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An evaluation of disciplinary guarantees of public employees in Libyan law

Zankuli, Enas A.

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Enas A. Zankuli

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Abstract

Disciplinary guarantees for public employees in Libyan law appear to be inadequate, and problems with respect to ensuring respect for procedural fairness guarantees for public employees in Libya during the disciplinary process can arise at any point between the first stage of the process — referring an accused employee to investigation until the final stage, which is the employee's right to appeal against a penalty decision. The aim of this study is to evaluate the extent to which Libyan Law guarantees public employees' rights in disciplinary proceedings in a fair manner, together with an evaluation of these guarantees in light of selected other countries' jurisprudence. The author will suggest possible solutions that may help to solve some of the problems currently found in Libya's public employment disciplinary system.

The thesis begins by providing a full and comprehensive analysis of different aspects of disciplinary procedures and related guarantees for employees in Libyan law, in order to arrive at appropriate solutions that may help to resolve the problems associated with the disciplinary guarantees in Libya law. Although the study provides and analyses relevant aspects of disciplinary guarantees by comparison with Egyptian, Kuwaiti and UK law where appropriate, this is not a comparative study in the traditional sense of the term. In an effort to produce an analytical investigation that will detect defects in Libyan disciplinary law, and in an attempt to implement some solutions to improve the system, a comparison is made with the above countries' legal systems wherever possible, with contrast being between Libyan law and Egyptian law, as Egyptian law has had a major influence on Libyan law.

The study finds that several key deficiencies in Libya's disciplinary system for public employment still exist. These anomalies affect how fairly or otherwise public employees are treated, and suggest how such inconsistencies be addressed. Possible solutions are suggested by the author, which could be implemented in Libyan law, in an effort to achieve maximum legal guarantees for public employees.

Dedication

I dedicate this thesis to my country and my family

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I would like to express my sincere gratitude to everyone who made a contribution to this work in every aspect. I am grateful to Professor Dermot Cahill for his supervision, guidance, assistance and his constructive criticism during the writing of this thesis.

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Introduction

Public employment in Libya is considered a critical factor in improving different fields of life, socially, economically and politically.[1] Public employment includes all employees who work in government departments and who are regulated by Civil Service law in Libya.[2] Public employment in Libyan law represents the general administration of the State, which is represented in Ministries and administrative institutions.[3] This includes the majority of public employees in Libya, whose disciplinary process is regulated by Civil Service Law.

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[1] Mhamed Eharary, *Principle of Administrative Law, Part Two* (House of National Books 2003) 9; Elsid Elmdni, *Libyan Administrative Law* (Darsader 1964-1965) 211.

[2] Nasreldin Khalil, *Plurality of Disciplinary Authorities* (1st edn, Darelnada Elarabia 2002) 51.

[3] **The current Law No. 12 of 2010** (concerning Labour Relations) specifies the meaning of 'public employee' through specifying the public institutions. This law defines the public employee as anyone who is employed in public institutions. Article 5 of Law No. 12 of 2010 defines a public institution as the public legal body that is established by the general people's congress, or the general people's committee (Prime Minister).The Libyan administrative judiciary (in Administrative Appeal No.22/22) defines the public employee as a person who has a permanently assigned post to serve in a public sector body, which is run or supervised by the State. Consequently, all the Civil Service Laws and regulations apply to him/her, including civil service rights and duties. According to what has been discussed above, it seems that the current Law No. 12 of 2010, Libyan administrative judiciary, requires certain conditions to be satisfied in order to categorise an employee under the public employee description. These conditions are:
a. The employee must be assigned a permanent position within the grading system available in the public institution. Therefore, employees who work temporarily within the public institution, such as experts and legal consultants, are not considered to be public employees. b. The employee must be working in a public institution that is supervised by the state and he/she must be connected to the administration, based on the rules and regulations of that particular administration. Public institutions have two possible meanings: the first is just a formal definition, focusing on the administration that runs the activity. In this instance, if the administration is employing maintenance of a separate legal identity from its shareholders or owners and they can make independent decisions about funding and administrative decisions, they represent a public institution. The second definition is an objective one, focusing on the nature of the activity. In this case, if the activity of the institution is to satisfy the needs of the public community by providing services, then they represent a public institution.
The question is: which of the two meanings did the administrative Libyan judiciary take? It can be noticed from the judgments that are issued by the administrative Courts that Libyan administrative judiciary preferred the formal meaning for the public institution (above). In other words, to categorise the employee as a public employee, he/she must follow one of the administrative bodies that are regarded as having a separate public corporate personality, such as the public institutions (General organisations of petroleum, public electricity institution, and all the secretariats, such as the Secretariat of Agriculture). This was the ruling of the Benghazi Court of Appeal (in Appeal Court No.39/11) when it ruled over the jurisdiction of the appeal submitted by an employee. The Court ruled against the decision of dismissal taken by the manager of the Libyan Arab Airline. Its decision was based on the Libyan Arab Airline not being considered as using a separate legal identity. Therefore, it is not under the power of the administrative law, so the employee works under a specific law.
Given the information discussed above, the public employee can be defined as: the employee who has permanent employment in a public institution and which has independent powers (regarding funding and administrative decisions), that are supervised and controlled by the State under a relationship following

An improvement in public employment law means an improvement in the disciplinary system as well as the disciplinary guarantees. Public employment historically started as a personal relationship between a leader and a group of employees, who were normally chosen according to certain trust standards to fill job vacancies. In other words, they were chosen according to certain requirements decided by the manager, who had the power to keep them or dismiss them at any time, without any disciplinary hearing or any legal rights.[4] Libyan public employment had at various levels, corruption and lack of organization, as the manager was vested with the power to employ staff, regardless of their abilities and competence to perform the job.[5] This continued until the enforcement of Libya's first employment law —Law No. 2 of 1951 concerning the Civil Service.[6] This law was enacted to organised provision related to employment, including the exercise of disciplinary authority.[7]

Another law was later adopted (e.g., Law No. 36 of 1956, regarding the Civil Service). This law was enacted to further organize the administrative system and public employment in Libya. Following this two law, a further two laws[8] were enacted in order to regulate employees, the disciplinary process and employment, until the adoption of current Law No. 12 of 2010 concerning Labour Relations. These laws, including the aforementioned current Law, were all devised to provide public employees with guarantees by reducing the unlimited authority of the administrative head.[9] Reducing the power of the administrative head can be achieved by giving full authority to an impartial disciplinary authority (committee) to impose penalties that have a complex nature, or to enforce serious penalties other than warnings and salary

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rules and regulations based on Civil Service law. See: Administrative Appeal No.22/22, Libyan Supreme Court (24.01.74) *Supreme Court Journal*, Year 7, no.3, 22; Appeal Court No.39/11, Administrative Court of Bangazi (12.04.82) *Unreported.* See also Irahem Elkbese, *The General Principles in the Administrative Libyan Law* (Published Papers 2004-2005) 183; Elsaid Fawze, *The Libyan Administrative Law* (Darelnahda Elarabia 1964) 204.

[4] Abdalftah Abdelber, 'The Disciplinary Guarantees in Public Employment, A Comparative Study' (PhD Thesis, Cairo University 1971) 3-7.

[5] Kaled Ariem, *Libyan Administrative Law* (Darsader 1971) 717.

[6] Nasreldin Elgadi, *The General Theory of Discipline in Libyan Law, A Comparative Study* (Darelfeker Elarabe 2002) 87-88.

[7] Ibid.

[8] Law No. 14 of 1964 concerning the Civil Service and Law No. 55 of 1976 concerning the Civil Service.

[9] Article 59 of Law No. 2 of 1951, concerning the Civil Service; Article 50 Law No. 36 of 1956 concerning the Civil Service, Article 52 of Law No. 14 of 1964, concerning the Civil Service; Article 84 (4) of Law No. 55 of 1976, concerning the Civil Service and Article 161 (3) of Law No. 12 of 2010 concerning Labour Relations.

deductions.[10] The adoption of more guarantees for employees during the disciplinary process arose due to the fact that more than one authority can be involved in the disciplinary process. This is a combination of administrative authority and disciplinary committees, whereby the management authority of the public institution enforces a simple penalty (for example, warning and blaming), and leaves the imposition of more complex penalties (such as dismissal penalty) to be enforced by disciplinary committees. However, several rights for public employees during disciplinary procedures, that are available in other countries, are yet to be recognised in Libya. Also, the fairness of Libyan law with respect to these guarantees needs to be reviewed, and will be discussed later in the thesis.

1. Thesis statement

In Libya, disciplinary guarantees for public employees appear to be inadequate to sufficiently protect the employee's interests and ensure fair procedural guarantees apply during the disciplinary process. Also, employees often do not seem to be aware of their rights during the disciplinary process. There has not been any thorough assessment as to the inadequacy of disciplinary guarantees in Libyan law, the fairness of the laws themselves and how all of this affects the employee. Disciplinary procedures are of a great significance to the public employee in Libya, as they guarantee that he/she will be granted his/her rights and will be disciplined fairly. If there is any problem with these procedures, it could lead to a breach of the employee's rights.

However, problems with respect to guarantees for public employees can arise during disciplinary procedures, between the times of referring the employee to disciplinary investigation until the time the employee experiences the right to appeal against a penalty imposition decision. Despite the significance of the procedure of referring an employee to disciplinary investigation, Libyan law does not specify which authority is competent to conduct the investigation, which makes the employee subject to referral to investigation by a multiplicity of disciplinary authorities.[11] Suspension from work on half salary can be a consequence of referral to investigation which affects the

[10] Ibid.

[11] For further information see Chapter One, Section 1.2.1.

employee's financial status and consequently his/her family. Failure to specify the authority competent to undertake the referral to investigation can seriously affect the employee's guarantees: for example, the employee can be disciplined and penalised, without being given the right of defence in an investigation. In addition, conducting a verbal investigation with an employee in Libya can adversely affect the employee's guarantees during the appeal stage, as there will be no written disciplinary decision that the employee can refer to subsequently.

Furthermore, another problem is that Libyan law does not specify elements that should be included in the investigation decision, even in cases where a written investigation takes place.[12] There is also a contradiction between Libyan legislation and Libyan Courts on applying the law in some situations. For example, Libyan legislation gives the employee the right to a lawyer in the disciplinary Court, while the Libyan Supreme Court in Administrative Appeal No.9/15[13] does not grant the accused employee this right. Another contradiction between the Libyan administrative judiciary and Libyan legislation was found with respect to presenting the employee with the charges against him during an investigation: although Libyan law stipulated it as a necessity, the Libyan judiciary in Appeal Court No.58/26[14] ruled that failure to present the employee with charges does not lead to the invalidity of the final penalty, if this procedural defect was corrected at a later stage.

The issues, disadvantages and problems mentioned above can adversely affect public employees' right to be treated fairly in Libya. These are just a few of the problems regarding several issues that the author found interesting to study in this thesis. Research involved investigation of the operation of disciplinary guarantees for public employees and demonstrating their vulnerability in order to help improve aspects of these guarantees in Libyan law. Therefore, the author focused on the disciplinary process and guarantees for public employees with respect to procedures and guarantees

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[12] For example, the stenographer of the investigation hearing should not be the investigator, and the necessity to sign the investigation record by all three parties: stenographer, investigator and the accused employee, is not required. For further information see Chapter Two, Section 2.5.1-2.5.1.3.

[13] Administrative Appeal No.9/15, Supreme Court (3.05.70) *Supreme Court Journal,* Year 6, no. 4, 44. For this Judgment see Chapter Three, Section 3.3.4.

[14] Appeal Court No.58/26, Administrative Court of Bangazi (17.01.98) *Unreported.* For this Judgment see Chapter Three, Section 3.2.

of public employees in labour relations law. The Labour Relations Law[15] is important because it applies to all public employees working in the State,[16] including some public employees subject to the private employment law (members of the judiciary and members of the customs service), as when there is no legal text in private law governing a particular issue, the labour relations law is applied. This is because this law is considered to be part of Libya's general laws, which apply to all public employees in the State.

2. Standards of Fairness

The author derives the standards of fairness which in this thesis from looking at certain other legal systems (Kuwaiti, Egyptian and UK laws). This is in an effort to propose maximum fair treatment guarantees for Libyan public employees. The following are some examples of standards of fairness which the author proposes should be satisfied in order to ensure fairness of treatment for employees. Libyan law will be considered fair if it meets the standards set by the following examples:

(a) Prior to the investigation stage, Kuwaiti law specifies the authority concerned with the referral to the investigation; the employee can then avoid the consequences of this decision.

(b) Egyptian law and Kuwaiti law specify and identify the authority concerned with the investigation. In order that an employee should know which authority is going to investigate him/her and also be aware whether the investigatory authority is specialised or not.

(c) Egyptian law conducts an investigation into accused employees in all cases to provide the employee with the right of defence.

(d) Precautionary suspension is made on full pay in UK law.

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[15] Law No.12 of 2010 concerning Labour Rations.

[16] For further information about Law No. 12 of 2010 concerning Labour Relations. See 4.2 of this Chapter.

In Libya, there are perhaps no objectively defined standards of fairness for evaluating the fairness and impartiality of disciplinary guarantees. This may be due to the fact that all previous studies have been more descriptive than analytical,[17] so there was no one study that attempted to assess Libyan law and disciplinary practices against defined standards of fairness. Therefore, in the thesis the author attempts to set out standards of fairness in order to test the fairness of some of the disciplinary procedures in Libya. One can argue that standards of fairness may vary from one situation to another. However, the author has made an effort to define such standards on the basis of what is required to achieve maximum guarantees for public employees in order to achieve maximum justice. This study will also perhaps be an inspiration for further studies in which will be found different standards of fairness, so we can achieve the required variety and have better standards in the future. On many occasions, the author examines the fairness of application of the disciplinary guarantees and disciplinary procedures at particular stages of the disciplinary process, as well as the fairness of action of the relevant authorities assigned to conduct the disciplinary procedures.

3. Research Questions and Structure of the Thesis

The primary aim of the thesis is to answer the question of the extent to which Libyan Law guarantees public employees' rights in disciplinary proceedings, together with an evaluation of these guarantees in the light of other selected countries' jurisprudence. In order to answer the principle question of the thesis, the author sets out the standards of fairness, as well as a number of key questions throughout the chapters.

Research Questions

The following are the general questions of the dissertation and shall target different parts in different chapters of the thesis:

1. What are the Procedures that are not stipulated by law, in the stage before investigation, the penalty enforcement stage and the stage following imposition of the penalty?

[17] See below 1.5.

2. Testing the fairness of disciplinary procedures stipulated by Libyan law during the investigation stage and the stage following enforcement of the penalty .

3. Are all disciplinary procedures during the referral to the investigation, imposing the penalty and after imposing the penalty, adequately specified by the judiciary in Libya?

4. To what extent does Libyan judiciary apply legal text in its judgments?

Structure of the Thesis

In Chapter One, the thesis investigates how the inadequacy of the guarantees

before the administrative investigation stage can adversely affect the rights of the accused employee.

In Chapter Two, the thesis considers whether there are enough guarantees in Libyan law *during the investigation stage* in order to ensure fairness to the employee during this stage.

In the third chapter, the thesis will examine whether there are enough disciplinary guarantees available to public employees at the stage *prior to the imposition of the penalty.*

In the fourth chapter, the thesis will consider the *fairness of action of the authority concerned with enforcing the penalty,* as well as an assessment of whether the *impartiality* of the disciplinary authorities is considered in Libyan law.

Chapter Five, chapter five will provide an estimation of the extent to which the authority follows the disciplinary restrictions while enforcing the penalty.

In Chapter Six, the author will assess the *disciplinary guarantees applicable during the administrative appeal stage and* will also assess whether the administrative appeal in Libyan law succeeds, or fails, as a major guarantee in the disciplinary process.

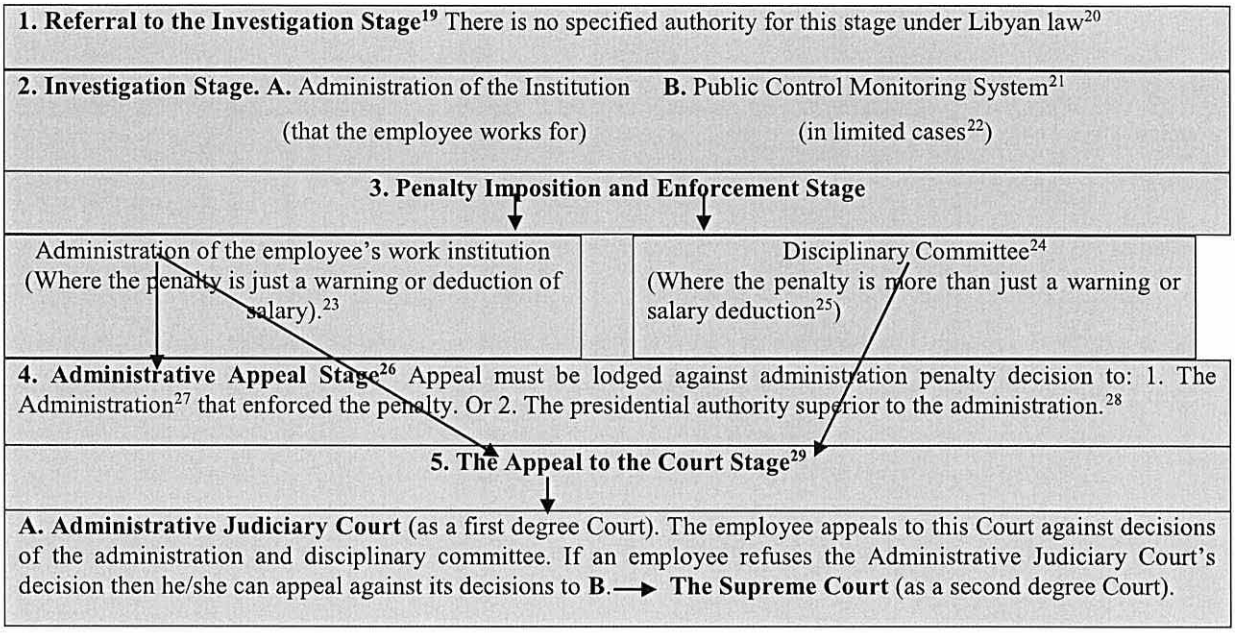
In Chapter Seven, the author will consider whether Libyan Administrative Courts monitoring the legitimacy of the penalty (enforced by disciplinary authorities) perform their role in an impartial manner.

4. Disciplinary Authorities in Libyan Law and their Functions According to the Disciplinary Law

4.1 Chart Showing the Different Stages in the Disciplinary Process

Given the information discussed above, it can be seen the disciplinary processes, as well as disciplinary guarantees, go through several stages.[18] These stages are conducted by several different authorities. Accordingly, they will be explained in the following section.

[18] Start from referring the accused employee to the investigation until the final stage, which is an appeal to the Court.



[19] See Chapter One.

[20] The authority specified to refer the employee to the investigation should be depends on the employment rank of the employee. According to Libyan Law No.12 of 2010 concerning Labour Relations, if the employee works in a high position in the institution, for example the 11th degree and above, then the referral should be made by the Minister, while if an employee hold the 10th degree or lower, then the referral should be by the administrative head.

[21] The People's Inspection and Control System represents a monitoring mechanism over all of the administrations inside the public institutions in the country. Its function is to ascertain the extent of the performance of the public institutions' responsibilities and duties. For further information about the function of people's Inspection and Control System see Chapter Two, Section 2.3.

[22] These cases are: (i) If the Administrative Authority requests the People's Inspection and Control System to conduct the investigation. (ii) If the People's Inspection and Control System has received complaints from individuals regarding an error contrary to the law. (iii) If a member of the Public Control Monitoring System discovers any disciplinary errors. For further information see Chapter Two, Section 2.3.1.

[23] In detail, see Chapter Four, Section 4.2.1-4.2.1.2.

[24] The disciplinary system is based on two committees, one of them specialising in administrative errors, the other specialising in financial errors. The Disciplinary Committee which specialises in administrative errors is subdivided into two committees (i) the General Disciplinary Committee, present in each administrative unit, to prosecute employees who hold grade ten or less. The members of the committee are the Undersecretary of the Ministry or any employee who holds no less than grade eleven, and the Director of Administration and Legal Affairs and Legal Advisor. (ii) The Highest Disciplinary Committee) which takes place to prosecute employees holding the eleventh grade (a senior position). This committee is headed by the President of the Administration Management Law, Advisors in the Administrative Justice department, a Head of Preliminary Prosecution, and a High Administration Employee nominated by the General People's Committee. For further information regarding Disciplinary Committees see Chapter Four, Section 4.2.2-4.2.2.5.

[25] In detail, see Chapter Four.

[26] The author submits that Libyan law considers that the employee may not feel comfortable in appealing to the administration which imposed the penalty. Therefore, Libyan law gives the employee choice between appealing either to the administration or to the presidential authority of the administration. More details in Chapter Six.

[27] The term 'administration' here refers to all the administrative institutions that provide public services to citizens, such as hospitals, oil institutions, etc.

[28] The term 'presidential authority' means a higher authority to an administration in an institution. For example, the Ministry of Health is the presidential authority to any administration in any hospital.

[29] For this stage see Chapter Seven.

Given the information in the chart above, it can be concluded that these stages of disciplinary processes are conducted by several different authorities. The stage of referring the employee to the investigation, as well as the investigation stage, are stages conducted by the administration, while at the disciplinary hearing, if the administration have reached a penalty decision of warning or salary deduction, the investigation ends at that stage.[30] However, if the penalty to be enforced is thought to be (by the administration) other than a warning or salary deduction, the administration refers the employee to the disciplinary committee. The disciplinary committee is a mixture of administrators and individuals with a legal background (judge, legal advisor). This is because one of the conditions stipulated by law is that the disciplinary committee should include individuals with a legal background (judicial members)[31] to ensure that all legal procedures are followed and that the penalties imposed are appropriate to the error committed, according to the law. Individuals with a legal background cannot take part in the Court at a later stage in the disciplinary process as this is against the principle of impartiality.[32] These individuals do not represent their institutions such as Courts or legal institutions; they are to be considered solely as legal candidates in a disciplinary committee.

After the administration has reached a decision of warning or salary deduction, the employee has the right to appeal either to administration itself or to the Appeal Court and also to the Supreme Court if he/she wishes to appeal against the Appeal Court. This also applies after the disciplinary committee has reached a decision. The employee has the right to appeal to the Appeal Court, and if he/she does not accept the Appeal Court decision, he/she can then appeal to the Supreme Court.[33]

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[30] The specialties in enforcing the penalty are distributed between the Administrative Authority and the Disciplinary Committee. Libyan Law has given the Under-Secretary and Head of a Public Institution the power to impose warning and salary deduction penalties, while more complex penalties are imposed against the employee by a Disciplinary Committee. In detail see Chapter Four, Section 4.2-4.2.2.3.

[31] Article 86 of Law No.55 of 1976 concerning the Civil Service; Article 4 of Law No. 6 of 1992 concerning the Management Law. In detail see Chapter Four, Section 4.2.2.1-4.2.2.2.

[32] Article 267 of Civil Procedures Act 1953.

[33] For further information see Chapter Seven.

4.2 Disciplinary Libyan Legislation (legal system)

Public Employment Law is not a law in itself, Civil Service Law and Labour Relation Law together are called Public employment law. Discipline in Libyan law is dependent on the following legislations:

1. Civil Service Law.

(a) Law No. 55 of 1976.

(2) Labour Relations Law.

(a) Law No. 12 of 2010.

(3) Civil Procedures Act 1953.

(4) Administrative Judiciary Law.

(a) Law No. 88 of 1971.

(5) Law of People Inspection and Control System.

(a) Law No. 2 of 2007.

(6) Court Judgments.

(a) Appeal Court.[34]

(b) Supreme Court.[35]

(7) Management Law.

(a) Law No. 6 of 1992.

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[34] Judgments of these Administrative Courts are sources of the administrative legitimacy that should be respected by disciplinary authorities and considered by them during the imposition of penalty decisions. Administrative Appeal No.6/3, Supreme Court (26.06.57) *Supreme Court Journal*, Constitutional Administrative Judiciary, part 1, 89.
For Administrative Courts, their composition and specialties see Chapter Seven, Section 7.2.

[35] According to Article 31 of Libyan Supreme Court Law 1953, judgments of the Supreme Court are sources of the administrative legitimacy that should be respected by lower Courts, including Administrative Courts and disciplinary authorities when they imposed the penalty. For Supreme Court, its composition and specialties see Chapter Seven, Section 7.2.

Discipline in Libya is organised by current Law No. 12 of 2010 concerning Labour Relations, which is the main law that organises the procedures and guarantees for the public employee. This includes the employee's right to be promoted, or remunerated and the conditions under which employee should be employed for a particular position.[36] In addition, Law No. 12 of 2010 stipulates the duty which the employee must follow, such as performing his/her work concisely and sincerely, and also obeying his/her boss's orders during the period of employment.[37] Law No. 12 of 2010 included the disciplinary procedures that must be followed during the disciplinary process. These procedures are:

1. It is stipulated in Law No. 12 of 2010 that the authorities who specialise in imposing disciplinary authorities must only be specified to the Minister, Secretary of the Ministry, Head of Institution and Head of Department and Disciplinary Committees.[38] Additionally, this law stipulates the penalties which are permitted for each of the aforementioned authorities, according to the severity of the disciplinary penalty.[39]

2. An investigation must take place before any penalty is imposed on the employee. In addition, the investigation must be carried out in written form.[40] However, there is an exception where a penalty can be enforced without investigation and also where an investigation can be carried out without being written up.[41] These exceptions apply under certain conditions mentioned in Article 156 of Law No. 12 of 2010.[42]

3. Law No. 12 of 2010, which stipulates the right of defence for an employee during the disciplinary hearing, forbids penalising the same misconduct more than once, and stipulates the necessity of justifying any enforced penalties with valid causes.

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[36] Articles 142-143-144-145 of Law No .12 of 2010 concerning Labour Relations.
[37] Article 11 of Law No.12 of 2010 concerning Labour Relations.
[38] Articles 161-163 of Law No.12 of 2010 concerning Labour Relations.
[39] Articles 160-161of Law No.12 of 2010 concerning Labour Relations.
[40] Article 156 of Law No .12 of 2010 concerning Labour Relations.
[41] Ibid.
[42] These conditions are: if error committed by the employee was observed by the administrative head himself, or if that error is proven to have been committed by evidence and the facts based on documentation. For these conditions see Chapter Two, Section 2.4.1.

Even though Law No. 12 of 2010 is the main law which defines the disciplinary procedures, the previous Law No. 55 of 1976, concerning the Civil Service, also remains applicable on some occasions. This is because the current law (No. 12 of 2010) maintains in force Law No. 55 of 1976 regarding any issues that are not covered by its text, until these issues have been covered in the executive regulations of the new Law No. 12 of 2010 (which have not yet been brought into effort). Some of these issues are as follows:

(a) Rules that govern the formation of Disciplinary Committees are organised by Law No. 55 of 1976 and categorised into three groups:[43] the General Disciplinary Committee, The Highest Disciplinary Committee, and the Disciplinary Committee of Financial Errors.[44]

(b) The rules that set out the test of impartiality of disciplinary authorities: Law No. 55 of 1976 (the Civil Service) refers to Article 267 of the Law Civil Procedures Act 1953 regarding the disciplinary authority, which can be removed from a disciplinary hearing if one of the members of the Disciplinary Committee is proven to be biased.[45]

(c) The rules that are concerned with administrative appeals (and the lodging of appeals by public employees to the Court) are defined by Law No. 88 of 1971 concerning the Administrative Judiciary.[46]

Given the information discussed above, it can be concluded that:
(i) The procedures and guarantees during the disciplinary process in Libyan law will be studied according to current Law No. 12 of 2010 (concerning Labour Relations) and also the previous Law No. 55 of 1976 (concerning the Civil Service), as current Law No. 12 of 2010 referred to the previous law in several disciplinary texts on matters such as forming disciplinary committees and other issues that the author will discuss later in

[43] Article 83-87-88 of Law No. 55 of 1976 concerning the Civil Service.
[44] The Highest Disciplinary Committee amended its form by virtue of Law No. 6 of 1992 concerning Management Law, while the Disciplinary Committee of Financial Errors amended its form and functions by virtue of Law No. 2 of 2007 concerning the People's Inspection and Control System. This amendment in forming the board seems to represent more guarantees to the accused employee as it includes more members, among them judges who were not present in the previous form of the board. In details see Chapter Four, Sections 4.2.2.2 and 4.2.2.3.
[45] In details see Chapter Four, Section 4.3.2.2.
[46] In detail see Chapters Six and Seven.

the thesis. Also, the disciplinary process in Libyan law will be studied, in particular Law No. 88 of 1971 relating to the Administrative Judiciary. This law is the only law that provides an organised administrative appeal process, and procedures for lodging an appeal with the Court. This law stipulates the reasons that can lead to an appeal, and other procedures that the author will also discuss. Meanwhile, the thesis will also consider Libyan Law No. 2 of 2007 concerning the People's Inspection and Control System,[47] as Libyan law gives the Public Control Monitoring System the right to investigate public employees in limited cases.[48] Also, the author found that some procedures that the Public Control Monitoring System follows can be implemented in the disciplinary procedures followed by the administration of the employee's work "institution".[49] All these issues will be discussed in detail later in the thesis. Accordingly, the author believes that an analytical examination of the fairness and legality of these procedures will help to develop several solutions to some of the existing problems currently affecting the disciplinary system of Libya.

(ii) The disciplinary rules in Libya are distributed throughout Law No. 12 of 2010 and other laws. This makes it difficult for an ordinary public employee to aware of his/her duties and rights during the disciplinary hearing, as the employee is not a legal expert and cannot be expected to collate all the information and the rules from different laws. Moreover, the judge will take longer to reach a decision because he/she needs to look at different laws in order to decide which laws apply to a particular case. Consequently, the employee will be affected, as he/she will endure a period of uncertainty until the judge has reached a decision. It will be submitted that Libyan law should consider

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[47] The People' Inspection and Control System is an independent authority which follows the General People's Congress. This system had been established in Law No.116 of 1970 and this has been amended in Law No. 56 of 1974. Libyan law was working with this law until it was reorganized in Law No. 11 of 1994, which was also amended in Law No. 2 of 2007 concerning the People' Inspection and Control System. This law classifies the organizational structure of the system to four categories: (i) Financial Control Department. (ii) Technical Control Department. (iii) Administrative Control Department and (iv) Department of Investigations. Articles 32-34-36 of Law No. 2 of 2007 stipulate that the People's Inspection and Control System specialised in investigating errors committed by employees through its investigation department (without imposing the penalties) on the occasions specified by law.

[48] For these cases see footnote 22 in this chapter.

[49] Such law specified the elements that should be provided in the written form investigation which are: the presence of a writer; mentioning the date of the investigation and signing of the record of the investigation by the accused employee, the writer of the investigation and the investigator. These elements are significant and represent important guarantee for the employee, who can refer to his/her statements if the administration claimed otherwise in an appeal in a later stage. For further information see Chapter Two, Section 2.5.1-2.5.1.3.

adopting specific legislation, or a Code of Practice with regard to this issue,[50] and make this available to the employees. In this law, all the procedures and guarantees of discipline for public employees in public institutions should be clearly outlined and explained, so that employees' rights would be known and easily accessible.

5. Literature Review

5.1 The Relationship between Public Employees and Public Institutions, as well as the views of Commentators on Discipline and its Guarantees

Commentators[51] have different views on the nature of the relationship between the employee and the institution, whether this relationship is a contractual one, or a legal relationship controlled by law. It was initially believed that the relationship between the employee and a government institution is a contractual one. The contractual relationship is not derived from Civil Service Law. Subsequently, commentators[52] altered their views regarding the relationship between the employee and government and agreed that this relationship is a legal one determined by law, rules, and regulations. Therefore, all employees are controlled by the Civil Service Laws, which aim to regulate the employees' issues within a civil service context.

Because the Libyan[53] and Egyptian[54] laws focused on the relationship between the employee and the administration as being one based on rules and regulations often the thesis will consider Egyptian law or a literature, as Egyptian law and scholarship has had a major influence on Libyan law. Libyan law is highly dependent on Egyptian law's development and frequently adopts and implements new ideas already accepted in Egyptian law. In addition, Egyptian law is the origin of Libyan law (for historical reasons) and Libyan Courts use the Egyptian judgments as a reference when there is no reference in Libyan law for a particular case. It may not use it officially for a particular

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[50] ACAS 'ACAS Code of Practice 1-Disciplinary and Grievance Procedures' (April 2009) 4-10.
[51] Mustafa Afifi, *The Philosophy of Disciplinary Penalty and its Purposes* (Elhya Elmasryallktab 1976) 40; Maged Elhelw, *Administrative Law* (Darelmatboat Eljameya 1982) 222; Sliman Tmaoi, *Encyclopaedia in Administrative Law, A Comparative Study* (Darelfeker 1984) 430.
[52] Ibid Maged Elhelw, 222; Ibid Sliman Tmaoi, 432; Abadaltefe Badran, *The Principles of Public Employment* (Darelnahda Elarabia 1990) 45; Fouad Elatar, *The Administrative Law* (Darelnahda Elarabia 1976) 444; Ali Mhareb, *The Administrative Discipline in the Public Employment, A Comparative Study* (Darelmatboat Elgameia 2010) 53-65.
[53] Law No. 12 of 2010 concerning Labour Relations.
[54] Law No. 47 of 1978 concerning Civil Servants.

case, but it refers to it as a matter of practicality and inspiration. Both States organised the employee/ administration relationship by means of the Civil Service Laws (with regard to employing, promoting and disciplining employees). The legal bond between the public employee and any government institution should therefore normally provide the employees with the rights assigned to him/her and all the employment duties, so that if the employee neglects these duties, he/she will be penalised.[55]

Discipline in law and how it has been explained by commentators[56] is to penalise the employee who neglects his/her duties, regardless of whether the neglect of the duty is a positive or a passive act. For example, the employee can be committing an error by refusing to obey the orders of his/her superiors. This disciplinary error could be passive, i.e., if the employee rejects doing certain work assigned to him/her or carries out the work improperly.

In both Libyan and Egyptian studies[57] it is agreed that in order to consider a certain action as a disciplinary error (gross misconduct) the employee must have broken the rules of the workplace. This perhaps leads to an important question: who judges the actions of employees as to whether disciplinary errors occurred or not? This question was answered in one study in Libyan law.[58] The study concluded that disciplinary authorities have authority in estimating actions committed by employees, as there is no text in law that specifies which actions can be considered contrary to the law as a disciplinary error. Therefore, the administration has full power to decide whether an action committed by an employee is an error, or not, and if he/she needs to be penalised for it. Accordingly, the aforementioned study submitted that Libyan law had vulnerability, namely that the administration may misuse its power and penalise an employee for an error that should not be considered as a disciplinary error, even though it had an effect on the interests of the institution. Therefore, the law should stipulate all actions that are to be regarded as administrative errors.

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[55] Mohamed Elsied, *Legal System for Public Employees, Part One* (Darelnahda Elarabia 1996) 106.
[56] Mhamed Eharary (n 1) 73; Elsid Elmadany (n 1) 294-295; Mhamed Otman, *The Principle Law for Public Administration in Libya* (University of Garyounis 1989) 54.
[57] Abdelsalam Elhatami, 'Disciplinary Error in Libyan Law, A Comparative Study' (Master's Thesis, University of Tripoli 2007) 120-124; Mahmoud Helmy, *Overturning Judgments in Justice* (Darelfek Erelarabi 1974) 317; Sliman Tmaoi (n 51) 222.
[58] Abdsalam Saood, 'Disciplinary Error for the Public Employee in Libyan Law, A Comparative Study' (Master's Thesis, Margab University 2003) 77.

The author partially agrees with the above-mentioned study submissions: full guarantees for employees in discipline in Libyan law cannot be guaranteed by such a system. The only problem is, that stipulating all actions that can be regarded as administrative errors in law may not be realistic, as administrative day-to-day life fluctuates every day and what is a mistake on one day, and what is not on another, can also be in a continuous state of change. Unfortunately, it is inevitable that to give full power to administration result in errors. However, as suggested in one Libyan study,[59] the solution is to monitor and review decisions of administration with respect to the proportionality between disciplinary error and disciplinary penalty by a judiciary authority.

A Libyan study[60] added that this guarantee is represented in the monitoring of the judiciary (judges in Court) over the proportionality of disciplinary decisions with regard to the errors committed. This guarantee was well known and was provided in Islam from a very long time ago, as there were specialised judges to whom appeals could be submitted, and this included disciplinary matters. The study also added that Islam was the source of several disciplinary rules and laws present in today's disciplinary laws, which in earlier times was enforced by the leader of the Muslims, the prophet Mohamed. Similarly in today's discipline in Libya, the administrative president enforces penalties.

Another Egyptian study[61] pointed to the guarantees of employees with respect to procedures that can be taken as an indirect punishment by forbidding the employee to exercise his/her guarantees during the disciplinary process. The study found that a penalty should be differentiated from other procedures which are taken to organise a workplace, such as the employee's transfer to another branch of an institution. Such a procedure can be interpreted as an indirect punishment to an employee. Therefore, strong valid reasons should be provided by the administration in order to prove that the transfer was undertaken in the interests of the institution and not to penalise the employee indirectly. The author agrees with the above-mentioned study submissions.

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[59] Abdullah Saad, 'Restrictions on the Authority of Estimating Errors and Penalties in Discipline' (Master's Thesis, University of Tripoli 2002) 158.
[60] Nasreldin Elgadi (n 6) 428.
[61] Ismail Zaki, 'Guarantees of Employees in Hiring, Promoting and Discipline' (PhD Thesis, University of Egypt 1936) 102-130.

This is because the disciplinary authority should not misuse its power by penalising the employee for personal reasons. For example, it can impose a penalty against the employee indirectly without following any disciplinary measures or providing any guarantees, such as in the case of transferring an employee from one workplace to another, giving the excuse that it wants to organise the workplace (while the real reason is to penalise the employee indirectly without following disciplinary measures, or giving guarantees that would have been provided to the employee in a disciplinary process and in such a way that would have ensured that procedures could have been observed).

Egyptian and Kuwaiti laws are similar to Libyan Civil Service law in several ways and can be a complementary and useful reference to Libyan law with respect to discipline in public employment. A study[62] in Kuwaiti and Egyptian law with respect to the employee's guarantees during disciplinary procedures pointed out different formal guarantees that should be provided to employees during disciplinary procedures, such as the need to conduct an investigation in writing and other main guarantees, the right of the employee to defend himself, the impartiality of the disciplinary authority, and the illegality of searching an employee unless there is an urgent necessity for same.

In conclusion, the study submitted that there should be essential and formal guarantees provided for employees during the disciplinary process: e.g., guarantees represented by conducting the investigation in writing. This is because conducting the investigation in writing guarantees the employee that an official investigation has taken place, and also that no other statements can be added to his/her written statements. However, this study did not examine the structure and requirements of conducting the investigation in writing, such as requiring the involvement of an individual specialised in writing up investigations, and signing the record of the investigation.

[62] Adnan Alsabti, 'Disciplinary Guarantees of Disciplinary Hearing, A Comparative Study' (PhD Thesis, University of Helwan 2007) 61-70.

5.2 Limitations of Existing Studies and How This Thesis Addresses Issues Arising

It is concluded by the author that the studies reviewed were not very specific. Of the examples cited, while some related to guarantees of employees, such as what can be considered a disciplinary error, writing up the investigation, and the principle of impartiality. However, none of these studies submitted *an analytical study* of a particular subject in disciplinary guarantees in Libyan law. All were descriptive studies, such as writing-up the investigation, which one study[63] concluded to be a guarantee to the employee, but did not query how an ideal form of a written investigation could be undertaken. Also, there was not an adequate analysis and criticism of some existing laws in Libyan law, which now need to be improved to bring them into line with the continued improvement in other laws with respect to discipline. One of the disadvantages in Libyan law texts is the granting of unlimited power to the administrative head in estimating the penalty for the error committed without review.[64]

There are many areas which are important for disciplinary guarantees, but which have not yet been studied in the literature on Libyan law, such as the extent to which Libyan law is fair with respect to the guarantees available for public employees during the disciplinary process. Also, the right for the employee to know the referral authority that referred him/her to the investigation and to appeal against its decision, if there are any problems with the legality of such decision. The subject of the principle of impartiality in existing studies is only studied as a general principle, and what has not yet been studied is how it can be applied appropriately to disciplinary authorities. Also, providing the reason for the penalty decisions by disciplinary authorities, the right to remain silent for the accused employee,[65] the consequences of administrative appeal and other factors in discipline still need to be analysed and studied in order to improve the performance and raise the level of discipline in public employment with respect to disciplinary guarantees. Accordingly, in this thesis the author will try to analyse and test the fairness of Libyan law with respect to these and other issues; its efficiency, procedures and performance in achieving maximum guarantees to the accused employee during disciplinary process.

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[63] Ibid.

[64] In detail see Chapter Five, Section 5.4.1.

[65] The right to remain silent is one of methods provided to an accused employee to defend him/herself. For details of this right see Chapter Three, Section 3.3.3.

6. Methodology and Limitations of the Study

6.1 Methodology

The thesis has employed three methodologies in order to provide a full and comprehensive analysis of different aspects and to arrive at an appropriate solution to resolve the problems of disciplinary guarantees in Libyan law.

(a) Legal analysis: a critical review of the theoretical aspects

The research provides criticisms of legal theories relating to assessing disciplinary guarantees in Libyan law. It includes reviews of the literature in books and articles in order to bring together an overview of legislation and case law.

(b) Case Law study

The study of case law refers to cases and judgments relating to disciplinary guarantees. This was approached from different angles. Examples for the cases studied in the thesis involved the right of the employee to be investigated,[66] and his/her right to defend him/herself; the occasions where an investigation may not be necessary and the consequences of this for the employee.[67] Other cases related to the employee being required to remain silent during the disciplinary hearing.[68] Studying the judgments of the Courts is important, as the Court's jurisprudence lays down legal rules that the employee can depend on in his/her effort to overturn a particular decision enforced against him/her. This is because judgments which are handed down by Administrative Courts should be respected by disciplinary authorities and considered by them during the imposition of penalty decisions, as these judgments represent legal rules.[69] Also, judgments which are handed down by the Supreme Court are to be followed by lower degree Courts, including Administrative Courts and disciplinary authorities.[70] Accordingly, the judgments of Courts are sources of the administrative legitimacy that

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[66] Administrative Appeal No.1/22, Libyan Supreme Court (24.04.75) Supreme Court Journal, Year11, no. 4, 24. For further information about this Judgment see Chapter Two, Section 2.4.
[67] Administrative Appeal No.9/15 (n 13) 44-46.
[68] Administrative Appeal No.55/46, Supreme Court (13.03.2003) *Supreme Court Journal*, the Group of the Principle decided by the Supreme Court, Administrative Judiciary, Year 2000-2003, 184. For further information about this Judgment see Chapter Three, Section 3.3.3.
[69] Administrative Appeal No.6/3, Supreme Court (26.06.57) *Supreme Court Journal*, Constitutional Administrative Judiciary, part 1, 89.
[70] Article 31 of Libyan Supreme Court Law 1953.

should be respected by disciplinary authorities. Furthermore, judgments of Courts can overturn decisions of disciplinary authorities in appeal stages, if the Court finds this contrary to judgment rules.

(c) Comparative Approach

The thesis provides and analyses disciplinary guarantees in Egyptian, Kuwaiti and UK laws. This approach was chosen in an effort to produce an analytical investigation to detect disadvantages in the disciplinary system in Libyan law and to attempt to implement some solutions from other legal systems in order to improve the Libyan system. Hence, comparisons will be made with Egyptian, Kuwaiti and UK law whenever possible or appropriate in order to set standards of fairness that will test the fairness of Libyan law during the disciplinary process and propose reforms to the Libyan disciplinary system. The main comparison in the study is between Libyan and Egyptian laws. This is due to the large similarities between the two countries' laws. Libyan law is highly dependent on Egyptian law's development. This is because Egyptian law has a persuasive effect on questions for which there is no legal text or a previous judgment for the Supreme Court in Libya. Libyan Courts do not have to follow Egyptian judgments, but they often look to their judgments for inspiration. In addition, Libyan and Egyptian law have similar cultural and religious beliefs that influenced the texts of law.

The thesis, in addition, has addressed a number of key cases from Egypt and Kuwait Courts which have considered the problems of disciplinary guarantees. This helped to evaluate the guarantees for public employees in the disciplinary process in Libyan law to answer the main question of the research and try to submit some solutions for the problems found.[71] Many issues not yet covered by the Libyan judiciary have been considered already by the Egyptian judiciary, as the latter have already had the opportunity to consider these difficult issues in dealing with issues of discipline.[72] The other advantage is that with respect to discipline, Libyan and Egyptian law is similar,

[71] Regarding the question of the research see above p 6.

[72] Such as: the Libyan judiciary does not clarify its position from applying the impartiality rules on the administrative investigator, while Egyptian judiciary does, see Chapter Four, Sections 4.3.1 and 4.3.2.1. Also, Libyan judiciary does not specify the authority of the referral to the investigation, while Egyptian judiciary does (In details see Chapter One, Section 1.2.1) and several other issues that Libyan judiciary does not specify, which were similar problems in Egyptian judiciary before it established solutions for it, will be looked into.

thus making it easy to transfer the experience of Egyptian judgments and legal rules to Libyan law wherever appropriate. However, there are also areas which are not covered by Egyptian law. Therefore, it is necessary to look to another Arabic legal system to see how these issues have been legislated for. For this purpose, the author chose Kuwaiti law,[73] as it is often similar to, but more advanced than Libyan law. The author also attempted to see if UK law could provide some solutions for those problems arising in Libyan law,[74] but due to the significant differences between the two systems, apart from a few instances, the comparison is made to derive standards of fairness against which to benchmark Libyan law. The author submits that UK law has many advantages which could be useful for Libyan law to consider. For these reasons UK law will sometimes be referred to in the thesis to offer several suggestions to problems arising under Libyan law, rather than undertaking a direct comparison between the two legal systems.

6.2 Limitation of the Study

The author has made every effort to cover as many disciplinary guarantees in Libya as she could in order to examine these and attempt to submit some solutions for the detected problems. However, it was almost impossible to cover every single detail in a particular project, especially with such a controversial subject as public employment disciplinary guarantees. The limitations of the thesis are as follows:

The thesis covers the disciplinary guarantees for public employees in Libya, but does not cover employees who work in the private sector. This is because the two systems are completely different, and it is very difficult to include them both in one project. Moreover, the author chose to study public employees because, in Libya, the majority of employees are in the public sector rather than the private sector, so an examination of their disciplinary guarantees will benefit a larger population and will add more value to the Libyan employment environment.

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[73] As an example, Kuwait law stipulated the appeal measures that must be following in the administrative appeal (In details see Chapter Six, Section 6.4.2). Also, Kuwaiti law specifies the extension period of the precautionary suspension (In detail see Chapter One, Section 1.3.3) and several other issues that will be looked into in this thesis.

[74] Such as UK law give the right to the employee to call a lawyer if the charges against him/her affect his/her career, (For further information see Chapter Three, Section 3.3.4). Also, UK Judiciary states that the penalty should be imposed for a valid and reasonable reason (In detail see Chapter Five, Section 5.5.1.2) and a number of other issues that will be looked at in this thesis.

Studying discipline in the public employment in Libya can be the most important subject in this country. The reason is that approximately more than 70% of the country is run by public institutions, such as post offices, hospitals, oil companies and electricity corporations. Literally, every field is managed by the government, which can be considered a policy that Libya follows in general. This means that if there is any corruption in any field, the accusation would point either to the institution's administration or to the employees in the administration,[75] and in all cases the accused would be an employee in a public institution who is employed by the government. Strengthening the discipline system means positively interfering with the progression of the country, and saving those institutions on which the country heavily relies. Guaranteeing more rights to the employee during the disciplinary process will make the employee feel safe and protected, and will encourage the employee to work more sincerely. Also, studying the fairness of Libyan law and the effectiveness of its application will help to test the system itself because if there is no strong, fair disciplinary system then this will affect the whole country, since a country such as Libyan depends heavily on public employees. Accordingly, the author has chosen to investigate the fairness of Libyan law with respect to its disciplinary system and the provision of disciplinary guarantees to public employees.

The author had planned to interview scholars in Libya to discover their views on the examination of disciplinary guarantees in Libya and how these could be improved. However, due the difficult circumstances during the revolution in Libya, the author was only able to meet a few scholars, who all answered that there has not yet been an analytical study carried out in this field. They added that this study, when it is completed, will be a reference an important and valuable reference for the subject of disciplinary guarantees in Libya.

Notice: For ease of reference, the titles of all material in Arabic (articles, books and thesis) have been translated into English for the purpose for this thesis to help the reader.

[75] For definition of public employees see footnote 3 of this Chapter.

Chapter One

How the Inadequacy of the Guarantees before the Administrative Investigation Stage affects the Rights of the Accused Employee under Libyan Law

1.1 Introduction

Referral to the investigation stage is the first step of the disciplinary process to uncover the truth of an accusation directed against an employee. This measure is considered as a guarantee to the accused employee, as its aim is to inform the employee about the accusation being referred, as well as the charge directed against him/her. This means that he will not be taken by surprise and cannot claim that he/she did not have any prior knowledge of the investigation. The referral to an investigation might have a stronger impact on the employee than the expected penalty, as it may subject him/her to a precautionary suspension.[1]

The aim of this chapter is to investigate whether the guarantees provided by Libyan law before the investigation are sufficient, and their effect on the accused employee, by examining the fairness of Libyan law with respect to these guarantees. For the purpose of this chapter, the author proposes that fairness before the investigation stage should include the following: the employee should know the authority which is going to refer him/her to investigation, the referral should be made within a specific period, the employee should be able to appeal against the referral, the suspension should be made for the purpose of the investigation and on full pay, and the period of suspension should be specified. On the basis of these standards, this chapter will examine the fairness of the guarantees currently available to the employee before the investigation stage in Libyan law, comparing them with Egyptian and Kuwaiti law, whenever possible. Therefore, two key areas will be examined:

1. An assessment of the fairness of the referral of an employee to investigation under Libyan law.

[1] Mohamed Ali, *Protection of Public Employee Administratively* (Darelnahda Elarabia 2010) 324.

2. An assessment of the fairness of precautionary suspension of the employee as a consequence of his/her referral to investigation.

1.2 An assessment of the Fairness of the Referral of an Employee to Investigation under Libyan Law

The first disciplinary step is to refer the accused employee to an investigation, thereby safeguarding his/her rights, ensuring that he/she has a fair hearing, and guaranteeing the employee the right to defend him/herself.[2] However, the seriousness of this action for the employee cannot be overlooked, as it may subject him/her to insult and gossip from his colleagues, his/her superiors and his/her subordinates.[3] Because of this, the relevant authorities should be very cautious about taking the decision to refer an employee for investigation. In other words, an investigation should be set up only if the employee has neglected the duties assigned to him/her, as the charge against him/her must be serious and based on facts and evidence, not merely on false charges intended to damage him/her.[4] If the employee did not neglect his/her duties, then this cannot be considered an administrative error.

The Supreme Court of Libya, in Administrative Appeal No.2/19,[5] held that the disciplinary decision, as with any other legal decision, must be based on genuine grounds for the administration to take legal action against an employee. The grounds for justifying the administrative decision would be if the employee violates his employment duties or commits an action that is prohibited by law. If the employee does not commit any violation of his employment duties, it cannot be considered that an administrative error has been committed.

The referral to investigation is a significant step in the disciplinary procedures applicable before the investigation and several issues arise in relation to a referral to investigation in Libyan law that have not been properly explored. This chapter will

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[2] Mohamed Alhelow, *The Administrative Judiciary* (Mnshat Elmarfe 2000) 524.
[3] Abdalhamed Alshorbi, *Discipline the Public Employees* (Mnshat Elmarfe 1995) 34.
[4] Mohamed Elhrary, *Review on the Management Works in Libyan Law* (2nd edn, Tripoli Complex of University 1994) 219-222.
[5] Administrative Appeal No.2/19, Libyan Supreme Court (29.11.73) *Supreme Court Journal*, Year 10, no. 2, 14.

assess the fairness of a referral to investigation based on the following "pressure" points:

1. The fairness of Libyan law in relation to identifying the relevant authority to deal with a referral to investigation.

2. The fairness of the permitted duration of a referral to investigation.

3. Whether it permissible to appeal against a referral to investigation.

4. The fairness of precautionary suspension as a consequence of a referral to investigation.

1.2.1 On the Fairness arising because Libyan Law does not specify the Relevant Authority to be competent to deal with a Referral to Investigation

Public employment laws in Libya (including the current Law No.12 of 2010 concerning Labour Relations) do not specify or designate the authority that is to deal with the referral to investigation. However, commentators[6] take the view that the administrative disciplinary authority, which enforces the penalty, is the authority that should deal with a referral to an investigation, as discipline lies within the remit of the presidential authority.

The Egyptian judiciary is in agreement with the commentators[7] as it specifies that the authority dealing with referral to an investigation should be the same authority as that enforcing the penalty. This is illustrated in Administrative Supreme Court of Egypt Appeal No.302/34,[8] a case concerning an inspector in the Grants Department at the Ministry of Awqaf[9] (the area of Bohera). The employee filed a lawsuit in the Administrative Supreme Court, requesting it to overturn a three days' salary deduction, which had been imposed by the Disciplinary Court as a result of the employee

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[6] Maher Aboelaini, *Disciplinary Guarantees and Procedures* (Union of Law 1991) 72; Nasreldin Elgadi, *The General Theory of Discipline in the Libyan Employment Law, A Comparative Study* (Darelfacer Elarabe 2002) 259.

[7] Ibid.

[8] Egyptian Administrative Supreme Court, Appeal No.302/34 (17.02.94) Council State, *Unreported.*

[9] The Ministry of Awqaf and Islamic Promote affairs inside and outside the country, where its activity includes looking after mosques and orphans. Also, discuss matters of Islam sconce (Fiqah) and directing Islamic centres.

disobeying his manager. The accused employee claimed that the decision reached was based on invalid procedures.

The Administrative Supreme Court ruled that the penalty decision enforced against the employee was invalid, because the employee had been referred by the head of the area of Bohera to the Administrative Prosecution to conduct an investigation against him. Later, when the case was referred to the Disciplinary Court (which had imposed a salary deduction penalty) the Court ruled that as the employment grade of the head of Bohera was inferior to that of the accused employee, it was not appropriate for him to investigate his superior. By looking at Article 82 of Egyptian Law No. 47 of 1978, it can be seen that the authority to investigate must be given to a specialist in this field who deals with referral decisions and enforcement of the penalty. That is to say, it should be of a higher ranking than the accused employee.[10] Since the investigator (the head of the area of Bohera) was of a lower ranking than the accused employee (the inspector of the area) the investigator did not have the right to refer the employee for investigation, nor did the investigator who enforced the penalty against him have the authority to do so.

Kuwaiti legislation, in contrast, specifies the authority concerned with the referral decisions, according to the employee's grade of employment. Kuwaiti law specifies that employees who work in general and leadership positions can be referred to investigation only by the relevant Minister.[11] Employees who work in technical and manual employment (e.g,. carpenters, mechanics) can be referred only by the Secretary of the Minister.[12] Failure to follow these rules with respect to referral decisions will result in the final decisions being rendered invalid. This is demonstrated in the Kuwaiti Supreme Court Administrative Appeal No.238/2001[13] in a case concerning a female doctor in Sabah hospital, who was subjected to a salary deduction by the assistant director of the hospital. The doctor refused to perform her duties, and opposed the decision that was handed down by the administration. In addition, the penalty was also

[10] Article 82 of Egyptian Law No. 47 of 1978, concerning Civil Servants, determines that the relevant authority concerned with the investigation should specialise in this area of employment and should be high-ranking (e.g,. the Under Secretary of the Ministry, the General Director of the Public Institution and the Minister, or the Head of the Public Institution. For further information see Chapter Four, Section 4.2, footnote 2.
[11] Article 56 of Kuwait Law No. 15 of 1979 concerning the Civil Service.
[12] Ibid.
[13] Kuwaiti Supreme Court, Administrative Appeal No.238/2001 (29.04.2002) *Unreported.*

imposed because the doctor left her work station to sit with the nurses, thereby neglecting her duties contrary to Article 24-27 of Law No.15 of 1979 concerning the Civil Service.

The employee did not accept the penalty decision and appealed to the Appeal Court, which refused her appeal. The accused employee subsequently appealed to the Differentiation Court (Supreme Court) claiming that the penalty that had been handed down had been enforced by a non-specialist authority. The Supreme Court overturned the penalty, based on Article 56 of Law No. 15 of 1979 concerning executive regulations. This Article stipulated that employees who work in a leadership role, such as this doctor, can be referred to investigation only by the Minister. The Court found no evidence that the Minister had conferred the assistant-director of the hospital with the authority to refer the doctor to an investigation. Therefore, the referral decision was enforced by a non-specialist authority, and the final decision was accordingly invalid.

It is submitted that Libyan law fails the test of fairness in not specifying which authority shall refer the employee to investigation. Libyan law does not specify the relevant authority that should make the referral to an investigation, despite the significant difficulties that can arise if the referral is made by an inappropriate authority. All measures based on such a referral, as well as the penalty, would be invalid. In order to avoid such consequences, Libyan law should identify the relevant authority to deal with a referral to investigation. Just as Kuwaiti law and the Egyptian judiciary both specify the authority for dealing with referral to an investigation, so Libyan law should also confirm which disciplinary authority should have the remit to refer an employee to investigation.[14]

The author submits that the nomination of an authority to deal with a referral to investigation (as in the case under Kuwaiti law) could serve to reform Libyan Law No. 12 of 2010 concerning Labour Relations. This is because determining which authority is permitted to refer an employee to investigation on any occasion is an important guarantee to the employee; it helps him/her to appeal to the judiciary in the case where a non-specified authority refers him/her to an investigation. It is submitted that failure

[14] Article 161 of Libyan Law No.12 of 2010 Labour Relations determines that the Administrative Authority is responsible for disciplining the employee, and this is the same authority that is concerned with the referral to investigation. This authority is composed of the Minister, the Under Secretary of the Ministry and the Head of Institution or Management Director of Administration. (For further information on disciplinary assignments of Administrative Authority in Libya, see Chapter Four, Section 4.2.1.

to specify this authority is a violation of the employee's rights, as at present any employee, whether in a senior or a junior position, can refer another employee to an investigation in Libya. This gap in Libyan law needs to be filled in order to promote legal certainty, as well as to guarantee fairness.

1.2.2 An assessment of the Fairness of the Permissible Duration of the Referral to Investigation

Libyan law specifies that the disciplinary procedures, such as referral to investigation, should be carried out within a reasonable time from the date of the employee committing the error, so that the exact details or evidence are not lost.[15] This section will attempt to answer the question of what shall be the permissible duration for the concerned authorities to refer an employee to an investigation, before it becomes impermissible to refer a particular disciplinary error. Also, the chapter will test the fairness of Libyan law in specifying this duration. The author assumes that fairness requires the period of the referral to the investigation to be specified.

Article 164 of current Law No. 12 of 2010 concerning Labour Relations[16] differentiates between limitation periods for administrative errors and financial errors (committing a financial error results in a waste of public funds). Administrative errors cannot be investigated after a period of three years from the date of committing the error. Financial errors cannot be investigated after a period of five years from the date of committing the error. This means that if the error committed is not discovered within the relevant limitation period specified by law, the employee cannot legally be punished by the administration. The ruling that the decision by the Disciplinary Committee with competence to investigate financial errors was invalid[17] was upheld by the Libyan Supreme Court in Administrative Appeal No.48/84.[18] The Court held that the error was committed in 1991 but the employee was referred to the Disciplinary Committee of

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[15] Mhmued Neda, *The Expiration of Disciplinary Lawsuit, A Comparative Study* (1st edn, Darelfacer Elarabe 1981) 87.

[16] This law replaced the previous Article 96 of Law No. 55 of 1976 concerning Civil Service.

[17] This Committee had enforced the penalty of a deduction of salary for two months, as the employee had been moonlighting, selling equipment. This action was contrary to Law No. 55 of 1976 concerning the Civil Service which states that an employee may not hold a second position while employed by the government.

[18] Administrative Appeal No.48/84, Libyan Supreme Court (6.02.2005) *Unreported.*

financial errors only in 1997. The Court ruled that the Disciplinary Committee's decision was invalid, as the time period for investigating the error had expired.

In some cases, an action committed by the employee can be regarded as both a disciplinary error and a criminal error at the same time, such as the theft of public funds or forgery of documents. Libyan Law No. 12 of 2010 concerning Labour Relations does not conflate disciplinary error with criminal error, regardless of the validity period for both errors.[19] This is in contrast to previous Law No. 55 of 1976 concerning the Civil Service, which conflates administrative error with criminal error.[20] Law No. 12 of 2010 specifies that the disciplinary error cannot be punished once the limitation period specified by law has expired, but that does not necessarily mean that the criminal error cannot be pursued.

It is submitted that Libyan law is fair with respect to determining the permissible legal period within which the referral to investigation should be made, and also that Libyan Law No. 12 of 2010 is fair and correct in separating disciplinary errors from criminal errors. The author submits that Libyan law is fair because the employee has a guarantee that no investigation will take place unless the disciplinary error is discovered within a specific legal period. Legislation protects the employee by not allowing the disciplinary error to chase follow an employee for the rest of his/her life and threatens his/her employment. This can be justified by the aim of the legislation in disciplinary law is to protect the public institution and therefore, the error should be discovered, and pursued, within a reasonable specified time. This is unlike the criminal legislation which protects the community at large, and where discovering, and pursuing, the criminal act at any time will still be a valid objective, in the interests of the wider community.[21]

However, linking the invalidity period of a disciplinary error with that of a criminal error, as in Law No. 55 of 1976 concerning the Civil Service, means that the disciplinary law limitation period potentially corresponds to the longer period specified in the Law of Criminal Procedures. This could mean that a disciplinary error could remain open to investigation so long as it was linked to a criminal error, since Article 1 of the Law No. 11 of 1997 concerning Specific Sentence of the Criminal Lawsuit does

[19] Article 164 of Law No. 12 of 2010 concerning Labour Relations.
[20] Article 96 (n 16).
[21] Administrative Appeal No.20/3, Libyan Supreme Court (14.03.74) *Supreme Court Journal,* Year 10, no.4, 45.

not specify a period outside which the criminal lawsuit would become invalid. This mean that where a disciplinary error remains related to a criminal error, the employee remains under the threat of disciplinary action all his/her life, as the period for investigating a criminal error has no limitation (whether the employee remains in his/her employment, or resigns).

1.2.3 The Unfairness of allowing no Appeal against Referral to Investigation

Referring an employee to investigation can affect him/her in different ways, such as causing him/her to be suspended temporarily from his/her post. This raises the question of whether in Libyan law the employee shall be permitted to appeal against the referral to investigation decision.

The Libyan Administrative Judiciary went through the same stages as the Egyptian Administrative Judiciary,[22] when the Appeal Court of Libya ruled in Appeal Court No.25/1[23] that it was not permissible to appeal against an employee's referral to investigation before the final decision, or a penalty decision, had been imposed by the relevant disciplinary authority. The rationale is that the referral to investigation forms part of the process, but is not the final decision. Consequently, the employee cannot appeal against the referral to investigation decision, because employees are only permitted to appeal against the final decision as stipulated in Article 2 (4) of Law No. 88 of 1971 concerning the Administrative Judiciary. In addition, the Court held that it is not beneficial for the employee to appeal against the referral to investigation, because appealing against the referral cannot change his legal position, or help him to overturn the charges brought against him.

The Administrative Supreme Court of Egypt held in Appeal No.996/25[24] that even though the decision of a referral to investigation can affect the employee's position by

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[22] This will be explained in the next paragraph.

[23] Appeal Court No.25/1, Administrative Court of Bangazi (25.03.73) *Unreported.*

[24] This case concerned a teacher who worked in the Applied Art Faculty at the University of Helwan, who filed a lawsuit requesting the Court to overturn the decision imposed on her (referral to the Disciplinary Court). The teacher claimed that she submitted a leave request to accompany her husband to Riyadh University in Saudi Arabia. When she went to the office at the University of Helwan to enquire if her request had been granted, she found the head of her department with the wife of the head of the university. The wife spoke inappropriately to the teacher in the presence of the head of department. The head of department supported the comments made by the wife of the head of the university. A complaint was brought against the teacher. That complaint led to an investigation and a disciplinary hearing. The Disciplinary Court ruled that the case did not lie within its remit. The Court ruled that the referral to a

referring him to the Court, the referral decision is not final and an appeal cannot be made to the Court. The referral to an investigation is a preliminary decision to assess whether or not the error committed is an administrative error, and to judge if a penalty is required.

Commentators[25] are not unanimous on this issue and several support the line adopted by the judiciary. These commentators' view is that the referral to an investigation is a preliminary decision, not a final one, and thus does not affect the legal status of the employee. As a result, it is not necessary for the employee to have the right to appeal to the judiciary to overturn the decision to refer him/her to an investigation. In their view, the final administrative decision is the only decision which affects the legal status of the employee or his/her personal well- being. Hyphen appealing to the judiciary to overturn the referral to an investigation may take longer than the time permitted for the duration of the investigation. One commentator[26] disagrees however, taking a different view, namely that the decision to refer the employee to an investigation has many legal consequences[27] which are sufficient justification for the employee to be granted the right to appeal against the initial referral decision.

It is submitted that the commentator[28] who advocates that the employee should be able to appeal the referral decision is correct. This is because it is unfair and against the employee's interests, to keep him/her waiting for a long time under the description of ''accused'' until a final decision has been made, so he/she should have the right to appeal the initial investigation referral decision. This is especially so if it is turns out

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disciplinary hearing was not considered to be a final decision, as it did not lie within the power of the Disciplinary Court. The employee did not accept the Disciplinary Court's decision and appealed (unsuccessfully) to the Administrative Supreme Court. The Administrative Supreme Court held that the employee was not allowed to appeal against a referral decision to an investigation, as this referral was not a final administrative decision, but simply a preliminary procedure leading to a disciplinary hearing, and that the employee was not allowed to appeal against a referral decision to a disciplinary hearing as it was not a final decision. Egyptian Administrative Supreme Court, Appeal No.996/25 (12.05.84) the Group of Principles Decided by the Administrative Supreme Egyptian Court from March 1984 until the end of June1984, Year 29, no.2, 111; see also Egyptian Administrative Supreme Court, Appeal No.700/11 (12.03.58) Year 12-13, Seat of Principles Established by the Administrative Supreme Court, Technical Office, 87.

[25] Sabeh Maskone, *Administrative Judiciary in the Arab Libyan Republic* (Publication of Bangazi University 1974) 319-320; see also, Mohamed Asfour, *Discipline of Public Sector Employees* (World of Books 1972) 166; Abdelaziz Kalefa, *Terms of Accepting the Appeal to Overturn the Administrative Decision* (Mnshat Elmarfe 2002) 86.

[26] Abdelfatah Hussien, *Discipline in Public Employment* (Darelnada Elarabia 1964) 146-147.

[27] The referral to the investigation affects the reputation of the accused employee as it may subject the employee to insult and gossip from his colleagues, superiors and subordinates.

[28] Abdelfatah Hussien (n 26) 146-147.

that the referral was made illegally, which means that the ''accusation'' (which may affect the reputation of the employee) will not be valid at that stage (as the final decision will be overturned because it was an illegal referral). In addition, permitting the employee to appeal the referral decision only after the final decision will also affect the interests of justice, as even if the employee is guilty he/she can avoid the punishment decision if it turns out that the referral decision was made by a non-specialised authority.[29] Accordingly, it is submitted that the fairness of Libyan law may be questionable if it does not consider permitting the employee to appeal the referral decision in an effort to protect his/her rights and reputation.

It can be concluded that although the Libyan[30] (and Egyptian[31]) administrative judiciary rule that appeals can be made only against the final administrative decision, however, the thesis submits that this inability to appeal against the referral to an investigation can be considered prejudicial to the rights of the employee, because the decision to refer to an investigation has grave consequences for an employee, one of which is that he could be temporarily suspended from work. In addition, this decision will adversely affect his/her reputation and cause him/her embarrassment among his/her colleagues. Consequently, it is submitted that the referral to an investigation should be subject to appeal by the accused under Libyan law, because of the serious prejudicial impact that would otherwise be inflicted on the accused employee.

1.3 An assessment of the Fairness of Precautionary Suspension as a Consequence of Referral to an Investigation in Libyan Law

Temporary (precautionary) suspension of an employee as a consequence of referral to an investigation is one of its most serious consequences. However, there is no specific definition of temporary suspension, either in the Libyan Law No. 12 of 2010 concerning Labour Relations, or in previous laws. Egyptian law (Law No. 47 of 1978

[29] As the author mentioned previously, Libyan law fails the test of fairness in not specifying which authority shall refer the employee to investigation, as at present any employee, whether in a senior or a junior position, can refer another employee to an investigation. Therefore, the author submits that because determining which authority is permitted to refer an employee, to investigation on any occasion is an important guarantee to the employee, it helps him/her to appeal to the judiciary in the case where a non-specified authority refers him/her to an investigation.See further information about the significant of referral decision by a non-specialised authority, Section 1.2.1 of this Chapter.

[30] Court Appeal No.25/1 (n 23) *Unreported.*

[31] Appeal No.996/25 (n 24) 111.

concerning Civil Servants) adopts a similar position. As a result, commentators have attempted to establish a definition of precautionary suspension.

Some of the commentators[32] state that precautionary suspension is a legal procedure and that the administration has a right to suspend an employee from employment. They see this as a temporary preventive procedure, for the benefit of the administrative investigation. Other commentators[33] define the precautionary suspension as a temporary protective measure, during which time the administration keeps the employee from work, while he/she is subject to disciplinary or criminal measures. As a result, he/she is not permitted to undertake any employment duties during the suspension period.

The administrative judiciary[34] defines precautionary suspension as being when a job is temporarily withheld from an employee, because the charges against him/her demand that he/she desists from working. This temporary suspension is imposed to protect the employee and his/her position in the workplace. However, it cannot be disputed that the authority of the accused employee is reduced while the authority concerned with the investigation ensures that the investigation can proceed following the suspension.

Therefore, the precautionary suspension appears to be neither a punishment nor a disciplinary penalty,[35] but a temporary measure imposed by the relevant authority to prevent the employee from carrying out his/her duties, for the benefit of the investigation. In this part of the thesis, the fairness of precautionary suspension in Libyan law will be assessed based on the following:

1. The reason for precautionary suspension.

2. How fair is the duration of the precautionary suspension in Libyan Law?

3. Whether Libyan law provides the suspended employee with sufficient rights during this period.

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[32] Nasreldin Elgadi (n 6) 515.
[33] Zaki Elnagar, *Summary of the Discipline of Servants Government Employees* (The General Egyptian Institution for Books 1986) 94.
[34] Administrative Appeal No.70/44, Libyan Supreme Court (28.01.2001) *Supreme Court Journal* (2003) Year 33-34, no. 4, 82.
[35] Galal Aladgem, *Discipline in the Light of both the Appeal and Administrative Supreme Court* (Darsheta for Publishing and Programming 2009) 230.

The author will propose that fairness requires that the period and extension period of precautionary suspension be specified, that the suspension be introduced on full pay and that it was made for the benefit of the investigation.

1.3.1 An assessment of the Fairness of the Reason for Precautionary (temporary) Suspension of the Employee

Libyan law stipulates that the only reason for precautionary suspension is to benefit the investigation.[36] Accordingly, for the precautionary suspension to be justified there must be an investigation into the alleged error committed by the employee.[37] In addition, keeping the employee from his/her employment during the investigation benefits the investigation.[38] Keeping the employee from his/her employment after the investigation has been completed (if there is no other investigation which requires keeping him/her from his/her employment) is invalid and illegal, as there is no 'live' investigation into the accused employee.[39]

It is submitted that the Libyan judiciary takes the same point of view as the Egyptian judiciary with respect to the reason for the precautionary suspension; that it is for the benefit of the investigation.[40] This was illustrated by the Supreme Court of Libya Administrative Appeal No.111/47,[41] an appeal lodged by an employee who worked in the Ministry of Formation and Professional Training, against the decision of the Minister, who suspended him from his post. The Court held that the suspension was

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[36] The current Law No. 12 of 2010 concerning Labour Relations, in addition to the other previous Civil Service Laws, is in agreement that the precautionary suspension measure is a procedure to facilitate the investigation, with the exception of Article 62 of Law No. 2 of 1951 concerning the Civil Service, which allowed precautionary suspension for the benefit of the public. See *the Official Journal of the United Kingdom of Libya* (24.10.51) no.1, Part 1, 14.

[37] Magawre Shahen, *The Disciplinary Respon*sibility (World of Books 1974) 287.

[38] Article 157 of Libyan Law No.12 of 2010 concerning Labour Relations; Article 83 of Egyptian Law No. 47 of 1978 concerning the Civil Servants. However, Article 45 of Law No.2 of 2007 concerning the People' Inspection and Control System allows the head of the People' Inspection and Control and System to suspend an employee temporarily, even if no investigation is conducted into the accused employee, if he/she is suspected of bringing his/her place of employment into disrepute and of embezzling public funds. It is noted that the precautionary suspension by the People' Inspection and Control System is for the benefit of the general public, which is in the remit of this organisation. The function of this People' Inspection and Control System is to: monitor all administration in Libya, to ensure that they work according to the rules and laws and to protect the community, as well as the employer, from the misdemeanours of employees. For further information regarding the function of Public Control and Monitoring Systems, see Chapter Two, Section 2.3.1.

[39] Mahmoud Helme, *The System of the Civil Servants in the Administrative System and the Public Sector* (Darelathad Elarabi 1970) 309; Mohamed Yakoot, *The Procedures and the Guarantees in Disciplining the Police Officers* (Mnshat Elmarfe 1993) 266-267.

[40] See further information in next paragraph.

[41] Administrative Appeal No.111/47, Libyan Supreme Court (20.01.2002) *Unreported.*

legal, according to the Article 81 of Law No. 55 of 1976 concerning the Civil Service, as the administrative decision by the Minister stated that suspending the employee from his job was for the purpose of avoiding any adverse effect on the investigation.

The Egyptian Administrative Supreme Court held that suspension was illegal in Appeal No.6032/45.[42] The Administrative Prosecution, after completing the investigation into the accused employee, referred him to the Disciplinary Court to further investigate the charges against him.[43] The Disciplinary Court found the employee innocent of the charges, as the Administration did not provide the relevant documents to prove the charges against him. The accused employee submitted an appeal to the Administrative Supreme Court against the suspension decision which ruled that the temporary suspension should not have taken place unless there was an ongoing investigation into the employee which required it. Therefore, as there was no ongoing investigation against the employee, and suspension was not required to benefit the investigation, the temporary suspension decision was illegal.

The author submits that Libyan and Egyptian laws are fair with respect to precautionary suspension. This is because both make it a condition that the precautionary suspension must be handed down only if the benefit of the investigation requires this, with no exceptions. This means an investigation must be carried out in order to justify this. It also means that the employee will be given the right to be informed of the charges, and the right to a defence.[44]

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[42] Egyptian Administrative Supreme Court, Appeal No.6032/4 Court (8.03.2007) the Seat of Principles Established by the Egyptian Administrative Supreme Court, from October2006 until December 2009, 564.

[43] The employee who worked as the legal representative of an engineering department accepted a bribe of one thousand dinar to finish and expedite a contract to buy a floor of a building which he owned in the city of Abohamad. An investigation was conducted by the Administrative Prosecution and he was suspended on half salary.

[44] In contrast, Article 84 of the executive regulations of Kuwaiti Law No. 15 of 1979 (concerning the Civil Service) allows for a precautionary suspension for the benefit of the investigation as well as for the general benefit (public institution). Kuwaiti law stipulates that the precautionary suspension must be for the benefit of the investigation, if the referral decision is enforced by the Secretary of the Ministry regarding the employee's work in leadership and senior positions. While the reason for precautionary suspension must be for the general benefit of the institution, the suspension decision is enforced by the Minister with regard to all the employees working in his Ministry. It is submitted that Kuwaiti law makes it a condition that precautionary suspension must be made on the grounds that it is required by the investigation (in cases when the Secretary of the Ministry enforces the precautionary suspension decision).On the other hand, it is also submitted that Kuwaiti law does not make it a condition for the Minister to consider if the persecutory suspension is for the benefit of the investigation, when he makes the precautionary decision. It does however, stipulate that the Minister must consider if it is for the general benefit of the institution. Accordingly, the author submits that this seems excessively vague. This

1.3.2 The Meaning in Law of 'the Benefit of the Investigation

Libyan commentators[45] view the condition 'the benefit of the investigation' as one that protects the employee and his/her position in the work place, so the condition should be fulfilled when there is an investigation into an accused employee and when it is necessity to keep the employee from work. Egyptian commentators[46] disagree about the meaning of 'the benefit of the investigation'. There are three views.

Commentators[47] who take the first view define 'the benefit of the investigation' narrowly, confining it literally to the legal text. They are of the view that the precautionary suspension is a preventative measure, which must be taken when the investigation into the accused employee is being conducted and that keeping the employee in employment could have an adverse effect on the investigation as well as on his/her reputation. For example, if the employee is a subordinate employee and has committed an error that is not consistent with his/her employment position, or if he/she is a storekeeper being charged with wasting money for which he/she is responsible. In these cases, allowing the employee to continue his/her employment duties would be inconsistent with the requirements of the employer.

Commentators[48] who take the second view 'interpret the benefit of the investigation' more broadly. They suggest that the precautionary suspension is for the public's sake and can be imposed even if there is no investigation being conducted into the accused employee. This is in complete agreement with a purposive reading of the legal text, although it is in disagreement with a literal reading of it. The third view[49] falls between

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is because the term 'general benefit' has a wide meaning; the Minister can misuse it and suspend any employee from his/her work. He may then claim that this is for the general benefit of the employment. Moreover, the Minister can do all this without conducting an investigation into the employee, which is against the employee's rights. It is submitted that Libyan law is fair and provides a valid justification for precautionary suspension, and that Kuwaiti law should consider the Libyan and Egyptian laws on this issue.

[45] Hussin Elmehdi, *Interpretation of Public Employments' Sentences* (Darelgamaheria for Publishing, Distribution and Advertisement 2000) 347-348; see also Mohamed Elhrary, *Principle of Administrative Law, Part Two* (1st edn, Publications of Open University 1992) 90; Nasreldin Elgadi (n 6) 713.

[46] Mstafa Bakar, *Discipline the Civil Servants in the State (*Darelfacer Elarabe 1966) 216; see also Magawre Shahen, *The Disciplinary Decision* (World of Books 1986) 451; Elsaid Ibrahem, *The Explanation of the Civil Service System in the State* (Darelmaaref 1966) 590; Mhamed Akelaa, 'Precautionary (temporary) Suspension in Egyptian Law No.47 of 1978' (Year 61) 5-6 Journal of Lawyer 127; Mohamed Raswan and Ibrahem Abas, *The Disciplinary Procedures for Public Employee and Public Sector* (Matbat Elrsala 1969) 62-64.

[47] Ibid Mstafa Bakar, 216; Ibid Magawre Shahen, 451.

[48] Elsaid Ibrahem (n 46) 590; Mohamed Raswanand and Ibrahem Abas (n 46) 62-64.

[49] Mhamed Akelaa (n 46) 127.

the other two views, taking the line that it is permissible to suspend the employee temporarily, if it is for the benefit of either the employer or the investigation. They include the condition that the error committed by the employee is serious and affects the investigation. The error affects the reputation of the place of employment and the investigation measures.

The author submits that the first view is more logical[50] and this is in agreement with Libyan commentators.[51] This is because the law takes a clear position regarding temporary suspension.[52] The law restricts the authority of the administration to temporarily suspend the accused employee, allowing it only if the benefit of the investigation requires it. The benefit of the investigation is strongly affected by keeping the employee in his/her employment during the investigation. For example, if the employee has not been suspended from his/her position during the investigation, he/she might take advantage of his/her employment to hide or falsify important documents that are related to the investigation; or, in addition, an accused employees who hold a senior position may coerce the employees who work under him/her to testify in his/her favour.[53] Moreover, suspending the accused employee will be beneficial to the employment, because the sincerity and loyalty of the employee is under suspicion. There is uncertainty as to whether the accused employee will be as confident and competent to do his/her duties as he/she was prior to the charges being levelled against him/her.

1.3.3 How fair is the Duration of the Precautionary Suspension in Libyan Law?

Libyan Law No. 12 of 2010 concerning Labour Relations stipulates that the administration is permitted to suspend the employee for a period of not more than three months during the investigation.[54] A similar period is specified in Egyptian Law Civil Servant No. 47 of 1978.[55] Accordingly, the relevant authority has the right to suspend the employee temporarily, for a period of not more than three months in total, by one,

[50] Mstafa Bakar (n 46) 216; Magawre Shahen (n 46) 451.
[51] Hussin Elmehdi (n 45) 347-348; Mohamed Elhrary (n 45) 90; Nasreldin Elgadi (n 6) 713.
[52] Article 157 (n 38); Article 83 (n 38).
[53] Mohamed Helmi (n 39) 309.
[54] Article 157 (n 38).
[55] Article 83 (n 38).

or more than one, decision.[56] But if the administrative authority needs to suspend the employee for more than three months, then it has to refer the case to the Disciplinary Committee regarding this issue (according to Libyan law[57]) or to the Disciplinary Court (according to Egyptian law).[58] Neither Libyan nor Egyptian law confines either the Disciplinary Committee (Libya) or the Disciplinary Court (Egypt) to a specific period, when they extend the period of the precautionary suspension.

This raises an important question: is it permissible for the Disciplinary Committee in Libya and the Disciplinary Court in Egypt to extend the period of the precautionary suspension to a maximum of three months, or should they have the power to extend the term for an indefinite period?

Egyptian commentators[59] answer this question: they observe that the Disciplinary Court has no right to extend the precautionary suspension for more than three months and that they should be confined to the precautionary suspension period of three months (which is specified by law). In addition, this three month period of extended suspension provides a guarantee to the accused employee. Other Egyptian commentators[60] state that the Disciplinary Court is not limited to a specific period for the precautionary suspension. This view is based on the fact that the legal text gives the Disciplinary Court the right to extend the period of the precautionary suspension, without any restriction to a specific period. This does not, in their view, violate the disciplinary guarantees of the employee.

It seems that the first view[61] is in accordance with the legal text, because it puts a restriction on the period of the precautionary suspension, that is, the period of the suspension is specified. This is a restriction on the disciplinary authority, as it cannot extend the precautionary suspension beyond what is specified. In the meantime it is a guarantee to the accused employee that no authority can use the precautionary suspension procedure to punish him/her indefinitely. By this restriction, the accused employee will always know the duration and end of the suspension and it supports the point that the suspension is made for the benefit of the investigation.

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[56] Samir Albhi, *Explaining the Civil Servants Law in the State* (Darelkotob Elwatani 1995) 65.
[57] Article 157 (n 38).
[58] Article 83 (n 38).
[59] Mostafa Bakr (n 46) 219-221; Abdalftah Hussien (n 26) 160-163.
[60] SlimanTmaoi (n 3) 367-368; Magawre Shahen (n 37) 298.
[61] Mostafa Bakr (n 46) 219-221; Abdalftah Hussien (n 26) 160-163.

It is submitted that no restriction has been put on the duration of the extension period of the precautionary suspension in either Libyan or Egyptian law.[62] This could be unfair to the accused employee because it may have an adverse effect on him/her. On the other hand, confining the Disciplinary Committee to a specific time frame may contradict the principle of the benefit of the investigation. The benefit of the investigation may call for continued exclusion of the employee from his/her job. Therefore, it is submitted that the Libyan and Egyptian legislation should do as the Kuwaiti legislation[63] does: rules and conditions should be put on the authority of the Disciplinary Committee when estimating the extension period of the precautionary suspension.

The period of the extension of the precautionary suspension must be specified (e.g., three months) and then the Disciplinary Committee can consider whether there is the need for a further extension. Specifying the extension period of the precautionary suspension period represents a restriction on the Disciplinary Authority, which has the power to set the extension of the period of suspension (it accelerates the settlement of the investigation). This provides a guarantee to the accused employee. The purpose of the precautionary suspension is to benefit the investigation. It is submitted that failure to specify the extension period of the precautionary suspension can give unlimited power to the Disciplinary Authority. This unlimited power may be used to penalise the employee, and keep him/her away from work for an indefinite period. This could potentially have serious effects on the employee's salary, as half his/her salary is suspended from the date of the suspension.[64]

1.3.4 Deduction of Salary: Fair or Foul?

The suspended employee should not be treated as guilty as long as a final decision has not been enforced to prove this. Therefore, a precautionary suspension in law is only made to serve the benefit of the investigation, as explained above. Accordingly, the

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[62] Libyan Law No. 12 of 2010 concerning Labour Relations and Egyptian Law No.47 of 1978 concerning Civil Servants.

[63] The Kuwaiti legislature in contrast, specifies the extension period of the precautionary suspension (a period of three months) and this extension must be justified by valid causes.

[64] Also, specifying the extension period of the precautionary suspension is of benefit to the institution, as it will save money. During suspension, the institution pays the employee half salary, even though he does not perform any duties for the institution. However, as soon as the suspension stops, the employee either goes back to work (earns his salary by being present at work and performing his duties) or is charged.

suspended employee should be provided with his/her full salary while under suspension. In order to answer the question of whether Libyan law has provided the suspended employee with sufficient rights, the author will look into the rights of the suspended employee in Libya, and compare them to an employee's rights under Egyptian law.

In Libyan law, a salary is paid to the employee for the work he/she performs for the institution he works for. The suspended employee, as he/she is away from work, no longer provides any service to this institution. Consequently, he/she is not entitled to receive his salary.[65] However, Libyan law considers that the suspended employee does not choose to be suspended. The employee is suspended as a precautionary measure, taken by the Disciplinary Authority for the benefit of the investigation. Libyan law (Law No. 12 of 2010 concerning Labour Relations[66]) is keen to ensure a minimum standard of living for the employee during suspension, so it allows him/her to receive half his/her salary, beginning from the date of the suspension; the other half is suspended by law.[67]

It is noted that Law No. 12 of 2010 concerning Labour Relations is aimed at protecting public employees by producing more humane rights than the previous laws.[68] This law allows payment of his/her half salary to the suspended employee, without making the decision dependent on the approval of the Disciplinary Committee. A few commentators[69] disagree that Libyan law should pay the suspended employee his/her full salary, based on the fact that the purpose of the precautionary suspension is to keep the employee from his/her employment duties. Consequently, suspending half of the employee's salary is a violation of this purpose, especially as the employee, during this stage of the investigation, is only accused of committing a certain error and has not been convicted of it. Moreover, the combination of the precautionary suspension and the deprivation of salary are incompatible with the nature of the suspension: the

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[65] Mstafa Yusuf, *Disciplinary Responsibility for Public Employees and its Guarantees* (Darelnada Elarabia 2009) 103.
[66] Article 158 of Law No .12 of 2010 concerning Labour Relations.
[67] Ibid.
[68] Article 61 (2) of Law No. 36 of 1956 concerning the Civil Service, Article 61(2) of Law No.4 of 1964 concerning the Civil Service, Article 81 (3) and Article 82 of Law No. 55 of 1976 concerning the Civil Service. These laws were based on no salary without work; the full salary of the employee is suspended all through the suspension period, until the Disciplinary Committee decides on whether or not to give the salary.
[69] Aomer Barkat, 'Precautionary Suspension' (1984 Year 26) Journal of Administrative Sciences 158.

temporary suspension is *a precautionary measure*, and should not be *a disciplinary punishment* enforced on the employee.

The author submits that this view is correct, because the combination of the precautionary suspension and the suspension of half of the salary will often be more detrimental to the employee than the ultimate disciplinary penalties that might eventually be imposed, because his/her salary is usually his/her only source of income. Suspending half of the employee's salary causes loss to the employee as well as to his/her family, who may have nothing to do with the error he/she may or may not have committed. Moreover, suspending half of the employee's salary by law seems like a punishment of the employee. This action suggests that the employee is guilty despite the fact that at this stage he/she is still being investigated and is innocent unless the investigation proves otherwise.

If the investigation shows that the employee is not guilty of the charges, then he/she returns to work and is compensated for the suspension period by being paid his/her full salary for the period of suspension. If the administration refuses to compensate the employee, then its decision will be invalid and subject to appeal to the administrative judiciary, to overturn this decision. This is the ruling of the Supreme Court of Libya in Administrative Appeal, No.26/31[70] when it held that if the disciplinary or criminal investigation found the accused employee to be innocent, the employee must regain his/her job and his/her salary be paid in full according to Article 81(4) of Law No. 55 of 1976.[71]

This was also illustrated by the Administrative Court of Tripoli Appeal No.2/28;[72] an appeal lodged by an employee working for Elekwa Elarabe Ellebe in Damascus. The employee appealed against the decision of the administration, which refused to let him return to work or to pay him the full salary for the period of his suspension. The Court held that the decision was invalid, because the Criminal Court, as well as the Disciplinary Committee, held that the employee was innocent of the charges against him (He was charged with theft from the treasury of funds entrusted to him). This

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[70] Administrative Appeal No.26/31, Libyan Supreme Court (6.09.83) *Supreme Court Journal*, Year 20, no.1-2, 41.

[71] The current Article158 of Law No. 12 of 2010 concerning Labour Relations, which has replaced the previous Article 81(4) of Law No. 55 of 1976 concerning the Civil Service, but was identical to Law No. 55 of 1976.

[72] Appeal Court No.2/28, Administrative Court of Tripoli (30.04.2001) *Unreported.*

means the suspension decision issued by the administration was invalid, as it was contrary to the provisions of Article 81 (4) of Law No. 55 of 1976 concerning the Civil Service. The Article stipulates that if the disciplinary and criminal measures result in finding the employee innocent, the employee can return to work and is entitled to receive his full salary.

The author submits that the judgment is logical and fair. This is because the Court regards the precautionary suspension as a procedure to serve the interests of the investigation, rather than to punish the employee. Therefore, if the investigation ends by finding the employee innocent, the disciplinary authority should let the employee return to his/her employment, as this would be the least the disciplinary authority can do for the employee as an apology for the false charges directed against him/her.

In Egypt, Law No. 47 of 1978 concerning Civil Servants stipulates that the suspended employee has the right to receive half his salary, while the other half is to be suspended from the date of the suspension. Suspending half of the employee's salary can only be done provided that the authority who decided the precautionary suspension consults the Disciplinary Court (regarding suspending half of the salary) within a period of not more than ten days from the date of the suspension.[73] In addition, the Disciplinary Court must reply within a period of not more than twenty days from receiving the matter.[74] Failure to comply with this procedure will result in the employee being entitled to continue receiving a full salary.[75]

In conclusion: both Libyan and Egyptian legislation agree on giving half of the salary to the suspended employee, but disagree on the method of suspending the other half. Libyan law provides the suspended employee with half of his/her salary, by the power of law, without giving authority to the Disciplinary Committee to decide on the other (suspended) half.[76] In comparison, Egyptian law provides the suspended employee with more guarantees. It provides the employee with half of his salary and gives the Disciplinary Court the authority to decide on the other half, that is, the Disciplinary Court has the power to decide whether the employee is to receive the suspended half of his/her salary or not, depending on the circumstances of the investigation.

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[73] Article 83 (n 38).
[74] Ibid.
[75] Ahmed Goma, *Conflicts of the Disciplinary Judiciary (*Mnshat Elmarfe 1984) 72.
[76] Article 158 (n 66).

It is submitted that Libyan law is unfair in retaining half of the employee's salary. This is because when the law provides the suspended employee with half his/her salary, or even makes the suspension without salary, it misses the essential goal of the precautionary suspension, which is for the benefit of the investigation, which does not require the retention of half of the employee's salary. Moreover, despite the fact that Libyan law states that the precautionary suspension is only made to serve the benefit of the investigation and not as a punishment, it contradicts itself when it decides to hold half of the employee's salary without any justification.

Therefore, it is submitted that Libyan law should do as UK law does. In UK law, suspension should be made with pay; to do otherwise it is illegal unless stated in the contract of the employee.[77] Moreover, ACAS Code of Practice, which regulates disciplinary procedures, states that suspension should be made on full pay,[78] as it regards suspending an employee without pay as a punishment, which is contrary to the goal of a precautionary suspension. However, Libyan law may at least take the same direction as Egypt[79] which is more fair than Libyan law in holding half of the employee's salary, as it gives the Disciplinary Court the power to decide whether the employee can receive the other half or not. It is submitted that Libyan law needs (at least) to give the Disciplinary Committee the authority to decide on giving the suspended half of the salary to the employee (according o the severity of the error committed and the proceedings under investigation). Even better would be if Libyan legislation went further and was amended so that it does not connect the precautionary suspension to the suspended employee's salary at all.

1.4 Conclusion

The aim of this chapter has been to investigate whether the guarantees provided by Libyan law at the stage prior to the investigation are enough in order to examine the fairness of Libyan law with respect to the employee's guarantees. The thesis concluded the following:

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[77] Langston v Auew [1974] 1 All ER 980 [1974] ICR 180 (CA).
[78] ACAS 'ACAS Code of Practice 1-Disciplinary and Grievance Procedures' (April 2009) 4-10.
[79] Article 83 (n 38).

(a) Libyan law failed the test on fairness in not specifying the relevant authority to deal with a referral to an investigation, despite the significant difficulties that can arise if the referral is made by an inappropriate authority. All measures based on this referral, as well as the penalty, can be invalid. In order to avoid such consequences, Libyan law should nominate a relevant authority to deal with referrals to investigation, just as Kuwaiti law and the Egyptian judiciary specify the authority concerned with referrals to investigation, so Libyan law should give the presidential disciplinary authority the remit to refer an employee to investigation.

(b) With respect to the limitation periods, it is submitted that Libyan law is fair with respect to determining the permissible legal period in which referral to investigation can be made. This is because the employee is guaranteed that the disciplinary authority cannot investigate him/her unless in conformity with a limitation period specified by law.[80] This is to guarantee the employee that he/she will not remain under the threat of disciplinary action for the duration of his/her entire career.

(c) The inability to appeal against the referral to an investigation decision in Libyan law is unfairly prejudicial to the employee, because the referral decision has grave consequences for the employee, one of which is that he/she could be suspended temporarily from work.[81] In addition, this decision has an impact on the accused's reputation and causes him/her embarrassment among his/her colleagues. Accordingly, it is submitted that the decision to refer to investigation should be subject to appeal by the accused in Libyan law, because of the serious potential impact on the accused employee.

(d) With respect to precautionary suspension as a consequence of referral to investigation, Libyan law strikes a fair balance in deciding that the precautionary suspension should be for a three months period and also because it makes it a condition that the precautionary suspension must be handed down only if the benefit of the investigation requires it, with no exceptions. The benefit of the investigation may be seriously affected by keeping the employee in his/her job during the investigation. If the employee is not suspended from his/her position during the investigation, he/she

[80] The period is three years from the date of committing Administrative errors and five years from the date of committing financial error. See further explanation above Section 1.2.2.
[81] Explained in detail above on Section 1.3.

might take advantage of his/her position to hide or falsify important documents that may be related to the investigation. However, Libyan law is unfairly prejudicial with respect to the extension period of the precautionary suspension. This is because it does not specify the maximum period for the extension, and gives the Disciplinary Committee the power to decide on the extension period of the precautionary suspension. The purpose of the precautionary suspension is to benefit the investigation. Failure to specify the extension period of the precautionary suspension can give unlimited power to the Disciplinary Committee, which may be used to penalise the employee and to keep him/her away from his/her work for an unknown period of indefinite duration. This has serious effects on the employee's salary, as half of this is suspended, beginning from the date of the suspension, which could cause severe hardship. It is submitted that rules and conditions should be imposed on the authority of the Disciplinary Committee to make an extension to the period of precautionary suspension. The period of the extension must be specified (e.g three months), as it is in Kuwaiti law and then the Disciplinary Committee can consider whether there is a need for a further extension.

Also, it is submitted that Libyan law is unfairly prejudicial when it provides for the suspension of half of the suspended employee's salary.[82] This is because when the law provides the suspended employee with half his/her salary or even makes the suspension without salary, it misses the essential goal of the precautionary suspension which is for 'the benefit of the investigation', which does not require half of the employee's salary to be withheld. This can only be regarded as a punishment, which Libyan law itself regards as unfair. Therefore, the employee must be provided with a full salary during the suspension period, as is the case in UK law. However, Libyan law may at least take the same direction as Egyptian law, which is fair, in that it gives power to the Disciplinary Court to decide whether or not the employee should receive the other half of his/her salary.

[82] As explained in detail above Section 1.3.4.

Chapter Two

Are there Sufficient Guarantees in the Investigation Stage in Libyan Law?

2.1 Introduction

There are a number of measures and guarantees which should be provided in order to ensure fair questioning of an accused employee during the investigation of the charges against him/her. This chapter will include a study of the authority which is assigned to conduct an investigation into an accused employee. Libyan law gives the Administration the right to investigate the employee on all occasions, apart from some occasions where the Public Monitoring Control System can run an investigation into the employee. The author will examine the extent to which Libyan law organises its rules in order to apply the principle of impartiality to the investigatory authorities during an investigation. Also, the author will investigate whether Libyan law separates between the authority which is directing the charge and the authority which imposed the penalty. This is because separating the two mentioned authorities helps in achieve a fair disciplinary process and disciplinary hearing.

Also, Libyan law stipulates that an investigation should be conducted with the employee, and the investigation should be conducted in written form. However, it makes an exception as stipulated, that an investigation may not necessarily take place in some instances and may also be carried out verbally in some cases.[1] Consequently, the author will examine the fairness of these exceptions that Libyan law makes with respect to the investigation, as these exceptions can have an effect on the disciplinary guarantees of the employee. The author proposes that fairness requires a separation between the authority directing the charge and the authority conducting the investigation of the employee. In addition, there must in all cases, without exception, be an investigation of the accused employee before the enforcement of a penalty. The investigator must be accompanied by a clerk to record the investigation and both must

[1] For further information see Section 2.4.1 of this Chapter.

sign the record. This chapter will discuss why these standards are so important in guaranteeing the fairness of Libyan public employment disciplinary guarantees. Accordingly, the author will aim to look into whether there are sufficient guarantees in Libyan law *during the investigation phase* in order to test the fairness of Libyan law in providing sufficient guarantees to the employee during this phase. Therefore, three key areas will be examined:

1. The fairness of how the administrative authority conducts the investigation.

2. Circumstances in which Libyan law allows an investigation to be conducted into the accused employees, and exceptions.

3. The fairness of the principle of writing up the proceedings of the administrative investigation, and exceptions.

2.2 Fairness of the Specialty of the Administrative Authority in the Investigation

Libyan[2] and Egyptian[3] Law assigns the responsibility for conducting the investigation to the administrative authority known as the People's Inspection and Control System in Libya and the Administrative Prosecution in Egypt. The question is: to what extent is Libyan law fair in giving these specialties to the administrative authority to conduct an investigation. In Libyan and Egyptian law,[4] investigations into disciplinary errors are usually conducted by the Administrative Authority of the public institution that the employee works for. The Administrative Authority investigates the employee by either one of the two following methods:[5]

In the first method, the investigation is conducted by the Administrative Authority itself, by assigning one of the immediate superiors of the employee, according to the local hierarchy system. In the second method, the investigation is conducted by a specialised management team attached to the Administrative Authority of the institution, usually called the Department of Law or Investigations Department.

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[2] This is confirmed by Article 156 of Libyan Law No. 12 of 2010 concerning Labour Relations and Article 46 of Law No. 2 of 2007 concerning the People's Inspection and Control System.

[3] Article 3 of Egyptian Law No.117 of 1958 concerning the Reorganization of Administrative Prosecution and Disciplinary Hearing.

[4] Article 156 (n 2); Ibid, Article 3.

[5] Mohamed Yakoot, *The Explanation of Disciplinary Procedure* (Mnshat Elmarfe 2004) 287.

However, if the Administrative Authority chooses to conduct the investigation by itself, that would mean a combination of both directing the charges and the sentencing functions. This could mean a violation of the principle of impartiality, which must be present in disciplinary procedures.

Libyan and Egyptian commentators[6] are of the view that the administrative head is not allowed to conduct the investigation and also direct the charges and enforce the penalty. This would be considered a violation against the principle of impartiality, as this principle cannot be sacrificed under any circumstances according to the simple meaning of a fair disciplinary hearing. Other commentators[7] disagree; they take the view that nothing can stop the administrative head from both conducting the investigation and directing the charges against the employee and enforcing the penalty, because the principle of impartiality is difficult to apply. They argue that it is difficult from a practical point of view to exclude the administrative head from the investigation. As a result, the guarantees in this case are confined to an appeal by the employee against the decision only after it has already been taken.

Another view[8] is a compromise between the previous views discussed above. Some commentators take the view that although there is no legal bar preventing the administrative head from conducting the investigation. This is because commentators in this view claimed that the administrative investigation is not at a Court level, and therefore, conducting an administrative investigation is not a judicial function require separation between the authority of directing the charge and investigating the accused employee. However, they viewed that under normal circumstances it is desirable for the investigation to be conducted by an independent authority other than the administrative head, because this may give a degree of comfort to the accused, as well as keeping the suspicion of bias away from the administrative head. The author prefers the first view of commentators (above): it is appropriate, because the principle of impartiality is one

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[6] Ibrahim Elmongy, *Overturn the Disciplinary Decision* (1st edn, Mnshat Elmarfe 2005) 701; Ibrahim Elsyad, *Explanation of Civil Service System* (Darelmarfe 1966) 525; Nasreldin Elgadi, *The General Theory of Discipline in the Libyan Employment Law, A Comparative Study* (Darelfacer Elarabe 2002) 544-545.

[7] Abdelfatah Hussien, *Discipline in Public Employment* (Darelnada Elarabia 1964) 245; Abdelfattah Abdalbar, *The Rules which have Principles in Discipline and Commenting on Them* (Darelnahda Elarabia 1999) 145.

[8] Sliman Tmaoi, *Administrative Justice, Disciplinary Justice, A Comparative Study* (4th edn, Darelfacer Elarabe 1995) 524; Ramdan Batik, *Disciplinary Responsibility* (Darelnada Elarabia 1998) 305.

of the most important principles that should be provided by the judge or the administrative investigator.

By looking to the basis of discipline in Libyan law, it can be suggested that the possibility of bias is a feature, when the law gives both the power to direct the charge and to convict to the administrative head.[9] In addition, this is contrary to the principle of impartiality, which is one of the most important guarantees in discipline.[10] Impartiality cannot be achieved without a separation between the two authorities responsible for directing the charge, and conviction. Consequently, the question arises: since the legal guarantee of the principle of impartiality applies only to disciplinary committees,[11] why does it not make it also applicable to the administrative authorities? In addition, even where an investigation is conducted by the management of the Department of Legal Affairs (rather than administration head), even this is not a complete separation, because the management of legal affairs follows the administrative authority, and this obviously can conflict with the principle of impartiality.

In conclusion, the author submits that Libyan law does not satisfy the standard of fairness in not separating the function of directing the charges and imposing the penalty: and Libyan law should require this separation in order to remove the possibility of bias and partiality. This can be achieve by giving the People's Inspection and Control System in Libya more of a role in the investigation of all disciplinary violations, leaving the role of imposing the penalty to the administrative side. This would apply in cases where the penalty is just a warning or deduction of salary; if it is more than that, the employee would need to be referred to a specialised Disciplinary Committee,[12] considering that such Committees are composed of judicial administrative members. This may represent a guarantee to the accused employee with

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[9] Articles 156-161 of Law No. 12 of 2010 concerning Labour Relations.

[10] The principle of impartiality is one of the most important guarantees for the public employee in disciplinary procedure. The employee can be assured that every authority involved in the disciplinary process is independent, impartial and has its specific specialty. None of these authorities has the right to practise the authorities' specialties. As a result, in the principle of impartiality, the authority who directs the charge will not be the same authority that enforces the penalty, so there will not be any connection between any two authorities. See further below Chapter Four, Section 4.3- 4.3.2.2.

[11] Article 90 of Law No. 55 of 1976 concerning the Civil Service. Regarding applying the principle of impartiality on disciplinary committees. See in detail Chapter Four, Section 4.3.2.2.

[12] Articles 160-161 of Law No.12 of 2010 concerning Labour Relations. Regarding disciplinary authority concerned with imposing the penalty, see in detail Chapter Four, Section 4.2-4.2.2.4.

respect to providing assurance that the ultimate penalty imposed will be decided fairly and appropriate to the error committed.

2.3 Investigation by the People's Inspection and Control System in Libyan Law

The People's Inspection and Control System[13] is a monitoring system to monitor all public institutions in the country. It represents a monitoring mechanism over all administrations inside the public institutions in the country.[14] Its function is to ascertain the extent of the performance of the public institutions' responsibilities and duties. It also ensures that employees in the public institution follow the rules and regulations stipulated by law, to achieve the objective of providing services by the public institution on a regular basis.[15]

2.3.1 Fairness of the Involvement of People's Inspection and Control System in the Investigations in Libyan Law

Investigations into disciplinary errors are usually conducted by the administrative authority of the public institution that the employee works for. But Libyan Law No. 2 of 2007 concerning the People's Inspection and Control System stipulates something different in Article 39-40, as it gives the People's Inspection and Control System the power to investigate errors committed by employees, without imposing the corresponding penalties.[16] Accordingly, this part of the chapter will investigate the

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[13] Article 5-6 of Law No. 2 of 2007, the People's Inspection and Control System stipulates that the People's Inspection and Control System consists of a general popular committee, which consists of the Secretary of the Device and the Assistant Secretary, who are chosen by the General People's Congress. Also, this system consists of the members of Public Control Monitoring of People's Main Conference, a number of employees, who must be holders of Libyan citizenship and holders of high qualifications or a university bachelor degree.

[14] Article 4 of Law No. 2 of 2007 stipulates that all those bodies which are funded from the general budget in the state (The institutions and public bodies) are under the monitoring control of People's Inspection and Control System. One of these which is under the monitoring of People's Inspection and Control System is the public institutions in the country (which is a main concern in the project) such as; a. Public electricity institution. b. General authority for maritime transport. Also, People's Inspection and Control System monitor other official bodies, such as Libyan people's offices worldwide as well as ports, airports and foreign companies that engage in activities in Libya and who make contracts for the benefit of the bodies, which is to undergo the monitoring of the People's Inspection and Control System.

[15] Articles 32-34-36 of Law No. 2 of 2007 concerning the People's Inspection and Control System.

[16] Article 3 of Egyptian Law No. 117 of 1958 concerning organisation of Administrative Prosecution and Disciplinary Courts gives the Administrative Prosecution the right to investigate errors committed by employees without enforcing the penalty. Also, it specifies to the administrative prosecution the occasions on which it is permitted to investigate, which are the same occasions that are specified by the Libyan legislation for the Public Control Monitoring system. These occasions are as follows:

fairness of the involvement of People's Inspection and Control System in employee investigations under Libyan law. This system has the right to investigate errors committed by employees in the following cases:[17]

(a) A request from the Administrative Authority to the People's Inspection and Control System to initiate the investigation. The administrative authority has the power to decide whether or not the investigation needs to be referred to the People's Inspection and Control System (however, errors committed by the employee of an administrative and financial nature must be referred to the People's Inspection and Control System).[18]

(b) If the People's Inspection and Control System has received complaints from individuals regarding an error contrary to the law or neglect of duty in a public institution which it monitors.

(c) If a member of the Public Control Monitoring System discovers any disciplinary errors during its monitoring to a public institution, it is permitted for him/her to conduct an investigation into employees who committed the errors.

It seems obvious in the last two situations that a member of the People's Inspection and Control System should inform the public institution that the employee works for before conducting an investigation into him/her.[19] This action is also in the interest of the public institution to be able to follow what is happening with their employee. In a case where the member of the People's Inspection and Control System starts an investigation into the employee without informing the public institution that the employee works for, the investigation is not considered invalid. This view was stated by some commentators[20] and has been applied in public institutions in Libya. This

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a. If the Administrative Authority requests the Administrative Prosecution to conduct the investigation. b. Investigations regarding financial violations, as well as investigations with employees who are in important positions, is a specialty that has been given only to the Administrative Prosecution by Egyptian law. c. The investigation is conducted in the complaint proposed by an individual regarding an error that has been committed or neglect of duties. In addition, the Administrative Prosecution conducts investigations concerned with the financial and administrative errors, which are discovered by the People's Inspection and Control System. In this case, the Administrative Prosecution should inform the Administrative Authority (of the public institution that the employee works for) about the error committed by the employee before conducting an investigation into the employee.

[17] Articles 39- 40 of Law No. 2 of 2007 concerning the People's Inspection and Control System.

[18] Khalefa Elgehmi, *The Disciplinary Responsibility for Public Employees in Financial Errors in Libyan Law, A Comparative Study* (University of Garyounis 1997) 188-190.

[19] Article 47 of Law No. 2 of 2007 concerning the People's Inspection and Control System.

[20] Mahmed Milad, 'Monitoring the Work of Management Bodies in Libya, A Comparative Study' (Master's Thesis, University of Arab States 2005) 99-100.

raises the question as to how the investigation can still be valid without informing the public institutions' administrative authority.

This is a valid query considering that the administrative authority of the public institution can be an effective tool in estimating the error assumed to be committed by the employee. In other words, if the People's Inspection and Control System is in doubt in estimating the error, or the error was not clearly committed by the employee, it would be of benefit to seek knowledge from the administrative authority about how the employee had been behaving throughout his/her work period at the institution. In addition, the administrative authority may have some evidence against the employee which may help in the investigation. Consequently, while the fairness of Libyan law in involving the Public Control Monitoring System is unquestionable (as it is always good to have a superior independent monitoring system over the investigation), Libyan law should consider prohibiting the Public Control Monitoring System from conducting the investigation into the employee, unless it first informs the public institution about the employee's error. This should be done before an investigation into the employee by the People's Inspection and Control System is commenced.

2.4 Circumstances in which Libyan Law allows an Investigation to be conducted into the Accused Employees and Exceptions

Conducting an investigation into an accused employee before imposing a penalty is a crucial issue.[21] The public employment laws in Libya[22] and Egypt[23] confirm the need to conduct an investigation into the employee before imposing the penalty. This was the ruling of the Libyan Supreme Court in Administrative Appeal No.43/32,[24] when it held that the penalty fine imposed against the employee was invalid because the penalty was imposed without any prior investigation into the employee (who was suspended for mishandling the importation of cars).

Another example to demonstrate how the penalty decision was held invalid because it was imposed without prior investigation can be found in Libyan Supreme Court in

[21] Abdalhmed Alshorbi, *Discipline the Labours in Law of Companies* (Mnshat Elmarf 1995) 33.
[22] Article 156 (n 2).
[23] Article 79 of Law No. 47 of 1978 concerning Civil Servants.
[24] Administrative Appeal No.43/52, Libyan Supreme Court (2.01.2000) *Unreported.*

Administrative Appeal No.1/22;[25] a case concerning an employee, who was contracted to the Council for Agricultural Development for a period of two years as an interpreter and who was surprised when he was dismissed by the Minister of Agricultural Development without any prior warning. Moreover, the employee was deprived of all the rights that he was entitled to in the case of his termination of service. The employee did not accept this decision and he appealed to the Appeal Court of Tripoli who refused to suspend the execution of the dismissal decision. The employee did not accept this decision, so he appealed to the Supreme Court, requesting it to overturn the judgment of the Appeal Court.

The Supreme Court held that even though Article 17 (4) of the contract permits the administration to dismiss an employee without previous warning where the employee commits repeated actions that harm the reputation of the employer, the decision of the Appeal Court of Tripoli to suspend the dismissal decision was not correct because the dismissal decision imposed on the employee was a disciplinary dismissal, which should be dealt with in the light of a disciplinary procedure, as stipulated by Article 14 in the contract. This required a prior investigation to have been conducted; required charges to be directed against him and required the employee to be given the opportunity to defend himself. For this reason, the dismissal decision was invalid because it was imposed without a prior investigation being conducted into the employee and without notifying the employee of the charges against him. In addition, the employee was also not given the chance to discuss the witnesses or to call in any witnesses, whose testimonies he might have wanted the Court to hear.

It is submitted that the Libyan judgment (in Administrative Appeal No.43/32 and Administrative Appeal No.1/22) is logical. This is because denying the employee his/her right to a fair investigation means denying his/her right to defend him/herself. So far therefore, Libyan judgments seem to meet the standard of fairness in requiring an investigation into the employee and in giving him/her a chance to defend him/herself. However, the thesis cannot judge whether Libyan law is fair or unfair until it looks into the exceptions of the need for an investigation before imposing the penalty in the following part of the chapter.

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[25] Administrative Appeal No.1/22, Libyan Supreme Court (24.04.75) *Supreme Court Journal*, Year11, no. 4, 24.

2.4.1 Exceptions to the need for an Investigation before Imposing the Penalty

Libyan law[26] permits the enforcement of a penalty without a prior investigation in cases where the penalty is a warning or salary deduction. This can be done only on condition that the error committed by the employee was observed by the administrative head himself, or if that error is proven to have been committed by evidence and the facts based on documentation.[27] This is demonstrated in the Libyan Supreme Court Administrative Appeal No.9/15.[28] This case involved an employee who worked within the administration department in a Director of Works of the southern provinces. During his employment, he started to interfere in affairs outside his specialties and assignments. Moreover, he used inappropriate words in his administrative correspondence, which triggered the Minister to direct a warning to him to cease such behavior. The employee objected to this warning and requested that it be overturned. He sent a letter to the Minister using inappropriate terms[29] and also claimed that he was willing to present his case to a Disciplinary Committee. Granting this request, the Minister referred him to the Disciplinary Committee for using inappropriate terms not suitable in administrative correspondence and several other charges.[30]

The Disciplinary Committee penalised the employee by suspending him from work for three months. The employee objected to the decision taken by the Disciplinary Committee, claiming that the decision was illegal on the grounds that there was no investigation undertaken by the Minister before he was referred to the Disciplinary Committee. The Court held that conducting an investigation with the employee before the disciplinary hearing was not required, because the charges against the employee had already been proven in documents found in his service file, which were written in his own handwriting. Thus, the decision of the Disciplinary Committee was legally valid and the appeal of the accused employee was refused by the Court.

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[26] Article 156 of Law No.12 of 2010 concerning Labour Relations, which was an amendment to Article 80 of Law No.55 of 1976 concerning the Civil Service.

[27] It is not included in the texts of the Egyptian Law No. 47 of 1978 concerning Civil Servants any exception to the necessity of conducting an investigation with the employee before enforcing a penalty.

[28] Administrative Appeal No.9/15, Libyan Supreme Court (3.05.70) *Supreme Court Journal* ,Year 6, no.4, 44- 46.

[29] "e.g., you took part in destroying human values and concealing the facts 'and using inappropriate terms".

[30] For further information about these charges see Administrative Appeal No.9/15, Chapter Five, Section 5.3.

This case[31] is a good example of the exception: i.e., it is permissible not to conduct an investigation in certain cases and the legislature made this exception in order to facilitate the performance of the administrative authority and simplify procedures in a way that enables it to deal with relatively minor errors quickly. However, it can also be considered from a different angle, namely as an example of where the principle of the administrative authority's effectiveness is given priority over the principle of providing adequate guarantees to the accused employee. This appears to be inappropriate, as it represents a detachment from the employee's usual disciplinary guarantees, the most important one being to conduct an investigation with the employee where all the basic guarantees that the law grants are provided, i.e., to call the employee in for the investigation, explain the charges against him/her and give him/her the opportunity to defend him/herself. It is submitted that the observing of the employee's error by the administrative head, as a substitute for the investigation into the accused employee, is unfair in Libyan law. This is because in situations where the administrative head has issues with a particular employee, there may be potential for a misuse of power by the administrative head. The administrative head can punish, can lie and can say that the employee committed an error in order to punish him/her for personal reasons.

In conclusion, it is submitted that fairness of Libyan law is questionable, as it places exceptions where a penalty can be imposed without conducting a prior investigation into the employee. This means that Libyan law in these exceptions denies the employee the most important right in the disciplinary process which is ''the right of defence'', because no investigation means no right of defence. Accordingly, Libyan legislation should consider that conducting an investigation into the accused employee before imposing the penalty is, in all situations, a must, and should not permit any exceptions. A comparison with Egyptian law is instructive, even in cases where there are enough facts and evidence to condemn the employee, under Egyptian law there is still a need to investigate.[32]

[31] Administrative Appeal No.9/15 (n 28) 44- 46.
[32] Article 79 (n 23).

2.5 Fairness of the Principle of Recording the Investigation in Written Form

Recording the investigation in writing is considered one of the most important formal guarantees, which must be part of the investigation with the accused employee.[33] It is done by writing every word that the investigator hears, whether these words are uttered by the accused employee or by the witnesses.[34] The details of the investigation must be written and documented in a record of its own.[35] This record provides all the details of the investigation and what factors the penalty is based on, as the process cannot rely on the investigator's memory to remember all the details of the investigation, whenever there is a need to recall them. This is especially important if it has been a long time since the conduct of the investigation, as the investigator may not be able to memorize all the details.[36]

The principle of writing up the investigation is upheld by the public employment laws of both Libya and Egypt. The previous Libyan Law No. 55 of 1976 concerning the Civil Service[37] (as well as the current one No. 12 of 2010 concerning Labour Relations[38]) clearly stipulates the principle of writing up the investigation; the investigating authority must start documenting the investigation as soon as it takes place. Similarly, Egyptian Law No. 47 of 1978, concerning Civil Servants, stipulates the illegality of enforcing any penalty against the employee, unless an investigation into the employee has been recorded in writing.[39]

The author concluded that both Libyan and Egyptian legislation found that the principle of writing the investigation is important. It is an essential measure concerning the interest of the accused employee to guarantee that he/she and his/her lawyer can see all the information documented in the investigation. It also enables the accused employee to prepare his/her defence in a way that can allow him/her to prove his/her innocence. At the same time, it represents a guarantee to the authority concerned, as it is proof of conducting an investigation into the employee, such as in situations where the

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[33] Mstafa Yusaf, *Disciplinary Responsibility for Public Employees and its Guarantees* (Darelnada Elarabia 2009) 87.
[34] Mahmed Otman, *Administrative Investigation* (Darelnada Elarabia 1992) 169.
[35] Mohamed Yakoot, *Investigation into the Disciplinary Errors, A Comparative Study* (Mnshat Elmarf 2002) 225.
[36] Maher Aboelenin, *Administrative Judiciary in Public Employment* (Daraboelmagd for Printing 2006) 349; Ramdan Batik (n 8) 309.
[37] Article 80 of Law No. 55 of 1976 concerning the Civil Service.
[38] Article 156 (n 2).
[39] Article 79 (n 23).

employee denies that an investigation took place.[40] In addition, writing up the investigation allows the accused employee, as well as the disciplinary authority, to refer to the facts and the circumstances of the case as it provides a definite record. Finally, it provides a valid base for the results of the investigation as to whether the employee is to be found innocent or guilty. Moreover, a written record of the investigations makes consideration of the penalty imposed easier for the judiciary, through evaluating the evidence and facts included in the record of the investigation on which the penalty was based.[41] Accordingly, this part of the chapter will examine the fairness of Libyan law in including the essential elements in writing up the investigation.

2.5.1 Elements of the Principles of Writing up the Investigation

Neither Libyan Law No. 12 of 2010 concerning Labour Relations, nor Egyptian Law No. 47 of 1978 concerning Civil Servants, specify the elements that should be provided in the record of the investigation (which is undertaken by the administrative authority). However, Law No. 2 of 2007 concerning the People's Inspection and Control System specifies the essential elements which should be provided for, in order to ensure the legality of the investigation. Consequently, the elements that should be provided in the record of the investigation conducted by the administrative authority are the same elements that are followed by the People's Inspection and Monitoring System in their investigations. These elements are as follow:

2.5.1.1 The Writer of the Investigation (Stenographer)

Neither Libyan Law No. 12 of 2010 concerning Labour Relations, nor Egyptian Law No. 47 of 1978 concerning Civil Servants, insists that the administrative investigator employs a stenographer during the investigation into the accused employee. In contrast, Article 62, of Bylaw[42] of Libyan Law No. 2 of 2007 concerning the People's Inspection and Control System stipulates the necessity of writing up the investigation by a member

[40] Maher Abdalhadi, *Procedural Legitimacy of Discipline* (Garib Library 1986) 266-267.
[41] Magawre Shahen, *The Disciplinary Responsibility* (World of Books 1974) 274.
[42] The Bylaw regulation No. 131 of 2008 concerning applying Law No. 2 of 2007 concerning the People's Inspection and Control System. It what is meant by the executive regulations are those regulations that are made to interpret an existing law or to add a legal rule that does not exist in a specific law. For example, the executive regulations of the People's Inspection and Control System is stipulated to created the new rules and interpret the rules exist in Law No. 2 of 2007 concerning People's Inspection and Control System.

of the People's Control Monitoring System. It is also stipulated by Article 62 that it is permissible for the investigator to ask for another stenographer other than the original one, on condition that he/she takes the oath immediately before participating in the investigation.

The author concludes from the above discussion that running the investigation (by the administrative authority) and having a stenographer to record the investigation is important. However, running the investigation without a stenographer does not affect the validity of the investigation, because there is no legal text which stipulates that running the investigation (by the administrative authority) without one makes the investigation invalid. Conversely, it is different for the investigators of the Public Control Monitoring System. If a member of the Public Control Monitoring System conducts an investigation without having a stenographer, this invalidates the investigation because there is a clear legal text that stipulates that the investigation by a member of the Public Control Monitoring System *must* be accompanied by a stenographer.

The author submits that Bylaw of Law No.2 of 2007, concerning the People's Inspection and Control System, takes the right direction when it requires that the investigator must be accompanied by a stenographer to write up the proceedings of the investigation, in order to assure the employee that all statements are recorded. In addition, the presence of a stenographer provides a form of monitoring of the investigation, as it is easy to refer to the proceedings of the investigation and monitor its validity.[43] Libyan law (No. 12 of 2010 concerning Labour Relations) is unfair regarding not stipulating the necessity of the presence of a stenographer in the investigation conducted by the administration. This is because not having a stenographer means the investigator will be too busy writing up the investigation instead of being focused on the conduct of it, and this in turn can affect the employee's presentation of his/her defence, and in case he/she subsequently appeals, the employee will not be able to refer to a comprehensive record of the investigation. Therefore, the presence of a stenographer in the investigation is necessary to guarantee further rights to the accused.

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[43] Fadel Awad, 'The Guarantees of the Accused Affront of the Authority of the Primary Investigation in the Kuwaiti Legislation' (1998 Year 22) 3 Journal of Law 64; Tharwat Abdelaal, *The Procedures of the Disciplinary Hearing for the Faculty Members* (Darelnahda Elarabia 1998) 146.

It is submitted that Libyan public employment laws should be amended to require the presence of a stenographer to be present with the investigator during the investigation of the employee, just as Bylaw of Law No.2 of 2007 concerning the People's Inspection and Control System requires. The author suggests that it is ordinarily necessary to have a stenographer with the investigator to allow the investigator to focus completely on the questioning. The investigator's role requires him/her to be able to confront the accused employee with the charges and facts in a sequential and logical way, without the distraction of writing up the investigation, as it requires time and concentration. This may lead the investigator to shorten the investigation, which is a prejudice to the investigation and its procedures.

2.5.1.2 Signing on the Record of the Investigation

Having the signature of the investigator, the stenographer, the accused and the witnesses on the record of the investigation, is proof of the proceedings of the investigation.[44] The signature is a declaration of the correctness of the words written in the investigation's record and a declaration that the investigation has been carried out by whoever is responsible for it.

It is stipulated by Article 61 and Article 62 of the Bylaw regulation of Law No. 2 of 2007 concerning the People's Inspection and Control System,[45] that the investigation which is run by a member of the People's Monitoring Control System must be accompanied by a specialised stenographer, and the investigator, stenographer and the accused employee must have his/her signature on every paper of the investigation record. By contrast, Libyan Law No. 12 of 2010, concerning Labour Relations, as well Egyptian Law No. 47 of 1978 concerning Civil Servants, do not stipulate the requirement of signing the record of the investigation run by the administrative authority.

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[44] Mohamed Yakoot (n 5) 180.

[45] Article 61 stipulates that investigation should be conducted in a written form and it should be recorded in a specific document or several documents at different times and all should be dated, including the place and the time in which the investigation was conducted. It is also stipulated by Article 61 that the investigator should write the accused's name, his employment grade, his workplace, his work nature, as well as all the questions directed to the accused, along with the accused's answers. Also, the investigator must ask the accused to sign every paper of the record of the investigation.

This raises the question as to what the impact might be from failure of the investigator and the writer, as well as the accused employee, to sign the record of the investigation. It also raises the question of what factors can lead to the invalidation of the investigation.

Some commentators[46] observe that failure to sign the record of the investigation by the investigator, stenographer and the accused employee does not lead to the invalidity of the investigation or the penalty decision. In other words, so long as the investigatory authority gives the accused his/her right to defend him/herself, the investigation will still be valid, even if the investigation record was not signed by the investigators, stenographer and the accused employee. This is based on the reasoning that the law does not specify specific rules for the written form of the investigation. Other commentators[47] state that the investigation is valid, so long as the specialised stenographer and the investigator sign it off. In other words, this view states that failure to sign the record of the investigation by the investigator and the stenographer will lead to the invalidity of the investigation. While it is logical to have the employer's signature on the investigation's record as well, they stated that it is not necessary to have that of the employee. The reason is that the signature of the investigator and the stenographer prove that the investigation was carried out by a specialised authority responsible for conducting the investigation.

The author of the thesis agrees to a certain extent that the direction of the second commentators discussed above is appropriate,[48] when they observe that non-signing of the investigation record by the both investigator and the stenographer does affect the validity of the investigation. However, the author disagrees that the accused employee's failure to sign the investigation record does not make the investigation invalid. The reason being, that if the accused employee did not sign the investigation record, this may result in other statements being attributed to him/her and lead him/her to receive a more severe penalty. Moreover, having the signature is a guarantee to the administration as well. This is because the employee's signature proves that he/she was

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[46] Mamon Salama 'Crimes of Employees against Public Initiation' (Year 1969) 1 Journal of Economics and Law 331; Abdelaziz Kalefa, *The Procedural Legitimacy in Precedential and Judiciary Discipline for Public Employee* (1st edn, Mnshat Elmarfe 2006) 163.
[47] Mohamed Yakoot (n 5) 180-181; Sliman Tmaoi (n 8) 36.
[48] Ibid.

given the right to attend the investigation and to defend him/herself in case he/she subsequently denies having attended the investigation.

The author therefore submits that Bylaw of Law No. 2 of 2007 concerning the People's Inspection and Control System is fair when it requires the record of the investigation to be signed by the investigator, the stenographer and the accused employee.[49] Conversely, Libyan public employment law (Libyan Law No. 12 of 2010 concerning Labour Relations), is unfairly prejudicial when it does not stipulate the necessity of the signing of the investigation record by the investigator, accused employee and the stenographer. This is because signing the record will guarantee the accused employee of having an approved recorded statement that he/she can use to defend him/herself, if he/she appeals to the Court at a later stage to prove his/her innocence. In addition, the employee can be reassured that no other statements will be added to what he/she has already given, once he/she signs the investigation record. It is submitted that failure to do so would make the investigation invalid unless the accused employee has refused to do so, and on condition that the investigator makes a note of this refusal.

2.5.1.3 The Date of the Record of the Investigation

Among the details that must be included in the record of the investigation are: determining the date (stating the day, month and year, as well as the time, when the investigation took place) of any investigation measures, as soon as this measure is carried out.[50] This is stipulated by Article 62 of the Bylaw regulation of Law No. 2 of 2007, concerning the People's Inspection and Control System, when it is conducting the investigation: it must record the date and the place, as well as the time of the start and the completion of the investigation. However, by contrast, Libyan Law No. 12 of 2010 concerning Labour Relations (as well as the corresponding Egyptian Law No. 47 of 1978 concerning Civil Servants), does not require the investigatory authority to record the date of the investigation in the investigation record.

However, the Libyan administrative judiciary does require these essential details, such as the date of the investigation record on the record itself; otherwise the record of the

[49] Article 61 and Article 62 of the Bylaw Regulation of Law No. 2 of 2007 concerning the People's Inspection and Control System.
[50] Abdelaziz Kalefa (n 46) 162-163.

investigation is considered invalid. This was illustrated in the Appeal Court of Tripoli in Libya in Appeal Court No.36/37,[51] a case concerning a police officer who was charged with committing errors that adversely affected his employment. He was referred to an investigation to ensure the validity of the charges directed against him. The investigatory board, after considering the facts of the case, referred him to the Disciplinary Committee, which dismissed him from the police authority service. Subsequently, the police officer appealed to the Minister for Public Security, who had accepted his appeal and referred him to the General Administration of Inspection to examine his appeal. As a consequence, they issued a report stating their opinion with respect to the legality of the measures taken by the investigatory board. They reported that there were legal errors in the measures taken.[52]

The report concluded by making a request to repeat the investigation into the accused and refer the report to the Minister for Public Security. This was agreed to by the Minister for Public Security. After the investigation had been carried out again into the police officer, the decision of the Disciplinary Committee was to declare him innocent. However, the Minister of Public Security refused to return him to his former job, which led the employee to appeal again (for the reasons discussed earlier). The Court held that the decision of the Minister not to permit the employee to return to his former work was illegal. This was based on the report of the General Administration of Inspection, when they reported that the errors committed by the investigator were major errors (having failed to mention the essential details, which should have been provided in the record of the investigation) and the fact that the police officer was pronounced innocent by the Disciplinary Committee.

From this it can be concluded that although both Libyan and Egyptian legislators do not stipulate rules with respect to mentioning the date of the investigation in the record, the judiciary takes the position that not mentioning the date of the investigation results in the invalidity of it. This seems correct because recording the date can enable the employee to account for the validity period of the disciplinary charge. Disciplinary errors become invalid after three years from committing the error and after five years

[51] Appeal Court No.36/37, Administrative Court of Tripoli (15.04.2008) *Unreported*.

[52] Firstly, the Investigatory Board did not inform the accused of the charges against him. Secondly, there was no mention of the date in the record of the investigation (day and the time of the investigation and the date on which the charges were directed against him). Thirdly, the accused was not given the right to defend himself or to choose a lawyer, nor was the investigator accompanied by a writer to record the investigation.

with respect to financial errors. This can be of benefit to the accused employee because he/she can claim invalidity of the investigation based on the fact that the investigation took place three years after the date on which the error was committed.[53]

Therefore, the author submits that fairness requires Libyan employment law to bear in mind the Bylaw of Libyan Law No. 2 of 2007 concerning the People's Inspection and Control System as an example to follow. Libya should include in its Civil Service Law legal text the requirement for the investigator to record the investigation date and having the accused employee's signature on the investigation record. This is because all these conditions regarding conducting the investigation in the written form and including all the aforementioned elements can guarantee beneficial rights to the employee. One of these includes giving the right to the employee to sign the investigation, which guarantees that once they sign the record of the investigation, no one can add anything further to their statements. Also, requiring the date of the investigation can guarantee to the employee that he/she will not be penalised for a disciplinary error that he/she had committed, unless the accusations are directed against him/her within the correct limitation period, in accordance with Article 164 of Law No. 12 of 2010 concerning Labour Relations.

2.5.2 Oral Investigation as an Exception to the Original Written Investigation

Libyan[54] and Egyptian law[55] make an exception with respect to warning and the salary deduction penalties, as in such cases the investigation into the employee can be carried out verbally, including proof of the content of the verbal investigation. Proving the content of the verbal investigation can be defined as the following: it is to prove (write down) the outcome of the investigation (penalty) as well as the important facts that made up the proceedings in the verbal investigation. This definition of proving the content was not stipulated in either Libyan or Egyptian law, but it was concluded from the judgment of the Administrative Supreme Court of Egypt in Appeal No.8/499.

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[53] See further information about the permissible and valid period to referral of the employee to the investigation and punish him/her, Chapter One, Section 1.2.2.
[54] Article 156 (n 2).
[55] Article 79 (n 23).

The Administrative Supreme Court of Egypt held in Appeal No.8/499,[56] a case concerning an employee who was sent abroad on an official mission and who insulted one of his colleagues by using inappropriate language. Subsequently, he was subjected to an investigation, charged and penalised by having ten days salary deducted. He appealed to the Administrative Supreme Court, seeking to overturn the penalty. The appeal was based on the fact that he had had a verbal investigation, which was inappropriate, arguing that the administrative manager did not mention his defence and the facts on which the penalty was based. The Court held that the verbal investigation was legal and had provided all the main guarantees. It was not necessary to mention everything in detail, in the content of the verbal investigation (these include: the facts that the decision was based on, statements of the witnesses, and the defence of the accused, as all the mentioned examples can delay the administration in completing the verbal investigation). However, proving the content of the verbal investigation requires that both the investigation took place (by mentioning the important facts), and the outcome of the investigation, in the penalty decision.

An example which defined the term "proving the content" of the investigation can be seen in Egyptian Administrative Supreme Court of Appeal No.451/13.[57] This case concerned the Head of a Faculty who wanted to direct the charge of neglecting duties against a cleaner in the faculty. The Head of the Faculty faced the cleaner with the charge of neglecting to supervise cleaning works, in addition to the charge of being absent during work hours. The cleaner denied the second charge (being absent during work hours), claiming that he had been inside the faculty building. The Head of the Faculty proved that the cleaner was absent by asking his colleagues. With regard to the first charge (neglecting work duties), the cleaner did not deny the charge on this occasion (or the previous times because this was not the first incident of its kind). The Head of the Faculty recorded these incidences in a file. However, the employee appealed to the Court, claiming that he was not given the right to defend himself.

The Court refused the appeal and ruled that the file written by the Head of the Faculty was proof that the head had directed the charges to the accused, and the accused

[56] Egyptian Administrative Supreme Court, Appeal No.8/449 (26.02.66) the Groups of Principles decided by the Administrative Supreme Court from 1965 until 1980, Year 1, 3974-3975.
[57] Egyptian Administrative Supreme Court, Appeal No.451/13 (24.12.74) *Unreported.*

employee had been given the right to defend himself. In addition, the Court ruled that the investigation was a proper, legal verbal investigation, as the content of an oral investigation does not mean mentioning everything that happened in the investigation in detail, nor how the error committed by the employee was discovered, or the witnesses' statements; otherwise this would be a written investigation and not an oral one. The Court ruled that an oral investigation is: involves conducting an investigation into the accused employee, directing the charges against him and stating the result of the investigation.

In conclusion, proving the content of an oral investigation as it has been defined in the two judgments above (Appeal No.8/499 and Appeal No.451/13) is as follows: it is not necessary to write down every detail, but it is necessary to conduct an investigation with the employee, direct the charges against him and write up the final decision of the investigation.

Libyan[58] and Egyptian[59] law make an exception with respect to both the warning and deduction from the salary penalties, as in such cases the investigation into the employee may be carried out verbally. However, commentators[60] are in disagreement with regard to this issue, as some are in favour of the exception of writing up the investigation and others are against this. Commentators[61] in favour of the verbal investigation justify the reason why these penalties (warning, salary deduction) do not require a written investigation, claiming that these are simple penalties that do not require written investigation. In addition, writing up the investigation in such penalties may cause a delay in the administrative authority's work.

Other commentators[62] disagree that the permission given by the legislation to carry out a verbal investigation (in cases where the expected penalty is to be either a warning or a salary deduction) gives the investigator a preconceived idea of the outcome before

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[58] Article 156 (n 2).
[59] Article 79 (n 23).
[60] Abdelaziz Khalefa, *Disciplinary Guarantees in Public Employment* (Institution of Affairs 2008) 109; Ahmed Goma, *Conflicts the Administrative Judiciary* (Mnshat Elmarfe 1984) 83; Nasreldin Elgadi (n 6) 514; Maher Abdalhadi (n 40) 64; Zaki Elnagar, *Summary of the Discipline of Servants Government Employees* (The General Egyptian Institution for Books 1986) 85; Saaed Alshtoy, *Administrative Investigation of Public Employment* (1st edn, Darelfeker Elgmaa 2007) 70.
[61] Ibid Ahmed Goma, 83; Ibid Nasreldin Elgadi, 514; Ibid Abdelaziz Khalefa, 109.
[62] Maher Abdalhadi (n 40) 219; Zaki Elnagar (n 60) 85; Saaed Alshtoy (n 60) 70.

carrying out the investigation. The error that is being investigated will be penalised by either one of two penalties (a warning or a salary discount). This anticipation of events is incompatible with legal logic, which requires that the penalty must be decided only after completing the investigation, *not before it has started.* It is submitted that this view is more appropriate than the first view (not requiring a written investigation) for the reasons mentioned by the above commentators.

Therefore, the findings of the thesis conclude that this guarantee in Libyan (and Egyptian legislation) is still inadequate. It is submitted that Libyan (and Egyptian legislation) should include in their legal texts the necessity of requiring written form in all investigations in all cases. This represents a guarantee to the accused employee that all facts and evidence relevant to the error are recorded. This will enable him/her to prepare his/her defence. Besides this, the simplicity of the penalties is not reason enough to give the disciplinary authority permission for not to set out the events of the investigation in written form. This is because the administration may choose these penalties as a way to deny the accused employee the guarantee of the written investigation, and just merely conduct a verbal investigation into him/her. The verbal investigation affects the judicial guarantees of the employee, as if the employee appeals to the Court claiming that he has not been given the opportunity to defend him/herself in a verbal investigation, the Court will refuse his/her appeal. This is because the investigation was conducted into the accused employee in verbal form.

In the verbal form investigation it is not necessary to write down every detail, such as the questions that were directed to the employee and his/her answers, or whether he/she was given the opportunity to defend him/herself, or not. Even a verbal investigation with a subsequent written report will not be enough, because the report will not include all the details and statements of the employee,[63] and the investigator may misuse his/her power to include incorrect facts against the employee instead of reporting everything in the investigation which may be used as evidence in favour of the employee in a later stage (appeal to the Court). Accordingly, accused employees cannot prove that they were not given the right to defend themselves and therefore they cannot appeal to the Court against the right of defence as they cannot prove it. This is because, in the verbal

[63] Mohamed Yakoot, *Investigation into the Disciplinary Error, A Comparative Study* (Mnshat Elmarf 2002) 230.

investigation, the investigator is only obliged to record the directing of charges against an employee and to write up the final decision of the investigation.

2.6 Conclusion

(a) Libyan law is fair in distributing the investigating authority between the administration's authority and the Public Control Monitoring System.[64] This is because Libyan law gives the right to the Public Control Monitoring System to investigate the employee on limited occasions without giving it the right to impose the penalty against the employee, as this is within the specialities of the administration. However, Libyan law is unfairly prejudicial when it provides the administration with both the authority to direct the charges and the authority to enforce the penalty.[65] This is seen to be against preserving the guarantees of the employee, as a fair hearing will require the investigating authority to be impartial. It is submitted that Libyan legislation should consider separating the power of directing the charges and imposing the penalty in order to achieve a fair disciplinary "hearing".

(b) With respect to whether Libyan law conducts investigations into the accused employee in all cases, the thesis concludes that Libyan law gives the accused employee the right to a fair hearing, which requires conducting an investigation into accused employees to give them the right to defend themselves. So far it seems that Libyan law is fair in considering that conducting an investigation into an employee is necessary in order to give employees a chance to defend themselves. However, it is submitted that considering the observation of an employee's error by the administrative head as a substitute for the investigation is unfair in Libyan law, because this is a threat to the preservation of the employees' rights, as without investigation the employee cannot effectively defend him/herself. Therefore, it is submitted that Libyan law should require that conducting an investigation into the accused employee should be mandatory in all cases, just as Egyptian law does.

(c) With respect to the fairness of the principle of recording the investigation in written form, Libyan law is fair in stating that the investigation must be conducted in such a way, because this principle is an essential measure in guaranteeing to help the

[64] See above Sections 2.2 and 2.3.1 of this chapter.
[65] See above Section 2.2 of this chapter.

employee to access all the information documented in the investigation. In this way, accused employees can prepare their defence. However, Libyan Employment Law (Libyan Law No. 12 of 2010 concerning Labour Relations) is unfairly prejudicial when it does not specify the elements that should be included in the record of the written form of the investigation (signing the record of the investigation and writing the date of the investigation).[66] Accordingly, the thesis concludes that fairness may still require Libyan law to bear in mind the executive regulations of Libyan Law No. 2 of 2007, concerning the People's Inspection and Control System, as an example to follow. This is because this executive regulation makes the correct decision when it proposes that the investigator must be accompanied by a stenographer to write up the proceedings of the investigation and both they and accused employees must sign the record of the investigation. The presence of a stenographer provides a form of monitoring of the investigation, because it is easy to refer to the proceedings of the investigation and monitor its validity

(d) Libyan law should include, in the Civil Service Law legal text, the requirement of the investigator to record the date of the investigation, and should also require the accused employee's signature on the record of the investigation, because all these elements can guarantee beneficial rights to the employee, one of which is that signing the investigation guarantees to the employee that no other statements will be added to what he/she has already given after he/she has signed the record of the investigation. Additionally, recording the date can enable the employee to account for the period of the validity of the disciplinary charge. Disciplinary errors become invalid after three years from committing the error and after five years with respect to financial errors.[67] This can be of benefit to the accused employee, who can claim invalidity of the investigation based on the fact that the investigation took place three years after the date he/she committed the error.

(e) Libyan law is unfairly prejudicial when it permits the disciplinary authority to conduct a verbal investigation when it chooses the simple penalties of either a warning

[66] As explained in details in Section 2.5.1-2.5.1.3.
[67] Regarding the limitation period of the referral to the investigation see Chapter One, Section 1.2.2.

or a salary deduction.[68] The simplicity of the penalties is not sufficient reason to give the disciplinary authority permission for not setting out the events and all facts of the investigation in written form. This is because the administration may choose these penalties as a means of denying the accused employee the guarantee of the written form investigation and to merely conduct a verbal investigation into the accused employee. The verbal investigation affects the availability of judicial vindication of employees' rights. This is because if an employee appeals to the Court, claiming that he/she has not been given the chance to defend him/herself in a verbal investigation, the Court will refuse the appeal, because during the verbal investigation it is not obligatory for the administration to include all minutiae in the investigation, including accused employees' right to defend themselves.[69]

[68] As discussed above in Section 2.5.2 of this chapter.
[69] Ibid.

Chapter Three

The Penalty Enforcement Stage (Investigation stage and disciplinary hearing stage) Eliminating Prejudicial Eliminates in Libyan Law

3.1 Introduction

Guarantees that come prior to enforcing the penalty are the bundle of rights that are provided to the accused employee during the investigation and the disciplinary hearing. They are significantly important.[1] This is because the final decision relies on them and the employee will find out whether the final decision is based on proper legal rules, or if its fairness is questionable and appeal against it. These guarantees encompass perhaps the most important factors for the employee, including presenting the accused employee with the charges against him/her, being given the right of defence, as well as some other factors that may affect the defence of the employee, such as the right to remain silent and the taking of an oath by witnesses. The author believes that examining these guarantees will make a significant contribution towards answering the main question of the research, which is how adequate and fair the disciplinary guarantees in Libya are for public employees. Therefore, the chapter will examine the adequacy of the fairness and the efficiency of these disciplinary guarantees in Libyan law, before imposition of the penalty.

The author proposes that fairness before imposing the penalty requires presenting the accused employee with the charges against him/her, as well as giving the employee an opportunity to defend him/herself by the method he/she thinks is most appropriate to prove his/her innocence. This chapter will examine the disciplinary guarantees available to public employees at the stage before imposing the penalty in Libyan law and compare it with Egyptian and UK law wherever possible. The chapter will examine two key areas:

1. The fairness of Libyan law in presenting the accused employee with the charges against him/her.

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[1] Saed Alshtoy, *Administrative Investigation of Public Employment* (1st edn, Darelfeker Elgmaa 2007) 7.

2. Does Libyan law guarantee sufficient rights of defence to the employee during the investigation?

These two points are significant for the thesis. This is because any fair hearing should include presenting the charges to the employee and ensuring that Libyan law does this properly, and ensures a fair hearing for the employee. As a result, the author will try to analyze the cases where any possible failure could arise with respect to presenting the charges against the employee, and giving the right of defence, as well as why and how this can be improved to enable him/her to hear and defend him/herself.

3.2 Fairness of Presenting the Accused Employee with the Charges Against him

The principle of presenting the employee with the charges against him/her (during the investigation conducted by the administration of the institution of the employee's work place) is one of the essential measures to which both Libyan and Egyptian laws have attached a high significance.[2] Both countries' laws stipulate that if any investigation is conducted without a hearing, then the penalty decision will be considered invalid.[3] The Egyptian Administrative Supreme Court[4] defined the principle of presenting the employee with the charges against him/her as follows: its purpose is to inform the accused employee of all the charges against him/her and the evidence that proves these charges, so that he/she can prepare a defence. Presenting the employee with the charges is to give the employee a detailed description of his/her position, so that he/she can be more active in preparing a defence.

From the information discussed, it can be concluded that it is not sufficient to merely inform the employee of the charges against him/her: this information must be specific and clear. In other words, information must include all aspects of the charges against the

[2] Article 156 of Libyan Law No. 12 of 2010 concerning Labour Relations; Article 79 of Egyptian Law No. 47 of 1978 concerning Civil Servants.
[3] Ibid.
[4] Egyptian Administrative Supreme Court, Appeal No.1043/9 (26.12.67) the Group of Principles Ruled by the Administrative Supreme Court from 1965 until 1980, Year 13, 223.

employee in order to enable him/her to reply to the charges.[5] In addition, while charging the employee, the administration must make the employee aware that he/she is under investigation, and if he/she is proved to be guilty, then he/she will be penalised for the misconduct committed.

Presenting the employee with the charges against him/her is considered a guarantee to the accused employee and an essential measure. Failure to comply will lead to the invalidity of the penalty decision. The Libyan Supreme Court in Administrative Appeal No.7/20[6] ruled that failure to present the employee with the charges against him rendered the penalty decision invalid. The Supreme Court held that the disciplinary hearing must provide the essential disciplinary guarantees before enforcing any penalty against the accused employee: this helps to ensure the legality of the decision, and reassures the employee that the disciplinary authority will not misuse its power. Another key feature is that the investigation stage must identify the charges against the employee, and present them to him: the Disciplinary Committee cannot add a new charge against the employee for the first time in the disciplinary committee stage, other than the charges mentioned in the investigator's referral decision. Consequently, a penalty decision will be held invalid if it prosecutes an error which was not referred to the Disciplinary Committee by the investigator (at the investigation stage).

However, in Appeal Court No.58/26,[7] the Bangazi Court held that the public notary[8] was forbidden from practising her profession. The reasons given were that she had written numbers in English only and had not declared to the company the price of the car she had bought, as was the policy. However, the accused did not accept the decision and appealed to the Bangazi Court, claiming that the penalty enforced against her was illegal, for the following reasons: firstly, the Secretary of Public Justice (Minister of Justice), who investigated her, had not mentioned the penalty decision, or the reasons that led to it.

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[5] Mohamed Yakoot, *The Procedures and the Guarantees in Disciplining the Police Officers* (Mnshat Elmarfe 1993) 292.

[6] Administrative Appeal No.7/20, Libyan Supreme Court (11.04.74) *Supreme Court Journal*, Year10, no. 4, 54. Regarding the proceedings of the case and restricting disciplinary committee with charges and rules referred to them in the referral decision. See Chapter Four, Section 4.2.2.4.

[7] Appeal Court No.58/26, Administrative Court of Bengazi (17.01.98) *Unreported.*

[8] Although a notary is not a public employee, nevertheless this judgment is included to demonstrate how the Libyan Courts view the consequence of not facing the employee with charges against him/her during the investigation.

Secondly, the Disciplinary Committee, who enforced the penalty decision, did not inform or record informing the accused about the date and time of the disciplinary hearing at least ten days before the Disciplinary Committee hearing, as is prescribed by law.[9] Instead, she was informed of, and summoned for the disciplinary hearing, by a phone call made by the Director of Records Branch in Bangazi, on the day of the hearing. Having considered the facts, the Court ruled that discipline must be conducted under certain essential disciplinary measures and procedures. Accordingly, the accused employee must be called in to the disciplinary hearing according to the procedure specified by law, and must have all her rights respected (e.g., being informed of the date and time of the disciplinary hearing and the right to defend herself). Failure to observe all these procedures invalidates the investigation. However, if one of these measures is violated or omitted, this will not make the final decision invalid so long as this failure is corrected at a later stage in the disciplinary committee (hearing) that is, by giving the accused the right to defend herself.

In this particular case, there was no document proving that the accused was informed about the date, time or place of the disciplinary hearing: this was in violation of Article 30 of Law No. 12 of 1993 concerning the Notary Contract. Also, the accused employee was not informed about the reasons that led to the penalty decision by the administration. In addition, the Disciplinary Committee did not correct these mistakes at a later stage (in disciplinary hearing). As a result, the final decision was considered invalid by the Court on the grounds that informing the accused employee of the charges against her (with a detailed description of these charges) is an essential measure. Failure to do so led to invalidity of the final decision.

Given the judgment discussed above, the thesis submits:

Despite the significance of the principle of presenting the employee with the charges against him/her (during the investigation run by the administration), it is noticeable that Libyan judiciary does not take a clear position. In one case, the Libyan judiciary[10] ruled

[9] Article 3 of Law No.12 of 1993 concerning the Notary Contract.
[10] Administrative Appeal No.7/20 (n 6) 54.

that failure to comply with the principle of notifying the employee of the charges leads to the invalidity of the penalty decision. However, on another occasion, the Libyan judiciary[11] ruled that failure to provide the employee with his/her guarantees, including the principle of presenting the charges (during the investigation run by the administration), does not lead to the invalidity of the penalty decision if this failure is corrected later in the disciplinary hearing.

It is submitted that the Libyan judiciary is unfair when it considers that if the failure to comply with the guarantee of presenting the employee with the charges during the investigation is corrected at a later stage in the disciplinary hearing, then it does not lead to the invalidity of the charge or disciplinary decision. The author submits that the Libyan judiciary is not correct in this approach and the charges should be presented to the employee in investigation stages. The reasoning is that if the penalty is found to be a lenient one, then the case will finish in the investigation stages without the need for the disciplinary hearing stage. It is proposed by the author that any failure to provide the employee with his/her rights in the investigation stage should render the final decision invalid, even if this guarantee is not facilitated and is only provided later in the disciplinary hearing stage. This is because, as mentioned previously, the case may end in investigation stage[12] and in that situation if the employee is not given the right to hear the charges and defend him/herself in the investigation stage, then the penalty should not be considered valid, as any fair investigation should include presenting the charges to the employee and giving him/her the right to defend him/herself. This guarantees a fair disciplinary hearing, as a disciplinary hearing should require conducting an investigation into the accused employee in order to give him/her the opportunity to know the charge and present a defence.

Ultimately, the author concludes that the public administration or the Disciplinary Committee must summon the employee and hear his/her statements and defence. They

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[11] Appeal Court No.58/26 (n 7) *Unreported.*

[12] When the employee commits a disciplinary error, then he/she will be formally investigated by the administration of the public institution he/she works for. Articles 160-161 of Law No.12 of 2010 (concerning Labour Relation) stipules that if the penalty is a minor penalty (warning, salary deduction), then it can be enforced by the investigating administration. However, if the decided penalty is a complex penalty then the employee must be referred to a Disciplinary Committee to examine the error committed.

must also state charges against him/her, as a disciplinary penalty is enforced to discipline an error and the error is subject to being proved or else denied. It is advantageous for the employee to discuss the error and put forward evidence he/she may be able to use to prove his/her innocence. Consequently, it is a must to inform the accused employee of the charges in all the stages of the investigation and the disciplinary hearing. This is because Law No.12 of 2010 concerning Labour Relations[13] and all previous Civil Service Laws preceding this law, stipulate clearly the illegality of enforcing any penalty until after conducting the investigation into the accused employee and after hearing the employee's statement and giving him/her the right to defend him/herself.

3.2.1 Elements of the Principles of Presenting the Accused Employee with the Charges

Informing the employee of the charges is an essential measure, as well as the employee's right to view the file of the investigation.[14] These are elements which should be provided to the accused employee when directing the charges against him/her. Libyan and Egyptian Laws do not stipulate clear texts with respect to informing the accused of the charges against him/her during the investigation stage. They also do not include a specific text with respect to informing the employee that he/she is being referred to investigation. However, both laws do stipulate the necessity of informing the employee who is being referred to the disciplinary hearing.[15] Also, Libyan Law does stipulate the right for the accused employee to view the investigation documents related to the charges against him/her.[16] Egyptian Law does not stipulate this right for the accused employee. Therefore, the following section-will examine the fairness of elements of the principles of presenting the accused employee with the charges against him/her.

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[13] Article 156 (n 2).
[14]Naser Elagamy, *Generalisation of Administrative Punishment in Kuwait Law and Other Law* (Darelnahda Elarabia 2010) 296.
[15] Article 90 (3) of Libyan Law No. 55 of 1976 concerning the Civil Service; Article 23 of Egyptian Law No. 117 of 1958 concerning the Reorganization of Administrative Prosecution and Disciplinary Hearing.
[16] Article 14 (1) of Libyan Law No. 55 of 1976 concerning the Civil Service.

3.2.1.1 Fairness of Informing the Employee of the Charges against him in the Investigation Stage

Informing the employee of the charges at the investigation stage, the evidence and all the facts of the case are essential measures that should be followed during the investigation stage. Neither Libyan Law No. 12 of 2010 concerning Labour Relations (and laws preceding it), nor Egyptian Law No. 47 of 1978 concerning Civil Servants, stipulate details with respect to informing the accused of the charges against him/her during the investigation stage. Both laws stipulate that it is not permissible to impose the penalty against the accused employee before conducting an investigation and hearing his/her defence.[17] This requires that the employee must be informed of the charges against him/her and the seriousness of his position, in order for him/her to prepare his/her defence.

The ACAS Code of Practice in UK law, states that an investigation into an accused employee takes place, he/she will be presented with the charges against him/her in order to give him/her the chance to respond to those charges. Also, the employer should inform the employee in detail about the alleged misconduct and also inform him/her about his/her right to appeal the disciplinary decision. By contrast, Libyan law is unjust with respect to the method of informing the employee of the charges during the investigation. This is because it does not guarantee the employee his/her right to be informed of the charges in a proper legal manner (as it does in the Disciplinary Committee (hearing) stage). It is submitted that Libyan law should specify that the notification of charges must be in writing and must be accompanied by a confirmation of receipt during the investigation stage, as is done when informing the accused of charges in the disciplinary committee stage.[18] Moreover, Libyan law should inform the employee of the charges in details, just as UK law does, which allows the employee fair rights.

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[17] Article 156; Article 79 (n 2).

[18] This specification is discussed in more detail in the next section, 'Informing the employee of the charges in a disciplinary committee'.

3.2.1.2 Fairness of Libyan Law in Informing the Employee of the Charges in Disciplinary Committee (Disciplinary hearing)

Libyan Law No. 55 of 1976 concerning the Civil Service emphasized in Article 90 (3)[19] the necessity to inform the accused employee of the referral decision to the Disciplinary Committee (disciplinary hearing). This includes the charges against him/her, as well as the date and time of the disciplinary hearing, according to the procedures described above.[20]

It is concluded that both Libyan and Egyptian laws emphasize the necessity to inform the accused employee about the referral decision in writing, with a confirmation of receipt. In addition, this letter must include all the errors committed by the employee, as well as the date and time of the disciplinary hearing, so that the accused can prepare his/her defence. If the letter of information is not accompanied by a confirmation of receipt, then the letter will not be considered as a formal letter, which can affect the validity of the disciplinary decision. It will make the procedure, as well as the decisions taken, invalid on the grounds of the changes letter not being accompanied by a confirmation receipt. With respect to this issue, the Supreme Court in Libya held in Administrative Appeal No.30/37[21] that, as the accused employee (accused of neglecting his duties and leaving his work without previous permission) was not informed of the referral decision to the disciplinary hearing, the disciplinary decision was invalid.

The Disciplinary Committee penalised him by dismissal. The employee did not accept this decision and appealed to the Supreme Court, which held that although the employee was informed by his director that he had to appear before the Disciplinary Committee, because this information was not officially handed to the accused employee by letter in person, it meant that there was no proof that he had received this information. Therefore,

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[19] Law No.12 of 2010 concerning Labour Relations referred to the right of informing the accused employee that he/she is being referred to Disciplinary Committee. However, the executive regulations of this law have not been enforced yet. Therefore, the study will discuss the employee's right to the referral decision through previous law (Law No. 55 of 1976 concerning the Civil Service) according to Article 2 of Law No. 12 of 2010.

[20] Article 23 of Egyptian Law No. 117 of 1958 (concerning Reorganisation of Administrative Prosecution and Disciplinary Hearing) does stipulate the necessity of mentioning all the errors committed by accused employees in their referral to disciplinary hearing. It also stipulates the process of doing so.

[21] Administrative Appeal No.30/37, Libyan Supreme Court (24.03.91) *Unreported.*

he could not be blamed if he did not attend the disciplinary hearing. This rendered the final decision invalid.

From Libyan Administrative Appeal No.30/37 it is noticed that the Court did focus on the necessity of following the disciplinary measures (informing the accused), and that failure to comply resulted in the invalidity of the final decision. The Court considered the Disciplinary Committee's decision invalid because the employee was not properly legally informed of the charges against him. This is fair, as the Court held that the accused employee should be informed about the disciplinary hearing through written documentation, as this is assurance that he/she knew about the charge, so he/she can prepare a defence. In other words, the law makes it a condition to inform the employee in person, in order to protect the employee from the occasion where the administration can make a judgment *in absentia* that would deny him/her the right of defence.

3.2.1.3 Employee's Right to View the File of Investigation

The right to view the investigation file is one of the essential guarantees available to the accused employee.[22] It is not enough to inform the employee of the charges against him/her. The accused must be given the chance to view his/her file, its contents and the investigation charges against him/her.

In Libya, Article 14 (1) of Law No.55 of 1976 concerning the Civil Service[23] stipulates the right of the accused employee, who is referred to the disciplinary hearing, to view the charges against him/her. This includes all the documents related to the investigation, as well as the copies the investigator had made of these documents.[24] Despite the significance of the investigation file being viewed by the employee in Libyan law, Egyptian Law No.47 of 1978 concerning Civil Servants does not stipulate this right for

[22] Mohamed Yakoot (n 5) 294.

[23] Law No. 12 of 2010 referred to the right of the accused employee to view the file of the investigation in its executive regulations which is not enforced yet. Therefore, the study will discuss the employee's right to view the file of investigation through previous law (Law No. 55 of 1976 concerning the Civil Service) according to Article 2 of Law No. 12 of 2010.

[24] The text of Article 14 (1) of Law No.55 of 1976 was as follows: if the employee was not able to view the documents during the investigation in the accusation stage, he/she can view them after the investigation has finished. This right to view includes taking a copy of the file under supervision of the authority that holds the documents.

the accused employee. Egyptian commentators[25] state that although the employee does not have this right stipulated by law, nevertheless the accused is still entitled to view the documentation because this right is recognised by the general principles of law.[26] These principles of law provide the accused employee with all the guarantees needed to defend him/herself. Although the fact that viewing the documents related to the investigation is a right that is provided to the accused employee by general law, not availing of this right (by the accused) does not affect the validity of the investigation and the penalty based on this investigation. The investigatory authorities and the relevant authority of disciplinary hearing are not permitted to force the accused to view the investigation and the documents related to it. Viewing the documents is done at the request of the accused and his/her request should not be refused.[27]

Even though the employee has the right to view the documents related to the investigation the question arises as to whether is it permitted for the administration to prevent the employee from viewing certain documents because they are confidential?

Some commentators[28] claim that the employee has every right not only to view the charges but all the documents in the investigation file, as the disciplinary authority must give the employee the complete file to view. Afifi[29] (commentator) however, states that guaranteeing the right to the employee to view the documents relevant to the investigation, does not mean that the accused has the right to view *all* the documents of

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[25] Aomer Barkat, *The Administrative Authority* (Darelnahda Elarabia 1979) 263; Abdelaziz Khalefa, *Disciplinary Guarantees in Public Employment* (Monshat Elmaaref 2008) 141-142; Saed Eshtwi (n 1) 113.

[26] The judge can extract a legal rule from a purposive reading to another legal text. This kind of legal rule extracted by the judge is not written in law as a legal text, but is extracted from another legal text. These category of legal rules called the General Principles of Law. For example, the right to be silent during a disciplinary hearing is not stipulated by law. However, a judge in Administrative Appeal No. 55/46 ruled that since the law gave the accused the right of defence, he/she has the right to defend his/her self by all forms, and the right to be silent may be regarded as a form of defence. Administrative Appeal No. 55/46, Libyan Supreme Court (13.03.2003) the group of principle decided by Supreme Court, Administrative Judiciary, Year 2000-2003, 184. For further information regarding the general principles of law. See Tarek Jafer, *Administrative Judiciary: The principle of Legitimacy and Organisation of Administrative Judiciary (*Elnser Eldhabi for Printer 2002) 38-42; Ramdan Badik and Muna Ramdan, *The Administrative Judiciary as Grantee of Quality and Protection for Legitimacy* (Darelnahda Elarabia 2010-2011) 33-35.

[27] Khalefa Elgehmi, *The Disciplinary Responsibility for Public Employee in Financial Errors in Libyan Law, A Comparative Study* (University of Gar Younis 1997) 307.

[28] Abdelaziz Khalefa (n 25) 141-42; Nasreldin Elgadi, *The General Theory of Discipline in Libyan Employment Law, A Comparative Study* (Darelfacer Elarabe 2002) 510.

[29] Mostafa Afifi and Badria Aljaser, *Disciplinary Authority between Efficiency and Guarantee* (Darelmaktbooate Lgamaaia 1982) 392.

the file. Some documents are related to State confidentiality and employment confidentiality, thus the employee should not be entitled to view those categories of documents which are not related and important for his/her defence.

By comparing the two views discussed above, it can be submitted that the first view[30] (which suggests that the employee is entitled to view all the documents of the investigation and those related to it) is more appropriate, as the legislation provided this right to the employee.[31] It is submitted by the thesis that any restriction or condition on this right is illegal. In addition, preventing the employee from viewing some documents, on the grounds that these documents are confidential to the employment, can give the administration an excuse to violate the accused's right to view the documents of the investigation. This in turn violates the right of defence, as the accused employee's right to defend him/herself cannot be achieved unless he/she knows of the charges and the evidence against him/her.

In conclusion, it is submitted that viewing the documents relevant to the investigation vindicate the employee's right to defend him/herself. Even if the employee was presented with the charges against him/her this is not sufficient, because by additionally viewing the relevant documents, he/she can prepare his/her defence. As a result, the author submits that Libyan law is fair in giving the employee the right to view the case documents. However, it is also submitted that in order for Libyan law to give maximum guarantees to protect the interests of the employee, it is suggested that this right must be fully given to the accused employee without any restrictions or conditions, to enable him/her to properly defend him/herself, regardless of whether there is a legal text which stipulates this right.

3.3 Does Libyan Law Guarantee Sufficient Rights of Defence

The right of defence is considered one of the essential principles in the disciplinary process. This is because any fair hearing requires conducting an investigation with the

[30] Abdelaziz Khalefa (n 25) 141-42; Nasreldin Elgadi (n 28) 510.
[31] Article 14 (1) of Law No.55 of 1976 concerning the Civil Service.

accused employee in order to face him/her with the charges and provide him/her with the opportunity to respond to these charges.[32] Therefore, the right of defence is an essential guarantee for the accused employee that enables him/her to prove his/her innocence. Respectively, both Libyan[33] and Egyptian[34] employment laws stipulate that it is not permissible to investigate an employee without hearing his/her statements and providing him/her with the right of defence.

3.3.1 Definition of the Right of Defence

The definition of the right of defence is still unclear and can easily be confused with other rights that must be provided to the employee. This is because of the generalisation of the meaning of the term ''the right of defence''. The right of defence is the essential guarantee from which other rights are derived, such as the principle of convening a meeting with the employee to formally bring charges against him/her.[35]

Kamis[36] states, without specifying details, that all employees have the right by law to a fair hearing. While another commentator,[37] defined the right of defence as a number of proceedings undertaken by the accused employee, or by someone representing him/her, in order to grant the employee the rights to a defence against the charges directed against him/her. Tmaoi[38] considered that the right of defence is based on two factors: notifying the employee of the accusation, and giving him/her the right to defend him/herself. In his opinion, the employee has the right of defence when the charges are first formally

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[32] Ali Shatnawi, *Encyclopaedia in Administrative Law* (Darwaael 2003) 579.
[33] Article 156 of Libyan Law No. 12 of 2010 concerning Labour Relations: 'it is not permissible to enforce the penalty on the employee until a written investigation has been conducted with him/her and his/her statements heard, thereby giving him/her the chance to defend him/herself'.
[34] Article 79 of Egyptian Law No. 47 of 1978 concerning Civil Servants. 'it is not permissible to enforce the penalty on the employee until a written investigation has been conducted with him/her and his/her statements heard, thereby giving him/her the chance to defend him/herself'.
[35] Mohamed Yakoot (n 5) 268.
[36] Mohamed Kamis, *Prejudice to the right of accused employee to defend* (Mnshat Elmarfe 2001) 109.
[37] Abdelrahim Othman, *Explaining the Criminal Procedural Law* (Darelnada Elarabia 1975) 417; Aomar Barkat (n 25) 288.
[38] Sliman Tmaoi, *The Administrative Justice, Disciplinary Justice, A Comparative Study* (4th edn, Darelfacer Elarabe 1995) 560-564.

brought against him/her. Abdelber[39] disagrees with this opinion and holds that the right of defence is a fundamental guarantee, differing from other guarantees, such as the principle of convening a meeting to confront the employee with the charges against him/her. However, the right of defence and the principle of confronting the accused employee with the charges against him/her are of equal significance.

It is submitted that Abdelber's[40] opinion is the most appropriate, as the employee will not be able to defend him/herself without being directly confronted with the charges. Being charged with the offence, the employee will be aware of the charges, and he/she can defend him/herself. What is more, facing accused employees with the charges proves that the disciplinary authority is respecting their right of defence, by giving them the opportunity to reply to those charges.

The thesis submits that the right of defence could be defined as follows: to give the right of defence to the accused employee, or to someone representing him/her, after notifying him/her of the charges and including the evidence against them. In light of this definition, it can be submitted that the right of defence must be provided to the accused employee, so that he/she can put his/her case in a legal manner to the authority conducting the investigation. In order for an employee to make his/her defence there are certain methods that are provided to him/her by Libyan law. For that reason, the aim of the study in this section is to examine the fairness of these methods in Libyan law. These methods are as follows:

1. Providing a defence in writing or by verbal defence.

2. The right of the employee to remain silent.

3. Right of the employee to be represented by a lawyer.

4. The right to call and examine witnesses.

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[39] Abdalftah Abdelber, 'The Disciplinary Guarantees in Public Employment, A Comparative Study' (PhD Thesis, Cairo University 1971) 292-294.
[40] Ibid.

3.3.2 Providing a Defence in Writing or by Verbal Defence

Commentators[41] state that the primary focus is not to give the right of defence to the accused employee, but to ensure that the correct procedures are taken to provide an effective guarantee of the right of defence. Since the employee has the right of defence, it is crucial to consider the ways in which this can be put into practice.

At the investigation stage, both Libyan and Egyptian laws give the right to the employee to defend him/herself, within the parameters of the law, but they do not specify details. As both stipulate that it is not permissible to enforce the penalty against the accused employee before hearing his/her statements and the accused is given the opportunity to defend him/herself.[42] However, there is no legal text explicitly stipulating that the employee can defend him/herself, either verbally or in written form.

In the disciplinary hearing stage, Libya Law Article 94 (2) of Law No. 55 of 1976 concerning the Civil Service stipulates that the employee referred to the Disciplinary Committee must attend the committee hearing, examine the witnesses and defend him/herself, either verbally or in written form. Article 29 of Egyptian Law No.117 of 1958, concerning the Reorganization of Administrative Prosecution and Disciplinary Hearing, stipulates that the employee appearing before the disciplinary hearing must attend the hearing and can provide his/her defence either verbally or in writing. Therefore, the accused employee ideally exercises his/her right of defence by means of both written and verbal statements. However, he/she can opt to employ only one means of defence, either in written or verbal form, as he/she so wishes, but there is no explicitly written code in Libyan or Egyptian law guaranteeing this right at the earlier investigation stage. It is suggested that in both Libyan and Egyptian law, specifying the method to carry out the right of defence at the investigation stage should be stipulated, as is the case for the disciplinary hearing stage.

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[41] Aomar Barkat (n 25) 289.
[42] Article 156 and Article 179 (n 2).

3.3.3 Fairness of Libyan Law in giving the Employee the Right remains Silent

The rationale for providing the employee with the right to submit statements is to enable him/her to put forward his/her defence to the charges directed against him/her. The most significant safeguard is the right of the employee to submit a statement which can provide the Court with the necessary evidence to prove his/her innocence.[43]

The aim of the study in this section is to answer the following question: would silence in Libyan law on the part of the employee be interpreted as proof of guilt, or would it be permissible for the employee to have the right to remain silent without incurring suspicion?

Law No. 12 of 2010 concerning Labour Relations, and Egyptian Law No. 47 of 1978 concerning Civil Servants, do not make provision for either the right of the employee to be silent, or his/her refusal to answer. This naturally led to a debate about whether it is permissible for the employee to be silent during the disciplinary hearing. By contrast, in UK law, public employees have the right to remain silent according to the Human Rights Act 1998 Sch.1 PART I Art.6 and this right cannot be overridden. Also the employee's silence cannot be interpreted as proof of guilt.[44]

Some commentators[45] suggest that remaining silent is not an accused employee's right because: a. the investigatory authority cannot force the employee to talk, or may not have the skill to encourage the accused to speak, or b. the employee remaining silent could suggest that the employee does not have evidence that can prove his/her innocence. A

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[43] Mohamed Yakoot (n 5) 256-257.

[44] An employee working as a bus driver was dismissed from work. The employee was alone in the bus at the station when the bus caught fire. The employee was investigated and on his solicitor's advice he refused to answer any questions. Consequently, he was charged with arson. Later, the employee declined to attend two disciplinary meetings, but the employer did not postpone the trial and based on this conclusion, the employee was found guilty. The employee was dismissed for not being able to safeguard the company's property. A year later, evidence was found which proved the employee's innocence. Therefore, the employee appealed to the employment tribunal and submitted that he was unfairly dismissed, as he was innocent of the charge that had led to his dismissal from work. The employment tribunal upheld the decision of the company's disciplinary authority and ruled that during the investigation and disciplinary meetings, the employee's right to silence under Human Rights Act 1998 Sch.1 Part I Art. 6 (2) had not been engaged and at the time, the employer believed that the employee committed the crime as there was no evidence to prove otherwise. They also gave the employee the right to defend himself, but the employee chose to be silent. This case demonstrates that UK Law gives the right to the accused employee to remain silent. Ali v Sovereign Buses (2006) (London) Ltd UK (EAT/0274/06).

[45] Maher Abdalhadi, *Procedural Legitimacy of Discipline* (Garib Library 1986) 247; Saad Algabaaly, *Guarantees of the Employee to Defend Himself* (Darelnada Elarabia 1998) 397.

different view,[46] which is the most common amongst commentators, is that silence on the part of the accused employee is his/her right. Accordingly, it cannot be implied that the silence of the employee means that he/she is guilty. This is in agreement with the concept that the employee is innocent until h/she is proven guilty, regardless of the evidence against him/her. Until he is pronounced guilty, an accused employee is considered innocent.

The Libyan judiciary does not consider the employee's refusal to give his/her statement to the Court as negative. In Administrative Appeal No.55/46;[47] the Supreme Court of Libya heard an appeal brought by an employee who worked as a manager in the treasury department in the western region of Libya. This employee was punished by having his salary suspended for six months because he failed to record all the main and secondary communications entailed in his work. This resulted in the mismanagement of state financial resources. The accused employee disputed the penalty enforced against him and he appealed to the Supreme Court, claiming that the investigatory authorities did not give him the opportunity to defend himself. Additionally, they referred him to the Disciplinary Committee without notifying him of the charges against him. The Supreme Court held that the employee had attended all the investigation meetings, as well as Court hearings undertaken by the Disciplinary Committee for Fraud and Mismanagement of Funds, and was notified of the charges against him clearly and in detail. Furthermore, he failed to take the opportunity to defend himself. Consequently, the Supreme Court refused his appeal. However, the Court did not draw adverse inferences from his silence.

The thesis concludes that even though there is no legal text in Libyan legislation granting the right to remain silent to the accused employee, the fairness of Libyan law is represented in Libyan judgments, with respect to this right. This is because Libyan case law considers that the refusal of the employee to give his statements and remain silent does not represent a misdemeanor for which the employee can be penalised, as based on

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[46] Altayb Mahmoud, *The Legal Guarantees to Judge the Civil Service in the State, A Comparative Study* (Darelnahda Elarabe 2008) 414; Saleh Mhmued, *Explanation of Civil Service System in the State* (Darelmarfe 1997) 727.

[47] Administrative Appeal No.55/46, Libyan Supreme Court (13.03.2003) *Supreme Court Journal,* the Group of the Principle Decided by the Supreme Court, Administrative Judiciary, Year 2000-2003, 184.

previous judgments (Administrative Appeal No.55/46[48]), which did not consider the silence of the employee as a circumstance from which to draw adverse inferences. From this judgment, we can deduce a lot: giving the accused employee the right to defend him/herself means that he/she cannot be forced to give statements and neither can his/her silence can be regarded as an error for which he/she must be penalised. Remaining silent or giving a statement is purely his/her choice, as a right. It can be concluded from the case law of the Libyan Supreme Court that refusal to give statements by the employee should not stop the investigatory authorities from imposing the penalty. By remaining silent, he/she fails to take the opportunity to defend him/herself, and this gives the authorities no reason to refrain from penalising him/her, dependent, of course, on the evidence against him/her. Thus, the accused cannot appeal to the Court claiming that he/she had not been given the right to defend him/herself, as by attending the Court, he/she was provided with the right of defence.

The Egyptian judiciary in one judgment adopts a similar approach, namely that the employee's refusal to give a written or verbal statement to the Disciplinary Court did not constitute an administrative error liable to punishment. In Appeal No.2847/30,[49] the Egyptian Administrative Supreme Court, (a case regarding an employee who worked in the Agriculture Institute and who submitted a lawsuit to the Disciplinary Court)[50] ruled that the penalties enforced against the employee were valid, as they were based on documents which proved that the employee neglected his duties. In addition, it was not acceptable for the employee to decline the submission of his statement, (the employee had requested to be referred to the Administrative Prosecution, claiming that he had confidential statements he wanted to show them). The employee did not accept this judgment and appealed to the Administrative Supreme Court. The Administrative Supreme Court supported the decision of the Disciplinary Court and ruled the validity of the penalty decision. However, the Administrative Supreme Court ruled on that the refusal of the accused employee to attend the proceedings of the investigation, or his

[48] Ibid.

[49] Egyptian Administrative Supreme Court, Appeal No.2847/30 (18.11.85) the Group of the Principle decided by the Administrative Supreme Court, Part 1, Year 3, 276.

[50] The employee appealed against the decision imposed against him for the following reasons: That he did not neglect his supervisory duties on the Water Committee, he did not give his statements to his department's legal administration and claimed that he was therefore not given the right to defend himself.

refusal to give a verbal statement, did not constitute a misdeed for which he could be punished because no accused employee can be forced to defend himself.

In another judgment, the Egyptian judiciary considered the refusal of the employee to give his statement to the Disciplinary Court as a punishable administrative error. The ruling of the Egyptian Administrative Supreme Court in Appeal No.480/36[51] was as follows: this case concerned an employee who worked in the capacity of inspector of goods in the Further Education Ministry. He appealed to the Disciplinary Court against the administration which had imposed a salary deduction penalty against him.[52] The Disciplinary Court refused the employee's appeal, as the Court ruled that the employee had been summoned for investigation by the Management of Legal Affairs, but had failed to attend. In addition, the accused asked the administration to refer him to another authority: the Administrative Prosecution for investigation. Consequently, he was referred to this authority which submitted a decision to the administration stating that the employee was to be penalised for showing contempt, as he did not appear when he was called by the Management of Legal Affairs.

Moreover, when the employee submitted his appeal to the administration he used inappropriate words[53] that insulted the honour and decency of a member of the legal issues administration. After receiving the Administrative Prosecution report, the administration penalised the employee with a one day salary deduction. However, the employee objected to this penalty and appealed to the Administrative Supreme Court to overturn this decision. The Administrative Supreme Court rejected the employee's appeal because the Court ruled that the employee was summoned for the investigation by the Management of Legal Affairs, but failed to appear, which is a punishable offence. Additionally, if the accused employee preferred to remain silent he would lose the opportunity to defend himself.

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[51] Egyptian Administrative Supreme Court, Appeal No.480/36 (18.05.96) Council State, *Unreported*.
[52] The employee claimed that he had submitted documents supporting his innocence to the Management of Legal Affairs (follow the Administrative Presidential Authority) who investigated him. The Management of Legal Affairs did not consider these documents and penalised him on the charge of not respecting his superiors.
[53] "Because of the conspiracy of the legal issues administration and the head of the central administration against me, the head of the administration cannot be my judge and my opponent at the same time".

The above two Egyptian cases (No.30/2847 and No.480/36) are contradictory. It seems that the Egyptian judgments are not sufficiently consistent as to whether the accused's silence was a disciplinary error that must or must not be punished. It is submitted that the Egyptian judiciary should clear up this contradiction in its judgments and decide whether or not the accused's silence is a disciplinary error. Moreover, the Egyptian judiciary should consider taking the Libyan approach with respect to this issue and consider the accused's silence as a right of the employee rather than a breach of discipline.

3.3.4 The Right of the Employee to representation by a Lawyer

Representation by a lawyer is considered an absolute right that must be provided to the accused employee. This is stipulated in Libyan law:[54] Article 94 (2) of Law No. 55 of 1976 concerning the Civil Service confirms the employee's right to be represented by a lawyer, but also states that the employee can attend the Court meeting with his/her chosen lawyer. The accused is also permitted to represent him/herself, if he/she prefers. Egyptian law[55] permits the employee to represent him/herself or be represented by a lawyer. Libyan and Egyptian legislation recognises the right of the employee to be represented by a lawyer. This is a right that is for the benefit of the employee during the disciplinary hearing. Unlike Egyptian law, Libyan law permits the accused the right to appear in Court with his/her lawyer. However, the law stipulates this right for the accused employee only during the disciplinary hearing,[56] not during the investigation phase.

This raises the question: can the employee summon a lawyer during the investigation phase?

Commentators[57] state that employment laws as well as the administrative judiciary do not explicitly provide the employee with the right to call his/her lawyer during the

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[54] Article 163 of the current Law No.12 of 2010 concerning Labour Relations, referred to the executive terms of this law regarding organising the right of defence and as this term has not come into force yet and until it has been produced, the right of defence will be studied through Law No. 55 of 1976 concerning the Civil Service, based on Article 2 of Law No.12 of 2010.

[55] Article 29 of Law No. 117 of 1958 concerning the Reorganisation of the Administrative Prosecution and Disciplinary Hearing.

[56] Article 94 (2) of the Libyan Law No.55 of 1976 concerning the Civil Service; Ibid Article 29.

[57] Altayb Mahmoud (n 46) 410; Mohamed Ali, *Protection of Public Employee Administratively* (Darelnahda

investigation phase. However, observers state that this right should be provided to the employee at the investigation stage. It seems that this opinion of the commentators is correct, when they state that the employee has the right to call his/her lawyer during the investigation phase. They support their argument by stating that if a penalty is enforced by the administrative authority, the presence of a lawyer is essential for the accused employee, the reason being that the lawyer has a legal knowledge and may prove his/her innocence, which could possibly affect the penalty outcome.

It seems that this opinion of the commentators is correct, when they state that the employee has the right to call his lawyer during the investigation phase, as the lawyer is more able to defend the accused employee than the employee is him/herself. The author submits that despite the fact that there is no legal text explicitly stipulating that the presence of a lawyer is optional, the accused employee is guaranteed this during the investigation phase, in both Libyan and Egyptian law. This is because Libyan law[58] stipulates that it is not permissible to enforce the penalty against the accused employee before hearing his/her statements and the accused is given the opportunity to defend him/herself. This is also the position in Egyptian Law in Article 74 of Law No. 47 of 1978 concerning Civil Servants, which stipulates that it is not permissible to enforce a penalty against the accused employee until his/her statements have been heard and he/she is able to put forward his/her defence during the investigation stage.

Giving the accused employee the opportunity to defend him/herself means that the employee has the right to defend him/herself by any means they believe is appropriate, including calling a lawyer. Thus, calling a lawyer is considered part of the employee's defence. Accordingly, it can be concluded that both Libyan and Egyptian legislation uphold the right of the accused employee to call on a lawyer as part of his/her defence at the investigation stage. However, the Libyan judiciary[59] approach is different, as it states that the employee does not need a lawyer to satisfy his/her defence. This is because the Supreme Court of Libya does not find the ultimate decision illegal where the employee has been denied the right to call his/her lawyer, provided that the employee has been

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Elarabia 2010) 312.

[58] Article 156 (n 2).

[59] For further information see next paragraph.

given the right to defend him/herself. It does not consider that granting the right to the employee to call his/her lawyer is an essential right.[60]

The following is the ruling of the Supreme Court in Libya in Administrative Appeal No.9/15.[61] This case concerned an employee working in an administrative department, who appealed to the Supreme Court and argued that the Disciplinary Committee did not provide him with the necessary right in order to guarantee his defence. The Disciplinary Committee refused the employee's request to postpone the investigation to enable the employee to call his lawyer. The Supreme Court ruled that the refusal of the Disciplinary Committee to postpone the investigation did not contravene the law, as the Disciplinary Committee gave the employee the chance to defend himself.[62] The Court added that the right to a defence does not necessitate the presence of a lawyer for the accused employee, because the law requires the presence of the accused's lawyer only in the Criminal Court. Accordingly, the employee has the right to defend himself without the presence of a lawyer.

The author submits that the Libyan Court interpreted Libyan Law No. 55 of 1976 differently and also the previous Law No.19 of 1964 (concerning the Civil Service, on

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[60] In contrast, Section 10 of the Employment Relations Act 1999 in UK law specifies that the employer can be accompanied by:
a. Independent trade union. b. Colleague. c. A trained official in trade union. The companion does not have the right to respond to questions on behalf of the accused employee and can only address the hearing and respond to questions if asked to.
In the UK, legal representation is allowed for the accused employee in disciplinary hearings only if the charges against him/her affect his/her career, or if the charges are serious, such as dismissal criminal charges. The Supreme Court held in *R (on the application of G) v The Governors of School X (2012) 1AC 167,* that where dismissal could lead to an employee being barred from working at all in his/her profession, they may have an implied right to legal representation at the disciplinary hearing. The dismissal itself does not lead the employee to be banned from his job, but normally other separate authorities make this decision after the dismissal. There is as yet no guidance on the extent of a lawyer's role at a disciplinary hearing
The author submits that the UK Courts' approach is superior to that taken by the Libyan judiciary. This is because the Libyan judiciary refuses completely to grant that the accused employee the right to call his/her lawyer in disciplinary hearing (in Administrative Appeal No.9/15), even though there is a legal text stipulating that moral errors that affect the honour of the employment are considered disciplinary errors (Article 11 (12) of Libyan Law No. 12 of 2010 concerning Labour Relations). Therefore, moral crimes can affect the employee's career. In contrasts, UK Court accept that the accused employee can be legally represented if the charges against him can affect his/her career as in the case cited above.

[61] Administrative Appeal No.9/15, Libyan Supreme Court (3.05.70) *Supreme Court Journal,* Year 6, no. 4, 44.

[62] The administration had notified the employee of the date of the investigation, as well as the charges against him. Similarly, the employee was given the chance to defend himself verbally, or by presenting a defence document, but he did not avail of these rights.

which the previous judgment was based).[63] This is because Libyan Law No. 55 of 1976 stipulated the right of the employee to be represented by a lawyer[64] while the Court (in Administrative Appeal No.9/15) states that the employee should not necessarily be represented by a lawyer unless there are criminal charges (Criminal Court). It is submitted that Libyan legislation is fair, because it gives the employee the right to call a lawyer to defend him/her. However, the Libyan judiciary has acted incorrectly in not providing the right to the employee to defend him/herself with a lawyer in cases of disciplinary error, without any differentiation between serious disciplinary charges which affect their future career, and other normal charges. One of the serious consequences for the employee when the expected penalty is a dismissal, is that it is difficult for them to find another job with the same advantages, as one of the requirements of the job is a certificate of experience from the previous job, which they cannot provide without a notice that at the end of their previous service they were dismissed.

Therefore, it is submitted that the Libyan judiciary should apply the law and give the employee the right to call a lawyer to defend him/herself, or the Libyan judiciary should differentiate between serious disciplinary charges and normal ones, as the UK Courts do,[65] and provide a lawyer or legal representative for the employee in Court, where the disciplinary error is considered serious and can have an effect on the employee's future. This is because the lawyer has more ability to defend the accused employee than the employee him/herself does. The lawyer is familiar with the legal texts and has a better understanding of the law and can therefore study the employee's case and examine the validity of the evidence against the employee to a greater degree than the employee can.

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[63] The previous Law No.19 of 1964 concerning the Civil Service did not expressly stipulate the right of the employee to call a lawyer. This however does not deny the employee the right to call a lawyer, because Article 58 of this law stipulated that employees have the right to defend themselves by either attending the Court, defending themselves verbally or in writing and examination of witnesses. It can be submitted that because requesting a lawyer is also considered part of the employee's right in defending him/herself, the Court should not refuse it.

[64] Article 94 (2) (n 56).

[65] See footnote 60 of this Chapter.

3.3.5 Fairness of Libyan Law in giving the Right to Call and Examine Witnesses

Witnesses are of great significance in the disciplinary process, as their statements play a major role in proving or denying the charge against the accused employee. This is especially important in cases where there is no written evidence to prove or deny the charge and the only evidence available is the witness's statement.[66] In this situation, witnesses are considered a principal source of evidence. Witness statements can be defined as the statement given by a person who is not involved in any way in the case in which he/she is testifying and the statement is based on what the witness sees, hears, or has information about the case.[67] In this section the fairness of the procedures provided by Libyan law to deal with witnesses will be tested for fairness through the following:

1. The witness's verbal testimony in Libyan law.

2. The authority of the investigator to hear witnesses.

3. Taking the oath.

3.3.5.1 The Witness's Verbal Testimony in Libyan Law

Previous Article 93 of Libyan Law No. 55 of 1976 concerning the Civil Service stipulated the right of the Disciplinary Committee to hear the statements of the witnesses (whether the witnesses come voluntarily or under subpoena) and gives the employee the right to call and examine the witnesses in Disciplinary Committee (Disciplinary hearing) stage. Also, Article 48 of Libyan Law No. 2 of 2007 concerning the People's Inspection and Control System provides the right to the member of the People's Inspection and Control System during the investigation to call the witnesses and examine their testimony.[68]

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[66] Samir Elbhi, *The Rules of the Administrative Supreme Court in Disciplinary of Public Employee* (Darelktub Elkanunia 1998) 30.

[67] Abdelfatah Hegazi, *Basics of the Disciplinary and Criminal Investigation* (Darelfeker Elgameai 2005) 105.

[68] Article 81 of Egyptian Law No. 47of 1978 concerning Civil Servants stipulates that the employee has the right to hear the witnesses of the incident regardless of whether the witness volunteered or was requested to appear by the accused employee. Also, Article 7 of Law No. 117 of 1958 (concerning the Reorganization

The question arises: can evidence be admissible against the employee in Libyan law in an investigation run by the administration, where the witnesses are not available for cross-examination hyphen by the employee, and does this meet the standard of basic fairness?

Although the current Law No. 12 of 2010 concerning Labour Relations and (previous Law No. 55 of 1976 concerning the Civil Service) do not stipulate clearly the right of the employee to call and examine witnesses, it can be understood from the legal phrase ''give the chance to the accused to defend''[69] that the accused employee has the right to do this. These testimonies could be of significance in proving his/her innocence, since hearing the testimony is part of the right of defence. The Libyan Court clearly granted this right in Supreme Court Administrative Appeal No.7/19.[70] In this case, the People's Inspection and Control System informed the Ministry of Education that a teacher in a school in Abosleem had a second job as a shopkeeper in a shop in Soog Etlat market, which is contrary to Article 45 (4) and 46 (1) of Law No.19 of 1964 concerning the Civil Service.[71] As a result, the Disciplinary Committee of the Ministry imposed a two-month salary deduction against the accused employee. The decision of the Disciplinary Committee was based on a member of the People's Inspection and Control System finding the teacher working in a shop in Soog Etlat market, selling goods. Moreover, the member of the People's Inspection and Control System took the identity card of the employee as evidence of the charge against him.

Later, the accused employee appealed against the penalty. The Appeal Court accepted his appeal and overturned the penalty against him. The administration appealed to the Supreme Court claiming that the Appeal Court decision was illegal, because it did not take into consideration the investigation of the People's Inspection and Control System, on which the administration's decision was based. The Supreme Court ruled that any investigation must be based on certain rules that guarantee the rights of the employee during the investigation. This is because it is permissible to judge the employee only after

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of Administrative Prosecution and Disciplinary Hearing) stipulates that the member of the Prosecution has the right to hear the witnesses after they take the oath.

[69] Article 156 of Law No. 12 of 2010 (which has replaced the previous Article 80 of Law No. 55 of 1976 concerning the Civil Service but was identical to Law No. 55 of 1976).

[70] Administrative Appeal No.7/19, Libyan Supreme Court (10.11.74) *Supreme Court Journal,* Year 10, no. 3, 70.

[71] This law was amended by Law No. 55 of 1976 concerning the Civil Service.

an investigation that gives all the rights and guarantees to the employee. The investigation must be based on correct legal rules, which include giving the employee the opportunity to defend himself, call defence witnesses and hear their testimonies.

These rights *must* be granted to the employee, despite the lack of legal text to stipulate this. In order for the employee to practise the right to hear the witnesses, he must be given the identity of the prosecution witness, or must be able to confront and examine such witness. Accordingly, as the People's Inspection and Control System did not, in this case, disclose the name of the Member of the People's Inspection and Control System to the accused employee (ie., the detective who found the employee in the shop), then the Disciplinary Committee should not have taken the statements of this member into account.[72] Consequently, the decision of the Disciplinary Committee was held to be invalid, as it was based on inappropriate evidence (concealing the detective's name from the accused employee, and not allowing the accused to question the detective who found him in the shop).

The preliminary conclusion at this point is that Libyan legislation and the Libyan judiciaries give the right to the employee to call defence witnesses. However, one cannot judge whether Libyan legislation and the Libyan judiciary achieve a balance of fairness, until we investigate whether the employee has a complete right to call witnesses in all cases, or whether the investigator has the right to refuse the employee's request to call witnesses. This will now be considered.

3.3.5.2 The Authority of the Investigator to Hear Witnesses

Although an accused employee has the right to call witnesses, commentators[73] take the view that the investigator has the right to hear the statement of any witnesses, even if the employee does not request this. The investigator also has the right to refuse to hear the

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[72] The statements of the member are not admissible and cannot be relied upon to condemn the employee. Plus, the identity card that the member took from the employee in the shop was of no benefit, as the card could prove only that the employee was in the shop, not that the accused was selling goods.

[73] Ahmed Elhafnawi, *The Invalidly of Procedure and its effect on the Disciplinary Lawsuit* (Darelfeker Elgameai 2007) 339; Sliman Tmaoi (n 38) 354.

statements of other witnesses, if he decides that hearing the statement would be of no significance to the case.

The author believes that refusing the employee's request in some cases is reasonable. Even though there is no legal text giving the right to the investigator to refuse the employee's request to call witnesses, in some cases refusing this can be beneficial to the investigation. This is seen, for instance, when the employee requests the same witnesses on multiple occasions to deny the charges against him. In this situation, the request to hear a witness may be refused.[74] On the other hand, if other evidence is insufficient to prove the charges against the employee, and the statements of the witnesses is the only evidence upon which the employee's defence is based, these details can affect the outcome of the case and then failure on the part of the investigator to accept the employee's request can render the investigation invalid. In addition, *all* the measures taken in this investigation will be invalid.

In conclusion, given the decision reached by the Libyan judiciary, it is submitted that the right of the employee to call witnesses should be more protected by Libyan law, as it is noted by the thesis that there is no specific guideline regarding failure to accept the

[74] Precedence for this can be found in Egyptian Administrative Supreme Court in Appeal No.1001/8. The Disciplinary Court suspended a doctor for three months without pay. The accused was the doctor responsible for the health sector in Shebranmbee village which includes prevention of contagious diseases. The issues that led to the Court decisions were as following: a. Three school children affected by typhoid were not isolated, which led to the disease infecting the rest of the children pupils and their families. b. Even though the accused doctor was informed by the principal of the school about the typhoid cases and was also informed that the disease was transferring rapidly and causing death, the doctor responsible did not take the required preventative procedures to control the situation. The required steps may include an evaluation of the problem, diagnosing the families of the children and treating the infected children.
However, the accused employee did not accept the penalty of the Disciplinary Court and submitted an appeal to the Administrative Supreme Court. The accused doctor based his appeal on the fact that the Court did not accept his request to call witnesses in an investigation conducted by the Administrative Prosecution. The Administrative Supreme Court refused the employee's appeal on the basis that the Disciplinary Court has based its charge on the investigations which were conducted by the director of the prevention department in the Ministry of health. In addition, the Disciplinary Court directed the charges to the employee and heard his defences and also heard the statements of the families of the infected children. The Disciplinary Court assigned to the Administrative Prosecution to investigate the accused employee. The results of the investigations confirmed that the accused was guilty. The Court ruled that hearing the defence witnesses is an issue that has to be estimated by the investigator and the investigator can refuse hearing the defence witnesses, if the investigator thinks that hearing them will not benefit the case and be irrelevant. The Court added in this case that the Administrative Prosecution did accept his request to call witnesses in investigation because they were the families of the children, whose statements had been heard before by the Disciplinary Court and by the director of the prevention department in the Ministry of health. Consequently, hearing the witnesses will not benefit the case and will therefore be irrelevant. Egyptian Administrative Supreme Court, Appeal No.1001/8 (27.02.62) Council State, *Unreported*.

employee's request to call witnesses by the investigator, thereby leading to the invalidity of the investigation, which is unfair. This outcome may be explained by many employees, particularly those in junior positions, not being familiar with disciplinary measures and how they work, such as the right to call witnesses. By the time accused employees know their rights and how the disciplinary measures work, they risk losing the chance to appeal the decision imposed against them within the limitation period (which is 60 days from enforcing the decision[75]). As a result, the thesis submits that the solution to this problem may be taken from the example set by Egyptian administrative judiciary and UK law.[76]

The Administrative Supreme Court in Egypt held that the decision against the employee was illegal in Administrative Appeal No.2180/33.[77] The investigator heard only the statements of the complainant against the accused employee (a surgeon) without investigating whether these accusations were correct or not. The Administrative Supreme Court ruled that despite the accusations that the complainant brought against the accused employee,[78] the investigation and subsequent penalty were invalid. This was because the investigator did not hear the statements of the persons mentioned by the complainant, nor did the investigator hear any of the witnesses that the accused employee requested in his defence. The investigator did not examine the accusations of the complainant or look at the defence documents of the accused employee. Nor was the accused granted the right to defend himself. As a result, the investigator condemned the employee without allowing him the right to defend himself.

It is submitted that the Egyptian judiciary (in Administrative Appeal No.2180/33) is clear about the rule that not hearing statements from employees can be a reason for the invalidity of the final decision, in cases where the investigator never heard a statement

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[75] Article 8 of Libyan Law No. 71 of 1988 concerning the Administrative Judiciary, stipulates that the limitation period that an employee is entitled to appeal to the judiciary to overturn a decision is 60 days from notifying him with the penalty decision.

[76] UK law guarantee maximum rights for the employee with respect to calling witnesses. It is the employee's right to call relevant witnesses according to the ACAS 'ACAS Code of Practice 1-Disciplinary and Grievance Procedures' (April 2009), but the ACAS does not mention cross-examination.

[77] Egyptian Administrative Supreme Court, Appeal No.2180/33 (29.10.88) *Unreported.*

[78] Including accusations that affected his competence, pride, as well as other qualities that lie within the employment specialism as a surgeon. The accusation insulted his colleague and superiors and these were all a complex and serious set of accusations. If these accusations had been proved then the accused employee would have lost the respect of his colleagues, in addition to losing his profession.

from a witness, or if the statement is in the interest of the accused employee and can strengthen his/her position in the case towards proving his/her innocence of the charge.

The thesis concludes that the Libyan legislator and Libyan judiciary give the employee the right to call witnesses. However, neither Libyan law nor Libyan case law mention any rules about whether the investigator must accept or can refuse the employee's request to call witnesses. It is difficult to judge whether the Libyan judiciary acts fairly or not, as the research could not find any case stating whether the investigator has the right to accept or refuse hearing the witnesses (this may be due to the causes that the study mentioned on p 97). Therefore, it is submitted that the Libyan judiciary should follow the approach taken by the Egyptian judiciary[79] and UK law.[80] This is because Egyptian and UK law do not give the investigator the right to refuse the employee's request to call witnesses, as it is an important guarantee to the employee. However, the investigator has the right to refuse hearing the statements of the witnesses if he has already heard them, as hearing the witnesses more than once is a time waste to the investigator.[81] Moreover, the guarantee of a fair hearing is in doubt if one of the important guarantees to the employee, employee — the right to call witnesses — is circumscribed by the will of the investigator.

3.3.5.3 Taking the Oath

Libyan and Egyptian Law do not stipulate the necessity to make witnesses take the oath before giving their testimony in the investigation stage. Libyan Law gives the investigator in the People's Inspection and Control System[82] in Libya the right to ask the witness to take an oath before testifying, as does the Administrative Prosecution in Egypt; Kuwaiti law stipulates a requirement that the oath being taken before testimony is offered in the administration investigation stage. Thus, in this section the author will exam the appropriateness of the procedure of taking the oath in Libyan law.

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[79] Appeal No.2180/33 (n 77) *Unreported.*
[80] ACAS 'ACAS Code of Practice 1-Disciplinary and Grievance Procedures' (n 76).
[81] For example see Appeal No.1001/8 (n 74) *Unreported.*
[82] Article 48 of Law No. 2 of 2007 (concerning the People's Inspection and Control System) stipulates that the member of the investigation can call in the accused employee as well as the witnesses, and can hear the statements of the witnesses, after they take the oath.

3.3.5.3.1 Taking the Oath by Witnesses in the Investigation managed by an Administrative Authority

Libyan Law No. 12 of 2010 concerning Labour Relations, and Egyptian Law No. 47 of 1978 concerning Civil Servants, do not specify that taking the oath is a requirement by either the prosecution or the defence witness before giving testimony, in investigations run by an administrative authority.[83] From what has been discussed, it can be concluded that Libyan and Egyptian Law are prejudicial towards the rights of the employee regarding not stipulating the necessity to require a witness to take the oath before his/her testimony at the administration investigation stage, as taking the oath compels the agreement of the employee or the witnesses to tell the truth. It may also raise awareness of the significance that his/her testimony has on the outcome of the investigation. In addition, taking the oath by the witness is a good tool to prompt the conscience and remind the witness that when he/she takes the oath before giving testimony, he/she cannot change this testimony afterwards, as it was given under oath.[84]

Libyan Law No. 2 of 2007 concerning the People's Inspection and Control System includes a requirement that the oath be taken in investigations run by the People's

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[83] By contrast, Article 57 of the executive terms of Kuwaiti Law No. 15 of 1979 concerning Civil Service stipulates clearly the right of the accused employee to call defence witnesses in the investigation (that is run by an administration). Kuwaiti Law has also given the investigator in the administration the right to ask the witness to take an oath before testifying. The Kuwaiti Supreme Court, in Administrative Appeal No. 2001/366, ruled that witnesses should give their testimonies under oath. This because giving the testimony under oath should guarantee to the accused that a witness will give an honest testimony. Therefore, the Court ruled that any testimony that is not given under oath will be invalid and will result in the invalidity of any decision based on.
Administrative Appeal No. 2001/366 (24.04.2002) *Unreported.*
The author took Kuwaiti law as an example for Libyan law. This is because Libyan law has several similar rules with Kuwaiti law and this gives more opportunities for Libyan law to implement any missing judgments that can help in solving standing issues in the disciplinary system in Libya. These similarities can be represented in many Articles, such as Article 30 Bylaw No. 15 of 1979 concerning the Civil Service which stipulates that an investigation should be conducted with an employee only in writing, which is the same in Libyan law. Also, both Libyan and Kuwaiti law give the employee the right of defence, as both laws stipulate the same Article, which is that 'it is not permissible to enforce the penalty on the employee until a written investigation has been conducted with him and his statements have been heard, thereby giving him the chance to defend himself'.
It is meant by the Bylaw of a particular law that regulations which include detailed rules explain the rules of the Public Control Monitoring System.

[84] Abdelfatah Hegazi (n 67) 111; Mohamed Othman, *Administrative Investigation* (Darelnahda Elarabia 1992) 271.

Inspection and Control System. The author noted that the necessity to take the oath is not stipulated in Libyan Law No. 12 of 2010, while it is stipulated in Libyan Law No. 2 of 2007 concerning the People's Inspection and Control System.[85] This system monitors all aspects of Libyan Institutions[86] and has a prosecution nature: and this law gives the investigator the right to apply the Criminal Measures Law to the witnesses.[87] Therefore, this system should take all precautions to ensure that the witness tells the truth by making him/her take the oath. However, the author believes that there should be a law that applies to the administration with respect to taking the oath. The author submits that taking the oath must be stipulated in Libyan employment law due to its significance for the efficiency of their testimonies. Not stipulating the necessity of the oath in Libyan employment law encourages the dishonesty of the witnesses, as the oath acts as a moral contract.

Also, there is no legal text in either Libyan or Egyptian legislation that forbids forcing the accused employee to take the oath before he/she gives his/her statements. The author believes that perhaps Libyan law does not stipulate taking the oath for the employee, so it does not breach its freedom to reconsider what is for his/her benefit and does not say statements against his/her position in the case. But even so, if the law considers it in that way, then this is illogical. This is because the judge has already provided the employee with the right to be silent, so whenever the employee thinks that he/she does not want to answer, he/she can remain silent.[88] Therefore, taking the oath is not a breach of the employee's freedom and also encourages witnesses to tell the truth.

In conclusion, it can be submitted that Libyan legislations encourages unfair conduct regarding this point (taking the oath), as it does not force the witness and the accused employee to take the oath in the investigation stage. The absence of this could lead to the employee and the witness giving false testimony. By taking the oath, the employee may

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[85] This will be further explored in the next section.
[86] The People's Inspection and Control System represents a monitoring mechanism over the administrations of the country's public institutions. The function of the People's Inspection and Control System is discussed in detail above, Chapter Two, Section 2.3-2.3.1.
[87] Article 48 of Libyan Law No. 2 of 2007 concerning the People's Inspection and Control System. For further information see next section.
[88] Administrative Appeal No.55/46 (n 47) 184. Regarding the right to remain silent, see above Section 3.3.3 of this Chapter.

tell the truth or may use his/her right to remain silent, but at least the law will guarantee, from a moral point, that the employee will not lie in his statements.

3.3.5.3.2 Taking the Oath in the Investigation conducted by the People's Inspection and Control System and the Administrative Prosecution

Libyan Law No. 2 of 2007 concerning the People's Inspection and Control System,[89] as well as Egyptian Law No.117 of 1958, concerning Reorganizing Administrative Prosecution and Disciplinary Hearing,[90] empower the investigator in the Inspection Public System in Libya and the Administrative Prosecution in Egypt with the power to ask the witness to take an oath before testifying and to apply the Criminal Measures Law on to the witnesses. Article 256 of the Criminal Measures Libyan Law 1953 stipulates that witnesses aged fourteen years or over must take the legal oath, while witnesses below this age must be heard only as a reference in the case.

The legislator's stipulation made taking the oath a requirement before hearing the testimonies of the witnesses, both in investigations that are conducted by the People's Inspection Control System in Libya, and the Administrative Prosecution in Egypt. Applying the Criminal Measures Law regarding taking the oath is also a requirement.

These issues raise questions about the consequences of not asking the witness to take an oath before testifying. The Supreme Court in Libya in the Criminal Appeal No.45/18[91] ruled that if a witness fails to take the legal oath before he/she testifies, then failure to do so results in the invalidity of the testimony. However, this only applies if the accused's defence objected to a testimony that has already been given without taking the oath (in the Investigation or Court stage), as he/she has no right to object after these stages (in the Supreme Court).

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[89] Article 48 (n 82).

[90] Article 7 of Law No. 117 of 1958 concerning the Reorganization of Administrative Prosecution and Disciplinary Hearing.

[91] Criminal Appeal No.45/18, Libyan Supreme Court (29.02.79) *Supreme Court Journal*, Year 3, no. 8, 155.

Libyan judgment No.45/18 seems incorrect, as it considers testimony given without taking the oath as invalid only if the accused or the opponent objects. Logically, if there is a legal text requiring taking the oath before testifying, then the Court must respect this text without qualification (Article 256 of the Criminal Measures Law 1953 stipulates taking the oath before giving any testimony). Moreover, this Article does not mention that testimony without taking the oath can be considered invalid, only if either the accused or the opponent objects to its validity. Accordingly, what the Court ruled is contrary to the law.

The Administrative Supreme Court of Egypt decision in Appeal No.4317/44[92] shows that a much better approach is taken by the Egyptian Courts. This concerned about an employee who worked as a general supervisor engineer in the Department of Religious Endowments of Fayoom (a city in Egypt). He was referred to the Disciplinary Court by the administrative prosecution,[93] as he neglected his duties in supervising the first stage of building the Fayoom mosque (this resulted in defects in the mosque building, which eventually led to the demolition of the entire structure). The Disciplinary Court ruled that the accused employee be suspended from work for two months. Additionally, his salary was to be suspended for two months. The accused employee appealed to the Administrative Supreme Court, which accepted the appeal and overturned the Disciplinary Court's decision. The reason was that the Disciplinary Court had based its decision on the testimony of the engineering administration's manager and this testimony was taken without asking the witness to take the oath before he had testified. This is contrary to Article 7 of Law No. 117 of 1958, which states that the member of the administrative prosecution is permitted to take the testimony of the witnesses after they have taken the oath. As a result, the testimony of the manager of the engineering administration (on which the decision was based) was invalid. Accordingly, the Administrative Supreme Court ruled that the decision of the Disciplinary Court was invalid.

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[92] Egyptian Administrative Supreme Court, Appeal No.4317/44 (22.03.97) *Unreported.*

[93] The administrative prosecution, after investigating an employee, referred him to the Disciplinary Court, in order to punish him for the charges he committed during his work.

One Egyptian commentator[94] supports the judgment (Administrative Appeal No.4317/44[95]). This commentator states clearly that any testimony (taken at the administration investigation stage or by the Administrative Prosecution) that is not preceded by the oath is considered invalid, and subsequently leads to the invalidity of the penalty decision. However, if the testimony is not preceded by the oath, the penalty decision would be still considered valid if it is based on evidence other than the admissible testimony.

Other Egyptian commentators[96] base their views according to the authorities concerned with the investigation. These commentators take the view that in investigations conducted by the Administrative Prosecution (cases where the Administrative Prosecution can run the investigation[97]), giving testimony without taking the oath is considered invalid, along with the penalty decision, because there is a legal text clearly stipulating that giving testimony without taking the oath renders the penalty decision invalid. However, if the investigations conducted by the administration giving testimony without taking the oath is considered valid, and does not lead to the invalidity of the penalties or investigations, because there is no legal text that clearly stipulates that giving testimony without taking the oath in administration investigations renders the penalty decision or investigation invalid.

It is submitted that the first view of commentators (above) is more appropriate than the second, for the reason that taking the oath encourages the witnesses to tell the truth. In addition, it differentiates between two cases. The first issue is regarding the testimony of witnesses as the only evidence to prove the innocence of the employee, and the other case is having evidences with the testimonies. If the testimony is to be provided without taking the oath it cannot be reliable if it is the only evidence to rely on. This is because taking the oath gives credibility to the testimony and without it the testimony can be questionable, as it encourages the conscience of the testifier to tell the truth. Therefore,

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[94] Altayb Mahmoud (n 46) 408.
[95] Appeal No.4317/44 (n 92) *Unreported*.
[96] Abdelaziz Kalefa, *The Procedural Legitimacy in Precedential and Judiciary Discipline for Public Employees* (1st edn, Mnshat Elmarfe 2006) 179; Mamdwh Tantwy, *Disciplinary Evidence* (1st edn, Darelfeker Elarabe 1998) 165; Mohamed Yakoot, *Explanation of Disciplinary Procedure* (Mnshat Elmarfe 2006) 209-210.
[97] As explained in Chapter Two, Section 2.3.1, footnote 16.

taking the testimony as evidence in this case is against fair justice for the employee as you cannot condemn an employee based on a testimony without evidence, especially if it is not supported by taking the oath.

In conclusion, from what has been discussed it can be concluded that the Egyptian judgment (Appeal No.4317/44[98]) can be seen to be more logical when it considered any penalty to be invalid, if the penalty is not based on a testimony preceded by an oath. This is because the Egyptian judiciary states that any testimony given without taking the oath is invalid without condition. In contrast, the Libyan judiciary stipulates that the testimony without oath is invalid only if the accused or the opponent objects (as in Appeal, No.45/18[99]). The approach taken by Egyptian judiciary is fairer because if there is no other evidence condemning the accused employee, then the testimony will be the major key factor in the case. As a result, this testimony must be credible and honest. This can be ensured (to a certain extent) if the witness takes the oath before testifying. It is submitted that the Libyan administrative judiciary should do the same as the administrative Egyptian judiciary with regard to this issue.

3.4 Conclusion

The chapter concludes that:

(a) With respect to the fairness of Libyan law in presenting the accused employee with the charges against him/her, Libyan legislation is fair in providing the employee with the right to be presented with the charges against him/her in order to better prepare his/her defence. However, the Libyan judiciary[100] acts unfairly and prejudicially when it considers the penalty as valid, even if the employee was not presented with the charges against him/her in the investigation phase, so long as this failure is corrected at a later stage in the disciplinary committee (hearing) phase. This is inappropriate and undesirable in the public employment sector and it affects the fairness of the judicial system in Libya.

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[98] Appeal No.4317/44 (n 92) *Unreported.*
[99] Criminal Appeal No.45/18 (n 91) 155.
[100] Bangazi Court of Appeal No.58/26 (n 7) *Unreported.*

This is because Law No. 12 of 2010 concerning Labour Relations and all previous Civil Service Laws preceding this law, stipulate clearly the illegality of enforcing any penalty until after conducting the investigation into the accused employee, hearing the employee's statement and giving him/her the right to defend him/herself. It is submitted that Libyan judiciary should give the employee the chance to defend him/herself in all cases and stages by presenting him/her with the charges against him/her at the investigation stage.

(b) The author also concluded that Libyan law ''as a text'' is fair in informing the employee of the referral decision to the Disciplinary Committee (hearing) stage. This is because Law No. 55 of 1976 emphasizes the necessity to inform the employee about the referral decision and failure to do so affects the validity of the final decision. However, Libyan law is unfair in not specifying the method of informing the employee of the charges against him/her in the investigation stage, as failure to do so may make the employee lose the opportunity to attend the investigation and the chance to defend him/herself at that stage. The thesis also concluded that Libyan law is fair in giving the accused employee the right to view documents pertaining to the investigation, as it assists the employee's right to defend him/herself.

(c) With respect to the fairness of Libyan law in guaranteeing the right of defence to the accused employee, the author concludes that Libyan law is fair in giving the employee the right to exercise his/her right to defence by means of either written or verbal statements. Also, Libyan case law[101] strikes a fair balance with respect to giving the employee the right to remain silent, as remaining silent or giving his/her statement is purely his/her choice, as part of his/her right to defence.

(d) The thesis concludes that the Libyan judiciary acts unfairly and prejudicially when it regards the final penalty decision as not being illegal if the employee has not been given the right to call his/her lawyer, provided that the employee is given the right to defend him/herself. It does not consider that granting the right to the employee to call his/her lawyer is an essential right. The author submits that this is unfair, firstly because the

[101] Administrative Appeal No.55/46 (n 47) 184.

judiciary's approach violates the law which give the employee the right to call his/her lawyer in the Disciplinary Court stage, and secondly, because the Court refuses to give this right to the employee in the Disciplinary hearing stage; it fails to consider the severity of the charges that the employee is facing, which is unfairly prejudicial to the employee's rights. It is submitted that when the employee faces a severe charge where he/she could be penalised by a severe penalty such as dismissal penalty, this may affect his/her future career. This is because it is difficult for the employee to find another job with the same advantages as in his/her previous job. One of the requirements of any job vacancy is a certificate of experience from the previous job, which a person cannot provide without a notice that at the end of their previous service he/she was dismissed.

Therefore, in this case the author urges the Libyan Courts to allow the right of calling a lawyer to the employee just as the UK Courts do[102] in case where serious charges are levelled against the employee. It is submitted that the Court should rule that the employee has the right to call his/her lawyer, as the employee is the only one who can decide whether the presence of the lawyer will be necessary. Having a judgement ruled by the Supreme Court (in Administrative Appeal No.9/15[103]) denying the employee this right is a serious matter, as the judgments of the Supreme Court bind the lower degree Courts, disciplinary authority and these Courts authority can use the Supreme Court's judgement to deny the employee this right, which is supposed to be guaranteed to him/her by law.

(e) Libyan law is fair in giving the employee the right to call witnesses. However, it does not mention anything about the taking of the oath by the prosecution or the defence witness before offering testimony in the investigation run by an administrative authority. This is unfairly prejudicial to the employee's rights because taking the testimony without oath affects the credibility of the testimony and can lead to a penalty decision based on insufficient reasons. It is submitted that Libyan legislation in employment law should take Libyan Law No. 2 of 2007 concerning the People's Inspection and Control

[102] *The Governors of X School and another* (n 60).
[103] Administrative Appeal No.9/15 (n 61) 44.

System,[104] or Kuwaiti Law, as an example to follow by stipulating the necessity to require witnesses to take the oath before their testimony at the investigation stage, conducted by the administration. This is because taking the oath means the agreement of the employee or the witnesses to tell the truth, as if there is no other evidence condemning the accused employee, then the testimony will be the major evidence against him/her.

(f) Also, Libyan law is silent on the question of whether the investigator can accept or refuse the employee's request to call witnesses, which could led to the investigator abusing his position. Therefore, the author submits that the Libyan judiciary should follow the Egyptian judiciary and UK law, which do not give the investigator the right to refuse the employee's request to call witnesses, as this is an important guarantee to the employee. The only exception to this would be if a request to call witnesses included hearing the statements which had already been heard by them, in which case it would be considered a waste of time.[105]

[104] Regarding taking the oath in the investigation conducted by the People's Inspection and Control System, see above Section 3.3.5.3.2 of this Chapter.
[105] An example for this exception see footnote 74 of this chapter.

Chapter Four

Disciplinary Guarantees Attached to Penalty Enforcement

4.1 Introduction

There are a number of measures and guarantees that should be provided during the enforcement of the penalty against an accused employee in order to achieve a fair hearing. These guarantees are represented by specifying the authority concerned with the enforcement of the penalty and the impartiality of its imposition. The aim of this chapter is to introduce to employees one of their guarantees; that they should only be investigated by the authority which is specified by law and that this authority should be an impartial authority that can conduct a fair investigation and disciplinary hearing.

In Libyan law, disciplinary authorities specified by law who enforce the penalty are divided between the administrative authorities (in the investigation stage) and disciplinary committees (in the disciplinary hearing stage). Libyan law enforces impartiality rules on *disciplinary committees*,[1] but does not enforce it on *administrative disciplinary authorities*. This point attracted the author to study the rules of impartiality on disciplinary committees, to investigate why Libyan law applies these rules only to disciplinary committees and how it could also apply rules of impartiality on administrative disciplinary authorities.

In this chapter, the standard of fairness, according to what the author proposes, requires specialised authorities concerned with enforcing the penalties in order for the employee to be guaranteed that the authorities concerned are independent and impartial, according to the law. Accordingly, in this chapter the author aims to examine the fairness of Libyan law with respect to these guarantees. Therefore, two key areas will be examined:

[1] Article 267 of Civil Procedures Act 1953.

1. The fairness of the authority concerned with enforcing the penalty.

2. An assessment of whether the impartiality of the Disciplinary Authorities is respected in Libyan law.

4.2 Fairness of the Authority Concerned with Enforcing the Penalty

Libyan law has organized the disciplinary authority concerned with enforcing the penalty between the administration and disciplinary committees. The "specialties" in enforcing the penalty are distributed between the Administrative Authority and the Disciplinary Committee (in Egyptian law the disciplinary specialties are distributed between the Administrative Authority and the Disciplinary Court).[2]

However, the question is: How fair is Libyan law in organising the authorities concerned with enforcing the penalty? This will be the subject of the first examination.

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2 Egyptian law has provided the Disciplinary Court authority since it was first established in Law No.117 of 1958, concerning Reorganization of Administrative Prosecution and Disciplinary Hearing. Assignments of Disciplinary Court can enforce all the penalties stipulated in Article 80 of Law No. 47 of 1978 concerning Civil Servants also having the right to review the appeals which may be proposed by the employees to overturn a decision produced by the administrative authority. These penalties include all the penalties from the warning penalty to the dismissal penalty. However, Egyptian law classifies the assignments of Disciplinary Court according to the position that is held by the employee.
a. Employees who hold high positions, according to Law No. 47 of 1978 concerning Civil Servants, imposing both the warning and the blaming penalties are assigned to the relevant authority. The penalty of referring to the pension and penalty of dismissal cannot be applied unless by the relevant Disciplinary Court. b. Employees other than those who hold high positions.
The Disciplinary Court has the right to enforce all penalties stipulated (in Article 80 of Law No. 47 of 1978 concerning Civil Servants) on this category of higher position employees. Egyptian law provides the Disciplinary Court with the right to enforce penalties which are usually enforced by the administrative head, such as warning and deduction of salary. This was the reason why commentators preferred imposing these penalties directly from the administrative head to the employee rather than by the Disciplinary Court, but the error committed is complex (such as neglecting duties, absence from work repeatedly without permission) then enforcing the penalties will be the specialty of disciplinary Court. See Ahmsd Hashis, *Principle of Administrative Law* (1st edn, Publisher of Egypt 1977) 218; see also, Abluwahab Elbndari, *The Disciplinary Specialty and Disciplinary Authority* (1st edn, Publisher of Egypt 1988) 320-380; Ramdan Badik, *The Administrative Judiciary* (Darelnada Elarabia 2008) 654; Mohamed Yakoot, *Explanation of Discipline Law of Public Employment Law* (Mnshat Elmarfe 2006) 946-964.

4.2.1 Determining the Specialties of the Administrative Authority in the Investigation on the Basis of the Gravity of the Error

The current Article 161 of Law No. 12 of 2010 concerning Labour Relations specifies the Administrative Authority that is permitted to enforce the disciplinary penalty. This Administrative Authority comprises the Minister, Undersecretary of the Ministry, Head of Institution or Managing Director of Administration. Libyan Law has given the Under-Secretary and Head of a Public Institution the power of imposing punishment on employees with a status of degree ten or less.[3] A Head of a Public Institution or Under-Secretary of a Ministry are not allowed to enforce a penalty against employees who occupy more senior positions.[4] This would be within the power of the Minister[5] (the principle here operates via the degree of the employee at the time of imposing the penalty, not at the time of committing the error[6]). Libyan Law No. 12 of 2010 and the previous Civil Laws gives the administrative authority the "speciality" of enforcing warning and salary deduction penalties, while more complex penalties cannot be imposed against the employee unless it is enforced by a specialised Disciplinary Committee,[7] as discussed below.

4.2.1.1 An Assessment of the Fairness of the Warning Penalty which is enforced by Administrative Authorities

The penalty of warning is considered to be one of the lightest disciplinary penalties. It involves delivering a warning to the employee against committing the error again, or committing any other errors.[8] Libyan law provides that the Minister and the Under-Secretary of the Ministry, as well as the Head of Institution or Managing Director, shall

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[3] Article 161 (2) of Law No.12 of 2010 concerning Labour Relations.

[4] It can conclude that the law avoids placing the investigator of an administrative Institution in an embarrassing position; ie., facing his superiors and conducting an investigation into them. In addition, the investigator is under the chairmanship of a career rank in an administrative unit. Therefore, it is unacceptable that the president would be questioned by a subordinate, who is of lesser seniority than him.

[5] It seems that by Libyan law not specifying the grade of the employees that the Minister can penalise, it can be concluded that the Minister is only allowed to impose the penalty on employees holding seniority above the tenth grade. This is because Libyan law specifies clearly that imposing penalties on employees who hold the tenth grade or less is only within the Administrative Head and Ministry Secretary specialties.

[6] Mhamed Eharary, *Principle of Administrative Law, Part Two* (1st edn, Publications of Open University 1992) 87.

[7] Article 161 of Law No. 12 of 2010 concerning Labour Relations.

[8] Abdwadood Yahya, *Interpretation of Labour Law* (1st edn, Library of Modem 1964) 196.

perform these duties. Libyan law (as well as Egyptian law[9]) has not put a maximum limit on the number of times this penalty can be enforced. In addition, Libyan law does not specify the way of delivering the warning to the employee. This means that the Administrative Authority has the power to decide the number of times that the penalty of warning can be imposed. If the Administrative Authority enforces the penalty more than once without considering the time difference between the numbers of warnings given, this may lead to loss of the effectiveness of the penalty (which is to prevent the employee from recommitting an error).

It submitted that this lacuna should require Libyan legislation to specify the number of times that the penalty of warning can be applied ; for example, twice. On the first occasion the purpose is to inform the employee about the error and warn the accused not to do it again. The second occasion means that the penalty on the first occasion has not achieved its goal. If on the second occasion the warning fails to achieve its goal, then a more severe penalty should be imposed on the employee (e.g., to call the employee for a meeting and inform him/her about the seriousness of his/her error and in addition, inform the employee that if he/she commits this error again, punishment will be enforced against him/her in the presence of his/her superiors and colleagues). In addition, Libyan law should specify that Warnings should be delivered to employees personally, as in UK law.[10]

4.2.1.2 An Assessment of Fairness of Deduction of Salary (enforced by administrative authorities)

Salary deduction is a penalty that has a financial consequence. (a) The Minister in Libyan law has the right to impose the penalty of deduction from salary. The period must

[9] Article 82 of Egyptian Law 47 No. of 1978 concerning Civil Servants stipulates the assignments of the administrative authority which are concerned with imposing the penalty of warning according to the following: those who hold high positions and relevant authority. See further information above in footnote 2 of this Chapter.

[10] W Books & Son v Skinner [1984] IRLR 379 (EAT).

not exceed one month per year, and not more than ten days for each deduction.[11] (b) The Under-Secretary of the Ministry and the Head of Institution or Managing Director of Administration are authorized to impose the penalty of salary deduction for a period that should not exceed fifteen days in a year, and not more than five days on each occasion.[12]

If the case requires a penalty more severe than a salary deduction, the Administrative Authority must refer the employee to the specialised disciplinary authority (the Disciplinary Committee) to enforce the decided penalty.[13] This was the ruling of the Supreme Court in Libya Administrative Appeal, No.15/36[14] in a case concerning an employee who worked in the State Oil Corporation, who was punished for being drunk and was dismissed from work by the administrative head. The employee did not accept this decision and appealed to the Appeal Court of Tripoli, who refused his appeal. Later the employee appealed to the Supreme Court against this judgment. The Supreme Court accepted his appeal and ruled the penalty was invalid, because the administrative authority (the Head of the Oil Corporation) has only the right to impose the penalty of salary deduction, but penalties which are more severe (dismissal from work) are not within its specialties.

Both Libyan[15] and Egyptian[16] laws have provided employees in public institutions with several guarantees, when it stipulates that salary deduction must not exceed a quarter of the monthly salary. In comparison to Egyptian law, Libyan law provides the accused employee with more guarantees by restricting the administrative authority to informing the People's Inspection and Control System of these decisions within one week from imposing this penalty.[17] This is to ensure that these decisions are in accordance with the law.

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[11] Article160 (1) of Law No.12 of 2010 concerning Labour Relations. By contrast Article 80 (3) of Egyptian Law No. 47 of 1978 concerning Civil Servants stipulates two months as a maximum limit.
[12] Article 161 (2) (n 3).
[13] Article 161 (3) of Law No. 12 of 2010 concerning Labour Relations.
[14] Administrative Appeal No. 15/36, Libyan Supreme Court (19.11.89) *Supreme Court Journal,* Year 26, no.1, 2, 25.
[15] Article 161 (2) (n 3).
[16] Article 84 of Egyptian Law No. 47 of 1978 concerning Civil Servants.
[17] Article 47 of Libyan Law No. 2 of 2007 concerning the People's Inspection and Control System.

It is submitted that the Libyan legislation should give the authority to Disciplinary Committees to impose the salary deduction penalty instead of to the administrative authority, considering that they are composed of judicial administrative members. This is because judges have experience and ability to apply proportionate penalties to errors according to the severity of the error committed. This may represent a guarantee for the accused employee; otherwise the law can overturn this penalty. Instead of overturning it, this penalty can be replaced by creating a work councelling unit that the employee can attend. This will provide benefits for the institution, as well as for the employee, who can do extra work in these additional units and keep all of his/her salary, without suffering any deduction. If the employee appears to have learned from his/her mistake, he/she can return to work. By this process, discipline can achieve its goals and also the penalty will be personal and will not affect the employee's family.

It can be concluded that Libyan law specifies penalties (warning and salary deduction) that the administration can impose, and also specifies the authorities to impose these penalties.[18] These authorities are the Minster, Under-Secretary and Head of a Public Institution. It is submitted that Libyan law permits the Under-Secretary and Head of a Public Institution to penalise a specific grade of employees (a status degree of ten or less). However, Libyan law does not specify the grade of the employees that the Minister can penalise,[19] but this does not mean that the Minister has the right to punish the employees who would be punished by the Head of Institution or Management Director of Administration. It is also submitted that the Minister is only allowed to impose the penalty on employees holding seniority above the tenth grade. This is because Libyan law specifies clearly that imposing penalties on employees who hold grade ten or less is only within the Administrative Head and Ministry Secretary specialties. Accordingly, only the authority which is specified by law to impose the penalty is allowed to do so. Therefore, the high occupational status of the Minister does not automatically allow him/her to interfere in another senior employee's specialty. He/she does not have the authority to penalize an employee who is not within his jurisdiction. This opinion is supported by the nature of discipline, which does not allow a multiplicity of specialties.

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[18] For further information see above Section 4.2.1-4.2.1.2 of this chapter.
[19] As explained in Section 4.2.1, footnote 5.

4.2.2 Determining the Specialties of the Disciplinary Committees in the Disciplinary Hearing based on the Classification of Disciplinary Committees and the Consequences of not following Rules to Form a Disciplinary Committee and their Specialties

The disciplinary system is based on two committees; one of them specialises in administrative errors,[20] which in turn is subdivided into two committees (the General Disciplinary Committee and the Highest Disciplinary Committee) and the other specialises in financial errors[21] (the Financial Committee).

4.2.2.1 The General Disciplinary Committee

The General Disciplinary Committee is present in each administrative unit to prosecute employees who hold grade ten or less (a junior position).[22] The committee acts according to the Minister-in-Charge's requests. The members of the committee are the

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[20] Law No. 12 of 2010 determines the penalties that the Disciplinary Committee is permitted to enforce, but referred to Law No. 55 of 1976 of the formation of Disciplinary Committee and their executive regulation, which is not enforced yet. Therefore, the study will discuss the formation of Disciplinary Committee through previous law (Law No. 55 of 1976 concerning Civil Service) according to Article 2 of Law No. 12 of 2010, while the penalties will be studied through the current law (Law No. 12 of 2010 regarding Labour Relations).

[21] The penalty for this error was stipulated in Articles 75-78 of Law No. 55 of 1976, while the penalty for financial error is stipulated in Article 62 of Law No. 2 of 2007 regarding People's Inspection and Public Control System.

It is noticed that Libyan law does not state special standards to differentiate between these two penalties; it just categorizes them separately in different laws. But the Libyan Supreme Court (in Administrative Appeal No.1/27) specifies a special standard to differentiate between the two penalties. The Supreme Court of Libya held in Administrative Appeal No.1/27, that determining whether the error is administrative or financial will depend on the nature of the error committed by the employee. The judiciary based its concept on their understanding of Article 31 of Law No. 79 of 1975 concerning the audit bureau that any waste of the public funds either deliberately or due to neglect from the employee, will be defined as a financial error. As a result, other errors committed by the employee can be defined as an administrative error. However, as the financial error is a consequence of neglecting financial rules, the administrative error is a consequence of neglecting the employment duties, which in turn may cause the institution financial damage. For example, an administrative error is doing work duties inaccurately and disrespecting the work schedules. Refer to:

Administrative Appeal No.1/27, Supreme Court (23.03.83) *Supreme Court Journal*, Year 20, no.3, 9. For further details about the difference between administrative error and financial error, see Enas Zankuli 'Mandatory Duties of Following the Orders in Laws of Public Committees, A Comparative Study' (Master's Thesis, Tripoli University 2007) 171-173.

[22] Article 86 of Law No.55 of 1976 concerning the Civil Service.

Undersecretary of the Ministry, or any employee who holds no less than grade eleven, as well as the Director of Administration and Legal Affairs and the Legal Advisor.[23]

The following are the penalties that the committee is allowed to enforce[24]:

(i) Deduction of salary for a period not more than six days in a year and not more than a quarter of the monthly salary.
(ii) Suspension of promotion for a period not less than one year and not more than three years.
(iii) The penalty of not giving the employee a bonus on his salary.
(iv) Demotion by grade.
(v) Dismissal from employment.

4.2.2.2 The Highest Disciplinary Committee

The Highest Disciplinary Committee takes place to prosecute employees holding the eleventh grade (a senior position).[25] According to Law No. 6 of 1992 concerning the Management Law, this committee is structured as follows:[26]

(i) The President of the Administration Management Law (as the head of the committee).
(ii) The three members are: an Advisor in the Administrative Justice department, a Head of Preliminary Prosecution, and a High Administration Employee nominated by the General People's Committee.

Given the above discussion, it is noted that the grade that the employee holds is a critical determinant of which committee is legally allowed to prosecute him/her, but if more than

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[23] Ibid.
[24] Article 159 (2) of Law No. 12 of 2010 concerning Labour Relations.
[25] Article 87 of Law No. 55 of 1976 concerning the Civil Service.
[26] Article 4 of Law No. 6 of 1992 concerning the Management Law. Law No. 6 was enforced to amend Law No. 55 of 1976 with respect to form the Highest disciplinary committee, as according to Article 87 Law No. 55 of 1976 the committee was formed from the Minister of Justice and is composed of three other members: the Head of Prosecution, the President of the Administration and Legal Affairs and the Undersecretary of the Ministry of Public Service.

one employee with different grades commits errors and these errors are related to each other, all of them are to be prosecuted by the Highest Disciplinary Committee.[27]

4.2.2.3 Disciplinary Committee of Financial Errors

The Disciplinary Committee of Financial Errors is the committee which is referred to in Article 88 of Law No. 55 of 1976 concerning the Civil Service. This committee acts on a decision from the Prime Minster to prosecute employees who have committed financial errors.[28] The committee meeting is to review all financial errors committed by the employees, regardless of the grade that they hold. In addition, this Disciplinary Committee has the right to prosecute an employee who commits an administrative error that results in financial damages.[29] The penalties that are allowed for this committee to enforce are referred to in Law No. 2 of 2007 concerning the People's Inspection and Control System.[30]

4.2.2.4 The Consequences of not following the Assigned Specialties

The classification of discussed obliges the referral authority[31] to refer the lawsuit to a competent Disciplinary Committee. If the Administrative Authority refers the case to a

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[27] Article 89 (1) of Law No. 55 of 1976 concerning the Civil Service and Article 5 of Law No. 6 of 1992 concerning the Management Law.

[28] The committee formation has been subject to many amendments, which started with Law No. 55 of 1976 concerned Civil Service and also Law No. 11of 1994 concerning People's Inspection and Control System and lastly, Law No. 2 of 2007 concerning the People's Inspection and Control System. Article 57 of Law No. 2 of 2007, pointed to forming the committee by: a. One of the judicial members, who are not less than Appeal Court advisor. b. One of the employees in Prime Minister, whose grade is not less than a general director. c. One of the members of Department of Law with a grade not less than assistant advisor, who must be chosen by the Minister of Justice.

[29] Article 89 (2-3) of Law No. 55 of 1976 concerning the Civil Service.

[30] Article 63 of Law No. 2 of 2007 concerning the People's Inspection and Control System specifies the penalties that this committee is allowed to enforce. These are: salary deduction of not more than one month in a year; stop banning of promotion for not more than three years; deduction reduction of the grade of the employment; enforced resignation and a financial fine of not less than one thousand dinar, but should not exceed five years.

[31] Article 90 (1) of Law No. 55 of 1976 stipulated that the referral decision to the disciplinary committee is produced by the relevant Minister if the hearing is in front of the Highest Disciplinary Committee. The Undersecretary of Ministry or the Head of Institution or Management Director of Administration has the right to refer to the Disciplinary Committee (hearing) if the hearing is in front of the General Disciplinary Committee. Article 157 of Law No. 12 of 2010 changed the relevant authority concerned with referral to the Disciplinary Committee by allocating it to the relevant Minister and Undersecretary of Ministry.

committee which does not contain the relevant specialties, then this committee should refuse to deal with the case. In addition, decisions that are taken by the Disciplinary Committees can be considered invalid and subjected to appeal, if they are not within their consequent specialties. This was illustrated by the Administrative Court of Zawia in Appeal No.2/19:[32] in a case concerning an employee holding the eleventh grade. He made an appeal to the Court because he was prosecuted by the General Disciplinary Committee. The latter is not allowed to prosecute him based on Article 87 of Law No. 55 of 1976, which stipulates that if employees who hold the eleventh grade or above commit an error, then the Highest Disciplinary Committee is in charge to prosecute. As a result, the Court accepted the appeal and overturned the penalty for not being imposed in accordance with Article 87 of Law No. 55 of 1976.

Also, Disciplinary Committees do not have the right of directing the accusations to an individual, unless his/her name exists in the indictments. In addition, Disciplinary Committees are interested only in the facts and accusations that are referred to them in the referral decision. They are not allowed to judge any facts that do not exist in the referral decision made by either the administrative authority or by the People's Inspection and Control System. This was illustrated by the Supreme Court of Libya in Administrative Appeal, No.7/20.[33] The case concerned an employee who was referred to the Disciplinary Committee for committing a certain error. The Disciplinary Committee found her innocent, but they dismissed her for an accusation that was not contained in the referral decision. The employee appealed to the Supreme Court, but the Court overturned the verdict issued by Disciplinary Committee, because it ruled that the Disciplinary Committee was not allowed to judge an accusation which was not referred to it by the methods stated by law.

It can be concluded that Libyan legislation does not state clearly the rule of restricting the disciplinary committee (not allowing the committee to judge an accusation which was not referred to it by the methods stated by law), as it leaves this issue to the justice system to

[32] Appeal Court No.2/19, Administrative Court of Zawia (15.03.2003) *Unreported.*
[33] Administrative Appeal No.7/20, Libyan Supreme Court (11.04.74) *Supreme Court Journal*, Year 10, no. 4, 54.

decide.[34] This seems an important point that Libyan legislation should reconsider for explicit inclusion legislation, ie., it should state this rule in Civil Service Law. This is because if this rule states only the judgments of the Court, then it is hard for an ordinary individual such as the employee to know about the rule, as it always needs a specialised candidate and it is unlikely that an ordinary employee, who has never been to the Court, would be familiar with this rule. Therefore, Libyan legislation should state clearly the rule of restricting the disciplinary committee in law, as it will be easier for the employee to find and use it. It is submitted that it is a must for disciplinary committees to restrict the charges to those mentioned in the referral decision. Ensuring this can provide the employee with important guarantees for his/her defence. The author submits that failure to do this will result in the employee possibly being faced with charges other than those mentioned in the investigation. If this happens, it will be contrary to justice, which should require that the employee is provided with an investigation to hear charges and have the opportunity for defence, before he/she is referred to disciplinary committees (disciplinary hearing).

4.2.2.5 The Consequences of not following the Rules to Form a Disciplinary Committee

Article 91 (1) of Law No. 55 of 1976 concerning the Civil Service stipulates that the Disciplinary Committee meeting can only be considered as a proper meeting, if all the members attend the meeting (in addition to the President of the Disciplinary Committee). It is noted from this Article that a decision taken by the Disciplinary Committee is invalid if any of the members or the president were absent.[35] This is in line with jurisprudence, which holds that any decision taken by the Disciplinary Committee that is composed of a missing member or extra member will be invalid.[36] It is submitted that the law took the right direction when it related the invalidity of the decision to failure to form the disciplinary committee properly. This will guarantee to the employee that he/she will not

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[34] Ibid.

[35] Mohamed Elhrary, *Review on the Management Works in Libyan Law* (2nd edn, Publication of Tripoli Complex of University 1994) 213.

[36] Administrative Appeal No.28/30, Libyan Supreme Court (3.06.84) *Supreme Court Journal*, Year 22, no. 1, 27.

be penalised, except by the specialised authority concerned, according to the form specified by law.

4.2.3 Summary of the Important Point detected on the Fairness of the Authority Concerned with Enforcing the Penalty

Based on what has been discussed above, it is submitted that Libyan law does not permit disciplinary authorities to impose a penalty that is not stipulated by the law.[37] It is noted that Libyan law has removed the authority of enforcing the severe penalties (such as demoting by grade, with a lesser salary than the previous salary, dismissal from employment, etc) from the administration authorities and gives it instead to the disciplinary committees. The thesis submits that Libyan legislation's direction in distributing the responsibility for enforcing the penalties is appropriate, as it achieves the balance between the efficiency of the process and guarantees for the employee. Although considering expanding the specialties of the administrative authority may make measures of imposing the penalty faster, it could have adverse effects (psychological and/or financial) on the employee. By assigning the simple penalties directly to the administrative head of the employee and leaving the more complex penalties to be considered by the relevant disciplinary committees, this represents a guarantee to the employee, as this committee is mainly composed of judicial members. As judges have more experience, we can expect they will apply proportionate penalties, appropriate to an individual error and accept the rules of procedure.

However, the deduction of salary penalty is an exception. This is because this penalty has serious effects on the employee and his/her family. Therefore, it is submitted that this penalty should be a responsibility of the disciplinary committee (as it is composed of judicial members who are more experienced than administrative members and have more depth of experience in estimating this penalty). The judiciary is more competent than the

[37] As explained above in Section 4.2.1.1-4.2.2.3 of this chapter; for further information regarding the legitimacy of the disciplinary penalty, see also Chapter Five, Section 5.2.

administrative authority to decide whether the error committed is a disciplinary error or not. Also, the judiciary can determine the suitability of a penalty for the error committed by the employee. Expanding the specialties of the administrative authority in imposing the penalty would be contrary to the guarantees of the accused employee. This is because administrative authorities may misuse their power and enforce a penalty against an employee for personal revenge reasons. Giving unlimited power to the administrative head may encourage him/her to misuse his/her power. Therefore, as the administration cannot guarantee that it will always act impartially, especially in cases such as estimating a penalty for a given error or applying rules, as a result, disciplinary committees can be fairer and the employee feels more comfortable when it considers an error committed by him/her. Disciplinary committees are composed of more than one member, which can result in the decision being looked at from different viewpoints and eventually reaching a decision with an agreement between different persons, unlike the administration, where the administrative head is the only one with the power to penalise the employee.

4.3 An Assessment of whether the Impartiality of the Disciplinary Authorities is considered in Libyan Law

Impartiality is one of the most important disciplinary guarantees in the investigation and the hearing stages.[38] Despite the significance of this guarantee, Libyan and Egyptian legislation do not give a specific definition for this guarantee; both countries' respective laws only mention the reasons that lead to the failure of impartiality by the judge.[39]

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[38] Ibrahim Elmongy, *Overturn the Disciplinary Decision* (1st edn, Mnshat Elmarfe 2005) 170.

[39] Article 92 of Libyan Law No. 55 of 1976 concerning the Civil Service, which refers to the conditions in Article 267 of the Civil Procedures Act 1953: (i) If the judge would gain any benefit in the lawsuit or in other cases that may be based on legal issues which are similar to the current case. (ii) If the judge, or the judge's wife, or his relatives up to the fourth grade, or one of whom use to live with or represent him, are involved in the case. (iii) If the judge's wife, or the judge himself, or one of his clients have an unfinished case, or are enemies with one of the parties involved in the current case, or one of them owes money to the other. (iv) If the judge has defended one of the involved parties in the case at any stage of the disciplinary lawsuit, or wrote anything about it, or gave a statement in the case, or if he was an investigator or a judge in the same case. (v) If there are any other reasons could that affect the legality (competence) of the judge, or if he was responsible or a representative of or serving one of the parties involved in the current case.
Article 26 of Egyptian Law No. 117 of 1958 the reorganization of Administrative Prosecution and Disciplinary Hearing which referred to the conditions (reasons) in Articles 146 and 148 of Law No. 13 of

Some commentators[40] define impartiality by viewing it as not being permissible for only one person to conduct the investigation and enforce the penalty in the disciplinary lawsuit; enforcing the penalty should be done by a different specialised authority. However, Abdelber[41] disagrees, taking a wide view, saying the previous definition only included impartiality concerning the disciplinary committee and hearing (judiciary and judiciary-like systems phase), but this definition does not include the impartiality in administrative authority (administration phase). Other commentators,[42] whose views, it is submitted, are more logical, define impartiality as: ''organizing the rules of specialties in a way that does not permit the combination between the following authorities for the same person or committee:

1. Investigation phase.

2. Directing the charges phase.

3. Enforcing the penalty phase.

They also added that it is not permissible to include on these authorities persons who are suspected to have personal or employment considerations regarding the case, as this can

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1968 regarding the Civil Procedures Act, the conflict according to Article 146 of Law No. 13 of 1968 concerning the Civil Procedures Act, these reasons are:
(i) If the judge is a close relative (up to the fourth grade relation) of one of the parties involved in the case. (ii) If there is another unfinished and suspended case in which the judge or his wife are involved with one of the parties in the current lawsuit. (iii) If the judge is a representative for one of the parties involved in the case in private work, or he is a legal guardian for one of these parties. (iv) If the judge or his wife, as well as his sons and daughters in– law are representatives to the involved parties or a responsible (legal guardian) for one of them. (v) If the judge has taken part in defending one of the involved parties in the same case at any stage of the disciplinary lawsuit or wrote anything about it (even if this happened before he became the judge of the lawsuit).
The conflict according to Article 148 of Law No. 13 of 1968 concerning the Civil Procedures Act and trade cases: (i) If there is a similar unfinished case for the judge or for his wife or one of them has an unfinished case with one of the parties involved in the current case, even after the time the case was assigned to the judge, unless this case was done on purpose to move the judge away from the current case. (ii) If the judge's divorced wife, with whom he has a son, or one of his relatives or sons and daughters in–law is involved in an unfinished case with one of the parties involved in the current case assigned to the judge. (iii) If one of the parties involved in the current case is a servant to the judge, or the judge used to represent or live with one of these parties, or he received a present from one of them before or after the case. (iv) If the judge and one of the parties are either close or are enemies.

[40] Mohamed Mhana, *The policy of General Employment and its Applications* (Darelmarfe 1967) 363.

[41] Abdelfattah Abdalbar, *The Rules which have Principles in Discipline and Commenting on Them* (Darelnahda Elarabia 1999) 140.

[42] Aomar Barkat, *The Disciplinary Authority, A Comparative Study* (Darelnahda Elarabia 1979) 30; Mohamed Yakoot, *Investigation into the Administrative Error, A Comparative Study* (Mnshat Elmarfe 2002) 425.

potentially affect their impartiality. Thus, in a case where one of the judges is suspected of not being impartial, then the employee can appeal against the final decision. Accordingly, in this part of the chapter, the author will investigate the fairness of Libyan law with respect to the application of the principle of impartiality, through looking into:

1. An Assessment of whether impartiality in the investigation stage is considered.

2. An Assessment of whether impartiality in the penalty stage is respected.

4.3.1 An Assessment of whether Impartiality in the Investigation Stage is considered

Impartiality in the investigation stage is related to the behavior of the investigator in all proceedings that they conduct during the course of the investigation.[43] Libyan law, as well as Egyptian law, does not yet state the rules that the investigator should follow, but this does not mean the investigator has sole authority to choose the manner in which he/she conducts the investigation. The investigator must be impartial and must not sympathise with any of the parties involved in the conflict. Moreover, the investigator must not take any action that can affect the spontaneous behavior of the accused employee when answering the questions of the investigator (such as asking the accused employee an indirect "leading" question).[44] Also, the investigator must not prompt the employee to say what he/she does not want to say, interfere with his/her answers, or place any psychological stress on the accused employee.[45] This includes promising the accused that he/she will not be referred to the Court if he/she answers, or intimidating the accused employee by saying that he/she will be suspended from work if he/she refuses to answer. The appropriate rule for directing the questions to the employee is to allow him/her absolute freedom to give answers according to his/her absolute will.[46]

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[43] Mohamed Yakoot, *Procedures and the Guarantees in Disciplining the Police Officers* (Mnshat Elmarfe 1993) 259.

[44] This was stipulated in Article 76-77-79 of Egypt resolution No.160 of 2010 regarding the instructions of the organization (which has replaced the previous resolution No. 507 of 2010) for work in the administrative prosecution in Egypt.

[45] Mohamed Yakoot, *Explanation of Discipline Law of Public Employment* (Mnshat Elmarfe 2006) 859.

[46] Saaed Alshtoy, *Administrative Investigation of Public Employment* (1st edn, Darelfeker Elgmaa 2007) 82.

It seems that there is not a specific judgment in Libya regarding the impartiality of the administrative investigator in the investigation stage. The author submits the following as reasons why this is so, as well as the results for the employee:

(a) Many employees, especially low level employees, do not know about the disciplinary measures and how they work (such as impartiality of the investigator). By the time accused employees know their rights and how the disciplinary measures work, they would have lost the opportunity to appeal against the decision enforced against them within a 60-day appeal limitation period to the Court.[47] This is one of the reasons why all public employees should know more about their rights and how to apply their rights during the disciplinary measures. A lack of disciplinary guarantees means that knowledge may lead the employee to lose the right to defence and not achieve his/her rights. This is also an important reason why this present thesis is relevant and significant for public employees in Libya.

(b) Most of the time, the employee does not have proof and agrees with the investigator if forced to give statements. It is this situation which makes the employee considers that any appeal will result in a waste of time and money. As a result, the author submits that the solution for this problem may be taken from the Egyptian administrative judiciary. In its judgment in Appeal No.1119/30,[48] the Administrative Supreme Court in Egypt considered the case of an employee who worked in the railway institution in the Ministry of Transferring and Transportation. The employee submitted a lawsuit to the Disciplinary Court of the Ministry, appealing against three penalties imposed against him by the administration.[49] The Disciplinary Court ruled that the decision enforced by the administration was appropriate, as the employee refused to provide them with statements in the investigation. The employee appealed to the Administrative Supreme Court,

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[47] Article 8 of Libyan Law No.71 of 1988 concerning the Administrative Judiciary stipulates that the time limit for submitting an appeal to the Court is 60 days, starting from the date either of publishing the decision or from that of notifying the employee of the decision.

[48] Egyptian Supreme Administrative Court, Appeal, No.1119/30 (15.07.88) the Group of the Principles which have been decided by the Egyptian Administrative Supreme Court from the first of March 1980 until the end of July 1988, 760.

[49] The administration charged the employee as follows: (i) Five days salary deduction as a result of arriving late to work on a number of days in one month, which had accumulated to a total of nine hours of lost working hours. (ii) A half day salary deduction for being absent for one day. (iii) Two days salary deduction, as the employee did not give any statements to the administration.

requesting it to overturn the penalty decision. The Administrative Supreme Court ruled the third penalty (two days salary deduction for not providing statements) was invalid, as the investigator must not force the accused to give any statements or threaten to impose a penalty against him/her if he/she does not give statements, as no one must force an accused employee to give a statement by applying any financial or psychological pressure.[50]

It is submitted that the Libyan judiciary, once a suitable opportunity arrives, should take the opportunity to state explicitly the rules of impartiality that the investigator should follow in the investigation stage. The Egyptian judgment[51] provides that the investigator must not force the accused to give any statements. Giving statements by the accused employee is a right confirmed by law on the employee to defend him/herself, therefore the employer should bring to the accused employee's attention that his/her silence may lead him/her to miss the chance of defending him/herself. It is submitted that the Libyan administrative judiciary should do the same as the administrative Egyptian judiciary with regard to this issue. This is in order to achieve a fair investigation according to the law, by giving the employee freedom to give or not give his/her statement in the investigation. This is because the employee is the only one who can decide whether giving his/her statement will help him/her to prove innocence.

4.3.2 An Assessment of whether Impartiality in the Stage of Enforcing the Penalty is considered

Neither in Libyan nor Egyptian law is there a legal text *in the employment laws* (at the investigation stage) which provides for the invalidity of the decision of the administrative authority, who impose the penalty. It does not require them to step down, nor possibly

[50] The first penalty enforced by the administration was a proper decision, as the employee, being late for work, was proved by the reports submitted by the administration. However, the accused claimed that being late to work was a result of living in Fayoom, which is a city far away from Cairo (the workplace) and the Court held that it was not a valid reason for being late, as it was contrary to Article 36 of Law No. 47 of 1978 concerning Civil Servants, which stipulates that the employee has to fulfil his/her duties in their employment. The second penalty was correct regarding a half day salary deduction as a result of the employee being absent for one day.

[51] Appeal No.1119/30 (n 48) 760.

request they move away from the investigation because all laws in both countries only state that the impartiality guarantee is to be provided by the Disciplinary Committee in Libya[52] and Disciplinary Court in Egypt[53] (in the disciplinary hearing stage).

This raises the following questions:

(i) How does the law provide for the impartiality of the Disciplinary Committee in Libya and the Disciplinary Court in Egypt?

(ii) Can the principle of impartiality apply to the administrative investigator?

In other words, can the administrative investigator be removed from the case if one of the conditions (Article 267 of Libyan law, or Article 146-148 of Egyptian law) that affect his partiality is contravened? The answer to this question is in the following:

4.3.2.1 Impartiality of the Investigator

The principle of not permitting the same authorities to direct the charge and enforce the penalty in the same case is one of the important principles to guarantee the impartiality of the disciplinary authority.[54] Whoever carries out the investigation with accused employees is not permitted to direct the charges against them, and is also not permitted to enforce the penalty.[55]

Libyan judiciary: It seems that there is no specific judgment in Libya regarding the impartiality of the administrative investigator, such as removing the investigator from a case if he/she lacks the required impartiality.[56] This may be explained by the following reasons:

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[52] Article 92 of Law No. 55 of 1976 concerning the Civil Service.
[53] Article 26 of Law No. 117 of 1958 concerning the Reorganization of Administrative Prosecution and Disciplinary Hearing.
[54] Waheed Ibraheem, *The Criminal Judgment on the Disciplinary Lawsuit, A Comparative Study* (Darelnada Elarabia 1998) 148-149.
[55] Mhamed Eharary (n 6) 94.
[56] In contrast, UK law, ensuring that employees will be subject to fair disciplinary actions at all stages of the disciplinary process, according to the ACAS (ACAS Code of Practice 1-Disciplinary and Grievance Procedures' (April 2009) 4-10) is essential and vital in including impartiality of the members of the disciplinary.

(a) Many employees, especially low level employees, do not know about the disciplinary measures and how they work (such as impartiality of the investigator). By the time the employee knows his/her rights and how the disciplinary measures work, he/she will have lost the chance to appeal against the imposed penalty within the 60 days allowed for lodging an appeal to the Court.[57] This is one of the reasons why all public employees should know more about these rights and how to assert these rights through the disciplinary measures. A lack of knowledge of disciplinary guarantees may lead accused employees to lose the right to defence and vindicate their rights. It is for this reason (among others) that the present study is important to public employees in Libya.

(b) These employees (low level) are usually fearful of the administration and do not dare to appeal against its decision, because they fear being victimized.

(c) Usually, the employee does not have proof that will help to remove the investigator from the case. This issue may make the accused feel that an appeal is a waste of time and money. As a result of the above reasons, the author submits that the solution to this

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However, UK law does not stipulate the cases where the judge can be considered biased and leaves that to the estimation of higher authorities (judges) such as the Supreme Court. In *(Watson)* an employee worked as a publication officer in the Marketing and Communication office of Strathclyde University. She submitted a grievance to the officer in the Marketing and Communication office against her new director. This is because he treated her in an inappropriate way and undermined her regarding a matter concerning the publication of the university diary. This happened as a result of the secretary telling the new director that he was not happy with a particular part of the publication diary and he also complained about her attitude in general. The administration refused the employee's grievance, but the employee appealed to the University which was composed of three members, one of whom was the Secretary of the University (who had been appointed Director).
The employee submitted that the panel must not include the Secretary of the University as his presence conflicted with the principle of impartiality. This is because the Secretary of the University had a good relationship with the director and he was one of the members who appointed the director. Moreover, the Director was then convicted of a breach of the peace for discharging an air gun in a public park at 3 am. The university did not accept his resignation and after discussing the matter with the principal, the secretary regarded what happened as a personal matter and it didn't affect the competency of the director. Therefore, the appellant requested that the secretary step down from the panel, as he had a good relationship with the director and his presence represented a potential bias.
The other two members of the disciplinary panel did not uphold the employee's submission, nor did the employment tribunal later, which made the employee, resign and claim unfair dismissal to the employment tribunal. However, the employment appeal tribunal accepted the employee's appeal and her submission by ruling that the presence of the secretary represented a bias and since there was a suspicion and possibility of bias around the secretary, then he had to be discharged from the panel – even though it is not necessary for an employer to do it, this is what a reasonable employer would do. Consequently, the employment tribunal regarded the panel as biased and judged that there had been an unfair dismissal. *Watson* (appellant) v *University of Strathclyde* (respondent) [2011] IRLR 458.

[57] Article 8 (n 47).

problem may be taken from the administrative Egyptian and Kuwaiti judiciary. The Egyptian judiciary ruled that the principle of impartiality can also be applied to the administrative investigator. This was illustrated by the judgment of the Administrative Supreme Court of Egypt in Appeal No. 3285/33.[58] The Court ruled that the judgment of the Disciplinary Court was invalid. There should have been an impartial investigation into the accused's actions, before transferring them to the Court. The Court stressed that the investigator, as well as the judge, must be honorable and impartial. The accused, it was revealed, had had a conflict with the Head of Prosecution, who investigated them.[59] Therefore, the Court held that this is against the principle of impartiality, as neither the judge, nor the investigator must be in conflict with the accused. In addition, if any investigator conducts an investigation into someone with whom he has a conflict, then the entire investigation must be considered invalid. In addition, employees must be provided with all the rights that enable them to defend themselves.

It is submitted that the Egyptian judgment (Appeal No.3285/33) is a good example of how to apply the impartiality principle to the administrative disciplinary authority. This helps the employee to achieve his/her rights in a fair hearing.

The Kuwaiti judiciary operates under not dissimilar rules. In Administrative Appeal No.23/2001,[60] a case concerning an employee who worked in a secondary school and who appealed to the Disciplinary Court against the penalty imposed against him.[61] The

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[58] In this case the Administrative Prosecution, after investigating two employees, submitted a lawsuit to the Disciplinary Court against the employees in order to punish them for irresponsible management of money, which had been allocated to them for projects (they requested money for the project and did not use it properly as they should have done). As a result, the Disciplinary Court suspended the employees with a warning penalty. The accused employees appealed to the Administrative Supreme Court against the Disciplinary Court decision. See:- Egyptian Administrative Supreme Court, Appeal No.3285/33 (13.05.89) the Groups of the Principles which have been Decided by the Egyptian the Administrative Supreme Court, part 2, Year 34, 974.

[59] The head of Prosecution had a previous conflict with the accused, who was the head of prosecution in a different case with his other title being the head of the Mohandessen club. He requested the Administrative Supreme Court to overturn the decision to give a land licence for part of the Mohandeseen club to the engineers' council, which is headed by the accused in the current case.

[60] Kuwaiti Supreme Court, Administrative Appeal No.23/2001 (8.04.2002) the Groups of the Principles Law which have been Decided by Fatawi and Legislation from January 1990 until 2002, 186.

[61] The administration of the school imposed the following against him: It (i) reduced his sequential employment degree from general employment with two promotions to the immediate lower degree, (ii) transferred him from the head of the school to a researcher in the books approaches section. Then yet another decision was enforced against him by transferring him from the previous job to a job as researcher

Court ruled that the decision enforced against the employee was invalid because it violated the employee's guarantees to be treated impartially because all the investigations were being carried out with the accused in the presence of the head of administration, contrary to the principle of impartiality. The administration of the Algararia area did not accept this decision and appealed to the Supreme Court. Claiming that the law does not specify in its texts either who must conduct the investigation in the administrative investigation, or the form or the place of the investigation. Accordingly, the presence of the head of the Algararia administration should not affect the legality of the administration's decision.

The Supreme Court refused the administration's appeal and ruled that the investigation must be conducted in an acceptable legal form, meaning that the investigator should not consider his personal views and should act impartially as well as decently in his decisions. Therefore, it was found that because all the investigations were conducted in the presence of the head of the administration, who was involved in the investigation and directed the investigator as he chose, all the investigations were conducted in the head's office, which means that the process was conducted in violation of the employees' rights. In this case, the head of the Algararia Educational administration acted contrary to the law because he was the person who referred the employee to the investigation, he himself investigated the employee, and ultimately penalised him. As a result, the principle of impartiality was not respected in this investigation, and so the employee's guarantee of having a fair hearing was not observed. Consequently, all the decisions emanating from the head, as well as the measures, were held to be invalid.

The Egyptian and Kuwaiti[62] judiciaries adopt a common position where there has to be a separation between the authority who is directing the charges and the authority who imposes the penalty. This is fair, and a good example of how to apply the impartiality principle to the administrative disciplinary authority and the author submits that Libya should follow this example. This is because the authority directing the charge is a party in

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in the educational capital town, (iii) 645, 90 real salary deductions for committing a financial error that he had previously committed in the Ministry of Education.

[62] Egyptian Appeal No.3285/33 (n 58) 974; Kuwaiti Administrative Appeal No.23/2001 (n 60) 186.

the case and will never be in favour of the employee. Therefore, giving it the authority to also impose the penalty is not free from bias.

In conclusion, the author submits that both Egyptian and Kuwaiti judiciaries[63] apply the principle of impartiality to the administrative investigator because if the administrative investigator does not step down from a case where one of the conditions affect his partiality, then his penalty decision will be overturned by the judge, if an employee lodges an appeal against a penalty imposed by a biased investigator. Also, the UK Courts applies the principle of impartiality, as it rules that if there is a suspicion and possibility of bias around the authority, the penalty will be invalid.[64] This is fair because it guarantees to the employee a fair hearing by an impartial authority. It is submitted that Libyan judiciary should do as the Egyptian, Kuwaiti and UK Courts do. Moreover, Libyan law should stipulate that the conditions in Article 267 of Libyan law Civil Procedures Act 1953,[65] that affect the validity and competence of the judge and which would make him step down from his lawsuit, should also affect the legal competence of the investigator. This is because both the judge and the administrative investigator have the same function, which is to investigate an error or a crime committed by the accused employee and therefore there is no reason why Libyan law does not also apply these conditions (that affect the legal competence of the judge) to the administrative investigator. Libyan law should apply these conditions to the administrative investigator because the principle of impartiality is one of the most important principles that should be observed, both by the judge and the administrative investigator. It is submitted that failure to observe this principle may affect the observance of other principles also in the disciplinary procedure.

[63] Ibid.
[64] See above in footnote 56.
[65] For further information see next section.

4.3.2.2 Impartiality of Disciplinary Committee and Disciplinary Court Members

Where the penalty is imposed by a specialised authority (the Disciplinary Committee in Libya and Disciplinary Court in Egypt), to what extent does the principle of impartiality apply to these authorities?

Libyan Law[66] is keen to provide the accused employee with the right to request:

(a) The judge to step down, (if the judge fails to do this voluntarily) from the lawsuit two days before the date that the hearing takes place.

(b) The members of the Disciplinary Committee to step down from the lawsuit two days before the date that the hearing takes place.

If one of the members of the Disciplinary Committee is proved to be biased then both the Disciplinary Committee member and the judge must step down.[67] The conditions that

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[66] Article 9 of Law No. 55 of 1976 concerning the Civil Service.

[67] **In Egyptian Law:** Law No. 117 of 1958 (concerned with regarding the re-organisation of administrative prosecution and disciplinary hearing) provides the employee, who is referred to a disciplinary Court, with the right to challenge the president of the disciplinary Court, or one of the other members, if one of them is under suspicion of doubtful impartiality. Egyptian law stipulates in Article 26 of Law No. 117 of 1958 that if one of the conditions (which are stipulated in Articles 146 and 148 of Law No. 13 of 1968 concerning the Civil Procedures Act) apply to the judge, the accused employee has the right to request whoever is biased to step away from the board of judges who work on the employee's case. The conditions that affect the impartiality of the judge and which make him/her step down from the law suit (in discipline law), even if he was not questioned by any of the parties related to the conflict. Article 146 of Law No. 13 of 1968 concerning the Civil Procedures Act specifies conditions in (i) If the judge is a close relative (the fourth grade relation) of one of the parties involved in the case. (ii) If there is another unfinished, suspended case in which the judge or his wife are involved with one of the parties in the current lawsuit. (iii) If the judge is a representative for one of the parties involved in the case in private works, or he is a legal guardian for one of these parties. (iv) If the judge or his wife, as well as his sons and daughters in - law are representatives to the involved parties or a responsible (legal guardian) for one of them. (v) If the judge has defended one of the involved parties in the same case, at any stage of the disciplinary lawsuit, or wrote anything about it, regardless of whether this happened before he became the judge of the lawsuit.
Reasons that affect the impartiality of the judge and make him step down from the disciplinary case if he was questioned by any of the parties related to the conflict, according to Article 148 of Law No. 13 of 1968 concerning Civil Procedures Act are:
(i) If there is a similar unfinished case involving the judge or his wife, or one of them has an unfinished case with one of the parties involved in the current case, even after the time the case was assigned to the judge, unless this action was taken deliberately, to move the judge away from the current case. (ii) If the judge's children from a previous marriage, or one of his relatives or sons and daughters in- law have conducted an unfinished case with one of the parties involved in the current case assigned to the judge. (iii) If one of the parties involved in the current case is a servant to the judge, or the judge used to represent or live with one of these parties, or he received a present from one of them before or after the case. (iv) If the judge and one of the parties are friends or someone that the judge has a problem with. It also stipulates in this Article that if the judge does not step down voluntarily and none of the involved parties in the case request this, then his measures as well as his final decision are legal and appropriate.

affect the validity and competence of the judge, or one of the other members of the Disciplinary Committee, and which require them to step down are as follows:

According to Article 92 of Law No. 55 of 1976, concerning the Civil Service, which refers to the conditions in Article 267 of Civil Procedures Act 1953, the judge must step down if it:-

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In the Egyptian Administrative Supreme Court in Appeal, No.108/2 the head of a school accused a student of cheating and referred the student to the disciplinary Court for this action. The head of school later took part in the Disciplinary Court by supporting the charges against the student. The student was penalised by the head of school. The student appealed to the Administrative Supreme Court, who ruled that the basics of impartiality require that any person or committee who plays a role in directing the charges, or any action during the investigation, are not permitted to get involved in the Disciplinary Court or in enforcing penalties, unless there is a clear legal text which stipulates this. This stipulation is to guarantee the impartiality of the judge. The judge's role is to judge between the authority directing the charges and the accused employee, so the latter can be assured that the judge acts impartially when judging the case. In addition, the rule citing the source stresses that the judges must not talk or listen to anyone regarding the case before the Court date: Egyptian Administrative Supreme Court, Appeal No.108/2 (2.03.96) the Groups of the Principles which have been decided by the Egyptian Administrative Supreme Court, from 1985 until 1995 Cairo, 850.

Kuwaiti Law: Article 29 of Law No. 23 of 1990 concerning the Organisation of the Judiciary, (which is applied to the administrative judge), stipulates that it is not permitted for judges who are related in some manner to the case to take part in the same case (to the fourth degree). In addition, it is not permitted for the judge to preside over a case, if he/she was previously a representative of one of the opponents in the case. Similarly, if the judge had already taken part in directing the charge to the accused at an earlier stage in the case, then he/she cannot look into that case. Accordingly, it is not permitted for the judge, who may have already taken part in the investigation or directed the charge against the accused, to also take part in judging the accused and enforcing the penalty against him/her. The rationale is that if the judge took part in the case in the early stages, then he/she had already formed his/her own opinion about the case; the judge must only consider facts and evidence rather than personal opinions and emotions. This is what the Supreme Court held in the Administrative Appeal No. 432/2005, a case concerning a secretary who worked for an airways company. She was referred to investigation and suspended from her work because of her continuous demands regarding her promotion. Later, she was referred to the Disciplinary Committee who dismissed her from her job for the following reasons: (i) having fireworks in her office, (ii) her negative attitude towards her superiors and disobeying their orders, (iii) ruining the reputation of the institution through notifying the press. The accused appealed to the head of the airways company, who did not respond to her appeal. As a result, she appealed to the Appeal Court who ruled the invalidity of the penalty enforced against her based on the fact that she was not given the right to be faced with the with the charges, in order to defend herself and also the formation of the Disciplinary Committee was illegal. The airways institution did not accept the judgment of the Appeal Court and appealed to the Supreme Court. The Supreme Court ruled that the decision of the Appeal Court was legal, as the Appeal Court based its judgment on the formation of the Disciplinary Committee being illegal, because the referral decision to the investigation was a decision that was conducted by the head of the institution, who was also the head of the Disciplinary Committee which had enforced the penalty on the accused employee. According to law, the combination of the authority who directs the charge as well as imposing the penalty is against the principle of impartiality. This is one of the guarantees that must be provided to the accused in order to obtain a fair judgment. As a result, in this case, the head of the institution combined more than one authority, (the authority of directing the charge and the authority of imposing the penalty), which violated the employee's guarantees and also the law. Consequently, all the decisions imposed by the Disciplinary Committee that were headed by the head of the airway institution were invalid. Kuwaiti Supreme Court, Administrative Appeal No.432/2005 (19.12.2006) *Unreported.*

(i) If the judge would gain any benefit in the lawsuit or in other cases that may be based on legal issues, which are similar to the current case; or,

(ii) If the judge, the judge's wife or any of the judges' relatives, or anyone who has lived with the judge and who have risen to the fourth grade are involved in the case; or,

(iii) If the judge's wife, or the judge himself, or one of his clients have an unfinished case, or are enemies with one of the parties involved in the current case, or one of them owes money to the other; or,

(iv) If the judge has defended one of the involved parties in the case at any stage of the disciplinary lawsuit, or wrote anything about it, or has given a statement in the case, or if he was an investigator or a judge in the same case; or,

(v) If there is any other reason which could affect the legality (competence) of the judge; or,

(vi) If he was responsible for or was a representative of, or was serving one of the parties involved in the current case.

It is submitted that if any of the reasons mentioned above apply to the judge or one of the members of the Disciplinary Committee, then they must step down from the case immediately. If they refuse to do so, then the final decision produced by them is invalid. The Supreme Court in Libya, in Civil Appeal No.232/43,[68] ruled that Article 267 of the Law Civil Procedures Act 1953 stipulates that if the judge previously testified and wrote any opinions on a case, or was a judge in this case, then he/she must step down from the case currently being investigated. This is stipulated by the legislation and is a procedure that must be followed. Failure to do so is considered illegal. Subsequently, the law stipulates where the judge must step down (if he/she has been involved in the case) and if he/she refuses to do so and continues with the case, any measures or decisions emanating from him/her are invalid. This was also confirmed by Supreme Court in Criminal Appeal No. 6/23,[69] Article 267 of Civil Procedures Act 1953. This law specifies the occasions where any of the parties involved in a case can object to the validity of the judge and

[68] Civil Appeal No.232/43, Libyan Supreme Court (4.11.2002) *Unreported.*
[69] Criminal Appeal No. 6/23, Libyan Supreme Court (27.11.79) *Administrative Judiciary,* Part 2, 371.

when this happens, the original case should be suspended until the concerned authority decides whether or not the judge is impartial enough to continue with the case.

From the above discussion regarding impartiality in the stage of enforcing the penalty, the author concludes that:

1. Both Libyan and Egyptian laws (employment law) refer to the Civil Law Procedures Act regarding the cases and the situations that affect the impartiality of the Disciplinary Committee members in Libya and the Disciplinary Court in Egypt.[70] If one of these situations applies, then the accused employee has the right to request the suspected disciplinary member to step down from the disciplinary hearing.

2. However, Libyan and Egyptian law take a slightly different direction with regard to this issue. Libyan law states that if one of the conditions that affect the legality of the judge is fulfilled, then the judge must step down, either on his/her own or by request, and either way, if he continues to judge the case, then his/her judgment is considered illegal. On the other hand, Egyptian law (there are two Articles, 146 and 148), stipulates two group of conditions that affect the legality of the judge. Article 148 stipulates that even if one of the conditions that affect the impartiality of the judge occurs and he/she does not step down from the case voluntarily, then his/her judgment is still valid unless the accused employee requests the judge to step down. However, Article 146 stipulates that if one of the conditions that affect the legality of the judge applies, and he/she does not step down on his/her own voluntarily then his/her judgment is invalid, even if the accused employee does not request this.[71] It is submitted that Libyan law gives more guarantees to employees than Egyptian law. This is because Libyan law states that if one of the conditions that affect the partiality of the judge applies and even if the accused does not request they be removed, not withstanding this, all judgments that flow from the judge in the case are considered illegal.

[70] Article 267 of Libyan Law Civil Procedures Act 1953; Article146-148 of Egyptian Law No. 13 of 1968 concerning the Civil Procedures.
[71] Article 151-152 of Egyptian Law No. 13 of 1968 concerning the Civil Procedures Act.

3. Libyan, Egyptian and Kuwaiti judiciaries adopt a similar approach; there has to be a separation between the authority who is directing the charges and the authority who imposes the penalty in disciplinary hearing stage. It is submitted that this act of the judiciaries is fair because whoever acts as an investigator or directs charges should not be an adjudicator in the disciplinary hearing, as disciplinary hearing members should be impartial. Impartiality requires that the disciplinary hearing members are completely independent from the investigatory authority and the accused employee.

In conclusion, it is submitted that the principle of impartiality is of great significance for the accused employee involved in the disciplinary procedure. This principle can render the decision of the judge or the administrative investigator to be illegal. In turn, if the principle of impartiality is not practised by the judge or the investigator, this may adversely affect the employee's life, reputation, and his family. Therefore, the author submits that Libyan legislation and the Libyan judiciary act prejudicially to the rights of the employee when applying the impartiality rules only on the Disciplinary Committee, as it should also apply it on the administrative disciplinary authority, as Egyptian[72] and UK law do.[73] Also, Libyan law should consider the Kuwaiti law as an example to follow, and should include these cases (in which the validity of the judge or the member of disciplinary committees can be affected) in the legal text of Libyan Law No.71 of 1988 concerning the Administrative Judiciary, rather than referring to the Law Civil Procedures Act 1953. This is to help the employee to find the rules in an easy way, as stipulating the rules between many laws may lead the employee to lose his opportunity to overturn the penalty, because he/she will not know that different disciplinary rules are to be found in more than one law.

4.4 Conclusion

It can be concluded that with respect to the authorities imposing the penalty that:

[72] Appeal No.3285/33 (n 58) 974.
[73] *University of Strathclyde* (n 56).

(a) Libyan law assigns the enforcement of a particular penalty to the administration and disciplinary committee, according to the nature of the penalty. This is because Libyan law assigns the warning and salary deduction penalties to the administrative authorities (administration), while more severe penalties are assigned to the responsibility of the disciplinary committee. This can be argued to be unfair, because the salary deduction penalty can have a huge impact on the employee's life, as well as on his/her family. This penalty cannot be regarded as a simple penalty that can be given to the Administrative Authorities to enforce. The administration may be biased, and may use it for purposes of personal revenge. It is submitted that Libyan law should consider transferring responsibility for enforcing the salary deduction penalty to the disciplinary committee, as it is composed of specialised judicial and administrative members, who are more competent in estimating the severity of the error and the right proper amount of deduction.

(b) Even though Libyan law specifies which authorities are permitted to enforce penalties (Minister, Secretary of Ministry and Administrative Head),[74] it seems however, that it does not specify clearly which employment ranks the Minister can penalise, as while the law specifies when the Minister can enforce penalties, it does not specify over which category of employees. Therefore, this is against the guarantees of the employee, as he/she will be unsure as to which authority can properly discipline him/her in the case of committing an error. It is submitted that Libyan law should specify accurately what category of employees the Minister can enforce penalties against, as permitting the Minister to enforce penalties against all categories of employees means that the employee, in some cases, will not have an opportunity for a fair appeal because the appeal against the penalties which are imposed by the Minister can be only made to the Minister himself.

(c) Libyan law has achieved an appropriate balance of fairness in giving the right to enforce the majority of the penalties to the disciplinary committees.[75] This is because

[74] Libyan law specifies for the Secretary of Ministry and Administrative Head to penalise the 10th employment grade employee and all employees under the 10th grade. For further information see above Section 4.2.1 of this chapter.
[75] As explained above Section 4.2.2- 4.2.2.3 of this chapter.

these committees are composed of experienced specialised judicial and administrative members. Libyan law is fair when dividing disciplinary committees according to their assignments: a disciplinary committee to investigate financial errors and others for administrative errors and in making the invalidity of the final decision a consequence of failure to observe the rule of specialisation by any of these authorities, thereby guaranteeing to the employee that only the relevant specialised disciplinary committee can consider his/her case.

(d) Libyan legislation is unfairly prejudicial in not stating clearly that the disciplinary committee is not allowed to judge an accusation which has not been referred to by the methods prescribed by law, as it leaves this issue to the justice system to decide.[76] This is because if this rule remains only within the control of the Court, then it is hard for an ordinary individual, such as the employee, to know about it. It is submitted that Libyan legislation should consider this and state clearly the rule requiring the disciplinary committee to only consider matters that are referred to in prescribed law.

(e) With respect to the efficiency of the impartiality principle in Libyan law, the thesis concludes that Libyan law is fair when it applies the impartiality rules to the Disciplinary Committees. The law stipulates that the judge or the member of the Disciplinary Committees must step down voluntarily from the case if his/her competence has been compromised. This is because the law guarantees to the employee that he/she will not penalised except by an impartial authority; this is to achieve a fair hearing. If the judge does not step down voluntarily or refuses the employee's request to step down, then his/her measures as well as his/her final decision is illegal and inappropriate. However, Libyan law is unfairly prejudicial when it only applies the impartiality rules to the Disciplinary Committees,[77] but not to the administrative investigators. This is because the investigator, with his unlimited power, can penalise the employee for personal reasons and the employee cannot question his/her impartiality. This is because Libyan law does not currently apply the impartiality rules to the investigators. Therefore, it is submitted that Libyan law may need to be amended along the lines observed under

[76] Administrative Appeal No.7/20 (n 33) 54.
[77] Explained in detail above Section 4.3.2.2 of this chapter.

employment law by the Egyptian judiciary, which applies the impartiality rules to both the Disciplinary Court and the investigators.

(f) Also, with respect to the efficiency of the impartiality principle in Libyan law, the author concludes that fairness of Libyan law with respect to the application of the impartiality on the judges is questionable. This is because Libyan legislation should consider the Kuwaiti legislation as an example to follow, and should include these cases in which the legal competence of the judge can be questioned. It is suggested that these cases should be included either in the legal text of Libyan Law No.71 of 1988 concerning the Administrative Judiciary just as Kuwaiti law does because it is this law that organizes the administrative judiciary in Libya. Alternatively, these cases can be stipulated in the Civil Service Law rather than referring to the Law Civil Procedures Act.[78] This is in an effort not to confuse employees with many laws which could lead to the loss of their rights.

[78] Article 267 of Civil Procedures Act 1953.

Chapter Five

Estimation of the extent to which the Authority follows the Disciplinary Restrictions while enforcing the Penalty

5.1 Introduction

The imposition of a disciplinary penalty not only requires disciplinary authority to perform it,[1] there are also certain procedures that must be followed by this authority to select the penalty. These procedures take into account that penalties enforced against employees must be within the penalties stipulated by law. Also, a penalty must be for its own specific reason, and not be enforced against the same error twice and this should be specified clearly. The author proposes that fairness should include the parameter that the disciplinary authority should be restricted to the standard of penalties stipulated in law. Also, fairness will require the disciplinary authority to include sufficient reasons that led to the final penalty in the disciplinary decision being set out.

Additionally, there should be clear and convincing reasons to lead to the conviction of the accused employee. Lastly, the penalty decision should be reviewed by judiciary for its legality and appropriateness and its proportionality to the error committed. Accordingly, this chapter will examine whether the Disciplinary Authority has restricted itself to the penalties stipulated by law, and whether these penalties are enforced for sufficiently valid reasons. The author will also examine whether Libyan Courts support or are opposed to ensuring the reviewing of the legality of the penalty's proportionality to the error committed, and also to what extent Libyan law is committed to following disciplinary restrictions while enforcing the penalty. Therefore, four key areas will be looked into:

1. Restrictions on the legitimacy of the disciplinary penalty.

[1] Regarding the authority concerned with imposing the penalty, see Chapter Four, Section 4.2-4.2.2.3.

2. Examination of the illegality of imposing multiple penalties for the same act.

3. An assessment of whether the Libyan judiciary properly reviews the proportionality between the penalty and disciplinary error.

4. An Assessment of the fairness of stating the reasons for imposing the disciplinary penalty.

5.2 An Estimation to how Libyan Law considers the Legitimacy of the Disciplinary Penalty

The principle of the legitimacy of the disciplinary penalty is that the penalty imposed by the disciplinary authority must be selected from the penalties that are stipulated by law.[2] Libyan law requires that the Administrative Authorities and Disciplinary Committees, when they impose disciplinary penalties, must be confined to the text of law[3] without any expansion in the interpretation. The disciplinary authority is not allowed to impose a penalty that is not stipulated by law.[4] This is regardless of whether the penalty stipulated by law is deemed to be lenient, or whether a penalty not stipulated by law is deemed to be more suitable (even if this is agreed to by the penalized employee).[5] The penalties that are stipulated by law cannot be changed. Any agreement that contradicts what is stipulated by law is illegal.[6]

Accordingly, the principle of legitimacy of the disciplinary penalty is treated in line with the principle of criminal law, which states that the selected penalty is improper unless stipulated by law.[7] Jurisprudence[8] provides that no penalty should be imposed other than that which is specifically stipulated by law, leaving the selection of a suitable penalty to

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[2] Aziza Alsharief, *The Disciplinary System and its Relation with the Penalty Systems* (Darelnahda Elarabia 1988) 242-243; Abdelaziz Kalefa, *Responsibility of Disciplinary Authority in the Public Employment* (Mnshat Elmarfe 2009) 54.
[3] Article 160-161 of Law No. 12 of 2010 concerning Labour Relations.
[4] Administrative Appeal No.3/29, Libyan Supreme Court (31.03.85) *Supreme Court Journal,* Year 22, no. 3-4, 30.
[5] Abdelfatah Hussien, *Discipline in Public Employment* (Darelnahda Elarabia 1964) 265.
[6] Magawre Shahen, *The Disciplinary Responsibility* (World of Books 1974) 444.
[7] Naser Elagamy, *Generalion of Administrative Punishment in Kuwait Law and Other Law* (Darelnahda Elarabia 2010) 357.
[8] Administrative Appeal No.3/29 (n 4) 26.

the relevant authority. The question is whether this evaluation is carried out through an open process, or whether there is a specific procedure that must be followed to select the penalty.

5.2.1 Restrictions on the Legitimacy of the Disciplinary Penalty

1. The penalties that are stipulated by law must be followed with regard to its duration and value.[9] For example, a deduction from the employee's salary is a penalty that is provided in Article 161 (2) of Law No. 12 of 2010 concerning Labour Relations. This deduction cannot exceed a period of more than thirty days in a year and cannot exceed more than a quarter of the employee's monthly salary.

2. It is not permissible for the disciplinary authorities to misuse certain procedures which favour a public institution in order to punish the employee. For example, the authority can transfer an employee from his workplace (seemingly for the benefit of the public institution), while the real reason is to punish the employee. Libyan Courts hold that this type of procedure is invalid and as a result, have disallowed them. In Administrative Appeal No.3/18[10] the Supreme Court in Libya ruled that the Court has the right to monitor and check the legality of the administrative decisions regarding the transfer of the employee. If the Court finds that the transfer is illegal and the purpose was to punish the employee, the Court overrules and overturns the decision.

However, if the Court finds that the decision is to transfer the employee from his employment to another position at a level similar to his current employment, the Court will leave the issue to the administration and will not overrule the decision. Precedence for this can be found in Administrative Appeal No.80/45.[11] The Supreme Court refused the request of the employee to overturn the decision to transfer him from Tripoli Central Hospital to Zahra Hospital, which was imposed by the Secretary of the General People's

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[9] Galal Aladgem, *Discipline in the Light of both the Appeal and Administrative Supreme Court* (Darsheta for Publishing and Programming 2009) 19; Mgdi Aboyounis, *The Rules of Disciplinary Procedures for Public Employees* (Darelnahda Elarabia 1998) 193.

[10] Administrative Appeal No.3/18, Libyan Supreme Court (20.06.70) *Supreme Court Journal*, Year 8, no.1, 62.

[11] Administrative Appeal No.80/45, Libyan Supreme Court (10.11.2002) *Unreported*.

Committee for Health. The decision of the Court to refuse the request of the employee was based on the fact that there was no evidence or documents to prove that the employee had been transferred to employment at a level lower than that of his previous post. By contrast, in another judgment, Administrative Appeal No.48/125,[12] the Supreme Court held that the transfer decision taken by the General Attorney in Benghazi was illegal. This is because he transferred an employee from his employment (as the senior clerk in the general attorney's office) to the post of recorder of sentences and subsequently to the role of the secretary of the archives and stores. This decision, taken by the General Attorney, is an example of a disciplinary penalty that is not in accordance with the disciplinary procedure prescribed by law. The administration had misused its power by transferring the employee to a lower grade position (director of stores), which was not appropriate for his rank and length of service. Therefore, the decision was not made in the overall interests of the institution, but was taken to the detriment of the employee's reputation.

It is submitted that it would appear obvious from the cases (Administrative Appeal No.80/45 and No.48/125) that if the employee is transferred from one position to another at the same employment grade, then this is legal and falls within the specialised remit of the administrative authority, without requiring supervision from the administrative judiciary.[13] It is submitted that Libyan law is fair, as it guarantees to the employee his/her rights by avoiding a possible severe penalty by the administration. This is because Libyan law guarantees that the employee is not transferred to a lower employment grade than his/her original. However, if an employee is transferred to a post lower than his/her previous position, then it can be assumed that the administration is not working for the benefit of the public institution. Rather, it is taking this measure to punish the employee without following the disciplinary measures stipulated by law.[14] In this case, the decision is subject to the scrutiny of the judiciary. This is because it contradicts Law No. 12 of

[12] Administrative Appeal No.48/125, Libyan Supreme Court (6.03.2005) *Unreported.*
[13] Mahmed Eharay, *Review on the Management Works in Libyan Law* (2nd edn, Publication of Tripoli Complex of University 1994) 82.
[14] Abdalftah Hussien (n 5) 112.

2010,[15] which stipulates that it is not allowed to transfer an employee to a post lower than his/her previous position.

The author submits that Libyan law is fair regarding the principle of the legitimacy of the penalty. This is because Libyan law puts a restriction on the disciplinary authority in that it can only enforce the penalties which are stipulated by law. Therefore, if the disciplinary authority imposes a penalty that is not stipulated by law, the employee is entitled to appeal against its decision on the grounds of its illegitimacy.

5.3 Examination of the Illegality of Performing Multiple Penalties for the Same Act

The rule of not imposing the penalty on the same act twice is considered one of the most important principles by commentators,[16] as well as by the Libyan[17] and Egyptian[18] Judiciaries. This principle means that it is not permissible to impose more than one disciplinary penalty on the employee for the same error, unless there is a clear legal text regarding this issue.[19] Libyan law does not only include what is stated by the commentators regarding this principle,[20] but it also stipulates this rule clearly in Civil Service Laws.[21] The latest Law is No. 12 of 2010 concerning Labour Relations, which

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[15] Article146-160-161 of Law No.12 of 2010 concerning Labour Relations.

[16] Ibid; Altayb Mhmued, *Legal Guarantees During Disciplining Civil Servants* (Darelnahda Elarabia 2008) 435.

[17] Administrative Appeal No.9/15, Libyan Supreme Court (3.05.70) *Supreme Court Journal* ,Year 6, no. 4, 42-44.

[18] This case was about one of the employees who appealed to the Egyptian Administrative Supreme Court requesting it to overturn the penalty of dismissal which was enforced against her. The employee claimed that on 25.04.93, the Chairman of the institution where she was employed had penalized her by a salary deduction. At a later date, the Chairman had again withdrawn a portion of her salary penalty and dismissed her from the service. After looking into the incidents, the Court held that the resolution was illegal, as it is not permissible for the disciplinary authority to replace a disciplinary penalty and enforce another, more severe penalty. Moreover, it is not permitted for the Administrative Authority to enforce a disciplinary penalty for an action that has already been punished. Egyptian Administrative Supreme Court, Appeal No.3154/25 (26.11.94) *Unreported;* see also Egyptian Administrative Supreme Court, Appeal No.1284/41 (4.01.97) *Unreported.*

[19] Aziza Alsharief (n 2) 263.

[20] Hussin Elmehdi, *Interpretation of Public Employments' Sentences* (Darelgamaheria for Publishing, Distribution and Advertisement 2000) 455; Mahmed Elhrary, *Principle of Administrative Law, Part Two* (1st edn, Publications of Open University 1992) 82-83.

[21] It is noticed by tracking the successive Civil Service Laws in Libya, that the repealed Law No. 2 of 1951 concerning Civil Service, as well as the repealed Law No. 36 of 1956 concerning the Civil Service did not stipulate the illegality of enforcing more than one penalty for the same error. Article 51 of Law No. 16 of 1964 concerning the Civil Service Law was the first to stipulate the principle of the illegality of enforcing

stipulates that it is illegal to judge an employee for the same error more than once. It is also not permitted to impose more than one penalty for the same error or misdemeanor.[22] However, there are a number of situations where it is permissible to apply a multiplicity in the penalties. These cases are:

a. Cases in which a single error is committed repeatedly. When the second penalty is imposed for the same error that the employee was punished for in the past, and he/she continues to commit the same error[23] or in circumstances where the second penalty was imposed against the employee for committing a different error, it is permissible to penalise him/her for committing this new error in this instance.[24] Failure to penalise the employee in this case could encourage the continued violation of employment duties.[25]

This is the ruling of Supreme Court in Libya in Administrative Appeal No.9/15,[26] a case about an employee who worked in a post within the administrative department as a director of the works of the south provinces. During his employment he started to interfere in affairs beyond his specialties and assignments. Moreover, he used inappropriate words in his administrative correspondence, which triggered the Minister to issue a warning to prevent him from acting in that such a manner. The employee objected to this warning and requested it to be overturned by sending a letter challenging the Minister and saying that he was willing to appeal in front of a disciplinary committee. At his request, the Minister referred him to the disciplinary committee with several

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more than one penalty for the same error. Later, this principle was stipulated in Article 79 of Law No. 55 of 1976 the Civil Service Law, and finally in Article 156 of current Law No. 12 of 2010 concerning Labour Relations, which cited the principle exactly as it had been stipulated in Article 51 of Law No. 16 of 1964, using the term 'error', however, instead of 'action'. Therefore, the legal text of the 1964 Law No. 16 was as follows: "it is not permitted to prosecute the employee for the same 'action' more than once, just as it is not permitted to enforce more than one penalty for the same 'action' ''. On the other hand, the legal text of Laws No. 55 of 1976 and Law No. 12 of 2010 is as follows: "it is not permitted to prosecute the employee for the same 'error' more than once any more than it is permitted to enforce more than one penalty for the same 'error' ".

[22] Article 156 of Law No. 12 of 2010 concerning Labour Relations.

[23] Abdelaziz Khalifa, *Disciplinary Guarantees in Public Employment* (The Institution of Affairs 2008) 59.

[24] Mostafa Afifi, *The Philosophy of Disciplinary Penalty and its Purposes* (Egyptian Institution for Book 1976) 191.

[25] Magawre Shahen (n 6) 447.

[26] Administrative Appeal No.9/15 (n 17) 42-44.

charges.[27] Consequently, the Disciplinary Committee penalised him for the second and third errors which were committed once only. They penalised him for the first error by the deduction of a month's salary and they also penalised him for the fourth error by suspending him from work for three months.

As a result, the employee objected to the decision taken by the Disciplinary Committee, claiming that the decision was illegal, based on the principle that the employee cannot be penalised for the same action more than once. He claimed that he had been penalised for those errors previously by the Minister. However, the Court observed in the first instance, that he was not penalised for the second and third errors (failure to maintain the confidentiality of the work and failure to execute his employment duties, leaving the workplace and frequent unauthorized absences). On the other hand, even though he was penalised by the Minister for the fourth error (using inappropriate terms in his correspondence) he continued to do so, even after the Minister's warning (he sent a similar letter again), which led the disciplinary committee to penalise him for this offence.

This case demonstrates, and therefore confirms, that although the employee cannot be punished more than once for the same error, in this instance there were two separate, albeit similar errors, one being at work (prior to his correspondence with the Minister) and the other in his written correspondence with the Minister.

b. Cases where the penalty is imposed by the law. There are some penalties which are stipulated by law that have a combination of two penalties. In other words, the second penalty is in conjunction with the first, such as a warning accompanied by delayed promotion, for a period of not less than three months and no more than a year.[28] Therefore, where the penalty imposed is a combination of two penalties (as mentioned above) this will not be considered as a multiplicity of penalties.[29]

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[27] (i) Interference in issues beyond his remit and work; failure to maintain the confidentiality of the work, (ii) Failure to execute his employment duties, (iii) leaving the workplace and frequent absenteeism without permission, (iv) Using terms inappropriate for administrative correspondence.
[28] Article 83 of Law No. 55 of 1976 concerning the Civil Service.
[29] Abdelfatah Abdelbar, *The Rules Which Have Principles in Discipline and Commenting on Them* (Darelnahda Elarabia 1999) 237.

c. Cases where an employee commits an act considered a disciplinary error and a crime. If an employee commits a disciplinary error and a crime at the same time, then the employee is penalised by both a disciplinary penalty and a criminal penalty. This will not be considered as a double penalty for the same act, as both the error and the simultaneous crime attract different pertinent laws, each providing a separate penalty and each imposed by a different specialised authority.[30] In addition, the purpose of the criminal punishment is for the protection and benefit of the community at large, while the purpose of the disciplinary penalty is for the benefit of the public institution. The author mentioned the criminal act and its punishment, as well as the difference between the criminal act and the disciplinary error, in an effort to bring to the public employees' attention that committing two errors of a different nature at the same time — one disciplinary and one criminal — will result in two penalties to discipline each error. This point hopefully will help the employee to avoid losing money and time in appealing to the Court for being penalised for the same error twice, which is not correct, as in fact, he/she would be penalised once for each crime committed at the same time.

Apart from the three examples discussed above, it is submitted that Libyan law is fair when it prohibits the penalising of an employee for the same error twice. This rule provides a guarantee for the employee that the penalty imposed on the employee will be confined solely to the error that he/she has committed. The employee will not be penalised subsequently for an error for which he/she has already been penalised. Failure to follow this rule undermines the intention of the disciplinary decision, which is to prevent the employee from committing the same act again. Also, failure to follow this approach suggests that the intention of the authority was not for the benefit of the public institution, but to exact retribution against the employee.

[30] Naser Elagamy (n 7) 394.

5.4 The Extent of Fairness of Libyan Law in Applying the Principle of Proportionality between the Penalty and the Disciplinary Error

The principle of correspondence is considered one of the most important of the general principles in the disciplinary process: i.e., it is crucial that there is a correlation between the severity of the disciplinary error and the type and degree of the penalty imposed by the Administrative Authorities and Disciplinary Committees.[31] The principle of selecting a relevant penalty is not stipulated by law, but it is supported in the jurisprudence of the administrative judiciary.

For example, the administrative judiciary in Libya follows the Egyptian judiciary[32] in this respect. In the first and second phase, the Disciplinary Authority assigned the power to select the penalty for the error committed. Then later, the judiciary[33] changed its approach and established the judicial power to control and monitor disciplinary decisions that are produced by the Disciplinary Authorities. However, at a later phase, the situation became difficult, because the Disciplinary Authority had the power to select the penalty for the error committed, without any control from the judiciary.[34] It seems that the Libyan judiciary does not specify its position with respect to extending its monitoring control over the proportionality of the penalty with the error committed.[35]

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[31] Sabeh Maskoni, *The Principles of Libyan Administrative Law* (Alnasher for Books, Distribution and Advertising 1982) 391; Sami Gamleldin, *Justice of Proportionality and the Estimation of Authority of the Administration* (Darelnada Elarabia 1992) 217.

[32] For example, although initially the Egyptian judiciary gave the Disciplinary Authority the power to select the penalty for the error committed, later the judiciary changed its approach and gave the judicial power to review disciplinary decisions that are produced by the Disciplinary Authorities. This was done in order to guarantee that the disciplinary penalty and the error committed corresponded. This approach was highlighted by the Egyptian Administrative Supreme Court in Appeal No.563/7, which held that the disciplinary authority (including the disciplinary Courts) had the right to estimate the severity of the administrative error. However, if there was a discrepancy between the severity of the penalty imposed and the severity of the error committed, there would be an impact on the legitimacy of the penalty imposed. Egyptian Administrative Supreme Court, Appeal No.563/7 (11.11.61) the Groups of the Principles which have been Decided by the Egyptian Supreme Administrative Court from November 1955 until November 1965, Cairo, 27. For further information see below p151.

[33] The Libyan Supreme Court in Administrative Appeal No.2/21 ruled that the penalty imposed by the Disciplinary Authority was inappropriate, as it was not proportionate to the severity of the error committed. For further information see below Section 5.4.1 of this chapter.

[34] The Libyan Supreme Court in Administrative Appeal No.16/38 ruled that the decisions that are taken by a disciplinary authority are not subject to the review by the administrative judiciary where the decisions are taken within the limitations of law. For further information see below Section 5.4.1.

[35] In detail see below Section 5.4.1.

The direction of the administrative judiciary influences the opinions of the commentators, who are split into three groups. The first group[36] states that the importance of this principle is being confined to the power of the Disciplinary Authority, with certain restrictions, in order to decide upon a suitable penalty for the error committed. The judiciary has the authority to review the suitability of the penalty to the error committed. The second group of commentators,[37] who are fewer in number, state that the power to evaluate the disciplinary penalty for the error committed should be given to the Disciplinary Authority, without any involvement from the judiciary.[38] The third group (also few in number[39]) stands between the first and second view (those in favour of and those against the control of the Judiciary on the principle of relating the penalty to the error committed). This principle will be examined from two angles: first to explain the Libyan and Egyptian judicial position, and second to look at the views of the commentators who are either for or against the principle.

5.4.1 An Assessment of whether Libyan Judiciary reviews the Proportionality between the Penalty and Disciplinary Error

The Libyan administrative judiciary adapted rulings about its monitoring control and the three-phase procedure of reviewing the proportionality between the penalty and the error committed. The Libyan judiciary, according to the case reports from Courts, was not

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[36] Fouad Elatar, *The Administrative Judiciary* (Darelnahda Elarabia 1968) 755; Abdelfatah Hssien (n 5) 282-483; Khalefa Elgehmi, *The Disciplinary Responsibility for Public Employee in Financial Errors in Libyan Law* (University of Gar Younis 1997) 410; Abdelfattah Abdalbar 'Aspects of Appeal the Administrative Decision' (1996 Year 38) 1 Journal of Administrative Sciences 60; Mostafa Afifi, *The Philosophy of Disciplinary Penalty and its Purposes* (Egyptian Institution for Book 1976) 210; Mostafa Fahmi, *Administrative Judiciary and the State Board* (The Home of University Publications 1999) 394; Esam Elbrzngi, 'The Estimating Authority of the Administration and Judiciary Control' (PhD Thesis, University of Cairo 1971) 440- 441; Mohamed Elhrary (n 13) 231-234.

[37] Elsied Ibrahem, 'The Judiciary Control on the Correspondence of the Disciplinary Decisions' (1963 Year 5) 2 Journal of Administrative Sciences 265; Sliman Tmaoi, *The Administrative Justice, The Judiciary in Discipline, A Comparative Study* (4th edn, Darelfacer Elarabe 1995) 656-657.

[38] The first group consists of those in favour of the review of the judiciary on the principle of correspondence of the penalty for the error committed. The second are against the control of the judiciary on the principle of correspondence of the penalty to the error committed. Correspondence of the penalty to the error committed between those who are in favour and those against the control of the judiciary on the principle of correspondence. See further information below Section 5.4.2-5.4.2.3 of this chapter.

[39] Mohamed Mrgne, 'Interpretation of Judgment of the Administrative Supreme Court Regarding no Proportionality of the Committed Penalty with the Error, Appeal No. 811/ 13' (1974 Year 16) 2 Journal of Administrative Science 176.

clear initially about its monitoring control on the proportionality between the penalty and the error committed. This is because initially the Libyan judiciary adopted rulings about this procedure in three phases.

In the first phase, the Libyan administrative judiciary (the Supreme Court and the Appeal Courts)[40] initially ruled that the Disciplinary Authority had the right to assess the error committed and the suitable penalty (within the limits of the law) without any review by the administrative judiciary. In the second phase, the Libyan judiciary changed its approach, as it recognised that the administrative judge had the power to review the Disciplinary Authority and the severity of the administrative penalty. The Libyan judiciary assessed that the judge had the power to replace the administrative authority in assessing the penalty without referring the incident to the Disciplinary Authority (who had decided the original penalty). This change was demonstrated in Administrative Appeal No.2/21.[41] This concerned a student at Tripoli University and the case was the impetus for change in the policy regarding this issue. The student appealed to the Supreme Court against the original penalty (expulsion from the university), for committing a disciplinary error. The Supreme Court ruled that the penalty imposed by the Disciplinary Authority was inappropriate and amended this penalty. The Supreme Court ruled instead that the student should be suspended from the University for nine months only.

Another example of monitoring the proportionality between the penalty and the error committee in Libyan jurisprudence was illustrated in Administrative Appeal No.31/99[42] when the Supreme Court held that the penalty must be appropriate to the error committed; otherwise the penalty will lose its legitimacy. The purpose of that Law was to establish a list of disciplinary penalties ranging from mild to severe, to enable the disciplinary authority to choose a penalty that was relative to the error committed. Accordingly, the Court held that the dismissal decision produced by the disciplinary

[40] Administrative Appeal No.1/11, Libyan Supreme Court (2.05.64) *Supreme Court Journal*, Year 1, no. 2, 7; see also Administrative Appeal No.16/7, Libyan Supreme Court (2.05.64) *Supreme Court Journal*, Year 2, no. 1, 11.
[41] Administrative Appeal No.2/21, Libyan Supreme Court (13.02.75) *Supreme Court Journal*, Year 11, no. 3, 29.
[42] Administrative Appeal No.31/ 99, Libyan Supreme Court (22.05.90) *Supreme Court Journal*, Year 24, no. 3-4, 34.

committee was a punitive penalty that was not suitable for the error of neglecting employment duties with which the employee was charged.

These cases gave the administrative judiciary greater power to ensure that the punishment for an administrative error was proportionate to the severity of the error committed. Even though the power to evaluate the severity of the error committed is one of the functions of the Disciplinary Authority, its decision can be over-ruled by the administrative judiciary if the decision is deemed illegal, due to a lack of proportionality. It may be noted that this important ruling established a significant general legal principle that should be followed by all the relevant disciplinary authorities: the principle that the penalty imposed must be proportionate to the error committed.[43]

However, in the third phase, the Supreme Court, which established this principle, also stated that the decisions that are taken by a disciplinary authority are not subject to the review by the administrative judiciary where the decisions are taken within the limitations of law. This marked a return to the original approach. In Administrative Appeal No.16/38,[44] an employee appealed to the Supreme Court against the penalty enforced against him by a Disciplinary Committee (claiming that the penalty was too severe for the error he had committed). The Court held that the decision regarding a suitable penalty for a given error by a Disciplinary Committee is not subject to review by the judiciary. The judiciary only has the right to monitor the decisions of the Disciplinary Authority from the prospective of procedural observance and its compliance with laws and regulations. Consequently, the Court ruled the employee was guilty and stated that the imposition of the appropriate penalty for any given error was within the remit of the Disciplinary Committee, provided that the penalty enforced was within the law. It can be

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[43] Mohamed Elhrary (n 13) 234.

[44] Administrative Appeal No.16/38, Libyan Supreme Court (22.11.92) Referred to: Nasreldin Elgadi, *The General Theory of Discipline in Public Employment in Libyan Law, A Comparative Study* (Darelfacer Elarabe 2002) 831.
Regarding this sentence, Elgadi states that the Court did not apply or even discuss the principle of the correspondence of the penalty to the error committed. In addition, the Court denied that this principle was the main point of the employee's appeal. In addition, Elgadi commented that the judiciary's position led to confusion in determining the Court's position with regard to monitoring the principle of the penalty corresponding with the error committed.

noted that the Appeal Courts[45] follow the ruling of the Supreme Court, as these Courts are directed by law to apply the principles and rules which are issued by the Supreme Court.

It is submitted that it is not appropriate when the Court does not use its authority to review the proportionality between the disciplinary misconduct and the selection of a suitable penalty for it imposed by the Administrative Authorities and Disciplinary Committees. This is because one of the Court's duties should be to monitor or review the proportionality of the penalty decision with the error, as this is considered the last guarantee for the employee (as refusing to review the penalty decision by the Court means that the employee will not be given the chance to defend him/herself before the Court).

In Egypt, the Egyptian administrative judiciary adopted rulings about this procedure in two phases. In the first phase, it gave the Disciplinary Authority full power to decide upon the suitable disciplinary penalty for a certain error committed, according to the severity of the offence. In the second phase, the Egyptian judiciary monitors and checks the correlation of the penalties with the error committed, as estimated by the Disciplinary Authority. The first example represents the first phase: in Appeal No.1695/10,[46] the Administrative Supreme Court refused the appeal of one of the employees to overturn the dismissal penalty enforced against him. This decision was based on the fact that the Administrative Supreme Court did not have the right to decide if the penalty of dismissal imposed by the Disciplinary Authority corresponded to the severity of the error. The Disciplinary Authority had the authority to determine if the action committed represents a disciplinary error, or not. It had the authority to choose the suitable penalty for the error committed within the limitation of the law. This punishment is carried out without the involvement of the judiciary, whether the penalty corresponds to the severity of the error or not.

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[45] In Appeal Court No.89/21, the Administrative Court of Tripoli held that the decisions that were taken by the disciplinary authority were not subject to the control of the administrative judiciary, so long as these decisions were taken within the limitations of the law, as it held that whether the penalty performed was suitable for the error committed or not, it remained a specialisation assigned only to the disciplinary authorities. Appeal Court No.89/21, Administrative Court of Tripoli (30.11.93) *Unreported.*

[46] Egyptian Administrative Supreme Court, Appeal No.1695/10 (5.11.55) the Group of the Principle Decided by the Administrative Supreme Court from October 1956 to March 1957, 193.

However, with regard to the second phase, the Egyptian judiciary changed its opinion concerning bestowing full power on the disciplinary authority to select the penalty without a judge's supervision. It decided that the judge should monitor and check the correspondence between the penalties selected by the disciplinary authority, and the severity of the errors committed.[47] This approach was highlighted by the Egyptian Administrative Supreme Court in Appeal No.563/7,[48] which held that the disciplinary authority (including the disciplinary Courts) had the right to estimate the severity of the administrative error. However, if there was a discrepancy between the severity of the penalty imposed and the severity of the error committed, this would have an impact on the legitimacy of the penalty imposed.

Another example demonstrating how the judiciary changed its methods of monitoring and checking the decision by the disciplinary authority (regarding correspondence of the penalties with the error committed), can be seen in the following decision of the Egyptian Administrative Supreme Court in Appeal No.29/1274.[49] In this case, the Court refused the appeal of a nurse to overturn a dismissal penalty imposed by the hospital administration. The Court ruled that evaluating the right penalty for a certain error is the specialist area of the administration. In addition, the Court looked into the record of the nurse in the hospital and found that 38 penalties had been enforced against her for many errors she had committed. These errors ranged from disobeying the orders of her superiors, failing to do the work assigned to her within her duties, to disputes with others in the department. Therefore, the Court held that the dismissal decision was proper and in proportion to the errors committed.

Another Egyptian example of judicial review as to whether penalties correspond with the error committed is demonstrated in Appeal No.1391-1692/34[50] of the Administrative

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[47] Mohsen Elabodi, *Discipline and Sentences to Discipline the Police Officers* (Darelnahda Elarabia 2004) 329.

[48] Egyptian Administrative Supreme Court, Appeal No.563/7 (11.11.61) the Groups of the Principles which have been Decided by the Egyptian Administrative Supreme Court from November 1955 until November 1965 Cairo, 27.

[49] Egyptian Administrative Supreme Court, Appeal No.29/1274 (5.05.65) the Groups of the Principles which have been decided by the Egyptian Administrative Supreme Court from 1946 until 1985, Part 2, 79.

[50] Egyptian Administrative Supreme Court, Appeal No.1391-1692/34 (26.01.91) the Seat of Principles Established by the Egyptian Administrative Supreme Court from October1990 until the end of February 1991, 541.

Supreme Court. This case concerned the General Manager of Housing in the area of Old Egypt called Maady, who filed a lawsuit with the Administrative Supreme Court. He requested the Court, which had enforced a penalty against him by reducing his employment rank to a lower status, to overturn their decision. According to the Disciplinary Court defence, the accused employee and others did not perform the works assigned to them accurately and thoroughly, during 1982-1985.[51]

The Administrative Supreme Court ruled that the Disciplinary Court's decision was invalid on the grounds that the accused employee had sent thirty letters (between 1982 and 1983) to the police of the Old Egypt area, as well as to the Housing Police, informing them about the property that had been illegally built, so that they could take the necessary action. However, the police did nothing about the matter. In addition, the employee had sent a letter to the Security of the West Egypt Council, informing them that he had told the police about the illegal building and asked the West Council to put a stop to the building operation. However, they did not respond. The Court also added that there was clear evidence in the documents that the accused employee had issued an order to remove this building. The employee had sent the letter to the Administration of the Accommodation Corporations and also to the Secretary of the Council. The objective was to stop the owner from continuing to build and to confiscate all the equipment within the building, which would be sequestered by the State, even though the building had been reopened following the decision of the Administrative Prosecution. Accordingly, the only valid charge was his absence from work. The Administrative Supreme Court reduced the penalty to a fifteen day salary deduction.

The author submits that this case represents a good example of the operation of judicial review over the correspondence between the penalty and the disciplinary error. This is because the judicial review of the suitability of the penalty can represent a guarantee to the accused employee that no authority can enforce an unfair penalty on him/her.

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[51] The charges that the disciplinary Court based its decision upon were as follows: (i) The accused employee did not take the necessary procedures to prevent the construction of an illegal building and granted the owner of this construction permission to build up to eight storeys. However, the owner built twenty storeys. (ii) The accused employee did not take the necessary procedures steps to remove the building that was built illegally. Also, he did not take precautions to secure the building and equipment within it. (iii) The accused employee was also absent from work without justification.

It can be concluded that initially, the Libyan judiciary took a similar approach as that taken by the Egyptian judiciary in the first and second phases, (giving the Disciplinary Authority the right to assess the error committed and the suitable penalty without review by a judge).[52] In the second phase, the administrative judge in Libya and Egypt was granted the power to review the disciplinary authority's decisions (with regard to assessing the severity of the penalty).[53] However, as discussed earlier, the Libyan judiciary, which initially followed this second phase approach, subsequently did not adopt it. Instead, it reverted to the initial position of the administrative judge's power of review over the disciplinary authority: regarding monitoring the suitability of the penalty for the misdemeanor, their power was removed by the Courts themselves.

The author submits that the Libyan judiciary is unfairly prejudicial with respect to not extending the authority of the judiciary to review the suitability of a penalty with a particular error, as it appears that the Libyan judiciary has demonstrated a degree of contradiction and confusion in this matter. It does not make a clear decision with regard to giving the administrative judge the power to apply its review over the disciplinary authority concerning decisions about the correlation of the selected penalty to the error committed. It can be submitted, therefore, that selecting the administrative penalty by the disciplinary authority should be under the review of the Libyan judiciary, as it is with the Egyptian judiciary. This guarantee for public employees is essential (because the law does not specify a particular penalty for each specific error). The Disciplinary Authority, which imposes the penalty against the employee, is capable of human error. It is possible that the Disciplinary Authority could take an improper decision against the employee. An improper decision would need to be reviewed by a judicial authority, in order to ensure that no abuse of authority had occurred, or that a disproportionate penalty had been imposed.

[52] Administrative Appeal No.1/11 (n 40) 7; Appeal No.1695/10 (n 46) 193.
[53] Administrative Appeal No.2/21 (n 41) 29; Appeal No.1391-1692/34 (n 50) 541.

5.4.2 Analyzing the Position of the Commentators regarding the Necessity of a Judicial Review over the Proportionality between the Penalty and the Disciplinary Error Committed

Libyan commentators[54] are in broad agreement that the judiciary has the right to review and monitor the Disciplinary Authorities and Disciplinary Committees regarding estimating the evaluation of a suitable penalty for the error committed. In contrast, Egyptian commentators have different views, as some of them are in favour of the principle, while others are against it.

5.4.2.1 Commentators in Favour of the Control of the Judiciary's Position on the Proportionality between the Penalty and Disciplinary Error

Libyan commentators, as well as most of the Egyptian commentators, welcome the prospect of control by the judiciary over the principle of correspondence, but they disagreed on providing a proper legal definition for the principle of correspondence. As a result, within this group there are different views as described below:

a. First view

Commentators,[55] who share this view, take the position that the lack of correspondence between the penalty and the error committed constitutes an illegal action. This view is based on the Disciplinary Authority power being granted specialised power given to it to be executed according to the law, and not for personal interpretation. The law specifies a number of penalties, but leaves the selection of the suitable penalty for the error committed to the Disciplinary Authority; hence a power of review is necessary

[54] Kalifa Elgehmi (n 35) 410; Mohamed Elkatbi, *The Administrative Decision between the Estimating Power and the Limited Specialty in Libyan Law (*Darelshab 2003-2004) 232; Mohamed Elhrary (n 13) 231-234; Nasreldin Elgadi, *The General Theory of Discipline in Libyan Employment Law, A Comparative Study* (Darelfacer Elarabe 2002) 816.

[55] Abdelfatah Hssien (n 5) 282-483; Fouad Elatar (n 36) 755; Ibid Khalefa Elgehmi, 410.

b. Second view

Commentators[56] who share this view suggest that lack of correspondence between the penalty and the error committed represents a misuse of power by the Disciplinary Authority.[57] In cases where the institution is found to have performed a disproportionately severe penalty, as a result of a personal prejudice rather than for the benefit of the institution, then this penalty would be found to be invalid.

c. Third view

Commentators[58] who share this view suggest that the lack of correspondence between the penalty and the error committed originates from an inadequate evaluation of the reason for the error committed. This will be further explored in this thesis at a later stage.[59] It is not related to a misuse of the authority's power: because the judicial review over the Disciplinary Authority simply ensures that the severe penalty was produced for a valid reason and is suitable for the error committed. Accordingly, imposing a penalty without mentioning causes leads to the legal invalidation of the penalty.

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[56] Abdelfattah Abdalbr (n 36) 60; Mostafa Afifi (n 36) 210; Mostafa Fahmi (n 36) 394; Nasreldin Elgadi (n 54) 816.

[57] The misuse of power is related to the intention, as well as the purpose of the decision maker, as it can be considered that there is a misuse of power when the decision-maker targets an irrelevant goal to that which is in the public interest and which is limited by law. For example, when revenge on the employee or the pursuit of a personal interest influences the decision produced. On the other hand, the error occasioned by the disciplinary authority misusing its power related to the subject of the decision misuse means decisions contrary to the law and enforcing a penalty that is not included in the penalties stipulated by law. For further information, see Chapter Seven, Section 7.3.2.

[58] Esam Elbrzngi (n 36) 440-441; Mohamed Elhrary (n 13) 231-234.

[59] In Section 5.5 of this chapter.

5.4.2.2 Commentators who are against the Control of the Judiciary on the Proportionality between the Penalty and Disciplinary Error

A second group of commentators[60] take a different view. They are against the role of the Egyptian administrative judiciary with respect to its power to evaluate the severity of the administrative error, as well as selecting the suitable penalty. In their view, the Disciplinary Authority should be solely responsible for selecting the most suitable penalty for an administrative error. Commentators consider that the judiciary should have no right to intercede with the disciplinary authority, unless the disciplinary authority misuses its power and imposes an improper decision. This is based on the view that the disciplinary authority is the most appropriate body to both estimates the severity of the error, and to select the suitable penalty for it, as those who work in the administration of the public institution are closer to the workplace and therefore are best placed to make an appropriate decision.

5.4.2.3 Commentators holding a Synthesis of the two Groups regarding those in Favour of and those against the Control of the Judiciary on the question of the Proportionality between the Penalty and Disciplinary Error

A few commentators[61] represent a composite view, which is a synthesis of those who are in favour those who are and against the review by the judiciary based on the principle of correspondence. These commentators feel that in cases where the Supreme Court finds that the decision produced by the Disciplinary authority (administrative authority) is improper, it has the right only to overturn the decision and not to produce a different one. These cases would be referred back to the administrative authority for reconsideration, the reason being that this is the appropriate authority to make such sensitive decisions. The Administrative Authority is more familiar with the workplace and is more qualified to take the most appropriate decision regarding punishment.

Given the above discussion, it should be noted that:

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[60] Elsied Ibrahem (n 37) 265; Sliman Tmaoi (n 37) 656-657.
[61] Mohamed Mrgne (n 39) 176.

a. Conclusively, there is disagreement between the groups of commentators discussed above.[62] However, it seems that the most appropriate view is that proposed by the composite group (commentators representing a synthesis of those who are in favour and those who are against the control of the judiciary on the principle of correspondence of the penalty with the error committed).[63] This group suggests that the judiciary has the right only to ensure that if correspondence between the error committed and the penalty selected is not established and the judiciary finds that the decision produced by the Disciplinary Authority is improper, the judiciary has the right to annul the decision only. It does not have the authority to take a different decision, because this power of selecting the right penalty for the error committed is only given to the Disciplinary Authority by law.

b. Most of the Libyan[64] and Egyptian[65] commentators support the operation of judicial review over the principle of correspondence, but they disagree on providing a proper legal definition for the principle. As a result, there are different views: some commentators'[66] state that the lack of correspondence between the penalty and the error committed is considered an illegal act, while other commentators[67] suggest that lack of correspondence between the penalty and the error committed represents a misuse of the power by the disciplinary authority. Other commentators[68] state that the lack of correspondence relates to inadequate evaluation of the reason for the error committed.

It seems that the second view[69] on the misuse of power is appropriate, because if the penalty selected for an error is unsuitable, it cannot be assumed that this penalty is illegal, as the law does not specify a particular penalty for each specific error. Instead, the law specifies a range of penalties but leaves the decision to select the appropriate penalty for the error committed to a disciplinary authority. As a result, it can be considered that the lack of correspondence between the error committed and the suitable penalty is a

[62] See above section 5.3.2-5.4.2.3.
[63] Mohamed Mrgne (n 39) 176.
[64] Khalefa Elgehmi (n 36) 410; Mohamed Elhrary (n 13) 231-234: Nasreldin Elgadi (n 54) 816.
[65] Fouad Elatar (n 36) 755; Abdelfatah Hssien (n 5) 282-483; Abdelfattah Abdalbar (n 36) 60; Mostafa Afefi (n 36) 210; Esam Elbrzngi (n 36) 440- 44.
[66] Ibid Fouad Elatar, 755; Ibid Abdelfatah Hssien, 282-483; Kalifa Elgehmi (n 36) 410.
[67] Abdelfattah Abdalbar (n 36) 60; Mostafa Afifi (n 36) 210; Mostafa Fahmi (n 36) 394.
[68] Esam Elbrzngi (n 36) 440- 441; Mohamed Elhrary (n 13) 231-234.
[69] Elsied Ibrahem (n 37) 265; Sliman Tmaoi (n 37) 656-657.

consequence of a misuse of power by a Disciplinary Authority. Accordingly, it is submitted that if it turns out that there is a lack of proportionality between the error committed and the penalty owing to abuse of power by the disciplinary authority, it is then considered a personal revenge against the employee and the penalty decision should be invalid.

5.5 An Assessment of the Fairness of Stating the Reasons for Imposing the Disciplinary Penalty

The Administrative Authority and Disciplinary Committee should state the reasons and the evidence supporting their decision against the employee[70] in order to justify the disciplinary decision.[71] Libyan Law stipulates precisely this in the Civil Service Laws (the most recent is Law No. 12 of 2010 concerning Labour Relations[72]). Similarly, Egyptian Law stipulates the necessity of giving clear reasons and evidence for imposing a disciplinary penalty.[73]

It is submitted that Libyan legislation stipulated the necessity of mentioning the reasons for the penalty. However, it does not stipulate how the reasons should be mentioned, should they be mentioned in detail or is just mentioning them in outline detail enough? Libyan law left this point unclear. Therefore, this part of the thesis will examine the position of the Libyan law in how the reasons of the disciplinary decision should be written.

5.5.1 An Assessment of whether the Disciplinary Authority has given Sufficient Reasons for the Disciplinary Penalty in Libyan Law

Stating the reasons for the disciplinary decision must include certain elements. One of the most important elements is the basic and main information of the contained in the

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[70] Mahmed Elhrary (n 13) 231-234; Esam Elbrzngi (n 36) 440-441.
[71] Azme Abdelfata, *The Judge's Duty in Achieving the Principle of Presenting the Employees with the Charges against him* (Darelnahda Elarabia 1983) 86.
[72] Article 156 of Law No. 12 of 2010 concerning Labour Relations.
[73] Article 79 of Law 47 No. of 1978 concerning Civil Servants.

disciplinary decision. By using this information, the details of the decision can be accessed as represented in:

5.5.1.1 The Direct Causes for the Disciplinary Decision

(a) A document should be compiled which should includes a list of incidents and evidence, upon which the Disciplinary Authority based its decision.[74] The document should also include specifics with respect to the place and date of the error. It is imperative that the accused employee knows the details of the charges directed against him/her, without having to refer to any other documents.[75] The Disciplinary Authority must specify one or two incidents in which the employee exhibited negligence that can be considered a violation of his/her employment duties. If the incidents and evidence of the disciplinary decision are not clear, this can render the causes of the Disciplinary Court decision invalid.[76] Therefore, the Disciplinary Authority is not permitted to judge the employee simply on the basis of his or her general attitude. The Disciplinary Authority must specify the incident which led to the decision against the employee. The Disciplinary Authority is required to reach a decision on individual employees of differing rank with consideration of each separate charge, and not examine employees together as a group. Separate accusations and causes must be brought against each of them.[77] Not adhering to this may render the Disciplinary Authority decision invalid as a result of insufficient cause. This could lead to an appeal by the employee to the judiciary, seeking an annulment of the decision.

Given the judgments studied from Libya, it seems that there is no specific judgment which requires the causes to be stated clearly and separately against individual employees of differing rank with consideration of each separate charge. This can perhaps be explained by the fact that many employees, especially those in more lowly positions, do not know about disciplinary measures and how they work. As a result, it can be submitted

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[74] In UK law, in the case of dismissal, the employee has the right to a written statement that includes reasons for such dismissal. Employment Rights Act 1996 [c.18] part IX.

[75] Mohamed Yakoot, *The Explanation of Disciplinary Procedure* (Mnshat Elmarfe 2004) 674-675.

[76] Sliman Tmaoi (n 37) 603.

[77] Khalefa Elgehmi (n 36) 336.

that the solution for this problem in Libya may come about by adopting the jurisprudence of the Egyptian Administrative Judiciary.

An example of this in Egyptian jurisprudence is illustrated in Appeal No.555/45.[78] A number of officials were charged with various offences,[79] but the Disciplinary Court declared them innocent.[80] The Administrative Prosecution did not accept the Disciplinary Court's decision and appealed to the Administrative Supreme Court. The Administrative Supreme Court rejected the appeal and upheld the innocence of the accused employees. Its judgment was based on the fact that the Administrative Prosecution, when conducting the investigation and referring the employees to the Disciplinary Court, did not include in the referral decision the role of each individual employee in the charge. It merely directed the charges against the group as a whole, which was illegal.

From the above discussion, it is submitted that Libyan judiciary is not acting fairly in not requiring groups of employees who are being disciplined and who have committed the same error individually to be penalised individually rather than being charged as a group. In contrast, the Egyptian judgment[81] seems the correct approach. It is submitted that Libyan Administrative Judiciary should follow the example of the Egyptian Judiciary with regard to this issue. Documenting the reasons/rule of each employee's responsibility guarantees fair examination of the case for the employee, because disciplinary responsibility is considered equal to the criminal responsibility. Both responsibilities must refer to the culpability of each individual. If the employee does not carry out his duties, this failure should properly be regarded as his/ her personal responsibility. If, however, he/she has colleagues committing the same error, then the role of each one of

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[78] Egyptian Administrative Supreme Court, Appeal No.555/45 (10.05.2006) the Seat of Principles Established by the Egyptian Administrative Supreme Court from April until the end of September 2006, Part 2, Year 51, 933.

[79] (i) The head of the Employment Council in Borsaied (equal to the Secretary of the Ministry). (ii) The head of the Council of Administrative issues in Borsaied. (iii) An administrative inspector in the Council. (iv) The head of the training department in the Council. (v) The secretary of the employees' issues in the Council.

[80] (i) Accepting bribes. (ii) They forged the signatures of the other employees working for the council. The purpose of the falsified signatures was to obtain a mortgage from the Ahli bank to finance the sports committee exhibition. (iii) They fraudulently claimed a greater amount than was required to carry out the project.

[81] Appeal No.555/45 (n 78) 933.

the parties involved in the case individually must be determined before the appropriate penalty can be selected for each individual.

(b) Including the causes for the original disciplinary decision enables the judge to check the validity of causes and their influence on the ultimate decision.[82] It also determines whether these causes are relative to the severity of the punishment.[83]

The question remains: is it permissible for the Disciplinary Authority to consider causes stated in previous documents that are related to the current case? Is the Disciplinary Committee allowed to refer to the investigator's opinion in the case, without mentioning the causes for the original disciplinary decision?

The judiciary in this matter is debating whether to accept or reject the background evidence provided. The Libyan Judiciary in Supreme Court Administrative Appeal No.29/10[84] upheld the Disciplinary Committee's decision to reduce the salary as a punishment, even if the latter refers to the causes in previous documents and omits the causes of its decision. The Disciplinary Committee had directed the administrative charges to the employee by referring to evidence-based documents ('the decision' of the Public Control Monitoring System), although it failed to mention this in its final decision. The Court held that it is enough for the administrative decision to have a justifiable reason in both fact and law. Accordingly, the resolution of the Disciplinary Committee had a justifiable origin in the documents, as it did comply with the law. This origin led to the valid decision taken by the Disciplinary Committee.

In another judgment, the Libyan Supreme Court ruled that it was not permissible to refer to the causes in previous documents. The decision reached by the Disciplinary Committee must take into account the causes to enable the judiciary to scrutinize their validity, together with the validity of the disciplinary penalty. This is what the Supreme Court ruled in Administrative Appeal No.92/44.[85] The need for guarantees for the

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[82] Abedhameed Alshorbi, *Discipline for Employees* (Mnshat Elmarfe 1995) 54.
[83] Mohamed Younes, *Judiciary Review on the Legitimacy of the General Administrative Penalties* (Daregamia Elgdida 2000) 192.
[84] Administrative Appeal No.29/10, Libyan Supreme Court (22.04.84) *Supreme Court Journal*, 1984, Year 21, no.3, 9.
[85] Administrative Appeal No.92/44, Libyan Supreme Court (14.06.98) *Unreported*.

employee in any disciplinary case is necessary, even when this is not stipulated in a legal text. Included in these guarantees is the right to present the causes of the disciplinary action in a way that will ensure the review of the validity of the facts that led to the penalty imposed on the employee. An employee must be provided with all the specific evidence against him, as it relates to the error committed. Stating causes of the resolution by the Disciplinary Committee means that all documentation relating to the investigation processes must be stated clearly and in detail in the Disciplinary Committee's decision. These factors (i.e. causes, evidence) can justify the penalty enforced against the employee and allow the Administrative Judiciary to monitor and check the legal aspects of the resolution produced by the Disciplinary Committee.

In the judgments discussed above, the author submitted that it is evident that the Libyan Judiciary[86] is allowing unfairness to proliferate by not having taken a clear and strict position with respect to accepting the background evidence and rejecting the reasons that were stated in previous documents relevant to the case before it. The lack of a definitive decision by the Supreme Court has its impact on the judiciary (Appeal Courts) and administrative applications, as all the stipulations issued by the Supreme Court must be followed by the Administrative Authority and the judiciary.[87]

This contradiction (between accepting and rejecting the background reasons stated in previous documents relevant to the current case as discussed earlier in Administrative Appeal, No.29/10 and Administrative Appeal, No.92/44) in the Libyan Supreme Court's judgment should be reviewed. In order to do this it would be necessary to convene a meeting of all the bodies (Criminal, Civil and Administrative[88]) involved with the Supreme Court, which would agree to overturn its previous judgment in Administrative Appeal No.29/10.[89] The decision could be reached by referring to reasoning in a preceding case in Administrative Appeal No.92/44, omitting mention of the causes in the original disciplinary decision. The Supreme Court would in this case overturn the decision and would concede that all decisions taken by the Disciplinary Authority must

[86] Ibid; Administrative Appeal No.29/10 (n 84) 9.
[87] Article 31 of Law No.6 of 1982 concerning the Reorganization of Supreme Court.
[88] Article 23 of Law No.17 of 1993 witch amended Law No.6 of 1982 concerning the Reorganization of Supreme Court.
[89] Administrative Appeal No.29/10 (n 84) 9.

be justified. The reasoning must be logical and supported by vital evidence in the original disciplinary decision, as ruled in the second judgment (Administrative Appeal No.92/44[90]). Reaching a decision by referring to old documents and without mentioning the causes, can be considered contrary to the guarantees granted to the employee, and therefore contrary to law. If the disciplinary authority investigates the causes mentioned in the referral decision of the administration, why was that reason not mentioned in its penalty decision, apart from only a brief reference to it?

Furthermore, depending on previous documents relating to a particular case, to reach a decision in this way can result in an erroneous disciplinary decision. There may be certain incidents in the case of which the Disciplinary Authority was unaware, which could have a direct impact on the disciplinary decision. Also, the judge will not be able to monitor the disciplinary decision or check the veracity of the facts or the evidence. He/she will not be able to clearly ascertain how the Disciplinary Authority applied the penalty to the case, because the incident and reasons were not clear. Consequently, the Disciplinary Committee must state all the incidents in that document, as well as the statements of the witnesses. There may be new documents and evidence presented by the litigants to the Administrative Authority that may change the disciplinary decision. This could be documentation and evidence not yet seen by the Administrative Authority. In addition, the law stipulates that the decision must be taken for a specific reason, regardless of whether the decision was reached by the Administration or the Disciplinary Committee.[91] For this reason, it is submitted that in order to fill this lacuna, the Libyan Judiciary should require that the reasons in the original disciplinary decision should be mentioned, and that they be considered as evidence in the case, just as Egyptian Judiciary does.[92] This is because it will assist the Disciplinary Authority in making a proper decision. Their specification will also allow for effective judicial oversight by the judicial authorities. The following judgment is illustrative:

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[90] Administrative Appeal No.92/44 (n 85) *Unreported.*
[91] Article 156 (n 72).
[92] For further information see next paragraph.

The Egyptian Administrative Judiciary is stated in Appeal No.774/ 40,[93] where a number of employees[94] were assigned to examine the condition of an abattoir, to check that it were up to a satisfactory technical standard. They reported that the building was in a good state. However, it transpired that the building required repairs which cost 6,500 Egyptian Pounds). They were charged with giving a false report on the state of the building and were given a one-year penalty by the Disciplinary Court. The employees did not accept the decision of the Disciplinary Court and appealed to the Administrative Supreme Court. The latter ruled that the judgment enforced by the Disciplinary Court was invalid because it was based on investigations which were conducted by the General Prosecution and its recommendations, but there was, however, no mention of details of these investigations. Consequently, the judgment of the Disciplinary Court omitted the causes that led to the investigation. The Administrative Supreme Court ruled that it is not sufficient to refer to the investigation or legal texts without clearly specifying the facts and causes upon which the Court based its judgment.

Another example of this in Egyptian jurisprudence is illustrated in Appeal No.2430/41,[95] a case concerning a third degree-ranking employee in the censorship department in the area of Demahlya, who was suspended from work for a month and had half of his salary deducted by the Disciplinary Court. The employee appealed against the Disciplinary Court decision to the Administrative Supreme Court. The Administrative Supreme Court ruled that the decision of the Disciplinary Court was incorrect. The reason for this decision revolves around Article 43 of Law No. 47 of 1973 concerning the Board of State, which stipulates that all judgments must be justified with cause and evidence. The Disciplinary Court's judgment was based on the report of the inspection and monitoring committee. The committee inspected the employee's work to investigate the error committed and found the employee guilty. Also, the decision was based on the testimony of both a member and the head of the committee. However, the Disciplinary Court did not consider all these causes that led to its decision. Consequently, it did not justify its decision by causes and evidence, so its final decision was not in accordance with the law.

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[93] Egyptian Administrative Supreme Court, Appeal No.774/40 (25.07.98) *Unreported.*

[94] The Head of the Water and Refuse Board, the technical supervisor of the Water and Refuse Board and the representative of the Water and Refuse Board.

[95] Egyptian Supreme Administrative Court, Appeal No.2430/41 (27.07.96) Council State, *Unreported.*

These cases are good examples to ensure that the penalty imposed against the employee is imposed for a clear and sufficient reason. This is because stating the causes in the disciplinary decision by the Disciplinary Authority is considered an important guarantee to the employee, as it reassures him/her that the penalty is imposed only after full consideration and examination of all the facts and incidents of the case. Therefore, the author submits that the Libyan judiciary should do as Egyptian judiciary does, when it ruled that the reasons for the decision must be stated in the penalty decision. This is because rules which are established by the Supreme Court have an impact on the disciplinary authorities, as disciplinary authorities are bound to follow the judgments ruled by Courts. The author found that the unclear position taken by the Supreme Court in Libya (between whether to require or not require the background mentioning of the reasons for the decision) promotes legal uncertainty in the decision, as the Supreme Court in one case (in Administrative Appeal No.92/44[96]) ruled the necessity of mentioning the reasons in the penalty decision, while in another case it did not require it.[97] This lack of clarity may affect the rights of the employees as disciplinary authorities in Libya may take this uncertainty by choosing not to mention the reasons for the decision in the decision text, because the superior judiciary does not take a clear view regarding this 'issues'. Accordingly, it is submitted that the Libyan judiciary should take Egyptian judiciary as the example to follow, by ruling that the reasons should be mentioned in the original disciplinary decision.

5.5.1.2 Adequate Reasons for the Disciplinary Decision

The reason underlying any decisions and the legality of the reasons will not be sufficient unless it is produced in a form that can be subject to judicial review.[98] It is the responsibility of the Disciplinary Authority to explain and give the reasons for a

[96] Administrative Appeal No.92/44 (n 85) *Unreported.*
[97] Administrative Appeal No.29/10 (n 84) 9.
[98] Abdelfatah Aboellel, *The Sufficient in Administrative Law* (Darelnahda Elarabia 2000) 55.

disciplinary decision.[99] The disciplinary decision must include the following to be appropriate:

a. The disciplinary decision must include the evidence that led to the charges levied against the employee, which must relate to the degree of penalty imposed on that employee.[100] This raises the question as to the necessity of explaining the causes in detail to prove that the reasons are sufficient and valid (for example, whether the Disciplinary Authority should reply in detail to each document presented to them. Or, on the other hand, can these reasons be summarized briefly by stating all the legal evidence and general reasoning underlining its decision, without reference to the documentation specific to a particular case which had been put before it, even if the decision includes a severe penalty, such as dismissal from work?.

Given the judgments from Libya that have been studied, it seems that there is no specific judgment which requires the reasons to be stated clearly in detail or briefly in the disciplinary decision.[101] This can perhaps be explained by the fact that many employees, especially those in more lowly positions, do not know about disciplinary measures and how they work. It is important for employees to know that they have the right to request that a disciplinary decision can be overturned if it based on a minor infringement or specific causes. As a result, it can be submitted that the solution for this problem may follow from the Egyptian Administrative Judiciary.

The Egyptian Judiciary considers a penalty still valid if the Disciplinary Authority did not examine in detail each document presented to them. However, it was also stated that if an employee presented a logical defence which is believed to have a direct influence on the

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[99] Mohamed Ali, *Protection of Public Employee Administratively* (Darelnahda Elarabia 2010) 351.

[100] Ahmed Aboelwafa, *the Sentences' Theory in the Court's Law* (Mnshat Elmarfe 1989) 172; Abdelfatah Hassan, 'Justifying the Reason of Decision as an Essential Condition in the Penalty Decision' (Year 66) Journal of Administrative Sciences 187.

[101] In UK law, fairness is an essential factor in disciplinary hearings, and reasonableness is one of the important keys that the employer must take into account when considering a disciplinary action. Reasonableness includes several things, such as gathering evidence which proves that an employee has committed an error, not just acting on the mere suspicion that an employee may be guilty. When an employer's charge against an employee is based on evidence and facts, then he/she can make an informed decision on the course of action to be taken. Decisions which are not justified by reasonable evidence may be overturned by either the employment tribunal or the employment appeal tribunal or, in the case of an employee's appeal, by employment appeals tribunal. *Waste Ltd v Scrivens* (2010) (London) UK (EAT/0317/09/ZT).

case and the Disciplinary Authority does not reply in detail, its decision will be considered invalid. An example to demonstrate how the reasons of a decision are valid in cases where the Disciplinary Authority did not respond to the defence presented by the employee in detail can be seen in Administrative Supreme Court of Appeal No.4415/49.[102] The manager and a technician from the local housing department of the area of Batnah were both penalised by the deduction of a month's salary. The reason for this was that they neglected to check up on and supervise the technical workers in their department. This led some technicians undertaking work that was contrary to the law (the technicians illegally erected some buildings on the land belonging to the department).

The two employees appealed to the Administrative Supreme Court, claiming that they had appealed previously to the Disciplinary Court. However, the latter did not respond to their appeal. The Administrative Supreme Court ruled that the deduction of the employees' salaries was correct, as the head of the local department, along with the technicians of the buildings in the department, did not take the proper measures. Procedures should have been taken to prevent others from taking advantage of state properties. Moreover, the employees' claims that the Disciplinary Court did not respond to their appeal was held not to be illegal. The Disciplinary Court is not obliged to follow the accused employee's defence or to reply to every detail in it. The Disciplinary Court included all the causes and evidence that led to its decision by submitting valid documents.

An example to demonstrate how the biases involved in a decision are invalid, in cases where the disciplinary authority did not respond to the essential defence presented by the employee in detail, can be seen in Administrative Supreme Court of Appeal

[102] Egyptian Administrative Supreme Court, Appeal No.4415/49 (21.01.2006) the group of principles decided by the Egyptian Administrative Supreme Court from October until the end of March 2006, Year 51, 305. In Administrative Appeal No.8/1001, the Administrative Supreme Court in Egypt held as correct the decision in a case presented by an employee to the Administrative Supreme Court. The employee appealed to the Administrative Court claiming that the Disciplinary Court (the equivalent of the Disciplinary Committee in Libya) did not mention in its resolution the documents which he presented in his defence. The Administrative Supreme Court ruled that the decision of the Disciplinary Court was legal. The Disciplinary Court referred in its resolution that it did not have to respond to every document presented to it by the employee in his defence. In this case, the appeal of the accused was rejected because the Disciplinary Court included the valid causes and evidence to justify its decision. Egyptian Administrative Supreme Court, Appeal No.8/1001 (26.01.63) the Group of the Principles decided by Administrative Supreme Court and Administrative Prosecution, Part 1, 1981, 40-41.

No.727/42.[103] In that this case, the Disciplinary Court imposed a salary deduction of ten days against the Head of Customs.[104] The employee did not accept the penalty imposed against him and appealed to the Administrative Supreme Court, which ruled that the judgment enforced by the Disciplinary Court was invalid. The judgment was not in accordance with Article 42 of Law No. 47 of 1971 concerning the Board of State. The decision should have included all reasons and facts that led to the Court's judgment. Also, if the employee had appealed to the Court with strong evidence that may have led to changing his position in the case, the Court would have been committed to looking into his appeal and responding to it. However, the employee had appealed previously to the Disciplinary Court but the Court did not reply to his appeal. The employee had provided the Disciplinary Court with a document from the Minister of Transport proving that the system which he used to register the car was still in operation. The steps taken by the employee were correct. The Disciplinary Court should have looked into the new evidence. As a result of not doing so, its decision was invalid.

Some commentators[105] support the second judgment,[106] which considers that if the employee presents a defence, the Disciplinary Authority must reply to it in detail, without any exceptions. The reasons must be stated clearly in detail, as a lack of vigour in examining every detail can be misleading, which can result in an unclear decision and insufficient establishment of reasons. Other commentators[107] disagree with the second judgment,[108] as in their view, it is not mandatory that the Disciplinary Authority has to reply to all details which are mentioned in the employee's defence. Their view is that the disciplinary decision does not require the mentioning of all the incidents and evidence that led to producing the disciplinary decision, because these details should be mentioned

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[103] Egyptian Administrative Supreme Court, Appeal No.727/42 (17.03.2001) Council State, *Unreported.*
[104] This employee, who was in charge of the importation of cars, was found to falsify the registration procedure for those clients returning from the Gulf War. The owner of the car was excused from paying the required tax. However, since that time, the system had changed and was no longer in operation.
[105] Mohamed Yakoot, *The Procedures and the Guarantees in Disciplining the Police Officers* (Mnshat Elmarfe 1993) 337; Sliman Tmaoi, *The General Theory of the Administrative Decisions* (7th edn, Darelfecr Elarabe 2006) 267.
[106] Appeal No.727/42 (n 103) *Unreported.*
[107] Abdelfatah Hssien (n 5) 348; Mohamed Taib, *Stating the Reasons for the Administrative Decision* (Darelnahda Elarabia 1991) 163.
[108] Appeal No.727/42 (n 103) *Unreported.*

in judgment, not in the disciplinary decision. In addition, as the administration deals with the routine administrative work, the reasons must be stated in the judiciary's judgment.

From what has been discussed, it can be concluded that the first view is more logical,[109] because stating the causes of the disciplinary decision by the Disciplinary Authority is considered an important guarantee to the employee. The employee can be assured that the penalty against him/her has been imposed after discussion of all the facts and the evidence. Also, by knowing the reasons the employee might find a mistake in one of the facts that are provided as reasons for the penalty decision and can appeal against it. What is more, if the employee submits essential evidence[110] and the Disciplinary Authority responds to this, the employee will be made aware that he/she has been penalised for justifiable reasons, and in accordance with the law. For this reason, it submitted that the Egyptian judgment is appropriate (Appeal No.727/42[111]) when it considers the invalidity of any penalty based on a lack of response to detailed essential evidence. It is submitted that the Libyan judiciary is promoting unfairness, because it does not require the mentioning of the causes of the penalty in detail in the penalty decision. This is because essential evidence can overturn a disciplinary decision. The Disciplinary Authority should reply, because the lack of response to essential defence details presented by the employee does not inspire the employee to consider that his defence was properly considered, nor does it allow a clear link to be identified in the decision between causes and penalty.

It is submitted that the Libyan Administrative Judiciary should adopt the same approach as the Egyptian Judiciary or as the UK Judiciary, with regard to this issue. The Judiciary should consider the invalidity of any penalty that is based on the lack of response to essential evidence in detail, as well as other evidence, even non-essential evidence were appropriate. The evidence should be explained in detail and should be reasonable and convincing; and should explain how it was obtained, to what extent this evidence is proper and to what extent this evidence relates to the facts (clear enough to be

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[109] Mohamed Yakoot (n 105) 337; Sliman Tmaoi (n 105) 267.
[110] An essential element of the employee's defence is the disciplinary authority's failure to take into account a change in the law after the error had been committed, thereby rendering the investigation invalid.
[111] Appeal No.727/42 (n 103) *Unreported.*

understood, monitored and controlled by the judiciary), to ensure that the causes were proper and sufficient to bring the charge against the employee.

b. Specifying the legal basis for the decision: A disciplinary decision takes into account both the positive and passive acts of the employee. In addition, the legal basis must be stated in the disciplinary decision,[112] regardless of whether the legal basis is law, regulations, or orders from an administrative body.[113] This is the reason for Libya's Supreme Court ruling in Administrative Appeal No.53/36[114] that dismissing an employee for forging an attendance sheet is contrary to the law. The decision was not based on legal specifics, nor was it logical. This was in accordance with Article 39 of Bylaw regulation of Law People's Inspection and Control System.

The importance of the existence of written law in all cases is to enable the judiciary to ensure that the Disciplinary Authority has applied the law properly, on a case by case basis. It is also in place to ensure that the penalty chosen to discipline the employee is within legal limits. However, omitting the Article of the penalty does not render it invalid. This was held by the Supreme Court in Libya in Administrative Appeal No.16/23.[115] The case concerned an employee who worked for the Ministry of Housing and Property. He appealed against a decision taken by the Disciplinary Committee to suspend him for six months. The employee claimed that the resolution enforced against him was illegal since the Article had been omitted. The Supreme Court held that the judge in the administrative and criminal sentences was not bound to mention the Articles of any particular law applied to the matter. So long as it is proven that the charges against the accused prove his breach of employment duties, the decision and penalty are valid. However, it is submitted this would appear illogical. Not all administrative errors on the part of the employee are recorded in disciplinary law. In Criminal Law no crime without a relevant written law exists. Disciplinary errors relate to a violation of a rule of law, a violation of employment regulations, or a violation of the legal orders of the administrative heads of an organisation. Consequently, if the employee commits an act

[112] Abdelaziz Khalifa (n 23) 236.
[113] Altayb Mahmoud (n 16) 460.
[114] Administrative Appeal No.53/36, Libyan Supreme Court (2.12.90) *Unreported.*
[115] Administrative Appeal No.16/23, Libyan Supreme Court (14.06.70) *Supreme Court Journal*, Year 7, no.1, 55.

that is considered an administrative error, such as failure of his/her employment duties, the Disciplinary Authority should specify the particular incident considered to be in violation of employment duties. If the employee commits an act that can be considered contrary to the law, the Disciplinary Authority should state clearly *the text of law* on which it is basing its decision. This is, of course, to enable the judge to ensure that the Disciplinary Authority applied the law properly and to be clear with regard to the proper penalty and incident. Accordingly, if the judge realizes that the Article in which the authority based its charge on does not apply on the error committed by the accused employee, the judge in this case can overturn the charges for the failure of the disciplinary authority to apply the rules of law.

5.5.1.3 The Importance of Stating Sufficient Reasons for the Disciplinary Decision

a. For the Employee

Stating the causes of the disciplinary decision by the Disciplinary Authority is considered an important safeguard for the employee. The employee can be assured that the penalty against him/her has been imposed after discussion of all the incidents and the evidence, as well as the defendant's evidence according to legal rules.[116] Such cases would be when the accused employee knows the causes of the disciplinary decision and agrees with these causes, as well as the final decision. He/she will be aware that he/she has been penalised and can therefore appeal against the penalty if, in his/her opinion, the decision is improper. This guarantee also helps the employee prepare his/her defence thoroughly, should he/she need to submit an appeal to the Court. He/she can closely examine and interpret the evidence that the Disciplinary Authority used to reach its decision, and try to prove his/her innocence using this and other evidence.[117] Causation (stating the causes of the penalty decision) is an indirect way to provide the accused employee with the right to defend him/herself.[118] By means of the requests and arguments that he/she presents to the investigators, to which they have to respond (either by accepting or refusing his

[116] Mohamed Younes (n 83) 189.
[117] Abdelfatah Hssien (n 5) 176.
[118] Amar Barakat, *The Disciplinary Authority, A Comparative Study* (Maktbat Elnahda Elmasrya 1979) 322.

argument and the appeal lodged to them), the Court can sometimes be persuaded by the evidence presented by the employee and therefore the appeal has to be accepted and the decision overturned.

b. For the Administration

Causation is an effective way to assess the competency of the administrative investigator. This is achieved by disclosing the intention of the administrative investigator towards the accused, with regard to the charges directed against the latter, and also whether the reasons of the decision are in line with the law and appropriate or not.[119] Stating the causes for the disciplinary decision supports the case for the administration, as stating the causes obliges the administration to scrutinise more closely all the incidents and the documents of the case and methodically reach its decision.

Moreover, stating the reasons restricts the extensive power of the administration which leads to considered and precise disciplinary decisions. Consequently, stating the causes of the disciplinary decision helps the administration to monitor its own procedures. Causation is one of the most important means of persuasion that the administration can put before the accused employee. It enables the administration to respond to all the objections raised by the accused employee in the investigation. Causation also enables the administration to disclose the reasons and facts that prompted the penalty on the accused employee (all of these will eventually justify the penalty and reinforce the principle that the decision was taken in accordance with the law).[120] Consequently, this increases confidence in the administration and reduces recourse to the Courts if the employee is convinced by the causes.

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[119] Ibrahim Alsyad, *Explanation of Civil Serves System in the State* (Darelmarfa 1966) 543; Ali Mhareb, *The Administrative Discipline in the Public Employment, A Comparative Study* (Darelmatboat Elgameia 2010) 515.
[120] Azme Abdelfatah (n 71) 86.

c. For the Judiciary

Stating the reasons for the disciplinary decision represents an important tool for the judiciary in its control and monitoring of the credibility, as well as the legality of the decisions produced by the Disciplinary Authority. In other words, the judge has to review all the details of the case (all the documents, papers and evidence) to ensure that the penalty decision has been taken on a proper basis, in order to prove the recorded facts of the case.[121] The Administrative Judge, according to the Supreme Court,[122] will have proof that legal procedures were followed by the Disciplinary Authority's consideration of the facts, as well as whether the decision is just. In addition, it ensures that the Disciplinary Authority respects and provides the accused employee with the right to defend him/herself, as stipulated by law. Another advantage for stating the cause for the disciplinary decision in order to achieve the principle of correspondence is that the judiciary can be assured that the penalty imposed on the employee is in proportion to the error committed.[123]

5.6 Conclusion

(a) Libyan law is fair with respect to the principle of legitimacy of the penalty (adheres to the penalties stipulated by law). This is because Libyan law guarantees to the employee that disciplinary authorities will only enforce penalties stipulated by law. Therefore, failure to comply with the principle of the legitimacy of the penalty means that the employee can appeal to the Court and a penalty decision can be overturned. Also, Libyan Courts are fair in considering that transfer from one job to another at a lower grade and not for the interest of the institution is against the law, as it is regarded as a punishment without investigation.

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[121] Mohamed Younes (n 83) 189.
[122] Administrative Appeal No.9/17, Libyan Supreme Court (10.01.74) *Supreme Court Journal,* Year 10, no.3, 70.
[123] Mostafa Fahme (n 36) 759-763.

(b) Having examined the illegality of imposing multiple penalties for the same act, Libyan law is fair with respect to the principle of not enforcing more than one penalty for the same error. Libyan law provides that the disciplinary authority cannot impose a penalty for the same error twice, which represents a guarantee to the accused employee, who can appeal against the disciplinary authority if it enforces more than one penalty for the same error.[124]

(c) With respect to the extent of the Libyan administrative judicial review on the question of the proportionality between the error and penalty,[125] the Libyan judiciary allows unfairness to proliferate, as it does not put clear non-contradictory rules in place that require correspondence between the proportionality or suitability of the error and the penalty. The Libyan administrative judiciary is also allowing unfairness with respect to its reluctance to monitor (review) the disciplinary authority regarding the estimation of the penalty. This is because the Libyan administrative judiciary does not take a clear position, oscillating between acceptance and refusal, towards enforcing its review over the suitability of the penalties imposed by the disciplinary authorities. Therefore, it is submitted that Libyan law should do as the Egyptian law does, and assert its power to review the penalties imposed by disciplinary authorities. The principle of having the power to review the decision of the disciplinary authority represents a guarantee to the accused employee that no disciplinary authority will exercise its power by infringing the guarantees of the employee.

(d) Justifying the penalty decision for valid reason is a point which is well addressed and stressed in Libyan law.[126] Therefore, the author submits that Libyan law is fair with respect to this. However, Libyan law is lacking in not having mentioned how disciplinary authorities must write these causes into their decision (is it enough to only mention the causes briefly or should the authorities mention them in detail?).[127] The author submits that the causes must be addressed in the penalty decision in detail, just as Egyptian and

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[124] See above Section 5.3 of this Chapter. For further information regarding the right of accused employee to appeal against the disciplinary authority if it enforces against him/her more than one penalty for the same error, see also Chapter Seven, Section 7.3.2.
[125] See in detail above in Section 5.4.1 of this Chapter.
[126] See in detail above Section 5.5 of this Chapter.
[127] See in detail above Section 5.5.1.2 of this Chapter.

UK law does, when they made it a condition that the penalty should be reasonable, as well as the causes that led to it specified. This guarantee additionally helps the employee to prepare his/her defence, as he can closely examine and interpret the evidence that the Disciplinary Authority used to reach its decision.

(e) Also, with regards to justifying the penalty decision by references to valid causes, the author found that Libyan judgments were not settled regarding the necessity of mentioning the causes of the penalty in the penalty original decision. In one case, the Court ruled on the necessity of mentioning the causes of the decision,[128] whereas in another case the Court ruled that it is enough to refer to the causes in the referral decision.[129] This is unfair for the employee, as the judgments ruled by the Supreme Court are used as a reference by the lower degree Courts and therefore should be consistent; otherwise the lower degree Courts would rule on either the necessity or the insignificance of mentioning the causes of the decision in the penalty decision. It is submitted that not mentioning the causes in the penalty decision and only referring to them in the referral decision is not appropriate and contrary to the rights of the employee. This is because referring to the causes in the referral decision will not indicate how the disciplinary authority discussed the evidence or facts that led to the decision, which makes their decision unclear. The Courts will not be able to review these decisions because if there are no detailed facts, then little is left for the Court to review. Consequently, the decision of the disciplinary authority will be immunised against the Court review, which is contrary to the rights of the employee, as he/she has the right to appeal and get a fair review from the Courts of the reasons and facts that led to the decision. Accordingly, it is submitted that the causes of the decision should always be mentioned in detail in the penalty decision.

[128] Administrative Appeal No. 29/10 (n 84) 9.
[129] Administrative Appeal No. 92/44 (n 85) *Unreported.*

Chapter Six

Measures to Improve the Fairness of Administrative Appeal Process in Libyan Disciplinary Appeals

6.1 Introduction

Disciplinary guarantees are not only those guarantees provided to the employee during the investigation and penalty stages,[1] there are also other guarantees which must be provided after enforcement of the penalty. These guarantees, which come into play in the administrative appeal stage, are submitted by the employee to a specialised administrative authority (either the authority which enforced the penalty or an authority superior to the authority).

In the context of the fairness theme, the importance of this chapter is to highlight to the employee his/her rights and the procedures that should be followed during the lodgement of an administrative appeal, so that he/she is guaranteed that his/her appeal is accepted and is not refused due to an error in one of the procedures during submission. Also, the employee should be made aware of what procedures should be followed should his/her appeal be either accepted or rejected. The chapter will propose improvement, both in terms of substance and procedure.

The author proposes that standards of fairness may require the appeal to be an 'optional appeal'[2] and should include essential details such as the reasons for the appeal and the submission date. The administration's response should be a mandatory clear-cut refusal or acceptance of the appeal, as well as providing the reasons for the decision that led to it. Furthermore, in order to respect the principle of impartiality, the appeal should be submitted to an impartial, independent appeal authority. Therefore, three key areas will be examined:

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[1] See in detail above Chapter 1-5.
[2] See below Section 6.3.

1. An assessment the procedures of the optional appeal.

2. An examination of the conditions pertaining to the administrative appeal.

3. An assessment of the consequences of the administrative appeal, since the administrative appeal is a major guarantee in the disciplinary process.

6.2 Definition of the Administrative Appeal

The right to seek an administrative appeal represents a significant guarantee to the employee and is one of the guarantees provided by legislation to the employee.[3] Despite the fact that Libyan Law No. 71 of 1988 concerning the Administrative Judiciary,[4] and Egyptian Law No. 47 of 1972 concerning the State Council[5] have given the employee the right to submit an appeal to the administration or to the presidential authority, neither Libyan Law nor Egyptian Law define the administrative appeal, they only specify its form (specialties of the administration, the legal time limit for submitting the appeal to the Administration etc.). As a result, commentators[6] have attempted to establish a definition of administrative appeal. Libyan commentators[7] define the administrative appeal as follows: it is a complaint by the accused employee to the administration, or to the presidential authority of the administration who enforced the decision against the employee, requesting them to either amend or overturn their decision.[8]

It can be concluded that both Libyan and Egyptian commentators' definitions[9] are very similar, as they are about the administrative appeal being a request that is made by the

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[3] Article 8 of Libyan Law No.71 of 1988 concerning the Administrative Judiciary; Article 12 of Egyptian Law No. 47 of 1972 concerning the State Council.
[4] Article 8 (n 3).
[5] Article 12 (n 3).
[6] Abdelognee Basionee, *Administrative Judiciary* (Mnshat Elmarfe 1997) 541; Maged Alhelow, *Administrative Judiciary* (Mnshat Elmarfe 2001) 321; Mohamed Eldelme, *Judiciary Monitoring on the Administration Works in Libyan Law* (1st edn, Open University Publications 2002) 251; Sabeh Maskone, *Administrative Judiciary in the Arab Libyan Republic* (Bangazi University 1974) 266.
[7] Ibid Mohamed Eldelme, 251; Ibid Sabeh Maskone, 266.
[8] Egyptian commentators observe that the administrative appeal is a request by the accused employee to the administration, to reconsider the decision which they had enforced on him (which adversely affects his legal position). See Abdelognee Basionee (n 6) 541; AbdAlzez Elgohary, 'Administrative Appeal and the Judiciary Appeal' (1967 Year 67) 9-10 Journal of Lawyer 40; Maged Alhelow (n 6) 321.
[9] Mohamed Eldelme (n 6) 251; Sabeh Maskone (n 6) 266.

accused employee to either the administration, or to the presidential authority of this administration, seeking to overturn or amend a disciplinary decision.

6.3 Assessment of the Impact of the Appeals' Mechanisms on Disciplinary Guarantees in Libyan Law

As an appeal is normally optional for the employee, he/she can either appeal to the administration, or to the Appeal Court. This is considered the 'optional appeal', which applies in Libyan law. However, if the legislation requires that the employee must have previously appealed to the administration before filing a lawsuit with the administrative judiciary (Court), in this case, the appeal becomes a 'mandatory appeal'.

The author proposes that fairness standards may require Libyan law to set out all those required procedures for lodging an appeal in detail and make it available to the appellant. This will avoid the employee losing the opportunity to appeal if the appeal time passes. It is submitted that failure to do so may affect the fairness of the application of the law and the employee's access to justice. In this part of the thesis, the author will assess the procedures for the two types of appeal and their effect on the guarantees available the employee.

6.3.1 Optional Appeal

When the accused employee wishes to appeal to the administration, requesting it either to amend or overturn its decision,[10] it means that the he/she has the right to choose between appealing either directly to the administration (who enforced the decision against him/her), or to the presidential authority superior to the administration. Alternatively, he/she can appeal directly to the judiciary in order to overturn the administrative

[10] Fouad Amer, *The Legal Time of Submitting the Lawsuit to overturn the Decision* (Darelfecr Elarabe 2001) 124; Sami Gamaleldin, *Administrative Judiciary and Monitoring on the Administration Works* (Darelgamia Elgadid 1992) 204-205; Tarek Kedr, *Administrative Judiciary — The Principle of Legitimacy Organizing the Administrative Judiciary* (Alnesr Eldahabe for Publisher 2002) 71.

decision.[11] Libyan legislation allows the optional appeal over its administrative decisions and (as specified in Article 8, Law No. 88 of 1971 concerning the Administrative Judiciary), the period during which an employee is entitled to submit an appeal to the Court.[12]

It can be understood from the above that Libyan legislation does not make the administrative appeal to the administration a mandatory pre-condition before the employee can appeal to the Court. However, the legislation does not specify a method or a form of how the appeal should be made. Also of interest is the fact that while the legislation permits the employee to appeal to the administration against its own decisions, the employee is not permitted to appeal to the Disciplinary Committee against its decisions. This is because the legislation considers the decisions imposed by the Disciplinary Committee are to be treated at the same level of significance as decisions which are taken by the Court (judicial judgments).[13] The decisions which are taken by the Court cannot be appealed to the same Court, but to a higher Court. This is analogous to the decisions taken by the Disciplinary Committee. The employee is not permitted to appeal to the Disciplinary Committee on its decisions; instead the employee can appeal to another authority (the Court).

It is submitted that:

The Libyan legislation is fair in affording the employee the choice between submitting his/her appeals internally or directly to the Court. It is an advantage for Libyan law to have provided the optional appeal instead of the mandatory appeal approach, which is drawn in Egyptian law.[14] The optional appeal will guarantee to the employee that the

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[11] Abdelognee Basionee, *Monitoring of the Administrative Judiciary on the Administration Works* (Mnshat Elmarfe 1983) 241; Sami Gamalelden, *Conflicts of Public Employment and Appeals Related to Employees' Issues* (1st edn, Mnshat Elmaref 2005) 179; Samir Sadk, *The legal Time of submitting the Lawsuit to Administrative Judiciary* (1st edn, Darefecr Elarabe 1969) 158-161.

[12] Where the employee wishes to appeal on the administration's decision to the Court, he/she has the right to appeal to the Court within 60 days, beginning from the date of notifying him of the administrative decision. However, if the employee chooses to appeal to the administration first, the time limit for the appeal will start within 60 days from the end of the 60-day submission period of his/her appeal to the administration.

[13] Article 2 (3) of Law No. 88 of 1971 concerning the Administrative Judiciary.

[14] Egyptian legislation draws the mandatory appeal instead of the optional appeal; this is stipulated in Article 12 of Egyptian Law No. 47 of 1972, concerning the State Council, that submitting an appeal to the

Court will hear his/her appeal, even where it is not preceded by an administrative appeal. On the other hand, the mandatory appeal forces the employee to appeal to the administration first before he can appeal to the administrative judiciary. It is submitted that this latter model is in breach of the employee's rights, as the Administration, the authority that enforced the penalty against the employee in the first place, is unlikely to admit it was wrong in its decision.[15] Also, the employees will no longer trust the Administration if he/she really feels that he/she is innocent and they were wrong. The requirement to appeal to the Administration first may be considered as a waste of time by the employee and exhaust him/her. Consequently, there is little value in requiring the employee to submit an appeal to the administration as a preliminary step to a judicial appeal, the appeal to the Administration should be optional, and the employee should be able to appeal directly to the Court, as the Court is an impartial third party. For this reason, it is submitted that Libyan law has an advantage over Egyptian law because Libya adopted it and drew on the "optional appeal" rather than the "mandatory appeal" approach taken by Egypt law. Therefore, this is an invitation to the Egyptian legislation to adopt what the Libyan legislation has enacted, in order to achieve maximum guarantees to the employee in his/her appeal.

However, it is also submitted that Libyan legislation is unfair in not having stipulated the details that must be included in the administrative appeal (unlike Egyptian law[16]),

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Court without a previous appeal to the administration results in the Court refusing the appeal of the employee. This is in line with what the Administrative Supreme Court in Egypt ruled in Appeal No.2581/32; a case concerning an employee who worked in the railway company. This employee submitted an appeal to the Disciplinary Court against the decision of the railway company's boss to impose a fifteen day salary deduction penalty against him, (He was accused of stealing three hundred pounds from passenger fares). The employee did not accept the judgment of the Disciplinary Court, which refused his appeal. He appealed to the Administrative Supreme Court which had refused his appeal, as the Court's decision was based on the employee not providing proof in his appeal' Court that he had first appealed to the administration. The employee received the decision of the administration on 2.08.84 and appealed against it to the Disciplinary Court on 22.09.84. Accordingly, the appeal of the employee to the Administrative Supreme Court was refused for not being preceded by a prior appeal to the administration. The employee's actions were contrary to Article 12 of Law No. 47 of 1972 concerning Council State.
Egyptian Administrative Supreme Court, Appeal No.21/32 (25.11.89) Council State, *Unreported.*

[15] Abdeladeem Abdelhameed, *Discipline the Public Employee* (2nd edn, Darelnada Elarabia 2004) 608; Maher Abdalhadi, *Procedural Legitimacy of Discipline* (Garib Library 1986) 379.

[16] Egyptian law (Article 2 by virtue of the presidential decision of the council No.72 of 1973) specifies which decisions the employee appeals against, which are: hiring decisions, referral to pensions, dismissal decisions, and administrative decisions. The president of the Council of State focused on the following: the administrative appeal must include all the essential details of the appeal; failure to include these details leads to the appeal being invalid. The essential details are; the name of the appellant, the subject of the

because details such as the appellant's name, the date of appeal, as well as the subject of the appeal and its causes, and the requests of the appellant, are important, as failure to do so may result in refusing an appeal. Also, it is important to mention the date of submitting the appeal, so that the employee can calculate the time limit, should he/she decide to appeal to the Court. Therefore, it is submitted that Libyan legislation should include the essential process elements mentioned above (as Egyptian law does). These details should be specified as part of the administrative appeal because they are considered a guarantee for the employee to retain his/her rights. Submitting the appeal in the proper form enables the Administration to understand it, and to know the identity of the appellant and the purpose of the appeal. Accordingly, if any of the details are missing in the appeal, this could render the appeal invalid.

6.4 An Assessment as to the Fairness of the Conditions for lodging an Administrative Appeal in Libyan Law

The administrative appeals against disciplinary penalties undergo must satisfy several conditions represented in the following: submitting the appeal to the specialised administrative authority and the legal time of submitting the appeal to the Administration. Accordingly, in this section the fairness of these conditions in Libyan law will come under scrutiny.

6.4.1 An Assessment of the Impact for the Legal Time of Submitting the Appeal to the Administration in Libyan Law

It is a condition of the administrative appeal that it is submitted within the relevant limitation period. Both Libyan and Egyptian law[17] specify the legal time to submit the appeal as 60 days, starting either from the date of publishing the penalty decision, or from the date of notifying the employee of the decision. Kuwaiti law adds that the appeal

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appeal, the causes that the appeal is based on, the date of the appeal; the date of issue of the decision appealed on; the date where the Administration notifies the employee about the decision.

[17] Article 8 (n 3); Article 12 (n 3).

limitation period can also be regarded as 60 days from the employee having "a complete knowledge of the decision", even if he/she is not officially informed of it.

Because both the optional administrative appeal in Libyan law[18] and mandatory appeal in Egyptian[19] law must be lodged within 60 days from the date of informing the employee of the disciplinary penalty, or from publishing the decision, presenting an appeal after this period will not be accepted. This decision was demonstrated in the Libyan Supreme Court Administrative Appeal No.20/16;[20] concerning an employee who worked in the general electricity corporation who was dismissed for being absent from work. This decision was taken on 6.08.68 and the employee was informed of the decision on 8.08.68. The employee appealed against the decision on 13.02.69. His appeal was refused. The employee objected to the decision taken by the administration, and he appealed to the Supreme Court, requesting to overturn it. The Supreme Court refused the employee's appeal and ruled that the appeal was presented to the administration after the permitted time specified by law. Moreover, even though the employee did provide the supporting documentation to prove that he was absent due to illness, he had only provided this after the legal time limit.

However, although Libyan legislation does not consider the third condition, which is "a complete knowledge of the decision'',[21] by the Libyan judiciary, it is applied in order for them to evaluate compliance with appeal limits. This was the ruling of the Supreme Court in Libya in Administrative Appeal No.36/50:[22] when an employee who recorded sales in a national organization for subsidized goods was found to be forging the documents that the organization used with their suppliers. The employee was investigated, and the

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[18] Ibid, Article 8.
[19] Article 12 (n 3).
[20] Administrative Appeal No.20/16, Libyan Supreme Court (21.06.70) *Supreme Court Journal*, Year 7, no. 1, 57.
[21] The complete knowledge of the administrative decision can be assumed on several occasions. These occasions could include if the employee sends a letter to the administration saying that he knows about the decision and he does not accept the penalty (within 60 days of enforcing the penalty); if the employee requests the administration to minimize the penalty within 60 days from enforcing the penalty; or if the employee appealed to the administration against their decision within 60 days from enforcing the penalty. These examples can be considered an assumption that he has complete knowledge of the decision. Complete knowledge of the penalty decision affects the legal position of the employee, even if he claims that he was not notified of the penalty decision.
[22] Administrative Appeal No.36/50, Libyan Supreme Court (1.01.2006) *Unreported.*

manager of the branch that he worked for sent a letter to the sales manager of the branch on 20.06. 2001, requesting him not to give the accused employee any further work tasks until the investigation had been concluded. Moreover, the manager wrote another letter to the financial department of the branch requesting them to suspend the employee's salary.

Subsequently, the employee appealed against the decisions of the branch manager on 10.03.2002, but he did not receive a response to his appeal. The administration's failure to respond to the employee's appeal was considered a clear refusal. The employee appealed to the Appeal Court of Tripoli on 8.06.2002. The Court refused the employee's appeal because it ruled that the employee should have appealed to the Court within 60 days from the end of the 60 days of submission of his appeal to the administration. The employee had appealed to the administration on 10.03.2002 and his appeal to the Appeal Court of Tripoli was on 8.06.2002, which was more than 60 days after the date he had submitted his appeal to the administration. The employee did not accept the judgment of the Appeal Court of Tripoli and appealed to the Supreme Court, claiming that this judgment was incorrect because he was not notified of the penalty decision by the branch manager. The Supreme Court held that the judgment of the Appeal Court of Tripoli was correct and refused the lawsuit of the employee as the permissible period to appeal is 60 days from notifying the employee of the administrative decision, or from publishing the decision, or from the time that the employee has a complete knowledge of the decision. As he had appealed against those decisions, it meant that the employee knew about the penalty. Consequently, he did not have the excuse that he was not informed the decisions.

From the above discussion, it is concluded that Libyan law specifies only two approaches (a. 60 days from the date of publishing the decision or b. 60 days from notifying the employee of the decision) to count the limitation period permitted for lodging an appeal. Libyan legislation prefers to leave the third approach (which is 60 days from the date on which the employee has a complete knowledge of the decision, even if he is not informed officially) to the Supreme Court[23] to decide. It is submitted that this is unfair, as searching the jurisprudence of the Court is not an easy task for an ordinary employee, nor

[23] Ibid.

understandable. That is why it is preferable to have obvious rules in the legislation which are easy to find and understand, so that the employee can use it and benefit from it, in order to avoid missing the opportunity of lodging an appeal with the Court. Accordingly, it is submitted that Libyan legislation should provide clearly — as does Kuwaiti law[24]— that complete knowledge of the decision is one of the essential factors in assessing the employee's legal position in his/her appeal. This is in order to avoid possible claims by some employees that they have not been informed of the penalty decisions enforced against them.

6.4.2 The Fairness of Submitting an Appeal to a Specialised Administrative Authority

One of the most important conditions factors in the administrative appeal is that the appeal must be submitted to a specialised administrative authority. Both Libyan[25] and Egyptian law[26] specify the authority which is authorised to look into an administrative appeal. The administrative appeal must be presented to the Administration who imposed the penalty decision — or to the presidential authority superior to the Administration,

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[24] Kuwaiti law stipulates the three approaches: the legal period for submitting the administrative appeal is within 60 days of notifying the employee with the administrative decision, or from publishing the decision, or from the time that the employee has a complete knowledge of the decision. This was illustrated by the Supreme Court of Kuwait in Administrative Appeal No.253/2000. The case concerned an employee who worked in the Ministry of Health. She had a row with her colleague in front of the Ministry building (out of the work hours). Consequently, her colleague submitted a complaint to the Secretary of the Ministry about the incident. The Minister issued a disciplinary dismissal of the employee. The employee appealed to the administration, but the latter did not respond to her appeal, so the employee later appealed to the Appeal Court.
The Appeal Court refused the employee's appeal for being submitted after the permissible period for appealing (as discussed above). As a result, the employee appealed to the Supreme Court, claiming that she was not notified of the penalty decision, and that was why she could not submit her appeal within the legal period (60 days from publishing the decision, or from informing the employee). The Supreme Court ruled that the employee had appealed to the Minister of Health on 28.09.98, challenging the penalty that was enforced against her. Later, on 29.09.98 the employee had signed a document provided by the employee's legal affairs department. This meant the employee had a complete knowledge of the penalty decision. As a result, the employee had no excuse for appealing after the legal period, as she had appealed on 31.01.99. Accordingly, the appeal was refused on the grounds of it being contrary to Article 7 of Law No. 20 of 1981, which stipulates that the legal period must be 60 days from the date that the employee has complete knowledge of the decision.
Kuwaiti Supreme Court, Administrative Appeal No.253/2000 (19.03.2001) Group of Principles decided by the Kuwait Supreme Court during 17 Years Part 7, no.1, 2000, 172.
[25] Article 8 (n 3).
[26] Article 12 (9) of Law No. 47 of 1972 concerning the Council State.

within 60 days from notifying the employee of the decision or from the date of publishing the decision. In contrast, the Kuwaiti legislator not only specifies that the administrative appeal must be presented to the administration, or to a presidential authority superior to the administration, but Article 3 of the specific Kuwaiti law organising administrative appeal measures (enforced on 5.10.1981[27]), specifies measures for submitting and recording the receipt of the administrative appeal. This law makes it mandatory for the administration to record the appeal in a specific record with a sequential number, together with the date of receiving the appeal. Moreover, this law makes it mandatory to provide the accused employee with a receipt, in order to prove that his appeal has been received, or to send him/her proof of this.

Despite the significance of the appeal to the administration, which provides the opportunity to correct alter its decision in accordance with the law,[28] some commentators[29] argue that the administrative appeal should be made to the presidential authority, which is superior to the administration (who enforced the decision). This is because the presidential authority is considered to be a superior and monitoring authority over the administration. In addition, the presidential authority would be regarded as being more impartial than the administration. Other commentators[30] take an even stricter approach, arguing that submitting the administrative appeal to either the administration or to the presidential authority is unacceptable, because it is not logical for these authorities to neutrally review a decision they have already enforced. This is because they will likely adhere to their initial decision and could hardly be expected to amend it.

For the reasons discussed above, it submitted that the last view is the better one. Even if the appeal is submitted to the presidential authority, this authority may sympathise with the administration and consider that the original decision was correct. The reasoning is that the administration is an authority which follows the presidential authority, so it will

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[27] The Specific Law Regarding the Measures of the Appeal on the Administrative Decisions in 5.10.1981, *the Official Journal in Kuwait,* Year 27, no. 1378, 3.

[28] Ibrahim Elmongy, *Overturn the Disciplinary Decision* (1st edn, Mnshat Elmarfe 2005) 185.

[29] Abdallah Argmid, *The Philosophy of the Disciplinary Measures for Civil Servants* (Darelnada Elarabia 1998) 318; Maher Abdalhadi (n 15) 397.

[30] Mahmed Eharay, *Review of the Works of Administration* (2nd edn, Tripoli Complex of University 1993) 25; Mohamed Maatoq, *The Principle of Legitimacy and its Applications in the Libyan System* (1st edn, Bengazi Complex of University 1993) 393.

be "on their side" and therefore may not be impartial. In other words, it can just remain silent and never reply to the appeal, or even refuse it.

In light of what has been discussed above, the author submits the following:

a. Both Libyan and Egyptian law are keen to specify the authority concerned with the appeal, but do not provide the employee with a guarantee of proof that his/her appeal has been received, which is unfair. Such a measure would guarantee the employee with proof that he/she has submitted his/her appeal, and guarantee his/her right to be heard in case the administration denied receiving his/her appeal. In addition, this measure could reduce errors in submitting the appeal to a non-specialised authority, as it makes the administrative authority more careful in considering the extent of its specialty. Consequently, it is submitted that Libyan and Egyptian law makers should be urged to amend their legislation and follow the Kuwaiti approach by organising measures for submitting and recording receipt of appeal, providing receipts and setting the date of the administrative appeal.

b. Requiring the accused employee to submit to either the administration or to the presidential authority by Libyan law is unfairly prejudicial to the employee's rights. This is because the appeal to the administration or to the presidential authority contradicts the principle of impartiality (which means that a lawsuit cannot be considered by one of the parties involved in the case) and the administration is a party in the case, as this was the authority that enforced the penalty. Accordingly, it should not be the judge in an appeal against the decision it originally enforced, as this is against the guarantees of a fair hearing which requires the impartiality of the disciplinary authority.

In considering this point, it can be concluded that there is a necessity to urge the Libyan legislature to provide a legal basis that would allow an administrative committee to look into employees' appeals, similar to the provision made by Libyan law in Article 14 of Law No. 55 of 1976 concerning the Civil Service.[31] This requires an administrative committee to look into appeals lodged by civil service employees against administrative

[31] To form a committee composed of the Minister of Justice as the head of the committee, the Chief of the Fatwa and legislation and the Secretary of the Minister as members of the committee.

decisions, such as transfer and pension decisions. However, this regime does not include appeals against disciplinary decisions. There is no explanation as to why the legislation draws a distinction between administrative decisions and disciplinary decisions, as disciplinary decisions are part of the administrative decisions.

It is submitted that Libyan law should be made similar to Kuwaiti law, by providing a clear way in which to appeal against administrative decisions. On 5.10.1981,[32] Kuwaiti adopted a specific law, including specific measures for the appeal and the manner of submission. Articles 4-5 and 6 of this law specify how to submit the appeal, which is by submitting it to the administration that enforced the penalty. The administration is obliged to consider the appeal and write its opinion, attaching to it all the relevant documents of the case as well as a copy of the original administrative decision. All of this must be sent to the Civil Service Board within ten days from the date the appeal was received.[33]

The Civil Service Board[34] will consider all the facts of the case, including what the administration sent and will write its opinion and transmit it, together with all the documents of the case, to the legislating and Fatwa board within twenty days. The legislating board then considers the documents, as well as the opinion of the Civil Service Board, and writes its opinion within twenty days of receiving the appeal. As soon as the administration receives the legislating board's opinion, the administration has ten days within which to decide whether to accept, or reject, the employee's appeal.

It is noteworthy that the Kuwaiti legislation has involved other authorities (the Civil Service Board and the legislator Board[35]) along with the administration, to consider appeals against disciplinary decisions. That is in an effort to guarantee employees that

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[32] The Specific Law Regarding the Measures of the Appeal on the Administrative Decisions in 5.10.1981, *the Official Journal in Kuwait*, Year 27, no. 1378, 3.

[33] Article 4 of specific law, regarding the Measures of the Appeal on the Administrative Decisions 1981.

[34] The Civil Service Board is established by virtue of Article 4 of Law No. 15 of 1979 concerning the Civil Service. It is headed by the Ministry Board or whoever is assigned by the president. The board has the right to form its committees from its members, or others, to consider any issues referred to them.

[35] The legislator Board is the administration of Fatwa and legislation in Kuwait and was organised by the power of Law No. 12 of 1960, concerning the Administration of Fatwa and legislation. This law stipulates that the administration of Fatwa and legislation is an independent authority which legislates laws and regulations and makes executive decisions of laws and also gives views, whenever requested to do so by Ministry Board.

their appeals will be considered fairly by more than one authority. However, Kuwaiti law does not go so far as to make the opinion of the Legislator Board mandatory, as the final decision in the appeal remains instead the responsibility of the administration. It is submitted that Libyan law should organise the administrative appeal along similar lines to Kuwaiti law, by providing a committee to be called an Employee's Affairs Board, specifically for considering disciplinary decisions appeals.

In addition, Libyan law should take the same steps as the Kuwaiti legislation by referring the appeal from the administration to the legislator Board, in Libya, named the Law Management Committees. Libyan law should make the opinion of the law management committee binding, i.e., to be followed by the administration, unlike Kuwaiti law, where the opinion of the legislator board is non-binding over the administration. The Law Management Committee in Libya is an independent authority from the administration,[36] due to its different specialties.[37] In addition, the Law Management Committee's opinion will assure the employee that whatever it decides is in accordance with law, as the Law Management Committee is a judicial authority. Consequently, this should reduce the number of cases submitted to the Administrative Court, as the employee will have confidence in the Law Management Committee's opinion. In the event of his/her appeal being refused, the employee may be less likely to appeal to the Administrative Court.

6.4.2.1 Assessment of the Consequences of Submitting the Appeal to Non-Specialised Authority and Exceptions

Submitting an appeal to a non-specialised authority in Libyan legislation is regarded as being invalid, as it must always be submitted to the specialised authority who enforced the penalty, or to the authority superior to it. The only exception to this rule is when an employee submits an appeal to a non-specialised authority and the specialised administration is aware of this. This condition (made by the Libyan judiciary) was found

[36] Article 1of Law No. 6 of 1982 concerning the Management Law.

[37] Article 2 of Law No. 6 of 1992 stipulates that: a. the Law Management Committee is specialised in considering any issues referred to them by public institutions. b. Enforcing and reviewing decisions and the regulations concerned with legislation. c. Interpreting laws and regulations. d. Giving a legal consultation for all issues referred to them of public institution.

by the author to affect the guarantees of the accused employee. Accordingly, in this part of the chapter, firstly, the author will discuss the consequences of submitting the appeal to non-specialised authority. Secondly, will be an assessment of the exceptions to submitting the appeal to non-specialised Authority, as following:

6.4.2.1.1 Assessment of Submitting the Appeal to Non-Specialised Authority

Originally in Libyan law, the employee could appeal against a penalty to a specialised administrative authority within 60 days from the date he was notified of the decision against him.[38] Once the employee submitted an appeal to a specialised authority, this would stop the 60-day appeal limitation period.[39] On the other hand, if the appeal was submitted to a non-specialised authority, while it would be considered improper and invalid, it would nevertheless not stop the clock running on the 60-day appeal period to the Court (which runs from the date of the employee receiving the administration's decision).

This is demonstrated in the Libyan Appeal Court of Zawia Appeal Court No.1/1.[40] In a case that concerned two employees, one of whom worked in the schools and colleges of the education institution of Zawia, while the other worked as an inspector (a holder of a tenth grade in the employment scale). Both employees lodged an appeal to the Appeal Court of Zawia for not being promoted in the same way as their colleagues, who were promoted on 3.07.88 ''even though we are entitled to get promoted'', the appellants argued. In addition, they argued before the Court that they had appealed the administration's decision to the public committee of Zawia (the city council) on 21.02.89 and also to the Minister of Education, but they had not received any reply from either. As a result, they appealed again to the Public Inspection and Monitoring System.

The Court refused the appeal presented to it by the employees because the Court held that the second appeal to the Public Inspection Monitoring System was improper and invalid. This was because it was not the specialised authority concerned with the appeal (it was

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[38] Article 8 (n 3).
[39] Ibid.
[40] Appeal Court No.1/1, Court of Zawia (16.02.2002) *Unreported.*

neither the administrative authority that enforced the decision, nor the presidential authority superior to the administration). In addition, the appeal submitted to Zawia council was on 21.02.89, while the promotion decision they appealed against was on 3.07.88, and so the period between the two dates exceeded the 60 day limitation.

It can be summarised that it is very important to present the appeal to the correct specialised authority, the purpose of which is to have the appeal considered by the proper authority. Libyan Law No. 88 of 1971 concerning the Administrative Judiciary, as well as the Libyan judiciary in case (No.1/1[41]), stresses the point that if an employee sends an appeal to the wrong authority and the employee discovers his/her mistake after the 60 day period, then he loses the chance to redirect his/her appeal to a specialised authority. Also, the employee loses the opportunity to redirect his/her appeal to a specialised authority if the non-specialised authority does not reply to his/her appeal before the 60 day appeal period ends. It is submitted that Libyan law does not make a fair balance regarding this issue, because if the administration responds after a long time by rejecting the appeal, then the employee will have missed the opportunity of defending him/herself and proving his/her innocence to the Court.

The author submits that this confusion in Libyan law should not be to the detriment of the employee. Libyan law should stipulate that any non-specialised authority that receives an appeal should reply as soon as possible, within a specific period, informing the employee that his/her appeal is not within its specialities and he/she should redirect his/her appeal to a specialised authority. This is because the employee would never know that the authority he/she appealed to is not a specialised authority unless it informs him/her. Consequently, the author submits that the Libyan legislator may need to oblige the administration to which the appeal is submitted, to respond within a reasonable time, informing the employees of its lack of jurisdiction.

[41] Ibid.

6.4.2.1.2 The Exceptions of Submitting the Appeal to Non-Specialised Authority

There is only one set of circumstances where an employee's appeal can be considered valid if it is submitted to the non-specialised authority and where the clock would stop running on the 60-day appeal period. This case arises when an employee submits his/her appeal to the non-specialised authority and the specialised authority has complete knowledge of this. This is what the Supreme Court in Libya held in Administrative Appeal No.42/25[42] when it ruled that the purpose of presenting the appeal to a specialised administrative authority is to ensure that the appeal will be considered by an authority that has the legal competence to do so. However, if the administration has been informed of an appeal presented to another non-specialised administrative authority, one which is able to consider it, the appeal remains valid.

The author can conclude that the Libyan judiciary (in Administrative Appeal No.42/25) made an exception to the rule, as even if the employee submits his/her appeal to a non-specialised authority by mistake, his/her appeal will still be accepted if a specialised authority (administration who imposed the penalty) knows about his/her appeal to the non-specialised authority. The author submits that the Libyan judiciary acts prejudicially to the rights of the employee: this is because this condition, that the judiciary proposes, is difficult and needs demonstration of effort from the accused, because he/she needs to prove to the judiciary that the specialised authority knows about his/her appeal. Finding the documents to prove this will not be an easy task, as the documents will be with the administration, which may not be willing to hand them over to the employee. It is submitted that the Libyan judiciary should do as the Egyptian judiciary does,[43] in that the condition to justify the employee's mistake to submit the appeal to a non-specialised authority should be for an acceptable reason.

The Egyptian judiciary can only accept an appeal presented to a non-specialised authority if the employee has a reason that justifies his mistake and if the non-specialised administrative authority agrees to look into this appeal without any objection. This was

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[42] Administrative Appeal No.42/25, Libyan Supreme Court (26.05.82) *Supreme Court Journal*, Year19, no.2, 25.

[43] See next paragraph.

demonstrated in Egyptian Administrative Supreme Court in Appeal No.334/5.[44] This case concerned an employee who worked as a post man for the telephone and telegraph office and who had worked previously in the Internal Ministry. This employee was dismissed because while working in his previous job he had been fined twenty thousand Egyptian pounds and also sent to prison because he had been caught selling meat for higher prices than allowed by law. However, this penalty was applied against him before he had been employed in the telephone and telegraph office. He was arrested on 17.10.55 and after he had served the penalty, he was informed that the telephone and telegraph office had dismissed him. He appealed to the general manager of communication and transportations institution on 13.03.57, who referred the employee's appeal to the Department of Law.[45] They recommended not re-employing the employee, and as a result the general manager enforced his decision not to return him to work.

The employee appealed to the Administrative Supreme Court against the general manager's decision.[46] The Administrative Supreme Court accepted the employee's appeal, as the Court ruled that the Minister's decision regarding organisation of the appeal measures did not mention that failure to follow his decision can affect the validity of the disciplinary decisions. In addition, the transportation institution is not the administration of the institution that the employee works for, but is a superior presidential authority to it, so the employee was right when he chose to appeal to the general manager of the communication and transportation institution. However, even if the communication and transportation institution is not the specialised authority that the employee should appeal to, the employee's appeal can still be accepted, as the communication and transportation institution accepted his appeal and responded to him within 60 days (legal period) from the date he presented his appeal. Also, the employee's appeal can still be

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[44] Egyptian Administrative Supreme Court, Appeal No.334/5 (15.04.62) Year 7, no.2 Seat of Principles Established by the Administrative Supreme Court, from the first of February 1962 until the end of April 1962, 654.

[45] The Department of Law is attached to the Communication and Transportations Institution and follows it; its specialty is to conduct an investigation into the accused employee.

[46] The administration of the Telephones and Telegraph Office (the office that employee worked for) requested a refusal of the employee's appeal, because it was presented to a non-specialised authority, claiming that the transportation institution is not the right authority to appeal to; the appeal should be submitted to the specialised Minister such occasions according to the Minister's decision on 6.04.55 regarding the organisation of the appeal measures.

accepted when it is submitted to non-specialised authority, and he has a reason that justifies this mistake.

This case is a good example for a possible exception to the rule of not accepting an appeal unless it is lodged with a specialised authority. This is because the Egyptian judiciary made it acceptable to consider an appeal even if it is not lodged with a specialised authority, as the Egyptian judiciary in case No.334/5 [47] ruled that if there is a reason justify why an appeal is not lodged before a specialised authority, it is acceptable for the Court to consider this appeal. It is submitted that Egyptian judiciary's approach is fair and appropriate in this matter, as it is not difficult for the Court to investigate whether the reason of the employee is right or wrong. This is because an appeal should be lodged with the presidential authority of the institution that the employee works for, and it is sometimes confusing for the employee to know exactly who is the appropriate presidential authority. Since Presidential authorities can keep continually changing in different administrations.

For example, in Libya, universities used to follow the Ministry of Education, whereas now it follows the Ministry of Higher Education, which is another presidential authority, so an employee can easily confuse these and appeal to incorrect presidential authority. A further example is the national institution of oil used to be an independent institution. But today it follows the Ministry of Oil and Gas. Accordingly, this confusion can be a reasonable cause for lodging an appeal to a non-specialised authority. Therefore, the exception that Egyptian judiciary made is more reasonable than the one ruled on by the Libyan judiciary (in Administrative Appeal No.42/25[48]) when it ruled that the appeal if it is submitted to a non-specialised authority can be only accepted if the specialised authority knows about it. It is submitted that it is difficult for the employee to prove that the specialised authority knows about it, therefore the Egyptian judiciary approach is more reasonable when it made this exception, provided that the employee can provide a reasonable cause. As to why he/she does not submit his/her appeal to a specialised author it.

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[47] Appeal No.334/5 (n 44) 654.
[48] Administrative Appeal No.42/25 (n 42) 25.

6.5 An Assessment of the Consequences of the Mistaken Procedures in Organizing the Administrative Appeal in Libyan Law

Consequences of the administrative appeal for the appellant depend on whether the administration accepts or refuses his/her appeal with a clear refusal, or by giving a sign of refusal. In this part of the chapter, the author will examine how the administration's acceptance or refusal of the administrative appeal can affect the employee's legal position and his/her rights.

6.5.1 Examination of how the Acceptance of the Administrative Appeal can affect the Employee in Libyan Law

The administration may accept the administrative appeal of the appellant by reconsidering the disciplinary decision they enforced on the employee, either by amending or overturning the penalty. If the appeal ends in this way, the employee will be satisfied with the administration's decision, and will not lose money by going to the Court since the dispute between the employee and the disciplinary administration will have been resolved.[49] Plus, giving the employee the right to appeal to the administration will result in resolving the dispute in an amicable way, regardless of whether the appeal is optional (Libyan law) or mandatory (Egyptian law).

6.5.1.1 A Clear Refusal to the Administrative Appeal

A clear refusal means that the administration does not remain silent and must respond to the employee's appeal by refusing it in writing. Libyan law does not make it mandatory for the administration to provide a clear response to the employee and can remain silent without any response, while Egyptian legislation makes the administration's response mandatory, as well as requiring specification of the reason that led to the decision.[50] Libyan law does not stipulate the consequences of an employee receiving a clear refusal

[49] Mohamed Albianon, 'The Appeal's Role in Practicing the Monitoring in the Administration Works' (Year 1988) 60 Journal of the General Administration 209.
[50] Article 24 of Egyptian Law No. 47 of 1972 concerning the State Council.

to the appeal from the administration. Having a law which does not state what the employee should do in a situation where he does receive a clear refusal to his/her appeal may be explained by the fact that it is to be expected that the employee will appeal against the refusal and that it is common sense to appeal.

It is submitted that Libyan legislation is a defective process which is prejudicial to employees' rights when it does not mention these rights if an appeal is refused, because an employee cannot know the result of his/her appeal if the administration does not reply to him/her with a clear refusal. If it does, the employee may reconsider his/her decision when he/she knows the reasons that led to the refusal and may convince him/herself that going further with his/her appeal to the Court is just a waste of time and money (e.g., where the administration's decision is legally proper and convincing). For this reason, it is submitted that this point — that the administration should respond clearly to appeals, as well as mentioning the reasons for the decision, as is found in Egyptian law — could serve to reform Libyan Law. Egyptian law by comparison is keen to provide the affected employee (appellant) with more rights and guarantees by clarifying the process for him/her. It is submitted therefore that the Administration should respond clearly to an appeal and inform the employee that he/she has the right to appeal to the Court within 60 days from the date the administration responds.

6.5.1.2 An Assessment for the Consequences of no Response to the Appeal of the Employee

The administration can be unresponsive to the employee's appeal either by remaining silent, or by neither accepting nor refusing the appeal. Because of this, both Libyan[51] and Egyptian[52] laws stipulate that if 60 days have passed without a response from the administration, this is considered an indirect refusal of the appeal and therefore the employee can appeal to the Court within a second 60 day period from the end of the initial 60 days submission period of his appeal to the administration. An appeal lodged to

[51] Article 8 (n 3).
[52] Article 24 (n 50).

the Court after the expiry of this second 60 day period will be refused for being presented after the permissible period stipulated by law.

In Libya, in Administrative Appeal No.67/54,[53] in a case concerning a doctor who worked in the cardiology department in the Medical Centre of Tripoli, the doctor appealed to the Appeal Court of Tripoli, requesting the overturning of a dismissal penalty enforced against him. The doctor claimed that the manager of the hospital had dismissed him because he (the doctor) had submitted several complaints to the Medical review authority[54] about the manager. The complaints were as a result of the manager closing the x-ray section and hiding some medical equipment from the doctor, while he was performing his duties. The government legal service objected to the judgment of the Tripoli Appeal Court, and they appealed to the Supreme Court seeking to overturn it, based on lodging an appeal to the Court after the expiry of the relevant 60 day limitation period.

The Supreme Court accepted the government legal service's appeal, as the employee's appeal was presented after the permissible period specified by law. The employee was informed of the charges on 14.03.2006, and appealed to the administration on 23.06.2006. However, he did not receive a response either accepting or refusing the appeal. His appeal to the Appeal Court of Tripoli was made on 28.10.2006, which was more than 60 days from the appeal date. Therefore, the Court refused the employee's defence. If the employee receives no response, then the period for appeal to the Court will be counted from the end date of the first 60 days of the non-response to the administrative appeal.

It is submitted that Libyan legislation stipulates the consequences of when the administration remains silent and gives no response to the appeal. The employee has 60 days from the date of submitting his appeal to administration and if he does not receive a response from administration to this appeal, he has a further 60 days in which to appeal to

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[53] Administrative Appeal No.67/54, Libyan Supreme Court (13.04.2008) Seat of Principles Established by the Supreme Court 2007-2008, Part 2, 1.

[54] This authority is specialised in monitoring the competence and effectiveness of medical services provided in all medical units within the State.

the Court.[55] It is also submitted that silence from administration can be read as being both fair and unfair at the same time. It can be fair because it tells the employee what to do in such circumstances. However, on the other hand, when the administration remains silent, this is an unusual situation for the employee, who does not know what to do, or how to deal with this silence, unless there is a clear legal text stipulating what the employee should do in such circumstances. Therefore, the legislator considered that explaining what to do and how to appeal in cases where the administration remains silent was crucial and significant to guarantee the employee's right to appeal.

It can be regarded as being unfair because it provides an opportunity for the administration to ignore the guarantee of the employee by neglecting his/her appeal and not looking into it, in order to make the employee miss the opportunity to prepare his/her defence. Therefore, the author submits that the administration should, in all cases, mandatorily respond to all appeals as soon as possible, without exception; because failure to do so may lead to the employee losing his/her right to submit an appeal to the Court.

The author concludes that the Libyan legislation and judiciary adopt a similar route to Egyptian law: both of them make the legal time in which to appeal somewhat complicated and unfair to the employee. If the employee receives a passive response (no response), then he/she can appeal to the Court within 60 days, if this is within that period.[56] The question that the author puts to Libyan legislators is this: how can the employee know of administration's decision if it remains silent? And why should the employee lose the chance to appeal because of such silence?

It is submitted that it is a defective process which is prejudicial to the employee's rights if the administration makes no response within the legal period of 60 days from receiving the appeal. This may affect the employee's position, as he/she will miss the opportunity to appeal to the Court in order to overturn or amend the penalty imposed against him/her. However, the administration may have a personal vendetta against the employee and

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[55] Eharay points out that in case the administration responded clearly by refusing the appeal within 60 days from receiving the appeal, then the new permissible time for appealing would be within 60 days from notifying the employee with the administration's response to his/her appeal. Mahmed Eharay, *Review on the Management Works in Libyan Law* (2nd edn, Tripoli Complex of University 1994) 190.

[56] As explained in detail above of this Section 6.5.1.2.

deliberately remain silent. Therefore, it is submitted that the administration's silence could be considered a disadvantage to the employee, and that the employee still has the right to appeal to the Court if he/she receives no response within 60 days from submitting his/her appeal to the administration. Since most employees do not know this right and are usually kept waiting for the administration's response, they miss the opportunity of appealing to the Court. Accordingly, the author submits the following:

a. Libyan law must urgently stipulate that the administration, when enforcing the penalty, should inform the employee about his/her right to appeal within 60 days from enforcing the penalty against him/her. Also, the employee should be informed that he/she has the right to appeal once within 60 days of the date of submitting his/her appeal or within 60 days from submitting his/her appeal if there is no response from the administration. In cases where there is a clear response, the employee should appeal within 60 days from receiving a clear response.

b. Libyan law must make it mandatory for the administration to respond to all the appeals of employees, just as UK law does,[57] in order to avoid confusion and also to guarantee maximum rights to the employee. This can prevent the administration from misusing the law (in cases where they have conflicts with the employee) as by failing to respond to the appeal, they can waste the employee's right to appeal against the original decision made to the Court.

6.5.2 An Assessment of the Consequences of the Administrative Appeal for the Disciplinary Decision Appealed Against

One of the important consequences of the administrative appeal in both Libyan[58] and Egyptian[59] law is that the lodging of an appeal stops running the time allowed for lodging an appeal with the Court. The appeal limitation period to the Court will run from the date the administration responds to the appeal, either by giving a clear refusal or giving no response and remaining silent (no response is an indirect refusal). This raises the

[57] ACAS 'ACAS Code of Practice 1-Disciplinary and Grievance Procedures' (April 2009) 4-10.
[58] Article 8 (n 3).
[59] Article 24 (n 50).

question: is it permissible for the employee to appeal to the Court without receiving a response from the disciplinary authority?

If the employee submits his/her appeal to the Court against the penalty enforced against him/her without waiting for the response of the administration, the administration may, during this time, accept its decision (before the response of the Court) and overturn the penalty against the employee. In such cases, the employee does not benefit from his/her appeal to the Court, but instead, encounters inconvenience and unnecessary expense. This was demonstrated in the Libyan Supreme Court in Administrative Appeal No.12/15.[60] This case concerned an employee in the Misurata council (Misurata is a Libyan city). He was referred to a disciplinary hearing and a criminal trial for forgery and for stealing from the council. Consequently, the employee tendered his resignation to the employee's affairs committee and it was accepted by the head of the council on 13.07.68. The employee appealed to the Minister of the Council Affairs on 9.09.68, claiming that he did not resign and that his personal file did not contain any written or verbal resignation. Without waiting for the Minister's response, the employee appealed to the Court on 12.09.68, requesting the Supreme Court to overturn the decision enforced by the administration.

The government legal service submitted to the Supreme Court that the appeal should be refused. It also submitted that before he appealed, the employee should have waited for up to four months for the administration's response.[61] However, the Supreme Court accepted the employee's appeal and rejected the proposal of the government legal services. Article 22 of Supreme Court Law 1953clearly specifies that the appeal to the Court must be within four months of the employee being notified of the decision. This period discontinued when the employee appealed to the administration against the decision. In the situation where the administration refuses his/her appeal, either by a clear refusal or by remaining silent, then an employee has the right to appeal to the Court

[60] Administrative Appeal No.12/15, Libyan Supreme Court (8.02.70) *Supreme Court Journal,* Year 6, no.1, 55.

[61] This is the period stipulated by Article 22 of Supreme Court Law 1953 considering the administration's silence as a refusal to the appeal, but later is amended with the period of 60 days by the virtue of Article 8 of Law No. 88 of 1971 concerning the Administrative Judiciary.

within four months of notification of its decision. However, this does not mean that the employee must wait for the administration's response to his appeal. The only reason he/she should wait is to find out the response, as the appeal might be accepted. He/she can then avoid paying money to the Court for his lawsuit.

From the Libyan judgment case (No.12/15) it can be concluded that an employee can appeal to the Court without waiting for the administration's response. During this time, if the administration responds by accepting his/her appeal and overturning the penalty, then the employee will lose money by going to the Court. The author submits that this is fair because it has considered the psychological effect on the employee. Even though the employee submits his/her appeal to the administration, he/she may not trust that the administration will amend or overturn the decision. Consequently, the law gives the employee the opportunity to go to the Court if the administration takes a long time to reply, because the employee will fear that the administration is not replying to his/her appeal in order to make him/her lose the opportunity to defend him/herself. The only reason to do so is because administration might accept his/her appeal and he/she can avoid paying for his/her lawsuit.

However, it is submitted that the Libyan judiciary acts prejudicially to the rights of the employee when it does not mention the procedures that should be followed by the employee in a case where the administration has amended the penalty enforced against the employee with a milder penalty. It is important to let the employee know if the administration has accepted an amended penalty, while he/she has submitted an appeal to the Court at the same time, as this would avoid incurring the expenses of the appeal and also the time taken. Therefore, it is submitted that the Libyan judiciary should consider taking the Egyptian judiciary's[62] route in such a case.

In Administrative Supreme Court of Egypt Appeal No. 2402/33,[63] an employee who worked for the Egyptian organisation for projects was penalised with a three-day salary deduction for violating her duties. The employee worked in another place (the pasta

[62] See next paragraph.
[63] Egyptian Administrative Supreme Court, Appeal No. 2402/33 (18.11.95) Council State, *Unreported.*

factory) when she took an unpaid annual break in 1984. The employee did not accept the penalty decision and appealed to the administration. Later, the administration responded to her appeal by amending the penalty decision to a one-day salary deduction. The employee had submitted her appeal to the administration without waiting for its response, and appealed to the disciplinary Court before the administration had amended the penalty. The Disciplinary Court refused the employee's appeal, based on the employee not appealing on the new decision of the administration (amended decision). The employee submitted an appeal to the Administrative Supreme Court which ruled that that the judgment of the Disciplinary Court was invalid.

The administration had amended the penalty when the appeal had already been submitted to the Disciplinary Court. However, amending the penalty does not mean that the appeal submitted to the Court is invalid. Consequently, as the appeal to the Court is still valid, the employee did not need to re-appeal to the administration about its amended decision. She was only required to amend her request to the Court before the Court produced its judgment. In addition, the law only stipulates the mandatory appeal on decisions within a particular period. The law does not stipulate that the employee needs to appeal every amended decision. As a result, the employee's appeal to the Court was still valid and she was not required to re-appeal on the new amended penalty enforced by the administration.

This case[64] is a good example to employees as to what measures should be taken following submission of an appeal to the Court without waiting for the administration's response, and if during this time the administration responds by amending the penalty: as amending the penalty by the administration does not mean overturning the penalty decision. Thus, the employee can still continue with the same appeal to the Court and does not need to appeal again. The employee is only required to amend his/her request to the Court (to take into account the amended penalty decision) before the Court produces its judgment. It is submitted that this is fair because the Court defined to the employee the required procedures that he/she should follow, which is to carry on his/her disciplinary

[64] Ibid.

case by amending his/her requests. This procedure is considered fair for the employee. Therefore, the Libyan judiciary should consider following the Egyptian approach in with this regard.

6.6 Conclusion

(a) The author submits that Libyan law is fair in permitting the employee to choose to take either an optional appeal rather than a mandatory appeal.[65] This provides the freedom to choose whether he/she will appeal to the administration or not. Also, the optional appeal permits the employee to appeal to the Court, even without a previous appeal to the administration, where the employee feels that he/she does not trust the administration, or in cases where the administration does not respond to the employee's appeal. However, Libyan law is unfair where it does not specify the essential details that the optional appeal should contain (the appellant's name, date of appeal, as well as the subject of the appeal and its reasons, or the appeal grounds of the appellant, in a clear way). Therefore, it is submitted that Libyan legislation should stipulate that the required details be included in the optional appeal decision, just as Egyptian law does.

(b) Libyan law is unfairly prejudicial when it does not specify the procedures for the submission of the appeal to a specialised authority, as Kuwaiti law does.[66] By organising the procedures for the submission of the appeal, including the need to provide a receipt to the appellant, Kuwait law strikes a fair balance. This is because the receipt works as proof in stopping the limitation period (for subsequent appeal to the Court) and confirms that the employee's appeal has been received. By this proof, the Court will decide to accept or refuse a consideration of the appeal by counting the period from the date of the submitted appeal, not from the date the employee was informed of the penalty decision, or the date of enforcing the penalty.

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[65] See above Section 6.3.1 of this Chapter.
[66] As explained in detail Section 6.4.2.

(c) Libyan law is prejudicial when it stipulates the administration itself as the authority to receive and look into the appeal.[67] This is because the administration itself is unlikely to admit its own mistake and overturn or amend the penalty decision which it has already imposed. It is submitted that Libyan law should involve a neutral third-part authority (e.g., Law Management Committee) to take over in the optional appeal, as Kuwaiti law does. Libyan law should be making the decision of the Law Management Committee mandatory to be followed by the administration. The reason for a third party authority is so that the employee can appeal to a neutral authority, before he/she goes to Court. This is an advantage for the employee, as this third party will be more likely to act impartially than the administration would.

(d) The author examined the extent to which Libyan law is fair in specifying the methods of notifying the employee of the penalty decision. The author believes that Libyan law is unfair in leaving the third method of notification ("the complete knowledge of the administrative decision"), to be decided at the discretion of the administrative judiciary.[68] This is because of the difficulties in finding the right text in the judgments, as it can take a long time for even the professional specialist lawyer to find it. Consequently, if the accused employee does not have enough money to pay for a specialist lawyer, he/she may lose his/her opportunity to appeal to the Court, because this process may require over 60 days to find and understand the relevant judgment. It is submitted that Libyan law should do as Kuwaiti law does, and stipulate the third condition in the actual legislative texts.

(e) The author examined the consequences which can result in presenting an appeal to the administration on time. The author submitted that Libyan law is fair when it organises the limitation period for appealing, because it gives the employee another 60 days in which to appeal to the Court, starting from the end of 60 days of submitting his/her appeal to specialised administration. However, the Libyan judiciary acts in an unfairly prejudicial manner when it considers the same period in a situation where the employee presents his/her appeal to a non-specialised authority, as the Libyan judiciary[69] makes it a

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[67] Ibid.
[68] Administrative Appeal No.36/50 (n 22) *Unreported.*
[69] Administrative Appeal No.42/25 (n 42) 25.

condition that the employee should prove in this case that the specialised authority knew about his/her erroneously lodged appeal to the non-specialised authority. This is because it is difficult for the employee to prove that the specialised administration knows about his/her appeal to the non-specialised authority, as the documents which prove this are with the administration and the administration may refuse to hand over those that are relevant. Therefore, it is submitted that Libyan law should make it easier for the employee to justify his/her appeal to a non-specialised authority by only being required to furnish a valid reason to justify his/her mistake for doing so, as Egyptian law does.

(f) Also, Libyan law does not stipulate the maximum time for a non-specialised authority to respond that it is not the proper authority to consider the appeal. This is unfair because in submitting his/her appeal to a non-specialised authority the employee does not know that this authority is non-specialised. If this authority does not reply before the legal period time (within 60 days from the date that employee receives the penalty decision), the employee may lose the opportunity to appeal to the Court. It is submitted that Libyan law should oblige the non-specialised authority to respond within a specific time, that is substantially less than 60 days, and to indicate that it is not competent to receive the appeal.

(g) Libyan law stipulates the consequences of those occasions when the administration remains silent and gives no response to an appeal.[70] The employee has 60 days from the date of submitting his/her appeal to the administration. The author believes that it is not fair for Libyan law to permit the administration to remain silent and not respond to an appeal, as this may make the employee lose the opportunity to appeal to the Court within the subsequent 60 day limitation period. The problem is that the employee does not know that the administration has the right to remain silent, and he/she may end up waiting for its reply and lose the opportunity to appeal to the Court. To achieve fairness, Libyan law should require the administration to respond to the employee's appeal in all cases in order to guarantee justice, just as in UK law. Also, Libyan law should require the administrative disciplinary authority to notify the employee about his/her right to appeal, which he/she may lose if he/she does not know about it.

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[70] In detail see Section 6.5.1.2.

(h) The Libyan judiciary does not mention the procedures that should be followed by the employee in cases where he/she appeals to the Court without waiting for the response of the administration to his/her appeal, in circumstances where the administration may have amended the penalty enforced against the employee with a milder penalty.[71] This may lead the employee to lodge the appeal to Court, because he/she does not know what to do in this case. Consequently, the employee would lose both money and time by going to the Court again. It is submitted that Libyan Courts should do as the Egyptian judiciary does, by stipulating that amendment of the penalty by the administration does not mean that the employee needs to re-appeal to the Court against the amended decision. The employee should only be required to amend his/her appeal to the Court.

[71] In detail see above Section 6.5.2 of this chapter.

Chapter Seven

Dose the Current Administrative Court System in Libyan Law promote Fairness of treatment for Public Employee?

7.1 Introduction

The Administrative Court represents a significant guarantee to the employee, as it is the last opportunity for the employee to overturn the penalty imposed against him/her. The author proposes that standards of fairness require a separate and impartial judiciary (Court) specifically to look into the employee's appeal. Also, fairness requires that Courts should review and monitor the legality of the penalty decision and overturn it if it is not imposed in accordance with the law. Therefore, this chapter will consider whether some practices of the Libyan Law Courts support or are against insuring a review of the legality (fairness) of disciplinary penalties imposed against public employees.[1] The chapter will also examine the reasons for the employees' appeals and the penalty decisions enforced by the disciplinary authorities. Therefore, six key areas will be examined:

1. Whether Libyan law specifies a specialised Court to look into appeals lodged by employees against penalty decisions.

2. Penalty decisions should be imposed by specialised authorities. To what extent do Libyan Courts review the legality of penalty decisions based on the requirement that such decisions should be imposed only by authorities specified by law?

3. To what extent does the Libyan judiciary (Courts) review the legality of the decisions of the disciplinary authority according to its obligation to observe and comply with legal texts?

[1] See below Section 7.3.

4. To what extent does the Libyan judiciary review the legality of procedures followed by disciplinary authorities in the disciplinary process?

5. To what extent does the Libyan judiciary review the legality of the decisions regarding misuse of power by the disciplinary authority, and also to what extent is the judiciary promoting fairness when it requires the employee to prove misuse of power?

6. To what extent does the Libyan judiciary review the illegality of a penalty decision based on lack of causes to justify the decision?

7.2 To what extent does Libyan Law Specify a Specialised Court to hear Appeals Submitted by Employees against Penalty Decisions

Specifying which Court is specialised to deal with an appeal represents a significant guarantee for public employees, as it guides them to the proper Court in which to lodge an appeal. This is important because failure to submit an appeal to the specialised Court can result in refusal of the appeal. Administrative Courts consist of two types: the Administrative Court, which is the Appeal Court, and the Supreme Court. Libyan legislation confers competence on the Administrative Court to consider appeals lodged by employees against administrative penalty decisions,[2] while the Supreme Court hears appeals lodged by employees against Appeal Court decisions.[3] In contrast, Egyptian legislation determines the Disciplinary Courts to look into appeals which are submitted by employees against the penalty decisions. Also, the Egyptian Administrative Supreme Court looks into appeals submitted by employees against the Disciplinary Court judgment.[4]

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[2] Article 4 of Law No. 88 of 1971 concerning the Administrative Judiciary.
[3] Article 24 of Law No. 88 of 1971 concerning the Administrative Judiciary.
[4] In Egyptian law: the ordinary Courts which look into civil cases were, until 1996, the judiciary responsible for looking into administrative conflicts, including disciplinary decisions. However, when Law No.112 of 1946 concerning the State Board was introduced, the judiciary responsible for looking into the administrative conflicts (including the administrative penalty) became separate from the ordinary judiciary, which looks into the civil and criminal cases (The ordinary judiciary which to looks into the financial, civil and criminal conflicts). The ordinary Courts consist of a Partial Court, a Preliminary Court, the Appeal Court and the Supreme Court, which is the highest of all the previous Courts since it looks into the extent to which the previous Courts have applied the law). As a result, the State Board became an independent

The Libyan Court differs from the Egyptian Court in that Libyan law does not have an independent specialised Disciplinary Court to consider disciplinary conflicts. There is only the ordinary judiciary, which has administrative Courts in the Appeal Courts and a Supreme Court,[5] and which specialises in monitoring these Courts, according to the following:

a. The Appeal Courts.[6]

The Appeal Courts consist of several Courts which are represented in the Administrative circle (Court), the Criminal Circle Court and the Civil Circle.[7] The Administrative Circle Court consists of three councillors and a member of the general prosecution.[8] The Administrative Court specialises in looking into administrative conflicts, including enforcing disciplinary decisions. This is because the Administrative Judiciary Court is regarded as a Court of the first degree, according to what is stipulated in Article 2 of Law No. 88 of 1971 concerning the Administrative Judiciary. This Article specifies the specialities of the administrative judiciary circle as:

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authority, becoming the only authority specialised with jurisdiction to hear administrative conflicts, including the enforcement of administrative penalties.
Articles 4-13-14-15-22-23 of Law No. 47 of 1972 concerning the Council State, the judiciary department in the State Board consists of the Administrative Supreme Court according to the following:
(i) The Court of Administrative Judiciary: It is specialised in the appeals that are made against the judgments of the Administrative Courts. (ii) The Administrative Courts: The administrative Courts such as the Court first degree specialised in looking into the different conflicts between employers and employees, and overturning the decisions, except the disciplinary decisions which are the specialty of the Disciplinary Courts. Some of the decisions that the ordinary Courts are specialised in include: referring an employee to retirement, hiring, promoting, and the conflicts of the administrative contracts. (iii) Disciplinary Courts: The Disciplinary Courts are specialised in appeals against the disciplinary decisions made by the disciplinary authority. In addition, it is specialised in the appeals submitted to the first degree Court by public employees. The employee can appeal to the Supreme Court against Disciplinary Court decisions. (iv) The Administrative Supreme Court: The Administrative Supreme Court is the highest Court in Egypt, the location of this Court is in Cairo. It is headed by the Director of the State Board, and it produces its judgments from the administrative circuit, which consists of five consultants, the Administrative Supreme Court specialises in looking into appeals that are lodged against the judgments and which are enforced by Disciplinary Courts. For further information see Abedekani Basiwni, *The Administrative Judiciary* (Mnshat Elmarfe 1997) 14; Ibrahim Shiha, *The Administrative Judiciary* (Mnshat Elmarfe 2006) 237-244; Mohamed Najeeb, *The Organisation of the Egyptian Judiciary* (Dareltebaa 1998) 142; Mohamed Mrgne, *The Administrative Judiciary and the State Board, Part One* (Mnshat Elmarfe 1989) 104.

[5] Ali Masaood, *Explanation of the Civil Procedures Act in Libyan Law, Organisation and Specialisation, Part One* (1st edn, Center of Talha Abdullah Khoms 2007) 27.

[6] There are six Appeal Courts in Libya (in Tripoli, Banghazi, Misurata, Zawia, Sabha and the Green Mountain).

[7] Article 4 (n 2).

[8] Ibid.

(i) Looking into the conflicts between the Administration and public employees, particularly those issues concerned with hiring and promoting employees.

(ii) Appeals which are submitted by public employees regarding due rewards.

(iii) Appeals which are lodged by public service employees regarding overturning decisions imposing disciplinary penalties.

(iv) Appeals which are submitted by public employees regarding dismissal decisions that are made other than through the disciplinary process.

(v) Conflicts relating to administrative contracts.

b. The Supreme Court.

The Supreme Court in the Libyan administrative judiciary system is the highest of all the Courts[9] (Appeal Courts and Partial Court).[10] The Supreme Court is in Tripoli.[11] This Court specialises in monitoring all the other lower Courts. It monitors the extent to which the other Courts apply the law in their decisions.[12] The Supreme Court does this monitoring through sub-Courts[13] represented in:

(i) The Administrative Court Circle. Specialised in administrative conflicts, the administrative Court examines the appeals of employees and whether the penalty decisions are contrary to the law or if there was an error in applying the law by a lower degree Court.[14]

(ii) The Criminal Court Circle; specialises in criminal conflicts.

(iii) The Civil Court Circle; specialises in civil conflicts (cases).

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[9] Muhmued Elgadi, *The Justice System and Legislation Movement in Libya* (The College of the Global Arabic Studies 1960-1961) 34.
[10] Article 4 (n 2).
[11] Ibid.
[12] Article 24 (n 3).
[13] Article 12 of Law No. 88 of 1971 concerning the Administrative Judiciary.
[14] Article 19 of Law No. 88 of 1971 concerning the Administrative Judiciary.

Given what has been discussed, it appears that the Libyan judiciary does not have a separate, stand-alone administrative judicial system. It has only one judicial system consisting of several Administrative Court Circles, which are in essence not separate from the ordinary Criminal judiciary. It has Appeal Courts that look into administrative conflicts (cases) and a Supreme Court that monitors the works of the lower degree Courts in all types of conflicts-administrative, criminal and civil.

It is submitted that Libya may be need to create an administrative judicial system (e.g. Employment Law Court) that is independent from the Civil and Criminal Courts, as in Egyptian law or as in UK law. Independent employment Courts, such as the Employment Tribunals in the UK, will mean that these Courts will not rely solely on the texts of law (such as Civil and Criminal Courts) in considering the cases, but will also create legal rules where there are none in current law text.[15] The Administrative Court is a creative judiciary in cases where in some conflicts the legal text documents may not exist. In such cases, the administrative Court may create a legal rule that applies to the case in order to solve the conflict, irrespective of the absence of a legal text. Thus, it is submitted that having an independent employment law Court system means that all the judges are specialised and experienced in this specialty rather than as a criminal or civil judge, who might be assigned from another area to judge a disciplinary case. Creating an independent Employment Law Court enables justice to achieve its goal.

In conclusion, it is submitted that the author has noted there is no independent Court to look into the employees' affairs and there is only the administrative Courts, which look into all the administrative affairs, including the employees' affairs. Therefore, it is submitted that Libyan law should consider founding an independent Court that will look only into employees' issues (cases), as is the case in Egyptian law. This will provide the employee with more guarantees because having an independent employment Court assures the employee that all the judges will be specialised in these types of cases and will therefore be able to make the right decision.

[15] Astra Emir, *Selwyn's Law of Employment* (17th edn, Oxford University Press 2012) 9-12.

7.3 Fairness of Administrative Court in Reviewing the Causes of Employees' Appeals and the Penalty Decisions Enforced by the Disciplinary Authority

The following are the causes that make a case subject to appeal, which, if they are upheld, can lead to the disciplinary decision being overturned by the Administrative Court.[16] Libyan legislation is keen on specifying the errors that may affect the validity or legality of a disciplinary decision. Article 2 of Law No. 88 of 1971, concerning the Administrative Judiciary, states the reasons for any appeal lodged by public employees seeking to overturn the decisions of a disciplinary authority. These reasons can be for any one of the following errors:

1. The error of enforcing a decision made by a non-specialised authority.

2. An error constituted by a decision contrary to law.

3. The existence of an error in the form of the disciplinary decision.

4. Misuse of authority in enforcing the disciplinary decision.

5. Error arising from lack of reasons.[17]

If one of the above-mentioned errors is committed by the disciplinary authority that imposed the disciplinary penalty, the employee has the right to appeal to the administrative judiciary to overturn the decision enforced against him/her. Accordingly, all these errors will be examined in relation to Libyan law, with comparison made to Egyptian law wherever relevant. The author assumes that a standard of fairness requires the employee to base his/her appeal to the Court on valid grounds. Fairness will also require the Court to investigate the honesty of his/her defence and its causes. This part of

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[16] Mohmed Eharay, *Review on the Management Works in Libyan Law* (2nd edn, Tripoli Complex of University 1994) 195.

[17] If the reason the disciplinary decision is based on is not sufficient, this will give the accused employee a chance to appeal against the decision to the Libyan and Egyptian administrative judiciary. The administrative Libyan and Egyptian judiciaries are keen on ensuring the existence of the facts (error that is committed by the employee) that led to the condemnation of the employee. Therefore, if it appears that the administration condemns the employee without explaining the error for which he/she has been specialised for, or condemns the employee without specifying the facts and evidence that are provided in the documents, then the administration's decision is invalid due to a defect in its cause (there is no valid cause for a penalty). For further information see Chapter Five, Sections 5.5.1.1 and 5.5.1.2.

the chapter will examine the fairness of Libyan law in reviewing the reasons of the appeals and the penalty decisions.

7.3.1 Error of Enforcement of the Decision by a Non-Specialised Authority

Enforcement of the final decision against the employee by a non-specialised authority is one of the occasions when the employee is able to appeal under both the Libyan[18] and Egyptian[19] Administrative Judiciary Court system. Fairness should require the Courts to review the legality of the penalty decision that is enforced by a non-specialised disciplinary authority. In this case, the Court should overturn the penalty decision in accordance with the law. Therefore, in this part of the chapter the author will examine the extent to which Libyan law permits review of the penalty decisions through ensuring that the disciplinary authority has applied the law without going beyond its specialities, according to the following:

1. According to the Appeal Court of Bangazi No.149/23,[20] enforcement of the decision by a non-specialised authority means that the decision is imposed in a way that is not in accordance with the legislation.[21] Thus, if one authority enforces a penalty which is within another authority's specialty, then the disciplinary decision will be regarded as invalid. Consequently, the employee can seek to appeal to overturn the disciplinary decision on the basis that the disciplinary decision was not imposed by a specialised authority.

The ruling of the Supreme Court in Libyan Administrative Appeal No.119/51[22] is instructive. This case concerned an employee who worked in the Ministry of Sport for a

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[18] Article 2 of Law No. 88 of 1971 concerning the Administrative Judiciary.
[19] Article 10 of Law No. 47 of 1972 concerning the Council State.
[20] Appeal Court No.149/23, Administrative Court of Bangazi (13.01.98) *Unreported.*
[21] Libyan and Egyptian legislation each specify the disciplinary authorities that are specialised in enforcing penalties. Articles 160-161 (2) of Libyan Law No. 12 of 2010 concerning Labour Relations, gives the authority of imposing the warning and salary deduction penalties to the administrative authority. The responsibility of enforcing all the other penalties is assigned to the Disciplinary Committees. On the other hand, according to Article 80-82 of Egyptian Law No.47 of 1978 concerning the Civil Servants, the authority allocates enforcement of penalties between the administrative authority and the Disciplinary Courts (each according to its specialty). For further information see Chapter Four, Section 4.2-4.2.2.3.
[22] Administrative Appeal No.119/51, Libyan Supreme Court (2.07.2006) *Unreported.*

certain period of time. The Ministry of Sport was terminated, so the employee went to work in the Internal Security Ministry. The employee was dismissed from work because he was absent for twelve days without a valid reason. The employee was successful in his appeal to the Appeal Court of Tripoli to overturn the penalty enforced against him by the administration, but the administration did not accept this decision and appealed to the Supreme Court against the judgment, claiming that the employee had not returned to work after twelve days and they had therefore assumed that he had resigned.

This is based on Civil Service Law, which allows the administration to regard an employee as having resigned if he/she is absent from work for twelve days or longer. The administration claimed that they were not acting unlawfully, but conceded that they had interpreted the law in an incorrect way by enforcing the dismissal decision. The Supreme Court was not convinced by this defence and ruled that the administration's decision clearly stated: 'dismissal of the employee from work'. Consequently, the decision to penalise the employee and not to require his resignation, was beyond the competence of the administration. The Court regarded the administration's decision (dismissal) to penalise the employee as not being within the administration's speciality (according to Article 84 of Law No. 55 of 1976 concerning the Civil Service).

It is submitted that the Libyan judgement (in the Administrative Appeal No.119/51[23]) is a correct decision. The judgment reviewed the case and applied the specialisation rules on the decision of the disciplinary authority. Specialisation rules require that the judgement should examine whether the penalty decision lies within the jurisdiction of the disciplinary authority that imposed the decision. The Court overturned the penalty decision because the decision was not within the specialities of the authority that enforced the penalty. The judgment of the Court was logical, because if the Court merely approves any authority to enforce a particular decision which is not within its specialities, this will subject the employee to discipline by any authority. Therefore, it is submitted that applying the specialisation rules in the realm of disciplinary penalties enforced by the disciplinary authorities, is fair and in the interests of the employee.

[23] Ibid.

2. A simple breach is when an administrative authority assumes the specialty of another administrative authority,[24] while a serious breach is when an administrative authority assumes the specialty of a disciplinary committee. The question therefore arises as to whether the breach of the speciality is simple or serious, and does this affect the limitation period of 60 days that the employee has in which to submit his/her appeal to the Court? Or does the employee have the right to appeal even after 60 days of being informed of the penalty decision, if the breach of speciality is a serious breach? The answer to this question is to be found in the following case, as illustrated by the Supreme Court in Administrative Appeal No.15/36.[25]

The case concerned an employee who worked for the National Institution of Oil and who was dismissed by the Director of Gas, who followed the National Institution of Oil Policy. The employee who was dismissed for consuming alcohol in the worker's accommodation, appealed to the Appeal Court of Tripoli. The Court overturned the decision imposed by the administration on the grounds that the decision was enforced by a non-specialised authority. However, the government legal service did not accept this decision and appealed to the Supreme Court against the judgment, claiming that the employee had appealed outside the legal time limit. The Supreme Court ruled that the decision enforced against the employee was invalid, as it was enforced by the Director of the National Institution of Oil, who is not specialised to make this dismissal decision. This is according to Article 83 and 84 of Law No. 55 of 1976, concerning the Civil Service, which confirmed the speciality to enforce this penalty on the Disciplinary Committee.

The Court refused the government legal service's appeal (that the employee was out of appeal time), as the Court ruled that the 60 day appeal time limit only applies if the lack of speciality is simple. However, the lack of speciality error committed by the

[24] The Libyan judiciary does not define simple lack of speciality. Instead, it mentions instances where the case in which the lack of specialty can be called simple: (i) when an administrative authority performs the specialty of another administrative authority. (ii) When the administration enforces a decision against an employee, after losing the title of "public employee", such as when the employee is being dismissed or has resigned. (iii) Enforcing a decision by the administration that exceeds the area of the institution such as when the mayor of Tripoli Council enforces a decision that interferes in the affairs of Misurata Council. Administrative Appeal No.6/3, Libyan Supreme Court (26.06.57) *Administrative judiciary*, Part 1, 79.

[25] Administrative Appeal No.15/36, Libyan Supreme Court (19.11.89) *Supreme Court Journal,* Year 26, no. 1-2, 25.

Director of the Institution in this case was considered a serious error. It was within the Disciplinary Committee specialism, which is regarded as the judicial authority. Consequently, violating the speciality of a judicial authority by an administrative authority is a serious breach of specialty which gives the employee the right to appeal, even after the expiry of the 60 days period from the enforcement of the decision.

The author submits that the judgment of the Court (Administrative Appeal No.15/36[26]) is a correct decision, as overturning the penalty decision for being a breach in the specialisation rule is a fair rebuke to the non-specialised authority and a good example to the authorities that they should not interfere with the specialities of the other authorities. Also, this represents a guarantee to the employee that he/she will only be disciplined by a competent specialised authority with the required speciality as stated by law.

The Egyptian Supreme Court is in agreement with the Libyan Supreme Court in considering the degree of lack of speciality being simple in cases when an administrative authority enforces the penalty that should be enforced by another administrative authority,[27] while a breach of speciality will be considered as serious if an administrative authority usurps the speciality of a Disciplinary Court. This was illustrated in Appeal No.743/49,[28] in a case where an employee was employed as an administrative inspector in the Institution of Tahrir in Cairo, which is part of the Ministry of Reform. The employee submitted several complaints to the Minister of

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[26] Ibid.

[27] An example of a simple degree of lack of speciality would be the General Director of a School enforcing a penalty within the specialities of the Minister. This was demonstrated in the Egyptian Administrative Supreme Court in Appeal No.38/1886. An employee, who worked in the Educational Department in Western Cairo, was dismissed by the Director of the Educational Department. The reason for dismissal was because the employee did not attend work following the end of his vacation. The Court overturned the decision because it was not enforced by a specialised authority. The decision was enforced by the General Director of the Educational Administration, not by the Director of the Directorate of Education, who is the specialist for this offence. The Court added that the degree of lack of specialty by the administration (doing work not within its specialities) was not complex but simple. It is only regarded as complex when an authority violates the specialty of a different authority, such as when an executive authority violates the specialty of a legislating authority. Egyptian Administrative Supreme Court, Appeal No.1886/38 (19.06.66) Council State, *Unreported.*

[28] Egyptian Administrative Supreme Court, Appeal No.743/49 (5.11.66) Council State, *Unreported.*

Agriculture regarding many violations within the Ministry. The Minister referred these complaints to the Investigation Department of the Ministry. However, during the investigation the employee requested the termination of the investigation, as it involved employees in senior positions in the Ministry and other Ministries. As a result, the investigation was terminated and the employee was transferred to a different position.

Later, the employee submitted other complaints to the Undersecretary of the Ministry, claiming that there were violations of rules in the Ministry. On this occasion the Undersecretary dismissed the employee on the grounds that the employee had submitted false complaints against his superiors. The employee appealed to the Disciplinary Court, which refused his appeal. As a consequence, the employee appealed to the Administrative Supreme Court, requesting that it overturn the decision. He appealed on the basis that the decision was not imposed by a specialised authority. The Administrative Supreme Court agreed with the employee and overturned the decision, because the administration did not refer the employee to the Disciplinary Court and enforced the dismissal decision independently, the Court ruled that the decision of the non-specialised authority was both invalid, and also being a serious breach of specialty.

It is submitted that the Libyan judiciary (in Administrative Appeal No.15/36) is in agreement with the differentiation made by the Egyptian judiciary.[29] Both make the differentiation between a simple and complex degree of lack of specialty. The significance of differentiation between the degree of lack of specialty (simple or complex), affects the employee's timing in appealing against a penalty. If the degree of lack of specialty is simple, the employee can only appeal to the Court within 60 days. If the degree of lack of specialty is serious, the employee has no specific time limit in which to lodge an appeal against the decision based on the lack of the specialty of the authority (the employee in this case is entitled to appeal, even after

[29] Ibid.

the 60 day appeal limit has expired, which normally is 60 days from the date of enforcement of the penalty).

It is submitted that the Libyan judiciary is acting properly in extending the 60 days permitted period for the employee, if it rules that the authority that enforced the penalty made a serious breach of a speciality of another authority. When there is a serious breach of speciality, the decision will be overturned and this also means that the employee did not have a fair hearing and he/she would then be disciplined by a non-specialised authority. In this case, the Court (as a justice authority) will correct the mistake that was made by the non-specialised authority. As a form of correction, the judgment will give the employee more time to appeal to the Court and will accept his/her appeal, even after 60 days have elapsed since the penalty decision was imposed, as compensation for the damage caused to the employee from having an unfair hearing by a non-specialised authority.

7.3.2 An Error Constituted by a Decision contrary to Law

An error constituted by a decision contrary to the law in the disciplinary decision is considered one of the causes that allows employee to appeal to the Libyan administrative judiciary[30] as well as to the Egyptian administrative judiciary.[31] The author proposes that standards of fairness require the disciplinary authorities to be restricted to the legal texts when looking into an employee's case. This is because doing so should guarantee a fair hearing to the employee. Accordingly, the author will investigate the extent to which the disciplinary authorities are restricted to the legal texts of law and also the extent to which the Libyan judiciary reviews the legality of the decisions of the disciplinary authority, according to its commitment to legal texts of law.

The Libyan Supreme Court[32] defined the error constituted by a decision contrary to the law as a disciplinary decision that is not made according to legal rules, i.e., a decision that is not based on a rule found in a law or a regulation, or rules of the Supreme Court. This

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[30] Article 2 (n 18).
[31] Article 10 (n 19).
[32] Administrative Appeal No.6/3, Libyan Supreme Court (26.06.57) *Administrative judiciary*, Part 1, 81.

error could be a direct error contrary to the law, or could be an error in applying the law or in interpreting it. Therefore, the disciplinary decision being contrary to the law can take one of following forms:

(a) When the disciplinary authority avoids following a certain procedure or may follow a procedure that is contrary to the law.[33] Examples include:

(i) Enforcing a penalty against the employee without a prior investigation.[34]

(ii) Enforcing a penalty without hearing the accused's statements and not giving the accused the opportunity to defend him/herself.

(iii) Enforcing a penalty against the employee without following procedures stipulated by law.

(v) Enforcing more than one penalty for the same error.[35]

(vi) Enforcement of a penalty by a non-specialised authority.[36]

If any of these forms (errors) are committed by the disciplinary authority, the authority's decision will be regarded as invalid, according to both the Libyan and Egyptian judiciaries.

(b) Error in applying the law or interpreting the law. This occurs when the disciplinary authority makes a mistake in applying the law, such as:

(i) Enforcing a penalty in an action that does not represent an administrative error.

(ii) Enforcing a penalty that is not stipulated by law.

The following highlights such a case: the Supreme Court in Libya ruled in Administrative Appeal No.55/59,[37] a case concerning a hospital employee who worked afternoons in the

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[33] Sabeh Maskone, *Administrative Judiciary in the Arab Libyan Republic* (Publication of Bangazi University 1974) 407-408.
[34] As explained in detail in Chapter Two, section 2.4.
[35] As explained in detail in Chapter Five, section 5.3.
[36] As explained above in detail, Section 7.3.1 of this Chapter.
[37] Administrative Appeal No.55/59, Libyan Supreme Court (14.01.2009) *Unreported.*

telephone exchange. While working in the hospital he was also hired by the Ministry of Education. When the Ministry of Education realised that the employee worked in two jobs at the same time, they penalised him by making a salary deduction from his hospital job. The employee appealed to the Appeal Court of Tripoli, which ruled that the disciplinary decision made by the Ministry should be overturned and also that the amount taken from the employee's salary was to be reimbursed.

The government legal service did not accept this decision, so they appealed to the Supreme Court against this judgment, requesting it to overturn the judgment of the Appeal Court of Tripoli. The Supreme Court ruled that even though the employee's actions were illegal (according to Article 77 of Law No. 55 of 1976, concerning the Civil Service), according to Article 83 of Law No. 55 of 1976, the administration of a particular institution can only deduct up to a quarter of the salary that the employee takes from his institution. However, the administration had no right to deduct earnings from an employee's salary that he takes from a different institution. Therefore, when the Ministry of Education deducted earnings from the employee's hospital work, this deduction was an illegal action, especially as the deduction was more than a quarter of the salary. Therefore, the administration's decision was invalid. In this case, the defect or error, committed by the administration was its application of the law. Consequently, the mistake in applying the law renders the penalty decision invalid.

The author submits that the Libyan judgment (in Administrative Appeal No.55/59) is fair and correct. This is because restricting the penalties to those that are stipulated by the law is considered one of the disciplinary guarantees to the employee in order for him/her to receive a fair hearing. In addition, it is illegal for the disciplinary authority not to confine its decision to the penalties stipulated by law. This is because by doing so, the disciplinary authority puts itself in the place of the legislator, which is illegal, as the legislator is the only authority that can make law, including the specification of disciplinary penalties.

The Egyptian judiciary takes a similar approach to the Libyan judiciary. The Administrative Supreme Court ruled in Administrative Appeal No.10712/5;[38] a case where a former employee in the Council of Cairo was penalised by having her promotion delayed for two years because she had committed the error of submitting incorrect prices to the Nasr Company, a car-manufacturing firm. The employee appealed to the Administrative Supreme Court against the decision of the Disciplinary Court. The Court ruled that the disciplinary decision made by the Disciplinary Court was invalid, as there had been an error in applying the law. The Disciplinary Court penalised the accused employee by delaying her promotion for two years. This penalty (in Article 80 of Law No. 47 of 1978, concerning Civil Servants) only applies to employees who are still in their employment. The accused employee was no longer working the Council of Cairo when she was penalised, and the administration should have penalised her according to Article 25 of Law No. 47 of 1978 (which stipulates a penalty fine of no more than twenty-five Egyptian Dinars for any former employee).

It is submitted that the Libyan judiciary (in Administrative Appeal No.55/59) is taking a similar approach to that of its Egyptian[39] counterpart. They both consider the penalty decision invalid if there is any mistake in applying the law, such as enforcing a penalty that is not stipulated by law, or penalising an employee for an action that does not represent an administrative error. It is submitted that reviewing the penalty decision of the disciplinary authorities and their commitment to applying the rules and the law in the disciplinary hearing is fair, because it represents a guarantee to the employee that if the penalty enforced against him/her is not in accordance with the law, then the administrative judiciary can overturn it. An error contrary to the law is more serious than all the other errors that might be committed by the administration or the Disciplinary Committee.[40] This is because an error contrary to law is the main error, while all the other errors stem from this. In other words, if the administration commits the error of

[38] Egyptian Administrative Supreme Court, Appeal No.10712/5 (2.07.2006) the Seat of Principles Established by the Egyptian Administrative Supreme Court, from the first of April 2006 until the end of September 2006, Part 2, Year 51, 103.
[39] Ibid.
[40] Article 2 of Law No. 71 of 1981, concerning the Administrative Judiciary, determined these errors as: (i) The error of enforcing a penalty by a non-specialised authority. (ii) The existence of an error in the form of the disciplinary decision. (iii) The existence of an error in the form of the disciplinary decision. d. Misuse of authority in enforcing the disciplinary decision. (iv) Error arising from lack of reasons.

enforcing the penalty by a non-specialised authority, this means that it is opposed to the law. Similarly, if the administration commits the error of enforcing a decision without justification (causes), then this is also regarded as contrary to the law.

7.3.3 The Existence of an Error in the form of the Disciplinary Decision (A Defect in the Form of the Procedures)

An error constituted by a decision contrary to the form of the procedures is considered one of the causes that enable the appellant to lodge an appeal to the Libyan[41] and Egyptian[42] judiciaries. The author states that the standard of fairness in this part of the chapter will require that disciplinary authorities be committed to replacing and following procedures stipulated by legal texts during the course of the disciplinary hearing. Also, their commitment should be reviewed by the Court in case the employee appeals against the penalty decision. Ensuring that the employee has a fair hearing is ensuring the very simple principles of justice, which is to have the investigatory authorities' work adhering to the legal texts. In addition, the employee can expect a better defence of his/her rights in that way. Accordingly, the author will examine the extent of reviewing the disciplinary hearing procedures and decisions by the administrative judiciary (Court).

The error contrary to the form of procedures means (as defined by the Libyan Supreme Court[43]) that the disciplinary authority does not follow the necessary measures, which are stipulated by law, when they make the administrative decision and impose the penalty.

It is understood from the above definition that failure to follow the necessary procedures stipulated by law (before enforcing the penalty decision) leads to the invalidity of the penalty. However, the author notes that the Libyan judiciary, in some cases, does not consider the penalty decision invalid when the disciplinary authority fails to follow disciplinary procedures during the disciplinary process.[44] This point has led the author to inquire if failure to follow disciplinary procedures by the disciplinary authority does not

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[41] Ibid.
[42] Article 10 (n19).
[43] Administrative Appeal No.6/3 (n 32) 79.
[44] For example, the Libyan judiciary does not consider the decision invalid if the Disciplinary Committee fails to mention the disciplinary members' names. For further information, see below Administrative Appeal No.14/16, p 225.

affect the legality of its decision, then which cases would? The answer to this question is found below in Section 7.3.3.2.

7.3.3.1 Assessment of Occasions Where a Decision is Considered Invalid if the Disciplinary Authority Does Not Follow the Necessary Procedures

The occasions where not following the disciplinary procedures before enforcing the decision can lead to the invalidity of the decision include: not notifying the employee of the charges against him/her,[45] not conducting an investigation into the accused employee,[46] or not writing down the investigation that is conducted with him/her.[47] This is because these particular procedures represent essential guarantees to the accused employees during the disciplinary process, so that they are able to defend themselves.

Another disciplinary procedure that the judiciary considers a cause for the invalidity of the decision is not forming the Disciplinary Committee according to the rules stipulated by law. This was highlighted by the Libyan Supreme Court in Administrative Appeal No.3/48.[48] This case concerned a bank employee who admitted giving money to a Turkish company after accepting cheques from it, even though he knew that the company had insufficient funds in its account to cover such cheques. In addition, he was not given any guarantees by the company for the missing sum of money. The company later left the country (Libya) without repaying the money owed.

As a result of the financial errors he had committed, the employee was referred to the Disciplinary Committee, who ruled that he was innocent of the charges. However, the government's legal service[49] did not accept this decision. It appealed to the Supreme Court against the judgment, claiming that the Disciplinary Committee did not include any member of the Inspection and Monitoring System in its form. This made the final decision invalid, as this is one of the disciplinary procedures that the authority must

[45] As explained in Chapter Three, Section 3.2.1.1.
[46] See in detail above Chapter Two, Section 2.4.
[47] See in detail above Chapter Two, Section 2.5.
[48] Administrative Appeal No.3/48, Libyan Supreme Court (26.06.57) *Administrative judiciary*, Part 1. 81.
[49] The government legal service is an authority which defends the interests of the public institutions and any corporations that follow the government.

follow. The Supreme Court refused the appeal that was submitted by the government's legal service because at that time Article 74 of Law No.11 of 1994, concerning the People's Inspection and Control System,[50] stipulated that the Disciplinary Committee is considered legal if the head and any three members attended the committee[51] and arrived at the decision by voting. In this case, the head and three members were on the Disciplinary Committee and made the decision by a majority vote, in which case it was legally correct.

The author submits that the Libyan judiciary (in Administrative Appeal No.3/48) acted fairly when it supported the decision of the Disciplinary Committee, as it ruled that the disciplinary committee was formed according to the form stipulated by law. It is submitted that the Libyan judiciary did so because these are the outlines of the form of the disciplinary committee according to that described by law, in helping to achieve a fair hearing for the accused employee. Also, one of these outlines requires having a fair hearing and an investigation in writing and notifying the employee of the charges. These are significant guarantees without which the accused employee would be unable to defend him/herself and prove his/her innocence.

7.3.3.2 Assessment of Occasions Considers Where the Decision is considered Valid, Even if the Disciplinary Authority does not follow the Necessary Procedures

There are cases where the decision of the disciplinary authority is valid even if the disciplinary authority does not follow certain disciplinary procedures, as some procedures such as 'notifying the employee of the penalty decision that is enforced against him/her is important for their guarantees. However, this is not stipulated by law, in cases of appeal, but it is ruled in jurisprudence of the administrative judiciary. This is illustrated by the

[50] This law, which was applied in this case, had been amended by Law No. 2 of 2007 concerning People's Inspection and Control System.

[51] Article 73 of Law No.11 of 1993 concerning People's Inspection and Control System, stipulated that the Disciplinary Committee must be formed from the head of the committee, who must be an employee with no lower degree than a consultant in the Appeal Courts. Also, one of the members of the committee must be a member of the Inspection and Control System.

Libyan Supreme Court in Administrative Appeal No.23/6,[52] a case concerning the Head of the Sports Committee in the Zliten branch (city of Libya). The accused made out a cheque to himself in the name of the Ministry of Sport. Later he was referred to the Disciplinary Committee, which penalised him by deducting the same amount from his salary. The employee appealed to the Supreme Court, claiming that he was not informed of the Disciplinary Committee's decision. The Supreme Court refused his appeal, ruling that not informing the accused employee of the penalty decision is not one of the procedures stipulated by law where failure to follow it makes the final decision invalid.

It is submitted that the Libyan judiciary's decision (in Administrative Appeal No.23/6[53]) is wrong in considering that failure to notify the employee of the penalty decision does not affect the validity of the final decision. The author submits that notifying the employee of the penalty is a significant guarantee that should be provided to the employee, as without being informed of the penalty, he/she cannot appeal to the Court to prove his/her innocence. Failure to inform the employee of the charges may result in him/her neither returning to his/her work nor appealing against the decision. Also, this failure could make the employee miss the opportunity to lodge an appeal before the expiry of the 60 day appeal period, which runs from the date of imposing the penalty decision.

Accordingly, it is submitted that the law should stipulate clearly the necessity to inform the employee of the penalty decision and should also obtain a signature from the employee as proof that he/she has received the penalty decision. The Court should monitor this and ensure that the employee is duly informed. Consequently, the author submits that the justification underlying the judgement above (that the law does not stipulate the procedures for informing the employee) is weak. This is because the Libyan judiciary is a creative judiciary by nature and has presented itself as so throughout its history. This judiciary always makes new rules when it finds it reasonable and fair to do so, even where they are not stipulated by law. Therefore, the judiciary should not be content to adopt the position that the law does not provide the procedures for informing

[52] Administrative Appeal No.23/6, Libyan Supreme Court (14.06.70) *Supreme Court Journal*, Year 7, no. 1, 55.
[53] Ibid.

the employee. It should have made this a rule, so as to require the necessity to inform the employee, instead of refusing the appeal by ruling that the procedures for informing the employee were not stipulated in law.

Another disciplinary procedure that the Libyan judiciary does not consider as grounds to render the decision invalid is the failure to mention the disciplinary members' names. This approach was highlighted by the Supreme Court of Libya in Administrative Appeal No.14/16.[54] In this case, the Disciplinary Committee, which follows the Ministry of Sport, enforced a salary deduction of forty-five dinar against an employee who worked in the Ministry. This was because the employee formed the team that participated in the Pan-Arabic games in a manner that was not in keeping with the decision of the Ministry of Sport and which led to the loss of the team. The employee appealed to the Supreme Court, claiming that the decision was invalid because it did not include the Disciplinary Committee members' names. The Court refused his appeal and ruled that the decision which had been imposed against the employee was legally correct, as mentioning the disciplinary committee's names is not one of the important procedures that should be mentioned in the disciplinary decision.

It is submitted that the Libyan judiciary (in Administrative Appeal No.14/16) does not guarantee fair procedures to the employee because failure of the disciplinary committee to mention the names of its members should lead to the invalidity of the decision. This is because declaring the name reassures the employee that none of the members have already taken part in the early disciplinary stages of his/her case. Also, mentioning the names will remove any doubt that the committee was not formed according to the law. This might be looked on as a breach of the employee's rights. Perhaps the Libyan judiciary should follow the Egyptian judiciary,[55] which considers the failure to mention

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[54] Administrative Appeal No.14/16, Libyan Supreme Court (14.07.70) *Supreme Court Journal,* Year 7, no. 1, 37.

[55] The Egyptian Administrative Supreme Court in Appeal No.21/4 explains the Egyptian judiciary's view with respect to the significance of mentioning the names of the Disciplinary Court. The case involved a technical supervisor on the Fayoom (city of Egypt) Board and the Director of the Board of works, who were suspended. In addition, half of their salaries were suspended. This is because the accused employees neglected their supervision of the repair works to the Fayoom Hospital. In addition, the Disciplinary Court enforced a month's salary deduction on the engineer, as he did not assign the supervisor who was responsible for repairing the defects in the building. The accused employees appealed to the Administrative Supreme Court. The latter ruled that the decision which was enforced on them was invalid, based on the

one of the judges' names and their signatures in the decision as rendering the decision invalid. Mentioning the names of the disciplinary committee reassures the employee that the judges who hear the witnesses and the conflicted parties are the same judges who have reached the final decision. In addition, mentioning the names of the disciplinary authority gives credibility to the enforced penalty by confirming that the decision is enforced by a specialised authority composed of the requisite membership.

7.3.4 Misusing the Authority of Enforcing the Penalty

The error occasioned by the disciplinary authority misusing its power in enforcing the disciplinary decision is one of the causes that can entitle the employee to appeal against the validity of the penalty decision to the Libyan[56] and Egyptian[57] judiciaries. Misuse of power is often an "invisible" error, which can be difficult for the employee to prove. In this part of the chapter, the author examines how Libyan law explains the meaning of misuse of power and will consider whether the judiciary is promoting fairness where it requires the employee to prove the misuse of power, even though it is often difficult to get the administration to admit that it has done so.

The Libyan Supreme Court (Administrative Appeal No.96/55[58]) defines the error of misusing authority as 'the deviation from the general interest or the goal of the law'. It can be concluded from this definition that misusing authority occurs when the administrative decision (in general) or the disciplinary decision (in particular) do not achieve the general interest of law. This is because the purpose of enforcing the penalty is to deter the employee from committing the error again and as a warning to the employee to do his/her work sincerely and accurately.[59] However, if the disciplinary authority enforces a penalty for any other reason, such as a personal issue between the

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premise that a decision must be made on valid causes to justify it. Additionally, in this case the decision was signed by two judges without the signature of the third judge, or even mentioning his name, which made the final decision invalid. Egyptian Administrative Supreme Court, Appeal No.21/4 (22.11.97) Council State, *Unreported*.

[56] Article 2 (n 18).

[57] Article 10 (n19).

[58] Administrative Appeal No.96/55, Libyan Supreme Court (22.11.2007) *the Seat of Principles Established by the Libyan Supreme Court,* Part 2, 2004-2008, 185.

[59] Mohamed Eharay (n 16) 235.

administration and the employee, or in order to seek revenge, then this will be regarded as misuse of power and the decision will be regarded as invalid.

In addition, if the administration misuses the law or the rules merely to transfer a particular employee from his/her work, this will be regarded as misuse of the authority. Moreover, any penalties that are imposed to satisfy a given party are considered invalid on the grounds of misusing the authority to enforce the penalty. Precedence for this can be found in the Libyan Supreme Court in Administrative Appeal 34/36.[60] Here, the Secretary of the Ministry enforced a decision by transferring a member of the staff from the University of Tripoli to the University of the Western Mountain. The Secretary based this decision as being in the interests of the work being undertaken in the Western Mountain University which needed members for a specialism.

The employee appealed to the Appeal Court of Tripoli, which accepted his appeal and overturned the transfer decision. The government legal service did not accept this decision and appealed to the Supreme Court, claiming that the transfer decision was one within the specialties of the administration and that the judiciary had no right to monitor them. The Supreme Court ruled that the Appeal Court of Tripoli's decision was correct; the transferral decisions are under the authority of the judiciary. Furthermore, the Supreme Court held that the decision constituted a misuse of power because this decision was aimed at penalising the employee and was not for the benefit of the University. The administration claimed that it used the transferral procedure as a tool for reorganising the institution, when in fact it did so as a punishment to the employee.

It is submitted that the Libyan judiciary (in Administrative Appeal 34/36) is correct. This is because the administration transferred the employee to punish him, which was illegal, as the transfer was not made in the interests of the institution. If the transfer was intended to be a punishment, then it should have started with an investigation and led to disciplinary procedures in order to provide the accused employee with all the required disciplinary legal guarantees where he could have challenged the process along the way.

[60] Administrative Appeal No.34/36, Libyan Supreme Court (17.06.2001) *Unreported.*

7.3.4.1 Assessment of Proving the Misuse of Authority in Libyan Law

The administrative judge monitors the purpose of enforcing the disciplinary decisions.[61] Misuse of authority related to the intention of the administrative authority is considered to be the most severe hidden error,[62] as it is not easy for the judge to follow and detect this. As a result, the Libyan judiciary makes it a condition for the public employee to provide evidence of misuse of power. This is because establishing a misuse of power in often very difficult for the employee. The author submits that the standard of fairness should require that proving the misuse of authority in imposing the penalty should be the responsibility of both the employee and the administration, as the employee may not have equal access to the required documents that the administration has in its possession. Therefore, in this part of the chapter, consideration will be given as to whether the Libyan judiciary is meeting the required standard of fairness in placing all the responsibility on the accused employee to prove the misuse of authority during the enforcement of the penalty.

7.3.4.1.1 The Responsibility of the Accused Employee in Proving Misuse of Power

The Libyan judiciary makes it a condition for the public employee to prove and provide evidence of misuse of power by disciplinary authority. Failure to do this can lead to the appeal being rejected by the Court. This was the ruling of the Supreme Court in Libyan Administrative Appeal No.5/15.[63] The case concerned a doctor of obstetrics and gynaecology, who was called for temporary service in the military medical service at Tripoli Hospital (the doctor worked in a different hospital on a permanent basis). When the hospital decided to terminate her service, the doctor claimed that this was a punishment and not for the sake of the interests of the hospital. She appealed to the Appeal Court of Tripoli, who refused her appeal and so she then appealed to the Supreme Court. The Supreme Court also refused her appeal because the employee did not have

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[61] Article 2 (n 18).

[62] Ibrahim Abdelazizshehat, *Administrative Judiciary* (Mnshat Elmarfe 2006) 558-559; Mostafa Fahmi, *Administrative Judiciary and the State Board* (The Home of University Publications 1999) 539.

[63] Administrative Appeal No.5/15, Libyan Supreme Court (7.05.2000) *Unreported.*

any proof that the hospital terminated her service as a penalty on a personal basis, rather than in the interests of the hospital.

It is submitted that the Libyan judiciary (in Administrative Appeal No.5/15) did not consider all aspects of this case. The Court ruled that the employee did not prove the misuse of power by the administration, which is unreasonable. This is because the Court itself should have examined and investigated the causes of the appeal to ensure that the reasons of the penalty were valid, instead of simply asking the employee to prove the alleged misuse of power. It is difficult and may even be impossible for the employee to prove that the administration has in fact misused its power. All the employee can do is to point to the suspected misuse of power and the investigation should then be the task of the Court.

Another example demonstrating that the Libyan judiciary considers providing evidence about misuse of power the responsibility of the accused employee is illustrated in Supreme Court Administrative Appeal No.45/99.[64] This case concerned an employee who worked in the Civil Record Institution. He was transferred from the Civil Record office in the Kowifia area to the civil section in the Salawli area. The employee appealed to the Supreme Court, claiming that the institution had transferred him because he had a conflict with a colleague, that they were not impartial and did not act in the interests of the institution. The Supreme Court refused his appeal, as the employee had no actual proof that the institution transferred him because of a conflict with a colleague. The Supreme Court ruled that the decision of the administration was in the interests of the institution, as the Civil Record of the Salawi area was in need of employees. As a result, the employee's appeal was refused for not being based on valid evidence.

The author submits that the judgment (Administrative Appeal No.45/99) is incorrect. This is because the Court refused the employee's appeal as he was unable to prove that his transfer was not in the interests of the institution. The judgment seems to overlook the fact that investigating the truth is the Court's responsibility and it is not to be left only to the employee to prove his position. The Court did not investigate the workplace to which

[64] Administrative Appeal No.45/99, Libyan Supreme Court (19.05.2005) *Unreported.*

the employee was transferred in order to find out if the workplace effectively needed his services, or whether the administration simply transferred him as a punishment for personal reasons. Therefore, the Court rests all these responsibilities on the employee to prove and has ignored its role in investigating the causes and facts to ensure that the procedures followed by the administrative authority are carried out according to the law and without misuse to the authority.

In conclusion, the Libyan judiciary (in Administrative Appeal No.5/15 and Administrative Appeal No.45/99[65]) makes it a condition that if there is a misuse of authority by the administration, the onus is on the employee to prove misuse. This is unfair. The author submits that the Libyan administrative judiciary provides more "equality of arms" by making it a responsibility of both the administration and the employee to justify their appeals and defences. This is because the employee may not have all the necessary documents required to prove the misuse of authority by the administration, as these documents are usually kept only in the hands of the administration. Consequently, it can be difficult for the employee to prove that the penalty decision is incorrect, as he/she would need documents from the administration to support his/her claims, which can be difficult to source and obtain.

It is submitted that the Libyan judges should investigate the alleged misuse of authority and ask the administration to provide any documents that the employee requests, in order to prove whether or not there has been misuse of power. This is because should the employee asks the administration to provide documents against itself, there is the possibility that the administration will hide such documents. However, should the Court seek the documents in question, then it would become the duty of administration to provide them. Similarly, requiring the administration to provide justification for its decision would be a positive step as it would make the administration take responsibility for justifying its decisions. This will reduce cases of misuse of authority and the administrations will think twice before misusing their authority, if they are made aware that they may be asked subsequently by the judiciary to justify their decision in the event that an employee appeals against it. This point is very important in achieving fairness in

[65] Ibid.

Libyan Courts, as it guarantees more protection to the employee and it also represents justice.

7.4 Conclusion

(a) This chapter examined the fairness and independence of the Libyan Courts and their fairness in reviewing employment cases.[66] The author concluded that Libyan law does not provide an independent administrative Court to consider administrative appeals lodged by employees against disciplinary decisions. Instead, the ordinary appeal Courts and the Supreme Court are assigned to consider these types of cases. Having an independent Court to consider employment disciplinary appeals means that this Court will be specialised in this field and this will reassure employees that their appeals will be dealt with in a professional and impartial manner. Therefore, the author submits that Libyan legislation should be enacted to create an independent administrative Court (including Disciplinary Courts) to consider these types of cases, just as the Egyptian and UK legal systems do.

(b) The author also examined the fairness of the administrative Court in reviewing the legality of penalty decisions that are imposed by non-specialised disciplinary authorities.[67] Courts in Libya with review the legality of the penalty decision that is improperly enforced by a non-specialised disciplinary authority, and the Court will overturn the penalty decision imposed by a non-specialised authority regardless of whether the lack of the specialty is a simple or complex degree.[68] It is submitted that considering any decision imposed by non-specialised authority to be invalid is fair, as the employee will be guaranteed that he/she will not be penalised except by a specialised authority that is competent to do so. However, the Libyan administrative Court makes significant differentiation as to how the degree of lack of specialty affects the limitation period for appealing against a penalty.[69] If the degree of lack of specialty is simple, the

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[66] In detail see Section 7.2 of this Chapter.
[67] As explained in detail in Section 7.3.1 of this Chapter.
[68] See above Administrative Appeal No.119/51 (n 22) *Unreported*; Administrative Appeal No.15/36 (n 25) 25.
[69] Ibid.

appeal must be lodged in the Court within 60 days from notifying the employee of the penalty decision, while if it is serious the Court will agree to review the penalty, even after the 60 days expiration date of the enforcement of the penalty.

The author submits that a differentiation between simple and complex degrees of lack of specialty is fair. This is because, in complex degrees, the Libyan Court can accept an appeal from an employee even after the legal time to appeal has passed. This is because the penalising authority lacks its speciality at a complex degree. This represents a major guarantee to the employee, as it guarantees to him/her that even if the administration wants to rid themselves of the employee by dismissal, he/she will never lose the right to appeal, even if such an appeal is made after the legal time limit has expired.

(c) The author has concluded that the Libyan administrative Court function of reviewing and monitoring the penalty decisions of the disciplinary authority ensures that the disciplinary authority follows laws and procedures during the disciplinary hearing and applies penalties that are within the law. An example of the Libyan Court's monitoring and reviewing of penalty decisions is when the Libyan administrative Court considers a penalty decision invalid if any penalty reviewed is found to be outside of those penalties stipulated by law, or when a penalty is imposed on the employee without a prior investigation. This represents an important guarantee for the employee, as in this way the employee is guaranteed that he/she will not be penalised, except in accordance with the law and in a fair Court.

However, the Libyan legislature does not stipulate a number of procedures that can be regarded as important for the employee during the hearing; such as making the oath mandatory during the hearing,[70] writing down the investigation in all cases, applying the impartiality rules on the administrative investigator and many other procedures that the author has already mentioned in this thesis.[71] These procedures are also important when the employee appeals to the Court, as he/she will be assured that his/her appeal case will be accepted. However, so long as these procedures are still not stipulated in law, the employee cannot appeal for not being treated according to these procedures. Libyan law

[70] As explained in Chapter Three, Section 3.3.5.3.1.
[71] As discussed above in Chapter Four, Section 4.3.2.1.

should consider all these procedures in order for the judiciary to monitor how committed the investigator is to respecting these rules and guarantees to the employee, ensuring he/she gets a fair hearing and avoiding any possible abuse by the disciplinary authority.

(d) The author has examined the Court's review on the commitment of disciplinary authorities to follow the proper disciplinary procedures. The author has concluded that the Libyan Courts do not extend reviews over all disciplinary procedures.[72] The Libyan judiciary makes a differentiation between two types of disciplinary procedures. Firstly, essential procedures, in which failure of the disciplinary authority to follow renders the penalty decision invalid. Secondly, formal procedures, in which failure of the disciplinary authority to follow do not affect the validity of the final decision.

It seems that this differentiation made by Libyan Courts are based on the fact that the first type of procedures (such as conducting an investigation into the accused employee) is stipulated by law, and so an error constituted by a decision contrary to law therefore leads to the invalidity of the penalty decision. However, since the second type of procedure is not stipulated by law, an error in this procedure does not trigger the invalidity of the final decision (e.g., failure to mention the names of the disciplinary committee in Administrative Appeal No.14/16[73] and failure to inform the employee of the penalty decision in Administrative Appeal No.23/6[74]).

The author submits that this differentiation is improper and unfairly prejudicial because it affects the interest of the accused employee. For example, failure to notify the employee of the penalty enforced against him/her may result in prolonging the employee's case, as the employee will not be able to appeal to the Court due to this omission. Also, failure to mention the names of the disciplinary authority members arouses doubts as to the credibility of those members. This is because omitting to mention the names makes it difficult to guarantee that one of these members did not take part in the early stages of the disciplinary process, which would then make that person ineligible to enforce a decision. Therefore, the Supreme Court should have been concerned with reviewing these

[72] As discussed above in Section 7.3.3.2 of this Chapter.
[73] Administrative Appeal No.14/16 (n 54) 37.
[74] Administrative Appeal No.23/6 (n 52) 55.

procedures instead of insisting what is stipulated in the law and what is not, as the function of this Court is not only to apply law, but also to make legal rules where they do not exist in law, if it considers that making a new rule will achieve greater justice.

(e) The author reviewed the limits of the judiciary regarding the misuse of power by disciplinary authorities when imposing disciplinary decisions.[75] The author found that judicial review is weak, because judges place the responsibility of proving the misuse of power on the employee, which in turn is very difficult to prove, as the documentation needed to prove this is held by the administration. The author concluded that the Libyan administrative Court does not guarantee equality of arms in making it a condition that in order to prove a misuse of authority by the administration, the onus is on the employee. It was pointed out that the Libyan administrative judiciary should takes steps to make it the responsibility of both the administration and the employee to prove whether or not the administration has misused its power.

[75] See above Section 7.3.4-7.3.4.1.1.

Chapter Eight

Conclusions and Recommendations

The aim of this thesis has been to evaluate the disciplinary guarantees available to public employees in Libyan law through studying advantages and disadvantages in the disciplinary system, starting from the initial stage of referral to investigation, through to the post penalty-enforcement appeal stage. The author concludes that there are insufficient disciplinary guarantees provided in Libyan law during the disciplinary process, and this chapter the author will sum up the issues that were detected as deficiencies in the disciplinary system of public employment in Libya, and propose some suggestions as solutions for these problems. Therefore, conclusions on four key areas will be presented:

1. Procedures not stipulated by law.

2. Procedures stipulated by law, but which are unfair.

3. Procedures not adequately specified by the judiciary.

4. Contradictions between Libyan legislation and its application by the Libyan judiciary.

8.1 Procedures not Stipulated by Law

There are several elements of disciplinary process that are not stipulated by law at different stages of the disciplinary process. These are:

(a) Referral to the Investigation Stage: Libyan law guarantees to the employee that he/she will not be referred to investigation after the stipulated legal period,[1] which is three years for administrative errors and five years for financial errors.[2] Also, the Libyan judiciary guarantees to the employee the right to appeal against the final decision, if it is imposed by a non-specialised authority.[3] However, neither Libyan law nor the judiciary *specify the authority permitted to make the referral* to the investigation.[4]

The author submits that Libyan legislation should specify the authority permitted to make the referral, as the Egyptian judiciary and Kuwaiti law do. It is submitted that *failure to specify the referral authority* makes the employee liable to be referred to investigation by *any* administrative authority superior to him/her. This creates the potential for unfair treatment and the possibility of bias. In addition, referral to the investigation is a sensitive matter for the employee as it subjects him/her to humiliation before his/her colleagues and also it is a precautionary suspension, a consequence which ensures that half of his/her salary will be withheld and this will not only affect the employee, but also his/her family.

Precautionary suspension is a measure that the administration is permitted to impose if the benefit of the investigation requires that half of the employee's salary is withheld. Libyan legislation specifies the time limit for the precautionary suspension at three months. However, it does not specify the permitted extension period to the suspension and allows the disciplinary committee to estimate this.[5] This is prejudicial to the rights of the employee, the problem being that precautionary suspension is a procedure that should count for the benefit of the investigation. However, the concern is that the disciplinary authority may use this suspension for its own benefit, which can constitute a misuse of its authority. Also, this procedure can have adverse economic and moral effects on the employee's life and family and can affect his/her reputation in the workplace.

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[1] See in detail above Chapter One, Section 1.2.2.
[2] This can be justified by the aim of the legislation in disciplinary law is to protect the public institution and therefore, the error should be discovered, and pursued, within a reasonable specified time. This is unlike the criminal legislation which protects the community at large, and where discovering, and pursuing, the criminal act at any time will still be a valid objective, in the interests of the wider community.
[3] See Chapter Seven, Section 7.3.1.
[4] See in detail above Chapter One, Section 1.2.1.
[5] See in detail above Chapter One, Section 1.3.3.

Therefore, the author submits that Libyan legislation should specify the permitted extension period, as Kuwaiti law does, to clear confusion and also to guarantee that neither the administration nor the disciplinary committee misuses its authority with respect to this issue. The thesis also submits that the precautionary suspension procedure is a precautionary procedure *for the benefit of the investigation* and should not constitute a penalty for the employee. Therefore, in Libyan law, the salary should continue to be paid in full to the employee during the investigation (as is the case in UK law) because there is no reason to withhold half the employee's salary during the suspension period pending the final outcome of the investigation.

(b) The Stage of the Investigation and Penalty Enforcement: Libyan law guarantees to the employee that he/she will not be penalised until an investigation into him/her has been conducted.[6] This is in order to give the employee the chance to defend him/herself either by calling a lawyer, and calling witnesses, or by remaining silent.[7] However, the author concludes that Libyan law misses a number of points that affect the guarantees of the employee during the disciplinary process. These are as follows:

(i) Libyan legislation stipulates the necessity of conducting a written form of investigation with the accused employee.[8] However, Libyan law does not require essential details such as *the date of the investigation to be recorded,* nor does it require *signatures to be placed on the record.*[9] It is submitted that Libyan legislation should include these elements in its public employment laws (just as Libyan Law No.2 of 2007 concerning People's Inspection and Control System does). This is because these are important guarantees for the accused employee, one of which includes giving the employee the right to sign the record of the investigation. This guarantees that once the record of the investigation is signed, no one can subsequently add any further statements.

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[6] See Chapter Two, Section 2.4.
[7] See Chapter Three, Section 3.3.3-3.3.5.
[8] See Chapter Two, Section 2.5.
[9] See Chapter Two, Section 2.5.1-2.5.1.3.

(ii) With respect to the right of *presenting the accused employee with the charges* against him/her, Libyan law guarantees this right in the disciplinary hearing stage,[10] but does not guarantee it at the investigation stage. This is because the law does not specify the method of informing the employee of the charges at the investigation stage. The author submits that Libyan law should deliver the notification of the investigation to the accused employee personally and get him/her to sign this notification, as it does at the disciplinary hearing stage. This is because the investigation stage is not a less serious stage than the disciplinary hearing stage, as even the investigation stage can result in enforcing a penalty against the employee. Notifying the employee at the investigation stage of the charges against him/her by this method will allow the employee sufficient preparation for his/her defence in advance.

(iii) With respect to the right of defence, Libyan law gives the employee the right to call witnesses at both the investigation and disciplinary hearings, but does not stipulate the significance of witnesses taking the oath,[11] which is unfairly prejudicial. Taking *testimony without oath makes the credibility of testimonies questionable* and this could affect the guarantees of the employee in securing an honest statement from witnesses. Taking the oath may encourage the witness, by moral conscience, to tell the truth even if he/she is in conflict with the accused employee. It is submitted that Libyan law should stipulate that witnesses take the oath (as Kuwaiti law does, and as does Libyan Law No. 2 of 2007, regarding the People's Inspection and Control System).

Also, Libyan law does not stipulate *whether the employee has an unfettered right to call witnesses* in all cases, or whether the investigator has the right to refuse the employee's request to call witnesses.[12] The author submits that Libyan legislation should stipulate the cases where an administrative investigator can refuse the employee's request to call witnesses, as leaving the acceptance or refusal to the total control of the investigator is unfair because this can provide unlimited authority to the investigator to refuse the

[10] Article 90 of Law No. 55 of 1976 regarding the Civil Service informs the accused employee of the referral decision in writing, to the Disciplinary Committee (disciplinary hearing) with a confirmation of receipt. This includes the charges against him/her, as well as the date and time of the disciplinary hearing. See in details Chapter Three, Sections 3.2.1.2.
[11] See Chapter Three, Sections 3.3.5.3 and 3.3.5.3.1.
[12] See Chapter Three, Section 3.3.5.2.

employee's request, which in turn threatens the employee's right to call witnesses. The Libyan judiciary should to do as the Egyptian judiciary and UK law do,[13] which is not to give the investigator the right to refuse the employee's request to call witnesses, unless the request to call witnesses includes hearing witness statements which had already been heard previously, or where a witness's testimony would not be relevant to the dispute at issue.

(iv) The author considered that Libyan law, which allows the investigatory authority to impose *warnings and salary deduction penalties* (because it regards them as simple penalties), while giving the disciplinary committee the power to impose complex penalties, such as dismissal.[14] The author concluded that Libyan law acts prejudicially to the rights of the employee when it permits salary deduction to be imposed by the investigatory authority. This is because salary deduction is not a simple penalty, as it has serious consequences for the employee's ability to cover for the living costs of his/her family. This is because, in most cases, his/her job is their only source of income, so giving the investigatory administration the right to impose a salary deduction penalty is unfair as the administration may misuse its authority and impose this penalty for personal reasons. Accordingly, this penalty should be imposed by an independent authority such as a disciplinary committee, which is composed of judicial members who have more ability and experience to judge whether it is necessary to impose this penalty or not.

(v) With respect to whether *impartiality in the investigation and disciplinary hearing stage* is respected, Libyan law applies impartiality rule at the disciplinary hearing stage because it guarantees employees that if any one of a number of specified conditions affect the partiality of the judge, if the judge does not then step down from the case, his/her penalty decision is illegal.[15] This is fair because impartiality is one of the guarantees that should be provided to the accused in order to obtain a fair judgment. However, in the investigation stage, while Libyan law guarantees to the employee that he/she will be

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[13] Ibid.

[14] See Chapter Four, Sections 4.2-4.2.2.3.

[15] Libyan law forbids any member of the disciplinary committee to stay on the committee if this member previously participated in any of the early stages in the disciplinary process with the accused employee. For further information see above Chapter Four, Section 4.3.2.2.

made aware of the identity of the disciplinary authority who will investigate him/her[16] and also the administrative authority who will impose the warning and a salary deduction penalty,[17] nevertheless this is unfair because Libyan law *does not sufficiently differentiate* or separate between the authorities of investigation and those imposing the penalty. This goes against the principle of impartiality.

The author submits that legislation should differentiate between these two authorities and that this be done by applying the principle of impartiality to the administrative investigator in much the same way it is applied to members of disciplinary committees. This is because an investigator is no less important than a member of a disciplinary committee, as both can impose penalties on the employee. Therefore, Libyan legislation should *differentiate* between the authority who conducts the investigation, and have a separate authority to direct the charges and imposes the penalty by leaving the investigatory authority to the Public Control Monitoring System, and the penalty imposition responsibility to the administration. Also, the thesis submits that Libyan law should consider creating rules that forbid an investigator from conducting an investigation into an employee where there is a personal conflict between the two, and should also forbid the investigator from acting in any way that could affect the statements made by the accused employee during the investigation.

(vi) With respect to *stating the reasons for imposing the disciplinary penalty*: the author concludes that Libyan law stipulates the necessity of justifying any penalty decision with reasons,[18] but it does not specify the method for doing so.[19] Is it enough to mention the reasons in brief, or should they be mentioned in detail? All these questions still stand and need to be answered. The author submits that Libyan legislation should require the reasons for imposing the penalty decision to be specified in detail, in order to justify the decision with reasonable cause, as UK law does, and it should also mention the causes in

[16] See Chapter Two, Section 2.2.
[17] See Chapter Four, Section 4.2.1.
[18] See in detail above Chapter Five, Section 5.5.
[19] This leads to a contradiction between the judgments of Libyan administrative Courts because some judgments (in Administrative Appeal, No.29/10) ruled the necessity of mentioning the causes of the penalty in the penalty decisions and others (in Administrative Appeal No.92/44) ruled that it is enough to refer to the causes which were mentioned in the referral decision. This contradiction may affect the employee in such a way that the employee cannot clearly know when he/she can appeal in this situation. In detail see above Chapter Five, Section 5.5.1.1.

the original penalty decision, as Egyptian law does. Mentioning the causes underlying the decision helps the employee to prepare his/her appeal when he/she lodges an appeal to the Court. Also, this will enable the Court to review the contested decision where the reasons underpinning it are clearly stated.

(c) *The Stage after Imposing the Penalty*

(i) Libyan law gives the employee the right to appeal to the administration which imposed the penalty, or even to appeal directly to the Court, bypassing the administration:[20] This is fair because the law allows the employee the privilege that the Court will look into his/her case without a prior administrative appeal. However, Libyan law omits a number of details which could preserve more rights for the employee in the appeal process. One of these procedures would be to have an imposed substantive requirement so that *the form of the appeal*, such as the name of the appellant, the subject and the date of the appeal would have to be specified.[21] This is because these details would help the Administration to understand the appeal so the employee would be less likely to lose his/her rights. The failure of Libyan law to require these details can be a source of unfairness. Also, Libyan law is unfairly prejudicial when it does not stipulate that the employee must be furnished with a receipt by the administration when submitting his/her appeal.[22] This is because these procedures are to protect the employee in case the administration denies receiving the appeal, as the receipt would confirm that the administration did in fact receive his/her appeal. Additionally, the receipt will help the employee to calculate the legal limitation period to lodge an appeal to the Court, from the date of submitting his/her appeal to the administration. Accordingly, the author submits that Libyan legislation should consider taking the Egyptian legislation route, where it stipulates that the appellant should include all the above mentioned details and it should also force the administration to record the appeal and to furnish receipts to the appellants, as Kuwaiti legislation does.

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[20] See above Chapter Six.
[21] For further explanation see above Chapter Six, Section 6.3.1.
[22] See above Chapter Six, Section 6.4.2.

(ii) In giving the employee the right to appeal against a disciplinary decision and submit it to either the administration or to the presidential authority[23] (if they chose not to appeal directly to the Court), Libyan law is unfair and prejudicial to the employee's rights. This is prejudicial because appealing to the administration means that the authority *who imposed the penalty* will be the *same one who will judge*-the appeal. Therefore, its judgment on the appeal is likely to go against the employee, as it is difficult for the administration to admit a mistake if it had already made it at the investigation stage. Therefore, the author submits that Libyan legislation should stipulate a third independent authority to look into the appeal when an employee appeals to the administration. This authority can be the "law management department", as is the case in Kuwaiti law.

(iii) Libyan law also guarantees that the accused employee can appeal to the administrative Court (a judicial authority).[24] However, Libyan law *does not provide an independent administrative Court* to consider appeals lodged by an employee against a penalty decision. Instead it has only one judicial system, consisting of several administrative circles, which are in essence not separate from the criminal and civil circles.[25] Accordingly, it would be a breakthrough for the Libyan disciplinary system if an independent, disciplinary judicial system could be created in which Libya had Employment Courts specialising in employees' issues, as the Egyptian or UK the judiciary does, where employment tribunals and employment appeal tribunals deal with employment issues and conflicts. These Courts would be independent, impartial and more specialised in employment issues, than "ordinary" Courts.

8.2 Procedures Stipulated by Law but which are Unfair

(a) Investigation Stage: Libyan law stipulates the necessity of conducting the investigation before imposing the penalty, so that the employee can defend him/herself. However, Libyan law does have exceptions to this rule, where it is permitted to penalise

[23] See above Chapter Six, Section 6.4.2.
[24] In detail see above Chapter Seven.
[25] See above Chapter Seven, Section 7.2.

the employee without an investigation, under two circumstances.[26] This is unfair because it goes against the most basic right of the employee, which is to defend him/herself from an unjust accusation. Therefore, the author submits that Libyan Law should require the conduction of an investigation into the accused employee *in all cases* without any exception, just as Egyptian law does.

Libyan legislation stipulates the necessity of conducting *a written form* of investigation with the accused employee.[27] However, Libyan law does make exceptions to this rule where it is permitted to conduct *a verbal form* of investigation in one situation, which is if the final penalty is a warning or salary deduction.[28] This means that if the administration conducts a verbal investigation into an employee when they already know the result, even before conducting it, this it is unfairly prejudicial to the employee's rights. The administration should base its final decision on the facts and evidence of the case, not according to its prejudices. Also, the verbal investigation in Libyan law does not require the administration to write down every detail, such as the questions that were directed to the employee, and his/her answers. Accordingly, this incomplete investigation record can adversely frustrate the employee from basing his/her defence before a Court.

It is submitted that this is unfair as the administration can conduct all types of investigations in a verbal form. The author submits that Libyan legislation should, in all cases, stipulate the necessity of conducting the investigation *in a written form,* as this will be the reference that the employee can refer to if he/she subsequently wishes to appeal to the Court.

(b) ***The Stage following Imposition of the Penalty*:** Libyan law gives the accused employee the right to appeal to the administration within 60 days of imposing the penalty.[29] However, Libyan law gives the administration the right either to reply or to remain silent.[30] It is submitted that this is unfair to permit the administration to remain silent, as this may cause the employee to lose the opportunity to appeal to the Court

[26] If the error committed by the employee was observed by the administrative head himself, or if that error is proven by evidence. For further information see Chapter Two, Section 2.4.1.
[27] As explained in detail on Chapter Two, Section 2.5.
[28] As explained in detail on Chapter Two, Section 2.5.2.
[29] See above Chapter Six, Sections 6.4.1-6.4.2.
[30] See above Chapter Six, Section 6.5.1.2.

within the short time limit (i.e., within 60 days of submitting an appeal or 60 days from receiving no response). The employee might wait (expecting a response) until the 60 days from submitting an appeal has elapsed without being aware that the administration has the right to remain silent. The thesis submits that *Libyan law should require the administration to respond to employees' appeals in all cases without exception*, so that the employee will, in all cases, be guaranteed the right of appeal to the Court within the legally stipulated time limit if his/her appeal against the administration's decision is not accepted.

8.3 Procedures Not Adequately Specified by the Judiciary

Some procedures are not stipulated by the legislator, the latter having left some procedures to be stipulated by the Libyan judiciary (Libyan Courts). These procedures are as follows:

(a) ***The Stage of Referral to the Investigation***: The judiciary permits the right of appeal to the Court against the referral to investigation decision only after the final decision (penalty) has been enforced.[31] This can act prejudicially to the rights of the employee because the referral to the investigation in itself has adverse consequences on the employee's life, such as precautionary suspension and withholding half of his/her salary, which the author regards as sufficient reason to allow the employee to appeal against the referral decision to the Court. It is therefore submitted that referral of an employee to an investigation should, under Libyan law, be subject to appeal by the accused, owing to the serious prejudicial impact arising from the referral.

(b) ***The Stage of Imposing the Penalty:*** Failure of the Judiciary to review the proportionality between the penalties imposed by the disciplinary authorities and the error committed:[32] the Libyan Supreme Court has demonstrated over time that it is not sufficiently strict with respect to reviewing the disciplinary authorities' decisions. In the first phase of its jurisprudence it gave the disciplinary authority the power to enforce

[31] See above Chapter One, Section 1.2.3.
[32] See above Chapter Five, Section 5.4.1.

decisions without any monitoring from its side. In the second phase, it recognized that the administrative judge had the power to review the decisions of the disciplinary authority, including the severity of the administrative penalty. However, it regressed in the third phase, as the Supreme Court went back to the first stage approach and refused to review proportionality of penalty and error. It is submitted that the Libyan Supreme Court, in taking this approach, acts prejudicially to the rights of the employee, as it appears that it has demonstrated a degree of contradiction and confusion in this matter in its jurisprudence.

This is unfair for the employee as the Supreme Court judgments are binding on the lower Courts and therefore should be consistent; otherwise the lower degree Courts would rule against either the necessity of reviewing or rejecting background control over the proportionality between the penalty and disciplinary error. This adversely affects the employee, as the disciplinary authority may impose a severe penalty for a minor error, because the law does not specify a particular penalty for each specific error. Therefore, the judiciary is needed to intervene and review the proportionality of the decisions of the disciplinary authorities when asked to do so, in order to ensure that the right penalty was imposed for a particular error.

The author submits that the Libyan judiciary should do, just as the Egyptian judiciary does, ie., assert the power to review all decisions of disciplinary authorities during appeals, because this is the last guarantee to the employee. In the absence of a review, the employee has no chance to overturn a disproportionate decision against him/her.

(c) ***The Stage after Imposing the Penalty***

Administrative Appeal Stage**:** sometimes while the employee's appeal is proceeding before the Court, the administration may revise its original decision (prior hearing to the response of the Court to the initial appeal) and reduce the penalty against him/her.[33] However, Libyan law is unfairly prejudicial because it does not stipulate the consequences of an employee appealing to the Court without waiting for the result of his/her first appeal to the administration, if during this time the administration had revised

[33] For further information see above Chapter Six, Section 6.5.2.

the original penalty that it had originally imposed.[34] This is because the employee in this case does not know what procedures should be followed. The question arises: does the employee have to lodge a new appeal to the Court against the administration's amended decision or can he/she continue with his/her initial appeal to the Court? This is unfair because lodging a new appeal to the Court after the amendment of the decision would require the employee to pay more legal fees in order for the Court to hear his/her new complaints.

Therefore, the author submits that the Libyan judiciary should consider the route taken by the Egyptian judiciary,[35] and rule that the employee can continue with his/her appeal to the Court by amending his/her complaint according to the revised decision of the administration, as this will be at less cost to the employee and achieve more rights for him/her by encouraging the employee to pursue his/her case without fear of incurring additional legal costs, arising from the amended appeal.

Also, Libyan law is prejudicial to the employee's rights where it gives *the administration the right to remain silent and give no response to the appeal.* This may encourage the administration to neglect looking into the employee's appeal and as a result this can lead to the employee missing the opportunity to lodge an appeal to the Court because the authority might not reply before the legal time period expires (within 60 days from the date that employee received the penalty decision). Therefore, it is submitted that Libyan law should make it mandatory for the administration to respond to all employee appeals, just as UK law does.

Appeal Court Stage: *Failure of the judiciary to review the procedures that represent guarantees to the accused employee:* The Administrative judiciary permits the employee the right to appeal against the penalty decision on several grounds, one of these being if the penalty decision is not imposed in accordance with the form of procedures specified by the disciplinary system in Libya.[36] This means that the law gives the judiciary the authority to ensure that decisions must be in accordance with the form of procedures

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[34] Ibid.
[35] Egyptian Administrative Supreme Court, Appeal No. 2402/33 (18.11.95) Council State, *Unreported.* See in detail Chapter Six, Section 6.5.2.
[36] As explained in detail on Chapter Seven, Section 7.3.3.

specified in the disciplinary system. However, the judiciary[37] has failed to review these procedures on a number of occasions, such as where it ruled that failure to mention the disciplinary members' names does not affect the validity of the penalty decision. This approach acts prejudicially to the rights of the employee because the disciplinary committee is formed according to law and offers significant guarantees for the employee. Declaring the names reassures the employee that no one of the members has already participated in the earlier investigation stages in his/her case. The justification (stating that these procedures were not stipulated by law) which the Libyan judiciary[38] has given for not extending its review of these procedures demonstrates a weakness in judiciary's attitude.

This is regrettable because the Libyan judiciary should aware that discipline is a field that evolves every day and that exceptional cases may come along which require exceptional procedures and therefore the law does not ask the judiciary to review the legality of the form of procedures according to the legislated law only. The reason being that: if the legislation wanted the judiciary to review certain disciplinary procedures only where that is specifically required by law, then it should not stipulate that the judge has the right to review an error (constituted by a decision contrary to the form of the procedures) as a separate reason for him/her to review the validity of the decision. It is submitted that the law does so because it wants the judiciary to review the form of procedures to achieve a fair disciplinary hearing. Therefore, the author submits that the judiciary should review all forms of procedures taken by disciplinary authorities and should estimate what is and is not reasonable among them, even if they were not stipulated by the law.

Failure to detect the misuse of power in a reasonable way: Libyan law gives the employee the right to lodge an appeal to the Court against a penalty decision if he/she finds that there has been a misuse of power by the disciplinary authority.[39] The author submits that this is fair because the purpose of enforcing the penalty is to deter the employee from committing the error again, not to seek revenge on him/her. However, the

[37] Administrative Appeal No.14/16, Libyan Supreme Court (14.07.70) Supreme Court Journal, Year 7, no1, 37. For further about this judgment see Chapter Seven, Section 7.3.3.2.
[38] Ibid.
[39] See Chapter Seven, Section 7.3.4.

Libyan judiciary requires that the employee must prove this misuse.[40] It is submitted that, in the Libyan Court, this is a defective process which is unfairly prejudicial to the employee's rights. This is because the judiciary makes it very difficult for the employee to prove any possible misuse of authority by the administration (disciplinary authority) as it asks the employee to prove the misuse of power even though the judiciary is aware that the employee cannot prove this. The employee needs documents from the administration to prove the misuse of power and the administration is a conflicting party in the case which imposes the penalty, so it is unreasonable for it to give the employee any evidence to prove any misuse on its part. The author submits that proving the misuse of power should be a responsibility of both the employee and the administration, because this encourages the administration to impose an impartially fair decision, and if it does otherwise, then it is required to cooperate with the employee and give him/her any required documents to prove its misuse of power.

8.4 Contradictions between Libyan Legislation and its Application by the Libyan Judiciary

(a) Libyan legislation gives the right to the employee to call his/her lawyer in all cases in the investigation stage and in the Court.[41] However, the Supreme Court in Administrative Appeal No.9/15[42] refused that right and ruled that this right can only be provided in criminal errors. It is submitted that this is a defective process which is prejudicial to the employee's rights. This is because the Court represents the force of application of law and its judgment should be according to the legislated law, unless there is no legal text for a particular issue, when the Court can then make reasonable and fair rules according to the circumstances of the case. Failure to follow the law by the Supreme Court can encourage all the lower degree Courts and administrations to do the same, forbidding the employee to call his/her lawyer, even though this right is given to the employee by the law. Therefore, the author submits that the Supreme Court should not misinterpret or

[40] As explained in detail on Chapter Seven, Sections 7.3.4.1.1.
[41] In detail see Chapter Three, Section 3.3.4.
[42] Administrative Appeal No.9/15, Libyan Supreme Court (3.05.70) *Supreme Court Journal,* Year 6, no. 4, 44. For further information about this judgment see Chapter Three, Section 3.3.4.

oppose the law, or it should at least provide the employee with the right to call his/her lawyer when the charge directed against him/her can threaten his/her professional career (as is the case in UK law).

(b) With respect to the fairness of Libyan law in presenting the accused employee with the charges against him/her, Libyan legislation is fair in requiring the employee to be provided with the right to be presented with the charges against him/her during the investigation and disciplinary hearing.[43] However, the Libyan judiciary[44] does not rule that the penalty decision is invalid where the employee is not presented with the charges at the investigation stage, so long as this failure is corrected in the later stage of the disciplinary hearing. It is submitted that this judgment is prejudicial to the employee's rights, because providing this right to the employee in both stages is considered an essential guarantee to the accused employee to prove his/her innocence. Therefore, it is submitted that the Libyan judiciary should apply the law and give the employee the right to be presented with the charge against him/her at all stages of the disciplinary processes.

In conclusion, is there a disciplinary employment law in Libya? The author concludes that there is no one disciplinary employment law in Libya: all disciplinary procedures are divided between current Law No. 12 of 2010; previous Law No. 55 of 1976 and Law No. 88 of 1971concering Administrative Judiciary; and the Civil Law Procedures Act 1953. The author submits that it would be better if Libyan law created a disciplinary employment law to discipline employees and include in it all the rules regarding disciplinary procedures, instead having them dispersed accross more than one law. This will be a breakthrough in the system and will help discipline to be more organised and will also help to remove any unclear issues and weaknesses in the system. Perhaps having disciplinary legal text laws in separate sources may even affect time and speed in a disciplinary hearing. It affects the employee's time as it will be time- consuming for him/her or even his/her lawyer to make a strong defence as he/she will need to consider different sources of law.

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[43] As explained in detail on Chapter Three, Section 3.2.
[44] Appeal Court No.58/26, Administrative Court of Bangazi (17.01.98) *Unreported.* See in detail Chapter Three, Section 3.2.

The author believes that providing guarantees for public employees at every stage of the disciplinary hearing is important, as failure to do so may affect the employee at a later stage of the proceedings hear. Therefore, all disciplinary guarantees are significantly important for public employees and should be provided to them during the disciplinary hearing. However, it is concluded that some of these guarantees can affect the employee more than others. These guarantees are: 1. specifying the authority concerned with the referral to the investigation and conducting an investigation with the accused employee in all cases without exceptions as this will provide the employee with the right of defence. 2. The investigatory authority should be independent and impartial to guarantee that the employee will have a fair disciplinary hearing. 3. Review the proportionality between the penalty and disciplinary error to guarantee that the employee will not be penalised by an extreme penalty. 4. The administrative appeal should be made to an impartial independent authority to guarantee to the employee the impartiality of the authority concerned with the appeal. 5. There should be independent Disciplinary Courts to guarantee to the employee that he/she will be considered by a specialized authority and also to save time and increase the speed of the disciplinary process. 6. Commitment of Courts to apply legal texts and remove any contradiction between law and its application, as this will affect the final judgment. This is not to say that other guarantees are not important but it is the author's belief that a major change in the disciplinary system in Libyan law can come through reforms in the guarantees outlined above.

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