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On Law and the Transition to Market: The Case of Egypt

Lama Abu Odeh

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Introduction

On the eve of independence from European colonialism, Egypt, like most other developing countries, undertook the project of de-linking itself from colonial economy through initiating domestic industrialization. The economic project known as Import Substitution Industrialization (ISI) was designed to liberate Egypt from raw commodity production, agricultural and mineral, servicing its previous colonial master Great Britain. The engine of development would be an expanding public sector with nationalization and socialism as leitmotif. In re-orienting the economy towards industrial production, it was hoped that the terms of trade with the international economy for Egypt would significantly improve, leading thereby to an improvement in the living standards of its population. And like most other developing countries (with the exception of the East Asian Tigers) Egypt failed. A symptom of its failure was a severe debt crisis that hurled Egypt, also like most other developing countries, into the brutal embrace of the International Financial Institutions (IFIs), the World Bank and the IMF. To be rescued from its debt crisis, Egypt had to concede to the neo-liberal economic program of these institutions otherwise known as the Washington

1 Cotton and agriculture had constituted the bulk of the Egyptian economy since the British colonization in 1882 and tied a new landowning class to the British presence in Egypt and the British cotton markets. Neither this class nor the British had any major incentive to promote the country’s industrialization and despite modest attempts to modernize, by the end of the Second World War agriculture continued to account for about a third of the country’s GDP. (John Waterbury: The Egypt Of Nasser And Sadat; The Political Economy Of Two Regimes 51-3 (1983))

2 After the revolution in 1952, the Nasser regime was determined to restore Egyptian power with full independence, political sovereignty and military capacity, and avoided alliances with either superpower. The ISI project that the regime adopted meant to diversify the economy and to break the economic linkages to the British metropolis that perpetuated Egypt’s backwardness. Id.

3 The country’s heavy reliance on cotton and its market had chained the peasant, the fallah, to a never ending cycle of cotton production and made him vulnerable to the unpredictable fluctuations in cotton prices. As land and capital stayed scarce, the population grew, continually diminishing the relative value of the peasant’s labor. At the time of the revolution of 1952, the per capita GNP remained the same as at end of the First World War. Id.


Consensus. The program aimed to improve Egypt’s capacity to repay its debt to international creditors through re-linking it to the global economy via trade liberalization, and the re-regulation of its domestic economy to be more market oriented with the private sector henceforth being the engine. And like most other debtor-countries, Egypt had to go through an austerity program to improve its savings.

Transitioning from an economy in which the public sector played a primary role to one in which this role is significantly reduced in favor of a domestic private sector is no easy matter. This is especially so, when in the post-colonial situation of Egypt, the public sector became, perhaps inevitably, the site not just of economic growth, but also of distribution and, equally importantly, the place in which those who came to rule Egypt were incubated, i.e., the state elites.

These state elites intermittently used the discourse of nationalist socialism to mobilize the population behind the project of domestic industrialization, but were for the most part populists. Political representation of the various social forces, especially emergent ones, was corporatized through state-based unions, associations and cooperatives. Soon the political trade-off of (I give you) economic wellbeing for (you give me) political power took hold.

The transition from an ISI-orientation driven by a public sector to the market essentially meant a transition from the relatively blurred class map of the public-sector-driven developing economy to a more differentiated one. The transition also meant that those tasks/ideologies/institutions associated with the public sector - growth, distribution, nationalism, socialism, populism, corporatism - had to be unbundled and given up. As they were unbundled and became associated

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6 Id.
7 Id.
8 Id.
10 In a study on elites in Egypt, state technocrats are together with the ruling party placed in the center of elite circles. In the second circle we find influential businessmen, trade unionists and parliamentarians. In the third outer circle are the judges of the SCC and influential NGOs (Gamal Abdelnasser, Egypt in ARAB ELITES, NEGOTIATING THE POLITICS OF CHANGE 117-123 (Volker Perthes ed., 2004).
11 It was nationalist to have one’s own domestic industry. In the name of socialism, the state, via its public sector, was responsible for the well-being of the new national body (AYUBI, supra note 9, at 298).
12 Populism is “a political movement which enjoys the support of the mass of the urban working class and /or peasantry but which does not result from the autonomous organizational power of either of these two sectors. It is also supported by non-working class sectors upholding an anti-status quo ideology” (Torcuato Di Tella quoted by AYUBI, supra note 9, at 206)
13 See infra
with the social forces of the new class map, rising ones and declining ones, they took new incarnations making them shadows of their previous selves.

The Egyptian story of transition is complicated by the fact that Egypt receives ‘rent’ from three strategic sources: the Suez Canal, oil and natural gas, and geopolitical location (US aid)\textsuperscript{14}. Since both the Suez Canal and oil and natural gas are administered by public companies, the revenues reach the coffers of the state directly\textsuperscript{15}. Revenues from these sources are “rent” in that while deploying minimal amount of local labor, they potentially yield large revenue\textsuperscript{16}. While the amount of this revenue could be sizable it is also be fragile: It is the international market or Egypt’s geopolitical value to the US that determine it, forces outside of Egypt’s control\textsuperscript{17}.

Although Egypt’s rent revenue is not comparable in size to that of the oil producing countries of the Gulf region\textsuperscript{18}, its availability, intermittently in sizable amounts, triggers a dynamic that approximates that of rent societies. Elites are dependent on rent revenue to preserve their hold on power through allocative activities while “rentiered” beneficiaries offer passive political loyalty in return. Rent surplus makes the state elite relatively autonomous by providing economic benefits to social groups that otherwise might challenge existing structures\textsuperscript{19}. Rentierism therefore enters the dynamic of transition from ISI to the Market in Egypt contributing its own dynamic, itself determined by the rise and fall of rent revenue. This adds to the story of transition another layer of complexity that needs to be captured.

\textsuperscript{14} SAMIR SULAYMAN, AL-NIZAM AL-QAWIYY WAL-DAWLA AL-DHA’FIYYA [THE STRONG REGIME AND THE WEAK STATE], 20-21 (2005)
\textsuperscript{15} Id.
\textsuperscript{16} Hazem Beblawi one of the original theorists of the “rentier state” insists on three essential features for such a state: 1) rent cannot be the only kind of income in the economy, but it should predominate; 2) the origin of the rent boils down to a situation of domestic payment transfer; and 3) a minority in the population must be engaged in the generation of the rent, while the majority is involved in the distribution or utilization of it. HAZEM BEBLAW, THE RENTIER STATE 12 (Hazem Beblaw & Giacomo Luciani eds., 1987), See also SULAYMAN, supra note 14, at 21
\textsuperscript{17} Moreover, Egypt is located within an oil rich region which finds itself the overseer periodically of petrodollars searching for labor and investment opportunities. This has allowed Egypt to export its labor to these countries utilizing their remittances at opportune moments of its economic history as a source of badly needed hard currency. In the same vein, foreign investment has often meant for Egypt petrodollar money from the gulf countries looking to invest in Egypt. (GALAL AMIN, EGYPT’S ECONOMIC PREDICAMENT: A STUDY IN THE INTERACTION OF EXTERNAL PRESSURE, POLITICAL FOLLY, AND SOCIAL TENSION IN EGYPT, 1960-1990, 40-6, 53 (1995))
\textsuperscript{18} In 2006, Egypt produced on average 668.22 thousand barrels oil a day 6, ranking it 26th of world producers. The same year, the natural gas production of 1,501 billion cubic feet made it the 19th biggest producer. Energy Information Administration, International Energy Data and Analysis for Egypt, http://tonto.eia.doe.gov/country/country_energy_data.cfm?fips=EG (February 2009)
\textsuperscript{19} AYUBI, supra note 9, at 235
Another layer of complexity is what I call “the Islamic Sector”. While the condensation of growth/distribution/political power within the public sector of ISI yielded the social forces undergoing “privatization”, it also through exclusion constituted the social forces outside it. Islamist ideology, in moderate or radical form, found a home within social groups existing “autonomously from the state”\(^{20}\): they were either never beneficiaries of the public sector, or they came to the social fore through the rent economy occurring outside the public sector, fed by worker remittances, or were children of those who benefited from the public sector but found themselves excluded from it due to the transition to the market\(^{21}\). While most other social forces live out the drama of their exclusion from the public sector, the “Islamist sector” sees itself as the alternative to the state, not in the form of private sector replacing public sector, but a kind of an alternative parallel state\(^{22}\). But because it was constituted through exclusion by the ISI public sector, it lives *in the shadow* of the state: mimicking its discourses, tools and institutions, engaging with it and conspiring to annex it\(^{23}\).

In the transition from ISI to market, law plays an important role. Just as the elites of Egypt received globalized ideas about the economy, first in the form of ISI as a response to the colonial economic legacy, globalized among post-colonial elites, and later on the Washington Consensus of International Finance Institutions, globalized in the form of an *imposition* on state elites as a response to the failure of ISI, so did legal elites receive globalized ideas about law that they too needed to contend with\(^{24}\). Egyptian jurists received the “social” in law during the ISI era\(^{25}\), and during the later neo-liberal era they were influenced by American style

\(^{20}\) In Egypt, “the main mobilization against the state bourgeoisie and its authoritarian apparatus has … so far not come from the economic private sector but rather from the socio-cultural private sector: From radical Islamic movements and from informal “Islamic business” groups with alternative network of schools, hospitals and social services.” *Ayubi*, supra note 9, at 408

\(^{21}\) *Amin*, supra note 18, at 137-40

\(^{22}\) The nucleus of this parallel state exists in the hospitals, clinics, mosques and banks administered by Islamists and used to provide both welfare services to the poor population and investment opportunities for those with money, completely autonomously from the state. The capacity of the “Islamic sector” to step in during the earthquake that hit Cairo in the mid-nineties by providing badly needed services revealing the inadequacy of the public sector is well documented. (Thomas Demmelhuber, *Egypt’s moment of reform and its reform actors: the variety-capability gap*, 16:1 DEMOCRATIZATION, 125 (2009))

\(^{23}\) A conflict between the Islamic business sector and the state has in recent years materialized in challenges over the “legality” of the status and practices of these companies. However, as *Ayubi* writes, “it is likely that the state saw in … this group … the development of a civil society that was seeking genuine autonomy from the state.” *Ayubi*, supra note 9, at 408


\(^{25}\) Judges and jurists are themselves a fraction of the state elites although they guard their autonomy from the political elites through a commitment they share to “judicial autonomy”. On judicial independence, see *Adel Omar Sherif & Nathan J. Brown, Judicial Independence in the Arab*
constitutionalism where rights were married to market (reasoned in neo-formalist and post-realist mode)\textsuperscript{26} \textsuperscript{28}. Legal rules serviced both economic strategies, ISI and subsequently the market, in that a set of rules and legal institutions had to be put in place to implement each economic mode in turn.

Not only is law used by elites to “implement” an economic strategy, and interpreted by judges in “the spirit of the times”, it is also deployed among the contending social forces of the transition. For the purposes of improving the bargaining power of one side at the expense of the other, it is used in the form of a proposed constitutional amendment here or a legislative reform there\textsuperscript{29}. State elites pass constitutional amendments that tighten their grip on the politics of transition; market oriented reformists propose a clearer separation of powers, married to market as an improvement of its own bargaining power vis a vis the state elites; and the working class agitates for the capacity to unionize independently from the state to improve its bargaining position both vis a vis the state elites and the new market with the hope of improving its declining living standards resulting from the transition to market\textsuperscript{30}. And the Islamist sector uses

\begin{itemize}
\item \textit{World}, Program of Arab Governance of the UNDP (2002), available at \url{http://www.undp-pogar.org/publications/index.asp?tid=9&src=1&doctype=0&so=0}
\item \textsuperscript{26} See how the court uses a constitutional provision to deduce a new basis for discrimination through analogy (which it treats as unconstitutional), a hallmark of formalist reasoning, Case No 11, Judicial Year 16, July 3, 1995:

“All Egyptian constitutions stress the principle of equality and treat it as the basis for justice freedom and social peace. …. However, these particular bases of discrimination are enumerated in the constitution by virtue of their commonality, but the list is not limited to them. … [E]ven though the list is limited it includes every aspect of differentiation, restriction, preference…. That this law privileges doctors over other lessees despite the fact that they share the same legal status, and without objective basis, renders the law unconstitutional”. (\textit{translation by author})

\item \textsuperscript{27} As an example of the use of post-realist mode of American reasoning see the recurring use in the court’s language of “balancing” and “weighing”, see Case No 11, Judicial Year 16, July 3, 1995:

“While it is permissible for a legislator in a state that combines individual freedom with state intervention to restrict use of property by the holder for a social purpose, this restriction however does not occur in a vacuum nor should it be conducted arbitrarily. The nature of the right itself, the purpose of this restriction, and the social circumstances under which this restriction takes place should all be taken into consideration. In this context, the legislator \textit{weighs} the alternatives and chooses the interests most worthy of protection… Right of property should therefore be regulated in a manner that \textit{balances} interests… Lessor and lessee should combine their interests in a manner that promotes economic development. \textit{The balance} between them should \textit{not weigh} in favor of one at the expense of the other; otherwise it would lead to injustice. It is hard to imagine that the exploited of yesterday has become the exploiter of today as a result of the \textit{skewed balance} through legislative intervention to its favor.”

\item \textsuperscript{28} \textit{Id.}
\item \textsuperscript{29} \textit{Id.}
\item \textsuperscript{30} \textit{Id.}
\end{itemize}
the courts to pass off its Islamicization agenda in the face of a highly secularized post-ISI state.\footnote{Lama Abu Odeh, Modernizing Muslim Family Law, The Case of Egypt, 37 Vand. J. Transnat’l L. 1043-1146 (2004)}

This paper is an attempt to describe this drama of transition from within the tradition of political economy that combines the study of the economy with that of the social forces and political systems constituted by and interacting with economic regimes. It starts with a historical review, of economic/political phenomena prevailing in Egypt, beginning with the regime of Nasser and ending with that of Mubarak. After inserting the Islamic sector to the drama, the paper continues with describing how law is used for each orientation and its actor. It finishes by describing four strategies for the state elite to remain in power. It is a description with an underlying normative agenda. It tries to describe the situation in a way that (hopefully) leads the reader to ask the following two questions: first, what is the response, indeed alternative to the Washington Consensus as a response to the failure of ISI; and second, which social force in the context of Egypt most likely to produce this alternative?

**Historical Review**


Nasser initiated ISI as soon as he came to power in 1952. Rather than promote industrialization through regulatory and macroeconomic measures favoring domestic private industry, as occurred in the East Asian Tigers, Nasser engineered the creation of a big public sector charged with the task of promoting full industrialization. Nasser responded to the massive popular demand for economic reform by passing a series of special legislations that took its base in land reforms. These were meant to remove the resource base of Egypt’s previous land elite, to redistribute rural assets and to be an incentive for previous landowners with economic means to invest in industry.\footnote{Land reforms, starting in September 1952, and continuing over time, ended up banning land ownership in excess of 50 acres per individual and 100 per family. Land properties exceeding this was expropriated by the state and sold back to the peasants cheaply. Foreign nationals were stripped of their Egyptian holdings.. Rent control in land tenancy gave tenures far reaching rights to the land. Waterbury, supra note 1, 61-3: Hamid Ansari, Egypt: The Stalled Society 79-87 (1986); T. Khattab, Land Law, in Egypt And Its Laws 126-7 (Nathalie Bernard-Maugiron & Baudouin Dupret eds., 2002)} An oversized public sector\footnote{Waterbury lists the following as falling in the hands of the state as a result of measures Nasser took when he came to power: Banking and insurance, foreign trade, all “strategic” industries, maritime and air transport, urban mass transport, modest public housing, some urban retail trade, major department stores, hotels, cinemas and theatres, all newspapers and publishing} came to serve two purposes for the regime of Nasser in addition to being
the locus of industrial oriented economic growth (ISI): It was the locus of resource transfer from the country side to the city\textsuperscript{34}, distributed through price controls and job creation\textsuperscript{35} (ISI + socialism + populism); and it was the vehicle for the emergence of state elites (the new authoritarians)\textsuperscript{36}. In exchange for employment and social benefits offered by the State, Nasser corporatized\textsuperscript{37} the political (corporatist populism). Each social group had its corporate entity that represented its interests which entity was part of the state. In the nationalization process, the object was thus not restricted to property but also social movements, associations and syndicates. The regime excluded only “conservative/reactionary social groups”\textsuperscript{38} and became itself the representative of all social interests in the political sphere.\textsuperscript{39}

In its early stages, the public sector-based development achieved high rates of economic growth.\textsuperscript{40} This however quickly changed for reasons related to the nature of the economic tasks undertaken; overambitious developmental programs not matched by local capacity, distribution considerations taking precedence over growth ones,\textsuperscript{41} the fragmentation of the public sector into “bureaucratic factions, clientelist networks and personalist cliques”\textsuperscript{42}, reasons related to international politics\textsuperscript{43} and regional politics\textsuperscript{44}. The political possibilities

\begin{itemize}
  \item houses, all reclaimed land, irrigation and drainage canals, major construction companies, High dam and Suez Canal. Only the following escaped: private cultivators, small scale retail and service firms, wholesale traders, small manufacturers (\textit{Waterbury}, supra note 1, at 76)
  \item \textit{Id.}, at 61, 66
  \item \textit{Id.}, at 66
  \item During an initial stage of ‘bureaucratic-authoritarian’ regimes, the demands of the ‘popular classes’ are to some degree met. But after a ‘ceiling’ is reached, a new “alliance between the military-technocracy and the upper bourgeoisie in cooperation with (subordination to) international capital” is reached and seeks to constrain the demands of the popular classes by exclusionary measures. (\textit{Ayubi}, supra note 9, at 277).
  \item In corporatism, “the tendency is to move downward through the re-stratification of the public into corporate functional groupings relevant to development and system-maintenance. Not class, but corporate grouping, is characteristic: hence a kind of “corporate representation’ in primary stage modernizing, mobilization systems is seen as the means of reconciling populism with functional expertise” David Apter quoted by \textit{Ayubi}, supra note 9, at 207.
  \item Sequestration was not only used to force a change in the social order but was also used against what the regime considered increasing security threats. Law 119 of 1964 was aimed against the increase in of activity by the Muslim Brotherhood and a third type of sequestration was aimed against a rising left. (\textit{Ansari}, supra note 39, at 173-83)
  \item \textit{Sulayman}, supra note 14 ,at 15-6
  \item Revenue growth passed that of nominal GDP during the 1960s (\textit{I.Kram}, supra note 5, at 11)
  \item \textit{Id.}
  \item Sunar in \textit{Ayubi}, supra note 9, at 208
  \item US’s antagonism to Nasser forced him internationally to an alliance with the Soviet Union and domestically to increase political repression against forces he feared might be allied with the US (\textit{Waterbury}, supra note 1, at 399)
\end{itemize}
of salvaging ISI were blocked by Nasser’s attack on the forces of the opposition from the left and the right. Those who refused to be “corporatized” were put in jail. Sadat came to power in 1970 having inherited a country heavily indebted as a result of its post-war reconstruction efforts.


By the time he was assassinated in 1981 Sadat left the following legacy: 1) he entered a war with Israel in 1973 (in alliance with Syria) in which the Egyptian army performed spectacularly well gaining Sadat in its aftermath a great deal of political legitimacy; 2) he demoted those of the state elites that favored socialism and promoted those favoring “opening up the economy”; 2) he facilitated the return of landowners to the countryside and the reconsolidation of their economic power through the relaxation of land reforms initiated by Nasser; 3) he initiated market reforms in what came to be called “open door policy” primarily oriented towards liberalizing trade and encouraging “foreign Arab investment”; 4) he unleashed the forces of the religious right in an attempt to marginalize the left as part of his agenda of transition to market.

Even before the costly 1967 war with Israel, Egypt’s defense expenses had in 1965 risen drastically to 12% of the GDP, much spent on the prolonged war in the Yemen and the war of attrition against Israeli forces (Waterbury, supra note 1, at 94-100, 331)

“Conservative/reactionary social forces”, i.e. the former landowning aristocracy in alliance with the foreign business, were disenfranchised economically and politically by Nasser. Ayubi, supra note 9, at 17, 209-16. However, “Unlike South East Asia, Egypt is not represented by a situation of social conflict and polarization. The Nasserist regime in 1952 ended an active period of such polarization. The Egyptian case, then represents a different model from that of third world countries that have succeeded in capitalism: the military dictatorship it witnessed came earlier than its counterparts”, giving the Nasser regime a great deal of autonomy from the society. (SULAYMAN, supra note 14, at 15-6 translation by author)

The Soviet military mission was ended in 1971 and Sadat purged the figures who were pro-soviet in the regime, attempting to liberalization. See MALAK ZAALOUK: POWER, CLASS AND FOREIGN CAPITAL IN EGYPT: THE RISE OF THE NEW BOURGEOISIE 57 (1989)

A policy of de-sequestration was implemented by which land was to return to its rightful owners. All sequestrations that had occurred 1961-4 was annulled, former owners granted full restoration of the property or full economic compensation, and third parties who had benefited or received property through the sequestration were taken into consideration. Just as the sequestration policies coincided with political ambitions and security concerns [under Nasser], so did the laws on de-sequestration mirror Sadat’s crackdown on opposition forces. Depending on the time and reason for sequestration, different laws of compensation applied. (ANSARI, supra note 39, at 173-83)

The Open Door Policy prioritized export related projects and was meant to bring in advanced technology and enhance Egypt’s strategic position: Foreign investors could now take majority interests in some firms that had been reserved for the public sector monopoly of banking; Arab investment was granted special privileges to attract Arab petrodollars; any project approved within its terms would automatically be considered part of the private sector; 49 percent of all equity in public sector firms to be put up for private subscription; weak companies would be sold off or liquidated, while strong would be put up for general share subscriptions. Private
The beginning of the rise in oil prices in 1975 heralded Egypt’s entry into the
dynamics of the rentier economy. Rent revenue entered the coffers of the state
through the publicly owned oil and natural gas companies. Given Egypt’s
location in a region that itself was receiving a rent windfall and was therefore
labor starved, Egypt conveniently exported a good part of its labor force. Labor
remittances became a feature of the Egyptian GNP landscape.

However, an economic orientation was already in place by the time the rent
windfall settled. The transition to market (Open Door Policy) initiated by Sadat
was mostly a “market” in its orientation towards trade liberalization. Trade
liberalization resulted in a massive increase of imports: food imports primarily
wheat, luxury goods, capital and intermediate goods. This ultimately
aggravated the balance of payment deficit inherited from the Nasser era as
external debt was resorted to, to foot the import bill.

Thus rentierism arrived as Nasser’s ISI was liberalized through trade only. Its
advent reinforced already existing patterns in the economy (orientation in
imports(exports), investment and output). However, given the fact that the
sectors that were fed the rent revenue (same as the ones that expanded through
trade liberalization) had limited employment creation potential, or that the
employment created was contingent on the availability of rent (services and
housing sectors); and given that indeed Nasser’s ISI public sector (with the
exception of the mineral industry) remained in decline, social conflict was not far
afield. The export of labor to the oil rich Gulf region averted such a conflict while
the patterns of (non-)production in the economy remained the same. In other
words, while social conflict was averted, the dynamics of wealth disparity were
in motion, waiting to tighten their grip once the rent depleted. Indeed this is

investment projects were not subject to labor laws, stipulations of worker representation on
management boards, profit-sharing formulae, and salary ceilings applied to the public sector.

(WATERBURY, supra note 1, at 131-9)

ANSARI, supra note 39, at 237-8

AMIN, supra note 18, at 40

Id.

Id.

AMIN, supra note 18, at 47; IKRAM, supra note 5 at 214-6

In other words, the transition to market at that period included trade liberalization without the
privatization of public sector companies. While Sadat’s Open Door policy set the tone for
forthcoming privatization, actual legal steps for privatization did not occur until the 1990s
(IKRAM, supra note 5, at 18)

Despite liberalizing measures, the trade deficit rose under Sadat from £E260 million in 1972 to
£1,000 in 1975, depending heavily on foreign loans. ZAALOUK, supra note 55, at 58.

WATERBURY, supra note 1, at 95-6

40-65, ZAALOUK, supra note 55, at 58

AMIN, supra note 18, at 131-40

Id.
what happened beginning the mid eighties when the decline in oil prices and the recession in the gulf region drove Egyptian labor migrants back home. Despite the plentiful availability of foreign exchange during this period, Egypt’s debt was compounded with a notable increase in state expenditure.

The Mubarak Era (1981-present)
Sadat’s economic legacies to Mubarak were twofold: 1) a much bigger external debt, 2) and a more distorted economic structure, rent economy superseding in size that of the productive economy whether agricultural or industrial.

These severe structural deficiencies of the economy drove the country into a precipice with the collapse of oil prices in 1986. Decline in the productive economy meant that the post-ISI elites were unable to provide jobs to those whose fate had been undermined by the decline in the rent economy and that the income from these sectors was unable to replace the hard currency income lost in the rent economy. However, to preserve its hold on power and buy social peace, the regime could not decrease public expenditure to absorb what it could of those driven to unemployment.

The crisis drove Egypt to sign an economic reform agreement with IMF in May 1987 according to which the government agreed to reduce expenditure, liquidate all losing public companies, and to liberalize the Egyptian pound relative to the dollar to attract expatriate savings especially from the Gulf. It also undertook to raise interest rates to encourage savings and curb consumerism. Following the agreement with the IMF, the Egyptian regime went to the Paris Club and got its consent to reschedule its external debt.

60 Id.
61 Most of the state expenditure was spent on the military. (SULAYMAN, supra note 14, at 81)
62 $14.3 billion external debt - an eightfold increase from Nasser’s days. (AMIN, supra note 18, at 12)
63 Oil, labor remittances, the Suez Canal and tourism accounted for 75% of Egypt’s total current receipts of foreign exchange in 1981. (AMIN, supra note 18, at 12, 40)
64 With oil prices collapsing, Egyptian oil income declined from 2.26 Billion dollars in 1985 to 1.2 in 1986 and income from Suez Canal declined in 1000m to 900m. In addition to the collapsing oil prices, the US government decided at this time to condition its economic aid to Egypt on implementing reforms advocated by IMF. SULAYMAN, supra note 14, at 54
65 AMIN, supra note 18, at 135
66 SULAYMAN, supra note 14, at 59
67 Id., at 59
68 Id.
69 However, the deal of 1987 proved to be a gross failure: public expenditure as a ratio of GDP increased by 5.4% in 1986/87, 57.2% for the year 1987/88. Net deficit increased from 5.3% in 1986/87 to 8.6% in 87/88. The regime went on financing its deficit by printing money, which reflected on the rate of inflation increasing it by 20% late eighties. (Id.)
Egypt’s situation was greatly improved when the US sought an international coalition in 1990 to roll back Iraq’s invasion of Kuwait. In return for Egypt’s support for the US war, creditor countries agreed to cancel half of Egypt’s debts, though they made this promise contingent upon Egypt carrying out economic reforms. Cancellation of debt took place incrementally; the cancellation of each part was contingent upon implementation of a set of policies agreed upon in the 1987 agreement with the IMF.

Since 1987 and particularly after a May meeting with the IMF in 1991, Egypt had gone some way in meeting the demands of IMF and the World Bank. It liberalized the pound, initiated privatization of public companies, and has once in a while been able to control budget deficit. While moves to privatization were initially slow, upon the appointment of Ahmed Nazif as Prime Minister in 2004, Western-educated technocrats in the government invigorated privatization, slashing tariffs and taxes and amending investment laws.

However, the structural dependence of the state elites on huge governmental expenditures to stay in power has meant that Egypt’s capacity to reduce governmental expenditure is limited: When indeed it succeeds in reducing the budget deficit, it is usually the result not of cutting down governmental expenditure but the renewal of rent income arriving to the state coffers due to international factors. In other words, in the patronage based authoritarian system of the regime, the elites depend on the political support and control that it receives in exchange for distributing benefits. This does not allow for a decrease in public expenditure.

The upshot of this economic history is that the failure of ISI has produced state elites that are path dependent in terms of their public expenditure patterns to stay in power, and have intermittent access to rent money. When available, the

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70 SULAYMAN, supra note 14, at 56
71 Id.
72 Id.
73 Id.
74 Since 2004, the privatization scheme has included selling shares in Suez Cement Company, telecom Egypt, department store Omar effendi and there are plans to sell shares in Egypt air. (OECD, Development Center, Working paper No. 261, Privatization in the MEDA Region: Where Do We Stand?, DEV/DOC (2007)4, (July 24, 2007) (prepared by Celine Kauffmann & Lucia Wegent). See infra note 117 on the privatization of banks.
75 AMIN, supra note 18, at 21
77 A recent increase in revenues is due primarily to a doubling of income from the Suez Canal and a doubling of tourists (The Economist, Id.)
78 SULAYMAN, supra note 14, at 39, 51, 64-5
rent reinforces expenditure patterns and when depleted, it drives the state into financial crises of debt increase. It further means that financial crises reinforce the bargaining position of International Finance Institutions (IFIs) in relation to these elites. Having abandoned the economic strategy of ISI and subjected the country to recurring financial crises, the elites are left with the IFI neo-liberal program to implement as the only alternative.

In isolation from a rent economy, implementation of the neo-liberal program creates an economic orientation that diminishes the role of domestic industry (due to the withdrawal of the state from the economy which domestic industry is dependent upon for protection) and increases the role of commodity production for export (agricultural and mineral), both reminiscent of the colonial economy. In the context of a rent economy, implementation of the neoliberal program highlights the role of those sectors of the economy dependent on rent: tourism, oil, commerce and the services sector. Both shifts lead to a differentiated class map both in the countryside and the city. The incremental implementation of neoliberalism leads to shift in class differentiation. The intermittent and on-going implementation of the neo-liberal program leaves a great deal of desire for it in the “air” and evacuates from consideration any alternative to it as a solution to the economic crisis of Egypt - *Egypt is always transitioning to Market*.

The result: A public sector that has increased in size (through rent) but lost symbolically (the failure of ISI discredited it) leading to its neglect; and a private sector that is small in size (due to resistance) but has succeeding in monopolizing the symbolic and ideological space.

**Three Orientations: A Comparison of Three Political Economies**

Egypt today has three economic orientations: ISI-on-the-decline; intermittent-rentierism, and Market-on-the-rise. These three orientations exist in combination; each with its own peculiar features that sometimes coheres and sometimes pulls in opposite directions.

Thus:

<table>
<thead>
<tr>
<th>Role of State in Economy</th>
<th>ISI</th>
<th>Rentierism</th>
<th>Market</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>State-based</td>
<td>State as recipient and allocator of rent</td>
<td>Withdrawal of the state from the economy</td>
</tr>
<tr>
<td>Public sector / Private sector</td>
<td>(State protected) industry as the engine of economic growth</td>
<td>Raw commodity export through public companies reminiscent of pre-ISI</td>
<td>The private sector: services, tourism, telecom, mineral, agribusiness, housing, commerce, and incrementally industrial</td>
</tr>
<tr>
<td>Distribution</td>
<td>Redistribution downward through the state and transfer of resources from agriculture to industry</td>
<td>Distribution downward and upward depending on the availability of rent</td>
<td>Distribution upward through privatization and withdrawal of subsidies of basic commodities</td>
</tr>
<tr>
<td>Nature of political regime</td>
<td>Populist authoritarian</td>
<td>Populist authoritarian when rent is available and bureaucratic authoritarian when it is not</td>
<td>Bureaucratic authoritarian</td>
</tr>
<tr>
<td>Political representation</td>
<td>Forms of political representations are corporatist in relation to the middle class and the working class: professional associations, unions, cooperatives, etc</td>
<td>When rent is available the state corporatist is reinforced. When it is not, a shift is made to the associationist corporatist where families, tribes, sects become representative of their members vis a vis the rentier state</td>
<td>State corporatist in relation to middle class, working class and the new capital. Business men come to have their own corporatist institutions: Chambers of Commerce, Chamber of Industrialists, Federation of Businessmen, etc, Incremental democratic representation through elections and political party representation</td>
</tr>
<tr>
<td>Ideology</td>
<td>Ideology is nationalist socialist</td>
<td>Relationship with the allocative state</td>
<td>Neoliberalism</td>
</tr>
</tbody>
</table>
The Islamic Sector

The "Islamic Sector" is inserted into this overall picture bearing in mind that I do not treat it as an "economic orientation" but a parallel state-in-the-making. It is undermined by an ongoing repressive assault by the state elites, but nevertheless has an economic base, an economic ideology, a relationship to law, and forms of political representation. But it is also a parallel state that has the ambition of annexing the formal state with the intention of transforming it. It therefore uses its parallel existence to make various assaults on the institutions of that state: It participates in elections of the Egyptian parliament⁷⁹; takes over in various state

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⁷⁹ In the 2005 parliamentarian elections, the Muslim Brotherhood, running as independents, gained 88 seats, or 20%, which was an increase from 17 seats in 2000. (Abdel-Moneim Said, What lies ahead?, AHRAKH WEEKLY, 1-6 Jan, 2009 at http://weekly.ahram.org.eg/2009/928/eg3.htm)
corporatist structures\textsuperscript{80}; and builds fortunes in the private sector that is emerging as a result of liberalization and privatization\textsuperscript{81}.

Islamic companies and Islamic banks are the most famous representations of “Islamic capital” that sees itself as an alternative to the secular capital promoted by the state elites. Notably, while Islamists have succeeded in infiltrating the corporatist structures of the middle class like professional associations, they seem to have failed in infiltrating labor unions\textsuperscript{82}. The urban working class seems thus far the most immune to Islamist influence.

I would thus describe it in the following way:

<table>
<thead>
<tr>
<th>The Islamic Sector</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Role of State in Economy</strong></td>
</tr>
<tr>
<td><strong>Public sector / Private sector</strong></td>
</tr>
<tr>
<td><strong>Distribution</strong></td>
</tr>
<tr>
<td><strong>Nature of political regime</strong></td>
</tr>
</tbody>
</table>

\textsuperscript{80} In the late 1980s and early 1990s, members of the Muslim Brotherhood won majority or absolute majority in the elections for the boards of the Engineers’, Doctors’, Lawyers’, Pharmacists’, and Scientists’ Syndicates (DEMMELHUBER, supra note 25, at 125) Although most active and present in student politics like at Cairo University, Muslim Brotherhood students have been banned from participating in student unions. (Mustafa el-Menshaw, : A Different Kind of Fraternity, AHRAH WEEKLY, Nov 24-30 2005, available at http://weekly.ahram.org.eg/2005/770/eg10.htm )

\textsuperscript{81} Successful Islamist businessmen have given the regime hiccups, which has moved to confiscate business assets and to prosecute successful Islamist businessmen under charges of money laundering, terrorism and plotting to overthrow the regime. In 2007, 40 businessmen and members of the Muslim Brotherhood, including deputy leader Khairat al-Shatir, were tried before a military tribunal. (Jailan Halawi, All’s Not Well on the Domestic Front: A Force to Reckon With, AHRAH WEEKLY, Dec 17 2007-Jan 2 2008, available at http://weekly.ahram.org.eg/2007/877/eg2.htm)

\textsuperscript{82} The Muslim Brotherhood has never enjoyed a strong base in the industrial working class, possibly due to reluctance from the affluent businessmen who dominate the leadership to mobilize workers. (Joel Beinin & Hossam el-Hamalawy: Strikes in Egypt Spread from Center of Gravity, MERIP, May 9, 2007, available at http://www.merip.org/mero/mero050907.html )
<table>
<thead>
<tr>
<th>Political representation</th>
<th>Islamist corporatist (Islamic societies and associations ) and state corporatist infiltrated by Islamists with the exception of labor unions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ideology</td>
<td>Ethical capitalism combined with Islamic commonwealth-ism</td>
</tr>
<tr>
<td>Class</td>
<td>Differentiated class map tempered by the disbursement of Islamic charity</td>
</tr>
<tr>
<td>Law</td>
<td>Use of Supreme Constitutional Law to strike down legislation perceived un-Islamic: family law reforms, interest rate laws.</td>
</tr>
</tbody>
</table>

Law and Adjudication in the Shadow of the Three Political Economies

When it comes to law, there is no doubt that legal rules are the handmaidens for the economic strategies of ISI and the market respectively. Rentier rule also dips into them.

For the ISI-orientation, the tone was set by Nasser in 1962 with the National Charter with nationalization and socialism as the main tenants. The legal structure includes rules that move the economic resources towards the industrial sector (investment laws, public companies laws, tax laws, and regulatory

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83 IKRAM, supra note 5, at 7-8;
84 E.g. Law 21/1958 on the regulation of the Egyptian industry stipulated a five year plan for industry in which the state financed 60% (IKRAM, supra note 5 at 5); Presidential Decree 44/1961 provided annexation of the capital of National Bank of Egypt;
85 According to the National Charter, economic infrastructure and a majority of heavy and medium industries should be public. (IKRAM, supra note 5, at 7) E.g. Laws 69, 70, 71 of 1961 nationalized the cotton market;
86 Tax laws are not found in a single act of legislation, but in a wide range of laws. E.g. see Law 7/1953 transferring existing law on taxation of capital income to commercial and industrial
rules touching on foreign exchange, tariff protection, customs duties, etc), as well as redistributive rules designed to shift the labor force from the countryside to the industrialized urban centers (agricultural legal reforms, land tenancy laws, rent-control in residential buildings, labor laws, laws of Associations, food subsidies, price controls, etc).

For Rentierism, budgetary laws used by the government to distribute the returns from rent went to the various segments of this civil service.

And for the Market-orientation, the goal is to create a robust domestic private sector with a shift of resources from labor to capital. The legal structure is

profit; Law 254/1954 on income tax; Law 370/1953 on taxation relief for small agricultural landowners; Law 463/1953 on taxation of arable land; Law 202/1960 imposed tax on inheritance; 87 E.g. Laws 156/1953, 475/1954 on foreign capital in investment; Presidential decree 581/1969 on the non-exchange income from the Suez Canal in foreign currency; Presidential decree 1037/1960 on the establishment of a ministerial committee of foreign trade and exchange; Ministerial decree 34/1956 on the determination of the Egyptian pound exchange rate for foreign currencies 88 E.g. Laws 513/1954, 365/1956, 482/1955 on tariff and excise duties, Laws 602/1953 & 173/1956 amending Law 2/1930 on customs tariff 89 E.g. Law 476/1959 provided the establishment of a Central Administration of Customs; 90 E.g. Land Reform Decree 178/1952 set the limit of individual ownership at 200 feddans; Law 152/1957 took over public waqf land; Law 24/1958 set a family limit at 300 feddans; Law 127/1961 reduced the individual ownership to 100 feddans; Laws 37/1951 & 15/1963 banned foreigners from owning agricultural land; Law 150/1964 transferred sequested property to public ownership 91 E.g. Land Reform Law 178/1952 regulated prices and terms of leases; Article 29 of Law 49/1977 stipulated that a lease contract would not be terminated with the death of a tenant if dependants are remaining in the premises 92 E.g. Tenancy regulation within Law 178/1952; Article 29 of Law 49/1977; Law 199/1952 brought tenancy agreements from 1944-52 under rent control, freezing them at a reduced level; Laws 55/1958, 168/1961 reduced the rent level further; Law 7/1965; Law No. 52/1969 as amended with Military Regulation 4/1976; Law 49/1977 & 136/1981: See Betsy Birns McCall; The Effects of Rent Control in Egypt, 3(2) ALQ, 151-66 (1988) 93 E.g. Law 244 of 1953 on the employment of workers; Law 46 of 1958 on the employment of workers in mines and quarries; Law 91 of 1959 was the first comprehensive labor law, replacing all previous labor laws 94 E.g. Presidential Decree 319 of 1952 on trade unions 95 On the Egyptian food subsidy system, see Ahmed et al., The Egyptian Food Subsidy System, Structure, Performance, And Options For Reform, Research Report 119, International Food Policy Research Institute, (2001); Also see IKRAM, supra note 5 at 14-5, 307; SULAYMAN, supra note 14, at 52-3 96 E.g. Law 32/1952 & 254/1954 on cotton prices; Law 296/1952 on prices for the crop of 1952; SULAYMAN, supra note 14, at 24 98 The de-sequestration policy was complicated due to the multiple types of sequestration and came to reflect the security interest of Sadat. Law 49/1971 called on speedy settlements of claims of compensation, Law no 69/1974 annulling all sequestrations that had occurred 1961-4 and granted full restoration of the property or full economic compensation. (ANSARI, supra note 39, at 173-83) Law no. 43/1974 laid the foundation of Sadat’s Open Door Policy (see supra note 57) But
guided by the triple prong of liberalizing trade (foreign investments laws\(^99\), corporate governance laws\(^100\), etc), privatizing public companies (privatization laws\(^101\), bank laws\(^102\), etc), and de-regulating or re-regulating the economy (new labor laws\(^103\), tax laws\(^104\), etc).

The judiciary is structured according to the needs of each economic strategy. The launching of the ISI-orientation witnessed a diffusion of judicial authority in the mode of spin-off specialized tribunals. These implemented special legislation (be it redistributive legislation or compensatory dealing with reimbursing the losers from the transfer of resources) either as panels of final instance or as first instance courts whose judgments are appealed in regular courts\(^105\). Such judicial bodies were manned by judges technocrats with expertise in the particular area they are adjudicating (agricultural credit, tax law, etc). Higher courts upheld much of the

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99 E.g. Law 32/1977 aimed to facilitate capital transfers; Law 8/1997 on investment guarantees and incentives; Law 13/2005 on Investment
100 E.g. Ministerial Decree 149/1996 on the organization of procedures for the nomination and election of employee representatives bodies of corporate governance; Dispute Settlement Law 27/1994 as amended 9/1997
101 E.g. Presidential Decree 262/1975 authorized 49 percent of all equity in public sector firms to be put up for private subscription; Law 111/1975 provided that weak companies would be sold off or liquidated, while strong would be put up for general share subscription; Privatization laws were more Law 203/1991 stipulated a sale of assets and shares in public enterprises and during the 1990s profitable companies in industrial market were sold.
102 In 1998, the legal preparations for privatizing the banking system took off. The process was initially slow and as of June 2005, state-owned banks accounted for more than 60% of total assets, and 85% of branch network. (See Mahmoud Mohieldin & Sahar Nasr, On bank privatization: The case of Egypt, 46 5 QREF, 707-725, (Feb 2007). However, in 2003 a new law on Central Bank was issued with Law 88/2003 and in October 2006, the state sold the smallest of its banks, Bank of Alexandria, with Italian Sanpaolo IMI acquiring an 80% share. In 2007, there was talk of a merger of the two state owned Banque du Caire and Banque Misr, but in July of the same year the government announced instead that 80% of Banque du Caire was up for sale. (Bank Information Center, WB, IMF and AfDB-backed program to privatize Egyptian banks arouses controversy, Aug 1 2007, available at http://www.bicusa.org/en/Article.3455.aspx ) According to the Word Bank Country Assistance Strategy for 2006-8, the government is to sell off its shares in 13 of the 17 joint venture banks (World Bank Group, International Bank for Reconstruction and Development, Country Assistance Progress Strategy Report, for the Arab Republic of Egypt, for the period FY06-08, Jun. 9, 2008, Report No. 43476-EG)
105 E.g. Law 494/1953, amended by 524/1954 on courts to hear disputes over land reform law; Law 476/1953 & 529/1954 on courts to hear disputes over farmland leases; Laws 160/1952, amended by 105/1953 on judicial committees in ministries to consider the disputes of civil servants; Ministerial Laws 2-4/1953 on Workers District Court; 119/1957 on a Court of Accounts;
decisions of these lower courts and the High administrative Court treated the bulk of ISI special legislation as valid under the doctrine of “Ordre Publique”\(^{106}\).

Contrary to the ISI phenomenon of judicial proliferation from the bottom, the Market-orientation has relied for its implementation on the Supreme Constitutional Court (SCC)\(^{107}\), playing the role from the top of the judicial structure, and striking down the special legislation of the ISI era. Using the pet rules of the market (contract and property located in the Egyptian civil code) the SCC has overturned much of what it treated as “distortive” legislation passed under ISI\(^{108}\). To do so, it has marshaled the assistance of comparative constitutional jurisprudence with heavy American influence to rationalize its comprehensive intervention, reversing the two-decade-long course of adjudication by regular courts\(^{109}\). I hypothesize that dipping into comparative constitutional jurisprudence has helped the SCC subdue opposition from within the judiciary itself to the radical course of action it was pursuing.

While the special legislation of ISI brought forth a new urbanized middle class in Egypt and the ISI corporate structures contained political dissent in the system, even eliminated the political altogether (through the mobilizing ideologies of socialism and nationalism), the Market has not been so fortunate. Social conflict in the era of the neo-liberal policies could not be so contained and discontent

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\(^{106}\) E.g. Decisions by the Egyptian Court of Cassation refusing to overturn legislation on agricultural reforms in the name of “Public Order”: Decision No 235, Judicial Year 23, 1957; Decision No 1865, Judicial Year 50, 1987; Decision No 597, Judicial Year 48, 1983; Decision No 459, Judicial Year 50, 1981; Decision No 107, Judicial Year 25, 1959.

\(^{107}\) Article 175 of the Egyptian Constitution of 1971 and Law 48/1979 set out that the SCC is “an independent judicial entity” whose jurisdiction includes judicial review of laws and decrees, interpretation of legislation according to the provisions of the constitution, and resolution of conflicts over judicial jurisdiction and decisions. The President of the Republic appoints the chief justice. As for the other justices the court, the High Judicial Council and the chief justice each nominates a member and the President picks one.

\(^{108}\) See for example a series of cases in which the SCC dismantled rent control regulations in residential buildings on the basis that many such regulations violate the property rights of the landlord: Case No 3, Judicial Year 18, 1997 in which the Court invalidated Art 29 of Law 49/1977 that allows relatives of the tenant to inherit the tenancy contract; Case No 71, Judicial Year 19, 1996 invalidating Art 7 of Law 29/1977 allowing tenants to exchange their tenancies in rental units; Case No 21, Judicial Year 7, 1989, invalidated Law 136/1981 because it prohibited lessor of non-commercial, no-industrial and non-professional premises from receiving annual increments in rent.

\(^{109}\) According to Al-Morr, chief justice of the SCC 1991-1998 “The adoption of the constitutional jurisprudence of the US and that of other foreign countries comes from the court’s belief that it has at its disposal a huge tradition of constitutional judicial review that should be made use of. “Science” evolves as a result of a cumulative effort, of each benefiting from the work of others, adding to it and developing it further. The work of the court in this context is no more than a form of participation in values (rights and freedoms) shared by all countries no matter what the unique culture of each might be”.
peaked its head, bared by the eroding flesh of corporatism. The development of
the SCC in the early eighties was contemporaneous with the introduction of
liberalized political forms of representation with political parties\textsuperscript{110} and regular
elections\textsuperscript{111}. This allowed the system to shift the task of absorbing political
dissent to these liberal structures of political representation and called upon the
court to adjudicate political conflict, now expressed in legal terms. The sites of
adjudication were election laws\textsuperscript{112} and political parties’ laws\textsuperscript{113}.

While the judiciary as a social group can be seen as part of the state elites, its
lineage firmly based in the state bureaucracy, it is nevertheless autonomous in
two senses: First, an ethic of autonomy is shared among its members which
constraints and conditions its subordination to the interests of the political state
elites\textsuperscript{114}. Second, ideological influence comes to the judiciary in the language of
legal discourse which means that its trafficking of the ideological is mediated
through a legal consciousness that runs parallel to, although autonomously, from
political consciousness\textsuperscript{115}. Thus under ISI, it adjudicated within a globalized
legal consciousness of the “social” while over the past thirty years the legal
thought that dominated its consciousness was based on the idea of “rights”

\textsuperscript{110} The Law on Parties 40/1977 was issued under Sadat, but only three parties were created at this
time. The creation of parties is subjected to approval by Political Parties Committee, which is
effectively in control by the regime. Decisions by the PPC may be appealed in court. Given that
the PPC has granted only one party license for 25 years, most of the 24 currently existing political
parties are thus creations of courts. (See Joshua Stacher, The Demise of Egypt’s Political Parties, 31(2)
British Journal of Middle Eastern Studies, 218-22 (Nov 2004)

\textsuperscript{111} First parliamentarian election under President Mubarak was in 1984; following elections 1987,

\textsuperscript{112} The elections in 1987 and 1990 were called on by the SCC. See Case No 37, Judicial Year 9, 1990
in which the SCC invalidated the law that reserved only one seat in each constituency to be
contested by both non-party candidates and candidates of political parties, while more than one
seat was reserved for candidates belonging to political parties arguing that it discriminated
against independents;

\textsuperscript{113} Case No 56, Judicial Year 6, 1986 in which Court invalidated Law 33/1978 because it excluded
from joining existing political parties those who “had corrupted political life” prior to the
Revolution of 1952 on the basis that it violated Art 62 of the Constitution that provides for the
right to participate in public life; Case No 23, Judicial Year 8, 1989 in which the Court invalidated
Art 8 of Law 120/1980 which excluded independent candidates from being nominated for the
Shoura Council; Case No 55, Judicial Year 7, 1988 in which the Court invalidated a law that
allowed for the exclusion from party creation leaders who were critical of the peace treaty
between Egypt and Israel.

\textsuperscript{114} See supra note 10; An ethic of autonomy is manifest in a continuing power struggle over
election supervision: In an interpretation of article 88 of the Constitution, the SCC found in July
2000 that election required judicial supervision. However, the 2007 amendments of the
Constitution removed this requirement. See infra note 143

\textsuperscript{115} See in general DUNCAN KENNEDY: THE RISE AND FALL OF CLASSIC LEGAL THOUGHT (1975)
interpreted to mean economic rights (property and contract) coupled with political rights\textsuperscript{116}.

Thus, when the SCC was asked to adjudicate political conflicts in the name of rights enumerated in the Egyptian Constitution (right to free speech and freedom of the press, right to assembly and freedom of Association, right to education and equal opportunity, the right to be tried according to law, the right to privacy, and the right to property, etc\textsuperscript{117}), it saw the Egyptian landscape studded with economic and political regulation that it deemed unconstitutional. It treated at par statutes regulating political parties and elections (passed in the 80s) that make it difficult to contest the dominance of the ruling party in the parliament\textsuperscript{118}, with statutes that regulate the right of property of landlords and landowners to the benefit of residential tenants and tenant farmers\textsuperscript{119}, with legislation that ensures the redistribution of resources such as education across the class structure by requiring that the rich subsidize the education of the poor\textsuperscript{120} and lastly, with corporatist legislation of the ISI era that ensures representation of all social groups involved in the production process or professional practice in public companies boards, boards of professional associations and labor unions\textsuperscript{121}.

In other words, by viewing through the same lens, the SCC in its approach equated the legalization of authoritarian practices, with that of corporatist ones, with that of redistributive ones. They were all bad because they violated, you name it, freedom of expression, freedom of association, right to property, right to education. Moreover, the SCC took a heavily libertarian approach and struck down various taxes designed to increase the state coffers when rent is depleted, in the process costing the state millions of dollars of lost revenue\textsuperscript{122}.


\textsuperscript{117} Articles 47, 48, 54, 55, 45, 36 of the Constitution

\textsuperscript{118} \textit{Supra} note 128, 129

\textsuperscript{119} \textit{Supra} note 123

\textsuperscript{120} Law 139/1981 grants the right to 8 years of free education for all Egyptian children over six years of age, See Case No 20, Judicial Year 16, 2 Sep 1995 referring to the right of education in finding differentiation between medical insurances for students unconstitutional

\textsuperscript{121} See Case No 17, Judicial Year 14, 14 Jan 1995 preventing high level administrative employees in the public sector from being nominated to membership of their companies’ boards of directors; Case No 6, Judicial Year 15, 15 April 1995 limiting the right of members of professional syndicates to serve on the board of a workers’ syndicate

\textsuperscript{122} See Case No 332, Judicial Year 23, 8 May 2005; Case No 129, Judicial Year 22, 12 Jan 2003; Case No 250, Judicial year 23, 8 Feb 2004; Case No 86, Judicial Year 17, 7 feb 1998; Case No 125, Judicial Year 18, 11 Dec 2005; Case No 33, Judicial Year 16, 3 Feb 1996; Case No 54, Judicial Year 19, 7 Mar 1998; Case No 26, Judicial Year 16, 16 Nov 1996; Case No 6, judicial Year 2, 9 May 1981; Case No 5, Judicial Year 10, 19 Jun 1993; Case No 43, Judicial Year 13, 6 December 1993 on the taxation of Egyptians working abroad
Moreover while the SCC, by opening up political party contestations through its decisions allowed for the Islamic party candidates to run as independents, it nevertheless dealt swiftly and adroitly with the attempt by Islamist litigants who argued for the Islamization of secular legislation based on Article 2 of the Egyptian Constitution. Either dismissing their claims procedurally or by appearing to interpret the Islamic texts earnestly, it concluded in one case after the other that secular legislation is indeed Islamic.

Towards the end of the 90s, the SCC was done dismantling both the regulatory structures of ISI (redistributive and corporatist) and that of the mono-party rule in Egypt. Meanwhile, its relationship with the political elites was in crisis. It had serviced the regime’s project of legalizing the political fall out from the implementation of neo-liberal policies by turning the court (as opposed to the street) into a site of political dissent and thereby minimizing for the regime the cost of the transition. Yet conversely, and perhaps even perversely, it had increased the costs for the regime in dealing with political dissent by opening up the political system for the participation of political parties of the opposition in parliament. At the same time, the SCC had curried favor with human rights advocates by being a champion of civil and political rights while taking them by surprise with its extreme hostility to economic regulation.

Sandwiched between two ambivalences, the strategy of the SCC could not be sustained. The president of the SCC in the nineties, Al-Morr, retired and three new ones consecutively were appointed. These emerged from the bosom of the state bureaucracy, clearly identified with the interests of the regime. More importantly, while its interventions in the economic sphere consolidated, the interventions of the SCC of the nineties in the political sphere were almost

123 See generally, ABU ODEH, supra note 37
124 See Case No 20, Judicial Year 1, 1985 in which the SCC argued that Art 2 of the Constitution was limited in its application to legislation passed after 1980 when this article was introduced through an amendment to the constitution. The SCC thereby refused to declare interest rate unconstitutional as provided by Art 266 of the Egyptian Civil Code, as the Rector of El-Azhar University, the claimant in the case, requested.
125 See Case No 7, Judicial Year 8, 1993 in which the court refused, among other things, to declare art 18 of the Personal Status Code, awarding women divorced against their wishes alimony for two years (Motaa), unconstitutional according to Art 2 of the Constitution, arguing that only legislation that violated the foundational “Islamic Sharia principles” violated such article. All other legislation is within the discretion of the modern state to legislate for the interest of all.
126 TAMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER, LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT esp 5-9, 41-6, 118-77 (2007)
127 Id.
128 Id.
completely reversed through the passage of constitutional amendments in March 2007\textsuperscript{130}. Neo-liberalism is now in a tight embrace with mono-party rule constitutionally.

**Strategies of the Current State Elites: Splitting Off**

Having conceded to the neoliberal program of the International Finance Institutions, the current state elites have found themselves confronting a conundrum. The implementation of the IFI-program leads to the unbundling of the constellation of growth, distribution and political power that was the feature of the public sector driven ISI strategy that they had incubated and that had birthed them in return. An enlarged public sector is the home of those state elites through which they have historically exercised control over the various social groupings. The failure of this public sector to produce development and the annexation of the ideological sphere by the “market” however has left them little choice but to give “it” up. But this essentially means that they stand to lose control. They therefore proceed cautiously inventing various strategies that are aimed to turn the economy to the market with as little loss to their control as possible. I call these strategies “splitting”, in the sense that tasks, powers and privileges associated with the public sector are split off to other social groups and institutional practices. The split in each case is carefully engineered not to jeopardize those state elites’ control. I identify four modes of splitting that they have pursued:

First, splitting off to the private sector, second, splitting off to democracy, third, splitting off to the judiciary, and fourth, splitting off to distribution.

It is important to assert that a) there is nothing stable about those split off strategies. They shift over time, indeed could be reversed, depending on the consequences for the state elites; and b) those strategies are not necessarily coherent. For example a carefully designed split off to democratic practice could be undermined by the split off to an autonomous judiciary when an overzealous SCC throws the former off balance (see above on the SCC).

\textsuperscript{130} Among the thirty-four constitutional amendments, introduced by President Mubarak, are provisions that prohibit parties from using religion as a basis for political activity; provide for drafting of a new anti-terrorism law which will replace the emergency legislation; makes it easier for the president to dissolve parliament; and end judicial monitoring of election. Opposition members of parliament withdrew from voting on the proposed changes, and only 27% of the registered voters went to the polling stations in the referendum. For Commentary on the Amendments see, Nathan Brown, Michael Dunne & Amr Hamzawy: *Egypt’s Controversial Constitutional Amendments*, Carnegie Endowment, March 23, 2007, see [http://www.carnegieendowment.org/files/egypt_constitution_webcommentary01.pdf](http://www.carnegieendowment.org/files/egypt_constitution_webcommentary01.pdf)
The Split off to the Private Sector
Privatizing the public sector gives rise to a private capital contending for representation of its interests within the state. The public sector historically included industrial companies, mineral extractive companies, and public companies administering services such as transportation and insurance, as well as banks\textsuperscript{131}. The state elites of Egypt have pursued an incremental strategy of privatization. Although privatization took up speed after 2004, they remain in control of the bulk of the national banking system (un-privatized)\textsuperscript{132}. Their control over banks significantly undermines the autonomy of the private sector vis a vis the state. The state elites also retain control by continuously shifting state support among the contending segments of the private sector: sometimes empowering the commercial trade-based capital, other times they provide protection to domestic industry allied with foreign capital, only to shift and support export oriented agribusiness.\textsuperscript{133} When rent is available the state elites’ autonomy vis-à-vis private capital is increased, when it is depleted, it turns to it for taxes, and contribution to infrastructural projects in the various localities\textsuperscript{134}.

In turn, the various segments of private capital strategize to increase their bargaining power vis a vis the state elites: they infiltrate the ruling Democratic National Party, home of the state elites, and run for elections under its umbrella\textsuperscript{135} and their intelligentsia (advocates of Market) find a foothold in the state bureaucracy through the parallel bureaucratic structures put in place by the World Bank\textsuperscript{136}. Thus far, the new capital seems inclined to the strategy of infiltration of the state to improve the terms of negotiation with the state elites. Serious democratization does not seem to be on its agenda as it seems inclined to get what it wants through the strategy of infiltration of contemporary political, bureaucratic and corporatist structures.

The Split off to Democratic Practice
The failure of development and the ongoing economic crisis has alerted the state elites to the following macro-political trade off as strategy of survival: opening up democratic practice in return for giving up part of the distributional role

\textsuperscript{131} See \textit{Waterbury, supra} note 1, at 40
\textsuperscript{132} See \textit{supra} note 117
\textsuperscript{133} \textit{Samir Sulayman, State and Industrial Capitalism} 28-35(1997)
\textsuperscript{134} \textit{Sulayman, supra} note 14, at 65-66
\textsuperscript{135} Today, reform minded politicians, cabinet members and parliamentarians surrounding Gamal Mubarak come from the business sector and there is a great overlap of people in business and NDP politics. (\textit{Demmelhuber, supra} note 25, at 122; Issandr el-Amrani, \textit{Controlled Reform in Egypt: Neither reformist nor Controlled}, MERIP, Dec 15, 2005, available at \texttt{http://www.merip.org/mero/mero121505.html})
\textsuperscript{136} E.g. Health Sector Reform, Airport Development Project etc. See website of World Bank for a list on projects and programs \texttt{www.worldbank.org/egypt}
associated with public-sector driven development. The rolling back of the
distributional role of the public sector is now relegated to the parliament to vote
on through a series of legislation. It is parliament, not government that could
now take the blame for the ensuing immiseration. That is the upside of this
strategy. The downside is that any opening up of democratic practice increases
the power of the Islamic sector at the expense of the NDP home of the state elites.
And given its parallel power, state elites are always inclined to reverse and
restrict liberties they bestow according to this strategy.

The Split off to the Judiciary
Empowerment of the SCC is symptomatic of this strategy. It too is part of a
macro-political trade off: increased judicialization at the expense of political
mobilization. Through the empowerment of the SCC, the state elites seem to
have succeeded in a) transferring the blame for the ongoing turn to market to the
SCC, b) encouraging individual adjudicatory solutions to political problems that
could have otherwise have powerful mobilizational force. In the discussion of the
SCC above, we have seen how the court reinforced the state elite’s strategy
towards the private sector while throwing off balance its strategy towards
democratization. Meanwhile, the striking down by the SCC of various tax laws
has thrown off balance the split off strategy to distribution (see below).

The Split off to Distribution
This strategy refers to the state elites’ practice of increasing public expenditure
when rent is available. The increase in expenditure typically targets the public
sector bureaucracy - the political base of the state elites. What such expenditure
usually does is increase salaries and benefits for this bureaucratic class. The state
elites’ relationship to this political base is contingent on the availability of rent.
While it resorts to this form for downward distribution to buy political passivity
from this base, it is nevertheless incapable of reviving the public sector as the
engine of the economy given its ideological commitment to the market. In other
words, distribution depends on rent while the devaluation of the public sector
makes it unlikely that growth would emerge from this sector to replace rent as
the source of the improvement in the life of the bureaucracy. The reason I call it a
split off is because it splits off the growth aspect of the public sector (to private
capital) and preserves the distributional one through use of rent revenue to buy
social peace.

Conclusion

One asks on behalf of Egypt: what is the alternative to this state elite deliberate
blundering of development? What social force is situated to provide the answer?
In my discussion of the nature of the new capital I showed its limitation. It had chosen to be the “buddy” of the state elites. Indeed, some of this capital has emerged from its very bosom. The middle class? Those segments of it that are downwardly mobile are swayed by Islamist ideology whose alternative to the system is ethical capitalism. Those segments that are upwardly mobile in the flourishing private sector of telecom, tourism, services and oil, fixate on constitutional separation of powers as the condition for its own empowerment. It is wedded to the market, bases ethics of meritocracy and efficiency, and sees the corruption in the bureaucracy and the lack of transparent governance as a violation of those twin values. More transparency and increased separation of powers seem to gratify the conditions of its national belonging. It is drawn to human rights discourse as the de-politicized response to the authoritarianism of the state elites. Human rights and the market are the twin faiths of the rising Egyptian middle class.

The working class watches the middle class’s obliviousness to its ongoing agitation. Labor strikes stud the Egyptian scene, yet barely get any mainstream media coverage. Workers of public companies find that financial losses caused by the corruption and mismanagement of the state elites is passed off to them in the form of decline in wages and benefits. Their unions, historically controlled by the state, and dominated by populist rhetoric, no longer represent the workers and mis-speak on their behalf. The new working class emerges in the new industrial cities and export processing zones, birthed by new labor laws that restrict unionization, and remains new to labor agitation given its rural routes. But given its recent birth, it is at least dis-inclined to be dominated by corporatized unions and the populist discourse that dominate the official, or traditional, working class.

Trapped in the interstices of a) the ideological hegemony of the market that rationalizes its worsening conditions, b) the populist discourse of corporatized unions that misrepresent its interests, and c) the non-alternative Islamist discourse of ethical capitalism, the working class stands to be the biggest loser in the transition from ISI to Market.\(^{137}\)

\(^{137}\) The argument made in the conclusion is an adaptation of the argument made by Amr Abdel-Rahman in Supra note 29