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**The American University in Cairo**

**School of Global Affairs and Public Policy**

**EGYPTIAN PUBLIC LAW JUDGE: REVIEWING PUBLIC ECONOMIC  
POLICIES FROM NATIONALIZATION TO PRIVATIZATION**

**A Thesis Submitted to the**

**Department of Law**

**in partial fulfillment of the requirements for  
the LL.M. Degree in International and Comparative Law**

**By**

**Omar Ali EL Menshawy**

**Fall 2020**

The American University in Cairo  
School of Global Affairs and Public Policy

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in partial fulfillment of the requirements for the LL.M. Degree in International and  
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The American University in Cairo  
School of Global Affairs and Public Policy

Department of Law

EGYPTIAN PUBLIC LAW JUDGE: REVIEWING PUBLIC ECONOMIC POLICIES  
FROM NATIONALIZATION TO PRIVATIZATION

Omar Ali EL Menshawy

Supervised by Professor Hani Sayed

ABSTRACT

Do public law judges play a role in public economic policies in Egypt? Egypt has witnessed rough changes, leading to the adoption of different public economic policies. Public law judges have played a key role in these economic shifts. However, the efficacy of this role is pending on the satisfaction or dissatisfaction of the government with the courts and the judicial decisions. This paper argues that the government possesses the upper hand in dealing with the judicial influence in economic issues in Egypt. The paper scrutinizes the transformation in the judicial attitude towards government economic policies. Specifically, the paper demarcates the extent to which the role of the public law judge has affected the public economic policies in Egypt, and portrays the reaction of the government towards the effects of these rulings. This paper argues that the government views courts' judgments according to its own economic policies. Practically, the government will appreciate courts' judgments if courts confer legitimacy on the controversial economic policies of the government, or if the judicial intervention is compatible with the government economic directions, while the government will hinder the impact of courts' contributions if the courts' decisions go against its willingness. In that case, the government can reverse court policy through enacting legislation that deprives courts' judgments from its crucial effects or restricts the scope of the judicial review of the public law judge itself. To that end, the paper highlights the Supreme Constitutional Courts' rulings in the economic sphere and how the court helped the regime dismantle the legal infrastructure of the socialist economic era in order to pave the way for the implementation of the new-liberal economic policies. In the same context, the Council of State Courts issued many noticeable judgments that annulled many privatization contracts for illegality and corruptions in a way that touched the essence of the neo-liberalism system. The paper also argues that Law No.32 of the year 2014 is an explicit example for how the government determines the limits and extent of the judicial influence in economic sphere in order to secure its economic policies.

## TABLE OF CONTENTS

I.	Introduction .....	1
II.	Historical Overview of Economic Development Policy .....	4
	A. Developmentalism (1952- 1970) .....	4
	B. Open Door Policy (1970-1990) .....	8
	C. Neo-Liberalism (1991-2011) .....	10
II.	Judicial Review of Economic Policies .....	18
	A. Nature and Progress of the Judicial Review in Egypt.....	18
	B. Non-Intervention .....	23
	C. Constitutional Review and the Role of the SCC .....	26
	D. The Era of the State Council (reviewing Mubarak era Neo-liberal economic policies) .....	38
	E. Post 2013 and the End of Judicial Review of Economic Policies? .....	46
V.	Conclusion .....	49

## I. Introduction

Undoubtedly, the real achievement of economic sustainable development of any state requires fruitful collaboration between the three branches of government: the executive, legislative, and judicial. Traditionally, courts are seen as independent platforms for reconciling conflicts between litigants, but they also have the ability to intervene in the public policy arena to weigh best priorities for the entire society.

Courts are an active player in determining public policy. In this regard, Neal Tate and Torbjorn Vallinder noted that “Judicialization of politics may be or may become one of the most trends in late- twentieth and early -twenty-first-century government.”<sup>1</sup> The “Judicialization of politics” has become a recognizable worldwide phenomenon that has resulted in the participation of the courts besides administrators and legislators in identifying the fundamental economic, political, and social basics of the state. On contrast, in his influential work on the role of the Supreme Court in American democracy, Dahl argued that the Court is rarely played that role. In this regards, Dahl stated that

The Supreme Court is inevitably a part of a dominant national alliance. As an element in the political leadership of the dominant alliance the Court of course supports the major policies of the alliance. By itself the Court is almost powerless to affect national policy. In the absence of substantial agreement within the alliance any attempt by the Court to make national policy is likely to lead to disaster.<sup>2</sup>

The role of the Egyptian public law judges is extremely perceptible. In Egypt, Public law judges act as gatekeepers of the rule of law. Currently, the authority of judicial review in the Egyptian legal system is divided between the Supreme Constitutional Court for constitutional matters on the one hand, and the Council of State for administrative controversies on the other. The public

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<sup>1</sup>- THE GLOBAL EXPANSION OF JUDICIAL POWER ,5(NEAL TATE, TORBJORN VALLINDER ed.,New York University Press, 1995); The judicialization of politics should normally means either (1) the expansion of the province of the courts or the judges at the expense of the politicians and/or the administrators, that is, the transfer of decision-making rights from the legislature, the cabinet, or the civil service to the Courts, at least, (2) the spread of judicial decision-making methods outside the judicial province proper. In summing up we might say that judicialization essentially involves turning something into a form judicial process, TORBJORN VALLINDER, “When The Courts Go Marching in”, THE GLOBAL EXPANSION OF JUDICIAL POWER ,13 (New York University Press, ed.1, 1995).

<sup>2</sup>- Robert A. Dahl, *Decision-making in a democracy: The Supreme Court as a national policy-maker*, 6 J. Pub. L. 293(1957).

law judge plays a prominent role in the decision-making process through reviewing the constitutionality of legislation and the legality of administrative acts and contracts.

Despite the fact that courts have the power to intervene in the public policy field to assess the best solutions for the whole society, the question that has received great concern is how public law judges are able to implement this function in practice. This question is crucial because indisputable reality concerning constitutional review and legality review is that courts with the authority to strike down legislation or annul administrative decisions must depend on the willingness of the government to enforce their judicial verdicts because they require a legislative or an administrative intervention. Thus, in this context, Hamilton argues in *Federalist 78* that the judiciary "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments"<sup>3</sup>

The current legal situation in Egypt has witnessed a considerable intervention of public law judges in the public economic policies of the state. No can deny the fact that the Egyptian public law judge is sometimes entitled to provide remedies for crucial economic dilemmas, whether through providing sufficient guarantees to investors, paving the way to adopt new economic approaches, or disclosing the deficiencies and irregularities of the implemented public economic policies. However, the government tremendously determines the influence of the public law judge role in the economic arena. Indeed, the government has the entire discretion in dealing with courts' contributions in economic dilemmas in Egypt.

Practically, the government will highly appreciate courts' judgments if courts confer legitimacy on the controversial economic policies of the government, or these judgments are compatible with the government economic directions, while the government will hinder the influence of courts' contributions if the courts' decisions go against its economic perspectives. In that case, the government can reverse court policy through enacting legislation that deprives courts' judgments from its crucial effects or restricts the scope of the judicial review of the public law judge itself.

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<sup>3</sup>- ALEXANDER HAMILTON, THE FEDERALIST PAPERS, THE FEDERALIST No. 78, (Ian Shapiro, ed ,New Haven, CT: Yale University Press, 2009).

Up to the present time, the Supreme Constitutional Court and the Council of State Courts have become principle platforms for Egyptian citizens dissatisfied with the public economic policies and seeking adoption of other economic approaches to ameliorate economic pressures. Since its establishment in 1979, The Supreme Constitutional Court has played a key role in the Egyptian economic sphere. The judicial activism of the Supreme Constitutional Court has legitimated the government's policy to overturn the socialist principles that shaped Egyptian development policies since 1952.

Moreover, since the 25<sup>th</sup> January 2011 Revolution, the Council of State has issued many controversial judgments that have annulled privatization contracts between the state and its public institutions and national or foreign investors based on their illegality, corruption, and squandering of public funds. Consequently, the government issued Law No.32 of the year 2014, named "Regulating Some Procedural Aspects of Challenging Government Contracts". This law has limited the right to challenge government contracts to the state and the investors in a way that hinders the Council of State from exercising its judicial oversight of government contracts in so doing diminished its participation in shaping the public economic policies.<sup>4</sup>

The paper is an effort to provide important insights into the extent and the limits of the Egyptian judicial influence in public economic policies. This paper shows that the government posses the legal and administrative mechanisms to demarcate the limits and the impact of the role played by public law judges in public economic policies in Egypt.

This paper overviews the legal infrastructure that was established during each economic epoch in various aspects including the motives, regulatory framework, and actual application of each policy. Then the paper moves to provide an overview of the creation of judicial review in Egypt and its development in order to effectively understand the public law judges' role in terms of imposing their judicial oversight on the public economic policies since the Republic was

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<sup>4</sup>- Law No. 32 of April 22, 2014 on Regulating Certain Procedures for Challenging State Contracts. InEgy OG of April 23, 2014, no. 16 bis (c). This law was issued by interim President Adly Mansour in 2014 in the absence of the Parliament which was dissolved by the Supreme Constitutional Court in May 2012. This law has been accepted after the parliamentary election in 2015 after a strong debate between parliament members.



proclaimed in 1952 until now. The significance of this paper stems from that it presents a historical overview of the relationship between the Egyptian public law judge and government with respect to the economic policies since the proclaiming of the Republic in 1952 until now. The paper precisely compares the role played by public law judges when the government decided to implement a major shift in the economic policies, and portrays governmental reaction to judicial rulings on the economic sphere.

To build these arguments, part II presents a historical overview of the public economic policies in Egypt and how the government economic policies have evolved since the adoption of socialist policies in 1952 to the implementation of the neoliberal economic reform in the early 1990s. Part III highlights judicial review of public economic policies since the Republic was proclaimed in 1952 until the issuance of Law No.32 of the year 2014. The first part of this chapter explores the creation and nature of judicial review in Egypt. The second part examines why the role of the public law judge in reviewing public economic policies had been slight. In addition, the third part illustrates the role of the Supreme Constitutional Court in reviewing the public economic policies especially those related to Nasser's era. The fourth part examines the Council of State rulings in privatization cases and presents an entire analysis of these judgments and their impact on the investment climate. Finally, this chapter also discusses Law No.32 of the year 2014 and its crucial impact on the Council of State judicial review on public economic policies with a brief commentary on the constitutionality of this law.

## II. Historical Overview of Economic Development Policy

This chapter provides a cursory description the development of economic policies since the adoption of socialist policies in 1952 to the implementation of the neoliberal economic reform in the early 1990s. This brief description provides the backdrop against which we can track the change in the Court's attitude towards economic policies.

### A. Developmentalism (1952-1970).

After the 1952 Free Officers' Revolution, the Egyptian Republic was proclaimed and Abdel Nasser became the new president of the State. During Abdel Nasser's era, after the British military existence in the Egyptian territories came to an end in 1954, the economic role of the government was mainly directed to invest only in the infrastructure in traditional areas like irrigation and land reclamation. Meanwhile, the private sector led the main productive sectors in the economy like agriculture, banking, insurance, and internal and foreign trade.<sup>5</sup> The government was convinced by the prominent role of the private sector in the first years of the revolution to drive the vehicle of the economic progress of the state. Officials worked on reinforcing the efficiency of private enterprises.<sup>6</sup> The government passed legislation that granted seven-year tax exemption to private investments in all sectors of the economy.<sup>7</sup>

According to Khalid Ikram, the agrarian reform was the most important procedure imposed on the private sector in this period. Nasser responded to calls for economic reform in favor of peasants and workers.<sup>8</sup> Based on the Agrarian Reform Law thousands of hectares were seized from feudal lords and redistributed to landless peasants.<sup>9</sup> The new Ministry of Agrarian Reform was responsible for the redistribution process. The land reform program led to the establishment of the agriculture cooperatives. These cooperatives were responsible for setting plans concerning crop rotation, marketing, and pricing and peasants had to abide by their directions and rules.

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<sup>5</sup>- KHALID IKRAM, THE EGYPTIAN ECONOMY, 1952-2000: PERFORMANCE POLICIES AND ISSUES, 2 (Routledge Studies in Middle Eastern Economies, ed.1) (2005).

<sup>6</sup>- *Id.*, at 2.

<sup>7</sup>- TAMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT 58 (Cambridge University Press, ed.1) (2007).

<sup>8</sup>- Khalid Ikram, *supra* note 5, at 3.

<sup>9</sup>- Law no. 178 of September 9, 1952 on Agrarian Reform (*El Aslah el zir'ay*). *In* Egy OG of September 9, 1952, no. 131, p. 2. Land reform is a social economic program based on expropriating land properties from feudal lords and selling it back to poor farmers cheaply.

These cooperatives disclosed Nasser's intention to enlarge the role of the state in the economy.<sup>10</sup> Later on, the regime gradually began to shift the economic policies of the country from pure capitalism to a more state- owned economy.

In the meantime, the government was keen to detach the country from colonial economy through establishing the national industrialization (Developmentalism).<sup>11</sup> This project was known as Import Substitution Industrialization (ISI). Nasser believed that the state should play an increasingly active role in the economy through directly investing in productive and service ventures, and controlling and monopolizing many economic sub-sectors to promote a huge industrial development. Although such policy achieved high rates of economic growth at the early stages, the situation changed after short period due to the fragmentation of the public sector into personal networks, international politics, and finally the absence of economic priorities.<sup>12</sup>

According to Lama Abu Odeh, Nasser drafted his industrialization plan on the creation of huge public sector rather than taking macroeconomic measures that could reinforce domestic industry, as happened in The East Asian Tigers.<sup>13</sup> Concurrently, the government established the National Planning Committee to articulate the social and economic development that depended on the state institutions and moved away from relying on the private enterprises.<sup>14</sup> Besides, as a reaction to the Suez Canal War, Egypt started to nationalize the French, British, and Belgian companies and assets.<sup>15</sup>

On the same level, nationalization was one of the main aspects of Nasser's regime. The entire private sector was virtually nationalized to be managed under state control. Nationalization, theoretically, is a governmental economic strategy that means the transfer of the ownership of private enterprises to the state in return for compensation in order to promote the public interest for the whole society.<sup>16</sup> Practically, the process of nationalization was always articulated

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<sup>10</sup>- Khalid Ikram, *supra* note 5, at 3.

<sup>11</sup>- Lama Abu-Odeh, *On Law and The Transition to Market: The Case of Egypt* 37 Int'l J. Legal Info. 59(2009).

<sup>12</sup>- *Id.*, at 67.

<sup>13</sup>- *Id.*

<sup>14</sup>- Khalid Ikram, *supra* note 5, at 5.

<sup>15</sup>- Tamir Moustafa, *supra* note 7, at 60.

<sup>16</sup>- FAROUQ ABDEL BUR, THE ROLE OF MAGLS EL DAWLA IN PROTECTING PUBLIC RIGHTS AND FREEDOMS (*Dor Majlis Al Dowal fi Hamya al hokok w al horyat al a'ma*) (Arabic) (1991).

according to a law issued by the President who also took over the legislative authority in this period due to the absence of parliamentary life after the dissolution of the political parties. Every law issued specified the regulations, conditions, and the new legal framework of the nationalized assets. Both laws established assessment committees that were responsible for determining the amount of compensation that could be paid to the owners of the nationalized assets.

The first step was when Bank Misr and the National Bank were nationalized in 1960. Bank Misr was one of the most profitable holding companies in this era whose 29 affiliated companies accounted for 20 % of industrial output in Egypt.<sup>17</sup> Subsequently, the huge waves of nationalization occurred 1961 according to Law No.117of the year 1961 and Law No.71of the year 1963.<sup>18</sup> As a result, the entire cotton industry became under government power, in June 1961. Subsequently, private banks and forty-four companies in a variety of industries such as, electricity, cement, and copper, were nationalized.<sup>19</sup> Besides nationalization, Nasser rendered legislations that gave the regime the authority to sequester or expropriate private enterprises based on state of emergency and transfer its ownership to the state in return of compensation.<sup>20</sup>

Nasser adopted socialist strategies to redistribute resources from elite classes to the whole nation. Constitutionally, the 1964 Constitution affirmed the socialistic nature of the economy in this era and the intervention of the government throughout the economy. Article 9 of the Constitution states that “The economic basis of the state is the socialistic system precluding exploitation and ensuring the establishment of the communal society founded on sponsorship and justice.”<sup>21</sup> Art.10 states that “The economic policies should be articulated in accordance with the development plan drafted by the state.”<sup>22</sup>

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<sup>17</sup>- Khalid Ikram, *supra* note 5, at 6.

<sup>18</sup>- Law no. 117 of July 20, 1961 on Nationalization of Private Companies (*Ta'mem Ba'd EL Monsh'at w El Sharakat*). *In* Egy OG of July 20, 1961, no. 162, art.2, art.3; Law no. 72 of August 20, 1963 on Nationalization of Private Companies (*Ta'mem Ba'd EL Monsh'at w El Sharakat*). *In* Egy OG of August 8, 1963, no. 177, art.2, art.3.

<sup>19</sup>- Khalid Ikram, *supra* note 5, at, 7

<sup>20</sup>- Law no. 150 of March 24, 1964 on Sequestration of Private Companies (*Rafaa'Al- Harasa A'n Ba'd EL Al-Ashakas* ). *In*Egy OG of March 24, 1964, no. 69; art.3.

<sup>21</sup>- Constitution of the Arab Republic of Egypt (*DusturJumhuriya tMisr al-Arabiya*) [Egy const.] of March 24, 1964, sec. I, art. 9. *In*Egy OG of March 25, 1964, vol. 99 bis (a), p. 1; free translation by the author.

<sup>22</sup>- Egy 1964 Const, art. 10; free translation by the author.

Moreover, Nasser issued the *National Charter* or *al-mithaq-al watany* which encompassed all socialist approaches that were embraced by policy makers in this period. The Charter contained economic guidelines which portrayed tasks that must be performed by public institutions in order to attain their desired economic perspectives. According to this document, the state was totally responsible for driving the process of economic development. Additionally, the state had the upper hand concerning the essential infrastructure of the economy. Moreover, the banking system was publicly owned.<sup>23</sup>

In the short term, after the waves of nationalizations were implemented, the Egyptian economy achieved reasonable rapid and sustained growth. The GDP growth rate increased from 5.3% per year during 1956-1961 to 6.1% per year during 1961-1966. But these early encouraging rates did not last, and the country was plagued by economic turmoil.<sup>24</sup> Poor administration of the nationalized assets and the government bureaucracy did not provide the efficiency needed for sustained growth.<sup>25</sup> Added to these inefficiencies, the country's subsidies for various forms of goods and services and the high costs incurred by military participation in the Yemen war have had a serious impact on the economy.<sup>26</sup> Besides, the socialist policies of the state in this period led to the exodus of capital abroad and deprived the economy from huge sums due to inhospitable investment climate and the political turmoil plaguing the state and damaging the economy.<sup>27</sup> In short, by the late 1960s and early 1970s, the rate of economic growth sharply decreased and both the rate of investment and domestic savings slowed down.<sup>28</sup>

#### B. Open Door Policy (1970-1990)

The Egyptian economy fell into a total disrepair at the time of Nasser's death in September 1970. The public sector was on the brink of collapse and needed a constant infusion of funds, and about 20 percent of the gross national income went to military expenditure because of the War of

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<sup>23</sup>- Khalid Ikram, *supra* note 5, at 7.

<sup>24</sup>- Tamir Moustafa, *supra* note 7, at 63.

<sup>25</sup>- Delwin A. Roy and William T. Irelan, *Law and Economics in the Evolution of Contemporary Egypt*, 25 MIDDLE EASTERN STUDIES 165 (1989)

<sup>26</sup>- *Id.*, at 165; Tamir Moustafa, *supra* note 7, at 63.

<sup>27</sup>- Tamir Moustafa, *supra* note 7, at 65.

<sup>28</sup>- *Id.*, at 64; GDP growth slowed significantly to 2.9 percent per year from 1966–1971; Khalid Ikram, *supra* note 5, at 12.

Attrition in the Suez Canal.<sup>29</sup> The growth of GDP was significantly reduced and the budget was mainly financed through borrowing from the national banking system.<sup>30</sup> Sadat believed that the failure of the socialist economic direction which resulted in the inefficiency of the nationalized public sector and the collapsed infra-structure after the War of 1967, necessitates important financial flows into the Egyptian economy. In fact, Sadat had to choose either to continue with the legacy of socialist economic ideas or to open up the country to implement new economic visions that could help in restructuring the economy to become more liberal.

Upon taking power, Sadat started to move towards the West through opening new channels of economic exchange. The government adopted new economic policies based on protecting private property rights, banning nationalizations and sequestrations, encouraging foreign investment, and reinforcing the role of the private sector.<sup>31</sup> Accordingly, the government rendered Law No. 34 of the year 1971 which banned sequestration of private assets except with a court's judgment as a message of reassurance to confirm that private property would now be protected by the state.<sup>32</sup>

Moreover, the preservation of private property was strongly affirmed in the new 1971 Constitution. The sanctity of private property was reflected directly in Article 34 of the 1971 Constitution which stated:

Private property shall be protected and may not be put under sequestration except in the cases specified in the law and with a judicial decision. It may not be expropriated except for a public purpose and fair compensation in accordance with the law. The right of inheritance is guaranteed in it.<sup>33</sup>

In terms of nationalization, Article 35 of the 1971 Constitution states that “nationalization shall not be allowed except for considerations of public interest, by means of law and with compensation.”<sup>34</sup> Article 36 states that “general confiscation of property shall be prohibited.

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<sup>29</sup>- Tamir Moustafa, *Law versus the State: The Judicialization of Politics in Egypt*, 28 Law & Soc. Inquiry 883, 889 (2003).

<sup>30</sup>- Khalid Ikram, *supra* note 5, at 17.

<sup>31</sup>- Tamir Moustafa, *supra* note 29, at 889.

<sup>32</sup>- Law no. 34 of June 17, 1971 on Sequestration (*Tanzeem Frd el harsa and Ta'meen Salama al Shaa'b*). *In*Egy OG of June 17, 1971, no. 24.

<sup>33</sup>- Constitution of the Arab Republic of Egypt (*Dustur Jumhuriyat Misr al-Arabiya*) [Egy const.] of September 12, 1971, sec. II, art. 34. *In*Egy OG of September 12, 1971, vol. 36 bis (a). , as translated in Tamir Moustafa, *supra* note 7.

<sup>34</sup>- Egy 1971 Const, *Supra* note 33, art. 35, as translated in Tamir Moustafa, *supra* note 7.

Special and limited confiscation shall not be allowed except with a judicial decision.”<sup>35</sup> Tamir Moustafa argues that the language used for articulating the guarantees against nationalization and sequestration of private property was, acutely, vague since it opened the door for different interpretations that could provide the government with the ability to unilaterally issue a legislation that regulates the sequestration of private property according to its needs.<sup>36</sup>

Despite the fact that Sadat realized the inefficiency of Nasser’s socialist approach and started to take wide measures to alleviate the state intervention in the economy, the 1971 Constitution was socialist in its essence and tone. Article 4 of the 1971 Constitution stated that “[t]he economic basis of the Arab Republic of Egypt is the socialist democratic system founded on self-sufficiencies and justice, precluding exploitation, reducing the differences between incomes, and protecting of legitimate earnings, and ensuring equity of distribution of the charges and general expenditures.”<sup>37</sup>

At that time, policy makers realized that a new economic agenda should aim at alleviating the harsh consequences of Nasser’s socialist approach economically and politically.<sup>38</sup> Thus, the government adopted a comprehensive economic reform Open Door or *Infta’h* that was considerably different from Nasser’s perspective. In 1974, the regime rendered *October Paper* a document designed to demarcate the new economic perspective of the government. The *October Paper* approved by the Egyptians in a national referendum on May 1974.<sup>39</sup> This document provided a comprehensive guide of the path of the economy in the future. Khalid Akram argues that the main aim of this paper is to find a mechanism that encourages Arab and foreign investors to invest in Egypt.<sup>40</sup> For that reason, Arab and Foreign Investment and Free Zones Law No.43 of the year 1974<sup>41</sup> was enacted to regulate the path of foreign investment in the economy. The new law contained many economic incentives for foreign and national investors including tax

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<sup>35</sup>- Egy 1971 Const, *Supra* note 33, art. 36. as translated in Tamir Moustafa, *supra* note 7.

<sup>36</sup>-Tamir Moustafa, *supra* note 29, at 890.

<sup>37</sup>- Egy 1971 Const, *Supra* note 33, art. 4, as translated in Tamir Moustafa, *supra* note 7.

<sup>38</sup>- Khalid Ikram, *supra* note 5, at 17.

<sup>39</sup>- The Decision of Minister of Interior to announce the result of the National Referendum. *In*Egy OG of June 16, 1974, no. 109.(bis).

<sup>40</sup>- Khalid Ikram, *supra* note 5, at 21.

<sup>41</sup>- Law no. 43 of June 27, 1974 on Arab and Foreign Investment and Free Zones (*Nazam Astsamr al Mal El Araby w al aganby w al Mantaa’ al Hora*). *In*Egy OG of June 27, 1974, no. 26.



exemptions, the ability to import new technology and machinery for production, partial exemptions from currency regulations, exemptions from Egypt's stringent labor laws, and exemptions on limits to annual salaries.<sup>42</sup>

The Open Door policy was the beginning of the transition to the market economy in a way that reduced the intervention of the state in the economy and gave the private sector the ability to restructure its function as a cardinal player in the economy. Lama Abu Odeh says that Sadat based his new economic style on trade liberalization.<sup>43</sup> However, the new economic policy led to an increase in food imports especially wheat and luxury goods which resulted in aggravating the deficit in the balance of payment.<sup>44</sup> Khalid Ikram argues that although Open Door policy did give the indication that private sector would participate actively in the economy and that the entry of the foreign investors would be facilitated, the actual impact on the economy was inadequate.<sup>45</sup> The main sectors of the economy like petroleum production, banking, and infrastructure were still dominated by public enterprises. This is attributed to the fact that there were laws remained in effect that hinder the progress of private enterprises and the deficiency of the incentive structure.<sup>46</sup>

To sum up, it is clearly evident that the new economic vision had positive effects on stimulating economic growth and attracting foreign investments; however, it was unsuccessful to lead the government to achieve any fundamental change in the economy.

### C. Neo-liberalism \_ Privatization (1991-2011)

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<sup>42</sup>- Tamir Moustafa, *supra* note 29, at 889.

<sup>43</sup>- Lama Abu-Odeh, *supra* note 11, at 69.

<sup>44</sup>- Khalid Ikram, *supra* note 5, at 22; See JOHN WATERBURY, EGYPT OF NASSER AND SADAT: THE POLITICS OF TWO REGIMES 95-6 (Princeton University Press, ed.1), (1983).

<sup>45</sup>-*Id.*, at 18-22.

<sup>46</sup>- *id.*, Delwin A. Roy and William T. Irelan, *supra* note 25, at 172; there is another approach that attributes the inability of the Open Door policy to achieve institutional change in the structure of the economy to other factors. Galal Amin argues that Open Door Policy is characterized by inconsistency and confusion. He believes the government remains puzzled about its economic direction. In his point of view, Amin believes that the government adopted conflicting economic objectives that led finally to a sharp increase in budget deficit; See GALAL AMIN, THE STORY OF THE EGYPTIAN ECONOMY 99-100 (*Qst al Aqtsad el masry*) (Arabic) (1st ed. 2012).



After the assassination of Sadat by Islamists in 1981, Mubarak had continued and even accelerated the reforms as evidenced by the consistent economic policies he had enacted throughout his rule.

In the early nineties, the economic position of Egypt was lamentable. Indeed, the country started to suffer dramatically from a downturn in growth rate and macroeconomic imbalances. The economy was deeply engulfed in productive dilemmas.<sup>47</sup> Indeed, at the end of the Gulf War, Egypt had a budget deficit of 15% of GDP, an inflation rate of about 14.7%, a balance of payment deficit running at a rate of LE 11.4billion, a strong decline in the value of the Egyptian Pound and a clear delay in paying the international debts.<sup>48</sup> Such a strained economic position was accompanied by international criticism of the Egyptian economic circumstances and calls for adopting different economic policies in order to address the economic situation and achieve macroeconomic stability.<sup>49</sup>

In this context, for instance, the United States Embassy in Cairo issued a report motivating the Egyptian authorities to abandon the notion of public property and support the public sector.<sup>50</sup> Additionally, the report argued that concentrating and depending on the public sector system, enlarging the role of the state in regulating and controlling the market activities, and establishing projects characterized by inefficiency and labor redundancies, had led to depressing impacts on the whole public economy and put heavy burdens on the government budget.<sup>51</sup> Concurrently, the government policy makers realized that the government had to intervene strongly and comprehensively to cope with the strained economic position. In 1991 the executive authorities began reacting with a cluster of initiatives and solutions to address the alarming economic situation. Chief among them was transferring the ownership and management of the public sectors' companies to the private sector.<sup>52</sup>

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<sup>47</sup>- Khalid Ikram, *supra* note 5, at 60; Safwat A. Awadalla, *Privatization and Economic Development: Study on the Effect of Privatization on the Economic Efficiency in Developing Countries: Egypt - as a Case Study under Law No. 203 for 1991*, 18 Arab L.Q. 40 (2003).

<sup>48</sup>- *Id.*, at 61.

<sup>49</sup>- HAMDY YASSIN, STATE COUNCIL'S ROLE AND FIGHTING THE CORRUPTED PRIVATIZATION AND PLANS FOR SALE EGYPT (*Dor Majlis al Dowla fe Mohrba al Khaskhasa al Fasada w Khatt Baa' Masr*) (Arabic) (1st ed. 2014).

<sup>50</sup>- *Id.*, at. 83.

<sup>51</sup>- *Id.*

<sup>52</sup>- *Id.*

Consequently, the Egyptian President Hosni Mubarak announced officially in a public speech at the 1991 May Day ceremony that “the country will adopt privatization as an official economic policy in order to create a more liberal economy.”<sup>53</sup> Mubarak believed that such an economic reform could have fruitful consequences on the Egyptian economy because privatization, firstly, would bring efficiency and profitability to the privatized assets, secondly, would reduce government cost and government intervention in the economy, and finally, would enhance individual and collective investment.<sup>54</sup>

The former Prime Minister Dr. Hazem EL Beblawi argues that the adoption of the privatization program by the Egyptian government was due to a pure political arrangement.<sup>55</sup> According to this political framework, Egypt was exempted from paying about USD 7 billion to Arab countries and about USD 3 billion to the US for military debts. Moreover, the Paris Club brought down about half of the international debts of Egypt. In return, Egypt was committed to entirely adopt and implement an Economic Reform and Structural Adjustment Program (ERSAP) designed by the International Monetary Fund (IMF) and the World Bank.<sup>56</sup>

The ERSAP mainly concentrated on monetary reform through liberalizing the Egyptian Pound, diminishing the budget deficit, and finally, controlling the inflation rate. On the same level, the program also aimed at guaranteeing and achieving an entire structural adjustment in the Egyptian economy in order to increase the economic and social development rates. This was to be done through different legal and economic steps: firstly, adopting privatization and diminishing the role of the public sector through liquidating all losing public sector enterprises; secondly, putting a legal framework that would guarantee a safe climate for national and foreign investment; thirdly, emphasizing on the role of the civil and private institutions in the economy to alleviate the burdens on the government.<sup>57</sup>

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<sup>53</sup>- *Id.*

<sup>54</sup>- *Id.*

<sup>55</sup>- HAZEM EL BEBLAWI, THE ROLE OF THE STATE IN THE ECONOMY, 128 (*Dor al Dowla fe al Aqtsad*) (Arabic) (1st ed. 1999); see generally, SAMIR SULAYMAN, THE STRONG REGIME AND THE WEAK STATE (*al Nizam al Qawy w al Dowla al Daa'efa*) (Arabic)(2004); Khalid Ikram, *supra* note 5, at 63.

<sup>56</sup>-*id.*, Paris Club is an informal group of official creditors. The function of the *Paris Club* is to find coordinated and sustainable solutions to the payment difficulties experienced by debtor countries. As debtor countries undertake reforms to improve and rebalance their macroeconomic and financial situation, Paris Clubs' creditors offer a flexible agreement in order debt scheduling; available at, <http://www.clubdeparis.org>.

<sup>57</sup>- *id.*

No wonder Egypt was one of the first Arab countries to adopt a leading public sector in the 1950s and 1960s and also was the first country to adopt new liberalization economic strategies like privatization.<sup>58</sup> It is undeniable that the economic transformation from a planned to free market economy was inconceivable unless a legislative and regulatory infrastructure was established.

Concerning the legal framework for the privatization, program policy makers worked on establishing a legislative and regulatory climate for its implementation. As a result, Law No. 203 of the year 1991<sup>59</sup> on Public Sector Business Companies was issued by People's Assembly in order to pave the way for the selling and transferring of the public sector organizations. This law replaced the public sector organizations and companies with holding companies, subsidiaries, and affiliate, based on a decision rendered by the Prime Minister.

Institutionally, the Public Sector Business Companies Law shifted the economic management of the Egyptian public sector companies, and accordingly, these economic institutions became independent economic enterprises and were recognized "moral personalities" managed and regulated in a way that was comparable to the private sector companies and were subject to private laws.<sup>60</sup> In other words, this law revolved around the idea of entire segregation of the management and ownership of the public business sector. Holding companies were responsible for initiating and implementing the privatization of affiliated companies. Decisions regarding production and marketing were to be issued by the directors and the boards of the affiliated companies. This law created the post of Minister of Public Sector Business.<sup>61</sup>

It should be noted that Law No.203 of the year 1991 did not contain clauses that explicitly regulate and manage the adoption and implementation of privatization as a governmental economic policy. It was only Article 20 that allowed the sale or the transfer of any asset, organization or activity from the public to the private sector. According to Article 20 of the

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<sup>58</sup>- Safwat A. Awadalla, *supra* note 47, at 40.

<sup>59</sup>- Law no. 203 of June 20, 1991 on Public Sector Business Companies (*Qataa' al Aa'aml al Aa'm*). InEgy OG of June19, 1991, no. 24(bis).

<sup>60</sup>- Safwat A. Awadalla, *supra* note 47, at 34.

<sup>61</sup>- Public Sector Business Companies Law, *supra* note 59, art.6; *See generally* Safwat A. Awadalla, *supra* note 47, at 41.

Public Sector Business Law, private entities and individuals may directly purchase shares in public affiliated companies according to the general regulations of the stock market. The proportion of private ownership in these companies was specified by the state on a case-by-case basis.<sup>62</sup> In case the state relinquished its majority ownership in a particular company 51% then the company would no longer be subject to the provisions of Public Sector Business Law but to the provisions of the Companies Law No.159 of the year 1981,<sup>63</sup> which governs private sector corporations. This article has led to a considerable debate among legal scholars due to its ambiguity and its severe conflict with the constitutional economic principles of the state in this period, but I will postpone this debate to the next chapter.<sup>64</sup>

Besides the Public Sector Business Law, Law No.95 of the year 1992<sup>65</sup> on Capital Market Law was also issued. This law regulated the stock market and provided legal stipulation for trade in the market. This law, moreover, established the Capital Market Authority which had the competence to guarantee the proper enforcement of the Law No.95 of the year 1992 and monitor the performance of the brokerage firms in the stock market.

Along with this legislative environment, the Technical Office of the Enterprise Sector in the Office of the Prime Ministry prepared a detailed economic guideline for the privatization process in February 1993.<sup>66</sup> This guideline was primarily drafted in order to reach certain economic objectives. These objectives were first, enlarging the usage of available resources of public sector; second, avoiding wasting the public resources and using them efficiently; third, opening the market for foreign capital and stimulating investment in Egypt; fourth, creating new

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<sup>62</sup>- Public Sector Business Companies Law, *supra* note 59, art.20.

<sup>63</sup>- Law no. 159 of Sep. 17, 1981 on Companies Law (*Al Sharakat*). *In*Egy OG of Oct. 1, 1981, no. 40.

<sup>64</sup>- For just a few examples, *see* Hazem EL Beblawi, *supra* note 55, at 107-109; MUSTAPHA KAMEI AL SAYYID. *RULE OF LAW, ISLAM, AND CONSTITUTIONAL POLITICIS IN EGYPT AND IRAN* 225-228, (Arjomand, Said Amir, Brown, Nathan J. ed., State University of New York Press, ed.1) (2013).

<sup>65</sup>- Law no. 95 of June 25, 1992 on Capital Market Law (*Soa' al Mal*). *In*Egy OG of June26, 1992, no. 25(bis); the Capital Market Authority had been replaced by The Financial Regulatory Authority by Law no. 10/2009, The function of the Authority focuses on controlling and regulating non-banking financial markets and instruments, including the Capital Market, the Exchange, all activities related to Insurance Services, Mortgage Finance, Financial Leasing, Factoring and Securitization. The role of this institution is also to organize the market, ensure its stability and competitiveness to attract more local and foreign investment, and to protect the national and foreign investors and participants rights, available at [http://www.fra.gov.eg/content/efsa\\_en/efsa\\_pages\\_en/main\\_efsa\\_page\\_en.htm](http://www.fra.gov.eg/content/efsa_en/efsa_pages_en/main_efsa_page_en.htm)

<sup>66</sup>- HamdyYassin, *supra* note 49, at. 84.

employment opportunities and, simultaneously adopting programs for improving the technical quality of the Egyptian labor, and ultimately, incentivizing the investment in the market.<sup>67</sup>

Additionally, in order to tackle any issue that may hinder the smooth implementation of the Egyptian privatization program, the Prime Minister had formed the Higher Ministerial Committee for Privatization by decision No.1765 of the year 2000.<sup>68</sup> This Committee was composed of 22 ministers and headed by the Prime Minister. Its main objective was firstly, selecting the companies which would be privatized and the ones that would stay under the state ownership, secondly, setting a comprehensive plan accompanied with a timeline for the privatization program according to the reports and data submitted by competent authorities, thirdly, identifying the criteria and regulations upon which the privatization was implemented, fourthly, recommending where the privatizations' proceeds would be spent, fifthly, approving the recommendations of the concerned ministers in terms of the timeline of the privatization program, ultimately, unifying the different perspectives of ministries concerning the major dilemmas of the privatization and achieving coordination among the governmental institutions to find solutions for the critical issues.

In fact, the Privatization policy was designed to be fully implemented within five years. The government offered, annually, not less than 25 public sector enterprises for privatization whether through floating on the stock market or direct negotiations with investors. This number could be raised according to the absorptive capacity of the market for the privatization transactions.<sup>69</sup> According to the proposed plan, the proceeds from selling public assets should be directed to pay the debts of these assets, reinforce the resources of the state budget, and finally, pay cash compensations to those who decided to retire optionally for tackling the issue of labor redundancy.<sup>70</sup>

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<sup>67</sup>- *Id*, p. 84, 85; However these guidelines have been updated several times until October 1996, the economic direction of the guidelines did not change; See *generally*, ZAINAB ABDEL AZEEM, IMF AND THE ECONOMIC REFORM IN THE DEVELOPED COUNTRIES (*Sando' al Naqd al Dowly w al Aslah al Aqtsady*) ( Arabic) (1<sup>st</sup>ed, 1999).

<sup>68</sup>-Prime Minister Decree No. 1765 of August 30, 2000 on Formation the Higher Ministerial Committee for Privatization. (*Tashkeel Al Lagna Al Wazerya lel Khaskhasa*)In Egy.OG of August 30, 2000, no. 197.

<sup>69</sup>-Hamdy Yassin, *supra* note 49 at. 85.

<sup>70</sup>-*Id*; see *generally*, Zainab, Abdel Azeem, *supra* note 67.

The government policy initially drafted to privatize about 316 public sector enterprises with assets of about of L.E 68 billion and revenues estimated to be over L.E 60 billion, while 85 companies were excluded from the first phase.<sup>71</sup> The privatization plan also excluded public enterprises which related to national security concerns like the Suez Canal, Egypt Air, and petroleum companies.<sup>72</sup> The program started slowly in 1993, but then accelerated until 1999. By 2003, the Egyptian government had entirely privatized about 133 public sector companies, and 35 companies had been partially privatized.<sup>73</sup>

To Sum up, Since the Revolution of 1952 Egypt has witnessed several approaches to market governance and to the economic and social development of the country. The identification of the dynamics of economic policies in Egypt during each economic epoch in terms of motives, regulatory framework, and the actual application of each policy will help in understanding of the role of the judicial institutions

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<sup>71</sup>- See generally Khalid Ikram, *supra* note 5, at 80; Safwat A. Awadalla, *supra* note 47, at 42-43.

<sup>72</sup>- *Id.*

<sup>73</sup>- Hamdy Yassin, *supra* note 49, at 78.



### III. Judicial Review of Economic Policies

Any litigation against the government gives the judiciary the opportunity to play a role in shaping public policy, including economic policies. However, the efficacy of this role was not static. Sometimes, the executive branch used the Courts to legitimate potentially unpopular policies. In others, the executive branch intervened to limit their reach, thereby reducing their power to meaningfully affect economic policies.

#### A. Nature and Progress of Judicial Review in Egypt.

Initially, it should be noted that the Egyptian judicial system is based on what is known as the dualistic legal system. It composed of two branches, one dealing with civil and criminal law and the other deals with administrative law. In other words, Civil courts (*Al Qada' Al A'adi*) or Ordinary Judiciary settle disputes between citizens in terms of tort, civil contract, commercial transactions, and family issues. The Court of Cassation (*Mahkamat al-Naqd*) prevailing over civil courts, with courts of first instance (*al-Mahakim al-Ibtida'iyya*) and appellate courts (*Mahakim al-Isti'naf*) distributed across the country. While, the administrative courts, within the Council of State (*Majlis al-Dawla*), settle disputes in which citizens challenge administrative actions; or, decisions of the government or any agency within the state bureaucracy. The Supreme Administrative Court sits at the apex of the administrative judiciary in Egypt.<sup>74</sup> The Council of State operates as a critical judicial avenue for citizens and civil servants to seek remedies for administrative abuse of power.<sup>75</sup>

In fact, before the establishment of the Supreme Court in 1969, the Council of State was the only public law judge with general jurisdiction over administrative disputes.<sup>76</sup> According to Law No.

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<sup>74</sup>- Adel Omar Sherif, *An Overview of the Egyptian Judicial System, and Its History*, 5 Y.B. Islamic & Middle E. L. 3 (1998-1999).

<sup>75</sup>- Article 190 of the 2014 Constitution states that “The Council of State is an independent judicial body which is solely competent to adjudicate administrative disputes, disciplinary cases and appeals, and execution disputes pertaining to its decisions. It is also solely competent to issue opinions in the legal issues of bodies to be determined by law, review and draft bills and resolutions of a legislative character, and review draft contracts to which the state or any public entity is a party. Other competencies are to be determined by law.” Constitution of the Arab Republic of Egypt (*Dustur Jumhuriyat Misr al-Arabiyyah*) [Egy const.] of January 18, 2014, sec. III, art. 190. InEgy OG of January 18, 2014, vol. 3 bis, (free Translation by the Author). This Article is amended by 2019 Referendum; InEgy OG of April 17, 2019, vol. 15 bis(3).

<sup>76</sup>- Law no. 81 of Aug. 31, 1969 on Law of Supreme Court (*Al-Mahkama Al- Ulya*). InEgy OG of Aug. 31, 1969, no.35(bis); Article 4 of Law No.81 of the 1969 determined the powers of the Supreme Court. According to this article, the Court was competent to constitutionally review laws, interpret legislative texts, and settle conflicts on



48 of the year 1979, the Supreme Constitutional Court replaced the Supreme Court.<sup>77</sup> Upon its establishment in 1979, the Supreme Constitutional Court sits at the top of the Egyptian judicial system. The Supreme Constitutional Court has exclusive jurisdiction to constitutionally review legislations and regulations, render final interpretation of legislative texts, and finally adjudicate disputes that may arise in terms of the enforcement of two contradictory final judgments rendered on the same subject matter by two different judicial bodies.<sup>78</sup>

Patterned to the French template, the Council of State is the highest administrative judicial avenue in Egypt. Since its inception, the Council of State is regarded as the sole arbiter with respect to governmental conducts which are rendered by executive authority acting in their capacity as a public authority.<sup>79</sup> Historically, the Council of State *Majlis al Dawla* was established in 1946 to handle certain kinds of administrative disputes.<sup>80</sup> According to Law No, 112 of the year 1946, the Council of State was confined to certain sorts of administrative disputes such as elections of local administrative agencies, administrative contracts and disputes involving government employees in terms of appointments, promotions disciplinary decisions, retirement, salaries, pensions and compensation.<sup>81</sup>

Compared to Law No.165 of the year 1955<sup>82</sup> stripping the Council of State from its powers and giving the Prime Minister powers and jurisdictions of the general assembly of the Council of State and the Special Council *al Majlis al Khas*, President Sadat initiated a new approach with the Council of State through restoring its effective judicial jurisdictions over governmental

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competence by specifying the competent body among different judicial bodies. The Supreme Court was dissolved by Law No.48 of the year 1979 on the Establishment of the Supreme Constitutional Court.

<sup>77</sup>- Law no. 48 of Sept. 20, 1979 on Law of Supreme Constitutional Court (*Al-Mahkama Al- Dustrya Al- Ulya*). InEgy OG of Sep. 6, 1979, no. 36, art. 9.

<sup>78</sup>- *id*, Supreme Constitutional Court Law, art. 25, art. 26.

<sup>79</sup>- Adel Omar Sherif, *supra* note 74, at 22.

<sup>80</sup>- Law no. 112 of Aug. 15, 1946 on Law of the Establishment of Council of State (*insha Majlis al Dawla*). InEgy OG of Aug. 15, 1946, no. 83.

<sup>81</sup>- *id*, Establishment of the Council of State Law, art. 4; *See* Adel Omar Sherif, *supra* note 73, at 23.

<sup>82</sup>- Law no. 165 of Mar 29, 1955 on Law of Council of State (*Tanzeem Majlis al Dowla*). InEgy OG of Mar 29, 1955, art. 1, art. 5, art. 6, art. 61 no. 25(bis); this law was amended by Law No.55 of the Year 1959 after the unity with Syria; the Special Council is the high authority in Council of State which is responsible for regulating the occupational life for judges in terms of appointments, promotions, and retirements. This council is headed by the president of the Council of State and the senior six vice-president.

activities and protecting and enhancing the social and personal rights of the citizens.<sup>83</sup> This was confirmed by the 1971 Constitution, which was the first constitutional document that explicitly stipulated the jurisdictions of the Council of State.

Article No. 172 of the 1971 Constitution stated that “The Council of State shall be an independent judiciary organization competent to take decisions in administrative disputes and disciplinary cases, the law shall determine its other competences.”<sup>84</sup> Moreover, Article No. 68 of the 1971 Constitution reinforced the Council of State’s role by prohibiting the immunity of any act or administrative decision from the control of the judiciary.<sup>85</sup> Consequently, Law No.47 of the year 1972<sup>86</sup> on the Council of State determined the powers of the administrative judicial system and enhanced its independence and capacity.

According to Law No. 47 of 1972, the Council consists of three principle sections: the judiciary section, the opinion section and the legislative section. The Judiciary section has an exclusive jurisdiction to review and monitor administrative acts, including government contracts, disciplinary cases, public property determinations, public order and safety disputes, disputes relating to wages, pensions due to public servants or their successors, and compensation claims arising from these disputes.<sup>87</sup>

Judicially, the administrative court has the power to annul administrative decision and compensate the aggrieved party if it finds on one of four specific statutory grounds: (1) the issuing entity is not authorized to issue the decision, (2) defective form, (3) violation of laws, or

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<sup>83</sup>- Tamir Moustafa, *supra* note 7, at 82; Moustafa argues that Sadat and Mubarak worked on the reemergence of the Council of State in 1970s and 1980s in order to cope the administrative bureaucracy, he added that the Council of State helped the regime to identify the most important cases of administrative dysfunction through a coherent system of procedural rules, standing criteria.

<sup>84</sup>- Egy 1971 Const, *Supra* note 33, art. 172; as translated in Tamir Moustafa, *supra* note 7.

<sup>85</sup>- *Id*, art. 68; as translated in Tamir Moustafa, *supra* note 7.

<sup>86</sup>- Law no. 47 of Oct. 10, 1972 on Council of State (*Majlis al Dawla*). InEgy OG of Oct. 5, 1972, art, 1, no.40; this law abolished Law No.55 of the year 1959; this law is amended by Law No.136 of the year 1984.

<sup>87</sup>-*id*, Article 10 of the Council of State Law states that the State Council is competent for settling disputes which result from 1) appeals relating to the local authorities' elections; 2) Disputes relating to wages, pensions, compensations due to public servants or their successors; 3) Requests made by the parties concerned to appeal the final administrative decisions concerning appointment in public positions, promotion or granting allowances; 4) .....; 5) .....; 11) contracts that relate to administering public utilities and providing the government with commodities and any other administrative contract.”

(4) abuse of power.<sup>88</sup> Specifically, an administrative decree that was taken by the proper official, according to prescribed procedures, and in conformity with laws and regulations was assured of judiciary.

However the review of the Council of State extends to oversight all administrative decisions and acts, some governmental actions lay beyond the purview of the administrative judiciary. Acts of sovereignty is a clear example.<sup>89</sup> In Egypt, theory of acts of sovereignty was established on a legislative basis, that there are explicit provisions in legislations that emphasize immunity of sovereign acts. Nevertheless the legislator's approach in dealing with acts of sovereignty was not static. For example, the Law No.112 of the year 1946 determined some sorts of acts of sovereignty such as those acts pertaining internal and external security, acts relating to international relations, and acts regulating the relation between the executive power and the Parliament.<sup>90</sup> While the legislator did not precisely determine these acts in subsequent legislations; this task was left to the judiciary itself.<sup>91</sup>

In this regards, the Jurist Sulaiman Al Tammawi defined acts of sovereignty as “ the acts performed by the executive power and shaped with special considerations like internal and external safety of the state and is not subject to the court control if judicial power so decides.”<sup>92</sup> Moreover, According to the Supreme Administrative Court, acts of sovereignty means “the actions performed by the government as a governing authority rather than an administration authority.”<sup>93</sup> Having reviewed the Council of State' Rulings, it is found that it did not depend on a specific criterion to define acts of sovereignty. Rather, it adopted various criteria in different cases such as the political motive criterion, nature of work criterion.<sup>94</sup>

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<sup>88</sup>- *Id*, see generally, HAMDY YASSIN. ENCYCLOPEDIA OF ADMINISTRATIVE DECISIONS OF STATE COUNCIL JUDICIARY (*Mowsoaa' al Qararat al Adary fi Qada' Majlis al Dowla*) (Part 1) (Arabic) ( 2010).

<sup>89</sup>- Theory of Sovereign Acts was emerged by the French justice. It was created by the French Council of State.

<sup>90</sup>- Establishment of the Council of State Law, *Supra* note 80, art. 6.

<sup>91</sup>- Council of State Law (*Majlis al Dawla*) *Supra* note 86, art. 11 Council of State law provides that the Council do not have jurisdiction over the requests in connection with acts of sovereignty ; *See* also, Law no. 46 of Oct. 10, 1972 on Judicial Authority (*al Solta al Qadaaya*). *InEgy* OG of Oct. 5, 1972, art, 17.

<sup>92</sup>- see generally, SULAIMAN ALTAMMAWI, AMINISTRATIVE JUDICIARY, ANNULMENT JUSTICE , 421 (Part1) (Arabic) (1967).

<sup>93</sup>- Case No. 26299, Judicial Year no. 51, of June 23, 2013, Supreme Administrative Court, (Egypt) (*Majmū'at al-mabādi' al-qānūniyah allatī qarrarat'hā al-Maḥkamah al-Idārīyah al-'Ulyā fi khams sanawāt*)(The set of principles adopted by the Supreme Administrative Court. The Eleventh Panel)[Egyptian Judicial review], at 924.

<sup>94</sup>- HAMDY YASSIN, *Supra* note 88, at 161-65.

Since the theory of acts of sovereignty is directly contrary to the principle of legality, which requires that all administrative conducts are subject to law, the Council of State goes to diminish the conducts that lay within the acts of sovereignty by removing some acts from the scope of acts of sovereignty and start to review these acts as administrative decisions. For example, the Supreme Administrative Court considered the signature of the representative of the Egyptian government on international conventions is an administrative decision and lay within the purview of the Council of State.<sup>95</sup>

For instance the Supreme Administrative stated the president's declaration to invite citizens for Parliament election is an administrative one according to the 2013 Constitutional Declaration.<sup>96</sup> Moreover, the Administrative Judiciary Court ruled that "... the power of the President of the Republic to declare the state of emergency has ceased to be an absolute power; rather it is a restricted power". The court declared that the decision of the state of emergency is an administrative one and is not regarded as acts of sovereignty according to the 2013 Constitutional Declaration.<sup>97</sup>

Additionally, the role of the opinion section is to provide administrative agencies with legal advice and revise administrative contracts, wherein the legislative section is responsible for reviewing the drafts of laws and public regulations before issuance. These jurisdictions helped

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<sup>95</sup>- Case No.74236, Judicial Year no. 62, of January 16, 2017, Supreme Administrative Court, (Egypt) (print copy); in contrast, the Supreme Constitutional Court relied on the nature of work criterion to differentiate between acts of sovereignty and other administrative acts. The Court concluded that the signature of the representative of the Egyptian Government on the international convention is pure political conduct. See Case No. 12, Judicial Year no. 39, of March 3, 2018, Supreme Constitutional Court. InEgy OG of March 7, 2018, no.9(bis)(c), at 21

<sup>96</sup>- Case No.13846, Judicial Year no. 59, of April 21, 2013, Supreme Administrative Court, (Egypt) (*Majmū'at al-mabādi' al-qānūniyah allatī qarrarat'hā al-Maḥkamah al-Idāriyah al-'Ulyā fī khams sanawāt*)(The set of principles adopted by the Supreme Administrative Court. The Eleventh Panel)[Egyptian Judicial review]; In fact there were some judgment considered the President declaration to invite citizens for election is an act of sovereignty according to the 1971 Constitution; see Case No.9376, Judicial Year no. 53, of March 25, 2007, Supreme Administrative Court, (Egypt) (*Majmū'at al-mabādi' al-qānūniyah allatī qarrarat'hā al-Maḥkamah al-Idāriyah al-'Ulyā fī khams sanawāt*)(The set of principles adopted by the Supreme Administrative Court) [Egyptian Judicial review] at 555.

<sup>97</sup>- Case No.74029, Judicial Year no. 67, of November 12, 2013, Administrative Judiciary Court, (Egypt) (printed copy); the Court stated that "the constitutional progress in the 2014 Constitution, by putting restricts on the power of the President concerning the state of emergency, requires the awareness of the judiciary to understand the obvious intention of the constitutional legislator to reduce the administrative abuse of power" (free translation by the author); in past, the Council of State considered this act as an act of sovereignty, which lay beyond the review of the judiciary; see Case No.39323, Judicial Year no. 60, of March 27, 2007, Administrative Judiciary Court, (Egypt), (printed copy).

the Council of State expand the judicial oversight in defending civil and political rights against any illegal or arbitrary administrative conducts.<sup>98</sup>

As I mentioned above, before the establishment of the constitutional review in Egypt, each court had the power to interpret legislative texts and abstain from enforcing laws which were deemed to violate the constitution the supreme law and ultimate source of all powers. Nevertheless, during that era neither ordinary judiciary nor the Council of State had the authority to strike down the unconstitutional clauses, but only refrain from applying it on the subject matter.<sup>99</sup>

In 1969, Law No.81 was rendered to establish the Supreme Court. This court had an exclusive power for judicial review and interpretation of legislative texts. The establishment of this court is considered as the beginning of the constitutional review in Egypt. The Supreme Court replaced the notion of abstention control exercised by the Council of State courts in 1948. Tamer Moustafa argues that the establishment of the Supreme Court was an attempt by the government to hinder judicial institutions from practicing abstention control, which had led to negative outcomes in the side of the government. Moustafa adds that the explanatory memorandum to Law No. 81 of the year 1969 disclosed the real desire of the government behind the establishment of the new Supreme Court when stating that “it has become clear in many cases that the judgments of the judiciary are not able to join the march of development which has occurred in social and economic relations.”<sup>100</sup>

In 1979, upon the establishment of the Supreme Constitutional Court, the Supreme Court ceased to exist and the new Court retained the power of judicial review. The Supreme Constitutional Court has been delegated to exercise this power by the explicit provisions of the 1971 Constitution. Consequently, all other courts have been precluded from exercising this power with the new court.<sup>101</sup>

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<sup>98</sup>- Adel Omar Sherif, *supra* note 74, at 22.

<sup>99</sup>- *Id.*, at 18; Tamir Moustafa, *supra* note 7, at 66.

<sup>100</sup>- The Text of Explanatory Memorandum as cited in Tamir Moustafa, *supra* note 7 at. 66.

<sup>101</sup>- Adel Omar Sherif, *supra* note 74, at 18.

In fact, although the 1971 Constitution affirmed the establishment of a Supreme Constitutional Court to review the constitutionality of laws and regulations and issue binding interpretations of legislative clauses, the court had still not been operated since the enabling legislation had not been rendered until 1979. Article 174 of the 1971 Constitution stated that “The Supreme Constitutional Court shall be an independent judicial body, having its own juristic personality in the Arab Republic of Egypt, and having its seat in Cairo.”<sup>102</sup> Moreover, Article 175 of the 1971 Constitution stated that:

The Supreme Constitutional Court alone shall undertake the judicial control in respect of the constitutionality of the laws and regulations and shall undertake the interpretation of the legislative texts in the manner prescribed by law. The law shall prescribe the other competences of the court, and regulate the procedures to be followed before it.<sup>103</sup>

The Supreme Constitutional Court is seen as one of the most important judicial and academic platforms in Egypt. The Court has played a pivotal role in reviewing public economic policies and political rights since its creation until now. Institutionally, the Court enjoyed substantial independence from governmental intervention compared to the Supreme Court.<sup>104</sup> The Law No.48 of the year 1979 gives judges the capacity to perform their legal duties without worry of removal or reprisals by executive authority. The General Assembly of the Court only has the power to manage the internal affairs of the court and to discipline its judges.<sup>105</sup>

Judicially, Law No.48 of the year 1979 demarcates the powers and jurisdictions of the Supreme Constitutional Court. In this connection, Article 25 of the Supreme Constitutional Court Law states that:

The following fall within the exclusive jurisdiction of the Supreme Constitutional Court: (Firstly) the exercise of the power of judicial review in constitutional issues with respect to laws and regulations. (Secondly) the settlement of conflicts on competence by specifying the competent body among different judicial bodies or other judicial forums, whenever a case dealing with the same subject-matter is being brought before two of such branches or forums, and jurisdiction regarding that case was not disclaimed by one of

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<sup>102</sup>- Egy 1971 Const, *Supra* note, art.174; as translated in Tamir Moutafa, *supra* note 7.

<sup>103</sup>- *Id*, art.175; as translated in Tamir Moutafa, *supra* note 7.

<sup>104</sup>- Tamir, Moustafa. *supra* note 29, at 893.

<sup>105</sup>- Supreme Constitutional Court Law, *Supra* note 77, art.8, art. 11; *see generally* Tamir Moustafa, *supra* note 27, at 895.

them or was disclaimed by both. (Thirdly) the determination of a final judgment in cases where two or more other judicial bodies have produced contradictory judgments.<sup>106</sup>

Practically, the Supreme Constitutional Court is entitled to perform judicial review only when it receives cases transferred from courts of merit. According to Article 29 of the Law No.48 of the year 1979, if any court, in the course of deciding a concrete case, finds that a law being applied may be unconstitutional, it can suspend the proceedings and transfer the case to the Supreme Constitutional Court for review. In most cases, a petition for judicial review in front of the SCC is requested by litigants themselves. Judges also have the power to cease the proceedings and file a request to the Supreme Constitutional Court if they find the constitutionality of a particular law they are applying questionable.<sup>107</sup>

In short, the concept of judicial review in Egypt currently has two machineries: review of constitutionality and review of legality. Constitutional review aims at guaranteeing the conformity of laws and regulations with the Constitution. Legality review seeks to maintain the adherence of administrative decisions and contracts to the applicable laws and public regulations. In other words, the authority of judicial review is divided between the Supreme Constitutional Court for constitutional matters on one hand, and the Council of State for administrative controversies on the other hand.<sup>108</sup>

In this context, the Supreme Constitutional Court and Council of State stood at the center of the most controversial debates concerning the review of the economic policies and economic identity of the Egyptian state. The judicial review of public economic policies has been changing since 1952, the year of the proclamation of the Egyptian Republic until now. This will be discussed later in next sections.

## B. Non Intervention

The identification of the role of the public law judge in public economic policy is not a simple matter. The role of the public law judge in reviewing the public economic policies and their impacts during these eras has not been a constant one. The impact of this role has been always

<sup>106</sup>- *Id*, Supreme Constitutional Court Law, art. 25 as translated in Tamir Moustafa, *supra* note 7.

<sup>107</sup>- *Id*, art. 29, as translated in Tamir Moustafa, *supra* note 7.

<sup>108</sup>- Adel Omar Sherif, *supra* note 74, at 23.



pending on the government's willingness, whether to execute courts' judgments or not according to its assessment for the economic situation.

After its outbreak, the Free Officers' Revolution legitimacy required reinforcement by law in order to fully back the smooth transition from monarchy to republic. The Revolutionary Command Council assigned Abdel Raziq al-Sanhuri \_the president of Council of State\_ to be the prime minister in this period. However al- Sanhuri was one of the supporters of the legitimacy of the 1952 Revolution, He was physically beaten by regime thugs and forced to resign in 1954.<sup>109</sup> Consequently, Law No. 165 of the year 1955 was issued to regulate the Council of State's affairs in terms of appointment, promotion and retirement of judicial members. The new law attached the Council of State to the executive authority. According to this law, the Prime Minister took over all delegated powers and jurisdictions of the general assembly of the Council of State and the Special Council (*al Majlis al khas*) within 15 days and was to issue the required decisions for applying this law.<sup>110</sup> Consequently, the Prime Minister used the new law to issue a decree that forced another twenty notable judges of the State Council to retire or transferred them to non-judicial occupations.<sup>111</sup>

Although there was radical change in public economic policies from capitalism to a more state-controlled economy reflected purely in a nationalization process and Agrarian Reform Law, the role of the Council of State in reviewing the economic strategies of the government in this period was significantly scarce. This can be attributed to the fact that these policies were immunized by legislations that primarily deprived that Council of State from adjudicating disputes arising from its implementation.

For instance, according to Agrarian Reform Law as amended by Law No. 381 of the year 1956, the Council of State had no judicial competence to adjudicate the disputes arising from the application of the law. This law established Judicial Committees which were entitled to settle any conflicts regarding the application of the law and then refer the whole matter for ratification

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<sup>109</sup>- Tamir Moustafa, *supra* note 29, at 888; al-Sanhuri was one of Egypt's greatest legal scholars and in Middle East. He can be considered the legal advisor and ally for the Free Officers Revolution who volunteered to address the legal issues that could hurdle the pace of the Revolution.

<sup>110</sup>- Law no. 165 of Mar 29, 1955 on Law of Council of State, *Supra* note, 82.

<sup>111</sup>- Farouq Abdel-Bur, *supra* note 16, at 60-65.



to the Supreme Committee of Agriculture Reform. The role of Judicial Committees mainly focused on matters relating to specifying the seized land, scrutinizing its ownership and settling distribution matters between its users. The decisions of the Supreme Committee of Agriculture Reform were unchallengeable.<sup>112</sup> According to Agrarian Reform Law as amended by Law No.147 of the year 1957, the decisions of the Supreme Committee of Agriculture Reform concerning the wastelands cannot be annulled before the Council of State courts.<sup>113</sup>

Concerning nationalization, the legal precedents of administrative courts were mainly directed to consider the nationalization process as an act which lays beyond the Council of State competence. Despite the fact that the notion of nationalization might impinge on the right of property, most judgments rendered in nationalization litigations stated that the nationalization process per se was legislative act that cannot be considered as an administrative decisions and the Council of State is not competent to review and scrutinize these actions.<sup>114</sup> For instance, in case No. 452 of judicial year 11, the Supreme Administrative Court refused the case of the plaintiff company which challenged the nationalization decree, because the nationalization process for the concerned company was made according to Law No. 151 of the year 1963. The Supreme Administrative Court upheld the judgment of the Administrative Judiciary Court which stated that the Council of State courts are not competent to review and scrutinize the legitimacy of the nationalization process per se because it was a legislative act, and it was not within the purview of Council of State Courts.<sup>115</sup> Additionally, nationalization laws immunized the decisions of the valuation committees regarding compensations from any sort of challenge.<sup>116</sup>

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<sup>112</sup>- Law no. 381 of Nov. 3, 1956 on Amending Agrarian Reform Law (*Taa'deel Baad Ahkam Qanon Al-Aslaah Al-zaraa'y*). InEgy OG of Nov. 3, 1953, no. 88(bis) C; In fact, this law was amended by Law no.69/1971 which allowed challenging of the decisions of the Judicial Committees only in terms of scrutiny the ownership of the seized lands before the Supreme Administrative Court. In 2002, the Constitutional Supreme Court ruled that the amendment of art.13(bis) by Law no.69/1971 was unconstitutional. The Supreme Constitutional Court states that the amendment had limited the scope of challenge before Administrative Supreme Court only for disputes regarding the scrutiny of the ownership of the seized land nevertheless the decisions of Judicial Committees in other sorts of disputes like distribution conflicts between users which are unchallengeable once it were ratified by the Supreme Committee of Agriculture Reform and cannot be appealed before the Administrative Supreme Court. The court stated that the legislature, by this amendment, had led to a clear discrimination between litigants \_ who had the same legal status \_ in the same nature of disputes; see generally Case No. 2, Judicial Year no. 22, of April 14, 2002, Supreme Constitutional Court. InEgy OG of April 27, 2002, no. 17(bis), at 51.

<sup>113</sup>- Law no. 148 of July. 13, 1957 on Amending Agrarian Reform Law (*Taa'deel Baad Ahkam Qanon Al-Aslah Al-zaraa'y*). InEgy OG of July.13, 1958, no. 53(bis) D.

<sup>114</sup>- See generally, Hamdy Yassin, *supra* note 88.

<sup>115</sup>- Case No. 452, Judicial Year no. 11, of May 6, 1967, Supreme Administrative Court, (Egypt) (*Majmū'at al-mabādi' al-qānūniyah allatī qarrarat'hā al-Mahkamah al-Idāriyah al-'Ulyā fi khams sanawāt*)(The set of principles

Ultimately, In fact, the notion of stripping the Council of State from its powers was confirmed by the 1956 Constitution. According to Article 191 of the 1956 Constitution, all decisions issued by the Revolutionary Command Council are unchallengeable and cannot be annulled before any judicial institution.<sup>117</sup>

In short, it is clearly evident that the Council of State did not play a significant role in economic policies at Nasser's era, because the government unilaterally articulated and implemented its socialist economic policies away from any sort of judicial review. In this regard, since investors assess the opportunities to invest their funds according to the effectiveness of the judiciary, and the degree of protection of property rights, in this context, the absence of the judicial protection in this period led to the exodus of capital abroad and deprived the economy from huge sums. In other words, if the government reinforced judicial institutions with power to review governmental and legislative conducts, the property right would be more secured and investors would not be forced to divest their assets and move abroad and would invest their funds securely inside Egypt.<sup>118</sup>

Consequently, these factors led the regime to think in how to restore the confidence in the Egyptian economy. Therefore, as I mentioned in the previous section, in 1969, Law No.81 was promulgated to set up the Supreme Court and was replaced by the Supreme Constitutional Court in 1979. The Supreme Constitutional Court played an important role in public economic policy, but, practically, the influence of this role was always subject to government's discretion and this will be reviewed in the next section.

### C. Constitutional Review and the Role of the SCC.

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adopted by the Supreme Administrative Court. The First Panel)[Egyptian Judicial review], (part2) at 1010; see also Case No. 1029, Judicial Year no. 11, of Nov. 30, 1968, Supreme Administrative Court, (Egypt) (*Majmū'at al-mabādi' al-qānūniyah allatī qarrarat'hā al-Mahkamah al-Idāriyah al-'Ulyā fī khams sanawāt*) (The set of principles adopted by the Supreme Administrative Court. The First Panel) [Egyptian Judicial review] (part1) at 115.

<sup>116</sup>- Law no. 117 of July 20, 1961 on Nationalization of Private Companies; Law no. 72 of August 20, 1963 on Nationalization of Private Companies.

<sup>117</sup>- Constitution of the Arab Republic of Egypt (*Dustur Jumhuriyat Misr al-Arabiyyah*) [Egy const.] of Jan. 16, 1956, art. 191. InEgy OG of January 16, 1956; this constitution was abolished by the 1958 Constitution after the unity with Syria.

<sup>118</sup>-See generally, Tamir Moustafa, *supra* note 7, at 61-75.

The creation of a Supreme Court to review the validity of legislation in order to ascertain their compliance with the constitutional provisions is considerably considered as the introduction of an arbiter between the government and individuals.<sup>119</sup> The literature of the Supreme Court on reviewing public economic policies was mainly focused on Nasser's socialist policies. In fact, the Supreme Court maintained the identity of the socialist policies adopted at Nasser's presidency, which restricted the courts of the Council of State from imposing its jurisdiction to review governmental economic policies. For instance, in case No.9 of judicial year 7, the Supreme Court affirmed the constitutionality of the creation of Judicial Committees established to settle disputes arising from the application of Agrarian Reform Law and considered its decrees as judicial rulings and not as administrative decrees.<sup>120</sup>

Moreover, the Supreme Court has affirmed that the determination of the maximum agriculture ownership for the person and his family is not contradictory to the constitution. The Court states that such determination was a part of the states policies to abolish feudalism as one of the main objectives of the 1952 Revolution.<sup>121</sup> It clear evident that the judgments of the Supreme Court revealed to what extent the court preserved the legacy of Nasser state-controlled policies and its legal infrastructure regardless of its conflict with the protection of property rights and its negative impacts on the climate of the investment in Egypt.

Nasser's death at 1970 brought about changes in the economic agenda and judicial institutions.<sup>122</sup> The economic situation was worrisome and in need of panacea. President Sadat realized the inefficiencies of Nasser's socialist plan and started to gradually abandon these policies that resulted in a fragile public sector and the need to a constant infusion of funds. The government was directed to a more capitalistic economic regime characterized by the maintaining of private property rights and encouraging foreign investments.

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<sup>119</sup>- Dr Awad Mohammed El-Morr, *Human Rights and the Constitutional Systems of Islamic Counties*, Cairo University Law Review, at 7 (1988), as cited in Adel Omar Sherif, *supra* note 74, at 28.

<sup>120</sup>- Case No. 9, Judicial Year no. 7, of April 1, 1978, Supreme Court, (Egypt) (*Majmū'at al-mabādi' al-qānūniyah allatī qarrarat'hā al-Mahkamah al-'Ulyā w al- Mahkamah al-Dustria al-'Ulyā fi Arba'een A'm*) (The set of principles adopted by the Supreme court and the Supreme Constitutional Court in 40 Years)[Egyptian Judicial review], at 199.

<sup>121</sup>- Case No. 13, Judicial Year no. 4, of April 5, 1975, Supreme Court, (Egypt) (*Majmū'at al-mabādi' al-qānūniyah allatī qarrarat'hā al-Mahkamah al-'Ulyā w al- Mahkamah al-Dustria al-'Ulyā fi Arba'een A'm*) (The set of principles adopted by the Supreme court and the Supreme Constitutional Court in 40 Years)[Egyptian Judicial review], at 201.

<sup>122</sup>- Delwin A. Roy and William T. Ireland, *supra* note 25, at 170.

Without a doubt the creation of the Supreme Constitutional Court was a crucial stone of economic reform during Sadat's presidency. With insecure property rights, foreign investors were reluctant about the climate of investment in Egypt due to the absence of efficient legal institutions that guarantee their funds would not be sequestered or expropriated by the regime at political turmoil.<sup>123</sup> Sadat attempted to attract foreign investment and Egyptian private investment. According to Mahmoud Fahmy one of the drafters of the Supreme Constitutional Court Law, the establishment of the Supreme Constitutional Court was an outcome of the internal and external pressure in order to reassure foreign investors that their properties would be secured.<sup>124</sup>

Undoubtedly, the Supreme Constitutional Court rulings in economic sphere were of great concern at the early 1980s. The Supreme Constitutional Supreme Court had substantially involved in economic public policy. The court overturned many socialist economic policies implemented at Nasser's era. For example, the court declared the unconstitutionality of sequestration process that was operated at Nasser's era according to Law No.150 of the year 1964 and its amendment in terms of the amount of compensation paid in return since this law was strongly contradicting with the legal basis of the protection of private property.<sup>125</sup>

Concerning nationalization, the Supreme Constitutional Court judicially reviewed Law No.117 of the year 1961 and Law No. 72 of the year 1963 concerning the nationalization of industry. As I mentioned before, these laws immunized the decisions of the valuation committees in terms of compensations that could be paid to the owners of the nationalized companies in a way that deprived citizens of the right to challenge the value of compensation. The Supreme Constitutional Court declared that these clauses are unconstitutional since they violated Article No. 68 of the 1971 Constitution, which guaranteed judicial supervision of any administrative decrees and supported the right to sue.<sup>126</sup>

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<sup>123</sup>. Tamir Moustafa, *supra* note 7, at 76.

<sup>124</sup>. *Id.*, at 78.

<sup>125</sup>. Case No. 5, Judicial Year no. 1, of May 16, 1981, Supreme Constitutional Court. *InEgy* OG of June 6, 1981, no. 23, at 1667.

<sup>126</sup>. *See* generally, Case No. 16, Judicial Year no. 1, of April 30, 1983, Supreme Constitutional Court. *InEgy* OG of May 20, 1981, no. 20, at 1144-1148; Case No. 5, Judicial Year no. 2, of April 30, 1983, Supreme Constitutional Court. *InEgy* OG of May 20, 1981, no. 20, at 1149-1153; Another judgment was rendered concerning article 2 of law no. 2/1963. This article authorized the valuation committee to declare the value of companies that were placed

Moreover, the Supreme Constitutional Court, in case no. 139 of judicial year 5, ruled that Law No. 141 of the year 1981 that determined certain methods for calculating compensation in return for sequestration was unconstitutional. The court stated that such valuations were undervalued and did not sufficiently account for the rate of inflation, therefore contradicting to property rights as protected in Articles 34 and 35 of the Constitution.<sup>127</sup>

Undoubtedly, the literature of the Supreme Constitutional Court in terms of Agrarian Reform Law was extremely substantial. Court' rulings disclosed the deficiencies of this law and its amendments. For instance, in case No. 3 of Judicial Year 1, the court struck down Law No. 104 of the year 1964 which provided that land that exceeded the maximum limits of the ownership can be confiscated by the government without any sort of compensation. The court declared that this law was in conflict with the rational basis of safeguarding of private property since it constituted a form of confiscation and, therefore is unconstitutional.<sup>128</sup>

Moreover, the Supreme Constitutional Court ruled that Article 2 of Law No.148 of the year 1957 was unconstitutional because this law immunized the decrees of the Supreme Committee of the Agrarian Reform concerning wasteland from challenge before the Council of State Courts. The court declared the decisions of this committee were administrative in nature, and therefore Art.2 of this law contradicted with Article 68 of the 1971 Constitution.<sup>129</sup>

The role of the Supreme Constitutional Court in economic sphere was very noteworthy. Since its creation, the Courts rulings disclosed the deficiencies of the economic policies of Nasser's socialist regime like nationalization, sequestration, and agrarian reform. It is clearly evident that the court abolished some of Nasser's socialist policies due to its infringements to the right to sue concerning economic issues and the safeguarding of private property.

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under sequestration. The SCC ruled that there must be judicial review of these administrative actions. Case no. 18, Judicial Year 5, of June 6, 1987, Supreme Constitutional Court. InEgy OG of June 20, 1987, no. 25, at 2049-2053.

<sup>127</sup>- Case No. 139,140, Judicial Year no. 5, of June 21, 1986, Supreme Constitutional Court. InEgy OG of July3, 1986, no. 27, at 961-972; *see also* Tamir Moustafa, *supra* note 7, at 93.

<sup>128</sup>- Case No. 3, Judicial Year no. 1, of June 25, 1983, Supreme Constitutional Court. InEgy OG of July 7, 1983, no. 20, at 1601-1608.

<sup>129</sup>- Case No. 92, Judicial Year no. 4, of Dec. 3, 1983, Supreme Constitutional Court. InEgy OG of Dec. 23, 1983, no. 51, at 2970-2977.

It is undeniable that the Supreme Constitutional Court was an effective partner in framing the public economic policy in this era. Although the Supreme Constitutional Court went far beyond the expected compensation that the government was intended to pay, the government benefited from the supreme Constitutional court rulings because these judgments were extremely consistent with its policies that were directed to protect private property rights and attract foreign investments.

It clear obvious that the establishment of the Supreme Constitutional Court helped the government in achieving desire to reduce the apparent risks regarding private investment in Egypt as the court restored the limits of protection of the private property right. Tamir Moustafa says “The impressive activism of the new Supreme Constitutional Court helped the regime assure both Egyptian and foreign private investors that property rights were now secure in Egypt and that formal institutional protections existed above and beyond mere promises by the regime.”<sup>130</sup>

As I mentioned in the previous chapter that Mubarak’s regime signed an economic reform and structural adjustment with international financial institutions in the early 1990s. The implementation of privatization is regarded as the most challenging step among others in terms of the enforcement of the economic reform, taking into consideration the sensitivity accompanied with fear of public opinion from the notion of selling public sector enterprises.<sup>131</sup> In fact, the socio-economic mainstream of the country in this period was not yet able to accept the idea of privatization of the public sector enterprises due to the fact that the dominant trend was always deemed the public sector as the cornerstone of the Egyptian economy and the driving force for improvement and economic development.<sup>132</sup>

The dilemma of privatization in Egypt relates to the fact that the implementation of privatization contradicted the socialist principles encapsulated by the entire Constitution of 1971. Although privatization was at the heart of the government’s economic reform, the privatization of public

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<sup>130</sup>- Tamir Moustafa, *supra* note 29, at 895.

<sup>131</sup>- RAMZY ZAKI, *CONFUSED PROBLEMS (Qadya Mozaa’ga)* ( Arabic) (1<sup>st</sup>ed, 1994).

<sup>132</sup>- *Id*; Dr Ramzy Zaki advised the government to hold a public referendum about the adoption of the privatization system, because he believed that public sector is not owned by the government only but it belongs to all the Egyptian citizens.

assets was implemented in the absence of a constitutional license explicitly allowing its existence in the Egyptian economic sphere.

In fact, the regime was obscure in shifting to a neo- liberal economic ideology. While the 1971 Constitution was amended at the onset of the 1980s to embody clauses concerning the presidential terms, the constitution still preserved the socialist nature of the economic regime; this is in spite the fact that President Sadat had initiated his Open Door *Inftha'h* in 1974 based on free market system.<sup>133</sup> The government did not amend the constitution and rendered Law No 203 of the year 1991 on privatization without making any constitutional reform that could pave the way for its implementation and left the task of conferring legitimacy on privatization to the Supreme Constitutional Court.

In fact, the socialist nature of the 1971 Constitution is reflected in many features. Firstly, the 1971 Constitution relied on the notion of development plans which are considered to be one of the cornerstones of the socialist system. Article No. 23 highlights its socialist nature that:

The national economy shall be organized in accordance with a comprehensive development plan which ensures the growth of the national income, fair distribution, higher living standards, elimination of unemployment, the increase of job opportunities, the linking of wages to productivity and the determination of minimum and maximum wages in a manner which guarantees the reduction of disparities between incomes.<sup>134</sup>

Moreover Article 30 stated that “Public ownership is the ownership of the people and it is confirmed by the continuous support of the public sector. The public sector shall be the vanguard of progress in all spheres and shall assume the main responsibility in the development plan.”<sup>135</sup>

Additionally, Article No. 24 stated that “The people shall control all means of production and direct their surplus in accordance with development plan laid down by the State.”<sup>136</sup> The socialist nature was also reinforced through confirming the immunity of public ownership in Article No.33 which stated that “Public ownership shall have its sanctity. Its protection and support shall be the duty of every citizen in accordance with the law as it is considered the mainstay of the

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<sup>133</sup>- MOHAMED ABD AL-LATEEF, THE CONSTITUTIONAL REGIME OF PRIVATIZATION (*Al-Nazam Al Dustorylal Al-Khaskhsa*) (Arabic) (1<sup>st</sup>ed, 2000).

<sup>134</sup>- Egy 1971 Const, *Supra* note, art.23; as translated in Tamir Moutafa , *supra* note 7.

<sup>135</sup>- *Id*, art. 30.

<sup>136</sup>-*Id*, art.24.



strength of the homeland, a basis for the socialist system and a source of prosperity for the people.”<sup>137</sup> Finally, Article No. 59 stated that “safeguarding, consolidating and preserving the socialist gains shall be a national duty”<sup>138</sup>

Based on these arguments, the privatization program was strongly resisted by leftists and opposition parties because such program was seen as a violation of the spirit and the letter of the 1971 Constitution.<sup>139</sup> In this context, a lawsuit was filed by Hamdy Badr, a worker in a public sector company, before the Supreme Constitutional Court in 1994 challenging the constitutionality of Law No.203 of the year 1991. He complained that the company in which he had been working was merged into another public sector company that was later sold. The plaintiff stated that “The sale of the second company had led to the failure of the merged company, as a result of which it discontinued paying the plaintiff several special work allowances and incentives.”<sup>140</sup> The plaintiff established his challenge on the argument that Law No.203 of the year 1991 stipulated certain economic outcomes which were incompatible with the socioeconomic principles of the constitution. In other words, this law could lead to the elimination of public ownership of national wealth. The plaintiff added that Law No.203 of the year 1991 had removed the clear distinction between public and private ownership.<sup>141</sup>

In 1997, the Supreme Court rejected the claim of the plaintiff and affirmed the constitutionality of Law no.203/1991. The Supreme Constitutional Court, in its reasoning, stated that:

1. Constitutional provisions should not be interpreted as a definitive and permanent solution for outdated economic conditions, but should be understood in the light of higher values aiming at economic and political liberation of the country and citizens;
2. Forcible integration of constitutional provisions, within a particular philosophy, would make it difficult for any particular community to adapt them to new goals that the community would like to reach;

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<sup>137</sup>- *Id*, art. 33.

<sup>138</sup>- *Id*, art. 59.

<sup>139</sup>- Tamir Moustafa, *supra* note 29, at. 908; *See also* MUSTAPHA KAMEI AL SAYYID, *supra* note 64, 225-228.

<sup>140</sup>- Case No. 7, Judicial Year no. 16, of Feb. 1, 1997, Supreme Constitutional Court. *InEgy* OG of Feb. 13, 1997, no.7, at 3-17; as Translated in MUSTAPHA KAMEI AL SAYYID, *Supra* note 64.

<sup>141</sup>-*Id*.



3. The interpretation of the character of public investment and the complementarities between public and private investment is not a violation of the Constitution but is an appreciation of the values upheld by the Constitution, foremost of which is that the quality of the investment that should be protected is dependent on the area in which it operates, and that public and private investments are complementary partners. In this sense, the offering of shares in units of holding companies in the stock exchange, even if this offer leads to their sale to the private sector, is not a reversal of the leading role of public investment, but is one way of protecting resources that should not be wasted in order to ensure sustainability of development through cooperation among its partners.<sup>142</sup>

In fact, the Supreme Constitutional Court's ruling has triggered a crucial debate among legal jurists especially concerning the constitutionality of the economic reform.<sup>143</sup> Mustapha Al Sayyid argues that the Supreme Court had abandoned the textual interpretation and relied on a liberal reading of constitutional clauses in order to reach this interpretation which totally contradicts with the real intentions of the drafters of the 1971 Constitution.<sup>144</sup> Leftists accused the Supreme Constitutional Court of striking down the 1971 Constitution itself.<sup>145</sup> In the same direction, Lama Abu Odeh argues that "the SCC performed interpretive acrobatics to introduce market economy in its decisions against the letter of an openly "socialist" constitution."<sup>146</sup> Moreover, according to Nathan Brown and Julian G. Waller "the Supreme Constitutional Court tended to whittle down the meaning of socialist provisions in the constitution"<sup>147</sup>

It is apparent that the Supreme Constitutional Court performed a crucial role in the implementation of the privatization program since it reinforced the confidence of the political figures to continue their market transition at a minimal political cost. Without a doubt, the intervention of the Supreme Constitutional Court helped the government to dismantle the legal infrastructure of Nasser's era and the socialist principles of the 1971 Constitution for justifying the market transition in the 1990s in a way that the government itself did not imagine. The Supreme Constitutional Court conferred legitimacy to neo-liberal policies. The Supreme

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<sup>142</sup>- *Id.*

<sup>143</sup>- Mohammed Abdel el Lateef, *supra* note 133, at.35.

<sup>144</sup>- Mustapha Al Sayyid, *supra* note 64, at 227.

<sup>145</sup>- Tamir Moustafa, *supra* note 7, at 130.

<sup>146</sup>- Lama Abu Odeh, *The Supreme Constitutional Court of Egypt: The Limits of Liberal Political Science and CLS Analysis of Law Elsewhere*, 59 Am. J. Comp. L. 985 (2011).

<sup>147</sup>- Nathan J. Brown, Julian G. Waller, *Constitutional courts and political uncertainty: Constitutional ruptures and the rule of judges*, 14 Int' J Const. L. 843 (2016).

Constitutional Court had removed the most serious legal challenge to the liquidation of the public sector. No one can deny the interests and policies of the government converged with the Court's perspective in order to overturn the socialist policies of Nasser's era.

Additionally, the significance of this ruling stems from the reality that the government heeded the call of the Supreme Constitutional Court to intervene and amend the socialist clauses in the 1971 Constitution to match the market transition. In March 2007, Egyptians agreed on the amendments to the 1971 Constitution. The amendments encompassed about thirty-four articles. Eleven among them were directed towards achieving compatibility between the prevailing capitalist market system and the constitutional clauses. The amendments revealed the intent of the regime to abolish any reference to the socialist economic system.<sup>148</sup> For instance, Article No. 4 of the 1971 Constitution after amendment stated that “The national economy is based on the development of economic activity, social justice, the guarantee of the different forms of property and the preservation of workers’ rights.”<sup>149</sup> The constitutional amendment discloses that the government responded positively to what the Supreme Constitutional Court said in the privatization ruling and started to remove any constitutional obstacles that could hinder market transition.

The executive- judiciary relation was not a constant one in terms of economic policies. As I mentioned before a constitutional court’s ruling generally cannot be overturned, nevertheless its impact may be blocked by other two authorities. This is true. The government determines the extent and the limits of the judicial influence in economic policies. Despite the cardinal role of the Supreme Constitutional Court in the economic sphere at the era of the transition to a market economy, the government was worried by the judicial activism of the Court in certain economic policies. Indeed, the government was negatively affected by the Supreme Constitutional Court’s tax rulings that forced the government to return hundreds of millions of pounds to those who were dissatisfied with these pieces of unconstitutional taxation legislation.<sup>150</sup> Consequently, and

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<sup>148</sup>-Nathalie Bernard-Maugiron, *The 2007 Constitutional Amendments in Egypt, and Their Implications on the Balance of Power*, 22(4) Arab Law Quarterly, 397, 399-402 (2008).

<sup>149</sup>- Constitution of the Arab Republic of Egypt [Egy const.] as amended of March 28, 2007, *In*Egy OG of March 31, 2007, vol. 13 bis.

<sup>150</sup>- See generally, Tamir Moustafa, *supra* note 7, at 178.

because the government has the upper hand concerning the efficacy of the public law judge, the government hindered the influence of the Supreme Constitutional Court rulings in taxes issues.

In 1993, the Court declared the constitutionality of Law No.229 of the year 1989 that imposed taxation on Egyptians workers in public sector companies abroad in order to increase tax revenues. The plaintiff, a woman working for the Ministry of Housing abroad, argued that Law No. 229 of the year 1989 discriminated against Egyptians workers in the public sector while authorizing Egyptians in the private sector to work abroad without having to pay taxes. The plaintiff claimed that this law established a form of discrimination between nationals and therefore violated Article No. 38 of the 1971 Constitution, which bases the taxation regime on social justice. The Supreme Constitutional Court agreed with the plaintiff's argument and struck down the law.<sup>151</sup>

On the same track, the Supreme Constitutional Court struck down other pieces of tax legislation because they imposed excessive taxation whether on private persons or companies.<sup>152</sup> In 1998, as a result of these rulings, the government started to protect itself from paying compensation in other pending challenges. Mubarak rendered Law No.168 of the year 1998 to block the impact of the Supreme Constitutional in taxation sector. This enactment amended Article 49 of the Law No.78 of the year 1979 of the Supreme Constitutional Court. The amendment foreclosed retroactive compensation requests as the result of Supreme Constitutional Court taxation judgments to the party who initiated the claim before the court; however, all other citizens were deprived of the right to retroactive compensation for the same unconstitutional laws.<sup>153</sup> The

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<sup>151</sup>- Case No. 43, Judicial Year no. 13, of Dec. 6, 1993, Supreme Constitutional Court. InEgy OG of Dec. 23, 1993, no. 51, at 3030-3036 as cited in Tamir Moustafa, *supra* note 7, at 134.

<sup>152</sup>- Tamir Moustafa, *supra* note 7, at 134-36; see generally Case 5, Judicial Year 10, of June 19, 1993 Supreme Constitutional Court. InEgy OG of July 7, 1993, no. 27, at 33-40; Case 23, Judicial Year 12, of Jan. 2, 1993 Supreme Constitutional Court. InEgy OG of Jan. 21, 1993, no. 3, at 120-132; Case 9, Judicial Year 17, of Sep. 7, 1996 Supreme Constitutional Court. InEgy OG of Sep. 19, 1993, no. 37, at 2253-2269.

<sup>153</sup>- Law no. 168 of July. 10, 1998 on Amending Law of Supreme Constitutional Court (*Taa'de lBa'd Ahkam Qanon Al Mahkama Al dustria Al Ulya*). InEgy OG of July 11, 1998, no.28(bis); the amendment states that "The outcome of ruling an article in a law or code unconstitutional is that it can no longer be applied the day following its publication, unless the ruling sets another date. Ruling the unconstitutionality of a tax article shall only have a direct effect, without undermining the benefits to the plaintiff of the issued ruling of unconstitutionality of this article" as cited in Tamir Moustafa, *supra* note 7.

government attempted to justify the legitimacy and legality of the amendment by relying on the maintenance of social and economic stability.<sup>154</sup>

The government's reaction in tax area undoubtedly indicates that the efficacy of the judicial intervention in economic dilemmas is pending on the satisfaction or dissatisfaction of the government with the courts and the judicial decisions. Moreover, the government possesses the upper hand in dealing with the judicial influence in economic issues in Egypt in a way that can hinder the fate of the courts' verdicts.

The Supreme Constitutional Court played a prominent role in overturning Nasser-era economic laws, thereby assisting the government in implementing its privatization program at a minimal political return. The government privatized several public companies; some through direct sale, while others were government partnerships with private sector. The administrative judge's intervention in the privatization program was evident as will be discussed in the next section.

D. The Era of the State Council (reviewing Neo-liberal economic policies)  
Compared to the Supreme Constitutional Court's perspective that underpinned the neo-liberal economic era of 1991, the role of the Council of State was extremely different and should not be overlooked. The Council of State Courts issued at least 11 rulings in the two years following the 2011 Revolution ordering the state to reverse deals signed by the government during the implementation of economic reform.<sup>155</sup> Many Council of State rulings strongly touched the essence of the economic policies that were undertaken by the government since the 1990s. These judgments scrutinized the legality of the economic policies and the motives behind their adoption, which crucially affected the economic stability of the country as a whole.

In the early 1990s, Egypt transitioned to a liberalized capitalist economy. Mubarak's regime signed an economic reform and structural adjustment program with the International Monetary Fund (IMF) and the World Bank. The implementation of privatization through liquidating all losing public sector enterprises is regarded as the most significant policy among others in terms

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<sup>154</sup>- Tamir Moustafa, *supra* note 7, at 180.

<sup>155</sup>- Maggie Fick, *Egypt Drags its Feet in Privatisation Tussle*, REUTERS (May 29, 2013) <https://uk.reuters.com/article/us-egypt-renationalisation/egypt-drags-its-feet-in-privatization-tussle-idUKBRE94S0Q420130529>

of the implementation of this economic reform program. In fact, this privatization program was implemented without a sufficient constitutional and legal infrastructure regulating its execution as I mentioned in the previous section.

In this regard, aggrieved workers of former publicly- owned companies , NGOs, and concerned citizens brought many disputes before the Council of State challenging the legality of the governmental acts and policies, and selling contracts of public assets to the private sector whether nationals or foreigners on the grounds that these privatization deals intentionally wasted the public assets of the country, severely affected the rights of workers of the privatized companies, and fatally impaired the public interest of the whole country.<sup>156</sup>

Judicially, the administrative judge's intervention in reviewing the privatization program was noticeable. In order to impose its judicial review on neo-liberal economic policies, the Council of State has relaxed the standing condition in order to widen its jurisdiction to hear cases filled by aggrieved workers, human rights organizations and legal activists for protecting the public assets of the country and workers' rights.

Article No.12 of the Council of State Law states that “a claimant has to prove a personal and direct interest in the outcome of any legal claim.”<sup>157</sup> According to this article, the defendants companies in most privatizations cases such as *Indorama Shebin Textiles*, *Centamin Gold Mine*, *Omar Effandi*, and *El Nasr Steam Boilers* requested the court to declare the case inadmissible since the claimants had no standing to file the case before the court because they did not have a clear direct interest in the dispute or relation to the other parties.<sup>158</sup> Since there is no administrative procedural code regulating the proceedings in the administrative litigations, the

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<sup>156</sup>-Hamdy.Yassin, *supra* note 49.

<sup>157</sup>. Council of State Law, *supra* note 86, art. 12; *see generally*, RAMDAN BATEEK, THE CANCELLATION JUDICIARY (Arabic) (1<sup>st</sup>ed, 2008).

<sup>158</sup>. Case No. 34517 of Judicial 65, of Sep. 21, 2011 (Administrative Judiciary Court \_Seven Circuit) [hereinafter “Indorama Shebin Textiles”]; Case No. 57579 of Judicial Year 65, of Oct. 30, 2012 (Administrative Judiciary Court \_Seven Circuit) [hereinafter “Centamin Gold Mine”]; Case No. 11492 of Judicial Year 65, of May 7, 2011 (Administrative Judiciary Court\_ Seven Circuit) [hereinafter“Omar Effandi”]; Case No. 40510 of Judicial Year 65, of Sep. 21, 2011 (Administrative Judiciary Court\_ Seven Circuit) [hereinafter“EL Nasr Steam”] as cited in HamdyYassin, *supra* note 49.

administrative judiciary is a sort of “making law” body regarding procedural matters particularly those relating to the standing condition.<sup>159</sup>

Administrative judges benefited from Article No. 12 in order to grant themselves discretionary power in dealing with the standing condition in privatization cases; however, claimants did not possess direct and a personal interest in these litigations. The Council of State ruled that citizenship is a sufficient criterion for granting standing in litigations raised to annul administrative decisions issued to regulate the transfer of the ownership of public funds to the private sector. The Court based its argument on Article No. 33 of the 1971 Constitution and its rendition in Article 6 of the Constitutional Declaration of 2011. The court declared that the Constitution itself provided “the direct and personal interest” required by law. These articles stated that “the public fund is for all Egyptians and there is a duty on every citizen to protect public funds in accordance to law.”<sup>160</sup> The administrative judiciary found that the Constitution provided an explicit mandate for any citizen to use the right to litigate in order to safeguard public assets against any infringements and corruption; thereby the citizen had a concrete and confirmed standing and right to file a lawsuit or accept intervention after the initiation of a case.<sup>161</sup>

The Administrative judiciary, after having decided that plaintiffs have legal standing to file these cases, started to scrutinize the legality of privatization program. The Council of State found that there were many explicit violations and infringements which accompanied the privatization of public sector companies implemented during the period of Mubarak’s economic reform effort. Consequently, due to unlawfulness, squandering of public funds, corruption, arbitrariness of power, and mismanagement and irregularities of the governmental authorities in adopting and implementing the privatization program, the court characterized the governmental acts and decisions as null and void. The Administrative Judiciary Court asserted that the administrative

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<sup>159</sup>- *see generally*, Ramdan Bateek, *supra* note 157; *see generally* RAFAT FODAA, ORIGNS AND PHILOPSHY OF ADMINISTRATIVE JUDICIARY (*Asl w Falsfa al Qada’ al Adary*) (Arabic) (1st ed. 2011).

<sup>160</sup>- Egy 1971 Const, *supra* note 33, art. 172; as translated in Tamir Moustafa, *supra* note 7.

<sup>161</sup>- Indorama Shebin Textiles, Centamin Gold Mine Case, Omar Efandi, *supra* note 158; some legal scholars strongly criticized the State Council’s lenient tendency concerning the standing condition *See* Ahmed El Hadidi, *Privatization and Revolution: a Critical Reading of the Omar Effendi Case* 31 (unpublished M.A. thesis, American University in Cairo, 2012 ) (on file with author).

transgression had diminished the administrative decisions to the point of nothingness, thereby rendering these privatization contracts null and void.

For instance, in *Omar Effandi*, the Administrative Judiciary Court asserted that one of the main features of corruption in the privatization program was the squandering of public funds during the valuation process of the assets of privatized projects. Accordingly, the Court annulled the sale of the Omar Effandi Company due to the fact that the valuation process was performed according to the present value (Discounted Value) rather than the real market value in violation of the decisions of the Higher Ministerial Committee for Privatization.<sup>162</sup>

In addition, in *El Nasr Steam Boilers*, the Court discovered that the valuation of the assets of the company had been implemented according to void economic standards that led to the wasting of public funds of the company. The Administrative Judiciary Court ruled that the valuation committee had adopted irrelevant financial techniques for assessment that lowered the sale price. The Court stated that the corruption that accompanied the valuation of this company was overwhelming because the Court revealed that one member of the Board of Directors of the company who participated in the evaluation committee of the investment was the father of the new buyers of the privatized assets. That person had improperly used his position to assist his sons in buying the enterprise at a lowered price; the Court annulled the contract on this basis.<sup>163</sup>

Finally, in *Indorama Shebin Textiles*, the Court affirmed that the selection of the Shebin Textiles Company for privatization, as a company with low profitability, was in gross violation of Public Business Law and its executive regulation. Based on the documents submitted by the litigants, The Court affirmed that the company was achieving profitable earnings each year, and did not suffer any damages since its establishment until 2004; its fiscal condition was both strong and stable. Ultimately, the Court argued that the selection of the public sector companies that were candidates for privatization was not established through an economic study and with accurate

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<sup>162</sup>- Omar Effandi, *supra* note 158.

<sup>163</sup>- El Nasr Steam Boilers, *Supra* note 158.



financial statistics, rather it was based on unreasonable decisions by the competent authority without any economic criteria, and thereby the Court annulled the contract.<sup>164</sup>

The Council of State Courts stated that the result of the annulment of these contracts was followed by the restoration of the sold companies to the state according to Article No.142 of the Egyptian Civil Code. In this way, the previously privatized assets were returned back to the state.<sup>165</sup>

Although the Administrative Judiciary Court annulled these privatization contracts; it took the opportunity to overview and comment on the public economic policies which had been adopted by the government since 1952 until the implementation of neo-liberal economic policies. The Court announced that privatization was not an evil which should be averted at all cost nor an absolute heaven whose way should be paved. However, privatization means that the state transfers its ownership of public projects to the private sector for improving the economic efficiency of these projects through relying on the market system and competition and alleviating the fiscal burdens on the states that suffered from its public assets.

In addition, the court confirmed that the state has to create a smooth and safe climate for investment, provide the investors with high standards of guarantees, and adopt the decisions required for the purification of the investment climate from corruption and illegal regulatory framework.<sup>166</sup> It evident that the Administrative Judiciary Court revealed its own perspective about efficient public economic policy, its legal infrastructure and the effective role that need to be played by the government during the implementation.

No doubt, the Council of State's intervention in the monitoring of privatization contracts was controversial. Although most aggrieved workers and NGOs highly appreciated the State Council's judicial activism in addressing the governmental transgressions during the implementation of the privatization program by the Egyptian government in the early 1990s, legal practitioners directed criticism towards State Councils judgments on several legal grounds.

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<sup>164</sup>- Indorama Shebin Textiles, *Supra* note 158.

<sup>165</sup>- Omar Effandi, El Nasr Steam Boilers, *supra* note 158.

<sup>166</sup>-*Id.*



In privatization cases, defendants regularly declared the inadmissibility of the cases being heard by the Council of State Court when the relevant privatization contract encompassed arbitration clauses to settle conflicts arising from its implementation.<sup>167</sup> However, the Administrative Judiciary Court had annulled the arbitration clause in most privatization contracts in order to hear the case; this is in spite of the fact that the meaning of Article 22 of Law No.27 of the year 1994 is explicit and represents a pure application of the *kompetenzkompetenz* principle.<sup>168</sup>

In fact, the Council State courts struck down arbitration clauses in privatization contracts relying on its judicial jurisprudence that considered the Council of State as being the natural judge for any administrative disputes. For instance, the Court, in *Omar Effandi*, declared the arbitration clause null and void by invoking the incapacity of the representative of the holding company to sign the arbitration clause in an administrative contract according to Article 1 of the Egyptian Arbitration Law.<sup>169</sup> In fact the Council of State's perspective on settling the validity of the arbitration clause triggered considerable criticism towards the privatization's judgments especially because the ordinary judiciary, in contrast, strictly adhered to the rules of Art. 22 deciding the inadmissibility for any dispute relating to the validity of the arbitral clauses.<sup>170</sup>

In fact, the Administrative Judiciary Court rejected the motions concerning inadmissibility and jurisdiction in order to pave the way for the annulling and canceling of governmental decisions

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<sup>167</sup>-*Id*; Law no. 27 of May 22, 1994 on Law of Arbitration in Civil and Commercial Articles (*Al Tahkeem fi Al mowad al madnyaw al Tagerya* ). InEgy OG of April 21, 1994, no.16 as amended by Law no.9 of May 16 1997. InEgy OG of May 16, 1997, no.20; (Article 13 states that The court before which an action is brought concerning a disputed matter which is the subject of an arbitration agreement shall hold this lawsuit inadmissible provided that the respondent raises this objection before submitting any demand or defense on the substance of the dispute, 2- The fact that the judicial lawsuit referred to in the preceding paragraph is brought shall not prevent the arbitral proceedings from being commenced or continued, or the making of the arbitral award, The arbitral tribunal is competent to settle the motions which connected to the plea of jurisdiction, including motions based on the absence of an arbitral clause, its expiry or nullity, or its failure to include the subject or the dispute. Moreover, Article 23 of the Egyptian Arbitration Law states that the arbitral clause is deemed to be an agreement that is independent of the other conditions of the contract. The nullity, repudiation or termination of the contract shall not affect the arbitral clause therein, provided that such clause is valid per se,

<sup>168</sup>-*Id*, Article 22 states that “the arbitral tribunal is competent to settle the motions which connected to the plea of jurisdiction, including motions based on the absence of an arbitral clause, its expiry or nullity, or its failure to include the subject or the dispute.

<sup>169</sup>- Omar Effandi Case, *supra* note 158; art.1 of the Egyptian Arbitration Law states “With regard to disputes relating to administrative contracts, agreement on arbitration shall be reached upon the approval of the competent minister or the official assuming his powers with respect to public juridical persons. No delegation of powers shall be authorized in this respect”.

<sup>170</sup>- *see generally*, Case No. 271 Judicial 70 of June. 17, 2001, The Court Cassation 52(*The Technical Bureau*) (Part2) at, 900.

that led to the making of sale contracts regardless of the *kompetenz kompetenz* principle and the principle of detachment of the contract from the arbitration clause.

In addition, legal scholars criticize the judicial review of the Council of State in terms of the standard of proof applicable to corruption.<sup>171</sup> In fact, the difficulty of privatization litigation stems from the novelty of this sort of conflict before the Council of State and the fuzzy nature of the privatization contracts; this can be attributed to the fact that these lawsuits were raised after a revolution calling for fighting corruption in the executive authority.

In this context, opponents of the State councils' judgment believe that the Court did not adopt a clear cut definition for the corruption of the governmental contracts compared to the definition of corruption in the criminal law arena. The term corruption was used in the privatization litigations liberally. The Council of State relied on violations of the Public Tender Law and the selling under market prices to prove the corruption of the privatization transactions between the government and the investor.<sup>172</sup> The critics also strongly blame the State Council judiciary because it proved the existence of the corruption without identifying whether the second party investors were personally involved with the officials of the governmental authorities in these illegal actions or not.<sup>173</sup> In addition, although the Council of State declared that the result of the annulment of these contracts was to be followed with the restoration of the sold companies to the state, there was great difficulty in deciding how to enforce these judgments on land taking into consideration that some of the privatized projects were resold again or mortgaged like Omar Effandi.<sup>174</sup>

In return, the government was not beyond the scene. The privatization judgments triggered significant anxiety among economic figures and decision policy makers in Egypt. Without a doubt these rulings pushed many foreign companies operating in Egypt into a legal and economic limbo. Many investors felt wary about the investment climate in the state because

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<sup>171</sup>- Heba Hazzaa & Silka N, Kumpf, *Egypt's Ban on Public Interest Litigation in Government Contracts: A Case Study of "Judicial Chill"* 51 Stanford L.J.147 (2015).

<sup>172</sup>- *Id.*

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

<sup>174</sup>- Omar Effandi, *supra* note 158.

these judgments had led to critical fiscal and economic damages for the owners of the restored companies.

Since 2012, the Council of State judgments have made the Egyptian Government a party in many arbitral cases under BIT agreements. Foreign investors moved to ICSID in order to obtain arbitral awards to gain compensation from the Egyptian authorities\_ because of annulment judgments\_ estimated to be worth billions of dollars.<sup>175</sup> The government of Egypt was the respondent in twelve ICSID disputes at the end of 2014. Investors based their claim on the fact that the Egyptian court system ignored the arbitral clauses embodied in the privatization contracts and BIT.<sup>176</sup>

In this regard, Monir Fakry Abdel el Nour, a former Minister of Trade and Investment, declared that such judgments destabilized the climate of foreign investment in the country which was already worrisome because of the negative consequences of the 25<sup>th</sup> January Revolution that had undermined the Egyptian economy.<sup>177</sup> Accordingly, the government felt that it had to intervene to stop the drain of the economy and to restore the confidence of the foreign investors.

The government restricted the right of citizens to challenge government contracts through amending the article of protecting public funds in the 1971 Constitution. Article No. 22 of the 2012 Constitution shifted the duty to protect public funds from the citizen\_ the main rationale for granting standing in privatization cases\_ and placed it on “the society and the State.”<sup>178</sup> Moreover such duty had been relinquished because Article No. 34 of 2014 Constitution states that “Public ownership is sacred and shall not be infringed upon and its protection is an

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<sup>175</sup>-ICSID is the world’s leading institution devoted to international investment dispute settlement. It has extensive experience in this field, having administered the majority of all international investment cases. States have agreed on ICSID as a forum for investor-State dispute settlement in most international investment treaties and in numerous investment laws and contracts. available at <https://icsid.worldbank.org/apps/icsidweb/about/pages/default.aspx>

<sup>176</sup>- Heba Hazzaa, Silka, *supra* note 171, at 157.

<sup>177</sup>- Jano Charbel, *Egyptian companies trapped in limbo by investment-friendly law*, Madamasr, (Mar. 15,2015), <http://www.madamasr.com/en/2015/03/15/feature/economy/egyptian-companies-trapped-in-limbo-by-investment-friendly-law/>.

<sup>178</sup>- Constitution of the Arab Republic of Egypt [Egy const.] as amended of Dec. 25, 2012, *In*Egy OG of Dec. 25, 2012, vol. 51 bis(b).

obligation practiced in accordance with the law.”<sup>179</sup> Besides, the government rendered Law No.32 of the year 2014 named Regulating Some Procedural Aspects of Challenging Government Contracts. These constitutional and legislative amendments have a crucial impact on jurisdiction of the Council of State since it put an end for the judicial review of the Council of State on government contracts which is examined in the next section.

#### E. Post 2013 and the End of Judicial Review of Economic Policies?

The government suffered severely from the annulment rulings of the Council of State Courts in privatization litigations. As a result of that, and to reinforce the investment climate, Law No.32 of the year 2014 was issued by the Former President Adly Monsour, based on the latest constitutional amendments to manage the challenges to state contracts.

According to Article No.1, this law limits the right to challenge government contracts only for the parties of these contracts: the investor and the state. Article No. 2 has retroactive impact on the law and orders of the courts to declare those pending and future cases articulated in Art.1 inadmissible. This means that the law has a direct impact not only on future cases but also pending cases before the Council of State.<sup>180</sup> Consequently, as a result of this law, the Council of state is obliged by the new legislation. As a form of strict adherence to this legislation, the Administrative Judiciary Court rendered many judgments inadmissible since cases were filled by a third party.

Although Law No.32 of the year 2014 helped the government to mollify the outrage of the investors, it triggered a considerable debate about its crucial consequences on the Egyptian legal system generally and administrative judiciary specifically. Some legal scholars and NGOs, particularly the Egyptian Center for Economic and Social Rights strongly criticize the government for issuing this law, because they believe that the law puts an end to the public interest litigation for reviewing government transactions under the Council of State jurisdiction

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<sup>179</sup>- Constitution of the Arab Republic of Egypt [Egy const.] as amended of Jan. 18, 2014, *InEgy* OG of Jan. 18, 2014, vol. 3 bis(1).

<sup>180</sup>- Regulating Some Procedural Aspects of Challenging Government Contracts Law, *Supra* note 4 at art. 1, 2.

through depriving citizens from exercising their constitutional right to protect public funds in the case of infringement or misuse of power by the authority.<sup>181</sup>

For these reasons, on May 3, 2014 many lawyers and human rights activists resorted to the Supreme Constitutional Court to challenge the constitutionality of Law no.32 of the year 2014.<sup>182</sup> Correspondingly, State Council judiciary abided by Law No.32 of the year 2014 concerning government contracts, and suspended the proceedings in these sorts of litigations until the Supreme Constitutional Court judges the constitutionality of this law.<sup>183</sup>

In this regards, the State Commissioner of the Supreme Constitutional Court issued an official report about the constitutionality of Law No.32 of the year 2014. The report concluded that the law is unconstitutional for various reasons. The State Commissioner argues that the issuance of Law No.32 of the year 2014 in this way contradicts with the right to sue which is stipulated and guaranteed to all citizens in Article 97 of the 2014 Constitution.<sup>184</sup> The report discloses that there are many categories of people which may be affected by governmental contracts like workers who are the subjects of the projects of these contracts and other concerned people who have the duty to maintain the public ownership according to Article 34 of the 2014 Constitution.<sup>185</sup>

The report also affirms that restricting the right to challenge these sorts of contracts by the parties alone deprives the citizens of the option of using litigation to safeguard public ownership in cases of inaction by the state authorities which undermine the citizenship principle and the sovereignty of the people.<sup>186</sup> In this point, the report affirmed that the recent constitutional amendments cannot be considered as a constitutional backup for the issuance of Law No.32 of the year 2014. The report also refutes the motives behind the issuance of this law in terms of protecting the national economy from huge damages and returning the confidence of the foreign investors and funding institutions. Additionally, the report assures that the motives of the state

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<sup>181</sup> - *See generally*, Mohamed Abdel El Latif. THE PUBLIC ECONOMIC LAW: COMPARATIVE STUDY. (Arabic). (2015)

<sup>182</sup>- Case No. 120, Judicial Year 36 (2014), Supreme Constitutional Court (not Settled).

<sup>183</sup>- *See generally*, Case no.22674 Judicial Year 66 Administrative Judiciary Court (print copy).

<sup>184</sup>- The Report of the State Commissioner in Case No. 120 Judicial Year 36 (2014), Supreme Constitutional Court.(print Copy).

<sup>185</sup>- *Id.*

<sup>186</sup>- *Id.*

cannot be a reason for immunizing governmental actions from judicial scrutiny. Secondly, the report also argued that the law explicitly undermines the established constitutional jurisdiction of the Council of State and the ordinary judiciary. The report illustrated that after depriving those who possess the real interest in challenging these contracts will be without judicial review in the case of the silence of the parties.<sup>187</sup> The report states that the meaning of contract was broad and comprehensive without a clear specification in a way that exempts the state and its governmental contracts from being subjected to a law which violates many constitutional principles.

Ultimately, the State Commissioner considers Law no.32 of the year 2014 a clear interference of the state authorities in judicial affairs and litigation and also clashes with the independence of judiciary.<sup>188</sup> Despite the advisory nature of the State Commissioner, the report put many constitutional issues in front of the Supreme Constitutional Court that should be answered. Is the judicial review of the Council of State still suspended in light of the remarks indicated in the report of the State Commissioner?

It's worth noting that the Investment Law No.72 of the year 2017 including regulatory framework for the process of the investment in Egypt was issued.<sup>189</sup> This law reduces barriers to how international companies invest and operate and guarantees a number of protections for international investors to encourage new development in Egypt. The government hopes to expand economic growth, increase domestic production, exports and foreign investment, and enhance good governance and transparency.

In order to immunize this new investment approach, the law has established two quasi judicial committees for solving investment conflicts. The first is the Ministerial Committee on Investment Dispute Resolution to scrutinize the hurdles that may hinder the continuity of the investment relation between the investor and the state.<sup>190</sup> The second one is the Ministerial

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<sup>187</sup>- *Id.*

<sup>188</sup>- *Id.*

<sup>189</sup>- Law No.72 of June 1, 2017 on Investment Law(*Qanon Al Astsmar*)InEgy OG of May. 31, 2014, vol.21bis(c) as amended by Law No.141 of Aug. 1, 2019 InEgy OG of July.31, 2019, vol. 30bis(d).

<sup>190</sup>- Art. 85 of the New Investment Law States that “A ministerial committee entitled “Ministerial Committee on Investment Dispute Resolution” shall be established to look into the applications, complaints, or disputes submitted or referred thereto which would arise among the investors and the State or where one of the State’s bodies, authorities, or companies are party to

Committee on Investment Contracts Dispute Resolution accompanied by certain procedural regulations in order to negotiate, rectify contract terms and settle disputes that arise between the state or its institutions and the investor from the investment contracts in order to return equilibrium to the contract.<sup>191</sup> The decisions of the Committee, after the approval of both of the parties and the prime Ministry, are enforceable and binding for the governmental authorities and they shall have the executive power.<sup>192</sup>

Finally, Law No.133 of the year 2019 was rendered. This law authorizes the Prime Minister submitting requests to committees stipulated in Law No. 72 of the year 2017 concerning the enforcement of the privatization judgments in order to reach suitable settlement with investors regardless of what the bench declared.

To sum up, Law No.32 of the year 2014 and Law No.133 of the year 2019 can clearly demarcate the relation between the government and the judiciary. These legislation are explicit examples to show the extent to which the government possesses the full power to hinder the judicial influence in economic policies. The government constrained the Council of State scrutiny on the state economic policies by limiting the right to challenge the legality of government contracts to the parties of the contracts only. This means that the government puts an end for the judicial review of the Council of State on government contracts in a way that indicates the dominance of the government on the judicial influence in economic arena.

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<sup>191</sup>- Art.89 of the New Investment Law states that “A ministerial committee entitled “Ministerial Committee on Investment Contracts Dispute Resolution” shall be established in the Cabinet of Ministers to settle the disputes arising from the investment contracts where the State, or one of its bodies, authorities, or companies is party to. This Committee shall be formed by a decree issued by the Prime Minister. One of the deputies of the President of the Egyptian Council of State shall be a member of the Committee and he shall be selected by the Administrative Affairs Council at the Egyptian Council of State. The Committee’s decisions shall be endorsed by the Cabinet of Ministers.”

<sup>192</sup>- Art. 90 of the New Investment Law states that “The Committee shall examine and explore the differences arising between the parties to the investment contracts. To such end, and with the consent of the contracting parties, it may perform the necessary settlement to handle the imbalance of such contracts, and extend the terms, periods, or grace periods provided for in such contracts.

Whenever it is required, the Committee shall further reschedule the financial dues or rectify the procedures which precede the conclusion of contracts, in a manner that achieves the contractual balance to the extent possible and ensures an optimal economic situation for the preservation of public funds and the investor’s rights in view of the conditions of each case. The Committee shall present a report of its findings on the settlement to the Cabinet of Ministers which shall indicate all the elements of the settlement. Upon being approved by the Cabinet of Ministers, such settlement shall be enforceable and binding on the competent administrative authorities and it shall have the executive power.





#### IV. Conclusion

It should be clear now that the executive- judiciary relation was not a constant one in terms of economic policies. This paper argues that the judicial influence is pending on the satisfaction or dissatisfaction of the government with the courts and the judicial decisions. This paper argues that the government views courts' judgments according to its own economic policies. The government will appreciate courts' judgments if courts confer legitimacy on the controversial economic policies, or if the judicial intervention is compatible with the government economic directions, while the government will hinder the impact of courts' contributions if the courts' decisions go against its willingness. In that case, the government can reverse court policy through enacting legislation that deprives courts' judgments from its crucial effects or restricts the scope of the judicial review of the public law judge itself.

This paper highlights the legal and economic framework in which public law judges imposed their judicial review over the public economic policies since the proclaiming of the Republic in 1952 until now. After the 1952 Free Officers' Revolution, the role of the Council of State in reviewing the economic policies of the government in this period was significantly scarce because the government adopted socialist policies which were immunized by legislation that initially deprived the Council of State from adjudicating disputes arising from its implementation.

Upon its establishment in 1979, the government benefited from the Supreme Constitutional Courts' rulings in economic sphere in achieving its desire to reduce the apparent risks regarding private investment in Egypt as the Court restored the limits of protection of the private property right. Besides, The Supreme Constitutional Court conferred legitimacy to market transition. The Supreme Constitutional Court had removed the most serious legal challenge to the liquidation of the public sector assuring the constitutionality of Public Business Law No.203 of the year 1991 that paved the way for policymakers to continue the implementation of the privatization policy despite its apparent conflict with the socialist philosophy of the 1971 Constitution. This Court's approach stimulated the government to intervene and amend the socialist clauses in the 1971 Constitution to be compatible with market transition.

Alternatively, Council of State' rulings revealed the deficiencies of the legal framework of privatization and its improper implementation. To counteract the negative impact of these rulings on the investment climate, the government issued Law No.32 of the year 2014. This law limits the right to challenge government contracts only for the parties of these contracts: the investor and the state. It constrained the judicial overview of the Council of the State in a way that forecloses the judicial review of the Council of State in public economic policies.