

RULING AGAINST REVOLUTION: THE JUDICIARY AND THE RESTORATION OF AUTHORITARIANISM IN EGYPT

革命に抗する支配：
エジプト司法権力と権威主義体制の復活

Housam Darwisheh*

〔要旨〕

エジプト政治を扱った本論稿で主に論じるのはホスニ・ムバーラク元大統領の罷免以降の政治過程における司法界の存在である。エジプト司法界はムバーラク体制崩壊後の選挙における不正への介入を通じてエジプト政治の主役に躍り出た。

エジプト司法界はこの間民主化を希求する国内の様々な政治主体やその政治過程に対して絶大な影響を与え続け、他方でムスリム同胞団の統治期には非イスラーム主義的な世俗主義勢力側もまた同胞団の権力行使に対抗するべく司法的手段に訴えることが度々であった。だがこうした司法の意図的な介入がいかに 2011 年以降のエジプトの移行過程を大きく阻害し、やがて軍部が国内の全権力を掌握するに至ったかを分析し明らかにするのが本稿の目的である。

本稿の構成としては、(1)2011 年以前のムバーラク体制下におけるエジプト司法界の独立性とそれが体制末期に次第に体制側に取り込まれていく過程を検証し、(2)ムバーラク体制後から同胞団系のムルシー大統領の罷免に至るまでの間に司法界がいかにエジプトの政治プロセスに関与したかを具体的に跡付け、検討を加える。

以上の議論を通じてエジプト司法界が政治的移行過程における各政治勢力間の合意形成をいかに阻害し、選挙の結果に基づいた実効性ある議会制度と政治組織の定着を妨げ、その結果としてエジプトにおける権威主義的支配の復活を助けることになったかが明らかとなるだろう。

* Research Fellow, Institute of Developing Economies, Japan External Trade Organization (IDE-JETRO).

* This study has been supported by the Emerging State Project (Shiraishi Group) under the Grant-in-Aid research project of the Japan Society for the Promotion of Science.

This article examines judicial intervention in Egypt's political transition after the ouster of ex-President Hosni Mubarak. The judicial and legal review of electoral disputes and the conduct of political actors gave judges unprecedented influence over the broader process of democratization. Non-Islamist/secular forces resorted to judicial mechanisms as their main tools of challenging and restraining the power and electoral mandate of the Muslim Brotherhood. Judicial intervention in politics, I argue, placed Egypt's transition on trajectories heading toward failure and enabled the military to retain its power. Indeed, within the electoral and constitution-making processes, the judiciary was a destabilizing factor that forestalled the emergence of consensus on the rules of the political transition, undermined the institutions produced by electoral processes, and as a result retained the power structure of authoritarian rule.

Introduction

Much of the literature on Egypt's short-lived and failed transition from authoritarianism to democracy emphasizes military intervention, the Muslim Brotherhood's failure in governance, and the weaknesses of a revolution that lacked leadership and organizational structures. These factors were important. This paper, however, sheds light on a relatively neglected dimension of political transitions, namely, the role of law and the judiciary which upheld an authoritarian form of legality and preserved the power structure that was challenged by young revolutionaries and the Muslim Brotherhood between 2011 and 2013. After the *coup d'état* of Abdel Fattah al-Sisi, the judiciary helped the regime to control political dissent, restrict civil liberties, and persecute its opponents. Ostensibly abiding by the "rule of law", the judiciary shaped a transitional governance repertoire that enabled state institutions to safeguard their interests and resist popular pressure.

The 18-day Egyptian uprising, which started with nationwide peaceful demonstrations on Police Day, 25 January 2011, was originally meant to draw attention to police brutality (Alaimo 2015, Khamis and Katherine 2012) and the absence of rule of law. The Interior Ministry over the years ordered the arrest, torture, and detention of tens of thousands of people without charge or any prospect of trial for months or years, often in defiance of repeated court orders for their release (*Amnesty International* 2011). During the uprising, activists mobilized Egyptians to demand justice, an end to police impunity and torture, and holding the ruler accountable for those practices. From 25 to 28 January, fighting in the streets between protestors and police all over the country created a revolutionary situation that ended the 30-year rule of Husni Mubarak on February 11, 2011 (El-Gobashy 2011).

Emergency powers under Mubarak blurred the separation of power between the executive, legislative and judicial branches of government. However, the legalist character of Egyptian authoritarianism, which allowed a limited degree of public dissent and participation (controlled pluralism) in accordance with a formalist conception of the rule of law, gave the judiciary legitimacy and relative autonomy from the executive. In addition, the presence of reformist judges, who tried to assure free elections by taking their electoral supervisory role seriously, won the judiciary popular credibility (Meringolo 2014). Mubarak's fall created an opportunity to entrench the rule of law, enforce judicial decisions, and institutionalize accountability in governance.

In fact, the rule of law is widely accepted as a crucial institutional safeguard in a transition from authoritarianism to democracy (Stotzky 1993). It is a fundamental principle of modern democracy,

good governance, and the preservation of human rights (O'Donnell 2004). The rule of law makes courts responsible for mediating political conflicts, protecting democratic procedures in government, and curbing the arbitrary exercise of power by upholding the constitution. In post-Mubarak Egypt, however, the judiciary acted as a counter-revolutionary force that ruled against democratically established institutions, undermined the transition and facilitated the resumption of authoritarianism.

The first section of this paper briefly examines judicial activism prior to the uprising of 25 January 2011 and shows how Mubarak's last decade produced a conservative and partisan judiciary whose interests were tied to authoritarian government. The subsequent two sections of the paper detail how the judiciary aborted Egypt's democracy between Mubarak's fall and al-Sisi's coup. The last section assesses the complicity of the judiciary in restoring an authoritarian political order and re-instating the repression of the opposition.

1. Before the uprising: reformist stirrings in the judiciary

Judicial activism before the uprising challenged regime policies on different occasions. In the mid-1990s, a group of reformist judges won the internal election of the Judges' Club and strove to reform the judicial system and strengthen its independence from executive power (Said 2008). These judges pressed for open and fair local and parliamentary elections. There were unexpected court decisions that ruled the NGO-Law unconstitutional and the Supreme Constitutional Court (SCC) mandated judicial supervision of the 2000 parliamentary elections that reintroduced relatively meaningful contestation into Egyptian political life. Led by the Judges' Club, reformist judges stipulated full judicial supervision of the entire electoral process, thereby forestalling to some degree the direct fraud that marred past elections.

In reaction to such court rulings, Mubarak asserted his formal authority over the SCC by selecting an external, loyal Chief Justice who packed the SCC with compliant judges (Moustafa 2007: 214). In 2005 constitutional amendments allowed direct and competitive multi-candidate presidential elections. At the same time, a Presidential Election Commission (PEC) was established. Headed by a loyal Chief Justice of the SCC, the PEC consisted of five judges and five public figures appointed by Mubarak's National Democratic Party (NDP¹). The PEC supervised the 2005 presidential election and pronounced Mubarak's reelection with 88% of the vote as "free and fair" despite massive irregularities (ibid).

Later, senior judges, including reformist judges Mahmoud Mekki and Hisham al-Bastawisi, publicly declared that irregularities and fraud had marred the parliamentary elections of November-December 2005 (Shehata and Stacher 2006: 36). In media appearances, the judges condemned large-scale violations of electoral laws and the direct physical intimidation of judges by NDP members and the police. Mubarak had wanted the 2005 elections to be a showcase of genuine reform to the USA during the George W. Bush administration. But the two respected judges' allegations of official duplicity deeply troubled Mubarak's regime. In response, the judges were arrested. The incident sparked huge media coverage and sympathy from public and opposition movements that made the judges' crisis a rallying point for political mobilization. Mubarak's regime dispatched thousands of riot police into the center of the city to suppress demonstrators who supported the judges and demanded

¹ The NDP, founded by Anwar Sadat in 1976, remained the ruling party until Mubarak's overthrow. Before the 2011 uprising, the NDP claimed a membership of 1.9 million people.

judicial independence. Mahmoud Mekki and Hisham al-Bastawisi were supported by the political protest movement of those years – the movement for change known as Kefaya (Enough), Youth for Change, the Muslim Brotherhood, and socialist forces (Wolff 2009).

The regime crushed that revolt with a mix of repression and cooptation so that the subsequent Judges' Club election of 2009 saw the victory of judges who were in no way inclined to fight the regime (Bradley 2009). Furthermore, constitutional mechanisms of the judicial system gave the executive authority to undermine any movement for judicial independence. For instance, since the President appointed most members of the Supreme Judicial Council, and the Justice Ministry appointed all court presidents, the executive maintained supervisory and disciplinary power over judges. In their time, Sadat and Mubarak placed the judiciary in the hands of trusted individuals chosen from the institution's own senior ranks loyal to the system in general and the president in particular (Brown 2012a). Sadat and Mubarak appointed the most senior SCC judge to serve as Chief Justice while other SCC judges were chosen from candidates nominated by the Chief Justice and the General Assembly of the Court. Thus the SCC could "operate for over twenty years as a self-contained and self-renewing institution in a way that few other courts in the world operate" (Moustafa 2007: 78-79). The SCC helped the ruler to restrain political opposition when it ruled constitutional "Egypt's Emergency Security Courts and it has conspicuously delayed issuing a ruling on the constitutionality of civilian transfers to military courts" (Moustafa 2007b: 204).

In addition to maintaining a heavy-handed interference in judges' careers, the regime used different forms of cooptation (for example by extending financial privileges to certain parts of the judiciary), tolerated widespread corruption, gave the Ministry of Justice oversight of many administrative affairs, and used the President's prerogative to name the General Prosecutor and the President of the SCC. On matters of grave concern, the regime bypassed the judiciary by using special courts such as military tribunals to prosecute its political opponents. All this did not prevent the judiciary from occasionally opposing the regime's policies. In effect, different stances towards the regime existed within the judiciary, from widespread passive resignation to active support for a reformist minority that wanted to be "critical within the boundaries of what is possible" (Pioppi 2013). As a result of the reformist judges' protest movements and initiatives in the last decade of Mubarak's rule, opposition circles regarded the post-2011 judiciary as an islet of integrity in an otherwise authoritarian and corrupt state.

2. After the uprising: the judicialization of politics

By the time of the 2011 uprising, the assertive judiciary of the late 1990s and early 2000s had already been beaten back through new appointments to the bench, the transfer of executive duties to the executive agencies, and a general campaign of intimidation and harassment. In other words, by late 2010 few judges dared to challenge the regime on any matter of significance (Sachs 2014). Moreover, reformist judges had been sidelined by Mubarak appointees, notably President of the Supreme Constitutional Court Faruq Sultan (appointed in 2009), and Attorney General Abdel Magid Mahmoud (appointed in 2006). The judiciary, like other state institutions, such as the interior ministry and the military, had an interest in limiting the pace of change. Crucially, the role of the judiciary was enhanced during the post-Mubarak transition due to strategic choices made mainly by three actors: (1) the revolutionary forces that aimed to undermine the MB's electoral victory through court rulings; (2)

the military's search for legalizing its authority to preserve its economic interests and political impunity, and (3) the Muslim Brotherhood's goal of legalizing its new electoral victories.

2.1. The revolutionary forces

The uprising deposed Mubarak and his associates but did not purge the state institutions or curb the power of the military. There was no leading figure, group or movement, or an organizational structure with a defined reformist program to transform the structure of the nation's political and economic life (Shahin 2012: 48-9). The revolutionary forces failed to exert pressure on the ruling elite to reform the state. Although the uprising organized and mobilized nationwide mass protests thanks to social networks and access to information, its lack of basic political infrastructure inhibited the rise of a movement of shared principles and beliefs that would control government through electoral process. Nathan Brown correctly notes that "the various forces that participated in the revolution spent little of the ten months since their stunning victory in Tahrir Square party-building, with many of them eschewing party politics on principle and others focusing, instead, on the politics of protest rather than of party organization" (Brown 2012: 4). Even though the uprising 'pushed for change and reforms in, and through, the institutions of the existing regime' (Bayat 2013: 53), the lack of organizational strength, cohesiveness and visibility hampered an efficient promotion of accountability and institutional reform. As the legal system was left untouched, reformist judges became more isolated. The forces that mobilized the masses against Mubarak were severely divided over the path of the political transition. By default they ceded control of the transition to the military and the Islamists, the latter having built a strong grassroots infrastructure of political and social institutions that sustained their committed supporters.

Hence, change was confined to the conduct of elections overseen by the Supreme Council of the Armed Forces (SCAF) that temporarily governed after Mubarak's fall. Here, Islamists with their electoral experience and organized social base emerged victorious. But the non-Islamist forces considered their "revolution" to have been high jacked by formal politics that offered few prospects for genuine change or reform. Elections moved politics from the streets into state institutions. Most remarkably, post-uprising politics moved rapidly to courtrooms, generated lawsuits, expressed itself in legal forms, and swiftly took the shape of complex legal and constitutional knots (Brown 2016: 101). The forces that came to the fore evidently privileged law as the site at which they would bargain with one another. The pervasive legalism of Egyptian politics was deepened when the emergency law, constitutional amendments, constitutional declarations, and elections laws became major issues of political struggle. The organizational weakness of those forces, however, and their lack of influence over the media and politics hindered the advance of accountability and paved the way for state institutions to be veto players during the transition. Faced with the MB's exclusionist policies, the non-Islamist opposition turned to the judiciary to undermine the MB's electoral victories by nullifying the legality of the elected parliament for apparently not reflecting the will of the people. As the political forces turned to law and its institutions to mediate and adjudicate their raging battles, the judiciary left its chambers, so to speak, and marched into the public sphere as one of Egypt's strong ruling powers. An election-based transition empowered the judges to adjudicate electoral disputes and determine which electoral rules violated the constitution. Soon judges became public interlocutors, holding press conferences, appearing on TV shows, and making statements to the foreign press (Abu-Odeh 2013). In other words, while the political forces legalized their conflict, the judiciary politicized its role and heavily influenced the trajectory of the transition.

2.2. The military's search for legalizing authority

The army's main objective was to secure the upper hand in internal and foreign policy alike while keeping its institutional prerogatives away from public scrutiny. The army has had enormous political and economic privileges since Egypt became a republic in 1952. All the presidents (Nasser, Sadat, Mubarak, and Sisi) came from the military. Military networks permeated virtually all branches and levels of state administration and the state-owned sector of the economy, including a vast amount of land for commercial investments (Abul-Magd Dec. 23, 2011). Crucially the military's budget was not subjected to oversight by elected civilian officeholders; nor was there much transparency in the production and allocation of its revenues. To preserve its interests and position, the military laid down ground rules for a transition that would grant it sweeping authority over civilian politics. In short, the military acted as a veto player who could limit the path to transitional justice, sustain impunity, and control the drafting of a new constitution. To do so the SCAF equated revolution and change with legalism by subjecting the demands of the uprising to legalistic and procedural measures while dismissing proposals for special courts to try members of the ousted regime.

Importantly, the SCAF would not facilitate a consensual political process that would bring together different forces to draft a new constitution or decide the rules of transition. Conducting elections before drafting a permanent constitution deepened the split within the revolutionary bloc and saved the SCAF from negotiating power with a unified force of those who had brought hundreds of thousands into the streets against Mubarak. The SCAF arrogated to itself the task of overseeing the transition for an initial period of six months (later extended to 18 months) according to its own rules, which permitted it to frequently expand its powers with constitutional declarations and amendments. This short transitional period excluded the revolutionary forces from shaping the country's transition. The military offered to cede power when a new constitution determined who would inherit power and on what terms.

The SCAF suspended the 1971 constitution but kept the SCC active to enforce the legal framework imposed by the SCAF. Had the SCAF dissolved the SCC along with the constitution, the SCAF's constitutional declarations would have been contested by the masses and reformist judges. Instead the SCC boosted the SCAF's claim on constitutional legitimacy and allowed it to shape the form the legal terrain.

Power was mainly concentrated in the SCAF. New decrees (constitutional declarations) and laws broadened its jurisdiction and became its tools for stemming the tide of mass mobilization and limiting the powers of coming presidents and parliaments. A new law criminalized workers' strikes. A new chapter was added to the penal code that criminalized "spreading terror and threatening law and order." The code of military justice was amended to give military tribunals sole jurisdiction over officers accused of making ill-gotten gains (El-Ghobashy 2015). In the 2012 constitution the defense minister had to be an army general and the National Defense Council had to have a majority of military commanders. In addition, Article 198 allowed military tribunals to try civilians. In effect, the military enforced law without being subjected to it. With the NDP and the police discredited, the military needed more than ever to align state institutions against any potential adversary produced by an electoral transition. With judicial backing, the military retained its right to overrule any part of the constitution that contradicted the "basic tenets of the Egyptian state and society" (Sayigh 2011). In other words, the judiciary placed the military above the constitution and gave the military strong influence over Islamist and non-Islamist opposition forces. And those who gained power democratically, mainly the MB representatives, found that their electoral victories were vulnerable to

negation by court rulings. Much in the name of reform and rule of law was, therefore, carried out to consolidate the status quo and stability of the ruling elites.

2.3. The MB and its electoral victories

For more than 80 years after it was founded by Hasan al-Banna in 1928, the Muslim Brotherhood (MB) influenced the course of Islamism and dominated the terrain of opposition politics in Egypt. The MB's post-Mubarak priorities and decisions were shaped by its previous encounters with authoritarian rule. Nasser and later Mubarak's severe repression of the MB made its older members very cautious about being exposed if they attempted revolutionary change. Indeed, past experiences tamed the MB into a reformist movement with longstanding agenda of gradual change and consolidation according to existing political arrangements and rules set by authoritarian rule (Darwisheh 2014).

Although the MB was never granted a legal status, relative tolerance in the late Mubarak period allowed the MB's members to infiltrate political and social institutions and contest local and parliamentary elections. However, the rules of the political game did not allow them to win and form governments. Nonetheless, the MB gained valuable experience and a space within which it could organize, promote its agendas, mobilize its constituencies and, in short, evolve and expand. With its electoral participation serving to bolster the legitimacy of the legislature and being thereby integrated into the authoritarian system, the MB had become wary of revolutionary transformation by the time Egyptian society rose against Mubarak. The MB's interest in gradualist reform and an electoral system explains why the MB mobilized its constituencies to vote in favor of the March 2011 constitutional amendments that ushered in early elections. The MB sought power and a reformist agenda through electoral politics which it was favored to win. The MB aimed to replace the NDP via the transitional process. To do so the MB appeased the coercive apparatus of the state. Presenting itself as the partner of the military and police, the MB acceded to their autonomy and privileges, and the legalist approach of the military (Kandil 2015: 137-138). This explains the MB's strategy to win the parliamentary and presidential elections without securing the consensus of key players, in particular the revolutionary forces.

Even so, the MB had no institutional or legal weapons to safeguard their electoral victories without a constitution. To overcome the strong opposition from revolutionary forces to an election-based transition and to force its non-Islamist opponents to accept their electoral defeat, the MB sought to legalize its victories through the rule of law and constitution-making. To stabilize its rule and craft a new constitution as the legal blueprint for post-Mubarak Egypt, the MB needed the endorsement of the electoral results by the military, the police, and the judiciary. But such a statist approach to change ceded absolute power to the state. The MB's strategy ironically led it to win elections under military rule that the judiciary later nullified. Along that path lay the legal foundations of state repression of both MB members and their non-Islamist rivals.

3. The judiciary's quest for autonomy

As an institution of an authoritarian regime, which operated with relative autonomy in terms of personnel, budgeting and administration, the judiciary had a strong sense of corporate identity and aspiration for autonomy within its own sphere. The judiciary offered a lifetime career with its own patterns of recruitment, appointments, training and promotion that are reproduced as the children and

relatives of judges often become judges themselves (Brown 2016: 116-17). The uprising threatened to bring under popular scrutiny the judiciary's nepotism, corruption, and complicity in past police brutality. In late 2011, law school graduates staged demonstrations before the High Judicial Court, protesting against "nepotism" in appointing graduates at judicial institutions. Thus, the judiciary was inclined to preserve a "status quo" developed over decades and was unlikely to approve of measures that called its previous conduct to account, not least because many judges were former prosecutors and police officers (Auf 2014, Aziz 2014).

Since the uprising did not follow a revolutionary course and there were no special courts to try members of the old regime, there was no judicial activity to challenge the legitimacy of the SCAF's role as the guardian of "political transition" or to monitor the SCAF's political activities. Nor were there accountability measures to purge corrupt judges or overturn the judiciary's hiring practices. As it were, the judiciary was immune to the political pressures that brought down Mubarak, and able to exploit the SCAF's dependence upon it to expand its power and protect its prerogatives. In June 2011, the judiciary secured a law (Law 43/2011) from SCAF that restricted the president's choices for the position of Chief Justice to the Court's three most senior members and required the appointment to be endorsed by the General Assembly of the Court's justices (Brown 2012). Granting the judiciary more independence before instituting judicial reform encouraged the judiciary to maintain the status quo. The effect was to immunize the SCC from other actors that might be produced by electoral processes and instill the idea that the SCAF was the best protector of the judiciary. In July 2012, Maher Ali Ahmad al-Behiri, the longest serving judge, replaced Faruq Sultan as Chief Justice of the SCC, the first judge to be legally and formally promoted within the SCC since 1998.

Right after Mubarak's fall, the courts were presented with a number of cases whose outcomes were critical to the country's political future. Major public tasks, such as overseeing elections, managing sequestered economic enterprises, or settling corruption cases involving top officials of the Mubarak era, fell to the judges. As will be shown later, many judicial decisions were based on political inclination rather than sound legal foundations. During the first 18-month transitional rule under SCAF, court rulings aimed to appease public anger and frustration at the slow pace of change, and growing popular discontent toward SCAF. While sentencing Mubarak on 2 June 2012 to life imprisonment for complicity in the killing of 900 demonstrators in February 2011,² the court spared his lieutenants who still ran the security service, and did nothing to halt the military's massive human rights violations. During the second transitional phase under the MB's rule, however, court rulings controlled the electoral process by invalidating elected institutions (the lower house in the summer of 2012 followed by the upper house in the summer of 2013) and keeping the constituent assembly in permanent danger of dissolution on judicial grounds. During the third post-coup transitional phase, the courts aided the al-Sisi regime by convicting dissidents under protest and terrorism laws. By legalizing the regime's repressive strategies, the judiciary helped to consolidate authoritarian rule.

3.1. The rise of the judiciary in the transitional period

After Mubarak's fall, the judiciary emerged as a strong political actor. The courts placated the highly mobilized public with various rulings against the Mubarak regime. During its two first months in power, SCAF used decrees and the courts to contain protests. To signal a move towards the rule of law, SCAF ended the state of emergency, disbanded the special emergency courts, and prohibited extraordinary courts. The administrative courts helped SCAF isolate powerful figures of the fallen

² After al-Sisi's coup, rulings by appellate courts overturned all the convictions of Mubarak and his two sons, Alaa and Gamal.

regime by dissolving parliament and municipal councils to appease striking workers and protestors who demanded faster trials. In April 2011, just days after the arrest of Mubarak, his sons, and some senior regime, the Supreme Administrative Court (SAC) ordered the dissolution of the NDP. The SAC cited the NDP's corruption, rigging of elections, and monopoly of political life, and ruled that the NDP's assets, including its bank accounts and offices, would be the property of the state (*Financial Times* April 17, 2011).

Deferring to nationwide labor strikes, courts made populist rulings. The State Council (Majlis al-Dawla), itself an administrative court, reversed the Mubarak regime's measures of economic liberalization and privatization. In September 2011 the State Council re-nationalized three industrial companies, Shebin El-Kom Textile Company, the Tanta Company for Linen and Derivatives, and the Steam Boilers Companies (*Al-Ahram* September 21, 2011). In 2011, Judge Ahmed Rifaat allowed the state television into the court room to telecast the proceedings of Mubarak's trial, including scenes of Rifaat's frequent clashes with Mubarak's defense attorney.

The SCAF's first Constitutional Declaration, which had ample scope for divisively partisan interpretations in a fragile post-insurgent context, set a political role for the judiciary. This Declaration was approved and endorsed by Islamist forces on March 19, 2011.³ But those who were tasked with interpreting legal reference texts had to turn to the judiciary to clarify the vagueness and ambiguity of the texts. Under Article 189 of the March 19 constitutional referendum, the two houses of parliament were responsible for forming a constituent assembly of 100 members who would draft the new constitution after the parliamentary and presidential elections. By the same article, a party that secured "50 + 1" of the parliamentary seats would lead the constitutional writing process. The SCAF's new constitutional declaration of March 30, 2011, however, named the SCAF an official political entity in charge of the country and granted it far more control over the legislative and executive reins of power.⁴ The March 30 declaration effectively overturned the popular will as reflected in the vote on the March 19 interim constitution, strengthened the military's position in the constitutional process, insulating it from civilian institutions. More importantly, the wording of the articles was so altered as to leave unclear the timetable of the transition, the criteria for selecting the constituent assembly, and the sequencing of presidential or parliamentary elections all of which led major political forces into endless debates and divisions (Lindsey 2014).

In particular, the capacity of the judges to influence the trajectory of the electoral transition was enhanced by the severe Islamist-secularist divide. In fact, the Islamists and secularists were not divided over secularism or political Islam but rather the practical details of the transition – setting tasks, fixing schedules and establishing procedures. Only later was the severe polarization of the electoral winners and losers translated into polarization around identity issues that overshadowed the transition politics. As the Islamists were expected to win the elections, there was almost no scope for building consensus on sharing electoral gains, or reaching compromises over the newly emerging parliamentary and presidential institutions as well as the constitution. Those who expected to be excluded had no incentive to participate in the constitutional writing process. Instead they disrupted the Islamist victory by challenging the Islamists in the courts and later turning to the military to bring down the MB's rule.

³ The military appointed a very small committee, which worked quietly for about two weeks, to provide a set of constitutional amendments that formed part of an interim constitution for the transitional and constitution-writing processes.

⁴ 30 March 2011 Constitutional Declarations available at <http://www.egypt.gov.eg/english/laws/constitution/>, (accessed on February 20, 2016).

From the beginning, the prospects for a democratic transition were saddled with various difficulties. An interim constitution had produced a procedurally confused transitional process. The military had no intention of subordinating itself (and especially its budget and its economic interests) to a civilian government. The politically and socially active Islamists (the MB and the Salafists), having superior organizational resources at their disposal, were expected to dominate the electoral processes and the body tasked with drafting a new constitution. Political polarization led the Islamists to work towards a state institution-empowering constitution and reach an accommodation with the military that would institutionalize the latter's role in politics. The non-Islamist forces were reluctant to trust in a democratic process because they lacked the electoral experience and support needed to win elections. Consequently, political polarization drove contestants to prolonged litigation that deepened the role of the judiciary in politics. The rise of the judiciary, therefore, was not a sign of the rule of law but a symptom of a chaotic political process in which rival forces could not resolve their growing polarization with compromise solutions. The judiciary became the interlocutor between winners and losers.

3.2. Undermining the legality of electoral politics

By the time of the parliamentary elections to the People's Assembly (28 November 2011 to 11 January 2012), Egypt's transition had been marked by growing instability and sociopolitical polarization. Even with the new parliament, the military represented by SCAF dominated the political terrain. The security apparatus repeatedly used deadly force against unarmed protesters and repressed political dissent. During the first year of transition military courts prosecuted an estimated 12,000 to 15,000 civilians, compared with the 3,000 civilians tried before military courts in 30 years of Mubarak's rule (Said 2012: 413). Antagonism against the SCAF rose dramatically when the military killed about twenty-five Coptic Christians who were among protesters rallying outside the government television building, Maspero. As a result, there were popular demands to prosecute SCAF members for involvement in the deaths and torture of protesters and activists.⁵

When SCAF announced plans in November 2011 to postpone the presidential elections until after the new parliament wrote a constitution, thereby extending the SCAF's rule,⁶ mass protests erupted. On November 19, 2011, fearing that the SCAF was working to reverse the gains of the revolution, Cairo's *Midan al-Tahrir* (Liberation Square; henceforth Midan) erupted in mass protests that demanded an early presidential election, a return to civilian rule, and prosecution of the Ministry of Interior officials accused of killing protesters. Mohammad Mahmoud Street, just off Midan and leading to the Ministry of Interior, saw some of the deadliest clashes between protesters and the police. About 46 people were killed and more than 3,000 injured.⁷ The battle lasted for almost a week while the parliamentary election campaigns were taking place. Many protesters in Midan called for the cancellation of the parliamentary elections and deemed them pointless so long as the SCAF was in power and protesters were being killed. However, fearing the postponement or cancellation of the elections, the MB decided not to take part in the fighting. The MB increasingly took the state's position to secure more votes and win elections. The MB's stance prompted an irrevocable rift with the non-Islamist revolutionary forces

⁵ "Egypt's Rulers Step Up Battle; As Protesters Seek End to Military Rule, a Violent Face-off in Cairo Threatens Next Week's Polling," *The Wall Street Journal*, November 1, 2011.

⁶ The government released a set of "supra-constitutional principles" that would have imposed strict limits on Egypt's new constitution. Through these principles, the SCAF wanted a veto over any law relating to the army to secure its interests such as immunity from prosecution, no civilian oversight of the military budget, retention of the army's vast business empire, and a role in national security decision-making.

⁷ "How to Mark the Battle of Mohamed Mahmoud?," *Al-Ahram Weekly*, No. 1172, 14 November 2013.

who regarded the MB as being complacent. While the Islamists won a decisive majority in the elections, the youth groups that launched the uprising in 2011 and other pro-democracy forces continued to be marginalized by regime repression and a political process that had passed them by.

With the first post-uprising parliament, Egypt's troubled transition entered a new phase and the judiciary started to adopt a confrontationist posture toward the elected government. The electoral alliance led by the MB's Freedom and Justice Party (FJP) captured 47 percent of the new parliament and the ultra-conservative Salafist parties took 24 percent, while the two main secular groupings, the Wafd and Egypt's Bloc, took 8 percent. The large Islamist majority in parliament consolidated the MB's position as the chief power broker and its authority over the 100-member constituent assembly which they believed would be the political and constitutional reality in Egypt.

3.2.1 The Judiciary and the Constituent Assembly

In March 2012, in accordance with Article 60 of the SCAF's 2011 Constitutional Declaration, a joint session of both houses of Parliament chose the Constituent Assembly (CA) members. The CA had the responsibility of drafting a new constitution to replace the SCAF's constitutional declarations of March 2011.⁸ The CA's composition reflected the new political landscape produced by the parliamentary election. A majority of Islamists dominated the CA against a minority of non-Islamist (secular, liberal and leftist) individuals led by Mohamed Elbaradei, Amr Moussa, and Hamdeen Sabahi. Article 60 was not clear whether CA members should be chosen from the two Houses or from the electorate. With half the CA members coming from Parliament, most non-Islamist political forces withdrew in protest. They feared an MB-dominated constitutional writing process. Even representatives from the SCC, Al-Azhar, the Coptic Church, and SCAF withdrew from the CA, citing the Islamists' domination and the absence of "national consensus" in the CA's composition. At the same time, minority parties brought a lawsuit challenging the CA's constitutionality.

A constitutional vacuum loomed. The SCC was supposed to decide on a finding by the Higher Administrative Court (HAC) that the laws under which the People's Assembly (Parliament) and Majlis Al-Shura (Upper House) were elected might have been unconstitutional (*Al-Akhar* March 5, 2012). If that was so, a Parliament of uncertain constitutionality was assigned to write a constitution that would shape Egypt's future. In April 2012, the Supreme Administrative Court (SAC) swiftly declared the CA illegitimate on grounds that the presence of parliamentarians among its members violated Article 60 that limited their role to electing CA members without taking part in writing the constitution. . The SAC ordered the CA to be abolished. The non-Islamist opposition supported the court's ruling, arguing that the CA did not fulfill the condition of representing all sectors of Egyptian society.

To avoid confrontation with the court rulings, the Islamist dominated Parliament decided that 50 percent of the 100 CA members would come from Parliament and the Shura Council and the rest from outside. But the non-Islamist forces rejected the new CA composition and boycotted the CA sessions, arguing that minorities, youth and women were not properly represented. In response, the SCAF threatened to replace Parliament's role in forming the CA if the assembly was not formed by June 7, 2012. But it was difficult to reach a consensus on the CA's formation since the election-based transition gave the Islamists a de facto majority in the legislative bodies that would form the CA regardless whether non-Islamist forces were represented in the CA. Alarmed by the growing power of

⁸ According to SCAF Constitutional Declarations, the CA must produce a draft constitution within six months. This would then be put to a popular referendum within another 15 days, and if approved, it would become operative as soon as the referendum result was announced.

the Islamists, Ahmed El-Zend, the president of the Judges Club, said in a televised address “that if the group’s members had known Islamists would win most of the seats in Parliament, they would not have supervised the voting, and he suggested that they might refuse to oversee the runoff” of the presidential elections. He added that, “We used to stand at the edge of the judiciary and not go near politics.... But now Egypt is falling. We won’t leave matters for those who can’t manage them, with the excuse that we’re not people of politics. No, we are people of politics” (*New York Times*, June 7, 2012). Judicial rulings were increasingly seen by Islamists as politically motivated and meant to curtail the rise of the MB.

Meanwhile, the rise of the Islamists drove non-Islamist forces to ally with the SCAF, the judiciary, and the police. The forces of this alliance foresaw no prospects of electoral victories in the near future. They shared a goal of “protecting the state” from the MB who had been engaged for decades in vicious conflict with the state. They regarded the MB’s members as having come from outside the ranks of the post-1952 Egyptian state – the military (Shama 2014). To reverse the electoral outcomes, non-Islamist parties and independent politicians filed lawsuits that challenged the election laws by which Parliament was elected and the CA was formed.

On June 14, 2012, two days before the second round of presidential elections that pitted Mohammad Morsi against Ahmed Shafik, the SCC plunged the country into a greater crisis when it ruled that Parliament was technically unconstitutional because one-third of the parliamentarians were illegally elected. According to the election law, one-third of parliamentary seats was to be reserved for independents. The MB’s FJP allegedly ran its own candidates for those seats. Based on this constitutional ruling, the SCAF immediately dissolved Parliament by decree. However, the SCAF had originally allowed political parties to run for those seats. In a televised statement, the military “regretted” the dissolution of Parliament. The SCAF blamed the SCC for the fiasco but did not reverse the court decision. As such the ruling returned wide-ranging legislative powers to the SCAF. To non-Islamists, the judiciary and the military had saved the state by preventing the handover of power to the MB. Crucially, the dissolution of Parliament relieved the judiciary from any MB legislation that would limit the former’s authority and recast its membership. But the dissolution of the first democratically elected parliament deepened the MB’s suspicions of the judiciary and the SCAF and prevented the MB and its electoral rivals from reaching any stabilizing compromise.

The SCC ruling came one day after Parliament announced the formation of the second CA. On the same day, the SCC also rendered invalid the Disenfranchisement Law (or political isolation laws). The law, which was passed by the dissolved parliament, barred high-ranking officials in the last ten years of the Mubarak regime from running for public office. The SCC ruling allowed Ahmed Shafiq, Mubarak’s last prime minister, to contest the presidential election. The ruling was a political maneuver to stop the rise of the Islamists, the MB in particular, keep the military in power, and leave the civilian president without a parliament or a constitution. As a result, many viewed the ruling as politically driven to allow the military’s favorite candidate to run for office against the MB’s candidate, Muhammad Morsi. On June 17, as the second round of presidential voting was beginning, the military sprang a new supplementary constitutional declaration that granted the SCAF legislative powers, oversight of the defense budget, the authority to appoint army commanders and the minister of defense, and the power to form a new CA if the previous one failed to complete its work within three months of its formation. There was a specific judge who articulated the reasons for dissolving Parliament and granting legislative powers to SCAF. The SCC Deputy President Tahani el-Gebali, an outspoken foe of the MB who was made judge on the SCC in 2003, specifically advised the generals not to cede

authority to a civilian government until a new constitution was written (Hamid 2014: 164; *New York Times* July 3, 2012).

The SCC's rulings sparked charges by the MB that the judiciary harbored dangerous remnants of the old regime and there was a coordinated effort to bring the MB down. By annulling the parliament, the SCAF robbed the presidency of significant power and carved out a strong role for the military in the constitution-writing process then underway. Another SCAF constitutional declaration required the new president to be sworn in not before Parliament but the SCC. This symbolic shift reflected the alliance of state institutions against an Islamist president and the political leverage the judiciary enjoyed in the transitional process. The speed in striking down government legislation was a persistent feature of judicial action during the transition period. The court's rulings reduced the influence of the Islamists but at the expense of curbing democratic practices and cementing the military's political power.

Morsi won the presidential election by a very small margin against Shafiq, thus becoming not only Egypt's first democratically elected president but also its first civilian one. In fact, the court ruling that dissolved the parliament left Morsi unrestricted by any legislature. Outraged by the SCC's ruling, Morsi refused to take his oath of office before the Mubarak-appointed SCC judges. In a symbolic gesture of defiance, he took his oath in Midan, the birthplace of the uprising. He vowed to achieve the aims of the 2011 uprising and reclaim the presidential powers stripped from his office by the SCAF's constitutional addendum. A day later, however, Morsi relented and took the oath before the SCC rather than before the SCC-dissolved Parliament. In fact, he bowed to the SCC's will, hinting of a continued contest for power over the institutions of government and the future constitution. Morsi took his oath before Mubarak-appointed chief justices, such as Adly Mansour who became interim president after the overthrow of Morsi. When he invited Morsi to take the oath, Judge Sultan⁹ specifically cited the authority of the interim constitution issued by military decree on June 17, 2012 which transferred the powers of the president's office to the ruling generals. On his part Morsi made remarks during the oath-taking that stressed the separation of powers, and especially the importance of keeping the judiciary and the legislature independent of executive power. He told the judges that he "will work to guarantee the independence of these powers and authorities," but in reality, real power resided with the military.

The judiciary shaped the electoral process by disqualifying high-profile presidential candidates, legalizing Ahmed Shafiq's candidacy after his earlier disqualification, and consolidating power in the army by ruling the composition of Parliament and the CA unconstitutional. (Later, the judiciary would acquit Mubarak, his sons, and his associates.) By abandoning restraint for partisanship, the judges made the country even more ungovernable, exacerbated political polarization, and undermined the tenuous legitimacy of the new regime and its nascent democratic institutions.

Few quarters regarded the judiciary to be acting impartially. The judiciary became a hero to those who saw it as a bulwark against Islamist domination. But animosities developed between the MB and the judiciary leading to the former to issue strident calls for a purge of the latter. Such sentiments were aggravated by other rulings and acts. Among them were the delay in announcing the results of the 2012 presidential election, the ruling to suspend Morsi's decree that called for parliamentary elections in 2013, and the decision (under appeal) to impose a one-year imprisonment on Morsi's prime minister, Hisham Kandil, for not implementing a court decree returning a privatized company to the state.

Bereft of a parliament and a constitution that defined his powers, Morsi tried to stop the SCC from challenging the constitutionality of the CA, the Shura Council, and even the presidency. He wanted to remove electoral politics from judicial review altogether, permitting him to assert

⁹ Judge Faruq Sultan, the Head of the Supreme Constitutional Court who also served as head of the Supreme Presidential Elections Commission, was an army officer and served previously as a judge in military courts.

presidential authority. Morsi's move, however, further alienated the judiciary, rigidified the polarization, and triggered a new round of protests. The protests were as severe as any that had been held since the 2011 uprising, only this time they did not target the old regime or the military but the MB's elected president.

3.3. The intensifying confrontation between the judiciary and Morsi

Morsi's victory boosted the MB's confidence. Morsi's first confrontation with the judiciary came on July 8, 2012 when he reversed the SCAF's decision and reinstated the dissolved parliament. The SCAF declared the following day that it had dissolved the PA out of respect for the rule of law and that it was assured that other state institutions would adhere to constitutional decrees. On July 9, the SCC issued a ruling that overturned Morsi's decision. The SCC's spokesperson said that, "If Morsi does not comply with today's verdict, he will be liable for defying a court order" (*New York Times*, July 10, 2012). Thousands of Morsi's MB supporters packed Midan to protest the court's ruling but Morsi eventually abided by the SCC's dissolution of Parliament. His decree, however, was viewed by many as a transgression against the judicial system and sharpened the division between political factions. In contrast, the incident bolstered the SCAF's legitimacy as the guardian of the constitution, rule of law, and independence of the judiciary.

On August 12, 2012, Morsi assumed power by issuing his own constitutional decree that canceled the SCAF's supplementary constitutional decree issued before he took office on June 30. He forced the retirement of Defense Minister Field Marshal Mohamed Hussein Tantawi and replaced him with the head of military intelligence, General Abdul Fattah al-Sisi. Morsi added legislative to his executive power, claiming the right to form a new CA if the SCC dissolved the current one. He appointed Mahmoud Mekki as his Vice-president after appointing Mekki's brother, Ahmed Mekki, as Minister of Justice. The two brothers were senior figures in the independent judges' movement of Mubarak's era. Through Mahmoud Mekki, Morsi wanted to strengthen his ability to respond to legal challenges and court cases that could determine the direction of Egypt's transition. The Administrative Judiciary Court meanwhile postponed the case to dissolve the CA to 24 September 2012, giving it time to draft the new constitution.

Morsi further targeted judges whom he thought were loyal to the Mubarak regime. On November 22, 2012, Morsi announced a constitutional decree firing General Prosecutor Abdel Maguid Mahmoud for failing to gain conviction of Mubarak's henchmen who were charged with killing protestors in Midan on February 2, 2011. Morsi might have thought that his decision would garner popular support since sacking Mahmoud was a demand of the revolutionary groups. However, in the context of Egypt's severe political polarization, many saw Morsi's act as intolerable executive encroachment on the rule of law. Morsi replaced Mahmoud with Judge Talaat Ibrahim Mohamed Abdullah, another leader of the former independent judges' movement. Morsi declared that the position would from then on be appointed by the president for a four-year term which circumvented laws that protected the prosecutor from presidential interference until the age of retirement. Morsi's detractors contended that the MB was targeting the judiciary.

Morsi expected the SCC to dissolve the Shura Council and the second CA. He was also aware that the opposition would not be satisfied with any compromise over the CA's composition. Morsi announced a Constitutional Declaration that granted him enormous new powers and immunized his decisions and the CA from judicial oversight. The Declaration allowed Morsi to shield the existing CA from the court's impending dissolution order. Most controversially, Morsi gave himself the right to

make any decision to “protect the revolution, the life of the nation, and national unity or security” and pronounced all constitutional declarations made by the government to be “final and binding and cannot be appealed in any way or to any entity,”¹⁰ until such time as a new parliament was elected and the constitution approved. The move allowed Morsi to push the Constitution through the CA and its drafting process was completed on November 30. The Judges’ Club rejected Morsi’s constitutional declarations and his decision to protect presidential decisions from judicial review and to insulate the Upper House and CA from dissolution by courts. The Judges’ Club called for an immediate strike and the suspension of work in all courts and administrative prosecutions.

On 28 November, the highest court, the Court of Cassation, held a general assembly in which members voted 270 to 19 to suspend work in response to Morsi’s decree. The strike by the Court of Cassation was joined by Egypt’s eight appellate courts in Cairo, Alexandria, Tanta, Mansoura, Ismailia, Beni Suef, Assiut and Qena. The country’s 26 primary courts, the courts of limited jurisdiction and most prosecution offices, also went on strike (*Daily News Egypt* November 28, 2012). Throughout the country about 200,000 people – non-Islamist forces, trade unionists, lawyers, and judges – protested Morsi’s declarations that put him above judicial authority. Judges in appellate courts joined the strike, refusing to conduct any legal business until Morsi rescinded his decree. In a direct challenge to Morsi, the SCC said that it would decide whether to dissolve the second CA. To deny the CA legitimacy, hundreds of judges announced their refusal to monitor future elections or certify the results of any constitutional referendum.

3.4. Attempted intimidation of the judiciary

On December 2, 2012, when the court was about to rule on the legality of the CA, about 5,000 supporters of the President besieged the SCC in Maadi to prevent it from convening and challenging the constitutionality of the CA and the Shura Council. Morsi accused the judiciary of being a counter-revolutionary force. Maher El-Beheiry, the SCC president, announced that the court would suspend all work until further notice. Ahmed Al-Zind, the head of the Judges’ Club, said that “we have decided to boycott the supervision of the referendum on the constitution scheduled for December 15, 2012” (BBC News December 3, 2012). Eventually the judges did supervise the referendum but due to the limited number of judges the referendum had to be held in two rounds on 15 and 22 December 2012. The constitution was passed, but the fact that the Higher Elections Council declared that just under 33% of eligible voters had cast their ballots – the lowest number since the transition began – meant that the constitution hardly had the national support such a document needed for popular legitimacy. Morsi’s battle with the judiciary had blighted the referendum on the new constitution as the vote took place in the absence of almost all non-Islamist political forces.¹¹

The new constitution, more precisely Article 176 of Section 4, reduced the number of SCC judges from 18 to 11, and dismissed several veteran members, including Deputy of the Constitutional Court Judge Tahani Al-Gebali, the only female judge and the most vocal critic of Morsi and the MB. The move was widely interpreted as an attack on the SCC’s independence and Morsi’s attempt to get rid of anti-MB judges. Article 177 of this constitution reduced the SCC’s jurisdiction by limiting judicial review of the constitutionality of laws governing presidential and parliamentary elections to the period before they were promulgated. This article aimed to prevent courts from invalidating laws after polling that had led to the dissolution of the elected parliament in June 2012. Morsi’s move gave

¹⁰ “English text of Morsi’s Constitutional Declaration,” *Ahram Online* November 22, 2012, <http://english.ahram.org.eg/News/58947.aspx> (accessed on June 13, 2015).

¹¹ *Al-Hayat*, November 30, 2012, <http://www.alhayat.com/Details/457588>, (accessed on March 4, 2015).

credibility to accusations of the growing ‘Brotherhoodization’ of the state and its laws to force the judiciary into submission. Even if the MB’s move to reform the judiciary was well intentioned, Morsi and the MB’s unilateral moves to do so had further polarized the country, and turned many (including former allies such as the Salafist Nour Party) against them.

The passage of the constitution was a victory for Morsi and the MB but it came at the cost of the dwindling support of revolutionary forces and the ability to build national consensus. Non-Islamist opposition leaders called the constitution illegitimate. Ironically the polarization compelled Morsi to rely more than ever before on the police and the military to protect his rule. Bloody clashes between supporters and opponents of Morsi outside the presidential palace left at least seven people dead and hundreds injured. To retain military support, Morsi and the MB allowed the army’s interests to be preserved in the new constitution, which excluded parliamentary oversight of the army’s budget, and agreed that civilians could still be tried by military tribunals (Sika 2012). Morsi also resorted to the repeated use of the Emergency Law and counted on the police to confront the growing opposition to his government.

The battle lines on the referendum hardened. In many ways the vote morphed from a decision on a contested document to a plebiscite on the MB itself. The non-Islamists, who were unable to match the consistently efficient organization of the MB, criticized their opponents for forgetting human rights and reform, and denounced Morsi as a new dictator. The non-Islamist forces abandoned the democratic process and looked to the military and the courts to undermine the rule of the MB even at the price of authoritarian resurgence that entrenched military rule in politics. In fact, the National Salvation Front, founded on November 24, 2012, two days after Morsi issued his constitutional declarations, was a coalition of opposition parties, social movements, and influential political figures such as former presidential candidates, Amr Mousa, Mohamed al-Baradei and Hamdeen Sabahi. The coalition had significant impact, bringing together rival groups and political parties and served as a compass for much of the anti-constitution and anti-MB opposition. For the first time since the January 25th uprising, a wide coalition of organizations united to counter the Islamists’ hold on power (Sika 2012). This coalition cobbled together strange bedfellows – young revolutionaries, non-Islamists, and members of the old regime – to bring down Morsi’s rule (Dunne and Radwan 2013: 98). The public backlash showed how unacceptable it was for Morsi to seize unlimited power and check the influence of a judiciary now acting as legal counterweight to the Islamists’ electoral victory.

3.5. Containing the SCC through the Judicial Authority Law

During the first half of 2013, relations between Morsi and the judiciary deteriorated. Egypt still could not have its lower house of Parliament and the electoral law passed by the Shura Council was repeatedly struck down by the courts – by the SCC on February 18, by the Administrative Court on March 7, and again by the SCC on May 25. The Shura Council was forced to prepare a fourth draft, which meant that the parliamentary elections could easily be delayed until 2014 (Al-Ali 2013). By now Morsi and the MB had little doubt that the judiciary intended to bring them down.

In light of the court’s rulings and rising tension between Morsi and the judiciary, MB members and supporters gathered outside the SCC on April 19, chanting, “the people want to purge the judiciary”, “our judiciary, where is justice and neutrality”, and so on. The protesters claimed the judiciary was infested with judges who had risen under the former regime and remained sympathetic to it. Those judges allegedly aided “counter-revolution” to fight against revolutionary gains (Sabry 2013).

The protest was boycotted by the second largest Islamist group, the Salafist al-Nour Party, and emphatically denounced by the opposition.

Among the protesters' demands was an amendment to the Judicial Authority Law (JAL) that became the centerpiece of national controversy. The new JAL, proposed in the Shura Council by the MB's ally the Wasat Party, included lowering the retirement age for judges from 70 to 60. Mubarak had steadily raised the retirement age to keep friendly judges in control of the judiciary. It was a move that was severely criticized then by many independent-minded judges some of whom joined the fight for judicial independence. They included Ahmed Mekki, the Morsi-appointed justice minister who later resigned, ironically, against the backdrop of the gathering crisis.

If it was enacted, the JAL would have forced the retirement of more than 3,000 judges, including the most senior ones who tended to be the most loyal to the old regime. Since the Ministry of Justice still had authority over judicial appointments, the thousands of vacancies arising from the new law would have permitted the appointment of judges vetted by the Morsi regime. To pave the way for appointing practicing lawyers as judges, the Morsi regime planned to enforce Article 41 of the JAL that required a quarter of the judges in the Courts of First Instance to be selected from practicing lawyers. This measure, it was believed, would allow lawyers associated with the MB and its allies to join the judiciary en masse. If successfully effected, a sudden influx of judges would have re-orientated the judiciary's leanings and undermined the military's ability to contain or weaken the power of the presidency through the judiciary (Aziz 2016: 158-6).

The proposed amendment to the JAL was adopted and it exacerbated the confrontation between the judiciary and Morsi and, more broadly, the polarization of society. On June 2, 2013, the SCC ruled that the Shura Council, the only functioning legislative body, was itself elected on the basis of an unconstitutional electoral law. The SCC also ruled that the CA was unconstitutional. The complicating factor was that Article 230 of the 2012 constitution provided that the existing Shura Council should have "full legislative authority" until the parliamentary elections (Al-Ali 2013). Therefore, although the Shura Council was elected in violation of the constitution, the SCC postponed its dissolution until the lower house was elected. The SCC decision not to dissolve the Shura Council denied Morsi a chance to centralize his power because an immediate dissolution of the Shura Council would have permitted the president to assume legislative power and enact the election law by decree. Now the Shura Council remained but its ability to function was unclear.

4. Morsi's ouster

The parallel and intensifying confrontations between Morsi and the MB, on the one hand, and the judiciary and the non-Islamist forces, on the other, created an impasse at which the government was unable to implement economic or institutional decisions. In an address to the nation to commemorate his first year in office, Morsi threatened legal action against several senior figures, some judges, and civil servants whom he accused of obstructing him. After praising the judiciary's historical contribution to stable governance, Morsi named Judge Ali Muhammad Ahmed al-Nimr as one of twenty-two judges who were to be investigated for election fraud.

In the tense milieu of late April 2013, members of the Egyptian Movement for Change (Kefaya), mounted a new anti-Morsi campaign called Tamarod (Arabic for revolt or rebellion). Soon to be known as the second "revolution" of June 30, 2013, Tamarod claimed to be a youth group whose main goal

was to collect signatures for a petition to demand Morsi's removal and fresh presidential elections. In fact, the campaign was financed by a big businessman and Mubarak crony, Nagid Sawiris, abetted by former Judge of the SCC Tahani Gebali, organized by the Ministry of Interior and security services, and given massive media exposure.¹² Whether or not Tamarod, as its leaders claimed, was genuinely started by young activists acting on their own, the movement endorsed a form of political competition in which it was legitimate for the army to remove an elected president if enough protestors asked for it (Faris 2013). In a matter of weeks, protests in support of Tamarod spread to almost all governorates in a well-orchestrated campaign that required extensive organization and resources way beyond the capacity of a new and small group. On July 3, following three days of large-scale, anti-Morsi demonstrations backed by an alliance of the judiciary and the police, the SCAF staged a coup and overthrew Morsi. The coup represented the ultimate triumph of state institutions when Field Marshal Abdel Fattah al-Sisi appeared on national television with the SCC judges standing behind him, and announced that Morsi had been deposed, arrested and detained in an undisclosed location.

4.1 The reinstatement of fear and the consolidation of authoritarianism

After Morsi's ouster, Sisi rewarded pro-government judges by appointing the Chief Justice of the SCC, Adly Mansour, as Acting President, and announced a 'road map' to amend the constitution and move towards new parliamentary and presidential elections. By dissolving the Shura Council, Mansour concentrated power in the Executive once again. Mansour's ascent to the presidency showed how the judges embraced the role of statesmen, providing legal backing to the ruling elite to crush protest movements that could "tear down the state." What emerged in the wake of Morsi's ouster was a counter-revolutionary moment where judicial rulings subdued dissent and subjected the MB leaders, its members, even opponents of Morsi's overthrow to imprisonment.

The judiciary now pursued an aggressive strategy of punishing dissent and restoring the state institutions that had weathered the political storm of 2011. More importantly, with its anti-protest rulings, the judiciary again implanted the fear of the security agencies in the hearts and minds of political activists and closed off arenas for expression in the media and on the streets. The courts eventually dropped all criminal charges against Mubarak, his associates, and dozens of police officers who stood trials for the killing of nearly 900 protestors during the 2011 uprising. But the courts meted out harsh sentences to the MB members and supporters. In September 2013, a ruling dissolved the FJP, banned the MB, and ordered their assets to be confiscated. Thousands of people were detained on accusations that they belonged to a banned terrorist group and took part in violent protests. The MB's sphere of social outreach and activism collapsed when its social service network of community organizations, such as hospitals and schools, was shut down. More than that the courts supplied the legal basis for the regime to move against the MB. On December 25, 2013, the Egyptian government formally listed the MB as a terrorist organization after accusing it of carrying out a suicide bomb attack on a police station that killed 16 people. In a mass trial on 28 April 2014, a court sentenced Morsi and hundreds of MB supporters to death after convicting them on all kinds of charges – inciting the murder of protesters outside the presidential palace in December 2012; committing espionage by leaking secrets to Iran's Revolutionary Guard, the Palestine's Hamas and Lebanon's Hezbollah; insulting the judiciary; committing fraud in the MB's economic program (Al-Nahda); leaking national security documents to Qatar; and murdering prison officers together with 130 prisoners in the latter's attempted escape from jail during the 2011 uprising.

¹² "Sudden Improvements in Egypt Suggest a Campaign to Undermine Morsi," *New York Times*, July 10, 2013 (accessed June 14, 2015).

In a second case in March 2014, during the run-up to the presidential elections, a mass trial ended in death sentences for 529 MB members. The following month another 683 accused were sentenced to death. Obviously, the timing and conduct of the trials smacked of retribution for Morsi's assault on the judiciary but such mass death sentences spread fear that dissent would bring execution or lengthy imprisonment. Judges who were suspected of being pro-Brotherhood were referred to disciplinary board, which deterred other judges from voicing dissent against mass trials and the complicity of their colleagues. In fact, tens of judges were forced into compulsory retirement by disciplinary committees formed by the Supreme Judiciary Council for condemning the military takeover and calling for a return to constitutional legitimacy. These disciplinary measures have effectively extended the regime's authority over the judiciary itself. Egyptian law prohibits judges from engaging in politics. However, judges who expressed political opinions in favor of the current regime, such as then-Minister of Justice Ahmed al-Zend, who called for the destruction of the MB, and Judge Mohammad Nagy Shehata, who repeatedly expressed his opposition to the MB and the 2011 uprising, have not faced any punishment.

The judiciary's involvement in legalizing repression allowed the security forces to suppress dissent with immunity. The latter clamped down on MB protesters and killed hundreds while dispersing pro-Morsi sit-ins and raiding two big camps of protesters at the Rabaa al-Adawiya and Al-Nahda squares on August 14, 2013. For all that, the military and security forces were treated as heroes by many who had revolted against Mubarak's police state in 2011. The return to authoritarianism was marked by the re-birth of the State Security Investigation Services, the symbol of oppression under Mubarak (Mabahith Amn al-Dawla), that was disbanded in the aftermath of the 2011 "revolution".

Non-Islamist critics of the regime, too, were tried and they received lengthy prison sentences for breaking the anti-protest law¹³ approved in November 2013 by Interim President Adly Mansour. The law allows state institutions to operate with immunity from public oversight. In particular, it expands the right of the security forces to legally and violently repress dissent by banning any demonstration or street protest held without government permission. The law makes it a crime ten or more people to take to the streets without prior authorization. Since Morsi's ouster, a 2015 Amnesty International report noted, Egypt has swung from "mass protest to mass arrest" where thousands of what the report called the "protest generation" were arbitrarily imprisoned and subjected to "disappearances".¹⁴ Egyptian public figures from diverse political and social backgrounds have likewise been tried for 'insulting the judiciary.' The Egyptian Penal Code punishes any "offence on public officials doing their job" with imprisonment of up to one year with no elaboration on the nature of the 'offence' in law (*Daily New Egypt* May 23, 3015).

With the MB crushed, the judiciary moved to punish non-Islamist opponents of the regime. In April 2014, a court ruling banned the second oppositional group, the secular liberal April 6 Movement, on charges of "damaging the image of the state" and making illegal contacts with foreigners. The April 6 Movement, a leading force of the 2011 uprising, had opposed the post-Morsi interim authorities and Sisi's presidential ambitions. The movement's leaders, Ahmed Maher and Mohamed Adel, and other activists were sentenced to lengthy imprisonment and heavy fines for violating the Protest Law by conducting unauthorized street protests.¹⁵ Journalists can also be silenced by a 2016 law that criminalizes "incitement against state institutions and broadcasting false information that would damage the image of the state" (*Ahram Online* December 26, 2016). With many of the prominent

¹³ "Full English Translation of Egypt's New Protest Law," *Ahramonline*, <http://english.ahram.org.eg/News/87375.aspx>, (accessed on August 20, 2016)

¹⁴ "Generation Jail: Egypt's Youth Go from Protest to Prison," *Amnesty International*, June 2015.

¹⁵ "Hundreds Protest banning of April 6 Youth Movement," *Mada Masr*, April 30, 2014.

leaders and activists of the 2011 uprising in prison or exile, the political elite associated with the military or the Mubarak regime have retaken central stage (Tohamy 2016). Thus, the judiciary rode on the military's repression of all political opposition, proving that courts and judges are no guarantors of a virtuous "rule of law." In a nut shell, Egypt's military and key state institutions retain autonomy from and dominance over civilian politics, preempting any anti-regime mobilization.

5. Conclusion: the Triumph of State Institutions over the 2011 Uprising

The 2011 uprising failed to tackle the authoritarianism and corruption embedded within state institutions from the military to the judiciary. To be sure, the SCAF and the SCC thwarted the popular demands of the uprising at every turn in order to restore the old political order as much as conditions would allow. On their part, Morsi and the FJP were trapped in more than one untenable situation. They attained victory through electoral processes only to be hamstrung by judicial hostility. They claimed fidelity to the principles of the "revolution" but sought expedient accommodation with the SCAF and put forward laws that maintained restrictions on civil society activities. In the frequent confrontations that they faced on multiple fronts, perhaps their fatal error was to alienate the non-Islamist forces. And without a broad, popular, united, and purposeful movement, the post-uprising MB turned out to be no match for an obstructionist judiciary and unreformed military. The judiciary subverted the process of democratic transition, criminalized civil society activities, and constituted a major obstacle to the establishment of genuine rule of law. In other words, the judiciary kept intact Egypt's long tradition of authoritarianism and prevented the rise of any political force that would challenge the central authority of the military. After influencing events under Sadat and Mubarak, as it were behind the scenes, the military now openly governs with strong control of the economy and the state apparatus. Consequently, police brutality, rampant corruption, and nepotism, which fuelled the mass grievances behind the 2011 uprising, have become worse.

A reformed judiciary is a key to Egypt's future and stable society. However, it has not been in the interest of the ruling elite (Mubarak, Morsi and Sisi) or the conservative judiciary to accept reform. There is hardly any prospect of genuine judicial reform at present when Egyptian society remains polarized while public space is closed by a legal authoritarian regime that silences dissent and represses civil society, not least with the judiciary as its partner.

References

- Abu-Odeh, Lama. 2013. "Of Law and Revolution," Georgetown Public Law and Legal Theory Research Paper (12) 129: 1-21.
- Abul-Magd, Zeinab. December 23, 2011. "The Army and the Economy in Egypt," *Jadaliyya*, (<http://www.jadaliyya.com/pages/index/3732/the-army-and-the-economy-in-egypt>, accessed on July 15, 2015).
- Al-Ali, Zaid. June 6, 2013. "The Constitutional Court's Mark on Egypt's Elections," *Foreign Policy*.
- Alaimo, Kara. 2015. "How the Facebook Arabic Page "We Are All Khaled Said" Helped Promote the Egyptian Revolution," *Social Media & Society*, 1 (2): 1-10.

- Auf, Y. 2014. "Prospects for Judicial Reform in Egypt," *Atlantic Council*, (<http://www.atlanticcouncil.org/blogs/menasource/prospects-for-judicial-reform-in-egypt>, accessed January 11, 2015).
- Aziz, Sahar. 2016. "Independence Without Accountability: The Judicial Paradox of Egypt's Failed Transition to Democracy," Research Paper No. 16-07, *Legal Studies Research Paper Series*, Texas A&M University, School of Law.
- Aziz, Sahar. August 20, 2014. "Egypt's Judiciary, Coopted," Carnegie Endowment for International Peace, (<http://carnegieendowment.org/sada/?fa=56426>, accessed on January 19, 2016).
- Bayat, Asef. March-April 2013. "Revolution in Bad Time," *New Left Review* 80: 47-60.
- Bradley, M. 2009. "Activists lose control of Egypt's Judges Club," *The National World*, (<http://www.thenational.ae/news/world/middle-east/activists-lose-control-of-egypts-judges-club>, accessed on March 3, 2016).
- Brown, Nathan. January 2012. "When Victory Becomes an Option: Egypt's Muslim Brotherhood Confronts Success," *Carnegie Endowment for International Peace*, Carnegie Papers, (http://carnegieendowment.org/files/brotherhood_success.pdf, accessed on February 6, 2016).
- Brown, Nathan. 2012a. "Egypt's Judges in a Revolutionary Age," *Carnegie Endowment for International Peace*, February 22.
- Brown, Nathan. 2016. "Egypt's Judiciary in a Postrevolutionary Era," in Bernard Rougier, Stéphane Lacroix (eds) *Egypt's Revolutions: Politics, Religion, and Social Movements*, Palgrave, Macmillan.
- Darwisheh, Housam. 2014. "Survival, Triumph and Fall: The Political Transformation of the Muslim Brotherhood in Egypt" in Boo Teik Khoo (ed) *Between Dissent and Power: The Transformation of Islamic Politics in the Middle East and Asia*, Palgrave, Macmillan.
- Dunne, Michele & Radwan, Tarek. January 2013. "Egypt: Why Liberalism Still Matters," *Journal of Democracy*, 24 (1): 86-100.
- El-Ghobashy, Mona. 2015. "Dissidence and Deference Among Egyptian Judges," Middle East Report, (<http://www.merip.org/mer/mer279/dissidence-deference-among-egyptian-judges>, accessed on June 4, 2016).
- El-Gobashy, Mona. April 2011. "The Praxis of the Egyptian Revolution," *Middle East Report* 258: 2-13.
- Faris, David M. 2013. "Deep State, Deep Crisis: Egypt and American Policy," *Middle East Policy*, 20 (4): 99-110.
- Hamid, Shadi. 2014. *Temptation of Power: Islamists and Illiberal Democracy in the Middle East*, Oxford University Press.
- Kandil, Hazem. 2015. *Inside the Brotherhood*, Cambridge, Policy Press.
- Khamis, Sahar and Vaughn, Katherine. March 2012. "'We Are All Khaled Said': The potentials and limitations of cyberactivism in triggering public mobilization and promoting political change," *Journal of Arab & Muslim Media Research*, 4 (2-3):145-163.
- Kirkpatrick, David. July 3, 2012. "Judge Helped Egypt's Military to Cement Power," *New York Times*
- Lindsey, Ursula. January 13, 2014. "Egypt's Winding Path Toward a New Constitution," Mada Masr, (<http://www.madamasr.com/en/2014/01/13/feature/politics/egypts-winding-path-toward-a-new-constitution/>, accessed on December 10, 2015).

- Meringolo, Azzurra. July 4th, 2014. "Egypt's Judiciary Risks the Jaws of Political Maneuvering," *Al-Arabiya.net*: (<https://english.alarabiya.net/en/views/news/middle-east/2014/07/04/Egypt-s-judiciary-risks-the-jaws-of-political-maneuvering.html> accessed September 11, 2016).
- Moustafa, Tamer. 2007. *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt*, Cambridge University Press.
- Moustafa, Tamer. 2007b. "Mobilizing the Law in an Authoritarian State: The Legal Complex in Contemporary Egypt," in Terence C Halliday, Lucien Karpik, Malcolm M Feeley (eds) *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Liberalism*, Oxford and Portland Oregon.
- O'Donnell, Guillermo. October 2004. "Why the Rule of Law Matters," *Journal of Democracy*, 15 (4): 32-46.
- Pioppi, Daniela. 2013. "The Judiciary and Revolution in Egypt," *Insight Egypt*, August (2).
- Rudolph, Peters. 1999. "Administrators and Magistrates: The Development of a Secular Judiciary in Egypt, 1842 – 1871," *Die Welt Des Islams*, 39 (3):378-397.
- Sabry, Bassem. April 2013. "Eight Questions on 'Purging' of Egypt's Judiciary," *Al-Monitor*: (<http://www.al-monitor.com/pulse/en/originals/2013/04/eight-questions-purging-egyptian-judiciary.html>, accessed on March 11, 2016).
- Sachs, JA. November 25, 2014. "Judicial Behavior during Transitions from Authoritarian Rule: Evidence from the Egyptian Case," *International Political Science Association*.
- Said, Atef Shahat. 2008. "The Role of the Judges' Club in Enhancing the Independence of the Judiciary and Spurring Political Reform," in Nathalie Bernard-Maugiron (ed) *Judges and Political Reform in Egypt*, American University in Cairo Press.
- Said, Atef. 2012. "The Paradox of Transition to 'Democracy' under Military Rule." *Social Research: An International Quarterly* 79(2): 397–434.
- Sayigh, Yezid. December 15, 2011. "The Specter of "Protected Democracy" in Egypt," Carnegie Europe, (<http://carnegieeurope.eu/publications/?fa=46245>, accessed on January 20, 2016).
- Shahin, Emad El-Din. 2012. "The Egyptian Revolution: The Power of Mass Mobilization and the Spirit of Tahrir Square," *The Journal of the Middle East and Africa*, 3 (1): 46–69.
- Shama, Nael. 2014. *Egyptian Foreign Policy From Mubarak to Morsi: Against the National Interest*, New York: Routledge.
- Shehata, Samer & Stacher, Joshua. 2006. "The Brotherhood Goes to Parliament," *Middle East Report*, 240: 32-39.
- Sika, Nadine. December 30, 2012. "The Future of Egypt: Autocracy or Transition to Democracy," *Muftah*, (<http://muftah.org/the-future-of-egypt-autocracy-or-transition-to-democracy/#.WIZ7TbGZNE4>, accessed on July 12, 2016).
- Stotzky, Irwin (ed). 1993. *Transition to Democracy in Latin America: the Role of the Judiciary*, Westview Press.
- Tohamy, Ahmed. 2016. *Youth Activism in Egypt: Islamism, Political Protest and Revolution*, London: I.B. Tauris & Co.Ltd.
- Wolff, Sarah. 2009. "Constraints on the promotion of the rule of law in Egypt: insights from the 2005 judges' revolt," *Democratization*, 16 (1): 100-118.