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NOHA ABOUELDAHAB

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## BROOKINGS

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# TRANSITIONAL JUSTICE POLICY IN AUTHORITARIAN CONTEXTS: THE CASE OF EGYPT

NOHA ABOUELDAHAB<sup>1</sup>

Transitional justice has increasingly struggled to provide realistic remedies for societies reeling from conflict or decades of authoritarian rule.<sup>2</sup> The transitional justice field traditionally presumes that transitions occur from violent, authoritarian rule to liberal, democratic rule. Such transitions are, in fact, applicable to only a few cases in the vast number of transitions that have occurred in the last few decades.<sup>3</sup> Renewed authoritarianism in Egypt is an example of the multiple challenges that actors face in their pursuit of transitional justice in diverse, non-liberal contexts. The Egyptian transition presents a significant challenge to this presumed path to liberal democracy and, instead, provides a powerful example of the diversity of transitions and the need to respond creatively to them.<sup>4</sup> Egypt's "deep state" institutions, for instance, play an important role in its so-called transitional society. It is those very institutions including the judiciary, the police, and other state security and political agencies that normally engage in the pursuit of transitional justice. In the Egyptian context, however, such deep state institutions use both the language and the tools of transitional justice to entrench authoritarian rule. This is a key difference between the uses of transitional justice in a democratizing state, as opposed to one in which authoritarian rule re-emerges.

While transitional justice seeks to reckon with

the past in order to build a better future, it often loses sight of the current state of affairs, which constitutes a set of weak institutions inherited from the pre-transition period. In Egypt, the actions of corrupt political institutions have led civil society organizations to pursue judicial avenues as a means of redress for both socio-economic and human rights abuses. Much, however, can be done to improve this. Without a realistic assessment of how policymakers and practitioners can make use of institutions in the present to effect the desired change in the future, transitional justice will fail.

This policy briefing argues that transitional justice in Egypt must be engaged in the immediate term, without having to "wait" for democratization to occur. It does so by advancing a gradual transitional justice approach that prioritizes three objectives: foregrounding social justice, strengthening civil society, and increasing judicial activism. First, social and economic crimes like large-scale corruption are often inextricably linked to human rights violations, such as torture and arbitrary detention. States that engage in corruption and economic crimes also pursue policies that violate human rights as a way of propping up authoritarian regimes and protecting their impunity for such crimes. Given the history of rampant large-scale corruption in Egypt, particularly with regard to real

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<sup>2</sup> Loosely understood as a set of judicial and non-judicial measures to address past atrocities, transitional justice comes in various forms including criminal prosecutions, vetting, truth commissions, reparations and other national reconciliation methods. See for example Kirsten J. Fisher and Robert Stewart, eds., *Transitional Justice and the Arab Spring* (London and New York: Routledge, 2014), 1.

<sup>3</sup> Thomas Carothers, "The End of the Transition Paradigm," *Journal of Democracy* 13, no. 1 (January 2002): 5-21, doi: <https://doi.org/10.1353/jod.2002.0003>.

<sup>4</sup> Noha Aboueldahab, *Transitional Justice and the Prosecution of Political Leaders in the Arab Region. A Comparative Study of Egypt, Libya, Tunisia, and Yemen* (Oxford: Hart Publishing, 2017).

estate, it is no surprise that the 2011 uprising's principal demands—"bread, freedom, social justice"—linked socio-economic grievances with human rights crimes. Thus, the calls for social justice were inseparable from justice for civil and political rights violations. Second, while civil society is one of the principal drivers of transitional justice processes in Egypt, it is also one of the most repressed actors under the renewed authoritarian regime. Laws that increasingly restrict the space within which civil society organizations conduct their work thus directly undermine a genuine transitional justice process. Third, given the heavy use of legislation to shape transitional justice so that it serves the interests of the authoritarian regime, judicial activism presents an important strategy to challenge such legislation.

This policy briefing calls for a greater focus on efforts that take into account the current state of civil society, political, and judicial institutions in order to improve the prospects of a peaceful and more just post-conflict setting. In doing so, it emphasizes the importance of transitional justice as a process, as opposed to a definitive outcome. The paper first illustrates the problem of transitional justice policy in authoritarian contexts by explaining the implications of diverse transitions and of the irreconcilable goals of transitional justice as it currently stands. It then uses the Egyptian example to highlight the importance of foregrounding social justice, strengthening civil society, and increasing judicial activism in shaping transitional justice policy to better address contextual realities. The briefing concludes with policy recommendations to this effect.

## **DIVERSE TRANSITIONS AND THE IRRECONCILABLE GOALS OF TRANSITIONAL JUSTICE**

Transitional justice is almost immediately invoked in states undergoing political

transitions. Victims of atrocities, socio-economic grievances, and a range of human rights violations begin to seek and to expect some form of justice—whether it is accountability through criminal trials, compensation and reparations, or truth commissions. The grand objectives of peace, justice, reconciliation, and institutional reform are often promoted as the ideal transitional justice package. They are frequently paraded alongside other ambitious programs of democratization and economic assistance for transitional societies. One of the problems with the projection of such grand objectives is that they are based on false assumptions regarding the liberalizing direction of transitions. Such assumptions prevent the adequate implementation of transitional justice processes in diversified transitions, particularly those marked by renewed authoritarianism.

As a result, transitional justice emerges as an area of practice whose goals are often irreconcilable.<sup>5</sup> It struggles to prioritize both short and long-term goals. For example, victims in societies newly emerging from violent conflict often demand and expect rapid retributive justice, similar to what takes place in a courtroom. On the other hand, internal and external political actors prioritize stability, often at the expense of justice, for the sake of long-term peace. Such considerations are typical of the field's peace versus justice deliberations, a dichotomy that has become increasingly unhelpful in proposing policy recommendations for post-conflict contexts. Notions of "peace" and "justice" are far from monolithic.

Thus, the restrictive framework of liberalizing transitions has important implications for transitional justice scholarship, policy formulation, and practice. Whether within the context of democratization or transitional justice, initiatives such as political party development, elections, and institutional

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<sup>5</sup> Bronwyn Anne Leebaw, "The Irreconcilable Goals of Transitional Justice," *Human Rights Quarterly* 30, no. 1 (2008): 95-118.

reforms do not conform to “rational sequences” resulting in democratization or justice.<sup>6</sup> Rather, they are “chaotic processes of change” that do not follow a linear path of transition.<sup>7</sup> This poses a dilemma for policy makers. Reliance on formulaic approaches that may have worked elsewhere in the world imposes significant limitations on transitional justice’s applicability to varied contexts, including Egypt, where the governing elites have hijacked the transitional justice process to serve their authoritarian interests.

Transitional justice also grapples with the challenges of addressing structural conflict, which has its roots in poverty, hunger, corruption, the plunder of natural resources, and so on. This is reflective of the field’s tendency to focus more on civil and political rights violations than on socio-economic injustices. Consequently, transitional justice is widely regarded to have failed in bringing social justice within its parameters.<sup>8</sup> Moreover, truth commission reports and memorials often advance a particular narrative about the past, leaving other narratives at the margins or forgotten altogether. Finally, political, state security, and judicial institutions are typically involved in advancing transitional justice when those very institutions are implicated in the crimes and injustices they allegedly seek to address. This is a problem of the legacy of deep state institutions in transitional countries, like Egypt.

## TRANSITIONAL JUSTICE IN EGYPT: THE CENTRALITY OF SOCIAL JUSTICE

Since the ouster of President Hosni Mubarak in February 2011, Egypt has pursued transitional justice primarily through criminal prosecutions. High-level political leaders—including Mubarak and several ministers—were put on trial. Charges included financial and political corruption, as well as the killing of peaceful protesters during the 2011 anti-government uprising. Mubarak was initially sentenced to life in prison in June 2012 for complicity in the murder of protesters. However, his sentence was overturned following two re-trials. After serving time in prison for corruption charges, Mubarak was set free in March 2017. Apart from a number of police officers, nobody in Egypt has been held accountable for the human rights violations perpetrated during the 2011 uprising, let alone during the previous decades of authoritarian rule. Instead, under the current presidency of Abdel-Fattah el-Sissi, thousands of political dissidents, activists, and journalists have been arbitrarily detained, tortured, or forcibly disappeared. As a result, political and judicial institutions in Egypt have used transitional justice to entrench authoritarian rule and to produce an illusory image of a definitive break with the former regime.<sup>9</sup>

The Egyptian uprising was driven by years of oppression in the form of both economic

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<sup>6</sup> Carothers, “The End of the Transition Paradigm,” 15.

<sup>7</sup> Ibid.

<sup>8</sup> See, for example, Lars Waldorf, “Anticipating the Past? Transitional Justice and Socio-Economic Wrongs,” *Social and Legal Studies* 21, no. 2 (2012): 171-186, doi: <https://doi.org/10.1177/0964663911435827>; Lisa LaPlante, “Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework,” *International Journal of Transitional Justice* 2, no. 3 (2008): 331-355; Dustin N. Sharp, “Addressing Economic Violence in Times of Transition: Toward a Positive-Peace Paradigm for Transitional Justice,” *Fordham International Law Journal* 35 (2012): 780; Hannah Franzki and Maria Carolina Olarte, “The Political Economy of Transitional Justice. A Critical theory Perspective” in *Transitional Justice Theories*, eds. Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun and Friederike Mieth (London: Routledge, 2014).

<sup>9</sup> The title of Egypt’s Ministry of Transitional Justice changed four times since its establishment in 2011. The swearing in of a new cabinet in September 2015 resulted in the abolishment of this ministry altogether. Commentators have gone so far as to describe this move as a sign that “the country’s transitional justice process is over”; see Elisa Miller, “A Close Look at the Changes to Egypt’s Ministries,” *Atlantic Council*, October 1, 2015, [www.atlanticcouncil.org/blogs/egyptsource/a-close-look-at-the-changes-to-egypt-s-ministries](http://www.atlanticcouncil.org/blogs/egyptsource/a-close-look-at-the-changes-to-egypt-s-ministries); “Egypt’s New Cabinet: What Changed and What Didn’t?” *Mada Masr*, September 19, 2015, [www.madamasr.com/news/%E2%80%8Begypt-new-cabinet-what-changed-and-what-didnt](http://www.madamasr.com/news/%E2%80%8Begypt-new-cabinet-what-changed-and-what-didnt).

and human rights violations. Socio-economic woes included poverty, high unemployment, lack of access to health services, poor working conditions, and the repression of unions. A shrinking middle class reflected an increase in inequality in the lead-up to the Egyptian uprising.<sup>10</sup> Human rights violations included widespread torture, arbitrary detention, and other repressive measures against regime opponents, activists, the media, and civil society. Hundreds of civilians were tried in military courts and confessions extracted through torture were common. The drivers of the 2011 uprising in Egypt were thus just as much about socio-economic grievances as they were about human rights abuses.<sup>11</sup> Demands for social justice in Egypt were, and continue to be, inextricably linked to calls for the protection of human rights.

Workers' movements and labor unions constituted a major source of opposition under Mubarak and they continue to play a significant role, post-uprising. Workers in the public textile industry, which comprises 45,000 workers across the country, have repeatedly led protests and strikes. The general strike led by textile workers in the Egyptian town of Mahalla in 2008 stands out in particular, as it led to the formation of the April 6 youth movement, which became an influential mobilizing force. The demands of the Egyptian labor movement include increasing the minimum

wage, replacing temporary contracts with permanent ones, payment of overdue bonuses, and the right to strike. Beinín notes that the Egyptian independent labor movement, or "militant labor dissidence," intensified in the late 1990s and grew into a full-blown culture of protest in the 2000s, posing a threat to the legitimacy of the Mubarak regime.<sup>12</sup> The labor rights movements in Egypt continued to actively challenge government policies in the post-uprising period through street protests and strikes, with the most recent strikes taking place in February and March 2017.<sup>13</sup>

Corruption and certain economic crimes thus figured heavily in the charges brought against former political leaders in Egypt, including Mubarak and several ministers.<sup>14</sup> Moreover, the Administrative Court ruled in favor of complaints filed against corrupt public contracts. At the same time, reconciliation deals have been struck with former business tycoons, such as Hussein Salem.<sup>15</sup> Such deals allowed corrupt businessmen, many of whom have strong ties to Mubarak's political party, to return a portion of their assets in exchange for immunity from prosecution. While these deals have been marred by a lack of transparency, they reflect the regime's acknowledgement that these are illicit gains, as well as its recognition that something must be done to address them, even if reconciliation drew anger from many Egyptians. A certain level of judicial and elite

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<sup>10</sup> "Inequality, Uprisings, and Conflict in the Arab World," World Bank, October 2015, <http://documents.worldbank.org/curated/en/303441467992017147/Inequality-uprisings-and-conflict-in-the-Arab-World>.

<sup>11</sup> Aboueldahab, *Transitional Justice and the Prosecution of Political Leaders in the Arab Region*.

<sup>12</sup> Joel Beinín, "The Rise of Egypt's Workers," Carnegie Endowment for International Peace, June 28, 2012, <http://carnegieendowment.org/2012/06/28/rise-of-egypt-s-workers-pub-48689>.

<sup>13</sup> Zainab Abul-Magd, "Egypt's Coming Revolt of the Poor," *Foreign Policy*, March 31, 2017, <https://foreignpolicy.com/2017/03/31/egypts-coming-revolt-of-the-poor/>; "Mahalla Textile Workers Initiate Partial Strike, Warn of Comprehensive Industrial Action," *Mada Masr* February 7, 2017, <http://www.madamasr.com/en/2017/02/07/news/u/mahalla-textile-workers-initiate-partial-strike-warn-of-comprehensive-industrial-action/>; Salma Shukrallah and Randa Ali, "Post-revolution Labour Strikes, Social Struggles on Rise in Egypt: Report," *Ahram Online*, April 29, 2013, <http://english.ahram.org.eg/News/70384.aspx>.

<sup>14</sup> Nadia Ahmed, "Show Me the Money: The Many Trials of Mubarak's Men," *Mada Masr*, January 24, 2015, <http://www.madamasr.com/en/2015/01/24/feature/politics/show-me-the-money-the-many-trials-of-mubaraks-men/>.

<sup>15</sup> Heba Afify, "Money without Truth: Egypt's Reconciliation Deal with Mubarak-era Tycoon," *Mada Masr*, August 3, 2016, <https://www.madamasr.com/en/2016/08/03/feature/politics/money-without-truth-egypts-reconciliation-deal-with-mubarak-era-tycoon/>. Hussein Salem is a Mubarak ally and businessman who was charged in the Israeli Gas Deal case and the Selling Electricity case, in which he and other Mubarak allies squandered billions of Egyptian pounds.

recognition of socio-economic grievances, then, emerged in the post-uprising period through the scant transitional justice measures already taken. However, an adequate response to social justice grievances in Egypt has been far from fulfilled. The military's dominance of the economy and of influential bureaucratic posts has meant that resources continue to be siphoned in a way that disadvantages the poor. This has led to increased frustration with the state and a recent wave of "supply riots" in several Egyptian towns.<sup>16</sup>

### TRANSITIONAL JUSTICE IN EGYPT: A STRANGLER CIVIL SOCIETY

While civil society actors are one of the most fundamental drivers of transitional justice processes in Egypt, they are also one of the most repressed. The term civil society is used here to encompass non-state actors including nongovernmental organizations (NGOs), lawyers, and activists—all of whom advocate for common causes. The common cause here is one form or another of a reckoning with the past, or transitional justice. In many ways, the challenges to civil society's work have multiplied since the 2011 uprising. In the immediate post-uprising period, civil society was one of the first groups of actors to be targeted by harsh laws restricting foreign funding and the registration of NGOs. A highly controversial protest law in 2013 further complicated civil society's ability to mobilize.<sup>17</sup> Such restrictions led organizations such as the Cairo Institute for Human Rights Studies to move its regional and international programs to Tunisia, so that it

could continue to work without facing threats of closure by the Egyptian regime. Other NGOs, human rights lawyers, journalists, and activists have had their offices shut down, their assets frozen, and their colleagues under heavy surveillance or arbitrarily arrested.<sup>18</sup> Hundreds of individuals continue to face torture in prison and there has been a spike in the number of forced disappearances in Egypt in recent years.<sup>19</sup>

Despite this crackdown on civil society, individual lawyers—many of whom work on behalf of civil society organizations representing victims—have been active in filing cases against former government officials. Many of these lawyers have been pursuing court cases both in pre- and post-uprising Egypt. NGOs and independent media outlets have been active in monitoring human rights violations, documenting them, and raising awareness about them. Civil society organizations have thus been one of the principal drivers of transitional justice in Egypt.<sup>20</sup> Their main asset is, arguably, their institutional memory of working under pre- and post-2011 authoritarian rule.

Civil society's resistance to violations often takes the form of street protests and strikes, but in Egypt, it is increasingly conducted through the courts as well. Despite a largely opaque and politicized judiciary, lawyers have persistently filed complaints against former high-level, mid-level, and low-ranking government officials, police officers, and state security agents. They have also been active in filing cases against corrupt public contracts, particularly those

<sup>16</sup> Abul-Magd, "Egypt's Coming Revolt of the Poor."

<sup>17</sup> Law 107 (2013) on the Right to Public Meetings, Processions and Peaceful Demonstrations. Also, Law 84 (2002) on Non-Governmental Organizations is a Mubarak-era law that continues to impose restrictions on civil society's ability to work and imposes arbitrary restrictions on NGO receipt of foreign funding.

<sup>18</sup> "Egypt: Unprecedented Crackdown on NGOs," March 23, 2016, Amnesty International, <https://www.amnesty.org/en/press-releases/2016/03/egypt-unprecedented-crackdown-on-ngos/>; Shahira Amin, "Egypt's Shrinking Space for Civil Society," Al Monitor, December 12, 2016, <http://www.al-monitor.com/pulse/en/originals/2016/12/egypt-clampdown-civil-society-ngos-funding.html>.

<sup>19</sup> "Egypt: Hundreds Disappeared and Tortured Amid Wave of Brutal Repression," Amnesty International, July 13, 2016, <https://www.amnesty.org/en/latest/news/2016/07/egypt-hundreds-disappeared-and-tortured-amid-wave-of-brutal-repression/>.

<sup>20</sup> Noha Aboueldahab, "Navigating the Storm: Civil Society and Ambiguous Transitions in Egypt, Libya and Tunisia," in *Advocating Transitional Justice in Africa: The Role of Civil Society*, eds. Jasmina Brankovic and Hugo van der Merwe (London: Springer, Forthcoming 2017).



relating to the sale of land. Such litigation activism has increasingly become central to civil society's attempts to bring about accountability for both socio-economic and human rights crimes, or at least to expose the shortcomings of a weak judiciary.<sup>21</sup> In the absence of space to mobilize and hold public advocacy and awareness-raising campaigns, particularly since the enactment of laws that further restrict such activities, civil society has persistently turned to courts as "active sites of resistance."<sup>22</sup>

### TRANSITIONAL JUSTICE IN EGYPT: THE PROBLEM OF JUDICIAL INDEPENDENCE

Judicial independence in Egypt has long been challenged by executive control over judicial appointments and over other judicial affairs. Executive authority controlled the composition of the Supreme Judicial Council, whose legal opinions were not always heeded by the executive. The State Security Investigation Department—established by Gamal Abdel Nasser's government—banned the Office of Public Prosecution (OPP) from investigating crimes committed by public officials and security officers.<sup>23</sup> The most powerful actor in the struggle for judicial independence in Egypt is the Judges' Club. An informal, yet influential association of judges established in 1939, the Judges' Club exerted pressure over decades to end executive control of the judiciary, mainly through proposed amendments to the Law on Judicial Authority. Such efforts continued throughout the 1990s and 2000s and culminated in a judicial revolt in 2005, during which judges exposed electoral fraud and demanded judicial independence through

boycotts, sit-ins, and public shaming via the media.

The OPP has also been criticized for its collusion with the police, thereby harming prospects for fair trials. For example, as the police are often implicated in the perpetration of torture crimes, the OPP has been accused of delaying forensic medical inspection to allow torture wounds to heal.<sup>24</sup> In addition, the OPP has strong political links to the state security agencies, including the Ministry of Interior and the Ministry of Justice, which raises serious concerns about the ability of the judiciary to issue independent judicial rulings.

The politics of the judiciary in Egypt are, however, much more complex than this. For example, Tamir Moustafa demonstrates how lawyers who persistently challenged legislation through the Supreme Constitutional Court throughout the 1990s and early 2000s were successful in exposing the contradictions between the regime's "rule of law" rhetoric and the actual workings of the courts.<sup>25</sup> Nathan Brown describes the stances of the Supreme Constitutional Court as both active and pliant, referring to its tendency to rule both in favor of, and against regime policy. Even in instances where the Court rules against the regime, it does so in a way that does not threaten "core regime interests."<sup>26</sup> Importantly, the courts were and continue to be used by both the Mubarak and el-Sissi regimes, as well as their opponents. The former have used the courts as a means to impose restrictions on political life, while the latter have used them to challenge the state. This use of the courts in Egypt for big

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<sup>21</sup> Mas Tamir Moustafa, "Law and Courts in Authoritarian Regimes," *Annual Review of Law and Social Science* 10 (2014): 281-299, doi: <https://doi.org/10.1146/annurev-lawsocsci-110413-030532>.

<sup>22</sup> *Ibid.*

<sup>23</sup> Abdallah Khalil, "The General Prosecutor between the Judicial and Executive Authorities," in *Judges and Political Reform in Egypt*, ed. Nathalie Bernard-Maugiron (Cairo, AUC Press: 2009).

<sup>24</sup> *Ibid.*, 67.

<sup>25</sup> Tamir Moustafa, "Law in the Egyptian Revolt" *Middle East Law and Governance* 3 (2011): 181-191.

<sup>26</sup> Nathan Brown, "Judicial Militancy within Red Lines" *Carnegie Endowment for International Peace* November 2, 2016, <http://carnegieendowment.org/publications/?fa=64999>.

and small cases meant that authoritarianism, as well as resistance to it, took on a heavily legalistic form.

Under President el-Sissi, this trend has continued to yield similar outcomes. Laws such as those imposing severe restrictions on freedom of assembly and on civil society organizations have been swiftly enacted.<sup>27</sup> Conversely, the courts have challenged certain executive decisions, most notably the decision made in a meeting between President el-Sissi and Saudi King Salman to transfer Egyptian sovereignty of the Tiran and Sanafir islands in the Red Sea to Saudi Arabia. In January 2017, the Supreme Administrative Court issued a final ruling declaring the islands to be Egyptian. This ruling was viewed as a victory for civil society and regime opponents, as there was significant popular opposition to the handover of the islands to Saudi Arabia.<sup>28</sup> Since this ruling, however, legal wrangling over the constitutionality of the islands' transfer to Saudi Arabia, as well as over which court should exercise jurisdiction over the matter, has continued.<sup>29</sup> In sum, while the Egyptian court system has demonstrated a certain level of independence from the executive, it has nevertheless repeatedly stopped short of threatening the core of the regime. This, as Sahar Aziz argues, has meant that the judiciary continues to be a "formidable deep state institution."<sup>30</sup>

## TRANSITIONAL JUSTICE IN AUTHORITARIAN CONTEXTS: SOME CONSIDERATIONS

The core dilemma for so-called transitional

countries in the Arab Spring such as Egypt concerns the use of deep state authoritarian institutions to build a meaningful social contract. Transitional justice is one of several initiatives pursued with a view to achieving the grand objectives of peace, justice, reconciliation, rule of law, and institutional reform. As discussed earlier, such programs are based on the false assumption that all transitions lead—or strive to lead—to liberal democracy. Given the diverse directions of transitions, as well as the tensions between transitional justice's various goals, the literature on critical transitional justice has grown significantly in recent years.

Critical transitional justice, however, has largely remained within the confines of scholarship.<sup>31</sup> It is time for it to manifest itself in practice, as policy is central to the transitional justice field. This policy briefing's recommendations apply some of the critical approaches to the practice of transitional justice in authoritarian contexts, with a focus on the case of Egypt. In doing so, it departs from the predominantly formulaic approaches employed thus far and instead examines how best to make use of existing institutions in an authoritarian environment to build a foundation for a genuine transitional justice process. The policy recommendations do not imply that democratization initiatives are futile. Instead, the recommendations focus on policy options for the immediate term, without having to "wait" for democratization to occur.

First, given the centrality of socio-economic grievances in Egypt, foregrounding social

<sup>27</sup> Law 107 (2013) on the Right to Public Meetings, Processions and Peaceful Demonstrations and Law 84 (2002) on Non-Governmental Organizations.

<sup>28</sup> Reuters, "Egypt Police Suppress Protests Against Sisi Government," *The Guardian*, April 25, 2016, <https://www.theguardian.com/world/2016/apr/25/cairo-protests-egypt-red-sea-islands-saudi-arabia>.

<sup>29</sup> The Tahrir Institute for Middle East Policy, "Tiran and Sanafir: Developments, Dynamics and Implications," August 9, 2017, <https://timep.org/special-reports/tiran-and-sanafir-developments-dynamics-and-implications/>.

<sup>30</sup> Sahar Aziz, "Theater or Transitional Justice: Reforming the Judiciary in Egypt," in *Transitional Justice in the Middle East*, ed. Chandra Lekha Sriram, (New York: OUP, 2016), 233.

<sup>31</sup> Catherine Turner, *Violence, Law and the Impossibility of Transitional Justice*, (Oxford: Routledge, 2016).

justice through legal accountability is essential. In Egypt, the military manages a “business empire” while effectively ruling the country.<sup>32</sup> Consequently, accountability for the arbitrary distribution of resources that disadvantages the poor is an important component of a transitional justice strategy that addresses social injustice in Egypt; one that is inextricably linked to the protection of civil and political rights. Egyptian civil society organizations, such as the Egyptian Center for Economic and Social Rights (ECESR) and the Hisham Mubarak Law Center have, for instance, successfully filed many cases with the Administrative Court to address the problem of corrupt contracts.<sup>33</sup> This is particularly important for real estate contracts that prioritize the sale of land at below market value to business tycoons who then use the land to build luxury houses that benefit the rich. Such large-scale corrupt deals significantly disadvantage millions of Egyptians without access to housing and public services, all while exacerbating corruption and socio-economic inequality.

Second, strengthening civil society organizations will give impetus to transitional justice efforts, as they have demonstrated time and again their role as key drivers of change, especially in authoritarian contexts. The work of civil society actors is crucial in challenging authoritarian policies and in identifying the priorities of ordinary citizens and advocating for them. This is not least because of civil society’s institutional memory, having struggled under decades of authoritarian rule, and then having to re-orient their struggle under a renewed authoritarian rule, post-uprising. A strangled civil society, however, makes this task a very difficult one. One report notes that a vast majority of civil society representatives point

to legislative restrictions as the greatest obstacle to their work.<sup>34</sup> Thus far, civil society has been one of the Egyptian government’s primary targets in its crackdown on dissent in the aftermath of Mubarak’s ouster. This has been particularly evident in the enactment of severely restrictive laws governing the registration and foreign funding of local NGOs as mentioned above, and in the widespread arbitrary arrests and disappearances of activists, lawyers, and journalists. This has sustained opposition to the state and intensified the atmosphere of frustration and resistance among civil society actors. This, coupled with the dwindling condition of the economy, will only continue to weaken the stability of the state. It is therefore in the interest of the country to encourage a strengthened and independent civil society that also serves as a genuine partner in identifying the needs of Egyptians, while re-building state institutions. Reforming the laws that govern civil society is an important first step toward this goal.

Third, tapping into independent elements of the judiciary can and has proven to effect desired change, primarily for the purpose of checking executive power. It should now also constitute a strategy toward a post-transition that addresses the everyday socio-economic needs of people, as well as criminal accountability for human rights abuses. A strong desire for retributive justice is typical of many societies undergoing transition. In an attempt to reckon with the past, many victims and their families prefer to seek justice for past atrocities in the courtroom.<sup>35</sup> While such expectations may wane or change over time, it is important to take them seriously, rather than to push the rhetoric of “turning the page on the past.” Resentment and indignation are negative, yet

<sup>32</sup> Abul-Magd, “Egypt’s Coming Revolt of the Poor.”

<sup>33</sup> For more on these cases, see Aboueldahab, *Transitional Justice and the Prosecution of Political Leaders in the Arab Region*.

<sup>34</sup> Mohamed Elagati, “Foreign Funding in Egypt After the Revolution,” FRIDE (2013): 10-11, [http://fride.org/download/wp\\_egypt.pdf](http://fride.org/download/wp_egypt.pdf).

<sup>35</sup> Judy Barsalou and Barry Knight, “Delayed or Denied: Egyptian Expectations about Justice in Post-Mubarak Egypt,” *The International Human Rights Funders Group*, January 14, 2013, <http://judybarsalou.com/wp-content/uploads/2017/08/Delayed-and-Denied-Survey-Paper.pdf>.

“politically relevant,” emotions that must figure into any transitional justice process, whether democratic or not.<sup>36</sup> While there are problems of a politicized judiciary in Egypt, elements of it, even at the highest level, have challenged the state. Moreover, lawyers representing victims of human rights and socio-economic violations persistently filed court cases against the actions of government officials and police officers. Throughout the Mubarak era, they also challenged the constitutionality of repressive laws. Litigation activism was predominant in the 1990s and 2000s, as it served as a viable alternative to social mobilization and protests, which were regularly repressed. With the emergence of renewed authoritarianism in the post-2011 period of the Egyptian uprising, litigation activism has resumed and it should intensify.

#### **POLICY RECOMMENDATIONS:**

In light of the considerations and analysis outlined above regarding transitional justice policy in authoritarian contexts, the policy recommendations that follow are directed at civil society leaders, government authorities, and legal professionals.

*Foreground Social Justice via Strengthened Legal Accountability:* Activist lawyers should continue to target corruption through court cases that request the cancellation of corrupt public contracts. Legal accountability for the individuals responsible for such corrupt contracts is particularly difficult, given that the criminal courts refrain from pursuing such investigations. However, continued efforts in this regard should remain a priority, not least because of their ability to expose the corrupt nature of the contracts. The partial success that

lawyers have had so far with the Administrative Court, for instance, is important as it indicates that certain actors within the judicial system remain somewhat independent in their rulings regarding corrupt contracts in particular, and social justice more broadly.

*Remove Repressive Laws that Govern Civil Society:* The use of the courts to dismantle repressive civil society laws should be central to civil society’s strategy to strengthen itself and to become independent. Specifically, the restrictions imposed by Law 84 (2002) on Non-Governmental Organizations need to be lifted. This Mubarak-era law continues to stifle civil society’s ability to work and imposes arbitrary restrictions on NGO receipt of foreign funding.<sup>37</sup> Law 107 (2013) on the Right to Public Meetings, Processions, and Peaceful Demonstrations has imposed further restrictions. Furthermore, these laws contradict the provisions of the constitution. A civil society viewed as a partner of the state, particularly in a transitional context, is crucial in building a meaningful social contract and for any kind of genuine transitional justice process to take place.

*Release Detainees to Build Trust between Civil Society and the State:* Transforming the relationship between civil society and the state from one of hostility to genuine partnership will require a major focus on reconciliation. This does not refer to reconciliation at the societal level, whereby victims and perpetrators make amends. Rather, it refers to mending the relationship between civil society organizations and the state institutions that continually repress them. Such a process should begin with the release of unlawfully detained civil society leaders and a clear commitment by the state to

<sup>36</sup> While Mihaela Mihai discusses the importance of negative emotions in a democratic emotional culture, I argue that they are a crucial part of any transitional society, whether democratic or not. Mihaela Mihai, *Negative Emotions and Transitional Justice*, (New York, Columbia University Press: 2016): 16.

<sup>37</sup> For an analysis of the repercussions of restrictions on foreign funding, see Elagati, “Foreign funding in Egypt after the revolution.”

cease arbitrary detentions of those expressing dissent through peaceful means. Consequently, the release of detainees would in and of itself constitute a transitional justice process and help strengthen the damaged relations between civil society and the state.

*Manage Victims' Justice Expectations:* The pursuit of retributive justice through fair trials is impossible in the context of renewed authoritarianism and a politicized judiciary. Egyptian civil society actors who are experts on transitional justice should, then, help manage the justice expectations of victims and their families using a three-pronged strategy. First, they should pursue the systematic documentation of violations to build a foundation of evidence and testimonies that may be used for accountability purposes in the future. Second, given the importance of working with the state, even within an authoritarian context, they should push for public apologies, a reparations fund, and memorials that are representative of victims. Third, they should continue to file court cases against alleged perpetrators, the merits of which are explained in the next section.

*Increase Judicial Activism via Intensified Litigation Activism:* The litigation activism of the 1990s and 2000s should intensify as a key strategy for civil society actors. Moreover, judges should continue to challenge executive control over judicial affairs and rulings. This should be done by taking three specific measures that will ultimately help strengthen the role of civil society as both a partner and a monitor of the state.

First, military trials of civilians must be challenged not just by those subjected to them, but also by the regular judiciary in its

capacity as the correct venue for the trial of civilians. In 2011 alone, the Egyptian military confirmed that almost 12,000 civilians were arrested and faced military trial for a range of offenses.<sup>38</sup> The parallel court system run by the military has significantly expanded its reach, thereby compounding the view that the military-backed regime has no tolerance of peaceful political dissent. Second, the judiciary must reject repressive laws pertaining to civil society that contradict the provisions of the constitution. Third, the judiciary must work toward ensuring the release of unlawfully detained activists, journalists, lawyers, and other political opponents. The highly symbolic importance of such a measure would, as mentioned above, contribute to reconciliation efforts that will help build a genuine partnership between civil society and the state. While it is unrealistic to expect such measures to be taken by judges politically allied with the regime, other strategies can be pursued. The use of the media—particularly by retired yet influential judges who no longer risk being dismissed—is one such strategy that is effective in raising awareness and challenging the abuse of the judicial system to protect the regime's authoritarian interests. The rise of independent media outlets in post-2011 Egypt will significantly facilitate this.

## CONCLUSION:

Fluid processes of change, rather than linear paths to liberal democracy characterize the Egyptian and several other Arab Spring transitions. As a result, the temporality of transitional justice is blurred.<sup>39</sup> It is important, then, to foreground the current institutions in place when formulating transitional justice policy, without losing sight of the forward-looking and reform-oriented potential of

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<sup>38</sup> The military sought to justify its broad jurisdiction by referring to the emergency law in Egypt, which was still in place at the time of the arrests. See "Egypt: Retry or Free 12,000 After Unfair Military Trials," September 10, 2011, Human Rights Watch, <https://www.hrw.org/news/2011/09/10/egypt-retry-or-free-12000-after-unfair-military-trials>.

<sup>39</sup> Turner, *Violence, Law and the Impossibility of Transitional Justice*.

transitional justice. Specifically, this requires a focus on what the current state of civil society organizations and judicial actors can do to pursue social justice and a degree of accountability and reconciliation, all of which are important components of a transitional context.

Transforming the relationship between the state and civil society to one of genuine partnership will strengthen the stability of the state. The release of detainees through litigation activism both on the part of individual lawyers and independent judges will help facilitate such a transformation. Continued legal accountability for corruption will help erode its practice in the long-term. Peace, justice, and institutional reform are important goals, but they should not be framed as objectives to be quickly achieved via weak and politicized institutions. This will inevitably set up a transitional society for disappointment. The lingering deep state in Egypt and elsewhere in the region means that piecemeal objectives toward accountability, social justice, and a strengthened civil society should be foregrounded in the immediate term.

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