

Theater or Transitional Justice: Reforming the Judiciary in Egypt

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**Theater or Transitional Justice:
Reforming the Judiciary in Egypt**

Sahar F. Aziz

Theater or Transitional Justice: Reforming the Judiciary in Egypt

Sahar Aziz¹

When Egyptian courts sentenced over 1,000 defendants to death in the spring of 2014, and when former President Hosni Mubarak was months earlier acquitted of human rights violations despite decades of documented torture, serious questions arose about the independence of the judiciary.² Of all Egyptian institutions, the judiciary's history of resisting executive interference caused many to believe it to be the least likely to partake in such affronts to individual rights.³ A closer

¹ Professor Aziz thanks the Center for International Relations at the Georgetown University in Qatar, Professor Mehran Kamrava, and Professor Zahra Babar for providing the opportunity to workshop earlier drafts of the paper. She also thanks Professors Adrien Wing, Chandra Sriram, and Nathan Brown for their insightful comments to earlier drafts. Special thanks to Deborah Bankhead, Brian Bailey, and Travis Gasper for their excellent research assistance. This book chapter is based, in part, on *Independence without Accountability: The Judicial Paradox of Egypt's Failed Transition*, PENN STATE LAW REVIEW (forthcoming 2015). All errors are mine.

² "Egypt: Fresh Assault on Justice," *Human Rights Watch*, April 29, 2014, accessed February 7, 2015, <http://www.hrw.org/news/2014/04/29/egypt-fresh-assault-justice>.

³ 3. Nathan J. Brown, "Why do Egyptian courts say the darndest things?," *The Washington Post*, March 25, 2014, accessed February 7, 2015, <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/03/25/why-do-egyptian-courts-say-the-darndest-things/>; Tamir Moustafa, "Law Versus the State: The Judicialization of Politics in Egypt," *Journal of Law & Social Inquiry* 3 (2003): 885 (discussing the effect of an independent judiciary free of governmental manipulation); Mahmoud Hamad, "When the gavel speaks: Judicial politics in modern Egypt"

look, however, reveals that Mubarak's efforts to curtail judicial independence successfully produced a conservative body whose top echelon supported the law and order narrative that facilitated the generals' return to rule.⁴ As a result, legal reforms are unlikely to come from within the judiciary.

These cases, along with numerous others, exposed the degree to which the judiciary had been coopted into the authoritarian patronage system. Mubarak's executive branch had apparently succeeded in its concerted efforts to quash the judicial independence movement that peaked in 2006 and reinforce the coalitions within the judiciary that ensured it remained a loyalist state institution. Thus, the conservative judiciary's response to the January 25th, 2011 uprisings was

(PhD diss., The University of Utah, 2008), 19, 161-62 (noting “the connection between the existence of an independent judiciary, capable of upholding property rights and enforcing business contracts and attracting investment to achieve economic development”) (discussing the political significance of judicial independence).

⁴ Yusef Auf, “Prospects for Judicial Reform in Egypt,” *The Atlantic Council*, October 21, 2014, accessed February 7, 2015, <http://www.atlanticcouncil.org/blogs/egyptsource/prospects-for-judicial-reform-in-egypt> (noting the judiciary is conservative by nature); Tom Ginsberg, “Courts and New Democracies: Recent Works,” *Law & Social Inquiry* 37 (2012): 735 (noting the Chilean judiciary's similar conservative inclinations as an impediment to transition to democracy); Asli U. Bali, “The Perils of Judicial Independence: Constitutional Transition and the Turkish Example,” *Virginia Journal of International Law* 52 (2012): 235 (arguing that the Turkish judiciary's composition of secular elites caused it to constrain political liberalization rather than secure democratic space in Turkey).

part of a larger phenomenon that ultimately left the authoritarian regime untouched, but for a new president and his new elite inner circle.⁵

Taking stock of the past three tumultuous years in Egypt, it has become evident that transitional justice was illusory from the start. Mass protests that once had the potential to produce revolutionary changes to the political and economic system were prematurely coopted to produce little more than a reshuffling of the elite coalition within the same authoritarian system.⁶ The institutions constituting the “deep state” were deeply entrenched in a corrupt patronage system that, if overhauled, risked the liberty and livelihood of its top echelon.⁷ Hence the millions of Egyptians who marched into Tahrir Square were up against far more than a dictator and his cronies.

Analysts have been late in this realization, however. This is largely due to the dominant narrative in Western literature that Egypt’s judiciary is relatively independent and its legal

⁵ Samer Soliman, *Autumn of Dictatorship*, (Calif.: Stanford University Press, 2011), 152; Thomas Carothers, ed., *Promoting the Rule of Law Abroad* (Washington, DC: Carnegie Endowment For International Peace, 2006), 3; Tom Ginsberg, “Courts and New Democracies: Recent Works,” *Law and Social Inquiry* 37 (2012): 720, 736.

⁶ Sahar Aziz, “Bringing Down an Uprising: Egypt’s Stillborn Revolution,” in *Tahrir Square and Beyond: Critical Perspectives on Politics, Law, and Security*, ed. Bessma Momani et al. (Under Review by Indiana University Press, 2015).

⁷ Soliman, *Autumn of Dictatorship*, 70; Roger Owen, *The Rise and Fall of Arab Presidents for Life*, (Boston: Harvard University Press, 2012), 189.

system is based on rule of law.⁸ As discussed in more detail in Sections II and III, Egypt’s legal system is a hybrid of ‘thin’ rule of law and rule *by* law, resulting in a politically vulnerable and facially independent judiciary.⁹ Rule of law assumes a separation between a society’s politics and law such that people are protected from political anarchy and arbitrariness through legal mechanisms that constrain government action.¹⁰ In contrast, rule by law permits authoritarian regimes to employ ostensibly legalistic mechanisms such as elections, parliaments, and judiciaries to impose their mandates on the public. In Egypt, these mechanisms are set up to be easily reversible should they produce outcomes that threaten the authoritarian regime’s

⁸ Nathan Brown, “Egypt’s Judges in a Revolutionary Age,” *Carnegie Endowment for International Peace*, February 22, 2012, accessed February 7, 2015, <http://carnegieendowment.org/2012/02/22/egypt-s-judges-in-revolutionary-age/9sri>; Hamad, “When the Gavel Speaks.” (noting “the connection between the existence of an independent judiciary, capable of upholding property rights and enforcing business contracts and attracting investment to achieve economic development”) (discussing the political significance of judicial independence).

⁹ Steven A. Cook, *Ruling But Not Governing*, (Washington, D.C.: Johns Hopkins University Press, 2007), 131; Tamir Moustafa, “Law in the Egyptian Revolt,” *Middle East Law and Governance* 3, (2011): 181-85.

¹⁰ Carothers, *Promoting the Rule*, 253-54.

survival.¹¹ Egyptians' preference for endogenous transitional justice conducted by Egyptian courts, therefore, further jeopardized a meaningful accounting of the Mubarak regime.¹²

Specifically, the military's savvy use of law and the courts to consolidate its political and legal authority created the appearance of a transition post-January 25th.¹³ By arresting and charging key members of Hosni Mubarak's inner circle, including his sons, the military went through the motions of holding former Mubarak officials accountable while cognizant that the Mubarak-hired Prosecutor General would likely sabotage the cases.¹⁴ Simultaneously, the military issued executive decrees and constitutional declarations that placed it above civilian control. This ultimately led to the current regime with former Field Marshall Abdel Fatah Al Sisi as president

¹¹ Cook, *Ruling But Not Governing*, 148.

¹² Marek M. Kaminski, Monika Nalepa, and Barry O'Neill, "Normative and Strategic Aspects of Transitional Justice," *Journal of Conflict Resolution* 50, (2006): 296.

¹³ Reem Abou-El-Fadl, "Beyond Conventional Transitional Justice: Egypt's 2011 Revolution and the Absence of Political Will," *International Journal of Transitional Justice* 6 (2012): 318, 319; Ivan Ivekovic, "Egypt's Uncertain Transition," in *Egypt's Tahrir Revolution*, eds., Dan Tschirgi, Walid Kazziha, and Sean McMahon (Boulder: Lynne Rienner Publishers: London, 2013), 183 (noting the military's role as the most prominent player in the transition process).

¹⁴ Fadl, "Beyond Conventional Transitional Justice," 327. Carlo Guarnieri & Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* 110 (Oxford: Oxford University Press 2002) (noting the important function in the French system (the foundation of Egypt's legal system) of the police in investigating crimes under the discretion of the prosecutor or instructing judge).

and a Defense Minister appointed by the military, not Egypt's president.¹⁵ It also failed to hold Mubarak accountable for the torture, deaths, and other human rights violations over a thirty year dictatorship.¹⁶ In the end, the outcome of the people's uprising is a nation firmly in the grasp, both politically and legally, of its military—with the judiciary's blessing.

This chapter argues that transitional justice did not occur in Egypt following 2011 and stood little chance of occurring for three reasons. First, despite valiant efforts by revolutionary opposition groups that triggered the January 25th uprising, a political transition never materialized.¹⁷ And without a political transition, transitional justice is improbable. Second, a conservative judiciary whose top echelon had been effectively coopted by Mubarak's centralized executive played a key role in ensuring that no political transition could occur.¹⁸ Finally, the different opposition groups calling for transitional justice, and in effect a political transition, diverged in their

¹⁵ "English Text of SCAF amended Egypt Constitutional Declaration," *Ahramonline*, June 10, 2012, accessed February 7, 2015, <http://english.ahram.org.eg/News/45350.aspx>.

¹⁶ David D. Kirkpatrick and Merna Thomas, "Egyptian Judges Drop All Charges Against Mubarak," *New York Times*, November 29, 2014.

¹⁷ Aziz, "Bringing Down an Uprising"; Nathan J. Brown, "Egypt's Failed Transition, Tracking the 'Arab Spring'," *Journal of Democracy* 24 (2013): 4, 45, 50.

¹⁸ Soliman, *Autumn of Dictatorship*, 70. Nathalie Bernard-Maugiron, ed., *Judges and Political Reform in Egypt*, (New York: The American University in Cairo Press, 2008), 9.

expectations of what that entailed.¹⁹ Revolutionary groups including youth activists, labor activists, and progressives called for thick rule of law that would overhaul the legal system substantively, rather than only procedurally. As they chanted “The People Want the Fall of the Regime,” they demanded that government affirmatively improve the lives of Egyptians through distributive justice.²⁰ In contrast, established secular liberal opposition groups and the Muslim Brotherhood (MB) were satisfied with establishing thin rule of law that enforced procedural protections against everyone, including the political elite. The established opposition was focused on reforming the existing legal system rather than developing new structures to redress decades of political suppression and corruption. In the end, transitional justice proved elusive, denying many Egyptians a remedy for decades of tyranny under Mubarak.²¹

Discussions on transitional justice in Egypt presuppose a political transition. As I argue in a previous article, more than three years after Egypt's historic January 25th uprising, nothing may be farther from the truth.²² In turn, this article focuses on the period between the January 25th uprising and the Fall 2014 to examine why the judiciary impeded the political transition that is the prerequisite to transitional justice. Although Egypt's judiciary has been historically more

¹⁹ Sean F. McMahon, “Egypt’s Social Forces, the State, and the Middle East Order,” in *Egypt's Tahrir Revolution*, eds., Dan Tschirgi, Walid Kazzuha, and Sean McMahon (Boulder: Lynne Rienner Publishers: London, 2013), 157-58.

²⁰ Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), 113; Abou-El-Fadl, “Beyond Conventional Transitional Justice,” 320.

²¹ Abou-El-Fadl, “Beyond Conventional Transitional Justice,” 323.

²² Aziz, “Bringing Down an Uprising.”

independent than other state institutions, the circumscribed independence it fought to attain was stunted over the past decade due to the purposeful efforts of the Mubarak regime to counter a nascent judicial independence movement that reached its zenith in 2006. Whether by packing the court with police academy graduates trained to be loyal to the executive branch, employing carrot and sticks tactics to discipline independent minded judges while rewarding compliant ones, or entrenching judges into a corrupt patronage system that sustained the authoritarian state;²³ Mubarak's regime created a judiciary incapable of delivering transitional justice to the millions of Egyptians who have been tortured, imprisoned, and denied basic social and economic rights for decades.²⁴ Even worse, members of the senior judicial leadership were either actively quashing the revolutionary forces or passively preventing a meaningful political transition from taking place.²⁵

In analyzing why the courts failed to meaningfully hold Mubarak era officials accountable, Section I begins by examining rule of law as a contested concept whose definition depends on the proponent's ideological leanings. The common fault line lies between proponents of thin and thick rule of law. Thin rule of law emphasizes procedural legal mechanisms and procedural due

²³ Moustafa, "Law Versus the State," 893-94.

²⁴ *Ibid.*, 907.

²⁵ Mark Wassouf et al., *Separating Law and Politics: Challenges to the Independence of Judges and Prosecutors in Egypt* (London: International Bar Association Human Rights Institute, 2014)

12, accessed February 7, 2015,

<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=B30A63AE-8066-4B49-8758-C1684BE5E9B9>.

process as sufficient for producing transitional justice. Thick rule of law, by contrast, goes beyond procedural mechanisms to focus on producing substantive equality within a political system that is not necessarily liberal or capitalist.²⁶ Whether a country pursues thin or thick rule of law affects the types of transitional justice tools it adopts such as reparations, truth and reconciliation commissions, amnesty, and criminal prosecutions. It also determines the broader political and socio-economic outcomes sought in the pursuit of transitional justice.

Section II proceeds to describe the restraints on Egypt’s judiciary leading up to January 25th which contributed towards its circumspect stance toward the uprising. The executive branch had put in place various structural mechanisms to restrain the judicial leadership from being led by judges acculturated and empowered to uphold the law irrespective of its impact on the executive’s power.²⁷ Indeed, independent adjudication entailed prohibitively high costs to a judge’s professional and personal life, including unfavorable judicial appointments, disparate disciplining and transfers, and denials of certain promotions. The Judicial Authority Law of 1972 (JAL) that governs the judiciary coupled with informal coercive tactics incentivize judicial self-censorship and voluntary compliance with executive branch expectations.²⁸

Finally, Section III examines how Egypt’s judiciary impeded the transitional process through its cooperation with the Supreme Council for the Armed Forces (SCAF) and defiance of Morsi.

²⁶ Carothers, *Promoting the Rule*, 67.

²⁷ Ginsberg, *Courts and New Democracies*, 738.

²⁸ Intisar Rabb, “The Least Religious Branch? Judicial Review and the New Islamic Constitutionalism,” *UCLA Journal of International & Foreign Affairs* 17 (2013): 124-26.

Specifically, the SCAF’s constitutional declarations and executive decrees were consistently upheld as lawful while the Morsi regime’s actions were heavily scrutinized by a skeptical judiciary with an apparently obstructionist agenda. Indeed, the Supreme Constitutional Court issued decisions clearly aimed at handicapping a president from the long distrusted MB.²⁹ Although the judiciary is not monolithic, a sufficient number of judges at the helm of a centralized governance structure, coupled with a powerful and politicized prosecutor-general, had vested interests in cooperating with the military-security apparatus to sabotage the young revolutionaries’ reform efforts and prevent any systemic restructuring of the political and economic system. While it is clear that the January 25th revolutionary moment was stillborn, it remains to be seen if Egypt’s judiciary can be rejuvenated into a meaningfully independent institution, able to keep an overreaching executive from perpetrating another protracted era of authoritarianism.

The Role of Law in Egypt’s Muted Transition

During Egypt’s 18-day uprising, demands for “rule of law” was a common catchphrase by various stakeholders calling for the overthrow of the Mubarak regime. A broad coalition of opposition groups invoked rule of law as a means of obtaining their revolutionary demands for bread, freedom, and justice (“aysh, horriya, wi adala”). Upon Mubarak’s overthrow, transitional justice became another slogan among international NGOs and Egyptian human rights groups.³⁰

²⁹ Brown, “Egypt’s Failed Transition,” 4, 45, 53.

³⁰ Moataz El Fegiery, “Truth and Reconciliation? Transitional Justice in Egypt, Libya and Tunisia,” *RIDE Policy Brief No. 177*, 3-4 (March 2014),

Despite the common rhetoric, these hotly contested terms were defined differently depending on the proponent. For the youth revolutionaries, labor activists, and progressives, “bread, freedom and justice” entailed overhauling the political system. It entailed meaningful inclusion of the youth, poor, and other politically disadvantaged groups in decision making processes in social and political institutions.³¹ The revolutionary slogan also entailed that the state abandon crony capitalist policies that had enriched the elite while impoverishing tens of millions of Egyptians.³² The youth revolutionaries called on the new government to embark on a socio-political program that would reallocate resources and wealth to the vast majority of Egyptians.³³ To address the decades of human rights violations, including state violence during the uprising itself, the revolutionaries demanded transitional justice primarily through criminal trials with a few calling

http://fride.org/descarga/PB_177_Truth_and_reconciliation.pdf; Luc Huyse, *Transitional Justice after War and Dictatorship*, (Brussels: Centre for Historical Research and Documentation on War and Contemporary Society, 2013), 22-23, accessed on November 11, 2014, <http://www.cegesoma.be/docs/media/Recherche/TransJustFinalReport.pdf>.

³¹ Owen, *Rise and Fall*, 174; Abou-El-Fadl, “Beyond Conventional Transitional Justice,” 323.

³² Abou-El-Fadl, “Beyond Conventional Transitional Justice,” 323; Moustafa, “Egyptian Revolt,” 185.

³³ Abdul-Fatah Madi, “Where are the Youth of the Egyptian Revolution?,” *Al Jazeera*, November 19, 2013, accessed February 7, 2015, <https://www.middleeastmonitor.com/articles/africa/8467-where-are-the-youth-of-the-egyptian-revolution>; Tamanaha, *On the Rule of Law*, 112; Moustafa, “Egyptian Revolt,” 190.

for a truth and reconciliation process.³⁴ Despite these calls for radical change and accountability, the Egyptian judiciary held fast to its belief that the existing judicial structures were fully capable of holding Mubarak regime officials accountable for their past corruption and abuses.³⁵

Although the more established opposition groups, including the liberals and MB, agreed that transitional justice was due, they preferred to tweak the existing legal system by enforcing laws that had historically been arbitrarily and selectively enforced, if at all, and focusing legal reforms on procedural mechanisms.³⁶ By focusing on existing laws and electoral processes, the MB accepted the legitimacy of the old regime's legal system and institutions. These fundamental differences between the youth revolutionaries and the established opposition proved fatal for both camps, as the security-military apparatus was able to manipulate the fissures between them

³⁴ *Recommendations on the Conference "Transitional Justice and Institutional Reform,"* (Cairo: Arab Center for the Independence of the Judiciary and the Legal Profession, 2013) (copy on file with author).

³⁵ Brown, "Egypt's Judges," 7. Moustafa, "Egyptian Revolt," 181-182.

³⁶ Mohammed Al Shafey, "A talk with the Muslim Brotherhood's Ibrahim Munir," *Ikhwanweb*, January 12, 2011, accessed February 7, 2015, <http://ikhwanweb.com/article.php?id=27804&ref=search.php> (discussing how the "existing laws must be applied to everyone"); "Muslim Brotherhood Praises Pro-Democracy Brussels Declaration," *Ikhwanweb*, May 13, 2014, accessed February 7, 2015, <http://ikhwanweb.com/article.php?id=31653&ref=search.php> (discussing the MB's wish to reinstate Morsi and build upon the existing laws in furtherance of the democratic transformation).

to retain control of the state while leaving the legal and political system intact. Worth noting is each stakeholder's emphasis on law as a tool, among others, for furthering its agenda. As such, a brief examination of the role of law during transition is warranted.

To be sure, law is more than the sum of courts, legislators, police, prosecutors, and other institutions with a direct relationship to the law.³⁷ Law is a normative system based on particularized cultural norms and values. In communitarian societies, for example, law is emphatically not neutral but rather conforms to and enforces a certain way of life influenced by history, culture, and religion.³⁸ Adjudication, thus, is oriented toward achieving an outcome consistent with the community interest, and in the case of Egypt, in accordance with the principles of Islamic law.³⁹

During transitional times, the role of law is further complicated as legal responses are both symbolic and performative of transition.⁴⁰ States experience disorder and legal instability that

³⁷ Carothers, *Promoting the Rule*, 21.

³⁸ Tamanaha, *On the Rule of Law*, 43.

³⁹ The Constitution of the Arab Republic of Egypt, available in English translation at <http://www.sis.gov.eg/Newvr/Dustor-en001.pdf>; Rabb, "The Least Religious Branch," 90.

⁴⁰ Kora Andrieu, "Political Liberalism After Mass Violence: John Rawls and a Theory of Traditional Justice," in *Transitional Justice Theories*, ed. Susanne Buckley-Zistel et al. (New York: Routledge, 2014), 6, 85.

cannot be addressed through the formalism of thin rule of law.⁴¹ Countries recovering from protracted conflict or revolutions experience normative shifts in their populations' understandings of justice and the role of law.⁴² In Egypt, for instance, Nathan Brown aptly notes that its transition was “shaped by political contests among confused and confusing actors at a time when the basic rules of political life are unclear, constantly reshaped, and broken.”⁴³ The conception of justice is partial and contextual as law is used to normatively construct the new political regime.⁴⁴

Naturalist and positivist approaches to transitional justice also inform the different ways law may be employed to remedy past wrongs. The natural law approach argues that the role of law in transition is to redress evil perpetuated under past regimes. Because putative law under the former dictatorial regime lacked morality, it never constituted a valid legal regime. As such, violating the law of the oppressor is not only justified but moral.⁴⁵ Universal conceptions of justice animate retributive or corrective justice, as do popular understandings of legality during

⁴¹ Wendy Lambourne, “Transformative Justice, Reconciliation and Peacebuilding,” in *Transitional Justice Theories*, ed. Susanne Buckley-Zistel et al. (New York: Routledge, 2014), 19, 24.

⁴² Susanne Buckley-Zistel et al. ed., introduction to *Transitional Justice Theories* by ed. Susanne Buckley-Zistel et al. (New York: Routledge, 2014), 1, 6.

⁴³ Brown, “Egypt’s Failed Transition,” 4, 45, 56.

⁴⁴ Andrieu, “Political Liberalism,” 6.

⁴⁵ Buckley-Zistel, *Transitional Justice Theories*, 14-15.

the transitional phase.⁴⁶ Furthermore, naturalists are more inclined to critique liberal democratic conceptions of the rule of law for its excessive individualist orientation and formalism at the expense of social solidarity and harmony.⁴⁷ Under the naturalist approach, in times of political flux, leaders and institutions justify otherwise extra-legal acts as to produce the justice demanded by the people. Consequently, naturalists critique positivist approaches to rule of law programs for reinforcing the existing power structures that jeopardize delivering transitional justice.⁴⁸ The criteria for measuring progress go beyond simply the fairness of elections, stability of institutions, or economic development in evaluating burgeoning new democracies.⁴⁹ Instead, institutions of the former regime must be completely restructured and former regime leaders must be removed to create a clean break from the past. Thus, the role of law is to transform the meaning of legality as part of a broader shift toward a more liberal regime.⁵⁰

In contrast, positive law is composed of the orders of government, statutes, and judicial enactments. Positive law is detached from moral considerations. The positivist approach argues

⁴⁶ Ibid., 4, 19.

⁴⁷ Randall Peerenboom, ed., *Asian Discourses of Rule of Law* (London: RoutledgeCurzon, 2004), 4; Tamanaha, *On the Rule of Law*, 96.

⁴⁸ Peerenboom, *Asian Discourses*, 35-36; Tamanaha, *On the Rule of Law*, 42-43; Abou-El-Fadl, “Beyond Conventional Transitional Justice,” 320.

⁴⁹ Buckley-Zistel, *Transitional Justice Theories*, 9; Owen, *Rise and Fall*, 3.

⁵⁰ Ruti Teitel, “Transitional Jurisprudence: The Role of Law in Political Transformation,” *Yale Law Journal* 106 (1997): 2020-21.

that preserving procedural regularity is a key priority for transition to democracy.⁵¹ This view assumes injustice under the previous regime was not due so much to unjust laws but failure to adjudicate them equally and in adherence to basic procedural rights. By divorcing questions of the legitimacy of law from the meta-rule-of-law value of due process, positivists believe that transitional justice responses to past tyranny lie in politics not law, thereby treating the two as neatly separated.⁵² As a result, judges view their role as passive and mechanical as they merely apply the letter of the law without concerns to the outcomes.⁵³

The revolutionary youth from the start adopted a naturalist approach calling for an overhaul of the political system and demanding socio-economic rights. In contrast, the SCAF and Muslim Brotherhood invoked the naturalist or positivist approach depending on their interests at a particular time. When the SCAF was in power, for example, it advocated positivist perspectives to justify thousands of military trials of civilians pointing to Mubarak-era laws that created a parallel judicial system for political cases.⁵⁴ But when naturalist arguments produced the desired political outcome, the military argued that revolutionary times called for revolutionary measures. For instance, SCAF invoked such reasoning when unilaterally issuing a constitutional declaration

⁵¹ Buckley-Zistel, *Transitional Justice Theories*, 14.

⁵² *Ibid.*, 4.

⁵³ Lisa Hilbink, *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile* 31 (New York: Cambridge Press 2007)

⁵⁴ Wassouf, *Separating Law and Politics*, 48-49. Emily C. Perish, Jenay Shook, and Eric Wiebelhaus-Brahm, “Transitional Justice in the Wake of the Arab Spring,” June 9, 2012, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2087696.

on March 30 that went far beyond the public’s mandate of the March 11, 2011 referendum.⁵⁵ The sixty-three new articles granted the SCAF the sole discretion to convene a joint session of parliament. It also allowed the presidential election process to be delayed indefinitely without affecting the constitutional drafting process thereby prolonging SCAF’s rule such that the generals could influence the constitution drafters and process. The March 30 declaration granted the SCAF executive and legislative functions that authorized it to issue legislation, determine the state budget, appoint members to the lower house of parliament and ministers, and represent the state externally.⁵⁶ Weeks prior to Morsi’s assumption of the presidency, the generals issued another constitutional decree in June 2012 that granted SCAF more power than the office of the presidency.⁵⁷ When pressed on the dubious legal basis for issuing the declarations, the SCAF responded that revolutionary times called for unconventional acts to protect the public interest.⁵⁸

⁵⁵ Abou-El-Fadl, “Beyond Conventional Transitional Justice,” 326.

⁵⁶ Kristen Stilt, “The End of “One Hand”: The Egyptian Constitutional Declaration and the Rift between the “People” and the Supreme Council of the Armed Forces,” *Yearbook of the Islamic and Middle Eastern Law* (2012): 16-19.

⁵⁷ Jason Brownlee, *Democracy Prevention: The Politics of the US-Egyptian Alliance* (New York: Cambridge University Press, 2012), xi-xii; Javed Maswood and Usha Natarajan, “Democratization and Constitutional Reform in Egypt and Indonesia: Evaluating the Role of the Military,” in *Arab Spring in Egypt: Revolution and Beyond*, eds. Bahgat Korany & Rabab El-Mahdi (Cairo: The American University in Cairo Press, 2012), 244; “English Text of SCAF.”

⁵⁸ Al Masry Al Youm, “Jama’a al-Islamiya: SCAF is rigging election for Shafiq,” *Egypt Independent*, May 5, 2012, accessed February 7, 2015,

Meanwhile, if anyone challenged the SCAF's authority, the generals pointed to the law as a basis for their legitimacy.⁵⁹ And thus rule by law, rather than rule of law, was perpetuated to manipulate a so-called transitional process that produced minimal changes to the political and legal system.

Likewise, Morsi's administration justified his fatal constitutional declaration of November 2012 with natural law-based arguments that violating the law was justified to preserve democracy and stop former regime elements from sabotaging his regime.⁶⁰ Nine months later when the military deposed Morsi, the MB reversed course to make positivist arguments highlighting violations of the constitution and due process rights, among other legal violations, to argue July 3rd was a military coup.⁶¹ This opportunistic conceptualization of the role of law during "revolutionary times" continued into Adly Mansour's military-backed government as thousands were killed, detained, and tortured in the crackdown against pro-Morsi supporters in Raba'a and Nahda

<http://www.egyptindependent.com/news/jamaa-al-islamiya-scaf-rigging-election-shafiq>

(discussing SCAFs use of "unconventional methods that had not been used in the past").

⁵⁹ Nathan J. Brown, "The Egyptian Political System in Disarray," *Carnegie Endowment*, June 19, 2012, accessed February 7, 2015, <http://carnegieendowment.org/2012/06/19/egyptian-political-system-in-disarray> (discussing SCAF's issuance of Constitutional decrees and loophole enforced laws to retain authority).

⁶⁰ Brown, "Egypt's Failed Transition," 4, 45, 50.

⁶¹ "Constitutional Timeline of Egypt," *Constitutionnet*, August 8, 2014, accessed on February 7, 2015, <http://www.constitutionnet.org/country/constitutional-history-modern-egypt>.

squares in the summer of 2013.⁶² Despite the ideological differences between various parties that have controlled Egypt since January 25, they each defined the role of law on naturalist or positivist bases depending on which approach was politically expedient. It quickly became apparent that law was the handmaiden of politics.

While a full accounting of the complex role of law in Egypt's stillbirth transition is beyond the scope of this paper, one thing is clear. Both the positivist and naturalist approaches emphasize the role of the judiciary in delivering transitional justice. The various stakeholders viewed an independent judiciary as a prerequisite for establishing rule of law and by extension democracy.⁶³ But similar to rule of law, an independent judiciary is a contested concept that is purported to exist in both democratic and authoritarian regimes. The next section examines the role of courts in authoritarian states and the implications for Egypt.

The Fragility of Judicial Independence in Authoritarian States

In authoritarian regimes, courts play an important role in preserving the executives grip on political and economic outputs. As such, persuading the international community that the judiciary is independent attracts foreign investment that expands the tax base and ultimately

⁶² Wassouf, *Separating Law and Politics*, 14, 15.

⁶³ Carothers, *Promoting the Rule*, 20; Brown, "Egypt's Judges," 1.

enriches the power elite.⁶⁴ For instance, Sadat established Egypt's Supreme Constitutional Court in 1979 primarily to gain the trust of foreign investors skeptical of Egypt's protection of private property.⁶⁵ Courts are also used to establish social controls, sideline political opponents, bolster a regime's claim to legal legitimacy, and resolve coordination problems among competing factions within the regime.⁶⁶

Cognizant that authoritarianism constrains avenues for airing public grievances and invites corruption, the Egyptian regime used the judiciary as a mechanism to discipline the civil bureaucracy, curb government excesses, and allow for public venting. Administrative litigation generated an independent stream of information on bureaucratic misdeeds to the chief executive.⁶⁷ This allowed the executive to rein in the state bureaucracy at any sign of autonomy or excesses that threatened the chief executive's. Venting through the courts also diverted the public from partaking in political disputes and instead turning to litigation under a judiciary

⁶⁴ Tom Ginsberg and Tamir Moustafa, eds., *Rule By Law: The Politics of Courts in Authoritarian Regimes* (New York: Cambridge University Press, 2008), 132; Moustafa, "Law Versus the State," 885; Hamad, "When the gavel speaks," 19.

⁶⁵ Bjorn Bentlage, "Strife for Independence in an Autocratic Regime: The Egyptian Judges' Club 2000-2007," *Die Welt des Islams* 50 (2010): 247.

⁶⁶ Ginsberg and Moustafa, *Rule by Law*, 4; Jothie Rajah, "Punishing Bodies, Securing the Nation: How Rule of Law Can Legitimate the Urbane Authoritarian State," *Law & Social Inquiry* 36 (2011): 4, 945, 948.

⁶⁷ Ginsberg and Moustafa, *Rule by Law*, 141-42.

closely monitored by the executive.⁶⁸ Litigation, thus, took the place of mobilizing, organizing, and sustaining a political movement.⁶⁹ For instance, election fraud was addressed through high profile cases challenging the constitutionality of election laws, resulting in the SCC striking down the laws and forcing the dissolution of the People’s Assembly in 1987 and 1990. Similarly, civil society combatted the regime’s use of libel laws to silence critical views through litigation that resulted in the SCC ordering amendments to the law in favor of freedom of expression.⁷⁰ A few years later 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; thereby decreasing self-censorship.⁷¹ By 1997, public interest litigation became the primary form through which civil society promoted reform.⁷² Because political mobilization could ultimately topple a regime, Mubarak tolerated human and civil rights litigation as a controllable mechanism for venting public grievances.⁷³

⁶⁸ Soliman, *Autumn of Dictatorship*, 137.

⁶⁹ Tamir Moustafa, “The Political Role of the Supreme Constitutional Court: Between Principles and Practice,” in *Judges and Political Reform in Egypt*, ed. Nathalie Bernard-Maugiron (New York: The American University in Cairo Press, 2008), 92-93.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, 93.

⁷² *Ibid.*, 94.

⁷³ Soliman, *Autumn of Dictatorship*, 142.

The following sections describe the various means of control exercised by the Egyptian executive and how this ultimately produced a conservative judiciary willing to cooperate, or look the other way, in the counter-revolutionary crackdown on pro-Morsi supporters and youth activists.⁷⁴ Section A argues that the prosecutor general has been the executive's gatekeeper who employs the criminal justice system to punish political opposition and reward loyalists. This practice continued after the January 25th uprising under the SCAF, Morsi, and Adly Mansour's military-backed interim government. It has yet to be determined if President Sisi can continue this practice now that the 2014 constitution grants the Supreme Judicial Council the authority to appoint the Prosecutor General for a term no longer than 4 years.⁷⁵ Section B argues that the fragility of judicial independence, as articulated in Tamir Moustafa's groundbreaking work on the Egyptian judiciary, was a key factor in transforming the judiciary into a conservative deep state institution suspicious of, if not outright opposed to, the demands of the revolutionaries. Section C shows how specific acts of judicial independence were swiftly quashed by the executive through legal and coercive measures thereby sending a chilling warning to judges that the boundaries of their independence were circumscribed by the executive's core interests.

Egypt's Prosecutor General as Gatekeeper

Authoritarian regimes govern through highly centralized rule under the tight grip of the chief executive. Egypt is no exception. Since the 1952 revolution, Egypt's president and his inner

⁷⁴ Ginsberg, *Courts and New Democracies*, 721; Auf, "Prospects for Judicial Reform."

⁷⁵ The Constitution of the Arab Republic of Egypt, available in English translation at <http://www.sis.gov.eg/Newvr/Dustor-en001.pdf>.

circle exercised centralized control over state organizations, including the judiciary.⁷⁶ An extensive patronage system allowed a select group of elites to manipulate state institutions to rely on the presidency politically and financially.⁷⁷ As such, Mubarak continuously interfered in governmental portfolios, violated the autonomy of state institutions, and fortified his position in the system.⁷⁸ Parliament was merely a décor to mask the true authoritarian face of the regime to the international community.⁷⁹ As a result, state institutions were weak, apolitical, and unable to openly compete with each other or oppose the upper elites' prerogatives.⁸⁰ Instead, they served the interests of the central authority even if it meant the institution's mandate was compromised. Because the ruling elite in control of state institutions derived their power from the chief executive, anyone who challenged his power was quickly eliminated and replaced with a compliant member of the ranking elite.⁸¹

⁷⁶ Joshua Stacher, *Adaptable Autocrats: Regime Power in Egypt and Syria* (Stanford: Stanford University Press, 2012), 173.

⁷⁷ *Ibid.*, 38.

⁷⁸ *Ibid.*, 83.

⁷⁹ Samer Shehata, ed., *Islamist Politics in the Middle East: Movements and Change*, (New York: Routledge, 2012), 124; Mona El-Ghobashy, "The Praxis of the Egyptian Revolution," in *The Journey to Tahrir: Revolution, Protest, and Social Change in Egypt*, eds. Jeannie Sowers and Chris Toensing (London: Verso, 2012), 21. Adel Omar Sherif, *Attacks on the Judiciary: Judicial Independence – Reality or Fallacy?*, 6 Y.B. ISLAMIC & MIDDLE E. L. 16 (1999-2000).

⁸⁰ Stacher, *Adaptable Autocrats*, 35.

⁸¹ *Ibid.*, 38, 173.

The centralized authoritarian system is deeply entrenched in a hierarchical patronage web that feeds at the top with each institution depoliticized and unable to seriously contest the top executive. Paradoxically, this makes the president more dispensable because the system can quickly adapt to whoever takes the reins.⁸² Should the executive unexpectedly be removed or die, executive elites can confront and overcome challenges to their rule by adapting without forcing the regime to collapse.⁸³ Thus, when Mubarak was forced out of office on February 11, 2011, General Tantawi was able to take on the role of the chief executive with relative ease, after which he quickly got to work putting the military elite at the helm of a centralized system. As Joshua Stacher predicted, Egyptian ruling elites were able to shed Mubarak's inner circle of established figures and incorporate new elites from the military-security establishment.⁸⁴ Because current President Sisi is subject to the same fate should he choose to push for radical reforms that jeopardize the deep state's economic and political interests; a peaceful transition to democracy is highly unlikely in the near term.

The Prosecutor General in Egypt is a key facilitator in the chief executive's centralized-system of political control. Based on the French legal system, the position wields significant powers through life tenure combined with supervisory authority over a hierarchy of prosecutors across

⁸² Ibid., 81-82.

⁸³ Ibid., 173.

⁸⁴ Ibid., 39.

Egypt.⁸⁵ The President had constitutional authority to appoint the Prosecutor General until January 2014 when the constitution was amended to transfer appointment authority to the Supreme Judicial Council pursuant to Article 189.⁸⁶ It remains to be seen whether this significant change will impede the executive from unduly interfering with prosecutions or simply be manipulated through political or other legal means to subordinate the prosecutor's office to the President's prerogative. Similar to other French-based legal systems, all public prosecutors in Egypt are members of the judiciary, and most become sitting judges once they reach the age of thirty.⁸⁷ Prosecutors are required to swear the same oath as judges, protected from dismissal from their post without their consent, and prohibited from consulting on cases that conflicts with their job including political activities.⁸⁸ As members of the judiciary, prosecutors are also immune from prosecution.

Despite these protections and ethical obligations of impartiality, the Ministry of Justice has used its significant influence over career members of the public prosecution to politicize

⁸⁵ Wassouf, *Separating Law and Politics*, 43. Carlo Guarnieri & Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* 149 (Oxford: Oxford University Press 2002).

⁸⁶ The Constitution of the Arab Republic of Egypt, available in English translation at <http://www.sis.gov.eg/Newvr/Dustor-en001.pdf>.

⁸⁷ Wassouf, *Separating Law and Politics*, 22; Clark B. Lombardi, "Egypt's Supreme Constitutional Court: Managing Constitutional Conflict in an Authoritarian Aspirationally 'Islamic' State," *Journal of Comparative Law* 3 (2008): 234, 235.

⁸⁸ Wassouf, *Separating Law and Politics*, 43.

prosecutions.⁸⁹ Specifically, the Ministry has the authority to appoint investigating judges, transfer prosecutors at its discretion, and discipline prosecutors.⁹⁰ These powers are used to select investigating judges in criminal cases whom the Minister of Justice knows holds views favorable to the prosecution.⁹¹ Or the Ministry of Justice can withhold appointing an independent-minded judge to investigate alleged criminal acts by regime loyalists'.⁹² Because the investigating judge's report is considered as credible evidence in a trial, a biased selection process has adverse consequences to the defendant's right to a fair trial. Other reported abuses of power include "suggesting" to prosecutors that certain investigations should be dropped or started.⁹³ Should a prosecutor refuse to cooperate with the Minister's request, he likely faces retaliation through transfers to unattractive positions that are effectively demotions in quality of work and status.⁹⁴ The Ministry has mastered these unspoken rules such that he provides pretextual reasons when accused of undue politicization of judicial transfers.

The prosecutor general's authorities allowed the Mubarak regime to maintain its authoritarian grip on the political system all the while proclaiming that Egypt respected the rule of law. For this reason, human rights advocates had long advocated for the judiciary, rather than the executive, to appoint the Prosecutor General; set term limits; and prohibit the Prosecutor General

⁸⁹ Ibid., 45.

⁹⁰ Ibid., 43.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid., 45.

⁹⁴ Ibid., 43; Bernard-Maugiron, *Judges and Political Reform*, 21.

from serving on the Supreme Judicial Council where he has power to appoint and promote judges. The January 25th uprising provided the long awaited political opening to implement these demands. To no one's surprise though, the SCAF declined to act.⁹⁵

Indeed, when the SCAF took the reins of power, it immediately tasked the Mubarak-appointed Public Prosecutor, Abdel Meguid Mahmoud, with quashing the young revolutionaries' calls for substantive equality and thick rule of law. During his six year tenure, Mahmoud was notorious for exploiting the prosecutor's office to detain, torture, and prosecute the regime's political opposition. Indeed, his reputation was so nefarious that his resignation was among the top demands voiced by the January 25th revolutionaries.⁹⁶ Nevertheless, his status as a member of the judiciary with life tenure offered the SCAF pretext for retaining Mahmoud to transfer over 10,000 civilians to military courts.⁹⁷ As a result, from February 2011 to June 2012 thousands more civilians were tried in military courts than the thirty years under Mubarak.⁹⁸ Military courts had jurisdiction to try any crime committed in a location operated by or for the military, including commercial places.⁹⁹ These courts were an effective mechanism for successful prosecution of dissidents because all judges are military officers appointed by the Minister of Defense and the President for two-year renewable terms. Due to their institutional identity and legal training, military judges tend to defer to the military's position, making a conviction nearly

⁹⁵ Abou-El-Fadl, "Beyond Conventional Transitional Justice," 327.

⁹⁶ Wassouf, *Separating Law and Politics*, 44.

⁹⁷ *Ibid.*, 19.

⁹⁸ *Ibid.*, 7.

⁹⁹ *Ibid.*, 33.

guaranteed. Military judges also determine whether the offense occurred within their jurisdiction, the trials are held in secret, and there is no right to appeal.¹⁰⁰ Moreover, the president has discretion to decide if any crime under the Penal Code can be tried by a military court.¹⁰¹

The SCAF did not hesitate to abuse these powers to prosecute liberals, youth revolutionaries, labor rights activists, and other secular groups for criticizing the military's human rights abuses and failure to provide transitional justice to the millions of Egyptians who had suffered under Mubarak's brutal state security apparatus.¹⁰² Meanwhile, Mubarak and his cronies were tried in conventional criminal courts with tighter evidentiary and procedural standards.¹⁰³ Despite tenacious protest, military trials of civilians were authorized under Egypt's 2014 constitution and continue to be used to prosecute political opposition.¹⁰⁴

¹⁰⁰ Moustafa, "Law Versus the State," 904-05.

¹⁰¹ The Military Court of Justice of Egypt, article 6; Wassouf, *Separating Law and Politics*, 33.

¹⁰² Holger Albrecht, "Authoritarian Transformation or Transition from Authoritarianism? Insights on Regime Change in Egypt," in *Arab Spring in Egypt*, eds. Bahgat Korany & Rabab El-Mahdi (The American University in Cairo Press, 2012), 267; Abou-El-Fadl, *Beyond Conventional Transitional Justice*, 327.

¹⁰³ Albrecht, *Authoritarian Transformation*, 267; "Egypt: Q&A on the Trial of Hosni Mubarak," *Human Rights Watch* (28 May 2012), <http://www.hrw.org/news/2012/05/28/egypt-qa-trial-hosni-mubarak>.

¹⁰⁴ Ursula Lindsey, "Egypt's Judges Strike Back," *The New Yorker*, March 26, 2014, <http://www.newyorker.com/news/news-desk>. Omar Mekky, "Evolution of the Rafaiest in

Adopting another aspect of the French legal system, criminal investigations in Egypt can be initiated by complaints by private citizens accepted by the prosecutor's office or *sua sponte* by the public prosecutors.¹⁰⁵ Before and after January 25th, Mahmoud abused his gatekeeping powers in determining which complaints to prosecute, the quality of the factual investigation, which prosecutors to assign to a case, and which judges to punish for criticizing the SCAF.¹⁰⁶ For example, three judges – Alaa Shawqi, Hassan El-Naggar, and Ashraf Nada – were investigated for allegedly insulting the military when they condemned military courts on television as lacking the due process rights provided by civilian courts.¹⁰⁷ Similarly, more civilians were charged with “insulting the military” than under Mubarak’s thirty year rule.¹⁰⁸ These cases, among others, offered further proof that Mahmoud’s loyalties to the security-military apparatus fatally compromised the prosecutions of Mubarak and his cronies.¹⁰⁹

Egyptian Politics,” *Kuwait Times*, September 17, 2012, <http://news.kuwaittimes.net/evolution-of-the-refaieist-in-egyptian-politics/>; Wassouf, *Separating Law and Politics*, 35.

¹⁰⁵ Wassouf, *Separating Law and Politics*, 24.

¹⁰⁶ Brown, *Egypt’s Failed Transition*, 4, 45.

¹⁰⁷ Wassouf, *Separating Law and Politics*, 29.

¹⁰⁸ *Ibid.*, 7.

¹⁰⁹ Leila Fadel, “Mubarak Trial a “Decisive Moment” for Egypt,” *The Washington Post* (3 August 2011), http://www.washingtonpost.com/world/middle-east/mubarak-trial-a-decisive-moment-for-egypt/2011/08/01/gIQAfYCNpI_story.html. Jamie Dettmer, “Mubarak’s Acquittal Signals Complete Triumph of Military Over Arab Spring,” *The Daily Beast* (Nov. 29, 2014),

Because the public's demand for the criminal prosecutions of Mubarak-era officials was too great to ignore,¹¹⁰ Mahmoud had no choice but to charge them. However, he sabotaged the trials by assigning junior prosecutors to complex corruption cases, conducting poor investigations that could not withstand judicial scrutiny, and declining to prosecute police and security personnel accused of killing protesters.¹¹¹ As a result, Mubarak's conviction and life sentence for complicity in the killings of protesters during the January 25th uprisings were reversed on appeal and on November 29, 2014 the charges were dismissed in their entirety.¹¹² The intense pressure in 2011- 2012 on the court of first instance to convict Mubarak coupled with the fact that the Judge presiding over the case was scheduled to retire after this case, thus having little to lose in issuing a conviction, likely explains the initial conviction.¹¹³ Yet, only one police officer is serving a three year sentence for shooting protesters during the bloody Mohamed Mahmoud

<http://www.thedailybeast.com/articles/2014/11/29/mubarak-s-acquittal-signals-complete-triumph-of-military-over-arab-spring.html>.

¹¹⁰ 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.

¹¹¹ Wassouf, *Separating Law and Politics*, 46, 48.

¹¹² "Key Events in Rule, Trial of Egypt's Hosni Mubarak," *Associated Press*, August 22, 2013, <http://bigstory.ap.org/article/key-events-rule-trial-egypts-hosni-mubarak-0>.; Joe Stork, "Mubarak Convicted, but Abuses Continue in Egypt", *Human Rights Watch*, June 20, 2012, <http://www.hrw.org/news/2012/06/10/mubarak-convicted-abuses-continue-egypt>.

¹¹³ Conal Urquhart, "Hosni Mubarak Sentenced to Life in Prison," *The Guardian* (June 2, 2012), <http://www.theguardian.com/world/2012/jun/02/hosni-mubarak-sentenced-life-prison>.

protests in November 2011 wherein over fifty-one protesters were killed in five days.¹¹⁴ And only two police officers are serving time for the killing of at least 846 protesters in the protests of January 2011.¹¹⁵ In the end, the public's overwhelming trust in the military at the time of Mubarak's ouster facilitated the SCAF's agenda, which was not much different than Mubarak's, with minimal public scrutiny.¹¹⁶ The next section examines why judges became either complicit or powerless in the executive's obstructionism against transitional justice after January 25th.

Structuring Egyptian Judicial Self-Restraint

Savvy authoritarians can constrain judicial activism without directly infringing on judicial autonomy.¹¹⁷ In Egypt, the regime uses carrots and sticks to persuade the upper echelons of the courts to cooperate on high priority cases in exchange for maintaining some institutional autonomy.¹¹⁸ Tamer Moustafa highlights four key strategies Mubarak used to constrain judicial independence: 1) institutional incentives that promote judicial self-restraint; 2) incapacitating judicial support networks; 3) constraining access to justice; and 4) fragmented judicial

¹¹⁴ Wassouf, *Separating Law and Politics*, 48.

¹¹⁵ *Ibid.*

¹¹⁶ Bahgat Korany, "Egypt and Beyond: The Arab Spring, the New Pan-Arabism, and the Challenges of Transition," in *Arab Spring in Egypt: Revolution and Beyond*, eds. Bahgat Korany & Rabab El-Mahdi (Cairo: The American University in Cairo Press, 2012), 290, 291; Aziz, "Bringing Down an Uprising."

¹¹⁷ Ginsberg and Moustafa, *Rule by Law*, 14.

¹¹⁸ *Ibid.*, 18.

systems.¹¹⁹ This section focuses on the first strategy to argue that the judiciary that existed on January 25th was predisposed to reject revolutionary upheavals to the political system and revolutionary youth's calls for thick rule of law reforms.

The Mubarak regime employed various institutional and legal mechanisms to incentivize judicial self-restraint while disincentivizing judicial activism. These include the process for appointing judges, assigning judges to particular cases and courts, appointments to lucrative secondments in state institutions, and the use of military and other exceptional courts.¹²⁰ Some of these restraints have been removed since the January 25th uprising while others remain in place.¹²¹ For instance, until January 2014, the president had the legal authority to select both the Chief Justice on the Supreme Constitutional Court (SCC) who presides over the presidential election commission and the Prosecutor General who sits on the Supreme Judicial Council.¹²² As of the writing of this article, the Minister of Justice appoints the presidents of the highest courts from among the judges at the appeals courts, some of whom also serve on the Supreme Judicial Council (SJC).¹²³ The SJC in turn selects all of the prosecutors and most judges across the judiciary, thereby granting it significant powers over the administration of justice and judicial governance.¹²⁴ Through these various direct and indirect appointment powers, the executive is able to control

¹¹⁹ *Ibid.*, 14.

¹²⁰ Wassouf, *Separating Law and Politics*, 22.

¹²¹ *Ibid.*, 34.

¹²² Lombardi, "Egypt's Supreme Constitutional Court," 241.

¹²³ Wassouf, *Separating Law and Politics*, 24.

¹²⁴ *Ibid.*, 23.

senior judges who in turn restrain, discipline, or expel junior judges whose rulings threaten the executive.¹²⁵

The Supreme Judicial Council (SJC) is the judiciary's governing body that, in theory, shields the judiciary from undue interference by the executive branch.¹²⁶ It was reinstated by Mubarak in 1984 after Nasser abolished it in 1969 as part of a broader assault on the judiciary, known as the Massacre of the Judiciary.¹²⁷ Nasser dismissed over 200 judges including senior judges on the Court of Cassation and prosecutors in various parts of the judicial system; and created the Supreme Council of Judicial Organizations to retain full control over judicial appointments.¹²⁸

The seven member council is comprised of the Chief Justice of the Court of Cassation, the two most senior Vice Presidents of the Court of Cassation; the General Prosecutor, the Chief Judge of the Cairo Appellate Court, the Chief Judge of the Alexandria Appellate Court, and the Chief Judge of the Tanta Appellate Court.¹²⁹ Even though they are nominated by judicial bodies based on seniority, each judge who occupies these positions must be approved by either the Minister of

¹²⁵ "Egyt Refers 60 'pro-Brotherhood' Judges to Disciplinary Board," *Al Ahram Online*, October 20, 2014, accessed on February 7, 2015, <http://english.ahram.org.eg/NewsContent/1/64/113517/Egypt/Politics-/Egypt-refers--proBrotherhood-judges-to-disciplinar.aspx>.

¹²⁶ El-Ghobashy, "Praxis," 139.

¹²⁷ *Ibid.*; Moustafa, "Law Versus the State," 889.

¹²⁸ Ginsberg and Moustafa, *Rule by Law*, 134.

¹²⁹ Judicial Authority Law of Egypt, article 77.

Justice or the President.¹³⁰ Thus, in practice, the SJC's independence is compromised by executive branch's powers to appoint the senior judges who comprise the SJC.¹³¹

The SJC has extensive powers in determining pay, promotion, and transfer of judges.¹³² These powers can be used to reward or punish judges. For example, a judge whose rulings are consistently unfavorable to the regime may find himself transferred to a rural area in South Egypt far from his family and the conveniences of urban life.¹³³ Likewise, a judge up for promotion as chief of an appellate court may be passed up if the regime fears he will not exercise his authorities to protect the regime's core interests.¹³⁴ Such decisions more often originate from the Minister of Justice, and while the SJC has the authority to decline to approve the Minister's decisions, it rarely does because it could lead to political retaliation.¹³⁵

¹³⁰ El-Ghobashy, "Praxis," 139.

¹³¹ Wassouf, *Separating Law and Politics*, 28.

¹³² Mahmud al-Khudayari, "The Law on Judicial Authority and Judicial Independence," in *Judges and Political Reform in Egypt*, ed. Nathalie Bernard-Maugiron (New York: The American University in Cairo Press, 2008), 45, 47.

¹³³ See Mohamed Sayed Said, "A Political Analysis of the Egyptian Judges' Revolt" *Judges and Political Reform in Egypt*, ed. Nathalie Bernard-Maugiron (New York: The American University in Cairo Press, 2008), 19, 21-22; Sherif Younes, "Judges and Elections: The Politicization of the Judge's Discourse," in *Judges and Political Reform in Egypt*, ed. Nathalie Bernard-Maugiron (New York: The American University in Cairo Press, 2008), 164.

¹³⁴ Hamad, "When the gavel speaks," 33.

¹³⁵ Judicial Authority Law of Egypt, article 9.

The SJC's gatekeeper role caused Egypt's past presidents to take great interest in ensuring those promoted to the SJC are either regime loyalists or at the very least not detractors.¹³⁶ Indeed, reformists have long accused the executive of making judicial appointments based on political considerations that would ensure a cooperative SJC, and in turn a cooperative judiciary vis-à-vis the regime's core interests. At the peak of the judicial independence movement in 2005-2006, the reformist judges unsuccessfully sought to amend the JAL to change control over appointment of SJC judges from the Ministry of Justice to an election by judges.¹³⁷ The demand remains unmet until the present day.

The chief judge of each appellate court serves as another powerful gatekeeper position. He oversees case assignments in the courts of first instance and the appellate court within his district, thereby controlling which judge will preside over cases important to the regime.¹³⁸ Should the chief appellate judge select a judge known for his independence, the case outcome could jeopardize the regime's core interests. Although, the chief judge is supposed to be selected through nomination by each appellate jurisdiction's general committee that meets annually to decide on promotions and transfers, in practice, the committee does not nominate a judge they

¹³⁶ Bernard-Maugiron, *Judges and Political Reform*, 8.

¹³⁷ El-Ghobashy, "Praxis," 139; Brown, "Egypt's Judges," 10; Bernard-Maugiron, *Judges and Political Reform*, 10.

¹³⁸ Wassouf, *Separating Law and Politics*, 26.

know the Minister of Justice will reject—a power vested in him by the JAL.¹³⁹ Therefore, ambitious judges are careful not to be perceived as too independent by the executive lest they be denied future opportunities for promotion.

Another powerful disciplining mechanism in the executive’s toolbox is the committee that investigates judges’ alleged ethical and legal violations. Despite the judiciary’s requests to transfer it to the SJC, this investigative committee remains under the control of the Ministry of Justice.¹⁴⁰ As a result, the Minister of Justice has the authority to appoint the judge who heads the office, and in effect, utilize the office to punish judges in the regular courts who go too far in challenging executive actions.¹⁴¹ Some judges, for instance, have been pushed out of the judiciary as baseless investigations are used to harass and embarrass them. In exchange for closing the file and avoiding an adverse ruling, the Ministry of Justice calls for the judge’s resignation.¹⁴² Others are coerced to leave the country to limit their influence over other judges. A case in point is the referral of senior judges Mahmoud Mekki and Hisham Al-Bastawisi to internal disciplinary hearings after they publicly condemned vote rigging and elections

¹³⁹ Wassouf, *Separating Law and Politics*, 26; Judicial Authority Law of Egypt, articles 30-31, 36.

¹⁴⁰ Wassouf, *Separating Law and Politics*, 7; Bernard-Maugiron, *Judges and Political Reform*, 10.

¹⁴¹ “7 judges sent to retirement for MB affiliation,” *Mada Masr*, January 27, 2014, accessed February 7, 2015, <http://www.madamasr.com/content/7-judges-sent-retirement-mb-affiliation>; Ginsberg and Moustafa, *Rule by Law*, 138-39.

¹⁴² Wassouf, *Separating Law and Politics*, 41.

irregularities in the 2005 parliamentary elections.¹⁴³ Although the disciplinary board found Mekki innocent while giving Al-Bastawisi a mild reprimand, the two judges soon after left the country for Kuwait presumably under pressure from the regime.¹⁴⁴ The case sent a chilling message to judges who took their independence too earnestly.¹⁴⁵ At the moment, over sixty judges who condemned the deposal of Morsi as a military coup are being investigated and systematically purged from the judiciary.¹⁴⁶ The judges had signed a statement on July 24, 2013 in support of the sit-in at Al-Raba'a Al-Adawiya opposing the July 3 military coup.¹⁴⁷ Another sixteen judges, who call themselves "Judges for Egypt," have been expelled from the judiciary through disciplinary proceedings based on accusations that by declaring Morsi's victory before the official results were released they participated in politics in violation of the JAL.¹⁴⁸

The Executive uses three ways to coerce or persuade judges to engage in self-restraint in high profile cases. First, judges are incentivized to impose harsh sentences against defendants in high profile political cases in hopes of being rewarded lucrative secondments to the Ministry of

¹⁴³ Samer Shehata and Joshua Stacher, "The Muslim Brothers in Mubarak's Last Decade", in *The Journey to Tahrir: Revolution, Protest, and Social Change in Egypt*, eds. Jeannie Sowers & Chris Toensing (London: Verso, 2012), 167.

¹⁴⁴ *Ibid.*, 168.

¹⁴⁵ *Ibid.*, 167.

¹⁴⁶ "Egypt refers 60."

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.* "7 Judges"; "Judges Investigated for Brotherhood Ties," *Mada Masr*, October 21, 2014, accessed on February 7, 2015, <http://www.madamasr.com/tags/judges-egypt>.

Justice, international organizations, or embassies abroad as special counselors.¹⁴⁹ For instance, the Ministry of Justice has been known to reward compliant judges with temporary transfers to non-judicial posts as governors or legal experts in government ministries where their monthly salaries are supplemented up to 20,000 Egyptian pounds, which more than double an average judge's salary.¹⁵⁰ Similarly, the President must approve secondments to foreign governments, international organizations, or Egyptian embassies abroad.¹⁵¹ Both the Ministry of Justice and the Supreme Judicial Council influence which judges are rewarded or denied such opportunities, and do so taking into consideration the judge's rulings on cases important to the regime.

Second, the judiciary is entrenched in Egypt's politics of patronage and clientalism.¹⁵² Like other state institutions, the judiciary is wrought with nepotism. The appointment process is not fully meritocratic. Judges' sons and nephews often become judges even if their academic records do not qualify them.¹⁵³ For instance, the International Bar Association Human Rights Institute reported that the President of the Tanta Court has twenty-one sons and nephews who are either judges or prosecutors despite academic records that disqualified some of them from

¹⁴⁹ Nathan J. Brown, "Why do Egyptian."

¹⁵⁰ Wassouf, *Separating Law and Politics*, 26.

¹⁵¹ *Ibid.*, 27.

¹⁵² Carothers, *Promoting the Rule*, 120; Abou-El-Fadl, "Beyond Conventional Transitional Justice," 322-23.

¹⁵³ Wassouf, *Separating Law and Politics*, 25; Bernard-Maugiron, *Judges and Political Reform*, 8.

judicial appointment.¹⁵⁴ Upon appointment, judges benefit from special treatment arising from their fathers and uncles in the judiciary who lobby on their behalf in transfer requests, disbursement of fringe benefits, and promotions. For instance, the SJC is weary of approving disciplinary actions against the sons of special counselors or senior judges, is more sympathetic to their requests for leaves of absence or secondments, and likely to approve requests for court transfers.¹⁵⁵

Third, the executive branch exercises significant influence in the vetting and initial hiring of judges. Domestic security forces collaborate with the Minister of Justice to thoroughly vet judicial candidates for any affiliations with the MB, political opposition groups, and criminal activities.¹⁵⁶ Anyone found to possess even the slightest anti-government leanings or have an extended family member associated with political opposition groups, particularly the MB, is often barred from entering the judiciary regardless of his qualifications.¹⁵⁷ While some may argue this produces a desirable apolitical judiciary, the objective is to exclude prospective judges who may exercise their role as neutral arbiters to the detriment of the executive's interests.¹⁵⁸

¹⁵⁴ Wassouf, *Separating Law and Politics*, 25; Auf, "Prospects for Judicial Reform."

¹⁵⁵ Carothers, *Promoting the Rule*, 120.

¹⁵⁶ Bernard-Maugiron, *Judges and Political Reform*, 13; Omar Mekky, "Evolution of the Rafaiest in Egyptian Politics," *Kuwait Times*, September 17, 2012, accessed on February 7, 2015, <http://news.kuwaittimes.net/evolution-of-the-refaiest-in-egyptian-politics/> .

¹⁵⁷ Brown, "Egypt's Judges," 9. Mekky, "Evolution of the Rafaiest."

¹⁵⁸ Brown, "Egypt's Judges," 8, 10.

Although the executive uses courts to advance the authoritarian regime's interests, courts sometimes transform into sites of political resistance.¹⁵⁹ The next section explores the episodes of judicial independence that laid the foundation for the January 25th uprising, prompting the executive to react by installing regime loyalists in senior judicial positions. With judicial regime loyalists strategically placed and a weakened reformist camp, the probability of judicially-led transitional justice post-January 25 was slim from the start.

Bouts of Judicial Independence Under Mubarak

Throughout its history, the Egyptian judiciary has struggled to combat executive interference in judicial affairs, election results, and case outcomes.¹⁶⁰ Such resistance has resulted in periods of executive curtailment of the judiciary's powers. Prior to the 1952 coup that brought General Gamal Abdel-Nasser to power, judges and lawyers were prestigious professions that were at the frontlines of opposing foreign occupation and preserving rule of law.¹⁶¹ With the nationalization of the economy and open access to higher education, lawyers' incomes plummeted and law students were no longer limited to the best and brightest.¹⁶² The quality of lawyering and

¹⁵⁹ Ginsberg and Moustafa, *Rule by Law*, 2.

¹⁶⁰ Alaa Al Aswany, *On the State of Egypt: What Made the Revolution Inevitable*, trans. Jonathan Wright (New York: Vintage Books, 2011), 104; Bernard-Maugiron, *Judges and Political Reform*, 13-14; Moustafa, "Law Versus the State," 897; Mekky, "Evolution of the Rafaiest."

¹⁶¹ Moustafa, "Law Versus the State," 897.

¹⁶² Tamir Moustafa, "Mobilising the Law in an Authoritarian State: The Legal Complex in Contemporary Egypt," in *Fighting for Political Freedom: Comparative Studies of the Legal*

judging suffered. In addition, repressive laws intended to quash any traces of judicial independence restricted reform-oriented judges to applying subtle pressure for political reform at the margins or risk retribution should they impinge on the executive's political priorities.¹⁶³

Nevertheless, on at least six occasions under Mubarak's reign, the Egyptian judiciary pushed for legal reforms that would bolster its institutional independence and exercised its judicial review powers to challenge executive action. Starting in 1986, the first Judicial Conference produced resolutions calling for removal of the government's emergency laws and authoritarian legislation to foster democratization.¹⁶⁴ Five years later in 1991, under the leadership of Judge Yahya al-Rifa'i, the Judges' Club intensively negotiated with the Ministry of Justice to amend the JAL to disentangle judges from executive control.¹⁶⁵ For instance, the judges wanted to eliminate the Minister of Justice's authority to appoint and annually confirm chief judges to the Courts of First Instance, which effectively permitted him to remove chief judges who failed to manage these courts in a manner that protected the regime's core interests.¹⁶⁶ Likewise, the Minister indirectly controlled these courts' general assemblies by virtue of his authority to endorse their decisions without which such decisions were unenforceable.¹⁶⁷ At the top of the judicial hierarchy, judges

Complex and Political Liberalism, eds. Terence C. Halliday, Lucien Karpik, and Malcolm M. Feely (Portland: Hart Publishing, 2007), 193-94.

¹⁶³ Ginsberg and Moustafa, *Rule by Law*, 14-15.

¹⁶⁴ Said, "A Political Analysis," 20-21; Mekky, "Evolution of the Rafaiest."

¹⁶⁵ Bentlage, "Strife for Independence," 255.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

sought to require that the majority of members on the Supreme Council for Justice be elected by the General Assemblies of the Court of Cassation and the Court of Appeal in Cairo as opposed to appointed by the executive branch.¹⁶⁸ Ultimately, the judicial reform proposals sought to transfer the Justice Ministry’s administrative supervision to the courts and the Supreme Council of Justice’s supervision to judges elected by other judges.¹⁶⁹

Although such efforts produced little by way of immediate changes in the law, they created political space for the Supreme Constitutional Court to issue dozens of opinions that expanded basic rights and rein in executive excesses, which in turn emboldened civil society to litigate human rights violations.¹⁷⁰ Notably, the Court did not dare strike down the emergency laws or military trials of civilians, as this could lead to its demise.¹⁷¹ Nor did the Court grant citizens the right to appeal emergency or military court rulings to the regular courts.¹⁷² However, the most transformative ruling came in 2000 when the SCC declared the constitution mandated that judges monitor all national elections, paving the way for the judiciary’s boldest challenge of executive

¹⁶⁸ *Ibid.*, 255-56.

¹⁶⁹ *Ibid.*

¹⁷⁰ Ginsberg and Moustafa, *Rule by Law*, 12-13; Albrecht, “Authoritarian Transformation,” 33; Moustafa, “Law Versus the State,” 884; Lombardi, “Egypt’s Supreme Constitutional Court,” 244.

¹⁷¹ Ginsberg and Moustafa, *Rule by Law*, 16; Moustafa, “Law Versus the State,” 903.

¹⁷² Ginsberg and Moustafa, *Rule by Law*, 151.

power in 2005-2006.¹⁷³ After witnessing pervasive electoral fraud in the 2000 parliamentary elections, reform-minded judges in control of the Judges' Club formed a committee to investigate widespread fraud in the 2005 parliamentary elections. Following the lead of a young female judge in the Office of Administrative Prosecution, Noha Al-Zini, who publicly disclosed these violations, judges collected testimony from other judges who witnessed similar fraud to publish a judicial report denouncing the election abuses. The executive swiftly retaliated. The Supreme Judicial Council threatened to investigate any judges who spoke to the press about election fraud.¹⁷⁴ The Ministry of Justice suspended the annual subsidies it gave to all judges' clubs, which was a primary source of funding for judge's fringe benefits.¹⁷⁵

The Judge's Club plays an important role in judges' lives because it controls which judges have access to scarce government resources including apartments in Cairo at discounted prices, villas on the Mediterranean and Red Sea, subsidized car loans, and free medical care in the US or Europe for a judge and his family.¹⁷⁶ To the chagrin of the Mubarak regime, a group of reformist judges won the Judge's Club elections in 2001 under the leadership of Judge Zakaria Abdel

¹⁷³ Nathalie Bernard-Maugiron, "Legal Reforms, the Rule of Law, and Consolidation of State Authoritarianism under Mubarak," in *The Rule of Law, Islam, and Constitutional Politics in Egypt and Iran*, eds. Said Amir Arjomand & Nathan J. Brown (Albany: SUNY Press, 2013), 187.

¹⁷⁴ Bentlage, "Strife for Independence," 264.

¹⁷⁵ Bernard-Maugiron, *Judges and Political Reform*, 2; Bentlage, "Strife for Independence," 265.

¹⁷⁶ Carothers, *Promoting the Rule*, 120; Bentlage, "Strife for Independence," 249.

Aziz.¹⁷⁷ In addition to mobilizing judges to demand electoral reforms, the Judge’s Club pressured the executive to amend the JAL to give the judiciary more autonomy. In response, the Mubarak regime passed its own law that transferred authority to distribute judicial fringe benefits from the Judge’s Club to the Ministry of Justice. It also amended the Constitution to substantially weaken the role of judges in overseeing future elections.¹⁷⁸

In retaliation, Egyptian police attacked protesters, including judges in 2006, engaged in a peaceful pro-reform sit-in in front of the Judges’ Club in Cairo.¹⁷⁹ Nearly 150 protesters were arrested on charges of supporting the judges.¹⁸⁰ Among those arrested was Dr. Mohamed Morsi, who was portentously to become Egypt’s first democratically elected president after the January 25th uprisings.¹⁸¹ The following month, Mubarak instructed Judge Abo El-leil, the current Minister of Justice, to refer two leading judges from the Judges’ Club to disciplinary proceedings on pretextual charges of “insulting the judiciary” for allegedly defaming a fellow judge.¹⁸² As the hearings were taking place, massive and well-equipped security forces surrounded the Judge’s Club, the Court of Cassation, the journalists’ syndicate, and the lawyers’ syndicate.¹⁸³

¹⁷⁷ Mekky, *Evolution of the Rafaiest*.

¹⁷⁸ Moustafa, “Egyptian Revolt,” 181, 184.

¹⁷⁹ Bernard-Maugiron, *Judges and Political Reform*, 3.

¹⁸⁰ Mekky, “Evolution of the Rafaiest”; Bentlage, “Strife for Independence,” 266.

¹⁸¹ Mekky, “Evolution of the Rafaiest.”

¹⁸² Bernard-Maugiron, *Judges and Political Reform*, 3; Mekky, “Evolution of the Rafaiest.”

¹⁸³ Bentlage, “Strife for Independence,” 266.

This was a clear warning to judges and lawyers of the government’s intent to crackdown hard on anyone planning to challenge the regime’s centralized grip on power.

Intent on crushing the judicial independence movement, the executive also employed administrative and legal means to change the Club’s leadership to pro-regime judges.¹⁸⁴ In January 2007, the Ministry of Social Affairs announced that the Judge’s Club should register as an association under the 2002 law on associations.¹⁸⁵ The move was aimed to bring the Judge’s Club under the administrative control of the executive and tame the judicial independence movement.¹⁸⁶ The confrontation culminated in a retaking of the Cairo Judge’s Club by Ahmed El Zind in 2009 while some of the leading dissidents were “encouraged” to work outside the country or retire.¹⁸⁷ In the aftermath of the January 25th uprising, the staunchly pro-regime Judge Ahmed Al Zind galvanized members of the judiciary to join the deep state’s confrontation with Mohamed Morsi’s regime.¹⁸⁸ He actively called for aggressive prosecutions of judges who participated in the independence movement of 2005-2006. Currently, Al Zind is leading the

¹⁸⁴ Bernard-Maugiron, *Judges and Political Reform*, 5.

¹⁸⁵ *Ibid.*, 4.

¹⁸⁶ *Ibid.*

¹⁸⁷ Mekky, “Evolution of the Rafaiest.”

¹⁸⁸ Tom Perry, “Egypt’s Mursi faces judicial revolt over decree,” *Reuters*, November 24, 2012, accessed February 7, 2015, <http://www.reuters.com/article/2012/11/24/us-egypt-president-idUSBRE8AM0DO20121124>; “Egypt judges call for national strike over Mursi decree,” *BBC News*, November 24, 2012, accessed February 7, 2015, <http://www.bbc.com/news/world-middle-east-20476693>.

charge within the judiciary to discipline and expel those judges who publicly condemned the ouster of Morsi as illegal.¹⁸⁹

Fragmenting the judiciary is another tactic employed by the executive to incentivize cooperation and disincentivize independent adjudication on cases important to the regime. Specifically, Mubarak created special security courts to try national security related cases, broadly to quash political dissidents belonging to the MB and other political Islamist groups. Paradoxically, because the executive was able to send politically sensitive cases to the auxiliary state security courts, the regular judiciary was granted significant autonomy.¹⁹⁰ In creating a fragmented judicial system, the executive retained control through non-tenured political appointments, heavily circumscribed due process rights, and the authority to order retrials if it wished.¹⁹¹ As a result, the more independent the regular judiciary behaved, the more fragmented the judicial system.¹⁹² By contrast, the more judges complied with executive agendas, the more the regime allowed political cases to remain within the regular courts' jurisdiction.¹⁹³ This explains, in part,

¹⁸⁹ Mara Revkin, "Egypt's injudicious judges," *The Middle East Channel*, June 11, 2012, accessed February 7, 2015, http://mideastafrica.foreignpolicy.com/posts/2012/06/11/egypts_injudicious_judges; "Egypt: Behind Mursi's Decisions, II," *Daily Kos*, November 29, 2012, accessed February 7, 2015, <http://www.dailykos.com/story/2012/11/29/1165273/-Egypt-Behind-Mursi-s-Decisions-II#>.

¹⁹⁰ Ginsberg and Moustafa, *Rule by Law*, 17, 332.

¹⁹¹ *Ibid.*, 18.

¹⁹² Bentlage, "Strife for Independence," 256.

¹⁹³ *Ibid.*

why Adly Mansour's military-backed government permitted the ordinary judiciary to prosecute MB members, Morsi supporters that were not members of the MB, and youth revolutionaries. The senior judicial leadership's cooperation with the executive's crackdown, coupled with a critical mass of judges that distrusted the MB, transformed the judiciary into a political ally.¹⁹⁴

To be sure, the Egyptian judiciary is in a difficult bind. On the one hand, it must be careful in how far it pushes back on executive policies so as to avoid extermination, as occurred under Abdel Nasser in the Massacre of the Judiciary.¹⁹⁵ On the other hand, judges have an institutional interest in preserving the legitimacy of the judiciary so as to incentivize compliance with the law, preserve order, and bolster their status in society.¹⁹⁶ Some judges may find that while the auxiliary state security courts violate citizens' substantive and procedural due rights, the ordinary courts could join the citizenry in condemning such actions and claim clean hands. Other judges may find the judiciary's institutional interests lie in expansive jurisdiction, which keeps political cases within the ordinary courts and judges cooperating with executive political agendas.

A case in point is the Supreme Constitutional Court. Although it had been one of the only formal sites of meaningful resistance during the 1990s, by the time the 2005-2006 judicial independence movement was underway, the SCC had been significantly emasculated.¹⁹⁷

Throughout much of the 1990s, the regime had tolerated the SCC's liberal rulings on social

¹⁹⁴ Albrecht, "Authoritarian Transformation," 5.

¹⁹⁵ Ginsberg and Moustafa, *Rule by Law*, 134.

¹⁹⁶ Ginsberg, *Courts and New Democracies*, 725.

¹⁹⁷ Moustafa, "Law Versus the State," 896.

rights due to the Court’s liberal rulings on economic reforms.¹⁹⁸ However, the SCC’s seminal 2000 ruling mandating judicial oversight of elections went too far. With the slowing pace of the controversial economic reform program, the regime was less dependent on the SCC for favorable rulings.¹⁹⁹ Meanwhile, the Court’s expansion of social and political rights had emboldened civil society to leverage international pressure to demand systemic political reforms.²⁰⁰ To curb this menacing trend, the President appointed Fathi Naguib in 2002 as Chair of the SCC; he previously had been second in command at the Ministry of Justice.²⁰¹ With the unprecedented move of appointing a chair outside of the SCC, Mubarak took back control of the Court. Soon after taking office, Naguib packed the court with justices whose jurisprudence did not to challenge the executive’s power.²⁰² Within a short period, the SCC’s liberal majority had been eliminated and the judicial independent movement had been weakened, producing a judiciary willing to support the state for the post-January 25th counter-revolutionary measures.²⁰³

After decades of rampant nepotism and exclusion of anyone even remotely associated or sympathetic with the MB; Egypt’s judiciary had become a conservative institution suspicious of

¹⁹⁸ Ibid., 913.

¹⁹⁹ Ibid., 914.

²⁰⁰ Ibid., 917.

²⁰¹ Ibid., 924; Bentlage, “Strife for Independence,” 248.

²⁰² Lombardi, “Egypt’s Supreme Constitutional Court,” 251.

²⁰³ Ibid; Maswood, “Democratization and Constitutional Reform,” 231.

both the youth revolutionaries and the MB.²⁰⁴ That the judges would suddenly transform into vanguards of transitional justice was improbable. Likewise, the prosecutors responsible for investigating the facts of prosecutions of Mubarak and his cronies were the same ones who for decades had propped up the Mubarak regime. Indeed, most judges were members of the same political elite that had benefited both financially and politically from the authoritarian state.²⁰⁵ The next section analyzes the judiciary's role in the deep state's counterrevolutionary efforts, which ultimately led to a military coup on July 3, 2014 and the subsequent violent crackdown on all forms of political dissent.²⁰⁶

Judicial Activism or Counter-Revolutionary Compliance?

Despite the judiciary's relative autonomy as compared to other state institutions, the executive imposed sufficient constraints to produce a conservative judicial leadership with material interests in preserving the status quo.²⁰⁷ Financial and status interests coupled with deep anti-Brotherhood biases caused members of the judiciary to forgive the past regime's transgressions

²⁰⁴ Nathan Brown, "Judicial Turbulence Ahead in Egypt, Fasten Your Seat Belts," *Carnegie Endowment for International Peace*, June 6, 2012, accessed on February 7, 2015, <http://carnegieendowment.org/2012/06/06/judicial-turbulence-ahead-in-egypt-fasten-your-seat-belts/b689>.

²⁰⁵ Lombardi, "Egypt's Supreme Constitutional Court," 239.

²⁰⁶ "Egypt Justice Minister Mekky quits 'over cleansing call'," *BBC News*, April 21, 2013, accessed on February 7, 2015, <http://www.bbc.com/news/world-middle-east-22240538>.

²⁰⁷ Ginsberg, *Courts and New Democracies*, 727.

as negligible compared to what many judges perceived was worse to come. Specifically, the revolutionary demands for judicial reforms would displace judges' sons and nephews from coveted judicial appointments, restrict judges from taking lucrative secondments in ministries, and potentially oust current senior judges from the highest courts. Calls for increased transparency in judicial governance would also expose the nepotism and corruption within the Judge's Club. It is thus no surprise that judicial institutions ultimately sided with the deep state in opposing revolutionary changes, including transitional justice, to the political system.²⁰⁸

Signs of this alignment became increasingly obvious as the MB Freedom and Justice Party (FJP) rose to power in the parliament and successfully fielded Dr. Mohamed Morsi as a presidential candidate.²⁰⁹ A series of events heightened tensions to such an extent that the MB and the judiciary became locked into a war of attrition as transitional justice fell by the wayside.²¹⁰ This was further exacerbated by many judges' distrust of the MB who for decades had been vilified as a secretive, menacing group with questionable national loyalties. When some FJP parliamentarians called for abolishing the SCC and transferring its authorities to the Court of Cassation, these suspicions were confirmed.²¹¹ The SCC responded by issuing a far reaching opinion on June 14, 2012 finding that the new election law passed by SCAF was unconstitutional, thereby dissolving the FJP-dominated lower house just weeks before Morsi

²⁰⁸ Brown, "Egypt's Failed Transition," 4, 45, 53.

²⁰⁹ Rabb, "The Least Religious Branch," 116.

²¹⁰ Sahar Aziz, "Egypt's War of Attrition," *Al Jazeera English*, April 7, 2013, accessed February 7, 2015, <http://www.aljazeera.com/indepth/opinion/2013/04/20134710923332904.html>.

²¹¹ Sahar Aziz, "Egypt's Protracted Revolution," *Human Rights Brief 19 No. 3* (2012): 9-10.

took office.²¹² By leaving Morsi without a parliament, the Court effectively emasculated the office of the presidency.

The revolutionary opposition accused the MB of engaging in the same cronyism under Mubarak by installing MB loyalists into key government positions and institutions as part of a broader agenda to control the political system.²¹³ The Morsi regime's recommended reforms to the JAL (JAL) only served to confirm those suspicions as the judiciary perceived the reforms as a direct assault on the judiciary. Specifically, mandatory retirement would be decreased from seventy to sixty years of age consistent with other state institutions.²¹⁴ Because the Ministry of Justice's authority over judicial appointments were still in place, the thousands of vacancies arising from the new law would remove the most senior judges who also tended to be the most loyal to the old regime and replace them with judges vetted by the Morsi regime.²¹⁵ To pave the way for appointing practicing lawyers as judges, the Morsi regime sought to enforce Article 41 of the JAL that required a quarter of the judges in the courts of first instance be selected from practicing lawyers.²¹⁶ If successful, Morsi would be the first president to enforce this provision. This sudden and large influx of judges had the potential to transform the judiciary's leanings and pave the way for additional Brotherhood-friendly judges in the future. For the security-military

²¹² Rabb, "The Least Religious Branch," 121.

²¹³ *Ibid.*, 81-82.

²¹⁴ Wassouf, *Separating Law and Politics*, Annex B.

²¹⁵ *Ibid.*, 36.

²¹⁶ Judicial Authority Law of Egypt, article 41.

apparatus, this would have posed a serious threat to their plans to use the judiciary to weaken the Morsi presidency.²¹⁷

Although the FJP’s draft law maintained the Minister of Justice’s authority to appoint judges to executive bodies, it limited the terms of secondments to once in a judge’s career for up to four consecutive years.²¹⁸ Secondments were also limited to positions that required judicial or legal work only.²¹⁹ Article 44 of the draft law tightened the criteria for judicial employment in appointment or promotion to be “on the basis of competence, without favoritism or intercession and in line with the principles of efficiency and academic appropriateness,” but kept final approval of judicial employment within the authority of the president of the republic.²²⁰ The amendment was presumably intended to decrease the nepotism that nearly guaranteed sitting judges would hire their sons and nephews who were unlikely to be Brotherhood sympathizers. It also kept the final say of judicial appointments with the Brotherhood-dominated presidency.

The tensions between the FJP and the judiciary were most acute in relations with the SCC. The Court viewed itself as the most prestigious judicial institution that deserved its own section in the constitution and complete control over its budget and assignments, separate from other courts. Thus, when the FJP responded to judges’ calls for salary increases, it proposed all judges be paid at the same levels as the SCC Justices. This was viewed as a direct economic threat, as well as a

²¹⁷ Wassouf, *Separating Law and Politics*, 23.

²¹⁸ *Ibid.*, Annex B.

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

blow to the SCC's prestige.²²¹ If the rumors were true that the Justices were significantly higher paid than other judges, there would likely be a readjustment of salaries adverse to the SCC Justice's salaries.

The Morsi-appointed constituent assembly further cut the number of SCC Justices from 18 to 11 resulting in the removal of Justice Tehany Al Gibally, the most vocal critic of the MB and the only female justice.²²² Morsi's legal advisors defended the decision by claiming it was a cost-saving measure that aligned the number of judges with those of other courts around the world.²²³ Further weakening the SCC, the constituent assembly removed its *ex post* judicial review and limited it to *ex ante* review.²²⁴ As a result, once a law was passed, the SCC lost its jurisdiction to determine the law's constitutionality. This strategy proved fatal to Morsi's attempts to install a parliament during his first, and only, year as president as the SCC repeatedly rejected drafts of the election law sent by the Shura Council.

Morsi's constitutional declaration of November 22, 2012 was his most controversial and arguably signaled the death knell of his administration. In it, he imposed a new four year term

²²¹ Ibid.

²²² Ibid., 30.

²²³ Ibid.

²²⁴ Carlo Guarnieri & Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* 110 (Oxford: Oxford University Press 2002) (noting that under the French system, *ex ante* review is typified by its Conseil Constitutionnel, and as a result the MB argued its proposals mirrored the system in France).

on the Prosecutor General, which authorized Morsi to replace Mubarak-appointed Abdel Meguid Mahmoud with Talaat Abdullah.²²⁵ He also revoked the power of the SCC to declare parliament or the constituent assembly unconstitutional.²²⁶ To ensure the courts could not reverse his decisions, he placed his presidential decrees above judicial review altogether. This was perceived as a direct attack on judicial independence, which expanded Morsi's unpopularity beyond the top echelon of the judiciary to the entire judiciary.²²⁷ The head of the Judge's Club, Ahmed Al Zind, rallied judges against Morsi's regime calling for his removal.²²⁸ Al Zind's political activities, arguably in violation of the JAL, made him a lightning rod in rallying the judiciary in support of the July 3 military coup.²²⁹ Al Zind's loyalties to the former regime and animosity toward the 2005-2006 judicial independence movement were well known, making him a powerful figure within internal judicial coalitions that supported the ouster of Morsi in July 2013.²³⁰

²²⁵ The Constitution of the Arab Republic of Egypt, available in English translation at <http://www.sis.gov.eg/Newvr/Dustor-en001.pdf>.

²²⁶ *Ibid.*, art. V.

²²⁷ Wassouf, *Separating Law and Politics*, 11.

²²⁸ Samer Al-Atrush, "Egypt judges back prosecutor against Morsi," *Morocco World News*, October 12, 2012, accessed on February 7, 2015, <http://www.moroccoworldnews.com/tag/egypt-judges-back-prosecutor-against-morsi/?print=pdf-page>;

²²⁹ Wassouf, *Separating Law and Politics*, 6.

²³⁰ David Kirkpatrick & Kareem Fahim, "In Cairo, Effort to Broaden Support for Charter," *New York Times*, December 11, 2012, accessed on February 7, 2015,

The Al-Zind coalition’s agenda did not end at supporting the deposal of Morsi, however. Judges who had openly aligned themselves with the Morsi regime, whether by supporting his legal decrees or condemning the events of July 3 as a military coup, found themselves subjects of internal disciplinary investigations. Ironically, the same judges who had openly condemned Morsi as an incompetent president – a clearly political stance – were now accusing their colleagues of violating the JAL prohibiting judges from engaging in politics. That disciplinary proceedings have been opened against these judges shows the proceedings are aimed to punish a judge’s non-alignment with Al-Zind rather than an objective determination that a particular judge violated the law.

By the end of the summer of 2014, it was clear that key members of the judicial leadership had actively supported the deep state and business elite in ousting Morsi and the MB from power. Meanwhile, the vast majority of judges kept quiet, either in agreement or out of fear, 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 minority that spoke out against the military’s takeover of the presidency through the proxy of the Chief Justice of the Supreme Constitutional Court are being purged from the judiciary.²³¹ Hence judicial activism was rewarded so long as it was in favor of the security-military apparatus – one of the bastions of the authoritarian state that was in control throughout Egypt’s purported transitional period.

<http://www.nytimes.com/2012/12/12/world/middleeast/egypt-morsi-referendum-International-Monetary-Fund-.html>.

²³¹ Hamad, “When the gavel speaks”; “7 judges”; “Egypt Refers 60.”

Conclusion

Notwithstanding the significant challenges facing the nation, Egypt's stillborn revolution was not necessarily a *fait accompli*. There were key points along the path from a decades-long dictatorship toward a democratic transition that could have changed the fate of its uprising. In hindsight, however, each crossroad became a lost opportunity to change the direction of the country wherein substantive equality enforced through thick rule of law could have provided meaningful opportunities for prosperity for all Egyptians, not just its small elite. From the SCAF's immediate ascendancy to power on February 11, 2011 to the MB's secret deal to protect the military's interests to the SCAF's decision to forgo transitional justice beyond nominal prosecutions of top Mubarak officials; Egypt was being directed by a deeply rooted security-military apparatus intent on limiting the impact of the uprisings to merely switching out the elite coalition.

To the surprise of some Western analysts, Egypt's judiciary proved more counter-revolutionary than independent.²³² More than three years after Egypt's uprising, the judiciary has proven to be

²³² Mustapha Kamel al-Sayyed, "The Judicial Authority and Civil Society," in *Judges and Political Reform in Egypt*, ed. Nathalie Bernard-Maugiron (New York: The American University in Cairo Press, Egypt 2008), 227-231 (discussing the need for judicial independence); Younes, "Judges and Elections," 155-56; Atef Shahat Said, "The Role of the Judge's Club in Enhancing the Independence of the Judiciary and Spurring Political Reform," in *Judges and Political*

a formidable deep state institution, guarding its material interests in the status quo even if it means betraying the rule of law. The judiciary serves the interest of powerful state actors leaving little incentive for those actors to change their monopolistic and authoritarian practices.²³³ This may be due to pressures by executive agencies that control judicial budgets,²³⁴ economic incentives where judges benefit financially from the litigant's success,²³⁵ or punitive measures taken against non-compliant judges in the form of transfers, investigations, or forced early retirement.²³⁶ Its material interests in the status quo, particularly at the highest echelon, trumped any commitment there may have been to judicial independence and (thick) rule of law. Because transitional justice meant an overhaul of the existing patronage system that benefitted sitting judges and their families, it was against their interests to support it.²³⁷ In a country saddled with debt and high unemployment, giving up the status, fringe benefits, and potential for lucrative secondments amounted to economic suicide. Coupled with Mubarak's successful efforts in weakening the judicial independence movement of 2005-2006 and co-opting the SCC, the judiciary was structurally incapable of taking the lead on a meaningful transitional justice

Reform in Egypt, ed. Nathalie Bernard-Maugiron (New York: The American University in Cairo Press, Egypt 2008), 129-30.

²³³ Carothers, *Promoting the Rule*, 23, 264; Ginsberg, *Courts and New Democracies*, 722.

²³⁴ Carothers, *Promoting the Rule*, 90; Bentlage, "Strife for Independence," 257.

²³⁵ Carothers, *Promoting the Rule*, 90.

²³⁶ Wassouf, *Separating Law and Politics*, 36-37.

²³⁷ Hamad, "When the gavel speaks," 294; Ginsberg, *Courts and New Democracies*, 735-36; Ginsberg and Moustafa, *Rule By Law*, 5.

process. In the end, Egypt's real revolution is yet to come. And when it does, a judiciary complicit in authoritarian practices may very well be among the targets of the people's rage.