

The Struggle for Constitutional Power

LAW, POLITICS, AND ECONOMIC
DEVELOPMENT IN EGYPT

Tamir Moustafa

University of Wisconsin



CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press

The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org

Information on this title: www.cambridge.org/9780521876049

© Tamir Moustafa 2007

This publication is in copyright. Subject to statutory exception and to the provision of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published in print format 2007

ISBN-13 978-0-511-29048-0 eBook (NetLibrary)

ISBN-10 0-511-29048-9 eBook (NetLibrary)

ISBN-13 978-0-521-87604-9 hardback

ISBN-10 0-521-87604-4 hardback

Cambridge University Press has no responsibility for the persistence or accuracy of urls for external or third-party internet websites referred to in this publication, and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Contents

<i>List of Figures and Tables</i>	<i>page vii</i>
<i>Acknowledgments</i>	<i>ix</i>
1 Introduction: Law versus the State	I
2 The Politics of Domination: Law and Resistance in Authoritarian States	19
3 The Establishment of the Supreme Constitutional Court	57
4 The Emergence of Constitutional Power (1979–1990)	90
5 The Rapid Expansion of Constitutional Power (1991–1997)	118
6 Executive Retrenchment and an Uncertain Future (1998–2005)	178
7 Law, Development, and Democracy: A Critical Appraisal	219
APPENDIX A: SCC Justices and Commissioners	239
APPENDIX B: The Egyptian Constitution	242
APPENDIX C: Law 48 of 1979 Governing the Operations of the Supreme Constitutional Court of Egypt	273
APPENDIX D: Figures on Supreme Constitutional Court Rulings	288
<i>Bibliography</i>	<i>291</i>
<i>Index</i>	<i>309</i>

Figures and Tables

FIGURES

1.1	Rulings of unconstitutionality by the Egyptian Supreme Constitutional Court, 1980–2004	7
1.2	Supreme Constitutional Court – judicial support network synergy	7
4.1	Egyptian law school graduates by year, 1948–1996	112
A1	Volume of petitions reaching the Supreme Constitutional Court by year, 1979–2005	285
A2	Volume of Supreme Constitutional Court rulings by year, 1980–2003	286
A3	Percentage of SCC rulings by chief justice	286

TABLES

3.1	Distribution of capital by sector and source in Law 43 projects underway as of December 31, 1980	75
3.2	Growth of the Egyptian bureaucracy, 1952–1987	82
4.1	Egyptian political parties in 1990	101
5.1	Leading human rights organizations by year of establishment	147
5.2	Egyptian political parties in 1995	155
6.1	New rights organizations by year of establishment	207

Acknowledgments

This book was made possible with the assistance and support of many colleagues, friends, and institutions. I was fortunate to have the advice and support of outstanding mentors at the University of Washington. Joel Migdal's thoughtful and sustained guidance was extraordinarily helpful at all stages of the project, from the first tentative discussions to revisions of the final book manuscript years later. Michael McCann helped to broaden my project from one that was initially concerned with a peculiar aspect of Egyptian political life to a project engaged with a broader field of public law scholars. Ellis Goldberg helped me to think about my work in new ways by raising weighty questions without easy answers. Anthony Gill was more than generous with his time and guidance. I am also thankful to James Caporaso, Rachel Cichowski, Reşat Kasaba, the late Dan Lev, Margaret Levi, John Mercer, and Susan Whiting at the University of Washington.

Funding from the Fulbright Commission, the Social Science Research Council, the American Research Center in Egypt, and the National Science Foundation made possible the fieldwork for this book in Cairo. There I received valuable input from Mustapha Kamal al-Sayyid, professor of political science at Cairo University; Mohamed Badran, professor of law at Cairo University; Hossam 'Eissa, professor of law at 'Ain Shams University; Sa'ad Eddin Ibrahim at the American University of Cairo; Baudouin Dupret and Nathalie Bernard-Maugiron at the Centre d'Etudes et de Documentation Economiques, Juridiques, et Sociales (CEDEJ); and the late Ibrahim Shihata, former general counsel of the World Bank. Justice Adel Omar Sherif deserves special thanks for his assistance over the years. Human rights activists Gasser 'Abd al-Raziq and Atef Shehata Said were both generous with their time and assistance. I also wish to thank Hoda Harb, Isis Hakim, and Zineb Davis for their helpful research assistance.

Fellowships at Berkeley and Princeton provided me with the time and facilities to revise the manuscript. At Berkeley, I wish to thank Martin Shapiro and Michael Watts. At Princeton University, I am particularly grateful to Kim Lane Scheppele, director of the Law and Public Affairs Program, for her support and hospitality.

I also wish to thank several colleagues for reading and commenting on my work at different stages of the project, including Ceren Belge, Nancy Bermeo, Nathan Brown, Jason Brownlee, Charles Epp, Scott Gehlbach, Roger Hartley, Laura Hatcher, Stan Katz, Arang Keshavarzian, David Leheny, Nancy Maveety, Joe Nevins, Roger Owen, Leigh Payne, Bruce Rutherford, Michael Schatzberg, Miguel Schor, Kristen Stilt, and Jennifer Widner.

I am grateful to a number of colleagues at the University of Wisconsin who were generous in their mentoring, guidance, and friendship. Thanks to Orfeo Fioretos, Hawley Fogg-Davis, Ed Friedman, Paul Hutchcroft, Tony Michels, Joe Soss, and Aili Tripp. Finally, I would like to thank my editor at Cambridge University Press, John Berger, for his superb guidance.

A project of this length requires a good deal of encouragement along the way. Steady and committed moral support was always forthcoming from my mother and father, Margaret and Mohamed Moustafa, and from my brother and sister-in-law, Shereef and Brenda Moustafa. My years in Cairo would not have been the same without the support of family and friends. I am grateful to the entire Eid, Abu Senna, and Ashour families for their endless hospitality and affection. I also want to thank Sara Zaghlul, Magda Aboufadel, Wilson Jacob, and Kareem Shalaby for their companionship in Cairo. *Nawartu misr!* Finally, I wish to thank Leila Harris, Justin Lin, Nina Lobo, Pat and Lisa Nelson, and Phil Shekleton.

This book is dedicated to my mother and father, Margaret and Mohamed Moustafa.

Introduction: Law versus the State

Why would an entrenched authoritarian regime establish an independent constitutional court with the power of judicial review? This is one of the most intriguing questions for students of contemporary Egyptian politics. In a country where the ruling regime exerts its influence on all facets of political and associational life, it granted the Supreme Constitutional Court (SCC) substantial autonomy from executive control. The paradox is all the more intriguing when one reviews the surprisingly bold rulings that the SCC delivered in a variety of areas over the past quarter-century. The Court consistently worked to curtail executive powers, expand freedom of expression, and shield groups active in civil society from state domination. Moreover, it provided the most important avenue for opposition parties, human rights groups, and political activists of every stripe to credibly challenge the Egyptian government for the first time since the 1952 military coup. Opposition parties used the SCC to contest electoral laws and strict constraints on political activity, human rights groups used the SCC to strengthen civil and human rights safeguards, leftists initiated litigation aimed at blocking the regime's privatization program, and even Islamists mobilized through the SCC to challenge the secular underpinnings of the state. In the process, the Supreme Constitutional Court stood at the center of the most heated debates concerning the political direction and even the fundamental identity of the Egyptian state.

Scholars have generally regarded courts in authoritarian states as the pawns of their regimes, upholding the interests of governing elites and frustrating the efforts of their opponents. Yet in Egypt, a country with one of the most durable authoritarian regimes in the world, opposition activists have found judicial institutions to be their frequent allies. Why

did Egypt's authoritarian regime establish a constitutional court with almost complete independence from executive control in 1979? Moreover, why did the regime not immediately reverse its reforms once the Supreme Constitutional Court began to challenge the executive branch in high-profile cases? Similarly, why did Egypt's rulers empower the administrative courts, an important avenue through which Egyptian citizens initiate (and win) lawsuits against state officials, all the way up to cabinet ministers and the President of the Republic himself?

Conventional understandings of authoritarian political systems deny the possibility of judicial politics emerging from within authoritarian states. Take, for instance, the following statement from one of the most frequently referenced works in the new scholarship on the judicialization of politics:

It is hard to imagine a dictator, regardless of his or her uniform or ideological stripe, (1) inviting or allowing even nominally independent judges to increase their participation in the making of major public policies, or (2) tolerating decision-making processes that place adherence to legalistic procedural rules and rights above the rapid achievement of desired substantive outcomes. The presence of democratic government thus appears to be a necessary, though certainly not a sufficient, condition for the judicialization of politics.¹

Such caricatures of authoritarian regimes tend to produce binary understandings of judicial politics across regime types. One is led to believe that democracies enjoy judicial independence, but authoritarian states do not; that courts in democratic states preserve citizens' rights, but courts in authoritarian states do not. To be sure, most scholars of judicial politics have few illusions about the ambiguities of law and legal institutions in democratic settings. But when constructed as a stark dichotomy, even one who is familiar with the significant shortcomings and institutionalized miscarriages of justice in U.S. courts might be tempted to indulge momentarily in a false sense of complacency. A sober understanding of judicial

¹ Neal Tate, "Why the Expansion of Judicial Power," in *The Global Expansion of Judicial Power*, eds. C. Neal Tate and Torbjorn Vallinder, 28 (New York: New York University Press, 1995). It is interesting to note that in a different forum, Tate himself observed that the "place and function of courts in authoritarian regimes is too little discussed." See, Neal Tate and Stacia Haynie, "Authoritarianism and the Functions of Courts: A Time Series Analysis of the Philippine Supreme Court, 1961–1987." *Law and Society Review* 27 (1993).

politics requires scholars to question not only the “myth of rights” in democratic settings, but also our simplistic understandings of how judicial institutions function in authoritarian states.² The task is arguably all the more important at this critical juncture in world history, when the distinction between authoritarian and democratic states are beginning to blur in many parts of the world.

Until now, however, the same nuanced understanding that comparative law scholars bring to bear on courts as contested sites in democratic polities has largely been missing from our knowledge of legal struggles in authoritarian polities. The assumption that democracy is a prerequisite for the emergence of judicial power is so completely taken for granted in the comparative law and political science literatures that research on judicial politics in one-party states is rare. But interestingly, nearly every empirical study of courts in authoritarian polities reveals that the reality on the ground is far more complex than we typically imagine.³ In many single-party states, vigorous and meaningful legal struggles take place daily, and courts provide the most important sites of state-society contention in the formal political arena. This book brings courts center stage as an arena of political contention in one such authoritarian state where we would not intuitively expect to observe vigorous legal struggles.

LAW VERSUS THE EGYPTIAN STATE

The military regime that seized power in Egypt’s 1952 coup d’état placed the advancement of such substantive concerns as national independence, redistribution of national wealth, economic development, and Arab nationalism over the procedural niceties of liberal democracy. Within a few months of assuming power, Gamal ‘Abd al-Nasser and the Free Officers annulled the Constitution and dissolved all political parties, thus initiating a decided shift away from the established political order.⁴ Two years later, the regime moved against the Egyptian administrative court system,

² Stuart Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (New Haven: Yale University Press, 1974).

³ Chapter 2 examines this thin but provocative body of research on courts in authoritarian regimes.

⁴ Nasser did not assume formal control of the Revolutionary Command Council until 1954, but it is generally acknowledged that he was the real force behind the regime from the time of the coup.

the *Majlis al-Dawla*.⁵ ‘Abd al-Raziq al-Sanhuri, president of the *Majlis al-Dawla* and architect of the Egyptian civil code, was physically beaten by Nasser supporters and forced to resign. By 1955, the *Majlis al-Dawla* was formally stripped of its institutional autonomy, and twenty prominent judges were forcibly retired or transferred to nonjudicial positions. Finally, a comprehensive law for the *Majlis al-Dawla* was issued in 1959 that restricted its power to review and cancel administrative acts. Given this history, it is curious that some two decades later, the regime not only rehabilitated the administrative court system but also established a new, independent Supreme Constitutional Court empowered to review regime legislation. An entrenched, authoritarian regime with no viable political rivals rebuilt autonomous judicial institutions through which citizens could contest administrative decisions and challenge the constitutionality of regime legislation. Why?

Records from the period indicate that the regime consolidated power and undermined judicial institutions in the 1950s only with significant indirect costs. The nationalization of much of the private sector and the elimination of all constraints on executive power produced a massive exodus of capital from the country at precisely the time that Egypt’s new leaders were attempting to mobilize national resources to build the economy. Egyptian citizens sent their wealth abroad at the staggering rate of \$2 billion per year, or roughly three and a half times the rate of all domestic sources of investment. By the time of Nasser’s death in 1970, the economy was in extreme disrepair. The public sector was acutely inefficient and required constant infusions of capital, the physical infrastructure of the country was crumbling, massive capital flight deprived the economy of billions of dollars each year, and military spending consumed a full 20 percent of the gross national product.

Faced with economic stagnation and escalating pressure from international lenders throughout the 1970s, Nasser’s successor, Anwar Sadat, pinned the regime’s survival on attracting foreign direct investment, as well as investment from Egyptian nationals holding tens of billions of dollars in assets abroad. However, given the regime’s history of nationalizing the vast majority of the private sector, it was difficult to convince investors that their assets would be safe from state seizure or adverse legislation on entering the Egyptian market. After a full decade of failed

⁵ The *Majlis al-Dawla* (Council of State) serves as the administrative courts in Egypt, modeled on the French Council d’Etat.

attempts to attract investment without implementing concrete institutional safeguards on property rights, the regime created an institutionally autonomous Supreme Constitutional Court with powers of judicial review. The new court was designed to assuage investor concerns and guarantee institutional constraints on executive actions, but it would also open new avenues for political activists to challenge the state.

A second unforeseen cost that the regime incurred as a result of undermining judicial institutions in the 1950s was an accelerated breakdown in administrative discipline within the state itself. The administrative courts had operated as an important institutional channel for individuals to sue state bureaucrats who had abused their power. The loss of these institutional channels combined with the rapid expansion of the Egyptian state resulted in the regime's inability to adequately monitor and discipline bureaucrats throughout the state's administrative hierarchy. Administrators and bureaucrats began to abuse their power and position to prey on citizens, and public sector managers siphoned off resources from the state. Corruption was exacerbated still further with the initiation of Sadat's open-door economic policy because it increased the opportunities for graft exponentially. The inconsistent application of legal codes by state bureaucrats also contributed to the uncertain investment environment, stifling attempts to attract both domestic and foreign private investment. Corruption not only affected the state's institutional performance but abuses of power also undermined the revolutionary legitimacy that the regime had enjoyed when it seized power in the 1950s.

To counteract these pathologies, the regime enhanced the independence and capacity of the administrative court system so it once again could serve as an avenue for individuals to expose corruption in the state bureaucracy. The regime increased the strength and autonomy of the administrative courts in 1972 and further still in 1984 by returning substantial control over appointments, promotions, and other internal functions, all of which had been weakened or stripped completely from them by presidential decrees two decades earlier. The government also expanded the institutional capacity of the administrative courts by establishing additional courts of first instance and mid-level appellate courts throughout the country. These new institutional channels increased the accountability of government bureaucrats, enabled the regime to monitor and discipline administrators diverging from their state-proscribed mandates, and facilitated the coordination of state policy.

Sadat also used the new Supreme Constitutional Court and the reformed administrative courts as centerpieces for a new legitimating ideology focused on the importance of “*sayadat al-qanun*” (the rule of law) and Egypt as “*dawlet mo’asasat*” (a state of institutions). Institutional reforms and rule-of-law rhetoric were used by Sadat to distance his regime from the substantive failures of the Nasser regime and to build a new legitimating narrative that was distinct from the populist foundations of the state.

Although judicial reforms helped the government provide a credible commitment to property rights, attract private investment, strengthen discipline within the bureaucracy, and build a new legitimizing ideology, the new Supreme Constitutional Court and the reformed administrative courts did not advance the regime’s interests in a straightforward and unambiguous fashion. Instead, judicial reforms provided institutional openings for political activists to challenge the executive in ways that fundamentally transformed patterns of interaction between the state and society. For the first time since the 1952 military coup, political activists could credibly challenge government legislation by simply initiating constitutional litigation, a process that required few financial resources and enabled activists to circumvent the regime’s highly restrictive, corporatist political framework. Litigation became the primary strategy for political activists to challenge the government, and they did so with surprising success in ways that were never possible in the People’s Assembly. Figure 1.1 illustrates the growing capacity and the increasing willingness of the SCC to strike down regime legislation.

Judicial power expanded over a two-decade period largely because of synergistic interactions among the Supreme Constitutional Court, the administrative courts, and three groups active in civil society – legal professional associations, opposition parties, and human rights organizations. The SCC facilitated the reemergence of this “judicial support network,” provided its supporters with ongoing legal protection, and afforded institutional openings for political activists to challenge the regime. In return, the Supreme Constitutional Court depended on the judicial support network to monitor and document human and civil rights violations, initiate constitutional litigation, and come to its defense when it was under attack by the regime. A tacit partnership was built on the common interest of both defending and expanding the mandate of the SCC (see Figure 1.2).

Beginning in the 1990s, these domestic legal struggles were internationalized in several significant ways. First, the capacity of the human rights

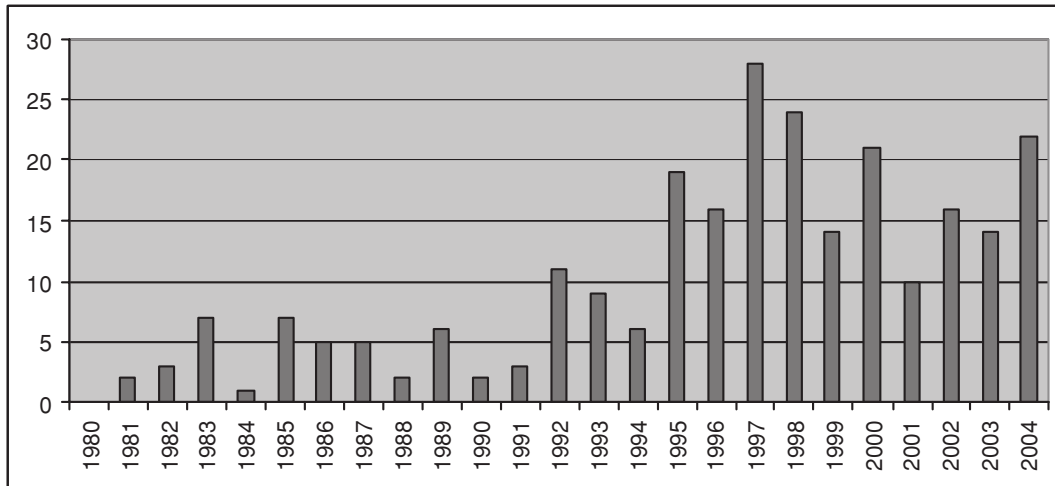


FIGURE 1.1: Rulings of Unconstitutionality by the Egyptian Supreme Constitutional Court, 1980–2004. *Source:* SCC rulings are compiled by the Arab Republic of Egypt in *al-Mahkama al-Dusturiyya al-'Ulia*, Vol. 1–10. See also Arab Republic of Egypt, *al-Jarida al-Rasmiyya*.

movement was vastly expanded as a result of increased funding streams from international human rights organizations. Moreover, links to international human rights networks enabled activists to leverage international pressure on the Egyptian regime in coordination with domestic litigation strategies. Legal struggles were also internationalized in the 1990s on the initiative of the Supreme Constitutional Court itself. The SCC expanded its mandate by using international legal principles and the international treaty commitments of the Egyptian government to provide progressive interpretations of the Constitution. Ironically, the Egyptian government signed and ratified international conventions as window dressing with no expectation that they would someday be used by an institution

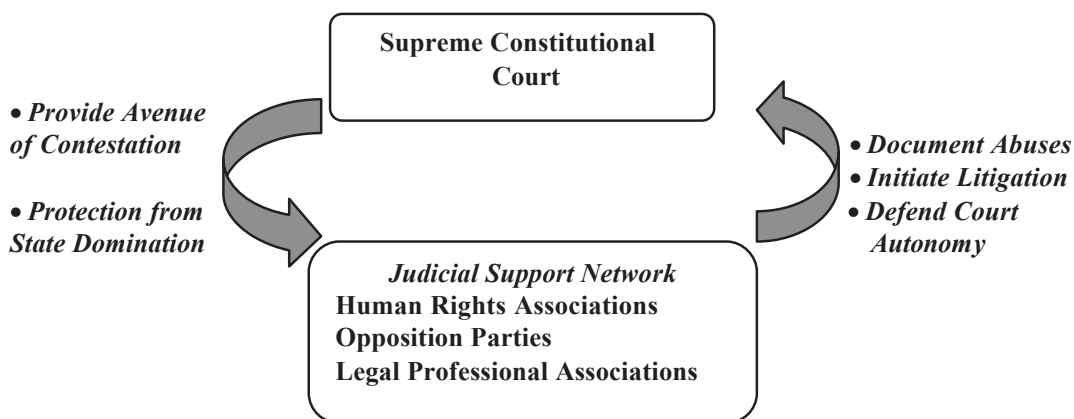


FIGURE 1.2: Supreme Constitutional Court – Judicial Support Network Synergy.

like the SCC to help interpret, adjudicate, and strike down repressive legislation.

The SCC pursued a progressive political agenda for over two decades by selectively accommodating the regime's core political and economic interests. In the political sphere, the SCC ruled that Egypt's Emergency State Security Courts were constitutional, and it conspicuously delayed issuing a ruling on the constitutionality of civilian transfers to military courts. Given that Egypt has remained in a perpetual state of emergency, the Emergency State Security Courts and, more recently, the military courts have effectively formed a parallel legal system with fewer procedural safeguards, serving as the ultimate regime check on challenges to its power. Although the Supreme Constitutional Court had ample opportunities to strike down the provisions denying citizens the right of appeal to regular judicial institutions, it almost certainly exercised restraint because impeding the function of the exceptional courts would likely have resulted in a futile confrontation with the regime. Ironically, the regime's ability to transfer select cases to exceptional courts facilitated the emergence of judicial power in the regular judiciary and in the SCC. The 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 retained ultimate control of the political playing field. Supreme Constitutional Court activism may therefore be characterized as a case of *bounded activism*. SCC rulings had a clear impact on the contours of state-society contention and the construction of political discourse, but the SCC was ultimately contained within a profoundly illiberal political system.

The SCC supported the regime's core economic interests in a similar fashion by overturning socialist-oriented legislation from the Nasser era. The economic liberalization program, initiated in 1991, was bitterly resisted by disadvantaged socioeconomic groups and those ideologically committed to Nasser-era institutions of economic redistribution. But dozens of rulings in the areas of privatization, housing reform, and labor law reform enabled the regime to overturn socialist-oriented policies without having to face direct opposition from social groups that were threatened by economic reform. Liberal rulings enabled the executive leadership to explain that they were simply respecting an autonomous rule-of-law system rather than implementing controversial reforms through more overt political channels.

By the late 1990s, however, the Egyptian government was increasingly apprehensive about Supreme Constitutional Court activism. Opposition

parties, human rights groups, and political activists had found a state institution with the capacity and the will to curb executive powers incrementally. A clear synergy had developed between the SCC and an emergent judicial support network. As the regime grew increasingly nervous about opposition advances through the SCC and the Court's growing base of political support, the regime moved to undermine their efforts. Over a five-year period, the regime employed a variety of legal and extralegal measures to weaken the judicial support network and ultimately to undermine the independence that the Supreme Constitutional Court had enjoyed for two decades. Political retrenchment was challenged inside and outside the courts, but political activists were unable to prevent regime retrenchment given the overwhelming power asymmetries between the state and social forces.

LAW VERSUS THE STATE: JUDICIAL POLITICS IN AUTHORITARIAN REGIMES

The Egyptian case challenges us to rethink our basic understanding of judicial politics in authoritarian regimes. Why do some authoritarian rulers empower judicial institutions? To what extent do judicial institutions open meaningful avenues of political contestation? How do courts in authoritarian systems structure political conflict and state-society interaction? What strategies do judges adopt to expand their mandate and increase their autonomy vis-à-vis authoritarian rulers? Are there discernible patterns of conflict and accommodation between judicial actors and state leaders over time? What are the implications of these judicial struggles for regime transition or sustained authoritarianism, and for commercial growth or economic decline? These are questions that comparative law scholars and political scientists seldom ask.

The first major objective of this study is to understand the dynamic complexity of judicial politics in authoritarian states. Cross-national comparisons presented in the [next chapter](#) suggest that many of the dysfunctions that plague the Egyptian state are common to other authoritarian states: (1) With unchecked power, authoritarian regimes have difficulty providing credible commitments to the protection of property rights, and they therefore have difficulty attracting private investment; (2) Authoritarian leaders face distinct disadvantages in maintaining order and discipline in their administrative hierarchies because of low levels of transparency; (3) With power fused into a single, dominant regime, unpopular policies are somewhat more costly to adopt because responsibility cannot

be shifted to other institutions or parties, as is often done in pluralistic systems; (4) Unlike democratic systems, state legitimacy is linked almost exclusively to the success or failure of substantive policy objectives rather than to procedural legitimacy, which makes policy failure all the more damaging to state legitimacy.

Judicial institutions are sometimes deployed to provide remedies for these pathologies, whether through providing credible commitments to investors, imposing a coherent system of discipline within state bureaucracies, providing alternate institutions to implement unpopular policies, or bolstering regime legitimacy. However, the cases examined here also indicate that when courts are deployed to achieve these ends, they never advance the interests of authoritarian rulers in a straightforward manner. Rather, courts inevitably serve as dual-use institutions, simultaneously consolidating the functions of the authoritarian state while paradoxically opening new avenues for activists to challenge regime policy. These courts often become important focal points of state-society contention.

It is important to stress two points of clarification at the outset. First, obviously not all authoritarian regimes choose to empower judicial institutions. The claim here is that regimes *sometimes* deploy judicial institutions to ameliorate the pathologies of authoritarian rule that are examined in the coming chapters. To the extent that courts are utilized, a judicialization of authoritarian politics will result.⁶ It is also critical to state at the outset that I do not wish to suggest that judicial institutions can, by themselves, act as guarantors of basic rights or affect basic transitions in regime type.⁷ Such expectations should be qualified even in established

⁶ A judicialization of politics has been defined elsewhere as “(1) the process by which courts and judges come to make or increasingly to dominate the making of public policies that had previously been made (or, it is widely believed, ought to be made) by other governmental agencies, especially legislatures and executives and (2) the process by which nonjudicial negotiating and decision making forums come to be dominated by quasi-judicial (legalistic) rules and procedures.” This book concentrates on the first mode of judicialization of politics in authoritarian regimes. Tate, “Why the Expansion of Judicial Power.”

⁷ In some cases, judicial institutions contributed to regime transitions when political dynamics reached a tipping point (Mexico’s Constitutional Court in the 2000 fall of the PRI, Indonesia’s Administrative Courts in the 1998 fall of Soeharto, Taiwan, and Korea), but those cases are not representative. See Gretchen Helmke, “The Logic of Strategic Defection: Court-Executive Relations in Argentina under Dictatorship and Democracy.” *American Political Science Review* 96 (2002): 291–303; Gretchen Helmke, *Courts under Constraints: Judges, Generals, and Presidents in Argentina* (Cambridge: Cambridge University Press, 2005); Jodi Finkel, *Judicial Reform in Latin America*; David Bourchier, “Magic Memos, Collusion and Judges with Attitude: Notes on the Politics

liberal democracies. In addition, as it should become abundantly clear in the chapters that follow, when regimes empower courts, they often adopt a variety of strategies to contain the impact of judicial activism. A better understanding of the pressures motivating judicial reform, and the dynamics of legal mobilization that result, can help us build a more nuanced model of judicial politics in authoritarian states.

THE RULE OF LAW, DEVELOPMENT, AND DEMOCRACY

The Egyptian experience with rule-of-law institutions additionally challenges us to rethink the relationship between law, development, and democracy. For nearly three decades, scholars and policymakers have placed considerable stock in judicial reform as a panacea for the political and economic turmoil plaguing developing countries in Latin America, Asia, Africa, and the Middle East. Rule-of-law institutions are charged with safeguarding human rights, spurring economic development, and even facilitating transitions to democracy. Moreover, there exists a deeply held assumption among policymakers and within much academic literature that rule-of-law institutions, vibrant market economies, and liberal democracy reinforce one another in a virtuous cycle. Take, for instance, the work of economists on the relationship between rule-of-law institutions and economic growth. Each year, economists churn out hundreds of empirical studies linking credible rule-of-law institutions with elevated levels of foreign investment, external finance, and higher aggregate levels of economic growth.⁸ They find that insecure property rights vis-à-vis the

of Law in Contemporary Indonesia,” in *Law, Capitalism, and Power in Asia: The Rule of Law and Legal Institutions*, ed. Kanishka Jayasuriya (New York: Routledge, 1999).
⁸ For just a few examples, see Stephan Knack and Philip Keefer, “Why Don’t Poor Countries Catch Up? A Cross National Test of an Institutional Explanation.” *Economic Inquiry* 35 (1997): 590–602; Lars P. Feld and Stefan Voigt, “Economic Growth and Judicial Independence: Cross-Country Evidence Using a New Set of Indicators.” *European Journal of Political Economy* 19 (2003): 497–527; Kevin Davis and Michael Trebilcock, *What Role do Legal Institutions Play in Development?* (Washington, DC: International Finance Corporation, 1999); Abdiweli Ali, “Institutional Differences as Sources of Growth Differences.” *Atlantic Economic Journal* 31 (2003): 348–362; Maria-Angels Oliva and Luis A. Rivera-Batiz, “Political Institutions, Capital Flows, and Developing Country Growth: An Empirical Investigation.” *Review of Development Economics* 6 (2002): 248–62; Robert Barro, *Determinants of Economic Growth* (Cambridge: MIT Press, 1997); Christopher Clague, Philip Keefer, Stephen Knack, and Mancur Olson, “Institutions and Economic Performance: Property Rights and Contract Enforcement,” in *Institutions and Economic Development* (Baltimore: Johns Hopkins University Press, 1997); Rafael La Porta, et al., “Legal Determinants of External Finance.” *Journal of Finance* 52 (1997): 1131–1150.

state discourage private investment and that firms operating in environments of policy uncertainty “tend to have short time horizons and little fixed capital, and will tend to be small scale” in an effort to minimize risk.⁹ Many legal scholars concur, explaining that “an investor will balk at a foreign investment decision if the host country does not offer adequate legal security and stability for investment. . . . The most pervasive legal risk for an investor is the risk of adverse legislative change.”¹⁰ Similarly, in their cross-national study of twenty-eight countries, Borner, Brunetti, and Weder confirm that

Very similar problems exist in a large number of LDC’s: uncertain property rights, unstable rules, unpredictable regulations – in short the absence of a meaningful rule of law – regularly prevent the hoped-for private-sector reaction to the reforms implemented under IMF and World Bank programs. . . . What many LDC’s lack is political credibility, as private business does not believe in the stability of the rules set and enforced by the state. [E]stablishing political credibility is a necessary precondition for economic growth.¹¹

The new institutional economics (NIE) thus became the dominant framework for understanding differential rates of economic development across countries. The policy prescriptions that followed from these analyses were swiftly carried beyond academic studies to the policy world.¹² The World Bank and the International Monetary Fund made judicial reform a cornerstone policy in the 1990s,¹³ explaining that “the

⁹ Douglass C. North, *Institutions, Institutional Change, and Economic Performance* (Cambridge: Cambridge University Press, 1990), 67.

¹⁰ David Flint, Robert Pritchard, and Thomas Chiu, “Constitutional and Legislative Safeguards for FDI: A Comparative Review Utilizing Australia and China,” in *Economic Development, Foreign Investment, and the Law: Issues of Private Sector Involvement, Foreign Investment and the Rule of Law in a New Era*, ed. Robert Pritchard, 104 (The Hague: Kluwer Law International, 1996).

¹¹ The authors conclude that “political credibility should be a prime focus of policy reform in LDCs” and judicial checks on executive power are identified as one of the primary mechanisms for ensuring this political credibility. Silvio Borner, Aymo Brunetti, and Beatrice Weder, *Political Credibility and Economic Development* (London: St. Martin’s Press, 1995), ix, 149, 98.

¹² Economists working in the new institutionalist framework contended that “institutional analysis is of paramount importance for guiding the transition to markets in formerly centrally managed economies.” Lee Alston, Thrainn Eggertsson, and Douglass North, *Empirical Studies in Institutional Change* (Cambridge: Cambridge University Press, 1996), 1.

¹³ The World Bank dedicated \$3.8 billion to 330 rule-of-law projects in over 100 countries between 1993 and 2003, and many more projects are currently underway. The World

rule of law is needed to give credibility to commitments on the part of governments” and “serious investors look for a legal system where property rights, contractual arrangements, and other lawful activities are safeguarded and respected, free from arbitrary governmental action.”¹⁴

Legal and judicial reform programs were also expected to produce positive *political* spillovers. Ibrahim Shihata, General Counsel of the World Bank, explained that “progress in these areas, especially the opening of the economy and the establishment of the rule of law and of an independent judiciary, leads to the evolution of more democratic forms of government.”¹⁵ World Bank and other international donors working on legal aid projects believe that judicial reform, political reform, and economic growth positively reinforce one another.¹⁶

The Egyptian experience with judicial reform illustrates the insights *and* exposes the policy limitations of the new institutional economics. On the one hand, the NIE helps make sense of the massive exodus of capital from Egypt during the Nasser period and the reluctance of investors to reenter the Egyptian market without credible institutional safeguards on property rights. The relationship between unrestrained state power and economic stagnation is an important finding. The new institutionalist concerns with judicial constraints on state power and credible third-party contract enforcement mechanisms also make good sense, but the question these analyses beg is whether these policy prescriptions are politically

Bank, *Legal and Judicial Reform: Observations, Experiences, and Approach of the Legal Vice-Presidency* (2002); World Bank, 2003 Annual Report. Cited in Alvaro Santos, “The World Bank’s Uses of the ‘Rule of Law’ Promise in Economic Development.” In David Trubek and Alvaro Santos, *The New Law and Economic Development* (Cambridge: Cambridge University Press, 2006).

¹⁴ Ibrahim Shihata, “Legal Framework for Development and the Role of the World Bank in Legal Technical Assistance” and “Judicial Reform in Developing Countries and the Role of the World Bank,” in *The World Bank in a Changing World, Selected Essays*, eds. Franziska Tschofen and Antonio Parra, 128 and 149 (London: Martinus Nijhoff Publishers, 1995).

¹⁵ “The World Bank in the Nineties,” in *The World Bank in a Changing World, Selected Essays*, eds. Franziska Tschofen and Antonio Parra (London: Martinus Nijhoff Publishers, 1995).

¹⁶ World Bank publications illustrate the assumption that judicial reform, political reform, and economic growth positively reinforce one another. For example, see Ana Palacio, *The Way Forward: Human Rights and the World Bank* (Washington D.C.: The World Bank, 2006); World Bank, *Legal and Judicial Reform: Strategic Directions*. (Washington, D.C.: The World Bank, 2003); Rudolf Puymbroeck, ed., *Comprehensive Legal and Judicial Development: Towards an Agenda for a Just and Equitable Society in the 21st Century* (Washington, D.C.: The World Bank, 2001); Paatii Oforu-Amaah, *Reforming Business-Related Laws to Promote Private Sector Development: The World Bank Experience in Africa* (Washington, D.C.: The World Bank, 2000).

feasible and sustainable. The Egyptian government was itself cognizant of the economic and administrative issues at stake, and it implemented judicial reforms in a deliberate fashion. However, the regime also worked to undermine those institutional reforms (again, quite deliberately) only two decades later when courts served as avenues through which opposition activists could mobilize against the state. An urgent question therefore emerges from the Egyptian experience: How effectively can courts secure property rights and facilitate economic growth, given the possibility of regime backlash, when those same institutions are inevitably used as avenues to challenge the legal underpinnings of authoritarian states? The Egyptian case suggests that the establishment of independent judicial institutions designed to provide credible commitments to the security of property rights is not as simple as much of the literature suggests.

Whereas most public law literature discounts judicial institutions in authoritarian regimes because they are assumed to be thoroughly *political* (and therefore thought to be ineffective in the protection of citizen rights and inconsequential in political struggles), the work by many economists is characterized by assumptions that are surprisingly *apolitical*. The literature tends to presume that once implemented, judicial reforms will remain secure because they represent a new equilibrium of lowered transaction costs and more efficient economic exchange.¹⁷ *Politics drops out of these analyses at precisely the moment when political dynamics begin.* Inattention to the ongoing dynamics of political contention leads many economists to greatly underestimate the challenge of institutional reform in developing countries.

Prominent scholars have recognized this blind spot in the literature. The Nobel Prize–winning economist Douglass North explains that

an essential part of development policy is the creation of polities that will create and enforce efficient property rights. However, we know very little about how to create such polities, because the new political economy has largely focused on the United States and developed polities. A pressing research need is to model Third World and Eastern European polities.¹⁸

¹⁷ In the case of credible commitments, the state benefits from increased investment, a larger tax base, and long-term political viability. Investors, on the other hand, benefit from more secure property rights and more investment opportunities.

¹⁸ Douglass North, “Epilogue: Economic Performance through Time,” in Alston, Eggertson, and North, *Empirical Studies in Institutional Change*, 353. North’s most recent

The second major objective of this study is to address this gap in the literature and to provide a new perspective on the political obstacles to sustained institutional reform in authoritarian polities such as Egypt. The Egyptian case demonstrates how nonstate actors mobilize through state institutions, often subverting them for purposes that were not initially intended by state leaders. As a result, state leaders often find themselves locked in conflict with the same institutions that they had created, and they are sometimes driven to abort their own institutional reforms. In these circumstances, institutional development and economic growth become collateral damage in the struggle to maintain political dominance.

What emerges from this study is a complex picture of judicial institutions that challenges core assumptions in both political science and economics. Contrary to the presumption of most political science literature, courts in authoritarian polities are not mere pawns of their rulers. Rather, they are often active sites of state-society contention. This political context is also missing from the economics literature, which typically assumes that courts protect property rights in an apolitical, mechanical fashion. Contrary to this presumption, courts are all too vulnerable to regime backlash if they challenge regime power.

These findings cut to the heart of perennial puzzles in the social sciences, including the persistent barriers to institutional development, economic growth, and democracy in the developing world. Far from inevitably reinforcing one another in a virtuous cycle, rule-of-law institutions, markets, and the state more typically interact in discordant and unpredictable ways. The Egyptian case illustrates why regimes sometimes short-circuit their own institutional creations, despite the devastating implications for national development. Regime behavior is the result of rational and shrewd political calculation, but the long-term effect on institutional development and economic growth can only be described as pathological.

work sets out to accomplish this task by integrating cognition into the process of institutional development. North explores how individuals and societies come to understand the world and how those understandings enable or undermine the ability of societies to solve dilemmas and forge institutions that promote vibrant economic growth. North's foray into cognition and social psychology has its merits, but it takes us another step away from understanding how power asymmetries and the evolving dynamics of political contention hinder institutional development. Douglass North, *Understanding the Process of Economic Change* (Princeton: Princeton University Press, 2005).

ORGANIZATION OF THE BOOK

Chapter 2, “The Politics of Domination: Law and Resistance in Authoritarian States,” examines when and why authoritarian regimes institutionalize state functions through judicial institutions. Cross-national comparisons illustrate how courts are used to ameliorate a series of pathologies that commonly afflict authoritarian states. Regimes pursuing such a judicial strategy empower dual-use institutions that simultaneously consolidate the functions of the authoritarian state while paradoxically opening new avenues for activists to challenge state policy. The second part of the chapter examines the various strategies that authoritarian rulers employ to contain judicial activism and constrain the emergence of synergistic support networks between courts and activists in civil society.

Chapter 3, “The Establishment of the Supreme Constitutional Court,” moves to the empirical data with a focus on the relationship between weakened rule-of-law institutions and the low volume of private investment in Egypt from 1952 to 1979. The chapter contextualizes Egypt’s transition from a free-market economy to a socialist-oriented economy in the 1960s and examines how unrestrained state power under Nasser’s regime (1952–1970) forced a mass exodus of private capital. The chapter then maps the shift back to a mixed economy under Anwar Sadat (1970–1981), focusing on the regime’s inability to attract investment capital for almost a full decade without backing its assurances against expropriation with concrete judicial institutions that could protect property rights effectively. The chapter makes use of extensive personal interviews and archival data, bringing to light how state leaders understood the need for institutional reform in the late 1970s and their motives for establishing an independent constitutional court and resuscitating the administrative courts.

Chapter 4, “The Emergence of Constitutional Power (1979–1990),” examines the dual role of the Supreme Constitutional Court in the economic and political spheres through its first decade of operation. The SCC provided restitution for Nasser-era property rights violations, and it shaped a new legal framework demarcating limits on state powers in the economy. SCC rulings went much further than the regime had originally intended when it struck down Sadat-era laws insulating the state from the burden of providing full compensation to citizens’ claims. Next, the chapter shifts to the impact of SCC rulings in the political sphere where the Court chipped away at the regime’s corporatist system of political

control by restoring political rights to opposition activists and striking down the regime's constraining electoral laws.

Chapter 5, "The Rapid Expansion of Constitutional Power (1991–1997)," investigates the SCC's role in the economic sphere through the 1990s by focusing on rulings in the areas of taxation, privatization, and landlord-tenant relations in urban and rural markets. Here, the Supreme Constitutional Court played a crucial role in overturning Nasser-era economic policies while enabling the government to claim that it was simply respecting an autonomous rule-of-law system. The second part of the chapter examines how the SCC used this leverage to initiate an aggressive political reform agenda with bold rulings in the areas of freedom of the press, freedom of association, and electoral reform. Throughout this period, a tacit partnership emerged between the SCC and a support network of opposition activists, human rights organizations, and professional syndicates. Domestic legal struggles were also internationalized when activists and the SCC used Egypt's international treaty obligations to challenge and strike down repressive domestic laws. The chapter closes with an analysis of the limits of SCC activism through an examination of the hard cases in which the Court dared not venture, including challenges to the draconian emergency laws and the jurisdiction of military and state security courts. Despite impressive opposition advances made through the SCC, court activism was ultimately a case of "bounded activism," which did little to undermine the regime's core mechanisms of political control.

Chapter 6, "Executive Retrenchment and an Uncertain Future (1998–2005)," maps interactions among the regime, the SCC, and Court supporters during the period of 1998–2005. Faced with an increasingly sophisticated reform movement that had the ability to use litigation as an avenue to challenge regime legislation, the regime sought to rein in the Supreme Constitutional Court and its judicial support network. The chapter examines how judicial support networks mobilized to defend the Court and how two of the boldest SCC rulings sought to protect human rights organizations and opposition parties, the two most crucial elements of its support network that were also under siege. The chapter concludes with an evaluation of how legal mobilization alone was insufficient to save SCC independence.

Scholars and policymakers place a great deal of faith in judicial reform as a straightforward solution for the political and economic turmoil plaguing developing countries around the world. In the concluding chapter,

“Law, Development, and Democracy: A Critical Appraisal,” the Egyptian case is used to critique this hopeful yet somewhat simplistic understanding of political and economic development. I elaborate on the insights that the Egyptian case provides for scholarship on judicial politics, the political economy of development, the bases of authoritarian rule, and the barriers to democratization in the Arab world and beyond.