

3

A Clash of Institutions: Judiciary vs. Executive in Egypt

Nathalie Bernard-Maugiron

Since the overthrow of Hosni Mubarak in February 2011, the judiciary has emerged as a central political player on the Egyptian scene. During Mohamed Morsi's year in power, members of the judiciary filled explicitly political posts in government, with prominent judges holding positions as vice president, justice minister, and chair of the Constituent Assembly. Courts increasingly weighed in on sensitive political issues, often in conflict with the executive and legislative branches. In retaliation, the executive and legislature took steps to discipline the judiciary, reduce its political influence, and even purge political opponents among them. After Morsi's ouster in July 2013, judges were accused of taking their revenge by prosecuting Morsi and his supporters. The courts cleared Mubarak and his top officials of all charges, failed to investigate members of the security forces on charges of killing protesters, and sentenced members of the Muslim Brotherhood and prominent secular opponents to jail for participating in peaceful street protests. Such rulings rendered the judges susceptible to accusations of delivering selective justice.

By taking what were considered explicitly political decisions, the courts have been accused of overstepping their authority. This perceived overreach has shaken public confidence in their standing as a dispassionate institution. In addition, the designation of the speaker of the Supreme Constitutional Court as interim head of state in 2013 (to serve until new elections could be organized) constituted a new high in the judicialization of politics or, worse, the politicization of the judiciary.¹ Furthermore, none of the regimes that have ruled the country since February 2011 have undertaken the passage of the long-anticipated reform of the judiciary.

30
The position of the judiciary in Egypt is thus at one of its lowest points in recent history.

The Judiciary on the Political Field

This is not the first time in Egyptian history that elements of the judiciary have been seen as being politically active. Under Mubarak, the judiciary had served as an arena for pursuing political objectives in defiance of the regime in power. The courts had challenged the authoritarian regime by issuing rulings aimed at guaranteeing a variety of political rights and freedoms (Moustafa, 2003, 2008). The courts' assertiveness led to the paradoxical outcome that under the Morsi regime judges were accused of being supporters of Mubarak and the army, whereas during the Mubarak era they were considered to be one of the few counterweights to the president's authoritarianism. Equally paradoxical, under Morsi, judges were accused of being opponents of Islamists, whereas under Mubarak, they were accused (by regime elites trying to tarnish their reputation) of being infiltrated by the Muslim Brotherhood.

Judicial Independence Prior to the 2011 Uprising

The political independence and assertiveness of the judiciary prior to the January uprising can be illustrated by several examples. The first concerns the leading role played by the judiciary in advocating for free and fair conduct of elections during the Mubarak era. Until the year 2000, state employees were assigned responsibility for overseeing the voting process in primary polling stations. Judges, by contrast, were assigned the role of monitoring general polling stations where the counting of ballots was performed. But in 2000, the Supreme Constitutional Court ruled that, in accordance with Article 88 of the constitution of 1971, the entire election process had to be performed under the supervision of members of judicial bodies.

This ruling meant that judges should supervise both general and primary polling stations. The Supreme Constitutional Court's ruling was implemented for the first time in the elections of 2000. During these elections, judges witnessed widespread fraud and irregularities and complained that they were asked to certify rigged elections.² They requested full supervision rights over the entire election process, from the preparation of voter lists to the announcement of the results. The battle was led by the Judges' Club,³ ruled by the "Independent Current," a faction of judges who put forward a platform of demands for democratic reforms.

Beyond this show of assertiveness, in 2005 a number of reformist judges from civil and criminal courts launched a protest movement to advo-

cate for free elections and real judicial independence.⁴ They resorted to new means of pressure, such as making statements to newspapers, granting interviews to satellite channels, and even organizing sit-ins and demonstrations. The reformist judges also threatened to refrain from monitoring the upcoming elections and constitutional referendum unless the regime met their demands for legal reforms.

For their independence and assertiveness, the reformist judges paid a high price. Not only did the government refuse to respond to their two main demands, but the judges and their club were subject to several measures of retaliation. Several reformist judges were referred for disciplinary investigation and their immunity was lifted by the Supreme Judicial Council. Beyond that, in 2007, judges were deprived of their role of supervising the voting process. That year the constitution was amended to explicitly provide that judges would supervise general polling stations only, and henceforth, state employees, and not specifically judges, would preside over the primary polling stations as had been the case before 2000.⁵

Another example of judicial assertiveness under the Mubarak regime also focuses on the battle for free and fair elections. Besides fighting for judicial supervision of the voting process, in 2005 judges also supported the campaign by NGOs to ensure the transparency of the ballots.⁶ Several human rights NGOs had submitted a request to the Presidential Elections Commission for permission to observe the elections inside the polling stations. When the NGOs failed to receive an official reply, they challenged this implicit refusal by bringing a case before the State Council.⁷ In an act of surprising political independence, the State Council agreed to hear the case. (Article 76 of the constitution provided that the Presidential Elections Commission decisions could not be challenged by any other authority and that only the commission itself could examine appeals against its own decisions.)⁸ After hearing the case, the court held that since civil society organizations, including human rights NGOs, were focused on reviving the idea of democracy in society and ensuring the transparency of elections, they had to be authorized to observe the electoral process, so long as they did not hinder the work of the polling stations.

But the conflict did not end there. The Presidential Election Commission challenged the State Council's competence to rule on this issue, and after appealing the decision to the Supreme Administrative Court, it had the ruling revoked. The Electoral Commission in charge of organizing the parliamentary elections then announced in a press release that NGOs and the National Council for Human Rights would be authorized to observe the parliamentary elections on the condition that they coordinate their actions and that they be "neutral" (i.e., have no political affiliation and have no members participating in the elections). But the commission refused to provide an official response to the NGOs directly. The NGOs decided to bring a suit to the Court of Administrative Litigation. On November 6, 2005, this court

responded favorably to the NGOs' request. It struck down the commission's tacit rejection of the NGOs' request, maintaining that civil society organizations should be granted authorization to observe the balloting without having to coordinate with the National Council for Human Rights. The court also insisted that NGOs be present during the counting of the ballots, arguing that the role of civil society organizations was to allow the peaceful expression of opinions and participation for the political, social, and economic edification of society. The assertiveness of the courts meant that NGOs managed to have access to the primary polling stations to observe the voting process. In this case judicial independence and activism delivered a victory for more transparent elections despite the intentions of the authoritarian regime.

Interference of the Executive Power in the Affairs of the Judiciary

These illustrations of judicial independence in Egypt are all the more surprising given the numerous laws and conventions that have long enabled the executive to meddle in the affairs of the judiciary.⁹ The first of these concerns the process of judicial appointment. In Egypt, the executive is responsible for appointing the most important positions in the judiciary.¹⁰ For example, the president, the vice presidents, and the counselors of the Court of Cassation are all appointed by the president of the republic.¹¹ Until 2012, the president of the republic also chose the general prosecutor among senior magistrates. The constitution of 2012 stated that he would be appointed by the president of the republic, on the basis of a selection made by the Supreme Judicial Council, for a nonrenewable period of four years or for the remaining time until retirement, whichever came first. (The 2014 constitution specified that he would be chosen by the Supreme Judicial Council and appointed by presidential decree.) The justice minister, an arm of the executive, appoints the presidents of the first instance courts for one renewable year (also subject to the agreement of the Supreme Judicial Council).¹² The justice minister also controls the geographic assignment of judges (to courts in remote areas far from the capital or not) determined once a year with the approval of the Supreme Judicial Council. The minister also plays an important role in choosing investigating judges, deciding on the transfer of members of the public prosecution, and exercising a supervisory role over the public prosecution. Overall, this set of powers gives the executive considerable influence over the judiciary.

In addition to control over the appointment process, the executive branch commands an outsize role in the Supreme Judicial Council. The council serves as the body in charge of monitoring and supervising the

entire civil and criminal judicial system (nomination, judicial promotions, assignment, salaries, transfers, and disciplinary actions). It is composed of seven members: the president of the Court of Cassation, the president of the Cairo Court of Appeal, the general prosecutor, the two most senior vice presidents of the Court of Cassation, and the two most senior vice presidents of the courts of appeal. From the above it is clear that these officials owe the lion's share of their positions to executive appointment. Judicial independence is compromised by the fact that the members of the Supreme Judicial Council are not elected by the ranks of the judiciary as reformist judges have demanded.

A third means of executive interference is exercised through the Judicial Inspection Department. This department oversees the technical evaluation of judges and members of the prosecution and oversees the annual judicial "movement" project (rotation of judges). The members of this department are nominated by the Ministry of Justice, which leaves the door open to possible abuses. A judge who is diffident about ministerial instructions could be penalized by a negative evaluation that might have harmful consequences for his career or alternatively find himself posted to a court far from his family with bad working conditions.

Control over judges' delegation to other government ministries or secondment abroad is another means available to the executive to undermine judicial independence. Egyptian judges are paid low salaries, and assignment to work in a foreign country, in particular Gulf countries, constitutes a very lucrative opportunity.¹³ Most of these assignments have been distributed to judges in return for attentiveness to government interests. Similarly, one of the means the regime has used to thank loyal judges is to nominate them to administrative functions in a ministry—also a financially lucrative opportunity. Such delegation creates a conflict of interest for judges since a seconded judge is likely to favor the interest of the ministry he has long served.¹⁴ The possible reward of secondment also gives the state the means to keep control over counselors of the State Council. Of course, providing judges with salaries adequate to allow them a decent livelihood would eliminate the appeal of delegation and secondment and strengthen the autonomy of the judiciary.

The independence and autonomy of judges are also compromised by the inordinate discretionary power awarded to court presidents over judges under their jurisdiction. The presidents (appointed by the Justice Ministry) are empowered to address disciplinary warning to their judges and can propose to the general prosecutor to activate a disciplinary action against them. Furthermore, the presidents have been delegated the authority to determine the assignment of cases to specific judges, even though, in principle, the distribution of cases should be mandated according to general and abstract rules.

Finally, the executive has compromised the effective autonomy of the judiciary by selectively abstaining from the implementation of its rulings

(el-Borai, 2008).¹⁵ In addition it has routinely withdrawn sensitive cases from the jurisdiction of the regular judiciary and referred them to more reliable judges in exceptional and military courts (Abu Seada, 2008).

In the waning years of the Mubarak regime, reformist judges pressed for changes that would bolster judicial independence. Among other things they called for the election of members of the Supreme Judicial Council, higher salaries for judges, and various amendments to the Judicial Authority Law. The latter was amended in June 2006 and the amendments were partially successful in that they did diminish the justice minister's supervisory and disciplinary power over judges. They also provided for an independent budget to the judicial authority. But they did not change the composition of the Supreme Judicial Council, and thus the executive branch retained its primary mechanism for control over judicial affairs.

Judges Influence the Transition Process

After the uprising of January 25, 2011, some of the fiercest political struggles over the course of Egypt's political transition were played out in the courts. The judges emerged as central actors in this drama as illustrated by a series of signal court rulings delivered by lower and higher courts. These rulings have led to accusations that the judges were politically motivated.

Some of the earliest politically sensitive rulings delivered by the judiciary came from the administrative courts. Immediately after the revolution in February 2011, an administrative court ordered the dissolution of the former ruling National Democratic Party. In addition, the administrative court ruled to dissolve all of Egypt's local councils, which had been largely staffed by members of the ruling party. Later, the same court delivered a ruling that permitted Egyptians living abroad to vote in all elections and public referenda. The courts also cancelled the privatization of several state-owned enterprises, putting a stop to the country's economic liberalization program. But if these cases were politically sensitive, even more so were a series of cases ruled upon by the Supreme Constitutional Court¹⁶ and the State Council.¹⁷

Rulings of the Supreme Constitutional Court on the People's and Consultative Assemblies

Among the most politically consequential decisions delivered by the Supreme Constitutional Court, and the ones most certain to put it on a collision course with the executive branch, concerned its rulings on the legality of parliamentary elections held in 2012. On June 14, 2012, two days

before the completion of Egypt's first postrevolution presidential elections, the Supreme Constitutional Court ruled that the electoral law that had governed the election of the lower house of Parliament back in January had been unconstitutional.¹⁸ On the basis of this ruling, the Supreme Council of the Armed Forces, which was still running the country at that time, immediately issued a decree to dissolve the assembly.

The Supreme Constitutional Court's ruling was seen by many as politically motivated, driven by opposition to the Islamist majority in the Parliament as well as concern about Islamists' controlling both the executive and legislative branch simultaneously. In addition, the court was accused of being motivated to disband the lower house of Parliament because the court was threatened by the assembly's discussion of legislation aimed at recasting the court's membership and limiting its mandate. But in fact, the reasoning of the constitutional court was not without precedent. The Supreme Constitutional Court had delivered similar rulings in 1987 and 1990 during the Mubarak era when it had declared electoral laws unconstitutional on similar grounds. But if the stance of the court was not surprising, its speed in delivering the ruling was. The court decided this case in less than two months, despite the fact that the court had a huge backlog of cases, whereas similar rulings in the past had taken years to produce. Partisans of the Supreme Constitutional Court explained away this unusual speed by pointing to the urgency and exceptional importance of the ruling. But for non-partisans of the court, this speed pointed to the political impetus behind the court's decision.

One year later (in June 2013), the Supreme Constitutional Court delivered a similar ruling with regard to the law that had governed the election of Egypt's upper house of Parliament, called the Shura Council. Although equally controversial, this ruling had more limited political impact. The upper house was not dissolved because the new constitution, adopted in December 2012, had expressly made the upper house immune from dissolution until new elections were held for the lower house.

The Supreme Constitutional Court and the Political Isolation Law

Another highly sensitive decision delivered by the Supreme Constitutional Court concerned its ruling on the Political Isolation Law. On June 14, 2012, the same day that it delivered the ruling declaring the election of the lower house unconstitutional, the court also ruled the Political Isolation Law unconstitutional. This law (adopted by the People's Assembly as an amendment of the 1956 law on the exercise of political rights) banned from participation in politics officials of a certain stature who had served the old

regime and ruling party in the last ten years of the Mubarak era. The law had been challenged by Ahmed Shafiq, a presidential candidate deprived of his right to run because he had served as Mubarak's last prime minister. The Presidential Elections Commission referred the case to the Supreme Constitutional Court. The court ruled on the challenge two days before the second round of the presidential elections (Shafiq had been allowed to run pending the ruling of the court) and invalidated the law.

The court's reasoning behind its decision had several prongs: penal laws should not have retroactive effects; individuals should not be punished twice for the same crime; penalties should not be imposed without a court ruling; discrimination between candidates on the basis of party affiliation was illegal; and penalties should be imposed on the basis of actions taken and not on mere presumptions of behavior based on the holding of an office. Despite this arsenal of reasoning, many viewed the court's ruling as politically driven because it permitted Ahmed Shafiq, the military's preferred candidate, to remain a presidential candidate. Partisans of the court retorted that the court's decision followed the same line of reasoning that had guided its decisions in the 1980s, in particular with regard to two rulings in 1986 and 1987 that had invalidated laws depriving members of the Nasserite party and former leaders of the Wafd Party of their political rights. The court's partisans argued that the consistency in the court's approach, despite the very different political persuasions of the defendants, attested to the political neutrality of the court.

The State Council and Supreme Constitutional Court Rulings on the Constituent Assembly

The State Council, alongside the Supreme Constitutional Court, also ruled on some very sensitive and consequential political issues, most notably the composition of Egypt's Constituent Assembly—the assembly tasked with drafting the country's new constitution. The State Council declared the composition of the Constituent Assembly unconstitutional in April 2012, delaying the formulation of the document. Then, a year later, the Supreme Constitutional Court delivered a similar ruling, declaring the composition of a second Constituent Assembly unconstitutional as well. The latter ruling came five months after the new constitution drafted by this assembly had already been adopted by popular referendum and entered into force!

The logic governing the council's and the court's decisions was as follows. In March 2011 the Supreme Council of the Armed Forces had delivered a "Constitutional Declaration" calling for the creation of a Constituent Assembly. The assembly, tasked with writing a new constitution for Egypt, was to be composed of 100 members and was to be chosen by the members

of the upper and lower houses of Parliament. Following the parliamentary elections, members of Parliament chose the members of the Constituent Assembly in March 2012, drawing half of the Constituent Assembly from people contemporaneously serving in the upper and lower houses of Parliament. The State Council reviewed this policy (it considered the process of composing a Constituent Assembly within its purview because it viewed the process as an administrative, not legislative, process), and it ruled that the composition of the Constituent Assembly was invalid.

What was its reasoning? The State Council argued that the language of Article 60 of the army's Constitutional Declaration was such that it required that the members of the Constituent Assembly to be chosen from outside of Parliament; that is, parliamentarians were barred from electing themselves. In addition, the State Council argued that the composition of the Constituent Assembly did not represent the entire spectrum of the Egyptian society, including too few young people, women, and minorities. The court's ruling was greeted with approval by liberals, who were especially alarmed by the preponderance of Islamist members in the Constituent Assembly. But Islamists considered this decision a politically motivated blow and argued that the State Council had no jurisdiction over the nomination decision since formation of the assembly was a purely parliamentary affair.

The issue of the composition of the Constituent Assembly did not end there. A second Constituent Assembly was formed by the Parliament in June 2012, after two months of negotiations among political forces. This time, however, its formation was challenged before the Supreme Constitutional Court. After the ruling was postponed several times, the court announced that it would decide on the case on December 2, 2012. This announcement elicited a strong response from President Morsi as well as from many of his Islamist supporters and spelled a near constitutional crisis (see below). Through some presidential high-handedness Morsi convened the Constitutional Assembly, encouraged the assembly to rush through the drafting of a constitution (delivered November 30, 2012), permitted Islamist crowds to intimidate the Supreme Constitutional Court (sufficient to suspend the court's deliberation on the assembly's legality), organized a popular referendum to approve the constitution (held December 15–22), and saw the new constitution signed into law by December 26. The court, though slow to respond, did finally rule on the issue of the legality of the Constituent Assembly a year and a half later in June 2013, declaring that the law governing the composition of the Constituent Assembly was unconstitutional. The Supreme Constitutional Court's ruling, however, had no practical impact. The Constituent Assembly had already dissolved itself in December 2012 after having finished the drafting of the new constitution. And despite the the court's ruling, the constitution drafted by this assembly remained in place because it had been adopted by popular referendum.

The Supreme Constitutional Court and the New Law on Parliamentary Elections

A fourth area of significant political contention ruled upon by the courts concerned the new constitution's law on parliamentary elections. According to the new constitution, the Supreme Constitutional Court was charged with reviewing the constitutionality of laws only after they were adopted, except in the case of electoral laws. For the latter, the court was called upon to exercise prior review; that is, Parliament was obliged to refer these laws to the court to check on their constitutionality before voting on them. If the Supreme Constitutional Court deemed the proposed law unconstitutional, it was to attach a report delineating the amendments necessary for the law to pass legal muster. The constitution, however, was silent as to whether the amended draft law had to be referred again to the court for approval before the legislature's vote.

This ambiguity set the stage for conflict between the judiciary and the legislature in 2013. In February, the upper house of Parliament sent a draft electoral law for parliamentary elections to the Supreme Constitutional Court for approval.¹⁹ The court rejected some of the articles of the law. The upper house amended the electoral law in light of the court's rulings and then voted on it. President Morsi promulgated the new law and called for elections in April 2013. At that point a lawyer filed a case before the State Council arguing that the draft law should have been sent back to the Supreme Constitutional Court for approval of the amendments and the final version of the law. In March 2013, the Court of Administrative Litigation of the State Council decided to suspend the presidential decree calling for parliamentary elections and to refer the election law to the Supreme Constitutional Court for final review. This ruling was upheld on appeal by the Supreme Administrative Court in April 2013. The parliamentary elections were therefore postponed until the law would have been deemed constitutional by the Supreme Constitutional Court. The delay in elections was to prevent the Supreme Constitutional Court from declaring the elections invalid and once again dissolving the lower house of Parliament, as it had in June 2012.

Subsequently, the draft election law was referred to the court three times. Each time the the court found new provisions unconstitutional and the elections were postponed. Responsibility for the delay was a matter of debate. Some wondered whether the Supreme Constitutional Court was purposely impeding the process, never precisely defining the amendments necessary to make the electoral law acceptable in order to constrain the ambition of the Islamist-dominated legislature. By contrast, opposition figures began to wonder whether members of the upper house of Parliament really wanted the electoral law to be adopted and new elections for the lower

chamber to be held. Members of the upper house had two reasons to delay elections. First, were a new lower house of Parliament to be elected, the upper house would lose the exceptional and temporary legislative powers that had been granted to it by the constitution so long as the lower house was dissolved (Hamzawy, 2013). Second, new elections would likely reduce the majority position Islamists held in the legislature. (The Islamist-dominated upper house had been elected with a mere 7 percent popular participation rate.) The political significance of this conflict was clear.

The Executive and Legislative Branches Push Back

The assertive stances adopted by the courts on these sensitive and highly politicized issues elicited important push back from the executive and legislative branches. At times the actions of the court pushed Egypt to the brink of constitutional crisis. They also led to reforms and decrees that impinged on the judiciary's independence and reduced the possibilities for court activism for the longer term.

The first evidence of push back from the executive branch manifested itself just a few days after Mohamed Morsi was elected president. Morsi first refused to be sworn in before the Supreme Constitutional Court (as the lower house had just been dissolved), insisting instead on taking the oath of office in Tahrir Square (to assert that his authority derived from the people, not the courts), and agreeing to appear before the court only after that event. A few days later Morsi unilaterally vitiated the court's June 14 decision to dissolve the lower house of Parliament and ordered the chamber to reconvene. The lower house of Parliament met briefly and decided to request the Court of Cassation's opinion regarding the validity of the mandate of its members. A few days later, the Court of Cassation ruled that it was not competent to decide on that case. At this point Morsi bowed to the court's authority and the lower house of Parliament was never reconvened again. But Morsi's unilateral vitiation of the Supreme Constitutional Court's decision earlier on was viewed by many as an aggression against the justice system and cast him as behaving like the head of a party, not like the president of the whole Egyptian society.

Removal of the General Prosecutor

Morsi's high-handedness toward the judiciary did not end there. Among other things, Morsi infringed on the principle of the irremovability of judges to purge those judges he considered loyal to the former regime. This intent was evident on November 22, 2012, when he unilaterally

announced a “constitutional decree,” firing the general prosecutor, Abdel Meguid Mahmoud, and stating that henceforth, the president would appoint the general prosecutor for a fixed term of four years.²⁰ This decree violated the extant Judicial Authority Law, which provided that the general prosecutor was secure in his office until the age of retirement unless removed by the Supreme Judicial Council. But Morsi was intent on getting rid of Mahmoud because he perceived him as politically unreliable. The general prosecutor had been criticized for failing to gather sufficient evidence to convict prominent Mubarak-era officials accused of attacking protesters during the January 25 revolution.²¹ Furthermore, many in the Muslim Brotherhood also held the general prosecutor responsible for their years of prison and torture since he had served as a prosecutor during the Mubarak era.

In response to Morsi’s dismissal of the general prosecutor in November 2012, judges and members of the prosecution suspended work nationwide, and most of them refused to supervise the constitutional referendum in December 2012. The new general prosecutor, appointed without the knowledge of the Supreme Judicial Council, was met with hostility by prosecutors who organized demonstrations to pressure him to step down.²² In July 2013, the Court of Cassation finally ordered the return of the former general prosecutor, Mahmoud. But by that point, Mahmoud decided not to return to his post claiming that he feared he would not be able to remain impartial. Later in the month he was replaced by a new general prosecutor.

Morsi’s move to fire the general prosecutor was viewed by judges and prosecutors as an attack on judicial independence. Even activists who had earlier sought the dismissal of Mahmoud on grounds of malfeasance objected to Morsi’s measures. The case showed the complexity of the transition process in Egypt: Should the principle of independence and irremovability of the judiciary prevail, even to protect judicial figures suspected of violating the right to access justice and to redress grievance?

Above Judicial Review

On the same day that Morsi announced the firing of the general prosecutor (November 22, 2012), he also challenged the independence and standing of the judiciary in an even more brash way. Morsi announced that until a new constitution was in force, his decisions would not be subject to judicial review. As guardian of the revolution Morsi granted himself broad powers above the redress of the judiciary.²³ Armed with this rhetoric, Morsi encouraged the Constituent Assembly, which had been under the shadow of disso-

lution by the Supreme Constitutional Court (as described above), to resume the work of drafting a constitution. The drafting process was rushed through and completed on November 30. On December 2, when the court was slated to rule on the legality of the Constituent Assembly’s composition, several thousand Islamist supporters of Morsi gathered outside the court’s building to prevent the justices from entering and meeting. The Supreme Constitutional Court decided to suspend its work indefinitely in protest against these “psychological pressures” (BBC News, 2012). In its statement, the court added that December 2 was “the blackest day” in the history of the Egyptian judiciary (*Ahram Online*, 2012a). The Freedom and Justice Party replied by affirming the right of all citizens to peaceful demonstration. A few days later, in a statement to the foreign media, President Morsi insinuated that the Supreme Constitutional Court was an “anti-revolutionary force” (*Ahram Online*, 2012b). The court released a statement in response saying that the presidency aimed to “undermine the reputation of the court internationally without giving one piece of truthful evidence to support his allegations and claims” (*Daily News Egypt*, 2012). Shortly after the constitution was approved by popular referendum, Morsi relinquished his “above-the-law” status. But by superceding and intimidating the Supreme Constitutional Court and declaring his decisions immune from judicial review, he seriously compromised the principle of rule of law in Egypt.

Attempt to Reduce the Age of Retirement

A fourth volley in the attack on the autonomy and stature of the judiciary came from the legislative branch. Under President Morsi, the Wasat Party, a moderate Islamist party, proposed draft amendments to the judiciary laws to “rid the judicial authority from corrupt elements” (*Ahram Online*, 2013b). One of the means to achieve this objective was to lower the age of mandatory retirement for judges from seventy to sixty. The Wasat Party argued this change in law would lead to the departure of old and mostly pro-Mubarak judges and their replacement with a new generation of independent judges. The amendment, had it been passed, would have led to the departure of some 3,000 judges in one fell swoop. Notably this practice of toying with the judges’ retirement age to influence the political tenor of the judiciary was not an innovation by Morsi. It had significant precedent under the Mubarak regime.²⁴ In the end, however, this “purge by retirement” was not carried out. The amendments submitted by the Wasat Party were referred to the legislative committee of the upper house of Parliament for discussion in April 2013. They had not been adopted before Parliament was dissolved by the military in July 2013.

Removal of Members of the Supreme Constitutional Court

Finally, the autonomy and influence of the judiciary was dealt a serious blow by the text of the constitution of 2012, which essentially decreed the “unpacking” of the Supreme Constitutional Court in a politically nonneutral way. Egypt’s prior constitution (1971) did not specify the precise number of justices who were to make up the court’s bench, and the 1979 law governing the Supreme Constitutional Court was hardly more specific, stating only that the number of justices had to be “sufficient.” In December 2012, the court’s bench comprised eighteen justices. But the constitution of 2012 specified that the bench of the Supreme Constitutional Court should be set at eleven. As a result, seven of the sitting justices had to be dismissed—the most junior ones first. Not surprisingly, last to go, according to the new threshold, was Tahany el-Gebaly, one of the most outspoken opponents of President Morsi who had stood firmly against him in favor of the army. Many suspected that the new constitutional provision had been tailored to enable Gebaly’s removal.²⁵

Failure to Bring Accountability and Justice

In the wake of Morsi’s ouster, the courts continued to deliver highly charged rulings that tainted them with the blot of politicization. The courts were perceived as delivering selective justice. They failed to hold high officials from the old regime accountable for the death and injury of hundreds of demonstrators, and they granted these officials impunity for their misappropriation of public funds even as they condemned members of the Muslim Brotherhood, as well as political opponents of the regime of Abdel Fatah el-Sisi, to harsh sentences.

On November 29, 2014, the Cairo Court of Appeal ruled Mubarak not guilty in the killing protesters in the period between January 25 and January 28, 2011. Earlier, in June 2012, the president and his former minister of interior had been found guilty of failing to prevent the killing of peaceful protesters and had been sentenced to life in prison. The conviction had been overturned by the Court of Cassation in January 2013 on points of law and a retrial was ordered for April 2013. It ended in November 2014 with charges being dropped on procedural grounds. In January 2015 Mubarak was released, after the Court of Cassation overturned his conviction to three years in prison for embezzling public funds. A retrial was set to begin in April 2015. The cases that were brought to trial were limited in scope and all crimes perpetrated during decades of abuses remain unpunished. Almost all former government officials who stood trial for squandering public

funds were also cleared. The few who had been indicted for their role in economic crimes and on corruption charges managed to negotiate financial settlements with the court.

The courts also exonerated members of security forces involved in the killing of demonstrators. Public opinion attributed this leniency to a failure of will on the part of the judiciary to punish associates of the ancien regime. Only one policeman is serving a sentence, only three years, for shooting at protesters’ eyes during the January 25 revolution. Most of the police officers involved in killing protesters during the same events were not brought to trial. In the few cases where charges were brought against them, the police were acquitted on the grounds of insufficient evidence.

Only three soldiers involved in the killing and abuse of protesters during the reign of the Supreme Council of the Armed Forces (from February 2011 to June 2012) were sentenced by a military court. (They were punished with two and three years in jail.) They were charged with involuntary manslaughter for driving military vehicles into the protesters during the Maspero clashes with Coptic Christians in October 2011 (twenty-seven protesters were killed). Other police officers were set free, and the military failed to investigate incidents involving army officers. Most security forces members remained in their positions or were transferred to administrative positions.

Only four police officers were convicted for the killing of protesters in the wake of Morsi’s ouster. In March 2014 one police captain was sentenced to ten years in jail, and three lower-ranking officers were given one-year suspended sentences for their roles in the deaths of thirty-seven prisoners who were gassed in a crowded police van during their transfer to a prison in August 2013. The sentence was overturned on appeal in June 2014.

Judges complain that the files sent to them by the prosecution, which investigates criminal complaints, are almost empty and that they cannot issue convictions not backed by enough concrete evidence. The prosecution accuses the police who were supposed to collect evidence of failing to gather the necessary material and blame the Interior Ministry for failing to cooperate and deliver the records of the Central Security Forces. Families of victims and their lawyers accuse the police of destroying the evidence and of pressuring and intimidating them to convince them to withdraw their complaints.

The police officers who are charged with gathering evidence belong to the very same administration as those being charged with crimes under investigation. As to members of the armed forces, they enjoy *de facto* immunity since they appear before military courts controlled by the military leadership.

A Selective Justice System

By contrast, the prosecution of supporters of Morsi has been much more forceful. Thousands have been arrested since Morsi's ouster and put in preventive detention pending the outcome of investigations on accusations that they took part in violent protests, belonged to a banned terrorist group, or were guilty of other charges.

Morsi and other prominent Brotherhood figures were referred to trial for escaping from prison during the opening days of the January 25 revolution and for inciting violence and killing peaceful demonstrators near the Presidential Palace in December 2012 as well as for espionage, treason, and conspiring with foreign groups to carry out terrorist acts in Egypt. He was sentenced to death in May 2015.

In separate trials in March and April 2014, a judge in the province of Minya handed down more than 1,200 death sentences for killing police officers.

The court argued that criminal intent to kill any member of the police forces and presence at the crime scene presented sufficient evidence to convict them of murder or attempted murder. Simultaneously, courts have consistently acquitted police officers present at the scenes of protester killings, citing lack of evidence linking individual officers to protester deaths or arguing self-defense. (Egyptian Initiative for Personal Rights, 2014)

The number of death sentences in the March 2014 trial was later reduced to thirty-seven, and the other sentences were commuted to life. For the April 2014 trial, 682 death sentences were reduced to 183. Nevertheless, such draconian sentences have contributed to a loss of the courts' credibility.²⁶ Both trials were criticized for violating the right to a fair trial and due process. In February 2015, the Giza Criminal Court handed down a death penalty against 183 defendants on charges of killing police officers during an attack on a police station in August 2013. This ruling led to accusations of the judges sustaining a bias against Muslim Brothers and seeking revenge for their conflict with Morsi.²⁷

In addition to the Muslim Brothers, secular activists, human rights defenders, and bloggers critical of the government have also been put on trial and sentenced to lengthy prison sentences and heavy fines for breaking the antiprotest law adopted in November 2013 and protesting without a permit. All these controversial rulings have led to an "alarmingly selective justice system in Egypt, which appears more intent on settling political scores and punishing dissent than establishing justice" (Egyptian Initiative for Personal Rights, 2014). Although Morsi supporters and political activists have been prosecuted and referred to trial, security forces and political officials responsible for human rights violations have walked free.

Judges: Actors in the Transition Process

Judges have been at the center of political struggles and have emerged as one of the most dynamic players in the postrevolutionary period. Their involvement in political issues can be traced to the mistakes committed by the army and by President Morsi, especially their haphazard and disorganized decisionmaking. Judges were called upon to rule by political actors who proved unable or unwilling to solve political conflicts through dialogue and consensus. Judges stepped in to fill the political vacuum left wide open by political forces who failed to be decisive. Had the leadership done its duty, the judiciary would not have carried this burden by itself.

It is true, though, that the courts could have avoided ruling on many of these issues by declaring themselves incompetent or considering the decrees under review as acts of sovereignty. However, as Sahar Aziz (2014) points out, "in light of the myriad tools used to restrain judicial independence, it is unsurprising that portions of the judiciary are cooperative in the ongoing crackdown on political dissidents. The current political climate makes it too costly for a judge to challenge the executive's core interests." Note that the courts' rulings were not criticized by other judges. The fact that judges suspected of affiliation with the Muslim Brotherhood had been subjected to dismissal may have deterred the remaining judges from speaking out against colleagues.

There is no evidence that these problematic rulings were due to direct interference from the executive authority. On the contrary, judges may have felt strong enough to let their vision of politics and society prevail in their decisions. As Ibrahim al-Houdaiby (2014) explains, "in many cases, the judiciary feels independent from the law. Judges replace their role as jurists with that of statesmen; their rulings fail to reflect prevailing interpretations of legal texts and are instead based on what they perceive as the interests of the state, based on their position in the legal structure and their own beliefs."

Most of the judges may be convinced that they are defending the stability of their country and condemning criminals that deserve such heavy sentences. Nathan Brown (2014) points out:

The judiciary as a body shows real willingness to distance itself from the executive but little interest or willingness to distance itself from the state. And, for many judges, that state has just come under severe attack by an alien force. The invaders managed to temporarily seize the presidency; for a while key institutions of state—including, most shockingly to judges, courts themselves—were quite literally besieged by these outsiders. Of course, not all judges feel this way, but many do seem to share the sense of crisis that has led perhaps to some of the brutal efficiency displayed when trying some cases.

This politicization of the judiciary has had damaging consequences for judges themselves. The rulings led to a general perception that the courts were issuing decisions with an implicit political leaning, in conformity with the army's priorities. Under Morsi, for the first time in Egyptian experience, popular demonstrations were organized to protest court rulings and the constitutional court was even prevented from convening. The judiciary, which used to enjoy high prestige and respect within society, has seen its status diminished. Selective prosecution and sentences that target government critics and opponents contribute to a loss of the courts' credibility outside the courtroom.

The constitution of 2014 has increased judges' autonomy, enshrined by various provisions in the document. For example, the constitution declares that the Supreme Constitutional Court will henceforth appoint its own chief justice whereas the general prosecutor will be selected by the Supreme Judicial Council, not the president. As before, judges will be appointed on the basis of the recommendation of the Supreme Judicial Council and will not be removable. The budget of the judiciary will be incorporated in the annual state budget as a single figure, meaning that the judges will receive their budget in a lump sum and can transfer funds from one post to another without seeking the agreement of the Parliament. The laws on the judiciary will need a majority of two-thirds of the Parliament to be amended.

The judges managed to win more autonomy with little accountability and with very few checks on their authority. Their autonomy has increased their isolation within the state and society. No mechanism of control has been established apart from the Supreme Judicial Council and no reform of the justice system has been provided. "Some observers have argued that increasing judicial independence is a positive development. However, in a country like Egypt where courts are generally seen (with notable exceptions) as failing the people, increasing judicial independence before operating wholesale reform means that the negative practices of the past will become much more difficult to change" (Al-Ali, 2013).

The majority of judges in Egypt, though, have long been hostile to getting the judiciary involved in politics. This hostility to politics is one of the reasons why the reformists lost the elections to the Judges' Club in 2009. Many of the judges were opposed to their colleagues making political statements and taking confrontational political stands. Most Egyptian judges have a rather conservative and patriarchal mind-set (Said, 2012). They are part of the elite of society, value hierarchy, seniority, and order, and oppose radical changes in politics and society. They are trained in the faculties of law of Egyptian universities, and most see themselves as the mentors of a modern liberal state based on respect for the rule of law and the separation of powers. They are loyal to the state and apply the laws adopted by the legislative branch even if they personally disagree with their content.

The conservative bent of most judges can be traced to recruitment process used in the judiciary and the demographic selection this process imposes on the institution. The criteria for appointment to the judiciary is delineated by the judiciary law. A candidate must have Egyptian nationality and hold a law degree. He must possess a good reputation, enjoy civil rights, and present various guarantees of morality. State security agencies monitor the appointment process and investigate the social and political background of every candidate. They ensure that whoever originates from a poor social strata or has relatives known to be Islamists, criminals, or leftists will be excluded from consideration.²⁸ Social standing has always been a main criterion in appointment. Sons of judges have a better chance of appointment to the judiciary than other law graduates. In fact, a widespread complaint is that sons of counselors or well-known personalities close to the government manage to get hired even when their exam results at the law faculty are inferior to those of other candidates. As Sahar Aziz (2014) explains, "Egypt's politics of patronage and clientelism have further compromised judicial independence. Like other state institutions, the judiciary is wrought with nepotism, and the appointment process is far from meritocratic. Judges' family members and relations are often appointed to judge-ships despite poor academic records that disqualify them."

Given this selection system, the lack of diversity found within the judiciary is not surprising. Most judges come from the middle class or elite classes of society. And until 2007, women were excluded from the courts. The Supreme Constitutional Court was the first court to include a woman judge, nominated in 2003.²⁹ The exclusive demographics of the judiciary mean that judges are largely conservative and accept and defend social privilege. They also explain why most judges felt threatened by the rise of Islamism in Egypt and opposed radical change and the Islamization of Egypt's law and institutions.

Conclusion

Egypt's entire judicial system is in need of structural reform. It suffers from inefficiency, slowness, notorious corruption by legal aides, and extreme case overload, particularly in the civil and criminal courts, where cases can drag on for years. Initial and continuous training of judges should be the focus of more attention, buildings should be repaired and extended, administrative personnel trained, and computerization introduced.

Reforms, however, have proven very difficult to introduce. Their cost has been deemed too high, and the system still suffers from strong inertia because of judges' conservatism. Judges by their nature oppose any radical change in their traditional working methods. All the successive govern-

ments that have ruled Egypt since the revolution of January 2011, including that of Morsi, have failed to initiate a reform of the judiciary.³⁰ A Justice Conference that had been scheduled to work out a reform acceptable to all sides was canceled in June 2013.³¹ Any amendment to the judiciary laws is viewed as driven by a hidden political agenda. Necessary reforms to improve access to and efficiency of the judiciary are postponed for fear of a hidden agenda behind them. According to Youssef Auf, an Egyptian judge and constitutional scholar, “full reform will not unfold in the near future, since the current leadership is old and resistant to change, in addition to the fact that the current landscape in Egypt is not conducive to significant change” (cited in Atallah 2014). Any change in inherited traditions that have developed over the decades will need internal support:

The judiciary has a perpetual sensitivity toward reform, especially when it does not come from within the judicial establishment. This leads to an important conclusion: the judiciary itself must be involved in the reform process. Otherwise, the process will be fraught with risks and prone to failure. The confrontation between the judiciary and the Muslim Brotherhood under the rule of former president Mohamed Morsi is an example of this kind of failure. (Auf, 2014)

Leading figures of the judicial independence movement, who had launched the judges’ revolt under Mubarak and then participated in Morsi’s government, have proved disappointing. They lost their credibility by accepting top political positions in the government and then failing to use these positions to implement the reforms they had advocated for many years prior.

Impartiality, neutrality, and independence remain the aspiration of the Egyptian judiciary. But in the absence of a political will to enforce a more democratic order, the events of the postuprising period make these components of the rule of law as elusive as ever.

Notes

1. The speaker had been elected as the new chief justice of the Supreme Constitutional Court by his colleagues in the court a few weeks before. This move marked the beginning of a total reversal of the relations between the judiciary and the executive power. If judges had been considered opponents of Morsi’s regime, they were now accused of being a strong ally of Abdel Fattah el-Sisi’s repressive politics toward all opponents.

2. After the constitutional referendum and the presidential elections in 2005, the Judges’ Club published a report, denouncing several types of abuses judges had witnessed. A couple of months later, a female member of the Office of Administrative Prosecution publicly denounced the fraud she had witnessed in the electoral constituency where she was supervising a primary station. The Judges’ Club

decided to lead an inquiry into the allegation and to interrogate judges who had supervised other polling stations in the same constituency. According to the club, 151 judges out of 160 agreed to testify, and they confirmed her testimony that the Muslim Brotherhood candidate received three times as many votes as the ruling National Democratic Party’s candidate. A complaint was filed at the general prosecutor’s office, but it received no response.

3. The Judges’ Club was founded in Cairo in 1939 to solidify relations among judges. It has evolved into an unofficial professional association and a forum for public issues relating to the judiciary. Any member of the ordinary judiciary or the Office of Public Prosecution can join it. It has more than 9,000 members.

4. The judiciary in Egypt is divided into three sets of courts, based on the French model: (1) the ordinary courts, which deal with civil and criminal cases: Court of Cassation, appeals courts, and courts of first instance; (2) the administrative courts (State Council), which deal with litigation between citizens and a state institution or between two state agencies; and (3) the Supreme Constitutional Court, which rules on the constitutionality of laws and administrative regulations.

5. Notably, in 2009, reformist judges lost the elections to lead the board of the Judges’ Club and were replaced by a more conservative, regime-allied team.

6. The judiciary had already come to the rescue of NGOs in 2000, when the Supreme Constitutional Court handed down a judgment declaring the unconstitutionality of the new Law of Associations, which NGOs had strongly criticized.

7. The State Council (or *Majlis al-Dawla*) is a judicial body charged with ruling on the legality of the state’s administrative acts. It exercises jurisdiction over cases where a state body is a party. It includes a Court of Administrative Litigation, whose decisions can be appealed before the Supreme Administrative Court.

8. The Court of Administrative Litigation maintained that Article 76 and the Law on Presidential Elections had given an exhaustive list of the competences exercised by the Electoral Commission, which did not include the decision to prevent NGOs from accessing polling stations. The commission’s decision, therefore, had to be considered an ordinary administrative decision that did not escape the control of the administrative judge.

9. For decades, Egyptian judges have been complaining of direct interference by the executive authority in judicial affairs that enabled the regime to obtain rulings in particular cases. The call for a judiciary emancipated from the grip of the executive branch was already on the agenda under former president Mubarak and even before. Judicial independence was one of the main recommendations of the 1986 Conference on Justice organized by the Judges’ Club. Moreover, in 1992, the General Assembly of the Judges’ Club adopted a draft law proposing amendments to the 1972 Judicial Authority Law, in order to increase judicial independence. Earlier even, in 1969, judges had already been involved in a serious conflict with the executive authority in order to keep their relative independence, a conflict that ended with the dissolution of the Board of the Judges’ Club and the famous *Massacre of the Judiciary* (when 189 judges were dismissed from their positions and the Board of the Judges’ Club dissolved, because they had refused to join the single-party Arab Socialist Union).

10. For a detailed analysis of challenges to the independence of the judiciary in Egypt, in comparison with international law, see International Bar Association Human Rights Institute (2014).

11. The Court of Cassation is at the apex of the civil and criminal court system in Egypt. It rules on challenges against decisions of the courts of appeal. Its jurisdiction bears on misapplication of the law or procedural errors, not on the facts of the case. With regard to the appointment of this court’s leadership, no clear and

objective criteria guide the president's appointment. Nevertheless, the most senior vice president of the court is normally appointed by the president of the republic. Candidates for the positions of vice president and counselors are proposed by an official body of judges (the General Assembly of the Court of Cassation), and half of the candidates for the positions of counselors are proposed by the Justice Ministry (under executive control). The president makes the final call on appointments though he must seek the agreement of the Supreme Judicial Council (see below).

12. Reformist judges argue that appointment of presidents of first instance courts gives the executive authority considerable influence over the judiciary, since they have significant powers, including, in practice, the possibility to refer particular cases to particular judges.

13. Upon a decision of the president of the republic, with the advisory opinion of the general assembly of the court to which the judge belongs or of the general prosecutor and with the agreement of the Supreme Judicial Council.

14. "Judicial assignments to particular courts and cases should be done in a transparent manner based on expertise or at random in order to ensure that there can be no scope for 'fixing' the judge that is to hear a particular case. Moreover, the selection by the Minister of Justice of which judges can be transferred to a more lucrative government post, or be transferred against his will to a less attractive one, creates a system where judges have an incentive to 'please' the Minister, which also threatens independence" (International Bar Association Human Rights Institute, 2014).

15. For example the executive has failed to abide by decisions that denied certain candidates the right to stand for elections.

16. The Supreme Constitutional Court rules on the constitutionality of parliamentary laws and administrative regulations.

17. For the definition of the State Council, see note 7 above.

18. The election law allocated two-thirds of the seats to party lists and the remaining one-third to individual candidates who could be either affiliated with parties or independents. But the Supreme Constitutional Court struck the law down on the grounds that allowing members of political parties to compete with independents for individual candidate seats discriminated against independent candidates because the latter were not allowed to contest political parties' seats. That is, independent candidates saw their right to candidacy limited to the portion allocated to individual candidacy, whereas political party candidates could compete for all seats.

19. After the dissolution of the People's Assembly, and until the election of a new lower chamber, the upper assembly was in full charge of the legislative power.

20. Prior to making this decree, Morsi had tried to remove the prosecutor general by announcing that he had resigned and that Morsi was appointing him as ambassador to the Vatican. The general prosecutor, however, denied the claims that he had resigned from his position and declared that he would never leave his post.

21. According to the Judicial Authority Law, the president of the republic was appointing, by his sole decision, the general prosecutor from among the vice presidents of the courts of appeal, counselors of the Court of Cassation, and chief public attorneys or higher ranks within the Office of Public Prosecution.

22. In December 2012, he issued a very controversial decision to transfer the attorney general of East Cairo to the town of Beni Suef in Upper Egypt "in the interest of the work." This measure was considered as a way to punish him for having decided, for lack of sufficient evidence, to release more than 100 defendants that

President Morsi had described as being thugs in the aftermath of clashes at the Presidential Palace between opponents and supporters of the president. After prosecutors and judges announced their solidarity with the attorney general and threatened to suspend work, the general prosecutor reversed his decision.

23. With the lower house of the legislature dissolved and the judiciary overruled, Morsi appeared to many as seizing a "presidential dictatorship."

24. Under former president Mubarak, the Judicial Authority Law had been amended in 2007, to postpone the age of mandatory retirement of judges from sixty-eight to seventy. Reformist judges accused the government of tailoring this amendment in order to reward and keep in office some progovernment judges who had neared retirement age. These included the presidents of the Court of Cassation, the Cairo Court of Appeal, the State Council, and the Supreme Constitutional Court. At the same time, the amendment prevented younger reformist judges from occupying high-ranking posts within the judiciary. The government justified the reform on the grounds that Egypt would benefit from the experience of veteran judges, and extending the tenure of these judges would speed up the flow of court cases. Reformist judges dismissed this argument pointing to the diminished mental capacities of aged judges and the fact that most senior judges exercised administrative and leadership responsibilities and did not sit on the bench anymore.

25. Gebaly was the only woman ever appointed to the Supreme Constitutional Court. A former lawyer, after her dismissal from the court she returned to legal practice. Her six other dismissed colleagues were transferred back to their previous positions in other courts. In the past, the chief justice of the Supreme Constitutional Court has been chosen directly and freely by the president of the republic (which permitted the intrusion of political considerations into the appointment of this very powerful position in the judiciary). But in 2011 the Law on the Constitutional Court had been amended by the then-ruling military power so that henceforth the president should appoint the chief justice from its three longest-serving vice presidents and with the agreement of the general assembly of the court—an important win for judicial autonomy that was not amended again by Morsi.

26. The judge was removed from that criminal court in October 2014 and transferred to a civil court.

27. See for instance the reports of Amnesty International (2014) and International Bar Association's Human Rights Institute (2014).

28. In September 2014, the Supreme Judicial Council decided to add a new criteria in the appointment procedure: parents of the applicants must be university graduates. More than 100 candidates appointed in June 2013 were retroactively excluded from the Office of Public Prosecution because their parents lacked higher education.

29. Neither the Judicial Authority Law nor the State Council Law sanctioned any discrimination based on gender in the recruitment of judges. In 2007, after years of struggle by feminist groups and international pressure, thirty women were finally appointed as judges in the ordinary judiciary. Judges criticized the fact that they had not been consulted beforehand. According to some observers, the government used the nomination of female judges to try to divide the Judges' Club from inside and deprive it of NGO support. The constitution of 2014 stated that the state shall guarantee women's appointment in judicial bodies and authorities without discrimination. In January 2014, however, the State Council rejected again women candidates' application for membership.

30. Two conflicting draft laws amending the Judicial Authority Law were prepared under Morsi, one under the supervision of the minister of justice, and the other by the Judges' Club, but due to divisions within the judiciary and the dissolution of the People's Assembly, none of them passed. For a comparative analysis of the reform projects prepared under Morsi, see International Bar Association Human Rights Institute (2014).

31. A first Justice Conference had taken place in 1986 to discuss potential remedies to challenges the judicial system was facing.

4

What Independence? Judicial Power in Tunisia

Mohamed Salah Ben Aissa

Since January 14, 2011, postrevolution Tunisia has been searching for its path toward a democratic transition. As in comparable cases elsewhere, this search has been characterized by a persistent tension between those forces advocating a break from the past and those resisting this rupture. The degree to which the revolution's objectives are realized will depend on how this tension is resolved. In the first two years after the revolution, Tunisia's transition toward democracy remained a conflict-ridden process because a revolution does not, in and of itself, give birth to a democracy. A revolution can only steer a country toward democracy if it achieves, either in the short- or long-term and depending on local conditions, a radical rupture from the dictatorial institutions and practices of the past.

This proposition is demonstrated in different sectors of public life to varying degrees. The sphere of justice is particularly significant in this regard. Here one sees the conflict between those advocating the values and objectives of the revolution and those who, whether in or out of power, seek to delay or prevent the realization of these objectives. The primary interest of the present study is the judicial system. More than any other, this sector conjures the abuses committed under the former regime, in which the judiciary was transformed into an instrument of the dictatorship.¹ Even if an objective and nuanced approach would preclude a sweeping condemnation of all judges, most litigants recognized that the judiciary as a system enjoyed limited independence from that regime. As a result, the legal system did not enjoy the public's trust, and the judiciary was in a state of crisis. Did the revolution bring an end to this situation?

Bernard-Maugiron Nathalie. (2016)

A clash of institutions : judiciary vs.
executive in Egypt

In : Bellin E. (ed.), Lane H.E. (ed.) Building
rule of law in the Arab world : Tunisia,
Egypt, and beyond

Boulder (USA) ; Londres : L. Rienner, 29-
49. ISBN 978-1-62637-278-8