



TEXAS A&M UNIVERSITY  
**SCHOOL OF LAW**

**Legal Studies  
Research Paper Series**

Research Paper No. 16–07

**Independence Without Accountability:  
The Judicial Paradox of Egypt's Failed  
Transition to Democracy**

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# Independence Without Accountability: The Judicial Paradox of Egypt’s Failed Transition to Democracy

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## INTRODUCTION

As political instability and violence grips the Middle East, Western policy makers and scholars are confounded by how populist, non-violent mass uprisings in the so-called “Arab Spring” ultimately strengthened authoritarianism in the region. In particular, mass uprisings that have come to be known as Egypt’s “January 25<sup>th</sup> Revolution” produced little more than a switching of the guard in the presidential palace. Because events in Egypt carry significant weight in the Middle East, a close examination of its post-Arab Spring experiences offers valuable insights into events unfolding in other Middle Eastern countries.

While attempting to predict Egypt’s future would be a fool’s errand, there is much to learn from the past four years. Among the various political actors shaping the post-January 25, 2011, political landscape, Egypt’s judges have proven to be among the most influential. However, rule of law scholarship on the Middle East has yet to take into account the role judges played in quashing Egypt’s popular uprisings. This Article attempts to fill that void in the literature.

An examination of the judiciary’s role in Egypt’s post-January 25<sup>th</sup> aftermath is a salient and under-researched topic that informs scholarship on the judicialization of politics and its impact on rule of law in countries undergoing political transitions. For instance, current scholarship on the Egyptian judiciary is based largely on studies of human rights lawyers and political opposition groups in the 1990s leveraging Egypt’s highest administrative and constitutional courts to expand political and social rights.<sup>1</sup> Indeed, civil society’s reliance on the courts—as opposed to the

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1. See, e.g., Thomas Carothers, *The Problem of Knowledge*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 15 (Thomas Carothers ed., 2006); Tamir Moustafa, *The Political Role of the Supreme Constitutional Court: Between Principles and Practice*, in JUDGES AND POLITICAL REFORM IN EGYPT 91, 94 (Nathalie Bernard-Maugiron ed., 2008) [hereinafter Moustafa, *Principles*].

streets—to restrain authoritarian practices was due in large part to the judiciary’s liberal leanings within an illiberal political context. Although Mubarak’s regime granted the court some latitude as part of a broader strategy of decreasing the political costs of the growing predatory state, the courts’ rulings nonetheless emboldened civil society to push for more political rights.<sup>2</sup> The human rights litigation in the two decades preceding the January 25<sup>th</sup> uprisings produced a protective constituency that vigorously defended the courts against overt executive interference in judicial independence.<sup>3</sup> As a result, students of Egypt’s deteriorating political and economic indicators expected Egypt’s judiciary to be a bastion of support for calls for structural legal reforms by the young revolutionaries, establishing opposition groups and burgeoning new political parties.<sup>4</sup> However, Egypt’s judiciary proved to be more co-opted than anticipated as it issued mass death sentences against thousands of alleged Muslim Brotherhood members,<sup>5</sup> life sentences to youth that led the January 25<sup>th</sup> uprisings for violating a dubious anti-protest law,<sup>6</sup> and convictions of journalists on specious evidence.<sup>7</sup> Judicial legitimacy, thus, hangs in the balance.

This Article explores why the Egyptian judiciary, despite its liberal rulings in the 1990s that facilitated the lead up to the January 25<sup>th</sup> uprisings, ultimately obstructed the populist demands for revolutionary change. Scholars have depicted Egypt’s judiciary as one of the few state institutions willing to challenge executive authority and among the most

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2. SAMER SOLIMAN, *AUTUMN OF DICTATORSHIP* 137 (Peter Daniel trans., Stanford University Press 2011) (2006).

3. See SIRI GLOPPEN ET AL., *COURTS AND POWER IN LATIN AMERICA AND AFRICA* 25 (2010); Mahmoud Hamad, *When the Gavel Speaks: Judicial Politics in Modern Egypt* 266–67 (Aug. 2008) (unpublished Ph.D. dissertation, The University of Utah) (on file with author) (noting that most scholars agree that courts and judges in Egypt have been instrumental in expanding rights and liberties).

4. *Who’s behind Egypt’s Revolution?*, THE NATION (Feb. 16, 2011), <http://www.thenation.com/slideshow/158642/slide-show-whos-behind-egypts-revolution#>; *A Look at the Youth of Egypt’s Muslim Brotherhood*, NPR (Feb. 17, 2011), <http://www.npr.org/2011/02/17/133777435/a-look-at-the-youth-of-egypts-muslim-brotherhood>.

5. Abdel Ramadan, *The Menace of Collective Punishment and Lack of Due Diligence in Egypt*, TAHIR INST. FOR MIDDLE EAST POL’Y (Feb. 11, 2015), <http://timep.org/commentary/the-menace-of-collective-punishment-and-lack-of-due-diligence-in-egypt/>; *Security vs. Justice: Mass convictions in Egypt underline judges’ power in punishing dissent*, ASSOCIATED PRESS (Feb. 8, 2015), <http://www.foxnews.com/world/2015/02/08/security-vs-justice-mass-convictions-in-egypt-underline-judges-power-in/>.

6. Ramadan, *supra* note 5; *Security v. Justice*, *supra* note 5; Aya Nader, *The ‘Executions Judge’ Nagy Shehata*, DAILY NEWS EGYPT (Feb. 16, 2015), <http://www.dailynewsegyp.com/2015/02/16/executions-judge-nagy-shehata/>.

7. Nader, *supra* note 6.

independent judiciaries in the Middle East.<sup>8</sup> I challenge this position and proffer that the Egyptian judiciary opposed revolutionary reform efforts for four reasons: 1) Mubarak's concerted efforts to quash judicial independence through coercive mechanisms imposed top-down by the loyalist judicial leadership who co-opted a critical mass of judges; 2) the revolutionary youth and civil society's failure to appreciate the judiciary's circumscribed definition of judicial independence that did not include judicial accountability to the citizenry; 3) judges' elite notions of rule of law viewed populism as a threat to the stability of the state and more specifically to the judiciary's institutional interests; and 4) internal divisions within the judiciary with respect to the role of religion in adjudication coupled with longstanding suspicions of the Muslim Brotherhood as an authoritarian organization pushed judges into the arms of the military-security apparatus that sought to preserve the status quo. As a result, judges internalized the polarized political disputes between the secular, military-security camp and the Islamist camp. Judges became more concerned with retaliating against Morsi and his loyalists than upholding liberal principles of separation of power and individual rights. In sum, endogenous politicization of judges, as opposed to exogenous threats to judicial independence, has become the primary threat to rule of law in Egypt.

Although the judiciary had long advocated for reforms to the Judicial Authority Law to remove formal executive controls over judicial affairs, their motive lied more in their desire for complete judicial autonomy from the executive rather than improving judicial governance through accountability measures. In contrast, the secular youth activists and Muslim Brotherhood called for judicial accountability as a prerequisite for legal reform in order to prevent the judiciary from co-optation by the executive branch. These populist calls for judicial accountability within broader campaigns for transitional justice

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8. Moustafa, *Principles*, *supra* note 1, at 91, 94; Tamir Moustafa, *Law Versus the State: The Judicialization of Politics in Egypt*, 28 J. LAW & SOC. INQUIRY 883, 885 (2003) [hereinafter *Law Versus the State*]; see Nathan J. Brown, *Reining in the Executive: What Can the Judiciary Do?*, in JUDGES AND POLITICAL REFORM IN EGYPT 133, 141 (2008) (discussing the impact of the independent nature of the courts in Egypt); STEVEN A. COOK, *RULING BUT NOT GOVERNING: THE MILITARY AND POLITICAL DEVELOPMENT IN EGYPT, ALGERIA, AND TURKEY* 65 (2007); see generally Clark B. Lombardi, *The Constitution as Agreement to Agree: The Social and Political Foundations (and Effects) of the 1971 Egyptian Constitution*, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 398 (Denis Galligan & Mila Versteeg eds., 1st ed. 2013); CLARK B. LOMBARDI, *STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE SHARI'A INTO EGYPTIAN CONSTITUTIONAL LAW* (2006) [hereinafter LOMBARDI, *STATE LAW AS ISLAMIC LAW*].

threatened judges' preferences.<sup>9</sup> While self-preserving characteristics are common among judges who often belong to the elite, in both democratic and authoritarian regimes, a group of Egyptian reformist judges had spearheaded efforts for judicial independence dating back to the 1970s at great risk to their individual interests.<sup>10</sup> The Report of the Judicial Conference of 1986, the Supreme Constitutional Court's rulings in the 1990s in favor of political and social rights, and the judicial independence movement in 2005–2006 gave reformists reason to believe the judiciary would be more supportive rather than obstructive of revolutionary forces. However, the reformists' agendas, which included merit-based hiring, transparency in judicial affairs, and de-politicizing the judiciary, were met with resistance. Once the judges realized they could not attain judicial independence without judicial accountability to the people, they joined the military-security apparatus' campaign to quash the secular youths' movement, buttressed by the Muslim Brotherhood. Likewise, the judges concluded that Morsi's purported judicial reforms were really an attempt to pack the courts with his loyalists; thereby prompting judges to join other state institutions keen on sabotaging the Morsi regime.

Accordingly, this Article begins with a summary of rule of law literature to argue that the judiciary relied on thin notions of rule of law to facilitate the criminalization of dissent, which was instrumental in the military-security apparatus' defeat of revolutionary forces. Section II explores the theories of judicial independence and rule of law with respect to courts in authoritarian regimes to provide a theoretical framework for analyzing the case of Egypt. Section III analyzes how the Sadat and Mubarak regimes co-opted the judiciary by manipulating financial and political incentives to allow judges to meet their preferences for job security for themselves and their male relatives, income security, and high status in exchange for rulings favorable to the executive. Starting with a brief historical summary, Section III examines the endogenous and exogenous factors that placed the Egyptian judiciary in a weak position with regard to challenging executive action. Over three regimes, incentives caused many judges to betray the institution's historical pursuit of serving as a check on authoritarianism and a refuge

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9. David Mednicoff, *Middle East Dilemmas*, in *PROMOTING THE RULE OF LAW ABROAD*, *supra* note 1, at 251, 264.

10. Carlos S. Nino, *On the Exercise of Judicial Review in Argentina*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY* 309, 311 (Irwin P. Stotzky ed., 1993) (arguing that judicial review requires that "a small group of wise people, who are neither directly involved in the democratic process nor directly responsible to [the parties] whose interests are at stake"); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciaries: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 977 (2002).

for citizens seeking relief from government abuse. This is due in large part to the executive manipulating internal divisions within the judiciary to marginalize and vilify reformist judges as a threat to the state while promoting loyalist judges as guardians of rule of law. In the post-January 25<sup>th</sup> era, a critical mass of judges appears much less hesitant in overtly allying with an authoritarian executive branch. Thus, President Sisi had license to purge reformist judges who vocally denounced Morsi's deposal on July 3, 2013, as a military coup.<sup>11</sup>

Section IV analyzes how presidents Sadat and Mubarak established self-perpetuating incentive systems to impose individual and institutional self-restraint. Formal mechanisms in the Judicial Authority Law 46 of 1972, for example, grant the Ministry of Justice and the President the authority to influence high-level judicial appointments, transfers, promotions, and lucrative secondments to state institutions.<sup>12</sup> Similarly, informal patron-client relationships, nepotism, and social influence over judicial elites discipline reformist judges who take too seriously the judiciary's role as a check on the executive branch. Meanwhile, pro-regime judges are placed in key positions in the Ministry of Justice and Judges Club and tasked with marginalizing reformist judges. The silent majority of judges have not overtly supported reform efforts because no judge sought the wrath of an executive branch that could transfer him to a remote rural court house, reject his sons' applications to the judiciary, or black list him from lucrative secondments. While the judges sought relief from such executive intervention, they did not want to lose the fringe benefits they had come to expect as an entitlement. As a result, the judges' efforts to attain judicial independence merely sought to transfer control of the distribution of incentives from the executive branch to the judiciary without necessarily reforming the way in which the judiciary is governed.

Finally, Section V focuses on the Morsi and Sisi eras to proffer that the judicial elite actively retaliated against Islamists for seeking reforms

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11. Adham Yousef, *Pro-Morsi Judges' Verdict Postponed to 14 March*, DAILY NEWS EGYPT (Feb. 21, 2015), <http://www.dailynewsegypt.com/2015/02/21/pro-morsi-judges-verdict-postponed-14-march/>; Salma Abdelaziz, Sarah Sirgany & Josh Levs, *'Mass Death Sentences' for 183 in Egypt*, CNN (Feb. 3, 2015), <http://www.cnn.com/2015/02/02/world/egypt-court/>; Jason Hanna, Sarah Sirgany & Holly Yan, *Egypt: Ex-ruler Hosni Mubarak, Accused in Deaths of Hundreds, Cleared of Charges*, CNN (Nov. 30, 2014), <http://www.cnn.com/2014/11/29/world/meast/egypt-mubarak-trial/>.

12. Carothers, *supra* note 1, at 24 (noting that the internal structure of appointments and promotions can constrain judicial activism independent of regime interference); *See also, e.g.*, Ratna Rueban Balasubramaniam, *Judicial Politics in Authoritarian Regimes*, 59 U. TORONTO L. J. 405, 408–09 (2009) (explaining the establishment of the Supreme Constitutional Court to counteract interference with the judicial branch through these mechanisms).

that would not only produce judicial accountability, but would also open up judicial posts to MB loyalists. Judges also retaliated against youth activists for igniting the revolutionary movement that posed a threat to judicial interests in the first place. After Morsi's regime was forcibly replaced with a military-backed government in 2013, the judiciary was passive at best or activist at worst in the face of the executive's manipulation of law in its harsh crackdown on the Muslim Brotherhood and the youth revolutionaries. Moreover, Morsi's efforts to amend the Judicial Authority Law (JAL) to make the judiciary less nepotistic, better qualified, and ideologically diverse earned the judges' ire— notwithstanding that the judiciary has long sought to amend the JAL to eliminate the formal mechanisms that authorize executive interference. The Article concludes by arguing that judicial reform and democratization efforts in Egypt and the broader Middle East should focus not only on removing exogenous controls that affect judicial independence, but also should impose a level of judicial accountability to the people that prevents judges from facilitating authoritarianism.

Three fundamental assumptions inform my analysis. First, I adopt a legal realist approach that politics and law are not neatly separable.<sup>13</sup> Thus, law is affected by the political context, and is often a product of it.<sup>14</sup> Second, a political transition is a prerequisite for transitional justice that holds past regimes accountable and prevents a reversion to authoritarianism. As I argued in a previous article, Egypt did not experience a political transition in 2011, which is a prerequisite for transitional justice.<sup>15</sup> Rather, the military came out from behind the veil of ruling for the past 50 years to openly govern on February 11, 2011.<sup>16</sup> Third, Egypt has been experiencing a culture war over the past three decades between Egypt's secular elite and the rural and urban poor who have become increasingly more religious. Indeed, the Muslim Brotherhood tapped into Egyptians' religiosity to win a landslide victory

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13. See BRIAN TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 78–81 (2004) (discussing the legal liberalist view of “law is politics”); see also Paul W. Kahn, *Independence and Responsibility in the Judicial Role*, in TRANSITION TO DEMOCRACY IN LATIN AMERICA, *supra* note 10, at 73, 84 (arguing that efforts to implement judicial independence is not just a struggle between law and politics, but rather a struggle in the creation of law itself).

14. See, e.g., Delwin A. Roy & William T. Irelan, *Law and Economics in the Evolution of Contemporary Egypt*, 25 MIDDLE EASTERN STUDIES 163, 166–67 (1989) (discussing the passage of a law which “denied the rank of minister . . . any person having occupied a position of such rank before the Revolution” and “a law was passed forbidding a government employee dismissed by order of the President from bringing an action in the Council of State”).

15. See generally Sahar F. Aziz, *Bringing Down an Uprising: Egypt's Stillborn Revolution*, 30 CONN. J. INT'L L. 1 (2014).

16. COOK, *supra* note 8, at ix–xx.

in the parliamentary elections of 2012. While a full exposition of these cultural fault lines is beyond the scope of this Article, it is worth noting that the judiciary is not immune or separated from these societal tensions. Indeed, most judges are from well-educated urban families that view a civilian as opposed to an Islamist state as a sign of modernity and progress. In Egypt's highly classist society, such views caused large portions of the judiciary to distrust the Muslim Brotherhood as suspect outsiders and consequently obstruct former president Morsi's Islamist agenda.<sup>17</sup>

With a judiciary firmly on the side of a strong-arm former military general as president and the streets no longer available for airing grievances, citizens no longer have a forum for seeking relief from their dire economic and political circumstances. President Sisi's claims that Egypt respects rule of law, therefore, is increasingly falling on deaf ears.

#### I. CONTESTATIONS OF RULE OF LAW AFTER THE "JANUARY 25<sup>TH</sup> REVOLUTION"

In contrast to Libya or Iraq where dictators ruled with an iron fist in flagrant disregard for the rule of law, Egypt's authoritarians manipulate law and the courts to create a veneer of legitimacy.<sup>18</sup> Through highly centralized rule, Egypt's president and elite coalition exercise control over state organizations, including the judiciary.<sup>19</sup> Mubarak continuously interfered in governmental portfolios, violated the autonomy of state institutions, and fortified his position in the political system.<sup>20</sup> Parliament was merely a décor to mask the true authoritarian face of the regime.<sup>21</sup> State institutions were weak, apolitical, and unable to openly compete with each other or oppose the upper elites' prerogatives.<sup>22</sup> Instead, public institutions served the interests of the president even if it compromised the institution's mandate. And because the ruling elite in control of state institutions derived their power from

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17. Lombardi, *Constitution as Agreement to Agree*, *supra* note 8, at 405 (noting mutual suspicions between liberals and Islamists in society and among jurists).

18. Balasubramaniam, *supra* note 12, at 407–08 (noting that a regime's dismantling a constitutional system of checks and balances risks the appearance of a lawless regime).

19. JOSHUA STACHER, ADAPTABLE AUTOCRATS: REGIME POWER IN EGYPT AND SYRIA 173 (2012).

20. *Id.* at 83; *see* Hamad, *supra* note 3, at 300–01.

21. Samer Shehata, *Political da'wa: understanding the Muslim Brotherhood's participation in semi-authoritarian elections*, in ISLAMIST POLITICS IN THE MIDDLE EAST: MOVEMENTS AND CHANGE 120, 124 (Samer Shehata ed., 2012); *see generally* Mona El-Ghobashy, *The Praxis of the Egyptian Revolution*, in THE JOURNEY TO TAHRIR 21 (Jeannie Sowers & Chris Toensing eds., 2012).

22. STACHER, *supra* note 19, at 35.

the president, anyone who challenged his power was quickly eliminated and replaced with a compliant member of the ranking elite.<sup>23</sup>

This section provides the theoretical backdrop that explains how authoritarian regimes exploit thin notions of rule of law to judicialize politics in favor of the executive's interest to remain in power. In doing so, judges become co-opted into legitimizing the authoritarian state by employing thin notions of rule of law. In the post-2011 era, diverging notions of thin and thick rule of law produced dissension between myriad stakeholders vying to reap the benefits of the revolution. The political chaos that transpired enabled the judiciary to pursue its preferences by assisting the old guard military-security apparatus to replace former general Hosni Mubarak with another military general, Abdel Fattah Al Sisi.

#### A. *Thin and Thick Rule of Law*

Lawyers and international development practitioners invoke “rule of law” so frequently that the term adds more confusion than clarity.<sup>24</sup> Beyond preventing anarchy and war, the objectives of rule of law are as diverse as the stakeholders that invoke the term.<sup>25</sup> Tyrants appropriate rule of law to perpetuate authoritarian rule while civil society advocates claim rule of law is the best means to end tyranny.<sup>26</sup> The contradictions

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23. *Id.* at 38, 173; *see, e.g.*, Hamad, *supra* note 3, at 288 (discussing a case of a judge being removed from the board of the Judge's Club for not complying with the executive interests).

24. SARAH WOLFF, *THE MEDITERRANEAN DIMENSION OF THE EUROPEAN UNION'S INTERNAL SECURITY* 179 (Michelle Egan, Neill Nugent & William E. Paterson eds., 2012).

25. Randall Peerenboom, *Varieties of Rule of Law: An Introduction and Provisional Conclusion*, in *ASIAN DISCOURSES OF RULE OF LAW* 1, 1–3 (Randall Peerenboom ed., 2004).

26. *Id.* at 1 (noting that social activists employ rule of law as “an expeditious means toward a greater end – achieving their favored political agenda”). Rodan defines authoritarianism as “characterized by a concentration of power and the obstruction of serious political competition with, or scrutiny of, that power.” Jothie Rajah, *Punishing Bodies, Securing the Nation: How Rule of Law Can Legitimate the Urbane Authoritarian State*, 36 *LAW & SOC. INQUIRY* 945, 949 (2011); Hilton L. Root & Karen May, *Judicial Systems and Economic Development*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 304, 329 (Tamir Moustafa & Tom Ginsburg eds., 2008) (identifying two norms related to rule of law: “the powers that be shall rule by, and themselves obey, enacted, general rules, and . . . they shall change their policies by changing those rules rather than by arbitrary deviations for or against particular persons” and 2) “a core of individual human rights inherent in law itself, so that the rule of law must include the protection of rights”).

are due in large part to the wide gulf in two dominant conceptions of rule of law: thin and thick.<sup>27</sup>

Several mechanisms effectuate thin rule of law including “an independent judiciary, open and fair hearings without bias, [and] review of legislative and administrative officials and limitations on the discretion”<sup>28</sup> of government policy makers.<sup>29</sup> By requiring that the government operate in accordance with law as declared by judicial decision in matters both of substance and procedure,<sup>30</sup> the state and the ruling elite are restrained from the arbitrary exercise of state power.<sup>31</sup> Open and fair hearings by unbiased judges, opportunities to review legislative and administrative mandates, and limitations on the discretion of police further constrain the state.<sup>32</sup> This allows, at a minimum, some degree of predictability and limitation on arbitrariness of government action, which in turn provides some level of individual rights and freedoms.<sup>33</sup> There is, however, a tension between liberty and equality in liberalism, which results in less attention being paid to the unjust or immoral outcomes of state power exercised in law’s name.<sup>34</sup> For instance, legal regimes that perpetuated slavery, colonial repression, or apartheid were not deemed an affront to rule of law at the time.<sup>35</sup>

Thin rule of law privileges formal procedural processes over substantive communitarian rights or moral outcomes,<sup>36</sup> causing

27. Peerenboom, *supra* note 25, at 2–5; Pilar Domingo et al., *Conclusion to RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM* 142, 147–48 (Pilar Domingo & Rachel Sieder eds., 2001).

28. TAMANAHA, *supra* note 13, at 93.

29. See Luis Salas, *From Law and Development to Rule of Law: New and Old Issues in Justice Reform in Latin America*, in *RULE OF LAW IN LATIN AMERICA*, *supra* note 27, at 24.

30. Laurent Pech, *Rule of Law in France*, in *ASIAN DISCOURSES OF RULE OF LAW*, *supra* note 25, 79, (“[T]he rule of law should provide in matters both of substance . . . and of procedure.”).

31. Peerenboom, *supra* note 25, at 37 (“[T]hin rule of law entails limits on the state and the ruling elite.”); Rachel Kleinfeld, *Competing Definitions of Rule of Law*, in *PROMOTING THE RULE OF LAW ABROAD*, *supra* note 9, at 31, 59; Salas, *supra* note 29.

32. TAMANAHA, *supra* note 13, at 93.

33. Peerenboom, *supra* note 25, at 6.

34. Balasubramaniam, *supra* note 12, at 412–13 (noting that this view is rooted in legal positivism which views law, and accordingly rule of law, as amoral concepts); TAMANAHA, *supra* note 13, at 75 (arguing that liberalism is rule by and in the interests of the economic elite while claiming to be neutral). Notably, most rule of law promotion programs claim to be neutral insofar as focusing on procedural mechanisms, but in practice rely on liberal democrat and capitalist values. Carothers, *supra* note 1, at 18–19; Peerenboom, *supra* note 25, at 36 (arguing that liberalism is founded on the liberty to pursue one’s own vision of the good life); Pech, *supra* note 30, at 79 (“[T]he rule of law should provide in matters both of substance . . . and of procedure.”).

35. TAMANAHA, *supra* note 13, at 95, 120; Peerenboom, *supra* note 25, at 37.

36. Pech, *supra* note 30, at 79; see Peerenboom, *supra* note 25, at 3 (thin rule of law places a greater emphasis on ensuring stability). See generally Mara Revkin, *Triadic*

authoritarian regimes to base their legitimacy on formal and procedural regularities of law while disregarding the substantive adverse effects on political and social rights.<sup>37</sup> Authoritarians find public support for their policies and practices by claiming that so long as they obey the law (no matter how oppressive or immoral the law may be), their regime is founded on “rule of law.”<sup>38</sup> Substantive political and social rights, thus, can be abrogated if correct legal procedures are followed.<sup>39</sup> In the end, thin rule of law permits democrats or tyrants to reject calls for distributive equality that promotes a more equal distribution of social goods across groups or communities and still proclaim to be in compliance with rule of law.<sup>40</sup>

In contrast, thick rule of law goes beyond incorporating formal legality to call for social rights,<sup>41</sup> substantive equality, and political morality. Thick rule of law adopts the formal components of thin rule of law but adds political morality to economic arrangements, forms of government, and conceptions of human rights.<sup>42</sup> It challenges formal legality by demanding more than merely the government enacting and abiding by laws constructed of rules. Instead, the focus is on concepts of justice rooted in community norms and values. Because rule of law is adopted for the purpose of restraining the government in order to protect substantive natural rights, shared customs, morality, and the good of the community,<sup>43</sup> the government’s responsibility is to make life better for its citizens and engage in distributive justice.<sup>44</sup>

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*Legal Pluralism in North Sinai: A case Study of State, Shari’a, and ‘Urf Courts in Conflict and Cooperation*, 13 UCLA J. ISLAMIC & NEAR E.L. 21 (2014) (discussing legal pluralism in the Sinai and the consequent rise of local customary courts).

37. See Rajah, *supra* note 26, at 948.

38. TAMANAHA, *supra* note 13, at 96. This is particularly important for securely entrenched authoritarians with long time horizons as they seek to expand their tax base through economic activity. To do so, they attract foreign investors who seek out signals of stability, which includes narrowly defined notions of rule of law focused primarily on protecting property rights. See Hannah Franzki & Maria Carolina Olarte, *Understanding the political economy of transitional justice: A critical theory perspective*, in TRANSITIONAL JUSTICE THEORIES 201, 215 (Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun, & Friederike Mieth eds., 2014) (describing the use of rule of law to attract foreign investments); Moustafa, *Law Versus the State*, *supra* note 8, at 883, 887.

39. Compare Kleinfeld, *supra* note 32, at 37, with TAMANAHA, *supra* note 13, at 72–73 (distinguishing between the rights and rule-book rule of law conceptions wherein the former does not distinguish between rule of law and substantive justice).

40. TAMANAHA, *supra* note 13, at 120; Mohsen Al Attar, *Counter-revolution by Ideology? Law and development’s vision(s) for post-revolutionary Egypt*, 33 THIRD WORLD Q., 1611, 1627 (2012); Balasubramaniam, *supra* note 12, at 412.

41. TAMANAHA, *supra* note 13, at 113.

42. Peerenboom, *supra* note 25, at 4.

43. TAMANAHA, *supra* note 13, at 96, 112–13 (noting that “freedom of expression is meaningless to an illiterate; the right to vote may be perverted into an instrument of

The theoretical debates surrounding thin and thick rule of law bring to light the diversity in institutions, rules, and practices that may be compatible with rule of law while producing myriad political outcomes.<sup>45</sup> Comparative law scholars raise valid questions as to what values the citizenry must possess to transform rule of law from an abstract ideal into practice, and to what extent such values are found only in Western liberalism.<sup>46</sup> These issues, among many others, define the role of law in society and its relationship with politics. For societies experiencing political transitions, or on the cusp thereof, the role of law determines the type and extent to which a transition is likely to occur.

While a full accounting of the complex role of law in Egypt's failed transition is beyond the scope of this Article, one thing is clear: each stakeholder regarded an independent judiciary as a prerequisite for establishing rule of law. But similar to rule of law, judicial independence is a contested concept both in the democratic and authoritarian context. Notwithstanding the lofty rhetoric in support of an independent judiciary in Egypt, the party in power actively sought to co-opt judges to further a particular political agenda.<sup>47</sup> The next section explores this issue to proffer that both the clashing notions of rule of law between the young revolutionaries and the judiciary and the sustained subordination of law to authoritarian politics stymied populist judicial reform efforts that sought judicial accountability.

### *B. Rule of Law and Judicialization of Politics in Egypt*

In arguing that Egypt's judiciary sought independence without accountability, this Article interrogates why an authoritarian regime allows an independent judiciary to function in the first place.<sup>48</sup> While

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tyranny exercised by demagogues over an unenlightened electorate; freedom from government interference must not spell freedom to starve for the poor and destitute").

44. See *id.* at 96; see also Meryl Chertoff & Michael Green, *Revitalizing the Rule of Law: Examining the Success of the Arab Spring*, 34 HARV. INT'L REV. 2, 59 (2012).

45. Peerenboom, *supra* note 25, at 14; Christopher Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L., 605, 608 (1998).

46. See Peerenboom, *supra* note 25, at 3–4, 7–8.

47. Carothers, *supra* note 1, at 264–65; NATHAN J. BROWN, EGYPT'S JUDGES IN A REVOLUTIONARY AGE, CARNEGIE ENDOWMENT FOR INT'L PEACE 1 (Feb. 22, 2012), [http://carnegieendowment.org/files/egypt\\_judiciary.pdf](http://carnegieendowment.org/files/egypt_judiciary.pdf) [hereinafter BROWN, REVOLUTIONARY]; Kleinfeld, *supra* note 31, at 38.

48. See Balasubramaniam, *supra* note 12, at 405 (suggesting authoritarian regimes tolerate independent judiciary only to the limited extent necessary to maintain legitimacy); Peter H. Russell, *Toward a General Theory of Judicial Independence*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 8–10 (Peter H. Russell & David M. O'Brien eds., 2001) (explaining that liberal authoritarian regimes may be willing to a judiciary enough independence to decide legal

this is not the question this Article aims to answer, it is an integral component in determining how the Egyptian judiciary responded to the transitional period after January 25, 2011.

By judicializing politics, authoritarian regimes use courts to lend the regime a veneer of legitimacy.<sup>49</sup> The judicialization of politics is “the degree to which regime legitimacy is increasingly constructed upon the public perception of the state’s capacity and credibility in terms of delivering on rule of law and rights protection.”<sup>50</sup> The more a regime experiences a political crisis, the more it leans on judicializing politics to bolster its legitimacy.<sup>51</sup> Likewise, political opposition use judicial bodies to challenge adverse government decisions, publicize domestically and internationally the regime’s malfeasance and human rights violations, and protect their members from coercive state practices.<sup>52</sup> The courts, thus, become the forum where political conflicts are fought.

Persuading the citizenry that the judiciary is in fact independent strengthens the government’s political legitimacy as well as the international community’s interest in investing in the economy.<sup>53</sup> As citizens demand that courts be impartial, regardless of how impractical that may be, authoritarians become savvy in giving the judiciary just enough leeway to counter allegations of tyranny but not enough to

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obligations of private citizens but not independent enough to decide the legal obligations of the regime); see Owen M. Fiss, *The Right Degree of Independence*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA*, *supra* note 10, at 57 (discussing the tension between judicial independence and sovereignty). *But see* Hamad, *supra* note 3, at 15–17 (arguing that democracy is ordinarily a precondition to an independent judiciary and that authoritarian regimes will only tolerate an independent judiciary upon losing power).

49. Shapiro identifies five possible reasons that authoritarian regimes use courts: “(1) establish social control and sideline political opponents, 2) bolster a regime’s claim to “legal” legitimacy, 3) strengthen administrative compliance within the state’s own bureaucratic machinery and solve coordination problems among competing factions within the regime, 4) facilitate trade and investment; and 5) implement controversial policies so as to allow political distance from core elements of the regime.” Tamir Moustafa & Tom Ginsburg, *Introduction* to *RULE BY LAW*, *supra* note 26, at 4 [hereinafter Moustafa & Ginsburg, *Introduction*].

50. Hamad, *supra* note 4, at 26 (quoting Pilar Domingo, *Judicialization of Politics: The Changing Political Role of the Judiciary in Mexico*, in *THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA* 22 (Rachel Sieder, Line Schjolden, & Alan Angell, eds., 2d ed. 2005)).

51. Hamad, *supra* note 3, at 27 (noting that judicialization of politics occurs in both democratic and authoritarian states).

52. HOLGER ALBRECHT, *RAGING AGAINST THE MACHINE: POLITICAL OPPOSITION UNDER AUTHORITARIANISM IN EGYPT* 33 (2013).

53. See Tamir Moustafa, *Law and Resistance in Authoritarian States: The Judicialization of Politics in Egypt*, in *RULE BY LAW*, *supra* note 26, at 132 [hereinafter Moustafa, *Resistance*]; Hamad, *supra* note 3, at 19.

jeopardize the regime's centralized grip on power.<sup>54</sup> The executive takes great interest in dominating the judiciary in ways that produce rulings that do not threaten the regime's core interests while still appearing independent in the eyes of the people. This places courts in the "dialectic of empowerment" whereby the regime simultaneously seeks both to benefit from judicial empowerment and to constrain the courts to minimize the costs of judicial autonomy through rulings that limit the regime's power.<sup>55</sup> Courts, however, must restrain their rulings to avoid losing jurisdiction to special courts that issue rubber stamp decisions in favor of the executive.<sup>56</sup> Over time, the judicialization of politics permits the authoritarian regime to offset its lack of electoral legitimacy by appearing to bow to court rulings.<sup>57</sup>

Multiple theories attempt to explain why authoritarians grant judiciaries some independence. The power preservation thesis argues that when they face probable replacement and their time horizon in power is short, authoritarian rulers establish independent judicial institutions to serve as watch dogs that prevent the emergence of power centers outside the regime's control.<sup>58</sup> The federal government structure thesis posits that if a democratization process takes root during a transitional process, the authoritarian regime is incentivized to create independent judiciaries to mediate conflicts between sub-national groups and the state to monitor powerful state institutions such as the central

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54. Balasubramaniam, *supra* note 12, at 405, 414–15; Root & May, *supra* note 26, at 319–20 (arguing that courts in authoritarian regimes that subscribe to thin rule of law enjoy some space to introduce marginal protections for rights).

55. Balasubramaniam, *supra* note 12, at 406.

56. Moustafa & Ginsburg, *Introduction*, *supra* note 50, at 18 (arguing that Egypt's "Supreme Constitutional Court was able to push a liberal agenda and maintain its institutional autonomy from the executive largely because the regime was confident that it ultimately retained full control over its political opponents").

57. Hamad, *supra* note 3, at 27; Moustafa, *Law Versus the State*, *supra* note 8, at 927–928.

58. Hamad, *supra* note 3, at 17. INT'L BAR ASS'N HUMAN RIGHTS INST., SEPARATING LAW AND POLITICS: CHALLENGES TO INDEPENDENCE OF JUDGES AND PROSECUTORS IN EGYPT 29 (2014) ("The decision was taken after the judges had publicly criticised irregularities in the parliamentary elections of 2005 and suggested that an inquiry should be held into alleged electoral fraud in which a number of judges close to the government were allegedly complicit.") [hereinafter IBAHRI]. See also Bjorn Bentlage, *Strife for Independence in an Autocratic Regime: The Egyptian Judges' Club 2000-2007*, 50 *Die Welt des Islams* 243, 265–66 (2010) ("At that time, election results in several districts had been declared invalid by court decisions. Although the rulings were not implemented by parliament, the evaluations by the Judges' Club threatened to further undermine the legitimacy of the government. As with previous reports by the Club's committees, details had been leaked to the press, this time including the names of judges who were suspected to have participated in electoral fraud. Based on these leaks to the press, the Supreme Council referred several prominent judges in February and March 2006, including the Club's secretary general, to interrogation on the charges of engaging in politics and harming the dignity of the judiciary.").

bureaucracy, intelligence apparatus, policy, and army.<sup>59</sup> Neither of these theories apply to Egypt, however, because Nasser, Sadat, and Mubarak all had long-time horizons of power and a democratization process never took root in Egypt after January 25, 2011.<sup>60</sup>

Tamir Moustafa's work on the Egyptian judiciary proffers that, under the credible commitment thesis, authoritarian regimes with longer time horizons (like the Nasser, Mubarak, and Sadat regimes) are more likely to provide the judiciary some independence to provide assurances to much needed domestic and international investments. Moustafa argues that the Sadat and Mubarak regime were compelled to allow more political liberalization, including rule of law and limited judicial independence, as a source of legitimacy to offset their regime's failure to sustain the high levels of public benefits provided by the Nasser regime.<sup>61</sup> To survive economically, the state had no choice but to substitute political rights for welfare rights due to its inability to provide employment, health service, and food subsidies.<sup>62</sup> The regime used judicial mechanisms to absorb the public's anger over increasing political corruption from the ruling elite.<sup>63</sup> By having courts issue rulings striking down certain laws as a means to privatize the economy and shrink subsidies, the executive redirected the public's anger toward the judiciary. As more judges were motivated by both self preservation and a conviction to do the government's political bidding, the judiciary itself became politicized.<sup>64</sup> The result is the judicialization of politics.

Mahmoud Hamad identifies four conditions that incentivize long term authoritarians to preserve some judicial independence: 1) lack of traditional legitimacy or charismatic sources of legitimacy; 2) inability to provide welfare goods such as economic and social services that have been provided in the past; 3) a weak international or regional role; and 4) popular support of the judiciary based on perceptions of judges as professionals, independent, and concerned political actors.<sup>65</sup> The absence of these conditions under Mubarak compelled his regime to allow for some restrained judicial independence. For instance, Mubarak

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59. Hamad, *supra* note 3, at 17–18.

60. See generally Aziz, *supra* note 15.

61. Tamir Moustafa, *Law in the Egyptian Revolt*, 3 MIDDLE EAST L. & GOVERNANCE 181, 184 (2011) [hereinafter Moustafa, *Revolt*] (“Finally, the regime pushed through controversial amendments to the Constitution in 2005 and 2007 that entrenched illiberal measures into the Constitution itself, thus placing them beyond the scope of judicial review.”).

62. Hamad, *supra* note 3, at 29.

63. Nabil Abdel Fattah, *The Political Role of the Egyptian Judiciary*, in JUDGES AND POLITICAL REFORM IN EGYPT, *supra* note 8, at 71, 86.

64. Brown, *Reining in the Executive*, *supra* note 8, at 149.

65. Hamad, *supra* note 3, at 31.

was notoriously uncharismatic and his incremental removal of subsidies due to pressures by international lenders incentivized him to judicialize politics by shifting some of the political backlash onto a quasi-independent judiciary. When the judiciary leveraged its limited independence to issue rulings that preserved civil liberties and the electoral process, popular support for the judiciary arose. This made it more costly for Mubarak to overtly eliminate judges' independence.<sup>66</sup>

As discussed in more detail in Section IV, the judicialization of politics under both Sadat and Mubarak created the veneer of judicial independence despite the regimes' deployment of formal and informal mechanisms that incentivized judges to self-restrain their powers to preserve their financial and individual interests.<sup>67</sup> In other words, the executive established an unspoken rule wherein the judicial leadership does not contest executive interference in politically sensitive cases in exchange for fringe benefits, unchecked nepotism, and minimal accountability to the public.

The courts are left with the unsavory choice of rejecting this arrangement at the risk of becoming more controlled by the executive or accepting the deal and compromising independence. In the end, courts had to placate the regime just enough to avoid full co-optation while still retaining their perceived public legitimacy.<sup>68</sup> When courts did not accommodate regime mandates and could not expeditiously and surreptitiously be co-opted, the regime created special courts to channel political cases it deemed essential to its survival. In contrast, political cases remained in the regular judiciary when judges show deference to the regime. This placed the judiciary in another bind wherein they must decide whether to defer to the regime to retain their jurisdiction or to challenge unlawful regime action and face future limits on their judicial review powers.<sup>69</sup>

While expounding a new theory to explain why the executive granted the judiciary some independence is beyond the scope of this Article, I argue that the credible commitment theory falls short in explaining the events that have unfolded since the January 25<sup>th</sup> uprising. Specifically, the theory does not address the internal divisions among the judges and endogenous factors that cause judges to resist judicial

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66. Notably, the judiciary's focus on expanding its independence was shaped in large part by its tug of war with the executive, and thus did not include accountability to the people. As such, the literature narrowly focuses on the relationship between the executive branch and the judiciary—a gap this Article aims to fill.

67. GLOPPEN, *supra* note 3, at 24.

68. Martin Shapiro, *Courts in Authoritarian Regimes*, in *RULE BY LAW*, *supra* note 26, at 326, 334.

69. Moustafa & Ginsburg, *Introduction*, *supra* note 50, at 4, 12; ALBRECHT, *RAGING AGAINST THE MACHINE*, *supra* note 52, at 7.

accountability to the people. Existing scholarship does not adequately address the dynamics that occur during transitional periods when the institutional identity of the Egyptian judiciary appears to be shifting away from liberal understandings of civil liberties and horizontal accountability of the executive toward thinner conceptions of rule of law antagonistic to populist democracy that privileges stability over substantive political and social rights.<sup>70</sup> As a result, Interim President Adly Mansour and President Sisi permitted politically sensitive cases to be tried within the ordinary judiciary because the judges' interests are more aligned with the military elite who currently control Egypt post-January 25th than the populist youth and Islamist opposition.<sup>71</sup> As discussed in Section III and IV, the internal cultural and institutional identity shifts that have occurred within the judiciary since 2000 may be a greater threat to judicial independence than exogenous factors used to co-opt individual judges' preferences.

The next section interrogates the contested concept of judicial independence to set the stage for Section III and IV's in-depth analysis addressing why the Egyptian judiciary was unable and unwilling to support the revolutionary demands for (thick) rule of law that would have granted judges more independence in exchange for judicial accountability to the people.

## II. THEORIZING JUDICIAL INDEPENDENCE AND ACCOUNTABILITY IN AUTHORITARIAN REGIMES

Through judicial review, courts serve the political accountability function of enabling popular contestation over political control by protecting the spaces where political deliberation and social mobilization

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70. See, e.g., Ferejohn & Kramer, *supra* note 10, at 973 (noting that judges are people too and thus their independence from oversight by voters may cause them to misapply the law for their own inappropriate reasons).

71. *Egypt Muslim Brotherhood verdicts 'blatantly unjust': Human Rights Watch*, REUTERS, Apr. 12, 2015, <http://www.reuters.com/article/2015/04/12/us-egypt-court-brotherhood-idUSKBN0N30RF20150412> ("An Egyptian court's decision to sentence 14 men to death and jail 37 others accused of ties to the outlawed Muslim Brotherhood was "politically motivated" and "blatantly unjust", Human Rights Watch (HRW) said on Sunday."); Gloria Galloway, *Trial of Journalists in Egypt Uncorroborated by Evidence Says Judge*, THE GLOBE & MAIL (Apr. 16, 2014, 7:36 PM), <http://www.theglobeandmail.com/news/politics/family-of-imprisoned-journalist-hopes-baird-will-intervene/article18047758/> ("Mohamed Fahmy, the English-language bureau chief in Cairo for the Qatar-based Al Jazeera television network, was arrested with two of his colleagues—Australian reporter Peter Greste and Egyptian producer Baher Mohamed—on Dec. 29. The men are being tried along with 17 others on charges of conspiring with the banned Muslim Brotherhood to tarnish Egypt's international reputation.").

occur.<sup>72</sup> Court rulings distinguish state sovereignty from the holders of governmental power, thereby empowering the people to protect their rights from an over-reaching state or the tyranny of the majority.<sup>73</sup> Consequently, independent judiciaries make possible the delegitimation of a government by facilitating the existence of competing representatives of the state.

While offering multiple benefits to democracy, an independent judiciary also poses risks. By placing a check on the executive and legislative branches, judicial review risks replacing rule of law with rule by judges.<sup>74</sup> Judges with the final say over the interpretation and application of laws promulgated by elected officials wield significant power to determine the implications of the rules.<sup>75</sup> And if those judges are members of the elite with minimal connections or accountability to the public, the judiciary becomes counter to majoritarian principles that undergird liberal democratic norms.<sup>76</sup> In countries experiencing transitions from authoritarian rule—as Egypt did albeit briefly—the rule of the few (including the judges) has impeded rule of law for the many.<sup>77</sup> Moreover, when boundaries between the branches of government are thin or nonexistent while the powers of presidents are broad,<sup>78</sup> courts struggle to shield themselves from undue interference, especially when court rulings hinder the executive's ability to remain in power indefinitely.<sup>79</sup>

In measuring a particular nation's judicial independence, at least the following two threshold questions come to the forefront. First, how much independence is necessary while still preserving accountability to

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72. GLOPPEN, *supra* note 3, at 19.

73. See Kleinfeld, *supra* note 32, at 59; Kahn, *supra* note 13, at 77 (noting that by taking jurisdiction, the courts dislocate the government's claim to represent the state and denies the government its privileged place as it becomes one of two parties before the court).

74. See GLOPPEN, *supra* note 3, at 124.

75. See TAMANAHA, *supra* note 13, at 90.

76. See GLOPPEN, *supra* note 3, at 166–67; see also Marcela Rodriguez, *Some Thoughts on Institutional Structures in the Judicial Process*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA*, *supra* note 10, at 166–67; Peerenboom, *supra* note 25, at 35–36 (noting that conservative judiciaries may aggravate inequities by siding with the powerful entrenched interests). However, empirical studies of the U.S. Supreme Court show it serves more as a pro-majoritarian institution in large part because the judges are selected through a political process that requires the executive's nomination and the Senate's confirmation. GLOPPEN, *supra* note 3, at 27; See also Nuno Garoupa & Tom Ginsburg, *The Comparative Law and Economics of Judicial Councils*, 27 *BERKELEY J. INT'L LAW* 53, 56–57 (2009).

77. Asli U. Bali, *The Perils of Judicial Independence: Constitutional Transition and the Turkish Example*, 52 *VA. J. INT'L L.* 235, 238 (2012); TAMANAHA, *supra* note 13, at at 74; see generally Aziz, *supra* note 15.

78. GLOPPEN, *supra* note 3, at 21.

79. *Id.*

the people? And second, from what or whom should the judiciary be independent?<sup>80</sup> A review of the theories set forth by four leading scholars focused on the institutional design of judiciaries shed light on these questions addressed in the Egyptian context in Section III.<sup>81</sup> That is, how does the executive branch employ exogenous and endogenous factors to co-opt Egypt's judges such that the judiciary is less independent than the regime purports?

Owen Fiss identifies three factors that contribute to judicial independence—party detachment, political insularity, and individual autonomy.<sup>82</sup> First, party detachment requires that judges be independent from parties who appear before them in court.<sup>83</sup> Without this, a judge cannot be impartial with respect to the interests of all parties in a legal dispute.<sup>84</sup> Second, political insularity requires that the judiciary be free from the influence or control of other government institutions.<sup>85</sup> Although the courts are part of the state, they should be independent of other governmental institutions, and thus serve “as a countervailing force within the larger government system.”<sup>86</sup> Notably, political insularity may still privilege the judiciary over the executive and legislature such that judges' authoritative positions on questions of principle may be incorrect or frustrate the will of the people, even if politically neutral.<sup>87</sup> Third, individual autonomy entails a judge's ability to adjudicate without

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80. Jorge Correa Sutil, *The Judiciary and the Political System in Chile: The Dilemmas of Judicial Independence During the Transition to Democracy*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA*, *supra* note 10, at 101.

81. GLOPPEN, *supra* note 3, at 25 (noting that most of the literature on judicial reform focus on institutional design and the structural protections necessary for ensuring the accountability function of the courts).

82. Fiss, *supra* note 48, at 55–56. In the Canadian context, Martin Friedland lists four categories that promote judicial independence. The first involves structural protections that shield the court from physical harm, political interference, contempt of court, immunity from civil and criminal process, and arbitrary removal of jurisdiction. The second category affects security of tenure such as rules setting retirement age, supernumerary status, and incapacity. The last two categories affect financial security in the form of pay and pension and disciplinary rules that ensure punishment for professional or personal misbehavior is not arbitrary, capricious, or politicized based on the regime's interests in restraining the judiciary. *See generally* MARTIN L. FRIEDLAND, *A PLACE APART: JUDICIAL INDEPENDENCE AND ACCOUNTABILITY IN CANADA* (Ottawa: Canadian Judicial Council 1995) (identifying aspects of systems that promote judicial independence); Hamad, *supra* note 4, at 13–14.

83. Fiss, *supra* note 48, at 55–56 (noting that even a cultural tie could cause a judge to identify with one party more than the other, resulting in a transgression).

84. Hamad, *supra* note 3, at 11.

85. Fiss, *supra* note 48, at 55–56; Hamad, *supra* note 3, at 12 (noting that political insularity is particularly relevant for administrative courts).

86. Fiss, *supra* note 48, at 56.

87. *Id.* at 58.

pressure from peers or senior judges to issue a decision against the findings of the presiding judge.<sup>88</sup>

Building off of Fiss, Donald Jackson proposes six overlapping factors that affect judicial independence: 1) the method of selection; 2) tenure of office; 3) removal for official misconduct; 4) adequate resources; 5) institutional rules that protect individual judge's decisions; and 6) a legal and political culture supportive of rule of law.<sup>89</sup> He argues that judicial autonomy is maximized when judicial recruitment is controlled from within the judiciary based on education and expertise of the applicants.<sup>90</sup> Likewise, lifetime tenure or pre-established long-term appointments coupled with legal safeguards against retaliatory removal preserve judicial independence.<sup>91</sup> While removal for official misconduct is essential for addressing corruption and incompetence, it should be conducted transparently and administered by professional peer judges.<sup>92</sup> Adequate facilities, staff, and other resources minimize judges' vulnerability to bribery, and allow courts to operate efficiently.<sup>93</sup> The integrity of individual and collective judges' decisions must also be protected by prohibiting prior review of judicial decisions before verdicts are issued.<sup>94</sup> Finally, a legal and political culture among judges and government officials that adheres to these rules is necessary.<sup>95</sup>

Often times, the dominant conceptions of judicial independence are taken from Western liberal democracies with a culture, history, and institutional framework that minimize the adverse externalities arising from independent judiciaries.<sup>96</sup> In authoritarian regimes, however,

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88. *Id.* at 55; GLOPPEN, *supra* note 3, at 11–12.

89. Donald W Jackson, *Judicial Independence in Cross-National Perspective*, in JUDICIAL INDEPENDENCE: ESSAYS, BIBLIOGRAPHY, AND DISCUSSION GUIDE 10 (American Bar Association ed. 1999).

90. *But see* Rodriguez, *supra* note 76, at 165 (arguing that judges can never be impartial or neutral because they belong to a particular class, gender, race, religion, ideology, and social position).

91. *But see* Nuno Garoupa, Marian Gili & Fernando Gómez-Pomar, *Political Influence and Career Judges: An Empirical Analysis of Administrative Review by the Spanish Supreme Court*, 9 J. OF EMPIRICAL LEGAL STUD., (forthcoming 2012) (manuscript at 11), <http://dx.doi.org/10.2139/ssrn.1877083>, (noting that non-lifetime tenure can lead judges to rule in ways that promote their self-interest in obtaining employment after their term ends).

92. *See, e.g.*, Donald P. Kommers, *Autonomy versus Accountability: The German Judiciary*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY, *supra* note 48, at 137, 148.

93. Hamad, *supra* note 3, at 14.

94. *Id.*

95. Hamad, *supra* note 3, at 13–14.

96. Garoupa & Ginsburg, *supra* note 76, at 71–72. Most judicial models fall within two categories: the career model or the recognition model. The career model is prevalent in Europe and nations operating under civil code systems, resulting in judges hired upon graduation from law school and serving as judges for their entire careers. The

judges are predominantly from the political and economic elites whose interests are intertwined with the regime and may exercise their judicial independence in contravention to a democratic process, particularly if it is populist. For example, granting significant powers to a politicized and corrupt judiciary intimidated by external pressure, motivated by personal or group agendas, or lacking expertise of law runs counter to democratic objectives.<sup>97</sup> Likewise, simply rewriting a country's laws based on Western models is doomed to fail.<sup>98</sup>

Siri Gloppen, thus, cautions that the context of a particular country plays a key role in examining a judiciary's independence.<sup>99</sup> Greater attention should be paid to the circumstances of a particular country's local politics, culture, and the legal context to determine how superior courts exercise judicial authority and accountability functions.<sup>100</sup> For instance, regime stability, a competitive political party system, horizontal power distribution, and the degree of political freedom are all preconditions for independent judicial behavior.<sup>101</sup> Similarly, impartial

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recognition model prevails in the US and other common law systems wherein the political system selects and approves judges through a process of nomination and confirmation or elections. Kahn, *supra* note 13, at 84; *see also* Fiss, *supra* note 48, at 57.

97. TAMANAHA, *supra* note 13, at 110.

98. *See* Carothers, *supra* note 1, at 25.

99. GLOPPEN, *supra* note 3, at 26. Siri Gloppen categorizes multiple factors into four groupings. The first group focuses on structural independence from the political branches including appointment procedures, disciplining judges, tenure protection, salaries, and the judiciary's control over its budget. Financial need, for instance, increases the judiciary's political vulnerability and susceptibility to being bribed in exchange for favorable decisions by a particular party. Likewise, executive or parliamentary control over judicial salaries may cause trenchant political responses to objectionable judicial behavior thereby resulting in self-restraint by judges. The second set of factors address institutional variables that affect the jurisdiction of the courts including control of the courts over their caseload. The third group includes the provisions of resources to courts including infrastructure, running costs, training, legal materials and other factors that affect the judiciary's ability to process cases and deliver judgments. The final grouping involves variables affecting the professional competence of the judiciary such as recruitment patterns, education, training, and professional standards. *Id.* *See also* Bali, *supra* note 77, at 239 (noting that "a conception of judicial independence that entails isolating the judiciary from the other branches of government might be desirable where executives and legislatures are not themselves democratic" whereas states in transition to democracy may be better off with a measure of interdependency between the branches to ensure judicial accountability).

100. GLOPPEN, *supra* note 3, at 153; Stephen Golub, *A House without a Foundation*, in *PROMOTING THE RULE OF LAW ABROAD*, *supra* note 9, at 105, 113, 134 (noting that constituencies and coalitions may be so fragmented and fractitious that the political environment is inimical to judicial reform); Root & May, *supra* note 26, at 324 (recognizing that "imposing formal institutional structures on societies with incompatible traditions is unlikely to succeed in bringing about lasting reform").

101. Hamad, *supra* note 3, at 15-16.

judging relies on professional police work in gathering evidence and enforcement of decisions after courts issue rulings.<sup>102</sup>

As discussed in more detail in Section IV, the Mubarak regime employed various tactics that diminished the ordinary courts' jurisdiction, increased the retirement age multiple times to reward senior loyalist judges, offered lucrative secondments to loyalist judges, and investigated reformist judges through a disciplinary process controlled by the Ministry of Justice.<sup>103</sup> The executive also interfered with the hiring of new judges, the disciplinary process, and secondments to both co-opt individual judges and circumscribe judicial notions of rule of law as primarily procedural, not substantive. Yet, Mubarak took great care not to interfere directly with particular cases in the form of telephone justice.<sup>104</sup> Instead, he relied on co-opted senior judges to serve as internal watchdogs against judicial disobedience.<sup>105</sup>

The next section delves into the Egyptian judiciary's protracted and checkered struggle to attain independence from multiple regimes dating back to the late 19<sup>th</sup> century. I argue that the Egyptian judiciary was founded on liberal principles of judicial independence and separation of powers that continue to influence contemporary judicial culture. However, over time the executive branch's concerted efforts to co-opt the judiciary eroded the judiciary's liberal underpinnings. As a result, the young revolutionaries' faith in the judges was misplaced.

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102. Root & May, *supra* note 26, at 304; Fiss, *supra* note 48, at 61–62.

103. See e.g., Law No. 183 of 1993 (Increasing Retirement Age from 60 to 64), *al-Jarīdah al-Rasmīyah*, 1993 (Egypt); Law No. 3 of 2002 (Increasing Retirement Age from 64 to 66), *al-Jarīdah al-Rasmīyah*, 2002 (Egypt); Law No. 159 of 2003 (Increasing Retirement Age from 66 to 68), *al-Jarīdah al-Rasmīyah*, 2003 (Egypt); Law No. 17 of 2007 (Increasing Retirement Age from 68 to 70), *al-Jarīdah al-Rasmīyah*, 2007 (Egypt).

104. Moustafa, *Law Versus the State*, *supra* note 8, at 927–28; Fattah, *supra* note 63, at 275.

105. Hamad, *supra* note 3, at 262. (“Mubarak wanted to accomplish this goal without forgoing his appeal to legality and the rule of law. Thus, instead of dismissing the Courts’ justices or amending the Courts’ legislation to limit its jurisdiction or change its mandate, as many authoritarian rulers would have done, Mubarak waited for the opportunity to achieve his objectives without sacrificing the regime’s appeal to legal legitimacy. Mubarak had an ample opportunity when the SCC Chief Justice Wali al-Din Galal retired in August 2001. During the liberal and active era of the SCC in the 1980s and 1990s, the position of chief justice went to the most senior member of the Court, making it virtually a self-perpetuating body. Unsurprisingly, that made possible a remarkable degree of independence and consequently activism, especially during the era of Awad al-Murr (1991-1998). In order to rein in the Court, Mubarak used his appointment power to bring in a series of chief justices who are closely aligned with the presidency.”).

### III. CO-OPTED AND INDEPENDENT: THE HISTORY OF EGYPT'S JUDICIARY

Notwithstanding interventionist policies of three consecutive authoritarian regimes, the Egyptian judiciary was more independent than Nasser, Mubarak, and Sadat desired. During the contemporary judiciary's formational period from 1883 to 1952, Egyptian judges observed and eventually adopted a corporatist professional identity from their European peers presiding over the Mixed Courts in Egypt.<sup>106</sup> Emboldened by the rise of the Egyptian nationalist movement that served as a protective constituency advocating for an independent judiciary to counterbalance the Crown and British occupation forces, the judiciary established a distinctive identity rooted in liberal principles.<sup>107</sup> Even under the most repressive conditions, this identity has survived among parts of the judiciary such that no Egyptian president has yet been able to completely dominate the institution. What has resulted, however, is an ebb and flow of periods of relatively more or less independence from the executive and little regard for judicial accountability to the people.

This section describes the various means of control exercised by the Egyptian executive and how this ultimately produced an illiberal judiciary willing to cooperate or look the other way in the military's counter-revolutionary crackdown on Morsi supporters and youth activists.<sup>108</sup> Subsection A provides an overview of the foundational period that established a culture of independence, a commitment to liberalism, and a corporatist identity within the Egyptian judiciary. This institutional identity, while diminished through executive incentives among a majority of judges, has remained strong among some judges, most of whom joined the judicial independence movement.<sup>109</sup> Subsection B proceeds to summarize the trend toward judicial independence stunted by the Nasser regime's perception of the judiciary as an elitist institution that threatened his socialist agenda. Although Nasser's commandeering was overt and sweeping, Sadat and Mubarak were no less interested in controlling the judiciary. But due to their

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106. Nathan J. Brown, *The Precarious Life and Slow Death of the Mixed Courts of Egypt*, 25 INT'L J. MIDDLE EAST STUD. 31, 31–32 (1993) [hereinafter Brown, *Precarious*].

107. Mustapha Kamel Al-Sayyed, *The Judicial Authority and Civil Society, in JUDGES AND POLITICAL REFORM IN EGYPT*, *supra* note 8, at 230; TARIQ AL-BISHRI, AL-QADA AL-MISRI BAYNA AL-ISTIQLAL WA-AL-IHTIWA 150–60 (al-Qahirah, Maktabat al-Shuruq al-Dawliyah, 2006).

108. Tom Ginsburg, *Courts and New Democracies: Recent Works*, 37 LAW & SOC. INQUIRY 720, 721–22 (2012); Yussef Auf, *Prospects for Judicial Reform*, EGYPTSOURCE (Oct. 21, 2014), <http://www.atlanticcouncil.org/blogs/egyptsource/prospects-for-judicial-reform-in-egypt>; *see* Hamad, *supra* note 3, at 251.

109. GLOPPEN, *supra* note 3, at 24 (noting that the extent to which a culture of legalism permeates society generally affects judicial behavior).

inability to retain legitimacy through personal charisma or welfare policies, Mubarak and Sadat were compelled to resort to indirect means of influencing the judiciary to ensure judges could not threaten the regime's core interests.

A. *The Roots of Egyptian Judicial Independence*

In the Middle East and North Africa region, Egypt's judiciary was at the forefront of progression from informal adjudication processes, based on customary and Islamic law undertaken by religious scholars, to formal courts, presided over by university trained professional judges applying codified law. The transition was driven in large part by French and British occupation of Egypt in the 19<sup>th</sup> and 20<sup>th</sup> centuries.<sup>110</sup> As more Europeans resided and conducted business in Egypt, they demanded resolving their disputes before judges from their home countries who would apply their laws.<sup>111</sup> In response to these demands, the Khedive established the Mixed Courts in 1876.<sup>112</sup> Beside European judges presiding over cases were a select number of Egyptian judges who applied British law to resolve disputes where one or more parties were British citizens.<sup>113</sup> Through their interactions with European judges on the Mixed Courts, Egyptian judges became exposed to the principles of strict judicial independence and developed a sense of professionalism. They also learned about the constitutional foundations of Western liberalism and the preservation of civil liberties.

When the National Courts were created in 1883, the judges who transferred from the Mixed Courts brought with them the values and training they received from their European counterparts.<sup>114</sup> Moreover, the judges in the National Courts were keenly aware of the institutional

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110. NATHAN J. BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD: ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT 156 (2002). For now it is enough to note that from the beginning of constitution writing, textual silences and vagueness were designed to undercut constitutionalism. Many of these techniques were already developed before the imperial era, but British and French practice in Egypt, Iraq, Syria, and Lebanon developed them still further. As Elizabeth Thompson writes of the imperial-era constitutions in Syria and Lebanon: "While assigning sovereignty to the people, they also granted supreme power to a nonelected official who stood above the law, the French high commissioner, who could decree laws, dismiss parliaments, and even suspend the constitution itself." ELIZABETH THOMPSON, COLONIAL CITIZENS: REPUBLICAN RIGHTS, PATERNAL PRIVILEGE, AND GENDER IN FRENCH SYRIA AND LEBANON 53 (2000).

111. Hamad, *supra* note 3, at 50.

112. *Id.* at 54; Brown, *Precarious*, *supra* note 106, at 33–52.

113. Brown, *Precarious*, *supra* note 107, at 34–37.

114. Hamad, *supra* note 3, at 58 (noting that by 1949 when the Mixed Courts were closed, at least forty-nine Egyptian justices and judges were serving on the courts and those who did not retire joined the ranks of the National Courts).

independence enjoyed by the Mixed Courts and sought the same privileges. To that end, Egyptian judges in the 1920s and 1930s demanded that the courts' general assemblies, instead of the executive branch, control the appointment of the presidents and deputy presidents of the courts and that all judges be immune from dismissal or arbitrary changes to the retirement age.<sup>115</sup>

Benefitting from nationalistic aspirations prevalent in Egyptian society at the time, the judiciary became a forum for challenging the occupying British authorities.<sup>116</sup> In an attempt to co-opt the judiciary from the top, the executive branch provided special pay increases to senior judges.<sup>117</sup> The famous Egyptian nationalist, Sa'ad Zaghloul, denounced these tactics in 1926 as a direct affront to judicial independence and a form of official bribery in return for rulings favorable to the government.<sup>118</sup> Despite such noble contestations, supplementary pay and secondments became a normal part of judicial compensation that continue until the present day to be a powerful tool in the executive's strategy of co-optation.

From 1923 to 1952, when Egypt experienced a liberal era under the 1923 Constitution, the judiciary established legal precedents and instituted a liberal legal tradition protective of citizens' rights and liberties.<sup>119</sup> The creation of the Supreme Judicial Council pursuant to Law Number 31 of 1936 and the passage of the Judicial Independence Act in 1943 codified judicial independence rather than making it dependent on the constitution, customs, or public opinion.<sup>120</sup> The Judicial Independence Act also prohibited removal of a judge or justice after he served three years.<sup>121</sup> Judges who had not yet served for three

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115. *Id.* at 67; *See generally* NATHAN J. BROWN, *THE RULE OF LAW IN THE ARAB WORLD: COURTS IN EGYPT AND THE GULF* (1997) (explaining the development of the modern Egyptian legal system).

116. Hamad, *supra* note 3, at 75 (providing an example of when the National Courts acquitted al-Wafd leaders in the assassination of the highest British general in the Egyptian army).

117. *Id.* at 68. ("The awareness of the significance of judicial independence manifested itself early on in the Chamber of Deputies' deliberations over the government budget in 1926. One leading MP of *al-Wafd* Party criticized the government for raising the salaries of three selected senior justices . . .").

118. *Id.* at 69 (quoting Sa'ad Zaghloul's famous speech on the floor of the parliament in 1926).

119. *Id.* at 89–90; Lombardi, *Constitution as Agreement to Agree*, *supra* note 8, at 402.

120. Hamad, *supra* note 3, at 70–71.

121. Law No. 66 of 1943 (Law on the Independence of the Judiciary), *al-Waqā'i' al-Miṣrīyah*, 12 July 1943, art. 10 (Egypt); Hamad, *supra* note 3, at 71.

years could not be removed without the consent from the Supreme Judicial Council.<sup>122</sup>

The establishment of the Council of State in 1946 was another significant development in Egypt's judicial history.<sup>123</sup> Modeled after its French counterpart, the Council has the legal capacity to void executive administrative decisions it finds in violation of legislative provisions or to be an abuse of power.<sup>124</sup> Its jurisdiction covers litigation and appeals concerning provincial and municipal elections; salaries, pensions and allowances due to public servants; disciplinary decisions against public employees; and other administrative decisions.<sup>125</sup> The founding justices of the Council were selected from among the most experienced and respected judges, thereby establishing a strong collective culture of independence that until the present day sets the Council of State apart from the ordinary judiciary.<sup>126</sup>

Prior to the 1952 Revolution, the British occupying forces, the Crown, and the nationalist Al-Wafd party competed for power and thereby placed the judges at the center of the nationalist movement.<sup>127</sup> As the courts issued rulings in favor of Egyptian defendants that directly challenged occupying British authorities, the judges earned popular support that in turn enabled them to expand judicial independence.<sup>128</sup> By the early 20<sup>th</sup> century, the Court of Cassation, Egypt's highest national court, became "the guardian of civil and political rights."<sup>129</sup> Through its rulings, the Court granted Egyptians the right to form political parties, acquitted journalists on allegations of defaming the Crown, and preserved the civil liberties of Egyptians.<sup>130</sup>

Over time, the professional socialization of judges produced a corporatist identity associated with independence and liberal values in favor of civil liberties.<sup>131</sup> To achieve institutional goals, the judges

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122. Law on the Independence of the Judiciary, art. 11 (Egypt); Hamad, *supra* note 4, at 71–72.

123. Law No. 112 of 1946 (Law on Establishing the State Council), *al-Waqā'i' al-Miṣrīyah*, 1946 (Egypt).

124. Negad Mohamed El-Borai, *The Government's Non-execution of Judicial Decisions*, in JUDGES AND POLITICAL REFORM IN EGYPT, *supra* note 8, at 199–202.

125. Law on Establishing the State Council (Egypt).

126. Hamad, *supra* note 3, at 81 (noting that Dr. Muhammad Kamil Mursi and Dr. Abd al-Razzaq Al-Sanhri were among Egypt's most sophisticated judges); Mahmud al-Khudayari, *The Law on Judicial Authority and Judicial Independence*, in JUDGES AND POLITICAL REFORM IN EGYPT, *supra* note 8, at 48.

127. Hamad, *supra* note 3, at 90.

128. *Id.* at 75.

129. *Id.* at 74, 230.

130. *Id.* at 74 (highlighting a case in 1922 of a journalist and his editor-in-chief who were acquitted for defaming the Crown).

131. See generally BROWN, REVOLUTIONARY, *supra* note 47.

engaged in collective action tools, which remain a salient characteristic of contemporary Egyptian judges.<sup>132</sup> Indeed, the sense of professionalism and corporatist identity explains the judiciary's tug of war with multiple authoritarian regimes seeking to co-opt them. The checkered results of such disputes have led one leading scholar to conclude that Egypt has "independent judges but no independent judiciary."<sup>133</sup> Many of the contemporary co-optation tactics can be traced back to the Nasser era.

*B. Setting Precedents in Judicial Co-optation – The Nasser Era*

In contrast to January 25, 2011, what transpired on July 23, 1952, was nothing short of a revolution. Upon taking power, Gamal Abdel Nasser swiftly implemented a socialist agenda that redistributed wealth from the crony royal elites to the masses, increased access to education for rural Egyptians, and expanded welfare programs to the poor.<sup>134</sup> His nationalist agenda aimed to release Egypt from the grip of foreign occupiers, and did so through coercive measures.<sup>135</sup> Nasser's regime passed laws granting the executive branch sweeping powers over political parties, the press, and civil liberties.<sup>136</sup> In the face of political opposition, Nasser explicitly privileged military rule as the only alternative to political disorder.<sup>137</sup> The social contract became the regime providing economic and social welfare in exchange for popular support of Nasser's socialist and nationalist policies.<sup>138</sup> That Nasser possessed such extraordinary charisma to mobilize the masses made him less dependent on political or legal-rational legitimacy to sustain public support.<sup>139</sup> As a result, assaults on judicial independence produced minimal political costs to his regime. Ultimately, Nasser's treatment of the judiciary established an ominous precedent that empowered the

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132. Hamad, *supra* note 3, at 58.

133. Holger Albrecht, *How Can Opposition Support Authoritarianism? Lessons from Egypt*, 12 *DEMOCRATIZATION* 378, 383 (2005) (quoting Nasser Amin).

134. Roy & Irelan, *supra* note 14, at 163–65.

135. See Roy & Irelan, *supra* note 14, at 164 (discussing state seizure of foreign holdings).

136. Hamad, *supra* note 3, at 74 (noting that Law No. 179 of 1952 granted the Ministry of Interior broad powers over the establishment, functions, and operation of political parties).

137. AMOS PERLMUTTER, *EGYPT, THE PRAETORIAN STATE* 19 (1974); Hamad, *supra* note 3, at 108 (noting that Nasser defined freedom based on macro and national level interest, not at the individual level).

138. See Hamad, *supra* note 3, at 106.

139. See Hamad, *supra* note 3, at 92–93 (identifying three ways in which authoritarians maintain legitimacy: personal charisma, welfare distribution, and legal-rational).

Sadat, Mubarak, and Sisi regimes to significantly constrain judicial independence.

Soon after taking power, Nasser issued Law 353 of 1952 and Law No. 165 of 1955, which transferred the powers of investigating judges to the executive-controlled Public Prosecution Office and placed the Council of State under the purview of the Council of Ministers.<sup>140</sup> The Ministers controlled judicial appointments, promotions, and discipline of judges in the Council.<sup>141</sup> After the judges expressed grave concerns with these changes, the Council of Ministers issued a decree that removed the most liberal members of the Council of State and replaced them with judges who would not issue rulings that obstructed the regime's agenda.<sup>142</sup> By threatening the security of tenure through arbitrary removal, the regime sent a clear warning to judges who took their independence too seriously. This produced a conservative institution that "favored governmental interests over citizens' or groups' rights and liberties."<sup>143</sup> It was not until the 1972 passage of Law No. 47, which granted the Council of State judicial immunity and removed the Council from under the supervision of the Ministry of Justice, that the Council of State began regaining its independence.<sup>144</sup>

As judges in the civil courts refused to allow Nasser to unilaterally impose his ideological agenda, he curtailed their jurisdiction.<sup>145</sup> Hundreds of laws were passed from 1952 to 1964 stripping courts of jurisdiction over various administrative acts including petitions to annul or suspend confiscation decrees, disputes related to ownership of requisitioned properties, dismissals of civil servants without disciplinary procedures, involuntary retirement of civil servants, university administration decisions related to students, decisions by the Minister of Interior to dismiss mayors and deputy-mayors, and presidential decrees related to national security.<sup>146</sup> As the jurisdiction of the Office of Public

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140. Hamad, *supra* note 3, at 114.

141. Hamad, *supra* note 3, at 117.

142. Law No. 165 of 1955 (Law on the Organization of the State Council), *al-Waqā'i' al-Miṣrīyah*, 29 Mar. 1955 (Egypt); Hamad, *supra* note 3, at 117; *but see* TAMANAHA, *supra* note 13, at 90 (acknowledging that, due to the indeterminacy of law, nothing prevents a judge from manipulating rules to achieve a pre-determined outcome).

143. Hamad, *supra* note 3, at 130.

144. Law No. 47 of 1972 (Law on the Council of State), *al-Jarīdah al-Rasmīyah*, 5 Oct. 1972 (Egypt); Hamad, *supra* note 3, at 181 (noting removal of the provision in Law No. 27 of 1967 that subjected the Council of State to oversight by the ministry of justice).

145. Hamad, *supra* note 3, at 118; *see also* Brown, *Reining in the Executive*, *supra* note 8, at 137 (noting how an Egyptian executive's control over the legal framework may allow manipulation of courts' jurisdiction).

146. *See, e.g.*, Law No. 178 of 1952 (Law on Agricultural Reform) 9 Sept. 1952 (Egypt); Law No. 181 of 1952 (Law on the Dismissal of Staff Other Than the Disciplinary Way), *al-Waqā'i' al-Miṣrīyah*, 14 Sept. 1952 (Egypt); Law No. 31 of 1963

Prosecution expanded, Nasser amended judicial authority laws to strengthen the government's domination over the judicial members of the Office.<sup>147</sup> Today, the Office of the Public Prosecution remains under the control of executive authority notwithstanding amendments to the JAL in 1984 and 2006 that returned some autonomy to prosecutors.<sup>148</sup>

Nasser also fragmented the judiciary to weaken its ability to serve as a check on executive power and preserve civil liberties. Exceptional courts were created to quickly adjudicate political cases and issue the rulings desired by the executive.<sup>149</sup> Moreover, any rulings issued by the Court of Treason were prohibited from judicial review.<sup>150</sup> This practice set the precedent for Mubarak's state security courts in effect throughout his 30 year tenure.<sup>151</sup> Fragmenting the judiciary was a means for the regime to control high profile cases through security courts while claiming, albeit unconvincingly, that the judiciary was independent.<sup>152</sup>

Judicial fragmentation put the judges in a dilemma. On the one hand, if they challenged the legality of the exceptional courts and their loss of jurisdiction, they would invite Nasser to revamp the judiciary by replacing the judges with regime loyalists. On the other hand, accepting the fragmentation of the courts gave the executive little reason to interfere in judicial affairs because the judges handled cases that were not viewed as vital to the regime.<sup>153</sup> Indeed, when the courts became more active in questioning the constitutionality of revolutionary

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(Law amending Article 12 of Law No. 55 of 1959 Concerning Regulation of the State Council), *al-Jarīdah al-Rasmīyah*, 11 Mar. 1963 (Egypt); Law No. 270 of 1956 (Law on the Abolition of Martial Law), *al-Waqā'i' al-Miṣrīyah*, 20 June 1956 (Egypt); Law No. 345 of 1956 (Law on the Organization of Egyptian Universities), *al-Waqā'i' al-Miṣrīyah*, 20 Sept. 1956 (Egypt); Law No. 106 of 1957 (Law on Mayors), *al-Waqā'i' al-Miṣrīyah*, 5 May 1957 (Egypt); and Law No. 119 of 1964 (Law on Special State Security Measures), *al-Jarīdah al-Rasmīyah*, 24 March 1964 (Egypt).

147. Abdallah Khalil, *The General Prosecutor between the Judicial Executive Authorities*, in *JUDGES AND POLITICAL REFORM IN EGYPT*, *supra* note 8, at 59, 62 (citing Law No. 56 of 1959 (Law on the Judiciary) 12 Feb. 1959 (Egypt) and Law No. 43 of 1965 (Law on the Judiciary) 22 July 1965 (Egypt)).

148. *Id.*

149. Mustapha Kamel Al-Sayyed, *The Judicial Authority and Civil Society*, in *JUDGES AND POLITICAL REFORM IN EGYPT*, *supra* note 8, at 227, 229–30 (citing the Court of the Revolution, the Court of Treason, state security courts, sequestration tribunals, anti-feudalist tribunals, and trials of civilians before military courts among the various exceptional courts created).

150. Hamad, *supra* note 3, at 124 (“Among the first legislation that denied the courts any power over basic regime interests was “the Court of Treason Law,” Law-decree 344/1952. This Law-decree sheltered verdicts issued by the Court of Treason from all sorts of review or appeal.”).

151. Hamad, *supra* note 3, at 124; Moustafa, *Principles*, *supra* note 1, at 96; LOMBARDI, *STATE LAW AS ISLAMIC LAW*, *supra* note 8, at 143 (noting that state courts heard political crimes and terrorism cases).

152. Moustafa & Ginsburg, *Introduction*, *supra* note 49, at 17.

153. Hamad, *supra* note 3, at 138.

legislation and procedures after the military defeat in 1967, Nasser began planning what became known as the 1969 Massacre of the Judiciary.<sup>154</sup> Arguably the same dilemma exists today as Sisi permits the ordinary courts to try politically sensitive cases. But in contrast to past regimes, I argue that judges are issuing favorable rulings not to appease a coercive executive but rather out of their individual convictions that Islamists and youth revolutionaries are a threat to both judges' material interests and the judiciary's institutional power.

The Judges Club is another product of the judiciary's formational period. Established in 1939, the Judges Club has long been the vehicle through which judges defend their institutional and personal interests.<sup>155</sup> More than a social club, it runs a cooperative and savings fund for judges, helps families of deceased judges, provides loans and low-cost housing, and subsidizes transportation costs.<sup>156</sup> The Judges Club also 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 United States or Europe for a judge and his family.<sup>157</sup> With over 90 percent of judicial personnel as members, the Judges Club is a powerful institution capable of flexing its political muscle to fight for judicial independence.<sup>158</sup> Under the leadership of Mumtaz Nasser in the 1960s, for example, the Judges Club denounced the use of exceptional courts that infringed on the ordinary courts' jurisdiction and rebuffed Nasser's attempts to tighten the Ministry of Justice's control over judges.<sup>159</sup> In retaliation, Nasser engaged in a multi-year strategy to weaken the Judges Club through divide and rule, draining the Club's resources, and attempting to control the professional socialization of judges.<sup>160</sup> Many of these same tactics were later adopted by Mubarak's

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154. Hamad, *supra* note 3, at 139; Roy & Irelan, *supra* note 14, at 167.

155. See Al-Sayyed, *supra* note 149, at 230.

156. Atef Shahat Said, *The Role of the Judges' Club in Enhancing the Independence of the Judiciary and Spurring Political Reform*, in JUDGES AND POLITICAL REFORM IN EGYPT, *supra* note 8, at 111, 112.

157. Golub, *supra* note 100, at 105, 120; see Bentlage, *supra* note 58, at 249 (noting the legal status and functions of the Judges' Club).

158. Atef Shahat Said, *supra* note 157, at 113; Fattah, *supra* note 63, at 88.

159. Hamad, *supra* note 3, at 137 (rejecting Minister of Justice Fathi al-Sharqawi's draft legislation in 1963 to tighten control of the Ministry of Justice's control over the judiciary).

160. Mustapha Kamel Al-Sayyed, *The Judicial Authority and Civil Society*, in JUDGES AND POLITICAL REFORM IN EGYPT, *supra* note 8, at 230 (describing Nasser's efforts to persuade judges associations in the governorates to declare their independence from the central Judges Clubs in Cairo and Alexandria).

regime to weaken the judiciary in the decade preceding January 25, 2011.<sup>161</sup>

After the Judges Club successfully pushed for Law 43 in 1965 that granted judges more autonomy, the regime pressured judges to join the Arab Socialist Union (ASU) party in order to remain a judge.<sup>162</sup> Nasser also sought to permit ASU officials to become judges without following the usual hiring procedures or possessing the proper qualifications.<sup>163</sup> The Judges Club called foul, adopted a number of resolutions in March of 1968 rejecting the proposals, and vocally denounced Nasser for endangering judicial independence.<sup>164</sup> After the regime determined that the Judges Club was a center of dissident activity, the Ministry of Justice publicly supported a list of regime-loyalists to run for the 15 member board elections on March 21, 1969.<sup>165</sup> They were decisively defeated.<sup>166</sup>

Intent on dominating the judges, Nasser issued five executive decrees on August 31, 1969, that effectively crushed the judiciary's independence—both in fact and in spirit.<sup>167</sup> Nasser dismissed 208 judges, most of whom were in leadership positions and at the helm of the independence movement.<sup>168</sup> He dismissed the entire board of directors of the Judges Club and abolished the Supreme Council of Judges of the Civil Judiciary.<sup>169</sup> In their place, Nasser appointed regime loyalists pursuant to the new authorities he had granted himself.<sup>170</sup> He also created the Supreme Council of Judicial Organizations—controlled by the President and the Ministry of Justice instead of judges—and vested it with the authority to determine judicial appointments, promotions, transfers, and disciplinary actions.<sup>171</sup> To restrain a judiciary deemed too

161. *Id.* at 231–232.

162. Hamad, *supra* note 4, at 40.

163. Hamad, *supra* note 3, at 140; Al-Sayyed, *supra* note 147, at 230.

164. Al-Sayyed, *supra* note 149, at 230.

165. Hamad, *supra* note 3, at 141.

166. Hamad, *supra* note 3, at 141.

167. Lombardi, *Constitution as Agreement to Agree*, *supra* note 8, at 406–07.

168. Roy & Irelan, *supra* note 14, at 168–69.

169. Roy & Irelan, *supra* note 14, at 168–69; *see also* Moustafa, *Resistance*, *supra* note 53, at 134. President of the Republic of Egypt Decision No. 81 of 1969 (Establishing the Supreme Constitutional Court), *al-Jarīdah al-Rasmīyah*, 1969 (Egypt); President of the Republic of Egypt Decision No. 82 of 1969 (Instituting the Supreme Council of Judicial Bodies), *al-Jarīdah al-Rasmīyah*, 1969 (Egypt); President of the Republic of Egypt Decision No. 83 of 1969 (Reorganizing the Judicial Authorities), *al-Jarīdah al-Rasmīyah*, 1969 (Egypt); President of the Republic of Egypt Decision No. 84 of 1969 (Reorganizing the Administration of the Judges Club), *al-Jarīdah al-Rasmīyah*, 1969 (Egypt).

170. Hamad, *supra* note 3, at 127. (“Nasser and all presidents that succeeded him used presidential appointment power to install loyal and politically trusted judges at the pinnacle of all judicial institutions.”)

171. Moustafa, *Resistance*, *supra* note 53, at 134; LOMBARDI, *STATE LAW AS ISLAMIC LAW*, *supra* note 8, at 144.

independent, Nasser established by legislation the Supreme Court and granted it sole jurisdiction over the constitutionality of law.<sup>172</sup> The regime did not conceal its motives when it stated that “[i]t has been clear in many cases that the judgments of the judiciary are not able to join the march of development which has occurred in social and economic relations . . . .”<sup>173</sup> By appointing judges to only three year terms, the President could place the court under his tight control. And indeed, the Supreme Court’s over 300 rulings in its first 10 years did not hinder the regime’s agenda.<sup>174</sup>

Although Sadat repealed many of Nasser’s judicial decrees during Sadat’s first two years in office, this traumatic period in Egyptian judicial history continues to haunt today’s judiciary.<sup>175</sup> In a telling statement, reformist Judge Yahya al-Rifa’i writes, “We, judges, have nothing to do with politics; we won’t involve either ourselves or our club in its struggle . . . . Reciprocally, politics has nothing to do with us either. As a matter of fact, politics imposed itself on the club’s affairs; and we all remember the 1968 and 1969 events.”<sup>176</sup>

Since then, Egypt’s judges have been engaging in self-restraint from fear of another judicial massacre that would not only destroy the institution but would devastate judges’ livelihoods.<sup>177</sup> The silent majority of judges who avoid direct confrontations with the executive appreciate that the cost of vocal opposition is significantly higher than silence. That is, some co-optation reaps a little independence.

#### IV. JUDICIAL CO-OPTATION UNDER SADAT AND MUBARAK

Upon Nasser’s death, Vice President Anwar Sadat stepped into a highly centralized political system firmly under the control of Gamal Abdel Nasser and his loyal elites, most of whom had little regard for the uncharismatic Sadat.<sup>178</sup> Sadat also inherited an economy buckling under

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172. Lombardi, *State Law as Islamic Law*, *supra* note 9, at 144.

173. Hamad, *supra* note 3, at 143. President of the Republic of Egypt Decision No. 81 of 1969 (Establishing the Supreme Constitutional Court), *al-Jaridah al-Rasmiyah*, 1969 (Egypt).

174. Hamad, *supra* note 3, at 143.

175. Roy & Irelan, *supra* note 14, at 171. The Supreme Council on Judicial Bodies was not repealed under Sadat and continued to exist until 2008. *See* Hamad, *supra* note 3, at 161–62, 180.; *see* 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*, at 179, 185 (Said Amir Arjomand & Nathan J. Brown eds., 2013).

176. *See* Atef Shahat Said, *supra* note 156, at 128.

177. *See* GLOPPEN, *supra* note 3, at 24.

178. BRUCE RUTHERFORD, *EGYPT AFTER MUBARAK: LIBERALISM, ISLAM, AND DEMOCRACY IN THE ARAB WORLD* 142 (2008). (“With Nasser’s death in 1970, Anwar Sadat ascended to power and sought to quickly differentiate his regime from Nasser’s.”);

Nasser's unsustainable social welfare programs.<sup>179</sup> To build his own base of legitimacy, Sadat adopted a three-pronged strategy. First, he committed his regime to retaking the Sinai from Israel after Egypt's devastating defeat in 1967. Second, Sadat declared himself committed to rule of law, free market economics, and liberalism. This declaration gave him political cover to undo some of Nasser's most oppressive laws and policies while keeping in place others that served his interests.<sup>180</sup> Sadat also freed many of Nasser's political opposition, including the Muslim Brotherhood, from jails under the auspices of being benevolent and forgiving.<sup>181</sup> His true intention, however, was to use the Muslim Brotherhood as a counterbalance to Nasser's socialist elites and ultimately to marginalize them.<sup>182</sup> Finally, Sadat cloaked himself in religious legitimacy through public displays of piety as he made sure to be seen praying on television and meeting with scholars from Al Azhar University, the regional center of Sunni Islamic scholarship.<sup>183</sup>

To bolster his credibility before the judiciary, Sadat reinstated many of the judges dismissed by Nasser in 1969.<sup>184</sup> He also passed a new constitution in 1971 that in principle granted significantly more rights and liberties to citizens and affirmed the judiciary's role as the guarantor of those rights.<sup>185</sup> Sadat's desire to attract foreign investment further

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Hamad, *supra* note 3, at 148 ("Sadat had to establish his own legitimacy that distinguished his regime from that of his predecessor. This was no easy mission as Sadat lacked Nasser's charisma and the new president's revolutionary credentials were never comparable to his predecessor.").

179. RUTHERFORD, *supra* note 178, at 139. ("The Nasserist system was based on an unsustainable mix of a generous welfare state, a large and inefficient public sector, low domestic savings rates, and a high degree of insulation from the global economy"); Hamad, *supra* note 3, at 148 (referencing Nasser's system by stating "[t]he struggling war economy denied any hopes of legitimacy based on entitlement or social programs for the lower classes").

180. RUTHERFORD, *supra* note 178, at 142 ("He released political prisoners; reinstated civil servants dismissed by Nasser, and returned property sequestered for political reasons. He also expressed a strong interest in the rule of law. In a speech to the Judges Club on January 12, 1971, he said, "I shall discuss with the Minister of Justice all problems that interest you, as judges, and facilitate your work with a view toward creating a legal framework for the Revolution that ensures the supremacy of law . . . . The judiciary is sacrosanct, surrounded by an aura of sanctity and respect that is an asset to the entire people.").

181. Lombardi, *Constitution as Agreement to Agree*, *supra* note 8, at 415.

182. Lombardi, *Constitution as Agreement to Agree*, *supra* note 8, at 415.

183. Hamad, *supra* note 3, at 155.

184. Hamad, *supra* note 3, at 173–74 (noting that 46 of the leading judges purged were never reinstated because Sadat wanted to build an image of liberalism and rule of law with minimum political cost).

185. Clark B. Lombardi, *Egypt's Supreme Constitutional Court: Managing Constitutional Conflict in an Authoritarian Aspirationally 'Islamic' State*, 3 J. COMP. L. 234, 244 (2008); Lombardi, *Constitution as Agreement to Agree*, *supra* note 8, at 400. Chapter Five of § 4 of the 1971 Constitutional included at least nine articles devoted

incentivized him to grant the courts more independence.<sup>186</sup> However, Sadat declined to reinstate the Supreme Judicial Council and instead retained the executive-controlled Supreme Council of Judicial Bodies as the governing entity over judicial affairs.<sup>187</sup> Sadat used the judiciary to monitor powerful state institutions such as the labor unions, the intelligence apparatus, the police, and the army so that he could preempt any challenges to his centralized control.<sup>188</sup> To do so, he granted the courts more independence to engage in judicial review while at the same time maintaining control over judges' salaries and opportunities for lucrative extrajudicial appointments.<sup>189</sup> Indeed, under Sadat the practice of seconding judges to executive and legislative positions increased exponentially and became standard practice under Mubarak's regime.<sup>190</sup> The result was a judiciary whose independence would be constrained by the Ministry of Justice through its operational and supervisory role over judges and courts.<sup>191</sup>

Mubarak began his tenure equally concerned with depicting himself as committed to rule of law to bolster his legitimacy domestically and internationally. Like Sadat, Mubarak visited the Judges Club, the Council of State (the "Council"), the Court of Cassation, and the Supreme Constitutional Court to pay homage to the judiciary.<sup>192</sup> He publicly affirmed his commitment to judicial independence at the First Justice Conference in 1984, stating, "I have committed, since the first day I assumed the responsibility, to wait for judicial rulings in all matters appropriate for adjudication. I hereby avow all state institutions' respect of courts' rulings and will enforce them in letter and essence."<sup>193</sup> To that end, Mubarak's regime issued Law 136 of 1984 that 1) eliminated the Ministry of Justice's authority over the Council,<sup>194</sup> 2) mandated the approval of the Council's general assembly for appointment of the vice

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entirely to matters concerning the judiciary. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, 22 May 1980, 25 May 2005, 26 Mar. 2007, 18 Jan. 2014.

186. See Martin Shapiro, *Courts in Authoritarian Regimes*, in *RULE BY LAW*, *supra* note 26, at 330.

187. In 1984, Mubarak restored the Supreme Judicial Council. Brown, *Reining in the Executive*, *supra* note 8, at 141–42.

188. See James Rosberg, *Roads to the Rule of Law: The Emergence of an Independent Judiciary in Contemporary Egypt*, 13–15 (1995) (unpublished Ph.D thesis, Massachusetts Institute of Technology) (on file with author).

189. Hamad, *supra* note 3, at 176, 185.

190. Hamad, *supra* note 3, at 247–50.

191. *Id.* at 182.

192. *Id.* at 212.

193. *Id.*

194. Law No. 136 of 1984 (Law Instituting Reforms Demanded by the Council's Members), *al-Jaridah al-Rasmīyah*, 1984, art. 69 (Egypt).

and deputy presidents of the Council;<sup>195</sup> 3) reformed the members' selection procedures that transferred control to the Council's seven most senior judges;<sup>196</sup> and 4) granted the Special Council for Administrative Affairs exclusive jurisdiction over promoting, removing, and disciplining members of the Council of State.<sup>197</sup> As a result, the Council was able to expand its role defending civil and political rights against arbitrary and unwarranted government action.<sup>198</sup> To the present day, the Council of State enjoys more formal independence than the ordinary judiciary.

Over the next 25 years, however, Mubarak's action would betray his rhetoric. He used the Supreme Judicial Council, the Prosecutor General, and the Ministry of Justice to limit judicial independence to matters of peripheral relevance to the regime.<sup>199</sup> Again, the courts became the regime's tool for establishing social controls, sidelining political opponents, bolstering Mubarak's claim to legal legitimacy, and resolving coordination problems among competing factions within the regime.<sup>200</sup> For these reasons, it took a mass uprising on January 25th rather than elections and incremental reforms to oust Mubarak. The following sections examine the endogenous and exogenous mechanisms employed by the Mubarak regime that emboldened the more conservative, loyalist elements of the judiciary while marginalizing, or outright harassing, the reformist judges. Over time, these tactics compromised the judiciary's political insularity, impartiality when the government is a party, and individual autonomy—all factors that affect judicial independence.<sup>201</sup>

#### A. *Imposing Judicial Self-Restraint Through Exogenous and Endogenous Pressures*

Sadat and Mubarak's regime used carrots and sticks to persuade judicial elites to cooperate on high priority cases in exchange for maintaining some institutional autonomy on matters that do not threaten the regime's permanency.<sup>202</sup> Thus, the centralization of judicial governance authority permits executive authorities to co-opt the judiciary

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195. Law No. 136 of 1984, art 83 (Egypt).

196. Law No. 136 of 1984, art. 83 (Egypt); *see also* Roy & Irelan, *supra* note 14, at 181.

197. Law No. 136 of 1984, arts. 100, 101, 102, 112 (Egypt).

198. Hamad, *supra* note 3, at 220.

199. *See* Lombardi, *Constitution as Agreement to Agree*, *supra* note 8, at 416–17 (discussing Mubarak's policy of political de-liberalization).

200. Moustafa & Ginsburg, *Introduction*, *supra* note 49, at 4; *See* Rajah, *supra* note 26, at 945, 948 (discussing how authoritarian regimes use courts to perform “regime legitimization functions”).

201. *See* Fiss, *supra* note 48, at 55–56

202. *See Id.* at 18. *See* Hamad, *supra* note 4, at 249–51.

without having to resort to another 1969 Massacre of the Judiciary scenario. So long as the executive can persuade (or dissuade) the leadership of the Supreme Constitutional Court, the Supreme Administrative Court, the Supreme Judicial Council, and the Judges Club to refrain from challenging the regime on its key interests and allow internal rivalries and divisions to do the rest, judicial independence can be circumscribed.<sup>203</sup>

The Mubarak regime employed a myriad of institutional and legal mechanisms to incentivize judicial self-restraint while disincentivizing judicial activism. These mechanisms included 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.<sup>204</sup> Some of these restraints have been removed since the January 25<sup>th</sup> uprising while others remain in place.<sup>205</sup> For instance, the 2014 Constitution removed the president's 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.<sup>206</sup> However, the Minister of Justice still 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).<sup>207</sup> The Minister also selects the presidents of the Courts of First Instance who, in turn, use the significant financial and administrative resources at their command to subdue the courts' general assemblies from threatening the regime's interests.<sup>208</sup> And most significantly, the Minister of Justice manages the Judicial Inspections Department authorized to initiate disciplinary hearings against judges that may lead to expulsion or forced early retirement from the judiciary.<sup>209</sup> In exchange for their loyalty, the

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203. See Brown, *Reining in the Executive*, *supra* note 8, at 143.

204. IBAHRI, *supra* note 58, at 22.

205. *Id.* at 34; see generally SUJIT CHOUDHRY, ET. AL., CTR. FOR CONST. TRANSITIONS AT NYU LAW, CONSTITUTIONAL COURTS AFTER THE ARAB SPRING: APPOINTMENT MECHANISM AND RELATIVE JUDICIAL INDEPENDENCE 57–64 (2014), <http://constitutionaltransitions.org/wp-content/uploads/2014/04/Constitutional-Courts-after-the-Arab-Spring.pdf> (discussing the changes in appointment of judges pre-Mubarak and post-Mubarak).

206. Lombardi, *Egypt's Supreme Constitutional Court*, *supra* note 185, at 241.

207. IBAHRI, *supra* note 58 at 23.

208. Hamad, *supra* note 3, at 247.

209. Mahmud al-Khudayari, *The Law on Judicial Authority and Judicial Independence*, in JUDGES AND POLITICAL REFORM IN EGYPT, *supra* note 8, at 45, 47 (“According to Article 78 of the judicial authority law, ‘A department of judicial inspection shall be formed in the ministry of justice to inspect the work of judges and presidents of courts of first instance.’ This judicial inspection department deals with all aspects of the work of members of the Office of Public Prosecution and of judges up to the grade of president of court of first instance. These judicial personnel attach great

presidents of the Courts of First Instance, members of the Public Prosecutor, and members of the Judicial Inspection Department receive fringe benefits in the form of official cars, government residences, and subsidized land and housing.<sup>210</sup> Through these various direct and indirect appointment powers, the executive is able to control senior judges who in turn restrain, discipline, or expel subordinate judges.<sup>211</sup> By controlling those who guard the guardians, the executive effectively restrains the judiciary's independence.<sup>212</sup>

Similar to the Judges Club, the Supreme Judicial Council ("SJC") wields significant power over judges. Although technically a judicial institution, the composition of the SJC is structured to permit the executive authority to indirectly interfere with key decisions in a judge's career.<sup>213</sup> The SJC must approve hiring of new judges, promotions, requests for transfers, secondments and special assignments, and pay increases.<sup>214</sup> The SJC also selects all of the prosecutors and most judges across the judiciary, thereby granting it significant powers over the administration of justice and judicial governance.<sup>215</sup> Thus, judges concerned with their professional and income growth are loath to anger any member of the SJC. Although the SJC is the judiciary's governing body that, in theory, shields the judiciary from undue interference by the executive branch,<sup>216</sup> in practice, the SJC's independence is structurally compromised by the executive branch's powers to appoint the senior judges who comprise the SJC.<sup>217</sup>

Mubarak reinstated the SJC in 1984 after Nasser abolished it in 1969 as part of his broader assault on the judiciary.<sup>218</sup> The seven

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importance to the matter of evaluation because it affects promotion. The judicial inspection department investigates complaints against judges and suggests penalties. It also is responsible for preparing the project of the annual judicial 'movement' (rotation of judges), which includes promotions, transfers, and secondments.").

210. See Hamad, *supra* note 3 at 253 (noting that such preferential financial treatment violates Article 68 of the Judicial Authority Law); Khalil, *supra* note 147, at 65.

211. Brown, *Reining in the Executive*, *supra* note 9, at 138; see, e.g., *Egypt Refers 60 'pro-Brotherhood' Judges to Disciplinary Board*, AL AHRAM ONLINE (Oct. 20, 2014), <http://english.ahram.org/NewsContent/1/64/113517/Egypt/Politics-/Egypt-refers-proBrotherhood-judges-to-disciplinar.aspx> [hereinafter *Egypt Refers 60*].

212. See GLOPPEN, *supra* note 3, at 17; Brown, *Reining in the Executive*, *supra* note 8, at 137–38.

213. Mahmud al-Khudayari, *The Law on Judicial Authority and Judicial Independence*, *supra* note 210, at 47.

214. IBAHRI, *supra* note 58, at 23-24, 26-28, 44.

215. Hamad, *supra* note 4, at 68.

216. Mona El-Ghobashy, *The Dynamics of Elections Under Mubarak*, in *THE JOURNEY TO TAHRIR*, *supra* note 21, at 132, 139.

217. IBAHRI, *supra* note 58, at 28.

218. El-Ghobashy, *The Dynamics of Elections Under Mubarak*, *supra* note 216, at 139; Moustafa, *Law Versus the State*, *supra* note 8, at 889.

member SJC is comprised of the Chief Justice of the Court of Cassation, the two most senior Vice Presidents of the Court of Cassation, the Public 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.<sup>219</sup> 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 Justice or the President.<sup>220</sup> Indeed, the executive takes great interest in which judges are promoted to these seven senior posts.

The SJC deploys its broad authority in determining the pay, promotion, and transfer of judges to reward or punish judges.<sup>221</sup> 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.<sup>222</sup> 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 authority to protect the regime's core interests.<sup>223</sup> Such decisions 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 so because it could lead to political retaliation.<sup>224</sup> 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.<sup>225</sup> 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.

The chief judge of each appellate court serves another powerful gatekeeper position. He oversees case assignments in the courts of first instance and the appellate court within his district, thereby controlling

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219. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 1972, art. 77 (Egypt).

220. El-Ghobashy, *The Dynamics of Elections Under Mubarak*, *supra* note 216, at 139; *see* Hamad, *supra* note 3, at 247 (discussing the role of the Minister of Justice in appointing judges).

221. Mahmud al-Khudayari, *supra* note 126, at 47.

222. *See* Mohamed Sayed Said, *A Political Analysis of the Egyptian Judges' Revolt*, in *JUDGES AND POLITICAL REFORM IN EGYPT*, *supra* note 8, at 19, 21; Sherif Younes, *Judges and Elections: The Politicization of the Judge's Discourse*, in *JUDGES AND POLITICAL REFORM IN EGYPT*, *supra* note 8, at 151, 164.

223. *See* Hamad, *supra* note 3, at 33.

224. Law No. 46 of 1972, (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 1972, art. 9 (Egypt).

225. Nathalie Bernard-Maugiron, *Introduction to JUDGES AND POLITICAL REFORM IN EGYPT*, *supra* note 8, at 1, 10.

which judge will preside over cases important to the regime.<sup>226</sup> Should the chief appellate judge select a judge known for his independence, the case outcome could jeopardize the regime's agenda. 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 that they know the Minister of Justice will reject.<sup>227</sup> Therefore, ambitious judges are careful not to be perceived as too independent by the executive lest they be denied future opportunities for promotion. At the peak of the judicial independence movement in 2005–2006, the reformist judges unsuccessfully sought to amend the Judicial Authority Law to change control over appointment of SJC judges from the Ministry of Justice to an election by judges.<sup>228</sup> The demand remains unmet until the present day.

The Ministry of Justice has also used its significant influence over the public prosecution to politicize cases.<sup>229</sup> Specifically, the Ministry takes political factors into account when exercising its authority to appoint investigating judges, transfer prosecutors at its discretion, and discipline prosecutors.<sup>230</sup> Other reported abuses of power include “suggesting” to prosecutors that certain investigations should be dropped or started.<sup>231</sup> 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, pay, and status.<sup>232</sup> The Ministry has mastered these informal tactics such that it provides pretextual reasons when accused of undue politicization of judicial affairs. When such efforts fail to bring prosecutors into line, the executive assigns sensitive cases to the State Security Prosecution Department.<sup>233</sup> State security prosecutors are notorious for their loyalty to the regime and are well compensated in return for handling cases involving public demonstrations, torture, and Islamists in accordance

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226. IBAHRI, *supra* note 58, at 26; *see* MOHAMED NOUR FARHAT & ALI SADEK, ARAB CTR. FOR DEV. RULE L. & INTEGRITY, REPORT ON THE STATE OF THE JUDICIARY IN EGYPT 43–44, [http://www.arabruleoflaw.org/Files/PDF/Judiciary/English/P2/Egypt\\_FinalReportP2S4\\_En.pdf](http://www.arabruleoflaw.org/Files/PDF/Judiciary/English/P2/Egypt_FinalReportP2S4_En.pdf) (discussing the overall work distribution structure in the court of appeals).

227. IBAHRI, *supra* note 58, at 26; Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 1972, art. 30–31, 36 (Egypt).

228. El-Ghobashy, *supra* note 216, at 139; BROWN, REVOLUTIONARY, *supra* note 47, at 10; *see generally* Bernard-Maugiron, *supra* note 225, at 139.

229. IBAHRI, *supra* note 58, at 45; *see* Hamad, *supra* note 3, at 245–47.

230. IBAHRI, *supra* note 58, at 43; *see* FARHAT & SADEK, *supra* note 226, at 38 (“Minister of Justice has the right to supervise and control the prosecution . . .”).

231. IBAHRI, *supra* note 58, at 45.

232. *Id.* at 43; Mohamed Sayed Said, *supra* note 222, at 19, 21.

233. Hamad, *supra* note 3, at 246.

with the regime's instructions.<sup>234</sup> The Minister of Justice also selects investigating judges in high profile criminal cases known for their favorable stances towards the prosecution.<sup>235</sup> At the same time, the Minister can withhold appointing an independent-minded judge to investigate alleged criminal acts by regime loyalists.<sup>236</sup> Because the investigating judge's report is considered credible evidence in a trial, a politicized selection process has adverse consequences on the defendant's right to a fair trial.

Another powerful disciplining mechanism in the executive's toolbox is the committee that investigates judges' alleged ethical and legal violations. Despite the judiciary's repeated requests to transfer it to the SJC, the Judicial Inspection Department ("JID") remains under the control of the Ministry of Justice.<sup>237</sup> Its authority to review, evaluate, and recommend promotion or discipline procedures makes the JID one of the most powerful departments within the Ministry of Justice.<sup>238</sup> The Minister appoints the judge who heads the JID, and in effect, utilizes it to punish judges in the regular courts who go too far in challenging executive actions.<sup>239</sup> Some judges, as a result, have been pushed out of the judiciary through baseless investigations used to harass and embarrass them.<sup>240</sup> In exchange for closing the file and avoiding an adverse ruling, the Ministry of Justice calls for the judge's resignation.<sup>241</sup> 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 election irregularities in the 2005

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234. *Id.* at 245–46 (noting that state security prosecutors receive generous financial remuneration, ample opportunities for professional development, and career prospects inside and outside of the judiciary).

235. IBAHRI, *supra* note 58, at 43; Khalil, *supra* note 147, at 60.

236. IBAHRI, *supra* note 58, at 43; *see, e.g., Egypt: Rights Activists at Risk of Prison*, HUM. RTS. WATCH (Feb. 5, 2012), <http://www.hrw.org/news/2012/02/05/egypt-rights-activists-risk-prison> (discussing investigative judges power in the criminal courts and the summons of Nasser Amin and numerous NGO group leaders).

237. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 1972, art. 78 (Egypt); IBAHRI, *supra* note 58, at 7; Hamad, *supra* note 3, at 247.

238. Hamad, *supra* note 3, at 183–84.

239. *7 judges sent to retirement for MB affiliation*, MADA MASR (Jan. 27, 2014), <http://www.madamasr.com/content/7-judges-sent-retirement-mb-affiliation>; Moustafa, *Resistance*, *supra* note 53, at 138–39.

240. Sahar Aziz, *Egypt's Judiciary, Coopted*, CARNEGIE ENDOWMENT (Aug. 20, 2014), [http://carnegieendowment.org/sada/index.cfm?fa=show&article=56426&solr\\_hilite](http://carnegieendowment.org/sada/index.cfm?fa=show&article=56426&solr_hilite).

241. IBAHRI, *supra* note 58, at 29.

parliamentary elections.<sup>242</sup> Although the disciplinary board found Mekki innocent while giving Al-Bastawisi a mild reprimand, the two judges soon thereafter left the country for Kuwait presumably under pressure from the regime.<sup>243</sup> The case sent a chilling message to reformist judges who took their independence too earnestly.<sup>244</sup>

A more severe disciplining process occurred after the military deposed Mohamed Morsi. The sixty judges who condemned the deposal of Morsi as a military coup were investigated and systematically purged from the judiciary.<sup>245</sup> These judges had signed a statement on July 24, 2013, in support of the sit-in at Al-Raba'a Al-Adawiya opposing what they declared was the July 3<sup>rd</sup> military coup.<sup>246</sup> Another 16 judges, who call themselves "Judges for Egypt," were also expelled from the judiciary through disciplinary proceedings. By declaring Morsi's presidential victory before the delayed official results were released, the judges were accused of participating in politics in violation of the JAL.<sup>247</sup>

In conjunction with disincentives for ruling against the regime's interests, judges are incentivized to impose harsh sentences against defendants in high profile political cases in exchange for well-paid secondments to the Ministry of Justice, international organizations, or embassies abroad as special counselors.<sup>248</sup> Because the basic salaries of judges are not sufficient to cover the expenses of a middle class family and have not kept up with inflation, secondments make judges more dependent on the executive branch for this supplementary income.<sup>249</sup> The lack of transparency and the absence of objective criteria for

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242. Samer Shehata & Joshua Stacher, *The Muslim Brothers in Mubarak's Last Decade*, in *THE JOURNEY TO TAHRIR*, *supra* note 21, at 160, 167.

243. *Id.* at 168.

244. *Id.* at 167; *see, e.g.*, Michael Slackmann & Mona El-Naggar, *Police Beat Crowds Backing Egypt's Judges*, N.Y. TIMES (May 12, 2006), <http://www.nytimes.com/2006/05/12/world/middleeast/12egypt.html?pagewanted=print>; Ben Wedeman et al., *Egypt Cracks Down on Critics*, CNN (May 18, 2006), <http://edition.cnn.com/2006/WORLD/africa/05/18/egypt.crackdown/>.

245. *Egypt Refers 60*, *supra* note 211; *41 Judges referred to retirement for political activity*, MADA MASR (Mar. 14, 2015), <http://www.madamasr.com/news/41-judges-referred-retirement-political-activity>.

246. *Egypt Refers 60*, *supra* note 211; *41 Judges referred to retirement for political activity*, *supra* note 245.

247. *Egypt Refers 60*, *supra* note 211; *41 Judges referred to retirement for political activity*, *supra* note 245; Law No. 46 of 1972 (Judicial Authority Law), *al-Jaridah al-Rasmīyah*, 1972, art. 73 (Egypt); *7 Judges Sent to Retirement for MB Affiliation*, *supra* note 239; *Judges Investigated for Brotherhood Ties*, MADA MASR (Oct. 21, 2014), <http://www.madamasr.com/news/judges-investigated-brotherhood-ties>.

248. Nathan J. Brown, *Why do Egyptian courts say the darndest things?*, WASH POST (Mar. 25, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/03/25/why-do-egyptian-courts-say-the-darndest-things/>.

249. Hamad, *supra* note 3, at 248–49; Moustafa, *Law Versus the State*, *supra* note 8, at 894, 921;

seconding judges makes the process ripe for abuse.<sup>250</sup> For instance, the Ministry of Justice is notorious for rewarding 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—more than double an average judge's salary.<sup>251</sup> Similarly, the President must approve secondments to foreign governments, international organizations, or Egyptian embassies abroad—all of which entail significant fringe benefits and higher pay.<sup>252</sup> 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.

The executive branch also 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.<sup>253</sup> Anyone found to possess even the slightest anti-government leanings or to have an extended family member associated with political opposition groups, particularly the MB, is barred from entering the judiciary regardless of his qualifications.<sup>254</sup> 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, not necessarily to depoliticize the judiciary.<sup>255</sup> Hiring decisions penalize sitting judges involved in the judicial independence movement through the rejection of their otherwise qualified sons and relatives.<sup>256</sup>

Fragmenting the judiciary is another common tactic employed by authoritarians to incentivize cooperation and disincentivize independent adjudication on cases important to the regime. Following Nasser's

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250. Hamad, *supra* note 3, at 249.

251. IBAHRI, *supra* note 58, at 26–27; Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 1972, art. 62 (Egypt).

252. IBAHRI, *supra* note 58, at 27.

253. Bernard-Maugiron, *supra* note 225, at 13; Omar Mekky, *Evolution of the Refaieist in Egyptian politics*, KUWAIT TIMES (Sept. 17, 2012), <http://news.kuwaittimes.net/evolution-of-the-refaieist-in-egyptian-politics/>; <http://news.kuwaittimes.net/evolution-of-the-refaieist-in-egyptian-politics/>; see also Hamad, *supra* note 3, at 63–64 (discussing generally the goal of finding “independent-minded” judges with “guarantees of judicial independence”).

254. BROWN, REVOLUTIONARY, *supra* note 47, at 9; Mekky, *supra* note 253.

255. BROWN, REVOLUTIONARY, *supra* note 47, at 8–10. See RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 212–213 (2004) (generally discussing the shift in regimes that are vesting greater authority in the judiciary and the possible explanations for this phenomenon).

256. See Hamad, *supra* note 3, at 255 (describing the case of the SJC's decision not to hire the son of the Judge's Club vice president and the senior Council of State Justice in retaliation for their disloyal acts of independence).

precedent, Mubarak created special security courts to quash political dissidents belonging to the MB and other political Islamist groups.<sup>257</sup> For example, Law 105 of 1980 created special courts with exclusive jurisdiction over specific financial and economic offenses.<sup>258</sup> In creating a fragmented judicial system, Mubarak heavily circumscribed due process rights, prohibited appeals of state security court rulings, and retained the authority to order retrials if he wished.<sup>259</sup> The more independent the regular judiciary behaved, the more fragmented the judicial system became.<sup>260</sup> The more judges complied with executive agendas, the more the regime allowed political cases to remain within the regular courts' jurisdiction.<sup>261</sup> By the end of Mubarak's tenure, special security courts were actively trying MB members as part of a broader crackdown on dissent. In contrast, Adly Mansour and Abdel-Fatah Al Sisi's government permitted the ordinary judiciary to prosecute MB members, Morsi supporters, and youth revolutionaries, further evincing the judiciary's willingness to buttress the regime's counter-revolutionary agenda.

Although the executive branch uses courts to advance the regime's interests, courts sometimes transform into sites of political resistance.<sup>262</sup> The next section explores the endogenous factors that produced a short-lived independence movement that prompted the executive to retaliate by packing the SCC and installing regime loyalists in senior judicial positions. With a de-liberalized SCC, loyalists in the judicial leadership, and a weakened judicial reformist camp, the probability of judicial

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257. June Ray, *Human Rights Protection and the Rule of Law: Case Studies in Israel and Egypt*, in *THE RULE OF LAW IN THE MIDDLE EAST AND THE ISLAMIC WORLD: HUMAN RIGHTS AND THE JUDICIAL PROCESS*, at 43, 48–49 (Eugene Cotran & Mai Yamani eds., 2000) (describing political dissident defendants' lack of access to lawyers, families, and evidence to be used against them).

258. Law No. 105 of 1980 (Law on the Establishment of State Security Court), *al-Jarīdah al-Rasmīyah*, 21 May 1980 (Egypt); BROWN, *REVOLUTIONARY*, *supra* note 47, at 3.

259. Moustafa & Ginsburg, *Introduction*, *supra* note 49, at 17–18; IBAHRI, *supra* note 58, at 34.

260. Bentlage, *supra* note 58, at 254–56. *But see* Brown, *Reining in the Executive*, *supra* note 8, at 136 (noting that over the past two decades more fundamental issues of governance are brought before the ordinary judiciary as a result of a strong administrative court system and constitutional court). *See also* Luke M. Milligan, *Congressional End-Run: The Ignored Constraint on Judicial Review*, 45 *GA. L. REV.* 211 (2011). Judicial fragmentation is a type of hydraulics wherein political actors evade or work around structural judicial decisions.

261. Fattah, *supra* note 63, at 275; Rutherford, *supra* note 178, at 299.

262. Moustafa & Ginsburg, *Introduction*, *supra* note 49, at 2; *see generally* Lama Abu Odeh, *The Supreme Constitutional Court of Egypt: The Limits of Liberal Political Science and CLS Analysis of Law Elsewhere*, 59 *AM. J. COMP. L.* 985 (2011) (discussing the “trade-off” between the SCC and the executive regime).

support for revolutionary demands post-January 25, 2011, was slim from the start.

*B. Bouts of Judicial Independence Under Mubarak*

Throughout its history, the Egyptian judiciary has struggled to stop executive interference in judicial governance, electoral processes, and case outcomes.<sup>263</sup> Prior to the 1952 revolution, judges and lawyers were prestigious professionals at the frontlines of opposing foreign occupation and defending (thick) rule of law.<sup>264</sup> With Nasser's nationalization of the economy and open access to higher education, law school enrollment was no longer limited to the best and brightest and lawyers' incomes plummeted.<sup>265</sup> As a consequence, the quality of lawyering and judging suffered.<sup>266</sup>

Nevertheless, on at least six occasions under Mubarak's reign, the Egyptian judiciary pushed for legal reforms that would bolster its institutional independence and expand its judicial review powers to challenge executive action. First, the Judges Club held its inaugural Judicial Conference in 1986 to discuss the state of judicial independence. The Conference issued resolutions calling for removal of the government's emergency laws and other laws that restricted civil and political rights.<sup>267</sup> The judges also demanded financial and administrative independence from the Ministry of Justice, and judicial supervision of elections.<sup>268</sup> Notably, the resolutions also called for adherence to Islamic law in legislation, which reflected the Islamist tendencies of the reformist judges.<sup>269</sup> These judges and their disciples would portentously spearhead the judicial independence movement in 2005–2006.

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263. See ALAA AL ASWANY, ON THE STATE OF EGYPT: WHAT MADE THE REVOLUTION INEVITABLE 104 (2011); Bernard-Maugiron, *supra* note 225, at 13–14; Moustafa, *Law Versus the State*, *supra* note 8, at 897; Mekky, *supra* note 253.

264. Moustafa, *Law Versus the State*, *supra* note 8, at 897.

265. 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 COMPLEX AND POLITICAL LIBERALISM 193, 194 (Terence C. Halliday, Lucien Karpik, & Malcolm M. Feeley eds., 2007).

266. Moustafa & Ginsburg, *Introduction*, *supra* note 49, at 14–15, 21; *see generally*, Hamad, *supra* note 3, at 296–299 (“The regime might try to circumvent judicial decisions using a plethora of legal and political tactics to avoid implementing rulings that are ominous to its basic interests.”).

267. Article 148 of 1971 Constitution granted the president significant power to declare a state of emergency and consequently exercise extraordinary powers. Lombardi, *Constitution as Agreement to Agree*, *supra* note 8, at 411.

268. Atef Shahat Said, *supra* note 156, at 120–21, 123; Mekky, *supra* note 253.

269. Al-Sayyed, *supra* note 107, at 231.

Following the First Judicial Conference, the Judges Club general assembly instructed the president of the Court of Cassation to draft a law incorporating the key recommendations arising from the Conference. They included: 1) an independent budget; 2) the total independence of the Supreme Judicial Council from the Ministry of Justice; 3) transferring the Judicial Inspection Department from the Ministry of Justice to the Supreme Judicial Council; 4) prohibiting secondment of judges to non-judicial positions; 5) regulating judicial secondments; and 6) creating a National Center for Judicial Studies to train judges throughout their careers.<sup>270</sup> When nothing came of this effort, the new Judges Club president Justice Yahya Al-Rifa'i invited the general assembly to draft a new judicial authority, which was approved on January 19, 1991.<sup>271</sup> This draft law became a template for subsequent judicial reform efforts, including those proposed by Morsi's regime 20 years later.

The second instance occurred five years later in 1991, under the leadership of Judge Yahya al-Rifa'i, when the Judges Club aggressively negotiated with the Ministry of Justice to amend the JAL to disentangle judges from executive control.<sup>272</sup> Judges wanted to eliminate the Minister of Justice's authority to appoint and annually confirm chief judges to the Courts of First Instance.<sup>273</sup> They also sought to curtail the Minister's indirect control of these courts' general assemblies by virtue of his authority to endorse their decisions.<sup>274</sup> To minimize executive capture of the SJC, judges demanded that 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.<sup>275</sup> The judicial reform proposals again sought to transfer the Justice Ministry's administrative supervision to the courts and the Supreme Council of Justice's supervision to judges elected by

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270. Atef Shahat Said, *supra* note 156, at 116–17.

271. *Id.* at 116.

272. Bentlage, *supra* note 157, at 255.

273. *Id.*; see Al-Khudayari, *supra* note 126, at 47 (discussing the underlying reason of the Judge's Club proposal to include judge's in the selection process due to executive interference through the Minister of Justice's authority to appoint judges to specific courts).

274. Bentlage, *supra* note 157, at 255.

275. *Id.* at 255–56.

other judges.<sup>276</sup> Despite persistent efforts to get the draft passed by the People's Assembly, it languished in the Minister of Justice's office.<sup>277</sup>

Although there were no immediate changes to the JAL, these efforts created political space for the Supreme Constitutional Court ("SCC") to issue dozens of opinions in the 1990s that expanded basic rights and reined in executive excesses. In turn, these decisions emboldened civil society to defend individual rights through human rights litigation.<sup>278</sup> For instance, in 1992 the SCC ruled that the Egyptian government was constitutionally required to respect international human rights norms, which Mubarak perceived as a threat to his power.<sup>279</sup> The SCC struck down laws that restricted citizens' rights to establish political parties, stripped prominent opposition leaders of their political rights, and denied independent candidates the right to run in parliamentary elections.<sup>280</sup> It also struck down a law banning any political party opposed to peace with Israel, overturned laws that interfered with governance of workers' syndicates,<sup>281</sup> and struck down laws that prohibited criticism of public servants on grounds that such laws violated constitutional rights of free speech.<sup>282</sup> The SCC's liberal rulings extended to noncitizens when it ruled that denying noncitizens deprived of their property rights access to the national courts was unconstitutional.<sup>283</sup> 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.<sup>284</sup>

By the late 1990s, public interest litigation became the primary forum through which civil society pursued legal reform.<sup>285</sup>

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276. *Id.*; see Antoine Nasri Messarra, *Empowering Magistracy in the Arab World, in TOWARDS A BETTER LIFE: HOW TO IMPROVE THE STATE OF DEMOCRACY IN THE MIDDLE EAST*, at 149, 169–71, [www.gpotcenter.org/dosyalar/mepi2010.pdf](http://www.gpotcenter.org/dosyalar/mepi2010.pdf) (discussing the Judges Club's call for amendments of the laws that would allow it to be more independent from the executive power).

277. Al-Khudayari, *supra* note 126, at 46.

278. Moustafa & Ginsburg, *Introduction, supra* note 49, at 12–13; ALBRECHT, *RAGING AGAINST THE MACHINE, supra* note 52, at 33; Moustafa, *Law Versus the State, supra* note 8, at 884; Lombardi, *Egypt's Supreme Constitutional Court, supra* note 185, at 244; RUTHERFORD, *supra* note 178, at 18.

279. Lombardi, *Constitution as Agreement to Agree, supra* note 8, at 420.

280. Abdel Omar Sherif, *The Rule of Law in Egypt from a Judicial Perspective: A Digest of the Landmark Decisions of the Supreme Constitutional Court, in THE RULE OF LAW IN THE MIDDLE EAST AND THE ISLAMIC WORLD, supra* note 257, at 1, 7–9 (discussing the numerous and various actions taken by the SCC during the 80's and 90's).

281. LOMBARDI, *STATE LAW AS ISLAMIC LAW, supra* note 8, at 147 (citing Case No. 44, Judicial Year 7 (May 7, 1998) and Case No. 6, Judicial Year 15 (Apr. 15, 1995)).

282. Sherif, *supra* note 280, at 20.

283. *Id.* at 14.

284. *Id.* at 18–19.

285. Moustafa, *Principles, supra* note 1, at 94.

Notwithstanding these liberal rulings, the SCC did not dare strike down the emergency laws or prohibit military trials of civilians lest it invite executive retaliation.<sup>286</sup> Nor did the SCC grant citizens the right to appeal emergency or military court rulings to the regular courts.<sup>287</sup>

A dysfunctional political system unresponsive to civil society interests made litigation an attractive alternative in pursuing social change.<sup>288</sup> Indeed, Egyptians gained a political voice through human rights litigation that publicized government abuses.<sup>289</sup> The more the courts issued rulings in favor of civil liberties and democratic principles, the more civil society, opposition political parties, and professional organizations defended the judiciary's independence against executive incursions.<sup>290</sup> Because political mobilization could ultimately topple a regime, Mubarak tolerated human and civil rights litigation as a controllable mechanism for venting public grievances.<sup>291</sup> The end result was a protective constituency that believed the judiciary would be an ally after the January 25<sup>th</sup> uprisings.<sup>292</sup> This optimism turned out to be woefully displaced, as further discussed in Section V.

The third exertion of judicial independence came via a transformative ruling in 2000 in which the SCC declared that the Constitution mandated that judges monitor all national elections. This decision paved the way for the judiciary's boldest challenge of executive power in 2005–2006.<sup>293</sup> Shortly after the SCC's ruling, Justice Hussam Al-Ghiryani issued a ruling invalidating the 2000 parliamentary election results in the East Cairo district of Zeitoun.<sup>294</sup> Justice Al-Ghiryani found that the inclusion of members of the State Cases Authority and the Administrative Prosecution Authority as elections monitors violated the SCC's ruling because these entities did not qualify as judicial entities authorized to supervise the elections.<sup>295</sup> The Judges Club also issued a

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286. See Moustafa & Ginsburg, *Introduction*, *supra* note 49, at 16; Moustafa, *Law Versus the State*, *supra* note 8, at 903; Moustafa, *Resistance*, *supra* note 53, at 151.

287. See Moustafa, *Resistance*, *supra* note 53, at 151.

288. See GLOPPEN, *supra* note 3, at 166; Brown, *Reining in the Executive*, *supra* note 8, at 135.

289. Moustafa & Ginsburg, *Introduction*, *supra* note 49, at 13, 21; see Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 *YALE L.J.* 2009, 2032 (1997) (asserting that constitutional courts assist in developing fledgling democracies through litigation).

290. Hamad, *supra* note 3, at 303, 305–307.

291. SOLIMAN, *supra* note 2, at 142; see generally Egypt: 'Shouting slogans into the wind': Human rights concerns ahead of the parliamentary elections, AMNESTY INT'L (Nov. 21, 2010), <https://www.amnesty.org/en/documents/mde12/032/2010/en/>.

292. See generally Brown, *Reining in the Executive*, *supra* note 8, at 143, 149.

293. See Nathalie Bernhard-Maugiron, *Legal Reforms, the Rule of Law, and Consolidation of State Authoritarianism under Mubarak*, *supra* note 176, at 187.

294. Hamad, *supra* note 4, at 267.

295. Hamad, *supra* note 3, at 267–68.

“Black List” of 13 judges who allegedly collaborated with the executive branch to engage in electoral fraud in their supervision of elections.<sup>296</sup> In retaliation, the Supreme Judicial Council issued official reprimands against Justice Al-Ghiryani and Justice Ahmed Mekky, both leading judge in the independence movement. The judges responded by convening an extraordinary general assembly of over 3000 judges on March 12, 2004, denouncing the SJC’s actions.<sup>297</sup>

The fourth push against the Mubarak regime’s attempts to control the judiciary came when a group of reformist judges led by Judge Zakaria Abdel Aziz won the Judges Club elections in 2002 under the “Change and Renewal” list.<sup>298</sup> Besides mobilizing judges to demand electoral reforms, the Judges Club again pressured the executive to amend the JAL to give the judiciary more autonomy and eliminate the manipulation of secondments to indirectly influence judges.<sup>299</sup> For example, the Judges Club sought to amend Article 62 of the JAL to provide that “it is not possible to second [judges] to work [in a capacity] other than their own judicial work which is within their jurisdiction according to the provisions of the Constitution and the law.”<sup>300</sup> Their secondment for legal and administrative work for the executive and legislative authorities or for public and private bodies is prohibited.<sup>301</sup> The judges also wanted to grant the Supreme Judicial Council, rather than the Minister of Justice, the authority to appoint presidents of the courts of first instance, to create sub-courts created within the jurisdiction of a court of first instance, and to select the location of where such sub-courts sit.<sup>302</sup> As a result, the new Judges Club leadership created a committee to promote the adoption and revision of the 1991 judicial authority draft law.<sup>303</sup>

After witnessing pervasive electoral fraud in the 2005 parliamentary elections, reform-minded judges in control of the Judges Club formed an investigative committee—the fifth key event in the judiciary’s independence movement. Following the lead of a young female judge in

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296. *Id.* at 276.

297. *Id.* at 267.

298. Mekky, *supra* note 253; see Hamad, *supra* note 3, at 265–66 (discussing how “[i]n 2001 the reformer Zakaria ‘Abd el-Aziz surprisingly defeated the three-term president of the Judges Club, Moqbel Shaker”).

299. IBAHRI, *supra* note 58, at 36; see also Shapiro, *supra* note 68, at 332 (discussing the need for judges to persuade their colleagues to create winning coalitions that produce rights-oriented judicial leadership).

300. IBAHRI, *supra* note 58, at 38.

301. *Id.* at 38 (quoting Law No. 46 of 1972 (Judicial Authority Law), 1972, art. 62 (Egypt)).

302. *Id.* at 38 n.168 (recounting proposed amendments to Article 11 of Judicial Authority Law No. 46 of 1972).

303. Atef Shahat Said, *supra* note 156, at 118.

the Office of Administrative Prosecution, Noha Al-Zini, who publicly disclosed these violations, a group of judges collected testimony from their colleagues who witnessed similar fraud.<sup>304</sup> The self-described judicial independence movement convened three general assembly meetings in 2005 and 2006 that culminated in the publication of a report denouncing the election abuses and citing various cases of election fraud witnessed by judges.<sup>305</sup>

The executive swiftly retaliated. The loyalist Supreme Judicial Council threatened to investigate any judges who spoke to the press about election fraud.<sup>306</sup> Any such speech was allegedly political activity in violation of the Judicial Authority Law.<sup>307</sup> The Ministry of Justice also suspended the annual subsidies it gave to all Judges Clubs—the primary source of funding for judge’s fringe benefits.<sup>308</sup> The Mubarak regime passed a new law that transferred authority to distribute judicial fringe benefits from the Judges Club to the Ministry of Justice.<sup>309</sup> The government also amended the Constitution in 2007 to substantially weaken the role of judges in overseeing future elections by allowing non-judicial officials to serve as elections monitors.<sup>310</sup>

Mubarak felt sufficiently threatened to use force against the judges when judges joined a protest in 2006 in front of the Judges Club in Cairo—the sixth and final push for independence. Egyptian police attacked the protesters and assaulted some judges.<sup>311</sup> “Nearly 150 protesters were arrested on charges of ‘supporting the judges’.”<sup>312</sup> Among those arrested was Dr. Mohamed Morsi, who was portentously to become Egypt’s first democratically elected president after the January 25<sup>th</sup> uprisings.<sup>313</sup> The following month, Mubarak instructed Judge Abo El-leil, then Minister of Justice, to refer two leading judges from the Judges Club to disciplinary proceedings on pretextual charges of

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304. Bernard-Maugiron, *supra* note 225, at 2 (“According to the club, 151 judges out of 160 agreed to testify, and they confirmed al-Zini’s testimony that the Muslim Brotherhood candidate received three times as many votes as the ruling National Democratic Party’s (NDP) candidate. A complaint was filed at the general prosecutor’s office, but it received no response.”).

305. Atef Shahat Said, *supra* note 156, at 123–26.

306. Bentlage, *supra* note 157, at 264.

307. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 1972, art. 73 (Egypt).

308. Bernard-Maugiron, *supra* note 225, at 2; Bentlage, *supra* note 157, at 265.

309. BROWN, REVOLUTIONARY, *supra* note 47, at 5.

310. Moustafa, *Revolt*, *supra* note 61, at 184; Lombardi, *Constitution as Agreement to Agree*, *supra* note 8, at 423 n.25.

311. *See e.g.*, Bernard-Maugiron, *supra* note 225, at 3.

312. Mekky, *supra* note 253; Bentlage, *supra* note 157, at 266.

313. Mekky, *supra* note 253.

“insulting the judiciary” for allegedly defaming a fellow judge.<sup>314</sup> As the hearings were taking place, massive and well-equipped security forces surrounded the Judges Club, the Court of Cassation, the journalists’ syndicate, and the lawyers’ syndicate.<sup>315</sup> The unprecedented use of force against judges was a clear warning of the government’s intent to crackdown hard on anyone planning to challenge the regime’s centralized grip on power.<sup>316</sup> And their status as judicial elites would not protect them.

Intent on decisively crushing the judicial independence movement, the executive employed administrative and legal means to change the Club’s leadership to pro-regime judges.<sup>317</sup> Because the Judges Club is not a non-government organization or a professional syndicate,<sup>318</sup> the Ministry of Social Affairs announced in January 2007 that the Club must register as an association under the 2002 law on associations.<sup>319</sup> The move was aimed to bring the Judges Club under the administrative control of the executive and tame the judicial independence movement for once and for all.<sup>320</sup> Although the Judges Club ultimately submitted its registration papers, the process was dismissed after the SCC struck down the civil society law as unconstitutional. The Judges Club remains an organization not subject to regulation by civil society or professional syndicate laws.<sup>321</sup>

The confrontation between the Mubarak regime and the Judges Club culminated in a retaking of the Cairo Judges Club in 2009 by regime loyalist Ahmed El Zind who served as the Minister of Justice under President Sisi. Taking from Sadat’s playbook, the Mubarak regime appealed to judges’ material interests by promising financial benefits if government loyalists were elected to the Judges Club board.<sup>322</sup> Some of the leading dissident judges were “encouraged” to work outside the country or retire.<sup>323</sup> At the same time, government-controlled media defamed the judicial independence movement by accusing them of

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314. *Id.*; Bernard-Maugiron, *supra* note 225, at 3.

315. Bentlage, *supra* note 157, at 266–67.

316. *See* Hamad, *supra* note 3, at 275–78, 286.

317. *Id.* at 287–90 (discussing the different attempts made by the regime to weaken the Judge’s Club); Bernard-Maugiron, *supra* note 225, at 5.

318. Atef Shahat Said, *supra* note 156, at 114.

319. Bernard-Maugiron, *supra* note 225, at 4.

320. *See id.*; *see* Bentlage, *supra* note 157, at 248–52; *see e.g.*, Dina Shehata, *Egypt: Judges Club Challenges the Regime*, CARNEGIE ENDOWMENT (2009), <http://carnegieendowment.org/files/Shehata.pdf> (“The Judges Club had been lobbying the Egyptian government for nearly 15 years to pass a law freeing the judiciary from financial and administrative control by the Ministry of Justice.”);.

321. *See* ALBRECHT, RAGING AGAINST THE MACHINE, *supra* note 52, at 157–63.

322. Hamad, *supra* note 3, at 197–98, 288.

323. *See* Mekky, *supra* note 253.

engaging in politics and alluded to their loyalties to the Muslim Brotherhood.<sup>324</sup> Furthermore, loyalist judges accused reformist judges of being secretly affiliated with the Muslim Brotherhood with illicit motives.<sup>325</sup> That many of the reformist judges self-identified as Islamists made it easier for the government to cast aspersions on their motives as a threat to national security.

Upon his election to president of the Judges Club, Al-Zind and his faction got to work on undermining the credibility of the reformist movement by accusing them of inflating the number of participants in the general assembly meetings that issued resolutions condemning executive action. The loyalist camp cast aspersions on the motives of Justices Mekky, Abdel Aziz, and Al-Ghiryani by alleging they were pursuing their own personal interests, allied with the political Islamist opposition, and went as far as accusing the three judges of treason.<sup>326</sup>

Concerned that his regime's crackdown on the judiciary compromised his reputation abroad, Mubarak supported the National Democratic Party's amendments to the JAL through Law No. 142 of 2006 to give the impression that his regime was committed to rule of law.<sup>327</sup> The most significant concessions secured by the judges included requiring the SJC's confirmations of all judicial appointments and secondments to the Ministry of Justice with the exception of the undersecretaries and appointment of judges to the Judicial Inspection Department.<sup>328</sup> The SJC also confirmed appointment of the Assistant Public Prosecutor, the First Public Attorney, and all other members of the Public Prosecution Department.<sup>329</sup> Secondments of judges to foreign governments or international organizations also required the SJC's approval.<sup>330</sup> Similarly, the Ministry of Justice no longer had supervisory authority over public prosecutors and could no longer instruct the Public Prosecutor to initiate disciplinary actions against a particular prosecutor.<sup>331</sup> The judiciary finally attained a key demand in obtaining an independent budget prepared by the SJC in collaboration with the Minister of Finance.<sup>332</sup>

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324. Hamad, *supra* note 3, at 273; Mekky, *supra* note 253.

325. See Hamad, *supra* note 3, at 299 (stating that the government may try to "discredit activist judges in the eyes of public opinion" through the media).

326. Atef Shahat Said, *supra* note 156, at 127.

327. Al-Khudayari, *supra* note 126, at 46.

328. Law No. 142 of 2006 (Description of Law), *al-Jarīdah al-Rasmīyah*, 2006, arts. 45 & 46 (Egypt).

329. Law 42 of 2006, art. 119 (Egypt).

330. Law 42 of 2006, art. 65 (Egypt).

331. Khalil, *supra* note 147, at 65.

332. Law No. 42 of 2006, arts. 93 & 77 (Egypt).

While such amendments diluted the Ministry of Justice's formal control over the judiciary, they place more pressure on the SJC to use its powers in the interest of the regime. In turn, the executive is more likely to seek informal means of interventions in the appointment of judges to positions constituting the SJC. For example, a reformist judge up for an SJC position may be offered an attractive secondment to make room for the next judge in line whom the regime views as loyalist. For this reason, future efforts to preserve judicial independence should focus on ensuring the SJC, in composition and legal authorities, is shielded from the executive branch's political and financial controls. The most significant short term win for the judges was their success in halting the regime's efforts to increase the mandatory retirement age again, resulting in the retirement of the chief justice of the SCC and the presidents of the Court of Cassation and Cairo's Court of Appeals.<sup>333</sup>

Despite these reforms, Mubarak rejected some important demands by the judges. For instance, the Judicial Inspections Department remains under the control of the Ministry of Justice.<sup>334</sup> The regime also refused to include objective criteria in the JAL for seconding judges because that would constrain the executive branch's control over selecting and assigning prosecutors and influencing judicial behavior.<sup>335</sup> Likewise, no objective criteria were added to guide the selection of the Public Prosecutor and the presidents of the Courts of First Instance—both politically sensitive positions.<sup>336</sup> Requests for a judicial police force to enforce judicial rulings and assist judges in electoral supervision were also rejected.<sup>337</sup> Perhaps the biggest defeat was Mubarak's refusal to allow judges to elect members from the Court of Cassation and Cairo's Court of Appeals to serve on the SJC as opposed to appointing them based on seniority. From the executive's position, it was easier to influence appointed senior judges than elected representatives to an SJC with expanded powers.<sup>338</sup>

To be sure, the Egyptian judiciary is in a difficult bind.<sup>339</sup> On the one hand, it must be careful how far it pushes back on executive policies so as to avoid extermination, as occurred under Nasser in the 1969 Massacre of the Judiciary.<sup>340</sup> On the other hand, judges have an institutional interest in preserving the legitimacy of the judiciary so as to

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333. Hamad, *supra* note 3, at 280.

334. Al-Khudayari, *supra* note 126, at 47–48.

335. *See* Hamad, *supra* note 3, at 281.

336. *See id.*

337. *See id.*

338. *See id.*

339. *See* Shapiro, *supra* note 68, at 335.

340. *See* Moustafa, *Resistance*, *supra* note 53, at 134.

incentivize compliance with the law, preserve order, and bolster their status in society.<sup>341</sup> Some judges may find that, while the auxiliary state security courts violate citizens' substantive and procedural due process rights, the ordinary courts could join the citizenry in condemning such actions and claim clean hands. Other judges may find that 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,<sup>342</sup> by the time the 2005–2006 judicial independence movement was underway, the SCC had been effectively emasculated.<sup>343</sup> Throughout much of the 1990s, the SCC bolstered its prestige and power through liberal rulings on social and political rights.<sup>344</sup> The Mubarak regime tolerated the SCC because the justices were also delivering liberal rulings on economic reforms.<sup>345</sup> However, the SCC's seminal 2000 ruling mandating judicial oversight of elections went too far for the regime. With the slowing pace of controversial economic reforms, the regime was less dependent on the SCC for favorable rulings.<sup>346</sup> Meanwhile, the Court's expansion of social and political rights had emboldened civil society to leverage international pressure to demand systemic political reforms.<sup>347</sup> To curb this menacing trend, the President appointed, in 2002, Fathi Naguib, who previously was second in command at the Ministry of Justice and President of the Court of

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341. Ginsburg, *supra* note 108, at 725.

342. See generally Kilian Balz, *Human Rights, the Rule of Law and the Construction of Tradition*, in *THE RULE OF LAW IN THE MIDDLE EAST AND THE ISLAMIC WORLD*, *supra* note 257, at 35.

343. Lombardi, *Egypt's Supreme Constitutional Court*, *supra* note 185, at 235; ALBRECHT, *RAGING AGAINST THE MACHINE*, *supra* note 52, at 157-58; see Moustafa, *Law Versus the State*, *supra* note 8, at 924-925; Javed Maswood & 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 Al Mahdi 2012)

344. LOMBARDI, *STATE LAW AS ISLAMIC LAW*, *supra* note 8, at 153.

345. See Moustafa, *Law Versus the State*, *supra* note 8, at 913; LOMBARDI, *STATE LAW AS ISLAMIC LAW*, *supra* note 8, at 153 (noting the SCC's support to the ruling party's free market economic policies).

346. Moustafa, *Law Versus the State*, *supra* note 8, at 914; see Maria Haimerl, *The Supreme Constitutional Court of Egypt (SCC) After Mubarak: Rethinking the Role of an Established Court in an Unconstitutional Setting* (Prepared for the ECPR General Conference) (Sept. 2014) (draft manuscript at 11–12), <http://ecpr.eu/Filestore/PaperProposal/2d6dfd1c-320f-42ca-881e-22ea2922c467.pdf> (discussing the decline in favorable rulings from the SCC).

347. Moustafa, *Law Versus the State*, *supra* note 8, at 917; see Tamir Moustafa, *THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT* 182–84 (2007); GLOPPEN, *supra* note 3, at 153.

Cassation.<sup>348</sup> Naguib was the lead drafter of illiberal election legislation, Law 153 of 1999, which the SCC had struck down as unconstitutional.<sup>349</sup>

With this unprecedented move of appointing a chief justice from outside the SCC, Mubarak effectively took control of the Court.<sup>350</sup> Soon after taking office, Naguib increased the number of justices from 9 to 15.<sup>351</sup> Breaking the tradition of selecting new justices from the Council of State, Naguib packed the Court with justices from the ordinary courts whose jurisprudence was deferential to executive power.<sup>352</sup> Within a short period, the SCC's liberal majority was eliminated and the judicial independence movement weakened, producing a judiciary poised to support the military-security state apparatus in its counter-revolutionary measures.<sup>353</sup> When Naguib unexpectedly passed away in 2003, Mubarak appointed Mamdouh Marra, who was the President of the Cairo Court of Appeals and previously presided over the Judicial Inspection Department—a position offered only to regime loyalists.<sup>354</sup> When Marra reached the age of retirement in 2006, Mubarak replaced him with the Public Prosecutor Maher Abdel Wahid.<sup>355</sup> This pattern of political appointments from outside the Court effectively compromised the SCC's ability to challenge executive action.

After decades of rampant nepotism and exclusion of any candidate remotely associated with or sympathetic to the MB, Egypt's judiciary had become a co-opted institution whose thin notions of rule of law and aversion to populist democracy prompted judges to oppose both the youth revolutionaries and the MB.<sup>356</sup> That the judges would suddenly transform into vanguards of reform was improbable. Indeed, most judges were members of the same political elite that had benefited both

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348. Moustafa, *Law Versus the State*, *supra* note 8, at 924; Bentlage, *supra* note 157, at 248.

349. Hamad, *supra* note 3, at 263 (citing Moustafa, *Law Versus the State*, *supra* note 8, at 924).

350. See Moustafa, *Resistance*, *supra* note 53, at 138–39 (noting the tradition of the president selecting the most senior justice on the SCC to serve as Chief Justice).

351. Hamad, *supra* note 3, at 263; LOMBARDI, *STATE LAW AS ISLAMIC LAW*, *supra* note 8, at 146 (noting that prior to the expansion of the SCC, a judgment was final after seven justices signed it and the justices' votes are secret).

352. Lombardi, *Egypt's Supreme Constitutional Court*, *supra* note 185, at 250–51.

353. *Id.*; Lombardi, *Constitution as Agreement to Agree*, *supra* note 8, at 421.

354. Hamad, *supra* note 3, at 264–65.

355. *Id.* at 265. See Asla Bali, *From Subjects to Citizens? The Shifting Paradigm of Electoral Authoritarianism in Egypt*, 1 *MIDDLE EAST L. & GOV.* 38 (2009) 80-81 & fn 108 (discussing the adverse effect on judicial independence of Mubarak's appointment of three Chief Justices from outside the SCC).

356. Nathan J. Brown, *Judicial Turbulence Ahead in Egypt, Fasten Your Seat Belts*, CARNEGIE ENDOWMENT FOR INT'L PEACE (June 6, 2012), <http://carnegieendowment.org/2012/06/06/judicial-turbulence-ahead-in-egypt-fasten-your-seat-belts/b689>.

financially and politically from the authoritarian state.<sup>357</sup> Similarly, the prosecutors responsible for investigating the facts of prosecutions of Mubarak and his cronies were the same ones who had propped up the Mubarak regime for decades.

#### V. THE POST-UPRISING PARADOX: CO-OPTED AND UNACCOUNTABLE

Despite the judiciary's relative autonomy as compared to other state institutions, the executive imposed sufficient constraints over time to produce a conservative judicial leadership with material interests in preserving the political status quo.<sup>358</sup> Judges' financial and status interests, coupled with deep anti-Brotherhood biases, caused members of the judiciary to forgive the past regime's transgressions as negligible compared to what many judges anticipated from the Morsi regime. That is, revolutionary demands for judicial reforms would displace judges' sons and nephews from coveted judicial appointments, restrict judges from taking lucrative secondments in ministries, and oust incumbent senior judges from the highest courts. Calls for increased transparency in judicial governance would expose the nepotism and corruption within the Judges Club and impose judicial accountability. It is thus no surprise that judicial institutions ultimately sided with the deep state in opposing revolutionary changes to the political system.<sup>359</sup>

Signs of this alignment came to light as the Muslim Brotherhood's Freedom and Justice Party ("FJP") rose to power in the parliament and successfully fielded Dr. Mohamed Morsi as a presidential candidate in 2012.<sup>360</sup> A series of events heightened tensions to such an extent that the MB and the judiciary became locked in a war of attrition. Senior judges successfully persuaded their colleagues—many of whom had refrained from participating in past judicial activist projects—that Morsi was intent on dismantling the judiciary only to reconstruct it as an Islamist institution that would do the bidding of the Muslim Brotherhood. Because the majority of judges were not Islamist in their worldview, by executive design, sitting judges believed Morsi would replace them. Thus, when key state institutions led by the military-security colluded to oust Morsi, the judges surreptitiously supported such efforts. With few

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357. See Lombardi, *Egypt's Supreme Constitutional Court*, *supra* note 185, at 239 ("[J]udicial appointments are . . . controlled to a large extent by hegemonic political elites; and arguable, judges 'mirrored the cultural propensities and policy preferences of these hegemonic elites.'").

358. Ginsburg, *supra* note 108, at 727.

359. See Nathan J. Brown, *Egypt's Failed Transition, Tracking the "Arab Spring"*, 24 J. DEMOCRACY 45, 50–53 (2013) [hereinafter Brown, *Egypt's Failed Transition*] (discussing bad behavior and decisions that led to the failure of democracy).

360. Intisar Rabb, *The Least Religious Branch? Judicial Review and the New Islamic Constitutionalism*, 17 UCLA J. INT'L L. & FOREIGN AFF. 75, 77 n.5, 116, 120 (2013).

real allies within a centralized state apparatus, Morsi's deposal was inevitable.<sup>361</sup>

Accordingly, this section expounds on two key points in support of this Article's thesis: 1) the judicial leadership and a large portion of the judiciary viewed the revolution as a threat to their interests to such an extent that a democratically elected president seeking judicial reforms was a foe; and 2) the youth activists that ignited the revolution had to be subdued because their demands for (thick) rule of law and judicial accountability threatened judicial preferences. Most judges by virtue of their elite status identified more with unpopular political elites than populist groups calling for greater democracy.<sup>362</sup> As a result, the judiciary facilitated Interim President Mansour and current President Sisi's crackdown on political dissent. Judges found they had little to gain and a lot to lose from revolutionary political and socio-economic change that entailed meaningful judicial accountability.

A. *The War of Attrition between Morsi's Regime and the Judiciary*

After a heated presidential campaign against former Mubarak official Ahmed Shafik, Mohamed Morsi won by a slim margin. His affiliation with an opposition group long vilified as sympathetic to terrorists made his legitimacy all the more fragile. Morsi's regime, thus, had little room for error. Morsi and his cabinet's political inexperience proved fatal and ultimately resulted in his forced removal on July 3, 2013, via a military coup. While a full explication of the plethora of political mistakes made by Morsi's regime is beyond the scope of this Article, this section highlights four key missteps that further alienated a skeptical judiciary.<sup>363</sup> The following events brought the silent majority of otherwise co-opted judges out of their quietist stance into the arms of Ahmed Al-Zind's activist opposition: 1) FJP parliamentarians called for abolishing the SCC and transferring its jurisdiction to the Court of Cassation; 2) Morsi proposed amendments to the Judicial Authority law that would force out thousands of senior judges by decreasing the retirement age by ten years, leading to their anticipated replacement with MB loyalist lawyers; 3) Morsi cut the SCC from 18 to 11 Justices as a means of removing senior justices who were vocally challenging Morsi's

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361. Sahar Aziz, *Egypt's War of Attrition*, AL JAZEERA ENGLISH (Apr. 7, 2013), <http://www.aljazeera.com/indepth/opinion/2013/04/20134710923332904.html>

362. See Mednicoff, *supra* note 9, at 264.

363. Brown, *Failed*, *supra* note 359, at 57 (arguing that Morsi and the Muslim Brotherhood made every conceivable political mistake including failing to build coalitions with others, alienating potential allies, ignoring rising discontent, using rhetoric that was tone deaf and sometimes threatening, and consolidating their rule).

legitimacy; and 4) a constitutional declaration in November 2012 made Morsi's executive actions immune from judicial review.

The judges' general distrust of the MB—who for decades had been vilified as a secretive, menacing group with questionable national loyalties—placed Morsi's action under heightened scrutiny. When some FJP parliamentarians called for abolishing the SCC and transferring its authorities to the Court of Cassation, these suspicions were confirmed.<sup>364</sup> The SCC responded by issuing a far-reaching opinion on June 14, 2012, finding that the new election law passed by the SCAF was unconstitutional because it did not offer independent candidates equal opportunity as party list candidates to run for office. As a result, the SCC dissolved the FJP-dominated lower house just weeks before Morsi took office.<sup>365</sup> Responding to allegations of questionable legal grounds for dissolving the parliament, the SCC pointed to its 1990 decision, wherein it dissolved the People's Assembly on similar grounds, as precedent.<sup>366</sup> By leaving Morsi without a parliament, the Court effectively emasculated the office of the presidency and left Morsi more dependent on the judiciary to legitimize his presidential decrees.<sup>367</sup> The MB perceived this sweeping decision as an act of political warfare that warranted taming an activist Court.<sup>368</sup>

Morsi's recommended reforms to the JAL further confirmed the judges' suspicions of a frontal assault on the judiciary. Specifically, mandatory retirement would be decreased from 70 to 60 years of age, consistent with other state institutions.<sup>369</sup> Because the Ministry of Justice had authority over judicial appointments, 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 Mubarak regime, and replace them with judges vetted by the Morsi regime.<sup>370</sup> Because Morsi's regime

364. Sahar Aziz, *Egypt's Protracted Revolution*, 19 HUM. RTS. BRIEF No. 3, 2, 8–9 (2012).

365. Rabb, *supra* note 360, at 121; see JASON BROWNLEE, *DEMOCRACY PREVENTION: THE POLITICS OF THE U.S.-EGYPTIAN ALLIANCE* xi–xii (2012); Maswood & Natarajan, *supra* note 343, at 244.

366. Sherif, *supra* note 280, at 7–9.

367. 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. *Id.* at 81–82.

368. Bassem Sabry, *Eight Questions on 'Purging' of Egypt's Judiciary*, AL-MONITOR (Apr. 24, 2013), <http://www.al-monitor.com/pulse/en/contents/articles/originals/2013/04/eight-questions-purging-egyptian-judiciary.html#>.

369. IBAHRI, *supra* note 58, Annex B, at 66.

370. *Id.* at 36; see, e.g., Kareem Fahim, *In Upheaval for Egypt, Morsi Forces Out Military Chiefs*, N.Y. TIMES (Aug. 12, 2012), [http://www.nytimes.com/2012/08/13/world/middleeast/egyptian-leader-ousts-military-chiefs.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/08/13/world/middleeast/egyptian-leader-ousts-military-chiefs.html?pagewanted=all&_r=0) (discussing the forced retirement of Field Marshal

adopted the same nepotistic and crony practices as his predecessors in executive appointments, most judges reasonably suspected the new judges would be friends and family of FJP members.<sup>371</sup> Morsi's regime rebuked accusations of political motives by pointing to the other state institutions and ministries where 60 had been the retirement age for decades. In his view, there was no reason to treat the judiciary differently.<sup>372</sup> Indeed, Mubarak had extended judges' retirement age multiple times over the past decade in order to retain loyalists at the helm of judicial institutions.<sup>373</sup>

However, Morsi's claims of good faith were undermined by street protests in April 2013 where MB supporters called for a purge of the judiciary.<sup>374</sup> The protesters accused senior judges of being loyal to the former Mubarak regime and actively engaging in countering the revolution.<sup>375</sup> The dispute became so contentious that Justice Minister Ahmed Mekky, a reputable figure in the 2005–2006 independence movement, was compelled to resign out of concern for judicial independence.<sup>376</sup> The Morsi regime's coercive tactics were becoming wearily similar to Mubarak's but for its lack of allies within the judiciary.

Morsi also sought to enforce Articles 41 and 47 of the JAL that required a quarter of the judges in the Courts of First Instance to be selected from practicing lawyers.<sup>377</sup> 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 political leanings and pave the way for additional Brotherhood-friendly judges in the

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Tantawi); *see, e.g., Egypt President Mohamed Morsi Forces Top Generals to Retire*, GUARDIAN (Aug. 12, 2012), <http://www.theguardian.com/world/2012/aug/12/mohamed-morsi-orders-generals-retire> (discussing the forced retirement of Sami Enan, Chief of Staff).

371. IBAHRI, *supra* note 58, at 27 (reporting that Judge Mahmoud Hamza in the Court of First Instance in Cairo was removed from his Cairo post in a suspected retaliatory decision by the Prosecutor General's office). Indeed, judges who had ruled against the regime on key political cases were suddenly transferred to other courts. *Id.*

372. *Id.* at 37; Sabry, *supra* note 368; *see Rights Groups Condemn Forced Retirement of 41 Judges for Expressing their Opinions*, CAIRO INST. FOR HUM. RTS. STUD. (Mar. 18, 2015), <http://www.cihrs.org/?p=14650&lang=en>.

373. *See, e.g.,* Law No. 183 of 1993 (Increasing the Retirement Age from 60 to 64), *al-Jarīdah al-Rasmīyah*, 1993 (Egypt); Law No. 3 of 2002 (Increasing the Retirement Age from 64 to 66), *al-Jarīdah al-Rasmīyah*, 2002 (Egypt); Law No. 159 of 2003 (Increasing the Retirement Age from 66 to 68), *al-Jarīdah al-Rasmīyah*, 2003 (Egypt); Law No. 17 of 2007 (Increasing Retirement Age from 68 to 70), *al-Jarīdah al-Rasmīyah*, 2007 (Egypt).

374. Sabry, *supra* note 368.

375. *Id.*

376. *Id.*

377. Law No. 46 of 1972 (Judicial Authority Law), *al-Jarīdah al-Rasmīyah*, 1972, art. 41 (Egypt).

future. For the security-military apparatus, this change would have posed a serious threat to its plans to use the judiciary to weaken the Morsi presidency and legitimize its return to power.<sup>378</sup>

The judges were equally distressed about the threat that Morsi's proposed amendments posed to the judiciary's hiring practices.<sup>379</sup> Like other state institutions, the judiciary is wrought with nepotism.<sup>380</sup> The appointment process is not fully meritocratic; judges' sons and nephews often become judges even if their academic records would not otherwise qualify them.<sup>381</sup> For instance, the International Bar Association Human Rights Institute reported that the President of the Tanta Court has 21 sons and nephews who are either judges or prosecutors despite academic records that disqualified some of them from judicial appointment.<sup>382</sup> Upon appointment, judges benefit from special treatment arising from their fathers and uncles in the judiciary who lobby on their behalf for transfer requests, disbursement of fringe benefits, and promotions. Likewise, sons of senior judges receive preferential treatment in their requests for leaves of absence, secondments, and requests for court transfers.<sup>383</sup> Moreover, the SJC is weary of approving disciplinary actions against the sons of special counselors or senior judges.<sup>384</sup>

Although the FJP's draft JAL 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.<sup>385</sup> Secondments were also limited to positions that required judicial or legal work.<sup>386</sup> 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," and Article 62 would limit secondments to the state's departments and public bodies for purposes of performing judicial or legal work.<sup>387</sup> Notably, Morsi wanted

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378. IBAHRI, *supra* note 58, at 260.

379. Carothers, *supra* note 1, at 120.

380. *See* Golub, *supra* note 100, at 123 (noting that favoring relatives and friends is what one does to be a good family or community member).

381. IBAHRI, *supra* note 58, at 25; Bernard-Maugiron, *supra* note 225, at 8.

382. IBAHRI, *supra* note 58, at 25; *see also* Auf, *supra* note 108 (discussing reform due to the current process of selecting judges based upon personal connections or status).

383. *Id.*

384. Golub, *supra* note 101, at 120.

385. IBAHRI, *supra* note 58, Annex B at 63.

386. *Id.*, Annex B at 62; *see also* FREEDOM AND JUSTICE PARTY, ELECTION PROGRAM 13 (2011), [http://kurzman.unc.edu/files/2011/06/FJP\\_2011\\_English.pdf](http://kurzman.unc.edu/files/2011/06/FJP_2011_English.pdf) ("Prohibiting assignment or secondment of judges to positions in ministries and executive branch authorities during their work in the judiciary, taking charge of governance.").

387. Freedom & Justice Party, Draft Judicial Authority Law, arts. 44 & 62; IBAHRI, *supra* note 58, at 38, Annex B, at 63.

to keep final approval of judicial employment within the authority of the president of the republic.<sup>388</sup> The proposed amendment was presumably intended to decrease the nepotism that nearly guaranteed that sitting judges would hire their sons and nephews who were unlikely to be Brotherhood sympathizers. The proposed law also kept the final say on judicial appointments with the Brotherhood-dominated presidency. Despite Morsi's proclaimed commitment to rule of law, he proved no different than Mubarak in his attempts to retain control over the judiciary.<sup>389</sup>

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.<sup>390</sup> When the judges demanded salary increases, the FJP proposed all judges be paid at the same levels as the SCC Justices.<sup>391</sup> The justices viewed this as a direct economic threat, as well as a political blow to the SCC's prestige.<sup>392</sup> Moreover, if the rumors were true that the justices were higher paid than senior judges on other courts, there would likely be a readjustment of salaries adverse to the SCC justices' salaries. As of the writing of this Article, the justices salaries remain secret despite lawsuits seeking their disclosure.<sup>393</sup>

Another strike against the SCC came when the Morsi-appointed constituent assembly cut the number of SCC justices from 18 to 11. This resulted in the removal of Justice Tehany Al Gibally, the most vocal critic of the MB, as well as other justices viewed as hostile to Morsi's agenda.<sup>394</sup> Morsi's legal advisors defended the decision by claiming it

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388. IBAHRI, *supra* note 58, Annex B at 63–64.

389. Brown, *Egypt's Failed Transition*, *supra* note 363, at 51 (noting that Morsi's regime was accused of using force against protestors, trying to purge the judiciary, harassing the media, prosecuting political dissenters, and failing to stop security-force abuse of citizens); IBAHRI, *supra* note 58, at 50 (noting the case of youth activist Ahmed Douma, who was put on trial for insulting President Morsi and transferred to the Tanta Court before a harsh judge, rather than the court in the jurisdiction where the alleged crime took place).

390. *See generally* IBAHRI, *supra* note 58, at 16, 33.

391. IBAHRI, *supra* note 58, at 38.

392. *See generally* Ziad Abdel Tawab, *The Political Pathology of the Egyptian State*, EGYPTSOURCE (June 19, 2012), <http://www.atlanticcouncil.org/blogs/egyptsource/the-political-pathology-of-the-egyptian-state> (discussing the political threat facing Egyptian courts).

393. *Constitutional Court to Ignore Ruling on Judge Salary Disclosure*, CAIRO POST (Feb. 24, 2015), [http://www.thecairopost.com/news/138932/inside\\_egypt/constitutional-court-not-to-consider-appeal-on-judge-salary-disclosure](http://www.thecairopost.com/news/138932/inside_egypt/constitutional-court-not-to-consider-appeal-on-judge-salary-disclosure).

394. IBAHRI, *supra* note 58, at 30; Yasmine El Rashidi, *Egypt: Whose Constitution?*, N. Y. REV. BOOKS (Jan. 13, 2013), <http://www.nybooks.com/blogs/nyrblog/2013/jan/03/egypt-whose-constitution/> (“[T]he

was a cost-saving measure that aligned the number of judges with those of other courts around the world.<sup>395</sup> Months later, the constitutionality of the constituent assembly was before the SCC. On the day of the scheduled hearing, Morsi supporters held a boisterous sit-in surrounding the SCC that prevented the justices from entering the court house.<sup>396</sup> Nevertheless, the SCC issued a ruling finding that the constituent assembly was illegal on the grounds that the means in which it was created contravened the constitution.<sup>397</sup> Morsi supporters accused the SCC of abusing its authority to politically retaliate against Morsi's regime.<sup>398</sup>

Further weakening the SCC, the constituent assembly removed its *ex post* judicial review and limited it to *ex ante* review. As a result, once a law was passed, the SCC lost its jurisdiction to determine the law's constitutionality. Despite Morsi's claim that this change reflected the French legal system, the strategy proved fatal to Morsi's attempts to install a parliament during his first, and only, year as president. Striking back against Morsi, the SCC repeatedly rejected drafts of the election law sent by the Shura Council, thereby impeding elections for a new lower house of parliament.<sup>399</sup> Morsi was forced to govern through presidential decrees rather than laws issued by an elected legislative branch, further eroding his legitimacy.

The constitutional declaration of November 22, 2012, was Morsi's most controversial executive act and arguably the death knell of his administration. He justified the declaration as a response to an alleged conspiracy by former regime foes, opposition politicians, and judges to dissolve the constituent assembly and disband the Shura Council—all of which would leave a shell of a presidency and pave the way for *de facto* military tutelage.<sup>400</sup> The declaration imposed a new four-year term on the Prosecutor General, which authorized Morsi to replace Mubarak-appointed Abdel Meguid Mahmoud with Talaat Abdullah.<sup>401</sup> He also

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constitution decreases the number of members on the SCC from 18 to 11—a move that is worded in a manner intended to get rid of the outspoken, secular, members of the court, such as the female judge and Mubarak appointee Tahani El-Gebaly.”)

395. IBAHRI, *supra* note 58, at 31.

396. Sabry, *supra* note 368.

397. Nouran El-Behairy, *SCC Deems Shura Council and Constituent Assembly Unconstitutional*, DAILY NEWS EGYPT (June 2, 2013), <http://www.dailynewsegypt.com/2013/06/02/scc-deems-shura-council-and-constituent-assembly-unconstitutional/>.

398. IBAHRI, *supra* note 58, at 13.

399. See Maswood & Natarajan, *supra* note 343, at 231 (“In the 1980s, the SCC twice struck down electoral laws, causing the dissolution of parliament and new elections.”).

400. See Brown, *Egypt's Failed Transition*, *supra* note 363, at 49.

401. See CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 189 (available in English at <http://www.sis.gov.eg/Newvr/Dustor-en001.pdf>).

revoked the power of the SCC to declare parliament or the constituent assembly unconstitutional.<sup>402</sup> To ensure the courts could not reverse his decisions, Morsi placed his presidential decrees above judicial review altogether.

Because this declaration was perceived as a direct attack on judicial independence, Morsi's unpopularity expanded beyond the top echelon of the judiciary to the majority of judges.<sup>403</sup> The head of the Judges Club, Ahmed Al Zind, rallied judges against Morsi, calling for his removal.<sup>404</sup> 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<sup>rd</sup> military coup.<sup>405</sup> 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 Morsi in July 2013.<sup>406</sup> Demonstrating how effective the judges were in damaging the regime's legitimacy, Morsi took the unprecedented step of naming specific judges as corrupt, fraudulent, and politicized in a nationally televised speech on June 26, 2013.<sup>407</sup> It would be the last time the nation saw Morsi before the military whisked him away to a secret prison on July 3, 2013.

#### B. *The Counter-Revolution*

The military-security forces that seized control of the presidency were keen to ensure the revolutionary movement would be completely quashed. To this end, they engaged in a violent crusade to punish the youth revolutionaries who had led the January 25<sup>th</sup> uprisings and the Muslim Brotherhood which had leveraged the momentum to win elections. The judicial leadership's longstanding loyalty to the regime, coupled with a critical mass of judges that distrusted the MB,

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402. *Id.* at art. 5.

403. IBAHRI, *supra* note 58, at 11.

404. See Samer al-Atrush, *Egypt Judges Back Prosecutor Against Morsi*, MOROCCO WORLD NEWS (Oct. 12, 2012), <http://www.morocoworldnews.com/tag/egypt-judges-back-prosecutor-against-morsi/?print=pdf-page>.

405. See Tom Perry, *Egypt's Mursi Faces Judicial Revolt Over Decree*, Reuters (Nov. 24, 2012), <http://www.reuters.com/article/us-egypt-president-idUSBRE8AM0DO20121124>.

406. See David D. Kirkpatrick & Kareem Fahim, *In Cairo, Effort to Broaden Support for Charter*, N.Y. TIMES (Dec. 11, 2012), <http://www.nytimes.com/2012/12/12/world/middleeast/egypt-morsi-referendum-International-Monetary-Fund-.html>.

407. IBAHRI, *supra* note 58, at 14.

transformed the judiciary into a political ally in President Mansour and Sisi's crackdown on dissent.<sup>408</sup>

Under the guise of countering terrorism, the military-backed interim government of Adly Mansour brutally quelled the protests at Raba'a Square and Nahda Square. The crackdown resulted in over 900 casualties of unarmed civilians. Meanwhile, police arrested and detained nearly every Morsi regime official. Many were charged with trumped up charges of threatening national security that made them eligible for the death penalty. To facilitate prosecuting the MB membership and supporters, the government designated the MB as a terrorist group—a move which met little resistance from the judges. This paved the way for closing the MB's social service organizations that provided much needed food, medical care, and shelter to millions of rural and urban poor Egyptians.<sup>409</sup> The Sisi regime also shut down the MB's businesses and had their assets frozen.<sup>410</sup>

Through specially created national security circuits within the ordinary courts of first instance, senior judges in coordination with the Ministry of Justice assigned loyalist subordinate judges who duly disregarded incriminating evidence, exercised their discretion in favor of the prosecution, and ultimately issued mass death sentences. And while the executive's use of the judiciary to impose its political agenda has a long tradition in Egypt, as discussed in previous sections, this time the judges are cooperating not out of fear of executive retribution but rather in support of authoritarianism. Their conviction that such harsh crackdowns on the Muslim Brotherhood and youth activists are warranted to preserve rule of law exposes the contested notions of rule of law underpinning Egypt's political turmoil. Specifically, in the name of (thin) rule of law, the Guardians of the law have joined an authoritarian executive to subdue political opposition whose basis for opposing the regime is their demands for (thick) rule of law.<sup>411</sup> It will take years to fully understand the implications of this seismic shift.

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408. See Maha Abdelrahman, *Report Thy Neighbour: Policing Sisi's Egypt*, Open Democracy (Feb. 23, 2015), <https://www.opendemocracy.net/5050/maha-abdelrahman/report-thy-neighbour-policing-sisi%E2%80%99s-egypt>.

409. See *Egypt Court Bans All Muslim Brotherhood Activities*, REUTERS (Sept. 23, 2013), <http://www.reuters.com/article/2013/09/23/us-egypt-brotherhood-urgent-idUSBRE98M0HL20130923>; Lombardi, *Constitution as Agreement to Agree*, *supra* note 8, at 403–04 (discussing the rise in popularity of the Muslim Brotherhood as due in part to their provision of social services to the poor).

410. Nourhan Fahmy, *President Approves 'Terrorist Entities' Law*, DAILY NEWS EGYPT (Feb. 24, 2015), <http://www.dailynewsegypt.com/2015/02/24/president-approves-terrorist-entities-law/>.

411. See BROWN, *THE RULE OF LAW IN THE ARAB WORLD*, *supra* note 115, at 119 (arguing that starting in the 1990s the SCC departed from its “traditional judicial focus to advance a substantive, and not simply procedural, view of the rule of law”).

As former Mubarak officials were released from jail with minimal, if any, accountability for their criminal actions, Morsi officials were aggressively prosecuted with terrorism charges. After being abducted from the presidential palace on July 3, 2013, by military officials, Mohamed Morsi was publicly charged on November 3, 2014, for escaping from Wadi Al-Natrun Prison during the uprisings on January 29, 2011; inciting MB supporters to kill ten people outside of the presidential palace on December 4, 2012; espionage for allegedly conspiring with Hamas, Hezbollah, and Iran's Revolutionary Guard based on his alleged presidential meetings with these entities; and insulting the Egyptian judiciary.<sup>412</sup> As of the writing of this Article, Morsi has been sentenced to death and remains in custody pending his appeal.<sup>413</sup>

Mohamed Badie, the spiritual leader of the Muslim Brotherhood that detractors accused was ruling Egypt instead of Morsi, was charged with murder and inciting violence on multiple occasions in July and August of 2013.<sup>414</sup> On April 29, 2014, Badie, along with hundreds of other defendants, were sentenced en masse to death for deadly riots that took place in Minya after Morsi was deposed. Badie was also sentenced to life in prison for inciting violence on a major road north of Cairo and clashes outside of al-Istiqama Mosque in July 2013.<sup>415</sup> The 15 minute hearing preceding the death sentences was conducted without a single

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412. Sarah El Deeb, *Egypt's Morsi to Be Tried for Inciting Violence*, USA TODAY (Sept. 2, 2013), <http://www.usatoday.com/story/news/world/2013/09/01/egypt-morsi-trial/2753587/>; Aaron T. Rose, *Morsi Prison Break Trial Resumes*, DAILY NEWS EGYPT (May 19, 2014), <http://www.dailynewsegypt.com/2014/05/19/morsi-prison-break-trial-resumes/>; Ryan J. Suto, *The Trials of Mohamed Morsi*, MIDDLE EAST EYE (Aug. 28, 2014), <http://www.middleeasteye.net/columns/trials-mohamed-morsi-1173100808>; Patrick Kingsley, *Mohamed Morsi Defiant in Face of Jailbreak and Conspiracy Charges*, GUARDIAN, Jan. 28, 2014, <http://www.theguardian.com/world/2014/jan/28/mohamed-morsi-charged-2011-jail-break-conspiring-foreign-groups>.

413. Mahmoud Mostafa, *Morsi's Espionage Case Adjourned to 4 January*, DAILY NEWS EGYPT (Dec. 29, 2014), <http://www.dailynewsegypt.com/2014/12/29/morsis-espionage-case-adjourned-4-january/>; *Mohamed Morsi Rails Against Sisi 'coup' at Egypt Espionage Trial*, GUARDIAN (Jan. 18, 2015), <http://www.theguardian.com/world/2015/jan/18/mohamed-morsi-sisi-coup-egypt-espionage-trial>. David D. Kirkpatrick, *Egyptian Court Confirms Death Sentence for Mohamed Morsi*, N.Y. TIMES (June 15, 2015), <http://www.nytimes.com/2015/06/17/world/middleeast/egyptian-court-confirms-death-sentence-for-ousted-president-morsi.html> ("An Egyptian judge on Tuesday confirmed a death sentence against the deposed president Mohamed Morsi, condemning his rule as a 'black night' and his Islamist movement as 'satanic' and 'diabolical.'").

414. *Egypt: Fresh Assault on Justice*, HUM. RTS. WATCH (Apr. 29, 2014), <http://www.hrw.org/news/2014/04/29/egypt-fresh-assault-justice>.

415. *Id.*; Mahmoud Mourad, *Egyptian Court Sentences Brotherhood Leader Badie to Life in Prison*, REUTERS (Aug. 30, 2014), <http://www.reuters.com/article/2014/08/30/us-egypt-brotherhood-idUSKBN0GU0BE20140830>.

lawyer present for the defense, and thus invited sharp condemnation from foreign governments and the international community.<sup>416</sup> Other Morsi officials charged and currently detained include Amr Darrag (former Minister of International Cooperation), Essam Al-Haddad (former Chief of Staff for the President), Aymen Ali (former advisor for Expatriate Affairs), Moahmed Saad Al-Katatni (former Speaker of the People's Assembly), and Khaled Al-Qazzaz (former Minister of Foreign Relations).<sup>417</sup> They have been indicted on charges ranging from harming national security, to spreading false news, collaborating with foreign groups to commit terrorism, inciting violence during protests, and insulting the judiciary. Although the executive remained firm in its stance that the MB is a terrorist organization, the judiciary is paying a high cost in terms of its legitimacy. Multiple hearings have been held without basic due process rights. For instance, defense attorneys were denied access to the prosecution's evidence, exculpatory evidence was excluded, and defense counsel was not given sufficient time to prepare for trial.<sup>418</sup> As a result, Egyptians increasingly view the judiciary as an active participant, rather than an impartial check, on the military's manipulation of law to perpetuate a political vendetta against the Morsi regime.

This judicialization of politics has spread, with the judiciary's blessing, to the regime's retaliation against the youth activists who lead

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416. *Egypt: Fresh Assault on Justice*, *supra* note 414.

417. Mahitab Assran, *FJP Leading Figure Amr Darrag Banned from Travel*, DAILY NEWS EGYPT (Nov. 5, 2013), <http://www.dailynewsegypt.com/2013/11/05/fjp-leading-figure-amr-darrag-banned-from-travel/>; *Egypt Arrests Leading Brotherhood Members, Including El-Katatni*, AHARAMONLINE (Jul. 4, 2013), <http://english.ahram.org.eg/NewsContent/1/64/75649/Egypt/Politics-/Egypt-arrests-leading-Brotherhood-members,-includi.aspx>; Eric Trager, *Who's Who in Egypt's Muslim Brotherhood*, Wash. Inst. (Sept. 2012), <http://www.washingtoninstitute.org/policy-analysis/view/whos-who-in-the-muslim-brotherhood#EssamalHaddad>; *All the President's Men*, Al-Ahram Weekly (June 17, 2013), <http://weekly.ahram.org.eg/News/3158/17/All-the-president%E2%80%99s-men.aspx>; Erin Obourn, *Khaled Al-Qazzaz, Mohamed Fahmy Supported at Rallies to Improve Prison Conditions*, CBCNews (June 28, 2014), <http://www.cbc.ca/news/politics/khaled-al-qazzaz-mohamed-fahmy-supported-at-rallies-to-improve-prison-conditions-1.2691026>.

418. *Egypt: Morsy Death Sentence Follows Flawed Trials*, HUM. RTS. WATCH, (June 16, 2015), <https://www.hrw.org/news/2015/06/16/egypt-morsy-death-sentence-follows-flawed-trials> ("Two cases that resulted in former President Mohamed Morsy and 114 others receiving death sentences on June 16, 2015, were compromised by due process violations and appear to have been politically motivated. The convictions are based almost entirely on security officials' testimony. . . . A lawyer on the defense team who asked not to be named told Human Rights Watch that the defense asked al-Shami to request satellite imagery from Egyptian security agencies to show whether alleged attackers had actually crossed the Egyptian border at the time alleged, but he said that al-Shami refused their request and another request to summon military witnesses to give evidence, including al-Sisi, former Defense Minister Hussein Tantawy, and former Armed Forces Chief of Staff Sami Anan.").

the January 25<sup>th</sup> uprisings. International organizations and human rights lawyers have condemned the prosecutions as politicized and in violation of the rights of assembly and expression.<sup>419</sup> Leaders of the April 6<sup>th</sup> movement, who played an instrumental role in mobilizing Egyptians to stand up to Mubarak's repressive security forces in the heady days following January 25<sup>th</sup>, are now in jail for years for minor infractions of an anti-protest law passed in haste by interim president Adly Mansour with no sitting legislature.<sup>420</sup> Youth activists Ahmed Maher, Mohamed Adel, Ahmed Abdallah, and Alaa Abdel Fatah were convicted for inciting and organizing illegal protests.<sup>421</sup> Maher, Adel, and Abdallah were sentenced to three years in prison and fined 50,000 Egyptian pounds while Abdel Fatah has been sentenced to five years.<sup>422</sup> Yara Sallam, a human rights lawyer and graduate of the elite American University in Cairo, was arrested on charges of violating the protest law merely for being in the vicinity of a protest march in Cairo.<sup>423</sup> Like the others, she was sentenced to three years, which was later reduced to two years on appeal.<sup>424</sup> In response to international pressure, Sisi pardoned Sallam along with other detainees in October 2015 just before he travelled to the United Nations annual conference in New York.<sup>425</sup>

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419. See generally AMNESTY INT'L, EGYPT—SYSTEMATIC ABUSES IN THE NAME OF SECURITY (2007), <http://www.amnesty.ie/sites/default/files/report/2010/04/Egypt%20Systematic%20abuses%20in%20the%20name%20of%20security.pdf>.

420. *Egypt: Three Prominent Activists Unlawfully Detained Under New Assembly Law*, ALKARAMA (Apr. 17, 2014), <http://en.alkarama.org/egypt/1216-egypt-three-prominent-activists-unlawfully-detained-under-new-assembly-law>.

421. *Id.*

422. *Egypt: Three Prominent Activists Unlawfully Detained Under New Assembly Law*, ALKARAMA (Apr. 17, 2014), <http://en.alkarama.org/egypt/1216-egypt-three-prominent-activists-unlawfully-detained-under-new-assembly-law>; *Egypt's Maher, Adel and Douma Sentenced to 3 Years in Jail*, AHAM ONLINE (Dec. 22, 2013), <http://english.ahram.org.eg/News/89748.aspx>; *Alaa Abdel Fatah: Egypt Jails Activist-Blogger for Five Years*, BBC NEWS (Feb. 23, 2015), <http://www.bbc.com/news/world-middle-east-31583404>

423. Brian Dooley, *The Exceptional Egyptian Human Rights Defender Yara Sallam*, HUFFINGTON POST (Aug. 14, 2014), [http://www.huffingtonpost.com/brian-dooley/the-exceptional-egyptian\\_b\\_5679301.html](http://www.huffingtonpost.com/brian-dooley/the-exceptional-egyptian_b_5679301.html).

424. *Egypt Court Reduces Protestor Sentences to 2 Years*, YAHOO NEWS (Dec. 28, 2014), <http://news.yahoo.com/egypt-court-reduces-protester-sentences-2-years-135448189.html>.

425. Samer al-Atrush, *Jazeera Journalists Walk Free in Egypt After Sisi Pardon*, AFP (Sept. 23, 2015), <http://news.yahoo.com/egypts-sisi-pardons-jailed-jazeera-journalist-fahmy-115330133.html> ("Two Al-Jazeera journalists walked free after being pardoned Wednesday along with scores of others by Egypt's president, following criticism of his government for jailing opponents. The release of Canadian Mohamed Fahmy and colleague Baher Mohamed was welcomed by their supporters, with Al-Jazeera saying it was 'delighted' and Fahmy's lawyer Amal Clooney calling it 'a historic day'. The 100 prisoners pardoned by President Abdel Fatah al-Sisi included women activists Sana Seif

Sanaa Seif is another prominent female activist who has been on the frontlines of Egypt's democratization movement dating back to the early 2000s. Seif is a co-founder of Egypt's "No to Military Trials for Civilians" that has been tirelessly demanding the end of transferring civilians to military trials in order to obtain speedy convictions in political cases.<sup>426</sup> Using military courts to try civilians was among Mubarak's strategies to penalize the judiciary for exercising too much autonomy.<sup>427</sup> Military courts had jurisdiction to try any crime committed in a location operated by or for the military, including commercial places.<sup>428</sup> These courts were an effective mechanism for expedited prosecution of dissidents because the judges are military officers appointed by the Minister of Defense and the President for two-year renewable terms.<sup>429</sup> Due to their institutional identity and legal training, military judges are more deferential and apply limited due process, making a conviction nearly guaranteed.<sup>430</sup> The trials are held in secret and defendants have no right to appeal to civilian courts.<sup>431</sup> The president has discretion to decide if any crime under the Penal Code can be tried by a military court.<sup>432</sup> For these reasons, Seif and her colleagues were protesting the continued use of military courts to try civilian political dissenters, and as a result she was a target of government repression.<sup>433</sup> Seif was arrested in June 2014 when protesting for the freedom of her brother, Alaa Abdel Fattah, and against the protest law.<sup>434</sup> She was convicted and sentenced to three years in prison in October 2014, which was reduced to two years on appeal.<sup>435</sup> Seif was also among those pardoned by Sisi in October 2015.<sup>436</sup>

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and Yara Sallam, the president's office said, in a goodwill gesture on the eve of a major Muslim holiday.").

426. *Case History: Yara Sallam, Front Line Defenders*, <https://www.frontlinedefenders.org/es/case/case-history-yara-sallam>.

427. Emily C. Perish, Jenay Shook, Eric Wiebelhaus-Brahm, *Transitional Justice in the Wake of the Arab Spring*, Paper Prepared for Presentation at the Ann. Meeting of the Int'l Stud. Ass'n (Apr. 1-4, 2012) at 7-8.

428. *Egypt: 7,400 Civilians Tried in Military Courts*, Human Rights Watch (Apr. 13, 2016), <https://www.hrw.org/news/2016/04/13/egypt-7400-civilians-tried-military-courts>.

429. Ray, *supra* note 257, at 48.

430. *See Id.* (discussing how civilians tried in military courts are not informed of the charges against them, detained in secret, tortured until they sign confessions and denied their right to see an attorney).

431. Moustafa, *Law Versus the State*, *supra* note 8, at 904-05; *see also* AMNESTY INT'L, *supra* note 419, at 27-28.

432. IBAHRI, *supra* note 58, at 33 (citing Law No. 25 of 1966 (Military Code of Justice), art. 6, amended by Law No. 16 of 2007).

433. *Case History: Yara Sallam*, *supra* note 427.

434. *Id.*

435. *Egypt Court Reduces Protestor Sentences to 2 Years*, *supra* note 424.

436. *Case History: Yara Sallam*, *supra* note 427.

Ahmed Douma, another prominent youth activist, was charged with organizing illegal protests and assaulting police officers during a protest.<sup>437</sup> Judge Mohamed Nagi Shehata, who has been assigned many post-July 3, 2013 cases involving the MB and youth activists, presided over Douma's case.<sup>438</sup> Douma was initially sentenced to three years in prison and fined 50,000 Egyptian pounds, but, after a retrial, Judge Shehata sentenced him to life in prison.<sup>439</sup> That Douma had openly denounced the trial as political and accused the judge of bias likely contributed to his harsh sentence.<sup>440</sup> By prosecuting the activists and raising the liberty stakes, the regime aims to quash the youth revolutionary movement through fear and deterrence. The judiciary's disdain for the revolution facilitated this agenda and, in contrast to past regimes, the use of special courts to try the political opposition was unnecessary.

But political retaliation did not end there. Reformist judges whose activism over the past decade had emboldened civil society to expand their activism from the courtrooms into the streets were also targeted. Al Zind actively called for aggressive prosecutions of judges who participated in the independence movement of 2005–2006.<sup>441</sup> Al Zind led the charge within the judiciary to discipline and expel those judges who publicly condemned the ouster of Morsi as an illegal coup.<sup>442</sup> Judges who openly aligned themselves with the Morsi regime, whether by supporting his legal decrees or condemning the events of July 3<sup>rd</sup> as a military coup, are currently targets of internal disciplinary investigations with minimal due process rights.<sup>443</sup> Ironically, Zind and his followers, who openly condemned Morsi as an incompetent president (an arguably

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437. *Egypt's Maher, Adel and Douma Sentenced to 3 Years in Jail*, *supra* note 422.

438. Renee Lewis, *Prominent Egyptian Activist Among 230 Sentenced to Life*, ALJAZEERA AM. (Feb. 4, 2015), <http://america.aljazeera.com/articles/2015/2/4/egypt-douma-court.html>.

439. *Egypt's Maher, Adel and Douma Sentenced to 3 Years in Jail*, *supra* note 422.

440. Renee Lewis, *Prominent Egyptian Activist Among 230 Sentenced to Life*, ALJAZEERA AM. (Feb. 4, 2015), <http://america.aljazeera.com/articles/2015/2/4/egypt-douma-court.html>.

441. Tom Perry, *Egypt's Mursi Faces Judicial Revolt Over Decree*, REUTERS (Nov. 24, 2012), <http://www.reuters.com/article/2012/11/24/us-egypt-president-idUSBRE8AM0DO20121124>; *Egypt Judges Call for National Strike over Mursi Decree*, BBC NEWS (Nov. 24, 2012), <http://www.bbc.com/news/world-middle-east-20476693>.

442. Mara Revkin, *Egypt's Injudicious Judges*, FOREIGN POL'Y (Jun 11, 2012), [http://mideastafrica.foreignpolicy.com/posts/2012/06/11/egypts\\_injudicious\\_judges](http://mideastafrica.foreignpolicy.com/posts/2012/06/11/egypts_injudicious_judges); *Egypt: Behind Mursi's Decisions, II*, DAILY KOS (Nov. 29, 2012), <http://www.dailykos.com/story/2012/11/29/1165273/-Egypt-Behind-Mursi-s-Decisions-II#>.

443. Adham Youssef, *Pro-Mursi Judges Forced Into Retirement*, DAILY NEWS EGYPT (Mar. 14, 2015), <http://www.dailynewsegypt.com/2015/03/14/pro-mursi-judges-forced-into-retirement/>.

political activity), are now accusing reformist judges of violating the JAL provision prohibiting judges from engaging in politics. That disciplinary proceedings have been selectively opened against some judges but not others demonstrates that the proceedings are aimed to punish a judge's non-alignment with Al-Zind rather than to objectively determine that a particular judge violated the JAL.

By the end of the summer of 2015, 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, 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, Adly Mansour, were purged from the judiciary.<sup>444</sup> Hence judicial activism is 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. More than four years after Egypt's uprising, the judiciary has proven to be a formidable deep state institution, guarding its material interests in the status quo even if it means betraying rule of law.

#### CONCLUSION

In this Article, I offer a nuanced explanation to an important question: what role did Egypt's judiciary play in Egypt's failed transition to democracy. To be sure, judges missed a historic opportunity to leverage the revolutionary fervor gripping the nation to finally implement meaningful judicial reforms. Instead, the judiciary opted to support another military-backed regime. Thus, I challenge the dominant narrative in the political science and comparative law literature portraying Egypt's judiciary as a relatively independent institution that is a regional exemplar in its commitment to rule of law and horizontal accountability.<sup>445</sup> In doing so, I bring to the forefront two paradoxes of Egypt's judiciary: 1) it is co-opted and independent; and 2) it wants judicial independence without judicial accountability. On the one hand,

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444. See *7 Judges Sent to Retirement for MB Affiliation*, *supra* note 239; *Egypt Refers 60 'Pro-Brotherhood' Judges to Disciplinary Board*, *supra* note 211; see also Hamad, *supra* note 3, at 145 (describing the history in Egypt of purging outspoken judges under various leaders);

445. See, e.g., SOLIMAN, *supra* note 2, at 137 (arguing that the judiciary is the chief agency capable of checking the excesses of the executive); see generally Brown, *Reining in the Executive*, *supra* note 8, at 133–50; Moustafa, *Law Versus the State*, *supra* note 8, at 883.

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the broader authoritarian context in which Egypt's judiciary has operated since its inception subjects judges to various means of co-optation to which a majority of judges now succumb. On the other, the judiciary valiantly fought executive infringements for over a century with mixed success.

The judges' commitment to rule of law, and more specifically judicial independence, was compromised by their individual preferences for access to lucrative secondments, nepotistic and exclusivist hiring practices, an extended retirement age of seventy, and other fringe benefits. Judges' conception of judicial independence without accountability ultimately caused the judiciary to ally with the military-security apparatus in countering the revolution. That is, if judicial independence from executive interferences entailed accountability to the people, the judges chose to have neither.