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Egypt's Judiciary: Obstructing or Assisting Reform?

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KEY RECOMMENDATIONS

- ◆ Recognize and provide support to the efforts of progressive judges and Ministry of Justice officials that are trying to restore the institution's professionalism and impartiality, and fight against the repressive and regressive tendencies of recent years.
- ◆ Improve upon the quality of legal education and judicial training by refocusing curriculum on critical thinking and analytical reasoning skills.
- ◆ Create a two-year Judicial Academy to replace the far more limited program delivered today by the National Center for Judicial Studies.
- ◆ Help develop an institute for mediation and other forms of alternative dispute resolution education.
- ◆ Provide scholarships for advanced legal study in the United States.

INTRODUCTION

Prior to the 2011 revolution, Egypt's surprisingly independent and assertive judiciary had gained recognition among scholars, political opposition figures, and many in the NGO community for strength and activism in defense of democratic values and political rights.[1] As Nathan Brown wrote in 2008:

Egyptian administrative courts and the Supreme Constitutional Court have become sites for individual and organized efforts to breathe life into Egypt's formal democratic practices and institutions. Political parties seeking to gain recognition, individuals seeking political rights, NGOs challenging restrictions, and activists seeking to eliminate unfair electoral procedures all have found the courts far friendlier places than other institutions of the Egyptian state...It is clear that the judiciary is generally a respected institution with a strong inclination toward supporting the rule of law.[2]

What changed after the 2011 revolution, particularly after the 2013 removal of President Mohamed Morsi from office, was not so much the judiciary itself as the response of many judges and the Public Prosecution Office to institutional attacks and national security threats, both real and perceived. It has become clear that for economic, political, security, and cultural reasons, most in Egypt's establishment, including judges, value order and stability above almost all else. More broadly, it has also become clear that many and perhaps most Egyptians, including a surprising number of the country's liberals, are willing to tolerate harsh security measures and even an

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alarming degree of human rights violations if deemed necessary for national security and to restore order on the streets.

Of equal importance are the huge practical challenges thrust upon the civilian court system of filling the void created by the sudden post-revolution end of over 70 years of almost continuous emergency rule. The challenges included the near impossibility of judiciously processing in a timely manner the sudden influx into the conventional judicial system of a high volume of politically charged cases involving thousands of defendants often arrested in large groups. The civilian judiciary and even the legal system itself were inadequately prepared with either the capacities or in many instances the procedures necessary to adequately deal with that challenge. Something had to give, and all too often what gave for reasons of expediency—many in the judi-

ciary would say exigency—was traditional Egyptian standards of individualized justice and due process of law.[3]

Not all in the judiciary, especially in its most influential senior ranks, have been willing to tolerate on even an interim basis the expediency of evidentiary and procedural shortcuts at the cost of their judicial integrity. Injudicious rulings of lower courts are

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fairly consistently reversed on appeal to the Court of Cassation, the supreme court of Egypt’s common court system. These have included reversals of politically incendiary mass convictions, mass death sentences, and the court’s scathing repudiation of the hugely damaging original trial court conviction of three Al-Jazeera English journalists.[4] Many senior judges, particularly after several recent judicial appointments, are supporters of major institutional reforms aimed at elevating the judiciary’s professional performance.

For example, the new Prosecutor General, Nabil Sadek, has expressed strong interest in sending public prosecutors on study trips to the United States to examine the U.S. justice system and prosecution practices with an eye toward incorporating compatible best practices in the Public Prosecution Office. Also, the new head of Egypt’s National Center for Judicial Studies, Judge Omar Hafeez, is a strong supporter of dramatically increasing both the quality and quantity of judicial education, which has for decades been in steep decline.

The professionalism of Egypt’s best judges deserves recognition and the progressive reform efforts of some of its bolder leaders need and deserve active support.

In the long run, the Egyptian judiciary will necessarily play a pivotal role in determining whether Egypt breaks free from its long history, and deep-rooted culture, of autocracy—popularly elected or otherwise—and successfully evolves into a functional and stable democracy. The judiciary has been one of the nation’s most autonomous and powerful poles of power, and is the primary mediating institution between the Egyptian people and their government. It wields the political power to legitimize or delegitimize government actions, and even the government itself. In the struggle for primacy between competing social currents and political interests, the judiciary will not only referee the contest, its judges will ultimately

“It would be self-defeating to abandon the best elements of the judiciary at this critical juncture”

determine the legal rules of engagement. Consequently, the judiciary is the key institution with both the role and power to moderate the authoritarian impulses of the other branches of government and enforce democratic rules of governance.

For friends of Egypt, who yearn to see that country governed by the rule of law and to eventually evolve into a stable democracy, it would be self-defeating to abandon the best elements of the judiciary at this critical juncture. Rather than react to the worst elements of the judiciary by backing away, now is the time to encourage and empower the best elements in their efforts to elevate the judiciary’s capacities and professionalism and to rebuild its reputation for independence.

CHALLENGES OF TRANSITION

Up until 2011, with only a few brief interludes, Egypt had been governed since 1939 under either martial law or a state of emergency. Each renewal of a state of emergency authorized special emergency courts, using expedited procedures and relaxed evidentiary and procedural standards, to deal with broadly-defined national security cases, constituting a highly trafficked special court system occupying a middle ground between the common court system and military courts. After the 2011 revolution, the then-governing military rulers allowed

the declaration of a state of emergency to expire. The special emergency courts were disbanded, the Emergency Law itself was amended to add duration and scope limits, and extraordinary courts became constitutionally prohibited.[5] While the end of emergency rule was widely hailed, the disappearance of a middle ground option between the common court system and military courts in national security matters had considerable practical consequences.

Since constitutional law limits the jurisdiction of military courts to military matters, most cases that would have been handled in the old emergency court system went to the common court system, which was already struggling under a crushing case backlog. The backlog resulted in even longer litigation delays, typically measured in years, and correspondingly long periods in criminal cases of pretrial detention and incarceration pending appeal.[6] In the wake of the civil unrest after the 2011 revolution, and particularly after the 2013 removal of President Mohamed Morsi from office, the sudden influx of a huge number of cases and defendants into the already struggling common court system, plus the need for speed in responding to a rapidly deteriorating security situation, created institutional

stresses and the search for judicial shortcuts. The Public Prosecution Office resorted to such expediciencies as mass prosecutions of protesters[7] and the abandonment by many trial court judges of Egypt's usual standards of the requirement of individualized evidence of guilt and due process of law.

On the other hand, when procedural or evidentiary corners have been cut at the trial level, the Court of Cassation has usually expedited and reversed injudicious lower court convictions and sentences, sending everything back to square one for retrial, creating the additional delays of a litigation loop. The trial, retrial, and now third trial of former President Hosni Mubarak is a prime example. Given the likelihood of reversal of injudicious trial court rulings on appeal, the judges who enter them may not expect them to withstand appellate scrutiny. This suggests that the real objective in many cases, especially mass prosecutions, is to detain the defendants for an extended period of time, even if they are ultimately released after the long cycle of litigation is finally exhausted. The bottom line is a legal and judicial mess.

The magnitude of the difficulties faced by the common court system in dealing with such a large volume of politically charged and time-sensitive cases naturally results in flawed trials and lengthy delays. It is unsurprising that the government has turned to the alternative of the military court system, especially in genuine national security

cases in which the relative secrecy of military court proceedings enables the protection from disclosure of evidence obtained through sensitive means or sources.

Some Egyptian judges view with dismay the government's resort to the military court system to try civilians in cases that would ordinarily be tried in civilian courts, while others welcome it with relief as a necessary evil. Few view it as enduring beyond current exigencies.

The constitutional prohibition against trying civilians in military courts for any crimes other than those involving the military[8] was dealt with by an October 2014 law enacted by presidential decree declaring that for a period of two years all "public and vital facilities"—including streets and university campuses—are military facilities, effectively a declaration of a form of jurisdictional martial law.[9] While almost certainly constitutionally overbroad, the course of litigation involved in challenging the constitutionality of that law would, even under normal circumstances, take many months and even one or more years to be resolved.

COMPETING JUDICIAL CURRENTS

The Egyptian judiciary has always been complex, with multiple currents and cross-currents and with some judges being more judicious than others. As such, neither the pre- or post-2011 revolution popular narratives about the judiciary tell the whole

story. Just as current post-revolution judicial dramas draw the spotlight of attention to the most injudicious judges and their rulings, so also the pre-revolution judicial dramas drew the spotlight to the most activist judges fighting to curb authoritarian excesses. But the judiciary was not then and is not now monolithic. It is a large body of over 10,000 judges. Its internal professional and political factions, strata, and currents are driven by differing visions of the role and interests of the judiciary and of the necessities and principles of governance.

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While united in protecting their institutional interests, the judges have always been divided in their visions of the role of the judiciary in protecting and promoting the “public good.” Some judges have always viewed the proper role of the judiciary as being to act as an enforcement arm of the state—within a kind of ‘division of labor’ model. Others view the judiciary not as an enforcement arm of the state, but as an independent institution with a duty to enforce the rule of law without regard for the government’s political agenda, and when

necessary to act as a legal check on the powers of the political branches—a ‘separation of powers’ model. In Egypt today, the two viewpoints can be seen in the higher and lower courts, with judges in the higher courts more often invoking the latter and lower courts referencing the former.

Recent attention for the most part focused on the most injudicious and sensational trial court rulings. While generally factual as far as they go,[10] these narratives ignore or underreport the more judicious rulings, including what has become the routine reversal on appeal of convictions in cases across the political spectrum.

Even at the trial court level, just as there have been highly reported mass convictions, there have also been several underreported mass acquittals.[11]

The Al Jazeera English journalists case presents an excellent case study of the interplay between trial court and Court of Cassation judges, and the limited opportunities for President Abdel Fattah al-Sisi to intervene. The case was placed under intense public scrutiny due to the suspect nature of the charges and scant amount of relevant evidence introduced at the original trial. This, coupled with highly expedited procedures not appearing to comport with usual standards of due process, meant that the trial and original conviction of the three journalists attracted a deluge of negative news media attention and were hugely damaging

to the reputation of the Egyptian judiciary, and by extension (of the Egyptian government).[12]

Following the trial court conviction, Sisi issued a statement in which he said, “The verdict issued against a number of journalists had very negative consequences, and we had nothing to do with it. I wished they were deported immediately after their arrest instead of being put on trial.”[13] Regardless of whether his critics believed that statement to be sincere, it was taken seriously by most Egyptian judges as an intentional signal of Sisi’s displeasure with the outcome of the trial, and was resented by many judges as being an improper attempt to politically interfere with judicial decision-making. There is good reason to believe that Sisi was surprised, or at least disappointed, by the verdicts of conviction. Nevertheless, the timing of his statement was surely calculated, made after the trial court proceedings were concluded, but before proceedings on appeal to the Court of Cassation commenced. The practical effect of the comments was at the very least to provide political cover for a subsequent reversal of the convictions on appeal.

The Court of Cassation did subsequently reverse the convictions in a sometimes scathingly worded repudiation of the trial court proceedings for multiple violations of Egyptian standards of justice.[14] Was the Court of Cassation’s reversal a direct result of the signal from Sisi? Perhaps, but probably not. Had the Court of Cassation

judges deciding the case been supportive of the trial court’s verdicts and sentences, the language used by the Court of Cassation to repudiate them need not and probably would not have been so scathing. It is far more likely that the Court of Cassation, like Sisi, intended to send a clear message to trial courts that the Court of Cassation would not compromise its standards of justice and due process.

On retrial, apparently on the same evidence, the journalists were again convicted. It seems reasonably likely that on essentially the same facts and same law, the case was on track for a second reversal on appeal, but only after months of inevitable delay. Sisi had a window of legally permissible and politically viable opportunity between the conclusion of the trial court and initiation of Court of Cassation proceedings to intervene by—as he did—deporting the Australian defendant, Peter Grete, and later issuing a presidential pardon for the remaining two defendants.[15]

The whole course of the Al Jazeera English case illustrates the sometimes complicated and delicate separation of powers dance that is the reality in Egypt in the interplay between trial courts and the Court of Cassation, as well as between the judiciary and the President.

In Egypt’s balance—or competition—of powers, the judiciary is far more independent than commonly understood. Egypt’s judiciary is institutionally quite auto-

mous, and as a general rule its judges are fiercely protective of their independence. For example, while it is true that the president appoints all civilian judges, he does not select whom to appoint. The judiciary self-selects its members and senior officers, including the Prosecutor General.[16] Moreover, the constitution provides that the Supreme Constitutional Court not only selects its own members and chief justice, it even decides how many justices will serve on the court.[17]

While the Ministry of Justice does retain a degree of control over some aspects of judicial administration, the degree of that control was substantially reduced after the 2011 revolution. Other than the authority to recommend disciplinary action against wayward junior judges, the Ministry of Justice has no operational control over judicial or public prosecution decision making. As an added measure, the constitution contains a provision stating, “Interference in judicial affairs or in its proceedings is a crime to which no statute of limitations may be applied.”[18]

THE JUDICIARY, MORSI, AND SISI

In the wake of the Muslim Brotherhood rule in the form of Morsi’s short-lived presidency, the judiciary has been fairly united in viewing the Muslim Brotherhood as being antithetical to its interests and values.

The attacks on the judiciary during Morsi’s term in office included a provision in the 2012 constitution drafted by an Isla-

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mist-dominated assembly that reduced the size of the Supreme Constitutional Court by almost half, resulting in the removal of its most junior members.[19] Legislation was then aggressively advanced by the Islamist-dominated Shura Council—then the only chamber of parliament—to reduce the mandatory judicial retirement age from 70 to 60, which if enacted would have removed all but one of the remaining Supreme Constitutional Court justices, the entire Supreme Judicial Council, and the entire senior leadership of the judiciary. Even more inflammatory was Morsi’s declaration in November of 2012 that his edicts would be above any judicial review.[20] These attacks and others on the judiciary[21] radicalized a large number of judges against Morsi and his supporters and de-liberalized others. The interests of Egypt’s multiple poles of power were brought into alignment against the Muslim Brotherhood and other Morsi

supporters, even uniting for a time what had previously been competing currents within the judiciary.

After Morsi was removed from office in July 2013, the Shura Council was also disbanded. Within days after Morsi's removal, the Supreme Council of the Armed Forces (SCAF) announced that the interim president of the republic would be Adli Mansour, the Chief Justice of the Supreme Constitutional Court. The military's actions of removing Morsi and his government from office and establishing an interim government headed by the nation's top judicial officer was an enormously gratifying to most in the judiciary, but the flip side of that coin was that the judiciary owed its salvation to the military, and in particular to the then-head of the military, General Abdel Fattah Al-Sisi.

The judicial war being waged by some members of the judiciary against former President Morsi and his supporters amounts to a form of judicial (or injudicious) counter-assault to ensure that there will be no repeat of Morsi's attacks on the judiciary, and no repeat of assassinations of judicial officers such as the June 2015 assassination of Prosecutor General Hisham Barakat. Of course, the flip side of that coin is that the post-Morsi attacks on judicial officers are

viewed by pro-Morsi elements as justified by the judiciary's targeting of them, which creates a vicious cycle.

Some judges and public prosecutors apparently extend the logic of the alignment of interests between the government and the judiciary, including the need to restore social and political order, to other groups and individuals who attack the government. This has resulted in the prosecution of peaceful human rights protesters and harsh criminal sentences being imposed on some liberal civil society activists who were among those on the front lines during the 2011 revolution.

Before the revolution, the judiciary was widely hailed for protecting the rights of political opposition groups, human rights groups, and NGOs, and in return many in those groups stood with and defended the judiciary in its times of greatest peril.[22] Now, when both currents again need each other, some in the judiciary are attacking those who once defended them, which on multiple levels is a strategic error.

The power of the judiciary is in its perceived legitimacy as a neutral and principled arbiter of disputes between people and between the people and their government. That legitimacy is rooted in the professionalism and integrity of judges in administering and defending the rule of law. The greatest threat to judicial legitimacy and independence today comes internally from judges

who confuse rule of law with rule of judges—who in effect say, “I am the law because I am a judge.”

All loss of perceived legitimacy due to the highly publicized, injudicious rulings of some judges not only fuels a self-defeating cycle of radicalization and counter-radicalization, it also weakens the judiciary as a whole and strengthens the hands of those who for a variety of reasons—including aversion to a strong judicial check on the other branches of government and security apparatus—would reduce judicial independence.

Fortunately, many of Egypt’s most influential judicial officers are resisting the faulty notion that the balance between human rights and social stability is a zero-sum equation. Indeed, the consistency of Court of Cassation reversals of controversial convictions is likely the motivation for the law decreed by President Sisi authorizing the referral of civilian protesters and dissidents to military courts,[23] and a draft law that would authorize civilian court judges to proceed to conviction without being required to receive and consider all defense evidence.[24] These measures, aside from being plainly unconstitutional, evidence a view by at least some elements of the executive branch that the judiciary is too independent to reliably serve their aims.

DECLINE IN QUALITY OF LEGAL EDUCATION AND JUDICIAL TRAINING

The quality of most legal education in Egypt today is only a shadow of what it once was when Egypt’s lawyers were among the nation’s elites, and the law school at Cairo University was sometimes called the “college of ministers” as so many of its graduates became leaders in government. Before the 1952 revolution that brought Gamal Abdel Nasser to power, the law school once admitted only about 400 students who received first-rate legal education in the form of a traditional four-year Bachelor of Laws (LL.B.) degree program. Egypt’s law schools have since become a massive dumping ground for undergraduate students whose secondary school proficiency test scores failed to qualify them for admission into college degree programs deemed by the government to be more desirable. Today, Cairo University Law School has about 40,000 students, and is only one of 15 government regulated law schools across the country. As with most education in Egypt today, the course of study consists almost entirely of rote memorization, almost totally devoid of the training in critical thinking and analytical reasoning skills that are the mainstay of legal education in the U.S. and most other Western countries.[25] Judicial training, once the best in the region, has been in similar decline. The training programs for new public prosecutors and

judges have been steadily reduced from one year to what is now only a few weeks of essentially orientation training, resulting in a generational gap in the quality of professional development between senior and junior judges and public prosecutors.

INVESTING IN THE JUDICIARY

Egypt's judiciary is the key institution with both the role and power to moderate the authoritarian impulses of the other branches of government and enforce democratic rules of governance. If a working democracy is to emerge in Egypt, the institution most needed and likely to shepherd the government and people in that direction is the judiciary. One of the most effective means of building democracy in Egypt is to support the efforts of visionary judges and Ministry of Justice officials to elevate the professional development and performance of the judiciary.

The most counter-productive way for the international community to attempt to influence judicial decision-making in Egypt is through pressure on the government to put pressure on the judiciary to rule the way foreign governments desire. It is hypocritical for governments professing to be interested in promoting democracy in Egypt to call for its government to violate the core democratic principle of judicial independence. Such efforts are far more likely

to backfire than to achieve the desired results. Egypt's judiciary takes extreme pride in and is highly protective of its institutional independence, and within the institution its judges take extreme pride in and are highly protective of their individual independence.

Judicial reform in Egypt must come from within the judiciary itself. Fortunately, there is a large appetite within the judiciary for high quality professional development training and technical assistance, including that provided or funded by foreign governments, provided such support is delivered by legal professionals on a peer-to-peer ba-

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sis and especially when designed and delivered in partnership with Egyptian judges. Even more importantly, among the most senior and influential figures within the judiciary and Ministry of Justice are leaders with both the role and will to undertake major efforts to dramatically elevate both the quality and quantity of professional development education provided to judges. Such dramatic improvements in the professional development of Egypt's judges and public prosecutors are sorely needed, and are the key to the judiciary's future.

A TWO-YEAR JUDICIAL ACADEMY

One suggestion among key leaders has been to dramatically elevate the judiciary's level of professional development by means of a two-year Judicial Academy to replace the far more limited program delivered today by the National Center for Judicial Studies. As envisioned, the Judicial Academy would not only educate Egyptian judges, but would also train judges from other countries in the region.

Plans to develop a Judicial Academy campus stalled due to lack of funding for the academy's physical facility, but the process to implement the vision ought to be revisited: the academy's program should be developed first, then the campus should be designed and built around the program.

The new Director of the National Center for Judicial Studies (NCJS), Judge Omar Hafeez, is unwilling to wait for the Judicial Academy to be built before building the

program. With funding and technical assistance from several countries, including robust USAID-funded assistance from the American Bar Association's Rule of Law Initiative, Judge Hafeez and his staff are designing and developing a robust professional development curriculum for delivery through the current NCJS.

Ideally, when sufficiently developed, the course of education provided to new or prospective judges and public prosecutors would result in bestowal of an academically respected Master of Laws (LL.M.) degree.

Similarly, until the program was discontinued due to lack of funding, a progressive series of workshops on conducting financial investigations delivered to trial judges and public prosecutors in 2013-2014 by the U.S. Department of Justice in partnership with the Ministry of Justice, and a parallel program requested by and delivered to judges of the Court of Cassation, were enthusiastically received and well attended. A 2013-2014 program on mediation and other subjects delivered by the German Foundation

for International Legal Cooperation (IRZ), also in partnership with the Ministry of Justice, was likewise well received. The best of Egypt's judges thirst for all the high quality professional development training they can get. The only limitation is not lack of need or receptivity, but lack of funding.

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INSTITUTE FOR CONFLICT AND DISPUTE RESOLUTION

Given the judiciary's need to reduce judicial caseloads by implementing alternative means of resolving civil disputes without the need for full courtroom litigation—a need matched by litigants' need to resolve disputes more expeditiously—there is a growing trend toward arbitration. However, a weakness in both the litigation and arbitration means of resolving disputes is that Egypt has relative weak mechanisms for enforcing judgments. Therefore, interest is growing in the alternative dispute resolution method of mediation, which aims to resolve disputes in a manner that is mutually agreeable, thereby eliminating or reducing the need for external enforcement of the agreement.

Mediation has far greater potential for application in Egypt than merely reducing the need for courtroom litigation. As one Court of Cassation judge put it after spending several months of mediation training in the United States, “Mediation is not only a means of resolving legal disputes, it is also a model for changing our culture.”[26]

As important and potentially powerful as mediation is, at present there are few trained mediators and no mediation training programs available in Egypt other than what is provided on occasion by foreign trainers such as those of the IRZ. The need is for an Egyptian source of training: an Egyptian In-

stitute for Conflict and Dispute Resolution that would either be a stand-alone entity or a branch of the Judicial Academy featuring both training and practice dimensions to its program.

A number of leading figures in the field of mediation training have expressed strong interest in helping develop a mediation and other alternative dispute resolution education program in Egypt.[27] The limitation, again, is not a lack of need, judicial interest, or program development resources, but lack of funding.

JUDICIAL EXCHANGES AND STUDY TOURS

The Court of Cassation, Ministry of Justice, and Public Prosecution Office have repeatedly expressed strong interest in study tours and exchange visits with counterparts in the United States and other countries. All have expressed a desire to send representatives for serious professional study and discussions, not just cultural good will, for the purpose of identifying and learning about best practices and approaches to dealing with judicial challenges suitable for adaption and application in Egypt. Again, the limitation is lack of funding.

SCHOLARSHIPS FOR ADVANCED LEGAL EDUCATION

Officials in the Ministry of Justice, Court of Cassation, Public Prosecution Office, and NCJS have repeatedly stressed that to overcome the limitations inherent in the static, rote memorization approach to teaching that typifies Egyptian legal and other education, more emphasis is required on critical thinking and analytical reasoning. They are more interested in the teaching methods used in courses delivered by the American Bar Association, U.S. Department of Justice, and IRZ than in the subject matter being taught. [28] With an eye toward long-term sustainability and institutional impact, they are keenly interested in developing a teaching faculty of Egyptian judges and public prosecutors skilled in the use of such modern teaching techniques.

One of the more powerful ways to develop such a high quality teaching faculty is for Egyptian judges and public prosecutors to personally experience modern teaching methods as students in leading law schools in Europe or the United States at the Master of Laws or doctorate program level. Egyptian judges and public prosecutors generally seek such advanced legal study in Europe, rather than countries like the United States, due to the lower cost and availability of scholarships. There is, however, no lack of interest in studying in the United States if funding support or fellowships are available.

CONCLUSION

Despite the current turmoil, the judiciary has remained the most stable of Egypt's branches of government, and retains the same potential to act as a check on authoritarian excesses today as in storied pre-revolution battles with past presidents and parliaments. However, events of the past few years have led some in the judiciary to use their powers as a blunt instrument to get back at perceived enemies of the judiciary or the state.

As Nathan Brown warned in 2008, "An isolated judiciary is easily defeated, as happened in 1969"—a reference to the notorious purging of the judiciary by the Nasser regime, often called the Massacre of the Judiciary.[29] In the few years after those words were written, the judiciary fortified its autonomy with new constitutional protections, but Brown's warning remains valid.

The more the international community allows the injudicious actions of some judges to define perceptions of the judiciary as a whole, the more the world recoils from the judiciary, isolates its best members, and renders the institution more vulnerable to disempowerment and decline. The good news is that there is much that can and should be done to support the work of the best elements of the Egyptian judiciary.

NOTES

[1] See Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (Cambridge: Cambridge University Press, 2007); Tamir Moustafa, “Law and Resistance in Authoritarian States: The Judicialization of Politics in Egypt,” in Tom Ginsburg and Tamir Moustafa, eds., *Rule By Law: The Politics of Courts in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2008) Nathalie Bernard-Maugiron, ed., *Judges and Political Reform in Egypt* (Cairo: The American University in Cairo Press, 2008); Bruce K. Rutherford, *Egypt after Mubarak: Liberalism, Islam, and Democracy in the Arab World* (Princeton: Princeton University Press, 2008).

[2] Nathan J. Brown, “Reining in the Executive,” in *Judges and Political Reform in Egypt*, ed. Nathalie Bernard-Maugiron (Cairo: The American University in Cairo Press, 2008): 135-36, 148. In the introduction to this volume, editor Nathalie Bernard-Maugiron wrote, “If justice in the Arab world is often marked by the judiciary’s lack of autonomy in relation to the executive branch, one of the characteristic features of the Egyptian judiciary is its strength and activism in defense of democratic values.”

[3] There were and are better alternatives to dealing with the very real challenges facing the judiciary than compromising standards of individualized justice and due process, which should be maintained no matter what as judicial bedrock. To a large extent, convictions entered despite insufficient individualized evidence of guilt reflect a misplaced sense of patriotic duty to do whatever is necessary to restore order to the streets and protect the nation, or an unwillingness to appear soft or sympathetic toward opposition groups by acquitting defendants. To the extent the usual standards of justice and due process have been sacrificed for the sake of expediency in moving cases off judges’ heavy caseloads, the better and far more judicious solutions needed to meet the challenge are in prioritizing cases and changing outdated and inefficient case management and courtroom procedures. For example, docket control: felony trials are routinely broken up into segments spread out over months, rather than being conducted more efficiently in one continuous proceeding in which the prosecutors, defense attorneys, and judges are required to be fully prepared on day one to try the case from beginning to end, whether the trial takes only one day or a period of weeks to complete. Many unnecessary trials could be avoided if judges were authorized to accept guilty pleas without requiring a trial to determine whether a defendant’s credible admission of guilt is factually justified, and if judges rewarded candid and contrite guilty pleas with lower sentences in recognition of the mitigating factor of the defendant’s repentant attitude. Some needed changes would require legislative

authorization, such as procedures to protect classified evidence from public disclosure (and to classify evidence). Modernization of case management systems from hard copy files to computerized systems require additional funding to develop and implement.

[4] <http://egyptjustice.com/analysis/2015/6/10/al-jazeera-english-journalists-marriott-cell-case> (Al-Jazeera English case reversal); <http://egyptjustice.com/analysis/2015/11/2/another-example-of-reversal-by-egypts-court-of-cassation-of-mass-conviction-of-morsi-supporters> (reversal of conviction of 77 pro-Morsi demonstrators charged after deadly violence). In the Al-Jazeera English case, the defendants were again convicted on retrial, but received presidential pardons before a second appeal.

[5] Article 97 of the 2014 constitution states in part (as translated), “Individuals may only be tried before their natural judge. Extraordinary courts are forbidden.”

[6] A judicial source reports that a study of the Court of Cassation’s caseload completed in December 2011 showed that the average time to resolve criminal cases on appeal was four years, although cases in which defendants are incarcerated are given priority and move more quickly. The average time for resolving civil cases was 10 years, although commercial and economic cases were similarly given priority and moved more quickly.

[7] The most commonly advanced explanation for mass prosecutions without individualized evidence of guilt and the filing of charges in so many cases in which the evidence is factually insufficient to sustain a conviction at trial or legally insufficient on appeal is that public prosecutors are afraid of making a mistake by failing to charge a guilty person, so they shift the responsibility to sort out the guilty from the innocent to the trial court judges, who in turn sometimes enter mass convictions and thereby shift the responsibility to determine whether the evidence was legally sufficient to convict individual defendants to the Court of Cassation. That practice of passing responsibility for judicial screening of defendants and charges up the judicial ladder has long been cited as a major contributing factor to the judiciary’s excessive caseload, and places a hugely unnecessary burden on the Court of Cassation. But, not all trial judges engage in that practice and have entered mass acquittals. <http://egyptjustice.com/analysis/2015/6/10/mass-acquittalscollected-cases>

[8] Article 204 of the 2014 constitution states, in part: “The Military Judiciary is an independent judiciary that adjudicates exclusively in all crimes related to the armed forces, its officers, personnel, and their equals, and in the crimes committed by general intelligence personnel during and because of the service. Civilians cannot stand trial before military courts except for crimes that represent a direct assault against military facilities, military barracks, or whatever falls under their authority; stipulated military or border zones; its equipment, vehicles,

weapons, ammunition, documents, military secrets, public funds or military factories; crimes related to conscription; or crimes that represent a direct assault against its officers or personnel because of the performance of their duties. The law defines such crimes and determines the other competencies of the Military Judiciary.”

[9] Presidential Decree, Law 136 of 2014 for the Securing and Protection of Public and Vital Facilities.

[10] Sometimes, even factual accurate but incomplete information can be misleading. A case in point is the clear distinction that should be but is often not drawn in popular news media accounts and even some human rights reports between real (enforceable) sentences, including death and other maximum sentences, entered in absentia in cases in which defendants fail to appear, since in Egypt in absentia sentences amount to little more than legal placeholders, subject to being automatically vacated and real trials granted as soon as the previously absent defendants make a personal appearance in court.

[11] See collected mass acquittal cases at <http://egyptjustice.com/analysis?tag=Mass+Acquittals>

[12] For examples, see these news reports from The Guardian: “Video Evidence Used Against Al-Jazeera Journalists Filmed by Other Networks” <http://www.theguardian.com/media/2014/apr/10/peter-greste-al-jazeera-egypt-trial-journalists-footage> (April 10, 2014); and “Six Flaws in the Case Against Three Jailed Al-Jazeera Journalists” <http://www.theguardian.com/world/2014/jun/24/six-flaws-case-against-three-jailed-al-jazeera-journalists-greste-fahmy-mohamed> (June 24, 2014).

[13] The Guardian, “Egypt’s President Says Al-Jazeera Journalists Should Never Have Been Tried,” <http://www.theguardian.com/world/2014/jul/07/egypt-president-al-jazeera-journalists-should-never-have-been-tried> (July 6, 2014).

[14] Court of Cassation, Case 26806, Judicial Year 86, January 1, 2015. A summary, the Arabic original, and an English translation of the court judgment are available at <http://egyptjustice.com/analysis/2015/6/10/al-jazeera-english-journalists-marriott-cell-case>.

[15] For an analysis of the legal options available for each defendant after conviction on retrial, see <http://egyptjustice.com/analysis/2015/8/31/al-jazeera-journalists-pardon>.

[16] Constitution of the Arab Republic of Egypt (2104), art. 189 (prosecutor general selected by the Supreme Judicial Council) and 193 (SCC selects its own justices).

[17] Constitution of the Arab Republic of Egypt (2104), art. 193. Even earlier, the appointment of the chief justice and justices to the SCC was governed by article 5 of the SCC statute, Egypt Law 48 of 1979, as amended by Egypt Law 48 of 2011, which provides that the authority to select those SCC officers is in the general assembly of the court, the decisions of which are to be implemented by presidential appointment. Prior to those reforms, the president of the republic had unfettered discretion to select whom to appoint as chief justice of the SCC, and could select other justices from two lists, one submitted by the members (general assembly) of the court and the other submitted by the chief justice. See Rutherford, *Egypt after Mubarak*, 50n70.

[18] Constitution of the Arab Republic of Egypt (2104), art. 184. In contrast, corresponding article 166 in the older 1971 constitution had no penal provision: “No outside authority may intervene in court cases or judicial matters.”

[19] Constitution of the Arab Republic of Egypt (2012), art. 176.

[20] Constitutional Declaration, November 22, 2012. While Morsi’s declaration was itself temporary, set to expire upon ratification of what became the 2012 constitution, the last article of that constitution preserved and made unappealable the effects of all edicts Morsi issued pursuant to his constitutional declarations. Constitution of the Arab Republic of Egypt (2012), art. 236. This decree was so inflammatory and dictatorial that it sparked large public protests across Egypt, and although it is often cited now as the beginning of the end of Morsi and the government he headed, at the time it drew only a relatively muted response from most Western news media and governments.

[21] For further information on attacks on the judiciary by Morsi and the government he led, see <http://egyptjustice.com/analysis/2015/6/4/former-president-morsis-attacks-on-the-judiciary-and-judicial-counter-jihad>

[22] See Nathalie Bernard-Maugiron, “The Relationship Between Judges and Human Rights Organizations during the 2005 Elections and the Referendum,” in *Judges and Political Reform in Egypt*, ed. Nathalie Bernard-Maugiron (Cairo: The American University in Cairo Press, 2008); Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (Cambridge: Cambridge University Press, 2007) 178-188; Nathan J. Brown, “Reining in the Executive,” in *Judges and Political Reform in Egypt*, ed. Nathalie Bernard-Maugiron (Cairo: The American University in Cairo Press, 2008) 134-36, 149.

[23] Presidential Decree, Egypt Law No. 136 of 2014, October 27, 2014.

[24] “Analysts Decry Proposal Allowing Judges to Ignore Witness Testimonies,” Mada Masr, February 19, 2015, <http://www.madamasr.com/news/analysts-decry-proposal-allowing-judges-ignore-witness-testimonies>; Human Rights Watch, “Egypt: Law Changes Would Threaten Fair Trials,” March 22, 2015, <http://www.hrw.org/sv/node/133700>.

[25] See Amr Shalakany, “‘I Heard it all Before’: Egyptian Tales of Law and Development,” *Third World Quarterly* 27, No. 5 (2006): 833-853, available at http://www.aucegypt.edu/fac/Profiles/Documents/Shalakany_Egyptian_Tales_of_Law___Development.pdf

[26] Statement made in a conversation with the author by Judge Ahmed Abou-Zeid, of the Court of Cassation.

[27] The referenced interest has been expressed to the author by several people in private email communications.

[28] Statements made to the author in conversations with multiple Ministry of Justice officials and senior judges.

[29] Brown, “Reining in the Executive,” 149.