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American legal realism: towards a new approach to the privatization of Omar Effendi in Egypt

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AMERICAN LEGAL REALISM: TOWARDS A NEW APPROACH TO THE PRIVATIZATION OF OMAR EFFENDI IN EGYPT

A Thesis Submitted to the

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the LL.M. Degree in International and Comparative Law

By

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ABSTRACT

This paper presents to its readers the progressive legal evolution that has influenced, over the past century, legal reform in American history. It focuses specifically on American legal realist thinking that was considered revolutionary in nature relative to the natural and formalist schools of jurisprudence. The focus then shifts to Egypt where the combination of formal and natural jurisprudence is clear to legal scholars. *Omar Effendi*, as one of the most prominent case decision in the post-25th January revolution period, was both criticized and lauded for political reasons. Scholars that supported the decision were glad that the corrupt privatization of a well-known company ended with the State Council's decision. Opponents feared that the state courts' interference in the commercial contractual relationship would negatively affect investment prospects in Egypt. This paper analyzes the application of law in a changing political context and concludes with the proof that legal realists strived to achieve: the implementation and execution of law are pure acts of political choice.

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I. INTRODUCTION

Since the ruling of the State Court in the Omar Effendi case in Egypt, many legal debates have emerged that are related to the relation between the court's interpretation of law and actual political circumstances. One significant question is whether the court took into consideration the political instability that faced Egypt after the 25th of January revolution in its ruling in *Omar Effendi*. And if that is true, then the judges were indeed politically affected by the external pressures that were present in Egypt at the time. The judges considered external factors rather than pursuing a strict application of the law. On this basis, the judges made their decision first before looking into the facts of the case, then interpreted the legal provisions to serve the desired outcome. This technique of analyzing a court's decision in the context of historical, economic and political circumstances is mainly attributed to the legal realism school of jurisprudence. The insight it provides the rationale for employing legal realist methodology in the rereading of the Omar Effendi case.

This thesis explores the contributions of legal realism to the evolution of the American legal system. And when applied to Egyptian legal reform as seen in the Omar Effendi case, it will prove the claim made by the realists that law is a matter of political choice rather than a mere application of rigid texts. It does this by analyzing one of the most prominent cases in Egypt after the 25 January Revolution in 2011, the Omar Effendi case.[1] The selection of *Omar Effendi* case was made for several reasons. For instance, it involves a privatization process, a contractual relationship between the state and private entities, legal due process and justice in its different manifestations. As a pure claim, the realists were successful in being descriptive towards those concepts in a legal system. They have sketched the 'real' picture of law. This paper is a serious effort to use the realists' tools in studying the Omar Effendi case in its historical and political contexts.

The intervention of policies in law debate has influenced legal scholars generally, and especially the realists for a long time. The most appealing aspects are the fast changing policies of American authorities, and the society's need for a stable legal system. The realists have always questioned the purity and neutrality of law. The question is ever-present. The realist approach to political factors that affect the legal

[1] Case no. 11492/65/Sate Council, (Administrative and Investment Circuit), (Egypt), (2011).

process and its implementation is beneficial not only for those interested in the neutrality of law, but also to every citizen who wants to know how the law affects his or her life. It also reveals flaws in the legal system.

As an instance of progressive legal thoughts' manifestation in the American legal system, Morton Horwitz argued that the progressive movement that criticized the decision of *Lochner* offended the formal jurisprudence school by stating:

> The decision of the U.S. Supreme Court in *Lochner v. New York* (1905) brought Progressive Legal Thought into being. *Lochner*, which struck down a maximum hours law for bakers as an unconstitutional interference with freedom of contract, galvanized Progressive opinion and eventually led to a fundamental assault on the legal thought of the old order.[2]

Realist jurisprudence took shape out of the criticism leveled at the *Lochner* decision; it also raised issues surrounding the concepts of neutrality and justice in law that influenced theorists and scholars. Realists claimed that legislation and the legal process of law is biased in a way which reflects the interests of the elites for political and economic reasons.

In order to understand the concepts of legal realism, it should be placed in its right historical and political context. Such a context included the reaction to policies that overwhelmed this period of American history, and gave birth to the invention and elaboration of legal realism. Realism was intentionally a reaction to classical legal thought. And as a well based assertion, realism evolved from classical legal thought.

The realists, I believe, were hoping to replace formalist thinking with a pragmatic approach towards legal thinking. The basis of this attempt was initially to consider law as human made, not found. Hence, this approach has lead to considering law as being based on societal ethics, policies and human experience, not the formal logic of existing rules. Also this leads to the flexibility of altering the laws which are not consistent with existing ethical concepts or policies. In addition, the rules of law are not universal, timeless nor logical; they are social systems that were based and designed by people in different historical and societal contexts to deliver specific

[2] Morton J. Horwitz, *The Transformation of American Law:1870-1960, The Crisis of Legal Orthodoxy,* Oxford University Press, 1992

purposes for certain social ends. By realizing these facts, it creates our understanding of the pragmatic approach towards law. It is a means to use law to our own benefit as a means, and not an end in itself.

This paper argues that a progressive legal thought approach can be applied to the Egyptian legal system. And by doing so, it will clarify our understanding of legal application in practice. This will be achieved by presenting a well-known Egyptian case – Omar Effendi - which involved many factors and analyzing it using Realist techniques. Part I of this research explores constructive and destructive aspects of Realism with respect to the contractual relationship. Part II of this paper explores the Omar Effendi case and the courts' rationale and demonstrates policy intervention. Part III recounts the flaws in the court's decision, and shows that the judges made the final decision then justified it by through the application of legal rules. Finally, the thesis proposes a legal methodology for analyzing cases which constructs different perspectives on the State courts' decisions. By applying the new method, it will serve as a tool for reviewing cases that involve political aspects. This paper aims to establish new perspectives towards court's decision in the contemporary Egyptian context. It will synthesize Realists' thoughts on the contractual relationship then a discussion of how it may help to develop thinking towards the implementation and execution of law in Egypt.

II. AMERICAN LEGAL REALISM

This chapter introduces an exploration of legal realism in the American legal system. It starts with a brief discussion of the basis of legal realism, and its origins. It then questions the basic features of realism; what it is, what realists think, and how it has contributed to the American legal reform. It concludes with the prominent cases which engaged legal realists to employ their method of reviewing court decisions. Hence, this chapter will be discussing realism in the context of the past jurisprudential schools of natural law and positivism.

A. Jurisprudence Meaning

Jurisprudence is the science which studies theories of law. The term jurisprudence itself means the wisdom of law. This wisdom can be studied via two different but related routes. The first is through the study of the doctrine of law and judgments of courts and tribunals. The second is through the study of theories of law. The relation between the two notions can be discerned in the legislation and legal process in different legal systems, for instance the civil legal system and common law system which are mostly the base of legal system in a vast number of countries. Those systems differ between two classical theoretical schools: Positivism and Natural Law. Legal positivism means the "social perspective of a legal rule's validity being authorized by law and socially accepted versus being based on natural or moral law. View of man-made law as posited by man for man, rather than being fair."[3] In contrast, the Natural law means "The foundation of this law is placed by the best writers in the will of God, discovered by right reason, and aided by divine revelation; and its principles, when applicable, apply with equal obligation to individuals and to nations."[4] In the late 19th and the beginning of the 20th century, a new revolutionary movement began to take shape. This movement is known as Legal Realism.

B. Legal Realism in Jurisprudence

To begin, legal realism has tackled many issues in the legal system, one of which is the contractual relationship between the state and individuals as seen in courts. The

[3] The Law Dictionary, What is LEGAL POSITIVISM? definition of LEGAL POSITIVISM (Black's Law Dictionary), http://thelawdictionary.org/legal-positivism/, November 2015.
[4] The Law Dictionary, What is NATURAL LAW? definition of NATURAL LAW (Black's Law Dictionary), http://thelawdictionary.org/natural-law/, November 2015.

debate of freedom of contract has influenced Realists. They attacked the vague principle of laissez faire that was affecting the rationale of judges in many cases. A survey of these scholarly writings is important because it will give the objective overview of the theory to draw a new context of analysis for cases such as *Omar Effendi*. Realism offers tools which aid the analysis of any legal system.

In terms of the theory of realism, most thinkers argue between two propositions. The first is that Legal Realism failed due to the weaknesses in the basic premises of the theory. Initially, judges and lawyers are the real creators of law, and not the legislators who write it. Some Realists contend that judges do not make decisions based on theory, but based on their own opinions, beliefs and desires which in turn are based on economic, sociological and psychological factors. The second is to what extent politics intervenes in law implementation. The fact is that economic and political factors have played a major role in marginalizing the theory.

In terms of the economic and political factors, most scholars agree that politics somehow intervenes in the law,[5] but they disagree on the extent and location of intervention.[6] The law is an essential element in a society. Other factors such as resources, land, administrations and wealth of a society are all elements which are often under the supervision and sometimes rule of state governments. Law is related to the life of every citizen in a society. It is a fact that law is not pure, and has always been affected by different factors, but there ought to be an acknowledgment of the political intervention in order to describe the actual process of execution of the law. Consequently, this will drive us to a better understanding of law implementation and application of any legal system in its own context.

There are at least five categories of publicists those who (1) believe that law is made politically by a small group of people who control the legislation of the American nation;[7] (2) ought not to question how law is made but how law will be applied and predicted;[8] (3) believe that law is a means with various sociological, economic and political elements designed for social ends;[9] (4) define the law as a myth which must

[5] *See* generally Neil Maccormick, *The Concept of Law and 'The Concept of Law'*, 14 Oxford J. Legal Stud.1-24 (1994).
[6] Joseph William Singer, *Legal Realism Now*, 76 Cal. L. Rev.465 (1988).
[7] *Id.* at 2.
[8] *See* generally *Id*. Justice Oliver Wendell Holmes and John Dewey who agreed on that perspective.
[9] *Id*. at 38. Roscoe Pound is the founder of the sociological jurisprudence.

be capable of adapting to the changing social, industrial and political conditions;[10] (5) and believe that law is definitely politicized and it is better to discover how to benefit from that position than debating the relationship between law and politics.[11]

The first three categories present the basic premises of the theory's founding fathers. Realism evolved in the beginning of the 20th century by uncovering the political and economic factors which undermined legal theories' application in practice. Consequently, the real evolution of the theory is presented in the fifth category which developed in the late 20th century by determining the reasons for failure and finding alternatives. The political and economic factors became a fact which is a challenge for Legal Realists.

Through historical analysis, Legal Realists in the past century have succeeded in proving their point through case law[12] that law is used politically sometimes/oftentimes to defend the *laissez faire* capitalist notion.[13] Even though the law was designed politically, the judges when they face a vague position in the law, they favor a political notion over the other. On the other hand, the realists' oppositionists have rejected the realist's insights on the law. They criticize the realist movement and scholars in many ways. Their most offensive critique is that the realists are considered as being critical Protestants rather than theorists, and Realists have failed to introduce an alternative answers to controversial legal debates.[14] In order to clarify this debate, a study of legal realism origins follows.

C. Realism Origins

Legal Realism arose out of the progressive movement of prominent scholars. It challenged the formal schools by exposing the legal system's biases, inconsistencies and structural injustices. Realism's aim was to study law from a different perspective than the prevailing type of analysis; a change that could transform the entire legal system. Legal practitioners kept using law as a political tool and each was

[10] Neil Duxbury, *The Theory and History of American Law and Politics*, 13 Oxford J. Legal Stud. 262, 249-270 (1993). Jerome Frank is presented by Duxbury as a founder of Realist movement.

[11] *See* generally *Id*.
[12] *See Id*. at 250. Brown and Lochner are the most significant cases which made legal scholars rethink the politicizing of law in a way which serves economical interests.
[13] Bernie R. Burrus, *American Legal Realism*, 8 Howard L.J., 36-51 (1962).
[14] See *Id*.

manipulating law to serve a certain political interest. *Lochner*[15] was the pivotal case which questioned the purity of law in terms of a court own interpretation and understanding of a law. It opened the door to tons of legal analysis which varied between supporting and rejecting the court's decision.

Realists criticized the common law system on one of its chief features. The courts judged based on precedent adjudications. By the late 19th century in the United States, the number of precedents had become enormous.[16] Unconsciously the judges had adopted a different approach to avoid the effort of deciding based on precedents; they adjudicated based on their own opinions and beliefs, essentially extra-legal elements, and then selected the precedents that supported their views. Three theories were formulated to explain this process; the first believe that precedents yield rules; the second based on formalism believed that rules must be developed by systemizing precedents and weeding out those which do not belong to the present social status; the third by realists believed that desired decisions determine the selection of precedents. While the process of desired decisions/ selected precedent was much easier for the judges, it was not achieved by using the precedents (or codified laws as in the Civil law systems); simply it was a pragmatic technique to find the desired outcome of one precedent case and use it for reference while ignoring the different facts. This process supports the realists' claim of the non-existence of the neutrality of law. From this point forward, realists have based their own premises of a legal system, on the social ideologies, opinions and beliefs of judges which affect the decision making process. First Realists wanted to destroy the facade of judicial impartiality. Then they wanted to explain the content, and predictability, of actual judicial decisions. Only then, thirdly, did they look to the shared politics of the judiciary. The aim was both to expose these politics and to shame the judges into abandoning them. A significant topic that raised many realist debates was the contractual relationship and its extent of *laissez faire*.

The principle of *laissez-faire* was the essential element that governed the contractual relationship. Horwitz praised its value when stating that "it expressed, above all, the post-Civil War triumph of *laissez-faire* principles in political economy," and for the

[15] Lochner v New York 198 US 45 (1905).
[16] Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev., 809-849 (1935), Footnote 52.

view that "government is best which governs least."[17] That position reflects the will of parties, on other terms, as long as the state intervenes in governing the contractual relationship, it deprives to an extent the freedom and will of contracting parties.

D. What Realism Is

Although legal realism is a field of study, there is no proper definition of its meaning. However, legal scholars have described it as a philosophical idea. Laura Kalman in her book *Legal Realism at Yale*[18] has defined Realism by stating that first, it is a form of functionalism or instrumentalism. The original realists sought to understand legal rules in terms of their social consequences.[19] To better their understanding of how law functions in the real world, they attempted to unify law and the social sciences.[20] They believed that this knowledge would enable them to reform the legal system to achieve efficiency and social justice.[21] Second, the realists proclaimed the uselessness of both legal rules and abstract concepts.[22] Rules do not decide cases; they are merely tentative classifications of decisions reached, for the most part, on other grounds.[23] They are, therefore, of limited use in predicting judicial decisions.[24] Thus, the realists rebelled, to some extent, against Langdell's case method. They taught their students that it was impossible to abstract general principles from cases and deduce specific rules from those principles.[25]

Realists hoped to make judicial decision making more predictable by focusing on both the specific facts of cases and social reality in general, rather than on legal doctrine. They sought to organize judicial decisions around situations of different cases rather than legal concepts.[26] By paying close attention to facts and to conventions of social institutions rather than abstract concepts, they hoped to discover what really animated

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[17] Henry David Thoreau, *Civil Disobedience* (1848).
[18] Laura Kalman, *Legal Realism at Yale: 1927-1960*, Chapel Hill and London: University of North Carolina Press, xii-314 (1986). This description of legal realists was an excerpt from Joseph William Singer, *Legal Realism Now*, 76 Cal. L. Rev.465 (1988), it should be noted also that Singer is not agreeing completely with this proposition over realism thinking. He introduced another story of Legal Realism as Pragmatic Critique of Power.
[19] *Id.* at 3.
[20] *Id.* at 17-18.
[21] *Id.* at 17-18, 31.
[22] *Id.* at 3-4.
[23] *Id.* at 5-7.
[24] *Id.* at 4-5.
[25] Laura Kalman, *Legal Realism at Yale: 1927-1960*, Chapel Hill and London: University of North Carolina Press, xii-314 (1986), at 17.
[26] *Id.* at 6, 29-30, 70.

judicial decisions.[27] By making connections between law and actual life experience, they sought to make law less abstract and link it more closely to social reality.[28] They believed that this would enable them both to predict judicial decisions more accurately and to promote just social reforms.[29] The realists believed that it was impossible to generalize about judicial decisions from the perspective of legal rules because every judge was different, and only "the personalities of judges" could explain their decisions.[30]

The main dilemma that faced the realist thinkers was the right way to engage the normative reasoning and application of law without referring to the applied formal rules and laws, or even without being affected by the political interest group's demands. Many scholars tended to use new means by combinating of classical and realist arguments when trying to answer hard questions of law.[31]

E. What Realists Thought

The methods of legal realists' thinking can be described as revolutionary relative to the formal schools of jurisprudence. They introduced their review of legislation and application of law in a 'real' world that involves many factors that affects the process of law. The realists generally were atheist in the determinacy of legal rules. They thought that there was no need for any generalization in making laws as it would be meaningless; the judges' decisions are mainly overwhelmed by the psychological state of the judge. The main elements in deciding cases are: the facts of the case, the judges' ideology, and the social context. The realists stated that studies of these factors would lead to better predictability of decisions.[32] The realists in fact turned the case deciding methodology upside down. Rather than deducing general principles from the case decisions, they used this tool to prove the incoherence of the law.[33] The case analysis method is seen as a great weapon for the realists to prove the inconsistency of law application. This inconsistent application of law refutes the formalists' argument that case analysis is for demonstrating the general principles of

[27] *Id.* at 33-34.
[28] *Id.* at 70.
[29] *Id.* at 8-9, 21, 131.
[30] *Id.* at 164.
[31] *See* Ronald Dworkin*, Hard Cases,* in TAKING RIGHTS SERIOUSLY 81, 82 (1977).
[32] Karl Llewellyn, *The Common Law Tradition: Deciding Appeals,* at 19-61, 121-32, 178-219 (1960).
[33] Joseph William Singer, *Legal Realism Now*, 76 Cal. L. Rev.465 (1988).

law. However for realists, the fact is the case analysis shows that the application of law is not more than an application of competing policy principles. The realists have always claimed that the law includes competing provisions which are always valid for a judge to choose to apply in a specific case, and to justify its position.

F. Influence of Extra-Legal Factors

Law has always had a complicated relationship with extra-legal[34] elements. Normally the constitution defines, or even in many cases chooses between the competing principles of policies and economics that govern the society in a state. Initially, an understanding of law is essential to draw a picture of law's necessity. This necessity is typically to achieve the constitution's objectives. One mainstream definition of Law is "the principles and regulations established in a community by some authority and applicable to its people, whether in the form of legislation or of custom and policies recognized and enforced by judicial decisions."[35] Another definition sees the law as "the system of rules which a particular country or community recognizes as regulating the actions of its members and which it may enforce by the imposition of penalties."[36] From those definitions we can draw a picture of the legal relationship between the various elements of a society: citizen, state, economy and policies. The fact is that policies change with changes in authority; consequently, the interpretation of legal rules by courts has always reflected the interests of one political ideology over the others due to the change of political authorities. This truism is clear in one of the father's of Realism, Gray's well-known comments: "law of a great nation means the opinion of a half-dozen old gentlemen."[37] The same point was made by Burrus describing Gray's view of law:[38]

> The result was that, although Gray himself retained the positivist penchant for an essentially logical process in

[34] The reference of extra-legal elements in this context is made for the competing economic, political and societal principles.
[35] Law, Dictionnary.com, http://dictionary.reference.com/browse/law?s=t, May 2013.
[36] Oxford Dictionaries, http://www.oxforddictionaries.com/definition/english/law, August 2015.
[37] Bernie R. Burrus, *American Legal Realism*, 8 Howard L.J. 2, 36-51 (1962). Burrus has described Gray as one of the mental fathers of Realism, he also presented the basic premises of Legal Realism by quoting the significant contributions of those mental fathers. The reference made of half-dozen old gentlemen is believed to refer to the majority of the nine justices of the Supreme Court of United States.

[38] See Id. at 37.

> deducting law from the sources indicated, his own definition as well as his comments called attention to the significant influence of personality, prejudice and other nonlogical[sic] factors upon the making of the law.

Realists based their main criticism on legal classicism on the myth of the equation. Judges practiced law as if they were solving an equation. According to Gilmore, he criticizes the formal technicality of adjudication by stating that: [39]

> The truth or error, the rightness or wrongness, of a judicial decision could be determined merely by checking to see whether it fitted into the symmetrical structure; if it fitted, it was right; if it did not fit, it was wrong and could, or at least should be disregarded.

The equation according to the application of formalists is rules and facts should always equal a conclusion. However, the myth of an equation might be applied in sciences such as math and physics, but not to a complicated system like law. The realists have claimed that political, social and economic factors in a society intervene in the whole legal system from legislation to the execution procedure; accordingly the question is now whether to accept or fight against this concept.

The most prominent forefathers[40] of Realism shaped the movement's premises. While Realists have disagreed on a number of the theory's fundamentals, the synthesis of their ideas shaped the basic premises. Initially, judges and lawyers were seen as the real creators of law, and not the legislators who first wrote it. They also agree that judges do not make decisions based on theory, but based on their own opinions, beliefs and desires which were based on economic, sociological and psychological factors

Therefore they hide behind the "transcendental nonsense"[41] which they created in the first place. Cohen deduced that the judges hide their decisions behind transcendental nonsense since they could not justify their 'affected' decisions without referring to nonsense justifications. Substantively, legal theories need

[39] Grant Gilmore, *Legal Realism: Its Causes and Cure*, 70 Yale L.J. 1037, 1037-1048 (1961).
[40] Reference is made here for Holmes, Karl Llwellyn, Felix Cohen and others.
[41] Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev., 809-849 (1935). Cohen has stated in his article that every trial to find an exact definition or answer to legal debatable questions is a transcendental effort. The transcendental nonsense is the way used by judges to argue or reason their position in interpreting the law.

to be evaluated for how they fit into the society they serve. Law is a means to social ends, not an end in itself. It needs to be constantly examined and evaluated for its purpose and its effect. The actors of such examination and evaluation consist of different groups of interest in order to make sure that a balance of interests is achieved. Realists' main proposition is that the value of a case is in its outcome, and who won, and the use of that knowledge to predict future cases. Also for the purpose of study we must separate ideas of is and ought, and not allow our judgment to be contaminated by the way we wish things to be, or how we think they ought to be. Realists' premises drove the notice of the intervention made between law and policies.

G. Lochner v. New York

The most relevant example of political adjudication is illustrated in *Lochner v New York*.[42] The Supreme Court struck down a New York statute fixing a ten-hour maximum work-day for bakers on the basis that it was against the stipulation in the Fourteenth Amendment that "no State shall . . . deprive any person of life, liberty, or property, without due process of law."[43] Justice Peckham declared the statute unconstitutional because it interfered with an individual's general right of contracting. The constitution was deemed to guarantee the individual's liberty and freedom of contract unless circumstances were at risk such as "the safety, health, morals and general welfare of the public."[44] Otherwise, all other attempts at regulation by courts of existing contracts would be considered "meddlesome interferences with the rights of the individual."[45] This case presents the argument of realists that the intervention of judges' personal opinions and ideologies is present when making decisions.

In this case, Justice Peckham clearly exploited the vagueness of the free will principle in the Constitution to favor the economic policy of *laissez-faire*, disregarding the safety and health of employees, and especially laborers.

[42] Lochner v New York 198 US 45 (1905).
[43] Neil Duxbury, *The theory and History of American Law and Politics*, 13 Oxford J. Legal Stud. 249, 249-270 (1993).

[44] *Id.* at 249.
[45] *Id.*

According to that concept, a twenty-four-hour work day contract is considered to be an enforceable contract. Justice Peckham neglected the possible negative impact of that decision on the relations between employer and employees in the event of more than ten hour daily work contracts, and their impact on the safety and health of workers, the workplace and society. With this decision, labor exploitation is legalized. An employer, as a supreme power in a labor contract, has the right to decide any amount of working hours for the employee. On the other side, the employee, in most cases, accepts these conditions based on his/her need of money or a job.[46]

H. Consequences of Lochner

Lochner raised many questions with respect to the jurisprudence of contractual relationships. It also motivated scholars to uncover the reasons behind the court's decision. Freedman concluded that the principles of free market shaped the court's decision:

> The institution of contract thus represented the legal expression of free market principles, and every interference with the contract system-such as regulation of the terms and conditions of a labor contract-was treated as an attack on the very idea of the market as a natural and neutral institution for distributing awards.[47]

Justice Holmes, also known as the founder of Realism, concluded that "the majority Justices has reached their decisions on the basis of an economic theory which a large part of the country does not entertain."[48] Holmes insisted that the constitution is not intended to embody a particular economic theory; on the contrary, a constitution stands above matters of policy and is made by people of fundamentally differing views. The concept of constitution neutrality was considered a naive one. It is more appealing for those who consider the Constitution as representing the various ideologies in a society, or in its Platonic[49] version, to stand in a neutral position apart from ideologies.

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[46] Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, Political Science Quarterly 38-3, 1923, 470-494 (472).
[47] See L. Freedman, Contract Law in America 184-94 (Univ. of Wisconsin Press 1965)
[48] *Id. Supra* note 19.
[49] Reference is made here for the Utopian state of Plato, as a sort of non-existence of the Constitution that stands neutrally between all citizens.

They believe that the moment when one ideology is favored over the others is the moment when the Constitution is partial and loses its neutrality. For realists, the fact remains that the choice of writing "this and not that" in a constitution is a political choice. The constitution was and will never be neutral. However, the constitution may be held neutral, for instance, when considering economic policy.

Lochner occurred at the same time as the creation of the stratified conception of a state, whereby the working class stake did not enjoy full constitutional rights as the upper class did. Peckham's decision was directly in favor of the employers' party in contract over the employees. With that notion, Peckham distorted the constitutional concept of neutrality in favor of protection of economic notion of *laissez faire*. It is contended that Justice Peckham subconsciously believed that *laissez faire* was a neutral principle no matter the facts or circumstances. Holmes believed that justices should "fairly be expected to restrain themselves from importing into the Constitution their own policy preferences."[50] Holmes also predicted that the Constitution would appear to be politically partial, and that partiality would drive the working class to lose respect and support for the Constitution. Horwitz agreed with this proposition in noting the changed economic landscape:

> Ironically, the constitutionalization of freedom of contract in Lochner came after two decades of astonishing change in the structure of the American economy that had resulted in the creation of giant corporations capable of exercising enormously disproportionate market power. Monopolization of the economy now would provide a catalyst for Progressive critiques of the traditional assumptions of relatively equal bargaining power that had formed the foundation of legitimacy for the freedom of contract doctrine within Classical Legal Thought.[51]

To sum-up, *Lochner* illustrates the point that competing political ideologies and principles actually exist in law. The Constitution also remained silent, and sometimes vague, towards those principles to be applied. From that point onwards, the courts have had the power to implement their political decisions

[50] *Id. Supra* note 19.
[51] *Id. Supra* note 2, at 33.

by appealing to favored law, or even appealing to their own interpretation of a vague principle in the constitution.

I. Brown v Board of Education

The Brown v Board of Education case reflects the political accommodation made by the court to achieve an acceptable outcome for the society. It shows that the interpretation of legal texts can vary according to the political position the court wants to possess at a certain period of time.

Duxbury illustrates the intervention of politics in adjudication in another classical case; he supported Holmes' critique of impartiality of the Constitution by stating that:[52]

> The problem of politics in constitutional adjudication surfaced again in the case of *Brown v Board of Education.* In *Brown,* the Supreme Court held that racial segregation in public schools, even where black schools are not demonstrably inferior to white schools, denies black children the equal protection of the laws guaranteed by section one of the Fourteenth Amendment. By declaring state-supported discrimination against racial minorities to be unconstitutional, the Court secured a victory for simple justice. But it also produced a decision every bit as political as that which it had reached in *Lochner.*

In this case, the Supreme Court used its authority in a political manner. The Court used its power in favor of defeating racial discrimination. This adjudication can be viewed from two perspectives. First, the intervention between politics and law is not always unconstructive. The court privileged the simple notion of justice and equity between citizens in the society. Racial discrimination has been an ongoing issue in American history. Disregarding the liberty of a group of people to organize public schools based on racial discrimination, the Court chose equality and antidiscrimination policies over the majority's liberty. This case illustrates the same argument used by Realists in *Lochner.* That is, the ideology of *laissez-faire* is not unlimited; basic rights of individuals and society must be protected by the courts.

The Realists constantly questioned the intervention of law and politics. In Duxbury's article, he mentioned *Lochner* and *Brown* stating:[53]

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[52] *Id. Supra* note 8.

> In both cases, the Court resorted to the Fourteenth Amendment in order to validate as law particular policy preferences. In *Lochner,* the Court demonstrated a preference for *laissez-faire* as opposed to economic interventionism. In *Brown,* it exhibited a preference for racial integration as opposed to segregation. In both cases, the Court failed to heed Holmes's plea for judicial restraint in matters of constitutional adjudication.

As this paper aims to prove the necessity of thinking realistically about legal system, it should be noted that many scholars were offended by Realism. Legal scholars argued about two points. The first is that Legal Realism has failed due to the weakness in the basic premises formulated by the theory's forefathers. Karl Llewllyn is known as one of the fathers of Realism; however, his plea for realism was the best description of Realism's positive attributes. He believed and defended the notion of realism, and refused to examine the movement with the same tools that formal schools were examined with. According to Karl Llewllyn's description, he defended Realism as being a collection of influential thinking rather than a theory:[54]

> There is no school of realists. There is no likelihood that there will be such a school. There is no group with an official or accepted, or even with an emerging creed. There is no abnegation of independent striking out. We hope that there may never be. New recruits acquire tools and stimulus, not masters, nor overmastering ideas. Old recruits diverge in interests from each other. They are related, says Frank, only in their negations, and in their skepticisms, and in their curiosity.

Llewellyn defended Realism on the basis of the enrichment that was due to the range of thinking. He considered this disagreement as being the main positive feature of their movement; consequently, this lead to the enlargement and enrichment critical theory. Alongside Llewellyn, Realists began their movement through criticizing the entire legal system, and agreeing on basic premises and principles. Realists took a revolutionary approach to legal thinking, reasoning and application. So rather than debating whether Realists are a school or not, it was better to analyze their principles and premises to reach the social end. The social end is a fair legal system which applies,

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[53] *Id.* at 251
[54] Burrus, see *supra* note 4, at 40.

relatively speaking, better equity. To sum up, Llwellyn was the prominent scholar who gave Realism dynamism, difference, integrity and hope.

On a different position of Llwellyn, other scholars viewed that Realism is a complete mess, for instance, Walter B. Kennedy highlighted Realists' failure in his article *A Review of Legal Realism*[55] stating that "It may well be that Realists, immersed in the ruthless pursuit of facts and the grim realities of life, are too close to their favored philosophy to observe its defects in operation." Kennedy presented four critical failures of Realism:

> (1) Lack of consistent application of the scientific approach in its criticism of traditional law.
> (2) Overemphasis upon fact-finding and consequent submersion of principles and rules.
> (3) Absence of skepticism regarding the hypothetical theories of the social sciences.
> (4) The creation of a new form of word magic and verbal gymnastics. [56]

Kennedy pointed out the critical and jurisprudential defects of Realism. These defects were understandable given that realists were lacking in the administrative field. The third criticism leveled by Kennedy was that they were either too unconsciously "Marxist" or too unconsciously "social-scientist"; in any event, they often failed to adequately engage the indeterminacy of the social, of justice, and of progress.

With mentioning the Realists lack of writings about administrative law, and according to Neil Duxbury's article *The Theory and History of American Law and Politics*,[57] Realists did not present an alternative administrative vision of law. Realists were not considered to be part of the administrative law framework. Duxbury pointed out that "realist jurisprudence remained basically silent on the matter of precisely what political and moral standards ought to guide administrative action. Realist jurisprudence, that is, urged no basic standards of justice or procedural criteria for the administrative agencies."[58] This defect has been an ongoing flaw in Realist jurisprudence; however, it can be considered as a formality deficiency rather than an objectivity deficiency. Realists did not aim for an alternative legal system; rather, they

[55] Walter B. Kennedy, *A Review of Legal Realism*, 9 Fordham L. Rev. 362, 362-374 (1940).

[56] *Id.* at 364.
[57] Duxbury, see *supra* note 8.
[58] *Id.* at 260.

sought improvement in legal scholarship through uncovering of the flaws in legal systems.

J. Law as a Political Tool

To begin, those who wished for an alternative legal system driven by the Realist movement were depressed. Realism rose as a critical way of thinking that constructs, and not to demolish. The policies played a major role in the law practice area. The legal process is a political act. Starting with legislating laws to their execution, the legal process involves political factors and decision that are most appropriate for the society. Varying from one democracy to another, law is a manifestation of the political position that a group of people want to achieve. The main dilemma for using law as a political tool is always the possibility that preferences will change with the political climate. The court may appear to actively promote its own anti-progressive social and economic policies.

The real challenge that faced new Realists was that they ought not to promote the independence between politics and law. The close relationship between law and politics is a social reality. The moment Realists imagine a disconnection between law and politics is the moment they fall into detachment from reality. Realists wanted to expose legal myths, one being the application of rules in a mechanical manner. Judges are not machines; they are human beings. It is a fact that judges make decisions based on beliefs and ideologies. What the judges should consider is that neutrality and impartiality are beliefs and ideologies on their own. The constitution should protect different types of ideologies in order for them to develop over time. Realists never argued that law should be neutral or impartial; nor that adjudication should be apolitical. Realists argued that partiality and politics were necessary, and should be done consciously, openly, and by accommodating different views.

Realism evolved starting the beginning of the past century by discovering the political and economic elements which deprive the challenging of legal theories to be applied in practice. Consequently, the real evolution of the theory is presented in the late of 20th century by seeing the reasons for failure and finding the solutions for these failures. The political and economic factors became a fact which draws the progressive challenge to the Legal Realists. In that matter, Duxbury stated that

"Between 1870 and 1960, it seems, there occurred in the United States not so much a major legal transformation as a struggle between those who wished, in one way or another, to politicize law and those who endeavoured to preserve the ideal of legal neutrality."[59]

Both ideas are transcendental. As law ought not to be politicized entirely, it cannot be detached from politics utterly too. The dilemma here is not using law as political tool; this is an undeniable reality. Detaching politics from law is pure fantasy as well. The law is inevitably political, and any claim to neutrality or impartiality is at best a charade, at worst a delusion. The idea that this thesis is trying to present is acknowledging the political element in the due process of law, which in the Egyptian context rejected in favor of the claim that law is totally equal and neutral. The law is inevitably politicised; the question is whether to acknowledge and expose this fact, or deny and disguise it.

Most realists did not see determinacy (and hence objectivity or impartiality) as possible within the so-called formal structures of law. Consequently, the question of its desirability was irrelevant. Some, however, sought determinacy out with the formal structures of law in the social sciences, in economics, and other fields. They sought to redefine law to incorporate that determinacy. Others did not see determinacy as an issue, or a worthwhile goal. This is the case for Duxbury who portrayed the relation of law and politics as being co-related:[60]

> I shall argue that the move to politicize American law was not quite so concerted or powerful as he would have us believe and that his own conclusion-that we must recognize that law is ineluctably political-merely reiterates rather than casts fresh light on what, above, we have termed the problem of law and politics.

The morality of concepts such as neutrality and impartiality versus partiality is the same moral contradiction as poor and rich. Even in the fairest system in the world, all people are not poor, or all people are rich. Differentiation is the main feature among human beings. There will always be the richer and the poorer. The justification is not what matters; the discrimination of people is a matter of fact in any society.

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[59] *Id.* at 254.
[60] *Id*. at 255.

K. Laissez-faire and Contractual Relationship

One major link between political concept and law is *laissez-faire* in the contractual relationship. *Laissez-faire* was a liberal movement and a system of ethics, and in some cases a claim about justice. Pound argued that the public right faced many threats:" there was an individualist conception of justice, which exaggerates the importance of contract [and] exaggerates private rights at the expense of public right."[61] The Utilitarian movement also that was very influential in the context of legal implementation. Horwitz has described this movement by stating that:

> As in many others areas of the law, late-nineteenth-century contract jurisprudence had actually shifted away from the post-revolutionary natural rights theories. Its increasingly utilitarian efforts to use law to promote economic growth often sacrificed an individualized sense of justice.[62]

Whether *laissez-faire* brings justice or not, that is not its aim; it is the role of law. *Laissez-faire* is a notion that can be used by courts to favor one political position over another as seen in *Lochner*, or controlling it by the courts if it brings racial discrimination as seen in *Board of Education*.

L. Conclusion

To conclude, Realism has in effect changed a lot of conceptions about legal reasoning. It has brought out thinking about the legal system and its context in society. The influence of Legal Realists was successful in terms of understanding the market system and the laws affecting it, especially self regulating and fair markets. We now understand that contracts are subject to coercive power exercised by the state through its legislation and implementation in courts.

Realism never intended to be an alternative to nor contradictive to formalism in the formal sense of the jurisprudential school; I believe that it naturally came after formalism. It is one stage in the development of law, and culture. The intellectual movement that was promoted by the Realists guided the reform of the American legal system.

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[61] Roscoe Pound, *Liberty of Contract*, 18 Yale L.J. 454, 457 (1909)
[62] *See Supra* note 3, at 36

I believe that a wide range of legal scholars who were exposed to Realist thoughts accepted the message that we should not answer questions of law by summoning the abstract concepts of contract, property and liberty. We are trying now to draw the line between fairness and coercion, or to find fairness in coercion by locating coercion in fair rules.[63] In order to draw this line, we should be thinking about the policies, intentions and purposes underlying legal rules. This line will also help move towards a fair and efficient social end. Every legal thinking approach should depend on the perception of competing policy interests. We attribute this approach to legal Realists; they were the initial introducers of line-drawing, policy analysis, purpose by reasoning and interest balance in the interpretation of court's decisions. The main aim of this paper is to detach from the holistic element that has always been attached to the Egyptian legal rules and courts' decisions. Every interpretation of a court's judgment in Egypt was viewed as doubting a judges' integrity. The following chapters prove that it is important to criticize those decisions for a better understanding of judicial reasoning.

[63] Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, Political Science Quarterly 38-3, 1923, 470-494.

III. OMAR EFFENDI CASE *(Fakharany Vs. Anwal Co.)*[64]

In Omar Effendi case,[65] the Egyptian State Council's Administrative court has rendered null and void the purchase agreement of 90% of the stakes of Omar Effendi Corporation between the National Company for Reconstruction and Development owned by the State of Egypt on the one side, and the Anwal Company represented by the businessman Jamil El-Kanbitt on the other side. The court also ruled the arbitration clause of the agreement invalid. The state was able to recall all assets and branches of the company free of any mortgages made by the purchaser. The employees of the company were to maintain their positions including all their rights from the moment of execution of the contract. The purchaser alone also should bore all losses due to mismanagement, and bore all due taxes during the period of execution of the agreement. The stipulation obliging the purchaser to sell 5% of shares to the IFC was also rendered null and void.

The judgment was delivered by Justice Hamdy Yassin Okasha, Vice President of the State Council. In the court's reasoning, the sale agreement was made by fault from corrupted politicians who, in the decision reasoning, acted as the company was an abomination of Satan that should get rid of at any cost. Those people in power dealt with Omar Effendi, with all that it contains of thousands of workers, staff, real estates and branches, in a neglecting way to its real value and importance to the state and economy. This sale agreement was suspicious of conspiracy and corruption. The court based its decision on a long and complex series of 24 administrative procedures and conditions that should have met before concluding the agreement.

From my perspective, this decision raises a long set of inquiries. I propose in this paper that this decision is actually an active political decision, same as *Lochner* and *Brown*. The *Omar Effendi* judgment was rendered in the aftermath of January 2011 revolution. While the economy of Egypt was collapsing promptly, active political judgments were considered as threats for investment prospects.

It is favorable from legal system to reconstruct more than to demolish. By this decision, investors may have fears of investing in a non-stable political climate. Also I

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[64] *See Hamdy El Fakharany and others* vs. Anwal Trading Union Co. and others, 11492/65 Egyptian State Council 1,3(2011).[Further referred as "*Fakharany vs. Anwal Co.*", or OE]
[65] Case no. 11492/65/Sate Council, (Administrative and Investment Circuit), (Egypt), (2011).

believe that the state misused its judiciary power to be in the supreme position in a contractual relationship. Superficially, the court triumphed over corrupted political decisions rendered before the revolution. However, it endangered the economical status of the country disruptively. It ignored the basic concept of a contractual relationship which is the will of parties. If the parties formerly anticipated the needed procedures and conditions they could have fulfilled it. I believe that both parties, upon the conclusion of the agreement, were convinced that they have satisfied those conditions mentioned above. To connect between *Omar Effendi* and *Lochner*, it should be noted that the same rational was used by the courts but in different context. Both courts claim that they deduced the intention of the parties by discovering the objective facts of each case, and disregarding the subjective facts of both. Clarence Ashley supported that proposition regarding the courts intervention in contractual relationship:

> Where courts imply conditions in a contract, they 've igorously disclaim any idea of changing the contracts of the parties and argue that by interpretation they find the intent of the parties, As a matter of Fact... in all these cases the courts have in reality made a new contract for the parties.[66]

The purpose for choosing OE is that it clearly shows the preoccupations used by the judge in a historical moment punctuated by political turmoil. This case highlights several key issues in the Egyptian legal system -pre and post- the 25th January's revolution.[67] Some of these are corruption, privatization, foreign investments and the contractual relationship between the state and investors. This chapter introduces the facts, decisions and the court's reasoning and procedures of the OE. Its goal is to demonstrate the case in an objective view and contextual framework.

A. Historical Background of Omar Effendi Co.

The history of the Omar Effendi Company is a long one. The Omar Effendi Company was established in 1856 in Cairo by the Orosdi family under the name of "Orosdi Back". The Company was formulated as a department store and general wholesaler

[66] Clarence Ashley, Should There Be Freedom of Contract? 4 Columb. L. Rev. 424 (1904)
[67] Demonstrations started from 25th January, 2011 demanding essentially "Bread, Freedom, Dignity and Social Justice" for Egyptian individuals. As soon as the clashes started to heat between policemen and rebels from the first day till 28th January, many events occurred starting from commanding the political authority by the Armed Forces, and ended on the step aside of Hosny Mubarak after an era of presidency that lasted for 30 years.

with branches. Its long history, merchandise and additional number of branches across Egypt contributed to its iconic status in the Egyptian market. The first prominent shift in the history of Omar Effendi was when it became one of the most popular chain stores when it was bought by a Jewish Egyptian investor in 1921 and changed its name to Omar Effendi. The second shift was when the company was nationalized during the Gamal Abd El Nasser era along with many other foreign and Egyptian owned companies in 1957. In 1967, Republican Decree No. 544 transformed Omar Effendi into public Egyptian company, and affiliated it to the Holding Company of Commerce. The Holding Company of Commerce was later dissolved and Omar Effendi's ownership transferred to the National Company for Building and Construction. The last and most significant shift in Omar Effendi's history was the decision made by the Egyptian Government to privatize the company by selling the majority of its stocks in November 2006. The company's investment plans included refurbishment and infrastructure upgrade of the Omar Effendi chain of retail department stores.

B. *Political Context*[68]

The political context of this case changed vastly from the government's decision to nationalize OE in 1956 to the court's decision to annul the Company's shares sale agreement. During the 1980s and 1990s, the Egyptian governments began a structural adjustment program which involved privatizing publicly owned companies as part of the principles of open market. The drafting of new laws and legislations were designed to serve the aim of transitioning to a *laissez faire* state. For instance, the law number 203 for the year 1991[69] governed the transition to privatizing public companies. In accordance with the economic and political demands of this period, the media began promoting the idea that public companies were a burden on the economy. The leftists of this period rejected this claim by stating that this burden was inaccurate, and misrepresented that the government made these claims in order to lower the sale prices of enterprises and expedite the privatization process. They also contended that the unavailability of accurate data and the lack of transparency about the real market value of assets was an opportunity to lower the sale prices in order to

[68] Bank Information Program, *Omar Effendi: Who's to Blame?*, April 2011, http://www.bankinformationcenter.org/en/Document.102659.pdf
[69] Law no. 203 of 1991

promote their purchase by the private sector.[70] Moreover, the governments also blamed the public companies management's corruption and argued that the process of privatization was the only means to end this corruption and reduce the economy's deficit.

With the sale of Omar Effendi, it was believed that the government was eager to privatize the company. It was the reason for its accepting low purchase price far below the company's worth. At the same time, the official charges of corruption that were raised after the sale agreement were dropped from the courts which increased suspicions about the deal. During the period before the OE sale, the company suffered from poor management.[71] Opponents have suggested that this strategy was adopted by the government to facilitate the privatization process. The OE Company was ultimately privatized and sold to Anwal United Trading Company Limited in 2006. Accordingly, Jameel El Kanbit became the new Chairman of OE, and in 2007 he initiated new strategies to upgrade the chain of stores.[72] The restructuring made by the Chairman included changes of the image, its management and operations. The stores also started to provide a variety of products that ranged from budget-friendly to expensive products. Of the 82 stores, between 5 and 10 stores were selected to appeal to the higher class of customers in the region. The rest of the stores continued the company's main focus to provide good quality products at inexpensive price.

In 2011, the Egyptian State Council ruled that this privatization occurred in contradiction to the law from both parties of the agreement; additionally, the buyer violated its obligations stated in the agreement. Anwal had allegedly mismanaged the company, unfairly fired employees and received unregistered assets. For these reasons, the court annulled the administrative decision taken by the Egyptian Government to sell Omar Effendi, and consequently the court held the agreement to sell 90% of Omar Effendi's shares to Anwal null and void.

C. Fakharany vs. Anwal's Facts

1. Timeline

[70] Bank Information Program, *Omar Effendi: Who's to Blame?*, April 2011, http://www.bankinformationcenter.org/en/Document.102659.pdf
[71] Bank Information Program, *Omar Effendi: Who's to Blame?*, April 2011, http://www.bankinformationcenter.org/en/Document.102659.pdf
[72] Bank Information Program, *Omar Effendi: Who's to Blame?*, April 2011, http://www.bankinformationcenter.org/en/Document.102659.pdf

The timeline of the case starts from the government's decision of selling the shares of the company, and ends by the annulment of the sale agreement. On 1st of January 2001, the Ministerial Committee for Privatization approved the privatization of the company. The committee issued a decree for the sale of some public companies including Omar Effendi to a sole investor, and based on three conditions. The first was that to exclude assets, freehold lands and losing branches by transferring its ownership to the National Company for Building and Construction. The second was to sell the company without the freehold of the lands, based on leasing these lands to the buyer with long-term renewable contracts (35 years). The last was to evaluate the company based on real market value then demonstrate this value in the Company's General Assembly and the Ministerial Committee for Privatization to take the decision of sale.

On the 6th of January 2004, the Ministerial Cabinet approved the sale of some public companies including Omar Effendi.

On the 5th of March 2006, Yehia Hussein Abd El Hady raised a notice to the Public Prosecutor claiming distrust in the procedures of sale of Omar Effendi. The Cairo's Court of Appeal excluded the accusation of dissipation of public wealth; although, the court proposed several considerations which the Holding Company should respect before concluding the sale. These considerations were taking needed guarantees and warranties from the buyer including: to keep the continuity of the activity, to remain the employees and preserve their rights, to keep the Commercial Name, to keep the fixed assets, and the final sale contract should set the appropriate penalty that should be held on the buyer in case of non respect of these obligations.[73]

The company by that time consisted of 82 branches and 68 warehouses that were valued by EGP 4 billion.[74] The Government thought that this value might be a burden in the privatization process, so it excluded some buildings that have historical significance then evaluated the company based on its market value.

[73] *Fakharany vs. Anwal*, *supra* note 65, at 25.
[74] *Id*. at 2.

Following an international bidding- by closed envelops-[75] to sell Omar Effendi, as one offer was submitted. Hence, the deal was awarded to Anwal Company.[76] On the 25th of September 2006, the privatization was processed. Omar Effendi's Extra-Ordinary General Assembly decided to sell 90% of the Company's shares for EGP 589,410,000.[77] The Assembly decided also to maintain the ownership of 10% of the company's shares in the possession of National Company for Building and Construction to supervise the good will of the buying investor, and accordingly in the future to distribute this stake on the company's employees when upon the improvement of their financial status.[78]

On the 2nd of November 2006, the National Company for Building and Construction[79] concluded a final sale agreement with Anwal Company related to 90% of Omar Effendi's shares. In 2008, Anwal Company filed an arbitration case before the Cairo Regional Center for International Commercial Arbitration[80] claiming that NCBC failed to comply with its contractual obligations, and thus requested to annul the sale agreement. On the 10th of November 2010, the arbitral tribunal rejected the plaintiff's claims and the annulment of the sale agreement in its award No. 583 for 2008.[81] The details of the award will be presented in the next chapter for the purpose of critique.

On the 21st of December 2010, Hamdy El Fakharany as claimant,[82] Aly El Seidi, Mohamed Labib and Aly El Bassiouny altogether as interfering claimants sued the Prime Minister, Investment Minister, NCBC Chairman, Anwal Chairman, Gamil El Kanbit and others before the administrative court. The claimants requested the court to annul the administrative order issued by the government to sell 90% of Omar

[75] The procedures of international bidding of companies varies between offering the shares to an IPO system, and closed envelops system by which the selling party set certain conditions that must be convenient in the buying party. That system is used when a company wishes to sell to a certain investor or to a financial entity that has the financial power to improve the company's status. In some cases, the government uses this specific system to sell public companies to an investor whom they previously agree with based on a corrupted act.
[76] Anwal Trade Union Company LLC, a Saudi Arabian Company owned by Gamil El Kanbit who holds the chairmanship of the company.
[77] Share Price of EGP 38, 53.
[78] *Supra* note 64 at 26.
[79] Further referred as NCBC
[80] Further referred as CRCICA
[81] *Fakharany vs. Anwal*, *supra* note 64, at 12
[82] El Fakharany is an Egyptian lawyer, political activist and former Parliament Member. He filed many cases for sake of protection of public wealth against ministers, persons in government and investors claiming the protection of public wealth such as the sale of land of Madinaty to the Businessman Hisham Talaat Mustafa, and the sale of Tanta Company for Textiles for Saudi Arabian Investor.

Effendi Company's shares to Anwal, consequently terminate the sale agreement and cease all its effects.[83]

2. The Claims

The claims presented to the court by the claimants included the breaches made by Anwal company towards its contractual relationship with the other party of the agreement. The claimants alleged that Anwal violated its contractual obligations by forcing employees to obey early retirement plans, discharging more than 600 employees, mismanaging the company, which lead to massive losses, undermined the financial status of the company by mortgaging assets and selling 5% of the company's shares to International Finance Corporation as credit facilities, and seizing unregistered property, as it was stated that several pieces of real estate property were not included in the sale agreement even though the buyer had acquired them.[84]

The first claim was based on the buyer's discharging more than 600 employees, which was against its contractual obligations. The agreement stipulated that the buying party could discharge 600 employees as a maximum number within three years from the date of the agreement, and that the discharged employee was entitled to an indemnity of an amount equal to the last three months' salary multiplied by the years of service.[85]

Relating to the mismanagement of the company, the buyer was obliged by the agreement to increase the public benefit of the company by activating its branches and improving the sale of products and profit, leading to improving the profit for the government from the company's taxes due and the dividends entitled to the 10% stake of NCBC. Conversely, the buyer requested EGP 130 Million from the Government as its share from the company's losses.[86]

Regarding the buyer's acquisition of unregistered assets, the claimants alleged that Anwal seized real estate properties that were not included in the tender offer conditions, and were never evaluated in terms of setting the sale price. The buyer also

[83] *Supra* note 64, at 1-2.
[84] *Id.* at 3.
[85] *Id.*
[86] *Id.*

received assets that were valued as leased properties while their real value was freely as properties.[87]

To sum up, the claimants demanded termination of the sale agreement relating to 90% of Omar Effendi's shares, along with ceasing its operations. Additionally they demanded the annulling of the sale's decision issued by the government based on corrupt acts committed by persons in the Government to facilitate the privatization of Omar Effendi, and charge its perpetrators for dispersing the public wealth.

3. State Council's Decision

The Supreme Administrative Court[88] decision challenged legal norms. It held its hearing sessions during February and March 2011. Accordingly, the court issued its final judgment on the 7th of May 2011, annulling the administrative order of the Government to sell Omar Effendi, along with all its effects. Consequently, it included ceasing and terminating the sale agreement related to selling 90% of Omar Effendi's shares to Anwal Co. and Gamil El Kanbit, invalidating the arbitration clause included in the agreement, and restoring the contractor's status to prior concluding the agreement. Therefore, the state redeemed its possession of the company's assets and branches free from mortgages that were concluded between Anwal and the banks. In addition, the company is obliged to re-employ the discharged employees during the execution of the agreement until the judgment to their positions along with settling all their duties and rights. Finally, the buyer should bear all debts and dues that incurred within the execution of the agreement, including the sale of 5% of the shares to IFC along with its effects.[89]

4. State Council's Reasoning

The reasoning of the court set a precedent for subsequent cases. The court reasoned based on various considerations. Below is a brief survey of these considerations respectively: the administrative court's justification for accepting the lawsuit, the assertion of the administrative court's competence to settle the dispute, and the parties' violations of necessary legal procedures before contracting, leading to violations of

[87] *Id.*
[88] The State Council is the Supreme Administrative Court, acting also as the Appeal Court for administrative lawsuits. Comparatively to the Conseil d' Etat in France, as the closest Civil System to Egypt, and according to which the Egyptian Legal System was established.
[89] *Supra* note 64, at 55.

the contractual obligations by the buyer. The sum of these factors was the basis for the withdrawal of the Government's initial decision to sell 90% of Omar Effendi's shares to Anwal.

5. Dispute of Competency

The first question any court asks at any case is its competency to accept the case. The primary claimant, Hamdy El Fakharany, acted as a defender of the public rights and wealth that were violated by the sale agreement.[90] For such reason, El Fakharany challenged the administrative decision to privatize Omar Effendi that was, in his rationalization, an assault on the public wealth. According to the Egyptian Constitution,[91] Article 33 stated that, public wealth had sanctity, and the citizen should bear the duty of its protection and support according to the law.[92]

Following the competence of the Administrative court,[93] the court maintained its competence over the dispute reasoning that defining the competence of the court is a discretionary power that must be ruled solely by the court. A public order gives this power to the court.[94] The court also considered that the Ministerial Commission for Economic Policies was a body affiliated to the Government; hence, all its decisions were considered to be administrative decisions. During the hearings, the counter argument was that the sale's agreement was a commercial agreement; thus the dispute resulting from such an agreement should be settled by civil courts. However, the court decided not to interfere in this debate by illustrating that it was settling a dispute

[90] At that time, and according to the constitution, even though a citizen is not a party to an agreement concluded between the government and any other party, the citizen may challenge the administrative decision based on his/her right to protect the public wealth. That situation has changed utterly under the ruling of temporary ex-president Adly Mansour who issued a law detaining any third parties to challenge an agreement that the government is part in it. Further discussions on such matter will be demonstrated in upcoming Part III.

[91] The Egyptian Constitution of 1971, which was ceased by the 25th January revolution, and replaced by a constitutional declaration issued from the Supreme Council of Armed Forces. At the time of judgment, the constitutional declaration contained the same article.

[92] *Supra* note 1, at 14. The court assumed that Omar Effendi is an asset of public wealth since it was nationalized and owned by the Holding Company for Commerce, which is a corporation owned and managed by the government.

[93] *See supra* note 19.

[94] *Supra* note 64, at 14.

arising from an administrative decision, and not the agreement itself. In order to strengthen its position, the court highlighted its competency to settle the dispute.[95]

The defendants presented arguments contending that the decision to sell Omar Effendi was a commercial decision, which was taken by a governmental entity to affect the commercial position of a company. Based on this point, the administrative decision ended the day the government designated the National Company for Building and Construction to handle the privatization process. Therefore, all transactions that conducted after this delegation were considered as commercial business dealings between companies, which alternatively are subjects of Private Law.

However, the court chose to favor the position of the claimants and pursue an administrative decision, even though commercial factors were present. In addition, the court asserted that when the Government delegated the Holding Company to handle the privatization, it was not for the purpose of its enrichment, and the returns from the sale would not be credited to its account. On the contrary, the returns of the sale of Omar Effendi had been credited to the account of the Egyptian Government in its Central Bank, into an account titled "the return of sale of assets owned by the state."[96] As a result, the Government was the real actor in the sales transaction, and not the Holding Company.

Another counter argument presented was that the agreement included an arbitration clause. According to the Egyptian law of Civil and Commercial Arbitration no. 27 for the year 1994, article 23:

> the arbitration clause should be considered as separate agreement from other clauses included in the agreement; consequently the termination, annulment or voidance of an agreement should not affect the separate arbitration clause provided that such clause is proper. [97]

The court justified its refusal of this proposition based on the sale contract's being considered as an administrative contract, requiring approval from a competent minister. In this case, such approval was not provided. The court considered the sale

[95] As a critical review, the court used two, hence contradictory, methods to assume its competence to settle the dispute. The first was its competence over the administrative decision, and the second was its incompetence over the commercial sale agreement, which should be relevant to the ordinary and civil courts. Realistically, the court in its judgment only affected the commercial agreement. More discussions on matter of competence will be introduced in Part III.

[96] *Supra* note 64, at 17.

[97] Law No. 27 for 1994, Civil and Commercial Arbitration.

agreement as an administrative contract based on its previous assertion that the government was a contractual party. Hence, the administrative court maintained its competence over the contract, and had the power to disregard the exclusivity of the arbitration agreement. In addition, whereas the agreement was considered to be an administrative contract, the legislator required the competent minister approval of the arbitration clause to deem it proper.[98] Without it, the arbitration clause would be deemed null and void.

6. Dispute of Violations Committed by Both Parties

Following the court's declaration of its competency over the matter of the dispute, it reasoned its judgment based on grounds of violations that were committed by both parties before and during contracting. Some of these violations were violations of law and procedures; others were violations of contractual obligations.

The court highlighted the violations committed by both contractual parties during the sale process. The auction of 90% of Omar Effendi's shares contravened the law.[99] Since there was a single offer submitted to the auction, the auction should have been reestablished. According to the law, in case a single offer is submitted to an auction to sell state's assets, the approval of a competent authority was required. Thus, the court declared that the auction should have been annulled; consequently, all the effects resulting from that auction should have also been annulled, including the sale agreement.[100]

In addition to that the auction was not convened properly. The reestablishment of the auction was the selling party's duty. However, the Government refused to rebid the sale of Omar Effendi, even though the price offered by the buyer was much less than the sale price of the tender. Such a refusal raised suspicions relating to the pre-contractual agreement between the investor and the seller. The court stated that the government should have reestablished the auction since the price offered for buying Omar Effendi's shares was much less than the real value of Omar Effendi's assets.[101]

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[98] *Supra* note 64, at 48.
[99] Law No. 89 for 1998, Auction and Bidding Law.
[100] *Supra* note 64, at 2.
[101] *Id.* at 27.

Another violation of law related to the tender offer brochure. The court acknowledged that the brochure excluded major assets and real estate properties, which affected the sale price negatively. However, the execution of the agreement lead to the investor's receipt of these assets and properties. This raised doubts to whether a proper due diligence was ever conducted on Omar Effendi's assets to evaluate the sale price, or whether it was made intentionally by the selling party to decrease the price and hence to pass the privatization process.[102]

The court highlighted in a significant portion of its judgment that the company was wrongfully valued, which negatively affected the sale price. However, the court never investigated the perpetration of such an act; consequently, the decision did not include the civil or criminal liability that should have been pursued for these violations. For instance, the sale price was set at nearly EGP 590 million; however, the main branch is valued for EGP 700 million, and many other branches constituted on lands that were valued at nearly EGP 4 billion. The proof of such was that the investor managed to get loans for a sum of EGP 462 million in return for the mortgaging of only 16 branches of the 82 total branches controlled by the company. Also the company's machines and tools were valued according to their net book value, without considering their condition.[103] The claim was made that the tools and machines were valued at lower than their real value.

Moreover, the auction brochure -which included the company's assets offered to sell- included branches which should have been excluded from being sold based on the Privatization Ministerial Committee's decision. Additionally, according to the sale agreement, the investor gained rights to sell 30% of Omar Effendi's assets to third parties after offering them to NCBC according to their real market value. That meant that the investor had the right to sell the Company's property and branches to third parties, which contradicted the law.[104]

Regarding the contractual obligations, the court asserted that the buyer violated its obligation to improve and develop the company. The court presented a series of facts, which it considered as being violations of contractual obligations. Such facts included the change of Omar Effendi's commercial name. The other main violation was the

[102] *Id.* at 34.
[103] *Id.* at 36.
[104] *Id.* at 27.

failure to properly finance the company, which was seen in the loans granted to the investor through mortgaging of the company's branches to the advantage of the Ahli United Bank, the Audi Bank and the IFC. These loans were EGP 462 million in total, which was very close to the sale price itself. Such a sum was considered a huge drag on the financial status of the company transforming it from being successful company to a losing one. Also the decrease in the sales profit was seen as a violation of the investor's commitment to developing the company.

Finally, the agreement stated that the buyer could not terminate the employment contracts of more than 1,200 employees through offering early retirement, and to 600 employees during the three years following the conclusion of the sale agreement. Such obligation was violated by the investor, who by 30th of June 2009 had terminated the employment contracts of 2,433 employees. Further, the investor sold 5% of Omar Effendi's shares and mortgaged six branches to the IFC in return for credit of USD 30 million, without giving any notice to the NCBC which had acquired 10% of the Company's shares. All of these facts constituted the basis of reasoning for the annulment of the sale agreement that was rendered by the court.

7. Conclusion

To sum up, as stated in the beginning of this chapter, the privatization process of Omar Effendi involved many irregularities and corrupt actions during the sale of Omar Effendi, along with the general breach of contractual obligations by the buying party. What is clear from the court's decision is that the judgment only affected the investor transferred losses and obligation to third parties. Superficially, the court acted as a defender of public wealth, and an organ of the Government political authorities. The upcoming chapter will discuss such a claim and discuss whether the courts should or should not play such a role, which has significant political and economic consequences on Egypt.

IV. REALIST CRITIQUE OF OMAR EFFENDI CASE

This chapter is dedicated to showing how the court in *Omar Effendi* had other options and rules of law that might have been applied in the case; however, the court chose the most favorable legal rules to achieve a certain end. I argue in this chapter that the court preferred to take a shortcut to reach the desired outcome. Setting the legal rules aside, the judges had pre-determined goal of ending the sale contract of Omar Effendi in any possible way. I believe that the State Council judges[105] cannot claim that they did not know the legal rules that should have been applied in that case. My main claim is that the judges disregarded the applicable legal rules in favor of other and more inconvenient legal rules to protect their interests, and those of the state general public.[106] In placing this decision in its historical and societal contexts, it will be revealed that the judges defended the political good. The judges were realistic even if they claimed they were not. The court in the OE decision claimed that it used a formalist methodology in deciding the case; however, the coming arguments will prove that really appealing to the formalist methodology would have produced a different decision in the case. We must acknowledge that what happened in OE case is legal realism in its proper sense. My aim for this chapter is to prove such claim, and to propose that recognizing legal realism produces better outcomes for Egypt especially in the present time.

The State Council Court formulated the law in claiming that the contract has an administrative nature, and disregarding the fact that it is a commercial contract which is subject to ordinary civil courts. Commercial contracts are deemed in most legal systems as a private law matter. However, in a case where the state gets involved in commercial transactions, the question of the separation of powers comes into play. When the state uses its judicial organ to favor the state party in a transaction, the alarm regarding the fairness and justice in a legal system is triggered. Moreover, it endangers the economic status of the state, the integrity of judges and affects the society. The limitation that should be made by a state to respect this fairness will take the form as a question as to which extent the state should be acting in contracts.

[105] Highest level of Administrative Courts in Egypt.

[106] Reference is made here to the duration of January 25th post revolution. The duration in which the courts were trying to prove that they are pro revolution's concepts, the people including the working class and against the corruption made by the pre-revolution governments.

Whether the state should be regulating the market or not, the market will remain a combination of public laws and rules and private commercial transactions. Also in this area we will be opposing to the question of coercion exercised by a state for the distribution of power. The answer of the previous questions cannot in any way be answered without reverting to the morality and policies adopted by the state in a certain historical and societal context. Any trial to answer these questions by general and vague principles and rules of law will be "transcendental nonsense".[107] This chapter will be divided to three parts, to be accurate, to three different routes which the court should have taken.

A. Legal Fallacies in Omar Effendi Judgment

1. Being Realistic to the Omar Effendi Judgment

The court's decision in the OE case contradicts the applicable laws in Egypt. Most of the reasoning was illogical, illegal and full of legal fallacies. The political ideology and context of this period in the Egyptian society clearly affected the court's decision. The State Council Court accepted the case despite the fact it was not competent; it reopened the case despite the fact that a previous arbitration award had been rendered on the same subject and directed at the same parties; and finally, it produced a judgment that contradicts existing laws.

In deciding this case, the court had three options. First, the court should have rejected the case based on the fact that as an administrative court, it was not competent to review commercial contracts. Second, the court could have refused to review the case based on the fact that a previous arbitral award had been rendered on the case. Third and finally, the court should have ended the sale contract based on the fact that the seller breached its obligations, while bearing in mind appropriate indemnification for both parties, together with the new parties involved.

2. Competency of State Council Court (Administrative Court)

The first realist critique on the court's decision is that the court chose to accept the case disregarding the matter of competency. The ordinary court is the competent entity to review the sale contract of Omar Effendi, not the administrative court. There are many legal rules that support this point as stated namely in the Judicial Authority

[107] *Supra* note 41.

Law, Notary Public Law, State Council Law and supported by Court of Cassation and Constitutional Court decisions. As stated in article 15 of the Judicial Authority Law "ordinary courts have the jurisdiction to settle all the disputes except for the administrative disputes, which in turn should be settled by the State Council."[108] The reference made for all disputes is for instance civil, commercial or criminal disputes. Thus, administrative disputes should be settled by the administrative courts which are supervised by the State Council. The same law states also that "ordinary courts are competent to settle all disputes that might arise in relation to the ownership of mobile or immobile assets." Thus, it is stated principle that all civil and commercial disputes are under the jurisdiction of the ordinary courts.

The Cassation Court also stated that "the ordinary courts are competent to settle the disputes that arise in relation to financial rights as mobile or immobile assets."[109] Deducing from these points, law and jurisprudence confirm the principle that ordinary courts are competent to settle disputes of a civil and commercial nature.

On the other hand, the law identifies State Council as competent to settle disputes that arise from administrative contracts. The State Council law[110] states that "the State Council is competent to settle disputes that arise from contracts that are related to managing public utilities, providing the government with products, and any other administrative contract." The administrative court itself denied its jurisdiction over contracts without an administrative nature:"the administrative court will not be competent to settle disputes over contracts unless the contract is an administrative contract."[111] Furthermore, the administrative court also states that "the state Council is not competent to settle disputes that arise from ownership law, as the ownership is subject of private law that is governed by ordinary courts."[112] In conclusion, the law has assigned the competency of settling disputes that arise from a civil and commercial nature to the ordinary courts, and the administrative courts have affirmed this position by denying its competence to settle such disputes.

[108] Judicial Authority Law No. 46 for 1972, Article 15.
[109] Egyptian Cassation Court, decision No. 16 for Judicial year 9.
[110] Egyptian State Council Law No. 47 for 1972, Article 10, 11.
[111] Supreme Administrative Court, Appeal No. 1059 for Judicial year 7, hearing held on 25 May 1963.
[112] Supreme Administrative Court, Appeals No. 4546 for Judicial year 47, and No. 4570 for Judicial Year 47, Hearing held on 22 February 2002.

In a matter of fact, the sale contract of Omar Effendi is considered to be a commercial contract concluded between the Egyptian Joint Stock Company and the Anwal Company. Accordingly, the only judicial entity that has jurisdiction to settle any dispute that arises from that contract is limited to the ordinary court.

The State Council claimed its jurisdiction over the dispute of the sale of Omar Effendi contract on the basis that the sale contract is an administrative contract. In contradiction, the Supreme Administrative Court formerly stated that "the administrative contract is the contract concluded between a governmental authority and any other party in order to manage a public utility."[113] The Egyptian jurisprudence[114] has established that a public utility is "every project established or administered by the state, and works regularly and continuously, and is assisted by the administrative authorities in its establishment or management in order to provide the community with its basic needs, not for the profit, but for assisting the public order and serve the general interests of the public in the state."[115] In another case before the State Council, it was stated that "even though one of the parties in the contract referred to in the case is a person of the public law, yet the clauses of the contract does not have the characteristics of administrative contracts, it can only be considered as sale contract for assets owned by the state, also it was concluded in terms of the private law, and does not propose the administration's intention to adopt the public law elements."[116] To that end, the State Council explicitly identified a main element in the administrative contract which is "an administrative contract concluded for managing public utility should include concession and privilege terms in favor of the government."[117]

To sum up, the State council's reasoning to consider the sale contract of Omar Effendi as being an administrative contract contradicts the law and the same court's reasoning in preceding cases. A contract can only be considered administrative when the government is a party in the contract, the management of a public utility is the subject of the contract, and it includes exceptional terms and privileges in favor of the

[113] Supreme Administrative Court, Decision No. 3480 on 2 June 1957, and Decision No. 1184 of 1961.
[114] The Egyptian Jurisprudence system is based on the doctrine and Supreme Court's Decisions, such as Constitutional Courts, State Council Courts and Cassation Courts.
[115] Administrative Court, Case No. 3480 for Judicial year 9, Hearing held on 2 June 1957.
[116] State Council, Appeal No. 4874 for Judicial year 45, Hearing held on 13 March 2002.
[117] Supreme Administrative Court, Decision No. 4874 for Judicial year 47.

government entity that are defined in the public law. Accordingly neither of these elements was included in the sale contract of Omar Effendi. The sale contract is simply considered a commercial contract of a sale of shares between two joint stock companies that are persons of private law.

3. Arbitration Clause

As a matter of fact, Egyptian law recognizes arbitration as a dispute settlement mechanism. In addition, the law prohibits resettling any dispute that has been previously awarded by an arbitral decision. Article 55 of the Egyptian Arbitration law no. 27 for 1994 has stipulated that "the arbitrators" awards that were awarded in accordance with this law acquire the *res judicata* authority, and shall be forcibly executed without prejudice to the provisions of the law." Hence, any trial to resettle a dispute through litigation after being settled by arbitration is restrictive, and contradicts the applicable law. That point was confirmed in jurisprudence. The Court of Cassation's decision no. 521 for the judicial year 42 in a hearing on 15th February 1978 confirmed that "it is illegal to deliberate either effect or recognition of an arbitral award even though it has not been enforced."

The State Council in its decision of the OE case assumed that the arbitration clause is null and void as it concerns the sale agreement. The Article 20 of the OE sale agreement states that:

> all the disputes that may arise from this agreement shall be settled by arbitration; the governing law shall be the Egyptian Arbitration Law; the language of arbitration shall be in Arabic. The arbitration shall be held in Cairo; the tribunal shall be formed of three arbitrators who shall be appointed in accordance with the Egyptian Arbitration law. The seller shall be liable for issuing all the approvals and permits necessary in relation to the enforcement of the arbitration clause according to the applicable provisions of the Egyptian laws.

On the 10th of June 2008, the parties in the OE case agreed to settle their dispute over the sale agreement of OE through the arbitration in accordance with the arbitration agreement which was included in the agreement. In a transformative event, the seller found out that the company was not making the estimated profit they had envisioned. This is in spite of the fact that the buyer had decided to mortgage some assets in favour of loans and facilities for the sake of gaining working capital. Also the buyer found that the seller was not performing its contractual obligations, including bearing

its share of debt and taxes. Consequently, in a trial to annul the sale agreement and obligate the seller to fulfil its obligations, Anwal Company filed an arbitration case before the arbitration tribunal of the CRCICA,[118] demanding the annulment of the sale agreement of OE shares based on the errors made by the seller. On the 10th of November 2010, the tribunal issued an award rejecting the request of the buyer to annul the sale agreement.

To sum up, the arbitral award rendered by the arbitration tribunal was final and executable, which means that it is not legal to seek a decision from another dispute settlement mechanism or through litigation. The State Council should have refused the case, or at least, declare its incompetency to resettle the case since a final arbitration award was rendered for the same dispute and for the same parties. The State Council did not have the authority either to review the case, or to annul the sale agreement, as a previous award had been made to rejecting this demand before the arbitral tribunal.

Moreover, article 22 of the Egyptian Arbitration Law stipulates that "the arbitral tribunal has the power to solve matters which relates to its competence, the absence of arbitral clause, its nullity or expiry, or its lack of subject of the dispute." To that end, the State Council had no right to claim its competence over the dispute, or to claim the nullity or validity of the arbitration clause. Article 23 of the same law confirms this position by stipulating that" the arbitration clause is deemed an independent agreement of the other clauses of a contract, and the nullity, expiry or termination of the contract shall have no effect on the arbitration clause provided that the arbitration clause is legitimate by itself." To reaffirm, the sole competency in the matter related to the arbitration clause must remain in the authority of the arbitrators only, and not in any other court. This law recognizes the seperability of the arbitration clause from the other terms of the contract. This means that the invalidity, expiry, termination or any other matter that affects the contract has no effect on the arbitration clause itself. Finally, the State Council's decision in the OE case to consider the arbitration clause as null and void along with the sale agreement is an illegal claim.

4. Contractual Relationship When the State is Involved

[118] Cairo Regional Center for International Commercial Arbitration.

The State Council court in this case was an active party. It did not respect the basic rule of neutrality between the parties of the dispute. The court also positioned itself as a defender of public wealth, even though it was not public wealth in the first place. As it was presented earlier, the seller in the OE case is a private entity who sold private shares to another private entity. The intervention made by the court to favor one party's right over the other is a clear policy intervention.

The reference to policy in this case can be regarded as the "need". The contract in the first place was concluded on the basis of the seller's need to get rid of a wealthy company that it could not properly manage. Consequently, in a period of time in which the policymakers encouraged its privatization, the Holding Company for Construction and Development sensed that getting rid of OE and selling it to a foreign investor was easier than restructuring the company.

Joseph Singer in his article[119] has described the realists' view about the need in contract and courts' intrusion in freedom of contract by stating that:

> The realists also criticized the internal coherence of the concept of freedom of contract by arguing that it was too abstract to generate specific conclusions of law. Freedom of contract necessarily includes the freedom *not* to contract, which requires courts to distinguish between contracts that were voluntarily entered into and contracts obtained through the coercive imposition of power by one party on others...Defining what constituted a free contract, then, required judges to make value judgments about where to draw the line between freedom and necessity.

In the OE case, the State Council's judges felt the necessity to make a value judgment to terminate the sale agreement. They also felt that the agreement was made during a period of necessity and though coercion, and during the period of the case's decision, the necessity transformed into annulling of the agreement for a better end in their perspective.

Furthermore, in a period of time where high level of corruption existed, and a lack of public transparency and surveillance, cover for the sale contract to be concluded at a non fair price was provided. In the post-revolution period, the need has changed. The State Council sensed that it must play the role of public wealth protector, and claimed that it had the power to do so. By manipulating and misusing the legal rules, it

[119] *Id. Supra* note 12, at 485.

succeeded in annulling the sale agreement. Nevertheless in an objective review of the case, while the dispute was not resolved legally, it was resolved politically and morally. Joseph Singer supported this view by showing that the realists concluded that contracts reviewed in courts certainly give the courts the authority to make moral and policy decisions in relation to the distribution and use of power in the commercial market. [120]

B. Conclusion

What the judges did in resolving the OE case should not be regarded as an execution of legal rules, but rather it was a creation of rules. They should think about the law with an understanding of the contemporary social context. They also should not make value decisions in the abstract, but rather examine the consequences of those decisions on those who are affected directly and indirectly in the future. A good understanding of the social context allows judges make decisions with satisfactory practical results.

The law is not mechanical, and not a mathematical 'since and thus'; the decision in the OE case is proof that the judges preferred the social consequence rather than the rigid applicability of legal rules. The judges responded to the changing values and circumstances of the changing political climate in Egypt by applying their moral decision to the case. And thus, it is the time to acknowledge that as a fact, judges superimpose their social and political values on legal cases.

For almost all legal actors and scholars in Egypt, the critical view is tough to understand, or to be taken seriously. They think it is meaningless to challenge a court's decision without giving the "right" answer. However, critical thinking is a way of thinking rather than a way of finding an answer. There is no such thing as a "right" answer. There will always be the better fitting answer in social and political context for each case individually. The continuous denial of the interference of politics in courts' judgments makes it easier for power-holders to implement their own political vision. The policy made in courts is and intended by the legislature is justified, and legitimizes the "right" way in the decision-making process.

[120] *Id. Supra* note 12, at 486.

V. FINAL CONCLUSION

To conclude, the aim of this thesis was never meant to be biased in favor of the investor, state or employees. This thesis presents new tools for the review of cases that include political aspects, especially contractual relationships between the state and Private entities. The thesis also claims that law implementation, application and execution has been and always will be attached to politics. The debate here is to acknowledge this claim regarding the state, along with its powerful organ the courts. The recognition of this state of affairs will lead to an improved review on the consequences of the implementation and application of the law. It will also lead to better anticipation of the court's decisions for lawyers and public individuals.

One alternative solution to this political case should have included independent technical and economic experts' commission to investigate and report on their findings. I believe that the court's decision was based on political reasons hidden behind legal reasoning, which is the practice favored by judges and lawyers. The most profitable solution for such a case, which affects the many parties involved directly or indirectly, should have been answered independently by experts, economists, investors and public individuals.

To develop our legal thinking as scholars, we should evade responding to controversial cases by appealing to the shared legal rules and neutral proceedings. If not, this will bring us back to assuming that everyone will arrive at the "right" answers if they think in the "right" way, and ignoring ideological and political considerations. Hence, the disagreement will be the wrong way of thinking, and not the ideological and political dispute.