Abbreviations

The following are the key abbreviations highly used in this thesis.

JCE. Judges Club of Egypt.
SJC. Supreme Judicial Council
SCJB. Supreme Council of Judicial Bodies
SCC. Supreme Constitutional Court
MOJ. Ministry of Justice
Chapter One
Studying the Judges Club of Egypt: Theories, and Methodology

I- 1 -Introduction

In August 1969, President Gamal Abdel Nasser decreed several laws by which the judicial system in Egypt was reorganized which provided the state with more control over the judiciary. These decrees included the dissolution of the council of the Judges Club of Egypt [JCE], and the most significant reason behind this reorganization was the clashes between the regime and the JCE. Feeling threatened by the JCE in particular, Nasser’s regime set out to limit the power of the judiciary at large. In October 1980, the chairman of the JCE council, Counselor Wagdy Abdel Samad, publicly criticized President Anwar al-Sadat, accusing him of undemocratic actions because he tried to suppress judges’ opinions concerning exceptional courts [the Courts of Values]. This was while President Sadat was present at a JCE meeting, serving as the chair of the meeting, and the incident was published in newspapers. In April 1986, the chairman of the JCE council, Counselor Yehia El-Refai’e, asked President Mubarak in a public broadcasted conference to repeal the Emergency Law in Egypt. This was in the opening session of what is known as the Conference of Justice. In November 1991, the JCE released a statement in which it criticized the government’s claims that the judiciary is supervising the public elections in Egypt. In this statement, the JCE argued that the judiciary has no genuine power in these elections and that the elections are unconstitutionally structured. In March 2003, the JCE released a statement in which it not only condemned the war on Iraq, but also critiqued most of the Arab regimes because of their stance on the war and argued that repression and the lack of democracy had facilitated the invasion of Iraq. (1)

While all these cases differ, they have one theme in common. They are part of the JCE’s overall call for democratic or constitutional reform in Egypt. One question I will explore is the following: Why have these judges called for such reform, in spite of the fact that this activity contradicts the law that prohibits courts from expressing what are
called “political opinions” and prohibits judges from participating in political work? Another question I will address relates to the fact that the government reacted differently towards the judges’ claims for political reform in Egypt. The government’s volatile attitude towards the independence of the judiciary in Egypt has changed from time to time due to varying socio-political and economic circumstances. What are the reasons behind the changing stand? I will link my exploration of this question to an exploration of what the Egyptian government requires from the judiciary and why a certain number of judges might criticize the political regime, while they might be regarded as part of the ruling institutions. Investigating the contradictory position of the judges, that is both elite and oppositional, will be central to my analysis.

Answering the above questions requires crystallizing a set of theoretical queries. For instance, what is the most plausible theoretical framework to study the role of judges outside courts? How does one approach an oppositional space comprised of socio-economic elites (i.e. the judges club argues for democracy and social change while the judges are members of the elite)? Are sociological or anthropological approaches that analyze civil society or Non Governmental Organizations [NGOs] applicable to the case of a judge’s union? Is it theoretically plausible to articulate judges as “activists”? Methodologically, how does a researcher conduct fieldwork in a site where access to information is highly limited to outsiders and considered confidential?

By exploring these questions, this thesis studies the role of the Judges Club of Egypt [JCE] in defending democracy and the independence of the judiciary, focusing on the limits to the JCE’s structure and function, the processes through which these limitations are established, and the possibilities for expanding judicial spaces in Egypt beyond these limitations.

This study is significant for several reasons. First, there exists a noteworthy empirical gap on the topic. Some scholars have approached the Egyptian judicial system while highlighting either the legal or the judicial mechanisms of the judges’ profession in Egypt, while others have focused on the political ramifications of the judiciary’s role in Egypt (Bernard-Maugiran, & Dupret, 2002; Brown, 1997; El-Refai’e, 1991& 2000; Hill, 1979; Moustafa, 2003; Nageeb, 2003; Sherif, 1996; U’baied, 1991). However,
anthropological or sociological efforts that comprehensively explore the different spaces through which judges express themselves are virtually non-existent. In particular, no previous study has questioned the anthropological or sociological implications of judges’ activities beyond their benches and the ways that they might affect the functions of the judicial system or democracy in Egypt. In ignoring spaces such as the JCE scholars have simultaneously ignored an important site where discursive shifts in legal and political thought take place and where shifts in the relationship between judges and the state are often inspired.

Second, this thesis is significant because it contributes to a comprehensive understanding of an important socio-political space within the Egyptian political and judicial system. The JCE gathers nearly all Egyptian judges and prosecutors who work within the common court system. (2) As a result, this study provides an insight into issues, problems, claims, and tensions that shape the judicial context in Egypt.

Third, this thesis problematizes the notion of “judicial functions” by siting the judges’ club’s activities and political positions within particular historical circumstances. This situated approach demonstrates that a relationship exists between capitalist economic structures, religious ideals and interpretations, international legal instruments and the extent to which judges contribute to the implementation of law. It also points to the limitations and the transformative possibilities of legal spaces that are at once independent and simultaneously extensions of state power.

1-2 Hypotheses and structure

This thesis examines the Judges Club of Egypt [JCE] between January 1985 and March 2004. My research demonstrates that Egyptian judges rely on the JCE as a space for defending democratic reform and the independence of the judiciary in Egypt. I will argue that while several laws and internal regulations within the Egyptian judicial structure forbid judges from being involved in any political activity, Egyptian judges craft strategic discursive mechanisms for expanding the role of the JCE beyond its seemingly confined function within the court. This thesis suggests that the JCE is a “meta-space” [neither NGO nor officially part of the “state”] in which judges debate
controversial issues that often produce discursive shifts. By discursive shifts, I mean that their work motivates new ways of thinking and acting within the hegemonic judicial and legal contexts of Egypt. One example of the debates taking place within the JCE involves a debate over the separation of powers in Egypt. Examples of the mechanisms through which the JCE operates include written statements, general meetings, seminars, conferences, and proposals for new laws.

By combining Marxist/ Gramscian and Foucauldian approaches to the meaning of law, with a focus on the concepts of power, knowledge, and hegemonic consciousness, this thesis suggests that while these judges are active participants in shifting discourses on law in Egypt, they are simultaneously constrained by the contradictory make-up of the nature of the JCE and the social status of judges in Egypt. For example, while judges argue for democracy and equality, the nature of the JCE uses a hierarchical system that positions judges and prosecutors in positions of superiority and inferiority. Moreover, the judges themselves are socially, culturally, and economically positioned among the elite, which means that much of their own social status often produces conflicting interests between themselves and the majority of Egyptian people who they align themselves with in the struggle for democracy and freedom.

The structure of this study will proceed as follows. This chapter is devoted to a review of the theoretical frameworks that I build upon in my work; the research design (including how the fieldwork was conducted and the methods used); the setting/context of the JCE; the data collection; and the sample. The second chapter will discuss the judicial structure in Egypt. I will focus on a short historical summary, the structure, and some key socio-political implications of the judiciary in Egypt. Another section will address the key historical brief of the JCE. The researcher thinks that this chapter is necessary because it underlines the central connotations and problems on which the JCE practices its actions. Besides, since most of the literature about the JCE is found in legal scholarship, it is necessary to locate the questions of this research within their precise surroundings.

Chapter three of this study is dedicated to investigating the role of the JCE in defending democracy in Egypt. In particular, it tries to answer some basic questions:
according to the JCE, what does it mean to call for democracy? What are the discourses the judges deploy in justifying their approach to questions of democratic reform? Furthermore, what kind of discursive mechanisms do they use in this process?

Chapter four explores the role of the JCE in defending the independence of the judiciary in Egypt. I will give special attention to the logic and mechanisms through which the JCE attempts to defend the independence of the judiciary. The last part of this study will be devoted to studying two of the main mechanisms. I refer to the first mechanism as the “grounding mechanism” and the second as the “supporting mechanism.” The “grounding mechanism” includes 1) fighting for the administrative independence of the judiciary; 2) proposing new laws in order to pressure the government to make judicial reform; and 3) defending the autonomy of their club (the JCE) itself. The “supporting mechanism” includes 1) organizing general meetings and 2) using media (i.e. their magazine al-Qudah [the judges]) to mobilize judges. The end of this chapter includes a case study of the general meeting of the JCE in March 12th, 2004.

Chapter five examines the contradictions that confine the activities of the JCE and their struggle for “democracy” and the independence of the judiciary. I argue that three key contradictions exist and that each of these contradictions simultaneously constrains and empowers the work of the JCE. The first contradiction exists beyond the space of the JCE in the context of state/capitalist interests’ vis-à-vis judiciary reform. Since capitalist interests within the state are constituted by various fractions that are constantly shifting depending on the shifting interests of these fractions, the state takes contradictory stances on the issue of the independence of the judiciary. The second contradiction exists within the context of the JCE itself. The JCE occupies an ambiguous space in Egyptian society because it is neither an NGO nor part of the “state.” This uncertain position gives them no “true” power to achieve their goals. This uncertainty plays itself out in three areas within the JCE: 1) its capability to adequately represent Egyptian judges; 2) its identity as an organization; and 3) its leadership and structure. The third contradiction exists within judges’ socio-economic relationship with the state and within the challenges that arise from their cultural dispositions.
In the conclusion, I will summarize my research findings and make suggestions for future research.

1-3. Theoretical Overview

In this section, I will explore six theoretical approaches for studying the JCE. I refer to the first approach as the “liberal democratic approach” which highlights civil society as a key component of the democratization process. The second approach is Weber’s conception of law within primitive and rational societies. The third approach is the sociology of law as explained by Schur and Just. The fourth approach is the “political jurisprudence,” which focuses on the court as an active agency in society. The fourth approach is Foucault’s notion of the link between power, knowledge, and the law. The fifth approach is Marxist/Gramscian and highlights the role of law within class relations and class struggles and the role of hegemony within this context. In my view, a theoretical framework that brings together Foucault, Marx, and Gramsci’s approaches to the study of law is the most relevant to my exploration of the JCE.

1-3-1 The liberal democratic approach

I will focus on two approaches to the relationship between civil society and democracy. One seeks to develop a particular theorization of “civil society” within the Middle East context in general or the Egyptian context in particular. Examples of theorists in this category are Ibrahim (1995), Al-Sayyid (1995), Janoski (1998), and Molutsi (1999). Ibrahim (1995: 29) emphasizes the relationship between democratization and civil society and he says that this relationship is neither simple or linear, nor does it operate in a vacuum. In the Arab World, he argues, the progress of civil society embodies a host of internal, regional and international factors.

Others, such as Al-Sayyid (1995: 290), are more concerned with offering a paradigm to understand civil society in the Middle East, with a particular emphasis on the case of
Egypt. His paradigm for understanding civil society includes two main features: the presence of formal organizations of various types among different social groups and classes and the ethic of tolerance and the majority’s acceptance of minorities’ legitimate rights. These features constitute a vibrant, autonomous civil society. Applying this model to the Egyptian case, the author concludes that only one of the two criteria is adequately met: the presence of a large number of active formal associations catering to citizens’ interests in many areas.

Unlike Ibrahim and Al-Sayyad, whose approach produces a list of key features that constitute “civil society,” Janoski (1998) and Molutsi (1999) focus more on the functional aspect of civil society within a democracy. They build a framework for understanding rights and obligations within civil society in the context of liberal-democratic regimes. For them, discerning the balance between rights and obligations and the centrality of the notion of “citizenship” are central to understanding “civil society.”

This approach might be useful in exploring the role of a single NGO in the democratization process. However, it is limiting because it assumes that in all cases, there exists a competition between “civil society” and “the state.” This assumption implies that there is a clear boundary between “civil society” and “the state” or that these are two separable, independent entities. This approach leaves no space for analyzing cases such as the JCE’s in which the boundary between civil society and the state is blurred. A theoretical framework is needed for exploring groups like the JCE that do not fit neatly within the classification system of “civil society” vs. “ruling institutions” but fit somewhere in-between.

The liberal democratic approach thus cannot capture the contradictory, in-between position of the JCE. Its binary logic cannot help to explain why judges often simultaneously struggle against the state while they are also extensions of the state who receive various privileges from the state. It also cannot help to explain the contradictions within the process by which they maintain an oppositional stance against the laws they are asked to implement. Understanding the role and function of judges and judiciary vis-à-vis the state requires exploring the function of judges and the judiciary in ways that
highlight their messy and complex relationship to the state rather than reducing them to the realm of “civil society.”

1-3-2 Schools of anthropology and sociology of law

Max Weber emphasized the peculiarly “rational” quality of legal institutions as they developed in modern western societies. This analysis stated that “the development of law and procedures could be seen as passing through several stages ranging from irrational law stages that had people who were ‘devoted’ to apply a “charismatic” legal revelation. The progress of law was developed up to the most advanced stage within a systematic elaboration of the law and a professionalized administration of justice by persons who have received their legal training in a learned and formally logical manner” (Schur, 1968: 108).

In addition to Weber, Donovan & Anderson (2003:179) state that the law could be seen as an indicator for understanding culture or as the basis of social change. They believe that anthropology is concerned with the question of “is” while mainstream legal theory focuses of the question of “ought” (2003: 29). In other words, anthropology focuses more on describing and analyzing the reality, while the “law” is a set of ideals or regulations.

Furthermore, other theorists suggest that modern anthropology of law goes beyond choosing between whether to study rules or processes (Just, 1992). Rather, a set of options are possible. For example Just urges anthropologists to connect ‘legal’ institutions and practices to broader historical processes that create and maintain hierarchies and inequalities. Anthropologists must choose between moving outward into the grand historical machinations of class, power, and privilege, or moving inward to both the heart and the fabric of meaning and belief (Just, 1992: 375).

While the above anthropologists focus on specific practices and institutions, sociologists focus on the structures, functions and practices of law. For example, Schur (1968: 25) states that laws could be seen in four different ways. First, he suggests viewing laws as morals. For example, he recommends looking at “legality” and “justice” as the aims of the legal system. This is the natural law perspective, as derived from
Aristotle, Aquinas, and Grotius. Second, he examines law as formalism by studying legal reasoning and emphasizing the significance of legal consistency. Third, he situates law within cultural and historical contexts. This might include highlighting the relationship between law and major value systems and law and social change. Fourth, he examines law as utilitarianism or focuses on sociological jurisprudence. This means focusing on the social consequences of law and the inappropriate uses of legislation, which is often referred to as legal realism. This fourth approach sees laws as mechanisms of social control, as a mean for shaping public policy, and as a key to understand judicial decision-making and courtroom behavior.

Several problems exist within these approaches. The work of Just and Schur are helpful for looking at the role of judges in social control and the role of law within the historical machinations of class, power, and privilege. However, all of these approaches exclude the fact that judges are agents who employ rationality and have the power to act and choose. Thus, they are not useful for exploring the JCE in that they cannot easily explain the various dilemmas of the judges beyond their benches (or beyond their “formal” structural roles). Nor can they assist the researcher in illuminating why some groups of judges choose to “suffer” or pay the price of losing their privileges for the sake of combating the unjust application of law and constitutionalism. These approaches are also limiting in that they do not help in exploring why various contradictory groups exist within the same association at the same time. We might be able to answer these questions by looking at modern political and jurisprudence theories and the Marxian/Gramscian and Foucauldian approaches.

1-3-2 Modern Political Jurisprudence Theories

The meaning of so-called “political jurisprudence” is the most significant in this group. Viewing courts as political agencies and judges as political actors is central to “political jurisprudence” (Shapiro & Stone. 2002:21). This approach is an extension of certain elements of sociological jurisprudence and judicial realism combined with the substantive knowledge and methodology of political science. Political jurisprudence
seeks to overcome some nebulous propositions of social jurisprudence by concentrating on the expressly political aspect of law’s interaction on the distribution of power and rewards among the various elements in a given society (Shapiro & Stone. 2002: 19). While this perspective is remarkable in terms of adding the complexities of ‘politics’ to understandings of courts and judges, it is only useful in understanding courses of particular courts and judges. An example of this usage is the study of the political role of supreme courts in particular societies. While this approach is useful, it only captures part of what I am interested in exploring.

1-3-3 The Foucauldian approach

Adding power to the controversy of law, Turkel (1990: 170) summarizes Foucault’s thought on law as neither determined by economic or by political structures. Rather, for Foucault, he explains, law must be analyzed in terms of its internal relations of power and knowledge, as well as its relations to other discourses and sources of power. Foucault’s approach to the relations among discourses of law, power, and the state has been partially faulted for emphasizing institutions like the prisons and the asylum, but failing to focus on the core social institutions where power appears to be concentrated. These include major state bureaucracies, courts, legislatures and centers of economic power (Turkel, 1990:171). Furthermore, the specific material relations of power, or how they are concretely played out is often missing in Foucault’s work.

Regardless the fact that the JCE is not a formal institution (within the formal judicial structure), Foucault’s approach is useful in terms of studying the judiciary as an institution that serves to justify state power. For example it can help explore how the judge’s position as one who works for a ‘claimed justice’ gives credibility to state power. At the same time, it is limited in helping us understand the judiciary position as marginally independent of the state. Hence, while the judiciary often legitimizes state power, its work extends beyond the realm of governing institutions. Foucault’s perspective is useful for exploring the role of the judiciary in social control in general and implementing laws in particular, but it is not helpful in exploring the particularities of the
JCE beyond its position as an extension of ruling institutions. A Marxist-Gramscian approach fills in these gaps and is useful for developing a class analysis of the judges and an analysis of the complexities of this judges’ association’s relationship to capitalist society at large.

1-3-4 The Marxist and Marxist Gramscian

The Marxist, and then the Gramscian, approaches have developed many ideas to understand law, state and civil society. To begin with, Marx argues that the political world of the secular modern state is comprised of as much illusion as religion. Underpinning the modern state are illusions about private property and commerce, and the legal structures, which uphold them (Vincent, 1993: 378). In this view, if there were no class structure there would be no law and no state. The Marxist approach asserts that law is often a form of alienation and class dominance (Bottomore, 1983:275). In particular, the Marxist thought suggests that at any capitalist society the economic ‘structure’ (class structure and mode of production) conditions the existence and the forms of the state and the social consciousness (superstructure). As Marxists assert, “any particular set of economic relations determines the existence of specific forms of state and social consciousness which are adequate to its functioning and any changes in the economic foundation of a society leads to a transformation of the superstructure” (Bottomore, 1983:42). However, the superstructure is not autonomous, it does not emerge out of itself, but has a foundation in the social relations of production (Bottomore, 1983:43). Both “the judiciary” and “the law” are part of the superstructure and they are part of the state apparatus and state ideology. Hence, both “the judiciary” and “the law” are outcome of the economic relations in the society, and they are subject to change when the economic relations are changing. In addition, this approach assumes that civil society exists within the superstructure.
In this approach, judges would be easily considered part of the ruling class, or technocrats who are employed-- by the ruling oppressors --to enforce laws, guaranteeing the dominance of the capitalist class. Nevertheless, classical Marxism may not expose why judges, as in the case of Egypt, may want to reform the regime they are supposedly protecting. Moreover, classical Marxism did not debate the problematic nature of the civil society. For the purpose of this study, an analytical framework that extends beyond classical Marxism is needed for exploring why the ruling class is more generous with some groups of judges than with others. This means that a more complex analysis of the “ruling class” is needed—one that does not assume that it is monolithic or homogeneous. The complexities of civil society in modern capitalist society should be taken into consideration.

Antonio Gramsci offers some useful theoretical tools for my analysis, as he values the 'cultural' phase of the class struggle and develops a sophisticated approach to civil society. He also contributes the concept of ‘hegemony’ which I will build upon. For Gramsci, civil society does not belong to the structural moment, but to the superstructural one. Hence, it is not the economic structure which directly determines political action, but "it is the interpretation of it and of the so-called laws which rule its development" (Bobbio, 1979: 30).

Second, the concept of 'hegemony' is needed by the bourgeoisie to ensure its popular support (Mouffe, 1979: 180). The hegemonic class, according to her, is the class which has been able to articulate the interests of other social groups to its own by means of ideological struggle. This conception has important consequences in relation to the way in which Gramsci envisaged the nature and the role of the state (Mouffe, 1979: 181). The most important aspect of Gramsci’s hegemony is the aspect of intellectual and moral leadership and the way in which this is achieved (Mouffe, 1979: 183). This understanding indicates that the political struggle was far more complex than had ever been thought of before by 'reductionist' tendencies, since it did not consist of a simple confrontation between antagonistic classes, but always involved complex relations (Mouffe, 1979:180).

Third, another key issue in Gramsci's perspective on civil society is that there are complex processes that shape the adjustment of the civil society. He thinks that there are
two different processes that organize the movement of civil society, and they happen interdependently and do not overlap. Those two are "the process which moves from structure to the superstructure and the one which takes place within the superstructure itself. In the first case, the end of the state is the overcoming of the superstructural moment in which civil society and political society are in reciprocal equilibrium. Yet, in the second case, the end of the state is a re-absorption of political society in civil society" (Bobbio, 1979: 43). Based on this, Gramsci analyzes not only the complexity of civil society, but also the ideas of 'alliances,' or 'wings' within the superstructure itself. This vision indicates that the civil society cannot be fixed and is not coherent in its relationship with the state and in its roles and stances. The relationship may be a complex or reciprocal equilibrium of an unreasonable 'game.'

Laura Nader (2002) offers a more developed version of Gramsci, which is very helpful for my work. She starts by referring to Gramsci in terms of both forms of hegemony, i.e., hegemony as organized by intellectuals, the “dominant group’s disputes,” and “counter hegemony,” or the conquest of hegemony by a subaltern class (2002:12). She elaborates by stating that Gramsci’s notion of hegemony is not only about the assumption of an existing order that is accepted by dominated and dominant alike, but it is also about “clusters of belief that circumscribe that which is considered natural, the way things are and should be” (2002: 119). Nader (2002:120) concludes that “both the vertical and the horizontal axes are relevant to any observation of the makeup and working of hegemonic power, especially in the configuring or reconfiguring of culture by means of language.” In my view, Nader’s approach is the most useful for my study. It is useful for addressing the cultural aspect of the JCE members.

At the outset, the Gramscian view helps us understand how one can forge genuine ideological unity between different social groups in such a way as to make them unite into a single political subject. This approach can explain that the state-civil society relationship is not antagonistic in many cases and their relations in many times are hesitant and contradicting. For instance, judges may not only call for increasing their privileges, but also call for law and political reform, as it is not only economics that motivates them. Secondly, this approach can explain why the state needs particular
institutions to create moral hegemony of a ‘claimed’ rule of law and enforcement of ‘justice.’ Hence, the state needs a ‘relatively’ independent ruling wing. Third, this approach is useful for exploring the nature of civil society in the context of a ‘despotic’ hegemonic class. This also offers a viable framework for understanding the role of political leadership and intellectuals.

1-4 Research Design

This thesis covers the period of 1985 to March 2004 in the life of the JCE. There are three reasons for choosing this period. First, the year 1984 witnessed the re-establishment of what is referred to as the Supreme Judicial Council [SJC] of Egypt after many years of the hegemony of the Supreme Council for Judicial Bodies [SCJB] over the judiciary, which was dominated by the government to a great extent. The JCE played a significant role in the restitution of the SJC. In addition to the role of the JCE in setting it up, this historical moment was a starting point for a relatively more independent judiciary in Egypt. Second, this period includes different activities of the JCE that witnessed both increases and declines in its role as a ‘political’ agent that speaks on behalf of Egyptian judges. Third, the JCE had different board members in this period, and this will be useful for examining this thesis’ questions about the contradictions of JCE membership. Lastly, several of the policy makers who have participated in this period of the JCE are accessible to the researcher.

1-4-1 The research setting

This section clarifies my usage of the term “space” and describes the setting of this thesis, which is the JCE. This thesis is not an institutional study of the JCE or a study of the overall administration, membership, or functions of the JCE. Rather, it studies the processes by which the JCE has attempted to organize particular activities. In particular, it focuses on the space where judges throughout the JCE work to organize actions that call for democracy and the independence of the judiciary in Egypt.
The aspects of the setting I will describe are those that are relevant to this thesis. These are the nature of the JCE, the membership and the role of the board members as well as the different mechanisms that have been used to carry out its activities.

A. The Structure of the JCE

To begin with, there are many kinds of membership options within the Bylaws of the JCE. These are: a) ordinary members (this includes all counselors of both the Courts of Cassation and Appeal, and judges in Primary Courts as well as prosecutors, and this also includes all retired judges except for those who were retired because of reasons related to suitability [salahya], which refers to the cases in which judges are dismissed because of misconduct); and b) the affiliated members [al’oddwiah al mountaseba], those who were members but worked in private professions or had a political position, but quit such positions and asked to rejoin the JCE as members. The affiliated members do not have the right to vote. The ordinary members include two sets of members: those who are working and those who are retired. Both have seats in the board council. In addition to the above, there is an honorary membership or chairmanship that might be given to particular people who considerably contributed to the JCE. (3)

B. Key Implications of the JCE Structure

A very special element of the JCE is that it predominantly includes judges who work in Egypt, except for those who work in both the Supreme Constitutional Court, and the State Council. Consequently, the JCE’s voice may indicate an expression of all judges of ordinary courts in Egypt (this means at least 95% of Egyptian judges). This means that general meetings of the JCE can be a significant mobilization and or lobbying tool for judges, if they are successful.

Secondly, the membership at the JCE is obligatory for all judges and prosecutors. In reality, most judges prefer to register because of the social services offered by the JCE. (4) However, while all judges are asked to register, in many cases some of them do not continue to disburse their annual membership fee (which is a sum of 10 LE).
Thirdly, membership as explained above, includes all judges (seniors, and juniors), and also prosecutors. This has led to some paradoxes. Above all is the fact that the JCE includes both superior and inferior judges and prosecutors, perhaps some members are subordinate to other members in their daily work duties. This will be dealt with in Chapter 5.

1-5. Data collection

1-5-1 Conducting the fieldwork

I conducted this fieldwork in different periods. First, most of the fieldwork was done between December, 2003 and April 2004. It included archival collection and semi-structured interviews. While the planned interview period was 27 March to 9 April, 2004, most of them required more than one or two months of preparation and communication with the interviewees before they happened, due to the fact that the judges have limited time available for participating in the actual interview. Second, I relied on materials collected through the period April 1997 and January 2003 that I collected through participant observation from many activities and events with judges and legal professionals in Egypt and the Arab world. All of the fieldwork was conducted in Cairo.

The particular sociopolitical atmosphere in an authoritarian (or even semi-democratic) country such as Egypt, in which it is difficult to do fieldwork on a topic such as the one I have chosen, played a significant role in limiting the possibilities of my research. Another problem is the scarcity of previous studies about the JCE itself. While a large body of research exists on the judiciary in Egypt, most studies are highly generalized or written only from a legal point of view that lacks sociological/anthropological analysis and/or ethnographic data. Moreover, the fact that surveying judges is often seen as a matter of “national security” posed significant challenges to this research. As a result, it was extremely difficult to conduct this research.
For these reasons, I was often positioned between many paradoxes. Originally, I planned to use standard anthropological research methods (such as several visits to judges’ offices in courts or to judiciary related events and several phone calls to senior judges). I hoped such methods would provide me with a great deal of original data, but I was unable to employ these methods easily due to the challenges mentioned above. The only methods that were applicable in this research context were: archival analysis, interviews, both participatory and non participatory observation (each with their own ramifications).

1-5-2 Data collection instruments:

This section outlines how the three methods used in this research were conducted.

I. Archival review.

I used this method from December 2003 until April 2004. I will now address these questions: what does archival research include? What problems did I confront doing archival research? And how did I solve these problems? First, I wanted to collect the maximum number of published materials either by the JCE or about its activities that related to the topic of this study. This includes: 1) roughly the entire series of published issues of the Judges Magazine [al-Qudah](5), that has been published by the JCE since 1968; 2) as many statements as possible that were released by the JCE; 3) basic documents about the JCE, such as its Bylaws or electoral papers; some records of the JCE council meetings or the general meetings, and documents of seminars or conferences organized by the club; and 4) the maximum amount of the media coverage about the JCE and its work.

All of these goals were not achieved since: 1) not all the al-Qudah issues were located in the JCE headquarters’ and it was not possible to find copies 2) some of the basic documents are not found in the JCE, (6) and 3) newspaper articles were difficult to find because they either referred to previous incidents unrelated to the period of my research and no well-organized archive of these newspaper articles exists. Moreover,
many governmental (the mainstream and they have the most organized archive) newspapers choose to ignore the JCE’s activism in their news when it criticizes the government.

I addressed the above problems in different ways. First, some of the interviewees helped the researcher access some rare materials, particularly Counselor Yehia El-Refai’e, who offered previous records of the JCE and some of his (out of print) books. Second, the researcher visited all law-or related legal or national libraries, which had some issues of al-Qudah. Third, both the current chairman of the JCE and his deputy offered some useful materials. Lastly, two employees in the library of the JCE helped me conduct my searches in their library stacks.

Reviewing these materials, I used the following methods. First, I analyzed the data while evaluating it for its relevance to my thesis. Second, I carefully reviewed all of the outside sources other than the JCE’s original documents that I had collected. I compared different periods of the JCE’s work according to the different publishing mechanisms or tones. Reviewing al-Qudah, for instance, made the most successful events or the largely exposed topics about the JCE and its work clear. A careful analysis of the media coverage was required to map the clashes between the JCE and the government. In general, this provided the researcher with some direction about the questions to be answered, but only hinted to the various activities of the JCE. To learn about the JCE’s activities, in-depth interviews were needed.

An important remark to make here concerns the process of final reporting of this study. One of the main difficulties in this process was presenting legal discourses and details to non-specialist readers. While trying to focus on anthropological or sociological aspects of the legal discourses, I tried to minimize the legal details and place them in the footnotes section of each chapter.

II. In-Depth Interviews.

Here, I will explore 1) the main problems that emerged in doing interviews; 2) an explanation of why semi-structured interviews were the best option for my research goals; and 3) the research sample.
1) the problems of the interviews:

The problems I faced conducting interviews were enormous. One of these problems is that judges often do not like to talk in general about their work. Their work is in their courts, and their conversations with outsiders ‘beyond’ their work might affect their “impartiality.” While they believe that they have the right to speak to public, they prefer not to be interviewed. (7) Even when some judges accepted to be interviewed (which was rare), younger judges were the most reluctant. This is because they occupy a subordinate position within the administration and within the Ministry of Justice’s system for inspecting judges. The third problem is time limitations of the judges.

There were also problems that related to the researcher. The biggest problems being that when I was supposed to interview different people, some of them were not considered to be serious critics of the government and were ‘hypothetically’ known as pro-government. Those people were harder to interview, especially if I was introduced to them through one of the other groups known to challenge the government. (8) The place of the interviews also was a problem, because if it was in the judges’ offices in the courts, they were so busy while in their workplace and the researcher had to incur disturbances and intrusions. Moreover, gaining their trust was difficult. For some of them at least, I was often seen as an ‘untrustworthy’ person, since they did not know me, so why would they allow me to visit them in their homes? Another problem is that discussing the cause of the independence of the judiciary in Egypt in a semi-democratic country is a very sensitive matter. It may mean “tarnishing” the “democratic” reputation of the country—and some judges were concerned and sensitive about this matter.

The above problems confined the researcher’s access to only eleven judges. Because the researcher is known to some of the judges through previous work that is related to the judiciary and human rights in Egypt, those who trusted me agreed to be interviewed. It was very hard to manage the issue of their time limitation. For instance, I have met with the current chairman of the JCE almost ten times. Each time, he only gave me a few minutes of his time and I could not interview him again until a month and half after the first meeting.
The problem of the location was solved because the interviewees trusted the researcher. As for these places, the interviews were mainly conducted at: 1) the JCE itself, 2) the interviewees’ houses, 3) offices of the interviewees; and 4) public places, such as social clubs. (9) In almost all the above cases, the researcher had to wear formal clothing. The difficulty of contacting the —allegedly-- ‘pro-government’ judges was solved through the help of outsiders, who had connections with some of these judges.

The sensitivity of addressing some problems related to the status of the independence of the judiciary was solved—to a great extent—through the following considerations. First, some of the interviewees are former judges and prominent figures who have no qualms about discussing these matters. I classify them as judges who were willing to speak. Second, because of the high degree of trust of the researcher with other interviewees, they did not mind addressing many issues with me. There were those who believe that judges ‘can not hide the truth’ and were willing to speak to me. Finally, I created a methodological solution—which I will discuss below—that interviewees who preferred not to talk about some issues accepted. Other interviewees only spoke in general terms and did not want to touch sensitive issues.

2) The types of the interviews:

The interviews were semi-structured because structured interviews would have limited the findings and because I was not interested in particular arenas of the JCE’s work but the JCE’s activities and their complexities in general. However, due to the judges’ time limitation and the difficulties of following up with interviewees, I had to prepare some basic questions. Some of the basic questions were: What does the government need from the judiciary? What is the JCE, what and how does it function? What are the most significant activities of the JCE? What takes place within general meetings and so on? Could you make a list of these events or projects based on what you are doing within the JCE? Do you conceive judges as social actors or actors who are only in connection with the ruling regime and why? I raised these questions to begin the interview and then gave the floor to the interviewee and guided [him] with spontaneous questions throughout.
3) Sample

The sample I interviewed included eleven judges. (10) I organized the sample so that six out of the eleven interviewees had or still have positions in the JCE. This includes three chairmen, two former chairmen and the current chairman, and this also includes one deputy. The preceding four includes judges who are part of the common court judiciary who are ordinary members of the JCE, and those who are outsiders of the JCE. Those two are notable judges, as one of them, Counselor Tareq El-Beshry, is well-known as a significant legal scholar and thinker in contemporary Egyptian history and the other, Counselor Mohamed Hamed Al-Gamal, can insert significant input to my research due to his position as a former chairman of one of the main courts in the Egyptian Judicial System. This includes valuable information concerning the relationship between the independence of the judiciary and the Ministry of Justice in Egypt. In terms of their positions and experience, most of them are counselors who spent an average of 30 years in the judiciary, and some are junior judges who spent an average of 15 years in the judiciary. Besides, the sample varies from those who had leading positions and those who did not. Three out of the eleven are retired judges. This is often methodologically valuable because working with judges who are not retired entails encountering difficulties when addressing sensitive issues.

What makes this sample highly representative is threefold. First, most of these judges are those who are called upon to represent the JCE in public settings. Second, the diversity of this sample reflects the diversity of the JCE. Third, the sample includes prominent judges who are not members in the JCE. This choice gives me a clearer picture of a judicial ‘outsiders’ view to the JCE, to its clashes with the government, and to the broader scene of the judiciary in Egypt. (11)

III. Participatory & non participatory observation

Participant observation took place through conversations with various judges, legal professionals, and human rights staff in the context of several JCE events and conferences between 1997-2003. In addition, I attended one of the significant general
meetings of the JCE, attended by 2000 judges on 12 March, 2004. While I was allowed to attend this meeting, my work was limited to taking notes. I refer to my attendance to that meeting, as a non-participatory observation. Attending this meeting illustrated the mechanism by which the JCE uses its capability to mobilize its members.

An important remark should be addressed concerning my fieldwork, in both ways as participant and non-participant observer. This remark is linked to the ‘setting’, my ‘positionality, ‘and the confidentiality between me and the interviewees. While the topic and the ‘setting’ are related to highly confidential matters, only some ‘certain trust’ towards me helped me to enter the field. In fact, throughout the period of my fieldwork, I gained access to some aspects of the judges’ everyday lives and inter-personal relations. I gained this access because I was often waiting in judges’ offices for extended periods of times, and I attended judges meetings and observed formal and informal discussions among judges. Since the JCE is an exclusive place for members only (12), I agreed to write only on the JCE members’ work in relation to democracy and the independence of the judiciary. The trust between my research participants and I was based on mutual understanding that my writing would not extend beyond these issues and that I would not write about the judges everyday lives and inter-personal relations.
Notes of Chapter One

(1) All these incidents will be explored in details, throughout this thesis.

(2) The exact number the JCE membership is 8715, as for April 7th, 2004. This does not include the number of affiliated members (55), and the number of retired judges (220). These numbers include only the members who disbursed their annual membership fees of year 2003. For this reason, the real number of the JCE could be much higher (an average of 10000 judges). These numbers is based on interview according to the employees’ in-charge of the JCE members’ records in April 7th 2004. These numbers do not include the number of the judges of the Supreme Constitutional Court (an average of 50 to 75 judges), and the State Council (an average of 500 to 600 judges). The latter numbers are suggested by Counselor Mohamed Hamed Al-Gamal, former chairman of the State Council (from 1990:1993). These facts suggest that the JCE is representing to a great extent all judges in ordinary court system in Egypt.

(3) An honorary chairmanship was granted, for instance, to two former chairmen, i.e., Counselors Wagdy Abdel Samad and Yehia El-Refai’e.

(4) Another important data about the JCE structure are the following. First, the JCE has many branches in Egypt’s provinces. The current number of these branches is 26 branches. The first of these branches was established in 1942, i.e., the Alexandrian Branch. These branches have different elections for their board council and regulations, but they are affiliated with the headquarters in Cairo. As several interviewees suggested, the main headquarters of the JCE in Cairo is the main body that has the capacity to represent judges in public domain and ‘political’ affairs matters. In mid-1980s, there was an instruction from the JCE general meeting that the JCE branches may not address any broader judicial or political affairs. For this reason, the study will not focus on the relationship between the JCE headquarters and the JCE branches unless this is needed for the discussion.

Further, the JCE has a board that consists of 15 members to be elected by the general meeting. The latter should be held annually in an ordinary general meeting and led by the chairman of the Court of Cassation or the chairman of the Council of the JCE when the aforementioned is unable to attend the meeting. Additional meetings can be held, provided that half of the members attend them. The JCE board council should be elected every three years. However, every year new five members should be elected (one –third) of the board council.

The first By-law was passed in the first meeting in 1939. Then it was amended because of the new NGO law during the reign of Abdel Nasser (during the reign of Counselor Mumtaz Nassar who was the chairman of the JCE at that time). This By-law was amended on 18 January, 1991. One of the main amendments concerned the membership conditions. This included the right of the JCE council to refuse membership to former judges who were dismissed because of their “unsuitability.” In 2000, a new By-law was enacted, during the chairmanship of Counselor Moqbel Shaker. It gives more
power to the JCE council, states that members should not speak in all political ‘affairs,’ and ‘facilitates’ the registration of the JCE according the new NGO law 153 of year 1999. However, that law was declared unconstitutional, and the general meeting of the JCE later underlined that any body does not subordinate the JCE. Hence, they returned to the previous Bylaw.

During the period of this research, there were five chairmen on different board councils. Counselor Wagdy Abdel Samad became the chairman in 1979 and reigned until 1986 (during the reigns of Sadat, and Mubarak). Counselor Yehia El-Refai’e became the chairman for only one year from 1986 to 1987. From 1987 to 1989, Counselor Mahmoud Bahhey Eddin Abdalla became the chairman, and then Counselor Yehia El-Refai’e was re-elected from 1989 to 1991. Counselor Moqbel Shaker became the chairman for four periods of the JCE council, from 1991 to 2001. The current chairman Counselor Zakaryah Abdel Azziz was elected in June 2001, and then re-elected in June 2002.

(5) *al-Qudah*, the Judges, magazine has two different editions, a monthly magazine that publish articles written mostly by judges or jurists (and this magazine supposedly monthly, but it is published in two editions a year temporarily), and the seasonal edition that focus more on legal research about all affairs concerning judiciary in Egypt. During the chairmanship period of counselor Moqbel Shaker, only the seasonal one was published by the JCE.

(6) Counselor Yehia El-Refai’e, for instance told me that one of the former chairmen of the JCE has taken all the records of the Council of the JCE meetings, of his period, after he left the JCE.

(7) As an example how it was so hard to convince judges to be interviewed, several of them suggested that it is sufficient to meet Counselor Yehia El-Refai’e.

(8) In fact, Counselor Ahmed Mekky gave the researcher advice about this problem.

(9) There was one interview in Bakery in downtown area, and the judge interviewed insisted on paying for my and his coffee.

(10) The interviewees are Counselor, Yehia El-Refai’e, a former vice chairman of the Court of Cassation and former chairman of the JCE, and an honorable chairman of the JCE for life; Counselor Tareq El-Beshry, a former vice-chairman at the State Council, Counselor Mohamed Hamed El- Gammal, a former chairman of the State Council, Counselor Moqbel Shaker, the first vice chairman of the Court of Cassation (currently) and a former chairman of the JCE for four terms, Counselor Zakariya Abdel-Aziz, a chairman of Circle in Banha Court of Appeal and the current chairman of the JCE (during the time of writing this thesis), Counselor Moahem Nagey Derbala, vice-chairman in the Court of Cassation and the current deputy of the JCE (during the time of writing this thesis ) (he was a member of the Council of the JCE many times), Counselor Assem Abdel Jabbar , a vice-chairman at the Court of Cassation, and he was a member
of the JCE Council many times as well, counselor Hisham Al-Bastaweesy, a vice chairman at the Court Court of Cassation, and also a member of the JCEC Council many times, Counselor Abdel Aziz Salman, chairman of a circulate at the Prosecution office of the Court of Cassation and he is currently delegated to the Commissioners Body at the Supreme Constitutional Court, judge Hossam Hisham Sadeq, chairman of a circle at the Prosecution office of the Court of Cassation and he is currently delegated to the Commissioners Body at the Supreme Constitutional Court, and judge Ahmed Saber, who is a chairman of a circle at Zaqaziq Primary Court and is a member of the current board council at the JCE (during the time of writing this thesis).

(11) The selection process had several facets because of the difficulties of meeting the interviewees. One of these ways was through the personal contacts of judges whom the researcher has met during his work in previous activities and work with legal professionals. The second way was through asking the first group to help me meeting the others. One of the respondents was interviewed through the help of a friend who is in touch with former figure judges, and another one was through the help of an American University in Cairo colleague. However, two respondents though they did not mind being mentioned in this thesis, preferred that some of their opinions not be attributed specifically to them. For this reason, and seeking a definite rule to be applied on all the respondents, and with respect to the confidentiality, the researcher chooses to apply one canon, namely by assigning letters to each interviewee. Hence, without specifying the speakers, in this thesis, each informant who was interviewed is assigned one of the following letters: J, H, B, Y, K, L, T, N, S, Q, and M respectively.

(12) The fact is that according to all different Bylaws of the JCE throughout its history, non-members are not allowed to enter the club. Only determined ‘guests’ are allowed to enter the club provided that guests’ names will be recorded in a proper register prepared for this reason. I tried in 1998 and 1999, for instance, to enter the JCE as a legal researcher, who looked for some judicial references. However, the atmosphere of the JCE at that time was ‘unwelcoming.’ It was only in 2002 that I was allowed to enter the club. This was because certain confidence between me and some former and current members of the JCE council. Such confidence helped me to wait several hours and talk to some employees in the JCE, and to attend one of the JCE’s general meetings.
Chapter Two
The Judicial System, the JCE: History, Structure and Key Socio-Political Dimensions

This chapter will address four main issues concerning the judicial structure in Egypt: 1) brief review of the historical development of this structure, 2) the main features of that structure, 3) situating the JCE historically in that context, and 4) some major socio-political concerns concerning the judiciary in Egypt.

2-1 Judicial structure: a historical brief:

It could be argued that the history of the modern Egyptian court system was the history of the development from the Pre-Colonial to Post Colonial era (Brown, 1995:107). In general, both Brown (1995) and Hill (1979) emphasize the link between the modern Egyptian court system and the history of foreign influence. However, they also suggest that the legal reform in Egypt should be understood as a complex that had been shaped by several factors. For instance, Brown (1995: 107) suggests that the mixed courts were established within the European presence in Egypt, and then the establishment of the national courts coincided with protected political crisis that eventually resulted in the British Occupation in Egypt. He suggests that legal reform was very much the turf of centralizing elite that sought to circumscribe foreign influence even when collaborating with it.

Attempting to group the complexities of the history of the Egyptian system, Bernard-Maugiran & Dupret (2002: xx-xxvi) and Sherif (1996: 13-37) suggest that the Egyptian judicial system since the Islamic era has passed four main stages. The first period is the Islamic period that lasted until the beginning of the nineteenth century (a period of over eleven hundred years). In this period, jurisdiction was vested in the Shari’a courts which consisted of single judges empowered with a general jurisdiction to hear criminal, civil and family matters within their assigned territory. The ruler, either the Caliph or the Walli
(local governor who was delegated by the Caliph), would appoint eligible individuals and also had the power to remove judges from office if they failed to maintain high standards or committed particularly grave legal errors (Sherif, 1996: 14).

The second period was during Mohamed ‘Ali and his family. Bernard-Maugiran, & Dupret (2002: xx-xxvi) argue that in the nineteenth century, there were certain efforts from the Ottoman governors, viceroy, and Khedives to transform and reorganize the law and the judicial system in Egypt. There were no substantive reforms during the French Occupation (1798-1801). However, when Mohamed ‘Ali came to power, and beginning in 1845, he undertook to establish specialized judicial councils competent in legal, administrative and military matters. The gradual subjection of Egypt to the constraints of international commerce and Western imperialism also led to the establishment of merchants councils, [majalis al-tujja ‘r], which had extensive recourse to French personnel and law. These judicial councils were not necessarily composed of professional judges. They were not independent institutions either. These councils progressively extended their competence to most of the matters, which previously fell under the capacity of the Shari’ a courts

The third stage began in 1875, when the Egyptian government established the so-called Mixed Courts, [maha’kim mukhtalata], to handle legal disputes that foreigners were either parties to, or had a stake in the outcome. In 1883, National Courts [maha’kim ahlalyya], then known as [maha’kim wataniyya], were established for the first time for citizens of Egypt. Each of these courts had different civil, commercial, criminal and procedural codes. These codes did not rely on Islamic Shari’ a law, but were derived from foreign sources, in particular French law, which has maintained its influence on Egyptian legal culture to the present day. Thus, by the beginning of the twentieth century, the Egyptian judicial system was composed of a wide variety of both judicial organs and laws, namely: 1) mixed codes applied by the Mixed Courts, 2) National codes applied by the National Courts, 3) Islamic Shari’ a applied by the Shari’ a Courts, and 4) religious rules applied by the different religious Judicial Councils, based on the litigants’ religions.

This has led to the fourth period, when the above situation necessitated a reform, which would ensure a system of equal treatment of nationals and foreigners, as well as
nationals among themselves without consideration of their religion. Within the proposed reform, the consular courts were abolished in 1937, and the Mixed Courts in effect from 14 October 1949, following the Convention of Montreux in 1937. All privileges granted to aliens, including the Mixed Courts system, were abolished, and jurisdiction of these courts transferred to National Courts. The National Courts, which became known as the Ordinary Courts, evolved into courts of general jurisdiction for all disputes concerning both nationals and aliens and applied unified set of Egyptian laws (Sherif, 1996: 17).

2-2 Current judges’ regulations:

As revealed above, the National Courts were transformed into jurisdictions with general competence in which a unified system of law was applied. Then, four Courts of Appeal, [maha‘kim al-isti‘na‘f], were created in 1949 (Cairo, Alexandria, Mansoura, Asyut), to which are to be added the Court of Tanta (1951), Bani Suwaf (1963), Isma‘iliyya (1976), and Qina (1985). The Court of Cassation, [mahkamat al-naqdl], was created in 1931. It was divided into two chambers: civil (civil and commercial matters and those pertaining to personal status) and criminal. Judicial power was organized in its actual form by law 46 for year 1972 [qa‘nu^n al-sulta al-qada‘i‘yya] (Bernard-Maugiran, & Dupret, 2002: xx).

It was only in 1946 that a specialized administrative jurisdiction was created, known as the State Council, (majlis al-dawla), competent in administrative matters and based on the French model. This includes two main courts: the Administrative Court, [ma‘hkamat al-qada‘ al-‘idari‘], and the Higher Administrative Court, [al- ma‘hkamah al-‘idari‘ya al-‘oliyya], that acts as the court of appeal for all Administrative Courts. The Supreme Court, [al- ma‘hkamah al-‘ulya] created in 1969. Then this court was re-introduced by the Constitution of 1971 and reformulated by Law 48 for year 1979 under the name the Supreme Constitutional Court, SCC, [al- ma‘hkamah al-dustu‘ryya al-‘ulya‘].

Several new jurisdictions were instituted after the revolution of July 1952 and the establishment of the republic, among which were the military courts, [ma‘hakim ‘skariyya, law 25 for year 1966], the Courts of State Security (emergency), [ma‘hakim
What the revolution of July 1952 did in transforming the judicial structure has several impacts lasting until today, as will be explained. Basic deductions can be drawn from the above structure. The first of these is that the Egyptian judicial structure is organized in a hierarchical structure, with a diminishing number of courts the higher the level. A Court of Cassation or Supreme Court, serving as the final court of appeal, is generally found at the apex of the hierarchy. A number of courts with specialized jurisdiction sit outside this hierarchy. These courts commonly include juvenile, constitutional, military, administrative, and security courts. The three higher courts in Egypt are: the Court of Cassation, the Supreme Constitutional Court [SCC], and the Supreme Administrative Court [SAC] (all parts of the administrative court system, known as majlis al-dawla, or State Council). The above courts form the ordinary judicial system. However, both the SCC and the SAC are separate from the common court system that are responsible for all criminal, civil, commercial, and personal status affairs disputes, while the previous courts are ordinary courts. The JCE represents most of those who work in the common court system, which is the majority of Egyptian judges.

The second observation is that the Egyptian judicial structure maintains an exceptional court system, parallel to the ordinary judiciary. This includes the military and the security state courts. Hence, one of the clashes between judges who call for their independence and the government often take the shape of criticizing the establishment of the exceptional courts. According to all the interviewees, the exceptional courts ‘trespass’ on the power of the ordinary court system, which presumably embodies democracy and rule of ordinary law, rather than exceptional laws.

The third observation is associated with what is meant by the concept of “justice” in the judicial sphere. While this concept has different meanings anthropologically or sociologically, in the judicial domain the ‘administration of justice’ refers to managing all
the processes and the structures of the court system to entail giving individuals the right to access courts so that they can acquire their claims or rights. Obtaining citizens’ claims does not include, per se, changing their class status.

With respect to the regulations of judges themselves, the term ‘judges’ [qudah] in general refer to those working for the judiciary regardless of their grades (El-Sawi, 2002: 197). The system applied in Egypt provides that judges are appointed by the executive authority according to general conditions stipulated in the Law of the Judicial Power. The judge shall be Egyptians. Despite the fact that Egyptian law does not disallow women from being judges, the practices of the controllers of judges’ selection (the Ministry of Justice and the government, as well as the high administrative body of judges, which is the Supreme Judicial Council [SJC]), often disregard the law and refuse to appoint women in the judiciary. Only in 2003, did the government did appoint the first woman judge in the Supreme Constitutional Court.

A judge of the first instance shall not be less than 30 years old; one of the Courts of Appeal shall not be less than 38 years old, whereas the judge of the Court of cassation should not be less than 43 years old, so that all of them have enough experience to rule whatever conflicts arise (El-Sawi, 2002: 198).

A judge needs to have a B.A in law or any equivalent foreign degree. Moreover, he needs to have commendable behavior and enjoy a good reputation. According to the above-mentioned law, judges are appointed by decree of the President of the Republic, with the approval of the Supreme Judicial Council.

In fact, three main notes should be addressed concerning judges’ regulations in Egypt. To start with, all the Egyptian judges (who are part of the ordinary court system) begin their profession in the General Prosecution Offices. Roughly after ten years of work, prosecutors are given the choice to continue in the senior level in the prosecution office, or to pursue their career in the judges’ profession. This fact is flexible, as some judges could be appointed or transferred to or from prosecution to the judges’ profession or the other way around upon their acceptance or promotion. The second point is that while the term judges refer to all judges of different grades, senior judges (who become such after a certain number of years of work, and once they chair primary court or
become members of or chair either Courts of Appeal or Cassation), get the title of Counselors, [*mustasharaeen*, the singular is ‘*mustashar*’]. Chairmen of courts have some certain of power to supervise their inferiors in their courts.

The third note is that while all these titles are given exclusively to judges who work in the ordinary court system, the Egyptian government sometimes gives the immunities (given to ordinary court judges) and titles (such as the counselor title) to other professionals. The government calls the bodies of those professionals ‘judicial bodies.’ An example of this is the case of both the Commission of the Government Lawsuits, [*hay’et qadayah al’dawla*], and the Commission of the Administrative Prosecution, [*hay’et al-nyaba al-idarya*]. Lastly, the age of judges’ retirement has been changed from 60 before 1993, to become 68 now. (2) Concerning the theme of training judges in Egypt, the main agent that supervises this training is what is called the National Council for Judicial Studies [*al-markaz al-qawmi lil derasat al-qada’iya*]. This council is highly controlled by the Ministry of Justice, and judges are offered training only for one year in the beginning of their work as newly appointed prosecutors. The problematization of the training theme in terms of administration and components of this theme will be explained in detail in Chapter Five, due to their relevance of the discussion of that chapter.

Attempting to crystallize the main implications of recent judicial history, ‘Abdel Bar (1988; 1991; 1998), (3) argues that this history could be summarized in the three main periods: 1) The ‘greater’ period of independence as it included the heritage from the national period, in which there were remarkably well-trained judges (from 1946 to 1952); 2) The period of the collapse of the separation between powers principle, the centralization of power, and the attack on the judiciary (from 1952 to 1970); and 3) the period of the return to liberal legitimacy, but which yet had some constraints on the role of the judiciary (from 1971 to 1996). Brown (1997) has the same conclusion, while reducing the history of the modern Egyptian court system into two main stages: from 1937 to 1971, identified as the centralization of the judiciary, then the control of authoritarianism, and socialism period over the judiciary, and the period from 1971 to 1996, described as the reemergence of liberal legality.
2-3 Key brief of the JCE history

Within the transformation to National Court system, there was a call for a union for judges. Some respondents argue that foreign pressures wanted some guarantees that a fair and independent judiciary should granted, after abolishing Mixed Courts. The guarantees included the formation of the Judges Club of Egypt, which matched the ‘will’ of many Egyptian judges. The JCE was established in February 1939. Its headquarters, since its establishment, is in Cairo. According to its Bylaw, the reason for its establishment was to strengthen the fraternity and solidarity between all judges, to sponsor their interests, and to facilitate ways of meetings and recognition among judges, and to associate a special fund for cooperation and saving among members, and to assist families of former judges who were members in the JCE. The Bylaw also states that an elected council shall administer the JCE affairs. This council would be elected by the general meeting of the JCE.

Several interviewees suggest that the JCE has been transformed from a simple union for judges to be the most important voice for judges in Egypt, which has become a syndicate of judges in Egypt. For instance, approximately all the interviewees of this research suggested that the JCE played the most significant role in calling for and then issuing the first law that secured the independence of the judiciary in Egypt (law number 66 for the year 1943).

The most significant shift that affected both the entire judicial system and the JCE was the 1952 revolution. Reid (1981) maintains that the transition from capitalism to socialism under Nasser hurt the economic basis for an independent legal system, as courts were no longer as important for settling contract disputes and the legal profession declined from being one of the most prestigious professions as there was less and less money to be made in that profession. The suspicious outlook towards lawyers from the state was higher towards to the judiciary. El-Behrsy (2003: 15) argues that the revolution adopted a method according to which it tried to dominate the judiciary and hold the role of the judiciary away from impacting particular areas linked directly with the revolution policies. What Abdel Bar (1988; 1991; 1998), and Brown (1997) described
as the period of the centralization of power in the 1950s embodies the economic and the political motivations of the new regime to control the judiciary.

According to *al Qudah* (January-June 1990: 147), and Haikal (1986: 60:64), the regime conceived judges as part of the opposing groups, which might threaten the legitimacy of 1952 revolution, to the extent that arguments used in the clash included that “some of the judges are sons of the former aristocrat ruling system, whose lands were confiscated by the agricultural reform.” While the economic and the political aspect cannot be denied in the discussion concerning the clash between the 1952 regime and judges, some other ‘cultural’ rationales cannot be neglected. As many of the interviewees insisted, the clash was between those who were trained in the liberal era, and the new regime that believed only in “revolutionary legitimacy.”

The most significant in the confrontation between the July regime and judges are two clashes: the state attempt to oblige the JCE to register according to the NGO law in 1963, and the regime’s decisions to dissolve the JCE in 1969. The first clash forced the JCE to become subordinated to the stipulations of the NGO law and the Ministry of Social Affairs (in spite of the fact that judges often refused and ignored this, *al-Qudah*, January, 1991). The second clash was raised between the JCE and the regime in 1968 and 1969, and led to the dissolution of the JCE and what is known later (among judges, legal professionals, and historians) as *mazbahat al qa’da*, the “massacre of the judiciary” (4) in Egypt. One aspect of the dissolution decisions was that the JCE would be directed by an appointed council not an elected one. It was only in 1975, that the JCE re-gained its right to have elected board members (5)

It could be argued that both the NGO law’s clash in 1963 and the “massacre of the judiciary” will outline, to great extent, the heart of the JCE activities. Both the NGO law clash in 1963 and the “massacre of the judiciary” in 1969 involved important debates that are substantial to this thesis’ discussion. For this reason, a summing up of the NGO laws and JCE, as well as the “massacre of the judiciary” is needed.
The NGO laws and the JCE

Many respondents assert that an introductory clash between Abdel Nasser’s regime and the Ministry of Justice with the JCE started in early 1956 when the JCE refused to register according to the first NGO law. Then in August 12th, 1963, and after all these disputes between the JCE and the MOJ, a decree—law by President Abdel Nasser dissolved the JCE. This was through the law number 76 for year 1963 for NGOs. According to this, the JCE should be reorganized, and its council shall include both elected and appointed members (Hussein: 1995). (6)

One of the respondents in the thesis argues that:

The 1963 crisis initiated the real struggle that took place later. This crisis not only ended in the victory of the state, but it also led to the control by the Ministry of Social Affairs, to the extent that an office of this Ministry (mudiryat al sho’un al ijtma’yeah bi Qasr Al Neel—Qasr El Nile Local office), sent to the JCE a notice instructing the JCE that it should prevent a particular judge from being elected at the JCE election. According to this office, this judge’s family was subjected to the agricultural law reform.

Judges boycotted participating in the JCE, as a way of resisting the control of the NGO law. A year later, in 1964, the regime enacted another NGO law (number 32 for year 1964). (7) According to al-Qudah (January 1991: 19) judges reluctantly accepted the subordination of the 1964 NGO to remove the appointed council. For this reason, in 7 June, 1964, a general meeting for judges was held to elect a new council, based on which a new Bylaw for the JCE was declared (al—Qudah, January 1991: 19). In 1969 the JCE was dissolved, and in 1975 the JCE re-gained the right to an autonomous and elected board council. However, up to the present day, the debate on the independence of the JCE and the illegality of constraining the JCE to be under the executives of the Ministry of Social Affairs was part of the discussion, as will be explored in chapter four of this thesis.

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In light of the NGO law clash, and due to the circumstances of the defeat of 1967, new socio-political circumstances took place involving a militarization of the public domain under Abdel Nasser. For instance, on 30 March, 1968, Nasser delivered a famous speech known as March 30th statement. This proclamation crystallized his new policies and strategies for Egypt after the defeat of 1967. A characteristic of these policies is what is so-called the “Unity of the Internal Front.” This happened to the extent that due to the one party system in Egypt, all people, including judges, were asked to join this party (which was called the Arab Socialist Union, [al-itihad al-ishteraky al’arabi]). In addition, a secret organization (known as the Organization of the Socialist Vanguard, [tanzeem tal’et alishterakeen], was created by figures of the ruling regime within the Arab Socialist Union to mobilize people for the regime. (8) According to almost all the interviewees of this research (as well as Al-Taweela, 1990: 121-126; al-Qudah, January-June 1990, 127:149), this organization targeted judges to recruit into the Arab Socialist Union, and or to send reports to the regime about judges who refuse to join this union. It was definitely not acceptable for the regime to hear criticism concerning either the independence of the judiciary or the rule of law during that moment. However, the JCE addressed a hard criticism concerning democracy in Egypt, which led to the decisions of the “massacre.” The following is a very short summary of the JCE and the regime clashes.

Firstly, just two days prior to Abdel Nasser’s declaration of the 30 March Statement, while bringing all the history of attacking its independence to bear upon it, the JCE held a general meeting that ended up in the release of a famous statement in which the JCE accused the regime of being dictatorial and claim that the significant reason for the defeat was the lack of democracy and the lack of respect for the rule of law in Egypt.

Known by judges as the 28 March Statement (al-Qudah, January-June 1991:136; Abdel ‘Al, 1993: 144), it contained some basic ideas: 1) It is necessary that judges contribute through their freedom of expression in societal affairs, 2) it was the suppression of all citizens freedoms that caused the defeat, 3) the regime’s claims that
Egypt should have a solid internal front to liberate lands occupied by Israel, i.e., Sinai, and to defy the enemy, is just vacant and abstract unless people’s freedoms are respected and 4) the sole solution to Egypt’s problems is endorsing democratic reform. The heart of this reform is guaranteeing an authentic independence of the judiciary. Besides, many parts of the statement insisted on the judges’ freedom of expression and that they should not be members in the Socialist Union.

Secondly, within the same surroundings, the next election of the JCE council witnessed an enlargement of the gap between the Egyptian government and the judiciary, represented by the JCE. On 21 March, 1969, the election was held in a very hostile environment, on which there was two opposing lists known as the list of the judges and the list of the government (Abdel ‘Al, 1993: 171-172). It was an impressive victory for the judges’ list. (9) The regime was upset and the Organization of the Socialist Vanguard began to manipulate and organize for the “massacre.” As confirmed by one of the interviewees in this thesis:

The JCE was forced—just to survive—to register according to the NGO law in 1964 after the 1963 clash. The state’s attitude was very different before the revolution. Indeed was different from the pre-revolution regime. The pre-revolution regime, for example, donated to the JCE this land in downtown. Also it gave the JCE contribution in construction costs of the building, i.e., 10,000 LE. The state’s stand was to support the independence of the judiciary before the revolution. However, after the revolution, the state began to change this stand. The state did create trade unions, and to initiate a socialist state. It was sympathetic with workers. But yet, it considered judges as part of its likely enemies.

The regime enacted the decisions known as the “massacre of the judiciary”, while claiming that such resolutions amounted to a “revolution of legislation and judicial reform” (al-Ahram newspaper, 1 September, 1969). The components of the decisions of the “massacre of the judiciary” took the shape of presidential law-decrees, including one that regulated the dissolution of the JCE. (10) These decrees, issued on August 31st, 1969,
were five decree-laws. The most basic ones in this discussion were: the decision to establish what is called the Supreme Council for Judicial Bodies [SCJB], to supervise all administrative affairs that related the judiciary, and the decision to dissolve the JCE so that the latter would have an appointed council.

Likewise, other presidential decrees were also enacted to oversee the process of dismissing or re-appointing judges (including lists of their names and their positions in the judiciary), and to re-organize the judicial bodies subjected to change in the 1969 law-decrees. Most of the judges who were dismissed were those who criticized the regime and had a role in the JCE activities. The most serious aspect of the 1969 decrees is that since then and until 1984 the judiciary was deprived to a great extent of its administrative independence. The administrative issues of the judiciary were directed by a Supreme Judicial Council [SJC] since 1943. This council included only senior judges. However, the new decrees established the SCJB, which included other judicial bodies (non-judges), to direct all the administrative affairs of the judiciary in Egypt. (11)

It was only in 1977 that these resolutions were canceled. (12) This was through a judicial verdict issued by the Court of Cassation. (13) According to several respondents in this study, the significance of the 1969 resolutions, and the impact of the JCE weight could be estimated by the fact that the dissolution of the JCE was not through the Ministry of Social Affairs (as the JCE was theoretically under its supervision). Instead, presidential law-decrees were enacted for this purpose. Judges referred to these resolutions as the most significant clash between the government and the judges in contemporary Egypt. (14) Hence, it is very indicative that the most serious of these clashes was due to the outspoken voice of the JCE.

2-4. Key sociopolitical implications:

The discussion of the “massacre of the judiciary” makes it clear that the JCE, the judiciary, and their independence are highly politicized matters, even though both the government and some judges affirm that the independence of the judiciary is a mere legal affair. For this reason, explaining some key socio-political implications of the judiciary is essential for the discussion of this study in the following chapters. The two key queries
discussed in this section are the sociopolitical consequences of the function of the judiciary and the reality of the independence of the judiciary in Egypt.

2-4-1 Socio-political dimension of the question of the judiciary function

It seems that there are two main questions that could be raised when discussing the theme of the ‘judicial function’: what are the main claims used concerning judicial function, on both sides (the state and the judiciary); and what the implications of these claims in reality are. First, for some legal theorists (Shapiro & Stone. 2002: 21) the main claim for the state’s legitimacy is that the state controls the usage of power in favor of offering ‘justice’ for its own citizens. For this reason, citizens should no longer speak the language of violence. Instead, citizens should seek the legal and ‘justice mechanisms’ offered to them through the courts. The main claim for the judiciary’s legitimacy and function is that the judiciary has no loyalty except for the law. Hence, judges cannot be involved in any political activity, because they should be impartial. An Egyptian legal theorist (Hasheesh. 2002) emphasizes the difference between the social and the legal theories for the judicial function, and affirms that law and judiciary as well as the state are no longer stable, and asserts that the answer of the question of function varies. For instance, the purpose of the law is—in natural law theories—justice or the public benefit (the public and private interests), or it is the stability (which means security or peace or social ‘order’). But law in social theory is a mere order that has been granted by the state. The state through its power controls, maintains ‘order,’ and compels people to accept the ‘legal’ means of ‘justice’ offered to them (Hasheesh. 2002: 268-270).

Seminal to this discussion is what El- Beshry (1987: 151-165) asserts when he argues that the judiciary is the field of the social and political struggle. He based this on a historic analysis of the role of the judiciary and the jurists in the anti-colonization period, before and after 1919. Brown (1997) believes that the Egyptian legal and judicial system was constructed as an integral part of an effort to build a stronger, more effective, more centralized, and more intrusive state. While the legal system has served to support existing political authority, the legitimating function of law has been greatly exaggerated.
According to him, in Egypt the rulers and the ruled have different but quite complementary images of courts. For rulers, courts are structures that enforce state-sanctioned policies. If they sometimes do so in inefficient or even politically annoying ways, they are still very attractive on the whole. For the ruled, courts are judged more by their usefulness than their fairness. Their procedures and rules appear as opportunities for increasing tactical mobility more than they represent fairness and justice (Brown 1997: 238). However, legal theorists who focus only on the ‘constitutional’ vision of the judicial power insist that judiciary should be understood as one of the three powers in the state, not as a mere function that has been practiced on behalf of the state (‘Asfour, 1969; and U’baied, 1991). They suggest that it is the state that wants to reduce the role of the judges to become employees who work for the state vision of the judiciary and to protect its needs.

The above discussion suggests that there is a clash often between the two visions, both the state and the judiciary. The significant conclusion is that because judiciary has an important role in expressing, and/or solving political and social struggles, there is an unceasing tension between judges and the state concerning the involvement of the judiciary in these struggles. The conflicting interests of different classes, social groups, the state, and the judiciary affect the views concerning the ‘judicial function.’

Respondent T, for instance, asserts that one of the chief bases of the state’s legitimacy is guaranteeing security and order while the judiciary is one of the main fields of the social and political struggles. This means that the judiciary is one of the main fields where the state’s attempts to practice its ‘enforced’ view of social order could be challenged. For this reason, the state wants often to control the function of the judiciary in Egypt. According to him,

The government wants all powers to be incorporated within its body and under its influence, while they have been kept as formally independent. The Ministry of Justice executes a progress of habituating [tarweed] the judiciary for the sake of the government. The law of the Judicial Power in Egypt itself gives the government the capacity to do so. This is indicated in many documents of the
JCE and other legal and judicial scholarship. These documents indicate the limitless authority of the Ministry of Justice over the judiciary, which takes the shape of the inspections over judiciary and appointing the chairmen of courts.

Respondent J, also for instance argues that:

What the Egyptian government proclaims is that it needs an impartial and unrestrained judiciary. However, ‘despotic’ governments do not want impartial verdicts from the judiciary, but want inequitable ones. When ‘we’ issue verdicts that do not match its will, this kind of government will be distressed, and its reaction will vary according to the extent of the judiciary and judges’ solidity.

In reality, the ‘margin’ of independence of the judiciary maintains the state’s political power, and gives the state ‘political legitimacy’ at the same time. The margin of the judicial independence has also a significant role, when the state wants to establish a proper atmosphere in which the economically powerful groups protect their interests. (15)

Many significant cases indicate to what extent the state wants this ‘margin’ of independence. The first of these examples is the significant role of the three higher courts of Egypt: the Supreme Constitutional Court, and Supreme Administrative Court, and the Court of Cassation in reviewing the election lawsuits. The Supreme Constitutional Court is a most noteworthy example in this regard, being on the one hand capable of declaring the ‘unconstitutionality,’ of the most important decrees and laws in the country. The weight of this court in the political scene in Egypt is demonstrated through the fact that this court declared four out of five parliaments in since 1984 unconstitutional. (16)

Moustafa (2003:883) asserts that despite Egypt’s authoritarian political system, “the Egyptian regime established an independent Constitutional Court, capable of providing institutional guarantees on the security of property rights, in order to attract desperately needed private investment after the failure of its socialist-oriented development strategy. The court continued to expand its authority, fundamentally
transforming the mode of interaction between state and society by supporting regime efforts to liberalize the economy while simultaneously providing new avenues for opposition activists and human rights groups to challenge the state.”

The researcher agrees with him that “the Egyptian case challenges some of our basic assumptions about the conditions under which ‘we’ are likely to see a judicialization of politics, and it invites scholars to explore the dynamics of judicial politics in other authoritarian political systems.” Therefore, it is not unexpected that the same court is given some ‘degree’ of authority to shake the ‘regime’. At the same time, the court is asked to maintain the stability of this regime. Reda Abu Qamar (1995) argues that the SCC is extremely affected by the changes in the political reality. In this sense, the government’s political pressures over the court makes it understandable why the SCC has affirmed the constitutionality of some exceptional courts such as the Court of Values, and declared the constitutionality of depriving arbitrarily arrested people of their right to appeal before ordinary courts instead of the emergency courts.

The second example also affirms that the state utilizes the margin of the independence of the judiciary for the sake of its political needs. This example refers to the case where the state involves the judiciary in controlling the professional syndicates in Egypt. The fact is that after the success of the Muslim Brotherhood in Egypt in gaining control over most of these syndicates in the mid 1980s, the government amended the law of these syndicates and involved the judiciary in this control so that it becomes more legal. The judiciary became involved not only in supervising the election of these syndicates, but also in the preparation of these elections. In addition, the judiciary became involved in administrating these syndicates in case their elections are postponed for any reason. In reality, the government benefits the fact that the judicial supervision of the election in these syndicates could be an assurance of the fairness of these elections. However, the case is that particular court chairman is chosen to do this mission (based on his position) (Faris 1996). The Ministry of Justice is the body that appoints this chairman by law. Hence, while judges appear as the supervisors of these syndicates, the fact is that the MOJ is behind the choice of the particular judges who will tackle such responsibility.
Hence, the judicial supervision is a mere cover used to justify the legitimacy of controlling these syndicates. (17)

The third example is the role of the General Prosecutor’s position in all criminal cases in Egypt, which involves many serious issues, such as torture or security state crimes. Respondent H maintains that even if there is an independence of the judiciary in Egypt, this crucial position is subordinated by the executive power. The fact is that the position of General Prosecutor has often been used in two different ways: in controlling all the prosecution offices in Egypt (hence, to control all criminal cases, and maintains the state power), and in creating a space of legitimacy (when the prosecution office plays a role in protecting some legal claims of individuals). (18)

2-4-2 The independence of the judiciary in reality:

The above discussion helps us understand to what extent there is a distance between the ‘ideal’ independence of the judiciary in Egypt and its realization. To better understand the reality of the independence of the judiciary, the concept of this independence should be understood first.

To begin with, Sherif & Brown (2003: 5) maintain that the judicial independence is not new in either the Arab world or the broader Muslim world. This doctrine is a very well established principle in the Islamic Shari’ā. However, this principle has historically been applied differently, because Islamic systems of government, in their early stages, did not adopt the principle of the separation of powers, as it is currently understood.

As for the international standards, one of the basic documents about the international standards of the independence of the judiciary is the so-called United Nations Basic Principles for the Independence of the Judicial Power. (19) Legal theorists (Al-Kylani, 1999; El-Refai’e, 1991; U’baied, 1991; Ga’far, 1995) summarize the international standards according to the above principles in the following way.

First of all, there should be a guarantee for the independence of the judiciary versus the legislative and the executive powers. This includes: A) that the judiciary has
the authority to supervise the executive actions, B) both the legislative and the executive powers shall not intervene in the judicial function, through canceling or impeding or postponing the execution of judicial rulings, C) legislative power should not attack or reduce the independence of the judiciary through its legislative means of organizing the judiciary. Second, there should be an assurance for the financial and administrative independence of the judiciary. This will be through A) judges are not removable, B) executive power should not have any authority in the promotion of judges, C) Judges salaries should be protected, and D) there should be a transparent and explicable administrative discipline codes for judges.

Third, what is known as ‘judicial capacity’ \textit{[walayat al qada’]} should be exclusive to the judiciary. This means that the government should not establish other bodies and give them the power to hear cases; an example of this is the exceptional courts. Fourth, there should be an assurance of the impartiality and the proficiency of judiciary. This includes: a) preventing all threat or pressures or any direct or indirect interventions in the judiciary’s affairs, b) also this includes that judges should not be involved in any political party or become member in any political party or group, and C) the professionalism means that the judiciary should be formulated from professional judges who are specialized in law. Lastly, the right to organize and to exercise their freedom of expression should be granted to judges.

Several ‘articles’ in the current constitution of Egypt, ratified on 1971, assured the judicial independence. First, article 65 maintained that “the rule of law is the basis of the state power, and the independence and immunity of the judiciary are two basic guarantees to safeguard rights and liberties”. Article 165 asserted, “The judiciary is independent...” In addition, article 166 affirmed, “Judges are independent. In their performance, they are subject to no authority but that of the law. No authority can interfere in cases or judicial affairs.”

The speculation of the independence of the judiciary discussed above suggests that there are two main sort of the independence: the independence of the judiciary (as a system), and the independence of judges (as individuals). Examples of the independence
of the judiciary as a system are guaranteeing that the executives will not attack the judiciary or reduce its judicial capacity. Examples of the independence of judges as individuals are the guarantees of their professionality, impartiality, and their salaries so that they will be capable of being fair in their decisions.

Addressing the reality question with respect to the Egyptian case leads us to proclaim that there is a relative gap between the above principles and their application. To begin with, Sherif & Brown (2003: 14) argue that in most Arab governments—including Egypt—a clear separation between the judiciary and the executive branch, in particular, has not been achieved. Executives in Egypt, represented in this context by the Minister of Justice, have some capacity to intervene in the judiciary. An example of this is the ministerial role in the discipline of judges. Furthermore, Abdel Bar (1993: 106-207) summarizes the forms of the executive interventions in judicial power from the following: 1) maintaining the chairmanship of the president, then the Minister of Justice to the Supreme Council for Judicial Bodies, 2) the ‘raiding’ of the authority of the ordinary courts in many cases for the sake of exceptional courts, 3) impeding the execution of judicial rulings, 4) shrinking the budget of the judiciary, and 5) involving the judiciary in some tasks that decrease confidence in the judiciary.

In addition, El-Refai’e (2003) gives a brief review of the different aspects that leads him to argue that there is no genuine independence of the judiciary in Egypt. He exemplifies that by the fact that the Administration of Judges’ Inspection (20) is part of the Ministry of Justice offices. This means that many serious issues in the judges’ work are under the control of the MOJ. These issues include: all processes of inspection over judges and chairmen judges, processes of assessing their qualifications and suitability, all tracks’ of disciplining judges. This also includes controlling all investigative procedures concerning complaints submitted against judges’ work (El-Refai’e, 2003: 13). This body is also responsible for the proposals of judges’ transmissions and delegation and promotion or ignoring them in promotion. Hence, this means that the Minister of Justice has the upper hand over judges in reality. According to El-Refai’e, the control of the
MOJ over judges damages the independence of the judiciary and contributes to decreasing the public trust in the judiciary.

Furthermore, the Ministry of Justice has the final word in delegating and expanding the delegation of selected judges to be—for unlimited years—the chairmen of the Primary Courts. This selection leads those chairmen, instructed by the Minister, to do their best to control inferior judges in their courts (El-Refai’e, 2003: 12). According to El-Refai’e, people began to mistrust the judiciary because of the government intervention in the judiciary. El-Refai’e (2003: 12) asserts that the records of distributing work in the Egyptian courts include a notice to Egyptian judges that they should present all the important lawsuits to the chairman of the court to discuss it with [him], once it was subjected to the final ruling. This demonstrates the inability of the judiciary to be impartial.

Respondent M comments on the situation of the independence of the judiciary in Egypt and assumes that: “The independence of the judiciary in Egypt is just a talk of ‘deceivers.’ Judges who proclaim that there is an independent judicial power in this country are doing so because of the pressures or the enticements of the ruling ‘gang.’ Those are helping the ruling bureaucracy.”

2-5. Key conclusions

While reviewing how the judicial function and independence are highly politicized, regardless of the claims of the law or the government, it could be argued that the broader judicial structure policies in Egypt are complex. As discussed above, it is the policies of utilizing the ‘margin’ of the independence of the judiciary that creates these challenges and complexities. Understanding these challenges will help in the following chapters. The first of these will involve examining the JCE as a space in which there was some practice for defending democracy.

Another way in which the above discussion is relevant to this study is that one of the major claims of the JCE was to establish a ‘genuine’ reform for the independence of the judiciary, as will be discussed in chapter 4 and throughout this thesis. Besides, one of
the significant problems that challenge the JCE activities is that there are many institutions involved in the judges’ and judiciary affairs. The first of these institutions is the SCJB, which has been functioning since 1969 and chaired by the Minister of Justice. This council in addition to the ordinary judiciary includes many other ‘non-judicial bodies,’ being called judicial to serve the government’s claims. It also includes other parts in the common judiciary such as the SCC and the State Council. The second of these institutions is the Supreme Judicial Council [SJC], which is the higher and main administrative body that represents all the ordinary court judiciary. The third institution is the Ministry of Justice, which is the government’s hand in the judiciary. The fourth institution is the JCE, which is the judges ‘union’ in which all judges of the ordinary courts, and prosecutors are affiliated. The consequence of addressing this point is that there is a ‘hardship’ of judiciary representation, and that will be discussed in chapter 5.
Notes of Chapter Two

(1) The investigation bodies first followed the centralization and then the dispersed power. With the creation of the Mixed Courts, the parquet (Public Prosecution Office) appeared. It was presided over by a foreigner and was composed of foreigners and nationals. There was also the parquet with the National Courts, over which an Egyptian presided starting from 1895. Apart from the General Prosecutor, [al-niya\textsuperscript{ba} al-\textsuperscript{a}\textsuperscript{mma}], numerous others were created: the administrative prosecution, [al-niya\textsuperscript{ba} al-ida\textsuperscript{riyya}, 1958], the military prosecution, [al-niya\textsuperscript{ba} al-\textsuperscript{askariyya}, 1966], the parquet of the Socialist Public Prosecutor, [al-mudd\textsuperscript{a}i al-\textsuperscript{a}\textsuperscript{m al-\textsuperscript{ishtira}\textsuperscript{ki}}, 1971], and the parquet of the Court of Cassation, [niya\textsuperscript{bat} mahkamat al-na\textsuperscript{qd}, 1972].

(2) In October 5\textsuperscript{th}, 2003, the Egyptian Parliament approved an amendment to change this age to be 68, al-Ahram newspaper, October 6\textsuperscript{th}, 2003). Several respondents mentioned to me that the reason for this amendment is expanding the period of some particular chairmen of the higher courts.

(3) Abdel Bar writes about the role of the State Council in his summary about the general implications of the political context where the State Council has practiced its role. His generalization of the political context is useful to understand the environment that affected also other parts of the judiciary.

(4) Abdel ‘Al (1993: 171) suggests that the term the “massacre” of the judiciary, mazbahat al-qa’\textsuperscript{dah}’ was first used by Counselor Mumtaz Nassar, the chairman of the JCE at that time, later in his book mazbahat al’adala, the “Massacre” of Justice, published in 1974.

(5) The JCE regained its right to have an elected council rather than one appointed by the regime through a lawsuit appeal that lasted from 1969 to 1975, (4) on which judges could achieve their right to elect their board. On June 19\textsuperscript{th}, 1975, the chairman of the Court of Cassation, Gamal Al-Marsfawi, as the JCE guardian who was appointed by the Cairo Urgent Court, invited the general meeting of the JCE to elect the new board. This was through an urgent lawsuit before the Cairo Urgent Court, by the lawsuit number 2426 for year 1975 (Urgent Law Suits of Cairo), on which the Court accepted judges demands to establish a guardianship over the club, stopping the appointment of the JCE council, and to allow judges to elected their own council ( al-\textsuperscript{Qudah}, January 1991: 20).

(6) According to the 1963 law, the chairman of the JCE should be an appointed member, based on his position in the judicial system ( the Chairman of the Court of Cassation would be the chairman of the JCE), and the deputy would be the General Prosecutor. The Minister of Justice was responsible for forming a temporary council for the JCE (Hussein: 1995).
(7) The Law number 32 for year 1964 was a very famous law that controls strictly the NGOs activities.

(8) A significant part of the responsibilities of the members in the Organization of the Socialist Vanguard was to maintain what are called the ‘revolution principles’ and to struggle against “enemies of the revolution and all those agents and traitors who are connected to foreign countries or works under the introduction of these countries” (Ahmed Hosni, 2003. 103). This organization had different branches among major sectors and institutions in the society (including the military and the judiciary). There were some members in the judiciary who get used to send reports to the regime about the judiciary. Some of the reports were about the JCE, its activities, and judges’ discussions about the election in the JCE.

(9) According to many interviewees, the election of the JCE in March 1969 ended up by a “15 members out of 15 victory” for the judges’ list. According to them, and Abdel ‘Al (1993: 173), there was a mobilization before the election and judges were enthusiastic so that about fourteen hundred judges (out of almost two thousand members or less at that time) came and voted in the election. The victory of the judges was significant; for instance, the judges’ list had 1123 votes compared to only 150 votes for the government list.

(10) The decrees of the “massacre of the judiciary,” issued on August 31st, 1969, were five decree-laws and included the following: law number 81 for year 1969 to establish the Supreme Court in Egypt, Law number 82 for year 1969 to establish the Supreme Council for Judicial Bodies [SCJB], the law number 83 -1969 to re-establish the judicial bodies, and law number 84 for year 1969 concerning the JCE, and law number 85 foe year 1969 concerning appointing and promoting members of the judicial bodies.

(11) Explaining to what extent judges considered these laws a ‘massacre’ could be exemplified by the fact that the first decision of the new JCE council was to greet President Abdel Nasser for the judicial reform of 1969( al-Qudah, January-June 1991: 20), and the first actions of the new SCJB was to establish a committee chaired by the Minister of Justice to ‘review’ all judges cases, and delegations, and to visit the President palace to acknowledge their appreciation by supporting him (al – Aharam newspaper November 17th, 1969).

(12) This was through unceasing efforts from many judges, including mainly Counselor Yehia- El-Refai’e. This is according to almost all the interviewees, Abdel Al ‘Al (1993), and El-Refai’e’s book (El-Refai’e, 2000).

(13) The declaration that the 1969 decisions were to attack judicial independence was through a judicial ruling by the Court of Cassation. The court affirmed that the JCE
is a recognized “judicial affair” and such case could be investigated and appealed in ‘this court’, and based on this it canceled the law-decrees of the “massacre of the judiciary.” It was the appeals number 76 (the judicial year 43) and number 43 (judicial year 45). While deciding that the JCE should be an autonomous judicial entity, the Court of Cassation declared that the law-decrees of Abdel Nasser should be annulled in December 29th, 1977 and explained this by arguing that:

Since the law and the nature of the judges’ work impose a particular attitude for judges and prosecutors in both their public and private lives, a special club shall be established on which they can socialize and that is authorized to work on behalf of judges in some particular issues. An elected council shall administer this club, according to article number 45 in law 32-1964 for private associations. The appealed decree-law (of dissolving the club) is considered a judicial affair, because it regulates the formation of the club’s member council who are appointed due to their positions. Hence, the mentioned law-decree is subjected to the assessment of the Court of Cassation, which is authorized to examine all judicial affairs. The decree-law number 84 for year 1969 ‘surpassed’ the delegation to the president by law number 15 for year 1967. Therefore, the mentioned decree-law is illegitimate and should have no impact (Hussein: 1995:548).

(14) In fact, there was a previous attack from the regime to the judiciary. This attack happened in 1955 against the State Council and his chairman Abdel Razeq al-Sanhouri, when he was ‘beaten’ physically in the council and then dismissed from his position arguing that ‘he was a Minister in the pre-revolution time, which was a ‘reactionary’ period (El-Beshry, 2003: 16). Counselor Tareq El-Beshry informed me that most legal historians focus on the “massacre of the judiciary” of 1969, while neglecting the first attack of 1955, because of the large number of judges dismissed in 1969. Also, this is because the State Council has a limited number of judges compared to common court judiciary. He argues also that the JCE activities and surrounding atmosphere after the defeat made the 1969 attack a very political issue, while being linked to democracy.

(15) In chapter five, there will be a detailed discussion about why the different (and contradicting even) capitalist needs affect the state’ choices concerning the judicial and the legal reform question.
The four Parliaments that have been declared unconstitutional by the SCC are the Parliaments of years 1984, 1987, 1990, and 1995. In 2000, this court affirmed clearly for the first time that it is unconstitutional to arrange any election that is not under the supervision of judicial bodies. The importance of the discussion of the relationship between the judiciary and the supervision of the election (with respect to the JCE in particular) will be discussed in chapter 3 and chapter 5.

The particular chairman of court who controls the election of the professional syndicates is the chairman of the Cairo/ Southern Primary Court, by [his] position. Subsequently, the election of the professional syndicates is often a matter that will be taken in consideration, when the Ministry of Justice selects this chairman. Involving judiciary in the election of the professional syndicates was created by the law number 100 for the year 1993, which has been criticized by many of the activists and the leaders in these syndicates.

An example of the first role of the General Prosecution office (maintaining the state power) is the case of ignoring or postponing the investigations of torture crimes against police officers for many years. An example of the role of the General Prosecution office in offering some space of legitimacy is the case of releasing some opposing groups from time to time. In the latter case, the used discourse is that “this is based on the democratic space given by the government”. This happened, for instance, when the anti war demonstration took place in Egypt in March 2003. In some stages of these demonstrations, the General Prosecutor released thousands of detainees, and announced that this is “based on the instructions of the President.” Many interviewees affirm that this position is highly political.

There are many other examples of how the government ‘utilizes’ the judicial independence claim in its political contentions. This may include: the cases of the courts involvement in the government struggles with political Islamists, and in many disputes concerning secularism in 1980s until now. The famous case against Saad Eddin Ibrahim is another example. In all these cases, the government used to justify its actions by the claim that there is no intervention in the rulings of the Egyptian courts due to the considerations of the Independence of the Judiciary. The judiciary is also involved in hearing corruption cases in which some ‘prominent figures’ of the political regime are accused, e.g., a famous case against many members in the Parliament who were accused of having unsecured loans from several banks (al – Ahram newspaper, February 19, 2003).

The UN Basic Principles for the Independence of the Judicial Power was ratified by the United Nations General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. The international conventions concerning the independence of the judiciary and their relevance to the Egyptian judges’ training will be discussed in chapter 5.
(20) The Administration of Judges’ Inspection is an important administration that plays a significant role in judges’ administrative records. According to article 78 of the Judicial Power Law, this administration has the upper hand in ‘inspecting’ junior judges. This is the case in controlling the records of all those judges. It was often one of the major demands of the JCE and judges that such administration should be part of the judiciary and not part of the Ministry of Justice. This will be discussed in detail throughout this thesis.

(21) After abolishing the Supreme Judicial Council in 1969, it was re-established [restituted] in year 1984 because of the JCE activities, and this will be discussed more in chapter 4.
Chapter Three
Defending Democracy

3-1 Introduction

The previous chapter demonstrated that a political stance was behind the reorganization and depoliticization of the JCE in 1969. Brown (1997:100) writes that since the 1980s, the JCE has gradually regained the position it held in the late 1960s as an agent representing a political perspective. However, the JCE is much more than a forum for public discussions. Rather, it involves particular discursive mechanisms that are deployed in order to shift the discourse about liberal legality and democracy in Egypt.

This chapter addresses three related issues: 1) the JCE’s position on defending the rule of law, 2) the rationalization of the JCE’s role in calling for democratic reform, and 3) the main discursive mechanisms deployed by the JCE from the mid-1980s until 2004. It should be noted that the JCE’s role in defending democracy was complex and varied from one JCE council to another, as will be taken up in depth in Chapter Five. As such, my focus in what follows is the JCE outlook on democratic reform as reflected in its activities related to the call for liberal legality in the time period under consideration.

3-2-1 The JCE’s position on defending the rule of law

Despite the contentious meanings of the notions of liberal legality and democracy in Egypt, some key definitional characteristics remain consistent throughout JCE discourses, as well as in discussions with interviewees. Three definitional characteristics stand out as significant: A) democracy is demonstrated by free and fair elections supervised by a ‘genuine’ (1) judiciary; B) democracy requires the expansion of the rule of law, including revoking emergency law and all exceptional courts in Egypt; and C) democracy entails an egalitarian system in which human rights are respected and government actions are subject to judicial supervision. All three of these characteristics are inspired by a broader call for constitutional implementation, and in particular a call for the implementation of the principle of the separation of powers.
One of the key vehicles through which the JCE addresses these issues is a critique of the method of judicial supervision of public elections. Most interviewees emphasized several reasons that underlie the JCE claim that the judicial supervision of public elections in Egypt lacks constitutional legitimacy. First, the Ministry of Justice, along with its internal apparatus for judges’ inspection, selects the judges who will supervise elections. Second, the Ministry of Interior supervises the electoral process to the extent that in the Parliamentary election of 2000, for instance, many meetings were held in the Primary Courts and prosecution offices in which the chairmen of courts and the judges’ inspectors asked judges to implement the instructions of the Minister of Interior in the election (El-Refai’e, 2000: 186).

Third, there are several so-called ‘judicial bodies’ that play a role in the supervision process that lack the impartiality of judges. These ‘bodies’ are the Commission of Government Lawsuits [hay’et qadaya al-dawla] and the Commission for Administrative Prosecution [hay’et al-nyaba al’idaryah]. Even when judges are selected to supervise elections, they have neither the authority to control the entire electoral process nor the authority to supervise the centers for both “voting” and “counting votes.” Finally, the constitution delegated to the Court of Cassation the role of investigating all electoral dispute appeals, but in reality Parliament often ignores this Court’s decisions.

3-2-2 Important debates

I would like to focus on two of these aspects of the elections: the Court of Cassation’s role and the debates concerning the other ‘judicial bodies’ involved in election supervision. Regarding the first, Mekky (1990:14) writes that in the judges’ view, the role of the Court of Cassation should be implemented and its investigations respected. The logic behind this is that it is reprehensible to ignore the Court’s reports as it is at the top of the judicial pyramid in Egypt, the highest court of appeal for all civil, criminal, and personal status lawsuits. An added factor is that as the highest court of appeal, the Court of Cassation’s decisions cannot be appealed. Given this, how can a Parliament—and one established by doubtful elections no less—neglect the Court’s
reports, sometimes even returning them to the Court for further consideration? In Mekky’s words (1990:10):

Judges no longer have a connection to the election. They have the right to disparage the election because they know that elections shake people’s trust in the judiciary. People have the right not to trust the elections in Egypt. This is because the Egyptian legislature neither structured the election procedures properly nor gave judges the capability to supervise elections in a legitimate way. The legislature did not even give judges the right to investigate electoral appeals!! Judges have the right to refuse their connection to the elections until the electoral laws are appropriately amended.

Turning to the second aspect of elections—the debates concerning other judicial bodies’ involvement—although most judges are against this involvement, some, mostly pro-government judges, instead legitimize it. For those opposed to these bodies’ involvement, the position dominant in the JCE, there are three compelling reasons. (2) First, some of these bodies are by nature biased and involved in elections as defenders of the government, even though legally they are considered ‘judicial bodies’, e.g., the Commission of Government Lawsuits. Second, members of these bodies do not have the immunities that judges have and therefore cannot be impartial in the same ways as judges. The final reason is that the original attachment of these bodies to the judicial power was in itself a transgression against the judiciary after the 1969 “massacre,” beginning with the establishment of the SCJB and the abolition of the SJC. Even the term ‘body’ was first used by one of the ‘engineers’ of that “massacre”, Sha’rawy Goma’a, a member of the revolutionary council. Interviewee Y suggested that using the term ‘body’ works to “disfigure and damage the rule of law in Egypt.”

Interviewee T explained in greater detail that only the process involving judges will guarantee fair elections. According to him:
While judicial supervision of elections is authorized only for judicial bodies, this means only the ‘legitimate’ judicial power. If we ask judges to supervise elections, this should occur according to the judges’ process. Hence, all election matters should be under the authority of the SJC and not the Minister of Interior. The second point concerns the question of who is responsible for determining the electoral constituencies. This should be done according to three principles, similar to those implemented in the distribution of cases to judges in different circles (3) within the same court. These principles are: A) there should be no selection for any particular judge after the determination of the lawsuit, as lawsuits should be undetermined for judges when judges start hearing them. This embodies that judges should not have access to the lawsuits before examining them. Otherwise, this will shake the impartiality of judges; B) particular judges must not be appointed to hear particular cases; and C) decisions of distributing lawsuits in the one court should be made democratically among judges in the court. Judicial organizations in the court are based on these principles. As a result, before finalizing the list for election candidates, judges should be distributed over different electoral constituencies according to objective and transparent rules.

On 29 May 2003, the JCE issued a statement calling for an open discussion about the judicial bodies, in light of the recent ‘intense’ debate on the subject in mid 2003. (4) The debate was triggered by a clash between two different decisions made in the Court of Cassation (declared by two circles at the same court). The key problem was not only that the two decisions reflected different opinions, but also that the circumstances surrounding the decisions emphasized this difference. In a nutshell, one of the decisions was issued in a circle authored by the chairman of the Court himself (who is also the head of the SJC). This decision confirmed that these bodies are indeed judicial ones. The opposing decision contradicted this. The clash was covered by the media, and gained significance because the latter decision concerned the election of a famous figure in the ruling party. The JCE supported the latter decision—the one stating that the bodies are not judicial ones—and opened a forum for discussion of the matter in its magazine (al-Qudah). However, although it took a stance in supporting one decision over the other, the JCE
simultaneously affirmed that the decisions of the Court of Cassation should be respected (*al–Qudah*, January-August, 2003: 70).

**3-3 Rationalization of the JCE’s political role**

Several justifications are offered as grounds for the JCE to expand the scope of their call for democracy. The first of these is rooted in the constitution, which initially authorized the judiciary to supervise elections. The rationale for this was that it would ensure the separation of the legislative and executive powers. On the one hand, by giving the judicial power, an impartial third party, control of the formation of Parliament, the legislature would be established independent of government hegemony. On the other hand, since the government is monitored by Parliament, the former’s establishment process should also be separated from the latter. This separation between the Parliament and the government is significantly important because the executive power is often controlled by the ruling party participating in the election process (El-Beshry, 2000). Under such circumstances, the executive power should definitely not be involved in supervising legislative elections.

Furthermore, El-Refai’e (2000:15) and Ahmed Mekky (1990:10) underscore the direct link between the independence of the judiciary and the supervision of elections, arguing that this is an even stronger rationale than constitutional authorization. A lack of judicial independence reinforces government hegemony over the electoral process and facilitates government forgery of elections in Egypt. This is clearly demonstrated by the Ministry of Justice’s complete control over the rules of the judge’s delegation. The Ministry of Justice also controls the Administration of Judge’s Inspection. (5) Thus, the government – through the Ministry of Justice—is able to choose the judges who will be involved in electoral supervision. Several former judges have told me that this process plays a significant role in allowing particular judges to be selected to supervise elections in particular electoral constituencies.

As emphasized by Mekky (1990:10), falsified elections lead to public mistrust of the judiciary. Most interviewees confirmed this notion. Additionally, several interviewees suggested that judges should indeed contribute to national judicial affairs
and debates. They noted that the prohibition on ‘political involvement’ for the judiciary only includes joining or supporting political parties, groups, or organizations. Some interviewees also insisted that the emphasis on the principle that judges should not be involved in politics is used as an excuse by the government and some ‘pro-government’ judges to silence the public role of the judiciary.

It is clear that the separation of powers principle should be respected, and that this separation is linked to maintaining the independence of the judicial power. There is a direct link between national interests and issues and the respect of democracy and human rights, a link affirmed in several JCE statements. Even when judges sharply narrow the scope of their political involvement, they still affirm that addressing issues of national interest is part of their duty as citizens.

3-4-1 Discursive mechanisms deployed by the JCE to call for democracy

This section explores the three main discursive mechanisms deployed by the JCE as it calls for democracy in Egypt. These are: 1) the Conference of Justice, 2) delivering statements, and 3) organizing seminars to propose new laws.

3-4-2 The Conference of Justice

Most interviewees highlighted the significance of the First Conference of Justice—the first national conference organized by the Egyptian judiciary, which took place in Cairo on 24-25 April 1986. In what follows, I analyze this event through a consideration of its background, rationalization, organization, main ideas, and significance.

Interviewees K and J both expounded on the background to the First Conference of Justice. According to them, in the mid 1980s, the board of the JCE sensed an atmosphere similar to that which existed prior to the “massacre” of judges. Considerable elements of the same discourses employed in the preparation of the 1969 laws were again being employed, especially by leading governmental media figures.

This period was also that of the early stages of the government’s struggles with political Islamists. The media and government’s fundamental criticism of the judiciary was that ordinary laws and ordinary judges were insufficient to meet the new political
and social circumstances in Egypt, particularly concerning alleged terrorist activities. Many writers argued that there was a need for exceptional laws and courts, aiming for a more ‘controlled’ judicial process that would ‘guarantee’ what was described as a ‘productive justice’ ['a'dala nageza']. Judges, in turn, felt the need for a high-quality response to this argument, in order to counter any probable risk. As Counselor K asserted, “this was the lesson of history and we thought we should oppose the trap.”

According to Counselors K and Y, the best way to implement and support the JCE response was to organize a comprehensive conference to discuss all justice related problems in Egypt. This was done with three goals and principles in mind. First, the conference should include a comprehensive survey of all justice administration problems in Egypt that would incorporate both diagnoses and remedies for the various problems. Second, accurate legal and judicial processes should protect citizens’ freedoms. Therefore, any proposed judicial reforms should be linked to guaranteeing these freedoms. Third, the JCE and the event organizers believed that this perspective should be grounded in a democratic and autonomous discussion building on the ideas and discourses of judges, leading lawyers, professors, intellectuals, political leaders, and others concerned with the administration of justice in Egypt.

The First Conference of Justice was held in the halls of the Court of Cassation. Both the opening and closing sessions were held in the greater hall at the court, with President Mubarak giving the opening address. Approximately four thousand judges, intellectuals, and legal professionals attended the conference, (6) and leading members of the JCE council played significant roles in its organization. (7) The conference was divided into five working groups or committees on legislation, judicial structure, judicial procedures, judges’ affairs, and the affairs of judges’ assistants (The Conference’s Basic Documents, 1986).

Brown (1997: 116-119) describes the recommendations that emerged from the conference as a comprehensive proposal for legal reform in Egypt, including both judicial and democratic reforms. The recommendations were divided into general and specific ones. The general statement contained a clear directive to the executive authorities to respect liberal legality, arguing that it was the primary basis for political legitimacy. It
argued that the judiciary “is prior to the creation of the state itself,” and that without the judiciary the law would degenerate into slogans and democratic life would lose its foundation. The specific recommendations concentrated on the reunification of the Egyptian judiciary. The increase in exceptional courts was described as offensive to the professional status and interests of the judiciary, as well as an infringement on the legal equality of citizens. As a result, according to the conference recommendation statement, “the resort to exceptional legislation, if it is extended, will corrupt the nature of the people and shake trust in the law and the regime.” The Conference of Justice included one paragraph about the importance of the inclusion of Shari’a regulations in Egypt. While doing this, the conference suggested that this proposal matches article 2 in the Constitution that declares that Shari’a is the basic reference for legislation in Egypt.

These recommendations were not the only aspect of the First Conference of Justice that made it exceptionally significant in the history of the Egyptian judiciary. This conference was also the first such judiciary event attended by the president. In addition, the conference was held just two weeks after the riot of the Central Police Forces [al-amn al markazy], after which many voices had called for an exceptional trial for those accused of starting the riot (including 1205 police and 31 civilians) (al –Ahram, 4 April 1986). Finally and perhaps most noteworthy, in his speech at the conference opening, Counselor Yehia El-Refai’e addressed President Mubarak with regard to the recent expansion of the Emergency Law in Egypt. The day before the opening Parliament had expanded the implementation of the Emergency Law. This came a mere two weeks after other official judges—mostly Ministry of Justice officials and the SJC—had ‘celebrated’ President Mubarak for opening new extensions and buildings during a visit to the Higher Judicial Building [dar al-q’ada’ al’a’li] (al –Ahram, 9 April 1986).

El-Refai’e speech and the other opening speeches by conference organizers were all so eloquent that they put Mubarak’s regime in the embarrassing situation of being held responsible for legal and judicial reform. El-Refai’e in particular crystallized all the reforms of the judiciary implemented under Mubarak, including the restitution of the Supreme Judicial Council (8). His speech also iterated constitutional principles, as can be seen confirmed through its analysis. The speech given by El-Refai’e was particularly
consequential for Mubarak for several reasons. As it was the address of the conference chairman, it was the first speech, setting the tone for the rest of the event. The entire talk centered on judges’ demands in Egypt and criticism of the president. Moreover, the section on the Emergency Law was unplanned and not part of the originally written speech. As a result, it came as a shock to Mubarak, because all conference statements were to have been delivered to state security officials prior to the conference because the president was going to be in attendance. (9)

According to most interviewees, the First Conference of Justice involved a group of intellectuals, political leaders and researchers in addition to the judges. Respondents Y, K, J, N, T, S, and B emphasized that the ruling regime intended to ignore the implementation of almost all the recommendations that emerged from the conference. Referencing this negligence was frequently used to indicate the state’s perspective on judicial reform, underscoring the different meanings “judicial reform” carries for judges versus the state. The conference was also mentioned in the JCE’s general meeting of 12 March 2004, where the JCE council was charged with assessing what progress, if any, had been made in judicial reform since the conference.

3-4-3 Delivering statements

The second strategic discursive mechanism deployed by the JCE in support of democracy is the delivering of official statements. Most significant among these statements are two concerning Iraq; one issued during the second Gulf War (January 1991) and the other during the Anglo-American invasion of Iraq (March 2003). Both statements highlighted the link between what the JCE called the adversity faced by the Gulf or the Arab People and the lack of democracy and rule of law in Arab countries.

For example, the first statement (al–Ahram, 19 January 1991) criticized the utter respect of “international legitimacy” with regard to Kuwait when it is ignored entirely with regard to Palestine. It argued that underlying the “adversity” faced by the Gulf is absolute rule by dictators in Arab countries, arguing that such totalitarian regimes are dependent on superficial institutions. These regimes ignore human rights and hold in contempt individuals’ rights to participate freely in public life.
On 24 March 2003, the JCE released a similar statement, focused more on recent developments on the national, regional, and international levels. This is an excerpt from the statement:

The Judges, having reflected upon all this, concluded the following in their deliberations: First, the most fundamental reason behind the ongoing calamity is the debility of the [Arab] nation. There can be no dignity or freedom for a nation that fails to protect the freedom and dignity of its citizens. The proscription of true democracy is a huge error, equal to the premeditated murder of the nation, making it easy prey for the enemy.

Second, it is the duty of Arab and Muslim governments to declare their hostility to the countries taking part in the aggression, led by the United States, and to use all means to fight them, including to deny them military bases, facilities and to refuse to take part in military exercises with them. They should also offer all means of assistance to the Iraqi people and their government, and to the Palestinian people and Palestinian resistance.

Third, it is the duty of Arab and Muslim peoples, as of all peoples that have a commitment to humanity, to do everything within their power to repel the current aggression; to declare their hostility to those who wage it; to denounce those who decline to act to stop it. They should raise their voices with all possible legitimate means, showing due concern for the safety of their communities and of private and public property.

Fourth, the judges of Egypt express their great appreciation for the positions of the Pope of Rome, the Christian Orthodox churches of Russia, Greece, and Egypt, and of Protestant churches throughout the world.

Another part of this statement criticized the “clash of civilizations” argument, describing the war as “an imperialist war and not a religious war nor a war between civilizations.” Several human rights and anti-war activists in Egypt informed me that this
statement provided strong support during their mobilization, and embarrassed the regime over both its stance on this war and democratic reform.

3-4-4 Seminars and laws:

The third discursive mechanism deployed by the JCE to call for democracy is organizing seminars to propose new laws. The most pertinent of these was a seminar organized by the JCE on 27 June 1990. Prior to this event, the JCE had undertaken other actions, including insisting in their meetings, such as one held on 13 November 1986 (11) that the election issue must be addressed. The outcome of those meetings was the conclusion that the judges should offer a comprehensive proposal for legal electoral reform.

The result of the 1990 seminar was a proposal for a comprehensive bill addressing the supervision of public elections in Egypt. Despite the fact that the seminar was limited to judges, the JCE publicized it in many newspapers and in their magazine, inviting the concerned public to submit proposals and suggestions to the JCE prior to the seminar (al-Qudah, January-June 1990: 47). On the evening of the seminar, Counselor Yehia El-Refai’ee, (12) chairman of the JCE, sent a formal memorandum to President Mubarak. The memorandum affirmed that the seminar was a response to Mubarak’s invitation to the judiciary during the Conference of Justice engage with public interests and reasserted that Mubarak himself had declared that the electoral process in Egypt should be a fair and free process for all Egyptian citizens.

Reading the proposed law suggests that it was clear and thorough. It did not only regulate judicial supervision of elections but also proposed comprehensive measures for guaranteeing free elections. These included, among other things, guarantees for the rights of candidates and for the rights of voters during the entirety of the electoral process. Moreover, in addition to regulation texts, the proposed law also included explanatory notes ordering and structuring the electoral process. The text of the law incorporated elements including the voting centers and general election centers, mechanisms for establishing the physical presence of voters, the process for counting votes, the meaning and regulation of judicial supervision for elections, the determination of electoral
constituencies, guarantees for electoral freedom, equality between candidates, and the investigation of electoral crimes. The JCE’s proposed law and proposition for judges’ supervision of elections has been often cited by political analysts, affirming that sincere political reform and fair elections can be established through the 1990 proposal (Rabee’: 2003).

In conclusion, it should be noted that while the JCE deploys different discursive mechanisms to defend democracy and judiciary independence, in many cases, the same mechanisms were employed for multiple purposes. Most interviewees suggested that all the JCE discursive mechanisms functioned in interaction with one another. For instance, the Conference for Justice was an efficient endeavor to establish liberal legality and the rule of law in Egypt. At the same time the conference addressed many aspects of judiciary independence. Similarly, general meetings which have often been employed as a vehicle through which to call for judiciary independence have also been utilized to call for political reform. For example, at the general meeting held on 12 March 2004, strong criticism of the western pressure for reform, including the proposed U.S administration project for the Greater Middle East, was voiced, along with a call for the Egyptian regime to act without hesitation or delay. (13)

The conviction that the JCE has had two main interlinked missions—calling for judiciary independence and for democracy—from its inception was clearly expressed by Interviewee B. In his words: “Democracy is the main guarantor for the sovereignty of the state itself” and “liberating ‘our’ lands is impossible without democracy and judiciary independence as key elements in a country ruled by law.”

3.5. Summary

This chapter has investigated the JCE’s role in defending democracy in Egypt. In particular, it has addressed some basic questions: According to the JCE, what does it mean to call for democracy? What discourses do judges deploy in justifying their approach to questions of democratic reform? Furthermore, what kind of discursive mechanisms do they use in this process? As discussed before, the most significant debate in the democratic reform call, as described by the JCE, concerned establishing free
elections supervised by the judiciary. The most significant rationale behind judges’ criticism to the government method in supervising public elections was damaging judges’ impartiality and reputation. The most significant of discursive mechanisms deployed by the JCE toward this goal were organizing the First Conference of Justice, delivering statements, and proposing laws. As affirmed by several interviewees, the rational and discursive deployments for defending democracy and judiciary independence are intertwined and overlapping. This relationship is taken up in the next chapter.
Notes of Chapter Three

(1) There is a debate about which entities constitute the authorized judicial bodies for supervising public elections, explained later in this chapter.

(2) Eight respondents affirm this.

(3) The circle [da’yra] is a unit at a court for hearing a group of lawsuits. Based on this, all lawsuits in any one court are to be distributed among the different circles in that court at the beginning of the judicial year (September/October annually).

(4) Because this debate leads to clashes between the JCE and the chairman of the Court of Cassation as well as the SJC, this will be discussed in the next chapter.

(5) As explained in Chapter 2, the Administration of Judges’ Inspection has the upper hand in inspecting junior judges, and can affect their promotions and salaries.

(6) The expected number at the conference is taken from Akhbar Al-Youm newspaper (19 April 1986), five days prior to the conference. Most interviewees later confirmed this number.

(7) The organizing committee for the conference includes counselors Yehia El-Refai’e, as the chairman of the conference, Ahmed Mekky as its secretary general, and Hossam El-Ghorinai as its general reporter. They were leading members of the JCE council.

(8) The restitution of the Supreme Judicial Council came about through pressure from the JCE, as will be explained in the next chapter.

(9) A translation of this part of El-Refai’e speech follows:

“Mr. President Mohamed Hosni Mubarak. 
We hoped that the state of emergency would not be extended, seeing that it did not prevent recent incidents (the riot of the Central Police Forces). You also did not use it in those circumstances. And even though application of article 74 of the constitution would have been appropriate according to the constitution [an article that gives the president exceptional rights during critical moments in the country, and then submitting his actions to Parliament or in referendum to citizens], you did not apply this article. Moreover, you did not find a justification for its application. Egyptians appreciated this. We hoped that the state of emergency would not be extended. Since it was already extended yesterday, a decision regarding its annulment is in your hands. We hope that the
circumstances for such an annulment will be at hand soon, God willing” (mentioned in the Conference of Justice Basic Documents, the opening speeches).

(10) This meeting will be considered in depth in the next chapter.

(11) In the general meeting of 13 November 1986, the JCE stated:

Concerning public elections in Egypt and their results, both the executive power and some of the media agencies are used to proclaim that these elections are held under the supervision of the judicial power. This claim aims to sustain public confidence in the electoral process, particularly because people trust the impartiality of the judiciary. Egyptian judges are proud of that confidence and hope that public elections gain similar confidence. However, they regret to assert that their supervision of elections is ineffective and only symbolic. This is because judges’ role in elections does not exceed the supervision of general electoral centers. Hence, their role only includes counting votes and ‘totaling’ results. The fact is that voting processes are organized outside of judges’ ‘actual’ control. For these reasons, judges call for the amendment of the election laws, providing them with the authority to supervise and control all electoral processes, including both voting processes in voting centers and counting votes. Until then, judges insist that they be discharged of their supervisory task. The entire electoral process must either be given to the judges or discharged from them.


(12) Both the law proposal, and the memorandum sent by the JCE to Mubarak are mentioned in Annex 1 in El-Refai’e, 2000:290-300.

(13) The fact is that the general meeting call for prompt democratic reform could be considered a harsh criticism of the regime because both the president and the government usually insist that the specificity of Egypt’s problems dictates gradual reform.
Chapter Four
Defending The Independence Of The Judiciary

4-1 Introduction

As discussed in the previous chapter, the activities of the JCE concerning the independence of the judiciary and democratic reform cannot be easily separated. Moreover, the JCE activities directed at defending judiciary independence are themselves not easily categorized into discrete mechanisms. However, inspired by my interviewees’ opinions, I categorized the latter activities into two main groups. The first group are “grounding methods” for judiciary independence—those activities that judges see as the most crucial to expanding the independence of the judiciary in Egypt. The second group consists of “lobbying” or “supporting” mechanisms, which provide support for grounding activities and the greater goal of judiciary independence. Obviously these categories remain interconnected and overlapping, and they will be explicated further in what follows.

4-2 Grounding methods

An examination of the scope of JCE activities devoted to defending its independence suggests that its grounding methods include: a) the restitution of the Supreme Judicial Council; b) securing the JCE as a vehicle through which judges can continue working for judicial independence; and c) proposing laws and amendments that guarantee the independence of the judiciary in Egypt.

4-2-1 The restitution of the Supreme Judicial Council

As discussed in Chapter Two, the seriousness of the 1969 resolutions lay not only in the dissolution of the JCE, but also in the establishment of the SCJB as a means for government control of the judiciary. Although the JCE regained a certain amount of its autonomy in 1975, with the right to have an elected council, it has continued to struggle for the restitution of the SJC and to argue that judicial independence means that judges themselves must manage all judges’ affairs. On 13 March 1984, the JCE’s unceasing
demands resulted in government acceptance of law 35 for 1984, by which the judiciary regained the SJC.

Beginning in 1980, during the JCE chairmanship of Counselor Wagdy Abdel Samad, there was a continuing call for at least an amendment to the Judicial Power Law. For instance, there was a conflict between the JCE and the government over the enactment of the Law of the Protection of Values and the establishment of the Court of Values. During that struggle President Sadat visited the JCE and chaired its council meeting on 11 October 1980. He promised judges the amendment of the Judicial Power Law to guarantee the restoration of the SJC (*al-Ahram*, 12 October 1980).(1) The JCE never stopped working toward the fulfillment of that promise.

Although different judicial agents were involved in the discussions about restoring the SJC (e.g., at the general meeting of the Court of Cassation in 1982), the JCE often acted as the most dynamic agent behind law 35 for 1984 (El-Refai’e, 1991: 642-693). It was the JCE that sent memoranda to both the Minister of Justice (MOJ) and the Prime Minister of Egypt. (2) In March 1983, the MOJ proposed a law that was essentially a feeble version of law 35 that did not fully enable the SJC. The JCE took the lead in criticizing that proposal, with other judicial agents participating in only the final stages of the discussion (El-Refai’e, 1991: 645). (3)

The JCE used the media to pressure the regime to withdraw its vision for the new law. For instance, the deputy of the JCE published an article in *al-Ahram* in which he criticized the MOJ proposal. (4) The JCE also used its capacity to mobilize judges, announcing that the next general meeting would focus on the proposal for law 35 as prepared by the JCE, with full restitution of the SJC (respondents K, J, B, and N). Immediately after this general meeting was announced, the government decided to respond to JCE demands, and a series of meetings were held bringing the two parties together.

In 1984, when the JCE was under the council of Counselor Abdel Samad, political changes and the claims of Mubarak’s new regime opened up new spaces for democratic reform. The regime’s claims of commitment to democratic reform led the Prime Minster to support a compromise between the MOJ and JCE proposals.
Interviewees K, N, J, Y, and S emphasized that there were negotiations between the government and the JCE. In their opinions, and as it is noted by the JCE, it was the JCE that reestablished the Supreme Judicial Council. (5)

The two main advantages of the new law were the restitution of the SJC and new guaranteed immunities for members of general prosecutions, a first in Egypt. However, JCE judges did not feel that this was enough, because there was a concurrent expansion of the power of the MOJ in judicial affairs that challenged the newly restituted SJC. Key examples of this can be seen in the expansion of the MOJ’s role in appointing all Primary Courts chairmen and in its control over the Administration of Judges’ Inspection. Furthermore, the SJC was given a consultative, rather than an authoritative, role in several critical administrative matters (al-Qudah, January-June 1984: introductory page B).

As a result, the JCE was often positioned in support of the SJC as opposed to the MOJ. An apt example is the JCE’s mobilization of judges against the first Annual Shift for Judges’ Transfer [harakt al tanaqulat al- qada’yah] (6) in October 1985. The MOJ attempted to intervene in that shift, but met strong JCE criticism, as the JCE took the position that the annual transfer of judges was already under SJC capacity. As such, government (MOJ) intervention would have violated the new law 35 of 1984 (interviewees B and J).

Due to both the MOJ’s unrelenting interference in judges’ affairs and the overlooking of the Conference of Justice recommendations, the JCE took the position that ‘infrastructural’ solutions were necessary to ensure their independence. To this end, they put pressure on the regime by proposing laws that would guarantee the independence of the judiciary in Egypt, and mobilized judges to call for the enactment and implementation of these laws.

4-2-1 The struggle for JCE autonomy

Several interviewees indicated that securing the club was necessary to securing an unbound arena in which judges could work and speak for their independence. As a result, from the time the JCE regained its right for election on 19 June 1975, there has been
unceasing debate as to the jurisdiction of various NGO laws over the JCE. (7) At the core of these debates is the JCE stance that limiting JCE autonomy by executive supervision represents a direct attack on the forum in which judges can practice their freedom of expression and defend judicial independence.

Counselor Zakariya Abdel Azziz (al-Qudah, January-August 2002: 1) argues that the main mission of the JCE is to guard the independence of the judiciary and guarantee judges’ freedom of expression. Allocating any control of the JCE to the executive power would contradict the UN Basic Principles for the Judiciary Independence. According to Abdel Azziz, “the JCE’s independence was part of judiciary independence in Egypt. The supremacy of the Ministry of Social Affairs was contradicting the Supreme Constitutional Court rulings and the precedents of the Court of Cassation, as well as the law and the constitution” (al-Qudah, January-August 2002: 1).

In the 1980s and 1990s, despite NGO law supremacy over the JCE, the JCE continued to ignore the regulations of that law. Judges continuously insisted that the JCE did not fall under the supervision of executive authorities, as others, such as the Ministry of Social Affairs’ employees, did. Interviewee Y argues that the Ministry of Social Affairs’ control is no more than a cover for the police and particularly state security police officials. However, there was a JCE attempt to use the NGO law’s supremacy, in lawsuits by two members of the JCE in 1990 during which they requested guardianship for the JCE, as discussed previously. Another attempt also took place in 2001. (8)

In 1999, tensions between the JCE and the NGO law were raised when the SCC affirmed that NGO law 153 for 1999 was unconstitutional. (9) The annulled law had maintained that NGOs could not conduct any ‘political’ or ‘unionist’ activities, limiting the NGO sphere to social work and services. Once law 153-1999 was declared unconstitutional, the JCE declared in its general meeting that it was no longer subordinate to any NGO law, including the new one (law 84 for 2002).

In the general meeting on 21 June 2002, it was decided permanently that the JCE was no longer subordinate to the NGO law. Judges affirmed this as a ‘historic day’ because it confirmed JCE independence. That meeting concluded with two major decisions: 1) the affirmation that the JCE is absolutely not subordinated to any superior
authority; and 2) the suggestion that all means of discrimination among judges must be eliminated (Saber, 2002: 12-13). (10)

In spite of this ‘historic’ moment, however, there are still some unresolved problems concerning the relationship of the JCE to the NGO law, because despite the general meeting decision, two branches of the club had registered in accordance to that law (Tanta and Alexandria). In order to resolve the situation, in their general meeting on 8 April 2004, around one thousand judges in Alexandria met and decided to hold a general election to elect a new board in May and ensure their judicial independence. (11)

Three important points emerge from these events. First, judges in the JCE felt that their autonomy was necessary for their freedom of activity. Second, judges used general meetings as a powerful tool to undermine any external supervision of their club. And finally, judges never ceased fighting for their autonomy whenever they could, even when they were not entirely unified. The significance of the general meeting as a method/mechanism will be discussed further below, while the issue of ‘other’ discordant voices at the JCE will be considered in the next chapter.

It should also be noted that the issue of the JCE autonomy was at the core of the general meeting (12 March 2004) that I have chosen to examine below as a case study for the general meeting as a lobbying mechanism. However, since attacks on judges’ independence often came from myriad fronts, the JCE often felt that it was necessary to install a ‘genuine’ safeguard for judiciary independence. They concluded that they should pressure the regime by proposing laws for judicial independence. Law proposals, especially if implemented, are one of the JCE’s strongest grounding methods.

4-2-3 Proposing laws for the independence of the judiciary

I. Environment

During the research period, the JCE proposed two bills (January 1991 and April 2004) in which it articulated a concrete and comprehensive vision about an ideal law to guarantee their independence. It is important to situate the process of proposing laws within what may be called “the unceasing competition” that continued between the Ministry of Justice and the JCE.
Since 1984, there has been ongoing competition between the MOJ and the JCE (with occasional participation from the SJC) over who would prepare the new law for judicial independence in Egypt. It can be argued that the proclamations of the MOJ on this matter were ‘insincere,’ while the JCE ones were ‘honest.’ For example, from the beginning of 1990 until the present, the Minister of Justice has been announcing in the media and in public meetings with judges that a new comprehensive law for judicial power in Egypt would soon be enacted (recent examples include: *al-Ahram*, 28 December 2000; *al-Ahram*, 26 August 2002; *al-Ahram*, 5 December 2002; *al-Ahram*, 4 November 2003; *al-Wafd*, 6 November 2003). It was not until mid-2002 that the MOJ actually established a committee to draft that law, twelve years after the claims began.

Moreover, several judges claimed that the MOJ only established the committee in response to JCE pressure, and that the committee consists of mostly pro-government judges. Indicating support for these claims, additional JCE pressure eventually led the Minister to add two JCE council judges to the committee (*al-Quada*, June-December, 2002: 10).

Unlike the MOJ, the JCE took several concrete steps towards proposing new laws and addressed the issue in many general meetings. Due to the government’s overlooking of the Conference of Justice recommendations, proposing new laws for their independence became one of judges’ principal activities in their general meetings. For example, at a 25 November 1988 general meeting, judges proposed specific features that would go into a law ensuring judicial independence. (13) Although the chairman of the Court of Cassation was assigned to empower the JCE endeavor at that time, no steps were taken after the meeting. By the following general meeting on 15 December 1989, judges were unable to address the proposal for a new law, because the JCE council itself was up for election. (14).

The new JCE council, chaired by Counselor El-Refai’e, decided on 7 October 1990 to enact the previous recommendations, and called a general meeting for 22 November of that year. However, the chairman of the Court of Cassation (and the SJC) attempted to undermine this meeting with media announcements to judges that insisted that the law required more general meetings for discussion and that the judges should wait for a
different version of the law prepared by an SJC committee (al-Qudah, January 1991: 25). This resulted in the judges recommending that another general meeting be held, with stronger mobilization efforts behind it. That meeting took place on 18 January 1991, and was the forum in which a bill was approved amending the law for judicial power, based upon the JCE stance on judiciary independence.

II- The 1991 law proposal content:

The published version of that law (al-Qudah magazine, January 1991) contains the basic features of the JCE call for independence at that point, as it was prepared by a JCE special committee and approved by the 1991 general meeting. These basic features include: 1) maintaining that the judicial power should have an independent budget; 2) supporting the structure of the SJC and its capacities; 3) adhering to judicial inspection administration within the SJC’s capacity; 4) improving the role of the general meetings in the courts; 5) canceling all delegation of judges to non-judicial positions; 6) keeping the JCE solely and entirely under the control of judges; 7) guaranteeing new and objective measurements of the ‘delegation’ and ‘secondments’ of judges (15); 8) supporting the National Center for Judicial Training (and shifting the supervision of this center from the MOJ to the SJC; 9) improving the capacity of the general prosecution office to prepare civil lawsuits; 10) criminalizing any violation of judges’ immunities; 11) establishing the assistance of former judges in the judicial system; and 12) reorganizing judges’ insurance system.

It was noteworthy that the special committee established within the JCE to draft this bill included both judges involved with the JCE, and those others who were not, meaning prominent judges who were close to the MOJ (al-Qudah, January 1991: 7). (16)

The justification for the new proposed law can be understood from the explanatory notes [al muzakaera al’iedahiyyah] accompanying the proposal. First, with regard to the independent budget, the explanatory notes elucidated that all basic powers are independent except for the judicial. Other bodies that are part of the judicial system or that have similar functions are also independent, including the Supreme Constitutional Court, the General Socialist Prosecution Office, and the Central Apparatus for
Accounting [al-jihaz al-markazy lilmuhasaba]. The state did give some relative budgetary independence to the judicial power in 1976 while the judiciary was still controlled by the SCJB. However, complete independence for the judiciary means that the SJC should carry sole and entire responsibility for the judiciary. The establishment of the SJC by judges themselves supported the constitution. The essential argument was that the judiciary can and should be solely and entirely responsible for its functioning through an independent budget, which should be a separate item in the public budget of the state (al-Qudah, January 1991: 2-3).

With regard to developing the capacities of the Supreme Judicial Council, the law proposal called for adding two elected members to the SJC. The SJC is comprised totally of elected members, as delineated by law 36 in 1936. According to law 36-1936, the SJC consisted of four counselors elected by general meetings in both the Cairo Court of Appeal and the Court of Cassation. The new law proposal is inspired by these historical precedents. In addition, the explanatory notes establish that experience has taught that elected members are vital support to the SJC’s activities, particularly judicial reform.

As for improving the competencies of the SJC, the main rationale is that judicial affairs should be entirely supervised and managed by judges. Therefore, the bill proposed that all the consultative powers of the SJC be converted to actual authoritative powers. For instance, the bill suggested eliminating all language in the current (applied) law that states that the SJC “should be consulted” or that “the Supreme Judicial Council should approve” decisions related to judges. In addition, the bill suggested that a new administration should be added to the SJC, called the “technical secretariat”. Moreover, the bill proposed the Administration of Judges’ Inspection into the jurisdiction of the SJC, noting that this is similar to the case of state council members, as the administration of technical inspection on state council courts are not subject to MOJ control (al-Qudah, January 1991: 3).

The explanatory notes also emphasized the principle of independence among judges themselves with regard to the regulations for judges’ delegations and secondments. Law 56 for 1959 (a law affecting judges’ independence) and other related laws created serious problems for the equal treatment of judges. Particularly implicated in this is the increase
of policies empowering judges for non-judicial missions that affect their impartiality (al-Qudah, January 1991: 4). Other important suggestions and justifications were those related to JCE independence, and support for the general meetings in the courts, in conjunction with a decrease in the authority of the chairmen of the courts and the MOJ (al-Qudah, January 1991: 5).

III- The law bill of April 2004

On 29 March 2004, the JCE finished preparing a new bill for the Judicial Power Law. Work on this bill had begun at the JCE and was confirmed as an assignment to the board council at the 12 March 2004 general meeting, discussed further below. According to interviewees B, K, J, and N, it was necessary to prepare this new bill because the bill proposed in 1991 was never enacted (being ignored by the government). Their explanation (17) of the main features of the new bill are: 1) the formation of the SJC should be based on expanding its elected members; 2) the role of the MOJ with regard to the judiciary should be minimized, and the MOJ should have no relation to judges’ salaries and the arrangement of court circles and work; 3) the role of the general meetings in the courts should be broadened, and the SJC should be supervised by the democratic will of those general meetings; and 4) special regulations concerning the JCE would be added to the law, including allocating it part of the judicial power’s independent budget.

As published by al-Wafd newspaper (13 May 2004), the explanations of the law give more details. These explanations note that the components of the new law entail changing thirty-five articles of the current (applied) law for judicial power (law 46-1972). A significant addition to this proposal (where it differs from the 1991 proposal) is that the SJC is given the authority to appoint judges in Egypt. Similar to the 1991 proposal, this new bill also included two articles concerning the JCE, bringing the JCE under the Judicial Power Law. Another new aspect of the bill was the elimination of the title “counselor” for judges, so that all Egyptian judges will have the title “judge.” This element was added in response to abuse of the title “counselor” in governmental positions, and also because the unification of judges’ titles symbolizes and manifests the equal treatment of all judges. The new bill also proposed that all chairmen of courts
should be elected by the general meetings of the courts. This suggestion contradicted the 1991 bill which stipulated that chairmen be appointed by the SJC. Finally, the 2004 bill expanded the rights of the general meetings with regard to discussing and approving all courts work distribution.

In sum, the 2004 bill represents a more developed democratic perspective than the 1991 proposal. The main features of the law allocate greater rights to general meetings and eliminate the power of the MOJ. In addition, the bill calls for democratizing the structure of the SJC. The question remains of why there are differences between the 1991 and the 2004 proposals. Two interviewees, who are also drafters of the bill, felt that “there are no significant changes. However, most of the new modifications were added due to ‘experiences and developments’ since 1991.” According to interviewee B, the significance of the ‘experiences’ led the JCE to suggest democratizing the SJC. As he explicated: “Without this change, there will be no guarantee for the satisfactory execution of the new amendments. Even when judges have an independent budget and the Administration of Judges’ Inspection reverts back to the SJC, this will be nonsense if the SJC still consists of appointed members. For an acceptable implementation of the law, this is the first demand.”

The above discussion elucidates the crystallization of two different proposals up until April 2004, prepared by both the MOJ (supposedly) and the JCE. When I asked the chairman of the JCE and some of the drafters of the JCE proposal about the prospects of enacting the JCE proposal, they all emphasized the role of the JCE general meeting and their ability to pressure the MOJ by mobilizing judges. To this end the chairman, for example, planned to publish the proposal and distribute it to all Egyptian courts.

4-3 Supporting and lobbying mechanisms

In what were described as ‘grounding methods,’ (the restitution of the SJC, defending JCE autonomy, and proposing new laws for judiciary independence), the JCE often employed different supporting and lobbying mechanisms. Significant among them are the magazine *al-Qudah*, and the general meeting. After briefly describing how these
mechanisms were in support of judges’ independence, this section will conclude with a case study of the JCE general meeting of 12 March 2004.

4-3-1 The al-Qudah magazine

It can be argued that relative to other issues, judiciary independence takes up a great deal of ink in al-Qudah. The exception to this is those moments when the JCE is heavily focused on social service tasks. (18) These conclusions are based upon an investigation of twenty issues of al-Qudah published between 1985 and 2004.

That investigation also revealed that the magazine has four main tasks or charges. The first is the mobilization of judges, especially in the special issues linked to the general meetings. For instance, during the general meeting of January 1991, the magazine headline read “Egyptian judges hold the biggest general meeting in the history of their highbred club” and in the March 2004 issue the headline read “The JCE, as the sheltered castle of judges that is not subordinate to anyone other than judges’ consciences and general meetings, invites its members to persist on the path toward judiciary and judges’ independence.”

Not only do the magazine editors use enthusiastic statements to rally judges, but they also draw on comparisons between the current status of the judiciary and its previous more independent status, and on famous quotations or stories from the history of the judiciary in Egypt or in the world. An apt example is the use of a quote from a French judge who stated, “We need guarantees not more words” (January 1991: 6). Moreover, the issue of the 12 March 2004 meeting included excerpts from the speeches of the SJC chairman in 1984 that welcomed proposals and discussion of SJC decisions. These excerpts were placed in comparison to another speech given by the current SJC chairman (at the JCE general meeting on 17 October 2003) in which he refused to entertain any discussion of SJC decisions.

The special issues linked to general meetings typically emphasize mobilization through both their articles and in the extensive coverage allotted to all the basic documents required for the discussions in the meetings. For instance, the special issue of the 18 January 1991 general meeting included the following articles: an editorial titled
“The judges’ word” by Counselor Yehia El-Refai’e, the explanatory regulation for the 1991 proposal for a new Judicial Power Law, and the final draft of the proposed law’s text. In addition, the issue published a number of basic documents, including a memorandum from the Ministry of Social Affairs about the electoral rules for the board councils of associations subject to NGO law 32-1964 and a basic memorandum form recording all the JCE cases related to the subordination of the JCE to NGO law since 1963.

*Al-Qudah*’s second task is to provide a forum for dialogue among judges and legal professionals in Egypt. For example, the January-August 2003 issue contained three special set of articles concerning: a) the debate concerning the judicial bodies, b) comments on an earlier debate concerning the amendment of the Judicial Power Law, and c) a debate about judges’ health, social and retirement rights. The same issue included myriad other articles including two about JCE history, one about Counselor Yehia El-Refai’e, the JCE statement regarding the invasion of Iraq, and other legal news about the JCE and the meeting of the JCE council with the Minister of Justice.

The third role of the magazine could be called a declaratory one, encompassing announcements about events, seminars, or social services, and invitations to contribute articles or commentary to its pages. An example of these invitations is the one described above where all concerned citizens were encouraged to submit their proposals regarding the amendment of electoral law (*al-Qudah*, January-June 1990: 47). Another form of declaration is announcements about new social services offered by the JCE to its members, e.g., a new deal for car sales or a special publication about critical health conditions (*al-Qudah*, June-December, 2002). Other issues of the magazine included announcements about contracts for facilitating judges’ transportation and special offers with cell phone companies (*al-Qudah*, January-August 2003).

The fourth task with which *al-Qudah* is charged can be termed “urgent actions”—using the magazine as a vehicle to protect judges’ independence on the individual level. For example, in the January-June 1990 issue (pages 8-9), *al-Qudah* criticized the Administration of Judges’ Inspection for occasionally immediately interrogating judges about whom it has received complaints. The magazine argued that the Administration
should instead conduct its investigations to the greatest extent possible before interrogating judges.

As seen in all these examples, the issue of judiciary independence carries greater weight in the magazine as compared to other subjects. This assessment is based on both the quantity of documents devoted to judiciary independence and on the variety of ways in which judiciary independence is addressed. Even interviews are used to stress the independence question. For instance, a recent issue (January-August 2003: 16) included an interview with the ‘current’ (19) chairman of the Court of Cassation. Despite the fact that this interview was conducted immediately before a problem arose between the JCE and the SJC (as will be explained below) it was used to emphasize the magazine’s editorial policies and objectives. Only the chairman’s words concerning the urgent need for a new law for judiciary independence were highlighted. Quotations such as “I want the new proposed amendment of the Judicial Power Law to include an independent budget for the judiciary, allocating the Administration of Judges’ Inspection to the SJC, and relying on the assessment of judges regarding promotions” were highlighted. However, in spite of the significant role played by al-Qudah, the general meeting is still considered the JCE’s most direct and powerful activity.

4-3-2 General meetings:

As an assemblage of almost all Egyptian judges, general meetings are the main means by which pressure can be initiated through the mobilization of judges. As discussed above, the JCE’s capability to lobby judges is the most important factor supporting its other activities (proposing laws, defending JCE autonomy). According to informant J:

The ruling regime in this country is very suspicious of and fears any meeting of the JCE, particularly if the meeting is based on a single stance of all JCE judges. Such a meeting is without doubt the gathering of a group of the most intellectual elite in Egypt. I would argue that the government fears the gathering of one hundred judges in a Primary Court more than one thousand workers assembled
Examining the period from 1984 to 2004, it can be clearly demonstrated that the general meeting is the JCE’s most powerful lobbying mechanism. The incidents that support this claim include: 1) the case when the government accepted enacting the amendment of law 35 for 1984 concerning the restitution of the SJC; 2) the case of the 15 November 1988 general meeting where judges sponsored basic principles and proposals for new law amendments ensuring their independence; and 3) the cases of the meetings of January 1991 and March 2004 in which proposals for new laws were discussed with an emphasis on judicial independence. Even when there were clashes among different opinions within the JCE, general meetings are forums for different sides to make claims and demands (including both the JCE council and groups ‘opposed’ to it). An example of this can be seen in judges’ attempt to collect signatures in support of holding an exceptional general meeting to discuss salaries and set clear rules for the delegation and secondement of judges (al-Wafd, 30 December 1998).

Not only do general meetings provide forums for resolving internal disputes within the JCE, but they also provide space for both those who prioritize the issue of judiciary independence and those who would rather limit the JCE to social service issues. At the 22 November 1990 general meeting, the SJC chairman attempted to prevent the meeting from discussing a draft law for judicial power, and two judges even registered a legal plea (20) to suspend the meeting. In that meeting, conflict emerged between two opposing opinions: the JCE council’s desire to discuss the new proposed law, and those who prioritized other issues and wanted to postpone the meeting.

Another important observation that impinges on this discussion is that two of the three exceptional meetings in JCE history have been devoted to the issue of judiciary independence (January 1991 and March 2004, as opposed to the 28 September 1992 meeting). (21) The significance of the general meeting as a supporting and lobbying
mechanism can be best explained by examining a specific example, the goal of next section of this chapter.

4-4  Case study: The 12 March 2004 general meeting

4-4-1  Background

In 1975, the JCE regained its right to have an elected council. In 2002, it affirmed its independence from the NGO law. Finally, in March 2004, the JCE emphasized, “that it is no longer subordinate to any body, even the higher administrative judicial body in Egypt, which is the SJC.” The 12 March, 2004 meeting’s resolutions indicates the significance of this event.

It is very challenging to summarize the background to this March meeting. In brief, the meeting was born of a ‘clash’ between the SJC and the JCE, a conflict again centered on the question of JCE autonomy. At the core of the conflict was the issue of whether or not the SJC has the right to control the JCE in lieu of the NGO law. Other factors, explained below, were also at play, increasing the gap between two sides. In a sense, the gap emerged between two groups: on the one hand, those who criticize the SJC and defend the consistent independence of the judiciary based on the democratic participation of the JCE and its general meeting, and those who are high ‘official’ judges (the SJC). In order to continue clarifying the background to the March meeting, it is necessary to look at the different elements and events of this conflict.

The first of these took place on 28 October 2003, when the SJC decreed that any criticism, exposition, or comment on its decisions via any means other than legal petitioning constitutes a misdemeanor. Such a misdemeanor would contradict the conduct and duty of a judge, and would, as such, be subject to administrative discipline according to article 94 of the Judicial Power Law. This was a mere three days before the 17 October 2003 general meeting of the JCE.

The second element emerged during that October 2003 meeting. During that meeting, Counselor Fathy Khalifa, the chairman of the Court of Cassation, insisted that the JCE was no longer under Ministry supervision, but that it should be under the control of the
SJC instead. That meeting ended with the Counselor’s departure in the wake of severe criticism from senior judges in attendance. The following two quotes from speeches given at that meeting underscore that judges’ position that the JCE should not be subordinate to any body, even the SJC (22):

No body has authority over an elected council. The advantage of ‘our club’ is that it has an elected council and it has members who can check on/monitor this council. The club has a sole superior authority, which is the general meeting. However, the Supreme Judicial Council, for whose independence we have been struggling, consists of appointed members, and it became a ruling council. The SJC has no authority over the JCE council. The law of the club is to refer to ‘our’ general meeting, which has the capacity to even endorse decisions that contradict the JCE council itself.

The JCE is an aspect of the independence of the judiciary and it shields that independence. It is true that there is a Supreme Judicial Council that defends judiciary independence. However, several councils protect judicial independence, and others pay no attention to the independence issue. For this reason, the only body capable of protecting the independence of the judiciary in Egypt (and in any part of the world) is the union of judges (whatever it is called: a union or a syndicate or a club as is the case in Egypt). This club is our genuine shield, as it often has been in its history. It is impossible for any body (the JCE council, the Ministry of Justice, or the entire state bodies) to refute the word of the JCE general meeting. The shield of independence is in this [the general meeting] and nothing else.

These October 2003 speeches broadened the gap between the SJC chairman and the JCE for two main reasons. First, because the speeches were given by judges who are well-known for their role in defending judiciary independence, who played a significant role at the Conference of Justice, and who have been members of the JCE council. (23) Their speeches were supported by the general meeting. The second reason is that the SJC chairman decided to ‘discipline’ the critics for their opinions, essentially attacking their
freedom of expression in the JCE general meeting. This issue of ‘discipline’ thus took a place alongside the SJC insistence on controlling the JCE. (24)

The third element in the clash between the SJC and the JCE prior to the March meeting highlights the role of the political atmosphere in the ‘struggle’ between the SJC and the JCE over judges’ freedom of expression and autonomy. This story, introduced in the previous chapter, begins with the two conflicting decisions within the Court of Cassation regarding the definition of ‘judicial bodies.’ The key problem was that one of the decisions was made by the circle of the chairman of the court (Counselor Khalifa). The other decision was made by the circle chaired by Counselor Al-Ghorinai. Khalifa’s circle affirmed that judicial bodies are part of the judiciary, and that therefore they could supervise elections in accordance with the constitution. Al-Ghorinai’s circle instead insisted that these bodies are not part of the judiciary, and that it is therefore unconstitutional to authorize them to supervise elections. In essence, the former circle (Khalifa) asserted the government’s definition of these bodies, while the latter (Al-Ghorinai) asserted the opinion of the majority of the JCE.

Political tensions were particularly high because Al-Ghorinai’s decision declared the illegality of the election of a member of the ruling party, Dr. Zakariya Azmy, President Mubarak’s secretary. The significance of the clash was magnified because the chairman of the court attempted unsuccessfully to intervene in the ‘opposing’ circle’s decision and because the event was covered extensively by the media (25) (e.g., *al-Ahram* weekly, 14-20 August 2003; *al-Arabi*, 15 February 2004; *al-Wafd*, 19 February 2004).

These three events—the SJC decree, the October 2003 meeting incident, and the conflicting court decisions—combined to enlarge the gap between the SJC and the JCE. They also underscored the significance of JCE autonomy and judges’ right to freedom of expression to the SJC-JCE conflict.

4-4-2 The preparation of the meeting

As a result of this growing conflict, the JCE council worked towards conciliation with the SJC on two major issues: the development of notices, and the question of JCE autonomy. While the first issue resulted in two senior judges submitting petitions to the
SJC in which they criticized using ‘warning’ (the recognized legal mechanism) in an issue of freedom of expression, the latter was dealt with by the JCE. In order to prepare for the 12 March 2004 general meeting, the JCE council employed several strategies to mobilize judges.

The first of these was a published invitation booklet for judges that included all the basic documents and explanations of the agenda items. The booklet also emphasized that this meeting was for all Egyptian judges and that it was concerned with freedom of expression for every judge. The invitation/booklet was ‘a message to every judge in Egypt’ and was mailed to judges (al-Wafd, 4 March, 2004). The second mobilizing strategy employed by the JCE council was to lobby judges before the meeting, via personal visits to many courts in Egypt.

The invitation/booklet (26) insisted that despite the escalation of the conflict between the SJC and the JCE, the conflict was simply a mere legal dispute over two issues. The first legal dispute concerned whether the SJC had the right to succeed the Ministry of Social Affairs in the supervision of the JCE, and the second concerned the limitations on freedom of expression at the JCE general meeting. This was described as part of a broader constitutional debate. The invitation/booklet stated, “It is a basic constitutional principle that every syndicate or association member has the complete right to express his/her opinion in their general meeting. Moreover, this is a necessary requirement for the proper construction of the opinions of these syndicates and associations.”

The agenda of the meeting included discussion of: 1) the nature of the relationship between the SJC and the JCE and its general meeting; 2) the guarantees for judges’ freedom of expression in the JCE general meeting; and 3) discussion of all other proposals submitted by members to the JCE headquarters at least three days prior to the general meeting. On the day of the meeting a special issue of al-Qudah magazine was prepared that included additional comprehensive documents about the meeting and the legal nature of the dispute as well as its implications.
4-4-2 Meeting structure and discourse

Two main points should be noted before I turn to analyzing the structure and discourse of the March 2004 meeting. First, the meeting highlighted the concept of deliberation [moudawalah] among judges in their courts before declaring their decisions. In every court circle judges should confer before declaring their final decision. The attempt to attack their right to speak freely was conceived not only as an attack on their freedom of expression, but also as an attack on their ‘judicial’ performance and independence. The link between these issues resulted in extremely angry and enthusiastic discussions at the March general meeting.

The second point is that the March general meeting included several ‘supplements’ to support its mission. In addition to lobbying prior to the meeting (27), one of the key supplements was the mobilization of senior judges (both retired and working judges) who had credible influence on junior judges. In spite of the fact that relationships between senior and junior judges may be tense in court settings, in the general meeting these relations were employed toward the success of the meeting. By its end, for instance, during a discussion of the issue of notices, a young judge said, “Now they are doing this with our seniors. So, what they will do with us, young judges.”

In terms of the organization of the meeting, the chairman of the JCE led the meeting in lieu of the chairman of the Court of Cassation (who announced that he would be traveling outside the country). The meeting was held from 2:30 to 4:30 pm in a large special hall on the street of the JCE headquarters. There were approximately two thousand attendees. (28) The chairman opened the forum, several judges spoke, and the meeting began. The speakers included a representative distribution of several categories of judges, i.e., it included senior (working or retired) and junior judges, those who work in Primary Courts as well as those from Appeal or Cassation Courts. Also vocal were several representatives from the JCE branches in Egypt and several prosecutors. The average time given to speakers was three to five minutes, with most of the speakers having previously submitted requests for the floor.
The discourses utilized in the meeting took many forms, though all were directed at the same end. One form was the use of ‘exciting’ or otherwise stimulating statements, for example: 1) “This gathering is the most reputable gathering expressing democracy in this country”; 2) “Today the word is yours”; 3) “The JCE is the last foundation on which we can speak freely, as we cannot speak freely elsewhere”; 4) “We will be satisfied to receive notices for speaking the truth and following God’s orders, there is honesty in respecting God’s commands”; and 5) “Our choice tonight is between freedom and silence.” Some of these discourses drew upon Islamic reasoning, including: “Speaking truth is part of believing, and there should be no obedience for human beings to things that contradict the Creator’s commands [la ta’a limakhouq fi masyat al khaleq].”

The second form of discourse was legal argument. Examples of this include: 1) Confining the JCE’s freedom of activities contradicts its Bylaws; 2) the Judicial Power Law is very clear concerning the jurisdiction of the SJC, and this does not include supervising the JCE; and 3) according to international human rights conventions, the general assembly of any body or organization should be a space where its members can articulate any of their concerns.

Judges also used logical claims, such as the following statements: 1) It was the JCE’s that struggled for its autonomy and for the independence of the judiciary within the 1960s dictatorship until the “massacre of the judiciary” happened. The JCE has been struggling since that time for the same reasons. How can we deny the JCE autonomy after all these years and struggles!; 2) How can the SJC control the freedom of the JCE, while the latter has fought and still fights for the empowerment of the SJC as part of judiciary independence in this country; 3) How can the JCE substitute the supervision of the Ministry of Social Affairs for that of the SJC; 4) How can judges defend citizens’ rights if they are deprived of their own freedom of expression; and 5) How could the JCE defend judiciary independence if it were restricted by any body, even if this body were the SJC or the JCE council itself (this was supported by sarcastic examples such as: “Should the JCE ask the SJC when it wants to publish a book or organize a trip? Afterward, if we refuse the instructions of the SJC concerning that trip, will we receive notifications?”)
In general at the meeting, many judges and the JCE council were prepared to propose some practical suggestions. The meeting also included extensive legal interpretation. For example, a proposal was made that the Bylaws of the JCE or the law of judicial power be amended to clearly grant JCE independence. Several participants submitted proposals to include particular textual amendments. An example of the complex legal analysis is an analysis offered by Counselor Fouad Fahmy Al-Gazae’rli (a former member of the SJC and the chairman of first the Alexandrian then the Cairo Courts of Appeal) concerning the nature of SJC supervision over judges’ affairs and the nature of the general assembly. As Counselor Al-Gazae’rli explained:

The Supreme Judicial Council is the council of chairmen. In spite of the fact that they are judges (our senior brothers), they are appointed to that council because of their positions, as most of them are the chairmen of courts. For this reason, the SJC is doing an administrative job and its nature becomes administrative. Hence, its responsibility is to manage judges’ transfers, promotions, delegations, and related things. They cannot intervene in other ‘objective’ judicial work of judges. Otherwise, there will be no independence for judges, as they will lose their independence from their superiors. This is very similar to cases where a general meeting of a court delegates some of its capacity to the court’s chairman. If an authorization is given to a chairman from his court, this should be understood as an exception that cannot be extended. The fact is that it is not substantiated that the authority of any general assembly in any law can be substituted by anyone. This is illegitimate and undemocratic. Individuals cannot substitute for a general meeting.

We wonder how ‘we’ can be deprived of our freedom of expression to discuss our issues in the most democratic space available for this purpose, the general meeting! Here we are returning power to its owner, the power to discuss judges’ issues at the JCE belongs to the general meeting. Only the general meeting has the right to discipline its members with regard to speeches delivered at its meetings.
In sum, the meeting attempted to maintain a relationship with the SJC, while still emphasizing the autonomy of the JCE. In his opening speech, the chairman of the meeting stated:

There are two main issues that should be addressed today. The first is appreciation for the SJC and its role. Supporting the independence of the JCE supports the independence of the judiciary and the SJC. The second issue is that the general meeting of the JCE should not be subordinate to any power. This includes the SJC and also the JCE council.

4-4-3 The Main Resolutions:

The meeting concluded with several resolutions, described in what follows. It should be noted that these recommendations were sent to both the Minister of Justice and President Mubarak. The letter sent to the Minister informed him that the general meeting suggested that the process for preparing a new law for judiciary independence should be accelerated, and that they had assigned the JCE council to oversee this process. The letter sent to Mubarak informed him that the general meeting decided that it would organize another Conference of Justice and that they would appreciate his sponsorship. (29)

Reviewing the process by which the meeting was called, several ‘smart’ notes were created to maintain compromises with the regime and the SJC, while also respecting the general meeting’s resolutions. These memorandum included: 1) a note sent to Mubarak stating that the meeting supports him in refusing democratic reform by pressure; 2) notes saluting both judges who were reprimanded for their courage and histories of defending judicial independence (this despite the fact that the meeting also suggested that the issue of the notices sent to senior judges could only be discussed in the courtroom); 3) statements from all the speakers acknowledging the courage and role of attendees in defending the right to freedom of expression in the general meeting; and 4) a casting of the initial conflict by the JCE council as a struggle between the JCE general meeting and the SJC and as a mere legal dispute. This dispute was also described as a question of democracy and freedom of expression for the general meeting.
According to the general meeting’s final statement, the meeting resulted in judges confirming the following: (30)

1. That the JCE is not subordinate to or under the supervision of any body but to its general meeting. Judges cannot be deprived of their right to criticize any law or decision that is linked to their affairs. Furthermore, they shall not be able to be reprimanded for opinions they express during discussions at the JCE, as that is their only forum of assembly and the forum that represents their speech.

Moreover, the JCE council is charged with accelerating the process of preparing the amendment of the law of judicial power in Egypt. The new amendment should legalize judges’ freedom of expression and should grant the JCE this right. The law should also establish all private associations of judges as branches of the JCE in all issues related to the common affairs of judges and the judiciary.

2. That the salaries and allocations of judges should be reconsidered in order to correspond with rising prices, and in order to guarantee—as much as possible—a good and secure standard of living that matches their status and the dignity of their positions.

3. That the constitution of the Supreme Judicial Council be supported through the addition of a number of counselors from the Court of Cassation and Court of Appeal. The general meetings of Egyptian courts via an electoral process should choose courts’ chairmen. Supporting the SJC should also include its jurisdiction over all judges’ affairs, seeking SJC approval in all the mentioned affairs, and that the two inspection administrations (both the inspection over judges and prosecutors) should be under the supervision of the SJC.

4. That all the rules for delegations and secondements and transfers of judges should be identified, and precise measures should be taken with regard to appointing judges, in order to guarantee selection of the best judges.

5. That judges’ right to sue should be granted on two levels (including their right to appeal), and that this includes all their requests, lawsuits of discipline and suitability, requests from the JCE, and appeals to the decision of its council.
4-5 Summary

This chapter explored the JCE as a space where judges are defending the independence of the judiciary in Egypt. Special attention was allotted to the logic and mechanisms through which the JCE has worked to defend judicial independence. I referred to the first type of mechanism as “grounding methods” and to the second as “supporting mechanisms.” The “grounding methods” included: 1) fighting for the administrative independence of the judiciary through the restitution of the SJC; 2) proposing new laws in order to pressure the government to implement judicial reform; and 3) defending the autonomy of the JCE itself. The “supporting mechanisms” included: 1) using media (e.g., the JCE’s magazine *al-Qudah*) and 2) organizing general meetings to mobilize judges. The second part of this chapter included a case study of the 12 March 2004 general meeting of the JCE. Whereas the concern of the impartiality and judges’ reputation was the core of judges’ rationalization for defending democracy, legal and Islamic reasoning was key input in their discourses claiming for their independence.
Notes to Chapter Four:

(1) According to *al-Ahram* (12 October 1980), Sadat blamed judges for their criticisms of the Court of Values, arguing that they had criticized a “mere draft” of the law. An analysis of the discourse of the JCE meeting chaired by Sadat on 11 October 1980 indicates that tensions were high because at that single meeting Sadat was aiming to quiet judges’ anger over the Court of Values, while the JCE was articulating its demands concerning the restitution of the SJC. It can therefore be inferred that the dialogue included bridging the regime’s demands on the judiciary and the JCE’s claims of the judiciary, as its “popular” representative.

(2) In 1984 the Prime Minister of Egypt was Fou’ad Mohhi Eddin.

(3) There existed a struggle via legal discourse between the JCE and the MOJ concerning the shape of and need for reconvening the SJC. For instance, the JCE council studied a memo sent by the Minister of Justice (at that time, Counselor Mamdouh Attiaya) over several sessions (3, 4, 10, and 20 March 1983). The JCE council eventually produced a harsh legal criticism of the MOJ proposal. Their main criticisms were that the MOJ had ignored a comprehensive proposal submitted by the JCE (which had been approved by the general meeting of the Court of Cassation in 1982), and that the MOJ proposal included minimizing the SJC’s jurisdiction (the JCE wanted a very democratic SJC whose decisions were subject to appeal). Also, the MOJ proposal retained its power over the judiciary. The JCE memo was sent on 4 April 1983 to both the Prime Minister and the MOJ (El-Refai’e, 1991: 645).

(4) In his article in *al-Ahram* (19 January 1984) Counselor Yehia El-Refai’e reviewed the history of the SJC from its establishment in 1943 through its dissolution in 1969. He also reviewed the proposed law (later known as law 35-1984). He argued that the new law was an accomplishment for Egypt, because it would reinstate the SJC as a new formation consisting only of judges, and because it extends the immunities granted to judges to all Egyptian prosecutors. However, he also criticized the new law because it decreases the jurisdiction of the SJC, while extending that of the MOJ.

(5) The fact that the JCE played the most significant role in reinstating the SJC was mentioned by all judicial bodies in different situations and even by most of the chairmen of the SJC itself. The first JCE general meeting after 1984, for instance, was held to commemorate the JCE’s role in that matter. In that meeting, the first chairman of the SJC, Counselor Adel Burhan Nour, chaired the JCE meeting and emphasized the significance of the JCE’s efforts to the reinstatement of the SJC (*al-Qudah*, January-April, 1985: 15).

(6) At the beginning of every judicial year, all Egyptian judges must either be redistributed to different Egyptian courts or re-located to their courts. The Annual Shift for Judges’ Transfers is the process by which the SJC announces the lists of judges’ transfers
into different courts in Egypt. This shift should be done in accordance with judges’ administrative records and their right to promotions.

(7) According to an internal formal note at the JCE (concerning the history of the implementation of the NGO law over the JCE from 1964 to 1990, published in *al-Qudah*, January 1991: 20), the chairman of the Court of Cassation in 1975 (Counselor Gamal Al-Marsafawy, as the legal guardian who was appointed by the Cairo Urgent Court to supervise the JCE until the 1975 election) insisted that the execution of the first free JCE election on 19 June 1975 would take place while ignoring the NGO law.

(8) The reason why some of JCE members attempted to invoke the NGO law in the JCE elections in 1990 and in 2002 was often an “electoral” one, according to Counselor Zakariya Abdel Aziz.

Also the tension in 2001 was significant because it addressed a problem between the JCE and the SJC. This led to the 21 June 2002 general meeting during which the JCE decided that it was no longer subordinate to the NGO law. The debate and documents are mentioned in Zakarya Abdel Azziz, 2002, *il qudah al kalema al-a’kheera*, Judges have the final word, electoral papers, the JCE, June 2002.

(9) The ruling of the Supreme Constitutional Court on 5 June 1999 affirmed that law 153-1999 was unconstitutional. It was indicative that this SCC verdict canceled an administrative decision regarding the control of another judicial club, the club of the SCC counselors themselves. This verdict was based on the following: “The nature of the judicial work of the SCC counselors imposes a particular conduct and behavior in their private and public lives, and this means that they should have a private club, in which they can meet to discuss their concerns and through which they can socialize (*al-Qudah*, June-December, 2002, 12). This ruling was based on the same logic as the Court of Cassation annulment of the “massacre” verdicts concerning the JCE.

(10) The 21 June 2002 general meeting also re-elected the list of Counselor Zakariya Abdel Azziz as the chairman of the JCE.

(11) Based on a statement signed by over two hundred judges, and another statement by the chairman of the Alexandria Court of Appeal, who responded to their request, a general meeting was held in the JCE branch in Alexandria to elect a new council and to end the NGO law’s jurisdiction over that branch.

(12) The MOJ committee for drafting a new law for judicial power was established by ministerial decree number 2840-2001. However, the Minister added two members from the JCE to the committee (the chairman, Counselor Zakariya Abdel Azziz, and a member of the council, Counselor Hisham Ahmed Fou’ad Jeneena). This addition took place by ministerial decree number 5663-2002 (*al-Qudah*, June-December, 2002: 10).
In the 25 November 1988 JCE general meeting, judges assigned the chairman of the Court of Cassation to work on drafting a law based on the basic features they had proposed as the foundation for a new law for judicial independence. They also charged him with drafting a new proposal for amending the JCE Bylaws, targeting the removal of any disagreements between the JCE and the SJC in the future. Judges recommended that a special committee be formed for this task and that a general meeting of the JCE be held. However, the chairman of the Court of Cassation at that time (Counselor Mohamed Ahmed Hamdi) did nothing, while attempting to establish another committee through the SJC. This is mentioned in a statement released by the council of the JCE on 21 November 1990 (al-Qudah, January-1991: 26). The relevance of this note is that it indicates the existence of two different views inside the judiciary itself: the judges’ administrators (the SJC), and the JCE. The “problem of judges’ representation” in Egypt will be analyzed in Chapter 5.

It also could be deduced from the same aforementioned statement (al-Qudah, January-1991: 26) that one of the main reasons for postponing the judges’ endeavor to prepare a new law for judicial independence from 1988 to 1991 was the change in the council of the JCE, after the first period of Counselor El-Refai’e.

Delegation [al-entideab] is the process by which judges are mandated to work in governmental offices or in judicial work outside their court (while they still have their original judicial job). Secondment [al-i’era] is the process by which judges can be mandated to work in another country (mostly Gulf states), leaving their original job. Both processes entail extra financial benefits for judges. Both the SJC and the MOJ have the upper hand in selecting judges for these processes. Hence, many judges complain that the extension of these processes without clear and objective measures breaches judges’ independence. Details of how these processes affect judges’ salaries and independence will be taken up in Chapter 5.

The drafting committees of the law proposal of 1991 included members and former members of the JCE such as: Counselors Wagdy Abdel Samad, Yehia El-Refai’e, and Ahmed Mekky. The committee also included judges who are delegated to work in the MOJ such as Counselors Serii Syam and Fathy Naguib (al-Qudah, January 1991: 7).

Due to the fact that I was out of the country during the final stages of the drafting of the 2004 proposal, I asked some of my interviewees who were involved with drafting that bill to give me information about the basic features of the law before I departed.

As will be explained in Chapter 5, there were shifts from time to time in the JCE’s prioritization of activities. These shifts were usually between a focus on judges’ social service issues (arguing that this is part of the independence of judges as individuals) and a focus on the broader cause of the independence of the judiciary (as a system). These shifts were clear in al-Qudah.
(19) The chairman of the Court of Cassation and the SJC at the time of writing this thesis is Counselor Fathy Khalifa. He will play a role in opening the 12 March 2004 general meeting, as will be explained below.

(20) The legal basis by which two judges sued the JCE council was the fact that the JCE council was no longer representative of JCE members (because of the postponement of the election). Those judges initiated a lawsuit in which they requested the guardianship of the JCE. Because the JCE council ignored the lawsuit and held the meeting, the ‘opposing’ judges attended the meeting in order to argue for its ‘disqualification.’

(21) The 28 September 1991 general meeting will be discussed in Chapter 5. That meeting also raised ‘mottos’ about JCE autonomy and judiciary independence, although several judges argued that some ‘private’ claims (for the JCE council) were behind the meeting.

(22) The two quotations are from the speeches of Counselor Ahmed Mekky (al-Qudah, 12 March 2004: 25) and Counselor Hossam Al Ghoriani (al-Qudah, 12 March 2004: 28).

(23) They are Counselors Ahmed Mekky and Hossam Al Ghoriani. Part of their criticism is mentioned in their above quotations.

(24) On 28 January 2004, Counselor Khalifa sent notices to his critics, as the chairman of the Court of Cassation. Not only did he blame them for their criticism, but he also argued that what they did could be considered crimes of reviling and aspersion [sab and qazf]. The notice is a disciplinary mechanism for judges that may be directed from the chairmen of courts to their inferiors (according to article 94 in the Judicial Power Law). In his notice, Counselor Khalifa indicated the use of surveillance, stating that the recorded (audio and video) speeches of his critics were evidence of their criticism of the SJC.

(25) Counselor Al-Ghorinan and his colleagues (five counselors in his circle at the Court of Cassation) refused to change their decision after a memorandum from the chairman of the Court (in which he asked them to re-examine the case). This circle not only refused the appeal of the chairman to re-examine the case, but also decided to re-issue the original appeal, annulling the election in that electoral constituency and sending it to Parliament. This was on 9 February 2004. The appeal from the chairman of the Court of Cassation appears in electoral appeals numbers 959 and 949 for 2000. In that decision, the circle affirmed:

“According to the International Declaration for the Independence of the Judiciary, judges are independent in making their decisions, similar to their colleagues. It is illegal for any hierarchal system within the judiciary or any superiority among judges (whether this superiority is due to grade or experience) to affect any judge’s opinion. Judges’ opinions and decisions should be made freely. Judges can practice their function either individually or collectively under their complete responsibility, according to the rule of law in their national legal system.”
(26) All the basic documents concerning this meeting and its introductory events are collected in “Message to Egyptian Judges: The Basic Invitation Booklet for Judges to the General Meeting of the JCE in March 2004.”

(27) In the days before the meeting, I visited the JCE many times. During these visits every single employee spoke about the work required to prepare the meeting. The JCE council members were busy, so I could not speak with them.

(28) There were different estimates for the number of attendees. According to several respondents, despite the availability of a record for attendee signatures, not all the attendees signed that record. According to those interviewees who attended the meeting, as well as my own assessment, there were no less than two thousand attendees.

(29) Interviewee B informed me that following this letter, the Minister of Justice asked the JCE to report to him all the developments that had emerged since the recommendations of the Conference of Justice. This could potentially be a charge from the President, to be fulfilled before he responds to the JCE request.

(30) The preamble of the meeting resolutions emphasized the significant work of the JCE. For instance, it stated:

Judges of Egypt, gathered in their general—exceptional—meeting on 12 March 2004, in the castle that was by their perseverance in 1939, the place that was celebrated by the King of the country and the Prime Minister of that time; the creator of the first law for judiciary independence in 1943, and the struggler for the restitution of the Supreme Judicial Council through law 85 for 1984, and the sponsor of the ‘first’ Conference of Justice in 1986, and the maker of the law bill for the amendment of the Judicial Power Law, that guarantees the financial and administrative independence of the judiciary while also ‘sustaining’ the role of the Supreme Judicial Council. As the sole field on which judges can express their freedom of expression, their hopes concerning their nation, and as the asylum of judges where several Presidents, Prime Ministers and Ministers of the Republic have visited them.

They were concerned by the attempt to limit the independence of their club, to subordinate it to any side, and to impose censorship of the ideas and opinions of judges during their discussions about their affairs….”
Chapter Five  
The Contradictions of the JCE:  
A Constraining and Empowering Space

5-1 Framing chapter five

The previous two chapters explored the JCE’s actions with respect to the rule of law and the independence of the judiciary. Why the JCE’s actions in these areas were limited and confined goes beyond the government’s neglect of the recommendation of the Conference of Justice or the judges’ proposal for supervising public elections. An exploration of why the JCE’s actions were limited and confined should investigate a series of different dimensions that constrain the JCE structure and its members’ roles as well as other aspects that are located in the wider sociopolitical context within which the JCE moves. Such an investigation can explain why the JCE almost ‘crashed’ (1) several times in attempting to function according to its role in the public domain on the one hand while it was remarkably active in these areas on several occasions on the other. One question that arises is whether these different success rates are a result of the change of the board council of the JCE or another social dynamic that extends beyond the make-up of the board itself.

This chapter argues that in 2004, the Egyptian government has been in a critical situation in which it has been asked to go through democratic reform. This is because of internal capitalist needs and imperial pressures. However, it cannot endure these changes because such reform may affect the stability of the state and impair its interests. The judicial reform issue in particular is very messy, as the regime tends to reduce the predicaments that the judiciary will address to the sphere of lawsuits in the Egyptian courts, as if lawsuits are the only existing judicial “problem.” The regime is hesitant in all other profound kinds of judicial reform. Particular conflicting capitalist and imperialist interests are backing the regime in its ‘blundering’ concerning the judicial reform question. The above, which I will refer to as the “socio-political context,” is the first context of confinement that controls the space of the JCE movement.
The second context is the structure of the JCE itself. This chapter argues that the structure of the JCE and the nature of its position within the judicial system exists as a “meta space” in that it is neither merely confined such as other spheres of the judiciary nor is it a completely free branch of the judiciary. As such, it does not belong easily to either the structure or to the super-structure that creates some contradiction in its socio-political positioning. In particular, the JCE is supposed to be fair and impartial while it simultaneously cannot move beyond the hegemonic discourse of the dominant regime. The JCE is asked to move only within the realm of the dominant culture that plays a significant role in social control and that keeps state power in place. To build my argument, I will explore three main issues within the work of the JCE that play a key role in shaping this contradiction. They are the problems of representation, the problem of identity, and the problem of the agent/structure in the JCE milieu.

The third context that contributes to the confinement of the JCE’s role is the contradicting situation of its members themselves, i.e., the judges. In reality, judges are part of the intellectual and moral leadership that is very tied to the hegemonic class and is asked to defend the interests of hegemonic class or compromise between the latter with other social forces in the social or ideological struggle in the society. The fact is that judges are requested to play two contradicting roles at the same time: to protect the hegemonic legitimacy of the state (when they are asked in their daily life to apply the laws of the dominant class) and to protect their own legitimacy that is based on supposedly being fair and impartial. The first role (protecting the hegemonic legitimacy of the state) leads them to lose some social credibility, which is at the core of their social legitimacy. In particular, this chapter will explore why judges are imprisoned by their class (broader socio-political status) and by the hegemonic ideology of law enforcement in Egypt. In conclusion, this chapter will explore some of the key clusters of contradicting ideologies and beliefs in the judges’ perceptions.
Legislation does not reflect the majority will, but rather the particular majority of the congress [the parliament in this thesis’ case] at a particular moment--and legislation is product of a highly skewed procedural process that shuts out a number of options and predisposes the result in a highly anti-democratic ways. As a result, there is no such thing as the legislative intent (Silverstein, 1994:475).

This quote suggests to what extent the process by which laws are enacted are complicated. What legal analysts see as an ‘untainted’ legislative and judicial consideration should be viewed as compromises of class conflict and interests. Hence, the complexities and the tensions among the different fractions of the ruling class, due to their conflicting needs, are part of the larger question related to judicial reform. In fact, while it is assumed that all fractions in the capitalist class are jointly seeking the maximization of the benefits that they should acquire as members of the (exploitative) dominant group, they have different conflicting viewpoints on this maximization. In addition, the competition, and the inconsistency of these fractions with the ruling institutions results in different conceptions of the regulations needed at a particular historical moment.

As discussed in chapter two, there is a margin of judicial independence which is employed in constantly shifting ways due to socio-political changes and pressures, and the varying needs of the Egyptian ruling class. However, this section will explore some key elements of what the Egyptian government wants from the judiciary today, which can clarify the socio-political complexities surrounding the domain of the JCE.

The above assertion concerning the different networks and conflicts among the ruling class affects the formula of enacting laws. Even when capitalist groups are ‘united’ to maximize their benefits, particular changes in the socio-economic or political moment
complicate the law enactment process. Most recent examples indicate that the law enactment process is changing due to different conflicts and needs of either different capitalist groups or the particularity of the social or economic moment. While some laws were rapidly passed, in other moments they were very gradually endorsed. In fact, the fear from social tensions that might be raised because of particular laws makes it difficult to ratify these laws. Examples of these laws are the new Labor Law (12-2003) and the Tenant Law (96-92) in agricultural lands. It took 12 years since the beginning of the adjustment programs to enact the new Labor Law. The parliament passed the Tenant Law 6 years after the start of the adjustment programs. The latter required 5 years as transitional period for tenants before its real implementation began in 1997.

In other cases, there was a more rapid process of enacting laws that benefited the capitalist class. Examples are that in 2002 alone, four new laws were enacted to encourage investment. These are the laws for “Encouraging Investment,” “The Special Economic Zones,” “Money Laundering,” and “Copyrights” (al-Ahram newspaper, December 22nd, 2002). In only four months in 2003 (from January to April) four new laws were enacted to encourage investment. These are the “Law For the Guarantees and the Motivations of Investment and Amendment of the Law of Customs,” the “Law For the Electronic Signature and the Establishment of a Commission For the Information Production,” and the “Law For Tourist Goods (al-Ahram Newspaper, April 23rd, 2004).

The question here concerns how the contradictions in a capitalist society affect the margin of independence of the judiciary. A simple answer is that capitalist contradictions find their way to shape what is needed concerning judicial reform. In fact, it could be argued that the contradicting needs of the capitalist class leads it to inconsistently call for reforming the existent judicial system and at the same time create alternative forms for solving ‘legal disputes.’

Brown (1997: 238) argues that while the Egyptian legal framework is hardly an entrepreneur’s dream, in recent years the spread of arbitration has increasingly allowed some business actors to choose their own paths and sometimes their own laws, by passing rather than reforming the indigenous legal system. Also, capitalist groups have developed creative tools to make courts more useful. Besides, these creative tools enable capitalist
groups to use courts in the same way as other middle class litigants. The result indeed in all cases is to make the existing system work to their advantage (Brown, 1997: 223).

In general, while economic interest needs an extended version of independence of the judiciary, the same ruling class requires that the judiciary should function with respect to the laws that protect that class. However, at the same time, the capitalist class will be disappointed if this extended margin of the independence of judiciary will affect its interests (or will require them to make some substantial sacrifices of their interests).

Besides, as there have been outside pressures over the Egyptian ruling class that go further in requiring more ‘sincere’ and actual democratic reform, the Egyptian ‘ruling class’ has been asked to offer some authentic version of the independence of the judiciary. Hence, both internal and external capitalist forces have pressured the Egyptian state to create legal and democratic reform.

Furthermore, different capitalist forces (both internal and external) have their own conceptions about how they define legal reform. While the state has continued to facilitate the regulations for investment and free market (since the beginning of the structural adjustment programs in 1991), its responses to the claims for legal and democratic reform in Egypt have been multifaceted. This is because the capitalist class is made up of various fractions, each with their own ‘requests.’ These differences among the capitalist class produce contradictions that are often reproduced within the state responses to the issue of legal and democratic reform. (2)

Therefore, the state on the one hand remains committed to facilitating the regulations of investment, arguing that the judiciary should realize the benefits of investment and should ‘help’ the state in achieving ‘development.’ According to Dr. Mofeed Shehab, the Minster of High Education and Scientific Research, who emphasized in a recent conference, (3) for instance:

The judiciary plays a significant role beyond achieving justice. It should play a substantial economic and social role in achieving development and progress. For instance, if judicial procedures were easy and simple, this will increasingly benefit economic life. If not, the price of obtaining each individual
person’s claims will be costly. This will affect the cost of ‘right’ and will indeed affect the ‘economic moment.’ There is an essential need for the productive justice [al-‘adala al-nageza]; this is especially with the increase of the private sector economy. It is impossible to attract investment, if the copyrights, for instance, are not protected. Hence, the development process is comprehensive. Among other things, the development of investment requires judiciary and/or arbitrary means that guarantee the protection of this investment.

Dr. Ahmed Fathy Souror, the Speaker of the Egyptian Parliament (4), expressed the same view. He suggested that for the sake of development, what is so-called “legal security” (which means granting the safe legal atmosphere for people to protect and obtain their rights and interests through legal means) should be ensured for the sake of economy. Besides, President Mubarak decided that new specialized circles in the Egyptian courts should be established for all investment related disputes (al-Ahram Newspaper, 24 July, 2002).

However, the state does not clearly identify the next step concerning the judiciary in a straightforward manner. Government officials, for example, do not make it clear whether to reform the existing judiciary or to encourage other autonomous means of achieving ‘justice’ for different individuals and groups. Even if the government did the latter, this may cost the government the reduction of state power—in a context in which it sees itself as representatives of a power capable of offering and granting ‘justice’ and security to all groups. The following four examples support the above argument.

5-2-1 First example: the regime viewpoint on the question of judicial reform

The first example is that the discourse of the Egyptian regime concerning the judiciary suggests an uncertainty within the regime’s notion of judicial reform. Analyzing the discourse of the Minister of Justice regarding the judiciary’s sphere of work indicates that the government limits the problems in the work of the judiciary to the massive
increase in the number of lawsuits, while it is very vague in asking the judiciary to take on deeper and more substantial problems. Besides, analysis of the discourse of the speaker of the parliament implies that the Egyptian regime seems befuddled concerning accepting alternatives to the common judicial system or involving the judiciary in issues related to external political and economic interests.

To start with, the discourse of the Minister of Justice usually focuses solely on the development of court buildings and the number of legal cases. Within this discourse, the problem of the administration of justice is discussed as nothing more than finding solutions to the massive number of lawsuits in the Egyptian Courts. For instance, the Minister announced that 15.5 million cases were heard in the Egyptian courts during the first 9 months of 2001 (*al-Ahram* Newspaper, October 1st, 2001). In another example, the Minister affirmed that in 2002, the Egyptian courts have heard 12 million lawsuits. 86% of these suits were solved (*al-Ahram* newspaper, October 14th, 2003). In addition, in an answer to an *al-Ahram* reporter concerning the ‘justice’ problems in Egypt, the Minister affirmed that about 44 court concentrations were built in the previous 7 years, and that the cost of this was 319 million LE (*al-Ahram* newspaper, January 25th, 2003). The above view becomes a mainstream idea to the extent that opposing newspapers sometimes perceive that the drawbacks of the administration of the judiciary are limited to litigation problems. This was represented in *al-Ahaly* newspaper February 10th, 2004. The same report in *al-Ahaly* suggests that there are 10 thousand judges in Egypt who hear 10 million cases yearly.

Furthermore, while justifying this by reducing the judiciary’s burden, the Speaker of the Egyptian Parliament (5) suggests that alternative methods should be added to assist the judicial system in granting justice in Egypt. According to him, this would entail granting the judiciary plenty of space to achieve its goals. An example of this is allotting citizens a greater role in achieving justice within the judicial structure. This could be done through the ‘Conciliation’ [*al-sulh*] between the victim and the accused. This also could be done through adapting voluntary confession while reducing the accusations or punishments of those who voluntarily confessed their crimes before the judicial hearing. Moreover, he maintains that judicial reform entails what he calls “democracy of access to
Courts” [democratyat ale’itegaa lil qadaa’] and that the judiciary should be sensitive to “judicial protection of international values and interests.” However, by reducing the problem of judicial reform to a problem about whether or not citizens have access to courts, the Speaker of the Parliament excludes a series of much larger issues that are necessary for producing a just and democratic judicial system. In other words, he uses the language of “reform” whereas what he is suggesting is hardly a step towards “real” reform (or reform that could challenge the undemocratic nature of the legal system). For example, beyond arguing that citizens should have access to courts, “real” reform might look at whether the court system itself is democratic. It might also call for the administrative independence of the courts and the independence of the judiciary. In other words, how could allowing people to go to courts provide democracy if the courts and the judicial system themselves are undemocratic?

This discussion implies that the state considers reforming the existing judicial system and creating new methods for functioning within the judiciary. Underlying what the state chooses to reform (or not to reform) are capitalist and the state interests. It is central to capitalist endeavors to ensure that the state has a significant extent of control over the legal and judicial system (including the making and implementation of laws) in order to strengthen state power, particularly in the area of organizing the free market investment and development. Therefore, “real reform” could threaten capitalist interests. In avoiding “real reform” (while claiming a commitment to reform), state representatives reflect capitalist interests. Furthermore, different groups in the state apparatus itself want to ensure that the judiciary should maintain state interests. Significant of these interests is maintaining order and political stability. Even if the state wants from time to time to ‘relinquish’ some ‘space’ for opposing groups to benefit the margin of the independence of the judiciary and gain some rights, this relinquishment should not lead to ‘shaking’ state power.

The state and the JCE have two completely different views concerning the reform of the judiciary. While the state is contradictory and reluctant when it comes to reform, the dominant view in the JCE insists on the independence of the judiciary. Respondent B, for instance, believes that only through an independent budget for the judiciary and
through reforming the structure of the SJC can an authentic judicial reform exist in Egypt. He also says that one of the first steps for judicial reform in Egypt is the unification of the judicial system. It should be one judicial power that has only one structure and is also headed by one court.

5-2-2 The second example: the political regime’s commitment vis-à-vis the question of elections

The regime not only refuses the judges’ proposals for more effective judicial supervision of public elections, but it also tries to ‘employ’ the judiciary to defend its definition of such supervision. The most recent example involves a group of Parliamentary members who lost their seats because they did not perform their military service and in the process, submitted fraudulent papers that claimed that they had a legal excuse. The story began when the Supreme Constitutional Court (SCC) declared the constitutionality of the membership of these members (even though they committed an illegal act). All those unlawful members were associated with the ruling party (The National Democratic Party). The government insisted on its response to this problem when it agreed to re-open the election for those members (who committed the illegal act) while it refused to repeat the election for members who were competitors of the NDP. This happened in spite of the fact that verdicts from the State Council (the Supreme Administrative Court) affirmed that the election should be repeated only among the competitors of the former members who lost their seats (NDP members).

This problem took place alongside a similar clash within the Court of Cassation (as mentioned in the previous chapter) concerning the definition of “judicial bodies”--when there were two conflicting definitions in the court of cassation with two different opinions on how to define “judicial bodies.” As mentioned in the previous chapter, the government established a commission (including the Commission of Government Law Suits and the Commission of Administrative Prosecutors) and called them “judicial bodies” and used them to their advantage vis-à-vis the established judicial courts during the election. The JCE took a stance that these commissions are not judicial bodies. The
government declared that since defining ‘judicial bodies’ is a constitutional matter, the SCC should give out an explanatory decision concerning this definition. This meant that the government deferred to the SCC and that the SCC’s decision would be final. The significance of deferring to the SCC is that the government completely ignored the JCE’s position and the judges’ demands.

On 9 March, 2004, only three days before the general meeting of the JCE in 12 March, the SCC issued two explanatory decisions in which it argued that the government’s position on the membership of the Parliament members who did not serve in the military was constitutional. Moreover, concerning the issue of “judicial bodies,” the SCC affirmed that the government’s definition of “judicial bodies” was constitutional.

The above discussion does not only suggest that the government ignores judges’ demands concerning a comprehensive judicial supervision of public elections, but it uses the Supreme Constitutional Court to justify its interests and actions. Unquestionably, the relationship between the Supreme Constitutional Court and the regime, as well as the internal policies and structure of the Supreme Constitutional Court itself are complex. While an exploration of all of the complexities of the SCC is beyond the scope of this study, what this discussion suggests is that the ‘current’ needs and interests of the ruling class affect the ruling class’ commitment to constitutionality (or to the ruling class’ commitment to what the JCE define as proper judicial supervision of elections). The government thus does not provide a space for the JCE’s sharp voice or the mobilized judges within the JCE to act as key participants who play a role in shaping the form of elections in Egypt.

In this sense, respondent T suggests that the government pressures the judiciary in relation to the issue of elections. He argues that because of the significance of the election matter, for example, if the Ministry of Justice were given the authorization to supervise the election, it would gain significant political weight in society. There are a variety of opinions among the judges on this matter. In fact three respondents affirmed that they agreed with the government’s definition of “judicial bodies” and affirmed that they think that the Supreme Constitutional Court’s resolutions are constitutional and are legally correct. Respondent L, for instance, maintains:
There was no need for any other interpretation because the constitution gave the legislator the right to define judicial bodies in article number 167 of the constitution. This article affirms: “the law determines the judicial bodies, determines their competence, and organizes the process by which they are formed. These “other” judicial bodies are different than the ordinary court system (ordinary judiciary) (and the Supreme Constitutional Court and the state council) because there are clear articles in the constitution that affirm that these bodies are judicial powers.

Respondent L’s and the SCC’s viewpoint provide inadequate justification for ignoring the judges’ explanations and the JCE’s viewpoints. In the past, the SCC previously declared the unconstitutionality of many laws based on the fact that they contradict the constitution. In this case however, the SCC maintained or relied on the law and not on the constitution. It is not part of the Supreme Constitutional Court’s policy to rely on laws to identify the constitutionality of laws. Rather it is suppose to rely on the constitution to determine the constitutionality of laws. Clearly, the government placed pressure on the Supreme Constitutional Court in this case. The government did not only ignore the JCE’s position and the judges’ demands concerning the supervision of the election, but also wanted to ‘employ’ the SCC explanations to defend its stance in the Parliamentary election.

5-2-3 The third example: the Egyptian regime’s attitude concerning the application of Emergency Law in Egypt

The previous chapters made it clear that the cessation of the Emergency Law is one of the constant demands of the JCE. It also made it clear that the JCE perceives the Emergency Law as a key challenge to the common judiciary and rule of law because that law requires many special procedures that breach constitutional guarantees for the Egyptian citizens. In particular, the emergency law reduces the role of the common judiciary itself. However, there are two incidents that show that other socio-political
forces are also ‘plotting’ in the struggle against the application of Emergency Law in Egypt. First, the Supreme Constitutional Court has had a hearing concerning the constitutionality of Emergency Law for many years and it appears that there are pressures over the Supreme Constitutional Court to postpone the hearing of that lawsuit. According to the former chairman of the Supreme Constitutional Court (Chief Justice) Dr. Fathy Naguib, there is an unresolved lawsuit concerning the Emergency Law in the court (*al-Ahram* newspaper, November 9th, 2002). An expert (6) in constitutional lawsuits emphasized that one of the techniques used by the Supreme Constitutional Court to relieve the regime from the pressure of political or economic ‘sensitive’ cases is to postpone them for long periods of time. This makes it clear that there is unceasing pressure from the Egyptian regime on the Supreme Constitutional Court and that it does not benefit the Egyptian ruling class to implement the law and the constitution in a straightforward way at all times.

The second incident refers to the same law, but with respect to the new National Council for Human Rights. Since its establishment in January 19th, 2004, several human rights organizations criticized the way the Council for Human Rights was established mainly because it receives funds from the government, because the government appoints its members, and because it only has consultative power. However, the government has claimed that such a council will be a significant step concerning the respect for human rights. However, it could be inferred that such a council would not take a strong stance in support of democratic reform (in particular concerning the cancellation of the Emergency Law). In its discussion of an internal proposal for the cessation of that law, out of 25 members in that council, only three votes demanded the obliteration of that law (*al-Wafd* newspaper, 6 May, 2004).
5-3- The second context: the JCE’s constraints

The above discussion addresses the first context of constraints over the JCE and how it functions, particularly in terms of the socio-political context within which the JCE works. In fact, other internal factors within the structure of the JCE itself, and its relationship with the other judicial bodies create other kinds of challenges for the JCE and its work. In order to argue that the JCE is a “meta space” that is shaped by a contradictory structure, I will now explore the three key issues that contribute to this underlying contradiction within the JCE. These are the problem of ‘representation,’ the problem of ‘identity,’ and the problem of the ‘agent/structure relationship’ with respect to the JCE.

5-3-1. The problem of representation

The JCE is neither merely confined to the governmental sphere nor is it a completely free and independent branch of the judiciary. As discussed in chapter one of this thesis, both “the judiciary” and “the law” are part of the superstructure and they are part of the state apparatus and state ideology. Hence, both “the judiciary” and “the law” are outcomes of the economic relations in the society, and they are subject to change when the economic relations are changing. In addition, the classical Marxist approach assumes that civil society exists within the superstructure. However, Gramsci conceives of civil society and focuses on its complexities in the broader hegemonic ‘culture’ rather than on the sole economic dimension of the capitalist class. For Gramsci, it is not the economic structure which directly determines the political action, but "it is the interpretation of it and of the so-called laws which rule its development" (Bobbio, 1979: 30). In Gramsci’s approach civil society is in all cases, part of the structure of the class society.

As Marxists assert, “Any particular set of economic relations determines the existence of specific forms of state and social consciousness which are adequate to its functioning and any changes in the economic foundation of a society leads to a transformation of the superstructure” (Bottomore, 1983:42). However, the superstructure
is not autonomous; it does not emerge out of itself, but has a foundation in the social
relations of production (Bottomore, 1983:43). The conclusion of this discussion is that
judiciary (as a system) is clearly part of the state apparatus and the superstructure, but
civil society is not in all cases. This is the case concerning civil society in general.
Analyzing the JCE case also suggests that it cannot be situated easily within the
superstructure (as it is not part of the judicial system and the state), nor within civil
society (which is very negotiable). The JCE is not even an ordinary NGO. Rather, the
JCE is a unique case. In reality the JCE acts as the ‘union’ of all judges in Egyptian court
system, but it is legally deprived of several recognized capacities of unions. The state
even wants to reduce the JCE to a mere ‘social club.’ Hence, the JCE becomes a meta-
space (neither NGO nor part of the state).

For this reason, it cannot be easily defined within either a structural context or to a
super-structural one. While it was one of the judges’ demands that the JCE should gain
autonomy and should be granted an adequate authorization within the Judicial Power
Law itself, there is yet a problem in that this cannot be executed straightforwardly. In fact
the exact nature of the JCE implies that it is situated between two realms within which
judges move: 1) their everyday life realm that is controlled by the Ministry of Justice and
the judges’ administrative body, the SJC (I locate both of these in the super-structure as
part of the state apparatus) and 2) the private discussions and opinions where they lobby
themselves and talk freely.

The core implications of the above is that the JCE, while it is considered to be the
most powerful ‘popular’ representative for judges, cannot represent judges easily because
of the hegemonic power, tools, and knowledge entitled to the other two main bodies
involved in the judiciary affairs, that is, the Ministry of Justice and the Supreme Judicial
Council. This is because the JCE cannot easily progress outside the hegemonic
legitimacy of the ruling regime. The JCE is asked to move only within the realm of the
dominant culture or claimed legitimacy that plays a significant role in social control and
that keeps state supremacy intact. The following discussion will demonstrate to what
extent the problem of representation leads the ideas of the respondents to vary, and then
leads to some forms of contradiction within the JCE in relation to the problem of representation.

As respondent N, for instance, maintains:

I believe that the judiciary in Egypt includes three main institutions: 1) the JCE, it is the popular representative of judges; 2) the Supreme Judicial Council, which expresses the administrative part of the judiciary; and 3) the Ministry of Justice, which is the governmental hand in the judiciary. Many experiences have led us to believe that there should be a balance between these three main institutions. Without this balance, there will be no independence of the judiciary. Accordingly, it is essential to compose a balance between these three bodies—not only in terms of transferring the authority from the Ministry to the Supreme Judicial Council.

Respondent N crystallizes the above claim concerning the nature of both the Ministry of Justice and the Supreme Judicial Council (SJC). He asserts, “We should maintain the independence of the JCE. This only empowers its credibility in affecting the decision maker, who has the power [the Ministry and the Supreme Judicial Council].”

He also explains the significance of “democratizing” the Supreme Judicial Council (which means adding elected as opposed to appointed members to the SJC) as follows: 1) that this will make the Supreme Judicial Council more indebted to judges and reflective of their problems, fears, and interests (i.e. “feeling their pulses” according to one interviewee); and 2) that this will guarantee that the Supreme Judicial Council’s term is extended for a longer period, thus making it more capable of accomplishing its goals. He explains:

Sometimes the Supreme Judicial Council is practicing a legislative role when it enacts rules for the delegation of judges and secondments. For such a process, it would be more democratic if the Supreme Judicial Council took the
opinions of those who will be ruled by these regulations. So, the Supreme Judicial Council should listen to their represented people. If the Supreme Judicial Council create rules without listening to judges, this will be an abusive action and undemocratic.

Another interviewee, S, affirms,

The Ministry is part of the Executive power. It is impossible for the Ministry to represent the judiciary. It represents the judiciary by both force and law. The Ministry, by its nature, keeps and protects the interests of the Executive Power. The Supreme Judicial Council is supposed to be the key representative of the judiciary. However, the problem is that the SJC is incompetent. The purpose for the existence of the Supreme Judicial Council is to protect judges. Unfortunately, due to some factors, including the creation, the structure and the reality of the Supreme Judicial Council, it has become a Ruling Council [majlis hukm]. It is not concerned with judges’ affairs. Thus, the JCE became the only secure place where the judges can go. The JCE is not an innovation, but this is according to the UN Basic Principles for the Independence of the Judicial Power. So, the JCE is the most capable body to speak on behalf of the judges. It is the sole and popular representative for judges. The JCE has become stronger than the Supreme Judicial Council-even after 1984. The fact is that the JCE has elected board members, and this is a democracy. The Supreme Judicial Council members resemble employees, who are appointed in this council because of their positions in the courts.

Respondent K emphasizes a similar point:

The one body that represents judges is the JCE. This is based on the bylaw of the JCE and the international covenants and agreements of human rights and judiciary. These agreements stipulate that judges should have clubs or unions- whatever name they use for such a thing- for judges. Judges have no syndicates. They have no heads to submit their petition to. The Ministry of Justice is an executive power that will not defend judges, and also the SJC is an administrative authority for judges that will not defend them either. So, the only balance between the Ministry of
Justice and the SJC-- for judges’ rights and demands-- is the JCE.

However, respondents L, H and Q affirm that the Ministry of Justice according to law is the only ‘legitimate’ body that represents judges in Egypt. This is derived from the fact that all lawsuits concerning judges’ affairs are to be submitted to the Ministry. Interviewee Q in particular emphasized the role of the SJC in representing the judiciary in Egypt.

Explaining the above debate, one might notice that this may lead to different kinds of compromises that would certainly restrain the realm of free movement for the JCE as a space. One example of this compromise took place in 1995 when Hussein (1995) tried to create some clarification about the relationship between the Supreme Judicial Council and the JCE. He argued that there are underlying tensions between the JCE and the Supreme Judicial Council. But he maintained at the same time that this is not completely true in all cases because the capacity of the Supreme Judicial Council is administrative concerning the functional affairs of judges, such as the appointment, the promotion, the transmission, the delegation and the secondments. It also has some consultative capacities that include that the Supreme Judicial Council should be consulted in any laws that might be enacted concerning judges or prosecutors. But the SCJB has had only a consultative and coordinative role since 1984 (when the restitution of the SJC took place). However, he crystallizes this compromise in the following (1995: 584):

All the above capacities of the SJC -- including both the executive and the consultative-- are not in contradiction with the judges’ right to expressing themselves when they associate in their club or their syndicates. This might include doing research and express their opinions or proposals or recommendations in all what may sustain the independence of the judiciary and all things that are related to judges’ interests. But this should also be done in formal ‘decent’ ways, and should also send advice in just ways. Both the executive and the legislative powers should listen to the opinions of the JCE and should not ignore it, even if it was not compulsory.
Respondent N provides another version of these compromises. He claims that,

The balance between the Supreme Judicial Council and the JCE lies in the fact that the independence of the judiciary has two features: 1) the independence of the judiciary as a system and a power and 2) the independence of individual judges. We have to maintain and sustain both sides. The Supreme Judicial Council can defend the first one and the JCE can defend the latter. This includes everything including salaries, transportations, additional benefits and insurance.

A third version of compromise is a more superficial discourse, which does not vary much from the Ministry of Justice. According to respondent Q:

The relationship between the JCE and the Ministry is based on a mutual cooperation and respect for the judiciary’s interests and on minimizing all tiny problems \([al tarafu‘ a’n kul saghae’er]\) and respecting seniors and being sympathetic with juniors. The Minister attended all the occasions in the JCE with no exception, including social occasions, such as feasts and iftar in Ramadan and eating lunch with the judges, the Minister and all the JCE board members and the members (judges). In every feast in the morning you will find the Minister in the JCE.

5-3-2 *Contradictory results.*

The above discussion suggests that there is a problem of representation, which is derived from the situation of the JCE with respect to the Ministry of Justice and the Supreme Judicial Council. Following are two examples that the above discussion implies. To begin with, one of the main problems of the JCE is its inadequate financial resources. The fact is that the membership fee of the JCE members is miniscule. Hence, the JCE is enforced to finance itself through the help of the Ministry of Justice. This paradox thus entails opposing the Ministry and the government’s proposals and attitudes.
concerning the judiciary on the one hand while simultaneously receiving funding from the Ministry of Justice in order to survive. Undoubtedly, this will not grant the JCE with a free space to function nor will it assist the JCE in its struggle for the independence of the judiciary. According to respondent K,

One of the main problems of the JCE is that the JCE does not have financial resources and it relies mainly on the aid of the Ministry of Justice. As such, the JCE is like a circus man. It wants to maintain a good relationship with the electoral assembly while also maintaining the JCE as an independent institution. It also wants to maintain a good connection with the Ministry of Justice. We should compromise between the two (the general meeting and the Ministry of Justice). Otherwise, we will loose both. We are often trying to be accurate and to take the right stand—that is, not to lose the financial support.

Respondent B also affirms that because the JCE’s funds come primarily from the Ministry of Justice, the Ministry of Justice can easily control the work of the JCE through this funding.

The second paradox I will explore is that the JCE has no autonomous power concerning enacting the laws it proposes. This is not just because of the fact that it is not a legislator, but because the socio-political weight of the other two bodies gives them the power (as they are either part of the ruling regime or more tied with that regime) to negotiate until enacting any proposed law. This does not only explain why the law proposed in year 1991 was not enacted, but instead was ignored by the regime. This also describes the situation of the new proposed law from the JCE in April 2004. The paradox is that the JCE is forced to ask its ‘representative and powerful’ bodies to adopt its formula for judicial reform. As respondents K, B, and N insist, the JCE has no choice in this matter because the JCE has to use its powerful asset—the popular support of judges. As they suggested, the endorsement of the new law cannot ever be executed unless there is a public opinion supporting it and a mobilization of judges to defend their law.
5-4. The identity problem

This section suggests that the problem of identity not refers only to the definition of the JCE as a syndicate of judges or as a social organization that has some political interests—or even as a social organization that works only in social services issues. Rather, understanding this problem entails understanding the JCE as “meta-space” that is situated between the judges’ daily work and their societal positions. As a result of its in-between position, the JCE’s identity is not bounded; nor does it match up with what it says in its mission. The key issue that shapes the JCE’s identity problem is the JCE’s political border vis-a-vis the regime (the Ministry of Justice) and the administrative body of the judiciary in Egypt (Supreme Judicial Council). This problem emerges in particular as a consequence of the different visions of its members and board council that create a challenge to the JCE’s work and the extent to which it upholds its mission.

There are two internal factors that underlie the identity problem: 1) the fact that the JCE includes all Egyptian judges, both superiors and inferiors, as well as both judges and prosecutors, and 2) the fact that membership in the JCE is almost obligatory, and judges are urged to join the JCE to obtain the social services it offers. There was an important general meeting on September 28, 1992 when the JCE opposed the “Annual Shifts for the Transfer of Judges” made by the Supreme Judicial Council (which means the redistribution of judges throughout Egyptian courts). Several interviewees suggested that most of the attendees in that meeting were judges and that the JCE members who are prosecutors did not attend. This is because the issue of the “Annual Shift” affected judges more than prosecutors. What this indicates is that different groups within the JCE’s membership (i.e. judge and prosecutors) have different interests and struggles and that the JCE’s membership is not necessarily united as a unified political force. Moreover, the JCE council, by organizing this meeting, played a role in this division within the JCE, as I will explain in the following section.

Two other external factors contribute to the identity quandary. The first is that there are several associations that were created to serve judges. These associations primarily work on issues of housing or other issues involving access to social resources
(examples of which are the Association of Counselors of Court of Appeal and the Association of Prosecution members). The formation of associations such as these began to rise in the 1980s and 1990s. According to respondent B, the government encouraged these associations to weaken the JCE. The second of these is the exaggeration of the role and influence of the JCE’s branches. This happened in particular once in 1980 and spread in 1990s. Several respondents suggested the same viewpoint as B concerning the previous point. They argue that the government encouraged the branches to diminish the role of the JCE in the 1990s.

The existence of many associations supported by the government that serve judges and provide judges with social services has led some judges to de-value the role of the JCE (even though these associations are few and do not exist in all parts of Egypt). The fact is that until 1969, the JCE was not yet a fully established syndicate for judges, in spite of the fact that there were some general meetings that addressed the issue of salaries and judges transportation problems (in 1943 and 1944). According to interviewees N, B, J, and K, the “massacre of the judiciary” crystallized the need for the JCE as a union. As Brown (1997:100) suggests, the JCE in the 1960s was transformed from a social organization concerned at most with the material needs of judges into a forum for debating those political issues relevant to the judiciary (and by 1968, an agent representing their political perspectives). Besides, while the judges club has been active in the effort to further liberal legality in Egypt, it continues to reject any image of itself as a political organization.

As interviewee Y, emphasized,

The JCE could be considered an opposing group in this country and a pressure group. It is one of the main political pressures groups. The government is aware of this, and it finds that the best way to combat the role of the JCE is drowning it by money to stop pressuring the government.
However, Interviewee L suggests that “the JCE is a social club originally and not a political place. It was established to be a social club that gathers judges to discuss the variety of their concerns.”

5-5 The agent/structure problem

Who are the most substantial players in the JCE? Can the significant events organized by the JCE be solely attributed to the notable chairmen or boards in the JCE? What is the structure in the JCE? Does it lay within JCE itself, or its interactions with other socio-political factors? Answering these questions reveals to what extent the uncertain relationship between the state and the judiciary system challenges the activities of the JCE itself.

This section demonstrates the ways that the JCE’s status affects the outcome of its work. In particular, a shift happens from time to time in the JCE’s work within the public domain as a result of the dialectic between the role of agency within the JCE (within the JCE council and/or the individual chairmen) and the structure (the JCE itself, represented by its general meetings, its overall membership as well as the various sociopolitical contexts that each judge brings to the JCE).

5-5-1. Understanding the problem

Different interviewees had different views about the issue of classifying the different boards that have worked in the JCE. The first of these views attributes most of the significant activities of the JCE to either the chairman of each period or the collaboration between the chairman and the JCE board. Another view maintains that there is not much variation between the different boards of the JCE. However, these visions are usually complementary. A third view asserts that the JCE’s role goes beyond the vision of the JCE. Rather, it suggests that it is the structure of the JCE itself, represented by its general meeting, and the sociopolitical moment that gives credibility to the JCE’s activities. However, I argue that a process of structuration (as employed by Anthony Giddens, 1979) that involves a duality of structure is the most useful for understanding the complexity of the agency/structure question in the JCE.
In his Central Problems in Social Theory (1979, 69:95), Anthony Giddens argues that the concept of ‘structuration’ relates to the fundamentally recursive character of social life which involves a duality of structure. This expresses the mutual dependence of structure and agency. Giddens argues that the description of the action and the structure in both sociological and philosophical literature as antinomies is not completely valid. According to him, the structural properties of social systems are both the medium and the outcomes of the practices that constitute those systems. The theory of structuration rejects any differentiation of ‘synchrony and diachrony or statistics and dynamics’ (Ibid: 69). The identification of structure with constraint is also rejected: structure is both enabling and constraining, and it is one of the specific tasks of social theory to study the conditions in the organization of social systems that govern the interconnections between the two. The same structural characteristics participate in the subject (the actor), as in the object (society).

Building on Giddens (Ibid: 69) this thesis conceives power as complex. Power here is neither the capability of an actor to achieve his or her will, nor as a property of the collectivity. It is both. He maintains: “resources are the ‘bases’ or the ‘vehicles’ of power, comprising structures of domination, drawn upon by parties to interaction and reproduced through the duality of structure.” For this reason, and for the dual nature of the structure, institutions do not just work on the backs of the social actors who produce and reproduce them. Structure is the mode in which the relation between moment and totality expresses itself in social reproduction (Ibid: 71).

Taking Giddens’ argument as my point of departure, I contend that both the JCE council, the general meeting and the sociopolitical moment work concurrently. Often, notable judges and councils participate in the JCE who are more likely to defend an expanded formula of the independence of the judiciary. Coupled with this is their capability of mobilizing judges. At the same time, this can function alongside the model of the margin of the independence of the judiciary that the Egyptian state uses flexibly and changeably from time to time only according to its interests and to the benefit of the investors and the needs of the regime.
In other words, the pattern of the margin of the independence of the judiciary creates a great opportunity when there are particular actors who are willing to advance their role by defending the reputation and the legitimacy of the judiciary through the JCE. At the same time, in other cases, there is a coalition between the state (structure) that does not facilitate any opportunities for the JCE’s actors or for the existence of specific actors (particularly boards of the JCE).

The significance of this discussion lies in the importance of answering particular questions. Among these are: why was there a great difference among the JCE’s different boards with respect to their role concerning the independence of the judiciary and the democratic reform? Were the changes of the JCE’s board the sole factor that creating shifts in the JCE’s role in the public domain? Using the structuration thesis, I will address these questions while analyzing the two views that reduce the activities of the JCE to either its leadership or to its structure alongside the socio-political moment.

5-5-2 View one: the agent (chairmen and council) is the most effective player

Several respondents affirmed that significant shifts within the JCE could be attributed to very remarkable people in the history of the judiciary and the JCE such as Mumtaz Nassar (in 1960s), Wagdy Abdel Samad (1980-1985) and Yehia El-Refai’e (1986-1987, then 1989-1991). In fact, this view is supported by the fact that most of the JCE’s activities in relation to democratic reform or the independence of the judiciary studied in this thesis have taken place either under the leadership of Counselors Wagdy Abdel Samad, or Yehia El-Refaie, or Counselor Zakaiya Abdel Azziz (2001- present). For instance, the restitution of the Supreme Judicial Council was in year 1984, then the conference of Justice was in1986, the law proposal for the judicial supervision of public election was in 1990, the law proposal for a new Judicial Power Law was in 1991, and a new version for the same law was in 2004. In the periods of both Counselor Moqbel Shaker (1991-2001) and Counselor Mahmoud Bahhy Eddin Abddalah (1978-1989) nothing was done related to the public domain role of the JCE.

This view sees individuals as responsible for the significant events that occurred at the JCE or for the different vision within each council.
All of my interviewees recognize two main visions that have been at times compatible and at times conflicting with one another throughout the history of the JCE. The first of these is the idea that defending the independence of the judiciary could be largely achieved through defending the autonomy of the judicial system itself and through enacting new laws that guarantee that independence in conjunction with genuine respect for these laws. Almost all the respondents argue that counselors Abdel Samad, and El-Refai’e represented this vision in cooperation with their JCE councils.

The second vision is that it is preferable to work for the independence of judges as individuals; hence, to focus on the issue of their salaries and the issue of ensuring their access to social services. According to the second vision, there will be no regular clashes with the government and each judge’s demands will be met greatly through a positive relationship with the government and its agent (the Minister of Justice). Counselor Moqbel Shaker and Mahmoud Bahy Eddin Abdallah upheld this vision.

According to respondents N and K, a compromise between the two visions exists in the present council of Zakariya Abdel Azziz, which tries to defend the larger demands of the judiciary (by calling and working for judicial independence) and asks for reforming judges conditions. This is to be done, according to three members in this council, including the chairman, through the development of a strong and positive connection with the Ministry of Justice and by respecting the demands emergent from general meetings.

Both the tensions among JCE members during the election process and the significant shifts within the claims the JCE expressed in al-Qudah affirm the argument that these two different visions exist. For instance, Brown (1997: 100) argues that by the 1980s, elections in the judges club had become heated contests, often pitting those who wish to eschew confrontation with the government against those who are more ‘aggressive.’ The intense tensions existed in nearly all of the elections since 1980. Since the early 1980’s, tensions have existed between the two conflicting views in the JCE. Furthermore, reading al-Qudah during the chairmanship of Moqbel Shaker and Abdallah also indicates that the JCE’s activities were reduced to the very immediate needs of individual judges. For instance, during the chairmanship of Counselor Bahey Abdallah,
there were unceasing discussions on the salary of the judges. According to al- Qudah (January-June 1988, 4-5) the struggle for increasing judges’ salaries and guaranteeing them insurance is parallel to the economic problems facing the larger Egyptian society. During Moqbel Shaker’s leadership, al- Qudah repeatedly mentioned the issue of salaries and bonuses (See for example al- Qudah January-December 1993, 6:8).

The existence of these two conflicting visions suggests a challenge for the JCE’s activities. When particular chairmen and their boards leave and new chairmen and boards take their place, the risk is that the old chairmen and their boards may have a completely different vision than the new ones. This means that the focus of the JCE’s activities is likely to shift significantly alongside shifts in its leadership. For instance, in the examples above, some chairmen have focused on social services (Shaker and Abdallah) and others on the independence of the judiciary and democratic reform (El- Refai’e).

A brief biography of counselors Wagdy Abdel Samad, Yehia El-Refai’e and Moqbel Shaker supports the argument that the key players in the JCE have tended to be the chairmen and their boards.

First, Counselor Wagdy Abdel Samad was the one who tackled the mission of negotiation over the restitution of the Supreme Judicial Council in 1985 alongside his council with the Prime Minster of Egypt. (7) Furthermore, counselor Abdel Samad became the chairman of the Court of Cassation. However, his stance concerning the independence of the judiciary has not changed. After his retirement, he attended many general JCE meetings and played the role of a well respected judge who solved disputes among judges. For instance, in the general meeting of November 22nd 1990, there was a clash between the JCE and the chairman of the Supreme Judicial Council (concerning the proposal for a new law for the judiciary). Abdel Samad’s contributions played a key role in solving this clash. Judges then proposed that counselor Abdel Samad should be the head of the committee to continue drafting the law (al-Qudah, January 1991: 32).

He also attended the general meeting of January 18th, 1991 to support the proposal of the law that guarantees the independence of the judiciary. (He contributed to drafting this law). Furthermore, he refused to work as a consultant to one of the Gulf rulers after
his retirement. He argued that accepting such an offer tarnishes the dignity of the positions he had as the former chairman of the JCE, the Court of Cassation and the Supreme Judicial Council (al-Qudah January-June, 1988:5). Moreover, he continued writing to express his stance. For instance, he has written many times to criticize the establishment of exceptional courts in Egypt (al-Qudah January-June 1992:92-110).

Second, it could be argued also that counselor Yehia El-Refai’e has a charismatic and courageous personality that has led many judges to view him as the model of an honorable judge who never ceased in defending the ‘dignity’ of the judiciary. During the period of my research, the judges considered El-Refai’e a unique case. Respondent H, for instance, while blaming all the individuals and groups that have worked in the JCE of being antagonistic to one another and of being involved in electoral competitions, asserted, “Yehia El-Refai’e was often unique in that he was not antagonistic or competitive.” Respondent N additionally maintained that even though El-Refai’e was chairman for only four years, his term witnessed the most significant events in the history of the club. He contends that the El-Refai’e period was a comprehensive renaissance in the JCE. Abdel ‘Al (1993: 209) affirmed the courage of El-Refai’e because he states that he was one of the first people to appeal Abdel Nasser’s decrees concerning the judiciary in 1969. During this appeal, the police never stopped challenging El-Refai’e attempts to the extent that they attacked the publishing places where El-Refai’e was printing his legal defense. (8)

In fact, many counselors who were involved in JCE activities and were members in the JCE council consider El-Refai’e the great master. They consider him their “sheikh” (9) of judges who never ceased being brave in the fight for the independence of the judiciary. Respondent N, for instance emphasized, “All Egyptian governments since 1960s contested El-Refai’e.” After his retirement, El-Refai’e continued to contribute to the fight for the rule of law. He continued being politically active. For instance, in July 2000, when a ruling was declared from the Supreme Constitutional Court that affirmed that parliamentary election should be supervised by judicial bodies, he began to write a series of articles in the opposition newspaper al-Wafid. After his retirement, he worked as a legal professional for several years. However, in December 31st, 2002, he released a
statement of resignation from the Bar Association that energized political discussions on the independence of the judiciary and democracy in Egypt (El-Hamalawy, 2003).

The third example is counselor Moqbel Shaker. Though he was similar to El-Refai’e as a judge dismissed in the “massacre of the judiciary,” some respondents argue that his chairmanship in the JCE was one of the greatest downfalls of all times in the JCE’s history of defending democracy. Some of his activities indicate that his chairmanship had witnessed a less combative attitude towards the regime. For instance, in 1999, instead of combating the application of the NGO law (153-1999) over the JCE, the JCE council decided to postpone a general meeting in the JCE waiting for the NGO law regulation (al-Wafd Newspaper June 3rd, 1999). Thus, he did not stand in the way of the implementation of this law over the JCE. In addition, in the parliamentary election of 2000, the JCE council announced that it would formulate a special committee to execute the judicial supervision of the election (al-Ahram newspaper July, 28th, 2000). Hence, instead of debating the judicial role in the election, the JCE seemed to contribute to facilitating the government’s control of the election.

Furthermore, in most of the general meetings during the chairmanship of counselor Shaker to the JCE, there was a common criticism of the Law of the Judicial Power but nothing concretely was done. An example of this is the JCE council meeting with representatives from 24 of JCE branches in Egypt in December 2nd, 1999 in which the JCE council announced the need for a new law for the Judicial Power but nothing was done (al-Wafd Newspaper December 3rd, 1999). Fourth, in 1998, the JCE announced that it was going to organize a conference for the problems of justice in Egypt (al-Ahram Newspaper, November 25th, 1998; al-Ahram Newspaper, December 20th, 1998). The title of the conference was “Judiciary and the Era’s Transformations.” The JCE decided to cancel this conference.

The relevance of the details about three chairmen of the JCE in the period of this research is as follows. First, it is partly evident that each council of the JCE has contributed to the policy and the practice of the JCE activities. Second, and most importantly, the impact of the different visions of the different councils created debates and broadened the scope of challenges within the JCE’s work.
Interviewee K, for instance, argued that general meetings were often ineffective because the JCE councils themselves were ineffective. According to him, the stronger the club the more concerned the government becomes about its work. For instance, the government ‘esteemed’ the previous board (1991-2001) in the beginning, but then concluded that this council has no significant ambitions concerning the independence of the judiciary. He suggests that the government is highly suspicious with the strongly combatable council than the ‘weak’ one.

Besides, respondent B asserts that the massive majority of judges support a particular vision, which calls for fundamental changes in the status of the independence of the judiciary in Egypt. According to him, “the massive majority of judges support [our] call for genuine independence of the judiciary. They need a leadership that speaks for them. This is exactly what happened in the general meeting of March 12th, 2004.”

However, there are views among judges who seek to make compromises between the different boards. As respondent L maintains:

Each board member has its own view of how to offer its services to JCE members. There are some board members that direct all their energy to social activities and cultural ones. There are other board members that are more concerned with the image of the judge in society at large vis-à-vis the regime, the independence of the judiciary and how the judiciary functions. These are two different methods visions. They are relatively different, but they are complementary.

5-5-3. View two: the structure is the most effective player in shifts within the JCE

While the previous view highlighted individual actors as the key players producing shifts within the JCE, this view asserts that the general meeting of judges and the socio-political context that judges bring to the JCE are the most important factors that shape the JCE’s activities. Several respondents involved in drafting the new law proposal (prepared by the JCE in 2004) argued that the sole guarantee for implementing this law is lobbying judges and holding general meetings. According to respondent K:
The main guarantee for implementing the new law proposal is lobbying judges. Both judges and the JCE should sponsor their project. This is the only way to get judges to support this new bill. We will distribute the proposal for the law in all courts and clubs, and we will call for a general meeting in the JCE to support it. Then we will reach the version that will satisfy every judge. We will then present it to the Ministry of Justice and the legislative power.

Interviewee N stresses the significance of the political atmosphere that judges bring to JCE politics. According to him…

The curve in the JCE’s attention to public interests is higher when there is political and social support for the JCE. During President Abdel Nasser for instance, the question of democracy was rising. Hence, many voices in society supported what the JCE was doing, even if they could not help. In turn, the JCE was highly committed to public interests and the question of democracy during this period.

However, it is difficult to ignore the role of individuals and the different boards when considering the factors that produce shifts in the JCE’s activities. Both counselors Abdel Samad and El-Refai’e played a significant role in the JCE even after their retirement. Both were invited by the different board councils to help in general meetings (such as the case in the January 18th, 1991 meeting for Counselor Abdel Samad and the case of the March 12th, 2004 meeting for Counselor El-Refai’e).

While mentioning the general meetings, it is important to explain that the interests underlying the general meetings are not homogeneous or monolithic. Different interests affect the general meetings and their outcomes. In the general meeting of September 28th, 1992, for example, according to respondents J, and S, the council of the JCE tried to misuse the general meeting by taking it down the “wrong path” towards the SJC. The JCE council held an exceptional meeting on September 28th, 1992 to criticize the SJC

While the JCE council shaped the general meeting as an attempt to defend judges’ rights in relation to the redistribution of judges throughout Egypt and to reform the SJC, the actual reason they held the meeting was to defend judges in high positions who were affected by the decisions of the SJC that year. This happened to the extent that changing the regulations of judges’ redistribution was defined as a new “massacre” among the judiciary (*al-Sha’ab* Newspaper, October 2nd, 1992).

Respondent J explains the implications of that meeting:

There is a principle in the judiciary’s guidelines and traditions that judges should not be away for long periods from their benches. This will guarantee that judges should work in their judicial posts to maintain their independence, and to avoid their delegation in governmental or administrative positions for long periods. However, what the JCE council did is that it criticized the fair transference that was implemented for the first time in a long time in 1992! What the council did in fact was to care more about the positions of the JCE council members and some high executive judges than being concerned with the interests of all judges, and the broader cause of the independence of the judiciary.

The result of that meeting is that the majority of the attendants were only judges and not prosecutors. Also, the meeting tried to mobilize the JCE members to combat a problem that affected only some superior executive judges instead of mobilizing them concerning issues that related to the independence and the guarantees of all the JCE members. This example suggests that the general meeting and the judges’ capability of mobilizing themselves is complex because other factors are contributing to the JCE’s capability of benefiting from one of its most powerful mechanisms, the general meeting.
5-5-3. View three: a dialectical relationship between the agent and the structure

Using the structuration thesis, I argue that the JCE council, the general meeting and the sociopolitical moment work concurrently. It happened at certain points that ‘strong’ judges or JCE chairmen (and their councils) came, who were more likely to defend an expanded formula of the independence of the judiciary. This was matched by their capability of mobilizing judges.

My research supports this perspective. For instance, the regime accepted the JCE’s proposals in 1984 (and the restitution of the SJC) (in the beginning of the Mubarak epoch and prior to the adjustment programs). In 1984, the regime wanted to act as a democratic system in which it works alongside the existence of a ‘solid’ council at the JCE. However, in the early and mid 1990s, there was a strong clash between the government and the radical Islamists. At that time, the state was not capable of offering legal reforms. On the contrary, the state continued expanding the emergency and exceptional courts. This period witnessed two different boards that had two contradictory visions concerning the JCE role.

Legal thinkers such as El-Beshry (2003) emphasized the interactions between different factors in shaping the mobilization of judges. He maintains (2003:17):

The environment of confrontation creates a situation in which the potential of mobilizing the concerned people makes them stronger and more capable of resistance. The potentiality of mobilization is high whatever was the shape of this confrontation (a mere transgression or took a stronger shape). Unlike the situation of the confrontation times, when there are corruption and inducement attitudes, there is less potentiality of mobilizing people (judges). These situations encourage the fragmentation of the group and creates individual struggle. The corruption and inducement shifts the ‘public struggles’ into individual ones.

El-Beshry (2003: 14) also presumes that the independence of the judiciary relies more on public opinion and the political, social and cultural environment than solely on law guarantees. He based his argument on the fact that judicial independence was
enhanced by a combination of many factors in the 1940s. These are the nationalist movement that was associated with a constitutional claims movement alongside the weakness of the Ministry of Justice and the process by which the ruling elites enhanced judicial independence. Then he argues that the independence of the judiciary already existed in reality and did not require a “law” for its implementation. Law 66 for year 1943 did not grant the independence of the judiciary. Rather, it only reinforced the idea of the independence of the judiciary, which already existed before this law was enacted.

5-5-4. The third context: Judges’ socio-economic and cultural dispositions

The previous explanation concerning the intersections between three problems in the JCE (representation, identity, and agent/structure) affirms that the uncertainty of situating the JCE within the judicial system is two-fold. While representation, identity, and the agent/structure relationship expand the space within which the JCE moves, they also create challenges to its actions. My argument is that both agent and structure relationally shape the JCE’s activities. This context entails two “dispositions” that produce challenges for the JCE: the socio-economic and the cultural dispositions.

5-6 The Socio-economic disposition

In Marxist theory, the state is viewed as the ‘executive committee to manage the affairs of the bourgeoisie.’ The personnel of the state owe allegiance to one particular class—the bourgeoisie. Law is part of this oppressive mechanism and embodies the ideological mystifications of bourgeois intellectualism. The bourgeoisie, the capitalist class, dominates political power through its domination of economic power. However, the view that the bourgeoisie straightforwardly dominates political power through its domination of economic power is a classical Marxist outlook (Vincent, 1993: 384). Positively, neither the state nor judges are a harmonized and coherent party. Besides, the relationship between the state and judges on the one hand and between judges and ordinary people (dominated groups) on the other is also complex. However in simple terms and according to Sherif & Brown (2003) there is a paradox in the judges’ functions
in any country with respect to their relationship with both the state and the people. According to them (2003:1):

While judicial independence might be considered a human right, the subject of the right (the people) is different from those who exercise the right (the judiciary). In other words, judges are independent not for their own sake but for the sake of the society that they serve. Second, judges are both part of the apparatus of the state and part of a mechanism that holds state actors accountable. This requires them simultaneously to uphold the public order and correct the actions of public authorities. It would be impossible to fulfill these simultaneous missions without genuine independence.

However, as discussed in Chapter Two, it is almost impossible to guarantee genuine independence of the judiciary in a context where the dominant groups want to maintain a margin of independence for many political and economic purposes. For this reason, the Ministry of Justice plays a significant role. This Ministry is the particular agent in the government that has the power (on behalf of the ruling institutions or at least on behalf of the particular wing in the ruling class) to controls judges socio-economically. In this process, the Ministry of Justice offers privileges for judges and claims this for the sake of ‘justice’ and constitutional freedoms. Judges as technocrats, intellectuals, or those moral leaders are to tackle the mission of being impartial and balanced between the hegemonic ruling regime and the oppressed.

The role of the Ministry of Justice in the financial life of judges is also complex. This complexity exists because of a variety of techniques crafted by this Ministry. These techniques situate judges in a critical situation in which they are compelled either to accept privileges (and play their role in the socio-economic sphere by taking a superior position in the struggle between the dominant and the dominated groups) or to refuse these privileges in order to be consistent in their calls for democracy (and to suffer by being deprived of these benefits). The importance of this discussion is to explain the idea
that judges cannot easily disregard their ongoing struggle concerning their socio-economic privileges when it comes to how the JCE works.

5-6-1

Financially, judges are members of the work strata in the government and are called special cadre [cadre khas]. This refers to those particular employees who work in high-level offices. Such a position should locate them in the highest level of economic conditions compared to other government employees. According to the law of judicial power, judges’ salaries should be clear and equal. All judges’ salaries should be granted according to an official table (Article number 68 in law 47-1972). However, the government regularly uses particular techniques through which it creates disparities between judges in terms of their salaries. The question is why the government does not choose to set financially ‘generous’ practices with judges instead of going through some complicated arrangement for their payment. Perhaps it is because the government uses “salaries” and “bonuses” as a way to pressure judges or to control them. The following observations suggests that the particular organization of judges’ payment in Egypt has been arranged in a way that affects judges’ independence and pits judges against each other concerning the issue of refusing government proposals.

5-6-2

One of the most significant problems is that, on average, 60% of the judges’ salaries come from bonuses, and the remaining comes from their basic salary (al-Qudah, January-June 1990: 66). According to the Law of the Judicial Power (law number 47 for year 1972, Qanoun al Sulta al-qada’yya), (10) judges receive what is so-called additional payment for judgments [badal qda’a]. Moreover, judges are remunerated an additional amount of their monthly salary as a bonus. This is called the payment for excellent performance [moqabel tamayoz ada’‘aj], according to the ministerial decree number 2572-1984 (al-Qudah, January-June 1984:173). A third kind of bonus is called the
additional payment for extra work. The three kinds of bonuses are considered the major component of judges’ income beyond their basic salary—which is insignificant.

While most of their salaries are associated with their ‘production,’ judges’ monthly income is in the hands of the Ministry of Justice. Young judges (who are still subjected to the control of the Administration of Judges Inspection) in particular are administratively (and hence, financially) affected by the reports of that administration. Such a position might force some young judges to be more subordinated to the Ministry of Justice because of the reports of the administration. In addition to the problem of the fear of the reports of that administration, El-Refai’e (2003:12) describes another problem, which is the exceptional treatment of some particular judges and the ‘financial segregation’ among judges with respect to their additional payments and benefits.

Herein, respondent B maintains:

The average salary for one judge who spent more than ten years is 5000 LE. The basic salary in this amount is 300 LE. The basic salary of the Minister is 300 LE. (which is similar to the salary of Counselor in the Court of Cassation). So the salary of the Minister reaches 30, 40 or 50,000. All vice chairmen of the Court of Cassation and chairmen of courts of appeal have the same salary as the Minster, which is nothing. But most of the salaries are made up of the changeable additions. In that way judges are under the mercy of the government. In addition, the problem is that judiciary does not have an independent budget. This makes me say that the lives of judges (all our living cause) are in the hands of the government. Without an independent budget, our lives end up in the government’s hand.

5-6-3

Another side effect of the above problem is that the chairmen of courts have the right to evaluate or comment on judges’ performance to some extent, in particular with young judges. Since almost all the additional payment is linked to ‘productivity,’ the chairmen of courts have much power over junior judges (in spite of the fact that according to the
law no one can intervene in judges’ decisions (even the chairmen of courts). In many cases several judges complained that the power of chairmen of courts could affect their independence. This problem becomes clearer since the Ministry of Justice has the power of selecting all chairmen of courts (except for the higher courts’ chairmen). El-Refai’e (Ibid: 12) asserts that because the Ministry of Justice has the upper hand in selecting the chairmen of courts for unlimited years, this does not only affect the independence of the chairmen who become very liable to the regime, but also affects the junior judges who are under the mercy of the chairmen of courts. He argues that this situation affects the decisions of junior judges because chairmen have the power of warning the former (in anything that chairmen might conceive as conduct against the functional requirements of judges [muqtabayat al wazeefa]).

5-6-4

Another problem related to the financial running of judges is the huge gap between judges’ salaries and their insurance (payment) after their retirement. In addition, the majority of ordinary court judges do not have the same privileges of other parts of the judiciary or other governmental officials. This creates a situation in which judges’ fear for their future. The foremost problem related to insurance is that judges are paid a sum of remuneration after retirement, but the monthly payment after retirement is very minimal compared to the one they became used to receiving while they were working. The major difference lies in the fact that they lose all additional monthly payments. What intensifies this problem is that the basic salaries have never been significantly changed since the law of 1972. Moreover, since the beginning of the 1990s (when many of the structural adjustment programs started in Egypt) judges complained about the low salaries and that their earning is no longer capable of meeting the cost of living (example is al-Qudah, January-December 1993:6).

Respondent M explains the extent to which insurance does affect the lives of judges after their retirement. According to him, some judges were receiving a sum of 40 thousand LE a month, and after they retire they are getting only 700 LE a month. He believes that judges are forced to think of their future and to be liable to the regime so
that they can acquire a governmental position after their retirement (examples are being appointed to the parliament or being governors or ministers, or in particular governmental bodies as the Central Commission for the Accounting). In the same sense, Counselor Mohamed Nagy Derbala in *al-Qudah* (January-August 2003:102:104) proposed some ideas concerning improving judges’ salaries and insurances systems. The basic criticisms Counselor Derbala attributes to the current system are that: 1) there is a huge difference between the judges insurance compared to that set for Police and Military officers; 2) there is a huge difference between judges’ salaries and their insurance; and 3) there is a huge difference between judges salaries compared to that set for judges at the Supreme Constitutional Court. He argued that only the judges of the Court of Cassation have some comparable privileges to the one specified to judges of the Supreme Constitutional Court (while other judges in different divisions of the judiciary do not have these privileges). In addition, Counselor Derbala suggests that there is segregation among judges themselves in their insurance benefits with respect to their superiority and the year of their retirement. He explained that older judges do not have the same insurance of their successors after their retirement.

**5-6-5**

The third problem is that all additional economic and social privileges, which include health care services, are controlled entirely by the Ministry of Justice. For instance, what is called the Special Fund for Social and Health Care for judges is managed completely by the Ministry of Justice. The JCE is offering some assistance through the social and the health services systems offered to the members. However, due to the limited resources of the JCE, judges’ health care demands are almost controlled by the Ministry of Justice. According to respondent M,

“...In critical health cases, instead of waiting for the Special Fund decisions, judges are forced to beg the Ministry of Justice for urgent help!”
The way the financial aspect of judges’ life is organized has many implications that might coerce them to accept some of the governmental proposals, such as artificial roles in the electoral supervision, or to seek additional non-judicial posts (that might affect their independence). According to El-Refai’e (2000: 140) “it is hard for young judges who have small salaries to refuse the average of 7000 LE as remuneration for supervising the election.” According to him, judges ‘cannot’ oppose the government’s way of supervising the election and that judges ‘often’ accept being involved in electoral processes on which they do not have actual and comprehensive power. Moreover, judges are often compelled to look for additional tasks through their delegation to work in extra occupations in the judicial or non-judicial body, while keeping up with their previous judicial work [what is so-called al-entideab]. In most cases, this delegation is organized to mandate judges to work in governmental offices (while have the same judicial job). Judges may also seek to work outside Egypt through an organization between the Egyptian Ministry of Justice and some Arab Countries [through what is called al-i’era, secondment].

Delegating judges to governmental office has been one of the most significant criticisms from judges, not only because it might affect judges’ decisions in their courts when they deal with the same governmental bodies they work for, but also because it creates a conflict of interests in which judges who are more liable to the regime or ‘ambidextrous’ are the ones who will obtain the extra financial benefits.

Counselor Ibrahim al-Tawwela (al-Qudah, January -August, 2003: 105) explains the impact of the delegation and emphasizes:

What is the delegation [entideab] or the secondment [al- i’era]? What are the benefits for the judiciary and judges of these systems? The delegation, for instance, goes beyond its decision-making powers. Rather it is a relationship between the delegated judge and the governmental body where the delegated judge works. What kind of relationship makes a particular Minister
or chairman of a governmental commission or body asks for a particular help from a particular judge? How can we conceive the relationship between this judge and the rest of the employees in that governmental place? Is this the impartiality that we need to maintain and not to ever lose?

Respondent M emphasizes:

The Judicial Power Law prohibits proposing any extra benefits for some judges, while these benefits are not offered for others, entailing unequal financial treatment for judges. The law also bans offering any financial or material benefit for judges after their retirement. However, we have seen people delegated for 20 years who became millionaires and gain many times more than their colleagues, just because they are ‘close’ to the Ministry of Justice! Those judges have transformed their work into a mere executive job to satisfy the government. At the same time, there are poor judges, who are deprived of many financial benefits, just because they are principled judges!!

Because of the jeopardy of the above systems, it was included in all the JCE law proposals to control them. The pressures made by these systems also have a serious impact on judges’ freedom to take a stand. Being hyper active in the JCE (particularly in the case of junior judges who are subjected to inspections if they insensitively criticize the government) means paying the price in either salary or the transference or could possibly affect promotions, according to respondent S

5-6-7

The above discussion reveals that the government may expose judges to critical situations in which their reputation could be affected (this happens in the political realm in the election issue or when the government wants to affect judges’ decisions). Moreover, the government uses socio-economic privileges or pressures to influence
judges. Realistically, judges thus become confined by government pressures and manipulations (both politically and economically). The cultural sphere could be thought of as an alternative sphere where judges might gain some freedom. In this sense, several judges insist on the link between the socio-economic pressures and the cultural ones (such as impartiality and courage in truth telling of judgment). As explained by Counselor Ahmed Mekky (in El-Refai’e, 2000: 207):

Judges’ interests in Egypt are in the hands of their rulers. This means that once they want to achieve any of their interests, they are forced to request this from their ruler. The ruler is the only one who has the power to provide the inquirer (judges) for his inquiry (demands). Unfortunately, the inquirer may be forced to carry out the will of the rulers in his judgment. However, we are judges, who should speak the truth (we should not hide what we believe as the truth). Because of this we should not fear any blame or expect any compromise or mutual gain. When we ask for our interests we know that this is our right, and we are not petitioning.

5-7. The cluster of culture:

The medal does not create a judge. The judge will not be as such, unless this judge has in [his] own bosom, the soul, the pride, the dignity, and the anger of the judge for [his] authority and independence. Immunities and guarantees are no more than the ‘weapon’ in the hand of the solid judge. These weapons are used to shield and preserve judge’s independence. In the judges’ hearts is the ward of defending their independence and carrying on completing this independence (Mohamed Sabry Abu ‘Alam, Former Minister of Justice 1943).
Based on my experience for 40 years in the judiciary, judges are independent only according to their judicial training and their morals and their commitments that their God embraces their consciousness. This refers to the individual judge. However, the judicial system as a whole is not independent. My argument that the judicial system is not independent is clear because of the paradox that part of the judicial apparatus has no judges and has no independence. This part is what the government calls ‘judicial bodies.’ Faithful judges [al-iataqya’a] are the only ones who are independent and suffer for their choice and they know that they do not have a future after their retirement. (11)

It can be inferred from the above quotations that there are two key notions that play a significant role in formulating the cultural load of judges’ “dignity and impartiality” on the one hand and the ‘religious faith’ of achieving justice on the other. However, each of these is not synchronized, and the practices of each have different aspects of complexities and contradictions. Alongside other components of the cultural burden (such as training and the commitment to law, as well as the exposure to international instruments, as will be explained) different features of complexities, contradictions, and networks exist to frame each judge’s reaction and attitude not only in the court decision making, but also in any social or judicial public realm such as the JCE.

As Laura Nader suggests (2002: 119), Gramsci’s notion of hegemony is not only about the assumption of existing order that are accepted by dominated and dominant alike, but it is also about “clusters of belief that circumscribe that which is considered natural, the way things are and should be.” In fact, judges cannot escape the hegemony as organized by intellectuals as a “dominant group” to the counter hegemony” (as the conquest of hegemony by a subaltern classes). Instead they are forced to have cluster of contradicting ideologies and beliefs concerning their role within the law enforcement formula and the different boundaries of their work. The following section will analyze this cluster of beliefs exploring why it is so inconsistent, while focusing on the centrality
of two key beliefs about ‘dignity and impartiality’ and ‘the religious faith of achieving justice.’ The implications of these two beliefs for the judiciary will be explored.

5-7-1. The impartiality query

Shapiro & Sweet (2002: 3-4) assert that in democratic states most government officials achieve legitimacy by acknowledging their political rule and claiming subordination to the people through elections or responsibility to those elected. However, judges claim legitimacy by asserting that they are non-political, independent, neutral servants of ‘the law.’

Both the dignity and the impartiality discussions were important notions in all the discussions with almost all the respondents. My interviewees insisted that these notions are the most momentous ones with respect to all the different realms where judges move to since their selection process. Two examples indicate the importance of this notion in judges’ mindset, and also to what extent it is complex.

To start with, the following two quotations demonstrate the significance of the dignity matter while selecting judges. While both respondents criticized some aspect of the executives’ role in the process of selecting judges in Egypt, both affirmed the importance of the self-respect of judges over other factors in the process of selecting judges.

According to Respondent H,

The idea that judges should be chosen based on their class status was to a great extent acceptable before. The idea that the judge should be in an undemanding position [*mesh mehtag*] was acceptable those days. This means that he will not be corrupted and does not expect private benefits from [his] rulers, except for [his] salary. But nowadays life has changed. Most of the wealthy people are corrupt. They have considerable disasters on their backs, and in many cases the sources of their wealth are unknown. For this reasons, how can we select a particular judge just because he grew up in a wealthy family? We should know the source of wealth of this family. Some millionaires have become as such from drug dealing. So, one should not be selected just
because he is wealthy. We should care more about the healthy environment within which the applicant for a judicial position has grown up.

Besides, interviewee L maintains:

There are at least 30 or 40% of judges who are sons of poor families, not even middle or higher class. I mean by the poor (if you were from Upper or rural Egypt you would know) that there are people who are awlad nass [from a good family]. This means that they are from respectable families even if they do not have money.

When you say, “this guy is ibn nass [from a good family],” even if [he] has no property (land), this means that [he] is from a good family. This also means that [he] has a people who raised him to behave properly. This means that [he] grew up in a social environment that prevents him from committing a shame. It is not important that such environment would be a wealthy family. Some judges came from poor rural areas and posses nothing. However, [we] say about them, that they came from respectable families, and from a good ‘origin’ [asl]. Those people have the dignity that is required for judges. Only this dignity can render one capable of trying both guards and Ministers.

Applications for judicial positions would include different requirements (including security reports, law degree records, and social information about the possessions of the applicant’s family). Nevertheless, most of the interviewees in this research maintain that the social status of judges should be distinguished from the neutrality qualities. Yet the significance of this debate is its implication for the stance of judges, which may lead them to avoid taking a hard stance. In those cases, judges prefer to keep themselves away from the accusation of being biased. Simultaneously, the same fear may lead them to take a strong stance, when the government exposes their reputation ‘tarnishing’ them in the election issue.

In this sense, respondent H believes that the concept of impartiality and the reputation of judges have a deep rationality related to the function of judiciary as the last
anchor for people’s rights. The impartiality is also related to a law that stipulates that judges should not express their opinions beyond their courts when this is related to the cases they examine. He affirms:

When we are damaging the reputation of the judiciary, this will affect the role of law. The fact is that the judiciary is important. It is the last anchor [al maladh] for citizens, and we should not damage that anchor. This makes me argue that judges should not have any political ideology, these in terms of the internal politics. However, in terms of external politics, judges should express the ambitions and the rights of his country. Judges should express their opinions concerning any national causes.

But concerning the internal causes, judges should not have any opinions beyond their rulings. If the one judge has an obvious vision that was already expressed outside the court (in fact there is a legal stipulation in that case) this will affect his rulings. Imagine a verdict that is related to the same opinion previously expressed by this judge. The significant example for this is all the ideological stands pro-capitalism or pro-socialism that will affect the judge stand in the cases between capitalists (a corporate owner) and the workers. I would say that there is no doubt that the national causes should be dealt also by judges.

For this reason, covering judges’ news (in particular, cases of judges’ corruption) is one of the most sensitive areas that have caused clashes between the judges and the media. It should be noted that in these cases, the JCE operates as the most active agent to defend judges’ reputation. This happened to the extent that both the JCE and the Journalist Syndicate held several meetings to solve these problems (examples are in al-Ahram Newspaper, April 10th, 1997; al-Ahram Newspaper, October 11th, 2001).

However, some judges argue that impartiality should be understood as a way of supporting people’s freedoms and rights, even if this was against the regime. Counselor Ahmed Mekky (al-Qudah, January-June 1986: Introductory Page O) for instance emphasized:
The law is a living being. All that affects life itself affects law. Hence, the magazine al-Qudah is willing to study the environment on which these laws are to be applied. Yes, we (as judges or as a club) should not be involved in politics. However, we interpret this according to the explanation in the Explanatory Notes of the Law for Judicial Power. That note assigned us to neither to be biased to any of the existing political parties nor to have a confirmed opinion in the political struggles in the country. However, avoiding politics does not mean to relinquish people’s concerns and desires or to break off judges’ duties of protecting people’s freedoms and rights in conjunction with our role in defending the role of law. Those who argue for relinquishing their duties seek some security with the regime. The argument that judges should relinquish their duties of defending people is a mere call for judges’ subordination by the regime.

5-7-2 The religious significance

One of the most central issues within the cluster of culture is religion. In fact most of the judges I met since 1997 who are extremely concerned about their independence are religious. The question is, why is religion regularly raised in the discussion of the independence of the judiciary?

The first rationalization provided by my interviewees is that the idea of achieving justice [al’adl] is central to Islam. This is indicated by the understanding that justice [al’ad] is one of the names of God in Islam. Several judges explained that judges should remember that they are delegated to achieve justice and be fair in their rulings. As interviewee J explains:

The idea of courts in European and ‘western’ countries matches the idea that the judiciary plays a role in serving the ruling classes. However, this is not true in our societies. In the ‘western’ countries, the meaning of “court” is the same as the royal
palace [al-balat]. Judges in the ‘western’ countries were part of the balat of the ruler, meaning that judge were in charge of securing and stabilizing the ruling of particular emperor or king or likewise.

The judge was responsible for implementing the particular laws that were enacted by the ruler. The main purposes for that were: 1) satisfying the ruler, and 2) stabilizing the ruling regime. This happened even if judges were—in many cases—guaranteeing justice between different people before courts.

However, in our Islamic countries, (countries that have an Islamic reference in judiciary, these countries that have laws derived from God’s words), the judge is equal to the ruler, the Caliph. In that case, the judge is not being controlled by any law, but by the rules of the holy books. The judge in this case is implementing these laws while [he] believes that [he] is realizing the guidelines of God [allah]. Thus, [his] rulings should be based on justice. When a particular ruling lacks justice, it will be deprived of any credibility. Such a matter is based in the grassroots—in the consciousness of Egyptian judges, to the extent that there is a saying that says: ‘give me a just judge and an unjust law.’ It has become very famous. The judge, on his way to implement justice, can interpret the legislation to realize this.

In addition, it was clear from reviewing al-Qudah, that religious discourse is extremely linked, or is one of the most dominant convictions with respect to achieving justice. In many cases, the magazine included either stories from the Qur’an, Sayings [ahadeeth] of the Prophet Mohamed, or stories from Islamic history that assign or indicate that judges should be fair and to declare the truth, even if this was against the ruler. (12)

My research thus demonstrates that religion is a key factor that supports the function of judges within the JCE. I observed that in every court hall in all Egyptian courts a sign that has the Qur’anic verse assigning judges to achieve justice in their
rulings hangs on the wall. It states, “If you judge among people, declare justice [wa‘eza hakamtum bayna al nas fa‘hkumu bi’ al‘adl]). Moreover, it is roughly widespread among many judges that to consider the history of judges’ selection in Islam as an important guideline for today’s ‘rulers’ within the discussion of reforming judges selection process in Egypt. An example of this is the ‘Ali Ibn Abi Taleb” (the third Caliph after the Prophet Mohamed) instructions about the particular criteria that should be applied in selecting judges (including that they have faith and dignity, so that they do not fear declaring the truth). Ali Ibn Abi Taleb’s instruction appears in most judges’ speeches and writings when it comes to the topic of selecting judges.

Moreover, usually in general meetings, there is a silence for the souls of the dead (or martyred judges) and a prayer, particularly a Qur’anic verse [al–fatha] for their souls. These are the rituals that open every general meeting. In fact, the general meeting of 12 March, 2004 was held on Friday and for the following reason, it began after the prayer. Hence, the logic enables all the judges who wanted to pray before the meeting (the fact is that many judges prayed collectively in the JCE headquarters and others prayed in different mosques near the JCE). Lastly and more importantly, the Conference of Justice included one paragraph about the importance of the inclusion of Shari’a regulations in Egypt. While doing this, the conference suggested that this proposal matches article 2 in the Constitution that declares Shari’a as the basic reference for legislation in Egypt. The conference suggested that the inclusion of Shari’a should be sufficiently added to the curriculum of schools of law and the National Center for Judicial Studies.

The above examples are not sufficient confirmation concerning the significance of the religious component within the cultural substance on the mindset of many judges. However, they are indicators. Indeed the religious foundation underlying the work of judges is not straightforward. It varies even for the individual from time to time, as it has some complexities that require further explanation. My research indicates that on the one hand, a significant number of the judges who strive for the independence of the judiciary are religious and believe that it is part of their faith is to defend this independence. On the other hand, it indicates that there are others who are also religious yet may be considered less likely to fight against the government or to take a sharp stance against the regime.
Some of the judges who the researcher met during his work since 1997 are religious, while they may be considered liable to the regime. In fact, while the religious doctrine gives remarkable motivations for those who fight for judges’ independence, different interpretations and individual conduct complicate the reaction of judges to what is believed to be judges’ independence.

Following are two examples that demonstrate the complexity of the faith question in judges’ interpretations. The first example refers to the case that judges’ interpretations in the same lawsuit varied in different court levels, once it came to religion. It relates to a case against a scholar who used to teach at Cairo University (Dr. Nasr Hamed Abu Zayed), on which a lawyer claimed that Dr. Abu Zayed deserves to be an apostate [murtad] of the true Islam because of some ideas expressed in his scholarship. The story began when Cairo University refused the professorship promotion of Abu Zayed due to his ideas in his scholarship. The claimant asked the court to separate Dr. Abu Zayed from his wife arguing that Dr. Abu Zayed did not remain a Muslim and it is against Shari’a that a Muslim woman to live in an illegal marriage with an apostate.

This case demonstrates that three different courts examined the lawsuits against Abu Zayed and the interpretations varied among the three courts. The main reason for the difference between the three courts decisions are the variations in law and interpretations of Shari’aa and the complexity of the relationship between the Egyptian law and the Shari’aa’s application in Egypt (in simple terms, personal status affairs of Shari’aa should be applied alongside the positive law). Hence, there is a space of interpretation concerning the conditions of when and why the Shari’aa should be applied in all family law related cases.

In brief, the first Court (the Primary Court) (13) refused the claimants request, and refused to apply the Shari’aa in the case. The court argued that the positive Civil Procedural law should be implemented in both regulations unless there is a clear case and a clear text calling for Shari’aa implementation by the courts. The second court (the Court of Appeal) overturned the decision of the primary court by arguing that the latter ruling illegally explained what the applicable law should be in this case. The court ended up by applying Shari’aa on the case. While accepting the differentiation between the procedural
and substantial elements in the case, the court maintained that capacity does indeed exist in the case. It based this ruling on its explanation that the plaintiff has the right of *hisba* (an obligation on every Muslim to command goodness and condemn misdeeds, Saif, 1997). The court concluded that a particular school in the Islamic scholarship should be applied to the case (*abu hanifa*), [Abu Hanifa is an Islamic scholar and his school is a major Islamic school in Egypt]. Hence, the court refused to apply modern “positive” law on the case. The court relied on Abu Hanifa to argue that there is a command for every Muslim to not only confess [his] faith, but also to confess or call up the removing of misdeeds contradicting true Islam. Hence, the plaintiff has the right of *hisba*, and the court decided to separate Dr. Abu Zayed from his wife. The third court (the Court of Cassation) approved the decision of the Court of Appeal and separated Abu Zayed from his wife, and argued for the *Shari’a* (and hence) the *hesba* application on the case.

Though a new law was enacted just before the decision of the Court of Cassation that controls the right of the individuals for *hesba*, the Court ignored the new law and decided to approve the Court of Appeal’s verdict. The above example indicates the complexity of bringing *Shari’a* and religion to judges’ actions, due to the different interpretations.

*The second example* refers to the question of women judges. Even though there is no clear barrier concerning appointing women in the judiciary in Egypt, it was only recently (in year 2003) that a woman was appointed to a judge’s position. The relevance of this topic is that there is an extensive diversity among judges concerning this topic. In most of the cases, while bringing the stance of the *Shari’a* on the topic, contradicting opinions are offered (both in favor of and against appointing women in the judiciary). Opinions vary even among those who could be considered extreme ‘warriors’ for the independence of the judiciary. They offer different interpretations and this includes judges in different ranks.

An example of this is that the JCE published a special issue on *al-Qudah* (June-December, 2002) in which it opened the discussion about women and the judiciary. The JCE did not take a stance in the magazine but confirmed that the JCE is committed to the different concerns in society and is open to discuss this topic. Moreover, out of 12
contributors to the magazine were judges. Those contributors were divided equally on the topic, and both used some arguments from Islamic history. The most important implication of these contributions is that Shari’a and Islamic history were brought to the discussion in different ways, even though neither the Egyptian Constitution nor the Egyptian law denies women the right to occupy this post. Some of the arguments were utilized in two contradicting ways. One of these arguments was based on the incident in the history that one of the Caliphs (‘Omar Ibn Al-khabat) employed women in the position of being muhtaseb [the person on charge of this post has the authority of checking the markets]. While one view argued that this could be a precedent for women being judges, the other view disagreed and claimed that analogical deduction should be applied to the case (muhtaseb is not a qadi, judge).

5-7-3. The commitment to law implementation:

Unquestionably, the most basic function of judges is applying the laws that were enacted by the ruling class. According to this, judges are trained to apply these laws, and they cannot critically question either the laws or the real reasons behind their enactment. They are highly knowledgeable that respecting law is part of the general formula of rule of law and that all citizens are equally subject to the law. Even when judges are critically querying these laws, they cannot violate the regulations that authorize them some space or freedom of discretion. However, this creates a space of discretion in which judges’ views vary.

Respondent J emphasizes:

In many cases, judges in the criminal courts declare the innocence of a particular accused individual, because the law is unjust. There are many cases on which the Court of Cassation declares invalidity for imprisoning people in the cases of detention and inspection, just because the detainees arrested by unfair laws.

However, respondent H maintains that judges should respect the law, whatever this law may be:
When a particular law supports the interests of particular class or political party this will be a problem of the legislator, and not the judge. I believe that the legislator should be elected and chosen from the people and hence it is the people’s responsibility to elect a good legislator. Remember that there is a significant rule that governs (our) work, which is the principle of denying justice [inkar al a’dalah]. This is the situation when the particular judge refuses to declare his ruling concerning a case that this judge is examining or hearing. The one judge should find a law from within all the legitimate legal references of legislation in the country and should not impede the execution of law. In the case of impeding the execution of law or justice, this judge will be accountable to responsibility and disciplining.

Besides, as respondent B suggests

The judge will implement these laws according to the capability of this judge in interpretation. Even in the religious texts, the interpretations vary. We have many regulations that impact the interpretations. Not all the people are on the same level of understanding the regulations.

This discussion suggests that since the interpretation of law varies between judges, and since they are pushed to identify most of their problems in legal terms and disputes (even in the JCE general meetings and proposing laws), many disputes will appear that challenge any united stand of them. Hegemonic rules will strengthen particular interpretations (the pro ‘dominant’ interpretation). ‘Dominant interpretation’ will be supported by the state power.

As a result of the above, respondent T, argues that what is called ‘judges mentality’ exists. He means that judges are well trained to respect the capacity of the different authorities and courts. The court should decide that it is not responsible for hearing particular lawsuits and hence, it should refer it to the competent court. This can
also refer to respecting the roles and the functions of the superior bodies. Judges are requested to solve their own problems through legal (available) ways. An example of this is when the JCE is required to respect the decisions of the Supreme Judicial Council. When the Supreme Judicial Council suggested that a comprehensive election should be made in the JCE in June 2002, the decision of the former was respected. Disputes among judges should be kept inside the family of judges. Besides, Nagy (1998) insists on the values of the judges’ work. This includes the values and traditions that govern the judge’s relation with [his] work and [his] relations with colleagues and concerning [his] relations with all people [he] is connecting during [his] work.

Respondent B explains that this often played a role in shaping the life of the JCE. According to him, the accusation of some judges of being too political leads many judges to believe that those who are less likely to oppose the government could bring more privileges to judges. To some extent, this argument existed in the period from 1991 to 2001. The government played this game and used this assumption to get rid of what is often referred to as, “Yehia El-Refai’e and his group” (which means all who have “extreme” demands for the independence of the judiciary and who are accused of being “too political”).

Furthermore respondent H asserts that:

All the disputes and confrontations among judges should not be publicized. Our problems should be solved in our ‘one family’ the [al-’elah al-wahda]. Internal judicial problems should not be issues of the public opinion agenda. The litigator (citizens who deals with courts) will lose his/her trust in the administration of justice, if he/she found that judges are internally disputing with one another.

5-7-4. The training question

While it is very difficult to summarize the training path of judges in a few paragraphs, I would suggest that this training relies on two different stages. The first is
the preparatory training (the particular preparation that the newly appointed prosecutors are receiving before their entry in the judiciary path). Many of those prosecutors are expected to be judges. The entire responsible for this stage is what is called the National Center for Judicial Studies [al-markaz algawmy lildersat al-qada’yea]. The study in that center lasts only for one year (U’baied, 1991: 422). This center has a board chaired by the Minister of Justice and has a director who is usually a counselor who is delegated to direct this center under the supervision of the center’s board. The basics of the curriculum of that center are Egyptian laws, practical sciences for judiciary and prosecution (such as Legal Medicine), Islamic law, Egyptian judges’ history and tradition (which includes lectures about the ethics and both the duties and the rights of the young prosecutors in the Egyptian law). In general, the curriculum includes both theoretical courses and practical training (U’baied, 1991: 424).

However, because the experience at the center is only one year in the beginning of the judge’s career, its impact remains minimal. As a consequence, the judicial practice becomes the actual trainer in judge work. That is why different courses are interacting with one another to shape this period. For instance, Hussein (1995: 419-427) summarizes all the avenues that affect this period of the roles of the following: 1) the Administration of Judges’ Inspection, 2) the Primary Courts Chairmen in following up the work of their inferiors, 3) the Following Up processes of the performance of the Courts of Appeal Counselors, 4) the JCE, and 5) the Courts’ libraries and judicial information centers. Counselor Yehia El-Refai’e informed me that “The reason why some judges are less combatants in the independence of the judiciary affair is because they received less training and because they have fragile characters.” This summary suggests that there are enormous factors interacting with one another.

It could be argued that the intersection between many variables in all phases of judges’ work gives judges both empowering and restraining capabilities. Here are three examples of these complexities. First, the role of the Administration of Judges’ Inspection is very complex. Some judges argue that this administration is a ‘school’ (Hussein, 1995: 419-420). Besides, this administration creates some status of transparency and capability for the corrections and the disciplining of judges. However,
most of the judges the researcher interviewed explained how most of young judges have been constrained by this administration. This is because this administration is completely controlled by the Ministry of Justice. As discussed in chapter 4, it was proposed in the JCE bill in 1991 that this administration should be supervised and directed by the Supreme Judicial Council. Respondent B, for instance explores why this administration suppresses young judges’ expressions. According to him, “how can young judges speak in the general meetings in their courts or in the JCE, while they know well that they might receive a notice from the Administration of Judges’ Inspection? Such a notice might affect their salaries and their promotion.”

The second course is exposure of the Egyptian judges to one another. This exposure could play the dual role of empowerment and restraint. For instance, as interviewee L suggests, the capability of the judicial life and judges’ interactions with one another can play a significant role in “remedying all the problems of less trained judges.” Respondent J also argues that, “the fact is that the judge – after 8 to 10 years working in the prosecution office—gains experience. The idea is that [he] may absorb the ‘soul’ of justice.”

The third course is the impact of judicial history and tradition lessons and training on judges. Many judges the researcher met during his work emphasized the significance of the role and the history of the Egyptian judicial system in shaping their consciousness. In many conversations among judges, they recollect the incidents when they worked with famous, ‘principled’ senior colleagues. In that sense, they emphasize the fact that the Egyptian judiciary is the oldest one in the region. Many respondents suggest that all great nationalists were judges. They gave examples of Mohamed Abdou, Saad Zaghloul, Mustafa Kamel, and Mohamed Fareed. All those people were great reformers and combatant for the independence of the judiciary.

However, the role of the Administration of Judges’ Inspection and the role the chairmen of the primary courts (who are controlled by the Ministry of Justice) restrain judges freedom of expression or activities. Several respondents argue that the Ministry of Justice has played a role in corrupting these values. Counselor Ibrahim al-Tawwela (*al-Qudah*, January -August, 2003: 105) explores this and argues:
How can judges be independent while they see that those who are hypocrites to the regime are highly positioned? They are given the capacity to control judges even though they are hypocrites. Judges cannot request the comfort or the social privileges that have been specified to hypocrites.

5-7-5. The international conventions.

Particular sections of the international conventions on human rights address the issue of the independence of the judiciary or the right of every individual to an impartial and independent tribunal. The most basic of these are the Universal Declaration of Human Rights (1948), the European Convention on Human Rights (1950), the International Covenant for Civil and Political Rights (1966), the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Milan from 26 August to 6 September 1985, and lastly the UN Basic Principles for the Independence of the Judiciary (Sherif & Brown, 2003:4).

What is the impact of these conventions on the cultural complexities that affect the training of Egyptian judges? While it is very difficult to run through the complexities of the Egyptian judges’ exposure to international conventions, some observations can hint at this answer. First, only two of these conventions and conferences are directly related to the discussion of the independence of the judiciary. These are the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and the UN Basic Principles for the Independence of the Judiciary. Both the Congress and the Principles appear only in mid 1980s. Hence, they appear in Egyptian legal scholarship only recently (El-Refai’e, 1991; Ga’far, 1995; Syam, 1995; Syam 1999; Ubayied, 1991). This indicates that there are only minimal possibilities for these documents to impact judges’ training. In fact, many respondents stated clearly to the researcher that the international covenants are not part of the Egyptian judges’ training.
Second, sometimes there are opportunities for judges to participate in training sessions or the international scholarships or workshops. The opportunities for this kind of organized training hardly exist because they require foreign language skills. In fact, recently, the National Center for Judicial Studies has been working on foreign language training for judges. However, because the language courses are limited, it reduces the opportunities for international training (according to several respondents).

Third, since the mid 1990s, the usage of the international conventions discourse became clear in several judicial documents and events. It could be argued that the JCE has played a significant role in this aspect. This was clear, for instance, in the Conference of Justice (1986), and the different proposals for new laws of the Judicial Power. Also, the JCE used international conventions in its struggle for autonomy. Hence, these conventions tended to be empowering for judges’ activities.

However, since most of these conventions have no obligatory nature, their impact is minimal. This is partly because the actual implementation of the international conventions depends on the exclusive will of the government to acknowledge this implementation. Besides, there are some limits within international conventions themselves. For instance, Article 8 in the UN Basic Principles for the Independence of the Judiciary maintains both the judges’ right for freedom of expression, and also the restraint that this should be done within a particular judicial manner. It states:

In accordance with the Universal Declaration for Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly: provide, however, that in all exercising such rights, judges shall always, conduct themselves in such a ‘manner’ as to ‘preserve’ the dignity of their office and the impartiality and independence of the judiciary.
5-8. Summary

This chapter analyzed the processes by which three contexts interact to complicate the possibilities for transformation within judges’ activities in the JCE. The first of these contexts is the socio-economic and political context within which the JCE moves. The implication of this context is that the needs of different conflicting ‘wings’ in the Egyptian ruling class complicate the possibility of democratic and judicial reform. The second context involves the complexities of the JCE itself. The way it is situated between the structure and superstructure creates some problems that challenge the JCE’s work. These are the problem of identity, representation, and agent-structure. The third context entails the different socio-economic, religious and cultural dispositions placed upon judges. The interaction between these contexts creates an ongoing situation in which judges have both empowering and restraining conditions that can expand the spaces of their work and/or limit their involvement in endeavors for judicial and democratic reform.
Notes of Chapter Five:

(1) Most of the interviewees in this thesis suggested that there are some periods in the history of the JCE that witnessed such crash, particularly in its public domain role (the main theme of this study). They refer to the period from 1991 to 2001, which is the period of the chairmanship of Counselor Moqbel Shaker.

(2) State institutions themselves embody different interests and networks as well, not only among themselves, but also between these networks and the different capitalist groups.


(4) At the same conference.

(5) At the same conference.

(6) Mr. Ahmed Saif Al-Islam Hamad, in several conversations concerning the Supreme Constitutional Court.

(7) During the chairmanship of Counselor Abdel Samd to the JCE, he criticized President Sadat in a public meeting on 11 October 1980 during the JCE’s role condemning a new exceptional court (the Court of Values). This happened while the President was attending the JCE, chairing the JCE council meeting. Abdel Samad’s speech accused Sadat of undemocratic actions. This speech included:

“You should be angry with yourself. Free countries exist only where there are democratic regimes. Mistakes are bearable in democratic practices (even if these mistakes were widespread). However, one single mistake in a dictatorship regime cannot be corrected.”

(8) After the police attacks on two different printing houses, where El-Refai’e was printing his defense, he bought a typewriter and spent the whole night typing his defense in April 19th, 1972 (al-Qudah, January-August, 2003: 85; El-Refai’e: 2003: 9).

(9) The term “Sheikh” of judges is a term used among judges to refer to their elder senior judges. In particular it is used for the chairman of the Court of Cassation and the elder seniors in this Court. Judges also use this term to refer to all senior judges who are very principled.

In addition to what several judges affirm about their view of Counselor El-Refai’e, I had many examples about the way on which Counselor El-Refai’e has been very well
respected among judges. In other cases, he has been very concerned about his role in defending the independence of the judiciary and judges’ stance concerning democracy or the national causes in any public meetings they attend.

In one of these examples, El-Refai‘e was very angry due to an action done by Egyptian human rights NGO. In a conference related to the rule of law organized by this NGO, which El-Refai‘e attended, this NGO refused to take a stance concerning the invasion of Iraq in the final recommendation of the conference. He considered the position of this NGO a very serious disrespect to his attendance and contribution to the conference.

However, respondent T, while he agrees that Counselors Abdel Samad, and El-Refai‘e, had significant effects in the JCE history, affirms that they are the ‘outcome’ of the Egyptian judicial tradition. Some key aspects in the culture and the traditions will be analyzed later in this chapter.

(10) The table of the salaries and additional benefits for judges is in the Code of the Judicial Power (47-1972), published in the year 1999. The Table is the annex 1, page 71.

(11) The first quote is one of the famous passages that is been used in almost all the general meetings of the JCE. It is declared by a former Minister of Justice in Egypt (Mohamed Sabry Abu ‘Alam in year 1943). It is a part of the explanatory regulations of the Law for Judicial Power (66 for year 1943). The second quote refers to respondent M.

(12) One example of these stories is the following:
“In al Kuja, Iraq, during the Amwai Period, a judge insisted that the Walli come to the judgment’s place as a witness. The judge’s command was due to a petition submitted by a poor woman against the brother of the Walli in which she calmed that the Walli’s brother’s action was done through an approval of the Walli. For many months the Walli refused being subjected to any interrogation. The Walli even imprisoned all the messengers sent by the judge (including the chief Police of the city). As a result, the judge insisted on accepting [his] commands, and releasing all the prisoners. Otherwise, [he] would submit [his] resignation, and complain to the Caliph. Only after the judge’s resignation, and in [his] way to the Caliph, the walli accepted the judge’s conditions.”
Mentioned in al-Qudah (January-June 1990: 70-71).

(13) The three lawsuits are lawsuits N: 591 for the year 1993 Personal status courts [Shar‘ey Kully] Giza, which is based on Shari’a rules codified in the Egyptian law. This verdict issued in 27/1/1994; and law suit N: 278 for the judicial appeal year 111, Cairo Appeal of Cairo, personal status circle N 14, issued in June 16, 1995; and cases N: 475, 478, and 481 for the year 65 judicial year for personal status lawsuits in the Court of Cassation court, the civil, commercial and personal status circle, issued in August 5, 1996.
Chapter Six

Conclusion

6-1 Implications in sociology and anthropology

Most schools of thought within sociology of law view “law” as a singular bounded entity that operates as part of the state as a means of social control and order. This vertical approach to understanding “law” assumes that the state uses “law” as a means for controlling people and maintaining stability. It also assumes that the only factors that impact “law” are state power and the mode of production. In other words, there is a top-down relationship between “law” and “individuals.” According to such perspectives, “law” controls and “individuals “are controlled.” The significance of this thesis is that it challenges “vertical” or “top-down” approaches to understanding law by demonstrating the ways that individuals, and in this case, judges, negotiate state control vis-à-vis the “law.” In other words, if Egyptian judges are producing, and calling for, liberal interpretations of the law, calling for the protection of their legitimacy, and challenging state control over the law, then alternative theoretical frameworks are needed that consider the power (albeit confined) of individuals in ‘shaping’ “the law.”

As my thesis demonstrates, Egyptian judges debate major questions about the state’s legitimacy in the rule of law. They debate the separation of powers, constitutionalism, and the independence of the judiciary. Not only do they ask serious questions, but they negotiate their perspectives on these critical legal issues with the state and propose alternative laws in many cases. As this thesis has suggested, for example, judges proposed new models for laws that govern elections in 1990 and new laws on the independence of the judiciary in 1991 and 2004.

In addition to calling for future research on the relationship between the “law” and the agents or individuals who implement the law, this thesis calls for analysis of the cultural dynamics that shape the legal sphere beyond the context of courts. This study
thus contributes to efforts aimed at expanding the sociology of law beyond theorizations that reduce law to a mean of social control (Hunt, 1976) and adds to efforts that call for more comprehensive (as opposed to fragmented) approaches to the field of sociology of law (Evan, 1990). Bringing the agent and/or individual and the dynamics of culture to bear on sociology of law, this thesis provides a rich context for considering simultaneously multiple factors beyond the “state” that shape the processes by which “law” is subject to change or is at least been challenged.

This thesis also contributes to debates among Marxist theorists on the relationship between structure and super-structure. Classical Marxists, for example, while arguing that the mode of production (structure) conditions social consciousness and the state (super-structure), define structure and super-structure in highly fixed and bounded ways, as if the two are mutually exclusive and autonomous entities (Bottomore, 1983: 42). However, Marx himself characterized the relationship between structure and superstructure in more complicated terms and cautioned against such economic reductionism. As Bottomore explains, “That is why Marx further characterizes this relationship as historical, uneven, and compatible with the affectivity of the superstructure” (1983: 43).

My thesis supports such critiques of the classical Marxist view in that it similarly reveals that the relationship between structure and super-structure is indeed dialectical rather than linear or one-dimensional. The judges’ club that I explored is not officially part of the super-structure but is simultaneously linked to the super-structure through its work and its ongoing negotiations. In the judges’ work-life, they are part of the judiciary, but then in their meetings, talks with each other, and everyday discourses, they have created an alternative space. The judges’ club thus is part of the superstructure but simultaneously extends beyond the super-structure—revealing that the boundaries of superstructure are fluid, complex, and contextual. My research thus suggests that theoretical approaches that provide a lens for exploring the spaces in between structure and superstructure, or structure and super-structure as an ongoing, dialectical relationship, are needed for understanding the role of the judiciary in Egyptian society.
Moreover, my research reveals the significance of Gramsci’s theorization of hegemony to the field of sociology of law. My thesis analyzed the ways that many members of the judges’ club are calling for democracy and freedom while simultaneously representing the interests of the regime. This research finding contributes to scholarly critiques of classical Marxism and to the call for more complex analysis of the relationship between structure and super-structure. Bringing Gramsci’s theorization of hegemony to bear on the sociology of law, this thesis demonstrates that in the context of the relationship between individual judges and the ruling regime, the boundary between structure and super-structure is blurry, rather than fixed or neat. In other words, while many judges often position themselves on the side of social justice and democracy, their behaviors and lack of willingness to give up their own individual socio-economic privileges often reinforces hegemony. The judges are thus resisting state authority while operating within (and supporting) hegemonic power. As a result, they are both outside the boundaries of the super-structure while operating within at the same time.

While sociologists have tended to use macro approaches to study “law” that focus on issues of social control, the anthropology of law and critical legal theory have been concerned with demystifying law: “to show how rules are not, and cannot always be, obeyed, how laws are self-contradictory, how the practice of law differs from the ideal” (Harris 1997:4). Yet while anthropologists might be more nuanced in their analyses, the categories through which they view “law” in society often reproduce colonialist frameworks that inscribe binary oppositions of modern vs. primitive, or positive codified law vs. cultural norms/customary, law upon colonized or post-colonial societies. Thus, while anthropologists of law have produced comprehensive frameworks for exploring the everyday lived experiences of “law,” their approaches to understanding the relationship between culturally specific law and Western “modernist enlightenment”-based law have tended to be limited. By limited, I mean that a dominant trend in the anthropology of law has constructed a binary apposition between what is often referred to as positive codified law vs. customary law and as a result has failed to explore the nuanced, dialectic relationship between culturally specific legal forms and Western modernist enlightenment based approaches to law. My research demonstrates that a more useful
approach might highlight the ways in which what is often called “customary law” is shaped by ‘modernist enlightenment-based’ approaches to law and vice versa. For example, my research demonstrates that judges used both the United Nations Basic Principles for the Independence of the Judicial Power (presumably a Western “modernist” based discourse) and a religious Islamic discourse to call for democratic reform and to defend the independence of the judiciary. They brought these discourses together and selectively used pieces of each, depending on the circumstances. Moreover, the religious Islamic discourse was often shaped by the Western modernist-based discourse and vice versa. Therefore, this thesis contributes to anthropological efforts aimed at analyzing the fluidity of boundaries between tradition and modernity, or between so-called “traditional law” and “positive codified law,” and the ways that they often shape each other and have been deployed simultaneously and selectively.

Finally, this thesis raises important questions about methodologies useful for expanding the field of anthropology of law in the Egyptian context. This thesis implies that perhaps a narrative approach to the anthropology of law might be more useful for exploring “law” and “society” rather than methodologies that produce simple characterizations or generalizations about legal actors, such as judges, that might make the category “judges” or “judges club” seem coherent or self-contained. By highlighting the multiple, shifting, and often contradictory discourses of judges in Egypt, I have implicitly suggested a narrative approach to the anthropology of law that captures the ways that judges live and produce particular institutions and/or ideas.

Moreover, this thesis has also brought anthropological critiques of the concept of “field site” to bear on the anthropology of law. Many anthropologists have questioned the idea that bounded field sites exist by arguing that boundaries between “the field” and “home” or “the field” and “researcher” are imaginary, particularly “in a globalized, de-territorialized world” (Gupta & Ferguson, 1997). With reference to the judges club in Egypt, we found that a bounded field site was virtually non-existent, and that it was also possible for the researcher to enter the research site considering issues of national security and confidentiality. As a result, I crafted research methods that allowed me to follow the judges’ discourses throughout multiple ‘anthropological locations’ rather than
to “enter” one distinct “field site.” This thesis thus confirms that methodological alternatives to classical concepts of the “field site” (as a bounded distinguishable place that exists and that a researcher enters) are not only useful, but can help to expand the spaces for research and understanding. Particularly in the context of conducting research among judges in Egypt, where coupled with the lack of a bounded “field site,” there also existed the risk of posing a “threat to national security.” This exacerbated the need to be methodologically strategic and careful and to constantly move in and out of multiple anthropological locations—and to follow discourses instead of making grand generalizations about a geographically bounded “field site.”

6-2 Further research

Being interested in the area of the anthropology and sociology of law, judiciary and human rights, I was motivated as a result of this study to pursue a number of its particular findings in my further research. First, this research suggests that the state’s attitude in employing a margin of independence of the judiciary (according to variable factors and pressures) is not straightforward. It indicates that an authoritarian regime such as the Egyptian one was “manipulative” while using irregular methods to employ the judiciary in its political struggles. Examples of these irregular ways are: the Egyptian regime’s attitude on the election issue (involving judges in “fake” supervision of the election, and pressuring the Supreme Constitutional Court to “sponsor” the election as it has been proposed by the regime). Another example is the regime’s attitude in crafting complex techniques for judges’ salaries and financial privileges to force judges to “adhere to” the regime’s interests (through the extensive usage of the ‘changeable salaries’ [bonuses], for instance). Studying the history of the attitude of such an authoritarian regime could help us understand the socio-political history of the “rule of law” in Egypt, with respect to the judiciary. While taking into consideration comparative approaches to the stances of other authoritarian regimes with respect to judges unions or the judiciary as a whole, such study could bring some general understanding of the
relationship between authoritarian regimes’ attitudes concerning the judiciary and the common economic pressures these countries have.

This thesis also suggests that Egyptian judges used both the UN Basic Principles for the Independence of the Judicial Power, and religious Islamic discourse to call for democratic reform and defend the independence of the judiciary. However, this research also implied that the degree to which each of these discourses was used varied. Exploring the cultural disposition of the discourse of the Egyptian judges suggests that while there was a usage of ‘emanicipatory’ discourse relating to the legal reform and the judiciary’s independence, some judges used religious interpretation against appointing women in the judiciary. The thesis implies that the religious disposition of the Egyptian judges has ‘dual’ impact on their actions: sustaining the independence of the judiciary, and challenging their cultural stances concerning defending the ‘egalitarian legal reform,’ in particular concerning appointing women in the judiciary. The latter challenges specifically exist because of the varieties of interpretations that have been offered based on religion.

An interesting question that could be addressed for further research is when and why the usage of each of the ‘positive and applied’ codes versus the ‘religious discourse’ varies? In other words, such research would explore the multiple, shifting, and the ‘contradictory’ discourses of judges in Egypt.


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- *Al-Ahram* newspaper, different issues.
- *Al –Qudah*, the Judges, the Magazine of the Judges Club of Egypt, JCE, different issues.
- *Al-Sha’b* newspaper, October 2nd, 1992.
- *Al-Wafd* newspaper, different issues.

IV. Interviews

I interviewed following mentioned judges on the following dates):

1. Counselor *Hisham Al-Bastaweesy*, on 27 March , 2004
2. Counselor *Moqbel Shaker*, on 28 March, 2004
5. Judge *Ahmed Saber*, on 31 March, 2004
6. Counselor *Mohamed Hamed El- Gammal*, on 1 April, 2004
7. Counselor *Tareq El-Beshry*, on 2 April, 2004
8. Counselor *Yehia El-Refai’e*, on 4 April, 2004
9. Counselor *Hossam Hisham Sadeq*, on 4 April, 2004
10. Counselor *‘Assem Abdel Jabbar*, on 4 April, 2004
11. Counselor Zakariya Abdel Aziz, on 8 April, 2004,