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# Judging the Judges - The present crisis facing the Egyptian judiciary

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The prevailing understanding of the crisis in the Egyptian judiciary is that it is one of legal and administrative “independence” from the executive. As a result, proposals to solve the crisis are more or less limited to measures that grant the judiciary greater independence. This paper discusses these proposals and offers an alternative understanding of the crisis. It first examines the historical and institutional context of the judicial system, and its impact on the judiciary’s professionalism, independence, and vision of itself. It then analyses the resulting shortcomings and presents an alternative approach to judicial reform .

Without ignoring the legal and administrative dimensions, this paper argues that a major aspect of the crisis lies in the judiciary’s perception of itself – for historical and institutional reasons – as responsible not only for enforcing the law, but also for the national interest. In many cases, the judiciary feels independent from the law. Judges replace their role as jurists with that of statesmen; their rulings fail to reflect prevailing interpretations of legal texts and are instead based on what they perceive as the interests of the state, based on their position in the legal structure and their own beliefs .

Several factors contributed to this transformation from jurists to statesmen: the existence of conflicting laws since the 1970s, the deepening of ties between the judicial and executive authorities through a policy of delegation and appointment of former police officers to the judicial apparatus, the gradual disintegration of the state since the 1990s, the collapse of the group of “legal academics” due to increased state interference in the “Judges’ Club”, (an informal club organized in place of a formal professional association) and the feeling within the two main state institutions (the army and the judiciary) that there is an existential threat to the state .

These factors led to the development of an extremely complicated relationship between the judiciary and the revolution. The Egyptian revolution – which by definition is a violation of constitutional legitimacy – did not consider the judiciary as an enemy. The judiciary, in turn, did not view the revolution as an enemy, but there was concern because it challenged the administrative system that was based on centralized law, especially after toppling Mubarak. When the Muslim Brotherhood took over power and engaged in the battle to replace figures from Mubarak’s regime with those from the Muslim Brotherhood, without dismantling the dictatorship and replacing it with a more democratic system, concern in the judiciary turned into feelings of hostility towards the revolution, with the goal for judges now that of defending the state. In their battle against change, judges acted not as jurists, but as statesmen

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seeking to maintain and preserve the state, and as men of a judicial club who sought to bolster themselves and improve their conditions. This rationale continues to govern the work of the judiciary after the toppling of the Muslim Brotherhood and explains many of the shocking sentences that have been issued which indicate that the judiciary does not appear to be subordinate to the executive, as some claim, but is actually independent from both the executive and the law. This has caused a certain degree of embarrassment to the executive (expressed on more than one occasion politically and in the media); the judiciary acted – so it seems - in response to the “crisis threatening the state” and appointed itself as state guardian.

This explanation of the judicial crisis means that a broader perspective will be required when seeking solutions that go beyond traditional proposals. A law on the independence of the judicial authority would be important but insufficient. Alternative proposals are based on a fresh overview of the legal structure and the powers of academic legal groups over individual judges, in addition to the more general and crucial question about the formation of a different, more democratic and professional approach to be taken by judges .

The unprecedented wave of death penalty judgements issued against opposition members belonging to the Muslim Brotherhood has highlighted once again the judicial crisis in Egyptian politics. For the opposition, the crisis is basically seen as the outcome of the subordination of the judiciary to the executive, which exploits the judiciary to oppress the opposition, and to legitimize its presence and methods of operation .

Despite the acceptance of this discourse, its explanation remains limited because it ignores – in the current context – the impact of judicial rulings in causing problems for the authorities, which have expressed their resentment at these sentences politically<sup>1</sup> and in the media<sup>2</sup>. It also ignores the role of the judiciary in previous, though relatively recent opposition to the authorities. For example, in 2000, the sentence of the Constitutional Court in case No. 12 of judicial year 13 declared provisions of the law on the exercise of political rights to be unconstitutional for allowing the appointment of people from outside judicial bodies to supervise electoral sub-committees, thereby limiting the capacity of the state to engage in fraudulent elections. Judges also played a prominent role in exposing fraud in the 2000 and 2005 parliamentary elections, pushing the Mubarak regime to introduce constitutional amendments that limited the supervision of the judiciary over elections. Between 2005 and 2010, the civil judiciary acquitted the leaders of Muslim Brotherhood who had been arrested by the security services. The executive was left with one resort: to transfer the detainees to the military judicial system for indictment. Prior to the revolution, the courts issued several decisive rulings against the structure of the Mubarak regime, such as the ruling of the administrative court in December 2010 to remove guards from the entrances of universities, or the ruling to end gas exports to Israel. These and other rulings pushed several national factions, which today view the judiciary with suspicion, to demonstrate in the summer of

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<sup>1</sup> For example, President Abdel Fatah Al-Sisi, during a meeting with several media professionals at the start of July 2014, spoke about the problems caused by the prison sentence against reporters of *al-Jazeera* TV. He said that he would have preferred for them to have been expelled rather than sentenced. See for example: “Egypt's President Sisi 'regrets' jailing of Al-Jazeera journalists,” *The Telegraph*, 07 July, 2014. <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/egypt/10950532/Egypt-President-Sisi-regrets-jailing-of-Al-Jazeera-journalists.html>

<sup>2</sup> See Lamis al-Hadidi on the judiciary: *al-Masri al-Yaum* newspaper, June 30, 2014. <http://www.almasryalyoum.com/news/details/473872>

2006, leading calls for the independence of the judiciary, and supporting the demand by judges (mainly Mahmoud Makki and Hisham al-Bastawisi, who faced disciplinary councils as a form of internal judicial accountability) to ratify the law on judicial independence because of their role in exposing fraud. This led many to demand full judicial supervision of elections at the start of the revolution in January 2011.

There is a discrepancy between what appears to be a majority of judges who defend their independence, and the claim that the judiciary are now entirely subordinate to the executive. There is a difference between personal connections that make a judge “look for legal loopholes to reduce the sentence against a drug dealer or acquit a police officer of killing a revolutionary activist, while the same system restricts the movement of political activists in violation of the law on demonstrations.”<sup>3</sup> This needs to be taken into account before proposing any future vision of judicial reform. This paper will attempt to achieve this by examining the historical and institutional context of the judicial system, the impact of this on its self-image, professionalism and independence, its shortcomings and how to deal with these in political proposals.

### **Formation of the judiciary: historical context**

The judiciary enjoys a special status because, along with the military, it is the most important pillar upon which Egyptian nationalism was founded. The country’s national identity was developed by the modernization and state-building conducted by Mohammed Ali and those who succeeded him in ruling Egypt during the 19<sup>th</sup> century. This was achieved via these two institutions: first came the establishment of the modern army that included Egyptians for the first time in 1822. Next came the inclusion of the Copts as part of the Egyptian identity via the annulment of the Jizyah tax in 1855. The demands for revolution by Egyptians in the army during the Ahmad Orabi era expressed the rise of the new Egyptian identity. This process was completed by the judiciary, which was Egyptianized through the appointment of Coptic judges during the era of Isma’il Pasha (1863-1879) who established the modern courts. Thus, there was an Egyptian judiciary for all Egyptians.

From the last quarter of the 19<sup>th</sup> century, and for an entire century afterward, resistance to external powers and the establishment of the national identity were constructed together through the two institutions of the military and the judiciary. The role of the military became clear in the Orabi revolt (1879-1882), during the 1952 July Revolution, and in the successive military battles against Israel. In legal institutions, Egyptianization started with an interview in the Official Gazette by al-Bab al-Ali that talked about an “Egyptian” proposal to rationalize shariah law. This was implemented by Qadri Pasha, Minister of Justice in 1881, who laid the pillars of the law and courts domestically, and then moved general jurisprudence from the shariah courts to the modern courts (the shariah courts were abolished in the 1950s). Later, a series of national laws were issued applicable to all people living in Egypt – whether Egyptians or foreigners – in the 1930s and 1940s<sup>4</sup>, such as the revocation of foreign concessions in 1937, the law on the taxation of commercial and industrial profits in 1939, and the abolition of mixed courts in 1949. In addition, a major rationalization of laws, without

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<sup>4</sup> Judge Tareq al-Bishri. *The Egyptian Judiciary: Between Independence and Containment*, International Al-Shourouq publishing, 2006, p.12.

copying or translating from foreign laws<sup>5</sup>, enhanced Egyptianization and independence, including the civil law that became effective in the same year.

Egyptianization required two parallel support structures. First was the building of the Egyptian state with its own judicial system, which began under the Constitution of 1923 stipulating the establishment of an independent judicial authority. This was followed by the establishment of the Court of Cassation in 1931 and the State Council in 1946. The Higher Court (later the Constitutional Court) in 1968 was the culmination of the complete legal structure. Second was the legitimization of the work of this state to “grant it heritage”, meaning the creation of an extended cultural identity for the state by the passing of laws that are not borrowed from outside, along with proposals to rationalize shariah. In the 1940s, “rationalization took place derived from the Shariah ... previously, no provisions from the Shariah had been rationalized, with the exception of personal statute issues related to marriage, divorce and alimony”.<sup>6</sup> As in other countries, institutions (mainly the army and legal institutions, according to Joseph Mas’ad in his reading of the development of the Jordanian identity) played a major role in “the creation or formation” of this national identity.

By the mid-20<sup>th</sup> century, Egyptian nationalism was embodied in a state that expressed this identity in a superior manner and saw itself – not the people – as the body that possesses sovereignty and was, at the same time, responsible for serving the interests of the people. This body was highly centralized in its legal structure (probably influenced by French law because of educational scholarships) and based primarily on resistance to colonization and the Islamic spirit (represented by the Islamic movement in laws and in the army<sup>7</sup>) and in two main institutions: the military and the judiciary.

When the army took over rule following the 1952 Revolution, signs of conflict started to appear among those who promoted the banner of “national interest”. The army, in its structure and assumption of power, was governed by a mentality of statesmen pursuing issues of the national interest, success and reform, regardless of the soundness of decisions or their legal legitimacy, which were dealt with by the judges. Those who demonstrated in July 1952 were concerned with the fulfillment of independence, ending the feudal system and control of capital, and the achievement of social justice. Army officers exploited the popularity of their movement and, following a short and decisive confrontation with the State Council in 1955, expanded their executive influence by restricting the powers of the judiciary, issuing legislation that curtailed litigation. (For example, legislation banned litigation in affairs related to students, the army and other fields where the leadership perceived that its political interests lay.) Special courts were established for the trial of political opponents (such as a court for treason, a revolution court, the people’s court, and military courts). The result was a

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<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> There is insufficient space here to discuss the lengthy topic of the role of religion in the establishment of the Egyptian army. It is enough to point out that Mohammed Ali ordered the recitation of the first chapter in the Quran, Surat al-Fatihah, before the start of training (in the army) because if jihadi soldiers recited this verse it would bring every blessing. He also requested that some sheikhs from al-Azhar join the campaign to boost the shariah spirit in jihadist activities. The French commander of the army was forced to convert to Islam to facilitate the mission because he faced many problems with the soldiers. Today, army morale and perceptions of officers in the armed forces is based on several religious figures. For more about the historical role of religion in the Egyptian army, see: Tareq al-Bishri., Muslims and Copts in the National Assembly, al-Shourouq publishing, p.18 and Mohammed al-Srouji. The Egyptian army in the 19th century, Ein Printing, p.16.

reduction in the authority and influence of the judiciary, which was isolated from any aspects considered by the rulers to be “political”. The judiciary presided over other cases, but remained independent from the executive and formed a professional and law-abiding body within the state.

Following the defeat of the 1967 War, the rulers were faced with two parallel challenges. First, the rising wave of popular anger manifested in student demonstrations in 1968. Second, there was a faltering of the legitimacy that had enabled them in the past to override natural justice when dealing with political opponents. In light of its diminishing popularity, the executive was forced to turn to the judiciary.<sup>8</sup> It tried to contain the judiciary by making judges shift their mentality from that of jurists to statesmen in an effort to make them more sympathetic to the rationale of those in charge, and the executive called for judges to be included in the Socialist Union. Through their Judges Club, judges opposed these efforts. In a statement on March 28, 1968, they stressed that “the rule of the law must apply to both rulers and the people, and should be overseen solely by the judicial authority in accordance with the provisions of the general law and its procedures.”<sup>9</sup> This was the start of direct confrontation between the judiciary and the army that culminated in the enactment of the laws known as the 1968 “Massacre of the Judges”.

The conflict between the army and the judges in the 1950s was a conflict between two parties that saw themselves as the protectors of nationalism. Politically, the army believed that it should monopolize authority and marginalize restrictions on its influence as a means to maintain its project of national independence and state-building, while judges believed that the authority of the state lies in respect for the law, drafted in a manner that reflects independence.

The era of President Sadat was full of contradictions that had a marked effect on the structure of the judiciary. Although the army retained substantial influence and authority, it started to gradually move away from politics and was replaced – again, gradually – by businessmen. Direct confrontation between the army and the judiciary ended in a manner that permitted judicial rulings that reversed the impact of the Massacre of the Judges. The regime faced contradictions on several levels, in particular after the 1973 October War. Militarily, America was both an enemy (because of its strategic alliance with Israel) and a friend (because of assistance and the weapons provided to the army). Politically, the regime appeared to move from one party rule to political pluralism, but remained a one party system at its core. The “party of the state” is the ruler, who has relations with the security and sovereign institutions in the state. Economically, constitutional and legal texts retained a socialist flavor while, in parallel, capitalist laws were issued encouraging a free economy and limiting the role of the state. In this context of inconsistencies, thousands of items of legislation were enacted that formed a forest of conflicting laws and created many areas of ambiguity, allowing actions to be legitimized or delegitimized at the same time. This was the first blow to the cohesion and credibility of the legal structure.

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<sup>8</sup> Hatem Elliesie 2010: Rule of Law in Egypt, in Matthias Koetter/Guannar Folke Schuppert, “Understandings of the Rule of Law in Various Legal Orders of the World”, *Rule of Law Working Paper Series No. 5*, Berlin (ISSN 2192-6905).

<sup>9</sup> Dr. Mohammed Salim al-Awwa, *The Judge and the Authority*, al-Shourouq publishing, 2006, p.13.

The second blow was the employment of judges in the executive in exchange for financial privileges available only to selected judges and at the discretion of the executive, which appointed whoever it desired without any transparent criteria. These appointments, which were expanded in an unprecedented manner during the Mubarak regime, affected the work of judges in three ways. First it transformed the mentality of many judges from that of jurist to statesman and prompted greater sympathy for the goals of the executive. Second, the process worked very efficiently because it transformed the battle from an act of intimidation targeting all judges that might force them to protest as one body, into an act that lured some of them and dispersed their unity. Third, and this is related to the cohesion of the legal structure, it transformed the interests of the state, represented in the leadership of the executive, into a standard term of reference when discussing different interpretations of legal texts because an appointed judge does not reflect the opinion of the legal group but chooses the interpretation that best suits the party seeking his opinion, i.e. the executive. Thus, the viewpoint of a minority of judges shifts from the academic legal group, and professional discipline, to become more effective and their rulings more binding since the executive adopts these opinions, making them the most applicable and effective<sup>10</sup> even if these opinions are not sound. This leads to the disintegration of the legal structure to which the judge conforms and no criteria exist for use as a term of reference.

The judiciary was not the sole body to disintegrate during the era of President Mubarak. Many state structures fell apart as a result of the introduction of legal and administrative amendments aimed at subordinating the will of those holding the highest posts in these institutions.<sup>11</sup> An unwanted result was that Egypt was transformed into a state of “kings of sects”<sup>12</sup> where each institution operates according to its internal rationale and negotiations take place between these institutions as competitors, rivals and independent islands rather than as institutions in a larger entity of the state.

In this context, due to their historical role and structure which granted them greater independence from the executive, judicial and military institutions, whose higher echelon is automatically threatened by any threat to existing state structures, took the brunt of “defending the state” from the policies of President Mubarak aimed at enabling a free market and preparing his son, Jamal, to take over power. These two institutions also had to replace state military sovereignty, which had social responsibility, with police sovereignty allied to businessmen. Thus, it was the judiciary that criticized the regime the most in the first decade of the third millennium.<sup>13</sup> Judicial rulings started to emerge against the regime, such as the ruling to expel university guards, the ban on gas exports to Israel, the acquittal of the Muslim Brotherhood leaders and rejection of the eviction by force of residents in Tounson.

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<sup>10</sup> Judge al-Bishri, *Egyptian Judiciary*, p.55.

<sup>11</sup> For more on the disintegration of state institutions and their subjugation to the President in the 1990s, see Judge Tareq al-Bishri: *The science of tyranny and hegemony in Egypt: between disobedience and disintegration*, al-Shourouq publishing, 2010, p.68.

<sup>12</sup> Ashraf al-Shareef on the state of the kings of sects, *Jadaliyya*, December 5, 2012 <http://www.jadaliyya.com/pages/index/8805/%D8%B9%D9%86-%D8%AF%D9%88%D9%84%D8%A9-%D9%85%D9%84%D9%88%D9%83-%D8%A7%D9%84%D8%B7%D9%88%D8%A7%D8%A6%D9%81-%D9%81%D9%8A-%D9%85%D8%B5%D8%B1>

<sup>13</sup> Nathan Brown. *Egypt's Judges in a Revolutionary Age*. The Carnegie Papers. February 2012, p.5.

To interpret these rulings as signs of independence of the judiciary from the executive would be incomplete. It is more accurate to say that these rulings were not simply complying with the law, but outdated legislation was used to permit such violations. These rulings proclaimed the victory of judges in favor of the state – its rationale, responsibility and historical nature. We mean by this that the nature of the Egyptian state combines tyrannical acts with care for the interests of citizens, not as citizens with the right to participate, but as subjects that need to be taken care of. The rationale in which the people are sacred and must live a dignified life was therefore used to justify confrontation of the rising influence of the businessmen who controlled the executive.

### **Judicial formation: institutional context**

The historical context within which judges and their philosophy and bias developed – which is forgotten by observers of the current state of the judiciary – highlights important dimensions of the problem of the judiciary in Egypt. However, it must not detract from examining the institutional ties between the executive and judicial authorities, although researchers currently limit their research at this point.

The independence of the judiciary from the executive was confirmed with the enactment of the law on judicial independence in 1946. Initially, independence was protected by weaknesses in the executive relative to the judiciary due to a succession of 38 ministers in the Justice Ministry between the Constitution of 1923 and the 1952 July Revolution,<sup>14</sup> prompting researchers to state that “the Egyptian judiciary achieved much of its independence in the 1940s.”<sup>15</sup> This independence became extremely irritating to the political regimes that followed the July Revolution to the extent that the regimes – after clashing with the State Council in 1954 and 1955, and then clashing with the judges’ body in 1968 and 1969 – adopted successive measures to reduce the true nature of this independence, even if the constitutional provisions remained unchanged.

Judicial Authority Law No. 46 of 1972, enacted following judicial rulings in favor of the victims of the massacre, “stole independence from the judiciary”. It gave the executive greater authorities over the judiciary,<sup>16</sup> including subjecting the administrative bodies for the judicial inspection of courts and the public prosecution to the Minister of Justice. This expanded the influence of the Minister over members of the judiciary. There were other examples where the authority of the Justice Minister was enforced over judges, such as giving the Minister the right to establish the technical office of the Court of Cassation, granting the Minister the right to decide on where the Court of Appeals may convene in any location other than its original headquarters, and the appointment of the head of each court in the Courts of First Instance from the Appeals Court judges (and then have the Minister control all Courts of First Instance). In addition, the Minister, who represents the executive according to the law, issues decisions on the allocation of judges and establishes courts of summary jurisdiction.<sup>17</sup> Thus,

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<sup>14</sup> Judge al-Bishri, *Egyptian Judiciary*, p.10.

<sup>15</sup> Mahmoud Qandil, *Judicial authority in Egypt: requesting reform and support for independence*. The Arab Initiative Reform, research papers, July 2012.

<sup>16</sup> Dr. Al-Awwa, p.13.

<sup>17</sup> Judge al-Bishri, *Egyptian Judiciary*, p.40-42.

the constitutional provisions on the independence of the judiciary from the executive are deemed irrelevant in practice by the enabling of the Minister to run the judiciary in reality.

The judiciary is also connected to the executive by the fact that a number of police officers have joined the judiciary. According to some estimates, almost one quarter of current judges and public prosecutors were formerly officers.<sup>18</sup> This affects the judiciary in two ways: first, on an institutional level by increasing the subordination of officer judges to the executive (because of the ranks in the police institutions and the culture prevailing in this type of work), which is very different from the nature of judicial formations. Second, it reduces the gap between jurists or judges and statesmen, thereby leading to greater “understanding” on the part of judges to the wishes of the executive, particularly the security services. This is apparent in the testimony of human rights activists who revealed statements by prosecutors that decisions to release and arrest are issued according to the will of the Ministry of Interior.<sup>19</sup> These close links influence judges to the point that one judge, who had issued a sentence on an officer accused of killing revolutionary activists near a police station, stated that, “These officers are heroes. If it were up to me, I would honor them instead of bringing them to trial.”<sup>20</sup>

The problem of the appointment of judges is not limited to the appointment of former police officers, but extends to the sons of judges who enjoy preference in appointment to the judiciary under the pretext of maintaining judicial tradition. This point in particular caused a serious disagreement between judges during the preparation of two draft laws on the independence of the judicial authority following the revolution. One of the draft laws was prepared by the Judges’ Club and the other draft law was prepared by the High Judicial Council. Some researchers point to these appointments as “one of the most important tools in the executive’s structure to replicate itself in terms of class and personal connections.”<sup>21</sup>

In addition to personal connections and direct interference in the affairs of the judicial authority, the executive uses its power to influence judges in two other ways. First, in the Judges’ Club, which is a type of general assembly for judges that has traditionally adopted tougher stances than other bodies, and reflects the wishes of most judges by granting better benefits (increased salaries and raising the retirement age) when judges elect less “independent”<sup>22</sup> boards of directors. Second, pressure is exerted on judges by failing to secure court halls and causing problems that make judges feel that their safety is under threat and that they need the protection of the executive.

## **The judiciary and the 2011 revolution**

The position of the judiciary towards the revolution, and vice versa, is extremely complicated. The revolution was considered a rebellion against constitutional legitimacy and the revolutionary core rejected the judiciary. Yet, from the first day, the revolution demonstrated

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<sup>18</sup> An interview with a former judge at the State Council, Cairo, August 2012.

<sup>19</sup> An interview with Mahmud Bilal, attorney at the Egyptian Center for Economic and Social Rights, Cairo, January 20, 2014.

<sup>20</sup> <https://www.youtube.com/watch?v=WYupHJFLtK4>

<sup>21</sup> Ali al-Rajjal. *The judiciary is independent in Egypt: accept the bitter reality*, Lebanese *al-Safeer* newspaper, May 28, 2014.

<sup>22</sup> Nathan Brown, *Egypt’s Judges*. p.4.

that it was reconciled with the judiciary and even demanded that the judiciary supervise the elections. The position of the judiciary was also confused. In general, judges viewed with suspicion the rising popularity of businessmen at the expense of statesmen and shared the military's stance to halt this rise in popularity. On the other hand, it sought to maintain the nature of a centralized state as a protector of Egyptian nationalism. This state was able to secure the interests of the "sect" of judges by appointing their sons to the judiciary and granting financial privileges and other benefits to senior judges. The army and the judiciary were the sole bodies able to defend this state because they were excluded from the collapse of the legitimacy of the regime. Trust in these two institutions remained very strong during the revolution: in April it was 94% for the army and 80% for the judiciary, compared with 34% for the police.<sup>23</sup> Thus, they had the opportunity to play a role in making the revolution "successful" in removing Mubarak and the Policies Committee.

The "statesman" nature of the judiciary became apparent very quickly. Judges issued sentences to dissolve the National Party because it corrupted political life (which is a political rather than a legal charge). They then dissolved the local councils for the same reasons and prevented the remnants of the overthrown regime from running in parliamentary elections (before the higher administrative court criticized this ruling). The conduct of the judiciary was even clearer in the case of NGOs, when the head of the Court of Appeals in Cairo exerted pressure to annul the trial of two American defendants<sup>24</sup> because he saw this as a way to resist political corruption. Thus, judges acted as statesmen independent of the executive and the law at the same time, on the grounds of defending the state from the law and the judiciary.

Judges wanted to defend both the state and their own positions. The defense of the structure of the state was obvious in the rejection of efforts to find means of transitional justice, and insistence that the existing legal structure is adequate and suitable.<sup>25</sup> It was also obvious in the reversing of attempts by the Mubarak regime to allow non-judges to perform some judicial tasks, as in the case of the parties' court, and the emphasis on the monopoly by judges of non-judicial tasks such as the supervision of elections. They also revoked the constitutional provisions on the selection of public figures in the committee to supervise presidential elections, restricting it to judges. The constitutional court exploited the moment of freedom to amend the law that allowed the president of the state to select the head of the court from external figures. This clause was used by President Mubarak to restrain the highest judicial authority in the country.

The position of the judiciary – up to that moment – was not hostile to all aspects of the revolution, but there were concerns regarding the revolution's audacious acts against the law (which embodies the sanctity of the state). Demands to change political, economic and social structures by means other than those outlined by the constitution and the law were viewed as anarchy. These concerns gradually turned into disagreement, followed by conflict when the Muslim Brotherhood assumed power in the parliamentary elections and in the presidential elections in the first half of 2012.

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<sup>23</sup> Abu Dhabi Gallup Center: *Egypt From Tahrir to Transition*, June 2011. In a public opinion poll conducted by IRI in April 2011, the institution of the judiciary was the most trusted.

<sup>24</sup> Judge Tareq al-Bishri. *From the papers of January 25 revolution*, al-Shourouq publishing, 2011, p.199.

<sup>25</sup> Nathan Brown. *Egypt's Judges* p.7.

The rapid moves by the Muslim Brotherhood to control the parliament – where they won one third of the seats – had a direct impact on the position of the judiciary, which became an enemy of the revolution. In the parliament, the Muslim Brotherhood chose to engage in organizational battles under the guise of revolutionary slogans. They did not seek to dismantle the oppressive structure of the state by changing the constitutional and institutional structure, but brought a new group to replace the toppled group without introducing real change. According to some observers, the Muslim Brotherhood prompted the battle leading to resignations of the ministry so that its own members and leaders of the winning party would replace them. The party that won the most seats in parliament insisted on displaying its strength and overstating its powers to hasten its control over the state. This group aspired to take what it did not deserve and what it could not control, which is the state apparatus.<sup>26</sup> The parliamentary majority used legislation to demonstrate that its interests as a party were more important than the national agenda. For example, it did not propose the law of political isolation until a member of the former regime ran against their candidate in the presidential elections. It did not propose the law on the reform of the Constitutional Court until after the head of the court – in his capacity as the head of the Elections Higher Committee – excluded their candidate in the presidential elections. Due to the context, other legislation lost the qualities of objectivism and generalization required for any legal act, making this legislation a threat to the state and to the “sect” of the judiciary in a manner that led Judge al-Bishri to write: “In my capacity as a former judge, I am about to scream and appeal to others against this conduct; I do this to clear my conscience before God.”<sup>27</sup>

The reaction of judges was the result of two interrelated motives: defense by the “sect” from attempts to remove and replace them by members of the Muslim Brotherhood who wanted to take over and control the judicial system;<sup>28</sup> and defense of the state from attempts to infiltrate it by those who lack experience and knowledge. Harmony between the two branches of the state, the judiciary and the army, became apparent once again between the summers of 2012 and 2013 in the ruling by of the Constitutional Court to dissolve the parliament. The military council also responded, during the last days in which it assumed executive powers, by announcing a constitutional declaration that limited the authorities of the elected president,<sup>29</sup> insisting on the dissolution of parliament when the elected president tried to bring it back, and dissolving the Egyptian Constituent Assembly. The failure of the Muslim Brotherhood to deal with the growing revolt in state apparatuses allowed the army to intervene and exploit the popular uprising of June 30, 2013<sup>30</sup> to topple the Muslim Brotherhood and launch a new era.

With the escalation of political tension and violence following July 2013, in particular the formation and the dispersal of the Rab’a and Nahda sit-ins which were supported by the Muslim Brotherhood, Islamic violence returned to the arena and threatened to cause splits

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<sup>26</sup> Judge Tareq al-Bishri. *The mistakes of the Muslim Brotherhood in 100 days of the life of the parliament*, al-Shourouq newspaper, May 10, 2012.

<sup>27</sup> Judge Tareq al-Bishri. *Mistakes of the Muslim Brotherhood*.

<sup>28</sup> Ali al-Rajjal. *The judiciary is independent in Egypt*.

<sup>29</sup> For more on the judicial handling of this case, see Judge al-Bishri. *From the papers of the January 25 revolution*, page 229 and after.

<sup>30</sup> For more on the failure of the Muslim Brotherhood in managing their relations with the state, in particular the army in the last days of their rule, see Ibrahim al-Houdaiby. *Changing alliances and continuous oppression: the rule of the security and military sectors in Egypt*. The Arab Reform Initiative, research papers, April 2014.

within the army. The judiciary intervened as statesmen, viewing the Muslim Brotherhood as a threat to national security that must be dealt with in a decisive manner regardless of the law. Sentences were issued to dissolve the Muslim Brotherhood and to imprison demonstrators from the Muslim Brotherhood for periods exceeding the terms stipulated under the law. The judiciary then dissolved some trade unions such as the Pharmacists' Union in which the Muslim Brotherhood had won the majority of seats. Waves of "collective death penalties" were then issued against hundreds of people. At the same time, there was increased compassion for police officers, who were acquitted in the courts on charges of killing demonstrators.

## **Political proposals**

Numerous papers have addressed the process required to remove the judiciary from under the umbrella of the executive and grant it independence, including a proposal submitted by the Judges' Club in 2006. The proposals deal with amendments to the Law of Judicial Authority that transfer judicial oversight from the administration of the Justice Ministry and bring it under the High Judicial Council. The Council would also be granted the authority to appoint judges of the Courts of First Instance, limit the authority of the President and the Justice Ministry to appoint judges, revoke the subordination of prosecutors to the Justice Minister, and control the appointment of judges. Some of these proposals were considered in the constitutions of 2012 and 2013, some proposals were amended and modified, and other proposals were completely ignored, so there is nothing new to be added to this chapter.

However, the problems of the judiciary – as shown in this paper – are not limited to factors that affect its independence. Other aspects need to be tackled as part of efforts to reform the judiciary, including ensuring its full compliance with the law, the expansion of access to the court system, and the hearing of cases within a reasonable time frame. These are matters related to professionalism, legal discipline and adherence to the rationale of the democratic state rather than the state of "kings of sects". The cohesion of the academic legal group prevents corrupt interpretations of the law based on the viewpoint of "statesmen" over "jurists", or "interests" over "soundness".

The first thing required to reform the judiciary is to control public statements and clearly express what is required. What is required is not, as the majority claim, independence from the executive. In fact, this is a step that is unnecessary and insufficient to achieve the goal of a just judiciary that performs its role of enforcing the law.

An alternative path to tackling the reform of the judiciary opens up other horizons for reform that do not extend to the extremes of the "independence of the judiciary" that took place following the January 25 revolution. Reform should not deal with the judiciary as simply another sect in the state of "kings of sects", or try to appease them through abolishing all professional and objective oversight of their work, nor remove the overlap between judges and politics (as was apparent in the differences between the Judges for Egypt group, which was sympathetic to the Muslim Brotherhood, and the Judges' Club that acted against them). Efforts to reform the judiciary must identify objective mechanisms that buttress judges against arbitrary measures by the executive and against arbitrary measures that may be undertaken by

judges themselves, while not permitting anyone to act outside the context of the law or to act in a political manner that does not conform to the law.

This can only happen by enabling the work of the academic group of judges represented in the Judges' Club (in addition to State Council judges and the Constitutional Court). Since its establishment, the Club has been very courageous in defending the body of judges in the performance of their role and work. The agenda of the Club must feature reform as its top priority. This can be achieved by determining mechanisms that combine professionalism and democracy within its management. The Club must be granted greater authorities with the High Judicial Council and must have a role in managing judicial oversight. The Club must have a broader role in legal interpretations, the limits of such interpretations, and supervision with the High Judicial Council on the appointment of judges.

| <b>Administrative Judiciary</b> | <b>Constitutional Judiciary</b> | <b>Regular Judiciary</b>    | <b>Military Judiciary*</b> |
|---------------------------------|---------------------------------|-----------------------------|----------------------------|
| The Higher Administrative Court | The Higher Constitutional Court | The Court of Cassation      | The Higher Military Court  |
| The State Council               |                                 | Appeals Court               | The Central Military Court |
|                                 |                                 | Court of First Instance     |                            |
|                                 |                                 | Summary Jurisdictions Court |                            |

\* In its latest amendment, the Egyptian Constitution recognized the military judiciary as a part of Egyptian judicial institutions.

### **About the author**

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