

PUBLICAÇÃO

100

ISSN: 0101-9562

ISSN ELETRÔNICO: 2177-7055

SEQÜÊNCIA

Publicação do
Programa de Pós-Graduação
em Direito da UFSC

VOLUME 46 ■ ANO 2025

Estudos
jurídicos
e políticos



A1

SEQÜÊNCIA – ESTUDOS JURÍDICOS E POLÍTICOS é uma publicação temática e de periodicidade quadrienal, editada pelo Programa de Pós-Graduação Stricto Sensu em Direito da Universidade Federal de Santa Catarina – UFSC.

SEQÜÊNCIA – ESTUDOS JURÍDICOS E POLÍTICOS is a thematic publication, printed every four months, edited by the Program in law of the Federal University of Santa Catarina – UFSC.

Versão eletrônica: <http://www.periodicos.ufsc.br/index.php/sequencia>

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A publicação é indexada nas seguintes bases de dados e diretórios/

The Publication is indexed in the following databases and directories:

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OJS

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Portal de Periódicos UFSC

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ICAP (Indexação Compartilhada de Artigos de Periódicos)

Sumarios.org

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ULRICH'S

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Ficha catalográfica

Seqüência: Estudos jurídicos e políticos. Universidade Federal de Santa Catarina. Programa de Pós-Graduação em Direito. n.1 (janeiro 1980)-. Florianópolis: Fundação José Boiteux. 1980-.

Publicação contínua

Resumo em português e inglês

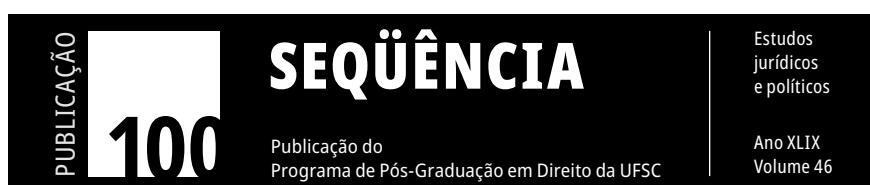
Versão impressa ISSN 0101-9562

Versão on-line ISSN 2177-7055

1. Ciência jurídica. 2. Teoria política. 3. Filosofia do direito. 4. Periódicos. I. Universidade Federal de Santa Catarina. Programa de Pós-graduação em Direito

CDU 34(05)

Catalogação na fonte por: João Oscar do Espírito Santo CRB 14/849



Rule by law (rule of man): egypt's stabs the rule of law

Governo pela lei (governo do homem): os golpes do egito contra o estado de direito

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ABSTRACT: This article examines the paradoxical relationship between the Rule of Law and authoritarian governance in contemporary Egypt, arguing that the legal system has been strategically instrumentalized to legitimize repression rather than to uphold justice and democratic principles. Through an analysis of Egypt's constitutional framework, emergency legislation, counterterrorism laws, and judicial practices, the study demonstrates how the state employs "rule by law" rather than "rule of law," enabling the executive to centralize power, undermine judicial independence, restrict civil liberties, and suppress political dissent. Drawing from primary sources, jurisprudence, and human rights reports, the article highlights how legal mechanisms, including extended pretrial detention, military courts for civilians, and exceptional decrees, are used to perpetuate authoritarian control while maintaining a façade of legality. The study concludes that Egypt's current legal order represents a systematic erosion of the Rule of Law, wherein law becomes a tool of domination rather than a safeguard of rights, justice, and constitutionalism.

KEYWORDS: Rule of Law. Authoritarianism. Constitutionalism. Human Rights.

RESUMO: Este artigo analisa a relação paradoxal entre Estado de Direito e governança autoritária no Egito contemporâneo, argumentando que o sistema jurídico tem sido estrategicamente instrumentalizado para legitimar a repressão, em vez de garantir justiça e princípios democráticos. A partir da análise da estrutura constitucional egípcia, das leis de emergência, das normas antiterrorismo e das práticas judiciais, demonstra-se como o Estado utiliza o "governo pela lei" em vez do "Estado de Direito", permitindo a centralização do poder executivo, o enfraquecimento da



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independência judicial, a restrição das liberdades civis e a repressão à dissidência política. Com base em fontes primárias, jurisprudência e relatórios de direitos humanos, evidencia-se como mecanismos legais, como a detenção preventiva prolongada, os tribunais militares para civis e os decretos excepcionais, são empregados para perpetuar o controle autoritário sob uma aparência de legalidade. Conclui-se que a atual ordem jurídica egípcia representa uma erosão sistemática do Estado de Direito, transformando a lei em instrumento de dominação, e não em garantia de direitos, justiça e constitucionalismo.

PALAVRAS-CHAVE: Estado de Direito. Autoritarismo. Constitucionalismo. Direitos Humanos.

I. INTRODUCTION

Till now, Egyptians remained to live under the cruel, tyrannical grip of President 'Abdel Fattah al-Sisi's government. In 2020, the World Justice Project (WJP) ranked Egypt 125th among 128 nations in their rule of law.¹ Egypt's disturbingly low ranking is possibly a result of al-Sisi's attempts to progressively establish tyranny in Egypt's legislation, steadily eroding the rule of law.² In 2019, the Egyptian Constitution was amended and, *inter alia*, allows the President to appoint district attorneys and justices without being qualified and with no integrity or transparency in his selection, just to serve the regime. Hence, the government has been oppressing and persecuting political opponents by breaching fundamental human rights, stifling political dissent, weakening judicial independence, and passing statute(s) that

¹ See *Egypt Rule of Law Index*, WORLD JUSTICE PROJECT (2020), <https://www.worldjusticeproject.org/rule-of-lawindex/country/2020/Egypt>.

² See generally Tom Bingham, *The Rule of Law* (London 2011) (examining the rule of law notion as the foundation of modern states and civilizations become even more talismanic than that of democracy, [and that this idea] is not an arid legal doctrine but is the basic of a fair and just society, a guarantee of responsible government, a significant contribution to economic growth and offers the best means yet devised for securing peace and co-operation).

authorizes arbitrary charges and the denial of fair trial (due process) guarantees.³

During the COVID-19 pandemic, President al-Sisi extended the emergency status, engendering (sentencing in) mass trials and illegitimately delayed pretrial detentions, denying civilians fair trial assurances and exposing inmates to prison conditions marred by over-crowding and an increased risk to COVID-19.⁴ Considering Egypt's legal and political reality, this report eventually finds that expressively challenging the regime and supporting democratic reform entails the international community sanctioning high-ranking officials and making their military and economic assistance more conditional (on hold) on the administration's conduct. There could be severe ramifications if Egypt does not upgrade the current legal, judicial, human rights status. In the long run, this situation could become part of a greater movement of a gradually politicized judiciary and a prevalent decline of human rights.

³ Bruce Rutherford, *To Stop Sisi, Strengthen Egypt's Judiciary: Why Restoring the Rule of Law is the Best Way Forward*, FOREIGN AFFAIRS, Oct. 22, 2018, <https://www.foreignaffairs.com/articles/middle-east/2018-10-22/stop-sisi-strengthen-egypt-s-judiciary> ("President Abdel Fattah el-Sisi's Egypt is a dangerous place for dissidents. Under Sisi's command, the military and security forces used extraordinary violence to consolidate power . . . Security forces detained, charged, or sentenced [...] mostly because of their alleged association with the Muslim Brotherhood. The human rights situation deteriorated even further in subsequent years. Egyptian police forcibly disappeared citizens, leaving no legal trail. The parliament passed laws in 2017 and 2018 that empowered the government to closely monitor civil society organizations and media outlets. It shut down those whose activities did not align with its interests. Egypt's new authoritarianism is not simply a continuation of the rule of former President Hosni Mubarak, whose dictatorial tendencies led to his overthrow. It is more repressive and more brutal.").

⁴ *Egypt: Constitutional Amendments Entrench Repression Referendum Set in Grossly Unfree, Rights-Abusive Environment*, HUMAN RIGHTS WATCH REPORT, April 20, 2019, <https://www.hrw.org/news/2019/04/20/egypt-constitutional-amendments-entrench-repression> ("The amendments will undermine the Egyptian judiciary's dwindling independence and expand the military's power to intervene in political life.").

The Rule of Law: An Abstract Notion?

Though the rule of law is a keystone of modern democracy, it is often deemed an elusive idea of a contested nature. It has been described as a complicated and, in some regards, ambiguous concept.⁵ It is broadly either considered as a procedural standard (“what the law is”) or as a standard of political morality (“what the law should be”). The former “*thin*” notion is deep-rooted in legal positivism and emphasizes formal characteristics, such as the need for obvious, precise laws. On the other hand, the latter “*thick*” conception (a product of natural law theory) advocates for an added substantial aspect, including a human rights element.⁶ Legal philosopher Joseph Raz, defines the rule of law as a negative value to be recognized from human rights and social justice:

[a] non-democratic legal system, based on the denial of human rights, or extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies . . .⁷

Raz argues that “the rule of law is meant to enable the law to promote social good.” However, the context he sets out permits situations that are ominous for his cause and repulsive to liberal democracies; the repression of minorities, slavery practice and strengthening of racism and discriminations.⁸ However, Bingham expands his substantive perspective by supporting the protection of human rights within its scope and argued a State which viciously suppresses

⁵ Rutherford, *supra* note 3.

⁶ *Id.*

⁷ Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press 1979), at 211.

⁸ *Id.*, at 228.

or persecutes sections of its individuals cannot be viewed as witnessing the rule of law, even if the wrongdoer is the subject of comprehensive laws properly endorsed and conscientiously pragmatic.⁹ According to its Constitution, Egypt is a republic governed by an elected president and a parliament (a bicameral legislature, with the Senate [upper house]).¹⁰ It should be noted that the “*thick*” perception in its assessment of the rule of law in Egypt will follow the rule of law’s paradigm Bingham incorporated: (a) the law must be accessible, possible comprehensible, obvious and predictable; (b) questions of law (legal rights and liability issues) should typically be settled by application of the law and not discretionally; (c) the laws of the land should apply equally to all, and to justify in case of inequality; (d) public officers (including ministers and secretaries) at all levels must exercise the powers conferred on them in good faith, fairly, and within their scope of competence, without unreasonably exceeding the limits of such powers; (e) the law must afford suitable protection of fundamental human rights and means must be provided for agreeing, without prohibitive cost or undue delay (*bona fide* civil disputes that parties are inept to solve), and (f) State’s adjudicative procedures should be fair, as rule of law entails compliance by the State with its commitments in both international law and national law.¹¹

The Egyptian uprisings highlight the role of the rule of law in people’s lives. The rule of law in each nation reflects the degree to which the principles and norms usually embodied in the state’s Constitution are applied on the ground. When the people are frustrated because of a poor rule of law, this disappointment indicates that the legal community failed to meet the people’s needs.

⁹ Bingham, *supra* note 2, at 67.

¹⁰ See DUSTUR JUMHURIYAH MASR ‘ALARABIYYAH [Constitution of the Arab Republic of Egypt], Jan. 18, 2014 (as amended to April 22, 2019), <https://www.refworld.org/docid/3ae6b5368.html>, at arts. 1, 2, 5, 101, & 139.

¹¹ Bingham, *supra* note 2, at 79.

Consequently, the legal community must bear the responsibility of supporting and ensuring the functioning of the rule of law.¹² To create a better rule of law environment in the future, the legal community must learn from its past errors. To that end, this report adopts a critical analysis to understand the deficiencies of the rule of law in Egypt after its 2011 uprisings and the very minimal efforts to promote the rule of law in post-revolution Egypt. The analysis explains that the absence of the rule of law was – and remains – a main reason for the Egyptian revolt, as the previous and the current regimes ignore the rule of law.

Against this succinct backdrop, this report examines (Part I) the 2019 amendments to the Egyptian Constitution that were intended to change the presidential electoral system (a multi-candidate election). Through a careful study of the amendments and the related laws, it shows that while on the surface, this amendment looks as though it opens to a much more democratic transition and enhances human rights, its actual goal is to perpetuate the rule-*by*-man (law). Further, it subverted the powers of the Supreme Constitutional Court (SCC) to score a significant victory for the executive and legislative branches in their ongoing cold war with the SCC. Part II identifies the Bingham

¹² See Ahmed elDakak, *Approaching the Rule of Law in Post-Revolution Egypt: Where We Were, Where We Are, and Where We Should Be?* 18 U.C. DAVIS J. INT'L. L. & POLICY (2012), at 263-306. (“Understanding how to conceive of the rule of law is an essential step in measuring the level of rule of law in Egypt and in comparing its status before and after the Revolution. Notably, consensus has never existed regarding the meaning of the rule of law doctrine. Generally, there are two main schools of thought: the instrumental interpretation school and the substantive interpretation school. According to the instrumental interpretation school, rule of law basically refers to the existence of a legal system in which there are rules, and these rules are followed. In other words, rule of law means ‘how to do things with rules.’ [...] Such rules need to be public, understandable, non-contradictory, and non-retroactive. Accordingly, such rules are not necessarily fair or democratic. Therefore, a legal system that does not recognize the most basic human rights can still claim to be governed by rule of law. The substantive interpretation approach also requires the existence of a set of rules that are followed.”).

prevailing interpretation of the rule of law doctrine (substantive perspective by supporting the protection of human rights) and describes the current human rights abuses which involved serious legal issues. Part III describes the *status quo* of the judiciary in applying and interpreting the rule of law under the current administration, recognizing its sharp decline. Part IV illustrates how the rule of law has evolved in the short period following the Revolution. Also, it identifies the tendency toward creating a better rule of law and recognizes the existing deficiencies that the Egyptian government must overcome; hence, it provides recommendations to promote this notion. Finally, this report concludes that Egyptians revolted to attain a better rule of law and offers a roadmap to establish an absolute rule of law in post-revolution Egypt.

II. RULE OF LAW IN THE EGYPTIAN'S LEGAL FRAMEWORK

The selective delegation of policymaking to judicial institutions indicates a clearer concern of autocratic leaders – the preservation of political legitimacy *in lieu* of reliable public accountability mechanisms. In numerous cases, dictatorial regimes change to the rule of law as a legitimizing narrative only after the collapse of their initial policy goals or after popular support for the regime has disappeared. Egypt's second President, Gamāl 'Abd anNāṣir (1954-1970), secured his legitimacy on the revolutionary values of national independence, the redistribution of wealth, economic growth, and Arab nationalism. Judicial bodies were tolerated only to the extent that they enabled the administration's accomplishment of these substantial objectives.¹³ On the other hand, President Muhammad Anwar asSādāt (1970-1981) expressly pinned

¹³ See generally Nathan J. Brown, *The Rule of Law in the Arab World* (Cambridge Univ. Press 2009).

his government's lawfulness to *siyādat alqānūn* (rule of law) and used rule-of-law rhetoric several times throughout his presidency, and to distance his regime from his predecessor (substantive failure), and to build a new legitimizing narrative that was distinct from the populist basics of the state.¹⁴

The rule of law in the Egyptian perspective is, nevertheless, more than just a lip-service. The term *siyādat alqānūn* has been integrated into the Constitution, namely in the Preamble and Article 94 (“*siyādat alqānūn ’asāsal-hukum fī addawla*”, i.e., the State is subject to the rule of law).¹⁵ However, since the Preamble is considered a gathering of motivations rather than concrete rights, duties, and civil liberties, it offers support for the interpretation of Egypt's current Constitutional text.¹⁶ Thus, the rule-of-law notion infers and seeks the prevention of arbitrary exercise of the executive – still a controversial issue in Egypt – even though the country has recently gone through two failed “*Arab Spring Uprisings*” and some successive “modernization” reforms.¹⁷ One of the key criticism directed at the 2014 Constitution

¹⁴ Tamir Moustafa, *Law and Resistance in Authoritarian States: The Judicialization of Politics in Egypt* in Tom Ginsburg/Tamir Moustafa (eds.), *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* (Cambridge Univ. Press 2008), at 132–146; Nathan Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge Univ. Press 1997), at 122.

¹⁵ *Egypt Constitution*, at art. 94. “The rule of law is the basis of governance in the State. The State is subject to the law, while the independence, immunity and impartiality of the judiciary are essential guarantees for the protection of rights and freedoms.” It marks a legally binding basis, whereas the Preamble *per se* does not share the binding legal character.”

¹⁶ Clark. B. Lombardi, *Egypt's Supreme Constitutional Court Managing Constitutional Conflict in an Authoritarian, Aspirationally “Islamic” State*, 3 J. COMP. L. 2 (2008), at 234–237; Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (Cambridge Univ. Press 2007), at 6–39.

¹⁷ See, e.g., Sūsan alGayār & Islām Kamāl, ALGUMHŪRĪYYAT ALKHĀMISA: ‘ĀMILIYAT TAGHĪR NIZĀM ALHUKUM FĪ MASR [The Fifth Republic: Changing the Rule of Law in Egypt], 4099 RŪZ AL-YŪSIF J. (Cairo 1982), Dec.30, at 16–21; Rania Al Malky, *Constituting Change*, EGYPT TODAY NEWS (Dec. 2006), at 36–41.

(and its amendments in 2019) by its dissidents is its extreme centralization of powers within the President's hand. However, the President maintained that the constitutional amendments would combine the checks-and-balances (balance of powers) among the government's branches through a redistribution of the competencies within the executive authority and increasing the powers of the judiciary and added that judicial independence would be enhanced and no immunity from judicial review.¹⁸

a. Checks-and-Balances: Constitutional Separation of Powers

Various 2019 amendments aimed at creating a better allocation of powers within the executive authority “by expanding the competencies of the President along with Council of Ministers (secretaries) to which it participates in the exercise of the executive authority.” Thus, it stipulates that the President shall constitutionally exercise some of his competencies after the consultation and government's approval. The constitutional amendments extended the presidential terms to six years each [and maintained the previous maximum of two consecutive terms].¹⁹ Also, they expanded the military role to include “safeguarding the Constitution and democracy, maintaining the foundations of the State and its civilian nature, the gains of the people, and the rights and freedoms of the individual[s].” The amendments expand the jurisdiction of military tribunals over civilians to include those who perpetrate all “attacks” directed against the military, rather than just “direct attacks.”²⁰ Further, the amendments empower

¹⁸ Lombardi, *supra* note 16.

¹⁹ *Egypt Constitution*, at arts. 140(a), 160(a)(b), & 241(bis.).

²⁰ *Id.*, at art. 204. It says: [. . .]

Civilians cannot stand trial before military courts except for crimes that represent a direct assault against military facilities, military barracks, or whatever falls under their authority; stipulated military or border zones; its equipment, vehicles, weapons, ammunition, documents, military secrets, public funds, or military factories; crimes

the President to appoint the heads of judicial bodies, (e.g., Supreme Constitutional Court Chief Justice, Attorney General, etc....).²¹ The Head of State, will have to get the government's (Prime Minister) approval upon adopting *allawā'ih allāzima li-tanfid alqānūn* (regulations for the enforcement of laws), *lauvā'ih adabt* (police/security regulations), *qarārāt allāzima li'ishnā' wa-tanzīm almarāfiq wa-l-maslāh al-`ma* (public services and interests decisions).²² It also amended "to provide further safeguards" around the exercise by the President of his exceptional powers in case of danger threatening national (state) security interest or public unity, or if an obstacle prevents the State's institutions from fulfilling their constitutional duties.²³ It should be noted that the exceptional powers of the President should be invoked in case of imminent or serious danger (e.g., external aggression/attack, public health crisis as in pandemics).²⁴

related to conscription; or crimes that represent a direct assault against its officers or personnel because of the performance of their duties. Members of the Military Judiciary are autonomous and cannot be dismissed . . .

²¹ *Id.*, at arts. 185, 186, 189(b), 190, & 193(c). Among these current obligations, a requirement that provisions related to the President reelection (recall) not be amended unless the amendment brings more guarantees, and articles creating the mandates of the House of Representatives as the country's legislative authority and the Supreme Constitutional Court as the only judicial body to oversee the constitutionality of laws and interpreting the legislative text. *Id.*, at arts. 226, 101, & 192.

²² As well as for promulgating the peculiar *qarārāt* (presidential decrees) with *quwwat alqānūn* (statutory legislative force). See, e.g., *Risālat arRa'is Mubārak* [Letter addressed to Parliament by H.E President Muhammad Husnī Mubārak] requesting amendments to the Constitution of Egypt, December 26, (Cairo 2006).

²³ *Id.*, at art. 156 (Decrees that have the force of law). See, e.g., Nathalie Bernard-Maugiron, *The 2007 Constitutional Amendments in Egypt, and their Implications on the Balance of Power*, 22 ARAB L. QUARTERLY 4 (Brill 2008), at 397-404. The government will be consulted when the President adopts *qarārāt quwwat alqānūn* by delegation from the *Majlis ashSha'b* (People's Assembly) before declaring the emergency status, or before ratifying important treaties.

²⁴ *Id.*, at art. 154, which reads:

The President of the Republic declares, after consultation with the Cabinet, a state of emergency in the manner regulated by law. Such proclamation must be submitted

Accordingly, the constitutional amendments usher in an initial legal system that endangers and infringes upon several of Egypt's prevailing constitutional duties. The amendments intimidate to continue and reinforce the tendencies reflected across Egypt today: a constrained public sphere, the decline of the rule of law, and the removal of the separation of powers. Thus, they have severe long-term consequences for the nature of the Egyptian State and its foundational stability and security, domestically, regionally, and internationally.

Moreover, one of constitutional reforms objectives was “reorganizing the relationship between both the legislative and executive powers in order to achieve greater balance between them.” In this respect, the amendments have reinforced the powers of the Congress’ second chamber *majlis ashShūra* (Consultative Council).²⁵ The Consultative Council’s approval is now required in three cases: (a) requests of constitutional amendments; (b) draft *al-qawānīn al-mukam-mila ad-dustūr* (laws complementary to the Constitution), and (c) peace and alliance treaties, and all treaties conducive to a modification in the state territory or related sovereignty rights along with the state’s general policy.²⁶ The President had also committed to strengthening

to the House of Representatives within the following seven days to consider it. If the declaration takes place when the House . . . is not in session, a session is called immediately to consider the declaration. In all cases, the declaration of the emergency status must be approved by a majority of members of the House. The declaration is for a specified period not exceeding three months, which can only be extended by another similar period upon the approval of two-thirds [2/3] of House members. In the event the House of Representatives is dissolved, the matter is submitted to the new House in its first session. The House of Representatives cannot be dissolved while a state of emergency is in force.

²⁵ *Egypt Constitution*, at art. 248. “The Senate is concerned with studying and proposing what it sees as a tool to consolidate democracy, support national unity, social peace, the basic values of society, supreme values, rights, freedoms and public duties, and deepen and expand the democratic system.”

²⁶ *Id.*, at art. 249. The language reads:

The opinion of the Senate is required as follows: (a) proposals to amend constitutional provisions; (b) projects concerning social and economic plan (economic growth);

the independence of the judiciary and no interference in their judicial decisions, and all its affairs should be resolved by *majlis al‘Ulyā li-l-Hay’āt alQadā’iyya* (Supreme Council of Judicial Bodies).²⁷ Reinforcing judicial independence not merely *de jure* but also *de facto*, is, crucial for an efficient separation of powers. Separation of powers entails separation with coordination, as opposed to absolute separation, a principle that requires continuous review.²⁸

b. Judicial Review

Generally, the Egyptian judicial system is based on French legal concepts and procedures. Judges are familiar with civil law – systems’ notions of the written codes and apply the law to the facts *versus* the “*Stare Decisis*” – and despite the huge case backlog and time-consuming proceedings, the due process and judicial review norms are fundamentally cherished and respected on paper.²⁹ In Egypt’s current legal system, constitutional review is carried out by a special constitutional

(c) reconciliation and alliance treaties and all sovereign agreements; (d) draft laws supplementing the Constitution and others referred to the Senate by the President, and (e) any matter referred by the President concerning the state’s general policy or its policy in Arab or foreign affairs . . .

The Supreme Constitutional Court had identified two criteria for law to be considered complementary to the Constitution. See, e.g., AL-MAHKAMA AD-DUSTŪRIYYA AL‘ULYĀ, Case No.7/8e, May 15, 1993 & Case No.153/21e, June 2000, *Collection of Decisions of the Supreme Constitutional Court*, vols. (5/2)(9), at 290–582. Nathalie Bernard-Maugiron, *Le Politique à l'épreuve du Judiciaire: La Justice Constitutionnelle en Egypte* (Brussels 2003).

²⁷ *Egypt Constitution*, at art. 185. Kristen A. Stilt, *Constitutional Authority and Subversion: Egypt's New Presidential Election System*, 16 IND. INT'L & COMP. L. REV. 2 (2006), at 335.

²⁸ *Egypt Constitution*, at art. 188. “The judiciary adjudicates all disputes and crimes except for matters over which another judicial body is competent. Only the judiciary settles any disputes relating to the affairs of its members, and its affairs are managed by a higher council whose structure and mandate are organized by law.”

²⁹ Stilt, *supra* note 27, at 341. See also Adel Omar Sherif, *Separation of Powers and Judicial Independence in Constitutional Democracies: The Egyptian and American Experiences* in Eugene Cotran/Adel Omar Sherif (eds.), *DEMOCRACY, THE RULE OF LAW AND ISLAM* (Kluwer Law International 1999), at 25–34.

court, *alMahkama adDustūriyya al‘Ulyā* (Supreme Constitutional Court: SCC), the successor establishment of the Supreme Court established by Law No.81 of 1969, after the adoption of Egypt’s 1971 Constitution.³⁰ The SCC acted to exercise judicial constitutional review over the government actions and to protect the courts’ authority to check legal interpretation and administrative misapplication of the law (procedural due process).³¹ To protect individuals from executive and legislative abuse and safeguard their civil liberties and public rights, the highest court in the land requires that government (political) branches act only through the codified constitutional mechanisms and ensure that the government branches remain subject to review (criticism) for any inappropriate actions.³² Historically in Egypt, the “rule of law, [at least] as envisioned by judges, focuses on accomplishing fairness and equity in application [and interpretation] of the law more than it just making good law.”³³ In the 1990s, however, the highest court has shifted from the conventional classical judicial emphasis to improve a substantive – *not* only procedural – perspective of the rule of law.³⁴ In a landmark decision, the SCC ruled,

³⁰ Lombardi, *supra* note 16, at 234 Law No.48 of 1979 was enacted, thus regulating the status and competence of the Supreme Constitutional Court and entrusting the court with judicial review.

³¹ *Id.*, at 236.

³² Adel Omar Sherif, *Constitutional Law*, in Nathalie Bernard-Maugiron/Badouin Dupret (eds.), EGYPT AND ITS LAWS [Arab and Islamic Law Series] (Kluwer Law International: vol. 22, 2002), at 315-323; Adel Omar Sherif, *The Rule of Law in Egypt from a Judicial Perspective: A Digest of the Landmark Decisions of the Supreme Constitutional Court* in Eugene Cotra/Mai Yamani (I.B. Tauris 2000), at 1.

³³ See, e.g., Law No.48 of 1979, *Al-Jar da Al-Rasmiyya* [Official Gazette No.36], Cairo, June 9, 1979, at 530-538.

³⁴ See, e.g., *La Révolte des Juges égyptiens*, LE MONDE, Paris, May 10, 2006; Mahmud Mekki/ Hisham Bastawisi, *When Judges are Beaten, Democracy in Egypt must Grow from the Streets, not be Imposed by Western Self-Interest*, THE GUARDIAN, May 10, 2006, <https://www.theguardian.com/commentisfree/2006/may/10/comment.egypt> (“For more than 20 years, members of the Egyptian judiciary have been fighting for independence from the state. The political and economic reforms needed to achieve democracy and to restore

[the scope of the power of judicial review] applies to law in its wider objective sense, that of legislative texts creating general and abstract legal status, whether such texts are enshrined in the status adopted by the legislative power, or in subsidiary status adopted by the executive power within its competence as defined by the Constitution. All such texts are characterized by their vast scope of application and the unlimited number of those subject to them. Consequently, if they were to be declared null and void by the Supreme Constitutional Court, the effects would be also far-reaching [...]. That is why it was necessary for such a judicial review to be entrusted to one single court.³⁵

Moreover, as the European constitutional courts, the SSC has constantly held that the Constitution must be interpreted in an organic perspective and ruled,

the straight completion of the constitutional structure will rise through the organic unity which distinguishes the order of constitutional norms. This unity will realize the congruity of the constitutional texts and will remove any obstacles and any contradiction that people may be think it to be affected. More, this court take this organic unity in consideration when a case reach before it [connected with an internal contradiction] that the challenger pretends to see among the legal texts contested and the constitutional norms. The examination of the existence or non-existence of this contradiction is not achieved by returning only to the constitutional texts [contradict the *qānū-niyya* [legislative] texts. Rather, one has to appeal *bi-l-ihtikām*

public faith in government can be achieved only under an independent judiciary. So, we are shocked to find ourselves before a disciplinary court, made up of government appointees, on charges of insulting the judiciary. The decision of the court, [...] is likely to be instant dismissal.”). See also Mohamed Abdel Azim, *La Naissante Pratique Démocratique en Egypte: La Révolte des Juges*, ACTUALITE SOCIALE ET POLITIQUE (September 2006).

³⁵ See AL-MAHKAMA AD-DUSTŪRIYYA AL'ULYĀ, Constitutional Case No.26, Year 15, Cairo, Dec. 2, 1995.

ilā ahkām ad-dustūr jam‘ihā [to all the constitutional norms], so that the Court make sure that the contested texts do not conflict within each other³⁶

Although the SCC took remarkably bold stands on most political matters, there were significant limits to the Court’s activism. At odds with its robust record of rights activism, the Court ruled Egypt’s *almahākim attawāri’* (emergency courts) constitutional and it has obviously delayed issuing a ruling on the constitutionality of civilian trials to military tribunals.³⁷ The *qānūn attawāri’* (emergency act) permits referrals to exceptional courts, and the Commander-in-Chief (military ruler – i.e., the President or his designate) – can refer civilians to *almahākim al‘askariyya* (military courts).³⁸

³⁶ AL-AHKĀM ALLATĪ ASDARATHĀ AL-MAHKAMA MIN YANĀYIR 1984 HATTĀ DİSAMBAR SANAT 1986, Dār al-Hannā li'l-Tabā'a (Cairo 1994), at 4. *See generally* Mohamed 'Arafa, *Case 8/1996 (Egypt)*, in MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW (R. Wolfrum, F. Lachenmann, & R. Grote eds., Oxford Univ. Press 2018). In other words, in the process of organic interpretation, the Court said a unifying thread for all constitutional norms is required, considering that Egypt shall remain democratic, enhancing the separation of powers, and ensuring that Egyptian legislature respects the “rule of law.”

³⁷ Bahy E. Hassan, *The Human Rights Dilemma in Egypt: Political Will or Islam?* in Hatem Elliesie (ed.), *Beiträge zum Islamischen Recht VII: ISLAM UND MENSCHENRECHTE [AL'ISLĀM WA-HUQŪQ AL'INSĀN: ISLAM AND HUMAN RIGHTS]* (Oxford 2010). Within the rise of Islamic radicalism and extremism, these tribunals effectively created a parallel legal system with few procedural guarantees, serving as the ultimate regime check on challenges to its power.

³⁸ Moustafa, *supra* note 14, at 132–153. It should be noted that judges in such trials are officers appointed by the Defense Secretary who have no impartiality but are rather subordinate to the top-down power structure of the army. However, the SCC argued that since Article 171 of the 1971 Constitution mentioned the military tribunals, it should be considered as a legitimate and regular component of the judiciary and Law No.50/1982, giving it the sole jurisdiction (competency) to adjudicate complaints (hearings) and own appeals, without any constitutional conflict. *See CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT*, Sept. 11, 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, *as abrogated* March 30, 2011, at arts. 171 & 172. *See, e.g., id.*, at arts. 137, 148, 150, 108, 109, 112, & 113.

III. EGYPT BETWEEN CONSOLIDATION AND FRAGILITY: EROSION OF THE LAW AND INSTITUTIONS OF GOVERNANCE

The issue of whether we are ethically obliged to obey the law is not a new one; principal among those who have underscored it are Plato, Aristotle, and Aquinas. Thus, in terms of the distinction between legitimate and illegitimate forms of government, it should be noted that it is based upon an accurate understanding of the nature of man and human happiness. Hence, the law of an illegal government, argues St. Thomas, “since it is not in accordance with reason, is not a law absolutely speaking, but rather a perversion of law.”³⁹ Preserving stability and order in the most populous Arab nations in the Middle Eastern region is a source of concern for the Western governments (US and European administrations) amid the turmoil and chaos in that world. While the threats of terrorism and religious radicalism are actual and old, the Egyptian government and its global allies should consider that the nation’s prospect for stability and security cannot be enhanced in isolation from the domestic conditions of better governance and human rights.

a. The Legislative Failure: Egypt’s Legislative Quality

The Egyptian Constitution reads,

The Rule of law is the basis of governance in the State. The State is subject to the law, while the independence, immunity and impartiality of the judiciary are essential guarantees for the protection of rights and freedoms.⁴⁰

Bingham’s paradigm affirms that the law should be available, clear, and predictable, and these conditions permit citizens to simply

³⁹ Raz, *supra* note 7.

⁴⁰ *Egypt Constitution*, at art. 94.

discover the anticipated civil conduct and their public rights and civil liberties.⁴¹ Lawmaking quality is critical to the rule of law; it affects legislation's efficiency and offers legal certainty to citizens. Egypt follows a civil law system that it adheres to a well-established system of codified written statutes. The existing legislative process permits for changes to be available to citizens, which is a key requirement to observe the rule of law; however, passed bills and (enacted) laws often fail to meet clarity, explicitly and certainty standards.⁴²

In the same vein, the Organization for Economic Cooperation and Development (OECD) acknowledged that Egypt's lack of a regular systemic review of legislation "results in an accumulation of outdated legislation and demonstrates that the development of legislation does not adequately assess the necessity of the adoption of new legislation or considers alternatives."⁴³ The accumulation of legislation results in a pernicious degradation of legal certainty, with the law unable to fulfill its primary duty: to identify citizens' rights and obligations accurately.⁴⁴ Accordingly, Egypt faces difficulties in

⁴¹ Bingham, *supra* note 2, at 81. Additionally, this fosters trade and investment, as people are more expected to conduct economic activity in places with clear norms.

⁴² *Id.* See, e.g., Yustina Saleh, *Law, the Rule of Law, and Religious Minorities in Egypt*, 8 MIDDLE EAST REV. INT'L AFF. 4 (2004), at 74-81.

⁴³ See, e.g., OECD *Good Governance in Egypt: Legislative Drafting Manual for Better Policy* (OECD Publishing, Paris 2019), <https://doi.org/10.1787/g2g9dd64-en>.

⁴⁴ *Id.* Without a thorough registry of all regulations, law and policymakers drafting legislation may not be entirely aware of all provisions in force. The OECD's analysis found that legislators may be compelled to recourse to the practice of tacit repeal in drafting, which entails adding an article "at the end of the regulation stating that any provisions contradicting the provisions are hereby repealed." Sarah Wolff, *Constraints on the Promotion of the Rule of Law in Egypt: Insights from the 2005 Judges' Revolt*, 16 DEMOCRATIZATION 1 (2009), at 100-111. ("The 'judges' revolt' was a test case for external promoters of the rule of law in Egypt . . . difficulties in promoting rule of law in Egypt. [it] reveals that the EU's action in the field of rule of law promotion in Egypt was constrained by two categories of factors: 'exogenous factors' related to the external promoters of rule of law (the EU, the US) and then 'endogenous factors' related to the domestic context [...] Then, at an endogenous level, the instrumentalization by the Egyptian regime of

creating predictable lawmaking. For instance, Egypt's criminal law (mainly the Penal Code of 1937 and the Code of Criminal Procedure of 1950) determines that the maximum time in pretrial detention is two years. However, this rule has been fundamentally ignored in its implementation, as the government evades legally adjudicating a case by using pretrial detention as punishment.⁴⁵

Therefore, Egypt's unpredictable legislation gives rise to an unfair power forceful. While the government anticipates its people to follow the law, punishing a failure to do so, the government *per se* can undermine their legal duties, leaving them uncontrolled and susceptible to unpredictability and arbitrariness. Prosecutors and judges kept numerous individuals in pretrial detention – as a punitive measure without even a pretense of judicial review – often *solely* [and held *incommunicado*] for exercising their rights to peaceful assembly and free expression, and many beyond the two-year limit Egyptian law provides.⁴⁶ The Criminal Procedure Code and Prisons Law provide

external aid funding in the field of human rights and democratization complicates . . . activities in the country. . .”)

⁴⁵ By frequently surpassing the codified capacity for pretrial custody, the law under al-Sisi's regime becomes arbitrary and unpredictable. See *No Pretense of Judicial Review for Hundreds in Egypt: Covid-19 Court Closure Exacerbates Grossly Unfair System*, HUMAN RIGHTS WATCH, May 18, 2020, <https://www.hrw.org/news/2020/05/18/egypt-no-pretense-judicial-review-hundreds> (“Egyptian authorities have been holding hundreds, and most likely thousands, of people in pretrial detention without a pretense of judicial review in a new law for the country's justice system. Security and judicial authorities have used the Covid-19 pandemic to effectively preclude detention renewal hearings, renewing pretrial detentions [automatically]. Judges should immediately review the detention of all those in prolonged pretrial detention and order their release pending trial unless there is clear evidence that there is a legal necessity for their detention before trial, such as a clear threat to witnesses or risk of flight. Everyone held in pretrial detention is entitled to a trial within a reasonable time, or release.”).

⁴⁶ For instance, a criminal court renewed the 45-day preventive detention of *aljazeera* journalist Mahmoud Hussein, who had been held for more than 1,400 days in pretrial custody, including long periods in solitary incarceration, for allegedly wide spreading false news and receiving funds from foreign organizations to defame the state's reputation.

for reasonable access to prisoners.⁴⁷ It should be noted that security apparatuses and judicial authorities used the Covid-19 pandemic as a pretext to justify successfully impede even a pretense of detention renewal hearings, in transgression of Egyptian law, as well as regional African and international human rights agreements. Moreover, they have often deprived attorneys and detainees of a momentous opportunity of presenting a defense or reviewing any alleged evidence.⁴⁸

Harsher, new rules under Egypt's draconian anti-terrorism laws No.8 of 2015 on "Terrorist Entities and Terrorists" and Counter-Terrorism Law No.94 of 2015 further erode vital human rights and could result in more arbitrary arrests, enforced disappearances and torture allegations, and a broader suppression on freedom of expression, thought, association and of peaceful assembly.⁴⁹ The deep concerns of this amended lawmaking are related to the scope, necessity, proportionality test, prejudiced effects, and the breach of the Constitution and domestic laws, as its more extensive provisions deeply impinge on a variety of crucial human rights.⁵⁰ The new legislative changes covering anti-terrorism, protests, associations, and NGOs

⁴⁷ Article 143 of the Criminal Procedure Code expressly reads that "any defendant must be released in the period of pretrial detention if his detention exceeds two years," which means that if the Attorney General of the State Security Prosecution exceeds the limits, should be considered in violation of the law, and should held accountable.

⁴⁸ In other words, the government excessively used pretrial and preventive detentions during trials for nonviolent criminal acts and sometimes held pretrial prisoners in the same facilities as convicted detainees. Large bottlenecks in the criminal courts caused the protracted periods of pretrial detention, and the government occasionally rearrested detainees on charges filed in new cases to lengthen their detention beyond a two-year maximum.

⁴⁹ Several government critics, including reporters, bloggers, and human rights defenders/ activists, continue to be confined on politically inspired charges, many in prolonged pretrial, detention, and authorities often used broad terrorism crimes against peaceful activists, harassed and detained their relatives.

⁵⁰ Mohamed 'Arafa, *Middle East Legislative Insight: Egyptian Antiterrorism Laws*, Egypt Law No.22/2018, Egypt Law No.8/2015, Egypt Law No.94/2015, LEXISNEXIS MIDDLE EAST COMMENTARY (2019).

define “terrorist entity” and execute new measures against individuals, businesses, media platforms, and trade unions and provide life sentences and the death penalty for funding terrorism. For instance, trade unions could have assets seized and be added to the terrorism list. The equivocal concept of terrorism under the national criminal law, the continuing and permanent use of emergency authorities, resorting to the exceptional State Security Emergency Courts, and the extended capacity of the Supreme State Security Prosecution is extremely disturbing.⁵¹ The new amendments clarify that any act that disturbs public order with force will be treated as a terrorist act. The amendments comprise provisions to protect the security forces from culpability, create firmer prison penalties for terror-related crimes, as well as heavy fines for those who publish “false/fake news,” and establishes a special judicial circuit for terrorism cases.⁵²

b. Emergency Law and the Use of Arbitrary Power

According to Bingham’s second norm, questions of laws (legal issues) should typically be settled through legal processes rather than discretion. However, this principle does not fully deny judicial discretion; a degree of flexibility can be permitted so long as discretions in rulings are properly decided and subject to appeal. Hence, combat abandoned discretion, which can become a source of

⁵¹ *Egypt Law No.94/2015*, at art. 2. The Interior Ministry’s security forces and National Security Agency (NSA) forcibly disappeared, arbitrarily arrested, tortured opponents, and detained a lot on unsubstantiated charges of joining a terrorist group and spreading false news and some health workers for criticizing the government response to Covid-19 including the lack of protective equipment and testing.

⁵² *Id.*, at arts.12, 13, 15, 18, 20, 27, 28, & 29 “...funding terrorist acts. These would now include providing a place for training one terrorist or more; giving them weapons or documents in any way or form; offering support and financing to help terrorists travel, even if the provider does not have a direct link to the terrorist crime.” The law already gives heavy jail punishments for criminal activities that include “promoting or encouraging any terrorist offense.”

inequality if judicial bias or preference is impact.⁵³ The Emergency Law No.162/1958 overly expands police power. Additionally, it halts constitutional rights, as it authorizes exceptional (emergency state-security) courts, whose military judges and officers are appointed by the President, to try individuals without appeal, in which the regime has exploited this law – under the guise of public security – making the emergency status a norm, rather than an exception.⁵⁴ Since 2017, the Egyptian government has extended the emergency status many unreasonable times to authorize military prosecutors to interpret whether a specific criminal act falls within the military's jurisdiction, conferring a substantial amount of discretion.

⁵³ Bingham, *supra* note 2, at 101. See also Vincent Durac, *The Impact of External Actors on the Distribution of Power in the Middle East: The Case of Egypt*, 14 J. NORTH AFRICAN STUDIES 1 (2009), at 75-80.

⁵⁴ Yussef Auf, *The State of Emergency in Egypt: An Exception or Rule?* ATLANTIC COUNCIL, Feb. 2, 2018, <https://www.atlanticcouncil.org/blogs/menasource/the-state-of-emergency-in-egypt-an-exception-or-rule/> (“The emergency law regulates the procedures that are followed when declaring the state of emergency, and the powers the law grants to the executive authority and its security apparatuses. The most prominent of these... First, the law grants broad powers to law enforcement officers, whether military or police, with regards to detaining suspects, arresting them, or imprisoning them for extended periods. Second...emergency state-security courts can be formed in every first instance court and court of appeal across Egypt. These courts are composed of judges, and the President can add military officers to them. Moreover, the verdicts of these courts cannot be appealed. The President has the right to appoint all the judges of the emergency state-security courts, whether civil or military judges. Third, [...], the President enjoys sweeping powers. The President (or whomever he authorizes) can refer any of the public law crimes to the state security courts, including criminalized offences in regular laws such as the criminal law and other laws that include criminal punishments (the Protest Law and Terrorism Law are examples). Additionally, the President ratifies the verdicts of the emergency state-security courts. This latter authority gives him the authority to approve or terminate a verdict, reduce a penalty, or transfer a trial to another court. Finally, the President can censor any kind of message and all types of publications, newspapers, images and all forms of expression, and announcements before they are published [and] has the right to restrain the press, confiscate its materials, and close its outlets.”). See, e.g., *ANHRI Files a Complaint Against the Attorney-General of the State Security Prosecution*, THE ARABIC NETWORK FOR HUMAN RIGHTS INFORMATION (2019), <https://www.anhri.info/?p=4846&lang=enhttps://www.anhri.info/?p=4846&lang=en>.

In 2019, Article 204 of the Constitution was amended to state that military tribunals will have jurisdiction over crimes committed by civilians “that represent an assault” against military facilities, equipment, weapons, documents, and public funds, among many other things, removing the pre-amendment requirement that such assaults be “direct.”⁵⁵ It seems that al-Sisi is vigorously trying to undermine the judicial system’s integrity and the constitutional limits on his powers and that his administration is using the pandemic to expand, not reform, Egypt’s violent emergency status.⁵⁶ The military’s amplified power in Egypt’s emergency status, coupled with a unique expansion of military tribunals’ jurisdiction, gives the armed judiciary a vulgarly broad scope that impedes any concern of the relationship between State security and respecting individuals’ basic public rights and civil liberties.⁵⁷

⁵⁵ *Egypt Constitution*, at art. 204. See, e.g., *Egypt: Court Arbitrarily Extends the Pretrial Detention of over 1,600 Defendants & Egypt: Allow Prison Visits for all Detained Defenders and Political Opponents*, AMNESTY INTERNATIONAL, May 7, 2020 & Aug.19, 2020, <https://www.amnesty.org/en/latest/news/2020/05/egypt-court-arbitrarily-extends-the-pretrial-detention-of-over-1600-defendants/>; <https://www.amnesty.org/en/latest/press-release/2020/08/egypt-allow-prison-visits-and-other-communication-for-detained-defenders-and-political-opponents-without-discrimination/#:~:text=The%20Egyptian%20authorities%20must%20allow,phone%20calls%2C%20Amnesty%20International%20said>.

⁵⁶ See, e.g., AL-JAZEERA STAFF, *Egypt’s Emergency Law Explained*, AJAZEERA, Apr.11, 2017, <https://www.aljazeera.com/features/2017/4/11/egypts-emergency-law-explained> (“Despite this limitation, the emergency law still grants the President exceptional powers. The emergency law grants the President, and those acting on his behalf, the power to refer civilians to State Security Emergency Courts for the duration of the three-month period. There is no appeal process for State Security Emergency Court verdicts. It also extends powers of the President to monitoring and intercepting all forms of communication and correspondence, imposing censorship prior to publication and confiscating extant publications, impose a curfew for or order the closure of commercial establishments, sequestration of private properties, as well as designating areas for evacuation. Article 4 of the emergency law grants the armed forces the authority to address any violations of these powers.”). Although the risks of the COVID-19 pandemic should not be ignored, they cannot justify the entire erosion of fair trial rights and due process.

⁵⁷ It has been reported that since 2014, over 15,500 civilians, including children, have been referred for military trials. See, e.g., *TIMEP Brief: 2019 Constitutional Amendments*, THE TAHIR

IV. IS THE JUDICIARY ABOVE POLITICS OR A POLITICAL THEATRE? ANTIINDEPENDENCE AND ABUSE OF POWER

Bingham's third principle claims that everyone should be equal before the law unless reasonable (objective) grounds justify any inequality, and hence, has two critical consequences: (a) no one, including powerful actors, should be above the law and (b) no citizen should experience discrimination based on personal (subjective) aspects.⁵⁸ Unfortunately, security forces and the intelligence community (Interior Ministry's National Security Agency) remain to operate with "near-absolute impunity."⁵⁹ Likewise, legal prejudice based on political

INSTITUTE FOR MIDDLE EAST POLICY, Apr.17, 2019, <https://timep.org/reports-briefings/timep-brief-2019-constitutional-amendments/> ("The amendments would expand the role of the Armed Forces to include "safeguarding the Constitution and democracy, maintaining the foundations of the State and its civilian nature, the gains of the people, and the rights and freedoms of the individual." It...expand the jurisdiction of military courts over civilians to include those who perpetrate all "attacks" directed against the military, rather than just "direct attacks" [and] would empower the President to appoint the heads of judicial bodies, the President of the Supreme Constitutional Court, and the attorney general. [It] give the President the chairmanship of the Supreme Council for Judicial Bodies and Entities.").

⁵⁸ Bingham, *supra* note 2, at 115. See Maha Abdelrahman, *The Nationalisation of the Human Rights Debate in Egypt, Nations and Nationalism*, 13 J. ASSOCIATION FOR THE STUDY OF ETHNICITY & NATIONALISM 2 (Cambridge Univ. Press 2007), at 285-296.

⁵⁹ The judiciary has inspected very few officers and prosecuted even fewer for human rights mistreatment involving torture and enforced disappearances (e.g., use detainee confessions despite credible allegations that a security officer coerced them through torture). See, e.g., FEDERAL FOREIGN OFFICE, *Federal Government Commissioner for Human Rights Policy and Humanitarian Assistance on Egypt*, Nov. 20, 2020, <https://www.auswaertiges-amt.de/en/newsroom/news/commissioner-for-human-rights-policy-and-humanitarian-assistance-egypt/2419262>. A 2014 Human Rights Watch report, said "the killings likely amount to crimes against humanity." See *Egypt: Rab'a Killings Likely Crimes against Humanity: No Justice a Year Later for Series of Deadly Mass Attacks on Protesters*, HUMAN RIGHTS WATCH, Aug. 12, 2014, <https://www.hrw.org/news/2014/08/12/egypt-raba-killings-likely-crimes-against-humanity> ("Crimes against humanity consist of specific criminal acts committed on a widespread or systematic basis as part of an "attack on a civilian population," meaning there is some degree of planning or policy to commit the crime. Such acts include murder, persecution on political grounds, and "other inhumane acts

beliefs is a concerning feature of the current administration. The regime utilizes the law and judicial authorities to promote a pervasive crackdown on political dissidents, such as human rights lawyers, journalists, activists, and political figures.⁶⁰ Under this government, legislation is progressively infringing on citizens' rights. For instance, the Anti-Protest Law No.107/2013 limits civilians' ability to mobilize and permits the use of excessive force by security forces to disperse demonstrations; the NGO Law No.149/2019 controls registration, activities, and funding of NGOs, subjecting them to extensive oversight and monitoring; the Press and Media Law No.180/2018 restricts "press entities" and gives broad discretion to authorities to block content, intercepting communications, basically codifying media censorship; along with the counterterrorism and cyber security legislation(s).⁶¹

of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health." Given the widespread and systematic nature of these killings, and the evidence suggesting that they were part of a policy to use lethal force against largely unarmed protesters on political grounds, these killings most likely amount to crimes against humanity. The prohibition of crimes against humanity is among the most fundamental in international criminal law and can be the basis for individual criminal liability in international courts, as well as in domestic courts in many countries under the principle of universal jurisdiction.")

⁶⁰ Rutherford, *supra* note 3. The NSA harasses and threatens political opponents by consistently tapping phone calls and launching smear campaigns and hate speech from government-controlled media. See Nathan J. Brown & Hesham Nasr, *Egypt's Judges Step Forward: The Judicial Election Boycott and Egyptian Reform*, CARNEGIE ENDOWMENT INT'L PEACE (2005), at 4.

⁶¹ See generally Mohamed 'Arafa, *The Tale of Post-Arab Spring in Egypt: The Struggle of Civil Society Against a Janus-Faced State*, 27 IND. INT'L & COMP. L. REV. 43 (2017); See Law No.175 of 2018, *Al-Jaridah Al-Rasmiyah*, vol.32 (bis)(c), Aug.14, 2018; Law No.180 of 2018, *Al-Jaridah Al-Rasmiyah*, vol.34 (bis)(h), Aug.27, 2018; Law No.58 of 1937 [Penal Code], as amended by Law No.95 of 2003, vol.25, *Al-Jaridah Al-Rasmiyah*, June 19, 2003. See generally Mohamed 'Arafa, *The Archeology of the Freedom of Information Laws: Egypt 'Fake-News Laws'*, 20 FLORIDA COASTAL L. REV.1 (2020). ("Law No.175 of 2018 on Anti-Cyber Crime allows the investigating authority the power to block or suspend Egyptian-based or foreign websites highlighting content identified as intimidating to national security or the national economy. Further, any person who hacks a website to adjust the information posted on such website or redistributes such information after changing it is accountable and punishable with a heavy fine and jail.").

In the same vein, Bingham's fourth norm sets forth that public officials (e.g., ministries) should exercise the powers conferred on them reasonably and in good faith.⁶² Also, they must act within their competence authority (the purpose of their powers) fairly and without exceeding its limits.⁶³ The rules of natural justice require that the decision-maker's mind should not be contaminated by bias or private/personal interest, but only by the public welfare and common good.⁶⁴ The 2019 constitutional amendments are enabling an increasingly politicized judiciary by allowing the President to appoint the heads of the judicial bodies (e.g., Attorney General, Supreme (Cassation) Court Chief Justice, Supreme Constitutional Court President, etc...).⁶⁵ Additionally, there is no required precision or integrity in the President's selection of judges, allowing for widespread corruption that threatens the judiciary's independence and integrity, and uses the system as a tool by the regime for revenge.⁶⁶ Article 73 of Egypt's Judiciary Act forbids judges from practicing politics and prohibits a judge sitting on the bench from expressing political views.

Due to the increasing elimination of the separation of powers, Checks-and-Balances, Egypt's judiciary is in a perilous state, and thus, this is a clear abuse of power, seeing as judges' and public officials'

⁶² Bingham, *supra* note 2, at 124.

⁶³ *Id.* (and trials could be branded as a “grotesque parody of justice”).

⁶⁴ *Id.*, at 129. The military banned access to journalists and other observers and forbade independent reporting.

⁶⁵ See TIMEP Brief, *supra* note 57.

⁶⁶ Ahmed Aboulenein, *Special Report: How Egypt's Crackdown on Dissent Ensnared Some of the Country's Top Judges*, REUTERS, Oct. 18, 2016, <https://www.reuters.com/article/specialReports/idUKKCN12I0W2?edition-redirect=uk> (“The country's justice ministry denied there was any attempt to reshape the Egyptian judiciary. [He said] 'The idea of revenge against specific judges or reshaping the judicial branch is absolutely not true. We have in Egypt the principle of judicial independence'... 'The executive branch does not interfere in the affairs of the judicial branch. In all honesty the executive branch does not and will never have the ability to reshape the judiciary. The President himself says openly in [public] speeches that he does not interfere in the affairs of the judiciary.'”).

personal interests override public good. The government is retaliating and targeting those calling for judicial reform or independence and sanctioning them as well (e.g., travel bans or denial of their pension funds). The alarming reality is that the administration's increasing control of the judiciary is an attack on one of the last institutions that can check the state's executive power and protect Egyptians' fundamental freedoms.⁶⁷

V. EGYPT IS 'NOT' IN THE BALANCE: FUNDAMENTAL HUMAN RIGHTS INFERNO

Conceivably the most egregious violation of the rule of law is the infringement of basic human rights. Bingham's fifth principle requires that the law must afford ample protection of basic human rights.⁶⁸ In this regard, the Universal Declaration of Human Rights (UDHR) of 1948 reads, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" and prohibits any form of discrimination based on subjective factors.⁶⁹ Physical conditions in prisons and detention centers were severe and possibly life-threatening due to overcrowding, physical (torture), psychological abuse, and insufficient medical care, poor infrastructure, ventilation, with no proper sanitation (hygiene), food, nor potable water.⁷⁰ It should be noted that the Egyptian prison systems fall short of the international

⁶⁷ *Id.* The remaining judges who resist political influence are being punished and removed from judicial office. See, e.g., Michelle Dunne, *Evaluating Egyptian Reform*, CARNEGIE ENDOWMENT INT'L PEACE (2006), at 12.

⁶⁸ Bingham, *supra* note 2, at 136.

⁶⁹ See *Universal Declaration of Human Rights*, UN GENERAL ASSEMBLY, Dec.10, 1948, 217 A (III), at arts. 2 & 5, <https://www.refworld.org/docid/3ae6b3712c.html>.

⁷⁰ See, e.g., *Egypt: Covid-19 Cover for New Repressive Powers: Amendments Could Curb Rights in Name of 'Public Order'*, HUMAN RIGHTS WATCH, May 7, 2020, <https://www.hrw.org/news/2020/05/07/egypt-covid-19-cover-new-repressive-powers> ("...even in the

standards (Standard Minimum Rules for Prisoners' Treatment 1975).⁷¹ Under international law, procedures constraining rudimentary rights during an emergency should be necessary, set out in the law, limited in time and place to what is severely necessary, proportionate, and provide for effective remedies for any violations of rights such as an independent, transparent appeal mechanism.⁷² There have been fears about Egypt's congested and over capacitated prisons cells and the risk of the swift spread of COVID-19.⁷³

Human rights are not bargaining chips for political benefit; they are the absolute and undeniable guarantees that every human being will be treated with respect and dignity. In his sixth principle, Bingham argues that the two major barriers to fair court procedures are prohibitive cost and inordinate delay.⁷⁴ In addition to the pretrial

absence of any public health purpose, to restrict “public gatherings, protests, rallies, festivities”, and any other form of gathering, including private gatherings.”).

⁷¹ See generally *Standard Minimum Rules for the Treatment of Prisoners*, UNITED NATIONS, Aug. 30, 1955, <https://www.refworld.org/docid/3ae6b36e8.html>.

⁷² See *International Covenant on Civil and Political Rights*, UN GENERAL ASSEMBLY, Dec.16, 1966, Treaty Series, vol.999, 171, at art. 4, <https://www.refworld.org/docid/3ae6b3aa0.html>. (“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties . . . may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin . . .”).

⁷³ Prisoners could request investigation of alleged inhuman conditions. Maged Mandour, *Egypt Behind Bars*, CARNEGIE ENDOWMENT FOR INT'L PEACE, Feb. 11, 2020, <https://carnegieendowment.org/sada/81045> (“Egypt's penal system, defined by severe punishment and pretrial abuses, impacts the state's legitimacy, the rise of radicalization, and prospects for a transition...The most distinctive feature of the Egyptian prison system is its brutality.”). See, e.g., Adham Youssef and Ruth Michaelson, *Egypt Sentences 75 Muslim Brotherhood Supporters to Death*, THE GUARDIAN, Sep. 8, 2018, <https://www.theguardian.com/world/2018/sep/08/egypt-sentences-75-to-death-in-rabaa-massacre-mass-trial>.

⁷⁴ Bingham, *supra* note 2, at 175. Although this rule was meant for civil cases, it is also relevant to Egyptian criminal cases, where undue delay is a policy to punish without prosecution. Egyptian authorities have been routinely using indefinite pretrial detention

detention misuses, the prosecutorial practice of creating “revolving door cases” has become progressively common. In such cases, even if a defendant is released or serves their term, they are instantly re-arrested in similar cases with ambiguous charges without trials.⁷⁵ These instances show the terrible conditions of pretrial detention and the administration’s attack on human rights and due process policies.

a. Fair Trial Hurdles and the Deprivation of Rights

According to the UDHR, “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”⁷⁶ Bingham devotes his seventh rule exclusively to the right to a fair trial because of how crucial it is to the rule of law. Without a fair trial, citizens cannot seek remedy and protect themselves from an arbitrary and repressive government.⁷⁷ The military tribunals established under Egypt’s draconian exceptional legislation (e.g., emergency law) restrict fair trial and due process guarantees for political gain.⁷⁸ Defendants cannot petition or appeal the verdicts of the military judiciary, and the proceedings are usually hidden from the public, destabilizing the accountability of the State and a judge’s impartiality.⁷⁹ Egyptian enforced the death penalty for a vague wide

to punish those perceived as political dissidents, human rights defenders, or simply advocates of dignity and democratic transformation.

⁷⁵ Mandour, *supra* note 73. For political dissidents, justice is *not* only delayed, but denied.

⁷⁶ UDHR, *supra* note 69, at art. 10.

⁷⁷ Bingham, *supra* note 2, at 186.

⁷⁸ Mohamed ‘Arafa, *Egypt between Fear and Reform in its Second Revolution: The Failure to Protect the Fundamental Human Rights Over and Over Again*, 7 ARIZ. SUMMIT L. REV. 149 (2013), at 150–202.

⁷⁹ *Id.*, at 162–164. In other words, (“. . . the military courts in Egypt do not meet the requirements of independence and credibility since judges are under pressure and subject to the instructions and orders of their superior military officers [...] Accordingly, judicial verdicts cannot be subject to change by authorities other than superior courts.

range of criminal acts, including cases of alleged political violence and terrorism in which defendants' claims of enforced disappearance and torture nearly always went uninvestigated by judges.⁸⁰

These practices violate Bingham's principle, deny Egyptian citizens their basic right to a just trial, and pose a disturbing intrusion on the judiciary's autonomy.⁸¹ Many of the accused have not been given sufficient time and facilities to prepare a defense, the evidence against them is essentially not shared with them nor their attorneys, and they are systematically denied access to case files. Also, lawyers are denied the ability to consult with their clients before and during the interrogation privately.⁸² The COVID-19 pandemic has catalyzed the deprivation of fair trial guarantees, in which judges – in several cases – declined to hear concerns over the illegitimacy of the rulings considering Egyptian law or even note these concerns in court documents. Moreover, due process is a vital cornerstone of any democratic society; al-Sisi's regime has demonstrated a disproportionate response to COVID-19 to destabilize fair and just trial guarantees.

b. Egypt's Non-Compliance with International Law Norms

Bingham's eighth principle dictates that a State must act in accordance with international law standards.⁸³ Egypt's Constitution reads, "The State shall be bound by the international human rights agreements, covenants and conventions ratified by Egypt, and shall have the force of law after publication in accordance with the

Consequently, the wide jurisdiction of the military courts allows them to focus on cases involving prosecution of military staff and allows the impunity that such personnel enjoy from sanctions for grave human rights transgressions.").

⁸⁰ *Id.*

⁸¹ *Id.*, at 163. Mass trials deny defendants their right to a fair trial as they cannot defend themselves adequately.

⁸² Mandour, *supra* note 73.

⁸³ Bingham, *supra* note 2, at 227.

prescribed conditions.”⁸⁴ Further, “the President of the Republic represents the State in foreign relations and concludes treaties and ratifies them after the approval of the House of Representatives. They shall acquire the force of law upon promulgation in accordance with the provisions of the Constitution.”⁸⁵ *Jus Cogens* (peremptory norms) refer to specific fundamental, overriding international law principles. In this domain, the Egyptian Supreme Constitutional Court ruled in 1986 landmark decision that “generally recognized principles of human rights, including the UDHR, must be considered constitutional norms within the domestic legal framework.” Conversely, the regime has purposely disrupted/degraded.⁸⁶ A more independent, professional, and efficient judiciary is a significant requirement not only for the safety and freedom of Egyptians but for any future democratic transition. Furthermore, the prospects

⁸⁴ *Egypt Constitution*, at art. 93.

⁸⁵ *Id.*, at art. 151.

⁸⁶ Sudarsan Raghavan, *U.S. Lawmakers Urge Egypt's Sissi to Release Prisoners*, THE WASHINGTON POST, Oct. 18, 2020, https://www.washingtonpost.com/world/middle_east/egypt-sissi-human-rights-congress-democrats/2020/10/18/851b8df4-0ff4-11eb-b404-8d1e675ec701_story.html. In terms of the international pressure and catalyzing democratic reform, the U.S. Congress members wrote a letter noting unfair imprisonment cases and raised concerns of COVID-19 spreading in Egypt's prisons and detention centers. They accordingly urged al-Sisi to release those “unjustly detained for exercising their fundamental human rights [...] These are people who should never have been imprisoned in the first place.” In the same vein, the European law (and policy) makers called on al-Sisi to release human rights defenders, political, activists, journalists, lawyers, and other prisoners of conscience held unfairly in unsafe conditions, as described as “unprecedented mobilization” that “demonstrates the swelling frustration of the international community with rights abuses in Egypt.” See, e.g., Tom Allinson, *European Lawmakers Call for Release of Egypt's Political Prisoners*, DEUTSCHE WELLE, Oct. 21, 2020, <https://www.dw.com/en/european-lawmakers-call-for-release-of-egypt-political-prisoners/a-55333083> (“UN human rights experts have expressed alarm over the “grave risks” detainees face in overcrowded jails during the pandemic.”). See also Nancy A. Youssef, Vivian Salama and Michael C. Bender, *Trump, Awaiting Egyptian Counterpart at Summit, Called Out for 'My Favorite Dictator'*, THE WALL STREET JOURNAL, Sept. 13, 2019, <https://www.wsj.com/articles/trump-awaiting-egyptian-counterpart-at-summit-called-out-for-my-favorite-dictator-11568403645>.

for democracy in Egypt are not promising; it might be feasible to accomplish under the current *status quo*.

Despite its tragic record of human rights violations, Egypt's Western regional and international allies did not go beyond occasional, weak statements of concern and were mainly unsuccessful to condition security assistance on accountability or improvement in the human rights condition. The Western's relationship with Egypt privileged security, trade, environmental, and other collaboration over a pressure on Cairo to confront its serious record of human rights misuse.⁸⁷ Authorities are using the law to consolidate authoritarianism. This is echoed in new overly broad statutes that confine rights and re-write the relationship between civilians and the State (e.g., prosecution of peaceful advocates); the introduction of the constitutional amendments authorizing the executive to influence and interfere in the functioning of what are meant to be independent state institutions, including the judiciary.

VI. WHY REINSTATING THE RULE OF LAW IS THE BEST WAY FORWARD? CONCLUSION AND POLICY RECOMMENDATIONS

Sisi's years of unprecedented tyranny since 2013 – after the 2011 uprising – marked a turning point for the rule of law and democratization promotion in Egypt. Against the backdrop of inexorable

⁸⁷ In other words, divisions among European Union member states stopped the bloc from implementing effective measures to focus on human rights crisis in Egypt, though, prioritized collaboration with Egypt on issues including the Libya crisis, radical Islamism along with counterterrorism programs and migration management, limiting their public condemnation to enhanced statements at the UN Human Rights Council. *See generally* Mohamed 'Arafa, *Egypt* in Luis R. Barroso and Richard Albert (eds.), THE 2020 INTERNATIONAL REVIEW OF CONSTITUTIONAL REFORM, THE PROGRAM ON CONSTITUTIONAL STUDIES, THE UNIVERSITY OF TEXAS AT AUSTIN IN COLLABORATION WITH THE INTERNATIONAL FORUM ON THE FUTURE OF CONSTITUTIONALISM, Sep. 4, 2021, at 100-104, <https://ssrn.com/abstract=3917596>.

breaches of the rule of law while under pressure from the international community, including the U.S. and EU governments, President al-Sisi announced his attention to hold the first multiparty fair and free elections, a landmark decision in Egypt's modern history. The influence of the United States throughout the elections, combined with the prospect of political transition, led the regime to change slightly, from full iron-fist undemocratic rule to semi authoritarianism, if only cosmetically, its discourse. However, and throughout Egypt's political and legal history, the press globally reported on the "judges' revolt" against the rule of law violations, the judiciary, supported by civil society [non-governmental organizations (NGOs)] and human rights defenders, confronted the executive by disapproving any fraudulent results of any constitutional referendums, the presidential and legislative elections, along with fighting the widespread vote fraud.

The "judges' revolt" was a test case for external advocates of the rule of law in Egypt: judges voiced a desire to supervise the entire electoral (and the counting) process and took the chance of the presidential campaigns to ask for complete independence from the (prepotent) executive within the overall domestic bodies. Also, in terms of presidential elections, an electoral commission has been established composed of impartial magistrates (judges/prosecutors) to supervise the ballot and the voting process. Although part of the judiciary decided and agreed to such an institutional novelty, some judges pointed to the fact that their integrity [was] being used to lend transparency and credibility to processes over which they have only a restricted control/role. In post-revolutionary Egypt, the overall discourse on the rule of law, the debates around the human rights profile (including the right to vote) constituted a significant episode in the long-running conflict between the executive (President) and the judiciary. Frankly, the Egyptian legal system, with its French-inspired hierarchical courts, positivist orientation, and reliance on state-codified written statutes, has compelled the executive will quite faithfully and fairly for over a century. With the legislative power obviously – if

at times unofficially – under executive dominance or hegemony, it would be astonishing if matters have been otherwise.

In this regard, lifting the emergency status, that would abolish the exceptional (emergency) court system and ending the trial of civilians before the military tribunals would be a significant step in upgrading the rule of law and in harmonizing the imbalanced *Check-and-Balances* (separation of powers) notion in Egypt. An explicit, obvious separation between the judiciary and the executive has still not been accomplished. Both the Defense Minister and the Justice Secretary continue to exercise substantial authority over the judiciary.

If the presidential powers diminish – on paper not on the ground – following the amendments, the Head of State maintains the most significant powers, be it in the executive, legislative or even judicial fields where he/she – as a Chair of the Judicial Bodies Council – is the one who nominates heads or the chairs or the chief justices of the judicial entities, including the Attorney General, the Presidents of the *Conseil d'État* (State Council), the Supreme Court (Cassation Court). Furthermore, although the powers of the parliament have increased, it must be seen whether the two chambers dominated by the ruling party or the circle close (loyal) to the President and the military will make substantial and vital adjustments when drafting the State's budget bill. Though the constitutional amendments were introduced as improving the balance of powers, they have not attained key changes in the distribution of powers within the executive authority *per se* and between the executive and legislative ones. Nonetheless, the reform package could establish the basis of continuative reviews in the future.

Despite rhetorical obligations to advance human rights and the promise to clean up the heroic human rights record, many powerful nations continue to assist Egypt through financial and military means. Generally well-known, the United States is Egypt's strongest ally in the region, with the past decades – since the 1979 Peace Agreement with Israel – of grant assistance accounting for approximately 20% of Egypt's annual defense budget. The U.S. not only helps fund Egypt's

armed forces but also helps train its military personnel along with expanding the counterterrorism programs and safeguarding the national security interests in the region.

Moreover, although the European Union has extended some sanctions on Egypt for human rights violations and breach of international laws, Germany and France continue to be strategic allies for al-Sisi's regime. For example, in 2020, Germany agreed to export weapons and military equipment worth €752 million to Egypt and France was Egypt's primary arms supplier and security equipment until recently (2017). Regardless, military tribunals and security (law enforcement officers) forces are crucial to al-Sisi's cruel, brutal oppression of political dissidents and infringement of human rights. Despite this, Western countries, and other nations in the region (the Gulf) that have publicly and freely condemned the Egyptian government in the past continue to strongly facilitate the crackdown on political dissidents and human rights abuses. By funding the army that allows the incitement of political terror, Egypt's partners are rendering their public calls for reform fruitless.

International leaders justify military assistance, as Egypt is professed as a bulwark against terrorism and radical Islamism (fundamental *Jihādists*). When criticized for continuing to support the Egyptian government, President Emmanuel Macron of France said that he “will not suspend or condition defense policies and economic cooperation on these disagreements [over human rights].” Several Western nations have prioritized counterterrorism policies over human rights, observing basic civil liberties and public rights/freedoms as acceptable justified trade-offs. However, on a practical ground, it has been reported that Egyptian counterterrorism strategies are “ineffective,” that the immense human toll of the Egyptian military’s tactic to counterterrorism (especially in the *Sinai* Peninsula) has isolated local communities and radicalized substantial numbers of individuals who have subsequently been recruited by terrorist groups and joined extremist international terrorist organizations.

Violence creates violence and begets animosity; it is becoming progressively clear that financing (military aid) an authoritarian administration will not accomplish sustainable peace, stability, and security on both the domestic and global stance. A greater implication is that funding Egypt legitimizes a State that suppresses its citizens, stifles the political dissent and is accused of corruption and committing crimes against humanity. While the terrorist threat is unquestionably real, it has also resulted in President al-Sisi blurring the boundaries between fundamentalist militants and his broader political adversaries. His government has vigorously promoted by his government to legalize his rule while justifying his crackdown on dissent. This deep polarization has occasionally surfaced in violent confrontation but continues for the most part latent – hidden beneath a tide of fear, tyranny, and oppression.

There is a vast gap between verbal promises and solid political action, which must be addressed and reviewed. Considering Egypt's reliance on external funds, Egypt's partners and friends have the power and leverage to challenge the behavior and conducts of corrupt, abusive actors efficiently. In terms of its new foreign policy, the Biden/Harris administration will withhold \$130 million and black the entire \$300 million worth of military assistance to Egypt until Cairo takes specific steps towards guaranteeing human rights. For decades and within the violation of the US federal laws, many exceptions were granted to free up Foreign Military Financing for the Egyptian government, worth \$300 million annually, on the basis that it was in the interest of U.S. national security. Recently, the State Department said that it “will move forward with the use of \$130 if the Government of Egypt affirmatively addresses specific human-rights related conditions and improves its record.”

However, human rights activists described it as a “betrayal” of the U.S. commitment to promote human rights and highly recommended cutting the \$1.3 billion annual aid package to Egypt by \$300 million and then repurposing the funds for humanitarian assistance

to help global efforts against the spread of COVID-19. The United States – especially President Biden – has pledged to put human rights at the heart of his foreign policy and rights advocates have pushed Washington to get tougher on al-Sisi, even though ties with Egypt have improved after Cairo's mediation – as usual – to help end hostilities between Israel/Palestine (*Hāmās* militants). It has been argued that states' "willingness to put energy interests and profits from arms sales ahead of human rights and justice risks destabilizing both human and international security – and thus represents a clear failure of judgment and leadership." Egypt's allies need to take collective action and begin offering fewer arms and less military aid. It is unbelievable that liberal democracies would sacrifice human rights, justice and the improvement of national and regional stability and national security for short-term profits. By making their unconditional support on Egypt's legal and political landscape, states can create diplomatic pressure and incentive for democratic reform.

In terms of economic sanctions, they can often hurt rather than help the cause. Frequently, the citizens of an authoritarian regime – rather than the regime *per se* – suffer the consequences of economic punishments. Legal scholars and political scientists argued that sanctions that aim particularly at improving the human rights position have a powerful negative effect on fundamental human and political rights. However, targeted sanctions imposed on senior public officials responsible for the strengthening of dictatorship could prove effective. Several nations already have mechanisms in place to expedite targeted sanctions. For instance, the E.U. implemented – via European Council – a worldwide human rights sanctions regime (EUGHRSR) that targets "individuals, entities and bodies – including state and non-state actors – responsible for, involved in or associated with serious human rights violations and abuses worldwide, no matter where they occurred." These individuals would be banned from entering the E.U. Bloc and incapable of accessing any funds. In the U.S., the Magnitsky Rule of Law [Human Rights] Accountability Act of 2012,

can be used to target high-ranking (government) officials in the form of visa bans or frozen assets. Targeted sanctions could play a critical role in penalizing perpetrators and deterring others from committing further atrocities or illegitimate acts.

Change needs to occur gradually and with as much mutual collaboration as possible. It would be quixotic to declare that declining military financing will transform Egypt into a democracy overnight. However, it could assist in moderating the worst elements of al-Sisi's rule and foster a tremendous amount of respect for the rule of law, justice, and human rights. Egyptian allies' absolute and uncritical support includes a lack of accountability that needs to be restored. The Egyptian government should not have the ability to commit atrocities with virtual impunity and have the private backing of States. The international community needs to take communal and expressive action that guarantees the protection of Egyptian citizens while preserving stability in the region.

Rather than explain an inaccessible aspect of the rule of law that requires improving, that the Egyptian case represents a systematic and deliberate erosion of the rule of law for power. The administration has constrained the public sphere, weakened the rule of law, and obliterated the separation of powers. There are serious long-term implications for the Egyptian society, state, and its foundational stability, both domestically and regionally. Citizens and human rights activists are suffering at the hands of a government taking steps to abolish and eradicate any trace of liberty and freedom. The international community needs to challenge the Egyptian government and its insidious consolidation of autocratic rule by scaling back military and economic assistance, and executing sanctions that target high-ranking officials responsible for human rights violations. It is significant to consider what is at stake: the safety and well-being of Egyptian people; the fight against terrorist threats at home and abroad; the security and stability in the Middle East; and the public rights, freedoms (civil liberties) and values we deem worth defending even in the darkest of times.

Therefore, the Egyptian authorities should, (a) guarantee a quick and steady transition of public authority to the Check-and-Balances and separation of powers constitutional norms along with the judicial review on the governmental actions (legislature and executive), through legitimate and fair processes consistent with rule of law principles and international standards; (b) ensure the right of all Egyptians to contribute within the political spectrum and public sphere, and that the Constitution is entirely in line with international law; (c) provide for legislative civil oversight and other mechanisms over financial and budgetary issues, and (d) end executive hegemony or any undue influence over the judiciary (e.g., eradicating the executive's powers over the functioning of the judiciary; ensure that the Attorney General Office and the courts is sufficiently independent from any political pressure [interference], so that judges and prosecutors can discharge the duties of their office fairly, effectively and impartially, without any inappropriate interference).

Additionally, the government's need to ensure the jurisdiction of military tribunals is limited to military personnel for only disciplinary conducts and excludes civilians and cases involving human rights abuses. Breaking the impunity cycle that predominates over human rights infringements carried out by any public officer (e.g., security or armed forces) should be considered and, to this end, guarantee that those allegedly responsible are held accountable. Also, ensuring access to effective remedies and reparation/reconciliation programs to the victims of human rights misuses via the judicial and non-judicial mechanisms of transitional justice (truth commissions); and institutional reform, by for example, undertaking expressive reforms of police and security forces in line with international law norms, revising policing protocols on the use of deadly (lethal) force and ensuring that such force may only be used when strictly inevitable to protect life. This future will not be easy to reach. It will not come without impediments, nor will it be immediately claimed. However, the founding of the Egyptian Nation itself is a testament to human

progress. Countries should lead *not merely by the example of power but by the power of example*.

Remember, in times that were far more trying than their own, Egyptians chose the hope of unity over the ease of division and made a promise to future generations that the dignity and equality of human beings would be a common cause. It falls to real leaders to fulfill that promise. Moreover, though Egyptians will have their resolve tested by dark forces that will test their resolve, they have always had cause to believe that they can choose a better history and a bright future; that need only to look outside the walls around them. For through the citizens of every possible ancestry who make Egypt their own, it is still possible to see living proof that opportunity can be accessed by all, that what unites them as human beings is far greater than what divides, and that people from every part of this nation can live together in peace and security.

This preliminary agenda of reform, especially in battling undemocratic or tyrannical rule, will certainly face barriers in every probable application phase. Nevertheless, the question is, why do the Arab and Muslim nations have very slight to no experience in developing any intricate political or legal systems based on comprehensive and humanistic values? In a secure, stable State, social awareness is a requirement to emerge a functional system, and this awareness is encompassed of public knowledge of the law (legal literacy), the efficacy of the law to access justice and build civil public order (legal mobilization), and evolving the values, approaches, and behaviors towards law (legal socialization). These cornerstones are all lacking in the Middle East. So, it seems that the Middle East generally, and Egypt specifically may need to *back-track* to move forward. Launching the very basics of modern society (social contract, elementary literacy, etc.) with education are quite indispensable chief footsteps. It is a blatant realism. Middle Eastern and Arab countries cannot build prosperous systems without having the productive soil of an educated community along with changing cultural traditions and paranoia.

Then and only then can the process of sustainable development, rule of law, and improvement begin.

The U.S. foreign policy in the Middle East has proven to be business as usual for the Biden administration, though ostensibly presented as a break from the Trump administration's embrace of the region's autocratic leaders. Biden has stressed democracy and the rule of law as the linchpin of the United States' contest with the global rise of autocracy. Indeed, he vowed to lead the world on advancing human rights and scorned "authoritarians of the world [who] may seek to proclaim the end of the age of democracy." However, the administration continues to be captivated by the siren calls of defense industry profits (continuing paying in weapons and political support to dictators) under the cover of outdated claims of security imperatives in the Middle East. The human cost of Biden's support for these undemocratic, totalitarian nations to the region's people are already apparent; the sagging global "democracy" policy is yet to be factored in.

On September 21, 2021, President Joe Biden before the 76th Session of the United Nations General Assembly in New York said:

Will we affirm and uphold the human dignity and human rights under which nations in common cause, more than seven decades ago, formed this institution [UN]? Will we apply and strengthen the core tenets of the international system, including the U.N. Charter and the Universal Declaration of Human Rights . . . We'll continue to uphold the longstanding rules and norms that have formed the guardrails of international engagement for decades that have been essential to the development of nations around the world – bedrock commitments like . . . adherence to international laws and treaties, support for arms control measures that reduce the risk and enhance transparency . . . And in that chorus of voices across languages and continents, we hear a common cry: a cry for dignity — simple dignity. As leaders, it is our duty to answer that call, not to silence it [. . .] to find ways to respond that advance human

dignity around the world. As we pursue diplomacy across the board, the United States will champion the democratic values that go to the very heart of who we are as a nation and a people: freedom, equality, opportunity, and a belief in the universal rights of all people. It's stamped into our DNA as a nation. And critically, it's stamped into the DNA of the UN . . .

Then, he added, “I quote the opening words of the Universal Declaration of Human Rights, quote: ‘The equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.’ The founding ethos of the United Nations places the rights of individuals at the center of our system, and that clarity and vision must not be ignored or misinterpreted . . . but we will be more successful and more impactful if all of our nations are working toward the full mission to which we are called.” He then closed with “The future will belong to those who unleash the potential of their people, not those who stifle it. The future will belong to those who give their people the ability to breathe free, not those who seek to suffocate their people with an iron hand. Authoritarianism — the authoritarianism of the world may seek to proclaim the end of the age of democracy, but they’re wrong. The truth is: The democratic world is everywhere.”

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Received: 11/17/2025

Accepted: 11/26/2025

Responsible Editors:

Dr. Thanderson Pereira de Sousa

Data Availability

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