

## OF LAW AND THE REVOLUTION

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### 1. INTRODUCTION

The Egyptian revolution is proving to be a very legal one. That is not to say that the revolution’s demands have been legalized, or that Egypt’s law has been revolutionized. Rather, the forces that have come to the fore since the toppling of Mubarak in February 2011 have chosen law as the privileged form through which to bargain with each other. The density of the legal back and forth has been overwhelming—constitutional amendments,<sup>1</sup>

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<sup>1</sup> In the aftermath of the revolution, the Supreme Council of Armed Forces (“SCAF”) suspended the 1971 constitution and appointed a special committee, the Constitutional Reform Committee, to draft constitutional amendments to allow for the transition to a new system of governance. *See Power or Glory: How*

constitutional supplementary declarations,<sup>2</sup> parliamentary laws, legislative amendments,<sup>3</sup> military decrees,<sup>4</sup> court trials,<sup>5</sup>

*Successive Constitutional Changes Limit Egypt's Presidency*, EGYPT.COM (June 24, 2012, 1:40 PM), <http://news.egypt.com/english/permalink/126999.html>. A national referendum held in March 2011 approved the amended constitution by a majority vote of 77%. See *al-Natījah: Na'am bi-Nisbit 77.3% [Result: Yes by 77.3%]*, ISTIFTA'A. MIŞR [REFERENDUM. EGYPT], <http://www.referendum.eg/84-slideshow/155-result.html> (last visited Nov. 15, 2012) (Egypt). For a complete list of the proposed constitutional amendments, see *Nuṣūṣ al-Ta'dīlāt [Constitutional Amendments]*, ISTIFTA'A. MIŞR [REFERENDUM. EGYPT], <http://www.referendum.eg/2011-03-13-00-09-44.html> (last visited Nov. 15, 2012) (Egypt). Later on, SCAF changed course and rejected the amended constitution, as approved by the referendum, and unilaterally issued a provisional constitutional declaration to serve as an interim constitution until a new constitution is drafted. For the full text of the provisional constitution, see *al-I'ālān al-Dusturī 2011 [Constitutional Declaration 2011]*, BIWĀBAT AL-ḤUKŪMAH AL-MIŞRIYAH [EGYPTIAN GOVERNMENT PORTAL], <http://www.egypt.gov.eg/arabic/laws/constitution/default.aspx> (last visited Nov. 15, 2012) (Egypt) (citing sixty-three articles, in comparison to the 1971 Constitution's 211 articles).

<sup>2</sup> On June 2012, SCAF issued a supplementary constitutional declaration amending provisions of the earlier constitutional declaration of March 2011. *The Constitutional Declaration (with June 17, 2012 Annex)*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Oct. 17, 2012), <http://egyptelections.carnegieendowment.org/2012/06/19/the-constitutional-declaration-with-june-17-2012-annex-added>.

<sup>3</sup> The legislative drafting committee of the People's Assembly approved a bill that amends the presidential elections law by adding a provision, which may be applied retroactively, that excludes members of the former ruling party from holding the positions of President, Vice President, Prime Minister, or Government Minister for ten years. This is known as the "Political Isolation Law." Cf. *Major Court Cases in Egypt's Transition*, CARNEGIE ENDOWMENT FOR INT'L PEACE, <http://egyptelections.carnegieendowment.org/2012/07/02/major-court-cases-in-egypt-s-transition> (last visited Jan. 20, 2013) (noting that the Supreme Constitutional Court invalidated this law, permitting Ahmed Shafiq to remain a candidate). On a different matter, the People's Assembly approved the abolishment of Article 6 of the Law on the Military Judiciary, which allows the President to refer civilians for trial before military courts. However, the Assembly approved a revision of Article 48 of the Law, which provides the military judicial authority and sole jurisdiction over certain types of crimes, regardless of whether they were committed by a civilian or a member of the military. See *Egypt: People's Assembly Amends Law of 1996 on Military Judiciary*, LIBRARY OF CONGRESS, [http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_l205403135\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403135_text) (last updated May 8, 2012).

<sup>4</sup> Military decrees were issued to replace the amended constitution approved by a national referendum, to amend the law governing the Supreme Constitutional Court ("SCC") regarding the appointment of its president, to dissolve the elected parliament, to amend the election law (to allow political parties to field candidates in the one-third of seats that had previously been reserved for independent candidates), and to eventually issue a new supplementary constitution (right after the presidential elections). See Nathan J.

constitutional court decisions overturning laws passed,<sup>6</sup> presidential decrees,<sup>7</sup> and emergency laws annulled and then reclaimed in another form.<sup>8</sup> In fact, there was so much back and forth that to trace the historical unfolding of the Egyptian revolution, one would be wise to use the Official Gazette and law reports as a primary guide through this maze of events. It is hard to miss the fact that in the case of Egypt, no sooner had the public

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Brown, *The Egyptian Political System in Disarray*, CARNEGIE ENDOWMENT FOR INT'L PEACE, <http://egyptelections.carnegieendowment.org/2012/06/19/the-egyptian-political-system-in-disarray> (last visited Jan. 23, 2013).

<sup>5</sup> For example, the Egyptian Supreme Administrative Court disbanded the National Democratic Party (Mubarak's pre-revolution ruling party). In another case, the Administrative Judicial Court issued a decision suspending the constitutional panel that included one hundred members (half of whom were parliamentarians representing Islamic interest groups) and assigned parliamentarians to select experts and individuals who do not belong to the legislative branch to join the panel. Another tribunal, the Supreme Electoral Commission of Egypt, disqualified ten presidential candidates from the upcoming presidential race because they were in violation of the country's election laws. See *Major Court Cases in Egypt's Transition*, *supra* note 3 (listing major post-revolution judicial decisions). Finally, Egypt's Criminal Court in Cairo ruled that the Muslim Brotherhood is legal, and that the 1954 decision to ban it is null and void. See Sarah Paulsworth, *Paper Chase: Cairo Court Voids 1954 Ban on Muslim Brotherhood*, JURIST (July 4, 2012, 10:53 PM), <http://jurist.org/paperchase/2012/07/cairo-court-voids-ban-on-muslim-brotherhood.php> (finding that the Muslim Brotherhood had been in compliance with existing laws at the time of its origin).

<sup>6</sup> The SCC ruled in June 2012 that the political isolation law that bars old regime officials from running on the presidential ballot is unconstitutional. *Major Court Cases in Egypt's Transition*, *supra* note 3. The Court further ruled that one-third of the seats in the Lower House of the Egyptian Parliament were invalid, and ordered the dissolution of the entire parliament. Case no. 20/2012/Supreme Constitutional Court (Egypt), available at [http://www.earla.org/userfiles/file/Case%20No\\_%2020%20of%20the%2034th%20Judicial%20Year.pdf](http://www.earla.org/userfiles/file/Case%20No_%2020%20of%20the%2034th%20Judicial%20Year.pdf). Commentators described these decisions as the "Judicial Coup."

<sup>7</sup> Immediately after his election, Egypt's President Morsi issued a presidential decree that invited the dissolved parliament to reconvene and to exercise its prerogatives (despite SCC and SCAF orders). The July 8, 2012 presidential decree also called for the election of a new legislature within sixty days of the ratification of a new constitution. See Ivana Assy et al., *Presentation and Full English Text of Morsi's Decree Restoring Parliament*, AHARAMONLINE (July 9, 2012), <http://english.ahram.org.eg/NewsContent/1/0/47250/Egypt/Presentation-and-full-English-text-of-Morsis-decre.aspx>.

<sup>8</sup> SCAF lifted the Emergency Law on May 31, 2012. However, prior to the presidential election, the army-backed government issued a decree giving the military the power to arrest civilians, in essence reviving the Emergency Law. The Supreme Administrative Court later annulled this governmental decree. See *Major Court Cases in Egypt's Transition*, *supra* note 3 (reporting on the declaration that the Military Police Law was unconstitutional).

space opened up for the political as an autonomous sphere—one that is only possible through genuine democratic practice—than it was annexed by the legal.

## 2. LEGALIZING THE POLITICAL AND POLITICIZING THE LEGAL

Ironically, just as the political forces expectantly turned to law and its institutions to mediate and arbitrate their raging battles, the Egyptian judiciary left its chambers and marched into the public sphere. In doing so, it turned itself into a public interlocutor by holding press conferences, appearing on TV talk shows, and making statements to the foreign press, explaining and defending its decisions to the public. Through these actions, the judiciary participated directly in the political debates that had dominated Egypt since the revolution,<sup>9</sup> sometimes even openly favoring one side over the other.<sup>10</sup> While the political forces legalized their bargaining maneuvers, the judiciary politicized its role, refusing to grant whatever “cover of law” the political forces sought to acquire from it. In doing so, the judiciary seemingly denied itself the veneer of “objectivity and neutrality,” the public performance that sustains its high social status and privileges, choosing to blow the cover of the political forces and call their bluff, so to speak!

The public watched the national judiciary closely, longing for a just and “revolutionary” resolution of the persistent political uncertainty and angst that had been hanging over the skies of Egypt since the revolution. Although the public had idealistically hoped that the Court’s enforcement of the law would clear Egypt’s dark skies, it quickly surmised that this was the corrupt judiciary of Mubarak—dependent, abject, self-interested, and incompetent. Having failed to provide the “revolutionary” answer to the

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<sup>9</sup> The SCC released a statement to the media in response to the President’s July 8, 2012 decree to reinstate the parliament, proclaiming that its decisions “are final and not subject to appeal, and that its provisions in cases of constitutional interpretation and decisions are binding on all state authorities.” See *Egypt’s High Constitutional Court Tells President Calls [sic] Its Decisions ‘Final, Binding,’* AHARAMONLINE (July 9, 2012), <http://english.ahram.org.eg/NewsContent/1/64/47248/Egypt/Politics-/In-response-to-presidential-decree,-Egypts-High-Co.aspx>.

<sup>10</sup> For an extreme example of this, see Justice Tahani el-Gebali’s statement to the *New York Times* regarding the judiciary’s role in keeping the military in power. David D. Kirkpatrick, *Judge Helped Egypt’s Military to Cement Power*, N.Y. TIMES (July 3, 2012), <http://www.nytimes.com/2012/07/04/world/middleeast/judge-helped-egypts-military-to-cement-power.html?pagewanted=all>.

political “stuckness” of post-revolutionary Egypt, the judiciary quickly turned itself into the very cause for revolution.

Things were a bit more complicated of course. The judiciary’s performance had sufficient nuance; its overall failure to satisfy “revolutionary” desire in the law was interspersed with some successes which kept lawyers coming back to knock on the courts’ gates. Sometimes, it seemed that litigants were driven not by any faith in the courts themselves, but rather by an ideal of the rule-of-law state that they hoped would suddenly metamorphose before their eyes if they only kept up hope and kept coming back.<sup>11</sup>

The legalization of political battles and the public scandal caused by the Egyptian judiciary’s failure to satiate the public’s need for the “revolutionary” answer seemed to turn every newly politicized Egyptian citizen into a lawyer. If the rule-of-law was out there, but the judiciary refused to pick it up, then (“by Jove”) Ahmad and Adel were going to. They were going to tell anyone who bothered to ask, in legalistic terms, how the court had failed to rule legally—how it failed to assert its *own* jurisdiction when it should have, how it claimed jurisdiction it should not have, how it upheld bad law about military trials, and how it overturned good law about parliamentary elections. This type of widespread political discourse was an exciting development in Egyptian society and served as a slap in the face of social hierarchy and all its concomitant privileges. There is something very exciting about this popularization of legal talk, which could be seen as an

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<sup>11</sup> For example, following its reinstatement by presidential decree (after its dissolution by SCC and SCAF), the elected Egyptian parliament decided to submit the question of its very legality, which was uncertain after the SCC ruling, to the Cassation Court. The Court eventually decided that it lacked jurisdiction to consider the case. See Alaa Shahine, *Egypt Appeals Court Rejects Requests to Hear Parliament Case*, BLOOMBERG (July 14, 2012, 8:34 AM), <http://www.bloomberg.com/news/2012-07-14/egypt-appeals-court-rejects-requests-to-hear-parliament-case-1-.html> (noting that the ruling was unanimous); *Egypt Presidency Declines to Comment on Court Ruling Against Restoration of Parliament*, AHRAMONLINE (July 10, 2012), <http://english.ahram.org.eg/NewsContent/1/64/47385/Egypt/Politics-/Egypt-presidency-declines-to-comment-on-court-ruli.aspx> (reporting that President Morsi’s office capitulated to the Court of Cassation ruling). See also Paulsworth, *supra* note 5 (discussing the Criminal Court’s decision to void the 1954 ban against the Muslim Brotherhood); Case no. 20/2012/Supreme Constitutional Court (Egypt), *available at* [http://www.earla.org/userfiles/file/Case%20No\\_%2020%20of%20the%2034th%20Judicial%20Year.pdf](http://www.earla.org/userfiles/file/Case%20No_%2020%20of%20the%2034th%20Judicial%20Year.pdf) (holding unconstitutional several provisions contained within Legislative Decree Nos. 120, 108, and 123, which were issued in 2011, amending the Parliament law, Law No. 38 of 1972).

example of people “taking the law into their own hands” –the layman demystifying the rule of the “expert”, an in-your-face busting of social hierarchy and all its concomitant privileges. Thus, in a very short period of time, one witnessed in the case of Egypt an interesting way of testing the limits of the rule-of-law state. This occurred not through critique—as happens in Western countries where the rule-of-law is thick—but rather through an overturning of hierarchy, where every citizen becomes the judge and legal language is popularized—its technical, mystifying quality flattened, made simple, and accessible, to be digested by the lay mind.

### 3. WHAT WOULD A “PROPER JUDICIARY” HAVE DONE?

Could the Egyptian judiciary have acted differently? Could it have carried the day and arbitrated the conflicts between the political forces as objectively and neutrally as was expected of it? Could it have done so persuasively to the contending parties, allowing the judiciary to claim the mantle of autonomy from the executive and the legislature?

Many decried the behavior of the Egyptian judiciary as symptomatic of a pliant judiciary—a residue of an *ancien régime* that refused to drop old habits, but instead, simply replaced Mubarak with the Supreme Council of Armed Forces (“SCAF”). Had the judiciary behaved more autonomously, many thought, then the legal battles would have ended differently and favored the “revolution.”

But this argument ignores that a judiciary capable of acting independently is one already buffeted by a robust political sphere—one in which political forces feel no compulsion to legalize their primary political battles in the first place. In such a sphere, political forces bargain with each other politically, following background bargaining rules known to all, whether those rules are legal in the formal sense or merely customary. In other words, an independent judiciary is only possible when it intervenes to settle disputes among political players only marginally, and only when there is confusion about the background bargaining rules or how to interpret the outcome of bargaining once it has taken place. In these cases, the judiciary—no matter how high the stakes—can intervene to shift the interpretation of the background rules or change the political outcome by privileging one side over the other through its decision, while still appearing objective and neutral. It

can do all that while not appearing as an actual participant in the political dispute. Of course, the losing side may accuse the court of acting politically, as happened in *Bush v. Gore*.<sup>12</sup> However, courts usually survive the day because of the marginality of such cases in the overall docket of the court. Still, courts, especially constitutional courts like the Supreme Court of the United States, deal with many cases with significant political consequences.<sup>13</sup> Even so, American political arguments usually settle outside the court system, evidenced by their continuous coverage in the news. Politics happens as of course—its basic outline clear to all participants. When this occurs, and courts are spared the burden of delineating the outline itself in a society that aspires to be democratic, then courts can get away with acting “independently.”

In short, an independent judiciary can exist only where there is an active political sphere. The quality of “independence” in a judiciary is not merely a function of the personal virtue its members would either enjoy or fail to enjoy. It is also a function of the social organization of the state, just as corruption of state officials is a function of the economic and social organization of the state.

#### 4. UNDER THE DICTATORSHIP

Of course, such conditions hardly prevailed under Mubarak, whose dictatorship absorbed the judiciary into its machinations of

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<sup>12</sup> On December 12, 2000, the U.S. Supreme Court terminated recounts of election ballots in Florida, effectively awarding the presidential election to the Republican Party candidate, George W. Bush. See *Bush v. Gore*, 531 U.S. 98 (2000). The Court’s five most conservative Justices (all appointed by Republican presidents) constituted the majority on the 5-4 decision. See *Bush v. Gore*, OYEZ, [http://www.oyez.org/cases/2000-2009/2000/2000\\_00\\_949/#sort=ideology](http://www.oyez.org/cases/2000-2009/2000/2000_00_949/#sort=ideology). For a criticism of the decision, see, for example, ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000* (2002) (arguing that, because the conservative Justices voted according to political ideology or preferences, the decision “may be ranked as the single most corrupt decision in Supreme Court history.”).

<sup>13</sup> On June 28, 2012, the U.S. Supreme Court upheld the constitutionality of the Patient Protection and Affordable Care Act (Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of 26 and 42 U.S.C.)), known as “Obamacare”), which represents the most significant federal law overhaul of the U.S. health care system. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

power.<sup>14</sup> There have been periods and instances where the judiciary fought the dictatorship, including the High Administrative Court's famous anti-Mubarak rulings and the period in the 1990s when the Supreme Constitutional Court took seriously the Egyptian constitution's bill of rights, issuing several rulings that pushed for greater democratic representation. Judicial decisions that overturn laws that cement repression, or decisions that declare illegal unfair state actions, abuses of authority, or corruption (and in the past twenty years there has been several of those), signal gestures of independence by the judiciary.<sup>15</sup> But such acts of defiance, against a background of dictatorial rule interspersed with contrary acts of compliance by the same judiciary, signal less a thick judicial sphere acting legally than a political sphere in which the judiciary carefully calculates its position. Because of the high stakes for the judiciary when it stands up to the repressive regime, its discrete acts of opposition signal a deliberate political act of its own. And since underneath the thin veneer of legality, there is a thick and overbearing political consideration, one loses the sense that what is being undertaken is a *legal* interpretive activity, a judge reading the law objectively and neutrally, as the "Rule of Law ideology" would have him do. In other words, one might describe those acts as "independent" but not exactly "judicial" even though they are the outcome of a judicial act and issued in the form of court decisions. What is gained in acts of "independence" by the "judiciary" is lost in the performance of "a separate *judicial* sphere" because the element of calculation in the issued ruling is transparent when judged within the overall context of the behavior of the particular court over time. It is as if, in order to be deemed *independent*, the judge must cease being a judge altogether!

A parallel perception develops in the collective mind of the judges' national audience. Contemptuous of the dictator's law and longing for justice and vindication from an alternative authority, the public turns to the judiciary. It pays little attention to the laws themselves or to the nature of judicial activity. It shows scant

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<sup>14</sup> See generally Lama Abu Odeh, *The Supreme Constitutional Court of Egypt: The Limits of Liberal Political Science and CLS Analysis of Law Elsewhere*, 59 AM. J. COMP. L. 985 (2011) (chronicling the intermittently independent and influential Egyptian Supreme Constitutional Court in the two decades leading up to the 2011 revolution).

<sup>15</sup> *Id.*



interest in comprehending the machinations of interpretations or the judicial interpretive ethos that the judges see themselves obeying, even if only on the surface of their consciousness. For the judges' audience, "standing for" becomes synonymous with adjudicating, and "rightness and justice" becomes synonymous with law. Thus, law loses its most basic quality—textuality—and judicial activity loses its most basic feature—interpretation. It does not matter how interpretively persuasive the judge in a given instance might be. As long as the decision does not correspond with the "rightness and justice" of the situation, the judge is not deemed to have acted independently. Conversely, the audience might feel vindicated and rejoice with delight at the specter of an "independent" judge (the judge opposing the dictator), and the judge might savor the popularity. But what has been lost in this latter moment of joint elation is the idea of the judiciary itself. It is not just when the judiciary is compliant that it ceases to be a "judiciary" in the proper sense. The same happens when exactly the opposite occurs—when it acts independently.

#### 5. AFTER THE REVOLUTION

While SCAF has replaced Mubarak as the remaining "authoritarian" representative, the dictatorship no longer acts with the same robustness it had before the revolution. New political forces have come to the fore as a result of the revolution, especially the Islamic forces, whose absence was notable during the time of the dictatorship. The loosening up of the political sphere should, on principle, allow the judiciary room to maneuver, as it does not have to remain beholden to one dominant dictatorial force, and could therefore avoid being absorbed in the political machination of the time. Such a possibility is at least open to an independently minded judiciary, which I will define here as: *inclined to be politically opposed to the trappings of dictatorial rule*, which could conceivably emerge from the bosom of the present judiciary. After all, it is not uncommon to hear in Egypt: "There is no independent judiciary here, though there are independent judges."

#### 6. DIFFERENT LOGICS

But this "born-again" judiciary finds itself confronting paradoxical and contradictory demands, which it is hard to see how it could possibly manage, even if it were to call upon its most "independently" minded judges to meet those demands. The

judiciary has to delineate the contours of the political sphere anew, while acting “independently” of it. And at the same time, the judiciary has to maintain “interpretive fidelity” to the legal materials, as defined by the “Rule of Law ideology,” without which it cannot establish its “judicial-ness”, i.e., its autonomy as a sphere of the state. On top of all that, the judiciary’s decisions must correspond to a revolutionary expectation of “rightness and justice” to make it all worthwhile in the end.

Viewed more closely, two of those demands—“judicial-ness” (interpretive fidelity to the legal materials) and independence (from the political sphere)—belong to the Rule of Law ideology. The third demand—rulings that correspond with “rightness and justice”—belongs to the idea of “Revolution.” This last demand assumes that the judges’ fidelity is to the ideas of “rightness and justice,” the principles that mobilized the people to Tahrir Square. Whatever legal materials are before them, judges should interpret those materials in *light of* those principles. In other words, in order to comply with the principles of rightness and justice, the judiciary has to immerse itself in the “politics” of Revolution, foregoing interpretive fidelity to the legal materials for the benefit of fidelity to principles.

Rule of Law and Revolution, therefore, belong to two different “logics” that are in tension with each other, even though, the one, Rule of Law, is often the historical genealogical descendant of the other, Revolution; and even though (and here’s the rub) the demand of the Egyptian revolution has been the Rule of Law state.

## 7. THE LOGIC OF REVOLUTION

Arguably, Revolution is the Rule of Law before “The Fall,” or “The Big Bang” if you like. Revolution is the moment when all the spheres are condensed into one; where their implosion has yet to occur as independent spheres; where the text has yet to separate from “principle” and acquire its maddening interpretive quality; where the Rule of Law state has yet to be birthed. At this collective moment, the screams on Tahrir—“Bread, Freedom, Social Justice”—yield their meaning without textuality intervening between the intention of the people and their words; the revolutionary “subject” is there to inform us of what they mean, not in the sense that informing us is occurring orally, rather than in a written fashion (although that too!), but rather, that the enormity of the event in its earth-shattering transformation leaves no

ambiguity as to what is desired. It is when all that is utopian is real.

At that moment, “law” does not belong to the Rule of Law. It is something altogether different: it is the simple working out in deductive fashion of the meaning of “Bread, Freedom, and Social Justice”! It is when deduction is most transparent, determinate, and necessary—made stable by revolutionary desire that infuses the air. The Revolution hovers as a meaning-stabilizer working as direct inspiration to “law.”

Revolution not only removes the barrier of textuality from its project of self-projection unto the future, it also dismantles all those other *past* texts that bedeviled its subjects with its sadistic indeterminacy used by power to stabilize their oppression. Law that is good combined with law that is bad, a civilian court with an emergency court, a democratically legislated law that is also a dictatorial one, text upon text in which legality, as indeterminate textuality, produced them determinedly and always as “criminals.”

The Revolution, as the set of principles that end all texts, begins as a criminal act against the state, in which one’s criminality in the eyes of the state and its law is rudely and fearlessly returned back to the state with, “J’accuse!” The accuser (the state) becomes the accused, and the accused (the Revolutionary) becomes the accuser. In this fashion, by staring the state in the eye when she had always been stared down by the state, the Revolutionary puts the state in its proper place. We all remember that famous lunge on the bridge over the Nile, when the multitude lunged forward towards the riot police stacked up with their latest riot gear (supplied by the good offices of the United States), and, much to the multitude’s surprise and to the surprise of those who were watching, the police bolted back in fear.<sup>16</sup> At that moment, the state with its towering authority crumbled, and the alienated powers of the collective projected unto the state were returned back to their original owners with a vengeance so sweet that history had to record. Indeed, after that bolt, the rest *was* history!

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<sup>16</sup> See freemanfilmsuk, *10'000 Egyptian Protestors Force Police to Retreat Over Bridge*, YOUTUBE (JAN. 28, 2011), <http://www.youtube.com/watch?v=rXbRdumboZ0> (amateur video of the protest); Kareem Fahim, *Egyptian Hopes Converged in Fight for Cairo Bridge*, N.Y. TIMES (Jan. 28, 2011), <http://www.nytimes.com/2011/01/29/world/middleeast/29cairo.html>.

The Revolution is therefore doubly an “outlaw/law-that-is-out-there”: it eliminates the legal texts of the state it puts in its proper place, *and* it reduces law into principle, eliminating the textuality that typically haunts the gap between law and principle in situations that are not revolutionary.

#### 8. THE LOGIC OF THE RULE OF LAW

Law is politico-phobic within the Rule of Law. Law’s utopianism lies in its insistence on a clean and clear separation from the political. For the “subject” of the Rule of Law—the judiciary, Revolution smacks of the sphere of the political, where the messiness and ambiguity of power and resistance take place. The judiciary therefore cares not for Revolution as an event in new time, only what Revolution has managed to pass in legislative texts. The universals of Revolution yield no definite answer the judiciary wishes to read. Whatever principles Revolution may have enunciated that have turned into legal rules—that is the stuff of the Rule of Law.

And even though legal rules are framed in the shape of “universals”—generalities addressing all, the equality of the rules is only formal. Rules, whatever their content might be, apply equally to all with no exception. The equality opened up by the universals of Revolution is, on the other hand, deep and cut through the formal flesh straight to the substance of the bone. Universals are an invitation to “Bread, Liberty and Social Justice” for all, no exception.

And while Revolution challenges the authority of the state by putting the state in its proper place so that revolutionary subjects can take back whatever power they have projected unto it, the Rule of Law puts the power back *in* the state. Unlike Revolution, Rule of Law is invested in exaggerating the power of the state because it speaks with the authority of the state outside of which it yields no meaning. Indeed Rule of Law affirmatively uses the power of the state to sanction and punish.

And unlike Revolution that presages clarity of meaning of what the subject of the Revolution wants, the Rule of Law relies on written legal texts, created through legislative compromise. Ambiguity, gaps, and conflicts are inherent to the text, and interpretation, with all its frustrating pursuit of the “intent of the legislature,” is what haunts the subject of the Rule of Law.

## 9. REVOLUTION-TRANSITION-RULE OF LAW

If all went well with Revolution, the common wisdom says the transition from Revolution to Rule of Law would have been smooth, with the demands of Revolution embodied in new legislative texts and an honest independent judiciary. So what is it that puts Egypt at this conjunction of Revolution and Rule of Law, stuck right in the teasing middle, its various contending parties using the Rule of Law to litigate Revolution, and using Revolution to put Rule of Law on trial?<sup>17</sup> Is the trouble with the Egyptian “revolution” itself that it did not yield a smooth transition? Perhaps one shouldn’t call it a Revolution after all?<sup>18</sup> Is the trouble with the very notion of transition—the assumption that Revolution yields a transition that is in effect an interruption in time and situation that eventually yields new legal texts and new judiciary? Or, is the trouble with the idea of the Rule of Law itself and the imagined respite it would deliver the Revolutionary once it is in full bloom?

What is interesting, if not indeed ironic, is that the transitional situation in which Egypt finds itself is in some ways the envy of countries where the Rule of Law is thick and dominant. To be able to judge the Rule of Law by the universals of Revolution, not so remote in memory and not made invisible by legislative texts, is an enviable position to be in. To have law appropriated and mastered with confidence by the layman, whereby the role of judiciary is eliminated altogether, is the dream of progressives in such countries.

One might push the critical point even further and argue that the idea that the Rule of Law will deliver a respite for the revolutionary and a resting place for the Revolution is itself a form of false consciousness. No such place exists. One might obtain an honest and independent judiciary, but legislation passed by an elected legislature and a counterrevolutionary situation prevails nevertheless. Enemies of Revolution can as easily sneak right back

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<sup>17</sup> See *supra* notes 3 and 6.

<sup>18</sup> Other scholars share similar doubts on the making of the revolution. See, e.g., Tamir Moustafa, *It's Not a Revolution Yet*, Posted in *The Middle East Channel*, FOREIGN POL'Y (Feb. 28, 2011, 5:24 PM), [http://mideast.foreignpolicy.com/posts/2011/02/28/it\\_s\\_not\\_a\\_revolution\\_yet](http://mideast.foreignpolicy.com/posts/2011/02/28/it_s_not_a_revolution_yet) (discussing the proposed amendments to the new Egyptian Constitution and Egypt's precarious transition to democracy).

into control through proper law and an independent judiciary as they can through military uniforms and anti-riot gear. And once they do, they are in fact much more tightly locked in, having acquired the legitimacy of the Rule of Law. At the end of the day, aren't visible displays of unjust power better than those that are invisible?

"Revolution/Transition/Rule of Law" is an expression of a time sequence that has captured the imagination of Egyptian revolutionaries. There is nothing unrealistic or irrational about it. Put in the simplest and most vulgar of terms, it is an expression of a perfectly legitimate desire to have a proper and functioning state. No sooner does Revolution size up the power of the authoritarian state, showing the limits of its projected authority and the hollowness of its inside through its acts of resistance and challenge, than it seeks to seize state power to prop it up again, this time on new terms, the terms of the Rule of Law. The trouble is that this time sequence, rational and realistic, is also highly indeterminate. The indeterminacy plagues each one of its terms—Revolution, Transition, Rule of Law—as events that are disruptive of time and situation. The indeterminacy of the first term, Revolution, implicates the other two terms, making the whole sequence indeterminate.

#### 10. INDETERMINATE REVOLUTION?

As soon as we ask whether what happened in Egypt was a Revolution, we find our interpretation of the time sequence in the aftermath of the overthrow of Mubarak—or what I call here, "Transition"—indispensable to our answer. And if that time sequence was pregnant with law and legalism(s), then our interpretation of law and legalism also seems to play a role in answering this question.

A possible answer is that what happened in Egypt was not a Revolution, after all. Yes, the spectacle of the crowds in Tahrir—persistent, passionate, creative, and brave—was stunning and wondrous. The moment when Mubarak, in the face of the crowds' persistent chants, finally conceded his throne was indeed spectacular, but all of that did not amount to a Revolution. What happened was simply a "tap" on an already imploding state. The failure of the police to contain the gathering crowds was a signal of the weakness of the state, a decline already proceeding apace for several years before that crowning moment of spectacle. The

crowds simply witnessed what those administering the state had known all along—that its collapse was a question of time only. Why is it that a “tap” on an imploding state does not amount to Revolution? It is because it had no proper subject. While a kind of media-generated consensus on calling it a Revolution quickly formed, there was no force that could step up briskly and forcefully after the fall of Mubarak to draw out the consequences of the chant “Bread, Liberty and Social Justice.” No force could have, because, as we have seen with the benefit of time after the fall, no force *did*.

There was indeed a group of people who called themselves “The Revolutionary Bloc” and the interpretation they offered of “Bread, Liberty and Social Justice” —which they often supported with their bodies in several altercations with the police in the aftermath of the overthrow of Mubarak—was most “revolutionary.” But their spin proved solitary, utopian, overdrawn, and unwarranted by the events that followed; namely, state implosion followed by a dictator’s concession. The subject necessary to tap an imploding state was very different from the one required to create a rupture in situation. The former requires a condensation of rage, otherwise diffuse, that quickly finds its release in the achievement of the object at hand—the removal of the dictator. The latter nurtures its resentment and rage in the service of a universal idea, the consequences of which bleed out over time. It amounted to a revolutionary demand before the Revolution. The crowds had already departed!<sup>19</sup>

#### 11. LAW IN THE SHADOW OF THE FALL

If one adopts the pessimistic take on the above interpretation, one would have to eye with suspicion the law-filled time in the aftermath of the Fall (of Mubarak). The legal density of the back and forth that I described in the opening paragraph of this essay can only trigger our suspicions. That is to say, it is neither a species of the Rule of Law nor of Revolution. It is not of the former

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<sup>19</sup> Most of my ideas about revolution as disruption in time and situation—an act that puts the state in its place and an event that elicits “universals” that require a revolutionary subject to tease out—I take from the French philosopher Alain Badiou. Badiou’s philosophical writings are dedicated to analytically deciphering the meaning of revolution to which he attributes the capacity to yield “truths.” For an elaboration of his ideas on revolution, see ALAIN BADIOU, *BEING AND EVENT* (Oliver Feltham trans., Continuum ed. 2006) (1988).

because it cannot effectively project state authority without which the Rule of Law may not be performed persuasively. The state has imploded and left the void in its tracks. To the contrary, all those law-acts appear like a manic scramble *for* state authority—an abundance of law to make up for the absence of the state. As if the aggregate of state (legal) acts, be it in the form of law or legal decisions, can bring an imploded state back to life!

Arguably, the scramble for the state—the desire to put the fragments back together against the background of the Fall (rather than the Revolution)—can be attributed to both those who “tapped” the imploding state and those who lost their authority with the implosion. For the latter, legalizing their power, even as a thin veneer similar to that under the dictatorship, was too hard to resist. Indeed, it was business as usual. For the former, the “sizing up” of the state may have been so terrifying that the dread of the void soon displaced the pleasure of overthrowing a dictator. The desire for state authority quickly reinstated itself. Those who lost their authority may be acting in a sinister fashion, claiming power back through law, while those who tapped the imploding state, look for *good* authority through law and litigation. It is this conjoint desire for the state that fills the post-Fall period with dense law-acts.

This kind of Rule of Law performance would take place outside the constraint of the universal: no Revolution had taken place, after all. A dictator fell, revealing the weakness of the state he presided over. This was no productive rupture that would set forth a new situation under the constraints of different norms. Authoritarian law, punctured by certain legal concessions, can be reinstated with a view to accommodating the now diffuse rage of the demonstrators. Military trials of demonstrators can continue while a reorganization of the police and the Ministry of Interior is conceded to the public to make it more transparent and less arbitrary.<sup>20</sup> Meanwhile Mubarak’s trial takes place, albeit in

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<sup>20</sup> Approximately twelve thousand Egyptians were tried by military courts between Feb. 11, 2011 when SCAF assumed power and August 2011. Countless others were also tried militarily before Morsi was elected in June 2012. See *Egypt: President Must Go Beyond Decree and Carry Out Greater Human Rights Reform*, AMNESTY INT’L, (Oct. 9, 2012), <https://www.amnesty.org/en/news/egypt-president-2012-10-09> (explaining that about). For a description of the military endeavor to revive the emergency rules, see *supra* note 8.



civilian courts and only for those crimes committed in Tahrir.<sup>21</sup> The dictator is “under arrest,” but is spending his time in a military hospital for “health reasons.” The usual practice of managing the state—splitting the difference and then splitting it again within the original split and so forth—is back. This time, the difference is being split between two pressing considerations: on one side, the exigencies of cementing state power without radically reorganizing its practice; on the other, accommodating public discontent. The absence of Revolution makes the resurfacing of this state managerial style less outrageous given its manic, overcompensating quality. Repeating with intensity what had been the case before produces an air of urgency rather than normalcy. A state had just imploded!

## 12. LAW IN THE SHADOW OF REVOLUTION

The above interpretation can be given a more nuanced and optimistic spin by insisting that, while all the above was true (i.e., that Tahrir was no more than a tap on an imploding state) and that the revolutionary bloc that emerged afterwards was guilty of an overbearing reading of the flash event of Tahrir; nevertheless, this reading could match the event through willful operation and diligent political work. This would insist on projecting Revolution backwards and forwards: “It was a Revolution, therefore it is, therefore it will be!” By tirelessly reminding Egyptians of the consequences of Tahrir when they had sized up the power of their state, by insisting that the distance between sizing up the state and seizing it was a very short one, and by convincing Egyptians that they can run, walk, or crawl that one last mile, but that they do so is a must—Revolution it will be!

If one adopts this more optimistic spin of what happened in Tahrir, one would have to see the law-filled time in the aftermath of the Revolution as more complex, with the conflict of interests between those who lost and those who gained heightened, as each is now laboring under the constraint of the universal unleashed by Revolution. For those who lost, law becomes a means through which the universal is blocked. The tendency of the Rule of Law to siphon off any political influence outside its domain is most convenient for those purposes. For those who lost, the

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<sup>21</sup> *Egypt: Mubarak Verdict Fails to Deliver Full Justice*, AMNESTY INT’L, (June 2, 2012), <http://www.amnesty.org/en/news/egypt-mubarak-2012-06-02>.

introduction of law—either good or bad law, early on in the process—is a means for derailing the normative pressure of the universal given the self-referential and extreme textuality of the law. The faster one moves toward law and legal performances, the sooner one departs from revolutionary times. The legal performance calls upon the state to respect the radical egalitarianism of the collective in Tahrir, while the law itself counters with its own textually constrained notion of egalitarianism, which will inevitably fall short.

For those who won, the move to law is desired in a double, but ultimately contradictory, sense. On the one hand, the Rule of Law with all that it implies is one of the enunciated goals of the Revolution. As I mentioned earlier, the desire for the Rule of Law is part of the desire for a decent and functioning state that most Egyptians covet. On the other hand, Rule of Law is seen as a means: to utilize the porous quality of the law at this early stage, to infuse law with the universal (to which it lives in temporal proximity), to insist that that law should echo as much as possible the commands of the universal, and to insist that law's textuality should be interpreted under its constraint. These are contradictory desires on the part of the revolutionary camp because, having the one, politico-phobic Rule of Law, they need to give up the latter, law constrained by the universal, and vice-versa.

To have the Rule of Law in a state that labored for decades under dictatorships is itself so revolutionary that the attributes of Revolution are given to the Rule of Law mistakenly and in an idealizing fashion. Beginnings as presaging birth of the new have their own political aesthetics, and collapsing differences through idealization might be one of them!

Note how attributing the quality of Revolution to the removal of Mubarak and the implosion of the authoritarian state sharpen the degree of conflict between the forces of the old and the forces of the new and make law-acts that would otherwise appear to be run-of-the-mill, difference-splitting, state management styles appear more assaultive and deliberate. For they become more than a scramble for state authority; they are attempts at containing the revolutionary tide. Given the inherently conservative nature of the Rule of Law as a sphere that blocks the political, the early entry into the Rule of Law domain soon after the events in Tahrir would seem to transport unresolved political conflicts into the more secure (for the old forces) domain of the law. This is not because the judiciary is not independent and is still acting to please the old

political forces as the Revolutionary wisdom has it, but because the judiciary might choose to become independent from politics precisely by blocking off the influence of the Revolution as an event that constrains its interpretation of law. By doing that, it would be most faithful to its judicial role and therefore most persuasive in its Rule of Law performances. On the revolutionary side, on the other hand, this early immersion into law, while seemingly promising a Rule of Law-coveted universe, amounts to an invitation to law before the maturation of the universals of the Revolution. The worst that could happen to a Revolution with weak subjects, whose Revolution teeters between self-inflicted implosion and revolutionary acts, is to be inducted into the Rule of Law before the revolutionaries have worked out the implications of their actions. It is the entry into the "written" when they have barely had time to enunciate the words of Revolution.

### 13. LAW IN THE SHADOW OF DEMOCRACY

That what happened in Tahrir was indeed a revolution but a very specific one, namely, a popular Revolution for democracy, is by far the most popular interpretation of the events in Tahrir. This interpretation, while insisting on the revolutionary nature of the Tahrir events, limits the range of the universals to be read out of them into one universal: namely, Democracy. Indeed, what else could be read out of the toppling of a dictator but the desire for political freedom, the freedom to choose one's representatives? Democracy, according to this interpretation, enters as a mediating term between Revolution and the Rule of Law. The former is overridden by the choices democracy yields (the populace elects its political representatives); they come to stand in for whatever revolutionary potential there was. The latter is treated as a species of democracy (elected representatives pass laws that are applied by an independent judiciary) and one of its organic effects.

Democracy is inserted here with its own logic that is independent of that of Revolution and the Rule of Law. A Revolution *for* Democracy is one that subordinates all its potential universals to the one of "choice." "Choice by the greatest number" is its most privileged term that functions as its sole universal. The arrangements that put democracy in place are designed to mine the consequences of this one solitary universal: "choice." It is form to Revolution's content; procedure to Revolution's substance; nihilism to Revolution's faith. This is nothing to scoff at, as choice

is an expression of freedom, the practice of which is highly revolutionary in the aftermath of a dictatorship.

Perhaps the most corrosive effect Democracy has on Revolution is that the democratic choice by the populace comes to seal the otherwise indeterminate events in Tahrir by offering its own retrospective interpretation of those events. That its choice might fall on a party (the Muslim Brotherhood) that had hedged Tahrir, rather than participated un-ambivalently in it, one whose reaction to those events could best be described as “obscure” and at worst antagonistic, is even the more sobering for those insisting on flying a narrative-balloon above Tahrir with the word “REVOLUTION” inscribed on it. More alarming still is the way the democratic choice suggests that what happened was more of a “tap” on an imploding state rather than Revolution—the tectonic plates moved and the next political force standing in line popped up, before they settled down again. No universals were reported from the scene.

While on the one hand, the Rule of Law is considered as an organic effect of the practice of Democracy, Democracy can have no less of a corrosive effect on the Rule of Law, seen as its twin, than it does on Revolution. The legalization of dictatorial rule, or law as a means to practice authoritarian governance,<sup>22</sup> was without doubt a burdensome legacy that Egyptians seem happy to be rid of with Mubarak’s departure. But popular choice can turn and negate itself by choosing a supreme authority, such as God, to oversee the government’s worldly choices. While the legislative machinery produced by Egypt’s first elections has not yet yielded enough legislation to judge how the Rule of Law under the reign of Democracy will fare, there are indications that unelected institutions such as Al-Azhar will be given supreme authority over Parliament to review compliance of democratically passed laws with Sharia law.<sup>23</sup> This system offers no less of a Rule of Law

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<sup>22</sup> See Abu Odeh, *supra* note 14, at 992–95 (describing the role of the Supreme Constitutional Court of Egypt in Mubarak’s authoritarian regime).

<sup>23</sup> Article 4 of Egypt’s draft constitution enshrines the role of Al-Azhar as an “independent institution” and states that the opinions of the Senior Ulama Body will be taken in matters pertaining to Islamic law. [Editor’s Note: Egypt’s State Information Service has not yet published on its website the new Constitution of Egypt, signed into law by President Morsi on December 26, 2012. For alternative translations of the November 30 draft constitution that Morsi signed, see Nariman Youssef, *Egypt’s Draft Constitution Translated*, EGYPT INDEPENDENT (Dec. 2, 2012, 1:15 PM), <http://www.egyptindependent.com/print/1278681>; *The New Constitution of the Arab Republic of Egypt*, <http://www.constitutionnet.org/>

except that it is one whereby the worldly lawgiver has willingly delegated some of its powers to another for guidance.

While the choice of democracy can have a double corrosive effect—one retrospectively on how to understand the events of Tahrir, and one prospectively on the Rule of Law—this is not altogether without limit. A commitment to democracy and the Rule of Law in the aftermath of the toppling of a dictator would seem to drag with it a constellation of ideas, universally settled, about what they mean. The uneasy relationship between democracy and “rights” is a staple of such constellations, inherited from Revolutions at other times in other places. If the choice of democracy has the power to eliminate other universals from Tahrir, it nevertheless has to contend with universals imprinted in the institutions of democracy, “rights” being the most basic. This would allow for a possible destabilization of democratic choice and its legislative embodiments, not from a source outside of the democratic government, but from deep inside of it through the settled legal trends of Revolutions elsewhere that have become legally “universalized.”

“Rights” are open to interpretation and allow for possible constellations of liberties and entitlements that move from radical to liberal to conservative on the political spectrum, and can be the basis for another Revolution on different terms. This time, Revolution comes from inside a settled discourse with its debates already drawn out in other contexts. These debates can provide legitimate oppositional language that diffuse revolutionary forces can latch onto to compensate for their initial weakness. The drafting of a new constitution after the fall of a dictator becomes a compensatory event that through the language of Rights utilized now with some urgency, allows for the universals of Tahrir to be revisited, recited, and rehashed through the particular public “choice” of democracy.

#### 14. CONCLUSION

By the time I finished writing this paper, Morsi, the Muslim Brotherhood’s first democratically elected president of Egypt, had

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files/final\_constitution\_30\_nov\_2012\_-english\_-idea.pdf; *The 2012 Constitution of Egypt, Translated by Nivien Saleh, with Index*, <http://niviensaleh.info/constitution-egypt-2012-translation/>.]

disbanded SCAF.<sup>24</sup> SCAF had taken over the state in the aftermath of Mubarak's fall and assumed the role of the caretaker of the transition to democracy. SCAF's rule was considered highly suspect given the heightened reliance on law to cement military control over the country. SCAF was generally regarded as representing the network of interests that were prominent under Mubarak, now seeking to re-establish power on new terms. The ease with which the dismantlement of SCAF took place and the almost complete absence of resistance on the part of SCAF is hard to interpret at this point. Some argue that Morsi's act is tantamount to finishing an unfinished revolution—a daring act that would not have been possible if it were not for the spirit of "Tahrir" and the multiple violent encounters with the army by the revolutionary forces. It was the Revolution that inspired, produced, and directed its own final act. Others opine that while the political representative of the interests has been removed, the network itself has not been eliminated. They argue that the Muslim Brotherhood seeks to replace its own network in its stead, or alternatively, seek to edge its own network inside the old one to create a new partnership. This analysis relies on the fact that the Brotherhood is adopting the same economic policies of the Mubarak regime (with minor differences) and is already showing signs of authoritarian control over political opposition. The fact that such policies will aggravate the already difficult lives of the struggling masses and threaten to send them back to the streets again with a renewed round of repression from the state, means that little has changed in Egypt.

Such arguments raise the specter that haunts Egypt and which I have tried to capture in this paper—namely, the indeterminateness of what happened in Egypt that led to the fall of Mubarak, which is a question that cannot be settled without an interpretation of the events that followed the Fall and the law-acts that permeated this time sequence. One can either use the language of "revolution-over-time" or "revolution-counter-

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<sup>24</sup> In August 2012 the president decided to revoke the supplementary declaration issued by SCAF and "retire" the heads of SCAF. See *Morsi's Ramadan Surprise: Q&A with Nathan J. Brown*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Aug. 13, 2012), <http://egyptelections.carnegieendowment.org/2012/08/13/morsi%e2%80%99s-ramadan-surprise>.

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revolution-back-to-revolution” sequence or “popular revolution” to describe what happened and what continues to unfold. What causes the indeterminateness is what the left has come to call “the weakness of the Revolutionary forces,” or what I call the ambiguity of the subject of Revolution. It is my view that Egypt lives within the gravitational field of implosion, Revolution, and popular revolution for democracy, all at the same time, and that this indeterminateness will not be settled soon.