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Introduction

July 3, 2013, was a typical warm summer day in Cairo (temperature was 95° Fahrenheit – 35° Celsius), but it was an even more blistering politically. That afternoon, army chief General Abdel Fattah Al-Sisi deposed Mohamed Mursi, Egypt's first democratically elected president. In making this momentous proclamation the general was naturally flanked by the top brass of the army, navy, and air force. But the carefully choreographed picture put front and center Egypt's most senior judge (the president of the Supreme Judicial Council and the Court of Cassation). Sisi also announced the appointment of the chief justice of the Supreme Constitutional Court (SCC) as interim president of the republic. The junta, it appears, was eager to demonstrate that the guardians of the rule of law supported these actions, which had no constitutional or legal basis.¹

Chief Justice (President) Adly Mansour promoted Sisi to the rank of field marshal, oversaw the writing of an army-backed constitution, and guaranteed the election of the field marshal to the presidency. This heavy judicial involvement in politics was, nevertheless, the tip of the iceberg of an extended and protracted judicialization of pure politics since and even before the removal of Mubarak.²

The post-Mubarak era was the most judicialized in recent memory if not the most court-centered transition ever. The judiciary molded every aspect of the transition(s) from devaluation of the old order to building (and dismantling) political institutions and writing of new constitution(s). Administrative

¹ An added benefit from the generals' perspective was to tie the fate of senior judges and hence their respective institutions to the lot of the army takeover itself, "We must, indeed, all hang together, or most assuredly we shall all hang separately" as Benjamin Franklin memorably stated.

² About the definition of "pure politics," see Ran Hirschl, "The New Constitutionalism and the Judicialization of Pure Politics Worldwide," *Fordham Law Review* 75, no. 2 (2006): 721–754.

courts disbanded Egypt's ruling and de facto single party for more than thirty years, dissolved all of Egypt's municipal councils, and suspended the Constituent Assembly (CA). The criminal courts were visited by the who's who of the old regime, including Mubarak, his two sons, the speakers of the two houses of parliament, two prime ministers, many cabinet members, chieftains of the interior ministry, and scores of leading business tycoons. The SCC did not let other courts surpass it. They dissolved the parliament less than six months after it was elected, annulled a law preventing Mubarak's lieutenants from contesting elections, and almost handed over the presidency to Mubarak's last prime minister.

Off-the-bench judicial acts were not less impressive. The judiciary managed the first free and fair parliamentary and presidential elections. A senior judge became the first-ever civilian vice-president, and another senior judge headed the nation's CA that drafted the 2012 Constitution. Furthermore, judicial rulings and actions were instrumental in undermining the Mursi regime and laying the groundwork for army takeover. After July 3rd, it was Mursi's turn to appear before the courts, accompanied by the main pillars of his regime and thousands of his supporters.

The amplified role of Egyptian courts came as a surprise to many. In reality, the judiciary played a crucial political role in Egyptian politics during the First Republic (1954–2011). The Egyptian experience of the existence of active judiciary within a fundamentally illiberal authoritarian environment is a truly unique phenomenon. Why would an authoritarian regime allow an independent center of power to exist outside its control?

This book engages with some of the most enduring issues of politics and political science. Why do authoritarian regimes survive? How do dictators fail? What role do political institutions play in these two processes? As I will explain, many of the answers to these questions can be traced to the same source: the interaction between institutions and preferences. These answers in turn present another indulgence: to build bridges between the recent scholarly work on institutionalism, regime transition, and judicialization, which appear to be isolated and detached islands.

This work asserts that much of Egypt's modern political history could be understood through studying the relation between the bench and the army command, the gavel and the tank. Generals, who ruled Egypt since the military takeover of July 1952, needed the collaboration of judges to supplement might with right, power with legitimacy, and dominance with respect.

In this chapter, I first start by presenting the commonly accepted explanation of judicial independence in Egypt and show why this explanation is

lacking. I then introduce an account of judicial independence under Sadat and Mubarak. My analysis highlights the role of long-term regime survival strategies in the decision to grant courts a high degree of institutional independence. This work, therefore, focuses on the rich, dynamic, and politically relevant interaction between the regime and the courts. Judicialization of politics in Egypt went through waves of expansion and contraction but remains vital to the political future of Egypt in the twenty-first century.

JUDICIAL INDEPENDENCE UNDER AUTHORITARIANISM

The main explanation of the independence of the Egyptian judiciary under the authoritarianism of the First Republic is “credible commitment.”³ According to Moustafa, government officials in Egypt noted the connection between the existence of an independent judiciary capable of upholding property rights, enforcing business contracts, and attracting investment to achieve economic development.⁴ The creation of an independent judicial body, the SCC, was intended to provide assurance to the badly needed domestic and international investment.

I see many major problems at the outset with this thesis. First, the 1971 Constitution, issued by Sadat, emphasized the socialist nature of the state and did not provide any genuine guarantees of private ownership. If judicial review means ensuring the conformity of legislation to the supreme law of the land, no court should reject nationalism or any other form of public control over private capital. For instance, the very first article asserted the socialist nature of the state, “The Arab Republic of Egypt is a democratic, *socialist state based on the alliance of the working forces of the people*” while article 4 clearly stated the socialist nature of the Egyptian economy: “The economic foundation of the Arab Republic of Egypt is a *socialist* democratic system based on sufficiency and justice in a manner preventing exploitation, conducive to liquidation of income differences, protecting legitimate earnings, and guaranteeing

³ Tamir Moustafa, *The Struggle for Constitutional Power* (Cambridge: Cambridge University Press, 2007).

⁴ The credible commitment thesis was built on the work of North and North and Weingast on the importance of institutions in minimizing transaction costs and advancing economic development Douglass C. North, *Structure and Change in Economic History* (New York: W. W. Norton, 1981), Douglas North and Barry Weingast, “Constitution and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England,” *The Journal of Economic History* 49, (1989): 97–109.

the equity of the distribution of public duties and responsibilities.” Other articles leave no doubt of this constitutional commitment.⁵

If Sadat did want to provide credible commitment, as argued by Moustafa, it would have been much easier to change the constitution than to empower the SCC. Notwithstanding, Sadat amended the constitution in 1981, two years after the establishment of the SCC, without touching these socialist provisions; which did not change until 2007. Under the 1971 Constitution it was perfectly legal for the rubber-stamp parliament to change the maximum land ownership and confiscate private properties. It was also lawful for the legislature to draft a law to nationalize, sequester, or expropriate private properties. As Magaloni notes, in his analysis of the Mexican Supreme Court, “when the existing constitutional framework is not liberal, judicial review does not provide stronger limits on government predation.”⁶

Second, for the SCC to provide these commitments credibly, the constitution must be self-enforcing through a degree of a balance of power in the polity. North and Weingast, in their study of the constitutional development in the United Kingdom argued, “The constitution must be self-enforcing in the sense that the major parties to the bargain must have an incentive to abide by the bargain after it is made.”⁷ This is hardly the case in Egypt. The

⁵ Article 24 was another classic provision emphasizing the socialist notion of control of means of production: “The people shall control all the means of production and direct their surplus in accordance with the development plan laid down by the State.” Article 30 highlights public ownership as the norm and the leading role the public sector plays in national development: “Public ownership is the ownership of the people and it is confirmed by the continuous consolidation of the public sector. The public sector shall be the vanguard of progress in all spheres and shall assume the main responsibility in the development plan.” Article 37 mandates sitting maximum limit of land ownership, hardly a guarantee of private ownership: “The law shall fix the maximum limit of land ownership with a view to protecting the farmer and the agricultural laborer from exploitation and asserting the authority of the alliance of the people’s work forces at the level of the village.” Article 32 put severe restrictions on private ownership: “Private ownership shall be represented by the non-exploitative capital. The law organizes the performance of its social function in the service of national economy within the framework of the development plan so that it may not be in conflict, in the ways of its use, with the general welfare of the people.” Article 34 provided some guarantees for private ownership but permitted the legislature to curb it: “Private ownership shall be safeguarded and may not be put under sequestration except in the cases specified in the law and with a judicial decision. It may not be expropriated except for the general good and against a fair compensation in accordance with the law.” Article 35 again gave the parliament the authority to nationalize private properties: “Nationalization shall not be allowed except for considerations of public interest, in accordance with a law and subject to compensation.”

⁶ Beatriz Magaloni, “Enforcing the Autocratic Political Order and the Role of the Courts,” in Tamir Moustafa and Tom Ginsburg (eds.), *Rule by Law: The Politics of Courts in Authoritarian Regimes*, (Cambridge: Cambridge University Press, 2008), 204.

⁷ North and Weingast, “Constitution and Commitment,” 623.

emergence of the SCC, and for that matter the courts and the Council of State, is by no stretch of the imagination a product of a bargain between semiequal political powers. This has grave consequences for Moustafa's views because in the absence of a viable balance of power, at any given moment, the authoritarian ruler could alter the institutional structure – as well as its diverse functions. The Amendment of Article 88 of the constitution, which removed the full judicial oversight of the elections, is a case in point.⁸

Third, unlike the US Supreme Court and other high courts in the West, the Egyptian SCC does not control its docket. No party in a legal dispute can directly bring a case before the SCC. A foreign investor, negatively affected by governmental action, must file a case before the courts or the Council of State, and the merit court has the sole jurisdiction to certify the case to the SCC.⁹ Hence, the institutional independence of the SCC is of little value, if any, where petitioners could not request the SCC to adjudicate their complaints.¹⁰

Fourth, Moustafa provided a partial explanation for the creation of independent courts in Egypt. Moustafa limited his analysis to the SCC. The conformity in regime behavior toward the different branches of the judiciary suggests that the regime's strategy toward the courts had a unified logic. It was not a mere historical coincidence that all of Egypt's judicial institutions lost a great deal of independence and powers under Nasser and regained these institutional guarantees and prerogatives under Sadat and Mubarak. If the same regime treated different courts similarly, why should we assign independent causes for its behavior toward each judicial institution?

Fifth, the examples of authoritarian regimes that were able to attract massive sums of foreign direct investment such as China and Singapore are illustrative of the fact that judicial independence is not a prerequisite for foreign

⁸ North and Weingast accentuated this aspect, asserting the crucial importance of multiple veto points to ensure the continuity of the political equilibrium that provides for the credible commitment. North and Weingast, "Constitution and Commitment," 623–625. During the reigns of Sadat and Mubarak no such veto points existed. The regimes of Sadat and Mubarak had the political power to alter institutional arrangements whenever they so choose.

⁹ For instance, when minister of trade and industry, *Rashid Mohamed Rashid*, issued an administrative decree to stop exporting Clinker and Portland cement to meet the growing local demand, the cement companies publicly threatened to file a lawsuit before the Council of State, not the SCC. *Al-Masry Al-Youm*, March 28, 2008.

¹⁰ Furthermore, because of the chronic delay in the adjudication of cases by the exceptionally busy lower courts, the value of constitutional adjudication seems of little value in economic and financial matters where timing is the essence of success. The Egyptian government in 2007 became aware of such a problem and proposed legislation to establish special economic circuits within every appeals court to be exclusively responsible for the speedy settlement of economic legal disputes.

investment. Egypt itself saw an increase in foreign investment after the 2005 crack on the judiciary. The same happened in Singapore. After the government emasculated the independence of the courts, some experts expected a negative effect on the economy. “Not at all. No corporations fled the country. Singapore’s competitiveness ranking held strong and capital continued to flow in. Singapore therefore presents countries like China with the possibility of an alternative model: while economic reform and prosperity demand the rule of law, the rule of law does not necessarily mean that judicization – and the expansion of individual rights – necessarily will follow. It is possible to de-link economic and political/social reform (Silverstein 2003).”¹¹

Therefore, this work does not find the credible commitment thesis satisfactory. This theory fails to grasp the complicated and dynamic web of relationships within authoritarian regimes and between those regimes and their regional and international partners. In the following section, I present an alternative explanation that takes all of these shortcomings into account.

REGIME SURVIVAL AND JUDICIAL INDEPENDENCE

Political survival is the fundamental objective that all leaders embrace. To stay in power, democratic leaders win elections (after all, the cardinal difference between democracy and authoritarianism is the existence of competitive, free, and fair elections). Authoritarian leaders do not have to worry about such trivial matters. Electoral contestations either do not exist altogether or are generally perceived as sham exercises of political theater with little meaning or value.¹² Autocrats, nevertheless, face two types of domestic threats: those that emerge from within the ruling elite (horizontal threat) and those that come from outsiders within society (vertical threat).¹³ While these two threats appear as distinct, in fact they are not mutually exclusive. Horizontal threats could have the potential of enticing popular uprising, and vertical threats could lead to defection from within the regime.

¹¹ Gordon Silverstein, “Singapore: The Exception That Proves Rules Matter,” in Tom Ginsburg and Tamir Moustafa (eds.), *Rule by Law*, 83.

¹² The 2018 presidential elections in both Russia and Egypt are excellent examples in this regard.

¹³ In addition to “domestic” threats, de Mesquita and Smith add foreign threat. “Threats to political survival can arise from three distinct sources: rivals within the current political order; domestic mass movements that seek to revolutionize the extant political system by replacing it with new institutions of governance; and foreign enemies who seek to take control of national resources or policies.” Bruce Bueno de Mesquita and Alastair Smith, “Political Survival and Endogenous Institutional Change,” *Comparative Political Studies* 42, no. 2 (2009): 171. In the Egyptian context, regime change through foreign intervention lost value since British forces departed from Egypt in the mid 1950s.

Hence, a critical task for any dictator is to manage potential threats with the aim of forestalling popular revolutions and/or elite defections. In *The Economic Origins of Dictatorship and Democracy*, Acemoglu and Robinson write, “the major constraint that faces those controlling political power in non-democracy is a danger that those excluded from political power might attempt to gain political power or to overthrow those who are in control.”¹⁴ To avoid this, authoritarian rulers use a mixture of punishments and rewards. In fact, authoritarian rule could be understood as a balancing act involving

The supply of carrots and sticks. Carrots are measures intended to buy loyalty or acquiescence, while sticks are repressive measures that raise the costs of collective action against the ruler. It has become common in the growing literature on authoritarian politics to describe rulers’ policy choices using some formulation of this dichotomy.¹⁵

Tales of repression are well documented in Egypt and many authoritarian regimes, but tyrannical governments survive in the long run because they do more than (just) repression. They ought to provide or promise to provide some benefits for the society. The problem, however, is the fact that “the promises of an autocrat are never completely credible.”¹⁶ To mitigate this “credibility deficit” authoritarian leaders build institutions that have the potential of making their promises more credible and hence help sustain their power.¹⁷

Researchers came to conclude that authoritarian institutions are much more than “window dressing.” After all, “why would some autocrats care to dress their windows?”¹⁸ These political structures are the result of elite strategic choices and have a real impact on the survival of autocrats. The literature on authoritarian institutions generally examined one of two questions: (1) why authoritarian regimes have political institutions similar to those in

¹⁴ Daron Acemoglu and James A. Robinson, *Economic Origins of Dictatorship and Democracy* (New York: Cambridge University Press, 2010), 120.

¹⁵ Mary Gallagher and Jonathan K. Hanson, “Coalitions, Carrots and Sticks: Economic Inequality and Authoritarian States,” *PS: Political Science & Politics* 42, no. 4 (2009): 667–672.

¹⁶ Mancur Olson, “Dictatorship, Democracy, and Development,” *American Political Science Review* 87, no. 3 (September 1993): 571.

¹⁷ Political scientists did not always pay due attention to political institutions. Gandhi and Przeworski summed this nicely: “Blinded by ideological antagonisms of the Cold War, we paid little attention to the institutional structure of authoritarian regimes. Announcing their plan for a seminal analysis of “totalitarianism,” Friedrich and Brzezinski (1961, p. 18) refused to bother with institutions: “The reader may wonder why we do not discuss the ‘structure of government,’ or perhaps ‘the constitution,’ of these totalitarian systems. The reason is that these structures are of very little importance.” Jennifer Gandhi and Adam Przeworski, “Authoritarian Institutions and the Survival of Autocrats,” *Comparative Political Studies* 40, no. 11 (November 2007): 1292.

¹⁸ Olson, “Dictatorship, Democracy, and Development,” 571.

democracies and (2) how these institutions influence political and economic outcomes such as economic development and regime endurance.¹⁹

Over the past two decades, a growing body of scholarship has begun to systematically examine authoritarian political institutions such as parties, legislatures, and elections.²⁰ The majority opinion among scholars (if we use courtroom terminology) holds that institutions are important for the survival of durable authoritarianism. Large-N statistical analysis and detailed case studies of one or a few cases agree that institutions are critical to the survival of authoritarian leaders. This body of research argues that “repression only goes so far in perpetuating autocratic rule and that elections, political parties, legislatures and courts are tools used by autocratic regimes to co-opt regime opponents and make concessions to regime insiders.”²¹

Political institutions perform two critical functions: division and co-optation or, in the language of O'Donnell, “encapsulate” potential opposition.²² Authoritarian institutions are consequential because elites can use them to cement or protect their hold on power. Authoritarian leaders devise a complex set of institutions to control the polity and society and increase chances of political survival. Ezrow and Frantz put it elegantly, “At the most fundamental level, they [political institutions] are tools for the regime’s survival.”²³ Political

¹⁹ Joseph Wright, “Do Authoritarian Institutions Constrain? How Legislatures Affect Economic Growth and Investment,” *American Journal of Political Science* 52, no. 2 (2008): 322.

²⁰ For an extensive discussion of how parties, elections, and legislatures function under dictatorships, see Jennifer Gandhi, *Political Institutions under Dictatorship* (Cambridge, UK: Cambridge University Press, 2008); Beatriz Magaloni, *Voting for Autocracy: Hegemonic Party Survival and Its Demise in Mexico* (Cambridge, UK: Cambridge University Press, 2006); Jennifer Gandhi and Adam Przeworski, “Cooperation, Cooptation and Rebellion under Dictatorships,” *Economics and Politics* 18, no. 1 (March 2006): 1; Erica Frantz and Natasha Ezrow, *The Politics of Dictatorships: Institutions and Outcomes in Authoritarian Regimes*, (Boulder: Lynne Rienner, 2011); Jason Brownlee, *Authoritarianism in an Age of Democratization* (Cambridge, UK: Cambridge University Press, 2007); Jennifer Gandhi and Adam Przeworski, “Authoritarian Institutions and the Survival of Autocrats,” *Comparative Political Studies* 40, no. 11 (November 2007): 1279–1301; Carles Boix, *Democracy and Redistribution* (Cambridge: Cambridge University Press, 2003); Benjamin Smith, “Life of the Party: The Origins of Regime Breakdown and Persistence under Single-Party Rule,” *World Politics* 57 (2005), 421–451; Beatriz Magaloni, “Credible Power-Sharing and the Longevity of Authoritarian Rule,” *Comparative Political Studies* 41 (2008), 715–741. Valerie Bunce, *Subversive Institutions: The Design and the Destruction of Socialism and the State* (New York: Cambridge University Press, 1999).

²¹ Michael Albertus and Victor Menaldo, “Dictators as Founding Fathers? The Role of Constitutions under Autocracy,” *Economics & Politics* 24, no. 3 (2012): 281.

²² Guillermo O'Donnell, *Modernization and Bureaucratic-Authoritarianism: Studies in South American Politics* (Berkeley, CA: Institute of International Studies, 1973).

²³ Natasha M. Ezrow and Erica Frantz, “State Institutions and the Survival of Dictatorships,” *Journal of International Affairs* 65, no. 1 (Winter 2011): 10.

liberalization in the form of the introduction of multiparty system, “competitive” elections, and more active legislatures once perceived as steps in the long road to democracy are now considered tools of autocratic regime entrenchment. As Volpi and Cavatorta recognized, “authoritarian incumbents utilize the procedures and the discourse of democracy to strengthen the iron arbitrary rule.”²⁴

Autocratic rulers survive when they meet threats with “an adequate degree of institutionalization.”²⁵ Scholars disagree, however, about what “adequate degree of institutionalization” entails. They also disagree about how institutions facilitate regime survival. For instance, Boix and Svolik argue, “institutions contribute to authoritarian stability by reducing informational asymmetries among the governing elite.”²⁶ They went further to add,

Formal political institutions have the potential to facilitate power-sharing and thus enhance the survival of authoritarian regimes: once such institutions are in place, the dictator and his allies can maintain a more stable ruling coalition under less favorable circumstances than would be possible without those institutions.²⁷

Geddes concluded that party-based regimes survive longer than other non-party authoritarian regime, regardless of whether they hold elections.²⁸ Brownlee found no relationship between holding limited elections and authoritarian regime survival.²⁹ Magaloni demonstrated that hegemonic party survival and demise is explained by four central independent variables: elite unity, mass electoral support, manipulation of electoral institutions, and coordination dilemmas among oppositional parties.³⁰

²⁴ Frédéric Volpi and Francesco Cavatorta, “Introduction: Forgetting Democratization? Recasting Power and Authority in a Plural Muslim World,” in Frédéric Volpi and Francesco Cavatorta (eds.), *Democratization in the Muslim World: Changing Patterns of Authority and Power* (New York: Routledge, 2007), 3.

²⁵ Jennifer Gandhi and Adam Przeworski, “Authoritarian Institutions and the Survival of Autocrats,” *Comparative Political Studies* 40, no. 11 (November 2007): 1284.

²⁶ Carles Boix and Milan W. Svolik, “The Foundations of Limited Authoritarian Government: Institutions, Commitment, and Power-Sharing in Dictatorships,” *Journal of Politics* 75, no. 2 (2013): 313.

²⁷ *Ibid.*, 301.

²⁸ Barbra Geddes, “What Do We Know about Democratization after Twenty Years?” *Annual Review of Political Science* 2 (1999): 115–144.

²⁹ Thomas Pepinsky, “The Institutional Turn in Comparative Authoritarianism,” *British Journal of Political Science* 44, no. 3 (July 2014): 641.

³⁰ Beatriz Magaloni, *Voting for Autocracy: Hegemonic Party Survival and Its Demise in Mexico* (Cambridge, UK: Cambridge University Press, 2006).

Institutions are critical to streamline authoritarian succession. Ezrow and Frantz encapsulated the significance of institutions for authoritarian survival stating,

Dictatorships rely on parties and legislatures because they help to prolong their survival. Indeed, regimes that use these institutions are longer lasting than those that do not. On average, dictatorships with neither a party nor a legislature rule for three and a half years, dictatorships with at least one-party rule for eight and a half years and dictatorships with at least one party and a legislature rule for eighteen years.³¹

Another important contribution of this line of scholarship is investigating the conditions under which institutions succeed in performing their regime survival functions (RSFs). “It may be that the real difference between successful autocracies (resilient autocracies) and breakdown is the relative strength and health of institutions that facilitate the efficient allocation of punishments and rewards.”³² For Brownlee, institutions enhance regime durability when they remain strong and independent; “ruling parties create durable authoritarian rule ‘unless institutions weaken and elites destroy them, which happens because ‘elites behave opportunistically in response to the political context that surrounds them’.”³³ Another group of scholars maintained, “Recent work clearly demonstrates that, depending on their origins and external factors, institutions such as elections, parliaments, parties and courts may stabilize but also destabilize autocratic regimes.”³⁴

Several scholars utilized this institutional approach to examine the durability of authoritarianism in Egypt.³⁵ Maye Kassem’s *In the Guise of Democracy: Governance in Contemporary Egypt* and William Zartman’s

³¹ Natasha M. Ezrow and Erica Frantz, “State Institutions and the Survival of Dictatorships,” 1.

³² Mary Gallagher and Jonathan K. Hanson, “Authoritarian Survival, Resilience, and the Selectorate Theory,” in Martin K. Dimitrov (ed.), *Why Communism Did Not Collapse: Understanding Authoritarian Regime Resilience in Asia and Europe* (New York: Cambridge University Press, 2013), 186.

³³ Brownlee, *Authoritarianism in an Age of Democratization*, 37 & 40.

³⁴ Dag Tanneberg, Christoph Stefes, and Wolfgang Merkel, “Hard Times and Regime Failure: Autocratic Responses to Economic Downturns,” *Contemporary Politics* 19, no. 1 (2013): 125.

³⁵ This book subscribes to the view that Egypt has been an authoritarian state under Nasser, Sadat, and Mubarak. While the regime since the 1970s could fall under what Brumberg may term “liberalizing autocracy,” in reality this was nothing other than a newer, sleeker form of authoritarianism. Daniel Brumberg, “The Trap of Liberalized Autocracy,” *Journal of Democracy* 13, no. 4 (2002): 56–68.