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Excerpt

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I

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

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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).

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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.

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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.

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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.

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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 legitimating 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

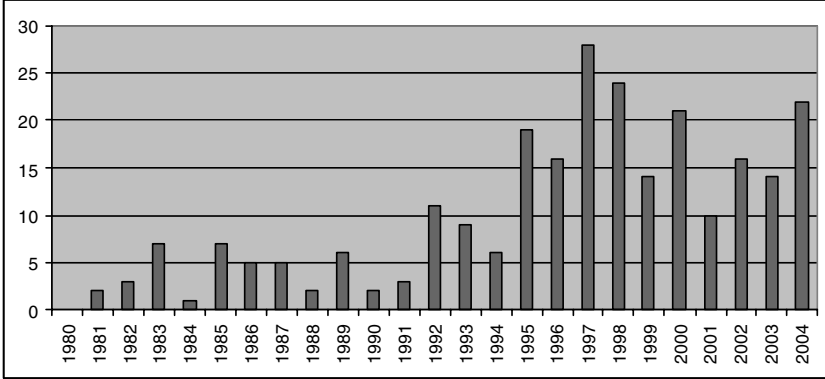


FIGURE 1.1: Rulings of Unconstitutionality by the Egyptian Supreme Constitutional Court, 1980–2004. *Source:* SCC rulings are compiled by the Arab Republic of Egypt in *al-Mahkama al-Dusturiyya al-'Ulia*, Vol. 1–10. See also Arab Republic of Egypt, *al-Jarida al-Rasmiyya*.

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

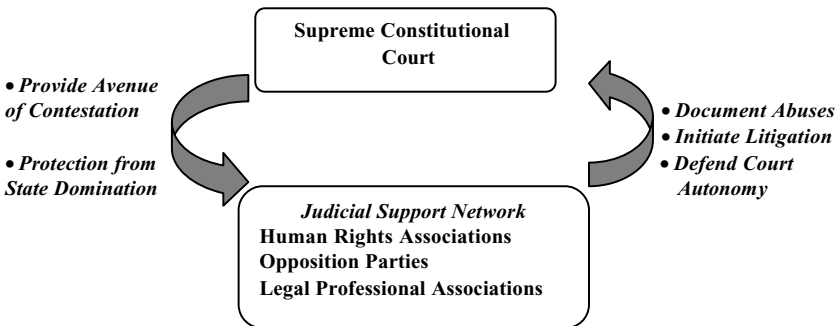


FIGURE 1.2: Supreme Constitutional Court – Judicial Support Network Synergy.

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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

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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

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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 Bouchier, “Magic Memos, Collusion and Judges with Attitude: Notes on the Politics