INTRODUCING MANDATORY MEDIATION TO EGYPT'S ADMINISTRATIVE COURTS: TWO FEASIBLE APPROACHES

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Abstract

The Egyptian Judiciary suffers a huge case backlog. Alternative Dispute Resolution has proved to be a good tool in various jurisdictions to reduce the number of disputes referred to courts. Specifically, the advantages of integrating mediation into public disputes are very clear. It can reduce the time and costs required to settle disputes by avoiding the lengthy process of litigation. Also, mediation helps disputing parties to settle their disputes confidentially. Unlike litigation, mediation is not associated with public disclosure requirement.

Since the Egyptian government aims to follow the international trend of requiring court-annexed mandatory mediation before referring cases to competent courts, the Egyptian Ministry of Justice has recently proposed a bill on the integration of mediation into Ordinary Courts. In line with the case-load reduction strategy reflected in the bill, this paper aims to provide a roadmap for the introduction of mandatory mediation into Egypt's administrative courts, represented in the State Council of Egypt. What this paper proposes, as a solution to reduce number of cases referred to the administrative courts, is making mandatory mediation a prerequisite before referring a dispute to the relevant court within the State Council. This might lead to an increase in amicable settlements of disputes and a reduction of the State Council's case workload.

Mandatory mediation is a new concept to the Egyptian Administrative Courts. In addition, Egypt does not have enough qualified mediators and there are very few well-established and qualified external mediation centers in the country. Furthermore, disputants are seldom willing to bear the extra costs associated with mandatory mediation. Thus, applying mandatory mediation through external mediation centers is unattainable at the moment. Accordingly, this paper suggests introducing mandatory mediation to the Administrative Courts in Egypt through one of the following two approaches: (1) By restructuring the currently existing Conciliation Committees, that were created by virtue of law number 7/2000; or (2) By repealing the currently existing

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Conciliation Committees and replacing them with mandatory mediation conducted by judges of the Unit of Commissioners within the State Council of Egypt.

I. Introduction

"Access to justice" is one of the required basic principles to promote rule of law.[1] The definition of "access to justice" varies from one legal system to the other.[2] Within the Egyptian legal system, "access to justice" simply means "the right to litigate."[3] However, the world now recognizes that litigation is not the only way to settle disputes.[4] Alternative Dispute Resolution "ADR", which means settling disputes amicably while avoiding the court system, plays an important role in parallel to traditional litigation.[5] ADR includes various techniques such as mediation, conciliation, and arbitration. ADR proved to be successful in facilitating access to justice by reducing the heavy load of cases before courts and applying fast procedures.[6]

Mediation refers to the inclusion of an independent third party to facilitate negotiations between the parties in conflict with the purpose of reaching a settlement. The role of the mediator as an independent and neutral party is to help the disputing parties reach a solution without making a decision himself. Recently, mandatory mediation has been adopted by various legal systems in an attempt to help solve the problem of chronic backlog of cases before courts. Mandatory mediation may be imposed by law or by court order and the parties are only obliged to attend the mediation procedures, without being mandated to accept the proposed resolution.[7]

The benefits of mandatory mediation as a preliminary requisite to litigation are many. Litigation is time consuming, costly, and anxiety provoking. Pursuing mediation, in good faith, as a preliminary step to litigation, would help reduce the huge number of trials before courts.

This paper suggests two possible and feasible approaches for applying mandatory mediation that fits within the Egyptian Administrative Courts represented in the State Council of Egypt. The Italian model is to be examined as a guiding model for Egypt. In addition to the fact that Italy is a civil law jurisdiction like Egypt, Italy has a successful and well-established experience with mediation. Before adopting its current model of mediation, Italy experienced five various models of mediation ranging from voluntary to mandatory mediation. The Italian mandatory mediation

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[1]United Nations and Rule of Law, Access to Justice, *available a*t, https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/

[2] Fernando Vieira Luiz, *Designing a Court-Annexed Mediation Program for Civil Cases in Brazil: Challenges and Opportunities*, 15 Pepp. Disp. Resol. L.J. 1 (2015), *available at*, http://digitalcommons.pepperdine.edu/drlj/vol15/iss1/1

[3] The Constitution of the Arab Republic of Egypt, 18 January 2014, *Al-Jarida Al-Rasmiyya*, 18 Jan 2014 (Egypt), at, Clause 97.

[4] Justice S.B.Sinha, *ADR And Access to Justice: Issues and Perspectives*, *available at*, http://www.tnsja.tn.nic.in/article/ADR-%20SBSinha.pdf

[5] Fernando Vieira Luiz, *supra* note 2.

[6] *Id*.

[7] *Id.*

model has unique features such as speed procedures, providing incentives to enhance mediation such as tax exemption, and others.

Before addressing the problem that raised the need to have a well-developed mandatory mediation system before Egypt's administrative courts, Section II distinguishes mediation from other similar dispute settlement mechanisms. Section III, then, introduces the Italian model of mandatory mediation as a successful example that achieved positive results. Introducing the Italian model aims to ascertain the feasibility of adopting similar, but not identical, model that fits the Egyptian legal system. Section IV provides a bird's eye view of the structure of the Egyptian legal system which is necessary to have a clear understanding of the proposed approaches to mandatory mediation, highlighted in this paper. In addition, Section IV briefly explains the challenges that faces Egypt's administrative judiciary which justifies regulating mandatory mediation. Finally, Section IV explores the status quo of mediation in Egypt to distinguish the proposed approaches to mandatory mediation from the mediation mechanism that Egypt currently has. Lastly, Section V aims to propose the suggested approaches to mandatory mediation.

II. Mediation Versus Other Similar Settlement Mechanisms

As this paper mainly focuses on establishing a mandatory mediation system that fits with the internal structure of the State Council of Egypt, it is necessary, to define some of the key concepts that will be frequently used throughout the context of this paper. Generally, Alternative Dispute Resolution "ADR" refers to settling disputes amicably through any mean while avoiding the court system.

Mediation, according to the definition of the International Chamber of Commerce, refers to the process, in which an impartial third party helps the disputing parties to negotiate possible resolution to their dispute. The parties have full discretion on whether to accept the negotiated settlement, however, once accepted, the resolution becomes binding to its parties.[8]

There are different models of mediation. Voluntary and mandatory mediation are the most commonly used models. Voluntary mediation refers to the situation when the disputing parties choose, on their own, to involve a neutral third party, to help them reach a resolution on their dispute, which they failed to reach by themselves.[9] On the contrary, mandatory mediation refers to the situation where the disputing parties are obliged to attend mediation proceedings, before approaching courts. Scholars explain that mandatory mediation would take the form of referral of the disputing parties, by force of law, to mediation, in an attempt to reach a settlement, as a prerequisite to commending litigation.[10] Another form is court-referred mediation whereby a relevant judge refers the disputing parties to mediation, whether they accept or not, on a case by

[8] The International Chamber of Commerce: Mediation, *available at*, https://iccwbo.org/dispute-resolution-services/mediation/

[9] Giuseppe De Palo and Leonardo D'Urso, *Achieving a Balanced Relationship between Mediation and Judicial Proceedings, available at*, https://www.adrcenterinternational.com/balanced-relationship-mediation.pdf

[10] Melissa Hanks, *Perspectives on Mandatory Mediation*, 35 UNSW Law Journal, 929 (2012)

case basis.[11] Finally, mandatory mediation could take the form of "quasi-compulsory" requiring the disputing parties to consider amicable settlement of their disputes otherwise financial sanctions apply. This technique does not require the parties to recourse to mediation rather to recourse to ADR, but mediation is usually recommended whether implicitly or explicitly.[12]

Additionally, distinguishing mediation from conciliation is essential. While some jurisdictions use both terms, simultaneously, to refer to the same process, other jurisdictions distinguish between them and provide different regulation for each.[13] For instance, while in Brazil there are no differences between mediation and conciliation, India treats both concepts as two different systems, even though, the two terms are sometimes used interchangeably.[14] Justice M. Jagannadha Rao, a former judge of the Supreme Court of India, provides that the main difference between mediation and conciliation lays in the role of mediators compared to the role of conciliators; while mediators are restricted to act as facilitators to help the parties reach a settlement to their dispute, conciliators have more powers as they may provide the parties with "*proposals for settlement*."[15]

Finally, it is important to distinguish mediation from settlement conferences. Settlement conferences or pre-trial conferences refer to the amicable settlement of disputes in courtrooms with the intervention of judges.[16] There are two approaches to settlement conferences; traditional settlement conferences and modern settlement conferences. In the traditional settlement conferences model, the judge who conducts the settlement conference is the same trial judge, who will decide upon the case, if the parties fail to reach an agreement through the settlement conference. In contrary, the modern settlement conferences model entails two separate judges; one for conducting the settlement conference and another trial judge who may decide upon the case if the settlement conference fails.

Both mandatory mediation and settlement conferences use similar techniques to reach the same goal, which is to settle a dispute before it reaches courts.[17] However, the main difference between both techniques is in the background of the third party who will help the disputing parties to reach a settlement agreement.[18] Thus, in mediation, the mediator could be a judge or a neutral person such as experts or lawyers, while in settlement conferences the intermediate is always a judge. Also, mediators are more likely facilitators while judges in settlement conferences sound to be evaluators.

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[11] *Id.*
[12] *Id.*
[13] Fernando Vieira Luiz, *supra* note 2, at 1.
[14] *Id.*
[15] Concepts of Conciliation and Mediation and their Differences, Law Commission of India, *available at*, http://lawcommissionofindia.nic.in/adr_conf/concepts med rao 1.pdf (last visited Apr 7, 2018)
[16] Justice S.B.Sinha, *supra* note 4.
[17] *Id.*
[18] *Id.*

III. Previewing Best Practices of Mandatory Mediation Programs: The Example of Italy

There is no "one-size-fits-all' mandatory mediation approach. The application of mandatory mediation varies between jurisdictions based on their cultural and legal backgrounds.[19]Therefore, having exposure to a jurisdiction that has a successful experience with mandatory mediation will be useful as a guiding example for showing how mandatory mediation may function if adopted. However, designing a mandatory mediation approach that fits within the Egyptian legal system shall have its own peculiarities that fits the Egyptian legal system. As such and for this paper, addressing the Italian mandatory mediation program is useful.

Italy has a long successful tradition with mediation. Between 1990 and 2016, Italy experienced five different models of mediation that range between voluntary to mandatory mediation, until it adopted its current model in 2013.[20] Regulating mediation in Italy entered a new phase after enacting Law No. 60/2009 that authorized the government to regulate mediation in civil and commercial disputes.[21] Accordingly, the government passed Decree No. 28/2010, which was the first decree to provide for mandatory mediation before commencing cases in civil and commercial disputes. According to this decree, if the disputing parties ignore mediation and resorted directly to the court, the court should hold the case and order the parties to try mediation first.[22] In addition, if the parties, after initiating mediation, showed recklessness during the mediation process, the court may take this in consideration and it may affect the defaulting party's ability to present evidence in later stages.[23]

The Italian model of mandatory mediation has unique features, which appeared in Decree No. 28/2010. These features are as follows: (a) There is an obligation on lawyers to inform their clients, in writing, about the possibility to mediate. (b) The whole process of mediation may not exceed four months. (c) All mediation relevant documents or acts are exempted from taxes. (d) The ministry of justice givers accreditation to all mediators after they receive appropriate training. (e) Mediators have the authority draft settlement proposals. If the final judgement is identical to the mediation proposal, the party who rejected the proposal should pay the court fees, even if he is the one who won the case. Finally, the mediation agreement comes into force immediately after its validation by the competent court.[24]

Nevertheless, Decree 28/2010 was amended by virtue of Decree No. 69/2013.[25] The new decree provides for a new mandatory mediation system that will be experimented for four years, after which, the ministry of justice should evaluate its success. The most important amendments introduced through decree 60/2013 were as follows: (a) The duration of the mediation process was

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[19] *Id.*
[20] Leonardo Durso and Romina Canessa, *The Italian Mediation Law on Civil and Commercial Disputes*, ADR Center
[21] Aleksandar Mojasevic, *(Judicial) Mediation in Italy and Serbia: Comparative Legal and Economic Analysis*, 69 Collection papers Fac. L. Nis 93 (2015)
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] In 2012, the Italian Constitutional Court declared that decree 28/2010 is unconstitutional. Following this Constitutional Court decision, decree 28/2010 has been subject to some modifications as per Decree 69/2013.

decreased to three months instead of four.[26] (b) Mediation became required for less types of claims.[27] (c) Disputing parties enjoy more freedom to end the mediation process in its initial phase if they estimate that they will not reach an agreement.[28] (d) Addressing one of the main concerns of lawyers, the new decree allows (obliges) lawyers to participate in the mediation process.[29]

In conclusion, the initial results of the Italian experience with mandatory mediation appears to be very comprehensive, successful, and well examined. Accordingly, Italy can be good example for understanding the aspects of mandatory mediation. However, since the Egyptian legal system has its own features, as will be shown below, that prevents adopting the Italian model as it is. However, before suggesting approaches to the inclusion of mandatory mediation before Egypt's administrative courts, it sounds important to preview the structure of the Egyptian legal system and highlight the difficulties that led to the emergence of the need to include mandatory mediation.

IV. Egypt's Legal System: Its Structure and Persisting Challenges

For understanding the importance of adopting mandatory before Egypt's Courts, it is necessary to understand the structure of the Egyptian legal system. In addition, recognizing the challenges that Egypt's courts face is vital to justify the persisting need to implement mandatory mediation. Finally, this section aims to preview the status quo of mediation in Egypt; to distinguish my proposal from the already known use of mediation in Egypt's regulatory framework.

The Structure of the Egyptian Legal System

The Egyptian court system is comprised of two different court structures; Ordinary Courts including civil, commercial, and criminal courts on one hand, and administrative courts on the other hand, and within each are different levels. Ordinary Courts are composed of courts of first instance, courts of appeal and the Supreme Court (Court of Cassation).[30] Administrative courts are represented in the State Council of Egypt ("*Conseil d'Etat"*) where public disputes are decided. The State Council was established in 1946 as an independent judicial body that is exclusively competent to adjudicate in administrative disputes. It is also solely competent to issue opinions on the legal issues of bodies to be determined by law, review and draft bills and resolutions of a legislative character, and review and draft contracts to which the state or any public entity is a party.[31]

The structure of the judicial section within the State Council or the administrative courts' system is composed of:

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[26] Giuseppe Conte, *The Italian Way of Mediation*, 6 Y.B Arb. & Mediation 180 (2014).
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] Mohamed S. E. Abdel Wahab, *Update: An Overview of the Egyptian Legal System and Legal Research* (October 2012), *available at* http://www.nyulawglobal.com/globalex/Egypt1.html#_6._The_Judicial
[31] The Constitution of the Arab Republic of Egypt, *supra* note 3, at Clause 190.

- Administrative Courts: these are courts of limited jurisdiction that adjudicate disputes involving employees with low rank and disputes involving administrative contracts with low values;

- Courts of Administrative Justice: these are courts that generally adjudicate in administrative matters, somewhat analogous to Courts of Appeal in the Ordinary Court System. Such courts act as courts of first instance in administrative disputes not falling with the jurisdiction of Administrative Courts, and as court of appeals for decisions issued by Administrative Courts;

- The Supreme Administrative Court: this roughly analogous to the Court of Cassation in the Ordinary Court System; and

- The Unit of the Commissioners of the State: this Unit is composed of a number of administrative judges. The Unit has a preliminary role, which is to prepare lawsuits before being referred to the relevant court within the Council. As such, the Unit provides a non-binding decision to guide the relevant court.[32] This implies that all public disputes that are referred to the State Council have to be referred to the courts within the Council by force of law, but a preliminary guiding non-binding decision has to be issued by the Unit of the Commissioners of the State, which role is described to be preparatory role.[33]

Why is Egypt in Need to Include Mandatory Mediation to Its Courts' System?

According to the Egyptian Central Agency for Public Mobilization and Statistics, the number of disputes before Egyptian courts, in 2011, exceed 13,662,533 cases.[34] Referring all disputes to courts results in having a huge number of cases before Egyptian courts with the outcome of pursuing high cost, delay in the issuance of judicial decisions, and lack of efficiency of the judicial system in general. The huge number of cases negatively affects the budget of the State. It is also costing to the parties who have to pay for their appointed lawyers. It is worth mentioning here that delaying the issuance of the judicial decisions by the relevant courts, due to the heavy load of cases, make courts take up to more than ten years to issue a decision in a given case, sometimes.

A good solution to reduce the number of cases referred to courts is the integration of mediation into the Egyptian courts system.[35] The Egyptian Ministry of Justice has recently proposed a bill

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[32] State Council Law No. 47 of 1972, 40 *Al-Jarida Al-Rasmiyya*, 5 October 1972 (Egypt).
[33] *Id.*
[34] MORE THAN 13 MILLION CASES BEFORE COURTS IN 2011, Al-youm Al-sabe News Paper (Author's translation of title) *available at* http://www.almasryalyoum.com/news/details/366442
[35] In the USA, for example, mediation is an integral part of the pre-trial process in Federal Courts. *See* Peter N. Thompson, *Codifying Mediation 2.0: Good Faith Mediation in the Federal Courts*, 26 Ohio St. J. on Disp. Resol. 363, 365 (2011). Mediation typically arises in one of two contexts in U.S. litigation. The first is through court-ordered or court-annexed mediation. Typically, such courts maintain a panel of approved mediators who offer their services to litigants, at either the court's direction or the litigants' request. The second context is the context in which mediation arises is private mediation. In these cases, the parties to a dispute decide that mediation would be appropriate and

on the integration of mediation into Ordinary Courts. In the same context, this paper suggests the integration of mediation into public disputes before the courts of the State Council of Egypt. Referring all public disputes to the courts of the State Council implies a huge waste of time, efforts, and resources of the State Council. Especially, many disputes are usually submitted with common claims, common legal grounds, and sometimes against same defendants. What I propose as a solution to this problem is making mediation a prerequisite action that should be conducted before referring a dispute to the relevant court within the State Council. This might lead to the settlement of disputes and accordingly avoiding referring all trials to courts.

As explained, the advantages of integrating mediation into public administrative disputes are very clear. It would definitely reduce the time required to settle a dispute through avoiding the lengthy process of going to court. A shortened litigation process usually results in reduced costs. Mediation can settle disputes without associated public disclosure of a trial that could negatively impact both conflicting parties. Mediation reduces the strain on the court system by reducing backlog, which fastens the process of litigation.[36]

Mediation in the Egyptian Legal System: The Status Quo

The only ADR technique officially acknowledged by the Egyptian law is arbitration.[37] In addition, most Egyptian scholars and the Egyptian legislature itself do not distinguish between mediation, conciliation, and settlement conferences.[38] Thus, the Egyptian legislature usually uses the term "conciliation," while he means to express the essence of mediation, as defined above. This applies to both ordinary courts' system and administrative courts system, represented in the State Council of Egypt, as explained above.

A) Ordinary Courts

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select a mediator from among the many private providers who have gone into the business of offering these services. See *Issues of Democracy, Mediation and the Courts*, 4 ELECTRONIC JOURNALS OF THE U.S DEPARTMENT OF STATE 15 (1999). Similarly, in Canada, the Rule 24.1 of the *Rules of Civil Procedures* provides for mediation infrastructure and mandates mediation before any action to which the rule applies may be scheduled for trial. *See* Joel Richler, *Court-Based Mediation in Canada*, 50 Judges J. 14 (2011).

[36] In the USA, for example, the positive experience of using mediation in the Federal Courts of Appeal made the Congress specifically recommend that district courts consider using mediation in their local ADR programs. *See generally* John Maull, *ADR in the Federal Courts: Would Uniformity Be Better?*, 34 Duq. L. Rev. 245, 271-72 (1996) (addressing a similar approach by Congress in the Civil Justice Reform Act of 1990); Lisa B. Bingham, Tina Nabatchi, Jeffrey M. Senger & Michael S. Jackman, *Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes*, 24 Ohio St. J. on Disp. Resol. 225, 229-32 (2009); Gregory A. Litt, Note, No Confidence: *The Problem of Confidentiality by Local Rule in the ADR Act of 1998*, 78 Tex. L. Rev. 1015 (2000).

[37] An independent law on Arbitration was issued in 1994. *See generally*, the Law Number 27/1994 on Arbitration in Civil and Commercial Matters, *Al-Jarida Al-Rasmiyya*, 21 April, 1994 (Egypt).

[38] Khallaf Fateh, *The Use of Mediation to Settle Public Disputes in Algeria*, (2015) (dissertation, University of Mohamed Kheider)

Though this paper is not related to ordinary courts, it is important to elaborate on the relevant rules applied by Ordinary Courts regarding mediation, to confirm that mediation, conciliation, and settlement conferences are confused and used to refer to the same process in Egypt most of the time. The Egyptian legislature recognized settlement conferences within Ordinary Courts (courts competent with commercial, civil, and criminal matters) in different occasions.

First, the Civil Procedures Law requires referring the disputes of trial courts (disputes with value that does not exceed 5000 EGP, equivalent to $320), to settlement conferences as a prerequisite to commencing proceedings before trial courts.[39]

Second, the Law establishing Economic Courts[40] provides for the establishment of an entity within each court that should be competent to offer conciliation to disputing parties before referring the case to the Economic Court. This entity is composed of three judges and headed by a judge from the appellant court.[41]

B) Administrative Courts (The State Council of Egypt)

The Law no. 7/2000 Establishing Conciliation Committees in Public Disputes provides for establishing special Conciliation Committees for settling some of the disputes that involves public bodies.[42] Also, The State Council Law No. 47/1972 ("State Council Law") refers to conciliation. The clauses relevant to conciliation of both laws lack efficiency and are not welcomed either by judges or other stakeholders. The most important is that though they use the term conciliation, the

[39] Clause 64 of the Civil Procedures provides that: "The disputing parties in trial disputes shall attend settlement conference that applies the rules of conciliation between them except for the cases where conciliation is not acceptable, cases of expedition, enforcement disputes, and precautionary measures disputes. The settlement conference shall be headed by one of the prosecutors, shall take place in the premises of the trial court relevant with the dispute, and the conciliator shall finish within 30 days, to be extended for maximum another 30 days by the consent of the parties. If the parties reach a settlement agreement, this agreement shall be enforceable and the trial shall be ended. However, if the parties do not reach a settlement, the trial shall be referred to the relevant trial court." *See*, the Law No. 13/1968 on Civil Procedures, *Al-Jarida Al-Rasmiyya*, 9 May 1968, *at*, Clause 64.

[40]The Egyptian Economic Courts Law is a law that was issued recently in Egypt establishing a limited number of courts to decide only upon cases related to commercial matters and cases which commercial value exceeds certain amount of money. The laws was issued with the purpose of establishing courts that meet business requirements through having qualified judges and applying fast and efficient procedures to avoid the drawback of ordinary courts. *See generally*, the Law Number 120/2008 on Economic Courts, *Al-Jarida Al-Rasmiyya*, 22 May 2008.

[41] Clause 8 of the Law Number 120/2008 on Economic Courts provides that: "Within each economic court, an entity shall be established with the purpose of preparing the law suit. This entity shall be headed by a judge from the appellate court with the membership of two other judges from the first instance court. The job of this entity is to prepare the case, examine all the relevant documents, conclude hearing session, prepare memos with the parties' claims and requests within 30 days from the day of brining the law suit to be extended for an extra 30 days by the head of the entity. The entity shall also conclude conciliation between the disputing parties and if the parties reach a settlement, the entity shall refer this to the relevant court to decide upon it in the light of the civil procedures law." *Id*, at, Clause 8.

[42] *Id*.

technique provided confuses conciliation with mediation and settlement conferences, as highlighted above.

- Mandatory Conciliation of Public Disputes as per Law No. 7/2000 Establishing Conciliation Committees in Public Disputes

The Law No. 7/2000 provides for the establishment of Conciliation Committees with the purpose of settling the disputes that involve public bodies, with some exceptions, before being referred to the competent administrative court.[43] These committees are established within each ministry, governorate, or public authority. The main role of the committees is conciliating disputes involving a public authority as one of its parties.

The Committees are mainly composed of retired judges who act as neutral third parties. In addition, a representative of each of the disputing parties should be represented in a given Committee.[44] If the necessity arises, judges who are in office may preside conciliation committees after receiving special permission from the Supreme Judicial Council.[45]

The work of the Committees includes as a first step, the submission of a grievance, by the claimant, to the administration that he is suing. If the administration does not reply to the claimant's grievance within sixty days from the date of submission, or if it dismisses his grievance, the claimant submits a request before the Conciliation Committee. The conciliation committee should try to settle the case within 60 days from the date of filing the request by the claimant.[46] If the parties, within 15 days, from the date of issuance of the recommendations, accept the recommendations made by the Committee, the Committee has to register such acceptance in enforceable minutes signed by both parties and the dispute ends. Alternatively, if after the 60 days, the Committee does not issue its recommendations or if the parties do not accept the issued recommendations, each of the parties has the right to refer the dispute to the relevant administrative court.

It seems that the rationale behind establishing these committees, as appeared in the explanatory notes of the Law, is to promote access to justice. Thus, these committees aim to settle public disputes amicably before they reach courts. Therefore, it would help the disputants by providing them with faster process and less costs. This would be useful for the whole justice sector, which will reduce cases backlog before administrative courts.[47]

For the purpose of this paper, it is important to evaluate the work of the Conciliation Committees. This law has been subject to criticism for many reasons:

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[43] The Law No. 7/2000 Establishing Conciliation Committees on Public Disputes, *Al-Jarida Al-Rasmiyya*, 4 April 2000 (Egypt).
[44] *Id, at,* Clause 2.
[45] *Id*.
[46]Id., *at,* Clause 9.
[47] Sabry Mohamed Al-sonousy, Procedures Before Administrative Courts, 48-58, (2012), (Egypt), (available in Arabic).

First, though the court should decline the case that is not referred to the Conciliation Committee, as a prerequisite to litigation, this does not mean that the recommendations of the Conciliation Committees have any value for the relevant administrative judge.[48] As previously mentioned, the committee only attempts to settle the dispute before it reaches the court.[49] Thus, in cases where the Committee successfully settle the dispute, its recommendations may have an executive power.

Second, some scholars argue that the mission of the Conciliation Committee is a mere repetition of the State Commissioners' of Amicable Settlement as per the State Council Law.[50]

Third, the long history of the administrative courts' as well as the practice of the Committees shows that referring disputes to the said Committees became a formal procedure that the parties take only to meet with the requirements of the law. Committees hardly pursue proper conciliation. Most of the disputes are declined by the Committees and referred to courts. This made mandatory conciliation within the administrative courts' system in Egypt unsuccessful adding more burden on litigants in public disputes.[51]

In response to the above criticism, the Egyptian Legislature issued a new law in 2017 "Law no. 6/2017" introducing some significant modifications to the operation of Conciliation Committees. This law reduced the duration from 60 days to 30 days. It also requires the Conciliation Committees accompany their recommendations with detailed factual and legal justification. Finally, the law provides the Conciliation Committees the authority to issue enforceable decisions in any public dispute that does not exceed forty thousand Egyptian pounds (around $2000) and disputes including financial rights of civil servants, regardless their value. If the public administration is not satisfied, it may challenge these decisions before the courts of the State Council.

Notwithstanding the efforts of the Legislature to raise the efficiency of the Conciliation Committees, it gave the Conciliation Committees unnecessary powers, that conflict with the authority of the State Council. Allowing the Conciliation Committees to decide upon disputes of certain values grant them judiciary powers. Nevertheless, the Egyptian constitution of 2014, provides that the State Council is an independent judicial authority, that has the exclusive jurisdiction to decide administrative disputes.[52] Furthermore, in practice, this new amendment appears to represent a huge failure, as the public administration would challenge most of the decisions that are issued by the Conciliation Committees, which will turn to present more delays in delivering justice. Accordingly, refining the operation and the composition of these Conciliation Committees will be the focus of the first approach suggested in this paper.

- <u>Pre-trial Amicable Settlement of Public Disputes as per the State Council Law No. 47/1972</u>

[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] Marwan Al Ashaal, *Report on Reconciliation in the Egyptian Legal System*, *available at,* https://www.arabwestreport.info/sites/default/files/pdfs/Paper_23_-_Legal_views_of_Reconciliation.pdf
[52] The Constitution of the Arab Republic of Egypt, supra note 3, *at,* Clause 109.

The State Council Law No. 47/1972 allows judges, the members of the Unit of Commissioners, to try to amicably settle disputes brought before the State Council of Egypt instead of referring such disputes to the competent court within the State Council. If the parties agree to try to settle the dispute peacefully, the mediating judge determines a timeline for the mediation process. On one hand, if the parties reach a settlement, it should be integrated into the minutes of the session and it should be acknowledged as a writ of execution after it is ratified by the disputing parties. On the other hand, if the parties fail to reach an agreement, the mediating judge should refer the dispute to the competent court accompanied with his report. During the court's hearing, the trial judge may order the party who rejected the settlement to pay a fine, that may not exceed 20 Egyptian Pounds (1$), and it may be granted to the other party."[53]

It is worth noting here that the judge members of the Unit of Commissioners play the role of conciliators, themselves, according to the State Council law, without referring the case to external conciliators. It is also worth noting that trying to settle a dispute amicably by the relevant judge member of the Unit of Commissioners' is voluntary. Accordingly, the relevant member of the Unit of Commissioners might choose not to offer amicable settlement and decide to refer the dispute to the relevant court directly, which most judges prefer to do.

Accordingly, if we try to evaluate these set of procedures, the same way we did with the Amicable Settlement Procedures as per Law No. 7/2000, they proved to be unsuccessful and have not been applied, except in very few cases. This implies that having such a clause in the State Council Law that allows judges (the members of Unit of Commissioners) to apply conciliation is not effective. In particular, the role of the Unit of Commissioners is, originally, guiding rather obligatory to courts. Accordingly, reforming conciliation, conducted through judges of the Unit of Commissioners, and turning it into mediation, will form the focus of the second approach of this paper.

V. Conclusion and Recommendations

It could be claimed that the State Council of Egypt has two possible conciliation mechanisms applicable to public disputes, as a prerequisite, before being referred to courts. These two mechanisms are the voluntary amicable settlement of public disputes by the Unit of Commissioners within the State Council as per the State Council Law No. 47/1972 and the Conciliation Committees as per the Law No. 7/2000. Nevertheless:

[53] Clause 28 of the State Council Law provides that: "A State Commissioners' member may offer the disputing parties to amicably settle their dispute as per the rules of the Supreme Administrative Court within a duration determined by him. If settlement has taken place, this should be registered within enforceable minutes to be signed by the disputing parties and the case should be terminated. If settlement fails, the relevant court might penalize the party who declined settlement with a minor penalty equivalent to 20 Pounds ($1). State Council Law No. 47 of 1972, *supra* note 10, *at*, Clause 28.

- Both mechanisms are confusing. It is not clear whether they apply mediation, conciliation or settlement conference procedures. The three terms are used interchangeably by the legislator; and

- Both mechanisms turned out to be a cumbersome to the justice process as they lead to unnecessary excessive delays that also proved most times to be ineffective.[54]

Accordingly, using mediation/conciliation as a pre-requisite before trial to ease the blockage before the Egyptian administrative courts requires replacing both mechanisms with a new and more efficient mechanism, which might be difficult in terms of money, efforts, and possibility. Alternatively, reforming at least one of the two mechanisms sounds a good and practical solution.

As such, this paper recommends introducing mandatory mediation to the Egyptian Administrative Courts; either through restructuring Conciliation Committees by improving their operation, composition, and regulatory framework; or through presenting a new arrangement for mandatory mediation to be run by judges of the Unit of Commissioners at the State Council of Egypt and repealing Conciliation Committees at all. Both approaches are feasible, however, choosing between one of the two approaches depends on the preference and the priorities of the Egyptian government and the State Council of Egypt at the time of implementation. If the Egyptian government is very keen on retaining the current structure of conciliation committees, then, the first approach would be more appropriate to adopt. Otherwise, the second approach would be more viable.

The two approaches can clearly be distinguished from one another. While the first approach aims to apply mandatory mediation through focusing on restructuring the composition and the operation of Conciliation committees, the second approach focuses on adopting mandatory mediation through judges of the Unit of Commissioners within the State Council. In addition, applying the first approach necessitates amending the law of the Conciliation Committees No. 7/2000; and Law of the State Council No. 47/1972 to repeal the competence of judges of the Unit of Commissioners to conduct mandatory mediation. On the other hand, adopting the second approach requires repealing law of the Conciliation committees No. 7/2000; and amending the Law of the State Council No. 47/1972 to include the new arrangements of conducting mandatory mediation through judges of the Unit of Commissioners.

If the first approach is adopted, the composition of the reformed committees is recommended to include not only retired judges but also other professionals such as lawyers. Nevertheless, mediation committees are recommended to remain governmental; in form of units within public bodies, at least at the early stages of implementation. In particular, mediation is a new concept that most legal professionals in Egypt are unfamiliar with and accordingly having governmental units would guarantee a certain degree of supervision, quality, training, and manpower. Finally, Mandatory mediation is recommended to be acknowledged as an official mechanism instead of conciliation if any of the two approaches is adopted. On one hand, conciliation was not efficient as explained above. On the other hand, mediation has many advantages as explained earlier. That

[54] *Id.*

is in addition to the fact that mandatory mediation has been tried by various legal systems and achieved remarkable success.