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Strife for Independence in an Autocratic Regime: The Egyptian Judges' Club 2000-2007

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This article describes and examines a conflict between the Egyptian Judges' Club and the regime in the years 2000-2007. Due to the Club's special status, this conflict illustrates several developments in today's Egypt: It relates to the state of the judiciary, professional syndicates, national elections, and overall state politics. The judges' strife for independence serves as an example of the ways and means of representation, contestation, and control in an authoritarian regime.

In the years 2005 and 2006, Egypt's judges found themselves at the forefront of a broad protest movement; they were hailed as "heroes" and the "conscience of the nation" by NGOs and oppositional parties, while the state media and officials accused them of damaging the reputation of the judiciary and the country. Amidst a series of demonstrations that were accompanied and at times dissolved by security forces and which made downtown Cairo seem a city under siege, judges themselves took to the street in 2006, staging stand-ins in Alexandria and the capital.

The demonstrations of the Judges' Club mark the second hot phase in a conflict that began in the year 2000 and that became most visible after 2005's parliamentary and presidential elections. It is a conflict about the independence of the judiciary, the division of powers, the role of corporatist structures in a nominally pluralistic democracy, and the supervision and forgery of elections. It is carried out legislative procedures, draft laws, changes in the system of retirement, disciplinary investigations, protests and demonstrations, interviews, and numerous public announcements.

Due to the functions of judges in the Egyptian political system and because of the special legal status of the Judges' Club, this conflict makes for a case study that highlights developments in various sectors of the Egyptian society. In fact this conflict can be seen as a focal point for developments in the judiciary, the state policy with regard to elections and maintaining control, as well as developments in the so called civil society, i.e. NGOs and professional organizations. It offers a chance to consider in detail the ways and means of contestation, presentation, control and containment in an autocratic state that is based on formally democratic institutions.

This paper¹ divides into four parts. Before narrating in part three the events of the years 2005 and 2006, it's necessary to sketch the backdrop against which this contention evolved in the preceding years. So part one discusses some general developments in state policy, the judiciary, etc.; part two is of more specific relevance for the Judges' Club and lays out the major points of controversy with the state. These will later fuse with broader political themes and fuel the conflict described in part three, followed by the last part in which I offer some remarks and observations.

1 The Background

1.1 Elections and Supervision

When judges threatened to boycott the supervision of elections in 2005, this came at a critical time for the regime. The 1990s had been characterized by deliberalization, the regime regaining some of the control lost due to reforms in the previous decade. Participation was limited on several levels and the regime took more and more to extra-legal and illegal means to regain control. At the same time the judiciary had gained an important function in Egypt's political system, reigning in election procedures, and as a consequence, in the way the regime

¹Here I can only give an abbreviated account of what happened. For a more detailed description, including references to the newspaper articles and other sources used, see my magister thesis: Björn Bentlage (2008): *Protest im Anzug. Der Ägyptische Richterclub und der Konflikt mit dem Justizministerium 2000-2007*, Ed. Conermann, Stephan. *Bonner islamwissenschaftliche Hefte*, EB Verlag, Hamburg, 2008.

exercised control.

Egypt's Supreme Constitutional Court had declared as invalid all of the four parliaments elected between 1984 and 1995, and through its rulings in 1986, 1990, and 2000, it had altered the election system at two crucial points. First, it abolished the proportional system based on party lists, thus allowing for independent candidates to enter the elections. And second, it demanded that elections must be supervised by members of the judiciary at each single polling station. For this, elections had to be held over a period of several days. The first step limited a party's disciplinary capacities vis á vis its members. Before, the ranking on a party list had been decided by its leadership, now all candidates were virtually independent, intensifying internal competition and rendering slim majorities in parliament less secure.² The second step made it harder to rig elections. It replaced ordinary civil servants who had previously supervised many polling stations with members of the judiciary, who tend to be more independent, due to the immovability and immunity many of them enjoy. The NDP's poor showing in the elections of 2000 were partly attributed to these decisions by the Supreme Court and the stricter supervision it had implemented.

By 2005, the Egyptian government had come under massive international pressure to engage in democratic reforms, since at this time, the democratization of the Middle East was the declared goal of the USA. Elections for the office of the President of the Republic and the People's Chamber were scheduled for the autumn of that year. In February, president Ḥusnī Mubārak (since 1981) called for parliament to amend article 76 of the constitution so that multiple candidates may compete for the office of president – until then there had only been one candidate who was then legitimized by a referendum. In addition, to other laws relevant for the organization of elections should be amended also. United States' Secretary of State

²Tamir Moustafa (2003): "Law Versus the State. the Judicialization of Politics in Egypt," in: American Bar Association (2003): 896f.; Eberhard Kienle (2001): *A Grand Delusion. Democracy and Economic Reform in Egypt*, London, New York, 2001: 19f. 25f. 51-68.

Condoleeza Rice welcomed Mubārak's declaration as a hopeful step towards democratic reform. On May the 10th 2005 the parliament approved the amendment of article 76 and scheduled the necessary referendum for May the 25th which, according to the Constitutional Court's ruling of 2000, had to be supervised by members of the judiciary.

At least the opposition press discussed the amendment controversially, the exact procedures of the presidential and parliamentary elections and their legitimacy. Several opposition parties criticized the amendment in a series of conferences and called for a boycott of the referendum. Meanwhile, *kifāya*, the Egyptian Movement for Change (*al-ḥaraka al-miṣriyya min ajl al-taghyīr*), had established itself as a civil protest movement against another term in office for president Mubārak and was much commented on in international press. Also, the government had to fend off calls for an international monitoring of elections. The supervision by the judiciary had been an important argument in this regard. In other words, the regime was in dire need of successful elections to maintain legitimacy at home and abroad.

1.2 Judiciary Reform and the Judicialization of Politics

Just as for the regime, the elections of 2005 came at a decisive moment for the Egyptian Judges' Club. Its boycott threat was simply the most visible consequence of several developments that had been under way for years.

Egypt's modern legal system was shaped in the first half of the 20th century, reaching its utmost degree of independence in the 1940s, when the existing lack of government interference was codified in the law of the independence of the judiciary. After the revolution of 1952, the subsequent regimes, although intent on curbing the independence and political influence of the judiciary, opted for circumventing the existing system instead of an outright abolishment. This happened through the establishment of special courts outside the regular court system to ensure favorable rulings in sensitive matters.³

³Tāriq al-Bishrī (2006): *al-qadā' al-miṣrī bayna al-istiqlāl wa-l-iḥtiwā'*, Cairo, 2006: 10ff., 13-17, 292ff.; Moustafa (2003), *Law Versus the State*: 888f..

After lawyers and judges had been marginalized economically and politically for about three decades, it was economic necessity that once again elevated their status. When Egypt's Supreme Constitutional Court was established in 1979, it was mainly in order to gain the trust of foreign investors who had shown great reluctance towards the free-market elements introduced by president Anwār al-Sādāt (1970-1981). Despite specific laws guaranteeing the safety of private property, the autocratic nature of Egyptian polity called for caution. An independent constitutional court was supposed to alleviate such fears.⁴ And the reforms of the administrative courts implemented by president Mubārak during the 1980s were primarily a response to widespread corruption within the state apparatus.⁵

These structural changes in the constitutional and administrative judiciary contributed largely to political and social changes throughout the 1980s and 1990s. The rulings of more independent judges and courts gave credibility to the rule of law and won the trust of investors. The Constitutional Court was able to tackle issues too sensitive for government to undertake, as the reform of rental law for example; it played a big part in economic liberalization and the curtailment of benefits and regulations introduced under president Jamāl 'Abd al-Nāṣir (1954-1970).⁶ The political ramifications were considerable as well. Apart from the alterations to the electoral process mentioned above, the reformed courts gave oppositional parties and NGOs a means to achieve their goals through litigation, which has become a vital part of political activism since the 1990s. They set a new arena for political contestation in

⁴Clement H. Moore (1975): "Professional Syndicates in Contemporary Egypt. 'The Containment' of the Middle Class." *The American Journal of Arabic Studies* (Vol. 3), (1975): 60-82; Moustafa (2003), *Law Versus the State*: 898, 892f.

⁵Kienle (2001), *Grand Delusion*: 42ff.; Yaḥyā al-Rifā'ī (2004): "aṣl maqāl mustashār Yaḥyā al-Rifā'ī al-manshūr bi-jarīdat al-Ahrām bi-ta'rīkh 19.1.1984 'an al-mashrū' al-jadīd li-'ādat majlis al-qaḍā' al-a'lā bi-l-qānūn 35 li-sana 1984," in: *majallat al-quḍāt* ('adad ḥāṣṣ bi-da'wat al-sāda al-a'ḍā' li-ḥuḍūr al-jam'iyya al-'amma li-l-nādī li-l-in'iḳād bi-idhn allāh), (2004): 7-12.

⁶Moustafa (2003), *Law Versus the State*: 894f., 908-13.

Egypt, often countering the regime's interest.⁷

The heightened independence of the constitutional and administrative judiciary was not limitless of course, and courts stayed clear of the "red lines", i.e. issues pertaining to the most immediate interests of the regime. For about twenty years, the benefits of a more independent judiciary outweighed the political and sometimes economic costs of its rulings.⁸ But by 2001, this balance was apparently lost. Following the retirement of the Supreme Constitutional Court's chief judge, president Mubārak broke with the long-standing *usus* to pick as successor the most senior judge within the court. He instead appointed Fathī Najīb, an official in the Ministry of Justice and author of several laws that had been declared unconstitutional by his new colleagues. He immediately tried to gain control over the court's decisions by appointing new judges and by implementing some other structural changes.⁹

1.3 Professional Syndicates and the Judges' Club

At about the same time that the regime had decided to curb the constitutional judiciary, judges in the ordinary branch of the judiciary prepared to push for more independence. The basis for this endeavor was the Judges' Club of Egypt, and the Club's curious legal status plays a decisive role in the upcoming conflict.

Considering its organization¹⁰ and function, the Judges' Club is a professional syndicate, or

⁷Kienle (2001), *Grand Delusion*: 51-68; Moustafa (2003), *Law Versus the State*: 895, 897, 838-85, 926-28; El-Mona Ghobashy (2008): "Constitutionalist Contention in Contemporary Egypt." *American Behavioral Scientist* (Vol. 51), 11 (2008): 1590-1610.

⁸Moustafa (2003), *Law Versus the State*: 903-07.

⁹Moustafa (2003), *Law Versus the State*: 893f. 924f..

¹⁰Membership is obligatory for all judges in regular courts as well as public prosecutors. Each governorate may establish its own regional Club, all of which are branches of the national organization. In between its ordinary sessions once a year, the General Assembly delegates important powers to the Administrative Board, whose members are determined in elections

niqāba. Syndicates, in contradistinction to other legal forms of assembly, are founded and regulated by laws, have some exclusive functions, and adhere to a respective ministry; the Doctors' Syndicate (*niqābat al-aṭibbā'*) for instance follows the Ministry of Health. Yet since its establishment as a club (*nādī*) by 59 judges and prosecutors in 1939 - apparently this designation better befitted the elite rank of the Club's members - Egypt's Judges' Club (*nādī quḍāt miṣr*) has the legal status of a civil organization (*jam'iyya*). It is therefore treated very much like an NGO and is regulated by the Ministry for Social Affairs.

According to its statutory charter the Club's aims are to further the relations among judges and members of the public prosecution authorities, as well as promoting their interests and the "independence of the judiciary and its representatives."¹¹ The latter two points are by law exclusive functions of professional syndicates, whose main purpose - apart from setting and overseeing professional standards - is to represent their members vis á vis the state. For instance, syndicates negotiate salaries and bonuses, the details of retirement, etc., and have to be consulted in any legislation relevant for their profession.¹² All in all the Judges' Club exercises several functions that exclusively pertain to syndicates and offers services which are illegal for civil organizations: providing life-insurance for example, or the publishing of a journal (the *majallat al-quḍāt*). Consequently, the Club's legal status does not match its

taking place every two years, and which is headed by its Chairman. This general structure is shared by all other professional syndicates. See: "al-niẓām al-asāsī li-nādī l-quḍāt", (http://egyptjudgeclub.org/index.php?act=page_detail&p_id=102; last visited: 2010, May 25): §1, 3, 7, 9, 14, 17; Robert Bianchi (1989): *Unruly Corporatism. Associational Life in Twentieth-Century Egypt*, New York, Oxford, 1989: 73.

¹¹"al-niẓām al-asāsī": §2.

¹²The Judges' Club is not consulted on legislation. This function is ascribed to the highest administrative body in the regular judiciary, the Supreme Judiciary Council (*majlis al-qaḍā' al-a'lā*): Law 1972/46: wizārat al-'adl al-miṣriyya: "1972/46 qānūn as-sulṭa al-qaḍā'iyya", 1972 (available through: <http://www.arablegalportal.org>, last visited: May 25, 2010): §77.

functions. And although the Judges' Club has been fulfilling these functions for decades, this conflict has not been dealt with or resolved.¹³

The relationship between professional organizations and the state has seen many ups and downs throughout the last decades in Egypt. Syndicates, just as unions and chambers, are often used to control, co-opt, and coerce their members, while at times they emerge as platforms for critique against state policy. Being potential venues for representation, contestation, and mobilization, professional organizations can be politically relevant, and sometimes experience political pressure as a consequence.¹⁴

In the mid-1990s for example, Islamist activists had gained control of several syndicates. But as part of a broader trend of deliberalization, parliament passed laws in 1993 and 1995 that were meant to prevent further successes of the Muslimbrothers and other Islamists. And in 1995 and 1996, for the same purpose, prominent members of syndicates were arrested, the boards of the engineers' and lawyers' syndicates dissolved, elections impeded and postponed for all syndicates. The only professional organizations not put under government control were the syndicate of journalists and the Judges' Club, both headed by boards close to the regime.¹⁵

In February 2001 the lawyers' syndicate finally succeeded in court and could hold its first internal elections since 1996, other professions were soon to follow. The Judges' Club, since 1989 headed by Muqbil Shākir, a judge loyal to the regime since the late 1960s, held elections in 2001 as well and Shākir lost by a slight margin to Zakariyya Aḥmad 'Abd al-'Azīz, a

¹³"nādī quḍāt miṣr wa-thalāth sanawāt min al-'aml al-jādd 2002/2005. taqrīr li-l-'araḍ 'alā l-jam'iyya al-'umūmiyya al-ma'qūda fī 16.12.2005.", n.A., in: *mağallat al-quḍāt* (2005); Mustapha K El Sayed (1988): "Professional Associations in the Arab World, with Special Reference to Lawyers Associations." *Beyond Coercion. The Durability of the Arab State*, Ed. Adeed Dawisha und William Zartman, London, 1988: 100f.

¹⁴Bianchi (1989), *Unruly Corporatism*: 74-80; Robert Springborg: (1978): "Professional Syndicates in Egyptian Politics, 1952-1979." *International Journal of Middle East Studies* (Vol. 9), (1978): 275-95: 278

¹⁵Geneive Abdo (2000): *No God But God. Egypt and the Triumph of Islam*, Oxford, (2000): 73f. 99-196; Kienle (2001), *Grand Delusion*: 85ff..

reformist candidate. Confronted with a board loyal to the government, a gridlock ensued that was broken up the following year when 'Abd al-'Azīz succeeded over Shākīr more clearly and the majority within the board changed as well.¹⁶

2 The Issues - Towards Confrontation

The new leadership was eager to revive the Judges' Club as an agent of judiciary reform, for more independence of the judiciary, and for the recognition of the Club as the true representation of judges.¹⁷ Confronted with an executive branch determined to strengthen its control and not willing to yield any, conflicts soon emerged on different issues.

2.1 The Legal Status

One issue was the legal status of the Judges' Club, which in principle is similar to that of an NGO. And towards the end of the 1990s the regime took steps to centralize control over NGOs and with them the Judges' Club, because during the 1990s Egyptian and international NGOs had become ever more able to exert political pressure. As a part of that government response all of Egypt's roughly 16,000 NGOs were obliged by law 2002/84 to register with the Ministry of Social Affairs.¹⁸

However, the Judges' Club considered itself a syndicate, not a club or NGO, and consequently decided in June 2003 not to register with the Ministry. The Club's new leadership wanted to change its legal status through a new judiciary law. A draft for such a law – actually a draft for an amendment of the existing judiciary law no. 46 of 1972 – was at that time being prepared by a committee of the Judges' Club. As the draft shows, the Judges' Club intended to be recognized as the syndicate of judges, to represent them before the state, to express

¹⁶Al-Ahram Weekly, 2001, March 1. El-Nahhas, Mona: "Back to square one."; Šābir, Aḥmad (2002): "yawm lahu ta'rikh. al-jam'iyya 21 yūniya sana 2001," in: *majallat al-quḍāt* (2002): 12-14.

¹⁷These topics clearly dominate the Judges' Club's magazine of December 2002, see: *majallat al-quḍāt* (2002).

¹⁸Moustafa (2003), *Law Versus the State*: 898-902, 917; Sheila Carapico (2007): "Sleeping with the Devil?," in: ISIM Review (20), (2007): 8f.

opinion on political issues as well as on decisions of all bodies of the judiciary, and foremost, to be subject to no other authority than its own General Assembly.¹⁹

While the Ministry of Justice, headed by Fārūk Sayf al-Naşr, had no objections and was regularly informed on the progress and assured its support,²⁰ the Club's plans were opposed by the Supreme Judicial Council. The Council, chaired by judge Fathī Khalīfa, took sides in a dispute between the Club and a retired judge. It declared in a statement on October 14th 2003, that the Judges' Club falls under the Supreme Council's jurisdiction, which was of course contrary to the Club's intended new status.²¹

2.2 *The Judicial Bodies*

Another divisive issue started with a ruling by the Court of Cassation (*maḥkamat al-naqd*) from May 5th 2003. It concerned the Constitutional Court's decision of 2000 that in future elections all polling stations have to be supervised "by members of a judicial body."²² Now, the question was, which institutions should be regarded as judicial bodies, i.e. as organizations belonging to the judiciary. This was of importance because employees of ministries, prosecution authorities and the like are bound by the instructions of their superiors and are therefore easier to influence and control than independent judges. The constitution explicitly

¹⁹Şābir (2002), *yawm labu ta'rikh*: 12ff.; Yaḥyā al-Rifā'ī (2003): "shaykh al-quḍāt yun'ī l-istiqlāl aḍ-ḍā'i". March 18, 2003. [lamalef.net \(www.lamalef.net/news/02/sikkada/html\)](http://www.lamalef.net/news/02/sikkada/html), last visited: May 25, 2010); paragraph 9; "mabādi' al-umam al-muttaḥida al-asāsiyya bi-sha'n istiqlāl al-sulṭa al-qaḍā'iyya", n.A., in: *majallat al-quḍāt* (2002): 117ff.; "mudhakkira idāḥiyya li-mashrū' qānūn bi-ta'dīl ba'ḍ aḥkām qānūn al-sulṭa al-qaḍā'iyya", n.A., in: *majallat al-quḍāt* (2002): 29-34: 33.; "mashrū' quḍāt miṣr li-ta'dīl qānūn al-sulṭa l-qaḍā'iyya wa-mudhakkiratuhu al-idāḥiyya", n.A., nādī quḍāt miṣr, December, 2002: 24-28.

²⁰Hishām Junayna (2003): "liqā'āt ma'ālī wazīr al-'adl bi-rijāl al-qaḍā' wa-majlis idārat nādīhim," in: *majallat al-quḍāt* (2003): 24f.; Zakariyya'Abd al-'Azīz (2004): "risālat ra'īs nādī l-quḍāt," in: *majallat al-quḍāt* (2004): 1-6.;

²¹baheyya, 2006, February 22. "Honour." (<http://baheyya.blogspot.com/2006/02/honour.html>, last visited: May 25, 2010); "qarār majlis al-a'lā bi-ḥaẓr munāqashāt aw al-ta'qī 'alā qarārātihi bi-ghayr ṭariq al-tazallum fīhā", n.A., (inclosure) in: *majallat al-quḍāt* (2004).

²²Article 88 of the constitution, cited in al-Bishrī (2006), *al-qaḍā' al-miṣrī*: 67.

recognizes regular courts, the State Council and the High Constitutional Court, but leaves the organization and composition of judicial bodies to the legislator.

The case before the Court of Cassation concerned the elections of 2000 and questioned the validity of election results in the district of Shurṭat al-Zaytūn. The Ministry of Justice had delegated not only judges but also lawyers of the State Case Authority (*hay'at qaḍāyā al-dawla*) and the Administrative Prosecution Authority (*hay'at qaḍāyā al-niyāba al-idāriyya*) to supervise polling stations.²³ In Shurṭat al-Zaytūn, 6 of 49 had been supervised by members of the respective authorities. The Ministry regarded them bodies of the judiciary and argued with the general competence of the legislative branch to organize the latter. But the Court of Cassation ruled for the invalidity of the elections because the two authorities do not exercise judicial functions and therefore should not be regarded as bodies of the judiciary. The verdict, handed down by a circuit chaired by judge Muḥammad Ḥusām al-Dīn al-Ghiryānī, was criticized by state-owned media. And the president of the Court of Cassation and chairman of the Supreme Council of Justice, Fathī Khalīfa, openly disapproved of the decision. This was an unusual event because senior judges like al-Ghiryānī are not subject to review by their superiors.²⁴

2.3 Freedom of Speech

Fathī Khalīfa's critique of al-Ghiryānī's ruling intensified the existing tensions between the Judges' Club and the Supreme Council. During the Club's regular General Assembly in October 2003, several speakers rejected Khalīfa's remarks as a provocation and an infringement of the independence of the judiciary. And two other topics that were discussed at the General Assembly were relevant with regard to the Supreme Council: the Club's legal

²³Employees of these authorities are lawyers, not judges, and represent the state and its institutions before court.

See: Baudouin Dupret and Nathalie Bernard-Maugiron (2002): "Introduction. A General Presentation of Law and Judicial Bodies." *Egypt and its laws*. Ed. Dupret, Baudouin und Bernard-Maugiron, Nathalie. London: 2002: xxiv-ii.

²⁴al-Bishrī (2006), *al-qaḍā' al-miṣrī*: 67f., 83f.

status and the raising of the retirement age that had been introduced by a presidential decree during parliament's recess that summer. Speakers stressed the Club's autonomy versus the Council.²⁵

In the same month, the Supreme Council published a statement that condemned all critique to its decisions as a violation of the judiciary law. It thus denied the Judges' Club to discuss matters as the age of retirement, promotions and salaries, since the Supreme Council is responsible for all of these. And in January 2004 the judges Aḥmad Makkī and Ḥuṣām al-Ghiryānī were officially admonished for their statements during October's General Assembly by the Council that described their demeanor as "without precedent in the history of the judiciary."²⁶

The board of the Judges' Club then convoked an Extraordinary General Assembly for March 12th 2004 to discuss its stance in the confrontation with the Supreme Council. The invitation letter names the divisive points as the independence of the Judges' Club, and the freedom of discussion. It concludes that the position of the Supreme Council, if indeed realized, would void the Club of its most important functions.²⁷

About 3000 judges and public prosecutors convened for the Club's General Assembly. They insisted on their freedom of discussion and the independence of the Judges' Club, subject to no authority but its general assembly. Chairman 'Abd al-'Azīz tried to strike a consoling tone

²⁵baheyya (2006), *Honour*; "qarār majlis al-qaḍā' al-a'lā bi-farḍ wiṣāyatihī 'alā nādī l-quḍāt", n.A., (inclosure) in: majallat al-quḍāt (2004); "ḥaqq al-qaḍā' fī ḥurriyyat al-ta'bī wa-l-i'tiqād wa-l-ijtimā' wa-takwīn al-jam'īyyāt", n.A., (inclosure) in: majallat al-quḍāt (2004); "bayān min majlis idārat nādī l-quḍāt (16.10.2003)", n.A., in: majallat al-quḍāt (2004): 53f.; Moustafa (2003), *Law Versus the State*: 915f.; "mulakhkhaṣ al-kalimāt al-muntazi'a min siyāqihā allatī ulqiyat fī l-jam'iyya al-'umūmiyya bi-nādī l-quḍāt al-ma'qūda fī yawm al-jum'a 18 uktūbar sana 2003 wa-qad tu'ashshar 'alā kull ṣafḥa bi-mā yufīd al-naẓr min al-sayyid al-mustashār ra'īs maḥkamat al-naqḍ", n.A., in: majallat al-quḍāt (2004): 25-29.

²⁶baheyya (2006), *Honour*.

²⁷'Abd al-'Azīz (2004), *risālat ra'īs*.

towards the Supreme Council, reassuring it of the Club's respect, while he criticized its chairman Fathī Khalīfa at the same time, alluding to his past role in an incident known as the "massacre of the judiciary." The admonished judges al-Ghiryānī and Makkī were greeted by the Assembly with cheers and applause that lasted for minutes, several speakers promising the Judges' Club's support for them. The relatively unknown judge Maḥmūd al-Khuḍayrī gave an extraordinarily inspiring speech at this occasion.²⁸

His appearance before the general assembly payed out for al-Khuḍayrī. The Judges' Club of Alexandria held its elections just one month later and al-Khuḍayrī succeeded with a majority of just two votes over 'Izzat 'Ajwa, thus becoming the new chairman. One year later the Judges' Club of Alexandria was to take the leading role in the confrontation with the regime.

2.4 The State of the Judiciary and the Amendment of the Judiciary Law

The Club's legal status, opposition to the raising of the retirement age, and the critique and admonishment of high ranking judges – set against the backdrop of the next years' unfolding events, all these issues appear as variations of one central theme: the independence of the judiciary. And this theme becomes apparent most directly in the Judges' Club's proposal for a new judiciary law. The Club had been calling for an amendment of the existing legislation (1972/46) ever since the Conference of Justice in 1986, and a committee of the Club, headed by judge Yaḥyā al-Rifā'ī, had prepared a draft as early as 1991. After a futile yet time consuming attempt to work out a common draft in cooperation with the Ministry of Justice, the Club's General Assembly of March 2004 agreed upon the Club's own draft and commissioned its board to see it introduced into parliament. This happened on March 20th 2005 and the draft was presented to the public during the conference in early April of the

²⁸Aḥmad Ṣābir (2004): "al-ḡam'iyya al-'umūmiyya ḡayr 'ādiyya li-nādī l-quḍāt allatī 'uqīdat fī 12.03.2004", in: *maḡallat al-quḍāt* (2004, Aug): 141-57.

same year.²⁹

The ultimate motive in most of the draft's provisions is to hinder or limit influence by the executive branch on the judiciary.³⁰ For although the constitution declares the judiciary to be independent, and despite the fact that courts and judges enjoy legal guarantees similar to those in Western European countries for example, the judiciary law of 1972 enables the executive branch to exert influence both at the top and at the bottom of the judicial hierarchy. At the bottom for example, the Minister of Justice has full control over the Courts of First Instance (*maḥkama ibtidā'iyya*), which he is free to establish and assign their presidents who have to be confirmed in office annually. Even decisions of the courts' general assemblies, which distribute cases to their respective circuits, have to be endorsed by the Minister.³¹ The Club's draft proposed to transfer some of these functions to the Supreme Council of Justice. In effect, the Ministry's administrative supervision would be limited to courts, and the Council's supervision to judges.³²

While the Courts of First Instance are on the lower level in (regular) court hierarchy, the Court of Cassation (*maḥkamat al-naqd*) stands at its top. Its president, the most senior judge in the judiciary's ordinary branch, is appointed by the President of State. He is by office chairman of the Supreme Council of Justice (*majlis al-qaḍā' al-a'lā'*), which is the regular judiciary's highest body in administrative terms. The Council is responsible for judges and employees of the prosecution in terms of their appointment, advancement, relocation, etc.. Also, the Council has to be consulted about any legislation that concerns the members of the

²⁹ Aḥmad Hishām Junayna (2002): "liqā'āt ma'ālī wazīr al-'adl al-mustashār Fārūq Sayf al-Naṣr bi-majlis idārat nādi l-quḍāt," in: *majallat al-quḍāt* (2002): 9-11. p.9f.; bayān min majlis (2004); qarār majlis al-a'lā' (2004); "al-bayān aṣ-ṣādir 'an al-jam'iyya l-'umūmiyya", n.A., in: *majallat al-quḍāt* (2004): 102-4.

³⁰ "mashrū' quḍāt miṣr" (2002).

³¹ al-Bishrī (2006), *al-qaḍā' al-miṣrī*: 40ff; Kienle (2001), *Grand Delusion*: 41ff., 44ff..

³² "mashrū' quḍāt miṣr" (2002). §6, 44, 77, 78, 93, 161; al-Bishrī (2006), *al-qaḍā' al-miṣrī*: 40ff. 94ff.; al-Rifā'i (2003), *shaykh al-quḍāt*: pa. 15.

judiciary.³³ Here, the Club's draft intended to strengthen the principle of representation. It proposed that the majority of members should be elected by the General Assemblies of the Court of Cassation and the Court of Appeal in Cairo.³⁴

Ever since the revolution of 1952, the subsequent regimes' main method to secure rulings in their interest was to circumvent the ordinary judiciary, rather than to directly control, reshape, or abolish the existing system. For this purpose, special courts were set up outside of the ordinary court system. Today for instance, there are the State Security Courts (*maḥākim amn al-dawla ṭawāri'*) that can be established because of the State of Emergency that has been continuously declared since 1981. In State Security Courts the judges are appointed and there is no chance to appeal a verdict. Military Courts provide another way to circumvent regular procedures. Technically, Military Courts are part of the ordinary court system.

However, military judges are easier to control than their counterparts, and under the State of Emergency the President of State may refer any case, even against civilians, to either Military or State Security Courts. These measures have been used in the past as a drastic measure to silence political opposition.³⁵ It is noteworthy that the Judges' Club's draft does not raise any demands in this regard. However, individual judges have called to end the State of Emergency. In addition, there were frequent demands to limit the definition of "judicial body" to courts in the strict sense and to unify Egypt's threefold judiciary.³⁶

Apart from such organizational matters, there were other infringements on the independence of the judiciary that the Judges' Club's draft law attended to. For the deliberalization of the 1990s had not so much happened through changed legal provisions but through a different

³³Law 1972/46: §77.

³⁴"mashrū' quḍāt miṣr" (2002): §44, 77, 79, 81, p.50f.; al-Bishrī (2006), *al-qaḍā' al-miṣrī*: 94ff.

³⁵Kienle (2001), *Grand Delusion*: 46ff.; Dupret/Bernard-Maugiron (2002), "A General Presentation": xxxvi.

³⁶"mashrū' quḍāt miṣr" (2002): §130, 51f.; al-Bishrī (2006), *al-qaḍā' al-miṣrī*: 43-46, 91f.; al-Rifā'ī (2003), *ṣayḥ al-quḍāt*: pa. 18.

application of the existing rules and institutions. That way, the judiciary could be influenced without openly deviating from the process of democratization. For example, the granting of bonuses and gratifications to conforming judges by the Ministry of Justice evolved into an elaborate system under minister Fārūq Maḥmūd Sayf al-Naṣr (1987-2004). Well paid contracts to advise ministries and authorities belong into the same context. And lastly, the Minister of Justice as well as court presidents have sometimes exceeded their legal authority by meddling with the distribution of cases within courts and sometimes even with the very process of ruling.³⁷ To counter these developments, the Club's proposed draft demands the financial self-administration of courts. Salaries, bonuses and gratifications should depend on function alone, and possibilities to work outside of the judiciary be strictly limited.³⁸

And finally the draft spells out the recognition of the Judges' Club as the general representation of judges and state prosecutors with all the proper privileges and duties of a syndicate. The Club would be subordinate to no other authority but its General Assembly, whose approval would be needed to establish any organization or body in the name of judges or justice, and members have the right to comment and discuss freely all matters directly or indirectly relating to them.³⁹

If fully implemented, the draft proposed by the Judges' Club of Egypt would severely limit the regime's potential to influence jurisdiction. Also, it would reduce the function of the Supreme Council of the Judiciary. It is no wonder then, that the latter became the Club's main contender in the following months and years.

³⁷Kienle (2001), *Grand Delusion*: 124ff., 42-48; al-Bishrī (2006), *al-qaḍā' al-miṣrī*: 25-30; al-Rifā'ī (2003), *ṣayḥ al-quḍāt*: pa. 12.

³⁸al-Bishrī (2006), *al-qaḍā' al-miṣrī*: 28ff.; "mashrū' quḍāt miṣr" (2002): §68, 70, 77, 79; al-Rifā'ī (2003), *ṣayḥ al-quḍāt*: pa. 18.

³⁹"mashrū' quḍāt miṣr" (2002): §130, p.51f.

3 The Conflict

At the beginning of 2005, the amendment of the judiciary law still had not made any progress. The Ministry of Justice continued to signal support for the Judges' Club's demands, but nothing followed, and relations to the Supreme Council deteriorated. Then the elections scheduled for that year, and the regime's need for legitimacy described above, gave judges a means to press for the enactment of their draft.

On May 30th 2005 a Special General Assembly of the Judges' Club convened to renew their demands. A little earlier, the date for the referendum on the constitutional amendment had been set - that is the amendment of article 76 that would allow multiple presidential candidates for the first time. In this situation the Assembly decided to issue the threat to boycott the parliamentary and presidential elections.⁴⁰ The conditions to call off the boycott was for the Club's draft to be passed until September 2nd, and that a complete supervision of elections by judges be guaranteed. Considering the referendum, judges would participate in supervision but denied any responsibility for the fairness of the polling.

With their boycott threat and the second stipulation - full supervision - the Judges' Club had tied its core demand of an amendment of the judiciary law to issues with more political relevance and urgency. This step decisively changed the nature of the controversies between judges and the state and led to further escalation. The ensuing conflict can be roughly divided in three different phases that follow their own dynamics. The first phase, from April to September 2005, was determined by the boycott threat, the elections dominated the second phase until December 2005, followed by a final standoff that lasted until June 2006.

3.1 The Boycott Threat

The General Assembly of May 2005 had set September 2nd as the deadline for their demands

⁴⁰This step was preceded by an Special General Assembly of the Judges' Club of Alexandria, headed by its new chairman al-Khudayri, on March 18th where the supervision of elections was directly linked to the demands of the Judges' Club for the first time.

to be met. Until then the Judges' Club continued to call for an amendment of the judiciary law, and it tried to influence how the elections of that year would be organized. For after the referendum, the laws organizing both the presidential and the parliamentary elections were discussed and modified, followed by the actual organizational work of the respective election committees.

Concerning the referendum on May 25th, many judges had considered its supervision a test run for autumn's elections. The official results showed an approval rate of 82,86% for the amendment and a quorum of 53,64%. Yet pictures of demonstrators beaten up by security forces stained the image of a clean election process that the government press tried to paint. And the Judges' Club had set up a committee of inquiry to evaluate the referendum.⁴¹ It examined witnesses and presented its final report to the Club's board in July 2005. But even before the final report was issued, prominent judges leaked details of the evaluations to the public, mostly accounts of irregularities. These frequent statements and public appearances of judges kept the Committee's work in the headlines of independent and oppositional newspapers throughout June 2006, just when the organization of elections was discussed in parliament.⁴²

With regard to the laws organizing the elections, the Judges' Club made a series of proposals, which they compiled in a published memorandum for the Minister of Justice. These focused on the "full supervision of elections" (*al-ishrāf al-kāmil 'alā l-intikhābāt*), which meant that the elections should take place over a certain period of time to enable judges to supervise all

⁴¹Again, the national Club's decision was preceded by similar steps taken by the Alexandrian branch.

⁴²The committee's final report published in July 2005 contradicted the official results and numbers on several accounts. According to the report, 95% of all stations had been controlled by civil servants, not judges, and the principle of seniority had been neglected in the distribution of members of the judiciary to polling stations. The official quorum of 50% was obviously wrong, since in stations supervised by judges the average participation had not exceeded 3%. The report further lamented that authorities had not fully cooperated and even attempted to interfere with the committee's work.

polling stations, the merging of smaller stations, and the establishment of larger election centers for densely populated areas. The composition of the election commission was another issue. As the Consultative Council (*majlis al-shūrā*) discussed the law on the presidential elections, several of the Judges' Club's demands were adopted. Nevertheless, when the People's Chamber enacted the law on June 16th, it voted on the original draft, i.e. for elections to be held on a single day, a limitation of judicial supervision to larger polling stations, and a ban of international monitoring. Except for the transfer of the chairmanship of the election commission to a senior judge, none of the Judges' Club's demands had been met.⁴³

The High Commission for the Presidential Elections took up its work in July 18th. It was charged with organizing the presidential elections, i.e. the candidature, regulation of the campaigns, polling and supervision, and finally the counting and the releasing of the results. Additionally, the High Commission handled and decided on complaints.

In order to constantly follow and comment on the work of the High Commission, the Judges' Club established the Committee to Implement the Decision of the General Assembly (*al-lajna al-'ulyā li-mutāba'at qarārāt al-jam'iyya al-'umūmiyya al-tāri'a li-nādī l-quḍāt*). The Committee made a variety of suggestions on how to organize the elections and their supervision. It also proposed a meeting with the Commission to negotiate and discuss the details. The Commission did meet with the official representatives of the judiciary but refused to consult with the Judges' Club. Nevertheless some of the Club's proposals were accepted, the establishment of election centers for example, and the use of phosphorus ink to mark electors' thumbs after casting their vote in order to prevent repeated voting.

With regard to the parliamentary elections, the pattern of events in this phase was very similar. The law for the exercise of political rights was amended on June 23th. Again, few of the judges' demands had been recognized. The chairmanship of the High Election Commission

⁴³The law was declared unconstitutional, a revised version finally passed on July 4th, just one day before parliament went into recess for the summer.

(*al-lajna al-'ulyā li-l-intikhābāt*) still lay with the Minister of Justice, and he could appoint several other members of the Commission. Also, the law did not necessitate an update of election registers, although the existing lists contained names of people deceased and emigrated.

Meanwhile, the judges' boycott threat and its other activities generated mixed responses. They can be summed up as confrontation, cooptation, and procrastination. The Supreme Judiciary Council for instance confronted the Club on several issues. It considered public statements made by judges and their Club a form of illegal political activism. After the boycott threat had been issued, Fathī Khalīfa denied the Judges' Club's right to speak in the name of judges and declared the supervision of elections a "sacred duty" that had to be carried out without conditions. In addition, the evaluation of the referendum had been obstructed on various levels, as for example by the State Prosecution which investigated against some of its members because of cooperation with the Judges' Club.

The Ministry of Justice on the other hand, did not confront the Judges' Club directly at that time. Officially it considered the current situation a conflict internal to the judiciary, a matter strictly between the Supreme Council and the judges. But at the same time, the Ministry and other parts of the state apparatus mobilized lawyers among its civil servants to be able to carry out the supervision even without judges. Also there were attempts to divide judges on the boycott issue. Several court presidents offered higher bonuses for judges willing to supervise elections in autumn, and in some regional branches of the Judges' Club chairmen went at odds with the decisions of their General Assemblies and spoke out against the boycott, which led to some resignations from office and re-elections. In August, the Minister of Justice Abū l-Layl announced the largest advancements in the judiciary in the history of Egypt, opened a Club house for the Alexandrian Judges' Club and promised further funding, new court buildings, a computer for every judge, and so on.

And lastly, the amendment of the judiciary law was being negotiated and delayed. In June the Ministry announced that it had accepted several of the judges' demands and said the

remaining issues would be negotiated with the Club's board members in the near future. At the same time it sent a draft to the Supreme Judiciary Council – taking the view of the bodies of judiciary was a necessary step before introducing it into parliament. So, the process seemed well under way, but as parliament went into recess at the beginning of July the Council still had not finished its decision making process, which meant that it was not possible anymore to enact the amendment before the elections or the deadline set for the judges' boycott threat.

3.2 *The Elections*

The Judges' Club's ultimatum ended on September 2nd 2005, the day of its General Assembly. In the end, the Assembly voted against a boycott and decided to perform its duty of supervising the presidential and parliamentary elections. Yet the Club upheld its demands and added new ones. In the previous weeks the Club's board had raised the pressure by calling for an admission of NGOs and representatives of the candidates into polling stations, and it had proposed to form a special committee for the supervision and monitoring of elections that would also collect complains, a task the Supreme Council claimed for itself. The Assembly accepted all these proposals and further demanded that all supervision should be carried out by judges only, while respecting the principle of seniority. Chairman 'Abd al-'Azīz directly attacked the Election Committee and its head Mamḍūḥ Mar'ī, accusing them of obstructing an effective supervision and thus damaging the legitimacy of the presidency and Egypt's standing in the world. Also, the General Assembly condemned the Election Committee's decision to exclude 1700 judges from supervision – mostly supporters of the boycott – and demanded that it be reversed.

All in all the presidential elections on September 7th 2005 went down in a rather calm manner. There were reports of irregularities, but no violence or riots ensued. Ḥusnī Mubārak was reelected as president with an approval of 88.5% and an official quorum of 23%. NGOs and the Judges' Club's special committee started to write their reports on the elections, but no one really doubted that the result – the reelection of president Mubārak – was valid in principle.

The two months between the presidential elections and the parliamentary elections in

November 2005 were rather calm. The Election Committee, headed by Minister of Justice Abū l-Layl, took up its work on September 20th. The Judges' Club made several proposals as to the organization of elections, some of which were indeed accepted: Egyptian NGOs were permitted to monitor the elections, a method was decided to identify voters without the proper papers, copies of election registers were made accessible for the candidates' staff, polling stations were not set up in police stations, every ballot box put under the control of one supervisor, and distribution of supervisors according to their rank was promised.

The Committee seemed serious about cooperating with the Judges' Club and NGOs, and the Minister repeated his promise of a "full supervision by the judiciary" at every occasion. The Judges' Club in turn sent a wire to president Mubārak, praising the advances on the way to true democratic elections. Relations between the Ministry and the Club's board appeared cordial once again and some suspected that a deal had been struck.

Like in 2000, parliamentary elections in 2005 took place in three rounds, divided by gouvernements, with one rerun each.⁴⁴ Compared to previous elections, supervision by members of the judiciary was imposed on a broader basis, yet it was far from complete; according to NGOs, only 15% of the polling stations were supervised by judges, the rest by civil servants. Aḥmad Makkī wrote a letter to chairman 'Abd al-'Azīz, stating that judges should not take responsibility for the results of this election.

Already the first round showed remarkable changes to previous elections. The absence of party lists and the unprecedented number of independent candidates, Muslimbrothers, as well as independents intent on joining the NDP after the elections, led to more competition. Reruns had to be scheduled for most districts, and the level of violence, mostly by hired thugs and supporters of the candidates, started to rise with the first rerun. The success of many

⁴⁴The first round started on November 9th with the rerun on November 15th, the second round began on November 20th, rerun on the 26th, and the third and final round was scheduled for December 1st with the rerun on the 7th.

candidates belonging to the Muslimbrotherhood made things even worse in the second and third round. There were dead and wounded, cars burned, a candidate was kidnapped, voters threatened and access to polling stations limited to members of the NDP, polling boxes were stolen and a supervising judge was attacked. The police stepped in only seldom but arrested hundreds of Muslimbrothers.

In the end, thanks to many independents rejoining the NDP, the government party could secure a two thirds majority, 88 of 432 went to the Muslimbrothers, together with other oppositional parties and independents they represent one quarter of parliament.

3.3 After the Elections

Although the events with the gravest and most immediate political ramifications were now over, the situation did not calm down. The issues that remained at stake were the new judiciary law, the evaluation of the past national elections, as well as the internal elections of the Judges' Club that were scheduled for December 2005.

Before the electoral General Assembly in December anonymous pamphlets and letters with accusations circulated, and they were clearly intended at removing 'Abd al-'Azīz and his list from office. The authority of the reform-minded board to speak for the majority of judges at that time was disputable because of internal strife during the elections.⁴⁵ However, 'Abd al-'Azīz, surrounded by supporters of the past boycott threat, won by a large margin against the list of pro-regime 'Ādil al-Shurbājī and the independent list of Īhāb al-Muṭṭalīb. And on other issues, the Assembly rejected another raising of the retirement age, and requested from the Supreme Council to finally announce its position on the draft for the judiciary law.

The past elections were discussed also. As before, the Club had formed a special committee to

⁴⁵Members of the Club, including leading figures of the Alexandrian branch, had wanted to stop the election process or at least boycott the supervision after the level of violence had risen throughout each election round. But the Board had insisted on negotiations with the Ministry to solve the problem, so that members started collecting signatures to convene a General Assembly and overrule the Board.

evaluate the elections. The committee's final report was scheduled to be presented in March 2006 during the next General Assembly. But reports and leaks concerning the committee's work made it an important topic long before. Its members had already encountered difficulties during the elections, and some reported that they had received anonymous phone threats. And the Supreme Judiciary Council had threatened to investigate against all judges talking about fraud to the press. It may well be that this pressure helped to reunite the factions that had appeared in the reform camp during the national elections. The General Assembly in December 2005 voted to bind future supervision of elections to the fulfillment of all the Club's demands, and it requested from the State Prosecution to start investigations for electoral fraud.

From here on, matters started to escalate quickly. The Supreme Judiciary Council had finished considering the draft for an amendment of the judiciary law by the middle of January 2006 and sent its position to the Ministry of Justice. Details leaked to the press and it appeared that the Supreme Council had changed the draft to an extent that the Judges' Club considered it a new draft entirely. For example, it intended to raise the retirement age to 72 years and place the Club under the control of the Council. The Minister tried to mediate between the Council and the Club, that had convened an emergency session of its board. He promised to inform the Club on all future development and to include it in negotiations.

Yet at the beginning of February 2006 the Ministry started to exert pressure on the Club again, while trying to convince it to accept the Supreme Council's changes to the draft. The Minister halted government funding of the Judges' Club, and high ranking judges were pressed to stop investigating against police officers in the evaluation of the elections. The Alexandrian Judges' Club decided to stage a public demonstration in response. On February 17th, between 200 and 400 judges convened on the steps of the Judges' Club building in Alexandria and stood still in silent protest for about an hour. This form of protest was to shape the public image of the conflict in the coming months. Soon other local branches decided to organize similar protests, and the national Club intended to protest publicly

alongside its General Assembly in March.

Meanwhile, the Supreme Judiciary Council took to more drastic measures against the Judges' Club's evaluation of the elections. At that time, election results in several districts had been declared invalid by courts. And although the rulings were not implemented by parliament, the evaluations by the Judges' Club could further undermine the legitimacy of the government. As with previous reports by the Club's committees, details had been leaked to the press, this time including the names of judges who were suspected to have participated in electoral fraud. Based on these leaks to the press, the Supreme Council in February and March 2006 referred several prominent judges, including the Club's secretary general, to interrogation on the charges of engaging in politics and harming the dignity of the judiciary.

The General Assembly on March 17th 2006 condemned the Council's decision, which had occurred in close proximity to the dates of the Club's demonstrations, as well as the freezing of government funding by the Ministry as attempts to intimidate judges. The Assembly rejected the Supreme Council's draft for an amendment of the judiciary law, renewed the Club's well known demands, and delegated the Club's Board to organize another public protest for May 25th. However, this latest protest was of an entirely new quality, because for the first time the Club invited all interested groups, parties, and citizens to participate.

A month later, on April 17th the Minister of Justice responded to a request by the State Prosecutor and referred prominent pro-reform judges Maḥmūd Makkī and Hishām al-Baṣṭawīsī to a disciplinary board. This was the most drastic step possible because the board had to decide on the professional competence of the judges questioned. There are only two possible outcomes, either censure or discharge. A disciplinary hearing of such high ranking judges was unprecedented. Fathī Khalīfa was by office the chairman of the board.

The Board of the Judges' Club held an emergency meeting and decided unlimited protests and demonstrations until April 27th, the day of the disciplinary hearing. The hearing was adjourned two times and was not resolved until May. The judges' protest began on April 18th, joined by various political activists and diverse groups of society signaling their support. On

April 24th serious riots ensued as police dissolved a gathering of demonstrators in front of the Judges' Club. One judge was attacked, injured and arrested. The days of hearing on April 27th, May 11th and May 18th also were accompanied by large demonstrations, riots, arrests and physical attacks on demonstrators, reporters, and members of parliament participating in the demonstrations.

The independence of the judiciary had become the prime political issue in these weeks and, as blogger *baheyya* put it at the beginning of May, "every major pundit has written about the judges' saga in the last two weeks."⁴⁶ All the while negotiations took place between the Club and the Ministry of Justice that demanded compliance with the Supreme Council's draft law and to halt investigations into electoral fraud. The Judges' Club however did not change its position but sent open letters to president Mubārak, asking him to intervene. The President still regarded the issue an affair internal to the judiciary, proclaiming himself a stark opponent of its independence.

Yet until the final day of the disciplinary hearing, pressure to bring things to an end had risen remarkably. The riots surrounding the previous session of the disciplinary board had been devastating, the press wrote that downtown Cairo looked like "military barracks" as several thousand security forces tried to dissolve the gathering of several thousand protesters.⁴⁷

International NGOs had expressed their concern, a representative of the European Union had stated his utter lack of understanding for what happened in Egypt, and more and more public figures joined ranks with the judges. Even investments were suffering, as the responsible minister declared.

Although the accused judges did not attend the final hearing – al-Baṣṭawīsī had suffered a

⁴⁶[baheyya](http://baheyya.blogspot.com/2006/05/mubarak-fin-du-rgime.html), 2006, May 2: "Mubarak. Fin du Régime?", (<http://baheyya.blogspot.com/2006/05/mubarak-fin-du-rgime.html>; last visited: 2010, May 25).

⁴⁷[jarīdat al-wafd](#): 2006, May 12. Sha'bān, Waḥīd: "ta'jīl muḥākamat Makkī wa-l-Baṣṭawīsī wa-ḍarb al-jamāhīr wa-'tiqāl al-'asharāt."

heart attack two nights before – and their defendants had suggested to adjourn the session once more, Fathī Khalīfa insisted on hearing the defense’s pleading. The defense did not deal with the actual content of the claim against Makkī and al-Baṣṭawīsī. Instead they argued that Khalīfa and other members of the board were biased and partial and should be replaced. The true motives for the hearing, according to the defense, were the Judges' Club's demands and the reports about the elections. The Supreme Council declared its verdict after only brief consultation. It issued a reproof of al-Baṣṭawīsīs and acquitted Makkī of all charges.⁴⁸ The Judges' Club saw the disciplinary board's decision as a clear victory and decided to end its open protests.

While the protests of the Judges' Club and the public support for their cause succeeded in bringing the disciplinary measures against its members to an end, they failed with regard to the Club's main goal. A day before the silent vigil of the judges on May 25th that had been scheduled for a long time, the president of the People's Chamber declared that an amendment of the judiciary law would be passed before parliament went into summer recess. This left hardly any time for negotiations, and two days later the Ministry of Justice presented the draft it had prepared. During the next month, judges were consoled by promises and concessions. The Ministry's draft was changed repeatedly and in accordance with the Club's wishes, only for these changes to be taken back in the end. Amidst uproar by the Club, open letters to the President of State, Emergency General Assemblies and oppositional members of parliament leaving the building out of protest, the People’s Chamber passed the amendment to the judiciary law (2006/142) on June 26th in the form originally proposed by the Ministry of Justice.

Neither the Club nor the opposition were satisfied with the contents of the amendment, nor with the way it was produced or passed. The goal of an independent judiciary had been reached partially at best. Courts enjoyed more financial autonomy but the Judges' Club still

⁴⁸The latter outcome is actually not foreseen by the law (baheyya, 2006, May 2).

was not recognized, nor were the members of the Judiciary Council to be elected.

3.4 The End of the Conflict

After the elections and the amendment of the judiciary law the regime seemed intent to break the reform movement within the Judges' Club. First, strict opponents of the reform movement in the judiciary were put into key positions: Mamdūh Mar'ī was appointed the new Minister of Justice in August 2006, and Muqbil Shākir, the former president of the Judges' Club until 2001, replaced Faṭḥī Khalīfa in his position as president of the Court of Cassation and head of the Supreme Council. Since his installation, Mar'ī has produced a series of draft laws that would further limit the independence of judges and courts. In November 2006, plans to place the Judges' Club under the jurisdiction and control of the Ministry were leaked to the public.⁴⁹ A year later, a draft law on the powers of the newly established Council of Judicial Bodies (*majlis al-hay'āt al-qaḍā'iyya*) threatened to restrict judges' immunity and curb the financial self-administration of courts.⁵⁰ And in July 2009, Mar'ī attempted to change the composition of the Supreme Council of Justice. He intended to add to its members two presidents of Courts of First Instance, who are easier to control by the Ministry.⁵¹ However, none of these drafts was enacted, due to the harsh criticism they provoked; in November 2007 the President of State got involved and ordered Mar'ī to retract his draft.⁵² Whereas the Ministry of Justice's did not pass laws that would formally restrict the independence of the judiciary, the Judges' Club was robbed of its primary means to pressure the government when an amendment to the constitution in March 2007 limited the

⁴⁹al-maṣrī al-yawm: 2006, Nov 8. Amīn, Ṭāriq: "mufāja'a. al-ḥukūma tu'idd qānūnan yujiz li-'adl al-ishrāf wa-l-riqāba 'alā nādī al-quḍāt."

⁵⁰al-maṣrī l-yawm: 2007, Nov 20. Ṭāriq, Amīn: "al-maṣrī l-yawm tanshur mashrū' qānūn jadīdan li-l-sayṭara al-kāmila 'alā al-sulṭa al-qaḍā'iyya."

⁵¹Al-Ahram Weekly: 2009, Jul 9. El-Nahhas, Mona: "Mubarak quashes degree."

⁵²jarīdat al-wafd: 2007, Dec 2. Sha'bān, Waḥīd: "fī l-jam'iyya l-'umūmiyya li-nādī l-quḍāt ittiṣāl hātifī min al-ri'āsa naza' fatīl al-azma."

supervision of elections by the judiciary to the major polling stations once again.⁵³ This amendment curtailed the possible effect of future threats to boycott elections to a minimum. The pressure on the reform oriented Judges' Club was kept up on other levels as well. One of Mar'ī's first actions in office was to freeze again all financial support to the Club. In November 2006 the accounts of several regional branches of the Club were examined, although these receive no more than a few thousand Egyptian Pounds annually. Threats were made to sell the estates of the Club and payment for housekeepers and secretaries of the Club was stopped. Because of the reduced and halted government subsidies the Club's General Assembly in 2008 decided to raise the monthly fee for members from two to twenty Egyptian pounds. And later chairman 'Abd al-'Azīz announced that he would strip 3000 judges from their membership because they had not payed the raised fees.

The raising of membership fees and the threat to oust so many judges were very unpopular and opposed by several local branches of the Club.⁵⁴ Even before, in May 2007, there had been attempts to mobilize local clubs against the national organization. The president of the Judges' Club in Asyūṭ had tried to found a second national Judges' Club in Jīza to rival the existing organization, but had failed in winning the allegiance of other branches.⁵⁵

Nevertheless, the continuing pressure from the Ministry, strains between the Club and the Supreme Council of Justice over appearances in the media, had taken its effect on the reform movement and its supporters. When the Courts of Appellation elected a new board, many

⁵³al-maṣrī l-yawm: 2007, Jan 14. Abū Shāl, Nabīl: "al-quḍāt yuṭālībūn Mubārak bi-munāqashatihim ḥawl ta'dīlāt al-dustūr."; Al-Ahram Weekly: 2007, Mar 22. El-Nahas, Mona: "Judges to boycott referendum."

⁵⁴majallat rūz al-yūsif: 2008, Nov 10. Ghāzī. Ayman: "azmat al-18 jinēh tatafāqam 'alā Zakariyya 'Abd al-'Azīz ba'd taḍāmun 15 ra'īs nādī quḍāt ḍiddahu."

⁵⁵al-maṣrī l-yawm: 2007, May 11. Jāb Allāh, Khalīfa: "'Abd al-'Azīz. «nādī quḍāt al-jīza» da'wa li-l-fitna wa-ikhtirāq aṣ-ṣaff .. wa-ṣāhibhā fashal ma' ru'asā' al-andiya."

members hoped that it could function as an alternative to the Judges' Club.⁵⁶

The dwindling support for the reform movement showed clearly in the Club's internal elections. In January 2008, prominent reformer Maḥmūd al-Khuḍayrī lost the chairmanship of the Alexandrian Judges' Club to Ismā'īl al-Basyūnī, whom many thought to have the backing of the Ministry. About a year later, in February 2009, the reform camp lost their majority and the chairmanship on the national Judges' Club as well. 'Abd al-'Azīz had not run as a candidate again. The new president, Aḥmad al-Zind, announced very early that one of his main goals was to keep the Club out of politics.⁵⁷

However, the reform movement has not disappeared altogether. In May and June 2009 two regional Judges' Clubs elected reform minded boards and presidents. And in Alexandria, the deep rift between the two factions on the administrative board have led to the resignation of Ismā'īl al-Basyūnī in November 2009.

4 Some Remarks

The years 2000-2007 should be considered a characteristic phase in the relations between the judiciary and the regime in Egypt, marked by the considerable leverage judges gained from the decision of the Supreme Constitutional Court in 2000, i.e. that members of the judiciary should supervise elections in all polling stations. In short, the Judges' Club utilized this function ascribed to its members and threatened to boycott the supervision of the presidential and parliamentary elections in 2005. They did so to push the government into accepting their demands, detailed in a draft for an amendment of the judiciary law, and to secure a fair and just election process. Once the elections were over, judges' reports of irregularities held up the pressure. The government reacted with a curious mixture of reassuring promises,

⁵⁶al-masrī l-yawm: 2008, Dec 19. Amīn, Ṭāriq: "1000 qāḍin yaḥtārūn al-yawm majlisan jadīdan li-«mustashārī al-isti'nāf» wa-maṣādir tu'akkid. «al-jam'iyya sa-takūn badīlan li-nādī l-quḍāt»."

⁵⁷al-masrī l-yawm: 2009, Feb 16. Amīn, Ṭāriq: "ra'īs nādī l-quḍāt al-jadīd yamna' a'ḍā' majlisihi min al-taṣrīḥāt al-i'lāmiyya."

procrastination, attempts to charm judges into compliance, and indirect pressure. The most drastic measure was to take disciplinary action against senior judges, which led to huge demonstrations encompassing various actors. As to its outcome, the conflict wasn't resolved but cooled down as government altered laws and the constitution to take away the judges' most obvious means of pressure. Ever since, controversies have been flaring up now and then, although not to the same degree as in 2005 and 2006 when judges made headlines and were deemed heroes often enough.

After seven years of contestation the Judges' Club had not been able to reach its goals. Although singular issues were indeed settled in the interest of the Club – financial self-administration, a Council of Justice more powerful vis a vis the ministry – these changes are rather insignificant as long as other core demands – the election of members of the Council of Justice for instance – are not met. Also, the legal status of the Judges' Club is yet unresolved, its abilities curbed by financial sanctions, the supportive protest movement, so vast in 2005 and 2006, stifled by massive arrests and riots. And most of all, the judges' main leverage, their superior role in the supervision of elections as defined by the High Constitutional Court in 2000, has been made obsolete by constitutional amendments in 2007, putting an end to a unique period in the longer history of the strained relations between Egyptian regimes and members of the judiciary keen for independence.

As a case study the description of this conflict can highlight several recent developments in Egyptian politics. For example, the events described here are consistent with two trends described by Kienle and Tamir for the late 1990s, and they update them for the period of 2000-2007: first, that the regime is trying to compensate for the loss of control it suffered from the relative liberalization in the 1980s and economic crisis; and second, the increasing importance of the judiciary in the overall political process, an effect of the same liberalization.⁵⁸

⁵⁸Kienle (2001), *Grand Delusion*: 124-127; Moustafa (2003), *Law Versus the State*: 913-16, 924ff.

In the period of 2000-2007, the first trend is manifested in the appointment of loyal personnel to key positions – the chief of the Supreme Constitutional Court, the head of the Council of Justice, and the Minister of Justice – in amendments to laws and the constitution tailored to the regime’s interests, in illegal measures as the employment of thugs to break up demonstrations or scare away voters, election fraud, in utilizing disciplinary measures, financial pressure, attempts to divide the ranks of opponents, etc.. Evidence for the second trend is the high number of litigations surrounding elections, relations of the Judges' Club to other actors in civil society and a change in rhetoric: phrases like "full judicial supervision" and "independence of the judiciary" have become part of common media language and are used as slogans by all political parties.⁵⁹

Also, this conflict offers some insights into how interests can be represented in an autocratic state, as well as into the mechanisms to contain opposition and critique within acceptable limits. In this regard, it is worthwhile to look at the means of contestation available to each party. The Judges' Club has only little institutionalized powers because it is not officially recognized as the representative of judges, i.e. their syndicate. Mobilizing its members to boycott the supervision of elections gave the club considerable leverage to blemish the reputation and legitimacy of the Egyptian government. However, after the boycott threat was off the table, the Club's only influence lay in garnering public support. It received the media's attention in a wider scale for the first time with its boycott threats in March and May 2005. Live coverage of May's General Assembly by the satellite news network *al-jazīra* was prevented only by temporarily arresting its reporter on the ground. Later on, the better part of the pressure the Judges' Club managed to exert resulted from the fact that other actors took up the judges' cause and positions, supported and propagated them. These actors were oppositional parties, the *kifāya*-movement, syndicates, interested citizens, and Egyptian as well as international NGOs, who made use of their various channels of action, including

⁵⁹Of course nobody ever openly opposed an independent judiciary. But the frequency as well as the tone of references to these ideals changed since 2006.

litigation.

While the Club may have some expertise and authority on the intricacies of the judiciary law and electoral supervision, this is hardly enough to explain the wide support that it could rally at certain times. Of course, sometimes interests converged, as with some NGOs on the issue of an independent monitoring of elections. The Club included the monitoring in its demands, NGOs in turn used the Judges' Club's evaluation on the referendum in court cases and their public relations work.⁶⁰ But on the whole and in order to gain this kind of wide endorsement, the Judges' Club had to transcend its own members' immediate interests and connect their core demands to broader issues relevant to other actors. The Club did so by presenting itself as the only legitimate representative of judges and the judiciary, it alluded to the fundamental function of justice for society, and the supervision of elections was pictured as a safeguard of democratic principles. Also, prominent judges, the Club's Board and even the General Assembly discussed and took position on political issues not directly related to their profession, calling for an end of the state of emergency for example. And although the Judges' Club's concrete demands were about details beyond the scope of the general political discussion, its rhetorics constantly made use of big themes. 'Abd al-'Azīz for instance called the judges the "nation's conscience", a notion often repeated in the media. And in another context the Club's board bluntly accused the government of "oppressing the people." In this way the Judges' Club was seen as standing in a general political struggle for reform and democratization.

Certainly this political rhetoric has been employed by participants in the reform movement from early on, and there are also large stylistic and political differences between individual judges. Aḥmad Makkī, for instance, accused the Supreme Council of Justice in October 2003

⁶⁰For example, when May's referendum was discussed in parliament, opposition parties and NGOs drew heavily from the work of the Club's Committee and drafted their own reports which ultimately led to an international campaign condemning violence and irregularities during the referendum.

to represent the interests of the regime only, and called the Election Commission an institution with imperial authorities in 2005, while 'Abd al-'Azīz struck a more conciliatory tone most of the time. Nevertheless there is a considerable dynamic in the Club's relation to the public and its immersion in political rhetoric, and this dynamic changed with the General Assembly in March 2006. Until then, the Club had upheld some distance to its supporters and had shied away from common demonstrations, stressing that judges are a part of the state and not opposed to it. But starting with the General Assembly's decision in March 2006, the Judges' Club welcomed interested groups to participate in supportive demonstrations.

There had been good reasons for the Club to not associate itself too much with the groups and individuals who supported their cause. For one, the oppositional agendas of many of these other groups gave credibility to critics of the Club, who accused it of engaging in politics.

Fathī Khalifa called the Judges' Club an assembly of opponents to government, "sick at heart" and presenting but a small fraction of judges. And in addition, the judges' public image and authority relied on the fact that they were usually not part of politics and governing. But by early 2006 the Judges' Club had little else to go by, since a new boycott threat was of no relevance for the next few years. And after the Supreme Council had shown its clear intent to prevent the Club from publishing its evaluation of the elections and had threatened to investigate against any judge talking to the media, the Club had no other option to exert counterpressure than to attract as much public support as possible, both with regard to the defense of the judges who had been referred to disciplinary hearings and with regard to the continuing negotiations on the amendment of the judiciary law.

In comparison the regime has a much wider array of measures at its disposal that have been already mentioned in passing. Most of the measures that were put to use can best be described as indirect means to influence: false promises regarding legislation, partial compromises in the organization of elections, financial pressure on the Club paired with benefits for compliant judges, disciplinary measures, etc.. All in all - and only considering the conflict with the Judges' Club - the regime has steered clear from the kind of drastic measures

that marked the final years in the presidencies of 'Abd al-Nāṣir and al-Sādāt, such as mass arrests, dissolving the boards of syndicates, halting elections, or extending the membership of the organization. However, as the experience of the 1990s had shown, these methods are still not off the table.

In contradistinction to the Judges' Club, the regime's means of control and influence were not limited to the occasion of 2005's elections. The only thing that changed considerably after the end of the elections was its motivation. As long as the elections were underway, the regime had an interest to not estrange judges completely, since an actual boycott of the supervision of elections would have harmed any new governments legitimacy; the continuing negotiations about the judiciary law were no doubt helpful in this. But after the elections, the biggest danger to the same legitimacy was the Judges' Club's evaluation of the elections, which consequently the Supreme Council attempted to stop, and also there was no reason left to keep the judiciary law up in the air. This explains why matters could escalate so easily in 2006 and 2007.

Even though a consideration of the interests as well as the measures available to the participants in this conflict helps to analyze the broad dynamics of its development, focusing on the regime is not very helpful when it comes to understand the chain of events in more detail. And that is because the puzzling and often inconsistent responses to the judges' demands and actions - especially the endless back-and-forth in the amendment of the judiciary law - can be interpreted much better as a result of the considerable leeway various actors seem to enjoy, and of their taking initiative, rather than as an orchestrated strategy. In short, the Minister of Justice, the Supreme Council, and members of both houses of parliament follow different agendas most of the time.

Due to its informal, not institutionalized nature, the composition and functioning of the Egyptian regime is very much unclear. It is working the state apparatus but is not identical

with it.⁶¹ Nevertheless, the regime, however vague as a concept, is indispensable to understand Egyptian politics today. And it does seem to get involved directly on singular issues and at decisive times. Apart from personal interventions by the President of State - as in his phone message to an Assembly of the Judges' Club in November 2007 that announced the withdrawal of a controversial draft law - the regime became noticeable most clearly in those instances when parliament had discussed and made changes to draft laws over weeks and in the end voted on the original version of the draft anyhow, as was the case with one of the laws organizing the elections in 2005 and the judiciary law in 2006.

Finally, one last point that I find worth mentioning is the motivation of judges. From early on in the conflict it was obvious that to further pursue confrontation would lead to manifold disadvantages, as opposed to material incentives stuck out for compliance. Still a majority of judges stayed the course. What proponents of the reform movement themselves see as their motivation is stated quite plainly in public statements, as well as in articles in the Judges' Club's journal: it is their professional honor as judges they appeal to, which many feel has been diminished by their daily experiences on the job.⁶² Ṭāriq al-Bishrī, former vice-president of the State Council, speaks of a 'spirit of autarchy' that stems from a judge's essential function and training and reaches back to Egypt's liberal age.⁶³ The basically independent judiciary that was shaped between the two world wars was never truly abolished, and its legal principles reflect in today's codes of law and the education of the legal profession. The appeal to 'honor' then is an expression of the tension between the institutional settings of the judiciary and the informal practices therein. I think this is something typical, or at least not uncommon for Egypt, i.e. that the seemingly democratic form of institutions and the law

⁶¹Kienle (2001), *Grand Delusion*: 3-10; see also on the related notion of 'elite' and with particular mentioning of methods to investigate elites: Perthes, Volker: "Politics and Elite Change in the Arab World." *Arab Elites. Negotiating the Politics of Change*. Ed. Volker Perthes. Boulder: Lynne Rienner Publishers Inc., 2004.: 1-32.

⁶²One example for an account of these infringements is: al-Rifā'ī (2003), *šayḥ al-quḍāt*.

⁶³al-Bishrī (2006), *al-qaḍā' al-miṣrī*: 9, 43f. 54f.; 91f.

contrasts sharply with the autocratic way institutions function. Especially in the reign of president Mubārak the better parts of the relative liberalization in the 1980s as well as the deliberalization since the 1990s were accomplished not through structural changes but through a change of practice, a new style so to say. The conflict between the Judges' Club of Egypt and the regime in the years 2000-2007 can serve as a reminder that this somewhat contradictory situation comes at a cost. It will be interesting to see whether attempts to formally consolidate the regime's control, such as the constitutional amendment of 2007 and the proposed legislation on terrorism that is presented as a precondition to lift the state of emergency, will increase in the next years to bring down that cost.