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Egypt's Judges Step Forward

The Judicial Election Boycott and Egyptian Reform

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On May 13, 2005, the General Assembly of the Egyptian Judges Club approved by acclamation a startling threat to boycott their constitutionally mandated role of supervising elections. They insisted that they would call off the boycott only if a series of judicial reforms were enacted and, in addition, if the election system were amended to give judges full (rather than partial) supervisory authority. The Judges Club has in the past generally been a social organization and has no power to compel observance of the boycott. And it has been challenged by the Supreme Judicial Council, the body that actually oversees most judicial affairs. But the threat is still a powerful one; because of the limited number of judges in Egypt, even a partial boycott would seriously undermine efforts to assure Egyptians that all aspects of the election process would be overseen by a neutral party.

Although their action attracted international attention for its boldness, the Egyptian judiciary is not embarking on a quixotic quest to transform the Egyptian regime. Instead it has engaged in a calibrated confrontation that aims primarily to secure judicial reform and secondarily to support electoral reform. The motives relate more to professional integrity than ideology: Reformist judges are aware that their actions may help pry open the political system, but their efforts are restricted to the legal and judicial realms. The most likely outcome is a series of regime concessions that, while limited, may still have the significant long-term effect of helping to bring life to a hitherto fairly inert political system.

The judicial initiative has been portrayed—both inside and outside Egypt—as connected with the contest over the upcoming presidential elections, but it is actually an outcome of three deeper interrelated contests over judicial independence, election oversight, and leadership within the judiciary. The timing is not coincidental: The presidential elections present a propitious occasion for judges to combine these three struggles.

Struggle over Judicial Independence

The first struggle—over judicial independence—is part of a long-term contest between the executive and the judiciary about the judiciary's authority to manage its own affairs. Even though Egyptian judges have an impressive degree of autonomy, there are significant lingering aspects of executive influence. Perhaps just as significant are lingering memories

among the judges of an audacious set of moves taken over three decades ago (if subsequently reversed) to subordinate the judiciary to the executive.

In 1968, the Judges Club issued a statement calling for greater freedoms safeguarded through an independent judiciary and the rule of law. Judges were reacting to the general political crisis following Egypt's defeat in the 1967 war with Israel. But they were also fearful of plans to absorb the judiciary into the Arab Socialist Union (the country's sole political party at the time). The Egyptian regime of Gamal Abdel Nasser never did proceed with such plans, and at first it held back from open confrontation with the judges. But in 1969, after a group of reformers and critics of the regime's authoritarianism won an election for the board of the Judges Club, the direct challenge posed by the vocal judicial leadership proved intolerable to the regime. Nasser responded with a series of measures subsequently referred to as the "massacre of the judiciary," including the dismissal of over a hundred sitting judges.

Under Nasser's successors, Anwar Al Sadat and then Hosni Mubarak, the Egyptian regime has gradually backtracked on most of the steps taken in 1969, granting considerable autonomy to the judiciary and raising salaries and other benefits. Over the past decade in particular, judges have seemed to be a favored group—being granted, for instance, extensions on the mandatory retirement age not given to other state employees. But this in itself has created some tensions, as some judges feel that benefits have been doled out as part of an implicit bargain in which they are expected to be politically quiescent in return.

On several occasions, judges have put forward reform proposals that go beyond the regime's initiatives. In 1986 the Judges Club sponsored a "National Conference on Justice" that issued far-reaching recommendations for legal reform. In 1991 the Judges Club developed a comprehensive draft law for the judiciary. For the most part, these judicial initiatives received little response. Accordingly, the Judges Club recently dusted off its project for a comprehensive law, issuing an updated version in December 2004. The proposed law is designed to eliminate the executive's remaining authority over the judiciary. Specifically, the draft calls for

- Granting the judiciary full fiscal autonomy and a budgetary status similar to that enjoyed by the parliament as a co-equal branch of the state;
- Transferring the committee responsible for judicial discipline from the Ministry of Justice (part of the executive) to the Supreme Judicial Council (a largely judicial body). In addition, judges accused of an offense would have the right to defense counsel as well as the ability to appeal from the disciplinary committee to a judicial body; and
- Amending the rules of the pension funds so that judges no longer face a major reduction in their income upon retirement.

These reforms are not aimed at comprehensive liberalization but instead stem from a sense of violated status: Egyptian judges tend to take the separation of powers quite seriously and resent any infringement on their autonomy. Their concerns focus on legal and institutional issues, especially as they affect the judiciary. For instance, the assertion of control over judicial discipline would be less of a change than it initially appears and involves as much principle as it does practice. At present, the judicial discipline committee consists of judges seconded to the Ministry of Justice; the Supreme Judicial Council must review and approve any penalty that goes beyond a warning. The main reform proposed entails transferring the committee from the ministry to the council and removing the authority to give warnings from the minister of justice and the chief justice. The proposals are designed less to

counteract specific abuses (though there was an uproar when a leading reformer recently received a warning) and more to underline the separation of powers.

In addition to these changes, the Judges Club's proposed law also pursues a set of reforms internal to the judiciary that might ultimately have more significant impact on the judicial structure. These reforms will be examined more fully below.

Struggle over Supervising Elections

The struggle over supervising elections was originally a separate matter, even though the Judges Club has linked it with judicial independence with its boycott threat. Article 88 of the Egyptian constitution provides that "The law shall define the necessary conditions that the members in the People's Assembly must fulfill. It shall specify the provisions for elections and referenda, providing that the balloting take place under the supervision of a judicial body." The reach of this judicial supervision is ambiguous in three ways. First, the "judicial body" referred to is nowhere defined. Second, it is unclear which elections are included—the article is placed in the section dealing with the parliament, but the reference to "referenda" suggests that perhaps nonparliamentary elections are to be included. And, third, the nature of the supervision is not specified.

For decades, most controversy centered on this last ambiguity. Arguing that there were not enough judges to oversee every polling place, the government had judges involved only at the places where ballots were counted—and at such places they only observed rather than administered proceedings. Critics claimed that this did not meet the constitutional requirement, and in 2000 they won a victory when the country's Supreme Constitutional Court struck down the election law because it did not provide for judicial oversight of each polling station and failed to give judges the necessary authority over balloting. The government responded quickly by drafting legislation that spread the balloting out over several days (allowing judges to move around the country and be present at all polling stations) and placed judges in control of the polling. The legislation also pressed into service all judicial and quasijudicial personnel, including prosecutors and members of the State Cases Organization (responsible for advising and representing the official bodies in litigation). Some complained that those who were not firmly within the judicial branch did not have the independence required to supervise elections, which in turn violated Article 88's stipulation that a "judicial body" be involved.

But the more trenchant criticism of the 2000 election law was that it simply moved electoral manipulation outside of the polling station, sometimes by just a few feet. With judges only able to supervise the balloting itself, other aspects of the election process fell completely outside of their control. Opposition candidates and movements complained of official harassment (such as disconnected telephone lines), intimidation by security forces (who often surrounded polling stations), and other steps designed to deny them the opportunity to communicate with and mobilize potential supporters.

As part of its recent set of proposed political reforms, the Egyptian government has proposed the formation of an electoral commission for presidential elections (but not for parliamentary or other elections) that would assume the overall administrative responsibility for elections currently falling to the Ministry of Interior. Although precise plans are unclear, presidential balloting could not be carried out under full judicial supervision because presidential voting takes place on a single day and there simply are not enough judges to oversee each polling station. The presidential electoral commission is to have a strong

judicial element, however, with half of its members being judges (and the other half public figures probably including retired judges). Reformist judges—and an Egyptian court faced with the matter—have agreed that the commission’s composition, determined by a constitutional amendment, is beyond their power to review.

But dissenting judges have not been mollified by these moves. More outspoken members of the judiciary charge that their integrity is being used to lend credibility to a process over which they have only limited control. They insist that the government’s reforms must go further, placing all election oversight totally within the judiciary. Significantly, judges have not supported calls for independent, much less international, monitoring. They have asked for the authority to conduct the oversight themselves but not for any assistance in the task.

Struggle within the Judiciary

A third struggle has taken place within the judiciary itself—generally quietly, although the current crisis has thrust it into public view. Since the 1969 “massacre of the judiciary,” the judicial branch and the Judges Club have generally been dominated by a senior leadership that has combined hostility to partisan politics with appreciation for the benefits that a conciliatory attitude can bring. Regained autonomy, better working conditions, and higher salaries have all been the result. Even the electoral oversight task given to judges since 2000 has proved lucrative, with substantial bonuses paid those who undertake the assignment.

But there have always been dissenting voices within the judiciary. Some judges have been deeply offended by the remaining fetters on judicial independence, such as the Ministry of Justice’s control over most aspects of court administration, the use of the emergency law, and a host of benefits offered by the government to judges that in the eyes of critics are designed to purchase political quiescence. In 2002, such dissidents within the Judges Club finally wrested control of the body away from the more senior, conciliatory leaders.

The Judges Club is not a governmental body but one that operates as a social organization—although over time it has evolved into an unofficial professional association. An old guard of judges still dominates the Supreme Judicial Council, the organ that has formal control over judicial appointments, promotions, and transfers. Recent events have therefore taken the form of institutional rivalry between the club and the council. Only a small minority of judges might truly be considered sympathetic to the political opposition, with the vast majority anxious to preserve a non-partisan reputation. But the club’s leadership, even as it positions itself as nonpartisan, has been willing to use far stronger rhetoric and techniques than the council. And when it came to drafting the proposed judicial law, the more reform-minded elements leading the Judges Club inserted some provisions designed partly to wrest influence out of the hands of the old guard. In this regard, the Judges Club December 2004 draft law discussed above has additional provisions focusing on intrajudicial relations, including

- Calling for granting the Judges Club legal status as the representative of the judiciary and placing its administration under the club’s general assembly (consisting of all member judges);
- Broadening the composition of the Supreme Judicial Council, which oversees most personnel matters, to include two members from the Court of Cassation (the highest appellate court) and two members of the Cairo Court of Appeals (which falls one level below the Court of Cassation);

- Having these new members elected by the judges of the courts they represent;
- Allowing the Court of Cassation to elect its own head (who also chairs the Supreme Judicial Council) rather than the current system of selecting him on the basis of seniority; and
- Transferring some authority from the head of each court to a general assembly of the judges of that court.

Taken together, these steps would reconfigure authority within the judiciary itself and diminish the role of those judges at the apex of the system. Given this content, it is not surprising that some of the senior judicial leadership reacted coolly to the proposal. As a result, personal rivalries burst into the open, but the contest has been primarily institutional: The Judicial Council insisted that it was the party the government should consult with on the law. And when the May 13 boycott threat came, the council criticized it on legal grounds (that election oversight was a constitutional obligation) and on procedural ones (that no formal vote was taken). The Judges Club immediately responded, claiming that it represented thousands of judges and was interested in promoting the rule of law, not undermining it.

Contained Confrontation

Since the Judges Club unveiled its draft judicial law in December 2004, the three contests have come together to produce the current confrontation between the executive and the judiciary. Judges were initially frustrated by official dawdling—when an opposition member of parliament agreed to introduce the draft, the government responded that it was studying the matter but would not be able to act before upcoming elections for the presidency and the parliament. Linking the proposal to elections may have been a tactical mistake, because it suggested to the judges a very different linkage of their own.

With the proposed law in limbo—and with some senior judges lukewarm at best in their support for the law—the Alexandria branch of the Judges Club decided to press the issue. On April 8, in a meeting originally called after a lawyer had attacked one of its members, the club called for a boycott of its oversight role in elections. Only if the government acted on the proposal and also gave the judiciary a full supervisory role over elections would the judges reconsider their stand. The boycott call resulted in the national Judges Club to call for an emergency meeting of all of its members on May 13.

The boycott threat could not have come at a worse time for the government. Not only was it facing an upsurge in domestic opposition, but it was falling under increasing international criticism for its autocratic nature. In February 2005, President Mubarak responded to this combination of domestic and international pressure, by withdrawing his opposition to multicandidate presidential elections, thus placing electoral reform in the center of the regime's efforts to regain its credibility. For the opposition, the boycott's implicit criticism of the existing electoral system (made explicit by some judges) offered vindication for their demands for more thorough reform.

In the period leading up to the May 13 meeting, therefore, both the government and the opposition maneuvered to ensure a favorable outcome. Opposition elements claimed the judges' cause as their own. The government, by contrast, enlisted various groups of judicial personnel—such as in the State Cases Organization and the head of the Cairo Appeals Court—to declare their willingness to monitor elections.

The meeting on May 13 was held in a tense atmosphere, but both the government and the judges held back from full confrontation. Judges, mindful of the events of 1969 but also professionally averse to any partisan political activity, generally phrased their demands in terms related to the rule of law and judicial independence. The government tended to ignore the brewing crisis in its public statements. On the day of the meeting itself, the government prevented *Al Jazeera* journalists from filming the meeting; for their part, the judges declined to invite representatives from Kifaya—a major opposition umbrella group opposing Mubarak’s reelection—from entering the meeting hall. Outside, however, government and opposition supporters were less restrained.

The meeting resulted in a full endorsement of the boycott call. The Judges Club decided that it would revisit the matter in September, to assess whether it would follow through on the boycott. That left time and room for maneuver. The government’s public reaction was quite restrained. Indeed, it presented the judges’ call for full supervision of the election as a nationalist rejection of U.S. President George W. Bush’s call for international monitoring, barely commenting on the boycott threat itself. And indeed, most of the reformist judges have insisted that they wish to stay aloof from party politics and reject calls for international monitoring.

Opposition leaders were elated at the outcome, perhaps excessively so. The unrestrained Nasserist journalist Abd Al Halim Qandil wrote that the “revolution of the judges” meant the death of the regime save the formality of a burial certificate. Despite such statements, there is plenty of room for compromise.

The judicial reforms that are being pressed may provoke little enthusiasm in the executive branch, but they do not fundamentally threaten its interests. The judicial demand for full supervision of elections may be more problematic, but it is less threatening than it initially seems. Full election oversight would extend to far-reaching matters such as media access and campaign finance, and there are few signs that judges, working on a part-time basis, are interested in anything so extensive. And since election oversight is not the judges’ primary issue, there may be room for both sides to bargain.

Thus, what some refer to as the “revolution” or “uprising” of the judges may be slightly less shattering for the political system than some have claimed. Yet the long-term implications are still quite significant in two ways. First, the feistiness of judges, though not unprecedented, marks a trend toward a slippage in executive domination of the Egyptian state. Second, the limited reform program launched by the regime in the past few months has already proved difficult to manage. This seems to be particularly the case with the electoral process, as the regime has seemed on unsure footing, alternating between conciliatory and heavy-handed gestures.

Egyptian judges may not be aiming at full liberalization by their own efforts. Their proposed reforms focus on the legal and judicial realms. But they are not blind to the context and possible effects of their efforts. And indeed, their actions could help open some political space for opposition groups to occupy and jar one of the most inert political systems in the region out of its prolonged stasis. Their actions will little affect the outcome of the coming presidential elections. But that balloting will not be Egypt’s last, and if a more open electoral system eventually emerges, judges will be able to take some of the credit. ■

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