Politics on Trial? Criminal Justice and Egypt’s Political Opposition in the Aftermath of July 2013

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Abstract
In the aftermath of the overthrow of President Morsi in the summer of 2013, Egypt garnered international censure for violations of due process in mass trials. Thousands of members of the political opposition, pro-democracy movement, and other activists and journalists were arrested, held in pre-trial detention, handed lengthy prison sentences, or sentenced to death in criminal courts. This article shows how ordinary criminal courts became a focal point in the repression of political opposition and activists in Egypt in the aftermath of July 2013. Studying the courts’ verdicts during a time of socio-political upheaval provides insight into political and judicial dynamics, and how these may interact in times of crisis. The article shows that it was not due to executive pressure that ordinary courts reasoned and ruled as they did, but the ideologies and interests of judges. Several of the verdicts were subsequently overturned by Egypt’s Court of Cassation for failing to uphold Egyptian standards of due process. This divergence may be motivated by an interest in higher courts in upholding professional and institutional integrity, revealing significant cleavages within the judiciary. This, too, may in part be deemed an expression of judicial independence.

Keywords
Egypt, uprising, political transition, rule of law, criminal law, judiciary

1. Introduction
The protests that drew the world’s attention to Egypt in 2011 culminated with the stepping down of President Hosni Mubarak after almost thirty years in power. The ‘Arab spring’ was celebrated on Cairo’s Tahrir square and beyond, but the sense of revolutionary victory was short-lived. After less than a year, popular sentiment against elected President Mohamed Morsi, hailing from the ranks of the Muslim Brotherhood, reached a boiling point. On 30 June 2013, Egyptians took to the streets again, calling for the new president to step down. On 3 July, the Supreme Council of the Armed Forces (SCAF) announced the appointment of interim president Adly Mansour and a roadmap for a transition. Following elections in May 2014, President Abdel Fattah al-Sisi was sworn into power in June 2014.

The ousting of Morsi was welcomed by large segments of the population, while met with fierce opposition from the Muslim Brotherhood, Egypt’s largest organised political opposi-
tion group. Thousands of protestors participated in sit-ins and demonstrations in Cairo’s Raba’a and al-Nahda squares in August 2013. State security forces responded by killing at least 800 protesters and injuring more in what has been deemed the ‘largest single massacre in modern Egyptian history’. The Muslim Brotherhood was declared a terrorist organisation. The April 6 Youth Movement, a political group that played a key role in the 2011 protests, was declared illegal. Numbers have not been verified, but an estimated 41,000 members of the Muslim Brotherhood, the April 6 Movement, and independent activists and journalists were arrested, indicted, and sentenced to lengthy prison terms or to death between July 2013 and May 2014.

The criminal trials of members of the Muslim Brotherhood, youth activists, journalists and others shocked the world for their speed and severity. In March 2014, 529 individuals were sentenced to death after a trial where most of the defendants were tried in absentia. In April the same year, another 683 defendants were sentenced to death after a trial that lasted only hours. The European Union (EU), United Nations (UN) and others criticised the verdicts hailing from a judiciary that in the past had been praised for its independence and integrity compared to other countries in the region. The criminal justice system embarked on what has been termed a ‘steep slope of decline’, eroding its legitimacy at home and abroad. What motivated this shift towards judicial exceptionalism?

The judiciary – the system of courts interpreting and applying the law – is central among legal institutions. These institutions have become important political players in a number of countries. While much of the literature has focused on judicial politics in democracies, there is a growing body of literature on the dynamics of judicial politics in authoritarian regimes. Recent scholarship shows that judicial institutions do not advance the interests of the authoritarian rulers in a straightforward manner, and courts rarely serve as mere pawns of their regimes. The judiciary may be used to advance the interests of authoritarian regimes, and may be transformed into sites where political conflicts are fought. Courts may ‘serve as dual-use institutions’, facilitating some State functions while also opening new

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1. Founded in 1928, the Muslim Brotherhood was Egypt’s largest organised political group. Morsi was president of the affiliated Freedom and Justice Party, which was founded shortly after the revolution of 2011. See further Ibrahim El Houdaiby, ‘Islamism in and after Egypt’s Revolution’ in Bahgat Korany and Rabab El-Mahdi (eds), Arab Spring in Egypt: Revolution and Beyond (American University in Cairo Press 2012) 125.
2. International Center for Transitional Justice, ‘State Repression and Polarized Politics Thwart Hopes for Justice in Egypt’ (28 September 2015) <www.ictj.org/news/state-repression-polarized-politics-thwart-hopes-justice-egypt> accessed 21 September 2020.
3. The April 6 Youth Movement was established after the labour strikes on 6 April 2008. See Dina Shehata, ‘Youth Movements and the 25 January Revolution’ in Bahgat Korany and Rabab El-Mahdi (eds), Arab Spring in Egypt: Revolution and Beyond (American University in Cairo Press 2012) 105, 115.
4. According to the Interior Ministry, nearly 12,000 people were arrested on terrorism charges in 2015, adding to the 22,000 people security officials said had already been arrested as of July 2014. The Egyptian Center for Economic and Social Rights documented more than 41,000 arrests, indictments, or sentences between July 2013 and May 2014. Exact numbers are difficult to ascertain. See interview with Hazem Kandil, ‘Sisi’s Egypt’ (2016) New Left Review 102.
5. Nathan J Brown, The Rule of Law in the Arab World: Courts in Egypt and the Gulf (Cambridge University Press 1997) 1.
6. Mohamed el-Ansary, ‘The Role of the Public Prosecution in Egypt’s Repression’ (Project on Middle East Democracy 2016, updated in July 2017) 25 <https://pomed.org/wp-content/uploads/2016/11/POMEDAnsary-EgyptReport.pdf>.
7. Tamir Moustafa, The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt (Cambridge University Press 2007) 20.
8. Hans Petter Graver, Judges against Justice: On Judges When the Rule of Law Is under Attack (Springer 2015) 91.
9. Sahar F Aziz, ‘Independence Without Accountability: The Judicial Paradox of Egypt’s Failed Transition to Democracy’ (2016) 120(3) Penn State Law Review 101, 113.
avenues for activists to challenge the State. As Tamir Moustafa puts it, courts may be ‘vital nodes in which power is delegated, contested, and subverted’.10

Scholarship has looked at the relationship between the judiciary and the regime in Egypt, both before Mubarak and in more recent years. In The Rule of Law in the Arab World: Courts in Egypt and the Gulf (1997), Nathan Brown examines why and how the government in Egypt constructed an independent judicial system as part of a broader effort to build a stronger and centralised State. In The Struggle for Constitutional Power: Law, Politics and Economic Development in Egypt (2007), Tamir Moustafa studies the relationship between the Mubarak regime and the Supreme Constitutional Court. In an article on the independence of the judiciary, Sahar Aziz finds that the judiciary largely opposed reform efforts following the revolution in January 2011.11

This article focuses on the immediate aftermath of the overthrow of the regime in July 2013. It looks at how criminal courts in Egypt responded in an attempted transition from authoritarian rule – a critical juncture during which to study the role of the courts. Ginsberg and Moustafa have noted how the public nature of the judicial process and paper trail in courts provides access to internal regime dynamics.12 Looking at how criminal courts rule in cases involving political opposition and pro-democracy activists may provide insight into political and judicial dynamics, and how these may interact in a time of crisis. The article examines judicial reasoning and the rulings of judges in ordinary criminal courts and Egypt’s high court, the Court of Cassation, in the aftermath of July 2013. It first looks at the ambit of criminal justice since mid-2013. It examines pre-trial violations of due process rights and violations of fair trial rights in high-profile court cases involving members of the Muslim Brotherhood, the pro-democracy movement, youth and other activists, and looks at judicial efforts to uphold due process. The article then examines how these court cases shed light on questions regarding judicial independence, and how ideology, interests and other factors help to explain the evolution in parts of the judiciary in the aftermath of July 2013 in Egypt.

The article is informed by legal-historical and sociological sources and makes reference to legislation and verdicts in criminal trials and appeals. It refers to a dozen high-profile court cases involving political opposition, pro-democracy and other activists that were tried between 2013 and 2015, publicised in the media and analysed by legal scholars and civil society organisations. In the following cases, the entire verdicts were obtained from a database of cases compiled by the Law and Society Research Unit of the American University in Cairo; rulings banning the Muslim Brotherhood, the April 6 Youth movement and Ansar Beit al-Maqdis; the Marriott Cell Case; the Raba’a Operations Room Case, and the verdict in the appeal of the Matai Police Station case. Excerpts from these cases have been translated into English for the purpose of this article. Section 3 also refers to an unofficial translation of the Morsi Prison Break Case and the verdict in the appeal of the Marriott Cell Case.14

10. Moustafa (n 7) 21.
11. Aziz (n 9).
12. Tom Ginsburg and Tamir Moustafa, ‘Introduction: The Functions of Courts in Authoritarian Politics’ in Tom Ginsburg and Tamir Moustafa (eds) Rule by Law: The Politics of Courts in Authoritarian Regimes (Cambridge University Press 2008) 3.
13. See: <www.manshurat.org> last accessed 21 January 2021.
14. David Risley, ‘Summaries and English translations of selected cases of Egypt’s Court of Cassation’ <https://egyptjustice.com/court-of-cassation-cases> last accessed 21 January 2021.
2. The ambit of criminal justice since mid-2013

2.1 The Egyptian criminal justice system

The ordinary judiciary in Egypt is separated into three branches: the constitutional judiciary, represented by the Supreme Constitutional Court and charged with reviewing the constitutionality of laws and regulations; the administrative judiciary or State Council, headed by the Supreme Administrative Court, which considers cases based on decisions made by the executive; and, finally, the general judiciary, headed by the Court of Cassation, competent in civil, criminal, family, commercial and labour cases.

The court of misdemeanours occupies the lowest level of the system of criminal courts. The next level is the criminal court of appeal, which handles appeals from the misdemeanours court. The criminal court of appeal also judges in the first instance in felony cases. The criminal court of appeal can hear complete retrials of the facts of a case and review the application of the law. The Court of Cassation is charged with controlling the judgments of courts of appeal regarding errors of law. One of the two chambers deals with criminal cases.15

The Penal Code lists three main categories of crime: i) felonies (offences punishable by hard labour, imprisonment or death); ii) misdemeanours (offences punishable by imprisonment or fines); and iii) contraventions (minor offences punishable by fines).16 Crimes that can result in death sentences include murder, manslaughter occurring in the commission of a felony, the use of explosives causing death, rape, treason, terrorism and endangering state security.17 The Grand Mufti and the President of the Republic review each death sentence.

The Code of Criminal Procedure provides the regulatory framework for conducting investigations and criminal trials.

2.2 New laws and ‘outlaws’

New and amended laws promulgated between 2013 and 2015 entail further penalties for promoting disorder, destabilising national security, and engaging in acts of terror. The Demonstrations Law (2013) bans unapproved gatherings of ten or more people, and those who defy it face high fines and prison sentences of two to five years. President al-Sisi extended the jurisdiction of military courts in October 2014 to include crimes against public facilities, utilities, and properties. The Anti-Terrorism Law of 2015 broadens the basis for criminal prosecutions of terrorist crimes. It has a long and broad definition of ‘terrorist action’, and imposes a minimum of five years in prison for promoting perpetration of terrorist crimes, and large fines for publishing ‘false news or statements’ about terrorist acts, or issuing reports that contradict official accounts. It complements the Terrorist Entities Law, adopted in 2015.

Together with the Penal Code and an Assembly Law dating back to 1914,18 these laws have been used in trials involving political opposition and other activists. Taken together, the legislation broadens the definition of terrorism and punishes a number of acts with the

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15. Nathalie Bernard-Maugiron, ‘Introduction’ in Nathalie Bernard-Maugiron (ed), Judges and Political Reform in Egypt (American University in Cairo Press 2015) 1, 6–9.
16. The Arab Republic of Egypt, Penal Code (قانون العقوبات) Law Number 58 of 1937. Articles 9 to 12. Unofficial translation: <https://sherloc.unodc.org/cld/uploads/res/document/criminal_code_of_egypt_english_html/Egypt_Criminal_Code_English.pdf> last accessed 26 January 2021.
17. Article 77 in the Penal Code concerns felonies and misdemeanours from a source abroad that are harmful to national security and punishable by death. Article 88 in the Penal Code concerns the crime of terrorism.
18. The Assembly Law (Law 10/1914) has been used in several recent court cases, despite its formal repeal in 1928. See Cairo Institute for Human Rights Studies (CIHRS), ‘Towards the Emancipation of Egypt: A Study by CIHRS on the Assembly Law’ (CIHRS 2017).
death penalty. Several of the laws have been legally challenged for contravening the Constitution, but criminal courts have ignored these challenges. On 3 December 2016, however, the Supreme Constitutional Court ruled portions of the Demonstrations Law unconstitutional based on a direct challenge to the law.

Not long after the events of July 2013, cases were filed with the Cairo Court of Urgent Matters to ban the activities of the Muslim Brotherhood and the April 6 Youth Movement. This happened in spite of the fact that the Muslim Brotherhood was banned already in 1954 and the April 6 Youth Movement was not a registered organisation. On 23 September 2013, the Cairo Court of Urgent Matters issued a ban against the Muslim Brotherhood, a decision that was upheld on 5 November 2013. This served to criminalise all their activities, financing and membership. This, together with a Cabinet decision of December 2013 classifying the Brotherhood as a terrorist organisation, became a basis for prosecutions of thousands of members and alleged members of the Brotherhood. On 28 April 2014, the Cairo Court of Urgent Matters issued a ban of the April 6 Youth Movement for alleged acts that tarnish Egypt’s image and for espionage. The decision was affirmed on 31 March 2015, and became a basis for charges of belonging to an unlawful group.

Until the expiration of the state of emergency in 2012, State Security Courts formed a parallel legal system in Egypt. The Constitution of 2014 prohibits the use of exceptional courts. Since the ouster of former President Morsi, the judiciary has created national security circuits in the ordinary system of criminal courts to try high-profile cases dealing with protests and terrorism. The head of the appeals court in each jurisdiction selects the judges assigned to these courts. Senior judges, in coordination with the Ministry of Justice, have allegedly assigned judges who ‘exercised their discretion in favour of the prosecution’.

2.3 Pre-trial violations of due process

The Office of Public Prosecution is charged with investigating and prosecuting crimes, and constitutes the main link between the executive and the judiciary. The prosecution’s powers of investigation are wide-ranging, and only the public prosecutor can file criminal lawsuits. The case must be terminated if the act is ‘not punishable by law’ or if the investigative judge finds that there is ‘no sufficient evidence’. In this event, the accused person is to be released. Statements produced by an accused or a witness under duress or threat of duress ‘should not be relied on’. Pre-trial detention shall not exceed two years if the crime is
punishable by death or life in prison. An exception to this is given in an amendment to the Code of Criminal Procedure in 2013, authorising criminal courts and the Court of Cassation to prescribe provisional detention of 45-day increments without a maximum time limit for individuals facing a death sentence or life in prison.

After the removal of President Morsi from office, there was an influx of cases to the Office of the Public Prosecution, often with hundreds of defendants. The prosecution became a focal point for referring cases regarding political opposition and activists to criminal trials following July 2013. The prosecution also referred a number of cases to State Security Prosecution, which has jurisdiction in crimes that are detrimental to the security of the government, labour strikes, and crimes relating to public gatherings. Prosecutions were initiated against individuals without evidence of the commission of a criminal offence, or based on distorted evidence. Numerous cases of enforced disappearances and torture to obtain confessions for use in criminal cases have been documented, and prosecutors relied on these in formulating charges and authorizing detention. At the same time, the prosecution failed to bring charges against the police and security agencies for violence against citizens.

In the Marriott Cell Case from 2014, the accused Al-Jazeera English journalists were charged with joining a group that destroyed the religious unity and peace of the nation and joining the Muslim Brotherhood, among other things. Reports from trial observers showed a lack of relevant evidence to support the charges, such as recordings from the defendants’ hard drives and phones that had no relevance to Egypt or Al-Jazeera, including footage of trotting horses and a program about sheep farming. On appeal, the Court of Cassation found that the conviction ‘did not mention any substantiated evidence upon which the judges based their ruling that was delivered in vague expressions’, and overturned it.

The use of pre-trial detention exceeding the legal limits became widespread after July 2013. By the end of 2016, an estimated 8,500 people were being held in pre-trial detention, and more than 1,400 were held in pre-trial detention beyond the legal limits. There were numerous instances of denying access to legal counsel at the pre-trial stage and during trials. Mahmoud Abou Zied (‘Shawkan’) was arrested on 14 August 2013 while he was working as a photojournalist covering the incidents of the Raba’a square dispersal and was kept in pre-trial detention beyond the two-year legal limit. In the Foreign Espionage and Prison Break cases in 2015, where Mohamed Morsi and other senior officials of the Brotherhood faced multiple charges, many of the accused were denied access to counsel and to family members during detention.

29. Ibid Articles 142–143.
30. Ashraf Tawfiq Shams Al-Din, ‘Commentary on the Code of Criminal Procedure’ (2015), 455.
31. El-Ansary (n 6) 8.
32. Amnesty International, ‘Officially, You Do Not Exist’: Disappeared and Tortured in the Name of Counter-Terrorism’ (2016) 9.
33. El-Ansary (n 6) 1–2.
34. Patrick Kingsley, ‘Six flaws in the case against three jailed Al-Jazeera journalists’, The Guardian (London, 24 June 2014) <https://www.theguardian.com/world/2014/jun/24/six-flaws-case-against-three-jailed-al-jazeera-journalists-greste-fahmy-mohamed> accessed 21 January 2021.
35. Court of Cassation, The Circuit Criminal Court (1 January 2015) <https://static1.squarespace.com/static/5541099b8ecb0269a2d77e01d/t/55c66b77e4b033a4a77d69b25/1439066999190/Al-Jazeera+foreign+jounalists-Cassation-Eng-annotated-2015-06-01.docx.pdf> accessed 21 January 2021.
36. El-Ansary (n 6) 13–14. See also Egyptian Initiative for Personal Rights, ‘Detention without end’ (2016) <https://eipr.org/sites/default/files/reports/pdf/endless_imprisonment_0.pdf> accessed 19 January 2021.
37. El-Ansary (n 6) 14.
38. International Commission of Jurists (ICJ), ‘Egypt’s Judiciary: A Tool of Repression. Lack of Effective Guarantees
2.4 Violations of due process during trial

2.4.1 Mass trials and sentencing

Article 96 of the Egyptian Constitution establishes that ‘the accused person is presumed innocent until proven guilty in a fair legal trial in which the right to defend himself is guaranteed.’ The duty to respect fair trial rights applies equally when a group of individuals are tried together. According to the Code of Criminal Procedure, judgments must include the reasons upon which it has drawn. Any conviction must state the punishable incident, the circumstances under which it occurred, and must indicate the text of law upon which the judgment was based. Egyptian jurisprudence asserts the individual nature of criminal responsibility:

[...] a person can be held responsible only if that person, either as principal or as accomplice, committed the alleged acts [...] Whether an act is wilful or by simple omission, it must be personally attributable in order for the individual’s responsibility to be engaged. Egyptian jurisprudence continuously refers to this principle.

In the aftermath of the overthrow of President Morsi in mid-2013, mass trials were used to prosecute suspected supporters of the Muslim Brotherhood and activists. Criminal courts imposed life sentences and the death penalty following mass trials violating fair trial rights. In the Matai Police Station Case in 2014, the Supreme Guide of the Brotherhood and 528 others were charged with violence after the Raba’a and al-Nahda sit-ins and sentenced to death. The trial lasted for three sessions, two of which were used to read the decisions of the court, with the third session reportedly only lasted 30 minutes. This made it impossible to determine individual criminal responsibility. Of the accused, 398 were tried in absentia. After receiving the opinion of the Grand Mufti, the trial court upheld 37 death sentences while 492 defendants were sentenced to life in prison. In the Adwa Police Station Case of 2014, the same court sentenced a further 683 supporters and members of the Muslim Brotherhood to death for violence at a police station. Also in this case, most of the accused were absent and the hearing was held in the absence of lawyers. The only hearing lasted a few hours, and the judgment does not explain how evidence supports the convictions. The court considered 681 of the accused charged with intentional killing to be ‘collectively responsible for the crime’. Individuals under the age of eighteen at the time of the crime were sentenced to death in both cases.

In the Prison Break Case concerning former President Morsi and other senior leaders of the Muslim Brotherhood in 2015, 107 people were initially sentenced to death. The defendants were denied the right to call and to cross-examine witnesses during the trial, and were
convicted despite a lack of credible evidence proving individual guilt beyond reasonable doubt. In the case of the high-profile activist Alaa Abd el Fattah and Twenty-Four Others in 2015, all defendants were sentenced to fifteen years in prison although none of them were present in the court.

The practice of issuing verdicts in the absence of the defendant – *in absentia* trials – became widespread from mid-2013. Although the absence of the individual and his or her lawyer when the sentence is given is a serious violation of due process rights protected by the Constitution, the Code of Criminal Procedure allows for this procedure and allows a retrial in such cases. If the person has been legally notified of the committal order and summons, the court may issue a ‘default judgment’ and may adjourn the case or order to re-summon the person. The Public Prosecution and defendant are to present their statements and pleadings, and the court hears any witnesses if deemed necessary, after which a judgment is issued. A judgment *in absentia* may be executed if not objected to by the person convicted within the given time limit.

### 2.4.2 Other violations of fair trial rights

The Constitution guarantees the right of the accused to a fair trial and to defence, either in person or by proxy. Article 97 of the Constitution prohibits the use of exceptional courts, and establishes that ‘no person may be tried except before the ordinary judge.’ Article 98 of the Constitution establishes that ‘the independence of the legal profession and the protection of its rights is a guarantee for the right of defence.’ It prohibits the arrest of a lawyer while he or she is exercising the right to defence except in *flagrante delicto* crimes (Article 198). Article 96 of the Constitution sets out the state duty to provide protection to the victims, witnesses, accused and informants, and the Code of Criminal Procedure sets out the procedures for hearing witnesses.

In the aftermath of July 2013, trials were sometimes held in police facilities. The accused were held in a soundproof glass cage with metal bars obscuring their vision and limiting the opportunity to communicate with counsel and present a defence. Some trials were conducted in the absence of defence attorneys. Lawyers were also subject to verbal and physical abuse by the police, and in some cases, arrest, detention, or prosecution seemingly in response to attempts to uphold the rights of their clients. Judges have refused to allow defence witnesses to present evidence and to cross-examine prosecution witnesses. In the case of the profiled activist Ahmed Douma and 268 others, defence lawyers were referred to investigation for disruption due to their insistence that the Court hear their client. The judge referred a defence lawyer to investigation based on his request to include a statement by the judge in the case file: ‘Do you want military and police forces to be beaten up and not respond?’

In the appeal of the Matai Police Station Case, the Court of Cassation pointed out the violation of the right to defence and other due process violations in the trial court. The Court of Cassation highlighted how defendants with felony charges have the right to a genuine defence. Many of the accused did not have legal representation and the trial court continued with the hearing without appointing lawyers and without informing the accused of the right

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44. Ibid 66.
45. Ibid 42.
46. See the Code of Criminal Procedure, Articles 384, 386, 388 and 467. See also Hafez Abu Seada, ‘Exceptional Courts and the Natural Judge’ in Nathalie Bernard-Maugiron (ed), *Judges and Political Reform in Egypt* (American University in Cairo Press 2015) 167, 172.
47. Code of Criminal Procedure, Articles 110 – 122.
48. ICJ (n 38) 42 – 54.
to a defence attorney. In spite of this, the lower court had continued the trial and found them guilty. The Court of Cassation found that this invalidated the procedures, necessitating a retrial. The Court also struck down the decision of the lower court to impose the death penalty on a minor.49

There has been an escalation in the use of military trials for civilians since mid-2013, which further curtail due process rights. Defendants have been accused of belonging to the Muslim Brotherhood or charged for taking part in student protests.50 Civilians have been sentenced to death and executions have been carried out. On 17 May 2015, six civilians were executed following conviction in a military court. They were accused of participating in attacks on security services and killing two officers. In addition to violating the right to an independent and impartial tribunal, there was evidence that three of the accused were already in detention when the attacks they were convicted for took place. There was no opportunity for appeal.51

2.5 Efforts to uphold due process
Parts of the judiciary in Egypt have sought to uphold due process since mid-2013 by making public statements, stepping down from trials, and reversing criminal verdicts upon appeal. Public statements have resulted in disciplinary action against judges.

On 24 July 2013, a group of 75 judges made a statement read out by the deputy president of the Court of Cassation in Raba’a Square following the ouster of President Morsi. The signatories included high-standing judges from the Court of Cassation, courts of appeals and first instance courts. The statement noted the removal of Egypt’s elected president, the suspension of the Constitution, the dissolution of the elected parliament, the closure of media outlets, and thousands of deaths and injuries. It affirmed the judges’ role in upholding and protecting citizen rights and declared that the judges were ‘not involved in politics and do not support any particular side’.52 Members of the Judges’ Club filed a complaint with the Office of Public Prosecution accusing the signatories of the statement of lies. An investigating judge referred 56 of the judges to disciplinary proceedings. The proceedings concluded that 32 of the judges were unfit for judicial office and forced them into retirement.53

In appeals processes, the Court of Cassation has repudiated trial court proceedings and has reversed mass convictions and death sentences. In January 2015, the court ordered a retrial of the Matai Police Station Case. Parts of the verdict merit repetition as it renders a blunt blow to the trial court:

The original court is not only wrong in applying the law, it is also based on corrupt procedures that infringed the right to a proper defence. This is considered one of the main principles in criminal proceedings […] all successive Constitutions have stipulated in protecting or ensuring the right of fair trial, which means that all defendants must be treated as not guilty unless they are found guilty with the final court in a legal trial that protects their guarantees to defence […] a right that was mentioned in the Universal Declaration of Human Rights in Articles 10 and 11, and it is also a principle that has been established in democratic countries […]. This is irrespec-

49. ICJ (n 38) 60–61 and Court of Cassation, ‘Revoking the Death Sentences in the Case on the Events of Matai Police Station in Minya’ <https://manshurat.org/node/1255> last accessed 22 January 2021.
50. Sahar F. Aziz, ‘The Expanding Jurisdiction of Egypt’s Military Courts’ (Carnegie Endowment for International Peace 2016) <http://carnegieendowment.org/sada/64840> accessed 15 September 2020.
51. ICJ (n 38) 67–68.
52. Ibid 71.
53. Egyptian Initiative for Personal Rights, ‘32 Judges Forced into Retirement for Expressing Their Opinion’ (2016) <https://eipr.org/en/press/2016/03/new-purging-judiciary> accessed 15 September 2020.
of the nature of the crime or the severity of the case being examined. [...] this right is more supreme, sacred, and comes before the rights of society, which will not be damaged if one guilty person is free as much as it would be damaged if one innocent person is found guilty.54

The Court of Cassation also ordered a retrial in the Adwa Police Station Case where 683 individuals were facing death sentences, noting that the accused did not have legal representation during the hearing. The Court reversed the convictions and death penalty of 12 defendants and the life sentences of 25 defendants in the Rab'a Operations Room Case.55 Further, the Court reversed the convictions in the Marriott Cell Case where the defendants initially were sentenced to seven to ten years in prison.56 It held that the trial court failed to cite sufficient or valid evidence, that the search warrant was invalid, and that the confessions were involuntary. It found that the judgment was ‘weak in its reasoning’ and ‘full of contradictions,’ which made it necessary to overturn. The court limited the broad definition of terrorism in the Penal Code – which could be used against non-violent protest activity – to crimes involving violence or an intent to commit or aid the perpetration of violence.57

The verdicts from the Court of Cassation showcase the magnitude and gravity of due process violations in ordinary criminal courts. A key question that follows is what may have motivated the judges in lower courts to reason and rule as they did, and why the Court of Cassation diverges from these rulings in the appeals process.

3. Understanding the Egyptian judiciary since mid-2013

Scholarship has identified different forms of generic state repression and how this relates to the law. Extrajudicial repression – involving acts such as unauthorised detention and enforced disappearance – is an outright departure from the law to accommodate the needs of the regime. Other forms of State repression are ostensibly within the law: administrative repression, summary or quasi-judicial repression, and legal repression.58 Administrative repression involves restrictions on individual liberty without a prior trial and conviction – often based on emergency law. In cases of quasi-judicial repression, trials may apply laws that are retroactive, secret or unclear, limiting the defendants’ right to a defence and employing dubious standards of evidence. In such cases a ‘veneer of legality is given to the discretionary repression of political enemies and opponents’.59 Finally, legal repression involves the repression of individuals for political offenses, while proceeding through regular judicial mechanisms that provide full protection from arbitrariness. Individuals may be convicted in a fair trial, whereas the law may be draconian.60

A combination of different modes of repression is common in authoritarian regimes. In general, the above-described Egyptian developments in the aftermath of July 2013 cor-

54. Court of Cassation, ‘Revoking the Death Sentences in the Case on the Events of Matai Police Station in Minya’ <https://manshurat.org/node/1255> last accessed 22 January 2021.
55. David Risley, ‘Egypt’s Court of Cassation Reverses Death Sentences for Muslim Brotherhood Leaders, Orders Retrial’ (4 December 2015) <http://egyptjustice.com/analysis/2015/12/4/egypts-court-of-cassation-reverses-death-sentences-for-muslim-brotherhood-leaders> last accessed 21 January 2021.
56. See https://manshurat.org/node/1279 for the entirety of the verdict, only available in Arabic.
57. David Risley, ‘Al-Jazeera English Journalists (‘Marriott Cell’) Case’ (2015) <http://egyptjustice.com/analysis/2015/6/10/al-jazeera-english-journalists-marriott-cell-case> last accessed 21 January 2020.
58. Graver (n 8) 23.
59. Robert Barros, ‘Courts out of Context: Authoritarian Sources of Judicial Failure in Chile (1973–1990) and Argentina (1976–1983)’ in Tom Ginsburg and Tamir Moustafa (eds) Rule by Law: The Politics of Courts in Authoritarian Regimes (Cambridge University Press 2008) 156, 168.
60. Ibid (n 59) 167 – 168.
respond closely to a situation of quasi-judicial repression: there is a legal basis in broadly worded laws and the prosecutions take place in courts, where rights to defence and other due process rights are severely curtailed. It is necessary to look beyond the letter of the law, however, to explain the developments in the judiciary in Egypt. In 2015, lawyer Malek Adly gave the following characterisation of the state of play concerning the rule of law in the Egyptian context: ‘they say the hand of justice is shackled by law. Pardon me, what law? Justice is only shackled’.61 The distinction between law in the books and ‘in action’ is well-known even in democracies.62 In other contexts, it has been found that the readiness of the judges to accept and apply oppressive laws cannot be fully explained by reference to their legal approach or sense of duty. Rather, judges were enforcing laws in accordance with their views of what they deemed appropriate.63

The following sections shed light on how ideology, interests and other factors impacted upon judges in Egypt, which helps in turn to explain the trials of political opposition, pro-democracy and other activists in the aftermath of July 2013.

3.1 Nationalism and identity

3.1.1 Judging with vengeance?

The political context, particularly the one-year rule of the Muslim Brotherhood, helps to explain the judicial excesses that transpired in criminal trials in the aftermath of July 2013. The Brotherhood’s year in power was characterised by attacks on the judiciary that served to exacerbate the ‘crisis of governance and justice’.64 A provision in the new Constitution reduced the Supreme Constitutional Court by almost one half, and President Morsi pushed legislation that would force senior judges into retirement.65 Perhaps most notable was Morsi’s declaration of November 2012 that his edicts would be above judicial review.66

The Morsi presidency has been described as ‘one of the most colossal failures in the Brotherhood’s history’.67 A key aspect of this failure was that the attacks on the judiciary served to provoke and unite judges against the Muslim Brotherhood. What evolved subsequently was effectively a judicial war against former President Morsi and his supporters. The ruling of the Cairo Court of Urgent Matters banning the Muslim Brotherhood organisation and ordering its assets to be frozen deemed the Brotherhood a threat to national security and ‘a deviation from public values and public order’. According to the ruling, the organisation extends beyond Egypt and its members have a ‘dual loyalty’:

The Egyptian people realized that the Muslim Brotherhood is an odd body that does not belong. Therefore, they took to the streets to take them away. The Egyptian people were victorious with the support of the armed forces.68

61. Malek Adly, ‘The Broken Side: About the Lawyers’ Struggle in the Corridors of the Justice System’ (The Arabic Network for Human Rights Information 2015) 26.
62. Carlo Guarnieri and Patrizia Pederzoli, The Power of Judges: A Comparative Study of Courts and Democracy (Oxford University Press 2002) 15.
63. During apartheid in South Africa, the judiciary adopted an ideology of racial separation. In Argentina, judges in the Supreme Court were generally political conservatives who supported the military coup in 1976 and believed in the legitimacy of military rule. See Graver (n 8) 74.
64. Ziad Abdel Tawab, ‘The Crisis of Transitional Justice Following the “Arab Spring”: Egypt as a Model’ (CIHRS 2013) 98; <www.cihrs.org/wp-content/uploads/2013/09/Transitional-Justice.pdf>.
65. Nathan J Brown, ‘Tracking the “Arab Spring”: Egypt’s Failed Transition’ (2013) 24(4) Journal of Democracy 51.
66. Aziz (n 9) 161.
67. Brown (n 65) 57.
68. Cairo Court of Urgent Matters, ‘The Ruling on Banning the Activities of the Muslim Brotherhood Organisation
The ruling goes on to claim that the Brotherhood ‘[…] did ikhwaniisation of all the public positions in the country, which further worsened living conditions.’ *Ikhwan* is the Arabic word for ‘brother’, suggesting that the Muslim Brotherhood sought to insert themselves throughout the administration. The judge narrated the events of the summer of 2013, and in doing so went beyond the realm of legal reasoning to express overtly political convictions:

The revolution of June 30th, 2013 went peacefully and was unprecedented in the history of the world. They went to reject this unjust entity, and they revolted against it to remove it and end its injustice and its rule. And they were supported by the army, the courageous army, which is a strand of this nation that cannot be separated from its people and will only stand for the people […] to stand against this unjust regime that was deaf to the people’s demands and blind in seeing the truth of what’s happening […].

The Brotherhood was essentially deemed a threat to what it means to be Egyptian, and rejecting the Muslim Brotherhood thereby became a patriotic duty. The ideological opposition to the Muslim Brotherhood is reflected in rulings from criminal courts. In the Raba’a Operations Room Case, the 51 defendants, including the Supreme Guide of the Brotherhood Mohamed Badie, were charged with ‘forming an operations room to direct the Muslim Brotherhood terrorist group to defy the government during the Raba’a sit-in dispersal, and to spread chaos in the country.’ Of the defendants, 14 were sentenced to death and 37 to life imprisonment on 11 April 2015. The judge reasoned that the defendants:

[…] purposefully spread news statements and false rumours abroad on the internal situation in Egypt by propagating on the internet and some satellite channels video clips, pictures and news to give the impression for the external public opinion that the current regime is incapable of running the country and that led to weakening the country’s prestige and damaged the national interests of the country.

In the Prison Break Case, former President Morsi and other leaders of the Muslim Brotherhood were sentenced to death. Nationalism and state sovereignty were again at the forefront of the judgment:

After looking at the evidence and the documents, the Court has no doubt whatsoever that the scheme brought together the accused from inside and outside the country to intentionally commit acts to undermine the independence and territorial integrity of the country, coinciding with the outbreak of the January 25 Revolution to bring chaos to the country, benefiting from the country’s preoccupation with securing the inside so it can infiltrate from abroad.

The ruling states that it was proven that the defendants’ plans to commit crimes were at the instigation and support of terrorist organisations outside the country, and that they participated in a conspiracy against Egypt and implemented the criminal scheme in coopera-

and the Confiscation of Its Properties on September 23, 2013’ [https://manshurat.org/node/1301] last accessed 27 January 2021.
69. Ibid.
70. Giza Criminal Court, ‘Sentencing the General Guide and Other Leaders of the Muslim Brotherhood in the Case on Rabi’a Operations Room’ [https://manshurat.org/node/1296] last accessed 21 January 2021.
71. Cairo Criminal Court, ‘Court Proceedings of Morsi’s Prison Break Case’ (unofficial translation). The entire verdict is available in Arabic here: [https://manshurat.org/node/1290].
tion with the Palestinian Hamas movement and the Lebanese Hezbollah. The verdict in the Prison Break Case notes that the Egyptian State had a tight grip on the Brotherhood before the revolution, indicating that third parties were involved. The court suggests evidence of coordination between the Brotherhood and foreign intelligence services, particularly American intelligence, to rally support for the Brotherhood in the implementation of its plan and secure its future in the Middle East.

Other political opponents, activists and the media were characterised as a challenge to Egyptian statehood and subject to judicial ‘vengeance’ in trial courts. In the decision declaring the April 6 Youth Movement illegal, national interest was again central:

Members of these movements are helped by a superpower which is the US and April 6 wanted to cut the US aid to Egypt [...]. They spread chaos and threaten public security, and this was clear after several rulings have been issued against their members for violating the law, claiming that they are defending rights or freedoms. They conspire against the nation for the benefit of foreign entities and the protests organized by this group is to humiliate national security and to blatantly threaten the tourism sector and the Egyptian economy.72

In the Marriott Cell Case, the Al-Jazeera English journalists were charged with aiding or being members of a terrorist group and harming Egypt’s national interest by broadcasting false news. The defendants were sentenced to seven to ten years in prison, and the judge elaborated a counter-revolutionary narrative in the verdict:

During a dark time which the country passed through and state institutions struggled, they seized the opportunity and attacked the Egyptian State thinking that this was going to be the end of the nation […]. However, amidst all this the Egyptian State soon woke up and converted darkness into light. And soon the state institutions recovered and took over its sovereignty once again and managed to impose its authority nationwide and to stand against all the messing around with the destiny of the nation, that would disturb its security and stability and stand against anything that spreads chaos and jeopardizes security and tranquillity of the people […]. However, a minority of people rejected this stability in the country and on purpose decided to challenge the prestige of the State and they kept spreading corruption, forgetting that the Egyptian State is one with sovereignty.73

The use of narrative in the practice of law has been a feature in other transitional contexts. Law is a way to maintain continuity over time. Legal conflict arises when a state of affairs is challenged, calling for the judiciary to set matters right. When sudden or significant change occurs, the use of narrative may entail framing legal issues as a fight for the survival of the State and its institutions, thereby justifying oppressive means.74 Parts of the criminal justice system portrayed the stakes for Egypt as though its very survival hinged on it.

The verdicts in criminal courts create a narrative where opposing the Muslim Brotherhood and revolutionary activists is a patriotic duty. Judges have sometimes gone beyond

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72. Cairo Court of Urgent Matters, ‘Banning April 6 Movement’ <https://manshurat.org/node/1308> last accessed 27 January 2021.

73. Cairo Criminal Court, ‘Three Years Imprisonment for the Accused in the Marriott Cell Case’ <https://manshurat.org/node/1280> last accessed 21 January 2021.

74. Anthony G Amsterdam and Jerome S Bruner, Minding the Law (Harvard University Press 2000) 140 – 141.
this, characterising the duty as religious. The ruling banning the Brotherhood quotes several verses from the Quran, finding that the Brotherhood ‘used Islam as a curtain to cover their acts and wasted the rights of Egyptian citizens’. The narrative is similar in the verdict banning the April 6 Movement. In the Adwa Police Station Case, the court referred to the accused as ‘the devil Mohamed Badie, who has come out of the core of hell along with the other devil accused’. Cloaking the narrative not just in political or nationalistic but also in religious terms makes it more powerful: loyalty to the nation and the State is bolstered when its rightness is given a religious basis.

### 3.1.2 Security context

The verdicts from criminal courts since mid-2013 also reflect the security situation at the time. Studies from other contexts have found that ‘when judges share the view of the government that drastic measures are required to combat dangers to society, individual rights are placed in a subordinate position’. Such dangers, perceived or real, were on the minds of Egyptian judges.

Immediately following the overthrow of former President Morsi, there was a significant spike in terrorist attacks. Known terrorists were released in 2013, and analysts point to the ousting of President Morsi as a catalyst for this proliferation of terrorist violence. The spike in terrorist attacks might be an expression of seizing an opportune moment of turmoil to launch attacks.

The case against Ansar Beit Al-Maqdis of April 2014 illustrates how the broader security situation shaped the minds of parts of the Egyptian judiciary. The judge in charge of the case claimed that the fall of Morsi led to the resurgence of attacks because, to the Muslim Brotherhood, the fall meant ‘destroying the chances of having Shari’a law in Egypt’. The judge concluded that the targeting of security checkpoints in Sinai began when Morsi fell:

> They shifted from fighting Israel to fighting the Egyptian army and police [...]. The group was aiming to abort efforts of Egyptian state to instil democracy and establish a strong economy that is based on flow of FDI and also wanted to weaken the national spirit that was made by the revolution, negatively affecting all activities in the country. It made the tourism sector deteriorate, and the Egyptian economy in general, seeing that these acts pose an imminent threat to security of the nation-state, people, state institutions [...].

While it is beyond the scope of this article to analyse terrorist attacks and their perpetrators, it is clear that some judges made the connection between terrorism and the end of the rule of the Brotherhood. Judges in criminal courts furthermore made little distinction between those who use violence and those who use peaceful means to express themselves. The rulings

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75. Cairo Court of Urgent Matters, ‘Banning the Activities of the Muslim Brotherhood Organisation’.
76. ICJ (n 38) 59.
77. Graver (n 8) 75.
78. Allison McManus, ‘The Battle for Egypt’s Sinai’ (Tahrir Institute for Middle East Policy 2014), <https://timep.org/commentary/battle-egypts-sinai/> last accessed 21 January 2021.
79. Allison McManus, ‘Egypt’s Security: Threat and Response’ (Tahrir Institute for Middle East Policy 2014) 10; <https://timep.org/wp-content/uploads/2014/10/TIMEP_Egypt-Security-Threat-and-Response.pdf> last accessed 21 January 2021.
80. Cairo Court of Urgent Matters, ‘Banning Ansar Beit Al Maqdis Organization and Considering It a Terrorist Organization’ <https://manshurat.org/node/1303> last accessed 21 January 2021.
81. Ibid.
banning the terrorist group Ansar Beit Al-Maqdis, the Muslim Brotherhood, and the April 6 Youth Movement applied reasoning that differs only marginally in respect of the various groups, indicating how parts of the judiciary equated these groups despite their marked ideological and tactical differences and their divergent goals. The enemy became all those who sought to overturn the established order, whether they be violent terrorists, Islamists or youth activists. The power wielded by the judiciary is in part definitional. Parts of the judiciary engaged in defining the State against its enemies, producing a narrative that at times reads like a political manifesto stating their ideology and interests.

3.1.3 The interests and self-perceptions of judges

The interests and self-perceptions of judges also help to explain their comportment subsequent to mid-2013. Prosecutors and judges generally are part of the establishment that places a high value on maintaining order and security. Egyptian judges generally have a strong sense of loyalty to State sovereignty and to political and social order.82 This loyalty is especially common in legal systems in countries where the judiciary benefits from other elites.83 Most judges in Egypt are members of the political elite that benefited financially and politically under Mubarak.84 Loyalty to the State may be accentuated in extreme situations, where judges may replace their professional logic with class logic to maintain their paradigm and serve their interests.85 In responding to what they see as attacks on the State and threats to national security, they have consciously cast themselves as statesmen and not simply jurists.86 The ruling banning the Muslim Brotherhood illustrates this self-perception. The Court of Urgent Matters found that the Brotherhood:

[... ] filled their stomachs and filled the brains of their followers using their abundance of money and their powers. It was therefore necessary for the court to believe that this is an issue that needs to be looked into urgently due to the imminent threat to the country. [The Muslim Brotherhood] threaten national unity, bring destruction to the country, and it is a must to protect the country from this threat and danger.87

Further, judges have interests as members of a unique fraternity with a strong sense of identity, and their verdicts against members of the political opposition can be seen as defending these interests. Islamists seemingly threaten the judiciary’s power, and the Brotherhood’s attacks on the judiciary during their year in government helps to explain this sense of threat. The judiciary may also feel threatened by pro-democracy activists inasmuch as their demands for political and socio-economic change entail judicial accountability.88 Further to this, it has been argued that judges in Egypt ‘never put forward their discourse from a liberal perspective based on individual, citizens’, or voters’ rights’.89 This may be seen

82. Nathan J Brown, ‘Egypt’s Judiciary in a Postrevolutionary Era’ in Bernard Rougier and Stéphane Lacroix (eds), Egypt’s Revolutions: Politics, Religion, and Social Movements (Palgrave Macmillan 2016) 101, 117.
83. Moustafa (n 7) 221–222.
84. Aziz (n 9) 154–55.
85. Lucien Karpik, ‘Political Lawyers’ in Terence C Halliday, Lucien Karpik and Malcolm M Feely (eds), Fighting for Political Freedom: Comparative Studies in the Legal Complex and Political Liberalism (Hart Publishing 2007) 463, 475.
86. Ibrahim El Houdaiby, ‘Judging the Judges – the Present Crisis Facing the Egyptian Judiciary’ (Arab Reform Initiative 2014) <www.arab-reform.net/en/node/616>.
87. Cairo Court of Urgent Matters (n 75).
88. Aziz (n 9) 105.
89. Sherif Younes, ‘Judges and Elections: The Politicization of the Judges’ Discourse’ in Nathalie Bernard-Maugiron (ed), Judges and Political Reform in Egypt (American University in Cairo Press 2015) 151, 159.
in part as reflecting decades of authoritarian rule. If individual rights never were the rationale undergirding the courts, a time of crisis would not be expected to bring such concerns to the forefront.

However, the verdicts from the Court of Cassation presented in the previous section run counter to the assumption that times of crisis make upholding individual rights less likely. How do we explain these verdicts? The self-perception and ideology of the judges in that particular court are undoubtedly an important factor. In the Court of Cassation, the judiciary is often seen as an independent institution tasked with enforcing the rule of law in a ‘separation of powers’ paradigm, and this perception is held by the judges themselves. Overturning sentences from lower courts for violating fair trial rights may thus in part be motivated by an interest in retaining professional and institutional integrity, and the rule of law, in a time of perceived crisis.

3.2 The independence of the judiciary

Article 94 of the Constitution of Egypt grants that the ‘independence, immunity and impartiality of the judiciary are essential guarantees for the protection of rights and freedoms.’ A generic distinction is often made between the independence of the judiciary and the independence of individual judges. Institutional independence is secured through rules governing the appointment and dismissal of judges, and the establishment of independent bodies to appoint and oversee the judiciary. Individual independence is about the extent to which the judge is subject to external pressures on how to decide individual cases, be it from the leading judge of the court, the prosecutor, the executive or other external forces. Even some of the most repressive regimes have respected the right of the judge to decide the individual case.

The verdicts against political opposition and activists in Egypt have raised questions about whether the judiciary was acting based on explicit or implicit pressure from the regime. It must first be noted that judicial independence was a central goal in the inception of the modern judiciary in Egypt. The anti-colonial movement was a key motivating factor for the formation of a unified, national court system. This was part of creating a national identity that would withstand and preclude the ‘need’ for colonial rule. Legal reforms in the nineteenth and twentieth centuries reflect strong nationalist sentiments, where codified law and a hierarchical court system were part of a statist project that motivated legal and other reforms in post-colonial Egypt.

Since then, the independence of the judiciary has had times of setback, while at other times the courts have challenged the regime. The judiciary has at times fought significant battles for institutional independence, and verdicts have sometimes been ‘deeply inconvenient for a security-conscious regime’. There have been areas in which the judiciary has been afforded less independence, as seen in the use of State Security Courts and when it comes to core regime interests. Authoritarian regimes frequently create exceptional

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90. David Risley, ‘Egypt’s Judiciary: Obstructing or Assisting Reform?’ (Middle East Institute 2016) 5.
91. See Jan Helgesen, ‘The Independence of Judges – and the Judiciary – as Seen from Venice’ in Nils A Engstad, Astrid Lærdal Frøseth and Bård Tønder (eds) The Independence of Judges (Eleven International Publishing 2014) 105, 111.
92. Graver (n 8) 39.
93. Farhat Ziadeh, Lawyers, the Rule of Law, and Liberalism in Modern Egypt (Hoover Institution 1968) 27.
94. Nathan J Brown and Benjamin Helfland, ‘Reforming Justice: The Failure of Politics and Rule-of-Law Reform in Egypt and Tunisia’ (The Century Foundation 2017) 5; <https://tcf.org/content/report/reforming-justice/?agreed=1> accessed 4 March 2021.
95. Brown (n 5) 114–124 and Aziz (n 9) 124.
and State Security courts to circumvent regular courts, resulting in a shadow judiciary that undermines the rule of law. These courts were abolished in Egypt with the expiration of the Emergency Law on 31 May 2012.

The practice of selecting judges to judge in special circuits of ordinary criminal courts might serve to hamper the impartiality of criminal courts. Still, these courts have been staffed by ordinary judges. This is a departure from when the Egyptian regime resorted to special courts for mass convictions. During the time period covered in this article, the Minister of Justice was charged with appointing the presidents of the highest courts from among judges in appeals courts and the presidents of courts of first instance. This is not necessarily incompatible with international standards. There were instances of dismissing judges since the summer of 2013, albeit not in the order of magnitude of the ‘massacre of the judiciary’ in 1969, where President Nasser dismissed over two hundred judges.

Challenges to and fluctuations in judicial autonomy are not new realities in Egypt. Direct interference in individual cases and sanctioning judges for their rulings are rare occurrences also in authoritarian regimes. In the case of Egypt, there is no evidence that the executive has instructed the courts in individual criminal cases. Nathan Brown argues that there is ‘probably no area where the regular judiciary has more autonomy from the executive.’

Should the executive have deemed further control of the judiciary desirable in the immediate aftermath of July 2013, the unfolding events ultimately show that it was not ‘necessary’. Judges have seemingly acted not out of fear of retribution from the executive but ‘in support of authoritarianism’. In other words, they have acted based on their convictions, ideology, identity, and interests. Sahar Aziz contends that the primary threats to the rule of law in Egypt were not exogenous pressures but the politicisation of judges. Nathan Brown has similar observations, finding not so much a politically subservient judiciary, but a judicial apparatus that willingly participated in what many saw as a rescuing of the Egyptian state and a series of emergency measures necessary to restore social and political order.

The judiciary ‘willingly joined’ in the repression of political opposition and activists. The judiciary ultimately sought to protect itself as a ‘deep state institution, guarding its material interests in the status quo’, even if this meant betraying rule of law. The criminal courts were not alone in this response. The military, security apparatus and other actors responded to political change by making decisions in the name of Egypt. Each institu-

96. Fateh Samih ‘Azzam, ‘Civil and Political Rights in Arab Constitutions’ in Salma Khadra Jayyusi (ed) Human Rights in Arab Thought: A Reader (I B Tauris 2011) 489, 508.
97. Brown and Helland (n 94) 9.
98. Aziz (n 9) 136. Changes to the Judicial Authority Law in 2017 grant the President the authority to appoint a chief justice for each of the main four judicial bodies: the State Lawsuits Authority, the Administrative Prosecution, the Court of Cassation and the State Council. The Judges’ Club, representing judges nationwide, considered this a ‘blow to the independence of the judiciary’. See George Sadek, ‘Global Legal Monitor’ (Library of Congress, 2 May 2017).
99. International Bar Association, ‘Separating Law and Politics: Challenges to the Independence of Judges and Prosecutors in Egypt’ (2014) 22.
100. Moustafa (n 7) 79.
101. Graver (n 8) 44.
102. Nathan J Brown, ‘Reining in the Executive: What Can the Judiciary Do?’ in Nathalie Bernard-Maugirion (ed), Judges and Political Reform in Egypt (American University in Cairo Press 2015) 133, 136.
103. Aziz (n 9) 163.
104. Ibid 104.
105. Ibid 105.
106. Brown and Helland (n 94) 9.
107. Aziz (n 9) 169.
tion was acting according to its interest, which was equated with the national interest. These institutions may be conceived of as pyramids occupying the ‘top levels of a stratified society’. While their interests are not always shared, they may have ‘a common interest to preserve a specific status quo which enables them to maintain their power capacities in moments of socio-political upheaval.

In times of crisis, elite interests may coincide, at least for some time. Egypt has a long history of being governed by what Brown terms an infrastructure of authoritarianism. The ideology and interests of judges may be born in part of an authoritarian and securitised mentality, which permeates public life and institutions. This mentality and inheritance may help to account not only for the response of parts of the judiciary, but the fate of democracy in Egypt.

4. Conclusion
The summer of 2013, culminating in the overthrow of the Muslim Brotherhood government and the military takeover, changed the course of Egypt’s political transition, turning it into what has been termed a failed transition or an authoritarian transformation. Courts became a key locus for the negotiation of power and politics in the aftermath of the overthrow of President Morsi. Ordinary criminal courts went far in punishing political opposition including the Muslim Brotherhood, pro-democracy and other activists. Egyptian standards for due process and fair trials were violated in numerous cases referred to criminal courts by the Office of Public Prosecution. The mass trials and sentences to death or lengthy prison terms, beg the question of why parts of the judiciary responded to political upheaval in this manner.

The court cases referred to in this article indicate that it is not the lack of independence that was the cause of judicial repression since mid-2013 in Egypt, but the ideologies and interests of judges. The end of the state of emergency and the abolition of the State Security Courts in the aftermath of the revolution might have led Egypt towards less judicial excess if not for the critical events in the summer of 2013. Parts of the judiciary reacted to what was regarded as threats to national security and the status quo during the rule of the Muslim Brotherhood. The self-perceptions of judges as guardians of the State and the corporate interests of judges help to account for the verdicts against political opposition and activists. Judges in lower courts characterised political opponents as enemies of the State, and elaborated a narrative around statehood and patriotic duties. What evolved in Egypt following the overthrow of the Muslim Brotherhood in 2013 was, to some extent, a convergence of interests between the regime and the criminal justice system. Both saw the rule of the Brother-

108. Brown (n 65) 56.
109. Athina Lampridi, ‘Egypt’s National Interest. A ‘Sociology of Power’ Analysis’ (2011) 28.
110. Ibid 30.
111. Brown (n 65) 52.
112. Mohamed Nour Farhat and Ali Sadek, ‘Report on the State of the Judiciary in Egypt’ Arab Center for the Development of the Rule of Law and Integrity, 2. <http://www.arabruleoflaw.org/Files/PDF/Judiciary/English/P2/Egypt_FinalReportP2S4_En.pdf> accessed 21 January 2021.
113. Holger Albrecht, ‘Authoritarian Transformation or Transition from Authoritarianism? Insight on Regime Change in Egypt’ in Bahgat Korany and Rabab El-Mahdi (eds), Arab Spring in Egypt: Revolution and Beyond (The American University in Cairo Press 2014) 251. Joshua Stacher finds that what transpired was not a transitional moment, but ‘deliberate political engineering by elites who are directing violence against their citizens in order to maintain some part of the existing regime or create a new regime on the ashes on the older order […]’. See Joshua Stacher, ‘Fragmenting states, new regimes: militarized state violence and transition in the Middle East’ (2015) 22(2) Democratization 259, 269, <https://doi.org/10.1080/13510347.2015.1010810>.
hood as a threat that called for an exceptional response. Institutional interests and notions of social order and stability may be helpful in explaining the verdicts from lower courts not just against the Brotherhood, but against all actors that were prominent in the mass protests.

Studying the role of courts is of significant interest at a time when the scope and impact of judicial authority is expanding worldwide. It is to be expected that the higher degrees of social conflict challenge basic elements of the rule of law and put higher demands on the judiciary. Still, neither lower nor higher courts in Egypt responded as mere pawns of the regime at the critical juncture examined in this article. Particularly noteworthy in this respect is that judges in the Court of Cassation overturned verdicts for failing to uphold fair trial rights, thus maintaining professional integrity while avoiding questions of ideology, thereby also revealing significant cleavages within the judiciary. This article’s inquiry into the evolution of criminal justice in an Egyptian post-revolutionary context begs questions for further research on what factors may bolster the ability of judges generally to withstand the pressures created by significant socio-political upheaval, and to uphold the rule of law in times of perceived crisis.

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114. Ginsberg and Moustafa (n 12) 2 – 3.
115. Hans Petter Graver, Judges under Stress (JuS) – the Breaking Point of Judicial Institutions (FRIPRO Toppforsk 2017) 1 <https://www.jus.uio.no/ifp/english/research/projects/jus/judges-under-stress-jus_2017.pdf>.