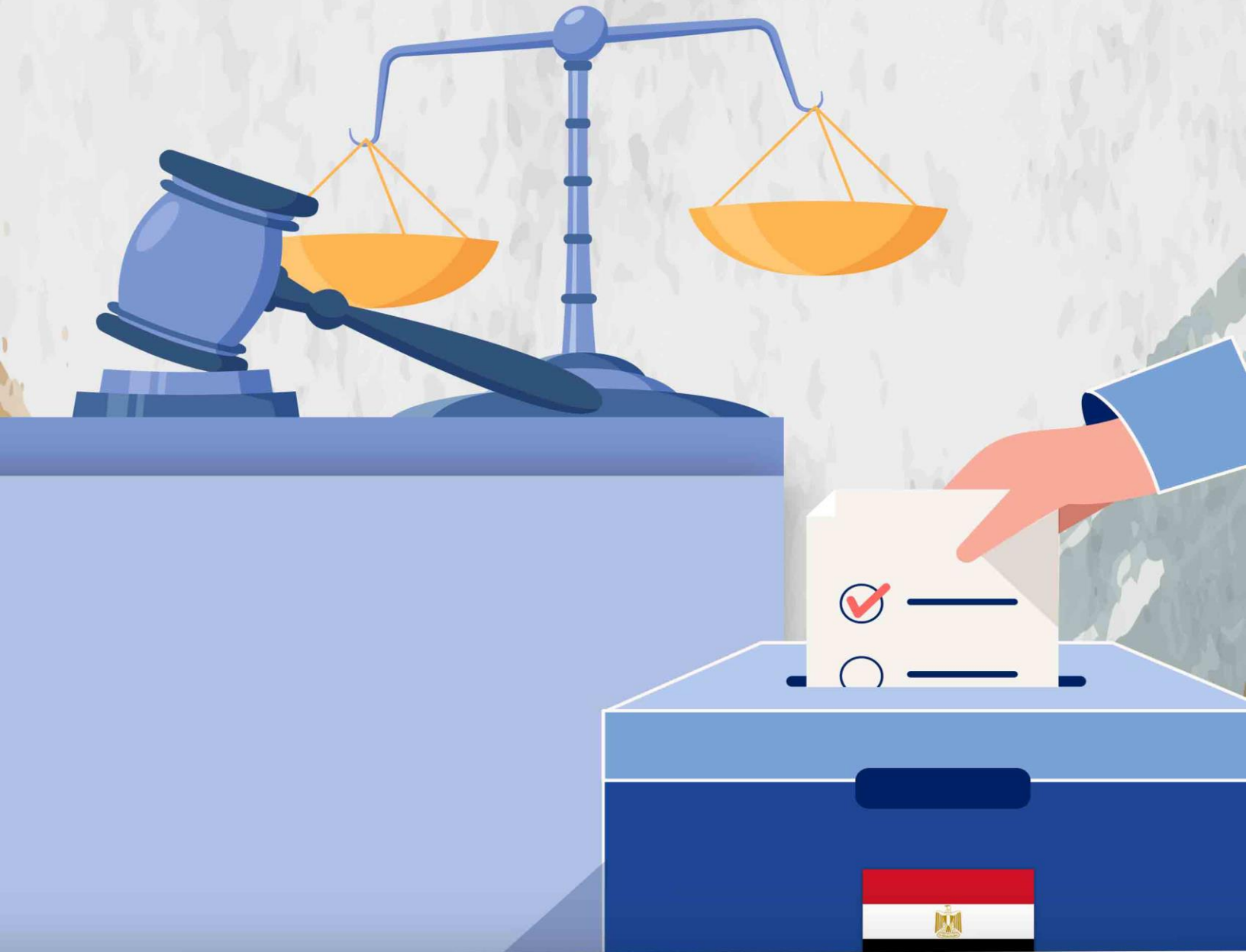


FULL JUDICIAL SUPERVISION ON PRESIDENTIAL ELECTIONS BETWEEN CONCEPT AND APPLICATION



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Introduction:

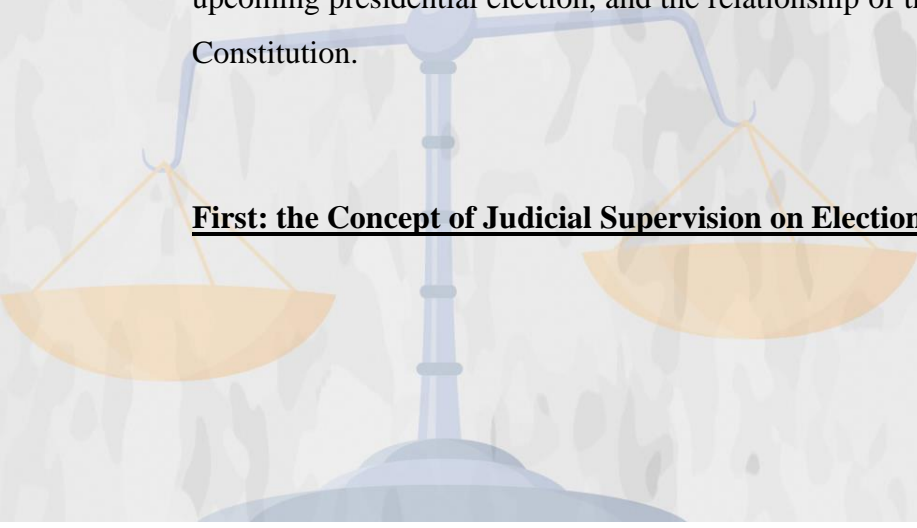
The upcoming presidential election of 2023 is the last electoral process to be conducted under full judicial supervision in accordance with the 2014 Constitution. The new constitution adopted a system of independent management of elections, ten years after its issuance, as a transitional phase ending in mid-January 2024.

Judiciary being responsible for election supervision has been the only solution proposed to confront popular distrust in the elections in Egypt, with widespread fraud in most of the electoral processes, to which people responded with widespread reluctance to exercise their right to vote. Judicial rulings have accumulated to partially invalidate the elections in some circuits, or completely in some other cases. For decades, the Parliament has protected itself from judicial rulings with the rule: “the Council is the master of its own decisions”, since its law gave it the right not to enforce judicial rulings invalidating the membership of representatives whose elections were ruled invalid in their circuits. However, assigning the judiciary to supervise the elections was not easy, and rather surrounded by ambiguity, where the judiciary intervened more than once to set legal controls for that supervision.

What is the full judicial supervision on the elections? Who fits the description of judges? How will the full judicial supervision of the 2023 presidential election go? Does the existence of the National Election Authority conflict with the concept of full judicial supervision especially since the National Authority is the one that actually manages the election?

This paper attempts to approach an answer to these questions by analyzing the legal status of the election, starting with defining the concept of full judicial supervision that must govern the upcoming presidential election, and the relationship of this concept to the provisions of the 2014 Constitution.

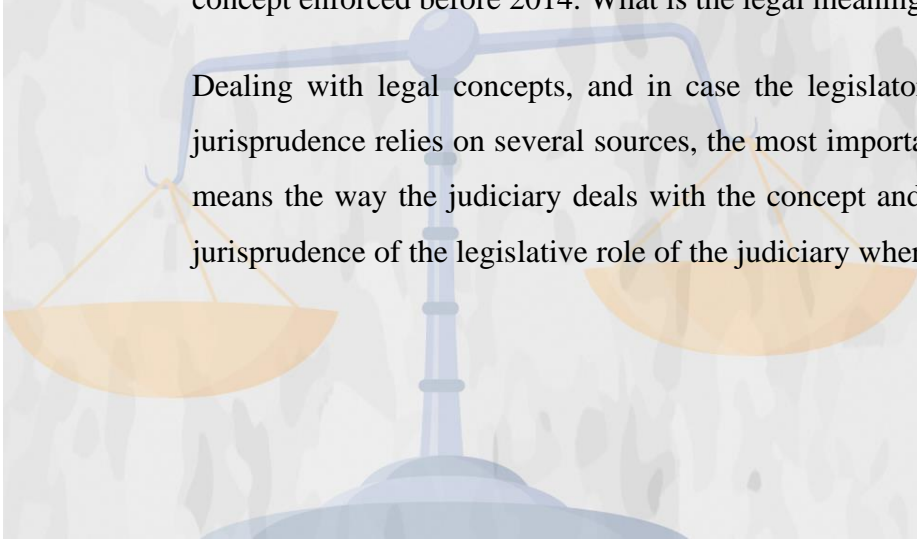
First: the Concept of Judicial Supervision on Elections:



Although judicial supervision on election in Egypt has practically begun since 1976 elections, the various laws regulating election have not precisely defined the concept of judicial supervision, and this has become the case in successive election laws, up to Presidential Election Law No. 22 of 2014, which, in turn, did not accurately define the concept of Judicial supervision, as well as the Law on the Regulation of the Exercise of Political Rights No. 45 of 2014, which stipulates in the first paragraph of Article no. 3 that: “The first legislative elections shall be held following the entry into force of the Constitution of January 18th 2014, under the full judicial supervision of the High Electoral Committee provided for under Article (228) of the Constitution”. The law used the term “full judicial supervision” without setting a specific definition for it.

As for the National Elections Commission Law No. 198 of 2017, which replaced the High Electoral Committee, which is supposed to be a permanent committee in charge of all electoral operations, it explicitly stipulated in Article 3, which enumerated the committee’s terms of reference in Clause 7, that: “ Seconding members to administer polling and counting in referenda and elections from the state’s civil servants and others given that they meet the conditions that should be fulfilled by the Executive Body’s personnel. It may seek the assistance of members of judicial authorities after obtaining the approval from the respective Special and Supreme Councils as applicable (depending on the case)”. This means that the legislator assumed that the Permanent National Committee would manage the following electoral processes without judicial supervision, so that the judicial role would be limited to forming the Commission’s Council, which consists of the judicial bodies, thus ending the stage of full judicial supervision on the elections in Egypt, giving, however, at the same time, the Committee the right to Seeking assistance from members of judicial bodies. In the new situation, it was logical for the law to lack a specific definition of judicial supervision on elections. This means that the electoral processes that take place during the ten-year period approved by the Constitution must be managed in accordance with the legal concept enforced before 2014. What is the legal meaning of judicial supervision?

Dealing with legal concepts, and in case the legislator did not set a precise definition, legal jurisprudence relies on several sources, the most important of which is the judicial concept. This means the way the judiciary deals with the concept and its judicial applications. This is called: jurisprudence of the legislative role of the judiciary where the frequency of judicial interpretation



of a specific legal text or concept, especially the rulings of the Supreme Courts, gives a specific meaning to the concept.

The Legal Basis for the Concept of Judicial Supervision on Elections:

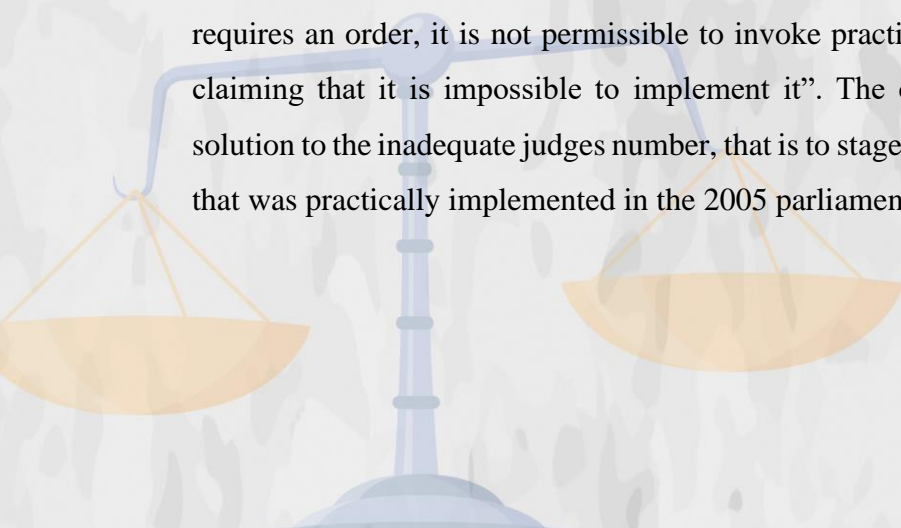
Throughout its history, the Egyptian judiciary, especially the judiciary of the supreme courts, plays an important role in adjusting legal concepts and giving them specific meanings. The judiciary applies the concept after interpreting it, determining its linguistic and legal meaning and the legislator's purpose for it. Thus, the judiciary applies the text in a way that achieves justice, and the judicial ruling becomes the legal basis for the concepts stated in the legal text.

As a result of lacking specific legislative definitions of the concept of judicial supervision on elections, the judiciary confronted this, especially the Supreme Constitutional Court, which addressed the interpretation of judicial supervision in its historic ruling of 2000 In Case No. 11 of 13th judicial year. The ruling addressed judicial supervision as a guarantee that Egyptian people can exercise their right to vote in a reassuring atmosphere. The constitutional ruling specified the elements of the concept as follows:

- Judicial supervision must be effective and comprehensive.
- Judicial supervision must include all public and subsidiary polling committees.
- Judicial supervision must be carrying out polling, counting, and announcing the results.

The ruling summarized the concept as: “The judiciary must take control of the voting process so that it does not slip away from their hands, but rather dominate it in its entirety so that all its aforementioned steps are completed under their hearing and sight”.

The State Lawsuits Authority had justified the impossibility of achieving full supervision of the judiciary due to lack of adequate judges number. The ruling affirmed that: “if the constitution requires an order, it is not permissible to invoke practical considerations to disrupt its ruling by claiming that it is impossible to implement it”. The constitutional ruling provided a practical solution to the inadequate judges number, that is to stage elections in phases, and this is the solution that was practically implemented in the 2005 parliamentary elections.



This historic ruling not only provided a specific and clear concept of judicial supervision, but also provided a practical solution for implementing elections under judicial supervision without seeking help from nonjudicial bodies. To fulfill the meaning of judicial supervision, it remains for us to define the legal meaning of the concept of a judge, especially since the constitution combines judicial bodies that represent the actual judiciary, with judicial bodies that do not play a judicial role, even if they work within the justice system, including the State Lawsuit Authority, which plays the role of a lawyer and the Administrative Prosecution, which is responsible for investigating administrative frauds and corruption.

Who is the judge?

Linguistically, the judiciary means ruling and deciding, and the judge is a person who has the jurisdiction to judge, and rules between the disputing parties according to the law. Judiciary, technically, is to show the ruling of the Sharia regarding those who must fulfill it. The judge, then, is the person entrusted with ruling between people, and who is qualified to do so.

The Court of Cassation's interpretation of the concept of the judge agrees with both the linguistic and terminological meanings. In its well-known ruling in Case No. 949 in 2000, it states that: "Members of judicial bodies mean the judges entrusted with adjudicating disputes, who are protected by guarantees of impartiality, integrity and independence. This is not applicable to members of the State lawsuit Authority and the Administrative Prosecution as they are not judges, since their work is dominated by their subordination to the executive authority. Meanwhile, the judicial authority assumes that whoever in charge of it must be entrusted with all the guarantees of integrity, independence, impartiality, and non-subordination to any administrative or legal person.

This clearly means that the status of a judge applies only to a judge, that is, a qualified person who rules judicial disputes in accordance with the law, and with complete impartiality. This concept does not apply to bodies that have been granted judicial status by the law or the constitution because they carry out specific roles in the judicial system, whether the role of government lawyer or the role of investigating administrative violations. In these cases, the members of these bodies do not settle disputes and rule between people. The ruling of the Court of Cassation made this clear, as it affirmed that: "It is not sufficient for the body to be one of the bodies assisting judiciary

or to participate in applying justice to be entrusted with this description. Otherwise, the police, bailiffs, bar associations, experts, and others who contribute in the administration of justice must be described as judicial”.

The status of a judge, then, is based on complete independence from any affiliation to any party, which ensures impartiality, as well as carrying out the task of ruling in disputes, and not merely participating in work within the scope of justice regardless its importance. The status of a judge in the Egyptian system then applies only to judges in ordinary courts, the State Council and the Supreme Constitutional Court.

In 2004, the government resorted to the Supreme Constitutional Court requesting an interpretation where it ruled Interpretively in ruling No. 3 of the 26th judicial year that: “The term ‘judicial body’, in the Egyptian legal system, is the genus under which several types fall, including bodies that hold the reins of justice and are uniquely independent in adjudicating cases on objective grounds and in accordance with procedural rules that are fair per se, ensuring full protection of the rights of those who seek its refuge. Most notably the Supreme Constitutional Court, and the courts of the ordinary and administrative judiciary at various levels, including stand-alone bodies, which are the State Lawsuit Authority and the Administrative Prosecution which although not entrusted by the legislator with adjudicating cases, were bestowed the status of a judicial body out of appreciation that they are bodies- by virtue of the jurisdiction assigned to- contributing to the course of justice.

In fact, although this explanatory ruling of the Constitutional Court gave the State Lawsuit Authority and the Administrative Prosecution a judicial status, it did not contradict the ruling of the Court of Cassation until the Constitutional Court differentiated between the judicial bodies that independently adjudicate lawsuits independently, and the bodies that were given a judicial status by virtue of the jurisdiction assigned to it. The cassation ruling was no different from that, it was rather more detailed, as it did not grant a member of those bodies the status of a judge, which is also what the Constitutional Court did not do.

According to the above-mentioned, we conclude that full judicial supervision on the elections, which was stipulated in 2014 Constitution to be continued for the ten years following its issuance, and in accordance with the legal concept defined by recurring judicial rulings, means that 2023 presidential election will be subject to full judicial supervision. However, some may believe that

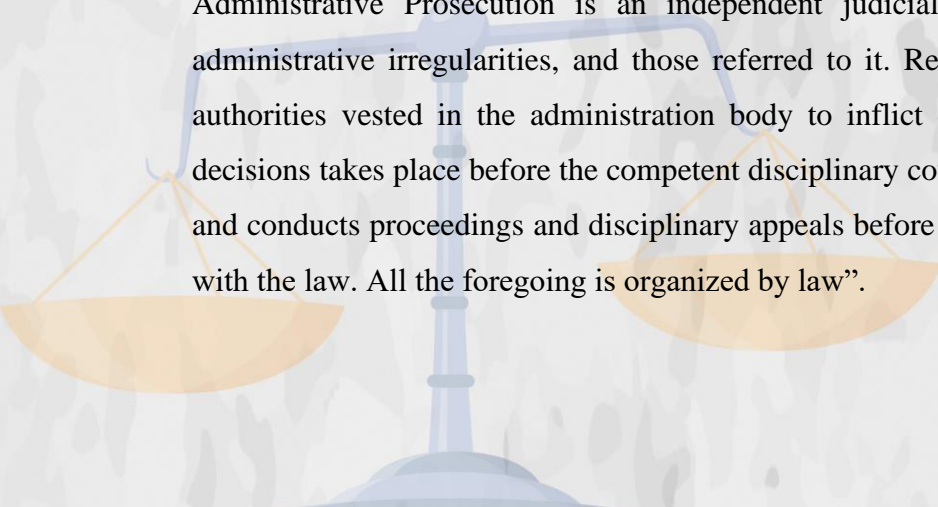
this situation has changed after the 2014 Constitution. Therefore, we must address the concept of the judiciary in the 2014 Constitution compared to the 1971 Constitution in order to see if there's a conceptual difference, and then address the relationship of judicial supervision to the law of the National Elections Authority, to find out whether the Authority is preparing for implementing judicial supervision on the 2023 presidential elections, especially after the elections were advanced to mid-January 2024.

Has the Concept of the Judge Changed in the 2014 Constitution?

The 2014 Constitution allocated Chapter Three of Part Five to the judicial authority in Articles no. 185 to 195. It includes the ordinary judiciary, the State Council, the Supreme Constitutional Court. The Public Prosecution was added to it as part of the judiciary, as Article 189, first paragraph, stipulates: “The Public Prosecution is an integral part of the judiciary. It is responsible for investigating, initiating and directing criminal cases except what is excluded by the law, and the law determines its other jurisdictions”.

The constitution included judicial bodies in Chapter Five, where it addressed the State Lawsuit Authority in Article no.196 which stipulated: “State Lawsuit Authority is an independent judicial body that acts on behalf of the state in any lawsuits brought by it or against it, and in proposing to settle them amicably at any stage of litigation, and responsible for providing technical supervision on the legal affairs departments of the state's administrative apparatus with regard to the lawsuits it undertakes. It also drafts contracts that are referred to it by the administrative authorities to which the state is a party, all in accordance with what is regulated by law. The law determines its other jurisdictions, while its members have all the guarantees, rights, and duties stipulated for judiciary members, and the law regulates their disciplinary accountability.

The Constitution addresses the Administrative Prosecution in Article 197, which stipulates: “The Administrative Prosecution is an independent judicial body. It investigates financial and administrative irregularities, and those referred to it. Regarding these irregularities, it has the authorities vested in the administration body to inflict disciplinary penalties. Challenging its decisions takes place before the competent disciplinary court at the State Council. It also initiates and conducts proceedings and disciplinary appeals before the State Council courts in accordance with the law. All the foregoing is organized by law”.



The basic difference between the current constitution and the 1971 constitution regarding judicial authority is that the current constitution is more detailed, as it addresses, in detail, the components of the judiciary represented in courts judiciary, as stated in Article no. 184 stipulating that: “The judiciary is independent. It is vested in the courts of justice of different types and degrees, which issue their judgments in accordance with the law. Its powers are defined by law. Interference in judicial affairs or in proceedings is a crime to which no statute of limitations may be applied”.

It corresponds to the text of Article 165 of the 1971 Constitution stipulating that: “The judiciary is independent. It is vested in the courts of justice of different types and degrees, which issue their judgments in accordance with the law”.

The 2014 Constitution addressed the components of the judiciary in detail, unlike the 1971 Constitution, which assigned the task of organizing judicial bodies to the law, in Article no. 167.

According to the Constitution, Judicial authority is entrusted by courts of all types and degrees. The constitutional text was very clear in that; it resolves the debate about the components of the judiciary. The judicial authority is represented by judges of courts of all types and degrees, that is, judges of the bench or ruling.

This does not negate Article no. 169 granting members of the State Litigation Authority the rights and guarantees specific to judges. This does not change the nature of the body as defined by the constitution, which is to handle government lawsuits. Of course, the legal concept of the judge determined by the Court of Cassation remains valid and consistent with the current constitution and legal jurisprudence.



Election Provisions After the Transitional Period:

The following electoral processes after January 2023 are subject to the provisions of the 2014 Constitution, one of whose goals was to move completely to a new electoral system, the independent system, which means the end of the stage of judicial supervision over elections. According to the second paragraph of Article no. 210: “Voting and counting of votes in referendum

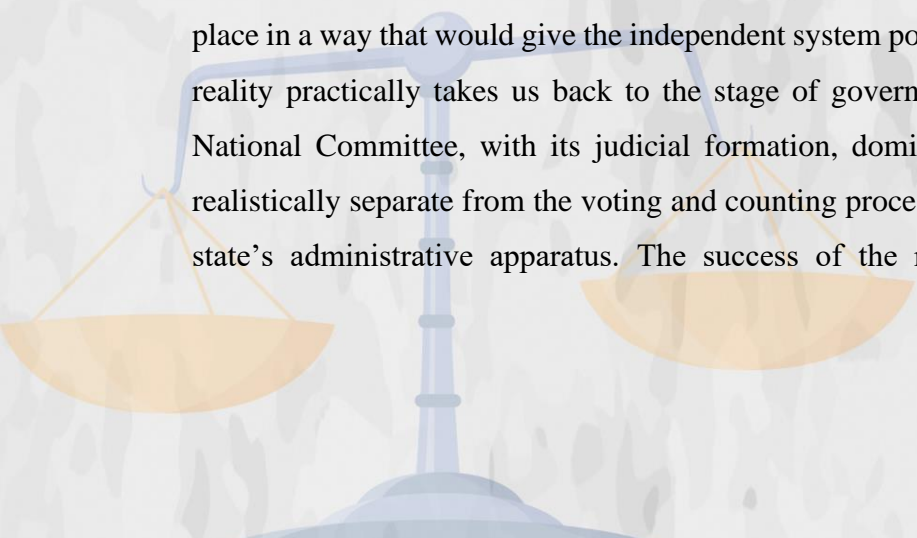
and elections run by the Commission is administered by its affiliated members under the overall supervision of the Board. It may use the help of members of judicial bodies. The voting and counting of votes in elections and referenda in the 10 years following the date on which this Constitution comes to effect are to be overseen by members of judicial bodies and entities in the manner set out in the law”.

According to Article no. 208 of the Constitution, the National Election Authority has become fully and comprehensively responsible for all electoral processes and referendums in Egypt in the future, without any other party interfering in its work. According to Article no. 209, the Commission’s Council consists of a formation that brings together members of the judicial authorities and judicial bodies. The Commission may seek the assistance of specialists and those with experience in the field of elections.

According to Commission Law no. 198 of 2017, the administrative and technical operations of the elections are managed by an executive body covered by Articles no. 14 to 18 of the Constitution, and here precisely lie the problems that are strongly expected in the coming stages.

The ten-year period, which was assumed to be a transitional period, was based on a logical assumption at the time that the Egyptian state was entering a new phase on the foundations laid by the January 25, 2011 revolution. That revolution, which opened a wide door of optimism. The expected and declared assumption was that Egypt would transform within ten years into a democratic civil state, with elections becoming a simple process enjoying the impartiality of state agencies on the one hand, and the confidence of the masses on the other hand, and this is precisely what we claim did not happen.

The truth is that the current constitution was clearly biased to the independent system’s method of administering elections. However, the desired transformation in political life in Egypt did not take place in a way that would give the independent system popular confidence, meanwhile, the current reality practically takes us back to the stage of governmental administration of elections. The National Committee, with its judicial formation, dominates policies and procedures, but it is realistically separate from the voting and counting processes, which are completely subject to the state’s administrative apparatus. The success of the new method depends on the complete



impartiality of state agencies, and the state's political will to gain people's confidence in elections as a democratic path to political change.

Recommendations:

According to the above, we recommend the following steps, in order to optimally implement the practices and mechanisms of the upcoming electoral process:

First:

Following the Egyptian Supreme Constitutional Court's concept of judicial supervision on elections in organizing and managing the current 2023 presidential election, which ruled that only the ruling judges assume full supervision on public and sub-committees so that the voting and counting processes take place under their full control.

Second:

All decisions of the National Elections Authority related to organizing the current presidential election should seek implementing the concept of judicial supervision in accordance with the previous concept, in implementation of the provisions of the Constitution, whenever elections are held before January 14, 2024, which is the date specified for the National Elections Authority to assume sole responsibility for managing and organizing electoral processes in Egypt in the future.

Third:

In order to avoid a shortage in the number of judges entrusted with supervising the elections (according to the ruling of the Constitutional Court) relative to the number of public and subcommittees, elections should be held in more than one stage to ensure that the number of judges supervising the electoral process is proportional to the increasing number of public and subcommittees.

