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April 2012

## Approaching Rule of Law in Post-Revolution Egypt

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ARTICLE

APPROACHING RULE OF LAW IN POST-REVOLUTION EGYPT:  
WHERE WE WERE, WHERE WE ARE, AND  
WHERE WE SHOULD BE\*

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ABSTRACT

*Partial absence of rule of law was a central reason for the Egyptian Revolution in 2011, and the Revolution provides a golden opportunity to establish full rule of law in Egypt. Using a substantive approach to interpreting the rule of law doctrine, this Article analyzes the aspects of absence of rule of law before the Revolution. The former regime disregarded the rule of law by amending the constitution to promote the rule of the president, issuing laws that served the interests of the president's entourage, not enforcing judicial decisions, restricting freedom of speech, and concentrating the power in the hands of the president through the disreputable emergency law.*

*The period following the Revolution witnessed an increasing trend toward respecting the rule of law, through changes such as enforcement of judicial decisions, trying the former president and his entourage before courts of law, and increased promotion of freedom of expression. However, several serious obstacles to promoting rule of law remain after the Revolution: the current constitutional mess, the state of emergency, and the military trials for civilians. Ultimately, this Article seeks to provide a roadmap to establishing full rule of law in Egypt, recommending the*

*drafting of a new constitution that represents all political currents and elements of the society, lifting the state of emergency, eliminating military trials for civilians, and retrying convicted people before their natural judges.*

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## INTRODUCTION

On January 25, 2011, Egyptians decided to end the rule of “the last pharaoh,” referring to the former president Muhammad Hosni Mubarak.<sup>1</sup> Millions of people peacefully took to the streets chanting, “Change! Freedom! Social justice!” and “People want to overthrow the regime!”<sup>2</sup> Overcoming all obstacles, Egyptians achieved what was considered impossible a few days before the Revolution.<sup>3</sup> By doing so, the peaceful

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<sup>1</sup> MU AMMAD AL-BĀZ, AL-FĪR AWN AL-AKHĪR: MUBĀRAK - MILAFFĀT AL-THAWRAH WA-AL-FASĀD WA-AL-SUQŪT [THE LAST PHARAOH: MUBARAK – FILES OF THE REVOLUTION, THE CORRUPTION, AND THE DOWNFALL] (2011). Muhammad Hosni Mubarak was born in 1928. He graduated from the Air Force Academy in 1950. After graduation, he joined the Egyptian Air Force. Following the 1967 Egyptian-Israeli War, when the Israel defeated the Egyptian Air Force, Mubarak served as the Chief of Staff of the Air Force. He proceeded to rebuild the Egyptian Air Force and played a key role in the 1973 Egyptian-Israeli War, after which the Sinai Peninsula was restored to Egypt. In 1975, President Sadat appointed Mubarak as Vice President. He served as the Vice President until the assassination of President Sadat in October 1981. After the assassination, he was elected President of the Republic on October 14, 1981. He served as president for six successive terms before the revolutionaries forced him out of office on February 11, 2011. At the time of this writing, Mubarak is being tried for corruption and conspiracy in the killing of unarmed protesters who challenged his rule during the eighteen days of the revolution. For more information on Mubarak, *see generally* Charles Robert Davidson, *Reform and Repression in Mubarak's Egypt*, 24 FLETCHER F. WORLD AFF. 75 (2000).

<sup>2</sup> *See, e.g.*, Nagla Rizk, *Bread, Freedom and Social Justice*, BALKINIZATION, Dec. 9, 2011, available at 2011 WLNR 25464883; Amr Hamzawy, *The Day of Anger – A New Protest Scene in Egypt*, CARNEGIE MIDDLE EAST CENTER (Jan. 28, 2011), <http://carnegie-mec.org/publications/?fa=42391>; *Voices of the Revolution*, #3, TAHRIR DOCUMENTS (Mar. 30, 2011, 8:18 PM), <http://www.tahrirdocuments.org/2011/03/voice-of-the-revolution-the-revolution-is-still-ongoing>.

<sup>3</sup> STEVEN A. COOK, *THE STRUGGLE FOR EGYPT: FROM NASSER TO TAHRIR SQUARE* 295 (2011).

protesters proved “the lie to the idea that justice is best gained through violence.”<sup>4</sup>

The 2011 Egyptian Revolution highlights the role of the rule of law in people’s lives. The rule of law in a given country reflects the degree to which the principles and values usually embodied in that state’s constitution are applied on the ground. When the people are dissatisfied as a result of poor rule of law, this dissatisfaction implies that the legal community failed to meet the people’s expectations. Consequently, the legal community must bear the responsibility of promoting and ensuring the implementation of rule of law. To create a better rule of law environment in the future, the legal community must learn from its past mistakes. To that end, this Article adopts an analytical methodology to understand the deficiencies of rule of law in Egypt before and after the Revolution with reference to the efforts to promote rule of law in post-revolution Egypt.

This Article demonstrates that the *partial* absence of rule of law was a main reason for the Egyptian revolution. The previous regime ignored the rule of law, especially in the six months prior to the Revolution. Part I identifies the two prevailing interpretations of the rule of law doctrine and describes the events of the Revolution which involved serious legal issues. Part II describes the status of rule of law in the period before the Revolution, recognizing the sharp decline in rule of law in the six months prior to the Revolution. Part III illustrates how rule of law has evolved in the short period following the Revolution. It identifies the trend toward creating a better rule of law but also recognizes the existing deficiencies that the new government must overcome. Accordingly, it provides recommendations to promote the rule of law. Finally, this Article concludes that Egyptians revolted to attain better rule of law and provides a roadmap to establish full rule of law in post-revolution Egypt.

## I. BACKGROUND

To examine how rule of law in Egypt was deficient before and during the Revolution, it is necessary to first establish some conceptual and factual framework for analysis. This part identifies the two prevailing interpretations of the rule of law doctrine. It also describes the events of the Egyptian Revolution that included important legal issues such as the use of excessive force (including live bullets against peaceful protesters), the nationwide internet and telephone service blackout, and the handover of presidential power in contravention of the Constitution.

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<sup>4</sup> Press Release, The White House, Remarks by the President on Egypt (Feb. 11, 2011) available at <http://www.whitehouse.gov/the-press-office/2011/02/11/remarks-president-egypt> [hereinafter *President Obama on Egypt’s Revolution*].

A. *Defining and Interpreting the Rule of Law*

Although not an exhaustive analysis of all aspects of rule of law analysis, this section aims to identify the major interpretive approaches to the doctrine of the rule of law. 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.<sup>5</sup> Generally, there are two main schools of thought: the instrumental interpretation school and the substantive interpretation school.<sup>6</sup>

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.”<sup>7</sup> The actual content of the rules is less important than the actual existence of the rules themselves. Rule of law in this context is about the “formal and structural components, rather than the substantive content of the laws.”<sup>8</sup> Such rules need to be public, understandable, non-contradictory, and non-retroactive.<sup>9</sup> Accordingly, such rules are not necessarily fair or democratic.<sup>10</sup> Therefore, a legal system that does not recognize the most basic human rights can still claim to be governed by rule of law.<sup>11</sup>

The substantive interpretation approach also requires the existence of a set of rules that are followed. However, under the substantive approach, such

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<sup>5</sup> See LUC B. TREMBLAY, *THE RULE OF LAW, JUSTICE, AND INTERPRETATION* 29 (1997) (“It is stating the obvious to say that the rule of law is a contested concept within legal and political theory.”); see also BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 3 (2004) (“Some believe that the rule of law includes protection of individual rights. Some believe that democracy is part of the rule of law. Some believe that the rule of law is purely formal in nature requiring only that laws be set out in advance in general, clear terms, and be applied equally to all. Others assert that the rule of law encompasses the social, economic, educational, and cultural conditions under which man’s legitimate aspirations and dignity may be realized...There are almost as many conceptions of the rule of law as there are people defining it.”).

<sup>6</sup> Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 783 (1989). It is common to call the instrumental approach minimal, thin, or formal. By contrast, it is common to call the substantive approach maximal or thick.

<sup>7</sup> *Id.* at 786.

<sup>8</sup> JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, *CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS* 70 (2007).

<sup>9</sup> LON L. FULLER, *THE MORALITY OF LAW* 39 (1969).

<sup>10</sup> See *id.*; JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 214 (2d ed. 2009) (arguing that rule of law “says nothing about how the law is to be made: by tyrants, democratic majorities, or any other way. It says nothing about fundamental rights, about equality, or justice.”).

<sup>11</sup> See Raz, *supra* note 10, at 211.

rules must have essential goals that represent the desired end-state of the society.<sup>12</sup> The goals under this view are “making the state abide by law, ensuring equality before the law, supplying law and order, providing efficient and impartial justice, and upholding human rights.”<sup>13</sup> Consequently, a legal system that does not respect basic human rights, such as freedom of speech, cannot claim to be governed by rule of law. Notably, the United Nations adopted a substantive approach in its rule of law definition:

*Rule of law* refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.<sup>14</sup>

The United Nations’ adoption of the substantive interpretation approach signifies an international agreement that substantive interpretation is superior to instrumental interpretation. Accordingly, this Article adopts the substantive interpretation of rule of law.

While instrumental interpretation is more definite, it oversimplifies the goals of the rule of law. Instrumental interpretation renders the doctrine effectively useless if the rules are corrupt and only serve the interests of rulers and their entourages. Rule of law should not be regarded as simply following such laws. Rather, it should be regarded as following the set of rules that promotes justice in society.<sup>15</sup>

Admittedly, justice is a relative concept — what seems just for one person may not be just for another.<sup>16</sup> However, consensus exists on core issues like basic human rights guarantees that constitutions usually protect. A regime that does not respect human rights cannot be considered to be governed by rule of law, because laws that oppose human rights should not

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<sup>12</sup> See Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 34-35 (Thomas Carothers ed., 2006).

<sup>13</sup> *Id.*

<sup>14</sup> U.N. Secretary General, *Report of the Secretary-General in the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004).

<sup>15</sup> See David M. Rabban, *Free Speech in Progressive Social Thought*, 74 *TEX. L. REV.* 951, 962 (1996) (stating that “the law should promote justice by balancing competing social interests”).

<sup>16</sup> See Karen L. Newman, *The Just Organization: Creating and Maintaining Justice in Work Environments*, 50 *WASH. & LEE L. REV.* 1489, 1490 (1993).

be promulgated in the first place.<sup>17</sup> As one commentator on rule of law stated, “a substantive moral value of dignity underlies the rule of law.”<sup>18</sup> Thus, the substantive approach of interpreting the rule of law doctrine is more consistent with commonly shared international values in modern civilization.

### *B. Scenes from the Egyptian Revolution*

This Section describes the exceptional uprising in Egypt in January and February of 2011 in three parts, each describing a different stage of the events. The first stage shows the peaceful demonstrations with use of arguably excessive force against protesters. The second stage shows an absolute use of excessive force and the commission of crimes, mainly against protesters. Finally, the third stage reviews the events that took place while the regime gasped its last breath.

#### 1. Stage 1: January 25 – January 27

In mid-January 2011, a group of Egyptian youths proposed to organize a protest on the National Police Day holiday in Egypt, January 25.<sup>19</sup> The preparation for the protest took place virtually through social media platforms, including Facebook, Twitter, and YouTube.<sup>20</sup> The protest

<sup>17</sup> For example, a racially discriminatory labor law may be described as a law in that it is, on its face, a statute, but such a system is not governed by rule of law.

<sup>18</sup> Corey Brettschneider, *A Substantive Conception of the Rule of Law: Nonarbitrary Treatment and the Limits of Procedure*, in *GETTING TO THE RULE OF LAW* 54 (James E. Fleming ed., 2011).

<sup>19</sup> Rose Marie Berger, *Nothing Spontaneous about It: The Story of Egypt's long Preparation for Nonviolent Revolution*, *SOJOURNERS MAG.*, MAY 1, 2011, at 20, available at <http://www.sojo.net/magazine/2011/05/nothing-spontaneous-about-it>). The National Police Day holiday in Egypt is a day to honor the 1952 rebellion by Egyptian police forces against the British Army. On January 25, 1952, the British Army surrounded Ismaïlia Police Station and ordered police forces to hand over weapons and evacuate the police station. Police officers refused the British Army orders and a one-sided battle ensued, leading to the martyrdom of fifty police officers. See Noha El-Hennawy, *The Making of a Police State: From the Battle of Ismailiya to Khaled Saeed*, *EGYPT INDEPENDENT* (Jan. 27, 2011, 7:05 PM), <http://www.almasryalyoum.com/en/node/306989>.

<sup>20</sup> See Amir Hatem Ali, *The Power of Social Media in Developing Nations: New Tools for Closing the Global Digital Divide and Beyond*, 24 *HARV. HUM. RTS. J.* 185, 185-86 (2011); see also Liz Sly, *Arab World Ripe for a Wave of Uprisings*, *ST. PAUL PIONEER PRESS*, Jan. 31, 2011, at A1, available at 2011 WLNR 2135330; Sonia Verma, *How Egypt got here: A brutal beating and a penchant for Facebook has protesters eager to brave the streets*, *GLOBE & MAIL*, Jan. 27, 2011, at A10, available at <http://www.theglobeandmail.com/news/world/africa-mideast/how-a-brutal-beating-and-facebook-led-to-egyptian-protests/article1884156/>. (“An estimated 3.4 million Egyptians use

invitation targeted ordinary people unaffiliated with political parties.<sup>21</sup> The protest plans were simple — gather at noon in the neighborhoods surrounding Tahrir Square, and move in groups toward Tahrir Square, which is the heart of the Egyptian capital, Cairo.<sup>22</sup> By doing so, the police would be unable to block protesters coming from different directions.<sup>23</sup>

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the social networking site, the vast majority under the age of 25. Egypt is the No. 1 user of Facebook in the Arab world, and No. 23 globally. It is the third most-visited website in the country, after Google and Yahoo”). A group of young political activists created videos explaining why to protest and posted it on YouTube. After which, they shared these videos via Facebook and Twitter. These videos spread like wildfire through the sharing buttons and the result was that hundreds of thousands, and may be millions, of people watched them and believed that it was the right moment to revolt. *See, e.g.,* Video: Asmaa Mahfouz, *Ana Nazla Yawm 25 ‘Ashan Karamty ka-Mi rīyah [I will Protest on the 25<sup>th</sup> to Save my Dignity as an Egyptian]* FACEBOOK (Jan. 18, 2011), <http://www.facebook.com/video/video.php?v=10150365540400230> (this video was released one week before the revolution).

<sup>21</sup> Kareem Fahim & Mona El-Naggar, *Violent Clashes Mark Protests against Mubarak’s Rule*, N.Y. TIMES, Jan. 26, 2011, at A1, available at [http://www.nytimes.com/2011/01/26/world/middleeast/26egypt.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2011/01/26/world/middleeast/26egypt.html?_r=1&pagewanted=all) (stating that “many people said they did not belong to any particular group and were attending their first demonstration”). While a few opposition political parties announced their intention to participate, most political parties, which Egyptians call “cartoonic” parties, refused the invitation to participate in the protest. Even the most organized opposition group, the Muslim Brotherhood, rejected the invitation to participate, fearing the consequences of participating in a protest against the regime. The Muslim Brotherhood announced that any person who belonged to the Brotherhood and participated in the protest would be acting in his own capacity and did not represent the official position of the brotherhood, which neither supported nor opposed the protest. *See* Michael Slackman, *In Mideast Activism, New Tilt Away From Ideology*, N.Y. TIMES, Jan. 23, 2011, at A10, available at <http://www.nytimes.com/2011/01/23/world/middleeast/23egypt.html?pagewanted=all>. The Egyptian Coptic Orthodox Church called Christians not to participate in the protest. *Church Calls on Copts to Boycott Day of Rage*, IKHANWEB (Jan. 23, 2011) available at <http://www.ikhwanweb.com/article.php?id=27902>.

<sup>22</sup> *See* Berger, *supra* note 19. Tahrir Square is a gateway to the city center of Cairo and is surrounded by some of the most important buildings in Cairo, including the Egyptian Museum, the Arab League Headquarters, the American University in Cairo, the colossal Mogamma administrative building, the old building which used to house the Foreign Ministry, Nile Hilton Hotel, Omar Makram Mosque, Omar Makram Garage, and the Sadat Underground Metro Station. Tahrir Square assumed its current shape in “the latter part of the 19th Century when Ali Pasha Mubarak was charged with remodeling Cairo after Paris at the behest of ruler Ismail Pasha. The Square (“Midan”) was known as Midan Ismailiya until the 1952 revolution and overthrow of the monarchy. It was renamed Midan Tahrir — Liberation Square — under President Gamal Abdul Nasser, who redeveloped it again, tearing down hated barracks which had once housed occupying British troops, and ‘liberating’ the square and the city from its past.” Embassy of the Arab Republic of Egypt in Washington, DC, *Tahrir Square*, <http://www.egyptembassy.net/tahrir.html> (last visited Jan. 23, 2012).

<sup>23</sup> In other governorates, the plan was to reach the main public squares in groups as well to avoid very expected harassments by police forces that are usually accompanied by thugs.

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Frustrated and inspired by the recent Tunisian Revolution that ousted the Tunisian president a few days before the scheduled Tahrir Square protest, tens of thousands of citizens took to the streets in a scene never before witnessed in modern Egyptian history.<sup>24</sup> Police forces attempted to disperse demonstrators using water cannons and randomly detaining hundreds of protesters.<sup>25</sup> Despite the police harassment of the police forces, the peaceful protesters' massive numbers enabled them to reach Tahrir Square safely.

The idea to stage a sit-in at Tahrir Square emerged when some protesters announced they would not leave until their demands were met.<sup>26</sup> At midnight, riot police decided to end the sit-in at any cost.<sup>27</sup> Riot police resorted to the excessive use of tear gas bombs and non-lethal weapons and were able to disperse protesters.<sup>28</sup> Hundreds of protesters were wounded and hundreds more were arrested. The day was over but the protests were not.

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<sup>24</sup> On December 17, 2010, a Tunisian young man who worked as a street vendor set himself on fire. Allegedly, a police officer who confiscated his unlicensed cart slapped him on his face. The incident ignited a wave of protests across Tunisia until the president stepped down on January 14, 2011. As one commentator noted, "[r]evolutions are explosions of frustration and rage that build over time, sometimes over decades. Although their political roots are deep, it is often a single spark that ignites them — an assassination, perhaps, or one selfless act of defiance." Marc Fisher, *In Tunisia, Act of One Fruit Vendor Unleashes Wave of Revolution through Arab World*, WASH. POST (Mar. 26, 2011), available at [http://www.washingtonpost.com/world/in-tunisia-act-of-one-fruit-vendor-sparks-wave-of-revolution-through-arab-world/2011/03/16/AFjfsueB\\_story.html](http://www.washingtonpost.com/world/in-tunisia-act-of-one-fruit-vendor-sparks-wave-of-revolution-through-arab-world/2011/03/16/AFjfsueB_story.html); see also Fahim & El-Naggar, *supra* note 21.

<sup>25</sup> *Timeline: Egypt's Revolution: A Chronicle of the Revolution that Ended the Three-Decade-Long Presidency of Hosni Mubarak*, ALJAZEERA (Feb. 14, 2011, 3:54 PM) <http://www.aljazeera.com/news/middleeast/2011/01/201112515334871490.html> [hereinafter *Revolution's Timeline*]; Amir Ahmed, *Thousands protest in Egypt*, CNN WORLD, Jan. 25, 2011, [http://articles.cnn.com/2011-01-25/world/egypt.protests\\_1\\_street-protests-thousands-protest-economic-policies?\\_s=PM:WORLD](http://articles.cnn.com/2011-01-25/world/egypt.protests_1_street-protests-thousands-protest-economic-policies?_s=PM:WORLD).

<sup>26</sup> Fahim & El-Naggar, *supra* note 21, at 4 (citing Mustapha Kamel al-Sayyid, a political science professor at the American University in Cairo). At this point, the demands of protesters were: (1) enforcing the judicial decision requiring the government to fix a minimum wage and paying subsidies for unemployed individuals, (2) lifting the state of emergency, (3) dismissing the Minister of Interior, (4) releasing all political detainees who were being arrested under the Emergency Law, (5) dissolving the parliament due to the evident rigging in the last parliamentary elections, and (6) removing the restrictions that Mubarak placed on running for presidency and creating a two-term limit for the presidency. *Over 37,500 Egyptians to Take Part on January 25th Uprising*, IKHWANWEB (Jan. 19, 2011), <http://www.ikhwanweb.com/article.php?id=27870>.

<sup>27</sup> Fahim & El-Naggar, *supra* note 21, at 3.

<sup>28</sup> *Id.*

The excessive force of riot police did not deter protesters who gathered again the next day with larger numbers.<sup>29</sup> For protesters, the protest became about regime-change.<sup>30</sup> However, for the regime, it was about “the transition from the old guards to new cadres” of the same regime.<sup>31</sup> Fights between riot police and protesters were common in the subsequent days and protestors called for a one million man march on Friday, January 28.<sup>32</sup>

## 2. Stage 2: January 28 – February 2

In the very early hours of January 28th, the regime decided to shut off the access to internet and most telephone services across the country.<sup>33</sup> However, this blackout did not prevent Egyptians from organizing the mass protest. In Egypt, Friday is the weekend and the Friday prayer that takes place around noon is sacred to Muslims, who represent approximately ninety percent of the population.<sup>34</sup> By virtue of the Friday prayer, protesters were already gathered and ready to continue their demonstrations.

More than a million people protested across the country. Riot police desperately continue to use excessive force to disperse protesters. The means

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<sup>29</sup> *Anti-Government Protests Continue to Rock Egypt*, VOICE OF AMERICA NEWS, Jan. 26, 2011, available at 2011 WLNR 1713924.

<sup>30</sup> M. Cherif Bassiouni, *The Fight for Democracy in Egypt's Liberation Square: Background Paper*, CHI. COUNCIL ON GLOBAL AFF., 1 (Feb. 10, 2011), available at [http://www.thechicagocouncil.org/UserFiles/File/Events/FY%2011%20Events/02\\_February\\_11/EgyptBackgroundPaper110207.pdf](http://www.thechicagocouncil.org/UserFiles/File/Events/FY%2011%20Events/02_February_11/EgyptBackgroundPaper110207.pdf) (last visited Jan. 23, 2012).

<sup>31</sup> *Id.*

<sup>32</sup> Importantly, the Muslim Brotherhood realized that there was no turning point and announced that they would officially participate in the Friday protests. Souad Mekhennet & Nicholas Kulish, *With Muslim Brotherhood Set to Join Egypt Protests, Religion's Role May Grow*, N.Y. TIMES, Jan. 28, 2011, at A10, available at 2011 WLNR 1742910. Similarly, more Christians disobeyed the Church calls to stop protesting. Benjamin Mann, *High stakes and hopes for Egypt's Christians in historic protests*, CATHOLIC NEWS AGENCY, Jan. 29, 2011, available at <http://www.catholicnewsagency.com/news/high-stakes-and-hopes-for-egypts-christians-in-historic-protests/>.

<sup>33</sup> Alexandra Dunn, *The Arab Spring: Revolution and Shifting Geopolitics: Unplugging a Nation: State Media Strategy during Egypt's January 25 Uprising*, 35 FLETCHER F. WORLD AFF. 15, 15-16 (2011); see also Karson K. Thompson, *Not Like an Egyptian: Cybersecurity and the Internet Kill Switch Debate*, 90 TEX. L. REV. 465, 465 (2011).

<sup>34</sup> Bureau of Democracy, Human Rights, and Labor, U.S. Dept. of State, *Egypt: International Religious Freedom Report*, Sept. 13, 2011, at 2, available at <http://www.state.gov/documents/organization/171733.pdf> (last visited Jan. 10, 2012) (noting that almost ninety percent of the populations “are Sunni Muslims. Shia Muslims constitute significantly less than 1 percent of the population. Estimates of the percentage of Christians range from 8 to 12 percent (6 to 10 million) the majority belonging to the Coptic Orthodox Church. The country's Jewish community numbers approximately 125 persons.”).

of excessive force escalated to include live bullets killing an unknown number of protesters.<sup>35</sup> Clashes between protesters and riot police lasted for several hours until the powerful Egyptian police forces were overcome.<sup>36</sup> Some policemen escaped at home, while others rushed to protect police stations that were under attack by angry protesters and subversives. For the first time in the modern Egyptian history, policemen disappeared from the streets and even from police stations after failures to defend them.<sup>37</sup>

Upon President Mubarak's orders, the Army Forces took to the streets to protect public properties under attack.<sup>38</sup> The intervention of the Army Forces alleviated the absolute chaos resulting from the complete disappearance of police forces. In his first speech commenting on the events, the president responded by firing the cabinet, but this gesture far from satisfied the people's expectations.<sup>39</sup> Adding insult to injury, he posited a conspiracy theory which suggested that protesters were subversives with their own agenda.<sup>40</sup>

On the next day, January 29, the president who had ruled Egypt single-handedly since 1981 appointed a vice president for the first time.<sup>41</sup> The people had demanded a vice president for many years. The chosen vice president was Omar Suleiman, the head of the Egyptian Intelligence Agency at the time.<sup>42</sup> However, this appointment was still not enough for those who had suffered life-threatening injuries or those who lost family members or

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<sup>35</sup> David D. Kirkpatrick, *Mubarak Orders Crackdown, With Revolt Sweeping Egypt*, N.Y. TIMES, Jan. 29, 2011, at A1, available at 2011 WLNR 1820575.

<sup>36</sup> Edmund Blair, *Machetes, Gunshots Transform Leafy Cairo Suburb*, REUTERS (Jan. 30, 2011), <http://www.reuters.com/article/2011/01/30/us-egypt-night-idUSTRE70T3I820110130> (“[A]fter a day spent trying to quash the protests that erupted all over the country, the police suddenly had withdrawn entirely from the streets.”).

<sup>37</sup> Kristen Chick, *Cairo protesters: 'We're staying here until Mubarak leaves'*, CHRISTIAN SCIENCE MONITOR, Jan. 30, 2011, available at 2011 WLNR 1857705.

<sup>38</sup> Neil MacFarquhar, *Egypt's Respected Military is Seen as Pivotal in What Happens Next*, N.Y. TIMES, Jan. 29, 2011, at A13, available at 2011 WLNR 1820735.

<sup>39</sup> Yasmine Saleh & Dina Zayed, *Highlights: Egyptian President Hosni Mubarak's speech*, REUTERS (Jan. 29, 2011, 5:13 AM), <http://www.reuters.com/article/2011/01/29/us-egypt-mubarak-speech-idUSTRE70S0SA20110129> (citing President Mubarak's speech stating that “I have asked the government to present its resignation today (Friday) and I will name a new government starting from tomorrow.”).

<sup>40</sup> *Id.* (citing President Mubarak's speech stating that “those protests turned into riots that threaten the system and obstruct the daily life of citizens ... What happened throughout these protests extends beyond looting, chaos and fire to a larger scheme aimed at shaking stability and an attack on legitimacy.”).

<sup>41</sup> *Revolution's Timeline*, *supra* note 25.

<sup>42</sup> Chick, *supra* note 37.

friends, and they continued to insist on overthrowing the regime.<sup>43</sup> For them, reform could not happen without first removing the dictator who had ruled the country for three decades with an iron fist, and the protests continued.<sup>44</sup>

On February 1, Mubarak made a dramatic public speech in an attempt to gain sympathy.<sup>45</sup> He emphasized his history as a military leader who played a key role in the 1973 Egyptian-Israeli War.<sup>46</sup> He announced he did not intend to seek reelection in the next election scheduled later that year.<sup>47</sup> Mubarak also emphasized that the protesters were violent and led by political actors that wanted to attack the legitimacy of the regime.<sup>48</sup> While the speech garnered him some sympathy, this sympathy quickly eroded when the protesters were attacked again shortly thereafter.

On February 2, members of the National Democratic Party (NDP) and some citizens who were worried about the future organized a counter-protest to support the president.<sup>49</sup> This counter-protest aimed to demonstrate that those in Tahrir Square did not represent the national opinion.<sup>50</sup> Around noon, cameras spotted Republican Guard forces<sup>51</sup> surrounding hundreds of thugs

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<sup>43</sup> Marwa Awad & Dina Zayed, *Mubarak Shuffles Cabinet but Protesters Say "Go!"*, REUTERS (Jan. 31, 2011), <http://af.reuters.com/article/topNews/idAFJQE70U00D20110131>.

<sup>44</sup> *Id.*

<sup>45</sup> See Samia Nakhoul & Andrew Hammond, *Text-President Mubarak's Speech after Mass Protest* (Feb. 1, 2011), <http://af.reuters.com/article/egyptNews/idAFLDE7102JP20110201> ("I have never, ever been seeking power and the people know the difficult circumstances that I shouldered my responsibility and what I offered this country in war and peace, just as I am a man from the armed forces and it is not in my nature to betray the trust or give up my responsibilities and duties. ... Hosni Mubarak who speaks to you today is proud of the long years he spent in the service of Egypt and its people. This dear nation is my country, it is the country of all Egyptians, here I have lived and fought for its sake and I defended its land, its sovereignty and interests and on this land I will die and history will judge me and others for our merits and faults.").

<sup>46</sup> *See id.*

<sup>47</sup> *See id.*

<sup>48</sup> *See id.* ("Those protests were transformed from a noble and civilized phenomenon of practicing freedom of expression to unfortunate clashes, mobilized and controlled by political forces that wanted to escalate and worsen the situation. They targeted the nation's security and stability through acts of provocation theft and looting and setting fires and blocking roads and attacking vital installations and public and private properties and storming some diplomatic missions.").

<sup>49</sup> See Tamer El-Maghraby, *Egyptians Wanting to Vent Their Anger*, ONISLAM (Feb. 2, 2011), available at <http://www.onislam.net/english/politics/middle-east/450846-egyptians-wanting-to-vent-their-anger.html>.

<sup>50</sup> *See also id.*

<sup>51</sup> The Republican Guard is a military unit whose main role is to protect the president and the most important sites in the capital in the event of war or attempted coup. See, e.g., Galal Nassar, *The army's revolutionary mission*, AL-AHRAM (Feb. 23, 2011),

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carrying bladed weapons marching towards Tahrir Square.<sup>52</sup> Apparently, the thugs were not affiliated with the peaceful counter-protest and their motivations were unclear, but their mission was obvious — to remove the protestors from Tahrir Square.<sup>53</sup> The unarmed protesters in were shocked when they saw the thugs approaching them, yet the Army Forces surrounding Tahrir Square did nothing.<sup>54</sup> Many protesters were murdered, and many others were badly injured.<sup>55</sup> The attack on protesters sounded the death knell for Mubarak's rule.

### 3. Stage 3: February 3 – February 11

On February 3, the Army Forces reversed its initial position of inaction regarding the clashes between the pro-Mubarak thugs and the protesters.<sup>56</sup> The Army Forces began arresting many of the violent thugs for nearly forty-eight successive hours. This move encouraged more people to join those in Tahrir Square in the following days. However, public transportation to Cairo was suspended and highways were blocked to prevent more protesters from reaching Tahrir Square.<sup>57</sup>

On February 9, the Supreme Council of the Armed Forces (*al-Majlis al-A'la lil-Quwwat al-Musallaha*) (SCAF) held a meeting without Mubarak who, as president, was also the Commander-in-Chief.<sup>58</sup> The SCAF issued a communiqué supporting “the legitimate demands of the people.”<sup>59</sup> The

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<http://weekly.ahram.org.eg/2011/1035/eg0201.htm> (“The mission of the Republican Guard is not only to protect the president but also to protect the republican system, which entails protecting such institutions and edifices as the presidential palaces, command centres, presidential airports, as well as state edifices such as the People's Assembly, the Shura Council Building, the Constitutional Court and the State Council building.”).

<sup>52</sup> Video: *Forces of the Republican Guard Facilitated Attacking Protesters in Tahrir Square*, YOUTUBE (Jan. 24, 2012), <http://www.youtube.com/watch?v=VGOriYh8pxw>.

<sup>53</sup> Ironically, the state television announced, “You have to evacuate Tahrir Square immediately. We've got confirmed information that violent groups are heading toward Tahrir Square carrying firebombs and seeking to burn the Square.” *Live Blog Feb 2 - Egypt Protests*, AL JAZEERA BLOG, (Feb. 1, 2011, 9:31 PM) <http://blogs.aljazeera.net/middle-east/2011/02/01/live-blog-feb-2-egypt-protests>.

<sup>54</sup> See *Revolution's Timeline*, *supra* note 25 (“Pro-democracy protesters say the military allowed thousands of pro-Mubarak supporters, armed with sticks and knives, to enter the square.”).

<sup>55</sup> *Id.*

<sup>56</sup> Cook, *supra* note 3, at 288.

<sup>57</sup> See Anthony Shadid, *Obama Urges Faster Shift of Power in Egypt*, N.Y. TIMES, Feb. 2, 2011, at A1, available at 2011 WLNR 2055270.

<sup>58</sup> See Chris McGreal & Alexandra Topping, *Mubarak resignation rumours grow*, THE GUARDIAN, Feb. 10, 2011, available at 2011 WLNR 2655468.

<sup>59</sup> *Id.*

communiqué stated that the SCAF would remain in a permanent session to determine “what measures and arrangements could be made to safeguard the nation, its achievements and the ambitions of its great people.”<sup>60</sup> The announcement signaled that a military coup could occur, if Mubarak did not resign voluntarily.<sup>61</sup>

On February 10, Mubarak made his third and final speech. He delegated his presidential powers to Vice President Suleiman.<sup>62</sup> However, the phrasing of his speech revealed that he intended to remain as the *de facto* ruler.<sup>63</sup> Mubarak also emphasized that those who called for his immediate resignation had their own foreign agenda.<sup>64</sup> Protesters rejected the speech and announced that the protests would continue until Mubarak stepped down completely.<sup>65</sup>

On the last day, February 11, the SCAF issued its second communiqué backing Mubarak and calling for protesters to return home.<sup>66</sup> The communiqué declared that the military guaranteed Mubarak’s promises of lifting the state of emergency, amending the Constitution to remove restrictions on running for presidency, and holding free and fair elections.<sup>67</sup> However, the people believed in the proverb which states that “if you want to kill a snake, cut off the head,” insisting that the only way to end the corrupt regime was to cut off its head — the president. Although the SCAF apparently did not want to force Mubarak to resign, protesters continued to insist on his removal. Protesters in Cairo and Alexandria surrounded the presidential palaces while trying to avoid confrontation with the protective

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*; Hamza Hendawi & Sarah El Deeb, ‘Leave, leave!’ Egyptians Stunned When Mubarak Doesn’t Quit, CHI. DAILY HERALD, Feb. 11, 2011, at 1, available at 2011 WLNR 2941064 (“The statement was labeled ‘Communique No. 1,’ language that also suggests a military coup.”).

<sup>62</sup> Cook, *supra* note 3, at 293.

<sup>63</sup> *Id.* at 293-94; see also *Highlights-Hosni Mubarak's speech to Egyptian people*, REUTERS (Feb. 10, 2011), available at <http://af.reuters.com/article/egyptNews/idAFLDE7192MZ20110210?sp=true> (“The blood of your martyrs will not be lost and I will not be lenient in punishing those responsible for it, with the all strictness and seriousness ... I will continue to shoulder my responsibility in protecting the constitution and the interests of the people ...”).

<sup>64</sup> See *id.* (“There is no shame in hearing your voices and opinions, but I refuse any and all dictations from abroad, wherever it came from and under any justification or pretext.”).

<sup>65</sup> See Anthony Shadid & David D. Kirkpatrick, *Mubarak Refuses to Step Down, Stoking Revolt's Fury and Resolve*, N.Y. TIMES, Feb. 11, 2011, at A1, available at <http://www.nytimes.com/2011/02/11/world/middleeast/11egypt.html>.

<sup>66</sup> See Paul Owen, *Egyptian Army Backs Hosni Mubarak and Calls for Protesters to go Home*, THE GUARDIAN, Feb. 12, 2011, available at 2011 WLNR 2737486.

<sup>67</sup> *Id.*

Republican Guards.<sup>68</sup> Mubarak finally realized that the fight was over. At 6:00 p.m., Suleiman announced that Mubarak had resigned and assigned the SCAF to run the country.<sup>69</sup>

By doing so, Mubarak transferred power to the SCAF in contravention of the provisions of the Egyptian Constitution. The Constitution provided that in the absence of the President for any reason, the Head of the Lower House of the Parliament or the Head of the Supreme Constitutional Court should assume the responsibility and organize an election within sixty days.<sup>70</sup> However, it was the people's will not to follow the Constitution in this matter. They rejected assumption of control by the Head of the Lower House of the Parliament or the Head of the Supreme Constitutional Court because both entities were under Mubarak's influence. The Head of the Lower House of Parliament served in this position for two decades as a member of the NDP, the party Mubarak led. Mubarak also hand-picked the Head of the Supreme Constitutional Court. Consequently, as one revolutionary slogan in Tahrir Square made clear, "[r]evolutionary legitimacy cancels all constitutions."<sup>71</sup>

All political groups arguably participated equally during the Revolution. No single political group can claim it led the Revolution, but because the Revolution had no leadership; it was difficult to entrust any one person or political group with the presidential powers until the presidential election was held.<sup>72</sup> Thus, there was a general consensus that a military figure, rather than a political figure, should assume state responsibility during the transition period. People did not object to the SCAF's assumption of the responsibility, even though the head of the SCAF, Field Marshal Mohamed Hussein Tantawi, had previously served as Mubarak's Minister of Defense since 1991.<sup>73</sup>

<sup>68</sup> *Hosni Mubarak Resigns as President*, ALJAZEERA (Feb. 11, 2011, 4:39 PM), <http://www.aljazeera.com/news/middleeast/2011/02/201121125158705862.html>.

<sup>69</sup> Cook, *supra* note 3, at 194-295 (reprinting the Vice President's speech: "Citizens, in these difficult circumstances the country is going through, the President Mohamed Hosni Mubarak has decided to leave his position as the president of the Republic, and has entrusted the Supreme Council of the Armed Forces to administer the nation's affairs.").

<sup>70</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 84 (repealed 2011).

<sup>71</sup> KARIMA KHALIL, *MESSAGES FROM TAHRIR: SIGNS FROM EGYPT'S REVOLUTION* 41 (2011).

<sup>72</sup> Anthony Shadid, *In Crowd's Euphoria, No Clear Leadership Emerges*. N.Y. TIMES, Feb. 1, 2011, at A11, available at [http://www.nytimes.com/2011/02/01/world/middleeast/01square.html?pagewanted=2&\\_r=3](http://www.nytimes.com/2011/02/01/world/middleeast/01square.html?pagewanted=2&_r=3).

<sup>73</sup> Yolande Knell, *Egypt after Mubarak: Mohamad Hussain Tantawi Profile*, BBC NEWS (Nov. 22, 2011), <http://www.bbc.co.uk/news/world-middle-east-12441512>. Mohamed Hussein Tantawi was born on October 31, 1935 of Nubian origin. *Id.* He is well known for being loyal

At the time of this writing, over a year after the Revolution, the SCAF still controls the Egyptian government. It is unclear how the decision-making process works. While the SCAF looks like a presidential council of nineteen military generals, Tantawi appears to be the acting president, as he is the one who ratifies the laws and treaties. The presidential election was scheduled for May and June of 2012.<sup>74</sup>

The next two Parts of this article adopt an analytical methodology to study the level of rule of law before the Revolution. This analysis allows for a comparison with the level of rule of law after the Revolution, and recommendations for promoting and establishing full rule of law follow accordingly.

## II. ASPECTS OF ABSENCE OF RULE OF LAW BEFORE THE REVOLUTION

Ignoring issues related to rule of law cost the previous regime its legitimacy and pushed the people to overthrow it. Aspects of the illegitimacy included serious legislative corruption – in particular, the distortion of the Constitution in order to legalize Mubarak’s rule. Non-enforcement of judicial decisions operated systematically. Moreover, the former regime insisted on extending the application of emergency law without valid cause. Finally, the previous regime did not respect freedom of speech and pressured media to suppress certain political news. The trend of ignoring rule of law sharply increased in the last six months of the former regime.

### A. *Constitutional and Legislative Corruption*

The substantive interpretation of rule of law assumes that laws are enacted to serve the public interest. Laws enacted instead to serve the interests of the ruler attempt to legalize the rule of *man* as opposed to the rule of law. This section highlights two important examples of absence of rule of law before the Revolution. The first relates to the constitutional corruption that served Mubarak’s personal interests at the expense of rule of law and democracy. The second deals with legislative corruption which had

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to the former president Hosni Mubarak. *Id.* He joined the Egyptian Army “as an infantryman in 1956 and went on to study for a master’s degree in military science. He served in the 1956 Suez Crisis and the 1967 and 1973 Middle East wars, all against Israel. In 1991, following Iraq’s invasion of Kuwait, he was on the coalition side for the first Gulf War. He received Kuwait Liberation medals from Egypt, Kuwait and Saudi Arabia. He has served in the Egyptian government as minister of defence and military production since 1991 and became general commander for the armed forces in 1995.” *Id.* After the revolution, he became the head of the Supreme Council of the Armed Forces, which is currently the *de facto* ruler of the country.

<sup>74</sup> *Presidential Election, 2012*, PRESIDENTIAL ELECTION COMMISSION, <https://www.elections.eg/>.

an enormous impact on the steel industry and economic competition in general.

### 1. The Constitutional Amendments Scandals

According to the 1971 Constitution in place before the Revolution, the President or one-third of the Lower House of the Parliament (*Majlis al-Shaab*) could propose a constitutional amendment.<sup>75</sup> To approve such an amendment, two-thirds of the Lower House must vote in favor of the amendment.<sup>76</sup> An approved amendment would then be subject to a referendum.<sup>77</sup> Previous presidents Muhammad Anwar El Sadat and Mubarak distorted the practical application of the Constitution. The Constitution was amended three times in 1980, 2005, and 2007 to further concentrate power in the hands of the president. These successive amendments resulted in extreme instability in the country's most important legal document.

While the Constitution included safeguards to prevent attempts to transform the rule of law to the rule of man, Sadat and Mubarak managed to bypass these safeguards. Members of the NDP usually dominated the Lower House and would vote in favor of any of Sadat and Mubarak's proposals, both of whom were also the head of the NDP while serving as president. The government also systematically forged referendums to make it appear as though the people consented to the constitutional amendments or the presidential proposals.<sup>78</sup> Therefore, the office of the president wielded more power than the Constitution because, given the reality of the situation, he was able to amend it.

The 1980 amendment canceled limitations on the presidential term.<sup>79</sup> The purpose of this amendment was to secure Sadat a third presidential term, which would not be possible under the existing constitutional term limits.<sup>80</sup> Ironically, Sadat was assassinated and could not take advantage of the

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<sup>75</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 189 (repealed 2011).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Kristen A. Stilt, *Constitutional Authority and Subversion: Egypt's New Presidential Election System*, 16 *IND. INT'L & COMP. L. REV.* 335, 340 (2006).

<sup>79</sup> LISA BLAYDES, *ELECTIONS AND DISTRIBUTIVE POLITICS IN MUBARAK'S EGYPT* 196 (2010); *see also* Adham A. Hashish, *Ijtihad Institutions: The Key to Islamic Democracy Bridging and Balancing Political and Intellectual Islam*, 9 *RICH. J. GLOBAL L. & BUS.* 61, 81 n.136 (2009).

<sup>80</sup> Hashish, *supra* note 79, at 81 n. 136.

constitutional amendment he initiated.<sup>81</sup> However, he paved the road for his successor, Mubarak, to remain president for three decades.<sup>82</sup>

In 2005, under opposition pressure, President Mubarak proposed a new amendment to the Constitution.<sup>83</sup> According to the original text of the Constitution, selecting a president took place through a referendum rather than an election.<sup>84</sup> The Lower House was to nominate a presidential candidate, who must attain more than fifty percent of the popular votes in a referendum.<sup>85</sup> If the nominee failed to reach this majority, the Lower House nominated a different candidate and repeated the procedure.<sup>86</sup> Mubarak secured four consecutive terms as a president through this process until 2005, when the Constitution was again amended.<sup>87</sup>

The 2005 amendment restructured the presidential election system to allow multi-candidate elections in place of the referendum method.<sup>88</sup> The 2005 amendment was supposed to be a major step toward democratic transformation. However, Mubarak was careful to draft the amendment in such a way that essentially guaranteed the exclusion of his opponents running for the presidency.<sup>89</sup> It was evident that non-NDP members would have a very limited chance to run for president due to the severe requirements the amendment imposed.<sup>90</sup> Political parties had to obtain five percent of parliamentary seats in order to nominate a candidate.<sup>91</sup> An independent candidate needed to obtain a total of 250 signatures from both the Lower and Upper Houses of the Parliament and the Regional Parliaments.<sup>92</sup>

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<sup>81</sup> BLAYDES, *supra* note 79, at 196.

<sup>82</sup> *Id.*

<sup>83</sup> Stilt, *supra* note 78, at 344.

<sup>84</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, art. 76 (repealed 2011) (prior to any amendments).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Stilt, *supra* note 78, at 345.

<sup>88</sup> *Id.* at 335-36.

<sup>89</sup> The official result of the referendum on the constitutional amendments shows that fifty-four percent of the registered voters voted in the referendum. Eighty-three percent of the voters approved the amendment. It is certain that the percent of participation in the referendum was far below ten percent of the registered voters. For further discussion on election rigging, *see id.* (noting “allegations of fraud in the voting process”).

<sup>90</sup> *Id.* at 340.

<sup>91</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, art. 76 (repealed 2011) (prior to the 2007 amendment).

<sup>92</sup> *Id.*

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In the 2005 presidential elections, Egyptians were allegedly able to select one of several candidates.<sup>93</sup> However, the truth was that the election was effectively a sham. The NDP, with the help of the Ministry of Interior, hired armed thugs to terrorize any person who dared to vote for another candidate.<sup>94</sup> Additionally, the NDP filled in unused ballots to increase the number of votes supporting Mubarak.<sup>95</sup> The final official but fabricated results<sup>96</sup> showed that Mubarak secured 88.6% of the votes.<sup>97</sup> Ayman Nour, the Al-Ghad Party candidate, secured only 7.6% of the votes.<sup>98</sup> Rumors suggested that Nour did quite well in the election and secured a ratio that might have actually reached 30%.<sup>99</sup> Shortly after the elections, Nour was jailed upon allegations that he forged documents used to establish the Al-Ghad Party.<sup>100</sup>

The 2005 election was held under the complete local supervision of the judiciary.<sup>101</sup> Judges played a key role in exposing the NDP and Ministry of

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<sup>93</sup> Hany Besada, *Egypt's Constitutional Test: Averting the March Toward Islamic Fundamentalism* 1 (Ctr. for Int'l Governance Innovation, Working Paper No. 28, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1019087](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1019087) (last visited Jan. 10, 2012). In the parliamentary elections held in the same year, the Muslim Brotherhood secured eighty-eight seats in the parliament. Amr Hamzawy & Marina Ottaway, *When Islamists Go into Politics*, 33 FLETCHER F. WORLD AFF. 37, 41 (2009). This was the first time any opposition group or party was able to secure this number of seats in the parliament. People who voted for the Muslim Brotherhood did not necessarily support the Brotherhood. Some people voted for the Muslim Brotherhood because it constituted the most organized and faithful opposition to the regime, compared to the corrupt liberal political parties that represented "cartoonic" opposition. *See id.*

<sup>94</sup> ALAA AL ASWANY, ON THE STATE OF EGYPT 39 (Jonathan Wright trans., 2011). Thugs were found everywhere outside the voting stations terrorizing people who might have voted for a non-NDP candidate. Men who had beards or women wearing niqab would be attacked because it was assumed that they would likely vote for the Muslim Brotherhood. A group of voters who held pictures for an opposition figure would be attacked because they would certainly vote for a non-NDP candidate. *See, e.g., Assaulting voters during Egypt's 2005 parliamentary election*, YOUTUBE (Jan. 24, 2012), <http://www.youtube.com/watch?v=wKWR8f3CnRQ>.

<sup>95</sup> *See* ASWANY, *supra* note 94, at 39.

<sup>96</sup> *Id.*

<sup>97</sup> Thanassis Cambanis, *Egypt's Mubarak is Reelected President*, BOSTON GLOBE, Sept. 10, 2005, at A7, available at 2005 WLNR 14318772.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Malcolm Brabant, *Jailed Nour Tests Egypt's Democracy*, BBC NEWS (Mar. 8, 2005), <http://news.bbc.co.uk/2/hi/4328353.stm>.

<sup>101</sup> According to article 88 of the abrogated 1971 Constitution, elections were to be held under the supervision of the judiciary. The former regime applied an incomplete judicial supervision by allowing judges to supervise the primary elections stations, while forging the results in the branches of the elections stations. In 2000, the Supreme Constitutional Court

Interior's violations. Despite their efforts, the corrupt committee in charge of generally supervising the elections announced results that were in reality fabricated.<sup>102</sup> The election's events sent a clear message to Mubarak that Egyptians were fed up with his corrupt regime. To secure his position as president, Mubarak had to choose between establishing a substantial reform plan or to creating a major setback for democratic change in Egypt.

In 2007, Mubarak made the easier choice by proposing new constitutional amendments that ended democratic change in Egypt. The amendments targeted thirty-four out of 211 articles in the Constitution.<sup>103</sup> Importantly, the amendments abolished judicial supervision of elections in an effort to rid the process of the judges who exposed the fraud of the regime in 2005. Moreover, the amendments granted the president the discretionary power to fire the parliament "when necessary" without first holding a referendum.<sup>104</sup> Furthermore, the amendments stated that while investigating a terrorism case, the authorities were not required to comply with any constitutional rights related to the detention of the accused.<sup>105</sup> This change was a step toward integrating the core of the emergency law into the Constitution before lifting the state of emergency, and a primary step for issuing a permanent anti-terrorism law that would preserve the main features of the emergency law.<sup>106</sup>

The amendments also included article 76, which became the longest and most poorly drafted article in any version of the Egyptian constitutions. As one commentator described it, article 76 is "far more like legislation than

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required the government to hold the elections under complete judicial supervision to comply with article 88 of the constitution. For further discussion on the role of the Supreme Constitutional Court in applying the complete judicial supervision, see Tamir Moustafa, *Law versus the State: The Judicialization of Politics in Egypt*, 28 LAW & SOC. INQUIRY 883, 919-24 (2003); *Judges to Oversee Elections after Court Challenge*, MIDDLE E. ECON. DIG., July 28, 2000, at 3, available at 2000 WLNR 10081541.

<sup>102</sup> The committee supervising the elections was composed of ten members: (1) Justice Mamdouh Mar'ie, (2) Justice Ahmed Aly Khalifa, (3) Justice Hamdy Mohamed Aly, (4) Justice Moqbel Shaker, (5) Justice Gamal el-Sayed Dahrug, (6) Justice Ahmed Medhat el-Maraghi, (7) Justice Fouad Gerges Salib, (8) Justice Gamal Ahmed Shouman, (9) Professor Mohamed Hassanain Abdel-All, and (10) Professor Mahmoud Mohamed Sallam. *Lajnat al-Intikhabat T'olin Fawz Mubarak bi-Ri'asat al-Jumhoriyah bi-Aghlabiyat 88.571%*. [*The Election Committee Announces Mubarak Winning of Elections by 88.571% of the Votes*], AL-AHRAM (Sept. 10, 2005), available at <http://www.ahram.org.eg/Archive/2005/9/10/FRON7.HTM>

<sup>103</sup> Sadiq Reza, *Endless Emergency: The Case of Egypt*, 10 NEW CRIM. L. R. 532, 541 (2007).

<sup>104</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, as amended, May 22, 1980, May 25, 2005, March 26, 2007, arts. 136, 204 (repealed 2011).

<sup>105</sup> *Id.* art. 179.

<sup>106</sup> See *infra* Part III.C.

an article from the Egyptian constitution.”<sup>107</sup> Although it regulated the rules of running for presidency, it created severe obstacles that prevented candidates other than the NDP candidate from running for the presidency. This amendment was widely viewed as a means of paving the way for Gamal Mubarak to succeed his father.<sup>108</sup>

These three constitutional amendments distorted the 1971 Constitution and were largely perceived as an insult to the legal profession and rule of law in Egypt. In all three instances, it was always the president who proposed the amendment and the Lower House of the Parliament which approved the proposal due to the NDP majority sustained via fraudulent parliamentary elections. These constitutional scandals thus reflected the dominant rule of man in Egypt prior to the Revolution.

## 2. The Anti-trust Law Scandal

The legislative corruption had catastrophic consequences on rule of law. The legislature enacted laws to serve the interests of the President’s allies rather than the interests of the public at large. The antitrust law amendment scandal is an example of such catastrophic consequences, as the amendment was aimed at protecting monopoly of power instead of fighting it. This result was unsurprising, given that the person who played a key role in drafting the amendment was Ahmed Ezz, the kingpin of the Egyptian steel industry. Ezz was a close friend of Gamal Mubarak and a senior NDP official.<sup>109</sup> He was a member of the parliament and controlled somewhere between 60–75% of the Egyptian steel market.<sup>110</sup> In 2007, strong allegations arose suggesting

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<sup>107</sup> Stilt, *supra* note 78, at 348.

<sup>108</sup> Besada, *supra* note 93, at 27; Eamonn Gearon, *In the Name of the Father*, MIDDLE E., Aug. 1, 2007, at 24, available at 2007 WLNR 16722167 (noting that “critics of the regime say that the constitutional amendments will actually make it easier for Gamal to succeed his father, not more difficult.”); see ALAA AL-DIN ARAFAT, *THE MUBARAK LEADERSHIP AND FUTURE OF DEMOCRACY IN EGYPT 185-202* (2009). Gamal Mubarak is the younger son of the former president. *Id.* at 188. Before joining politics, he served as an executive for Bank of America International in London. Starting his political career, he joined the NDP in 2000. In 2001, he became the head of the committee responsible for reforming the NDP. In 2002, he became the secretary-general of the policies committee, the most important committee in the NDP.

<sup>109</sup> Cynthia Johnston, *Egypt Competition Watchdog Says Steel Sector Sound*, REUTERS (Jan. 29, 2009), available at <http://www.reuters.com/article/2009/01/29/egypt-steel-idUSLT14784520090129>.

<sup>110</sup> Annelle Sheline, *Egypt Focuses on Spurring Trade, Promoting Industry in 2009*, DAILY NEWS EGYPT, Dec. 23, 2009, available at 2009 WLNR 25818531 (asserting that Ahmed Ezz controls sixty percent of the steel market); Economist Intelligence Unit, *Egypt Risk: Legal & Regulatory Risk*, THE ECONOMIST, Sept. 22, 2006, at 8, available at 2007 WLNR 27195246 (claiming that Ahmed Ezz controls seventy-five percent of the steel market).

that he was involved in monopolistic practices;<sup>111</sup> however, these accusations did not prevent him from taking the leading role in designing amendments to the antitrust law.

In 2008, the Egyptian Competition Authority (ECA) proposed amendments to Egyptian antitrust law.<sup>112</sup> The most important proposal was to increase the fine for monopolistic practices to 10–15% of the culpable company's profit.<sup>113</sup> However, Ezz objected to this proposal and instead proposed a fine ranging from E£100–300 million.<sup>114</sup> His proposal was adopted by virtue of the NDP majority in the Lower House of the Parliament, much like the constitutional amendments in 2007.<sup>115</sup> The chairman of the ECA commented that “passing the law with a fixed penalty of E£300 million will benefit companies as it is not such a big figure compared to the profits these companies make.”<sup>116</sup>

Rachid Muhammad Rachid, the Minister of Foreign Trade and Industry at the time, proposed another antitrust law amendment.<sup>117</sup> He suggested adding a leniency clause that would exonerate whistleblowers who report monopolistic practices from all charges and fines.<sup>118</sup> This clause was intended to encourage people aware of and involved in monopolistic practices to contact the authorities. Such a clause would not be favored by a person who was possibly involved in monopolistic practices. Consequently, Ezz strongly opposed Rachid's proposal.<sup>119</sup> Ezz suggested a partial exoneration clause, which corrupted the wisdom of the leniency clause.<sup>120</sup> The partial exoneration clause would not encourage whistleblowers to come forward, because they would still be punished, albeit to a lesser extent. Again, Ezz's proposal was passed due to the NDP's parliamentary majority.

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<sup>111</sup> Economist Intelligence Unit, *Egypt risk: Legal & Regulatory Risk*, THE ECONOMIST, Oct. 28, 2008, at 6, available at 2008 WLNR 13911995 (Stating that Ahmed Ezz's “company has been criticised throughout 2007 and 2008 for increasing steel prices, which rose by E£370 per tonne during February 2008”).

<sup>112</sup> Safaa Abdoun, *Major Laws Passed by the People's Assembly in 2008*, DAILY NEWS EGYPT, Dec. 23, 2008, available at 2008 WLNR 24585101. The Egyptian Competition Authority is a governmental agency established according to law no. 3 of 2005 with the purpose of promoting competition and eliminating monopolistic practices in the Egyptian market. *About the ECA*, EGYPTIAN COMPETITION AUTHORITY, <http://www.eca.org.eg/ECA/StaticContent/View.aspx?ID=1> (last visited Apr. 3, 2012).

<sup>113</sup> Abdoun, *supra* note 112.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Abdoun, *supra* note 112.

<sup>120</sup> *Id.*

Ezz's control over the parliament pushed Rachid to refrain from attending the debates about the amendments.<sup>121</sup> The antitrust law amendments further revealed the absence of rule of law, because they were specifically designed to serve the interests of a politically powerful man, rather than the greater public interest as the substantive interpretation of rule of law requires.

*B. The Dominance of the Executive Branch Over the Judiciary*

A main feature of a regime governed by rule of law is that the government, and all of its key actors, also abide by the law. One of the most important indicators for measuring rule of law is to examine to what extent the executive branch honors judicial decisions.<sup>122</sup> Unfortunately, the former regime did not honor many final judicial decisions, which angered the Egyptian people. Anger over the government's disregard for judicial decisions fueled the protests during the Revolution. This Section reviews several examples of how the Egyptian government ignored judicial decisions, reflecting the trend of decreasing rule of law prior to the revolution.

First, the government refused to obey a court order to set and enforce a national minimum wage. In *Nagy Rashad v. The President et al.*,<sup>123</sup> the plaintiff, a worker, asked the Court to require the government to set a minimum wage.<sup>124</sup> The court found that article 23 of the Egyptian Constitution required fixing a minimum and maximum limit for wages.<sup>125</sup> Similarly, article 34 of Egyptian labor law required the National Assembly

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<sup>121</sup> *Id.*

<sup>122</sup> Thomas Hammarberg, *Flawed Enforcement of Court Decisions Undermines the Trust in State Justice*, COUNCIL OF EUROPE: COMMISSIONER FOR HUMAN RIGHTS (Aug. 31, 2009), available at [http://www.coe.int/t/commissioner/Viewpoints/090831\\_en.asp](http://www.coe.int/t/commissioner/Viewpoints/090831_en.asp) (noting that “[i]t is an important principle that every judgment is enforced, including those delivered against the governmental administration. Therefore, it is particularly worrying that even political decision-makers at high levels sometimes tend to seek all kinds of pretexts to disregard judicial decisions and make public statements that convey a lack of respect for the judiciary.”).

<sup>123</sup> Case no. 21606/63/Administrative Court, (1st Circuit, Cairo) (Egypt).

<sup>124</sup> *Id.* The worker explained that he worked for a company of the public sector for more than twenty years. His basic wage is E£ 368. He had a family consisting of a wife and five children. He paid E£ 220 for monthly rent.

<sup>125</sup> *Id.* Article 23 of the 1971 Constitution reads as follows: “The national economy shall be organized in accordance with a comprehensive development plan which ensures raising the national income, fair distribution, raising the standard of living, solving the problem of unemployment, increasing work opportunities, connecting wages with production, fixing a minimum and maximum limit for wages in a manner that guarantees lessening the disparities between incomes.” CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 23 (repealed 2011).

for Wages to set a minimum wage at the national level.<sup>126</sup> Therefore, the *Rashad* court found in favor of the plaintiff and ordered the government to set a minimum wage.<sup>127</sup> The Egyptian lower and middle classes praised the decision highly. However, the former regime did not enforce the *Rashad* decision.<sup>128</sup>

Similarly, the government refused to enforce a court order to remove police forces from university campuses. In *Abdul Gelil Mustafa Al-Basiouny et al. v. Prime Minister et al.*,<sup>129</sup> university professors asked the Court to order the government to withdraw the Ministry of Interior police forces from university campuses, as their presence hindered the universities' independence.<sup>130</sup> The Court found that article 317 of the university regulatory laws required that universities establish security departments on their campuses.<sup>131</sup> These campus security departments must follow the policies of the university, not the Ministry of Interior.<sup>132</sup> Thus, the Court ordered the government to remove its police forces from university campuses and ordered universities to establish security departments on their campuses.<sup>133</sup> Again, the former regime did not enforce the Court's decision.<sup>134</sup>

Additionally, the administrative judiciary possessed exclusive jurisdiction over the disposition of electoral appeals by law.<sup>135</sup> Prior to and during the 2010 parliamentary elections, the administrative judiciary issued many decisions related to the elections. Some of these decisions required the Elections Commission to include names of candidates on the candidacy lists, which the commission unreasonably refused to include.<sup>136</sup> Other decisions

<sup>126</sup> Case no. 21606/63, *supra* note 124.

<sup>127</sup> *Id.*

<sup>128</sup> See *Na if: Raf' al-Ijur Yuqalil min Fora u ul al-Shabab 'la 'aml* [Nazif: Increasing the Minimum Wage Decreases Creating Jobs Opportunities for Youth], AL AHRAM, <http://gate.ahram.org.eg/News/11124.aspx> (last visited Aug. 24, 2012) (Egypt's former prime minister defending the governmental decision not to enforce the court decision).

<sup>129</sup> Case no. 26627/63/Supreme Administrative Court, (1st Circuit, Cairo) (Egypt).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> See *supra* note 128.

<sup>135</sup> Law No. 47 of 1972 (Law of the State Council), *Al-Jarida Al-Rasmiyya*, 5 Oct. 1972, No. 40, pp. 609-28, § 10 (Egypt).

<sup>136</sup> *Majlis al-Dawla Yulzim al-Lajna al-'olya bi-Tanfiz gami' al-A kam qabl al-Intikhabat* [The State Council requires the Elections Committee to Enforce all Judicial Decisions before the Elections], YOUN7, <http://www.youm7.com/News.asp?NewsID=309467&SecID=282&IssueID=0> (last visited Apr. 4, 2012).

ordered a halt to elections due to clear rigging.<sup>137</sup> The Elections Commission did not enforce these judicial decisions in order to favor the NDP candidates.<sup>138</sup> The non-enforcement of these judicial decisions reflected the reality that the former regime was far from bound by rule of law, even under an instrumental interpretation approach.

### *C. Emergency Law and Individual Freedoms*

Normally, countries have emergency laws that apply when a state of emergency is declared for exceptional dangers, such as war. However, it is not common state practice to sustain a perpetual state of emergency in the absence of any practical national emergency or danger for nearly thirty years. Following the assassination of President Sadat on October 6, 1981, a nationwide state of emergency was declared for one year.<sup>139</sup> Since then, President Mubarak unreasonably and continuously renewed the state of emergency shortly before its scheduled expirations.<sup>140</sup> The most recent renewal came in May 2010 and was due to expire on May 31, 2012. These repeated extensions were obviously attempts aimed at legalizing the concentration of powers in the hands of the president, beyond his constitutionally granted authority.

The Egyptian emergency law authorizes the declaration of a state of emergency upon an event that threatens public order or security.<sup>141</sup> Such an event can be a war or a situation threatening the eruption of war, internal disturbances, natural catastrophes, or the spread of an epidemic.<sup>142</sup> The declaration of an emergency must include a basis for the emergency, the region it covers, and the date of its application.<sup>143</sup>

The emergency law also grants the president broad powers, including “the power to impose restrictions on the individual freedoms of assembly, movement, residence; the power to arrest and detain suspects or those *deemed dangerous to public security or order*, and the power to search individuals and places without being restricted by the provisions of the

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<sup>137</sup> *Butlan Intikhabat al-Yaum howa al-Natiga al-Qanuniyah li-'adam Tanfiz al-A kam al-Qada'iyah* [Today's Elections are Void due to Non-Enforcing the Judicial Decisions], THE ARABIC NETWORK FOR HUMAN RIGHTS INFORMATION, <http://www.anhri.net/?p=19632> (last visited Apr. 4, 2012).

<sup>138</sup> *Id.*

<sup>139</sup> President of the Republic of Egypt Decision No. 560 of 1981, *Al-Jarida Al-Rasmiyya*, 6 Oct. 1981, No. 40 bis, p. 5 (Egypt).

<sup>140</sup> Reza, *supra* note 103, at 545.

<sup>141</sup> Law No. 162 of 1958 (Law Concerning the State of Emergency), *Al-Jarida Al-Rasmiyya*, 28 Sept. 1958, No. 29 bis (B), pp. 1-3, § 1. [hereinafter Emergency Law].

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* art. 2.

Criminal Procedure Code.”<sup>144</sup> The president also has the power to authorize the surveillance of all communications, including those of the mass media.<sup>145</sup> According to this law, a detained person can appeal his detention only after six months of confinement, if he is not released or scheduled for trial.<sup>146</sup> If the appeal is granted, the president must ratify it before it can take effect.<sup>147</sup>

The emergency law further grants the president the power to create emergency state security courts to hear cases related to violations of emergency law.<sup>148</sup> However, these courts can also hear ordinary criminal cases that the president refers to them.<sup>149</sup> The president appoints the judges sitting on the emergency state security courts.<sup>150</sup> The appointed judges can be from the ordinary judiciary or the military judiciary.<sup>151</sup> These courts’ decisions are not final until the president ratifies them.<sup>152</sup> The emergency law promotes rule of man to deal only with exceptional cases like war and was never designed to be permanent, because it clearly suspends many basic constitutional rights.<sup>153</sup>

The initial declaration of the state of emergency in Egypt under Mubarak’s rule was arguably illegal. After President Sadat’s assassination in 1980, a presidential decree declaring the state of emergency was issued without stating any reason for its declaration.<sup>154</sup> The assassination of the

<sup>144</sup> *Id.* art. 3(1) (emphasis added).

<sup>145</sup> *Id.* art. 3(2).

<sup>146</sup> *Id.* art. 3 bis. Notably, article 9 of the Universal Declaration of Human Rights states that “[n]o one shall be subjected to arbitrary arrest, detention or exile.” *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

<sup>147</sup> Emergency Law, *supra* note 141, at art. 31*bis*.

<sup>148</sup> *Id.* art. 7.

<sup>149</sup> *Id.* art. 9

<sup>150</sup> *Id.* art. 7

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* art. 12.

<sup>153</sup> The Emergency Law made some articles of the abrogated 1971 Constitution applicable only at the discretion of the police. Such constitutional articles include article 71, which guarantees the right of a suspect to be free from arbitrary arrest and detention, and the right to be informed promptly of the charges against him and to be brought to trial as soon as possible. Also, such articles include article 67, which states that every person accused of a crime must be provided with counsel for his defense and article 42, which requires treating any person arrested or detained in a manner concomitant with the preservation of his dignity. For further discussion on the relation between emergency law and the constitution, see Sohail Mered, *It's Not a Cultural Thing: Disparate Domestic Enforcement of International Criminal Procedure Standards – A Comparison of the United States and Egypt*, 28 CASE W. RES. J. INT’L L. 141 (1996).

<sup>154</sup> President of the Republic of Egypt Decision No. 560 of 1981, *Al-Jarida Al-Rasmiyya*, 6 Oct. 1981, No. 40*bis*, p. 5 (Egypt).

president understandably may qualify as an “internal disturbance” as stated in article 1 of the emergency law.<sup>155</sup> However, article 2 requires stating the reason clearly in the decree declaring the state of emergency.<sup>156</sup> This requirement was not met.<sup>157</sup> Mubarak subsequently extended the presidential decree establishing the state of emergency several times. Since the original 1980 presidential decree did not meet the requirements stated in article 2, it was invalid from the beginning and any extension thereof would also be invalid.

The last presidential extension decree claimed that emergency law was needed to overcome terrorism threats.<sup>158</sup> However, the government failed to prove that any exceptional circumstances suggesting the possibility of a terrorist attack in Egypt actually existed.<sup>159</sup> A state of emergency declared to overcome terrorism threats would be unreasonable unless there are clear indications that terrorist attacks are imminent or expected. Although terrorism has become a severe danger in recent years, this development does not justify the declaration of a permanent state of emergency permanently worldwide.<sup>160</sup> Article 1 of the emergency law does not set forth terrorism as a valid reason to declare a state of emergency. Moreover, while the last presidential extension decree provides terrorism as the reason for extending the state of emergency, it goes on to state that the emergency law shall apply to cases of narcotics trafficking.<sup>161</sup> How or why narcotics trafficking was

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<sup>155</sup> Emergency Law, *supra* note 141, art. 1.

<sup>156</sup> *Id.* art. 2.

<sup>157</sup> President of the Republic of Egypt Decision No. 560 of 1981, *Al-Jarida Al-Rasmiyya*, 6 Oct. 1981, No. 40*bis*, p. 5 (Egypt).

<sup>158</sup> President of the Republic of Egypt Decision No. 126 of 2010, *Al-Jarida Al-Rasmiyya*, 11 May 2010, No. 8*bis*(A), p. 2 (Egypt); the Egyptian definition of terrorism is highly criticized for being very broad. The definition encompasses not only violent acts. Other acts can be considered an act of terrorism, such as “any threat or intimidation with the aim of disturbing the peace or jeopardizing the safety and security of the society” and “the prevention of the public authorities in the performance of their work.” Michael Slackman, *Egyptian Emergency Law is Extended for 2 Years*, N.Y. TIMES, May 12, 2010, at A10, available at 2010 WLNR 9784363.

<sup>159</sup> “The government pointed to ... the recent prosecution of a Hezbollah cell convicted of planning terrorist acts in Egypt as evidence of the need for preserving the emergency law.” *Id.* Arresting a group of terrorists does not justify the need to extend the state of emergency for two years. The government failed to prove that terror attacks were expected and the state of emergency would help to avoid these terror attacks.

<sup>160</sup> The Egyptian Prime Minister justified extending the state of emergency as a measure taken in other democratic countries like the United States, which adopted the Patriot Act after the 9/11 terror attack and failed to shut down the prison at Guantánamo Bay. *Id.*

<sup>161</sup> President of the Republic of Egypt Decision No. 126 of 2010, *Al-Jarida Al-Rasmiyya*, 11 May 2010, No. 8*bis*(A), p. 2, § 2 (Egypt).

included under the umbrella label of “terrorism” that would justify the extension of the state of emergency is unclear.

A counterargument may exist that the last extension for terrorism reasons was not completely invalid. Terrorism may qualify as one form of the elastic definition of “internal disturbance” articulated in article 2 of the emergency law. Additionally, although the president alone declares a state of emergency, oversight occurs by requiring the parliament to approve his declaration. Nevertheless, the parliament continually agreed to those declarations that promoted the rule of the president, instead of fulfilling its mandate to promote rule of law by enacting laws that serve the greater public interest and the whole of the Egyptian people and society.

One police attempt to apply the emergency law in June 2010 had a direct impact on the Revolution. Khaled Saeed was a young man who refused to consent to search by two undercover police agents who did not have a search warrant.<sup>162</sup> The undercover police agents argued that under the emergency law, they had the power to search individuals without a warrant. Saeed insisted that he would not let them search him without a warrant.<sup>163</sup> The two undercover police agents then mercilessly beat Saeed to death.<sup>164</sup> The government later claimed that Saeed was a criminal suspect who died from swallowing a packet of drugs.<sup>165</sup>

The picture of Saeed’s corpse spread like wildfire over the internet and led to widespread public anger.<sup>166</sup> A few days after the incident, a Facebook group titled “We Are All Khaled Saeed” appeared and garnered hundreds of thousands of members within a few weeks. Because of their social media presence, members of this Facebook group likely formed the largest group of participants in the January 25 protest that initiated the Revolution. Under the pressure of protests and severe criticism by human rights advocates and opposition groups, the two undercover police agents were prosecuted and charged with illegal arrest, torture and excessive force.<sup>167</sup> After the

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<sup>162</sup> Case no. 15483/2010/ Court of Appeal, (Alexandria) (Egypt).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> The Associated Press, *Thousands of Egyptians Protest What They Call Police Torture*, N.Y. TIMES, June 26, 2010, at A5, available at 2010 WLNR 12900575.

<sup>166</sup> Jennifer Preston, *Movement Began With Outrage and a Facebook Page That Gave It an Outlet*, N.Y. TIMES, Feb. 6, 2011, at A10, available at 2011 WLNR 2352759.

<sup>167</sup> Kareem Fahim, *Death in Police Encounter Stirs Calls for Change in Egypt*, N.Y. TIMES, July 19, 2010, at A4, available at 2010 WLNR 14367279 (citing a witness who claims that two undercover police agents punched and kicked Khaled, and smashed his head against the bottom step of marble stairs until his body was still. After that, the undercover agents dragged him to a car and “returned 10 minutes later to leave his body at the bottom of the stairs.”); Universal Declaration of Human Rights, *supra* note 146, art. 5 (providing that “[n]o one shall be subjected to arbitrary arrest, detention or exile”).

Revolution, the trial reached completion. The Court added the charge of beating the victim to death, and the defendants were sentenced to seven years in prison.<sup>168</sup> Justice in this case may not have taken place without the Revolution. Clearly, abuse of the emergency law had a direct impact in ending Mubarak's rule.

#### *D. Freedom of Expression and Mass Media*

Freedom of expression is a basic human right,<sup>169</sup> and punishing a person for expressing his or her own opinion reflects the absence of rule of law. Freedom of expression is essential under the substantive interpretation of rule of law, and the freedom of mass media is one form of freedom of expression.<sup>170</sup> The 1971 Constitution guaranteed the liberty of press and mass media,<sup>171</sup> even though there was no free mass media in place at the time of the enactment of the Constitution. However, freedom of Egyptian press and mass media has progressively grown through the last two decades. Shortly before the Revolution, there were two kinds of media: state media and independent media.

The fact that Egyptians call the state media "governmental media" is telling.<sup>172</sup> This kind of media was influenced by the government and served only the government's interests, regardless of the greater interests of the nation.<sup>173</sup> The state media typically suppressed any news that reflected

<sup>168</sup> Case no. 15483/2010/ Court of Appeal (Alexandria) (Egypt).

<sup>169</sup> Article 19 of the Universal Declaration of Human Rights provides that "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Universal Declaration of Human Rights, *supra* note 146, art. 19.

<sup>170</sup> Article 19(2) of the International Covenant on Civil and Political Rights ("ICCPR") stipulates that "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171. The ICCPR is one of three parts of the international bill of rights. It is absolutely binding over signatory nations and arguably binding over all other states as customary international law.

<sup>171</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 48 (repealed 2011).

<sup>172</sup> See Tarek Ramadan, *Intiha' Zamn al- ikomi wa-Ta'kid I'lam al-Dawla: Majlis A'la lil-I'lam ilm Yantazir al-Ta qiq [The End of Governmental Media and the Affirmation of State Media: A High Council for Media is a Dream to be Achieved]*, AL AHRAM, <http://digital.ahram.org.eg/articles.aspx?Serial=813774&eid=487> (last visited May 16, 2012).

<sup>173</sup> Safaa Abdoun, *Ahram Journalists Lash out at Pro-Government Editorial Policies*, DAILY NEWS EGYPT, Nov. 14, 2011, *available at* 2011 WLNR 23637429 (noting that state media was "usually criticized for ignoring basic professional standards in favor of propagating regime policies").

negatively upon the government or its actions. Criticism of government performance was rare, and criticism of the president was simply impossible.<sup>174</sup>

The state media's lack of credibility gave rise to the development of privately owned independent media over the last decade. However, the independent media was not completely independent from government influence. The State Security Department used the pretext of national security to restrict the freedom of independent media.<sup>175</sup> Also, it was not difficult to influence the policies of most independent media television stations and newspapers because their owners were mostly businessmen who tried to build good relations with those in power. Most independent media journalists were able to express their opinions regarding the government's performance. However, criticizing the president still crossed the line. Arguing against the "presidential inheritance project," under which Mubarak would transfer his powers to his son Gamal, was risky. The few who did not fear the former regime and deviated from this rule suffered punishment and retaliation.<sup>176</sup>

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<sup>174</sup> Reda Helal was a successful journalist who worked as a deputy editor for Al-Ahram newspaper, the leading governmental newspaper. He was a political activist known for his opposition to the regime. He was one of the first Egyptian writers who wrote about the conspiracy that Mubarak was preparing the ground to transfer his powers to his son. It was strange that such a journalist worked for the leading governmental newspaper. However, in August 2003, he simply disappeared. The truth about his disappearance is still uncertain. See Marwa Al-A'sar, *EOHR Calls for Investigating 57 Forced Disappearances*, DAILY NEWS EGYPT, June 22, 2011, available at 2011 WLNR 12456298.

<sup>175</sup> Mai Yamani, *These Moderates are in Fact Fanatics, Torturers and Killers*, THE GUARDIAN, Feb. 6, 2007, available at 2007 WLNR 2834986 (noting that "there is strict censorship of media within the country, and strict control of access to the internet, satellite television and other forms of communication with the outside world"). Also, television channels reported after the revolution that the state security department used to pressure them before the revolution to suppress much news. Wael al-Maziki, *Albert Shafiq: Amn al-Dawla kan Yata il bi Ru'asā Tahrir al-Baramij Li Man' Ba'd al-Akhbar wa al-Ārā'* [Albert Shafiq: State Security Department used to call editors-in-chiefs of Television Shows to suppress some news and opinions], JANUARY25.ORG, <http://www.january-25.org/post.aspx?k=38061> (last visited May 23, 2012).

<sup>176</sup> Such journalists were always subject to police harassment, which may have included disappearances or kidnapping. For example, on November 2, 2004, Abdel Hamid Qandil, the Editor-in-Chief of Nasserist newspaper, *Al-Arabi*, was kidnapped. Carnegie Endowment for Int'l Peace, *Egyptian Opposition Journalist Attacked*, <http://www.carnegieendowment.org/2008/08/20/egyptian-opposition-journalist-attacked/6cbl> (Nov. 20, 2004) [hereinafter *Journalist Attacked*]. He was beaten and was told not to talk about "the important people" again. *Id.* He then was left naked on the Suez Desert Road. *Id.* Qandil linked his kidnapping to an article he had just published a few days prior to the incident. Shaden Shehab, *Terrible Message, but Who's the Sender? Can the State be Resorting to Gangster-Style Violence to Silence "Outspoken" Journalists*, AL-AHRAM (Nov. 17, 2004)

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The former regime realized that the independent media constituted a substantial danger to its plans to monopolize political power and silence any opposition. The independent media was capable of revealing activities aimed at rigging the presidential and parliamentary elections scheduled to occur in late 2010 and 2011.<sup>177</sup> The independent media also sometimes opposed Gamal Mubarak's inheritance of power, which potentially could have occurred in the next presidential election.

To overcome any potential troubles, the regime sought to restrict the freedom of mass media in the second half of 2010 in order to suppress any criticism or publication of the violations in advance of the elections. For instance, seventeen independent satellite television channels were shut down upon allegations of violating broadcasting regulations.<sup>178</sup> Twenty more independent satellite television channels were threatened with suspension of their licenses.<sup>179</sup> The government also imposed restrictions on the use of text messaging for news alerts to cellular phones, limiting such services to certain political parties.<sup>180</sup> This decision excluded major political opposition groups such as the Muslim Brotherhood, the National Association for

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<http://weekly.ahram.org.eg/2004/716/eg5.htm>. In his article, he criticized the Ministry of Interior and claimed that the culprits of the Taba terroristic attacks could never be those arrested by the Ministry. *Id.* (stating that "[y]ou would have to eliminate your brain to believe the Interior Ministry's official story ... If they were the real culprits, why is the security apparatus still torturing and arresting unprecedented numbers of people in Sinai?"). Qandil was also famous for his strong opposition to the presidential inheritance project. *Journalist Attacked*, *supra* note 176.

<sup>177</sup> Michael Jansen, *Crackdown on Egyptian media before poll*, IRISH TIMES, Oct. 21, 2010, at 14, available at 2010 WLNR 21005803 (citing Muhammad Habib, a senior member in the Muslim Brotherhood.)

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

Change (NAC),<sup>181</sup> the April 6 Youth Movement,<sup>182</sup> and the Democratic Kefaya Movement.<sup>183</sup>

Ibrahim Eissa provides a further example of restrictions on freedom of expression and mass media. On October 4, 2010, the chairman of *The Constitution (Al-Dostor)*, an independent newspaper, fired Eissa, the editor-in-chief.<sup>184</sup> Eissa wanted to publish an article for Mohamed ElBaradei (founder of the NAC opposition group) that criticized the regime.<sup>185</sup>

According to Eissa, the chairman warned him not to publish articles for ElBaradei because it would cause unnecessary troubles for the paper with

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<sup>181</sup> The National Association for Change (NAC) was founded by Mohamed ElBaradei to act as an umbrella organization for several opposition groups. *Egypt's opposition pushes demands as protests continue*, BBC NEWS (Feb. 1, 2011, 9:41 AM), <http://www.bbc.co.uk/news/world-middle-east-12290167> [hereinafter *Egypt's opposition*].

<sup>182</sup> "This youth opposition coalition was the main organising force behind ... the call for the 'day of anger' on Tuesday 25 January, citing a list of demands on its website. They included the departure of the interior minister, an end to the restrictive emergency law, and a rise in the minimum wage. The movement is urging Egyptians to 'take to the streets and keep going until the demands of the Egyptian people have been met.' The movement began as an Egyptian Facebook group in 2008 to support workers in the northern industrial town of Mahalla al-Kubra and called for a national strike on 6 April that year. Members, who include[d] many young well-educated Egyptians, have shown a greater willingness than others to risk arrest and start public protests." *Id.*

<sup>183</sup> Jansen, *supra* note 177.

<sup>184</sup> *Mr. Mubarak's Reversal*, WASH. POST, Oct. 31, 2010, at A14, available at 2010 WLNR 25817508 [hereinafter, *Mubarak's Reversal*]. Eissa "was fired almost one month after the paper come under the ownership of Al-Sayed Al-Badawy, the head of Al-Wafd opposition party, and Edward, also the chairman of a chain of international schools. A few days after Eissa was fired, Al-Badawy sold his shares in the newspaper to Edward and has repeatedly told the media that he was not behind Eissa's job termination." Marwa Al-A'sar, *Al-Dostor Staff Rejects Agreement Negotiated by Syndicate Head*, Nov. 1, 2011, DAILY NEWS EGYPT, available at 2010 WLNR 21834395; see also Jennifer Rubin, *Mubarak shows contempt for the 'Cairo Effect'*, WKLY. STANDARD, Dec. 20, 2010, at 18, available at 2010 WLNR 25374568.

<sup>185</sup> *Id.*; Mohamed ElBaradei served as an Egyptian diplomat, a special assistant to the Foreign Minister of Egypt, a senior fellow in charge of the International Law Program at the United Nations Institute for Training and Research, an Adjunct Professor of International Law at the New York University School of Law, and a Director General of the International Atomic Energy Agency (IAEA). *The Nobel Peace Prize 2005: International Atomic Energy Agency, Mohamed ElBaradei: Biography*, NOBELPRIZE.ORG, [http://www.nobelprize.org/nobel\\_prizes/peace/laureates/2005/elbaradei-bio.html](http://www.nobelprize.org/nobel_prizes/peace/laureates/2005/elbaradei-bio.html) (last visited Jan. 7, 2012). In 2005, he was awarded the Noble Peace Prize for his efforts "to prevent nuclear energy from being used for military purposes and to ensure that nuclear energy for peaceful purposes is used in the safest possible way." *Id.* After finishing his career in the IAEA in 2009, he returned to Egypt and formed the National Association for Change, declaring that he intended to be a "tool for reform" in Egypt against Mubarak's regime. See *Egypt's opposition*, *supra* note 181.

the regime.<sup>186</sup> When Eissa refused to comply with the chairman's instructions, he was fired.<sup>187</sup> The chairman of the newspaper was a businessman who was also the head of *Al-Wafd* party, one of the first political parties established in Egypt at the beginning of the twentieth century.

Eissa was also fired from the independent television station ONTV, where he hosted a show on which he criticized the government, Mubarak, and Mubarak's son.<sup>188</sup> Eissa's termination happened after the channel received a warning that it faced being shut down due to undisclosed violations.<sup>189</sup> Strong rumors suggested that the channel administration was compelled to prevent Eissa from appearing on its screen in order to save its existence.

This strict censorship began only a few months before the elections. Such acts stained the progressive evolution of freedom of speech in Egypt. Therefore, the Revolution was foreseeable because the regime sought to further restrict freedom of expression while the people were asking for more freedom. Having elaborated the partial absence of rule of law before the Revolution, the next Section analyzes the level of rule of law after the Revolution and provides policy recommendations for promoting rule of law.

### III. RULE OF LAW AFTER THE REVOLUTION

Undoubtedly, the Revolution has had a great impact on the promotion of rule of law in Egypt. This Part illustrates important scenes that reflect the new trend toward respect for the rule of law. However, these advances should not ignore the continuing deficiencies. Therefore, this Part proceeds to identify the continuing deficiencies and provides some solutions for these deficiencies to establish a better rule of law.

#### A. *What Has Been Accomplished to Achieve a Full Rule of Law*

The year following the Revolution witnessed an increasing trend towards respect for the rule of law. Aspects of respect for the rule of law can be summarized in three main developments: the trying of the former president and his entourage before courts of law, enforcement of judicial decisions, and the promotion of freedom of expression.

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<sup>186</sup> Jan25th2011, *Interview with Ibrahim Eissaa*, YOUTUBE (Jan. 25, 2012), <http://www.youtube.com/watch?v=BE37v8phQqw>

<sup>187</sup> *Id.*

<sup>188</sup> *Mubarak's Reversal*, *supra* note 184.

<sup>189</sup> *Taqyyid al-Bath wa Eghlāk Qanawat bi-Mi r* [Media Censorship and Channels Shutdown in Egypt], ALJAZEERA (10 Oct. 2010), <http://www.aljazeera.net/NR/exeres/7E06D409-2EAE-495D-8A49-6B68A4685F0D.htm>.

### 1. Mubarak's Trial

As Montesquieu once stated, “[l]aw should be like death, which spares no one.”<sup>190</sup> Mubarak’s trial is a huge development for the rule of law in Egypt. Despite several developments that had cast serious doubts on the success of the trial,<sup>191</sup> it marked the first time in Egyptian history that a former ruler was brought before courts of law.<sup>192</sup> Mubarak faces charges of corruption and conspiracy to kill unarmed protesters who challenged his rule during the Revolution.<sup>193</sup> This pursuit of legal justice is what differentiates the 2011 Egyptian Revolution from other past revolutions.<sup>194</sup> After other historical revolutions, people in power were often executed without fair trials.<sup>195</sup> Giving a trial to a dictator who caused the death of hundreds of brave innocents during the Revolution is one of the most effective first steps towards establishing full rule of law.<sup>196</sup>

<sup>190</sup> RIDDHI DASGUPTA, *CHANGING FACE OF THE LAW: A GLOBAL PERSPECTIVE* 291 (2006).

<sup>191</sup> At the beginning of the trial, it was announced that a CD containing phone recordings between the Minister of the Interior and his assistants during the days of the revolution was destroyed. Cherif AbulFadl, *Mufag’a fi Mu akamt Mubarak* [Surprise in Mubarak’s Trial], AL-AHRAM (Sept. 5, 2011), <http://gate.ahram.org.eg/News/112146.aspx>. Additionally, during the trial, the Public Prosecutor accused the Ministry of Interior and the Intelligence Agency of withholding evidence against Mubarak. Mahmoud Al-Mamlouk et. al, *al-Niyaba: al-Dakhliya wa al-Amn al-Kawmy lam Yukadima lana al-Ma’alamat al-Kafiya* [Prosecution: Interior Ministry and Intelligence Agency did not provide us with enough Information], (Jan. 4, 2012), <http://www1.youm7.com/News.asp?NewsID=570218&SecID=12>.

<sup>192</sup> Bradley Hope, *Mubarak Verdict far from a Done Deal*, NATIONAL (UAE), Aug. 5, 2011, available at 2011 WLNR 22134391 (citing Chibli Mallat, a visiting professor at Harvard University School of Law, stating that “[t]his is the first time in the history of Egypt for 5,000 years that a Pharaoh is being brought to court to be judged on his rule ... There is a historic dimension about it. It is very unusual for the region, for the rule of law and for the whole world.”).

<sup>193</sup> David D. Kirkpatrick, *Judge closes doors to Mubarak trial Barring of TV coverage*, INT’L HERALD TRIB., Aug. 16, 2011, available at 2011 WLNR 16146993.

<sup>194</sup> M. Cherif Bassiouni, *Egypt Update No. 9*, CHI. COUNCIL ON GLOBAL AFF., 5 (Aug. 4, 2011), available at [https://docs.google.com/viewer?a=v&pid=explorer&chrome=true&srcid=0B5DG\\_keKEp61NmI1YzdiMTEtOTY4NC00YjBkLWFiNzgtNmQwY2QxZDU0NTIi&hl=en\\_US](https://docs.google.com/viewer?a=v&pid=explorer&chrome=true&srcid=0B5DG_keKEp61NmI1YzdiMTEtOTY4NC00YjBkLWFiNzgtNmQwY2QxZDU0NTIi&hl=en_US) (last visited Jan. 23, 2012).

<sup>195</sup> *Id.* (noting that “the post-Bastille day in 1789 when the guillotine severed heads faster than people could be called to trial, or the post-Leninist revolution, where millions of people were killed in an arbitrary and indiscriminate manner, this is [describing Mubarak’s trial] the most civilized expression of contemporary justice – a trial with due process”).

<sup>196</sup> Sandro Contenta, *A Revolution without Justice*, TORONTO STAR, Nov. 19, 2011, at 10, available at 2011 WLNR 24014021 (citing official counts that declared the death of 846 people during the days of the revolution).

Another important improvement that reflected the evolution of rule of law is when Field Marshal Mohamed Hussein Tantawi, the head of the SCAF, received summons to testify during Mubarak's trial.<sup>197</sup> Before the Revolution, it was hard to imagine that senior members in the regime would appear before a court to testify. In Mubarak's trial, senior members of the new regime were required to testify, including: the Army Field Marshal, the Chief of the Intelligence Organization, and the Minister of Interior. These summons indicated the first time in the history of the Egyptian judiciary that people in such high positions of executive power could be compelled to testify before a court of law. Mubarak's trial sends a clear message that the rule of man has ended and the rule of law has reemerged. The remaining challenge is how to establish a full rule of law that will fulfill the ambitions of Egyptian society today.

## 2. The End of Executive Branch Dominance and Promotion of the Separation of Powers Doctrine

The Revolution ended executive branch dominance over the judiciary. Following the Revolution, the executive branch has enforced judicial decisions even if enforcement included serious practical difficulties. Additionally, the executive branch enforced previous judicial decisions that the former regime ignored. Importantly, the judiciary did not exploit the weakness of the executive branch and the absence of the legislative branch to impose its own influence. Instead, the judiciary promoted the separation of powers doctrine. This Part shall discuss the enforcement of old and new judicial decisions, especially those for which application was practically difficult, and the Egyptian judiciary's promotion of the separation of powers doctrine.

### i. The End of the Executive Branch Dominance Over the Judiciary

Egyptians should be proud that the Revolution's goals were achieved through important judicial decisions instead of unilateral decisions by the acting president. The Egyptian administrative judiciary, the Council of the State, played a leading role in satisfying many of the public's demands in this regard.

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<sup>197</sup> Anthony Shadid & Heba Afify, *Military Ruler Offers Region in Revolt*, INT'L HERALD TRIB., Sept. 26, 2011, at 4, available at 2011 WLNR 19484127 (citing Field Marshal Tantawi stating that he had to testify "to stress the rule of law, which must be the guiding approach for the Egyptian state after the Jan. 25 revolution.").

First, Egyptian expatriates are now able to vote. In *Ahdaf Mustafa Islamil Yousef et al. v. The Head of the Committee Supervising the Elections et al.*, the Supreme Administrative Court<sup>198</sup> required the government to enable Egyptian expatriates to vote in both the presidential and parliamentary elections.<sup>199</sup> Despite the serious practical difficulties in executing this decision, the government responded positively.<sup>200</sup> The government thereafter enabled expatriates to vote through two ways. An expatriate can either vote at the Egyptian embassy in the country where he or she resides or vote through an express mail service mailed to the Egyptian embassy.<sup>201</sup> The main problem with this solution was that the Constitution required the elections to be supervised by the judiciary.<sup>202</sup> Because it is impossible to send a judge to every country in the world to supervise the expatriates' votes, enforcing the court's decision necessitated new legislation that granted ambassadors temporary judicial functions during elections.<sup>203</sup>

Furthermore, another court order dissolved the NDP. In *Ahmed Bayoumi al-Fadaly v. The Head of the SCAF et al.*, the Supreme Administrative Court stated that Egyptians overthrew the regime by a revolution.<sup>204</sup> The Revolution not only ousted the president, but it also ended the actual existence of the NDP.<sup>205</sup> The Court's decision did not construct a new legal position; rather it only made explicit the fact that the NDP no longer exists.<sup>206</sup> Therefore, the NDP has been dissolved and the new government confiscated its headquarters and funds.<sup>207</sup>

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<sup>198</sup> The Egyptian judicial system has two different branches, one for administrative cases, and another for civil and criminal cases. Administrative cases are disputes which involve any governmental body. The Supreme Administrative Court is the highest court in the administrative judiciary, and it reviews judicial decisions issued by the court of administrative jurisprudence and the administrative courts. Regarding the civil and criminal courts, the Court of Cassation is the highest court that reviews decisions of the appellate courts and the lower courts of first instance.

<sup>199</sup> Case no. 56275/65/Supreme Administrative Court (Egypt).

<sup>200</sup> *Id.*

<sup>201</sup> Agence France-Presse, *Egyptian Expats Cast First ever Ballots*, DAILY NEWS EGYPT, Nov. 18, 2011, available at 2011 WLNR 24583585 (emphasizing that "Egyptians abroad could download a ballot paper from a government website — [www.elections2011.eg](http://www.elections2011.eg) — and mail it or deliver it in person to embassies in their country of residence.").

<sup>202</sup> Rana Kamaly, *Egyptians Flood Election Polls: While its Run-up was Marred by Doubts and Violence, Egypt's First 'Free' Elections Pulls through*, EGYPT TODAY (Nov. 2011), available at <http://egyptoday.com/news/display/article/artId:348/egyptians-flood-election-polls/secId:1/catId:1> (last visited Jan. 23, 2012).

<sup>203</sup> *Id.*

<sup>204</sup> Case no. 20030/57/Supreme Administrative Court (Egypt).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

Finally, it is imperative to note that after the Revolution, the new government enforced two important judicial decisions ignored by the former regime. The government banned the Ministry of Interior police forces on university campuses,<sup>208</sup> and it also showed its intention to implement a national minimum wage.<sup>209</sup> Due to the economic crisis facing the nation, the enforcement of the latter may be delayed or implemented in two stages. What is significant is that the government announced its responsibility to enforce judicial decisions. By doing so, the government is acknowledging that it is bound by rule of law in post-revolution Egypt.

ii. The Role of the Judiciary in Promoting the Separation of Powers Doctrine

How the courts treat the members of the former NDP after the Revolution shall be reviewed as landmark cases in Egyptian judicial history. The outraged citizenry sought to deprive the remnants of the NDP of their political rights.<sup>210</sup> Prior to the parliamentary elections, candidates from different governorates filed lawsuits demanding that the courts bar former NDP members from running in the elections.<sup>211</sup> The administrative courts of Mansoura and Alexandria came to opposing decisions.

The administrative court of Mansoura decided to deprive the former NDP members of their political rights.<sup>212</sup> The court determined that proper enforcement of the Supreme Administrative Court's decision to dissolve the NDP also required depriving NDP members of their political rights.<sup>213</sup> The

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<sup>208</sup> See *supra* Part III.B; AlAhram, *al-Haras al-Gam'i Rahal Nihayyan min Gam'at al-Qahira* [University Guards Permanently Leaves Cairo University Campus], <http://www.ahram.org.eg/The-First/News/64670.aspx> (last visited Jan. 23, 2012) (speaking of the enforcement of the judicial decision in Cairo University); Mona Abdel Rahman & Mohamed Megly, *Tanfiz ukm ilgha' al- arras al-Gam'i fi al-Siwayis wa al-Iskandariyah* [Enforcing Court's Decision Suspending the Existence of the University Guards in Suez and Alexandria Universities], <http://www.almasryalyoum.com/node/339294> (last visited Jan. 9, 2012) (speaking of the enforcement of the judicial decision in Universities of Alexandria and Suez).

<sup>209</sup> See *supra* Part III.B.

<sup>210</sup> Mai Shams El-Din, *Court Ruling Bans ex-NDP Members from Contesting Elections*, DAILY NEWS EGYPT, Nov. 11, 2011, available at 2011 WLNR 23618968 (noting that "[n]umerous calls have urged the Supreme Council of the Armed Forces (SCAF) and the Cabinet to issue a political exclusion law. Cabinet had submitted two drafts of a Treachery Act, to be amended to ban remnants of the old regime from holding government or political posts for five years. However, the amendments were never approved by SCAF.").

<sup>211</sup> *Id.*

<sup>212</sup> Case no. 1593/34/Administrative Court, (Mansoura) (Egypt).

<sup>213</sup> *Id.*

administrative court of Mansoura held that the decision to dissolve the NDP should not be limited to confiscating the NDP's money and headquarters.<sup>214</sup> The court of Mansoura reasoned that the NDP is a legal person that cannot implement decisions itself,<sup>215</sup> and that it is the natural persons who are members of the NDP that must lose their political rights.<sup>216</sup>

However, the administrative court of Alexandria rejected this reasoning and allowed the former NDP members to run in the elections.<sup>217</sup> The court reasoned that the defendant in that particular case, a former NDP member, had not been convicted of any crime.<sup>218</sup> The administrative court of Alexandria reasoned that the fact that the defendant belonged to the dissolved NDP would not be enough to exclude him from the candidacy list on the basis of the good reputation requirement clause.<sup>219</sup> Therefore, the Court could not reasonably deprive the defendant and other NDP members of their political rights.<sup>220</sup>

Enforcement of both decisions would have meant that former NDP members could run in Alexandria but not in Mansoura. The Supreme Administrative Court sought to resolve the opposing opinions and found in favor of the defendants.<sup>221</sup> The Court stated that the decision to dissolve the NDP could not constitute a basis for depriving its members of their constitutional rights.<sup>222</sup> The Court stated that any deprivation of political rights must be based on legislation enacted by the parliament.<sup>223</sup> If the Court deprived NDP members of their political rights, it would violate the principle of separation of powers.<sup>224</sup> This decision bolstered the judiciary's credibility, because it demonstrated that the courts decide cases by appropriately applying the laws, not by entertaining the retributive wishes of citizens, however noble. Undoubtedly, justice requires punishing the corrupt members of the former NDP. However, courts should not be allowed to exceed their powers and violate the separation of powers principle in order to achieve justice in this single case, as it would set an extremely dangerous precedent.

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<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> Case no. 1932/66/Administrative Court, (Alexandria) (Egypt).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> Case no. 2408/58/Supreme Administrative Court (Egypt).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

### 3. Freedom of Expression and Mass Media

The resumption of broadcasting *al-Qahira al-Youm* (“Cairo Today”) is the optimal example of growth of freedom of expression and mass media following the Revolution. Cairo Today is one of the most popular television shows in Egypt. Its main presenter is Amr Adeeb, who is famous for opposing the presidential inheritance project. Following an episode sharply criticizing the government media supporting Gamal Mubarak, the channel was shut down.<sup>225</sup> The official reason for the shutdown was that the channel administration owed several million pounds in debt.<sup>226</sup> Although the channel was truly in debt, the true reason for silencing the channel was Adeeb’s criticism of the presidential inheritance project.<sup>227</sup> Adeeb resumed broadcasting his show immediately after the ousting of Mubarak.

As for the state media, the government’s strict censorship policy has relaxed.<sup>228</sup> However, this relaxation does not mean that the state media now enjoys the same freedom as in other democracies.<sup>229</sup> The state media still suffers from limited censorship.<sup>230</sup> Hopefully, all censorship will cease after the transition period is over and power is transferred from the SCAF to popularly-elected authorities.

The independent media now enjoys more freedom as well. However, the fact that remains that the owners of the independent media outlets are businessmen who need to preserve good relations with whomever leads the current regime may be. Therefore, the independent media practices a sort of

<sup>225</sup> Miret El Naggari & Shashank Bengali, *Egyptians Will Vote Amid Crackdown on Opposition, Media*, MCCLATCHY WASH. BUREAU, Nov. 26, 2010, available at 2010 WLNR 23573479.

<sup>226</sup> The Middle East Reporter, *Journalists in Egypt Accuse Govt of Muzzling Media: Govt Shuts 2 Popular TV Programs*, MIDDLE E. REP., Oct. 5, 2010, available at 2010 WLNR 19762151.

<sup>227</sup> Al-Haq Center for Democracy and Human Rights, *Markaz al-Dimoqratiyah wa iquq al-Insan Yudīn Eghlaq Qanat “Orbit” wa Tawaquf Birnamij “Amr Adeeb” wa Yu’akid ‘ala arurat Kafalat uriyat al-Ra’i wa al-Ta’bir* [al-Haq Center for Democracy and Human Rights Condemns the Shutdown of Orbit’s Channel and the Stopping of Amr Adeeb’s Show and Confirms the Necessity of Ensuring Freedom of Expression], HAQ CENTER FOR DEMOCRACY AND HUMAN RIGHTS, <http://www.elhak.org/freedome/2010/09/28/48-elhak.html> (last visited May 23, 2012).

<sup>228</sup> Fouad Razek, *Egyptian Media Coverage of Protests Improves*, INST. FOR WAR & PEACE REPORTING (Nov. 25, 2011), <http://iwpr.net/report-news/egyptian-media-coverage-protests-improves>.

<sup>229</sup> *Id.* (noting that “[e]ven state broadcasters are airing criticism, although red lines for free speech remain.”).

<sup>230</sup> *Id.* (noting that “[t]here is freedom of speech, but only if you don’t go too far in your criticism.”). The state media from time to time accused political activists of being subversive to establish a negative public opinion against the political activists who criticized the SCAF.

self-censorship.<sup>231</sup> Self-censorship of independent media is a universal problem that exists worldwide for a number of reasons.<sup>232</sup> Channel owners may have the right to choose who to employ, and they have the right to hire presenters whose opinions are consistent with their own. However, the media should be more concerned with the science of accurate reporting than with preserving parasitic relationships with politicians. Such self-interested policies will damage the people's trust in independent media, especially at a time when the state media's credibility is improving with the populace.

*B. What Needs to be Realized to Achieve a Full Rule of Law –  
Problems and Policy Recommendations*

As stated above, the post-Revolution evolution of rule of law does not mean that full rule of law has been established. Much work remains to be done in order to establish full rule of law that realizes the ambitions of Egyptians. Challenges to establish a full of law include: facing the constitutional mess after the Revolution and drafting a new constitution, lifting the semi-permanent state of emergency, and ending the military trials for civilians.

1. The Constitutional Mess

A principal demand of the revolutionaries was the drafting of a new constitution to replace the 1971 Constitution that the ousted regime had previously distorted. After the Revolution, the public expected the SCAF to proceed in one of two ways: either call for drafting a new constitution

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<sup>231</sup> An example of self-censorship is the case of Dina Abdel-Rahman, a television presenter at Dream TV. On her show, Abdel-Rahman read a newspaper article by Naglaa Bedair that criticized a speech by one of the members of the SCAF. A member of the SCAF phoned her while the TV show was live and described the journalist who wrote the article as a "subversive." Jan25th2011, *The Video for which Dina Abdel Rahman was fired*, YOUTUBE (Jan. 25, 2012), [http://www.youtube.com/watch?v=LBTfomlB7\\_4](http://www.youtube.com/watch?v=LBTfomlB7_4). Abdel-Rahman pointed during the interview that Bedair was one of the elites in the Egyptian printing press. *Id.* This was the last episode for Abdel-Rahman on Dream TV. Abdel-Rahman Hussein, *Sacking of TV host raises fears of self-censorship in private media*, EGYPT INDEPENDENT, <http://www.egyptindependent.com/node/481370> (last visited Apr. 4, 2012). The businessman owner of the channel preferred to end her contract to avoid any trouble with the SCAF. *Id.* For the text of the article she read, see *Maqal Naglaa Bedair al-ladhi Tasabab fi Fa l Dina Abdel-Rahman* [The Text of Naglaa Bedair's Article that was the Reason for Firing Dina Abdel-Rahman], ELFAGR (July 24, 2011, 8:15 PM), [http://www.elfagr.org/index.php?option=com\\_content&view=article&id=30764](http://www.elfagr.org/index.php?option=com_content&view=article&id=30764).

<sup>232</sup> *Gertz v. Robert Welch*, 418 U.S. 323, 340 (1974) (recognizing that "a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship").

immediately, or issue a Temporary Constitutional Declaration governing the transition period and postpone drafting a new constitution until a new parliament and president were elected.

Accordingly, the SCAF suspended the 1971 Constitution.<sup>233</sup> Surprisingly, the SCAF then called for amending the 1971 Constitution a few days later. The SCAF formed a committee of constitutional law experts to amend nine articles in the Constitution that mainly regulated the presidential election.<sup>234</sup> After a referendum, 77.2% of voters affirmed the amendments.<sup>235</sup> The SCAF then unexpectedly issued a Temporary Constitutional Declaration composed of sixty-three articles.<sup>236</sup> The Temporary Constitutional Declaration also included the nine articles that were approved through the referendum.<sup>237</sup>

Issuing the Temporary Constitutional Declaration effectively rendered the referendum useless.<sup>238</sup> When the people participated in the referendum, they assumed the purpose of the referendum was to amend nine articles of the 1971 Constitution, leaving the remainder of the Constitution in effect. However, this was not the case. The Temporary Constitutional Declaration included many articles copied from the 1971 Constitution, suggesting that it abrogated the previous constitution. Furthermore, the SCAF announced the

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<sup>233</sup> E'lan Dūstūry [Constitutional Declaration], *Al-Jarida Al-Rasmiyya*, 13 Feb. 2011, No. 6bis, pp. 2-4 (Egypt); see also Anthony Shadid, *Egyptian Military Dissolves Parliament*, N.Y. TIMES, Feb. 14, 2011, at A1, available at 2011 WLNR 2858045.

<sup>234</sup> The Committee included Sobhy Saleh, a lawyer who belonged to the Muslim Brotherhood. This step raised criticism, as the committee should include only constitutional law jurists, not representatives of political groups like Sobhy Saleh. Additionally, if the Muslim Brotherhood gained a representative in the committee, other political groups should have enjoyed the same privilege. The other members of the committee were "Judge Tarek El-Beshry, former First Deputy President of the State Council (*Conseil d'Etat / Majlis al-Dawla*), Atef Al-Banna, a Constitutional Law professor at Cairo University, Hassanain 'Abdel-'All, another Constitutional Law professor at Cairo University; Mohammad Bahy AbouYounis, a Constitutional Law professor at Alexandria University, Justice Maher Samy, Justice Hassan Al-Badrawy, and Justice Hatem Begato, who are all Vice Presidents of the Supreme Constitutional Court." Mohamed A. 'Arafa, *Towards a Culture for Accountability: A New Dawn for Egypt*, 5 PHOENIX L. REV. 1, 19, n.85 (2011).

<sup>235</sup> Neil MacFarquhar, *Egyptian Voters Approve Constitutional Changes*, N.Y. TIMES, Mar. 21, 2011, at A4, available at 2011 WLNR 5475619.

<sup>236</sup> See Rizk, *supra* note 2 (noting that people participated in a referendum on 9 constitutional amendments to the 1971 constitution: "Right after, SCAF dictatorially issued a constitutional declaration with 63 articles including the amendments with some editorial changes. This nullified the old constitution.")

<sup>237</sup> *Id.*

<sup>238</sup> *See id.*

suspension of 1971 Constitution prior to the referendum and has not announced its reactivation.<sup>239</sup>

The constitutional mess following the Revolution illustrates that the acting president did not respect the will of people as represented in the referendum results. A ruler cannot take individual steps contrary to the express will of the people. To establish full rule of law, Egypt must draft a new constitution. The roadmap is that the newly elected parliament shall elect a Constituent Assembly, which has the duty of drafting the new constitution.<sup>240</sup> To draft a constitution that guarantees the rights of all citizens, it is critical that all social and political groups possess representation in the Constituent Assembly. Such broad representation is a challenge due to the fact that two major Islamist parties have recently secured an overwhelming majority of seats in the elections.<sup>241</sup> Thanks to their majority, these parties can exclude representatives from other social and political groups from the Constituent Assembly. This potential exclusion could result in a biased constitution, because it would not express the will of all social and political groups in the nation.

## 2. The Emergency Law Dilemma

Another principal revolutionary demand was lifting the state of emergency that had existed for over thirty years.<sup>242</sup> The SCAF promised more than once to lift the state of emergency “as soon as the current

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<sup>239</sup> E’lan Dūstūry [Constitutional Declaration], *Al-Jarida Al-Rasmiyya*, 13 Feb. 2011, No. 6bis, pp. 2-4 (Egypt).

<sup>240</sup> This shall happen in accordance with Article 60 of the Temporary Constitutional Declaration which states that “The members of the first People’s Assembly and Shura Council (except the appointed members) will meet in a joint session following an invitation from the Supreme Council of the Armed Forces within 6 months of their election to elect a provisional assembly composed of 100 members which will prepare a new draft constitution for the country to be completed within 6 months of the formation of this assembly. The draft constitution will be presented within 15 days of its preparation to the people who will vote in a referendum on the matter. The constitution will take effect from the date on which the people approve the referendum.” THE TEMPORARY CONSTITUTIONAL DECLARATION OF 2011, *Al-Jarida Al-Rasmiyya*, 30 Mar. 2011, No. 12bis(B), art 60. (temporary until drafting of a new constitution) [hereinafter TEMPORARY CONSTITUTION DECLARATION].

<sup>241</sup> The Freedom and Justice Party that represents the Muslim Brotherhood secured 235 seats in the parliament (47.2%). The Nour Party that represents the extremist Salafi group, secured 121 seats (24.3%). The remaining parties secured less than 30% in total. *Egypt’s Islamist Parties Win Elections to Parliament*, BBC NEWS (Jan. 21, 2012, 10:46 AM), <http://www.bbc.co.uk/news/world-middle-east-16665748>.

<sup>242</sup> Marwa Al-A’sar, *Legal Experts Say Amending, Extending Emergency Law Illegal*, DAILY NEWS EGYPT, Sept. 12, 2011, available at 2011 WLNR 18056156.

circumstances are over.”<sup>243</sup> The SCAF’s retreat from its promises has opened the door to a new constitutional concern.

The Temporary Constitutional Declaration states that the president can declare a state of emergency for six months after parliamentary approval.<sup>244</sup> Any extension of the state of emergency must be approved via a referendum.<sup>245</sup> The Temporary Constitutional Declaration entered into force in March 31, 2011.<sup>246</sup> Therefore, the state of emergency should automatically end six months after the Temporary Constitutional Declaration entered into force — September 30, 2011.<sup>247</sup>

However, the SCAF provided another argument. According to article 62 of the Temporary Constitutional Declaration, “[a]ll laws and regulations decided upon before the publication of this Announcement remain valid and implemented.”<sup>248</sup> The Lower House of Parliament approved a presidential decree renewing the state of emergency in 2010.<sup>249</sup> The decree declared that the state of emergency shall be in effect from the beginning of July 2010 till the end of June 2012<sup>250</sup> — and in fact, the state of emergency indeed lasted until the end of June 2012.<sup>251</sup>

The SCAF’s argument is sound but ignores the fact that the original 1980 decision to declare a state of emergency was itself illegal.<sup>252</sup> It is also unclear what will happen if the SCAF’s renewal of the state of emergency lacks a time limit. The SCAF’s insistence in maintaining the state of

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<sup>243</sup> Llyod C. Gardner, *THE ROAD TO TAHIR SQUARE: EGYPT AND THE UNITED STATES FROM THE RISE OF NASSER TO THE FALL OF MUBARAK* 195 (2011).

<sup>244</sup> TEMPORARY CONSTITUTIONAL DECLARATION, *supra* note 240, art. 59.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* art. 63.

<sup>247</sup> Shorouk El Hariry & Rana Muhammad Taha, *El-Beshri’s Emergency Law Statements Trigger Debate*, DAILY NEWS EGYPT (Sept. 22, 2011, 5:55 PM), <http://www.thedailynewsegypt.com/egypt/el-beshris-emergency-law-statements-trigger-debate.html> (citing Tarek El-Beshri, the head of the committee that drafted The Temporary Constitutional Declaration).

<sup>248</sup> TEMPORARY CONSTITUTIONAL DECLARATION, *supra* note 240, art. 62.

<sup>249</sup> President of the Republic of Egypt Decision No. 126 of 2010, *Al-Jarida Al-Rasmiyya*, 11 May 2010, No. 8bis(A), p. 2 (Egypt).

<sup>250</sup> *Id.*

<sup>251</sup> Shorouk News Staff, *Mas’ol ‘skary: alat al-Tawari’ Mostamirah* [Military Spokesman: The state of Emergency is still in Effect], <http://www.shorouknews.com/news/view.aspx?cdate=21092011&id=af5e92a4-c509-484d-a2b2-30e6392bd24f> (last visited Jan. 9, 2012) (citing Adel El-Morsy, the head of the military judiciary).

<sup>252</sup> *See supra* Part III.C.

emergency is unreasonable particularly after a revolution that was primarily initiated in response to such a disreputable law.<sup>253</sup>

It is imperative to note that when the public pressured the SCAF to end the state of emergency, the SCAF instead extended the scope of the application of the emergency law.<sup>254</sup> As the acting president, the SCAF amended the presidential decree declaring the state of emergency to further cover “acts of thuggery, attacks against the freedom to work, the sabotage of institutions, the disruption of transportation, the obstruction of roads and the deliberate broadcasting or spreading of false news, rumors or statements.”<sup>255</sup> These actions represent a huge step backwards for the rule of law under military rule.

To respect the rule of law, the SCAF must immediately end the illegal state of emergency. However, realistically speaking, the SCAF will probably not lift the state of emergency unless a major protest forces it to do so.<sup>256</sup> The bottom line is that the state of emergency was set to expire by the end of June 2012.<sup>257</sup> It is highly unlikely that the newly elected parliament will approve any presidential decree extending the state of emergency. This new parliament more likely expresses the true will of Egyptians in a way previous parliaments did not, due to the absence of the election rigging frequently practiced by the former regime.

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<sup>253</sup> *Id.*

<sup>254</sup> President of the Republic of Egypt Decision No. 193 of 2011, *Al-Jarida Al-Rasmiyya*, 10 Sept. 2011, No. 36*bis*, pp. 9-10, § 1 (Egypt).

<sup>255</sup> *Id.* The SCAF’s argument to extend the scope of application of emergency law was that “the emergency law is applied ... because of the security conditions the country has been going through.” Al-A’sar, *supra* note 242. The SCAF’s act of extending the scope of application of emergency law is absolutely unreasonable. As Professor Salah Sadek stated, “[t]he penal code covers all these crimes and defines a tough penalty for each. There is no need to apply extraordinary regulations under the pretext that regular laws are not enough.” *Id.* Importantly, amending the presidential decree declaring the state of emergency requires an approval from the parliament. Because the parliament is currently dissolved, the SCAF retains the powers of the parliament as well. It is very odd to issue a presidential decree as an acting president, then approving it as an acting parliament.

<sup>256</sup> At the time of writing this article, the SCAF announced that the Emergency Law shall be limited to acts of “thuggery.” David D. Kirkpatrick, *Egypt Military Council Partly Curbs State of Emergency Law*, Jan. 25, 2011, N.Y. TIMES, available at 2012 WLNR 1632038. This comes after revolutionaries announced they will sit-in again in Tahrir Square on the annual celebration of the Revolution, unless the SCAF starts the process of presidential election immediately. *Id.* It is noteworthy that the SCAF’s action of limiting the scope of application of emergency law shall be useless because “thuggery” is an elastic word. *Id.* It can even apply to political activists who participate in protests against the SCAF. *Id.*

<sup>257</sup> President of the Republic of Egypt Decision No. 126 of 2010, *Al-Jarida Al-Rasmiyya*, 11 May 2010, No. 8*bis*(A), p. 2 (Egypt).

### 3. The Military Trials for Civilians

In the period between January 28 and August 29 of 2011, the military courts tried 11,879 civilians.<sup>258</sup> The courts convicted 8,071 civilians, entered 1,836 suspended sentences, and left a further 1,225 convictions for ratification by the military.<sup>259</sup> The conviction rate in cases tried before military courts was 93%.<sup>260</sup> The debate over military trials for civilians grew heated when the army forces became involved in random detention of political activists who participated in protests against the SCAF.<sup>261</sup> The detained activists did not object to being interrogated, but they insisted that interrogations must take place before natural judges rather than military tribunals.<sup>262</sup>

The Military Judiciary Law of 1966 provides that the president may refer civilians to military courts whenever a state of emergency is declared.<sup>263</sup> Such military tribunals are another negative aspect of the unreasonable extension of the state of emergency. This law enables the acting president to refer any person to a military tribunal for trial for any reason. The Military Judiciary Law is one of the biggest obstacles toward improving rule of law, as this presidential discretion is a clear indication of the absence of rule of law.

Furthermore, the Military Judiciary Law states that the military judiciary can determine when to exercise its jurisdiction, but the Temporary Constitution Declaration suggests otherwise. Article 48 of the Military Judiciary Law provides that “the military judiciary is exclusively competent to determine whether an offense falls within its own jurisdiction.”<sup>264</sup> The Supreme Constitutional Court shall soon issue a decision on the constitutionality of this article.<sup>265</sup> The Court will likely find that this article

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<sup>258</sup> *Egypt: Retry or Free 12,000 after Unfair Military Trials: Civilians Tried since February Exceed Total under Mubarak*, HUM. RTS. WATCH (SEPT. 10, 2011), <http://www.hrw.org/news/2011/09/10/egypt-retry-or-free-12000-after-unfair-military-trials>.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Egypt: Rule of Law under Siege*, U.N. INTEGRATED REG’L INFO. NETWORK, Nov. 22, 2011, available at 2011 WLNR 24290257.

<sup>262</sup> *Id.*

<sup>263</sup> Law No. 25 of 1966 (Law of Military Justice, reformed in 2007), *Al-Jarida Al-Rasmiyya*, 6 June 1966, No. 123, pp. 593-611, §6(2) (Egypt).

<sup>264</sup> *Id.* art. 48.

<sup>265</sup> Ahmed Zaki Osman, *Court to Decide if Military Trials for Civilians Constitutional*, EGYPT INDEPENDENT, Sept. 10, 2011 (2:52 PM), <http://www.almazryaloum.com/en/node/494297>.

is unconstitutional.<sup>266</sup> Article 51 of the Temporary Constitutional Declaration stipulates that “[t]he law regulates the military judicial system and stipulates its responsibilities in line with constitutional principles.”<sup>267</sup>

This constitutional provision means that the legislature determines the jurisdiction of the military judiciary by passing military judiciary law. To put it another way, the constitutional provision does not allow the law to delegate the power to determine military court jurisdiction to the military courts itself. Courts should not be allowed to determine their own jurisdiction because such a determination belongs to the legislature. Moreover, article 48 of the Military Judiciary Law also likely violates article 21 of the Temporary Constitutional Declaration, which provides that “every citizen has the right to resort to his natural judge.”<sup>268</sup>

Additionally, there is an argument that article 48 is revoked under an implied revocation theory.<sup>269</sup> This article was enacted in 1966. In 1979, the legislature passed article 25 of the law of the Supreme Constitutional Court, which states that the Supreme Constitutional Court resolves jurisdictional conflicts between judicial bodies.<sup>270</sup> Therefore, because it came later, article 25 of the 1979 Supreme Constitutional Court law revoked article 48 of the 1966 Military Justice Law.

If the Supreme Constitutional Court holds that article 48 of the Military Justice Law unconstitutional, this holding will mean that military trials held on the basis of article 48 are invalid. However, not all who were tried before military courts were referred to those courts through the exercise of article 48 power. As stated above, the emergency law granted the president the power to refer civilians to military courts as long as the state of emergency is declared.<sup>271</sup>

To promote rule of law, civilians convicted in military trials should be retried before natural judges. This improvement may necessitate new legislation that bans military trials for civilians, even in a state of emergency. Such legislation can apply retroactively since it is in favor of the

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<sup>266</sup> *al-Ma kma al-Düstüreyah Tastaqbil Awel Ta'n 'ala I alat al-Madaniyyin lil Qadaa' al-'Askary* [The Supreme Constitutional Court Receives First Case against Military Trials for Civilians], SHOROUK NEWSPAPER (Dec. 13, 2011), <http://www.shorouknews.com/news/view.aspx?id=dcb2913a-1161-48eb-b5b3-a3d54cf5a318>.

<sup>267</sup> TEMPORARY CONSTITUTIONAL DECLARATION, *supra* note 240, art. 51.

<sup>268</sup> *Id.* art. 21.

<sup>269</sup> The implied revocation is also known as revocation by inconsistency.

<sup>270</sup> Law No. 48 of 1979 (Law on the Supreme Constitutional Court), *Al-Jarīda Al-Rasmiyya*, 9 Jun. 1979, No. 36, art. 25 (Egypt).

<sup>271</sup> Law of Military Justice, *supra* note 263, art. 6(2).

convicted and would not violate *ex post facto* considerations.<sup>272</sup> Adjusting the trial system should be one of the new parliament's first missions to promote the rule of law.

## CONCLUSION

This Article surveys the most important legal issues that emerged before, during, and after the 2011 Egyptian Revolution. It provides recommendations to establish full rule of law in post-Revolution Egypt to satisfy the desires of the people who ousted the former regime. These recommendations include drafting a new Constitution that represents all political groups, allowing the state of emergency to expire as scheduled in June 2012; and finally, ceasing military trials of civilians and retrying those already convicted before natural judges.

As President Obama observed, “[t]he people of Egypt have spoken, their voices have been heard, and Egypt will never be the same.”<sup>273</sup> The Revolution was about human dignity, which is the core of substantive rule of law.<sup>274</sup> The Revolution thus provides a golden opportunity to establish full rule of law in Egypt. The Egyptian legal community bears the responsibility of achieving and protecting full rule of law. Full rule of law will give meaning to the sacrifice of thousands of citizens who risked and lost their lives during the Revolution, proving that “the power of people is greater than the people in power.”<sup>275</sup>

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<sup>272</sup> According to the Egyptian law, only criminal law statutes that are in favor of the accused can be applied retroactively.

<sup>273</sup> *President Obama on Egypt's Revolution*, *supra* note 4.

<sup>274</sup> *Id.* (emphasizing that the revolution represents “the power of human dignity”).

<sup>275</sup> See generally WAEL GHONIM, *REVOLUTION 2.0: THE POWER OF THE PEOPLE IS GREATER THAN THE PEOPLE IN POWER: A MEMOIR* (2012) (an iconic figure of the Egyptian Revolution, recounting how he launched a Facebook page protesting the Egyptian government's responsibility for a citizen's death, igniting the Revolution).