

ARTICLES

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

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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.¹ The economic project known as Import Substitution Industrialization (“ISI”)² was designed to liberate Egypt from raw commodity production—specifically, agricultural and mineral—servicing its previous colonial master, Great Britain.³ The engine of development would be an expanding public sector with nationalization and socialism as leitmotifs.⁴ 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.⁵ And, like most other developing countries (with

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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.*

² See generally JAMES M. CYPHER & JAMES L. DIETZ, *THE PROCESS OF ECONOMICS* 253–58 (2d ed. 2004).

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.⁶ 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”).⁷ 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.⁸ 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.⁹ And like most other debtor-countries, Egypt had to go through an austerity program to improve its savings.¹⁰

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,¹¹ but also of distribution,¹² and, equally importantly, the place in which those who came to rule Egypt were incubated, i.e., the state elites.¹³

These state elites intermittently used the discourse of nationalist socialism to mobilize the population behind the project of domestic industrialization,¹⁴

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.

⁷ KHALID IKRAM, *THE EGYPTIAN ECONOMY 1952–2000: PERFORMANCE, POLICIES, AND ISSUES* 61 (2006).

⁸ *See id.* at 72–73; *see generally* John Williamson, *What Washington Means by Policy Reform*, in *LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED?* (John Williamson ed., 1990) (providing background on the Washington Consensus).

⁹ IKRAM, *supra* note 7, at 63–64.

¹⁰ *Id.*

¹¹ NAZIH H. AYUBI, *OVER-STATING THE ARAB STATE: POLITICS AND SOCIETY IN THE MIDDLE EAST* 298–301 (1996).

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*.¹⁵ Political representation of the various social forces, especially emergent ones, was corporatized through state-based unions, associations, and cooperatives.¹⁶ Soon the political trade-off of (I give you) economic well-being for (you give me) political power took hold.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.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.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.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).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.²² Revenues from these sources are rent in that while they deploy a minimal amount of local labor, they potentially yield large revenue.²³ While the amount of this revenue could be sizable, it could also be

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.” *Id.* at 206.

¹⁶ *See id.* at 215.

¹⁷ *Id.* at 215–16.

¹⁸ *Id.* at 217–18.

¹⁹ *See id.* at 340.

²⁰ *See id.* at 352.

²¹ SAMIR SULAYMAN, *AL-NIZAMAL AL-QAWIYY WAL-DAWLA AL-DHAFIYAA* [THE STRONG REGIME AND THE WEAK STATE] 20–21 (2005).

²² *Id.*

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).

fragile.²⁴ 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.²⁵

Although Egypt's rent revenue is not comparable in size to that of the oil producing countries of the Gulf region,²⁶ 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.²⁷ Rent surplus makes the state elite relatively autonomous by providing economic benefits to social groups that otherwise might challenge existing structures.²⁸ 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,"²⁹ 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";³⁰ 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

²⁴ GALAL AMIN, EGYPT'S ECONOMIC PREDICAMENT: A STUDY IN THE INTERACTION OF EXTERNAL PRESSURE, POLITICAL FOLLY, AND SOCIAL TENSION IN EGYPT, 1960–1990, at 40–46, 53 (1995).

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.eia.doe.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.³¹ 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.³² 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.³³

In the transition from ISI to market, law played an important role.³⁴ 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.³⁵ Egyptian jurists received the “social” in law during the ISI era,³⁶ and during the later neo-liberal era they were influenced by American-style constitutionalism, where rights were married to the market (reasoned in neo-formalist³⁷ and post-realist mode³⁸).³⁹

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.

³⁴ See, e.g., MALAK ZAALOUK, *POWER, CLASS AND FOREIGN CAPITAL IN EGYPT: THE RISE OF THE NEW BOURGEOISIE* 83–85 (1989) (describing several specific laws that facilitated the transition to a more open market economy).

³⁵ See generally Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT* 19 (David M. Trubek & Alvaro Santos eds., 2006).

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.undppogar.org/publications/index.asp?tid=9&src=1&type=0&so=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 Mahkamat 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,⁴⁰ ISI 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.⁴¹ 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.⁴² 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

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. . . . [E]ven 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).

³⁸ 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).

³⁹ Lama Abu-Odeh, *The Rise and Fall of the Supreme Court of Egypt*, 41, 53 (Nov. 5, 2009) (unpublished manuscript, on file with author).

⁴⁰ See *infra* notes 115–36 and accompanying text.

⁴¹ See Amr Abdel-Rahman, *A Look at Democratic Struggle in One Year: The End of Reform or Discovering the True Path to Change*, AL-BOSLA, Oct. 31, 2007, available at <http://bosla.org/node/78>.

⁴² *Id.*

market.⁴³ And the Islamic Sector uses the courts to pass off its Islamicization agenda in the face of a highly secularized, post-ISI state.⁴⁴

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

A. *The Nasser Era (1952–1970)*

Nasser initiated ISI as soon as he came to power in 1952.⁴⁵ 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.⁴⁶ Nasser responded to the massive popular demand for economic reform by passing a series of special legislations that took their base in land reforms.⁴⁷ 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.⁴⁸

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

total to fifty *feddans* per individual and 100 *feddans* per family. *Id.* A *feddan* is equal to 1.038 acres. *Id.* Land properties exceeding this were expropriated by the state and sold back to the peasants cheaply. *Id.* Foreign nationals were stripped of their Egyptian holdings. *Id.* Rent control in land tenancy gave tenures far reaching rights to the land. *Id.*

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.

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.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;⁶⁰ the fragmentation of the public sector into “bureaucratic factions, clientelist networks and personalist cliques”;⁶¹ reasons related to international politics;⁶² and regional politics.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.⁶⁴ Those who refused to be “corporatized” were put in jail.⁶⁵ Sadat came to power in 1970,⁶⁶ inheriting a country heavily indebted as a result of its post-war reconstruction efforts.

B. *The Sadat Era (1970–1981)*

By the time he was assassinated in 1981,⁶⁷ 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,⁶⁸ (2) he demoted those of the state elites

⁵⁹ IKRAM, *supra* note 7, at 12. Revenue growth passed that of nominal GDP during the 1960s. *Id.*

⁶⁰ *Id.* “Large amounts of investment had been channeled into branches of manufacturing industry with low social profitability, while . . . activities with higher social profitabilities had been denied the necessary capital.” *Id.* at 9–10, 12.

⁶¹ AYUBI, *supra* note 11, at 208.

⁶² WATERBURY, *supra* note 1, at 399. The United State’s antagonism toward Nasser forced him, internationally, into an alliance with the Soviet Union and, domestically, to increase political repression against forces he feared might be allied with the U.S. *Id.*

⁶³ *Id.* at 94–100, 331. Even before the costly 1967 war with Israel, Egypt’s defense expenses had, in 1965, risen drastically to 12% of the GNP with much spent on the prolonged war in the Yemen and the war of attrition against Israeli forces. *Id.* at 94–95.

⁶⁴ *See id.* at 93–100.

⁶⁵ “Conservative/reactionary social forces,” i.e. the former landowning aristocracy in alliance with foreign business, were disenfranchised economically and politically by Nasser. AYUBI, *supra* note 11, at 17, 209–16. However,

“[u]nlike Southeast Asia, Egypt is not represented by a situation of social conflict and polarization. The Nasserist regime in 1952 ended an active period of such polarization The Egyptian case, then represents a different model from that of third world countries that have succeeded in capitalism: the military dictatorship it witnessed came *earlier* than its counterparts[.]” giving the Nasser regime a great deal of autonomy from the society.

SULAYMAN, *supra* note 21, at 15–16 (translation by author).

⁶⁶ *See* discussion *infra* Part I.B.

⁶⁷ AMIN, *supra* note 24, at 47.

⁶⁸ ANSARI, *supra* note 57, at 177–78.

favoring socialism and promoted those favoring “opening up the economy”;⁶⁹ (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;⁷⁰ (4) he initiated market reforms in what came to be called the “Open Door Policy,” primarily oriented towards liberalizing trade and encouraging “foreign Arab investment”;⁷¹ 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.⁷²

The beginning of the rise in oil prices in 1975 heralded Egypt’s entry into the dynamics of a rentier economy.⁷³ Rent revenue entered the coffers of the state through publicly owned oil and natural gas companies.⁷⁴ 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.⁷⁵ Labor remittances became a feature of the Egyptian GNP landscape.⁷⁶

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.⁷⁷

⁶⁹ The Soviet military mission was ended in 1971, and Sadat purged the figures that were pro-Soviet in the regime, attempting liberalization. ZAALOUK, *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.⁷⁸ This ultimately aggravated the balance-of-payment deficit inherited from the Nasser era as external debt was used to foot the import bill.⁷⁹

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).⁸⁰ However, the sectors that were fed the rent revenue (same as the ones that expanded through trade liberalization) had limited employment creation potential.⁸¹ Furthermore, the employment that was created was contingent on the availability of rent (services and housing sectors),⁸² and given that Nasser's ISI public sector (with the exception of the mineral industry) remained in decline, *social conflict* was not far afield.⁸³ 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.⁸⁴ 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.⁸⁵ Despite the plentiful availability of foreign exchange during this period, Egypt's debt was compounded with a notable increase in state expenditure.⁸⁶

C. *The Mubarak Era (1981–present)*

Sadat's economic legacies to Mubarak were twofold: (1) a much bigger external debt,⁸⁷ and (2) a more distorted economic structure, with the rent economy surpassing that of the productive economy, whether agricultural or industrial.⁸⁸

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 1991,⁹⁸ Egypt began to implement the demands of the IMF and the World Bank. It liberalized the pound,⁹⁹ initiated privatization of public companies,¹⁰⁰ and started to control the budget deficit.¹⁰¹ 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.¹⁰²

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.¹⁰³ 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.¹⁰⁴

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.¹⁰⁵ When available, surplus revenue reinforces expenditure patterns, and when depleted it drives the state into financial crises of increasing debt.¹⁰⁶ This situation further reinforces the bargaining position of the IFIs in relation to these elites.¹⁰⁷ Having abandoned the economic strategy of ISI and subjected the country to

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.

¹⁰² Thomas Demmelhuber, *Egypt’s Moment of Reform and Its Reform Actors: The Variety-Capability Gap*, 16 DEMOCRATIZATION 119, 122 (2009); *Will the Dam Burst?*, ECONOMIST, Sept. 13, 2008, at 32; RUTHERFORD, *supra* note 32, at 198.

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.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)¹⁰⁹—both reminiscent of the colonial economy.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.¹¹¹ Both shifts lead to a differentiated class map in the countryside and the city.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—*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.

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.¹¹³ These three orientations exist in combination, each with its own peculiar features that sometimes cohere and sometimes pull in opposite directions.

¹⁰⁸ WATERBURY, *supra* note 1, at 133.

¹⁰⁹ IKRAM, *supra* note 7, at 283–84.

¹¹⁰ *Id.*

¹¹¹ *See* AMIN, *supra* note 24, at 40–65.

¹¹² *See* AYUBI, *supra* note 11, at 217–18.

¹¹³ *See* Abdelnasser, *supra* note 13, at 126.

Thus:

	ISI	Rentierism	Market
Role of State in Economy	State-based	State as recipient and allocator of rent	Withdrawal of the state from the economy
Public Sector/ Private Sector	(State protected) industry as the engine of economic growth	Raw commodity export through public companies reminiscent of pre-ISI	The private sector: services, tourism, telecom, mineral, agribusiness, housing, commerce, and incrementally industrial
Distribution	Redistribution downward through the state and transfer of resources from agriculture to industry	Distribution downward and upward depending on the availability of rent	Distribution upward through privatization and withdrawal of subsidies of basic commodities
Nature of Political Regime	Populist authoritarian	Populist authoritarian when rent is available and bureaucratic authoritarian when it is not	Bureaucratic authoritarian
Political Representation	Forms of political representations are corporatist in relation to the middle class and the working class: professional associations, unions, cooperatives, etc.	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	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

Ideology	Nationalist socialist	Relationship with the allocative state is direct and de-ideologized	Neo-liberalism
Class	A blurred class map	A blurred class map	A differentiated class map
Law	ISI law: agricultural reforms law, nationalization law, property confiscation law, rent control laws, labor law, public companies law, law of associations, tax law; regulations pertaining to exchange rates, tariffs, customary duties, price controls, etc.; various laws on special tribunals	Budgetary laws	Market law: foreign investment law, privatization law, corporate law, telecom law, new labor laws, export processing zones law, new industrial cities law, etc.

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 elites¹¹⁴ but nevertheless has an economic base, an economic ideology, a relationship to law, and forms of political representation.¹¹⁵ 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,¹¹⁶ takes over in various state corporatist

¹¹⁴ See RUTHERFORD, *supra* note 32, at 163; Jailan Halawi, *All's Not Well on the Domestic Front: A Force to Reckon With*, AL-AHRAM WEEKLY ONLINE, Dec. 27, 2007, <http://weekly.ahram.org.eg/2007/877/eg2.htm>.

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

¹¹⁶ Abdel-Moneim Said, *What Lies Ahead?*, AL-AHRAM WEEKLY ONLINE, Jan. 1, 2009, <http://weekly.ahram.org.eg/2009/928/eg3.htm>. In the 2005 parliamentary elections, members of the Muslim Brotherhood, running as independents, gained eighty-eight seats, or 20%, which was an increase from seventeen seats in 2000. *Id.*

structures,¹¹⁷ and builds fortunes in the private sector that is emerging as a result of liberalization and privatization.¹¹⁸

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.¹¹⁹ 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.¹²⁰ The urban working class seems, thus far, the most immune to Islamist influence.

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:

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

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

¹²¹ See generally IKRAM, *supra* note 7.

¹²² *Id.* at 7–8.

toward the industrial sector (investment laws;¹²³ public companies laws;¹²⁴ tax laws;¹²⁵ and regulatory rules touching on foreign exchange,¹²⁶ tariff protection,¹²⁷ customs duties,¹²⁸ etc.), as well as redistributive rules designed to shift the labor force from the countryside to the industrialized urban centers (agricultural legal reforms,¹²⁹ land tenancy laws,¹³⁰ rent-control in residential buildings,¹³¹ labor laws,¹³² laws of associations,¹³³ food subsidies,¹³⁴ price controls,¹³⁵ etc.).

¹²³ *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).

¹²⁴ *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).

¹²⁵ 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 profit); 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).

¹²⁶ *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).

¹²⁷ 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).

¹²⁸ *See, e.g.*, Law No. 476 of 1959 (Egypt) (providing the establishment of a Central Administration of Customs).

¹²⁹ *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).

¹³⁰ *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).

¹³¹ *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 Birms McCall, *The Effects of Rent Control in Egypt: Part I*, 3 ARAB L. Q. 151 (1988).

¹³² *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).

¹³³ *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.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 structure¹³⁷ is guided by the triple prong of liberalizing trade (foreign investments laws,¹³⁸ corporate governance laws,¹³⁹ etc.), privatizing public companies (privatization laws,¹⁴⁰ bank laws,¹⁴¹ etc.), and de-regulating or re-regulating the economy (new labor laws,¹⁴² tax laws,¹⁴³ etc.).

¹³⁴ On the Egyptian food subsidy system, see AKHTER U. AHMED ET AL., *THE EGYPTIAN FOOD SUBSIDY SYSTEM: STRUCTURE, PERFORMANCE, AND OPTIONS FOR REFORM*, RESEARCH REPORT 199 (2001); *see also* IKRAM, *supra* note 7, at 14, 307; SULAYMAN, *supra* note 21, at 52–53.

¹³⁵ *See, e.g.*, Law No. 32 of 1952 (Egypt); Law No. 254 of 1954 (Egypt) (regarding cotton prices); Law No. 296 of 1952 (Egypt) (regarding prices for the crop of 1952).

¹³⁶ SULAYMAN, *supra* note 21, at 24.

¹³⁷ The de-sequestration policy was complicated due to the multiple types of sequestration and came to reflect the security interest of Sadat. Law No. 49 of 1971 (Egypt) called for speedy settlements of claims of compensation; Law No. 69 of 1974 (Egypt) annulled all sequestrations that had occurred during 1961–64 and granted full restoration of the property or full economic compensation. ANSARI, *supra* note 57, at 179–80. Law No. 43 of 1974 (Egypt) laid the foundation of Sadat's Open Door Policy. *Id.* at 179–80. Although Sadat's Open Door Policy set the tone for forthcoming privatization, actual legal steps for privatization did not occur until the 1990s. IKRAM, *supra* note 7, at 18.

¹³⁸ *See, e.g.*, Law No. 32 of 1977 (Egypt) (aiming to facilitate capital transfers); Law No. 8 of 1997 (Egypt) (regarding investment guarantees and incentives); Law No. 13 of 2005 (Egypt) (regarding investment).

¹³⁹ *See, e.g.*, Ministerial Decree No. 149 of 1996 (Egypt) (regarding the organization of procedures for the nomination and election of employee representatives to bodies of corporate governance); Dispute Settlement Law, Law No. 27 of 1994 (Egypt) (as amended by Law No. 9 of 1997 (Egypt)).

¹⁴⁰ *See, e.g.*, Presidential Decree No. 262 of 1975 (Egypt) (authorizing 49% of all equity in public sector firms to be put up for private subscription); Law No. 111 of 1975 (Egypt) (providing that weak companies would be sold off or liquidated, while strong ones would be put up for general share subscription); Law No. 203 of 1991 (Egypt) (stipulating a sale of assets and shares in public enterprises and during the 1990s profitable companies in the industrial market were sold).

¹⁴¹ In 1998, the legal preparations for privatizing the banking system took off. *See* Mahmoud Mohieldin & Sahar Nasr, *On Bank Privatization: The Case of Egypt*, 46 Q. REV. ECON. & FIN. 710 (2007). The process was initially slow, and, as of June 2005, state-owned banks accounted for more than 60% of total assets and 85% of branch networks. *Id.* However, in 2003, a new law on the Central Bank was issued with Law No. 88 of 2003 (Egypt), and in October 2006, the state sold the smallest of its banks, Bank of Alexandria, with Italian Sanpaolo IMI acquiring an 80% share. Bank Information Center, *WB, IMF and AfDB-backed Program to Privatize Egyptian Banks Arouses Controversy* (Aug. 1 2007), available at <http://www.bicusa.org/en/Article.3455.aspx>. In 2007, there was talk of a merger of the two state owned banks, Banque du Caire and Banque Misr, but in July of the same year the government announced instead that 80% of Banque du Caire was up for sale. *Id.* According to the World Bank Country Assistance Strategy for 2006–2008, the government is to sell off its shares in thirteen of the seventeen joint venture banks. WORLD BANK GROUP, INT'L BANK FOR RECONSTRUCTION & DEV., COUNTRY ASSISTANCE PROGRESS STRATEGY REPORT, FOR THE ARAB REPUBLIC OF EGYPT, FOR THE PERIOD FY06–FY08, at 2 (June 9, 2008).

¹⁴² *See, e.g.*, Labor Code No. 137 of 1981 (Egypt); Labor Code No. 12 of 2003 (Egypt).

The judiciary is structured according to the needs of each economic strategy.¹⁴⁴ The launching of the ISI-orientation witnessed a diffusion of judicial authority in the mode of spin-off specialized tribunals.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.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*.”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”)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.¹⁴⁹ To do so, the SCC has marshaled the assistance of

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).

¹⁴⁴ See Abu-Odeh, *supra* note 39, at 34–35.

¹⁴⁵ EGYPT AND ITS LAWS 138 (Nathalie Bernard-Maugiron & Baudouin Dupret eds., 2002).

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).

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).

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.*

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.¹⁵⁰ 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).¹⁵¹ 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 parties¹⁵² and regular elections.¹⁵³ 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.

¹⁵⁰ 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.

¹⁵¹ *Id.* at 20–21.

¹⁵² 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).

¹⁵³ The first parliamentary election under President Mubarak was in 1984; the following elections were in 1987, 1990, 1995, 2000, and 2005. *See* Mohamed Younis, *Daughters of the Nile: The Evolution of Feminism in Egypt*, 13 WASH. & LEE J. OF CIV. RTS. & SOC. JUST. 463, 465 n.7 (2007); *Egypt’s Parliamentary Elections: An Assessment of the Results*, ESTIMATE (The Int’l Estimate, Inc., Falls Church, Va.), Nov. 17, 2000, available at <http://www.theestimate.com/public/111700.html>.

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.¹⁵⁴ The topics of adjudication were election laws¹⁵⁵ and political party laws.¹⁵⁶

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;¹⁵⁷ 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.¹⁵⁸ 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.¹⁵⁹

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

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).

¹⁵⁹ Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT 19, 22, 33, 58–59 (David M. Trubek & Alvaro Santos eds., 2006).

by law, privacy, property, etc.),¹⁶⁰ it saw the Egyptian landscape studded with economic and political regulation, which it deemed unconstitutional.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 parliament¹⁶² on par with statutes that regulate the property rights of landlords and landowners to the benefit of residential tenants and tenant farmers.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 poor¹⁶⁴ 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.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.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.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.¹⁶⁸

¹⁶⁰ CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT arts. 8, 18, 36, 45, 47, 48, 54, 55, 66.

¹⁶¹ See MOUSTAFA, *supra* note 148, at 126; see also RUTHERFORD, *supra* note 32, at 64–68.

¹⁶² MOUSTAFA, *supra* note 148, at 96–99.

¹⁶³ Abu-Odeh, *supra* note 39, at 34–35; see also MOUSTAFA, *supra* note 148, at 128.

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).

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).

¹⁶⁶ MOUSTAFA, *supra* note 148, at 97, 101–02, 231.

¹⁶⁷ See RUTHERFORD, *supra* note 32, at 58–59, 64–68.

¹⁶⁸ See Mahkramat al-Naqd [Sup. Const. Ct.], Case No. 125, Judicial Year 18, Dec. 11, 2005 (Egypt); Mahkramat al-Naqd [Sup. Const. Ct.], Case No. 332, Judicial Year 23, May 8, 2005 (Egypt); Mahkramat al-Naqd [Sup. Const. Ct.], Case No. 250, Judicial Year 23, Feb. 8, 2004 (Egypt); Mahkramat al-Naqd [Sup. Const. Ct.], Case No. 129, Judicial Year 22, Jan. 12, 2003 (Egypt); Mahkramat al-Naqd [Sup. Const. Ct.], Case No. 54, Judicial Year 19, Mar. 7, 1998 (Egypt); Mahkramat al-Naqd [Sup. Const. Ct.], Case No. 86, Judicial Year 17, Feb. 7, 1998 (Egypt); Mahkramat al-Naqd [Sup. Const. Ct.], Case No. 26, Nov. 16, 1996 (Egypt); Mahkramat al-Naqd [Sup. Const. Ct.], Case No. 33, Judicial Year 16, Feb. 3, 1996 (Egypt); Mahkramat al-Naqd [Sup. Const. Ct.], Case No. 43, Judicial Year 13, Dec. 6, 1993 (Egypt); Mahkramat al-Naqd [Sup. Const.

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.¹⁶⁹ Procedurally, it did so by dismissing their claims or by appearing to earnestly interpret the Islamic texts.¹⁷⁰ It repeatedly concluded that secular legislation is indeed Islamic.¹⁷¹

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.¹⁷² 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.¹⁷³ 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.¹⁷⁴ At the same time, the SCC simultaneously carried 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.¹⁷⁵

Ct.], Case No. 5, Judicial Year 10, June 19, 1993 (Egypt); Mahkramat al-Naqd [Sup. Const. Ct.], Case No. 6, Judicial Year 2, May 9, 1981 (Egypt) (discussing the taxation of Egyptians working abroad).

¹⁶⁹ See generally Abu-Odeh, *supra* note 39.

¹⁷⁰ See Note, *Supreme Constitutional Court (Egypt)—Shari'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 Shari'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 Shari'a principles" violated such an article. See CRIMINAL JUSTICE IN ISLAM: JUDICIAL PROCEDURE IN THE SHARI'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 Shari'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.¹⁷⁶ These presidents, who emerged from the bosom of the state bureaucracy, clearly identified with the interests of the regime.¹⁷⁷ 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 2007.¹⁷⁸ 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,¹⁷⁹ 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.¹⁸⁰ 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

¹⁷⁶ Awad Muhammad Awad al-Murr was replaced in 1998 by Muhammad Wali al-Din Galal (1998–2001), Muhammad Fathi Nagib (2001–2003), Mamduh Mohi al-Din Mara'î (2003–2006), and Maher Abd al-Wahed (2006–2009). See Supreme Constitutional Court, <http://www.hccourt.gov.eg/CourtMembers/SupremeCourtChairmans.asp> (last visited Jan. 9, 2010); see also MOUSTAFA, *supra* note 148, at 239.

¹⁷⁷ See, e.g., Mohamed A. El-Khawas & J. A. Ndumbe, *Egypt's Democracy: Will the Transformation Ever Be Complete?*, in 5 *POLITICS AND ECONOMICS OF AFRICA* 69, 75–76 (Olufemi Wusu ed., 2007).

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.¹⁸¹ 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.¹⁸²

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.¹⁸³ The state elites of Egypt pursued an incremental strategy of privatization.¹⁸⁴ Although privatization sped up after 2004, state elites remain in control over the bulk of the national un-privatized banking system.¹⁸⁵ Their control over banks significantly undermines the autonomy of the private sector vis-à-vis the state.¹⁸⁶ 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.¹⁸⁷ 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.

¹⁸⁴ *See* DENIS JOSEPH SULLIVAN, PRIVATE VOLUNTARY ORGANIZATIONS IN EGYPT, ISLAMIC DEVELOPMENT, PRIVATE INITIATIVE, AND STATE CONTROL 109 (1949).

¹⁸⁵ *See* RUTHERFORD, *supra* note 32, at 223–24.

¹⁸⁶ *See* JOHN P. ENTELIS, ISLAM, DEMOCRACY, AND THE STATE IN NORTH AFRICA 192 (1997).

¹⁸⁷ Samer Soliman, *State and Industrial Capitalism in Egypt*, 21 CAIRO PAPERS IN SOCIAL SCIENCE 1, 28–35 (1998).

depleted, the state elites turn to private capital for taxes and contributions to infrastructure projects in the various localities.¹⁸⁸

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,¹⁸⁹ 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.¹⁹⁰ 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.¹⁹¹

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.¹⁹² It is Parliament, not government, that could now take the blame for the ensuing immiseration.¹⁹³ 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.¹⁹⁴

¹⁸⁸ *Id.* at 65–66.

¹⁸⁹ Demmelhuber, *supra* note 102, at 121–22; Issandr El Amrani, *Controlled Reform in Egypt: Neither Reformist nor Controlled*, MIDDLE EAST REPORT ONLINE, Dec. 15, 2005, <http://www.merip.org/mero/mero121505.html>. Today, reform minded politicians, cabinet members, and parliamentarians surrounding Gamal Mubarak come from the business sector, and there is a great overlap of people in business and National Democratic Party politics. Demmelhuber, *supra* note 102, at 121–22; El Amrani, *supra*.

¹⁹⁰ See The World Bank, Egypt: Project and Program Assistance, <http://web.worldbank.org/external/default/main?menuPK=287188&pagePK=141155&piPK=141124&theSitePK=256307> (last visited Oct. 8, 2009) (providing examples such as Health Sector Reform, Airport Development Project, etc.).

¹⁹¹ See generally Soliman, *supra* note 187, at 28–35; Demmelhuber, *supra* note 102, at 121–22; The World Bank, *supra* note 190.

¹⁹² See generally El Amrani, *supra* note 189.

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.¹⁹⁵ 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.¹⁹⁶ 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.¹⁹⁷ Meanwhile, the striking down by the SCC of various tax laws has thrown off-balance the split-off strategy to distribution.¹⁹⁸

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.¹⁹⁹ What such expenditure usually does is increase salaries and benefits for this bureaucratic class.²⁰⁰ The state elites' relationship to this political base is contingent on the availability of rent.²⁰¹ 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.²⁰² 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.²⁰³ More transparency and increased separation of powers seem to gratify the conditions of their national belonging.²⁰⁴ They are drawn to human rights discourse as the de-politicized response to the authoritarianism of the state elites.²⁰⁵ 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.²⁰⁶ Labor strikes stud the Egyptian scene, yet barely get any mainstream media coverage.²⁰⁷ 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.²⁰⁸ Their unions, historically controlled by the state and dominated by populist rhetoric, no longer represent the workers and misspeak on their behalf.²⁰⁹ 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.²¹⁰ But given its recent birth, it is at least

²⁰² See AMIN, *supra* note 24, at 40–46, 53; Kauffmann & Wegner, *supra* note 100, at 22–23.

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

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.