Law's ideology: Neoliberalism and developmentalism in Egyptian jurisprudence

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This article contrasts neoliberal and developmental Egyptian judicial responses to questions of social justice to examine the role of law in shaping the economy. It argues that the Supreme Constitutional Court's jurisprudence, both before and after the Arab Spring, has advanced a neoliberal counterrevolution and legitimated an anti-egalitarian and unjust social order. In contrast, administrative courts' rulings, particularly those that challenged the privatization of public assets after the Arab Spring, represent a developmental approach that exposes neoliberal fallacies and advances social justice and the common good. Notwithstanding neoliberal invocations of constitutional legitimacy and the rule of law, the existence of an alternative within the field of legal interpretation illustrates that constitutionalism is a site for ideological contestation between opposing visions of the social order.

1. Introduction

Examining judicial rulings as "ideological documents,"[1] this article extrapolates ideological formations and a politics of disagreement from Egyptian jurisprudence. Instead of identifying ideology at the level of the regime or the state, the regime is analyzed as a site for ideological conflict by examining economic, normative-legal, and judicial-interpretive aspects.[2] This socio-legal analysis focuses on the role of the legal intelligentsia in mediating the ideological conflict over the economy.[3] It shows that

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1 Duncan Kennedy, A Critique of Adjudication (Fin de Siècle) 60 (1997).

2 On the incoherence of the state, the intertwinement of state and civil society, and criticisms of the reification of the state, see Roger Owen, State, Power and Politics in the Making of the Modern Middle East 42 (2d ed., 2000); Bob Jessop, The State: Past, Present, Future 54, 84 (2006); Nimer Sultany, Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring 8–15 (2017).

3 Duncan Kennedy, *A Political Economy of Contemporary Legality*, *in* The Law of Political Economy: Transformation in the Function of Law 89 (Poul F. Kjaer ed., 2020).

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competing courts developed their jurisprudence based on fundamentally different socio-economic understandings of the world, and deduced from the same constitution opposing constitutional commitments to the common good.

Thus, this article contrasts Egyptian constitutional and administrative judicial responses to questions of economic policy and social justice in both their opposing ideals and their differing material implications. As in many civil law countries, Egypt's judicial system is divided into administrative and civil courts. The Supreme Constitutional Court (SCC) has exclusive jurisdiction over judicial review of legislation but has no appellate jurisdiction over matters decided by the apex administrative court. In contrast, the administrative courts' judicial review focuses on the legality of executive and administrative decision-making. Using these tools of judicial review, the courts advanced contrasting economic visions: neoliberal and developmental.

On the one hand, the SCC's jurisprudence contributed prior to 2011 to the dismantling of Gamal Abdel Nasser's developmental policies (such as land reform and rent control) as part of a neoliberal counterrevolution. This anti-egalitarian jurisprudence, which persisted after 2011, is evident in rulings that facilitated the privatization of public assets, protected private property, privileged the interests of landowners, and undermined tenants' interests. In contrast, some of the administrative courts' rulings represented a developmental approach. It is developmental because it is committed to economic sovereignty, the welfare state, and the public sector's role in shaping economic policy.[4] It also echoes republican constitutionalism elsewhere because it is oriented toward the common good, advances social justice, and is hostile to oligarchy.[5] Republican constitutionalism requires civic virtue and thus rejects corruption as in cases in which public officials abuse power and advance private and factional interests at the expense of the common good,[6] including the ruling elites' squandering of resources and undermining of the people's control over the country's wealth.

These ideological formations are not necessarily coherent or highly systematized (because changes over time in ruling ideas and court personnel or differences between judicial divisions or hierarchies within the same court system undermine this coherence). Ideology does not necessarily determine specific rulings, and judges do not claim the neoliberal or developmental labels. Nevertheless, ideologies provide an explanation for judicial assumptions, discourse, rulemaking, and effects on wider political and economic struggles. Particular rulings can be associated with particular positions on an ideological spectrum, and they contribute to advancing these positions rather than others. Notwithstanding technical and legalistic discourse, the judicial resolution of conflicts between landowners and tenants, or workers and corporations, effectively places the court in one ideological formation over another.

[4] Ha-Joon Chang, *The Economic Theory of the Developmental State*, *in* The Developmental State 182 (Meredith Woo-Cumings ed., 1999).

[5] Joel Fishkin & William Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. Rev. 671 (2014); Roberto Gargarella, The Legal Foundations of Inequality: Constitutionalism in the Americas, 1776–1860 (2014); Philip Pettit, Republicanism: A Theory of Freedom and Government (1997); Frank Michelman, *Foreword: Traces of Self-Government*, 100 Harv. L. Rev. 4 (1986).

[6] Pettit, *supra* note 5, at 210–12; Michelman, *supra* note 5, at 40.

The politics of judicial disagreement between opposing ideological formations is obscured in scholarly accounts that exclusively focus on the Supreme Constitutional Court's neoliberalism.[7] Yet the presence of these two opposing visions underlines the constitutional order's incoherence. Developmental jurisprudence builds upon the 1952 Revolution that established a postcolonial developmental state and inaugurated a tradition of Arab socialist constitutionalism that centralizes popular sovereignty. This jurisprudence, however, unfolded in an inhospitable setting because its economic vision ran counter to state-backed policy. It was a remarkable judicial attempt to create an economic rupture from the Mubarak regime's socio-political order. Particularly from 2011 to 2014, the administrative courts reversed several privatization contracts by which the ousted neoliberal regime sold off state property.

This fundamental dispute between neoliberalism and developmentalism shows an irreconcilable gap within the legal system because each approach represents an opposing vision of the community and of the economy befitting this vision. Ultimately, these jurisprudential approaches advance conflicting material interests. This conflict is often represented as an opposition between two abstract conceptions of justice: market justice versus social justice.[8] Neoliberals favor a commutative conception of justice that is concerned with interpersonal relations. In contrast, social or distributive justice is concerned with the individual's relations with the community.[9] Market justice, thus, is the justice of exchange and transactions irrespective of outcomes, whereas social justice is concerned with fair outcomes (i.e., a normatively defensible allocation of goods and benefits among members of the community). By rejecting social justice,[10] neoliberals seek to immunize the allocation of resources from democratic and egalitarian interventions.

Yet, this abstract opposition should not be overstated, as none of these conceptions of justice dictates concrete results in legal disputes. The "market" exists in developmental states, and developmental policies like rent control may exist in neoliberal states. Moreover, neoliberals' invocation of individual freedom against social democratic institutions is contradictory. This is because it is not invoked against unaccountable institutions and state interventions that privilege the class interests of the few and suppress the freedoms of the many.[11] For instance, the "paternalism of neoliberal welfarism" illustrates that neoliberals do not really oppose the welfare state because of the threat of paternalism to individual freedom, but because they oppose equality.[12] Thus, the question that needs to be examined is the ideological role of law: particularly, how

[7] Tamir Moustafa, The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt (2007); Lama Abu Odeh, *The Supreme Constitutional Court of Egypt: The Limits of Liberal Political Science and CLS Analysis of Law Elsewhere*, 59 Am. J. Comp. L. 985 (2011).

[8] Wolfgang Streeck, Buying Time: The Delayed Crisis of Democratic Capitalism (P. Camiller trans., Verso 2014) [hereinafter Streeck, Buying Time]; Wolfgang Streeck, How Will Capitalism End: Essays on a Failing System (2016).

[9] For a classical statement of the distinction, see Aristotle, Nicomachean Ethics, bk V, chs. 2–4 (R. Crisp ed., Cambridge Univ. Press 2000).

[10] 2 Friedrich Hayek, Law, Legislation, and Liberty: The Mirage of Social Justice (1976); Friedrich Hayek, The Constitution of Liberty (R. Hamowy ed., Univ. of Chicago Press 2011).

[11] David Harvey, A Brief History of Neoliberalism 69–70 (2005).

[12] *See* Jessica Whyte, The Morals of the Market: Human Rights and the Rise of Neoliberalism (2019).

abstract legal rights, like property and contract, that make the "market" and "marketization" possible, are deployed in the struggle over the allocation of resources to justify the advancement of the interests of the few or the many.

By "taking ideology seriously,"[13] this article differs from accounts that dismiss law's ideological role in legitimizing distribution in Egypt and instead opt for extra-legal explanations for judicial behavior.[14] Ideology may be dismissed as irrelevant in favor of other explanations, such as strategic judicial behavior to preserve judicial autonomy, political backlash that undermines judicial independence, or partisan political prejudices in judicial decision-making. Yet these important factors are not unique to Egypt, but are constant concerns under liberal constitutional regimes like the United States.[15] Moreover, the SCC's longstanding neoliberal jurisprudence (before and after Mubarak and despite changes in the SCC's leadership and composition) is consistent not only with hegemonic economic orthodoxy, but also with general international trends of "market-friendly" human rights discourse that protects global capital and dispenses with the state's redistributive role.[16] It is also consistent with constitutional courts' neoliberal practice in many jurisdictions that prioritizes civil and political rights over socioeconomic protections.[17] Accepting this neoliberal jurisprudence as embodying an apolitical economic common sense obscures its ideological nature.[18] Ideology permeates judicial decision-making, and thus judicial behavior is neither explicable by merely adding an "external" political factor nor is it a mere reflection of external politics.[19] This study of law's internal politics, and its constitutive role of social relations, requires recognizing the indeterminacy of legal rights and the presence of contradiction in law, such as the existence of opposing economic philosophies. In order to foreground this contradiction, this article accounts for disagreement across courts.[20] Such an exposition facilitates a critical examination of neoliberal orthodoxy and the law's role in advancing it. It also points toward a more defensible alternative jurisprudence.

This article is organized as follows. Section 2 provides a general context for judicial disagreement and places it in a longer lineage by briefly reviewing the transition from Nasser's developmental economy to Sadat and Mubarak's neoliberal counterrevolution. Section 3 critically examines the Supreme Constitutional Court's role in advancing this counterrevolution and its deployment of interpretations of private property and freedom of contract that advanced the interests of private capital at the expense of the public sector, and landlords' interests at the expense of peasants and poor tenants. Sections 4 and 5 contrast this role with a developmental approach that centralizes the common good and requires the state to advance it. Section 4 examines administrative courts' pushback against neoliberalism's attack on the welfare state

[13] Kennedy, *supra* note 1, at 70.
[14] *See, e.g.*, Abu Odeh, *supra* note 7.
[15] Gerald Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 Rev. Pol. 369 (1992); Cass Sunstein & Thomas Miles, *Depoliticizing Administrative Law*, 58 Duke L.J. 2193 (2009).
[16] Upendra Baxi, The Future of Human Rights 234, 248–9, 264 (2d ed. 2006).
[17] Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (2004).
[18] *See, e.g.*, Moustafa, *supra* note 7, at 11–15.
[19] Samera Esmeir, Juridical Humanity: A Colonial History 273–4 (2012).
[20] Egyptian rulings are unanimous and thus judicial dissent is not available in published rulings.

and abuse of state power in cases related to slums, health care, minimum wage, and the sale of public goods. Section 5 examines several administrative courts' rulings that challenged Mubarak's privatization program after his ouster in 2011. They provided an elaborate criticism of Mubarak's economy because of its neglect of the common good and its surrender of economic sovereignty. By doing so, they also put forward a concrete agenda for the Arab Spring's general demand for social justice in Egypt.[21] Section 6 briefly discusses the reaction of the executive and SCC to administrative courts' anti-privatization rulings to reassert the neoliberal model of foreign investment in the aftermath of the July 2013 coup.

2. From revolution to the counterrevolution

Tariq Al-Bishri writes that, with the growth of the Egyptian capitalist and working classes during War World II, came an increasing realization in Egypt that the nature of colonial occupation was not only political but also economic, and not merely British but also global capitalist. Thus, national independence required an economic basis, anti-colonial struggle needed to be complemented with class struggle, and genuine liberation required a new revolution rather than a revival of the 1919 Revolution's "spirit."[22] The July 1952 Revolution, led by Gamal Abdel Nasser, abolished the monarchy and sought to achieve political and economic independence. Nasserism was an anticolonial, pan-Arab, revolutionary socialist, and republican ideology[23] that undertook a political and a social revolution.[24] It had to confront conditions of scarce natural resources, massive population growth, growing poverty, narrow export specialization in cotton (that made Egypt vulnerable to international markets' fluctuations), and a small foreign community that controlled large parts of the economy. In response, the revolutionary regime pursued policies of Egyptianization (by nationalizing foreign-controlled assets, including the Suez Canal), diversification of the economy (through industrialization), land redistribution (to address maldistribution in land and redirect private capital to invest in industry), and land reclamation (to increase available land for cultivation and redistribution).[25]

Nasser's constitutional politics envisaged a social and economic democracy that would secure social justice and intervene in the economy so that it benefits the many, not the few.[26] This "Arab Socialism" established a developmental state that endeavored

[21] This is particularly important for two reasons: first, the distraction effects of religious discourse and identity politics in post-2011 public debates on social justice. *See* Nimer Sultany, *Religion and Constitutionalism: Lessons from American and Islamic Constitutionalism*, 28 Emory Int'l L. Rev. 345, 414–15 (2014). Second, the risk of reducing revolutionary justice to the criminal trials of a few individual leaders and businessmen. *See* Sultany, *supra* note 2, at 174.

[22] Tariq Al-Bishri, Al-Harakah Al-Siyasiyyah fi Misr 1945–1953 [The Political Movement in Egypt] 257 (2d ed. 2002).

[23] Abdel Razzaq Takriti, Monsoon Revolution: Republicans, Sultans, and Empires in Oman, 1965–1976, at 52–3 (2013).

[24] Gamal Abdel Nasser, The Philosophy of Revolution (1955).

[25] Robert Mabro, The Egyptian Economy 1952–1972 at 56–7, 107 (1974).

[26] Tharwat Badawi, Al-Qanun al-Dusturi wa-Tatawwur al-Anzima al-Dusturiyyah fi Misr [Constitutional Law and the Evolution of Constitutional Orders in Egypt] 237–46 (1969); Muhammad Kamil Laylah, Al-Qanun al-Dusturi [Constitutional Law] 531–2 (1967).

to increase local production to decrease dependence on foreign imports (import-substitution industrialization) and relied on public sector-led growth to establish a welfare state. Moreover, it initiated "a far-reaching transformation of relations of production."[27] Nasser's agrarian reforms, which stipulated a maximum ownership in land,[28] "redistributed about one seventh of the country's cultivable land" from large to small landowners.[29] Beyond land reform, distributive justice encompassed social insurance, minimum wages, progressive taxation, and rent control.[30]

The July 23 Revolution's land redistribution was neither exceptional nor unique. In the history of republican constitutionalism, agrarian reform had been a centerpiece of attempts to address inequalities in the social order and to create a rupture from colonial legal orders.[31] Nasser's agrarian reforms weakened the political power of the royal family and the large landholding class, improved the peasants' living standards, and protected tenants' rights.[32] Nevertheless, these reforms did not significantly impact the wealth of middle-size landowners, and inequality in land distribution remained a crucial feature of Egypt's land regime.[33] Moreover, these reforms were highly centralized and bureaucratic, lacked effective public participatory elements, and did not sufficiently empower the poor peasants.[34] Despite these limitations, Nasser's regime remains the only period when postcolonial Egypt achieved economic independence and decreased class gaps.[35]

With Sadat's rise to power in 1970, and subsequently Mubarak's in 1981, Egypt underwent a process of political, economic, and cultural transformation, including a geopolitical realignment in the Cold War.[36] In particular, these rulers adopted

[27] Abdel Razzaq Takriti & Hicham Safieddine, *Arab Socialism*, *in* The Cambridge History of Socialism 474, 500 (Marcel van der Linden ed., 2022).

[28] Law No. 178 of 1952 (Agrarian Reform), al-Waqā'i' al-Miṣrīyah, vol. 131 bis, 9 Sept. 1952, p. 1; Law No. 127 of 1961 (Amending Provisions of the Agrarian Reform Law), al-Jarīdah al-Rasmīyah, vol. 166, 25 July 1961, p. 1076; Law No. 50 of 1969 (Determining a Maximum Limit to the Holdings of the Family and Individial in Agrarian Lands), al-Jarīdah al-Rasmīyah, vol. 33 bis, 18 Aug. 1969, p. 609.

[29] Ray Bush, *Coalitions for Dispossession and Networks of Resistance? Land, Politics and Agrarian Reform in Egypt*, 38 Brit. J. Middle East. Stud. 391, 395 (2011).

[30] Galal Amin, *The Egyptian Economy and the Revolution*, *in* Egypt Since the Revolution 40, 41–2 (P.J. Vatikiotis ed., 1968).

[31] Gargarella, *supra* note 5, at 38–44; Joel Beinin, Workers and Peasants in the Modern Middle East 133–4 (2001).

[32] Albert Hourani, A History of the Arab Peoples 383 (1991).

[33] *Id.* at 383; Beinin, *supra* note 31, at 132, 134.

[34] Beinin, *supra* note 31, at 134–5; Tariq Al-Bishri, Al-Dimuqratiyya wa Nizam 23 Yuliu 1952–1970 [Democracy and The 23 July Regime 1952-1970] 85–8 (1987).

[35] Galal Amin, Qessat al-Iqtisad al-Masri min 'ahd Muhammad Ali ila 'ahd Mubarak [The Story of Egyptian Economy from Muhammad Ali Pasha's Era to Mubarak's Era] 174–176 (2012).

[36] It is beyond the scope of this article to examine cultural, intellectual, educational, and propaganda resources invested in reversing Nasserism and facilitating the neoliberal transformation of society. An example of this is Sadat's alliance with the Islamist intellectuals such as Mustafa Mahmud, a popular author and TV personality, who, among other things, wrote two books in the mid-1970s attacking the left, socialism, Marxism, and Nasser's policies (such as nationalization) while defending private property on religious grounds. *See* Mustafa Mahmud, Al-Marksiyyah wa Al-Islam [Marxism and Islam] (1975); Mustafa Mahmud, Lematha Rafadtu Al-Marksiyyah [Why I Rejected Marxism] (1976). Regarding education, see Hania Sobhy, *Secular Façade, Neoliberal Islamisation: Textbook Nationalism from Mubarak to Sisi*, 21 Nations & Nationalism 805 (2015). Regarding the nurturing of neoliberal individualism through family planning policies, see Kamran Asdar Ali, Planning The Family in Egypt: New Bodies, New Selves (2002). Moreover, the

"free-market" policies that liberalized the economy, undermined the equalizing effects of Nasser's economy, and plunged Egypt into political and economic dependency on the United States.[37] Whereas Nasser represented an attempt at decolonization during a global era of national liberation, Sadat and Mubarak subjected Egypt to a stage of neocolonialism reminiscent of the very political and economic conditions that the July 1952 Revolution struggled against.[38] This break between Nasser and his successors is often neglected in nondiscriminating generalizations about authoritarian populism following the 2011 Revolution that lump together all three presidents in one category.[39]

Generally, neoliberalism seeks a free movement of capital and requires states to surrender their "sovereignty over capital and commodity movements. . . to the global market."[40] It disfavors democracy and instead favors technocratic governance, juridification, and juristocracy.[41] The neoliberal state attacks forms of social solidarity, systematically privileges property rights, and leads to a corporate capture of the state.[42] It thus undermines both national sovereignty—leading to neo-imperial relations—and popular sovereignty.[43] The neoliberal state becomes an agent of "accumulation by dispossession" because it redistributes wealth from the lower classes to the upper classes and from the poorest countries to the richest. Privatization and commodification are among the primary examples of this accumulation by dispossession.[44]

In Egypt, the neoliberal counterrevolution waged an assault on the innovations of the postcolonial developmental state. What enabled and justified this counterrevolution (and the policy of privatization) is the state's fiscal crisis.[45] Sadat's economic liberalization, formally inaugurated in 1974, "developed under the impact of the state bourgeoisie opting for alliance with international capital,"[46] because the state's developmentalism was no longer capable of financing its imports and welfarism.[47] State debt increased because of the liberalization of trade policy, despite a "severe

campaign against Nasserism included an attack on Egypt's Arab identity by rejecting the quest for Pan-Arab unity which Nasser considered instrumental for the realization of Arab socialism. *See, e.g.*, Ghali Shoukri, 'Urubat Misr. wa Imtihan Al-Tarikh [The Arabness of Egypt and History's Test] (2d ed. 1981); Raja' Al-Naqqash, Al-In'aezaliyyun fi Misr: Rad 'ala Lewis 'Awad wa Tawfiq Al-Hakim wa A'kharin [The Isolationists in Egypt: A Reply to Lewis 'Awad and Tawfiq al-Hakim and Others] (2d ed. 1988).

37 *Egypt–U.S. Business Relations*, Am. Chamber of Com. in Egypt, www.amcham.org.eg/information-resources/trade-resources/egypt-us-relations/overview (last visited Mar. 1, 2022) ("Egypt has received an average of USD 2 billion dollars in economic and foreign military assistance per year from the United States since 1979, just over USD 74 billion in total. It is the second largest recipient of foreign aid after Israel, stressing its significance to U.S. foreign policy").

38 Janet L. Abu-Lughod, *Cairo: Too many People, not Enough Land, Too Few Resources*, *in* World Cities Beyond the West: Globalization, Development and Inequality 119, 144–7 (J. Gugler ed., 2004).

39 Nimer Sultany, *Arab Constitutionalism and the Formalism of Authoritarian Constitutionalism*, *in* Authoritarian Constitutionalism: Comparative Analysis and Critique 219 (Helena Garcia & Günter Frankenberg eds., 2019).

40 Harvey, *supra* note 11, at 66.

41 *Id.* at 66, 176–7.

42 *Id.* at 23, 37, 41, 69–70, 77–9, 81, 165.

43 *Id.* at 27, 74.

44 *Id.* at 159–65; David Harvey, The New Imperialism 145–52 (2005).

45 Nazih Ayubi, Over-Stating the Arab State: Politics and Society in the Middle East 329, 331 (1995).

46 *Id.* at 340.

47 *Id.*; Owen, *supra* note 2, at 128.

foreign exchange shortage" after the 1967 war with Israel, and excessive (and costly) short-term borrowing to finance the spike in imports.[48] Against the backdrop of an increase in import prices in the 1970s and the costs of Egypt's 1973 war with Israel, Sadat sought to attract foreign investment and to borrow from foreign creditors.[49] The US decision to raise interest rates in 1979 led to a sharp increase in state debt and interest repayments.[50] After receiving debt relief because of Egypt's support for the Gulf War in 1990, Mubarak committed Egypt to neoliberal economic reform. In 1997, the Economist dubbed this policy a "revolution to end the revolution."[51]

Although the assault on the developmental state advanced the interests of some classes over others, it was ideologically represented as advancing the general interest. Whereas Nasser's policies empowered the rural poor and peasants and undermined the large landowners' political power, Sadat and Mubarak unleashed accumulation by dispossession: they dispossessed and marginalized small farmers and empowered large landowners and capitalists and channelled wealth to their benefit.[52] This counterrevolution claimed that "the market" rather than the state became the primary mechanism for wealth distribution. This explanation, however, conceals power struggles and the wielding of legal and political power as well as the infliction of violence in the context of these power struggles.[53] It posits a false dichotomy between "free market" and "state planning" that conceals the prevalence of coercion in the private sphere no less than in the public sphere.[54]

The state's role is reflected in an extensive legislative toolkit to ensure the security of property rights and attract foreign capital. The counterrevolutionary agenda of reversing Nasser's economy and redistributive justice included laws that returned tens of thousands of feddans of sequestered land to former landowners.[55] It also included Mubarak's Law No. 96 of 1992, which terminated land tenancy rights.[56] Law No. 96 was the culmination of the "de-Nasserization process" and economic liberalization.[57]

[48] Galal A. Amin, Egypt's Economic Predicament: A Study in the Interaction of External Pressure, Political Folly and Social Tension in Egypt, 1960–1990, at 7–9 (1995). Sadat's policies increased the state's external debt from USD 5 billion in 1970 to USD 30 billion by 1981, increased imports of basic food grains in per capita terms approximately eight times between 1970 and 1980, and transformed a surplus in agricultural trade balance of USD 300 million in 1970 into a deficit of USD 2.5 billion in 1981. Ray Bush, *Politics, Power and Poverty: Twenty Years of Agricultural Reform and Market Liberalisation in Egypt*, 28 Third World Q. 1599, 1603 (2007).

[49] Adam Hanieh, Lineages of Revolt: Issues of Contemporary Capitalism in the Middle East 31 (2013).

[50] *Id.*

[51] The Economist, Oct. 25, 1997, at 45, *quoted in* Owen, *supra* note 2, at 129.

[52] Bush, *supra* note 29, at 394–6.

[53] *See, e.g.*, Timothy Mitchell, Rule of Experts: Egypt, Techno-Politics, Modernity 296–8 (2002).

[54] Ellen Meiksins Wood, Democracy Against Capitalism: Renewing Historical Materialism 252–5 (2016); Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 Pol. Sci. Q. 470 (1923).

[55] Bush, *supra* note 29, at 396. *See also* Law No. 69 of 1974 (Settling the Implications of Sequestration), al-Jarīdah al-Rasmīyah, vol. 30, 25 July 1974, p. 490; Law No. 53 of 1972 (Liquidating the Sequestrations predating Law No. 34 of 1971), al-Jarīdah al-Rasmīyah, vol. 40, 5 Oct. 1972, p. 656; Law No. 80 of 1971 (Establishing an Egyptian Awqaf Authority), al-Jarīdah al-Rasmīyah, vol. 43, 28 Oct. 1971, p. 636; Law No. 42 of 1973 (Returning Lands to the Awqaf Authority), al-Jarīdah al-Rasmīyah, vol. 22, 31 May 1973, p. 227. An Egyptian feddan is equal to 1.03 acres or 0.42 hectares.

[56] Law No. 96 of 1992 (Amending Provisions of Decree-Law No. 178 of 1952 for Agrarian Reform), al-Jarīdah al-Rasmīyah, vol. 26 bis (a), 28 June 1992, p. 3.

[57] Reem Saad, *State, Landlord, Parliament and Peasant: The Story of the 1992 Tenancy Law in Egypt*, 96 Proc. Brit. Acad. 387 (1999).

Structural Adjustment Programs advanced the liberalization of agricultural markets (reducing state interventions like price control and crop purchase) and the commodification of land.[58] The World Bank, the International Monetary Fund (IMF), and the United States Agency for International Development (USAID) supported Law No. 96 as a rebalancing of the landlord–tenant relationship, which they viewed as detrimental to landlord interests.[59]

The July 1952 Revolution had issued the agrarian reform laws as "anti-feudalist" measures that empowered peasants by granting them the security of permanent tenancy rights and thus shielded them from landlords' arbitrary power. According to the 1952 law, landlords could evict the tenants only if the latter failed to pay the controlled rent (which was fixed at seven times the land tax).[60] In contrast, the 1992 law facilitated the commodification of rural lands against the backdrop of the rise in land value.[61] It tripled the tenancy fees and allowed the termination of tenancy rights and eviction of tenants by the end of a five-year transitional period after the law's enactment. Consequently, the law dispossessed an estimated one million peasant-tenants, who with their families amounted to 10% of Egypt's population in 1997.[62] Thus, the 1992 legislative repeal signified a return to unjust social relations by concentrating land in the hands of large landlords and dislocating "an important basis for a moral and political order" that had previously facilitated a dignified life for the rural poor.[63] The debate around the law's enactment constructed opposing but false images of tenants and landlords in which the former were portrayed as powerful and "lazy" and the latter as "helpless" and "downtrodden."[64]

The law's critics warned that it would have an anti-egalitarian impact, increase Egypt's economic dependency and food insecurity (because it would make food production export-oriented and require importation of food), and breed social discontent.[65] Indeed, USAID and international financial institutions supported Egyptian agricultural policies of "modernization" that marginalized small farmers and rewarded large farmers, focused on capital-intensive export to generate growth, and undermined "food sovereignty."[66]

Against this backdrop, and in addition to examining the judicial scrutiny of Law No. 96, the following sections focus on competing legal assessments of the privatization project. Starting with 1991, the IMF advanced and supervised privatization as part of Structural Adjustment Programs.[67] Mubarak also signed an agreement with USAID in 1993 to support privatization.[68] USAID support reversed earlier rural

[58] Hanieh, *supra* note 49, at 81–2.
[59] *Id.* at 82.
[60] Saad, *supra* note 57, at 388–90.
[61] *Id.* at 388.
[62] Bush, *supra* note 48, at 1606.
[63] Saad, *supra* note 57, at 390.
[64] *Id.* at 390–4.
[65] *Id.* at 394–5.
[66] Bush, *supra* note 29, at 395–6, 397, 398–9.
[67] For a summary, see, e.g., Nicola Pratt, *Maintaining the Moral Economy: Egyptian State-Labor Relations in an Era of Economic Liberalization*, 8–9 Arab Stud. J. 111, 115–16 (2001).
[68] President of the Republic of Egypt Decree no. 534 of 1993 (Agreement on the Grant for the Privatization Project between Egypt and the United States), al-Jarīdah al-Rasmīyah, vol. 18, May 5, 1994, p. 1049.

reforms and increased land concentration.[69] Whereas prior to 1952 the percentage of those who owned 20% of cultivated lands amounted to 0.1% of owners, in 2000 the percentage of the owners who held 11% of all the lands amounted to 0.05%.[70] USAID also supported the privatization of other public goods like education and healthcare in Egypt, thereby creating unequal opportunities and reproducing social privilege.[71] Ultimately, Egypt "recorded the largest number of firms privatized out of any country" in the Middle East and North Africa and "the highest total value of privatization" amounting to USD 15.7 billion between 1988 and 2008.[72]

In this context of economic transformation, Sadat distinguished himself from Nasser's revolutionary socialism by proclaiming the transition from "revolutionary legitimacy" to "constitutional legitimacy" (which he associated with "continuity," "the rule of law," and a "permanent constitution").[73] Yet these claims remained hollow since Sadat's legal regime was based on a constitution that was approved in a rigged referendum.[74] Moreover, as the following section argues, under the auspices of the 1971 Constitution, which remained in force until Mubarak's ouster in 2011, the post-Nasser discourse of "constitutional legitimacy" concealed and legitimized a counterrevolution. It thus proclaimed the separation between law and politics while effectively exemplifying their intertwinement. In particular, the judiciary played a constitutive role of social relations in solidifying the juridical basis for the neoliberal transformation of society and protecting it against challenges.

3. The Supreme Constitutional Court's neoliberal counterrevolution

To allay the concerns of foreign investors with respect to the "insecurity of property rights," Sadat's regime established the Supreme Constitutional Court in 1979 and empowered it to review the constitutionality of legislation.[75] Unlike the "political" Supreme Court that Nasser established in 1969, the SCC enjoyed "considerable independence from regime interference."[76] This institutional independence notwithstanding, the SCC constitutionalized the dismantlement of Nasser's developmental and welfare state. It provided the neoliberal counterrevolution with a veneer of legality that allowed the government to avoid taking responsibility for disagreeable and controversial decisions and to sidestep a direct confrontation with the losers of this political and legal reversal.[77] This neoliberalism is hardly consistent with invocations of the rule of law and constitutional legitimacy as substitutes for Nasser's revolutionary legitimacy. This is not merely due to the SCC's selective activism, which did not

[69] Mitchell, *supra* note 53, at 221.
[70] Bush, *supra* note 48, at 1612.
[71] Mitchell, *supra* note 53, at 229.
[72] Hanieh, *supra* note 49, at 50.
[73] Moustafa, *supra* note 7, at 6, 86–7.
[74] *Id.* at 70.
[75] *Id.* at 69, 77–8.
[76] *Id.* at 78.
[77] *Id.* at 17, 36, 120.

challenge the security state and its exceptional courts,[78] thereby evidencing a weak conception of the rule of law. Rather, it is also evident in the courts' legislative role in which judicial reasoning is hardly distinguishable from political reasoning.[79] As legislatures, judges are not passive recipients of extralegal political influences. Rather, they actively shape law's distributive outcomes, benefiting some groups and harming others.[80] In fact, the juridical approval of privatization effectively amended the constitution and echoed the very revolutionary legitimacy that the post-Nasser regime claimed to reject and oppose.[81] Indeed, despite the transition from Nasser to Sadat and then Mubarak, the 1971 Constitution committed Egypt (until it was amended in 2007) to a socialist economic system that seeks to "prevent exploitation and aims at bridging the gaps between the classes,"[82] and in which the "people control the means of production,"[83] and "the public sector shall be the vanguard of progress in all spheres and shall assume the main responsibility in the development plan."[84] The constitutional text notwithstanding, the SCC espoused a market fundamentalism of privatization, deregulation, and strong property and contract rights.

3.1. Privatization

The leading case that embodied this neoliberal counterrevolution is Case No. 7 of Judicial Year 16. Decided in 1997, it addressed the constitutionality of the legislation that allowed the privatization of publicly owned corporations, and removed these corporations from public control.[85] The SCC rejected the argument that the law contravenes the 1971 Constitution's stipulation that public property is the ownership of the people and requires its protection.[86] According to the SCC, constitutional texts should not be interpreted as providing a "final and permanent solution" that is "blindly" and "mechanically" applied in the face of changing economic conditions. Rather, the 1971 Constitution should be interpreted "in light of higher values whose end is liberating the homeland and the citizen politically and economically." Moreover, the Constitution becomes "an obstacle" in the face of the people's attempt to reach "new horizons" when it is "subordinated" to a "specific philosophy."[87] Accordingly, the specific philosophy of socialism, and the reliance on the public sector, in the SCC's view, is outdated and constitutional jurisprudence should unchain the economy from

[78] *Id.* at 8, 51–2, 104–6, 172–7.
[79] Kennedy, *supra* note 1; Nimer Sultany, *The State of Progressive Constitutional Theory: The Paradox of Constitutional Democracy and the Project of Political Justification*, 47 Harv. C.R.–C.L. L. Rev. 371 (2012).
[80] Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 Legal Stud. F. 327 (1991).
[81] Moustafa, *supra* note 7, at 128–32.
[82] Constitution of the Arab Republic of Egypt, 12 Sept. 1971 art. 4, al-Jarīdah al-Rasmīyah, vol. 36 bis (a), 12 Sept. 1971, p. 1. In the 1980 amendments, "bridging the gap between the classes" was replaced with "narrowing the gaps between the incomes."
[83] *Id.* art. 24.
[84] *Id.* art. 30.
[85] Law No. 203 of 1991 (Public Sector Corporations Law), al-Jarīdah al-Rasmīyah, vol. 29 bis, 19 June 1991, p. 3.
[86] Constitution of the Arab Republic of Egypt, 12 Sept. 1971, arts. 30, 33.
[87] al-Mahkamah al-Dustūrīyah al-'Ulyā [Supreme Constitutional Court], Case No. 7 of Judicial Year 16, session of Feb. 1, 1997, Hamdi Huda Bader v. President of the Republic and Prime Minister.

this straitjacket. Indeed, the Constitution is a forward-looking, "progressive document" that needs to be "consistent with the spirit of the times."[88]

The Court further rejected the petitioners' argument that privatization contravened the constitutional commitment to protect the "socialist achievements."[89] The petitioners argued that these achievements included protections to workers' rights, particularly regarding redundancy and setting a maximum limit to wages. The Court opined that this constitutional commitment was "devoid of any specification" that would "define its content and extent" and the Constitution "even ignored it completely and did not even refer to a legislation to specify its components."[90] Thus, this abstract commitment imposes no concrete obligations on the state.

Chief Justice 'Awd al-Murr acknowledged afterwards that the SCC's ruling was "a complete deviation" from "the terms of the Constitution," but described it as "a ruling in light of our legitimate aspirations."[91] For al-Murr, the Court had to channel the World Bank's wishes via judicial interpretation against a government unwilling to amend the Constitution "to pave the way for privatization."[92] Consequently, the ruling rhetorically rejected the Constitution's subordination to a "specific philosophy" but only to impose a neoliberal philosophy.

In line with this philosophy, the SCC jurisprudence provided strong protection for private property rights.[93] It highlighted the continuity of the right to property in Egyptian constitutions since 1923.[94] Its interpretation of property rights empowered landlords, hastened the demise of rent control laws, and promoted the creation of housing and land markets that are governed by the freedom of contract.[95] Defenders of the SCC jurisprudence present the deregulation of rent as a necessary rationalization of a counterproductive rent control that harmed those it sought to benefit and shackled private sector investment in housing development.[96] Yet the unleashing of the market's law of supply and demand merely worsened Egypt's housing crisis: it led to a historic decline in renting, to a massive increase in vacant flats, to unaffordable housing, and to pushing more lower-income people to the urban slums of "informal housing."[97]

[88] *Id.*

[89] Constitution of the Arab Republic of Egypt, 12 Sept. 1971, art. 58.

[90] al-Mahkamah al-Dustūrīyah al-'Ulyā [Supreme Constitutional Court], Case No. 7 of Judicial Year 16, session of Feb. 1, 1997.

[91] *Quoted in* Moustafa, *supra* note 7, at 131.

[92] *Quoted in id.* at 130.

[93] *Id.* at 91–3.

[94] *See, e.g.*, al-Mahkamah al-Dustūrīyah al-'Ulyā [Supreme Constitutional Court], Case No. 4 of Judicial Year 1, session of June 25, 1983.

[95] For the SCC's protection of landlords' right to property, and its insistence on the temporality of contracts in order to strike down legislative protections against evictions to tenants, see: al-Mahkamah al-Dustūrīyah al-'Ulyā [Supreme Constitutional Court], Case No. 44 of Judicial Year 17, session of Feb. 22, 1997, Bahiyya Ibrahim Abdul Allah Al-Muwafi v. President of the Republic et al.; al-Mahkamah al-Dustūrīyah al-'Ulyā [Supreme Constitutional Court], Case No. 11 of Judicial Year 23, session of May 5, 2018, Heirs to Ahmad Mursi Khalifa v. President of the Republic et al.

[96] *Compare* Moustafa, *supra* note 7, at 120–3 *with* Molly McUsic, *Reassessing Rent Control: Its Economic Impact in a Gentrifying Housing Market*, 101 Harv. L. Rev. 1835 (1988).

[97] Yahia Shawkat, Egypt's Housing Crisis: The Shaping of Urban Space (2020).

3.2. Land reform and private property

At the basis of the SCC's jurisprudential approach is the assumption that land is a commodity, as opposed to a social or a public good. Such an assumption ignores the "fictitious" nature of this commodity.[98] It sacrifices equity considerations (to mitigate market outcomes) and stipulates purchasing power in the market as the exclusive criterion for land allocation.[99] Notwithstanding the neoliberal support for security of title over land, this protection facilitates the liquidity of markets in which land becomes more easily transferable.[100] As the following discussion shows, this interpretation of property rights conflicts with demands for social justice because it authorizes the reversal of agrarian reform. The main manifestations of this reversal are (1) the rejection of confiscation without compensation for equity considerations, (2) the insistence on the market value of the confiscated land, and (3) the weakening of protections for rural tenants.

In Case No. 3 of Judicial Year 1, the SCC invalidated in 1983 Law No. 104 of 1964 because it determined that the state cannot take land without compensating its owners.[101] In the government's view, the Constitution—which stipulates the need for compensation in the case of takings for the public interest[102]—is silent in the case of agrarian land that exceeds the legally prescribed limit for owned feddans.[103] Thus, the Constitution differentiates agrarian land from other forms of property (because no similar limits are imposed on non-agrarian land). Yet the Court rejected the contention that constitutional silence enables lack of compensation (in the case of excess agrarian land). The Court reasoned that the constitution merely laid down the "anti-feudal" principle, which needs to be read in conjunction with other constitutional principles that protect private property. Likewise, it rejected the argument that agrarian land takings enforce the constitutional provisions on bridging class differences and achieving social solidarity.[104] It maintained that the legislature couldn't pursue these goals while violating other constitutional principles, namely the protection of private property.[105]

[98] Karl Polanyi, The Great Transformation: The Political and Economic Origins of Our Time 75–6 (1944).

[99] Olivier de Schutter & Balakrishnan Rajagopal, *Property Rights from Below: An Introduction to the Debate*, *in* Property Rights From Below: Commodification of Land and the Counter-Movement 1, 8 (Olivier de Schutter & Balakrishnan Rajagopal eds., 2020).

[100] *Id.* at 4–5.

[101] al-Mahkamah al-Dustūrīyah al-'Ulyā [Supreme Constitutional Court], Case No. 3 of Judicial Year 1, session of June 25, 1983.

[102] Constitution of the Arab Republic of Egypt, 18 Sept. 1971, art. 34.

[103] *Id.* art. 37 (authorizing the legislature to impose a maximal limit on agrarian ownership "to ensure the protection of the peasant and agrarian worker from exploitation").

[104] *See* Constitution of the Arab Republic of Egypt, 12 Sept. 1971, arts. 4, 7.

[105] *See also* al-Mahkamah al-Dustūrīyah al-'Ulyā [Supreme Constitutional Court], Case No. 4 of Judicial Year 1, session of June 25, 1983; al-Mahkamah al-Dustūrīyah al-'Ulyā [Supreme Constitutional Court], Case No. 23 of Judicial Year 1, session of June 25, 1983; al-Mahkamah al-Dustūrīyah al-'Ulyā [Supreme Constitutional Court], Case No. 24 of Judicial Year 1, session of June 25, 1983; al-Mahkamah al-Dustūrīyah al-'Ulyā [Supreme Constitutional Court], Case No. 25 of Judicial Year 1, session of June 25, 1983; al-Mahkamah al-Dustūrīyah al-'Ulyā [Supreme Constitutional Court], Case No. 27 of Judicial Year 1, session of June 25, 1983; al-Mahkamah al-Dustūrīyah al-'Ulyā [Supreme Constitutional Court], Case No. 38 of Judicial Year 4, session of June 25, 1983, invalidating Law No. 104 of 1964 (Transfer of Title over Taken Land to the State without Compensation), al-Jarīdah al-Rasmīyah, vol. 68, 23 Mar. 1964, p. 698, and establishing the principle of no taking without compensation.

The SCC, however, posits a false determinacy. As recent debates on constitutional amendment in South Africa show, confiscation without compensation may be necessary to rectify the injustice pervading the system of land holdings.[106] The upshot of the SCC ruling is that the protection of individual rights conceals the generality of social injustice and precludes a historical inquiry into unjust acquisition and distribution of entitlements.[107] The Court left little room for general policy considerations of equity.

Complementing the 1983 ruling is other jurisprudence that insists on individualized inquiries with respect to determining compensation for takings. In Case No. 24 of Judicial Year 15 in 1998, the SCC invalidated provisions of Law No. 50 of 1969 because the law imposed a fixed compensation for lands seized because they exceeded the legally prescribed limit on ownership. The Court reasoned that such a fixed compensation (70 times the real estate tax) violated the right to property because the rate does not provide for fair compensation. This fair compensation, the Court determined, requires "essentially ad hoc factual inquiries" to determine the value of the confiscated land and the required compensation. The determination on the basis of "70 times the tax" is speculative and is disconnected from the land's market value.[108] Following the same logic, the ruling in Case No. 28 of Judicial Year 6 invalidated provisions in Law No. 178 of 1952 and Law No. 127 of 1961. According to the SCC, compensation should be fair and tailored to each case rather than arbitrarily and rigidly determined.[109]

The Court thus equates fairness with market prices because a fair compensation must follow market prices (since land is a commodity and adherence to the constitutional right to private property requires market-based compensation in the case of forced sale when the land is distributed from a private holder to public ownership). The Court contrasts market fairness with legislative arbitrariness: whereas land value in the former fluctuates (and thus accurately reflects the value), land value in the latter is fixed and rigid. The assumption behind this binary perspective is that "the market" is not arbitrary because it is "self-regulating," whereas an "external" state intervention that seeks to change existing allocations of land title is arbitrary and thus suspect. Only when legislative action (the taking) is guided by market-based valuation can it be considered fair.

[106] Elmien du Plessis, *No Expropriation without Compensation in South-Africa's Constitution—for the Time Being*, Verfassungs Blog (Dec. 9, 2021), https://verfassungsblog.de/no-expropriation-without-compensation-in-south-africas-constitution-for-the-time-being/.

[107] El-Dessouky, for example, argues that the concentration of landownership between 1914 and 1952 resulted from sale of state lands in exchange for reclamation and from proximity of the large landholding class to political power. Moreover, the state bailed out mortgaged properties and debt-ridden landowners in 1930–36. Assem El-Dessouky, Kibar Mullak Al-Aradi Al-Zera'iyyah wa Dawruhum fi Al-Mujtama' Al-Masri 1914–1952 [The Large Landowning Class and Their Role in Egyptian Society], at 58–9, 168–80, 187–8 (1975). Regarding the 1800s, see Mabro, *supra* note 25, at 58–9.

[108] al-Mahkamah al-Dustūrīyah al-'Ulyā [Supreme Constitutional Court], Case No. 24 of Judicial Year 15, session of Mar. 7, 1998.

[109] al-Mahkamah al-Dustūrīyah al-'Ulyā [Supreme Constitutional Court], Case No. 28 of Judicial Year 6, session of June 6, 1998, Muhammad Fadhel Al-Marjushi v. President of Republic et al.

The Court does not, however, inquire into the landowner standing before it. Instead, it renders the landowner an abstract figure that flattens distinctions between small and large landholders. This abstract figure is de-historicized because it is separated from the regulatory regime that had historically facilitated landowners' status as small or large. Moreover, the Court provides an image of a powerless landowner who is facing a powerful state regulator and thus requires protection.[110] From this perspective, fairness does not require a case-by-case examination that transcends the veil of abstraction. Ultimately, these rulings empower the private landowner and seek to deter the policymaker. The latter's ability to embark on land redistribution is likely to be undermined by a significantly higher compensation.

Other courts such as the Court of Cassation spelled out the far-reaching economic implications of these rulings, including in the period after the 2011 Revolution. In one case, the petitioners appealed for more compensation than previously judicially allocated given the change in the legal basis for determining the compensation after the invalidation of the relevant provisions in the SCC cases. The Court of Cassation stipulated that invalidity means that the legislation is null and void from the moment of legislative enactment.[111] In numerous cases, the SCC repeatedly rejected the Minister of Finance's request to interpret the SCC 1998 ruling in Case No. 28 of Judicial Year 6 as determining compensation as per the land's value at the time of taking. The SCC thus declined to intervene in civil cases in which the courts ordered compensation based on the land's market value at the time of submitting the lawsuit, in addition to compensation for loss of revenue because of lack of use.[112]

3.3. Tenancy relations and freedom of contract

In stark contrast to this concern for compensating landowners, the SCC disregarded rural tenants' rights and supported their eviction. This bias is evident in a string of cases in which the SCC, on the one hand, affirmed the constitutionality of the termination of tenancy rights in Law No. 96 of 1992, and on the other hand invalidated the law's attempt to prevent rural homelessness. In its defence of this law, the SCC represented it as embodying the transition from revolution to the rule of law. In other words, it expressed a return from the revolutionary "exceptionality" of constraints on property and freedom of contract to an "original" state of strong property rights and freedom of contract. In Case No. 16 of Judicial Year 22, the Court stipulated that Law No. 96 "restores" the

[110] For a similar discussion in the US context, see Gregory S. Alexander, *Takings, Narratives, and Power*, 88 Colum. L. Rev. 1752 (1988).

[111] Mahkamat al-Naqd [Court of Cassation], petition no. 11633 of Judicial Year 80, session of June 21, 2015.

[112] *See, e.g.*, al-Mahkamah al-Dustūrīyah al-'Ulyā [Supreme Constitutional Court], Case No. 2 of Judicial Year 42, session of Dec. 5, 2020, Minister of Fin. v. Majdi Zakariyya Al-fiqqi et al.; al-Mahkamah al-Dustūrīyah al-'Ulyā [Supreme Constitutional Court], Case No. 3 of Judicial Year 42, session of May 8, 2021, Minister of Fin. v. Abdel Qader Muhammad Abdel Qader Sayyed Ahmad Al-Barhamtushi et al.; al-Mahkamah al-Dustūrīyah al-'Ulyā [Supreme Constitutional Court], Case No. 5 of Judicial Year 42, session of Jan. 2, 2021, Minister of Finance v. Heirs to Muhammad Wasfi Abaza et al.; al-Mahkamah al-Dustūrīyah al-'Ulyā [Supreme Constitutional Court], Case No. 19 of Judicial Year 41, session of Sept. 5, 2020, Minister of Fin. v. Samia Habib Nasr Salem.

relations between landlord and tenant from its "subjection for decades to exceptional constraints that undermined the right to property" to its "former state and to leave it to the general rules of contract that are based on voluntarism."[113] The Law thus reinforced "the rule of law as the basis for governance in the state" because tenancy relations in rural lands are henceforth governed by the freedom of contract.[114]

There are two primary difficulties with this legal and judicial attempt to "restore" property and contract relations. First, it begs the question of the existence of a neutral and natural baseline for these relations. Any historical (and legally approved) baseline will need to be normatively defensible given the history of entitlements. In effect, the ruling protects landowners' economic interests by presenting them as supra-political (constitutional) rights while relegating the economic interests of peasant-tenants to arbitrary political considerations.

Second, the invocation of the rule of law is hardly consistent with the reality of violence and lawlessness the law unleashed in Egypt's countryside. The enactment of Law No. 96 of 1992, whose first draft was tabled in parliament in 1985, increased rural conflict as it resulted in over 119 deaths between January 1988 and December 2000,[115] and 467 deaths in 2009–2010.[116] On the one hand, the law had far-reaching effects because it encouraged dispossession in more lands than those included in the law and unleashed landlords' violence against peasants.[117] On the other hand, the rural population in different parts of Egypt's countryside violently resisted the law's implementation in the years leading to the 2011 Revolution.[118] The government violently repressed this resistance.[119]

Moreover, the neoliberal vision underlying this invocation of the rule of law ignored the constitutional text. In Case No. 70 of Judicial Year 29, the Court rejected the argument that Law No. 96's attack on tenancy rights is inconsistent with a constitutionally enshrined socialist economy and its protection of peasants and agricultural workers from exploitation. The Court opined that the March 2007 constitutional amendments reflected a collective decision to move away from socialism and embrace a free-market economy.[120] This reasoning is remarkable because the petition was submitted in 1998 against a legislation enacted in 1992. It thus seems that the delay in delivering the ruling until 2008 enabled the Court to deploy its retrospective rationalization for an earlier neoliberal law on the basis of a later constitutional text.[121]

[113] al-Mahkamah al-Dustūrīyah al-'Ulyā [Supreme Constitutional Court], Case No. 16 of Judicial Year 22, session of May 7, 2006, 'Abd Al-Mu'ti Al'urabi Yosef et al. v. President of the Republic et al.
[114] *Id.*
[115] Bush, *supra* note 29, at 394.
[116] Hanieh, *supra* note 49, at 82.
[117] Bush, *supra* note 29, at 396, 402–3; Bush, *supra* note 48, at 1607.
[118] Bush, *supra* note 29, at 399–400.
[119] *Id.* at 401, 403.
[120] al-Mahkamah al-Dustūrīyah al-'Ulyā [Supreme Constitutional Court], Case No. 70 of Judicial Year 29, session of Jan. 13, 2008, Yosef Hafez Mustafa v. President of the Republic et al.
[121] The SCC reiterates this position in later rulings. *See* al-Mahkamah al-Dustūrīyah al-'Ulyā [Supreme Constitutional Court], Case No. 5 of Judicial Year 23, session of Dec. 4, 2011, Subhi 'Awwad Abdel Rahim Shu'ayshi' v. President of the Republic et al.; al-Mahkamah al-Dustūrīyah al-'Ulyā [Supreme Constitutional Court], Case No. 21 of Judicial Year 24, session of Apr. 3, 2011, Ibrahim Yosef Jado v. President of the Republic et al.

In Case No. 227 of Judicial Year 25 the Court went one step further in advancing neoliberalism.[122] The Court invalidated a provision of Law No. 96 not because the law undermined tenants' rights but rather because it did not go far enough in undermining them. Effectively, the SCC wanted the legislature to follow neoliberalism to its logical end by providing a strong protection to property and leaving the peasant-tenants at the mercy of landowners without legal protection. Indeed, the Law sought to end (by 1997) the land tenancy rights that Sadat had extended indefinitely in 1975. The Law, however, sought to protect those who resided in a house adjacent to the previously rented land by prohibiting their eviction if they had no other residence and until such time the state may provide them with another abode with an appropriate rent.[123] The SCC alluded to legislative debates in which a number of parliamentarians raised concerns regarding tenants' rights and thus introduced this provision. Instead of considering this provision as a legislative balancing between the interests of landowners and tenants, the Court considered it a sign of legislative "foot dragging" and inconsistency that undermines the law's objective, thereby resulting in a lack of rational connection between means and end.[124] If the tenants were allowed to stay in the house despite the expiry of their tenancy rights in the land to which the house is adjacent, this effectively would undermine the owners' ability to use their agricultural lands and financially benefit from them.[125]

The SCC argued that the regulation of rights does not permit emptying them from content.[126] While the "social function of property" may be considered in order to impose restrictions on property,[127] these cannot amount to a violation of the "core" of the right to property.[128] Although "social justice" is a constitutionally enshrined value, the Court denied that it conflicts with the right to property and stipulated that its application cannot violate the "core" of the right.[129] This essentialist or deterministic reasoning leaves the "social function of property" and "social justice" toothless rhetorical devices that cannot stand in the way of landowners' land use and financial profit. In effect, the SCC expresses neoliberal dogma when it portrays any political interference in market transactions to mitigate its outcomes as arbitrary (partisan or subjective) interference that distorts market efficiency or economic equilibrium, and is thus legally unacceptable. In this view, substantive and material considerations of social justice offend the formal rationality of the market.[130] Moreover, the invocation of the social function of property failed to divert the Court's attention from conceptualizing the right to property as essentially concerned with the relation between a human being

[122] al-Mahkamah al-Dustūrīyah al-'Ulyā [Supreme Constitutional Court], Case No. 227 of Judicial Year 25, session of Feb. 4, 2017, Wafa' Hussein Abu Shayib et al. v. President of the Republic et al., AL-JARĪDAH AL-RASMĪYAH, vol. 6 bis (b), 15 Feb. 2017, p. 3 [hereinafter Case No. 227/25]. The Court ruled in this case fourteen years after the petition's submission in 2003.
[123] Law No. 96 of 1992, *supra* note 56, art. 4.
[124] Case No. 227/25, pp. 10–11, 14.
[125] *Id.* pp. 15–16.
[126] *Id.* pp. 13, 16.
[127] CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 12 Sept. 1971, art. 32.
[128] Case No. 227/25, pp. 12, 16.
[129] *Id.* p. 13.
[130] STREECK, BUYING TIME, *supra* note 8.

and a thing (land) to one concerned with social relations, namely the relation between human beings with respect to a thing.[131] The Court's support for an exclusive and exclusionary interpretation of the right to property ignores the fact that property is a socio-legal construct, that is, a "set of policy choices backed by the power of the state."[132] Rather than understanding property as a "bundle of rights," this interpretation portrays it as pure, indivisible, and vested in single owners.[133] Armed with this reification of property, the Court invalidated the provision that protected the tenant from eviction and homelessness.

The judicial vision of society that emerges from such rulings is oblivious both to the massive inequity in land distribution in Egypt and to rural powerlessness. It effectively exacerbates unjust land distribution and unjust power relations. General policy concerns about social justice in land distribution and the history of unjust entitlements are virtually expelled from the judicial narrative. In fact, the Court's jurisprudence illustrates that no general state policy to tackle inequity in land ownership can pass constitutional muster. Consequently, social justice is an unrealizable ideal under such neoliberal jurisprudence. This is because defensible conceptions of social justice would attend to land distribution and attempt to rectify or mitigate its inequity. It is no wonder that neoliberals like Hayek maintain that the rule of law precludes social justice.[134]

This conception of the rule of law ignores the indeterminacy of rights, in light of the availability of different interpretations and judicial balancing between rights. This availability is even more conspicuous when domestic courts differ. The SCC's neoliberal vision of society stands in contrast not only to Nasser's developmentalism but also to judicial developmentalism. This alternative jurisprudence undercuts the SCC's vision because it illustrates the availability of an opposing vision of the community and its economy within the same legal and constitutional order. The following two sections outline the main expressions of this vision.

4. Administrative courts, the welfare state, and the common good

After its establishment in 1946, textbook writers celebrated the French-inspired administrative court system (the State Council) as a "transformative" development in Egypt's legal history, and the "start of a new era" of wider administrative and legal reform.[135] The main innovation consisted of establishing a judicial power to review

[131] *See, e.g.*, Morris R. Cohen, *Property and Sovereignty*, 13 Cornell L. Rev. 8 (1927).

[132] Jennifer Nedelsky, Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy 255 (1990).

[133] *See* Gaofeng Meng, *Contemporary China's Rural Landownership with Reference to Antony M. Honoré's Concept of Ownership*, 50 J. Econ. Issues 667 (2016); Simon Deakin & Gaofeng Meng, *Resolving Douglass C. North's "Puzzle" Concerning China's Household Responsibility System*, 18 J. Inst. Econ. 521 (2022).

[134] Hayek, The Constitution of Liberty, *supra* note 10, at 340–1.

[135] 2 Othman Khalil Othman, Qanun Idari: Majlis Al-Dawlah [Administrative Law: State Council] 14 (2d ed. 1950).

the legality of administrative decisions. Additionally, the legislature granted courts a jurisdiction over disputes between public bodies and individuals, including challenges to electoral results and public contracts, as well as matters concerning public sector employment to protect the civil service from partisan interventions.[136]

Despite the lack of explicit constitutional authorization, the administrative courts developed in 1948 a judicial review power over legislation by refusing to apply laws they deemed unconstitutional. However, the establishment of the Supreme Court in 1969 and then the SCC in 1979 sought to centralize judicial review and granted the constitutional court the exclusive jurisdiction over the constitutionality of legislation, including the power to invalidate legislation.[137] Henceforth, administrative courts, like the civil courts, could only refer claims regarding lack of constitutionality of legislation to the SCC for its determination. In the 1970s and 1980s, Tamir Moustafa points out, the Sadat and Mubarak regimes strengthened the administrative courts' independence and institutional capacity in order to address bureaucratic dysfunction, discipline the state's administrative hierarchy, and tackle the increase in corruption in the civil service that accompanied economic liberalization.[138] Yet, in the mid-1990s and afterwards, the administrative courts evolved, as Mona El-Ghobashy argues, into one of the primary fora for political contestation (alongside protests and elections) in which litigants publicly challenged the policies of Mubarak's regime and its abuses of power.[139] In particular, these courts "became the most effective forum to challenge the creeping privatization of public services and its attendant regime of new fees, duties, and taxes."[140]

The administrative courts' jurisprudence discussed in this article belongs to the Arab developmental constitutional tradition of the anticolonial conceptualization of sovereignty for three primary reasons: its economic nationalist emphasis on the ills of economic dependency as a result of neoliberal globalization; its quest to protect the role of the public sector in development to benefit the many not the few,[141] as opposed to the neoliberal emphasis on the private sector and global capital; and its welfarist orientation to a "moral economy,"[142] as opposed to the neoliberal view of society as a "spontaneous order" and of the market as an impersonal, unintentional, and unforeseeable order that does not owe the wretched any moral duty, except for a social minimum and voluntary individual charity.[143]

[136] *Id.* at 106–78; Law No. 112 of 1946 (Establishing State Council), AL-WAQĀ'I' AL-MIṢRĪYAH, vol. 83, 15 Aug. 1946, p. 1; Law No. 9 of 1949 (State Council), AL-WAQĀ'I' AL-MIṢRĪYAH, vol. 17, 3 Feb. 1949, p. 1; Law No. 47 of 1972 (State Council), AL-WAQĀ'I' AL-MIṢRĪYAH, vol. 40, 5 Oct. 1972, p. 609; for discussions that led to establishment of State Council, see, e.g., 2 MUHAMMAD HUSSEIN HEIKAL, MUTHAKKERAT FI AL-SIYASAH AL-MISRIYYAH [MEMOIRS IN EGYPTIAN POLITICS] 95, 142–3 (1953).

[137] SULTANY, *supra* note 2, at 88, 93.

[138] MOUSTAFA, *supra* note 7, at 81–6.

[139] MONA EL-GHOBASHY, BREAD AND FREEDOM: EGYPT'S REVOLUTIONARY SITUATION 68–73 (2021).

[140] *Id.* at 71.

[141] BADAWI, *supra* note 26, at 241–6 (discussing "economic democracy" in the 1956 Constitution); LAYLAH, *supra* note 26, at 531 (discussing "economic democracy" in the 1956 Constitution).

[142] LAYLAH, *supra* note 26, at 532 (discussing "social democracy" in the 1956 Constitution).

[143] HAYEK, LAW, LEGISLATION, AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE, *supra* note 10, at 70.

In line with republican constitutionalism, this jurisprudence prioritizes the common good over private interests and requires the government to advance it. In contrast, a neoliberal approach requires a "minimal government" whose primary function is to enable market transactions and in which "the notion of the common good is at best a utopian illusion, at worst a pretext for self-serving deals."[144] In the republican tradition, "corruption" is understood broadly as "the subversion, within the political motivation of any participant, of the general good by particular interest."[145] To guard against corruption and oligarchy and maintain self-government, republicans require civic virtue or an active citizenry that pursues the common good.

To illustrate the developmental and republican elements in Egyptian jurisprudence, the discussion is divided into two sections. This section shows that in contrast to the SCC's neoliberal lack of concern for the social effects of property and contract rights, the administrative courts developed a conception of the common good that required the state to limit privatization and protect lower-income citizens from market outcomes. The primary examples for this social justice-oriented judicial approach are cases that halted the eviction of slum dwellers, invalidated the privatization of basic services, insisted on enforcing the minimum wage, and exposed abuse of state power and corruption in selling public goods to private business. These rulings stipulate the priority of the common good and the state's obligation to advance it. They provide the setting for the discussion in the subsequent section of the annulment of the privatization of public assets after 2011.

In a series of cases, the administrative courts defended the interests of the slum-dwelling urban poor in the face of state planning and business interests. The urban poor's occupation of "lucrative" lands in "informal housing" became an obstacle for commercial interests and gentrification processes. Yet, in these rulings, the courts stipulated a constitutional hierarchy between different manifestations of the common good and a duty on administrative bodies to properly rank them in accordance with their importance. This ranking prioritizes the national interest over an individual interest, and the group interests of an indeterminate number of citizens over a private interest or small-group interest.[146]

Accordingly, illegality is discernible not only when state bodies deviate from the common good, but also when they prioritize an aspect of the common good that should be inferior to another aspect of the common good.[147] For instance, the state's

[144] Alexander, *supra* note 110, at 1771.

[145] Michelman, *supra* note 5, at 40.

[146] al-Mahkamah al-Idārīyah al-'Ulyā [Supreme Administrative Court], Case Nos. 1875 and 1914 of Judicial Year 30, session of Mar. 9, 1991 (*'Izbat Khayrallah*); al-Mahkamah al-Idārīyah al-'Ulyā [Supreme Administrative Court], Case Nos. 1233, 1242, 1243 of Judicial Year 38, session of Apr. 11, 1993 [hereinafter Rod Al-Farag case]; Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 782 of Judicial Year 62, session of Nov. 6, 2008, Maher Yosef Ibrahim et al. v. Prime Minister et al., pp. 5–7 (*Qursayah*); Mahkamat al-Qada' al-Idari [Court of Administrative Justice, Case Nos, 554949, 55909, 55875, 55784 of Judicial Year 66, session of Aug. 21, 2013, Muhsen Jebril 'Asran Muhammad et al. v. Gov'r of Cairo et al., pp. 4–5 (*Ramlah Bulaq*).

[147] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 782 of Judicial Year 62, session of Nov. 6, 2008,p. 7 (*Qursayah*).

right to regain possession of public land and its goal to make profit of its property for touristic and commercial interests are secondary to "the satisfaction of citizens' general needs and the maintenance of social stability." It cannot be prioritized over the interests of a farming and fishing community in Qursayah and lead to the eviction of more than 2000 inhabitants who have been leasing the land from the state in a Nile island designated as nature reserve.[148] Similarly, the taking of land in the informal housing neighborhood of Nile Towers / Ramlah Bulaq under the pretext of "development" and in order to advance private business interests is inconsistent with the public interest and is an abuse of state power.[149]

One can thus distinguish between two conceptions of the common good that conceptualize the role of the state differently: business-centered and people-centered. The business-centered prioritizes one aspect of the common good, which is the protection of state property to the exclusion of other aspects of the common good to effectively unleash state–business cooperation. In contrast, the administrative court's conception is people-centered because it foregrounds the interests of the urban poor and limits business interests. In particular, the case of the informal neighborhood of 'Izbat Khayrallah highlighted the impact of evicting large numbers of dwellers, the resultant homelessness for 60,000 people, and the general repercussions for the social order (namely, inducing instability and social unrest). Although the dwellers are formally law-breakers who invaded state land and built without permits, the court points out that the state is complicit in the long-term evolution of informal housing.[150] In such cases the apparent tension between a strict application of the formal rule of law (requiring enforcement against illegal construction and possession of state-owned land) and social justice (the right to home, the social function of property, the state's obligation to provide safety and security to its citizens, and social solidarity) is resolved by subordinating the former to the latter by preventing eviction and homelessness.

[148] al-Mahkamah al-Idārīyah al-'Ulyā [Supreme Administrative Court], Case Nos. 5730, 6585 of Judicial Year 55, session of Feb. 6, 2010, Nasr Ibrahim Nasr v. Maher Yosef Ibrahim et al., *affirming* Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 782 of Judicial Year 62, session of Nov. 6, 2008 (*Qursayah*). The Supreme Administrative Court ruling lists several examples of attempts and plans to evict residents and terminate their agricultural leases, including a plan for a tourist center submitted by an emir from the Arabian Gulf and another by the Giza governor for an "international touristic village." The court ruled that these investment plans contradict the designation of the island as a nature reserve and undermine its agrarian and fishing community. A later ruling, however, allowed the military to seize parts of the island on grounds of "strategic" and "military" importance: Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 21604 of Judicial Year 67, session of Mar. 17, 2015, Maher Yosef Ibrahim et al. v. President of Republic et al.

[149] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case Nos. 554949, 55909, 55875, 55784 of Judicial Year 66, session of Aug. 21, 2013, p. 6 (*Ramlah Bulaq*). The Court explained that the eviction plans that sacrificed the interests of residents who lived and owned property in the neighborhood for fifty to seventy years were not to the public's benefit but to the benefit of the Nile Towers' owner and that another planning and zoning decision by Cairo's governor privileged the businessman's interests. It also detailed incidents of intimidation and harassment against the residents to force them to accept very low and unfair compensation.

[150] *See* Shawkat, *supra* note 97 (enumerating nine amnesties for legal violations that were granted to informal housing dwellers between 1956 and 2019, and coining the term "manufactured informality").

Whereas neoliberal jurisprudence may undermine sociological stability by prioritizing property rights and freedom of contract, these administrative courts insist on reminding the state of its duty to maintain social peace among the classes and to consider the social implications of its policies. This duty requires the state to prevent the harms of homelessness and loss of livelihood and to avert social unrest. Social dislocation undermines society's "general foundations and values," such as "nurturing the family and morals," "rips apart social solidarity," and provides a breeding ground for "anger and acrimony." It also violates the social function of property and thus undermines "the realization of the common good to the people."[151]

Social stability is thus integral to the common good that the state is constitutionally required to advance. This is "stability for the rights reasons," to borrow from John Rawls, because it is based on the protection of citizens' freedoms and basic rights. It insists that the state discharge its obligations towards citizens rather than sacrifice their interests to economic development or business interests. It declares that "individual dignity is a natural reflection of the dignity of the homeland" and is "the cornerstone upon which the Egyptian national collective is based."[152]

Consistent with this people-centered conception of the common good, administrative courts insisted on the state's discharge of its welfare obligations. In 2008, an administrative court of first instance invalidated the privatization of health care.[153] In contrast to the neoliberal logic, the court made clear that certain state services like health care are not to be commodified. Establishing the centrality of health care to the Egyptian legal system, the court identified the body of legal materials as stretching from 1854, 1964, 1975, 1992, and 2003, as well as the 1971 Constitution. In addition to domestic law, it also enumerated international legal instruments, namely the International Covenant on Social, Economic, and Cultural Rights that Egypt accented to in 1967 and ratified in 1981. This suggests that the body of legal materials at the judges' disposal is vast and had been produced by a variety of legislatures in different times under different economic regimes.

In contrast to the 1997 SCC ruling that allowed privatization despite the constitutional commitment to socialist political economy,[154] the administrative court pointed out that although Mubarak's 2007 constitutional amendment removed "socialism" from the constitution, the latter still contained "social justice" and the "protection of workers' rights" and "social solidarity."[155] Thus, the state cannot relinquish its role in providing welfare to its citizens. Health care secures a minimum of decent life, and the

[151] al-Mahkamah al-Idārīyah al-'Ulyā [Supreme Administrative Court], Case Nos. 1875 and 1914 of Judicial Year 30, session of Mar. 9, 1991 (*'Izbat Khayrallah*).

[152] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case Nos. 554949, 55909, 55875, 55784 of Judicial Year 66, session of Aug. 21, 2013, p. 5 (*Ramlah Bulaq*).

[153] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case Nos. 21550, 21665, 2212, 25752, 25857 of Judicial Year 61, session of Sept. 4, 2008, Nabih Taha Muhammad Al-Bahi et al. v. President of the Republic et al.

[154] al-Mahkamah al-Dustūrīyah al-'Ulyā [Supreme Constitutional Court], Case No. 7 of Judicial Year 16, session of Feb. 1, 1997, Hamdi Huda Bader v. President of the Republic and Prime Minister.

[155] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case Nos. 21550, 21665, 2212, 25752, 25857 of Judicial Year 61, session of Sept. 4, 2008, p. 4.

state cannot escape from its obligation to provide it by invoking goals such as development or fiscal liability.[156]

The change in economic regime, namely the drive towards marketization, was not lost on the court. Yet, the court stipulated that this change does not impact the constitutional right to health care.[157] The governmental decision to privatize health care, by transferring it from public property to private property, and changing the status of the public body in charge of health care to a private entity subject to private law arrangements (a holding company and its subsidiaries), and changing the status of the health care workers from publicly to privately employed, violated public interest and defied the legislative intent behind the legal and constitutional protection of health care.[158] The decision to privatize replaced the public interest with profit-making, transformed the social right into a commercial enterprise, and left the citizen prey to market forces.[159] The court did not object to the attempt to make the management more efficient, but to doing so through a private holding company.[160] Any reform needs to attend to the social function of health care. The state's abandonment of health care did not achieve that.[161]

The insistence on the protection of the welfare state despite the removal of socialism from the constitution is also evident in the case of the minimum wage. In the lead-up to the 2011 Revolution in Egypt, the call for a minimum wage became an integral part of the demand for social justice. This demand culminated in a judicial victory in 2010,[162] later affirmed upon appeal in 2018.[163] The administrative court of first instance stipulated that the National Council for Wages' lack of determination of a minimum wage violated constitutional principles as well as labor law, which empowered the Council to make that determination. The court argued that the foundations of the welfare state endure despite the change in constitutional text:

> And since the Egyptian Constitution, irrespective of the social and political approach it reflected and endorsed since its enactment [in 1971] which is the socialist approach, and then

[156] *Id.* p. 9.
[157] *Id.* p. 11.
[158] *Id.*
[159] *Id.* p. 12.
[160] It should be mentioned that the petitioners questioned the governmental decision to privatize health care by showing that the Public Council for Health Care made a surplus between 2001 and 2007, and paid off its debts. Thus, the facts did not support the claim that it was a burden on state finances. Khalid Ali, *Qira'ah fi Dafatir al-Khaskhasah 2: Muwajahat al-Khaskhasah* [*A Reading of the Privatization Papers 2: Confronting Privatization*], Legal Agenda (Sept. 15, 2018), https://legal-agenda.com/%D9%82%D8%B1%D8%A7%D8%A1%D8%A9-%D9%81%D9%8A-%D8%AF%D9%81%D8%A7%D8%AA%D8%B1-%D8%A7%D9%84%D8%AE%D8%B5%D8%AE%D8%B5%D8%A9-2-%D9%85%D9%88%D8%A7%D8%AC%D9%87%D8%A9-%D8%A7%D9%84%D8%AE%D8%B5%D8%AE%D8%B5%D8%A9/.
[161] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case Nos. 21550, 21665, 2212, 25752, 25857 of Judicial Year 61, session of Sept. 4, 2008, p. 12.
[162] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], 1st div., Case No. 21606 of Judicial Year 63, session of Mar. 30, 2010, Naji Rashid Abd Al-Salam et al v. President of the Republic et al.
[163] al-Mahkamah al-Idārīyah al-'Ulyā [Supreme Administrative Court], Case Nos. 24109 of Judicial Year 56, and 7136 of Judicial Year 57, session of Mar. 19, 2018 (affirming the lower court ruling and dismissing the government's appeals).

> its abandonment of the socialist system as per the amendment on 26 March 2007, has established the Egyptian social and economic structure on the basis of several foundations and principles whose content remained unchanged after the departure from the socialist system, which are embodied in social justice and maintaining a balance between property and labour. . . .[164]

The court argued that the worker is the weaker party in the labor relationship and thus requires protection to secure a fair wage. The state's duty is a positive duty, rather than a negative one, and as such the government cannot leave the workers' wages to the determination of market forces and at the mercy of the imbalance of power between workers and employers. The court thus rejected the government's argument that the constitutional principles with respect to a minimum wage are "guiding" or "directive" principles of social policy that are not judicially enforceable. Rather, they are mandatory.[165]

These instances of protection of welfare in the face of business interests and profit-making went hand-in-hand with the protection of the common good through a judicial scrutiny of state contracts that sell public goods (in particular, energy resources and public lands). In a number of rulings, the administrative courts outlined the lack of transparency, the under-pricing of public resources, and improper procedures in governmental dealings with the business sector. In 2008, the administrative court of first instance ordered the government to discontinue the export of gas to Israel given the secrecy in which the deal was granted to a private company without an open and public competition and given the sale of gas for lower-than-market prices.[166] The Supreme Administrative Court (SAC) quashed this ruling upon appeal, stipulating that the decision to export gas to Israel is not subject to judicial review because it relates to "national security."[167] Nevertheless, a more recent report illustrates the persistence of the problematic nature of granting gas and oil contracts given the lack of transparency, oversight, and public debate.[168]

The administrative courts highlighted this illegality also in the case of the construction of gated communities and the transfer of public lands to private real estate developers.[169] In 2010 for instance, the courts invalidated the contract in which the government sold 8000 feddans to an Egyptian company for the purpose of a residential project called *Madinti* (in New Cairo).[170] This is because it violated the Tenders

[164] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], 1st div., Case No. 21606 of Judicial Year 63, session of Mar. 30, 2010.

[165] *Id.* See a similar ruling in 2016 stipulating the illegality of the omission to set a minimum wage for journalists: Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 35374 of Judicial Year 68, session of July 27, 2016, Mustafa 'Abd Assami'Mohammad 'Abeedo et al. v. Prime Minister et al.

[166] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 33418 of Judicial Year 62, session of Nov. 18, 2008.

[167] al-Mahkamah al-Idārīyah al-'Ulyā [Supreme Administrative Court], Case Nos. 5546, 6013 of Judicial Year 55, session of Feb. 27, 2010, Prime Minister et al. v. Ibrahim Yusri Sayyed Hussein 'Abdel Rahman et al.

[168] Egyptian Initiative for Personal Rights, Fasad Ta'aqudat Al-Ghaz fi 'Asr Mubarak [The Corruption of Gas Contracts During Mubarak's Era] (2013).

[169] *See* Ziad Koussa, *The Politics of Public Land Dispossession in Egypt: 1975–2011 and Beyond*, 58 J. Mod. Afr. Stud. 235 (2020).

[170] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 12262 of Judicial Year 63, session of June 22, 2010, Hamdi Al-Desouki Al-Fakhrani et al. v. Prime Minister et al., *aff'd by* al-Mahkamah al-Idārīyah al-'Ulyā [Supreme Administrative Court], Case Nos. 30952, 31314 of Judicial Year 56, session of Sept. 14, 2010, Legal Representative of the Arab Company for Projects and Construction Development v. Hamdi Al-Desouki Al-Fakhrani et al.

and Auctions Law.[171] Specifically, the government granted the sale contract in a direct offering rather than through a public process of an auction or closed envelopes. It violated standards of rational administrative performance and equality of opportunity by failing to create a process governed by one set of rules and in which different interested parties compete on equal footing.

In light of this jurisprudence, it is clear that parts of the Egyptian judiciary resisted neoliberal legality and the abuse of state power in the service of capital accumulation. They thus point towards an alternative to the SCC's vision of the social order and mode of governance. This jurisprudence advances welfarism rather than neoliberalism, the common good rather than the private interest, and the interests of the poor and workers rather than those of local and global capital.

5. Administrative courts and judicial resistance to privatization

Against this backdrop, the anti-privatization rulings that followed the 2011 Revolution solidify a developmental and republican orientation. They do so by connecting between the common good, economic sovereignty, and corruption, and by requiring civic virtue to defend the common good. These rulings expand the legal challenge to privatization beyond basic services towards protecting the public sector and challenging the private and foreign investment economic model.

These rulings were a response to workers' mobilization and strategic lawyering and despite a pro-business media campaign.[172] The courts cancelled the privatization of the following seven companies: Omar Effendi Department Store,[173] Tanta Flax and Oil Company,[174] Steam Boilers Manufacturing Corporation (Al-Nasr),[175] Shebin el-Kom Spinning and Weaving Company,[176] the Arab Company for Foreign

[171] Law No. 89 of 1998 (Tenders and Auctions), AL-JARĪDAH AL-RASMĪYAH, vol. 19 bis, 8 May 1998, p. 5.

[172] *Nasa'ih Khalid Ali: Kaif Aunaser al-Qadaya al-Ijtima'iyya* [*Khalid Ali's Recommendations: How I Support Social Issues*], LEGAL AGENDA (July 31, 2013), https://legal-agenda.com/%d9%86%d8%b5%d8%a7%d8%a6%d8%ad-%d8%ae%d8%a7%d9%84%d8%af-%d8%b9%d9%84%d9%8a-%d9%83%d9%8a%d9%81-%d8%a3%d9%86%d8%a7%d8%b5%d8%b1-%d8%a7%d9%84%d9%82%d8%b6%d8%a7%d9%8a%d8%a7-%d8%a7%d9%84%d8%a7%d8%ac%d8%aa/; Ali, *supra* note 160.

[173] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 11492 of Judicial Year 65, session of May 7, 2011, Hamdi Al-Desouki Muahammad Al-Fakhrani and 3 others v. Prime Minister and 8 others (*Omar Effendi*), *aff'd by* al-Mahkamah al-Idārīyah al-'Ulyā [Supreme Administrative Court], Case Nos. 33963, 35092, 39095, 41144, 43480 of Judicial Year 57, and no. 13 of Judicial Year 58, session of Aug. 1, 2013.

[174] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 34248 of Judicial Year 65, session of Sept. 21, 2011, Ibrahim Qutb Muhammad Sharaf and 11 others v. Prime Minister and 10 others (*Tanta Flax*), *aff'd by* al-Mahkamah al-Idārīyah al-'Ulyā [Supreme Administrative Court], Case Nos. 196, 1977, 2679, 2541 of Judicial Year 58, session of Apr. 15, 2013,.

[175] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 40510 of Judicial Year 65, session of Sept. 21, 2011, 'Adnan Qarni Ahmad Madkour and 5 others v. Prime Minister and 9 others (*Steam Boilers*), *aff'd by* al-Mahkamah al-Idārīyah al-'Ulyā [Supreme Administrative Court], Case Nos. 1976, 2677, 2688, 2699 of Judicial Year 58, session of Dec. 17, 2012.

[176] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case Nos. 34517, 40848 of Judicial Year 65, session of Sept. 21, 2011, Hamdi Mujahid Abdel Ghani and 3 others v. Prime Minister and 6

Trade,[177] Nile Cotton Ginning Company,[178] and the Middle East Paper Company (SIMO).[179] In these cases, the administrative court invalidated the governmental decision to privatize given the illegalities and irregularities that pervaded the process of decision-making and sale. Consequently, it declared the privatization contracts between the state and the private investors, which resulted from this decision and process, null and void. It thus decreed the return of the privatized companies to public ownership. With the exception of SIMO, all these cases were confirmed upon appeal and thus became final.[180]

This section focuses on the reasoning developed in the rulings of the first-instance administrative courts (Court of Administrative Justice). These rulings provided a comprehensive analysis beyond the detailing of the manifold technical irregularities in particular instances. In fact, they delivered one of the most comprehensive judicial indictments of neoliberal privatization. In particular, the rulings highlighted the main three drawbacks of privatization in Egypt: (i) it undermined sovereignty and led to economic dependency; (ii) it undermined the common good and devastated the public sector; and (iii) it was entangled with rampant corruption. Considering this, the rulings demanded accountability for the disastrous impact of the privatization program since 1991. The following elaborates on these drawbacks.

Echoing the anticolonial economic nationalism of Arab socialism, which posited economic sovereignty as a necessary condition for genuine national liberation,[181] the administrative court highlighted in these rulings Egypt's economic dependency and political weakness in the international order. In particular, the rulings emphasized

others, and Hassan S'ad al-Sawwaf v. Prime Minister and 4 others (*Shebin el-Kom*), *aff'd by* al-Mahkamah al-Idārīyah al-'Ulyā [Supreme Administrative Court], Case Nos. 1834, 2678 of Judicial Year 58, session of Nov. 21, 2013.

177 Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 3754 of Judicial Year 65, session of Dec. 3, 2011. The Supreme Administrative Court affirmed this ruling on November 4, 2013. *See Khaskhasah: Al-Idariyah al-'Ulya tua'yed butlan 'aqd bay' wa khaskhasat al-arabiyah lil-tijarah al-kharijiyyah* [*Privatization: Supreme Administrative Court Upholds the Invalidation of the Sale and Privatization Contract of the Arab Company for Foreign Trade*], Egyptian Ctr. for Econ. & Soc. Rts. (Nov. 6, 2013), https://ecesr.org/%d8%a7%d9%84%d8%a5%d8%af%d8%a7%d8%b1%d9%8a%d8%a9-%d8%a7%d9%84%d8%b9%d9%84%d9%8a%d8%a7-%d8%aa%d8%a4%d9%8a%d8%af-%d8%a8%d8%b7%d9%84%d8%a7%d9%86-%d8%b9%d9%82%d8%af-%d8%a8%d9%8a%d8%b9-%d9%88%d8%ae%d8%b5/.

178 Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 37542 of Judicial Year 65, session of Dec. 17, 2011, (*Nile Cotton*), *aff'd by* al-Mahkamah al-Idārīyah al-'Ulyā [Supreme Administrative Court], Case Nos. 8259, 8735, 8763, 8816, 8263, 8762, 8808, 8818 of Judicial Year 58, session of Sept. 29, 2013.

179 Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 6193 of Judicial Year 66, session of Mar. 15, 2014 (*SIMO*).

180 Interestingly, in four cases (administrative court ruling in *SIMO* in March 2014 and the Supreme Administrative Court's appeal decisions in *Omar Effendi*, the *Arab Company*, and *Nile Cotton* during August–November 2013), the administrative courts handed their decisions after the July 2013 coup. Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 6193 of Judicial Year 66, session of Mar. 15, 2014 (*SIMO*); al-Mahkamah al-Idārīyah al-'Ulyā [Supreme Administrative Court], Case Nos. 33963, 35092, 39095, 41144, 43480 of Judicial Year 57, and no. 13 of Judicial Year 58, session of Aug. 1, 2013 (*Omar Effendi*); al-Mahkamah al-Idārīyah al-'Ulyā [Supreme Administrative Court], Case Nos. 8259, 8735, 8763, 8816, 8263, 8762, 8808, 8818 of Judicial Year 58, session of Sept. 29, 2013 (*Nile Cotton*). This suggests a form of legal continuity despite the political upheaval.

181 Takriti & Safieddine, *supra* note 27, at 491, 502.

the role of neoliberal globalization, which refers to the economic role of international financial institutions and the United States (namely, USAID). In this context, the court argued that privatization under foreign tutelage undermined state sovereignty.

This weakening of the state, the court maintained, was evident in the detrimental effect of privatization on the public sector. Historically, "the public sector led to important achievements that enabled Egypt to construct its greatest projects over generations, including the High Dam, and establishing important bases for heavy industry and consumption-based businesses, and cultivating and developing the industrial sector."[182] The public sector "even enabled Egypt to withstand external challenges like Israel's aspirations in the critical period between the 1967 and 1973 wars."[183]

This assessment exposes two contrasting views of the public sector's role and reality and, by implication, of Egypt's history. For the SCC's al-Murr, the "public sector proved to be a complete failure in our society. Everything was wrong with the public sector…"[184] In contrast, for the administrative court, the public sector was an asset and an achievement. These opposing views (a condemnation versus a celebration of the past) led to contrasting assessments of the desirability and effects of privatization. Whereas the SCC rationalized privatization, the administrative court observed its negative consequences. Despite the importance of the public sector and its contributions, the court wrote,

> with [the onset of] economic liberalization [*infitah*] successive Egyptian governments allowed this sector to drown in unscrupulous performance and mismanagement and unqualified leadership and the spread of corruption in its corners, and as a consequence it suffered losses, and that was in preparation to opening this sector for sale to the Egyptian and foreign private sector as part of the transition to free market capitalism in Egypt, in compliance with the World Bank and International Monetary Fund's policies and conditions, instead of reforming this sector, alongside allowing the private sector to operate in all branches of the economy.[185]

"Privatization in itself," the court maintained, "is neither rampant evil that needs to be resisted, nor is it an absolute good that requires facilitating avenues for it and opening the doors ajar [before it]."[186] Theoretically, privatization is not problematic, according

[182] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 34248 of Judicial Year 65, session of Sept. 21, 2011 (*Tanta Flax*); *see also* Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 11492 of Judicial Year 65, session of May 7, 2011 (*Omar Effendi*).

[183] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 34248 of Judicial Year 65, session of Sept. 21, 2011 (*Tanta Flax*); *see also* Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 11492 of Judicial Year 65, session of May 7, 2011 (*Omar Effendi*).

[184] Quoted in Moustafa, *supra* note 7, at 130. Likewise, Moustafa writes that the public sector was "hopelessly inefficient," and that "state-owned enterprises. . . were notoriously inefficient." *Id.* at 119, 130.

[185] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 34248 of Judicial Year 65, session of Sept. 21, 2011 (*Tanta Flax*); *see also* Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 11492 of Judicial Year 65, session of May 7, 2011 (*Omar Effendi*).

[186] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 34248 of Judicial Year 65, session of Sept. 21, 2011 (*Tanta Flax*); *see also* Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 40510 of Judicial Year 65, session of Sept. 21, 2011 (*Steam Boilers*); Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 11492 of Judicial Year 65, session of May 7, 2011 (*Omar Effendi*); Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case Nos. 34517, 40848 of Judicial Year 65, session of Sept. 21, 2011 (*Shebin el-Kom*); Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 37542 of Judicial Year 65, session of Dec. 17, 2011 (*Nile Cotton*).

to the court, to the extent that it transfers public property to private hands in order "to improve economic performance in line with market mechanisms and competition," to help the state with the financial burden of loss-making publicly owned companies, to increase reliance on the private sector in economic development, and to cut red tape.[187] Yet, the theoretical advantages of privatization did not match Egypt's reality as a politically weak and economically dependent state in the global system. It is the link of privatization to economic dependency and foreign intervention that made this process of privatization objectionable in the court's eyes:

> The rampant evil that accompanies the privatization that destroys the national economy is the privatization that is based on subjection to the sale of the public sector under the international institutions' conditions in order to grant loans and new accommodations and allow the rescheduling of some external debts, in the pursuit of the public sector's liquidation, which is the privatization program that the government started in 1991. . .[188]

The court faulted the government with abuse of power and illegality because the primary reason driving privatization is capitulation to this external will and surrendering economic and political sovereignty rather than sound economic policy. The court found evidence for this in the fact that the sale included many publicly owned companies that were profitable, and the fact that the sale needed to be conducted with speed. The court cited a November 2003 decision of the Ministerial Committee for Privatization that reported that,

> Two hundred and two companies and factories have already been privatized and 178 companies remain in the possession of the public works sector, out of which fifty-nine were loss-making companies, fifty-two marginally profitable companies, and 66 profitable companies, and that it was decided to sell 127 companies, out of which 113 to be sold quickly between 2004 and 2006.[189]

The fact that Tanta Flax and Oil was a marginally profitable company and that it was one of 127 companies that needed to be sold within three years led the court to conclude that selling the company was not an economic necessity because it was not a financial burden on the state budget.[190] Thus, the decision to sell companies like Tanta

[187] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 34248 of Judicial Year 65, session of Sept. 21, 2011 (*Tanta Flax*); *see also* Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 40510 of Judicial Year 65, session of Sept. 21, 2011 (*Steam Boilers*); Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 11492 of Judicial Year 65, session of May 7, 2011 (*Omar Effendi*); Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case Nos. 34517, 40848 of Judicial Year 65, session of Sept. 21, 2011 (*Shebin el-Kom*); Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 37542 of Judicial Year 65, session of Dec. 17, 2011 (*Nile Cotton*).

[188] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 34248 of Judicial Year 65, session of Sept. 21, 2011 (*Tanta Flax*); *see also* Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 11492 of Judicial Year 65, session of May 7, 2011 (*Omar Effendi*); Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 40510 of Judicial Year 65, session of Sept. 21, 2011 (*Steam Boilers*); Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case Nos. 34517, 40848 of Judicial Year 65, session of Sept. 21, 2011 (*Shebin el-Kom*).

[189] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 34248 of Judicial Year 65, session of Sept. 21, 2011 (*Tanta Flax*).

[190] Indeed, claims of losses in publicly owned businesses were widely exaggerated. Ayubi, *supra* note 45, at 343; Mitchell, *supra* note 53, at 277, 282.

Flax was driven by the requirements of the international actors financing the privatization program. The court said it was "stunned" by the rampant corruption that squandered state property. It wanted, however, "to point out a very dangerous corruption that accompanied the execution of the sale" of companies like Tanta Flax and Omar Effendi. This corruption is the "foreign funding for privatization decisions" as part of the structural adjustment programs. It was, the court wrote, "a great testament to the blatant intervention in the country's internal economic conditions and a utilization of the grants and conditional aids to harm national sovereignty and achieve privatization's goals without concern to any social considerations."[191]

The court zeroed in on the 1993 agreement between the Egyptian government and USAID to support privatization as a main example of this detrimental intervention and corruption. It argued that neither the parliament nor Mubarak should have agreed to this grant that harms state sovereignty.[192] These public officials and institutions failed to realize the commitment to the common good and to discharge their obligation to further it.

The court found additional evidence for this failure to further the common good in the privatization of previously nationalized property and property seized for the public interest. In these cases, the government violated the public interest that underlined the nationalization or taking in the first place. So long as the public interest for which this property was nationalized or taken is still valid, this property does not lose its public character. The legal and constitutional protection offered in cases of public taking or nationalization (that it can be undertaken only for the sake of the public interest) is forfeited if the government can turn around and dispense with the property without regard to the continued observance of the particular state objective. This objective is lost when the government sells the asset to a private party who then changes the public asset's purpose or otherwise discharges owner's prerogatives guided solely by private interest and profit-making. The court thus stressed that the state is not a "merchant":

> The administrative party that possesses the public asset that was expropriated or nationalized is neither a company nor a merchant, and it is not permitted to deviate from the specific objective [underlying the] expropriation for the public interest in the pursuit of achieving its financial benefit, even if it were paying off the debts of its own loss-making companies in accordance with the privatization program.[193]

[191] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 34248 of Judicial Year 65, session of Sept. 21, 2011 (*Tanta Flax*); *see also* Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 11492 of Judicial Year 65, session of May 7, 2011 (*Omar Effendi*); Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case Nos. 34517, 40848 of Judicial Year 65, session of Sept. 21, 2011 (*Shebin el-Kom*); Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 37542 of Judicial Year 65, session of Dec. 17, 2011 (*Nile Cotton*).

[192] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 34248 of Judicial Year 65, session of Sept. 21, 2011 (*Tanta Flax*); *see also* Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 11492 of Judicial Year 65, session of May 7, 2011 (*Omar Effendi*); Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 37542 of Judicial Year 65, session of Dec. 17, 2011 (*Nile Cotton*).

[193] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 34248 of Judicial Year 65, session of Sept. 21, 2011 (*Tanta Flax*); Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 40510 of Judicial Year 65, session of Sept. 21, 2011 (*Steam Boilers*); Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case Nos. 34517, 40848 of Judicial Year 65, session of Sept. 21, 2011 (*Shebin el-Kom*).

The concern with the common good goes together with the requirement of civic virtue, or active citizenry willing to defend the common good. This is evident *inter alia* in the court's approach to the question of standing. The court pointed to the constitutional obligation on every citizen to safeguard public property.[194] From this obligation the court conferred a standing for every citizen to challenge in court any abuse, misuse, or squandering of public property. Every citizen has a duty to "rise up" to defend publicly owned property by ascertaining that it is managed or privatized in accordance with legality and proper procedures.[195] It is, thus, a sign of civic virtue for citizens to be actively involved in protecting public assets. Rather than the atomized individual acting to maximize wealth or advance private interest in a competitive market, the administrative court celebrates a different model of citizen who exemplifies civic virtue by prioritizing the common good, i.e., the antithesis to corruption. The active citizen that is being called upon is not the responsible and obedient neoliberal subject who compensates for the dismantlement of the welfare and developmental state, but an oppositional subject who contests neoliberal governance and rejects the governors' attempt to relinquish their obligations and sacrifice the interests of the governed.

Although these rulings do not articulate a broader theory of virtue, and how it is to be cultivated and maintained, they are consistent with other administrative courts' rulings after the 2011 Revolution in which courts conveyed a "republican proceduralist" view of popular sovereignty. In contrast to the SCC's liberal, market-based, and aggregative conception of popular sovereignty after 2011, these administrative rulings advanced a civic republican model of public-spirited mobilization.[196] Moreover, the people-centered judicial conception of the common good, discussed in the previous section, is consistent with the creation of basic socio-economic conditions that generate active citizens who are necessary for the exercise of self-government.[197]

A third drawback of neoliberal privatization is the corruption it induces in practice because it shows the administrative officials' complete disregard for public property and the lowering of standards that would have ensured due process and accountability.[198] Indeed, the speed by which companies like Tanta Flax were sold included a large number of irregularities such as in the valuation of the company, the process of sale in tenders and bidding, and the negotiations with prospective buyers.[199] The court suggested that these irregularities reflected a desire to get rid of the public asset in haste

[194] Constitution of the Arab Republic of Egypt, 12 Sept. 1971, art. 33; Constitutional Declaration of 2011, art. 6, al-Jarīdah al-Rasmīyah, vol. 12 bis (b), 30 Mar. 2011, p. 1 at 2.

[195] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 34248 of Judicial Year 65, session of Sept. 21, 2011 (*Tanta Flax*); Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 37542 of Judicial Year 65, session of Dec. 17, 2011 (*Nile Cotton*).

[196] Sultany, *supra* note 2, at 201–15.

[197] *See, e.g.*, Gargarella, *supra* note 5, at 38.

[198] For the argument that privatization creates a fertile ground for corruption, see Joseph E. Stiglitz, *What Is the Role of the State?*, *in* Escaping the Resource Curse 24, 29 (M. Humphreys, J. D. Sachs & J. E. Stiglitz eds., 2007); Michelle Celarier, *Privatization: A Case Study in Corruption*, 50 J. Int'l Aff. 531 (1997).

[199] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 34248 of Judicial Year 65, session of Sept. 21, 2011 (*Tanta Flax*) (stating, for instance, that "the procedures for public bidding by way of closed envelopes for the sale of Tanta Flax were tainted by numerous grave violations that undermined the principles of publicity, equality, and free competition").

and "at any price." They thereby undervalued the public assets and accommodated and incentivized the buyers at the expense of the actual value of the publicly owned companies, thereby sacrificing the common good and destroying an important and profitable public asset. The process evidenced a failure of internal mechanisms of accountability. The court cited the head of the Central Auditing Authority—a public entity responsible for supervising the public sector's finances—as both admitting the exceptional and irregular valuation methods used in the privatization process and acquiescing in these methods, thereby failing to discharge his supervisory role.[200]

From this perspective, corruption is not merely a question of sporadic instances of personal failings. Rather, it is a systemic condition of neglect of the common good, rampant abuse of power, and surrendering of economic sovereignty. Several post-2011 administrative court rulings expressed a "republican proceduralist" orientation in non-economic contexts, such as the rejection of the regime's corruption of the body politic and a desire for overcoming it by dissolving the former ruling party, dissolving the local popular councils, and disqualifying former ruling party members from electoral contest.[201] The anti-privatization rulings conveyed a similar rejection in the economic context. The court deemed the detailed facts it exposed in its rulings on privatization contracts as "criminal." It declared that it puts the relevant authorities on notice and called upon the authorities to investigate—in addition to "administrative corruption"—the "massive squandering of public money and the dismantling of the Egyptian economy's foundations that happened under the leadership of several cabinets in the biggest operation to ruin the Egyptian economy."[202] The court suggested that the meaning of revolution entails legality, accountability, and social justice. As such, it "calls upon the government of the 25 January revolution" to examine "the effects and economic consequences of the privatization program that was implemented since 1991 and until the present," in order to advance society towards social justice, to protect public finances, and to hold accountable those who were responsible for the devastation of the economy.[203] The program had far-reaching

[200] *Id.*

[201] Sultany, *supra* note 2, at 201–15.

[202] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 34248 of Judicial Year 65, session of Sept. 21, 2011 (*Tanta Flax*); Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 40510 of Judicial Year 65, session of Sept. 21, 2011 (*Steam Boilers*); Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case Nos. 34517, 40848 of Judicial Year 65, session of Sept. 21, 2011 (*Shebin el-Kom*); Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 37542 of Judicial Year 65, session of Dec. 17, 2011 (*Nile Cotton*); Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 11492 of Judicial Year 65, session of May 7, 2011 (*Omar Effendi*). Nevertheless, an administrative court dismissed, for lack of jurisdiction, a petition asking the administrative courts to intervene in the Public Prosecutor's lack of decision to open an investigation into corruption. Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 16505 of Judicial Year 66, session of Oct. 28, 2014, Hamdi Al-Desouki Muhammad Al-Fakhrani and Khalid Muhammad Omar v. Chief of Military Council et al.

[203] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 34248 of Judicial Year 65, session of Sept. 21, 2011 (*Tanta Flax*); Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 40510 of Judicial Year 65, session of Sept. 21, 2011 (*Steam Boilers*). The court reiterated the need to implement judicial rulings two months after issuing the initial *Omar Effendi* ruling: Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case Nos. 117, 123 of Year 2011, session of July 4, 2011, Hamdi Al-Desouki Muhammad Al-Fakhrani et al. v. Former Prime Minister Ahmad Natheef et al.

implications, the court suggested, on investment, unemployment, the squandering of public money, the spread of corruption, and the damaging influence of foreign capital. The privatization process, the court averred, is akin "to disposing of the savings of previous generations" to pay for the government's incompetence that was aggravated by the business class's tax evasion and shirking of social responsibility.[204]

This criticism of the criminality and corruption of the former regime's economic policy stands in contrast to the SCC judges who "all had in mind the foreign investor" when they rationalized privatization.[205] The administrative court replied to concerns that its rulings would be detrimental to the "investment environment" by insisting on subordinating investors to legality and a proper economic regime. It distinguished between risks that are related to commercial transactions and those that are not (like wars and nationalizations). Assuring the investor from the occurrence of the latter risks (that the political system is stable, that security is restored, and that the state does not intend to embark on nationalization processes) does not require turning a blind eye to corrupt financial practices and inadequate administrative standards. The best guarantee for a "serious investor" during "transitional periods" (following a revolution) is to establish the rule of law (including state enforcement of judicial rulings like the ones that annul privatization contracts), and reform the political and economic system.[206]

6. The reassertion of neoliberalism

Despite the developmental approach adopted by the administrative courts in Egypt, their rule of law and politico-economic reform project faces two major obstacles, one external and one internal. Externally, the privatization contracts include arbitration clauses that involve international arbitration tribunals. These tribunals are guided by neoliberal rationality, favor foreign investors, and may hinder Egyptian domestic action because of very limited judicial review of arbitration decisions.[207] Internally, this jurisprudence faced an executive backlash. Following the military's ouster of the Muslim Brotherhood in July 2013, and in reaction to these rulings against privatization,

[204] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 34248 of Judicial Year 65, session of Sept. 21, 2011 (*Tanta Flax*); Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case Nos. 34517, 40848 of Judicial Year 65, session of Sept. 21, 2011 (*Shebin el-Kom*); Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 40510 of Judicial Year 65, session of Sept. 21, 2011 (*Steam Boilers*).

[205] A former SCC judge quoted in Moustafa, *supra* note 7, at 133.

[206] Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case No. 34248 of Judicial Year 65, session of Sept. 21, 2011 (*Tanta Flax*); Mahkamat al-Qada' al-Idari [Court of Administrative Justice], Case Nos. 34517, 40848 of Judicial Year 65, session of Sept. 21, 2011 (*Shebin el-Kom*).

[207] *See, generally*, David Schneiderman, Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise (2008). For examples in the case of Egypt, see Norhan Sherif, Heba Khalil & Hatem Zayed, Above the State: Multinational Corporations in Egypt (2015); B. Bréville & M. Bulard, *The Injustice Industry: Transatlantic Trade and Investment Partnership*, Le Monde Diplomatique (June 1, 2014), https://mondediplo.com/2014/06/12ttip; I. Esterman & P. Magid, *Egypt to Appeal Ruling Awarding Fine to Israel after Gas Halt*, Mada Masr (Dec. 7, 2015), www.madamasr.com/en/2015/12/07/feature/economy/egypt-to-appeal-ruling-awarding-fine-to-israel-after-gas-halt/.

Interim President Adly Mansour issued two decrees that undermine accountability and prevent judicial scrutiny. A September 2013 decree excludes administrative units and public entities that are regulated by specific legislation or decrees from the applicability of the Auctions and Tenders Law. Moreover, the decree significantly increases the scope of the "urgent" cases that are not suitable to regular procedures of tenders and offering and that allow "direct offering."[208] In addition to depriving the judiciary from applying the Auctions and Tenders Law, another decree—publicly dubbed as the "immunization of contracts law"—limits standing by preventing public interest litigation.[209] The decree instructs the courts to dismiss cases requesting the annulment of (i) contracts in which the state or one of its ministries or bodies is a party; (ii) decisions or procedures on which these contracts are based; and (iii) decisions to allocate property exclusively to the parties to the contracts. The only exception the decree makes is for cases in which there is a standing judicial conviction against one of the parties to the contract in relation to crimes related to public money. Thus, the decree disables parties who are not party to the contract from legally challenging the privatization contracts. Violating conventions of legality, the decree stipulates that it applies retroactively to lawsuits that were submitted prior to the promulgation of the decree.

The purpose of this executive retort is to re-establish the model of foreign investment that the anti-privatization rulings threatened. Prime Minister Ibrahim Mehlab argued that the decree is one of his government's primary achievements and that it does not protect corruption but rather seeks to regain investors' confidence.[210] Yet such an assertion neither answers nor remedies the judicially exposed corruption and mismanagement in these particular cases, the disregard for the common good in the privatization process, and the persistence of economic dependency. Moreover, the government amended the Criminal Procedure Law to allow "reconciliation" with investors and state employees who are accused of corruption.[211]

In January 2023, the SCC dismissed a petition challenging the constitutionality of Decree-Law No. 32.[212] The SCC rejected the argument that its judges should recuse themselves considering their relations with Interim-President Mansour who issued the Decree, because he served as their Chief Justice when he assumed the interim-presidency after the July 2013 coup (from July 2013 to June 2014) and remained in the SCC till 2016. Led by Chief Justice Boulus Fahmy Eskander—who was appointed by President Sisi in 2022 despite being the fourth judge in seniority—the SCC claimed that the law does not identify this situation as one of the grounds for recusal. Yet this

[208] Decree-Law No. 82 of 2013 (Amending Provisions of Law No. 89 of 1998), AL-JARĪDAH AL-RASMĪYAH, vol. 36 bis (a), 11 Sept. 2013, p. 3.

[209] Decree-Law No. 32 of 2014 (Regulation of Appeal Procedures against State Contracts), AL-JARĪDAH AL-RASMĪYAH, vol. 16 bis (e), 22 Apr. 2014, p. 3.

[210] Ahmad 'Antar, *Mehlab: Hathr al-t'an 'ala 'uqod al-dawla ma' al-mustathmerin ahad ahamm injazat al-hukumah* [*Mehlab: The Ban on Challenging State Contracts with Investers is One of the Government's Most Important Achievements*], ELWATAN NEWS (May 17, 2014), http://elwatannews.com/news/details/484007.

[211] Decree-Law No. 16 of 2015 (Amending Provisions of Criminal Procedure Law, promulgated as Law No. 150 of 1950), AL-JARĪDAH AL-RASMĪYAH, vol. 11 Supp., 12 Mar. 2015, p. 3.

[212] al-Mahkamah al-Dustūrīyah al-'Ulyā [Supreme Constitutional Court], Case No. 120 of Judicial Year 36, session of Jan. 14, 2023, 'Imad 'Abd Al-Karim Ahmad Al-Shebasi et al. v. Prime Minister et al.

technical answer avoids the larger issue of the exceptional situation in which Mansour (a former administrative court judge who was handpicked in 1992 to join the SCC as a deputy to Chief Justice ʿAwd Al-Murr)[213] had judicial, legislative, and executive powers after the coup. It also avoids the larger issue of the SCC's own institutional position considering its confrontational trajectory with the Muslim Brotherhood's government leading to the coup.[214] The choice of Mansour as a temporary president sought to legitimate the military takeover, but it also made the SCC an institutional partner.

More substantively, the SCC rejected the petitioners' argument that there was no necessity or exceptional circumstances to justify issuing the law through the instrument of a presidential decree in the absence of a parliament, both of whose houses the SCC had dissolved in 2012 and 2013. Instead, the SCC argued that the "national economy" was in a "sensitive period" in which there is a "need to attract foreign investment" and to prevent "anything that would shake the confidence in the well-being of the state's economic structure." It also argued that the 2014 Constitution, that followed the coup, differed from the 1971 Constitution in that it removed the obligation on citizens to defend public property, and thus the Decree's limitations on standing in cases challenging privatization contracts is a permissible regulation of the right to access to justice. Accordingly, the Decree legitimately excluded those who are not parties to the dispute but "imagine [the existence of] a harm" or seek "to impose economic policies that are inconsistent with the existing constitution's approach."[215]

The effect of the ruling is that cases like SIMO and other companies, where courts had stayed the anti-privatization litigation and refrained from ruling until the SCC determines the law's constitutionality,[216] have to be dismissed. In other cases, such as *Tanta Flax*, the ruling was implemented by reaching an agreement with the investor.[217] In the case of *Nile Cotton*, the State Council allowed the enforcement of the ruling through the payment of compensation because the return of the corporation to state ownership was not feasible due to its sale in the stock market.[218] Thus, despite the

[213] *See* Adly Mansour, http://adlymansour.bibalex.org (last visited July 14, 2024).

[214] Sultany, *supra* note 2, at 164, 204–12, 311–15.

[215] al-Mahkamah al-Dustūrīyah al-ʿUlyā [Supreme Constitutional Court], Case No. 120 of Judicial Year 36, session of Jan. 14, 2023.

[216] *See, e.g.*, Muhammad Napoleon, *Intitharan lil Dusturiyya al-ʿUlia. waqf nathar tʿan al-hukumah ʿala hukm butlan khaskhasat sharikat simo lil waraq* [*Awaiting the Supreme Constitutional Court.. Suspending the Deliberation in the Government's Appeal Against the Ruling Invalidating the Privatization of SIMO Paper Company*], Al-Shorouk (June 23, 2020), www.shorouknews.com/news/view.aspx?cdate=23062020&id=6f27c8b7-9622-48b9-8aad-4d9cb6465629. *See also* Imad Suleiman, *'Abrzha Ismant Bani Suwaif wa Noubasid wa Idiyal. Narsud Sharikāt al-Khaskhasa: Al-Muʿallaq al-Nutq bil-Hukm Fiha* [*The Main Ones are Beni Suef Cement and Nubiaseed and Idial. We Survey the Privatization Companies: The Delivery of Rulings Is Suspended in Them*], Albawaba News (Nov. 19, 2014), www.albawabhnews.com/910040 (listing seven additional companies in which the courts stayed litigation); Muhammad Abdul ʿAati, *Waqf Da'wa Butlan Khaskhasa "Ratanjat al-Mansoura".. wa Mutalabat bi Tadakhul al-Sisi* [*Suspending the Case of Invalidating the Privatization of "Mansoura for Resins".. and Calls for Sisi to Intervene*], Al-Masry Al-Youm (Dec. 6, 2014), www.almasryalyoum.com/news/details/594437 (mentioning an eighth company).

[217] *Egypt Buys Back Tanta Flax Company over 15 Years after Privatization Deal*, Mada Masr (Aug. 8, 2021), www.madamasr.com/en/2021/08/08/news/u/egypt-buys-back-tanta-flax-company-over-15-years-after-privatization-deal/.

[218] Majlis al-Dawlah [State Council], Al-Jamʿiyah Al-ʿUmumiyah li-Qismayy al-Fatwa wal-Tashreeʿ [General Assembly of Fatwa and Legislation Departments], Fatwa No. 58/1/314 (Addressed to Prime Minister Ibrahim Mehlab, June 30, 2014), https://manshurat.org/node/1169.

executive backlash, the anti-privatization rulings have been consequential. Clearly, however, the SCC had the final word in reasserting the neoliberal approach, for now.

7. Conclusions

Contrasting revolution and counterrevolution, developmentalism and neoliberalism does not merely illustrate an ideological opposition within law, in the sense of competing courts advancing opposing worldviews. Rather, this opposition highlights the ideological role of law because jurisprudential approaches legitimate socio-economic arrangements that advance particular interests and thus invite our judgment regarding the desirability of these arrangements.

The contrast between the jurisprudence of the Egyptian courts discussed in this article is not ephemeral but long-standing. It extends over a period that witnessed a transition from a revolution between 1952 and 1970 that adopted developmental policies to a neoliberal counterrevolution preceding another revolution in 2011. Within this trajectory the Egyptian legal system provided a site for a struggle between competing jurisprudential approaches.

The SCC emerges as a defender of the neoliberal ideological project. But this project relies on a biased economic framework that privileges the interests of the few;[219] falsely assumes the efficiency of property and contract;[220] and presents a misleading opposition between an efficiency calculus and distributional equity.[221] In contrast, the administrative courts' developmental jurisprudence challenges the market fundamentalism of neoliberal globalization. It highlights its fallacies and injustices and aims at protecting the common good to the benefit of the governed.

These judicial approaches, within the same constitutional order, are irreconcilable. This is because they deploy competing ideals that universalize the interests of different categories of winners and losers. The administrative court rulings convey an underlying aspiration to overcome economic dependence in a neocolonial world. They offer a modest form of judicial resistance to accumulation by dispossession through impairing the profitability of its model of foreign investment. Conversely, the SCC's jurisprudence facilitates capital accumulation and redistributes wealth to the upper classes and multinational corporations. Whereas the SCC advances neoliberal hegemony, the administrative court rulings are counterhegemonic.

The binary opposition between revolutionary and constitutional legitimacy or ideology and legality merely obfuscates this ideological opposition and conceals the role of law in advancing particular interests. This is because ideas about legality are intertwined with opposing visions of the social order.[222] Whereas the SCC associates

[219] C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 Phil. & Pub. Aff. 3 (1975).
[220] Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 Hofstra L. Rev. 711 (1980).
[221] Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 Stan. L. Rev. 387 (1981); Martha McCluskey, *The Illusion of Efficiency in Workers' Compensation "Reform,"* 50 Rutgers L. Rev. 657, 657 (1998); Martha McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 Indiana L.J. 783 (2003); Martha McCluskey, *Constitutional Economic Justice: Structural Power for "We the People,"* 35 Yale L. & Pol. Rev. 271 (2016).
[222] Nimer Sultany, *Marx and Critical Constitutional Theory*, *in* Research Handbook in Law and Marxism 209 (Paul O'Connell & Umut Özsu eds., 2021).

the 1952 Revolution with exceptionality (because it imposed constraints on private property and freedom of contract), the administrative courts associate neoliberal privatization with exceptionality (because it created zones of illegality, facilitated abuse of state power and corruption, and enabled foreign intervention to the detriment of the interests of the local population). Whereas the SCC grants the neoliberal counterrevolution the imprimatur of legality and constitutionality, the administrative courts associate the 2011 Revolution with the demand for legality and accountability considering their absence under Mubarak's rule. Whereas for the SCC legality requires the restoration of strong protections to private property and freedom of contract, for the administrative courts legality requires restoring the public sector, defending the common good, and recovering economic sovereignty.

Ultimately, the ability of the anti-privatization judicial resistance to produce significant social change is limited when acting in an inhospitable environment.[223] A variety of local and global actors (army, business class, Muslim Brotherhood, and international financial institutions) sought a speedy return from revolutionary agitation to stability. They had no interest in the democratization of the economy or the pursuit of a conception of social justice that would benefit the poor. Whereas popular pressure during 2011–13 prevented the conclusion of new agreements with the International Monetary Fund, after the July 2013 military takeover the relationship between Egypt and the international financial institutions returned to business as usual.[224] With the resumption of the neoliberal counterrevolution under General Sisi's regime, the Egyptian pendulum swings back to the alliance between authoritarianism and neoliberalism.[225] This alliance excludes the masses from governance and sacrifices their interests and rights to the benefits of global capital. It subdues the administrative court system and curbs judicial independence to weaken judicial resistance.[226] It pursues loans from international financial institutions,[227] changes the regulatory environment to lure private investors,[228] and redistributes wealth from the lower to the upper classes and global business elites.[229] It invites praise for "doing privatization right" this

[223] *See, e.g.*, Gerald Rosenberg, The Hollow Hope: Can Courts Bring about Social Change? (2d ed. 2008).

[224] Adam Hanieh, *Shifting Priorities or Business as Usual? Continuity and Change in the Post-2011 IMF and World Bank Engagement with Tunisia, Morocco and Egypt*, 42 Brit. J. Middle East. Stud. 119 (2015); Osama Diab & Salma Ihab Hindy, *IMF's Social Protection between Rhetoric and Action: The Case of Egypt*, 30 Middle E. Critique 391 (2021).

[225] Angela Joya, *Neoliberalism, the State and Economic Policy Outcomes in the Post-Arab Uprisings: The Case of Egypt*, 22 Mediterranean Pol. 339 (2017); Maha Abdelrahman, *Policing Neoliberalism in Egypt: The Continuing Rise of the "Securocratic" State*, 38 Third World Q. 185 (2017).

[226] Law No. 13 of 2017 (Amending Laws on State Prosecution Authority, Judicial Authority, and State Council), al-Jarīdah al-Rasmīyah, vol. 17 Supp., 27 Apr. 2017, p. 10; Law No. 77 of 2019 (Changing the Procedures for Appointing Prosecutors and Judges), al-Jarīdah al-Rasmīyah, vol. 25 bis (b), 26 June 2019, p. 3.

[227] Amr Adly, *Short Term Fixes for Long Lasting Troubles: Why IMF Reforms Won't Solve Egypt's (Political) Economic Problems*, Friedrich Ebert Stiftung (Nov. 2018).

[228] U.S. Dep't of State, Bureau of Econ. & Bus. Aff., 2021 Investment Climate Statements: Egypt, www.state.gov/reports/2021-investment-climate-statements/egypt/ (last visited Mar. 1, 2022).

[229] Maged Mandour, *Sisi's War on the Poor*, Carnegie Endowment (Sept. 23 2020), https://carnegieendowment.org/sada/82772.

time,[230] and vows to implement structural reforms even if it requires quelling social discontent with an iron fist.[231] In short, Egypt returns to the very model that led to the 2011 Revolution.

[230] Doaa A. Moneim, *Egypt Starting to Correct Mistakes of Wrongly Implemented Privatisation Programme of 2010: UNDP's Knowledge Project Chief Advisor*, Ahram Online (Dec. 2, 2019), https://english.ahram.org.eg/NewsContent/3/12/356954/Business/Economy/Egypt-starting-to-correct-mistakes-of-wrongly-impl.aspx.

[231] *After IMF Deal, Egypt's Sisi Says Will Not Hesitate on Tough Reforms*, Reuters (Aug. 13, 2016), www.reuters.com/article/economy/after-imf-deal-egypts-sisi-says-will-not-hesitate-on-tough-reforms-idUSKCN1000FP/.