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THE STRUGGLE FOR CONSTITUTIONAL POWER

Law, Politics, and
Economic Development in Egypt

TAMIR MOUSTAFA

CAMBRIDGE



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THE STRUGGLE FOR CONSTITUTIONAL POWER

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. Courts are charged with spurring economic development, safeguarding human rights, and even facilitating transitions to democracy. How realistic are these expectations, and in what political contexts can judicial reforms deliver their expected benefits? In this book, Tamir Moustafa addresses these issues through an examination of the politics of the Egyptian Supreme Constitutional Court, the most important experiment in constitutionalism in the Arab world.

The Egyptian regime established a surprisingly independent constitutional court to address a series of economic and administrative pathologies that lie at the heart of authoritarian political systems. Although the Court helped the regime to institutionalize state functions and attract investment, it simultaneously opened new avenues through which rights advocates and opposition parties could challenge the regime. The book examines the dynamics of legal mobilization in this most unlikely political environment.

Standing at the intersection of political science, economics, and comparative law, *The Struggle for Constitutional Power* challenges conventional wisdom and provides new insights into perennial questions concerning the barriers to institutional development, economic growth, and democracy in the developing world.

Tamir Moustafa is Assistant Professor of Political Science at the University of Wisconsin–Madison. He teaches and writes in the areas of comparative law and society, religion and politics, and politics of the Middle East. He was the recipient of the Edward S. Corwin Award for the Best Dissertation in Public Law from the American Political Science Association (2004) and the Best Dissertation Award from the Western Political Science Association (2004).

The Struggle for Constitutional Power

LAW, POLITICS, AND ECONOMIC
DEVELOPMENT IN EGYPT

Tamir Moustafa

University of Wisconsin



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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

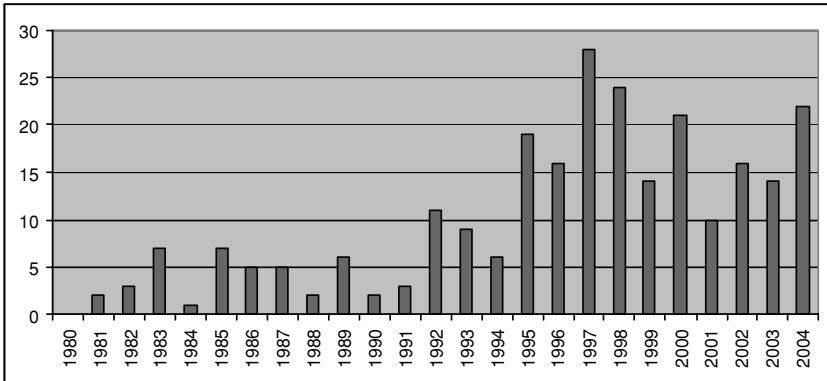


FIGURE 1.1: Rulings of Unconstitutionality by the Egyptian Supreme Constitutional Court, 1980–2004. *Source:* SCC rulings are compiled by the Arab Republic of Egypt in *al-Mahkama al-Dusturiyya al-'Ulia*, Vol. 1–10. See also Arab Republic of Egypt, *al-Jarida al-Rasmiyya*.

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

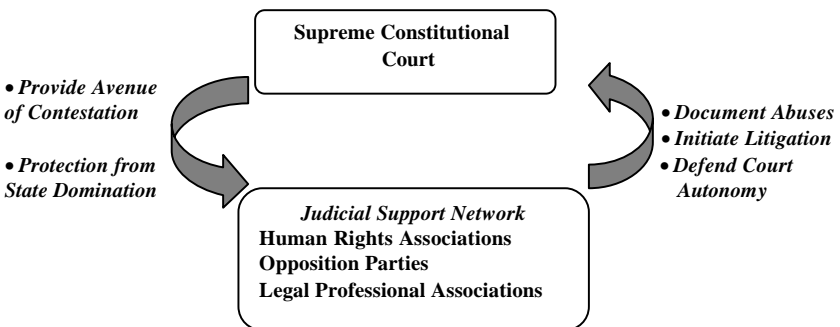


FIGURE 1.2: Supreme Constitutional Court – Judicial Support Network Synergy.

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 Ofosu-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.

The Politics of Domination: Law and Resistance in Authoritarian States

The thought of judicial institutions in authoritarian states typically conjures up the image of state security courts with no standards of due process, handpicked judges lacking any degree of independence, and little hope for any measure of justice. We picture the bright lights on the defendant during his interrogation, or the young man from the film *Midnight Express* who is held in a Turkish prison without recourse to the law. In the academic literature, too, there is a strong assumption that authoritarian regimes either have no use for law and legal institutions or that law is applied instrumentally with courts acting as faithful agents of the regime. These assumptions are reflected in and reinforced by the new wave of comparative law scholarship that is focused almost exclusively on judicial politics in democratic or democratizing states.¹

This chapter challenges the conventional wisdom that democracy is a necessary prerequisite for a judicialization of politics. The Egyptian case and comparisons with Brazil (1964–1985), Chile (1973–1990), China

¹ In an influential study of constitutional politics in the new democracies of East Asia we are told that “where a single party believes it is likely to hold on to political power, it has little incentive to set up a neutral arbiter to resolve disputes about constitutional meaning. It would rather retain the flexibility to dictate outcomes without constitutional constraint. Flexibility allows policy change and maximum exercise of power.” Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003), 24. Similarly, Chavez explains that “the balanced dispersal of political power among competing actors is a necessary condition for the rule of law.” Rebecca Bill Chavez, *The Rule of Law in Nascent Democracies: Judicial Politics in Argentina* (Stanford University Press, 2004). For more studies that share these assumptions, see Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (Chicago: University of Chicago Press, 2000); Lee Epstein, Olga Shvetsova, and Jack Knight, “The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government.” *Law and Society Review* 35 (2001): 117–163.

(1990–present), Indonesia (1986–1998), Mexico (1926–2000), the Philippines (1972–1986), Franco’s Spain (1936–1975), and other countries illustrate why and how regimes use courts to institutionalize their rule. The cases highlight a series of pathologies common to many authoritarian states that courts are often deployed to ameliorate. In some cases, courts were empowered to encourage investment. In others, they were created to strengthen administrative discipline within the state’s own bureaucratic machinery. Still other regimes designed courts to arbitrate between factions within the ruling coalition. Once up and running, some regimes benefited still further when courts took the initiative to implement controversial reforms, and all regimes sought to exploit judicial institutions to bolster their claim to procedural, or “legal,” legitimacy.

However, the cases reviewed in this chapter also indicate that judicial institutions never advance the interests of authoritarian rulers in an unambiguous and straightforward fashion. Rather, courts inevitably serve as dual-use institutions, simultaneously facilitating some state functions while paradoxically opening new avenues for activists to challenge regime policy. In effect, courts not only serve as the institutional glue that helps hold some authoritarian states together but often their relative autonomy also leads them to become important focal points of state-society contention. Not all regimes choose a judicial strategy to institutionalize their rule, but to the extent that they do, they inadvertently create a unique field of contention within the authoritarian state.² The result is a *judicialization of authoritarian politics*, bearing striking parallels to the judicialization of politics in democratic polities, as well as having its own distinct dynamics.³

With more than half of all states categorized as authoritarian or semi-authoritarian and more headed in that direction, it is crucial for us to get

² Clearly, not all regimes opt to institutionalize their rule through empowered courts. In fact, many rely on tightly controlled state security courts alone for the political and social control functions that we take as a given in nonliberal polities. Other regimes prefer arbitrary rule as a purposive strategy to instill fear in society; for example, Saddam Hussein’s Iraq, Cambodia under the Khmer Rouge, or China under Mao.

³ 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, out 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 primarily on the first mode of judicialization of politics in authoritarian regimes. Neal Tate, “Why the Expansion of Judicial Power,” in *The Global Expansion of Judicial Power*, eds. C. Neal Tate and Torbjorn Vallinder (New York: New York University Press, 1995).

a grip on the reality of judicial politics in nondemocratic environments.⁴ Courts also require careful study because they serve as vital nodes in which power is delegated, contested, and subverted within the authoritarian state. As such, they provide important windows onto the mechanics of the state, as well as onto efforts by activists to throw monkey wrenches into its moving parts.

The chapter proceeds as follows. The first part identifies five pathologies that are common to many authoritarian states. Concrete examples are then used to illustrate how regimes deploy judicial institutions to ameliorate those pathologies. The second part of the chapter turns to the synergy that often emerges between judges seeking to expand their mandate and political activists intent on using courts to effect political change. Finally, the chapter delineates 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.

INSTITUTIONALIZING AUTHORITARIAN RULE THROUGH COURTS

Judicial Institutions as Economic Infrastructure

Political economists have long observed that rulers wielding unrestrained power suffer from an inability to provide credible commitments that property rights will be respected by the state.⁵ Potential investors are acutely aware that the unrestrained state may alter property rights arrangements in response to short-term fiscal crises or simply for personal gain in the most predatory states. The most egregious form of property rights violations may be the outright seizure of private assets, but, short of nationalization, there are more subtle ways for the unrestrained state to unilaterally alter property rights, such as changing the tax structure, imposing new restrictions on foreign exchange or the repatriation of profits, or altering

⁴ Freedom House, *Freedom in the World 2006*. Twenty-four percent of all countries comprising 36 percent of the world's population were categorized as "not free." An additional 30 percent of all countries comprising 18 percent of the world's population were categorized as "partly free."

⁵ Douglass C. North, *Institutions, Institutional Change, and Economic Performance* (Cambridge: Cambridge University Press, 1990); Mancur Olson, "Dictatorship, Democracy, and Development." *American Political Science Review* 87 (1993): 567–576; Barry Weingast, "Constitutions as Governance Structures: The Political Foundations of Secure Markets." *Journal of Institutional and Theoretical Economics*, 149 (1993): 286–311.

a variety of other regulatory mechanisms.⁶ Insecure property rights discourage private investment, and firms continuing to operate in such an environment of uncertainty “tend to have short time horizons and little fixed capital, and will tend to be small scale” in an effort to minimize risk.⁷ An abundant body of empirical research supports these hypotheses. In the Middle East alone, it is estimated that \$600 billion was held abroad in the 1990s.⁸

However, not all regimes are the same. Mancur Olson makes an important distinction between rulers with short time horizons and those with long time horizons. According to Olson, rulers with an insecure hold on power have short time horizons and a greater incentive to expropriate assets. In contrast, authoritarian rulers with a secure hold on power have longer time horizons and therefore prefer to invest in institutions that promote economic activity because, over the long term, an expanded tax base will result in a larger fiscal stream to the state. Such rulers have a greater incentive to establish institutions that promote the security of property rights, both among contracting parties in society and vis-à-vis the state itself. “An autocrat who is taking a long view will try to convince his subjects that their assets will be permanently protected not only from theft by others but also from expropriation by the autocrat himself. If his subjects fear expropriation, they will invest less, and in the long run his tax collections will be reduced.”⁹

What practical measures can such an autocrat take to strengthen property rights and make his commitment to sustained economic reform credible? New institutionalists propose a number of reforms designed to

⁶ This form of “creeping expropriation” has been described by many economists and business risk analysts as a more common form of property rights violation than outright seizure of assets. See, for example, Stephen Kobrin, *Managing Political Risk Assessment: Strategic Response to Environmental Change* (Berkeley: University of California Press, 1982); M. Sornarajah, *The Settlement of Foreign Investment Disputes* (The Hague: Kluwer Law International, 2000).

⁷ Douglass North, *Institutions, Institutional Change, and Economic Performance* (Cambridge: Cambridge University Press, 1990), 67.

⁸ Alan Richards and John Waterbury, *A Political Economy of the Middle East* (Boulder: Westview Press, 1996), 326.

⁹ Olson, “Dictatorship, Democracy, and Development,” 571. Similarly, North and Weingast contend that “the more likely it is that the sovereign will alter property rights for his or her own benefit, the lower the expected returns from investment and the lower in turn the incentive to invest. For economic growth to occur, the sovereign or government must not merely establish the relevant set of rights, but must make a credible commitment to them.” Douglass North and Barry Weingast, “Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England.” *The Journal of Economic History* 49 (1989): 803–832.

ensure multiple veto-points on the policymaking process. On the most fundamental level, state powers can be restrained through the classic, horizontal division of power among the executive, legislative, and judicial branches. Veto-points may also be expanded vertically, with power dispersed among different levels of governance, such as in “market-preserving federal” systems.¹⁰ Additionally, states can provide credible commitments designed to guarantee that specific policy arenas will be protected from political influence, such as by granting independence to central banks.¹¹ For new institutionalists, the proper design of political institutions is critical to the success of market economies because they help guarantee policy stability:

Appropriately specified political institutions are the principal way in which states create credible limits on their own authority. These limits are absolutely critical to the success of markets. Because political institutions affect the degree to which economic markets are durable, they influence the level of political risk faced by economic actors. Attention to political institutions is thus essential to the success of an economic system.¹²

Among the various mechanisms that new institutionalist scholars focus on, independent and effective courts are considered perhaps the most important state institutions for establishing a credible and stable property rights regime. Judicial institutions provide the infrastructure through which firms can enforce agreements and defend property rights vis-à-vis other firms. Similarly, judicial institutions empowered to review executive and legislative actions are essential to the security of property rights vis-à-vis the state. Here, specialized constitutional courts not only enable citizens to challenge infringements on property rights but court rulings also act as important barometers of the state’s respect of property rights more generally, both in qualitative and quantitative terms. Qualitatively, most infringements of property rights by the state are relatively ambiguous, except in the most egregious cases of state interference. Quantitatively, it is nearly impossible for any one firm to monitor all state agencies effectively and to assess the state’s general level of respect for property

¹⁰ For examples of new institutionalist analyses of “market-preserving federalism,” see Barry Weingast, “Constitutions as Governance Structures”; Yingyi Qian and Barry Weingast, “Federalism as a Commitment to Preserving Market Incentives.” *Journal of Economic Perspectives* 11 (1997): 83–93.

¹¹ Helmut Wagner, “Central Bank Independence and the Lessons for Transition Economies from Developed and Developing Countries.” *Comparative Economic Studies* 41 (1999).

¹² Weingast, “Constitutions as Governance Structures,” 288.

rights. Constitutional courts can, at least in theory, guard against the outright expropriation of private assets, but perhaps more important, they can guard against the “creeping expropriation” that political risk analysts identify as a far more common risk for private investors.

The new institutionalist literature on property rights (perhaps unwittingly) brings a central dilemma facing today’s authoritarian states into sharp relief. Because independent judicial institutions are among the primary means to establish credible commitments to property rights, authoritarian regimes face a concrete choice between accepting institutional constraints on power or maintaining unrestrained power and forgoing the economic benefits that are thought to accompany institutional reform. To some extent, postcolonial authoritarian regimes have faced the stark choice between political control and economic growth for some decades, and authoritarian rulers have all too often sacrificed the latter for the former.¹³ But the global trend toward economic liberalization over the past two decades has made the pressure for institutional reforms all the more intense.

The simultaneous opening of economies throughout the former Eastern Bloc countries, Latin America, Asia, and Africa has meant fierce international competition over a finite amount of investment capital, and judicial reform has been identified as one of the most important institutional enhancements necessary for creating a competitive investment environment.¹⁴ In the age of global competition for capital, it is difficult to find any government that is *not* engaged in some program of judicial reform designed to make legal institutions more effective, efficient, and predictable. Although the challenges of globalization are formidable for many developing countries, the option of opting out is increasingly one of economic suicide.

¹³ Robert Bates, *Markets and States in Tropical Africa: The Political Basis of Agricultural Policies* (Berkeley: University of California Press, 1981).

¹⁴ Turning to specific illustrations, it is clear that investor perceptions of the security of property rights in any given country is linked not only with formal property rights provisions and institutional safeguards but also with the track record of specific regimes and specific economic contexts. For example, firms invest a tremendous amount of capital in China despite the fact that there are no institutional protections on property rights vis-à-vis the state. The Communist Party maintains a monopoly on power, and its formal platform is hostile to capital. However, decades of swift economic growth and the vast potential of future profit make investors reasonably confident that the Chinese leadership has no interest in returning to the past. Other important factors, such as labor costs, the size of the Chinese market, and a variety of other factors, also outweigh the risks. The Chinese state has therefore focused its efforts on the reform of the legal infrastructure that facilitates contracting between firms rather than vis-à-vis the state.

*The State versus Itself: Judicial Institutions
and Administrative Discipline*

Many authoritarian regimes also empower judicial institutions to bolster administrative discipline and coordination within the state bureaucracy. Political scientists often imagine authoritarian states as organizations that are far more unified than they are in reality. Reification of the state, or the process of imagining state organizations as a unified set of institutions working in lockstep with one another, is seductive when considering state functions in authoritarian regimes for two reasons. First, we commonly assume that authoritarian rulers maintain absolute authority over their subordinates, and second, low levels of transparency often obscure our ability to observe the considerable discord and breakdowns in hierarchy that occur regularly in authoritarian settings.¹⁵ But the Weberian ideal of a rational bureaucracy does not adequately capture the dynamics of how state institutions operate in real-world contexts.¹⁶ Far from acting in unison, each bureaucrat has his or her own set of personal interests and ideological preferences that are often at odds with those of the central regime. A variety of studies from the state-in-society approach also demonstrate that state institutions are transformed from the moment they begin to interact with social forces championing various competing agendas.¹⁷

Counteracting this centrifugal force is one of the primary challenges for the central leadership of any state, but it is a particular challenge for authoritarian leaders for precisely the same reason that we, as observers of the state, tend to reify it: authoritarian rulers suffer from a lack of transparency in their own state institutions. Part of the difficulty of collecting accurate information on bureaucratic functions can be attributed to the hierarchical structure of modern states more generally, as articulated by Martin Shapiro:

Certain pathologies arise in the hierarchical lines designed to transmit information up and commands down the rational-legal pyramid. Such ‘family

¹⁵ To some considerable degree, reification of state power works to the advantage of authoritarian rulers because those living under authoritarian rule, like political scientists, often overestimate the power, presence, and coordination of state institutions.

¹⁶ Joel Migdal, “Studying the State,” in *Comparative Politics: Rationality, Culture, and Structure*, eds. Mark Lichbach and Alan Zuckerman (Cambridge: Cambridge University Press, 1997).

¹⁷ Joel Migdal, Atul Kohli, and Vivienne Shue, eds., *State Power and Social Forces: Domination and Transformation in the Third World* (Cambridge: Cambridge University Press, 1994); Joel Migdal, *Strong Societies and Weak States: State-Society Relations and State Capabilities in the Third World* (Princeton: Princeton University Press, 1989).

circles' – conspiracies among the lower-level workers to block or distort the flow of information upward – are successful in large part because of the summarizing that is essential to such a hierarchy . . . the process of successive summarization gives lower levels ample opportunity to suppress and distort information, particularly that bearing on their own insubordination and poor performance.¹⁸

Accurate information on bureaucratic misdeeds is even more difficult for authoritarian regimes to collect because the typical mechanisms for discovery, such as a free press or interest group monitoring of government agencies, are suppressed to varying degrees. Moreover, because administrators are unaccountable to the public and because fear of retribution typically pervades political life, authoritarian rulers at the top of the administrative hierarchy receive little or no feedback from the public, making it particularly difficult to assess the day-to-day functions of state agencies. The classic principal-agent problem, which has been examined extensively in democratic settings, is therefore aggravated in authoritarian political systems. With low levels of transparency and exacerbated principal-agent problems, local administrative officers regularly circumvent, undermine, or subvert central government policies in order to promote their own competing policy agendas or simply to translate their administrative power into supplementary income streams. These dynamics are so commonplace, that a completely alternate set of norms often emerges around how much one is expected to line a bureaucrat's pocket with every interaction, whether to renew a driver's permit, process paperwork for a court case, or secure a business license.¹⁹ At a minimum, low levels of transparency and principal-agent problems can undermine the central regime's developmental goals.

At its worst, low levels of transparency within state agencies can mask the emergence of power centers aspiring to challenge the central regime. We have grown accustomed to various coping strategies that authoritarian regimes use to maintain their control of state institutions, including the retention of particularly sensitive posts in the military and the central

¹⁸ Martin Shapiro, "Appeal." *Law and Society Review* 14 (1980): 641–642.

¹⁹ Ironically, the more a regime seeks to extend its political and administrative capacities, the more opportunities for corruption develop in tandem. Perhaps the best example of this was the global expansion of public-sector enterprises in the developing world in the postindependence period, a move that was intended to extend the state's political patronage networks as much as it was intended to build the state's economic capacity. This rapid expansion of state functions produced countless opportunities for bureaucrats to translate official power into individual gain. John Waterbury, *Exposed to Innumerable Delusions: Public Enterprise and State Power in Egypt, India, Mexico, and Turkey* (Cambridge: Cambridge University Press, 1993).

security agencies for trusted relatives, or, alternately, through the constant rotation of officials whose loyalty cannot be trusted based on blood relations.²⁰ However, the ad hoc shuffling of state functionaries and the reliance on familial, tribal, clan, and personal solidarities are tremendously inefficient and have distinct limitations in modern states with complex bureaucracies. More institutionalized methods of monitoring are necessary for authoritarian states with expansive bureaucracies.

In his seminal study, *Courts*, Martin Shapiro observes that judicial institutions are used as one of several strategies to promote discipline within the state's administrative hierarchy because they generate an independent stream of information on bureaucratic misdeeds that is driven by citizens themselves. Shapiro explains that "a 'right' of appeal is a mechanism providing an independent flow of information to the top on the field performance of administrative subordinates." This observation helps explain why even authoritarian regimes with little regard for civil liberties often preserve the right of citizens to have their day in court.²¹ Courts play "fundamental political functions" by acting as avenues "... for the upward flow of information [and] for the downward flow of command."²²

Two models of administrative supervision, "police-patrol oversight" and "fire-alarm oversight," developed by McCubbins and Schwartz are also particularly instructive. In the police-patrol model of supervision, administrative oversight is centralized, active, and direct. The legislator (principal) continuously monitors his or her administrators (agents) by observing as many administrative actions as possible. "An example of police-patrol oversight is a legislator who personally conducts an audit of agency activity."²³ The disadvantages of this form of monitoring are that it is costly and it does not provide the legislator the capacity to comprehensively monitor all the actions of its agents.²⁴ By using a model

²⁰ For numerous examples in the Middle Eastern context, see Michael Herb, *All in the Family: Absolutism, Revolution, and Democracy in the Middle Eastern Monarchies* (Albany: State University of New York Press, 1999).

²¹ Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 49.

²² Shapiro, "Appeal," 643.

²³ Matthew McCubbins and Thomas Schwartz, "Congressional Oversight Overlooked: Police Patrols versus Fire Alarms." *American Journal of Political Science* 28 (1984): 165–179; Matthew McCubbins et al., "Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies." *Virginia Law Review* 75 (1989): 431–482.

²⁴ The delegation of state activities to particular agencies is, in the first place, caused by the inability of the legislator to implement policies directly due to constraints on time and expertise.

of police-patrol oversight, the legislator can evaluate only a small sample of administrative activities, and most problems are likely to go undetected.²⁵ The alternative, the fire-alarm model of oversight, is a more passive, indirect, and decentralized system of rules and procedures in which citizens can appeal to courts or special agencies when they experience problems with administrators. These formal channels for citizens to call attention to administrative abuses enable legislators to focus on the root causes of administrative deviance and to punish administrators who have diverged from their legislated mandates. Although McCubbins and Schwartz are concerned with strategies for administrative supervision in democratic contexts, their models are equally useful for understanding how judicial institutions are used by authoritarian regimes as a means to collect accurate information and instill discipline within the state's own institutions.²⁶

China provides an excellent example of how courts are employed by the central government in order to resolve the principal-agent problems between the center and periphery. Two of the most urgent political problems facing the Chinese central government today are rampant corruption by local government officials and tenuous control over the periphery. The two problems are interrelated. Since the late 1970s, when China began its slow transition to a free-market economy, local government officials found it all too easy to abuse their administrative powers because they face few practical constraints from administrative superiors in the central government. Local government officials provide the basic services, issue licenses and permits, and collect taxes. Abuse of these powers is extremely common, particularly because local government

²⁵ The police-patrol model of administrative monitoring is even more costly and ineffective in authoritarian contexts. Not only do authoritarian rulers typically have multiple agencies devoted to supervising, auditing, checking, and cross-checking the actions of administrators throughout the state hierarchy but these monitoring agencies are also known to devote as much or more energy spying on one another as they do monitoring threats coming from society, as authoritarian rulers guard against the emergence of power centers even within the regime's monitoring agencies themselves.

²⁶ The framework developed by McCubbins and Schwartz is inspired from an American context, but it appears that the utility of the fire alarm model of administrative oversight is not tied exclusively to administrative oversight in democracies. Rather, the fire alarm model of administrative oversight applies more broadly to the degree of complexity of state institutions, regardless of whether a state is democratic or authoritarian. "Although our model refers only to Congress, we hazard to hypothesize that as most organizations grow and mature, their top policy makers adopt methods of control that are comparatively decentralized and incentive based. Such methods, we believe, will work more efficiently . . . than direct, centralized surveillance." McCubbins and Schwartz, 172.

officials often have a significant stake in local commerce.²⁷ The Chinese proverb, “the mountains are high and the Emperor is far away,” has been used by many to describe the inability of the central government to effectively monitor and punish local officials abusing their administrative powers. Not surprisingly, such abuse of power and corruption at the local level produced extensive public protest. The Chinese media reported 100,000 local protests between 1997 and 2000.²⁸ By 2004, the number of “mass protests” reported by the Chinese government had risen to 74,000 incidents per year.²⁹

How has the Chinese central government dealt with this critical problem? Interestingly, in the same way that Egypt did before it – through the rapid expansion of an administrative court system. Efforts began in earnest in 1988 with the establishment of 1,400 specialized administrative courts across the country. An Administrative Litigation Law was issued the next year, and more enabling legislation followed over the next several years.³⁰ The administrative courts were designed to provide Chinese citizens with an avenue through which they could contest the decisions of local officials based on a variety of charges, including the inconsistency, arbitrariness, or capriciousness of administrative decisions; inappropriate delay; procedural irregularities; or manifest unjustness.³¹ Citizens have increasingly used the administrative courts to challenge local officials. Within six years of their establishment, more than 50,000 administrative cases were raised annually, and within ten years, the number of new cases doubled to 100,000 annually. This is still a low rate of administrative litigation given China’s massive population, but the swift rise in cases indicates that administrative courts are increasingly regarded as viable avenues through which citizens may challenge corruption and the low-level abuse of power. What is perhaps most surprising, particularly for those who would dismiss judicial institutions in an authoritarian state, is

²⁷ Stanley Lubman, *Bird in a Cage: Legal Reform in China after Mao* (Stanford: Stanford University Press, 1999); Melanie Manion, *Corruption by Design* (Cambridge, MA: Harvard University Press, 2004).

²⁸ Murray Tanner, “Cracks in the Wall: China’s Eroding Coercive State.” *Current History* (2001, September): 243–249.

²⁹ Howard French, “Riots in Shanghai Suburb as Pollution Protest Heats Up,” *New York Times*, July 19, 2005, A3.

³⁰ These include the Administrative Supervision Regulations, the Administrative Reconsideration Regulations, a new Lawyers’ Law, Judges’ Law, Procuracy Law, and Prisons Law.

³¹ Randall Peerenboom, *China’s Long March toward Rule of Law* (Cambridge: Cambridge University Press, 2002), 423.

the fact that plaintiffs win 40 percent of the cases that they initiate, in whole or in part.³²

Although paradoxical at first blush, the administrative courts also serve important functions for the central government. First, court cases provide valuable information about which bureaucrats are abusing their powers at the local level, as well as the nature and extent of the problem. The central government can then use that information to discipline subordinates and shape more effective administrative laws.³³ Second, administrative courts provide legal recourse and some sense of justice and equity to those who suffer at the hands of local officials.³⁴ This function appears to be an increasing priority for the central government as a means to stave off the political instability that corruption and abuse of power at the local level produce. Administrative courts, moreover, relieve political pressures and perform a legitimizing function *without* opening up the political system. Finally, reducing corruption, abuse of power, and manipulation of local markets is crucial for the promotion of both market rationality and secure property rights.

There are, of course, a host of problems that the administrative courts face, from lack of sufficient autonomy from the state to citizen fear of bureaucratic retaliation and problems with the implementation of court rulings.³⁵ But despite these difficulties, there are clear indications that the government is moving ahead to strengthen the institutional capacity of the court system.³⁶ Peerenboom confirms that “Jiang Zemin endorsed rule of law in part because he sees it as a tool for strengthening Party rule. Rule of law is a way to rein in increasingly independent local governments and ensure that central Party and government policies are carried out. It is also a weapon to be used in the fight against corruption and a means of promoting economic development.”³⁷

The same dynamics are clearly at play in a number of other cases. Jennifer Widner’s study of judicial institutions in East African countries illustrates the utility of administrative courts for enhancing bureaucratic

³² Peerenboom, 8.

³³ “Clearly, the ruling regime sees administrative law as a way to rationalize governance, enhance administrative efficiency, and rein in local governments.” Peerenboom, 398.

³⁴ If corruption, abuse of power, and manipulation of markets are to occur, the officials in the central government want to be the ones to benefit. One might say that officials in the central government are attempting to monopolize the *illegitimate* abuse of power.

³⁵ Lubman, 258–269.

³⁶ Peerenboom, 280–342.

³⁷ Peerenboom, 60.

compliance in both democratic *and* authoritarian regimes. According to Widner,

Opportunities to develop judicial independence arose as leaders grew concerned about corruption within the ranks of the ruling parties or with arbitrariness and excess on the part of lower officials whose actions they could not supervise directly. The ability of private parties or prosecutors to bring complaints against wayward civil servants and party members in independent courts helped reduce the need for senior politicians to monitor and cajole.³⁸

Similarly, during the seven-decade stretch of single-party rule in Mexico, citizens were encouraged to use the courts “for protection against arbitrary applications by capricious individuals” who staffed various agencies of the state.³⁹ Once again, the ruling *Partido Revolucionario Institucional* (PRI) did not provide recourse to judicial institutions out of pure benevolence. Rather, the regime used these mechanisms to better institutionalize its rule and to strengthen discipline within its burgeoning administrative hierarchy. Similarly, the Polish Administrative Court was established in 1980, well before Poland’s transition to democracy, as a means by which the regime could increase bureaucratic accountability.⁴⁰

In Soeharto’s Indonesia, the regime passed an Administrative Justice Act in 1986 and established a specialized administrative court system in 1991 after decades of failed attempts to stamp out corruption in the government bureaucracy. Bouchier explains that “the most important factor behind the establishment of the Administrative Courts appears to have been the desire of senior government officials to improve the efficiency of the bureaucracy.”⁴¹ The central government’s long-standing frustration with lower level corruption and abuse thus merged with its broader concern for economic growth “in an era of globalization.” The Indonesian government also faced foreign pressure for administrative court reform from international lenders, such as the International Monetary Fund.

³⁸ Jennifer Widner, *Building the Rule of Law* (New York: W.W. Norton, 2001), 393.

³⁹ Joel Verner, “The Independence of Supreme Courts in Latin America: A Review of the Literature.” *Journal of Latin American Studies* 16 (1984): 486.

⁴⁰ Susan Rose-Ackerman, “Public Participation in Hungary and Poland.” *Journal of East European Law* 10 (2003): 10.

⁴¹ David Bouchier, “Magic Memos, Collusion and Judges with Attitude: Notes on the Politics 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), 248.

The new administrative courts achieved, at least in part, their stated mission.⁴² However, they also opened an avenue for citizens to challenge the regime in ways that they were not able to before the reforms. Bourchier explains that “what appears to have started out as an effort to rein in errant bureaucrats soon became an important vehicle not only for critics to challenge the government leadership but also for judges in the Administrative Courts and beyond to take advantage of public support to press for greater institutional autonomy.”⁴³

In sum, a similar pattern emerges from Egypt, China, Mexico, Indonesia, and many other cases. The lack of transparency that is characteristic of authoritarian polities provided cover for state bureaucrats to abuse their powers. Administrative courts were then introduced by authoritarian rulers to monitor and discipline state agencies violating regime-proscribed mandates. However, these courts also opened avenues for activists to challenge the regime’s political control. In some countries such as China, administrative courts enjoy only limited autonomy and their institutional capacity is relatively weak because reforms are new and the regime is, not surprisingly, cautious in its approach. In other cases, such as Egypt, administrative courts have a longer institutional history and a high degree of institutional autonomy, and they serve as effective avenues for citizens to challenge executive decisions all the way up to the ministerial level of government. Because of their double-edged capacity, authoritarian rulers must constantly counterbalance administrative court independence with various strategies of managing and containing judicial activism.

*The State versus Itself: Judicial Institutions and
the Maintenance of Elite-Level Cohesion*

Judicial institutions are also sometimes empowered by authoritarian rulers to maintain cohesion among regime insiders. It has long been noted that the Achilles heel of any authoritarian regime is the difficulty in maintaining consensus within the ruling coalition.⁴⁴ Authoritarian leaders are

⁴² “Where officials were prone to issue low level regulations with little thought to their compatibility with superior regulations, they now double check first for fear that their decision will be nullified by an Administrative Court.” Bourchier, “Magic Memos,” 245.

⁴³ Bourchier, “Magic Memos,” 248.

⁴⁴ O’Donnell and Schmitter observe that “...there is no transition whose beginning is not the consequence – direct or indirect – of important divisions within the authoritarian regime itself. . . .” Guillermo O’Donnell and Philippe C. Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Baltimore: The Johns Hopkins University Press, 1986), 19. Similar arguments can be found in a

acutely aware that if elite-level cleavages are not managed properly, their regimes can rapidly cannibalize themselves. On occasion, judicial institutions are used to formalize ad hoc power-sharing arrangements among regime elites. Pinochet's Chile provides the most lucid example of how constitutions have been used to formalize pacts among competing factions within authoritarian regimes and how judicial institutions are sometimes used to balance the competing interests among those factions.⁴⁵ The 1980 Chilean Constitution and the 1981 *Tribunal Constitucional* were designed to arbitrate among the four branches of the military, which were organized along distinct corporatist lines with strong, cohesive interests.⁴⁶ Rules of standing prevented opponents of the regime from using the *Tribunal* to challenge the government. In other cases, such as the regime that ruled Brazil from 1964–1985, the first military administration wished to institutionalize the rotation of power and codify concrete limits on presidential powers in order to prevent the regime from slipping into a personalistic form of authoritarian rule, or “caudillismo.”⁴⁷

Cooperation among regime elites also requires some minimum level of transparency within the state hierarchy. As noted in the [previous section](#), perhaps the most self-destructive pathology common to authoritarian regimes is the lack of reliable information about the functions of state institutions. Aggravated principal-agent problems lie at the root of administrative abuse and corruption in authoritarian regimes. But more fundamentally, the absence of reliable information on state functions can mask the emergence of power centers that can challenge the authority of the central regime. Moreover, lack of transparency typically feeds the paranoia and uncertainty that are often endemic among key players within authoritarian regimes. This uncertainty encourages factions to seize power as a

number of other studies, including Stephan Haggard and Robert Kaufman, *The Political Economy of Democratic Transitions* (Princeton: Princeton University Press, 1995); Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (London: University of Oklahoma Press, 1991); Dankwart Rustow, “Transitions to Democracy: Toward a Dynamic Model.” *Comparative Politics* 2 (1970): 337–363.

⁴⁵ Robert Barros, *Constitutionalism and Dictatorship: Pinochet, the Junta, and the 1980 Constitution* (Cambridge: Cambridge University Press, 2002).

⁴⁶ Ironically, the *Tribunal Constitucional* eventually turned against the regime and became an important institution paving the way for the return to democracy.

⁴⁷ Thomas Skidmore, *The Politics of Military Rule in Brazil, 1964–85* (New York: Oxford University Press, 1988), 57. According to Skidmore, “by codifying the arbitrary powers they considered necessary . . .” President Branco attempted to “. . . forestall future recourse to even more arbitrary measures.” Alfred Stepan makes the similar argument in *The Military in Politics: Changing Patterns in Brazil* (Princeton: Princeton University Press, 1971).

defensive move, before their rivals beat them to the punch. This problem is acute within newly formed regimes with low levels of institutionalization. Conscious of the fragility of their coalitions and the distinct possibility of cannibalizing themselves, some regimes adopt judicial institutions as a way of counteracting these pathologies.

In the Egyptian case, both Nasser and Sadat came to the conclusion that centralized modes of monitoring did not produce reliable information about the conduct of the state's own administrative hierarchy. They both became concerned that they would fall victim to the emergence of alternative "power centers," particularly within the military, the police, and the intelligence services.⁴⁸ Sadat spoke repeatedly about the need to strengthen legal institutions as a way of policing the state and short-circuiting the possibility of power grabs.⁴⁹ Similarly, Pereira finds that the Brazilian courts "gathered information on the security forces and provided a kind of balancing mechanism to political leaders, effecting compromises between different factions within the regime."⁵⁰

The Delegation of Controversial Reforms to Judicial Institutions

Authoritarian regimes can also benefit from autonomous judicial institutions by channeling divisive political questions into the courts. This phenomenon is more familiar in democratic settings, where elected leaders sometimes delegate decision-making authority to judicial institutions to avoid divisive and politically costly issues. According to Graber, "The aim of legislative deference to the judiciary is for the courts to make controversial policies that political elites approve of but cannot publicly champion, and to do so in such a way that these elites are not held accountable by the general public, or at least not as accountable as they would be had they personally voted for that policy."⁵¹ Seen from this perspective, some

⁴⁸ Rosberg provides numerous examples of how rivals in the Egyptian state, such as the head of the Egyptian army, Abdel Hakim 'Amer, attempted to wield more influence by interfering in a variety of state institutions including public-sector enterprises and the press. James Rosberg, *Roads to the Rule of Law: The Emergence of an Independent Judiciary in Contemporary Egypt*. Ph.D. Dissertation, Massachusetts Institute of Technology, 1995, 83–104.

⁴⁹ "I believe that a one-man rule is fraught with dangers. Because no one can really know everything, some of his assistants will concentrate power in their hands and, so to speak, run amok – creating power bases just as had happened in Nasser's case." Anwar Sadat, *In Search of Identity: An Autobiography* (New York: Harper & Row, 1978).

⁵⁰ Anthony Pereira, "'Persecution and Farce': The Origins and Transformation of Brazil's Trials, 1964–1979." *Latin American Research Review* 33 (1998): 56.

⁵¹ Mark Graber, "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary," *Studies in American Political Development* 7 (1993): 43.

of the most memorable U.S. Supreme Court rulings may not be markers of judicial strength vis-à-vis other branches of government; rather, they might be regarded as strategic modes of delegation by officeholders and as strategic compliance by judges (with somewhat similar policy preferences) who are better insulated from the political repercussions of controversial rulings.⁵²

Classic examples from U.S. politics abound. Graber argues that

Dred Scott v. Sandford epitomizes political attempts to steer a disruptive partisan fight into safer legal channels. Rather than take the responsibility for resolving the burning issue of the 1850s, members of the dominant Democratic Party coalition openly encouraged the Supreme Court to decide when and whether persons could bring slaves into United States territories.⁵³

A little more than a century later, the Supreme Court would issue another famous racially charged ruling in *Brown v. Board of Education*, again largely because segregation was a politically contentious issue that was costly for many politicians to take on. In *Brown*, courts not only found themselves in the role of deciding on the unconstitutionality of segregation, but judges also ended up having to implement the ruling through hundreds of lower court decisions, essentially setting policy that many would see as the role of legislative and administrative bodies.⁵⁴

There are many more examples in the areas of business and labor policy. Graber contends that the Sherman Antitrust Act of 1890

is an excellent example of elected officials using legislation as a vehicle for inviting independent judicial policymaking. Party moderates in the late nineteenth century, unwilling or unable to agree on the extent to which powerful monopolies should be regulated by the national government, drafted a bill with exceptionally vague language for the purpose of forcing the Court in the guise of statutory interpretation to determine the scope of the federal commerce power.⁵⁵

In yet another example of legislative delegation of politically contentious labor issues, Lovell contends that congressmen intentionally wrote labor laws in vague and indefinite terms so that the courts would

⁵² Also see Keith Whittington, “‘Interpose Your Friendly Hand’: Political Support for the Exercise of Judicial Review by the United States Supreme Court.” *American Political Science Review* 99 (2005): 583–596.

⁵³ Graber, 45.

⁵⁴ Martin Shapiro, “The United States,” in *The Global Expansion of Judicial Power*, eds. C. Neal Tate and Torbjorn Vallinder.

⁵⁵ Graber, 45.

be left to interpret and define labor policy that was too politically contentious.⁵⁶ With *Roe v. Wade*, the U.S. Supreme Court even entered into the regulation of reproductive rights because such regulation was too politically charged for most politicians to tackle.⁵⁷

Is it possible that the political interests motivating this delegation to judicial institutions can similarly come into play in authoritarian polities? The dominant assumption in the comparative politics and public law literature is that authoritarian rulers simply have no need to avoid politically sensitive issues because they are unaccountable to the public. But although it may be true that authoritarian rulers are more insulated from *some forms* of public pressure (most obviously, they do not have to face direct opposition through free and fair elections), even the harshest of authoritarian regimes will regularly steer clear of issues that are identified as too politically costly for fear that controversial policies will produce mass opposition to the regime or splits within the ruling coalition. Authoritarian regimes, particularly those with flagging popular legitimacy, often avoid the implementation of controversial policies, even when such avoidance comes at great expense to the national interest or the long-term viability of the regime.

Perhaps the best example of this phenomenon is the continued postponement of urgently needed economic reforms in postpopulist, authoritarian states. Rulers in these contexts are sensitive to the risks of retreating from prior state commitments to subsidized goods and services, full employment, state-owned enterprises, and broad pledges to labor rights generally. They rightly fear popular backlash or elite-level splits if they renege on policies that previously formed the ideological basis of their rule. If authoritarian leaders can steer these sensitive political questions into judicial forums, however, they stand a better chance of minimizing the political fallout. The chapters that follow illustrate how dozens of Egyptian Supreme Constitutional Court rulings enabled the regime to overturn socialist-oriented policies without having to face direct opposition from social groups that were threatened by economic liberalization. Court rulings dismantled parts of the social welfare system built by Nasser without the regime having to assume direct political responsibility for those actions.

⁵⁶ George Lovell, *Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy* (Cambridge: Cambridge University Press, 2003).

⁵⁷ Graber contends that politicians “. . . took steps to ensure that *Roe v. Wade* would remain in the courts so that they would not be forced to support either pro-life or pro-choice positions in legislative and electoral forums.” Graber, 45, 53–61.

Economic reform is just one example of a contentious issue that cuts across all developing countries, but inevitably, there are a variety of controversial issues specific to local contexts that authoritarian leaders also prefer to avoid. For example, in the Egyptian context, the religious versus secular nature of the state is a perennial tension. Although the regime periodically uses religious institutions and symbolism to shore up its legitimacy, the piety card is a double-edged sword because of the state's inability to monopolize religious rhetoric.⁵⁸ The question of religion and the state is one that the regime therefore prefers to circumvent, both to avoid public discontent and to smooth over possible rifts within the ruling elite itself. Once again, the regime benefits from having judicial institutions to which such problematic and intractable disputes can be delegated in precisely the same way that politicians defer to courts in democratic systems.

As in democratic environments, the expansion of judicial policymaking as the result of strategic delegation is not an indication of judicial strength vis-à-vis the executive. Rather, judicial policymaking expands and contracts with the general consent of the regime. But to the extent that judicial institutions perform useful policymaking roles, courts can gain some degree of leverage with which to push the regime.

Law and Legitimacy in Authoritarian Regimes

The selective delegation of policymaking to judicial institutions points to a broader concern of authoritarian leaders – the maintenance of political legitimacy in lieu of credible mechanisms of public accountability. Legitimacy is perhaps the most difficult concept for political scientists to pin down, because it is extraordinarily difficult (if not impossible) to measure, and it is neither a necessary nor sufficient ingredient for political stability. However, nearly everyone acknowledges that states devote extraordinary resources toward promoting willful compliance, in part because it is less costly and more effective than coercion alone.⁵⁹

In comparison to their democratic counterparts, authoritarian regimes face particular challenges when it comes to establishing and maintaining political legitimacy. Because they are unelected, authoritarian regimes typically pin their legitimacy to the achievement of substantive outcomes, such as income redistribution, land reform, economic growth, political

⁵⁸ See Tamir Moustafa, "Conflict and Cooperation between the State and Religious Institutions in Contemporary Egypt." *The International Journal of Middle East Studies* 32 (2000): 3–22.

⁵⁹ Margaret Levi, *Of Rule and Revenue* (Berkeley: University of California Press, 1988).

stability, and the like. But, to various degrees, rulers will also attempt to make up for their questionable procedural legitimacy by preserving judicial institutions that give the image, if not the full effect, of constraints on arbitrary rule.⁶⁰

In some cases, authoritarian rulers use courts as a fig leaf for a naked grab at power. For example, after seizing control of the Philippine government in September 1972, Ferdinand Marcos swiftly declared martial law, took over the media, arrested political opponents, and banned political parties. Oddly enough, however, he did not shut down the Philippine Supreme Court. On the contrary, in his first public statement, Marcos reassured the public that “the judiciary shall continue to function in accordance with its present organization and personnel.” Moreover, he claimed that his new government would have effective “checks and balances,” that would be enforced by the Supreme Court in a new framework of “constitutional authoritarianism.”⁶¹ The important point here is not whether there were in fact effective checks and balances on the Marcos regime – there were not.⁶² Rather, the interesting observation is that Marcos felt compelled to make such statements and to keep the Supreme Court functioning to provide legal cover for his seizure of power. Such staged deference to liberal legality indicates that Marcos was well aware that his claim to procedural legitimacy was problematic at best. By leaving judicial institutions with a considerable degree of independence from executive interference, Marcos could claim more credibly that “constitutional authoritarianism” was not simply a laughable oxymoron. Similarly, Anthony Pereira observed that in Brazil, “. . . the regime pointed to the courts to claim legitimacy” whose legitimacy in turn “. . . was bolstered by a certain measure of autonomy.”⁶³ The same has been noted in cases as diverse as Franco’s Spain, Egypt, and China.

⁶⁰ Generally speaking, the more a regime is able to deliver successfully on its substantive goals such as economic growth, the less it is dependent on other legitimizing logics. However, the less a regime is able to deliver on substantive outcomes, the more it will be forced to choose between increased coercion or other legitimizing logics, such as legal legitimation.

⁶¹ Rolando Del Carmen, “Constitutionalism and the Supreme Court in a Changing Philippine Polity.” *Asian Survey* 13 (1973): 1050.

⁶² Marcos did not close the Supreme Court, nor did he dismiss the sitting justices or pack the court. Instead, the regime adopted a number of less obvious measures to constrain the court, as is examined later in this chapter.

⁶³ Pereira, “Persecution and Farce: The Origins and Transformation of Brazil’s Trials, 1964–1979.” *Latin American Research Review* 33: 43–66, 55. Elsewhere, Pereira notes that the Brazilian case is illustrative of regimes throughout the Southern Cone: “Despite the fact that they had all come to power through force, these leaders strove mightily to frame their actions with a scaffolding of laws, a mixture of the old and the new.”

In many cases, authoritarian regimes switch to the rule of law as a legitimizing narrative only after the failure of their initial policy objectives or after popular support for the regime has faded. Nasser (1954–1970) pinned his legitimacy on the revolutionary principles of national independence, the redistribution of national wealth, economic development, and Arab nationalism. Judicial institutions were tolerated only to the extent that they facilitated the regime’s achievement of these substantive goals. In contrast, Anwar Sadat (1970–1981) explicitly pinned his regime’s legitimacy to “*sayadat al-qanun*” (the rule of law) and used rule-of-law rhetoric hundreds of times throughout his eleven years at the head of Egypt’s authoritarian state.

A similar transformation to rule-of-law rhetoric has occurred in China. Mao Zedong undermined judicial institutions after founding the People’s Republic of China in 1949, but rule-of-law rhetoric is now increasingly employed by the regime in part to fill the ideological vacuum left after the state’s clear departure from communism. In both cases, incoming leaders Anwar Sadat and Deng Xiaoping used rule-of-law rhetoric to distance themselves from the spectacular excesses and failures of their predecessors and to build a new legitimizing ideology.⁶⁴ Their successors – Hosni Mubarak, Jiang Zemin, and Hu Jintao – continue to use judicial institutions to consolidate their institutional capacity and to employ rule-of-law rhetoric to bolster their legitimacy.⁶⁵

This is not to say that these regimes were consistently supportive of judicial independence or that they had stable policies vis-à-vis judicial institutions during the periods demarcated. Instead, authoritarian rulers typically have contradictory impulses. Courts can perform crucial roles for regimes struggling to resolve the pathologies of authoritarian rule, but they also entail variable costs that rulers may not wish to tolerate. The claim here is simply that each of these regimes attempted to garner support at various moments by declaring their fealty to the rule of law. For

Anthony Pereira, *Political (In) Justice: Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina* (Pittsburgh: University of Pittsburgh Press, 2005), 18.

⁶⁴ For Nasser, these included the failure to deliver economic development, defeat in the 1967 war, and the collapse of the United Arab Republic with Syria. For Mao Zedong, these included the Great Leap Forward, which resulted in the largest famine in human history with 30 million deaths, the chaos of the Cultural Revolution, and the failure to deliver economic growth.

⁶⁵ “As the core of the third generation of leadership, Jiang has also been searching for a normative agenda to call his own that would differentiate Jiang from Mao and Deng, provide the moral foundation for his right to rule, and the basis for this future legacy.” Peerenboom, *China’s Long March*, 60; Lubman, *Bird in a Cage*, Chapter 10. A 1999 amendment to the Chinese constitution explicitly declares, for the first time, that China is a rule-of-law state in which the government is bound by the law.

such a legitimizing function to succeed, however, judicial institutions must enjoy some degree of real autonomy from the executive, and they must, at least on occasion, strike against the expressed will of the regime. As E. P. Thomson famously noted, “the essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation. . . .” Otherwise, Thomson observed, legal institutions “. . . will mask nothing, legitimize nothing.”⁶⁶ The more a regime relies on rule-of-law rhetoric, the greater the opportunity for litigants and judges to expose the shortcomings of the government.⁶⁷

When courts are not able to rule against the core interests of the regime, litigation becomes an effective tool of political theater. Thus, high-profile cases challenging the emergency law, state security courts, and civilian transfers to military courts are launched in Egypt with the full knowledge that the SCC could never rule against the regime’s core interests in these areas. The purpose of constitutional petitions in these areas is simply to shame the regime using its own rule-of-law rhetoric and to expose these shortcomings in the opposition press.

THE AMBIGUITY OF JUDICIAL INSTITUTIONS: LAW AND RESISTANCE IN AUTHORITARIAN REGIMES

The preceding discussion underlines some of the distinct pathologies that entrenched authoritarian states face: (1) With unchecked power, rulers have difficulty providing credible commitments to 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 and accountability to the public. (3) With power fused into a single, dominant regime, unpopular policies are somewhat more costly to adopt because responsibility cannot be shifted onto other institutions or parties, as is often done in other systems. (4) Unlike in democratic systems, legitimacy in authoritarian regimes is linked almost exclusively to the success or failure of specific policy objectives, rather than to procedural legitimacy.

⁶⁶ E. P. Thomson, *Whigs and Hunters: The Origins of the Black Act* (New York: Pantheon Books, 1975).

⁶⁷ In the Chinese case, Peerenboom contends that “ironically, in the end, the wishes of Jiang and other government leaders notwithstanding, reliance on rule of law to augment regime legitimacy could backfire and produce just the opposite result. Repeated appeals to rule of law raise expectations among the people that the government will act accordingly. As a result, the large gap between the idea of rule of law and actual practice could undermine the authority of the government.”

The cases reviewed here make clear that judicial institutions are often used by authoritarian regimes to ameliorate these pathologies, whether through providing credible commitments to investors, enabling the central regime to maintain unity and discipline within state institutions, providing an alternate institution to implement unpopular policies, or by helping bolster regime legitimacy. It is perhaps no coincidence that some of the most long-lived authoritarian regimes are the ones that have institutionalized their rule and structured their domination of society.

Once established, however, judicial institutions do not advance the interests of authoritarian rulers in an unambiguous manner. Rather, courts simultaneously consolidate the functions of the authoritarian state while opening new avenues for activists to challenge regime policy. This is perhaps an inevitable outcome because the success of each of these regime-supporting functions depends on some measure of real judicial autonomy. In other words, commitments to property rights are not credible unless courts have independence and real powers of judicial review. Administrative courts cannot stamp out corruption effectively unless they are independent from the political and bureaucratic machinery that they are charged with supervising and disciplining. The strategy of “delegation by authoritarian institutions” will not divert blame for the abrogation of populist policies unless the courts striking down populist legislation are seen to be independent from the regime. And finally, rule-of-law rhetoric also rings empty unless courts are perceived to be independent from the government and they rule against government interests from time to time. Not all regimes will empower courts to capitalize on these functions, but those that do create a uniquely independent institution with public access in the midst of an authoritarian state.

*Legal Mobilization in Authoritarian Settings: Small Arms Fire
in a Rights Revolution?*

Scholars working in the state-society tradition observe that when social forces engage state institutions from the bottom up, they inevitably transform those institutions in ways that were often not initially intended by central decision makers.⁶⁸ As a result, authoritarian leaders frequently find themselves locked in conflict with the very institutions that were

⁶⁸ See, in particular, Joel S. Migdal, “The State in Society: An Approach to Struggles for Domination” and “State Power and Social Forces: On Political Contention and Accommodation in the Third World,” in *State Power and Social Forces: Domination and Transformation in the Third World*, eds. Joel Migdal, Atul Kohli, and Vivienne Shue (Cambridge: Cambridge University Press, 1994).

initially created to advance state interests.⁶⁹ This dynamic is especially true of judicial institutions, which enjoy a unique degree of institutional autonomy, a prominent position as the nerve center of state functions, and a unique position vis-à-vis society. These three institutional attributes give courts the capacity to act as dual-use institutions through which activists can challenge the state.

Groups that engage the courts might include human rights organizations, opposition activists, business associations,⁷⁰ legal professional associations, and other organizations in civil society, not to mention hundreds of thousands of individuals who file cases on their own initiative. Courts represent crucial avenues for these actors to challenge state policy because most other formal avenues are, by definition, closed down in authoritarian states. Litigation also affords strategic advantages to political activists because it provides opportunities to challenge the state without having to initiate a broad social movement, a task that is all but impossible in highly restrictive political environments. This ability to circumvent collective action problems is one of the most significant benefits of legal mobilization even in consolidated democracies where civil liberties are relatively secure. However, the ability to initiate litigation in lieu of broad political and social mobilization is even more crucial for opposition movements in authoritarian systems in which the state forcefully interferes with political

⁶⁹ For some specific examples of this dynamic in Egypt, see Robert Bianchi, *Unruly Corporatism: Associational Life in Twentieth-Century Egypt* (New York: Oxford University Press, 1989); Tamir Moustafa, "Conflict and Cooperation between the State and Religious Institutions in Contemporary Egypt." *The International Journal of Middle East Studies* 32 (2000): 3–22.

⁷⁰ Support from the business community is contingent on a number of exogenous factors such as how that community is structured. On a group level, firms have an interest in judicial systems that are fair, efficient, and reliable so they can benefit from stable and predictable regulation of business affairs, dependable contract enforcement mechanisms, and the protection of property rights vis-à-vis the state. Throughout history there are numerous examples of how the development of local, national, and transnational legal systems went hand in hand with the interests of expanding business elites. For examples, see Michael E. Tiger and Madeleine Levi, *Law and the Rise of Capitalism* (New York: Monthly Review Press, 1977); Yves Dezalay and Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago: University of Chicago Press, 1996). However, if firms come to the conclusion that it is more efficient to resort to corruption or if they have special access to political power-holders, they can have deleterious effects on judicial independence. The more that corruption and crony capitalism exist within a given legal system, the more perverse are the incentives at the firm level to secure favorable rulings through bribery. Business support for judicial independence and integrity often hinges on the ability of firms to overcome their own collective action problems.

organizing.⁷¹ Finally, courts can sometimes provide a measure of protection to nascent civil society organizations when they are under attack by the state, essentially becoming their main guardians.

As in any other setting, judicial institutions also provide less tangible but equally important symbolic resources for rights advocates.⁷² Courts offer a unique space for the opposition to turn the state's own institutions on itself. Activists search for the bold judge who is willing to turn on his master and, like saboteurs, throw monkey wrenches into the state's moving parts. When activists win in court, they not only win in the case at hand, but they also expose the legal shortcomings of the regime and provide fodder for the opposition press. When they lose, on the other hand, they expose the gap between the regime's rule-of-law rhetoric and the narrow margins for achieving institutional remedy. Litigation is thus used to raise the salience of political issues even when activists are almost certain that they will not win their case.

In turn, political activists can perform a number of critical tasks that courts cannot do by themselves. Rights organizations can provide research and documentation of government malfeasance and initiate the litigation that fuels the expansion of judicial power. Moreover, groups in civil society can play the essential role of raising the legal consciousness of the public through covering the court cases in opposition newspapers, organizing national and international conferences, and mobilizing international resources in support of legal battles, as in Keck and Sikkink's "boomerang pattern."⁷³ Finally, and perhaps most critically, these groups form a popular base of support, making it more difficult for a regime to undermine judicial institutions. Because courts do not wield power in

⁷¹ For more on legal mobilization and circumventing collective action problems in democratic settings, see Frances Zeman, "Legal Mobilization: The Neglected Role of the Law in the Political System." *American Political Science Review* 77 (1983). For more on constitutional litigation as a political strategy for groups with limited political resources, see Richard C. Courtner, "Strategies and Tactics of Litigants in Constitutional Cases." *Journal of Public Law* 17 (1968). Ironically, the ability to initiate litigation in lieu of a broad social movement also has distinct disadvantages in terms of sustaining a thoroughgoing reform movement, as is examined in the concluding chapter.

⁷² Marc Galanter, "The Radiating Effect of Courts," in *Empirical Theories about Courts*, eds. Keith Boyum and Lynn Matter, 127 (New York: Longman, 1983).

⁷³ Keck and Sikkink explain that "... voices that are suppressed in their own societies may find that networks can project and amplify their concerns to an international arena, which in turn can echo back into their own countries. Transnational networks multiply the voices that are heard in international and domestic policies." Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998).

and of themselves, they must depend on opposition parties, groups active in civil society, and the broader public to come to their defense if the regime decides that judicial activism has grown too costly. The unique opportunities afforded through courts make opposition parties and non-governmental associations vigorous supporters of judicial independence.

In authoritarian contexts, the fate of judicial power and legal channels of recourse for political activists are essentially intertwined. Political activists mobilize resources to monitor the regime, initiate litigation, raise public consciousness about the importance of judicial institutions, and come to the defense of the courts when necessary. In turn, empowered judicial institutions have a greater capacity to expand civil liberties, provide avenues for activists to challenge the state, and protect civil society from government domination.⁷⁴ Together, they constitute a *judicial support network*.⁷⁵ The relationship between reform-minded judges and their supporters is reciprocal and dynamic, but not simply in a strategic sense. Repeated interactions also reconstitute the identities, goals, and belongings of actors over time.⁷⁶

Legal professionals play unique roles in these struggles because of their ability to mobilize on both sides of the political equation. On the supply side, judges occupy the strategic position of interpretation, application, and sometimes review of regime legislation. On the demand side, both judges and lawyers are motivated to protect their own professional and institutional interests. As agents of the state, judges generally administer the will of the regime, but they never do so in an automatic fashion. Legal professionals everywhere are part of self-conscious communities, and in most developing countries they are acutely aware of their central role in political life.⁷⁷ The identities and aspirations of judges, lawyers, and law

⁷⁴ Indeed, the courts do not play a passive role here. Through their rulings, judges can build institutional allies outside the state that will fight for an expanded judicial mandate and autonomy.

⁷⁵ I have essentially broadened Epp's definition of "judicial support structure" to account for the interactive relationship between judicial support structures and judicial institutions and also to include the transnational actors that increasingly shape the nature of judicial politics both directly and indirectly. Charles Epp, *The Rights Revolution* (Chicago: University of Chicago Press, 1998).

⁷⁶ Michael McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994).

⁷⁷ For some examples from the Arab world and beyond, see Donald Reid, *Lawyers and Politics in the Arab World, 1880–1960* (Chicago: Bibliotheca Islamica, 1981); Farhat Ziadeh, *Lawyers, the Rule of Law and Liberalism in Modern Egypt* (Stanford: Hoover Institution on War, Revolution, and Peace, Stanford University, 1968); Terence Halliday

professors are further shaped by their legal training, which at a minimum will emphasize “thin” (procedural) conceptions of the rule of law, but also inevitably contains “thick” (substantive) conceptions of the rule of law to varying degrees. Finally, transnational epistemic communities also shape how judges understand their role in advancing a thick conception of the rule of law.⁷⁸ Dedicated actions in support of rule-of-law principles are thus guided by both interest-based considerations and identity-based, expressive actions.

Legal professional associations, such as lawyers’ associations, judges’ associations, law faculties, and the like, also provide the organizational structures that help legal professionals advance their collective interests in a coordinated fashion.⁷⁹ Countries like Egypt illustrate how legal professional associations have stood at times at the forefront of struggles to expand rights provisions for more than a century, even though colonial occupation was followed by home-grown authoritarian rule.⁸⁰ Cases like China, on the other hand, illustrate how quickly lawyers take up these roles, despite the tremendous personal cost, when only a generation earlier the legal profession was virtually nonexistent.⁸¹ Finally, comparisons with eighteenth-century Europe remind us that, even in the Western

and Lucien Karpik, *Lawyers and the Rise of Western Political Liberalism: Europe and North America from the Eighteenth to Twentieth Centuries* (Oxford: Oxford University Press, 1997).

⁷⁸ Anne-Marie Slaughter, “Judges: Constructing a Global Legal System,” in *A New World Order*, 65–103 (Princeton: Princeton University Press, 2004).

⁷⁹ The ability of legal professional associations to act as meaningful advocates for judicial strength depends to some degree on the economic environment within which they operate. Legal professionals and their associations tend to thrive in free-market economies, which generate demand for private lawyers to advise firms, write contracts, and take commercial cases to court. Throughout the developing world, transitions from free-market economies to socialist-oriented economies in the independence period dealt a severe blow to legal professional organizations, as commercial transactions that had provided the bread and butter of the profession dried up. With the transition in many developing countries back to free-market economies over the past two decades, we see increasingly robust legal professional associations, with the potential for significant political spillover.

⁸⁰ See Donald Reid, *Lawyers and Politics in the Arab World, 1880–1960*; Farhat Ziadeh, *Lawyers, the Rule of Law and Liberalism in Modern Egypt*; Raymond Baker, “Fighting for Freedom and the Rule of Law: The Bar Association,” in *Sadat and After: Struggles for Egypt’s Political Soul*.

⁸¹ Terence Halliday and Sida Liu, “Birth of a Liberal Moment? Looking through a One-Way Mirror at Lawyers’ Defense of Criminal Defendants in China,” in Terence Halliday, et al., *The Legal Complex and Struggles for Political Liberalism*, ed. Halliday, in press.

experience, democracy was *not* a necessary condition for legal professionals to advance rights claims.⁸²

Reform-minded judges attempt to push the envelope as much as possible by tacitly cooperating with political activists while simultaneously capitalizing on the critical roles they play for authoritarian rulers (attracting investment capital, maintaining discipline and coordination within state institutions, and helping bolster regime legitimacy) to leverage pressure in the direction of political reform. Simultaneously, authoritarian rulers attempt to maximize the benefits that courts confer while attempting to constrain the ability of judges to challenge the core interests of the regime. Within these narrow margins, the game of judicial politics is played out.

HOW REGIMES CONTAIN COURTS

Nowhere in the world do courts operate free of political constraints. Despite the myth of judicial independence, judges always face political limitations on how far they can push legal claims, a topic that has now been studied, debated, and rehashed by scholars in great detail in democratic contexts.⁸³ Courts in authoritarian states face acute limitations, but the most serious constraints are often more subtle than tightly controlled appointment procedures, short term limits, and the like. Regimes contain judicial activism *without* infringing on judicial autonomy through at least four principal strategies. They (1) provide institutional incentives that promote judicial self-restraint and “core compliance,” (2) engineer fragmented judicial systems, (3) constrain access to justice, and (4) incapacitate judicial support networks.

Judicial Self-Restraint and Core Compliance

Judges everywhere are finely attuned to the political environment that they operate within – they anticipate the likely political fallout of rulings under consideration, and they are generally aware of both the reach and

⁸² Terence Halliday and Lucien Karpik, *Lawyers and the Rise of Western Political Liberalism*.

⁸³ The difficulties of pinning down precise and uniform standards for judicial independence are explored in Peter Russell and David O’Brien, *Judicial Independence in the Age of Democracy* (Charlottesville, VA: University of Virginia Press, 2001) and Stephen Burbank and Barry Friedman, eds., *Judicial Independence at the Crossroads* (Thousand Oaks, CA: Sage Publications, 2002).

limitations of their power. The assumption that courts serve as handmaidens of rulers obscures the strategic choices that judges make in authoritarian contexts, just as they do in democratic contexts.⁸⁴ Judges are acutely aware of their insecure position in the political system and their attenuated weakness vis-à-vis the executive, as well as the personal and political implications of rulings that impinge on the core interests of the regime.

Core interests vary from one regime to the next depending on substantive policy orientations, but all regimes seek to safeguard the core legal mechanisms that undergird its ability to sideline political opponents and maintain power. Reform-oriented judges therefore occupy a precarious position in the legal/political order. They are hamstrung between a desire to build oppositional credibility among judicial support networks on the one hand, and an inability to challenge core regime interests for risk of retribution, on the other hand. Given this precarious position, reform-minded judges typically apply subtle pressure for political reform only at the margins of political life.

On occasions when the anticipated response of the government or judicial support networks is ambiguous, judges assess the probable political fallout of rulings by issuing legal briefs from research organs within the court or by leaking information on pending judgments to the press. For example, the commissioners' body of the Egyptian Supreme Constitutional Court sometimes issues several different "recommended rulings" prior to the final, binding ruling. Prospective rulings that push the limits of political action too far will produce swift feedback indicating the displeasure of the regime and give some sense of whether judicial support networks will counterbalance regime pressure.

Core regime interests are typically challenged only when it appears that the regime is on its way out of power. In most cases, reform-oriented judges bide their time in anticipation of the moment that the regime will weaken to the extent that defection is no longer futile, but can have an impact on the broader constellation of political forces.⁸⁵ Strategic defection in such a circumstance is also motivated by the desire of judicial actors to distance themselves from the outgoing regime and put themselves in good stead with incoming rulers. The more typical mode of court activism in a

⁸⁴ A classic account in the American context is Walter Murphy, *Congress and the Court* (Chicago: University of Chicago Press, 1962).

⁸⁵ 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).

secure authoritarian regime is to apply subtle pressure for political reform at the margins and to resist impinging on the core interests of the regime.

The dynamics of “core compliance” with regime interests are noted in dozens of authoritarian states. An observer of judicial politics in early twentieth-century Argentina concluded that “although possessing the power of judicial review, the Supreme Court has used considerable restraint in its exercise, and it has defined as political any issue that might lead to a major conflict with the executive branch – a conflict that all justices realize they would certainly lose.”⁸⁶ In the Egyptian case, the Supreme Constitutional Court issued dozens of progressive rulings that attempted to expand basic rights and rein in executive abuses of power, but it never ruled on constitutional challenges to the emergency laws or civilian transfers to military courts, which form the bedrock of regime dominance. Similarly, in the early days of the Marcos regime, the Philippine Supreme Court did not attempt to resist the decree of martial law, the imposition of a new constitution, or decrees placing new constraints on the jurisdiction of the courts. Rather, the court yielded to Marcos’s seizure of power, and it continued to submit to the regime’s core political interests for the next fourteen years of rule. Philippine Justices Castro and Makalintal candidly acknowledged the political realities that undoubtedly shaped the court’s unwillingness to confront the regime, stating in their ruling that “if a new government gains authority and dominance through force, it can be effectively challenged only by a stronger force; no judicial dictum can prevail against it.”⁸⁷ Similar dynamics are noted in Pakistan, Ghana, Zimbabwe, Uganda, Nigeria, Cyprus, Seychelles, Grenada, and other countries.⁸⁸

In such circumstances, formal judicial independence can clearly exist within an authoritarian state. One can also understand why an authoritarian ruler would find it politically advantageous to maintain formal judicial independence. Del Carmen’s characterization of judicial politics under Marcos is particularly illuminating:

While it is true that during the interim period . . . the President can use his power to bludgeon the Court to subservience or virtual extermination, the

⁸⁶ Peter Snow, *Government and Politics in Latin America* (New York: Holt, Rinehart, and Winston, 1967), 215, as cited in Joel Verner, “The Independence of Supreme Courts in Latin America: A Review of the Literature.” *Journal of Latin American Studies* 16 (1984): 463–506.

⁸⁷ Rolando Del Carmen, “Constitutionalism and the Supreme Court in a Changing Philippine Polity.” *Asian Survey* 13 (1972): 1059–1060.

⁸⁸ Tayyab Mahmud, “Jurisprudence of Successful Treason: Coup d’Etat & Common Law.” *Cornell International Law Journal* 27(1), 1994.

President will most probably not do that – ironically, because he realizes that it is in his interest to keep the Court in operation. On the balance sheet, the Court thus far has done the President more service than disservice, more good than harm.⁸⁹

The important dynamic to note in each of these instances is that authoritarian regimes were able to gain judicial compliance *and* enjoy some measure of legal legitimation without having to launch a direct assault on judicial autonomy. The anticipated threat of executive reprisal and the simple futility of court rulings on the most sensitive political issues are usually sufficient to produce judicial compliance with the regime's core interests. *An odd irony results: The more deference that a court pays to executive power, the more institutional autonomy an authoritarian regime is likely to extend to it.*⁹⁰

The internal structure of appointments and promotions can also constrain judicial activism quite independent of regime interference. The judiciary in Pinochet's Chile is a good example of a court system that failed to act as a meaningful constraint on the executive, despite the fact that it was institutionally independent from the government. According to Hilbink, this failure had everything to do with the process of internal promotion and recruitment, wherein Supreme Court justices controlled the review and promotion of subordinates throughout the judiciary.⁹¹ The hermetically sealed courts did not fall victim to executive bullying. Rather, the traditional political elite controlling the upper echelons of the court system disciplined judges who did not follow their commitment to a thin conception of the rule of law.⁹² This example illustrates why judicial independence is not a concept that is easy to pin down. A court system can enjoy complete formal independence from the executive in terms of appointments, promotions, discipline, and the like. However, the same

⁸⁹ Del Carmen, 1061.

⁹⁰ This observation should also call into question our common understanding of the concept of "judicial independence." If we understand judicial independence to mean institutional autonomy from other branches of government, then we must conclude that more than a few authoritarian states satisfy this formal requirement. In both democratic and authoritarian contexts, formal institutional autonomy appears to be a necessary condition for the emergence of judicial power, but in both cases it is insufficient by itself to produce effective checks on power.

⁹¹ Lisa Hilbink, *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile* (Cambridge: Cambridge University Press, in press).

⁹² Hilbink finds that the independent Chilean Supreme Court ironically became a significant obstacle to democratic consolidation, challenging the assumption in the vast majority of the political science literature that independent courts provide a check on executive or legislative abuses of power and that courts consistently work to protect basic rights that are essential for a healthy democracy.

functions subject judges to a corporatist form of control that is equally stifling when practiced within the judiciary.

FRAGMENTED VERSUS UNIFIED JUDICIAL SYSTEMS

Authoritarian regimes also contain judicial activism by engineering fragmented judicial systems in place of unified judiciaries. In the ideal type of a unified judiciary, the regular court hierarchy has jurisdiction over every legal dispute in the land. In fragmented systems, on the other hand, one or more exceptional courts run alongside the regular court system. In these auxiliary courts, the executive retains tight controls through non-tenured political appointments, heavily circumscribed due process rights, and retaining the ability to order retrials if it wishes. Politically sensitive cases are channeled into these auxiliary institutions when necessary, enabling rulers to sideline political threats as needed. With such auxiliary courts waiting in the wings, authoritarian rulers can extend substantial degrees of autonomy to the regular judiciary.

Examples can be found in a number of diverse contexts. In Franco's Spain, Jose Toharia noted that "Spanish judges at present seem fairly independent of the Executive with respect to their selection, training, promotion, assignment, and tenure." Yet Toharia also observed that the fragmented structure of judicial institutions and parallel tribunals acted "to limit the sphere of action of the ordinary judiciary." This institutional configuration ultimately enabled the regime to manage the judiciary and contain judicial activism, all the while claiming respect and deference to independent rule-of-law institutions. Toharia explains that "with such an elaborate, fragile balance of independence and containment of ordinary tribunals, the political system had much to gain in terms of external image and internal legitimacy. By preserving the independence of ordinary courts . . . it has been able to claim to have an independent system of justice and, as such, to be subject to the rule of law."⁹³

Similarly, the military courts in Brazil (1964–1985) had sole jurisdiction over civilians accused of crimes against national security, making resistance in the regular judiciary less consequential.⁹⁴ Likewise, the Emergency State Security Courts and the military courts of Egypt form a parallel legal system with fewer procedural safeguards, serving as the ultimate check on challenges to the regime's power. Exceptional courts played the

⁹³ Jose Toharia, "Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain." *Law and Society Review* 9 (1975): 495.

⁹⁴ Verner, "The Independence of Supreme Courts," 489.

same functions in other authoritarian states – only their names differed. In fascist Italy, the *Tribunale Speciale per la Sicurezza dello Stato* performed the same functions. In Portugal under Salazar, it was the *Tribunais Plenarios*.⁹⁵

A far more extreme form of this legal bifurcation was noted by Ernst Fraenkel in Nazi Germany, which he described as a “Dual State” (*Der Doppelstaat*). The dual state encompasses both a “Prerogative State . . . which exercises unlimited arbitrariness and violence unchecked by any legal guarantees,” and a Normative State, which was “. . . an administrative body endowed with elaborate powers to safeguard the legal order as expressed in statutes, decisions of the courts, and activities of the administrative agencies.”⁹⁶ The Normative State continued to deal with everyday aspects of governance including business law, family law, and the like, but the Normative State ceded its authority whenever required.

All other things being equal, there is likely to be a direct relationship between the degree of independence and the degree of fragmentation of judicial institutions in authoritarian contexts. The more independence a court enjoys, the greater the likely degree of judicial fragmentation in the judicial system as a whole. Boundaries between the two sets of judicial institutions also shift according to political context. Generally speaking, the more compliant the regular courts are, the more that authoritarian rulers allow political cases to remain in their jurisdiction. The more the regular courts attempt to challenge regime interests, on the other hand, the more the jurisdiction of the auxiliary courts is expanded.

In authoritarian states, the regular judiciary is unwilling to rule on the constitutionality of parallel state security courts for fear of losing a hopeless struggle with the regime, illustrating both the core compliance function at work and the awareness among judges that they risk the ability to champion rights at the margins of political life if they attempt to challenge the regime’s core legal mechanisms for maintaining political control. Returning to the Egyptian example, the Supreme Constitutional Court had ample opportunities to strike down provisions that deny citizens the right of appeal to regular judicial institutions, but it almost certainly exercised restraint because impeding the function of the exceptional courts would result in a futile confrontation with the regime. Ironically, the regime’s ability to transfer select cases to exceptional courts

⁹⁵ Carlo Guarnieri and Pedro Magalhaes, “Democratic Consolidation, Judicial Reform, and the Judicialization of Politics in Southern Europe,” in *The Changing Role of the State in Southern Europe*, eds. R. Gunther, P. N. Diamandouros, and G. Pasquino (Oxford: Oxford University Press, 1996).

⁹⁶ Ernst Fraenkel, *The Dual State* (New York: Oxford University Press, 1941).

facilitated the emergence of judicial power in the regular judiciary. As we see in the coming chapters, 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 ultimately retained full control over its political opponents.⁹⁷ To restate the broader argument, the jurisdiction of judicial institutions in authoritarian regimes is ironically dependent on the willingness of judges (particularly those in the higher echelons of the courts) to manage and contain the judiciary's own activist impulses. *Judicial activism in authoritarian regimes is only made possible by its insulation within a fundamentally illiberal system.*

Constraining Access to Justice

Authoritarian rulers can also contain judicial activism by adopting a variety of institutional configurations that constrain the efforts of litigants and judges. At the most fundamental level, civil law systems provide judges with less maneuverability and less capacity to create “judge-made” law than their common law counterparts.⁹⁸ Historically, the rapid spread of the civil law model was not merely the result of colonial diffusion, in which colonizers simply reproduced the legal institutions of the mother country. In many cases, the civil law model was purposefully adopted independent of colonial imposition because it provided a better system for rulers to constrain, if not prevent, judge-made law. Although the differences between civil law and common law systems are often overstated and even less meaningful over time as more civil law countries adopt procedures for judicial review of legislation, civil law judges are still more constrained than their common law counterparts because they lack formal powers of judicial review.⁹⁹ More important than any legal constraints is

⁹⁷ Nathan Brown came to the similar conclusion: “Having successfully maintained channels of moving outside the normal judiciary, the regime has insured that the reemergence of liberal legality need not affect the most sensitive political cases. . . . The harshness of the military courts, in this sense, has made possible the independence of the rest of the judiciary.” *The Rule of Law in the Arab World*, 116.

⁹⁸ John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford: Stanford University Press, 1985); Mark Osiel, “Dialogue with Dictators: Judicial Resistance in Argentina and Brazil.” *Law and Social Inquiry* 20 (Spring 1995); Joel Verner, “The Independence of Supreme Courts in Latin America.”

⁹⁹ Shapiro explains that the role of the civil law judge to simply apply preexisting legal codes is a myth because it assumes that codes can be made complete, consistent, and specific, which is never fully actualized in reality. The result is that civil court judges engage in judicial interpretation, a fundamentally political role, just as judges do in common law

the norm that judges in civil law systems are to apply the law mechanically, resulting in a tendency toward thin rather than thick conceptions of the rule of law.

Regimes can engineer further constraints on the *institutional structure* of judicial review,¹⁰⁰ the *type* of judicial review,¹⁰¹ and the *legal standing* requirements. Some of these institutional choices are straightforward. For example, a regime can better constrain judges by imposing a centralized structure of judicial review in place of a decentralized structure. Centralized review yields fewer judges who must be bargained with, co-opted, or contained, resulting in predictable relationships with known individuals. It was precisely for this reason that Nasser abolished the diffused system of “abstention control” and imposed a centralized structure of judicial review under the tight control of the executive. A similar centralization of review powers was imposed by the Turkish military in the 1982 Turkish Constitution.¹⁰²

Other institutional characteristics are fixed according to the function that courts are designed to perform. For example, courts established to arbitrate between factions within the state, such as Pinochet’s *Tribunal Constitucional*, can deny standing to nonstate actors. In contrast, constitutional courts that are created to bolster property rights and attract investment must grant standing to nonstate actors; doing otherwise would defeat their *raison d’être*. Here, judicial review entails risks for the regime because it opens an avenue through which activists can mobilize on noneconomic issues.¹⁰³ On the other hand, access to judicial review opens an avenue for laws counterproductive to regime interests to be challenged

systems. See Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981).

¹⁰⁰ In a centralized system of judicial review, only one judicial body (typically a specialized constitutional court) is empowered to perform review of legislation. In a diffused system of judicial review, on the other hand, any court can decide on the constitutionality or unconstitutionality of a particular piece of legislation.

¹⁰¹ Courts with provisions for concrete review examine laws after they take effect, in concrete legal disputes. Courts with provisions for abstract review examine legislation as part of the normal legislative process and can nullify legislation before it takes effect.

¹⁰² In the 1961 Turkish Constitution, courts could practice judicial review if the Constitutional Court had not issued a judgment within a defined period. This procedure was abolished in the 1982 Constitution, and a number of other constraints were put in place to narrow the scope and standing requirements of judicial review. See Ceren Belge, “Friends of the Court.” *Law and Society Review* 40 (September 2006).

¹⁰³ Regimes are therefore likely to provide access to parties involved in concrete disputes, but to bar direct access to constitutional adjudication. This formula reduces the number of constitutional claims brought to court and effectively turns courts of merit into a series of gatekeepers to constitutional adjudication.

and defeated by nonstate actors, which is a convenient way for authoritarian rulers to delegate politically controversial reforms.

Most regimes also limit the types of legal challenges that can be made against the state. This was an important constraint on the Mexican Supreme Court under the PRI.¹⁰⁴ Similarly, article 12 of the Chinese Administrative Litigation Law empowers citizens to challenge decisions involving personal and property rights, but it does not mention political rights, such as the freedom of association, assembly, free speech, and freedom of publication.¹⁰⁵ These select issue-areas speak volumes about the intent of the central government to rein in local bureaucrats while precluding the possibility of overt political challenges through the courts. However, it is also clear that these constraints are renegotiated constantly. Furthermore, it is not clear that the instrumental functions that authoritarian regimes wish to gain from judicial institutions (investment, bureaucratic discipline, legitimation, and so forth) can be achieved without substantive individual rights provisions.

Incapacitating Judicial Support Networks

Finally, authoritarian regimes can contain court activism by incapacitating judicial support networks. In his comparative study, *The Rights Revolution*, Epp shows that the most critical variable determining the timing, strength, and impact of rights revolutions is neither the ideology of judges, nor specific rights provisions, nor a broader culture of rights consciousness.¹⁰⁶ Rather, the critical ingredient is the ability of rights advocates to build organizational capacity that enables them to engage in deliberate, strategic, and repeated litigation campaigns. Rights advocates can reap the benefits that come from being “repeat players” when they are properly organized, coordinated, and funded.¹⁰⁷ Although Epp’s study is concerned with courts in democratic polities, his framework sheds light on the structural weakness of courts in authoritarian regimes.

The weakness of judicial institutions vis-à-vis the executive is not only the result of direct constraints that the executive imposes on the courts; it

¹⁰⁴ Beatriz Magaloni, “Authoritarianism, Democracy, and the Supreme Court: Horizontal Exchange and the Rule of Law in Mexico,” in *Democratic Accountability in Latin America*, eds. Scott Mainwaring and Christopher Welna (Oxford University Press, 2003).

¹⁰⁵ Peerenboom, 420. ¹⁰⁶ Charles Epp, *The Rights Revolution*.

¹⁰⁷ The advantages enjoyed by “repeat players” in the legal system were first examined by Marc Galanter in his seminal article, “Why the ‘Haves’ Come out Ahead: Speculations on the Limits of Social Change.” *Law and Society Review* 9 (1974): 95–160.

is also related to the characteristic weakness of civil society in authoritarian states. The task of forming an effective judicial support network from a collection of disparate rights advocates is all the more difficult because activists not only have to deal with the collective action problems that typically bedevil political organizing in democratic systems, but authoritarian regimes also actively monitor, intimidate, and suppress organizations that dare to challenge the state. Harassment can come in the form of extralegal coercion, but more often it comes in the form of a web of illiberal legislation spun out from the regime. With the legal ground beneath them constantly shifting, rights organizations find it difficult to build organizational capacity before having to disband and reorganize under another umbrella association.

Given the interdependent nature of judicial power and support network capacity in authoritarian polities, the framework of laws regulating and constraining the activities of judicial support networks is likely to be one of the most important flashpoints between courts and regimes.

If we shift our conceptual lenses to account for the divergent interests of the center and periphery of the state once again, the deep complexity of these legal encounters comes into sharper focus. In some political contexts, litigation is blocked not by the central government, but by local officials wishing to protect their interests.¹⁰⁸ This interference can undermine the ability of the central government to police the bureaucracy through administrative courts. As a result, the central government may be motivated to strengthen other important rights provisions that enable citizens to use the administrative courts without fear of retaliation by local officials.

The Chinese case may confirm this hypothesis. The Chinese government issued legislation providing for defendant rights in criminal cases, most importantly with the 1996 Criminal Procedure Law,¹⁰⁹ but local officials have constantly undermined basic provisions of this legislation.¹¹⁰ One way of understanding the problem is to simply dismiss the disparity

¹⁰⁸ For example, see Kevin O'Brien and Lianjiang Li, "Suing the Local State: Administrative Litigation in Rural China," in *Engaging the Law in China: State, Society, and Possibilities for Justice*, ed. Neil Diamant et al. (Stanford: Stanford University Press, 2005).

¹⁰⁹ This law expanded the role of defense lawyers, increased the procedural rights of defendants, strengthened the right of appeal, and even provided for a government-sponsored system of legal aid.

¹¹⁰ Yi Sheng, "A Promise Unfulfilled: The Impact of China's 1996 Criminal Procedure Reform on China's Criminal Defense Lawyers' Role at the Pretrial Stage." *Perspectives*, March 31, 2004.

between the law on the books and the law in practice as typical of an authoritarian regime that wishes to project an image of a rule-of-law state (a motive that is interesting in and of itself). A more nuanced understanding of successive attempts by the central government to amend the criminal procedure might take into consideration the context of struggles between the center and periphery. The central government seems intent on strengthening the criminal procedure law, not for altruistic ends, but rather to curb rampant and unauthorized abuses of power by bureaucrats at the local level, particularly those who might initiate criminal proceedings in order to punish or discourage those challenging administrative decisions. This example once again highlights how judicial politics in authoritarian contexts is not a simple imposition of state power over society. Rather, contradictory impulses within different layers of the state provide openings for judicial support networks to gain a foothold in their efforts to make effective rights claims.

Recapitulation

Judicial politics in authoritarian states are often far more complex than we commonly assume. The cases reviewed here reveal that authoritarian rulers often times make use of judicial institutions to counteract the many dysfunctions that plague their regimes. Courts help regimes attract capital, maintain bureaucratic discipline, and enhance regime legitimacy. However, courts do not advance regime interests in a straightforward manner. Rather, they open spaces for activists to mobilize against the state and to seek out judges who wish to expand their mandate and affect political reform. Authoritarian rulers work to contain judicial activism through providing incentives that favor judicial self-restraint, designing fragmented judicial systems, constraining access to justice, and incapacitating judicial support networks. However, those efforts are never completely effective. Instead, a lively arena of contention emerges in what we typically imagine to be the least likely environment for the judicialization of politics – the authoritarian state.

The Establishment of the Supreme Constitutional Court

“Commerce and manufacture can seldom flourish long in any state which does not enjoy a regular administration of justice, in which the people do not feel themselves secure in the possessions of their property, in which the faith of contracts is not supported by law and in which the authority of the state is not supposed to be regularly employed in enforcing the payment of debts from all those who are able to pay. Commerce and manufacture, in short, can seldom flourish in any state in which there is not a certain degree of confidence in the justice of government.”

Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*¹

“The law is on holiday.”

Shar‘awi Gom‘a, Gamal ‘Abd al-Nasser’s Minister of Interior²

Why did Egypt’s authoritarian regime establish an independent constitutional court in 1979 when only twenty-five years earlier it had worked to undermine judicial power? From the standpoint of the mainstream comparative law and politics literature, the birth of the Egyptian Supreme Constitutional Court presents a surprising anomaly: an entrenched regime facing no credible challengers established an autonomous court with the ability to strike down regime legislation.

The motives for judicial reform make somewhat more sense when viewed from a political-economy angle. The passages above by eighteenth-century economist Adam Smith and Nasser’s Minister of Interior nicely illustrate one of the principal tradeoffs that authoritarian regimes face

¹ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. Edwin Cannan (Chicago: University of Chicago Press, 1976), Book 5, Chapter 3.

² Quoted in Moheb Zaki, *Civil Society and Democratization in Egypt: 1981–1994* (Cairo: Ibn Khaldun Center for Development Studies, 1994), 9.

when they remove constraints on their power. Incoming regimes have the ability to announce that “the law is on holiday,” and they can strip courts of their independence with impunity, but doing so carries significant economic costs. Unbridled power undermines the ability of authoritarian leaders to credibly commit to the security of property, leaving investors reluctant to make long-term, capital-intensive investments. Egypt provides a textbook example of how the nationalization of industry and the consolidation of unrestrained state power can wreak a devastating economic toll. Insecure property rights following the Free Officer’s 1952 coup d’état forced a mass exodus of private capital as both Egyptian and foreign industrialists moved their assets abroad, depriving the economy of much-needed development resources. Assaults on the administrative courts also impaired the ability of the regime to police the bureaucracy. Economic failure paired with rampant corruption throughout the state bureaucracy worked to undermine the revolutionary legitimacy that the regime had enjoyed for its first fifteen years. Faced with this economic, administrative, and legitimacy crisis, Sadat eventually turned to judicial institutions to ameliorate the dysfunctions that lay at the heart of his authoritarian state. He empowered courts to assure investors that there were institutional protections on property rights, to give the regime new tools to monitor and discipline the state’s own bureaucratic machinery, and to provide a new legitimizing ideology to bolster regime legitimacy.

NASSER’S SOCIALIST EXPERIMENT

When the Free Officers seized power through a military coup in 1952, there was little indication that in ten years time the regime would nationalize virtually the entire economy in the name of national development. Many of the initial laws issued by the regime actually sought to encourage domestic and foreign private investment. One of the first moves of the new regime was to reverse law 138 of 1947, which required 51 percent Egyptian ownership of firms. In 1953, the regime also passed legislation allowing foreign companies to participate in the petroleum industry, and it granted seven-year tax holidays to new private investments in all sectors of the economy.³ Finally, law 26 of 1954 even eased regulations on the repatriation of earnings.⁴

³ Laws 430 of 1953 and 25 of 1953.

⁴ John Waterbury, *The Egypt of Nasser and Sadat: The Political Economy of Two Regimes* (Princeton: Princeton University Press, 1983), 63.

But despite these early pro-business offerings, there were troubling developments from the perspective of private capitalists. One of the first programs of the regime was to institute a land reform program that placed a limit on landholdings of 200 *feddān* per person.⁵ The new Ministry of Agrarian Reform redistributed individual landholdings larger than 200 *feddān* in small plots to landless peasants. Only 10 percent of landholders lost land through this reform, but a precedent was set that the regime had the capacity and the political will to implement bold new reforms with little regard for the property rights configuration of the pre-revolutionary period. In total, 460,000 *feddān* were redistributed by the state.⁶ Initially, landholders were to be compensated for 40 percent of the market value of the land, but even this partial payment was delayed and incomplete.⁷ In the area of labor rights, the new regime similarly moved to strengthen the hand of workers vis-à-vis management by making it more difficult for employers to dismiss workers.⁸

Perhaps more troubling than any particular piece of legislation was the fact that, within a few months of seizing power, the regime made a decided shift away from the established political system and showed no intention of restoring liberal-democratic political institutions. The Constitution was annulled by executive decree on December 10, 1952, and another decree, issued January 17, 1953, dissolved all political parties. Egyptian legal institutions were also weakened significantly. ‘Abd al-Raziq al-Sanhuri, one of Egypt’s greatest legal scholars and the architect of the Egyptian civil code, was assaulted by Nasser supporters and forced to resign in 1954.⁹ Another twenty prominent members of the *Majlis al-Dawla*, Egypt’s administrative court, were also forcibly retired or transferred to nonjudicial positions and by 1955 the *Majlis al-Dawla* was formally stripped of its power to cancel administrative acts.¹⁰

⁵ A *feddān* is slightly larger than 1 acre; 200 *feddān* is the equivalent of 208 acres.

⁶ Patrick O’Brien, *The Revolution in Egypt’s Economic System: From Private Enterprise to Socialism, 1952–1966* (London: Oxford University Press, 1966), 76.

⁷ By 1964, the regime issued law 104/1964, which denied compensation completely.

⁸ Ellis Goldberg, *Trade, Reputation, and Child Labor in Twentieth-Century Egypt* (New York: Palgrave, 2004), 119–141.

⁹ For an account of the attack on Sanhuri and the circumstances leading up to it, see Faruq ‘Abd al-Bur, *Moqef ‘Abd al-Razeq al-Sanhuri min Qadayan al-Huriyya wa al-Dimokratiyya*, 156–158.

¹⁰ The best treatment of the *Majlis al-Dawla*, including landmark decisions and its position in the broader political context, is Faruq ‘Abd al-Bur, *Dor Majlis al-Dawla al-Misri fi Hamayit al-Haqq wa al-Hurriyat al-‘Ama. The Role of the State Council in Protecting Public Rights and Freedoms*, Vol. 1–3. See Vol. 2, 24–99 for analysis of the *Majlis al-Dawla* throughout this period.

In addition to these assaults on Egyptian legal institutions, the regime also consolidated its control by circumventing the regular court system and establishing a series of exceptional courts, including *Mahkamat al-Thawra* (Court of the Revolution) in 1953 and *Mahakim al-Sha'b* (The People's Courts) in 1954.¹¹ These courts had sweeping mandates, few procedural guidelines, no appeals process, and were staffed by loyal supporters of the regime, typically from the military. Finally, the regime regularly transferred cases from the regular court system into both military and security courts, which again afforded few procedural protections. With no check on the political power of the new regime, either through political parties in Parliament or through legal institutions, private investors understandably hesitated to make major new investments in the economy.

In the wake of the 1956 Suez War, the investment climate in Egypt became even more worrisome for private investors. Following the tripartite aggression by Britain, France, and Israel to recapture the Suez Canal, Egypt retaliated by nationalizing all British and French companies and assets. Laws 22, 23, and 24 of 1957 transferred hundreds of British and French companies to Egyptian control, including such major banking institutions as Barclay's and Credit Lyonnais. The nationalization of all Belgian companies followed in 1958. Waterbury is right to note that this was a bittersweet time for Egyptian industrialists, who were now free of foreign competition but also acutely aware of the ability of the state to unilaterally nationalize private property. If the state could nationalize property belonging to the great powers with impunity, what protections would Egyptian capitalists have against government attempts to take their property in the future? The question was all the more pressing given the text of the new 1956 Constitution. Far from giving absolute guarantees to property rights, the new constitution stated that private economic activity would be "free from state interference, provided that it does not prejudice public interests, endanger the people's security, or infringe upon their freedom or dignity."¹² The new economic perspective of the regime was also becoming clear through the speeches of government ministers and Nasser himself. Nasser warned of "opportunistic individualism and exploitation

¹¹ For more on the exceptional courts, see Muhammad Kamil 'Ubayd, *Istiqlal al-Qada'*; and Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge: Cambridge University Press, 1997). Documentation of the early cases of the *Mahkamat al-Thawra* can be found in Amin Hasan Kamil, *Mahkamat al-Thawra* (Cairo, 1953).

¹² Article 8.

of the people by a profiteering minority,” and he argued that “economic initiative must be the state’s, which protects the interests of all classes.”¹³ In 1958, the regime put this rhetoric into more concrete practice with a new law requiring a license from the Ministry of Industry for the establishment, expansion, or transformation of any private sector enterprise.¹⁴

Despite the increasing restrictions on investments and no foreseeable end to government encroachment in the private sector, the government still looked to the private sector to provide a full 70 percent of all investments in the 1960–1965 development plan. Numerous accounts illustrate the regime’s repeated assurances that it would not make further moves to nationalize the economy and that it might even divest control of the economy in the near future.¹⁵ Wary of the regime’s intentions and aware of the increasing political and economic constraints on the ground, industrialists showed a decreasing willingness to accept the assurances of the regime. Foreign investment in the economy totaled only £E 8 million (\$20 million) between 1954 and 1961, and it was mostly concentrated in the petroleum industry. Private investment from domestic sources declined from £E 80 million per year in 1952 to £E 40 million in 1956.¹⁶

Simultaneously, some private investors actively divested their assets and transferred them abroad. This divestment came principally in the form of profit distributions through dividends. For example, Misr Mehalla al-Kubra Spinning and Weaving Company increased dividends to 77 percent of its profits in 1956, 79 percent in 1957, and further still to 81 percent in 1958.¹⁷ This method of divestment was put to an end in January 1959 when the regime issued law 7/1959 forbidding more than a 10 percent

¹³ Speech by Nasser at the Third Co-operative Congress, 1957, as cited in O’Brien, *The Revolution in Egypt’s Economic System*, 102.

¹⁴ Law 21 of 1958.

¹⁵ John Waterbury, *Exposed to Immense Delusions: Public Enterprise and State Power in Egypt, India, Mexico, and Turkey* (Cambridge: Cambridge University Press, 1993); Anouar Abdel-Malek, *Egypt: Military Society* (New York: Vintage Books, 1968); Charles Issawi, *Egypt in Revolution: An Economic Analysis* (London: Oxford University Press, 1963); O’Brien, *The Revolution in Egypt’s Economic System*.

¹⁶ Private domestic investments in industry expanded and then contracted severely. From 1954–1955 to 1955–1956, private investment in the industrial sector increased from £E 27.6 million to £E 41.3 million but then dropped significantly to £E 30.4 million in 1958–1959 and to zero in 1959–1960. See Mourad Magdi Wahba, *The Role of the State in the Egyptian Economy 1945–1981* (London: Ithaca Press, 1994). Goldberg’s comparison of long-term sovereign debt with yields demanded by portfolio investors who were working with fixed assets suggests that there was a corresponding “investment risk premium” during the first years of the new regime because of the increasingly uncertain investment environment. See Goldberg, 140–141.

¹⁷ Wahba, 55.

distribution of profits. In its place, other methods of divestiture were developed, including raising administrative costs to artificially high levels for distribution to members of the boards of directors.¹⁸ Additional accounts point to evidence of capital flight through banknote exports, gold exports, and the issuance of false bills of lading.¹⁹

When it became increasingly clear that the private sector was not about to risk its assets in the troubling investment climate, the regime decided to bring private resources under state control by force. In February 1960, the regime nationalized Bank Misr and the Central Bank. These were the first major nationalizations of Egyptian-owned companies, and they were among the largest single privatizations, with Bank Misr controlling a full 20 percent of Egypt's industrial output and more than half of the Egyptian textile industry.²⁰ The takeover of Bank Misr was followed by a vast wave of nationalizations in the summer of 1961 that affected every sector of the economy. The entire cotton trade was put under government control, as well as all aspects of foreign trade, in June 1961.²¹ One month later, law 117 nationalized all remaining private banks and forty-four companies in a variety of industries. Law 118 gave the regime a controlling interest in a further eighty-six companies engaged in commerce and manufacturing. Finally, under law 119 the shares owned by individuals in excess of £E 10,000 (\$23,000) for another 147 medium-sized enterprises were forcibly transferred to the state, with the remaining shares fully expropriated in 1963. During the same summer of 1961 another round of land reform was implemented, lowering the limit on land ownership from 200 *feddan* per person to 100 *feddan* per person. A total of 257,000 *feddan* (266,766 acres) were confiscated.

Nationalization of the private sector took on a more overtly political tone following the breakdown of the United Arab Republic, which had bound Syria and Egypt together into a formal republic. Reaction to the nationalizations among the Syrian business community was severe, and the first nationalizations carried out in Syria produced an alliance between business interests and factions in the Syrian military. In September 1961, this alliance carried out a coup. The three-year experiment of the United Arab Republic, the showcase of the Arab nationalist movement, was brought to an abrupt end. Nasser perceived the Syrian coup

¹⁸ Wahba, 56.

¹⁹ Goldberg, 138, citing Mustafa al-Saqqaf, *al-Raqaba 'ala al-Naqd al-Ajnabi fi Misr* (Cairo: Egyptian Renaissance Press, 1954), 158–163.

²⁰ O'Brien, *The Revolution in Egypt's Economic System*, 125.

²¹ Law 69, 70/1961.

as a challenge to his leadership in the Arab world, but more important, he was worried that he might face a similar challenge from his own business community. In October 1961, Nasser moved to neutralize the “reactionary capitalists,” whom he suspected could potentially challenge his power. The assets of 167 citizens were sequestered, and 7,000 citizens were deprived of the right to participate in political life. In 1963 and 1964 the nationalization of industry was extended to construction and pharmaceutical companies, and incomes above £E 10,000 (\$23,000) per year were taxed at a 90 percent rate.²² By the early 1960s, Nasser had nationalized virtually the entire private sector, with only small workshops and shopowners still in control of their property.

For the first five years following the bulk of nationalizations, the Egyptian economy seemed to respond favorably to state guidance. The rate of GDP growth increased from 5.3 percent per year during the 1956–1961 period to 6.1 percent per year over the 1961–1966 period. However, these promising rates of economic growth were shortlived, and Egypt soon found itself plagued by economic turmoil. The problems of chronic inefficiency associated with Import Substitute Industrialization (ISI) were particularly acute in the Egyptian case. The organization of industry into state-owned enterprises with monopolies on production failed to promote efficiency. Additionally, the public sector was saddled with the burden of providing ever increasing subsidies on basic commodities, managerial positions were often distributed according to political considerations rather than merit, and the government bureaucracy became bloated in the regime’s efforts to hide unemployment.²³

Added to these inefficiencies, Egypt had to contend with a number of economic burdens that would have been difficult for any economic system to bear. The first among these was a population growth rate of 2.5 percent per year, which was partly the result of better health care and social services provided by the state. Second, Egyptian participation in Yemen’s civil war from 1963–1967 was a financial drain.²⁴ Finally, the 1967 war with Israel was an immense financial and military loss for Egypt. Not only was the Egyptian air force almost completely destroyed, but Egypt also lost control of the Sinai Peninsula and with it the remittances from the Sinai oil fields and the Suez Canal. The ongoing war of

²² John Waterbury, *The Egypt of Nasser and Sadat*, 75.

²³ For the best accounts of public-sector problems, see Waterbury, *The Egypt of Nasser and Sadat*, and Waterbury, *Exposed to Imnumerable Delusions*.

²⁴ Throughout the four-year period of involvement, Egypt was fielding between 20,000 and 40,000 troops in Yemen.

attrition with Israel was a further drain on the economy. As a result, GDP growth slowed significantly to a meager 2.9 percent per year from 1966–1971. After taking into account the natural population growth rate, the real growth rate for the period averaged only 0.4 percent per year. Some contend that real GDP and per capita incomes actually declined during this period after taking population growth into account, which is not at all impossible given the bias of Egyptian government statistics.²⁵ Even if we take government statistics at face value, the period was a spectacular failure in terms of economic growth.

Underlying all of the most noticeable problems facing the economy, capital flight abroad in the period leading up to the socialist transformation of the country was extremely damaging to the economy. According to Fu'ad Sultan, one of the chief architects of the economic liberalization program, an estimated US\$20 billion (£E8 billion) was held abroad by Egyptian citizens in the 1960s, and an equal amount was transferred abroad in the 1970s.²⁶ If these figures are correct, then transfers abroad represented perhaps the single biggest drain on the Egyptian economy throughout the period. By comparison, in the ten-year period between 1965 and 1974, domestic sources of investment in the economy totaled £E2.3 billion (US\$5.8 billion). In other words, the private savings of Egyptian citizens that were transferred to foreign bank accounts in the years leading up to the nationalizations were nearly three and a half times the total amount of domestic sources of investment in the Egyptian economy from 1965–1974. If we compare this £E8 billion of capital flight with the total fixed capital investments in the economy (including external funding sources such as foreign aid, external borrowing, and debt financing), the figure is still staggering. The £E8 billion that was sent out of the country leading up to the nationalizations was more than double the figure of total fixed investments in the economy from 1965–1974, which stood at £E3.6 (US\$9 billion). Because of political uncertainties and an inhospitable investment climate, Egyptians held considerable assets abroad at a time when the country faced increasing and severe capital

²⁵ Waterbury, *The Egypt of Nasser and Sadat*, 210. Waterbury notes that "... there was no incentive anywhere in the system that would have encouraged an honest appraisal of performance – in the name of protecting socialism's good name and Egypt's international stature, all failures had to be swept under the rug" (122).

²⁶ Kirk Beattie, *Egypt during the Sadat Years* (New York: Palgrave, 2000), 150. The majority of the \$20 billion that was held abroad by Egyptians in the 1960s was probably transferred out of the country in the 1950s. The additional transfer of \$20 billion in the 1970s probably came from the hundreds of thousands of Egyptians who were working abroad in the Persian Gulf.

shortages. The trend continued throughout the 1970s with the transfer of another \$20 billion in assets.

Even if Fu'ad Sultan is off in his estimates by several billion dollars, this capital flight clearly represented the single largest drain on the Egyptian economy. It also explains why the government was so intent on making every assurance to investors that their assets would be safe throughout most of the 1950s. However, rather than strengthen institutions that would make property rights more secure (particularly judicial institutions), the regime instead removed all checks on its power and put an end to Egypt's experiment with liberal-democratic political institutions. When the regime found that private sector industrialists were concerned about the political and economic direction of the country, it decided that the state would have to seize what assets remained in order to mobilize capital for productive investment.

Nasser's preference for an expansion of executive powers at the expense of autonomous rule-of-law institutions continued into the late 1960s, despite its crippling effect on the economy. The final and most significant blow to Egyptian judicial institutions came in the 1969 "massacre of the judiciary." In the wake of the humiliating defeat in the 1967 war and with increasing calls from both the Judges' Association and the Lawyers' Syndicate for political and judicial reform, Nasser decided that judicial autonomy was too great a threat to the regime.²⁷ In an executive decree, Nasser dismissed over 200 judicial officials, including the board of the Judges Association, a number of judges on the Court of Cassation, and other key judges and prosecutors in various parts of the judicial system. Moreover, the board of the Judges' Association was dissolved, and new members were appointed by the regime. To ensure that resistance to executive power would not reemerge easily, Nasser created the Supreme Council of Judicial Organizations, which gave the regime greater control over judicial appointments, promotions, and disciplinary action.

Another executive decree consolidated executive control over the process of judicial review through the creation of a new, executive-dominated Supreme Court.²⁸ This court was given the exclusive power of judicial review, replacing the system of *abstention control* in which each individual court practiced constitutional interpretation and periodically abstained

²⁷ For more on the calls for political and judicial reform coming from both the Judges' Association and the Lawyers' Syndicate, see Bruce Rutherford, *The Struggle for Constitutionalism in Egypt: Understanding the Obstacles to Democratic Transition in the Arab World* (Ph.D. Dissertation, Yale University, 1999), 278–285.

²⁸ *al-Mahkama al-Ulia'*, established by decree 81 of 1969.

from enforcing laws that were deemed to violate articles of the Constitution. The practice of abstention control had long been a thorn in the side of the regime dating back to its first use in a precedent established by the *Majlis al-Dawla* on February 10, 1948.²⁹ A series of acquittals in high-profile cases in the years preceding the Supreme Court reform are thought to have motivated the regime's action.³⁰ In its explanatory memorandum to decree 81/1969, the regime made no attempt to hide the purpose of the new court when it declared openly that

it has become 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. . . .

The legislator depends on, or is hindered by, his task according to what is handed down in the way of interpretation of texts, especially because legislation is not always able to follow the changes which occur in a society with the necessary speed. This makes the task of the judge in the stage of transition to socialism of the utmost importance and assures his vanguard role and his responsibility to preserve the values of the society and its principles as an element completing his independence.³¹

Essentially, the new Supreme Court centralized the process of judicial review and placed it under the tight control of the regime. Court justices were appointed directly by the president for three-year terms, and the court was regularly stacked with pro-regime justices. In the unlikely event that judicial resistance to executive policy emerged, the president could easily appoint new justices to replace the old.³² From 1969–1979, when the Supreme Court was in operation, it made over 300 rulings, not

²⁹ A Cairo trial court attempted to set a similar precedent in May of 1941, but an appeals court overturned its ruling two years later. In the ruling on February 10, 1948, the *Majlis al-Dawla* reasoned that if any court finds two laws contradictory in a dispute, then the court is obliged to determine which of the two laws should be applied. Because the Constitution is considered to have supremacy over all other laws, the *Majlis al-Dawla* reasoned that the court should not apply other laws that come into conflict with it. See Adel Omar Sherif, *al-Qada' al-Dusturi fi Misr*, 78. Also see the speech by Mamduh 'Atiyya, the first chief justice of the Supreme Constitutional Court, "Darasa Maqarana Tahliya Hawl Qanoon al-Mahkama al-Dusturiyya al-'Ulia," reprinted in *al-Mahkama al-Dusturiyya al-'Ulia*, Vol. 1, 107–144.

³⁰ See Brown, *The Rule of Law*, 89.

³¹ The text of the explanatory memorandum is reproduced in Imam, *Mathbahat al-Qada'*, 136–137, as cited in Brown, *The Rule of Law*.

³² For more detail on the institutional configuration of the Supreme Court and its competencies, see Hisham Muhammad Fawzi, *Raqaba Dusturiyya al-Qawaniin: Darasa Maqarina Bayn Amrika wa Misr*, 54–60; 'Adil 'Omar Sherif, *al-Qada' al-Dusturi fi Misr*, 80–83; Yehia al-Gamal, *al-Qada' al-Dusturi fi Misr*, 109–133.

one of which significantly constrained the regime.³³ From the standpoint of the legal profession, the shift from abstention control to centralized judicial review was a mixed bag. Abstention control had always been an inadequate method of judicial review because, although laws could be disregarded in individual cases, courts did not have the power to strike down legislation. Not only did abstention control impair the power of the judiciary vis-à-vis the executive, but it also led to inconsistent outcomes across different cases applying the same laws. But despite the shortcomings of the decentralized system of abstention control, the legal profession was outraged by the regime's audacity in establishing a new Supreme Court with virtually no autonomy from government control.

The creation of the executive-dominated Supreme Court and the "massacre of the judiciary" in 1969 marked the pinnacle of Nasser-era domination of the judicial system and the nadir of formal institutional protections on property rights. By the time of Nasser's death in September 1970, the Egyptian economy was in a state of 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 as the war of attrition dragged on along the Suez Canal. Nasser's successor, Vice President Anwar Sadat, turned almost immediately to foreign sources of capital to make up for the domestic shortfall. However, it proved extremely difficult to convince investors that their assets would be safe in Egypt, particularly given the fact that this was the same regime that had seized foreign assets only a decade earlier.

EGYPT'S ECONOMIC OPENING – AL-INFITAH AL-IQTISADI

The possibility that the Egyptian regime might renege on its renewed commitment to private property rights proved to be a major disincentive for both foreign and Egyptian investors. Worldwide, firms were obsessed with the risk that investment in the developing world entailed after a string of expropriation movements in the 1950s and 1960s. A partial list of foreign countries that seized foreign assets through the 1960s includes Algeria (1967), Argentina (1959), Brazil (1959–1963), Burma (1963–1965), Ceylon (1962–1964), Cuba (1960–1962), Egypt (1956,

³³ Bruce Rutherford, "The Changing Political and Legal Role of the Egyptian Supreme Constitutional Court." Paper presented at the annual meeting of the Middle East Studies Association, 1996, 13.

1961, 1963–1964), India (1956), Indonesia (1963–1965), Iraq (1964), Syria (1965), and Tanzania (1966–1967).

In the wake of national independence movements and economic nationalization campaigns worldwide, a virtual industry focusing on “political risk assessment” emerged in the 1960s and 1970s. Economists and business faculty produced a prodigious volume of studies aspiring to create a framework for the measurement of political risk,³⁴ business consultants attempted to assess the degree of political risk in individual countries,³⁵ and trade magazines obsessed about the perils of expropriation.³⁶ The overriding sentiment in much of this literature was that “a common cause of hesitancy in committing funds is fear of expropriation or nationalization of the investment . . . companies are still reluctant to take all the risks of establishing a new business abroad, and fostering and developing it, only to have it taken over . . . the danger [of expropriation] lurks throughout much of the world.”³⁷

In many of these studies, investors were urged to examine the host country’s legal system in order to assess the general investment climate and the extent of concrete protections on property rights. For example, one study from the period suggested that:

The quality of a legal system in a host nation is a major element of the investment climate. The investor is forced to make at least implicit judgments about certain elementary concepts of justice, continuity, and predictability as dispensed by the legal system.

³⁴ Dolph Warren Zink, *The Political Risks for Multinational Enterprise in Developing Countries* (New York: Praeger, 1973); Stefan Robock, “Political Risk: Identification and Assessment.” *Columbia Journal of World Business* (July–August 1971): 6–20; Frederick Truitt, *Expropriation of Private Foreign Investment* (Bloomington: Graduate School of Business, Indiana University, 1974); Ingrid Delupis, *Finance and Protection of Investments in Developing Countries* (Essex: Gower Press, 1973); Frank Knight, *Risk, Uncertainty and Profit* (Chicago: University of Chicago Press, 1971); Charles Nehrt, *The Political Environment for Foreign Investment* (New York: Praeger, 1970); Robert Aliber, “Exchange Risk, Political Risk, and Investor Demands for External Currency Deposits.” *Journal of Money Credit and Banking* (May 1975): 161–179; Norman Baglini, *Risk Management in International Corporations* (New York: Risk Studies Foundation, 1976).

³⁵ Many examples of political risk studies focused on the Egyptian business environment follow.

³⁶ For examples, see Franklin Root, “The Expropriation Experience of American Companies: What Happened to 38 Companies.” *Business Horizons* 11 (April, 1968): 69–74; Margaret Kelly, “Evaluating the Risks of Expropriation.” *Risk Management* (January 1, 1974): 23–43; Antoine Van Agtmael, “How Business Has Dealt with Political Risk.” *Financial Executive* (January 1976): 26–30; Robert Hershberger and John Noerager, “International Risk Management.” *Risk Management* (April 1976): 23–34.

³⁷ Truitt, 13.

The presence of a strong, independent, and competent judiciary can be interpreted as an indicator of a low propensity to expropriate... If this judicial system is strong, independent, and competent, it will be less likely to “rubber stamp” the legality of an expropriation and more likely to accede to a standard of fair compensation. The effect of this would be to lower the propensity of the host nation government to expropriate.³⁸

It was in this context of elevated concern about the risks of expropriation and the insecurity of property rights that Sadat attempted to attract foreign investment and Egyptian private investment. Sadat’s first attempt to assure investors that Egypt was turning a new corner came with law 34/1971, issued less than one year after Nasser’s death.³⁹ The law repealed the government’s ability to seize property, stating, “It is illegal to put private property owned by real persons under sequestration except with a legal order.” Article 3 added that a “legal order” could only be issued in cases concerning corruption, the drug trade, or other criminal offenses. Law 65/1971 extended anti-sequestration guarantees to Arab capital, in addition to providing tax incentives for investments.⁴⁰ Sadat also approved the IBRD framework for the settlement of foreign investment disputes through international arbitration by way of presidential decree 90/1971.⁴¹ Presidential decree 109/1972 further tied Egypt to the Agreement for the Establishment of the Arab Organization for the Safeguarding of Investments.

But the most important assurance that the regime was committed to respecting property rights in the early 1970s was contained in the new Constitution of 1971. Although still reserving a central role for the public sector in the national economy, the Constitution sought to reestablish the security of private property in articles 34–36:

Article 34

Private property shall be protected and may not be put under sequestration except in the cases specified in the law and with a judicial decision. It may not be expropriated except for a public purpose and against a fair compensation in accordance with the law. The right of inheritance is guaranteed in it.

³⁸ Truitt, 44–45.

³⁹ *al-Jarida al-Rasmiyya*, no. 124, 17 June 1971.

⁴⁰ *al-Jarida al-Rasmiyya*, no. 40, 30 September 1971.

⁴¹ *al-Jarida al-Rasmiyya*, no. 141, 11 November 1971.

Article 35

Nationalization shall not be allowed except for considerations of public interest, by means of law and with compensation.

Article 36

General confiscation of property shall be prohibited. Special and limited confiscation shall not be allowed except with a judicial decision.

The proposed Constitution was put to a national referendum in September 1971 and was approved by 99.98 percent of voters. The irony of the situation was surely not lost on potential private investors. The regime was intent on attracting private investment, and it was employing the language of property rights to do so. But what kind of real guarantees were being extended, particularly in light of the fact that the national referendum, like every referendum since the Free Officers' coup in 1952, was rigged by the government? The supposed 99.98 percent voter approval was an absurd illustration of the power of the regime to unilaterally expand and contract legal rights to suit its needs at the time. Moreover, even the assurances provided in both law 65/1971 and in the Constitution were not absolute. Rather, they were to be interpreted by other laws on the books. For example, in the case of law 65 of 1971, property could still be seized by court order in the event that "criminal offenses" were involved. But with a whole array of loosely worded criminal offenses on the books, including financial crimes damaging the "public interest," real guarantees to private property were questionable at best. Similarly, the Constitution stated that private property would be protected, "*except in the cases specified in the law*" and "*in accordance with the law.*" Not only did this language open the door to the interpretation of constitutional guarantees based on illiberal laws already on the books, but it also did not address the issue of the government's ability to unilaterally issue new legislation to suit its current needs. Nor did law 65/1971 or the new Constitution address the lack of independent legal institutions with the power to protect private property.⁴² In short, repeated assurances by the government that it would respect property rights fell far short of providing real safeguards against state expropriation on the ground.

⁴² The 1971 Constitution called for the establishment of the Supreme Constitutional Court in articles 174–178, but the enabling legislation was not passed until 1979 and it did not begin operations until 1980. Moreover, the Constitution did not establish concrete guarantees for an independent appointment process for justices. Rather, it stated, "The law [of the SCC] shall organize the way of formation of the Supreme Constitutional Court and prescribe the conditions to be fulfilled by its members, their rights and immunities" (article 176).

On a more constructive note, the government made limited moves to correct past infractions of property rights through laws 53/1972⁴³ and 69/1974.⁴⁴ These laws reversed the sequestration of property legislated by laws 119/1964 and 162/1958. However, these laws simultaneously placed strict limits on the amount of compensation that could be claimed, setting the limits at £E 30,000 for individuals or £E 100,000 for a family. The regime was attempting to show its good intentions toward private property, but by placing caps on compensation, it once again confirmed the right of the state to expropriate property above these limits. Moreover, these laws did nothing to ensure that similar legislation would not be issued in the future. As a result, the influx of foreign investment was miniscule. From 1971 to June 1974, a paltry fifty projects were approved with a total value of only £E 13 million (\$29 million). By 1974, not one of these projects had initiated operations.⁴⁵ Potential investors both in Egypt and abroad would wait for more credible commitments to the protection of property rights.

In 1974, the regime issued its landmark “October Paper,” a document designed to explain the new economic orientation of the government. The document stated that lack of investment capital posed the single biggest obstacle to national economic development and that attracting foreign investment was an indispensable way to make up for domestic shortfalls. The October Paper also noted the importance of a secure investment environment as a key prerequisite to attracting foreign capital:

We clearly understand that the burden of progress and development rests on the shoulders of the Egyptian people. However, whatever the magnitude of domestic resources that could be amassed, we will still be in desperate need for external resources. The present condition of the world makes it possible for us to acquire those resources. . . . The time has come for the private sector to feel secure in order that it may produce and satisfy the demands of society.⁴⁶

The October Paper was put to a national referendum on May 15, 1974, and, like the Constitution, it received nearly 100 percent voter approval thanks to electoral fraud orchestrated by the Ministry of Interior. The

⁴³ *al-Jarida al-Rasmiyya*, no. 40, 5 October 1972.

⁴⁴ *al-Jarida al-Rasmiyya*, no. 30, 25 July 1974.

⁴⁵ Waterbury, *The Egypt of Nasser and Sadat*, 130.

⁴⁶ *Waraqat October* [The October Paper] *al-Tali'a*, June 1974, 139–140, as cited in Khaled Mahmud Fahmy, *Legislating Infitah: Investment, Currency, and Foreign Trade Laws* (Cairo: American University in Cairo Press, 1988).

October Paper laid the groundwork for law 43/1974, which provided a new, more detailed framework for the operation of foreign capital in Egypt. Law 43 provided guarantees and incentives to foreign investors, including tax exemptions (articles 16, 17), the ability to import new technology and machinery for production (article 15), partial exemptions from currency regulations (article 14), exemptions from law 73/1973 requiring labor representation on the boards of directors (article 10), exemptions on limits to annual salaries as governed by law 113/1961, and, finally, guarantees against nationalization and sequestration (article 7). In this last regard, article 7 repeated the government's commitment that "[t]he assets of such projects cannot be seized, blocked, confiscated or sequestered except by judicial procedures."

Egyptian newspapers and government officials anticipated a flurry of economic activity and the prompt injection of much-needed foreign capital into the economy after the passage of law 43/1974. Once again, they were sorely disappointed. Foreign investors were reluctant to set up shop in Egypt for three primary reasons: (1) external instability caused by the ongoing conflict with Israel, (2) an inhospitable investment environment brought about by an unreliable government bureaucracy and unfavorable regulations for repatriation of profits, and (3) the lack of credible commitments that private property would not be confiscated. On this last point, the government had still done nothing to address the fact that it could unilaterally change the legislation that it had so easily produced.⁴⁷ Foreign analyses of law 43/1974 concluded that the property rights provisions were "... really of little protection."⁴⁸ In lieu of foreign direct investment, the government continued to rely on foreign aid, foreign loans, and deficit spending.

The gravity of the economic problems and their implications for political stability were brought into sharp relief by the food riots of January 18–19, 1977. Riots erupted in Cairo and spread throughout the country when the government attempted to reduce subsidies on thirty basic commodities, including rice, sugar, and gasoline, in an attempt to deal with budget constraints. After two days of rioting, 79 people had been killed, 800 had been wounded, and over 3,000 had been arrested in the worst outbreak

⁴⁷ In a cross-national study, Quan Li finds that tax incentives typically do not compensate for weak rule of law institutions in attracting foreign direct investment. Quan Li, "Democracy, Autocracy, and Tax Incentives to Foreign Direct Investors: A Cross-National Analysis." *Journal of Politics* 68 (2006) 62–74.

⁴⁸ Jeswald Salacuse, "Egypt's New Law on Foreign Investment: The Framework for Economic Openness." *International Lawyer* 9 (1975).

of civil violence since the regime took power in 1952.⁴⁹ In the wake of the riots, the Egyptian government received short-term relief through a loan package of \$3.6 billion from Persian Gulf states, but it was becoming increasingly clear that dependence on foreign loans only added to the problem. By 1977, debt servicing reached \$1 billion per year and consumed a full 35 percent of export earnings.

In the wake of the food riots, the government made another concession to the foreign investment community in an attempt to attract much-needed capital. Law 32/1977 removed the dual exchange rate on the Egyptian pound, thereby easing the ability of foreign investors to repatriate profits.⁵⁰ Law 32/1977 also extended to Egyptians the same benefits and guarantees that were provided to foreign capital in law 43/1974. This was almost certainly motivated by an increasing awareness that expatriate Egyptians working in the Gulf had accumulated impressive amounts of money and that, if this money was brought back for investment in Egypt, it could represent a huge influx of development capital. Unfortunately, law 32/1977 again failed to address the core concerns of both domestic and foreign investors. One could only guess how long the government would continue to invite capital without providing adequate institutional safeguards against expropriation.

Curiously, the government's own publications directed toward private investors illustrated its own awareness of the need to provide credible commitments that property rights would be secure. In its 1977 *Legal Guide to Investment in Egypt*, the General Authority for Investment and Free Zones affirmed that "[t]he Arab Republic of Egypt actively encourages the investment of foreign capital within its borders in order to advance economic and social development." The investment guide went on to say the following:

The 1971 Permanent Constitution of Egypt is based upon respect for individual freedoms and for the rule of law. For the private investor, its provisions protecting private property are of particular interest and are to be found in articles 29 and 34–36.

The draftsmen of the Constitution recognized that declared constitutional rights and freedoms may be ineffective in the absence of some institution

⁴⁹ These are the official figures provided by the government. It is quite likely that the extent of violence was far greater.

⁵⁰ Law 32/1977 can be located in *al-Waq'ai al-Misriyya*, no. 23, 9 June 1977. Prior to 1977, currency transferred to Egypt for investment had a rate of \$2.50 per Egyptian pound, but when profits were repatriated the mandatory rate of exchange was \$1.70 per Egyptian pound.

or mechanism to enforce them. It was for this reason, therefore, that the 1971 Constitution confirmed the establishment of a Supreme Constitutional Court to judge the constitutionality of laws and regulations and to render authoritative interpretations of legislative texts. As organized by Law 81 of 1969, the Supreme Constitutional Court [sic] has jurisdiction in the following cases . . . ⁵¹ [emphasis added].

The investment guide attempted to assure investors of the security of the legal system, but the contradictions were once again plain for all to see. It was true that “the 1971 Constitution confirmed the establishment of a Supreme Constitutional Court to judge the constitutionality of laws and regulations and to render authoritative interpretations of legislative texts.” However, by 1977 this independent court had still not been established because the enabling legislation had been delayed by the regime. In its place was the tremendously political Supreme Court that had been established by Nasser in 1969 as a means to rob regular courts of the ability to perform judicial review and to centralize control in an executive-dominated court. Moreover, the eight new draft laws circulated by the government between 1971 and 1978 hardly envisioned a Supreme Constitutional Court with real independence from the regime. Each bill proposed a new way for the executive to exercise direct control over the court. For example, most drafts proposed an SCC in which justices would serve renewable terms between five and seven years in length, with appointments being made by different actors in the regime, such as the Minister of Justice, the rubber-stamp People’s Assembly, or directly by the President of the Republic himself. One draft law went so far as to recommend that the Supreme Constitutional Court be a consultative body with absolutely no binding power over the government.⁵²

The passage from the investment guide demonstrates that the government was well aware of the concerns of private investors, but it also suggests that throughout most of the 1970s the regime was reluctant to create a truly independent court with powers of judicial review. However, by the late 1970s, it had become increasingly clear that investors were not willing to simply take the word of the government when the same regime and the same personalities had only fifteen years earlier engaged in one

⁵¹ Arab Republic of Egypt, General Authority for Investment and Free Zones, *Legal Guide to Investment in Egypt*, 9–10.

⁵² For more on the various draft laws proposed by the government, see Rutherford, 320–323; and the February 1978 issue of the Lawyers’ Syndicate publication, *al-Mohamah*.

TABLE 3.1: *Distribution of capital by sector and source in law: 43 projects under way as of December 31, 1980*

Sector	Gross				
	Capital (£E)	Egyptian	Arab	US	Other
Services and Finance	634,412,000	68%	19%	2%	11%
Agriculture and Construction	92,426,000	72%	12%	0.4%	15.6%
Industry	175,497,000	56%	25%	6%	13%
Total	902,335,000	65%	19%	3%	13%

Source: *al-Ahram al-Iqtisadi*, no. 635, March 16, 1981, as cited in Waterbury, *The Egypt of Nasser and Sadat*, 148.

of the most sweeping nationalization programs in the developing world. Studies conducted by international consulting firms in the late 1970s confirmed that investors “remained reluctant to invest in long-term projects due to uncertainty about the future of the Egyptian economy.”⁵³

By the close of the 1970s, investor concern about expropriation was also reflected more concretely in the volume of foreign operations that were established under law 43/1974. By the end of 1980 (the same year that the Supreme Constitutional Court began operations), the capital allocated to law 43 projects that had actually begun operations totaled only £E 902,335,000 (\$1,263,269,000).⁵⁴ The paucity of this figure is even more sobering when we consider that 65 percent of investments were from Egyptian sources and that much of the Egyptian financing came from the public sector itself in the form of joint ventures. True foreign direct investment amounted to only \$442,144,000 (see Table 3.1).

Even more revealing than the low volume of investment were the sectors of the economy in which investments were made. Only 19 percent of total investments were made in the industrial sector, which entailed high initial outlays of capital, a long-term return on investment, and therefore the necessity of long-term security in the economy. In contrast, a full 81 percent of total investments were directed to nonindustrial sectors,

⁵³ Robert Nathan Associates, “A Study of the Feasibility of a Private Investment Encouragement Fund for the Egyptian Private Sector.” Submitted to U.S. Agency for International Development, September 1979, 216.

⁵⁴ The disappointing investment figures received much press coverage. See, for example, Arnold McKay, “U.S. Investors Fail to Rush into Egypt: Program to Stir U.S. Investment in Egypt Generally in Limbo.” *Journal of Commerce*, March 27, 28, 1978.

such as banking and tourism. These sectors of the economy conversely required low initial outlays of capital, provided a short-term return on investment, and risked less in the event of nationalization.

The specific activities of law 43 banking operations provide an even more striking picture of how insecure property rights deprived the Egyptian economy of long-term investment capital. A report by the government's Central Auditing Agency during the period revealed that banks were investing only 42 percent of their total local deposits in local investment projects, with the rest of their holdings going to investments overseas.⁵⁵ In effect, law 43 banking projects resulted in a *net outflow* of capital from the country. Another business study from the period concluded that foreign investment was weak and that "the bulk of investments is not being made in capital-intensive activities, but rather in areas promising quick returns such as trading and service activities and consumer products." In other words, both data and analysis from the period support North's contention, made over a decade later, that "firms come into existence to take advantage of profitable opportunities, which will be defined by the existing set of constraints. With insecure property rights . . . firms will tend to have short time horizons and little fixed capital, and will tend to be small scale."⁵⁶

The reluctance of foreign investors to enter the Egyptian market for fear of expropriation was also reflected in the fact that most American businesses in Egypt undertook capital-intensive operations only when they received medium- and long-term financing for projects from the U.S. Agency for International Development under its Private Investment Encouragement Fund. These long-term, capital-intensive investments in the Egyptian economy were publicly rather than privately financed because private investors were unwilling to risk expropriation. Moreover, nearly every American firm investing in Egypt during this period did so only after securing costly insurance from the Overseas Private Investment Corporation, substantially reducing profit margins.⁵⁷

⁵⁵ *al-Ahram al-Iqtisadi*, no. 628, January 26, 1981, as cited in Waterbury (1983), 149. The same observation on foreign banking operations was made in a business report written during this period. See David William Carr, *Foreign Investment and Development in Egypt* (New York: Praeger Publishers, 1979), 58–59.

⁵⁶ Douglass North, *Institutions, Institutional Change, and Economic Performance* (Cambridge: Cambridge University Press, 1990), 67.

⁵⁷ This insurance was specifically arranged to cover for three types of risk: inconvertibility of profits, expropriation, and war loss. U.S. Department of Commerce, "Investing in Egypt." *Overseas Business Reports*, OBR 81–08.

The low volume of total investments and the attention devoted to low-risk investments with promises of quick returns did little to help the ailing economy. More than seven years after the passage of law 43/1974 and a full decade after the first moves to attract foreign capital through law 65/1971, these projects provided a total of only 74,946 jobs.⁵⁸ Compared with the total Egyptian workforce of nearly 11 million, this means that law 43 projects accounted for only 0.7 percent of the total employment in the country. With the Egyptian population growing at a rate of approximately one million per year by the end of the 1970s, law 43 projects were not generating nearly enough new employment to address this population explosion. By 1979, the year that the Supreme Constitutional Court was created, total external debt had reached \$15.4 billion, and debt servicing consumed 51 percent of all export earnings. The Egyptian economy was a virtual time bomb, and the political survival of the regime hung in the balance. The specter of the 1977 food riots was on the mind of Sadat as he searched for more ways to attract foreign investment. It was in this context that the new Supreme Constitutional Court was established on August 29, 1979.⁵⁹

Mahmud Fahmy, one of the main architects of the economic opening and a member of the committee that drew up the first draft of the Supreme Constitutional Court law, recalled that

the establishment of the Supreme Constitutional Court was really the result of internal and external pressure. From inside, the legal profession was pushing and they were very upset about the old Supreme Court because it was really a tool to legitimize the government's acts and views and it was not an independent body. But more importantly, from the outside there was pressure from foreign investors and even the foreign embassies. They all said, 'you are crying for investments to come but under what circumstances and with what protections?'

Fahmy concluded that "the establishment of the Supreme Constitutional Court was part of a bundle of legislative reform at the time. It [the establishment of the SCC] was intended by Sadat to keep the foreign investor at ease. The foreign investor needed to be sure that he could come

⁵⁸ Arab Republic of Egypt, Central Agency for Public Mobilization and Statistics, *Status of the Open Door Economy Investment Guide*, 54, 68.

⁵⁹ Law 48/1979 issued in *al-Jarida al-Rasmiyya*, no. 36, 6/9/1979. For an analysis of law 48/1979, see the speech given by Ahmed Mamduh 'Atieh, the first chief justice of the Supreme Constitutional Court, in *al-Mahkama al-Dusturiyya al-'Uliya*, Vol. 1, 109–130. Law 49/1979 is reproduced in the appendix.

and go as he pleased.”⁶⁰ This connection between the need to attract foreign capital and the establishment of an independent SCC as recalled by Mahmud Fahmy is confirmed by Mustafa Khalil, who held the position of prime minister when the SCC law was passed.⁶¹ According to Khalil,

There were efforts to encourage foreign investment in Egypt at the time because we were dealing with a fiscal crisis. One major factor that was impeding investment was the lack of political stability – both foreign and domestic. We issued a number of laws aimed at guaranteeing private investment such as law 43. But a major problem was that the NDP, having the majority in the People’s Assembly, could push through any legislation it wanted and change the previous laws. This was at the forefront of Sadat’s thinking when he created the Supreme Constitutional Court. He primarily wanted to make guarantees [to investors] that laws would be procedurally and substantively sound.⁶²

Unlike the Supreme Court, which operated from 1969–1979, the new SCC enjoyed considerable independence from regime interference. Its chief justice is formally appointed by the President of the Republic, but for the first two decades of its operation, the president always appointed the most senior justice serving on the SCC to the position of chief justice. A strong norm developed around this procedure, although the president always retained the formal legal ability to choose anyone meeting the minimum qualifications for the position as defined by article 4 of law 48/1979.⁶³ New justices on the Court are appointed by the president from among two candidates, one chosen by the General Assembly of the Court and the other by the chief justice (article 5).⁶⁴ In effect, the SCC

⁶⁰ Personal interview with Mahmud Fahmy, October 31, 2000. Mahmud Fahmy was a judge on the *Majlis al-Dawla* and the secretary-general of the court in the early 1970s. Fahmy was also the main legal counselor to the Minister of Economy, and he played a leading role in shaping almost every piece of legislation that liberalized Egypt’s investment environment.

⁶¹ Mustafa Khalil was prime minister from October 1978 through May 1980.

⁶² Personal interview with Mustafa Khalil, June 14, 2000. In a separate interview with Kirk Beattie, Khalil provided a similar assessment of Sadat’s general understanding of the tie between political and economic reform. According to Khalil, “he [Sadat] was anxious to have the open-door policy work, and in his mind the political *infitah* was directly related to and a necessary adjunct of getting the open-door policy to ‘take off.’” Beattie, *Egypt During the Sadat Years*, 223.

⁶³ This norm was broken for the first time in September 2001 with the appointment of Fathi Nagib as the new chief justice of the SCC. This challenge to SCC independence is examined in detail in Chapter 6.

⁶⁴ In practice, the nominations of the chief justice and the General Assembly of the SCC have always been the same.

operated for over twenty years as a self-contained and a self-renewing institution in a way that few other courts in the world operate.

Extensive safeguards were also provided to shield the Court from government interference. SCC justices cannot be removed, although they face mandatory retirement at age 66.⁶⁵ Additionally, the General Assembly of the SCC is the only body empowered to discipline members of the court, insulating SCC justices from the threat of government pressure and reprisals.⁶⁶ Moreover, article 13 states that “[m]embers of the court may be delegated and seconded *only* for the performance of legal duties associated with international organizations or foreign states, or for the accomplishment of scientific missions.” This provision deprives the government of one of the subtle techniques that it uses to corrupt personnel in other parts of the judiciary. Lucrative legal consulting positions are regularly distributed to judges in critical positions in return for tacit compliance with government interests in sensitive court cases.⁶⁷ The salaries for consulting positions to various ministries of the government are often equal to or more than the meager base salary of most judges, making cooperation with the government hard to resist.⁶⁸ Finally, provisions in law 48/1979 also give the SCC full control of its own financial and administrative matters.⁶⁹

COMPETENCIES AND INSTITUTIONAL SETTING WITHIN THE EGYPTIAN JUDICIARY

The Supreme Constitutional Court has the exclusive authority to perform three important roles: (1) issue binding interpretations of existing legislation when divergent views emerge, (2) resolve conflicts of jurisdiction between different judicial bodies, and (3) perform judicial review

⁶⁵ Mandatory retirement age was set at 64 years of age until 2001, when it was raised at the same time that Fathi Nagib was appointed chief justice of the SCC. This change is examined in detail in Chapter 6.

⁶⁶ Article 19.

⁶⁷ This is a commonly understood problem articulated by numerous judges and law professors interviewed by the author. Also see allegations by Yehia al-Rifa'i in *Istaqlal al-Qada' wa Mehna al-Intikhabat, The Independence of the Judiciary and the Ordeal of Elections* (Cairo: al-Maktab al-Misri al-Hadith), 165–170, and articles in *al-Wafd* on April 11, 1994, and October 15, 1994, by Hasan Hafiz.

⁶⁸ The case could be made that the government intentionally allows the salaries of judges to depreciate from inflation in order to put judges in a position where they are ever more dependent on this kind of supplementary income.

⁶⁹ Articles 56–60.

of legislation.⁷⁰ Without a doubt, SCC powers of judicial review are the most important of these duties. Article 29 of law 48/1979 specifies that the SCC is empowered to perform judicial review only when it receives cases transferred from courts of merit. If any court, in the course of deciding a concrete case, finds that a law being applied may be unconstitutional, it can suspend the proceedings and transfer the case to the Supreme Constitutional Court for review. In most cases, a petition for judicial review in front of the SCC is initiated at the request of litigants themselves. However, judges also have the right to initiate a petition for judicial review by the SCC if they question the constitutionality of the laws they are applying. After a ruling is issued by the SCC on the constitutionality of a law in question, the case is returned to the court of merits, and it proceeds with the new clarification provided by the SCC. In more technical terms, the institutional structure of judicial review in Egypt is *centralized* rather than *diffused*, the timing of judicial review is *a posteriori* rather than *a priori*, the SCC practices *concrete* review of real controversies rather than abstract review, and legal *standing* is restricted to litigants engaged in a real legal controversy with a stake in the outcome.

The SCC is embedded within a civil law system with an institutional configuration resembling the French judiciary. The Egyptian judicial system is composed of two separate hierarchies, one dealing with civil and criminal law and one with administrative law.⁷¹ Civil courts handle litigation between citizens in the areas of tort, contract, and family law. The Court of Cassation (*Mahkamat al-Naqd*) sits at the apex of the civil system, with primary courts (*Mahakim al-Ibtida'iyya*) and appellate courts (*Mahakim al-Isti'naf*) distributed across the country. The administrative courts (*al-Mahakim al-Idariyya*), within the State Council (*Majlis al-Dawla*), hear cases in which citizens challenge executive actions of the government or any agency within the state bureaucracy. Citizens can challenge the government on the grounds that a state agency has violated administrative laws or that administrative laws themselves contradict the Constitution. At the apex of the administrative court system sits the

⁷⁰ Statutory interpretation is initiated at the initiative of the Minister of Justice on the request of the Prime Minister, the Speaker of the People's Assembly, or the Supreme Council for Judicial Bodies.

⁷¹ For more on the basic structure of the Egyptian judicial system, see Enid Hill, *Mahkama! Studies in the Egyptian Legal System* (London: Ithaca Press, 1979); Brown, *The Rule of Law in the Arab World*; Nathalie Bernard-Maugiron and Baudouin Dupret, *Egypt and Its Laws* (Kluwer Law International, 2002); Adel Sherif, "The Origins and Development of the Egyptian Judicial System," in Boyle and Sherif, *Human Rights and Democracy, The Role of the Supreme Constitutional Court of Egypt*, eds. Kevin Boyle and Adel Omar Sherif (London: Kluwer Law International, 1996).

Supreme Administrative Court (*al-Mahkama al-Idariyya al-'Uliya*). Both the civil courts and the administrative courts regularly refer cases to the Supreme Constitutional Court for judicial review.

Dependence on courts of merit constitutes a structural weakness of the Supreme Constitutional Court. The SCC is unable to practice judicial review without first receiving a concrete dispute from a court of merit, and citizens are not able to approach the SCC directly. Clearly, this is not dissimilar to most other judicial systems and it would be unusual for citizens to be able to approach the SCC directly. The difference in the Egyptian case is that with the executive exercising a number of formal and informal controls on the functions of the rest of the judiciary, regular courts may be less willing to transfer politically sensitive laws to the SCC for judicial review. In effect, to some extent the regular judiciary performs a “gatekeeping” function that may interfere with judicial review of unconstitutional legislation. Despite this constraint, the SCC has performed judicial review on even the most sensitive political and economic issues of the day. As it will become abundantly clear in the chapters to come, thousands of regular court judges and literally millions of cases initiated per year provide so many points of entry to the SCC that petitioners wishing to contest legislation will almost always find at least one gatekeeper willing to transfer a case to the SCC.⁷² In addition, the regime restored the strength and autonomy of the administrative courts in 1972 and further in 1984 by returning to them substantial control over appointments, promotions, and internal discipline, which were stripped from them by presidential decree in 1959.⁷³

This leads to a parallel question concerning the expansion of judicial power in the administrative courts. Why did Egypt’s authoritarian regime empower and facilitate the expansion of an administrative court system, which provides another avenue for citizens to challenge the state both directly, through the power to overturn administrative decisions, and indirectly, by referring constitutional questions to the Supreme Constitutional Court?

Expansion and Empowerment of the Administrative Courts

As suggested in the [previous chapter](#), administrative courts serve several important functions for authoritarian rulers. First, they can bolster the

⁷² This is particularly true when activists initiate coordinated litigation campaigns, as human rights organizations did beginning in the mid-1990s.

⁷³ Law 47/1972 and law 136/1984. For more on these, see ‘Ubayd, *Istiqlal al-Qada’*, 290–305.

TABLE 3.2: *Growth of the Egyptian bureaucracy, 1952–1987*

Year	Number of state employees
1952	350,000
1957	454,000
1963	770,000
1966	1,035,000
1970	1,200,000
1978	1,900,000
1980	2,876,000
1987	3,400,000

Sources: Ministry of Finance, Arab Republic of Egypt, *Statistical Statement for the 1979 Budget*; Nazih Ayubi, *Overstating the Arab State*, 299.

ability of the central government to maintain discipline within the state's own bureaucratic machinery. Second, administrative courts provide essential institutional infrastructure for the protection of property rights and the promotion of market rationality by reducing corruption, abuse of power, and the manipulation of local markets. Finally, they perform a legitimizing function by providing legal recourse and some sense of justice to those who suffer at the hands of local officials.

James Rosberg was the first to observe that the Sadat and Mubarak regimes facilitated the reemergence of the administrative courts in the 1970s and 1980s in an effort to rein in their own administrative bureaucracy.⁷⁴ The public sector had mushroomed with the vast waves of nationalization, and the state bureaucracy continued to swell as a result of the government's provision of jobs to new graduates in order to stave off social unrest (see Table 3.2). One of the most pressing problems that Nasser and his successors faced under these circumstances was the inability to adequately monitor and discipline bureaucrats throughout the state's administrative hierarchy. With political parties dissolved, judicial independence impaired, the free press suppressed, and citizens stripped of access to institutions through which they could effectively protect their interests, there was little transparency in the political and economic systems. Corruption began to fester as administrators and bureaucrats abused their power and position to prey on citizens and public sector managers siphoned off

⁷⁴ James Rosberg, *Roads to the Rule of Law: The Emergence of an Independent Judiciary in Contemporary Egypt*. Ph.D. dissertation, Massachusetts Institute of Technology, 1995.

resources from the state.⁷⁵ Not only did this affect the state's institutional performance but corruption and abuse of power also began to undermine the revolutionary legitimacy that the regime enjoyed when it came to power in the 1950s.⁷⁶ Nasser also feared that the lack of transparency within the state's own administrative hierarchy masked the emergence of "power centers" within the military, the police, and the intelligence services that could challenge his authority.⁷⁷

Nasser attempted to bolster administrative monitoring and discipline through a series of centralized mechanisms. The first was to create a complaints office to which citizens could lodge their grievances. This office morphed over time into a vast array of complaints offices attached to various ministries, public sector companies, governorates, and the office of the president itself. Nasser also attempted to carry out administrative reform and monitoring through the establishment of the Central Agency for Organization and Administration, and Sadat would later create his own National Council for Administrative Development. Both strategies were deemed to be failures.⁷⁸

The monitoring agencies suffered from the same principal-agent problems and information asymmetries that had led to administrative abuses in the first place. Complaints offices were better able to overcome principal-agent problems because they generated an independent stream of information from citizens filing petitions. However, the volume of petitions reaching the central government presented an equally damning problem. The presidential complaints office alone received 4,000 petitions per day, or nearly 1.5 million per year.⁷⁹ With such an overwhelming volume of petitions, the office could not effectively process even a fraction of the petitions, nor could it identify *a priori* which complaints pointed to the most egregious abuses and which ones were frivolous. Ad hoc arrangements for the discipline of civil servants also proved to be inefficient and prone to abuse.

As it became clear that centralized monitoring strategies were failing to produce reliable information on the activities of the state's own

⁷⁵ Nazih Ayubi, *Bureaucracy and Politics in Contemporary Egypt* (London: Ithaca Press, 1980); Raymond Baker, *Egypt's Uncertain Revolution under Nasir and Sadat* (Cambridge: Harvard University Press, 1978); Moheb Zaki, *Egyptian Business Elites* (Cairo: Arab Center for Development and Future Research, 1999); Rosberg, 76–82.

⁷⁶ This was never more clear than after Egypt's humiliating defeat in the 1967 war. Egypt's failure in the war was partially the result of the state's poor institutional performance, and it marked the most significant blow to the credibility of the regime.

⁷⁷ Rosberg, 83–91.

⁷⁸ Ayubi, 305–310.

⁷⁹ Ayubi, 285–287.

institutions, Sadat enhanced the independence and capacity of the administrative court system to serve as a neutral forum for citizens to voice their grievances and to expose corruption in the state bureaucracy. The regime facilitated the strength and autonomy of the administrative courts in 1972 by returning substantial control over appointments, promotions, and other internal functions, all of which were weakened or stripped completely from the administrative courts by presidential decree in 1959.⁸⁰ The regime also expanded the institutional capacity of the administrative courts through the 1970s by establishing courts of first instance and appeals courts throughout the country.⁸¹ That the expanded administrative court system provided new avenues for litigants is clear from the rapid increase in the number of cases that were initiated throughout this period.

The administrative courts helped the regime overcome the design failures inherent to both centralized monitoring agencies and the complaints offices. Administrative courts did not suffer from principal-agent problems as did independent monitoring agencies because they produced a stream of information from aggrieved citizens themselves. At the same time, the hierarchical structure of the administrative courts enabled the regime to identify the most significant cases of administrative dysfunction through a coherent system of procedural rules, standing criteria, and the like.⁸² Frivolous petitions were winnowed out in the primary courts, but more significant cases made their way up the judicial ladder, all the while leaving a paper trail for the regime to survey. Finally, administrative courts provided a built-in mechanism to discipline the bureaucracy, illustrating Shapiro's observation that judicial institutions play "fundamental political functions" by acting as avenues "... for the upward flow of information [and] for the downward flow of command."⁸³ To say that the administrative courts could solve all of the dysfunctions of the Egyptian bureaucracy would surely be an overstatement. But, undoubtedly, the administrative courts proved more effective than the aborted strategies of centralized monitoring agencies and complaints offices.

⁸⁰ Law 136/1984. For more on these amendments, see 'Ubayd, *Istiqlal al-Qada'*, 290–305.

⁸¹ The expansion of the administrative courts is documented in *Waq'a' ai Misriyya and Majalat Majlis al-Dawla*. A concise list of the expansion of the administrative court system is reproduced in Rosberg, 191.

⁸² These are further examined in Abdel-Mahdi Massadeh, "Disciplinary Actions under the Egyptian Civil Service Legal System." *Journal of International and Comparative Law* (1991): 363–397.

⁸³ Shapiro, "Appeal," 643.

Further reform and expansion of the administrative court system took on increased urgency with the initiation of Sadat's open-door economic policy. The sudden transition from a socialist economy to a mixed public/private sector economy increased the opportunities for corruption and graft exponentially, and by all accounts these problems were severe.⁸⁴ Reports from within the state's own National Center for Social and Criminal Research observed that corruption had "become the rule rather than the exception."⁸⁵ Lack of bureaucratic discipline also resulted in the inconsistent application of the law and an uncertain investment environment. A major business consulting group operating in Egypt in the 1970s reported that "while new legislation prompted many international companies to examine the possibilities of Egypt as an investment site, most of them found that the Law 43 guidelines were too broad and their application too inconsistent by an Egyptian bureaucracy which was not uniformly committed to the new policy. Largely for this reason, substantial foreign investment was slow to materialize. . . ."⁸⁶ In some cases, low-level bureaucrats created needless obstructions in order to extract bribes. At other times, bureaucrats interfered with firms because they were ideologically opposed to the new open-door economic program.⁸⁷ In still other cases, squabbles erupted within various branches of the bureaucracy, with severe negative consequences for the foreign business community.⁸⁸

⁸⁴ This problem has been documented extensively. See Baker, *Egypt's Uncertain Revolution under Nasir and Sadat*, 175–195, 258–265; Nazih Ayubi, *Bureaucracy and Politics in Contemporary Egypt* (London: Ithaca Press, 1980); Raymond Hinnebusch, *Egyptian Politics under Sadat: The Post-Populist Development of an Authoritarian-Modernizing State* (Cambridge: Cambridge University Press), 138–142.

⁸⁵ Nazih Ayubi, *Administrative Corruption in Egypt* (Cairo: National Center for Social and Criminal Research, 1979), as cited in Hinnebusch, *Egyptian Politics under Sadat*.

⁸⁶ Business International Corporation, *Egypt: Business Gateway to the Middle East?* (Business International S.A., 1976), 115–116. Also see Carr, *Foreign Investment and Development in Egypt*, 40–53.

⁸⁷ According to the report, "Said a senior official of one of the key ministries recently: 'I have just come out of a meeting with my key coordinating people in the ministry, and they are behind execution of the policy to liberalize the economy and bring in more foreign investment. But the difficulty comes in getting the people further down to go along. The very last man on the totem pole can get things snarled since he is involved in the daily application of decisions. Until you get the little people to go along, you have problems.'" Business International Corporation, 1976, 4.

⁸⁸ "Businessmen may get caught in the crossfire between warring factions of the Egyptian bureaucracy, which may disagree on the interpretation of regulations vitally affecting a company's operating efficiency, such as customs duties or taxes." Business International Corporation, 1976, 4. For an academic analysis of these dynamics, see Raymond Baker, "Sadat's Open Door: Opposition from Within." *Social Problems* 28 (1981): 378–84.

A Business International report recounts numerous examples of foreign companies that lost large sums of money because of the inconsistent application of laws on the books.⁸⁹ The lack of discipline throughout the bureaucratic hierarchy and its adverse impact on the investment environment are summed up in the report's finding that "top people in President Sadat's government sympathize with the difficulties foreign investors will face in Egypt, because they face the same problems themselves."⁹⁰ The *Investment Climate Statement* compiled by the U.S. Department of Commerce and the *Economic Trends Report* published by the American Embassy found similar problems. The further expansion of the administrative courts through the 1980s aimed to address these bureaucratic dysfunctions.

Marketing Judicial Reform at Home and Abroad

Egyptian government officials were keen to bring judicial reforms to the attention of the international business community whenever possible. The General Authority for Investment and Free Zones published investment guides highlighting legal reforms,⁹¹ the Minister of State for Economic Cooperation elaborated on the security of the investment environment,⁹² and the Speaker of Parliament was dispatched to talk with American lawyers.⁹³ President Sadat himself talked countless times about the sanctity of the rule of law (*sayadat al-qanun*), explaining that "the transition from the state of revolution to that of continuity, a permanent constitution, and state institutions" was underway:

The time has come for us now to change this stage of revolutionary legitimacy to the stage of constitutional legitimacy, particularly since the principles of the 23 July Revolution have become deeply entrenched in our land and in the conscience of the wide masses so that now they are capable of protecting themselves by ordinary means, laws and institutions.

⁸⁹ Business International Corporation, 1976, 75–78; Business International Corporation, 1976, 122–129. Other business consultants reported the same problems. See, for example, Reckford International, *U.S. Business Experience in Egypt*.

⁹⁰ Business International Corporation, *Egypt: Business Gateway to the Middle East?*, 4.

⁹¹ Arab Republic of Egypt, General Authority for Investment and Free Zones, *Legal Guide to Investment in Egypt*, 9–10.

⁹² Egyptian Minister of State for Economic Cooperation, Gamal el-Nazer's statement on "The Legal Framework for Foreign Investment in Egypt," reprinted in *Case Western Reserve Journal of International Lawyer* 11 (1979): 613–622.

⁹³ Speech by Sayed Mar'ai to the American Bar Association Convention, reprinted in *International Law* 14 (1980).

We raised the slogan of the sovereignty of the law, and by so doing, we restituted the respect and independence of the judicial authority. That is how the sovereignty of the law, the establishment of constitutional institutions and the independence of the judicial authority enable us to close down all detention camps for the first time in forty years. All sequestrations were liquidated, and the few particularly cases which needed to be studied were examined, allowing us to turn this page over. No citizen was ever again to be deprived of his political rights and no privileges were to be allowed to one citizen over another in the practice of these rights.⁹⁴

This rule-of-law rhetoric had more than one audience. For foreign investors, rule-of-law rhetoric was used to attract capital. For foreign governments, and the United States in particular, it helped signal Egypt's political realignment from the Soviet Union to the West. For Egyptian capitalists, rule-of-law talk was intended to bring back the \$40 billion held abroad. And for all Egyptians, rule-of-law rhetoric was used to build a new legitimating ideology after the policy failures and political excesses of the Nasser regime.

There was, of course, a significant gap between the government's rule-of-law rhetoric and the operation of judicial institutions on the ground. As we have noted throughout this chapter, the disparity between rhetoric and reality was particularly significant through the 1970s when the regime sought to attract private investment without placing any practical constraints on its power. It was no wonder that private investors did not risk their assets throughout the 1970s. But institutional constraints on the state became more credible with the establishment of the Supreme Constitutional Court in 1979 and the rehabilitation of the administrative courts. The SCC began to rebuild a property rights regime through dozens of rulings in the economic sphere, which are reviewed in the following chapters. The administrative courts also opened new avenues to challenge the decisions of bureaucrats, increasing accountability and giving citizens some measure of satisfaction that the political system had mechanisms for ensuring justice – at least against low-level civil servants in areas that were less politically sensitive.

Business consultancy reports in the 1980s noted these judicial reforms as crucial steps in providing concrete mechanisms for the protection of property rights, and political risk indices also registered positive

⁹⁴ Speech by Anwar Sadat, July 22, 1977. Arab Republic of Egypt, State Information Service, *Speeches and Interviews of President Anwar El Sadat*, 108; July 22, 1976, 28, 38.

change.⁹⁵ For example, the “bureaucratic quality” index and the “law and order” index compiled by Political Risk Services both recorded positive movement beginning in 1985.⁹⁶ These indices provide only a crude approximation of the variables that they purport to track, and they are perhaps better understood as measures of investor perceptions than the reality on the ground. Still, the new institutional environment was one of the primary reasons for the sharp increase in private investment starting in the 1980s after a full decade of failed attempts to attract capital without institutional reforms.⁹⁷

The success of these institutional reforms should not be overstated. The Egyptian judiciary continued to face overwhelming problems, particularly in terms of administrative capacity,⁹⁸ which to this day has an adverse impact on the country’s investment climate.⁹⁹ What is intriguing is that an authoritarian regime was first compelled to use rule-of-law rhetoric, eventually going well beyond mere statements to carry out concrete and meaningful institutional reforms. The pressures facing the regime were not idiosyncratic, nor were the motives for initiating judicial reform. In fact, the government was grappling with many of the same dysfunctions that plague other authoritarian regimes, as reviewed in the [previous chapter](#). With unchecked power, the government was unable to attract private investment. With low levels of transparency and accountability, the government faced difficulties in maintaining order and discipline throughout the state’s administrative hierarchy. With the failure of pan-Arabism and the deterioration of the economy, the substantive basis of the regime’s legitimacy suffered.

The new Supreme Constitutional Court and the reformed administrative courts helped the regime ameliorate these pathologies by attracting investment capital, strengthening discipline within its own administrative

⁹⁵ See, for example, Carr, *Foreign Investment and Development*, 40–42.

⁹⁶ Political Risk Services’ “bureaucratic quality” index measuring the “institutional strength of and quality of the bureaucracy” moved from zero to two on a scale of four. Similarly, their “law and order” index, measuring the “strength and impartiality of the legal system” advanced from two to four on a scale of six.

⁹⁷ It must be noted that 1979 was also the year that Anwar Sadat signed the peace treaty with Israel, thus putting to bed one of the most important foreign-policy concerns of foreign investors.

⁹⁸ See John Bentley, *Egyptian Legal and Judicial Sector Assessment*, a four-volume report sponsored by the U.S. Agency for International Development, Egypt (1994); and Arab Republic of Egypt, Ministry of Justice, *Report on the Reform of Judicial Functions* (1998).

⁹⁹ Moheb Zaki, *Egyptian Business Elites: Their Visions and Investment Behavior* (Cairo: Konrad-Adenauer-Stiftung, 1999).

bureaucracy, forging a new legitimizing ideology around “the rule of law” and a “state of institutions,” and doing away with populist, Nasser-era legislation in a politically innocuous way. However, these new institutions also opened new avenues through which enterprising political activists could challenge the regime in ways that were never before possible.

The Emergence of Constitutional Power (1979–1990)

When the Supreme Constitutional Court initiated operations in 1979, Egypt was in the midst of simultaneous economic and political transitions. On the political front, Sadat had engineered a fundamental reorganization of Egypt's political landscape as part and parcel of his reorientation away from the Soviet Union and his drive to entice foreign direct investment from the West. In 1976, Sadat introduced a tightly controlled process of political liberalization when he divided the Arab Socialist Union into three platforms, representing the left, right, and center of the political spectrum. One year later he issued a new political parties law that allowed for the establishment of political parties and governed competition among them. But Sadat's shift to a multiparty system was never intended to be a complete and comprehensive democratic transition. Rather, it was to be a tightly controlled process of political liberalization that would give the appearance of free party competition with few concrete concessions from the regime.

The legal framework was critical to this process of controlled liberalization. The new political parties law, in combination with an assortment of new legislation regulating political activity, established a tightly bounded corporatist political system with abundant levers for the regime to control nascent opposition parties.¹ If there were any doubts about who was in

¹ The term "corporatism" is used here to describe a restricted form of interest aggregation and representation. I follow the definition of corporatism provided by Schmitter as "a system of interest representation in which the constituent units are organized into a limited number of singular, compulsory, noncompetitive, hierarchically ordered and functionally differentiated categories, recognized or licensed (if not created) by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demand and supports." Philippe Schmitter, "Still the Century of Corporatism?" *The Review of Politics* 36 (January, 1974): 85–131.

control of the pace and extent of political reform, they were put to rest by Sadat's move to ban the New Wafd Party and to bar Wafd leader Fu'ad Sirag al-Din and hundreds of others from political life when their criticism of the regime reached disagreeable levels.

Sadat believed that the return to a "state of institutions," the establishment of the Supreme Constitutional Court, and the façade of still more comprehensive political reforms through the introduction of a multiparty system were essential to attract foreign investment to Egypt's ailing economy.² What Sadat may not have realized is how these simultaneous reforms would create an unexpected synergy between opposition activists and the SCC. Within the first decade of operation, the Supreme Constitutional Court pushed far beyond the bounds that the regime had intended in both its economic and political rulings.

RESTORING PROPERTY RIGHTS: SCC RULINGS IN THE ECONOMIC SPHERE

With independence from the government, the Supreme Constitutional Court took a lead role in shaping a new legal framework that demarcated limits on state powers in the economy. As early as May 1981, the Court demonstrated its commitment to restore private property rights and its willingness to do so outside the bounds established by the regime.³ The Court considered a challenge to law 150/1964, under which the regime had sequestered private property, and law 69/1974, which had reversed the sequestration order but concurrently placed limits on the amount of compensation that could be awarded. As we saw in the [last chapter](#), Sadat reversed sequestration orders in the mid-1970s to demonstrate the regime's new respect for private property while at the same time limiting the amount of compensation that individuals could obtain. The SCC found both laws unconstitutional, opening the door to hundreds of challenges to sequestration orders in the regular courts, at considerable financial expense to the government.⁴

² Kirk Beattie provides convincing evidence that Sadat's introduction of a multiparty system was, like the establishment of the SCC, part of an overall strategy to attract foreign investment. In an interview, Mustafa Khalil recounted that Sadat "was anxious to have the open door policy work, and in his mind the political *infitah* was directly related to and a necessary adjunct of getting the open door policy to 'take off.'" Kirk Beattie, *Egypt during the Sadat Years* (New York: Palgrave, 2000), 223.

³ Supreme Constitutional Court rulings are compiled by the Arab Republic of Egypt in *al-Mahkama al-Dusturiyya al-'Ulia*, Vol. 1–10.

⁴ Case 5, Judicial Year 1, in *al-Mahkama al-Dusturiyya al-'Ulia*, Vol. 1, 195–205. On October 15, 1981, just a few months after law 150/1964 and law 69/1974 were struck

The SCC made further moves in the same direction in April 1983, with rulings on three laws issued between 1961 and 1963 concerning the nationalization of industry.⁵ The contested articles denied citizens the ability to challenge the value of compensation for nationalizations, even though valuations were made by committees that were political and not judicial in nature. The Court ruled that these provisions violated article 68 of the Constitution, which guaranteed judicial supervision of administrative acts. Once again, the SCC cleared the way for hundreds of new compensation claims as a result of its ruling.⁶

On June 25, 1983, the SCC declared land confiscations from the Nasser era to be unconstitutional.⁷ Law 104/1964, which had denied compensation for land reform measures in 1952 and 1961, was ruled to be in conflict with articles 34 and 36 of the Constitution.⁸ Another landmark ruling was issued in March 1985 on decree law 134/1964, which had placed caps on compensations up to £E 15,000 for the nationalizations of property under laws 117, 118, and 119 of 1961. The Court declared that the decree law was in violation of articles 34, 36, and 37 of the Constitution providing for the protection of private property.⁹

down by the SCC, a case was transferred to the SCC wherein the plaintiff charged that the ruling in case 5, Judicial Year 1, was not implemented and that the plaintiff was unable to gain proper compensation from a primary court judge. The plaintiff appealed to the SCC to assist in the implementation of the original ruling of unconstitutionality, but the SCC responded that it was only empowered to consider questions of constitutionality and that issues of implementation lay outside its competency. A similar case concerning the nonimplementation of a ruling reached the SCC on September 8, 1983, but the Court dismissed the petition for the same reasons on March 17, 1984. These early cases illustrate that full implementation of rulings in a fundamentally illiberal political environment is an ongoing constraint on the SCC's ability to affect change. (Case 4, Judicial Year 3, in *al-Mahkama*, Vol. 2, 148–154; Case 136, Judicial Year 5, Vol. 3, 49–53.)

⁵ Article 3 of decree 72/1963 was struck down in Case 16, Judicial Year 1; article 3 of decree 117/1961 was struck down in Case 5, Judicial Year 2; article 2 of decree 38/1963 was struck down in Case 7, Judicial Year 3. These rulings can be found in *al-Mahkama al-Dusturiyya al-'Ulia*, Vol. 2, 94–116.

⁶ A similar ruling was issued two years later against article 2 of law 119/1961. This article had allowed a valuation committee to declare the value of companies that were placed under sequestration. The SCC ruled that there must be judicial review of administrative actions. Case 68, Judicial Year 6, *al-Mahkama*, Vol. 3, 145–151. Similarly, see Case 18, Judicial Year 5, and Case 38, Judicial Year 11, found in *al-Mahkama*, Vol. 4, 36–51 and 297–304, respectively.

⁷ Case 3, Judicial Year 1, *al-Mahkama*, Vol. 2, 155–167.

⁸ The government attempted to argue that the land reforms were in accordance with article 4 of the Constitution, which called for the reduction of income differentials in society, but the SCC insisted that this constitutional provision did not give the government the right to sideline other rights granted in the Constitution.

⁹ Case 1, Judicial Year 1, *al-Mahkama*, Vol. 3, 162–175.

Similar rulings against limits to compensation followed in succession throughout the 1980s. On June 21, 1986, the SCC struck down decree law 141/1981, which had been a further attempt by the government to limit the compensation for cases of state sequestration from the Nasser years.¹⁰ Article 2 of decree 141/1981 provided for the return of formerly sequestered property, but with the provision that if the property had been sold or transferred by the state, the original owners would receive financial compensation fixed at a rate of 70 times the current land tax or at 150 percent of the original sales price. The SCC ruled that such calculations were vastly undervalued and did not sufficiently account for the rate of inflation, therefore infringing on property rights as protected in articles 34 and 35 of the Constitution. Similarly, the SCC ruled presidential decree 179/1963 unconstitutional in January 1988.¹¹ This law specified limits on compensation to the owners of national press institutions whose companies were nationalized.

These and a number of similar rulings by the Supreme Constitutional Court restored private property rights, limited state powers to expropriate private investment, and helped reduce the perceived risks associated with private investment in Egypt. Although these rulings went in the same direction as government efforts to reverse the nationalization and sequestration measures, the Supreme Constitutional Court pushed far beyond the partial compensation that the government was prepared to offer. Business reports from the period noted the establishment of the Court as a crucial step in providing concrete institutions for the protection of property rights,¹² and private investment increased at a rate that vastly exceeded that during the first decade of the open-door economic policy.¹³ After concentrating on the most blatant violations of property rights from the Nasser years, in the 1990s the SCC began to review property rights provisions in other areas such as taxation, landlord-tenant relations, and the status of the public sector.

¹⁰ Cases 139, 140, Judicial Year 5, *al-Mahkama*, Vol. 3, 336–352.

¹¹ Case 12, Judicial Year 5, *al-Mahkama*, Vol 4, 63–67.

¹² See, for example, David William Carr, *Foreign Investment and Development* (New York: Praeger, 1979): 40–42. Almost every study of the Egyptian investment environment continued to note the legal framework for property rights, as well as the judicial infrastructure for their enforcement. For one such example, see *International Business Lawyer* 25, no. 3 (March 1997): 126–133.

¹³ It is difficult to isolate the effect of judicial reform and strengthened property rights provisions from other important variables. Most significantly, Egypt's 1979 peace treaty with Israel helped assure investors that the economy would be less vulnerable to shocks as a result of regional instability.

THE POLITICAL SPILLOVER: SCC RULINGS
IN THE POLITICAL SPHERE

*The SCC and the Breakdown of Egypt's Corporatist
Political Landscape*

At the heart of Sadat's managed political liberalization was a new political parties law. Law 40 of 1977 established a corporatist framework for a multiparty system, bounded by extensive executive controls. It empowered an executive-dominated Political Parties Committee to consider applications for party licenses and to regulate ongoing party activities.¹⁴ Simply achieving legal status is extremely difficult under law 40/1977 because party platforms must be in harmony with the Constitution while at the same time remaining distinct from existing political parties. These two requirements provided the Political Parties Committee the pretext to reject dozens of party applications.¹⁵ In fact, between 1977 and 2000 the Political Parties Committee approved only one application for the Socialist Labor Party. All other opposition parties came into existence as the direct result of administrative court rulings that overturned the decisions of the Political Parties Committee, or as a result of Supreme Constitutional Court decisions in the case of the Nasserist Party.¹⁶

Once a party gains legal status, its activities continue to be constrained by the political parties law. As is typical of laws governing political activity in Egypt, vague guidelines in law 40 are backed by draconian penalties for violations, giving the regime maximum formal and informal leverage over

¹⁴ According to article 8 of law 40/1977, the Political Parties Committee is composed of the speaker of the Shura Council, the minister of justice, the state minister of affairs of the People's Assembly, the minister of the interior, and three representatives of judicial bodies selected directly by the president.

¹⁵ In some cases, the Political Parties Committee produced absurd reasons for denying party licenses that had little to do with the formal conditions required by law 40/1997. In the case of the proposed Constitutional Party, for example, the committee based its rejection on the argument that "the performance of the government of President Mubarak in the field of foreign policy has succeeded thus far in establishing strong relations with all countries in such a way that Egypt is an important actor on the international level. And this is much more than could be accomplished by the program of the party in question." Party applications that were rejected by the Political Parties Committee are listed in *Egyptian Politics: The Fiction of a Multiparty System* (Center for Human Rights Legal Aid, 1996), 31–32.

¹⁶ The ability of administrative courts to overturn decisions of the Political Parties Committee (PPC) was weakened in 1981. Law 30/1981 mandated that appeals of PPC decisions would be reviewed by an exceptional body of "public figures" appointed by the minister of justice and on approval from the state-dominated Supreme Council of Judicial Bodies.

political opponents. Article 4 of law 40/1977 declares that “[t]he principles, objectives, and programs of a party should not contradict . . . the maintenance of national unity, social order, the democratic socialist system and its socialist gains.” Moreover, party programs must not violate “the principles of the July 23 and May 15 revolutions” in addition to a variety of other requirements. These vague guidelines, in combination with article 17 of the same law, empower the Political Parties Committee to suspend the publication of party newspapers and to temporarily suspend party activities.¹⁷

The requirement that political parties have distinct political platforms, coupled with the ongoing ability of the Political Parties Committee to discipline opposition parties, created a corporatist framework. Entry into the political arena was restricted, and parties with legal status must follow informal understandings of how far they can challenge the regime before facing punishment. Rif‘at al-Said of the Tagammu‘ Party likens the situation to animals tied to a rope; parties are set free to do as they like, but if they set out on a path that the regime is displeased with, they are easily reeled back in.¹⁸ As a result, opposition parties rarely push the informal limits on political organizing for fear that they will be punished by the Political Parties Committee and lose their ability to participate in the political system.¹⁹

This corporatist system of political management is reinforced by severe constraints on party activity. The emergency law, which has been applied for all but six months since 1967, places severe restrictions on public gatherings and makes demonstrations and public speeches impossible without the regime’s prior consent. Furthermore, the emergency law empowers the state security forces to detain individuals without charges for a thirty-day period, a privilege that the regime makes full use of, particularly during the election season.²⁰ Law 2/1977 also provides for life imprisonment

¹⁷ Administrative courts can overturn the suspension of party activities ordered by the Political Parties Committee.

¹⁸ Symposium at the American University in Cairo, October 18, 2000.

¹⁹ Salah ‘Eissa, another prominent member in the Tagammu‘ Party and editor-in-chief of *al-Qabira*, articulates a widely held understanding of opposition politics when he states “the margin of movement for any political party is limited – so limited, in fact that parties do not have the ability to draw distinctions between themselves.” “Down to Earth with Few Grassroots,” *al-Abram Weekly*, September 21–27, 2001.

²⁰ Administrative detention is also regularly abused by the regime. Once the subject of administrative detention is released within the required thirty-day period, he is often simply transferred to another prison or holding facility and then registered once again for another thirty-day period, essentially allowing the state security forces to lock up anyone it wishes for months or even years at a time.

with hard labor for organizers of even peaceful demonstrations. Additionally, opposition parties have no access to the state-controlled media, and their only real connection to the public is through opposition newspapers, which, as we see in this chapter, are also controlled in a similar corporatist fashion.

Buttressing these external party constraints are internal constraints on opposition party members. The internal organization of opposition parties is fundamentally nondemocratic, with leadership turnover usually occurring only with the death of party leaders. Opposition activists who attempt to push the limits of political activism are duly disciplined from *within* their own parties. When internal factions occasionally arise to challenge party leadership, the Political Parties Committee typically enters the fray to back regime-friendly opposition blocs.²¹ This corporatist system of managing the political arena crippled opposition party activities throughout the 1980s and resulted in a widening disconnect between party leadership and the public at large.

The regime's corporatist system of managing the political arena was buttressed still further by a proportional representation (PR) system that governed both national and local elections through the 1980s. Under the PR-list system, only members of official political parties were allowed to participate in elections on party lists. This system effectively excluded political activists who wished to operate outside the constraints of the regime's corporatist arrangement. At the same time, the PR-list system empowered the opposition party leadership (who decided the order of their opposition candidates on the list) to maintain party discipline and to sideline party members willing to risk an open confrontation with the regime. In other words, the PR-list system subjected individuals otherwise unwilling to participate by the corporatist rules of the game to internal party constraints and easy management by the regime. Finally, an 8 percent minimum threshold posed a formidable barrier to most opposition parties, and the votes for parties falling short of this threshold were transferred to the party winning the plurality of seats.²²

²¹ Examples include internal disputes between factions led by 'Ali al-Din Saleh versus 'Abd Allah Rushdi of the Misr al-Fatah Party in 1992, between factions led by Ibrahim Shukri versus Ahmed Megahed in the Socialist Labor Party in 1993, and between factions led by Muhammad 'Abd al-Allah versus 'Abd al-Rashid Ahmed of the Social Justice Party in 1998.

²² For more details on the election law in force in 1984, see 'Abd al-Ghani Basiuni 'Abd Allah, *al-Nizam al-Intikhab fi Misr wa al-'Alam: Bayn al-Intikhab al-Fardi wa al-Intikhab bil-Qa'ma*. [The System of Elections in Egypt and the World: Between Individual [Candidate] Elections and Elections by List], 166–184.

To circumvent these obstacles in the 1984 People's Assembly elections, the Wafd Party entered into an awkward alliance with the Muslim Brotherhood. For the Wafd Party, cooperation with the Brotherhood increased the chances that they would pass the 8 percent threshold. For the Brotherhood, this informal coalition allowed them to participate in the elections without legal party status. Together, they managed to win 12.7 percent of the national vote, which translated into fifty-eight seats. However, no other opposition parties were able to gain representation because they did not reach the 8 percent threshold. Votes for all other opposition parties were transferred to the regime's National Democratic Party.

After the election, lawyer and political activist Kamal Khaled successfully transferred a case to the Supreme Constitutional Court, challenging the laws governing elections for the People's Assembly. Khaled charged that the PR-list system prevented citizens from running for office as independents and therefore denied them the right to participate in political life if they were not affiliated with a registered political party.

By December 1986, the commissioner's body of the SCC issued its preliminary report recommending that the electoral law be ruled unconstitutional for contradicting articles 8, 40, and 62 of the Constitution.²³ Opposition parties applauded the decision and, in a joint press conference, called for the reform of election laws, the dissolution of the People's Assembly, and a new round of elections.²⁴ To the surprise of many, the regime agreed to all three opposition demands. The People's Assembly was dissolved after a national referendum, new electoral laws were drafted, and new elections were held in 1987.

This was the first time in Egyptian history that an electoral law was deemed unconstitutional. Throughout the 1980s, however, the Supreme Constitutional Court continued to chip away at the regime's corporatist system of political control by striking down election laws at both local and national levels.

The regime's new electoral law governing People's Assembly elections did as little as possible to comply with the Supreme Constitutional Court ruling. The new electoral law divided the country into twenty-four multi-member districts for proportional distribution among party lists. At the same time, to comply with the SCC ruling, the new law reserved two seats

²³ The final ruling of the SCC came on May 16, 1987. Case 131, Judicial Year 6, *al-Mahkama*, Vol. 4, 31–45.

²⁴ Opposition parties also used the opportunity to repeat long-held demands, such as the cancellation of the emergency law, full judicial supervision of elections, and the cancellation of the socialist public prosecutor's office.

per district for independent candidates. However, it also maintained the 8 percent minimum threshold that was required to gain representation and, moreover, the new district boundaries were so skewed that opposition parties were put at a severe disadvantage by the disproportional districts. For example, one district with five million residents was allocated thirteen seats in the People's Assembly, whereas another district with only two million residents was allocated sixteen seats. In contrast, a third district with 350,000 residents had five seats.²⁵

With skewed districts, electoral fraud, the 8 percent minimum threshold, and the continued weakness of opposition parties, the NDP predictably maintained an overwhelming majority in the 1987 People's Assembly elections, taking 348 of 448 seats compared to a combined total of 100 seats for the opposition.²⁶ With a supermajority in the People's Assembly, the regime's National Democratic Party was once again able to nominate Mubarak as the sole candidate for the presidency in a national referendum held in October 1987. Electoral corruption orchestrated by the Ministry of Interior ensured that Mubarak received 97 percent voter approval and six more years in power.

Meanwhile, opposition candidates challenged the electoral fraud that occurred in the People's Assembly elections. The administrative courts proved their readiness to confront the regime when they annulled the electoral results of seventy-eight seats, lending judicial support to opposition claims that the regime regularly used electoral fraud to systematically undermine the performance of the opposition.²⁷ However, the NDP-dominated People's Assembly recognized only seven of these court decisions, thereby establishing a pattern of institutional conflict that would grow only more severe in future election cycles.²⁸

Once again, Kamal Khaled demonstrated that the surest way to challenge the regime was through the Supreme Constitutional Court. Khaled immediately initiated a lawsuit contesting the new electoral arrangement, and by December 16, 1987, his appeal was transferred to the SCC. Khaled contended that the new election law should be ruled unconstitutional for three primary reasons. First, Khaled contended that political parties provided their candidates with financial resources that were denied

²⁵ Justice 'Abd al-Rahman Nosseir, "The Supreme Constitutional Court and the Protection of Human Rights" (unpublished manuscript, November 1992), 36.

²⁶ The Socialist Labor Party and the Muslim Brotherhood alliance won fifty-six seats, the Wafd Party won thirty-six seats, and independent opposition candidates won eight seats.

²⁷ See statements by Fu'ad Sirag al-Din, leader of the Wafd Party in *al-Wafd*, May 8, 1989.

²⁸ Zaki, *Civil Society and Democratization in Egypt*, 35.

to independent candidates, and therefore independent candidates could not compete on equal terms. Moreover, because political parties received resources from state coffers, this funding meant that the state itself was favoring parties over individual candidates. Second, Khaled argued that the number of seats allocated to different electoral districts did not correspond to the number of residents or registered voters. Finally, Khaled argued that because only 48 seats were allocated to independent candidates and the remaining 400 seats were reserved for party competition under the list system, individual candidates were at a further disadvantage compared to party members. Khaled held that the election law again violated articles 8, 40, and 62 of the Constitution, which guarantee equality of Egyptian citizens and the right to participate in political life.

Government attorneys responded that article 5 of the Constitution established a multiparty system in Egypt, but the People's Assembly reserved the right to organize elections in whatever way it deems fit as long as a multiparty system is maintained. The SCC disagreed with the government's plea and argued that the intent of article 5 of the Constitution was to replace the single-party rule of the Arab Socialist Union and that, although the government had the power to decide on the preferred electoral system, this power did not give it the right to infringe on citizen's rights to equal opportunity and equality before the law as defined by articles 8 and 40 of the Constitution. The SCC also agreed with Khaled's contention that the new electoral system still favored established political parties at the expense of independent candidates. When the government attorney argued that citizens were at liberty to join political parties if they wished to share in the opportunities provided by established parties, the SCC responded that article 47 of the Constitution guaranteed the freedom of opinion and therefore citizens should not be compelled to participate in political programs. Two similar rulings from the Supreme Constitutional Court forced comparable reforms to the system of elections for both the Shura Council (the Upper House) and local council elections nationwide.²⁹

With its ruling of unconstitutionality on May 19, 1990, the SCC once again forced the dissolution of the People's Assembly, new election laws, and early elections in 1990.³⁰ A national referendum confirmed

²⁹ Case 23, Judicial Year 8, ruled April 15, 1989, *al-Mahkama*, Vol. 4, 205–217, and Case 14, Judicial Year 8, ruled April 15, 1989, *al-Mahkama*, Vol. 4, 191–204. SCC rulings forcing the reform of local elections are examined extensively in the next chapter.

³⁰ Case 37, Judicial Year 9, *al-Mahkama*, Vol. 4, 256–293.

the process and on September 26, 1990 the law governing elections to the People's Assembly was amended.³¹ The result of the 1990 SCC ruling was a complete abandonment of the PR-list system and the adoption of the single-member district system for elections to the People's Assembly. The country was divided into 222 districts, and each district was allocated two seats, one reserved for workers and peasants as stipulated in article 87 of the Constitution, and the other for open competition. Opposition activists applauded the amendments, but also called for more sweeping reforms that would ensure clean elections, including the reform of voter lists, repeal of the emergency law, and comprehensive judicial supervision of elections. Instead, the government issued law 206/1990, which gerrymandered district boundaries to the substantial advantage of the ruling NDP by cutting across opposition strongholds.

When it became apparent that the regime was not willing to implement further reforms to guarantee that the 1990 People's Assembly elections would be free and fair, the Wafd Party, Labor Party, Liberal Party, and the Muslim Brotherhood all decided to boycott the elections with the vocal support of the majority of professional syndicates. In their joint statement, the parties declared their refusal to take part in "the creation of a false democratic façade." Gamal Badawi of the Wafd Party elaborated in its newspaper:

All the regime wants from democracy is its form. It wants all the parties to participate in a performance so that the world will think we are proceeding in the democracy march and participating in its known forms: general elections, competing parties, participating masses, and televised sessions.

Has the government taken a single practical measure to prove its sincere intentions to hold free elections? Has it at least stopped applying the emergency law during the elections? Has it entrusted the judiciary with supervising the elections processes? Has it classified the electoral constituencies correctly and fairly?³²

With the regime unwilling to accommodate long-standing opposition demands for clean elections, several opposition proposals came to the fore. The first, widely circulated in the run-up to the 1990 People's Assembly elections, advocated full judicial monitoring of polling stations.

³¹ Opposition activists used the ruling as an opportunity to contest a variety of laws that were issued by the illegitimate People's Assembly. The SCC dismissed these cases, arguing that the substance of laws themselves must be found to be in violation of the Constitution for them to be ruled unconstitutional. Over the course of the next two years, eighty-seven similar appeals reached the SCC but each one was summarily dismissed with the same reasoning.

³² *al-Wafd*, October 19, 1990.

TABLE 4.1: Egyptian political parties in 1990

Party	Date of establishment*	Avenue for attaining legal status
NDP (ruling party)	1976	Presidential decree
Tagammu'	1976	Presidential decree
Ahrar	1976	Presidential decree
Socialist Labor Party	1977	Approved by Political Parties Committee
Wafd	1978	Administrative court ruling
'Umma	1983	Administrative court ruling
Green Party	1990	Administrative court ruling
Misr al-Fatah Party	1990	Administrative court ruling
Union Democratic Party	1990	Administrative court ruling

* The National Democratic Party, the Tagammu', and the Liberal Party were initially established as three "platforms" representing left, right, and center of the political spectrum. They took on their current names after Sadat issued law 40/1977 on political parties.

The Judges Association, under the leadership of Yehia al-Rifa'i, issued a detailed proposal on how judges could ensure clean elections. The regime flatly refused the request. Other proposals came from political activists and intellectuals, who envisioned a network of social groups that would monitor elections and systematically report on election irregularities, thus putting pressure on the regime and providing documentation to be used in the administrative courts. Both proposals eventually came to fruition, but the dominant opposition strategy for the 1990 elections was boycott.

The Tagammu' Party was the only significant opposition party to formally participate in the 1990 election, but joining it were the Green Party and the Young Egypt (*Misr al-Fatah*) Party, both of which had gained legal status as the result of Supreme Administrative Court rulings (see Table 4.1).³³ At the conclusion of the election, the Tagammu' Party and independent opposition candidates won only twenty-nine seats, down from the hundred seats that they held in the outgoing People's Assembly.³⁴

Clearly, the 1987 and 1990 SCC rulings on election laws did not undermine the regime's dominance, but they were not without effect. The long-term impact of the rulings was to disable the regime's corporatist technique for maintaining political control. Prior to the SCC reforms,

³³ Candidates from other parties stood for election as independents.

³⁴ Six seats went to the Tagammu' Party, fourteen went to Wafd candidates running as independents, eight went to Labor candidates running as independents, and one seat went to a Liberal Party candidate running as an independent.

the government easily managed the political field by negotiating with only a handful of relatively weak opposition parties. The parties themselves exercised *internal* controls on activists who dared to challenge the government outside the bounds that were implicitly negotiated between the government and opposition parties. After the SCC induced electoral reforms, however, opposition activists were no longer beholden to opposition party leaders, who controlled the position of candidates on party lists. Moreover, the SCC rulings enabled Islamist candidates to compete as independents. This had serious implications for the type of opposition trends that would be represented in future People's Assemblies. Finally, SCC rulings forced the regime to shift its method of maintaining political control from an unfair legal framework to one that increasingly depended on physical coercion, intimidation, and electoral fraud.

SCC Rulings Restoring Political Rights

In addition to undermining the regime's corporatist system of political management through its rulings on the electoral system, the Court issued a number of decisions that directly expanded political rights for opposition activists.³⁵ In one of its earliest political decisions in May 1985, the Supreme Constitutional Court ruled against presidential decree 44/1979 for not meeting the procedural requirements laid out in article 147 of the Constitution, which governed the use of presidential decrees in cases of emergency.³⁶ The ruling was far less confrontational than it might appear at first glance because the decree was overturned only after Sadat's assassination and after intense criticism of the substance of the

³⁵ The Court also attempted to place some procedural constraints on the executive branch. An important early ruling in this regard concerned law 74/1970, which empowered the police to arrest and imprison anyone deemed by the executive to have committed a crime a second time. The law enabled the police to take such actions without a trial or even a judicial order. The SCC struck down the law as a violation of article 66 of the Constitution, which states that punishment can only be made on the basis of law and it can only be executed by virtue of a judicial decision. This was a significant early ruling because at one in the same time, the SCC moved both to expand due process rights and to defend the jurisdiction of the judicial branch. Case 39, Judicial Year 3, issued 15 May 1982, Vol. 2, 45-49.

³⁶ Article 147 allows the president to issue executive decrees that have the force of law, but only when the People's Assembly is not in session and only when the president is faced with a critical situation requiring immediate action. The People's Assembly must then approve of the president's decree when it reconvenes. Case 28, Judicial Year 2, *al-Mahkama*, issued May 4, 1985, Vol. 3, 195-208.

law.³⁷ Moreover, the SCC ruling did not effectively constrain the president's actions. Mubarak has certainly issued far fewer presidential decrees than both Nasser and Sadat, but the executive's firm grip on the rubber-stamp People's Assembly ensures the swift passage of bills, even when they are routed through the proper procedural channels specified in the Constitution.

Bolder SCC rulings were right around the corner. At the same time that the commissioner's body of the SCC was preparing the bombshell ruling forcing the first dissolution of the People's Assembly, the SCC issued another landmark ruling that allowed prominent opposition activists who had been banned from political life to participate in the next People's Assembly elections.³⁸ The case concerned law 33/1978, which stated that "whoever caused the corruption of political life before the July revolution, either through participation in the leadership or the administration of political parties in power before the revolution . . . shall be deprived of the right to join political parties, and of the exercise of rights and activities of a political nature. . . ." ³⁹ The case was raised by Fu'ad Serag al-Din, the prerevolutionary head of the Wafd Party, against a virtual who's who of regime insiders, including the president, the prime minister, and the minister of the interior. The government contended that the SCC did not have the power to review the law because it had been ratified in a national referendum, thus making the law a political act beyond judicial review. The SCC disagreed with the government's opinion and ruled the law unconstitutional, allowing hundreds of prerevolutionary politicians and public figures to return to political life. Among these figures were Fu'ad Serag al-Din, leader of the Wafd Party, and Dia' al-Din Dawud, founder and president of the Nasserist Party.⁴⁰

A similar SCC ruling struck down another provision of law 33/1978, which had denied the right of political participation to anyone convicted in Anwar Sadat's 1971 crackdown on opponents of his new administration.⁴¹ This case was initiated by Dia' al-Din Dawud, who pleaded that

³⁷ The decree was an amendment to law 25/1929. The decree, also dubbed "Jihan's law" after President Sadat's wife, strengthened women's rights provisions in the personal status laws.

³⁸ Case 56, Judicial Year 6, *al-Mahkama*, issued June 26, 1986, Vol. 3, 353–363.

³⁹ This law is commonly known by the regime's title, the "Law for the Protection of the Homefront and Social Peace."

⁴⁰ Other prominent figures regaining their political rights were Ibrahim Farag, Hamed Zaki, and 'Abd al-Fatah Hassan.

⁴¹ Case 49, Judicial Year 6, *al-Mahkama*, issued April 4, 1987, Vol. 4, 19–24.

the law provided for retroactive punishment and the denial of political rights in violation of articles 66 and 187 of the Constitution. Dawud's multiple victories in the SCC encouraged further litigation by opposition activists.

Another ruling in 1988 forced the legalization of the opposition Nasserist Party, which was denied a license by the regime-dominated Political Parties Committee on the grounds that the proposed founding members had publicly expressed their opposition to Egypt's peace treaty with Israel.⁴² A provision of law 40/1977 had empowered the Political Parties Committee to reject party applications if the leaders of the proposed party had initiated or encouraged principles or practices opposing the peace treaty. The case was raised by one of the founding members of the Nasserist Party against the President of the Republic, the Speaker of the People's Assembly, and the Ministry of Interior. The administrative courts agreed with the reasoning of the plaintiffs, promptly transferred the case to the SCC, and, shortly after Dia' al-Din Dawud's return to political life, the SCC struck down the provision blocking the founding of the Nasserist Party.

The Limits of SCC Activism: Circumventing the Regular Judiciary through State Security Courts

Despite the many progressive rulings protecting civil liberties and promoting political rights throughout the 1980s, there was a crucial exception to the Supreme Constitutional Court's impressive record. This was a landmark ruling affirming the constitutionality of the regime's State Security Courts (*Mahkamat Amn al-Dawla*), which regularly hear cases that are considered particularly threatening to the state. Judges at the primary level of the security courts are drawn from the regular judiciary, but defendants are allowed only one appeal to the Supreme State Security Court. At the appellate level, the president has the right to appoint two military officers, with no required training in law, to join three regular judges from the appellate level of the regular judiciary to form a five-judge panel. Judgments of the Supreme State Security Court are final and cannot be appealed in the regular court system.

Emergency State Security Courts (*Mahkamat Amn al-Dawla Tawari'*) handle all trials prosecuted under the emergency law. Similar to the State Security Courts, the Emergency State Security Courts are staffed with

⁴² Case 44, Judicial Year 7, *al-Mahkama*, issued May 7, 1988, Vol. 4, 98-114.

judges from the regular judiciary in addition to two military officers, if so desired by the president, but there is no right to appeal for the defendant. After the court renders a decision, it is sent to the president, who has the power to overturn the court's ruling or demand a retrial. In theory, the Emergency State Security Courts are only to be used for short periods of time during a state of war or similar crisis. In practice, these courts form a parallel legal system, given the fact that Egypt has been in a perpetual state of emergency for all but eighteen months since 1967. The loose wording of the emergency law itself gives the government wide latitude to transfer cases that are perceived as politically threatening out of the jurisdiction of the regular judicial system. The broad powers of the president over the Emergency State Security Courts ensure that once cases enter this parallel legal track, the government will almost certainly win favorable rulings.⁴³

By 1983, dozens of cases were transferred to the Supreme Constitutional Court contesting the provision that denies defendants the right to appeal rulings of Emergency State Security Courts in the regular judiciary.⁴⁴ The SCC delivered a ruling on one of these challenges in 1984.⁴⁵ The case was initiated when a defendant facing a detention charge in an Emergency State Security Court launched an independent challenge against the action in an administrative court. The plaintiff contended that the provision in law 50/1982, granting the Emergency State Security Courts exclusive jurisdiction over all appeals of cases prosecuted under the emergency law, violated articles 68 and 172 of the Constitution.⁴⁶ The administrative court transferred the case to the SCC where the plaintiff argued that the lack of appeal outside of the State Security Court system violated his right to due process and the competency of the administrative courts.

The Supreme Constitutional Court ruled the provision constitutional based on article 171 of the Constitution, which states that “[t]he law shall

⁴³ There were, however, notable exceptions in the 1990s. In response to acquittals in several high-profile Islamist cases, the regime began transferring civilian cases to the even more restrictive military courts. This is explored in Chapter 5.

⁴⁴ The challenged provision was paragraph 2, article 3 of law 50/1982.

⁴⁵ Case 55, Judicial Year 5, ruled June 16, 1984. *al-Mahkama*, Vol. 3, 80–89.

⁴⁶ Article 68 reads as follows: “The right to litigation is inalienable for all. Every citizen has the right to refer to his competent judge. The state shall guarantee the accessibility of the judicial organs to litigants, and the rapidity of rendering decisions on cases. Any provision in the law stipulating the immunity of any act or administrative decision from the control of the judiciary shall be prohibited.” Article 172 of the Constitution reads that “[t]he State Council shall be an independent judicial organ competent to take decisions in administrative disputes and disciplinary cases. The law shall determine its other competences.”

regulate the organization of the State Security Courts and shall prescribe their competencies and the conditions to be fulfilled by those who occupy the office of judge in them.” The SCC reasoned that article 171 of the Constitution, establishing the State Security Courts, must be interpreted as proof of their legitimacy as a regular part of the judicial authority. Based on this reasoning, the SCC rejected the plaintiff’s claim concerning article 68 protections, guaranteeing the right to litigation and the right of every citizen to refer to his competent judge. The SCC also reasoned that the provision of law 50/1982, which gives the State Security Courts the sole competency to adjudicate their own appeals and complaints, was not in conflict with article 171 of the Constitution. Moreover, the SCC ruled that the procedures governing State Security Court cases were in conformity with the due process standards available in other Egyptian judicial bodies, such as the right of suspects to be informed of the reasons for their detention and their right to legal representation.

The ruling was based on a thin notion of the rule of law that many constitutional scholars and human rights activists found questionable at best, but the Supreme Constitutional Court never looked back, and refused to revisit the question of State Security Court competency. Six months after this landmark decision, the SCC summarily dismissed forty-one additional cases contesting the jurisdiction of the State Security Courts.⁴⁷ The SCC dismissed another thirty cases petitioning the same provision over the course of the following year.⁴⁸ The flood of cases contesting the competency of the State Security Courts in such a short period of time reveals the extent to which the government depends on this parallel legal track, both to administer justice in a more efficient manner and as a tool to sideline political opponents. The large volume of cases transferred to the SCC from the administrative courts also underlined the determination of administrative court judges to assert their institutional interests and to fend off encroachment from the State Security Courts. Finally, the Supreme Constitutional Court’s reluctance to strike down provisions denying citizens the right of appeal to regular judicial institutions, despite the dozens of opportunities to do so, illustrates the SCC’s reluctance to challenge the core interests of the regime.

Islamist Litigation in the SCC, 1980–1990

Human rights advocates and pro-democracy reformers were not the only activists to use the new Supreme Constitutional Court to challenge the

⁴⁷ See *al-Mahkama*, Vol. 3, 90–95.

⁴⁸ See *al-Mahkama*, Vol. 3, 108–113, 152–157, 189–194.

government. Moderate Islamists also quickly came to understand that litigation was one of the few available avenues to challenge the status quo from within the formal legal/political system. Whereas all political activists used the Supreme Constitutional Court to successfully challenge the regime's political controls, Islamist activists additionally attempted to use SCC powers of judicial review to challenge what they believed to be the secular foundations of the state.⁴⁹

Islamist challenges of secular laws were based on article 2 of the Egyptian Constitution, which states, "Islamic jurisprudence is the principal source of legislation."⁵⁰ Article 2 was included in the 1971 Constitution and was strengthened further by a constitutional amendment in 1980 in order to bolster the religious credentials of the regime at a time when Sadat was using the Islamist trend to counterbalance Nasserist power centers within the state and society. Sadat probably never imagined that article 2 would open the door to constitutional challenges by both Islamist-oriented activists in civil society and lower court judges sympathetic to the Islamist movement, just as he never imagined he would be assassinated by Islamist militants one decade later. After Sadat's assassination, Islamist challenges to secular laws were transferred to the SCC in droves.⁵¹

The first Islamist challenges to reach the SCC concerned the compatibility of article 2 of the Constitution with provisions for paying interest on delinquent payments as stipulated in the Egyptian civil code. According to strict interpretations of the *shari'a*, Islamic law prohibits *riba*, or unearned accretion, such as interest charged on loans. Islamist activists set their sights on striking down article 226 of the civil code concerning state-mandated interest charges on overdue payments. The first such case

⁴⁹ For more on Islamist litigation in the SCC, see Clark Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of shari'a into Egyptian Constitutional Law* (E. J. Brill, 2006); Nathalie Bernard-Maugiron, *Le Politique a l'Epreuve Du Judiciaire: La Justice Constitutionnelle En Egypte* (Bruxelles: Bruylant, 2003), 339–395.

⁵⁰ Article 2 was amended on 22 May 1980 from "Islam is the religion of the State, Arabic is its official language and *the principles of Islamic jurisprudence are a chief source of legislation*" (*mabadi' al-shari'a al-Islamiya masdar ra'isi li al-tashri'*) to "Islam is the religion of the State, Arabic is its official language and *the principles of the Islamic jurisprudence are the chief source of legislation*" (*mabadi' al-shari'a al-Islamiya al-masdar al-ra'isi li al-tashri'*). The simple amendment of one word from "a" principal source to "the" principal source was interpreted by almost everyone (including SCC justices) as meaning that all laws must be in conformity with Islamic law. How the diverse traditions and trends in Islamic law were to be defined and the time frame under which these laws were to be brought into conformity with Islamic law was open to dispute.

⁵¹ At least 215 challenges were made in the SCC invoking article 2 of the Constitution between 1979 and 1990.

considered by the SCC was transferred to it in its second year of operation. However, before the SCC issued a ruling on the case, the plaintiff rescinded his petition for constitutional review, raising the question of whether the plaintiff had reached this decision on his own free will or whether he faced pressure from the government to rescind his petition.⁵² Two more cases challenging the same provision in the civil code reached the SCC just one month later, and the SCC quickly dismissed both cases on technical grounds.⁵³ However, with fifty-three more challenges reaching the SCC's dockets within a few years, it was clear that the court would have to confront the issue of *riba* and article 2 of the Constitution directly.⁵⁴

On May 4, 1985, the SCC issued a landmark ruling on the constitutionality of interest in a case launched by none other than the *Sheikh al-Azhar*, 'Abd al-Halim Mahmud, against the offices of the President of the Republic, the Prime Minister, and the President of the Legislative Committee of the People's Assembly, in addition to Fu'ad Gudah, who had a concrete, personal interest in the case.⁵⁵ The case was a spectacular clash between the head of state versus the most authoritative Muslim religious figure in Egypt and arguably throughout the Muslim world. The case at hand concerned a mere £E 592 that an administrative court had ordered al-Azhar medical school to pay for medical equipment in addition to the 4 percent interest rate that had accrued on the overdue payment. Sheikh Mahmud used the dispute as an opportunity to challenge article 226 of the civil code, which provides for interest on overdue payments.⁵⁶ Al-Azhar's position was simple: article 2 of the Constitution declares Islamic jurisprudence the principal source of legislation, and by the *Sheikh al-Azhar's* reading of the *shari'a*, article 226 was in clear violation of the prohibition on *riba*. The implications of such a decision were tremendous because any ruling of unconstitutionality would have far-reaching effects on the entire Egyptian economy and on the regime's relationship with the Islamist movement.

⁵² Case 31, Judicial Year 2, December 3, 1993, *al-Mahkama*, Vol. 2, 177-179.

⁵³ Cases 21 and 72, Judicial Year 6, January 26, 1985, *al-Mahkama*, Vol. 3, 158-161. The cases were dismissed on the grounds that the law in question was not specified in the petition.

⁵⁴ See *al-Mahkama*, Vol. 3, 245, 301 for a listing of the *shari'a*/ interest cases that reached the SCC.

⁵⁵ Case 20, Judicial Year 1, May 4, 1985, *al-Mahkama*, Vol. 3, 209-224.

⁵⁶ The case was continued after Sheikh 'Abd al-Halim Mahmud's death by his successor, Sheikh Gad al-Haq 'Ali Gad al-Haq.

In its final ruling, the SCC drew on the Report of the General Committee, which had prepared the amendment of article 2 of the Constitution in 1980:

The departure from the present legal institutions of Egypt, which go back more than one hundred years, and their replacement in their entirety by Islamic law requires patient efforts and careful practical considerations. Hence, legislation for changing economic and social conditions that were not familiar and were not even known before, together with the innovations in our contemporary world and the requirements of our membership in the international community, as well as the evolution of our relationships and dealings with other nations – all these call for careful consideration and deserve special endeavors. Consequently, the change of the whole legal organization should not be contemplated without giving the law-makers a chance and a reasonable period of time to collect all legal materials and amalgamate them into a complete system within the framework of the Qur'an, the Sunna and the opinions of learned Muslim jurists and the 'Ulama. . . .⁵⁷

The SCC agreed with the reasoning of the General Committee and argued that if citizens were allowed to challenge laws that were issued before the 1980 amendment to the Constitution, it would “lead to contradictions and confusion in the judicial process in a manner that would threaten stability.”⁵⁸ The SCC concluded that the legislature must be given the opportunity to review all laws and bring them into conformity with the *shari'a* over time. In the interim, the amended article 2 of the Constitution would not have retroactive effect and instead would be applied only to laws that were issued after the 1980 amendment that made Islamic law *the* principal source of legislation.

With this ruling, the SCC neutralized a significant Islamist legal challenge and dismissed dozens of similar challenges to article 226 that had collected on its docket.⁵⁹ Simultaneously, the ruling provided a legal basis to reject scores of other Islamist challenges to a wide variety of pre-1980 legislation, from personal status laws to aspects of the criminal code.⁶⁰ However, in the process of making its non-retroactivity ruling, the SCC also implicitly established the principle that laws issued after the 1980

⁵⁷ *al-Mahkama*, Vol. 3, 222.

⁵⁸ *al-Mahkama*, Vol. 3, 223.

⁵⁹ See *al-Mahkama*, Vol. 3, 245, 301 for a listing of other cases contesting the constitutionality of article 226 with article 2 of the Constitution.

⁶⁰ For a sample of the variety of laws that were contested by Islamists based on article 2 of the Constitution and rejected by the SCC based on its precedent set in case 20, Judicial Year 1, see the listing in *al-Mahkama*, Vol. 4, 253–255.

amendment were justiciable and that they must be in conformity with the *shari'a*. Prominent legal scholars such as Ibrahim Shihata observed that this reasoning placed the SCC in an uncomfortable position regarding future cases invoking article 2 of the Constitution, rather than definitively putting the question to rest.⁶¹

Perhaps the most interesting cases dealing with article 2 and the *shari'a* were not those that were initiated by litigants bringing disputes to court, but rather those cases brought by lower court judges themselves, using their power to refer questionable laws to the Supreme Constitutional Court for judicial review. For example, in presiding over a case concerning drinking in public in 1982, the judge of a Cairo criminal court decided to suspend the case and to petition the SCC to review the constitutionality of law 63/1976 on the consumption of alcohol.⁶² It was the judge's opinion that law 63/1976 did not conform to the requirements of Islamic law because it mandated prison time rather than lashings as the punishment for drinking in public. Just as it had done previously in the al-Azhar interest case, the SCC denied the petition on the grounds that the law had been issued before the 1980 amendment to the Constitution, which had made the *shari'a* the principal source of legislation rather than simply a source of legislation.

In similar judge-initiated cases that followed, the SCC found ways to dismiss the petitions on technicalities or on the basis of its non-retroactivity precedent.⁶³ However, repeated challenges of this sort revealed both the contentiousness of these questions and the ideological schisms that increasingly divided Egyptian society, the Egyptian legal community, and the hierarchy within Egyptian legal institutions.

THE REEMERGENCE OF A JUDICIAL SUPPORT NETWORK

By the end of the 1980s, it was abundantly clear that judicial institutions were playing a critical role in restoring political rights to opposition activists, opening the political arena to new opposition parties, and forcing the reform of Egypt's electoral laws. In return, Egyptian opposition

⁶¹ Shihata took the position that, even with the 1980 amendment strengthening article 2, commitments to Islamic law could not override other constitutional provisions, and this should have been made clear by the SCC early on. Interview with Ibrahim Shihata, February 10, 2001.

⁶² Case 61, Judicial Year 4, ruled April 23, 1988, *al-Mahkama*, Vol. 4, 84–87.

⁶³ More examples of judge-initiated Islamist challenges to secular laws can be found in *al-Mahkama*, Vol. 4, 253–255.

parties began to vigorously support judicial independence in general and SCC independence in particular, when it became clear that the Court was the only viable avenue to challenge NDP legislation and that it provided the most promising avenue for bringing about further political reforms. In effect, the SCC first cultivated and later strengthened its own support network through its rulings. By opening the political arena and empowering opposition activists, the SCC won over a vocal support group and ensured that activists would have the necessary political space to initiate litigation and therefore provide the SCC with more opportunities to expand its mandate in the future.

The Legal Profession

The 1980s also saw the reemergence of the legal profession as a political force. The Lawyers' Syndicate, the Judges' Association, and the legal profession in general have a long history of political activism in Egypt that is characterized by a deep commitment to liberalism and rule-of-law institutions.⁶⁴ Lawyers played a particularly strong role in political life in prerevolutionary Egypt, with fourteen of the nineteen prime ministers from 1919 and 1952 having their formal training in the law and nearly all cabinets during the same period featuring a majority of lawyers.⁶⁵ Indeed, many of the most famous and venerated personalities in modern Egyptian history – among them Sa'd Zaghlul, Mustafa Kamil, Mustafa al-Nahas, and Tawfik al-Hakim – were all lawyers.

But with the decline in private sector activity during Egypt's socialist transition, the legal profession took a major hit. Nasser's sweeping nationalization programs had brought private sector activity to a near standstill, and the most profitable commercial cases supporting the legal profession were drastically reduced. Lawyers were left to work on civil or criminal cases that generated only a fraction of the revenue of commercial cases, and commercial lawyers were folded into the state's burgeoning public sector. As a result, the legal profession fell from being perhaps the most attractive, lucrative, and respected profession in prerevolutionary Egypt to one of the least desirable career paths.

⁶⁴ See Donald Reid, *Lawyers and Politics in the Arab World, 1880–1960*; Farhat Ziadeh, *Lawyers, the Rule of Law and Liberalism in Modern Egypt*; Raymond Baker, "Fighting for Freedom and the Rule of Law: The Bar Association," in *Sadat and After: Struggles for Egypt's Political Soul*.

⁶⁵ Reid, *Lawyers and Politics*, 118.

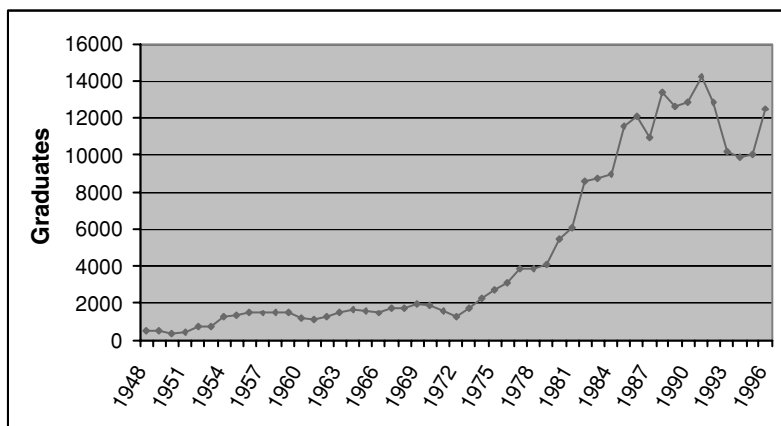


FIGURE 4.1: Egyptian Law School Graduates by Year, 1948–1996. *Source: Statistical Yearbook of the Arab Republic of Egypt*, Central Agency for Public Mobilization and Statistics, various years, 1960–1998.

Compounding the problem was an overproduction of lawyers, partly as a result of the state's commitment to offer advanced education to every Egyptian family, free of charge.⁶⁶ From 1970 to 1980 alone, university enrollment jumped threefold, from nearly 180,000 students to over 550,000 students. Law schools that were once highly selective, attracting the best and the brightest of Egyptian youth, became the easiest faculty to enter at the university. The quality of legal education declined quickly, and law schools produced an ever-increasing number of new lawyers each year, further diminishing the prestige of the profession (see Figure 4.1).⁶⁷

Throughout the 1980s, the most dynamic changes in the legal profession were again tightly linked to the process of economic reform. The steady expansion of private sector activity and the increased need for legal services strengthened segments of the legal profession that were best positioned to take advantage of the regime's *infatih* program.⁶⁸ Leading

⁶⁶ This overproduction of lawyers was a problem even before the vast expansion of the public education system under Nasser and Sadat. From 1917 to 1960, the Egyptian population doubled in size, but the number of lawyers increased twelvefold. Reid, *Lawyers and Politics*, 131.

⁶⁷ The overproduction of lawyers reduced the cost of legal services and encouraged litigation as a means to solve disputes. This contributed to the tremendous backlogs and long delays in court proceedings.

⁶⁸ In the ten years from 1987 to 1997 alone, the private sector share of the Egyptian economy increased from 25 percent to 65 percent.

Egyptian law firms also entered into joint operations with American and British firms to service new, transnational trade ventures.⁶⁹ At the same time that this segment of the legal profession was experiencing the biggest boom in decades, a vast surplus of lawyers, most with poor training and coming from disadvantaged socioeconomic backgrounds, continued to form the bulk of the legal profession. Sharp cleavages between old-school liberals, on the one hand, and disadvantaged but highly motivated Islamist lawyers, on the other hand, soon appeared within the legal profession. By 1985, these cleavages were already evident not just in the Lawyers' Syndicate membership but also in the formal programs organized at the Syndicate. *Shari'a* committees were established in all syndicate branches across the country to offer social and cultural services to lawyers and their families. Conferences and seminars were also organized around various themes related to Islamic law. Finally, these *shari'a* committees were charged with drafting legislation that would be submitted to the People's Assembly for consideration, with the aim of bringing contemporary laws into conformity with the *shari'a*.

The Supreme Constitutional Court facilitated the rebirth of the Lawyers' Syndicate by striking down law 125/1981, which had terminated its elected council.⁷⁰ Throughout the 1980s, the Syndicate was at the forefront of calls for political and judicial reform. The journal of the Lawyers' Syndicate, *al-Mohammah*, became an important forum for intellectuals and activists in the legal profession to sound out and publicize their calls for further judicial and political reforms. Numerous conferences were also held under the auspices of the Lawyers' Syndicate, drawing intellectuals, academics, and opposition activists to discuss the important issues of the day, including avenues for political reform. Moreover, the Syndicate began to provide free legal representation to the poor as a way to lodge cases against the regime.

⁶⁹ For more on the transformation of the branch of the legal profession engaged in transnational commerce, see Yves Dezalay and Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago: University of Chicago Press, 1996).

⁷⁰ This case was initiated by Ahmed Khawaga, president of the dissolved Lawyers' Syndicate, and other prominent members of the syndicate board. Case 47, Judicial Year 3, June 11, 1983, *al-Mahkama*, Vol. 2, 127–147. Although Mubarak's regime had already lifted law 125/1981 by the time the SCC issued the ruling, the decision is still viewed as an important precedent concerning freedom of association and the independence of the judiciary.

Similarly, the Judges' Association continued to play an assertive role throughout the 1980s. In its 1986 National Justice Conference, the Judges' Association issued a formal call for a comprehensive reform of Egyptian judicial and political institutions.⁷¹ *al-Qada'*, the official publication of the Judges' Association, became an important forum for judges and academics alike to address important issues concerning the administration of the courts, as well as the rule of law and political reform in general.

Similarly, administrative court judges sounded out proposals for reform in their own publication, *Majalat Majlis al-Dawla*. To some extent, the regime facilitated this process by restoring much of the independence of the civil and administrative courts through judicial reforms in 1984. Law 35/1984 reformed the Supreme Judicial Council, giving judges the ability to administer their own appointments and promotions for the first time since the power was stripped from them by presidential decree in 1969. Law 136/1984 similarly returned control over appointments and promotions to the *Majlis al-Dawla*.⁷²

The Human Rights Movement

The 1980s also saw the birth of the Egyptian human rights movement with the establishment of the Egyptian Organization for Human Rights (EOHR) in 1985. Within a short period of time, the EOHR was investigating and exposing the repressive methods of state control with hard-hitting reports on torture in prisons, electoral fraud, and violations of basic civil liberties. However, the EOHR was significantly constrained by the repressive legal environment within which it operated. All non-governmental organizations were supervised and regulated by the Ministry of Social Affairs (MOSA) according to the extremely restrictive law 32/1964 on associations. Formally, MOSA is designed to provide technical support for NGO activity, coordinate programs between NGOs, and assist them in dealing with the government bureaucracy. In practice, however, MOSA's primary function is to supervise the programs of Egyptian NGOs in order to neutralize political threats to the regime. Under law 32/1964, NGOs were required to obtain a license from MOSA. However, MOSA regularly rejected applications for the establishment of new

⁷¹ A copy of the formal recommendations issued by the Judges' Association at the 1986 National Justice Conference can be found in al-Rifa'i, *Istiqal al-Qada' wa Mehna al-Intikhabat* (Cairo: al-Maktab al-Misri al-Hadith, 2000).

⁷² For more on these amendments see 'Ubayd, *Istiqal al-Qada'*, 290–305.

NGOs based on a corporatist framework in which only a single organization was permitted to operate in the same district with the same purpose.⁷³ Furthermore, once in operation, law 32 imposed strict requirements on NGO activities, fundraising, and membership. The law gave MOSA the mandate to dissolve any association that it believed was “undermining the security of the republic or the government’s republican form.”⁷⁴ This vague wording gave MOSA the wide authority to dissolve NGOs at will.

Law 32 also gave MOSA jurisdiction over NGO leadership positions by empowering it to impeach any NGO leader, appoint up to 50 percent of board members, cancel the results of board elections, and combine existing NGOs.⁷⁵ Additionally, board meetings required approval by MOSA fifteen days in advance of convening, and minutes of the meetings were to be submitted to the government within fifteen days.⁷⁶ Finally, any decision reached by the general assembly or the board of an NGO was subject to veto by the Ministry of Social Affairs.⁷⁷ Failure to comply with any of the requirements of law 32/1964 resulted in fines and/or imprisonment of NGO board members.⁷⁸ The regime regularly used these broad powers to prevent the formation of NGOs, to monitor the activities of established organizations, and to disband or co-opt NGOs that built organizational resources and loyalties that were potentially hostile to state interests.

The Ministry of Social Affairs rejected the first attempt of the Egyptian Organization for Human Rights to register as an NGO in August 1987, initiating what would become a legal struggle lasting more than a decade. MOSA rejected the application on the grounds that the EOHR was engaged in political action, in violation of law 32, and that a similar organization was already active in the Giza Governorate.⁷⁹ The EOHR appealed the Ministry’s decision in the administrative courts, but the administrative court was bound to apply the provisions of law 32, and rejected the EOHR petition on the grounds that MOSA was acting within the limits of the law.⁸⁰

At the same time, the EOHR submitted a petition before the Supreme Constitutional Court to challenge law 32/1964 on the grounds that it was

⁷³ Article 12.

⁷⁵ Articles 28, 29, 30, 46–48, 55, 56.

⁷⁷ Article 3.

⁷⁹ According to article 12, any application can be refused on the grounds that “the community does not need the NGO or that there are other NGOs already performing the intended activities . . .”

⁸⁰ Lawsuit 2959, Judicial Year 42.

⁷⁴ Article 57.

⁷⁶ Articles 39, 44.

⁷⁸ Article 92.

issued by presidential decree rather than through the People's Assembly and that numerous articles of the law violated constitutional guarantees of the freedom of association. The administrative court rejected the petition and refused to transfer the case to the SCC, underlining the critical gatekeeping role that regular courts have in deciding which constitutional questions reach the SCC and which ones are blocked. Refusing to disband, the EOHR launched an appeal in the Supreme Administrative Court, and the appeal continued through the next decade, the details of which are explored in the [next chapter](#).

This precarious legal situation throughout the late 1980s forced the EOHR to devote a tremendous amount of energy and resources to its own struggle for legal existence rather than concentrating on a program of human rights monitoring. The fact that the EOHR did not have solid legal footing also meant that its members were left in a precarious position. Without a license to operate, human rights activists had less recourse to already limited judicial safeguards under law 32/1964 and they risked far more stringent penalties. Yet, the EOHR continued to carry out its human rights work throughout the 1980s, all the time locked in litigation with the government.

In addition to its precarious legal situation, the EOHR faced financial constraints that would have been crippling if it were not for assistance it received from international human rights groups. Nearly all funding for the EOHR came from foreign sources. According to Negad al-Bora'i, former Secretary-General of the EOHR, human rights groups in Egypt were almost completely dependent on foreign funding sources because domestic benefactors fear state retribution.⁸¹ Increased links between Egyptian human rights activists and international human rights organizations enabled the EOHR to rapidly expand its operations, but the reliance on foreign funding made the organization vulnerable to the regime's claim that human rights groups operated at the behest of "foreign interests"

⁸¹ Bora'i explains that Egyptians are willing to donate money to charitable organizations if they are nonpolitical and sanctioned by the regime, but "if a businessman gives money to human rights NGOs, he knows he will be destroyed by the government. He will suddenly find the government inspecting his tax situation and digging up evidence of any infractions of the law." Personal interview with Negad al-Bora'i, October 22, 2000. This example of state retribution is particularly interesting because Egyptian business law is cumbersome and the bureaucracy is corrupt to the extent that one can hardly engage in business without having to resort to corruption or evasion of the law. In such a system where every actor is technically operating outside the law, legal provisions can be applied selectively to punish anyone that the regime chooses to target.

and that their reports of human rights conditions were either fabricated or greatly exaggerated. Despite these legal and financial obstacles, the human rights movement became a crucial support structure for the Supreme Constitutional Court when it turned to constitutional litigation as a primary strategy to challenge the regime.

The Rapid Expansion of Constitutional Power (1991–1997)

“Mr. President, what does freedom of expression mean to you?”

Mubarak: “Freedom of expression means you can speak up, criticize, and write what you want, as long as it is not against the law.”¹

By the early 1990s, the Supreme Constitutional Court had become a significant force in the Egyptian political system. In the economic sphere, it played a leading role in overturning Nasser-era nationalization laws, with an early willingness to push the pace and the extent of compensation much further than the government had intended. In the political sphere, the SCC also issued surprisingly strong rulings that twice forced the dissolution of the People’s Assembly and a complete restructuring of the electoral system for local and national elections. Throughout the 1980s, the interests of civil associations, opposition parties, and the SCC began to converge, and a judicial support network began to take shape.

These synergies were accelerated as the Court became more assertive under the leadership of Chief Justice ‘Awad al-Murr during the period from 1991 to 1997. Al-Murr led a new group of justices who were appointed to the SCC through its unique process of internal recruitment, replacing the justices who had been transferred from the regime-dominated Supreme Court in 1979.² Under ‘Awad al-Murr, the SCC

¹ Interview with Mufid Fawzi on the television program, *Hadith al-Madina* (Talk of the Town), November 28, 1995.

² Former Justice Muhammad Abu al-‘Aynayn and Justice ‘Abd al-Rahman Nusayr both explained that the new recruits were more activist than the holdovers from the Supreme Court, resulting in tensions between the full justices of the court and the lower ranking commissioner counselors in the first decade of SCC operations. Interview with former justice and vice president of the SCC, Muhammad Abu al-‘Aynayn, February 17, 2001; interview with Justice ‘Abd al-Rahman Nusayr, February 21, 2001.

began to use international law to bolster its rulings, and it forged new institutional links with foreign jurists and international rights organizations. The SCC also made itself the focal point for reform efforts by continuing to open space for political activists. This generated the constitutional litigation necessary for the SCC to expand its exercise of judicial review and it shaped a vocal judicial support network that would defend SCC independence. This symbiotic relationship was a key ingredient to the rapid expansion of constitutional power that occurred in the 1990s.

Although the SCC took bold stands on many political issues, there were important limits to SCC activism that are explored in this chapter. Perhaps the best example of limitations to judicial activism was the SCC's reluctance to rule on the constitutionality of military courts to try civilians – the ultimate regime check on challenges to its power. Ironically, this willingness to accommodate the most egregious rights violations made SCC activism possible in other spheres of political life. Moreover, the politics of executive-judicial relations is more complicated than a simple struggle with the regime on one side and the SCC and Egypt's civil society coalition on the other. The Court's enthusiastic support of the economic reform program proved to be a useful way for the government to discard Nasser-era economic policies, but rulings in the economic sphere also gave the Court increased leverage to push a moderate political reform agenda.

THE SCC AND ECONOMIC REFORM, 1991–1997

In 1991, the regime initiated its long overdue structural adjustment program. Despite the fact that the public sector was chronically inefficient and state controls on the economy only exacerbated economic difficulties through the 1980s, privatization and structural adjustment had been postponed for years because of the political costs that reform entailed. Among the most pressing economic issues were housing reform and the privatization of the hopelessly inefficient public sector. It was an inescapable fact that Nasser's socialist legacy imposed a severe drain on the economy, but there was little consensus about which direction to steer the economy. Economic reform remained the single most controversial domestic policy issue, and recent history had proved it to be the most volatile. Sadat's austerity measures had produced widespread rioting and dozens of deaths in 1977, but the reforms required in the 1990s would unavoidably affect the basic livelihood of tens of millions of Egyptians on a far more fundamental level.

The Egyptian government therefore benefited tremendously from a number of SCC rulings in the economic sphere that effectively dismantled the economic foundations of the Nasserist state. Liberal SCC rulings in the area of housing reform, privatization, land reform, and labor law enabled the executive leadership to avoid the direct opposition of groups both inside and outside the state with a vested interest in maintaining the status quo.

The SCC Transforms Owner-Tenant Relations

Since independence, one of the most pressing economic problems in Egypt has been a chronic housing shortage. At first glance, it appears that the housing crisis is the direct result of the population explosion and chronic poverty that are typical of a country at Egypt's level of development. With an annual population growth rate between 2.2 percent to 3 percent for several decades, Egypt has approximately one million new citizens to house every *eight* months. When this growth is combined with rural-to-urban migration, urban centers like Cairo experienced a staggering annual population growth rate of nearly 4 percent per year for several decades. On closer examination, however, it is apparent that Egypt's housing crisis is as much the result of socialist-era rent-control laws as it is the result of poverty and demographic dynamics.³

In an effort to control the skyrocketing cost of housing and win political support among the urban poor, Nasser repeatedly extended rent-control laws held over from World War II. On seizing power, the Free Officers promptly issued law 199 of 1952 and brought all rental contracts signed between 1944 and 1952 under a state rent-control system. Rental rates were reduced by 15 percent and frozen at that level. In 1958, the regime extended the reach of rent-control laws to all rental contracts signed between 1952 and 1958. Again, the regime reduced rents by 20 percent and froze their rates at that level.⁴ In 1961, all new leases signed between 1958 and 1961 were similarly reduced by 20 percent and frozen.⁵

In addition, these rent-control laws made it nearly impossible for owners to expel their tenants, and rental contracts would live on even *after* the death of the original tenant. Spouses, children, and other relatives to

³ For an excellent summary of rent-control laws in Egypt and their disastrous impact on social and economic development, see Betsy McCall, "The Effects of Rent Control in Egypt." *Arab Law Quarterly* (1988): 151-166, 274-286, 345-365.

⁴ Law 55/1958.

⁵ Law 168/1961.

the third degree of relation had the right to continue the rental contract at the *same rate* on the single condition that they had resided with the original tenant for one year prior to his or her death. Similar provisions in the rent-control laws extended the same privileges to tenants using rental units for commercial or professional purposes. This extension covered millions of rental contracts for small grocery markets, doctors' offices, lawyers' offices, and the like. After decades of double-digit inflation, tenants were still obliged to pay only the amount that was fixed at the time that rent control went into effect, a sum that was typically as little as ten pounds a month for a good apartment in central Cairo.⁶ High rates of inflation, coupled with the right of the tenant to maintain the rental contract indefinitely for generations, had the practical effect of completely transferring property rights from building owners to their tenants.

Although the socialist-era rent-control laws were intended to provide housing relief for Egypt's urban masses, the actual effect of the laws was quite the opposite. Rent control created several perverse economic incentives that greatly aggravated Egypt's housing crisis. First, the rent-control regime resulted in a sharp decrease in private sector investment in the formal housing sector. Once considered among the most lucrative sectors in Egypt, investors shied away from building new rental properties. Second, under the rent-control laws, building owners no longer had the incentive or the financial means to maintain existing rental properties, and as a result, buildings suffered from premature decay and even collapse. Finally, landlords renting apartments in the formal sector would only sign new rental contracts if they received large, illegal side payments known as "key money" (*khilw rigl*) in advance in order to offset the depreciation in the value of rent payments after inflation took its toll. The only alternative was to purchase a new unit outright, but again, doing so required a tremendous sum of money that had to be paid in advance. With a poorly functioning banking system and a legal system that is unable to enforce contracts efficiently and effectively, Egypt has not been able to develop an adequate home mortgage system.⁷ Even modest housing in the formal sector was (and continues to be) out of reach for most Egyptians.

Unable to afford even basic housing in the formal sector, low-income Egyptians have been forced into a burgeoning informal sector composed

⁶ This was roughly the equivalent of \$3 for the decade of the 1990s.

⁷ A new mortgage law was finally issued in 2001, but given the weakness of the banking sector and various inefficiencies in the legal system, affordable and effective home mortgage programs are still not available for the vast majority of citizens.

of squatter settlements, which typically circle major urban centers. It is estimated that between 1973 and 1983, a period of rapid inflation with the initiation of the open-door economic policy, 60 to 80 percent of all new housing construction was in the informal sector.⁸ This *ashwa'i* housing is unplanned and unregulated, often with no running water, no waste disposal, and no other basic services. Moreover, the informal housing sector has negative implications for both residents and the state beyond the obvious deficiencies in infrastructure, planning, and public health. Because informal housing operates outside the formal legal system, residents are unable to use their property as a form of collateral, even for small loans. For the state, the proliferation of informal housing and the increase of illegal side payments in the formal sector crippled its ability to tax property owners and generate development revenue.⁹

By the 1970s, there were already clear indications that the rent-control regime had generated tremendous economic and social problems, particularly for couples wishing to marry and begin new households. In an attempt to deal with the housing crisis, the government issued a series of amendments to law 52/1969 in 1976, 1977, and 1981.¹⁰ The amendments made slight adjustments to the formula for assessing rents by tying rates to the cost of construction materials and land. The modifications allowed for slightly higher rates for apartment buildings constructed after 1981, but in the process the government continued to expand the coverage of the rent-control regime to include all new buildings in the formal sector instead of allowing new rental contracts to be priced according to market forces. In a move that is typical of the Egyptian government in so many areas, the regime chose to continue with a failed policy for fear that any attempt to rationalize the system would lead to political rupture. The risks were very real; full liberalization of rent-control laws would mean a dramatic increase in rental rates, and the economic burden for many would result in evictions and major social dislocation. Tentative government moves to consider the amendment of rent-control laws were met by furious

⁸ Because informal housing is completely unplanned and outside the law, it is often built illegally on areas zoned for agricultural land, thereby exacerbating Egypt's food scarcity problems.

⁹ The proliferation of housing outside the formal sector and the negative implications for residents, the state, and the economy in general are not peculiar to the Egyptian experience. For the parallel phenomenon halfway around the world in Peru, see Hernando De Soto, *The Other Path: The Invisible Revolution in the Third World* (New York: Harper & Row, 1990).

¹⁰ Law 4/1976, law 49/1977, and law 136/1981.

opposition in the popular press.¹¹ But in the meantime, every year that the government postponed reform, Egypt's housing crisis became more severe and the political implications of housing reform more perilous.

The distortions created by the housing regime reached absurd levels by the early 1990s. The Ministry of Housing estimated that, despite the severe housing shortage, at least two million flats remained unoccupied across the country. Because signing a rental contract essentially resulted in the complete transfer of property rights from the building owners to their tenants, owners simply preferred to leave their apartments vacant, rather than be subject to the provisions of the rent-control laws. The rent-control laws created incentives that were perfectly rational on an individual level, but absolutely dysfunctional in the aggregate.

By the 1990s, the Supreme Constitutional Court began to take on the politically sensitive task of dismantling the rent-control regime by itself.¹² Already in its decision on April 29, 1989, the SCC ruled that rental units used for religious or cultural purposes should not be exempt from paying the small increases in rent provided for in law 136/1981.¹³ In 1992 and 1994, the SCC invalidated extraordinary rental rights provided to legal professionals at the expense of owners.¹⁴ Shortly thereafter, a similar ruling invalidated the privileged rental provisions for the medical profession.¹⁵ By 1995, the SCC went beyond tinkering at the edges and began to make more aggressive rulings.

In a decision in March of that year, the SCC ruled that article 29 of law 49/1977 was unconstitutional.¹⁶ This provision extended rental contracts to relatives by blood or marriage to the third degree, if they had occupied the unit with the original tenant for at least one year prior to the tenant's death.¹⁷ The SCC ruled that the provision extending the

¹¹ One such initiative came in November 1994, when Housing Minister Salah Hasaballah announced that he would submit a draft bill to remove restrictions on rental values of older properties. When this produced a storm of protest in the papers, the government put off introducing the bill. It is likely that Hasaballah's announcement was a way for the regime to test the level of public opposition to housing reform.

¹² Enid Hill also explores many of these rulings in "The Supreme Constitutional Court of Egypt on Property," in *Le Prince et son Juge: Droit et Politique en Egypte*, 55–91.

¹³ Case 21, Judicial Year 7, issued April 29, 1989, *al-Mahkama*, Vol. 4, 218–227.

¹⁴ Case 25, Judicial Year 11, issued 27 May 1992, *al-Mahkama*, Vol. 5, 364–381; Case 30, Judicial Year 15, issued 3 Dec. 1994, *al-Mahkama*, Vol. 6, 386–407.

¹⁵ Case 11, Judicial Year 16, issued 3 July 1995, *al-Mahkama*, Vol. 7, 19–44.

¹⁶ Case 6, Judicial Year 9, issued 18 March 1995, *al-Mahkama*, Vol. 6, 542–566.

¹⁷ In the case at hand, the brother-in-law of a deceased tenant had claimed legal rights to the rental contract, but the owner of the flat contested the constitutionality of article 29.

rental contract to relations of the third degree by marriage constituted an infringement of the property rights of the landlord.¹⁸ However, the Court did not strike down the same provision for blood relatives. A number of legal scholars and leftists immediately criticized the SCC for functioning more like a legislative body than a judicial organ. How, leftists asked, could the Court determine that property rights are infringed if the rental contract is extended to the third degree of relation through marriage but not through blood? Leftists argued that this arbitrary distinction was not a constitutional issue, but rather one of policy that the government was too timid to take on through the People's Assembly.¹⁹

In early February 1996, the government issued new legislation liberalizing all new rent contracts. Although this was an important step in the effort to liberalize rent-control laws and to alleviate Egypt's housing crisis, the regime still did not dare to liberalize the millions of rental contracts that were binding from the previous several decades. This task was left to the Supreme Constitutional Court. The next two SCC decisions in the area of owner-tenant relations dealt with commercial tenancy. In July 1996, the Court ruled that, on the death of a commercial tenant, business partners do not have the right to continue the rental contract. Instead, they must enter into a new contract with the property owner.²⁰ Although this was an important ruling, it was only a taste of what was to come the following year in one of the SCC's most important rulings in the economic sphere.

On February 22, 1997, the Supreme Constitutional Court struck down a provision of law 49/1977 that froze rental prices at their 1977 level and automatically passed rental contracts for commercial properties from tenants to their family members on their death.²¹ The law essentially allowed commercial tenants to occupy small shops and businesses and to pay the same rent that they did back in 1977, even after decades of inflation. The SCC ruled that this was an unacceptable infringement on the property rights of landlords.²² The impact of the SCC ruling was far reaching, affecting over 800,000 commercial

¹⁸ Interestingly, the SCC made references to protections on property rights in Islamic law to lend further moral weight to its ruling.

¹⁹ These views were related to me by Hossam 'Eissa, professor of law at 'Ain Shams University, October 29, 1997.

²⁰ Case 4, Judicial Year 15, issued July 6, 1996, *al-Mahkama*, Vol. 8, 39–72.

²¹ Case 44, Judicial Year 17, issued February 22, 1997, *al-Mahkama*, Vol. 8, 394–410. The ruling struck down paragraph 2 of article 29.

²² Chief Justice 'Awad al-Murr made it clear both in the ruling and in public statements that the SCC was ready to hear more petitions challenging similar provisions related to units leased for industrial activity.

tenants by conservative estimate and up to several million tenants by other figures.

Fearful that the SCC ruling could result in hundreds of thousands of evictions and massive social and economic dislocation, the government quickly introduced new legislation to regulate landlord-tenant relations for commercial properties. Law 6/1997 allowed for the continuation of rental contracts after the death of the tenant under three conditions: (1) the inheritor should be a first- or second-degree relative of the original tenant, (2) the rental unit must be used for the same kind of commercial activity that the original tenant engaged in, and (3) the lease may not be transferred to relatives more than one time. The new law also increased rents by various rates depending on when buildings were constructed, in addition to providing for an annual increase in the rental price by up to 10 percent.²³

The SCC ruling, coupled with the new law, produced a formula that was extremely useful to the regime. The ruling of unconstitutionality allowed the government to modify law 49/1977 without facing direct opposition from millions of tenants. At the same time, the new provisions provided for the continuation of most rental contracts at higher, but not completely free-market rates, which would have entailed massive social and economic disruption. The government was able to capitalize on its moderate position; tenants were not evicted, as they feared, yet landlords were able to collect far more revenue than they had been able to for years. The new law allowed prices to reach market equilibrium over time, with 10 percent increases per year. Moreover, because the new law provided for the continuation of the rental contract after the death of the original tenant (the core concern of the SCC ruling), the regime would have another opportunity to modify landlord-tenant relations for commercial spaces in the future when landlords inevitably challenge the constitutionality of the new law.²⁴

Later in the same year, the ruling on commercial tenancy was followed by a string of fresh SCC rulings on owner-tenant relations in the residential sector. In August 1997, the SCC ruled that tenants cannot transfer their contract rights to others and that owners have the right to break the

²³ Rent on units constructed before January 1944 were increased eightfold, from 1944 to 1961 rents were raised fivefold, from 1961–1973 rents were quadrupled, from 1973 to 1977 rents were tripled, and from 1977 to 1996 rents were increased by 10 percent.

²⁴ As of December, 2006, the SCC had reviewed two challenges to law 6/1997. The Court refused the first petition (Case 176, Judicial Year 22) and dismissed the other (Case 207 Judicial Year 27). However, dozens of other challenges remain on the SCC docket.

lease if another individual replaces the original tenant.²⁵ The SCC made concurrent rulings in ten other cases challenging the same provision of law 49/1977 on the same grounds. A similar decision came in October 1997, when the SCC ruled article 7 of law 49/1977 unconstitutional, thereby prohibiting tenants from exchanging apartments.²⁶ The following month, the SCC struck down another provision of the same law that had allowed tenants to sublet their apartments.²⁷

For over a decade, SCC rulings in the urban housing market were consistently free market in orientation, effectively diffusing one of the most volatile elements of the economic reform agenda. Justices were well aware that, by striking down the legal foundations of the Nasser-era economy in this piecemeal fashion, they were effectively legislating from the bench; moreover, they were proud of it. Justice Nusayr made clear that the Court was “. . . very interested in changing the economic system in Egypt.” He explained that, “of course we are looking at the legal principles and circumstances in each case, but there is an awareness that we have an important role to play in renewing our country and our economy.”²⁸ Leftists criticized the SCC for overstepping its role, deflecting direct criticism from state policy as a whole.²⁹

Interestingly, Mark Graber notes exactly the same dynamic in his study of U.S. politics. Graber observes that “[t]he aim of legislative deference to the judiciary is for the courts to make controversial policies that political elites approve of but cannot publicly champion, and to do so in such a way that these elites are not held accountable by the general public, or at least not as accountable as they would be had they personally voted for that policy.”³⁰ The striking similarity between legislative-judicial dynamics in the United States and Egypt indicates once again that one should not automatically assume that judicial politics in democratic and authoritarian states are fundamentally different. In many cases, the interests and strategies of legislators and judges are indistinguishable across regime type.

Failure to Block Land Reform through the SCC

The Court’s commitment to a free-market economy was illustrated once again when it failed to block agricultural sector reforms, despite the

²⁵ Case 116, Judicial Year 18, issued August 2, 1997, *al-Mahkama*, Vol. 8, 789–808.

²⁶ Case 71, Judicial Year 19, issued October 4, 1997, *al-Mahkama*, Vol. 8, 876–891.

²⁷ Case 149, Judicial Year 18, issued November 15, 1997, *al-Mahkama*, Vol. 8, 949–966.

²⁸ Personal interview, February 21, 2001.

²⁹ For representative examples, see *October*, March 23, 1997; *al-Arabi*, March 31, 1997.

³⁰ Mark Graber, “The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary.” *Studies in American Political Development* 7 (1993): 43.

many petitions brought by leftists. This story begins in June 1992 when the government hammered land reform legislation through the People's Assembly. Law 96/1992 reversed Nasser-era rent-control provisions in the agricultural sector, first through an immediate increase in rental rates and then, more significantly, by completely annulling rental contracts in the agricultural sector after a five-year grace period. By 1997, owners and tenants in the agricultural sector were to enter into new rental contracts at free-market rates, with owners having the right to evict tenants if they wished. The economic implications of law 96 were staggering, as it affected 1.3 million agricultural leases sustaining approximately six million of Egypt's poorest peasants.³¹ Despite the potential for severe economic hardship for millions, the government took the lead on owner-tenant relations in the countryside because peasants were more geographically dispersed than urban tenants, making rural mobilization more difficult. Moreover, peasants had fewer economic and political resources and so would pose fewer obstacles to the government's liberalization program.

Realizing that a reversal of Nasser's land reforms could still potentially result in widespread unrest in the countryside, the regime attempted to minimize opposition by providing a five-year grace period before law 96 would go into effect. More important, the law stated that landlords could not expel tenants without first obtaining a court order.³² Use of the courts in this way reduced direct pressure on the regime by breaking opposition to law 96 into hundreds of thousands of smaller disputes. This process not only made enforcement of individual rulings more feasible but it also reduced the ability of peasants to solve their collective action problems. Channeling impending disputes through the court system on an individual basis facilitated the gradual reversal of land reform and helped to mitigate the political repercussions of a volatile issue in Egypt's transition to a liberalized economy.³³

Despite these measures, resistance to law 96 was strong both within formal legal channels and through spontaneous acts of violence. Protests were organized across the country, including one in 1997 staged by 3,000 peasants, who blocked the main road to Upper Egypt until the protest

³¹ Moreover, peasants had already been feeling the pain of the government's economic liberalization program with the removal of subsidies for basic inputs.

³² Richard Engle, "Slow Courts Avoid Peasant Unrest." *Middle East Times*, October 24, 1997.

³³ The regime also placed several leading opposition activists in preventive detention in order to interfere with their plans to organize and oppose land reform. These activists included Nasserist leader and director of the Arab World Media Center Hamadeen Sabahy, Tagammu' Party members Dr. Muhammad 'Abdu and Hamdy Heikal; and Muhammad Suliman Fayad, a lawyer participating in State Security Case 795/1997.

was broken up with tear gas and arrests. Most clashes were spontaneous, however, when owners, backed by the police, evicted tenants forcibly. In 1999 alone, 82 peasants were killed, 411 were injured, and 402 were arrested in disputes related to land tenancy.³⁴ Allegations of torture at the hands of state security forces were also widespread.

Opposition within formal state institutions came from leftist opposition party members in the People's Assembly, but activists recognized that the only real hope of defeating law 96/1992 was in the courts. The new Land Center for Human Rights (LCHR), established in 1996, launched thousands of cases and provided free legal assistance on behalf of peasants attempting to prevent the confiscation of their lands. More important, however, LCHR filed a number of petitions to challenge the constitutionality of law 96 in the Supreme Constitutional Court, claiming that it violated articles 4 and 23 of the Constitution.³⁵ By December 2000, the Land Center for Human Rights was granted permission by a Giza court to challenge law 96 in front of the SCC. But unlike the many cases logged with the SCC contesting the constitutionality of Nasser-era legislation, the Land Center for Human Rights fought an uphill battle when attempting to challenge the constitutionality of law 96. When interviewed, LCHR legal director, Mahmud Gabr, was not at all optimistic about the possibility of overturning law 96 because of the Supreme Constitutional Court's track record of backing the economic liberalization program. Gabr somberly admitted that "even though Egypt's constitution is essentially a socialist constitution, the court has a program and an agenda of its own."³⁶ Gabr's cynicism appears to have been on target, as the government's land reform program was never struck down by the SCC. The rent-control regime, a cornerstone of Nasser's efforts to redistribute national resources, was dismantled with the cooperation of the Supreme Constitutional Court.

The SCC and the Privatization of the Public Sector

The most controversial Supreme Constitutional Court ruling in the economic sphere concerned the privatization of public sector companies.

³⁴ Land Center for Human Rights report, "Land and the Farmer."

³⁵ Article 4 reads, "[t]he economic foundation of the Arab Republic of Egypt is the socialist democratic system based on sufficiency and justice, in a manner preventing exploitation, narrowing the gap between incomes, protecting legitimate earnings and guaranteeing justice in the distribution of public responsibilities and expenditures."

³⁶ Interview with Mahmud Gabr, Land Center for Human Rights, November 18, 2000.

Privatization was at the heart of the government's economic reform program, but the law providing for the liquidation of the public sector was difficult to reconcile with several constitutional provisions guaranteeing the prominence of the public sector:

Article 30

Public ownership is the ownership of the people and it is confirmed by the continuous support of the public sector. The public sector shall be the vanguard of progress in all spheres and shall assume the main responsibility in the development plan.

Article 33

Public ownership shall have its sanctity. Its protection and support shall be the duty of every citizen in accordance with the law as it is considered the mainstay of the strength of the homeland, a basis for the socialist system and a source of prosperity for the people.

Article 59

Safeguarding, consolidating, and preserving the socialist gains shall be a national duty.

Leftists organized the ad hoc National Committee for the Protection of the Public Sector and the Preservation of Egypt's Wealth to challenge the constitutionality of law 203/1991, which had organized the privatization of the public sector. Together with the Nasserist Party, the Islamist-oriented Labor Party, and the Tagammu' Party, they backed a former worker for the Egyptian Company for Paper and Stationary who had a case transferred to the SCC in 1994.

Leftists were generally pessimistic about the possibility of a successful challenge to the constitutionality of the privatization program because of the SCC's well-known position on economic reform. However, they nonetheless used the case to mobilize opposition against the privatization program. Khaled Mohi al-Din, leader of the leftist Tagammu' Party, explained at the time that "even if we don't get a court ruling to stop the selling of these companies, we would have still got the message across to the public that the sell-off is not constitutional." Sabri 'Abd Allah, a left-wing economist with the National Committee for the Protection of the Public Sector, agreed that "this is precisely the main purpose of this lawsuit: to provoke a public reaction against the selling. It is primarily a political maneuver."

The constitutional challenge put the SCC in an awkward position. Public sector and socialist-oriented growth figured prominently in the Constitution, but the regime did not amend the Constitution because doing so

would have triggered a direct confrontation with leftists. Moreover, any amendments to the Constitution would raise other contentious constitutional issues, such as the secular/Islamic nature of the state. Taking these political risks into consideration, the regime decided to sidestep the question and simply issued law 203/1991 on privatization without making *any* constitutional reforms.

The Supreme Constitutional Court was left to work out the inconsistencies in the law. Chief Justice, ‘Awad al-Murr, recalled the situation that the court faced:

The Constitution in its plain terms said that the public sector is dominant and it has to command the process of development in Egypt... Could the court accept this? The public sector proved to be a complete failure in our society. Everything was wrong with the public sector. It failed in administration. It failed in producing revenues. It failed in every aspect of its life....

The World Bank said that the only solution was to amend the Constitution but the government was unwilling. The court faced a real problem. Either Egypt was to move ahead or retreat backward. Such was the case when we made our decision; a government unwilling to amend the Constitution, the World Bank [*sic*] saying that the only way forward is to amend the Constitution, and we have to interpret the Constitution in a way that will pave the way for privatization.³⁷

The SCC adopted an extremely liberal reading of the Constitution and justified the constitutionality of the privatization program on the grounds that the phrase “public sector” must be understood loosely to have the same meaning as “public investment.”³⁸ According to this reasoning, the government had the authority to liquidate state-owned enterprises, which were notoriously inefficient, in order to redeploy those resources to other forms of public investment that better serve the interests of the people. The Court contended that constitutional provisions concerning the economy must be read “in light of present contexts and current goals of development.” Leftists accused the SCC of striking down the Constitution itself. Even long-time Court supporters argued passionately that the Court had once again overstepped its mandate by twisting the Constitution and

³⁷ ‘Awad al-Murr, “The Constitution as a Means for Changing Egyptian Society” (lecture, American University in Cairo, September 18, 2000). This account was also related to the author by ‘Awad al-Murr in a personal interview conducted on June 11, 2000.

³⁸ Case 7, Judicial Year 16, ruled February 1, 1997, *al-Mahkama*, Vol. 8, 344–367.

playing a legislative role.³⁹ ‘Awad al-Murr responded to his critics by arguing that

... a Constitution cannot impose on any society a specific method of achieving progress. Since these methods are changeable and scientific in nature, they are in constant movement. What is seen at the time to be a step for progress could be seen the other way around at another time. So, if you acknowledge that the means of development are changeable and scientific in nature, then no specific method should be imposed on our society. The government must have alternatives for investing its money in directions pertinent to the public interest.

Instead of a public sector, which has been considered by the Constitution as the only method of development, the court said that the method of development could not be restrained by a specific method, *even if it is stated in the constitution*. . . . Without this, no proper decision would ever happen and the economy in Egypt would have stayed as it was, incapable of advancement. [emphasis added]

‘Awad al-Murr’s public comments were astonishingly candid. They illustrate the fierce commitment of SCC justices to the creation of a free-market economy in Egypt and their willingness to radically reinterpret the Constitution to the point of rewriting it. His comments also illustrate what some called a disturbing willingness to brush aside aspects of the Constitution that are disagreeable with his notion of progress. ‘Awad al-Murr went on to argue that

a constitutional provision is a living creature. *It cannot be interpreted in any way that will impede our society. Impediments in our society cannot have tools within our Constitution. Our Constitution must not be construed as hindering our movement in the advance of progress.* That is why, despite the fact that the ruling of the court is a complete deviation of the terms of the Constitution, it is a ruling in light of our legitimate aspirations. So, whatever criticisms have been made against this ruling I will never regret what we have done. It was not only fair but it is required as a necessity in our society. [emphasis added]

So fervent were al-Murr’s views on the Egyptian economy, the italicized portion of the passage echoes statements made by Nasser when he

³⁹ Opposition papers from this period were filled daily with articles criticizing the ruling. Representative headlines include “SCC is Exceeding its Limits and Playing a Legislative Role,” *al-Sha’ab*, February 25, 1997; “After the SCC Ruling: The Government has the Right to Sell Egypt,” *al-Ahali*, March 10, 1997.

championed revolutionary legitimacy above strict adherence to the rule of law. Again, the SCC was roundly criticized by leftists for its defense of privatization, but with it the Court had neutralized the most serious legal challenge to the liquidation of the public sector.

Compensation Cases Continue

Despite market-friendly rulings in urban housing markets, rural agricultural markets, and privatization of the public sector through this period, some SCC rulings proved to be an economic burden for the state. The Supreme Constitutional Court continued to aggressively overturn remaining Nasser-era nationalization laws in addition to Sadat-era legislation that had limited the state's responsibility for providing full compensation to former property holders. On March 7, 1992, the SCC overturned a law that placed a limit of £E 30,000 compensation for buildings that had been seized by the government.⁴⁰ Similarly, the SCC overturned limits on compensation for agricultural land that had been confiscated by the regime.⁴¹ The SCC also issued several important rulings extending property rights and compensation guarantees to *non-Egyptians*. In a landmark case, two Egyptian citizens who had been stripped of their nationality attempted to receive compensation for assets seized in 1961.⁴² Lawyers for the government contended that, because the plaintiffs were no longer Egyptian citizens, they should not have the legal standing to challenge Egyptian legislation. The SCC rejected the government's claim and declared that the same constitutional rights that are extended to Egyptian citizens must also be applied to noncitizens, provided they have a direct interest in the case.⁴³ The following year, the SCC affirmed the right of access to the

⁴⁰ Case 26, Judicial Year 4, issued March 7, 1992, *al-Mahkama al-Dusturiyya al-'Ulia*, Vol. 5, 185–198. The ruling struck down clause b, article 10, of law 69/1974. Two months later, the SCC ruled against a clause of the same article in law 69/1974, contending that it also interfered with proper compensation in violation of articles 34, 36, and 37 of the Constitution. Interestingly, the SCC based its ruling not only on property rights provisions in the constitution but also on “the principles of Islamic *shari'a*” and the economic rationale that the violation of property rights threatens the individual incentives to save and invest, thus interfering with the advancement of the development process and frustrating the economic interests of society in general. Case 65, Judicial Year 4, issued May 16, 1992, *al-Mahkama al-Dusturiyya al-'Ulia*, Vol. 5, 307–323.

⁴¹ A ceiling on compensation had been set at seventy times the prevailing real estate tax for the land.

⁴² Case 8, Judicial Year 8, issued March 7, 1992, *al-Mahkama*, Vol. 5, 224–241.

⁴³ The SCC based its ruling on articles 34 and 36 of the Constitution concerning property rights, but the Court also interjected its opinion that the protection of property rights

courts for both foreign individuals and companies when it interpreted articles 64 and 68 of the Constitution, the first declaring that “the state shall be subject to law” and the latter guaranteeing the right to litigation, as extending to foreign parties as well as Egyptian citizens.⁴⁴ Former Justice Muhammad Abu al-‘Aynayn affirmed that, when deliberating this ruling, as well as other rulings involving the property rights of foreign parties, “we all [the SCC Justices] had in mind the foreign investor.”⁴⁵

The SCC also issued rulings denying the government the ability to set arbitrary time limits that either legitimized sequestration orders or interfered with compensation claims for sequestered property. The first case concerned decree 44/1962, which empowered the state to seize *waqf* property and administer it through the *Wizarat al-Awqaf* (Ministry of Endowments) if its owners did not claim it and divide it among its rightful heirs within a six-month period.⁴⁶ The SCC decided that the legal provision forcing a division within six months of the decree was completely arbitrary and did not give the state the right to sequester property. The SCC ruling allowed victims of law 44/1962 to receive compensation in the administrative courts. The second case regarding arbitrary time limits concerned a provision in decree law 141/1981 that set a time limit of one year for the initiation of all property rights cases, absolving the government of the responsibility to remedy sequestration cases after that period.⁴⁷ The nonretroactivity provision in law 141 was an attempt to shield the government from compensation claims, but the SCC ruled that time limits posed a barrier to legitimate compensation claims and therefore infringed on articles 34 and 40 of the Constitution.

Finally, the SCC expanded procedural protections on property rights, first by striking down a provision in the law of criminal procedure that had allowed the regime to confiscate the property of those accused of crimes without a judicial order.⁴⁸ Next, the SCC struck down article 50 of law

must be extended to foreigners or else Egypt would be viewed as a country that does not respect its international obligations.

⁴⁴ Case 57, Judicial Year 4, issued February 6, 1993, *al-Mahkama*, Vol. 5 (2), 150–172. This reasoning was confirmed yet again in Case 98, Judicial Year 4, and Case 117 Judicial Year 6, issued March 5, 1994, *al-Mahkama*, Vol. 6, 198–212.

⁴⁵ Interview, February 17, 2001.

⁴⁶ Case 18, Judicial Year 13, issued May 15, 1993, *al-Mahkama*, Vol. 5 (2), 304–314.

⁴⁷ Case 130, Judicial Year 5, issued February 6, 1993, *al-Mahkama*, Vol. 5 (2), 173–182.

⁴⁸ Case 26, Judicial Year 12, issued October 5, 1996, *al-Mahkama*, Vol. 8, 124–141. The SCC also struck down a similar provision in law 66/1963 in Case 6, Judicial Year 17, issued May 4, 1996, *al-Mahkama*, Vol. 7, 574–594.

95/1980, which had deprived sequestration victims the right to contest final decisions of the Court of Values, which adjudicated all compensation cases according to law 141/1981.⁴⁹ This landmark ruling brought compensation cases out of the Court of Values, which was criticized for being unfair because of the presence of nonjudicial figures on the court.⁵⁰ After the SCC ruling, all judgments of the Court of Values could be appealed directly to the Court of Cassation, and thousands of plaintiffs exercised this option.

THE SCC AND TAXATION

The Supreme Constitutional Court was also increasingly assertive concerning less blatant cases of property rights infringement, most notably in the area of excessive and inequitable taxation. One of the most significant early taxation rulings was delivered in December 1993 when the Court struck down a law that provided for the taxation of Egyptians working in public sector companies abroad. The plaintiff, a woman working for the Ministry of Housing abroad, claimed that law 229/1989 discriminated against Egyptians working in the public sector while allowing Egyptians in the private sector to work abroad without paying the tax.⁵¹ The employee argued that this was a form of discrimination, and therefore the law violated article 38 of the Constitution, which bases the taxation regime on social justice. The SCC agreed with the litigant, and the law was overturned.⁵² The ruling deprived the state of a significant revenue stream and forced the government to pay back over £E 100 million.⁵³

⁴⁹ Case 9, Judicial Year 16, issued August 5, 1995, *al-Mahkama*, Vol. 7, 106–138.

⁵⁰ Not everyone contended that the presence of nonjudicial figures on the Court of Values produced unfair judgments. Ahmed Salah Mabruk, a prominent attorney specializing in compensation cases, believed that nonjudicial officials on the court seldom interfered with the opinions and decisions of those judges with legal background sharing the bench. According to Mabruk, the bigger problem in compensation cases was, and continues to be, attaining fair valuations for properties that are being compensated. Valuations are provided by court “experts,” who are part of the state bureaucracy. They have little independence from the government, and their valuations are considered to be consistently lower than fair market prices. Adding to this problem is the fact that compensation values are often pinned to the property values that are recorded in the tax records. Because owners consistently record property values below market value in order to circumvent exorbitant tax rates, it is difficult for titleholders to establish proof of higher property values. Interview with Ahmed Salah Mabruk, March 14, 2000.

⁵¹ She also contended that the tax was assessed based on the career level of government employees and not on the actual income of the employee, which can vary greatly.

⁵² Case 43, Judicial Year 13, issued December 6, 1993, *al-Mahkama*, Vol. 6, 80–93.

⁵³ Approximately \$29 million in the mid-1990s.

The SCC struck down a number of other tax laws that were also deemed to be egregious cases of excessive taxation. For example, in 1993 the Court struck down a land tax that was levied on vacant land. It contended that the tax burden was so high that it virtually resulted in state confiscation of property. Moreover, the SCC ruled that taxes should only be levied on property that generates a regular income and not on capital.⁵⁴ In another taxation case, the Zamalek Hotel and Tourism Company petitioned for a ruling of unconstitutionality on an aspect of law 147/1984, which imposed double the normal tax rate if tax payments were not made by a stipulated deadline. The SCC struck down the law, arguing that the fee was exorbitant and was not proportionate to the violation.⁵⁵ Similarly, the Egyptian-American Company for Paints successfully challenged articles 83 and 86 of tax law 111/1980, which had placed a tax on corporate capital. The SCC ruled that the law was a blatant instance of arbitrary and excessive taxation to the point of infringing on the property rights of companies.⁵⁶ Finally, the SCC issued several rulings reversing government efforts to tax citizens retroactively.⁵⁷

In most taxation rulings, the SCC once again underlined the economic rationale behind its rulings. For instance, in the taxation case concerning the American paint company, the SCC affirmed that “a capital tax of this kind deteriorates or ruins the value of its base and impedes accumulating the necessary resources for a rational, built-in economic base.” Moreover, al-Murr explained that such a tax was “a real impediment against investments and the healthy growth of national income.”⁵⁸

An interesting trend in taxation cases, as well as in economic cases in general, was the increasing frequency of constitutional litigation initiated by private companies. Whereas individuals initiated almost all of the petitions for constitutional review of economic laws in the first decade of SCC operations, litigation initiated by firms made up a considerable share of economic cases in the 1990s. In 1996, for example, one half of all successful constitutional challenges in the economic sphere were launched by private companies. Less than two decades after the resurrection of the private sector, Egyptian companies, such as the Eastern Cairo Bank and

⁵⁴ Case 5, Judicial Year 10, issued June 19, 1993, *al-Mahkama*, Vol. 5 (2), 331–341. Law 107/1976, amended by law 34/1978.

⁵⁵ Case 33, Judicial Year 16, issued February 3, 1996, *al-Mahkama*, Vol. 7, 393–423.

⁵⁶ Case 9, Judicial Year 17, issued September 7, 1996, *al-Mahkama*, Vol. 8, 87–112.

⁵⁷ See, for example, Case 23, Judicial Year 12, issued January 2, 1993, *al-Mahkama*, Vol. 5 (2), 131–149.

⁵⁸ *al-Mahkama*, Vol. 7, 107–108.

the Arab Cotton Company, successfully challenged the constitutionality of business laws.⁵⁹ Moreover, foreign companies, including the Meridian Hotel Corporation, British Airways, and Gulf Airways, also successfully challenged laws in the SCC.⁶⁰

The Supreme Constitutional Court was effectively fulfilling its mandate of protecting property rights against government infringement. The question was whether Mubarak's government would continue to abide by these court rulings as a necessary institutional restraint in the transition to a free-market economy or whether it would attempt to undermine its own institutional creation. Although SCC rulings in compensation and taxation cases forced the state to return hundreds of millions of pounds through the 1990s, pro-government rulings in the areas of housing reform, land reform, privatization, and labor law more than made up for the occasional inconveniences of some SCC rulings in the economic sphere. On balance, the government benefited tremendously from the Court's rulings on economic matters through the 1990s, and the SCC used this leverage to push more aggressively for expanded political and civil rights.

THE SCC IN THE POLITICAL SPHERE, 1991-1997

Throughout the 1990s, the regime reversed the tentative moves toward controlled political liberalization that were first initiated in the 1970s by Sadat and cautiously maintained throughout much of the 1980s under Mubarak. The government expanded its ability to exercise preventive detention and to try civilians in military courts through law 97/1992, professional syndicates were increasingly regulated and threatened with state sequestration by law 100/1993, the position of village *umda* (mayor) and *shaykh al-balad* (deputy mayor) became appointed rather than elected through law 26/1994, democratic institutions at universities were undermined by law 142/1994, the regime attempted to assert further controls over the press through the "press assassination law" 93/1995, and the emergency law was periodically extended throughout the decade.⁶¹

⁵⁹ Case 27, Judicial Year 16, issued April 15, 1995, *al-Mahkama*, Vol. 6, 671-685; Case 36, Judicial Year 18, issued January 3, 1998, *al-Mahkama*, Vol. 8, 1054-1064.

⁶⁰ Case 18, Judicial Year 8, issued February 3, 1996, *al-Mahkama*, Vol. 7, 424-439; Case 72, Judicial Year 18, issued August 2, 1997, *al-Mahkama*, Vol. 8, 749-769; Case 35, Judicial Year 17, issued August 2, 1997, *al-Mahkama*, Vol. 8, 770-788.

⁶¹ For a good overview of political retrenchment throughout the 1990s, see Eberhard Kienle, *A Grand Delusion: Democracy and Economic Reform in Egypt* (London: I.B. Tauris, 2000) and annual reports from the Egyptian Organization for Human Rights and the Center for Human Rights Legal Aid.

The declared objective of the new legislation was to better enable the government and security forces to root out militant Islamists.⁶² However, the government demonstrated that it was just as willing to target liberals, socialists, moderate Islamists, human rights advocates, and any other group that opposed the regime. Political retrenchment was designed to shore up the government's grip on power in anticipation of the political rupture that it risked with the introduction of the structural adjustment program. The structural adjustment program marked the beginning of a long overdue process of dismantling the chronically inefficient public sector, removing state controls on the economy, and rationalizing public expenditures. The government was concerned that economic liberalization would simultaneously lead to social discontent and weaken the regime's patronage network, which had facilitated political stability at the price of economic stagnation for decades.

As a sign of how central the Supreme Constitutional Court had become to political life in Egypt, almost every piece of new legislation was met with litigation. Although not all constitutional petitions were successfully transferred to the Supreme Constitutional Court for consideration, it was clear that the SCC had entered the public consciousness in a significant way. Among the cases that reached the SCC, several resulted in important rulings protecting civil society from state interference.

Reining in the Professional Syndicates

An early example of both the regime's tightened controls and the efforts by the opposition to hold the line concerned the regime's attempt to bring the professional syndicates under its control. Professional syndicates have always played a highly visible role in Egyptian public life, and partly because Egyptian political institutions do not provide adequate avenues for participation, syndicate politics have historically been highly politicized. As seen in Chapter 4, the Lawyers' Syndicate in particular had traditionally been an extremely vocal advocate of liberal political reform. But, with the Islamist wave sweeping Egyptian society beginning in the 1970s, moderate Islamists began to make strong inroads in syndicate board elections. Islamist candidates won a majority in the Doctors' Syndicate elections in 1986, the Engineers' Syndicate in 1987, the Pharmacists' Syndicate

⁶² Fighting between militant Islamists and state security forces claimed the lives of over 1,200 citizens between 1992 and 1997. Although it would be an exaggeration to contend that militants posed a credible threat to state power, the violence did result in the loss of tens of billions of dollars to the tourist industry.

in 1990, and, most important, the Lawyers' Syndicate in 1992.⁶³ This final victory in the Lawyers' Syndicate elections stunned the country because of the Syndicate's long-standing role as a bastion of liberalism. However, changes from inside and outside the legal profession – the overproduction of lawyers, the decades-long slump in private economic activity, the decline in the prestige of the profession, and hence the change in its socioeconomic composition – combined with the Islamist revival sweeping the country to produce a strong Islamist mandate in the Lawyers' Syndicate.⁶⁴

The government recognized that the Lawyers' Syndicate, long a thorn in its side, could be brought under its control under the guise of combating radical Islamists, who were waging armed attacks against the regime by 1992. The regime quickly pushed through law 100/1993, after only six hours of debate in the People's Assembly.⁶⁵ To prevent future Islamist victories stemming from low voter turnout, the new law required a minimum 50 percent turnout in syndicate elections. If a 50 percent turnout was not achieved, a second round would be held in which a 30 percent turnout would be required.⁶⁶ In the event that a 30 percent turnout was not achieved, the Syndicate would be placed under judicial sequestration. Perhaps more ominous was a provision in the new law stating that "syndicates shall not engage in activities other than those for which they were formed."⁶⁷ The law was considered a significant assault on the independence of Egypt's professional syndicates.

Within days of the passage of law 100/1993, a conference was held bringing together representatives of seventeen syndicates. The syndicates issued a joint statement condemning the legislation as unconstitutional and demanding its annulment. Ahmed Seif al-Islam Hasan al-Banna, a

⁶³ In each of these cases, highly motivated Islamist candidates benefited from consistently low voter turnout rates.

⁶⁴ Islamists took eighteen of twenty-four seats in the September 1992 election.

⁶⁵ Ibrahim Shukri, leader of the Socialist Labor Party, joked that the bill was hammered through so quickly it was "as if it were carried by a rocket."

⁶⁶ A 1995 amendment raised the required turnout to 70 percent of syndicate members and allowed the government to impose sequestration for alleged financial irregularities.

⁶⁷ At the same time, the regime attempted to undermine the Lawyers' Syndicate from the inside. In 1993, one of the remaining NDP members on the syndicate board, Muhammad Sabri Mubadda, launched an administrative court case demanding the board's dissolution based on a technicality. Mubadda contended that the 1992 elections were not conducted in line with law 95/1980, which stipulates that the names of all candidates be provided to the Socialist Public Prosecutor at least one month before elections are held. Mubadda's request was denied, but the legal wrangling in the administrative courts illustrated the government's attempt to undermine the Islamist board on technical grounds, without producing an overt confrontation.

prominent member of the Muslim Brotherhood and the new spokesperson for the Islamist majority on the Lawyers' Syndicate board, illustrated both the level of constitutional consciousness among the opposition and the degree of awareness of the utility of litigation in the SCC when he publicly demanded that the regime retract the law or "we will take the matter to the Supreme Constitutional Court to prove that the law is unconstitutional."⁶⁸ Indeed, over the next year, twelve syndicates launched court cases attempting to transfer their constitutional challenges to the SCC.⁶⁹ Their efforts were encouraged in public statements by activist judges. Ahmed Meki, vice president of the Court of Cassation and an outspoken judge, went on the record to state that he believed law 100/1993 was unconstitutional and that if a petition contesting the law reached his court, he would immediately transfer it to the SCC for consideration.⁷⁰

Tensions between the regime and the Lawyers' Syndicate increased to unprecedented levels when an Islamist lawyer and EOHR member, 'Abd al-Harith Madani, was abducted by state security forces, tortured, and killed in custody in April 1994. Madani's death provoked a direct confrontation between lawyers and state security forces as hundreds of lawyers assembled in protest at the syndicate headquarters. After a day of rioting, dozens more lawyers were taken into detention. The case focused international attention on the Egyptian regime, with detailed reports compiled by Human Rights Watch, the Center for the Independence of Judges and Lawyers, and the Lawyers' Committee for Human Rights.⁷¹

The regime eventually succeeded in sequestering the Islamist-dominated Lawyers' Syndicate, not through the new syndicate law but by manipulating the Syndicate's internal factions. In 1996, a Syndicate member initiated a court case accusing the board of financial irregularities. The administrative court that heard the case then placed the Syndicate under sequestration.⁷² The failed attempt to undermine the Lawyers'

⁶⁸ *Al-Ahram Weekly*, February 25, 1993.

⁶⁹ This legal strategy was combined with more traditional strategies. On February 21, 1993, the Lawyers' and Engineers' Syndicates held a one-day strike in which well over a hundred thousand lawyers and engineers participated, according to opposition estimates. *al-Wafd*, February 21, 1993.

⁷⁰ *al-Wafd*, November 3, 1997.

⁷¹ For more details on the Madani incident and regime-syndicate relations during this period, see *Clash in Egypt: The Government and the Bar* (Center for the Independence of Judges and Lawyers, 1995).

⁷² Opposition activists contended that they were not able to get a fair hearing in this case and in subsequent appeals because the government interfered with court dockets to ensure that cases would be heard by pro-government judges. The Islamist-dominated Engineers' Syndicate was similarly brought under sequestration in 1995 for alleged financial irregularities.

Syndicate from within in 1993, and the successful bid to do the same in 1996, illustrate how the regime can manipulate internal cleavages for its own advantage, in much the same way that it exploits internal divisions within opposition parties.⁷³ Although the sequestration order was eventually overturned in 2000 after considerable legal wrangling, the four-year period of sequestration paralyzed one of the most important support structures for judicial independence at a time when there were a number of crucial confrontations between the regime and its opponents.

The SCC and Press Liberties

The battleground of press liberties is yet another example of where the interests of the Court, opposition parties, and rights groups converged. Even a cursory review of the opposition press reveals how important judicial institutions are to political life in Egypt. On any given day one is likely to find several articles in each paper covering the proceedings of various trials, administrative petitions, and constitutional challenges. Most articles are written by opposition activists and law professors, but SCC justices themselves also use the papers to explain court procedures, examine the outcomes of specific cases, and expound on the role of judicial institutions in the defense of basic rights. Newspapers therefore serve as sites where the SCC seeks to raise public consciousness. They also serve as sites where political activists mobilize opposition to the regime, both by parading their legal victories and by highlighting the ultimate limits and inconsistency of the regime's rule-of-law rhetoric. It is no surprise, therefore, that the SCC issued a number of important rulings in the area of press liberties throughout the 1990s.⁷⁴

On February 6, 1993, the SCC struck down a provision in the code of criminal procedures dealing with libel cases.⁷⁵ This provision required

⁷³ For examples of how the Political Parties Committee had backed regime-friendly opposition blocks within opposition parties, see Chapter 4.

⁷⁴ The SCC also issued a number of rulings protecting other important civil liberties throughout this period. The most notable rulings overturned laws presuming the guilt of the accused and those that empowered the executive to punish suspects without trial. See, for example, Case 3 Judicial Year 10, issued January 2, 1993, *al-Mahkama* Vol. 5 (2), 103–123 and Case 49 Judicial Year 17, issued June 15, 1996, *al-Mahkama* Vol. 7, 739–762.

⁷⁵ For a historical background on press and publication controls in Egypt as well as the role of the courts in adjudicating these issues, see 'Abd al-Khaleq Faruq, *Azmet al-Nashar wa al-Ta'bir fi Misr: al-Qiyawd al-Thaqafiyya, wa al-Qanuniyya, wa al-Idariyya*. [The Publication and Expression Crisis in Egypt: Cultural, Legal, and Administrative Constraints.]

defendants charged in libel cases to present proof validating their published statements within a five-day period of notification by the prosecutor. Any evidence provided by the defendant after this period was deemed inadmissible.⁷⁶ The SCC ruling was in response to a petition filed by the independent candidate, Kamal Khaled.⁷⁷ The SCC agreed with Khaled and ruled that the time limit interfered with the ability of the press to monitor the government, to uncover corruption and inefficiencies, and to encourage good governance.⁷⁸ The ruling declared that freedom of expression is an essential feature of a properly functioning democracy and that the five-day provision in libel cases was a flagrant and unnecessary violation of article 47 of the Constitution. The SCC also used the opportunity to make general statements concerning the importance of freedom of expression when it stated in its ruling that

national peace lies in the tolerance of an open dialogue between all members of society in order to confront suffering and to reach a consensus of solutions. It is logical, rather inevitable, that the Constitution should be in favor of freedom to discuss public affairs, even if it results in harsh criticism of those in public office. It is not acceptable to close our eyes to those issues even by force of law. The dialogue of force is an infraction of the power of intellect, freedom, innovation, hope, and imagination. Force leads to fear that prevents an individual from expressing a free opinion. This enhances the arrogance of those in public office, which, in turn, threatens the independence and the security of the nation.

Following on the heels of this legal victory, the Labor Party successfully transferred a case to the Supreme Constitutional Court contesting a provision of law 40/1977 concerning the opposition press and vicarious criminal liability. According to article 15 of law 40/1977, in the cases of libel claims against public officials, heads of political parties were jointly responsible for all publications in party newspapers, along with the reporter and the editor-in-chief of the newspaper. This provision

⁷⁶ Case 37, Judicial Year 11, ruled February 6, 1993, *al-Mahkama*, Vol. 5 (2), 183–205. The ruling struck down paragraph 2 of article 123 of the code of penal procedures.

⁷⁷ In the original case, Khaled was accused of libel by Mustafa Abu Zeid, a former minister of justice and socialist public prosecutor, for information printed in Khaled's book, *Nasser and Sadat's Men*.

⁷⁸ The SCC ruled the same provision of article 123 unconstitutional two years later in Case 42, Judicial Year 16, ruled May 20, 1995, *al-Mahkama*, Vol. 6, 740–760. The fact that the SCC ruled the same provision unconstitutional raises questions about the ability of the Court to have its rulings fully implemented.

essentially formed a corporatist system of control over the opposition press. Because the heads of opposition political parties were held directly responsible for all publications, law 40/1977 pressured the leadership of opposition parties to practice self-censorship and to rein in their staff and writers. Law 40 thus posed one of the most serious constraints on the freedom of the opposition press.

Labor Party Chairman Ibrahim Shukri and ‘Adel Husayn, editor-in-chief of the Labor Party newspaper, were standing trial for libel against the Minister of Petroleum for accusations that were published in the Labor Party newspaper, *al-Sha‘ab*, when they filed a petition for constitutional review of article 15 of law 40/1977. The SCC found that the law violated articles 41, 66, 67, and 165 of the Constitution, which collectively guarantee the presumption of innocence, the right of legal defense, and the right of the courts alone to adjudicate guilt and innocence.⁷⁹ The SCC also invoked articles 10 and 11 of the Universal Declaration of Human Rights and the principles of justice “shared by all civilized nations.”⁸⁰

Two years later, the Court struck down a parallel provision for vicarious criminal liability for libel cases involving the editors-in-chief of newspapers.⁸¹ This expanded ruling represented yet another important precedent, as it was the first time that a human rights NGO had successfully challenged legislation in front of the Supreme Constitutional Court.⁸² As we see later in this chapter, this successful challenge encouraged human rights organizations to focus on litigation as the most effective avenue to challenge the regime and, moreover, to concentrate their legal campaigns on constitutional litigation.

At the same time that the Supreme Constitutional Court, human rights NGOs, and opposition parties seemed to be making good progress contesting and striking down illiberal legislation impeding the freedom of the

⁷⁹ Case 25, Judicial Year 16, ruled July 3, 1995, *al-Mahkama*, Vol. 7, 45–94.

⁸⁰ For a useful analysis of vicarious criminal liability in the Egyptian legal system, see ‘Adel Sherif, “The Supreme Constitutional Court of Egypt and Vicarious Criminal Liability,” in Eugene Cotran and Adel Sherif, *The Role of the Judiciary in the Protection of Human Rights* (London: Kluwer Law International, 1999).

⁸¹ This case was initiated by Muhammad Tharwat Abaza. Case 59, Judicial Year 18, ruled February 1, 1997, *al-Mahkama*, Vol. 8, 286–309.

⁸² The Center for Human Rights Legal Aid also filed appeals with the SCC in five additional cases it had been representing for journalists prosecuted under article 195. These were the cases of Mahmud al-Tuhamy, chair and editor-in-chief of *Ruz al-Yusuf*; ‘Abd al-Baqry, editor-in-chief of *al-Ahali*; Mahmud al-Maraghy, former editor-in-chief of *al-Arabi*; ‘Essam al-Din Rif’at, editor-in-chief of *al-Abram al-Iqtisadi*; and Mahmud Baqry, editor-in-chief of *Sawt Helwan*. At least eighteen editors-in-chief were charged under article 195 according to CHRLA records.

press, the regime demonstrated that it could easily issue new repressive legislation to replace the old. Perhaps the clearest example of this power during the mid-1990s was the regime's comprehensive reform of press laws embodied in law 93/1995.⁸³ Law 93 was prepared in total secrecy and railroaded through the People's Assembly in an emergency session with only 44 of 444 members in attendance. The law was dubbed by opposition activists as the "Press Assassination Law" because it allowed for preventive detention of journalists and radically increased jail terms and fines for publications that were found to be libelous or that resulted in "damage to national interests."⁸⁴ Opposition activists contended that law 93 was timed to place added constraints on the press in anticipation of the 1995 People's Assembly elections later in the year.

The regime proved early on that it would not shy away from vigorously applying the new law. Over the course of the year, more than 120 journalists were taken in for interrogations, 99 were tried in court under the new law, and several were sentenced to prison. The law affected every significant opposition newspaper, with charges brought against the editor-in-chief of the Socialist Labor Party's *al-Sha'ab*, the Wafd Party's *al-Wafd*, the Liberal Party's *al-Ahrrar*, the Tagammu' Party's *al-Ahali*, the Nasserist Party's *al-'Arabi*, and even a number of state-owned newspapers. A total

⁸³ The most comprehensive and reliable reviews of law 93/1995 and law 96/1996 can be found in three studies published by the Center for Human Rights Legal Aid: "All The News That's Fit to Print: A Study of Law No. 93/1995, Legislation Restricting Freedom of the Press in Egypt, and a Draft Law for the Protection of the Freedom of the Press and Journalists," "Saying What We Think: CHRLA's Report on Freedom of Opinion and Expression in Egypt," and "After the Defeat of Law 93/1995: The Current State of Freedom of the Press in Egypt."

⁸⁴ Law 93/1995 stipulated a prison sentence of at least five years, together with a fine of between £E 10,000 and £E 20,000 for publications intentionally or subsequently resulting in damage to the national economy or national interests. For libel cases, law 93/95 increased prison sentences to between one and three years and mandated fines at a minimum of £E 5,000 and a maximum of £E 15,000. Even harsher jail terms and fines were mandated for libel cases involving state officials. Additionally, penalties were increased for a number of other crimes (many extremely vague) related to the press including articles 172 (inciting felonies), 176 (inciting hatred or contempt of a particular group of people), 178/3, 178 bis2 (violating public morality), 179 (offending the President of the Republic), 181 (vilifying the president of a foreign state), 184 (offending the People's Assembly, army, courts of law, or any public authority or interest), 185 (defamation of a public official, government employee or representative, or a person appointed to perform public service), and 186 (compromising the reputation of a judge in relation to a court case in progress), among others. Article 5 of law 93/1995 also repealed articles in the Journalists' Syndicate law (76/1970) and article 135 of the code of criminal procedures, which had protected journalists accused of offenses from preventive detention.

of seven journalists were brought to trial from *al-Abrar*, five from *al-Sha'ab*, five from *al-Ahali*, thirteen from *Ruz al-Yusuf*, and dozens more from other publications.⁸⁵ The Center for Human Rights Legal Aid took a leading role in providing legal representation to dozens of journalists charged under the new law.

Journalists, opposition parties, and human rights groups mobilized in unison to oppose the new legislation.⁸⁶ Egyptian human rights organizations brought international pressure to bear on the regime within days, with twenty-four international organizations demanding the repeal of the law.⁸⁷ Over the course of the year, the Journalists' Syndicate held several high-profile general assemblies, and journalists initiated a number of actions to put pressure on the government, including an active campaign in the opposition press, the symbolic freezing of opposition newspapers for a time, and ultimately the resignation of the entire Journalists' Syndicate including its chairman, Ibrahim Naf'a.

Journalists, opposition parties, and rights groups also worked together to fight law 93 in the courts, mounting legal appeals on behalf of detained journalists and focusing special efforts on constitutional appeals so that they might defeat law 93 in the Supreme Constitutional Court.⁸⁸ As in the past, the debate in the popular press turned to a surprising degree around the constitutionality of the law.⁸⁹ Interestingly, opposition papers self-reflectively noted that constitutional litigation provided a focal point

⁸⁵ For a comprehensive list of journalists and editors-in-chief who were brought to trial under law 93/1995, see CHRLA, "Saying What We Think," 72–73.

⁸⁶ An editorial by 'Adel Hamuda (editor-in-chief of *Ruz al-Yusuf*) illustrated how the common interests of journalists, opposition parties, and human rights organizations were simultaneously threatened by law 93/1995 when he commented, "When we discuss the issues of the poor who live in graveyards, or the feigned oversight of the National Democratic Party to include Copts in nominations for the Shura Council elections, or issues of social justice, we may be taken to court for 'undermining public peace.' When we discuss rotten meat, contaminated water, buildings on the verge of collapse, quack medicine, or hormone injected chickens, we will be put in jail on the charge of 'spreading panic among the people.' Each and every news story. . . . may be considered as a crime of publication." "Death by Law," *Ruz al-Yusuf*, June 4, 1995.

⁸⁷ "All the News," 6.

⁸⁸ One constitutional petition initiated by 'Abd al-Halim Ramadan was submitted directly to the Supreme Constitutional Court, but it was immediately dismissed because it did not satisfy the standing requirements of the Court. The ruling generated a fierce debate in the press, with opposition activists and prominent law professors arguing that the standing rules for the SCC should be amended to allow interested parties to approach the SCC directly. See *al-Sha'ab*, August 3, 1996, for press coverage of Case 40, Judicial Year 17, *al-Mahkama*, Vol. 7, 615–630.

⁸⁹ "New Press Law Remains a Sword Over Our Neck," *al-Abrar*, May 7, 1996.

for opposition mobilization.⁹⁰ Constitutional petitions reaching the court once again highlighted the disparity between law 93 and the government's formal commitments to both international treaties and, interestingly, the principles of the *shari'a*.

Before the SCC had the opportunity to review law 93/1995, Mubarak decided to rescind it. In its place, the regime issued law 96/1996, which addressed some of the main grievances of the journalists. It repealed the ability of the prosecutor to hold journalists in preventive detention, reduced prison sentences and fines levied for crimes of libel and inflicting "damage to national interests," abolished mandatory prison sentences, and restored discretion to judges.⁹¹ Although the repeal of law 93/1995 was a rare victory for opposition parties and civil society activists, law 96/1996 still marked a significant step backward for press freedoms compared with the prior provisions laid out in the penal code. Despite gains both inside and outside the SCC, the regime remained in firm control of the opposition press. The state press reported the repeal of law 93 as a significant landmark in safeguarding freedom of speech (portraying Mubarak as a great defender of civil liberties with this spin), but independent journalists and human rights activists remained sober about the wide variety of press controls that were still available to the regime.⁹²

The Human Rights Movement, 1991–1997

The 1991–1997 period was marked by a significant increase in the activities of human rights organizations, making them perhaps the most important element of the judicial support network. The capacity of the human rights movement was expanded primarily as a result of increased funding streams from international human rights organizations and some European governments. Increased foreign funding enabled the Egyptian Organization for Human Rights to establish seventeen regional branches

⁹⁰ "Petition of Unconstitutionality against Law 93 Generates Debate," *al-Sha'ab*, March 8, 1996.

⁹¹ Law 96/1996 still provided for administrative detention in cases of libel against the President of the Republic.

⁹² In addition to the standing penalties (albeit reduced from law 93) for vague infractions damaging the "national interest," there are several provisions that allow the suspension or closure of newspapers, including articles 9 and 27 of law 20/36; articles 198, 199, and 200 of the penal code; article 17 of law 40/77; and article 49 of law 96/96. Law 96/96 also maintained restrictions on the right to issue newspapers and allows "limited censorship in areas related to public or national security during wartime or a state of emergency."

around the country and expand its active membership base to several thousand citizens. The EOHR continued to document human rights violations and to publish hundreds of pages of documentation every year in both Arabic and English. These reports gained a steady presence in opposition newspapers, allowing the EOHR to circulate its findings widely while at the same time giving opposition parties the documentation to substantiate claims of government malfeasance.

Throughout the early 1990s, the Egyptian Organization for Human Rights also strengthened its international contacts, enabling the domestic human rights movement to bring international pressure to bear on the regime. It regularly dispatched its press releases to international human rights groups, and reports of EOHR investigations served as the basis for reports by leading international human rights organizations, including Human Rights Watch, Amnesty International, and the Lawyers' Committee for Human Rights. Without EOHR research and reports, it is unlikely that international human rights organizations would have been aware of even a fraction of the regular violations that came to light throughout the 1990s. International human rights organizations also made periodic visits to Cairo with the assistance of the EOHR, thereby bringing pressure and international attention to the human rights situation in Egypt. Similarly, the EOHR established strong relationships with foreign embassies in Cairo. By the mid-1990s, representatives from foreign embassies could be seen regularly at EOHR press conferences and workshops. These new links resulted in stronger, faster, and more specific condemnations of rights violations when they occurred.

Finally, the EOHR registered with the United Nations and acquired membership and observer status in several international human rights regimes, including the International Commission of Jurists, the African Commission for Human and People's Rights, the International Federation for Human Rights, the International Organization for the Freedom of Expression, and the UN Economic and Social Council. Throughout the 1990s the EOHR regularly used its observer status in these international human rights regimes to submit alternate reports and rebut Egyptian government claims that there had been progress on the human rights situation or that human rights violations were simply an unfortunate necessity, given challenges to the state by militant Islamists.

Over a dozen more Egyptian human rights associations were established in the 1990s, focused on a variety of issue areas (see Table 5.1). Some of the groups, such as the Legal Research and Resource Center and the Cairo Institute for Human Rights Studies, concentrated on increasing the awareness of human rights abuses in Egypt, both domestically and

TABLE 5.1: *Leading human rights organizations by year of establishment*

1985	Egyptian Organization for Human Rights
1988	Ibn Khaldun Center
1992	Legal Research and Resource Center for Human Rights
1993	Nadim Center for the Management and Rehabilitation of Victims of Violence*
1994	Cairo Institute for Human Rights Studies
1994	Center for Human Rights Legal Aid*
1995	Center for Womens' Legal Aid*
1996	Group for Democratic Development
1996	Land Center for Human Rights*
1997	Human Rights Center for the Assistance of Prisoners*
1997	Arab Center for the Independence of the Judiciary and the Legal Profession
1999	Hisham Mubarak Center for Legal Aid*
1999	Association for Human Rights Legal Aid*

* Human rights organizations engaged in public interest litigation.

internationally, through conferences and publications. These groups also sought to foster an indigenous human rights discourse specific to the development experiences of the Arab and Islamic worlds. Other groups had specific policy objectives, such as the expansion of women's rights, peasants' rights, prison reform, the provision of legal aid for the poor, and the expansion of judicial independence. Like the Egyptian Organization for Human Rights, these groups established links to international human rights organizations in order to mobilize international pressure for reform.

The 1990s also saw the rise of a new breed of rights organizations that went beyond simply documenting rights abuses to confronting the government in the courts. The most aggressive group engaged in public interest litigation was the Center for Human Rights Legal Aid (CHRLA), established by the young and forceful human rights activist, Hisham Mubarak, in 1994. CHRLA quickly became the most dynamic human rights organization, initiating 500 cases in its first full year of operation, 1,323 cases in 1996, and 1,616 by 1997.⁹³ CHRLA's mission was to provide free legal representation to those who had experienced human rights violations at the hands of the government. Additionally, CHRLA documented

⁹³ In 1996, CHRLA's cases roughly broke down along the following lines: 40 percent of cases concerned economic and social rights, 10 percent concerned freedom of expression, 10 percent concerned women's cases, 8 percent concerned cases of maltreatment and torture, and 32 percent concerned juvenile cases. For specifics on the types of cases initiated by CHRLA, including case studies, see Center for Human Rights Legal Aid Activity Report, 1996.

human rights abuses and used the cases that it sponsored to publicize the human rights situation. As with every other human rights group in Egypt, CHRLA depended almost completely on foreign funding, but throughout the mid-1990s, foreign funding sources proved plentiful. CHRLA quickly expanded its operations, opening two regional offices in Alexandria and Aswan.

In hopes of emulating the model provided by CHRLA, human rights activists launched additional legal aid organizations with different missions. The Center for Women's Legal Aid was established in 1995 to provide free legal aid to women dealing with a range of issues including divorce, child custody, difficulties securing alimony, and various forms of discrimination. The Center initiated 71 cases in its first year, 142 in 1996, and 146 in 1997, in addition to providing legal advice to 1,400 women in its first three years of activity.

The Land Center for Human Rights joined the ranks of legal aid organizations in 1996 and dedicated its energies to providing free legal aid to peasants. With the land reform law 96/1992 coming into full effect in October 1997, hundreds of thousands of peasants faced potential eviction in the late 1990s, and lawsuits between landlords and tenants began to enter into the courts by the thousands. Between 1996 and 2000, the Land Center for Human Rights represented peasants in more than four thousand cases and provided legal advice to thousands more.⁹⁴

The Human Rights Center for the Assistance of Prisoners (HRCAP) similarly provided legal aid to prisoners and the families of detained individuals by investigating allegations of torture, monitoring prison conditions, and fighting the phenomenon of recurrent detention and torture through litigation. In its first five years of operation, HRCAP launched more than two hundred court cases per year and gave free assistance (legal and otherwise) to between seven thousand and eight thousand victims per year.⁹⁵ Opposition parties began to offer free legal aid as well, with the Wafd Party's Committee for Legal Aid providing free legal representation in over four hundred cases per year beginning in 1997.⁹⁶ Similarly, the Lawyers' Syndicate was active in providing legal aid, and it greatly expanded its legal aid department until the regime froze its functions in 1996.

⁹⁴ Interview with Mahmud Gabr, director of Legal Unit, Land Center for Human Rights, November 18, 2000.

⁹⁵ Correspondence with Muhammad Zara'i, director of the Human Rights Center for the Assistance of Prisoners, January 24, 2002.

⁹⁶ Interview with Muhammad Gom'a, vice chairman of the Wafd Committee for Legal Aid, February 17, 2001.

By 1997, legal mobilization had unquestionably become the dominant strategy for human rights defenders because of the difficulty of creating a broad social movement. Gasser ‘Abd al-Raziq, director of the Center for Human Rights Legal Aid and later the Hisham Mubarak Center for Legal Aid, explained that “in Egypt, where you have a relatively independent judiciary, the only way to promote reform is to have legal battles all the time. It’s the only way that we can act as a force for change.” A strong and independent judiciary became so central to the strategy of the human rights movement that human rights activists did more than simply oppose threats to the judiciary and the legal profession on an ad hoc basis; in 1997, the human rights movement institutionalized its support for judicial independence by founding the Arab Center for the Independence of the Judiciary and the Legal Profession (ACIJLP).

Under the direction of former EOHR legal director, Nasser Amin, the ACIJLP set to work organizing conferences and workshops that brought together legal scholars, opposition party members, human rights activists, and important figures from the Lawyers’ Syndicate and Judges’ Association. The ACIJLP began to issue annual reports on the state of the judiciary and legal profession, extensively documenting government harassment of lawyers, critiquing the regime’s sequestration of the Lawyers’ Syndicate, and exposing the regime’s interference in the normal functions of judicial institutions. Like other human rights groups, the ACIJLP established ties with international human rights organizations including the Lawyers’ Committee for Human Rights, and attempted to leverage international pressure on the Egyptian government.

In 1997, another innovation occurred in the strategies used by human rights activists. The leadership of CHRLA began to understand that constitutional challenges could induce systemic changes beyond the immediate case at hand. According to Gasser ‘Abd al-Raziq, this change in legal tactics came with the 1997 Supreme Constitutional Court ruling on article 195 of the Penal Code, a major case that CHRLA lawyers had helped prepare.⁹⁷ CHRLA attorneys and the human rights movement in general were already following the activism of the SCC with considerable interest. ‘Abd al-Raziq recalled,

We were encouraged by [Chief Justice] ‘Awad al-Murr’s human rights language in both his formal rulings and in public statements. This encouraged

⁹⁷ Case 59, Judicial Year 18, issued February 1, 1997, *al-Mahkama*, Vol. 8, 286–309. Case 59, Judicial Year 18, is examined later in this chapter.

us to have a dialogue with the Supreme Constitutional Court. CHRLA woke up to the idea that litigation in the SCC could allow us to actually change the laws and not just achieve justice in the immediate case at hand.⁹⁸

Beginning in late 1997, CHRLA initiated a campaign to systematically challenge repressive legislation in the SCC. CHRLA's first target was law 35/1976, governing trade union elections. CHRLA initiated fifty cases in the administrative and civil courts, all with petitions to challenge the constitutionality of the law in the Supreme Constitutional Court. Ten of the fifty cases were successfully transferred and within months the SCC issued its first verdict of unconstitutionality against article 36 of the law.⁹⁹ CHRLA also successfully advanced three cases to the SCC challenging sections of the penal code concerning newspaper publication offenses and three additional cases dealing with the social insurance law.¹⁰⁰ CHRLA was further encouraged by activist judges in the regular judiciary who publicly encouraged groups in civil society to challenge the constitutionality of NDP legislation. Some judges went so far as to publicize their opinion of laws in opposition newspapers and to vow that if particular laws were challenged in their court, they would transfer the relevant constitutional question to the SCC without delay.¹⁰¹

The ruling of unconstitutionality on law 35/1976 and an additional fifteen pending decisions in a three-year period represented a tremendous achievement, given the slow speed of litigation in Egyptian courts and the relatively meager resources at the disposal of the human rights movement. Although the results may seem modest, the human rights community came to understand that constitutional litigation was perhaps the most effective way to challenge the regime. Until the CHRLA campaign, activists, opposition parties, and individuals had initiated cases in an ad hoc fashion, but CHRLA's coordinated strategy of constitutional litigation was a significant innovation that prompted the rest of the human rights community

⁹⁸ Interview with Gasser 'Abd al-Raziq, director of the Hisham Mubarak Legal Aid Center, formerly the Center for Human Rights Legal Aid, April 16, 2000.

⁹⁹ Case 77, Judicial Year 19 *al-Mahkama*, Vol. 8, 1165–1185. The other cases challenging various articles of law 35/1976 were 128 Judicial Year 19, 146 Judicial Year 19, 147 Judicial Year 19, 148 Judicial Year 19, 195 Judicial Year 19, 220 Judicial Year 19, 184 Judicial Year 20, 206 Judicial Year 20, and 49 Judicial Year 21.

¹⁰⁰ Cases 237 Judicial Year 20, 25 Judicial Year 21, 83 Judicial Year 21, 181 Judicial Year 21, 182 Judicial Year 21, and 183 Judicial Year 21.

¹⁰¹ For example, see "Vice President of the Court of Cassation Reveals Law of the Professional Syndicates Is Unconstitutional," *al-Wafd*, November 3, 1997.

to consider the possibility of constitutional litigation more seriously. A number of conferences and workshops were sponsored to examine the possibilities afforded by constitutional litigation, some of which brought together human rights associations and Supreme Constitutional Court justices.¹⁰² Rights organizations were clearly eager to emulate CHRLA's approach.

The Land Center for Human Rights set their sights on contesting the constitutionality of the land reform program and a variety of labor laws. By the close of 2001, the Land Center had successfully transferred two cases to the Supreme Constitutional Court. The first petition challenged the constitutionality of law 96/1992, which liberalized owner-tenant relations in the countryside. The other petition challenged the constitutionality of law 177/1967, which governed the activities of the Principal Bank for Agricultural Development and Credits. Like other human rights activists, lawyers at the Land Center said they were encouraged by the many bold SCC rulings on political issues. However, as noted earlier in this chapter, rights activists attempting to safeguard the last vestiges of Nasser-era economic rights for the poor were far more pessimistic about the possibility of successfully defending these rights through the SCC, despite the many socialist-oriented provisions in the Constitution.

Ironically, even as human rights groups were using litigation as their primary tool for challenging the regime, they themselves were without solid legal footing.¹⁰³ The battle waged by the Egyptian Organization for Human Rights to gain legal status in the late 1980s continued throughout the 1991–1997 period. Having failed in its first attempt to challenge the Ministry of Social Affairs in the administrative court of first instance, the EOHR leadership launched a second attempt in the Supreme Administrative Court in 1991. By this time, the EOHR was using its international connections to leverage pressure on the Egyptian government. Representatives from the Lawyers' Committee for Human Rights were conspicuously present at court hearings on EOHR registration, and the

¹⁰² One of many examples is the conference organized by the newly founded Arab Center for the Independence of the Judiciary and the Legal Profession under the title, "The Future Role of the Supreme Constitutional Court in Constitutional Review," which was held from June 30 to July 1, 1998.

¹⁰³ The Ministry of Social Affairs exercised its ability to dissolve NGOs throughout this period. One prominent example is the closure of Nawal al-Sadawi's Arab Women's Solidarity Organization. MOSA charged that the activities of the association violated Islamic law and threatened social peace and security.

Lawyers' Committee brought the case to the attention of the international human rights community. However, the case remained mired in litigation for over a decade despite ample legal talent and overwhelming international support. In the meantime, the EOHR carried out its functions without firm legal footing.

Instead of seeking registration with the Ministry of Social Affairs, other human rights organizations sought to avoid the Ministry altogether. The Ibn Khaldun Center for Development Studies, formed in 1988 by Sa'ad Eddin Ibrahim, was the first organization to discover a legal loophole and register as a civil company instead of an association. Nearly every other human rights group followed the lead of the Ibn Khaldun Center and registered as civil companies.¹⁰⁴ Some groups, such as the Center for Human Rights Legal Aid, sought additional legal protections through the Lawyers' Syndicate regulations, which guarantee legal aid centers.¹⁰⁵

Meanwhile, human rights groups mounted a campaign to defeat law 32/1964 on associations. Constitutional litigation became the dominant strategy, not only for challenging government legislation, but also for expanding the legal foundation of civil society itself. At an NGO workshop convened by the Cairo Institute for Human Rights Studies in December 1996, leading human rights activists considered constitutional litigation to be the most effective avenue for challenging law 32 and liberalizing the legal framework that constrained NGO activities. Discussions revolved around the previous rulings of the Supreme Constitutional Court, the legal basis for challenging the constitutionality of law 32/1964, and a strategy for initiating litigation and transferring cases to the SCC. The final position paper of the workshop stated that

The freedom of forming associations is documented in the Egyptian Constitution. The Supreme Constitutional Court has asserted in its rulings that if the Constitution authorizes the legislator to organize a constitutional right (like the right to form associations by groups or individuals), this entails that the right is not taken away, undermined or complicated. . . . the participants thus have called for proceeding with legal appeals that cast doubt over the constitutionality of the law. . . .¹⁰⁶

¹⁰⁴ Registration as civil companies continued until the regime closed the loophole in 1999 with law 153/1999 on civil associations.

¹⁰⁵ CHRLA sought to further consolidate this role by signing formal agreements with the bar associations of Cairo and Giza.

¹⁰⁶ *Min Ajil Tabrir al-Mojtema' al-Madani: Mushrua' Qanoon, Bisha'n al-Jama'iyyat wa al-Mo'asasat al-Khasa* [Setting Civil Society Free: A Draft Law Concerning Civil Associations and Institutions] (Cairo Institute for Human Rights Studies, 1998), 28.

More than ever, it was apparent that the “constitutional consciousness” of civil society had reached a new plateau. Moreover, the discussion of the legal basis for challenging the constitutionality of the law on associations took on increasing sophistication. In addition to discussing how specific articles of law 32/1964 violated the Constitution, participants in the workshop considered how the law violated the International Covenant on Civil and Political Rights, ratified by Egypt on August 4, 1967, and entered into force by presidential decree 536 of 1981. The discussion of how the law violated Egypt’s international treaty commitments was no longer a strictly academic debate because, under the leadership of Justice ‘Awad al-Murr, the Supreme Constitutional Court had demonstrated that international agreements signed into law would be used to support the Court’s interpretations of constitutional provisions. To take advantage of the opportunity that the SCC was providing, the legal tactics of human rights activists engaged in constitutional litigation began to mirror the language of the Court.¹⁰⁷

Constitutional litigation was also combined with other tactics. Throughout 1997, a network of sixteen human rights organizations, three leading opposition parties, and a number of prominent academics drafted a new bill on associations. The draft law sought to remove legal restrictions on the establishment of civil associations and to limit the regime’s ability to interfere in the activities of NGOs. By February 1998, the draft law was presented to the People’s Assembly by ‘Ali Fath al-Bab of the Labor Party, Ayman Nur and Fu‘ad Badrawi of the Wafd Party, and Muhammad ‘Abd al-‘Aziz Shabban of the Tagammu’ Party. Opposition parties never expected the legislation to pass through the People’s Assembly. Rather, they used the draft law as an opportunity to expose the shortcomings of law 32/1964 in opposition newspapers and to draw attention to the campaign to challenge the constitutionality of the law in front of the SCC.

¹⁰⁷ The Court was not simply intent on protecting civil associations as an end in itself. Rather, justices clearly believed that the emergence of a vibrant civil society was an essential starting point for the further reform of Egyptian state and society. In his formal rulings and less formal essays, Chief Justice ‘Awad al-Murr made it clear he considered a vibrant civil society and a liberal political order to be integral to one another. According to al-Murr, “there is no denying that human rights will not actively or adequately survive except in a liberal environment at the apex of which is the emergence of a civil society capable of providing adequate safeguards and straightforward channels for protecting human rights and freedoms.” “Human Rights as Perceived by the Supreme Constitutional Court of Egypt,” *al-Mahkama al-Dusturiyya al-‘Ulia*, Vol. 7, 2–3.

While NGOs and opposition activists were mobilizing to contest the constitutionality of law 32/1964 in the Supreme Constitutional Court, the regime was quietly preparing legislation that would close the legal loophole in the law, thus allowing the regime to better constrain human rights NGOs. The increasing strength of human rights groups and their supporters in the mid-1990s, coupled with the regime's redoubled efforts to contain the gains made by the human rights movement, set the stage for a spectacular confrontation between the regime and human rights NGOs, opposition parties, and the Supreme Constitutional Court in the 1998–2001 period. But before taking up that clash in the [next chapter](#), let us continue to focus on the judicial support network synergy that was developing through the mid-1990s.

1995 People's Assembly Elections

The 1995 People's Assembly elections provide a window through which to observe the further convergence of each element in the judicial support network. By the time the elections arrived, the number of legal opposition parties had increased to thirteen (see Table 5.2). With the exception of the Socialist Labor Party, the regime-dominated Political Parties Committee had rejected every opposition party application. But successive rulings by the administrative courts and the Supreme Constitutional Court gradually opened the field to new, albeit extremely weak, opposition parties. Six new parties entered the political arena in the five years after the 1990 election as a direct result of these court interventions.

The number of opposition parties active in Egypt might give the misleading impression that Egyptians were actively engaged in political life and that opposition parties represented a vibrant array of political trends among the citizenry. Nothing could be farther from reality. Despite the impressive increase in the number of opposition parties as a result of judicial activism, the strength of Egyptian opposition parties had reached new lows by 1995 and the Egyptian public had sunk to correspondingly low levels of political participation. In contrast to the Nasser and Sadat regimes, the overwhelming drive of the Mubarak regime had been to demobilize the Egyptian citizenry as much as possible while allowing vocal opposition parties to participate in the construction of a democratic façade for both domestic and international consumption.¹⁰⁸ Extensive

¹⁰⁸ Maye Kassem, *In the Guise of Democracy: Governance in Contemporary Egypt* (Reading: Ithaca Press, 1999).

TABLE 5.2: *Egyptian political parties in 1995*

Party	Date of establishment	Avenue for attaining legal status
NDP (ruling party)	1976	Presidential decree
Tagammu'	1976	Presidential decree
Ahrar	1976	Presidential decree
Socialist Labor Party	1977	Approved by Political Parties Committee
Wafd	1978	Administrative court ruling
'Umma	1983	Administrative court ruling
Green Party	1990	Administrative court ruling
Misr al-Fatah Party	1990	Administrative court ruling
Union Democratic Party	1990	Administrative court ruling
Nasserist Party	1992	Supreme Constitutional Court ruling
Populist Democratic Party	1992	Administrative court ruling
Egypt Arab Socialist Party	1992	Administrative court ruling
Social Justice Party	1993	Administrative court ruling
al-Takafal	1995	Administrative court ruling

formal and informal controls on opposition party activities prevented opposition parties from forging strong links with the public, and the initial enthusiasm with which Egyptians greeted the revival of parliamentary life in the 1970s turned to cynicism and apathy.¹⁰⁹

In one of the few independent surveys conducted in the 1990s, the nongovernmental think tank, *al-Mishkat*, measured the level of political activism and party identification in Egypt just before the 1995 People's Assembly elections.¹¹⁰ The survey found that 72 percent of respondents were in a state of total resignation from politics, believing that no political parties represented their political views. Approximately 17 percent of those surveyed said that they considered the regime's NDP to represent their interests, followed by a mere 4 percent for the Wafd Party, 1.5 percent for the Labor Party, 1 percent for the Nasserist Party, and 0.4 percent

¹⁰⁹ The new electoral rules introduced for the 1990 elections also weakened opposition parties by breaking their monopoly on opposition politics and allowing activists to break from official opposition parties to stand as independent candidates in elections. This exit option decreased loyalty to both opposition parties and the regime's National Democratic Party.

¹¹⁰ Full results of the survey, including survey methods, are presented in *al-Ahram Weekly*, December 29, 1994.

for the Tagammu'.¹¹¹ Egypt's other opposition parties were absolutely irrelevant to those interviewed. The survey also found that only 22 percent of adults had voter registration cards, and only 16 percent had participated in previous elections for the People's Assembly. These survey results suggest that the lack of public affinity to opposition parties was at least one factor contributing to low levels of participation.

It is not surprising, therefore, that only the Wafd, Tagammu', Labor, Liberal, and Nasserist parties were able to gain nominal party representation in the People's Assembly, with the other eight official opposition parties unable to win even a single seat over the past two decades. The poor showing of opposition parties and the resignation of Egyptian voters were the product of strict constraints on party activity, the inability of parties to make direct contact with their constituencies, and the fact that electoral fraud made voting a pointless activity. Chief Justice 'Awad al-Murr himself observed that "we can't expect people to vote when their votes have no promise of changing anything."¹¹² This situation would begin to change however, with the further development of the judicial support network and key SCC rulings that required additional reforms to the election system.

Six months prior to the 1995 People's Assembly elections, opposition activists voiced their long-standing grievances about electoral corruption in a detailed public statement directed to Mubarak as they had done many times before. But, in contrast to previous elections, opposition parties were now joined by a chorus from the new Egyptian human rights movement. Opposition parties issued a joint public statement calling on the government to grant international observers access to polling stations. The government predictably refused the request, arguing that sufficient measures had been taken to ensure clean elections and that "foreign interference" was unnecessary.

Refusing to take no for an answer, the leading human rights organizations, in cooperation with the major opposition parties, announced their plans to establish the Egyptian National Commission for Monitoring the 1995 Parliamentary Elections. The idea of a citizen-based electoral monitoring commission was a historic first for Egypt, but the campaign picked up considerable momentum in a short period of time. In just a few

¹¹¹ In contrast, 73 percent of those surveyed by *al-Mishkat* said that nonviolent Islamic groups operate for the benefit of the people. This support is almost certainly due to the fact that Islamist groups operate outside of the regime's corporatist political system and they represent a truly grassroots trend.

¹¹² Interview with 'Awad al-Murr, June 11, 2000.

months, the commission had grown to involve more than 100 academics, 600 human rights activists, many prominent journalists, and the five most important opposition parties.¹¹³ Dr. Sa'ad Eddin Ibrahim, a professor at the American University in Cairo and head of the Ibn Khaldun Center for Development Studies, was appointed its secretary general.¹¹⁴

The goal of the commission was to monitor the election from start to finish and to systematically document electoral corruption in Egypt for the first time. In doing so, the commission hoped to expose electoral fraud, induce domestic and international pressure for political reform, and assist candidates by documenting electoral irregularities that might facilitate litigation in the courts.

Their findings were telling. In the months leading up to the elections, human rights groups affiliated with the commission received 1,100 complaints from candidates concerning irregularities in voting lists and harassment by government officials.¹¹⁵ The commission determined that between 5 percent and 8 percent of the names on the voting lists belonged to dead people and that names were listed more than once in fifty of eighty-eight electoral districts examined.¹¹⁶ In some districts the same names were listed as many as *twenty times*. Rights groups also documented the regime's crackdown on opposition candidates in the months leading up to the elections. In October, eighty-five leading Islamist figures, including four former members of the People's Assembly, were tried before a military court and the unofficial headquarters of the Muslim Brotherhood in the Tawfiqiyya district of Cairo was closed by the government.¹¹⁷ Moreover,

¹¹³ The commission was formally established at a workshop on October 22, 1995, organized by the Egyptian Organization for Human Rights, the Center for Human Rights Legal Aid, the Legal Research and Resource Center for Human Rights, and the Ibn Khaldun Center for Development Studies and attended by the leaders from the Wafd, Tagammu', Nasserist, Labor, and al-Ahrrar parties. The final report of the commission is *Testimony to History: Report of the Egyptian National Commission for Monitoring the 1995 Parliamentary Elections* [in Arabic; hereafter referred to as *Shihadit lil-Tarikh*] (Cairo: Ibn Khaldun Center for Development Studies). Additionally, the Egyptian Organization for Human Rights published its own findings in *Democracy Jeopardized: Nobody Passed the Elections* (Cairo: Egyptian Organization for Human Rights, 1996), and the Center for Human Rights Legal Aid issued a detailed, four-part report on election irregularities.

¹¹⁴ For a list of the other major participants in the commission, see *Shihadit lil-Tarikh*, 223–228.

¹¹⁵ *Shihadit lil-Tarikh*, 184. The commission was able to confirm the validity of 264 of these complaints, but it also assumed that many more acts of corruption occurred that were not reported.

¹¹⁶ *Shihadit lil-Tarikh*, 185.

¹¹⁷ Five Brotherhood members received five years in prison with hard labor, forty-two received three years with hard labor, and nine received three years in prison. Those

a total of 1,392 Islamists and opposition party members were detained between November 15 and December 12, 1995.¹¹⁸ Most of the detentions occurred just days before the first round of elections, which inhibited the ability of opposition candidates to place monitors and representatives at the polling stations and thereby prevent government-orchestrated election fraud. Additionally, election campaign materials for opposition figures were seized, dozens of election workshops were derailed, and opposition marches were prevented or suppressed.

Human rights organizations documented even more irregularities during the election itself.¹¹⁹ On the first day of the election, candidates and voters filed more than one thousand complaints, with over half coming from candidates from the Muslim Brotherhood and the Islamist-oriented Labor Party. There were 149 complaints that the managers of polling stations refused to open ballot boxes before voting began to confirm that the boxes were empty. In several cases, boxes were opened on the order of judges who were running selected voting stations, and rigged votes were found inside. Poll-watchers filed 496 complaints that they were denied entrance to polling stations, despite having the proper paperwork. A full 372 complaints came from poll-watchers who were ejected from polling stations by thugs; 186 more cases concerned physical assaults by candidates, their supporters, or thugs. There were 211 complaints that voting stations opened one to two hours early and that, when they opened, members of the ruling NDP were already inside. Complaints were also filed by voters who were prevented from entering polling stations, and the commission estimated that 15 to 20 percent of voters gave up trying to vote because of harassment and coercion by police and hired thugs.

Between the first round and second round of voting, which was held on December 6, there were eight hundred more complaints, of which the commission was able to verify approximately 40 percent. Many complaints concerned the arrest of opposition candidates and supporters. Numerous complaints asserted that the NDP candidates were receiving support

sentenced included Dr. 'Essam al-Eryan, secretary general of the Doctors' Syndicate; Dr. Ibrahim al-Zaafarani, head of the Alexandria branch of the Brotherhood; and Hassan al-Gamal, a former member of the People's Assembly. They were charged with attempting to revive an outlawed organization.

¹¹⁸ *Democracy Jeopardized*, 17. Figures provided by CHRLA are for a slightly different time period, but their documentation of the number of detainees is even higher. According to CHRLA, 1,712 people were detained between November 26, 1995, and December 8, 1995.

¹¹⁹ Commission findings on the first round of the elections are found in *Shihadit lil-Tarikh*, 179–192.

from local government. For instance, mosques controlled by the *Wizarat al-Awqaf* (Ministry of Endowments) were used to build support for NDP candidates, and public-sector factories held forums to publicize the programs of pro-NDP candidates.

The cooperation between opposition parties and human rights groups through the National Commission produced immediate results, even before the start of the second round of voting. Opposition candidates used the documentation provided by human rights groups to initiate litigation in the administrative courts. The courts found the evidence provided by the commission to be sound in most cases. By the eve of the runoff elections, the administrative courts had already ruled that irregularities in fifty constituencies were so significant that run-off elections should not be held.¹²⁰ Opposition parties lauded the Egyptian judiciary for its role in exposing the corruption of the regime with headline banners such as “Judges Confirm the Collapse of Governmental Legitimacy.”¹²¹ Unwilling to call off the second round of elections, the government filed an appeal with the Supreme Administrative Court and used the ongoing case as a pretext to proceed with the second round of elections.¹²²

On the day of the second round of elections, human rights organizations received another 406 complaints, the majority of which were again from Islamist candidates. Human rights groups with the National Commission alleged that there were “flagrant interventions” by the government in at least thirty-three of the eighty-eight constituencies that they were monitoring.¹²³ Again, there were numerous cases of polling stations opening late, boxes found with ballots already inside, vote buying, and physical attacks on voters and candidates.¹²⁴ By the end of the second round, the NDP had tightened its grip on the People’s Assembly with only a handful of seats going to the Wafd Party (six), the Tagammu’ Party

¹²⁰ The administrative courts later ruled first-round elections in another fifty-nine districts to be invalid.

¹²¹ *al-Sha’ab*, December 8, 1995.

¹²² This appeal was later refused by the Supreme Administrative Court in August 1996 and the Court admonished the Ministry of Interior for its questionable legal maneuvering.

¹²³ Hisham Kassem, one of the human rights activists working on the 1995 election, summed it up this way: “When we were writing the final report, we were looking for a title. You know, there are 222 constituencies in Egypt. I suggested we call it ‘222 ways to rig an election.’ They were very creative. They did everything you can imagine from outright police brutality where everyone is kicked out of the polling station and the boxes are taken until 5:00 PM all the way to a bomb scare as a way to switch the boxes. We ended up with the worst parliament in our history.”

¹²⁴ For details on violations during the second round, see *Shihadit lil-Tarikh*, 193–222.

(five), the Ahrar Party (one), and the Nasserist Party (one). The NDP would dominate the People's Assembly for the next five years, controlling 94 percent of the seats.

By all accounts, the 1995 People's Assembly elections were the most corrupt and violent on record, with 60 people killed and up to 820 people seriously injured. The increased violence and aggravated electoral fraud orchestrated by the Ministry of Interior was the indirect result of the SCC ruling that shifted the elections from the PR-list system to the district system. The district system raised the personal stakes at the district level and brought opposing candidates in direct conflict with one another for the first time, often resulting in violence. The new electoral configuration also increased the use of state violence in place of formally legal methods of control, such as the 8 percent threshold that had ensured NDP dominance in previous elections.

Throughout the elections and in their aftermath, opposition newspapers continuously publicized the irregularities and gave a prominent voice to the findings of human rights groups. *Al-Sha'ab* described the elections as "a massacre," *al-Wafd* described them as "the worst elections in Egypt's history," and even articles printed in the government-run newspaper, *al-Akbbar*, could not deny that "[t]he names of living persons disappeared and those of the dead reappeared."¹²⁵ In the months following the elections, 914 petitions challenging election results across the country proceeded on to the Court of Cassation. The detailed reports and extensive documentation provided by human rights organizations were the most important pieces of evidence in these cases. Judges concluded that electoral fraud was rampant in the elections and ruled that 226 seats in the People's Assembly (over half of the total 444 seats) should be disqualified. Opposition parties let it rip in their newspapers. Gamal Badawi of the Wafd party stated, "It seems these influential perpetrators forgot that in Egypt there is a just judiciary. Can the NDP, after the public theft, still claim that it commands a majority and that it rules Egypt according to the law?"

Despite impressive success in the courts, however, not a single seat was turned over to opposition candidates, and no new elections were held for seats ruled invalid by the administrative courts. As in previous elections, the NDP-dominated People's Assembly invoked article 93 of the Constitution, which explicitly states that "the People's Assembly

¹²⁵ See, for example, "Discontent Is Widespread in Egypt," *al-Wafd*, December 5, 1995; "Black Day for Democracy," *al-Ahrar*, November 30, 1995; "Black Wednesday in the History of Democracy," *al-Haqqiqqa*, December 2, 1995.

shall be competent to decide upon the validity of the membership of its members. . . . Membership shall not be deemed invalid except by a decision taken by a majority of two-thirds of the Assembly members.” The Speaker of the People’s Assembly, Fathi Sorur, used article 93 to refuse the court rulings and instead claim that the Assembly would initiate its own hearings into allegations of election fraud.¹²⁶ Moreover, the High Administrative Court issued a ruling on November 17, 1996, giving the People’s Assembly, rather than the administrative courts, the final word on election challenges. This ruling dismayed opposition activists, and judges themselves were disturbed by their inability to have rulings implemented. However, in this circumstance, the explicit wording of the Constitution itself once again prevented the judiciary from playing a more assertive role.¹²⁷

Following the 1995 People’s Assembly elections, Egyptian opposition parties again turned to the Supreme Constitutional Court in an attempt to break the regime’s control of elections. Lawyers representing the main Egyptian opposition parties worked together to challenge the constitutionality of the election law. Their focus turned to article 88 of the Egyptian Constitution, which states that “the law shall determine the conditions which members of the Assembly must fulfill as well as the rules of election and referendum, *while the ballot shall be conducted under the supervision of the members of a judicial organ*” [emphasis added]. Based on this article, opposition activists initiated litigation challenging the legal framework governing elections, which allowed for state employees to supervise election substations where the majority of electoral fraud occurred.¹²⁸ Five years later, their efforts paid off with one of the SCC’s boldest political rulings demanding full judicial supervision of elections.¹²⁹

¹²⁶ This gives the National Democratic Party yet another tool for controlling its own members in the People’s Assembly. Because the majority of the members gained seats through electoral fraud, the NDP, through article 93, can choose to initiate hearings and expel any of these members at virtually any time in the name of defending democracy.

¹²⁷ The only avenue for legal recourse available to victims of electoral fraud is to return to the courts to seek financial compensation, which generally ranges between £E 25,000 and £E 100,000 (\$7,350–\$29,400). Typically, opposition candidates will use this compensation to pay for their next campaign. Dr. Hossam ‘Eissa, a law professor and human rights advocate, finds it the ultimate irony that “the citizens pay twice; first for an illegitimate, ineffective government and a second time when the state pays compensation with the people’s money.” Personal interview, October 29, 1997.

¹²⁸ Kamal Khaled had already successfully transferred a similar petition to the SCC after the 1990 People’s Assembly elections, but by 1995 the SCC had still not issued a ruling.

¹²⁹ In the meantime, the human rights movement kept up the heat by applying pressure through international organizations. When the Egyptian government hosted an international conference of the Inter-Parliamentary Union in September 1997, the

The SCC and Local Election Reform: The Breakdown of Egypt's Corporatist Political Landscape at the Local Level

Opposition activists also made new constitutional challenges to the electoral laws governing local council elections, just as they had at the national level in the 1980s. The SCC first initiated electoral reform by striking down the provision of law 43/1979 that prevented the participation of independent candidates.¹³⁰ However, the government did not completely abandon the PR-list system at the local level. Instead, the government introduced a mixed system, with a single seat on each local council reserved for competition among independent candidates and the rest of the seats allocated according to the PR-list system.

The government had a vested interest in maintaining the list system for local council elections for the same reason that it preferred the list system in national elections. It allowed the government to better manage the political landscape. The list system facilitated the government's control because the government could discipline, punish, control, and coopt a handful of opposition parties easier than it could tens of thousands of independent candidates across the country. With the list system, entry into the political arena is restricted, and parties follow informal understandings of how far they can challenge the regime before facing discipline. More important, it is worth repeating that under the list system, parties themselves play an important role in reining in their own members. The internal organization of opposition parties is fundamentally non-democratic, with leadership turnover usually occurring only on the death of party leaders. Opposition activists who attempt to push the limits of political activism are duly disciplined *within* their own parties. The regime also had a vested interest in continuing the PR-list system at the local level because opposition parties were simply too weak to field candidates across the country. In the 1992 local council elections, for example, a full 84 percent of NDP slates went unopposed by opposition parties because they did not have the organizational resources necessary to mount an effective campaign. Finally, the regime was reluctant to abandon the PR-list system

Egyptian Organization for Human Rights urged the Union to investigate the electoral fraud in the People's Assembly elections. The EOHR also distributed documentation of election irregularities to conference participants, to the considerable embarrassment of the government. Simultaneously, the Group for Democratic Development sponsored a parallel conference bringing together NGO activists, opposition party members, and academics to discuss strategies for advancing the reform agenda.

¹³⁰ Case 14, Judicial Year 8, ruled April 15, 1989, *al-Mabkama*, Vol. 4, 191–204.

at the local level because that is where Islamist activists provide services to the poor that an inefficient and corrupt state bureaucracy is unable to provide effectively.¹³¹ A transition away from the list system would enable the Muslim Brotherhood, and other Islamist-oriented activists without official party status, to participate in elections as independent candidates.

The government's effort to circumvent the full impact of the 1989 SCC ruling lasted only as long as it took the Court to issue a new ruling on the matter. When Kamal Khaled brought down the People's Assembly and forced the reform of national electoral laws for the second time in 1990 through the SCC, 'Essam al-Islambuli and Negad al-Bora'i took their cue and raised an analogous case contesting the same provisions for elections to the local councils. In their petition, Islambuli and Bora'i engaged the courts in an explicit constitutional dialogue, using the 1990 SCC ruling to build their argument. By early 1994, the case was referred from the administrative courts to the Supreme Constitutional Court. Two years later, the SCC issued its ruling, declaring the government's electoral law "completely biased in favor of candidates listed on the political party slates," violating articles 7, 8, 40, and 62 of the Constitution.¹³²

The government did not attempt to circumvent this second SCC ruling on local council elections. The list system was abandoned completely, and the 1997 council elections were held according to an individual candidacy system. Nonetheless, the ruling National Democratic Party still dominated, winning approximately 93 percent of the total 47,382 local council seats across the country. At first blush, it would appear that the move away from the PR-list system was inconsequential because the NDP retained an overwhelming majority of local council seats. But to expect that a single Court ruling could produce a democratic transition is obviously unrealistic.

The more interesting and subtle impact of the SCC-induced reform was *how* the government adapted to the new electoral arrangement. The government had to resort to far more extensive *extralegal* measures to maintain control during the 1997 election, rather than depending on a formally legal, corporatist system of opposition management. Like the 1995 People's Assembly elections, the 1997 local elections were marked by

¹³¹ For more on this, see Tamir Moustafa, "The Dilemmas of Decentralization and Community Development in Authoritarian Contexts." *Journal of Public and International Affairs* 13 (2002): 123–144.

¹³² Case 2, Judicial Year 16, issued February 3, 1996, *al-Mahkama*, Vol. 7, 470–501.

an increase in preventive detention of opposition candidates (particularly Islamists), increased physical coercion of candidates and their supporters, and electoral fraud on an unprecedented scale. Human rights NGOs monitoring the elections reported that the regime “showed no consideration for rules or guarantees to ensure proper voting and respect for the will of the voters.”¹³³ This extralegal coercion carried costs in terms of the government’s legal legitimacy.

Islamist Litigation in the SCC, 1991–1997

Islamist challenges in the Supreme Constitutional Court continued throughout the 1990s, with dozens of attempts to contest laws by way of article 2 of the Constitution, which declares that “Islamic jurisprudence is the principal source of legislation.”¹³⁴ In one interesting case, Islamists contested the constitutionality of a series of laws governing alcohol and the gambling industry. The plaintiff claimed that these laws violated article 2 of the Constitution as well as article 12, which states that “society shall be committed to safeguarding and protecting morals, promoting the genuine Egyptian traditions and abiding by the high standards of religious education, moral and national values . . . and public manners within the limits of the law. The State is committed to abiding by these principles and promoting them.”¹³⁵ The plaintiff demanded not only that the laws be struck down and that the state actively confiscate alcohol and gambling paraphernalia, but he also demanded that the state build mosques in place of nightclubs throughout the country as moral compensation to the people. The presiding judge on the civil court agreed with the applicant’s constitutional claim and advanced the challenge on to the Supreme Constitutional Court, where the petition was soundly rejected on the grounds that the plaintiff did not have a direct interest in the case.¹³⁶

¹³³ For more on the extent of electoral corruption and coercion, see the Egyptian Organization for Human Rights 1997 Annual Report, 97–103, and the press release from the Center for Human Rights Legal Aid, “CHRLA’s Local Government Elections Roundup,” April 9, 1997.

¹³⁴ More Islamist challenges to civil code provisions for charging interest were rejected by the SCC from 1991–1997 on the same basis as the landmark 1985 al-Azhar interest case. See, for example, case 12, Judicial Year 14, ruled September 5, 1992, *al-Mabkama*, Vol. 5 (2), 40–46; case 26, Judicial Year 15, ruled December 2, 1995, *al-Mabkama*, Vol. 7, 226–239; case 93, Judicial Year 6, ruled May 18, 1996, *al-Mabkama*, Vol. 7, 709–715.

¹³⁵ The plaintiff also claimed that the laws on gambling and alcohol infringed articles 9, 79, and 155 of the Constitution.

¹³⁶ Case 3, Judicial Year 12, January 2, 1993, *al-Mabkama*, Vol. 5 (2), 124–130.

Dozens of similar challenges to a variety of laws highlight broader tensions within the Egyptian legal establishment. Some lower court judges are sympathetic to Islamist challenges, but Islamist litigation makes little headway once constitutional petitions reach the SCC. In fact, the most interesting constitutional challenges based on article 2 were *not* those initiated by litigants bringing disputes to court but rather those brought by lower court judges using their power to refer questionable laws to the Supreme Constitutional Court for consideration *on their own initiative*. For example, in presiding over a hearing concerning prostitution in 1990, the judge of Abu Hamad primary court decided to suspend the case and to request that the SCC evaluate the constitutionality of law 10/1961.¹³⁷ It was the judge's opinion that this law, which punished prostitution, did not conform to the requirements of Islamic law and therefore did not conform to article 2 of the Constitution. The judge argued that in Islamic law, the crime of adultery is to be punished by stoning if the adulterers are married and by lashings if the adulterers are unmarried, whereas law 10/1961 only provided for a prison sentence. Again, the SCC was able to dodge the challenge and dismiss the case based on the grounds that the law had been issued before the 1980 amendment to the Constitution that made the *shari'a* the principal source of legislation, just as it had ruled previously in the al-Azhar interest case.¹³⁸

By the early 1990s, however, it became increasingly difficult for the SCC to dismiss Islamist challenges based on the nonretroactivity claim established in the al-Azhar interest case. New laws promulgated after the 1980 constitutional amendment were open to judicial review based on the Court's own reasoning, and new Islamist challenges based on article 2 were levied with increasing frequency. One of the most interesting challenges sought to overturn a decree by the Minister of Education that had prohibited students from wearing the *niqab* (full veil) while attending public schools.¹³⁹ In response to the decree, the father of two schoolgirls launched a legal challenge that made its way to the Supreme Constitutional Court. The father argued that the school dress code violated articles 2 and 46 of the Egyptian Constitution, the first of which declares that Islam is the religion of the state and that the *shari'a* is the principal source of legislation, and the latter, which guarantees the freedom

¹³⁷ Case 89, Judicial Year 12, ruled May 16, 1992, *al-Mahkama*, Vol. 5 (1), 338–343.

¹³⁸ Case 20, Judicial Year 1, May 4, 1985, *al-Mahkama*, Vol. 3, 209–224 (reviewed in the [previous chapter](#)).

¹³⁹ Decrees 113 and 208 of 1994 by the Minister of Education.

of belief and the freedom to practice religion. The SCC ruled that the ministerial decree did not interfere with any fundamental requirement of Islam.¹⁴⁰ The court contended that “Islamic jurists disagree as to the proper construction of the Qur’an and the confirmed or alleged sayings of Muhammad the Prophet with regard to women’s dress.”

The court asserted that:

... women under Islamic law have no definitive requirement for their dress. However, their choice of garments may not be based on caprice or be an internal decision of their own. Women have to bear their responsibilities in the different aspects of life, taking into account that Islamic law has never mandated a particular design or image for their dress, but left their form and arrangement to different interpretations within the straightforward criterion of moderation and uprightness, in line with valid prevailing customs and traditions.

Therefore, their dress is not regarded as the performance of a religious service but rather indicative only of the changeable requirements of time, place, and circumstance, without setting aside their obligation to adjust their dress to virtues and proprieties in order not to behave disgracefully or imprudently.

At the same time, SCC justices did not conceal their opinion of the *niqab*.

It would be impractical to regard as mandatory a phantom-like dress for women... The Qur’an, along with the sayings of the Prophet do not portray women as figures hidden under a screen, draped from head-to-toe, with no part of their bodies except their eyes revealed.¹⁴¹

The SCC ruled that the Minister of Education’s decree was well within his right to regulate school uniform and that it did not violate article 46 of the Constitution. The Court interpreted article 46 as guaranteeing that “no one may be compelled to believe in a religion which he denies; to declare the religion to which he adheres; to withdraw from the one he has chosen, or to favor a particular religion in prejudice to another, either by way of contempt, defamation or renunciation.”

Despite challenges to laws that some Islamists considered to be in conflict with the *shari‘a*, the overwhelming majority of petitions invoking article 2 of the Constitution most likely did so in instrumental ways to strengthen claims of unconstitutionality. For example, litigants used the

¹⁴⁰ Case 8, Judicial Year 17, ruled May 18, 1996, *al-Mabkama*, Vol. 8, 344–367.

¹⁴¹ ‘Awad al-Murr, “Judicial Sources for Supporting the Protection of Human Rights,” in *The Role of the Judiciary in the Protection of Human Rights*, 14–19.

shari'a to strengthen claims in property rights cases that had little to do with Islamic law in substance.¹⁴² Similarly, dozens of cases dealing with personal status issues of divorce,¹⁴³ alimony,¹⁴⁴ and child custody¹⁴⁵ used article 2 to contest family law regulations, despite the fact that personal status provisions in the Egyptian legal code are generally based on accepted interpretations of the *shari'a*.¹⁴⁶ Although some of the constitutional claims in these cases may have been made by litigants who sincerely believed that the personal status codes deviate from the *shari'a* and therefore impose secular rights and duties conflicting with their perceived religious duties, it is probably safe to assume that many of these petitions simply used the *shari'a* to strengthen their claims in instrumental ways. In some cases, the SCC itself began to draw on principles of Islamic law to strengthen the moral weight of its rulings. However, the court was more eager to draw on foreign and international law.

The Internationalization of SCC Judgments

Supreme Constitutional Court jurisprudence was internationalized under the leadership of Chief Justice 'Awad al-Murr. Beginning in 1992, SCC rulings began to note that the Egyptian government had signed and ratified international conventions, such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The Court used these international conventions to build progressive interpretations of constitutional provisions and to lend legal and moral weight to its rulings. This

¹⁴² See, for example, Case 36, Judicial Year 9, *al-Mahkama*, Vol. 5, 224–259; Case 65 Judicial Year 4, *al-Mahkama*, Vol. 5, 307–323; Case 6, Judicial Year 9, ruled March 18, 1995, *al-Mahkama*, Vol. 6, 542–566; Case 116, Judicial Year 18, ruled August 2, 1997, *al-Mahkama*, Vol. 8, 789–808.

¹⁴³ For example, Case 35, Judicial Year 9, 1 Judicial Year 16, 4 Judicial Year 16, 21 Judicial Year 13, 25 Judicial Year 9, 54 Judicial Year 13, 25 Judicial Year 15 ruled on August 14, 1994, October 1, 1994, and November 5, 1994, *al-Mahkama*, Vol. 6, 331–357; case 37 Judicial Year 16, ruled August 5, 1995, *al-Mahkama*, Vol. 7, 102–105.

¹⁴⁴ For examples, see Cases 29 Judicial Year 11, 5 Judicial Year 14, and 21 Judicial Year 16 ruled March 26, 1994, *al-Mahkama*, Vol. 6, 231–256; Case 5 Judicial Year 8, ruled January 6, 1996 and Case 46 Judicial Year 17, ruled May 4, 1996, *al-Mahkama*, Vol. 7, 347–387.

¹⁴⁵ For examples, see Case 7, Judicial Year 8, ruled May 15, 1993, *al-Mahkama*, Vol. 5 (2), 260–290.

¹⁴⁶ For analysis of the SCC's reasoning in these cases, see Lombardi, "Islamic Law as a Source of Constitutional Law in Egypt," 233–307.

was particularly useful in light of the odd character of the 1971 Constitution, which has many ambiguous and sometimes contradictory rights provisions. Ironically, the Egyptian government signed and ratified these conventions as window dressing, with no expectation that they would be used by an institution like the SCC to strike down repressive legislation.

SCC justices also began to consult foreign court rulings under the leadership of ‘Awad al-Murr, and SCC rulings increasingly invoked foreign case law, most notably from the French Constitutional Council and the U.S. Supreme Court.¹⁴⁷ Through the mid-1990s, between one-quarter and one-half of all SCC rulings incorporated specific aspects of international legal or foreign court rulings. Even more rulings referred to “accepted international standards,” broadly stated, and to the comparable judicial principles of other “civilized nations.”¹⁴⁸

SCC justices acknowledged quite frankly that these techniques helped them strengthen rulings and provide progressive interpretations of constitutional provisions. For example, one prominent SCC justice explained that “the recent tendency of the court to interpret constitutional guarantees in light of the international human rights standards and rules which are applied in the democratic countries gives the court the capacity to broaden its interpretation of constitutional rights and freedoms. As a result, I believe that the court must continue in this direction.”¹⁴⁹ Despite the benefits articulated by SCC justices themselves, references to foreign court rulings and international human rights frameworks were not costless. References to foreign court rulings also left the SCC vulnerable to accusations of subversion of the Egyptian legal order.

The SCC’s internationalization of domestic legal struggles went beyond engaging with international treaty commitments and foreign court rulings. It also involved pragmatic efforts to forge links with the international

¹⁴⁷ See, for example, case 41 Judicial Year 7, ruled February 1, 1992 [relying on the reasoning of *Brown v. Board of Education*] *al-Mahkama*, Vol. 5, 89–102; Case 33 Judicial Year 15, ruled December 2, 1995, *al-Mahkama*, Vol. 7, 297–315; Case 48 Judicial Year 18, ruled September 15, 1997, *al-Mahkama*, Vol. 8; 854–871; Case 142 Judicial Year 19, ruled February 7, 1998, *al-Mahkama*, Vol. 8. 1186–1188. In some rulings, direct references were even made to the U.S. Constitution. See, for example, Case 19, Judicial Year 15.

¹⁴⁸ Justice Adel Omar Sherif himself addresses the use of international law in SCC rulings in his article, “The Primacy of the Law and the Constitution – The Egyptian Experience,” in *Yearbook of Islamic and Middle Eastern Law*, ed. Eugene Cotran and Martin Lau, Vol. 10, 3–19 (The Hague: Kluwer Law International, 2006).

¹⁴⁹ Justice ‘Abd al-Rahman Nosseir, “The Supreme Constitutional Court and the Protection of Human Rights” (unpublished manuscript, November 1992, 54). This sentiment was confirmed by a number of SCC justices interviewed between January 2000 and March 2001.

legal community and with domestic civil associations linked to the international human rights community. This effort was most evident in two international conferences convened in Cairo in 1996 and 1997 under the auspices of the Supreme Constitutional Court and the British Council.¹⁵⁰ Both conferences drew hundreds of representatives from throughout the Arab world, Africa, Europe, and the United States. Over three days, SCC justices, foreign judges, and NGO activists exchanged views in dozens of panels on the importance of rule-of-law institutions for the protection of human rights.¹⁵¹ The SCC used the event to showcase its record and to announce that, in less than two decades, it had arrived on the international scene.

Early Challenges to SCC Independence

There were, however, early signs that the government was increasingly uncomfortable with SCC activism under 'Awad al-Murr. In addition to direct threats to the Court through private channels, prominent regime insiders made public attacks in the mid-1990s. The first such challenge came from Fathi Sorur, the Speaker of the People's Assembly in 1996. In a lengthy interview published in *al-Musawwar*, Sorur accused the SCC of imposing deviant interpretations of the Constitution, diverging from the interests of the nation, and destabilizing the legal framework of the state.¹⁵² In a candid foreshadowing of what was in store for the Court five years later, Sorur suggested that continued SCC activism may produce a crisis similar to President Franklin D. Roosevelt's confrontation with the U.S. Supreme Court. Sorur's proposed solution was to allow for a process of abstract review of legislation in its draft stage, and only on the request of the President, the Speaker of the People's Assembly, or the Prime Minister. After examination at the draft stage, laws would then be immune from future review. Sorur's chilling interview with *al-Musawwar* was followed by an attack by Mustafa Abu Zeid, a former Minister of

¹⁵⁰ Conference papers were subsequently published in Kevin Boyle and Adel Omar Sherif, eds., *Human Rights and Democracy: The Role of the Supreme Constitutional Court of Egypt* (London: Kluwer Law International, 1996) and Eugene Cotran and Adel Omar Sherif, *Democracy, the Rule of Law, and Islam* (London: Kluwer Law International, 1999).

¹⁵¹ Similar international links were cultivated on a less formal level with periodic visits to the SCC by foreign embassy staff and international NGO advocates.

¹⁵² *al-Musawwar*, March 15, 1996, 34–36, 82–83. Also see Hisham Fawzi's analysis in *Raqaba Dusturiyya al-Qawaniin*, 316–318.

Justice and socialist public prosecutor.¹⁵³ Abu Zeid supported Sorur's proposal and went so far as to accuse the SCC of efforts to "apply the text of the American Constitution."¹⁵⁴ Here, the Court was beginning to pay a clear price for its references to foreign court precedents and international human rights frameworks in its rulings.

'Awad al-Murr responded forcefully to Sorur's prior revision proposal with an extensive interview of his own in which he articulated the fundamental role that the SCC played in upholding constitutional protections of civil and political rights, and how prior revision would undermine its work.¹⁵⁵ al-Murr continued to vigorously address the danger of prior review at nearly every public lecture, both during and after his tenure as chief justice. When asked about the prior revision proposal during a lecture at Cairo University, al-Murr insisted that prior revision is unsuitable because courts often do not know the implications of legislation until laws are actually put into practice. But more troublesome, al-Murr asserted, is how the regime would abuse a system of prior revision.

Do you think that Dr. Fathi Sorur will one day refer to the court a bill and ask it to determine whether it is right or wrong? Do you imagine that the Prime Minister who sends a bill to pass through the People's Assembly will ask for our opinion of it? Do you think we have an opposition with 60 persons who have an interest in asking whether the law is right or wrong? But let us suppose that we had that number in the opposition and they asked us to review a bill. We will even suppose that the Prime Minister has his country's interest at heart and asks us whether the bill is right or wrong. Do you know what the Egyptian Prime Minister would do? He would send you 20 bills on the same day, saying that the cabinet approved these laws, which might be of different years, and ask our opinion in the constitutionality of them all. Every bill would be of 200 articles or so, and the Constitutional Court would be required to decide in 30 days on four, five, or six thousand articles. It took us a year to decide on one article. Imagine if we were asked to decide in six months on all the bills approved by the executive authority before they were signed by the President. They will dump all bills on us to get the seal of approval of the Constitutional Court, and the result would be that the constitutionality of these bills could not be challenged later

¹⁵³ Some speculated that Abu Zeid's attack was motivated by a personal vendetta because the SCC had ruled against him in Kamal Khaled's successful challenge of the five-day evidence provision in the code of criminal procedures. The SCC decision prevented Abu Zeid from pursuing his £E 500,000 claim against Khaled.

¹⁵⁴ *al-Ahram*, June 17, 1996; *al-Ahram*, July 1 1996, Rutherford, 400. Also see the analysis in Fawzi, *Raqaba Dusturiyya al-Qawaniin*, 318–322.

¹⁵⁵ *al-Musawwar*, March 22, 1996.

on. . . . If you want to destroy the Constitutional Court, let's shift to prior revision.¹⁵⁶

Opposition parties and NGOs lined up behind 'Awad al-Murr's position.¹⁵⁷ The fallout from Fathi Sorur's public statements in the opposition press demonstrated once again that the SCC enjoyed support from a number of actors in Egyptian society. As the regime began to issue veiled threats against the Court, NGOs pushed back in the opposite direction. Human rights NGOs, such as the Center for Human Rights Legal Aid, insisted that "the constraints against institutions directly filing complaints should be lifted so that political parties, syndicates, and NGOs can file direct cases on the constitutionality of legislation."¹⁵⁸

Interestingly, SCC justices credited the public response as the reason why the government did not carry out its threat to rein in the Court. Moreover, they credited themselves for having shaped the public's attitude. 'Adel Omar Sherif, a prominent member of the Court, explained that "the Court had raised constitutional awareness among the people. It especially raised popular consciousness of the necessity of maintaining the democratic process and respecting individual rights and freedoms, and these two elements were behind the defeat of this attack on the Court."¹⁵⁹ Whether or not Sherif sincerely believed that SCC independence was saved as a result of this popular outcry is unknown. But his writings make clear his view that the public needs to "play an active role" in the protection of judicial independence so that it can "be alert to, and consequently defeat, any attempts to detract from this highly important constitutional guarantee."¹⁶⁰

A second act of intimidation came in late 1997 when Hamed al-Shinawi, a member of the regime's National Democratic Party, submitted a bill to the People's Assembly Complaints and Proposals Committee designed to strip the SCC of its powers of judicial review. The bill proposed that any law ruled unconstitutional by the SCC should remain standing until it is sent to the People's Assembly for consideration. If the People's Assembly did not agree with the reasoning of the Supreme Constitutional

¹⁵⁶ Lecture by 'Awad al-Murr at Cairo University, September 25, 2000.

¹⁵⁷ See, for example, Mustafa Salim, "This Scandalous Attack on the Supreme Constitutional Court," *al-Sha'ab*, June 21, 1996; *al-Sha'ab*, April 2, 1996; *al-Wafd*, March 23, 1996.

¹⁵⁸ Center for Human Rights Legal Aid, "The Highest Authority?," 26.

¹⁵⁹ Adel Omar Sherif, "Attacks on the Judiciary: Judicial Independence – Reality or Fallacy?" *Yearbook of Islamic and Middle Eastern Law* 6 (1999–2000): 18.

¹⁶⁰ Adel Omar Sherif, "Attacks on the Judiciary," 21.

Court, it could reject the ruling without question. The bill would have effectively made SCC decisions nonbinding, completely undermining the role of the Court. The bill was transferred to the Shura Council's Constitutional Committee, the last stop before debate in the People's Assembly, when a draft was leaked to the press. Opposition newspapers slammed the bill for days after the news leak, and human rights organizations unanimously condemned the draft law. Particularly strong statements also came from the newly formed Center for the Independence of the Judiciary and the Legal Profession, and the Center for Human Rights Legal Aid.

Fathi Sorur and the NDP leadership denied responsibility for the bill and explained that Shinawi had proposed the legislation on his own, without consulting NDP leadership. However, opposition activists did not believe this account, particularly because Fathi Sorur had transferred the bill to the Shura Council himself and Hamed al-Shinawi was a tourism entrepreneur with no expertise in constitutional law whatsoever. A popular consensus emerged among reformers that the bill, and the press leak itself, were thinly veiled warnings to both the SCC and opposition activists that the regime was running the show and that the powers of the Court could be curtailed if it continued to push its reform agenda.

The Limits of SCC Activism: Circumventing the Regular Judiciary through Military Courts

As we have seen in the [previous chapter](#), the regime made extensive use of the State Security Courts and the Emergency State Security Courts throughout the 1980s as a tool to sideline political opponents considered particularly threatening to the state. Given the fact that Egypt has been in a perpetual state of emergency for all but eighteen months since 1967, the Emergency State Security Courts have, in effect, formed a parallel legal system with fewer procedural safeguards than the regular judiciary. 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 constraint because impeding the function of the State Security Courts would have posed a threat to the core interests of the regime and would have likely resulted in a futile confrontation. In the 1990s, the SCC faced a similar dilemma with implications that were far more grave, when it received petitions requesting judicial review of the government's increasing use of military courts.

Despite the extensive controls that the president held over the Emergency State Security Courts, there were isolated cases in which even the emergency courts attempted to constrain executive powers in the late 1980s and early 1990s. For example, an emergency court acquitted Sheikh ‘Omar ‘Abd al-Rahman and forty-eight of his followers in 1990 when it was revealed in court that confessions were extracted through torture. The government was able to overturn the verdict on “procedural grounds” and retry the defendants, but only after an uncomfortable exposition of the regime’s disregard for human rights. In another trial of twenty-four Islamists charged with assassinating parliamentary speaker Rifa‘t al-Mahgub in the early 1990s, the panel of judges again dismissed the case when they found that confessions were extracted through torture.¹⁶¹

The occasional inconveniences in the Emergency State Security Courts prompted the government to begin using the military courts (*al-Mahakim al-‘Askariyya*) to try terrorism cases throughout the 1990s.¹⁶² Military courts provide an airtight avenue for the regime to try its opponents; all judges are military officers appointed directly by the minister of defense and the president for two-year renewable terms. Judges are not required to be trained in law, and they are under the jurisdiction of the Ministry of Defense rather than the Ministry of Justice. Finally, there are fewer procedural safeguards in the military courts, trials may be held in secret, and there is no right to appeal.

The first cases transferred to the military courts concerned defendants accused of specific acts of terrorism. However, within just a few years, the government began to try civilians for mere affiliation with moderate Islamist groups, such as the Muslim Brotherhood.¹⁶³ The government’s

¹⁶¹ Judge Wahid Mahmud Ibrahim did not spare any details, announcing that medical reports proved the defendants had been severely beaten, hung upside down, and subjected to electric shocks to their genitals. Michael Farhang, “Terrorism and Military Trials in Egypt: Presidential Decree No. 375 and the Consequences for Judicial Authority.” *Harvard International Law Journal* 35 (1994): 225–237. Additional acquittals based on allegations of torture are provided in Brown, *The Rule of Law in the Arab World*, 98–99.

¹⁶² The first such case was transferred to a military court by Mubarak by presidential decree 375/1992. From December 1992 through April 1995 alone a total of 483 civilians were transferred to military courts for trial. Sixty-four were sentenced to death. According to the 1998 Arab Center for the Independence of the Judiciary and the Legal Profession annual report, the number of civilian transfers to military courts reached as high as 317 in 1997 alone.

¹⁶³ Presidential decree 297/1995 transferred the cases of forty-nine members of the Muslim Brotherhood from lawsuit 8 military no. 136/1995 in the Higher State Security court to the military judiciary. See details in the report by the Center for Human Rights Legal

use of military courts to try civilians was hotly contested, and opponents of the regime attempted to wage a legal battle over the procedure in the early 1990s. Both liberal reformers and Islamist activists argued that, at best, military law 25/1966 gave the president the authority to transfer whole categories of crimes to the military judiciary, but it did not permit the president to handpick individual cases for transfer. A ruling from a lower administrative court on December 10, 1992, supported this claim.¹⁶⁴

In response, the government launched its own legal offensive. First, state attorneys appealed the lower administrative court decision to the Supreme Administrative Court. On May 23, 1993, the Supreme Administrative Court issued an authoritative ruling overturning the lower court decision and affirmed the right of the president to transfer any crime to the military courts during the state of emergency. The Supreme Administrative Court based its decision on articles 73 and 74 of the Constitution and an earlier ruling by the executive-dominated Supreme Court, which had operated from 1969–1979.¹⁶⁵ Next, the government attempted to establish an air of legal legitimacy around the transfer of cases to the military judiciary by requesting the Supreme Constitutional Court to exercise its power of legislative interpretation and give a definitive reading of law 25/1966.¹⁶⁶ The SCC obliged, and in January of 1993 it confirmed the broadest interpretation of the law.¹⁶⁷

Unsuccessful in the administrative courts, activists attempted to challenge the constitutionality of military law 25/1966 in the SCC. The defense panel for a Muslim Brotherhood case being tried before a military court requested the right to challenge the constitutionality of the military law.

Aid, “*al-Qada’ al-‘Askary fi Misr: Qada’ Bighayr Damanat ... Qada’ Bidun Hasana Mathamun Bila Haquq*” [The Military Judiciary in Egypt: Courts without Safeguards, Judges without Immunity, and Defendants without Rights]. In 1996 the government again transferred twelve members of the emerging Wasat Party to the military court.

¹⁶⁴ It should be noted that this judgment was issued by an administrative court under Tareq al-Bishri, a prominent judge with Islamist leanings.

¹⁶⁵ Article 74 of the Constitution reads, “If any danger threatens the national unity or the safety of the motherland, or obstructs the constitutional role of the State institutions, the President of the Republic shall take urgent measures to face this danger, direct a statement to the people, and conduct a referendum on those measures within sixty days of their adoption.”

¹⁶⁶ Article 6/2 of the Law on the Military Judiciary no. 25/1966, states that “during a state of emergency, the President of the Republic has the right to refer to the military judiciary any crime which is punishable under the Penal Code or under any other law.”

¹⁶⁷ *al-Mahkama*, Vol. 5 (2), 417–428. Some mistakenly understood this ruling to be the SCC’s confirmation of the constitutionality of the law, but interpretation of legislation is another function of the SCC that is completely independent of judicial review.

On November 7, 1995, their request was granted by an administrative court.¹⁶⁸ The petition of unconstitutionality was filed with the Supreme Constitutional Court within a month, but as of the writing of this study, the SCC had not yet issued its ruling. Given the extreme political sensitivity of the case, the SCC will probably never rule against these core interests of the regime. Moreover, because the earlier Supreme Court issued a ruling affirming the constitutionality of law 25/1966, the SCC is bound to respect its judgment unless it can find a creative way to circumvent that reasoning.

The Supreme Administrative Court ruling, the SCC interpretation of law 25/1966, and the failure of the SCC to produce a ruling on the constitutionality of civilian trials in military courts clearly illustrate the limits of political reform through judicial channels. Administrative court judges typically defend civil liberties and human rights when they can, but they are ultimately constrained by the web of illiberal legislation issued by the government. With the power of judicial review, Supreme Constitutional Court justices are not similarly bound by illiberal legislation.¹⁶⁹ Nonetheless, SCC justices must look after their long-term interests vis-à-vis the regime and pick their battles appropriately, given the undeniable power asymmetries. It is striking that former Chief Justice ‘Awad al-Murr acknowledged this fact when he described Egyptian politics as a “red-line system,” with implicit understandings between the regime and opposition over the extent to which political activism is tolerated.¹⁷⁰

Ironically, the government’s ability to transfer select cases to the military courts probably facilitated the emergence of judicial power in the regular judiciary. Administrative courts and the Supreme Constitutional Court were able to push a liberal agenda and maintain their institutional autonomy from the executive largely because the regime was confident that it ultimately retained full control of its political opponents.¹⁷¹

Even outside of the military courts, the government effectively detains its political opponents for long periods of time, in flagrant violation of

¹⁶⁸ The constitutional challenge was raised by Selim al-‘Awa, a prominent Islamist lawyer, and ‘Atef al-Banna, a Wafd party activist and professor at Cairo University.

¹⁶⁹ However, some constitutional provisions are themselves illiberal.

¹⁷⁰ Personal interview, June 11, 2000.

¹⁷¹ Brown comes to the same conclusion: “Having successfully maintained channels of moving outside the normal judiciary, the regime has insured that the reemergence of liberal legality need not affect the most sensitive political cases. . . . The harshness of the military courts, in this sense, has made possible the independence of the rest of the judiciary.” *The Rule of Law in the Arab World*, 116.

judicial orders, through a procedure known as “recurrent detention.”¹⁷² Under article 3 of the emergency law, prosecutors can detain any citizen for up to thirty days without charges. Once a subject of administrative detention is released within the required thirty-day period, he is often simply transferred to another prison or holding facility and then registered for another thirty-day period, essentially allowing state security forces to lock up anyone they wish for months or even years at a time. Human rights organizations first brought the phenomenon of recurrent detention to light through extensive documentation in the 1990s. The Egyptian Organization for Human Rights noted that the problem has been particularly prevalent since 1992 when the regime began to wage a protracted campaign against militant Islamists.¹⁷³ Between 1991 and 1996, the EOHR documented 7,891 cases of recurrent detention.¹⁷⁴ In 90 percent of the cases investigated by the EOHR, the detained subjects were tortured, and most were denied the right to legal representation or family visits. Moreover, some detained subjects faced a particularly disturbing pattern of collective punishment, with government harassment of family members and even the detention of whole families.

Article 3 of the emergency law permits the president, or anyone representing him, to “detain persons posing a threat to security and public order.” However, the emergency law does not define the terms “threat,” “security,” and “public order,” leaving it to prosecutors to apply the provision with its broadest possible interpretation.¹⁷⁵ Administrative courts issued a number of rulings attempting to define and limit the application of article 3, but their rulings had no effect.¹⁷⁶ Again, the ironic result of these sweeping government powers of administrative detention is that they allowed the Supreme Constitutional Court and the regular judiciary to push their liberal agenda and to maintain their institutional

¹⁷² The EOHR also refers to this practice as “release on the register.”

¹⁷³ The problem of recurrent detention was further aggravated by the “anti-terrorism” law 97/1992, which expanded the authority of the public prosecutor’s office and weakened the oversight of the administrative courts.

¹⁷⁴ This figure represents the number of cases that the EOHR was able to document. The number of actual cases of recurrent detention is probably much higher. See the Egyptian Organization for Human Rights, *Recurrent Detention: Prisoners without Trial*.

¹⁷⁵ Further aggravating this problem is the lack of independence of the *niyaba* [public prosecutor’s office] from the regime. The *niyaba* does not enjoy the same autonomy as judges with respect to appointments, promotions, and disciplinary measures.

¹⁷⁶ For examples of administrative court rulings concerning administrative detention and recurrent detention, see EOHR, *Recurrent Detention*, 41–45.

autonomy because the regime knew that it retained ultimate control over its opponents.

Despite the ultimate limitations on SCC activism, human rights groups and opposition parties scored impressive political victories through the Supreme Constitutional Court from 1991–1997. As a result, the government became uneasy about the potential for more serious political challenges through the Court in the future. The government was increasingly torn between the benefits of SCC rulings in the economic sphere and the boldness of SCC rulings in the area of political rights. Early suggestions by the government that it might curtail SCC powers were met with fierce criticism from the human rights movement, opposition parties, and the legal profession itself. The backlash following Fathi Sorur's comments foreshadowed a major confrontation between the SCC and its supporters, and the government. Although the government would ultimately prevail, the SCC and its supporters would not go down without a fight. This confrontation is the focus of the [next chapter](#).

Executive Retrenchment and an Uncertain Future (1998–2005)

“Isn’t amending the Constitution so easy that it can be done overnight?”

“Yes, in Egypt it can take place in a second.”

Question-and-answer session at a lecture by former Chief Justice
‘Awad al-Murr at Cairo University, September 25, 2000

By the late 1990s, the Egyptian government was increasingly apprehensive about Supreme Constitutional Court activism. In less than two decades of operation, the SCC had become the most important avenue for political activists to challenge the regime, and the Court continued to issue scores of rulings that incrementally undermined the regime’s levers of control. Egyptian human rights groups were exposing the repressive nature of the government both at home and abroad, and rights groups had begun to formalize their strategies of constitutional litigation. By 1998, rights groups were raising dozens of petitions for constitutional review every year. Intent on reasserting its authority, the regime steadily tightened its grip on the SCC, the human rights movement, and opposition parties in the late 1990s.

This chapter examines the fall of Supreme Constitutional Court independence between 1998 and 2005. In this period, the SCC and its judicial support network attempted to stave off political retrenchment by mobilizing on behalf of one another. Early challenges to the Supreme Constitutional Court generated resistance from opposition parties, human rights groups, professional syndicates, and the legal profession. Likewise, the SCC played a crucial role in defending the human rights movement and opposition parties with two of its boldest rulings: one against the government’s repressive 1999 NGO law and another that required full

judicial supervision of elections. But ultimately, the government was able to impose its will by continuously weakening the judicial support network and packing the Court with new justices. The exclusive dependence on litigation, without more direct modes of political mobilization, ultimately limited the ability of political activists to defend themselves and preserve Supreme Constitutional Court independence.

THE SUPREME CONSTITUTIONAL COURT UNDER ATTACK

As we saw in Chapters 4 and 5, Supreme Constitutional Court rulings on property rights claims had drained state coffers of billions of Egyptian pounds. Pending cases on the SCC docket had the further potential to make the early property rights rulings pale by comparison. Most significant were ninety-two petitions on the Court docket contesting a variety of provisions of the sales tax law. Minister of Justice Seif al-Nasr estimated that pending rulings could cost the state up to £E 7.7 billion (approximately \$2.3 billion).¹ The Constitutional Court was effectively fulfilling its mandate of protecting property rights against government infringement, but would the government continue to abide by its rulings?

The answer to the question came in 1998 with the first concrete struggle over Supreme Constitutional Court independence. In July of that year, the government attempted to protect itself from pending challenges in the sphere of taxation. Mubarak issued a presidential decree that restricted retroactive compensation claims as the result of SCC taxation rulings to the party initiating the constitutional petition.² All other citizens were effectively denied the right to retroactive compensation for the same unconstitutional legislation.³ The explanatory memorandum of the new decree rationalized the need for the amendment as “the maintenance

¹ *Al-Ahram Weekly*, December 10–16, 1998.

² Decree 168 of 1998 amending paragraph 3 of article 49 of law 48/1979. The amendment states that “the outcome of ruling an article in a law or code unconstitutional is that it can no longer be applied the day following its publication, unless the ruling sets another date. Ruling the unconstitutionality of a tax article shall only have a direct effect, without undermining the benefits to the plaintiff of the issued ruling of unconstitutionality of this article.”

³ Part of Mubarak’s decree theoretically gave the Court more flexibility by allowing it to specify an effective date for rulings of unconstitutionality in noncriminal cases, thus facilitating its ability to avoid political ruptures (such as the dissolution of the People’s Assembly in 1987 and 1990) if it so chooses.

of . . . social and economic stability.” According to the explanatory memorandum,

the court’s retroactive annulment of a tax means that the government would have to return the revenue spent to cover its obligations to those who paid it. This would hinder realizing [the government’s] development plans, prevent it from developing society, and force it to impose new taxes to cover budget deficits. All the above are dangerous effects whose severity would destroy the prevailing conditions and disrupt the State’s budget.⁴

The government was quite bold in stating that its objective was to shield itself from pending and future property rights claims in the area of taxation. This was the first concrete test of whether supporters of the Court would rise to the occasion to defend the reach of SCC rulings. As with the previous veiled threats to the SCC, the regime faced a storm of protest. Opposition newspapers were filled with editorials insisting that the decree was unconstitutional on both procedural and substantive grounds.⁵ NGOs, such as the new Arab Center for the Independence of the Judiciary and the Legal Profession, also joined the fray, printing extensive critiques in opposition papers.⁶ Prominent members of the legal profession, such as the head of the Cairo branch of the Lawyers’ Syndicate, also criticized the decree.⁷ Minister of Justice Seif al-Nasr and other

⁴ At the same time, the explanatory memorandum of the decree went out of its way to state that it satisfied the “requirements of constitutional legitimacy.” The explanatory memorandum for decree 168/1998 is reprinted in ‘Abd Allah Nassef, *Higiya wa Athar Ahkam al-Mahkama al-Dusturiyya al-‘Ulia qabl al-T’adil wa ba’d al-T’adil*. (*Dar al-Nahda al-‘Arabiya*, 1998), 75–78.

⁵ The procedural argument for the unconstitutionality of the law was that it was unnecessary for Mubarak to circumvent the People’s Assembly and issue an executive decree. The substantive arguments were based on constitutional provisions protecting property rights and protecting access to justice. For example, see Nu‘man Gom’a, “The Legislation is Contradictory to the Constitution and an Aggression on the Function of the Court,” *al-Wafd*, July 12, 1998; “Amending the Law of the SCC is an Aggression on the Rights of Citizens,” *al-Abali*, July 15, 1998; Muhammad Hilal, “Three Reasons Behind the Attack on the Supreme Constitutional Court,” *al-Sha‘ab*, August 4, 1998; Muhammad Shukri Abd al-Fatah, “Remove Your Hands from the Constitutional Court,” *al-Haqiqa*, August 8, 1998. Several of these articles are reprinted in Nassef, *Higiya wa Athar Ahkam al-Mahkama*.

⁶ See the extensive report by the Arab Center for the Independence of the Judiciary and the Legal Profession printed in *al-Wafd*, July 14, 1998. Also see the extensive critique provided by the Legal Research and Resource Center for Human Rights, printed in *al-Wafd*, July 17, 1998. The Center for Human Rights Legal Aid issued its own report a few days later in *al-Wafd*, July 20, 1998.

⁷ See the article by ‘Abd al-Aziz Muhammad, “Treasonous Amendment to the Constitution and to the Law!” *al-Wafd*, July 16, 1998.

regime supporters attempted to justify the legitimacy and legality of the amendment.⁸

The ensuing debate, which was waged in both the state press and opposition papers for months, was a sure sign that the SCC had become a focal point of contention, simultaneously adjudicating and structuring state-society interaction. Moreover, the debate in the press underlined the extent to which the SCC had altered the rhetoric that both the regime and social actors employed, with each side building the legitimacy of its position on constitutional arguments. The responses from opposition parties, the human rights community, and legal professional associations were sure signs that Egypt's political landscape had been transformed significantly from the late 1970s when the Supreme Constitutional Court was established. This new political landscape was no mere coincidence; all the groups that rushed to support the SCC during its successive encounters with the regime were effectively rehabilitated and empowered largely as a result of SCC rulings. The Supreme Constitutional Court had successfully shaped its own support network over its first two decades of operation, and now it reaped the benefits.

But characterizing the Supreme Constitutional Court as an institution that is completely dependent on social actors to repel the regime's threats also underestimates its own ability to launch retaliatory rulings against the wishes of the executive. Credible sources indicate that during periods of heightened friction between the SCC and the regime, the Court has used informal channels to warn that if its independence is curtailed, it would immediately issue retaliatory rulings in cases waiting on the SCC dockets. Viewed from this perspective, the Court's protracted "deliberation" for upwards of a decade on highly sensitive political issues (such as the legality of civilian transfers to military courts or full judicial supervision of elections) is not simply the result of unstated understandings among SCC justices on how far it would be prudent to push the government. The SCC has an interest in keeping highly sensitive political cases available on the Court's dockets because they can be used as a counterthreat against regime attacks on the court. Although it would be naïve to believe that there is an institutional balance of power between the SCC and the

⁸ Seif al-Nasr, "Three Reasons behind Amending the Law of the SCC," *al-Ahram al-Misa'i*, July 13, 1988; Muhammad Morsi, Chair of the Legislative Committee in the People's Assembly, "I Agree with the Law of the Government to Amend the Law of the Rulings [sic] of the Constitutional Court and Here are My Reasons!," *Akbbar al-Youm*, July 18, 1998; Muhammad Badran, "The Decree is a Step in the Right Direction," *al-Ahram*, July 27, 1997.

executive, so too would it be a misrepresentation to portray the Court as a powerless actor without positive and negative incentives (primarily the provision or denial of legal legitimacy) of its own.

Ironically, it is the Supreme Constitutional Court that will ultimately decide the fate of presidential decree 168/1998, which modified the powers of the SCC. Within the first six months of the amendment, five separate cases had already arrived at the SCC challenging the constitutionality of the presidential decree, and by February 2001, the number of challenges waiting on the SCC dockets had reached eighteen.⁹ With the number of petitions adding up, the Court faced increasing pressure to issue a ruling on the presidential decree, which put it in the uncomfortable position of either legitimizing constraints imposed on it or coming into direct conflict with the regime. Along with the constitutional challenges of civilian transfers to military courts, the petitions challenging presidential decree 168 provide the ultimate test of the Supreme Constitutional Court's ability to check executive abuses of power.

RETURNING THE FAVOR – THE SCC DEFENDS THE HUMAN RIGHTS MOVEMENT

By 1998, the government discomfort with the human rights movement reached new levels. In just over a decade, the movement had grown to over a dozen organizations, many of which had established strong links with the international human rights community, and many had achieved observer status in a number of international human rights regimes, such as the UN Economic and Social Council. The human rights movement was increasingly able to leverage international pressure on the Egyptian government through these channels. Domestically, human rights organizations had begun to cooperate more closely with opposition parties and professional syndicates, as demonstrated most effectively in their resistance to press law 95/1995 and their campaign to monitor the 1995 People's Assembly elections. Moreover, the most dynamic human rights organizations increasingly used the courts as an effective avenue to challenge the regime.

In response, the regime began to turn the screws on the human rights movement as early as 1995 through intimidation, smear campaigns in the

⁹ The petitions that reached the SCC by February 2001 were Cases 193, 204, 209, and 220 of Judicial Year 20; Cases 31, 71, 110, 125, 130, 135, 203, and 217 of Judicial Year 21; cases 31, 76, 97, and 161 of Judicial Year 22; and Case 7 of Judicial Year 23. Case numbers provided in an interview with Hanifi Gibali, Chief Commissioner Counselor on the Supreme Constitutional Court, February 12, 2001.

state press, and discouraging donors from contributing to local human rights NGOs. Beginning in 1998, the regime engaged in a full-fledged campaign to undermine the human rights movement after the Egyptian Organization for Human Rights published an extensive report on a particularly shocking episode of sectarian violence that occurred in the village of al-Kosheh in August 1998. The EOHR report uncovered not only the details of one of Egypt's worst bouts of sectarian violence, a politically taboo subject in itself, but also that hundreds of citizens were tortured at the hands of state security forces for weeks following the incident. In response to the report, Hafez Abu Sa'ada, secretary general of the EOHR, was charged by state security prosecutors with "receiving money from a foreign country in order to damage the national interest, spreading rumors which affect the country's interests, and violating the decree against collecting donations without obtaining permission from the appropriate authorities."¹⁰ Abu Sa'ada was detained for six days of questioning and then released on bail. The trial was postponed indefinitely, but the charges remained on the books.¹¹ Abu Sa'ada's interrogation served as a warning to the human rights community that strong dissent and foreign funding would no longer be tolerated by the government. In the aftermath of Abu Sa'ada's interrogation, the EOHR acquiesced to government pressure and stopped accepting foreign funding.

The following year, the government issued a new law governing NGO activity that tightened the already severe constraints imposed by law 32/1964. Law 153/1999 first eliminated the loophole in the previous NGO law that had allowed organizations to operate as civil companies. All human rights organizations were forced to submit to the Ministry of Social Affairs (MOSA) or face immediate closure. The new law additionally forbade NGOs from engaging in "any political or unionist activity, the exercise of which is restricted to political parties and syndicates." Moreover, MOSA maintained the right to dissolve any organization "threatening national unity or violating public order or morals. . . ."¹² The new law also struck at the Achilles heel of the human rights movement by further constraining its ability to receive foreign funding without prior government

¹⁰ The copy of a \$25,703 check from the British House of Commons Human Rights Committee to fund EOHR's legal aid project for women was printed on the front page of *al-Osbua'*, November 23, 1998, with the caption, "the price of treason."

¹¹ This is a common strategy to intimidate and silence opponents of the government because they know that the prosecutor can resume the case at any moment.

¹² Article 11. As with other laws restricting political rights, law 153/1999 does not define what constitutes a threat to national unity or a violation of public order.

approval.¹³ Finally, law 153 prevented NGOs from even communicating with foreign entities without first informing the government.¹⁴ These new regulations were clear attempts by the regime to place new constraints on human rights groups that were effectively leveraging international pressure on the Egyptian regime through transnational human rights networks. The greatest asset of the human rights movement now became its greatest vulnerability.

Moreover, the vulnerability of the human rights movement went beyond the material support and institutional linkages that were jeopardized by the new law; the moral authority of the movement was increasingly challenged as the government framed its dependence on foreign support as nothing short of sedition. Law 153/1999 was accompanied by a smear campaign in the state-run press in which rights groups were portrayed as a treasonous fifth column, supported by foreign powers that only wished to tarnish Egypt's reputation and sow internal discord. Consider, for example, an editorial by Karam Gabr, printed in the state-owned magazine *Ruz al-Yusuf*:

All that concerned them [human rights groups] was defaming the reputation of the country that was trying to develop and build a firm economic base that is admired by people throughout the world. . . . These organizations did not feel any shame when they begged the mercy of international organizations. Several years ago they asked for the protection of the United States, even though they are Egyptians. Accordingly, these organizations revealed their true selves. Instead of fighting for the principles of democracy, freedom, and the establishment of the country, they were fighting for foreign interests and asked for the protection of foreign organizations. How can human rights organizations sell their patriotic dignity on the slave market, claiming that the government was limiting their civil work through its supervision? Will this mess, the organizations that are financially supported by foreign organizations some of whom have connections with Zionists and terrorists, carry Egypt to the third millennium?¹⁵

¹³ Article 17 reads, "No association shall collect funds from abroad, whether from an Egyptian or foreign person, or a foreign quarter or its representative inland . . . except with the permission of the Minister of Social Affairs . . ." This restriction was not completely new, as military decree number 4/1992 imposed the same restrictions on foreign funding. The provisions in law 153 did, however, formalize the decree and built redundancy into the legal system.

¹⁴ Article 16 reads, "The association may join, participate with or be affiliated to a club, association, authority or organization whose head office is located outside the Arab Republic of Egypt . . . providing it shall notify the administrative authority. . . ."

¹⁵ *Ruz al-Yusuf*, August 14, 1999.

Human rights groups mobilized considerable opposition to the new NGO law in a short period of time. Within a week, rights groups organized a press conference at which they vowed to fight law 153/1999 in the Supreme Constitutional Court if it was not repealed. At the same time, they met with the major opposition parties and professional syndicates to secure their support. Days later, a national NGO coalition was convened, bringing together more than one hundred organizations from across the country. NGOs committed to mobilize domestic and international pressure on the government through a demonstration in front of the People's Assembly, a week-long hunger strike, and litigation in the courts. International pressure came quickly with statements from Human Rights Watch, Amnesty International, the International Federation of Human Rights, the Lawyers' Committee for Human Rights, and others. U.S. State Department spokesman, James Rubin, criticized the new law in a formal statement, and the U.S. Embassy in Cairo raised concerns in several meetings with high-ranking figures in the Egyptian government.

But the government proved its resolve to rein in human rights groups. In February 2000, the State Security Prosecutor announced that the case against human rights defender Hafez Abu Sa'ada would be reopened and that he would be tried before the Emergency State Security Court under military decree 4/1992 for accepting money from foreign donors without governmental approval.¹⁶ The charges carried a maximum sentence of seven years in prison. The announcement came when Abu Sa'ada was in France, and for the following two weeks he remained in Paris, allegedly considering political asylum. Zakaria 'Azmi, chief of the presidential staff, and Kamal al-Shazli, minister of parliamentary affairs, were dispatched to France to negotiate with Abu Sa'ada and defuse the embarrassing political incident. Abu Sa'ada returned to Egypt in March, but the trial was not held, possibly because of a deal cut with the authorities. However, the charges against him were not formally withdrawn, once again allowing the authorities to resume the case at any time in the following ten years. The charges cast a shadow not only over Abu Sa'ada and his Egyptian Organization for Human Rights, but also over the entire human rights movement, which depended almost entirely on foreign funding.

The new NGO law, the government intimidation, and restrictions on foreign funding threatened to shut down the entire human rights movement. Worse still, rifts within the rights community emerged over how to deal with the government's new assault. Some rights groups, such as

¹⁶ Days later, the State of Emergency was extended for a further three years.

the EOHR, declared their intention to fight the new NGO law through official avenues, but to comply with its requirements by formally registering with MOSA. Alternately, the Group for Democratic Development decided to suspend its activities in March 2000 to protest the new law, the renewal of emergency law, and the Abu Sa'ada interrogation. The Center for Human Rights Legal Aid (CHRLA), the most important organization engaged in rights litigation, faced internal splits when its leadership disagreed on whether to acquiesce to the new law or to fight it. As a result, CHRLA split into two organizations. The faction advocating accommodation with the new NGO law acquiesced and registered as the Association for Human Rights Legal Aid. The faction advocating an uncompromising stance established the new Hisham Mubarak Center for Legal Aid under the leadership of Gasser 'Abd al-Raziq.¹⁷ The lack of coordination between human rights organizations and discord within the organizations themselves interfered with their ability to present a united front against the government.

With the future of the human rights movement looking bleak, a ray of hope emerged in April 2000 when the commissioner's body of the Supreme Constitutional Court issued its preliminary report on a constitutional challenge to law 153/1999. The case involved an NGO from Tanta by the name of *al-Gam'iyya al-Shar'iyya*, which was fighting an order by the Ministry of Social Affairs that barred several of its members from running in elections for the NGO's board of directors.¹⁸ The advisory body of the SCC recommended that law 153 be ruled unconstitutional on several counts. First, the report found the law unconstitutional on procedural grounds because it was not referred to the Shura Council for debate as required by article 195 of the Constitution.¹⁹ The report also suggested that the law was unconstitutional on substantive grounds because it gave the civil courts the sole authority to issue binding rulings in disputes between MOSA and NGOs, in violation of articles 68 and 172 of

¹⁷ The Hisham Mubarak Center was named after CHRLA's founder who passed away in 1997.

¹⁸ The initial actions of the Ministry of Social Affairs against *al-Gam'iyya al-Shar'iyya* were taken under the old NGO law (32/1964), and the group raised a case in the administrative courts. However, law 153/1999 specified that disputes between MOSA and NGOs should be heard in the court of first instance. The case was transferred to the SCC by the administrative court to resolve the situation.

¹⁹ According to article 195, the Shura Council is to debate all draft laws that regulate basic freedoms guaranteed by the Constitution before they are issued.

the Constitution, requiring the administrative courts to arbitrate disputes between citizens and state authorities.²⁰ Finally, the commissioner's body determined that law 153/1999 imposed unreasonable restrictions on the freedom of association, enshrined in article 195 of the constitution.

On June 3, 2000, the Supreme Constitutional Court issued its final ruling in the case, striking down the most important piece of legislation governing associational life in decades.²¹ The Court crafted and delivered the ruling in a strategic way that maximized its impact while minimizing the chances of a direct confrontation with the regime. The SCC found that the law had not been submitted to the Shura Council for debate, a formal requirement of the Constitution, and that it violated the jurisdiction of the administrative courts. The Court added that several aspects of law 153/1999 interfered with the freedom of association, but the SCC did not rule the law unconstitutional on those grounds. By finding the law unconstitutional on procedural rather than substantive grounds, the ruling was less confrontational yet simultaneously loaded with the implicit warning that if the next NGO law contained substantive restrictions on the freedom of association, it too could be ruled unconstitutional.

The timing of the ruling also appears to have been strategic. The SCC issued the ruling only five days before the end of the 2000 People's Assembly session, making it impossible for the government to issue a new NGO law in time to replace law 153/1999. As a result, rights groups were effectively granted a five-month lease on life. Moreover, the ruling effectively forced the government to run a new NGO law through the People's Assembly, giving opposition parties, rights groups, and professional syndicates the opportunity to pressure the government to soften up the bill the second time around. Finally, this lease on life came at a critical time for human rights activists and pro-democracy reformers. National elections for the next People's Assembly were only months away and activists hoped to play a prominent role in monitoring the elections as they had done for the first time in 1995.

The ruling was a bold move by the SCC not simply to defend the freedom of association for its own sake. The ruling also had the convenient result of extending the life of human rights NGOs, which had become

²⁰ The speed with which the case was transferred to the SCC was most likely due to the threat that the new law posed to the jurisdiction of the administrative courts. This jurisdictional dispute had political implications because the administrative courts enjoy more independence than the civil courts.

²¹ Case 153, Judicial Year 21, issued 3 June 2000. *al-Mahkama*, Vol. 9, 582–600.

loyal supporters of SCC independence, as well as a critical conduit through which the SCC received the litigation that was necessary to expand its mandate. Prior to the ruling, Chief Justice Muhammad Wali al-Din Galal had been viewed by many as less willing to confront the regime than his predecessor, ‘Awad al-Murr. The NGO decision proved that the golden era of the Supreme Constitutional Court had not yet passed.

THE SCC FORCES FULL JUDICIAL MONITORING OF ELECTIONS

In the lead-up to the 1999 presidential elections and the 2000 People’s Assembly elections, the topic of electoral reform emerged once again, and the convergence of interests among opposition parties, NGOs, and judicial personnel was never more clear. The first move came from the four main opposition parties – the Wafd, Labor, Nasserist, and Tagammu‘ – in cooperation with a number of NGOs. Together, they issued a five-point call for reform, demanding a lifting of the state of emergency and the release of political prisoners, safeguards for free and fair elections, the freedom to establish political parties without authorization from the Political Parties Committee, the freedom to operate independent media, and guarantees for the independence of civil society. But with Mubarak selected once again by the NDP-dominated People’s Assembly as the sole candidate running in the 1999 presidential elections, the outcome was determined ahead of time, and therefore reform efforts were focused on the People’s Assembly elections.²²

Khaled Mohi al-Din, leader of the leftist Tagammu‘ Party, submitted a bill to the People’s Assembly for election reforms on behalf of the main opposition parties.²³ The bill called for elections to be supervised and administered by a “Supreme Election Committee” composed of nine high-ranking judges from the Court of Appeals and Court of Cassation, rather than from the Ministry of Interior. The bill also called for procedural changes in the voting process, such as the reform of existing voter lists, safeguards designed to cut electoral fraud, and full judicial supervision of polling stations. Egyptian judges and NGOs backed opposition reform proposals in a number of public venues. In a “Justice Conference,” which

²² The Ministry of Interior helped engineer a fourth-term “mandate” for Mubarak with a supposed 93.79 percent of the vote and a 79.2 percent voter turnout.

²³ Khaled Mohi al-Din had submitted similar versions of the proposed reforms eight times over a ten-year period, but each time the NDP would not allow the bills to proceed into the People’s Assembly Proposals and Complaints Committee.

was sponsored by the Judges' Association, a resolution was issued urging the amendment of the law on the exercise of political rights prior to the 2000 People's Assembly elections. The Arab Center for the Independence of the Judiciary and the Legal Profession also held a forum in February 2000 on the topic of judicial supervision for the upcoming elections.²⁴ The forum brought together prominent judges, including the former head of the Judges' Association, Justice Yehia al-Rifa'i; the vice chairman of the Court of Cassation, Justice Ahmed Meki; and representatives from the various opposition parties and NGOs. Articles circulated in opposition newspapers highlighting the possibilities for electoral reform and the efforts of the opposition parties, NGOs, and legal professionals themselves to introduce the reforms.

The government sought to take the wind out of the sails of the opposition-NGO alliance by declaring that its own reforms were on the way. Hosni Mubarak, Kamal al-Shazli, and other regime insiders promised that the 2000 elections would be cleaner than in the past because judicial monitoring would extend beyond the main polling stations to cover at least some auxiliary stations where most of the fraud typically occurred. In the end, however, the government claimed that with only 5,661 of 9,949 judges available for the elections, there were not enough judicial personnel to supervise the 42,000 polling stations nationwide. Instead, the People's Assembly approved an NDP-sponsored amendment to the law on the exercise of political rights that granted only a partial extension of judicial supervision to auxiliary voting stations.²⁵ Under the new amendment, between six and eight auxiliary polling stations would fall under the supervision of a member of the judiciary. The new arrangement was a meaningless gesture because it was clear that there was no way that a judge could prevent electoral fraud at six separate polling stations spread throughout a district at the same time.

Opposition parties and human rights groups were outraged by the amendment and argued that, if there were insufficient judicial personnel to continuously monitor all 42,000 voting stations, then the government should combine auxiliary voting stations and organize the elections in successive stages across the country.²⁶ Judges were increasingly worried that

²⁴ The forum was held February 10, 2000, under the title, "Judicial Supervision over Elections in Egypt: A Disregarded Guarantee."

²⁵ Law 13/2000 amending law 73/1956, issued April 11, 2000.

²⁶ See the statement from the Egyptian Organization for Human Rights entitled, "An Appeal to the Members of the Parliament and the Shura Council for Real Guarantees for Fair General Elections."

by playing an expanded yet incomplete role in judicial monitoring, they would not be able to guarantee clean elections and at the same time they would be implicated in the regime's electoral fraud. The Judges' Association held a second Justice Conference at which it issued a statement, with unanimous support, that judges would either be continuously present at all polling stations or they would abstain completely from monitoring the elections. The government refused to accommodate opposition demands and, to add insult to injury, the regime further sought to consolidate its position for the upcoming People's Assembly elections by hammering through a last-minute amendment to law 120/1980, which concerns the organization of electoral districts across the country. The redistricting, which came on the last day of the legislative session, rearranged the configuration of thirty-three electoral districts. Blatant gerrymandering effectively broke up districts that were traditional strongholds for opposition candidates.

Worse still, when it became apparent that Sa'ad Eddin Ibrahim and other human rights activists would initiate work to build a civil society coalition to monitor the elections as they had done to great success in 1995, the regime proved its determination to rein in the human rights movement with or without the NGO law that the Supreme Constitutional Court had struck down just weeks earlier.²⁷ On June 30, 2000, Ibrahim was arrested on charges of "accepting funds from a foreign party with the purpose of carrying out work harmful to Egypt's national interest and disseminating provocative propaganda that could cause damage to the public interest."²⁸ Ibrahim's Ibn Khaldun Center and the Association for the Support of Women Voters had used foreign funding – in this case, from the European Union (EU) – to create a short film that informed voters of their voting rights and proper voting procedures. As with Hafez Abu

²⁷ As examined previously, Ibrahim was the driving force behind the civil society election monitoring campaign that in 1995 exposed the methods and the sweeping extent of electoral fraud, both to Egyptians and to the international community, for the first time. This documentation provided the basis for opposition candidates to challenge electoral fraud in the administrative courts, casting a constant shadow on the legitimacy of the People's Assembly for its entire five-year term.

²⁸ In addition to his role in organizing the monitoring of People's Assembly elections, Ibrahim had pushed the envelope with the government for some time on a number of sensitive political issues. Ibrahim's Ibn Khaldun Center held conferences and published reports on the status of religious minorities in Egypt and across the Middle East. After the death of Hafez al-Assad of Syria and the succession of his son Bashar, Ibrahim published a political essay on "the new Arab monarchies" explicitly addressing the apparent grooming of Hosni Mubarak's son, Gamal, for future succession in Egypt.

Sa'ada and the Egyptian Organization for Human Rights, dependence on foreign funding left Ibrahim's Ibn Khaldun Center vulnerable to accusations of treason. Ibrahim and ten of his colleagues were held in detention for two months for accepting funding from the EU in violation of military decree 4 of 1992.²⁹

Just days after Ibrahim and his colleagues were arrested, the Supreme Constitutional Court issued a bombshell ruling requiring full judicial supervision of elections for the first time in Egyptian history.³⁰ The SCC stated unequivocally that article 24 of law 73/1956 was unconstitutional because it allowed for public sector employees to supervise polling stations, despite the fact that article 88 of the Constitution guaranteed that "the ballot shall be conducted under the supervision of members of the judiciary organ." The case had been raised ten years earlier by Kamal Hamza al-Nisharti, a candidate who ran in the People's Assembly elections of 1990. Although opposition activists had been critical of the SCC for stalling on issuing a decision, they celebrated the ruling as a great step forward for democracy in Egypt. What the opposition was unable to achieve through the People's Assembly over the previous three decades, it was eventually able to bring about through constitutional litigation. The Wafd Party's Ayman Nur went so far as to admit that the Supreme Constitutional Court had virtually replaced the role of opposition parties in driving the reform agenda. He stated that "this ruling and the previous others will unquestionably affect the future of domestic politics. . . . the judiciary has nearly taken over the role of the political parties in forcing the government to take action in the direction of greater democracy."³¹

Coming a full ten years after the case was transferred to the SCC, the timing of the ruling was interpreted by just about everyone as a strategic move by the Court. Yehia al-Rifa'i contended that the timing of the ruling, delivered at the end of the 1995–2000 People's Assembly term, was arranged in advance with President Mubarak himself in order to minimize

²⁹ The Egyptian human rights community again mobilized international pressure. Within days, nine international human rights organizations including Amnesty International and Human Rights Watch issued a joint statement condemning Ibrahim's detention and calling for his immediate release. The U.S. embassy also reportedly raised concerns at "the highest levels" with the Egyptian government. The international pressure proved effective, as Ibrahim was released after two months of detention. As with the detention of Hafez Abu Sa'ada, however, the charges against Ibrahim were not dismissed. Instead, they were simply suspended so that a trial could be reintiated at any time.

³⁰ Case 11, Judicial Year 13, issued July 8, 2000.

³¹ *Al-Ahram Weekly*, August 3–9, 2000.

political disruption.³² On the other hand, Sa'ad Eddin Ibrahim believed that the timing of the ruling was almost surely related to the regime's efforts to stifle the ability of the human rights movement to monitor elections as they had done in 1995. According to Ibrahim, "the timing of the SCC ruling on judicial supervision of elections clearly had to do with this case [the detention of Ibn Khaldun Center staff]. The SCC could have made the ruling a year earlier or a year later. The decision came at this time for a reason."³³ The SCC ruling proved that the golden age of Supreme Constitutional Court activism had not come to an end with 'Awad al-Murr's retirement. Indeed, the NGO ruling and the judicial supervision ruling go down as two of the boldest attempts to advance a political reform agenda and to defend two critical elements of a judicial support network. The focus of state-society contention quickly turned to implementation of the SCC ruling.

THE LIMITS OF ACTIVISM: IMPLEMENTATION OF THE SCC RULING ON JUDICIAL MONITORING

Within a week of the Supreme Constitutional Court ruling, Mubarak issued a presidential decree that amended law 73/1956 yet again to ensure that there would be continuous judicial monitoring of all voting stations, including auxiliary stations. To make that monitoring possible, the elections would be held in three successive stages, covering different regions of the country, and auxiliary voting stations would be combined in order to reduce their number.

In the weeks following the SCC ruling, the Judges' Association set to work to establish rules and regulations for electoral supervision. They developed guidelines for judges to authenticate voting lists, guard against fraud on the day of elections, and maintain the integrity of the vote-counting process. However, the regime was determined to maintain whatever control it could over the electoral process to minimize the impact of the SCC ruling. Rather than giving oversight control to the Judges' Association, the Supreme Judicial Council, or an ad hoc committee of judges, oversight remained with the Ministry of Interior and the Ministry of Justice, both under the direct control of the executive. Interior Minister Habib

³² Al-Rifa'i points to an interview with Fathi Sorur in *Ruz al-Yusuf* (July 15, 2000) in which a reporter allegedly persuades Sorur to acknowledge that there was an agreement between the court and the executive. See *Istaqlal al-Qada'*, 108.

³³ Personal interview with Sa'ad Eddin Ibrahim, September 25, 2000.

al-‘Adli was promptly charged with appointing judges to polling stations, and Prosecutor General Maher ‘Abd al-Wahed was appointed to chair a committee within the Ministry of Justice charged with administering judicial supervision. Additionally, many of the judicial personnel selected to cover polling stations were drawn from the *niyaba* (prosecutor’s office) and even from among attorneys in the State Lawsuits Authority – all of whom are under the control of the executive branch. The government also announced that judicial personnel participating in election monitoring would receive a bonus of £E 6,600 (\$1,700), a tremendous sum of money for judges on state salaries. Reformers were immediately concerned that the bonus would be used as a stick and carrot to encourage cooperation with the Ministry of Interior and the Ministry of Justice.

These shortcomings prompted judges and law professors to publish extensively in opposition newspapers. Yehia al-Rifa‘i, honorary head of the Judges’ Association, launched a fierce attack in a series of *al-Wafd* articles.³⁴ Al-Rifa‘i argued that government compliance with the SCC ruling was inadequate because judicial monitoring would be ineffective if judges were subordinate to the authority of the Ministries of Interior and Justice:

Let every Egyptian know that the new law only added the number of the judges practically subjected to the supervision of the Ministry of Interior and the Ministry of Justice, both of which are part and parcel of the executive authority.

What is the value of increasing the number of judges involved in the election process if they are only clerks working under its dominance, and it does not believe in their value, and does not truly and faithfully follow the Constitution, using it as a disguise to accomplish its objectives?

It is all a cover so that when people object to the results of the elections they can be told that judges supervised the process. Things are to stay as they are and the damaged party shall resort to the Supreme Constitutional Court to spend another ten years in litigation.³⁵

Al-Rifa‘i insisted that, for judicial monitoring to function properly, judges should be supervised by an autonomous body, such as the Judges’ Association or the Supreme Judicial Council. He also used the occasion to

³⁴ See *al-Wafd*, July 16, 2000; July 20, 2000; July 27, 2000; August 30, 2000; August 31, 2000. All articles are reproduced in Yehia al-Rifa‘i, *Istaqlal al-Qada’ wa Mehna al-Intikhabat* [The Independence of the Judiciary and the Ordeal of Elections] (Cairo: *Maktab al-Misri al-Hadith*, 2000).

³⁵ *al-Wafd*, August 24, 2000. Reprinted in *Istaqlal al-Qada’ wa Mehna al-Intikhabat*, 78–93.

reiterate the long-standing grievances of the judicial community concerning the formal and informal controls exercised by the executive branch on the administration of justice.

Judicial independence is guaranteed in the Constitution, but all the administrative and financial affairs of the judiciary and the judges – even the medical and social affairs – remain in the hands of the Minister of Justice; in other words, in the hands of the executive authority. Even the judicial inspection department, to which judges are accountable technically, administratively, and disciplinary (and which holds the reign to promoting, transferring, and rewarding them for overtime) is part of the Minister's office; in other words, part and parcel of the executive authority. All this is in clear violation of the provisions of the Constitution and the law and in violation of what is established in all true and real democratic systems.³⁶

Al-Rifa'i and others were clearly uncomfortable with their increasing, yet incomplete role in monitoring the elections. Judges and opposition activists alike feared that judicial supervision organized by the regime would be insufficient to guarantee truly fair elections, yet the prominent role played by judges would implicate them in electoral fraud in the eyes of the public. Al-Rifa'i explained that "the participation of thousands of judges in the coming election, under the dominance of the executive authority and without enforcing the [SCC] ruling in full, will shake the general confidence in the judiciary and the judges."³⁷ Zakaria Shalash, head of the Court of Cassation, shared this concern. According to Shalash, "in the final analysis, judges will be held responsible for whatever results come out of these elections and it seems to me that the credibility of the judiciary will be in the balance. If the elections produce results that would create suspicion of the judiciary favoring the ruling party, then people won't trust us anymore."³⁸ Former Chief Justice of the SCC, 'Awad al-Murr, similarly declared that "if this election is rigged, it will be no one's fault but the judges."³⁹

In addition to subjecting judges and prosecutors to the direct management of the executive authority, it also became clear that the regime would compensate for its decreased control inside the voting stations with

³⁶ *Istaqlal al-Qada'*, 131–132.

³⁷ *al-Wafd*, August 31, 2000, "Intikhabat . . . wa Kalam . . . wa Kalam . . . wa la Damanat" [Elections . . . and Words . . . and Words . . . and No Guarantees], reprinted in *Istaqlal al-Qada'*, 94–110.

³⁸ *al-Ahram Weekly*, "Defining Full Supervision."

³⁹ Public lecture at Cairo University, September 25, 2000.

increased repression outside the voting stations. As in previous years, the election cycle brought about the predictable clampdown on the Islamist movement. The emergency law gave the regime the legal cover to launch a new campaign of arrests and detentions of Muslim Brotherhood members, and during the summer of 2000, as many as 750 suspected Brotherhood members were arrested and 250 more were detained. By the time of the People's Assembly elections, another 1,600 Islamists had been taken into custody.⁴⁰ Not surprisingly, most of those arrested were candidates or campaign organizers. Moreover, the regime's suppression of dissent went far beyond the arrest and detention of Muslim Brotherhood candidates. The Political Parties Committee issued a decision to freeze the activities of the Islamist-oriented Labor Party, including the suspension of the only legal Islamist-oriented newspaper, *al-Sha'ab*.⁴¹ The suspension of the party and its newspaper was conveniently timed to interfere with Labor Party organizing for the upcoming People's Assembly elections.⁴²

Despite the adverse conditions, civil society activists attempted to regroup. Earning his release from detention in August 2000, Sa'ad Eddin Ibrahim returned to the work of organizing the monitoring campaign for the People's Assembly elections. The government expected that the detention would silence Ibrahim, but he promptly returned to the American University in Cairo to deliver a public lecture humorously entitled "How I Spent My Summer: Diary of a Prisoner of Conscience." Ibrahim slammed the regime for blocking political reform and called for volunteers to help in monitoring elections. For the next several weeks, activists worked feverishly to organize the monitoring campaign. Ibrahim was already compiling initial reports focused on the obstacles that opposition candidates faced while attempting to register for the elections when he was taken back into custody. The prosecutor's office announced that Ibrahim and his twenty-seven colleagues would stand trial in an Emergency State Security Court. They were formally charged with "disseminating rumors with

⁴⁰ These figures are in addition to the approximate 2,600 Islamists who were already being held on administrative detention under the emergency law.

⁴¹ Splits within the Labor Party leadership and allegations of financial and administrative irregularities provided the pretext for the closure, but the decision made by the Political Parties Committee was almost certainly in response to rioting at al-Azhar University only a week earlier, following the publication of Syrian author Haidar Haidar's allegedly blasphemous novel, *Banquet for Seaweed*. Statements by Labor Party officials and a series of critical articles in *al-Sha'ab* were considered an incitement to violence.

⁴² The Labor Party went to an administrative court to contest the decision of the Political Parties Committee and had the ban on the newspaper lifted on September 9.

the purpose of undermining Egypt's reputation" and accepting unauthorized funding from a foreign source in violation of military decree 4/1992.

The charges filed against Sa'ad Eddin Ibrahim sent a chill through the human rights community. As a respected AUC professor with extensive connections in Egypt and abroad (even the wife of President Mubarak was a former student of Ibrahim) and dual Egyptian-U.S. citizenship, Ibrahim's trial proved the regime's determination to prevent the emergence of a civil society coalition resembling the National Commission for Monitoring the 1995 Parliamentary Elections. In response, the majority of human rights activists decided to play it safe and abandon an extensive campaign to monitor the 2000 elections.

Moreover, because of the suffocation of the human rights movement through restrictions on foreign funding, human rights groups did not have the resources to mount an adequate monitoring campaign as they had in 1995. By the eve of the 2000 elections, the Group for Democratic Development had been dissolved, the entire staff of the Ibn Khaldun Center was on trial, the Egyptian Organization for Human Rights was forced to close four of its regional offices and reduce its staff in Cairo by 60 percent, and the remainder of the human rights groups decided not to actively participate in election monitoring activities for fear of being shut down by the government.⁴³ Only the Egyptian Organization for Human Rights dared to monitor the elections, but because of its precarious financial and legal condition, it was only able to monitor less than 20 percent of constituencies compared with more than 40 percent in the 1995 elections.⁴⁴ Had it not been for the election coming in three stages, human rights groups would have had the capacity to oversee less than 7 percent of constituencies as compared with the nearly 60 percent monitored by the Egyptian National Commission for Monitoring the 1995 Parliamentary Elections. Reduced capacity during the 2000 elections resulted in thin documentation of election irregularities and fewer lawsuits in the administrative courts.

On the other hand, increased judicial supervision brought about by the SCC ruling had a clear impact on the ability of opposition candidates to win. By all accounts, the 2000 People's Assembly elections were the cleanest *inside* the polling stations, although the degree of coercion outside

⁴³ Personal interviews with Sa'ad Eddin Ibrahim, September 25, 2000; Negad al-Bora'i, October 22, 2000; Hisham Kassem, March 17, 2000; Hafez Abu Sa'ada, February 22, 2001; Gasser 'Abd al-Razeq, February 17, 2001.

⁴⁴ Personal interview with Hafez Abu Sa'ada, secretary-general of EOHR, February 22, 2001.

polling stations reached unprecedented levels. Perhaps the most surprising outcome in the first two rounds was the strong showing of Muslim Brotherhood candidates. The Brotherhood took fifteen seats in the first two rounds, more than any other opposition trend, despite the arrest and detention of thousands of Brotherhood activists.⁴⁵ Judicial monitoring was credited for the early losses of prominent and long-standing NDP figures, including Ahmed Khayry (head of NDP for Alexandria), Muhammad ‘Abd Allah (chair of the foreign relations committee), and Mahmud Abu al-Nasr (chair of the planning and balancing committee).

By the end of the election’s second stage, Egyptian human rights groups were already celebrating that “judicial supervision has ended the period of filling ballots with fake names, which was prevalent in previous elections.”⁴⁶ At the same time, however, opposition parties and human rights groups highlighted the fact that what the regime could not produce inside the voting stations, it tried to induce outside of the stations.⁴⁷ Arrests of hundreds of Brotherhood members continued throughout the three stages, and state security forces prevented voters from entering polling stations. According to the EOHR, “in the third stage, security blockades were not limited to a few number of polling stations, but were extended to block whole roads leading to polling stations, and sometimes up to 2 to 3 kilometers from the stations.”⁴⁸ Muslim Brotherhood leader Mamun al-Hodeibi lamented that “elections are not about ballot boxes only. Inside the polling stations nobody can tamper with the process, but outside it is like a war.”⁴⁹

Increased coercion in the third round contained opposition advances, but opposition forces still won more seats than at any time since 1990. By the end of the third round, formal opposition parties had won sixteen seats, independent candidates affiliated with the Muslim Brotherhood won a further seventeen seats, independent Nasserist candidates won five, and unaffiliated independent candidates won fourteen seats.⁵⁰ Independent candidates for the Muslim Brotherhood had for the first time won

⁴⁵ The Muslim Brotherhood was so weakened by the beginning of the first round of the elections that it was only able to field seventy-seven candidates nationwide.

⁴⁶ EOHR Statement no. 3 on Monitoring the Parliamentary Elections for 2000–2005, 1.

⁴⁷ Personal interview with ‘Abd al-‘Aziz Muhammad, February 5, 2001; EOHR Statements no. 1–4.

⁴⁸ EOHR Statement no. 4 on the Third Stage of Parliamentary Elections, 4.

⁴⁹ *al-Ahram Weekly*, November 16, 2000.

⁵⁰ The sixteen seats won by official opposition parties went to the Wafd (seven), Tagammu‘ (six), Nasserist (two), and Liberal (one) parties. A further two seats went to non-Muslim Brotherhood, independent Islamist candidates.

more seats in the People's Assembly than all of the candidates standing for election from the formal opposition parties combined, despite the intense campaign of government repression in the lead-up to the elections.

As with previous rulings on the electoral law, the Supreme Constitutional Court ruling on judicial monitoring did not dislodge the regime from power, but it did have a significant effect on the means by which the regime maintained its power. The government was again forced to resort to more extreme forms of extralegal coercion to ensure that the SCC ruling would not undermine the NDP's grip on power. Yet, despite the increased reliance on extralegal coercion, the government took every opportunity to capitalize on the SCC ruling. President Mubarak addressed the opening session of the new People's Assembly and hailed both the SCC ruling and full judicial monitoring as a great step forward in the march of democracy.⁵¹ The televised speech was intended to showcase the legitimacy of the voting process in the 2000 People's Assembly elections and to assure the public that the widespread electoral fraud, which had reached unprecedented levels in the election for the 1995 People's Assembly, was a thing of the past. But the continued shift from legal to extralegal control increasingly exposed the hypocrisy of the regime; the growing disparity between the government's constitutionalist rhetoric and its repressive measures were untenable. While Mubarak publicly praised the Supreme Constitutional Court for its service to democracy, the regime was arranging to deal a blow to SCC independence behind closed doors.⁵²

REINING IN THE SUPREME CONSTITUTIONAL COURT

With the retirement of Chief Justice Wali al-Din Galal in late 2001, the government had its opportunity to rein in the SCC. To everyone's surprise, including SCC justices, Mubarak announced that his choice for the new chief justice would be none other than Fathi Nagib, the man who held the second most powerful post in the Ministry of Justice.⁵³

⁵¹ See *Madabat Majlis al-Sha'ab*, December 17, 2000.

⁵² As one of the last rulings under the leadership of Chief Justice Wali al-Din Galal, the SCC struck down article 48 of the Criminal Code, which enabled the government to imprison anyone conspiring to commit a crime for up to fifteen years. Case 114, Judicial Year 21, issued February 6, 2001. *al-Mahkama*, Vol. 9, 986–1008.

⁵³ Nagib was appointed as first deputy president of the Court of Cassation one year prior to his appointment to the Supreme Constitutional Court. Just prior to Nagib's appointment as chief justice, Mubarak extended the mandatory retirement age of judges from sixty-four to sixty-six years of age. Although the shift in the mandatory retirement age was not designed explicitly to extend Nagib's term, it was well understood by both government insiders and opposition that the timing of the extension was made with Nagib in mind.

Opposition parties, the human rights community, and legal scholars were stunned by the announcement. Not only had Fathi Nagib proved his loyalty to the regime over the years but he was also the very same person who had drafted the vast majority of the government's illiberal legislation during the previous decade, including the oppressive law 153/1999 that the SCC had struck down only months earlier. Moreover, by selecting a chief justice from outside of the Supreme Constitutional Court, Mubarak also broke a strong norm that had developed over the previous two decades. Although the president always retained the formal ability to appoint whomever he wished for the position of chief justice, constitutional law scholars, political activists, and justices themselves had come to believe that the president would never assert this kind of control over the Court and that he would continue to abide by the informal norm of simply appointing the most senior justice on the SCC.⁵⁴ Mubarak proved them wrong.

The challenge to SCC independence was compounded when Fathi Nagib immediately appointed five new justices to the Court. Although the procedure was again technically legal, it contravened a number of conventions that had developed over two decades of Court appointments.⁵⁵ Almost all appointments to the SCC had been made at the junior level of commissioner counselor, with an eventual advancement to the level of justice. But four of Nagib's appointments came directly from the Court of Cassation and the fifth from the Cairo Court of Appeals at the senior level of justice. The appointments also expanded the number of sitting justices on the Court by 50 percent. It is unclear whether or not there was resistance from other SCC justices because the deliberations over new appointments are closed to the public.

On reaching the SCC, Nagib proposed that the Court be divided into three separate benches: one for petitions of constitutional review, one for interpretation of legislation, and one for questions of jurisdiction between courts. The prospect of a divided bench coupled with the regime's demonstrated willingness to pack the Court raised the possibility that

⁵⁴ The only formal restrictions on presidential appointments of chief justice concern the age, formal legal training, and experience of candidates.

⁵⁵ The constitutional provisions for the SCC (embodied in articles 174–178) do not specify the number of justices who will sit on the Court, nor does law 48/1979, which governs the functions of the Court. The explanatory memorandum of law 48 states, "The law does not specify the number of the members of the court to leave ample room for expansion in accordance with the work requirements that unfold as the court proceeds with its tasks." According to article 5 of law 48/1979 governing the SCC, new appointments to the SCC are made by the president from among two candidates, one chosen by the general assembly of the SCC and the other by the chief justice of the SCC.

progressive judges would be isolated on the benches concerned with jurisdictional disputes and legislative interpretation, leaving the far more important role of constitutional review to the new, more compliant appointees. Although Nagib's initial attempt to implement this reform was rebuffed by other SCC justices, credible sources believed that this issue remained unresolved, and renewed attempts to introduce a divided bench may still be in store.⁵⁶

Nagib justified the five new appointments by arguing that almost all SCC justices had come from the administrative courts and that their expertise needed to be balanced by other justices with backgrounds in criminal and civil law fields.⁵⁷ When asked if it was a problem that many of the laws that the SCC would review were written by him, Nagib responded that he would simply step aside during deliberations of any law that he had a hand in writing. Nagib also explained that Mubarak's selection of a chief justice from outside the SCC did not set a troubling precedent for the future independence of the court. He reasoned that article 84 of the Constitution mandates that the chief justice will temporarily fill the post of President of the Republic in the event that the President is incapacitated and the Speaker of the People's Assembly is unavailable. For this reason, according to Nagib, the president should have the ability to select a chief justice that he trusts fully. If this person comes from outside the SCC, the president should be free to select him, provided the candidate meets the minimum requirements of age and legal training.

Nagib also contended that his appointment did not jeopardize the independence of the SCC because other justices effectively balance the powers of the chief justice, and the chief justice is unable to impose his will without the support of the majority of justices. However, this view was not shared by former members of the Court, who reported that justices can go against the will of the chief justice in theory, but strong informal norms dictate otherwise.⁵⁸ One former justice stated that the internal decision-making structure of the court is not democratic under the leadership of most chief justices and that even if a majority dares to vote against the will of the chief justice, he can simply refuse to sign the ruling. Because

⁵⁶ Judicial appointments from outside the SCC continued when Tahani al-Gabali, a private attorney, was recruited by Nagib in early 2003. Although the appointment was celebrated by many as an important step toward including women on the bench, it represented yet another departure from the SCC's customary system of internal recruitment.

⁵⁷ Interview with Fathi Nagib, March 27, 2002.

⁵⁸ A number of former SCC justices related this to me during interviews in 2000, before the appointment of Nagib.

of this informal norm, former justices explain, it is crucial that the chief justice be an activist justice.

Nagib further defended his appointment by contending that there were “technical deficiencies” in SCC rulings that he was charged with remedying: “It was important for me to be selected to take care of technical deficiencies in the rulings of the court. These are not political deficiencies – there was simply a problem with the level of the court rulings.” But, when pressed, Nagib was astonishingly candid about what he meant by the “technical deficiencies” of Supreme Constitutional Court rulings:

They [SCC justices] were issuing rulings that were bombs in order to win the support of the opposition parties. They were very pleased with the rulings, but the rulings were not in the interests of the country. This needed to be corrected. Now the President [Mubarak] can be assured that the Court will make rulings that are in the interest of the country and yet still maintain its independence.⁵⁹

The prominent role that the SCC played in political life through the 1980s and 1990s was recognized by everyone, but Nagib’s blunt recognition of the political objectives motivating his appointment was truly remarkable.

Without the ability to mobilize opposition on the streets, the judicial support network responded to this fundamental attack in the same way that it had responded to presidential decree 168/1998, which had constrained SCC powers of judicial review in questions related to taxation. Newspapers printed articles criticizing Nagib’s appointment, and NGOs such as the Center for the Independence for the Judiciary and Legal Profession issued statements of protest. Without the ability to press for change in the People’s Assembly, activists again headed for the courts. Long-time activist ‘Essam Islambuli attempted to challenge the constitutionality of the executive decree, charging that the appointment contravened constitutional guarantees of judicial independence, abandoned norms of internal recruitment and promotion, and resulted in a conflict of interest because Nagib himself had authored so many of the laws being contested before the SCC. Government lawyers claimed executive sovereignty and ironically argued that the petition for judicial review of Mubarak’s appointment should be rejected because article 174 of the Constitution guarantees SCC independence. The administrative court rejected the government’s

⁵⁹ Interview with Fathi Nagib, March 27, 2002.

contentions, agreed with the merits of the constitutional claim raised by Islambuli, and referred the case to the SCC. Once again, the Supreme Constitutional Court was put in the terribly awkward position of having to arbitrate between the regime and political activists at loggerheads over its own powers and autonomy from the executive. It was inconceivable that the SCC would rule in favor of Islambuli's challenge, not only because of the political sensitivity of the case, but also because Nagib had assumed control of the Court in the meantime.⁶⁰ As in the 1998 attack on the Court, there was no countervailing force that could effectively check the imposition of Nagib as chief justice.

REINING IN THE HUMAN RIGHTS MOVEMENT

At the same time that the regime worked to undermine SCC autonomy, the government continued to attack the Court's most vocal advocate, the human rights movement. The government issued a new NGO law (84/2002) to replace law 153/1999, struck down by the SCC two years earlier. The procedural problems of law 153/1999 that had been grounds for the SCC's ruling of unconstitutionality were addressed when the government routed the new legislation through the Shura Council and provided NGOs with the right to appeal decisions of the Ministry of Social Affairs in the administrative courts. However, by preserving the power of the Ministry of Social Affairs to reject or dissolve any association threatening "public order or public morality," law 84/2002 proved to be just as draconian as the law struck down by the SCC two years earlier. This time around, the human rights movement and opposition activists were so weakened by the government's continuous assaults, they could do little to oppose the new legislation.

Moreover, the resumption of Sa'ad Eddin Ibrahim's trial cast a shadow across the human rights movement. The trial captured the world's attention and brought Egypt's judicial system into the international spotlight. He was accused of accepting foreign funding without government approval (required by military decree 4/1992), embezzling money from an EU grant, and "spreading false information and vicious rumors abroad, dealing with internal conditions in the country which would weaken state's prestige and integrity." Despite an extensive campaign by international human rights groups, a vigorous legal defense, and testimony from

⁶⁰ Islambuli's case was almost certainly intended to bring public attention to the appointment and the threat that it posed to opponents of the government.

some of Egypt's most respected figures, Ibrahim was eventually found guilty and sentenced to seven years in prison by the Emergency State Security Court.⁶¹

The initial sentence was contested at the appellate-level Emergency State Security Court. 'Awad al-Murr, the former chief justice of the SCC, joined the legal defense, yet even then the Emergency State Security Court refused to approve their petition to challenge the constitutionality of the emergency law. Instead, the Emergency State Security Court reaffirmed Ibrahim's guilt. The court transcript reveals much about the character of the Emergency State Security Courts, with the final ruling stating the following:

It has been proven to the court that the allegations and lies the first defendant [Sa'ad Eddin Ibrahim] has included in the reports and papers which he sent abroad involved an insistent call for funding and a request of grants and donations irrespective of what he put forward in his defense that he, as a researcher in sociology, was opting for enlightenment. Enlightenment cannot be achieved by deviating from the truth and resorting to swindling. This society, which hosted the defendant and his assistants, has often suffered from words of truth which in fact lead to evil ends. This defendant has often talked about defending human rights which are squandered; what kind of squandered human rights has he talked about? The right to deceive? The right to swindle or the right to propagate evil rumors? In the name of human rights, the court confronts those defendants and uncover their tricks. It will make them drink from the same cup they wanted their country to drink from. The law encourages NGOs and human rights organizations which only seek the truth and the reinforcement of the bastion of democracy with full awareness and sincerity. Egypt's stability will not be a toy in the hands of those who manipulate its reputation and the rights of its people. Egypt's prestige will never be compromised by spiteful persons. Egypt does not need sycophants to draw up a modernized social structure for her as much as it needs models that enhance its personality and preserve its identity. If the defendants have another country as a homeland, Egyptians have only Egypt as their own, and Egyptians will accept no less than veneration and respect for their homeland.⁶²

Ibrahim and his colleagues were abruptly transferred from the courtroom to an undisclosed location in downtown Cairo and finally to the infamous Tora prison to begin serving their term. Amid intense international criticism and scrutiny, Ibrahim's lawyers approached the Court

⁶¹ Including the vice president of the World Bank, Ibrahim Shihata.

⁶² Public Prosecution Case no. 13422 for 2000.

of Cassation requesting a retrial. The court agreed and the government relented, presumably in response to the embarrassing international attention.

Knowing full well that the case was attracting international coverage, Ibrahim's lawyers skillfully used the Court of Cassation as a forum to air the government's dirty laundry. The defense team argued that Ibrahim and the Ibn Khaldun Center were simply conducting social scientific research with the intent of helping the country advance, rather than acting as a treasonous fifth column. Ibrahim's lawyers reproduced a number of mainstream publications with similar findings concerning political corruption, sectarian tensions, and the like. Court transcripts reveal that the judges were clearly receptive to this airing of the government's dirty laundry.⁶³ The court itself reproduced biting criticism of the regime in its court transcript, with passages like the following from Ibrahim Desuqi Abaza:

Let us lie with liars and allege that Egypt is the country of democracy and the stronghold of freedom; a country where the majority rules, where everyone lives in justice and democracy, in richness and welfare. Let us . . . not feel shy of rigging the elections, hitting trade unions, killing human rights organizations, and attacking professors, intellectuals, and pioneers in the name of tarnishing Egypt's image and receiving funds from foreign bodies.

Other testimony reproduced in the final ruling pointed to the real motivation behind Ibrahim's trial in the Emergency State Security Courts:

The trial of the defendant is no more than a message to all those engaged in non-governmental organizations. . . . The message simply says 'you have no other choice but to join the government's ranks, obey its orders, stand in the long queues of hypocrites, and swear that this government is democratic so that you don't tarnish its image' which is necessarily your own. The message asks us not to say that the elections are forged, that the peoples' activities are restricted, and that the country is looted. Otherwise, why has the state of emergency been imposed for twenty years and continues in force for so long?

The Emergency State Security Court ruling that convicted Sa'ad Eddin Ibrahim and the Court of Cassation ruling together reveal the complexity of the Egyptian judicial system and the relative degrees of independence and judicial activism that exist side by side within the judiciary. The Court

⁶³ Prosecution docket no. 39725/2002, court docket no. 39725, Judicial Year 72.

of Cassation acquitted Ibrahim and his colleagues on all charges of treason and ordered their release in March 2003.

However, there was little to celebrate. The two-year ordeal was the final assault on a movement that had endured years of government harassment, crippling new legislation regulating NGO activity, and financial strangulation through the closing of foreign funding sources. By the time of Ibrahim's release, little remained of a human rights movement that just a few years earlier had promised to be the most effective force for political reform in the Arab world.

Chief Justice Fathi Nagib's sudden death from a heart attack in 2003 raised the possibility of the return of a more independent Supreme Constitutional Court. However, instead of a reversion to the prior norm of seniority as many had hoped, Mubarak frustrated political activists again by appointing Mamduh Mara'i, then the head of the Cairo Court of Appeals, as the new chief justice. Not only had Mara'i spent much of his career in the inspection department of the Ministry of Justice, in a post informally charged with exerting government control over judges, but also most lawyers, judges, and political activists did not think he had sufficient experience and education to head the most important court in Egypt. Nasser Amin, director of the Center for the Independence of the Judiciary and the Legal Profession, put it this way:

When it came time for Mubarak to appoint a new Chief Justice, there were several judges that everyone could imagine as suitable appointments if Mubarak insisted on selecting someone from outside the Court. It came as a total and complete shock that someone of such a modest stature as Mara'i could be selected to head such an important court. Fathi Nagib's support of the government was clear, but at least he had a sophisticated understanding of the law.⁶⁴

Despite the grave threat that the Mara'i appointment posed for the future of the Court, there was no countervailing force to challenge the government's action. As in the previous challenges to SCC independence in 1998 and 2001, the only response was criticism in the opposition press. Without support from broad sectors of society and without more direct modes of political mobilization, the judicial support network was unable to defend the autonomy of the Supreme Constitutional Court.

⁶⁴ Interview with Nasser Amin, director of the Center for the Independence of the Judiciary and the Legal Profession, March 17, 2004.

AN UNCERTAIN FUTURE

The political climate in Egypt changed dramatically with the U.S. invasion of Iraq in 2003. On the first day that bombs rained down on Baghdad, thousands of protesters stormed into the streets to voice their outrage. For one full day, the unthinkable happened – protesters occupied *Midan al-Tahrir*, the central square in downtown Cairo. State security forces regained control the next day through beatings and mass arrests, but the return of street protest for the first time since the 1970s represented a radical new turn in opposition politics. Political discontent had already been elevated with the start of the second Palestinian Intifada in 2001, the devaluation of the Egyptian pound in 2003, and the widespread recognition that Gamal Mubarak was being groomed by the regime to inherit the presidency.⁶⁵ External pressure from the Bush administration to initiate political reform put the government further on the defensive. New civil organizations emerged, the most vocal being the Egyptian Movement for Change (*al-Haraka al-Misriya min Ajli Taghiyer*), popularly known as *Kifaya!* (Enough!). Beginning in 2004, *Kifaya* organized dozens of political rallies and street protests, attempting to build a popular base to press for political reform.

Emboldened by a politicized public and the defensive posture of the government, human rights organizations, opposition activists, and legal professional associations assumed a more assertive stance. The new NGO law (84/2002), which had been issued only one year earlier to replace the one struck down by the SCC, empowered the Ministry of Social Affairs to reject or dissolve any association threatening “public order or public morality,” but it was not aggressively enforced because of the swiftly changing political context.⁶⁶ The new circumstances gave rights groups the de facto ability to operate, despite the restrictive NGO law. Rights groups also enjoyed renewed access to foreign funding streams, which became more difficult for the government to block without appearing to suppress civil society.⁶⁷

⁶⁵ Tamir Moustafa, “Protests Hint at New Chapter in Egyptian Politics.” *Middle East Report Online*, April 9, 2004.

⁶⁶ The New Woman Research Center, the Land Center for Human Rights, and the Egyptian Association against Torture were denied licenses in the summer of 2003. After legal wrangling in the administrative courts, the New Woman’s Research Center gained legal recognition, and the other two organizations continued their activities without license.

⁶⁷ One grant alone from the U.S. AID provided a number of groups with \$1 million, the largest-ever grant of its kind from the United States.

TABLE 6.1: *New rights organizations by year of establishment*

2002	Egyptian Initiative for Personal Rights*
2002	Egyptian Center for Children's Rights*
2002	South Center for Human Rights*
2003	Egyptian Association for Supporting Democracy
2004	Habi Center for Environmental Rights*
2004	al-Marsad al-Madani for Human Rights
2004	Egyptian Association for Developing Legal Awareness*
2004	Arab Penal Reform Organization
2004	South Center for Human Rights
2004	Egyptian Center for Housing Rights*
2004	Egyptian Association to Support Democratic Development
2005	Ma'at Center for Juridical and Constitutional Studies*

* Rights organizations engaged in public interest litigation or legal education.

The more established public interest organizations made some headway during this period. By 2004 the Hisham Mubarak Center for Legal Aid had a total of fifty cases on the SCC dockets, up from fifteen in 2000. Most notable were several cases in front of the SCC challenging the Emergency Laws. The Land Center for Human Rights had six cases on the SCC dockets, an increase from only two in 2000. The Center for Human Rights Legal Aid had several cases transferred to the Court. The Center for Egyptian Women's Legal Assistance also successfully transferred its first case to the SCC, concerning the constitutionality of differing penalties for women and men convicted of adultery.⁶⁸ Ironically, just as rights organizations were honing their ability to launch constitutional petitions and have cases transferred to the SCC for judicial review, the SCC itself was less apt to play an assertive role vis-à-vis the government because of the new personnel on the Court.

Still, with the regime on the defensive, a plethora of new rights organizations sprouted up to join the ranks of the more established rights groups (see Table 6.1), many of them ignoring the formal requirement to register with the Ministry of Social Affairs under the new associations law. It is too early to assess the track record of these new organizations, but it is

⁶⁸ Case 318, Judicial Year 23, transferred to the SCC on October 10, 2001. The SCC also ruled against a challenge to the *khul'* provisions in the 2000 personal status law the following year. This was considered an advance for women's rights because it allowed women to divorce without the consent of their husbands. See case 201, Judicial Year 23, issued December 15, 2002.

notable that most aim to use litigation as a primary strategy for effecting change.

THE GOVERNMENT'S INSTRUMENTAL USE OF
THE SUPREME CONSTITUTIONAL COURT

With Supreme Constitutional Court autonomy lost, there are clear signs that the government is using the SCC as a weapon against both reform activists and against other branches of the Egyptian judiciary itself. The government's instrumental use of the Court is clearly seen in the contested area of election monitoring. As noted earlier in this chapter, the government sought to circumvent the full impact of the SCC ruling requiring full judicial supervision of elections by interpreting "judicial authorities" as inclusive of the State Cases Authority (SCA) and the Administrative Prosecution Authority (APA), which are both under the control of the executive-dominated Ministry of Justice. In the aftermath of the 2000 elections, opposition activists contested the status of the SCA and the APA and their ability to participate in election monitoring. By June 2003, the Court of Cassation ruled election results in the Cairo district of al-Zeitun null and void because polling stations were supervised by members of the SCA and the APA. It found that members of the SCA and the APA must be considered employees of the Ministry of Justice and not members of the independent judiciary.

Faced with this fundamental blow to the integrity of the electoral process and the government's technique for circumventing the spirit, if not the letter, of the 2000 Supreme Constitutional Court ruling, Mubarak requested that the SCC issue a definitive interpretation of the term "judicial authorities" in the law governing political rights. The SCC responded in less than two months that the State Cases Authority and the Administrative Prosecution Authority must be considered a part of the "judicial authorities" because the law governing political rights refers to the Higher Council for Judicial Authorities, of which the SCA and APA are members.⁶⁹ With this ruling, the SCC severely limited the impact of its own June 2000 ruling that had demanded full judicial monitoring of elections. This precedent was arguably the single biggest rollback for opposition parties because it expanded the government's ability to tamper with elections once again.

⁶⁹ Request for *tafsir* (interpretation) no. 2, Judicial Year 26, issued July 3, 2004. *al-Jarida al-Rasmiya*, no. 10, July 3, 2004.

Another clear example of the regime's instrumental use of court rulings is found in the selective implementation of court orders in the aftermath of the 2000 elections. Opposition activists had launched hundreds of cases in civil courts contesting election irregularities in what had become a standard opposition strategy to shame the regime. In most cases, the Court of Cassation ruled in favor of opposition candidates, but the inconsistent application of court rulings made a mockery of the process. For example, the Court of Cassation found that the Minister of Economy, Yusef Butros Ghali, had won his seat through election irregularities, but the People's Assembly refused to implement the court ruling. Similarly, the Assembly refused to heed a court ruling that found widespread irregularities in the defeat of Ma'mun al-Hudaybi, the head of the Muslim Brotherhood. On the other hand, when a court found that Muslim Brotherhood member Gamal Heshmat had benefited from a vote-counting error, the People's Assembly implemented the ruling and stripped Heshmat of his seat.

A final controversy stemming from the 2000 elections was also resolved in the government's favor through instrumental use of the Supreme Constitutional Court. In this case, it came to light that a considerable number of People's Assembly members had managed to illegally avoid their military service. Because most were members of the ruling NDP, opposition parties shamed the regime through the press and forced irregular by-elections for the open People's Assembly seats in December 2003. The Wafd party led the charge by claiming that candidates who had not participated in the 2000 elections should not be permitted to enter the race, but the government argued the opposite to prevent the loss of a considerable number of seats. The NDP dismissed the claim and ran new candidates in the elections, which resulted in another round of political struggle in the courts. Thirteen Administrative Courts of Justice ruled the by-elections invalid, but two Administrative Courts sided with the government's position. The Supreme Administrative Court came down on the side of the opposition, declaring the participation of new NDP candidates to be illegal. At this point, Mubarak requested that the Supreme Constitutional Court interpret the intent of the law regulating the People's Assembly, and the SCC quickly ruled in favor of the government's position, stating that there was nothing written in the People's Assembly regulations that precluded the participation of new candidates in a by-election.⁷⁰ Once

⁷⁰ Request for *tafsir* (interpretation) no. 1, Judicial Year 26, issued July 3, 2004. *al-Jarida al-Rasmiya*, no. 10, September 3, 2004.

again, the government enjoyed the benefits of ending political controversies and disempowering the administrative courts through the recently tamed SCC.

THE 2005 ELECTIONS

Presidential and People's Assembly elections provided the focal point for state-society contention in 2005. It was a year of spectacular legal clashes between human rights organizations, opposition activists, and legal professional associations on the one hand, and the government on the other. In the run-up to the election, the players staked out their usual positions: opposition parties advocated reforms that would reduce the government's ability to orchestrate fraud at the ballot box, rights organizations stood poised to monitor and document election irregularities, the government went to work to create a façade of political reform, and judges were faced with the dilemma of whether or not to participate in election monitoring with the considerable risk of being implicated in the regime's manipulation of the election results. But new developments in 2005 promised to make this election cycle unique.

In February 2005, Mubarak announced that Egypt would have its first-ever multicandidate presidential election.⁷¹ The move was a strategic decision to placate pressure from the United States and to appease domestic critics of the regime. By early May, however, it was clear what the regime had in mind. The People's Assembly issued a draft amendment to article 76 of the Constitution that specified the rules that would govern multicandidate presidential elections. Candidacy would be restricted to those who could muster the support of at least 250 members from among the People's Assembly, the Shura Council, and Municipal Councils nationwide, making it virtually impossible for independent candidates to enter the race and effectively sidelining the Muslim Brotherhood.⁷² Political parties holding at least 5 percent of the seats in both the People's Assembly and the Shura Council would also be able to field one candidate if they

⁷¹ In every previous presidential election, the People's Assembly (dominated by the regime's National Democratic Party) would nominate a single candidate to stand for what was essentially a referendum. Citizens could vote for or against the nominee, but there was never a choice between multiple candidates.

⁷² A minimum of 65 of the 250 supporters are required to be from the People's Assembly, a minimum of 25 supporters are required from the Shura Council, and a minimum of 10 members are required from Municipal Councils from each of at least 14 Governorates.

satisfied several additional requirements.⁷³ No opposition parties met the 5 percent threshold, but the draft amendment specified an exception for the 2005 elections by allowing each party to nominate one candidate regardless of its current strength in the People's Assembly.

The move was masterful. By opening the election to opposition candidates, the government appeared to make a bold gesture in the direction of political reform.⁷⁴ But the government would risk little, if anything, because of the weakness of formal opposition parties and the difficulty faced by any party in satisfying the entry requirements in future elections.⁷⁵ Moreover, the political parties law was revised, giving the government ample ability to sideline political parties at will. To further control the process, the amendment called for a Presidential Elections Committee with complete control of the election oversight *and* adjudication of all claims of fraud. This Presidential Elections Committee would be composed of five members of the judiciary and five “public figures known for their impartiality” nominated by the NDP-dominated People's Assembly and Shura Council.⁷⁶ Essentially, the constitutional amendment would sideline the ability of citizens to contest election results to the judiciary, and it would undermine the ability of judges to adequately detect and deter election irregularities. The government clearly sought to circumvent the embarrassing barrage of litigation that opposition activists launched with every election cycle in order to shame the regime in front of the Egyptian public and the international community.

The constitutional amendment also required the Supreme Constitutional Court to review the legislation governing the new multicandidate system of elections within fifteen days in order to determine its constitutionality. If any aspect of the draft was found to be unconstitutional, it would be returned to the People's Assembly for modification. In other words, if passed, the constitutional amendment would require the

⁷³ The party must have been operating for five consecutive years, and the candidate must occupy a leading position within the party for at least one year prior to nomination.

⁷⁴ Moreover, the Bush administration could claim a victory in “advancing democracy” through its Broader Middle East Initiative at a time of flagging credibility due to Iraq's steady fall into chaos.

⁷⁵ Recall that the single largest opposition party (*al-Wafd*) won only 1.3 percent of seats in the 2000–2005 People's Assembly.

⁷⁶ The five members of the judiciary would be made up of the chief justice of the Supreme Constitutional Court, the head of the Cairo Court of Appeal, the first deputy chief justice of the Supreme Constitutional Court, the first deputy chairman of the Court of Cassation, and the first deputy chairman of the State Council.

Supreme Constitutional Court to perform *abstract* (prior) review of legislation before its promulgation, despite the fact that the law of the Supreme Constitutional Court only provides for *concrete* review of legislation.⁷⁷ These procedural acrobatics were meant to inoculate the election laws against any future constitutional challenge.

Opposition parties, rights organizations, and *Kifaya* mobilized to oppose the constitutional amendment in the courts, in the streets, and in the opposition press.⁷⁸ The Wafd Party, the Nasserist Party, the Tagammu' Party, Ayman Nur's *al-Ghad* Party, the Muslim Brotherhood, and *Kifaya* also called for a boycott. Regular street protests erupted throughout the country.

Pressure for reform also came from judges themselves. The Alexandria Judges' Association first announced that 1,200 judges would boycott judicial monitoring duties unless reforms were forthcoming. Soon thereafter, a general assembly meeting at the Cairo Judges' Association ended with the resolution that 2,500 more judges would not take part in presidential or People's Assembly elections unless they gained complete control over every stage of the process from start to finish, including the preparation of voting lists, the transfer of voting boxes, and the tabulation of votes. Judges wanted to avoid being implicated in the regime's inevitable manipulation of the election results. However, judges also threatened to abstain from election monitoring activities to increase the pressure for long sought-after reforms, such as financial independence from the executive, a reduction in the influence of the Minister of Justice, and reform of the Supreme Council of the Judiciary.⁷⁹ What was once the most radical position taken by maverick judges like Yehya al-Rifa'i and Ahmed Meki in the 2000 elections had now become the norm.

On May 25, 2005, the national referendum was held, and the amendment to article 76 of the Constitution was adopted. The government claimed a 53.6 percent turnout, with 82.9 percent approving the amendment, but the actual voter turnout was far lower. The Judges' Association issued a report, entitled *Egypt's Conscience*, which documented election

⁷⁷ Law 48/1979, article 29, on the procedures of the SCC reproduced in the appendix.

⁷⁸ The Tagammu' Party attempted to block the referendum in the administrative courts, but failed.

⁷⁹ For a more detailed analysis of the threat to boycott and its objectives, see Nathan Brown and Hesham Nasr, "Egypt's Judges Step Forward: The Judicial Election Boycott and Egyptian Reform." Carnegie Endowment for International Peace, 2005.

fraud and recorded voter turnout at most voting stations at a mere 3 percent.⁸⁰ Two weeks later, the People's Assembly issued the enabling legislation, which was sent to the Supreme Constitutional Court for abstract review as provided for in the constitutional amendment.

The SCC was then faced with a politically loaded request. The amendment to article 76 was deeply flawed, contradicting both the spirit and the letter of multiple articles of the Constitution. Moreover, the procedure by which the request for judicial review reached the Court was also unprecedented and was an extremely troubling indication of how the Court might be (ab)used in the future.⁸¹ Opposing the regime on such a sensitive political issue would not have been a viable option even in the heyday of SCC assertiveness. But the leadership of Chief Justice Mamduh Mara'i further hindered the ability of principled Supreme Constitutional Court justices to take a stand. The Chief Justice was imposed on the SCC for precisely this sort of occasion. With the SCC seal of approval, the stage was set for a new series of confrontations in both the presidential and People's Assembly elections.⁸²

The candidates in the presidential election were Hosni Mubarak, Ayman Nur (Ghad Party), and Nu'man Gom'a (Wafd Party), with a number of characters from other parties providing comic relief more than real competition.⁸³ The lead-up to the election was marked by a constant state of tension and negotiation between high-profile judges and the government. The judges eventually backed down from their threat to boycott election monitoring duties, but they instead resolved to document and expose as much electoral fraud as possible. The Ministry of Justice excluded five hundred of the most activist judges from election monitoring

⁸⁰ A retired, high-ranked police officer, Mahmud Qatari, exposed the role of the police in orchestrating NDP victories at the polls in his book, *Tazwir Dawla: Shahadat al-Istibdad wa Tazwir al-Intikhabat* [Forging a State: Testimonies of Tyranny and the Rigging of Elections] (Cairo: Markaz al-Mustaqbal al-Misri, 2005).

⁸¹ Prior review of legislation is exactly what former Chief Justice 'Awad al-Murr had warned about years earlier. He stated bluntly that abstract review would be used as a tool "... to get the seal of approval of the Constitutional Court, and the result would be that the constitutionality of these bills could not be challenged later on.... If you want to destroy the Constitutional Court, let's shift to prior revision." Lecture at Cairo University, September 25, 2000.

⁸² The SCC required a few minor changes to the legislation that did not place any meaningful constraints on the government. Details of the amendments and the opposition's objections to the process can be found in *al-Wafd*, July 3 and 8, 2005.

⁸³ The leftist Tagammu' and the Nasserist Party continued their boycott.

duties, but many more remained who were determined to expose the government's dirty laundry.

Civil society groups also flexed their muscles. The National Campaign for the Monitoring of Elections⁸⁴ organized 270 monitors, the Independent Monitoring Committee⁸⁵ coordinated another 1,500 monitors, and the Civil Coalition for the Monitoring of the Elections⁸⁶ boasted 2,500 monitors. In all, civil society groups fielded over five times the number of monitors than it had in the 1995 elections and roughly fifty times the number of monitors deployed in the 2000 elections, when human rights organizations were under constant assault by the government. Thirty-four civil society groups filed a lawsuit to gain access to the inside of voting stations. Two lower administrative courts granted them access, but the legal wrangling in the Supreme Administrative Court lasted until the day of the election. Predictably, election results showed a Mubarak victory with a comfortable margin, but judges and civil society activists documented and publicized election irregularities. The following day, *al-Abram* ran a front-page headline quoting Chief Justice Mamduh Mara'i's confirmation that "The Elections Ran under Complete Judicial Supervision."⁸⁷ The Supreme Constitutional Court, once the most promising hope for political reform in Egypt, was now being used as a rubber stamp in the manipulation of elections.

The People's Assembly elections proved to be far more controversial. The Judges' Association threatened to boycott election monitoring duties throughout the three rounds, but piecemeal concessions from the regime prevented a blanket boycott. The Judges' Association was assured that a new law guaranteeing increased judicial independence would be passed following the elections; the number of polling stations was consolidated, allowing judges to cover more territory; and judges were given the ability to close polling stations if irregularities were noted. The 2005 People's Assembly elections were again marked by widespread fraud and overt coercion, but for the first time, judges were also subjected to violence, as the regime took off its gloves. The Egyptian Organization for Human Rights recorded seventy-six acts of violence against judges. A further 1,700 judges were barred from monitoring the elections by the Ministry of Justice. Outraged judges retaliated by exposing fraud and coercion

⁸⁴ A network of four NGOs led by Human Rights Association for the Assistance of Prisoners.

⁸⁵ A network of six NGOs led by the Ibn Khaldun Center for Development Studies.

⁸⁶ A network of NGOs led by the Egyptian Organization for Human Rights.

⁸⁷ "Mubarak is First Elected President of Egypt," *al-Abram*, September 10, 2005.

at a moment when international attention was focused on Egypt. High-profile judges including Hisham al-Bastawisi and Ahmed Meki also took the extraordinary step of condemning the elections on the *al-Jazeera* satellite television network.

As the most viable opposition movement, the Muslim Brotherhood once again faced the brunt of state repression. Thousands of Brotherhood members were taken into detention. Yet, despite the crackdown and a strategic decision to run candidates in a limited number of districts, the Brotherhood won eighty-eight seats, many times more than all other opposition trends combined. These gains would not have been possible if it had not been for the Supreme Constitutional Court rulings in 1987 and 1989 that forced Egyptian elections to move from the PR-list system to the single-member district system. Under the PR-list system, only official parties could run, effectively sidelining the Muslim Brotherhood.⁸⁸ But, under the district system, Brotherhood members could run as independent candidates. Even after the fall of Supreme Constitutional Court independence, its rulings continued to shape the political arena in profound ways.

After the People's Assembly elections, the judges tried to keep the spotlight on the reform process by organizing a conference around the theme, "The Role of the Judiciary in the Process of Political Reform in Egypt and the Arab World."⁸⁹ The three-day conference brought together prominent judges, human rights activists, law professors, and highly placed Muslim Brotherhood members, such as 'Essam al-Erian. In the lead-up to the conference, the government announced that it would lift judicial immunity on judges Hisham al-Bastawisi and Ahmed Meki, two of the most high-profile critics of the regime. After the conference, the government lifted judicial immunity from five other judges and initiated disciplinary proceedings against al-Bastawisi and Meki.

The government crackdown on judicial dissent was predictable, but the response from civil society activists was not. When judges organized a sit-in at their downtown headquarters, hundreds of citizens gathered to show their solidarity and their commitment to judicial independence. Signs reading "Egyptian judges, the hopes of the people are in your hands!" and "Free Judiciary = Free Nation," and the simple but effective words,

⁸⁸ The only exception occurred in the 1987 People's Assembly elections, when the Muslim Brotherhood participated under the PR-list system by entering into an informal coalition with the Wafd Party.

⁸⁹ Organized in cooperation with the Cairo Institute for Human Rights Studies, April 1–3, 2006.

“I Love Judges,” could be seen throughout the crowd. After several days, state security forces broke up the spectacle. Dozens were beaten and taken into detention. Despite the repression, however, supporters of judicial independence continued to turn out in the streets over the following weeks in greater numbers, with the largest rally nearing two thousand participants. Fearing that the situation was growing unmanageable, the government changed its tactics and began to strike at demonstrators as soon as they appeared on the street. Plain-clothed police and hired thugs beat hundreds, and more than five hundred demonstrators were taken into detention.

The mobilization of activists in support of the besieged judges was one more indication of how central the judiciary had become to the Egyptian political reform movement. Unlike earlier attacks on the independence of the Supreme Constitutional Court, which were met only by opposition in the press, the new political environment of active street protests and direct mobilization produced tangible results. Judge Meki was acquitted and al-Bastawisi only received a symbolic reprimand, rather than being expelled from the judiciary as was widely expected.

On the other hand, the new law for the judiciary issued in June 2006 failed to meet the judges’ demands for administrative independence from the executive. Furthermore, in July 2006, Prosecutor General Maher ‘Abd al-Wahed was appointed to replace Mamduh Mara’i as chief justice of the Supreme Constitutional Court.⁹⁰ ‘Abd al-Wahed was therefore the third chief justice since Chief Justice Muhammad Wali al-Din Galal to come from within the ranks of legal officials who were unequivocally part of the regime’s inner circle. The continued subjugation of the Supreme Constitutional Court to the executive branch was inevitable because the amendment to Article 76 of the Constitution requires the chief justice to serve as the head of the Presidential Elections Commission. With the SCC tied to this most critical function of regime preservation, it is unlikely that the Court will reemerge any time soon as an effective avenue for activists who seek to curb executive powers, strengthen rights provisions, or promote political reform.

CONCLUSION

In an authoritarian polity, the potential for any given reform movement is perhaps best measured by the way that the regime responds to its new

⁹⁰ Mamduh Mara’i had reached the mandatory retirement age.

adversaries. If the regime does little or nothing at all and critics are left to organize free of interference, the opposition probably does not pose a viable threat to the regime's control. But when the state takes far-reaching actions to control its opponents, it is a sure sign that the regime believes it faces a credible threat from the opposition or at least a potential threat that it would like to confront early on, rather than giving it the ability to gain momentum.

The Egyptian government's aggressive response to both the Supreme Constitutional Court and the judicial support network is proof that constitutional litigation increasingly posed a credible threat to the regime's tools for maintaining control. The SCC provided an effective new avenue for critics to challenge the state through one of its own institutions. Success in battling the government's restrictive NGO law, as well as litigation forcing full judicial supervision of elections, illustrated how human rights groups and opposition parties had become increasingly adept at using the courts to challenge the government and defend their interests. Moreover, the SCC's willingness to confront the government with the landmark rulings on NGOs and full judicial monitoring of elections proved once again the commitment of SCC justices to a political reform agenda. It also demonstrated their determination to protect the judicial support network that had initiated litigation (thereby enabling the court to expand its mandate) and come to the defense of the SCC when under attack.

However, the ultimate collapse of the human rights movement, the continued weakness of opposition parties, and the institutional assault on the SCC demonstrate how litigation by itself, without support from broad sectors of society, was insufficient to protect the SCC/civil society coalition from collapse. Just as the SCC and Egypt's civil society coalition built a movement based on the converging interests of the Court, opposition parties, human rights organizations, and the legal profession, so too was the government able to incapacitate this cooperative effort by successively undermining each element of the movement through legal and extralegal tactics. Rather than follow through on its threats to neutralize the Supreme Constitutional Court outright in the mid-1990s, the government instead adopted the subtler strategy of simply moving against the SCC's judicial support network. The Lawyers' Syndicate was neutralized by 1996, human rights associations faced near total collapse by 1999 due to intimidation and restrictions on foreign funding, and opposition parties were progressively weakened throughout the period, despite SCC rulings on political rights. By undercutting each element of the support network, the government effectively killed two birds with one stone: undermining

support groups impaired their ability to monitor the regime's increasingly aggressive human rights violations, while at the same time disabling their capacity to raise litigation and mount an effective defense of the SCC when it came under attack. New life came to the opposition movement beginning in 2003, but popular mobilization proved to be too little and too late to restore Supreme Constitutional Court independence. Instead, SCC leadership was transferred from one regime insider to the next, from Fathi Nagib to Mamduh Mara'i to Maher 'Abd al-Wahed. In the process, the SCC was transformed from the most promising avenue for political reform to a weapon in the hands of the regime to constrain the regular judiciary and sideline political opponents.

Law, Development, and Democracy: A Critical Appraisal

Scholars and policymakers have placed a great deal of faith in judicial reform as a cure-all for the political and economic turmoil plaguing developing countries in Latin America, Asia, Africa, and the Middle East. Rule-of-law institutions have been charged with safeguarding human rights, spurring economic development, and even facilitating transitions to democracy. These expectations are grounded in our understanding of the way that legal institutions, markets, and the state developed in the West. Although dependency scholars and others have highlighted the radically different circumstances that “late-late” developing countries face, there is still a pervasive assumption that rule-of-law institutions, market economies, and democracy are self-reinforcing. Indeed, these relationships seem both intuitively sound and historically accurate.

Some of the earliest writings in the social sciences by Adam Smith, Max Weber, David Ricardo, and others examined how independent and effective judicial institutions provided the stable property rights system necessary for long time horizons and vigorous private investment. Similarly, judicial institutions are seen as essential tools for providing the checks and balances necessary to curb arbitrary rule. In this view, arbitrary rule is inimical to democratic governance and viable market economies alike, making legal infrastructure essential not only to enforce the rules of the economic game, but to enforce the rules of the political game as well. Finally, we have long observed that economic growth and market economies are positively correlated with the social requisites for democracy.¹

¹ Seymour Martin Lipset, “Some Social Requisites of Democracy: Economic Development and Political Legitimacy.” *American Political Science Review* 53 (1959): 69–105; Robert Dahl, *Polyarchy: Participation and Opposition* (New Haven: Yale University Press, 1971).

The emergence of rule-of-law institutions, successful market economies, and democratic transitions seems to go hand-in-hand in a virtuous cycle.

This chapter takes a critical look at our assumptions about legal and judicial reform as straightforward solutions to the intractable economic and political predicaments facing so many developing countries. Judicial institutions *can* be important tools for promoting economic growth and safeguarding human rights, but their fate and efficacy are fundamentally tied to the outcomes of specific political struggles and the distribution of power within any given political system.

LAW, DEVELOPMENT, AND DEMOCRACY

In 1909, Max Weber argued that one of the most important ingredients of rapid economic development in the West was the particular brand of legal-rational authority that had emerged there. Weber explained that in the West, “concrete [legal] decisions were based on the application of universal rules, and decision making was not subject to constant political intervention.” Unlike traditional and charismatic forms of authority, legal-rational authority was free from the influence of religious institutions or other “nonrational” sources of authority. Legal-rational authority was based on a system of codified law that was universally applied with a coherent and predictable internal logic. Furthermore, this legal authority was insulated from political manipulation and was backed by the full coercive power of the state. For these reasons, Weber argued, law as it developed in the West provided predictability and security, two of the most important elements for capitalist economic development.

The rationalization and systematization of the law in general and . . . the increasing calculability of the functioning of the legal process in particular, constituted one of the most important conditions for the existence of economic enterprise intended to function with stability and especially, of capitalistic enterprise which cannot do without legal security . . .²

According to Weber, the rational-legal system, which was so crucial to capitalist economic development, was consistently pushed by those who had the most to benefit from such a system. Historically, the most prominent advocates of expansion of judicial power were “the bourgeois interests, which had to demand an unambiguous and clear legal system,

² Max Weber, *Law in Economy and Society* (Cambridge, MA: Harvard University Press), 304–305.

that would be free of irrational administrative arbitrariness as well as of irrational disturbance by concrete privileges, that would also offer firm guaranties of the legally binding character of contracts, and that, in consequence of all these features, would function in a calculable way.” Weber also observed that in the English experience, these bourgeois interests were often in line with the wishes of the Crown, which wanted to centralize authority and tax commerce. Tigar and Levi revisit this theme:

The English pattern was repeated, with variations, elsewhere: an alliance between crown and merchants, the latter supporting the legislative and judicial power of the former in order to obtain uniform laws favorable to trade throughout a large area. The merchant repaid this debt by paying taxes and customs duties and in many cases by making huge loans to the crown to carry on military policy abroad.³

Decades after *Economy and Society* was written, law and development scholars picked up on the themes introduced by Weber and examined how legal institutions could be established in the developing world to promote the same kind of rapid economic and political development as occurred in the West.⁴ The hopes and expectations of the law and development scholars were stifled, however, when the problems associated with modernization theory were exposed in the dependency revolution.⁵ David Trubek and Marc Galanter, two scholars at the forefront of the law and development movement, discounted their own work, and the law and development paradigm in general, in their landmark 1974 article, “Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies.”⁶

Trubek and Galanter charged that leaders in most developing countries were not interested in adopting legal reforms that would promote economic growth. Rather, legal systems in most developing countries were designed to benefit elites and to satisfy and appease political allies of the regime. The rule of law was not autonomous, and it suffered from constant and egregious political interference. Trubek and Galanter concluded

³ Michael E. Tigar and Madeleine Levi, *Law and the Rise of Capitalism* (New York: Monthly Review Press, 1977), 47.

⁴ Marc Galanter, “The Modernization of Law,” in *Modernization: The Dynamics of Growth*, ed. M. Weiner (New York: Basic Books, 1966); David Trubek, “Max Weber on Law and the Rise of Capitalism.” *Wisconsin Law Review* (1972): 720–753.

⁵ Andre Gunder Frank, *Capitalism and Underdevelopment in Latin America* (New York: Monthly Review Press, 1967); Fernando Cardoso and Enzo Faletto, *Dependency and Development in Latin America* (Berkeley: University of California Press, 1979).

⁶ David Trubek and Marc Galanter, “Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies.” *Wisconsin Law Review* (1974): 1062–1101.

that important structural prerequisites for the emergence of rational-legal authority were not present in developing countries. Most notably, social stratification was too intense and imbalances in political power undermined the possibility for the emergence of a rational-legal order. Trubek and Galanter's article marked the beginning of the end of the law and development literature.

Economists soon returned to the importance of legal institutions to economic growth. Douglass North and others explained that effective, impartial legal institutions are imperative for the smooth and efficient operation of market economies because they lower the risk associated with trade and thus enable firms to benefit from an increasing division of labor.⁷ New institutionalists also explained that legal institutions can and should be used by state leaders to bind their own hands and disable their own ability to violate property rights.⁸ They argued that where these institutions remain underdeveloped and property rights remain weak, firms will invest their resources in avenues that produce short-term returns but do little to facilitate sustained economic growth in the long run. North goes so far as to claim that "the high cost of contract enforcement is the most important source of both historical stagnation and contemporary underdevelopment in the Third World."⁹

Theoretical accounts expounding the fundamental importance of institutions in securing property rights and economic growth were supported by a flood of empirical studies throughout the 1990s. The new institutional economics became the dominant framework for understanding differential rates of economic development across countries, and an examination of institutional safeguards on property rights figured prominently in these studies.¹⁰ Institutional analyses promised new policy prescriptions

⁷ Whether firms actually use legal institutions to settle their disputes or not, the knowledge that they are operating in the shadow of the law is usually enough to get firms to comply with their contractual obligations.

⁸ "Appropriately specified political institutions are the principal way in which states create credible limits on their own authority. These limits are absolutely critical to the success of markets. Because political institutions affect the degree to which economic markets are durable, they influence the level of political risk faced by economic actors. Attention to political institutions is thus essential to the success of an economic system." Barry Weingast, "Constitutions as Governance Structures: The Political Foundations of Secure Markets." *Journal of Institutional and Theoretical Economics* 149 (1993): 288.

⁹ Douglass North, *Institutions, Institutional Change, and Economic Performance* (Cambridge: Cambridge University Press, 1990), 34.

¹⁰ For example, see Silvio Borner, Aymo Brunetti, and Beatrice Weder, *Political Credibility and Economic Development* (London: St. Martin's Press, 1995); Stephan Knack and

for the dozens of developing countries that had made substantial progress in liberalizing their economies by the early 1990s, without reaping the long-promised fruits of economic reform. Our theoretical framework – which had moved from a focus on tradition versus modernity under the modernization paradigm, to the structure of the global economic system under the dependency paradigm, to the pathologies of state intervention in neoliberal economics – shifted once again to an understanding that state intervention in the economy was not, by itself, a barrier to development. Rather, the new lesson was that institutions frequently structure incentives in ways that can be deleterious to national economic growth but, at other times, properly designed institutions can alternately structure incentives in ways that can encourage vigorous growth. The trick, we are told, is to design institutions that get the incentives right.

The World Bank and other international financial institutions put these policy prescriptions to work and began to fund judicial reform programs throughout the developing world to the tune of \$3.8 billion.¹¹ They explained that “without judicial independence, there is no rule of law, and without rule of law the conditions are not in place for the efficient operation of an open economy, so as to ensure conditions of legal and political security and foreseeability.”¹² These programs were often implemented with the explicit hope that they would produce positive political spillovers, over and above the targeted economic benefits they were designed to induce. For the World Bank and other international donors working on legal aid projects, all good things seem to go together harmoniously: Legal reform promotes a vibrant market economy; legal reform combined with a market economy in turn promotes democratization; democratization, in turn, consolidates legal reforms and market growth.

Philip Keefer, “Why Don’t Poor Countries Catch Up? A Cross National Test of an Institutional Explanation.” *Economic Inquiry* 35 (1997): 590–602; Rafael La Porta, et al., “Legal Determinants of External Finance,” *Journal of Finance* 52 (1997): 1131–1150.

¹¹ For information on World Bank support for judicial reform in the 1990s, see Malcolm Rowat, Waleed Malik, and Maria Dakolias, eds., *Judicial Reform in Latin America and the Caribbean – Proceedings of a World Bank Conference*. (Washington, DC: The World Bank), 1995; Ibrahim Shihata, “Relevant Issues in the Establishment of a Sound Legal Framework for a Market Economy,” in *The World Bank in a Changing World*; Buscaglia, Dakolias, and Ratliff, *Judicial Reform in Latin America: A Framework for National Development* (World Bank, 1995); Ross Levine, *Law, Finance, and Economic Growth* (World Bank, 1997); Sanjay Pradhan, “Improving the State’s Institutional Capability.” *Finance and Development* 34 (1997).

¹² Edmundo Jarquin and Fernando Carrillo, eds. *Justice Delayed*. Washington, DC: Inter-American Development Bank, 1998, vii.

These assumptions are deeply rooted in our understanding of the Western experience. However, a close reading of the Western experience itself indicates that the relationship between institutions and economic growth is not a straightforward one. In their classic study of judicial reforms in England after the Glorious Revolution, for example, North and Weingast explain that independent courts enabled the Crown to make credible commitments that loans would be repaid. The authors find that “the creation of a politically independent judiciary greatly expanded the government’s ability to credibly promise to honor its agreements, that is, to bond itself. By limiting the ability of the government to renege on its agreements, the courts played a central role in assuring a commitment to secure rights.”¹³ According to North and Weingast, the economic results of these reforms were immediate. After institutional restraints were put in place to provide a check on the power of the Crown, creditors could be confident that the government would not default on loans. This confidence resulted in a rapid drop in interest rates on loans extended to the Crown and in an increased ability of the state to raise tremendous amounts of capital.

The analysis provokes a crucial question: Were institutional reforms effective and sustainable in the English case in their own right, or were they effective and sustainable principally because they represented a balance of power between the Crown and the landed elite? In other words, was the key causal mechanism simply a matter of clever institutional design (which might be replicated in other countries), or was it structural in nature, thus limiting its applicability to other states? If the answer is simply “getting institutions right” (somewhat akin to “getting prices right” for neoliberal economists), then the promise of institutional reform for developing countries is indeed bright. But if institutional reforms are feasible and sustainable only when they represent a given balance of power between the state and social forces, then the prospects for institutional reform are much less clear.

Power Asymmetries and Institutional Reform

A detailed examination of institutional reforms in seventeenth-century England and France illustrates the useful insights that institutional

¹³ Douglass North and Barry Weingast, “Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England.” *The Journal of Economic History* 49 (1989): 819.

analyses provide, but it also exposes the practical limitations on the implementation of many institutional reforms.

From the seventeenth to the nineteenth centuries, England and France competed with one another for global hegemony. The two states fought six major wars, and both faced immense pressures to raise revenue to pay for their costly military campaigns. Because neither state had an adequate system of taxation, both depended on loans from domestic creditors. As the financial strains on the British Crown became more intense, it began to renege on its loans with impunity.¹⁴ The Stuarts controlled the daily operation of the government, and the Crown had almost complete control over the judiciary. When opposition emerged in the courts, the Crown could overturn most decisions through its Star Chamber, and it dismissed justices for rulings that went against the interests of the Crown.¹⁵ Without institutional checks, the Crown was able to renege on its loans in times of financial strain.

As a result of the Stuarts' poor track record in servicing debt, moneylenders charged much higher interest rates to the Crown than they did to individuals because of the substantial risks that those loans entailed. Thus, although the Crown was able to impose its will on moneylenders and to unilaterally alter their property rights, it became increasingly difficult for the Crown to raise revenue and finance state expenditures through loans. As the long-term repercussions were felt by the Stuarts, they began to resort to increasingly desperate measures to secure financing. Creditors unwilling to cooperate with the Crown suffered extreme sanctions, including the seizure of assets and imprisonment.¹⁶ Ultimately, this situation helped encourage open opposition to the Crown, leading to the English Civil War. The Star Chamber was abolished along with the royal administrative apparatus after the Civil War. James II reasserted the Crown's

¹⁴ At the beginning of the Stuarts' reign, sale of Crown lands produced approximately half of the annual revenue of the state. However, by the end of the reign of Charles I (1625–1641), almost all of the Crown's lands had been sold, making loans from creditors imperative. North and Weingast, "Constitutions and Commitment," 809.

¹⁵ Maitland, *The Constitutional History of England*, 218–221, 261–264, and Shapiro, *Courts*, 87–89. Maitland characterizes the Star Chamber as "a court of politicians enforcing a policy, not a court of judges administering the law. It was cruel in its punishments, and often had recourse to torture. It punished jurors for what it considered perverse verdicts; thus it controlled all the justice in the kingdom." Chief Justices Coke, Crew, and Heath were all dismissed. Maitland, *The Constitutional History of England*, 263, 267–272.

¹⁶ For more on penalties that moneylenders faced for not cooperating with the English Crown, see Richard Cust, *The Forced Loan and English Politics, 1626–1628* (Oxford: Clarendon Press, 1987).

power forty-five years later, but he again faced a united opposition, resulting in the Glorious Revolution of 1688. Numerous institutional reforms further curtailed the arbitrary powers of the Crown and established parliamentary supremacy in law making and financial matters. Foremost among these institutional changes were judicial reforms designed to guarantee the independence of the courts from interference by the Crown.

By providing an institutional check on the power of the Crown, the independent judiciary enabled the Crown to make credible commitments that loans to the state would be repaid. Confidence in the institutional reforms was reflected in an impressive drop in interest rates on loans extended to the Crown. Within ten years of the Glorious Revolution of 1688, interest rates on new loans fell from 14 percent to 8 percent and thereafter fell to 3 percent.¹⁷ With the Crown's ability to establish credible commitments through new institutional safeguards on the property rights of creditors, it was able to raise huge sums of money to finance the state-building project at home and a new war abroad with France. Within eight years of the Glorious Revolution, government spending power increased fourfold, thanks to the cooperative assistance of domestic creditors.¹⁸

The French Crown had the same problem making credible commitments. Just as the English Crown had manipulated judicial structures in order to renege on its debts, the French monarchy used its overwhelming political influence to take loans and then renege on its obligations during times of financial crisis. The main judicial tool of the French Crown was a series of royal tribunals called *Chambres de Justice*. Judges serving on these *Chambres* were handpicked by the Crown and served at the king's behest. Ostensibly called to session to root out corruption, these *Chambres* were designed to cancel debts that the Crown was unable or unwilling to service. At least fourteen *Chambres de Justice* were held between the sixteenth and eighteenth centuries.¹⁹ According to Root,

These courts were created to drum up public support so that the crown could cancel its debts to private financiers. Such prosecutions generally set off a wave of private bankruptcies among the financiers. Even the vague threat of punishment for ill-defined crimes could cause an

¹⁷ North and Weingast, 824.

¹⁸ *Ibid.*, 822.

¹⁹ Philip Hoffman, "Early Modern France, 1450–1700," in *Fiscal Crises, Liberty, and Representative Government, 1450–1789*, eds. Philip Hoffman and Kathryn Norberg (Stanford: Stanford University Press, 1994), 233.

individual financier to lose his credibility among his peers and force him into bankruptcy.²⁰

The fear of prosecution by these *Chambres* was a major disincentive for financiers to extend new loans to the king. This drove up interest rates that the Crown had to pay to attract the cooperation of financiers. As in England, the normal interest rate for loans among individuals throughout this period typically ranged from 4.5 percent to 8 percent. However, interest rates on loans to the Crown were significantly higher, reaching as high as 15 percent to 25 percent during the reign of Louis XIV.²¹ In turn, these high interest rates increased the incentive for the Crown to renege on its obligations, creating a vicious circle. Eventually, the French Crown was able to foster corporate institutions that allowed creditors to pool their loans to the Crown, thereby easing somewhat the financial risk posed to creditors and increasing the difficulty for the Crown to renege on its commitments.²² However, these institutional innovations were insufficient to correct the underlying problems of concentrated and unchecked power in the hands of the French Crown.

Ironically, absolute power undermined the ability of the French Crown to mobilize the resources required to defend French national interests vis-à-vis England. The “weaker” English state was better able to extend credible commitments to moneylenders after the Glorious Revolution because of a strengthened Parliament and, equally important, *independent judicial institutions*. These resources empowered the English state to generate more income for state expansion than did the French absolutist state. With these resources, England was able to field a formidable military and ultimately defeat the French in almost every conflict during this period, establishing England as the unquestioned hegemon.

In sum, the historical record points to the fact that judicial checks on absolute power were essentially the result of a structural balance of power

²⁰ Hilton Root, “Tying the King’s Hands: Credible Commitments and Royal Fiscal Policy During the Old Regime,” *Rationality and Society* (October 1989): 246. According to Root, for example, “Samuel Bernard loaned Louis XIV 15 million livres in 1703, 20 million in 1704, and 30 million in 1708. When Bernard refused further advances in 1709, he was denied payments on the outstanding debt. Unable to repay his creditors, Bernard went into bankruptcy. After the war he was able to recover what he was owed only after agreeing to a fine of 6 million livres,” Root, 255.

²¹ Hoffman, “Early Modern France,” 234. Hoffman also notes that interest rates often peaked during times of war or political crisis when the probability of the Crown renegeing on its promises was highest.

²² See Root, “Tying the King’s Hands,” for more on these innovations.

between the Crown and Parliament. This balance of power resulted in a *political compromise* between the Crown and Parliament, placing England in the fortuitous position of establishing the right mix of institutions and enabling the state to provide credible commitments to domestic creditors. To be sure, the institutional reforms implemented after the Glorious Revolution were the result of intentional design, but they would not have been possible or sustainable if they had not been backed by a structural balance of power between the Crown and the landed elite. Without the same balance of power, the French were unable (and the Crown remained unwilling) to mimic similar institutional constraints on its absolutist power until the period after the Revolution. At that time similar structural factors facilitated institutional reform and checks on state power.

Nevertheless, many economists tend to assume that economic institutions are the product of agreement between mutually assenting parties, made in order to reap common benefits, rather than understanding the institutional environment as the result of relative power differentials and political struggle.²³ Economists focus on the economic consequences of various property rights regimes, but most studies typically beg the question of what hinders the successful adoption of credible property rights institutions in the first place. Policy prescriptions are therefore relatively simplistic. Institutional reforms are assumed to be straightforward and self-enforcing because they are understood as representing equilibria of lowered transaction costs and more efficient economic exchange.

These assumptions mask the ability and the will of leaders to unilaterally undermine the very institutions that they created if and when those institutions threaten to undermine the political power of the regime. Authoritarian rulers constantly abort institutional reforms when those institutions are turned against them, and it is this political context that lies at the heart of the barriers to economic and political advancement throughout much of the developing world.

²³ Robert Bates makes this point well when he explains that “the new institutional economics is profoundly apolitical. Institutions represent agreements or conventions chosen by voluntarily transacting parties in efforts to secure mutually welfare-enhancing outcomes. Each agent is assumed to be autonomous; each agreement voluntarily entered into by mutually assenting parties . . . what is omitted from the accounts of the new institutionalists, then, is that institutions are often imposed rather than chosen. . . .” Robert Bates, “Social Dilemmas and Rational Individuals: An Assessment of the New Institutionalism,” in Harriss, Hunter, and Lewis, *The New Institutional Economics and Third World Development*, 46.

This critique does not mean to imply that institutional protections on property rights are not vital to economic growth. They most certainly are. However, the focus on comparative statics rather than evolving dynamics of contention leads many economists to underestimate the challenge of sustained institutional reform. When traced over time, the Egyptian case makes sense of *how* actors and institutions transform one another over time and *why* authoritarian leaders frequently undermine the same state institutions that were established to advance their interests only years earlier.

INSTITUTIONAL CREATION, EVOLVING DYNAMICS
OF CONTENTION, AND THE BREAKDOWN
OF INSTITUTIONAL REFORMS

The Paradoxes of Power

The evidence presented in Chapter 3 indicates that the establishment of an independent constitutional court and the revival of the administrative courts under Sadat were designed to counteract the pathologies of unrestrained authoritarian rule. The nationalization of much of the private sector and the elimination of all constraints on executive power during the Nasser years produced a massive exodus of capital. Faced with budget shortfalls and a crumbling economy after the failure of Nasser's socialist experiment, Anwar Sadat turned to private investment. However, Sadat faced an uphill battle in convincing wary investors that their assets would be safe from state seizure or adverse legislation after entering the Egyptian market. After the failure of a ten-year effort to attract investment through tax incentives and other short-term inducements, the government established a surprisingly independent court empowered to perform judicial review. The Supreme Constitutional Court provided long sought-after institutional guarantees on property rights.

Similarly, Sadat rehabilitated the battered administrative courts so they could police the bureaucracy and serve as an avenue for individuals to expose corruption. The accelerated breakdown in administrative discipline was a paradoxical result of the lack of transparency that is endemic to authoritarian rule, as well as the rapid expansion of the state bureaucracy. The administrative courts increased the accountability of government bureaucrats, enabled the regime to monitor and discipline administrators diverging from their state-proscribed mandates, and promoted the coordination of state policy. The regime returned substantial control over

appointments, promotions, and other internal functions to the courts, all of which were weakened or completely stripped by presidential decree two decades earlier. The institutional capacity of the administrative courts was also bolstered through the expansion of courts of first instance and appeals courts throughout the country. The new Supreme Constitutional Court, the reformed administrative courts, and the accompanying rhetoric around the rule of law also enabled Sadat to build an alternate legitimizing narrative and to distance himself from the substantive failures of the Nasser regime.

The political dynamics that drove the adoption of relatively autonomous judicial institutions in Egypt share striking similarities with the comparative cases explored in Chapter 2. With unchecked power, authoritarian regimes have difficulty providing credible commitments to the protection of property rights and therefore have difficulty stimulating private investment. Independent courts, particularly those with powers of judicial review, enable rulers to highlight institutional safeguards on property rights. Similarly, authoritarian rulers paradoxically face difficulty in maintaining order and discipline in their administrative hierarchies because of aggravated principal-agent problems. Once again, administrative courts can help strengthen compliance within the state's own bureaucratic machinery. The Egyptian case additionally provides a detailed illustration of how the delegation of controversial reforms to the courts enables rulers to reduce the political cost of their implementation, in a fashion that is strikingly similar to judicial delegation in democratic states. With power fused into a single, dominant regime, unpopular policies are somewhat more costly to adopt because responsibility cannot be shifted onto other institutions. Here again, delegation to the courts enables rulers to mitigate the political cost of controversial reforms. Finally, unlike democratic systems, regime legitimacy is linked almost exclusively to the success or failure of specific policy objectives rather than to procedural legitimacy, but judicial institutions help bolster a regime's claim to "legal" legitimacy, particularly in the wake of major failures in policy.

Evolving Dynamics of Contention

Judicial reforms were initiated by the Egyptian government to counteract the pathologies of authoritarian rule, but the courts themselves introduced new challenges. From its first year of operation, political activists began to use the SCC as an avenue to challenge the government on a wide variety of political issues. The rulings examined in Chapters 4–6 illustrate how

the Supreme Constitutional Court carved out a space for civil society by restoring political rights and partially dismantling the regime's corporatist system of control. Synergies soon emerged between judges wishing to strengthen the rule of law (and expand their institutional mandate) and activists intent on using the courts to effect political change. Opposition activists monitored and documented human and civil rights violations, they initiated the constitutional petitions that fueled the Court's expanded exercise of judicial review, and they defended SCC independence as best they could when the Court was threatened by the regime.

It is remarkable how quickly rights groups mobilized through judicial institutions as a result of the changing opportunity structure. In the mid-1990s, the nascent human rights movement had only begun to use litigation as a strategy to challenge the government, but the speed with which the movement built its capacity is clear when one reviews Bruce Rutherford's assessment of public interest litigation in Egypt in 1996. At that time, Rutherford reported that

the effectiveness of [court] rulings has been constrained by several factors. The most important is the failure of civil society groups to utilize the courts as vehicles for political change. The most obvious candidates to utilize the courts are human rights organizations, which have a firm commitment to law and civil rights and which are often founded and staffed by lawyers. However, as of 1996, none of the human rights groups in Cairo had a strategy for using the courts to advance specific rights. None had a staff for the preparation of cases or a budget to support a judicial strategy.²⁴

There were, in fact, a few organizations that were initiating litigation by 1996, most notably the Nadim Center for the Management and Rehabilitation of Victims of Violence (beginning in 1993), the Center for Human Rights Legal Aid (1994), the Center for Women's Legal Aid (1995), and the Land Center for Human Rights (1996). However, Rutherford is quite correct that until 1996, these organizations only initiated litigation on behalf of individuals with the objective of providing assistance in the particular case at hand. It was not until the landmark 1997 Supreme Constitutional Court ruling on article 195 of the Penal Code, a major case that CHRLA lawyers had helped prepare, that human rights activists began contesting laws on constitutional grounds in order to induce systemic changes.²⁵

²⁴ Bruce Rutherford, *The Struggle for Constitutionalism in Egypt* (Ph.D. dissertation, Yale University, 1999), 393–394.

²⁵ Case 59, Judicial Year 18, issued February 1, 1997, *al-Mahkama*, Vol. 8, 286–309.

The capacity of the human rights movement was vastly expanded as a result of increased funding streams from international human rights organizations and other foreign donors. Links to transnational rights networks also enabled activists to leverage international pressure on the Egyptian government. However, the resources provided by transnational rights networks were not costless. With their budgets almost entirely dependent on transnational sources, rights organizations were vulnerable to government-imposed restrictions on foreign funding as well as smear campaigns in the state press.

The internationalization of legal struggles was similarly double edged for the Supreme Constitutional Court itself. As explored in Chapter 5, the SCC expanded its mandate in the 1990s by incorporating international legal principles and taking seriously the international treaty commitments of the Egyptian government. International legal principles helped the Court provide progressive interpretations of constitutional provisions, but the use of foreign legal precedents left the Court vulnerable to similar charges of sedition.

Far from seditious, the Supreme Constitutional Court was careful not to issue rulings that challenged the regime's core legal mechanisms for maintaining political domination. The Court ruled the Emergency State Security Courts constitutional, and it did not consider petitions on the constitutionality of civilian transfers to military courts. Overlapping laws and regulations, vague legal provisions, and quasi-legal tools, such as the practice of recurrent detention, also afforded the regime ample tools to sideline political opponents. Ironically, illiberal legal mechanisms facilitated judicial activism in other areas of political life. The courts were able to push an incremental liberal agenda because the regime remained confident that it ultimately retained full control over its political opponents. Supreme Constitutional Court activism may therefore be characterized as "bounded activism" or "insulated liberalism." SCC rulings shaped state-society interaction and affected state policy, but the Court was contained within a fundamentally illiberal political system. This dynamic is paradoxical, but not at all unique to Egypt. As illustrated in Chapter 2, the more deference that judicial institutions pay to any regime's core political interests, the more they are allowed to expand rights provisions at the margins of political life and, as a result, the more they bestow a sense of legitimacy on the political order.

The regime also tolerated moderate degrees of SCC activism because of the Court's important role in reestablishing a credible property rights system. SCC rulings in the areas of taxation and compensation for Nasser-era nationalizations pushed far beyond the government's expectations.

But even when the government was defeated in court, it could point to a credible property rights system to drum up investment.

More important, the regime tolerated moderate degrees of SCC activism in the political sphere because the Court proved to be a useful ally in the economic reform program. The SCC blocked constitutional challenges to crucial aspects of the structural adjustment program, such as the privatization and agricultural reform programs. In other areas of the economy, the SCC assumed a proactive role in dismantling the populist economic policies of the Egyptian state. In the urban housing and commercial properties markets, in particular, the Court issued dozens of rulings incrementally dismantling rent-control laws. Rent control was arguably the most explosive aspect of economic reform because it affected the day-to-day lives of tens of millions of citizens. Just as the U.S. Supreme Court shaped the course of economic development through less conspicuous methods over the past century, the Supreme Constitutional Court has played a profound role in shaping Egypt's economic development.²⁶

The Egyptian case suggests a far more complicated relationship between economic liberalization and political/legal reform than is commonly articulated both in the academic literature and by development practitioners. Economic reforms did not act as a uniform catalyst for either democratization or political retrenchment. Instead, alternate phases of the economic reform program produced contradictory impulses on the part of the government. Whereas the return of the private sector acted as a catalyst for the establishment of liberal legal institutions in the 1970s, the structural adjustment program initiated in 1991 had the opposite effect. Chapters 5 and 6 document how the regime's structural adjustment program was accompanied by a comprehensive agenda of political retrenchment.²⁷ The Egyptian regime tightened the screws on political and associational life throughout the decade in order to maintain control in the face of reduced state services at the local level, weakened patronage networks, and aggravated social grievances. The Egyptian case illustrates how judicial institutions established during one phase of the economic

²⁶ In the American context, courts played key roles in privileging corporate legal interests over small-scale enterprises in nineteenth-century America (Horowitz), they restrained the trajectory of the labor movement (Hattam), and they crushed the Populist movement at the turn of the century (Westin). Morton Horowitz, *The Transformation of American Law, 1780–1860* (Cambridge: Harvard University Press, 1977); Victoria Hattam, *Labor Visions and State Power* (Princeton: Princeton University Press, 1997); Alan Westin, "The Supreme Court, the Populist Movement, and the Campaign of 1896." *Journal of Politics* (1953).

²⁷ This process is also well documented in Eberhard Kienle, *A Grand Delusion: Democracy and Economic Reform in Egypt* (London: I.B. Tauris, 2000).

liberalization program were used by political activists as the primary avenue to fight regime retrenchment in the second phase of economic reform.

Aborting Institutional Reform

Opposition parties and rights groups used litigation as their primary strategy to challenge political retrenchment, but the regime's discomfort with the Supreme Constitutional Court was clearly evident by the late 1990s. Despite overt threats that the government might repeal the Court's power of judicial review, the SCC issued two of its boldest rulings, striking down the government's new NGO law and ordering full judicial monitoring of elections. Both rulings were brave attempts to defend the Court's judicial support network, but they were undoubtedly the reason why the government packed the Court the following year. The SCC had overstepped by challenging the core legal mechanisms through which the regime preserves its dominance. The SCC did not have many palatable options. It was essentially faced with the dilemma of either sitting on the sidelines while rights organizations were crushed by the new NGO law, or attempt an intervention to preserve its support network. Court supporters mobilized as best they could to meet the challenge to SCC independence, but their exclusive reliance on litigation without more direct forms of political action proved insufficient to block regime retrenchment.

The tragedy of these events goes beyond the obvious short-term implications for Egyptian political life. The loss of Supreme Constitutional Court independence is an unambiguous example of the tendency of authoritarian regimes to undermine their own institutions at the expense of economic development. The government had established the SCC with the power of judicial review in order to provide security to private capital, and virtually every foreign investment guide produced from the 1970s onward highlighted the integrity of the legal system. The 2001 foreign investment guide assured investors that

Egypt has a long established court system and judiciary. Under the terms of the Egyptian Constitution, the Egyptian judiciary is independent and subject to no other authority but the law. . . . The Supreme Constitutional Court is an independent legal entity with competence to rule upon the legality of legislation, thereby upholding the principle that the State is subject to the law.²⁸

²⁸ Marat Terterov, ed., *Doing Business with Egypt* [Compiled under the guidance of the Egyptian Ministry of Economy and Foreign Trade] (London: Kogan Page, 2001) 193–196; 26–31.

The investment guide drew particular attention to the fact that “the Supreme Constitutional Court has judicial control over the constitutionality of laws and regulations and has shown itself willing to exercise that power.”²⁹ Ironically, the regime broke SCC independence with the appointment of regime insider Fathi Nagib only months after this investment guide was published. During the same period, real GDP growth slowed more than threefold, from a high of 6 percent in 1999 to only 1.8 percent in 2003. Likewise, foreign direct investment shrank sixfold, from \$1.2 billion per year in 2000 to only \$200 million in 2003. Of course, these economic indicators should not be taken as the direct outcome of Nagib’s appointment. The economic downturn had to do with the general investment climate and the concern among investors that the government was not committed to a full implementation of the privatization and structural adjustment programs.³⁰

In other words, the government and investors sought to minimize different aspects of political risk. For the regime, the perennial stumbling block to thoroughgoing economic reform was the risk of political instability, and it was precisely this political calculation on the part of the regime that investors sought to shield themselves from. The unilateral reversal of fundamental economic reforms, coupled with the loss of independent legal institutions, were troubling developments from the perspective of investors. The Supreme Constitutional Court had acted as the most important institutional check on the government for over two decades, but court packing with regime insiders inspired little confidence that the SCC would continue to play that role in the future.

Judicial reform, the dynamics of state-society contention, and the ultimate collapse of SCC independence in Egypt call into question the straightforward policy prescriptions offered by the World Bank, the IMF, and many economists. The Egyptian case lends considerable support to institutionalist claims that institutional guarantees to property rights are important prerequisites to investment and long-term economic growth. However, the Egyptian case also suggests that a decontextualized focus on institutions captures only part of the story. Economists tend to assume that, once institutional reforms are implemented, they are easily sustained because they shape new equilibria of lowered transaction costs and more efficient economic exchange. In the Egyptian case, new institutionalists

²⁹ *Ibid.*, 27.

³⁰ The slowing pace of the economic reform program had also rendered the regime less dependent on pro-liberalization rulings from the SCC, reducing the cost of reining in the Court.

would observe that, by establishing an independent court, the government benefited from increased investment, a larger tax base, and long-term political viability. Investors, on the other hand, benefited from more secure property rights and more investment opportunities. But, by ignoring how groups mobilize through the courts, new institutionalists fail to account for the evolving dynamics of state-society contention and the ability and willingness of authoritarian regimes to abort institutional reforms when their power is threatened.³¹ It is this lack of attention to the broader political context that leads new institutionalists to greatly underestimate the challenges of sustained efforts toward institutional reform in developing countries.

The Egyptian case and the comparative cases in Chapter 2 reveal that authoritarian regimes sometimes establish autonomous judicial institutions to address the pathologies endemic in many of their states. These institutions inevitably lead to a judicialization of politics, as activists mobilize through the courts and judges seek to guard and expand their institutional mandate. Regimes work to contain judicial activism, but in some cases they will find that the political cost of autonomous courts comes to outweigh the benefit that they provide in terms of attracting investment, maintaining discipline in the state's bureaucratic machinery, defraying the cost of controversial policies, and bolstering a regime's claim to some degree of procedural legitimacy. If and when that day comes, the strength of judicial support networks is put to the test. Given power asymmetries and the general weakness of civil society in the developing world (itself the purposive result of regime dominance), judicial support networks typically collapse under the weight of determined regime retrenchment. These dynamics define the nature of judicial politics in authoritarian political settings, and they also underline the less apparent barriers to institutional development, economic growth, and democracy in the developing world. Rather than automatically reinforcing one another in

³¹ The dynamics of reforms initiated to advance administrative rationality followed by policy reversals to preserve political power have been noted in a variety of contexts outside judicial politics, including the devolution of administrative functions to local government followed by reversals under Nasser, Sadat, and Mubarak (Mayfield, 1996) as well as pendulum-like swings in government policy toward community-based development networks (Moustafa, 2002). James B. Mayfield, *Local Government in Egypt: Structure, Process, and the Challenges of Reform* (Cairo: American University in Cairo Press, 1996); Tamir Moustafa, "The Dilemmas of Decentralization and Community Development in Authoritarian Contexts." *Journal of Public and International Affairs* 13 (2002): 123–144.

a virtuous cycle, judicial institutions, markets, and the state often work against one another. The Egyptian case illustrates how the same regime can undermine rule-of-law institutions at mid-century, resuscitate them some twenty years later, and work to undermine them a second time at the close of the century as it jealously guards its grip on power.

APPENDIX A

SCC Justices and Commissioners¹

SCC Chief Justice (1979–2006)

Ahmed Mamduh ‘Atiya	09/10/1979–31/08/1982*
Faruq Mahmud Seif al-Nasr	19/09/1982–30/06/1983*
Dr. Fathi ‘Abd al-Sabur	01/07/1983–30/06/1984*
Muhammad ‘Ali Ragheb Baligh	01/07/1984–11/07/1987*
Mahmud Hamdy ‘Abd al-‘Aziz	15/09/1987–06/10/1987†
Mamduh Mustafa Hasan	13/10/1987–30/06/1991*
Dr. ‘Awad Muhammad ‘Awad al-Murr	01/07/1991–30/06/1998*
Muhammad Wali al-Din Galal	09/09/1998–19/08/2001*
Dr. Muhammad Fathi Nagib	20/08/2001–12/08/2003†
Mamduh Mohi al-Din Mara‘i	26/08/2003–30/06/2006*
Maher ‘Abd al-Wahed	01/07/2006–

*reached mandatory retirement age †passed away while in office

SCC Justices (1979–2006)

‘Ali Ahmed Kamal	09/10/1979–06/20/1980
Abu Bakr Muhammad ‘Atiya	09/10/1979–06/30/1980
Faruq Mahmud Seif al-Nasr	09/10/1979–09/18/1982
Yaqut ‘Abd al-Hady al-Ashmawy	09/10/1979–09/30/1981
Muhammad Fahmy Hasan ‘Ashry	09/10/1979–09/30/1981
Kamal Salama ‘Abd Allah	09/10/1979–09/19/1982
Dr. Fathy ‘Abd al-Sabur ‘Abd Allah	09/10/1979–06/30/1983
Mahmud Hasan Husayn	09/10/1979–06/30/1984
Muhammad ‘Ali Ragheb Baligh	06/08/1980–09/14/1987

¹ Source: *al-Mabkama al-Dusturiyya al-‘Ulia*, Vol. 1–10; correspondence with the Supreme Constitutional Court 22/10/2006.

Mahmud Hamdy ‘Abd al-‘Aziz	06/08/1980–09/15/1987
Mustafa Gamil Morsy	06/08/1980–09/15/1987
Mamduh Mustafa Hasan	06/08/1980–10/12/1987
Muhammad ‘Abd al-Khalq al-Nadi	29/06/1981–06/30/1984
Dr. Munir Amin ‘Abd al-Magid	29/06/1981–09/25/1989
Rabih Lutfi Gum‘a	28/06/1982–09/28/1988
Fawzy Asa‘d Murqus	28/06/1982–06/30/1990
Muhammad Kamal Mahfuz	18/03/1983–06/30/1990
Sherif Burham Nur	24/09/1983–08/22/1989
Dr. ‘Awad Muhammad ‘Awad al-Murr	21/07/1984–06/30/1991
Dr. Muhammad Ibrahim Abu al-‘Aynayn	17/10/1984–06/30/1998
Wasil Ala‘ al-Din Ibrahim	26/11/1984–02/08/1990
Muhammad Wali al-Din Galal	02/10/1988–09/08/1998
Nehad ‘Abd al-Hamid Khalaf	02/10/1988–05/09/1998
Faruq ‘Abd al-Rahim Ghunim	09/10/1988–06/30/2000
Hamdy Muhammad Muhammad ‘Ali	09/10/1988–30/06/2006
‘Abd al-Rahman Nusayr	02/09/1990–08/07/2002 [†]
Sami Farag Yusef	02/09/1990–08/31/1999
Muhammad ‘Ali ‘Abd al-Wahid	18/12/1990–09/12/1992
Dr. ‘Abd al-Magid Muhammad Fayad	12/10/1991–06/30/2001
Maher ‘Ali Ahmed al-Behiry	12/10/1991–
Muhammad ‘Ali Seif al-Din	11/06/1992–
‘Adli Mahmud Mansur	17/12/1992–
Muhammad ‘Abd al-Qader ‘Abd Allah	17/12/1992–
‘Ali ‘Awad Muhammad Salah	08/11/1998–
Anwar Rashad Muhammad al-‘Asy	08/11/1998–
Dr. Hanify ‘Ali Gabaly	21/03/2001–
‘Abd al-Wahab ‘Abd al-Raziq Hasan	21/03/2001–
Ilham Nagib Nawar Girgis	02/10/2001–
Muhammad ‘Abd al-‘Aziz al-Shinawi	02/10/2001–
Maher Sami Yusef	02/10/2001–
al-Sayyid ‘Abd al-Mena‘m Hashish	02/10/2001–
Muhammad Khayry Taha ‘Abd al-Mutteleb	02/10/2001–
Sa‘id Mara‘i Muhammad Gad ‘Amr	22/10/2002–
Dr. ‘Adil ‘Omar Hafez Sherif	31/12/2002–
Tehany Muhammad al-Gabaly	25/01/2003–

Senior Members of the Commissioner’s Body (1979–2006)

‘Umar Hafez Sherif	09/10/1979–08/07/1981
Muhammad Kamal Mahfuz	07/25/1981–03/16/1983

Dr. 'Awad Muhammad 'Awad al-Murr	03/31/1983–07/20/1984
Dr. Ahmed Muhammad al-Hefni	03/10/1984–08/15/1989
'Abd al-Rahman Nusayr	08/19/1989–01/09/1990
al-Sayyid 'Abd al-Rahim 'Amara	05/20/1992–
'Abd al-Wahab 'Abd al-Raziq Hasan	01/27/1994–03/20/2001
Dr. Hanafy 'Ali Gabaly	07/16/1996–03/20/2001
Muhammad Khayry Taha 'Abd al-Mutteleb	08/31/1998–01/10/2001
Sa'id Mara'i Muhammad Gad 'Amr	09/29/1999–21/10/2002
Dr. 'Adel Omar Hafez Sherif	01/08/2001–30/12/2002
Nagib Gamal al-Din 'Ulama	01/08/2001–
Ragab 'Abd al-Hakim Salim	01/08/2001–
Hamdan Hasan Muhammad Fahmy	01/08/2001–
Mahmud Muhammad 'Ali Ghunim	12/12/2002–

Members of the Commissioner's Body (1979–2006)

Muhammad Kamal Mahfuz	09/10/1979–07/24/1981
Dr. 'Awad Muhammad 'Awad al-Murr	09/10/1979–03/30/1983
Dr. Ahmed Muhammad al-Hefny	09/10/1979–10/29/1984
Dr. Ahmed Othman 'Ayad	09/10/1979–06/30/1987
Dr. Muhammad Ibrahim Abu al-'Aynayn	09/10/1979–10/17/1984
'Abd al-Rahman Nusayr	10/30/1983–08/18/1989
al-Sayyid 'Abd al-Rahim 'Amara	04/26/1984–09/01/1991
'Abd al-Wahab 'Abd al-Razeq Hasan	09/20/1988–01/26/1994
Dr. Hanify 'Ali Gibaly	09/20/1988–07/15/1996
Muhammad Khayry Taha 'Abd al-Mutteleb	04/05/1989–07/30/1997
Sa'id Mara'i Muhammad Gad 'Amr	07/05/1990–09/28/1999
Dr. 'Adel Omar Hafez Sherif	05/01/1993–07/31/2001
Nagib Gamal al-Din 'Ulama	01/15/1993–07/31/2001
Rageb 'Abd al-Hakim Selim	07/15/1993–07/31/2001
Hamdan Hasan Muhammad Fahmy	11/30/1993–07/31/2001
Mahmud Muhammad 'Ali Ghanim	10/10/2002–11/12/2002
Hatem Hamad 'Abd Allah Begatu	04/01/2006–
Dr. Muhammad 'Emad 'Abd al-Hamid al-Nagar	04/01/2006–
Dr. 'Abd al-'Aziz Muhammad Salman	04/01/2006–
Faten 'Abd al-'Aziz al-Shar'awi	04/01/2006–
Dr. Tareq 'Abd al-Gawad Shibl	04/01/2006–
Tareq 'Abd al-'Alim al-Sayyid Abu al-'Ata	09/05/2006–

APPENDIX B

The Egyptian Constitution¹

Constitutional Proclamation

We, the people of Egypt, who have been toiling on this glorious land since the dawn of history and civilization, we the people working in Egypt's villages, fields, cities, factories, centers of education and industry in any field of work which contributes to the creation of life on its soil or plays a part in the honor of defending this land,

We, the people who believe in its spiritual and immortal heritage and who are confident in our profound faith and cherish the honor of man and of humanity at large,

We, the people who in addition to preserving the legacy of history, bear the responsibility of great present and future objectives whose seeds are embedded in the long and arduous struggle, with which the banners of liberty, socialism and unity have been hoisted along the great march of the Arab Nation,

We, the Egyptian people, in the name of God and with His assistance pledge to indefinitely and unconditionally exert every effort to realize:

Peace to our world

Being determined that peace can only be based on justice and that political and social progress of all peoples can only be realized through the freedom and independent will of these peoples, and that any civilization is not worthy of its name unless it is free from exploitation whatever its form.

¹ Official English translation, published by the State Information Authority of the Arab Republic of Egypt, found at www.egypt.gov.eg/english/laws/Constitution/index.asp).

Unity

The hope of our Arab Nation being certain that Arab Unity is a call of history and future and an inevitable destiny which can only materialize through an Arab Nation capable of warding off any threat whatever may be the source or the pretexts justifying it.

The Constant Development Of Life In Our Nation

Being convinced that the true challenge confronting nations is the realization of progress and that such progress does not occur automatically or through slogans alone, but that the driving force behind it is the release of all potentials of creativity and originality in our people, who have asserted at all times their contribution to civilization and humanity through work alone.

Our people have passed through successive experiences, meantime offering rich experiences on both the national and international levels, by which they have been guided. These experiences finally took shape in the basic documentations of the July, 23rd Revolution led by the alliance of the working forces of our struggling people. This people have been able, through deep awareness and refined sensibility, to retain the genuine core of this revolution and to continuously rectify its path and to realize through it full integration between science and faith, political and social freedom, national independence and affiliation on the one hand and the worldwide struggle of humanity for political economic, cultural and intellectual freedom and the fight against all forces and remnants of regression domination and exploitation on the other hand.

Freedom For The Humanity Of The Egyptian Man

Having realized that man's humanity and dignity are the torches that guide and direct the course of the enormous development of mankind towards its supreme ideals.

The dignity of every individual is natural reflection of the dignity of his nation, for each individual is a cornerstone in the edifice of the homeland. This homeland derives its strength and prestige from the value of each individual, his activity and dignity.

The sovereignty of law is not only a guarantee for the freedom of the individual but is also the sole basis for the legality of authority.

The alliance of the popular working forces is not a means for social conflict towards historical development, it is, in this modern age, with its climate and ways, a safety valve protecting the unity of the working powers of the nation and eliminating contradictions within these forces through democratic interaction.

We the working masses of the people of Egypt – out of determination, confidence and faith in all our national and international responsibilities, and in acknowledgment of God’s right and His messages, and in recognition of the right of our nation as well as of the principle and responsibility of mankind, and in the name of God and with His assistance – declare on the Eleventh of September 1971 that we accept and grant ourselves this Constitution, asserting our firm determination to defend and protect it, assuring our respect for it.

Chapter One: The State

*Article 1**: The Arab Republic of Egypt is a Socialist Democratic State based on the alliance of the working forces of the people. The Egyptian people are part of the Arab Nation and work for the realization of its comprehensive unity.

*Article 2**: Islam is the Religion of the State. Arabic is its official language, and the principal source of legislation is Islamic Jurisprudence (Shari’a).

Article 3: Sovereignty is for the people alone who will practice and protect this sovereignty and safeguard national unity in the manner specified by the Constitution.

*Article 4**: The economic foundation of the Arab Republic of Egypt is the socialist democratic system based on sufficiency and justice, in a manner preventing exploitation, narrowing the gap between incomes, protecting legitimate earnings and guaranteeing justice in the distribution of public responsibilities and expenditures.

*Article 5**: The political regime of the Arab Republic of Egypt is based upon the multi-party system within the framework of the basic principles and components of the Egyptian society stipulated by the Constitution. Political parties shall be organized by law.

Article 6: Egyptian Nationality is defined by law.

Chapter Two

Part One: Social and Moral Constituents

Article 7: Social solidarity is the basis of society.

Article 8: The State shall guarantee equality of opportunity to all Egyptians.

Article 9: The family is the basis of the society founded on religion, morality and patriotism. The State is keen to preserve the genuine character of the Egyptian family – with all values and traditions represented by it – while affirming and promoting this character in the interplay of relations within the Egyptian society.

Article 10: The State shall guarantee the protection of motherhood and childhood, look after children and youth, and provide the suitable conditions for the development of their talents.

Article 11: The State shall guarantee coordination between woman's duties towards her family and her work in the society, considering her equal to man in the political, social, cultural and economic spheres without detriment to the rules of Islamic jurisprudence (Shari'a).

Article 12: Society shall be committed to safeguarding and protecting morals, promoting the genuine Egyptian traditions and abiding by the high standards of religious education, moral and national values, the historical heritage of the people, scientific facts, socialist conduct and public manners within the limits of the law. The State is committed to abiding by these principles and promoting them.

Article 13: Work is a right, a duty and an honor ensured by the State. Distinguished workers shall be worthy of the appreciation of the State and the society. No work shall be imposed on citizens, except by virtue of the law, for the performance of a public service and in return for a fair remuneration.

Article 14: Citizens are entitled to public offices, which are assigned to those who shall occupy them in the service of people. The State guarantees the protection of public officers in the performance of their duties in safeguarding the interests of the people. They may not be dismissed by other than the disciplinary way except in the cases specified by the law.

Article 15: War veterans and those injured during wars or because of them, martyrs' wives and children shall have priority in work opportunities according to the law.

Article 16: The State shall guarantee cultural, social and health services and shall work to ensure them particularly for villagers in an easy and regular manner in order to raise their standard.

Article 17: The State shall guarantee social and health insurance services. All citizens shall have the right to pensions in cases of incapacity, unemployment, and old-age in accordance with the law.

Article 18: Education is a right guaranteed by the State. It is obligatory in the primary stage. The State shall work to extend obligation to other stages. The State shall supervise all branches of education and guarantee the independence of universities and scientific research centers, with a view to linking all this with the requirements of society and production.

Article 19: Religious education shall be a principal subject in the courses of general education.

Article 20: Education in the State: Educational institutions shall be free of charge in their various stages.

Article 21: Combating illiteracy shall be a national duty for which all the people's capacity shall be mobilized.

Article 22: The institution of civil titles shall be prohibited.

Part Two: Economic Constituents

Article 23: The national economy shall be organized in accordance with a comprehensive development plan which ensures raising the national income, fair distribution, raising the standard of living, solving the problem of unemployment, increasing work opportunities, connecting wages with production, fixing a minimum and maximum limit for wages in a manner that guarantees lessening the disparities between incomes.

Article 24: The people shall control all means of production and direct their surplus in accordance with development plan laid down by the State.

Article 25: Every citizen shall have a share in the national revenue to be defined by law in accordance with his work or his unexploiting ownership.

Article 26: Workers shall have a share in the management and profits of projects. They shall be committed to the development of production

and the implementation of the plan in their production units, in accordance with the law. Protecting the means of production is a national duty. Workers shall be represented on the boards of directors of the public sector units by at least 50% of the number of members of these boards. The law shall guarantee for the small farmers and small craftsmen 80% of the membership on the boards of directors of the agricultural and industrial co-operatives.

Article 27: Beneficiaries shall participate in the management of the services projects of public interest and their supervision in accordance with the law.

Article 28: The State shall look after the co-operative establishments in all their forms and encourage handicrafts with a view to developing production and raising income. The State shall endeavor to support agricultural co-operatives according to modern scientific bases.

Article 29: Ownership shall be under the supervision of the people and the protection of the State. There are three kinds of ownership: public ownership, co-operative ownership and private ownership.

Article 30: Public ownership is the ownership of the people and it is confirmed by the continuous support of the public sector. The public sector shall be the vanguard of progress in all spheres and shall assume the main responsibility in the development plan.

Article 31: Co-operative ownership is the ownership of the co-operative societies. The law shall guarantee its protection and self-management.

Article 32: Private ownership shall be represented by the unexploiting capital. The law shall organize the performance of its social function in the service of the national economy within the framework of the development plan, without deviation or exploitation. The ways of its utilization should not contradict the general welfare of the people.

Article 33: Public ownership shall have its sanctity. Its protection and support shall be the duty of every citizen in accordance with the law as it is considered the mainstay of the strength of the homeland, a basis for the socialist system and a source of prosperity for the people.

Article 34: Private ownership shall be safeguarded and may not be placed under sequestration except in the cases defined by law and in accordance with a judicial decision. It may not be expropriated except for the general good and against a fair compensation as defined by law. The right of inheritance shall be guaranteed in it.

Article 35: Nationalization shall not be allowed except for considerations of public interest and in accordance with a law and against compensation.

Article 36: General confiscation of funds shall be prohibited. Private confiscation shall not be allowed except by a judicial decision.

Article 37: The law shall fix the maximum limit of land ownership with a view to protecting the farmer and the agricultural laborer from exploitation and asserting the authority of the alliance of the people's working forces in villages.

Article 38: The tax system shall be based on social justice.

Article 39: Saving is a national duty protected, encouraged and organized by the State.

Chapter Three: Public Freedoms, Rights and Duties

Article 40: All citizens are equal before the law. They have equal public rights and duties without discrimination due to sex, ethnic origin, language, religion or creed.

Article 41: Individual freedom is a natural right not subject to violation except in cases of flagrante delicto. No person may be arrested, inspected, detained or have his freedom restricted in any way or be prevented from free movement except by an order necessitated by investigations and the preservation of public security. This order shall be given by the competent judge or the Public Prosecution in accordance with the provisions of the law.

Article 42: Any citizen arrested, detained or whose freedom is restricted shall be treated in a manner concomitant with the preservation of his dignity. No physical or moral harm is to be inflicted upon him. He may not be detained or imprisoned except in places defined by laws organizing prisons. If a confession is proved to have been made by a person under any of the aforementioned forms of duress or coercion, it shall be considered invalid and futile.

Article 43: Any medical or scientific experiment may not be performed on any person without his free consent.

Article 44: Homes shall have their sanctity and they may not be entered or inspected except by a causal judicial warrant as prescribed by the law.

Article 45: The law shall protect the inviolability of the private life of citizens. Correspondence, wires, telephone calls and other means of communication shall have their own sanctity and their secrecy shall be guaranteed. They may not be confiscated or monitored except by a causal judicial warrant and for a definite period and according to the provisions of the law.

Article 46: The State shall guarantee the freedom of belief and the freedom of practicing religious rights.

Article 47: Freedom of opinion shall be guaranteed. Every individual shall have the right to express his opinion and to publicize it verbally, in writing, by photography or by other means of expression within the limits of the law. Self criticism and constructive criticism shall guarantee the safety of the national structure.

Article 48: Liberty of the press, printing, publication and mass media shall be guaranteed. Censorship on newspapers shall be forbidden as well as notifying, suspending or canceling them by administrative methods. In a state of emergency or in time of war, a limited censorship may be imposed on the newspapers, publications and mass media in matters related to public safety or for purposes of national security in accordance with the law.

Article 49: The State shall guarantee for citizens the freedom of scientific research and literary, artistic and cultural creativity and provide the necessary means for encouraging their realization.

Article 50: No citizen shall be prohibited from residing in any place or be forced to reside in a particular place except in cases defined by law.

Article 51: No citizen may be deported from the country or prevented from returning to it.

Article 52: Citizens shall have the right to permanent or temporary emigration. The law shall regulate this right and the measures and conditions of emigration.

Article 53: The right to political asylum shall be granted by the State to every foreigner persecuted for defending the people's interests, human rights, peace or justice. The extradition of political refugees shall be prohibited.

Article 54: Citizens shall have the right to peaceful and unarmed private assembly, without the need for prior notice. Such private meetings should not be attended by security men. Public meetings, processions and gatherings shall be allowed within the limits of the law.

Article 55: Citizens shall have the right to form societies as defined by law. The establishment of societies whose activities are hostile to the social system, clandestine or have a military character shall be prohibited.

Article 56: The creation of syndicates and unions on democratic basis shall be guaranteed by law and shall have a legal person. The law regulates the participation of syndicates and unions in carrying out the social plans, and programs raising the standard of efficiency, consolidating socialist behavior among their members, and safeguarding their funds. They are responsible for questioning their members about their behavior in exercising their activities according to certain codes of morals, and for defending the rights and liberties of their members as defined by law.

Article 57: Any assault on individual freedom or on the inviolability of the private life of citizens and any other public rights and liberties guaranteed by the Constitution and the law shall be considered a crime, whose criminal and civil lawsuit is not liable to prescription. The State shall grant a fair compensation to the victim of such an assault.

Article 58: Defense of the motherland is a sacred duty and conscription shall be obligatory in accordance with the law.

Article 59: Safeguarding, consolidating and preserving the socialist gains shall be a national duty.

Article 60: Safeguarding national unity and keeping State secrets shall be the duty of every citizen.

Article 61: Payment of taxes and public imposts is a duty as defined by law.

Article 62: Citizens shall have the right to vote, nominate and express their opinions in referenda according to the provisions of the law. Their participation in public life is a national duty.

Article 63: Every individual shall have the right to address public authorities in writing and with his own signature. Addressing public authorities should not be in the name of groups with the exception of disciplinary organs and legal person.

Chapter Four: Sovereignty of the Law

Article 64: The Sovereignty of the law is the basis of State rule.

Article 65: The State shall be subject to law. The independence and immunity of the judicature are two basic guarantees to safeguard rights and liberties.

Article 66: Penalty shall be personal. There shall be no crime or penalty except by virtue of the law. No penalty shall be inflicted except by a judicial sentence. Penalty shall be inflicted only for acts committed subsequent to the promulgation of the law prescribing them.

Article 67: Any defendant is innocent until he is proved guilty before a legal court, in which he is granted the right to defend himself. Every person accused of a crime must be provided with counsel for his defense.

Article 68: The right to litigation is inalienable for all, and every citizen has the right to refer to his competent judge. The State shall guarantee the accessibility of the judicature organs to litigants, and the rapidity of starting on cases. Any provision in the law stipulating the immunity of any act or administrative decision from the control of the judicature shall be prohibited.

Article 69: The right of defense in person or by power of attorney shall be guaranteed. The law shall grant the financially incapable citizens the means to resort to justice and defend their rights.

Article 70: No penal lawsuit shall be sued except by an order from a judicature organ with the exception of cases defined by law.

Article 71: Any person arrested or detained shall be informed forthwith of the reasons for his arrest or his detention. He shall have the right to communicate with whoever he sees fit and inform them of what has taken place and to ask for help in the way organized by law. He must be notified, as soon as possible, with the charges directed against him. Any person may lodge a complaint to the courts against any measure taken to restrict his personal freedom. The Law shall regulate the right of complaint in a manner ensuring a decision regarding it within a definite period or else release shall be imperative.

Article 72: Sentences shall be passed and executed in the name of the people. Likewise, refraining from executing sentences or obstructing them on the part of the concerned civil servants shall be considered a crime

punishable by law. In this case, those whom the sentence is in favor of shall have the right to sue a direct penal lawsuit before the competent court.

Chapter Five

Part One: The Head of the State

Article 73: The Head of the State is the President of the Republic. He shall assert the sovereignty of the people, respect for the Constitution and the supremacy of the law. He shall safeguard national unity and the socialist gains and maintain the limits between authorities in a manner to ensure that each shall perform its role in the national action.

Article 74: If any danger threatens the national unity or the safety of the motherland or obstructs the constitutional role of the State institutions, the President of the Republic shall take urgent measures to face this danger, direct a statement to the people and conduct a referendum on those measures within sixty days of their adoption.

Article 75: The President of the Republic should be an Egyptian born to Egyptian parents and enjoy civil and political rights. His age must not be less than 40 Gregorian years.

Article 76: The People's Assembly shall nominate the President of the Republic. The nomination shall be referred to the people for a plebiscite. The nomination for the President of the Republic shall be made in the People's Assembly upon the proposal of at least one third of its members. The candidate who obtains two thirds of the votes of the members of the People's Assembly shall be referred to the people for a plebiscite. If he does not obtain the said majority the nomination process shall be repeated two days after the first vote. The candidate obtaining an absolute majority of the votes of the Assembly members shall be referred to the citizens for a plebiscite. The candidate shall be considered President of the Republic when he obtains an absolute majority of votes cast in the plebiscite. If the candidate does not obtain this majority, the Assembly shall propose the nomination of another candidate and the same procedure shall follow concerning his candidature and election.

Article 77:* The term of the presidency shall be six Gregorian years starting from the date of the announcement of result of the plebiscite. The President of the Republic may be re-elected for other successive terms.

Article 78: The procedures for the choice of a new President of the Republic shall begin sixty days before the expiration of the term of the President in office. The new President shall be selected at least one week before the expiration of the term. Should this term expire without the choice of a new President for whatever reason, the former President shall continue to exercise his functions until his successor is elected.

Article 79: Before exercising his functions, the President shall take the following oath before the People's Assembly: "I swear by Almighty God to uphold the Republican system with loyalty, to respect the Constitution and the law, and to look after the interests of the people fully and to safeguard the independence and territorial integrity of the motherland".

Article 80: The salary of the President of the Republic shall be fixed by law. Any amendment in the salary shall not be applicable during the presidential term in which such an amendment is decided upon. The President of the Republic may not receive any other salary or remunerations.

Article 81: During his term of office the President of the Republic may not exercise any free profession or undertake any commercial, financial or industrial activity. Nor may he acquire or take or lease any state property, sell to or exchange with the State any property of his whatsoever.

Article 82: In case the President of the Republic, due to any temporary obstacle, is unable to carry out his functions, he shall delegate his powers to a Vice-President.

Article 83: In case of resignation, the President of the Republic shall address his letter of resignation to the People's Assembly.

Article 84: In case of the vacancy of the Presidential office or the permanent disability of the President of the Republic, the Speaker of the People's Assembly shall temporarily assume the Presidency. In case the People's Assembly is dissolved at such a time the President of the Supreme Constitutional Court shall take over the Presidency on condition that neither one shall nominate himself for the Presidency. The People's Assembly shall then proclaim the vacancy of the office of President. The President of the Republic shall be chosen within a maximum period of sixty days from the date of the vacancy of the Presidential office.

Article 85: Any charge against the President of high treason or of committing a criminal act shall be made upon a proposal by at least one third of the members of the People's Assembly. No impeachment shall be

issued except upon the approval of a majority of two-thirds of the Assembly members. The President of the Republic shall be suspended from the exercise of his duties as from the issuance of the impeachment. The Vice-President shall take over the Presidency temporarily until the decision concerning the impeachment is taken. The President of the Republic shall be tried by a special Tribunal set up by law. The law shall also organize the trial procedures and define the penalty. In case he is found guilty, he shall be relieved of his post without prejudice to other penalties.

Part Two: The People's Assembly

Article 86: The People's Assembly shall exercise the legislative power, approve the general policy of the State, the general plan of economic and social development and the general budget of the State. It shall exercise control over the work of the executive authority in the manner prescribed by the Constitution.

Article 87: The law shall determine the constituencies into which the State shall be divided. The number of the elected members of the People's Assembly must be at least 350 members of whom one half at least must be workers and farmers elected by direct secret public balloting. The Law shall determine the definition of the worker and the farmer. The President of the Republic may appoint a number of members not exceeding ten.

Article 88: The Law shall determine the conditions which members of the Assembly must fulfill as well as the rules of election and referendum, while the ballot shall be conducted under the supervision of the members of a judiciary organ.

Article 89: Employees of the State and the public sector may nominate themselves for membership in the People's Assembly with the exception of cases determined by law. The member of the People's Assembly shall devote himself entirely to his duties, while his former work or post shall be preserved for him as determined by law.

Article 90: Before exercising his duties, the member of the People's Assembly shall take the following oath before the Assembly: "I swear by God Almighty that I shall sincerely safeguard the safety of the nation, the republican regime, attend to the interests of the people and shall respect the Constitution and the law".

Article 91: The members of the People's Assembly shall receive a remuneration determined by law.

Article 92: The duration of the People's Assembly term shall be five Gregorian years starting from the date of its first meeting. Elections for the renewal of the Assembly shall take place within the sixty days preceding the termination of its term.

Article 93: The People's Assembly shall be competent to decide upon the validity of the membership of its members. The Court of Cassation shall be competent to investigate the validity of contestations on membership presented to the Assembly after referring them to the Court by the Speaker of the Assembly. The contestation shall be referred to the Court of Cassation within fifteen days as from the date on which the Assembly has been informed thereof while the investigation shall be completed within ninety days from the date on which the contestation is referred to the Court of Cassation. The result of the investigation and the decision reached by the Court shall be submitted to the Assembly to decide upon the validity of the contestation within sixty days from the date of submission of the result of the investigation to the Assembly. Memberships shall not be deemed invalid except by a decision taken by a majority of two-thirds of the Assembly members.

Article 94: If the seat of a member becomes vacant before the end of his term, a successor shall be elected or appointed to it, within sixty days from the date of the communication to the Assembly of the occurrence of the vacancy. The term of the new member shall extend until the end of the term of his predecessor.

Article 95: No member of the People's Assembly shall, during his term, purchase or rent any state property or sell or lease to the state or barter with it regarding any part of his property, or conclude a contract with the State in his capacity as entrepreneur, importer or contractor.

Article 96: No membership in the People's Assembly shall be revoked except on the grounds of loss of confidence or status or loss of one of the conditions of membership or the loss of the member's status as worker or farmer upon which he was elected or the violation of his obligations as a member. The membership shall be deemed invalid on the grounds of a decision taken by two-thirds of the Assembly members.

Article 97: The People's Assembly alone may accept the resignation of its members.

Article 98: Members of the People's Assembly shall not be censured for any opinions or thoughts expressed by them in the performance of their tasks in the Assembly or its committees.

Article 99: Except in cases of flagrante delicto, no member of the People's Assembly shall be subject to a criminal prosecution without the permission of the Assembly. If the Assembly is not in session, the permission of the Speaker of the Assembly must be taken. The Assembly must be notified of the measures taken in its first subsequent session.

Article 100: The seat of the People's Assembly shall be Cairo. However, the Assembly may, under exceptional circumstances, meet in another city at the request of the President of the Republic or the majority of the Assembly members. Any meeting of the Assembly in other than its designated seat is illegal and the resolutions passed in it shall be considered invalid.

Article 101: The President of the Republic shall convoke the People's Assembly for its ordinary annual session before the second Thursday of November. If it is not convoked, the Assembly shall meet by force of the Constitution on the said date. The session of the ordinary meeting shall continue for at least seven months. The President of the Republic shall declare the ordinary session closed. This may not take place until the general budget of the state is approved.

Article 102: The President of the Republic may call the People's Assembly to an extraordinary session, in case of necessity, or upon request signed by a majority of the Assembly members. The President of the Republic shall announce the dismissal of the extraordinary session.

Article 103: The People's Assembly shall elect, in the first meeting of its ordinary annual session, a Speaker and two Deputy – Speakers for the term of the session. If the seat of anyone of them is vacated, the Assembly shall elect a replacement, whose term will last until the end of his predecessor's term.

Article 104: The People's Assembly shall lay down its own rules of procedure organizing the manner in which it fulfills its tasks.

Article 105: The People's Assembly alone shall be entitled to preserve order inside it. The Speaker of the Assembly shall be entrusted with this task.

Article 106: The meeting of the People's Assembly shall be public. However, a meeting in camera may be held at the request of the President of the Republic, or the Government, or the Prime Minister or of at least twenty of its members. The Assembly shall then decide whether the debate on

the question submitted to it shall take place in a public meeting or in a meeting in camera.

Article 107: The meeting of the Assembly shall be considered invalid unless the majority of its members are present. The Assembly shall adopt its resolutions by an absolute majority of its attending members, in cases other than those for which a specific majority is required. A separate vote will be taken on each article of the draft laws. In case of a tie vote, the question on which the debate has taken place shall be rejected.

Article 108: The President of the Republic shall have the right, in case of necessity or in exceptional cases and on the authorization of the People's Assembly, to issue resolutions having the force of law. Such authorization must be for a limited period of time and must point out the subjects of such resolutions and the grounds upon which they are based. The resolutions must be submitted to the People's Assembly at its first meeting after the end of the authorization period. If they are not submitted or if they are submitted and not approved by the Assembly, they shall cease to have the force of law.

Article 109: The President of the Republic and every member of the People's Assembly shall have the right to propose laws.

Article 110: Every draft law shall be referred to one of the committees of the Assembly which will study it and submit a report concerning it. Draft laws presented by members of the People's Assembly shall not be referred to these committees unless they are first referred to a special committee which will study them and give an opinion on the suitability of their consideration by the Assembly and after the Assembly decides to consider them.

Article 111: Every draft law proposed by a member and rejected by the Assembly cannot be presented again in the course of the same session.

Article 112: The President of the Republic shall have the right to promulgate laws or object to them.

Article 113: If the President of the Republic objects to a draft law ratified by the People's Assembly, he shall refer it back to the Assembly within thirty days from the Assembly's communication of it. If the draft law is not referred back within this period, it is considered a law and shall be promulgated. If it is referred back to the Assembly on the said date and

approved once again by a majority of two-thirds of the members, it shall be considered a law and shall be promulgated.

Article 114: The People's Assembly shall approve the general plan for economic and social development. The manner of the preparation of the plan and of its submission to the People's Assembly shall be determined by law.

Article 115: The draft general budget of the State shall be submitted to the Assembly at least two months before the beginning of the fiscal year. It shall not be considered in effect unless it is approved by the Assembly. Each chapter of the draft budget shall be voted upon separately and shall be promulgated by law. The People's Assembly shall not make modifications in the draft budget except with the approval of the government. In case the ratification of the new budget does not take place before the beginning of the new fiscal year, the old budget shall be acted on pending such ratification. The law shall determine the manner of preparing the budget and determine the fiscal year.

Article 116: The approval of the People's Assembly shall be considered necessary for the transfer of any funds from one title of the budget to another, as well as for any expenditure not included in it or in excess of its estimates. These shall be issued by law.

Article 117: The law shall determine the provisions regulating the budgets and accounts of public organizations and institutions.

Article 118: The final account of the State budget shall be submitted to the People's Assembly within a period not exceeding one year from the date of the expiration of the fiscal year. Each title shall be voted upon separately and issued by a law. The annual report of the Central Agency for Accounting and its observations must be submitted to the People's Assembly. The Assembly has the right to demand from the Central Agency for Accounting any data or other pertinent reports.

Article 119: The imposition, modification or abolition of general taxes cannot be effected except in the cases decreed by law. No one may be exempted from their payment except in the cases specified by law. No one may be asked to pay additional taxes or imposts except in the cases specified by law.

Article 120: The basic rules for collection of public funds and the procedure for their disbursement shall be regulated by law.

Article 121: The Executive Authority shall not contract a loan, or bind itself to a project entailing expenditure of public funds from the State Treasury in the course of a subsequent period, except with the approval of the People's Assembly.

Article 122: The rules governing the granting of salaries, pensions, indemnities, subsidies and bonuses from the State treasury, as well as the cases excepted from these rules and the authorities charged with their application, shall be determined by law.

Article 123: The law shall determine the rules and procedures for granting concessions related to the investment of natural resources and public utilities. It shall also define cases where it is permitted to dispose free of charge, of real estate property belonging to the State and the ceding of its movable property and the rules and regulations organizing such procedures.

Article 124: Every member of the People's Assembly shall be entitled to address questions to the Prime Minister or to any of his deputies or the Ministers or their deputies concerning matters within their jurisdiction. The Prime Minister, his deputies, the Ministers and the persons they delegate on their behalf shall answer the questions put to them by members. The member may withdraw his question at any time; this same question may not be transformed into an interpellation in the same session.

Article 125: Every member of the People's Assembly shall be entitled to address interpellations to the Prime Minister or his deputies or the Ministers and their deputies concerning matters within their jurisdiction. Debate on an interpellation shall take place at least seven days after its submission, except in the cases of urgency as decided by the Assembly and with the Government's consent.

Article 126: The Minister shall be responsible for the general policy of the State before the People's Assembly. Each minister shall be responsible for the affairs of his ministry. The People's Assembly may decide to withdraw its confidence from any of the Prime Minister's deputies or from any of the Ministers or their deputies. A motion of no confidence should not be submitted except after an interpellation, and upon a motion proposed by one tenth the members of the Assembly. The Assembly shall not decide on such a motion until after at least three days from the date of its presentation. Withdrawal of confidence shall be pronounced by the majority of the members of the Assembly.

Article 127: The People's Assembly shall determine the responsibility of the Prime Minister, on a proposal by one-tenth of its members. Such a decision should be taken by the majority of the members of the Assembly. It may not be taken except after an interpellation addressed to the Government and after at least three days from the date of its presentation. In the event that such responsibility is determined, the Assembly shall submit a report to the President of the Republic including the elements of the subject, the conclusions reached on the matter and the reasons behind them. The President of the Republic may return such a report to the Assembly within ten days. If the Assembly ratifies it once again, the President of the Republic may put the subject of discord to a referendum. Such a referendum shall be held within thirty days from the date of the last ratification of the Assembly. In such a case the Assembly sessions shall be terminated. If the result of the referendum is in support of the Government, the Assembly shall be considered dissolved, otherwise, the President of the Republic shall accept the resignation of the Cabinet.

Article 128: If the Assembly withdraws its confidence from any of the Prime Minister's deputies or the Ministers or their deputies, he shall resign his office. The Prime Minister shall submit his resignation to the President of the Republic if he is found responsible before the People's Assembly.

Article 129: Any twenty members at least, of the People's Assembly may ask for the discussion of a public question to ascertain the Government's policy regarding such a question.

Article 130: The members of the People's Assembly shall be entitled to express their opinions concerning public questions before the Prime Minister or any of his deputies or of the Ministers.

Article 131: The People's Assembly may form an ad hoc Committee or entrust any of its committees with the inspection of the activities of any of the administrative departments or the general establishments or any executive or administrative organ or any of the public projects, for the purpose of fact – finding and informing the Assembly as to the actual financial, or administrative or economic situation thereof, or for conducting investigations into a subject related to one of the said activities. In the course of its work, such a committee shall be entitled to collect whatever evidence it deems necessary and to subpoena all those it needs. All executive and administrative bodies shall answer the demands of the committee and put under its disposal all the documents and evidence it demands for this purpose.

Article 132: At the inaugural meeting of the ordinary session of the People's Assembly, the President of the Republic shall deliver a statement of the general policy of the State. He may also make other statements before the Assembly. The Assembly is entitled to discuss the statement of the President of the Republic.

Article 133: After the formation of the Cabinet and at the inaugural meeting of the ordinary session of the People's Assembly, the Prime Minister shall submit the program of his Government. The People's Assembly is entitled to discuss such a program.

Article 134: The Prime Minister, his deputies, the Ministers and their deputies may become members of the People's Assembly. Those of them who are not members may attend the sessions and committee meetings of the Assembly.

Article 135: The Prime Minister and the Ministers shall have the right to be heard in the Assembly sessions and committee meetings whenever they ask for the floor. They may ask for the assistance of the high ranking officials of their choice. When taking votes a minister shall have no counted vote unless he is a member.

Article 136: The President of the Republic shall not dissolve the People's Assembly unless it is necessary and after a referendum of the People. In such a case, the President of the Republic shall issue a decision terminating the sessions of the Assembly and conducting a referendum within thirty days. If the total majority of the voters approve the dissolution of the Assembly, the President of the Republic shall issue the decision of dissolution. The decision dissolving the Assembly shall comprise an invitation to the electors to conduct new elections for the People's Assembly within a period not exceeding sixty days from the date of the declaration of the referendum results. The new Assembly shall convene during a period of ten days following the completion of elections.

Chapter Five

Part Three The Executive Authority

First Branch: The President of the Republic

Article 137: The President of the Republic shall assume executive power and shall exercise it in the manner stipulated in the Constitution.

Article 138: The President of the Republic, in conjunction with the cabinet, shall lay down the general policy of the state and shall supervise its implementation in the manner prescribed in the Constitution.

Article 139: The President of the Republic may appoint one or more Vice-Presidents define their jurisdiction and relieve them of their posts. The rules relating to the calling to account of the President of the Republic shall be applicable to the Vice-Presidents.

Article 140: Before exercising his functions the Vice-President of the Republic shall take the following oath before the President of the Republic: "I swear by Almighty God to uphold the Republican system with loyalty to respect the Constitution and the Law, to look after the interests of the People in full and to safeguard the independence and territorial integrity of the motherland."

Article 141: The President of the Republic shall appoint the Prime Minister, his deputies, the Ministers and their deputies and relieve them of their posts.

Article 142: The President of the Republic shall have the right to convoke the Cabinet and to attend its meetings. He shall also preside over the meetings he attends and is entitled to demand reports from the Ministers.

Article 143: The President of the Republic shall appoint the civil and military officials, and the diplomatic representatives and dismiss them in the manner prescribed by the law. He shall also accredit the diplomatic representatives of foreign states.

Article 144: The President of the Republic shall issue the necessary regulations for the implementation of the laws in the manner that would not modify, delay, or exempt them from execution. He shall have the right to vest others with authority to issue them. The law may determine whoever issues the decision requisite for its implementation.

Article 145: The President of the Republic shall issue control regulations.

Article 146: The President of the Republic shall issue the decisions necessary for establishing and organizing public services and administrations.

Article 147: In case it becomes necessary during the absence of the People's Assembly, to take measures which cannot suffer delay, the President of the Republic shall issue decisions in this respect which have the force of law. Such decisions must be submitted to the People's Assembly, within

fifteen days from the date of issuance if the Assembly is standing or at its first meeting in case of the dissolution or recess of the Assembly. If they are not submitted, their force of law disappears with retroactive effect without having to take a decision to this effect. If they are submitted to the Assembly and are not ratified, their force of law disappears with retroactive effect, unless the Assembly has ratified their validity in the previous period or settled their effects in another way.

Article 148: The President of the Republic shall proclaim a state of emergency in the manner prescribed by the law. Such proclamation must be submitted to the People's Assembly within the subsequent fifteen days to take a decision upon it. In case the People's Assembly, is dissolved the matter shall be submitted to the new Assembly at its first meeting. The state of emergency in all cases, shall be for a limited period, which may not be extended unless by approval of the Assembly.

Article 149: The President of the Republic shall have the right of granting amnesty or commuting a sentence. General Amnesty can only be granted by virtue of a law.

Article 150: The President of the Republic shall be Supreme Commander of the Armed Forces. He shall have the authority to declare war after the approval of the People's Assembly.

Article 151: The President of the Republic shall conclude treaties and communicate them to the People's Assembly, accompanied with suitable clarifications. They shall have the force of law after their conclusion, ratification and publication according to the established procedure. However, peace treaties, alliance pacts, commercial and maritime treaties and all other treaties involving modifications in the territory of the State or having connection with the rights of sovereignty, or which lay upon the treasury of the State certain charges not included in the budget, must acquire the approval of the People's Assembly.

Article 152: The President of the Republic may call a referendum of the People on important matters related to the supreme interests of the country.

Second Branch: The Government

Article 153: The Government shall be the supreme executive and administrative organ of the State. It shall be composed of the Prime Minister,

his Deputies, the Ministers and their Deputies. The Prime Minister shall supervise the work of the Government.

Article 154: Whoever is appointed Minister or Deputy Minister must be an Egyptian, no less than 35 Gregorian years of age, and enjoying full civil and political rights.

Article 155: Before exercising their functions, the members of the cabinet shall take the following oath before the President of the Republic: "I swear by Almighty God to uphold the Republican system with loyalty, to respect the Constitution and the law to look after the interests of the People in full and to safeguard the independence and territorial integrity of the motherland."

Article 156: The Cabinet shall exercise in particular the following functions:

- a. Laying down the general policy of the State in collaboration with the President of the Republic and controlling its implementation in accordance with the laws and republican decrees.
- b. Directing, coordinating and following up the work of the ministries and their different administrations as well as public organizations and institutions.
- c. Issuing administrative and executive decisions in accordance with the laws and decrees and supervising their implementation.
- d. Preparing draft laws and decrees.
- e. Preparing the draft of the general budget of the State.
- f. Preparing the draft of the State's overall plan.
- g. Contracting and granting loans in accordance with the rules of the Constitution.
- h. Supervising the implementation of law, maintaining State security and protecting the rights of the citizens and the interests of the State.

Article 157: The Minister shall be the administrative supreme chief of his ministry. He shall undertake the laying down of the Ministry's policy within the limits of the State's General Policy and shall undertake its implementation.

Article 158: During the term of his office, the Minister shall not practice any free profession, a commercial, or financial or industrial occupation, buy or rent any State property or lease or sell to or barter with the State any of his own property.

Article 159: The President of the Republic and the People's Assembly shall have the right to bring a Minister to trial for crimes committed by him in the performance of his duties or due to them. The decision of the People's Assembly to charge a Minister shall be adopted upon a proposal submitted by at least one-fifth of its members. No indictment shall be issued except by a majority of two-thirds of the members of the Assembly.

Article 160: Any minister indicted shall be suspended from his duties until his case is decided. The termination of his services shall not prevent legal action being taken or pursued against him. The trial of a minister, the procedures and guarantees of the trial, and the indictment shall be in accordance with the manner prescribed by the law. These rules shall be applicable to Deputy Ministers.

Third Branch: The Local Administration

Article 161: The Arab Republic of Egypt shall be divided into administrative units, enjoying legal person among which shall be governorates, cities and villages. Other administrative units may be established having legal person when required by common interest.

Article 162: Local People's Councils shall be gradually formed, on the level of administrative units by direct election half the members of whom must be farmers or workers. The law shall provide for the gradual transfer of authority to the local People's Councils. Presidents and Vice-Presidents of the Councils shall be elected from among their members.

Article 163: The law shall determine the way of forming the local People's Councils, their competences, their financial resources, the guarantees for their members their relation to the People's Assembly and to the Government as well as their role in preparing and implementing the development plan in controlling various activities.

Fourth Branch: National Specialized Councils

Article 164: National Specialized Councils shall be established on a national level, to assist in planning the general policy of the State in all the domains of national activities. These Councils shall be under the President of the Republic. The formation and functions of each council shall be defined by a presidential decree.

Part Four: The Judiciary Authority

Article 165: The Judiciary Authority shall be independent. It shall be exercised by courts of justice of different sorts and competences. They shall issue their judgments in accordance with the law.

Article 166: Judges shall be independent, subject to no other authority but the law. No authority may intervene in judiciary cases or in the affairs of justice.

Article 167: The law shall determine the judiciary organization and their competences, and shall organize the way of their formation and prescribe the conditions and measures for the appointment and transfer of their members.

Article 168: The status of judges shall be irrevocable. The law shall regulate the disciplinary actions with regard to them.

Article 169: The sessions of courts shall be public, unless a court decides to hold them in camera for considerations of public order or morality. In all cases, judgments shall be pronounced in public sessions.

Article 170: The people shall contribute to maintaining justice in accordance with the manner and within the limits prescribed by law.

Article 171: The law shall regulate the organization of the State Security Courts and shall prescribe their competences and the conditions to be fulfilled by those who occupy the office of judge in them.

Article 172: The State Council shall be an independent judiciary organization competent to take decisions in administrative disputes and disciplinary cases. The law shall determine its other competences.

Article 173: A Supreme Council, presided over by the President of the Republic shall supervise the affairs of the judiciary organizations. The law shall prescribe its formation, its competences and its rules of action. It shall be consulted with regard to the draft laws organizing the affairs of the judiciary organizations.

Chapter Five

Part Five: The Supreme Constitutional Court

Article 174: The Supreme Constitutional Court shall be an independent judiciary body in the Arab Republic of Egypt, and having its seat in Cairo.

Article 175: The Supreme Constitutional Court alone shall undertake the judicial control in respect of the constitutionality of the laws and regulations and shall undertake the interpretation of the legislative texts in the manner prescribed by law. The law shall prescribe the other competences of the court, and regulate the procedures to be followed before it.

Article 176: The law shall organize the way of formation of the Supreme Constitutional Court, and prescribe the conditions to be fulfilled by its members, their rights and immunities.

Article 177: The status of the members of the Supreme Constitutional Court shall be irrevocable. The Court shall call to account its members, in the manner prescribed by law.

Article 178: The judgments issued by the Supreme Constitutional Court in constitutional cases, and its decisions concerning the interpretation of legislative texts shall be published in the Official Gazette. The law shall organize the effects subsequent to a decision concerning the unconstitutionality of a legislative text.

Chapter Five

Part Six: The Socialist Public Prosecutor

Article 179: The Socialist Public Prosecutor shall be responsible for taking the measures which secure the people's rights, the safety of the society and its political regime, the preservation of the socialist achievements and commitment to socialist behavior. The law shall prescribe his other competences. He shall be subject to the control of the People's Assembly in accordance with what is prescribed by law.

Chapter Five

Part Seven: The Armed Forces and the National Defence Council

Article 180: The State alone shall establish the Armed Forces, which shall belong to the people. Their task shall be to protect the country, safeguard its territory and security, and protect the socialist achievements of popular struggle. No organization or group may establish military or paramilitary formations. The law shall prescribe the conditions of service and promotion for the armed forces.

Article 181: General mobilization shall be organized in accordance with the law.

Article 182: A Council named “The National Defense Council” shall be established and presided over by the President of the Republic. It shall undertake the examination of matters pertaining to the methods ensuring the safety and security of the country. The law shall establish its other competences.

Article 183: The law shall organize military judicature, prescribe its competences within the limits of the principles prescribed by the Constitution.

Part Eight: The Police

Article 184: Police authority shall be a civil disciplinary body. Its Supreme Chief shall be the President of the Republic. Police Authority shall perform its duty in the service of the people, maintain peace and security for the citizens, preserve order, public security and morality, and undertake the implementation of the duties imposed upon it by laws and regulations, in the manner prescribed by the law.

Chapter Six: General and Transitional Provisions

Article 185: The city of Cairo shall be the capital of the Arab Republic of Egypt.

Article 186: The law shall prescribe the Egyptian flag and the provisions relating thereto, as well as the state emblem and the provisions relating thereto.

Article 187: Provisions of the laws shall apply only from the date of their entry into force and shall have no retroactive effect. However, provisions to the contrary may be made, in other than criminal matters, with the approval of the majority of the members of the People’s Assembly.

Article 188: All laws shall be published in the Official Gazette within two weeks from the date of their issuance. They shall be put into force a month after the date following their publication unless another date is fixed for that.

Article 189: The President of the Republic as well as the People’s Assembly may request the amendment of one or more of the articles of the Constitution. The articles to be amended and the reasons justifying such amendments shall be mentioned in the request for amendment. If the request emanates from the People’s Assembly, it should be signed by at least one third of the Assembly members. In all cases, the Assembly shall

discuss the amendment in principle, and the decision in this respect shall be taken by the majority of its members. If the request is rejected, the amendment of the same particular articles may not be requested again before the expiration of one year from the date of such rejection. If the People's Assembly approves an amendment, in principle, the articles requested to be amended shall be discussed two months after the date of the said approval. If the amendment is approved by two thirds of the members of the Assembly, it shall be referred to the people for a plebiscite. If it is approved by the people it shall be considered in force from the date of the announcement of the result of the plebiscite.

Article 190: The term of the present President of the Republic shall be terminated at the end of six years from the date of announcing his election as President of the Arab Republic of Egypt.

Article 191: All the provisions of the laws and regulations prior to the proclamation of this Constitution shall remain valid and in force. However, they may be repealed or amended in conformity with the rules and procedures stipulated in this Constitution.

Article 192: The Supreme Court shall exercise its competences prescribed in the law establishing it, until the Supreme Constitutional Court is formed.

Article 193: This Constitution shall be in force as from the date of announcing the approval of the people in this respect in the referendum.

Chapter Seven

Part One: The Shura Assembly*

Article 194: The Shura Assembly is concerned with the study and proposal of what it deems necessary to preserve the principles of the July 23, 1952 Revolution and the May 15, 1971 Revolution, to consolidate national unity and social peace, to protect the alliance of the working forces of the people and the socialist gains as well as the basic constituents of society, its supreme values, its rights and liberties and its public duties, and to deepen the democratic socialist system and widen its scope.

Article 195: The Shura Assembly shall be consulted in the following: Proposals for the amendment of one or more articles of the Constitution; Draft laws complementary to the Constitution; Draft of the general plan for social and economic development; Peace treaties, alliances and all treaties affecting the territorial integrity of the State or those concerning

sovereignty rights; Draft laws referred to the Assembly by the President of the Republic; Whatever matters referred to the Assembly by the President of the Republic relative to the general policy of the State or its policy regarding Arab or foreign affairs. The Assembly shall submit to the President of the Republic and the People's Assembly its opinion on such matters.

Article 196: The Shura Assembly shall be composed of a number of members defined by the law, not less than 132 members. Two thirds of the members shall be elected by direct secret public balloting, half of whom at least must be workers and farmers. The President of the Republic shall appoint the other third.

Article 197: The law shall determine the electoral constituencies of the Shura Assembly the number of members in every constituency, and the necessary conditions that should be fulfilled by the elected or appointed members of the Shura Assembly.

Article 198: The term of the membership of the Shura Assembly is six years. The election and the appointment of 50% of the total number of the members should be renewed every three years as defined by law. It is always possible to re-elect or re-appoint those whose term of membership has expired.

Article 199: The Shura Assembly shall elect a Speaker and two Deputy Speakers at its first ordinary annual session for a period of the three years. If one of these offices becomes vacant, the Assembly shall elect a successor for the rest of the term.

Article 200: No member can hold office in both the People's Assembly and the Shura Assembly at one and the same time.

Article 201: The Prime Minister and his Deputies, the Ministers and government officials shall not be held responsible to the Shura Assembly.

Article 202: The President of the Republic has the right to make a statement upon the general policy of the State or upon any other matter before a joint meeting of the People's Assembly and the Shura Assembly, headed by the Speaker of the People's Assembly. The President of the Republic has the right to make whatever statements he wishes before the Shura Assembly.

Article 203: The Prime Minister and the Ministers and other government officials may make statements before the Shura Assembly or before one

of its committees upon a subject that comes within their competence. The Prime Minister and his Deputies and Ministers and other government officials shall be heard by the Shura Assembly and its committees upon their request, and they may seek the assistance of any government officials, as they see fit. However, any minister or government official shall not have a counted vote unless he is a member.

Article 204: The President of the Republic may not dissolve the Shura Assembly except in case of the necessity, while such a decision should comprise an invitation to electors to hold new elections for the Shura Assembly within a period of the sixty days from the date of its dissolution. The Assembly shall hold its first meeting within ten days from the date of its election.

Article 205: The Provisions included in the following articles of the Constitution shall apply to the Shura Assembly: (89, 90, 100, 101, 102, 104, 105, 106, 107, 129, 130, 134), insofar as they are not incompatible with the provisions cited in this chapter. The Shura Assembly and its Speaker shall exercise the competences specified in the aforementioned articles.

Chapter Seven

Part Two: The Press Authority

Article 206: The press is a popular, independent authority exercising its vocation in the manner stipulated in the Constitution and the law.

Article 207: The Press shall exercise its vocation freely and independently in the service of society through all the means of expression. It shall thus interpret the trend of public opinion, while contributing to its information and orientation within the framework of the basic components of society, the safeguard of liberties, rights and public duties and the respect of the sanctity of the private lives of the citizens, as stipulated in the Constitution and defined by law.

Article 208: The freedom of the press is guaranteed and press censorship is forbidden. It is also forbidden to threaten, confiscate or cancel a newspaper through administrative measures, as stipulated in the Constitution and defined by the law.

Article 209: The freedom of legal persons whether public or private, or political parties to publish or own newspapers is safeguarded in accordance with the law. The financing and ownership of newspapers and the

funds belonging to them, come under the supervision of the people, as stipulated in the Constitution and defined by law.

Article 210: Journalists have the right to obtain news and information according to the regulations set by law. Their activities are not subject to any authority other than the law.

Article 211: A Supreme Press Council shall deal with matters concerning the press. The law shall define its formation, competences and its relationship with the state authorities. The Supreme Press Council shall exercise its competences with a view to consolidating the freedom of the press and its independence, to uphold the basic foundations of society, and to guarantee the soundness of national unity and social peace as stipulated in the Constitution and defined by law.

() Amended according to the result of the plebiscite on the constitutional amendment which was conducted on May, 22nd 1980.*

APPENDIX C

Law 48 of 1979 Governing the Operations of the Supreme Constitutional Court of Egypt¹

In the name of the people,
The President of the Republic,

The following law having been adopted by the People's Assembly is promulgated.

Article 1: The provisions of the attached law shall apply to the Supreme Constitutional Court.

Article 2: All cases and applications pending before the Supreme Court, and falling within the jurisdiction of the Supreme Constitutional Court in accordance with the attached law, shall be referred to this court immediately following its formation and without judicial fees. In addition, all requests suspend the execution of judgments rendered by arbitration organs that were binding before the Supreme Court will be referred to the Supreme Constitutional Court without judicial fees. These requests will be ruled upon in accordance with the Law No 81 of 1969 promulgating the Supreme Court's law, and Law No 66 of 1970 promulgating the law concerning procedures and fees enforceable before it.

Article 3: The provisions of Articles 15 and 16 of the attached law shall apply to cases and applications related to recusation and disputes addressed against members of the Supreme Court as well as applications related to their salaries, pensions and related matters.

¹ Translation by 'Awad al-Murr, Former Chief Justice of the Supreme Constitutional Court, reprinted in Kevin Boyle and Adel Omar Sherif, eds., *Human Rights and Democracy: The Role of the Supreme Constitutional Court of Egypt* (London: Kluwer Law International, 1996).

The Supreme Constitutional Court shall exclusively decide upon all of these cases and applications.

Article 4: The Supreme Constitutional Court shall be represented in the Supreme Council of Judicial Bodies by the Chief Justice. In his absence, the most senior member will carry out this duty.

Article 5: Without prejudice to the provisions of paragraphs 3 and 4 of Article 5 of the attached Law, the first formation of the Supreme Constitutional Court, will be established by a presidential decree which includes the appointment of the Chief Justice and the members of the court, on condition that these appointees meet the requirements specified in the attached law, and upon consultation of the Supreme Council of Judicial bodies regarding the appointment of members of the court.

Those members shall take the oath mentioned in Article 6 of the attached law, which shall be sworn in before the President of the Republic.

Article 6: Members of the Supreme Court and its Commissioners' Body that are not included in the formation of the Supreme Constitutional Court, shall retain the positions they held prior to their nomination in the Supreme Court, and their previous order of seniority therein, and shall retain on a personal basis their functional ranks, salaries and allowances.

Article 7: Immediately upon the establishment of the Supreme Constitutional Court, all the administrative and clerking staff associated with the Supreme Court will be transferred to the new court.

All of the funds allocated to the Supreme Court in the current year's budget will be transferred to the Supreme Constitutional Court.

Article 8: The former Chief Justice and members of the Supreme Court whose official duties have ended, together with their families, shall benefit from and have access to the services rendered by the fund regulated by Article 18 of the attached law in accordance with its stated conditions.

Article 9: Without prejudice to the provisions of Article 2 of the promulgated law, the following laws are abrogated:

- the law on the Supreme Court promulgated by Law No 81 of 1969;
- the law on the procedures and fees before the Supreme Court promulgated by Law No 66 of 1970;
- Law No 79 of 1976 regarding specific provisions applicable to the Supreme Court.

In addition, all legal provisions contrary to those of the attached law will be abrogated following the formation of the Supreme Constitutional Court.

Article 10: This law shall be published in the Official Gazette and come into force two weeks after its publication.

This law shall be stamped with the States seal and implemented as one of its laws.

PUBLISHED IN THE OFFICIAL GAZETTE NO 36
ON 6TH SEPTEMBER 1979

THE SUPREME CONSTITUTIONAL COURT'S LAW

PART ONE: THE ORGANISATION OF THE COURT

Chapter I – The Formation of the Court

Article 1: The Supreme Constitutional Court is an independent judicial body, in the Arab Republic of Egypt, with its seat in Cairo.

Article 2: In the application of this law, the word “court” denotes the Supreme Constitutional Court, and the expression “member of the court” signifies the Chief Justice of the Court and its members unless otherwise provided for in a statutory provision.

Article 3: The court shall be formed of the Chief Justice and a sufficient number of members.

Judgements and decisions of the court, shall be entered by a quorum of seven of its members.

The Chief Justice or the next senior member, shall preside over the sessions of the court.

Where the office of the Chief Justice is vacant, or in case of his absence or impairment, all competencies attributed thereto shall be carried out in accordance with descending seniority of the members of the Court.

Article 4: Nominees for membership of the court must meet all the requirements for the general judicial service specified in the law on the judicial power, and must be not less than forty-five calendar years of age.

They may be chosen from among the following groups:

- (a) Members of the Supreme Court.
- (b) Current or former members of the judicial bodies holding the rank of a counsellor or its equivalent for at least five consecutive years.
- (c) Current or former law professors who have held the position of a professor at an Egyptian university for at least eight consecutive years.
- (d) Attorneys-at-law who have practised before the court of cassation, or the high administrative court for at least ten consecutive years.

Article 5: The President of the Republic appoints the Chief Justice of the Court by a presidential decree. Members of the court are also appointed by a presidential-decree after consulting with the Supreme Council of the Judicial Bodies; from among two candidates, one is chosen by the general assembly of the Court, and the other by the Chief Justice. At least two thirds of the appointees to the bench must be chosen from the other judicial bodies. The presidential decree that appoints a member shall indicate his position and seniority.

Article 6: The Chief Justice and the members of the court, shall solemnly pledge to uphold the following oath:

“In the name of the Almighty God, I swear to respect the Constitution and the laws and to judge with justice.”

The Chief Justice shall take this oath before the President of the Republic while members of the court shall take it before the general assembly of the court.

Chapter II – The General Assembly of the Court

Article 7: The general assembly of the court consists of all members of the court. The head of the commissioners’ body, or the next most senior member of the body, attends the general assembly’s meetings, and has a counted vote on matters related to the commissioners’ body.

Article 8: In addition to its other competencies provided for in this Law, the general assembly shall consider issues bearing on the organisation of the court, its internal affairs, the distribution of the work among its members, and all other relevant matters of concern.

The general assembly may delegate either the Chief Justice, or a committee from among its members, to deal with specified issues within its domain.

The opinion of the assembly must be sought regarding draft laws relevant to the court.

Article 9: The general assembly shall be convened either upon an invitation from the Chief Justice or in response to a request from one-third of its members. Meetings of the general assembly shall not be held valid unless attended by the majority of its members. Voting shall be public unless the assembly decides [it should] be secret. The Chief Justice or his substitute shall preside over the meetings of the assembly. Decisions of the general assembly shall be adopted by the majority-vote of attendants. Voting is overt unless otherwise the assembly decides to run it in secrecy. Where counted votes are equal, the opinion of the side on which the vote of the Chief Justice fell shall prevail unless balloting is secret, in which case the proposal shall be considered as rejected. “Process-Verbaux” of the general assembly shall be inscribed in a record signed by the president of the meeting and the secretary general of the court.

Article 10: A committee for the occasional affairs presided over by the Chief Justice, and the membership of two or more of the members of the court, shall be established by a decision of the general assembly. The above-mentioned committee shall tackle all questions of pressing nature that occur during the judicial recess of the Court.

Chapter III – Rights and obligations of the members

Article 11: Members of the court shall not be removed from their posts or transferred to other positions without their consent.

Article 12: Salaries and allowances of the Chief Justice and members of the court shall be determined according to the schedule annexed to this law. However, if a member, before his arrival on the court, was earning a salary or allowance higher than outlined by this schedule, he shall continue receiving his previous earnings on an individual basis. Apart from this, a member of the court shall not receive a salary, or allowance on an individual basis nor otherwise be exceptionally treated in whatever form.

Article 13: Members of the court may be delegated and seconded only for the performance of legal duties associated with international organisations or foreign states, or for the accomplishment of scientific missions.

Article 14: Rules concerning the retirement of counsellors of the court of cassation, shall apply to members of the court.

Article 15: The relevant provisions applied to counsellors of the court of cassation in cases of unfitness, execution, litigations and bias shall be applied to members of the court. The application addressed against a member of the court relating to recusal or manifest neglect of basic duties, shall be disposed of by a panel comprising all the members of the court with the exception of the defendant and whoever is excusable for cause. The requirement of plurality of the number of members present at the settlement of this application, must be respected by exclusion of the most junior member. Assertions of bias or neglect of duty directed against all the members of the court, or toward a group of members will not be considered if the consequential effect of the allegation is to reduce the number of available members to less than seven.

Article 16: The court shall exclusively settle disputes concerning salaries, compensation and pensions due to members of the court, or to their beneficiaries. It shall also rule on matters which involve the annulment of final administrative decisions that affect members of the court, or compensation for damages resulting therefrom. In exception from the provisions of Article 34, the interested party is entitled to personally sign the aforesaid application. Without prejudice to the provisions of Articles 35 to 45, and unless otherwise provided for in this law, the matters addressed in this Article, shall be governed by the pertinent provisions applicable to counsellors of the court of cassation.

Article 17: The provisions spelled out in the law on judicial power shall apply to vacations of the members of the court. In this regard, the general assembly of the court, shall assume the competencies of the Supreme Council of the Judicial Bodies, and the Chief Justice shall assume those of the Minister of Justice.

Article 18: A fund that has a juristic personality shall be established in the court, with resources allocated by the government, to provide medical and social services to members of the court, its Commissioners' Body and their families. The rights and obligations of the fund established under article 7 of Law 79 of 1976 concerning specific provisions of the Supreme Court, shall be transferred to the new fund. The beneficiaries of this fund shall not have access to services provided by the fund for medical and social services of members of the Judicial Bodies. The Chief Justice shall determine the organisation, administration and the rules of expenditure related to the fund after approval of the general assembly.

Article 19: Allegations that a member of the court has been untrustworthy or derelict in his duties shall be submitted to the committee on occasional

affairs by the Chief Justice of the court. If this committee concludes, after summoning and hearing the concerned member, that furtherance investigation is warranted, it shall then delegate one of its members or a committee of three to conduct the investigation. At the time of this decision, the concerned member shall be placed on mandatory leave with full salary. Following the completion of this investigation, its outcome shall be transmitted to the general assembly sitting as a disciplinary tribunal with the exclusion of those members who participated in the investigation or in the accusation. After verifying the defence of the concerned member, the general assembly will decide whether this member is innocent or must retire from the court. The sentence shall be final and irrevocable.

Article 20: The general assembly assumes the competencies assigned to the committee provided for in Articles 95 and 96 of the law on judicial power, along with those ascribed to the disciplinary council under Article 97 of that law. All guarantees, privileges, rights and duties assigned by the law on the judicial power to counsellors of the court of cassation shall be conferred on the members of the court, unless otherwise specified in that chapter.

Chapter IV – The Commissioners’ Body

Article 21: The Commissioners’ Body shall consist of a head and a sufficient number of counsellors and assistant counsellors. If the head is absent, his duties shall be entrusted to the next most senior member of the body. The head regulates the work of that body and supervises its management. Salaries and allowances of the head and members shall be in accordance with the schedule annexed to this law.

Article 22: The conditions stated in Article 4 of this law for the appointment of members of the court, shall apply to the appointment of the head of this body. Appointees to the post of counsellors and assistant counsellors must meet the requirements specified in the law on the judicial power regarding their counterparts counsellors of appellate courts, or presidents of primary courts, as the case may be. The head and the members of this body are appointed by presidential decrees upon the recommendation of the Chief Justice and after considering the advice of the general assembly of the court. Appointments for the post of the head and counsellors shall be by promotions from immediately inferior posts. However, whoever satisfies the conditions prescribed in paragraphs 1 and 2 of this Article may be appointed directly to the vacant position.

The Chief Justice, after taking the advice of the general assembly, may delegate members from the other judicial bodies, in accordance to the procedures provided in the law of their bodies, to serve in the commissioners' body, provided that the requirements of paragraph 2 of this Article are met by them.

Article 23: The head and the members of the Commissioners' body shall solemnly pledge to take the following oath: "In the name of Almighty God, I swear to respect the constitution and the law, and to perform my duties with honesty and truthfulness." This oath shall be sworn before the general assembly of the court.

Article 24: The head and members of the Commissioners' Body may not be dismissed and may not be re-assigned without their consent. Rules applicable to members of the court shall govern their guarantees, rights, duties, retirement, vacations, and disputes relating to their promotions, salaries, remunerations and pensions due to them, or to their recipients. The provisions of Article 13 of this law shall not apply to members of this body.

PART TWO: JURISDICTIONS AND PROCEDURES

Chapter I – Jurisdictions

Article 25: The following fall within the exclusive jurisdiction of the Supreme Constitutional Court: (Firstly) the exercise of the power of judicial review in constitutional issues with respect to laws and regulations. (Secondly) the settlement of conflicts on competence by specifying the competent body among different judicial bodies or other judicial forums, whenever a case dealing with the same subject-matter is being brought before two of such branches or forums, and jurisdiction regarding that case was not disclaimed by one of them or was disclaimed by both. (Thirdly) the determination of a final judgment in cases where two or more other judicial bodies have produced contradictory judgments.

Article 26: The Supreme Constitutional Court is empowered to provide the definitive interpretation of laws, enacted by the legislature, and presidential decrees with the force of law issued in accordance with the constitution if, during the course of their application, they arise divergent points of view, and they have an importance that necessitates their uniform interpretation.

Article 27: The Supreme Constitutional Court may, in all cases, and after observing the procedural rules laid down for the preparation of constitutional cases, decide the unconstitutionality of any provision of a law, or regulation which it faces in the course of exercising its jurisdiction, provided that provision is linked to a dispute under its consideration.

Chapter II – Procedures

Article 28: Unless otherwise set forth in this chapter, the forwarding of cases, requests and applications to the Supreme Constitutional Court shall abide by the rules of the law on civil and commercial procedure to the extent that their enforcement is not in opposition to the nature of the court's competencies, or variance with formalities established therefore.

Article 29: The court shall exercise its power of judicial review of laws and regulations through the following channels:

- (a) Where in the course of deciding a case on the merits, a court, or any other judicial forum a *prima facie* views that a provision of a law, or regulation on which the settlement of the dispute depends is unconstitutional, the proceedings are suspended by the court of merits and the case is forward to the Supreme Constitutional Court without judicial fees for the adjudication of the constitutional issue.
- (b) Where the constitutionality of a provision in a law or regulation has been contested by a party to a meritorious case before a court or any other judicial forum, and the grounds are found to have been plausible by that court or forum, it shall ordain the postponement of the case and specify for that party a period not exceeding three months within which the constitutional issue is to be presented to the Supreme Constitutional Court. Failing this, the challenge will be regarded as void.

Article 30: A decision, or a case which refers or otherwise brings a constitutional issue before the Supreme Constitutional Court in accordance with the preceding Article, must unequivocally indicate the legislative provision whose constitutionality is challenged, the constitutional provision involved, and the different aspects of the alleged contravention.

Article 31: Every interested party may, in the case envisaged under subparagraph 2 of article 25, request that the Supreme Constitutional Court determine the judicial body competent to hear the case. The request must define the subject of the dispute, the judicial bodies to which it

was brought, and the decisions which have been reached by them in this respect. The submission of the request shall have the effect of suspending all relevant cases pending the court's ruling.

Article 32: Every interested party may, in the case envisaged under subparagraph 3 of Article 25, request that the Supreme Constitutional Court solve the dispute relating to execution of two final contradictory judgments. The request must precisely point out the disagreement between the judgments and the issue that led to the contradiction between them. Upon an application from the interested parties, the Chief Justice may suspend the two contradictory judgments, or either one of them pending the settlement of the request.

Article 33: Request for statutory interpretation is to be submitted by the Minister of Justice upon the request of the Prime Minister, the Speaker of the People's Assembly, or the Supreme Council of the Judicial Bodies. The request for interpretation must plainly state the legislative provision at issue, the divergent points of view which surrounded its application, and the degree of importance requiring its interpretation to ensure its uniform application.

Article 34: Requests and Citations before the Supreme Constitutional Court, are to be signed either by a counsel permitted to appear therein or by one of the members of the "Contentieux d'Etat"² with a rank not inferior to the rank of counsellor, as the case may be. The request referred to in Articles 31 and 32, must include two formal copies of the two relevant judgments that document the contradiction at issue or the alleged conflict of competence. Otherwise, the request shall be inadmissible.

Article 35: Decisions by which an issue is referred to the Supreme Constitutional Court, as well as other cases and applications, must be inscribed in the assigned record by the registration office of the court on the day of their arrival or presentation. Within fifteen days of that date, the registration office, through the bailiffs department, shall inform the parties concerned with the aforesaid decisions, cases, and applications. The government is considered one of the parties having an interest in the constitutional cases.

Article 36: The office of the counsel who signed the citation, or the application, shall be viewed as the address of the petitioner; and the office of

² The French expression "Contentieux d'Etat" refers to the authority mandated under law with the competence to defend the interests of the government in lawsuits.

the counsel of the respondent will be his address, unless either of them designates another given address to which notifications addressed to him shall be delivered.

Article 37: Whoever receives a notification related to a decision or a case before the court shall have the right to file, within fifteen days of that notification, a brief of his views with the registration office of the court. This brief should be accompanied by the relevant documents. The adversary is entitled to reply by presenting a counter brief together with documents during the fifteen days follow in termination of the preceding period. Where the latter exercises his right to reply, the first party may comment by presenting a brief within the subsequent fifteen days.

Article 38: Upon the expiration of the periods detailed in the preceding Article, the registration office shall bar the admission of further documents which the parties may deliver. The registration office is responsible for recording the date on which such papers are presented, the name of the person who submitted them, and his capacity.

Article 39: The registration office of the court, shall submit to the commissioners' body the file of the case or application on the day following the completion of the time-limits prescribed under Article 37. That body will then prepare the matter. If necessary, it may communicate with all interested parties in order to acquire the necessary information or papers. That body shall also have the right to summon the interested parties to obtain further clarification concerning facts; to require their presentation of documents and supplementary briefs; and to conduct other investigatory procedures within the prescribed time limits. Member of the commissioners' body may fine with no more than twenty pounds whoever causes the repeated postponement of the case. The decision in this regard is final. However, those so fined may be released from that fine either entirely or partially upon submission of a justifiable excuse.

Article 40: Upon completing the preparation of the case, the commissioners' body files a report to the court that analyses the constitutional and legal issues in the matter, its opinion concerning them, and the rationale underlying it. The interested parties may view this report at the registration office. They may also acquire a copy of this report at their expense.

Article 41: Within one week of submitting the report, the Chief Justice shall assign the date of the session on which proceedings on the case or application will commence.

The registration office shall send information regarding the session to all interested parties through a registered letter with a receipt acknowledging delivery. The time limit for appearance before the court, must be at least fifteen days, unless the Chief Justice orders the reduction of this period to not less than three days. He may issue this order only when necessary and when requested by the parties concerned.

The order of the Chief Justice is to be delivered to the interested parties along with the notification of the session.

Article 42: All sessions of the court must be attended by a member of the commissioners' body who holds the rank of a counsellor at least.

Article 43: Lawyers authorised to practice before the court of cassation and the high administrative court are authorised to appear before the court. Those appearing as lawyers of the government must hold the rank of counsellor at the "Contentieux d'Etat".

Article 44: The court shall resolve the cases and applications brought before it without pleading. However, where the court views the necessity of oral pleadings it may hear the counsels of the parties and the representatives of the commissioners' body. In this case, the parties concerned are not allowed to appear before the court without their counsel. In addition, parties who have not submitted briefs in accordance with Article 37 shall not have the right to be represented in that session. The court may invite counsels of the parties and the Commissioners' Body to present supplementary briefs within a prescribed period.

Article 45: Rules of appearance and absence as stated in the law on civil and commercial procedures are not applicable in regard to cases and applications brought before the court.

PART THREE: JUDGEMENTS AND DECISIONS

Article 46: Judgements and decisions of the court, shall be entered in the name of the people.

Article 47: The court shall *ex-officio* settle all related issues.

Article 48: Judgements and decisions of the court are final and irreviewable.

Article 49: Judgements of the court in constitutional controversies and its decisions on statutory interpretation shall bind public authorities and

individuals. Judgements and decisions mentioned in the preceding paragraph shall be published without fees in the Official Gazette within fifteen days at most as from their promulgation. A provision held as void, whether in a law or regulation, shall cease to apply as of the day following its publication. In cases where a provision of criminal nature has been struck down, convictions based on that provision shall be regarded as if they had never occurred.

The head of the commissioners' body shall inform the attorney general of the judgement immediately after its delivery in order for it to be given full effect.

Article 50: The court shall exclusively decide disputes which involve the execution of its judgements and decisions. The rules of the law on civil and commercial procedures shall govern such disputes in so far as their enforcement is compatible with the nature of the court's jurisdiction and its established procedures. The initiation of such a dispute shall not effect the execution of the decision unless the court otherwise orders pending the settlement of that dispute.

Article 51: Unless otherwise provided for in this law, judgements and decisions of the court shall be subject to the rules of the law on civil and commercial procedures which are not in contradiction with the nature of those judgements and decisions.

PART FOUR: FEES AND COSTS

Article 52: Fees shall not be charged on applications provided for in Articles 16, 31, 32 and 33 of this law.

Article 53: A fixed fee of twenty-five pounds shall be levied on constitutional cases. This fee shall cover all judicial proceedings regarding the case including the notification of papers and judgments. The petitioner must deposit in the treasury of the court a bail of twenty-five pounds upon the submission of the case. The payment of one single bail is sufficient in situations where more than one petitioner have jointly introduced a case reflecting their collective claim. The court shall confiscate the bail fee if it concludes that the constitutional case is either inadmissible or groundless. Without prejudice to the provisions of the following Article, the registration office of the court shall not accept a notice of action without proof that the bail fee has been paid.

Article 54: If an individual proves his inability to pay the fixed fee or/and bail fee and his case has a possibility of success, the fees can be waved in whole or in part. Applications for such exemptions are to be decided by the head of the commissioners' body after reviewing the corresponding papers and considering the statements of the applicant and the observations of the registration office. His decision in this regard is final. The submission of the application for exemption shall delay the start of the time limit for presenting the constitutional case.

Article 55: Unless otherwise provided for in this law, provisions of the Law No 90 of 1944 on judicial fees in civil issues and the law on civil and commercial procedure shall determine fees and costs required before the court.

PART FIVE: FINANCIAL AND ADMINISTRATIVE MATTERS

Chapter I – Financial Matters

Article 56: The court shall have an annual independent budget to be prepared in alignment with the public budget of the State. It shall commence with the fiscal year of the State and end with it. The Chief Justice shall prepare the proposed budget for presentation to the competent authority after review and approval of the general assembly of the court. The General Assembly shall manage, in regard to the court's budget, the powers which laws and regulations bestow to the minister of finance while the Chief Justice shall assume the powers of the minister of administrative development and that of the head of the central body for organisation and administration. Unless otherwise specified in this law, the law on the public budget of the state, shall apply to the court's budget and its financial balance sheet.

Chapter II – Administrative Matters

Article 57: The court shall have a secretary general and a sufficient number of employees. The Chief Justice will hold upon them the competencies of ministers and their under secretaries as specified by laws and regulations.

Article 58: The Chief Justice shall establish a committee for "personal affairs" composed of two members of the court and the secretary general. The committee mandate is to propose the appointments, allowances

promotions and transfers of the employees. The Chief Justice of the court shall determine appropriate standards for the promotion of the court's employees after having been advised by this committee.

Article 59: Without prejudice to the provisions of Article 57, disciplinary sanctions relating to employees of the court shall be entrusted to a committee of three members of the court, chosen annually by its general assembly. The decision to refer an employee to this committee shall be taken by the Chief Justice. Prosecution duties shall fall within the mandate of the Commissioners' Body. Decisions of that committee are final and irrevocable.

Article 60: Unless otherwise specified in this law or in the law on the judicial power as applied to employees of the court of cassation, the provisions of the law on state's employees shall govern the employees of the court.

APPENDIX D

Figures on Supreme Constitutional Court Rulings

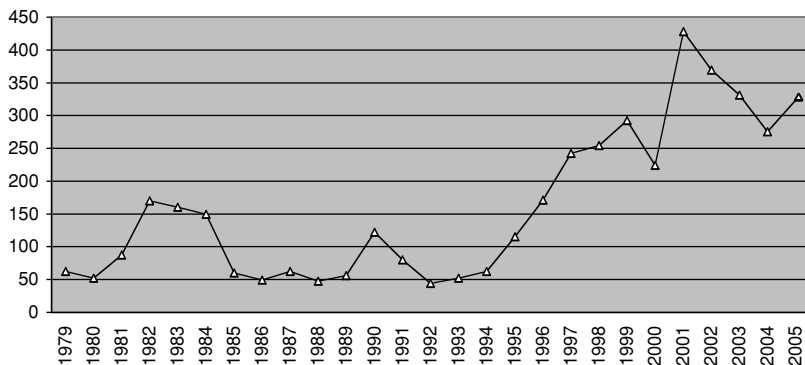


FIGURE A1: Volume of Petitions Reaching the Supreme Constitutional Court by Year, 1979–2005. *Source:* Correspondence with the Supreme Constitutional Court 10/5/2006.

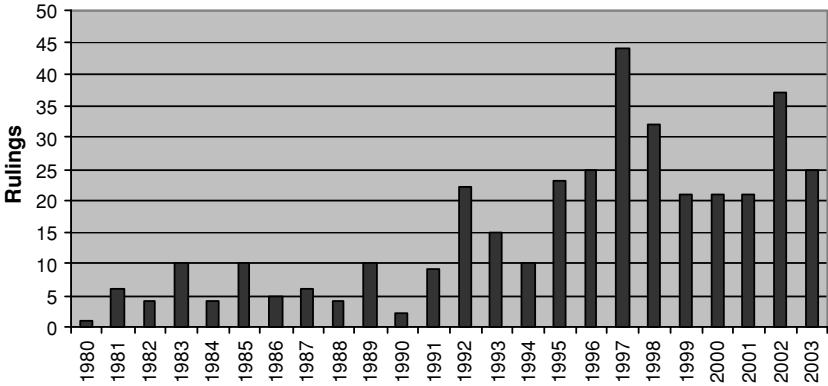


FIGURE A2: Volume of Supreme Constitutional Court Rulings by Year, 1980–2003. These figures represent the number of expanded SCC rulings on the constitutionality of legislation, excluding cases that were (1) deemed inadmissible for not conforming to the procedural requirements of law 48/1979, (2) deemed inadmissible because the petition lay outside the Court’s functions, or (3) dismissed as the result of the end of the withdrawal by the petitioner or a resolution of the concrete case at hand. These figures were generated by coding for SCC rulings in *al-Mahkama al-Dusturiyya al-‘Uliya*, Volumes 1–10, in *al-Jarida al-Rasmiyya*, and on www.tashreaat.com.

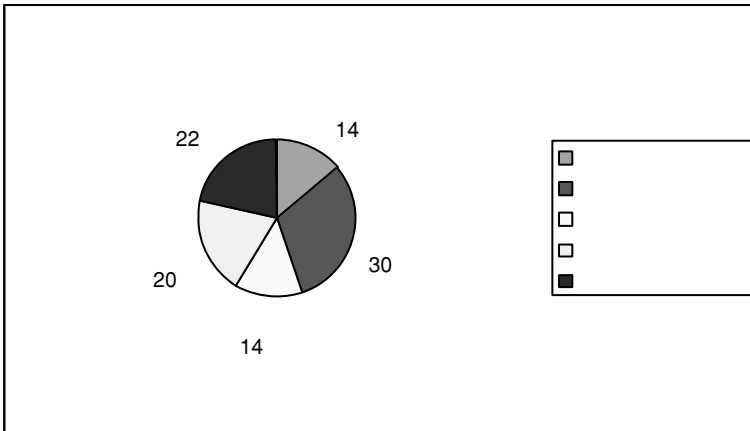


FIGURE A3: Percentage of SCC rulings by Chief Justice.

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<i>al-Akhbar</i>	<i>al-‘Arabi</i>
<i>al-Haqiqa</i>	<i>al-Mohammah</i>
<i>al-Musawwar</i>	<i>al-Sha‘ab</i>
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