

Seeing Like a Court

Judicial Agency in Autocratic Regimes and Transition Politics: The Case of Egypt

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**Abstract**

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This dissertation – a comparative study – seeks to explain judicial conduct and judicial preferences outside the prisms of "judicial empowerment," "judicial independence," and "judicial activism." It articulates a theory of judicial agency – what judges want, and how their wants change and adapt in different political settings and over time. I posit judicial agency as a fluid equilibrium among three sets of primary commitments that judges hold: professional (to state legality), associational (to other members of the judicial corps as a status and corporate group), and regime commitments (to the rules and norms structuring government authority). In autocratic regimes where judges and courts are allowed to enact their professional commitments, they are more likely to reciprocate by upholding as well their regime commitments. And vice versa. This complex account of judicial agency explains how courts in autocratic regimes may simultaneously appear activist *and* safeguard the regime's core interests. This study uses the judicial agency framework to explain how the judicial conduct of Egyptian courts varied between the Nasser tenure (1954-1970) and the Sadat and Mubarak tenures (1970-2011). It then explains how judicial agency played out during the heightened political uncertainty of the "Arab Spring" period in Egypt (2011-2013). In the penultimate chapter I show how judicial agency and judicialization interact with and aggravate political uncertainty during recent episodes of contention in Turkey, Pakistan, Russia and Hungary. This work contributes to the scholarship on comparative judicial politics, authoritarianism and democratization.

## **Index**

|  |     |
|--|-----|
| Dedication:  | 2   |
| Acknowledgements:  | 3   |
| Chapter One: Willful Courts  | 5   |
| Chapter Two: On the Sources of Judicial Power                      | 29  |
| Chapter Three: A Theory of Judicial Agency in Autocratic Regimes   | 59  |
| Chapter Four: Judicialization and Consequences                     | 115 |
| Chapter Five: Courts of Transition – Variations and Qualifications | 173 |
| Conclusion: Who Is Afraid of Judicial Independence                 | 197 |

Dedication

To Lula, Hossam, Mehdi and Sarah

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## Chapter One

### Willful Courts

#### 1. Introduction: Same Courts, Different Choices

In an 1824 decision, U.S. chief justice John Marshall articulated a conception of judicial power that has proven tenacious. “Courts are mere instruments of the law and *can will nothing*,” he wrote in *Osborn vs The Bank of the United States* (Marshall, 1824). [Emphasis added.] “Judicial power,” Marshall added, “is never exercised for the purpose of giving effect to the will of the Judge, but always ... for the purpose of giving effect to the will of the ... law.”<sup>1</sup>

This dissertation argues against this conception – a conception that, as I demonstrate below, remains prevalent, if increasingly less predominant, in the comparative judicial politics scholarship. It shows that courts and judges “can will” something – indeed, several things – not just in democracies but in authoritarian regimes, too. It shows, further, that what they want changes and adjusts in adaptation to shifting political circumstances, within the same regime and across regime type.

The study has three chief objectives. The first is to present a formulation for understanding judicial will, or judicial agency, in autocratic regimes. (To readers who find the notion of politically willful courts within autocratic regimes a contradiction in terms, please read on.) The second is to propose mechanisms and pathways that explain how judicial agency can give rise to variable outcomes – at times opening up avenues for political participation, at others foreclosing them; at times, safeguarding civil and political

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<sup>1</sup> I first encountered Marshall’s views on judicial agency in Tamanaha (2004, p. 65).

rights, at others certifying their violation. And the third is to trace, and explain, how judicial power, during periods of political change, may destabilize politics and stunt democratization.

What has prompted this study? While many apex courts or entire judiciaries have over the past five decades acted in ways incompatible with the Marshallian view – the view positing judges and courts as possessing no distinct agency as political actors – the explanations offered by many scholars continued, to a stunning degree, to assume a Marshallian conception of courts and judicial power. They thereby failed to explain highly visible and immensely consequential variation in judicial conduct.

Consider, for illustration, these glancing examples, all of which will receive further elaboration in Chapter Five.

*Example 1: Turkey.* The country's 1961 constitution mandated the creation of the Constitutional Court of Turkey (CCT), which held constitutional-review powers. In the wake of another military coup, in 1971, the military junta introduced constitutional amendments that shrank the competence of CCT. Nevertheless, in over two thirds of the disputes over civil rights laws that landed in the CCT's docket throughout the 1970s, the court ruled against the government (Belge, 2006, p. 672). Over the following two decades, however, the court proceeded in a different direction. Between 1983 and 1999, the CCT initiated proceedings against or authorized the closure of 13 political parties, practically all the parties that aimed to give expression to Islamist or Kurdish causes (Belge, 2006, p. 675). Among the parties closed was the (Islamist) Welfare Party, whose parliamentary victory qualified it to form government in 1996. Under pressure from the military, the government resigned the following year. The CCT's 1998 "sweeping judgment" (Morris, 1998)

certified the military's move against the ruling party (Bali, 2012, p. 253 footnote). And so it was: the court that had safeguarded rights in the 1970s was now restricting political participation. A few years later, the CCT, in 2007 and 2008 (Bali, 2012), intervened bluntly to forestall a legislative act intended to legalize the Muslim head-cover at universities and government offices, precipitating a constitutional crisis. An observer described CCT's conduct as a "judicial coup d'état."<sup>2</sup>

*Example 2: Pakistan.* In 2006 and 2007, the Supreme Court of Pakistan, under its chief justice Iftikhar Chaudhury, employed its *suo moto* powers (*suo moto* is Latin for "on its own motion") to decide on highly sensitive cases, including the "disappeared" suspects in the course of the government's "war on terror" and a privatization program. The decisions displeased the country's president, Pervez Musharraf, a former general who ascended to power by way a military take-over in 1999. He responded by removing the chief justice and accusing him of corruption, in March 2007. But upon a petition by Chaudhury, the Supreme Court reinstated its chief justice in July. Musharraf reacted by declaring martial law in November and removing Chaudhury again from the apex court, along with several other justices. In opting for defiance in 2006-2007 and during the Musharraf-Chaudhury standoff, the Supreme Court was assuming an unfamiliar posture. The same court had certified three military coups in the past – in the 1958, 1977 and 1999 – employing unorthodox (or unorthodox readings of) concepts such as "revolutionary legality" and "state necessity" (Aziz, 2012). Chaudhury himself had been promoted twice under Musharraf. To get a seat on the Supreme Court, he took an oath that approved the

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<sup>2</sup> Quoted in Bakiner (2014, p. 15)

1999 coup, an oath that other justices had rejected.<sup>3</sup> When Musharraf was no longer in power and Chaudhury was reinstated a second time, in 2009, the actions of the chief justice did not help stabilize politics or protect rights.<sup>4</sup> His feuds with the democratically elected governments led to the resignation of one prime minister and cast a long shadow of uncertainty on the fate of the country's president. The *Economist* summed up the character of the judiciary under Chaudhry, in February 2011, as “an overactive judiciary [that] might undermine a fragile democracy.”<sup>5</sup> Many lawyers and commentators described the Supreme Court's actions against the prime minister and the president as a “judicial coup” (Christophe, 2013; Human Rights Watch, 2014; Kalhan, 2013).

*Example 3: Russia.* Russia's Constitutional Court came into existence, through a constitutional amendment, in late 1990, at a time of upheaval in the country. The just-created court was immediately a front-seat witness to dramatic political developments: the dissolution of former Soviet Union, a coup attempt against the democratically elected president, Yeltsin, and constant jockeying for power between the president and the new parliament. Into this combustible mix arrived the Constitutional Court and its first chief justice, Valerii Zorkin. Bucking a tradition of generally deferential courts in the Socialist Bloc,<sup>6</sup> the Constitutional Court under Zorkin assumed a highly interventionist posture, at times threatening impeachment procedures against both the executive and the parliament if they did not change course (Scheppele, 2006, p. 1806). The court's interventionism

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<sup>3</sup> (International Crisis Group, 2004) Compelling members of “superior judiciary” to give oath anew after a coup was an innovation first introduced in 1981 by General Zia ul-Haq, the leader of the 1977 coup. P.5

<sup>4</sup> (Walsh, 2013), New York Times. Accessed May 13, 2024.

<sup>5</sup> (“Courting Trouble,” The Economist, February 2011)

<sup>6</sup> A formal divergence from this tradition was Yugoslavia, the first socialist country to introduce constitutional review, in 1963 (Al-Ottaifi, 1980, p. 108).

seemed only to further destabilize the precarious political process. In an October 1993 decree, Yeltsin so characterized the court's influence: "Twice during 1993, the Constitutional Court of the Russian Federation has placed the country on the edge of civil war with its precipitous actions and decisions" (Scheppelle, 2006, p. 1833). Thereupon, Yeltsin suspended the court until the passage of a new constitution. Then fast-forward to the Constitutional Court under Putin, whom Yeltsin plucked out of relative obscurity and made prime minister in August 1999 and then acting president four months later (Bohlen, 2000). Trochev and Solomon note that even as "Russia's political regime became less democratic and more authoritarian" under Putin (Trochev & Solomon, 2018, p. 202), the Russian Constitutional Court was simultaneously defending the regime vis-à-vis the European Court of Human Rights *and* growing more "activist," striking as unconstitutional every single law it reviewed in 2016 and 2017.

What do these three examples have in common? First, all three displayed variable conduct by courts under different political circumstances, even as the law they were implementing remained practically the same. Courts were not simply "instruments of the law," as Marshall contended; they exhibited a sensitivity toward, and the ability to adapt to, the shifting distributions of government authority. And their actions do not fit well into longstanding binaries – for example, "activist" versus "coopted" courts.<sup>7</sup> Second, the cases above unsettle some of our conventional associations. Consider, for example, judicial independence, democracy and democratization. Ever since the collapse the Berlin Wall, "judicial independence," "the rule of law," and "democracy" have been deemed affinity

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<sup>7</sup> See, for instance, Malcolm Feeley's categorization of "three political orders" (Halliday et al., 2012, p. 502).

categories: synergistic, mutually dependent and mutually reinforcing.<sup>8</sup> Yet in two instances from the examples above (Pakistan in 2006-7 and Turkey in the 1970s), apparent “judicial independence” occurred within autocratic regimes. In two other instances (Pakistan in 2009-2013 and Russia in 1991-1993), “judicial independence” appeared to interfere with democratization rather than help it along. Courts, in these two latter instances, aggravated political uncertainty instead of mitigating it, rendering democratic transition a remoter prospect.

All these themes – including the variable expressions of judicial agency and the possibly anti-democratic role of judicial independence – come into sharp relief in the Egypt case. Egyptian courts (especially, but not exclusively the Supreme Constitutional Court) received plaudits for independence and “activism” during the 1980s and 1990s, especially during the tenure of the exceptional chief justice Awad El-Morr (Bernard-Maugiron & Al-Bastawissi, 2006). But once Hosni Mubarak, the autocrat who ruled Egypt since 1981, collapsed in 2011, the country’s courts (especially, but not exclusively the Supreme Constitutional Court) issued decisions and assumed public stances that undercut democratization. In Egypt, too, the actions of courts within the precarious political process that followed the autocrat’s ouster were described as a “judicial coup” (Brown, 2012).

Egypt serves as this study’s primary case, the chief empirical vehicle for the theoretical propositions I advance. (I elaborate in Section 5 below the reasoning behind selecting Egypt as the primary case.) Chapters Two, Three and Four present a periodized

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<sup>8</sup> The scholarship on these associations and affinity categories is truly vast. Some of the more influential works focused on the link between judicial independence and capitalist development (e.g., Weingast, 1997), others on synergy between judicial power and democratic governance (e.g., Tate & Vallinder, 1997). But see Carothers (1998) for a careful corrective.

account of Egypt's judicial politics. Simultaneously, these chapters elaborate the study's questions and proposed mechanisms institutional pathways. Chapter Five, leaning on secondary cases (Turkey, Pakistan, Russia and Hungary), illustrates the explanatory force of my theoretical claims beyond Egypt. It also supplies variations on and qualifications to these claims. I present a fuller outline of the chapters to follow at the end of this one.

The remainder of this chapter proceeds as follows. Section 2 presents the study's research questions. The subsequent section situates these questions, and the study at large, within the comparative judicial politics scholarship. The crux of the third section is a critique of the "judicial empowerment" accounts of judicial power, since they, like Marshall's, overlook or under-theorize judicial agency, leaving much variation in judicial conduct unexplained. Section 4 offers a synopsis of the study's core arguments. That is followed by a discussion of research design, theory building and empirics (including the rationale for choosing Egypt as the primary case), in Section 5. And I conclude in Section 6, as promised, with the plan for each of the chapters to follow.

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## 2. The Research Questions: What Courts Want

The conduct courts in Turkey, Egypt, Pakistan and Russia raises a set of interconnected questions. The overarching one is: *Why do some judiciaries choose to aid democratization, and others to impede it, when the autocrat wobbles or collapses?* The puzzle sharpens in cases when the courts that interfere with or derail democratization had been "activist" under the former (authoritarian) ruler (e.g., Pakistan 2009-2013 and Egypt 2011-2013).

This question encompasses two sets of motivations and expressions of judicial agency, to each of which a chapter is devoted. The first concerns the political preferences

of courts and judges in autocratic regimes. *What, for instance, explains “judicial independence” and “judicial activism” in autocratic regimes?* I answer this question in Chapter Three by providing a theory of judicial agency in authoritarian regimes, one that accounts for *both* regime-preserving *and* legality-upholding conduct by courts in autocracies. The second set of motivations and expressions of judicial agency concerns the interlude, or interregnum, after an autocratic regime is jolted or ousted. What explains the variation in judicial involvement in interregnum or transition politics? Such involvement was higher, for instance, in Hungary (early 1990s), Pakistan (2009-2013) and Egypt (2011-2013) than in Argentina (mid-1980s) Chile (early 1990s) and Indonesia (late 1990s). In other words: *Why are some political interregnums, or transitions, more judicialized than others? And how does the judicialization of transition politics affect the odds of democratization?* I take up these questions in Chapter Four.

In the fourth chapter, I argue that the judicialization of interregnum politics – that is, when courts step forward or are called upon to adjudicate the period’s political questions – is often the result of institutional continuities and institutional *resonances* from the old regime. Institutional resonances are a variety of institutional pathways. They are not direct descendants or reproductions of past iterations. Nor would they exist in the absence of originating influences from the past. Their connection to originating influence in the old regime can be dialectical or only obliquely causal. One example of the obliquely causal variety is the validation of “judicial activism” during a political interregnum on the basis of past “activism,” despite the visible divergence in both circumstances and outcome. An example of the dialectical institutional connection to the old regime can be seen in the historically subordinated judiciaries that strove to play an outsize role during transitions

(e.g., Pakistan in 2009-2013, Russia 1991-1993), in a manner that did not always aid democratization. I discuss these sources of judicialization of transition or interregnum politics in Chapter Two, and their implications for democratization in Chapter Four.

Chapter Two is the more historically-oriented and Egypt-specific of the study's chapters. It argues that the major manifestations of judicial power in Egypt of the 1980s and 1990s were neither the result of calculations by the executive nor of valiant struggles by the courts and judges, as some scholarly accounts had argued. Instead, they were outcomes of long-running and winding institutional paths. These included both formal aspects of judicial power, such as the introduction of judicial review in the country, and less formal ones but no less influential on the imagination of political actors. Particular understandings of "judicial independence" and the "massacre of the judiciary" of 1969, to cite only two examples, served as "inherited legal meanings" (McCann, 1991, p. 227) that influenced the perceptions and choices of political actors during transition politics, as I illustrate in Chapter Four.

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### 3. Situating the Study in the Comparative Judicial Politics Scholarship

In this section I argue that what I call "the empowerment thesis" – an influential strand in the scholarship on judicial power and judicial conduct – fails to account for judicial agency, and consequently struggles to explain much variation in judicial behavior.

#### The Empowerment and Liberal-Legality Theses

What do politicians from the seventeenth-century England (North & Weingast, 1989), twenty-first-century China (Wang, 2015), Tsarist Russia (Solomon, 2008), 1970s Egypt (Moustafa, 2007a), 1980s South Korea (Ginsburg, 2003), 1990s Israel (Hirschl, 2000a) and

Mexico (Domingo, 2000), to name just a few examples, have in common? They all “empowered” their courts. The immediate rationales for empowerment varied, but they shared two common wellsprings. In one, as state coffers ran thin, the executive wanted to reassure his wary lenders. In the other, a politician anxiously regarding his electoral odds decided that courts with expanded jurisdiction provided protection against abuse of political power by his opponents if he lost. So, whether a sniffy monarch unnerved by a depleted treasury and lurking foreign enemies, or a scrappy oppositionist navigating the swirl of political change, the politician decided he was better off with a measured transfer of executive power to courts. Consequently, courts became proportionally more independent (*vis-a-vis* the executive), and thus more powerful. Powerful as in possessing the capacity to influence the actions and calculations of those holding or striving after elected power. I call this argument about the origins of judicial power *the empowerment thesis*.

And what do the empowered courts do? They, many authors contended, deploy their influence in ways that expand civil and political rights, check the worse impulses of the executive, and make the political process more open, regularized and inclusive. Judicial power, the argument went, enacts the commitments that judges and courts carry, instinctively as well as institutionally.<sup>9</sup> These commitments expand politics and protect rights: they are, respectively, democratic and liberal. I call this vision of the assumed ends of judicial power *the liberal-legality thesis*.

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<sup>9</sup> One of the few authors who, however, does not impute a liberal-legality orientation to judicial power is Ran Hirschl in the various iterations of his “hegemonic preservation” thesis.

Often in tandem, occasionally individually, the empowerment and liberal-legality theses have over the past two decades dominated the scholarship on judicial power in autocratic regimes and transition politics. Too often, analyses launched from an executive-centric notion of judicial power and ended with assumptions (liberal-legal assumptions) about how such power played out. Scant or no attention went to judicial agency as the intelligence guiding judicial power.

#### The Case for a Judicial for a Judicial-Agency Account of Judicial Behavior

The paucity of attention to judicial agency—what constitutes it and how it manifests—is my fundamental critique of the twin-theses accounts. To begin, the “power” label is only merited when the intelligence guiding the use of that power is identified. Without a deliberate, guiding intelligence, “power” is mere entropy. Put differently, only a possessor of agency can be said to wield power. So what does constitute judicial agency? A fuller elaboration awaits in Chapter Three, but a working definition is as follows. Courts and judges—that is, the institutional and the individual aspects of a judiciary—have a fluid matrix of primary commitments. These commitments are *professional* (e.g., to legality of state actions), *associational* (to other members of the judicial corps as a status and corporate group) and *regime* commitments (to the rules and norms structuring government authority). The commitments are “poles setting limits to a complex *field of action and motive*” that is judicial agency (Cover, 1975, p. 6).<sup>10</sup> [My emphasis.] Judicial agency is the

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<sup>10</sup> Robert Cover is here quoted from his *Justice Accused* (1975) about the conundrums facing progressive judges who still affirmed slavery. He captured well the complexity of judicial agency as he recounted the “story of earnest, well-meaning pillars of legal respectability [that is, judges] and their collaboration in a system of oppression” (p. 6). The notion of judges sincerely holding simultaneously a multiplicity of potentially contradictory beliefs better reflects the empirical record of judicial behavior in autocratic regimes. I first encountered Cover’s thoughts on the “judicial process” in Hilbink (2007).

capacity to order and reorder the priority and urgency of these commitments in response to shifting political reality.

The agency approach brings into sharp relief the shortcomings of the twin-theses conception of judicial power. In the following paragraphs I discuss the major shortcomings and describe the utility of an agency-centric approach to judicial power.

#### *How Judicial Are Executive-Centric Conceptions of Judicial Power?*

The twin theses have an overtly executive-centric understanding of judicial power. Consider again the empowerment thesis. In empowerment, the executive reassigns a portion of his power to courts to head off alternatives worse than meddling judges. So even as scholars spoke of judicial power, often their eyes were squarely on the executive, his preferences, his calculus and his survival imperatives. That would not be so terrible, until we recall it takes our gaze away from where the action is happening. The locus of judicial power is not simply the executive. It is, as I will argue and illustrate in Chapter Three, the outcome of bargaining, mutual learning and interdependence among two parties: the executive and the judiciary.

#### *Like All Power, Judicial Power Is Relational*

Undergirded by agency, judicial power regains the central feature that distinguishes all power: it is relational. It is not, as the empowerment thesis suggests, a one-way parcel from one party to another. Power forms and plays out in the field of interactions between the parties. Together, judicial agency and the reaffirmation of (judicial) power's relational character point attention to misunderstood aspects of judicial behavior. One such is judicial "activism" or "assertiveness" (Couso & Hilbink, 2011). In accounts where courts have power but no discernible agency, each instance of courts restraining the executive is

understood as “activism.” I offer in this study (Chapter Three) alternative perspectives of judicial activism and its underlying dynamics. One of those dynamics is that such “activism” can be evidence of how so secure the judiciary is within an autocratic regime that it can, in certain areas, rein in the autocrat without fearing repercussions.

Another dimension of relationality is that judicial power is not simply the outcome of institutional innovations or changes, because that too obscures judicial agency and the choices underlying it. Hirschl, who pays more attention than most to the agency of actors, still views the “constitutionalization of rights” and the “establishment of judicial review” (Hirschl, 2000b, 2000a) as the manifestations of judicial empowerment (and thus judicial power). Chapters Two and Four address this by pointing attention to the subtler, normative (in contrast to highly formal) sources of judicial power.

*Viewed Through Binaries, Judicial Power Lands Analyses in Dead Ends*

There is one more dividend from asserting the roles of agency and relationality in shaping judicial power. We move past some of the binaries the socio-legal scholarship that have landed analyses into dead ends. In the “legal complex” works (Halliday et al., 2012), for instance, courts and judges are depicted as repressed and powerless or empowered and activist (and adherents of liberal-legality). This approach fails to account for the spectrum of judicial behavior when, say, judges are powerful but not through empowerment, empowered but not democratic or liberal, to name a couple of scenarios. In fact, one can read in the repeat use of the “judicial coup” label (used to describe decisions by courts in Pakistan, Turkey, and Egypt) the stickiness of these binaries: if courts seem independent but they do not deploy their autonomy in the service of liberal and democratic ideals, they must be engaging in coup-mongering. I do not file these “judicial coup” moments under

separate categories. I contend in Chapter Four that they can be explained within the same framework (what I call the embeddedness hypothesis) that also explains legality-upholding decisions by courts.

#### *Judicial Agency Helps Explain Variability in Judicial Behavior*

An agency-centric notion of judicial power furnishes better tools to explain variability in judicial behavior. Why, say, have the courts in Singapore and China stayed within the bounds of the empowerment script, but not their Egyptian or Pakistani counterparts? Even more promising analytically is the variability over time in the outlook of the same judiciary. Why were Allende's judges in Chile so vociferously "activist" against him but more quiescent under the military man who deposed him in 1973 (Hilbink, 2008)? Why have "activist" courts under the autocrats in Pakistan and Egypt, which acted to expand rights, then switched to actions that derailed the democratic transition when Musharraf and Mubarak were no longer in the picture (in 2009 and 2011, respectively)?

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#### 4. Preview of the Study's Arguments

I argue in Chapter Three that autocratic regimes vary in the degree to which they embed, or integrate, courts and judges as a faction of the political elite. Where judges and courts hold, or are gaining, authority within the regime and the latitude to honor their legality and status/corporatist commitments, they are more likely to safeguard the existing power-distribution arrangements. Judiciaries that are more *embedded* into the regime are more likely to rescue it at its hour of need. At the same time, courts that are more embedded into an autocratic regime have more freedom, and security, to ensure the legality of a significant

portion of government conduct. That makes the regime as a whole, autocratic though it remains, less capricious, more rule-bound.

In Chapter Four, I argue, first, that transition periods are more likely to be judicialized if old-regime politics had been judicialized. The actions and interactions of judges, courts and cause-lawyers under the autocratic regime – such as their “activism” and their cultivation of a “judicial support network” – create demand for judicialization when the autocrat tumbles or trembles. Second, contrary to some scholarly accounts, the judicialization of transition politics may exacerbate, rather than reduce, political uncertainty and muddle the efforts of democratization. And third, courts that had been highly embedded into the autocratic regime are more likely to plunge transition politics into deep, cascading uncertainty that derails democratization. That is especially the case if the rising electoral victors are a counter-elite bent on eradicating all arrangements from the old regime.

Chapter Two argues that how political actors mobilize the law, especially during periods of political change, comprises more than the formal artifacts of law and judicial power (such as statutes and, say, judicial review). It includes, additionally, long-evolving inherited legal meanings, norms and political memory. Though less strictly institutionalized, these imprints extend profound influence on the political actors’ choices during periods of political change.

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## 5. Research Design, Theory Building and Empirics

### 5.1. A Historical-Institutionalist Approach

This study employs a historical-institutionalist approach (March & Olsen, 1983, 2005; Pierson, 2004; Smith, 1988, 2010; Steinmo et al., 1992; Streeck & Thelen, 2005). By institutions I mean “the formal rules, compliance procedures, and standard operating practices that structure the relationship between individuals in various units of the polity and economy” – Peter Hall’s definition quoted in Steinmo *et al* (1992, p. 2). Institutions include not just the formal rules and the “overarching structures of state,” but also a nation’s “normative social order” (Ikenberry, quoted in the previous source). “Institutions,” March and Olsen write (2005, p. 5), “create elements of order and predictability. They fashion, enable and constrain political actors as they act within a logic of appropriate action.” “Order and predictability” are the key observable parameters of the process of judicial embeddedness. The “historical” component in “historical institutionalism” stresses that “timing and sequence matter greatly” in explaining political phenomena (Smith, 2010, p. 48), as do the contingency of political actors’ conduct, the rules’ unintended consequences (Pierson, 2004). Indeed, not all political time unfolds similarly. Katznelson distinguishes between “settled” and “unsettled” times; the latter are periods of heightened political uncertainty. During “unsettled” moments, such as those following regime weakening or collapse, “constraints on agency are broken or relaxed and opportunities expand so that purposive action may be especially consequential.”<sup>11</sup> In this dissertation’s case studies – the primary as well as the secondary cases – I focus on these unsettled periods to uncover

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<sup>11</sup> Quoted in Streeck and Thelen (2005, p. 7).

the changing political preferences of judges and courts, the preferences held prior to and during the periods of political change.

## 5.2. Case Selection & Theory Building

This dissertation uses the comparative case-study method. Gerring has asserted that the case-study method is better at “hypothesis generation” than “hypothesis testing” (Gerring, 2006, pp. 37–38, 2009). I heed Hirschl’s admonition: comparative public law, like other social scientist should devise their research to produce “causal inference through controlled comparison” (Hirschl, 2005, p. 127). Case selection should be deliberate and defensible in terms of the research objectives. Before I explain the grounds for selecting my primary case and secondary cases, another glance at my research question is in order. The reader will recall that the chief question of this study is *why do some judiciaries enable of democratic transition while others stall or derail them?* Though I aim to uncover institutional pathways rather than causal variables, the variables lingo can be clarifying here. The dependent variables in this study would be aiding or hindering democratization, and the choices by courts to aid or hinder democratization. The independent variables would be the integration of courts in autocratic regimes (Chapter Three) and the extend of judicialization of transition politics (Chapter Four).

I select Egypt as the primary case using the “most favorable case” or “most likely case” logic (George & Bennett, 2005, p. 253; Hirschl, 2005, p. 145). The logic behind the selection is that the Egyptian courts, more than their counterparts nearly anywhere in the universe of autocracies, should have aided the transition to democracy. Influential works by, among others, Moustafa (2003, 2007b) and El-Ghobashy (2008) accentuated how Egypt’s courts, especially but not exclusively the Supreme Constitutional Court, used their “empowerment” to advance rights and open up politics. Other influential accounts on

Egypt's courts – by, among others, Brown (2006), Bernard-Maugiron (2008), Hirschl (2003) and Ziadeh (1968) – underscored the country's, and the courts', traditions of liberal and secular jurisprudence. In addition, Egyptian courts acquired a reputation of “activism” in the 1980s and 1990s, often with reference to decisions that restrained the autocrat's power or reversed politics-stifling laws. In other words, among candidates to illustrate twin theses of “empowerment” and “liberal legality,” Egypt stood an excellent chance. And yet the Egyptian courts acted in an anti-democratic manner when the autocrat collapsed. An in-depth study of Egypt's judicial politics, one that seeks to uncover how political preferences for judges and courts develop and change within autocratic regimes, is thus warranted.

But, taking Hirschl's counsel to heart, the study does not stop at hypothesis generation. In Chapter Five I use secondary cases to illustrate the explanatory force of my theoretical claims, as well as to qualify and set scope conditions for them. The four countries I select – Pakistan (2009-13), Turkey (2007-8), Russia (1991-1993) and Hungary (1990-98) – were ones where courts were highly interventionist during “unsettled” period, that is, during periods of heightened political uncertainty. I select countries with variation in two parameters: the degree of judicial embeddedness (Pakistan and Turkey) and successful democratization despite high judicial interventionism (Russia and Hungary). In each of these four cases, by necessity brief, I trace mechanisms that inclined or disinclined judiciaries to endorse, derail or withhold support to democratic politics.

### 5.3. Fieldwork Research and Empirics

For this study, I conducted fieldwork in Egypt between September 2017 and June 2022.

This research included semi-structured interviews with judges, constitutional lawyers and

legal scholars, and archival research, including landmark court rulings, newspaper accounts, and writings by and biographies of judges and lawyers. The interviews occurred between September 2017 and June 2018. Among those I interviewed were three Supreme Constitutional Court (SCC) justices, seven senior (former) Cassation Court judges, two deputy chiefs of the State Council, one Appeals Court judge, two district court judges, the former justice minister under president Morsi, the head of the Constituent Committee for the 2012 constitution, the head of the constitutional amendment committee in March 2011, a legal adviser to president Morsi, four public interest lawyers, seven human rights lawyers, and four law scholars and academics. I attended seminars headlined by SCC justices. I took a dive in the archival records, digging up rarely analyzed landmark cases from before and after the 1923 constitution, which helped me gather a fuller picture of the interaction between jurisprudence, contentious politics and the changes in institutional evolution of the judiciary (e.g., the timing and circumstances surrounding the introduction of the Egyptian State Council in 1946). The synthesis of these sources features in Chapters Two, Three and Four.

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## 6. The Study's Chapter Outline

**Chapter One** (this chapter): The research questions, key terms, and argument preview.

**Chapter Two:** A brief history of the judicial and constitutional review in Egypt, focusing on four sources of judicial power: “judicial independence,” judicial review, the “massacre of the judiciary” in 1969, and the Judges Club. This chapter draws attention to shared and inherited meanings in a political community as a source of judicial power, especially during periods of political uncertainty.

**Chapter Three:** In this chapter I present a theory of judicial agency in autocratic regimes. I call it the Embeddedness Hypothesis. The chapter defines the components of judicial agency (itself the basis of judicial power), tracing how it plays out in autocratic regimes. The authoritarian regime of Sadat and then Mubarak (1970-2011) serves to illustrate the dynamics and manifestations of embeddedness. I argue that embeddedness transforms not just the judiciary but the autocratic regime as a whole, making it generally more sensitive to legality and more accommodating to the rule of law, broadly defined.

**Chapter Four:** This chapter has two chief components. First, it investigates how the judicial support network, which had mastered the art of political-contestation-through-courts during the autocrat's reign, can undercut the aspirations of democratic transition. This can happen when "cause lawyers," lawyer-politicians, and opposition politicians in general resort to courts to arbitrate transition-politics conflicts. Second, it probes the transition window as a special decision environment that structures, by both expanding and constraining, the choices of the chief political actors.

**Chapter Five:** This chapter takes the embeddedness hypothesis far afield to test its utility and set the scope of its applicability. Each of the four cases in this chapter – Pakistan, Hungary, Russia, and Turkey – provides a particular synthesis between the empirical record and the theory's expectations.

**Chapter Six:** This is the dissertation's concluding chapter. In it, I attempt to articulate a concept of the separation of powers during periods of political transition or heightened uncertainty that enables rather than short-circuits politics.

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## Chapter Two

### On the Sources of Judicial Power<sup>12</sup>

#### 1. Introduction: Judicial Power As Institutions, and As Accepted Meanings

One way of recasting the chief occupations of this dissertation is as follows. It seeks to trace how *judicial power* emerges, manifests, asserts itself and modulates the actions of other political actors within autocratic regimes (Chapter Three) and during periods of political uncertainty following the autocrat's ouster or collapse (Chapter Four).

But like “the rule of law” and “democracy,” judicial power appears to be one of those “essentially contested concepts” (Gallie, 1955). One may define it broadly, but at the risk of losing precision, or define it narrowly, ending up with only a caricature of the empirical record. The tension is visible in different strands of law-and-courts scholarship. Comparative judicial politics scholarship, especially of the strategic variety, tends to define judicial power narrowly and situationally. In such accounts, judicial power often revolves around formal structures and institutions, including judicial review, and around the calculations of actors holding or aspiring to hold legislative or executive power. In contrast, legal-mobilization scholarship, especially the interpretive strand, tends to emphasize the less formalized aspects of judicial power, showing how novel interpretations and creative deployments of law can invoke and exploit the authority of courts in the service of diverse ends. (In the next section, I present, in very broad strokes, a sketch of

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<sup>12</sup> An earlier draft of this chapter was a (longer) historical narrative. I owe thanks to Mona El-Ghobashy and Nathan Brown for suggesting that focus on particular themes connected to the interregnum of 2011-2013.

both approaches: strategic, comparative judicial politics and interpretive legal mobilization).

In this chapter, I attempt a synthesis of these two strands. The attempt is not motivated by a conciliatory sentiment but by an empirical one. During periods of political uncertainty and transition (as we shall see in Chapters Four and Five), formal bases of authority, for courts and for the legal order at large, are weakened, contested or altogether delegitimized. Political actors navigating these periods – including courts, the new electoral elite, lawyers, those pressing for revolutionary change, and those advocating gradual reforms – understand, and invoke, judicial power not only in terms of its formal structures, but as often in terms of the accepted meanings, conventions and aspirations surrounding the law, courts and judges. For example, judiciaries with weak formal independence protections under an autocratic regime may still become central players during transition politics if they are perceived to have defied the outgoing autocrat, as was the case in Pakistan (2009-2013). This chapter thus seeks to capture both the formal aspects of judicial power, all along heeding their temporal evolution, and the less formal but widely accepted meanings and conventions that are especially influential during periods of political uncertainty.

Since Egypt is the dissertation's primary case, this chapter focuses on a select set of formal and informal aspects of judicial power in the country. As shall become clear below, the lines between the two categories can be blurry. These aspects influenced the actions and outlook of the judiciary and the executive during the long authoritarian period, 1954-2011, and during the transition or interregnum period after Mubarak stepped down (2011-2013). I present below two formal aspects of judicial power. One is judicial review,

which has several starting points in the country's history, each supporting a different (if not necessarily irreconcilable) view of courts in national politics. The other is the Judges Club, the associational body representing the judicial corps which served as the focal point for mobilization of the judiciary as a whole, and as an identity-forming collective. The two less formal aspects of judicial power I discuss below are notions of "judicial independence" and the powerful legacy of the "massacre of the judiciary" in 1969. Throughout, my purpose is to link the temporal evolution of the formal aspects and the meaning-making, less formal aspects of judicial power to the choices by courts, judges and other political actors during periods of political uncertainty.

Of the dissertation's chapters, this is the one more narrowly focused on Egypt, providing historical grounding for Chapter Three. It also engages more thoroughly with the country's constitutional jurisprudence than the ones that follow, unearthing or highlighting previously un- or under-reported landmark rulings by Egyptian courts. Although the empirical engagement in this chapter is Egypt-centric, its implications are not, especially in connection to how courts deploy and utilize settled legal meanings to augment their power during periods of political change.

The remainder of this chapter unfolds as follows. The next section is a brief engagement with the scholarship on the sources of judicial power. Sections 3-6 present, respectively, present long-view accounts of judicial independence, judicial review, the "massacre of the judiciary," and the Judges Club in Egypt. The conclusion occupies the seventh section.

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## 2. What the Scholars Said: Meanings of Judicial Power

What is judicial power? Unsurprisingly, scholars have proposed more than a few definitions. Often, the focus is on formal, institutional aspects, especially “courts’ authority to make and enforce decisions,” with the acknowledgement that in nearly all cases, “a degree of de jure legal-constitutional authority and judicial independence is a necessary, but not sufficient, condition for judicial power” (Bakiner, 2020, p. 605). Other formal sources of judicial power identified by scholars include the constitutionalization of bills of rights and the introduction of judicial review (Ginsburg, 2003; Hirschl, 2000). Political actors may also enact “judicial empowerment” (Hirschl, 2000; Moustafa, 2003; Yadav & Mukherjee, 2014; Yeğen, 2018), which manifests as higher judicial autonomy. Other authors focus on yet another dimension of formal judicial power: the adoption or imitation of court-like processes in diverse areas of policymaking. Vallinder, for one, nearly equates judicial power with the “infusion of judicial decision-making and court-like procedures into arenas where they did not previously reside” (1997).

My definition of judicial power borrows from and expands on Vallinder’s. I take judicial power to mean judges’ and courts’ capacity to alter the choices of other actors, inside and outside court halls, with or without formal judicial decisions. An evocative definition of an actor or agent, by the French philosopher Bruno Latour, helps convey my conception of the power of courts and judges. “What is an ‘actor’? Any element which bends space around itself, makes other elements dependent upon itself and translates their will into language of its own. An actor makes changes in the set of elements and concepts habitually used to describe the social and the natural worlds,” quoted in Turner (2023, p. 44).

This understanding of judicial power incorporates the observation by another French author, Alexis de Tocqueville, about the U.S., where, he argued, political questions were routinely “resolved into legal questions.”<sup>13</sup> As more political questions are imagined and phrased as legal questions, the authority of courts and judges grows. Nearly always, converting political questions into the idiom of the law invokes, and simultaneously endorses, the authority of courts into policymaking. Phrasing political questions as legal ones is not just a function of invoking formal rules (regulations, statutes, etc.). Equally important, it draws on “inherited legal meanings” (McCann, 1991, p. 227) in a particular political community, “the multiplicity of the legal meanings created out of the exiled narratives and the divergent social bases for their use.”<sup>14</sup> Investigators whose gaze is fixed only on formal aspects of judicial power, such as judicial review or statutes expanding or restricting “judicial independence,” miss a crucial impetus: accepted understandings and norms connected to law, courts and judges. Indeed, even in a formal aspect of judicial power, such as the introduction of judicial review, tracing the “temporal sequences” (Pierson, 2004, p. 77) that brought it into being is useful. It illuminates the shifting meanings and aspirations that members of a political community attach to the law and courts at various times. The story, discussed below, of how judicial review was *demande*d of courts as early as 1926 illustrates this point.

In sum, my contention is that for a better understanding of how judicial power manifests in autocratic regimes and, especially, during periods of political uncertainty, we must pay heed not only to its formal aspects, but also to the normative understandings and

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<sup>13</sup> From *Democracy in America*, quoted in Ferejohn (2002, p. 42): “Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”

<sup>14</sup> Robert Cover, quoted in McCann and Lovell (2020, p. 358).

inherited meanings associated with the law, courts and judges. For the more formal aspects of judicial power, tracing their temporal evolution can help explain their enduring authority during periods of political change, when the entire legal order is standing on shifting sands.

The following four sections sequentially discuss four themes and sources of judicial power. In each I take longer view than presented by other authors in similar discussions.

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### 3. Judicial Independence

Over the past decade, more scholarly works have grappled with how apparent judicial independence destabilized politics and jeopardized democratization (Aziz, 2015; A. Bali, 2013; A. U. Bali, 2012; N. J. Brown & Waller, 2016; Kalhan, 2013). In this section I trace the origins of the prevalent conceptions of judicial autonomy in Egypt since the country's first "judicial independence" law, in 1943.

Between 1923 and 1952, 38 justice ministers occupied office, averaging less than one year each, and none of them exceeded two years (Al-Bishri, 2006, p. 39). Each new justice minister dismissed the judges he deemed allies of his political rivals. Gradually, notions of judicial independence coalesced around shielding the judiciary from the executive branch – in appointments, promotion, transfer, and especially in dismissals. Until-retirement-tenure for judges became synonymous with full judicial independence (as demonstrated by the explanatory notes for the judicial-branch laws in 1943 and 1949). Rare was the voice that expressed a broader, non-executive-centric view of judicial independence.<sup>15</sup> The concept of judicial independence as breaking free from all oversight

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<sup>15</sup> Author and Appeals Court judge Hassan Naguib (1945) published what I believe to be one of the first books devoted wholly to a discussion of judicial independence in Egypt. The focus of his discussion was the

by the executive endured, craning its head whenever the matter was discussed, including during the judicial independence debates in 2005 and 2006.<sup>16</sup>

The 1943 law, dubbed the “judicial independence” law, introduced or formalized two institutional innovations. One was the affirmation and expansion of until-retirement tenure to include nearly all judges, and not just the senior ones. “Immovability” of judges was established in the 1923 constitution, but cabinets did not respect that constitutional protection. The second institutional change was the formalization of the Supreme Judicial Council, a body made up of the heads of the higher courts and a representative of the justice ministry, with the authority to review the performance of judges and discipline them. Still, the judicial branch remained under the supervision of the justice ministry. The deep involvement of the ministry in judicial affairs gave a lie to the law’s optimistic title (Naguib, 1945, p. 94).

After the overthrow of the monarchy in 1952, Nasser, throughout his reign, expanded the use of hybrid and exceptional tribunals and restricted access to regular courts on a vast range of issues (as I elaborate in Chapter Three). For the Sadat and Mubarak tenures, the law 46/1972 was the chief judicial-authority statute, and the focal point of disputation between the Judges Club and the executive over judicial autonomy.

The law replicated the essential features of its predecessor from 1965. It too failed to address the criticisms that were directed at its predecessors (since 1943) with regards to the justice ministry’s sweeping powers over courts and judges (Article 93), including in

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1943 judicial-branch law. He lamented the narrow conception of independence the law assumed, suggesting that independence ought also incorporate independence from powerful individuals (such as lawyers who were former cabinet ministers), from public opinion, from higher courts, and from the executive branch (p. 6).

<sup>16</sup> A book of essays that abundantly illustrates this is the edited volume by Nathalie Bernard-Maugiron (2008)

performance evaluation, secondment and related financial compensation. In some other respects, the 1972 law went backwards on judicial-autonomy protections, compared with the 1965 law. Chief among the downgraded protections were those previously associated with the Supreme Judicial Council. The 1965 law expanded the powers of the Council as a body made up exclusively of judges. The Council held veto and decisional powers over all matters pertaining to courts. Then, in 1969 Nasser abolished this body altogether and replaced it with an executive-dominated council, The Supreme Council of Judicial Agencies. All his pronounced love for the rule of law notwithstanding, Sadat retained the new, executive-dominated council in his 1971 constitution and reaffirmed it in the 1972 judicial-branch law. One nod to conciliation with the judicial corps in the new law was that it prohibited only courts, but not judges, from expressing political views (Article 73) –a departure from a more restrictive provision in the 1965 law (Article 75).

Law 46/1972 was of great consequence throughout the four decades of Sadat's and Mubarak's tenures. It served several functions, most of them unforeseen. To begin, the law became the fulcrum of the judicial corps' discontents (al-Khydayri, 2006). During Sadat's tenure, Law 46/1972 was a constant and jarring reminder of the gap between the president's rule-of-law rhetoric and the reality of a statute that brought the judicial branch under executive control, as it granted the minister of justice and the new Supreme Council of Judicial Agencies significant powers over judicial affairs. Whenever Sadat visited the Judges Club in the second half of the 1970s (and he was now named the Club's honorary president), judges persistently but politely pressed for the return of the judges-dominated Supreme Judicial Council. After Mubarak settled in the presidency, he granted the judges' demand, restoring the Supreme Judicial Council and its oversight functions over the

judiciary (Law 35/1984). The Judges Club then switched to a more ambitious demand: introduce significant amendments to the judicial-branch statute in order to expunge or minimize executive control over judicial affairs. In 1991 (al-Khydayri, 2006, p. 102), it presented a draft law to the ministry of justice with those amendments, which was ignored.

Over the following two decades, the discarded draft law turned into the Judges Club central grievance, especially when the Club was under independent-minded leaders. At every opportunity – say, if Mubarak spoke of democratic reforms – the Judges Club waved their draft law for the judicial branch to remind the executive of their long-unfulfilled wish. In 2005, one of those opportunities arose. Finally yielding to domestic and international pressure, Mubarak set out to introduce a constitutional amendment that allowed a multi-candidate presidential election. Previously, a presidential candidate was nominated by the parliament and appointed to office by a yes-or-no referendum. Parliamentary and then presidential elections were scheduled for later in 2005, and judges were to supervise every single polling station, the first implementation of a 2000 Supreme Constitutional Court ruling that made such supervision mandatory.

The Judges Club led calls for more protections for judges – that is, for amending or rewriting Law 46/1972. Without the demanded protections, judges could not supervise the polls; they would not participate in polls that distorted the Egyptian people's will. Mubarak brought a former SCC chief justice, Mamdouh Marei, from retirement to head the justice ministry and negotiate with the increasingly vocal Judges Club (Ramadhan, 2018). Throughout the back-and-forth between Marei and the Club, which were intense and, through press leaks, often public, the judges insisted that an amended or rewritten Law 46/1972 based on their 1991 draft law was their core demand. In the end, all the 2005 polls

– one constitutional-amendment referendum, a parliamentary election and a presidential election – were conducted under fuller judicial supervision than any poll since 1952. And in return the judicial-branch statute was indeed amended in June 2006. Many – lawyers, journalists, members of the public – viewed the 2005-2007 skirmish between the Judges Club and the justice minister as a new episode of the “massacre of the judiciary.” Mubarak won twice in the 2005-2007 crisis: once by granting the judges only a sliver of their demands while getting their cooperation in the elections, and another by reaffirming courts, in the popular consciousness, as the protectors of rights, and thus as the best places to stage political contestation. This arrangement served Mubarak well.

Throughout the Mubarak reign, the executive too appreciated the import of the judicial-branch statute in negotiations with the judicial corps. If judges made it their central grievance, the executive could dangle its amendment as a possible prize if the Judges Club did not interfere with the executive’s plans. Mubarak did precisely that throughout the 1990s and the first decade of the 2000s. In other words, the 46/1972 law proved curiously fruitful to the Judges Club and the executive alike, providing the former with a straightforward grievance and a potent nucleus for mobilization, and furnishing the latter a circumscribed domain of conflict-and-accommodation with the judiciary that did not threaten the survival of the authoritarian regime.

Another unforeseen but highly significant outcome of the 46/1972 law was that it helped calcify a particular conception of judicial independence, a conception that would aid anti-democratic forces during the interregnum, or what I call the transition window, of 2011-2013. The long stalemate in the contestation over the judicial-branch statute, a stalemate that spanned almost all of Mubarak’s tenure, hardened the positions of first the

judicial corps and later the general public. Judges, lawyers, oppositionists, academics and opinion leaders were by 2005-6 convinced that judicial independence meant to extricate the judges from any form of executive control or oversight. As I noted above, this understanding of judicial independence did not originate in the 1970s or 1980s. It went back to the 1940s, to the two judicial-branch statutes of 1943 and 1949. However, the longevity of Mubarak's reign, along with his intransigence on the Law 46/1972, led to uncritical acceptance of the notion that should they be left to their own devices, and released from the executive's, judges would surely advance democratic aspirations and curtail the autocrat's violations of rights and liberties. In a word, judges were not considered "political." I discuss in Chapter Four how this misconception was detrimental to the democratic transition in 2011-2013.

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#### 4. Judicial Review

The dominant story of judicial or constitutional review in Egypt has two major variations. One centers the formal introduction of constitutional review, in 1969 and 1979, underscored for instance in the influential work by Moustafa (2008; 2003, 2007) and Brown (2006, 2013). The other variation is that presented by Egyptian judges, especially SCC justices and they trace the beginnings of judicial review in the country in terms of landmark cases, often starting in the mid-1920s.<sup>17</sup>

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<sup>17</sup> Examples include the article of Hanafi Al-Gibali, in the first issue of *Majallat Al-Dostouriyya* (the magazine issued by the SCC), in January 2003, and Abdalaziz Salmaan (1995, p. 285). Al-Gibali is a former chief justice and Salmaan is currently deputy chief justice. This was also the government's story as it presented draft law 48/1979, which established the SCC: see the explanatory note accompany the draft law as well the parliamentary report about it.

These accounts are inadequate. Stressing the formal, institutional introduction of constitutional review obscures the fact that throughout Nasser's reign judges indeed wielded judicial-review powers, thanks to Marbury-like decisions by the State Council in 1948 and 1952.

As for the history based on landmark cases, it is beset by four connected problems. First, accentuating the landmark cases overestimates the role of judges and reinforces the inaccurate notion that judges were automatically oriented to liberal values. One finds an example of this in Ziadeh (1968, p. 152). Second, it obscures the demand-side of judicial review, which the 1923 constitution created. Third, it fails to consider the structural changes in the judiciary, themselves emanating from political contestation. Those changes were crucial to the introduction of judicial review.

In the following paragraphs, I discuss one under-reported source of judicial review in Egypt: the demand created by the 1923 constitution.

As soon as the 1923 constitution was adopted, it prompted the need for constitutional interpretation. In the first parliamentary election after the constitution's passage, cabinet led by Saad Zaghloul, the eminent national leader, contested King Fouad's constitutional prerogative to appoint his share of Senate membership, as the Constitution stated. Zaghloul argued that Article 48 of the Constitution ("The King exercises his powers through his ministers.") was unambiguous; the king's powers were to be enacted by the cabinet, not the king himself. After an impasse, the two parties agreed to arbitration. For this task, they selected Firmin van den Bosch, the (Belgian) prosecutor general of the Mixed Courts (Abdulqader, 1973, p. 51). Bosch agreed with Zaghloul.

Not long after this came a more powerful illustration of the Constitution calling forth a mechanism for judicial review: the village-chiefs cases of late 1925 and early 1926.

A wave of strikes and mass resignations of (officially appointed) village chiefs took place across Egypt in December 1925.<sup>18</sup> The first election after the ratification of the 1923 Constitution gave Al-Wafd a landslide victory. It won about 90 percent of the House of Representatives seats (Al-Bishri, 1987), and consequently formed a government in 1924 headed by Zaghloul. The monarch, King Fouad, was still adjusting to a parliament that actually represented the popular will and claimed a share in executive power. The adjustment did not go well. He disbanded the Wafd-dominated House of Representatives, dismissed the Wafd-dominated government, and appointed a high-ranking government official to form a new government and run fresh elections under a new electoral law. The new law was issued as decree by the king. It was effective immediately, but per the Constitution was subject to final ratification once the new cohort of the House was in office.

Then in late 1925 something unprecedented happened. Village chiefs from across Egypt refused to receive or prepare voter lists for the new election as they were instructed by their superiors in the executive branch. What prompted their objections? Mahmoud Ali Al-Sawi, the chief of Kanneesat Damsheet, a small village in the Nile Delta, relayed his reasoning in a telegraph message to one of his superiors, the head of the Gharbiyya Province (50 miles north of Cairo), on December 31st, 1925:

“I have come to believe that disaffection among the residents of my village is widespread. They insist on boycotting the election law [and parliamentary elections] because they reckon it to be in violation of the constitution. On this basis, I announce that I will not be able to prepare the election lists, out of respect for the

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<sup>18</sup> The rulings discussed in this section are printed in Majallat Al-Mohamah, 263 and 264, issue of 1926 pp. 346-362. A scan of these rulings can be accessed here: <https://shorturl.at/Ksd9A>.

sentiments of my village's residents and out of my duty toward my country. I am thus submitting my irrevocable resignation from the mayorship" (the ruling cited above, p. 359)

Other village chiefs did not resign but were instead fired as they refused to carry out election-related duties, which led to more chiefs resigning *en masse* or staging strikes in solidarity. Faced with this rebellion, the government took many of those government appointees to court, under a recently introduced amendment in the penal code with stiffer penalties for public servants who refused to perform official duties, Article 108-B. Defending their actions in courts across the country, some village chiefs (or their lawyers) employed a striking argument. The 1925 election law was in violation of the Constitution, they said. Failure to carry out obligations connected to an unconstitutional law could not be criminalized.

In court, Al-Sawi, the village chief, stood his defense on three arguments. First, he did not comply with election-related instructions because the new election law was illegitimate. Second, he was entitled by law to the right to resign from his job. And third, his resignation or eschewing certain duties did not result in harm in the slightest, nor made harm possible (359). Abdulhameed Othman, the Tanta court judge (Tanta is a city in the Gharbiyya Province) had to respond to all three arguments in his ruling, as required by established judicial procedures, else the ruling would be swiftly voided on appeal.<sup>19</sup> Judge Othman started by arguing that the alleged infringement for which mayor Al-Sawi was tried was not the violation of election law, but rather the violation of his duties as a public servant, as specified by statute. Assessing the constitutionality of the election law was thus

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<sup>19</sup> One of the settled principles in the jurisprudence of the Cassation Court and its precursor, the Cassation committees, is that as part of the defendant's right to defense, the judge must respond all the arguments he deems "essential" (*difaa' jawhari*). See for instance Cassation Court ruling on December 26, 2004, on petitions 561 and 813, judicial year 74.

irrelevant to the matter at hand. “The defendant was not within his rights to refuse to comply with the instructions issued to him [by his superiors] with regards to preparing voter lists for the election, *even if we granted the hypothetical that the manner in which the election law was passed made it unsound*” (my emphasis, p. 360 of the ruling), judge Othman wrote in his January 1926 ruling, convicting the mayor with contravening Article 108-B of the penal code.

Mohammed Tawfiq Ridhwan, a judge in nearby Talla (a city in the Mennoufiyya Province in the Nile Delta) faced the same legal questions but on a larger scale. Dozens of village chiefs in the province were brought to his court hall. They were charged with staging a strike – an egregious offense when committed by public servants – and bad-faith resignations that hampered government work, all again under Article 108-B. The reason cited for the mass resignations was unambiguously political: the village chiefs were resigning because they “could not work under the leadership of an unwise government” (a euphemism for “illegitimate government”) (353). Again the village chiefs argued, in their own defense, that the election law was unconstitutional.

Judge Ridhwan took the legal questions presented by the case far more expansively than his Tanta colleague did. He took a dive in French jurisprudence in discussing if there were “legitimate grounds” for a public servant to disregard instructions from superiors. He also elaborated a distinction between the duties of village chiefs as public servants and their rights as citizens — including the right to resign from their jobs. Those resignations could not have intended harm to the public, Judge Ridhwan wrote in his January 1926 ruling, first because the stated goal was preservation of public interest, and second because

political parties which undoubtedly cared for public welfare also decided to boycott the election (357). Though the judge's sympathy for the defendants was palpable, he still had to convict many of them with an unlawful conspiracy-based strike (the defendants admitted to that much in the interrogations by prosecutors). Even so, he said only minimal penalties under the 108-B Article would apply, partly for the fact that this was the first instance of litigation involving this article. He acquitted the village chiefs who admitted no collusion with others in their decisions to resign.

On the constitutionality of the election law, Judge Ridhwan too asserted that the dispute occasioning the trial was not connected to the election law, but to the statute enumerating the public servants' duties. Then he directly addressed the matter of judges assessing the constitutionality of legislation. Judge Ridhwan argued that courts had the right to decline applying, but not to declare void, a law to a case at hand if they believed the law to be in breach of the constitution. He cited, as part of the reasoning, the views of neo-natural law jurists Leon Duguit and M. Hauriou.

The Talla ruling by Judge Ridhwan was the first instance of an Egyptian court claiming the right to judicial review. I discuss it and the events occasioning it at some length above to illustrate the profound popular-constitutionalism sentiments among Egyptians across social strata in the shadow of the 1923 Constitution (in the Talla case, the judge and the defendants alike).

By the time the State Council jurists issued the two major rulings asserting judicial-review powers for courts – in 1948 and 1952 – courts at various levels had been advancing the case for judicial review for over two decades, using essentially the same rationale that the State Council would later employ.

Diffuse judicial review, where courts could abstain from implementing the laws they deemed unconstitutional but without striking them down, remained the only form of review until the late 1960s. Egypt's centralized, or concentrated, constitutional review was born twice, in 1969 and 1979. In both instances, the president who created or relaunched the court did not live long enough to enjoy the fruits of his labor. This is where similarities end. The 1969 Supreme Court immediately found itself in an altered political environment where its very founding was denounced as demonstration of the Nasser-era lawlessness. In contrast, the 1979 Supreme Constitutional Court, coming into its own as Mubarak (1981-2011) settled into office, entered a political environment that was institutionally and discursively a continuation of the Sadat era.

It was also an environment of political and constitutional crisis. Sadat had appealed throughout his decade in power to conservative social values and courted the Islamists. He was also assassinated by Islamists in a stunning attack during the ceremony of eighth anniversary of the 1973 war, retaliation for the president's peace with Israel. Coinciding with the assassination, widespread, coordinated attacks by Islamists on police stations rocked the country.<sup>20</sup> To topple the whole regime and not just behead it – this was the goal. Alongside the economic, infrastructure, and housing crises his predecessor bequeathed him, Mubarak was additionally confronting the bleak reality of a militant, Islamist insurgency in various parts of the country, and the Islamist infiltration of the military.

Over the following three decades, Mubarak never lost sight of the political utility of courts, even when they gave him grief. He understood, as did his predecessor, that strong-

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<sup>20</sup> See Chapter 5 of Sharif Younes's *Sqyyid Qutb and Islamic Fundamentalism* (Younes, 1995, pp. 245–299). For an excellent account of Sadat, Mubarak and the Islamists, see generally Mary Anne Weaver's *A Portrait of Egypt* (Weaver, 2000).

arm tactics with courts made judges less predictable and thus more threatening to the regime. Sadat often expressed the notion that so long as the judiciary did not threaten the entire regime, it would be granted substantial freedom of action. A year before he died, he told his audience at the Judges Club, where he celebrated with them the annual Judiciary Day:<sup>21</sup>

“You are an authority that comes before any other in this regime. So don’t be overly sensitive [regarding decisions from the executive pertaining to the judiciary]. *Just place yourselves where your country wants you to be, where your people want you to be, where I want you to be, and after that all that you want will be granted, no problem at all.*” [My emphasis.]

Elsewhere in his remarks, Sadat said:

“We shall never go back to the past and the grudges it left in its wake, such as the *judges operation* in 1968 [that is: the 1969 laws-by-decree], which was remedied. We are never going back. We are done with this past, and we have unburdened ourselves of all the resentment and all the problems and are proceeding together, with a unified will, like one man, to build and exalt Egypt.” [My emphasis.]

Mubarak was not as susceptible as his predecessor to confusing rhetorical flourishes, but he surely implemented his predecessor’s insights. He tolerated the SCC decisions that restored political and civil liberties abridged or violated under his two predecessors.<sup>22</sup> When the court, on reasonable legal grounds, annulled the election law twice (in 1987 and 1990), he did not retaliate. Even when the Islamists sought to contest government decisions in court, and successfully obtained redress, the Mubarak regime did not discourage the practice, calculating that legal mobilization and contestation in courts was far preferable to the militant alternative (Agrama, 2010, p. 496; Moustafa, 2007, pp.

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<sup>21</sup> The Sadat section on the Alexandria Bibliotheca website: [http://sadat.bibalex.org/Historic\\_Documents/Historic\\_Docs\\_All.aspx?TabName=Speech&page=76#Gallery](http://sadat.bibalex.org/Historic_Documents/Historic_Docs_All.aspx?TabName=Speech&page=76#Gallery). The Oct 11, 1980, remarks. Accessed September 26, 2022.

<sup>22</sup> See generally Moustafa (2007).

109–110; Soliman, 2012). When the SCC declared a tax law unconstitutional, threatening to “strain government resources,”<sup>23</sup> Mubarak simply had his parliament amend the SCC statute, changing the retroactive applicability provision in the 48/1979 statute regarding tax laws. Thus came into existence law 168/1998. Meanwhile, whenever core regime interests were at stake, the SCC could be counted on to protect and advance them – on matters such as trying civilians before military tribunals, the constitutionality of the martial law and the legality of the regime’s privatization program. The fuller story of this pattern of accommodation is told in Chapter Three.

Like other consequential judicial structures, the SCC had several births, several beginnings. The SCC, however, surpasses all other Egyptian judicial structures in the extent of diversity of origins. It partly began as a concession from the executive in the wake of 1967 defeat (in the 1968 Covenant/Mithaque), but also as an instrument of control in dealing with the judges who stalled the “socialist transformation.” It had origins in a 1926 court ruling, which was grounded in the 1923 Constitution, in widespread popular constitutionalism, and in the self-confidence of a new cohort of Egyptian judges and legal scholars. They utilized the work of Duguit. The French jurist, like his American counterparts, believed that a constitutional provision was not necessary for asserting judicial review powers for courts (Sweet, 2003). The two State Council rulings from 1948 and 1952 too drew on Duguit. But they were also political, as they appeared directed against the electorally invincible Wafd Party. Both decisions were crafted by legal scholars deeply disenchanted with electoral politics and majoritarian institutions, even though the

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<sup>23</sup> The December 5, 1998, parliamentary transcripts.

dominant party of the era was Al-Wafd, the party that singularly carried the torch of national liberation and representative rule between 1923 and 1952.

Alongside all the above, judicial review was a rationalizing device. It was an instrument of unifying and streamlining judicial processes, as an act of state-modernization, which was a dream that Sanhuri, the second chief of the State Council, long held. In the design of both 1969 and 1979 iterations of the constitutional court, too, the judiciary-rationalizing dimension was visible. For instance, the new court acquired a permanent jurisdiction over disputes of competence among courts, replacing the ad hoc committees that previously brought together representatives of the Court of Cassation and the State Council.

In the absence of these widely shared and appreciated meanings and origins of judicial and constitutional review in Egypt, the Supreme Constitutional Court's interventions in 2011-2013 would likely have been rebuffed or would not have occurred in the first place.

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##### 5. The "Massacre of the Judiciary"

Just before midnight on the last day of August 1969, Gamal Abdul-Nasser, Egypt's president, issued several decrees entitled "judicial reform laws." The decrees created a new apex court, replaced the Supreme Judicial Council with another council controlled by the executive, removed about 200 leading judges the president deemed to have defied him, and disbanded the "Judges Club." Couriers on motorbikes were dispatched immediately,

past their working hours, to deliver the official orders to the dismissed judges so they could not enter their offices the following morning.<sup>24</sup>

When Nasser last resorted to overtly strong-arm tactics against judges – in 1954, against the State Council; in 1963 against the Judges Club – his actions provoked little or only duly measured protest from the larger judiciary. Not so in 1969, when the broadside against the judiciary seemed to target several venerable judicial bodies all at once. Indeed, the masterminds of the assault, many of them members of the judiciary,<sup>25</sup> correctly anticipated a backlash. To defuse some of the anger (and disguise the hands of the plotters), they staged the resignation of Mohammed Abu Nossair, the justice minister, to coincide with the nightly dismissals (Nassar, 1974). But regardless of how the judiciary reacted, the crucial factor that undercut the anti-judiciary scheme was that Nasser did not live long afterwards. Shortly after Anwar Sadat became president in October 1970, he reinstated most of the judges Nasser had fired. More noteworthy, the new president’s public speeches now featured a favored incantation: “the rule of law.”

The decrees of August 31, 1969 birthed two potent and enduring forces in Egypt’s judicial politics landscape: the “massacre of the judiciary,” and the constitutional court. Judges immediately called the anti-judiciary measures (especially the removal of about 189 of their notables) a “massacre,” though no one bled. The moment and the designation were seared into the public’s consciousness. Valiant judges, a common narrative goes, defied the autocratic executive and in the end prevailed. The “massacre” label lives on. Whenever a clash surfaced between the executive and the judiciary, even judges who were habitually

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<sup>24</sup> The overnight couriers anecdote is recounted in Nassar (1974)

<sup>25</sup> According to court documents partially reproduced in Hosni (2008)

pro-autocrat<sup>26</sup> would invoke the “massacre” and the judiciary’s ostensible sacrifices. The August 1969 moment was mythologized.

The term is not hyperbolic. In myths, heroes are always heroes, however flawed, however tragic the projects they embark on. “Facts” about the mythological rarely matter. Similarly, the “massacre” made Egyptian judges perennial heroes.<sup>27</sup> For over five decades it served as a mythological commons into which judges and other actors tapped to gain political favor or discredit opponents, including during the 2005-06 mobilization by the “Independence Current” judges, and during the transition window of 2011-2013.

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## 6. The Judges Club

Established by 59 judges and prosecutors in 1939, the “club” is a professional syndicate that aimed to “further the relations between the judges,” advance their interests, and “safeguard judicial independence.” The founders likely chose the “club” appellation for two reasons. One was that as a “club,” its legal status was one of a non-governmental organization (NGO), which operated under less executive restrictions than professional syndicates. The second reason was more affective. The legal-profession elites likely thought the syndicate (*niqābah*) – a term used by all other associational groups, including trash collectors – was beneath them.<sup>28</sup> Nonetheless, as Bjorn Benthage observes, the Club

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<sup>26</sup> Such as Judges Moqbil Shāker and Ahmed Azzind during the 2012 and 2013 disputes between the Mohammed Morsi government and the Supreme Constitutional Court.

<sup>27</sup> What I mean here is that the prism through which scholars and commentators viewed the judiciary was nearly always favorable. One can witness this in the commentary during the 2005-2006 crisis between the “Independence Current” in the judiciary and the executive, by the prominent, anonymous blogger Baheyya, and by political scientists such as Nabeel Abdel Fattah and Mohammed Essayed Al-Saeed. This does not mean that those authors were blind to failures of individual judges or of the judiciary at large. They were not. Still, many, or likely most, bought into the liberal-judges-against-lawless-autocrat mythologization.

<sup>28</sup> Aziz Khanki, a prominent lawyer and legal scholar, and a key figure in founding the bar association, related an anecdote about Saad Zaghoul, when the latter was the justice minister. Zaghoul did not like the

always provided services which only syndicates, by law, could provide, such as health insurance to members, and the regular publication of a periodical (Bentlage, 2010).

Ever since it was founded, the Judges Club served as the representative of judges as an associational group, aggregating and channeling the proximate collective agency of the judicial corps. It displayed remarkable cohesion among its members at various moments of conflict or negotiation with the executive, such as in 1963, 1969, 1979, and 2005-07.

The Judges Club played a central role in the momentous “massacre of the judiciary” discussed above. After 1962, Nasser made it clear in his public pronouncements that it was only a matter of time before judges would have to join the Arab Socialist Union (ASU), the president’s latest one-party-like “political organization,” as the country marched to a “socialist transformation” (Imam, 1976, pp. 35, 45). The other still-unincorporated groups were the police and the military. Given the ASU was an arm of the executive, the judicial corps understandably preferred to stay clear. They avoided confrontations with Nasser, resorting instead to avoidance when the executive branch harassed the Judges Club or planned restrictive laws directed at the judiciary (as in 1963). The regime’s intellectuals – such as the legal scholar Jamal Al-Ottaifi – argued often in articles in *Al-Ahram*, probably on cues from the Nasser government, that if judges did not join the “coalition of society’s productive forces” they were a hurdle to the hoped-for “socialist transformation” (Al-

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word “niqābah” for new bar association, saying it reminded him of the trash-collectors’ niqābah. But Khanki reminded him that the same word was used by the association of Prophet Mohammed’s descendants (Niqabat Al-Shraf) – and that is when Zaghoul changed his mind. The source of this anecdote is Shalakani (2013, Chapter 3 on lawyers).

Ottaifi, 1980, p. 73).<sup>29</sup> The last of such calls came from Ali Sabri, the president of the ASU, in March 1967 in a series of articles in the state-owned Al-Jomhuriyya newspaper (Imam, 1976, p. 18).

That changed after the June 1967 defeat. Now occupied with “reversing the outcomes of the [Israeli] aggression,” the executive branch no longer had bandwidth to expend on maneuvers to corporatize the judicial corps. With the Nasser regime at its nadir, and with unprecedented student and worker protests in February 1968, the Judges Club identified an opportunity to put to rest any lingering plans to force the judges into the ASU.<sup>30</sup> On March 28, the Judges Club issued and widely circulated a statement that argued, if in a roundabout manner, that the military defeat was in the end the result of the regime’s erroneous domestic policies, restricting press and individual freedoms and running roughshod over due process. The statement asserted the centrality of judicial independence (that is: Nasser and his allies should stop trying to force the judiciary into the ASU).

Nasser did not take it well and resolved to remove the board of the Judges Club at the earliest chance. In the Judges Club election held in March 1969, the government fielded

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<sup>29</sup> Al-Ottaifi (1980, p. 73) wrote: “it is time to banish any artificial contradiction between the rule of law and the socialist transformation.” In two articles published in Al-Ahram on April 27 and 28, 1968 and reprinted in the above cited book (p. 118), Al-Ottaifi argued that a constitutional court “is a means to safeguard the socialist transformation, and a means to protecting individuals’ rights and liberties enumerated in the constitution.” The significance of a constitutional court, Al-Ottaifi added, was heightened by the fact that many of the pre-191 laws (that is, pre-socialist laws) had remained on the books. On September 2, 1969, two days after the night-time “judicial-reform” decrees, he wrote (same book as above, p. 127): “the neutrality expected from the judge, a neutrality crucial to his independence, is that which he maintains between the parties to a litigation. He cannot be neutral regarding the social system he lives in.”

<sup>30</sup> Sami Sharaf was a close aide of Nasser. In his multi-volume memoir on his years with Nasser (Sharaf, 2016), he repeatedly underscores the timing of the Judges Club assertive stance – that it occurred at time of regime weakness. See Chapter 23, Vol. 5, starting p. 1195.

a slate of candidates that sought to unseat the defiant incumbents, but Nasser's plans were again thwarted. The judicial corps reelected the Club's independent board. The government then changed tack, switching to covert scheming aimed at ridding the judiciary of its "agitator elements." Those plans, hatched with collaboration from members of the judiciary,<sup>31</sup> were enacted on August 31, 1969. Law by decree number 81 created a constitutional court. Law-by-decree 82 abolished the Supreme Judicial Council and replaced it with the executive-dominated Supreme Council of Judicial Organizations. Law-by-decree 83 practically fired 189 judges, 15 of whom were Cassation Court judges, including the court's chief (Imam, 1976, p. 16). And law-by-decree 84 changed the rules of appointing the leaders of the Judges Club.

Why were the judicial corps prepared to challenge Nasser in 1968 but not in 1954 when he had undertaken a ferocious assault on the State Council and its head, the eminent jurist Sanhoury? And the same goes for 1963 when a justice minister dismissed the leadership of the Judges Club. Both the writers sympathetic to Nasser (such as Sharaf and Imam) and those who were not, such as Al-Bishri, agreed that the timing reflected an understanding that the Nasser regime was weaker in 1968 (Al-Bishri 2006, 18). Previously, the regime's muscular measures may have been accepted as trade-offs for its national liberation and national revival achievements. After the 1967 defeat, the regime's legitimacy was harder to maintain (2006, p. 22).

In any case, Nasser died 13 months later. But the memory of the anti-Nasser stand by the Judges Club and "massacre of the judiciary" lived on. Decades later, in 2011-2013,

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<sup>31</sup> Some of the backroom scheming was uncovered in court documents in 1971. See the documents appendix in Hosni (2008), but also Sharaf (2016, pp. 1205–1216) and Imam (1976, p. 90).

lawyers, judges and journalist would draw (inaccurate) parallels between president Morsi's antipathy toward the Supreme Constitutional Court and Nasser's "massacre of the judiciary." And it was a highly effective rallying cry in assembling an anti-Morsi coalition, as I discuss in Chapter Four.

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## 7. Conclusion: Authority by Other Means

One significant question raised often in comparative judicial politics scholarship over the past two decades is this: How to explain the power of courts during post-autocrat transitions? Many accounts focused on the calculations of the transition period's interim holders of legislative or executive power, and how such calculations led to "empowering" courts as the optimal answer to political uncertainty (Chavez, 2004; Chavez et al., 2011; Ginsburg, 2003; Helmke & Rosenbluth, 2009; Hirschl, 2000). These accounts seem to overlook the pre-transition histories and meanings associated, in the collective mind of the political community, with courts and judges. The political uncertainty breaking out with "constitutional ruptures" (N. J. Brown & Waller, 2016), periods when political authority is broadly contested and fluid, elevates the influence of these shared histories and meanings.

In this chapter I presented long-view accounts of four sources of judicial power, heeding their inherited meanings and shared conventions as much as their formal aspects. In Chapter Four I discuss how these sources play out and help "judicialize" transition politics.

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## Chapter Three

### A Theory of Judicial Agency in Autocratic Regimes

#### 1. A Question of Motivation

What does motivate, or underpin, the political choices of judges and courts in autocratic regimes? This chapter answers this question by presenting a theory of judicial agency. The theory offers a general framework of what judges want in autocratic and hybrid regimes, and how their wants change *over time* in adaptation to shifting political circumstances.

A theory of judicial agency is necessary for two reasons. The first is that, as I showed in Chapter One, the “empowerment thesis” focuses nearly exclusively on the interests and calculations of the majoritarian branches of government: an autocrat facing economic collapse may seek to lure in foreign investments by “empowering” courts (Moustafa 2007; North and Weingast 1989; Wang 2015; Weingast 1997). Or it might be new electoral elites that “empower” courts to hedge against the fallout from future electoral defeat (Ginsburg 2003; Hirschl 2000; Ramseyer 1994). In both cases, the reigning or future executive transfers a parcel of his power to the courts in order to avoid worse eventualities. As for how courts use the surplus authority, the “empowerment” accounts more often assume than investigate. They assume that courts would deploy their power in the service of liberal and democratic objectives: safeguarding rights and opening up politics. So while these accounts recognize judicial power – and it is impossible not to acknowledge it in the era of the “global expansion of judicial power” (Tate and Vallinder 1997) – they do not

offer a theory of what motivates judges and courts, let alone how the motivation changes over time.

The “empowerment thesis” has another shortcoming. Putting aside the view of courts submitting to the wishes of the autocrat at gunpoint, the empowerment thesis fails to anticipate or explain anti-democratic or illiberal conduct by courts when they (courts and judges) are unencumbered by domineering autocrats. Some authors have bracketed out those episodes, filing them under residual categories, such as “bounded activism,” “insulated liberalism” (Moustafa 2007, 232) and “selective activism” (Belge 2006). By contrast, this chapter places at the center of the analysis these out-of-character moments, when otherwise rights-protecting judges softened their legality commitments, but also when otherwise pro-autocrat judges were keener than usual on upholding legality. These variations in judicial conduct require a new theoretical framework.

In this chapter, I argue that to explain how judicial power manifests and plays out in autocratic regimes, we need a theoretical framework for what motivates the wielders of this power – namely, judges and courts. (By judicial power I mean, broadly, courts’ jurisdiction over and authority to adjudicate social and political conflicts.) A theory of judicial agency is thus necessary. A working definition of judicial agency is that it is a fluid balance, or equilibrium, among three sets of primary commitments that judges harbor: to legality, to other members of the judiciary as a status and corporate group, and to the “regime.” I use “regime” in the Eastonian sense (after David Easton), which denotes, broadly, the rules and norms of the game and the constraints on the political actors and

their interactions.<sup>32</sup> The distribution of authority within the regime influences which set(s) of commitments, at any given time, judges prioritize or relegate. Where judges and courts hold, or are gaining, authority within the regime and the latitude to honor their legality, status and corporate commitments, they are more likely to safeguard the existing power-distribution arrangements. Judiciaries that are more *embedded* into the regime are more likely to rescue it at its hour of need. At the same time, courts that are more embedded into an autocratic regime have more freedom, and security, to ensure the legality of a significant portion of government conduct. That makes the regime as a whole, autocratic though it remains, less capricious, more rule-bound. Embeddedness is a two-way process: courts become keener on safeguarding the regime, even if that goes against legality sometimes, and simultaneously the regime at large becomes more respectful of legality's principles. It is mutual embeddedness (more on this in the chapter's conclusion). Integrating (or embedding) courts into the autocratic regime can be understood as a process of attaining at least mutual accommodation and at best mutual reinforcement between judicial agency and executive agency.

The remainder of the chapter unfolds in five sections. Section 2 briefly discusses the three threads of explanation that scholars employed to account for variation in judicial conduct: structural, ideational and strategic. In Section 3, I elaborate my judicial agency framework, showing how it plays out in "integrative" and "fragmentary" autocratic

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<sup>32</sup> "The regime," Easton (1965, 192) writes, "represents relatively stable expectations ... with regard to the range of matters that can be handled politically, the rules or norms governing the way these matters are processed, and the position of those through whom binding action may be taken on these matters. Within this range, the politically relevant members are less likely to challenge the authority and validity of settlements arrived at even though they may of course question the wisdom." He later added that "the regime as sets of constraints on political interactions [has] three components: values (goals and principles), norms, and structure of authority" (193).

regimes. The mechanisms and manifestations of judicial embeddedness, or integration, in autocratic regimes are presented in Section 4. Section 5 furnishes the core empirical component of the chapter. It is set, fundamentally, as a comparison between the Nasser and the Sadat-Mubarak regimes with regards to the judicial policy of each. The comparison illustrates the mechanisms and manifestations of embeddedness through telling examples. The chapter concludes, in Section 6, with a brief discussion of the implications of the embeddedness hypothesis. Three are highlighted: substantive rule of law in autocratic regimes, judicial “activism” in autocratic regimes, and the connection between autocratic embeddedness and democratic transition if/when the autocrat tumbles or trembles.

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## 2. Available Explanations for Variation in Judicial Conduct

Though the judicial-politics scholarship does not offer an explicit theory of judicial agency, several authors have presented different explanations for variation in judicial conduct.

In this section, I briefly discuss three key themes that scholars employed to explain variation in judicial conduct. These also serve as the alternative answers to the question that opens this chapter about what motivates courts and judges. Addressing what I take to be the shortcomings of these answers, I present in Section 3 a theory of judicial agency within regime.

Those three themes are structural, ideational and interest-oriented or strategic explanations. I discuss, and critique, each in turn.

### 2.1. Structural Explanations

To explain variation in judicial conduct – when courts appeared more deferential or more “activist” toward the autocrat than at other times – some authors employed structural explanations. In this category of explanations authors often proceed in one of two directions. In one, they underscore a key structural element to which they attribute the consistency and stability of judicial preferences across different political environments, even across regime types. Ramseyer and Rasmusen, for example, observed that in civil-law systems, the majoritarian branches of government could exploit their power over the bodies that appoint and assign judges to obtain favorable rulings, all without direct interference. Focusing on Japan, they argued that “by using a systematically biased incentive structure, the [longtime ruling Liberal Democratic Party] was able to obtain the results it wanted without overtly intervening (Ramseyer and Rasmusen 1997, 3). Another structural account is Lisa Hilbink’s study of the Chilean judiciary. Hilbink argued that judicial “apoliticism,” which had its roots in institutional choices planted in the nineteenth and twentieth centuries, “provided professional understandings and incentives that rendered even democratic-minded judges disinclined to take stands in defense of liberal democratic principles” (Hilbink 2007, 5). Thus the conservatism that judges demonstrated prior to, through and after the Pinochet autocratic era (1973-1990).

Other authors home in on a change in structure, or institutional design, and use it to explain change in judicial conduct. The introduction of judicial review has doubtless been the structural innovation that received the most attention. Indeed, in many studies, authors designate the introduction of constitutional review as a demarcation point, setting a “before” and “after” line in a polity’s or a regime’s history (Cappelletti 1971; Ginsburg 2010; Lustig and Weiler 2018)

Such explanations have three problems. The first is that, as sociologists and political scientists have long noted – including, Bourdieu (1977), Anthony Giddens (1984) and Alexander Wendt (1992; 1987) – structure does not translate automatically or predictably into particular choices by the agents. Second, in relation to constitutional review, even if we accept that its introduction does indeed strengthen the hand of the judiciary, the evidence on whether this strengthening advances rights and other liberal desiderata is mixed (Rosenberg 2008; Tushnet 2009). And even if it is granted, further, that constitutional review increases the options and influence of courts within a regime, structural explanations are not especially enlightening on how courts may deploy or expend their augmented influence.

The third critique of predominantly structural explanations is also a longstanding one, and it holds true of judicial power. They fail to account for variation in conduct that is observed under unchanged institutional arrangements (Steinmo, Thelen, and Longstreth 1992, 18). For example, what has motivated the “Marbury moments” (Koh 2015) at the time they occurred, and in the absence of significant institutional change? For example, Egyptian and Israeli courts declared for themselves (in 1948 and 1995, respectively) the power to review legislation, despite the absence of an explicit constitutional text granting this prerogative, and with no significant change in the institutional environment.

## 2.2. Ideational Explanations

In explaining judicial conduct, some authors argued for attention to ideational changes. They argue that change in ideas – whether motivated by historical experiences, aspirations for a particular vision for the future of the polity, or exposure to transborder norms – are

better predictors of variation in judicial conduct than other variables (Hilbink 2009; Woods 2009; Woods and Hilbink 2009)

This strand of explanations has the following shortcomings. The first is that despite their apparent dynamism, ideational-change accounts are actually static. Once ideas-induced change occurs, it is depicted as one-off and, implicitly, irreversible. Whereas the conduct of other political actors is viewed as contingent and adaptable, judges and courts, in ideational accounts, seem to undergo only one-way conversions. The second shortcoming in ideational explanations has to do with the difficulty in isolating a causal mechanism, let alone a causal “variable,” based on changes in ideas. If we grant that ideas matter, and assume that change in ideas can partly be explained by changes in the normative environment (Ben-Josef Hirsch 2014), judges and courts are not the only audience influenced or inspired by the emergence of new norms. What is described as ideational-change on the part of judges might instead be a system-wide change. The whole political class, and not just the judges or the jurists, might be embracing new standards of conduct.

The third weakness in ideational accounts concerns timing. New ideas might float around for long, but it is *when* they are embraced that poses a more intriguing puzzle. The timing may have less to do with the ideas themselves than with other changes in the political environment. Nothing illustrates this point better than the constitutional-review innovation itself. French jurists such as Leon Duguit and Maurice Hauriou, and then the Austrian Hans Kelsen, had warned, over the first two decades of the twentieth century, against the concept of parliamentary supremacy and advocated different approaches to constitutional and judicial review (as I discussed in Chapter Two). But those innovations were not widely adopted until after World War II.

### 2.3. Strategic Explanations

These explanations, whose origins are found in studies of the U.S. Supreme Court, are based on assumptions about “rationality.” In these accounts “(1) justices are policy oriented; (2) they act strategically to further their goals; and (3) their interactions are structured by institutions” (Epstein and Knight 2000, 628). Over the past three decades, scholarship employing various strands of strategic analysis mushroomed, in what some called the “strategic revolution” (Epstein and Jacobi 2010; Epstein and Knight 2000). Predictably, these studies were the subject of the criticism hurled at rational-choice analyses. Rational-choice accounts assume rather than investigate preferences, the critics said. Besides, crucially, preferences are not abstractions. They are constituted, contingent and adaptable (for instance, see McCann 2009).

My fundamental critique is not the general criticism directed at rational-choice accounts (with which I agree). It is rather that the more influential *comparative* strategic judicial-politics accounts (in autocratic and hybrid regimes), unlike their American forerunners, focused nearly exclusively on the choices and calculations of the majoritarian branches (Ginsburg 2003; Ginsburg and Moustafa 2008; Helmke and Rosenbluth 2009; Hirschl 2000; Moustafa 2007). They investigated why the “political” branches might empower courts, what explained higher “judicial independence” under this autocrat than under that one. Only scarce attention went to what judges might want as political actors, and how such wants may change over time.

The approach adopted in this study is generally strategic (and institutionalist). What it hopes to contribute is a keener understanding of the strategic environment and interdependent decision-making of judges in autocratic regimes. In the next section I

present an account of the content and expression of judicial agency and how autocrats may choose to interact with such agency.

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### 3. Judicial Agency and Judicial Embeddedness in Autocratic Regimes

The first part of this section presents something like an origin story of how new autocrats decide to integrate or marginalize courts in their regimes. The second part discusses the content and expression of judicial agency and how it plays out in integrative and fragmentary autocratic regimes.

#### 3.1. The Autocrat's Choice: Diminished Control Or Unbound Uncertainty?

Before proceeding with the story, two definitions are in order. I use judicial embeddedness to mean the integration of judges, as members of the political elites, into the regime. And I use these two terms (integration and embeddedness) interchangeably throughout this chapter. By political elites I mean “persons who are able, by virtue of their authoritative positions in powerful organizations and movements of whatever kind, to affect national political outcomes regularly and substantially” (Higley and Burton 1989, 18). A national elite is integrated when

its members (1) share a largely tacit consensus about rules and codes of political conduct amounting to a "restrained partisanship" ..., and (2) participate in a more or less comprehensively integrated structure of interaction that provides them with relatively reliable and effective access to each other and to the most central decision-makers .... This combination of tacit consensus on rules of the game and comprehensive integration disposes elite members to view decisional outcomes as a positive-sum or "politics-as-bargaining" game, rather than a zero-sum or "politics-as-war" game ((Higley and Burton 1989, 19)

The starting point in the embeddedness process (or the failure thereof) is when a new authoritarian executive ascends to power after regime change. Think, for example, of the new cohort of military leaders who became presidents during the decolonization tide of the 1950s and 1960s. The new autocrat justifies his take-over by claiming that the old regime was corrupt, incompetent or unjust. His plans to remedy these alleged ailments often place him on the wrong side of legality – arbitrary purges of political enemies, grand economic plans that place the economy under the executive's thumb, seizures of property for land reform and other redistributive policies, martial laws to tighten control over society, to name a few examples. Those stripped of property or power often take their grievances to courts for redress. From the autocrat's perspective, the courts, which he inherited rather than created, are ambivalent political actors. They may prefer to avoid confrontation with the executive, but they would not forswear it either. Or they may, in the autocrat's eyes, deliberately halt or derail his plans. Either way, they increase the uncertainty within the regime, and thus shrink the executive's control. Thus perceived, they are a threat to the nascent regime. The autocrat must, and soon, formulate a judicial policy.

He could pursue one of three courses of action. The first is to integrate the judiciary into the new regime so that courts are more invested in and dependent on regime survival. That means viewing the judiciary as a faction of the political elite and accommodating its preferences within the regime. In the second scenario, the autocrat seeks to diminish the judiciary-posed uncertainty by weakening, marginalizing and demoralizing courts, stripping them of jurisdiction, restricting access to them, and creating exceptional tribunals. And in the third scenario the autocrat may resort to more drastic measures to banish courts-

induced uncertainty altogether, by reconstituting the judiciary, dismissing or sending into early retirement scores of judges, and putting judicial bodies under executive control.

The strong-arm approach of the second and third scenarios might give the autocrat a sense of control and a reprieve from judicial interference. Neither lasts very long. They last only until the next crisis in the regime. At the first sign of the autocrat weakening or tottering, courts would either withhold their support or actively undercut the executive.<sup>33</sup> Their stance is simultaneously principled and self-interested. The autocrat earned their antagonism not just for slashing judicial power but also for trampling over legality.

Alternatively, there is the option of integrating the judiciary into the new regime. If the autocrat regards judges and courts not merely as holdovers from the old regime, but as a faction of the political elite, he may choose to integrate them into the regime, as he would, say, trade unions or the religious authorities. The decision to accommodate the judiciary within the new regime rather than assault it yields two outcomes. On the one hand, it decreases the executive's stock of control within the regime, as it secures for courts the authority to halt or second-guess his policies. On the other hand, it decreases the uncertainty courts may pose to the regime as a whole. Integrated courts are less likely to issue rulings that delegitimize the entire system or weaken its core structures. For some

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<sup>33</sup> Is it accurate to speak of an entire judiciary in an autocratic regime as a monolith? If one took a snapshot of interactions among courts on any given day in, say, Egypt in 2004 or Chile in 1974, one would see courts engaging in turf skirmishes and jurisprudence squabbles. A monolith they were not. However, during periods of perceived common threat, as in Chile in 1972-3 and Egypt in 2011-3, courts closed ranks and practically spoke in one voice, in opposition to the head of the executive branch, Salvador Allende and Mohammed Morsi, respectively. To use Katznelson's useful framing (Katznelson 2003), during "settled periods," courts can disagree amongst themselves without weakening the judiciary as a whole. During "unsettled periods," however, a sense of systemic threat forces courts to bury differences and prioritize actions that advance power distributions favorable the judiciary as a whole. The examples in Section 5 of this chapter will show that during times of crisis otherwise fractious judiciaries can display remarkable unity of action and purpose.

autocrats, whom I will describe as integrative, a measured, circumscribed abridgement in executive authority is more favorable than unpredictable, reckless, retaliatory or opportunistic conduct by courts in the future.

### 3.2. Judges, Primary Commitments and Judicial Agency

What exactly does the autocrat do to integrate the judiciary into the regime? To what, precisely, does he extend accommodation? These questions pertain to the terms of bargaining between the executive and the judiciary, and even more fundamentally to how judges formulate and express their preferences as political agents.

To answer these questions, I start from an insight drawn from the institutionalist literature. The political preferences of judges are not generic abstractions about gaining more power, however defined; they are “constituted,” the outcome of judges being enmeshed in varied experiences and institutional settings, which can pull in different, possibly opposing directions.<sup>34</sup> In the following paragraphs I enumerate what I call the primary commitments of judges.

I posit three sets of primary commitments as constituting the core *content* of judicial agency: professional (to legality), associational (to other judges as members of a status and corporate group), and regime commitments. There is tension among these commitments, as I will elaborate shortly. The *expression* of judicial agency does not mean that judges and courts wish simply to uphold those sets of commitments always, simultaneously and

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<sup>34</sup> Steinmo et al (Steinmo, Thelen, and Longstreth 1992) write: “And because of the dense matrix of institutions in which individuals maneuver, they are motivated by a complex mix of sometimes conflicting preferences. Friedland and Alford argue that conflicts between preferences and behavior evoked by these institutions contribute to the dynamism of the system: ‘These institutions are potentially contradictory and hence make multiple logics available to individuals and organizations. Individuals and organizations transform the institutional relations of society by exploiting these contradictions’” (8-9).

in equal measure. Rather, the crucial manifestation of judicial agency is in courts and judges ordering and reordering the priority of these commitments over time and in response to changing political circumstances. The agency-structure literature stresses that the essence of agency is that the agent “could have acted otherwise” (Pleasant 2019). Similarly for judges as political agents, deciding which of these commitments get(s) precedence at any given moment constitutes the *expression* of judicial agency.

An elaboration of these three sets of commitments is in order. By professional commitments I mean judges’ sincere wish and worldview, ingrained by training in the law, that the state’s actions should always be informed by and subject to the test of legality. Associational commitments mean judges’ sense of group belonging and group power. They have two strands. First, judges form a status group, groomed for membership in the state elites, and expect to wield a share of state authority.<sup>35</sup> Second, they are a corporate group wishing to grab a share of the state’s resources.<sup>36</sup>

The third set of primary commitments is what I call regime commitments. These mean the sense of duty to uphold the “rules of the game” in the political system, and the consequent distributions of authority within that system.

These sets of commitments are not mutually harmonious. Ensuring the legality of state conduct, for instance, can threaten extant distributions of authority in the political

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<sup>35</sup> In Book One of *Democracy in America* (Ch. 16), Tocqueville described lawyers as bearers of aristocratic claims. He wrote: “Lawyers belong to the people by birth and interest, to the aristocracy by habit and by taste, and they may be looked upon as the natural bond and connecting link of the two great classes of society.” (Source: <https://www.marxists.org/reference/archive/de-tocqueville/democracy-america/ch16.htm#:~:text=Lawyers%20belong%20to%20the%20people,two%20great%20classes%20of%20society>. Accessed February 22, 2024).

<sup>36</sup> On the redistributive dimension of corporatism, see for example Schmitter (1974), Bianchi (1989) and Valentin (1978).

system, and thus come into conflict with judges' regime commitments. Similarly, judges may decide to be less stringent about legality commitments as they seek to advance their associational commitments. During "settled periods" (Katznelson 2003) in an integrative autocratic regime – that is, when the regime is generally stable the uncertainty is relatively low – these sets of commitments coexist in a fluid balance. The tension among them is hidden from view as judges and courts are not forced to make drastic choices. It is during "unsettled times" – periods of transition and heightened uncertainty – that judges and courts must make unambiguous choices that reveal the ordering of their commitments.

Two brief examples should illustrate how primary commitments are deployed. If judges are operating under a hostile, fragmentary (non-integrative) autocrat, they may give precedence to legality commitments, however disruptive to the regime such conduct might prove. One example is when the Supreme Court of Pakistan (under chief justice Iftikhar Chaudhury) used its *suo moto* powers in 2006 and 2007 to rule against the executive (under president Pervez Musharraf) on matters of great significance to the regime: among others, a privatization program and the "disappearances" of terrorism detainees (Qureshi 2009). If judges are instead operating under an integrative autocratic regime, they would act differently. They would ensure that their upholding of legality comes with as little disruption to the executive's plans as possible. In 1987 and 1990, Egypt's Supreme Constitutional Court (SCC) annulled the parliamentary election law upon which 1984 and 1987 elections, respectively, were held. But it did so nearly at the end of the term, and in both cases with advance notice to the executive. Especially under integrative autocrats, judges do not invent the wheel with every crisis or friction among their primary commitments. They follow largely predictable patterns in how they balance and reconcile

these various commitments. These include, among others, the deferral of potentially disruptive decisions and the employment of highly conservative readings of legal-standing. In other words, they develop something akin to what Tilly and Tarrow called “repertoires of action,” “those great regularities in the ways that contention unfolds” (Tarrow and Tilly 2009, 441).<sup>37</sup>

The embeddedness process – that is, the process of integrating judges, as a faction of the political elite, into the regime – is thus one of reconciling the autocrat's primary commitments or imperatives with those of the judiciary. At its rudimentary state, embeddedness only means mutual, probably reluctant accommodation. At its most advanced state, it means mutual reinforcement of commitments and identity of purpose, each side increasingly viewing the advancement of the other party's core interests as helping its own.

It bears emphasis that embeddedness is a process that unfolds over time. The progression toward a more integrated judiciary within the autocratic regime is neither linear nor inevitable. Nevertheless, scholarship in other areas of political science and economics has demonstrated that repeat bargaining among the same actors (or so-called “repeat games”) creates incentives for the actors to sustain the game rather than “defect,” increasing trust between the actors and decreasing the odds of the arrangement unraveling (Blair and Stout 2000; Johnston and Waldfogel 2002). Each instance of crisis between the judiciary and the executive resolved within the “rules of the game” – that is, within the

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<sup>37</sup> Thanks are due to Amr Adly, of the American University in Cairo, for suggesting the connection between the behavior of courts and Tilly's work.

agreeable distributions of authority in the regime – makes resolving the next crisis in a similar fashion likelier. The process acquires a self-sustaining quality.

An even more apt model for the embeddedness process comes from sociology, especially Bourdieu’s “habitus” concept.<sup>38</sup> As he set out to explain how power sustains and reproduces itself, Bourdieu argued that for a power arrangement to endure, the agents involved share not just interests, however defined, but deep perceptions and, over time, worldviews. He called this system of shared perception habitus. Habitus is “a subjective but not individual system of internalized structures, schemes of perception, conception, and action common to all members of the same group or class” (Bourdieu 1977, 86). The keyword is “internalized.” Members of the habitus– in this study, the judiciary personnel who work in the executive branch, and executive personnel who interact with the judiciary – progressively view the world from the same vantage point. Threats, survival imperatives, worthy social causes (and groups) – all these the judiciary at large as well as the executive increasingly view alike (Bourdieu 2002). Membership in a habitus is an instance of “socialized subjectivity,” as Bourdieu put it. “It entails perceptual schemes of which ends and means are reasonable given that individual’s particular position in a stratified society” (Edgerton and Roberts 2014, 195)

“Repeat games” induce trust by decreasing transaction costs, but each party to the transaction retains its sense of interests and of what it wishes to extract from the other. “Habitus” explains how identity of interests and then of worldviews emerges, how the lines

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<sup>38</sup> Thanks are again due to Amr Adly for suggesting Bourdieu’s “habitus” as a model for the patternized conduct the “embeddedness” process displays.

between “their interests” and “our interests” (between the judiciary and the executive) gradually erode.

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#### 4. The Mechanisms and Manifestations of Embeddedness

In this section I discuss how, given the sets of primary commitments and the internalization mechanism just elaborated, integrating judges and courts into the autocratic regime actually proceeds, and what its manifestations are. The analysis, which draws on the elite-integration literature, has two sub-sections: integration mechanism and integration manifestations.

I contend that that there are two chief mechanisms of integration. The first is trust-building through a revolving door between the executive and the judiciary. Judges who serve in executive capacities are more than interpreters of one side’s primary commitments to the other. They make each side more predictable (and thus more trustworthy) to the other. Further, these judges are socialized into the executive’s ways, sensibilities and principal views on society and the political order.

The second integration mechanism is to resolve crises within existing rules, not outside them, and making this a habit of practice. When courts issue decisions that the executive does not appreciate, the executive does not respond by changing the existing rules or tossing them to the wind, as Yeltsin and Musharraf did in 1993 and 2007, the first suspending the Supreme Court, the other kidnapping the Supreme Court chief justice and then illegally dismissing him. An integrative autocrat responds to crises with the judiciary within the rules – subtly tweaking statutes, countering the decisions he disliked with other

legal measures, such as referenda, among other measures. It is not only the autocrat who stays within the rules of the game. Courts, too, avoid surprises to the executive by ensuring their legality-protecting decisions carry as little disruption to government functions as possible.

As for the manifestations of judicial embeddedness – how one detects it when it exists – the key parameter is the emergence of “value consensus” (Burton and Higley 1987; Higley and Burton 2006; Higley and Moore 1981) regarding the political and social order. That consensus, in turn, is operationalized into two routines of practice. The first concerns the definition of turf. While the rotation of judicial personnel between the executive and the judiciary boosts trust, each side simultaneously recognizes a largely exclusive domain of unfettered action for the other. Judges do affirm this domain of unfettered action for the autocrat through their jurisprudence, scholarly writings, and public statements. The autocrat reciprocates through legislative acts, policy choices and public statements (as Section 5 below illustrates).

The second parameter of integration is when both sides, the judiciary and the executive, strain to avoid conflict with the other, or to help the other overcome a crisis, each finding in the other a source of durability for favorable power arrangements. One example of this dynamic is the Russian Constitutional Court defending the Putin regime vis-à-vis the European Court of Human Rights (Trochev and Solomon 2018, 202).

Both the mechanisms and manifestations of embeddedness are illustrated empirically, using the Egypt case, in the following section.

As in any complex process in which agency and structure bend one another, embeddedness yields system-wide (or regime-wide) unintended consequences. The key consequence of the embeddedness process is the carving out and progressive expansion of the legality space within the regime. Legality acquires not just a normative aura but also teeth. I elaborate this point in the chapter's conclusion. There I argue that while the autocrat may be the first mover in the embeddedness process, sustaining the process in motion inevitably changes the character of the regime as a whole. Judicial embeddedness makes the regime more rule-bound. That may explain two of the more curious phenomena in some autocratic regimes: sustained judicial "activism" and the existence of substantive rule of law.

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## 5. Empirical Illustration of Mechanisms and Manifestations of Embeddedness

In this section, I draw on the Egypt case to illustrate the theory of judicial agency within regime as well as the embeddedness process. The crux of this section is a comparison between the fragmentary (that is, disintegrative) Nasser regime (1954-1970) and the integrative regime of Sadat and Mubarak (1970-2010). The presentation is divided into three parts. First, I summarize the Nasser regime's fragmentary, strong-arm approach toward the judiciary, and how that ended up undercutting the regime after the 1967 military defeat. Second, I discuss and present examples of the mechanisms of embeddedness under Sadat and then Mubarak. That is followed by a discussion of the manifestations of judicial embeddedness under both presidents.

In selecting examples for both mechanisms and manifestations of embeddedness, I focus on moments of crisis. In each of the instances cited below, the commitments of courts clashed with those of the executive. In the case of the fragmentary autocratic regime, the clash turned into conflict that eventually shrank Nasser's authority and increased the uncertainty about regime survival. Under the integrative autocrats (Sadat and Mubarak), by contrast, clashes of commitments rarely devolved into conflict. They often served to reaffirm the habits and practices of accommodation, recognition of turf, and mutual reinforcement of objectives.

#### 5.1. Nasser the Fragmentary Autocrat and His "Isolation and Severance" Strategy

In the scheme presented in sub-section 3.1 above, the new autocrat can choose from two approaches to the judiciary. He could endeavor to integrate the judiciary he inherited into the nascent autocratic regime. Or he could isolate and weaken it so as to remove the uncertainty courts posed to his grand plans for society and the state. Under Nasser, the regime mostly took the latter route. After he and his fellow "Free Officers" took power in the July 1952 coup, for almost two years there was intense cooperation between the new regime and several prominent jurists, especially from the State Council (which includes the administrative courts system), as I discussed in Chapter Two. During that time, new statutes expanded the jurisdiction of State Council. The sanguine collaboration soon met a sanguinary end, in March 1954. Regime-recruited thugs assaulted and nearly killed the country's jurist of note (Abdul Raziq Al-Sanhouri), who was up to that point the head

of the State Council, the head of the constitution-drafting committee, the Nasser regime's chief enabler in the judicial system, and its legal architect.

It was not simply, or only, a matter of personality clash between Nasser and Sanhoury. Whoever became the head of the executive branch at the time would have had to contend with the power of the judiciary. Over the preceding six decades, the judicial system and the legal profession had undergone rapid, wide and deep modernization (as I elaborated in Chapter Two). The modern court system was created by Khedival decree in 1883. Its rationalization was completed with the creation of the Cassation Court in 1931 and the State Council in 1946. In jurisprudence, courts developed, over the decades after the adoption of the 1923 Constitution, restrictions on "administrative acts" and "sovereign acts," bringing more government action into the purview of courts. Courts were constantly reading and asserting competencies not specified in statute or the constitution. That reached a peak in 1948 and June 1952, when the State Council (under two successive chiefs) declared without ambiguity that regular courts held judicial-review powers (not to annul laws, but to refrain from implementing those they deemed unconstitutional). That was the judiciary that the Nasser regime inherited. Starting the 1960s, regime functionaries and loyalists openly charged that the judiciary was a hurdle on the path to "socialist transformation," especially after the major socialist reorientation of the regime in 1961.

Between 1954 and 1970, the Nasser regime harassed judges on more than one occasion, trimmed the jurisdiction of courts and restricted access to them.<sup>39</sup> Combined, these policies amounted to a removal of courts from political life, placing them into a state

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<sup>39</sup> An exception to this trend was the 1965 "judicial authority law" (Law 43/1965), which expanded the powers of the Supreme Council of the Judiciary, a body made up largely of judges, over judicial affairs.

“isolation and severance”<sup>40</sup> (Al-Bishri 2006, 14) at the regime’s periphery. First, the Nasser regime created a succession of exceptional tribunals (the People’s Tribunal, the Revolution Tribunal and the Treason Tribunal) in which military officers served as both prosecutors and judges.<sup>41</sup> Second, it created portals of exceptionality into regular law by dramatically increasing the offenses prosecutable by State Security and military tribunals (Al-Ottaifi 1980, 292–98, 430–45). Third, the Nasser regime made judicial redress inaccessible on a vast range of state actions. Those affected by the decisions of, among others, property-seizure committees, rent-control committees or dismissed without cause from their government jobs could not petition the courts. A legal scholar, who was nonetheless sympathetic with the Nasser regime and often collaborated with it, noted at least 80 instances of insurmountable hurdles to litigation and judicial redress between 1948 and 1968 (Al-Ottaifi 1980, 171).

In June 1967 Israel launched a multi-front attack on its neighbors, snatching territories from Syria, Egypt and Palestine. The annihilation of Egypt’s air force, along with the chaotic, disastrous retreat of Egyptian troops from the Sinai Peninsula, all made the defeat feel like a national humiliation. Nasser, the most prominent advocate of Arab nationalism, felt the sting. Soon, anti-regime mass protests, combining workers and students, returned to the streets, in February 1968, for the first time since 1954.

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<sup>40</sup> My translation of the Arabic original: "الإحاطة والاقطاع"

<sup>41</sup> In public statements, Nasser argued that those tribunals were the lesser of two evils. The greater evil avoided was interference with judicial autonomy, Nasser asserted in 1962 (Imam 1976, 35), and April 1970 (p. 74). That was disingenuous because stripping courts of jurisdiction (and contravening judicial autonomy) did not stop at the creation of exceptional tribunals. The Nasser regime continued endeavoring to control the Judges Club in 1963, 1967 (before the military defeat), 1968 and then by direct takeover in 1969.

Facing its nadir, the Nasser regime tried conciliatory measures. That included amendments to state-security and emergency laws, allowing petitioning regular courts against detention (Laws 59/1968 and 60/1968). Also in 1968, the regime proposed a package of reforms (in what became known as the March 30 Declaration) to protect political rights, unshackle press freedom and restore access to judicial redress. In that Declaration, for the first time, Nasser spoke of creating a constitutional court.

But judges and courts were not waiting for the laws to change. They were already on the offensive. In 1968 and 1969 courts ruled against the government in highly publicized cases – in at least one of which Nasser expressed his preference in a speech (Hosni 2008, 124–25). Administrative Courts pushed, in 1968, against the government’s “sovereign act” privileges and ruled against the regime, arguing that the law the government leaned on was unconstitutional (Al-Ottaifi 1980, 138, 164), even though these courts knew their decisions would be overturned by the Supreme Administrative Courts which had affirmed the constitutionality of the law in question (164).

The largest acts of defiance against the regime, however, came from the Judges Club, the body representing the country’s judicial corps. The Judges Club issued a scathing statement in March 1968, two days before Nasser was to announce his reforms, charging the Egyptian leader with weakening the country regionally by restricting freedoms domestically. The statement denounced attempts by the regime to incorporate judges by force into the Arab Socialist Union. In the first election for the Club’s leadership after these acts of defiance, in March 1969, the regime-supported slate was roundly defeated. That was the culmination of 12 months of the judicial corps showing unambiguous hostility

toward the Nasser regime. It responded with four laws-by-decree on August 31, 1969, which reconstituted the judiciary and brought it under executive control.<sup>42</sup>

To recap, then: the Nasser regime attempted to remove the judiciary from political life, in the hope that this would decrease the uncertainty courts posed to the regime's plans. The Nasser regime created exceptional courts, expanded the jurisdiction of military and irregular tribunals, and restricted access to litigation at regular courts. As soon as the regime was weakened by the 1967 defeat, the courts and the judicial corps reasserted their presence in acts of defiance toward Nasser that further undermined and delegitimized the regime. The Nasser regime illustrates what I refer to as fragmentary autocratic regimes. Things changed fast after Nasser died.

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Sadat ascended to power in 1970. Outwardly, he was a continuation of the Nasser regime, in the sense that the succession of power to the former vice president proceeded smoothly. But in the Eastonian sense of "regime," Sadat's was in fact different. It set out to change the regime's distributions of authority. As far as the judiciary was concerned, Sadat was an integrative autocrat. This is not to suggest that he foresaw the unfolding of the integration/embeddedness process from the outset. That was not possible. Still, through two early and connected decisions Sadat set in motion a process of reintegrating judges and courts into political life. The first was Sadat's decision to distinguish his governing philosophy from Nasser's, making the rule of law a core distinction. The second was the

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<sup>42</sup> I discussed this in Chapter Two, but see also Nassar (1974) for an account of the 1968-69 crisis between the judiciary and the Nasser regime.

decision to avoid open animosity to courts and judges, especially after he witnessed how judicial defiance in 1968-9 further weakened the Nasser regime.

Mubarak would continue and deepen the process his successor started. I elaborate the mechanisms and the manifestations of integration in the following sub-sections.

## 5.2. Mechanisms of Integration

I argue that autocrats use two chief mechanisms to integrate judges and courts into their regimes: a revolving door between the judiciary and the executive, and the resolution of clashes between the judiciary and the executive within existing rules, not outside them. In the following paragraphs I discuss each of these in turn.

### *5.2.1. Trust-Building Through a Revolving Door between the Judiciary and the Executive*

To avoid unpleasant surprises, integrative autocrats endeavor to build trust with judges and courts. Trust “involves an expectation that the other individual or the institution will execute or abstain from certain actions at a certain point of time in the near or distant future” (Gulbrandsen 2007, 195). It is a necessary step in the process of creating shared perceptions, within both the executive and the judiciary, of the social and political orders. Pinochet’s trust-building approach was to spare the Chilean judiciary any institutional or personnel change as he took power, a courtesy he hardly extended to any other political group (Hilbink 2008). Others, like Sadat and then Mubarak, sought to forge trust by running judicial personnel through a constantly revolving door between the judiciary and the executive.

The revolving-door approach assumed several forms. One was the appointment of judges (or justices) to ministerial positions. Three of the Mubarak tenure’s four justice

ministers had served as chief justices of the SCC.<sup>43</sup> The fourth, Mahmoud Abu El-Lail, also a judge, had served as a governor twice between 1992 and 1999, before taking the justice minister job in 2004.<sup>44</sup> One of the four, Ahmed Mamdouh Attiyya, had briefly served as justice minister under Sadat (between May and October 1978) before returning to the bench as the chief justice of the Supreme Court (the forerunner of the Supreme Constitutional Court). And he continued as the chief justice of the reformed SCC in October 1979, and remained in the court's top job until he was appointed justice minister again, under Mubarak, in 1982!<sup>45</sup> Though Nasser too appointed former judges to be justice ministers, his picks (with one exception)<sup>46</sup> were not drawn from the heads of apex courts, the practice his successors routinized.

The other facet of the revolving-door policy was the expansion and transformation of the “secondment” (or second assignment; in Arabic *nadb* or *intidab*) practice under Sadat and Mubarak. The practice started out of necessity in the early 1900s, whereby judges could be sent on a temporary basis to serve on other courts. It aimed solely to address the shortage in qualified personnel, and it was regulated by the first major judicial-authority law, in 1943. That regulatory framework remained largely unchanged in subsequent editions of the law, in 1965 and 1972.<sup>47</sup> But in practice, *nadb* became a

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<sup>43</sup> Ahmed Mamdouh Attiyya (1982-1987), Farouq Seif Al-Nasr (1987-2004), and Mamdouh Marei (2006-2011).

<sup>44</sup> See Mahmoud Abu El-Lail obituary (in Arabic) here: <http://tinyurl.com/4xzppybw> (accessed February 26, 2024).

<sup>45</sup> Copies of the appointment decisions in the Official Gazette are available on Manshurat.org, here: <https://manshurat.org/node/48762>, here: <https://manshurat.org/node/7291>,

<sup>46</sup> This exception is Badawi Hammouda, who was appointed justice minister for under two years in 1964-5 after serving as the chief justice of the Supreme Court. See Mohammed Al-Gawadi's profile of Hammouda (Arabic) here: <https://bityl.co/OQYc> (accessed Feb 26, 2024).

<sup>47</sup> Among the restrictions were a) a ceiling of three years in secondment posts in the country and four abroad; b) the secondment decision had to be approved by the Supreme Judicial Council; and c) the Supreme Judicial Council alone determined financial compensation for the judge at the secondment post.

different beast under Sadat and Mubarak. Under Sadat, the parliament introduced in 1974 an exception (based on the broad phrase of “when necessitated by national interest”) that lifted the ceiling on duration of secondment posts in other countries.<sup>48</sup> More Egyptian judges now worked in the newly petrodollar-flush Gulf states. Along with a judicial-secondment system to other Arab countries, plum secondment/nadb posts in ministries and state-owned companies became a way not just to reward well-behaved judges but also to signal to all judges that favors awaited those who did not cause trouble.

The even more consequential side of the *nadb* policy was the circulation of regular-court judges through the autocratic regime’s system of hybrid and exceptional tribunals. Judges on, say, the appeals court would go on secondment posts in the State-Security Court or the Values Court (both with diminished due-process standards) for years before they return to their older jobs on the bench of the regular judiciary. Again, whereas this practice was very modest under Nasser, circulating only a few dozen judges per year between the different systems, under Sadat and especially under Mubarak the number rose to the four-digit level.<sup>49</sup>

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<sup>48</sup> Egyptian Official Gazette, Law 39/1974, June 6, 1974, Issue 23. The crucial amendment was in Article 65.

<sup>49</sup> In one decision by Mubarak in 2000, he approved the secondment/nadb of 1810 (one thousand and eight hundred and ten) judges (by my count), most of whom appeals court judges, to State Security tribunals. The decision, dated September 25, 2000, was published in the Official Gazette, issue 41, on October 12, 2000. Among those listed are a future SCC justice (Farouq Sultan) and three terrorism-circuit judges whose names appeared often in the news since 2015, including the judge who sentenced former president Mohammed Morsi to death. According to news reports (e.g., Al-Arabiya, here: <https://bitly.co/Lwn8>, accessed October 25, 2023), in 2005 Egypt had 8000 judges. That meant that at least one in four of Egypt’s judges was cycled through the state-security tribunals system. Moqbil Shaker, A judge on the bench of the Values Court, a hybrid court Sadat introduced in 1979 (to the opposition of the Judges Club) would later return to the regular judiciary and become the head of its apex court, the Cassation Court.

Circulating thousands of judges annually through exceptional and hybrid tribunals, advisory posts at ministries and publicly owned companies, and senior judicial jobs in neighboring (conservative, autocratic) governments played a larger role in closing the perceptions gap between judiciary and the executive on the social and political orders (I will say more about this in the “values consensus” discussion below). Unlike post-retirement jobs in the executive that were handed out to senior judges, secondment assignments came with the guarantee that their occupants would go back to the regular judiciary.<sup>50</sup>

So even as the apex courts were issuing executive-restraining decisions (especially the SCC, and especially under its exceptional jurist Awad El-Murr, between 1991 and 1998), the judicial corps as a whole were progressively more in tune with and more socialized into the ways and perceptions of the executive.

Consider, for evidence of this claim, the events surrounding the many elections held in Egypt in 2005. That year was to witness the first full implementation of judicial supervision over the voting process, as mandated by a 2000 decision by the Supreme Constitutional Court. The Judges Club, the associational body representing the country’s judges, was to coordinate with the executive branch on how best to run the elections. At the time, the Judges Club was under the leadership of what was called “the Independence

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<sup>50</sup> Secondment/*nadb* practices were a source of contention between the Judges Club and the executive when the former was under more independent leadership. In the draft judicial-authority law presented by the Club to the Mubarak regime in 1990 and again in 2006, bringing secondment decisions under judicial (rather than executive) control was a core demand. The 2014 constitution decreed the phasing out of secondment nearly entirely as well as the issuance, within for years of the constitution’s ratification, of a new statute specifying the conditions under which secondment could be granted. The State Council resisted any change to secondment practices (as administrative judges were more likely to get advisory jobs in government ministries and agencies). As of this writing, in 2024, the provision to phase out *nadb* practices is yet to be implemented.

Current,” a group of cassation and appeals judges who were pushing for loosening the justice ministry’s supervision of judicial affairs. When members of the judiciary publicized the irregularities in the polls, the Mubarak government took an uncharacteristically harsher stance toward judges. Some were assaulted. Two prominent members of the Independence Current were referred to disciplinary action. The justice minister (Mahmoud Abu El-Lail) who was sympathetic with his judicial colleagues was fired and replaced by one who was especially belligerent to the Judges Club (Mamdouh Marei). Egyptians and Egypt commentators were excited by the Judges Club defiance in 2005-6. What receives far less attention is that in the first Judges Club election after these eventful years, the judicial corps chose a pro-Mubarak slate to lead the Club. “Judges realized they should not carry alone the entire burden of democratizing Egypt and defying Mubarak,” an Appeals Court judge told me in an interview in Cairo in May 2018, as he explained the puzzling collective choice by the country’s judges. Judicial supervision of polling stations, he added “was good for democracy, bad for the judges.”<sup>51</sup>

### *5.2.2. Resolving Crises Within Existing Rules*

Scholarship on elite integration (Gulbrandsen 2007; Higley and Burton 1989, 2006; Higley and Moore 1981), which all but exclusively focuses on democratic polities, assert that “consensual” integration, wherein “no single elite group predominates in the network” (Higley and Moore 1981, 584), is the most or only durable mode of elite integration. The model evokes a pluralistic, flat (rather than hierarchical) structure of elite groups. This is

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<sup>51</sup> This same judge, who was crucial of the Sisi regime, told me that judges should have never engaged with elections. Mubarak cared deeply about those elections, he added, “and should have been allowed to do as he pleased with them.”

not exactly the case in autocratic regimes. The structure of national elites is more often hierarchical, with the executive retaining the power to disregard existing norms or rules when crises emerge.

How the executive, in an autocratic regime, responds to such crises is a key marker of differentiation between the integrative and fragmentary types. The integrative autocrat does not reinvent the “regime” – the rules and norms structuring authority – whenever a clash of commitments occurs between the executive and the judiciary. To maintain the ongoing bargaining and trust-building with the judiciary, he uses the ordinary prerogatives available to him (as opposed to emergency or exceptional powers), to contain or diminish the crisis or to preclude its occurrence in the future. And the judiciary – especially, but not exclusively, the apex courts – returns the favor. When it confronts an unavoidable conflict between its regime and legality commitments, it is never blind to the former. It either prioritizes the regime commitments outright, or, if it gives precedence to the legality commitments, it extends the most accommodation possible to the regime commitments. Each crisis so resolved – by both sides responding *within the rules* – makes resolving the next crisis similarly more likely. So despite the power asymmetry between the executive and the judiciary in autocratic regimes, an asymmetry that advantages the former, the arrangement that emerges is still largely consensual.

Examples contrasting the Nasser regime and the Sadat-Mubarak regime illustrate this point. Each time the Nasser regime confronted a crisis with the judiciary, the executive disregarded existing rules and responded outside them. In 1954 (after the fallout with Sanhoury), the Nasser government introduced a lustration law that removed the head of the State Council, increased the executive power over the appointment of the State Council

chief justice, and in 1955 created a new apex court for the administrative-court system, the Supreme Administrative Court. The new court fulfilled two opposing goals. The first was to provide an appeals option in the administrative court system, which was a longstanding demand predating the 1952 regime change. The second was to control the administrative court system through a court headed by a presidential appointee.<sup>52</sup>

Another example was the bigger crisis between the executive and the judiciary after the 1967 defeat. As I noted above, in 1968 and 1969 the judiciary took a much more assertive stance toward the executive than at any moment since 1952. Courts issued rulings against Nasser's express wishes. The Judges Club issued a scathing diagnosis of the 1967 defeat, connecting the country's loss of territory to the regime's repression of freedoms. The judicial corps rejected the pro-government slate in the Judges Club election, retaining the leadership that stood up to Nasser in 1968.

Responding to the defiance, the Nasser regime, true to form, changed the rules of the game, so to speak. On August 31, 1969, the Nasser government issued four laws-by-decree that created a new apex court, dismissed about 200 leading judges and prosecutors, introduced a new executive-dominated body to supervise judicial affairs, and disbanded the Judges Club leadership.<sup>53</sup> Even if Nasser had the authority to issue these laws, they amounted to a dramatic recasting of the relation between the executive and the judiciary. Many argued he did not have the authority. The parliament granted Nasser the authority to issue laws by decree (under the so-called "delegation law," Law 15/1967) only to

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<sup>52</sup> The Supreme Administrative Court, which was wildly celebrated in the last decade of Mubarak's rule for its assertiveness as it declared several privatization deals in violation of the law, was actually known to be excessively deferential to the executive between 1955 and 1968. See the footnote on page 138 of Al-Ottaifi (1980).

<sup>53</sup> Laws-by-decree 81, 82, 83 and 84, in the Official Gazette, August 31, 1969, Issue 35-B.

respond to the consequences of the 1967 defeat, not to reconstitute the judiciary or create new courts.<sup>54</sup> In other words, the Nasser regime's response to the crisis either stretched presidential powers to near-breaking point or flatly abused them.

Now contrast this with how the executive, as well as the judiciary, responded to crises during the Sadat-Mubarak regime. I will cite only a few examples and discuss them briefly. They will show that both the judiciary and the executive each used every crisis to affirm its goodwill and accommodation to the other. Notice especially how the executive's reaction to crises was a far cry from those of the Nasser era.

I will start with examples from the judiciary. When autocrats create exceptional tribunals, they attack not just the legality/professional commitments of judges, but also their associational commitments. On the legality-commitments front, exceptional tribunals have little or no due-process protections. Anyone trained in law is predisposed to despising them. As for their associational commitments, judges find executive-controlled exceptional tribunals to infringe on their turf of authority. Under both Sadat and Mubarak, special tribunals or emergency law arose as sources of tension between the judiciary and the executive, in 1979 and 1986. In 1979, the Sadat government was about to create the new Values Court and its special prosecutor post. In keeping with Sadat's approach to policy after 1973, the court's blueprint was a hodgepodge. It was supposed not just to protect "Egyptian family values" but also to safeguard the "social peace." Critics reckoned

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<sup>54</sup> Judges who were dismissed in 1969 and those who wanted to remove executive supervision of judicial affairs, in 1972 and 1978, attacked the basis for Nasser's authority to issue laws by decree based on Law 15/1967 as they took the cases to the Cassation Court, the court charged with ruling on disputes connected to judicial affairs: Case 26, Cassation Court Judicial Year 41, December 21, 1972 (Cassation Court Jurisprudence Office – in Arabic, *Al-Maktab Al-Fanni* – publication year 23, jurisprudence principle # 178, p. 1191). And Case 111, Cassation Court Judicial Year 44, February 23, 1978 session, Jurisprudence Office publication year 29, jurisprudence principle #2, p. 4). Regarding the rickety foundations of the August 31, 1969 decree-laws, including the one that established the constitutional court, see also Brown (2013, 3).

that court's vague mandate could ensnare political dissidents. The Judges Club – and by then Sadat had been named its honorary head for years – waited to express its opposition to the new court until a scheduled Sadat visit to the Club. The Club's president, Cassation Court judge Wagdi Abdel-Samad used his speech in Sadat's presence to discourage the creation of the new court and to make the case that the regular judiciary was adequate to the task of facing the country's many challenges.<sup>55</sup> In fact, he requested that the president, as the person in charge of "safeguarding bounds between government branches," to forestall the violation of the judiciary's authority (which would occur with the creation of the new court).<sup>56</sup>

Much the same dynamic played out in 1986. After Mubarak ascended to power in 1981, his government organized or spurred the organization of a series of national conferences to debate and address the country's maladies – in housing, industry, foreign investments, among others. In this spirit the Judges Club organized "the Justice Conference" in 1986 and invited the president to attend. Mubarak was days away from requesting an extension of emergency law from his parliament. As in 1979, the Judges Club decided to express its legality commitments in as undistruptive a manner to the executive as possible. The Club's head, Cassation Court judge Yahia Al-Refaei, simply used his remarks in Mubarak's presence to plead with Mubarak not to extend the emergency law (Ghamroun 2012).

As for how the executive responded within the rules to crises with the judiciary, I will cite three examples. One was when the Supreme Constitutional Court (SCC) annulled

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<sup>55</sup> Part of Abdel-Samad's remarks the Judges Club in 1979, addressed to Sadat, is available on YouTube, here: <https://ytube.io/3r1X>, accessed March 2, 2024.

<sup>56</sup> At around the 8:30 minute mark in the YouTube video above.

the election law twice in a row, in 1987 and 1990, cutting short the tenure of the parliamentary cohorts of 1984 and 1987. The Mubarak regime implemented the 1987 decision without fuss. It expressed its discontent with the second decision by announcing that it would implement it only after a national referendum (an authority granted to the president in the 1971 constitution). In these annulment decisions, then, the executive and the SCC each displayed accommodation of the other's primary commitments. And each benefited more from doing so than from pursuing other alternatives. The court asserted its legality commitments, but without disturbing the functioning of the Mubarak government. It held onto these decisions until nearly the end of the parliamentary term. And the Mubarak regime could claim that its respect for the rule of law was not just rhetorical. Its reaction to the second decision was little more than symbolic gesture with the second decision. On the judiciary side, that was an instance of upholding the legality commitments while safeguarding regime commitments. On the executive side, that served as an instance of resisting to temptation of responding to the crisis outside existing rules.

The second example pertains to SCC decisions throughout the 1990s, under chief justice El-Murr, striking down sections of the tax code (Moustafa 2007, 134). One of those decisions, in June 1998, was among the final decisions El-Murr wrote.<sup>57</sup> Those decisions were costly to the country's treasury. The regime's response was highly measured. Mubarak's parliament just tweaked the SCC law to restrict the retroactivity of its rulings when the tax code was concerned.<sup>58</sup> That meant that the government would not refund those taxed under provisions later pronounced unconstitutional. The amendment had

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<sup>57</sup> Case 152, judicial year 15, in Volume 8 of the SSC decisions. Available online at: <https://bitly.co/Lxv4> (accessed October 26, 2023).

<sup>58</sup> The amendment was introduced through Law by Decree 168/1998. Full text on Manshurat, here: <https://manshurat.org/node/28628> (accessed October 26, 2023).

another unforeseen consequence: it made future decisions on the constitutionality on the tax code less risky for the SCC. Even chief justices who were visibly protective of Mubarak's interests, such as Mamdouh Marei<sup>59</sup> and Maher AbdelWahed,<sup>60</sup> struck down sections of the tax code in the early 2000s. In other words, as the Mubarak regime removed the retroactive force of SCC's decisions on tax questions, it made it safer for more judges to enact their professional/legality commitments without threatening the regime's overall interests.

### 5.3. Manifestations of Integration

How do we detect elite integration, or embeddedness, when we see it? The crucial parameter of integration is what elite-integration scholarship describe as “value consensus.”

[Elite] integration ... depend[s] on an underlying, largely tacit value consensus among elite groups. In effect, elites agree not to push partisan interests to the point where compromise becomes impossible, to obey largely unwritten rules of conduct, and thereby to support and protect existing political processes and institutions (Higley and Moore 1981, 583).

The value consensus means that elite groups view the political and social orders in identical or at least proximate terms. By political order I mean how government authority is distributed and who is eligible to wield it. Social order denotes what is acceptable conduct by citizens, and which groups and causes are worthy of expending state resources

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<sup>59</sup> For example: Case 232, judicial year 23, May 8, 2005, session; available online here: <https://bityl.co/Lxvq> (accessed October 26, 2023).

<sup>60</sup> For example: Case 178, judicial year 19, April 15, 2007, session; available online here: <https://bityl.co/Lxvx> (accessed October 26, 2023).

on. In democratic regimes, the value consensus tends to be stable but not fixed. The barriers to entry into political bargaining, say through new political parties, allow new groups, new demands and new values to force themselves onto the national agenda. By contrast, value consensus in autocratic regimes is more elitist – that is, exclusive – as it cannot accommodate pluralistic, contentious politics. The autocratic regime thus carries two impulses pulling simultaneously in different directions. In one, the autocrat strives to forge shared perceptions of the political and social worlds among the national elite groups. In the other, the autocrat does not want relinquishing authority to other elite factions to turn the system into a constant checks-and-balances practice. He accepts that other groups within the regime can wield authority, but he wants each to stay in its lane, so to speak. A notable example of this is the “apoliticism” disclaimer put forth by the Chilean judiciary whenever they were challenged to review the Pinochet regime’s human rights abuses. The judiciary viewed these as “political,” not judicial or legal matters. Pinochet agreed and was happy to keep the judiciary’s authority unabridged (Hilbink 2008).

I contend that two features serve as evidence of value consensus in an autocratic regime. The first is the (re)affirmation, by the executive and the judiciary, of an exclusive domain of action for the other – and treading carefully on domains of overlap. The second is that when the regime faces a systemic crisis, regime survival takes precedence over the particular commitments of its constituents. In the following paragraphs I illustrate these two features using examples from Egypt under Nasser, Sadat and Mubarak.

*5.3.1. Affirmation by Each of the Executive and the Judiciary of an Exclusive Domain of Action for the Other*

Gulbrandsen noted that affinity is higher among elite political groups that share related functions.

Elite groups representing institutions with similar basic functions [have] higher [trust among them] than between elite groups which have different functions, i.e. such trust relations are to be expected within each of the groups of “social order”, “intellectual”, “political”, and “production” elites/institutions respectively. As an example, ... top leaders in the military services and the judges and top leaders within the police have more trust in each other’s institutions than in other elite groups (Gulbrandsen 2007, 197)

The natural affinity between the judiciary and components of the executive does not preclude clashes and crises, however. Part of what over time becomes a *modus operandi* for resolving or avoiding disputes in an integrative autocratic regime is that the executive and the judiciary each routinely affirms an exclusive domain of action for the other.

In one of the more influential studies on Egyptian judicial politics, Moustafa (2007) cast judicial accommodation for the executive as failures in courts’ liberal commitments. He bracketed such accommodation as a necessary abatement of legality standards by courts to avoid confrontation with the autocrat. The courts, Moustafa contended, were activist and liberal, but they could only go so far. In the end, theirs were “bounded activism” and “insulated liberalism” (2007, 232).

In a judicial-agency framework, such judicial conduct was more than a grudging concession. It was an affirmation of unfettered latitude for the executive in certain areas of regime operations. And, importantly, the executive returned the favor, routinely affirming a domain of largely unfettered latitude for the judiciary in many areas of public law. Each side gambled that in making this choice it safeguarded its own primary

commitments. The judiciary would not undercut the executive's survival imperatives, and the executive wouldn't impair the judiciary's legality and associational commitments. Each winning gamble made a similar gamble in the future more likely and less uncertain.

Examples of the courts allowing the executive largely unfettered latitude include the 1993 case regarding the referral of civilians to military tribunals, the constitutionality of martial law in 1984 (Moustafa 2007, 104–6), and the constitutionality of the privatization program, in 1997. The SCC ratified the constitutionality of all three. What is remarkable is that two of the three decisions (referral of civilians the military tribunals when emergency law was in effect<sup>61</sup> and the privatization case) were made under chief justice Awad El-Murr, the face of “judicial activism” in Egypt in the 1990s and the country's jurist of note in the second half of the twentieth century.

Examples of the autocrat (re)affirming and protecting judicial latitude have received far less attention. Because of space limitations, I cite and discuss briefly only three instances: the Nasr Hamid Abu Zeid controversy in 1996, the introduction of single-use

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<sup>61</sup> Two courts - a military court and an administrative court - arrived at different interpretations of the powers authorized to the president under emergency law. So the justice minister sent an "interpretation request" to the SCC. The SCC, with El-Murr as the lead author, accepted the interpretation of the military tribunal, which gave the executive a larger latitude in designating "crimes" under martial law. The session was held on January 30, 1993. Full text of the SCC decision is available here, on Manshurat.org: <https://manshurat.org/node/1529>. And the administrative court's decision (by the eminent jurist Tariq Al-Bishri) is available here: <https://manshurat.org/node/71325>. Both accessed October 28, 2023. In May 2018, I asked Al-Bishri (in Cairo) what he thought about El-Murr's decision. He said the SCC's decision was not unreasonable, and it only and narrowly meant that under emergency law the president had those broad powers; it was not a blank check broadly authorizing the referral of civilians to military tribunals. He also noted that the decision was broadly congruent with the court's jurisprudence. Indeed, the constitutional court had refused in the past to restrict the president's emergency-law powers. In a 1976 decision, the Supreme Court (the SCC's forerunner) rejected a challenge, emanating from an administrative court case, to the constitutionality of the Military Tribunals Law, 25/1966. Case 12, constitutional court year 5, April 3, 1976, session. Full text on Manshurta.org here: <https://manshurat.org/node/71332>. Accessed October 28, 2023.

abstract review in 2005, and the phasing out of hybrid tribunals throughout the last decade of Mubarak's tenure.

*A. The Nasr Hamid Abu Zeid Controversy*

Abu Zeid, a Cairo University professor, was accused in June 1993 of apostasy because of his work on Quran exegesis (Najjar 2000). A lower court ruled against him, a ruling that entailed he would be separated from his wife, since he was no longer considered Muslim. The case, which proceeded to the Cassation Court, was embarrassing to the regime in international media. Mubarak's political party, the National Democratic Party (NDP), which dominated parliament, passed two amendments to the penal code, one restricting legal standing in public morality cases<sup>62</sup>, the other conditioning legal standing, in general, on "direct personal interest" for litigation to proceed.<sup>63</sup> Those amendments practically stripped the plaintiffs of standing in the case. All the same, the Cassation Court disregarded the amendments, arguing that they had been introduced after it started reviewing the case. In defiance to the Mubarak government, and in a stunning verdict, the court affirmed the ruling against the Islamic studies scholar.<sup>64</sup>

The autocrat was clearly displeased with the decisions by the courts. He sought to stave off an unfavorable outcome by stripping the litigants of legal standings. But in the

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<sup>62</sup> Law 3/1996, full text on Manshurat.org: <https://manshurat.org/node/12691> (accessed October 26, 2023).

<sup>63</sup> Law 81/1996, full text on Manshurt.org: <https://manshurat.org/node/28967> (accessed October 26, 2023).

<sup>64</sup> The August 5, 1996, session; cases 475, 478 and 481, Cassation Court judicial year 65. Source: EastLaws legal documents repository.

end, he deferred to the courts' notions of legality, and social control, as expressed in their rulings.<sup>65</sup>

### *B. Single-Use Abstract Review*

Ever since Egyptian courts started implementing judicial review – by all courts, starting 1948, and through a special-purpose constitutional court since 1969 – the mode of review was “concrete.” That is, only laws invoked in concrete litigation could be challenged on constitutional grounds. There were exceptions, however. Narrow abstract (advance) review was mandated twice, once in 2005 and again, a bit more expansively, through the short-lived 2012 constitution. The first implementation of abstract review was unique. Most countries either have both kinds of judicial review (such as Germany, Spain and France) or only concrete review, such as the U.S. and Japan.<sup>66</sup> To my knowledge, there are no countries where abstract review is instituted only in connection to certain statutes. But that is what the Mubarak regime did in 2005. In preparation for the country’s first multi-candidate presidential election, the parliament, dominated by the Mubarak’s National Democratic Party, issued a presidential election law. The law required that Supreme Constitutional Court review it and publish its decision within 15 days. The court was forbidden from exercising concrete review of the law in the future (Abdelfattah 2017, 135–38). It was a peculiar instance of single-use abstract review.

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<sup>65</sup> Also weighing on Mubarak’s mind was the ongoing insurgency against the regime by Islamist militants. He did not want to have his faith credentials questioned, particularly given the fact that scholars of the government-sanctioned Al-Azhar endorsed the court verdicts (Weaver 2000, Ch. 7)

<sup>66</sup> Stone-Sweet and Shapiro argue, however, that the U.S. system practically has abstract review as well (Shapiro and Stone-Sweet 2002)

Was Mubarak afraid of the SCC? Evidence suggests an answer in the negative. After all, the Mubarak regime had since 2001 appointed judges from outside the court to the chief justice post. And in 2005 the chief justice was none other than Mamdouh Marei, Mubarak's future justice minister. There is a better explanation for the abstract-review appendage to the election law. The Mubarak regime recognized that judges and justices, even those highly faithful to the regime, were inclined to ensure legality of state actions, and he largely accepted that as their domain of action. Still, to forestall the headache of judicial decisions against the presidential election law, the Mubarak regime inoculated that statute against concrete review, but without breaching the principle that all statutes were subject to judicial review.<sup>67</sup>

### *C. Phasing Out Hybrid and Exceptional Tribunals*

Throughout the last decade of its tenure, the Mubarak regime phased out or significantly diminished the jurisdiction of exceptional or hybrid tribunals. It significantly reduced State Security tribunals jurisdiction in 2003, and transferred their cases to ordinary criminal courts.<sup>68</sup> In 2008, it canceled the Values Court and its founding statute.<sup>69-70</sup> Both were longstanding demands by the Judges Club. These decisions were only the

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<sup>67</sup> Abstract review remained applicable only to presidential law through the 2011 political change and was expanded in the 2012 constitution, to include not just the presidential election law but also “political rights” and municipal elections laws (Abdelfattah 2017). Abstract review was canceled in the 2014 constitution, returning the country to its concrete-review-only tradition.

<sup>68</sup> Law 95/2003, available on Manshurat.org, here: <https://manshurat.org/node/14575> (accessed Feb 29, 2024).

<sup>69</sup> Law 194/2008

<sup>70</sup> Even long before the hybrid court was retired, the Cassation Court had brought it under its jurisdiction. In 1997 it issued a decision that rendered the Values Court's rulings, even the final ones, reviewable by Cassation Court. Practically, that brought Values Court into the regular judicial system, and the Mubarak regime did not protest (Case 1536, Cassation Court Judicial Year 59, Jurisprudence Office publication year 48, jurisprudence principle #149, p. 757, May 21, 1997 session).

culmination of a long series of reversals under Sadat and then Mubarak, all intended to restore the authority of judges over judicial affairs. The trend started as soon as Sadat became president: in 1971-1974 he reinstated judges dismissed in 1969, presided over drafting a constitution that affirmed the sanctity of the right to judicial redress, and developed cordial relations with the Judges Club (which earned him the title of the Club's "honorary president"). That continued under Mubarak, who in 1984 significantly reduced executive control over judicial affairs and throughout his reign reduced the jurisdiction of military tribunals. Though repression and police brutality continued under Mubarak and were widely reported in the press, the regime was relying less and less on irregular tribunals. It had all but fully returned the judicial authority to regular courts. And these courts rarely used their authority to threaten the regime as a whole.

### *5.3.2. In the Face of Systemic Crises, All Must Offer Help*

The second manifestation of judicial integration is evident in courts going to great lengths to ameliorate the regime's crises. I mentioned above how the Russian Constitutional Court defended the Putin regime against the European Court of Human Rights. Hilbink (2007) has documented how the Chilean judiciary defended the Pinochet regime.

In the case of the Egypt, Sadat tossed into Mubarak's lap a constitutional crisis entirely of former's making. The Supreme Constitutional Court and the Cassation Court, employing a highly conservative jurisprudential stance, largely neutralized it.

Likely in preparation for a few more terms in office (after changing the constitution to lift the ceiling on presidential terms), and to firm up his self-professed credential as the “faithful president,” Sadat amended the second article of the constitution in May 1980. Sharia principles were now *the*, not *a*, principal source of legislation. Vast swathes of Egypt’s legal codes were suddenly precarious. It did not help that various quarters in society, including lower-court judges, immediately started demanding that all of Egypt’s laws be rewritten to be in congruence with the amended Article Two. This was hardly surprising; the Egyptian society had become more conservative over the 1970s, thanks to Sadat’s own pious discourse, and to Islamic revivalist trends across the Muslim world, especially in the wake of the Iranian Revolution in 1979. The Article Two amendment did not only create gaping legal uncertainty, it also assigned to the Mubarak regime the impossible task of rewriting the country’s legal codes. Delay in carrying out this task handed the regime’s critics grounds to brand it as unreligious, further undercutting Mubarak’s legitimacy amid an Islamist insurgency.

Relief came from the SCC and the Cassation Court. In 1985, SCC issued a decision that was “peculiarly reasoned but politically ingenious” (Lombardi and Brown 2005, 392). Overstepping its remit (which prohibited issuing constitutional interpretations and presenting them as binding),<sup>71</sup> the SCC said the amended Article Two did not extend its

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<sup>71</sup> The parliamentary report accompanying draft law 48/1979 states the following about the SCC’s competence to interpret the constitution (p. 896, the official gazette, the version available on the SCC website):

“The court does not have the authority to interpret constitutional provisions [in a binding fashion]. This is the correct implementation of the [1971] constitution ... It is not permissible to grant the court constitution-interpretation powers because interpretation involves the introduction of complementary or altering rules to the constitution’s provisions ... and only the people should have the authority to amend the constitution.”

force over legislative acts predating May 1980. It still asserted its competence to review the compliance of future legislative acts with the amended provision.<sup>72,73</sup> The Cassation Court too struck down decisions by lower courts that invoked the amended constitutional article. Its rationale was that the amended Article Two was addressed not to the judge but to the legislator. Only after legislators have “unpacked” the principles of the new Article Two into precise statutes could judges apply the laws, not the constitutional provision itself.<sup>74</sup> Together, the SCC and the Cassation Court absorbed the initial wave of Article Two litigation without embarrassing the Mubarak regime, without forcing any significant change to the status quo, and without making Mubarak appear any less pious than his predecessor.

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<sup>72</sup> On what the May 4, 1985 decision accomplished, the authors (Lombardi and Brown 2005, 393) further note:

At a time in which secularists and Islamists were engaging in increasingly violent confrontations, this doctrine gave each side a partial victory. It allowed the SCC to paint itself as a neutral arbiter. At the same time, the decision had the beneficial effect of buying the Court time to develop a method of interpreting the principles of the Islamic *shari'a*. . . . In short, without renouncing its authority to eventually exercise Article Two review, the SCC was able to postpone for several years the day when the Court would have to identify, interpret and apply the principles of the Islamic *shari'a*. This delay was fortunate because of the difficulty inherent in articulating these principles.

<sup>73</sup> Egypt's 2012 constitution, adopted when the Muslim Brotherhood were in power, transferred part of the jurisdiction over shari'a matters to Al-Azhar (Article 4), but that jurisdiction was removed in the 2014 constitution (Article 7). In an interview with a current deputy of the SCC in Cairo in November 2017, the only moment when he was visibly irritated, almost angry, was when he commented on the Muslim Brotherhood constitution that stripped the SCC of its exclusive competence on Article Two interpretation.

<sup>74</sup> Four examples of when this rationale was used: in 1981 (Case 2170, Cassation Court Year 51, November 4, 1981 session; source: the Cassation Court Website); 1982 (Case 4402, Cassation Court Judicial Year 52, Jurisprudence Office publication year 33, jurisprudence principle #152, p. 736, October 7, 1982 session, Criminal Circuit), 2001 (Case 8365, Cassation Court Judicial Year 64, Jurisprudence Office publication year 52, jurisprudence principle #75, p. 366, February 26, 2001 session); and in 2005 (Criminal Circuit of the Cassation Court, Case 50614, Cassation Court Year 74, Jurisprudence Office publication year 56, jurisprudence principle # 105, p. 691, December 17, 2005 session).

## 6. Conclusion: The Rule of Law, “Judicial Activism” in Autocratic Regimes, and Judicial Embeddedness as Political Development

In this chapter I argued that explaining judicial conduct in autocratic regimes and during periods of heightened political uncertainty requires a theory of judicial agency. In sociology literature, the key marker of “agency” is that the actor “could have done otherwise.” I defined judicial agency as the ordering and reordering of three sets of primary commitments in adaptation to shifting political circumstances. These are professional commitments (to legality), associational commitments (to other judges as a status and corporate group) and to regime commitments, where the regime denotes the rules and norms structuring authority in the political system. I further argued that autocratic regimes that allow latitude for judges to enact their professional and associational commitments are more likely to secure judicial support for the “regime” – the rules of the game, so to speak – and the consequent distributions of authority. These I called integrative autocratic regimes, in contradistinction to the fragmentary ones.

Then, focusing on Egypt, the second half of the chapter elaborated how the autocratic regime of Sadat and Mubarak sought to integrate judges versus the fragmentary regime of their predecessor, Nasser. The examples of the actions taken by the judiciary and the executive featured court cases, public statements, and informal gestures. Together, those comprised what can be described as “repertoires of action,” to use Tilly’s and Tarrow’s felicitous phrase (though they used it in a different context). By “repertoires of action” I mean the patterned, predictable behavior that progressively increases trust in, and the predictability of, the other parties in an ongoing interaction. With each crisis between the executive and the judiciary resolved amicably and within the existing rules, not outside

them, the next crisis stands an even better chance of getting a similar resolution. This is what I mean by the embeddedness/integration process.

In the remaining part of this concluding note, I wish to underscore, briefly, three implications of the embeddedness argument elaborated in this chapter: on the rule of law in autocratic regimes, on “judicial activism,” and on embeddedness as political development.

*A. On the rule of law in autocratic regimes.* As I suggested above, no autocrat starts off with a vision to embed/integrate the judiciary. The initial moves (such as Sadat’s in 1971-4) are contingent and informed by past interactions.<sup>75</sup> But once a pattern of mutual accommodation obtains, the embeddedness process is in motion; it develops a self-sustaining force. As the autocratic regime grants judges larger space and latitude to enact their legality commitments, the regime as a whole, while still fundamentally autocratic, becomes more rule-bound. The embeddedness becomes mutual.

Scholars who wrote about authoritarian legality – such as Wang (2015) on China and Rajah (2012) and Silverstein (2008) on Singapore – often stressed a dichotomy. In these countries, something approximating the rule of law existed in economic affairs, but not in political matters. That is how Singapore became a runaway success economically and simultaneously remained autocratic. My argument about Egypt is quite different. Substantive rule of law actually emerged and held. The examples in Section 5 above illustrate this point, especially those showing how the Mubarak regime resisted caprice and

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<sup>75</sup> For one thing, Sadat was likely involved in the decision-making that led to Nasser’s anti-judiciary laws-by-decree in August 1969. Nasser’s chief of staff, Sami Sharaf, later made this claim in his biography (Sharaf 2014), and printed what he alleged was a handwritten note by Sadat approving the names of the judges who were to be dismissed.

stayed within the rules. One finds even stronger evidence of this in the conduct of judges and jurists who were unapologetically pro-autocrat. Even the most ardent, die-hard Mubarak supporters in the judiciary issued legality-advancing (and autocrat-constraining) rulings.<sup>76</sup> The state's growing respect for legality under Mubarak was not lost on observers. Writing in 2006, Nathan Brown noted that "Egypt's current judicial system probably approaches liberal conceptions of legality more closely now than at any time in the country's history" (Brown 2006, 96).

The optimistic 1990s gave us the notion that authoritarianism and the rule of law are mutually exclusive categories (Tate and Vallinder 1997, 2). The experience of Egypt between 1971 and 2011 (as well as those of the countries I discuss in Chapter Five) invites a qualification of this understanding. The qualification is not about semantics. It is significant for probing the sources of rule-of-law practices in autocratic regimes. Judges who secure substantive rule of law as part of the integrative bargain in the autocratic regime might resist the transition to democracy if it threatens that bargain.

*B. On "Judicial Activism" in Autocratic Regimes.* Scholars writing about "judicial activism" or "judicial assertiveness" in autocratic regimes often framed such conduct as *against* the autocrat. Among these are Kureshi (2020, 2021), Tezcur (2009), Moustafa

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<sup>76</sup> I mentioned above the cases of chief justices Mamdouh Marei and Maher AbdelWahed, both Mubarak appointees from outside the SCC, who struck down sections of the tax code, despite the well-publicized displeasure of the Mubarak regime with SCC decisions that affect its coffers. Another striking example is Moqbil Shaker, who was the head of the Cassation Court (the apex court in the regular court system), had served as the head of the hybrid "Values Court," and served for three terms as the head of the Judges Club, ending in 2002. As the "Independence Current" took the leadership of the Club in 2002, he was often critiqued on the pages of the Club's periodical as having been excessively pro-Mubarak. His public statements confirmed this. And yet, as the chief of the Cassation Court he issued unambiguous, legality-advancing rulings. One example is the ruling, where he was the chief author, drastically restricting the power of the executive to wiretap the domiciles of criminal suspects (Case 6852, Cassation Court Judicial Year 59, Jurisprudence Office publication year 47, jurisprudence principle #9, p. 72, January 14, 1996 session, Criminal Circuit).

(2014) and Karpik and Halliday (2011). Each judicial decision restraining the executive and reasserting the precedence of legality is understood as targeting the autocrat and weakening the autocratic regime. In contrast, this chapter suggested that decisions restraining the authoritarian executive can occur as part of a consensual autocratic bargain, can come from even the most ardent autocrat supporters, and can sustain and prolong the life of the autocratic regime.

Why is the differentiation important? It is because if/when the autocratic regime tumbles or trembles, courts perceived to have been “activist” are more likely to be called upon to arbitrate the transition-politics process. Their past executive-restraining decisions, mislabeled as “activism,” make them appear as democrats and recommend them to adjudicate the transition-politics disputes. This observation partly answers a key transition-politics question: What makes courts a no-brainer for presiding over transition politics in some countries and a no-option in others? One answer: those deemed to have been activist stand a better chance of occupying the center-stage of transition politics, even if their “activism” was in fact a manifestation of judicial embeddedness into the autocratic regime. We will see this dynamic play out in the next chapter (Chapter Four), which discusses the “transition window” and the role of “judicial support networks” in transition politics.

*C. Judicial Embeddedness As Political Development.* The judicial-embeddedness argument carries another important implication. Regimes better able to incorporate and integrate various societal forces make governing easier and government more predictable, even an autocratic government. Political-elites scholarship has repeatedly shown the connection between elite disunity and “regime instability” (Higley and Burton 1989, 20), and vice versa. Field *et al* observed that “The national political outcomes [political elites]

affect are: the basic stability or instability of political regimes, the more specific democratic or authoritarian forms regimes take, as well as regimes main policies” (Field, Higley, and Burton 1990, 152). Though this scholarship rarely admits of consensual integration in autocratic regimes, its emphasis on the stabilizing, pacifying outcomes of elite integration is useful. Sadat and Mubarak proved better than Nasser at pacifying society, forestalling conflict and making government function more smoothly. With regards to courts specifically, Mubarak's tenure witnessed the fewest crises between the judiciary and the executive compared with his predecessors (if we factor in the length of his reign).<sup>77</sup> Put differently, Mubarak and Sadat were better able to articulate rules and establish norms for the distribution and structuring of state power. More often than not, they themselves respected those rules and norms. Crucially, these rules and norms appealed to large enough sections of society and state elites, including the judges.

The dark side of the autocratic integration of elites comes to the fore when we consider transition to democracy. In democratic regimes, the rules of the game are not attached to particular individuals, nor is their enactment conditioned on these individuals' presence on the scene. The rules and their implementation are thoroughly impersonal. Not so in autocratic regimes, where the rules structuring state power can be unduly colored by the autocrat's personality. If and when the autocrat appears weakened, uncertainty about the elite arrangement explodes, prompting elite resistance to change. In other words, as it

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<sup>77</sup> The Nasser tenure (1954-1970) was the stage of three major crises between the judiciary and the executive: in 1954 with drastic measures against the State Council and its eminent jurist Abdulraziq Al-Sanhouri; in 1963, detailed in Nassar (1974), and in 1968-69. The only major crisis during the Sadat tenure (1970-1981) between the judiciary (represented by the Judges Club) and the executive was in 1979, over the introduction of Sadat's "Values Court" and the powers of the Social Public Prosecutor. Mubarak's tenure (1981-2011) witnessed two crises: in 1986 as the Judges Club opposed extending the state of emergency, and in 2006 as the Judges Club publicized the irregularities in the elections held in 2005.

ingrains multiple foundations of stability, political development in autocratic regimes simultaneously implants multiple inertias to democratization. Chapter Four completes this story.

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## Chapter Four

### Judicialization and Consequences

#### Courts, the Judicial Support Network, Transition Politics, and Democratization

“We were all going direct to Heaven, we were all going direct the other way.”

— Charles Dickens in *A Tale of Two Cities*

#### 1. To Court or Not to Court

Raul Alfonsín was Argentina’s president between 1983 and 1989. He was the country’s first freely elected president after yet another spell of military dictatorship, his term marking the transition to democracy. Writing in 1993, Alfonsín noted that “during a transition period [following an authoritarian regime], the judicial branch suffers from the same lack of legitimacy that affects an authoritarian government’s executive branch” (Alfonsín 1993, 45). Perhaps the quintessential illustration of this sentiment is the French Revolution. One of its first acts was the abolition, in 1790, of the *parlements*, the system that recruited and granted abundant authority to judges, who were often drawn from the aristocracy, and were known as the “*noblesse de robe*,” the “Nobles of the Robe” (Merryman 1996, 110).<sup>78</sup>

But cast another glance at the recent record and you will find instances that are incongruent with the Argentine and French examples. The weakening or collapse of the *ancien regime* did not always delegitimize the courts or the “nobles of the robe.” In fact, cases like Hungary (1990-1996), Pakistan (2009-2013), South Africa (1990-1994), and

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<sup>78</sup> “The Law of 16-24 August 1790, Title II, article 13 provided: ‘Judicial functions are distinct and remain forever separate from administrative functions; judges may not, on pain of forfeiture, interfere in any way whatever in the activities of administrative officials nor subject them to judicial proceedings concerning their functions’” (Merryman 1996, 111 footnote).

Egypt (2011-2013) show how courts, in the immediate wake of autocratic weakening or implosion, may step forward or be called upon to adjudicate transition politics. In these countries, courts not only maintained their reputation through the transition period, they were central political actors.

This chapter explains one variety of judicialization during transitions. By “judicialization” I mean the phrasing of social or political questions in the idiom of the law, and taking them to courts for remedy or resolution. Judicialization means not only the deployment of “judicial decision-making and court-like procedures into arenas where they did not previously reside” (Vallinder 1997), but also the elevation and validation of judiciary-endorsing shared meanings and conventions, as I discussed in Chapter Two.

The chapter spells out its consequences for democratization. It poses two central questions. First, why are some political transitions more judicialized than others? That is, what conditions determine where judiciaries fall on the spectrum extending between “delegitimized courts,” on one end, and court-mediated transitions, on the other? Second, how does judicialization structure and change the calculations of the political actors during periods of political uncertainty, thereby influencing the odds of democratization?

*The chapter advances three connected claims. First, transition periods are more likely to be judicialized if old-regime politics had been judicialized. The actions and interactions of judges, courts and cause-lawyers under the autocratic regime – such as their “activism” and their cultivation of a “judicial support network” – create demand for judicialization when the autocrat tumbles or trembles. In other words, institutional legacies from the old regime carry over into the transition period. Second, contrary to some scholarly accounts, the judicialization of transition politics may exacerbate, rather than*

*reduce, political uncertainty and muddle the efforts of democratization. And third, courts that had been highly embedded into the autocratic regime are more likely to plunge transition politics into deep, cascading uncertainty that derails democratization. That is especially the case if the rising (electoral) political elites are bent on eradicating all arrangements from the old regime.*

This chapter builds on the argument from Chapter Three, where I argued that autocratic regimes vary in the extent of embedding, or integrating, judges and courts as a faction of the political elite. More embedded judges are able to advance their own legality and associational commitments and simultaneously safeguard the autocratic regime's core imperatives. In an integrative autocratic regime, crises between the judiciary and the executive unfold within the ethos of accommodation, mutual reinforcement and internalization of objectives, and the affirmation by each of a domain of nearly unfettered action for the other. Over time, the regime as a whole becomes less capricious and more rule-bound. The current chapter continues this story by asking: How do courts that were embedded into the old (autocratic) regime act in the environment of transition politics? How does the political agency of an embedded judiciary manifest in, and influence, transition politics? In my answer, the possible anti-democratic influence of embedded courts boils down to their dramatic aggravation of the forces of uncertainty during periods of transition. Thoroughgoing political uncertainty influences the calculus of the transition period's key political actors and impedes the basic accommodation and consensus which democratization requires.

The remainder of the chapter unfolds in four sections. Section 2 elaborates the nature of transition periods after autocratic collapse. It underscores the three key forces

shaping the transition environment: *political uncertainty* (deriving from the sudden, dramatic expansion in the range of political possibilities); *rule formulation*; and the *momentousness* of choices made the by actors. I call these mutually aggravating forces the “*uncertainty continuum*.” In Section 3, I discuss the sources of judicialization during transition periods. I devote special attention to the “judicial support network,” the coalition of “cause lawyers” and opposition politicians whose decision to influence transition politics through litigation can short-circuit the process and influence the odds of democratization. In both sections (2 & 3), I elaborate my own propositions through sustained engagement, chiefly, with authors in the strategic strand of judicial politics scholarship (my main interlocutors throughout this study). In Section 4, I present an account of Egypt’s 2011-2013 “transition window” to illustrate the chapter’s claims about judicialization, uncertainty and democratization. The empirical section is a stylized account, depicting the transition period as the interaction among three players: courts, the rising electoral elites in the legislature and/or the executive, and the judicial support network. I contend in Section 4 that choices made relatively early in the transition window (in March 2011 and June 2012) deeply aggravated the period’s uncertainty and diminished the odds of democratization. I conclude the chapter in Section 5. It briefly discusses two themes connected to democratization: the powerful influence of pre-transition legal culture (and I specify which aspects of legal culture I mean), and the orientations of the political elite factions who dominate the transition period.

The core contribution of this chapter is the illumination of the possibly anti-democratic role of legal mobilization during periods of political change.

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## 2. On the Nature of the Transition Window

In the following two sub-sections I elaborate an account of the (structural) forces shaping transition periods, then engage with the scholarship that cast courts as uncertainty mitigators and stabilizers of rules.

### 2.1. On the Uncertainty Continuum and the Transition Window

The fundamental feature of the periods following autocratic collapse is political uncertainty. As it centers political uncertainty, my account of transition politics is in line with the “political agent thesis” accounts (Kugler and Feng 1999, 141) which argue that transition periods (and their outcomes) are shaped by the choices of key political actors, and not just structural conditions [e.g., (Crescenzi 1999; O’Donnell 1986; Przeworski 1991; Przeworski and Limongi 1997; Rustow 1970) and more recent works from hybrid regimes (Lupu and Riedl 2013; Slater and Simmons 2012)]. Though it draws insight and inspiration from the classic works on transitions, my account diverges from them in three respects. The first is the focus on judicialization as a particular dynamic that the political players employ to deal with the transition period’s forces of uncertainty. The second is that I elaborate and stress the authoritarian-era’s roots of judicialization during the transition, specifically highlighting the anti-democratic potentialities of decisions by the “judicial support network” during the transition period. (That transitions unfold in the institutional shadow of the old regime is far from an original insight, however [e.g., (Linz and Stepan 1996, Ch.4; Munck et al. 1994; Munck and Leff 1997)]). And third, I elaborate dynamics in which courts and judges can increase political uncertainty and derail democratization. Practically all the pioneering works cited above either assumed that

courts during transitions were inconsequential or mere enforcers of liberal ideals, or they ignored them altogether.

I define political uncertainty as (deriving from) the dramatic expansion in the range of political possibilities. The uncertainty results from, and aggravates, two connected, structural aspects of post-autocratic periods. The first is rule-formulation. The political actors in post-autocratic periods do not know what the new rules structuring government authority will be, who will participate in the new rule-making, or what the relative voting heft of each participant will be. Dickens, in the epigraph atop this chapter, captured the essence of political uncertainty by suggesting that in the wake of regime collapse (he was writing about revolutionary France), vastly divergent outcomes suddenly become proximate probabilities.

Scholars of institutional change and reproduction -- in the “critical juncture” and broadly the historical institutionalism tradition [e.g. (Capoccia 2016a; Capoccia and Kelemen 2007; Collier and Munck 2017; Hogan 2006; Katznelson 2003; Pierson 2004, Ch.1; Volpi and Gerschewski 2020)], and in the comparative judicial politics tradition [(e.g., (N. Brown and Waller 2016; Ferejohn 2002; Ginsburg 2003, Chapters 1 & 2)] -- have underscored the explosion of possibilities, and the ensuing political uncertainty, as a core feature of “unsettled periods” (Katznelson’s phrase). During these periods, “agents face a broader than normal range of feasible options and ... their choices among these options are likely to have a significant impact on the path-dependent development of an institution” (Capoccia 2016b, 91). During transition periods, democratization is contingent, in part, because we cannot know in advance which choices in the large range

of feasible options the agents will pick. Contingency derives from the actors' exercise of agency.

The uncertainty deriving from rule-formulation is not concerned only with rule-making. It is also concerned with rule-wrecking: which of the old regime's rules, encoded in institutional legacies, will be relaxed, unmade or upended. Beneficiaries of institutional continuities would resist their abolition, and that in itself precipitates conflict and compounds uncertainty. But more importantly, they (that is, the beneficiaries) continue to embrace the reasoning and habits of those institutions -- their posited cause-and-effect, their pointers regarding the appropriateness and efficacy of conduct and choices. Those patterns of conduct and choice are "sticky" (Pierson 2004, 11). By activating, and thereby preserving, antecedent institutional pathways, these constituencies influence the scope and outcomes of transition-politics conflicts (as I elaborate below).

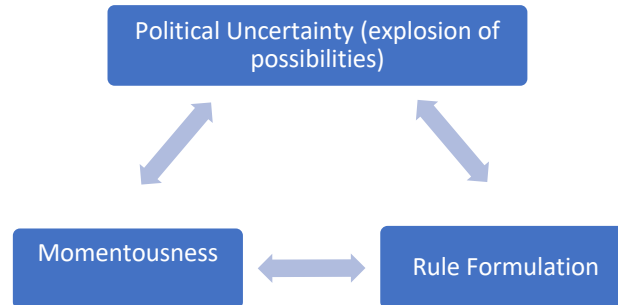
Contestation over rule-wrecking thus looms perhaps as large, and engenders as much uncertainty during transitions, as rule-making.<sup>79</sup>

The second structural aspect of post-autocratic spells is momentousness. Decisions that key political actors make early in the transition window – say, using litigation in political contestation – can have "increasing returns" that forge path-dependent processes (Pierson 2000). These processes set in motion positive feedback loops that make switching to alternatives difficult and costly (Levi 1997; Pierson 2000). Momentousness too has a link of mutual enforcement with uncertainty. As it places further significance on

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<sup>79</sup> Hans Kelsen observed that annulling a rule is a (negative) form of rule-making (Kelsen 1942, 187). In other words, rule-wrecking often entails rule-making. Both forms impose new restrictions and open up new possibilities for the actors to whom the new rule (or negative rule) is addressed.

participation in the all-important rule-formulation, momentousness induces political actors to take drastic actions to obtain a seat at the table or prevent rivals from obtaining one.



*Diagram 1: The Transition Window's Uncertainty Continuum*

In short, the post-autocratic spell is a severe decision environment shaped by a continuum of mutually aggravating features: political uncertainty, rule-formulation and momentousness. I call this swarm of forces the *uncertainty continuum*. And I describe the post-autocratic spell as the “transition window,” the period roughly two to five years long after authoritarian collapse or implosion, when rule-formulation, and thus uncertainty, is especially intense. I use these terms because the alternative – “transition periods” – has come, in the scholarship on democratization, to denote vastly different time frames, sometimes spanning decades. For one, Huntington proposed that a transition was over and democracy had consolidated only after two turnovers of those in power (Huntington 2012, Ch.5). Aspiring for more clarity (and to avoid some of the “teleology” inherent in “transition” (Carothers 2002, 7)), I use “transition window” to convey, first, the maiden stage of rule-formulation after autocratic collapse, and, second, the contingency of democratization after autocracy. The window of possibility that opens up after autocratic collapse includes, but far from exclusively, democratic transition. Connected to the transition window is transition politics. In this study, the latter means the political

contestation following the weakening or collapse of the autocratic regime, and wherein the actors state that democratization is their objective.

I argue that the key driver of action among political agents during the transition window is to minimize or contain uncertainty. At its purest element, uncertainty endangers (political) survival. Its unnervingly expanded range of possibilities includes such dreadful fates as banishment, violence or worse. So, whatever guises the agents' actions may assume, be they jockeying for rule-formulation or undercutting rivals, the agents' first-order motivation is to ensure survival through mitigating uncertainty. To preview more of the discussion to follow: I further argue, in a departure from an influential strand in judicial-politics scholarship, that the judicialization of transition politics may exacerbate rather than moderate the forces of the uncertainty continuum.

## 2.2. Courts As Uncertainty Mitigators?

Authors in the comparative judicial politics tradition (especially those of the strategic persuasion, my chief interlocutors in this study) have perceptively identified the key features of transition window. They correctly attributed uncertainty to rule fluidity, noting how the suddenly expanded range of possibilities modulated the political agents' conduct. They argued that political actors resort to courts and court-mediated remedies to deal with the uncertainty continuum. In other words, to best confront the transition window's uncertainty, key political actors *judicialize* transition politics. They make courts central player during transitions.

These accounts err in three important respects. First, they stress, nearly exclusively, the agency of the new, often interim, wielders of the legislative and/or executive authority and ignore the agency (and associated preferences) of other actors, chiefly the courts and

the “judicial support network” (which I define shortly). Second, since these accounts do not recognize courts and judges as bearers of political agency, they assume that resorting to courts automatically stabilizes rules and reduces uncertainty. Third, their analyses do not incorporate the staying power and influence of the past’s institutional legacies. They do not heed how institutional continuities and resonances from the old regime shape and channel the preferences of the transition window’s agents. I briefly expand on each of these critiques after a glance at the notion of courts as rules’ stabilizers and uncertainty mitigators.

Many strategic accounts of judicial politics drew on influential scholarship in institutional economics (or neo-institutionalism) that emphasized how institutions (which they often defined as the “rules of game”) could decrease the “transaction cost” of economic and political exchange and give rise to “credible commitments” that bound the actors engaged in repeat interactions (North 1993, 1995; North and Weingast 1989; Weingast 1997). Soon enough, especially after the collapse of the Soviet Union and the triumph of capitalism, courts were receiving abundant attention, not only in institutional economics but in comparative politics scholarship, too. Courts were increasingly understood as the object of “credible commitments;” they guaranteed and stabilized rules, and thereby curbed political uncertainty, especially during periods of political change.

An example from this scholarship is in order. Explaining how courts and court-mediated remedies emerge as the optimal resolution to the uncertainty condition, Ginsburg observed two key features of political transitions:

First, future political outcomes are more uncertain relative to autocracy. ... Information on future outcomes is more difficult to assess. There is ample evidence that constitutional designers sometimes misjudge the probabilities of their electoral

success. Second, ... there is a wide range of institutional configurations that are possible even within the category of democracies. Indeed, this range itself is a source of uncertainty. ... In sum, changes in the party system [after authoritarian collapse and during the transition], changes in the party system and institutional structure characterize transition environments, so that outcomes are more uncertain” (Ginsburg 2003, 30).

How do the transition environment’s actors mitigate political uncertainty? “Other things being equal,” Ginsburg wrote,”

uncertainty increases demand for the political insurance that judicial review provides. Under conditions of high uncertainty, it maybe especially useful for politicians to adopt a system of judicial review to entrench the constitutional bargain and protect it from the possibility of reversal after future electoral change. ... *In short, the presence of elections [with the advent of the transition] – the sine qua non of democracy – increases uncertainty, and thus the demand for judicial review*” (31). [Italics added.]

I quote at some length from Ginsburg as he succinctly articulates the connection between uncertainty, rule fluidity and a judicial remedy (that is, judicial review). Other scholars in the strategic strand of judicial-politics scholarship advanced similar or connected logics [e.g., (Chavez 2004; Chavez, Ferejohn, and Weingast 2011; Helmke and Rosenbluth 2009; Hirschl 2000, 2006; Ramseyer 1994; Ríos-Figueroa 2007)] .<sup>80</sup> In these logics, especially as articulated by Ginsburg and Hirschl, actors navigate the uncertainty of political change/transition by shrinking their own freedom of action and that of others, narrowing the range of political possibilities they and others could pursue. And they transfer the relinquished control to courts.<sup>81</sup>

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<sup>80</sup> While Hirschl’s arguments stress the “empowerment” of courts as insurance against future loss of power, Chavez (2004), Rio-Figueroa (2007), and Helmke and Rosenbluth (2009) and Chavez, Ferejohn and Weingast (2011) provide variations of the “fragmentation” theory: politicians “empower” courts or allow them to be politically independent when no single political group/party is dominant.

<sup>81</sup> Hirschl (2000) wrote: “In response to perceived threats by peripheral groups, elites who possess disproportionate access to and influence upon the legal arena often initiate a constitutional entrenchment of rights in order to insulate policymaking from popular political pressure. *Power is transferred from majoritarian decision-making arenas to national high courts, where they assume their policy preferences will find greater support*” (91). [Italics added.]

Why courts? In these accounts, courts are disinterested guarantors of the new, abridged scope of political action for the contemporary and future wielders of government authority. In short, the key political actors judicialize transition politics as the best strategy available to deal with a fundamental (structural) challenge of the transition window: the uncertainty continuum.

This understanding of courts and the transition window exhibits several shortcomings. The first is that these accounts over-state the agency (calculations and preferences) of the transition window's wielders of legislative or executive authority, and over-estimate their ability to make binding rules.

Second, most of the accounts cited above<sup>82</sup> depict courts as the archetypal third-party dispute resolver: neutral, with no interests of their own, applying pre-existing rules, and only capable advancing rights and opening up politics. But as Shapiro has long observed, courts harbor motivations other than resolving disputes among the disputants. Whatever the dispute at hand, they must always advance a separate, fundamental interest: social control.<sup>83</sup> In other words, courts have commitments and preferences which precede and are independent from the disputes that land in their dockets. I elaborated the concept of judicial agency in Chapter Three, and will elaborate below how judicial agency interacts

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<sup>82</sup> Hirschl is an exception, as he allows that courts might identify, politically, with the threatened electoral elites.

<sup>83</sup> Shapiro wrote: "At the point at which the judge is expected to apply general pre-existing law in the settlement of disputes, that law becomes an element of social control. That law must come from somewhere. Whether its origin in custom, or in the systematizing of earlier judgments, or in the fiat of the rulers, or in some legitimized process of legislation, its very nature as a general rule applicable to future situations imports some element of social concern beyond the particular concerns of the particular disputants. ..." (Shapiro 1981, 25–26)

with, confounds and modulates other political agents' conduct during the transition window.

The third shortcoming in the analyses I critique is their failure to incorporate the staying power and influence of the past's institutional legacies; how institutional continuities and resonances from the old regime shape and channel the preferences of the transition window's agents. They seem to model the transition period (or, broadly, spells of political change) on an ahistorical, social-contract imaginary. The new or soon-to-be incumbents choose from behind "the veil of ignorance", and they devise the most optimal, and least dangerous, rules for the future.<sup>84</sup> The difficulty here is obvious. Some transitions may indeed approach clean-slate situations, when the old regime has been thoroughly delegitimized domestically and internationally. The South African apartheid regime, and some of the former communist regimes in Eastern Europe perhaps approximate that ideal-type more than other transitions. But these cases are the exception, not the rule. Most transitions unfold, at least in part, within the rules and arrangements of the old regime. This has been one of the crucial insights of the 1990s the democratization scholarship (an insight I discuss more in the conclusion, Section 5). Indeed, even in transitions approaching the clean slate, such as Hungary in the early 1990s, the "antecedent conditions" (such as the presence and credibility of lawyers in the roundtable negotiations) exercised influence over transition politics.

Crucially, analyses of transition politics that invoke a social-contract imaginary fail to account for and integrate the multitudinous sources of judicialization. The interim

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<sup>84</sup> Ginsburg (2003) actually cites John Rawls and the "behind the veil of ignorance" heuristic (p. 23).

wielders of legislative or executive authority are far from the sole political agents capable of activating courts and shaping the rule-formulation battles of the transition. Lawyers and lawyer-politicians who had mastered the skills of public-interest litigation under the old regime would likely continue to gravitate toward this mode of legal mobilization as they navigate the transition-window contests. Another example is the judiciary. Courts that had under the old regime engaged in apparent “judicial activism” are more likely to have the authority, and the institutional habit, of stepping forward to adjudicate the transition’s political questions.

Erroneous assumptions about the actors and forces of the transition window led many accounts (such as the one I quote from above) to a faulty conclusion: that courts or court-mediated remedies (such as judicial review) diminish political uncertainty. The empirical record suggests that as judges and courts express agency during transitions, they can amplify the transition environment’s uncertainty. Exacerbated uncertainty sets in motion dynamics that can hamper democratization, which requires minimal accommodation and compromise. “A new political regime,” Rustow observed in 1970, “is a novel prescription for taking joint chances on the unknown” (1970, 358). Taking joint chances on the unknown is less likely when the transition window’s players progressively aggravate one another’s uncertainty. Over the past two decades comparative scholars have documented and analyzed how the judicialization of politics during periods of change compounded the uncertainty and threatened or derailed democratization — in, among others, Pakistan (Kalhan 2013), Thailand (Mérieau 2022), Turkey (Bali 2012), Egypt (N. Brown and Waller 2016; Hamad 2018) and Argentina (Gargarella 2003).

In the following section, I present, briefly, a fuller accounting of the sources of judicialization.

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### 3. On the Sources of Judicialization During the Transition Window

In strategic accounts, such as Ginsburg’s above, the new incumbents in the legislature or the executive resort to courts or court-mediated remedies to reduce the uncertainty of transition politics. I concur with these analyses in their anchoring of political uncertainty. All the key actors want to diminish it. But who the key actors are, how they strive to diminish uncertainty, and how their actions affect uncertainty and alter the decision environment – these are areas where my account diverges from the strategic accounts I cite above.

I distinguish between two sets of sources for judicialization during the transition window. The first set comprises demand-side actors and factors, those that by preference, habit or both turn the transition window’s political questions into legal questions, thereby elevating courts as central actors in transition politics. The second set encompasses supply-side factors. One such is the courts’ motivation to enact political preferences in the face of the transition window’s uncertainty continuum. Another is the surplus legitimacy from “activism” and “independence” in the autocratic past, which can validate intervention in transition politics.

*Demand-side actors and factors include:*

- A. A pattern of previous public-law litigation or “cause lawyering”;

- B. A pattern of judicial “assertiveness” or “activism” under the old regime;
- C. Landmark moments of courts and judges successfully bending the will of the outgoing autocrat;
- D. The presence of a highly developed “judicial support network” (JSN);
- E. If prominent members of the JSN run as candidates for legislative or executive office during the transition window.

*As for the supply-side factors, I focus on two:*

- A. Motivation by threat, opportunity or both to force their preferences (among other things, their notions of legality) upon the transition process. Invoked and authorized by the demand-side actors, courts may endeavor to express their political agency regarding both the rule-making and the rule-wrecking aspects of the transition window.
- B. Courts’ possession of surplus legitimacy and credibility from the past – say, from protecting legality under the autocrat. Such surplus enables and validates courts’ decision to step forward to arbitrate the transition’s political questions. In other words, courts may parlay their “activism” aura from the authoritarian era into a source of credibility to intervene into and influence the direction of transition politics.

I briefly discuss each in the following two sub-sections.

### 3.1. Demand-Side Judicialization

In Ginsburg’s and other analyses of a similar outlook, the impetus for judicializing transition politics comes nearly exclusively from the calculations of the new and interim incumbents hedging against future electoral defeat. It is the uncertainty about the future

(and not the institutional continuities from the past) that induces judicialization. In this and the following sub-sections I elaborate a larger set of forces and actors driving transition politics toward judicialization. Combined, the two sub-sections develop my claim that judicialized autocratic politics increases the odds of judicializing transition politics if/when the autocrat collapses.

*A. A pattern of previous public-law litigation:* Did a pattern exist under the old regime wherein political questions were routinely “resolved into legal questions”?<sup>85</sup> If this pattern existed under the old regime, it would likely carry over into the transition window. Even as they strive to adapt to new circumstances, political actors do not invent themselves anew. They largely follow habits and routines. Tarrow and Tilly stressed the role of “repertoires of action” that political agents develop and deploy (2009) in political contestation. Emile Durkheim underscored the centrality of habit in human conduct, reckoning it “a chief determinant of human action” and one of the ‘principal supports for the moral fabric of modern societies.’ [Quoted in Pedwell (2017, 100).]

*B. Judicial “activism” or assertiveness:* Were courts under the old regime perceived as activist or assertive? And was such activism understood to be directed against the executive and diminishing his power? If the answer is in the affirmative to either or both questions, the odds are higher for the transition-window actors to call upon courts to adjudicate the transition’s conflicts. Court seen as having been too subservient to the

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<sup>85</sup> The observation is Tocqueville’s, from *Democracy in America*, quoted in Ferejohn (2002, 42): “Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”

autocrat of the old regime, as Alfonsín observed in the opening lines of this chapter about the Argentine judiciary, are less likely to be solicited to adjudicate transition politics.

*C. Landmark moments of courts successfully bending the will of the autocrat in the old regime, inside and outside court halls.* Among the most forceful accounts stressing how lawyers and judges shape the liberal political order are Karpik and Halliday (1997; 2011). The authors go as far as defining political liberalism in terms of the actions and influence of lawyers and judges. Members of the legal profession, the authors argued, “moderate state through judicial restraints on sovereign or executive power; ... civil society through the creation of publics; and ... citizenship, through grants of individual rights” (1997, 19). Where lawyers and judges are viewed in these terms, the judicialization of transition politics is higher. Actors, even those not trained in the law, are more likely to seek the advice or intervention of lawyers and judges to navigate the period’s uncertainty.

*D. How developed the judicial support network (JSN) is.* During the 1990s and early 2000s, several authors observed how judicial “support structures” in civil society afforded rights the same advantages (in litigation) that had used to belong only to business interests (I devote a sub-section to the judicial support network below). A more developed JSN during the transition window would mean it had formed under the old regime, and it would heighten the odds of turning political questions into legal ones, placing courts at the center of transition politics.

*E. Prominent members of the JSN as transition-window politicians.* The judicial support network includes not just lawyers and resources, but also opposition politicians. Both the lawyers and the oppositionists are likely candidates for office when the autocrat

exits the scene. This too increases the odds of a judicialized transition as these actors would engage in politics through familiar venues of political contestation: court halls.

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### 3.2. Supply-Side Judicialization

Supply-side actors and factors received much less attention in the judicial-politics scholarship. The assumption is that courts, in general, cannot decide which cases to review. But although courts are fundamentally reactive institutions, they might use judicial discretion and jurisprudential precedents to extend influence beyond the remit of the litigation or referral that activated them.<sup>86</sup> This discretion alone points to a baseline of supply-side judicialization, wherein judges can control the scope of litigation (and we will see an example of this in Section 4). Brown and Waller (2016) offer a more forceful account of supply-side judicialization. The authors set out to explain why some constitutional courts are highly “interventionist” during periods of “constitutional rupture.” They single out three factors: “institutional centrality” of an apex court, strong and “personalized court leadership,” and “division among elected branches of the state.” But whereas the strategic accounts overlook the supply-side factors of judicialization, the Brown and Waller account swings far in the opposite direction, largely skipping the demand-side factors. It ignores the dynamics of interaction between the suppliers and demanders of judicialization.

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<sup>86</sup> In a landmark essay, published in 1976, Chayes (1975) argued that the traditional model of civil litigation, which had assumed the litigation process to be “party-initiated and party controlled” (1283) was no longer congruent with reality. He called the new model “public law litigation” (1284). In the new model: “The judge is the dominant figure in organizing and guiding the case, and he draws for support not only on the parties and their counsel, but on a wide range of outsiders - masters, experts, and oversight personnel. Most important, the trial judge has increasingly become *the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge's continuing involvement in administration and implementation*” (1284). [Emphasis added.]

I focus on two chief supply-side factors for judicialization. The first is evident in courts and judges reacting to the “constitutional rupture” by seeking impose their preferences (including their notions of legality) on a fluid political environment or on a weakening autocrat.<sup>87</sup> The second supply-side factor concerns the courts’ past: did they have a history of apparent judicial “assertiveness” or “activism”? I have listed this same factor under demand-side as well. The cross-listing underscores the enduring force of judicial “activism” through and across periods of political change. It establishes habits and constituencies. Later the constituencies become demand factors for judicialization. Crucially, the “activism” confers enduring legitimacy and authority upon courts, enabling and entitling them to intervene in politics when the autocratic regime becomes the old regime. In the opening paragraphs of this chapter, the Argentine president observed that during transitions from autocratic rule, courts, like other branches of government, “lack legitimacy.” This observation can thus be qualified: Courts that are perceived to have been “activist” under the old regime are less likely to be delegitimized during the transition window. In fact, they stand a good chance of being brought into the center of transition politics.

Both of judicialization’s sets of demand-side and supply-side factors have a crucial quality in common. All of them are institutional continuities (e.g., public-law litigation) or institutional resonances (e.g., judicial “activism”) from the old regime. As these institutional continuities and resonances carry over into the transition window, they can

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<sup>87</sup> Some strategic analyses suggested supply-side judicialization: courts might exploit the “fragmentation” or weakness of other political actors to assume a larger political role (Chavez 2004; Ríos-Figueroa 2007) or to assert independence (Chavez, Ferejohn, and Weingast 2011). But hardly did any of them explain the agency that guided the courts’ augmented share of authority. Judicial agency was a core component of the discussion in Chapter Three.

aggravate the forces of uncertainty, shunting transition politics onto a path less conducive to democratization. Section 4 illustrates this assertion.

In order to keep this chapter within a reasonable length, I dedicate elaboration only to one actor on the demand side, the judicial support network (JSN). This choice stands on two reasons. First, encoded into its practices and outlook are patterns and influences of nearly all the other demand-side factors. Under the old regime, the JSN's members were the courts' interlocutors in turning political questions into legal ones, and their chief collaborators in the judicial "activism" enterprise. Judicial "activism" extended a reputational aura not just to courts, but also to the JSN. When the JSN members activate courts during the transition window, they are not just taking well-trodden institutional paths; they are asserting their own longstanding bona fides as political actors and change agents. Second, while American socio-legal scholars have elucidated the ambivalent, contingent utility of legal mobilization for effecting change (McCann 1992, 1994, 1996; Sarat 2005, 2011; Sarat and Scheingold 2006; Scheingold 2004), hardly have students of transition politics explored the anti-democratic potentialities of public-law litigation. I take up precisely this task in the following sub-section.

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### 3.3. The JSN and Its Discontents

I start by offering a sketch of how the JSN phenomenon started, how comparative scholars adapted the concept, then I discuss how its actions can aggravate the transition window's uncertainty continuum.

Among the rising global political phenomena of the 1980s and 1990s was the explosion of rights litigation, the so-called "rights revolution" (Epp 1998). Two

explanations of this “revolution” gained currency. One was Epp’s “support structure” hypothesis (1998). Judicial endorsement of rights, Epp wrote, required “deliberate, strategic organizing by rights advocates” (p. 2). “And strategic rights advocacy became possible because of the development of ... support structure for legal mobilization, consisting of rights advocacy organizations, rights advocacy lawyers, and sources of financing, particularly government-supporting financing” (p. 2). In focusing on the resources required for “strategic litigation” (p. 46), Epp adapted a striking insight from Galanter (2007), who had argued in a 1974 essay that business interests were able to change the law in a slow, incremental fashion through repeat litigation. The other prominent explanation was (what would later be named) the “legal complex” hypothesis. Karpik and Halliday (Terence C. Halliday, Karpik, and Feeley 2007, 2012; 1997; 2011) rejected accounts of lawyers as mere players in the marketplace of professions, concerned only with protecting their privilege and jurisdiction. They emphasized instead the political role of the legal profession (later “the legal complex”) as political actors, driven by a liberal political agenda.

Both the “support structure” and “legal complex” explanations shared a core view: public-law litigation was crucial in forging the liberal state, safeguarding rights and making pluralistic politics possible. That view built on earlier scholarship that cast legal mobilization as “political participation” (Zemans 1983). Critical Legal Studies authors too acknowledged, perhaps grudgingly, the social-change possibilities even of private-law litigation, since it conferred upon private, individual interests the awesome power of the state (Mensch 1998). As judicial politics scholarship ventured beyond its U.S. roots, new scholars adapted insights from the “support structure” and “legal complex” to autocratic

and hybrid contexts. Moustafa (2007) wrote of the “synergy” (p. 9) and the “symbiotic relationship” (p. 109) between Egypt’s Supreme Constitutional Court and the “judicial support network,” which included, in addition to lawyers and resources, opposition activists. Woods wrote of Israel’s “judicial community” (2009). Belge (2006) underscored the role of “socio-political alliances” (p. 654), which included and supported courts, in enabling judicial activism.

Not all scholars agreed that public-law litigation or “cause lawyering” was an unqualified good [e.g., (McCann 1992; Sarat 2005; Sarat and Scheingold 2006)]. Some argued that just as it opened up political possibilities, legal mobilization may simultaneously close others off. “The broader question,” Scheingold wrote (2004, 8), “is whether litigation can be useful for redistributing power and influence in the political arena.” His answer was cautious, but also, for the purposes of study, far-sighted. He suggested that “the utility of litigation may be expected to vary from one policy arena to another. What is useful at one stage in a process of change may be worthless or even counterproductive at another stage” (p. 9). Scheingold, in other words, alerted us to the dark side of public-law litigation. For it could fragment causes and shunt political conflict onto dead ends. “Precisely because litigation is structured to serve individual needs,” Scheingold wrote (p. 118), “it tends to fragment problems by breaking them into a multiplicity of discrete transactions,” conferring on courts inordinate decision-making power to determine which “fragments” to approve and which to foreclose.

This brings us to the role of the JSN in transition politics after autocratic collapse. A highly developed JSN under an autocratic regime is all but certain to endure and gain in prominence if the regime totters or collapses. Its members do not turn up into the transition

window as political neophytes. They arrive as bearers and probably enforcers of institutional legacies from the old regime. Certainly they recognize the change in the political environment. But as they endeavor to deal with the transition window's uncertainty continuum, they would not, and could not, invent new tools and tactics instantly to interact with the new environment. Under the window's severe conditions of uncertainty, rule-formulation and momentousness, they resort, as is the habit of political agents, to what they know and what served them well in the past. They reach for their "repertoires of action," the habits of conduct and institutional pathways that had proved efficacious under the old regime. If they had put to good use the art of "resolving political questions into legal ones," they would likely continue the practice. If they had achieved legal victories in cooperation with "activist" courts under the old regime, they would continue to assert the utility and validity of judicial interventions during the transition window. In short, they transport into the transition window the only mode of political contestation they know: court-mediated politics.

This yields important implications for transition politics. First, immediate and repeat activation of courts to resolve transition-politics disputes can exacerbate the uncertainty continuum. To begin, courts might not possess the constitutional authority or tools to decide on political questions. Their interventions on the basis of thin or questionable constitutional merit might make them appear as partisan or part of the autocratic restoration camp. Other actors might take drastic measures to trim the jurisdiction of courts. Second, the realization that litigation can influence rule-formulation during the transition window may tempt other actors to forgo political mobilization and coalition building in favor of easier victories through courts. Third, once the JSN engages

in transition politics by means of litigation, it is difficult to wrest politics back from the courts. That is to say, the choice to judicialize transition politics forges a path-dependent dynamic, creating a positive feedback loop of uncertainty-aggravating interactions. Political actors alarmed by judicial interventions might seek to temper the forces of the uncertainty continuum for themselves by controlling or diminishing judicial authority, which in turn may raise the distrust of the political actors in other camps.

Finally, if courts had been integrated into the old regime, they are more likely to be wary of the transition-window's new electoral elite. They would act to sustain at least aspects of the political order that had allowed to enact their professional and associational commitments. And they would be more likely interventionist, using the activation from the JSN to contain the uncertainty posed to the embeddedness arrangement. In short, the judicialization of transition politics, even if courts had not been integrated into the old regime, can increase the period's uncertainty and instability. Courts might get overwhelmed with questions they are ill-equipped to answer authoritatively. Their answers may raise suspicions about their motives, and prompt counter-judiciary measures. Only courts that come into existence as a component of the transition bargain may escape this dynamic. If, on the other hand, courts had been integrated into the old regime, the judicialization of transition politics significantly aggravates the uncertainty continuum and plunges transition politics into a dynamic that is highly inimical to democratization.

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Before presenting empirical illustration from Egypt, a summary of the discussion above is in order. Influential scholarship on comparative judicial politics cast courts as disinterested guarantors or enforcers of transition bargains. In those transitions, the only

political agency that matters is that of the “politicians” – the new/interim incumbents in parliament or the executive. Courts are understood as mitigators of the structural trio of features that characterize the transition window – political uncertainty, rule formulation and momentousness. In the account above I emphasize the political agency of two other core players: the JSN and the courts. The JSN receives special attention since it embodies and captures many of the demand-side factors for judicialization that migrate from the old regime into the transition window. I thus claimed that transition politics is more likely to be judicialized (that is, court-mediated) if autocratic politics too had been judicialized. Political contestation through courts, the chief mode of contestation allowed under the autocrat, is thus transported into and imposed on transition politics. All of a sudden, courts are central arbiters of transition politics.

Courts that had been integrated into the old regime are not necessarily hostile to democratization. But they would be highly wary of the new electoral elites, especially if the latter wish to eradicate autocratic-era arrangements. Embedded courts may not necessarily wish to retain all autocratic arrangements, but they would wish to preserve those arrangements that allowed them to enact their legality and association commitments. Their stance on democratization is thus contingent on how radical the new elites are in their effort to eliminate the old rules. Simultaneously, early choices by the JSN and the courts can set transition politics onto a path of cascading uncertainty, making arrival at a basic consensus for democratization less likely.

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#### 4. A Toxic Pattern (or the Story of Egypt’s Failed Transition)

In this section, I present a stylized account of a transition window – Egypt’s, 2011-2013 – to illustrate the core claims of my argument. The discussion casts transition politics as the interaction among three players: the judiciary (courts and judges), the JSN, and the new electoral elites in parliament and/or the executive. Each of the players is at once motivated by the wish to influence rule-formulation and the fear of being “ruled out” of the arena by the other players. The transition window I discuss here is the period of 29 months that extended between February 11, 2011, when the Egyptian president

*Transition Politics, Judicialized*

- **February 11, 2012:** Mubarak steps down after widespread protests, handing over power to a military council.
- **March 19, 2011:** Referendum approves constitutional changes and the sequence of the transition period, placing parliamentary elections before the drafting of a new constitution.
- **March 30, 2011:** A “constitutional declaration” by SCAF incorporates the articles of the March 19 referendum into an abridged constitutional text, adding a provision, Article 60, on how the Constituent Committee would be formed. The declaration gives the SCC and the Cassation Court broad authority over the presidential and parliamentary election process.
- **January 23, 2012:** the first session of the first post-Mubarak parliament is held.
- **April 10, 2012:** Admin. Court dissolves first (Islamist-dominated) Constituent Committee.
- **June 14, 2012:** SCC declares parliamentary election law unconstitutional.
- **June 14, 2012:** SCC declares unconstitutional the “political exclusion” law, allowing Mubarak’s last prime minister to still run for president.
- **June 17, 2012:** SCAF issues a “constitutional declaration” with provisions establishing authority for the SCC over the Constituent Committee and constitution drafting.
- **June 20, 2012:** The petitioner whose filing led to the dissolution of parliament on June 14, 2012, sues the SCC, arguing that it went much farther than he perimeters of his petition.
- **June 24, 2012:** Mohammed Morsi wins in the presidential election.
- **July 8, 2012:** President Morsi issues a decree reinstating parliament and canceling the June 17 declaration.
- **July 10, 2012:** The SCC issues a decision voiding the July 8 presidential decree.
- **September 22, 2012:** Supreme Admin. Court (First Circuit) reaffirms SCC decision voiding election law that had led to the dissolution of the whole parliament, and not just the third whose election came under constitutional scrutiny.
- **October 23, 2012:** An administrative court refers the second iteration of the Constituent Committee to the SCC.
- **November 22, 2012:** President Morsi issues a constitutional declaration shielding his decisions from judicial challenge.
- **November 24, 2012:** Violence breaks out outside the presidential palace between protestors denouncing the November 22 declaration and supporters of the Muslim Brotherhood president. A coalition of non-Islamist political groups forms an anti-Morsi “National Salvation Front.”
- **November 28, 2012:** Judges of the Courts of Cassation and Appeal say they are suspending all work until the Nov 22 declaration is retracted. The Judges Club says it won’t supervise the referendum for the draft constitution.
- **December 5, 2012:** Members and supporters of the Muslim Brotherhood surround the SCC building and block access to it, to prevent the court from reviewing the referral from the administrative court regarding the new Constituent Committee. And the SCC suspends work until further notice.
- **December 8, 2012:** Morsi retracts several articles from the Nov 22 declaration after violent confrontations between his supporters and opposition three days earlier.
- **December 15, 2012:** A new constitution is ratified which removes a political enemy of the Islamists from the SCC bench and reduced the SCC’s authority over Article Two (the Sharia article). Days later (on December 22<sup>nd</sup>), Morsi’s vice president, a prominent judge, resigns.
- **May 25, 2013:** The SCC rejects a draft election law, making it the third time that courts delay parliamentary elections.
- **June 2, 2013:** The SCC declares the Constituent Committee that drafted the 2012 constitution unconstitutional, but spares the constitution itself.

Hosni Mubarak stepped down, and July 3, 2013, when a coup d'état, supported by broad sections of society, removed a democratically elected president, Mohammed Morsi. The first sub-section (4.1) sets the scene by underscoring the core contest of the transition. Then the choices and reactions of each of the key players are discussed in the following sub-sections – the JSN, the courts and the new political elite, respectively.

#### 4.1. The Contest Over the Constitution

Post-authoritarian transition politics can be distilled into two major contests: over the rules for the future, and over the rules from the past. The former regards what the content of the new or amended post-authoritarian constitution is and who will write it; the latter concerns what to do about the old-regime's institutions and actors, what are called lustration laws or broadly transitional-justice laws. Both prospective rule-making and retrospective rule-wrecking pose an immense test to transition politics. They exacerbate the uncertainty continuum (as I discussed in Section 2 above).

And, in the era of the “global expansion of judicial power,” especially post-1990, contests over one or both are nearly guaranteed to end up in courts.(Sólyom 2003) How courts (especially, but not exclusively, apex courts) dealt with these central questions displayed much variation. In some cases, such as Pakistan (2009-2013) and Egypt (2011-2-13), the manner in which courts tackled the questions deeply destabilized politics. In others, such as South Africa and Hungary in the early 1990s – and both featured apex courts that were highly involved in transition politics – did not derail democratization, and likely aided it. What explains the variation? My argument in this chapter is that a) if transition politics is judicialized by institutional continuities and resonances from the old regime, and b) if the judiciary placed, through judicialization, at the center of transition has been

embedded into the old regime, courts are less likely to assist democratic change. The odds of democratization are still slimmer if the new, post-autocrat electoral elites are radical in their endeavor to obliterate the old regime and its arrangements.

In Egypt's transition window, the Supreme Constitutional Court (SCC) issued, on one day in mid-June 2012, two momentous decisions, one connected to prospective rule-making, the other to retrospective rule-wrecking. The former decision annulled the election law, leading to the dissolution of the first post-Mubarak parliament. The other voided a "political exclusion" law, enacted by that same parliament, which had deprived high-ranking officials from the Mubarak era of political rights, including candidacy for elected office. Commentators immediately grasped the immensity of the decisions. "The rulings themselves are perfectly defensible," a keen observer of the Egyptian judiciary wrote of the June 14 decisions (N. Brown 2012), but still he called them a "judicial coup." "The timing and speed ... were a big surprise," Brown wrote. In all three previous instances of election law annulment (1987, 1990 and 2000), the SCC virtually or actually delayed its decision until the end of parliamentary term. In the case of the June 14 decisions, the SCC unmade the election law of a parliamentary cohort that had been seated only five months earlier. In the other decision, on "political exclusion" law, the Court issued the decision on the same day it heard the case. Comparison with the judicial meta-practices during the Mubarak and Sadat era was inescapable. Under the two previous presidents, as I discussed in Chapter Three, high courts took every measure to ensure that their legality-upholding decisions caused minimal disruption to the regime. Now, during the transition window, the SCC (and the judiciary at large, as I show below) seemed indifferent to the disruption it caused to an already precarious political process.

The fundamental link between the two decisions was the drafting of a new constitution. The dissolution of the parliament removed the Islamists' legislative advantage, which they used to shape the composition of the Constituent Committee. The decision shifted weighty authority over the drafting of the new charter from the legislature to the executive. The annulment of the "political exclusion" law ensured that the Muslim Brotherhood candidate would face serious competition in the run-off round of the presidential election, which was days away. Ahmed Shafique, Mubarak's last prime minister, and who had continued to serve in that after former president stepped down, thereby remained on the presidential ballot.

The June 14 decisions constituted a "judicial coup," less because they engineered a direct, illegitimate takeover of government power, Brown seemed to suggest, but because they wrenched open a gaping "constitutional vacuum," aggravating uncertainty and suspicion among the transition window's already insecure political actors. He noted some of the key questions unleashed, unanswered, by the June 14 decisions: about the fate of the Constituent Committee (whose composition had just been legislated into law by the dissolved parliament); about who would hold legislative power until a new a parliament was seated; who would draft the election law for the new parliament; and whether SCAF (the Supreme Command of Armed Forces, which held executive and legislative powers since Mubarak stepped down) would reinstate the suspended 1971 constitution.

The centrality of the fight over the drafting of the new constitution in Egypt's transition politics cannot be overstated. Waheed Abdul Majeed, a scholar and politician in 2011-2013, described the nomination and composition of the Constituent Committee as

the “most intractable political crisis” that confronted Egyptians after the 2011 Revolution.<sup>88</sup> The bitter contests over the new constitution did not end with its ratification, in December 2012. The document itself, birthed in an environment of deep mutual suspicion and acrimony between the judiciary and executive, added to and justified some of the fears of the anti-Islamists camp. Among other things, it slightly changed the composition of the SCC bench, and reduced the court’s jurisdiction over a historically key area of influence: the “sharia article” (Article Two) in the constitution (I discuss this further, below). Rather than stabilize politics, the 2012 constitution further unsettled it. Not surprisingly, as soon as the Islamists were removed from power, in the July 2013 coup, the 2012 charter was suspended and replaced by a new one, in early 2014.

Given the centrality of the contestation over the drafting of a new charter, I use it as an organizing thread over the following sub-sections. Each instance I highlight below is a decision by one of my key players connected to constitution-making. This makes the discussion easier to follow and more concise, all while capturing the core dynamic of contention during Egypt’s transition window. Discussing the choices and reactions of each political player in an individual sub-section, I trace below the origins of June 14 “judicial coup,” and its ramifications.

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<sup>88</sup> Waheed Abdul Majeed so said this in the second part of his testimony about the politics surrounding the constituent assembly in Al-Shorouk newspaper, on June 21, 2012: <https://bityl.co/PGNN> (accessed online on April 8, 2024).

#### 4.2. the Judicial Support Network

By the JSN I mean the lawyers and human rights organizations that used public-interest litigation expressly to effect social or political change. I start with a glance at the history of Egypt's JSN.

The Egyptian JSN has its roots in the pioneering human rights organizations established in the mid-1980s by left-leaning lawyers, journalists and scholars (Shash 2017). But the significant turn to public-interest litigation both to publicize and change government conduct on human rights started in 1994, when a young human rights lawyer, Hisham Mubarak, founded the Center for Human Rights and Legal Aid (CHRLA) (Moustafa 2006; Shash 2017). Successes by CHRLA directed attention to courts as partners in the enterprise of political contestation through litigation. With that recognition, Nasser Ameen, a human rights lawyer, established in 1997 the Arab Center for Judicial Independence and Law (ACJIL). The Center elevated again the issue of judicial independence, created a “focal point” for regular interactions between judges and lawyers over how to use law to advance human rights, and regularly issued publications on these matters.<sup>89</sup>

Hisham Mubarak, the pioneering public-interest lawyer, died in 1998. Two of his colleagues created a new litigation-oriented human rights organization named after the late lawyer, the Hisham Mubarak Law Center. One of the co-founders, Khaled Ali, would become a key figure in the JSN (and the youngest presidential candidate) during the transition window. Ali gained national prominence in the 2000s as he filed petitions with Administrative Courts against some of the privatization program's deals that allegedly

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<sup>89</sup> An interview with me in Cairo on May 2, 2018.

involved corruption. The link between litigation, “judicial independence” and political change was a tenet of the Hisham Mubarak Law Center’s team. One of its first directors, Gasser Abdel Razeq, told an interviewer in 2017: “In Egypt, where you have a relatively independent judiciary, the only way to promote reform is to have legal battles all the time. It’s the only way that we can act as a force for change” (Shash 2017, 11).

Bringing courts into the political fray started immediately after Mubarak’s ouster, in February 2011. In April, two courts issued decisions removing the names of Mubarak and his wife from public squares, roads and government buildings.<sup>90</sup> And the First Circuit of the Supreme ministrative Court issued a ruling that disbanded the National Democratic Party (Mubarak’s party) and transferred its assets to government coffers.<sup>91</sup>

However, the first major episode of the JSN placing courts at the center of transition politics occurred a year later, in April 2012. It concerned the formation of the Constituent Committee that would draft the new constitution. On March 24, 2012, the first post-revolution parliament, which the Islamists dominated, announced the names of the Committee’s members, reserving for its own members 50 seats, out of 100. The parliament’s authority to name the Constituent Committee came from Article 60 of the March 30 Constitutional Declaration, issued by SCAF (Supreme Command of Armed Forces). The constitutional document was an abridged version of the 1971 constitution, which SCAF suspended as soon as Mubarak stepped down. Article 60 included hardly any criteria for how the parliament would choose the Constituent Committee – for instance, could parliamentarians serve on the Committee? And if yes, was there a ceiling on how

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<sup>90</sup> Al-Ahram, April 21, 2011: <https://bityl.co/PHQ4>, accessed April 10, 2024.

<sup>91</sup> Full text of the decision on Manshurat.org: <https://manshurat.org/node/72713>, accessed April 10, 2024.

many seats parliament members could take? The ambiguity made the document a “minefield,” as Waheed Abdul Majeed, the parliamentarian who participated in the deliberations over the formation of the Constituent Committee, described it. “It exploded polarization between the Islamists and other political currents ... and continues to poison political life,” Abdul Majeed wrote at the time.<sup>92</sup> Lawyers, including Khaled Ali, took the matter to the Administrative Court, arguing that the March 30 Constitutional Declaration authorized the parliament to name the Constituent Committee, not to populate it.<sup>93</sup> On April 10, 2012, the Administrative Court concurred.<sup>94</sup>

Though Abdul Majeed decried the Islamists’ relentless maneuvering to dominate the Constituent Committee, he believed that his and others’ mediation efforts brought the disparate factions in parliament closer to compromise. Then the Administrative Court’s decision “spelled the end for those efforts.”<sup>95</sup> Abdul Majeed noted that the secular camp in parliament took the Administrative Court’s decision as a victory, and became less amenable to compromise. He wrote at the time: “Although the ruling opened up a path [out of the crisis] to elect a new Constituent Committee, it led to higher demands by the political parties that had vetoed the earlier composition of the Committee, on March 24. [Dealing with those higher demands] required more mediation efforts, all in an

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<sup>92</sup> Part I of Abdul Majeed’s account on Al-Shorouq newspaper on June 20, 2012: <https://bityl.co/PHTM>, accessed April 10, 2024.

<sup>93</sup> Other prominent lawyers among the petitioners included Sameh Ashour (the former head of the Egyptian Bar and a former parliamentarian), and Gaber Nassar (a legal scholar, lawyer, and the future president of Cairo University).

<sup>94</sup> Full text of the decision on Manshurat.org: <https://manshurat.org/node/1003>, accessed April 10, 2024.

<sup>95</sup> Part I of Abdul Majeed’s account.

environment of uncertainty, and one lacking the slightest semblance of trust [between the Islamist and secular camps].”<sup>96</sup>

The parliament finally named the second Constituent Committee in early June 2012. The new Committee too was dominated by the Islamists, this time with loyalists from outside parliament. Days later, on June 14, the SCC issued the decisions that Brown described as a “judicial coup” – disbanding parliament and retaining Mubarak’s last prime minister on the president ballot.

After June 14, the fault-lines were unambiguous: lawyers and lawyer-politicians formed an unwritten pact with the courts to thwart the Islamists in parliament and later the presidency. When the new president, Mohamed Morsi, issued a “constitutional declaration” to reinstate the disbanded parliament, the SCC, unprompted, and later the Supreme Administrative Court (First Circuit) declared the action in violation of the law. Matters between the Islamists in power (first in parliament, then the presidency) and the judiciary were constantly deteriorating. Adding to the mutual distrust, a Supreme Court justice, Tahani El-Gebali, affirmed to a New York Times journalist, in early July 2012, that she helped draft SCAF’s “constitutional declarations” to undercut the electoral gains of the Islamists.<sup>97</sup>

Over the next five months, Khaled Ali and fellow members of the JSN continued to take all political matters, especially those connected to the drafting of the constitution,

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<sup>96</sup> Part II of Abdul Majeed’s account, on Al-Shorouq newspaper: <https://bitly.co/PGNN>, accessed April 10, 2024. The translation, from Arabic, is mine. Here is the original paragraph:

"وبالرغم من أن هذا الحكم فتح الطريق إلى إعادة انتخاب الجمعية، فإنه رفع سقف مطالب الأحزاب التي اعترضت على تشكيل هذه الجمعية في الانتخابات التي أجريت في 24 مارس على نحو استلزم المزيد من الجهود في أجواء مليئة بغيوم كثيفة وفي غياب حد أدنى من الثقة المتبادلة"

<sup>97</sup> In David Kirkpatrick’s article “Judge Helped Military Cement Power,” published on July 3, 2012: <https://bitly.co/PHb3>; accessed April 10, 2024.

to courts. Two lawyers filed a case against the new Committee with the First Circuit of the Supreme Administrative Court.<sup>98</sup> Others, including prominent human rights defenders and lawyers, filed a petition with an Administrative Court against a “constitutional declaration” by president Morsi shielding the Constituent Committee against judicial challenge.<sup>99</sup> When a draft constitution was completed, and as the referendum to ratify it was underway, Ali filed a petition with an Administrative Court against the constitutional referendum.<sup>100</sup>

I interviewed Khaled Ali at his office in Downtown Cairo on May 7, 2018. I asked him if constant resorting to courts during the transition window undermined other forms of political mobilization. “I’m not at all against political mobilization and debate. But it might not mount to more than talk,” he told me. “The judiciary is where action happens,” he added.<sup>101</sup> But given his and others’ share of frustrating outcomes in court, why was he persistent in making courts central players in the transition? He answered:

Taking matters to court, as in the case of the first Constituent Committee, was because it appeared that the state [meaning: SCAF] struck a deal with the Muslim Brotherhood, the best organized political group at the time. The judiciary was our only option to improve the terms of bargaining [with the Islamists]; we wanted to show that we were not weak. When you are marginalized as a political group, you must do what you can to stay in the arena. That was especially important because we believed we were in a foundational, and not transitional, phase.

Another prominent human rights lawyer, Negad Al-Borai, was more critical of the judicialization of transition politics. “It was a trend; all matters were ending up in courts and we [the secular camp] were getting favorable decisions. Things were moving very fast

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<sup>98</sup> The head of the First Circuit, Magdi Al-Agatti, was a judge who had been on a continuous “secondment” assignment at one of the country’s security services, in 1992, and after 2013 he would serve as the minister of parliamentary affairs and later as the acting justice minister.

<sup>99</sup> The text of the Constitutional Declaration on Manshurat.org: <https://manshurat.org/node/4262>; the Court’s decision on the petition: <https://manshurat.org/node/1014>; accessed April 10, 2024.

<sup>100</sup> Al-Ahram newspaper, December 16, 2012: <https://bitly.co/PHd6>; accessed April 10, 2024.

<sup>101</sup> In Arabic: "القضاء يظل رمانة الميزان"

[during the 2011-13 period]. We did not pause to engage with the old regime. But making courts central actors [in transition politics] was a mistake,” he told me in an interview in Cairo on May 8, 2018. “We were political adolescents in the way we kept resorting to courts. The SCC decisions ended up straightjacketing the political process. We had gotten accustomed to a certain way of doing things [with regards to using courts] during Mubarak’s reign and then we continued along the same path [after Mubarak’s ouster],” he added.

To summarize this sub-section: once the transition window arrived at the all-important constitution-drafting phase, the JSN turned politics into a constant shuttle between courts. Part of the rationale was the (justified) suspicion that the Islamists were bent on dominating the constitution-drafting process. But the relentless phrasing of political questions into the idiom of the law, and the consequent placement of courts at the center of the political process, deepened mutual distrust between the Islamist and the secular camps. To forestall defeats in courts (which were increasingly indiscreet in their antipathy toward the Islamists), the Islamist took measures to shield or inoculate their authority, aggravating their rivals’ distrust. In the next sub-section, I turn to the courts.

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#### 4.3. The Courts

As soon as Mubarak stepped down, SCAF (which held the executive and legislative powers) granted courts and judges significant authority over transition politics. Three road-map constitutional documents by SCAF, two in March 2011 and one on June 17, 2012, all issued by SCAF, introduced unprecedented competencies to courts and judges. One was a

new “presidential election” committee headed by the SCC chief justice<sup>102</sup> and populated by senior judges from the Cassation, Administrative and Appeals courts. These documents also made SCC, and later the Cassation Court, the final arbiter on parliamentary membership disputes, a departure from the Mubarak era, when the Cassation Court’s decisions on such disputes were only advisory. And in June 17, 2012, after the dissolution of the Islamist-dominated parliament, SCAF issued a new “constitutional declaration” which endowed the SCC with the authority over the Constituent Committee (Article 60-2).<sup>103</sup>

This significant redistribution of government authority in the judiciary’s favor was an instance of supply-side judicialization from the outset of the transition window, authorized by a holdover from the old regime. SCAF’s actions seem congruent with Hirschl’s “hegemonic preservation” thesis. The political faction threatened by, and uncertain about, electoral politics transferred authority to courts. But this is as far as the explanatory power of the thesis would go. For one thing, Hirschl drew mostly on democratic regimes, where the transfer of power from one government to the next largely has no consequence for the authority or reputation of the judiciary. In these circumstances, it is reasonable to assume that courts may strive to stabilize rules and decrease political uncertainty. In contrast, when courts (especially apex courts) endure through regime change after authoritarian collapse, they may not possess the authority to stabilize rules.

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<sup>102</sup> Farouq Sultan, the chief justice at the time, had spent considerable portions of his career on secondment assignment at “state security” tribunals. See also the New York Times, April 19, 2012: <https://bitly.co/PKa2>, accessed April 13, 2024.

<sup>103</sup> Full text of the March 30, 2011 Constitutional Declaration on Manshurat.org: <https://manshurat.org/node/3169>; and of the June 17, 2012 Constitutional Declaration: <https://manshurat.org/node/3567>, accessed April 10, 2024. For a discussion of the March 19, 2011 constitutional amendment and referendum, see Nathan Brown and Michelle Dunne: <https://bitly.co/PHmC>, accessed April 10, 2024.

They would be tainted or “delegitimized” by their association with the old regime, as the former Argentine president observed in this chapter’s opening paragraphs. One immediate puzzle of Egypt’s transition window is, therefore: Why were not Egypt’s courts “delegitimized” by their association with the Mubarak regime? Why did the other political actors acquiesce to the vast authority of courts and judges on the political process?

The answer lies, at least partly, in legal culture, which extended a powerful influence on the imagination of many political actors. Legal culture served as a deep well of demand-side judicialization. One aspect of the legal culture was the view among many in the political class that a) judicial “independence” was a desirable quality (without any qualification), and b) that decisions by courts, especially apex courts, during Mubarak’s reign that ensured the legality of state actions were evidence of “independence” or even “activism.” Another aspect was the memory of the 1969 “massacre of the judiciary” (which I discussed in Chapters Two & Three). Even though nearly all the judges fired in 1969 were reinstated by 1974, and the institutional legacy of the 1969 was wholly reversed by 1984, the “massacre” remained a powerful myth-making moment for the judiciary. Valiant judges stood up to the autocratic Nasser, and outlasted him, the story went. Very often over the four decades following Nasser’s death, any action against judges or courts would prompt warnings of another “massacre.” During the 2011-2013 period, even judges who had been wholeheartedly pro-Mubarak when he was in power (such Moqbil Shaker and Ahmed Al-Zind) invoked the “massacre” whenever Morsi attempted to contain the reach of a judiciary that was openly hostile toward him and his political faction. The “massacre of the judiciary” a designation which by then everyone used and not just the judges, became

a piece of political hot iron with which the judiciary’s political rivals – the Islamists – were constantly branded and delegitimized.

Both these factors – notions of judicial independence, and a mythological reading of the 1968-1969 altercation between Nasser and the judiciary – were evident in the decisions and views of political actors across the political spectrum in 2011-2013. For example, when Morsi issued a “constitutional declaration” in November 2012 which, among other things, shielded the Constituent Committee against judicial challenge, 23 human rights groups responded with a scathing statement.<sup>104</sup> The signatories said that through the “constitutional declaration,” Morsi “declared his private war against the judicial branch, ... launching a new massacre of the judiciary.” Morsi’s measure “dealt a fatal blow judicial independence ... and [practically] suspended the statutes of the Supreme Constitutional Court and the judicial authority at large.”

After Morsi’s November 2012 “constitutional declaration,” which aimed chiefly to ensure the Islamists’ control over the constitution-drafting process, politics became more toxic. Violence erupted around the presidential palace. The Cassation and Appeals courts suspended their work in protest.<sup>105</sup> The Judges Club denounced it (and later announced it would not permit its members to supervise the polling stations for the constitutional referendum).<sup>106</sup> A new political coalition, the Salvation Front, emerged. It supported the judiciary and denounced Morsi. Some judges in Morsi’s cabinet resigned in protest, including his vice president.<sup>107</sup> When the SCC appeared to disregard Morsi’s Declaration

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<sup>104</sup> Full text of the statement on Manshurat.org: <https://manshurat.org/node/1681>, accessed April 11, 2024.

<sup>105</sup> BBC (Arabic): <https://bityl.co/PIvL>, accessed April 11, 2024.

<sup>106</sup> Al-Hurra: <https://bityl.co/PIvU>, accessed April 11, 2024.

<sup>107</sup> BBC: <https://bityl.co/PIvI>, accessed April 11, 2024.

and proceeded to review the second iteration of the Constituent Committee, supporters of the president besieged the court's building to block the justices from entering it. The SCC, breaching a longstanding norm, issued a blistering denunciation of its political rivals, the Islamists, but without directly naming them. It described December 2, 2012 as "one of the darkest in the history of Egypt's judiciary across the ages." "The SCC has no option but to announce to the great people of Egypt that it could no longer undertake its *holy [or sacred] mission* in this environment of resentment, vengeance and unwarranted hostility [from the Islamists]. It was therefore suspending its sessions ... until the time when its justices were no longer under psychological and financial pressures," the statement read.<sup>108</sup> [My emphasis.]

Remarkable about the SCC's, and broadly the judiciary's, interventionist stance during transition window was that it stood on a thin constitutional text: the abridged, 60-article-long version of the 1971 constitution, issued on March 30, 2011. Given the "constitutional rupture" (N. J. Brown and Waller 2016) after Mubarak's ouster, could such an interim, limited-purpose constitutional document give grounds for such an oversized role? Indeed, commentators at the time and later talked openly of a constitutional vacuum between February 2011 and the ratification of a constitution in December 2012.

I posed this question about the thin constitutional basis and the oversized, interventionist posture of courts, especially apex courts, to three SCC justices, all of whom were co-authors of the SCC's June 14 ("judicial coup") decisions.<sup>109</sup> Two justices, Justice

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<sup>108</sup> Full text on Manshurat.org: <https://manshurat.org/node/12769>, accessed April 11, 2024.

<sup>109</sup> Of the three SCC justices, one preferred not to be named, and I interviewed him at his office in the SCC building twice, on November 19, 2017 and April 3, 2018. I will call him Justice M. The other two are Tahani El-Gebali, at her law office in Downtown Cairo, on April 14, 2018 (by then she was a former

M and El-Gebali, rejected the premise of the question, adamantly asserting that at no point during the 2011-2013 was there “constitutional vacuum” (and El-Gebali went further and described the phrase as “Muslim Brotherhood propaganda”). But they offered different bases for the legitimacy of the SCC’s interventionist decisions. Justice M and Salmaan used a technical argument: as long as the SCC decisions were robustly reasoned and clearly connected to a constitutional text, there was no basis for “constitutional vacuum” talk. El-Gebali used a natural-law argument.<sup>110</sup> She said:

Certain constitutional principles remain in force, even after revolutions. The regime can change but the principles of connected to rights and freedoms never fall by the wayside. Therefore, there was no constitutional vacuum. It the was the Muslim Brotherhood who first breached the legitimacy of their own authority when they issued the constitutional declaration of July 8 [2012] that canceled [SCAF’s June 17 Constitutional Declaration] upon which Morsi delivered his oath to become president. Egypt can never fall into a constitutional vacuum because it has well-established constitutional documents, such as the *siyasatnameh* since Mehmet Ali’s reign [in the first half o the 1800s].<sup>111</sup>

When asked whether judicial rulings may have disrupted transition politics, El-Gebali made two points. One was that it was the judiciary’s role to “safeguard the foundations of the state,”<sup>112</sup> which the Islamists were bent on “destroying.” The other was that the two most controversial rulings were in line with the SCC’s previous jurisprudence from the 1980s and 1990s. The two other justices also underscored this point. (Though that was

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justice), and Abdoul Aziz Salmaan, to whom I posed questions in a public seminar held by the Law & Society Research Unit of the American University in Cairo, on November 24, 2019.

<sup>110</sup> As I noted in Chapter Two, natural-law arguments for judicial review, by French scholars like Duguit and later the Egyptian scholar Sayyid Sabri, loom large in the education of Egyptian lawyers and judges. See for instance Abdul Aziz Salmaan’s doctoral dissertation, published as a book: (Salmaan 1995).

<sup>111</sup> The Arabic original:

"ثمة مبادئ دستورية لا تسقط حتى بالثورات. ممكن نظام السلطة يتغير (نظام الحكم) إنما المبادئ الخاصة بالحقوق والحريات لا تسقط. ومن ثم لم يكن هناك فراغ دستوري، إنما الأخوان كانوا أول من انتهك شرعية السلطة بإصدار الإعلان الدستوري في ٨ يوليو والذي كان يلغي الإعلان الدستوري (من المجلس العسكري) الذي أقسم مرسي على أساسه اليمين الدستوري لدى توليه الرئاسة. ثم ليس ممكناً أن يحدث أبداً في مصر فراغ دستوري لأن في مصر وثائق دستورية مستقرة – من أيام "السياسة نامة" على عهد محمد علي."

<sup>112</sup> In Arabic: "حماية مقومات الدولة"

technically correct, it was not entirely so. In the 2012 election annulment decision, the SCC, notoriously conservative on matters of legal standing and painstaking in ensuring engagement only with the matters raised by petitioners, went far beyond what the petitioner had requested. He later asserted that he never challenged the constitutionality of the election law as a whole, issued a public apology for taking the case the SCC in the first place, and sued the court.)<sup>113</sup>

To summarize this sub-section, three factors led to the elevated interventionism of courts into Egypt's transition windows: the JSN's patterns of conduct from the Mubarak era, and their desire to loosen the Islamists' control over the constitution-drafting process; the authorization of courts to dominate the political process (by SCAF); and the fact that the courts had been embedded into the old autocratic regime (as I discussed in Chapter Three). Especially after the November 22, 2012, courts and judges – the SCC, the Administrative Courts, the Cassation Court, the Appeals Court, the Judges Club and the JSN – unified in denouncing and hampering the executive's attempts to contain the highly disruptive judiciary. The judicialization of Egypt's transition politics, through constant litigation and judicial intervention, exacerbated uncertainty and pushed all the parties for maximalist positions that made democratization, which requires accommodation and compromise, less likely.

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#### 4.4. The New Electoral Elite

The Muslim Brotherhood (MB), the most prominent and best organized of the Islamist factions, was allowed to engage in electoral politics under Mubarak. In the 2005

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<sup>113</sup> Al-Yom Al-Sabi, June 20, 2012: <https://bityl.co/PJgu>, accessed April 12, 2024.

parliamentary election, which was fairer than the previous one, but still with widely publicized irregularities, the MB (whose members ran as independents) acquired about a fifth of the legislature's seats. After Mubarak stepped down, the MB and other Islamists judged (correctly, it would turn out) that they would prevail in electoral contests. They thus supported a democratic-transition sequence in which parliamentary elections preceded constitution writing. Other revolutionary groups supported a "constitution-first" roadmap, and worried that the Islamists planned to use their electoral advantage to control the constitution-drafting process. That was the beginning of a split among the revolutionary coalition that helped topple Mubarak. The popular referendum that ratified the elections-first sequence, on March 19, 2011, was acrimonious and polarizing. The "yes" camp used explicitly religious language and rationale in rallying support for the proposed roadmap.

This was one of the opening acts launching the uncertainty-continuum forces that would shape Egypt's transition window. The Islamists' eagerness to write the new rules immediately alarmed their partners in the revolutionary camp. The alarm was vindicated when new Islamist-dominated parliament reserved for itself 50 per cent of the Constituent Committee. Judicial challenge to the Islamists' authority thus commenced (as I discussed in sub-section 4.2) and the first iteration of the Committee was voided in April 2012. The big reaction from the courts came on June 14, when the SCC (and later the Supreme Administrative Court) would reassert their authority over transition politics and arrest the Islamists' electoral advance.

That does not mean the Islamists were oblivious to the widely accepted authority of courts and judges. Early on, they sought both to combat judicial animosity and exploit the judicial aura to their advantage by attempting to recruit a judge as their presidential

candidate.<sup>114</sup> This shows that the Islamists, like other political actors, had accepted notions of “independence” and “activism” of courts under Mubarak and the consequent credibility for courts during the transition window.

The tit-for-tat, between courts and the JSN on one side and the Islamist-dominated parliament or executive on the other, was the transition window’s primary pattern. Each new hostile judicial decision made the MB more eager to control rule-making and weaken the judiciary, which in turn deepened suspicion and distrust toward the Islamists. Looking back, one finds it remarkable that the Islamists in power often responded to the actions of their political rivals by doing more of what alienated those rivals in the first place. Morsi’s November 2012 deeply divisive “constitutional declaration” (which shielded several controversial and consequential rule-making questions against judicial challenge) was emblematic of this mindset. But it was not the only one. The MB or their Islamist allies floated ideas about changing the judicial-authority law so as to reduce retirement age, which opponents reckoned to be a measure to remove the senior judges that the Islamists did not like. The Islamists also drafted into the 2012 constitution two provisions that guaranteed further alienation of the SCC and the judiciary at large. One would reduce the number of SCC justices from 12 to 11, effectively removing Tahani El-Gebali, the Islamists’ vociferous critic, from the bench. The other gave Al-Azhar, the storied institution of Sunni Islam (Article Four), and other vaguely defined “schools of Islamic jurisprudence” (Article 219) significant authority over the *sharia* article in the constitution,

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<sup>114</sup> Among those approached with this offer were Tariq Al-Bishri (former deputy of the State Council and the head of the committee that drafted the March 19 constitutional amendments), Hossam Al-Ghiriyani (later the head of the Constituent Committee), and Ahmed Makki, later Morsi’s justice minister. This was confirmed to me by Ahmed Makki (May 15, 2018), Al-Bishri (May 21, 2018), and the senior administrative court judge (October 10, 2017).

Article Two. Since 1985, the SCC had developed jurisprudence on and drew authority from having the last word on Article Two litigation.<sup>115</sup>

The constant attacks and reprisals between the MB president and the judiciary consumed the former. A senior administrative court judge who served as a legal adviser to Morsi told me that “the SCC hampered every action the president took. The president was always consumed by managing crises rather than enacting the vision of a government that reached power after a popular revolution.”<sup>116</sup> Another Morsi administration official, who described the constant invocation of courts in transition politics as a “folly by everyone,” nonetheless accepted the rationale for the judicialization of politics. Ahmed Makki, Morsi’s justice minister and formerly a prominent member of the “Independence Current” in the Judges Club, told me that “no one could stand up to the modern state unless he is supported by political, professional or ethnic groups. The only way to stand up to the state without any of those is through courts.”<sup>117</sup>

After the November 2012 “constitutional declaration” and then the bitterly contested constitution of 2012, conciliatory politics was no longer possible. A youth group (which, it later transpired, was funded by, among others, the security services) circulated a petition to demand early presidential elections. Politicians secretly contacted foreign

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<sup>115</sup> Justice M, in the April 3 interview, was especially agitated when he discussed the changes related to Article Two in the 2012 constitution: “They [the Muslim Brotherhood] had arrived to power with certain notions about sharia [Islamic law], and introduced the bizarre change in the 2012 [connected to Article 2] in Article 219, which implicated the different schools of Islamic jurisprudence [into Article Two interpretation], even though the SCC had developed settled jurisprudence about sharia. They [the Islamists/the Muslim Brotherhood] clearly intended to place the court under their control.” The Arabic original follows:

"هما كانوا جايين بتصور عن الشريعة، وعملوا التعديل الغريب في دستور ٢٠١٢، المادة ٢١٩ وأدخلوا موضوع المدارس الفقهية. مع العلم أن قضاء المحكمة كان له فقه مستقر حول الشريعة وتفسيرات تطبيق الشريعة. ومن ثم كان هناك رغبة في السيطرة على المحكمة."

<sup>116</sup> Interview in Cairo on October 10, 2017.

<sup>117</sup> May 15 interview.

diplomats about removing Morsi, who “bungled the country’s transition to an inclusive democracy.”<sup>118</sup> In a rally at the Cairo Stadium in support of the Syrian revolution, in mid-June 2013, one of president Morsi’s Islamist allies described the secular opposition, in the president’s presence, as “hypocrites and infidels.”<sup>119</sup> On June 24, 2013, in a nearly unprecedented breakdown of law and order, the residents of a village in Giza lynched four Shia Egyptians, one of whom was a leader of the Egyptian Shia community. Many immediately linked the tragedy to the incendiary rhetoric by some of the president’s allies. The same person who called the opposition “hypocrites and infidels” days earlier had also insulted Shia Muslims.<sup>120</sup>

On July 3, 2013, a coup d’état, which broad sections of society supported, removed president Morsi from office. Highly interventionist for two and a half years, the courts immediately fell silent (N. J. Brown and Waller 2016).

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##### 5. Conclusion: Structure, Agency, Political Elites and Democratization

In some of the influential works on courts in new democracies and in transition periods, courts are depicted as guarantors and stabilizers of rules, and thereby mitigators of the uncertainty concomitant with political change. I countered that judicialization and courts could aggravate the forces of uncertainty, and decrease the odds of democratization, especially when three conditions hold a) a legal culture that normalizes the phrasing of political questions into the idiom of the law and rushing them to courts; b) courts that had been embedded into the old (autocratic) regime; and c) a new electoral elite bent on

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<sup>118</sup> New York Times, July 4, 2013: <https://bitly.co/PJoP>, accessed April 12, 2024.

<sup>119</sup> Al-Arabiya, June 16, 2013: <https://bitly.co/PJoW>, accessed April 12, 2024.

<sup>120</sup> France24, June 24, 2013: <https://bitly.co/PJol>, accessed April 12, 2024.

obliterating old-regime arrangements. I argued that judicialized politics under the old regime is a strong predictor of judicialized transition politics. This chapter, like the previous one, underscores how the agency of the political actors interacts with the structural forces creating or perpetuating political uncertainty. In Chapter Three, the new autocrat dealt with the judiciary-induced uncertainty (a judiciary he inherited rather than created) by attempting either to integrate or “isolate and sever” the courts. In Chapter Four, the JSN and new members of the non-Islamist electoral elite resorted to courts to counter the forces of what I called the uncertainty continuum (the uncertainty emanating from the sudden expansion of political possibilities, rule-formulation and momentousness).

The argument, and the empirical section about Egypt (Section 4), re-elevate an insight from the scholarship on democratization: the connection between old-regime institutions and the outcomes of the transition. Writing about “modes of transition and democratization,” Munck and Leff underscored a “key variable” in determining the trajectories of transitions: “whether a transition is carried out by elites within the established structure of power, by counter-elites who challenge incumbent elites, or by some combination of the two” (1997, 344). But the distribution of authority between the “elites within” – the embedded elites – and the counter-elites is not symmetrical. Linz and Stepan observed that

regime-controlled transfers [of power] can be placed along a continuum ranging from democratically disloyal to loyal. A democratically disloyal transfer is one in which ... the outgoing regime attempts to put strong constraints on the incoming, democratically elected government by placing supporters of the nondemocratic regime in key state positions and by successfully insisting on the retention of many nondemocratic features in the new political system (1996, 72)

In light of this pair of insights, Egypt's transition politics can be cast as a contest among three factions of the political elite: two embedded into the old regime (the judiciary and the JSN), and one counter-elite faction, the Islamists, especially the Muslim Brotherhood, who rose on a wave of electoral victories. (The JSN was embedded into the old regime institutionally, if not always intellectually.) But though it was "regime-controlled," the Egyptian transition presents a twist on Linz and Stepan's scenario. First, there was no inevitability that the players had to comply with such control. Second, it was not only the old-regime's supporters who facilitated the "retention of non-democratic features," but also a political faction that saw itself and was seen as revolutionary: the judicial support network. By instantly and constantly bringing courts to the center of politics, the JSN imported a power-redistribution dynamic from the authoritarian era into transition politics. Under the authoritarian regime, litigation (and courts' upholding of their legality commitments) decreased the authority of the executive. That made the authoritarian regime less capricious, more predictable. During the transition window, litigation and court-mediated politics decreased the authority of elected officials, subjected their decisions to the added uncertainty of the always-looming judicial challenge, and pushed politics onto a path of maximalist measures by both the embedded elite factions and the counter-elite faction.

So while the structural aspects of the transition window (rule-formulation, political uncertainty and momentousness, or, collectively, the uncertainty continuum) certainly influenced the calculations of the three main players, it was how each expressed its political agency that bore more heavily on the outcome of the transition. The Islamists, apparently dizzied by electoral victories, insisted on an exclusive approach to constitution-writing.

The courts, immediately alarmed by the Islamists' political rise after Mubarak's ouster, used their aura of independence and "activism" from the Mubarak era to lay siege around the new incumbents. The JSN made political contestation outside courts nearly impossible.

The conduct of the JSN raises a larger point, a point that is a core concern of this dissertation: How the judicialization of politics can yield diametrically different outcomes; how the same "repertoires of action" of the JSN (in collaboration with courts) can open up political paths in one political environment and kill them off in another. To be clear, this chapter has *not* argued that judicialization dooms democratization. Rather, it engaged with the question: Under what conditions may judicialization doom democratization? And I showed that during Egypt's transition window, non-textual sources of law constantly recast, expanded, shrank or upended the text of the law. The sources included the legal culture (such as the tradition of "resolving political questions into legal ones"), legal professional development (the authority society conferred upon lawyers and judges), syntheses of the community's histories (e.g., on notions of judicial "independence," "activism" and "the massacre of the judiciary"). These "inherited legal meanings shape[d] the very terms of citizen understanding, aspiration, and interaction with others" (McCann 1991, 227). Indeed, the inheritors were not just the lawyers and the judges, but also the Islamist politicians (evident, among other things, in their seeking to recruit a judge as their presidential candidate), the secular politicians, and the citizenry at large. Consider, for instance, this photo, from May 2006, in which a man held a banner reading: "A Free [or Independent] Judiciary = A Free Nation."<sup>121</sup>

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<sup>121</sup> Source: Baheyya, an influential Egyptian blogger, May 17, 2006: <https://bityl.co/PKM4>, accessed April 13, 2024.



The banner also carries the insignia of the “Kifaya” (Enough!) movement, a broad coalition of groups that opposed the succession of power from Mubarak to his son, Gamal. The years 2005 and 2006 saw the intermingling of agitation by a section of the Judges Club to rewrite the judicial authority law and broader political anti-authoritarian agitation as Mubarak seemed to groom his son for the presidency. Writers, scholars and opposition politicians endorsed “judicial independence” as the country’s chief rallying cause.<sup>122</sup> These imprints on the consciousness of the citizenry lingered through the transition period.

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<sup>122</sup> See, instance, Bahyya’s blog post entitled “Are Judges Heroes?” (And the answer was in the affirmative, if with some mild qualification), published May 18, 2006: <https://bityl.co/PKMn>, accessed April 12, 2024.



(March 17, 2006, AP)<sup>123</sup>

In part, democratization failed, one could argue, as the citizenry, including the lawyers and judges and new electoral elite, Islamist and non-Islamist alike, all struggled and failed on two fronts: to deal with the forces of uncertainty during the transition, and to synthesize or at least reconcile potent political understandings and sentiments – on judicial “independence,” on pluralistic politics, and on who held authority to write the rules of the game.

In the next chapter, I turn away from Egypt to briefly examine and qualify my claims about judicialization, judicial embeddedness, transition windows and democratization in other countries: Hungary, Pakistan and Chile.

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<sup>123</sup> Via Baheyya blog, <https://bitly.co/PKMz>, accessed April 13, 2024.

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## Chapter Five

### Courts of Transition: Variations and Qualifications

#### 1. Illustrating Institutional Pathways

I present in this chapter, through very brief accounts of secondary cases, syntheses and variations of the argument in Chapter Two and the institutional pathways in Chapters Three and Four. I intend to advance two goals in this chapter. The first is to illustrate the explanatory force of these processes and institutional pathways beyond the study's primary case. The second is to articulate a more general statement about courts, judicial autonomy, judicial agency and democratic transition. It is a statement about how these influences, in interaction, may hinder democratization or prolong authoritarian rule, one that could not be derived from the analysis of the Egypt case alone. In the chapter's concluding paragraphs I comment on democratization's narrow path.

The propositions that the previous chapters advanced are as follows.

*Chapter Two:* The power of judges and courts does not emanate from their formal, codified competencies alone. It also arises, perhaps in equal measure, from informal institutions (Helmke and Levitsky 2004) and the "inherited legal meanings" (McCann 1991, 227) in a given political community. Such meanings are preserved and animated within the political community's "normative order," which "guides praxis, guides what we do, and ... is ... practical in the sense of practicable" (MacCormick 1997, 1054). During periods of uncertainty, the (formal, scripted) rules are contested or vulnerable. Individuals and groups plug the deficit in formal rules, or counter the new ones being proposed, by projecting outwards collective (though not uniform), longstanding understandings of how they *should* act in analogous situations; how and when, among other

things, they should call upon courts to adjudicate conflict. I elaborated in Chapter Two four sources of judicial power in a manner that paid heed to both their codified as well as their meaning-making dimensions. We will see in this chapter that norms guide actions not just generatively, but also by the negation of alternative actions and cognitions. Mahoney distinguishes self-reinforcing institutional sequences and reactive consequences. In that latter, initial events trigger subsequent development, not by reproducing a given pattern, but by setting in motion a chain of tightly linked reactions and counterreactions,” as quoted in Katznelson (2003, 291 footnote) In 1991-1993 Russia, for instance, the actions of the country’s chief justice appear to have been guided not by a tradition of judicial intervention into politics, but by the desire (and the emerging norm) of breaking with the Soviet past, a past of deferential or bystander courts.

*Chapter Three:* Autocratic regimes vary in the extent to which they integrate, or embed, courts and judges into the regime’s political elite. An autocratic regime with a more integrated judiciary is more likely to maintain a larger “rule of law” space, where courts and judges are able to enact their commitment to state legality. In such a regime, courts will simultaneously appear “activist,” safeguard the regime’s foundational interests, and take every measure to ensure that its legality-upholding decisions come with as little disruption to government functions as possible. In this chapter (Chapter Five), I demonstrate how variation in judicial embeddedness can influence judicial conduct during periods of heightened political uncertainty – with Pakistan demonstrating less judicial embeddedness and Turkey showing more. In neither country, as the discussion below shows, did judicial intervention help stabilize politics during periods of heightened political uncertainty. This runs counter to arguments in some influential works in the comparative

judicial politics scholarship about courts as enforcers and stabilizers of rules and, thereby, as facilitators of democratic politics.

*Chapter Four:* When an autocratic regime wobbles or collapses, the (old) regime's judiciary is not foreordained to go the way of the autocrat. It may instead see its influence grow if it is perceived to have been "activist" or "autonomous" under the weakened or ousted autocrat. Chapter Four further proposed that a) the judicialization of autocratic politics (that is, the designation of and resort to courts as a chief site for mediating political conflicts) anticipates and lays the institutional groundwork for the judicialization of transition politics; and b) the judicialization of transition or interregnum politics aggravates the period's political *uncertainty continuum*, rendering basic compromise among the core political groups less likely and democratization a remoter prospect. The Russia and Hungary cases illustrate a central proposition in Chapter Four: the supply-side sources of the judicialization of transition politics, especially when new apex courts are created as part of the transition bargain. That is in contrast to many comparative judicial politics works that focus on the demand side of judicialization; namely, how the incumbents in the legislature or the executive may activate or "empower" courts.

The remainder of the chapter proceeds as follows. In the following section (Section 2), I explain the rationale for the paired comparisons, first Turkey and Pakistan, then Russian and Hungary. Section 3 presents a discussion of the embeddedness process, and Section 4 takes up the paired comparison of Russia and Hungary to illustrate the process and institutional pathways of judicialized transition politics. In the fifth and

concluding section, I offer a brief comment on how judicial power may tempt abuse from, and may be made more politics-destabilizing by, big-personality chief justices.

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## 2. The Logic Behind the Selection of Secondary Cases

The cases in this chapter are of highly interventionist courts during periods of heightened political uncertainty. In other words, all of them exhibit a high degree of judicialization of transition politics. By judicialization I mean instances when courts step forward or are called upon to adjudicate political questions. The analysis below follows the different sources and consequences of judicialized transition politics, and how judicialization boosts or diminishes the odds of democratization.

The cases are divided into two pairs. One pair displays variation in the extent of judicial embeddedness into the autocratic regime (Pakistan and Turkey). The other pair shows variation in how judicialization can impact democratization (Russia and Hungary). Common features in each pair – in terms of historical experience and political development – justify the comparison. In one pairing, that of Pakistan and Turkey, the two countries experienced several coups d'état, at nearly regular intervals and in proximate periods, in the second half of the twentieth century. In the other pairing, the two countries were part of the Soviet universe, and for both the collapse of the Berlin Wall served as the closest thing imaginable to a clean-slate moment in setting up new political institutions. But even in these countries, as I show below, old-regime institutional legacies helped judicialize

transition politics. The construction of these pairings is far from novel. The countries I place in paired comparisons have been paired together before.<sup>124</sup>

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### 3. Pakistan and Turkey: Variations of Judicial Embeddedness

In Chapter Three I defined judicial embeddedness into the autocratic regime as a variation of elite integration. I distinguished between “fragmentary” and “integrative” autocrats in terms of their stances toward the judiciaries they inherit. Both view judicial power as a source of unpredictability in the regime that diminishes their control. But they vary in how they react to the unpredictability. Fragmentary autocrats reduce the authority of courts, transferring broad swathes of disputes to exceptional and hybrid tribunals (all with no or diluted due-process protections) or to administrative agencies under their control. In essence, the executive in a fragmentary autocratic regime swallows up judicial power. In integrative autocratic regimes, the executive realizes, or has witnessed persuasive evidence, that appropriating judicial power may banish courts-posed uncertainty in the present, but would probably aggravate it in the future. Repressed, marginalized courts may seize upon moments of regime weakness, potentially turning crises into threats to regime survival. In Chapter Three, I presented as an example for this dynamic the Egyptian judiciary’s lunge against the Nasser regime after the 1967 military defeat. In this chapter, the actions of the Supreme Court of Pakistan (SCP) in 2006-2007, under chief justice Iftikhar Chaudhury, illustrate this point.

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<sup>124</sup> Instances of the Pakistan-Turkey pairing include Yilmaz (2019), Saleem (2017) and Akturk (2015). For the Russia-Hungary pairing, examples include Scheppele (2006), Pickvance (1997, 1998) and Priszniuk & Sokhey (2023)

Integrative autocrats, by contrast, take a longer view of how to attain regime durability. They do so by endeavoring to integrate judges and courts, as a faction of the political elite, into the autocratic regime, partly by recognizing courts as the holders of judicial power, and by creating cross-cutting agencies and posts that socialize judges into the ways and worldviews of the executive. I described this process, in Chapter Three, as one of mutual learning between the executive and the judiciary, mutual trust-building, mutual recognition of largely unfettered freedom of action in certain domains of public policy, and, over time, mutual internalization of commitments.

By the logic of this argument, one would *not* expect to find successful, sustained judicial embeddedness in polities beset by frequent military coups. Mutual trust between the executive and the judiciary is harder to attain when the military captures the executive branch every decade or two. And yet, I file Turkey under the higher-embeddedness category, for reasons which I discuss below.

A brief comparison between the coups in the two countries is illuminating – Turkey’s in 1960, 1971, 1980 and 1997; and Pakistan’s in 1954, 1958, 1977 and 1999. I discuss Turkey first.

In their impact on courts, the Turkish coups were, in several respects, distinct from their analogues elsewhere. First, in nearly each of the Turkish coups – save for that of 1980 – the exceptional measures accompanying the coup were softened or reversed in a relatively short span of time. For instance, the exceptional (“state security”) tribunals created in 1973 were canceled in 1976, in response to a Constitutional Court decision (Yilmaz 2019, 728). And though the coup leaders of 1971 introduced constitutional amendments that restricted the jurisdiction of the Constitutional Court, the court continued

to rule against the government in rights-related cases, using unprovocative, procedural grounds (Belge 2006, 672). Even the bloodiest of the four coups, that of 1980, restored elections three years later and, by 1987 a genuinely free and fair poll was held. Second, while each of the coups entailed purges in the bureaucracy and among judges, courts were largely unaffected by the coups. Nor were the courts forced (as in Pakistan) to certify the legitimacy of military take-overs at the proverbial gunpoint. Indeed, even in the aftermath of coups, as in 1970s, the Turkish Constitutional Court (TCC) was able to rule against the government and face no repercussions for its institutional autonomy. The only time the TCC appeared to legitimize a coup was in 1998 when it issued a decision disbanding the (Islamist) Welfare Party, which was in power in 1997, “because of its actions against the principles of the secular republic,” the court said (Morris 1998). The “constitutionalization of military emergency power” (Yilmaz 2019, 715) after the 1980 coup and the 1982 constitution allowed courts simultaneously to uphold legality of state actions and sustain their commitment to state secularism. So even as courts remained steadfast (that is, statist and hostile) on Kurdish and Islamist questions, their jurisprudence appeared to converge with European human rights jurisprudence on other matters, such as social and gender rights (Öden and Esen 2016). Yilmaz so explained how courts achieved these two objectives:

The legal history of Turkey reveals how and why its legal and political tradition depends on the integration of the concept of the executive prerogative principle into the normal functioning of the legal and political system to enable politicians, security personnel and judicial decision-makers to suppress any threats to the construction of the nation-state, nation building (Turkification of the population), and their distortion or controlling of the field of representation (presenting the army, one party or nationalist movements as the true embodiment of the nation and delegitimizing the opposition as an internal extension of the enemy).

Now contrast this with the Pakistan coups. First, return to elections after coups was far from the norm. Former generals were in power between 1954 and 1971, 1977 and 1988, and 1999 and 2008, longer tenures than those of democratically elected governments. Second, from the first coup in 1954, the Federal Court (the precursor to the Supreme Court of Pakistan) was forced to legitimate the unconstitutional take-over. In this and later coups, the court creatively used and expanded common-law concepts such as “state necessity” or introduced new ones, such as “revolutionary legality,” to accommodate the illegitimate seizures of power (see Aziz 2012; Newberg 1995). Not only were courts forced to come up with coup-legitimizing jurisprudence, judges, after Ziaul Haq’s coup in 1977, had to accept the humiliating practice of swearing the oath of office under an emergency document (International Crisis Group 2004, 5). Musharraf (the leader of the 1999 coup) honored that precedent. Third, the succession of Pakistani coups laid into the country’s constitutional order deeply anti-democratic foundations that were difficult to undo even under civilian governments. “Pakistan’s military,” Kalhan wrote, “has engaged in a recurring, iterative process of *transformative preservation*, by which its own power and that of its affiliated interests have been extended and entrenched into periods of civilian rule” (Kalhan 2013, 10). [Emphasis in the original.]

Pakistan (1954-2008) fits my characterization of a fragmentary autocratic regime. Successive holders of executive power routinely encroached upon, marginalized or humiliated courts. Hoping to preserve the basic institutional integrity, courts opted for deference. “By and large,” Newberg wrote, “the judiciary in Pakistan has tried, in times of crises, to avoid confrontation with the executive and went out of its way to take the path of least resistance. It upheld the *de facto* situation rather than declare the *de jure* position”

(1995, 7). Rather than protect the regime's interests on the basis of "value consensus," the hallmark of an integrated political elite, courts did what they could to survive. And when the Supreme Court displayed signs of "activism," in 2006-7, under the chief justice Iftikhar Chaudhry, the president and former general Musharraf responded with the arm-twisting tactics characteristic of fragmentary autocrats. He first dismissed the chief justice, in March 2007, and when Chaudhry was reinstated by his Court, Musharraf doubled down, declaring martial law and firing the chief justice and several other justices from the Court's bench.

I contended in Chapter Three that fragmentary autocrats might banish short-term courts-posed political uncertainty by marginalizing or encroaching on courts. The example I used was how the judicial corps took a strong stance against the Nasser regime after the 1967 defeat. A similar dynamic can be seen in the anti-autocrat stance by the Supreme Court of Pakistan (SCP) and its chief justice in 2006-7. After all, Chaudhry himself had been promoted twice under Musharraf, and swore an oath of office in 2001 legitimating the 1999 coup. In 2006-7, however, there was no hiding the regime's weakness. Despite strong economic performance under Musharraf,<sup>125</sup> the regime confronted several major domestic challenges. A policy report in 2007 described the country's western and northern borders as "violent, chaotic, and threatening" (Khan 2007, 125). It added that while "the military-dominated politics of Pakistan stayed well entrenched in the hands of the generals, the government's tactics in dealing with terrorism and its use of force against ethnic violence in the western province of Baluchistan ... invited more domestic and international

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<sup>125</sup> Pakistan's Economy in 2006: Performance and Outlook, *The World Bank*, <<https://documents1.worldbank.org/curated/en/817881505288483345/pdf/119582-WP-PK-Economy-2006-PUBLIC.pdf>> Accessed May 23, 2024.

condemnation than usual.” In terms of the regime’s external support, Musharraf was viewed as an unreliable ally of the U.S. in its “war on terror” and Afghanistan war. The cover story of the *Economist* magazine described Pakistan, in January 2008, as “the world’s most dangerous place” (The Economist 2008). The agitation by members of the judiciary and more importantly by the Lawyers Movement further weakened Musharraf.

Under mounting pressure, Musharraf resigned in 2008. In 2009, Chaudhry returned triumphantly to head the SCP. The military had to accept the abridgement of its power in Musharraf’s departure. The new president, sworn to office in late September 2008, was weakened by the constant swirl of corruption allegations around him. The fragmentation of political authority channeled a significant share of government power to courts (Ríos-Figueroa 2007). But as the country was emerging from eight years of military rule and a democratically elected government was settling in office, the SCP relentlessly intervened in politics. Among the supply-side sources of the judicialization during this period’s politics were the personality of the chief justice, and the judiciary’s aura of “activism” against the autocrat, which further legitimized court intervention. On the demand side, the Lawyers Movement at first, after Musharraf’s departure, continued to support the SCP’s actions, but then soured on the court as its chief justice appeared to pursue his own retaliatory agenda against his political enemies, bringing the country to the brink of another military take-over (Walsh 2013). Though all of this looked like “judicial independence,” it was deeply destabilizing to politics (Kalhan 2013).

Turkey (1923-2001), by contrast, displays the features of what I describe as an integrative autocratic regime – integrative at least in connection to the judiciary as a faction of the state elite. The country’s political elite found cohesion and formed identity around

the Kemalist, west-oriented modernization outlook since the abolition of the caliphate in 1923. As Gulbrandsen noted, factions of the political elite engaged in related functions are more likely to find affinity and forge mutual trust. He cited the military and the judiciary as “social order” groups (Gulbrandsen 2007, 197). The secular, nationalistic, west-oriented vision for the state was the fulcrum of the “value consensus” at the heart of the Turkish elite arrangement. When these foundations were at stake, courts could be relied upon to chip in to preserve the elite Kemalist arrangement (Belge 2006). One manifestation of embeddedness is that, as in Egypt between 1971 and 2010, legality-upholding decisions by the apex courts coincided with politics-restricting ones, and they did not prompt retaliation from the executive.

The two largest challenges to the Kemalist elite consensus were the Kurdish question and the repression of political Islam (in a Muslim-majority country). The Turkish Constitutional Court (TCC), which came into existence in 1962, through a military-supervised constitution, played Whac-A-Mole with these two causes. In the 1980s and 1990s, the TCC precipitated the closure of 13 Kurdish and Islamist parties (Belge 2006). In one instance, the court’s decision against the Welfare Party (which had won elections and formed government in 1995), all but certified the soft coup of 1997. The successor party to Welfare, the Virtue Party, met the same fate at the hands of the TCC in 2001. The electoral victories by Islamists successively brought a counter-elite to the halls of power. In 2002, a former member of the Welfare Party and his new political party, the Justice and Development Party (AKP), won the parliamentary elections. Recep T. Erdogan became prime minister.

The political crisis, or series of crises, at the core of the Turkish case in this chapter occurred in 2007 and 2008. (The remainder of this section draws on Bali (2013).) The first crisis arrived in 2007, when the TCC interfered with the process of nominating a president. The party in power, the AKP, wielding a comfortable majority, nominated a candidate for the presidency, Abdullah Gul, a moderate Islamist. The Republican People's Party (CHP), the last stronghold of Kemalist republicanism, led the effort to derail the nomination by calling upon the TCC to weigh in. The TCC decision led to a political stalemate. The nomination process was held hostage by minority parties, paralyzing the majority (AKP) party. At the same time, the minority parties did not have the votes to make a nominee of their own prevail. To break the stalemate, the AKP chose an early parliamentary poll, a move that in end enlarged its parliamentary majority.

The 2008 constitutional crises placed the country in further political jeopardy. To lift the quasi-legal ban on headscarves at universities and other public places, the AKP government proceeded to introduce a constitutional amendment that would make any form of discrimination in education enforceable only when endorsed by an explicit law. The smaller parties, especially the CHP, not only took the matter to the TCC, they additionally filed a petition asking the Court to ban the ruling party, the AKP. The TCC accepted both filings. On the headscarf constitutional amendment, the Court went "so far as to accord itself authority to serve as the sole arbiter of the propriety of all democratically enacted constitutional amendments" (Bali 2013, 682). As for the filing requesting the closure of the AKP, the majority of the Court actually voted in favor of the petition, but it fell short of the super-majority required in party-closure cases. Had the votes been garnered, Bali

notes, the ruling party, the country's president and prime minister, as well as scores of senior politicians would have been banned from politics.

Alongside a growing number of scholars, Bali observed the inadequacy or even the disutility of viewing judicial conduct from the “judicial independence” prism alone. The AKP case at the Turkish Constitutional Court,” she wrote, “exemplified the potential risks that judicial independence without checks and balances may pose in periods of democratic transition” (2013, 690). And in an observation that described as well judicial conduct in Egypt in 2011-2013, she added:

If elites from the ancien régime can continue to impose their preferred interpretation of constitutional provisions long after they lose the capacity to wield popular support for their views, an autonomous and activist constitutional court may prove a detriment to the institutional requirements for democratic consolidation (690)

To summarize Section 3: During periods of heightened political uncertainty – as Musharraf's grip on power loosened and as the AKP appeared poised to introduce constitutional amendments – the apex courts in Pakistan and Turkey intervened in ways that exacerbated the political uncertainty. Both the judiciary that was embedded into the autocratic regime (in Turkey) and that which was not (in Pakistan) appeared to use the power accruing to them in ways that destabilized politics. The former was keen on holding onto arrangements from the past (anti-Islamist; anti-Kurdish). But what about the latter? In Pakistan, political fragmentation in the last two years of Musharraf's tenure, and more so after he stepped down, engendered a major redistribution of government authority in favor of courts. The perception of past “activism” added to the SCP's power. The power differential in 2009 between the Supreme Court and government of president Asif Zardari

would have taken a special kind of chief justice to restrain himself and his court in order not to threaten to destabilize the democratization process. Chaudhry was not that.

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#### 4. Russia & Hungary: Transition-Bargain Courts and Democratization

For insights into transition politics, judicialization and democratization that the embeddedness pair (Pakistan and Turkey) could not offer, I now turn to another paired comparison, Russia (1991-1993) and Hungary (1990-1998). The periods in focus start roughly with the fall of the Berlin Wall and coincide with the tenures of the inaugural chief justices of the Russian and Hungarian constitutional courts, Valerii Zorkin and László Sólyom, respectively.

In both cases, the constitutional court was created, by a constitutional amendment, as part of the democratic transition process, in 1989 in Hungary and 1990 in Russia. By the logic of my argument, these apex courts were not embedded in the old regime as they had not existed then. They were therefore less likely to hold onto or preserve old-regime arrangements. Thanks to the Soviet collapse and the thorough delegitimization of former communist regimes, the transition windows that followed should have been as free from the institutional tentacles of the past as was imaginable. The new constitutional courts were to serve fully and only as “guardians of the constitution” (Scheppelle 2006), implementing and upholding the new constitution, and firming up and stabilizing the new rules of democratic government. In other words, apex courts with these two features – birth as a component of the transition bargain, and in the wake of thoroughly discredited regimes – should provide the strongest illustration of courts as stabilizers of rules and, thereby, as facilitators of democratic politics, as suggested by influential accounts of

comparative judicial politics (e.g., Chavez, Ferejohn, and Weingast 2011, 2011; Ginsburg 2003; Ríos-Figueroa 2007). Instead, the Russian Court added to political instability by its persistent interference with majoritarian politics. The Hungarian Court intervened heavily in politics as well, using natural-law (e.g., “invisible constitution”) and equivocal, something-for-everyone concepts like “revolution under the rule of law” (Scheppelle 2006, 1776). This level of interference might have provoked a stronger backlash from the majoritarian branches of government had it not been for the chief justice’s pre-transition political credentials, later reaffirmed when leading political parties successfully nominated him for president, in 2005. The chief of the new Russian apex court did not have a similar advantage.

I am not suggesting that every apex court created as part of the transition bargain did intervene in transition politics. One example of a non-interventionist transition-era court would be Indonesia’s Constitutional Court, created after Suharto stepped down in 1998 (Butt 2015, Ch.2). Nor am I suggesting that every instance of persistent interventionism from courts into transition politics necessarily derailed democratization. An often-cited example of a transition-period court that facilitated constitution drafting and democratization is South Africa. Instead, I intend the Russia-Hungary discussion to underscore two aspects of transition politics, even when the old regime had been comprehensively discredited. The first is how institutional legacy from the old regime may increase the odds of judicialization, even when apex courts are new to the scene. And the second is how judicialization, interacting with the particular institutional environment of transition politics (one structured by what I described as the *uncertainty continuum*) can aggravate political uncertainty and slow down or derail democratization.

Both the Solyom and Zorkin Courts had to deal with the question of the old-regime officials and party structures, or what is known as lustration laws. These laws are a staple of constitutional courts during transitions (the Egyptian equivalent was the “political exclusion” law upon which the SCC ruled on June 14, 2012). Controversy around them is inescapable no matter how the Court rules. In Hungary, the lustration law, called “justice law,” extended the statute of limitations on a number of crimes so as to facilitate the prosecution of more former officials. The Solyom Court struck the law down as unconstitutional (Scheppele 2006, 1779). In Russia, Yeltsin issued a decree closing the Soviet and Russian iterations of the Communist Party and confiscating their assets. The Zorkin Court, in November 1992, issued a compromise ruling: it banned the party but reserved the right of assembly for its former members, and it placed the matter of the asset confiscation in the hands of an arbitration court (Scheppele 2006, 1800).

Beyond lustration laws, however, the constitutional courts under both Solyom and Zorkin waded into avoidable controversies in a manner that was heavy-handed and increased political instability. I will discuss one major controversy for each, starting with Solyom.

Some of the earliest Solyom Court decisions were frowned upon by the democratically elected government, but not openly challenged. The Court declared unconstitutional a privatization law on the basis that the law did not treat claims of past, unjust confiscations equally (Scheppele 2006, 1776). The Court’s use of the “invisible constitution” concept bewildered law-makers. A prominent parliamentarian complained that concept practically gave the Court the power not only to interpret the constitution but to rewrite it (Scheppele 2006, 1778). When critics of the Court raised the possibility of

introducing legislative measures to counter some of the Court's decisions, Solyom responded by asserting that "there is no legal possibility for the re-interpretations of previous decision" (Scheppelle 2006, 1780).

The biggest controversy occurred in 1995. The newly elected Socialist-Liberal government passed a package of austerity measures to meet loan conditions set by the International Monetary Fund (IMF). They were known as the "Bokros Package," named after the finance minister at the time. The Court declared the measures unconstitutional on the grounds that the removal of welfare programs violated the principle of "legal security" or "legal certainty" (Scheppelle 2006, 1781). Finding itself in a corner, the government threatened to proceed with higher taxation laws to increase its revenues. Parliamentarians and government officials now openly criticized the Court and called for restraining its powers. Bokros, the finance minister, threatened to resign from government, complaining that he could not function under the constant second-guessing from the Court (Scheppelle 2006, 1782). In 1998, a new government (Viktor Orban's) was in power, and Solyom's first nine-year term was up for renewal. Getting the cold shoulder from Orban, Solyom realized his term would not be renewed. He then launched a campaign for a constitutional amendment that would extend the term's length of Constitutional Court justices by three years, to twelve years instead of nine. The effort failed.

Zorkin's tenure was a series of controversies. The controversies would seem familiar from the discussion in Chapter Four: they revolved around the jockeying between the parliament and the president over the drafting of a new constitution. Scheppelle (upon whose account most of the Russia-Hungary discussion is based) noted that in the newly independent Russian Federation, the Constitutional Court immediately found itself in a

tangled institutional setting. Under the amended constitution that was still in force, the parliament was strong, the executive weak. In reality, the opposite was true (Scheppelle 2006, 1795). The Court was supposed to enact the constitution. As much as it could, therefore, Court thus avoided issuing decisions that favored either party outright, instead offering compromise decisions or simply mediation between the two parties. When mediation failed, the chief justice threatened impeachment proceedings against the parliament, the presidency or both (Scheppelle 2006, 1806).

What was perhaps the largest of controversies, aggravated by the Zorkin Court, took place in early 1993. The constant bickering over the new constitution and the powers of the president vis-à-vis parliament culminated in Yeltsin declaring, in a television broadcast, a state of emergency, in March 1993. The parliament was furious. The Constitutional Court declared the measures unconstitutional even before it received their official text. When, in the end, the televised announcement turned out to be only a threat, the Court was exposed as unduly political and interventionist. Zorkin's colleagues criticized him and practically expressed no confidence in his leadership. He resigned as chief justice. Months later Yeltsin suspended the Court until a new constitution was passed, criticizing it for bringing the country, twice in 1993, to the brink of a "civil war" (Scheppelle 2006, 1833).

Two points are noteworthy when placing the Hungarian and Russian experiences against one another. First, though in both cases the constitutional court came into existence as part of the transition bargain, institutional legacies and resonances from the old regime exercised indirect influences. Solyom's stature from the time preceding the transition (as a prominent legal scholar, public-interest lawyer, politician, as well as a member of the

“roundtable negotiations” that facilitated the transition) allowed him to assert a highly active role for the court in transition politics without much resistance, initially. Zorkin, who made no secret of his Communist Party membership and was practically unknown before he became chief justice, did not have a similar stature. But that does not mean the Russian Constitutional Court was free from the past’s institutional resonances. In responding to the political environment of the transition window, Zorkin was simultaneously enacting a vision for the present based on negating past practices. The Court had to do what it could to stem continuities with the political past, Zorkin appears to have believed. In a speech on April 8, 1993 explaining judicial interventions in politics, Zorkin said:

[W]ho has involved us in this politicized process? Have we ourselves jumped into it recklessly, as into a whirlpool, or have we realized that the sides cannot come to terms and emerge onto a peaceful and civilized road? Should we have kept silent in such a situation? Moreover, in December, if you remember, the two sides themselves appealed to us. . . . We are defending constitutional space for politics (Scheppelle 2006, 1820).

Zorkin seemed to suggest that his Court’s authority, and authorization, to intervene in politics, was in part a role imposed on it by virtue of birth during the transition, but also from the moral mandate of breaking with the “uncivilized” past.

The second point is that both Solyom and Zorkin, having had their formative political years during the Soviet era, were highly skeptical of and condescending toward majoritarian politics. Both called upon parliamentarians in their respective countries to “come to your senses” (Scheppelle 2006). Solyom spoke of “the morass in parliament” (Scheppelle 2006, 1787). That wariness made the apex courts feel a historic responsibility, at least occasionally, to rescue politics from the politicians, and in doing they rendered

politics less stable, more unpredictable. In other words, even in the absence of a rising counter-elite (such as the Islamists in Egypt and Turkey), and even in apex courts created as part of the transition bargain, chief justices may show in their decisions and conduct an anti-political tinge that can destabilize politics.

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#### 5. Conclusion: Democratization's Narrow Path

In this chapter I presented two paired comparisons: Turkey and Pakistan to illustrate the embeddedness hypothesis; Russia and Hungary to illustrate the various (especially supply-side) sources of judicialization during transition politics. In countries where apex courts were introduced as part of the transition bargain, we should have expected the least amount of courts-posed or courts-aggravated political uncertainty. And yet Russia and Hungary display the dynamics of how such uncertainty may be activated and exacerbated.

The role of the judicial support network deserves brief attention. The reader will recall from Chapter Four that by the judicial support network I mean the public-interest lawyers, human rights group and opposition politicians who resort to courts to assert political rights or to pressure the executive to change its conduct. The more salient presence of a judicial support network in the cases above can be found in Pakistan (Traub 2008) and Turkey (Choi 2016; O'Donohue 2023). In neither case do we find the hopeful features associated with these networks in Epp (1998) or Moustafa (2007). In Pakistan, the Lawyers Movement soured on the chief justice as he became vengeful toward political enemies upon his return to the top post. In Turkey, the key allies of the country's apex court were political parties and groups bent on retaining political power even if that meant restricting or reversing the outcomes of democratic politics.

When one thinks of the apex courts in Pakistan, Hungary and Russia, one might be tempted to think that perhaps the accident of personality might explain conduct of courts in these countries. And it is true that the chief justices of all three apex courts in these countries displayed unique personality feature. None of them shied away from controversy; Chaudhry and Solyom showed very little self-questioning; all appeared to have an eye on how history would judge them. But these strong personality traits would not have mattered much if the courts over which these men presided did not have abundant political authority. That authority came in part from institutional arrangements (Hungary and Russia), institutional continuities (Turkey) and resonances (Russia, Hungary and Pakistan) and from other actors, the judicial support network, who turned political questions into legal ones and rushed them to courts (Turkey and Hungary). The discussion in this chapter and in Chapter Four suggest that, given the harsh political environment of transitions, democratization stands a chance only through a narrow path. In that path, the pro-democracy forces are able, against bad odds, to overcome the old regime's institutional continuities stacked against democratic transition.

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## Conclusion

### Who Is Afraid of Judicial Independence?

In this concluding note, I wish first to summarize the dissertation's objectives and contributions, and then offer brief thoughts on a conception of separation of powers that enhances the odds of democratization.

This dissertation has striven to explain the conduct of courts and judges in autocratic regimes and transition politics. I claim that this account has three features that make it a contribution to the scholarly conversations on comparative judicial politics, autocratic politics and democratization. First, it is largely emancipated from the grip of the categories and presumed affinities of the hopeful 1990s, in the immediate wake of the end of the Cold War, categories like “judicial independence” and “judicial activism,” and affinities such as between democracy and increased judicial power. Whatever the merit in the initial use of these concepts and affinity categories, soon enough scholars, compelled by new input from the political world, had to add qualifications – e.g., “selective activism” (Belge 2006), “bounded activism” (Moustafa 2007), the “limits of judicial independence”(Hilbink 2007, 240), “authoritarian rule of law” (Rajah 2012), “rule by law” (Ginsburg and Moustafa 2008), “partial rule of law” (Wang 2014) and “autocratic legalism” (Scheppelle 2018). These qualifications sought to adjust or recast the role of courts, or more broadly law, in both democratic and autocratic politics. One category that is as persistent as it is unsalvageable by the addition of qualifications is “judicial independence.” The range of judicial actions (including democracy- or democratization-threatening actions) described as expressions of “judicial independence” is so vast as to render the concept at best of little utility, at worst dangerous. I sought to understand and

explain judicial conduct outside the prism of judicial independence and its possible qualifications, but instead through the prism of judicial agency. This conceptual reorientation has proven fruitful, I believe. For it has allowed me to trace the complex politics of courts and judges in autocratic regimes. Gradually, the investigation was able to explain more and more variation in judicial conduct (in Chapter Three), such as autocrat-restraining “judicial activism,” outside obscuring categories such as “judicial activism.”

Second, this dissertation’s conception of judicial agency sought, in the discussion of the primary case, to strike a balance between theoretical generality and historical specificity. I presented a general framework of judicial agency as the constant ordering and reordering of three sets of primary commitments: professional (to state legality), associational (to other members of the judicial corps as a status and corporate group), and to the regime (as rules and norms structuring government authority in the political system). The framework’s chief merit is its dynamism: it can explain variation in judicial conduct within regime and across regime type. Other scholars can employ this framework to explain variation in judicial conduct in other polities. Simultaneously, on the historical-specificity front, my discussion of the primary case (especially in Chapter Two) attempted to trace the evolution and shaping of judicial commitments of Egypt’s judges over decades.

And third, this dissertation endeavored to underscore the risks that judicialization poses to democratization. Influential and truly path-breaking works by Hirschl and Ginsburg and others have argued that when courts are entrusted with adjudicating transition politics, they would help enforce rules, stabilize politics and, more often than not, facilitate democratization. But then input from the political world – from Pakistan, Turkey, Egypt and elsewhere – compelled a revision of this view. In Chapter Five, I showed that even

apex court created as part of the transition bargain can unleash chaos into the political process. The question then is: Which kind of judicialization, or court-involvement, or “judicial independence,” is useful for democratization? I comment briefly on this question in the next section, using an old but, to my mind, more fruitful concept: separation of powers.

#### Separation of Powers and Democratization

The experiences of Egypt (2011-2013), Pakistan (2009-2013) and Turkey (2007-8) show that, whether or not the “least dangerous branch” (Bickel 1986), courts can wield authority in ways that influence the conduct of other political actors and shape momentous political outcomes. In the scholarship on the U.S., the tension between pluralistic politics and judicial autonomy is nearly always at the forefront of debates (Graber 1993). Not so in the works on the “new democracies” or the tenaciously autocratic regimes. If it is granted that a certain degree of autonomy for courts is a necessity for optimal functioning, just as some autonomy is needed for other government structures, what is the proper amount? Where to draw the line between the requisite, function-enabling autonomy for courts and the politics-destabilizing potentialities of unfettered judicial autonomy?

In very broad strokes, one may speak of two major articulations of the separation-of-powers concept. The first was Montesquieu’s, in which he argued against the concentration of government powers in the hands of the (monarchical) executive. The second articulation, developed at the turn of the twentieth century, argued that separation of powers did not mean that each government branch treated its authority like a fief in which it could exert absolute control. Instead, French jurists in the neo-naturalism (that is, new natural law jurisprudence) wave in the early 1900s, such as Leon Duguit, contended

that if a government branch violated the constitution, other branches did not have to follow or endorse the violation on the basis of separation of powers. In fact, separation-of-powers made it the responsibility of the other branches to avoid getting dragged into constitutional infringement (Sweet 2003). Thus emerged one of the two Continental European conceptions of judicial review, *diffuse* review in which all courts could abstain from implementing, but not void, legal rules it deemed unconstitutional. (The other one is Hans Kelsen's concentrated review, where only a specialized constitutional tribunal would assess the compliance of law and regulations with the constitution.) Separation of powers, historically the strongest argument *against* judicial review, was suddenly, in the work of neo-naturalists, a potent argument *for* judicial review. Note that this argument in favor of judicial review was not based on the foreordained desirability of "judicial independence" or innate authoritativeness of courts. And this is one of the advantages of separation-of-powers accounts. Rather than fixate on, say, judicial power or "judicial independence," and constantly gauge whether either is expanding or shrinking, a separation-of-power account (especially in the second-articulation mold) focuses on constitutionality, broadly defined. Constitutionality is a balance, a compromise, between viewing electoral mandates as a pass to do anything and the view of electoral mandates as mob rule that could be wholly disregarded even on the narrowest of legal technicalities.

For the context of democratization and transition politics, a separation-of-powers framework for the proper role of courts would be useful. In such a framework, courts would intervene as little as possible in politics during rule-making periods. For as I noted in Chapters Four and Five, such interventions nearly inevitably lead to increased political uncertainty and may destabilize politics rather than regularize it. But given the widespread

adoption of constitutional courts, it seems nigh impossible that courts would voluntarily stay out of the fray during periods of political change or heightened uncertainty. Transitional justice (including lustration laws), to cite just one example, has become a staple of constitutional courts during periods of political change. Nor am I suggesting restrictions on access to courts during periods of transition. What I am suggesting, instead, is the development of a more expansive political-question doctrine (Henkin 1976) that trains lawyers and judges to be especially cautious about court interference during periods of rule-making. In the political-question doctrine, whose origins are in the U.S. jurisprudence, courts are forbidden from reviewing matters that are inherently political rather than legal. Granted, the lines between “legal” and “political” can be blurry, especially for apex courts that routinely adjudicate public-law questions. Still, entrenching the doctrine can make judges more sensitive to questions of rule-making, ones best left to the majoritarian branches of government. Judicial circumspection during periods of rule must be inculcated alongside other judicial instincts. This task is far from easy, since it goes against another judicial instinct: “legal certainty,” or legal stability. For instance, in the writings and decisions by Laszlo Solyom, the former Hungarian chief justice, legal certainty supersedes nearly any other competing consideration (e.g., Sólyom and Brunner 2000, 40). Many of Solyom’s controversial opinions, especially on the “Bokros Package” (discussed in Chapter Five), were reasoned in terms of the legal-certainty principle. The tension between the legal certainty that judges demand and the fluidity of rules attendant to transition periods must first be acknowledged. Then judges and lawyers must receive training in, and internalize, judicial circumspection.

Judicial circumspection also entails that, during transition periods, courts should be wary toward and avoid the judicialization of politics, even when structural features of what I called “the transition window” push for judicialization. How can one convince courts and lawyers to step aside and acknowledge the lack of legal remedies to political uncertainty? I do not have a complete answer. But one possible answer that appeal must be made to their professional and associational commitments. After all, interventionism comes at a price, for the court and for democratization. As Brown and Waller (2016) observed, courts that intervene heavily during periods of political uncertainty end up with much less leverage afterwards. They may in due course get a strong backlash. It could be argued, for instance, that prime minister Viktor Orban, who first refused to renew the term of the Hungarian chief justice Solyom in 1998, wanted to ensure he would not have to deal with a politically interventionist court henceforth, and therefore attempted, successfully by 2014, to bring the Court until his government’s control. Granted, Orban would likely have had autocratic tendencies no matter what the Solyom Court did. But the conspicuous, politically interventionist role by the Solyom Court probably alerted Orban to the constitutional court as one of the “first targets” in his authoritarian project (Scheppelle 2018, 550).

The alternative to new conceptions for the proper for courts during transition periods – conceptions similar to the one I am proposing above – is the continuation of “judicial independence” notions that derail democratization and, thereby, cause untold suffering to millions.

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