

## Rule of Law in Egypt

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*The year 2005 marked a turning point for rule of law and democratization promotion in Egypt.<sup>1</sup> Against the backdrop of unrelenting breaches of the rule of law while under pressure from the US government, President Muhammad Husnī Mubārak announced his intention to hold the first multiparty elections in 2005, a landmark decision in 24 years of his presidency.<sup>2</sup> The influence of the United States of America over the course of the 2005 presidential<sup>3</sup> and parlia-*

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- 1 Sarah Wolff, 'Constraints on the Promotion of the Rule of Law in Egypt: Insights from the 2005 Judges' Revolt', *Democratization*, Volume 16, No. 1, Taylor and Francis Group, London 2009, p. 100 and p. 111.
- 2 Cf., in more detail, International Crisis Group, *Reforming Egypt: In Search of a Strategy*, Middle East / North Africa Report N° 46, International Crisis Group, Cairo / Brussels 4. October 2005.
- 3 Cf. Kristen A. Stilt, 'Constitutional Authority and Subversion: Egypt's New Presidential Election System', *Indiana International and Comparative Law Review*, volume 16, issue 2, Indiana University School of Law, Indianapolis, 2006, p. 335; Michael A. Lange, 'Das Ergebnis der ägyptischen Präsidentschaftswahlen', *Kairo News: Wahlen 2005-3 – Ein neues sechsjähriges Mandat für Hosni Mubarak!*, Konrad-Adenauer-Stiftung Länderbüro Kairo, Cairo, 2005, pp. 2-4; Volker Perthes, *Pharaos Wiederwahl: Ägypten auf dem Weg zu politischem Wettbewerb* (SWP Aktuell 40), Stiftung Wissenschaft und Politik, Berlin, September 2005. See also Vincent Durac, 'The Impact of external actors on the Distribution of Power in the Middle East: The Case of Egypt', *The Journal of North African Studies*, volume 14, issue 1, Taylor & Francis, London 2009, pp. 75 et seqq. (on p.80).

mentary elections,<sup>4</sup> combined with the prospect of political transition a possible succession by the President's son Gamāl Mubārak, led the regime and taking into consideration a change, if only cosmetically.<sup>5</sup> During the election, however, newspapers around the world widely reported on the "judges' revolt"<sup>6</sup>. The judiciary, supported by civil society, confronted the executive by denouncing the fraudulent results of the constitutional referendum, as well as the presidential and legislative elections. The "judges' revolt" was a test case for external promoters of the rule of law in Egypt: Some judges voiced a desire to supervise the entire electoral process and took the opportunity of the presidential campaign to request full independence from the (prepotent) executive within the overall national structures. For the presidential elections, a new electoral commission composed of magistrates (50 per cent) and other public figures close to the government, was established to supervise the ballot. Although part of the judiciary agreed to such an institutional novelty, some judges pointed to the fact that their "integrity [was] being used to lend credibility to process over which they have only a limited control".<sup>7</sup> In Egypt's post independence overall discourse on the rule of law, the developments around the 2005 elections constituted another episode in the long-running conflict between the executive and the judi-

<sup>4</sup> See in more detail Michael A. Lange, *Kairo News: Wahlen 2005-5a – Die ägyptischen Parlamentswahlen 2005 (Der I. Wahlgang)*, Konrad-Adenauer-Stiftung Länderbüro Kairo, Cairo 2005; Michael A. Lange, *Kairo News: Wahlen 2005-5c – Die ägyptischen Parlamentswahlen 2005 (Der II. Wahlgang)*, Konrad-Adenauer-Stiftung Länderbüro Kairo, Cairo 2005; Michael A. Lange, *Kairo News: Wahlen 2005-5c – Die ägyptischen Parlamentswahlen 2005 (Der III. Wahlgang)*, Konrad-Adenauer-Stiftung Länderbüro Kairo, Cairo 2005.

<sup>5</sup> Maha Abdelrahman, 'The Nationalisation of the Human Rights Debate in Egypt', *Nations and Nationalism* (Journal of the Association for the Study of Ethnicity and Nationalism), Volume 13, Issue 2, Cambridge University Press, Cambridge, 2007, pp. 285 et seqq. (on p. 296).

Cf. e.g. 'La révolte des juges égyptiens', *Le Monde*, Paris, 10 May 2006; Mahmud Mekki / Hisham Bastawisi, 'When Judges are beaten, Democracy in Egypt must grow from the Streets, not be imposed by Western Self-Interest', *The Guardian*, London, 10 May 2006; See also Mohamed Abdel Azim, 'La naissante pratique démocratique en Egypte: La révolte des juges', *Actualite Sociale et Politque*, September 2006, available at: <http://www.editions-harmattan.fr/index.asp?navig=catalogue&obj=article&no=6092> [accessed 28 November 2009].

<sup>7</sup> Nathan J. Brown / Hesham Nasr, *Egypt's Judges Step Forward: The Judicial Election Boycott and Egyptian Reform*, Carnegie Endowment for International Peace, Policy Outlook – Democracy and Law, Washington D.C. 2005, p. 4.

ary.<sup>8</sup> The Egyptian system, with its French inspired hierarchical courts, positivist orientation, and reliance on state-codified law has fairly and faithfully enforced executive will for over a century. With the legislative authority clearly (if at times unofficially) under executive domination, it would be surprising if matters have been otherwise.<sup>9</sup>

### I. Rule of Law in Egypt's Context

The selective delegation of policymaking to judicial institutions points a broader concern of authoritarian leaders – the maintenance of political legitimacy in lieu of credible mechanisms of public accountability. In many cases, authoritarian regimes switch to the rule of law as a legitimizing narrative only after the failure of their initial policy objectives or after popular support for the regime has faded. Egypt's second President, Gamāl 'Abd an-Nāsir (1954-1970), pinned his legitimacy on the revolutionary principles of national independence, the redistribution of wealth, economic development, and Arab nationalism. Judicial institutions were tolerated only to the extent that they facilitated the regime's achievement of these substantive goals. In contrast, the third President of Egypt, Muhammad Anwar as-Sādāt (1970-1981) explicitly pinned his regime's legitimacy to *siyādat al-qānūn* (rule of law) and used rule-of-law rhetoric at various times throughout his eleven years of presidency,<sup>10</sup> to distance his regime from the substantive failure of the Gamāl 'Abd an-Nāsir regime and authoritarian state in crisis, and to

8 Sarah Wolff, 'Constraints on the Promotion of the Rule of Law in Egypt: Insights from the 2005 Judges' Revolt, *Democratization*, Volume 16, No. 1, Taylor and Francis Group, London 2009, p. 100 and p. 105; see also Huda Abū Bakr, 'al-quḍā: allaḍīna istaba'dūnā min al-'ishrāf al-kāmil 'ala ath-intikhābāt min lā'bī al-thalātha waraqāt wa-'ijrā'uhā fī yawm wāhad ma'nāhu at-tazwīr', *Sawt el-'Umma*, No. 317, Cairo, 1 January 2007, p. 2.

9 Nathan Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf*, Cambridge University Press, Cambridge / New York / Melbourne, 1997, p. 118.

10 Tamir Moustafa, 'Law and Resistance in Authoritarian States: The Judicialization of Politics in Egypt' in Tom Ginsburg / Tamir Moustafa (eds.), *Rule by Law: The Politics of Courts in Authoritarian Regimes*, Cambridge University Press, Cambridge / New York / et al., 2008, p. 132 (on p. 146); Nathan Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf*, Cambridge University Press, Cambridge / New York / Melbourne, 1997, p. 122.

build a new legitimate narrative, distinct from the populist foundations of the state.<sup>11</sup>

Rule of law in the Egyptian context is, however, more than just lip-service. The term *siyādat al-qānūn* has been incorporated into the Constitution: One is able to locate it in two prominent positions of the Constitution, namely in the Preamble and in Article 64 (“*siyādat al-qānūn ‘asās al-hukum fī ad-dawla*”, i.e. the State is subject to the rule of law). Due to its prominent position in the normative part of the Constitution, the latter marks, a legally binding basis, whereas the preamble itself does not share this legally binding character. However, since the Preamble is considered to be a compilation of motives rather than concrete rights or obligations, it nevertheless offers guidance for the interpretation of the text of Egypt’s current Constitution. That said, one should bear in mind that the rule-of-law concept implies and seeks the prevention of arbitrary exercise of the executive power – still a controversial issue in Egypt, even though the country has recently went through two successive reforms of “modernization” in 2005<sup>12</sup> and 2007.<sup>13</sup> One of the main criticism directed at the 1971 Constitution (and its amendments in 1980) by its opponents is its extreme centralization of powers with the President of the Republic. In his request for constitutional amendments dated 26 December 2006,<sup>14</sup> the President of the Republic maintained that

- 11 Clark. B. Lombardi, ‘Egypt’s Supreme Constitutional Court Managing Constitutional Conflict in an Authoritarian, Aspirationally “Islamic” State’, *The Journal of Comparative Law*, Volume 3, Issue 2, Wallington 2008, p. 234-237; Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt*, Cambridge University Press, Cambridge / New York / Melbourne / et al., 2007, p. 6 and p. 39.
- 12 Cf. Michael A. Lange, ‘Verfassungsänderung durch Referendum bestätigt’, *Kairo News: Wahlen 2005-1*, Konrad-Adenauer-Stiftung Länderbüro Kairo, Cairo, June 2005, pp. 2-8.
- 13 See e.g. Sūsan al-Gayār ‘Islām Kamāl, ‘al-gumhūrīyyat al-khāmisa: ‘amiliyat taghīr nīzām al-hukum fī Masr’, *Rūz al-Yūsif*, Year 82, Issue 4099, Cairo, 30 December 2006, pp. 16-21; Rania Al Malky, ‘Constituting Change’, *Egypt Today*, Cairo, December 2006, pp. 36-41; *Al-Ahram*, nusūs mawadd ad-dustūr allafī talaba ar-ra’īs ta’īlaha... wa-tahdīd falsafa wa-‘ahdāf ta’dīl kul māda’, Year 131, No. 43850, Cairo, Wednesday 27 January 2007, p. 7; Abdul-Monem Al-Mashat, ‘Ägypten’, in Rainer Grote, *Demokratie- und Rechtsstaatsförderung in der Entwicklungszusammenarbeit: Einschätzungen aus den Empfängerländern in Afrika, Asien, Lateinamerika und Südosteuropa*, Konrad Adenauer Stiftung, Sankt Augustin, 2009, pp. 29 et seqq. (pp. 31-34).
- 14 Cf. Al-Ahrām, khutwa tārikhiya fāsila ‘ala tariq al-‘islāh as-siyāsī wa-ad-dīmuqrātī: ar-ra’īs yatlubu min majlisa ash-sha’b wa-ash-shūra ta’dīl 34 mādda min mawādd ad-

the amendments would consolidate the balance of powers between the branches of the government through a redistribution of the competencies within the executive authority, and increasing the powers of the parliament. He added that the independence of the judiciary would also be enhanced.<sup>15</sup>

## II. Constitutional Separation of Powers

Some of the 2007 amendments aimed at creating a better allocation of powers within the executive authority, “by expanding the competencies of the Council of Ministers and the extent to which it participates with the President in the exercise of the executive authority”.<sup>16</sup>

Thus, a paragraph was added to Article 138 stipulating that the President of the Republic shall exercise some of his competencies, as allocated by the constitution,<sup>17</sup> after the approval of the government, and others after taking its opinion. As from now, the Head of State, will have to get the assent of the government upon adopting regulations for the enforcement of laws (*al-lawā'ih al-lāzima li-tanfīd al-qānūn*),<sup>18</sup> police control regulations (*lawā'ih adabt*),<sup>19</sup> decisions necessary for the creation and organization of public services and interests (*qarārāt al-lāzima li'inshā' wa-tanzīm al-marāfiq wa-l-maslāh al-'āma*),<sup>20</sup> as well as for promulgating the peculiar presidential decrees (*qarārāt*) with statutory legislative force (*quwwat al-qānūn*).<sup>21</sup> The government will simply be consulted

dustūr, Year 131, No. 43850, Cairo, Wednesday 27 January 2007, p. 1 (see also pp. 2 et seqq.).

15 See Ahmad Abd al-Hafī, 'at-ta'dīl ad-dustūriy wa-'āfāq al-'islāh as-syāsīy min misr', *Kurāsāt 'Istrātijīyya*, Volume 25, No. 150, Markaz ad-Dirāsāt as-Syāsīyya wa-l-'Istrātijīyya, Cairo 2005, available at: <http://acpss.ahram.org.eg/ahram/2001/1/1/SB2K34.HTM> [accessed 4 December 2009].

16 Letter addressed to Parliament by H.E President Muhammad Husnī Mubārak requesting amendments to the Constitution of Egypt, Cairo, 26 December 2006, available at: <http://constitution.sis.gov.eg/ar/html/stat02.htm> [accessed 12 December 2009]; hereinafter: Muhammad Husnī Mubārak, *Risālat ar-Ra'īs Mubārak* (26 December 2006).

17 Cf. Art. 137 of the Constitution.

18 Article 144 of the Constitution.

19 Article 145 of the Constitution.

20 Article 146 of the Constitution.

21 Cf. Article 147 of the Constitution.

when the President adopts *qarārāt quwwat al-qānūn* by delegation from the *Majlis ash-Sha'b* (People's Assembly)<sup>22</sup>, before declaring a state of emergency, or before ratifying important treaties.<sup>23</sup> Article 74 was also amended "to provide further safeguards"<sup>24</sup> as to the exercise by the President's exceptional powers in case of danger threatening national unity or state security, or if an obstacle prevents the state institutions from fulfilling their constitutional roles. The exceptional powers of the Head of State should, however, not be mixed up with the declaration of a state of emergency, provided by Article 148 of the Constitution: The amended Article 74 requires that the danger be serious and imminent. Moreover, the President must consult the Council of Ministers before adopting any emergency measures. The amended Article 141, on the other hand, obliges the President of the Republic to consult the President of the Council of Ministers upon nominating or dismissing members of his government, while the head of government will simply give an opinion.<sup>25</sup>

Moreover, according to President Muhammad Husnī Mubārak, one of the objectives to be achieved through the constitutional reforms was "reorganizing the relationship between both the legislative and executive powers in order to achieve greater balance between them."<sup>26</sup>

In this regard, e.g. the 2007 amendments have strengthened the powers of the second parliamentary assembly, the *Majlis ash-Shūra* (Consultative Council). Until then it was consulted for certain issues, but its opinion was non-binding. With the amendments of Articles 194 and 195 in 2007, the approval and not only the opinion, of the Consultative Council is now required in three cases: (1) requests of constitutional

22 Article 108 of the Constitution.

23 Article 148 of the Constitution and Article 151 para. 2 of the Constitution.

24 Muhammad Husnī Mubārak, *Risālat ar-Ra'īs Mubārak* (26 December 2006), op. cit. (note 16).

25 As to this context see Nathalie Bernard-Maugiron, 'The 2007 Constitutional Amendments in Egypt, and their Implications on the Balance of Power', *Arab Law Quarterly*, Volume 22, No. 4, Brill, Leiden, 2008, pp. 397 et seqq. (on p. 401 et seq.).

26 Muhammad Husnī Mubārak, *Risālat ar-Ra'īs Mubārak* (26 December 2006), op. cit. (note 16).

amendments, (2) draft laws complementary to the Constitution stipulated in about thirty articles,<sup>27</sup> (3) and peace and alliance treaties, and all treaties conducive to a modification in the state territory or related sovereignty rights. A joint committee is formed to resolve any disagreement arising between the two parliamentary chambers on issues where the Consultative Council has the right of assent.<sup>28</sup>

New Article 194 of the Constitution has given a list of the “laws complementary to the Constitution” (*al-qawānīn al-mukammila ad-dustūr*), that have to be submitted to the Consultative Council. Before then, the Constitution had not given any definition or list of such laws, and the Supreme Constitutional Court had identified them on a case-by-case basis.<sup>29</sup> For instance, in 2000, the Supreme Constitutional Court had decided that the new association law, adopted in application of Article 56 of the Constitution, had to be considered as complementary to the Constitution, and that it should have been submitted to the *Majlis ash-Shūra* (Consultative Council) for its opinion in the first place. Since this had not been the case, the law was declared unconstitutional for procedural error<sup>30,31</sup>

The President of the Republic had also committed himself, during his electoral campaign in 2005, to strengthen the independence of the judiciary and, in his request of 26 December 2006, promised to enhance

27 Articles 5, 6, 48, 62, 76, 85, 87, 88, 89, 91, 160, 163, 167, 168, 170, 171, 172, 173, 175, 176, 177, 178, 179, 183, 196, 197, 198, 206, 207, 208, 209, 210 and 211 of the Constitution.

28 Nathalie Bernard-Maugiron, ‘The 2007 Constitutional Amendments in Egypt, and their Implications on the Balance of Power’, *Arab Law Quarterly*, Volume 22, No. 4, Brill, Leiden, 2008, pp. 397 et seqq. (on p. 404).

29 The Supreme Constitutional Court had identified two criteria for law to be considered complementary to the Constitution. See al-Mahkama ad-Dustūriyya al-‘Ulyā, Case 7/8e, 15 May 1993, *Collection of Decisions of the Supreme Constitutional Court*, vol. 5, part 2, p. 290; and also Nathalie Bernard-Maugiron, *Le politique à l’épreuve du judiciaire: la justice constitutionnelle en Egypte*, Bruylant, Brussels, 2003.

30 Al-Mahkama ad-Dustūriyya al-‘Ulyā, Case No. 153/21e, June 2000, *Collection of Decisions of the Supreme Constitutional Court*, vol. 9, p. 582.

31 In more detail Nathalie Bernard-Maugiron, ‘The 2007 Constitutional Amendments in Egypt, and their Implications on the Balance of Power’, *Arab Law Quarterly*, Volume 22, No. 4, Brill, Leiden, 2008, pp. 397 et seqq. (on p. 404).

“the independence of the judiciary through the dissolution of the *Majlis al-'Ulyā li-l-Hay'āt al-Qadā'iyya* (Supreme Council of Judicial Bodies)”.<sup>32</sup>

Strengthening the judicial independence not simply *de jure* but also *de facto*, is, indeed, essential for an effective application of separation of powers. Separation of powers requires separation with coordination, as opposed to absolute separation. It is a principle that requires constant review.<sup>33</sup> According to the amended Article 173, the former Supreme Council of Judicial Bodies, created in 1969 by Presidential Decree No. 82, should be replaced by a new Council, made of the presidents of all judicial bodies, and chaired by the President of the Republic. It shall protect the common interest of all judicial bodies.

In November 2007, the Minister of Justice prepared a draft law to implement this constitutional provision, defining the composition, competencies, and rule of procedure of that council. That law would have questioned the immunity of judges, and decreased the powers of the Supreme Council of Judicial Bodies.<sup>34</sup> In front of the unanimous criticisms addressed to this draft law by almost all judicial bodies, the Minister of Justice decided to amend the proposal, before the President of the Republic finally requested its withdrawal.<sup>35</sup>

### III. Judicial Review

Generally, the Egyptian judicial system is based on French legal concepts and methods. Judges are familiar with civil law systems' concepts, and despite the huge case backlog and time-consuming proceedings, the principles of the due process and judicial review are inherently cher-

32 Muhammad Husnī Mubārak, *Risālat ar-Ra'īs Mubārak* (26 December 2006), op. cit. (note 16).

33 Adel Omar Sherif, 'Separation of Powers and Judicial Independence in Constitutional Democracies: The Egyptian and American Experiences, in Eugene Cotran / Adel Omar Sherif, *Democracy, the Rule of Law and Islam* (CIMEL Book Series No. 6), Kluwer Law International, London, The Hague / Boston, 1999, pp. 25 et seqq. (on p. 34).

34 For the text of the draft law see *al-Misrī al-Yawm*, Cairo, 20 November 2007.

35 Nathalie Bernard-Maugiron, 'The 2007 Constitutional Amendments in Egypt, and their Implications on the Balance of Power', *Arab Law Quarterly*, Volume 22, No. 4, Brill, Leiden, 2008, pp. 397 et seqq. (on p. 406).

ished and respected.<sup>36</sup> In Egypt's current legal system constitutional review is carried out by a special constitutional court.<sup>37</sup> The so called *al-Mahkama ad-Dustūriyya al-'Ulyā* (Supreme Constitutional Court), the successor institution of the Supreme Court established by Law No. 81 of 1969, was launched in 1971 by the adoption of Egypt's new Constitution.<sup>38</sup> The Constitution did not provide, however, many details about the new court in its respective Articles 174-178. In implementation thereof, Law No. 48 of 1979<sup>39</sup> was issued, organizing the status and competence of the Supreme Constitutional Court.<sup>40</sup> Law No. 48 of 1979<sup>41</sup>

- 36 Mohamed S. Abdel Wahab, *An Overview of the Egyptian Legal System and Legal Research*, December 2008, available at: [http://www.nyulawglobal.org/Globalex/Egypt1.htm#\\_6\\_The\\_Judicial](http://www.nyulawglobal.org/Globalex/Egypt1.htm#_6_The_Judicial) [accessed 16 December 2009].
- 37 Clark B. Lombardi, 'Egypt's Supreme Constitutional Court: Managing Constitutional Conflict in an Authoritarian, Aspirationally 'Islamic' State', *The Journal of Comparative Law*, Vol. III, issue 2, The Association for Comparative Legal Studies Limited, Wallington, 2000, p. 234.
- 38 Kristen A. Stilt, 'Constitutional Authority and Subversion: Egypt's New Presidential Election System', *Indiana International and Comparative Law Review*, volume 16, issue 2, Indiana University School of Law, Indianapolis, 2006, pp. 335 et seqq. (on p. 341); Adel Omar Sherif, 'Constitutional Law', in Nathalie Bernard-Maugiron / Badouin Dupret (eds.), *Egypt and its Laws* (Arab and Islamic Law Series, Volume 22), Kluwer Law International, The Hague / London / New York, 2002, pp. 315 et seqq. (on p. 323); Adel Omar Sherif, 'The Rule of Law in Egypt from a Judicial Perspective: A Digest of the Landmark Decisions of the Supreme Constitutional Court' in Eugene Cotran / Mai Yamani, I.B. Tauris Publishers, London / New York 2000, p. 1; Omaia Elwan, 'Überblick über die Entwicklung des ägyptischen Staatsrechts seit den 70er Jahren', *Verfassung und Recht in Übersee*, volume 23, issue 3, Nomos Verlag, Baden-Baden / Hamburg, 1990, p. 297 et seqq. (on p. 314); Gunter Mulack, 'Die neue ägyptische Verfassung', *Verfassung und Recht in Übersee*, volume 5, issue 2, Hamburg / Baden-Baden 1972, pp. 187-194.
- 39 Published in *al-Mahkama ad-Dustūriyya al-'Ulyā*, al-juz' 'al-awwal, wathā'iq 'inshā' al-mahkama al-Ahkām allafī asdarathā hatta 30 yūnyū sanat 1981, Gumhūriyat Misr al-'Arabiyya, Cairo 1981, pp. 69-94.
- 40 Clark B. Lombardi, 'Egypt's Supreme Constitutional Court Managing Constitutional Conflict in an Authoritarian, Aspirationally "Islamic" State', *The Journal of Comparative Law*, Volume 3, Issue 2, Wallington 2008, pp. 234 et seqq. (on p. 236); Clark B. Lombardi, *State Law as Islamic Law in Modern Egypt: Incooperation of the Shari'a into Egyptian Constitutional Law* (Studies in Islamic Law and Society, Volume 19), Brill Academic Publishers, Leiden / Boston, 2006, p. 144; Aziza Fahmi, 'Verfassungsrecht Arabischer Staaten unter besonderer Berücksichtigung Ägyptens', in Ulrich Battis / Philip Kunig / Ingolf Pernice / Albrecht Randelzhofer (eds.), *Das Grundgesetz im Prozeß europäischer und globaler Verfassungsentwicklung / Internationales Symposium zum 50-jährigen Bestehen des Grundgesetzes am 14. und 15. Mai 1999*, Nomos Verlag, Baden-Baden 2000, pp. 189 et seqq. (on p. 214).

entrusted the court with judicial review.<sup>42</sup> Not surprisingly, the Supreme Constitutional Court acted to protect the courts' power to check legal and administrative abuses and its own specialized power to exercise constitutional review over most government action.<sup>43</sup> In short, during the 1980s and 1990s the courts and the Supreme Constitutional Court in particular tried to ensure what North American colleagues would think of as procedural due process. That is to say, they tried to protect individuals from executive and legislative abuse by (1) requiring the political branches to act only through the mechanisms permitted them by the constitution, and (2) ensuring that the branches remain subject to criticism for offensive actions.<sup>44</sup> Historically in Egypt, the "rule of law, [at least] as envisaged by judges, focuses on achieving fairness and equity in application of the law much more than it focuses on making good law"<sup>45</sup>. Starting in the early 1990s, however, the Supreme Constitutional Court has departed from the traditional judicial focus to advance a substantive, and not simply procedural, view of the rule of law.<sup>46</sup> The court ruled e.g. that the scope of the power of judicial review "applies to law in its wider objective sense, that of legislative texts creat-

41 As to the text of Law No. 48 of 1979, see *al-Jarīda ar-Rasmiyya* [Official Gazette], No. 36, Cairo, 9 June 1979, pp. 530-538.

42 Adel Omar Sherif, 'Constitutional Adjudication' in Nathalie Bernard-Maugiron / Badouin Dupret (eds.), *Egypt and its Laws* (Arab and Islamic Law Series, Volume 22), Kluwer Law International, The Hague / London / New York, 2002, pp. 325 et seqq. (on p. 326); Adel Omar Sherif, 'The Rule of Law in Egypt from a Judicial Perspective: A Digest of the Landmark Decisions of the Supreme Constitutional Court' in Eugene Cotran / Mai Yamani, I.B. Tauris Publishers, London / New York 2000, p. 1; Omaia Elwan, 'Überblick über die Entwicklung des ägyptischen Staatsrechts seit den 70er Jahren', *Verfassung und Recht in Übersee*, volume 23, issue 3, Nomos Verlag, Baden-Baden / Hamburg, 1990, p. 297 et seqq. (on p. 314).

43 See, for example, Adel Omar Sherif, 'Constitutional Adjudication', in Nathalie Bernard-Maugiron / Badouin Dupret (eds.), *Egypt and its Laws* (Arab and Islamic Law Series, Volume 22), Kluwer Law International, The Hague / London / New York, 2002, pp. 325 et seqq. (pp. 339-400).

44 Clark B. Lombardi, *State Law as Islamic Law in Modern Egypt: Inccoperation of the Shari'a into Egyptian Constitutional Law* (Studies in Islamic Law and Society, Volume 19), Brill Academic Publishers, Leiden / Boston, 2006, p. 148.

45 Nathan Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf*, Cambridge University Press, Cambridge / New York / Melbourne, 1997, p. 118; Clark B. Lombardi, *State Law as Islamic Law in Modern Egypt: Inccoperation of the Shari'a into Egyptian Constitutional Law* (Studies in Islamic Law and Society, Volume 19), Brill Academic Publishers, Leiden / Boston, 2006, p. 148.

46 Nathan Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf*, Cambridge University Press, Cambridge / New York / Melbourne, 1997, p. 119.

ing general and abstract legal status, whether such texts are enshrined in the status adopted by the legislative power, or in subsidiary status adopted by the executive power within its competence as defined by the Constitution. All such texts are characterized by their vast scope of application and the unlimited number of those subject to them. Consequently, if they were to be declared null and void by the Supreme Constitutional Court, the effects would be also far-reaching [...]. That is why it was necessary for such a judicial review to be entrusted to one single court."<sup>47</sup>

Moreover, like some recently created European constitutional courts, the Supreme Constitutional Court has consistently held that the constitution must be interpreted as an organic whole.<sup>48</sup> In this regard, the third President of the *al-Mahkama ad-Dustūriyya al-'Ulyā*, Muhammad 'Aī Balīgh, stated that "the straight completion of the constitutional building will rise through this organic unity which characterizes the order of constitutional norms. This unity will realize the congruity of the texts of the constitution and it will remove the obscurity that may be mixed with it and the contradiction with which people may think it to be afflicted. Moreover, this court has this organic unity in mind whenever a case put before it is connected with an internal contradiction which the contestant portends to see between the legal texts he contests and the norms of the constitution. Rather, one has to appeal [*bi-l-ihkām ilā ahkām ad-dustūr jam'ihā*] to all the constitutional norms so that the Court may make sure that the contested texts do not contradict each other."<sup>49</sup> In the process of an organic interpretation, the Court has identified a handful of meta-principles that implicitly provide the unifying thread for all constitutional principles. Among these the Court has singled out four that are of particular importance, e.g. an overarching prin-

47 Al-Mahkama ad-Dustūriyya al-'Ulyā, Constitutional Case No. 26, Year 15, Cairo, 2 December 1995.

48 Baber Johansen, 'Supra-legislative Norms and Constitutional Courts: The Case of France and Egypt' in Eugen Cotran / Adel Omar Sherif (eds.), *The Role of the Judiciary and the Protection of Human Rights* (CIMEL Book Series No. 5), Kluwer Law International, The Hague 1997, 347 et seqq. (on p. 365).

49 Al-Ahkām allatī asdarathā al-Mahkama min yanāyir 1984 hattā dīsambar sanat 1986, Dār al-Hannā li'l-Tabā'a, Cairo 1994, p. 4.

ciple requiring Egypt to remain “democratic”<sup>50</sup> and to respect the separation of powers, and a commitment to ensure that Egyptian law respects the “rule of law”.<sup>51</sup>

#### IV. State Security Courts

Although the Supreme Constitutional Court took surprisingly bold stands on most political issues, there were important limits to the Court’s activism. At odds with its strong record of rights activism, the Supreme Constitutional Court ruled Egypt’s emergency courts (*al-mahākīm at-tawāri’*) constitutional (cf. *al-Mahkama ad-Dustūriyya al-‘Ulyā* 1984: 80), and it has conspicuously delayed issuing a ruling on the constitutionality of civilian transfers to military courts. The *qānūn at-tawāri’* (Emergency Law) allows for referrals to those exceptional courts, and the military ruler – i.e., the President of the Republic or his designate – can refer civilians to military courts (*al-mahākīm al-‘askariyya*). The judges in such trials are officers appointed by the Minister of Defence who have no independence but are rather subordinate to the top-down authority structure of the military establishment.<sup>52</sup> However, the Supreme Constitutional Court reasoned e.g. that, since Article 171 of the Constitution provided for the *al-mahākīm at-tawāri’*, it must be considered a legitimate and regular component of the judicial authority.

50 Cf., for example, Al-Ahkām allatī asdarathā al-Mahkama min Uktūbar 1981 hattā Dīsambar sanat 1983, Dār al-Hannā li-t-Tabā’a, Cairo, no date, p. 131, p. 144; Al-Ahkām allatī asdarathā al-Mahkama min yanāyir 1984 hattā dīsambar sanat 1986, Dār al-Hannā li-t-Tabā’a, Cairo 1994, p. 360; Al-Ahkām allatī asdarathā al-Mahkama min yanāyir 1987 hattā’āhar yunyū sanat 1991, Matābī’ Dār Akkhabār al-Yawm, Cairo, no date, pp. 98 et seqq.

51 See, for example, Supreme Constitutional Court’s Deputy Chief Justice’s article: Adel Omar Sherif, ‘Constitutional Law’ in Nathalie Bernard-Maugiron / Badouin Dupret (eds.), *Egypt and its Laws* (Arab and Islamic Law Series, Volume 22), Kluwer Law International, The Hague / London / New York, 2002, pp. 315 et seqq. (pp. 318-319).

52 Bahey eldin Hassan, ‘The Human Rights Dilemma in Egypt: Political Will or Islam?’ in Hatem Elliesie (ed.), *Beiträge zum Islamischen Recht VII: Islam und Menschenrechte / Islam and Human Rights / al-‘Islām wa-Huqūq al-‘Insān*, Peter Lang Publishing Group, Berlin / Frankfurt am Main / New York / Oxford / et al., 2010, pp. 281-298; Tamir Moustafa, ‘Law and Resistance in Authoritarian States: The Judicialization of Politics in Egypt’ in Tom Ginsburg / Tamir Moustafa (eds.), *Rule by Law: The Politics of Courts in Authoritarian Regimes*, Cambridge University Press, Cambridge / New York / et al., 2008, p. 132 (on p. 153).

Moreover, it also reasoned that the provision of Law 50/1982, giving the *al-mahākīm at-tawāri'* the sole competency to adjudicate their own appeals and complaints, was not in conflict with Article 172 of the Constitution. Given that Egypt has remained in a perpetual state of emergency for all but six months since 1967, the *al-mahākīm at-tawāri'*, and more recently, especially after the upsurge of Islamist violence in 1992, the *al-mahākīm al-'askariyya* have effectively formed a parallel legal system with fewer procedural safeguards, serving as the ultimate regime check on challenges to its power.<sup>53</sup>

#### V. Conclusion

Lifting the state of emergency, which would abolish the emergency court system, as well as ending the trial of civilians before *al-mahākīm al-'askariyya*, would be a further important step upgrading the rule of law and balancing the imbalanced separation of power concept in Egypt.<sup>54</sup> A clear separation between the judiciary and the executive has still not been achieved. Both the Minister of Defence – as mentioned above – and the Minister of Justice continue to exercise considerable authority over the judiciary.<sup>55</sup> If the powers of the President have decreased following the amendments, he still keeps the most important ones, be it in the executive<sup>56</sup>, legislative<sup>57</sup> or even judicial fields where he is the one who nominates the general prosecutor, the presidents of the

53 Tamir Moustafa, 'Law and Resistance in Authoritarian States: The Judicialization of Politics in Egypt' in Tom Ginsburg / Tamir Moustafa (eds.), *Rule by Law: The Politics of Courts in Authoritarian Regimes*, Cambridge University Press, Cambridge / New York / et al., 2008, p. 132 (on p. 151 et seqq.); Yustina Saleh, 'Law, the Rule of Law, and Religious Minorities in Egypt', *Middle East Review of International Affairs*, volume 8, issue 4, December 2004, p. 74 et seqq. (on p. 81); Nathan Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf*, Cambridge University Press, Cambridge / New York / Melbourne, 1997, p. 114.

54 Likewise: Michelle Dunne, *Evaluating Egyptian Reform* (Carnegie Papers, No. 66), Carnegie Endowment for International Peace, Washington D.C., January 2006, p. 12.

55 See also Adel Omar Sherif, 'Separation of Powers and Judicial Independence in Constitutional Democracies: The Egyptian and American Experiences, in Eugene Cotran / Adel Omar Sherif, *Democracy, the Rule of Law and Islam* (CIMEL Book Series No. 6), Kluwer Law International, London, The Hague / Boston, 1999, pp. 25 et seqq. (on p. 35 and pp. 38 et seqq.).

56 See Article 137, Article 148 and Article 150 of the Constitution.

57 See Article 108, Article 109, Article 112, Article 113 of the Constitution.

Court of Cassation and of the Supreme Constitutional Court, and is the head of the council of judicial bodies. Moreover, although the powers of the parliament have increased, it has to be seen whether the two assemblies dominated by the ruling party *Hizb al-Watanī ad-Dīmuqrātī* will put substantial modifications in the draft budget to table. Though they were introduced as strengthening the balance of powers,<sup>58</sup> the constitutional amendments have not procured major changes in the distribution of powers within the executive authority itself and between the executive and legislative ones. Nevertheless, the reform package could constitute the basis of further revisions in the future.

58 Muhammad Husnī Mubārak, *Risālat ar-Ra'īs Mubārak* (26 December 2006), op. cit. (note 16).