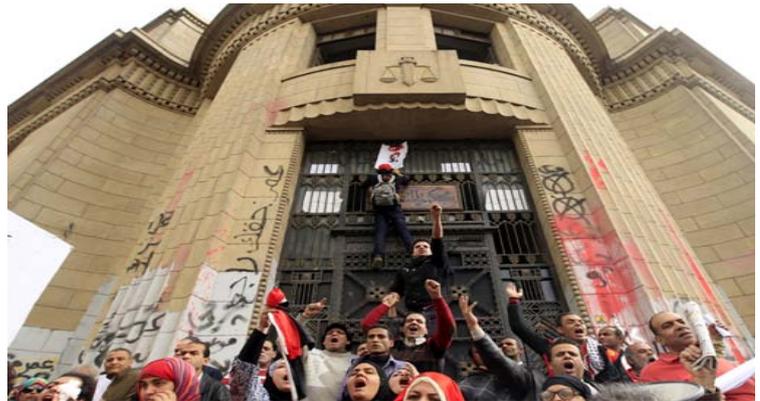


## The Judiciary and "Revolution" in Egypt

Daniela Pioppi

The vital role of Egypt's judiciary, in the two and half years since the start of the "revolution" of 25 January 2011, has been amply demonstrated by the relentless legal bombshells that have been constantly dropping on the public scene. As like other state institutions after the fall of Hosni Mubarak, the justice system has been hardly reformed, while its work methods and personnel have been molded by decades of authoritarianism. Contrary to other public institutions however, the judiciary has benefited - at least until 2011 - from an indisputable reputation for integrity and a relative independence from the regime due to the legalist character of the Egyptian authoritarianism, but also to the existence of democratic reformist judges among its ranks.



Cairo, 22 February 2013 - Protesters opposing Egyptian President Mohamed Mursi shout in front of the courthouse and Office of the Attorney General, which has been graffitied with anti-government slogans. Foto: Mohamed Abd El Ghany/Reuters

The judiciary can therefore be considered, with good arguments, both a bastion of the authoritarian Egyptian state and an actor for change. We will attempt here to shed light, as far as possible, on the role of this complex and sometimes contradictory institution in the context of Egypt's transition.

### 1. The Judiciary, before and after the "25 January revolution"

In its 60 years of existence, the Egyptian regime has obviously never promoted an independent judiciary. However, especially under the presidencies of Anwar Sadat and Mubarak, it has attempted as much as possible to operate in a "legal" framework. The prestige and relative importance of Egypt's judiciary spring from this constraint.

The first and probably most important clash between the regime and the judiciary, known as the “massacre of the judges” took place under Gamal Abdel Nasser in 1969, the year in which 100 judges who had dared support the demand for political reform through a powerful association known as the “Judges’ Club”<sup>1</sup> were dismissed, while a flurry of measures placed the judicial power firmly under the control of the executive power<sup>2</sup>. In the following decades the more restrictive enactments were gradually removed and the judiciary managed to acquire some measure of independence. What remained, however, was a heavy-handed political interference in the judges’ careers, different forms of cooptation (for example by extending financial privileges to certain parts of the judiciary), a widespread corruption, the oversight of the Ministry of Justice over many administrative affairs, and the President’s prerogative to name the General Prosecutor<sup>3</sup> and the President of the Supreme Constitutional Court.<sup>4</sup> Moreover, the regime established special courts such as military tribunals for political opponents to control the judiciary on the issues of greater concern.<sup>5</sup> This state of affairs did not however prevent the judiciary from occasionally playing an active role by taking sharp positions against some of the regime’s policies.<sup>6</sup> In effect, within the judiciary, different approaches to the regime coexisted: from widespread passive resignation, to active support, to a reformist minority who promoted an approach that was “critical within the boundaries of what is possible.”

Midway through the first decade of this century, a group of judges belonging to this last group won the internal elections to the Judges’ Club and launched a battle for the reform of the judicial system that would strengthen its independence from the executive power.<sup>7</sup> Two reformist judges, Mahmoud Mekki<sup>8</sup> and Hisham al-Bastawisi, were supported by the political protest movement of those years (the Egyptian movement for change, known as *Kefaya*, Enough) and also by the Muslim Brotherhood.<sup>9</sup> The “judges’ revolt”, as the media called it, was crushed by the regime with a mix of repression and cooptation so that the following elections of the Judges’ Club in 2009 saw the victory of judges who were in no way inclined to fight the regime.

1 Founded in 1939, to all effects it is the association that represents the judiciary in Egypt, with offices around the country.

2 For a brief history of the Egyptian judiciary see Nathan J. Brown, “Egypt’s Judges in a Revolutionary Age”, in *The Carnegie Papers*, February 2012, <http://carnegieendowment.org/2012/02/22/egypt-s-judges-in-revolutionary-age>.

3 The General Prosecutor is an essential figure in the Egyptian system since he has a right of supervision over all penal proceedings and therefore determines which are zealously prosecuted and which are overlooked. The choice of a loyal Prosecutor was one of the ways in which the old regime governed the different judicial actors.

4 For a brief description of the Egyptian judicial system see Nathan J. Brown, “A Guide Through the Egyptian Maze of Justice”, in *Carnegie Articles*, 6 June 2012, <http://carnegieendowment.org/2012/06/06/guide-through-egyptian-maze-of-justice/b68l>.

5 For a detailed description of the regime’s methods to control and/or marginalize the judicial power despite liberal political reforms, see Eberhard Kienle, *A Grand Delusion. Democracy and Economic Reform in Egypt*, London, I.B. Tauris, 2001, p. 117-131.

6 The ruling by the Supreme Constitutional Court of July 2000 that required judicial supervision of the elections is notorious. See the Introduction in Sarah Ben Nefissa et Alâ’ Al-dîn Arafat, *Vote et démocratie dans l’Egypte contemporaine*, Paris, Karthala-IRD, 2005.

7 On judiciary’s reformist activism in mid 2000s see Nathalie Bernard-Maugiron (ed.), *Judges and Political Reform in Egypt*, Cairo, American University of Cairo Press, 2008; and Hossam Baghat, “Egypt’s judiciary flexes its muscles”, in *Global Corruption Report 2007*, p. 201-204, [http://www.transparency.org/whatwedo/pub/global\\_corruption\\_report\\_2007\\_corruption\\_and\\_judicial\\_systems](http://www.transparency.org/whatwedo/pub/global_corruption_report_2007_corruption_and_judicial_systems)

8 Mahmoud Mekki was named vice-president by Morsi in August 2012 and remained until his resignation on December 22. Mahmoud is the younger brother of Ahmad Mekki, who was Minister of Justice in the Qandil government.

9 A draft law drawn up by a group of reformist judges was introduced in Parliament by a member belonging to the Muslim Brotherhood. The draft was voted down, while Mubarak’s National Democratic Party passed the regime’s law by a wide margin.

Though it ended with a stalemate, the reformist judges' initiative left an important legacy among the circles that were opposed to the regime. As a result, immediately after the 2011 revolt, the judiciary was unanimously seen as an island of integrity in Mubarak's authoritarian and corrupt state.

Nevertheless the judiciary was hardly united in its attitude towards the new events. While the judges were tight in welcoming the revolution (not at all an unusual occurrence in the post-Mubarak period), in 2011 and 2012 their internal disagreements became more and more evident.

From the beginning, a part of the judiciary wanted the immediate resignation of the judges who were most tied to the former regime and the reinstatement of those who had been removed for political reasons before 2011. The majority, however, rejected both requests and as previously mentioned, the judiciary remained untouched by the revolution. The reason given for this conservative choice, was that it would have been difficult to define "collaboration" with the regime as well as "political motivations" without starting a political witch-hunt similar though opposite to the 1969 "massacre of the judges". At the same time, it is evident how tricky it can be to keep the same corrupt and politically compromised officials from the Mubarak era in significantly powerful positions such as the case, for example, of the General Prosecutor Abdel Meguid Mahmoud, considered by many to be responsible for the nearly complete lack of criminal proceedings against the leaders of the old regime.<sup>10</sup> What's more, the differences between moderates and reformists have remained even after Mubarak's demise, though perhaps less for reasons of principle which in theory have been mitigated by the "revolution", than because of personal rivalries and the settling of old accounts. In the mid-2000s the reformists had taken control of the Judges' Club while the Supreme Judicial Council remained faithful to the regime, but after the 2011 "revolution" the situation was reversed. The leadership of the Judges' Club was now the result of the 2009 vote, won by the "loyalists", while the Supreme Council was dominated instead by the reformists thanks to the new president, Husam al-Ghiryani, a leading reformist judge elected in the summer of 2011. In 2011 the judiciary advanced two draft legislations for a reform of the judicial system, one by the Club, the other by the Supreme Council.<sup>11</sup>

Finally another source of discord is the ideological divide. During the Mubarak era, the members or sympathizers of the Islamic movements were prevented from entering the judiciary. However a number of judges gradually became closer to the Muslim Brotherhood in the course of their career. The reformists in the first decade had very different ideological inclinations and some were certainly very close to the Islamists (such as al-Ghiryani himself) though any actual affiliation with a political organization would have been unthinkable, not least out of professional ethics.

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<sup>10</sup> Abdel Meguid Mahmoud, named by Mubarak, was finally forced into retirement by Mohammed Morsi with a decree dated November 22, 2012. He was replaced by Talaat Abdallah, named by Morsi himself. In March 2013 a ruling by the appeals court invalidated the decree. The sentence was later confirmed by the Court of Cassation which reinstated Mubarak's General Prosecutor on July 2, 2013. Abdel Meguid Mahmoud eventually resigned.

<sup>11</sup> Both proposals remain a dead letter as result of the dissolution of Parliament in June 2012.

As the security controls over the judiciary relaxed in the post-revolutionary phase, the different ideological proclivities have become more apparent, although the judges' disposition towards one or another current cannot be determined with certainty until after their retirement.

More in general, as we shall see in the next paragraph, these dissensions reflect the danger of excessive politicization of the judiciary, given the way the transition has taken place. In the months immediately after Mubarak's forced resignation, the need to ensure the independence of the judiciary was one of the few points agreed upon by all the actors in the field. Despite this favorable premise, the post-revolutionary transition proved to be less agreeable to an independent judiciary and to a general rebalancing of the powers within the state than one could have imagined at the start.

## 2. The judiciary's role in the transition

A quick overview of the main junctures of the Egyptian transition shows a leading role played by the judiciary as a whole. It starts with the rulings of the State Council that in effect dismantled Mubarak's economic policy (first semester 2011), moves on to the sentence that dissolved the National Democratic Party (April 2011), to the dissolution of the first constituent assembly (April 2012), the dissolution of the lower chamber of Parliament (June 2012) and, more recently, the declaration of unconstitutionality of the upper chamber of Parliament and of the second constituent assembly (June 2013).

This is a succession of judgments with clear political implications that, considered together, can only arouse a sense of uneasiness about the neutrality of the judiciary itself. In the highly polarized Egyptian political scene two opposing interpretations of the judiciary's role currently coexist. The first, opposed to the Muslim Brotherhood and prevailing at this date, sees the judiciary as a bastion of legality against the newcomers' abuses and particularly against the attempt by the Islamists to take over the state institutions. This explains, for example, a lack of significant protests by the opposition forces against the rulings that disbanded the first constituent assembly and the Parliament's lower house, both of which were heavily dominated by the Islamists.

The second interpretation, which is closer to the Islamists' positions, highlights the substantial continuity of the judicial system under Mubarak and in the post-revolutionary period and denounces the judiciary's bias for having relentlessly attacked the first elected executive in the country. The reform of the judicial system presented in April 2013 by the Muslim Brotherhood's Freedom and Justice Party to the upper chamber of Parliament proposed a radical restructuring of the judiciary, forcing all judges over 60 into retirement and in effect eliminating about 3,000 high magistrates that would have been replaced by younger judges or by new recruits. These last would have eluded Mubarak's veto against Islamist judges. Paradoxically this was one of the requests made by the reformist judges since the mid 2000s, precisely to get rid of the magistrates that were most compromised with the regime. But now

- as a result of the Muslim Brotherhoods' lack of transparency and one-sided policies - it is interpreted instead as an unacceptable interference on the part of the executive and as an attempt to take control of the judiciary. Indeed a wide majority of judges have reacted against the law by suspending work and organizing demonstrations.<sup>12</sup>

Without taking sides with one or the other of the interpretations, it is possible in any case to arrive at some general conclusions. The Supreme Council of the Armed Forces (SCAF) set the tone for the role of the judiciary in the political process with the first Constitutional Declaration (approved with Islamist support in March 2011) that was full of "mysterious silences",<sup>13</sup> with ample room for partisan and politically impactful interpretations in the midst of a fragile post-revolutionary context. The same can be said of the 2012 Constitution, which was hastily drawn up by an ill-equipped constituent assembly that was unrepresentative of the opposition and under threat of dissolution (pending a sentence by the Supreme Constitutional Court). In essence, the lack of legitimacy, together with the vagueness and ambiguity of the legal reference texts, stretched beyond measure the role of those whose job was to interpret those texts. As a result the judiciary was suddenly pushed into a political role, irrespective of its own wishes.

Precisely for this reason, however, the judiciary should have proven to be impartial in order to be a non-partisan institution in a polarized environment. It was perhaps too much to ask from an institution that was shaped, like the entire Egyptian state, by decades of authoritarianism.

As we have seen in the preceding paragraph, the judiciary is far from a monolithic actor and it consists of people who belong to the old regime, many corrupt judges, as well as judges who are honest and faithful to their institutional mission. It is therefore to be presumed that not all the judges will act with the same design. We will therefore see rulings that are clearly political and of doubtful juridical value<sup>14</sup> and others that are more well-founded from a legal point of view.

However, in the last two and a half years, the political statements by judges in positions of power or partisan political stances have multiplied, thus wrecking any reputation of fairness the judiciary had with a consistent part of the population. For example, the judiciary lost credibility in the eyes of the Muslim Brotherhood as a result of many anti-Islamic statements by important members of the judiciary<sup>15</sup> or the widespread protest by the judges against the Constitutional Declaration of November 22,

12 The former Minister of Justice in Hesham Qandil's government, Ahmed Mekki, a reformist judge named by Mohammed Morsi, also resigned in April 2013 to protest against the draft law and particularly against the demonstrations organized by the Muslim Brotherhood to demand a purge of the judiciary. In turn, the Muslim Brotherhood took a stand against the umpteenth ruling, this one by the Court of Appeals, that invalidated Morsi's nomination of the General Prosecutor. See "Egypt justice minister demands guarantees over judicial independence", in *Ahram Online*, 23 April 2013, <http://english.ahram.org.eg/News/69940.aspx>; and "Egypt appeal court overturns dismissal of former prosecutor-general", in *Ahram Online*, 27 March 2013, <http://english.ahram.org.eg/News/67838.aspx>.

13 Nathan J. Brown, "Judicial Turbulence Ahead in Egypt. Fasten Your Seat Belts", in *Carnegie Articles*, 6 June 2012, <http://carnegieendowment.org/2012/06/06/judicial-turbulence-ahead-in-egypt-fasten-your-seat-belts/b689>.

14 See examples mentioned in Nathan J. Brown, "Judicial Turbulence Ahead in Egypt. Fasten Your Seat Belts", cit.

15 See for example the anti-Islamic statements by the president of the Judges' Club, Ahmed Zend or by the vice-president of the Supre-

2012 with which Mohammed Morsi seized full powers until the final approval of a new Constitution, but not - for example - against the constitutional statement by SCAF of June of that same year, with which, in the midst of an election, the powers of the future president-elect were curtailed.<sup>16</sup>

Finally, the judiciary's support for the military coup of July 3, 2013 which deposed the elected President was without a doubt legally unjustifiable and "politically oriented". It is in clear violation of the Constitution of 2012 that judge Adly Mahmoud Mansour<sup>17</sup>, president of the Supreme Constitutional Court, has been made interim Head of State.

The excessive politicization of the judiciary, in addition to harming its prestige, exposes this vital institution to the ups and downs of the political game, and does not bode well for the country's political-institutional order. What is more, the latest events strengthen the argument of those who have always pointed to the permanence of Egypt's "deep state" made of the military, the security services, as well as the elite public administration and elements of the judiciary.<sup>18</sup> Certainly, the institutions of the state do not always operate by common consent. On the contrary they frequently attempt to carve out autonomous or even independent spaces, in conflict or in competition with the others, yet all have in common a low tolerance for external interference by civil and political society.<sup>19</sup> In this sense, the Muslim Brotherhood – being the only organized political force in the country - represented for the Egyptian 'deep state' a greater danger of societal interferences than all the other little movements and parties put together.

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me Court, judge Tahani al-Gebali. Cfr. David D. Kirkpatrick, "Egyptian Judge Speaks Against Islamist Victory Before Presidential Runoff", in *The New York Times*, 7 June 2012, <http://www.nytimes.com/2012/06/08/world/middleeast/egyptian-judge-speaks-against-islamist-victory-before-presidentialrunoff.html>; David D. Kirkpatrick, "Judge Helped Egypt's Military to Cement Power", in *The New York Times*, 3 July 2012, <http://www.nytimes.com/2012/07/04/world/middleeast/judge-helped-egypts-military-to-cement-power.html>.

16 The judiciary's opposition to Morsi's constitutional declaration of November 22, 2012 was led by the Judges' Club. However, there are groups within the judiciary which supported it, for example the Judges for Egypt, a group famously made up of judges that are close to the Muslim Brotherhood and who were recently the object of disciplinary actions. See Mohamed Hossam Eddin, "Members of 'Judges for Egypt' referred to Disciplinary Board", in *Egypt Independent*, 25 May 2013, <http://www.egyptindependent.com/news/members-judges-egypt-referred-disciplinary-board>.

17 In the summer of 2011, the SCAF changed by decree the rules for the appointment of the president of the SCC - the Supreme Constitutional Court - until then named by the President of the Republic. Following the new rules, the choice is to be made among the three most senior judges by the Court itself, with a procedure that would be considered too independent in many democracies. Adly Mahmoud Mansour (obscure vice-president of the SCC since 1992) was elected president of the SCC in May 2013 and had taken office the 1st of July, 2013, just two days before the military coup. His predecessor as president of the SCC, Maher al-Beheiry, had replaced in July 2012 Farouq Sultan, the president named by Mubarak (and an expert of the special courts) who had retired that same year and who in 2012 presided the Election Commission which had pronounced on the validity of the presidential candidates.

18 Cfr. Hazem Kandil, *Soldiers, Spies and Statesmen. Egypt's Road to Revolt*, London and New York, Verso, 2012.

19 See the argument made by Brown of a "balkanization of the state": Nathan J. Brown, "Egypt's Wide State Reassembles Itself", in *The Middle East Channel*, 17 July 2013, [http://mideast.foreignpolicy.com/posts/2013/07/17/egypt\\_s\\_wide\\_state\\_reassembles\\_itself](http://mideast.foreignpolicy.com/posts/2013/07/17/egypt_s_wide_state_reassembles_itself).

## About Insight Egypt

The series is part of a two-year research project on Egypt, started in 2013, which aims at monitoring the uncertain transition taking place in the North African country. Following closely the evolution of events, the series explores the transformations of the socio-economic and political-institutional, as well as energy policy and foreign policy of the country, including its relations with Italy and Europe

A specific attention is devoted to the actors of the transition: opposition movements, youth groups, the judiciary, the Supreme Council of the Armed Forces, the Muslim Brotherhood and other social actors such as trade unions and business associations.

Possible scenarios of the political, economic and social evolution in Egypt are also prepared and discussed.

The project will be realized by a multidisciplinary research team of the Istituto Affari Internazionali (IAI), which has developed over the years a solid experience on Egypt.

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