

THE RULE OF LAW AND JUDICIAL INDEPENDENCE IN EGYPT DURING THE TRANSITION TO DEMOCRACY AFTER THE ARAB SPRING

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This research traces the rule of law, and judicial independence in Egypt during the transition to democracy after the Arab Spring in light of the complicated realities of nation's centralized system over the past seven thousand years where the discretion of the ruler and the interests of the ruling elites prevailed. In this article, the author asserts that Egypt's law has long been recognized not only as a reflection of the prevailing forces in the society, but also as a strong instrument of the authoritarian ruler who presides over a centralized government structured to regulate and protect Egypt's Nile river resources from outside enemies. This trend has been followed after 1952 revolution's military rulers to date. The five authoritarian Presidents with military background (Naguib-1952 to 1954, Nasser-1954 to 1970, Sadat-1970 to 1981, Mubarak-1981 to 2011 and currently, Al-Sisi-2013 to date) operate in a legalistic environment which allowed them to use legal tools and shift tactics in their efforts to use the law to enhance their executive privileges by satisfying the military corporate interests. This tendency has compromised judicial independence and empowering judges to use law as an instrument of change and tool for progressive economic and social development. The author argues that the Egyptian constitutional context under the five military rulers ruled does not translate into principles of law-abiding governmental powers, independent courts, transparency of legislation, and judicial review of the constitutionality of laws, but the wishes of the ruler and his power base-the military. The period following the two revolutionary waves of January 25, 2011, and June 30, 2013 witnessed an increasing development toward respecting the rule of law in the form of an efficient enforcement of judicial decisions, trying the two former Presidents-Mubarak and Mursi and their entourage before courts of law rather than special courts, and increased promotion of freedom of expression.

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INTRODUCTION: LAW & PROGRESSIVE CHANGE

Absence of rule of law was a central reason for the Egyptian revolution on January 25, 2011. Egypt's law has long been recognized not only as a reflection of the prevailing forces in a given society but also as a potential instrument of change and progressive development. These two attributes, Ibrahim Shehata (1997) argued, enabled it to play seemingly contradictory roles in society: that of a keeper and interpreter of the status quo and, simultaneously, that of a catalyst for its change and the mechanism through which such a change may be brought about in an orderly manner.¹ Rules, however, are seldom self-executing and even when they are, they need appropriate institutions to ensure their correct application and enforcement and to settle disputes which inevitably arise in the course of their application.² The Egyptian legal system like all legal systems consists not only of applicable *rules* but also of the *processes* through which these rule are to be applied and of the *institutions* in charge of these processes.³ Without such processes and institutions, rules may remain abstract concepts which do not always reflect the law in force.⁴

The Egyptian revolutionary waves of January 25, 2011 and June 30, 2013 provided an opportunity to introduce the most appropriate and liberal changes toward the rule of law and judicial independence under the current circumstances of the Egyptian society. Liberalism according to Nathan Brown (1997) has played a role in Egyptian legal history, and the Egyptian judiciary has at times emerged as a force for liberal legality and it served to support existing political authority.⁵ The changes must also include such *legislative, administrative* and *judicial* reforms as may be needed to insure that the rules will be changed to serve the Egyptian people public interest,

¹ IBRAHIM SHIHATA, COMPLEMENTARY REFORM, ESSAYS ON LEGAL, JUDICIAL AND OTHER INSTITUTIONAL REFORMS SUPPORTED BY THE WORLD BANK 55 (London/Boston: Kluwer Law International 1997).

² *Ibid.*

³ *Ibid.*, at 56.

⁴ *Ibid.*

⁵ NATHAN BROWN, THE RULE OF LAW IN THE ARAB WORLD 236 (Cambridge: Cambridge University Press 1997).

will be applied by an *independent judiciary* in a correct and fair manner so that they may continue to serve this purpose, will be complemented by the necessary regulations and interpretations which facilitate their application and will be subject to future reviews to ensure their continued relevance and usefulness.⁶

The purpose of this research is to investigate the following two research questions:

(a) How did Egypt's authoritarian Presidents, with military background since 1952 revolution to date, operate in a legalistic environment which allowed them to use legal tools and shift tactics in their efforts to use the law to advance their military corporate interests without empowering independent judges?

(b) What are the challenges confronting judicial independence and the rule of law during the transition to democracy in Egypt after the two revolutionary waves of January, 25, 2011 and June 30, 2013?

I. THE NASSER, SADAT, MUBARAK REGIMES & THE RULE OF LAW

The “*Rule of Law*” according to Otis Stephens, John Scheb and Colin Glennon (2015) is the idea that law, not the discretion of officials should govern public affairs⁷. The “*Rule of Law*”, sometimes called the “*Supremacy of Law*,” has been understood by some to generally indicate that decisions should be made by the application of known principles or laws without the intervention of the ruler's discretion in their application⁸. The “*Rule of Law*” in terms of constitutional law was invoked by English writers as early as the 12th and 13th centuries to restrain the powers of monarchs, and was articulated in the Massachusetts Constitution (Part the First, Article XX of 1780) which spelled out the principles of separation of powers “*to the end [the government] may be a government of laws, and not of men*”⁹. In modern constitutional law, the “*rule of law*” translates into the principles of law-abiding governmental powers, independent courts, transparency of legislation, and judicial review of the constitutionality of laws and other

⁶ IBRAHIM SHIHATA, COMPLEMENTARY REFORM, ESSAYS ON LEGAL, JUDICIAL AND OTHER INSTITUTIONAL REFORMS SUPPORTED BY THE WORLD BANK 56 (London/Boston: Kluwer Law International 1997).

⁷ Otis H. Stephens, Jr., John M. Scheb II & Collin Glennon, *American Constitutional Law, Volume II Civil Rights and Liberties D-21* (Stamford: Cengage Learning 2015).

⁸ IBRAHIM SHIHATA, COMPLEMENTARY REFORM, ESSAYS ON LEGAL, JUDICIAL AND OTHER INSTITUTIONAL REFORMS SUPPORTED BY THE WORLD BANK 5 (London/Boston: Kluwer Law International 1997).

⁹ *Ibid.*

norms of lower order¹⁰.

Generally, there are two main schools of thought: the instrumental interpretation school and the substantive interpretation school, according to Ahmed Eldakak (2012).¹¹ The instrumental interpretation school, rule of law basically refers to *the existence of a legal system in which there are rules, and these rules are followed*. In other words, rule of law means “*how to do things with rules*”.¹² The actual content of the rules is less important than the actual existence of the rules themselves. Rule of law in this context is about the “*formal and structural components, rather than the substantive content of the laws*”. Such rules need to be public, understandable, non-contradictory, and non-retroactive. Accordingly, such rules are not necessarily fair or democratic. Therefore, a legal system that does not recognize the most basic human rights can still claim to be governed by rule of law.¹³ The substantive interpretation approach also requires the existence of a set of rules that are followed. However, under the substantive approach, such rules must have essential goals that represent the desired end-state of the society¹⁴. The goals under this view are “*making the state abide by law, ensuring equality before the law, supplying law and order, providing efficient and impartial justice, and upholding human rights.*”¹⁵ Consequently, a legal system that does not respect basic human rights, such as freedom of speech, cannot claim to be governed by rule of law. Notably, the United Nations adopted a substantive approach in its rule of law definition:

Rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.¹⁶

The United Nations’ adoption of the substantive interpretation

¹⁰ *Ibid.*

¹¹ Ahmed Eldakak, *Approaching Rule of Law in Post-Revolution Egypt*, 18(2) U.C. DAVIS JOURNAL OF INTERNATIONAL LAW AND POLICY 261—307 (2012).

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

approach signifies an international agreement that substantive interpretation is superior to instrumental interpretation. Accordingly, this article adopts the substantive interpretation of rule of law.¹⁷

II. EGYPT'S GEOGRAPHY & ITS IMPACT ON JUDICIARY INDEPENDENCE

Egypt's geographic location dictated the establishment of an authoritarian regime to rule rather than to govern via the rule of Law. Archaeologists have dated signs of organized human habitation in the fertile Nile Valley that forms the heart of Egypt to over 6,000 years ago, and the signs of fabled Land of the Egyptian Pharaohs go back over 7,000 years¹⁸. The heart of Egypt has been the Nile river valley, which early in human history made Egypt an agricultural supplier to many of the world's surrounding and competing powers and formed the basis of the Pharaoh's empire that prospered into biblical times. These geographic circumstances required the development of authoritarian centralized institutions to govern the creation, maintenance and policing of a sophisticated irrigation system. However, the aforementioned bases of Egyptian ascendancies have simultaneously and perplexingly been a blessing and a curse. While the abundance of the Nile allowed Egypt to flourish, it also meant outsiders cast a frequently resentful and greedy eye on Egypt. When the rulers and their central institutions policing the state weakened due to internal power struggle among the ruling elite or when the central authority's exercise of policing power over its population, geographical territories and borders relaxed—the result was invasion and conquest that disturbed the country well into the 19th and 20th century with a British occupation for seventy two years, from 1882 to 1954¹⁹.

The aforementioned mix of geography and Egypt's historical circumstances has its profound impact on the rule of law, and Judiciary represented by the Ministry of Justice (MOJ) which administers justice, judicial independence, and the judge's ability to apply and interpret the law. Both the MOJ and the judges presiding at the judiciary benches are at the mercy of the executive branch's powerful arm- the Ministry of Interior (MOI) which administers the state's police power, enforcing judicial decisions/verdicts and provides personal protection to Judges. Hence, the Egyptian Judiciary since the dawn of history is heavily centralized, heavily

¹⁷ *Ibid.*

¹⁸ ELLEN LUST (ED.), *THE MIDDLE EAST*, 14TH EDITION 424—453(Thousand Oaks, Sage-CQ Press 2017).

¹⁹ *Ibid.*

controlled by the executive branch of government and submits to the ruler—King or President who represents the will of the state.

III. RULE OF LAW DURING NASSER'S REGIME

The 1952 revolution led by the charismatic leader Gamal Abdel Nasser left the judicial system intact, and enabled their top leadership of the judiciary to double their income by allowing them to hold teaching positions at the only Police Academy in the country under the Ministry of Interior (MOI) the most powerful arm of the executive branch. Nathan Brown (1997) argued that historical development of these era from 1954 to 1970 (the end of Nasser's regime) indicates that there were several major confrontations with one important component of the Egyptian judiciary branch that is *Majlis al-Dawla*, or *Council of State*²⁰. It is this judicial body which championed the institutionalization of liberal legality in Egypt during the 1940s under the leadership of Abdul Razak al-Sanhuri—gifted Jurist²¹. *Majlis al-Dawla* is a judicial body responsible for reviewing any new legislation prior to enacting it by the parliament. Also, responsible of adjudicating disputes between the government and individuals, or between two government agencies²². It is equivalent to the administrative courts in the United States.

In 1954 according to Enid Hill, the *Majlis al-Dawla* was attacked and its Chief Justice (al-Sanhuri) forced to retirement from public life²³. Nathan J. Brown in his seminal work on “*The Rule of Law in the Arab World, Courts in Egypt and the Gulf*”, noted that *Majlis al-Dawla* initially assisted the Free Officers took power in July 1952. When the officers formed a Regency Council to take the place of the ousted King Faruq, the *Majlis al-Dawla* provided a legal formula that obviated the need to present the measure to the disbanded parliament (as was constitutionally required)²⁴. The *Majlis al-Dawla* thus worked out a relationship with the ruling military officers (members of the Revolutionary Command Council (RCC)—the *de facto* legislative body), based on the assumption that the authoritarian measures taken by the new regime were emergency measures and that full constitutional and parliamentary life would soon be restored²⁵.

²⁰ The Rule of Law in the Arab World, 73—76.

²¹ *Ibid.*

²² *Ibid.*

²³ IBRAHIM OWEISS (ED.), *THE POLITICAL ECONOMY OF CONTEMPORARY EGYPT* 240—259 (Washington DC: Center for Contemporary Arab Studies, Georgetown University 1990).

²⁴ The Rule of Law in the Arab World, 73—76.

²⁵ *Ibid.*

The years of 1953 and early 1954 witnessed also, another attempt to increase the institutionalization of liberal legality championed by *Majlis al-Dawla's* Chief Justice al-Sanhuri took place in the drafting of a new republican constitution²⁶. However, the RCC which was composed of military officers decided to move beyond forcing the abdication of King Faruq to abolishing the monarchy altogether, it appointed a body of legal and political experts to draft a new constitution²⁷. Al-Sanhuri proved to be among the most influential members of the committee which nearly completed a very liberal and democratic document.²⁸

The draft would granted women the right to vote and established a supreme constitutional court to protect the constitution (over the objection of Makram Ubayd, a powerful Wafdest politician—another member of the committee who argued that this would infringe the prerogatives of the legislature)²⁹. A parliament was to be established with al-Sanhuri arguing for a strong measure of popular participation in electing its members. Work proceeded fairly quickly at first, and by August of 1953 al-Sanhuri promised that the draft would be completed within months, making an extension of Military rule via the RCC³⁰.

When the faction led by Khalid Mohi Aldeen and Naguib within the RCC which supported and favored the return to constitutional life, were defeated in the March 1954 crisis, the fate of the new constitution was sealed³¹. While the *Majlis al-Dawala* was not an active participant in the conflict between who favored the return to parliamentary life and those supported the continuation of the RCC (which controls both legislative and executive authorities), it was clear where its sympathies lay. At the end of March 1954, a demonstration organized by supporters of the military's rule turned violent when al-Sanhuri's office was stormed and al-Sanhuri was assaulted by members of the military police³². Nasser's faction won, al-Sanhuri was removed from his position as Chief Justice of *Majlis al-Dawla*. Followed by sending, Kaled Mohi Al-deen to permanent exile abroad (in Switzerland), and Nagub was placed under house arrest from 1954 to the remainder of Nasser regime, September 1970, without trial³³.

In 1955, another attack against the *Majlis al-Dawla* came to bring it

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

more closely within the executive branch supervision, but this effort was frustrated because of the judges resistance, according to Enid Hill³⁴. The final assault came in 1969, with the so-called “*Massacre of the Judges*”, when a substantial number of the judges were in effect fired. And a new body to supervise judicial appointments, controlled by the Ministry of Justice, was established. And Nasser prevailed. When Nasser wanted to force certain public policies about basic political or socioeconomic changes the judiciary was just bypassed. Special revolutionary courts were set up for special purposes; there were also experimentation with “*popular courts*.”³⁵

Another means of exercising executive influence on the judiciary was through a comprehensive Emergency Law legislated in 1958 by the first elected parliament since the 1952 revolution. The Parliament’s Speaker Abdul Latef al-Bagdady is one of the original Free Officers Corps. When he or any one from the Free Officers Corp ran in his electoral district for election in the parliament—called the People’s Assembly, no other person was allowed to run. Under this Emergency Law, various statutory procedural protections for the defendants are not applicable, various acts (otherwise allowed) are designated as crimes, and certain crimes specified in the penal code are subject to harsher penalties³⁶. Parallel with the 1958 Emergency Law, State Security Courts staffed by Military judges were established to prosecute “political” crimes committed by civilians³⁷. Military prosecutors were given the police power (*al-Dabtia al-Kadaia*.) Likewise the military police and its affiliated the Criminal Military Investigation Administration (*Edaret al-Mabahech al-Gnaaih al-Askaria*). These measures were directed mainly against the Muslim Brotherhood (MB), the most disciplined, organized, and militant social and political movement existed in Egypt since 1928 to date-2017.

Only in the late 1960s, in the last years of Nasser’s presidency, did the regime mount a concerted efforts to bring the judiciary under firm presidential control: A new “Supreme Court” was created by decree and staffed by presidential appointments after thorough background check about their attitude toward the regime by three security agencies. A “*Supreme Council of Judicial Organization*” was given authority over administrative matters as well as appointments and promotions within the judicial ranks and effectively placed under executive oversight.³⁸

³⁴ The Political Economy of Contemporary Egypt, 242.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ The Rule of Law in the Arab World, 73—76.

³⁸ Nathan Brown, *Egypt’s Judges in a Revolutionary Age* 1-14 (Washington DC: Carnegie Endowment for International Peace-The Carnegie Papers 2012).

IV. RULE OF LAW DURING SADAT'S AND MUBARAK'S REGIMES

Presidents Sadat and Mubarak both came from the military institution, but lack Nasser's popular charisma relied heavily on the military and security agencies as a source of their power and legitimacy to rule, but not to govern. Yet over the next four decades, Nasser's two successors, Anwar Sadat and Hosni Mubarak, the State Security Courts remained in addition to a new exceptional court was created by Sadat in 1980: the "*Court of Values*"³⁹. In addition to another exceptional jurisdiction utilized by Sadat and used by Mubarak which is the "*Socialist Prosecutor*". The Socialist Prosecutor is appointed by the president of the republic and directly responsible to him. His office serves as the executive's arm for investigations and for the preparation of accusations independent of the judicial apparatus. The aforementioned measures built by Nasser, followed and strengthened by Sadat and cemented by Mubarak long reign of 30 years totalitarian role resulted in the continuation of legal and judicial system in Egypt with the purpose of providing support for the political-heavily centralized hierarchal structure build by Nasser. And to be an integral part of an effort to build a stronger, more effective, more centralized, and more intrusive police state. The result was an absent of the Rule of Law known to civil societies, and led Egypt to become close to a failing state.

Tamir Moustafa (2012) work on the Egyptian judiciary proffers that, "under the credible commitment thesis, authoritarian regimes with longertime horizons (like the Nasser, Sadat, and Mubarak regimes) are morelikely to provide the judiciary some independence to provide assuranceto much needed domestic and international investments"⁴⁰. Moustafa argues that the Sadat and Mubarak regime were compelled to allow more political liberalization, including rule of law and limited judicial independence, as a source of legitimacy to offset their regime's failure to sustain the high levels of public benefits provided by the Nasserregime. To survive economically, the state had no choice but to substitute political rights for welfare rights due to its inability to provide employment, health service, and food subsidies. The regime used judicial mechanisms to absorb the public's anger over increasing political corruption from the ruling elite. By having courts issuerulings striking down certain laws as a means to privatize the economy and shrink subsidies, the executive redirected the public's

³⁹ The Political Economy of Contemporary Egypt, 242.

⁴⁰ TAMIR MOUSTAFA, DRAFTING EGYPT'S CONSTITUTION: CAN A NEW LEGAL FRAMEWORK REVIVE A FLAWED TRANSITION? 1—11 (Washington DC: Brookings Doha Center-Stanford Project on Arab Transitions 2012).

anger toward the judiciary. As more judges were motivated by both self-preservation and a conviction to do the government's political bidding, the judiciary itself became politicized. The result is the judicialization of politics.⁴¹ The author believe that there are four conditions that incentivize long term authoritarian regimes such as Egypt to show to the outside world some tolerance to judicial independence, first, lack of traditional legitimacy or charismatic sources of legitimacy; second, inability to provide welfare goods such as economic and social services that have been provided in the past; third, a weak international or regional role; and fourth, popular support of the judiciary based on perceptions of judges as professionals, independent, and concerned political actors. The absence of the aforementioned conditions under Mubarak compelled his regime to allow for some restrained judicial independence. For instance, Mubarak was notoriously uncharismatic and his incremental removal of subsidies due to pressures by international lenders incentivized him to judicialize politics by shifting some of the political backlash onto a quasi-independent judiciary. When the judiciary leveraged its limited independence to issue rulings that preserved civil liberties and the electoral process, popular support for the judiciary arose. This made it more costly for Mubarak to overtly eliminate judges' independence. Finally, the disreputable emergency law is one common tool used by the former regimes of Nasser, Sadat and Mubarak that disregarded the rule of law by amending the constitution to promote the rule of the president, issuing laws that served the interests of the president's entourage-the military, not enforcing judicial decisions, restricting freedom of speech, and concentrating power in the hands of the executive branch over the legislative branch and the Judiciary.

V. RULE OF LAW AND JUDICIAL INDEPENDANCE AFTER THE JANUARY 25, 2011 REVOLUTION

The period following the two revolutionary waves of January 25, 2011, and June 30, 2013, witnessed an increasing trend toward respecting the rule of law, through changes such as enforcement of judicial decisions to remove private properties build on public land, trying the two former Presidents (Mubarak, and Mursi) and their entourage before courts of law (rather than special courts), and increased promotion of freedom of expression. However, several serious obstacles to promoting rule of law remain after the two revolutionary waves. One of the *Deep State's* tools is still fully penetrating the judiciary branches as a result of allowing Ex-police officers to join the

⁴¹ *Ibid.*

judicial bench due to their equal legal education with judges. Ex-police officers constitute approximately 1/5 of the current judges according to a former General in the Egyptian police who asked not to be identified by name. Also according to one of the world's leading experts on Egyptian and international law UN war crimes specialist and Nobel Peace Prize nominee, Mahmoud Cherif Bassiouni. Dr. Bassiouni tells the International Bar Association (IBA) Global Insight, that:

the unprecedented sentencing to death of 529 Muslim Brotherhood supporters on 24 March, 2014 has prompted much-needed scrutiny of the Egyptian judiciary. It has been undermined by poorly trained former police officers' and is in urgent need of reform, over the past two decades; around a fifth of judges may have passed through the ranks of the police force, compromising their independence and integrity. This is an anomaly in any legal system that you create a career path opening by going to the police academy. The Police Academy has become a path for people who did not have good enough grades to get into law school or because of some relations their parents might have had with the authorities. You might call it an infiltration of the judiciary. The deteriorating professional standard of the police has had a direct impact on the quality of the judiciary.⁴²

Bassiouni explains further by arguing that:

Many have accepted the higher standards of the judiciary, but many have remained with the original police culture. For a large number, their training and standards leave much to be desired. The shock ruling—on charges including murdering a policeman and violent attacks on people and property—was made after just two hearings, in which the defendants' lawyers complained they had no chance to examine the evidence.⁴³

Santiago A. Canton, Director of Robert Kennedy's Center of Partners for Human Rights, criticized the aforementioned court ruling. He calls for the annulment of the death sentences handed down to over 500 individuals in Egypt and for the need to safeguard due process of law protections during trials and Last Monday, after a mass two-day trial, a judge in the Minya criminal court sentenced 529 people to death for crimes related to violence against the Matay police station and the death of its deputy police chief, Colonel Mustafa Ragab⁴⁴. According to media and NGO sources, the defendants face charges including the murder of a police officer and attempt to kill two others, vandalism, seizing weapons, unlawful public gathering,

⁴² Rebecca Lowe, *Egypt: Judiciary Undermined by Badly Trained Ex-Police*, INTERNATIONAL BAR ASSOCIATION'S GLOBAL INSIGHT (April 2, 2014).

⁴³ *Ibid.*

⁴⁴ Santiago A. Canton, *Director of Robert F. Kennedy's Center of Partners for Human Rights* (June 21, 2014).

and belonging to an illegal organization. The last charge is in reference to the Muslim Brotherhood, which was designated as an unlawful organization in December 2013, four months after the incident took place.⁴⁵ The scale of these death sentences is unique and unparalleled; furthermore, it sets a dangerous precedent in Egypt's application of law. The proceedings violated a range of Egypt's international human rights obligations with respect to a fair trial, in particular articles 6 and 14 of the International Covenant on Civil and Political Rights and articles 4 and 7 of the African Charter on Human and Peoples' Rights. The trial proceedings also violated several provisions of Egypt's new constitution, including articles 95, 96, and 98. According to civil society and news reports, the procedural irregularities included the absence of most of the defendants from the trial, the defense lawyers' denied access to the court, the lack of witnesses called to stand, the lack of relevant evidence presented that implicates any individual defendant, and the potential application of an ex post facto law⁴⁶.

Human Rights Watch reported on June 21, 2012 and December 3, 2014 that "*Five hundred people have been sentenced to Capital Punishment. The Grand Mufti must annul this judgment immediately*".⁴⁷ The cases are sent to the *Grand Mufti* who will decide whether the death sentences will be confirmed, as per Egyptian law. That same day, the Minya criminal court will render the verdict in another mass trial against 683 people, including the MB's Supreme Guide Mohammed Badie, for similar charges in connection with an attack on a separate police station. Additionally, two other trials have been ordered for 919 suspected MB supporters for charges that include murder for some of the accused for using force used during the sit-in dispersals on August 14, 2013, when over 600 people died, have not been prosecuted. In addition, only four police officers have been convicted for the deaths of 37 detainees, who died of asphyxiation while being transported to a prison on August, 18, 2014. One of the police officers was given a 10-year sentence while the other three were given one-year suspended sentences. This implementation of mass trials is being targeted at perceived critics and opponents of the government, and speaks to a larger, worrying trend of the backsliding of the rule of law in Egypt.⁴⁸ The Egyptian court system is overwhelmed with a back log of cases due to the vast number of arrests. Many of those arrested are supporters of the MB, but the detained also include secular activists and journalists. According to

⁴⁵ Human Rights Watch (June 21, 2014).

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

senior interior ministry officials, 16,000 people have been arrested in recent months.

Santiago A. Canton reported that “The use of mass trials does not bode well for the thousands of others who await their day in court”. “Dissidents from various affiliations and journalists have been rounded up in droves since last summer. With so many in prison, it begs the question of whether Egypt is truly moving forward in democratic and inclusive manner”, or moving toward a Failing State or a Soft State?⁴⁹

VI. THE NEED TO REALIZE THE RULE OF LAW, AND JUDICIAL INDEPENDENCE DURING THE TRANSITION TO DEMOCRACY

Undoubtedly, the two revolutionary waves of January 25, 2011 and June 30, 2013 had a great impact on the promotion of rule of law as a concept, and that Egypt’s political system is moving forward toward some sort of democracy suitable for the Egyptian culture and the country’s complicated economic and social development realities⁵⁰. The Egyptian new form of democracy may not be squared with or to be identical to other well known Western democracies, but hopefully will preserve the Egyptian State from collapsing as what happened in other countries of the Arab spring such as Libya, Syria or Yemen. The following can be seen as a positive development according to Ahmed Eldakak (2012):

First: The trying of the two former Presidents Mubarak and Mursi and their associates before courts of law rather than a special court is a positive sign of progress toward the *rule of law*. As Montesquieu once stated, “[*l*]aw should be like death, which spares no one.” Mubarak’s trial particularly is a positive development for the rule of law in Egypt. Despite several developments that had cast serious doubts on the success of the trial, it marked the first time in Egyptian history that a former ruler was brought before courts of law. This pursuit of legal justice is what differentiates the 2011 Egyptian Revolution from the 1952 revolution where members of the former regime were tried before special court composed of all military officers without fair trials. Giving a trial to a dictator who caused the death of hundreds of heroic innocents during the Revolution is one of the most effective first steps towards establishing full rule of law the essence of democracy.

Second: An important development that echoed the evolution of rule of law is when Field Marshal Mohamed Hussein Tantawi, the head of the

⁴⁹ *Ibid.*

⁵⁰ Approaching Rule of Law in Post-Revolution Egypt, 296—297.

Supreme Council of the Armed Forces (SCAF), received subpoena to testify during Mubarak's trial. Before the Revolution, it was hard to imagine that senior members in the regime would appear before a court to testify. In Mubarak's trial, senior members of the new regime were required to testify, including: the Army Field Marshal, the Chief of the Intelligence Organization, and the Minister of Interior. These subpoenas indicated the first time in the history of the Egyptian judiciary that people in such high positions of executive power could be obliged to testify before a court of law. Mubarak's trial sends a clear message that the rule of man has ended and the rule of law has rematerialized. The remaining challenge is how to establish a full rule of law that will fulfill the expectations of Egyptian society today after the great human sacrifices during the first revolutionary wave of January 25, 2011.

Third: After the revolution, judges set to work drafting a law that would likely have support of all political forces. They worked to legitimate a more powerful Supreme Judicial Council, rendering it freer of executive oversight and transferring to the council functions that currently belong to the Ministry of Justice. Even the indirect ways of influencing judges, such as doling out attractive secondments, would be placed in judicial rather than executive branch hands. The effect would be to make the judiciary as a body far more self-directed in terms of administration, budgeting, and personnel.

This is a goal that not one person would question in the post-revolutionary atmosphere.

Fourth: After the overthrow of Mubarak in 2011, the Supreme Constitutional Court (SCC) attempted to regain its control over judicial appointments. While the details of its interactions with the SCAF are unknown, it won an important concession from SCAF with the decree law on SCC appointments, which gives SCC judges an important role in appointments decisions and limits the President's choices regarding candidates. During the last constitution-drafting process, the SCC indicated its displeasure with proposed articles on the judiciary by calling a press conference. A press conference by the leadership of the judiciary is not known in the Egyptian history since the military came to power after the 1952 revolution.

Fifth: The resumption of broadcasting *al-Qahira al-Youm* ("Cairo Today") is the optimal example of progress of freedom of expression and mass media following the Revolution. The "Cairo Today" program is one of the most popular television shows in Egypt. Its main presenter is Amr Adeeb, who is famous for opposing the presidential inheritance project. Following an episode sharply criticizing the government media supporting

Gamal Mubarak, the channel was shut down. The official reason for the shutdown was that the channel administration owed several million pounds in debt. Although the channel was truly in debt, the true reason for silencing the channel was Adeeb's criticism of the presidential inheritance project. Adeeb resumed broadcasting his show immediately after the ousting of Mubarak. As for the state media, the government's strict censorship policy has relaxed. However, this relaxation does not mean that the state media now enjoys the same freedom as in other democracies. The state media still suffers from limited censorship. The independent media now enjoys more autonomy as well if they do not cross the red line of criticizing the military under the current regime of Abdel Fatah al-Sisi.

Sixth: Despite an uneasy transition due to internal and external forces operating in the geopolitics of the Middle East, Egypt completed its road map toward democracy, by electing a new president in July 1, 2014, drafting and popularly legitimating through referendum a new constitution in January 2014, and finally electing a new parliament in December 2015. The country survived an imminent civil war as what happened in Libya, Syria and Yemen.

Seventh: It is imperative to note that after the Revolution, the new government enforced two important judicial decisions ignored by the former regimes. The government banned the Ministry of Interior police forces on university campuses, and it also showed its intention to implement a national minimum wage. Due to the economic crisis facing the nation, the enforcement of the latter may be delayed or implemented in two stages. What is significant is that the government announced its responsibility to enforce judicial decisions. By doing so, the government is acknowledging that it is bound by rule of law in post-revolution Egypt, rather than the discretion of the ruler and the ruling elite⁵¹.

Despite the aforementioned positive development reported by Ahmed Eldakak in 2012, Amr Hamzawy the distinguished scholar of the Middle East with a first hand knowledge of Egypt's politics observed that:

Recently (September, 2016), Egypt's parliament has approved—without revision—almost all of the 342 presidential-decree laws issued by then-Interim President Adly Mansour and by President Abdel Fatah al-Sisi. Despite the clear autocratic nature and the violations of basic human rights prevalent in many of them, the parliament passed almost all of these laws with very little discussion—a testimony to how submissive the legislative branch is to executive power in

⁵¹ AMR HAMZAWY, EGYPT PARLIAMENT OPENS THE DOOR FOR MORE REPRESSION (Washington DC: Carnegie Endowment for International Peace, and published by the Washington Post on September 22, 2016).

Egypt and of the growing despotism of Sisi.

The “Organization of Lists of Terrorist Entities and Terrorists” law is particularly troubling. It defines acts of terrorism in an extremely broad manner that can be easily manipulated to pursue peaceful dissidents and to punish independent nongovernmental organizations. The legislation uses elusive phrases such as “preventing and impeding public authorities, disturbing public order, harming social peace, endangering the safety and interests of the community, and harming national unity and security.” It does not even relate acts of terrorism exclusively to the use of violent means or armed force. Rather, it refers to “any means”.

The new law practically enables the government to curtail basic rights and freedoms under the banner of counterterrorism efforts. Peaceful assembly, expression of dissenting opinions and the formation of opposition political parties and independent NGOs are constitutionally guaranteed rights and freedoms that can be undermined once the government classifies practicing them as acts of terrorism.

The law doesn’t necessitate a judicially proven connection with terrorist activities for a charge to be filed, and the procedures for inclusion on the list are done through what seems to be an opaque procedure between the public prosecution and the criminal court. The law doesn’t define the necessary documents to submit a request for placement on the list, and leaves all things “administrative” to the office of the public prosecutor and the Criminal Court of Appeals in Cairo. Affected parties cannot interfere with the question of placement on the list before it is executed, and this strips them of their constitutional legal right to defend themselves from the charges.

Furthermore, the law initiates a wide variety of draconian consequences without waiting for the outcome of an appeal. They include the banning of listed groups, halting of all organizational activities, closing of all locations, criminalization of meetings and freezing of assets and funds. Individuals placed on the terrorist list may be placed under a travel ban and can expect a cancellation of their passports, freezing of their funds and revocation of their constitutional right to run for and occupy public office.

Sisi’s government does not hide its distaste for opposition parties, independent NGOs and voices of dissent. It sees them as hostile entities and individuals conspiring to impose chaos on Egypt. Demands for the protection of human rights and freedoms are, according to Egyptian generals, Trojan horses pushed forward to make the country ungovernable. Since Sisi’s ascendancy to power following the 2013 military coup, his government has outlawed hundreds of NGOs, banned activists from travel and confiscated their assets, and ordered investigations and court proceedings against leading human rights organizations—most notably the Cairo Institute for Human Rights Studies and the Egyptian Initiative for Personal Rights.

Regrettably, according to Amr Hamzawy 2016, Western silence on Egypt’s despotism continues. Western officials and politicians met with Sissi during the United Nations General Assembly in New York, including U.S. presidential nominees Hillary Clinton and Donald Trump <<https://www.washingtonpost.com/>

news/worldviews/wp/2016/09/20/trump-met-his-favorite-middle-east-strongman-what-happened-next-will-not-surprise-you/>. Sissi unambiguously thinks that his repression of civil society is tolerated—if not outright accepted—by the United States and Europe. They have yet to prove him wrong.⁵²

CONCLUSION

Since the dawn of history, Egypt's geography and its dependence on the water resources of Nile River have led to the institutionalization of a centralized government. Rulers'- Pharaohs', Kings' and Presidents'-personal discretion and the ruling elite interests are the canvas for ruling rather than the rule of law. The absence of rule of law was a central reason for the first and second Egyptian revolutionary waves of January 25, 2011, and June 30, 2013. These two revolutionary waves provide a golden opportunity to establish full rule of law in Egypt. This Article analyzes the features of absence of rule of law before the Revolution, and after the 1952 revolution where five Presidents with a military background disregarded the rule of law by amending the constitution to promote the rule of the president, issuing laws that served the interests of the president's entourage the military, not enforcing judicial decisions, restricting freedom of speech, and concentrating the power in the hands of the president through the notorious emergency law. The period following the two revolutionary waves witnessed an increasing tendency toward respecting the rule of law, through changes such as enforcement of judicial decisions, trying the former two presidents Mubarak and Mursi, and their associates before courts of law, increased promotion of freedom of expression, and judges are giving the opportunity to work on drafting laws that would likely have support of all political forces. They worked to legislate a more powerful Supreme Judicial Council, making it unrestricted of executive oversight and reassigning to the council functions that currently belong to the Ministry of Justice. However, several serious obstacles to promoting rule of law remain after the two revolutionary waves such as the absence of transitional justice, the continuation of the state of emergency, and the military trials for civilians. Despite an uneasy transition due to internal and external forces operating in the geopolitics of the Middle East, Egypt completed its road map toward democracy, by electing a new president in July 1, 2014, drafting and popularly legitimating through referendum a new constitution in Jan. 2014, and finally electing a new parliament in Dec. 2015. The country survived an imminent civil war as what happened in Libya, Syria and Yemen.

⁵² *Ibid.*