup>

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31. See Frank Macchiarola, *The Courts in the Political Process: Judicial Activism or Timid Local Government?*, 9 ST. JOHN'S J. LEGAL COMMENT 703, 706 (1994); see also Isaiah Baker, *Of Bench, Bar and Bosses: The Political Process of Judicial Reform*, 21 HOWARD L.J. 821, 830 (1978).

32. Richard Schaufliker, *Judicial Accountability in the US State Courts: Measuring Court Performance*, 3 UTRECHT L. REV. 112, 112–15 (2007).

33. Andrea McArdle, *The Increasingly Fractious Politics of Nonpartisan Judicial Selection: Accountability Challenges to Merit-Based Reform*, 75 ALB. L. REV. 1799, 1801–02 (2012).

34. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 73/1 (Egypt).

35. *Id.*

36. *Id.* art. 73/2 (“Courts are prohibited from giving political opinion. Judges are also prohibited from political participation. They cannot run for the election of public assembly, regional institutions or political organization, unless they have submitted their resignation.”).

37. Antoine Garapon & Harold Epinuse, *Judicial Independence in France*, in JUDICIAL INDEPENDENCE IN TRANSITION 290 (Anja Seibert-Fohr eds., 2012).

38. *Id.*

39. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 186.

40. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 96 (Egypt).

41. *Id.*

42. *Id.* art. 97.

Moreover, judicial accountability triggers the question of the separation of powers between judges and the Judicial Accountability Power, which has the right to hold the judiciary accountable.<sup>43</sup> Although most universal jurisdictions, like the United States and Germany, separate clearly between powers, the Egyptian judiciary unifies them.<sup>44</sup> The absence of a separation of powers and a checks and balances system makes it difficult to understand the accountability of the judiciary.<sup>45</sup> The Minister of Justice in Egypt enjoys a mixed role, based on both his judicial and executive functions.<sup>46</sup> On an executive level, the Minister of Justice is part of the Cabinet.<sup>47</sup> The President of the Republic appoints the Minister of Justice from the ordinary judiciary upon consultation with the Prime Minister.<sup>48</sup> As for the judicial aspect of the MoJ, this is based on the nature of the Minister of Justice and its senior officials, who work in the ministry. All senior officials are judges, whose work is performed on a time-bound secondment,<sup>49</sup> basis granted by their respective courts to the MoJ.<sup>50</sup> In other words, the executive authority uses members of the judiciary as a tool for retribution against dissenting judges.<sup>51</sup> Hence, the unification between the judiciary and its Judicial Accountability Power gives rise to many questions that this Article endeavors to address.

This Article aims, first, to prove that the current rules of accountability are inadequate and lead to partiality and subjectivity against judges in Egypt. Due to the scarcity of literature on this topic, related research is based on the testimony of several members of the judiciary that

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43. *Id.*

44. The judiciary is responsible for the impeachment of its members. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 186.

45. *See Aziz, supra* note 29, at 670.

46. *Id.*

47. The term “sovereign ministries” includes the Ministry of Defense. The appointment of this minister is taken directly from the President of the Republic. “The Minister of Defense is appointed upon the approval of the Supreme Council of the Armed Forces. The provisions of this article shall remain in force for two full presidential terms starting from the date on which this Constitution comes into effect.” CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 234.

48. *Id.*

49. “Secondment” is “the detachment of a person (such as a [judge or] military officer) from his or her regular organization for temporary assignment elsewhere.” *Definition of Secondment*, MERRIAM-WEBSTER (2017), <https://www.merriam-webster.com/dictionary/secondment> [<https://perma.cc/3G75-2F8G>].

50. *Egypt's Judiciary: A Tool of Repression*, INT'L COMMISSION OF JURISTS 10 (2016), <https://www.icj.org/wp-content/uploads/2016/10/Egypt-Tool-of-repression-Publications-Reports-Thematic-reports-2016-ENG-1.pdf> [<https://perma.cc/6PUS-GVWD>].

51. *See* Philippe Schmitter, *Political Accountability in 'Real Existing' Democracies: Meaning and Mechanisms*, EUROPEAN U. INST. 2 (Jan. 2007), <http://www.eui.eu/Documents/DepartmentsCentres/SPS/Profiles/Schmitter/PCSPoliticalAccountabilityJan07.pdf> [<https://perma.cc/2Z9T-FB9Y>]; *see also* Ruth Grant & Robert Keohane, *Accountability and Abuses of Power in World Politics*, 1 AM. POL. SCI. REV. 29, 30 (2005).

was later made public. Second, this research aims to propose a reform for the dilemma of judicial accountability. The solution lies in both reforming the rules and the authority of accountability. The rules lack transparency and clarity, and open the door for the executive authority to violate judicial independence. The authority of accountability, which includes the MoJ and the SJC, lack any form of democratic formulation. Consequently, the rule of accountability needs to be addressed.

This Article consists of three sections. The first tackles the current legal process of judicial accountability in Egypt, including complaints, proceedings, and disciplinary actions. It also deals with the question of the separation of powers regarding judicial accountability. The second section of this Article proposes reforming judicial accountability considering the contemporary challenges facing Egypt. Finally, this Article proposes several reformations to the judicial accountability rules in Egypt. These reformations ensure public participation in both judicial independence and accountability.

#### I. THE JUDICIAL MASSACRES OF 1969 AND 2016

The first Massacre of Judges occurred during the presidency of Gamal Abdel Nasser.<sup>52</sup> Nasser's policy solicited inappropriate interference in judicial affairs.<sup>53</sup> Between 1964 and 1969, Nasser enticed judges to join the Arab Socialist Union.<sup>54</sup> His successive attempts failed when judges turned down his offer.<sup>55</sup> The judges insisted that joining the Union would affect their independence and impartiality.<sup>56</sup> In response to their refusal, Nasser established a group of loyal judges to eavesdrop on their colleagues.<sup>57</sup> This group of loyal judges formed a secret organization known as "Tanziem Sarie al-Tali'i" (Tanziem).<sup>58</sup> Membership of Tanziem consisted of several judges who held leading positions in the MoJ and the

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52. HAMIED ANSARI, EGYPT THE STALLED SOCIETY, 140–50 (1986).

53. *Id.*

54. Mustapha Kamel al-Sayyed, *The Judicial Authority and Civil Society*, in JUDGES AND POLITICAL REFORM IN EGYPT 227, 230 (Nathalie Bernard-Maugiron ed., 2008).

55. Ahmed Mansour, *Tanziem Sarie le-Jamal Abdel Nasser Dakhal al-Qada*, SHOROUK NEWS (May 22, 2013), <http://www.shorouknews.com/columns/view.aspx?cdate=22052013&id=c5a4f197-1c5a-4b50-b7e7-87cd25ca435a> [<https://perma.cc/RT2A-PW6R>].

56. AMR SHALAKANY, IZDIHĀR WA-INHIYĀR AL-NUKHBA AL-QĀNŪNIYYA AL-MIŞRIYYA 230 (2013).

57. *Id.*

58. Atef Shahat Said, *The Role of the Judges Club in Enhancing the Independence of the Judiciary and Spurring Political Reform*, in JUDGES AND POLITICAL REFORM IN EGYPT 111, 112, 230 (Nathalie Bernard-Maugiron ed. 2008).

PPO.<sup>59</sup> As a result, this caused a growing sense of outrage among judges and prosecutors.<sup>60</sup>

The Judges' Club (Club) provided an arena in which to condemn the government's solicitation of judges to join the Socialist Union, and also provided a social venue for judges and prosecutors.<sup>61</sup> Nasser's regime was unable to impose its rule over the Club. Nasser regarded the Club as the face of opposition and a threat, especially when Tanziem failed to secure any seats on the Club board.<sup>62</sup> Repeated failure led to more antagonism against the judiciary.<sup>63</sup> Nasser took two steps to put an end to the resistance from the judiciary.<sup>64</sup> First, he issued a law that dissolved the Club board.<sup>65</sup> He appointed all the members of the Club's board, instead of elected members.<sup>66</sup> Second, he issued Law Number 83 of 1969, dissolving all judicial bodies and reserving for himself the right to reappoint all judges.<sup>67</sup> In this reappointment process, he excluded at least 200 judges whom he considered a threat.<sup>68</sup> The consequences of this law were not addressed until the al-Sadat era in 1972.<sup>69</sup>

The Court of Cassation determined that Nasser's law violated both the Constitution and the Judicial Authority Law (JAL).<sup>70</sup> The inability of the SJC to face the interference of the executive in the judiciary leads to the establishment of informal organizations among judges.<sup>71</sup> The role of these organizations is to unify the judges against the executive and its allied Tanziem judges.<sup>72</sup> These organizations are the Independent Judicial Movement, *Qoda' al-Istqlal* (IJM), and the Judges for Egypt, known as *Qoda' men-ajl-Misr* (JFE).<sup>73</sup>

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59. *Id.*

60. *Id.*

61. SHALAKANY, *supra* note 56, at 113.

62. *Id.*

63. *Id.*

64. *Id.*

65. Law No. 84 of 1969 (Judges' Club), *al-Jarīdah al-Rasmīyah* (al-Jumhūrīyah al-'Arabīyah al-Muttaḥidah [United Arab Republic]), 31 Aug. 1969 (Egypt).

66. *Id.*

67. Law No. 83 of 1969 (Reformulation of Judicial Institutions Law), *al-Jarīdah al-Rasmīyah* (al-Jumhūrīyah al-'Arabīyah al-Muttaḥidah [United Arab Republic]), 31 Aug. 1969 (Egypt).

68. GABRIEL ABRAHAM ALMOND, *COMPARATIVE POLITICS TODAY: A WORLD VIEW*, 588 (2000).

69. Shams Al Din Al Hajjaji, *The Egyptian Judiciary in the Age of the Republic: The Role of Internal Conflicts in Controlling the Judicial System*, 4 *INDON. J. INT'L & COMP. L.* 364, 395 (2017).

70. Maḥkamat al-Naqd [Court of Cassation], session of 21 Dec. 1972, year 32.

71. These organizations are informal because first, they have no legal status, and second, not all judges are members of such organizations.

72. Ahmed Mansour, *Al-Tanziem al-Sarie leJamal Abdel Nasser Dakhal al-Qada*, SHOROUK NEWS (May 22, 2013), <http://www.shorouknews.com/columns/view.aspx?cdate=22052013&id=c5a4f197-1c5a-4b50-b7e7-87cd25ca435a> [<https://perma.cc/H4X7-DHBT>].

73. *Id.*

The first informal organization is the IJM, which was established after the judicial massacre in 1969.<sup>74</sup> From 1970 to 2010, many judges formed the IJM.<sup>75</sup> They organized secret meetings to support judicial reform.<sup>76</sup> The leading figures of this movement were Judge Hossam Gheriani,<sup>77</sup> Ahmed Mekki,<sup>78</sup> and Hisham Genenia.<sup>79</sup> They were, however, unable to enforce any judicial reform, and the government blacklisted them.<sup>80</sup> After the January 25th Revolution, Gheriani, Mekki, and Genenia were appointed to high-ranking judicial and political positions.<sup>81</sup>

The second informal organization is the JFE, which suffered the second Massacre of Judges.<sup>82</sup> This organization was established after the January 25th Revolution.<sup>83</sup> There are allegations that the JFE is connected to the Muslim Brotherhood (MB).<sup>84</sup> Waled Sharabi, one of the JFE leaders, was photographed leaving the MB headquarters.<sup>85</sup> After ousting ex-President Mohamed Morsi, Waled Sharabi was impeached.<sup>86</sup> JFE also made several statements,<sup>87</sup> including their famous position after the military coup when they signed a document condemning it.<sup>88</sup> They also

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74. SHALAKANY, *supra* note 56, at 10.

75. *Id.*

76. *Id.*

77. Judge Hossam 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*, N.Y. TIMES (Nov. 29, 2012), <http://www.nytimes.com/2012/11/30/world/middleeast/panel-drafting-egypts-constitution-prepares-quick-vote.html>.

78. Ahmed Mikky was the previous Minister of Justice in the Muslim Brotherhood Government of 2012. Sayed Gamaledine, *Egypt's Justice Minister Ahmed Mekki Resigns: Judicial Sources*, AHRAM ONLINE (Apr. 21, 2013), <http://english.ahram.org.eg/NewsContent/1/64/69781/Egypt/Politics-/BREAKING-Justice-minister-Ahmed-Mekki-resigns-Judi.aspx> [https://perma.cc/WR49-AYEG].

79. Hasham Genenia served as president of the Central Auditing Organization from 2012 to 2016. 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> [https://perma.cc/R74C-K94N].

80. Al Hajjaji, *supra* note 69, at 395.

81. *Supra* note 77, 78 and 79.

82. More than fifty-five judges were impeached for writing a statement condemning the Military Coup. See *Egypt: Arbitrary and Unfair Removal of Judges Must Be Reversed*, INT'L COMMISSION OF JURISTS (Mar. 28, 2016), <http://www.icj.org/egypt-arbitrary-and-unfair-removal-of-judges-must-be-reversed/> [https://perma.cc/3DHE-M8FK].

83. *Id.*

84. *Sisi Forces 4 Judges into Retirement for Alleged Brotherhood Ties*, MADA MASR (Feb. 18, 2016), <https://www.madamasr.com/en/2016/02/18/news/u/sisi-forces-4-judges-into-retirement-for-alleged-brotherhood-ties/> [https://perma.cc/2892-X9Y2].

85. *Id.*

86. Shaima Rashied, *Tadeb we-salahyat ya'zal alqadi walid Sharabi letadokholah fi alsyasa*, SHOROUK NEWS (Jan. 4, 2014), <http://www.shorouknews.com/news/view.aspx?cdate=04012014&id=3a62eb86-f3a6-43d2-bd27-32b9b9f621c9> [https://perma.cc/GNR4-E9XX].

87. *Id.*

88. *Id.*

publicized the document in *Rabaa al-Adawiya* Square, the center of the sit-in of the MB following the coup.<sup>89</sup>

The MoJ started pursuing JFE members for violating the JAL in relation to political participation—while leaving alone the judges who supported the Coup.<sup>90</sup> The document that JFE members signed empathizing with MB members was considered proof of political participation.<sup>91</sup> Their act was therefore a violation of the judicial law.<sup>92</sup> Resultantly, there is still an ongoing Second Massacre of Judges not yet fully completed.<sup>93</sup> This has led to the urgent need to tackle the outstanding issue of judicial accountability in contemporary Egypt.

## II. ARBITRARINESS AND VAGUENESS OF JUDICIAL ACCOUNTABILITY RULES IN EGYPT

### A. *Judicial Accountability of Individual Judges*

#### 1. Judicial Conduct

Egypt's Constitution grants an exclusive right to the judiciary to settle disputes related to its members.<sup>94</sup> However, the Constitution lacks a clear prohibition against the MoJ or its delegates interfering in the judicial accountability process.<sup>95</sup> Unlike the Constitution, the JAL mentions four types of conduct that judges and the judiciary are banned from exercising: political, criminal, disciplinary, and civil.<sup>96</sup>

First, political accountability is the most controversial ban. The JAL does not specify any sanction for the violation of political participation. Political accountability is furthermore the only form of accountability that

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89. *Id.*

90. Al Hajjaji, *supra* note 69, at 395.

91. *Id.*

92. *Id.*

93. *Id.*

94. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 186.

95. The role of the MoJ over the Ordinary Courts and PPO has passed over two stages. In the first stage (until 2006), the MoJ had full supervision power over the courts. Before its amendment, Law No. 46 (Judicial Authority Law) stated “the MoJ has full authority to supervise all courts and judges. The Chairperson of the court, and the Public Assembly for each court have the right to supervise judges in their respective courts.” Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 93 (Egypt). In the second stage, this article was amended in 2006. The new amendment states “the Ministry of Justice has the right to administrative supervision over courts. The Chairperson of the court and the Public Assembly for each court, have the right to supervise judges in their respective courts.” Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, 2006 amendment, art. 93 (Egypt).

96. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972 (Egypt).

addresses both judges and the judiciary.<sup>97</sup> The collective responsibility of the judiciary is not a common issue, except when it comes to political responsibility. As a result, political accountability raises several questions related to the definition of political participation that judges and the judiciary are banned from engaging in.<sup>98</sup>

Second, criminal accountability is organized contrary to the judicial immunity of prosecutors and judges, which includes investigative or criminal actions taken against them.<sup>99</sup> Members of the judiciary, including PPO members, are not subject to arrest, search, or seizure.<sup>100</sup> This ban also includes all forms of investigation, both felony and misdemeanor.<sup>101</sup> There are two exceptions to this rule.<sup>102</sup> First, both the JID and the SJC permit criminal procedures against a judge or prosecutor.<sup>103</sup> The SJC has to issue an arrest warrant or authorize the process of investigation, such as search and seizure.<sup>104</sup> Second, if a judge or prosecutor is caught engaging in illegal conduct, a judicial investigator or police officer can arrest the judge or prosecutor.<sup>105</sup> In this case, the Attorney General must notify the SJC of the issue within twenty-four hours, and the SJC then decides whether to arrest the judge or release him on bail.<sup>106</sup> This form of criminal accountability in the JAL leads to social and legal inequality for several reasons.

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97. *Id.* art. 73 (“Courts are prohibited from giving political opinion. Judges are also prohibited from political participation. They cannot run for the election of public assembly, regional institutions or political organization, unless they have submitted their resignation”)

98. Before 2000, the interpretation of Article 88 of the 1971 Constitution maintained partial judicial supervision of elections. Al Hajjaji, *supra* note 90, at 377. On July 8, 2000, the Supreme Constitutional Court (SCC) overruled the governmental interpretation of Article 88. This judgment was called “a judge for every election box” (*Qadi le-kol Sandowq*). *Id.* at 381. It stated that Article 88 indicated full judicial supervision over elections for both general committees and sub-committees. The court concluded it was only permissible to appoint the chief of the election sub-committees from the judiciary. al-Mahkamah al-Dusturiyah al-Ulya [Supreme Constitutional Court] case no. 11, session of 8 July 2000, year 12 (Egypt). Moreover, judges were unable to stop election fraud from occurring during Mubarak’s regime. Al Hajjaji, *supra* note 90, at 381–82. Before 2000, the regime committed election fraud to sustain its political legitimacy. It used to perform election fraud under mock judicial supervision. Such supervision was limited to the general electoral committee. After 2000, the regime committed blatant fraud during the parliamentary election, despite it being under full judicial supervision. Hence, it led the judiciary to be involved in the political arena. Jeremy Sharp, *Egypt: 2005 Presidential and Parliamentary Elections*, THE LIBRARY OF CONGRESS (Sept. 21, 2005), [https://digital.library.unt.edu/ark:/67531/metacrs9716/m1/1/high\\_res\\_d/RS22274\\_2006Jan15.pdf](https://digital.library.unt.edu/ark:/67531/metacrs9716/m1/1/high_res_d/RS22274_2006Jan15.pdf) [https://perma.cc/L6TY-AKU3].

99. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 52 (Egypt).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

First, a judge who commits a crime is prosecuted and put on trial by his or her colleagues.<sup>107</sup> In the United States, Congress is responsible for the impeachment process of federal judges.<sup>108</sup> In Germany, the Bundestag, with a two-thirds majority, has the right to impeach a judge who violates the constitution in either official or unofficial capacity.<sup>109</sup> However, judges in Egypt are the competent authority that impeach other judges.<sup>110</sup> The Minister of Justice is a former judge,<sup>111</sup> the members of the JID are judges and prosecutors on secondment,<sup>112</sup> and the SJC is formulated from senior judges.<sup>113</sup> The impeachment authority of judges allows them to turn a blind eye on investigating certain crimes against senior judges.<sup>114</sup> Hence, there is an assumption of nepotism when judges impeach their colleagues.

Second, the special judicial committee is made up of senior judges.<sup>115</sup> This committee will convene only for serious crimes, such as murder, while less serious crimes are given less priority by the committee.<sup>116</sup> This understanding leads the prosecution, for instance, to refrain from prosecuting judges for traffic law violations.<sup>117</sup> As a result, there is a growing consensus among the public that judges are above the law.

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107. See *Egypt: Arbitrary and Unfair Removal of Judges Must Be Reversed*, INT'L COMMISSION OF JURISTS (28 March 2016), <http://www.icj.org/egypt-arbitrary-and-unfair-removal-of-judges-must-be-reversed/> [<https://perma.cc/3DHE-M8FK>].

108. U.S. CONST. art. II, § 4.

109. GRUNDGESETZ [GG] [BASIC LAW], translation at [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html).

110. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 186.

111. See discussion *infra* Part III.3.B.

112. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 46 (Egypt).

113. The SJC consists of 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, as well as the Attorney General. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 77, bis (1) (Egypt).

114. See the famous case of the corruption of Judge Ahmed Al-Zend, the former president of the Judges Club. In 2014, new evidence was published on his involvement in corruption cases in public newspapers. See Ahmed Abdel Azeam, *Bemostandat ... Al-Zend yabe'e arad nadie alqodah be-portsaid leqareab zawjatho be18 allf joneh lelmater badaan men 50 ragham malkyatha ledawlah*, ALHARAM (Sept. 9, 2014), <http://gate.ahram.org.eg/News/534798.aspx> [<https://perma.cc/RLB4-B5V6>]. In 2015, the Central Auditing Organization president declared the accuracy of the published documents. However, according to him, when the case was transferred to the SJC, it did not take the appropriate measures. Hesham Genina *Yakshaf fasad al-zend belmostandat*, YOUTUBE (May 20, 2015), <https://www.youtube.com/watch?v=YLRRvzgGdKM>.

115. INT'L COMMISSION OF JURISTS, *supra* note 107.

116. *Id.*

117. As part of the criminal immunity and accountability rules, judges and prosecutors are kept in separate detention facilities. They are not to be jailed in the public facilities with other detainees. The reason for such separation is based on the protection of judges and prosecutors from being detained with citizens they have brought to justice in earlier cases. This protection extends from the period of remand "pretrial detention" until the final judgment and imprisonment. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 96/4 (Egypt).

Third, disciplinary accountability is yet another vague form of accountability after political accountability. The JAL also uses vague terms regarding disciplinary accountability. These terms include commercial work, work ethics, and integrity, among others.<sup>118</sup> Judges must fulfill their obligations and comply with professional ethics.<sup>119</sup> The JAL gives the President of the Court the right to respond to such violations committed by judges.<sup>120</sup> Additionally, judges are banned from engaging in any commercial activities.<sup>121</sup> However, the limits of commercial transactions are not clearly delineated in the JAL.<sup>122</sup> The JID does not demarcate what is considered commercial activity, and what is not, with a few exceptions. As a result, disciplinary accountability terms are vague and open the door to arbitrary proceedings.

Fourth, there are two types of civil accountability. The first type of civil accountability is related to the judicial work of both judges and prosecutors.<sup>123</sup> The general rule for this type of civil accountability is that judges are immune while their accountability is an exception, as will be discussed in the following paragraphs.<sup>124</sup> The Civil Procedure Law (CPL) grants judges and prosecutors legal immunity from any civil damages that may arise from their work.<sup>125</sup> Article 494 lists two exceptions to this rule.<sup>126</sup> First, judges and prosecutors are not immune from legal actions if they commit fraud, a hoax, treachery, or serious professional misconduct.<sup>127</sup> Second, judges are not immune from civil liability, which occurs when a judge refuses to hear cases.<sup>128</sup>

The second type of civil accountability applies to nonjudicial actions. In theory, judges should not derive any form of civil immunity from their

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118. These types of vague terms are used to impeach noncompliant judges, like in the 1969 and 2016 judge massacres. For more on the massacre of 1969, see Sarah Wolff, *Constraints on the Promotion of the Rule of Law in Egypt: Insights From the 2005 Judges' Revolt*, 16 *DEMOCRATIZATION* 102 (2009). For more on the massacre of 2016, see Ahmed Abouelenein, *How Egypt's Crackdown on Dissent Ensnared Some of the Country's Top Judges*, *REUTERS* (Oct. 18, 2016), <http://www.reuters.com/investigates/special-report/egypt-judges/> [https://perma.cc/BSU5-EXFX].

119. "Judges are also prohibited from doing any work against their independence or integrity." Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 October 1972, art. 2 (Egypt).

120. *Id.* art. 94 ("The President of the Court has the right to warn judges about violations of their obligation and work ethics. The warning can be in oral or written form, after hearing the judges defense.")

121. *Id.* art. 72/1 ("Judges are prohibited from doing any commercial work.")

122. *Id.*

123. 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. 494 (Egypt).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

nonjudicial work.<sup>129</sup> The CPL does not regulate such civil liability of judges and prosecutors.<sup>130</sup> Despite this, judges and prosecutors enjoy comprehensive immunity for their nonjudicial actions.<sup>131</sup> The JID has developed certain practices for nonjudicial civil liability.<sup>132</sup> This policy occupies a middle ground between criminal and disciplinary accountability, but judges enjoy nonjudicial civil immunity.<sup>133</sup> On the one hand, the JID must express its consent for civil procedures to be launched against the nonjudicial civil actions of judges.<sup>134</sup> On the other hand, the JID cannot take any civil action against a judge.<sup>135</sup> If the JID believes that there is nonjudicial civil liability, it will transfer the case to the competent civil court.<sup>136</sup> The court will then hear from all the parties, including the judge.<sup>137</sup> In other cases, if the JID cannot find any cause for taking nonjudicial civil action, the JID will not transfer the case to the competent civil court.<sup>138</sup> As a result, the plaintiff in the nonjudicial civil case will not have his or her case heard.

Nonjudicial civil liability jeopardizes trust in the judiciary in general and in judges specifically. Judges shall not enjoy any civil privilege from their personal behavior.<sup>139</sup> It is legally unacceptable to add an extra judicial barrier with the aim of protecting certain classes in society. If a plaintiff claims that a judge has refrained from paying rent, the plaintiff must first resort to the JID to obtain its approval to sue the judge. The JID has thus imposed an extrajudicial procedure on such plaintiffs.<sup>140</sup> Neither the CPL nor the JAL regulates nonjudicial civil liability. The practice of the JID,

129. Robert Kligman, *Judicial Immunity*, 38 *ADVOC. Q.* 251, 252 (2011).

130. 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. 494 (Egypt).

131. Ibrahim Qassem, *Wazear al- Adl Yohieal 6 Qodah ila-altaftish le'amaloham be-tjarah we alkatabah 'ala alfacebook.. altaḥqīqat: ahdohm ba' ard lembwatenean belmokhalafat leqanoun ... 5 nashrow araqhm 'ala mawaqa' altawasal alijma'I beshan ta'weam aljanah*, *YOUN7* (Nov. 20, 2016), <http://www.arsheev.com/news/3363943> [<https://perma.cc/CK9N-W854>].

132. *Id.*

133. *Id.*

134. Mostada Eid, *Altraftish alqadie, Lasna mokhtasean betlaqi alshqkwa dad qadi I'dam almanaiya*, *SHOROUK NEWS* (May 1, 2014), <http://www.shorouknews.com/news/view.aspx?cdate=01052014&id=794ba8f0-497d-4807-beac-ee3ec90ea940> [<https://perma.cc/4N2M-DSGV>].

135. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 104 (Egypt) (“The disciplinary proceeding terminates with the other the judge’s resignation or retirement. The disciplinary proceeding does not affect criminal or civil proceedings arising from the same incident.”).

136. *Id.*

137. *Supra* note 134.

138. *Id.*

139. SHIMON SHETREET & SOPHIE TURENNE, *JUDGES ON TRIAL: THE INDEPENDENCE AND ACCOUNTABILITY OF THE ENGLISH JUDICIARY* 273 (2013).

140. Marco Fabri & Philip Langbroek, *Is There a Right Judge for Each Case—A Comparative Study of Case Assignment in Six European Countries*, 1 *EUR. J. LEGAL STUD.* 292, 295 (2008).

however, has helped to develop a form of immunity for judges. As a result, it must be reformed to abolish nonjudicial civil immunity.

## 2. Procedures

### *a. Political Accountability Procedures*

Accountability procedures differ according to the nature of the judicial violation: political, criminal, disciplinary, or civil. For political accountability procedures, Article 73 of the JAL identifies two forms of political participation by judges.<sup>141</sup> First, judges are banned from participating in politics.<sup>142</sup> Political participation is not identified by the JAL in detail, particularly with regard to related procedures and consequences for violators.<sup>143</sup> However, the JID considers political accountability to be part of disciplinary accountability for the procedures; it applies the same rules to the disciplinary accountability procedures.<sup>144</sup> Second, judges may not run for any parliamentary elections of regional or political organizations unless they resign from their position.<sup>145</sup> Article 73 of the JAL regulates the procedures and rights of judges and prosecutors who resign to run for parliamentary elections.<sup>146</sup> Therefore, a legislative gap exists regarding the procedures for political accountability of judges and prosecutors because the procedures and consequences for a judge or prosecutor who participates in politics are not clearly identified or defined in the JAL.

### *b. Disciplinary Accountability Procedures*

For disciplinary accountability procedures, the chairperson of the primary court is the competent authority to initiate disciplinary actions against judges, while the district attorney of the PPO is the competent authority for prosecutors.<sup>147</sup> There are several levels in disciplinary accountability procedures, starting with a verbal warning to the violator (judge or prosecutor), which can then escalate to a written notice if the violation is more serious or frequent.<sup>148</sup>

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141. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 94 (Egypt).

142. *Id.*

143. *Id.*

144. Tarek al-Bashri, A'an Al-Qodah we-al-Sayrasah, SHOROUK NEWS, (Sept. 20, 2013), <http://www.shorouknews.com/columns/view.aspx?cdate=20092013&id=13d4e693-34af-46fc-9787-ce113c22f9ff> [https://perma.cc/9VJ7-8P92].

145. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 73 (Egypt).

146. *Id.*

147. *Id.* art. 94/1.

148. *Id.*

In a first-instance violation, the chairperson of the primary court or the district attorney issues a verbal notice or private admonition to the violator.<sup>149</sup> They are entitled to issue such a notice if the judge or the prosecutor “violate[d] their job obligations, or requirements of their job.”<sup>150</sup> However, the law’s definitions of job obligations and job requirements are not clear.<sup>151</sup> Because a major challenge arising from verbal notice is that it opens the door to arbitrary decisions, clear definitions of these terms are needed.

In a second-instance violation, if the verbal notice proved insufficient, the violator receives a written notice.<sup>152</sup> If the district attorney or the chairperson believes that the violator was not deterred by the warnings, they raise the issue in a complaint addressed to the JID at the MoJ.<sup>153</sup> Otherwise, the JID calls on the violator, whether a judge or prosecutor, to go to the JID headquarters for further investigation.<sup>154</sup> Investigations are handled by judicial inspectors of a rank higher than the rank of the judge or the prosecutor.<sup>155</sup>

The JID is the competent authority that holds judges’ records and files as a reference for their promotion or transfer.<sup>156</sup> It is also the competent authority for investigating all disciplinary actions, except for verbal notices.<sup>157</sup> The disciplinary commission may not take any punitive action unless the disciplinary procedures were initiated by the JID.<sup>158</sup> The Minister of Justice nominates all the judges who work in the JID to look into violations committed by other judges.<sup>159</sup> Any nominated judge must be of a rank that is either equal or senior to the violating judge.<sup>160</sup> If the violator is a judge at the Court of Appeal or at the Court of Cassation, the nominated judge must hold the rank of vice president of the Court of Cassation or president at the Court of Appeal.<sup>161</sup> If the violator is a member of the primary court, the investigator shall be a judge at the Court of Appeal or the Court of Cassation.<sup>162</sup>

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149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* art. 94/2.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* art. 98.

157. *Id.*

158. *Id.* art. 94/5.

159. *Id.* art. 45/1.

160. *Id.*

161. *Id.* art. 99.

162. *Id.*

Written notice is considered a harsher form of warning for three reasons. First, while verbal notice does not affect the professional development of a judge or prosecutor, a written notice is a blemish on the judge's competency.<sup>163</sup> Second, a written notice is documented in the file of the judge or the prosecutor until his or her retirement, while a verbal notice is not mentioned in any record.<sup>164</sup> Third, the Minister of Justice or the Deputy Attorney General issues a written notice, while only the chairperson of the court or the district attorney gives a verbal notice.<sup>165</sup>

If the violator continues to commit a further infringement after receiving written notice, the JID will proceed with a disciplinary case in front of the Disciplinary Commission.<sup>166</sup> The procedures are the same as the procedures for verbal and written notices.<sup>167</sup> The chairperson of the primary court or the district attorney will notify the violator of his or her violation, and the violator will present his or her case.<sup>168</sup> The JID then transfers the case to the Disciplinary Commission.<sup>169</sup>

The aim of the Disciplinary Commission is to impeach the violator.<sup>170</sup> The Commission consists of the three most senior justices of the Court of Appeal, the two most senior vice presidents of the Court of Cassation, and the two most senior justices of the Court of Appeal.<sup>171</sup> This configuration depends mainly on the seniority of the judges of both the Court of Appeal and the Court of Cassation.<sup>172</sup> In the event that a senior-ranking judge has an issue attending the Commission, he is replaced by the next in command.<sup>173</sup> Thus, if the second most senior vice president in the Court of Cassation is unable to attend, he is replaced by the third most senior vice president of the Court of Cassation.<sup>174</sup>

The proceedings of the Disciplinary Commission are the same as that of a trial process.<sup>175</sup> While the defendant presents his defense, the Attorney General presents the people's claim against the judge.<sup>176</sup> Each party presents its case to the Commission.<sup>177</sup> During the trial, the judge has the right to have a public defender, as well as a judge willing to represent him

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163. *Id.* art. 94/1.

164. *Id.* art. 94/2.

165. *Id.* art. 127.

166. *Id.* art. 98.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* art. 97.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

at the trial.<sup>178</sup> Unlike the general rule of public trials, proceedings of the trial are closed, while the session announcing the final verdict is public.<sup>179</sup>

*c. Criminal Accountability Procedures*

The JAL includes rules on two types of criminal accountability procedures. The first is *Flagrante Delicto*.<sup>180</sup> This happens when the judge or the prosecutor is caught in the act of committing the misdemeanor.<sup>181</sup> This is mentioned in the same section as judicial immunity.<sup>182</sup> Judges and prosecutors cannot be arrested unless they are caught while committing the crime.<sup>183</sup> The Commission determines whether the judge or prosecutor should be kept in custody or released with or without bail.<sup>184</sup> Additionally, the Commission must hear the defendant upon request by the defense council.<sup>185</sup>

The second type of procedure takes place when there is “irrefutable and conclusive evidence” of the misdemeanor.<sup>186</sup> This type of procedure combines both criminal and disciplinary procedures.<sup>187</sup> For the criminal procedures, the Commission suspends the violator from continuing to exercise his judicial duties until the criminal court issues its final judgment.<sup>188</sup> It is worth noting that criminal procedures against the violator do not necessarily lead to impeachment.<sup>189</sup> The disciplinary procedures are a separate process, unrelated to criminal procedures.<sup>190</sup> Once the criminal procedures have concluded, the Commission begins its impeachment proceedings.<sup>191</sup> Further, the acquittal does not imply exemption from disciplinary procedures.<sup>192</sup> The Disciplinary Commission will still have to decide on the impeachment, forced resignation, or acquittal of the judge or prosecutor.<sup>193</sup>

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178. *Id.* art. 106.

179. *Id.* art. 95.

180. *Id.* art. 96.

181. *Id.*

182. *Id.*

183. *Id.* (requiring the Attorney General to transfer the issue to the Disciplinary Commission).

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* art. 104/2.

193. *Id.* art. 104/1.

*d. Civil Accountability Procedures*

The JAL does not regulate civil accountability procedures. These procedures have, however, been developed by the JID.<sup>194</sup> The JID's policy of civil accountability occupies a middle ground between the criminal accountability procedures and the disciplinary accountability procedures.<sup>195</sup> The JID adds one requirement, namely the acceptance of the JID to proceed with the accountability procedures against the violator.<sup>196</sup> The JID has to decide either to proceed with the civil case or to dismiss it. In the first case, the plaintiff can resort to the court of law to present his or her case against the violator.<sup>197</sup> In the second case, the court will not hear the case.<sup>198</sup> The plaintiff cannot proceed to the court of law without the permission of the JID because the court will refuse to hear the case on the grounds of judicial immunity.<sup>199</sup> In both cases, the JID cannot impeach or force the violator to resign.<sup>200</sup> As a result, nonjudicial civil liability adds a procedural burden to litigation against judges.

### 3. Disciplinary Actions

The JAL does not impose specific sanctions for political, criminal, or civil accountability. This has resulted in two issues. First, it has forced the JID and the SJC to use disciplinary sanctions as an alternative option. The JID and the SJC have established their right to determine suitable disciplinary sanctions for political, criminal, or civil violations.<sup>201</sup> Second, the JID and the SJC have developed policies regarding political, criminal, and civil accountability that are not reflected in the JAL. The process of forced resignation is an example of such a policy: violators are forced to resign before initial criminal or disciplinary procedures even commence.<sup>202</sup>

The JAL differentiates between disciplinary sanctions and reasons for ending disciplinary procedures. Both of these are forms of disciplinary sanctions. Nonetheless, there are three differences between the two types.

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194. *Id.* art. 96/3 (stating that “[i]t is not permissible to make any investigation or prosecution against any judge, unless there is permission from said committee and upon the request of the attorney general.”). The JID adopts a wide interpretation of this article to include both civil and criminal procedures.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. See discussion *infra* Part III.A.1.

First, disciplinary sanctions are imposed solely by the SJC.<sup>203</sup> The violator, however, may decide to end disciplinary procedures at any stage through voluntary retirement or resignation.<sup>204</sup> Second, disciplinary sanctions result in supplementary sanctions, such as not being granted a retirement salary.<sup>205</sup> On the other hand, ending disciplinary procedures aims to provide the judge or the prosecutor with an opportunity to avoid supplementary sanctions.<sup>206</sup> The violator can still have his or her end-of-service financial rewards and salaries.<sup>207</sup> Third, disciplinary sanctions can result in exclusion from the Bar and the practice of law for impeached judges.<sup>208</sup> The violator can resort to terminating the disciplinary procedures in order to join the Bar.<sup>209</sup> The Bar Association denies its membership to impeached judges.<sup>210</sup> Hence, judges under disciplinary procedures prefer to resort to end disciplinary procedures.

First, disciplinary sanctions involve impeachment or reprimand and admonition.<sup>211</sup> In terms of impeachment, the JAL considers this as either recidivist or harsh punishment.<sup>212</sup> In recidivist cases, the violator already has a record of disciplinary reprimand or admonition. The Disciplinary Commission uses this record as a basis for impeachment.<sup>213</sup> As for using impeachment as a harsh punishment, the Commission uses impeachment directly, even if the violator lacks a track record of disciplinary sanctions.<sup>214</sup> The Minister of Justice must transfer the impeachment decision to the President of the Republic.<sup>215</sup> The President then delivers the impeachment in the form of a presidential decree.<sup>216</sup> Finally, the Commission Committee can decide whether to transfer the violator to nonjudicial work.<sup>217</sup>

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203. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 107 (Egypt).

204. *Id.* at 104.

205. *Id.* art. 70

206. *Id.*

207. *Id.*

208. Islam Abu-Almajid & Amal Al-'atar, *Qodah 'atlow n yatolbown alandmam lenqabat almohamien*, ELHORIANEWS (May 21, 2016), <http://www.elhorianews.com/207329> [https://perma.cc/2PWS-MM2P].

209. *Id.*

210. *Id.*

211. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 108 (Egypt).

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* art. 110.

216. *Id.*

217. *Id.*

In terms of reprimand and admonition, the JAL does not identify specific violations for which a primary court chairperson or the JID issues a reprimand or an admonition.<sup>218</sup> The JID and the Committee have discretion to determine what sanction is appropriate based on the violator's behavior.<sup>219</sup> This practice facilitates impartiality and arbitrariness. The chairperson of the primary court can issue a notice of violation against certain members, while refraining from doing so against those who align with the government.<sup>220</sup>

Second, reasons for terminating disciplinary procedures are the resignation or retirement of the judge or the prosecutor. These reasons are an alternative to the disciplinary sanctions. This bargaining sanction is mentioned in Article 104 of the JAL.<sup>221</sup> In the case of retirement, it terminates the work contract, thereby also leading to the termination of the disciplinary procedures.<sup>222</sup> A violator who has reached the age of seventy is immune from any disciplinary sanctions.<sup>223</sup> Resignation is an option for two reasons. First, judges usually resort to resignation rather than facing impeachment, for fear of shame within the judicial community.<sup>224</sup> Second, one of the consequences of impeachment procedures is the suspension of a pension.<sup>225</sup> For this reason, if the JID finds strong incriminating evidence against a judge, it offers him the option of resigning (rather than facing impeachment) so that he can benefit from his pension plan.<sup>226</sup>

### B. Accountability of the Judiciary

The JAL does not recognize the collective responsibility of the judiciary as an institution, except in the case of political participation. Article 73/2 bans courts from declaring their political opinion.<sup>227</sup> The demand for judicial accountability is a sacrosanct issue in the Egyptian judiciary. This is due to four reasons.

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218. *Id.* art. 94.

219. *Id.* art 108.

220. See Al Hajjaji, *supra* note 90, at 394.

221. A judge can choose to stop the disciplinary procedures if two things take place. The first is the judge's resignation, and the second is the judge reaching the age of retirement. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 104 (Egypt).

222. *Id.* art. 94.

223. *Id.* art. 98/3.

224. See discussion *infra* Part III.A.1.

225. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 97 (Egypt).

226. *Id.* art. 70 ("As an exemption from the Civil Servant law and Pension Laws, Judge's resignation does not drop the right in any pension or reward that judge deserves.").

227. This ban was mentioned in the 1943 JAL and has become a common article in successive JALs. *Id.* art. 73/2.

First, the Egyptian judiciary propagates itself as a protector of rights.<sup>228</sup> A journalist or writer who meddles in judicial matters or comments on judgments,<sup>229</sup> however, is subject to criminal prosecution for interfering in judicial matters or for insulting the judiciary.<sup>230</sup> Furthermore, political participation of the judiciary in past years, specifically the 2005 and 2012 elections, has raised the question of public trust in the judiciary as an institution.<sup>231</sup> Many judges have made statements against the Muslim Brotherhood (MB) regime, the Mubarak regime, or the 2013 Coup by handing down harsh sentences for nonlethal protests.<sup>232</sup> The issue became more complicated after the establishment of special courts to place members of the MB on trial.<sup>233</sup> This occurred after several judges refused to preside in trials against members of the MB.<sup>234</sup>

Second, the current rule of the Minister of Justice is ambivalent.<sup>235</sup> The successive Ministers of Justice are former senior judges.<sup>236</sup> Even though they are members of the Cabinet, they still use their former status.<sup>237</sup> All the senior public officials working in the MoJ are judges, who

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228. See David Risley, *Egypt's Judiciary: Obstructing or Assisting Reform?*, MIDDLE EAST INST. (Jan. 13, 2016), <http://www.mei.edu/content/at/egypt's-judiciary-obstructing-or-assisting-reform> [https://perma.cc/Q95K-9P29] (noting that before the 2011 revolution, the Egyptian judiciary “was widely hailed for protecting the rights of political opposition groups and human rights groups,” but “the judges have always been divided in their visions of the role of the judiciary in protecting and promoting the ‘public good.’”).

229. See, e.g., Farah Bahgat, *Journalist Accused of Violating Judiciary's Prestige Acquitted*, DAILY NEWS EGYPT (May 9, 2017), <https://dailynewsegypt.com/2017/05/09/journalist-accused-violating-judiciarys-prestige-acquitted/> [https://perma.cc/2BZY-SSL2]; see also *Egypt Activist Sanaa Seif Jailed for ‘Insulting Judiciary’*, BBC NEWS (May 4, 2016), <http://www.bbc.com/news/world-middle-east-36205265> [https://perma.cc/L6DP-BWU6].

230. See CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 184 (stating that “interference in judicial affairs, or in their proceedings is a crime to which no statute of limitations may be applied”).

231. See, e.g., Noha al-Zaini, *Tazwear tahat ishrاف al-qada*, AL MASRY AL YOUM (Nov. 25, 2005), <http://today.almasryalyoum.com/article2.aspx?ArticleID=41680> [https://perma.cc/Z4QU-EUE2].

232. See Jared Malsin, *Egypt's Judges Flex Their Muscles*, TIME EGYPT (May 13, 2014), <http://time.com/97636/egypt-judges-morsi-muslim-brotherhood/> [https://perma.cc/949B-S65V]; *Egypt Forces 32 Judges Who Opposed Removal of Morsi to Retire*, THE GUARDIAN (Mar. 29, 2016), <https://www.theguardian.com/world/2016/mar/29/egypt-forces-32-judges-who-opposed-removal-of-morsi-to-retire> [https://perma.cc/527L-PCVL].

233. Egypt's Sisi Approves Anti-Terrorism Law Creating Special Courts, REUTERS, (Aug. 17, 2015), <http://www.reuters.com/article/us-egypt-security-lawmaking-idUSKCN0QL0TU20150817> [https://perma.cc/6MX2-N3ZP].

234. Catherine Philp, *Judges Refuse to Preside Over Brotherhood Trial*, THE TIMES (Oct. 30, 2013), <http://www.thetimes.co.uk/article/judges-refuse-to-preside-over-brotherhood-trial-x5r7kcdw3rm> [https://perma.cc/3MX4-7NJ3].

235. See discussion *infra* Part III.B.1.

236. See discussion *infra* Part III.B.2.

237. *Id.*

are on secondment from the judiciary.<sup>238</sup> Moreover, before the JAL amendment in 2006, the Minister of Justice had the ultimate right to supervise judges and courts.<sup>239</sup> In 2006, the new JAL amendment limited this right to only the administrative supervision of the courts, which is limited only to court employees.<sup>240</sup> Currently, the real effective authority of the MoJ is its authority over the JID.<sup>241</sup> As a result, a redefinition of the authority of the Minister of Justice, the MoJ, and the SJC should have been addressed before transferring the authority of the MoJ to the SJC.

Third, the clear lack of a checks and balances system between the judiciary and the other authorities raises the question of to whom the judiciary is accountable.<sup>242</sup> Egypt's Constitution makes the judiciary accountable to itself.<sup>243</sup> This raises the question of how to make the judiciary accountable to more than just itself, like in the US.<sup>244</sup> The JAL ensures that the JID is under the full supervision of the MoJ.<sup>245</sup> However, current proposals lean toward transferring the MoJ's authority to the SJC.<sup>246</sup> On the one hand, this proposal is based on the fact the MoJ has a history of misusing the accountability procedures.<sup>247</sup> On the other hand, this proposal would give accountability authority to an unaccountable authority—the SJC.<sup>248</sup> As a result, this would lead to a situation where “absolute power corrupts absolutely.”<sup>249</sup>

Fourth, the Attorney General and the PPO were members of the executive and judicial authorities until 2006.<sup>250</sup> They used to be under the direct supervision of the Minister of Justice.<sup>251</sup> In 2006, that article was

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238. *Supra* note 50, at 9.

239. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 93 (Egypt).

240. *Id.* art 77, bis (5), para. 1 (“Judiciary and Public Prosecution shall have an independent annual budget.”)

241. *Id.* art. 45.

242. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 186 (“Judges are independent, cannot be dismissed, are subject to no other authority but the law, and are equal in rights and duties. The conditions and procedures for their appointment, secondment, delegation and retirement are regulated by the law. It also regulates their disciplinary accountability.”).

243. *Id.*

244. *Id.*

245. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 45 (Egypt).

246. Mahmud al-Khudayri, *The Law on Judicial Authority and Judicial Independence, in JUDGES AND POLITICAL REFORM IN EGYPT* 45, 47–48 (Nathalie Bernard-Maugiron ed., 2008).

247. *Id.*

248. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 196/2.

249. See NASSER AMIN, *SLOW LITIGATION IN EGYPT: FACTS AND SOLUTION* 10 (1997).

250. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, art. 125 (Egypt) (before amendment).

251. *Id.*

amended to limit the supervision over the PPO to the Attorney General.<sup>252</sup> In 2014, the Constitution made both the Attorney General and the PPO members of the judiciary only.<sup>253</sup> In addition, the Constitution eliminated the authority of the President to appoint the Attorney General.<sup>254</sup> Currently, the SJC has the sole discretion to appoint the Attorney General.<sup>255</sup> Hence, the pure judicial nature of the Attorney General illustrates the lack of a checks and balances system between the judiciary, the legislative, and the executive authorities.

### III. THE CURRENT CHALLENGES REGARDING JUDICIAL ACCOUNTABILITY IN EGYPT

#### A. *Accountability of Judges*

##### 1. The New Policy of Forced Resignation of Judges

Recently, the Minister of Justice, the Attorney General, the President of the SJC, and the President of the State Council have exhibited new legal behavior against judges who have committed serious offenses, such as bribery or getting involved with drugs. This behavior aims to protect the image of the judiciary. It involves requesting that the judge resign before the start of any criminal or disciplinary procedures.<sup>256</sup> This is not yet a judicial policy. The JID does not publish the disciplinary procedures against judges or prosecutors, as highlighted in two recent major cases.

In the first case, a judge was caught smuggling 68 kilograms of cannabis in November 2016.<sup>257</sup> The judge used his judicial immunity to pass through security checks at the tunnel connecting Cairo to the Sinai Peninsula.<sup>258</sup> While the judge's car was passing through, a police dog

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252. *Id.* (after amendment).

253. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 189/1 (stating that “[t]he public prosecution is an integral part of the judiciary”).

254. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 119 (Egypt) (stating that “the president of the republic appoints the Attorney General from one of the court of appeals or court of cassation judges”).

255. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 189/2 (stating that “[p]ublic 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”).

256. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 104 (Egypt).

257. *Egyptian Judge Arrested After 68 Kg of Cannabis Found in His Car*, AHARAM ONLINE (Nov. 11, 2016), <http://english.ahram.org.eg/News/248813.aspx> [<https://perma.cc/6NYZ-WJQ5>].

258. Ali Hamid & Sarah Wahid, *Al-qasah al-kamalah le-qadi alhashish .. Dabt raes mahkamah besharkayah behawzatahot 68 kg mokhadrat benafaq Ahmed Helmi...Al Tahqiqat athbatat*

barked at it.<sup>259</sup> This led police officers to search the car.<sup>260</sup> The judge was arrested, and the Minister of Justice requested that he resign from his position.<sup>261</sup> Hence, this resignation deprived the judge of all his legal immunity.<sup>262</sup>

In the second case, the Secretary General of the State Council was charged as an accomplice in a bribery case involving 150 million Egyptian Pounds in December 2016.<sup>263</sup> The case was publicized when the head of the procurement department of the State Council was caught taking a bribe.<sup>264</sup> The Administrative Control Authority (ACA) taped the bribery, upon which the employee (the head of the procurement department) agreed to cooperate with the investigation authority.<sup>265</sup> He directed them to the Secretary General of the State Council, who had supported all bribery transactions.<sup>266</sup> The ACA presented the information to the Attorney General, who went to meet with the President of the State Council.<sup>267</sup> After a long discussion, they requested that the Secretary General resign.<sup>268</sup> The Secretary General was later arrested and brought to the ACA headquarters.<sup>269</sup> After a long day of investigation, he was detained in solitary confinement.<sup>270</sup> When they went to conclude the investigation the next day, they found that he had committed suicide.<sup>271</sup>

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*tawarothoh fi-qadayah ... Habshoh 4 Ayam be'd raf' alhasanah*, VETOGATE (Nov. 10, 2016), <http://www.vetogate.com/2450263> [<https://perma.cc/ATM4-42XB>].

259. *Egyptian Judge Prosecuted Over Drug Related Bribery*, XINHUA NE (Nov. 27, 2016), [http://news.xinhuanet.com/english/2016-11/27/c\\_135860726.htm](http://news.xinhuanet.com/english/2016-11/27/c_135860726.htm) [<https://perma.cc/H8FW-UCY6>].

260. *Id.*

261. *Id.*

262. *See Egyptian Judge Arrested After 68 Kg of Cannabis Found in His Car*, AHARAM ONLINE (Nov. 11, 2016), <http://www.egyptindependent.com/egyptian-judge-jailed-life-over-drug-trafficking/> [<https://perma.cc/5UAY-87F5>].

263. *See Criminal Court Announces "State Council Bribery" Case Verdict to be September 13th*, DAILY NEWS EGYPT (June 11, 2017), <https://dailynewsegypt.com/2017/06/11/criminal-court-announces-state-council-bribery-case-verdict-september-13th/>.

264. *See El-Sayed Gamal El-Din, Official Arrested in Bribery Case Is Not a Judge: State Council*, AHARAM ONLINE (Dec. 28, 2016), <http://english.ahram.org.eg/NewsContent/1/64/254039/Egypt/Politics-/Official-arrested-in-bribery-case-is-not-a-judge-S.aspx> [<https://perma.cc/K3BU-U5JH>].

265. *Id.*

266. *Id.*

267. *Egypt: Senior Judge Hangs Himself in Cell After Corruption Allegations*, DEUTSCHE WELLE (Jan. 2, 2017), <http://www.dw.com/en/egypt-senior-judge-hangs-himself-in-cell-after-corruption-allegations/a-36978112> [<https://perma.cc/XWS4-ZFA>].

268. *Id.*

269. *Id.*

270. *Id.*

271. *El-Sayed Gamal El-Din, Egyptian Senior Judge Found Dead on Monday Committed Suicide: Prosecutor- General*, AHARAM ONLINE (Jan. 5, 2017), <http://english.ahram.org.eg/NewsContent/1/64/254512/Egypt/Politics-/Egyptian-senior-judge-found-dead-on-Monday-committ.aspx> [<https://perma.cc/5XT8-TF2E>].

Cleansing the judiciary of corrupt members is not a good enough reason to violate the law. The Minister of Justice, the Attorney General, the President of the SJC, and the President of the State Council clearly violated these judges' rights. The seriousness of the two crimes (drug smuggling and bribery) does not justify violating the JAL procedures. In these two incidents, both judges were asked to resign.<sup>272</sup> These requests violated JAL mandates.<sup>273</sup> Specifically, requesting a judge to resign before the start of any criminal procedures or disciplinary procedures violates the rights stipulated in the Constitution.<sup>274</sup> The Minister of Justice, the Attorney General, the SJC, and the State Council illegally forced the two judges to resign.<sup>275</sup> Such action from them would go without holding them accountable. As a result, this raises the question of the institution's accountability regarding the head of the judicial institution.

## 2. Political Participation

There must be a clear definition of political participation and the ban against judges becoming involved in politics. Judges in the United States are able to express their political opinion.<sup>276</sup> Freedom of expression is not only reflected in their personal lives, but also in their judgments.<sup>277</sup> Judges are accountable to the people on both a professional and a personal level.<sup>278</sup> While the definition of judicial accountability is not clear, it is always connected to either a judicial decision or judicial performance in general.<sup>279</sup>

In Egypt, Professor Rifaat Fodah argues that every division of the state has the right to express its political views.<sup>280</sup> The only exception to

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272. *Id.*

273. The JAL does not give any authority to Ministry of Justice, SJC or the State Council the authority to ask the judge to resign. Law No. 46 of 1972 (Judicial Authority Law), *al-Jaridah al-Rasmīyah*, 5 Oct. 1972, art. 104 (Egypt).

274. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 94/2.

275. *Egypt Force 32 Judges Who Opposed Removal of Morsi to Retire*, GUARDIAN, (Mar. 29, 2016), <https://www.theguardian.com/world/2016/mar/29/egypt-forces-32-judges-who-opposed-removal-of-morsi-to-retire> [https://perma.cc/Q57U-VDWG].

276. Accountability is one of the six core values of the American judiciary system, including “stringent standards of conduct; self-enforcement of legal and ethical rules; good stewardship of public funds and property; and effective and efficient use of resources.” *Administrative Oversight and Accountability*, U.S. CTS., <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/administrative-oversight-accountability.aspx> [https://perma.cc/URY9-JL8P].

277. *Id.*

278. Paul De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 28 WILLAMETTE L. REV. 377, 387 (2002).

279. Stephen Colbran, *The Limits of Judicial Accountability: The Role of Judicial Performance Evaluation*, 6 LEGAL ETHICS 55, 55–56 (2003).

280. RAFEET FODAH, *AL-TASHRE'AT AL-DOSTORAYAH LE-SOLTAH AL-QADA'EYAH WE-WAD' OSSOS TAHKIK AL-'DALAH WE-BANA DAWLAT AL-QANWANA* (2012). Professor Rifaat Fodah is the Chair of the Public Law Department at Cairo University.

this rule is the judicial authority.<sup>281</sup> Article 73 of the JAL prohibits courts and judges from any form of political participation.<sup>282</sup> Supporting political parties jeopardizes judicial neutrality.<sup>283</sup> Thus, the ban aims to sustain the neutrality of the judiciary in political disputes.

The JID distinguishes between two types of political participation. While the JID denounces political participation by left-wing judges, it leaves political participation by right-wing judges unpunished.<sup>284</sup> This political discrepancy started after the 2013 Coup.<sup>285</sup> During 2012 and 2013, judges were divided into three main parties.<sup>286</sup> The first was the neutral party.<sup>287</sup> They did not adopt any political position during the political turmoil following the success of the MB presidential candidate.<sup>288</sup> This group was the smallest group in the judiciary at that time.<sup>289</sup>

The second party opposed the MB in various political statements in a way that benefitted Mubarak's regime.<sup>290</sup> These official statements and press conferences were published in the public media, denouncing the MB and their politics.<sup>291</sup> The leader of this faction was Judge Al-Zend, who was the President of the Judges' Club and later became the Minister of Justice.<sup>292</sup> The major position of this group came after the promulgation of the 2012 Constitutional Declaration.<sup>293</sup> The Declaration instigated three major points of contention by these judges.<sup>294</sup> First, the Declaration reopened the investigation and prosecutions in acts committed against the revolutionaries.<sup>295</sup> Second, the Declaration offered legal immunity from

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281. *Id.*

282. "Judges are prohibited from expressing political views, and judges are equally prohibited from working in the political arena. They are prohibited from standing for elections for peoples' assembly, regional institutions, or political organizations, unless they give up their calling in the judiciary." Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 73 (Egypt). Judges are prohibited from being part of commercial transactions and participating in any work that does not comply with principles of judiciary independence.

283. Sherif Younes, *Judges and Elections: Politicization of the Judges' Discourse*, in *JUDGES AND POLITICAL REFORM IN EGYPT* 151, 161–63 (Nathalie Bernard-Maugiron ed., 2008).

284. Al Hajjaji, *supra* note 90, at 395.

285. *Id.*

286. *Id.* at 390–94.

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. Shahat, *supra* note 58, at 115.

293. CONSTITUTIONAL DECLARATION OF ARAB REPUBLIC OF EGYPT, 17 June 2012, art. I.

294. Al Hajjaji, *supra* note 90, at 395.

295. Reopen the investigations and prosecutions in the cases of the murder, the attempted murder and the wounding of protesters as well as the crimes of terror committed against the revolutionaries by anyone who held a political or executive position under the former regime, according to the Law of the Protection of the Revolution and other laws. CONSTITUTIONAL DECLARATION OF ARAB REPUBLIC OF EGYPT, 17 June 2012, art. I.

any judicial supervision to all legal acts of the President, especially the Constitutional Declaration.<sup>296</sup> It also offered immunity to the Constituent Assembly from judicial supervision.<sup>297</sup> Third, the Declaration limited the Attorney General's term of office to four years.<sup>298</sup> As a result, Al-Zend's judges issued statements against the executive and legislative bodies.<sup>299</sup> By the same token, the MB, several executives, and members of the legislative authority have issued counter-statements against the judiciary.<sup>300</sup>

The third party was a minority of judges, who supported the MB against the 2013 Coup.<sup>301</sup> These judges subsequently signed a petition.<sup>302</sup> The judges who signed this petition were later called "judges of Raba'a."<sup>303</sup> After the 2013 Coup, some of the JIM members signed a document condemning the Coup.<sup>304</sup> They also publicized this document in

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296. *Id.* art. II.

Previous constitutional declarations, laws, and decrees made by the president since he took office on 30 June 2012, until the constitution is approved and a new People's Assembly [lower house of parliament] is elected, are final and binding and cannot be appealed by any way or to any entity. Nor shall they be suspended or canceled and all lawsuits related to them and brought before any judicial body against these decisions are annulled.

*Id.*

297. The text of the article on the formation of the Constituent Assembly in the 30 March 2011 Constitutional Declaration that reads, 'it shall prepare a draft of a new constitution in a period of six months from the date it was formed' is to be amended to "it shall prepare the draft of a new constitution for the country no later than eight months from the date of its formation." *Id.* art. IV. "No judicial body can dissolve the Shura Council [upper house of parliament] or the Constituent Assembly." *Id.* art. V.

298. The prosecutor-general is to be appointed from among the members of the judiciary by the President of the Republic for a period of four years commencing from the date of office and is subject to the general conditions of being appointed as a judge and should not be under the age of forty. This provision applies to the one currently holding the position with immediate effect.

*Id.* art III.

299. David Kirkpatrick, *Egypt Judge Speaks Against Islamist Victory Before Presidential Runoff*, N.Y. TIMES, (June 7, 2012), <http://www.nytimes.com/2012/06/08/world/middleeast/egyptian-judge-speaks-against-islamist-victory-before-presidential-runoff.html?mcubz=3>

300. Yasmine ElRashidi, *Egypt: The Rule of the Brotherhood*, N.Y. REV. BOOKS, (Feb. 7, 2013), <http://www.nybooks.com/articles/2013/02/07/egypt-rule-brotherhood/> [https://perma.cc/E3WD-R9LE]; see also, David Kirkpatrick, *Egyptian Judges Challenge Morsi Over New Power*, N.Y. TIMES, (Nov. 24, 2012), <http://www.nytimes.com/2012/11/25/world/middleeast/morsi-urged-to-retract-edict-to-bypass-judges-in-egypt.html?mcubz=3>.

301. *Egyptian Court Sacks 41 Judges for Supporting Muslim Brotherhood, Judicial Sources Says*, ABC (Mar. 15, 2015), <http://www.abc.net.au/news/2015-03-15/egypt-sacks-41-judges-for-supporting-muslim-brotherhood/6320528> [https://perma.cc/25X3-MFHE].

302. *60 Judges Disciplined for Signing a Statement Supporting Rabaa Sit-In*, MIDDLE EAST MONITOR (Oct. 21, 2014), <https://www.middleeastmonitor.com/20141021-60-egyptian-judges-disciplined-for-signing-a-statement-supporting-rabaa-sit-in/> [https://perma.cc/SNK4-QGQY].

303. *Id.*

304. More than fifty-five judges were impeached for writing condemning statements of the Military Coup. See *Egypt: Arbitrary and Unfair Removal of Judges must be Reversed*, INT'L

Raba'a Al-Adawiya Square, the center of the MB sit-in following the Coup.<sup>305</sup> Currently, the JID and the SJC have issued disciplinary procedures as well as impeachment proceedings against several of the judges of Raba'a.<sup>306</sup> The JID and the SJC believe that the judges of Raba'a have clearly violated Article 73 regarding the ban against political participation.<sup>307</sup> On the other hand, even though Al-Zend's judges also participated in politics during this time, the JID and the SJC have left them unpunished.<sup>308</sup> The JID and the SJC view Al-Zend's judges as protecting judicial independence from the brutal aggression of the executive.<sup>309</sup> Hence, they do not consider their participation in politics a violation of Article 73.

### 3. Lack of Transparency

The judiciary often withholds necessary information concerning judicial administration from the public. Each circuit and prosecution district office issues its own statistics.<sup>310</sup> This data is sent monthly to the MoJ and the Attorney General.<sup>311</sup> None of this data is made available to the public.<sup>312</sup> There is no public institution within the judiciary that releases judicial data in reference to the number or types of cases.<sup>313</sup> This is a violation of Article 68/1 of the Constitution, which regulates access to information and official documents.<sup>314</sup>

The lack of transparency within the judiciary takes on three forms. First, the Attorney General has the ultimate authority to ban media coverage in certain cases to protect the confidentiality of those involved.<sup>315</sup> Between 2013 and 2015, the Attorney General banned the publication of

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COMMISSION OF JURISTS (Mar. 28, 2016), <http://www.icj.org/egypt-arbitrary-and-unfair-removal-of-judges-must-be-reversed/> [<https://perma.cc/2VHU-9ZWE>].

305. *Id.*

306. *Id.*

307. Law No. 46 of 1972 (Judicial Authority Law), *al-Jaridah al-Rasmīyah*, 5 Oct. 1972, art. 73 (Egypt).

308. Al Hajjaji, *supra* note 90, at 394.

309. *Id.*

310. *Id.*

311. There is no available data on the Ministry of Justice website. See Bawabat Wazaret al-A'del, *Johorayat Misr Al-Arabyah* (2016), <http://www.jp.gov.eg/ar/Default.aspx> [<https://perma.cc/9RKY-QW44>].

312. *Id.*

313. *Id.*

314. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 68/1. ("Information, data, statistics and official documents are owned by the people. Disclosure thereof from various sources is a right guaranteed by the state to all citizens. The state shall provide and make them available to citizens with transparency.")

315. *Egypt: Freedom of the Press 2016*, FREEDOM HOUSE (2016), <https://freedomhouse.org/report/freedom-press/2016/egypt> [<https://perma.cc/S79X-H9TC>] (noting Egypt's press freedom status as "not free").

fifteen cases, all related to police or judicial violations.<sup>316</sup> This right is criticized, given that the Attorney General is empowered with an authority that is undisputed and unverified by any national independent bodies.<sup>317</sup>

Second, judges and prosecutors prepare statistics related to their districts, which are subsequently sent to both the MoJ and the Attorney General.<sup>318</sup> They believe that the publication of such data leads to interference with the administration of justice, which is mainly the responsibility of the MoJ.<sup>319</sup> Third, neither the judiciary nor the PPO appoints a public speaker to address the public with judicial and public concerns.<sup>320</sup> The judiciary believes it is the legal elite<sup>321</sup> and disregards public demands for information.<sup>322</sup> As a result, it is rare to come across public statements regarding popular cases from either the judiciary or the PPO.<sup>323</sup>

There are two reasons for this lack of transparency in the judiciary: a lack of legal responsibility and a lack of political responsibility. In terms of legal responsibility, even though there is a constitutional mandate to ensure the transparency of state agencies, the JAL and the judicial practice take a stand against this right.<sup>324</sup> On the one hand, the Constitution stipulates that there should be a forum in which citizens can file complaints

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316. Ahmed al-Bahnasawi, *Qadaia hazr alnashr monzo 30 July le-elrashowh aljansayah*, AL WATAN NEWS (July 2015), <http://www.elwatannews.com/news/details/777221> [https://perma.cc/SJD6-KDBJ].

317. *Id.*

318. The website of the Ministry of Justice does not include any information regarding the ministry, except news of the Minister of Justice and his assistance. See generally Al Hajjaji, *supra* note 90.

319. *Id.*

320. Deputy Attorney General Mustafa Suleiman held only one public press conference. This press conference was about the murder of the Italian researcher Giulio Regeni. See *Regeni Murder: Egypt Denies Italy Phone Record Request*, BBC NEWS (Apr. 9, 2016), <http://www.bbc.com/news/world-middle-east-36007876> [https://perma.cc/F2C3-3ZB6].

321. Nancy Elshami, *The Egyptian Judiciary: Current Divisions and Historical Contexts*, MUFTAH (Jan. 9, 2013), [http://muftah.org/the-egyptian-judiciary-current-divisions-and-historical-contexts/#.V\\_J4TfTV6Xk](http://muftah.org/the-egyptian-judiciary-current-divisions-and-historical-contexts/#.V_J4TfTV6Xk) [https://perma.cc/KE8Z-JWXP].

322. Mustafa Suleiman stated “such conference is the first of its kind. It is not to answer any question regarding the investigations, rather it is to answer questions related to PPO’s delegates visit to Italy.” To view full press conference see *Mutamar Suhafi le-na’eb al’am almusa’d, OnE*, YOUTUBE (Apr. 9, 2016), <https://www.youtube.com/watch?v=enHZ1up5a5U>.

323. The Supreme Judicial Council has issued a decision to ban all judges and prosecutors from making public statements, which includes writing on social media. The violators of the decision are subject to disciplinary proceedings. *Egypt’s SJC Warns Judges of Publishing News Related to Judiciary Affairs on Social Media*, AHARAM ONLINE (Jan. 9, 2017), <http://english.ahram.org.eg/News/254733.aspx> [https://perma.cc/J72M-GU7K]; see also Alaa Turki, *Egypt: SJC Warns Judges Against Sensitive Social Media Posts*, SADA ALBALAD (Jan. 9, 2017) <http://en.el-balad.com/2318541> [https://perma.cc/BEE8-275D].

324. Law No. 46 of 1972 (Judicial Authority Law), *al-Jaridah al-Rasmīyah*, 5 Oct. 1972, art. 83 (Egypt). The article limits the right to sue the judiciary as an institute to judges, prosecutors, and their families.

regarding access to public data being withheld.<sup>325</sup> It also maintains that responsibility must be taken in cases of nonconformity.<sup>326</sup> On the other hand, the JAL protects the judicial administration from any redress sought by the public.<sup>327</sup> Members of the public cannot force the judiciary to disclose such data. Article 84 of the JAL limits the right to complain against judicial administrative decisions, including the request to disclose judicial data to judges and prosecutors.<sup>328</sup> The Judges' Circuit at the Cairo Court of Appeal, which is responsible for all cases relating to the annulment of judicial administrative decisions, will not hear any cases related to a constitutional mandate unless the plaintiff is a judge or prosecutor.<sup>329</sup> Members of the public are not able to seek legal redress before the Judges' Circuit, even if they have been harmed by the judicial administrative decision.<sup>330</sup> Consequently, the current formulation of the JAL constitutes an obstacle to enforcing the constitutional right, resulting in its inapplicability.

In terms of political responsibility, no responsibility falls to either the judiciary or the Attorney General when it comes to publishing judicial data.<sup>331</sup> This is due to two reasons. First, there is no consultation of the public in the appointment process of the SJC, the Minister of Justice, or the Attorney General.<sup>332</sup> As far as the SJC is concerned, all of its seven

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325. Article 68/2 of the Constitution of the Arab Republic of Egypt provides “[t]he law shall organize rules for obtaining such, rules of availability and confidentiality, rules for depositing and preserving such, and lodging complaints against refusals to grant access thereto. The law shall specify penalties for withholding information or deliberately providing false information.” CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 68/2

326. *Id.*

327. MOHAMMED NOUR FARHAT & ALI SADEK, ARAB CTR. FOR THE DEV. OF THE RULE OF LAW & INTEGRITY, REPORT ON THE STATE OF THE JUDICIARY IN EGYPT: SECOND DRAFT, [http://hrlibrary.umn.edu/research/Egypt/Egypt\\_FinalReportP2S4\\_En.pdf](http://hrlibrary.umn.edu/research/Egypt/Egypt_FinalReportP2S4_En.pdf) [https://perma.cc/2ZNL-73LU].

328. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 84 (Egypt). This law outlines the process of seeking legal redress against judicial administrative decisions, judicial appointment, judicial transfer, judicial organization, regulation, and finances of the courts.

329. *Id.*

330. This applies to the candidates who got rejected from being appointed to the judiciary. These candidates try to litigate such cases at the civil circuit in the Cairo Court of Appeal; the circuit would rule that they are not competent personnel for such cases based on Article 83 of the Judicial Authority Law.

331. The Public Prosecution Office has never held any public press conferences, except a sole press conference in 2016. This conference was related to the homicide of the Italian PhD student Giulio Regeni. The Assistant Attorney General stated that “this is the first public conference. It is not to answer any question regarding the investigations, rather it is to answer question related to the Public Prosecution Office delegates visit to Italy in March 2016.” *Mutammar Suhafi le-na'eb al'am almusa'd*, *OnE*, YOUTUBE (Apr. 9, 2016), <https://www.youtube.com/watch?v=enHZ1up5a5U>.

332. *Id.*

members are appointed based on the principle of seniority.<sup>333</sup> Second, there is an issue of sensitivity among the executives in dealing with the SJC, the Minister of Justice, and the Attorney General. While the MoJ is a member of the Cabinet, the Prime Minister cannot request that data be made available to the public.<sup>334</sup> This is because the Cabinet fears executive interference in judicial affairs.<sup>335</sup> As a result, both legal and political responsibilities of the judiciary must be established. The JAL can work on establishing the legal responsibility of the judiciary. The political responsibility is part of judicial legitimacy, which also needs to be addressed.

#### 4. Current Endeavors to Transfer the JID to the SJC

One of the major requests of judges is to transfer the JID from the MoJ to the SJC. The JID is a subdivision of the MoJ and a strong tool in controlling the judiciary. Before 2006, the Minister of Justice was the only competent authority that nominated the JID chairperson, who also works as a Deputy to the Minister of Justice.<sup>336</sup> In 2006, a new amendment was introduced requiring SJC acceptance of the proposed JID chairperson candidate.<sup>337</sup> This amendment was a great disappointment to judges, as they sought a full transfer of the JID from the Minister of Justice to the SJC.<sup>338</sup> This is why the new amendment is not considered a real reform.

Transferring the JID to the SJC failed after the 2011 Revolution.<sup>339</sup> In 2012, the Minister of Justice, Judge Ahmed Mikky, sent a formal letter to the SJC requesting a factual transfer of the JID.<sup>340</sup> He intended for this

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333. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 77, bis (1) (Egypt).

334. Tamir Moustafa, *Law Versus the State: The Judicialization of Politics in Egypt*, 28 L. & SOC. INQUIRY 883, 883–84 (2003).

335. *Id.*

336. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 45 (Egypt) (“The nomination of the presidents, vice presidents and members of legislation department, judicial inspection department, divisions of the court, judicial inspection for prosecution bureau, and prosecution administration are nominated by members of judiciary or the prosecution bureau. The nomination is renewable for one year. The Ministry of Justice is the sole competent authority of nomination, after permission of the SJC.”).

337. *Id.* art. 46 (“The nomination of the assistant to the Minister for the judicial inspection, and his assistance, and members of the department of judicial inspection is done by the Minister of Justice, and only after permission of the Supreme Judicial Council.”).

338. Al-Khudayri, *supra* note 246, at 47–48.

339. Minister of Justice Ahmed Mikky requested a full transfer of the JID to the SJC. However, this request was denied by the SJC. Letter from Minister of Justice Mikky, to Chief Justice of the Court of Cassation and Supreme Judicial Council (2012), <http://new.elfagr.org/Detail.aspx?nwsId=167356&secid=1&vid=2> [https://perma.cc/Y3BZ-Y6BL].

340. The letter states the following:

The Chief Justice of the Court of Cassation and the Chairman of the SJC . . . Since I have the honor to be a member of the Judiciary, I shared with my colleagues the utmost necessity

factual transfer to potentially lead to the legal transfer of the JID to the SJC.<sup>341</sup> This incident was the only significant attempt at transferring the JID from the MoJ to the SJC.<sup>342</sup> Judge Mikky's request, however, was denied.<sup>343</sup> The SJC claimed that such a transfer required a legislative amendment to the JAL, instead of a ministerial decision.<sup>344</sup> This was a golden opportunity for the judiciary to carry out a factual transfer of the JID. Most of the judges felt betrayed by the SJC.<sup>345</sup> It was very difficult at that time to amend the JAL due to existing political hurdles. As a consequence, there was a predominant feeling of fear among judges that the SJC would become another arm of the executive.<sup>346</sup>

Egypt's Constitution has led to increasing judicial instability. Any proposal for judicial reform has been suspended during the period of President Al-Sisi.<sup>347</sup> The status quo is considered the best position for any regime to maintain strong influence over judicial decisions, while giving more authority over the judiciary to the MoJ.<sup>348</sup> With a clear lack of separation of powers in contemporary Egypt, it is hard to say there is an impartial and independent mechanism that ensures judicial accountability.

## B. *Accountability of the Judicial Institute*

### 1. Accountability of the Minister of Justice

The ambivalence regarding the position of the Minister of Justice— in other words, whether it is a purely executive authority or somewhere between the executive and the judiciary—has given rise to the term

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to transfer JID from the Ministry of Justice to the SJC . . . . As per our last meeting, I heard that you would nominate Judge Zaghloul al-Balushi to be the new chairperson of the JID. I have not only agreed with your nomination, but also starting today I would like to inform you the transfer of the JID to the SJC is now in effect. I wish also to ask your acceptance of his nomination to be Assistant to the MoJ until the promulgation of a new law, which would attach the JID to your Council. Please accept my sincere regards to the SJC, the new chairperson of the JID, and all our colleagues.

*Id.*

341. Mohamed al-Sanhuri, *al-Qada Al'al: lan nosherf 'la al-Tafish down qanwan*, AL MASRY AL YOUM (Aug. 16, 2012), <http://www.almasryalyoum.com/news/details/157553> [<https://perma.cc/FUD6-8H6A>].

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.*

347. The only reform al-Sisi's parliament has proposed is to abolish the seniority principle in the appointment of the President of the Court of Cassation and the State Council. This proposal was met with great opposition from both the President and the Council. Sayed Elhadidi, *Egypt's Parliament, Judiciary Face Off Against Each Other*, EGYPT PLUS (Jan. 11, 2017), <http://www.al-monitor.com/pulse/originals/2017/01/egypt-parliament-law-judiciary-independence.html>.

348. *Id.*

“sovereign ministry.”<sup>349</sup> This term does not have a specific legal definition. Rather, it denotes the practice followed before the formulation of the 2014 Constitution.<sup>350</sup> The President of the Republic has the right to appoint ministers for “sovereign ministries” upon consultation with the Prime Minister.<sup>351</sup> Moreover, in July 2013, the President of the Republic made an attempt to appoint Judge Mohamed Mahdi, a former judge at the Egyptian State Council and the ICTY, as the Minister of Justice.<sup>352</sup> This suggestion was rejected by most of the ordinary court judges.<sup>353</sup> One of the judges said “the club, as well as the judges, will boycott the ministry if Mahdi is chosen to be the Minister of Justice.”<sup>354</sup> The president was then forced to appoint him as the Minister of Transitional Justice.<sup>355</sup>

In May 2015, ex-Minister of Justice, Judge Mahfouz Saber, was asked during a television interview whether “the son of a garbage collector stood any chance of being appointed as a public prosecutor.”<sup>356</sup> He replied:

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349. The term “sovereign ministry” includes the Ministry of Defense and the Ministry of Interior. The appointment of these ministers is taken directly from the President of the Republic. Article 234 of the 2014 Constitution states “The Minister of Defense is appointed upon the approval of the Supreme Council of the Armed Forces. The provisions of this article shall remain in force for two full presidential terms starting from the date on which this Constitution comes into effect.” CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 234. As for the Minister of Interior, Article 207 of the Constitution states the Supreme Police Council is composed from among the most senior officers of the police force and the head of the Legal Opinion Department at the State Council. *Id.* art. 207. The Article further states that the Council assists the Minister of Interior in organizing the police force and managing the affairs of its members. Its other competences are identified by law. It must be consulted in any laws pertaining to it. *Id.*

350. *Id.*

351. “In the event that the government is chosen from the party or the coalition that holds a plurality of seats at the House of Representatives, the President of the Republic shall, in consultation with the Prime Minister, choose the Ministers of Defense, Interior, Foreign Affairs and Justice.” *Id.* art. 146.

352. *Former Judges*, U.N. INT’L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA, <http://www.icty.org/en/about/chambers/former-judges> [https://perma.cc/78TR-WPRW].

353. Shima Rasid, *Masdar Qadai: Al-Bablawi Rastaqr Mabdian ‘ala Ta’yeen Adel Abdel Haid Wazearn Lel’adl*, SHOROUK NEWS (July 18, 2013), <http://www.shorouknews.com/news/view.aspx?cdate=18072013&id=2296c089-52e1-4c46-ba16-5ecad13b0a52> [https://perma.cc/28MP-7DMD].

354. *Al qodah yad’own ljam’yah ghair ‘adayah ‘tradan ‘la almahdi waziran lel’dl*, KADY ONLINE (July 16, 2013), <https://kadyonline.com/?p=7522> [https://perma.cc/D6AE-MEZY]. Judges and prosecutors announced that they refused the appointment of State Council ex-judge Amin al-Mahdi as the Minister of Justice; see also Mahmoud Housin, *Shabab ALqodah Totalab Be’qd Jam’yah ‘omomyah Taraeh Letasadi Leta’yeen Al-Mahdi Wazearn Lel’adl*, MASRESS (July 16, 2013), <http://www.masress.com/youm7/1164107> [https://perma.cc/LSH5-AJDM].

355. Ahmed Morsy, *Transition Justice: Egypt’s Way Forward*, MIDDLE EAST INST. (July 26, 2013), <http://www.mei.edu/content/transitional-justice-egypts-way-forward> [https://perma.cc/4AHL-N37T]. See also *Who’s Who: Egypt’s Full Interim Cabinet*, AHAM ONLINE (July 17, 2013), <http://english.ahram.org.eg/NewsContentPrint/1/0/76609/Egypt/0/Whos-who-Egyptys-full-interim-Cabinet.aspx> [https://perma.cc/52AF-95BR].

356. *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>.

[T]he 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 are necessary . . . I am not saying the judge should be an aristocrat . . . I am saying the class should not be very low.<sup>357</sup>

As a result of this statement, Saber resigned from office a week later.<sup>358</sup>

In March 2016, the ex-Minister of Justice and ex-president of the Judges' Club, Judge Ahmed Al-Zend, made several controversial statements upon his appointment as the Minister of Justice.<sup>359</sup> The two most controversial were about neutralizing MB opponents without a trial and involved insulting the prophet Mohammed. In the first statement, he was answering a question about what he thought of the killing of the terrorists in Sinai without a trial. His response was as follows:

If the armed forces have responded hastily and killed 40 of those terrorist extremists . . . the armed forces will spare no effort in avenging their deaths in a way that will satisfy our fury . . . I believe 400,000 are not enough for our martyrs . . . Personally, the fire in my heart will not die out until at least 10,000 radicals are killed for every martyr[.]<sup>360</sup>

In the second incident, Al-Zend responded to the question on the imprisonment of journalists who insulted him in their newspapers. He said "if jail was not created for those people, then for whom? . . . I would imprison anyone who violates the law, even if it is the Prophet Mohammed—Peace be upon him."<sup>361</sup> Al-Zend later voiced his regret at having made such a statement.<sup>362</sup> The Prime Minister, however, asked Al-Zend to resign as a result of his controversial statement.<sup>363</sup> Al-Zend refused to comply with the Prime Minister's request.<sup>364</sup> He believed that he could

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357. *Id.*

358. *Egypt's Justice Minister Sacked Over Social Class Remarks*, BBC NEWS (May 11, 2015), <http://www.bbc.com/news/world-middle-east-32688825> [<https://perma.cc/765J-NFNJ>].

359. Morgan Winsor, *Who Is Ahmed el-Zend? Egypt's New Justice Minister Supports Beheadings and Public Lashings, Is Anti-Muslim Brotherhood*, INT'L BUS. TIMES (May 20, 2015), <http://www.ibtimes.com/who-ahmed-el-zend-egypts-new-justice-minister-supports-beheadings-public-lashings-1931785>

360. *Egypt's MoJ Calls to Kill 400,000 of Muslim Brotherhood Members and Their Supporters*, *Middle East Monitor*, YOUTUBE (Jan. 30, 2016), [https://www.youtube.com/watch?v=64S\\_MvfmNis](https://www.youtube.com/watch?v=64S_MvfmNis).

361. *al-Zend Insult the Prophet*, YOUTUBE (Mar. 27, 2016), <https://www.youtube.com/watch?v=HbpmvjZ7L0s>.

362. *'I Would Jail Prophet Muhammad' Remarks Cost Egypt's Justice Minister His Job*, DEUTSCHE WELLE (Mar. 13, 2016), <http://www.dw.com/en/i-would-jail-prophet-muhammad-remarks-cost-egypts-justice-minister-his-job/a-19114406> [<https://perma.cc/EK88-HXHC>].

363. *Id.*

364. It should be noted that the resignation was more politically than religiously motivated. Al-Zend's words about the Prophet Mohamed are not a religious violation. The Sunna does not contradict

not be removed from office for this type of verbal mistake.<sup>365</sup> The issue was raised with President Al-Sisi, who ordered his removal from the Cabinet.<sup>366</sup> Hence, Al Sisi appointed a new Minister of Justice.<sup>367</sup>

## 2. Accountability of the SJC

There are three issues closely related to the accountability of the SJC. First, the Constitution and the JAL lack any legal rule regarding SJC accountability.<sup>368</sup> It has been argued that members of the SJC hold their position for only one judicial year, starting in October each year.<sup>369</sup> However, the continuous attempts from the executive to override the judiciary mandate the existence of a strong SJC.<sup>370</sup> This strength would be used to stop such attempts.<sup>371</sup> The weakness of the SJC's position leads to a stronger role of the Judges' Club as the sponsor of the judiciary against the executive authority, even though the main—and supposedly sole—role of the Club is to offer services to its members.<sup>372</sup> As a result, the call for increased authority of the SJC must include concrete accountability rules.

Second, SJC members are elected neither internally (internal judges' elections) nor externally (public elections). They are appointed based on their seniority, except for the position of the Attorney General.<sup>373</sup> The president of the SJC is the most senior member at the Court of Cassation.<sup>374</sup> The two other members from the Court of Cassation are the

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with such wording. This can be clearly seen in the incident of the woman from Bani Makhzum who committed theft during the prophet's time. When Usama bin Zaid (former adopted child of the prophet and one of his close friends) talked to him about this woman, the prophet said, "Do you try to intercede for somebody in a case connected with Allah's Prescribed Punishments?" Then he got up and delivered a sermon saying, "What destroyed the nations preceding you, was that if a noble amongst them stole, they would forgive him, and if a poor person amongst them stole, they would inflict Allah's Legal punishment on him. By Allah, if Fatima, the daughter of Mohamad stole, I would cut her hand." *Sahih Bukhari: Sahih Bukhari Volumen 004, Book 056, Hadith Number 681*, HADITH COLLECTION, <http://hadithcollection.com/sahihbukhari/89/4383-sahih-bukhari-volume-004-book-056-hadith-number-681.html> [<https://perma.cc/58ZX-FVJX>].

365. Ahmed Hamdi, *A Costly Slip of the Tongue*, AL-AHRAM WEEKLY (Mar. 17, 2016), <http://weekly.ahram.org.eg/News/15805.aspx> [<https://perma.cc/AD3G-DS5Z>].

366. Sonia Farid, *The Prophet Remark That Got Egypt's Justice Minister Sacked*, AL ARABIYA ENGLISH, <http://english.alarabiya.net/en/perspective/features/2016/03/19/The-prophet-remark-that-got-Egypt-s-justice-minister-sacked-.html> [<https://perma.cc/AE8D-U6W9>].

367. *See Egypt's Sisi Reshuffles Cabinet, Appoints 10 New Ministers*, REUTERS (Mar. 23, 2016), <http://af.reuters.com/article/topNews/idAFKCN0WP1M1> [<https://perma.cc/NC8V-637X>].

368. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 196/2.

369. Law No. 46 of 1972 (Judicial Authority Law), *al-Jaridah al-Rasmīyah*, 5 Oct. 1972, art. 69 (Egypt).

370. Shahat, *supra* note 58, at 112.

371. *Id.*

372. *Id.*

373. Law No. 46 of 1972 (Judicial Authority Law), *al-Jaridah al-Rasmīyah*, 5 Oct. 1972, art. 34 (Egypt).

374. *Id.* art. 77, bis (1).

second and the third most senior.<sup>375</sup> The president of the Cairo Court of Appeal and the two most senior judges at the Court of Appeal are also members.<sup>376</sup> Previously, the 1943 Judicial Independence Law (JIL) required at least two elected members in the composition of the SJC.<sup>377</sup> The JIL was amended in less than two months after the 1952 Coup.<sup>378</sup>

Third, SJC members are potential candidates for executive positions after their retirement. The hope of holding a position after retirement prevents members of the SJC from taking any aggressive measures against the executive authority, for fear of being deprived of senior, post-retirement positions. From 2011 to 2016, eight judges have assumed the position of Minister of Justice.<sup>379</sup> Six out of the eight ministers were members of the SJC.<sup>380</sup> These judges who were members of the SJC and later became the Minister of Justice are:

1. Adel Abdel Hamid (ex-president of Court of Cassation, appointed as Minister of Justice from December 2011 to August 2012 (first term)),<sup>381</sup>
2. Ahmed Mikky (ex-vice president of Court of Cassation, appointed as Minister of Justice August from 2012 to May 2013),<sup>382</sup>
3. Adel Abdel Hamid (ex-president of Court of Cassation, appointed as Minister of Justice from July 2013 to February 2014 (second term)),<sup>383</sup>
4. Nair Othman (ex-vice president of Court of Cassation, appointed as Minister of Justice from February 2014 to June 2014),<sup>384</sup>
5. Mahfouz Saber (ex-president of Alexandria Court of Appeal, appointed as Minister of Justice from June 2014 to May 2015),<sup>385</sup> and

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375. *Id.*

376. *Id.*

377. Article 34 of the JIL replaced all the elected judges who were elected through an internal election process. Instead of electing two members—one from the Public Assembly of the Court of Cassation and one from the Public Assembly of the Cairo Court of Appeal—they were replaced with appointed members. The current JAL maintains the appointment form in the SJC formulation. Law No. 66 of 1943 (Judicial Independence Law), *al-Jarīdah al-Rasmīyah*, 12 July 1943, art. 34 (Egypt).

378. SHALAKANY, *supra* note 56, at 277.

379. *Infra* III.B.2.

380. *Id.*

381. *Al-syrah al-zatyah le-moshtashar Adel Abdel Hamid wazer al-'adl*, AHARAM ONLINE (July 21, 2013), <http://www.ahram.org.eg/NewsQ/222274.aspx> [<https://perma.cc/NQ57-59AM>].

382. *Egypt Justice Minister Resigns*, REUTERS (Apr. 21, 2013), <http://www.reuters.com/article/us-egypt-minister-resignation-idUSBRE93K04Z20130421> [<https://perma.cc/FZ4Z-8N3C>].

383. Fatma Khaled, *Adel Hamid Appointed as Justice Minister*, DAILY NEWS EGYPT (July 22, 2013), <http://www.dailynewsegypt.com/2013/07/22/abdel-hamid-appointed-as-justice-minister/> [<https://perma.cc/C56K-N758>].

384. Ahmed al-Masry, *al-syrah al-zatyah lewzer al-'adl Nair Othman*, ELBALAD (Mar. 1, 2014), <http://www.elbalad.news/836981> [<https://perma.cc/3N7T-RNUE>].

385. Bahi Hassan, *Belvideo .. 10 Ma'lowmat a'n almostashar Mahfouz Saber Wazear Al-'dl*, AL MASRY AL YOUM, (May 11, 2015) <http://www.almasryalyoum.com/news/details/730137> [<https://perma.cc/E9SW-J882>].

6. Mohamed Hossam (ex-president of Court of Cassation, appointed as Minister of Justice from March 2016 to the present).<sup>386</sup>

### 3. Accountability of the Attorney General

The appointment of the Attorney General has undergone three stages. In the first two stages, the nature of the position of the Attorney General was either executive only,<sup>387</sup> or a mixture between judicial and executive powers.<sup>388</sup> During these two periods, both the legal and the political accountability of the Attorney General was left to the executive authority to handle. The first stage was from 1972 to 2005.<sup>389</sup> The Attorney General was under direct supervision of the Minister of Justice for both judicial and administrative work.<sup>390</sup> The second stage occurred after the JAL reform in 2005, when the Attorney General position became independent from the Minister of Justice.<sup>391</sup> The appointment of the Attorney General was still at the discretion of the President of the Republic.<sup>392</sup> In these two stages, any legal or political responsibilities of the Attorney General were

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386. *Mostashar Mohamed Hossam Wazear alAdl*, AL MASRY AL YOUM (Mar. 23, 2016), <http://www.almasryalyoum.com/news/details/915392> [<https://perma.cc/QVF7-P3TH>].

387. “President of the Republic nominates the Attorney General, from judges of the Courts of Appeal, judges of Court of Cassation, or Senior District Attorneys at least.” Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 19 (Egypt). In 2014, the Constitution transferred such right to the SJC. Article 189/2 states:

Public prosecution is carried out by a Prosecutor General who is selected by the SJC 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.

CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 189/2.

388. Article 26 of the JAL was amended in 2006. Before the amendment, it used to state that “Members of the Public Prosecution Bureau follow their superiors on their different levels, and then to the Minister of Justice.” Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 26 (Egypt). In 2006, the article was amended to replace the “Minister of Justice” with “The Attorney General.” *Id.* It should be noted that in Egypt, the position of the Attorney General is different than the position of the Minister of Justice. Each of them has different competencies that are mentioned in the JAL. *Id.*

389. Shannon Roesler, *Modern Legal Reform in Egypt: Shifting Claims to Legal Authority*, 14 CARDOZO J. INT’L & COMP. L. 393, 393–94 (2006).

390. “Member of the Public Prosecution Bureau under the supervision of their senior members and the attorney General. The Minister of Justice has the right of supervision over the Prosecution Bureau and its members.” Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 125 (Egypt).

391. *Id.*

392. *Id.* arts. 44, 119.

directly referred to the executive, despite the mixed nature of the position.<sup>393</sup>

In contrast, the position of the Attorney General in the third stage has raised many questions regarding legal and political accountability.<sup>394</sup> The third and current stage started in 2014.<sup>395</sup> The 2014 Constitution transferred the appointment authority of the Attorney General from the President of the Republic to the SJC.<sup>396</sup> This transfer turned a blind eye to the accountability issue regarding the Attorney General.<sup>397</sup> The JAL has not tackled this issue of accountability. Its philosophy is that the Attorney General is a member of the executive authority, or at least enjoys an authority of mixed nature (executive and judicial).<sup>398</sup>

Any form of legal or political accountability of the Attorney General is not a matter of discussion for several reasons. First, the term of the Attorney General is currently for a limited period.<sup>399</sup> Previously, the appointment term of the Attorney General was unlimited, which is based on ex-Attorney General Abdel-Majid Mahmoud, who was appointed from 2006 to 2012.<sup>400</sup> Currently, the Constitution limits the duration of the Attorney General to only four years.<sup>401</sup> Therefore, the Constitution and the JAL do not address the impeachment process or the replacement of the Attorney General.

Second, the impeachment or removal of the Attorney General is directly connected to the replacement of the ex-Attorney General Abdel-Majid Mahmoud (2006–2012). The impeachment of the Attorney General

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393. “The Public Prosecution is an integral part of the judiciary. It shall carry out the investigation and prosecution of criminal cases, except those excepted by law. The law shall determine its other jurisdictions.” CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 189/1.

394. After the assassination of Attorney General Hesham Barakat in 2015, the appointment of a new Attorney General was put on hold for more than six months. The reason for the delay was that the President wanted to appoint the new Attorney General, while the SJC upheld its constitutional right to do so itself. Following this struggle, the SJC successfully appointed the new Attorney General. Nabil Sadek, *Egypt Prosecutor Hisham Barakat Killed in Cairo Attack*, BBC NEWS (June 29, 2015), <http://www.bbc.com/news/world-middle-east-33308518> [https://perma.cc/M2WV-WFNT].

395. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 189/2.

396. 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. *See id.*

397. *Id.*

398. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 125 (Egypt).

399. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 189/2.

400. Mohamed Abdelaal, *Holding the Executive Accountable in Egypt*, 4 U. BALT. J. INT’L L. 1, 3, 22 (2016).

401. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 189/2.

was one of the most pressing issues after the 2011 Revolution.<sup>402</sup> During the period between 1992 and 2006, Mahmoud was the district attorney of the National Security Prosecution Office.<sup>403</sup> In 2006, Mahmoud was appointed as Attorney General by ex-President Mubarak.<sup>404</sup>

After the success of the Revolution in 2011, it was difficult for the MB to keep Mahmoud in his position.<sup>405</sup> The MB believed that he was a tool of Mubarak's regime and that he himself used to persecute MB members.<sup>406</sup> The MB offered Mahmoud the opportunity to leave his position in return for an appointment as ambassador to the Vatican.<sup>407</sup> Even though he initially accepted the offer, Mahmoud later refused to leave his position.<sup>408</sup> Following this incident, ex-President Morsi issued the 2012 Constitutional Declaration to limit the appointment period of the Attorney General.<sup>409</sup> Mahmoud—as well as the whole judiciary—refuted the Declaration, based on Article 67 of the JAL.<sup>410</sup> That article bans the dismissal of judges from their office.<sup>411</sup> As a consequence, judges and prosecutors engaged in several strikes against the MB and its Declaration until the 2013 Coup.<sup>412</sup>

#### IV. PROPOSED REFORM FOR JUDICIAL ACCOUNTABILITY IN EGYPT

##### A. *Proposed Reform for Accountability of Judges*

##### 1. Clear Criteria for Non-Disciplinary Behavior

The unclear criteria of what is considered disciplinary and what is not renders the judicial accountability process vague. It opens the door for the Minister of Justice, the Attorney General, and the Disciplinary

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402. Mohamed Abdelaal *Holding the Executive Accountable in Egypt, Impeachment: A Losing Case*, 4 U.B. J. INT'L L. 1, 22 (2015–2016).

403. Rana Yosri, *Abdel Mjid Mahmoud Fi Sotowr, al Wafed*, MASRESS (Oct. 11, 2012), <http://www.masress.com/alwafd/276621> [<https://perma.cc/7MD8-N3MC>].

404. *Id.*

405. CONSTITUTIONAL DECLARATION OF ARAB REPUBLIC OF EGYPT, 17 June 2012, art. 3.

406. Mostafa Silliman, *Morsi Yoqil al-Naeb al-'am... we-al-akhear yatamasak be-mansaboh*, AL-ARABIYA (Oct. 12, 2012), <http://www.alarabiya.net/articles/2012/10/11/243191.html> [<https://perma.cc/BE5E-XSLD>].

407. *Id.*

408. *Id.*

409. *See supra* note 298 and accompanying text.

410. “Members of judiciary and public prosecution—except aide to district attorney—are not subject to dismissal from their jobs . . . except with their own acceptance.” Law No. 46 of 1972 (Judicial Authority Law), *al-Jaridah al-Rasmīyah*, 5 Oct. 1972, art. 67 (Egypt).

411. *Id.*

412. *Egypt Judges On Strike Over Judicial Authority Law*, AHARAM ONLINE (May 29, 2013), <http://english.ahram.org.eg/NewsContent/1/64/72598/Egypt/Politics-/Egypt-judges-on-strike-over-judicial-authority-law.aspx> [<https://perma.cc/6FPM-7ZXH>].

Commission to get rid of noncompliant judges. This can be rectified in three steps.

First, an independent and democratic institution should be the competent authority for impeachment and investigation of disciplinary actions. At the federal level in the United States, the Constitution mandates the “good behavior” of the judiciary.<sup>413</sup> The U.S. Supreme Court has settled several principles in this regard.<sup>414</sup> In *Nixon v. United States*, the Court indicated that the Senate had the sole discretion to choose its procedures.<sup>415</sup> The chief judge of the federal district court was prosecuted and sentenced to prison for false statements before a federal grand jury.<sup>416</sup> After hearings in the Senate, senators voted in favor of Nixon’s conviction and impeachment.<sup>417</sup> The establishment of an independent institution is, therefore, discussed in detail in the last part of this Article by highlighting a proposed reform for the accountability of the judiciary.<sup>418</sup>

Second, the application of the JAL violates the principle of *Nulla Poena Sine Lege* (“no penalty without a law”).<sup>419</sup> This principle has two dimensions. The first dimension is that the law must clearly state the illegal behavior of a judge or prosecutor, which is subject to disciplinary procedures.<sup>420</sup> For example, even though the CPL did not include personal

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413. “The judicial power of the United States, shall be vested in one supreme court . . . judges . . . shall hold their offices . . . and [shall, at stated times, receive for their services, a compensation, which shall not be diminished during their Continuance in Office.” U.S. CONST. art. III, § 1.

414. Alex Long, “*Stop Me Before I Vote for This Judge Again*”: *Judicial Conduct Organizations, Judicial Accountability, and the Disciplining of Elected Judges*, 106 W. VA. L. REV. 1, 4 (2003).

415. *Nixon v. United States*, 506 U.S. 224 (1993).

416. *Id.* The Constitution states “the Senate shall have the sole Power to try all Impeachments. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.” U.S. CONST. art I, § 3, cl. 6.

417. *Nixon*, 506 U.S. at 226. The Court also maintained Hamilton’s position on judicial accountability:

The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for mal-conduct by the House of Representatives, and tried by the senate, and if convicted, may be dismissed from office and disqualified for holding any other. *This is the only provision on the point, which is consistent with the necessary independence of judicial character, and is the only one which we find in our constitution in respect to our own judges.*

*Id.* at 235 (quoting THE FEDERALIST NO. 65, at 442 (Alexander Hamilton) (J. Cooke ed., 1961) (emphasis in original)).

418. *People v. Bonnetta*, 205 P.3d 279 (2009). The Supreme Court of California maintained in *Bonnetta* that “[t]he purposes for requiring a trial court to state its reasons for a dismissal are (1) to promote judicial accountability so as to protect the public interest in not allowing improper or corrupt dismissals.” *Id.* at 288.

419. Stefan Glaser, *Nullum Grimen Sine Lege*, 24 J. COMP. LEGIS. & INT’L L. 3D SERIES 29, 34 (1942).

420. *Id.*

conduct as grounds for disciplinary action, the practice of the JID considers conduct as part of disciplinary behavior.<sup>421</sup> In France, disciplinary action is not limited to intentional professional negligence,<sup>422</sup> but it also includes the private conduct of judges' in their personal lives.<sup>423</sup> Judges and prosecutors do not represent themselves; they represent the institution they belong to: the judiciary. Theft and alcoholism, among other acts, constitute a violation of judges' obligations in private life in France.<sup>424</sup> Second, the JAL must specify the exact punishment for each violation.<sup>425</sup> It cannot be left to the authority to determine the suitable punishment.<sup>426</sup> This occurred when the Disciplinary Commission impeached judges and prosecutors who made political statements after the 2013 Coup.<sup>427</sup>

Third, the JAL does not grant judges or prosecutors any form of safeguard measures against arbitrary actions by the Disciplinary Commission.<sup>428</sup> In France, the Constitution and the Judicial Ordinance offer judges and prosecutors several safeguards against arbitrary decisions or unfair trials. Judges and prosecutors who are charged with disciplinary action (defendants) are entitled to full access to evidence and files relevant to their cases.<sup>429</sup> They are not subject to any form of search or seizure by the Committee.<sup>430</sup> Judges and prosecutors' houses and properties are protected as part of the immunity endowed upon them.<sup>431</sup>

Another example of a French judicial safeguard is that decisions taken by the Committee are additionally reviewed by the *Conseil d'Etat*, which is the entity responsible for administrative disputes.<sup>432</sup> The significance of such a body lies in the integration between the two systems of ordinary and administrative courts. It also offers a high level of protection against arbitrary decisions. In these cases, the *Conseil d'Etat* acts as a *juge de cassation* if the defendant is a judge,<sup>433</sup> and it acts as a

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421. As stated earlier, the JID adopts the wide interpretation of Article 96/4 of the JAL.

422. Antoine Garapon & Harold Epinuse, *supra* note 37, at 290.

423. *Id.*

424. *Id.*

425. No person shall be punished except in pursuance of a statute, which fixes a penalty for such behavior. *See, e.g.*, Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165, 165 (1938).

426. *See id.* at 172–74.

427. Nader Diab, Egypt: Arbitrary and Unfair Removal of Judges must be Reversed, INT'L COMMISSION JURIST (Mar. 28, 2016), <https://www.icj.org/egypt-arbitrary-and-unfair-removal-of-judges-must-be-reversed/> [<https://perma.cc/MC3G-TCC4>].

428. Sandra Day O'Connor, *Judicial Accountability Must Safeguard, Not Threaten, Judicial Independence: An Introduction*, 86 DENV. U. L. REV. 1, 1 (2009).

429. Garapon & Epinuse, *supra* note 422, at 291.

430. *Id.*

431. *Id.*

432. *Id.* at 292.

433. *Id.*

*juge de l'excès de pouvoir* if the defendant is a prosecutor.<sup>434</sup> It reviews the legality of the decision and whether it complies with constitutional and legal guidelines.<sup>435</sup> As a result, these safeguards ensure that sanctions are not “clearly disproportionate to the offences.”<sup>436</sup>

## 2. Transparent Disciplinary Processes

In Egypt, there is a clear lack of transparent disciplinary processes. On a smaller scale, there is no transparent impeachment process. On a broader scale, there are no general disciplinary processes. A transparent process takes on three forms. Under the first form, the whole process should be categorized as a transparent process. An example of a transparent disciplinary process can be found in the United Kingdom, where there are two aspects of judicial accountability: sacrificial accountability and explanatory accountability.<sup>437</sup> Sacrificial accountability occurs when a judge commits a criminal act.<sup>438</sup> Judges are subject to criminal investigation by the office of judicial complaints, where the violator is later subject to disciplinary sanctions.<sup>439</sup> Explanatory accountability occurs when the actions of the judge and the reason for his or her behavior are investigated.<sup>440</sup> The Lord Chief Justice and the Lord Chancellor are both responsible for investigating any complaints of this type of behavior.<sup>441</sup> The Judicial Conduct Investigations Office handles these types of complaints.<sup>442</sup> It is considered an independent body of the judiciary.<sup>443</sup> This process is to guarantee public confidence in the process of accountability across the United Kingdom.

Under the second form of a transparent judicial process, the outcome of the judicial accountability process is made available to the public in order to increase its confidence in the judicial system. In the United Kingdom, the Judicial Conduct Investigations Office issues an annual

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434. *Id.*

435. *Id.*

436. *Id.*

437. *The Principle of Judicial Accountability*, CTS. & TRIBUNALS JUDICIARY (2014), <https://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/principles-jud-acc/> [https://perma.cc/6396-CWK5].

438. *Id.*

439. *Id.*

440. *Id.*

441. *Judicial Conduct*, CTS. & TRIBUNALS JUDICIARY (2014), <http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/jud-conduct/> [https://perma.cc/45MS-792N].

442. *Id.*

443. *Id.*

report, which includes the number of complaints received.<sup>444</sup> Between 2013 and 2014, the number of full- and part-time judiciary members was estimated at 36,000, of which 29,000 were magistrates and 7,000 tribunal members.<sup>445</sup> Out of 2,018 total complaints, fifty-eight cases involved formal disciplinary actions.<sup>446</sup> Complaints are first screened by the Judicial Conduct Investigations Office.<sup>447</sup> If the complaint falls within its authority, the case is referred to the Office for Judicial Complaints.<sup>448</sup>

Under the third form of a transparent judicial process, there must be a spokesperson to address the public regarding all matters of judicial authority. Judicial affairs are not a national security issue that needs to be hidden from the public. In the United Kingdom, the judiciary offers three forms of activities: interviews and media briefings; the Lord Chief Justice's review of the administration of justice in courts; and court reports.<sup>449</sup> As for interviews and media briefings, judges occasionally give interviews to the media.<sup>450</sup> Since 2008, the Lord Chief Justice's office has published a periodical review of judicial matters.<sup>451</sup> The report aims to identify issues of major concern to the judiciary and justice administration.<sup>452</sup> As for court reports, each court must provide an annual report on their "performance throughout the year."<sup>453</sup> Hence, Egypt should follow in the United Kingdom's footsteps and have all of its judiciary data made public.

### 3. Limited Civil and Criminal Accountability

Judicial immunity aims to protect judges and prosecutors from the executive authority.<sup>454</sup> However, the judiciary in Egypt has expanded the application of judicial immunity to unprecedented instances in an effort to

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444. *Annual Report 2013-14*, JUD. CONDUCT INVESTIGATIONS OFF. (July 15, 2014), [https://s3-eu-west-2.amazonaws.com/jcio-prod-storage-1xu6pgd2b1rf/uploads/2015/12/jcio\\_annual\\_report\\_2013\\_-2014.pdf](https://s3-eu-west-2.amazonaws.com/jcio-prod-storage-1xu6pgd2b1rf/uploads/2015/12/jcio_annual_report_2013_-2014.pdf) [<https://perma.cc/9C7Q-LYGN>].

445. *Id.* at 6.

446. *Id.*

447. *Id.*

448. *Id.*

449. *Other Forms of Accountability*, CTS. & TRIBUNALS JUDICIARY (2014), <http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/other-forms-of-accountability/> [<https://perma.cc/4573-UJXT>].

450. *Statement From the Judicial Conduct Investigations Office - Mrs Amanda Cornick JP*, JUD. CONDUCT INVESTIGATIONS OFF. (Oct. 14, 2014), [https://s3-eu-west-2.amazonaws.com/jcio-prod-storage-1xu6pgd2b1rf/uploads/2014/10/JCIO\\_press\\_statement\\_-\\_Mrs\\_Amanda\\_Cornick\\_JP.pdf](https://s3-eu-west-2.amazonaws.com/jcio-prod-storage-1xu6pgd2b1rf/uploads/2014/10/JCIO_press_statement_-_Mrs_Amanda_Cornick_JP.pdf) [<https://perma.cc/8CA7-Y3SM>].

451. *Id.*

452. *Id.*

453. *Id.*

454. Vicki Jackson, *Judicial Independence: Structure, Context, Attitude*, in JUDICIAL INDEPENDENCE IN TRANSITION 52 (Anja Seibert Fohr ed., 2012).

face the authoritarian regime in Egypt.<sup>455</sup> The rules of legal immunity need to be redefined to reflect their real objective. Criminal immunity must be limited to criminal conduct of the judges inside the courtroom.<sup>456</sup> It should not be extended to include a special status for judges and prosecutors. Offering a special status to judges and prosecutors leads to the abuse of their powers.<sup>457</sup>

Civil immunity is granted to judges to safeguard them against damages incurred from their profession.<sup>458</sup> This form of immunity is a limited immunity.<sup>459</sup> However, unlimited civil immunity violates the point of civil accountability of judges.<sup>460</sup> The JAL should either abolish civil immunity of judges for nonjudicial work or ensure that procedures are clearly stated in the law. In France, civil liability for a judge for nonjudicial work starts with filing a complaint or calling for disciplinary action against a judge.<sup>461</sup> The plaintiff has to submit a complaint to the national ombudsman (*médiateur de la République*).<sup>462</sup> The complaint is first reviewed by an ombudsman associate before being taken to the next level.<sup>463</sup> Therefore, a limited civil liability should be granted to Egyptian judges that does not add any procedural burdens to litigation.

## B. Proposed Reform for Judicial Accountability

### 1. Reformulation of the SJC

It has been argued that the authority of the MoJ should be transferred to the SJC.<sup>464</sup> However, this proposal expands judicial autonomy. This proposal implies a transfer of the authority of the MoJ from one judge (the Minister of Justice) to seven judges (the SJC).<sup>465</sup> Any transfer of authority

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455. Mokhtar, *supra* note 8, at 778.

456. Sophie Turenne, *Judicial Independence in England and Wales*, in JUDICIAL INDEPENDENCE IN TRANSITION 147 (Anja Seibert Fohr ed., 2012).

457. *Id.*

458. Jackson, *supra* note 454, at 53.

459. *Id.*

460. Judicial accountability is not always accounted for in constitutions. It is disputed that legal scholars and politicians fear to involve themselves in drafting constitutional proposals. *See, e.g.*, Shimon Shetreet, *The Limits of Judicial Accountability: A Hard Look at the Judicial Officers Act 1986*, 10 U. NEW SOUTH WALES L.J. 4 (1987).

461. *Id.*

462. *Id.*

463. *Id.*

464. TOM GERALD DALY, THE JUDICIARY AND CONSTITUTIONAL TRANSITIONS 23–25 (IDEA 2014).

465. The current formulation of the SJC is similar to the formulation 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

to the SJC should be done only after its reformulation. The current formulation is prejudiced against fair representation of all members of the judiciary or judicial ranks and the public. A full public representation in the judiciary involves two steps: interim and permanent reforms. The interim reform should take between five and ten years. It should aim to pave the way for full public participation in judicial administration. During this period, not only should the SJC include elected members from the judiciary, as was the case before 1952,<sup>466</sup> but the new formulation should also include senior law professors who represent the public.

The proposed temporary formulation is as follows: three representatives from the primary courts, three representatives from the courts of appeal, three representatives from the Court of Cassation, two representatives from the junior prosecution, two representatives from the senior prosecution (including the Attorney General), and five senior law professors chosen from the oldest four law schools (Cairo, Alexandria, Assuit, and Ain Shams). The permanent reform should occur at a later period, once the judiciary and the public bodies accept the idea of lay people, lawyers, and professors in the judicial administration. The formulation of the SJC during this period should include elected judges, lawyers, prominent public figures, and emeritus professors. The manner and method of choosing them should be tackled in separate research covering a later period of Egyptian judicial history.

## 2. Transfer of the JID to the SJC

The current proposed amendment is to transfer the JID from the MoJ to the SJC.<sup>467</sup> It has been argued that there are three merits behind relocating this power from the MoJ to the SJC.<sup>468</sup> First, this transfer achieves judicial independence.<sup>469</sup> This advantage, however, is not tangible. There is no concept of a multi-party system in the Egyptian government and especially in the Minister of Justice position. Ordinary court judges never accept a Minister of Justice from the administrative judiciary, as was the case with Judge Mahdi,<sup>470</sup> who was later appointed

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president (instead of the representative of the MoJ), and the Attorney General. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972, art. 77, bis (1) (Egypt).

466. Law No. 66 of 1943 (Judicial Independence Law), *al-Jarīdah al-Rasmīyah*, 12 July 1943, art. 43 (Egypt).

467. Al-Khudayri, *supra* note 246, at 47–48.

468. *Id.*

469. Aziz, *supra* note 29, at 690.

470. Rasid, *supra* note 354.

as the Minister of Transitional Justice.<sup>471</sup> Besides, all members of the JID are judges who are on secondment to the department.<sup>472</sup>

Second, the Minister of Justice uses the JID to retaliate against unwanted judges.<sup>473</sup> For example, during the impeachment process of the judges of Raba'a, the chairperson of the Impeachment Committee,<sup>474</sup> who is also the president of the SJC, jailed Judge Awad during the disciplinary proceedings for violating the Commission's order.<sup>475</sup> When the rest of the Raba'a judges requested the chairperson to step down from the Committee, Al-Zend adamantly refused their request.<sup>476</sup> As a result, the chairperson was both the plaintiff and the judge in the same case.

Third, the formulation of the Committee is undemocratic. The Committee faces a legitimacy dilemma because neither the people nor the judges choose its members. The role of the JID in the MoJ is limited to investigating violations committed by judges and prosecuting cases before the Committee. The Committee is the only authority that has the right to impeach a judge. The Committee consists of seven members, six of whom are members of the SJC.<sup>477</sup> The authority of impeaching a judge therefore lies in the hands of the SJC.<sup>478</sup>

Moreover, the JID and the Impeachment Committee rules must be replaced. The proposed amendment is to establish an Independent Impeachment Committee (IIC), as well as transfer the JID to the SJC. There are three advantages to adopting such a solution. First, the IIC indicates a democratic choice of the impeachment committee members. Second, nonjudicial members make significant contributions to the accountability process. The choice of these members can be made on a seniority basis or by an internal election among judges in selecting these lawyers and professors. Third, the transfer of the JID to the SJC must be

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471. Ahmed Morsy, *Transition Justice: Egypt's Way Forward*, MIDDLE EAST INST. (July 26, 2013), <http://www.mei.edu/content/transitional-justice-egypts-way-forward>; see also *Who's Who: Egypt's Full Interim Cabinet*, *supra* note 355.

472. Morsy, *supra* note 471.

473. In an interview with the JID chair and the Deputy Minister of Justice during the Muslim Brotherhood era, he stated that the Ministry of Justice used the department to retaliate against judges in the past. Mai Rada, *Zaglowl al-Balshi: Wad' al-Qada alaan aswa men alnazam alsabaq*, EL WATAN NEWS (Mar. 17, 2013), <http://www.elwatannews.com/news/details/148252> [<https://perma.cc/5JUJ-UTPR>]; see also Rania Badawi, *Al Mostashar Zagloul Al Belshi: Alqada Yahtaj letatwear we-alhadith 'an tahier al-qada kalam Faragh*, AL MASRY AL YOUM (Apr. 29, 2013), <http://www.almazryaloum.com/news/details/310220> [<https://perma.cc/56X6-AEQH>].

474. *Id.*

475. Dina Ashour, *Habs qadi albayan raba'a*, VETOGATE (Feb. 23, 2016), <http://www.vetogate.com/mobile/2059727> [<https://perma.cc/GR22-HSSP>].

476. *Id.*

477. Law No. 46 of 1972 (Judicial Authority Law), *al-Jaridah al-Rasmīyah*, 5 Oct. 1972, art. 98 (Egypt).

478. *Id.*

conditional upon the reformulation of the SJC. The SJC must include elected, nonelected, judicial, and nonjudicial members. If the reformulation is not adopted and the JID is transferred to the SJC, little change would occur. On the contrary, it would be considered a threat to judicial independence. Judges can still put up a resistance to the MoJ, as it is still subject to political responsibility.<sup>479</sup> Judges will not be able to put up any resistance to the SJC. The current formulation of the SJC places it at a higher level of accountability to both the judiciary and the public. As a result, the judges and the public would not be able to fight the inconsistency of the decisions of the SJC.<sup>480</sup>

### 3. Reform of the Position of the Minister of Justice

The current function of the primary court chairperson is that of supervising judges. This role must change.<sup>481</sup> In Germany, the president of the court oversees the work of judges.<sup>482</sup> Such supervision cannot conflict with their independence.<sup>483</sup> There are two conditions attached to this type of supervision. First, judges shall be subject to the supervision as long as it does not conflict with their independence.<sup>484</sup> Second, if a judge “contends that a supervisory measure detracts from his independence, a court shall give a ruling in compliance with this Act.”<sup>485</sup> A clear distinction between the judiciary and the MoJ should be in force. The MoJ shall not be chosen from the SJC or any newly retired judge. The work of the MoJ contradicts with judicial work. Appointment of a recent former judge increases the notion that this position is a reward for compliance with the executive authority. To avoid such a hypothesis, a time delay of five years must be introduced. No judge should take on an executive position after his or her retirement until five years has passed. This period will function as a safeguard against attempts to buy the loyalty and allegiance of judges—including SJC members.

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479. *Egypt's Judiciary*, *supra* note 238, at 45.

480. *Id.*

481. Zuhtu Arslan, *Reluctantly Sailing Towards Political Liberalism: The Political Role of the Judiciary in Turkey*, in *FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM* 220 (Terence Halliday et al. eds., 2007).

482. *Id.* at 384.

483. *Id.*

484. Deutsches Richtergesetz (DRiG) (The German Judiciary Act) 19 April 1972 (BUNDESGESETZBLATT, Part I p. 713) as last amended by Article 1 of the Law of 11 July 2002 (BUNDESGESETZBLATT, Part I p. 2592), art. 26/1 (Ger.).

485. *Id.* art. 26/3.

## CONCLUSION

The 2013 Military Coup succeeded in suspending all calls for judicial reform.<sup>486</sup> The Egyptian judicial system, however, faces an interconnected web of serious problems. This Article attempts to answer the question of why judicial institutions are in need of reform. It lists the judicial failures in facing serious economic, social, legal, and political challenges. The contemporary challenges facing Egypt are not secluded from the judicial challenges. Legal activists, including lawyers, judges, and NGO members, have long called for reform. This Article endeavors to shed light on the importance of judicial reform, especially with regard to judicial accountability in Egypt. The inability of the judiciary to respond to ongoing challenges continues to prevent the progress of society as a whole. Strong governmental institutions need an independent and accountable judiciary to reinforce the law.

This Article makes four recommendations. First, the judiciary must adopt clear rules of political participation and issue sanctions for violations. It is unacceptable that rules banning political participation apply only to opponents of the political regime. The JID must apply rules equally; they are not a tool of retribution against political rivals. Second, the judiciary must be excluded from the electoral process to fulfill its main role of protecting the legality of the process instead of protecting the process itself. Third, the judiciary must accept the political responsibility of its actions. It is unacceptable for an independent judiciary to be above political participation. Fourth, a new formulation of the Supreme Judicial Council must be introduced to reflect a democratic and accountable judiciary to the public because the public is the source of its authority.

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486. Al Hajjaji, *supra* note 16 at 283.