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On Law and the Transition to Market: The Case of Egypt

Lama Abu-Odeh
Georgetown University Law Center, la34@law.georgetown.edu

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ARTICLES

ON LAW AND THE TRANSITION TO MARKET: 
THE CASE OF EGYPT

Lama Abu-Odeh*

INTRODUCTION

On the eve of independence from European colonialism, Egypt, like most other developing countries, undertook the project of de-linking itself from colonial economy by initiating domestic industrialization. The economic project known as Import Substitution Industrialization ("ISI") was designed to liberate Egypt from raw commodity production—specifically, agricultural and mineral—servicing its previous colonial master, Great Britain. The engine of development would be an expanding public sector with nationalization and socialism as leitmotifs. In re-orienting the economy towards industrial production, Egypt hoped that the terms of trade with the international economy would significantly improve, thereby leading to an improvement in the living standards of its population. And, like most other developing countries (with

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* Professor of Law, Georgetown University Law Center; S.J.D., Harvard Law School; M.A., University of York, England; L.L.M., University of Bristol, England; L.L.B., University of Jordan.

1 JOHN WATERBURY, THE EGYPT OF NASSER AND SADAT 51 (1983). Cotton and agriculture had constituted the bulk of the Egyptian economy since the British colonization in 1882 and tied a new landowning class to the British presence in Egypt and the British cotton markets. Id. Neither this class nor the British had any major incentive to promote the country's industrialization, and despite modest attempts to modernize by the end of the Second World War, agriculture continued to account for about a third of the country's gross domestic product ("GDP"). Id.


3 WATERBURY, supra note 1, at 51. After the revolution in 1952, the Nasser regime was determined to restore Egyptian power with full independence, political sovereignty, and military capacity and avoided alliances with either superpower. Id. The ISI project that the regime adopted meant to diversify the economy and break the economic linkages to the British metropolis that perpetuated Egypt's backwardness. Id.

4 See id. at 57.

5 Id. at 51–53. The country's heavy reliance on cotton and its market had chained the peasant (fallah) to a never ending cycle of cotton production and made him vulnerable to the unpredictable fluctuations in cotton prices. Id. at 51. As land and capital stayed scarce, the population grew, continually diminishing the relative
the exception of the East Asian Tigers), Egypt failed. A symptom of its failure was a severe debt crisis that hurled Egypt into the brutal embrace of the International Financial Institutions ("IFIs"): the World Bank and the International Monetary Fund ("IMF"). To be rescued from its debt crisis, Egypt had to concede to the neo-liberal economic program of these institutions, otherwise known as the Washington Consensus. The program aimed to improve Egypt’s capacity to repay its debts to international creditors by: re-linking it to the global economy via trade liberalization and through the re-regulation of its domestic economy to be more market oriented with the private sector, henceforth, being the engine. And like most other debtor-countries, Egypt had to go through an austerity program to improve its savings.

Transitioning from an economy in which the public sector played a primary role to one in which this role is significantly reduced in favor of a domestic private sector is no easy matter. This was especially true in postcolonial Egypt because the public sector became, perhaps inevitably, the site not just of economic growth, but also of distribution, and, equally importantly, the place in which those who came to rule Egypt were incubated, i.e., the state elites.

These state elites intermittently used the discourse of nationalist socialism to mobilize the population behind the project of domestic industrialization,

value of the peasant’s labor. Id. At the time of the revolution of 1952, the per capita gross national product ("GNP") remained the same as at end of the First World War. Id.
6 Id. at 80–81, 286–88.
9 IKRAM, supra note 7, at 63–64.
10 Id.
12 Id. at 199–200.
13 Gamal Abdelnasser, Egypt: Succession Politics, in ARAB ELITES: NEGOTIATING THE POLITICS OF CHANGE 117–23 (Volker Perthes ed., 2004). In a study on elites in Egypt, state technocrats are together with the ruling party placed in the center of elite circles. Id. In the second circle we find influential businessmen, trade unionists, and parliamentarians. Id. In the third outer circle are the judges of the Supreme Constitutional Court ("SCC") and influential non-governmental organizations ("NGOs"). Id.
14 AYUBI, supra note 11, at 196–200, 298. It was nationalist to have one’s own domestic industry and, in the name of socialism, the State, via its public sector, was responsible for the well-being of the new national body. See id. at 196.
but were, for the most part, *populists*.\textsuperscript{15} Political representation of the various social forces, especially emergent ones, was corporatized through state-based unions, associations, and cooperatives.\textsuperscript{16} Soon the political trade-off of (I give you) economic well-being for (you give me) political power took hold.\textsuperscript{17}

Essentially, the transition from an ISI-based economy driven by a public sector to the market-based economy meant a transition from the relatively blurred class map of the public-sector-driven developing economy to a more differentiated one.\textsuperscript{18} The transition also meant that those tasks/ideologies/institutions associated with the public sector—growth, distribution, nationalism, socialism, populism, corporatism—had to be unbundled and given up.\textsuperscript{19} As they were unbundled and became associated with the social forces of the new class map, both rising ones and declining ones, they took on new incarnations making them shadows of their previous selves.\textsuperscript{20}

The Egyptian story of transition is complicated by the fact that Egypt receives “rent” from three strategic sources: the Suez Canal, oil and natural gas, and geo-political location (U.S. aid).\textsuperscript{21} Since both the Suez Canal and oil and natural gas are administered by public companies, the revenues reach the coffers of the state directly.\textsuperscript{22} Revenues from these sources are rent in that while they deploy a minimal amount of local labor, they potentially yield large revenue.\textsuperscript{23} While the amount of this revenue could be sizable, it could also be

\textsuperscript{15} Id. at 203–11. Populism is a “political movement which enjoys the support of the mass of the urban working class and/or peasantry but which does not result from the autonomous organizational power of either of these two sectors. It is also supported by non-working class sectors upholding an anti-status quo ideology.”

\textsuperscript{16} See id. at 215.

\textsuperscript{17} Id. at 215–16.

\textsuperscript{18} Id. at 217–18.

\textsuperscript{19} See id. at 340.

\textsuperscript{20} See id. at 352.


\textsuperscript{22} Id.

\textsuperscript{23} Hazem Beblawi, one of the original theorists of the “rentier state” insists on three essential features:

(1) [R]ent cannot be the only kind of income in the economy, but it should predominate; (2) the origin of the rent must be external to the economy, as “pure internal rent boils down to a situation of domestic payments transfer”; [and] (3) a minority in the population must be engaged in the generation of the rent, while the majority is involved only in the distribution or utilisation of it.

Hazem Beblawi & Giacomo Luciani, Introduction to The Rentier State 12 (Hazem Beblawi & Giacomo Luciani eds., 1987). See also SULAYMAN, supra note 21, at 21 (indicating that when a government receives its money from sources other than taxes, it is not beholden to its people, and therefore it is not sustainable).
Forces outside of Egypt’s control, such as the international market or Egypt’s geopolitical value to the United States, determine the amount of revenue.  

Although Egypt’s rent revenue is not comparable in size to that of the oil producing countries of the Gulf region, its intermittent availability in sizable amounts triggers a dynamic that approximates that of rent societies. Elites are dependent on rent revenue to preserve their hold on power through allocative activities while “rentiered” beneficiaries offer passive political loyalty in return. Rent surplus makes the state elite relatively autonomous by providing economic benefits to social groups that otherwise might challenge existing structures. Therefore, rentierism enters the dynamic of transition from ISI to the market in Egypt contributing its own dynamic, itself determined by the rise and fall of rent revenue. This adds to the story of transition another layer of complexity that needs to be captured.

Another layer of complexity is what I call the “Islamic Sector.” While the condensation of growth/distribution/political power within the public sector of ISI yielded the social forces undergoing “privatization,” it also constituted the social forces outside it through exclusion. Islamist ideology, in moderate or radical form, found a home within social groups existing “autonomously from the state”; they were either never beneficiaries of the public sector, or they came to the social force through the rent economy occurring outside the public sector, fed by worker remittances, or were children of those who benefited from the public sector but found themselves excluded from it due to

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25 Id. Moreover, Egypt is located within an oil-rich region that finds itself the periodic overseer of petrodollars searching for labor and investment opportunities. This has allowed Egypt to export its labor to these countries utilizing their remittances at opportune moments of its economic history as a source of badly needed hard currency. In the same vein, foreign investment has often meant for Egypt petrodollar money from the Gulf countries looking to invest in Egypt. Id.

26 In 2007, Egypt produced on average 665.08 thousand barrels of oil a day, ranking it twenty-seventh among world producers. Energy Information Administration, International Energy Data and Analysis for Egypt, http://tonto.cia.doc.gov/country/country_energy_data.cfm?fips=EG (last visited Oct. 10, 2009). The same year, the natural gas production of 1,501 billion cubic feet made it the nineteenth biggest producer. Id.

27 Beblawi, supra note 23, at 53.

28 See Ayubi, supra note 11, at 234–35.

29 See id.

30 In Egypt, “the main mobilization against the state bourgeoisie and its authoritarian apparatus has so far not come from the economic private sector but rather from the ‘socio-cultural’ private sector: From the radical Islamic movements and from the informal so-called ‘Islamic business’ groups with alternative network of schools, hospitals and social services.” Ayubi, supra note 11, at 408.
the transition to the market. While most other social forces live out the drama of their exclusion from the public sector, the Islamic Sector sees itself as the alternative to the state, not in the form of private sector replacing public sector, but a kind of alternative parallel state. But because it was constituted through exclusion by the ISI public sector, it lives in the shadow of the state: mimicking its discourses, tools, and institutions; engaging with it; and conspiring to annex it.

In the transition from ISI to market, law played an important role. Just as the elites of Egypt received globalized ideas about the economy—first in the form of ISI as a response to the colonial economic legacy, globalized among postcolonial elites, and later on the Washington Consensus of International Finance Institutions, globalized in the form of an imposition on state elites as a response to the failure of ISI—so did legal elites receive globalized ideas about law that they too needed to contend with. Egyptian jurists received the “social” in law during the ISI era, and during the later neo-liberal era they were influenced by American-style constitutionalism, where rights were married to the market (reasoned in neo-formalist and post-realist mode).

31 See generally Carrie Rosefsky Wickham, Mobilizing Islam: Religion, Activism, and Political Change in Egypt (2002).

32 The nucleus of this parallel state exists in the hospitals, clinics, mosques, and banks administered by Islamists and used to provide both welfare services to the poor population and investment opportunities for those with money, completely autonomously from the state. The capacity of the Islamic sector to step in during the earthquake that hit Cairo in 1992 by providing badly needed services—revealing the inadequacy of the public sector—is well documented. Bruce K. Rutherford, Egypt after Mubarak: Liberalism, Islam, and Democracy in the Arab World 85–86 (2008) (specifically discussing aid provided by the Muslim Brotherhood following the 1992 earthquake).

33 A conflict between the Islamic business sector and the state has, in recent years, materialized in challenges over the “legality” of the status and practices of these companies. However, as Ayubi writes, “it is . . . likely that the state saw in . . . this group . . . the movement of a civil society that was seeking genuine autonomy from the state.” Ayubi, supra note 11, at 408.


36 On judicial independence, see generally Adel Omar Sherif & Nathan J. Brown, Judicial Independence in the Arab World, Program of Arab Governance of the UNDP (2002), available at http://www.undp-pog.org/publications/index.asp?tid=9&src=1&type=0&sd=0. Judges and jurists are themselves a fraction of the state elites although they guard their autonomy from the political elites through a commitment they share to judicial autonomy. Id.

37 See Mahkramat al-Naqd [Sup. Const. Ct.], Case No. 11, Judicial Year 16, July 3, 1995 (Egypt) (showing how the court uses a constitutional provision to deduce a new basis for discrimination through analogy, which it treats as unconstitutional, a hallmark of formalist reasoning).
Legal rules serviced both economic strategies, and subsequently the market, in that a set of rules and legal institutions had to be put in place to implement each economic mode in turn.

Not only is law used by elites to "implement" an economic strategy and interpreted by judges in "the spirit of the times," it is also deployed among the contending social forces of the transition. For the purposes of improving the bargaining power of one side at the expense of the other, law is used in the form of a proposed constitutional amendment here or a legislative reform there. State elites pass constitutional amendments that tighten their grip on the politics of transition; market-oriented reformists propose a clearer separation of powers, married to the market as an improvement of their own bargaining power vis-à-vis the state elites; the working class agitates for the capacity to unionize independently from the state to improve its bargaining position both vis-à-vis the state elites and the new market with the hope of improving its declining living standards resulting from the transition to

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All Egyptian constitutions stress the principle of equality and treat it as the basis for justice freedom and social peace. However, these particular bases of discrimination are enumerated in the constitution by virtue of their commonality, but the list is not limited to them. Even though the list is limited it includes every aspect of differentiation, restriction, preference. That this law privileges doctors over other lessees despite the fact that they share the same legal status, and without objective basis, renders the law unconstitutional.

Id. (translation by author).

See id. for an example of the use of the post-realist mode of American reasoning noting the recurring use in the Court's language of "balancing" and "weighing."

While it is permissible for a legislator in a state that combines individual freedom with state intervention to restrict use of property by the holder for a social purpose, this restriction however does not occur in a vacuum nor should it be conducted arbitrarily. The nature of the right itself, the purpose of this restriction, and the social circumstances under which this restriction takes place should all be taken into consideration. In this context, the legislator weighs the alternatives and chooses the interests most worthy of protection. Right of property should therefore be regulated in a manner that balances interests. Lessor and lessee should combine their interests in a manner that promotes economic development. The balance between them should not weigh in favor of one at the expense of the other; otherwise it would lead to injustice. It is hard to imagine that the exploited of yesterday has become the exploiter of today as a result of the skewed balance through legislative intervention to its favor.

Id. (translation by author) (emphasis added).

See infra notes 115–36 and accompanying text.


Id.
market. And the Islamic Sector uses the courts to pass off its Islamicization agenda in the face of a highly secularized, post-ISI state.

This paper is an attempt to describe this drama of transition from within the tradition of political economy that combines the study of the economy with that of the social forces and political systems constituted by and interacting with economic regimes. It starts with a historical review of economic/political phenomena prevailing in Egypt, beginning with the regime of Nasser and ending with that of Mubarak. After inserting the Islamic Sector into the drama, the paper continues with describing how law is used for each orientation and its actor. It finishes by describing four strategies for the state elite to remain in power. It is a description with an underlying normative agenda. It tries to describe the situation in a way that (hopefully) leads the reader to ask the following two questions: First, what is the response, indeed alternative to the Washington Consensus as a response to the failure of ISI; and second, which social force in the context of Egypt is most likely to produce this alternative?

I. HISTORICAL REVIEW


Nasser initiated ISI as soon as he came to power in 1952. Rather than promote industrialization through regulatory and macroeconomic measures favoring domestic private industry, as occurred in the East Asian Tigers, Nasser engineered the creation of a big public sector charged with the task of promoting full industrialization. Nasser responded to the massive popular demand for economic reform by passing a series of special legislations that took their base in land reforms. These were meant to remove the resource base of Egypt’s previous land elite, to redistribute rural assets, and to be an incentive for previous landowners with economic means to invest in industry.

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43 Id.
44 See generally Lama Abu Odeh, Modernizing Muslim Family Law: The Case of Egypt, 37 VAND. J. TRANSNAT’L L. 1043 (2004) ("An example of Islamist Sector advancing its views through the legal system can be displayed by the practice of adherence to strict Islamic law for family law issues, whereas, the remainder of law in Egypt is largely secular.").
45 WATERBURY, supra note 1, at 60.
46 Id. at 60–61.
47 Id. at 61.
48 Land reforms, starting in September 1952, and continuing over time, ended up banning land ownership in excess of fifty acres per individual and 100 acres per family. T. Khattab, Land Law, in EGYPT AND ITS LAWS 126–27 (Nathalie Bernard-Maugiron & Baudouin Dupret eds., 2002). The reform actually dropped the
In addition to being the locus of industrial oriented economic growth (ISI), an oversized public sector49 came to serve two purposes for the regime of Nasser. First, it was the locus of resource transfer from the countryside to the city,50 distributed through price controls and job creation51 (ISI + socialism + populism); and second, it was the vehicle for the emergence of state elites (the new authoritarians).52 In exchange for employment and social benefits offered by the state, Nasser corporatized53 the political (corporatist populism).54 Each social group had its corporate entity that represented its interests and was part of the state.55 Thus, in the nationalization process, the objective was not restricted to property but also included social movements, associations, and syndicates.56 The regime excluded only “conservative/ reactionary social groups”57 and became the representative of all social interests in the political sphere.58

49 Waterbury, supra note 1, at 76. Waterbury lists the following as falling in the hands of the state as a result of measures Nasser took when he came to power: banking and insurance, foreign trade, all “strategic” industries, most maritime and all air transport, urban mass transport, modest public housing, some urban retail trade, major department stores, hotels, cinemas and theatres, all newspapers and publishing houses, all reclaimed land, irrigation and drainage canals, major construction companies, the High Dam and the Suez Canal. Id. Only the following escaped: private cultivators, small scale retail and service firms, most wholesale traders, and small manufacturers. Id.
50 Id. at 61, 66.
51 Id. at 66. See id. at 208, 215.
52 AYUBI, supra note 11, at 277. During an initial stage of “bureaucratic-authoritarian” regimes, the demands of the “popular classes” are to some degree met. But after a “ceiling” is reached, a new “alliance between the military-technocracy and the upper bourgeoisie in cooperation with (subordination to) international capital” is reached and seeks to constrain the demands of the popular classes by exclusionary measures. Id.
53 In corporatism, “[t]he tendency is to move downward through the re-stratification of the public into corporate functional groupings relevant to development and system-maintenance. Not class, but corporate grouping, is characteristic: hence a kind of ‘corporate representation’ in primary stage modernizing, mobilization systems is seen as the means of reconciling populism with functional expertise.” DAVID APTER, RETHINKING DEVELOPMENT: MODERNIZATION, DEPENDENCY, AND POSTMODERN POLITICS, 148–49 (1987), quoted in AYUBI, supra note 11, at 207.
54 AYUBI, supra note 11, at 207–08.
55 Id. at 213–14.
56 See id. at 208, 215.
57 HAMID ANSARI, EGYPT: THE STALLED SOCIETY 173 (1986). Sequestration was not only used to force a change in the social order but was also used against what the regime considered increasing security threats. Law No. 119 of 1964 (Egypt) was aimed against the increase in activity by the Muslim Brotherhood and a third type of sequestration was aimed against a rising left. Id.
58 SULAYMAN, supra note 21, at 15–16.
In its early stages, the public-sector-based development achieved high rates of economic growth.\textsuperscript{59} However, this quickly changed for reasons related to the nature of the economic tasks undertaken: overambitious developmental programs not matched by local capacity; distribution considerations taking precedence over growth ones;\textsuperscript{60} the fragmentation of the public sector into “bureaucratic factions, clientelist networks and personalist cliques”;\textsuperscript{61} reasons related to international politics;\textsuperscript{62} and regional politics.\textsuperscript{63} The political possibilities of salvaging ISI were blocked by Nasser’s attack on the forces of the opposition from the left and the right.\textsuperscript{64} Those who refused to be “corporatized” were put in jail.\textsuperscript{65} Sadat came to power in 1970,\textsuperscript{66} inheriting a country heavily indebted as a result of its post-war reconstruction efforts.


By the time he was assassinated in 1981,\textsuperscript{67} Sadat left the following legacy: (1) he entered a war with Israel in 1973 (in alliance with Syria) in which the Egyptian army performed spectacularly well, gaining a great deal of political legitimacy for Sadat in its aftermath;\textsuperscript{68} (2) he demoted those of the state elites...
favoring socialism and promoted those favoring “opening up the economy”;
(3) he facilitated the return of landowners to the countryside and the
reconsolidation of their economic power through the relaxation of land reforms
initiated by Nasser;  
(4) he initiated market reforms in what came to be called
the “Open Door Policy,” primarily oriented towards liberalizing trade and
couraging “foreign Arab investment”; and (5) he unleashed the forces of
the religious right in an attempt to marginalize the left as part of his agenda of
transition to market.

The beginning of the rise in oil prices in 1975 heralded Egypt’s entry into
the dynamics of a rentier economy. Rent revenue entered the coffers of the
state through publicly owned oil and natural gas companies. Given Egypt’s
location in a region that was receiving a rent windfall and was, therefore, labor
starved, Egypt conveniently exported a good part of its labor force. Labor
remittances became a feature of the Egyptian GNP landscape.

However, an economic orientation was already in place by the time the rent
windfall settled. The transition to market (“Open Door Policy”) initiated by
Sadat was mostly a “market” in its orientation towards trade liberalization.

69 The Soviet military mission was ended in 1971, and Sadat purged the figures that were pro-Soviet in
the regime, attempting liberalization. ZAALOUD, supra note 34, at 57.

70 A policy of de-sequestration was implemented by which land was to return to its rightful owners.
ANSARI, supra note 57, at 172–84. All sequestrations that occurred in 1961–64 were annulled; former owners
were granted full restoration of the property or full economic compensation; third parties who had benefited or
received property through the sequestration were taken into consideration. Id. Just as under Nasser, the
sequestration policies coincided with political ambitions and security concerns, the laws on de-sequestration
mirrored Sadat’s crackdown on opposition forces. Id. Depending on the time and reason for sequestration,
different laws of compensation applied. Id.

71 The Open Door Policy prioritized export related projects and was meant to bring in advanced
technology and enhance Egypt’s strategic position: foreign investors could now take majority interests in some
firms that had been reserved for the public sector monopoly of banking; Arab investment was granted special
privileges to attract Arab petrodollars; any project approved within its terms would automatically be
considered part of the private sector; forty-nine percent of all equity in public sector firms was to be put up for
private subscription; and weak companies would be sold off or liquidated, while strong ones would be put up
for general share subscriptions. WATERBURY, supra note 1, at 131–39. Private investment projects were not
subject to labor laws, stipulations of worker representation on management boards, profit-sharing formulas,
and salary ceilings applied to the public sector. Id.

72 ANSARI, supra note 57, at 237–38.

73 AMIN, supra note 24, at 40–41.

74 Id. at 47.

75 Id.

76 Id.; IKRAM, supra note 7, at 214–16.

77 In other words, the transition to market at that period included trade liberalization without the
privatization of public sector companies. IKRAM, supra note 7, at 18. While Sadat’s Open Door Policy set the
tone for forthcoming privatization, actual legal steps for privatization did not occur until the 1990s. Id.
Trade liberalization resulted in a massive increase of imports: food imports (primarily wheat), luxury goods, and capital and intermediate goods. This ultimately aggravated the balance-of-payment deficit inherited from the Nasser era as external debt was used to foot the import bill.

Thus, rentierism arrived as Nasser’s ISI was liberalized through trade only. Its advent reinforced already existing patterns in the economy (orientation in imports/exports, investment, and output). However, the sectors that were fed the rent revenue (same as the ones that expanded through trade liberalization) had limited employment creation potential. Furthermore, the employment that was created was contingent on the availability of rent (services and housing sectors), and given that Nasser’s ISI public sector (with the exception of the mineral industry) remained in decline, social conflict was not far afield. The export of labor to the oil-rich Gulf region averted such a conflict while the patterns of (non-)production in the economy remained the same. In other words, while social conflict was averted, the dynamics of wealth disparity were in motion and waiting to tighten their grip once the rent depleted. Indeed, this is what happened beginning in the mid-eighties when the decline in oil prices and the recession in the Gulf region drove Egyptian labor migrants back home. Despite the plentiful availability of foreign exchange during this period, Egypt’s debt was compounded with a notable increase in state expenditure.

C. The Mubarak Era (1981–present)

Sadat’s economic legacies to Mubarak were twofold: (1) a much bigger external debt, and (2) a more distorted economic structure, with the rent economy surpassing that of the productive economy, whether agricultural or industrial.

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78 Despite liberalizing measures, the trade deficit rose under Sadat from £E260 million in 1972 to £E1 billion in 1975, depending heavily on foreign loans. Zaalouk, supra note 34, at 58–59.
79 Waterbury, supra note 1, at 95–96.
80 Zaalouk, supra note 34, at 58–59.
81 Ikram, supra note 7, at 214.
82 Amin, supra note 24, at 138–40.
83 Id. at 85–99.
84 Id. at 46–52.
85 Id. at 47.
86 Most of the state expenditure was spent on the military. Sulayman, supra note 21, at 54–55.
87 $14.3 billion in external debt—an eightfold increase from Nasser’s days. Amin, supra note 24, at 12.
88 Oil, labor remittances, the Suez Canal, and tourism accounted for 75% of Egypt’s total current receipts of foreign exchange in 1981. Amin, supra note 24, at 40.
These severe structural deficiencies in the economy drove the country to the precipice with the collapse of oil prices in 1986.89 Decline in the productive economy meant that the post-ISI elites were unable to provide jobs to those whose fate was undermined by the decline in the rent economy and that the income from these sectors was unable to replace the hard currency income lost in the rent economy.90 However, to preserve its hold on power and buy social peace, the regime could not decrease public expenditure to absorb what it could of those driven to unemployment.91

The crisis drove Egypt to sign an economic reform agreement with the IMF in May 1987, according to which the government agreed to reduce expenditures, liquidate all losing public companies, and liberalize the Egyptian pound relative to the dollar to attract expatriate savings, especially from the Gulf.92 It also undertook to raise interest rates to encourage savings and curb consumerism.93 Following the agreement with the IMF, the Egyptian regime went to the Paris Club and got consent to reschedule its external debt.94

Egypt’s situation was greatly improved when the United States sought an international coalition in 1990 to roll back Iraq’s invasion of Kuwait.95 In return for Egypt’s support for the U.S. war, creditor countries agreed to cancel half of Egypt’s debts, though they made this promise contingent upon Egypt carrying out economic reforms.96 Cancellation of debt took place incrementally; the cancellation of each part was contingent upon implementation of a set of policies agreed upon in the 1987 agreement with the IMF.97

89 With oil prices collapsing, Egyptian oil income declined from $2.26 billion dollars in 1985 to $1.2 billion in 1986, and income from the Suez Canal declined from $1 billion to $900 million. SULAYMAN, supra note 21, at 54–55. In addition to the collapsing oil prices, the U.S. government decided at this time to condition $265 million in economic aid to Egypt on the implementation of reforms advocated by the IMF. Id.
90 AMIN, supra note 24, at 137–40.
91 SULAYMAN, supra note 21, at 59.
92 Id. at 54–55.
93 Id. at 55.
94 However, the deal of 1987 proved to be a gross failure: public expenditure as a ratio of GDP increased by 5.4% in 1986–87 and 57.2% for the year 1987–88. Id. Net deficit increased from 5.3% in 1986–87 to 8.6% in 1987–88. Id. The regime went on financing its deficit by printing money, which was reflected in the rate of inflation, increasing it by 20% in the late 1980s. Id.
95 Id. at 57.
96 Id.
97 Id.
Since 1987, and particularly after a May meeting with the IMF in 1991, Egypt began to implement the demands of the IMF and the World Bank. It liberalized the pound, initiated privatization of public companies, and started to control the budget deficit. While privatization efforts were initially slow, upon the appointment of Ahmed Nazif as Prime Minister in 2004, Western-educated “technocrats” in the government invigorated privatization, slashing tariffs and taxes and amending investment laws.

However, the structural dependence of the state elites on huge governmental expenditures to stay in power means that Egypt’s capacity to reduce governmental expenditure is limited. When it succeeds in reducing the budget deficit, it is usually not the result of a decrease in governmental expenditure but of an increase in revenues due to international factors. In other words, in the patronage-based authoritarian system of the regime, the elites depend on the political support and control that they receive in exchange for distributing benefits. This does not allow for a decrease in public expenditure.

Thus, one of the failures of the ISI model is that it has produced state elites that are path-dependent in terms of their public expenditure patterns to stay in power and have intermittent access to surplus revenues. When available, surplus revenue reinforces expenditure patterns, and when depleted it drives the state into financial crises of increasing debt. This situation further reinforces the bargaining position of the IFIs in relation to these elites. Having abandoned the economic strategy of ISI and subjected the country to

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98 AMIN, supra note 24, at 20–21.
99 IKRAM, supra note 7, at 71.
100 Celine Kauffman & Lucia Wegner, Privatisation in the MEDA Region: Where Do We Stand? 22 (Org. for Econ. Co-Operation and Dev., Working Paper No. 261, 2007). Since 2004, the privatization scheme has included selling shares in Suez Cement Company and Telecom Egypt, and there are plans to sell shares in Egypt Air. Id.
101 See IKRAM, supra note 7, at 65–69.
103 Will the Dam Burst?, supra note 102, at 32. A recent increase in revenues is due primarily to “a doubling of income from the Suez Canal, a surge in industrial exports, and a doubling of tourist arrivals.” Id.
104 SULAYMAN, supra note 21, at 39, 51, 64–65.
105 See AMIN, supra note 24, at 57–62. Although income from the Suez Canal is fairly steady, revenues for tourism have a “tendency for violent year-to-year fluctuations.” Id.
106 See id. at 62–65; see also IKRAM, supra note 7, at 47, 162–63.
107 See AMIN, supra note 24, at 36–39, 123.
recurring financial crises, the elites are left with the IFIs' neo-liberal program to implement as the only alternative.\textsuperscript{108}

In isolation from a rent economy, implementation of the neo-liberal program creates an economic orientation that diminishes the role of domestic industry (due to the withdrawal of the state from the economy which domestic industry is dependent upon for protection) and encourages commodity production for export (agricultural and mineral)\textsuperscript{109}—both reminiscent of the colonial economy.\textsuperscript{110} In the context of a rent economy, implementation of the neo-liberal program highlights the role of those sectors of the economy dependent on rent: tourism, oil, commerce, and services.\textsuperscript{111} Both shifts lead to a differentiated class map in the countryside and the city.\textsuperscript{112} The incremental implementation of neo-liberalism leads to shifts in class differentiation. The intermittent and on-going implementation of the neo-liberal program increases the popularity and hegemony of this model within Egypt and dispels any notions of the model as a solution to the economic crisis of Egypt—\textit{Egypt is always transitioning to Market.}

The result is a public sector that has increased in size (through rent) but lost symbolically (the failure of ISI discredited it) leading to its neglect, and a private sector that is small in size (due to resistance) but has succeeded in monopolizing the symbolic and ideological space.

\section*{II. Three Orientations: A Comparison of Three Political Economies}

Today, Egypt has three economic orientations: (1) ISI-on-the-decline; (2) intermittent-Rentierism; and (3) Market-on-the-rise.\textsuperscript{113} These three orientations exist in combination, each with its own peculiar features that sometimes cohere and sometimes pull in opposite directions.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{108} Waterbury, supra note 1, at 133.
\item \textsuperscript{109} Ikram, supra note 7, at 283–84.
\item \textsuperscript{110} Id.
\item \textsuperscript{111} See Amin, supra note 24, at 40–65.
\item \textsuperscript{112} See Ayubi, supra note 11, at 217–18.
\item \textsuperscript{113} See Abdelnasser, supra note 13, at 126.
\end{enumerate}
\end{footnotesize}
Thus:

<table>
<thead>
<tr>
<th>Role of State in Economy</th>
<th>ISI</th>
<th>Rentierism</th>
<th>Market</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Sector/Private Sector</td>
<td>State-based</td>
<td>State as recipient and allocator of rent</td>
<td>Withdrawal of the state from the economy</td>
</tr>
<tr>
<td></td>
<td>(State protected) industry as the engine of economic growth</td>
<td>Raw commodity export through public companies reminiscent of pre-ISI</td>
<td>The private sector: services, tourism, telecom, mineral, agribusiness, housing, commerce, and incrementally industrial</td>
</tr>
<tr>
<td>Distribution</td>
<td>Redistribution downward through the state and transfer of resources from agriculture to industry</td>
<td>Distribution downward and upward depending on the availability of rent</td>
<td>Distribution upward through privatization and withdrawal of subsidies of basic commodities</td>
</tr>
<tr>
<td>Nature of Political Regime</td>
<td>Populist authoritarian</td>
<td>Populist authoritarian when rent is available and bureaucratic authoritarian when it is not</td>
<td>Bureaucratic authoritarian</td>
</tr>
<tr>
<td>Political Representation</td>
<td>Forms of political representations are corporatist in relation to the middle class and the working class: professional associations, unions, cooperatives, etc.</td>
<td>When rent is available the state corporatist is reinforced; when it is not, a shift is made to the associationist corporatist where families, tribes, and sects become representative of their members vis-à-vis the rentier state</td>
<td>State corporatist in relation to the middle class, the working class, and the new capital; businessmen come to have their own corporatist institutions: Chambers of Commerce, Chamber of Industrialists, Federation of Businessmen, etc.; incremental democratic representation through elections and political party representation</td>
</tr>
</tbody>
</table>
III. THE ISLAMIC SECTOR

Although the Islamic Sector is inserted into this overall picture, it is not treated as an "economic orientation," but rather a parallel state-in-the-making. It is undermined by an ongoing repressive assault by the state elites but nevertheless has an economic base, an economic ideology, a relationship to law, and forms of political representation. But, it is also a parallel state that has the ambition of annexing the formal state with the intention of transforming it. Therefore, it uses its parallel existence to make various assaults on the institutions of that state. For example, it participates in the elections of the Egyptian Parliament, takes over in various state corporatist

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115 See Abdelnasser, supra note 13, at 133–35.

structures, and builds fortunes in the private sector that is emerging as a result of liberalization and privatization.

Islamic companies and Islamic banks are the most famous representations of "Islamic capital" that sees itself as an alternative to the secular capital promoted by the state elites. Notably, while Islamists have succeeded in infiltrating the corporatist structures of the middle class, like professional associations, they seem to have failed in infiltrating labor unions. The urban working class seems, thus far, the most immune to Islamist influence.

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117 See Demmelhuber, supra note 102, at 125. In the late 1980s and early 1990s, members of the Muslim Brotherhood won majorities or absolute majorities in the elections for the boards of the Engineers', Doctors', Lawyers', Pharmacists', and Scientists' Syndicates. Id. Although most active and present in student politics like at Cairo University, Muslim Brotherhood students have been banned from participating in student unions. Mustafa el-Menshaw, A Different Kind of Fraternity, Al-Ahram Weekly Online, Nov. 24, 2005, http://weekly.ahram.org.eg/2005/770/eg10.htm.

118 Successful Islamist businessmen have impeded the progress of the regime, which has moved to confiscate business assets and to prosecute successful Islamist businessmen under charges of money laundering, terrorism, and plotting to overthrow the regime. In 2007, forty businessmen and members of the Muslim Brotherhood, including deputy leader Khairat al-Shatir, were tried before a military tribunal. Halawi, supra note 114.

119 See AMIN, supra note 24, 137–40.

120 The Muslim Brotherhood has never enjoyed a strong base in the industrial working class, possibly due to reluctance from the affluent businessmen who dominate the leadership to mobilize workers. Joel Beinin & Hossam el-Hamalawy, Strikes in Egypt Spread from Center of Gravity, MIDDLE EAST REPORT ONLINE, May 9, 2007, http://www.merip.org/mero/mero050907.html.
Thus:

<table>
<thead>
<tr>
<th>Role of State in Economy</th>
<th>The Islamic Sector</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Sector/Private Sector</td>
<td>Withdrawal of the state from the economy</td>
</tr>
<tr>
<td>Distribution</td>
<td>The private sector as the engine of growth</td>
</tr>
<tr>
<td>Distribution</td>
<td>Distribution downward to those left out by the failed ISI state, especially the informal economy, through rent collected from religious institutions</td>
</tr>
<tr>
<td>Nature of Political Regime</td>
<td>Islamist populist</td>
</tr>
<tr>
<td>Political Representation</td>
<td>Islamist corporatist (Islamic societies and associations ) and state corporatist infiltrated by Islamists with the exception of labor unions</td>
</tr>
<tr>
<td>Ideology</td>
<td>Ethical capitalism combined with Islamic commonwealth-ism</td>
</tr>
<tr>
<td>Class</td>
<td>Differentiated class map tempered by the disbursement of Islamic charity</td>
</tr>
<tr>
<td>Law</td>
<td>Use of supreme constitutional law to strike down legislation perceived un-Islamic: family law reforms, interest rate laws</td>
</tr>
</tbody>
</table>

IV. LAW AND ADJUDICATION IN THE SHADOW OF THE THREE POLITICAL ECONOMIES

When it comes to law, there is no doubt that legal rules are the handmaidens for the economic strategies of ISI and the Market respectively. Rentier rule also dips into legal rules.¹²¹

For the ISI-orientation, the tone was set by Nasser in 1962 with the National Charter—nationalization and socialism were the Charter’s main tenants.¹²² The legal structure includes rules that move the economic resources

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¹²¹ See generally IKRAM, supra note 7.
¹²² Id. at 7–8.
toward the industrial sector (investment laws; public companies laws; tax laws; and regulatory rules touching on foreign exchange, tariff protection, customs duties, etc.), as well as redistributive rules designed to shift the labor force from the countryside to the industrialized urban centers (agricultural legal reforms, land tenancy laws, rent-control in residential buildings, labor laws, laws of associations, food subsidies, price controls, etc.).

Id. at 5, 9. For example, Law No. 21 of 1958 (Egypt) on the regulation of Egyptian industry stipulated a five-year plan for industry in which the state financed 60%. Id. at 5. Presidential Decree No. 44 of 1961 (Egypt) provided for annexation of the capital of National Bank of Egypt. See generally id. at 6–7 (discussing bank nationalization).

Id. at 7. According to the National Charter, economic infrastructure and a majority of heavy and medium industries should be publicly owned. Id. For example, Laws Nos. 69, 70, 71 of 1961 (Egypt) nationalized the cotton market. ZAALOUK, supra note 34, at 30 (discussing the 1961 cotton nationalization).

Tax laws are not found in a single act of legislation but in a wide range of laws. See, e.g., Law No. 7 of 1953 (Egypt) (transferring existing law on taxation of capital income to commercial and industrial profits); Law No. 254 of 1954 (Egypt) (regarding income tax); Law No. 370 of 1953 (Egypt) (regarding taxation relief for small agricultural landowners); Law No. 463 of 1953 (Egypt) (regarding taxation of arable land); Law No. 202 of 1960 (Egypt) (imposing tax on inheritance).

See, e.g., Law No. 156 of 1953 (Egypt); Law No. 475 of 1954 (Egypt) (regarding foreign capital in investment); Presidential Decree No. 581 of 1969 (Egypt) (regarding the non-exchange income from the Suez Canal in foreign currency); Presidential Decree No. 1037 of 1960 (Egypt) (regarding the establishment of a ministerial committee for foreign trade and exchange); Ministerial Decree No. 34 of 1956 (Egypt) (regarding the determination of the Egyptian pound exchange rate for foreign currencies).

For laws on tariffs and excise duties, see, e.g., Law No. 513 of 1954 (Egypt), Law No. 365 of 1956 (Egypt), and Law No. 482 of 1955 (Egypt). For laws amending Law No. 2 of 1930 (Egypt) on customs tariffs, see, e.g., Law No. 602 of 1953 (Egypt) and Law No. 173 of 1956 (Egypt).

See, e.g., Law No. 476 of 1959 (Egypt) (providing the establishment of a Central Administration of Customs).

See WATERBURY, supra note 1, at 265–67 (1983) (discussing the effects of Law No. 178 of 1952 (Egypt), Law No. 152 of 1957 (Egypt), Law No. 127 of 1961 (Egypt), and Law No. 150 of 1964 (Egypt) on Egyptian agrarian land ownership).

See Milad M. Hanna, Real Estate Rights in Urban Egypt: The Changing Sociopolitical Winds, in PROPERTY, SOCIAL STRUCTURE, AND LAW IN THE MODERN MIDDLE EAST 189, 192–95 (Ann Elizabeth Mayer ed., 1985) (discussing the effects of Law No. 199 of 1952 (Egypt)). For laws on Egyptian tenancy agreements and rental rates, see, e.g., Law No. 55 of 1958 (Egypt), Law No. 168 of 1961 (Egypt), and Law No. 7 of 1965 (Egypt).

See, e.g., Law No. 178 of 1952 (Egypt) (regarding tenancy regulation); Law No. 49 of 1977 art. 29 (Egypt); Law No. 199 of 1952 (Egypt) (bringing tenancies from 1944–1952 under rent control and freezing them at a reduced level); Law No. 55 of 1958 (Egypt); Law No. 168 of 1961 (Egypt) (reducing the rent level further); Law No. 7 of 1965 (Egypt); Law No. 52 of 1969 (Egypt) (as amended with Military Regulation 4 of 1976); Law No. 49 of 1977 (Egypt); Law No. 136 of 1981 (Egypt). See Hanna, supra note 130, at 192–95; Betsy Birns McCall, The Effects of Rent Control in Egypt: Part I, 3 ARAB L. Q. 151 (1988).

See, e.g., Employments of Workers Law, Law No. 244 of 1953 (Egypt); Employment of Workers in Mines and Quarries Law, Law No. 46 of 1958 (Egypt); Labor Law, Law No. 91 of 1959 (Egypt) (providing the first comprehensive labor law, replacing all previous labor laws).

See, e.g., Presidential Decree No. 319 of 1952 (Egypt) (regarding trade unions).
For Rentierism, budgetary laws used by the government to distribute the returns from rent went to the various segments of this civil service.\textsuperscript{136}

And for the Market-orientation, the goal is to create a robust domestic private sector with a shift of resources from labor to capital. The legal structure\textsuperscript{137} is guided by the triple prong of liberalizing trade (foreign investments laws,\textsuperscript{138} corporate governance laws,\textsuperscript{139} etc.), privatizing public companies (privatization laws,\textsuperscript{140} bank laws,\textsuperscript{141} etc.), and de-regulating or re-regulating the economy (new labor laws,\textsuperscript{142} tax laws,\textsuperscript{143} etc.).
The judiciary is structured according to the needs of each economic strategy.\textsuperscript{144} The launching of the ISI-orientation witnessed a diffusion of judicial authority in the mode of spin-off specialized tribunals.\textsuperscript{145} Tribunals implemented special legislation (be it redistributive legislation or compensatory legislation dealing with reimbursing the losers from the transfer of resources), either as panels of final instance or as first instance courts whose judgments are appealed in regular courts.\textsuperscript{146} Such judicial bodies were manned by technocrats with expertise in the particular area they were adjudicating (agricultural credit, tax law, etc.). Higher courts upheld many of the decisions of these lower courts, and the High Administrative Court treated the bulk of ISI special legislation as valid under the doctrine of "Ordre Publique."\textsuperscript{147}

Contrary to the ISI phenomenon of judicial proliferation from the bottom, the Market-orientation has relied for its implementation on the Supreme Constitutional Court ("SCC")\textsuperscript{148} playing the role from the top of the judicial structure and striking down the special legislation of the ISI era. Using the pet rules of the market (contract and property located in the Egyptian Civil Code), the SCC has overturned much of what it treated as "distortive" legislation passed under ISI.\textsuperscript{149} To do so, the SCC has marshaled the assistance of

\textsuperscript{143}See, e.g., Unified Income Tax Law, Law No. 157 of 1981 (Egypt); Sales Tax Law, Law No. 11 of 1991 (Egypt); Investment Law, Law No. 8 of 1997 art. 2 (Egypt) (authorizing fields of tax holiday); Income Tax Law, Law No. 91 of 2005 (Egypt).
\textsuperscript{144}See Abu-Odeh, supra note 39, at 34–35.
\textsuperscript{145}EGYPT AND ITS LAWS 138 (Nathalie Bernard-Maugiron & Baudouin Dupret eds., 2002).
\textsuperscript{146}See, e.g., Law No. 494 of 1953 (Egypt) (as amended by Law No. 524 of 1954 (Egypt)) (regarding courts hearing disputes over land reform law); Law No. 476 of 1953 (Egypt) & Law No. 529 of 1954 (Egypt) (regarding courts hearing disputes over farmland leases); Law No. 160 of 1952 (Egypt) (as amended by Law No. 105 of 1953 (Egypt) (regarding judicial committees in ministries considering the disputes of civil servants); Ministerial Laws Nos. 2, 4 of 1953 (Egypt) (regarding Workers District Court); Law No. 119 of 1957 (Egypt) (regarding Court of Accounts).
\textsuperscript{147}See, for example, decisions by the Egyptian Court of Cassation refusing to overturn legislation on agricultural reforms in the name of "Public Order": Decision No. 235, Judicial Year 23, 1957 (Egypt); Decision No. 1865, Judicial Year 50, 1987 (Egypt); Decision No. 597, Judicial Year 48, 1983 (Egypt); Decision No. 459, Judicial Year 50, 1981 (Egypt); Decision No. 107, Judicial Year 25, 1959 (Egypt).
\textsuperscript{148}Article 175 of the Egyptian Constitution of 1971 and Law No. 48 of 1979 (Egypt) set out that the SCC is "an independent judicial body" whose jurisdiction includes judicial review of laws and decrees, interpretation of legislation according to the provisions of the Constitution, and resolution of conflicts over judicial jurisdiction and decisions. See TAMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT 266–67, 275, 280 (2007). "The President of the Republic appoints the Chief Justice." Id. at 276. As for the other SCC Justices, the General Assembly of the SCC and the Chief Justice each nominate a member, and the President, in consultation with the Supreme Council of the Judicial Bodies, picks one. Id.
\textsuperscript{149}For example, a series of cases exists in which the SCC dismantled rent control regulations in residential buildings on the basis that many such regulations violate the property rights of the landlord. See
comparative constitutional jurisprudence with heavy American influence to rationalize its comprehensive intervention, reversing the two-decade-long course of adjudication by regular courts. I hypothesize that dipping into comparative constitutional jurisprudence has helped the SCC subdue opposition from within the judiciary itself to the radical course of action it was pursuing.

While the special legislation of ISI brought forth a new, urbanized middle class in Egypt, the ISI corporate structures contained political dissent in the system and even eliminated the political altogether (through the mobilizing ideologies of socialism and nationalism). The Market has not been so fortunate. Social conflict in the era of the neo-liberal policies could not be so contained and discontent peaked its head, bared by the eroding flesh of corporatism. The development of the SCC in the early eighties was contemporaneous with the introduction of liberalized political forms of representation with political parties and regular elections. Change

Case No. 44, Judicial Year 17, 1997 (Egypt) (invalidating Egyptian Law No. 49 of 1977 art. 29 (Egypt) (allowing relatives of the tenant to inherit the tenancy contract)); Case No. 71, Judicial Year 19, 1996 (Egypt) (invalidating Law No. 29 of 1977 art. 7 (Egypt) (allowing tenants to exchange their tenancies in rental units)); Case No. 21, Judicial Year 7, 1989 (Egypt) (invalidating Law No. 136 of 1981 (Egypt) (prohibiting landlords of space “used for cultural or religious purposes” from receiving annual increments in rent)); see also Moustafa, supra note 148, at 123–24, 126.

According to Al-Morr, Chief Justice of the SCC from 1991–1998:

The adoption of the constitutional jurisprudence of the US and that of other foreign countries comes from the court’s belief that it has at its disposal a huge tradition of constitutional judicial review that should be made use of. “Science” evolves as a result of a cumulative effort, of each benefiting from the work of others, adding to it and developing it further. The work of the court in this context is no more than a form of participation in values (rights and freedoms) shared by all countries no matter what the unique culture of each might be.

Abu-Odeh, supra note 39, at 41.

Id. at 20–21.

The Law on Parties, Law No. 40 of 1977 (Egypt) was issued under Sadat, but only three parties were created at this time. See generally Egyptian State Information Service: Laws and Mandates, http://www2.sis.gov.eg/En/Politics/PElection/election/Laws/040202040000000005.htm (last visited Jan. 9, 2010). The creation of parties is subjected to approval by the Political Parties Committee (“PPC”), which is effectively in the control of the regime. Decisions by the PPC may be appealed in court. But, given that the PPC has granted only one party license in twenty-five years, most of the twenty-four currently existing political parties are, thus, creations of courts. See Joshua Stacher, Parties Over: The Demise of Egypt’s Opposition Parties, 31 Brit. J. Middle E. Stud. 215, 218–22 (2004).

allowed the system to shift the task of absorbing political dissent to these liberal structures of political representation and called upon the Court to adjudicate political conflict, now expressed in legal terms. The topics of adjudication were election laws and political party laws.

While the judiciary as a social group can be seen as part of the state elites, with its lineage firmly based in the state bureaucracy, it is nevertheless autonomous in two senses: (1) an ethic of autonomy is shared among its members which constrains and conditions its subordination to the interests of the political state elites; and (2) ideological influence comes to the judiciary in the language of legal discourse, which means that the judiciary’s trafficking of the ideology is mediated through a legal consciousness that runs parallel to, although autonomously from, political consciousness. Thus, under ISI, the judiciary adjudicated within a globalized legal consciousness of “the social,” while over the course of the past thirty years the legal thought that dominated its consciousness was based on the idea of “rights,” interpreted to mean economic rights such as property and contract, coupled with political rights.

Thus, when the SCC was asked to adjudicate political conflicts in the name of rights enumerated in the Egyptian Constitution (free speech, freedom of the press, assembly, freedom of association, education and equal opportunity, trial

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154 Moustafa, supra note 148, at 102-04.
155 The elections in 1987 and 1990 were voided by the SCC. See Mahkramat al-Naqd [Sup. Const. Ct.], Case No. 37, May 19, 1990 (Egypt) (invalidating the law that reserved only one seat in each constituency to be contested by both non-party candidates and candidates of political parties, while more than one seat was reserved for candidates belonging to political parties arguing that it discriminated against independents); see also Rutherford, supra note 32, at 72.
156 Mahkramat al-Naqd [Sup. Const. Ct.], Case No. 23, April 15, 1989 (Egypt) (invalidating Law No. 120 of 1980 art. 8 (Egypt) which excluded independent candidates from being nominated for the Shura Council); Mahkramat al-Naqd [Sup. Const. Ct.], Case No. 55, 1988 (Egypt) (invalidating a law that allowed for the exclusion of leaders who were critical of the peace treaty between Egypt and Israel from party creation); Mahkramat al-Naqd [Sup. Const. Ct.], Case No. 56, June 21, 1986 (Egypt) (invalidating Law No. 33 of 1978 because it excluded those who “had corrupted political life” prior to the Revolution of 1952 from joining existing political parties on the basis that it violated Article 62 of the Constitution that provides for the right to participate in public life). See generally Rutherford, supra note 32, at 64-65.
157 See Ikram, supra note 7. An ethic of autonomy is manifest in a continuing power struggle over election supervision: In July 2000, in an interpretation of Article 88 of the Constitution, the SCC found that elections required judicial supervision. Moustafa, supra note 148, at 191. However, the 2007 amendments to the Constitution removed this requirement. See infra note 178.
158 See generally Duncan Kennedy: The Rise and Fall of Classic Legal Thought (1975) (discussing legal consciousness).
by law, privacy, property, etc.),^{160} it saw the Egyptian landscape studded with economic and political regulation, which it deemed unconstitutional.\textsuperscript{161} The SCC treated statutes regulating political parties and elections (passed in the 1980s) that make it difficult to contest the dominance of the ruling party in the parliament\textsuperscript{162} on par with statutes that regulate the property rights of landlords and landowners to the benefit of residential tenants and tenant farmers.\textsuperscript{163} Similarly, the SCC treated legislation that ensured the redistribution of resources, such as education across the class structure, by requiring the rich to subsidize the education of the poor\textsuperscript{164} on par with corporatist legislation of the ISI era that ensured representation of all social groups involved in the production process or professional practice in public companies, boards of professional associations, and labor unions.\textsuperscript{165}

In other words, by viewing all laws through the same lens, the SCC equated the legalization of authoritarian practices with that of corporatist ones and redistributive ones.\textsuperscript{166} They were all bad because they violated several constitutional rights, such as the freedom of expression, the freedom of association, the right to property, and the right to education.\textsuperscript{167} Moreover, the SCC took a very libertarian approach and struck down various tax programs designed to increase the state coffers when rent is depleted, in the process costing the state millions of dollars in lost revenue.\textsuperscript{168}

\textsuperscript{160} Constitution of the Arab Republic of Egypt arts. 8, 18, 36, 45, 47, 48, 54, 55, 66.
\textsuperscript{161} See Moustafa, supra note 148, at 126; see also Rutherford, supra note 32, at 64–68.
\textsuperscript{162} Moustafa, supra note 148, at 96–99.
\textsuperscript{163} Abu-Odeh, supra note 39, at 34–35; see also Moustafa, supra note 148, at 128.
\textsuperscript{164} Law No. 139 of 1981 (Egypt) (regarding the right to education for all Egyptian children over six years of age); see also Mahkramat al-Naqd [Sup. Const. Ct.], Case No. 20, Judicial Year 16, Sept. 2, 1995 (Egypt) (referring to the right to education in finding the differentiation between medical insurances for students unconstitutional).
\textsuperscript{165} See Mahkramat al-Naqd [Sup. Const. Ct.], Case No. 6, Judicial Year 15, Apr. 15, 1995 (Egypt) (limiting the right of members of professional syndicates to serve on the board of a workers syndicate); Mahkramat al-Naqd [Sup. Const. Ct.], Case No. 17, Judicial Year 14, Jan. 14, 1995 (Egypt) (preventing high level administrative employees in the public sector from being nominated to membership of their companies’ boards of directors).
\textsuperscript{166} Moustafa, supra note 148, at 97, 101–02, 231.
\textsuperscript{167} See Rutherford, supra note 32, at 58–59, 64–68.
Additionally, while the SCC decisions opened up political party contestations and allowed Islamic party candidates to run as independents, the SCC nevertheless dealt swiftly and adroitly with Islamist litigants who argued for the Islamization of secular legislation based on Article 2 of the Egyptian Constitution. Procedurally, it did so by dismissing their claims or by appearing to earnestly interpret the Islamic texts. It repeatedly concluded that secular legislation is indeed Islamic.

Towards the end of the 1990s, the SCC finished dismantling both the regulatory structures of ISI (redistributive and corporatist) and that of the mono-party rule in Egypt. Meanwhile, the SCC’s relationship with the political elites was in crisis. It had serviced the regime’s project of legalizing the political fallout from the implementation of neo-liberal policies by turning the Court, as opposed to the street, into a site of political dissent, thereby minimizing the cost of transition for the regime. Yet conversely, and perhaps even perversely, the SCC increased costs for the regime in dealing with political dissent by opening up the political system to political parties of the opposition in parliament. At the same time, the SCC simultaneously curried favor with human rights advocates by being a champion of civil and political rights while taking them by surprise with its extreme hostility to economic regulation.

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169 See generally Abu-Odeh, supra note 39.

170 See Note, Supreme Constitutional Court (Egypt)-Sharī‘a and Riba: Decision in Case No. 20 of Judicial Year No. 1, 1 ARAB L.Q. 100, 107 (1985) (discussing how Article 2 of the Constitution was limited in its application to legislation passed after 1980, when this Article was introduced through an amendment to the Constitution). The SCC thereby refused to declare the interest rate unconstitutional as provided by Article 266 of the Egyptian Civil Code, as the claimant, the Rector of El-Azhar University, requested. Id.

171 See Case No. 7, Judicial Year 8, 1993 (Egypt) (refusing, among other things, to declare Article 18 of the Personal Status Code, which awarded women divorced against their wishes alimony for two years (Motaa), unconstitutional according to Article 2 of the Constitution); see also Clark B. Lombardi & Nathan J. Brown, Do Constitutions Requiring Adherence to Sharī‘a Threaten Human Rights?: How Egypt’s Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law, 21 AM. U. INT’L L. REV. 379, 425 (2006). According to Article 2 of the Constitution, only legislation that violated the foundational “Islamic Sharī‘a principles” violated such an article. See CRIMINAL JUSTICE IN ISLAM: JUDICIAL PROCEDURE IN THE SHAR‘A 15 n.23 (Muhammad Abdel Haleem, Adel Omar Sherif & Kate Daniels eds., 2003). All other legislation is within the discretion of the modern state to legislate for the interest of all. See Frank E. Vogel, Conformity with Islamic Sharī‘a and Constitutionality Under Article 2: Some Issues of Theory, Practice, and Comparison, in DEMOCRACY, THE RULE OF LAW AND ISLAM 525, 534 (Eugene Cotran & Adel Omar Sheri eds., 1999).

172 See generally Abu-Odeh, supra note 39.

173 MOUSTAFA, supra note 148, at 90–91.

174 See id.

175 See id. at 232–33.
Sandwiched between two ambivalences, the SCC’s strategy could not be sustained. Al-Morr, the President of the SCC in the nineties, retired and was succeeded by four consecutively appointed presidents. These presidents, who emerged from the bosom of the state bureaucracy, clearly identified with the interests of the regime. More importantly, while the SCC consolidated its interventions in the economic sphere, its interventions of the nineties in the political sphere were almost completely reversed through the passage of constitutional amendments in March 2007. Currently, neo-liberalism is in a tight constitutional embrace with mono-party rule.

V. STRATEGIES OF THE CURRENT STATE ELITES: SPLITTING OFF

Having conceded to the neo-liberal program of the IFIs, the current state elites have found themselves confronting a conundrum. The implementation of the IFI-program led to the unbundling of the constellation of growth, distribution, and political power that was the feature of the public-sector-driven ISI strategy that they had incubated and that had birthed them in return. An enlarged public sector is the home of those state elites and the instrument through which they have historically exercised control over the various social groupings. The failure of this public sector to produce development and the annexation of the ideological sphere by the “market,” however, has left them with little choice but to give “it” up. This essentially means that the state elites stand to lose control. Therefore, they proceed by cautiously inventing various strategies aimed to turn the economy towards the market with as little

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178 Among the thirty-four constitutional amendments introduced by President Mubarak are provisions that: (1) prohibit parties from using religion as a basis for political activity, (2) provide for drafting of a new anti-terrorism law which will replace the emergency legislation, (3) make it easier for the President to dissolve Parliament, and (4) end judicial monitoring of elections. See NATHAN J. BROWN, MICHELE DUNNE & AMR HAMZAWY, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, EGYPT’S CONTROVERSIAL CONSTITUTIONAL AMENDMENTS: A TEXTUAL ANALYSIS 2–8 (2007), http://www.carnegieendowment.org/files/egypt_constitution_webcommentary01.pdf (commenting on the constitutional amendments). Opposition members of Parliament withdrew from voting on the proposed changes, and only 27% of the registered voters went to the polling stations in the referendum. Id.

179 MOUSTAFA, supra note 148, at 220–24.

180 Id. at 128–32.
loss as possible to their control. I call these strategies “splitting,” in the sense that tasks, powers, and privileges associated with the public sector are split off to other social groups and institutional practices. The split in each case is carefully engineered not to jeopardize those state elites’ control. I identify four modes of splitting that they have pursued: (1) splitting off to the private sector; (2) splitting off to democracy; (3) splitting off to the judiciary; and (4) splitting off to distribution.

It is important to assert that there is nothing stable about these split-off strategies. They shift over time and, indeed, could be reversed depending on the consequences for the state elites. A second important assertion is that those strategies are not necessarily coherent. For example, the split-off to an autonomous judiciary could undermine a carefully designed split-off to democratic practice, when an overzealous SCC throws the former off-balance.

A. The Split-Off to the Private Sector

Privatizing the public sector gives rise to private capital contending for representation of its interests within the state. The public sector historically included industrial companies, mineral extraction companies, and public companies administering services such as transportation, insurance, and banking. The state elites of Egypt pursued an incremental strategy of privatization. Although privatization sped up after 2004, state elites remain in control over the bulk of the national un-privatized banking system. Their control over banks significantly undermines the autonomy of the private sector vis-à-vis the state. The state elites also retain control by continuously shifting state support among the contending segments of the private sector: sometimes empowering the commercial trade-based capital and other times providing protection to domestic industry allied with foreign capital, only to shift and support export-oriented agribusiness. When rent is available, the state elites’ autonomy vis-à-vis private capital is increased; when rent is

181 Id. at 118–36.
182 See id. at 118–77; see also supra text accompanying note 148 (discussing the SCC).
183 See WATERBURY, supra note 1, at 40.
185 See RUTHERFORD, supra note 32, at 223–24.
depleted, the state elites turn to private capital for taxes and contributions to infrastructure projects in the various localities.  

In turn, the various segments of private capital strategize to increase their bargaining power vis-à-vis the state elites: They infiltrate the ruling National Democratic Party—home of the state elites—and run for elections under its umbrella, and their intelligentsia (advocates of Market) find a foothold in the state bureaucracy through the parallel bureaucratic structures put in place by the World Bank. Thus far, the new capital seems inclined to the strategy of infiltrating the state to improve the terms of negotiation with the state elites. Serious democratization does not seem to be on its agenda, as it seems inclined to get what it wants through the strategy of infiltrating contemporary political, bureaucratic, and corporatist structures.

B. The Split-Off to Democratic Practice

The failure of development and the ongoing economic crisis have alerted the state elites to the following macro-political trade-off as a strategy of survival: opening up democratic practice in return for giving up part of the distributional role associated with public-sector-driven development. The rolling back of the distributional role of the public sector is now relegated to the Parliament to vote on through a series of legislation. It is Parliament, not government, that could now take the blame for the ensuing immiseration. That is the upside of this strategy. The downside is that any opening up of democratic practice increases the power of the Islamic sector at the expense of the National Democratic Party. And given its parallel power, state elites are always inclined to reverse and restrict liberties they bestow according to this strategy.

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188 Id. at 65-66.
191 See generally El Amrani, supra note 189.
192 See generally id.
193 See generally id.
194 See generally id.
C. The Split-Off to the Judiciary

The SCC’s empowerment is symptomatic of this strategy. It too is part of a macro-political trade-off: increased judicialization at the expense of political mobilization. Through the empowerment of the SCC, the state elites seem to have succeeded in: (1) transferring the blame for the ongoing turn to Market to the SCC and (2) encouraging individual adjudicatory solutions to political problems that could have otherwise had a powerful mobilizing force. In the discussion of the SCC above, we have seen how the Court reinforced the state elites’ strategy towards the private sector while throwing off-balance its strategy towards democratization. Meanwhile, the striking down by the SCC of various tax laws has thrown off-balance the split-off strategy to distribution.

D. The Split-Off to Distribution

This strategy refers to the state elites’ practice of increasing public expenditure when rent is available. The increase in expenditure typically targets the public sector bureaucracy—the political base of the state elites. What such expenditure usually does is increase salaries and benefits for this bureaucratic class. The state elites’ relationship to this political base is contingent on the availability of rent. While it resorts to this form for downward distribution to buy political passivity from this base, it is nevertheless incapable of reviving the public sector as the engine of the economy, given its ideological commitment to the market. In other words, distribution depends on rent while the devaluation of the public sector makes it unlikely that growth would emerge from this sector to replace rent as the source of the improvement in the life of the bureaucracy. I call it a “split-off” because it splits off the growth aspect of the public sector (to private capital) and preserves the distributional one through use of rent revenue to buy social peace.

195  See Moustafa, supra note 148, at 5–9, 41–46.
196  See id. See generally Sherif & Brown, supra note 36, at 9–16.
197  See id.
198  See supra note 168 (citing the relevant cases).
199  See Soliman, supra note 187, at 20–21.
200  See id.; Ayubi, supra note 11, at 298–301.
201  See id. See generally Beblawi & Luciani, supra note 23.
CONCLUSION

One asks on behalf of Egypt: What is the alternative to this deliberate blundering of development by state elites? What social force is situated to provide the answer?

In my discussion of the nature of the new capital, I showed its limitation. It had chosen to be the “buddy” of the state elites. Indeed, some of this capital has emerged from its very bosom. The middle class? Those segments of it that are downwardly mobile are swayed by Islamist ideology whose alternative to the system is ethical capitalism. Those segments that are upwardly mobile in the flourishing private sectors of telecom, tourism, services, and oil fixate on the constitutional separation of powers as the condition for their own empowerment. They are wedded to the market-based ethics of meritocracy and efficiency, and they see the corruption in the bureaucracy and the lack of transparent governance as a violation of those twin values. More transparency and increased separation of powers seem to gratify the conditions of their national belonging. They are drawn to human rights discourse as the de-politicized response to the authoritarianism of the state elites. Human rights and the market are the twin faiths of the rising Egyptian middle class.

The working class watches the middle class’s obliviousness to its ongoing agitation. Labor strikes stud the Egyptian scene, yet barely get any mainstream media coverage. Workers of public companies find that financial losses caused by the corruption and mismanagement of the state elites are passed off to them in the form of a decline in wages and benefits. Their unions, historically controlled by the state and dominated by populist rhetoric, no longer represent the workers and misspeak on their behalf. The new working class emerges in the new industrial cities and export processing zones, birthed by new labor laws that restrict unionization, and remains new to labor agitation given its rural routes. But given its recent birth, it is at least

203 See Kauffmann & Wegner, supra note 100, at 45–47, 46 fig.3.
204 See id.
205 See id.
206 See generally Beinin & el-Hamalawy, supra note 120.
207 Cf. id.
208 See id.
209 See id.
210 See id.
disinclined to be dominated by corporatized unions and the populist discourse that dominate the official, or traditional, working class.

Trapped in the interstices of: (1) the ideological hegemony of the market that rationalizes its worsening conditions, (2) the populist discourse of corporatized unions that misrepresent its interests, and (3) the non-alternative Islamist discourse of ethical capitalism—the working class stands to be the biggest loser in the transition from ISI to Market.  

\[211\] See generally Abdel-Rahman, supra note 41. The argument made in the Conclusion is an adaptation of the argument made by Amr Abdel-Rahman.