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**(De)Liberalizing Judicial Independence
in Egypt**

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The January 25th Egyptian revolution was initiated in the public square and defeated in the courts.² In the months following the forced resignation of longtime president Hosni Mubarak, a protracted power struggle ensued between a people demanding self-governance and a chronically authoritarian regime. As the various stakeholders within the “deep state”³ realized their political disadvantage in mass street mobilizations by youth activists and opposition groups, they strategically transferred the conflict to the courts. Cognizant of Mubarak’s success in co-opting significant portions of the judiciary, the military-led interim government trusted the judges to deploy thin notions of rule of law to quash Egyptians’ demands for substantive justice and populist democracy. Thus, assessing the implications of Egypt’s so-called January 25th Revolution warrants an inquiry into the role that courts played in the retrenchment of a centralized, authoritarian state and what ultimately became a stillborn revolution.⁴

In the heady days following Mubarak’s forced resignation, youth activists and the Muslim Brotherhood had few qualms with litigating the revolution. In the 1990s, the judiciary had been the only state institution that dared to check executive powers through rights-protective rulings and public condemnations of fraud in the 2005 parliamentary elections.⁵ Indeed, the Egyptian

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² *Timeline: Egypt’s Revolution*, ALJAZEERA, (Feb. 14, 2011), <http://www.aljazeera.com/news/middleeast/2011/01/201112515334871490.html>; Amir Ahmed, *Thousands Protest in Egypt*, CNN, (Jan. 26, 2011); <http://edition.cnn.com/2011/WORLD/meast/01/25/egypt.protests/>.

³ The idea of the “deep state” was first used to describe the political structure of Turkey, which has a democratic government, but also a powerful military that steps in to intervene when the leadership veers too far, in its view, towards Islamism. Sarah Childress, *The Deep State: How Egypt’s Shadow State Won Out*, FRONTLINE, Sept. 17, 2013, <http://www.pbs.org/wgbh/pages/frontline/foreign-affairs-defense/egypt-in-crisis/the-deep-state-how-egypts-shadow-state-won-out/> (quoting Nathan Brown, a professor of political science and international affairs at George Washington University); STEPHEN R. GRAND, UNDERSTANDING TAHRIR SQUARE - WHAT TRANSITIONS ELSEWHERE CAN TEACH US ABOUT THE PROSPECTS FOR ARAB DEMOCRACY, 198 (2014) (They have created “deep states” or “states within a state”—extensive domestic intelligence services and vast military establishments—that are kept out of public view, cloaked in secrecy, and that often operate beyond the control of political leaders).

⁴ See, e.g., Sahar F. Aziz, *Bringing Down an Uprising: Egypt’s Stillborn Revolution*, 30 Conn. J. Int’l L. 1 (2014) (provides a descriptive analysis of the key factors that caused Egypt’s January 25th revolution to be coopted into a mere mass uprising).

⁵ Tamir Moustafa, *Law Versus the State: The Judicialization of Politics in Egypt*, 28 Law & Soc. Inquiry 883, 895-96 (2003) [hereinafter *Judicialization*]. (The SCC even ruled national election laws unconstitutional in 1987 and 1990, forcing the dissolution of the People’s Assembly, a new electoral system, and

judiciary had a long history of fighting for its independence from executive branch interference such that both secular activists and Muslim Brotherhood supporters viewed it as a liberal institution that would side with their calls for social justice.⁶ What transpired since 2011, however, has exposed the fallacy of these assumptions and called into question the liberal underpinnings of Egypt's judiciary. In the end, the judges' self-ascribed roles as the guardians of social order and political stability has proven to be more rhetorical than substantive.⁷

Accordingly, this article examines how a critical mass of Egyptian judges have strayed from the judiciary's liberal roots dating back to the 19th century, resulting in the legitimation of the same authoritarian regime but for a new military elite coalition at the helm. Through mass death sentences of Muslim Brotherhood (MB) leaders and alleged supporters, convictions of dissident journalists, and punitive sentences of youth activists for protesting; the judiciary has signaled support for illiberal authoritarian practices that systematically quash personal, political, and legal liberty.

I challenge the predominant narrative in American legal scholarship that depicts the Egyptian judiciary as a relatively liberal institution within an otherwise illiberal political context.⁸ I argue

early elections.¹⁴ Two similar rulings forced comparable reforms to the system of elections for both the upper house (Maglis al-Shura) and local council elections nationwide. Although the rulings on election laws hardly undermined the regime's grip on power, they did significantly undermine the regime's corporatist system of opposition control. Simultaneously, judicial activism in both the SCC and the administrative courts allowed opposition activists to successfully challenge decisions of the regime-dominated Political Parties Committee and to gain formal opposition party status. By 1995, 10 of Egypt's 13 opposition parties owed their very existence to court rulings.)

⁶ Sahar F. Aziz, *Independence without Accountability: The Judicial Paradox of Egypt's Failed Transition*, Penn State Law Review (forthcoming 2015).

⁷ See, e.g. Boursou Daragahi, *Egypt's "Hanging Judge" Accused of Politicized Verdicts*, FINANCIAL TIMES, (April 24, 2015), <http://www.ft.com/intl/cms/s/0/18898000-e297-11e4-aa1d-00144feab7de.html#axzz3ZA4uA9q>. (reporting that Judge Nagi Shehata presiding over high profile cases against journalists and Muslim Brotherhood defendants stating "Judges are the shadow of God on earth, and we are designated by Him to maintain justice," to el-Watan, a pro-regime newspaper, in February [2015]. A judge has no fear but from God.").

⁸ Tamir Moustafa, *The Political Role of the Supreme Constitutional Court: Between Principles and Practice*, in JUDGES AND POLITICAL REFORM IN EGYPT 94, (Nathalie Bernard-Maugiron ed., The American University in Cairo Press 2008)[hereinafter *Principles*]; Tamir Moustafa, *Law Versus the State: The Judicialization of Politics in Egypt*, 3 J. LAW & SOC. INQUIRY 883, 885 (2003) [hereinafter *Judicialization*]; see Nathan Brown, *Reining in the Executive: What Can the Judiciary Do?*, in JUDGES AND POLITICAL REFORM IN EGYPT 111, 141 (2008)(discussing the impact of the independent nature of the courts in Egypt); STEVEN A. COOK, RULING BUT NOT GOVERNING: THE MILITARY AND POLITICAL DEVELOPMENT IN EGYPT, ALGERIA, AND TURKEY 65 (2007); Clark B. Lombardi, *The Constitution as Agreement to Agree: The Social and Political Foundations (and Effects) of the 1971 Egyptian Constitution*, SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS (ed. Denis Galligan & Mila Versteeg) (Cambridge 2013); Clark B. Lombardi, *STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE SHARI'AH INTO EGYPTIAN CONSTITUTIONAL LAW* (Brill 2006); *But see*, BRUCE RUTHERFORD, *EGYPT AFTER MUBARAK: LIBERALISM, ISLAM, AND DEMOCRACY IN THE ARAB WORLD* (2013).

that both exogenous and endogenous factors caused a critical mass of judges to incorporate illiberal (and elitist) values that consider populist political mobilizations a larger threat to social order and thin rule of law than an over-reaching, authoritarian executive branch. My critique brings to the forefront the Egyptian judiciary's flawed definition of judicial independence as restricted to horizontal accountability against executive interference into judicial affairs with minimal regard for vertical accountability between the state and the people.⁹

Egypt's judges have significant material and status interests at risk had meaningful reforms to judicial hiring and accountability been implemented. Pervasive nepotism that benefits sitting judges' sons and male relatives, lucrative secondments distributed based on opaque political criteria rather than transparently by merit, and minimal accountability to the public for judicial spending or governance would have been subject to change had the public's demands for political reform been met.¹⁰ Thus, Egypt's judiciary fought to obtain increased autonomy from executive interference while avoiding accountability to the people. The consequence is a judiciary that has failed in its role to protect and enforce private and political liberty.¹¹ Over the long, run the judiciary is likely to pay a high price in terms of its legitimacy before the public.¹²

While a full explication of liberalism is beyond the scope of this chapter, I begin a brief description of liberalism to highlight the contradiction between the judiciary's liberal rhetoric and illiberal behavior. Section II summarizes the liberal roots of the Egyptian judiciary arising from its interaction with European judges in the late 19th century through the formation of the Mixed Courts and participation in the anti-colonialist independence movement of the early 20th century. The section discusses the various methods employed by the Nasser and Sadat regimes to quash or co-opt a judiciary committed to political and legal liberalism from engaging in meaningful horizontal accountability vis-à-vis a nationalist authoritarian executive branch. Section III explains how Mubarak manipulated incentives and preferences to produce a fractured judiciary between loyalist judges ideologically supportive of a strong executive and distrustful of populist democracy, opportunist judges who place their individual material

⁹ SIRI GLOPPEN et al., *COURTS AND POWER IN LATIN AMERICA AND AFRICA* 13 (2010).

¹⁰ *Separating Law and Politics: Challenges to the Independence of Judges and Prosecutors in Egypt*, 54 Report of the International Bar Association Human Rights Institute (Feb. 2014) [hereinafter *Law and Politics*].

¹¹ Marcela Rodriguez, *Some Thoughts on Institutional Structures in the Judicial Process*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY* 167 (Irwin P. Stotzky ed., 1993).

¹² "The worst culprits in the erosion of justice, of civil society, of everything that makes life livable in Egypt are the judiciary," the renowned writer and activist Ahdah Soueif told me moments after her nephew, the prominent activist Alaa Abdel Fattah, was sentenced to five years in prison for a peaceful protest. "It's been such a bitter disappointment and knowledge that they could destroy a basic belief in justice that people have because they've decided that their interests lie with this regime. It's unbelievable." Kouddous, *supra* note 40.

interests above judicial reforms they support, and reformist judges who engage the public to pressure the executive to act on its stated commitment to judicial independence.. Finally, Section IV contextualizes the current judiciary’s illiberal and counter-revolutionary rulings. I argue that notwithstanding the judiciary’s liberal roots and historical struggles for judicial independence from executive interference, a majority of Egyptian judges hold elitist, anti-populist, and thin notions of rule of law that emphasize formalist legal liberty while disregarding political and private liberty. That judges have been successful in doing so and still remain on the bench, exposes the limitations of liberalism in serving as an ideological framework for the Egyptian peoples’ revolutionary demands for “bread, freedom, and social justice.”

I. The Three Prongs of Liberalism: Private, Political, and Legal Liberty

Liberalism is animated by the principle that personal freedom is the only good worth pursuing so long as it does not deprive others of their freedom.¹³ Toward that end, classical liberalism is comprised of private liberty, political liberty, and legal liberty.¹⁴ Private liberty, commonly referred to as individual rights, is rooted in natural law. Private liberty grants human beings a minimum level of integrity of body and mind that in its fullest produces personal privacy. As such, the right against torture, unjustified imprisonment, constraints on movement, and forced labor are negative rights protected by private liberty.¹⁵ Some theorists argue that economic liberties such as the right to private property and freedom of contract are also part of private liberty.¹⁶ Any government actions that violate private liberty are thus prohibited unless they are necessary to prevent harming others.

To avoid strife and insecurity, the liberal social contract presumes that autonomous, rights-bearing individuals consensually enter a covenant to form a government authorized to create and enforce law in the interest of preserving order.¹⁷ This covenant between the government and the governed produces political liberty. Some liberal theorists argue that democracy is

¹³ Brian Z. Tamanaha, *Rule of Law in the United States*, in *ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S.* 56 (Randall Peerenboom, ed., RoutledgeCurzon 2004).

¹⁴ *Id.* at 58. (noting, however, that early liberals opposed popular democracy because they distrusted rule by the ignorant masses susceptible to demagoguery).

¹⁵ Cass R. Sunstein, *The Negative Constitution: Transition in Latin America*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY* 368 (Irwin P. Stotzky ed., Westview Press 1993).

¹⁶ Sunstein, *supra* note 15, at 369.

¹⁷ Tamanaha, *supra* note 13, at 56-57.

integral to preserving political liberty.¹⁸ That is, political liberty can only be realized through the right to vote and freedom of speech, assembly and association.¹⁹ As a result, government legitimacy arises from individuals' consent to be subjected to the dictates of law that treats each person equally bound by law. This in turn establishes rule of law. Notably, some scholars argue that the consent required to produce political liberty need not be granted through elections, but rather may arise from religious, tribal, or other traditional grounds.²⁰

Due to political elites' distrust of the masses to elect a competent government, representative democracy is often preferred over direct democratic governance.²¹ This allows purportedly reasoned elites to govern who can prevent the government from being captured by an oppressive and passionate majority. Moreover, government powers are divided into compartments to prevent the accumulation and abuse of power. By setting up a legislative, executive, and judicial branch, a competitive interdependence among the three branches produces horizontal accountability.²² The application of law is entrusted to an independent judiciary whose work institutionalizes the preservation of private, political, and legal liberties.²³

Liberalism claims to be neutral in how it treats alternative visions of the good.²⁴ As such, the state cannot adopt or promote one vision over another unless it threatens others or the state.²⁵ In the face of diverse moral values, liberalism posits that the position of neutrality is the right principle on which to construct a pluralistic society that grants each individual the autonomy to pursue her or his self-defined freedom. To preserve legal liberty, therefore, judges are obligated to remain neutral in legal disputes as well as eschew involvement in political disputes.²⁶

Western liberalism adopts legal formalism as a means of protecting individual freedom. That is, so long as laws are prospective, general, clear, public, predictable, and relatively stable, they

¹⁸ Hannah Franzki & Maria Carolina Olarte, *Understanding the political economy of transitional justice: A critical theory perspective*, in *TRANSITIONAL JUSTICE THEORIES 207* (Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun, & Friederike Mieth eds., 2014).

¹⁹ Tamanaha, *supra* note 13, at 57.

²⁰ *Id.*

²¹ Brian Z. Tamanaha, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 120* (2004).

²² *Id.* at 35.

²³ *Id.*

²⁴ *Id.* at 51.

²⁵ *Id.* at 41.

²⁶ *Id.* at 32 (keeping the peace requires laws, and unbiased law enforces and judges).

are legitimate.²⁷ Formalist notions of liberalism place little value on how the law is made or the substantive consequences of such laws.²⁸ For instance, legal liberalism has legitimated slavery, apartheid and other oppressive legal regimes that met formal legalist criteria.²⁹ As a result, (thin) rule of law – often used interchangeably with formalist legal liberalism – is a highly contested term that can simultaneously legalize oppression and legitimate populist revolution against the state.

Proponents of thin rule of law emphasize neutrality as the mainstay of legal liberalism. So long as a government meets its obligation to act according to the law and treat similarly situated persons equally, regardless of the substance of the law, there is rule of law.³⁰ Whether the government is democratically elected or authoritarian is also irrelevant as long as the law is the means by which the state conducts its affairs.³¹ Likewise, the abrogation of individual rights is acceptable if the state follows the appropriate legal measures, even if such measures are promulgated by an authoritarian state.³² Thin rule of law is attainable without democracy.³³ For these reasons, among others, legal scholarship is replete with critiques of liberalism and (thin) rule of law.³⁴

While a full explication of these theoretical debates is beyond the scope of this article, it is worth noting three critiques applicable to the Egyptian context. First, liberalism disconnects substantive justice from law such that rule of law perpetuates systems of domination and social hierarchies based on the unequal distribution of wealth and talent.³⁵ As a result, critics argue that liberalism creates liberty for the economic elite to dominate while falsely claiming to be neutral.³⁶ Second, law is indeterminate such that a body of legal rules does not produce a single right answer and may even allow for contradictory outcomes. Judges may manipulate rules to achieve a predetermined outcome animated by political motives. Whatever predictability of law exists, thus, may not lie in the law itself but rather the shared social and

²⁷ Tamanaha, *supra* note 13 at 71. ; Randall Peerenboom, *Varieties of Rule of Law: An Introduction and Provisional Conclusion in ASIAN DISCUSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S.*, 2-3 (Randall Peerenboom, ed., RoutledgeCurzon 2004).

²⁸ Tamanaha, *supra* note 13, at 57.

²⁹ *Id.* at 72.

³⁰ Peereboom, *supra* note 27, at 13.

³¹ Tamanaha, *supra* note 21, at 92.

³² Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in *PROMOTING THE RULE OF LAW ABROAD* 37 (Thomas Carothers ed., 2006).

³³ Tamanaha, *supra* note 21, at 92.

³⁴ Franzki, *supra* note 18, at 217; Tamanaha, *supra* note 10, at 65.

³⁵ David Mednicoff, *Middle East Dilemmas*, in *PROMOTING THE RULE OF LAW ABROAD* 258 (Thomas Carothers ed., 2006).

³⁶ Tamanaha, *supra* note 13, at 65, 75.

economic background of judges.³⁷ Third, liberalism's emphasis on individual autonomy overlooks the role of community norms in preserving order and promoting justice, particularly in communitarian societies.³⁸ In Egypt, for example, liberalism has been adopted in piecemeal by the economic and political elite only when it serves their interests.³⁹ Similarly, post-January 25th Egypt's judicial elite have deployed rule of law to justify quashing civil liberties of youth activists and political Islamists whom the judges deemed threaten social order and in turn the judiciary's institutional interests. In doing so, judges have made the values of liberty, equality, and freedom devoid of meaning for many average Egyptians.⁴⁰ But the Egyptian judiciary has not always been an illiberal institution.

II. The Liberal Roots of Egypt's Judiciary

The importation of Western liberalism into the Egyptian judiciary dates back to the late 19th century when Egyptian judges worked alongside European judges in the Mixed Courts. Three key historical developments, in particular, exemplify the influence of liberalism on the Egyptian legal system. First, constitutionalism and rule of law were part of the nationalist rhetoric of the early 1900s as Egyptians called for self-determination from the British-controlled Crown.⁴¹ Second, judges were on the frontlines of the Egyptian nationalist movement culminating in passage of the 1923 constitution—arguably the most liberal vision of state-society relations compared to subsequent constitutions. Third, the executive's pressures to circumscribe judicial independence initiated under Nasser, which continues until the present-day, have fragmented the judiciary into loyalists, opportunists, and reformists. As a result, judges are left vulnerable to executive cooptation and coercion, resulting in a slow process of deliberalization of a once liberal institution.⁴² Post-January 25th, the dominant loyalist camp has not only issued increasingly illiberal rulings, particularly with regard to private liberty, but also abused their power by purging reformists from the judiciary.

³⁷ *Id.* at 74.

³⁸ Mednicoff, *supra* note 35, at 258.

³⁹ Nabil Abdel Fattah, *The Political Role of the Egyptian Judiciary, Judges and Political Reform*, in *JUDGES AND POLITICAL REFORM IN EGYPT* 71, (Nathalie Bernard-Maugiron ed., 2008).

⁴⁰ Irwin P. Stotzky, *The Tradition of Constitutional Adjudication*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY* 350 (Irwin P. Stotzky ed., 1993); Sharif Abdel Kouddous, *Egypt's Judiciary: A Willing Participant in Repression*, *L.A. TIMES* (April 23, 2015), <http://www.latimes.com/opinion/op-ed/la-oe-kouddous-egypt-20150423-story.html>.

⁴¹ BRUCE RUTHERFORD, *EGYPT AFTER MUBARAK: LIBERALISM, ISLAM, AND DEMOCRACY IN THE ARAB WORLD* 34 (2013) (the 1900s saw the elite of Egypt seeking more autonomy and this was heavily influenced by constitutionalism in Istanbul).

⁴² SIRI GLOPPEN et al., *COURTS AND POWER IN LATIN AMERICA AND AFRICA* 24 (2010).

At the turn of the 20th century, Egypt's brightest judges were trained in France where they were exposed to French philosophy and culture. Their training was grounded in liberalism's emphasis on rights, duties, authority, sovereignty, and personal freedoms protected within a constitutional framework.⁴³ The constitutional foundations of Western law and civil liberties eventually became the foundation of the Egyptian nationalist movement.⁴⁴ This led to the passage of the 1923 Egyptian Constitution wherein the National Courts were granted independence from the Crown.⁴⁵ Worth noting is that Egyptian liberal constitutionalism never shared the same emphasis on personal liberty found in classical liberalism. The well-being of the community, rather than the individual, animates protection of personal liberty.⁴⁶ Thus, the judiciary has tolerated a more powerful and invasive state than found in Western liberal states and views populist participation in political life as a source of disorder.⁴⁷

Nevertheless, Egypt's judges supported a clear and impartial legal code, checks and balances between the different state branches, an independent judiciary, and property rights – all basic components of liberalism. As such, the Court of Cassation became a guardian of civil and political rights in its seminal 1925 ruling that Egyptians had the right to form political parties as an integral aspect of the right to association and the right to criticize the Crown within their freedom of speech guaranteed under the 1923 constitution.⁴⁸ During this liberal era from 1923 to 1952, the Egyptian judiciary established liberal legal precedents and legal traditions protective of citizens' and groups' rights and liberties. Judicial independence became intertwined with liberal judicialization,⁴⁹ which culminated in 1943 when judicial independence became was codified in the Judicial Independence Act.⁵⁰ The public's engagement at the time with judicial matters coupled with a liberal cultural, social, and political environment buttressed the judiciary's identity as a liberal institution.⁵¹

But these circumstances turned out to be short lived. Although Gamal Abdel Nasser and his Free Officers movement had welcomed the judges' role in defeating the Crown in 1952, they expected the judiciary to obediently legitimize their nationalist policies. The judges did not

⁴³ Rutherford, *supra* note 41, at 37.

⁴⁴ Mahmoud Hamad, *When the Gavel Speaks: Judicial Politics in Modern Egypt* (Aug. 2008) (unpublished Ph.D. dissertation, The University of Utah)(on file with author) 59.

⁴⁵ *Id.* at 67.

⁴⁶ Rutherford, *supra* note 41, at 67.

⁴⁷ *Id.* at 75.

⁴⁸ Hamad, *supra* note 44, at 74.

⁴⁹ *Id.* at 90.

⁵⁰ *Id.* at 72.

⁵¹ *Id.*

accept their fate without resistance, particularly after the devastating military defeat in 1967 that led to Israel occupying the Sinai Peninsula. The judges increasingly questioned Nasser's revolutionary legislation and issued verdicts against the regime, the consequence was devastating.⁵² In 1969, Nasser issued four presidential decrees that figuratively massacred the judiciary.⁵³ Over two hundred judges were categorically dismissed, including the most liberal and respected reformist judges. A Supreme Council of Judicial Organizations was created to grant the regime control over judicial appointments, promotions, and disciplinary actions.⁵⁴

Nasser also created exceptional security courts presided over by military and security personnel who produced pre-determined outcomes set by the executive branch. The ordinary courts' jurisdiction, thus, was narrowed to prevent judges from invalidating the regime's policies. And the regime appointed loyalist judges to powerful judicial positions to discipline reformist judges.⁵⁵ Over time, what was once a staunchly independent institution became increasingly comprised of loyalist and opportunist judges who no longer viewed liberalism as a component of their self-appointed role as guardians of social order.

Despite Nasser's best efforts, he was unable to completely change the liberal institutional culture within the judicial corps. Hence, after Nasser's death in 1970, reformist judges resumed defending rule of law, civil rights and liberties, and judicial independence.⁵⁶ A new constitution in 1971 passed under Sadat's reign established a Supreme Constitutional Court, explicitly stated that the regime was based on the rule of law, and guaranteed Egyptians nearly all internationally recognized political liberties and human rights consistent with liberal principles.⁵⁷ In addition, over thirty percent of the constitution either directly pertained to the judiciary or linked citizens' rights and liberties with the courts as guarantors of such rights.⁵⁸ The reversion to a constitutional democracy, at least on paper, provided a legal and political basis for the judges to defend civil liberties and seek more meaningful judicial independence. Indeed, Sadat's primary motive for granting the judiciary more independence and citizens more limited rights was to bolster his credibility in front of the international community, and more

⁵² *Id.* at 139.

⁵³ *Id.* at 142-43.

⁵⁴ Tamir Moustafa, *Law and Resistance in Authoritarian States: The Judicialization of politics in Egypt*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 134 (Tamir Moustafa & Tom Ginsburg eds., Cambridge University Press 2008)) [hereinafter *Resistance*].

⁵⁵ Hamad, *supra* note 44, at 118.

⁵⁶ *Id.* at 146.

⁵⁷ *Id.* at 166.

⁵⁸ *Id.* at 176.

specifically foreign investors.⁵⁹ However, Sadat’s reforms were circumscribed. He manipulated fringe benefits and financial incentives to coopt the judges if their calls for judicial independence or defense of civil liberties went so far as to threaten the regime’s legitimacy.

Although Egypt’s judges were again at the forefront of liberalizing the political system after twenty years of political repression, the previous two decades under Nasser fundamentally changed the composition of the legal profession. Law schools opened up to any applicant that met a minimum exam score, and thus transformed law schools from primarily upper class students with the highest exam scores to a dumping ground for low performing students not accepted by other colleges. The consequent deterioration in legal education with bulging class sizes left little opportunity for teaching French political and legal thought rooted in liberal values. Instead, the Bar, and to a lesser extent the judiciary, transformed into a predominantly middle and lower-middle class institution whose younger members had little exposure or commitment to liberal principles.⁶⁰ Thus, in contrast to the early 1900s when the judiciary could rely on the Bar to buttress its liberal agenda, the judges became the sole proponent of liberal constitutionalism within the legal profession.⁶¹ This made the judges more vulnerable to the Mubarak regime’s intensified cooptation strategy that offered fringe benefits to reward loyalists and opportunists while punishing reformist judges.

III. Incremental Deliberalization in the Mubarak Era

Like Sadat, Mubarak began his presidency touting the importance of rule of law and judicial independence as the cornerstone of his regime.⁶² Lacking charisma and inheriting a bankrupt state unable to distribute social goods to the people, Mubarak was left with rule of law as the primary basis for his political legitimacy.⁶³ At the same time, Mubarak sought to retain a centralized and powerful executive branch that circumscribed rule of law to formalistic procedural notions. Thus, Mubarak envisioned the judiciary’s role as rotely enforcing laws promulgated by an executive-controlled parliament.

⁵⁹ *Id.* at 31.

⁶⁰ Rutherford, *supra* note 41, at 47.

⁶¹ Rutherford, *supra* note 41, at 50; Mona El-Ghobashy, *The Dynamics of Elections Under Mubarak*, in *THE JOURNEY TO TAHIR: REVOLUTION, PROTEST AND SOCIAL CHANGE IN EGYPT* 139 (Melissa Moskowicz, ed., 2012).

⁶² Hamad, *supra* note 44, at 235.

⁶³ *Id.*

Not all of the judges, however, were willing to adhere to such thin notions of rule of law or accept their relegation to a mere rubber stamp of authoritarian policies arising from rigged elections. In the first and only Justice Conference held in 1986, the judiciary stipulated a roadmap for comprehensive judicial reform that would provide it with meaningful independence from an over-reaching executive. Specifically, judges called for 1) complete budgetary autonomy; 2) removing the role of the Ministry of Justice from judicial affairs; 3) rescinding all exceptional courts; 4) restructuring judicial supervision to grant full judicial control over the electoral processes; 5) granting the Court of Cassation the jurisdiction to rule on the merits of a case if it overturns a lower court ruling; 6) prohibiting trials of civilians in military courts; 7) separating prosecution and indictment powers; and 8) establishing a judicial police in the Ministry of Justice to enforce judicial rulings.⁶⁴ Unsurprisingly, none of these demands were granted. For the next twenty years, leading reformist judges made multiple attempts to amend the Judicial Authority Law to no avail.

Arising from these reform efforts was a judicial independence movement led by reformist judges who engaged the public in confronting the regime on its illiberal policies and practices. Another group of judges agreed with the need for reform but disagreed with the prominent public role of reformist judges. These judges, which I place in the opportunist camp, worried that public advocacy, rather than private consultation with the executive branch, eroded the public's respect for the state and undermined public order – and more importantly jeopardized their fringe benefits.⁶⁵ They sought to avoid the executive's collective retaliation against all judges for the reformist judges' campaign for more judicial independence. Indeed, many judges had few qualms with a strong state so long as it was not arbitrary or corrupt.⁶⁶ While agreeing that judges have an obligation to maintain public order; reformist judges believed they had a duty to draw attention to infringements of law inhibiting conditions that allow for the practice of personal liberty. As such, the judiciary should be vigilant and aggressive in reining in the state and keeping it focused on serving the public interest.⁶⁷

From 1986 to 2007, the reformist and loyalist camps struggled for control of the Judges Club – the vehicle through which judges defended their institutional and personal interests vis-à-vis the executive branch.⁶⁸ With over ninety percent of judicial personnel as members, the Judges

⁶⁴ *Id.*

⁶⁵ Rutherford, *supra* note 41, at 146-47.

⁶⁶ *Id.* at 60.

⁶⁷ *Id.* at 146.

⁶⁸ Mustapha Kamel Al-Sayyed, *The Judicial Authority and Civil Society*, in *JUDGES AND POLITICAL REFORM IN EGYPT* 230 (Nathalie Bernard-Maugiron ed., 2008); Atef Shahat Said, *The Role of the Judges' Club in Enhancing the*

Club is a powerful institution capable of flexing its political muscle to fight for judicial independence.⁶⁹ In 1992, reformist Judge Yahia al-Rif'ai was defeated by Judge Muqbil Shakir as president of the Judges Club.⁷⁰ Shakir's quietist approach led to substantial increases in resources to the judiciary including remodeling of court facilities, salary increases, and substantial annual bonuses to judges.⁷¹ These successes on bread and butter issues bolstered a quietist approach among judges in compliance with the executive branch's strategy of offering benefits to incentivize judges against confronting the regime on rule of law infringements. The executive's manipulation of benefits continues until the present day as a means of fracturing the judiciary and marginalizing vocal opposition to the regime's practices, particularly with regard to economic policies and individual rights.

In 2002, a group of reformist judges under the "Change and Renewal" list won the Judges Club elections under the leadership of Judge Zakaria Abdel Aziz.⁷² Besides mobilizing judges to demand electoral reforms, the Judges Club again pressured the executive to amend the Judicial Authority Law to give the judiciary more autonomy and eliminate the manipulation of benefits to indirectly influence judges.⁷³ After witnessing pervasive electoral fraud in the 2005 parliamentary elections, the reformist judges controlling the Judges' Club formed an investigative committee. Following the lead of a young female judge in the Office of Administrative Prosecution, Noha Al-Zini, who publicly disclosed the elections violations, judges collected testimony from other judges who witnessed similar fraud. The self-described judicial independence movement convened three general assembly meetings in 2005 and 2006 culminating in the publication of a report denouncing the election abuses and citing various cases of election fraud witnessed by judges.⁷⁴ Civil society, in tandem with reformist judges and Judges Club leaders, exposed the electoral fraud and security forces' interference. The Bar went

Independence of the Judiciary and Spurring Political Reform, in JUDGES AND POLITICAL REFORM IN EGYPT 112 (Nathalie Bernard-Maugiron ed., 2008).

⁶⁹ Said, *supra* note 68, at 113; Nabil Abdel Fattah, *The Political Role of the Egyptian Judiciary, in* JUDGES AND POLITICAL REFORM IN EGYPT 88 (Nathalie Bernard-Maugiron ed., 2008).

⁷⁰ Rutherford, *supra* note 41, at 147.

⁷¹ *Id.*

⁷² Omar Mekky, *Evolution of the Rafaiest in Egyptian Politics*, KUWAIT TIMES (Sep. 17, 2012), <http://news.kuwaittimes.net/evolution-of-the-rafaiest-in-egyptian-politics/>; see Hamad, *supra* note 44 at 265-66 (discussing how "in 2001, reformer Zakaria Abdel Aziz surprisingly defeated the three term president of the Judges Club, Moqbel Shaker").

⁷³ See Martin Shapiro, *Courts in Authoritarian Regimes, in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 332 (Tamir Moustafa & Tom Ginsburg eds., Cambridge University Press 2008). 332 (discussing the need for judges to persuade their colleagues to create winning coalitions that produce rights-oriented judicial leadership).

⁷⁴ *Id.* at 122.

even farther to create a list of thirteen judges allegedly engaged in electoral fraud and published it in independent newspapers.⁷⁵

The executive swiftly retaliated. The Supreme Judicial Council threatened to investigate any judges who spoke to the press about election fraud.⁷⁶ Any such speeches or interviews with the press were labeled political activity that could lead to disciplinary charges of violating the Judicial Authority Law.⁷⁷ The Ministry of Justice also suspended the annual subsidies it gave to all Judges Clubs, which was a primary source of funding for judges' fringe benefits.⁷⁸ And the parliament passed a law that transferred authority to distribute judicial fringe benefits from the Judges Club to the Ministry of Justice. The government also amended the Constitution in 2007 to substantially weaken the role of judges in overseeing future elections by allowing non-judicial officials to serve as elections monitors.⁷⁹ The message was clear – judges would be collectively punished for the judicial independence movement's activities.

Mubarak felt sufficiently threatened to take the unprecedented act of using force against the judges. When judges protested in 2006 in front of the Judges Club in Cairo near another protest by the Muslim Brotherhood, Egyptian police attacked both the MB protesters the judges.⁸⁰ Nearly 150 protesters were arrested on charges of supporting the judges.⁸¹ Among those arrested was Dr. Mohamed Morsi, who was portentously to become Egypt's first democratically elected president after the January 25th uprisings.⁸² The following month, Mubarak instructed the Minister of Justice to refer two leading judges from the Judges Club, Ahmed Mekky and Hisham Al-Bastawisi, to disciplinary proceedings on pretextual charges of "insulting the judiciary" for allegedly defaming a fellow judge.⁸³ As the hearings were taking place, massive and well-equipped security forces surrounded the Judges Club, the Court of

⁷⁵ Hamad, *supra* note 44, at 276.

⁷⁶ Bjorn Bentlage, *Strife for Independence in an Autocratic Regime: The Egyptian Judges' Club 2000-2007*, 50 DIE WELT DES ISLAMIS 264 (2010).

⁷⁷ Article 73, Judicial Authority Law.

⁷⁸ Nathalie Bernard-Maugiron, *Introduction to JUDGES AND POLITICAL REFORM IN EGYPT 2* (Nathalie Bernard-Maugiron ed., AUC Press 2008); Bentlage, *supra* note 76, at 265.

⁷⁹ Tamir Moustafa, *Law in the Egyptian Revolt*, 3 Middle East Law and Governance 181, 184 (2011)[hereinafter *Revolt*]; Clark B. Lombardi, *The Constitution as Agreement to Agree: The Social and Political Foundations (and Effects) of the 1971 Egyptian Constitution*, SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 423 (Denis Galligan & Mila Versteeg eds., Cambridge 2013).

⁸⁰ Bernard-Maugiron, *supra* note 76, at 3.

⁸¹ Mekky, *supra* note 72; Bentlage, *supra* note 73 at 266.

⁸² Mekky, *supra* note 72.

⁸³ Mekky, *supra* note 72; Bernard-Maugiron, *supra* note 78, at 3.

Cassation, the journalists' syndicate, and the lawyers' syndicate.⁸⁴ The unprecedented use of force against judges was a clear warning of the government's intent to crack down hard on anyone planning to challenge the regime's centralized grip on power.⁸⁵ And their status as judicial elites would not protect them.

The confrontation between the Mubarak regime and the Judges Club culminated in a retaking of the Cairo Judges Club by regime loyalist Ahmed El Zind in 2009. Meanwhile some of the leading dissident judges were "encouraged" to work outside the country or retire.⁸⁶ Taking from Sadat's playbook, the Mubarak regime appealed to judges' material interests by promising financial benefits if government loyalists were elected to the Judges Club board. Upon his election to president of the Judges Club, Al-Zind and his faction got to work in undermining the credibility of the reformist movement by accusing them of inflating the number of participants in the general assembly meetings that issued resolutions condemning executive action. The loyalist camp alleged that Justices Ahmed Mekky, Abdel Aziz, and Al-Ghiryani were pursuing their own personal interests, allied with the political Islamist opposition, and went as far as implying national treason.⁸⁷ Government-controlled media also defamed the judicial independence movement by accusing reformist judges of violating the Judicial Authority Law by engaging in politics and alluded to their loyalties to the Muslim Brotherhood.⁸⁸ Mubarak loyalist judges also accused reformist judges of being secretly affiliated with the Muslim Brotherhood motives.⁸⁹ However, these allegations have not been proven to be true.

As the ordinary judiciary struggled for more autonomy from the state, the Supreme Constitutional Court (SCC) issued monumental rulings in the 1990s that legitimated Mubarak's economic liberalization project in exchange for expanding some personal liberties. For instance, in 1992 the SCC ruled that the Egyptian government was constitutionally required to respect international human rights norms.⁹⁰ The SCC struck down laws that restricted citizens' rights to establish political parties, stripped prominent opposition leaders of their political rights, and denied independent candidates the right to run in parliamentary elections.⁹¹ It also

⁸⁴ Bentlage, *supra* note 76, at 266.

⁸⁵ Hamad, *supra* note 44, at 286.

⁸⁶ Mekky, *supra* note 72.

⁸⁷ Said, *supra* note 68, at 127.

⁸⁸ Hamad, *supra* note, 44 at 197-98, 273; Mekky, *supra* note **Error! Bookmark not defined.**

⁸⁹ Hamad, *supra* note 44, at 299.

⁹⁰ Lombardi, *Constitution as Agreement to Agree*, *supra* note 79 at 420.

⁹¹ Abdel Omar Sherif, *The Rule of Law in Egypt from a Judicial Perspective: A Digest of the Landmark Decisions of the Supreme Constitutional Court*, in *THE RULE OF LAW IN THE MIDDLE EAST AND THE ISLAMIC WORLD: HUMAN RIGHTS AND THE JUDICIAL PROCESS* 7 (Eugene Cotran & Mai Yamani eds., 2000).

struck down a law banning any political party opposed to peace with Israel; overturned laws that interfered with governance of workers' syndicates;⁹² and struck down laws that prohibited criticism of public servants on grounds that it violated constitutional rights of free speech.⁹³

The SCC's liberal rulings extended to noncitizens when it ruled that denying noncitizens deprived of their property rights access to the national courts was unconstitutional.⁹⁴ In 1995, the Labor Party successfully challenged the constitutionality of criminal provisions that imposed joint liability on heads of political parties, reporters, and editors-in-chief for alleged libel of public officials in party newspapers.⁹⁵ By the late 1990s, public interest litigation became the primary forum through which civil society promoted legal reform.⁹⁶ Notwithstanding these liberal rulings, the SCC did not dare strike down the emergency laws or military trials of civilians lest it invite executive retaliation.⁹⁷ Nor did the SCC grant citizens the right to appeal emergency or military court rulings to the regular courts.⁹⁸

Although the justices delivered rulings that assisted the regime's economic liberalization project,⁹⁹ the SCC's seminal 2000 ruling mandating judicial oversight of elections went too far for the regime.¹⁰⁰ To rein in the SCC, Mubarak appointed Fathi Naguib in 2002 as the Chair. Naguib had been second in command at the Ministry of Justice prior to serving as the President of the Court of Cassation.¹⁰¹ With this unprecedented move of appointing a Chief Justice from outside the SCC, Mubarak took control of the Court.¹⁰² Soon after taking office, Naguib

⁹² Clark B. Lombardi, *STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE SHARI`A INTO EGYPTIAN CONSTITUTIONAL LAW* 147 (Brill 2006) (citing Case No. 44, Judicial Year 7 (May 7, 1998) and Case No. 6, Judicial Year 15 (April 15, 1995)).

⁹³ *Id.* at 20.

⁹⁴ *Id.* at 14.

⁹⁵ Lombardi, *State Law as Islamic Law*, *supra* note 92 at 93; EUGENE COTRAN ET AL., *THE RULE OF LAW IN THE MIDDLE EAST AND THE ISLAMIC WORLD: HUMAN RIGHTS AND THE JUDICIAL PROCESS* 18 (Eugene Cotran & Mai Yamani eds., 2000).

⁹⁶ Tamir Moustafa, *The Political Role of the Supreme Constitutional Court: Between Principles and Practice*, in *JUDGES AND POLITICAL REFORM IN EGYPT* 94 (Nathalie Bernard-Maugiron ed., The American University in Cairo Press 2008); SAMER SOLIMAN, *AUTUMN OF DICTATORSHIP* 137 (2011).

⁹⁷ Tamir Moustafa & Tom Ginsburg, *Introduction* to *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 16 (Tamir Moustafa & Tom Ginsburg eds., Cambridge University Press 2008); *Resistance*, *supra* note 54, at 151.

⁹⁸ *Resistance*, *supra* note 54, at 151.

⁹⁹ Lombardi, *State Law as Islamic Law*, *supra* note 92, at 153 (noting the SCC's support to the ruling party's free market economic policies).

¹⁰⁰ CLARK LOMBARDI, *CONSTITUTIONS OF ARAB COUNTRIES IN TRANSITION: CONSTITUTIONAL REVIEW AND SEPARATION OF POWERS* 129 (MEDITERRANEAN YEARBOOK 2014).

¹⁰¹ Bentlage, *supra* note 73, at 248.

¹⁰² *Resistance*, *supra* note 54, at 138-39 (noting the tradition of the president selecting the most senior justice on the SCC to serve as Chief Justice); *Judicialization*, *supra* note 5, at 924.

increased the number of justices from nine to fifteen.¹⁰³ Breaking the tradition of selecting new justices from the Council of State, Naguib packed the Court with justices from the ordinary courts whose jurisprudence was deferential to executive's power.¹⁰⁴ Within a short period, the SCC's liberal majority was eliminated and the judicial independence movement weakened, thereby producing a judiciary poised to support the military-security state apparatus in its counter-revolutionary measures.¹⁰⁵

Indeed, by 2011 the SCC was comprised mostly of loyalist judges who viewed populist democracy with suspicion and deeply distrusted the Muslim Brotherhood. The Judges Club was firmly under the control of loyalist judges led by Judge Ahmed Zind who had successfully marginalized the reformist camp.¹⁰⁶ Neither the SCC nor the ordinary courts were prepared for the revolution that would put to the test whether their proclaimed commitments to liberalism were deeply rooted values or merely rhetoric to shore up legitimacy. Based on judicial behavior thus far, the latter appears to be closer to the truth.

IV. A Counter Revolution in the Courts

In hindsight, the counter revolution started the day Hosni Mubarak stepped down from power on February 11, 2011.¹⁰⁷ Although most Egyptians agreed to allow the Supreme Council of the Armed Forces (SCAF) to serve merely as an interim government until new presidential and parliamentary elections could be conducted, the SCAF maneuvered to grant itself extraordinary legislative and executive powers. SCAF postponed elections under various pretexts—ranging from the need to draft a new constitution first or amend the election law to claims that Egyptians needed more time to determine for whom to vote. The loyalist judges cooperated with the military-security apparatus to ensure neither the military nor the judiciary's institutional interests would be threatened by the revolutionary process. But to do so, the revolutionary disputes had to be moved to the judges' home territory – the courts.

¹⁰³ Hamad, *supra* note 44, at 263; Lombardi, *State Law as Islamic Law*, *supra* note 92 at 146 (noting that prior to the expansion of the SCC, a judgement was final after seven justices signed it and the justices' votes are secret).

¹⁰⁴ *Judicialization*, *supra* note 5, at 924.

¹⁰⁵ *Id.*; Javed Maswood and Usha Natarajan, *Democratization and Constitutional Reform in Egypt and Indonesia: Evaluating the Role of the Military*, in *ARAB SPRING IN EGYPT* 231 (Bahgat Korany & Rabab El-Mahdi eds., The American University in Cairo Press 2012); Lombardi, *Constitution as Agreement to Agree*, *supra* note 79 at 421.

¹⁰⁶ Heba Afify, *The Judges Behind the Verdicts*, MADA MASR, (April 29, 2014)

<http://www.madamasr.com/sections/politics/judges-behind-verdicts> (noting that the judges club, led by Zind, largely rejected Egyptian judges that favored groups such as the Muslim Brotherhood).

¹⁰⁷ Sahar F. Aziz, *Bringing Down an Uprising: Egypt's Stillborn Revolution*, 30 Conn. J. Int'l L. 1 (2014).

During SCAF's rule, the streets and public squares were the locus of what became a protracted revolutionary process. Youth activists, and the MB when it served their interests, mobilized multiple mass protests across the country demanding a new government, accountability of the Mubarak regime, and substantive reforms to Egypt's legal and political system.¹⁰⁸ Their success in leveraging the streets to air three decades of populist grievances made it all the more necessary for the military and other deep state stakeholders to shift the disputes to the courts – a forum friendlier to their interests while still claiming to take the people's complaints seriously. The secular youth and MB underestimated the extent to which a critical mass of Egyptian judges had been endogenously politicized. Thus, the SCAF had little trouble litigating the counter-revolution.

From the beginning, prosecutions against former Mubarak regime officials were doomed to fail. Lackluster investigations by prosecutors, destruction of evidence by the police, and handpicked judges ensured convictions would be rare. The loyalist judges, along with the significant number of opportunist judges, perceived a democratically elected Islamist president coupled with a politically mobilized public as a threat to social order, the security of the state, and most importantly the judiciary's material interests. Such values aligned the judiciary squarely with a military-led authoritarian regime seeking to eliminate any viable political opposition that could threaten the permanency of its rule.

What transpired during the four years since January 25th exposes the extent to which a portion of the judiciary has become further deliberalized during the last decade of Mubarak's rule. While a full rendition of this deliberalization process starting in 2000 is addressed in another article,¹⁰⁹ here I highlight five categories of cases post-January 25th that evince continued and accelerated deliberalization of the judiciary.

The first involves the SCC's dissolution of Egypt's first parliament elected without systemic fraud and the SCC's subsequent rejections of proposed amendments to elections laws. As a

¹⁰⁸Ben Hubbard, *Egyptians protest against new powers for military council*, INDEPENDENT, (Nov. 18, 2011) <http://www.independent.co.uk/news/world/africa/egyptians-protest-against-more-powers-for-military-rulers-6264259.html>; *Thousands Flock to Cairo's Tahrir Square to Slam Emergency Law*, AL ARABIYA, Sept. 16, 2011 <http://english.alarabiya.net/articles/2011/09/16/167184.html>. (Thousands of people protest the SCAF and its recent decision to expand emergency law).

¹⁰⁹ See Sahar F. Aziz, *Independence without Accountability: The Judicial Paradox of Egypt's Failed Transition*, Penn. St. L. Rev. (forthcoming Fall 2015).

result, Egypt did not have a parliament for nearly four years from June 2012 to January 2016.¹¹⁰ The second category of cases is the prosecutions of security personnel and former Mubarak officials, including Mubarak and his sons, that have resulted in under-charging defendants, acquittals, or nominal sentences.¹¹¹ The third is the prosecutions of Morsi regime officials, including former president Mohamed Morsi, and alleged Muslim Brotherhood members and supporters leading to harsh sentences with minimal due process.¹¹² The fourth category of cases encompasses the prosecution of leading revolutionary youth activists for violating an anti-protest law passed specifically to stop further street protests and legalize detaining and silencing activists.¹¹³ The final category involves the judiciary's ongoing purge of reformist judges who were either notable leaders in the judicial independence movement in 2005-2006 or young reformist judges who declared the ouster of Morsi as illegal.¹¹⁴

Each group of cases indicates the following three trends. First, the executive branch no longer needs to exert as much pressure on judges in order to preserve the regime's interests in high profile cases. Second, endogenous politicization among a faction of judges has compromised the independence of the judiciary from the executive. Third, judicial politicization exists at the case level and the broader political level wherein judges are ideologically biased against political Islamists and youth activists who lead the revolutionary process. These trends call into question the judiciary's commitment to the fundamental components of liberalism including judicial independence, preservation of civil liberties, and the judges' obligation to serve as an impartial check on executive over-reaching.

¹¹⁰ David D. Kirkpatrick, *Blow to Transition as Court Dissolves Egypt's Parliament*, NEW YORK TIMES (June 14, 2012), <http://www.nytimes.com/2012/06/15/world/middleeast/new-political-showdown-in-egypt-as-court-invalidates-parliament.html>.

¹¹¹ *Hosni Mubarak Sentenced to Three years in Prison for Corruption*, THE TELEGRAPH (May 9, 2015) (<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/egypt/11594495/Hosni-Mubarak-sentenced-to-three-years-in-prison-for-corruption.html>).

¹¹² *What's Become of Egypt's Morsi*, BBC NEWS (June 16, 2015), <http://www.bbc.com/news/world-middle-east-24772806>.

¹¹³ *Egypt's Maher, Adel and Douma Sentenced to 3 Years in Jail*, AHAM ONLINE (Dec. 22, 2013), <http://english.ahram.org.eg/News/89748.aspx>. <http://www.bbc.com/news/world-middle-east-31583404>.

¹¹⁴ Hamad, *supra* note 44, at 145 (describing the history in Egypt of purging outspoken judges under various leaders); *7 judges sent to retirement for MB affiliation*, MADA MASR (Jan. 27, 2014), <http://www.madamasr.com/content/7-judges-sent-retirement-mb-affiliation>; *Egypt Refers 60 'pro-Brotherhood' Judges to Disciplinary Board*, AL AHAM ONLINE (Oct. 20, 2014) <http://english.ahram.org.eg/NewsContent/1/64/113517/Egypt/Politics-/Egypt-refers--proBrotherhood-judges-to-disciplinar.aspx>.

A. Dissolving Egypt's Democratically Elected Parliament

Soon after Mubarak was deposed, some MB members accused the SCC of being Mubarak loyalists keen on undermining the revolution.¹¹⁵ Indeed, some parliamentarians affiliated with the MB went as far as call for dissolution of the SCC. Others sought to transfer the SCC's jurisdiction to the Court of Cassation.¹¹⁶ Coupled with Morsi's public criticism of the SCC, this inflammatory rhetoric triggered a war of attrition between the SCC and the Morsi regime that eventually expanded to the rest of the judiciary.

Some SCC Justices responded by vocally criticizing Morsi and the Muslim Brotherhood on television and newspaper interviews. In particular, then SCC Justice Tehanny El Gibally, expressed her disdain for the Muslim Brotherhood and outright opposition to then President Morsi as she accused them of loyalty to the international Muslim Brotherhood rather than Egypt.¹¹⁷ In contrast to the judges currently under investigation for challenging the legality of Morsi's ouster in July 2013, El Gibally and other judges vocally critical of Morsi were not disciplined by the Judicial Inspection Office for violating the provisions in the Judicial Authority Law (JAL) that prohibit judges from engaging in politics. As discussed in Section IV.E, such selective enforcement is further evidence that the judiciary has become politicized.

The SCC beyond rhetorical responses when it issued a ruling in June 2012 declaring unconstitutional the election law by which the sitting parliament was elected.¹¹⁸ Election officials were found to have violated the constitution in allowing political parties to compete for the seats designated for independents.¹¹⁹ The Court-ordered remedy was to dissolve the entire parliament, as opposed to the one-third allotted to independent candidates, just weeks before Morsi became president.¹²⁰ That the parliament was controlled by the Muslim Brotherhood

¹¹⁵ Daniel Nisman, *Showdown in Egypt's Halls of Justice*, Huffington Post (July 8 2013) http://www.huffingtonpost.com/daniel-nisman/showdown-in-egypts-halls-_b_3239213.html.

¹¹⁶ David Kirkpatrick, *Egyptian Leaders Meet in Defiance of Court and Military*, NEW YORK TIMES (July 10, 2012) http://www.nytimes.com/2012/07/11/world/middleeast/egyptian-parliamentary-deputies-defy-court-and-military.html?_r=0 (Some members of the MB even tried to have the Court of Cassation look at the decision to dissolve the parliament, something outside of their jurisdiction).

¹¹⁷ Sarah El Deeb, *Former Judge Challenges Egypt's Constitution*, THE TIMES OF ISRAEL (Jan. 8, 2013) <http://www.timesofisrael.com/former-judge-challenges-egypts-constitution/>.

¹¹⁸ Q&A: *Egypt's Supreme Court Rulings*, BBC NEWS (June 17, 2012) <http://www.bbc.com/news/world-middle-east-18463887> (review of what was deemed unconstitutional by the court's ruling).

¹¹⁹ Kirkpatrick, *supra* note 110.

¹²⁰ *Id.*

and Salafi political groups caused their supporters to call into question the SCC's motives.¹²¹ In contrast to similar rulings in 1987 and 1990 when the SCC took months to make its decision, this ruling was issued within a matter of weeks. To political Islamists, this was further proof of the politicization of the SCC justices.¹²² As a result, each subsequent attempt Morsi's regime made to amend the election law in order to proceed with new parliamentary elections was rejected by the SCC. Morsi did not have a parliament during his year in office thereby forcing him to govern by presidential decree and make him more vulnerable to accusations of authoritarianism.

The SCC's ruling dissolving parliament was just one among many rulings that effectively paralyzed Morsi's reform efforts. For instance, both of Morsi's parliamentary committees that he had established to draft a new constitution were struck down as unconstitutionally created, and his appointment of Talaat Abdullah to replace Abdel Meguid Mahmoud as Prosecutor General was reversed.¹²³

But Morsi did not lose the war of attrition for lack of trying. He attempted to rein in the Court by placing a constitutional limit on their number to ten in addition to the chief justice, resulting in the removal of six justices including Tehanny El Gibally. Morsi also limited the SCC's judicial review to ex ante as opposed to post facto and proposed to decrease mandatory retirement for all judges from 70 to 60 years old.¹²⁴ These decisions proved fatal as the judiciary concluded Morsi's regime was a threat to its institutional interests.¹²⁵ Further angering the judges, Morsi took the unprecedented action in a nationally televised speech in June 2013 (just days before he was deposed) accusing judges by name of corruption and participating in falsifying election results under Mubarak.¹²⁶ Tellingly, the names were taken from reports of election fraud issued by the judicial independence movement during the 2005 parliamentary elections.

¹²¹ David Hearst and Abdel Rahman Hussein, *Egypt's Supreme Court Dissolves Parliament and Outrages Islamists*, THE GUARDIAN (June 14, 2012), <http://www.theguardian.com/world/2012/jun/14/egypt-parliament-dissolved-supreme-court>.

¹²² *Id.*

¹²³ *Law and Politics*, supra note 10, at 6.

¹²⁴ Deeb, supra note 118 (reduced the size of the court from 18 to 11); Chibli Mallat, *Reading the Draft Constitution of Egypt: Setbacks in Substance, Process, and Legitimacy*, AHARAM ONLINE (Dec. 2, 2012), <http://english.ahram.org.eg/NewsContentP/4/59606/Opinion/Reading-the-Draft-Constitution-of-Egypt-Setbacks-i.aspx> (limits court's review to before the fact instead of post facto review).

¹²⁵ See Kleinfeld, supra note 30, at 264 (noting judges having little stake in broad political change).

¹²⁶ *Law and Politics*, supra note 10, at 14.

Despite official denials, the political underpinnings of court rulings became clear once Morsi was deposed. Sitting judges openly expressed in court their disdain for the Muslim Brotherhood and the “black night” of Morsi’s rule.¹²⁷ Such strong sentiments against the Muslim Brotherhood as a political opposition and specific members as defendants in legal proceedings is a troubling new development that signals a loss of judicial independence, not only due to external executive branch pressures, but also endogenous politicization.

B. No Accountability of Mubarak Officials

Dubious prosecutions of former Mubarak officials are perhaps the most obvious examples of judicial bias against the revolutionary process. Because the public’s demand for the criminal prosecutions of Mubarak-era officials was too great to ignore,¹²⁸ the SCAF had no choice but to charge them. However, the Mubarak appointed Prosecutor General, Abdel Meguid Mahmoud, sabotaged the trials by assigning junior prosecutors to complex corruption cases, conducting poor investigations that led to an incomplete evidentiary record, and declining to prosecute police and security personnel accused of killing protesters.¹²⁹ Rather than appoint investigating judges to conduct an impartial investigation,¹³⁰ the judges presiding over alleged police violence cases dismissed the cases. As a result, only one police officer is serving a three year sentence for shooting protesters during the bloody Mohamed Mahmoud protests in November 2011 wherein over fifty-one protesters were killed in five days.¹³¹ And only two police officers are serving time for the killing of at least 846 protesters in the protests of January 2011.¹³² Likewise, only one Egyptian policeman has been convicted of killing a protester after the July 2013 military coup that deposed Morsi, notwithstanding the hundreds killed in the Raba’a and Nahda squares sit-ins.¹³³

In contrast, judges presiding over prosecutions of Muslim Brotherhood membership and leadership have convicted defendants with minimal evidence often limited to a security

¹²⁷ David Kirkpatrick, *Egyptian Court Confirms Death Sentence for Morsi*, NEW YORK TIMES (June 16, 2015), <http://www.nytimes.com/2015/06/17/world/middleeast/egyptian-court-confirms-death-sentence-for-ousted-president-morsi.html>.

¹²⁸ Jeannie Sowers, “Egypt in Transformation”, in *The Journey to Tahrir: Revolution, Protest, and Social Change in Egypt*, eds. Jeannie Sowers & Chris Toensing (London: Verso, 2012), 13.

¹²⁹ *Law and Politics*, *supra* note 109, at 46, 48.

¹³⁰ *Id.* at 43.

¹³¹ *Id.* at 48.

¹³² *Id.*

¹³³ Laura King, *In a rare Conviction, Egyptian Policeman Gets 15 Years in Protestor’s Death*, LA TIMES (Sept. 5, 2015), <http://www.latimes.com/world/middleeast/la-fg-egypt-protester-slain-20150611-story.html>.

officer's testimony.¹³⁴ Cases that should have taken months to prosecute produced convictions in a matter of weeks. To a large extent, the judges' approach to police brutality cases and the politicization of the Prosecutor General's office is a continuation of the Mubarak era.¹³⁵ But the judges' collective antagonism towards the revolution and its proponents as a threat to social order makes them even more partial to police and former Mubarak officials.

The same judicial leniency and flawed investigations infected the prosecutions of Hosni Mubarak, his sons, and his cronies. The former dictator has been cleared of corruption charges, and only faces a retrial on charges of the killings of protesters after his life sentence was remanded by the appellate court.¹³⁶ The few Mubarak-era officials charged with corruption are now free after their verdicts were overturned, while journalists and other political prisoners are denied bail on trumped up charges.¹³⁷ Others such as Safwat al-Sherif and ex-Prime Minister Ahmed Nazif have been freed on bail despite serious corruption charges involving millions of Egyptian pounds.¹³⁸ That judges have been so lenient despite three decades of corruption and human rights violations against former senior Mubarak officials while simultaneously denying bail, refraining from requiring proper investigations, and issuing the most severe sentences to Muslim Brotherhood defendants is further evidence of endogenous politicization.

C. Deposing a Democratically Elected President

Of all the events that occurred after the January 25th revolution, the most surprising was the rapid political rise of the Muslim Brotherhood. Not only did they control nearly fifty percent of parliament, but they also won the presidency. Perhaps even more remarkably is the relatively

¹³⁴ *Egypt: Scant Evidence for Mass Convictions*, HUMAN RIGHTS WATCH (April 19, 2015), <https://www.hrw.org/news/2015/04/19/egypt-scant-evidence-mass-convictions>. *Egypt: Rab'a Killings Likely Crimes Against Humanity*, HUMAN RIGHTS WATCH (Aug. 12, 2014), <https://www.hrw.org/news/2014/08/12/egypt-raba-killings-likely-crimes-against-humanity>

¹³⁵ *Law and Politics*, *supra* note 10 at 45.

¹³⁶ *Egypt court confirms ousted President Morsi's death sentence*, ASSOCIATED PRESS (June 16, 2105), http://www.bostonherald.com/news_opinion/international/middle_east/2015/06/egypt_court_confirms_ousted_president_morsis_death.

¹³⁷ *Egypt: Free Illegally Jailed Journalist Al Jazeera Correspondent Held 9 Months Without Charge*, HUMAN RIGHTS WATCH <https://www.hrw.org/news/2014/05/15/egypt-free-illegally-jailed-journalist> (at least 15 journalist are imprisoned while being denied bail for "assisting terrorism").

¹³⁸ Marwa al-Asar, *Egyptian Rights Group Accuses Justice System of Double Standards*, MIDDLE EAST EYE (June 2, 2015), <http://www.middleeasteye.net/news/egyptian-rights-group-accuses-justice-system-double-standards-525727160> (Several former officials - including head of the dissolved ruling National Democratic Party (NDP) Safwat al-Sherif and Ex-Prime Minister Ahmed Nazif – have also been freed despite currently facing a raft of serious charges including profiteering and the illicit gain of millions of Egyptian pounds.).

free and fair elections under which the MB rose to power. After decades of rigged elections fraught with violence and fraud, the five elections that took place between 2011 and 2012 were not challenged even by the MB's most adamant detractors. Hence, the forced deposal of Morsi led by then Field Marshall Abdel Fatah Al-Sisi on July 3, 2013 was a direct affront to Egypt's slow progress toward granting its citizens political liberty through democratic elections. Notwithstanding Morsi's myriad political mistakes including a constitutional declaration that placed his decrees immune from judicial review, the military's intervention moved the country further away from liberalism.

Not only was Morsi deposed by the military, but he was also held incommunicado for four months without charges and outside the purview of law.¹³⁹ When the military finally disclosed his location, he was immediately charged with terrorism, treason, and other serious crimes subject to the death penalty. Specifically, Morsi was accused of collaborating with Hamas to break out of prison during the 18 day revolution in 2011. Strangely, the alleged crimes were committed a year prior to Morsi's candidacy for president during which the High Elections Committee had disqualified multiple candidates on various grounds. That the military had this information as far back as January 2011 and yet did not disqualify Morsi raises serious questions as to both the veracity of the claims and the abuse of law for political reprisal.¹⁴⁰

Morsi was also charged with killing three protesters and torturing fifty-four others during the December 2012 protests at the presidential palace. These charges mirrored those facing Mubarak for the killing of protesters during the January 25th revolution. While Mubarak's trial has slowly gone through the courts with little evidence of judicial bias against him and his conviction was ultimately reversed on appeal, Morsi's legal team reportedly could not access his case files until after the trial began.¹⁴¹ Moreover, Morsi's trial sped through the courts resulting in his being sentenced to death among 100 others in two sweeping mass trials.

The Sisi regime also charged Morsi with illegally obtaining copies of intelligence reports and military plans while he was president. Although it remains unclear how having possession of such documents while president of the nation is illegal, the charges corroborate the extent to which the Sisi regime has gone to manipulate law to settle political scores. But none of it would

¹³⁹ Maggie Michael, *Court Sentences Ousted Egyptian President Mohammed Morsi to 20 Years in Prison for Protesters' Deaths*, THE WORLD POST (April 21, 2015), http://www.huffingtonpost.com/2015/04/21/mohammed-morsi-sentenced_n_7105972.html

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

be possible without the cooperation of the judges. Those appointed to preside over the cases have not balked at their disdain for Morsi and other MB defendants. For instance, the judge over the alleged jailbreak case condemned Morsi's rule as a "black night" and the Muslim Brotherhood as "satanic" and "diabolical."¹⁴² Such overt partiality is far from what the founders of Egypt's judiciary envisioned when establishing a liberal institution. The rulings against Morsi signified a retraction of legal and political liberty as a new authoritarian military regime has replaced the Mubarak regime indefinitely.

D. Silencing the Revolutionary Youth

The politicization of the judiciary also facilitated the regime's crackdown on youth activists and civil society groups that supported the January 25th uprisings.¹⁴³ Youth leaders who played an instrumental role in mobilizing Egyptians to stand up to Mubarak's repressive security forces in the heady days following January 25 are serving two or three year sentences for minor infractions of an anti-protest law hastily passed by interim president Adly Mansour without a parliament.¹⁴⁴ The protest law provided the legal pretext the executive needed to silence youth activists after they realized they had been duped into supporting the military's ouster of Morsi in July 2013. Despite international organizations and human rights lawyers' condemnations of the prosecutions as violations of the right to assembly and expression, the Sisi regime continued using the draconian anti-protest law to silence dissenters of myriad ideological persuasions.¹⁴⁵

While the number of youth activists jailed in the past two years is too large to address in detail, a few cases are worth highlighting as exemplars. Yara Sallam, a human rights lawyer, prominent Egyptian feminist, and a 28 year old graduate of the elite American University in Cairo, was arrested on June 21, 2014 for allegedly violating the protest law.¹⁴⁶ As she was

¹⁴² Kirkpatrick, *supra* note 127.

¹⁴³ See Nuno Garoupa & Tom Ginsberg, *The Comparative Law and Economics of Judicial Councils*, BERKELEY J. INT'L L. 60-61 (2008) (highlighting the tension between judicial independence and accountability and how more accountability may result in less independence and vice versa).

¹⁴⁴ *Egypt: Three Prominent Activists Unlawfully Detained Under New Assembly Law*, *supra* note 174. *Egypt's Maher, Adel and Douma Sentenced to 3 Years in Jail*, AHAM ONLINE (Dec. 22, 2013), <http://english.ahram.org.eg/News/89748.aspx>. <http://www.bbc.com/news/world-middle-east-31583404>.

¹⁴⁵ *Egypt: Systematic abuses in the name of security*, AMNESTY INTERNATIONAL (Apr. 5, 2007), <http://www.amnesty.ie/sites/default/files/report/2010/04/Egypt%20Systematic%20abuses%20in%20the%20name%20of%20security.pdf>.

¹⁴⁶ Brian Dooley, *The Exceptional Egyptian Human Rights Defender Yara Sallam*, HUFFINGTON POST (Aug. 14, 2014), http://www.huffingtonpost.com/brian-dooley/the-exceptional-egyptian_b_5679301.html.

purchasing water with her cousin near the protest, security forces in civilian clothing arrested Sallam and 22 others accused of demonstrating against the controversial Protest Law near the Presidential Palace.¹⁴⁷ Although her cousin was released a few hours later, security forces held Sallam and referred her to the prosecutor because she worked with the outspoken human rights organization the Egyptian Initiative for Human Rights.¹⁴⁸ The judge in the misdemeanor court sentenced Sallam to three years later reduced to two years after appeal.¹⁴⁹ Days before Sisi traveled to New York to speak before the United Nations General Assembly in September 2015, he issued a pardon that included Yara Sallam, Sanaa Seif, and Al Jazeera journalists, among others.¹⁵⁰ After significant international pressure, Sisi pardoned Sallam in October 2015.¹⁵¹

Ahmed Douma, another prominent youth activist, was charged with organizing illegal protests and assaulting police officers during a protest. Judge Mohamed Nagi Shehata, who consistently has been assigned to many post-July 3, 2013 cases involving the MB and youth activists, presided over Douma's case.¹⁵² Douma was initially sentenced to 3 years in prison and fined 50,000 Egyptian pounds but later retried where he was sentenced to life in prison by Judge Shehata.¹⁵³ By prosecuting the activists and raising the liberty stakes, the regime effectively quashed the youth revolutionary movement through fear and deterrence. Rather than serve as a neutral check on executive over-reaching, the judiciary facilitated the regime's agenda, so much so that the use of special courts to try the political opposition has been unnecessary.

In what appeared to be a systematic campaign to silence - through detention - the leading revolutionary youth, the government also targeted Ahmed Maher.¹⁵⁴ A cofounder of the April 6th grassroots movement that mobilized young Egyptians through social media and other new technologies, Maher was highly influential among youth groups who suspected the military had

¹⁴⁷ Nourhan Fahmy, *One Year Behind Bars Due to Controversial Protest Law*, DAILY NEWS EGYPT (June 21, 2015),

¹⁴⁸ Joe Stork, *Egypt's Political Prisoners*, HUMAN RIGHTS WATCH (March 6, 2015),

<https://www.hrw.org/news/2015/03/06/egypts-political-prisoners>.

¹⁴⁹ *Egypt Court Reduces Protestor Sentences to 2 Years*, ASSOCIATED PRESS (Dec. 28, 2014),

<http://news.yahoo.com/egypt-court-reduces-protester-sentences-2-years-135448189.html>.

¹⁵⁰ Emma Graham-Harrison, *Egypt Pardons and Releases Jailed al-Jazeera Journalists*, THE GUARDIAN (Sept. 23, 2015), <http://www.theguardian.com/world/2015/sep/23/egypt-pardons-jailed-al-jazeera-journalists>

¹⁵¹ Mada Masr, *Update: Activists Yara Sallam and Sana Seif Released from Jail* (Sept. 23, 2015),

<http://www.madammasr.com/news/update-activists-yara-sallam-sanaa-seif-released-prison>

¹⁵² Daragahi, *supra* note 6; Aya Nader, *The 'Executions' Judge Nagi Shehata*, DAILY NEWS EGYPT (Feb. 16, 2015),

<http://www.dailynewsegypt.com/2015/02/16/executions-judge-nagi-shehata/>.

¹⁵³ *Egypt's Maher, Adel and Douma Sentenced to 3 Years in Jail*, AHARAM ONLINE (Dec. 22, 2013),

<http://english.ahram.org.eg/News/89748.aspx>; Kouddous, *supra* note 37. .

¹⁵⁴ Shahira Amin, *Egypt: Law will "severely erode civil liberties"*, INDEX ON CENSORSHIP (April 14, 2014),

<https://www.indexoncensorship.org/2014/04/egypt-law-will-severely-erode-civil-liberties/>.

sabotaged the revolution.¹⁵⁵ Maher accused the military and police of regressing Egypt backwards with regard to civil and political rights to levels worse than the last years of Mubarak's rule.¹⁵⁶ He also criticized the Muslim Brotherhood of political ineptness and a power grab that ultimately led to a military coup in July 2013.¹⁵⁷ In the same trial as Douma's, Maher was sentenced to three years in prison for protesting against the Anti-Protest Law passed in the fall of 2013. Maher's sentences were upheld on appeal.¹⁵⁸ Other prominent youth activist leaders prosecuted for protesting illiberal government practices include blogger Alaa Abdel Fattah and his sister Sanaa Seif.¹⁵⁹

That then Interim President Adly Mansour had been the Chair of the SCC, to which he returned after Abdel Fatah Al Sisi was elected president, further calls into question the SCC's commitment to freedom of speech and assembly, notwithstanding their rhetorical support for constitutional rights.¹⁶⁰ Equally troubling as the executive branch's aggressive political crackdown is the judiciary's cooperation. Rather than express concern with the threat that anti-protest laws may pose to freedom of speech, assembly, and other political rights; the judges sided with the state's narrative that protests threaten national security and social order. Thus, it is no surprise that youth activists, bloggers, and journalists hauled into criminal court find judges overtly partial to the prosecution at worst or complacent at best.¹⁶¹ One explanation for this troubling phenomenon may be that only a select number of handpicked loyalist judges (among a growing number of loyalist judges) are willing to do the executive's bidding. Prior to January 25th, 2011 this explanation was plausible. However, I argue that in the past four years the judiciary's shift away from liberalism has accelerated. Although this is primarily due to the threats to their material interests that the revolution posed, the explanation is more complex and nuanced. That is, Mubarak's concerted cooptation strategies were effective in politicizing judges to favor a strong central state particularly if that quashed the development of a populist democracy. And because the judges have always viewed themselves as the guardians of social order,¹⁶² their increasingly illiberal notions of what it

¹⁵⁵ MARWAN MUASHER, *THE SECOND ARAB AWAKENING AND THE BATTLE FOR PLURALISM* 161–185 (2014)

¹⁵⁶ Stork, *supra* note 148.

¹⁵⁷ *Id.*

¹⁵⁸ Mai El Sadany, *Life Sentence for Douma: The Latest Story of Justice Denied*, TAHRIR INSTITUTE FOR MIDDLE EAST POLICY (Feb. 5, 2015), <http://timep.org/commentary/life-sentence-for-douma/>.

¹⁵⁹ Dalia Rabie, *A Year at the Courts: Dissidents Sentenced, Old Regime Figures Acquitted*, MADA MASR (December 29, 2014), <http://www.madamasr.com/sections/politics/year-courts>.

¹⁶⁰ Ryan J. Suto, *Proven Guilty: Egypt's Judiciary and the Undermining of Democracy*, THE ATLANTIC COUNCIL (April 28, 2014), <http://www.atlanticcouncil.org/blogs/egyptsource/proven-guilty-egypt-s-judiciary-and-the-undermining-of-democracy#.U16VISR1W4U.twitter>.

¹⁶¹ Daragahi, *supra* note 7.

¹⁶² Rutherford, *supra* note 41, at 38.

takes to produce social order is manifested in their rulings against youth activists, dissident journalists, and the Muslim Brotherhood. Notably, their illiberalism extends to their own colleagues in the reformist camp.

E. Expelling Reformist Judges

Also targeted were reformist judges whose judicial independence campaigns over the past decade emboldened civil society to expand their activism from the courtrooms into the streets. Judges Club president Ahmed Al Zind actively called for aggressive prosecutions of judges who participated in the independence movement of 2005-2006.¹⁶³ President of the Judges Club Ahmed Al Zind, who is currently Minister of Justice, led the charge to discipline and expel seventy-five judges who publicly condemned the ouster of Morsi as an illegal coup.¹⁶⁴ Judges who openly aligned themselves with the Morsi regime, whether by supporting his legal decrees or condemning the events of July 3 as a military coup, became targets of internal disciplinary investigations with minimal due process rights.¹⁶⁵ Politically motivated disciplinary hearings have resulted in their expulsion from the judiciary, sending a chilling message to other judges.¹⁶⁶

Ironically, Zind and his followers who openly condemned Morsi as an incompetent president, an arguably political activity, are now accusing reformist judges of violating the JAL provision prohibiting judges from engaging in politics.¹⁶⁷ That disciplinary proceedings have not been

¹⁶³ Tom Perry, *Egypt's Mursi faces judicial revolt over decree*, REUTERS (Nov. 24, 2012), <http://www.reuters.com/article/2012/11/24/us-egypt-president-idUSBRE8AM0DO20121124>; *Egypt judges call for national strike over Mursi decree*, BBC NEWS (Nov. 24, 2012), <http://www.bbc.com/news/world-middle-east-20476693>.

¹⁶⁴ Mara Revkin, *Egypt's injudicious judges*, THE MIDDLE EAST CHANNEL (Jun 11, 2012), http://mideastafrica.foreignpolicy.com/posts/2012/06/11/egypts_injudicious_judges; *Egypt: Behind Mursi's Decisions, II*, DAILY KOS (Nov 29, 2012), <http://www.dailykos.com/story/2012/11/29/1165273/-Egypt-Behind-Mursi-s-Decisions-II#>.

¹⁶⁵ Adham Youssef, *Pro-Morsi Judges Forced into Retirement*, DAILY NEWS EGYPT (March 14, 2015), <http://www.dailynewsegypt.com/2015/03/14/pro-morsi-judges-forced-into-retirement/>.

¹⁶⁶ EGYPTIAN INITIATIVE FOR PERSONAL RIGHTS, *Rights Groups Condemn Forced Retirement of 41 Judges for Expressing Their Opinions* (March 18, 2015), <http://eipr.org/en/pressrelease/2015/03/18/2344>.

¹⁶⁷ Rana Allam, *Justice Minister Al-Zind: A Perfect Representation of the Times*, DAILY NEWS EGYPT (May 20, 2015), <http://www.dailynewsegypt.com/2015/05/20/justice-minister-al-zind-a-perfect-representation-of-the-times/> (His allegiance to the Mubarak regime and to the Armed Forces rule is non-questionable of course. During the 25 January revolution, Al-Zind attacked judges who joined in the protests, saying that “these judges do not represent the judiciary. Judges should not join the commons and the mob”. Later on in the months when the Supreme Council of Armed Forces ruled post-Mubarak, Al-Zind said that anyone who opposes SCAF is a “traitor”. Without a doubt, one of the fiercest opponents of the January revolution and everything it stands for.)

opened against judges who vocally opposed Morsi and expressed their support for Sisi demonstrates the proceedings are more about a judge's non-alignment with the military-security apparatus than an objective determination that a particular judge violated the JAL.

As of the summer of 2015, it is clear that key members of the judicial leadership actively supported the deep state in ousting Morsi and the MB from power. Many judges initially kept quiet as they were all too familiar with the high price of betting on the losing side of a high stakes political game. And justifiably so, as the reformist judges that spoke out against the military's takeover of the state are now being purged from the judiciary.¹⁶⁸ More than three years after Egypt's uprising, the judiciary has proven to be an endogenously politicized institution guarding its material interests in the status quo even if it means betraying its liberal origins.¹⁶⁹

V. Conclusion

The events that have transpired since January 25th, 2011 not only signify a court-centered counterrevolution but also a deliberalization of the Egyptian judiciary. Dating as far back as the Nasser era, Egypt's judges have been under inordinate pressure to cede their independence to the executive. Notwithstanding courageous efforts by reformist judges over the past sixty years, the executive masterfully manipulated judges' material interests to incentivize cooperation and punish independence. In the decade preceding the January 25th uprisings, the perennial power struggle between these two government branches left the judicial independence movement in tatters. As loyalist judges worked behind the scenes with the Mubarak regime to garner the support of the opportunist judges, the reformist judges' influence waned. The result is a group of judges who no longer feel obliged to remain impartial in disputes between political actors as they issue rulings directly infringing on private, political, and legal liberty.

; For a summary of similar events in Chile under Pinochet, see Lisa Hilbink, *JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE* 39 (2007).

¹⁶⁸ Hamad, *supra* note 44, at 145 (describing the history in Egypt of purging outspoken judges under various leaders); *7 judges sent to retirement for MB affiliation*, MADA MASR (Jan. 27, 2014), <http://www.madamasr.com/content/7-judges-sent-retirement-mb-affiliation>; *Egypt Refers 60 'pro-Brotherhood' Judges to Disciplinary Board*, AL AHRAM ONLINE (Oct. 20, 2014), <http://english.ahram.org.eg/NewsContent/1/64/113517/Egypt/Politics-/Egypt-refers--proBrotherhood-judges-to-disciplinar.aspx>.

¹⁶⁹ Daragahi, *supra* note 7. Reuters, *Egypt Using Courts and Jail to Intimidate Journalists*, *Amnesty International Says*, May 2, 2015; <http://www.theglobeandmail.com/news/world/egypt-using-courts-and-jail-to-intimidate-journalists-amnesty-international-says/article24231411/>; Kouddous, *supra* note 7.cit.

Despite this, the post-January 25th judiciary views itself as the guardian of social order and political stability against proclaimed transgressions of political Islamists and youth revolutionary. Formal and thin rule of law have become the centerpiece of a highly circumscribed definition of liberalism that discounts political liberty and dismisses personal liberty altogether. While some judges are coerced into cooperating with, or at least not challenging, the Sisi regime's authoritarian laws; that does not fully explain the judiciary's recent rulings sentencing hundreds of political Islamists to death, convicting thousands more to life in prison, and failing to hold Mubarak era accountable for past crimes. Rather, a powerful faction of loyalist judges appear to be wholeheartedly in support of the Sisi regime and its nationalistic fervor promoting security over all else. In exchange for more, though not complete, autonomy from executive interference that translates into preserving their material interests, the judiciary has acquitted police accused of human rights abuses, released Mubarak-era officials with minimal sentences, and punished political dissidents of various ideological affiliations.¹⁷⁰

What we are currently witnessing, thus, is the full extent to which an institution once considered a bastion of anti-colonial national sovereignty and liberal constitutionalism in the early 20th century has become deliberalized into a politicized judiciary taking sides in political disputes to evade public accountability. As a result, the courts in the post-January 25th era have dutifully performed their roles in legitimizing authoritarian forms of social controls aimed at serving the interests of the military-security apparatus, and in the process exposed the absence of judicial independence and accountability in Egypt.¹⁷¹

¹⁷⁰ *Egypt Court Acquits Police of 2011 Killings*, ALJAZEERA AMERICA, (Feb. 22, 2014) (<http://america.aljazeera.com/articles/2014/2/22/egyptian-police-morsi.html>) (reporting that six officers were acquitted on charges of killing 83 protestors); *Prominent Egyptian Activist Among 230 Sentenced to Life*, ALJAZEERA, Feb. 4, 2014 <http://www.aljazeera.com/news/2015/02/prominent-egyptian-activist-230-sentenced-life-150204125859073.html>; *We will Not be Silenced: April 6, After Court Order Banning Group*, AHRAM ONLINE, April 28, 2014 <http://english.ahram.org.eg/NewsContent/1/64/100015/Egypt/Politics-/We-will-not-be-silenced-April--after-court-order-.aspx>.

¹⁷¹ Jothie Rajah, *Punishing Bodies, Securing the Nation: How Rule of Law Can Legitimate the Urbane Authoritarian State*, 36 LAW & SOC. INQUIRY 4, 948 (2011).