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# RULE BY LAW

## The Politics of Courts in Authoritarian Regimes

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justice. He closed by calling upon his audience to aid in the "reconstruction of the Republic . . . with the objective of making a better Chile, to which, with a healthy, prudent, opportune, and disinterested administration of justice, the judiciary could contribute so much."[44]

Urrutia thus contrasted the prejudicial, illegitimate politicking of the Allende government and its judicial sympathizers with the impartial, professional, and patriotic action of the Supreme Court. Because the military, too, acted out of "impartiality, professionalism, and patriotism" (Munizaga 1988; Nef 1974),[45] it was both logical and completely legitimate for the judiciary to cooperate with the military government in the "construction of a better Chile." It was thus clear that "the courts should be at the service of the new legality that the military power was creating and at the service of the entire process that began with the coup" (Interview with HRL96-5, August 2, 1996) and that those who would critique or disregard that position might throw into question their professional integrity and fitness for judicial service.

This understanding was also articulated in the 1984 plenary censure of Supreme Court president Rafael Retamal, in which the justices reminded their colleague that judges were prohibited by law from engaging in politics. Likewise, the basis for the suspension and, ultimately, the dismissal, of Judge René García in 1988 was his having "gotten involved in politics." Both cases not only served to perpetuate the "reverential fear" of the Supreme Court discussed above but also to reinforce the notion that the good judge, the true professional, is one who goes along and plays along, who sides with tradition, unity, and order. By contrast, he who dares to challenge the forces of tradition, unity, and order, to speak up in defense of liberal or democratic principles, is playing "politics" and thereby betraying his lack of professionalism. In such an ideological environment, it is unsurprising that most judges would remain quietest and deferential.

In sum, the structural and ideological features of the Chilean judiciary, in combination, effectively served to mobilize bias (Thelen and Steinmo 1992: 10) – specifically, a conservative bias – among judges. These features allowed and supported the expression of traditional, conservative juridico-political views by actors in the institution, while discouraging and sanctioning the expression of alternative views. Because of the institutional structure, the primary, and in some ways, exclusive "audience" or "reference group" for judges was the Supreme Court, whose members were not representative of

44 *RDJ* 71 (1974) 1: 18–21.
45 Urrutia's position clearly acccepts this perspective.

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the diversity in the wider polity.[46] They were clearly more conservative than the majority of society, in part because of the way the same institutional features had shaped their views. Given the power they bore over their subordinates' careers, it is clear that the expression of alternative juridico-political views was severely constrained. The institutional ideology also helped preclude the expression of alternative views because it equated professionalism with apoliticism. To behave professionally, so as to merit respect from peers and secure success in the career, meant to remain above "politics," or at least to appear to do so. This meant that passivity was prized, in general, and activism was only deemed acceptable when it was aimed at preserving or restoring the sociopolitical status quo. With this prevailing understanding of professionalism in the institution, and with the conservative Supreme Court monitoring adherence to this understanding, it is no wonder that Chile's judges offered little resistance to the abusive policies of the Pinochet regime.[47]

## CONCLUSIONS AND IMPLICATIONS

In his recent book on courts in contemporary Egypt, Moustafa notes that, although judges are agents of the state, they never administer the will of the regime "in an automatic fashion" (2007). This is an important point. Just as we should not expect judges in democratic regimes to assert themselves automatically in defense of rights and the rule of law, so in authoritarian contexts, we should not assume that judges will always be hopeless tools of the government. But if this is the case, why were judges in Chile judges such faithful agents of the authoritarian regime? Why in a country whose legalist and democratic traditions were much stronger than those of many countries that *have* produced significant judicial resistance (e.g., Brazil, Franco Spain, Egypt), did judges display "a willingness to collaborate that bordered on the abject" (Constable and Valenzuela 1991: 134)?

This chapter has contended that while regime-related factors, social class, and individual attitudes were all part of the equation, judicial capitulation in Chile was, above all, facilitated and maintained by the institutional structure and ideology of the judiciary. The Supreme Court held tremendous power over

[46] I borrow the idea of "audience" from Schattschneider (1960) and the notion of judicial "reference groups" from Guarnieri and Pederzoli (2002). The claim fits nicely within the framework of Baum (2006).

[47] This argument bears some resemblance to that of Müller (1991), which explores how and why judges and lawyers cooperated so fully with the Hitler regime. The major difference, of course, is that in Germany, it was the Ministry of Justice (i.e., the government) that controlled judges' careers, not the judicial elite itself, as in Chile and other cases (see Hilbink 2007, ch. 6).

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the judicial hierarchy, through which it induced conservatism and conformity among appellate and district court judges. It was able to do so by dismissing or taking disciplinary action against the few judges who refused to fall in line with its servile stance vis-à-vis the military government. These efforts were facilitated by the long-standing ideology of the judiciary, according to which judges were to remain "apolitical." Any judge desiring to preserve professional integrity and standing needed to take care to demonstrate his or her fidelity to "law" alone, and "law" was to remain distinct from and superior to "politics." Challenging the decisions of the military junta, the self-proclaimed apolitical guardians of the national interest, would both violate a judge's professional duty to remain apolitical and imperil his or her chances of professional advancement. Thus, even democratic-minded judges were, with few exceptions, unwilling to take public principled stands in cases brought against authoritarian laws and practices.

These findings have two main implications for theorizing on judicial behavior. First, the Chilean case demonstrates that institutional context matters to judicial behavior. Judicial decision making in authoritarian Chile was not a simple response to the political context; namely, the absence of political competition under Pinochet (Chavez 2004; Ginsburg 2003; Ramseyer and Rasmusen 2003). Indeed, as I show elsewhere (Hilbink 2007), judicial behavior in Chile did not change radically with the onset of authoritarianism in 1973, nor with the return to democracy in 1990. Rather, the performance of the courts remained quite constant, despite radical changes in the surrounding level of political competition. At the same time, as this chapter shows, judicial comportment was not a simple reflection of individual policy preferences that judges brought with them to the bench, nor of judges' objective class loyalties or sensibilities. And it was clearly not a function of legal positivist or formalist commitments, since judges cannot be said to have merely applied the laws on the books. Instead, the comportment of Chilean judges was the product of interests and understandings forged *within* the institutional setting in which they worked. Hence, whether inclined to view judicial behavior as sincere or strategic, theorists should devote greater attention to the institutional contexts in which different judges work and to the impact these have on what judges want, can, and think they ought to do (Gibson 1986: 150).[48]

Second, the Chilean case suggests that where judicial institutions are designed to keep judges maximally apolitical, it is unlikely that judges will seize on the formal autonomy they enjoy to challenge actions or decisions of regime leaders. An "apolitical" institutional structure works against the cultivation

[48] For an excellent recent argument that supports this view, see Baum (2006).

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of the professional understandings and capacities that allow judges to assert themselves against abuses of power. Rather than promoting independent- and critical-mindedness, such a structure fosters servile and mechanical mentalities and practices. Rather than cultivating a sense of connection and responsibility to the citizenry, it encourages an inward orientation and a refusal to engage with "nonexperts." And rather than breeding openness to difference, debate, and interpretive innovation, an "apolitical" judicial structure serves to enforce unity and repress dissent (Damaska 1986; Shapiro 1981; Solomon 1996). Likewise, where the institutional ideology of the judiciary is anchored by an imperative to remain apolitical, judges are generally discouraged from taking principled stands against members of a sitting government, from engaging deliberately and responsibly in polity-wide debates, and from taking seriously unconventional or unpopular perspectives (Cover 1975; Peretti 1999; Shklar 1986). In sum, while judicial capitulation to authoritarian regimes is never automatic (Moustafa 2007), judges who function in a system "cut off from wider [political] influences and assessments" (Solomon 1996: 469) are unlikely to act as anything but faithful agents of established power.

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# Law and Resistance in Authoritarian States: The Judicialization of Politics in Egypt

Tamir Moustafa

Scholars generally regard courts in authoritarian states as the pawns of their regimes, upholding the interests of governing elites and frustrating the efforts of their opponents. Yet in Egypt, a country with one of the most durable authoritarian regimes in the world, courts enjoy a surprising degree of independence and they provide a vital arena of political contention. From the standpoint of mainstream comparative law and politics literature, the Egyptian case presents a surprising anomaly. This chapter sets out to explain why Egyptian leaders chose to empower judicial institutions in the late 1970s when only twenty-five years earlier the same regime had stripped the courts of their power.

I find that state leaders deployed judicial institutions in an attempt to ameliorate a series of economic and administrative pathologies that are endemic to many authoritarian states. First, the consolidation of unbridled power resulted in a severe case of capital flight, depriving the economy of a tremendous amount of Egyptian and foreign private investment. Additionally, the concentration of political power paradoxically exacerbated principal-agent problems and impaired the ability of the regime to police its own bureaucracy, resulting in administrative abuse and corruption. These substantive failures damaged the ability of the regime to fulfill its populist agenda, and they undermined the revolutionary legitimacy that the regime had enjoyed for its first fifteen years. Faced with these compounding crises, Sadat eventually turned to judicial institutions to ameliorate the dysfunctions that lay at the heart of his authoritarian state. Judicial institutions were rehabilitated in an effort to attract investment, to provide the regime with new tools to monitor and discipline the state's own bureaucratic machinery, and to shape a new legitimizing ideology around the "rule of law." But while judicial institutions helped ameliorate some state functions, they simultaneously opened avenues through which activists could challenge state policy. The result was a new field of political contention within the authoritarian state.

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## JUDICIAL INSTITUTIONS AND ECONOMIC DEVELOPMENT

After the 1952 Free Officers' coup that brought Gamal 'Abd al-Nasser to power, Egypt's new rulers made a decided shift away from the established political system and showed no intention of restoring liberal-democratic political institutions. The constitution was annulled by executive decree in December 1952, and the following month all political parties were disbanded. Egyptian legal institutions were also weakened significantly. 'Abd al-Raziq al-Sanhuri, one of Egypt's greatest legal scholars and the architect of the Egyptian civil code, was physically beaten by pro-regime thugs and forced to resign in 1954. Another twenty prominent members of the *Maglis al-Dawla* (Egypt's supreme administrative court) were forcibly retired or transferred to nonjudicial positions. The regime further consolidated its control by circumventing the regular court system and establishing a series of exceptional courts throughout the early 1950s, including *Mahkmat al-Thawra* (The Court of the Revolution) in 1953 and *Mahakim al-Sha'ab* (The People's Courts) in 1954. These courts had sweeping mandates, few procedural guidelines, and no appeals process, and they were staffed by loyal supporters of the regime, typically from the military (Brown 1997; Ubayd 1991). Simultaneously, Nasser began to steer the country in a new economic direction, unilaterally seizing 460,000 feddan of land for redistribution and nationalizing hundreds of British and French companies in the wake of the 1956 Suez War.

With no check on the political power of the new regime, either through political parties or through credible legal institutions, private investors understandably hesitated to make major new investments in the economy. Instead, foreign and Egyptian capitalists actively divested their assets, depriving the Egyptian economy of large sums of capital. According to Fuad Sultan, one of the chief architects of the economic liberalization program, an estimated $20 billion (£E 8 billion) was held abroad by Egyptian citizens in the 1960s, and another $20 billion was transferred abroad in the 1970s (Beattie 2000: 150).[1] When the regime found that private sector industrialists were unwilling to invest in the economy, it seized what assets remained to mobilize capital for investment. Between 1960 and 1964 the regime initiated one of the most extensive nationalization programs in the non-Communist world.

[1] By comparison, in the ten-year period between 1965 and 1974, domestic sources of investment in the economy totaled £E 2,319,400,000 ($5,800,000,000). In other words, the private savings of Egyptian citizens that were transferred abroad amounted to nearly three and a half times the total amount of domestic sources of investment in the Egyptian economy during the same period.

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Nasser's preference for an expansion of executive powers at the expense of autonomous rule-of-law institutions continued into the late 1960s, despite its crippling effect on the economy. The final and most significant blow to Egyptian judicial institutions came in the 1969 "massacre of the judiciary." In an executive decree, Nasser dismissed more than 200 judicial officials, including the board of the Judges' Association, a number of judges on the Court of Cassation, and other key judges and prosecutors in various parts of the judicial system. To ensure that resistance to executive power would not easily reemerge, Nasser then created the Supreme Council of Judicial Organizations, which gave the regime greater control over judicial appointments, promotions, and disciplinary action. This marked the pinnacle of Nasser-era domination of the judicial system and the nadir of formal institutional protections on property rights. By the time of Nasser's death in September 1970, the Egyptian economy was in a state of extreme disrepair. The public sector was acutely inefficient and required constant infusions of capital, the physical infrastructure of the country was crumbling, and massive capital flight deprived the economy of billions of dollars each year. Nasser's successor, Vice-President Anwar Sadat, turned almost immediately to foreign sources of capital to make up for the domestic shortfall. However, it proved extremely difficult to convince investors that their assets would be safe in Egypt given the fact that this was the same regime that had seized foreign assets only a decade earlier.

The possibility that the Egyptian regime might renege on its renewed commitment to private property rights proved to be a major disincentive for both foreign and Egyptian investors. Worldwide, foreign investors were obsessed with the risk that investment in the developing world entailed after a string of expropriation movements in the 1950s and 1960s. A partial list of foreign countries that seized foreign assets through the 1960s included Algeria (1967), Argentina (1959), Brazil (1959–1963), Burma (1963–1965), Ceylon (1962–1964), Cuba (1960–1962), Egypt (1956, 1961, 1963–1964), India (1956), Indonesia (1963–1965), Iraq (1964), Syria (1965), and Tanzania (1966–1967). In the wake of national independence movements and economic nationalization campaigns worldwide, a virtual industry focusing on "political risk assessment" emerged in the 1960s and 1970s. Economists and business faculty produced a prodigious volume of studies aspiring to create a framework for the measurement of political risk (Aliber 1975; Baglini 1976; Delupis 1973; Knight 1971; Nehrt 1970; Robock 1971; Truitt 1974; Zink 1973), business consultants attempted to assess the degree of political risk in individual countries, and trade magazines obsessed about the perils of expropriation.[2] The overriding sentiment in much of this literature was that "a common cause of hesitancy

[2] For examples, see Kelly (1974), Van Agtmael (1976), and Hershbarger and Noerager (1976).

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in committing funds is fear of expropriation or nationalization of the investment.... Companies are still reluctant to take all the risks of establishing a new business abroad, and fostering and developing it, only to have it taken over.... According to investors, the danger [of expropriation] lurks throughout much of the world" (Truitt 1974: 13).

In many of these studies, investors were urged to examine the host country's legal system to assess the general investment climate and the extent of concrete protections on property rights. For example, one study from the period suggested the following:

> The quality of a legal system in a host nation is a major element of the investment climate. The investor is forced to make at least implicit judgments about certain elementary concepts of justice, continuity, and predictability as dispensed by the legal system.
>
> The presence of a strong, independent, and competent judiciary can be interpreted as an indicator of a low propensity to expropriate.... If this judicial system is strong, independent, and competent, it will be less likely to "rubber stamp" the legality of an expropriation and more likely to accede to a standard of fair compensation. The effect of this would be to lower the propensity of the host nation government to expropriate (Truitt 1974: 44–45).

It was in this context of elevated concern about the risks of expropriation and the insecurity of property rights that Sadat attempted to attract foreign investment and Egyptian private investment. Sadat's first attempt to assure investors that Egypt was turning a new corner came with law 34/1971, which repealed the government's ability to seize property.[3] Law 65/1971 extended anti-sequestration guarantees to Arab capital in addition to providing tax incentives for investments.[4] Sadat also approved the International Bank for Reconstruction and Development (IBRD) framework for the settlement of foreign investment disputes through international arbitration by way of presidential decree 90/1971. But the most important assurance of the early 1970s that the regime was committed to respecting private property rights was contained in the new Egyptian Constitution of 1971. While still reserving a central role for the public sector in the development process, it sought to reestablish the sanctity of private property:

> Article 34
> Private property shall be protected 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 a public purpose and against a fair compensation

[3] *al-Jarida al-Rasmiyya*, no. 124, 17 June 1971.

[4] *al-Jarida al-Rasmiyya*, no. 40, 30 September, 1971.

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in accordance with the law. The right of inheritance is guaranteed in it.

Article 35
Nationalization shall not be allowed except for considerations of public interest, by means of law and with compensation.

Article 36
General confiscation of property shall be prohibited. Special and limited confiscation shall not be allowed except with a judicial decision.

The proposed constitution was put to a national referendum and approved by a supposed 99.98 percent of voters. The irony of the situation was surely not lost on potential private investors. The regime was intent on attracting private investment, and it was employing the language of "property rights" to do so. But what kind of real guarantees were being extended, particularly in light of the fact that the national referendum, like every referendum since the Free Officers' coup in 1952, was rigged by the government? The "99.98 percent voter approval" was an absurd illustration of the power of the regime to unilaterally expand and contract legal rights to suit its needs at the time.

Moreover, even the assurances provided both in law 34/1971 and in the constitution were not absolute. Rather, they were to be interpreted by other laws on the books. For example, in the case of law 34 of 1971, property could still be seized by court order in the event that "criminal offenses" were involved. But with a whole array of loosely worded criminal offenses on the books, including financial crimes damaging the "public interest," real guarantees to private property were questionable at best. Similarly, the constitution stated that private property would be protected, "*except in the cases specified in the law*" and "*in accordance with the law*." Not only did this language open the door to the interpretation of constitutional guarantees based upon illiberal laws already on the books but it also failed to resolve the issue of the regime's ability to unilaterally issue new legislation to suit its current needs. Nor did law 34/1971 or the new constitution address the lack of independent legal institutions with the power to protect private property. In short, repeated assurances by the regime that it would respect property rights fell far short of providing concrete safeguards against state expropriation on the ground.

The disappointing response from private investors from 1971–1974 prompted the regime to make a more forceful and comprehensive statement about its commitment to its new open door policy. The regime created an "October Paper" outlining the state's new development strategy and put it to a national referendum on May 15, 1974. Like the referendum on the 1971 constitution, the new economic policy received nearly 100 percent voter approval thanks

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to electoral fraud orchestrated by the Ministry of Interior. The October Paper laid the groundwork for law 43/1974, which provided a new, more detailed framework in which foreign capital could operate in Egypt. Law 43 provided a number of guarantees and incentives to foreign investors, including tax exemptions, the ability to import new technology and machinery for production, partial exemptions from currency regulations, exemptions from Egypt's stringent labor laws, exemptions on limits to annual salaries, and, once again, guarantees against nationalization and sequestration. In this last regard, article 7 repeated the government's commitment that "[t]he assets of such projects cannot be seized, blocked, confiscated or sequestrated except by judicial procedures."

Egyptian newspapers and government officials anticipated a flurry of economic activity and the prompt injection of much-needed foreign capital into the economy after the passage of law 43/1974. They were sorely disappointed. By the late 1970s, it became increasingly clear that investors were not willing to simply take the word of the government when the same regime and the same personalities had only fifteen years earlier engaged in one of the most sweeping nationalization programs in the developing world. Studies conducted in the late 1970s by consulting firms and by the Egyptian government itself confirmed that investors "remained reluctant to invest in long-term projects due to uncertainty about the future of the Egyptian economy" (Nathan Associates 1979: 216). Investor concerns about expropriation were also reflected more concretely in the volume of foreign operations, which amounted to only $442,144,000 over the decade.

Even more revealing than the low volume of investment were the sectors of the economy where investments were made. Only 19 percent of total investments were made to the industrial sector, which entailed high initial outlays of capital, a long-term return on investment, and therefore the necessity of long-term security in the economy. Eighty-one percent of total investments were directed to nonindustrial sectors such as services and tourism. These sectors of the economy conversely required low initial outlays of capital, provided a short-term return on investment, and risked less in the event of nationalization. Egypt was attracting neither the volume nor the type of capital that it needed to sustain long-term economic development.

The reluctance of foreign investors to enter the Egyptian market for fear of expropriation was also reflected in the fact that most American businesses in Egypt undertook capital-intensive operations only when they received medium- and long-term financing for projects from the U.S. Agency for International Development under its "Private Investment Encouragement Fund." These long-term, capital-intensive investments in the Egyptian economy were

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publicly rather than privately financed because private investors were unwilling to risk expropriation. Moreover, nearly every American firm investing in Egypt during this period did so only after securing costly insurance from the Overseas Private Investment Corporation, substantially reducing profit margins (U.S. Department of Commerce 1981).[5]

The low volume of total investments and the emphasis on low-risk investments with promises of quick returns did little to help the ailing economy. More than seven years after the passage of law 43/1974 and a full decade after the first moves to attract foreign capital through law 65/1971, these projects provided a total of only 74,946 jobs (Arab Republic of Egypt 1982: 54, 68). Compared with the total Egyptian workforce of nearly 11 million, law 43 projects accounted for only 0.7 percent of total employment in the country. With the Egyptian population growing at a rate of approximately one million per year by the end of the 1970s, law 43 projects were not generating nearly enough new employment to address Egypt's population explosion. By 1979, total external debt had reached $15.4 billion, and debt servicing consumed a full 51 percent of all export earnings. It was in this context that Sadat finally decided to strengthen institutional guarantees on private property rights through the establishment of an independent constitutional court with powers of judicial review. Former Prime Minister Mustafa Khalil recalled,

> There were efforts to encourage foreign investment in Egypt at the time because we were dealing with a fiscal crisis. One major factor that was impeding investment was the lack of political stability – both foreign and domestic. We issued a number of laws aimed at guaranteeing private investment such as law 43. But a major problem was that the NDP, having the majority in the People's Assembly, could push through any legislation it wanted and change the previous laws. This was at the forefront of Sadat's thinking when he created the Supreme Constitutional Court. He primarily wanted to make guarantees [to investors] that laws would be procedurally and substantively sound (personal interview, June 14, 2000).[6]

The new Supreme Constitutional Court (SCC) enjoyed considerable independence from regime interference. The Chief Justice of the SCC was formally appointed by the President of the Republic, but for the first two decades

[5] This insurance was specifically arranged to cover for three types of risk: inconvertibility of profits, expropriation, and war loss.

[6] In a separate interview with Kirk Beattie, Khalil provided a similar assessment of Sadat's general understanding of the tie between political and economic reform. According to Khalil, "he [Sadat] was anxious to have the open door policy work, and in his mind the political *infitah* was directly related to and a necessary adjunct of getting the open door policy to 'take off'" (Beattie 2000).

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following its establishment, the president always selected the most senior justice serving on the SCC to the position of Chief Justice. A strong norm developed around this procedure, although the president always retained the formal legal ability to appoint anyone to the position of Chief Justice who met the minimum qualifications as defined by the law establishing the court.[7] New justices on the court are appointed by the president from among two candidates, one nominated by the General Assembly of the court and the other by the Chief Justice, but in practice the nominations of the Chief Justice and the General Assembly of the SCC have been the same. Extensive protections were also provided to SCC justices to guard against government interference. Justices cannot be removed by the government, and the General Assembly of the SCC is the only body empowered to discipline members of the court, insulating SCC justices from the threat of government pressure and reprisals. Finally, provisions in law 48/1979 also give the SCC full control of its own financial and administrative matters.

With protections against government interference, the Supreme Constitutional Court set to work establishing a new property rights framework. SCC rulings enabled thousands of citizens to receive compensation for property seized by the state. In fact, the SCC went much farther than even Sadat envisioned when it struck down laws limiting the extent to which compensation claims could be made against the government (Moustafa 2007). The impressive activism of the new Supreme Constitutional Court helped the regime assure both Egyptian and foreign private investors that property rights were now secure in Egypt and that formal institutional protections existed above and beyond mere promises by the regime. However, as we see later in this chapter, the SCC also opened an institutional channel through which political activists could challenge the government.

## JUDICIAL INSTITUTIONS AND BUREAUCRATIC DISCIPLINE

Political scientists make the common and recurring error of imagining "the state" as an organization that is far more unified than it is in reality. Reification of the state, or the process of imagining state organizations as a unified set of institutions working in lock-step with one another, is particularly seductive when considering state functions in authoritarian regimes for two reasons. First, we commonly assume that authoritarian rulers maintain absolute authority over their subordinates; second, low levels of transparency often obscure

[7] This informal norm ensuring SCC autonomy broke down in 2001, as documented in Moustafa (2007).

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our ability to observe the considerable discord and breakdowns in hierarchy that regularly occur in authoritarian settings.[8] But the Weberian ideal of a rational bureaucracy does not adequately capture the dynamics of how state institutions operate in real-world contexts (Migdal 1997). Far from acting in unison, each bureaucrat has his or her own set of personal interests and ideological preferences that are often at odds with those of the central regime. A variety of studies from the state-in-society approach also demonstrate that state institutions are transformed from the moment they begin to interact with social forces championing various competing agendas (Migdal 1989; Migdal, Kohli, and Shue 1994).

Counteracting these centripetal forces is one of the primary challenges for the central leadership of any state, but it is a particular challenge for authoritarian leaders for precisely the same reason that we, as observers of the state, tend to reify it: authoritarian rulers suffer from a lack of transparency in their own state institutions. Part of the difficulty of collecting accurate information on bureaucratic functions is due to the hierarchical structure of modern states more generally, as articulated by Martin Shapiro:

> Certain pathologies arise in the hierarchical lines designed to transmit information up and commands down the rational-legal pyramid. Such "family circles" – conspiracies among the lower-level workers to block or distort the flow of information upward – are successful in large part because of the summarizing that is essential to such a hierarchy. . . . The process of successive summarization gives lower levels ample opportunity to suppress and distort information, particularly that bearing on their own insubordination and poor performance (Shapiro 1980: 641–642).

Accurate information on bureaucratic misdeeds is even more difficult for authoritarian regimes to collect because the typical mechanisms for discovery, such as a free press or interest group monitoring of government agencies, are suppressed to varying degrees. Moreover, since administrators are unaccountable to the public in the same ways that they are in democracies, and because fear of retribution typically pervades political life, authoritarian rulers at the top of the administrative hierarchy receive little or no feedback from the public, making it particularly difficult to assess the day-to-day functions of state agencies. The classic principal-agent problem, which has been examined extensively in democratic settings, is therefore aggravated in authoritarian political systems. With low levels of transparency and exacerbated principal-agent

[8] To some considerable degree, reification of state power works to the advantage of authoritarian rulers because those living under authoritarian rule, like political scientists, often overestimate the power, presence, and coordination of state institutions.

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problems, local administrative officers regularly circumvent, undermine, or subvert central government policies to promote their own competing policy agendas or simply to translate their administrative power into supplementary income streams. These dynamics are so commonplace that a completely alternate set of norms often emerges around how much one is expected to line a bureaucrat's pocket with every interaction with agents of the state, whether to renew a driver's permit, process paperwork for a court case, or secure a business license.[9] At a minimum, low levels of transparency and principal-agent problems can undermine the central regime's developmental goals. At their worst, low levels of transparency within state agencies can mask the emergence of power centers aspiring to challenge the central regime.

We have grown accustomed to various coping strategies that authoritarian regimes use to maintain their control of state institutions, including the retention of particularly sensitive posts in the military and the central security agencies for trusted relatives, or, alternately, constantly rotating officials whose loyalty cannot be trusted based on blood relations.[10] However, ad hoc shuffling of state functionaries and reliance on familial, tribal, clan, and personal solidarities are tremendously inefficient, and they have distinct limitations in modern states with complex bureaucracies. More institutionalized methods of monitoring are necessary for authoritarian states with expansive bureaucracies.

In his seminal study, *Courts*, Martin Shapiro (1981) observes that judicial institutions are used as one of several strategies to promote discipline within the state's administrative hierarchy because they generate an independent stream of information on bureaucratic misdeeds that is driven by citizens themselves. Shapiro explains that "a 'right' of appeal is a mechanism providing an independent flow of information to the top on the field performance of administrative subordinates." This observation helps explain why even authoritarian regimes with little regard for civil liberties often preserve the right of citizens to have their day in court (Shapiro 1981: 49). Courts play "fundamental political functions" by acting as avenues "for the upward flow of information [and] for the downward flow of command" (Shapiro 1980: 643).

[9] Ironically, the more a regime seeks to extend its political and administrative capacities, the more opportunities for corruption develop in tandem. Perhaps the best example of this was the global expansion of public sector enterprises in the developing world in the post-independence period, a move that was intended to extend the state's political patronage networks as much as it was intended to build the state's economic capacity. This rapid expansion of state functions produced countless opportunities for bureaucrats to translate official power into individual gain (Waterbury 1993).

[10] For numerous examples in the Middle Eastern context, see Herb (1999).

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Two models of administrative supervision, "police-patrol oversight" and "fire-alarm oversight" developed by McCubbins and Schwartz are also particularly instructive (1984; McCubbins et al. 1989). In the police-patrol model of supervision, administrative oversight is centralized, active, and direct. The legislator (principal) continuously monitors his or her administrators (agents) by observing as many administrative actions as possible. The disadvantage of this form of monitoring is that it is costly and the legislator lacks the capacity to comprehensively monitor all the actions of the agents.[11] By using a model of police-patrol oversight, the legislator can only evaluate a small sample of administrative activities, and most problems are likely to go undetected.[12] The alternative, fire-alarm model of oversight is a more passive, indirect, and decentralized system of rules and procedures through which citizens can appeal to courts or special agencies when they experience problems with administrators. These formal channels for citizens to call attention to administrative abuses enable legislators to focus on the root causes of administrative deviance and to punish administrators who have diverged from their legislated mandates. Although McCubbins and Schwartz are concerned with strategies for administrative supervision in democratic contexts, their models are equally useful for understanding how judicial institutions are used by authoritarian regimes as a means to collect accurate information and instill discipline within the state's own institutions.[13]

Sadat (1970–1981) and Mubarak (1981–present) facilitated the reemergence of the administrative courts in the 1970s and 1980s in an effort to rein in the state bureaucracy (Rosberg 1995). The public sector had mushroomed with the vast waves of nationalizations, and the state bureaucracy continued to swell as

[11] The delegation of state activities to particular agencies is, in the first place, due to the inability of the legislator to implement policies directly due to constraints on time and expertise.

[12] The police-patrol model of administrative monitoring is even more costly and ineffective in authoritarian contexts. Not only do authoritarian rulers typically have multiple agencies devoted to supervising, auditing, checking, and cross-checking the actions of administrators throughout the state hierarchy. In addition, monitoring agencies are known to devote as much or more energy to spying on one another as they do monitoring threats coming from society, as authoritarian rulers guard against the emergence of power centers even within the regime's monitoring agencies themselves.

[13] The framework developed by McCubbins and Schwartz is inspired from an American context, but it appears that the utility of the fire-alarm model of administrative oversight is not tied exclusively to administrative oversight in democracies. Rather, it applies more broadly to the degree of complexity of state institutions, regardless of whether a state is democratic or authoritarian. "Although our model refers only to Congress, we hazard to hypothesize that as most organizations grow and mature, their top policy makers adopt methods of control that are comparatively decentralized and incentive based. Such methods, we believe, will work more efficiently . . . than direct, centralized surveillance" (McCubbins and Schwartz 1984: 172).

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TABLE 5.1 *Growth of the Egyptian Bureaucracy, 1952–1987*

| Year | Number of state employees |
|---|---|
| 1952 | 350,000 |
| 1957 | 454,000 |
| 1963 | 770,000 |
| 1966 | 1,035,000 |
| 1970 | 1,200,000 |
| 1978 | 1,900,000 |
| 1980 | 2,876,000 |
| 1987 | 3,400,000 |

*Sources:* Ministry of Finance, Arab Republic of Egypt, *Statistical Statement for the 1979 Budget*; Nazih Ayubi, *Overstating the Arab State*, p. 299.

a result of the government's provision of jobs to new graduates to stave off social unrest (see Table 5.1). One of the most pressing problems that Nasser and his successors faced under these circumstances was the inability to adequately monitor and discipline bureaucrats throughout the state's administrative hierarchy. With political parties dissolved, judicial independence impaired, the free press suppressed, and citizens stripped of access to institutions through which they could effectively protect their interests, there was little transparency in the political and economic systems. Corruption began to fester as administrators and bureaucrats abused their power and position to prey on citizens, and public sector managers siphoned off resources from the state (Ayubi 1980; Baker 1978; Rosberg 1995: 76–82; Zaki 1999). Not only did this affect the state's institutional performance, but corruption and abuse of power began to undermine the revolutionary legitimacy that the regime enjoyed when it came to power in the 1950s (Rosberg 1995: 83–91). Nasser also feared that the lack of transparency within the state's own administrative hierarchy masked the emergence of "power centers" within the military, the police, and the intelligence services that could challenge his authority.

Nasser attempted to bolster administrative monitoring and discipline through a series of centralized mechanisms. The first was to create a "complaints office" to which citizens could lodge their grievances. This office morphed over time into a vast array of complaints offices attached to various ministries, public sector companies, governorates, and the office of the president itself. Nasser also attempted to carry out administrative reform and monitoring through the establishment of the Central Agency for Organization and Administration; Sadat would later create his own National Council for

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Administrative Development. Both strategies were deemed failures (Ayubi 1980: 305–310).

The monitoring agencies suffered from the same principal-agent problems and information asymmetries that had led to administrative abuses in the first place. Complaints offices were better able to overcome principal-agent problems, because they generated an independent stream of information from citizens filing petitions. However, the volume of petitions reaching the central government presented an equally damning problem. The presidential complaints office alone received 4,000 petitions per day, or nearly 1.5 million per year (Ayubi 1980: 285–287). With such an overwhelming volume of petitions, the office could not effectively process even a fraction of the petitions, nor could it identify *a priori* which complaints pointed to the most egregious abuses and which ones were frivolous. Ad hoc arrangements for the discipline of civil servants also proved to be inefficient and prone to abuse.

Administrative problems took on increased urgency with the initiation of Sadat's open door economic policy. The sudden transition from a socialist economy to a mixed public/private sector economy increased the opportunities for corruption and graft exponentially, and by all accounts the problem was severe (Ayubi 1980; Baker 1978: 175–195, 258–265; Hinnebusch 1985: 138–142). Reports from within the state's own National Center for Social and Criminal Research observed that corruption had "become the rule rather than the exception" (Hinnebusch 1985, cited in Ayubi 1979). Lack of bureaucratic discipline furthermore resulted in the inconsistent application of the law and an uncertain investment environment. A major business consulting group operating in Egypt in the 1970s reported that "while new legislation prompted many international companies to examine the possibilities of Egypt as an investment site, most of them found that the Law 43 guidelines were too broad and their application too inconsistent by an Egyptian bureaucracy which was not uniformly committed to the new policy. Largely for this reason, substantial foreign investment was slow to materialize" (Sullivan 1976; see also Carr 1979: 40–53). In some cases, low-level bureaucrats created needless obstructions in order to extract bribes. At other times, bureaucrats interfered with firms because they were ideologically opposed to the new open door economic program.[14] In still other cases, squabbles erupted within various branches of

[14] According to the report, "Said a senior official of one of the key ministries recently: 'I have just come out of a meeting with my key coordinating people in the ministry, and they are behind execution of the policy to liberalize the economy and bring in more foreign investment. But the difficulty comes in getting the people further down to go along. The very last man on the totem pole can get things snarled since he is involved in the daily application of decisions. Until you get the little people to go along, you have problems'" (Sullivan 1976: 4).

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the bureaucracy, with severe negative consequences for the foreign business community.[15] The *Business International* report recounts numerous examples of foreign companies that lost large sums of money due to the inconsistent application of laws on the books (Sullivan 1976: 75–78, 122–129).[16] The lack of discipline throughout the bureaucratic hierarchy and its adverse impact on the investment environment are summed up in the report's finding that "top people in President Sadat's government sympathize with the difficulties foreign investors will face in Egypt, because they face the same problems themselves" (Sullivan 1976: 4) The *Investment Climate Statement*, compiled by the U.S. Department of Commerce, and the *Economic Trends Report* published by the American embassy found similar problems.

As it became clear that centralized monitoring strategies were failing to produce reliable information on the activities of the state's own institutions, Sadat enhanced the independence and capacity of the administrative court system to serve as a neutral forum in which citizens could voice their grievances and to expose corruption in the state bureaucracy. The regime facilitated the strength and autonomy of the administrative courts in 1972 by returning to them substantial control over appointments, promotions, and other internal functions, all of which were weakened or completely stripped from the administrative courts by presidential decree in 1959.[17] The regime also expanded the institutional capacity of the administrative courts through the 1970s by establishing courts of first instance and appeals courts throughout the country.[18] That the expanded administrative court system provided new avenues for litigants is clear from the increased volume of cases that went to court throughout this period.[19]

The administrative courts helped the regime overcome the design failures inherent to both centralized monitoring agencies and the complaints offices. Administrative courts did not suffer from principal-agent problems as did

[15] "Businessmen may get caught in the crossfire between warring factions of the Egyptian bureaucracy, which may disagree on the interpretation of regulations vitally affecting a company's operating efficiency, such as customs duties or taxes" (Sullivan 1976: 4). For an academic analysis of these dynamics, see Baker (1981).

[16] Other business consultants reported the same problems. See, for example, Reckford International, *U.S. Business Experience in Egypt*.

[17] Law 136/1984. For more on these amendments see 'Ubayd, *Istiqlal al-Qada'*, pp. 290–305.

[18] The expansion of the administrative courts is documented in *Waqa'ai Misriyya* and *Majalat Majlis al-Dawla*. A concise list of the expansion of the administrative court system is reproduced in Rosberg (1995: 191).

[19] Moreover, the rate of increase in the number of administrative cases is greater than the rate of increase in other types of cases in the civil courts. This indicates that the increase was not simply due to population growth and other similar factors, but was rather a consequence of the government's new method of monitoring and enforcing bureaucratic discipline.

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independent monitoring agencies because they produced a stream of information from aggrieved citizens themselves. At the same time, the hierarchical structure of the administrative courts enabled the regime to identify the most significant cases of administrative dysfunction through a coherent system of procedural rules, standing criteria, and the like.[20] Frivolous petitions were winnowed out in the primary courts, but more significant cases made their way up the judicial ladder, all the while leaving a paper trail for the regime to survey. Finally, administrative courts provided a built-in mechanism to discipline the bureaucracy, illustrating Shapiro's observation that judicial institutions play "fundamental political functions" by acting as avenues "for the upward flow of information [and] for the downward flow of command" (Shapiro 1980: 643). To say that the administrative courts could solve all of the dysfunctions of the Egyptian bureaucracy would surely be an overstatement. But, undoubtedly, the administrative courts proved more effective than the aborted strategies of centralized monitoring agencies and complaints offices.

## MARKETING JUDICIAL REFORM AT HOME AND ABROAD

Egyptian government officials were keen to bring judicial reforms to the attention of the international business community whenever possible. The General Authority for Investment and Free Zones published investment guides highlighting legal reforms (Arab Republic of Egypt 1977: 9–10), the Minister of State for Economic Cooperation elaborated on the security of the investment environment (El-Nazer 1979: 613–622), and the Speaker of Parliament was dispatched to talk with American lawyers (Sayed 1980: 167–170). President Sadat himself talked countless times about the sanctity of the rule of law (*sayadat al-qanun*), explaining that "the transition from the state of revolution to that of continuity, a permanent constitution, and state institutions" was underway:

> The time has come for us now to change this stage of revolutionary legitimacy to the stage of constitutional legitimacy, particularly since the principles of the 23 July Revolution have become deeply entrenched in our land and in the conscience of the wide masses so that now they are capable of protecting themselves by ordinary means, laws and institutions.
>
> We raised the slogan of the sovereignty of the law, and by so doing, we restituted the respect and independence of the judicial authority. That is how the sovereignty of the law, the establishment of constitutional institutions and the independence of the judicial authority enable us to close down

[20] These are further examined in Massadeh (1991).

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> all detention camps for the first time in forty years. All sequestrations were liquidated, and the few particularly cases which needed to be studied were examined, allowing us to turn this page over. No citizen was ever again to be deprived of his political rights and no privileges were to be allowed to one citizen over another in the practice of these rights.[21]

This rule-of-law rhetoric had more than one audience. For foreign investors, it was used to attract capital. For foreign governments, and the United States in particular, it helped signal Egypt's political realignment from the Soviet Union to the West. For Egyptian capitalists, rule-of-law talk was intended to bring back the $40 billion held abroad. And for all Egyptians, rule-of-law rhetoric was used to build a new legitimating ideology after the policy failures and political excesses of the Nasser regime.

There was, of course, a significant gap between the government's rule-of-law rhetoric and the operation of judicial institutions on the ground. As I have noted throughout this chapter, the disparity between rhetoric and reality was particularly significant through the 1970s when the regime sought to attract private investment without placing any practical constraints on its power. It is no wonder that private investors did not risk their assets throughout the 1970s. But institutional constraints on the state became more credible with the establishment of the Supreme Constitutional Court in 1979 and the rehabilitation of the administrative courts. The SCC began to rebuild a property rights regime through dozens of rulings in the economic sphere. The administrative courts also opened new avenues to challenge the decisions of bureaucrats, increasing accountability and giving citizens some measure of satisfaction that the political system had mechanisms for ensuring justice – at least against low-level civil servants in areas that were less politically sensitive.

Business consultancy reports in the 1980s noted these judicial reforms as crucial steps in providing concrete mechanisms for the protection of property rights, and political risk indices also registered positive change (Carr 1979, 40–42). For example, the "bureaucratic quality" index and the "law and order" index compiled by Political Risk Services both recorded positive movement beginning in 1985.[22] These indices provide only a crude approximation of the variables that they purport to track, and they are perhaps better understood as

[21] Speech by Anwar Sadat, July 22, 1977. Arab Republic of Egypt, State Information Service, *Speeches and Interviews of President Anwar El Sadat*, p. 108; July 22, 1976, pp. 28, 38.

[22] The Political Risk Services "bureaucratic quality" index measuring the "institutional strength of and quality of the bureaucracy" moved from zero to two on a scale of four. Similarly, their "law and order" index, measuring the "strength and impartiality of the legal system" advanced from two to four on a scale of six.

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measures of investor perceptions than the reality on the ground. Still, the new institutional environment was one of the primary reasons for the increase in private investment starting in the 1980s after a full decade of failed attempts to attract capital without institutional reforms.[23]

The success of these institutional reforms should not be overstated. The Egyptian judiciary continued to face overwhelming problems, particularly in terms of limited capacity (Arab Republic of Egypt 1998; Bentley 1994), which to this day has an adverse impact on the country's investment climate (Zaki 1999). What is intriguing is that an authoritarian regime was first compelled to use rule-of-law rhetoric, eventually going well beyond mere statements to carry out concrete and meaningful institutional reforms. The pressures facing the regime were not idiosyncratic, nor were the motives for initiating judicial reform. In fact, the government was grappling with many of the same dysfunctions that plague other authoritarian regimes. With unchecked power, the government was unable to attract private investment. With low levels of transparency and accountability, the government faced difficulties maintaining order and discipline throughout the state's administrative hierarchy. With the failure of pan-Arabism and the deterioration of the economy, the substantive basis of the regime's legitimacy suffered.

The new Supreme Constitutional Court and the reformed administrative courts helped the regime ameliorate these pathologies by attracting investment capital, strengthening discipline within its own administrative bureaucracy, forging a new legitimizing ideology around "the rule of law" and a "state of institutions," and doing away with populist, Nasser-era legislation in a politically innocuous way (Moustafa 2007).[24] However, judicial reforms provided institutional openings for political activists to challenge the executive in ways that fundamentally transformed patterns of interaction between the state and society. For the first time since the 1952 military coup, political activists could credibly challenge regime legislation by simply initiating constitutional litigation, a process that required few financial resources and enabled activists to circumvent the regime's highly restrictive, corporatist political framework.

[23] It must also be noted that 1979 was the year that Anwar Sadat signed the peace treaty with Israel, thus putting to rest one of the most important foreign policy concerns of foreign investors.

[24] Elsewhere (Moustafa 2007), I examine how dozens of rulings in the areas of privatization, housing reform, and labor law reform enabled the regime to overturn socialist-oriented policies without having to face direct opposition from social groups that were threatened by economic reform. Liberal rulings enabled the executive leadership to explain that they were simply respecting an autonomous rule-of-law system rather than implementing controversial reforms through more overt political channels.