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The American University in Cairo

School of Global Affairs and Public Policy

**IFIS CONTRIBUTION TO EGYPT'S UNDERDEVELOPMENT:
THE RULE OF LAW AND THE LAWS OF POVERTY**

A Thesis Submitted to the

Department of Law

**in partial fulfillment of the requirements for the degree of
Master of Arts in International Human Rights Law**

By

Kareem A. Younes

Summer 2021

The American University in Cairo
School of Global Affairs and Public Policy

IFIS CONTRIBUTION TO EGYPT'S UNDERDEVELOPMENT:
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A Thesis Submitted by

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to the Department of Law

Summer 2021

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Kareem A. Younes

Supervised by Professor Hani Sayed

ABSTRACT

In 2019 CAPMAS released a report estimating the percentage of extreme poverty amongst the Egyptian public at 32.5%; one in every three Egyptian lives on 1.45\$ a day. In 2017 a United Nations report highlighted that on average 40,000 Egyptian died because of pollution. Those figures represent the consequences of a *cumulative* “development” process that encompassed the economic, political and legal fields. In particular, the thesis focuses on the role of the New Commercial Law in disadvantaging vulnerable segments of the population and leading them to prison. I argue that the use of law as a tool of development in the context of neo-liberal reform has led to paradoxical outcomes that contributed to the underdevelopment of Egypt. Legal reforms under the umbrella of the liberal “rule of law” constitute the laws of poverty. This research sheds light on the role of “rule of law” as a pathway to economic development. It argues that “rule of law” projects must be designed with consideration to distributional outcomes. Those distributional outcomes could lead to creditor having the power to call upon the state to jail a debtor, they can also result in favoring certain economic sectors over others(non productive visa vis productive).

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I. Introduction: Egypt's Development Puzzle and The Rule of Law

In 2019 CAPMAS released a report estimating the percentage of extreme poverty amongst the Egyptian public at 32.5%; one in every three Egyptian lives on 1.45\$ a day¹. In 2017 a United Nations report highlighted that on average 40,000 Egyptian died because of pollution². Another report by WHO published in 2015 ranked Cairo as the second most polluted city in the world(This report is contested by the Ministry of Environment)³. Those figures represent the consequences of a *cumulative* “development” process that encompassed the economic, political and legal fields. The aim of this thesis is to trace and analyze certain developments in the legal field that are correlated to development studies and economics. The extent and nature of that relationship will be determined based on the interaction between those three disciplines. The attempt here in the words of prof. David Kennedy is to forge “an alliance of heterogeneous traditions from economics, law and other disciplines to understand development.”⁴

A normative definition of development that I thought would be fitting to adopt in this thesis is provided by prof. Allot “I see development as the enhancement of life and of life’s possibilities for the ordinary individual”⁵. By legal developments, I particularly focus on structural changes associated with ERSAP. Although the bulk of developments in the Egyptian

¹32.5% of Egyptians live in extreme poverty: CAPMAS EgyptToday, <https://www.egypttoday.com/Article/1/73437/32-5-of-Egyptians-live-in-extreme-poverty-CAPMAS> (last visited Apr 9, 2020)

²Cairo’s bad breath, UN Environment (2017), <https://www.unenvironment.org/news-and-stories/story/cairos-bad-breath> (last visited Apr 17, 2020).

³ Cairo is world's second most polluted city: WHO - Egypt Independent, Egypt Independent (2017), <https://egyptindependent.com/cairo-is-worlds-second-most-polluted-city-who/> (last visited Apr 17, 2020). See also Is Cairo the world’s most polluted city? ‘No’ says the government, ‘probably’ say its suffering residents, Arab News (2017), <https://www.arabnews.com/node/1368046/middle-east> (last visited Apr 17, 2020).

⁴ Taken from David Kennedy’s Syllabus for Law and Development accessible at <http://iglp.law.harvard.edu/wp-content/uploads/LawAndDevoSyllabusFall2010.pdf>

⁵*Law and development: facing complexity in the 21st century: essays in honour of Peter Slinn*, (John Hatchard, Amanda Perry-Kessaris, & Peter Slinn eds), (2003) at xii

legal system were conducted during the 1990s, certain developments were the product of the Infitah period during Sadat's era.

The Egyptian economy has witnessed since the abolishment of the monarchy varying strategies of economic development. Each economic strategy was accompanied by a change in both the political and legal systems. Each strategy has produced winners and losers and had an impact on the economic indicators. Judging from the hike in poverty levels reported earlier; it would seem that the losers far outnumber the winners, with the former's numbers and well-being declining. The economic performance of Egypt can be considered to be a puzzle. The country has an abundance of labor force, access to mineral resources, agriculture, ethnic unity and even at times of internal violence; the intensity of internal conflict has been low in comparison to the region.

In order to engage with this puzzle, I have decided to engage with the role of law in development. In particular, the role of law in the distribution of legal privileges that are assumed to promote an inclusive development agenda. I argue that the use of law as a tool of development in the context of neo-liberal reform has led to paradoxical outcomes that contributed to the underdevelopment of Egypt. To quote prof. Sayed on the effect of neo-liberal policies mainly propagated by IFIs and proponents "The institutional reforms associated with the neo-liberal economic agenda tends to reinforce some of the same conditions that they are designed to address"⁶. The institutional reforms discussed aim to universalize policy choices and bodies of law. In this sense, rule of law projects that aim to privilege investors, businessmen and creditors have led to a deterioration in living conditions of the majority of Egyptian. Legal reforms under

⁶Hany Sayed, *EBHRC Situated: An Essay on the Stakes of Research in Social Sciences*, Summer 2013 EBHRC (2013).

the umbrella of rule of law constitute the laws of poverty. By inserting the role of law; I aim to problematize the current conceptions for underdevelopment.

The thesis is split into three chapters; the first chapter has four aims: first it introduces the history of Law and Development. Second, it examines how the neoliberal framework articulates the role and function of the state, market and law. Third, it introduces the lenses of analysis used in this thesis and in doing so it provides a theoretical critique to the neoliberal conception. This critique operates to demystify and deconstruct the role of the “rule of law” in creating poverty and inequality. This approach to law offers two insights; firstly, it flushes the active role of the state as a function of neoliberal reforms (this simultaneously abolishes distinctions between the public and the private realms). Second, it highlights the capacity of law to take a form of its own and become a deciding factor in both production and the creation of capital, inequality and poverty.

Finally, it engages with how the neoliberal framework has operated in the context of Egypt since the 1970s. It highlights how the neoliberal conception of legality has been incorporated in the Egyptian economy through a narrative employed mostly by right wing commentators or neoclassical institutionalists. It argues that since the 1970s the economic liberalization agenda has adopted a rhetoric of “partial reform” that is often utilized to pursue new cycles of reform. Moreover, those new cycles end up reproducing paradoxical outcomes to the objectives pursued.

The second chapter provides a counter narrative to the neoliberal framework by examining how the distribution of legal(and material) entitlements has led to increased poverty/jobless growth. It aims to accomplish that goal through three levels of analysis. The first level revolves examining the role of the reform strategy is maintaining a cycle of poverty despite

improvements in growth. Building on Galal Amin's lead, I attempt to tell my own story of the development of the Egyptian economy. I do this with a focus on the changes in the legal form/content and how those changes led to several negative consequences on the development front.

The second level focuses on the hidden violent aspect of economic reform and highlights the distributional effects associated with the "repositioning" of the state. It utilizes the concept of the "predatory state" developed by Samir Soliman to highlight how through seemingly neutral legal measures the state can advantage and disadvantage certain sectors.

The final level engages with the most recent publication on Egypt's economic development by Amr Adly. In doing so it focuses on how certain institutional arrangements disempowered small and medium sized enterprises (SSEs and SMEs) by limiting their capacity to access credit/resources and grow. This analysis shows the extension of distributing legal advantages and disadvantages even within the private sphere. The inability of SSEs to gain resources on favorable terms is similar to the situation of prisoners of debt featured in this thesis. Both were often forced to use informal means of lending leading them to either miss out of opportunities of growth or placing them in prison if they succeed and face difficulties. Moreover, I focus on introducing external factors that would have influenced those institutional arrangements. While Adly provides a powerful framework to assess access to resources, I do disagree with his critique of leftist view on development.

The final chapter examines the situation of Egyptian debtors as an example of paradoxical reform that has continued to damage lives since its implementation until today. This is conducted through an examination of how the situation of debtors was *exacerbated* through a counter productive understanding of law in development. The first part engages with the

development of the New Commercial law by examining how the law changed to empower creditors and how that has propagated into court decisions. This empowerment effectively disadvantaged debtors leading to an increase in their imprisonment.

The second part examines several cases reported by newspapers, NGOs and researchers. This examination highlights the underlying causes that led debtors in the Egyptian context into situations of debt and imprisonment. It argues that the situation occurred because of transactions of civil nature that involved taking commodities on credit or using loans to satisfy urgent needs. It further highlights how debt imprisonment has been facilitated by sharp declines in the economy which are a result of previous reform programs.

The third part features an expansion of this examination of “debtors” constructed by IFIs, state NGOs and the Egyptian parliament; it highlights how this identity construction had rendered the violence against the debtors’ invisible. Fourth, the chapter examines the effectiveness of the reform proposals that are based on neoclassical fantasies. It argues that the current situation and the reform proposed; aid in placing debtors in a cycle of forced labor, imprisonment and poverty.

I. Neoliberal Legality Through “Partial Reform”

A. Law and Development and Lenses of Analysis

“Both law and economics and critical legal studies are united in their rejection of the notion of law as public ideal. One school proclaims “law is efficient,” the other that “law is politics.”⁷

The previous quote taken from Fiss’s “The Death of The Law?” was produced in a critique to the emergence of law and economics and critical legal studies. Fiss was worried of the increasing popularity of those two approaches to law in the academy and on the bench. To Fiss’s dismay the mantra of the law and economics “law is efficient” has been later incorporated in legal reforms strategies adopted by IFIs. This section is split into two parts: the first introduces the theoretical legal and economic approaches examined and utilized in the thesis (Law and Economics and CLS). The second is concerned with how legal theories (in specific the liberal rule of law) has unfolded in practice in the Egyptian context.

The first part deals with the how theoretical legal and economic frameworks are articulated in the context of using law as a tool of economic development.. First, it sheds the light on the history of law and development. Second, it examines the development of law and economics within reform strategies adopted in the context of economies of transition. Within the neoliberal framework the role of the state is assumed to be “constrained” from market operations. Law assumes the image of a neutral agent that allows for private interactions and dealings. Third, it introduces the neorealist lens of analysis adopted to deconstruct ambiguities and distributional concerns absent from law and economics. Through this lens certain fallacies

⁷ Owen M. Fiss *The Death of the Law* *Cornell Law Review* (1986) at 2, see also A. Bianchi, *Law and Economics, International Law Theories* (2016) 263-286.

within the first framework become apparent. Those fallacies in effect turn the neoliberal framework on its heads. They do so because in that lens of analysis neither the state is constrained, nor is law neutral. Both are contributing agents in wealth and poverty creation.

The second part shows how the rule of law was advanced in the Egyptian context through a rhetoric of “partial reform”. That rhetoric aided in the maintenance of the same legal rules that aim to privilege investors and businessmen who are assumed to generate higher growth (or efficiency). I argue that the outcome of reconstruction of the same rationale had led to paradoxical outcomes that contradict the objectives of reform goals.

1. Law and Development: An Overview

Interest in Law and Development became a significant part of international development agencies after World War II. This included a “systematic and organized efforts to reform legal systems”⁸; since then Law and Development has continually evolved to take different forms that aim to shape the development process. One thing is certain, the role of Law and Development has increased significantly during the previous decades especially in relation to MENA countries⁹. The initial utilization of law in development was geared towards the purpose of achieving development (industrialization projects for example) through state policy. However, during the 1970s the purpose of law and development shifted to view law as a “a framework for market activity than as an instrument of state power”¹⁰.

⁸ DAVID M. TRUBEK & ALVARO SANTOS, *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* (2006) at 1

⁹I’m using different editions from “ A political economy of the Middle East: See MELANI CLAIRE CAMMETT ET AL., *A POLITICAL ECONOMY OF THE MIDDLE EAST* (Fourth edition ed. 2015 at 13, 74, 316 for example “Various pathologies, from replacing a public monopoly with a private oligopoly to banking crises, were now explained by “deficiencies in the rule of law” and similar governance issues, which is really just another way of restating the essential necessity of market regulation. It became increasingly apparent that for the state to withdraw from the economy, a stronger state, not a weaker one, is needed in order to regulate markets and provide the public goods that allow them to function.” At 282

¹⁰Trubek and Santos, *supra* note 8 at 1

As argued by Trubek and Santos; during the 1990s the era of IFI sponsored reform “rule of law” became “constitutive of development”. In the Egyptian economic development context this conception of the “rule of law” plays a central role in Egyptian development. This manifestation had occurred through the liberal judgments of the Supreme Constitutional Court (SCC) that aimed to reverse previous socialist policies and affirm the right to private property. This was further advanced in the Egyptian context with the introduction of investment law, environmental law, banking law and the main focus of this thesis; The New Commercial Law.

It's important to emphasize that while we can trace an overall direction of the rule of law to support market operations; different conceptualizations of the “rule of law” exist. This is not a static concept and as noted by Santos even within the World Bank there are differing ideas as to how it is conducted¹¹. Trubek and Santos identify three moments that Law and Development have been generally “reimagined”. This thesis primarily focuses on the second and third moments or shifts in law and development. Those moments are transcribed to the Egyptian scene through the reforms applied by the “Washington Consensus” and the “Post Washington Consensus”. The third moment attempts to link law and development to the “social” or the human rights field while adopting a pro market strategy that does not abandon the core of neoliberal reforms. This has been described as adopting both a consequentialist and a formalist approach to the market¹².

¹¹Alvaro Santos, *The World Bank's Uses of the "Rule of Law" Promise in Economic Development*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* (David Trubek & Alvaro Santos eds., New York: Cambridge University Press 2006 at 253-300

¹² In reference to David Kennedy's article in Introduction in *The New Law and Economic Development: A Critical Appraisal* (Alvaro Santos & David M. Trubek eds., New York: Cambridge University Press 2006).(This third moment was in part due to the incorporation of social dimension by Amartya Sen and Joseph Stiglitz)

2. The State as the Market's Handmaiden

In the second moment of law and development the role of the state has been “repositioned”.¹³ This repositioning aimed to create a “division of labor between different institutions”¹⁴; the underlying assumption was that there could be a separation between political and economic issues. It was also assumed that through this division of labor the state’s role would diminish. How did that transformation occur and what were its consequences? The transformation occurred through two measures. First, through limiting the state’s functions to certain areas (assumption of constrain). Second, through privileging the market as the sole engine for the generation of collective wellbeing. The consequence of that transformation is the emergence of law that is subordinated to economic growth and efficiency.¹⁵

The retreat of the state from the public arena is envisioned to contribute to the improvement of general wellbeing. The state has been described by the World Bank as an “overprovider”.¹⁶ This “overprovision” highlights how state action in place of the market leads to inefficiencies. How is that articulated in practice? The state will no longer be able to direct funds at certain industries or certain goods. This has been a recurrent theme in Egyptian history from the 1970s onwards as highlighted in chapter II. The argument follows a utilitarian approach that recognizes an increase in poverty and inequality resulting from the withdrawal of the state from the provision of public services. That retreat is offset by market agents that allow for growth and productivity on the long run.

¹³ Those two sections draw on Kerry Rittich, *Recharacterizing Restructuring: Law, Distribution and Gender in Market Reform*. Vol. 3. The Hague; New York;: Kluwer Law International, (2002) at 50-52.

¹⁴ Id at 49.

¹⁵ Id at 50-56

¹⁶ Id at 52.

However, as argued by Rittich this “retreat” is “misleading”, because what happens is that the state is “repositioned”. This repositioning involves reconfiguring laws, policies and institutions; thus what happens can be described as “reregulation” instead of “deregulation”.¹⁷ Moreover, analyses of the Bank’s misleading philosophy on growth and productivity in addressed extensively in chapter II.

3. Defining The Market and the Role of Law.

Aside from efficiency considerations the state is framed as a man made creation influenced by external pressures and politics while the market exists in the state of nature¹. The market is not a creation of man and as such there will no difficulty in establishing a division of labor between “the enterprise and the market on one hand and institutions such as the family and the state on the other.”¹⁸. The “overprovision” and subsequent reconfiguration of the state is set to deprive certain groups from goods and services. However, the natural and “free” market is supposed to provide more efficiently. The market as a free place will provide a neutral realm that satisfies demand and supply while boosting wellbeing. The representation paints a picture of an apolitical set of rules and laws that will empower the market. For example, investors claims take priority over social claims, because the whole of society is set to benefit.

As the “neutral” market gains supremacy, the existence of a corresponding “neutral” legal framework becomes necessary. This framework as analyzed by Rittich has two relevant features; first it is concerned with the evaluation of “good” and “bad” laws. Good laws adhere to a list of legal rules that aim to create a “free” and a “voluntary” environment for economic agents to enter into agreements.¹⁹ Moreover, good laws are distinguished from regulation by virtue of the

¹⁷ Id at 51.

¹⁸ Id at 55.

¹⁹ Id at 66.

priority they give to economic agents that foster economic growth. In general good laws support state retreat from forms of administrative control and legislative action that encroaches upon the market(Law is not political, it is efficient is the mantra). Bad laws on the other hand would feature distributional elements and would include state intervention in the market.²⁰

Second, it has managed to adjust the use of the rights discourse to suit its legal framework. This adjustment has led to the crystallization/prioritization of property rights as the priority of that regime.²¹ The appropriation of the rights discourse not only allows for this theoretical framework to gain legitimacy, but it also allows it to avoid discussions of conflict amongst rights/claims. This also provides reformers leeway in omitting the fact that the rearrangement of legal entitlements results in “interference with pre-existing previous institutions and practices.”²².

The consequence of those two features in economies of transition is as follow: reregulation inspired by property rights takes away legal entitlements protecting labor and other disadvantaged groups. The result would be an asymmetrical distribution of wealth in relation to legal entitlements. Moreover, this result would seem “neutral” and would on the surface create a “voluntary” environment for economic transactions. This image of freedom is only disturbed by the contradiction within those two features. Essentially rules that are considered neutral in the context of transition are inevitably avoiding conflicts amongst rights. This change creates winner and losers: the winners would be capital owners who are presumed to be most capable of creating economic growth.

4. A Post-Realist Lens of Analysis

“Law is one of the things that constitute the bargaining power of people

²⁰ Id at 66-68.

²¹ Id.

²² Id at 69.

across the whole domain of private and public life. One of the things this power produces is a distribution of income, understood as a distribution of whatever people value that is scarce. But another product of the deployment of power in unequal relations is knowledge, meaning particular understandings of the world and how it works.”²³ -Duncan Kennedy

I rely on an assemblage of theories to argue that current neoliberal conceptions are lacking, incoherent and produce contrary results. First, the framework starts with the work of both Hohfeld and Hale to deconstruct the language of rights within the neoliberal framework. This deconstruction highlights the active role of the state in empowering certain actors in what is argued to be a “free” and a “voluntary” environment. Second, realists at the turn of the 20th century provided insights into clarifying the ambiguity around the definition of property rights and freedom of contract.²⁴ Third, critical legal studies has benefitted from historical debates concerning the active role of the state under the liberal rule of law to argue against the illusory private and public boundary. In a way, it is argued that both the private market and the public are constitutive.

Post Washington Consensus would maintain a distinction between the private and public realms favoring the latter²⁵. This has been a recurring theme in Egyptian reform policy; often a rigid distinction between public and private sectors existed. As highlighted this distinction allows for the construction of the private sector as the savior(guarantor of economic growth). The analysis offered by Hale and Hohfeld obliterates that private and public distinction; laws are

²³ See Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, Volume XV Legal Studies Forum (1991).

²⁴ For example Morris Cohen, *The Basis of Contract*, 46 Harvard Law Rev. 553 1933; Morris Cohen, *Property and Sovereignty*, 13 Cornell Law Q. 8 1927

²⁵ Dain Rodrik, *Rethinking Growth Policies in the Developing World*, in Luca d’Angliano Lecture in Development Economics, Turin, Italy, October 2004.

already granting power to individuals by default²⁶. The creation of new right to sustain the markets creates with each right(or privilege) a correlative duty, those might include “no-right”, “liability in another”. Law effectively becomes a deciding factor of production endowing certain properties or capital with more coercive power to extract more profit.²⁷

This can be seen in the Egyptian case whereby the ultimate concern was to provide investors with extensive state privileges. In the specific case of debtor prisoners covered in the research; the state privileges investors and creditors with the ability to call upon state power to track, arrest and imprison debtors. As can be seen from this case, the state is far detached from the market. It is engaged in contract enforcement(the severity of which falls under contestation), but more importantly it is engaged through its inaction through failing to protect improvised debtors from imprisonment. Due to a rearrangement of legal entitlement previous protection was effectively taken away.

Realists analysis into the definition of property rights has revealed that the “the classical Blackstonian ideal of property as a complete set of powers of disposition, use and alienation” is only one conceptualization of what property rights entails.²⁸ Other conceptualizations might include certain limits concerning environment or labor regulations. Parallely, freedom of contract has also been deconstructed to highlight that parties exercise mutual coercion based on each party’s legal entitlements.²⁹ Moreover, conditions of enforcement relating to the contract might vary. With each variation the power of the contract in terms of material endowment shifts. At this point its important to clarify that I do not use the term coercion in condemnation, but

²⁶ Robert L. Hale *Coercion and Distribution in a Supposedly Non-Coercive State*, Political Science Quarterly 38 (3), 1923: 470-494. See, Warren Samuels, *the Economy as a System of Power and its Legal Bases*, Miami Law Review (1973) at 348 See also Hohfeld, W.N., *Some fundamental legal conceptions as applied in judicial reasoning* The Yale Law Journal, 23(1), at 16-59 (1913)

²⁷ For a recent account see Katharina Pistor, *The Code of Capital*, (2019).

²⁸ Riitch, *supra* note 13, at 133

²⁹ Hale, *supra* note 25.

merely as a tool to highlight that freedom or “voluntarism” is dependent on pre existing power relations and the distribution of legal powers. It is worth highlighting that Hale believed that coercion can only be unjustifiable or worthy of condemnation; if it was under “the sense of influence under pain of doing a morally unjustified act.”³⁰. At this point I’m not interested in condemnation

State involvement in providing legal powers that maintain market operations contradicts the assumption of state retreat. Moreover, it also highlights the limits of using terms such as private and public or state and market as two separate realms. It also uncovers the distributional element in what argued to be a neutral legal framework. If anything if we consider the state as a private actor empowering other private actor any boundary between state and the market collapses. In essence, private power could be viewed as a delegation of sovereignty.

B. The Rule of Law and Rhetoric of Partial Reform

While I had started this thesis with an overall puzzlement from the status of the Egyptian economy, there has been a constant voice over the years claiming that the failure is not puzzling, but a product of “partial reform”. This voice has been present since the 1970s; it was often associated with those calling for more economic liberalization. As professor Galal Amin had highlighted since 1977 the pace of economic liberalization and foreign aid has been “almost never interrupted”.³¹ *Through the “partial reform” argument; legal reforms were enacted with the purpose of “repositioning” the state and privileging certain economic actors.*

At the heart of the “partial reform” argument is the absolute faith in a rigid distinction between a public sector and a private sector. This faith is further projected into the ability of the

³⁰ Hale, supra note 26, at 476

³¹ Galal Amin, *Major Determinants of Egyptian Economic Development 1977-1997*, in, *Twenty years of development in Egypt (1977-1997)* (Mark C Kennedy 1999).at 43

latter to function better in order to improve overall well-being. In order to act on this faith, the Egyptian agenda since the mid 1970s has been geared towards *preferential treatment to both foreign investors and businessmen*. The specific movements and shifts in the Egyptian political economy are examined in some detail in chapter two.

I argue that from the 1970s till today, there has been a continuous reconstruction of a “partial reform” justification. This reconstruction has been used as a justification for the failure of reform. Moreover, “partial reform” in times can be envisioned as a reform approach on its own (i.e. Conducted on purpose). To clarify, I’m not implying that reformers had always maintained that the reform programs were perfect, providing a label for the reform at the time of implementation is not the object of this chapter. Rather this part is concerned with the maintenance of the same policy choices under either “partial reform” rhetoric for reform or “partial reform” in justifying constant failures. Moreover, the argument that this part will establish using several critiques of the liberal “reform” agenda is that; Egypt had undergone “paradoxical reform” that consistently defies the objectives established by reform programs. This is not a product of a failure of state and/or society, but a failure in policy choices, specifically in the tools available for liberal legal economists attempting to provide solutions for the Egyptian system.

This section traces the “partial reform” argument from the 1970s till 2017. It examines the narratives of state officials and academics with an attempt to highlight the imagined missing ingredient from Egypt’s development formula. Each reform strategy and a “partial reform” justification were products of their periods; the aim from periodizing Egyptian legal economic history is to avoid totalizing the conceptualizations of “reform “ or “partial reform”.

1. Partial Reform and Infitah 1974-1977

The 1970s featured the rise of liberal economic “reform”; legal rules were the first indicator that the Egyptian economy is attempting to incentivize and depend on private investors. The 1971 constitution included article 34 and 36; both attempted to establish certain privileges over property rights; those privileges included a prohibition on state action to nationalize or sequester assets. If assets were sequestered, then the constitution guarantees fair compensation. Along with the constitutional changes, Law 65 enacted in 1971 aimed to attract investors and shift away from Nasserist policies towards a market driven economy. The law was later abrogated through law 43 of 1974 which was later also amended through Law 32 of 1977.

Each of those changes in legal rules carries with it an understanding of “reform” and a justification for the failure through the idea of “partial reform”. The first period that had included Law 65 aimed to “establish a system of incentives, guarantees, and privileges for foreign investors in Egypt”³². However, the economic outcomes of the law can not be assessed during that period due to the state of war and uncertainty the country had witnessed. The law was geared towards establishing export oriented industries and free zones; however, in 1974 it was decided that this law was not enough, thus it was replaced by Law 43 of 1974.³³

The second period aimed to “provide incentives and guarantees *beyond* those previously afforded foreign investors”.³⁴ However, the law was also heavily critiqued by foreign investors; one of the main conflicts between the state and the private sector at the time was the latter's insistence on depending on short term projects that yield 25-40% return.³⁵ On the other hand,

³²See, Bushnell, *THE DEVELOPMENT OF FOREIGN INVESTMENT LAW IN EGYPT AND ITS EFFECT ON PRIVATE FOREIGN INVESTMENT*, GA. J. INT'L. & COMP. 3 1981 at 303

³³Id at 304

³⁴ id.

³⁵ id.

the Egyptian government at that time had aimed to attract investors that would *contribute to the gross capital formation; not those who would leave after a 5 year short term investment*. Another major area of dispute was the investors' insistence on accessing the "untapped" Egyptian market; *while avoiding contributing to export oriented industries*.³⁶

The second period was during the premiership of Abd El Aziz Higazi and the third extends from 1975 till the next period of reform(ERSAP). Higazi was adamant in this distinction; according to him; his idea of reform depended on a partial "Open Door" that aimed to attract Arab and foreign investors' money.³⁷ He had highlighted that during 1974-1975; he was able to attract a significant amount of investment from Gulf States.³⁸ In a way; he envisioned further public action along the lines of Keynesian economics with gradual opening of the economy. Higazi aimed to distance himself from what was later popularly labeled as "Infitah Sadah Madah" (Chaos of Infitah).³⁹ This line of thought is in fact compatible with the previous contentions with foreign investors'; as the private sector was largely interested in non productive sectors for the consumption of the Egyptian public.

2. Partial Reform and the 1977 Amendments

The amendment of Law 43 in 1977; aimed to address certain "partial reform" justifications during that period. Specifically, the proponents of liberal reform contended that the exchange rate for investors needs to be adjusted in order to allow for repatriation of funds.⁴⁰ What was more dangerous was the expansion of investor activities beyond the export oriented

³⁶ id.

³⁷ EBHRC PANEL WITH EGYPTIAN PRIME MINISTER HIGAZI 2004

³⁸ id

³⁹ Popular name of Infitah popularized by iconic writer Ahmed Bahaa El Din; Often in reference to the rise in import and decline terms of trade due to conspicuous consumption.

⁴⁰ Salacuse & Parnall, Foreign Investment and Economic Openness in Egypt: Legal Problems and Legislative Adjustments of the First Three Years, 12 INT'L LAW. 759 (1978). At 764

projects.⁴¹ Specifically, investors were allowed to partake in capital intensive projects for local consumption, this included access to the chemicals industry and cement.⁴² This can be contrasted with two accounts from that period. The first was the contention between investors and the government on investment activities. The second was a contrast between the choice of the public sector under Aziz Sedky to choose particular projects that were labor intensive and would function as import substitutes.⁴³

Furthermore, the law included a significant clause that extended investors' privileges in the construction sector; it had even given them permission to expand beyond the borders of the cities.⁴⁴ The expansion of Law 43 in 1976-1977 included the implementation of four legal articles setting a general criteria to allow privileges to investors over a wide range of projects.⁴⁵ Higazi would most likely be critical of that law; especially that he aimed to distance himself from the rise of consumerism symbolized conspicuous consumption that was founded on expanding the privileges of investors.⁴⁶

Higazi's reform seemed to aim for a door half open situation; however, in order to attract foreign funding; the legal rules of the Egyptian system had undergone a chain reaction that included an expansion in legal rules that support a liberal economy. Once legal rules were introduced in 1971, 1974 and 1977 the economy had undergone effectively a forced "Open Door" policy. Laws providing privileges and protection to the private sphere were essential if

⁴¹Bushnell, *supra* note 32, at 309

⁴² *id*

⁴³ AZIZ SEDKY MEMORIAL ROUND TABLE DISCUSSION 2008 EBHRC, . accessible in AUC archives, also in Dr. Adel Gazarin commentary in 2009 EBHRC PANEL ON PRIVATIZATION

⁴⁴Bushnell, *supra* note, 32, at 308

⁴⁵*id*.

⁴⁶SEE, KHALID IKRAM, POLITICAL ECONOMY OF REFORMS IN EGYPT: ISSUES AND POLICYMAKING SINCE 1952. 2020 at 296-300

Egypt were to depend on foreign finance and the private sector. The question now becomes; did this reform program embodied in the shift of legal rules yield its desired outcomes?

3. Outcomes of Reform and the Resurgence of Partial Reform

Towards the beginning of 1980s; the results of economic liberalization, dependency on investors and the private sector “*dismayed even many of its most fervent adherents*”.⁴⁷ The failure of economic liberalization and dependency on investors was manifested in the failure of the economy to attract investors and capital transfers. According to prime minister Higazi; the capital transfers increased from 1974 to 1990 by 65%.⁴⁸ However, a decomposition of those transfers highlights that around 75% of capital was from Egyptians who invested money abroad and had relocated funds to Egypt. Higazi’s estimates placed gross fixed investment from economic liberalization at 10% from the implementation of policies till the death of Sadat. To put this in context, the situation in South Korea in that similar period featured around 460% growth of gross fixed investment during 1974-1985.⁴⁹

The partial reform argument was readily utilized during that period to highlight that the failure of the regime had occurred because investors did not acquire enough legal privileges that would make the Egyptian market attractive. This narrative was also echoed in the writings of liberal development scholars at the time; Bush and Bromley during the 1990s noted that the same scholars argued that the periods of reform within Infatih were also “partial reform in the following passage;” This consensus argues that after 1967, and especially since 1973, the Nasserist model proved to be increasingly unworkable, and that the *hesitant steps taken under the infatih have been too limited to produce meaningful reform*”.⁵⁰ This conclusion

⁴⁷ id

⁴⁸ id

⁴⁹ World Bank Data figures used in calculations

⁵⁰ See, Bromley, Simon, and Ray Bush *Adjustment in Egypt? The Political Economy of Reform* Review of African Political Economy 21, no. 60 (1994): 201-13. See also Richards, A 'The Political Economy of Dilatory Reform: Egypt in the 1980s', World Development, vol. 19, No. 12; (1993) Economic Imperatives and Political Systems, in

was followed by a variety of liberal legal decisions issued by the Supreme Constitutional Court in the 1980s; those decisions attempted to strip away the last vestiges of decision making when it came to economic development policies.⁵¹

The Egyptian development policy approach constructed an image of a “savior” that does not only have the capacity to adjust macroeconomic indicators, but also provide a sustainable and inclusive growth. This savior was the private sector, FDI and investors. The central question became; how to summon the figure of the savior? At a moment of desperation during the period 1986-1990s the IFIs granted the Egyptian regime an extended answer that should solve the predicament associated with that question. This answer was in the form of a series of laws that aimed at creating a legal framework that is conducive to FDI and the private sector. The answer also included insistence on the transfer of state owned enterprises(SOEs) to the private sphere.

4. The IFI’s Sponsored Reform and the Reconstitution of Partial Reform

“Negotiating tactics included “numbers games,” “smokescreens,” and “musical ministers.” Calculations of inflation rates, the GDP, and government revenues and spending can be distorted, concealed, and simply falsified. . . . The government created interministerial committees with overlapping jurisdictions to confuse outsiders – no one knew who was really in charge (if, indeed, anyone was)”⁵² - Alan Richard’s comment on Egypt’s hesitation to adopt IFI policies before 1991.

The previous quote represented the viewpoint of IFIs’; this point adhered to the idea of a “savior” figure that can be conjured out of thin air. On the other side of the negotiating table some of the Egyptian ministers did not understand the obsession awarded to the private sector.⁵³

The Middle East Journal, Vol. 47; See also Waterbury, J (1992), *The Heart of the Matter: Public Enterprise and the Adjustment Process*, in Haggard, S and Kaufman, R

(eds.), *The Politics of Economic Adjustment*, New Jersey: Princeton University

⁵¹ Moustafa, Tamir, *Law versus the State: The Judicialization of Politics in Egypt*. Law & Social Inquiry 28, no. 4 (2003): 883-930.

⁵²KHALID IKRAM, *THE EGYPTIAN ECONOMY, 1952-2000: PERFORMANCE, POLICIES, AND ISSUES* (2006), <http://site.ebrary.com/id/10227258> (last visited Apr 16, 2020).

at 60 (I’m using two editions of the same book this is the older version)

⁵³EBCHR, *supra note* 43 mainly the accounts of Minister Abd El Hady Kandil and Minister of Mohammed Abdel Wahab. The latter refused on several occasions to privatize any of the Petroleum minister’s companies.

There was nearly consensus in the EBHRC session from the business community, ministers and academics that there was no basis for the ERSAP strategy. According to Industry minister Mohamed Abdel Wahab; they did not know *why they were privatizing, it was closer to faith*; in fact, he had described the reform program in theological terms as a “call to prayer”. Furthermore, according to investment pioneer Hany Tawfik who was responsible for the appraisal of companies to be privatized during that period; what had happened during ERSAP was “criminal”; it had “sold Egypt’s air” and had “robbed future generations of their future”.⁵⁴ This particular testimony is significant coming from a leading figure in Egypt’s private sector.

According to Khalid Ikram “serious structural reform did not begin until the 1990s”⁵⁵; however Ikram, refrains from providing a definitive evaluation on the outcome of ERSAP policies. This lack of evaluation occurs despite his adoption of the view that the principle element in ERSAP was about giving the private sector a leading role in the economy. I argue that there were shared similarities between ERSAP and Infitah. Those shared similarities indicate a failure in policy, not a failure due to circumstances. Firstly, the policies were unable to conjure up the imagery of the savior. This had occurred despite the introduction of several bodies of law that aim to privilege investors, it had included economic measures such as tax holidays as well as the establishment of a financial market. Moreover, that period had included the adoption of new investment law, new commercial law, environmental law, capital markets law and Law 203 addressing the privatization of SOEs.

The second similarity between both reform programs lies in the justification offered for both “reform” programs; the reform was also labeled as “partial reform” and that is why it did not achieve its main objective. It is quite puzzling that Prof. Ikram in the latest version of his

⁵⁴ id.

⁵⁵ Ikram, *supra* note 46

book refused to render a conclusion about ERSAP especially when the strategy and tools adopted had failed to award the private sector a leading role. It is worth noting that some proponents of economic liberalization maintained that the reform was always going to be “partial”; this was the case with Fouad Soultan (He thought for example a full reform would include a change in 30 articles of the constitution.). However, it is worth noting that Soultan sought the “partial economic reform” conducted in the early 2000s was a positive step; the outcomes of the high GDP in the early 2000s culminated in a revolution demanding economic equality.⁵⁶ Nonetheless, the question still remains whether the outcomes of carrying out partial reform are desirable?

Finally, it would seem that in both periods the Egyptian state as well as IFIs ignored lessons learned from the British experience. Following a universalized and a generalized model that ignored the British experience led to a significant loss to the public. During infitah it had occurred with the rise of conspicuous consumption; despite the constant warnings of prime minister Higazi to Sadat. Higazi had briefed Sadat on the British experience in “nursing back the economy into normalcy”.⁵⁷ During the ERSAP; Owen raised the same issue in highlighting that the appraisal of SOEs was going to be at a loss to the state during the underdevelopment of the financial sector.⁵⁸ Both incidents had ignored historical precedents and lessons to support an ideological commitment to a disastrous recipe; whether removal of import tariffs or blind privatizations.

5. Partial Reform at the turn of the century

“The paper concludes by stating that privatization of banks is not a panacea in itself and to attain the benefits of privatization it has to be accompanied by stable macroeconomic conditions and a healthy regulatory and competitive environment. “ Paper authored by Mahmoud Moheidein and Sahar Nasr; both become investment/finance ministers from 2004-2010 and 2015-2019 respectively

⁵⁶ EBHRC PANEL WITH FOUAD SOULTAN.

⁵⁷ Ikram, *supra* note 46

⁵⁸ ROGER OWEN, STATE, POWER AND POLITICS IN THE MAKING OF THE MODERN MIDDLE EAST (3rd ed ed. 2004) at 113-30

One of the conditions laid out by scholars to “fix” or “complete” the “reform” beyond tax breaks, and legal privileges was the materialization of a competitive environment. This understanding of reform that moves along with privatization was adopted in 2003 in a paper co-authored by two of Egypt’s investment ministers. This was not just an internal endeavor, emphasis on competition law was placed as condition for Egypt to engage in a trade agreement with the EU. In 2005, the parliament approved a competition law to complement the partiality of “reform”. Competition law was another ingredient that fell within the “partial reform” argument. MoheiElDin, one of the authors’ of this quote, was shortly after Egypt’s investment minister in 2004. In 2019; he had claimed in a public lecture in AUC that “partial reform” was the cause of the underdevelopment of Egypt in each development strategy adopted.

Fortunately, parts of the “partial reform” legal “solutions” were examined over the years; the adoption of competition law fits into another series of “paradoxical reforms”. Dina Waked in analyzing the Steel and Cement interactions with competition law noted two findings.⁵⁹ Firstly, competition law has been delayed in adoption in Egypt due to concern for investors and local businessmen.⁶⁰ Secondly, the main beneficiaries from privatization or previous laws were able to start a chain of legislation that negatively impacts social peace.⁶¹ This was done through limiting the liability within the competition law to include fixed fines and not percentages of profit. The only conviction the law accomplished was against the cement cartel; one of the most pollutive industries.⁶² The cartel has managed to inflict a considerable amount of “social benefit” leakage. Each company within the industry and it is mostly composed of foreign entities paid around ten

⁵⁹ See Waked, Dina I., *Law, Society and the Market: Living with Egypt's Competition Law 2005-2015* (September 15, 2016). Forthcoming in *LAW AND SOCIETY IN POST-REVOLUTION EGYPT*, Amr Shalakany ed. (AUC Press), 2018. Available at SSRN: <https://ssrn.com/abstract=3091552>

⁶⁰ id

⁶¹ Id, in this case Ezz and cement cartel benefiting from certain legal rules and are able to shape and benefit from new legal rules.

⁶² id

million EGP out of hundreds of millions in profit. As a result of previous legal rules; the new laws were shaped in a way that supports leakages in public finance.

6. Partial Reform as The Rule of Law.

“Although these problems arguably had been building for some time, they became acute when oil prices collapsed in the mid-1980s. The decline of rents was widely noted at the time, and many analysts (including the authors of this book) thought that such a development provided an opportunity for real institutional change. As a simple generalization, one can say that many MENA governments have markedly improved their macroeconomic management but have postponed or simply balked at more complex reforms, *such as privatization, regulatory reform, and development of the rule of law.*”⁶³ -John Waterbury, Alan Richards, Ishaac Diwan and Melani Camett.

The previous quote represents some of the recently suggested classical solutions that are used to complete the “partial reform” argument. It is nothing but another attempt to summon an imaginary savior. The same rhetoric was advanced “not enough privileges were granted to investors” to justify the failure of ERSAP; the concept of “partial reform” survived. Recently as the quote above highlights; it has become privatization, regulation *and the rule of law as further necessary ingredients*. There has been too much literature on privatization; this research aims to demystify and assess the impact of regulatory reform and the development of “rule of law” on development. This is particularly important in light of the construction of both as tools that can be used to “complete” the reform agenda. Both have been framed as solutions that will evidently manage to summon the savior. However, as I will argue in the next chapter, this construction over the years has created recurring problems that continually evokes the need for a vague and a counter productive idea of the “rule of law”.

The newest edition of the classical book “Political Economy of the Middle East”⁶⁴; reference to the “rule of law” as a tool for development has increased significantly in comparison to previous editions(Compared to one mention in a single page in the previous edition, the new

⁶³CAMMET, SUPRA NOTE 9.

⁶⁴Id.

edition dedicates pages, graphs, analysis of rule of law in MENA)⁶⁵. Every time the rule of law is mentioned it is related to local corruption. It is often a “petty government official” and a lack of enforcement were the reasons for bad governance and underdevelopment.

The rule of law has in recent years been framed as a constitutive part of development; in MENA it has become the solution to the “partial reform” dilemma. However, the idea of “rule of law” is not only related to controlling corruption. The rule of law as the next chapters will argue has been present during the earlier reform periods. Law has always been in the background.

⁶⁵Cammett, *supra* note 9.

II. Cycles of Poverty Through “Partial Reform”

A. The History and Consequences of “Partial Reform”

In December 1983, the Oriental Hall in the American University in Cairo hosted a large crowd that included; Egyptian ministers, scholars from different disciplines, development and donor agencies. The symposium was titled “The Impact of Development Assistance on Egypt”; it aimed to answer a variety of questions, four of them are of relevance to this chapter. The questions were as follows; is the country better off than it was? is the country able to set and achieve its objectives? How are various groups which combine to make Egyptian society faring off these days? And what has been the impact on Egypt of the large development assistance programs which have operated in that country in recent years?.⁶⁶

Thirty-seven years later; those questions are still relevant and they are at the heart of this thesis. The main points that the symposium covered included; i) conflict between donor and government in setting priorities, ii) dependency, iii) the nature of aid relationship, iv) explicit or tacit strings or conditions associated with aid.⁶⁷ This thesis also touches upon those four points, however, in retrospect, *it aims to offer a different story to the “partial reform” rhetoric through examining both the process and the consequences of partial reform and the pursuit of the savior figure. I argue that because of political externalities imposing certain development strategies; the economy became volatile to several instabilities that have plunged the economy into a cycle of poverty and loans. In specific Egypt’s economy shifted from productive sectors to non-productive sectors leading to a weakness in current accounts and a volatility towards external pressures. This was associated with the use of both aid and loans controlled by IFIs, US treasury or US AID.*

⁶⁶ Earl L Sullivan, The Impact of development assistance on Egypt (1984) at 1-5

⁶⁷ id

1. The Return of Relations and Foreign Intervention (1974-1987).

"Economists are not the most modest of people, although they have a lot to be modest about. They are every ready to pronounce judgement on the economic experiences of different countries, find it easy to pronounce one a success and another a failure, and to all some of them miracles. They seem to be confident that they know the main causes of success and failure. This is surprising for it does not appear that their toolbox contains what enables them to pass judgements with much confidence"⁶⁸ -Galal Amin commenting on the "Success" of the Egyptian economy post ERSAP

This quote is from a brilliant short analysis of ERSAP conducted by Galal Amin.

According to Amin; each economist attempts to tell a story based on a select variables while neglecting others that may lead to a different conclusion. In the next few paragraphs I will attempt to tell my own story of Egypt's economic performance similar to what Amin had done twenty-three years ago in assessing ERSAP. That story does not include the mainstream accounts focusing on GDP growth and inflation. Rather it starts with the assumption that those changes are short term improvements that have not historically yielded improvements in the economy. *Moreover, the story of that performance can not be separated from the mechanisms that placed the Egyptian economy in a constant cycle of loans and spiraling poverty.* Firstly, Egypt's rule during each of those periods will be examined to highlight certain political determinants with regards to the decision making within the state. Second, each section will highlight some of the conditionalities associated with either loans or aid. It will attempt to highlight the role of those conditionalities in shaping Egypt's economy and productive sectors.

Egypt's rule at the time should be understood in the authoritarian context of one man rule.⁶⁹ There is an academic consensus that Sadat did not only listen to elites nor advisors in only foreign policy, but also in economic policies.⁷⁰ Some of Infitah's disasters were communicated

⁶⁸ Galal Amin, *Major Determinants of Egyptian Economic Development 1977-1997*, in, *Twenty years of development in Egypt (1977-1997)* Mark C Kennedy 1997. at 42

⁶⁹ See Brownlee *Peace Before Freedom: Diplomacy and Repression in Sadat's Egypt*, in *Political Science Quarterly*, Vol. 126, No. 4 (Winter 2012) at 650; See also, Raymond Hinnebusch *Egypt under Sadat: Elites, Power Structure, and Political Change in a Post-Populist State*. *Social Problems* 28, no. 4 (1981) at 442-64

⁷⁰ Ikram, *supra* note 46

to Sadat through his prime minister Higazi at the time, but to quote Ikram; “He (Sadat) was basking in the adulation of his *close circle and of Western commentators*, and was in no mood to do anything that might mute their applause”⁷¹. Sadat’s one-man rule was supported by the “peace” dividend; it is not hard to imagine in Egypt’s case the role of political externalities manifested in the power of western states on Sadat in effecting the conditions of loans and aid. Moreover, his close circle here denotes a small number of figures who had a role in shaping Egypt’s political economy along with IFIs and development agencies.⁷² The following sections will attempt to highlight the role of IFIs and aid in exposing the Egyptian economy to volatility through reinforcing conspicuous consumption and non productive sectors. The construction of the private sector and FDI as the savior were at the heart of IFI policies.

Adel Hussien’s seminal book “From Independence to dependency”⁷³ at the time records the move from independence to dependency through a variety of conditions aimed at strategic sectors of the economy such as cement and pesticides.⁷⁴ His book unpacks the vulnerability of Egypt’s dictator to external coercion through economic conditionalities. Moreover, Egypt’s dictator had the capacity to transmit this coercion by outside entities through repression and authoritarian rule within the national context. Hussien records how at certain instances the parliament would sign on a blank paper not knowing the interest rate nor the conditions attached to loans.⁷⁵

In fact, Ikram's conversation with the US Ambassador supports a strong relationship between Sadat and the US administration that had excluded Egyptians from the decision making

⁷¹id.

⁷² Hinnebusch, *supra* note 69

⁷³ Adel Hussien, *The Egyptian Economy from Independence to Dependence 1974-1979*, (Dar El Mostakbal El Araby), 1982

⁷⁴ id.

⁷⁵Hussien *supra* note 73; at 114-115 and 170-171

process.⁷⁶ For example after the 1977 bread riots; the ambassador had highlighted that as long as the Sadat committed to his “moderation” with regards to the “peace deal” then the loans would continue.⁷⁷ It is no wonder that Sadat did not only ignore his advisory team in Camp David, but had returned home with a massive campaign of repression directed at Egyptians.⁷⁸

The IFIs were able to manage the recycling of petrodollars as development loans to developing countries such as Egypt.⁷⁹ Although Egyptian loans between 1975-1977 originated mainly from Gulf states; their conditions and management were left to the IFIs. Hussien highlights how the laws attached to the loans taken included foreign interference in the economy. This interference included a prohibition on the state’s ability to foster special strategic industries.⁸⁰ Moreover, it had extended to manipulate the pricing in certain industries such as cement, it had set priorities to which factories or projects would receive energy intake.⁸¹ This had also included a prohibition on setting preferential access to certain strategic industries. In short the IFIs through loans in the 1970s were able to limit the role of the state in pursuing development goals.⁸²

The 1970s also featured a rise in US aid; this was often labeled in literature as tied aid. There are three aspects concerning the situation of aid that situates it as a tool that attempts to shift production in the economy. The first two aspects are commonly utilized, the third aspect

⁷⁶ Ikram *supra* note 46, at 56-58

⁷⁷ *id.*

⁷⁸ Brownlee *supra* note 69

⁷⁹ Hussien *supra* note 73 at 164-169

⁸⁰ *id.* at 224 and 214-218

⁸¹ *id.*

⁸² *id.* but also supported by several minister narratives from that period EBHRC panel on industrialization (2006) and on Aziz Sedky(2008). In fact, Dani Rodrik in 1999 had argued that “contrary to received wisdom, ISI-driven growth did not produce tremendous inefficiencies on an economywide scale. In fact, the productivity performance of many Latin American and Middle Eastern countries was, in comparative perspective, exemplary.” See Dani Rodrik, *The new global economy and developing countries: Making openness work*. Overseas Development Council, Policy Essay no. 24. Washington, DC: Overseas Development Council, (1999)

was highlighted by Beshai in 1983. Firstly, US aid awarded to Egypt was accompanied by the condition that part of aid is used to purchase raw materials and products from the US at higher prices⁸³. Hussien notes that this was not the same situation when development loans and aid were awarded in the 1950s and 1960s. In fact around 400 U.S companies benefited from the 8.7 billion USD of aid from 1975 till 1983.⁸⁴ Secondly, a common critique to aid is that it attempts to maintain American competitiveness by flooding or suppressing domestic markets. In fact this was highlighted by US AID officials; whereby they highlighted how aid was responsible for the reduction Egyptian wheat production. Wheat currently is the highest item imported by the Egyptian state.⁸⁵

Thirdly, as Beshai notes, the US aid to Egypt shockingly neglected the agriculture sector. As he argues the sector embodied Egyptian comparative advantage and due to its nature as labor intensive it was at the time the largest employer of labor.⁸⁶ Out of 8.2 billion dollars of aid only 343 million were designated to the agriculture sector. Prof. Beshai did not see value in expanding outside of the cities and leaving the rural areas; at this point it is worth emphasizing not just the role of aid in construction and urban expansion.⁸⁷ We should also be emphasizing the role of legal changes in 1977 awarding investors the privilege to invest in urbanization outside of the urban cities.⁸⁸

Beshai was also suspicious about the over emphasis on new technological adaptations in the agriculture sector.⁸⁹ He was in favor of more land reclamation projects and rehabilitation of

⁸³ Adel Beshai *Egypt and the Helping Hand* in Earl L Sullivan, *The Impact of development assistance on Egypt* 1984 at 68-70

⁸⁴ *Id.*

⁸⁵ See Weinbaum, Marvin G. *Egypt and the Politics of U.S. Economic Aid*. Boulder, Colo: Westview Press, at 52, 1986 See also Ikram *supra* note 24, at 79

⁸⁶ Beshai, *supra* note 83

⁸⁷ *id.*

⁸⁸ Bushnell, *supra* note 10, at 303

⁸⁹ Beshai, *supra* note 83

rural centers where poverty existed. Mitchell later on in 2003 would highlight the failure of the technological aid and would stress how it had disrupted the efficient ways farmers were able to utilize the land in.⁹⁰

Mitchell also confirms that stagnation of cotton production as well as the decrease in acreage from 6 million acres to one million.⁹¹ It is worth noting that cotton was the backbone of Egyptian exports for decades. In 1914; it constituted 90% of Egyptian exports, in 1966 it constituted 66% and in 2017 it had reached 1.5%.⁹² The sector was replaced by crude oil; one of Egypt's rentier sectors that are highlighted affected by external volatility similar to the same volatility that occurred in 1987.

A large share of US development low interest loans were directed at import businesses.⁹³ Egypt's comparative advantage in labor intensive sectors such as agriculture was hindered as agriculture had "lost out on medium and long term investment".⁹⁴ Until 1974; Egypt had a "net favorable trade balance for agriculture"⁹⁵ This had changed by 1981 with the food imports exceeding the exports by three billion USD.⁹⁶

This shift has also been accompanied by a rhetoric that attempts to disadvantage small agricultural producers in favor of larger ones. This narrative was carried forth by both academics and senior officials in Sadat's government.⁹⁷ It should not come as a surprise that the construction and agriculture elite had prospered in the time of Sadat considering two of the great

⁹⁰ TIMOTHY MITCHELL, *RULE OF EXPERTS: EGYPT, TECHNO-POLITICS, MODERNITY* (2012) at 254

⁹¹id at 270

⁹² UN YearBook of Trade statistics

⁹³ Weinbaum *supra* note 85, at 40-41

⁹⁴ Ibid page number is not available in the copy; but it is available in the second section of the Infitah in the PDF copy of the book I have. I have to find a physical copy!

⁹⁵Weinbaum, *supra* note 85

⁹⁶ Ikram *supra* note 46 but see also Weinbaum *supra* note 84 at 40-41

⁹⁷ Bromley, *supra* note 50, at 201-13.

beneficiaries from the two sectors were amongst his closest advisors; Sayid Marie and Osman Ahmed Osman.⁹⁸

In short, during the 1970s the IFIs contributed in laying the foundations of the Egyptian economy; this foundation paved the way for a shift in production from export oriented industries into an increase in imports, it had suppressed the agriculture sector in the economy by diverting funds to other non productive sectors such as construction. *But more importantly it had established privileges to the savior figure without any regard to where the growth of the economy was occurring.* This perhaps was the early beginning of the “rule of law” protecting Egyptian underdevelopment.

2. The Consequences of Partial Reform

The open door policy had several impacts on both the Egyptian economy and society. Firstly, during that period the term “jobless growth” would be first used in the Egyptian context.⁹⁹ It has been used again recently in 2020 to describe the recent neoliberal reforms undertaken by Egypt.¹⁰⁰ Second, Infitah signaled the first warning sign about the consequences of social instability on the Egyptian economy.

Firstly, the phenomenon of “jobless growth” included a shift in Egyptian society indicative of a shift in political economy. Kandil had highlighted that in 1970 Egyptian had no millionaires; by 1980; there were 17,000. Around 40% of those millionaires had acquired wealth simply through land speculation.¹⁰¹ Construction rose by 107% during that period; over 90% of

⁹⁸ Hinnebusch, Raymond A., *supra note* 69

⁹⁹ Samir Muḥammad Raḍwān and Markaz al-Miṣrī lil-Dirāsāt al-Iqtisādīyah. *Towards Full Employment: Egypt into the 21st Century*. Vol. 10. Cairo, Egypt: The Center, (1998), at 15.

¹⁰⁰ Raguie Assad in a recent conference hosted by Alternative policy; commenting on his own research conducted after he had gained access to CAPMAS data. The video and work is available at Alternative Policy video accessible at; *Why is the Egyptian Economy Not Creating Good Jobs* <https://www.youtube.com/watch?v=z4Jrr6YIyaA>

¹⁰¹ Hazem Kandil, *Soldiers, Spies, and Statesmen: Egypt's Road to Revolt*. (London;Brooklyn, NY;: Verso), (2012) at 161

this construction was aimed at luxury homes and villas. Kandil reports that between 1974-1979 the percentage of national investment that went into construction was 43%; while 60% of both aid and loans were devoted to the similar objective.¹⁰²

This period had also included some of the highest GDP growth rates in Egyptian history. This is a similarity that this period has with years prior to the 2011 revolution; in fact, during the high GDP growth rates, a large scale social eruption took place also in January 1977. Aside from a lack of employment and a shift in the political economy structure; there was a rising trend of inequality. For example, the lowest 20% of income earners had acquired around 6.6% of national income in 1960; this has increased by 6% in 1970 to reach 7% of national income. By the late 1970s; the lowest earners share of income was around 5.1% of national income. This is to be contrasted with the top 5% of earners acquiring 17.4% of national income in 1960; that had increased by 26% in late 1970s to acquire 22% of national income.¹⁰³

This rise in inequality is a product of privileging certain segments of society over others. Legal rules were distributed asymmetrically to increase the productivity of certain sectors. The same conditions in loans and aid channeled the capital through legal conduits into import industries and capital intensive industries. Both contribute directly to inequality, and both gained their competitive edge and productivity from legal rules within international agreements.

The rise in GDP growth in Egypt was halted by two realities; the first was the ghost of the bread riots in 1977. The second was the collapse of oil prices in 1987. Both situations highlight the role of *instability* during that period. This instability is split into two parts. The first is social instability due to inequality, inflation and worsening standards of living (for example

¹⁰² id.

¹⁰³ See for figures Marvin G. Weinbaum, *Egypt's "Infitah" and the Politics of US Economic Assistance*, Middle Eastern Studies 21, no. 2 (1985): at 206-22.

“jobless growth”). The second instability occurred precisely because Egypt had depended on “windfall” funds and had repressed productive exportable sectors at home. The decline in oil prices, led to a decline in worker remittances and had pushed Egypt towards two deals with creditors. The first was the Paris deal in 1987 and the second was ERSAP in 1991.

3. A State in Crisis; A Self Perpetuating Cycle of Poverty 1987-2003

In May 1991, Egypt engaged in two separate reform programs; at that time the IMF and World Bank had devised two programs attached to two loans to aid Egypt during its economic crisis. In return for adopting reform programs and participating in the war the Paris Club decided to “forgive” 50% of Egyptian debt. Around 19.6 billion USD were relinquished over installments. The omission of half of the debt effectively freed 2% of Egypt’s GDP just to service the debt¹⁰⁴.

Prior to the Paris Club cancelling Egypt’s debt; the economy was in shambles; this was due to external volatility because of dependency on non-productive sectors and oil. When the oil prices witnessed a phenomenal decrease 1980s Egypt featured high deficits in both the budget and external accounts. To quote prof. Beshai; “a currency is mirrored in the productive sectors in the economy”(quote from lecture; how do I reference that? Or can I?). Earlier shifts to construction and weak approaches to agriculture have rendered the economy vulnerable.

To provide an image of the Egyptian economy before the “reforms”, inflation was at 20%, while external debt constituted 28% of GDP¹⁰⁵. The IMF was engaged in adjusting the major indicators through conditioned loans; the first of which was 300 million USD in 1991. The World Bank was responsible for structural adjustments which included; “fighting poverty and

¹⁰⁴ Ikram, *supra* note 46 for a brief summary of the conventional and critical history see Bromley and Bush, *supra* note 50

¹⁰⁵ Id ,Ikram

enhancing level standards through structural reforms” to this end another loan of 300 million USD started the process¹⁰⁶. The reform programs were part of the Washington consensus at the time; the overall theme was growth through pro market strategies and free trade. The consensus placed the following conditions; fiscal discipline, trade liberalization, privatization and securing property rights through the implementation of laws and institutions¹⁰⁷.

In Egypt’s case the World Bank devised programs for reform and conducted several meetings and surveys with businessmen and investors. To quote Dr. Khalid Ikram “The chief of these (complaints of businessmen) concerned the glacial working of the *commercial judicial system*”. Law was at the heart of the reforms in the Egyptian context; the investment law, environmental law and the new commercial law were all adopted during the 1990s¹⁰⁸. For example, the Environmental law of Egypt is complete sync with the World Bank’s pro market environmental assessment handbook.¹⁰⁹

4. Outcomes of Reform; A Renewal of Subjugation.

In 2009, EBHRC hosted a round table that included several academics, ministers and businessmen who gathered to evaluate certain aspects of the ERSAP. Towards the end of the session, Prof. Soliman commented addressing the ministers with a quote taken from Ihasn Abdel Qudus had written during the time of Nasser that a secret organization rules Egypt behind closed doors. The reason for Soliman quoting AbdulQudus was that; most of the ministers present at the meeting were not in favor of the ERSAP policies. If anything, they sought the core of ERSAP which was privatization and was conducted with no vision. The earlier account of minister

¹⁰⁶ Id chapter 6 in Ikram and at 202-205 and Bush and Bromley, supra note 49

¹⁰⁷ See, Cammett, supra note 9 and see Alan Richards et al., A Political Economy of the Middle East 2013; Review chapter 8 and 9 consecutively in each edition.

¹⁰⁸ See Ikram, Khalid. The Political Economy of Reforms in Egypt: Issues and Policymaking since 1952. New York; Cairo;: The American University in Cairo press, 2018 at 286

¹⁰⁹ World Bank Environmental Abatement Handbook

Mohamed Abdel Wahab highlights how the core of ERSAP was a theological “call to prayer” based on faith. The government was instructed to follow ERSAP despite having extreme reservations¹¹⁰. It is unbelievable to paint Egypt’s team as “able to hold its own in the negotiations” when that team was detached from the realities experienced by the ministers.¹¹¹

A major difference between IFIs and Egyptian officials centered around three issues. The IFIs constant reply to the issues was that a conception of the “private” sector is more “efficient”, the IFIs had complete faith in the ability of the market. The Egyptian officials had three lines of responses; firstly, the public sector can perform as efficiently as the private sector. Second, the public sector needed funding due years of restrictions on funds, ministers were often puzzled that the government reaction has always been reductions in budgets, but not expansion along the line of Keynesian understanding. Third, the ministers did not object to the impositions and conditionalities of IFIs out of ideological grounds, but they thought pragmatically that allowing the private sector to prosper lay in allowing it the possibility to grow to support Egypt’s market. They disagreed on a transfer of ownership that would lead to a destructive private sector that would effectively kill the last of Aziz Sedky’s accomplishments with regards to productive sectors in the economy.¹¹²

Ikram responds to the first line by claiming the profitability of public enterprises was considered “humpty dumpty” because they receive privileges from the state¹¹³. Ikram does not issue a totalizing judgment. However, he believes that the success of the public sectors in certain aspects is a rare occasion. In a legal realist understanding this distinction is not necessarily accurate; for example, cronyism associated with the privatized companies included legal rules

¹¹⁰ EBHRC, *supra* note 23

¹¹¹ Ikram, *supra* note 46, at 282.

¹¹² *id*

¹¹³ Ikram, *supra* note 46 at 292.

increasing the productivity of firms away from public benefit. Public benefit here would depend on the difference in each of the sets of privileges the state awards to both the private and the public sector alike. If anything, I argue that public companies have managed to be profitable when they remained away from direct political control. An argument made by Heikal when he assessed the successful performance of Mahmoud Yunes in administering the Suez Canal¹¹⁴. Minister El Kafarway made the same argument with regards to the public companies in the era of Aziz Sedky. According to El Kafarway; during the patriotic leadership of Sedky the companies were successful and profitable.¹¹⁵ Kafarawy's account on the success of industrialization through state led policies had support in the literature of Egypt's economic history.¹¹⁶

Egypt received praise from IFIs over the adoption of trade agreements with the EU. The specific advantage from IFIs point of view was Egypt's cheap labor that made the country attractive for certain types of investment. Those types of investments were often related to pollutive industries; FDI poured in Egypt's cement industry in an attempt to use it for export and provide cheaper cement for the increasing non productive sectors such as construction. Aside from FDI supporting non productive sectors; the Egyptian communities suffered from increased pollution levels. The cheap labor in Egypt's case was translated into cheap lives that are unable to pay for a clean environment.

The ERSAP was able to control and even improve certain macroeconomic indicators; most significant was the reduction of debt, increased GDP growth as well as inflation reduction. However, according to studies examining the purchasing capacity of households to purchase basic nutrients; it would seem that Egyptian poverty during that period increased from 21% to

¹¹⁴ Id. Ikram also recognizes that certain public sector projects when give preferential access as well as access to competent personnel it can perform better.

¹¹⁵ EBHRC, *supra* note 23 panel on Aziz Sedky in 2008

¹¹⁶ Robert Mabro, *The Egyptian Economy, 1952-1972*. (Oxford: Clarendon Press) (1974)

44%.¹¹⁷ Similar to Infitah the country did not witness growth of exports, nor were there an improvement in trade balance. Furthermore, FDI during the period of “reforms” had in fact declined.

The “reform” in the 1990s was short lived, according to different scholars, the improvement occurred because of sale of SOEs, freezes on wages and hiring as well as a rise in tourism.¹¹⁸ The last account seems plausible as the economic performance declined after the 1997 terrorist attacks in Luxor. This was further exacerbated as the Asian crisis also affected the economy on two fronts, depreciation in Asian currency improved their terms of trade. Moreover, international economic stagnation further limited the ability of the FDI part of the constructed savior to materialize. By 2003 the economy was witnessing a slow down that necessitated another round of reforms and privatization. The dependency on windfall funds, as well as construction (i.e non productive capital intensive sector) has hindered the ability of the economy.

To summarize; a chain of political externalities in the late 1970s shifted production and exacerbated inequality. This led to a weakened bargaining position due to vulnerability to debt. *Moreover, it resulted in an expansion of political externalities leading to the adoption of several laws in the 1990s; those laws adhered to the principles that privileged Egypt’s savior.* While those laws improved macroeconomic indicators the economy remained vulnerable due to a shift in non-productive sectors. In short, Egypt’s reform projects since the 1970s have led to changes that are inherently contradictory to the objectives of the reform projects. Those laws further exacerbated inequality and led to further deterioration of social peace.

¹¹⁷ Karen Pfeifer, *How Tunisia, Morocco, Jordan and even Egypt became IMF "success stories" in the 1990s.* Middle East Report. (1999)

¹¹⁸ see Ikram, *supra* note 46, see Amin *supra* note 68

5. Law Versus Regulation; The Rise of Cronyism in Egypt

In 1999, Timothy Mitchell authored a seminal article that critically examined the performance of ERSAP. The following statement is of extreme importance to the research; “It(Egypt) now subsidized financiers instead of factories, cement kilns instead of bakeries, speculators instead of schools.”¹¹⁹. Mitchell’s analysis of the status of the Egyptian economy was reinforced by recent research tackling cronyism and politically connected firms in Egypt. Mitchell had already reported in 1999 that politically connected investors (foreign and Egyptian) were benefiting from tariff measures.¹²⁰ Cronyism has been largely present in either rentier, capital intensive and pollutive sectors.¹²¹ This section poses two arguments with regards to both the construction of “corruption” as a hindrance to development and the idea of the private sector as a “savior” of the economy. Firstly, both the “rule of law” and regulation in Egypt worked hand in hand to privilege the private sector; in that sense, both are not different. This argument is established in order to establish a dent on the necessary condition within liberal conceptions of “rule of law” to protect and expand property rights. Second, the use of “social peace” over the emphasis on investor and creditor privileges(savior image) can stimulate the economy in the Egyptian context.¹²²

The recent work on cronies makes two serious errors in locating the source of the empowerment of cronies. Firstly, The authors’ link its development to the financial and legal

¹¹⁹See Mitchell, Timothy. *No Factories, No Problems: The Logic of Neo-Liberalism in Egypt*, review of African Political Economy 26, no. 82 (1999): at 462

¹²⁰ id

¹²¹ Ishac Diwan, Philip Keefer, and Marc Schiffbauer. *Pyramid Capitalism: Cronyism, Regulation, and Firm Productivity in Egypt* at 216

¹²² See Mark J. Roe, “Backlash.” In *Political Determinants of Corporate Governance: Political Context, Corporate Impact*, (Oxford: Oxford University Press), (2006); See also Joe, Mark J. *Peace as Predicate*, In *Political Determinants of Corporate Governance: Political Context, Corporate Impact*, (Oxford University Press) (2006) see also; Mark J. Roe and Jordan I Siegel, *Political Instability: Its Effects on Financial Development, Its Roots in the Severity of Economic Inequality*, Journal of Comparative Economics 39 (2011) 279-309. Available at SSRN: <https://ssrn.com/abstract=963214>

liberalization related to the rise of Gamal Mubarak in the late 1990s.¹²³ I argue they had made the same mistake of the Egyptian ministers' thinking that reform did not have any basis or was carried internally. Gamal Mubarak's role has been facilitated by the moments in Law and Development. The only way to which the cronies were able to utilize the legal system in order to gain privileges occurred primarily due to impositions from the IFIs on the Egyptian government.

Secondly, it would seem that they adhere to a fictitious and fallacious distinction between rule of law and regulation.¹²⁴ Egyptian cronies such as ones reported by Diwan et al, might benefit from regulation, but they have been empowered by the "rule of law", they have been empowered by IFI' policies such as privatization. It is because of that empowerment that legal regulations exist in their current form. As Rittich had argued those reforms did not consider previous arrangements of power distribution or institutional guarantees that provide and protect for certain groups.¹²⁵ Consequently, regulation enacted as the rule of law empowered existing business actors while stripping away entitlements from public entities and communities. In this sense reregulation established existing rights in favor of the dominant actors. It was Ahmed Ezz that had acquired SOEs that monopolized steel and it was foreign companies that had acquired the publicly owned companies forming the cement cartel.¹²⁶

Both the steel and cement industries stand as examples of the ability of beneficiaries from the "rule of law" projects and reform to influence new conceptions of "rule of law". Ultimately, they can also influence regulation, therefore, the distinction between law and regulation fades, if anything, the liberal rule of law in the 1990s constituted the irregularities associated with

¹²³Diwan et al Supra note 121; specifically "the presence of connected firms in the economy significantly increased with the rise in political influence of Hosni Mubarak's son, Gamal Mubarak"

¹²⁴ See Kerry Rittich, *Recharacterizing Restructuring: Law, Distribution and Gender in Market Reform*. Vol. 3. The Hague;New York;: Kluwer Law International, (2002) at 70-73

¹²⁵ Id at 133

¹²⁶ Waked, supra note 59

cronyism. It had also coalesced those irregularities with protections such property rights(as broadly conceived as possible) that might prevent future corrections.¹²⁷

Advancement of the “rule of law” and good governance will not solve the cumulative effects of cronies plaguing the Egyptian economy. Only a re-imagination of the “rule of law” can yield such a result. This imagination has to go beyond arbitrary efficiency calculations into considering the distributional element within the law, The previous analysis in chapter one indicates that “rule of law” in Egypt developed as a set of privileges to the private sector. While Egypt had witnessed decades of increased privileges towards the use of property; during the same time cronies rose to power. This rise to power led to a specialization in sectors that are both capital intensive, rentier and pollutive. The rise of cronies is indicative of the role of political determinants in shaping legislation and regulation (Keep in mind, there is no distinction between both; both distribute privileges, duties, no rights etc..). At this point we should not envision the “rule of law” as a neutral project or a project with the sole aim of protecting property rights. In fact, it is a part and parcel of wealth distribution in the economy and can shape the distribution amongst sectors. The next section examines the other side of the coin associated with the rule of law and reform; repression. Repression comes hand in hand with reform. Consequently as the next section will argue legal reform cannot be assumed to be neutral and without state involvement.

¹²⁷ id

B. Violence and Repression as Necessary and Sufficient Conditions for Growth

In his book examining the transformation of Egyptian state during the fiscal crisis; Samir Soliman charts a beneficial model that includes the transformation of the Egyptian state from a well-fare state(or in his words Caretaker) to a “predatory” state.¹²⁸ This transformation is characterized by levying the revenues of the state during crises from the weakest segments of the Egyptian political economy. There are two aspects that are related to Soliman’s model that can be applied and highlighted. Firstly, predatory state practices started early in the 1980s; this predatory approach has been evolving during the Mubarak reign in the 1980s. Secondly, through this analysis, it can be seen that *liberal notions of reform or “rule of law” provide protection to certain actors in the political economy*. Other actors i.e. the losers from this transaction end up being the victims of different forms of state violence. This often depends on the perceived bargaining power of each party and their reaction to the proposed reform.

In 1986, thousands from the auxiliary police forces went into protests in the streets, the outbreak of violence and protest was met by decisive military force. At some instances military planes were used against the auxiliary police forces. The incitement of protest had occurred because the state had attempted to cut their waged labor and extend their service from three years to five years.¹²⁹

In many ways this incident embodies one of the first human sacrifices the Egyptian state had to make; but it also highlights the role of instability within society due to the incident’s economic impact. The police force was seen as a weak actor that can be used to

¹²⁸ Samir Soliman and Peter Daniel. *The Autumn of Dictatorship: Fiscal Crisis and Political Change in Egypt Under Mubarak*. Stanford, California: Stanford University Press, (2011) at 97

¹²⁹ Ibahim el Sahary *Twenty Years since the General Security Revolt* in Socialist papers; See also Eberhard. Kienle, *A Grand Delusion : Democracy and Economic Reform in Egypt*, I. B. Tauris & Company, Limited, (2001) at 151-153

impose fiscal discipline and provide a supply of labor for both projects and security. The Egyptian regime back tracked on the proposed changes and had promised to provide the conscripts with better services. The incident also signifies the role of political stability in maintaining the Egyptian economy. A common target during the 1986 were hotels; primarily an essential component of Egyptian tourism which represented one of Egypt's rentier economy pillars.

In order for the predatory state to function under conditions of crisis in the 1990s; it had to repress the opposition from gaining access to political channels. This was specifically conducted to allow for certain controversial IFI reforms to pass through Egyptian legislation.¹³⁰ If anything, this was a replication attempt to acquire a similar parliament to Sadat's in the 1970s. This parliament would support any government plan that aims to aid the state in managing the fiscal crisis. However, there were two incidents in 1993 and 1994 where the parliament had even refused certain IMF recommendations on taxes.¹³¹ Despite those two exceptional moments, this parliament should be examined in comparison to the two previous parliaments(1980s). The 1990s parliaments were practically empty of any opposition. This was due to the scathing critique the election had received from professional syndicates, the judges club and the opposition political parties.¹³²

Another form violence revolves around the act of distributing legal rules on actors based on their relative bargaining power; this distribution effectively leads to worsening living standards (by this I mean starvation/poverty). But also it includes limiting the ability of workers to negotiate for a better work environment, instead of sacrificing their lives operating in pollutive

¹³⁰See Eberhard, *supra* note 128 at 159-161

¹³¹ *id* at 156-161

¹³² *id*

industries. If anything, by weakening the workers bargaining power, the economy becomes favorable to industries that are pollutive. The 1990s included several examples that included legal distribution that aimed to disadvantage the workers. For example, the amendments to the trade union law governing union elections. Kienle highlights that fixed term workers were not allowed to participate in union elections; in his words; “hit hardest those workers who were threatened by the reform of the public sector and privatization”.¹³³ Moreover, a legal privilege was given to the managers to join the rank of the unions; this had allowed them to dilute membership in favor of economic liberalization. This highlights how the attempt to privilege the private sector had led to the weaker position of workers especially those operating in heavy industries.

The reform or the repression of the Egyptian state extended through its distribution of taxes; this also is another form of violence that is distributed asymmetrically. This is violence, because it primarily targeted lower classes in the Egyptian population denying them sustenance and improvements in basic well-being.¹³⁴ For example the general sales tax satisfied liberal fantasies about equality of the rich and poor to consume the same commodities. Moreover, Soliman highlights how the income taxes were levied mostly from those with paid salaries from the government.¹³⁵ Income tax was an indirect way to sustain the state without upsetting the private sector with corrective measures such as the ones highlighted in the previous use of the “second best theory”.

The state’s use of taxes in the Egyptian case indicates three important findings; firstly, salaried employees contributed to 4% of the tax revenue, this was comparable to the same

¹³³ Id at 159-160

¹³⁴ Soliman, *supra* note 127 at 96-100

¹³⁵ id at 116-117

contribution made by both industry and commerce.¹³⁶ Over 60% of taxes were obtained through indirect taxation; through a general sales tax that affects the lower income groups more; Soliman uses an old Arabic proverb to describe it as “spreading the blood between the tribes”.¹³⁷ Secondly, the government privileged certain corporations and industries by simply not applying the law. In 1998, the estimated amount of tax evasion was around 14 to 20 Egyptian billion pounds a year. Despite having a prison sentence as a penalty for evasion; that penalty was never executed.¹³⁸

Thirdly, as Soliman comments on the 2005 tax; it was conducted with the neoclassical rationale “To increase tax revenues you have to lower taxes.”¹³⁹. In reality, this “successful” reform was also nothing but another sham and spectacle of reform that does not relate to lived realities. The tax primarily lowered the income of private sector entities in order to attract the “savior” highlighted earlier in chapter one. This type of “partial reform” privileged companies by lowering their taxes by nearly half. The end result was an increase in taxes that was celebrated by the government. However, as Soliman highlights; “the devil always lurks in the details”; in reality the tax achieved lower taxes from the private sector; the increase in taxes was actually derived from taxation on the Suez Canal and an increase of taxation on gas.¹⁴⁰ Another facade of successful reform that was conducted under the guise of “partial reform” with neoclassical underpinnings.

The previous paragraphs highlight different uses of law to contain dissent, to privilege the private sector as well as distribute economic burdens asymmetrically. Those different uses

¹³⁶ id

¹³⁷ Id ; specific quote at 99

¹³⁸ Id at 117

¹³⁹ Id at 122

¹⁴⁰ Id at 125

became *necessary conditions* during economic liberalization. They all included forms of violence either direct or indirect; this occurs through economic repression by worsening the living conditions of the population to intolerable levels. It had also highlighted how the Egyptian state performs during the implementation of economic liberalization. This performance attempts to target with sometimes a trial and error approach the weakest segments of the population to extort. This extortion occurs *because it attempts to adhere to the principles of neoclassical thought that aims to privilege the private sector*; while taxing the population indiscriminately affecting lower income groups.

C. Cleft Capitalism: A Product of Policy Choices and Efficiency.

“Cleft Capitalism...is more of an institutional condition of multiple coexisting business systems in which market actors play with a different set of rules. This multiplicity differentially and decisively affects the ability of enterprises to access inputs and grow. Under these parallel arrangements, only those with a large initial or acquired endowment of private capital-- financial, physical, human, political and social—could grow alongside a further politically connected cronies.”¹⁴¹

Recently in 2020, Amr Adly published a remarkable study examining Egypt’s development puzzle. His main focus was on the institutional arrangements within Egypt that would allow certain businesses to grow while leaving Egypt’s large pool of SSEs and SMEs stagnating and eventually losing ground (The term he coined for that was Cleft Capitalism).¹⁴² This section will crystalize some points of Adly’s work that would be beneficial for this thesis.

¹⁴¹ See Amr Adly, *Cleft capitalism* at 52 (2020).

¹⁴² *id.*

Firstly, Adly makes an important argument is that Egypt's economic strategy of private sector empowerment did occur.¹⁴³ However, this economic success did not lead to increases in wellbeing(Or the empowerment of SSEs and SMEs in what is labeled the “missing middle syndrome”).¹⁴⁴ Secondly, there is a different critique against the proponents of the cronyism arguments. The third point builds on Adly's framework by emphasizing the role of law. I agree with Adly that a set of rules govern each business subsystem ability to grow or improve. Those sets of rules are in essence a product of law; each legal rule has a productive capacity. Those legal rules were directed on purpose to segments that are assumed to be more productive: this would primarily include large firms that are able to follow economies of scale for example. Moreover, each legal system adopted can influence economic distributional aims. Fourthly, I must highlight a disagreement with Adly, I disagree with parts of his valuable contribution. The book underplayed the role of conditionalities and coercion on the international field.¹⁴⁵

1. A Segmented Private Sector

Adly aimed to counter claims that Egypt did not transform into a successful capitalist society (Examples of successful transformation are for example China or Malaysia).¹⁴⁶ He relies on a conservative source such as the Heritage Foundation to establish his argument. It is highlighted that significant improvements in freedom of trade and the ability of private actors to enter and operate a business with the least state regulation did occur. Moreover, he cites commendations from the IMF and the World Bank as Egypt had succeeded in following their conditions to gain funding. Adly drives his argument through by highlighting the dominance of

¹⁴³ Id at pp 3.

¹⁴⁴ id.

¹⁴⁵ Id at 5 and 12

¹⁴⁶ id at 3

the private sector when it came to contributing by 75% to non-hydrocarbon industries, 65.4 of employments and the increase construction sector growth from 71% in 1991 to 89.1% in 2010.¹⁴⁷

The justification offered as to why this success did not generate increases in wellbeing was attributed to the “missing middle syndrome”. The missing middle syndrome postulates that SSEs and SMEs lacked the institutional ability to gain investments (or loans) to grow. As a result, SSEs and SMEs missed out on being integrated into a capitalist system. In such a system, they would be exploited by the big businesses, this would lead to an overall “benefit”.

It is through the different business subsystems that Adly provides we see how the institutional arrangement within neoliberal discourse operate to give the illusion of success. Adly provides three subsystems: Cronies, Dandy and Balady. Cronies rely on political connections and higher endowments to access credit. Below them in this hierarchy is Dandy capitalism. This category consists of individuals or firms with access to capital that would allow them entry into the finance system.

What is more relevant to this thesis is Balady capitalism. Balady capitalism does not have access to the formal finance market. This leaves them with a variety of other options to acquire credit. Often this leaves them exposed to higher transaction costs and being governed by different legal regimes when it comes to credit access. While Adly surveys their inability to gain credit, this thesis examines how the legal frameworks operate to secure the supply of credit away from what is conceived to be formal institutions.. Balady capitalism shares similar attributes to the case study of debtors in this thesis. For example, the bonds of friendship, family and local society are heavily relied upon in order to access credit.

¹⁴⁷ id.

The access to credit has been often through informal means because the institutional arrangement such as banks and public land management agencies. The institutional arrangement has been centralized (politically and geographically) and had ignored the interests of SSEs. This situation privileged those with larger initial endowments of capital. Adly correctly point to a lack of “complementarity”: complementarity is in this context means that vulnerable actors did not possess enough capital to access more investment. Their situation is lacking because of higher transaction costs.

2. Cronyism and The Role of External Factors

Adly offers a critique to cronyism different than the one envisioned in this thesis. It is argued that cronyism and the absence of formal market institutions can not solely explain the failure of reform programs in delivering suitable welfare.¹⁴⁸ Drawing on a comparative insight from Asia; he highlights that in countries such as South Korea, Malaysia and China development had occurred despite (“and perhaps thank to”) special state-business ties.¹⁴⁹ Emphasis on the experience of Asian countries has been stressed. This emphasis centered mainly on the ability of the institutions within those states to support SSEs and SMEs through local intermediaries that would provide finance.¹⁵⁰ Adly departs from the leftist accounts of underdevelopment that stress that neoliberal policies themselves are the conditions of underdevelopment. Leftist accounts according to Adly view the failure as the “logical outcome” (and not a “pathological deviation” to quote Adly) of disbanding the welfare state and steering away from macroeconomic Keynesian policies.

¹⁴⁸ Id at pp 30-33 and at pp 8

¹⁴⁹ id at 8

¹⁵⁰ id see chapter 4

Third, Cleft Capitalism is composed of rules that influence the distribution of resources. This point highlighted by the book touches upon the main tenet of this thesis. In a legal neorealist lens of analysis; legal rules have an ability to increase production; each legal rule can generate capital for the privilege holder.

While the book discerns itself with national institutions and their role in suppressing access to capital necessary for SSEs and SMEs to develop; what lies outside its scope are external conditions that have an affect on that policy(Adly on purpose focuses on economic sociology).¹⁵¹ For example, several World Bank publications during the 1990s placed conditions on access to finance based on restricting the state's ability to allocate capital.¹⁵² In essence, banks were forced to adopt higher interest rates allowing for higher price of debt vis a vis equity. Moreover, as a conditionality imposed from IFIs; the debt to equity ratio was increased from 1:9 and 1:10 to 1:2.¹⁵³ The increase of both interest rate and debt-equity ratio fundamentally disadvantages SMEs and SSEs who would need cheaper access to debt as well as a significant amount of credit to grow.¹⁵⁴ This legal rule while masquerading under the pretense of neutrality restricted funding to a certain type of businesses. When the state's ability to allocate funds is limited, SSEs and SMEs may seek other sources of finance that offers credit arrangements at higher costs. IMF measures aimed to create an environment of competitive investment between actors: *in this environment those who are better equipped with privileges will capture the market.*

¹⁵¹ id at pp 10

¹⁵² See also; Khaled Hussien and Ahmed Nos'hy, *What caused the liquidity crisis in Egypt?* (2002)

¹⁵³ World Bank 3 volume report "Arab Republic of Egypt Country Economic Memorandum Economic Readjustment with Growth" (1990) volume 2 at pp 19 "The fall(In private sector lending) was due to the tightening of the debt equity ratio from 1:9-10 to 1:1-2 (depending on project size) as a way to comply with the overall credit ceilings agreed upon with the IMF in the May 1987 Standby Agreement" Also for example; "Low interest rates distorted relative factor costs and led to a misallocation of resources. They also discouraged enterprises from self-financing and had a negative impact on business savings" ;See also Mansoor Dailami and Dinh T. Dinh *Interest Rate Policy in Egypt Its Role in Stabilization and Adjustment*, World Bank publication at pp 20-21 (1991)

¹⁵⁴

As a result, legal rules were determined in deciding who was deemed to be more efficient in running a business or those with political connections.

3. Points of Disagreement

I take issue with Adly's critique of leftist accounts of the Egyptian economy. Firstly, the book underplays the role of external conditions in policy; both Roccu and Cox are cited to establish that the Egyptian state was not a transmission belt and that "domestic factors (were) shaping the reforms as much as any external linkages or influences". While I do agree that the Egyptian state was not a mere transmission belt, I disagree on placing them on an equal footing with "external linkages or influences". This disagreement can be even supported by Roccu's account cited by prof. Adly. Roccu's argument recognizes that the reform was "pushed down the throat of the Egyptian government". Roccu's account explains how the Egyptian state managed at times to articulate the reforms to preserve its power as an authoritarian regime. This "articulation" occurred through delaying certain neoliberal reforms or privileging large capital owners with a tax code that saves money. This level of interplay between external and internal forces can be hardly described as two sides on an equal footing.

Second, prof Adly quotes Hansen's World Bank study to critique the leftist discourse for "underscoring" the productive side of state production or state led development. The study produced by Hansen and specifically the pages depended upon are an outstanding example of why World Bank policies failed in Egypt. Hansen critiques Mabro and Radwan for attempting to calculate economic inefficiency; he argues for increased spending on housing contrary to the five-year plan 1960-1965¹⁵⁵. While Hansen recognizes the role of scarcity and access to finance

¹⁵⁵ Hansen World Bank study (This study is full of terrible examples; in fact most of its recommendations were adopted in ERSAP and the specific sectorial recommendations faced a boom. Needless to say those sectors were conspicuous and unproductive. This entire study requires a whole paper to decompose the amount of ideological fallacies within in it.)

necessary for new parts that Egyptian industries needed; he ideologically claims that nationalization was the reason for the drop in productivity (instead of access to finance). The former account of Hansen with regards to access to spare parts and finance can actually be substantiated by accounts from Egyptian ministers of industry who emphasized a constant lack of funding that prevented SOEs to grow similar to SSEs and SMEs lack of finance.

Third, there seems to be a confusion associated with the use of productivity. The way productive sectors are understood in this thesis are sectors that are able to generate a trade surplus. It is unclear whether the state-elite ties that improved upon certain manufacturing sectors was productive. For example, the cement factories are often owned by foreign investors. The new towns being established in the construction boom are unproductive on the basis of its temporality (with regards to labor) and ability to generate much needed finance through foreign currency.

Finally, Adly issues a totalizing judgment on Egypt's access to finance. A plausible argument is made that Egypt had received more cash inflows and funding than both Turkey and Brazil. Prof. Adly in a correspondence with the writer of this thesis had highlighted how that access of funding should counter the narrative deployed that Egypt lacked scarcity.

This approach while seeming plausible runs the risk of underplaying the conditions associated with finance whether it was loans or aids. Moreover, in using the period of 1992 to 2012; the book runs the risk of totalizing the role of finance. To elaborate; it is necessary to examine each period on its own accord and to pose the following questions; where was the money used and what dynamics or legal rules had to change in order for that funding to be required. This indicates a need for a comprehensive study to examine at each period the conditions, power dynamics, and priorities of spending associated with the sum of 61 billion USD in funding

highlighted by Adly. In addition, within the World Bank reports; the first reference to microfinance appeared in 1998 (To my knowledge); during the 1998 report; it was highlighted that the region needs 1.4 billion USD in microfinance. What was being supplied was around 95 million USD.¹⁵⁶ This is an outcome of “efficient” allocation of funding; bigger corporations and those with social capital are able to capture state resources at the efficient interest rate and debt-equity ratio. What has been excluded from realm of banking finances and pushed to the side has been microfinance.

To conclude, prof. Adly provides a powerful framework that highlights the role of rules in privileging certain segments within the private sector. This privileging that narrows down and restricts access to capital is echoed in the case study presented in this thesis with Egyptian debt prisoners. Moreover, the comparative insight provided by Adly highlights that relying on accounts of cronyism is too simplistic to explain the failure of the Egyptian economy in terms of welfare. The previous sections and the example of increases in interest rate/debt-equity ratio are supplementary to the analysis by highlighting the role of external conditions in shaping access to credit.

¹⁵⁶ Judith Brandsma and Rafika Chaoua, *MAKING MICROFINANCE WORK IN THE MIDDLE EAST AND NORTH AFRICA*, World Bank report, at pp 2 (1998)

III. The Outcomes of Reform; Alienation and Violence Against Poverty.

A. Background On Egyptian Prisoners of Debt.

*“that ‘nine tenths of murderers, thieves and idlers come from what we have called the social base’ (Lauvergne, 337); that it is not crime that alienates an individual from society, but that crime is itself further to the fact that one is in society as an alien”*¹⁵⁷ -Foucault

In the late 1990s; journalist Nawal Mostafa first shed light on the situation of Egyptian women in prison; in particular those who she labeled “Women Prisoners of Poverty”.¹⁵⁸ During her visit to Al Qanatir women’s prison; she was shocked to discover a high amount of children amongst the prison population.¹⁵⁹ This had piqued her interest to investigate the situation of women in the prison system; after months of negotiation with the Ministry of Interior she had managed to survey their situation. She found that over 40% of female prisoners at the time were there due to debt.¹⁶⁰ This percentage increased significantly since Nawal last conducted her research. This was due to the decline in overall living standards in the 1990s¹⁶¹ Worsening living conditions and the new laws introduced in the 1990s evidently will lead to a higher percentage than Nawal had reported in the 1990s.

Due to the authoritarian environment in Egypt; it is difficult to acquire accurate accounts of prison population. According to the only recent academic thesis on the situation of Egyptian debtors; we can not determine the numbers of debtors in prison to be precise.¹⁶² However, in just

¹⁵⁷ Michel Foucault & Alan Sheridan, *Discipline and punish: the birth of the prison* (2019), <https://www.overdrive.com/search?q=90DFE98D-83DD-4217-BC9C-DA26C44BE8FD> (last visited Apr 17, 2020) at 275

¹⁵⁸ Hyacinth Mascarenhas, elan, *Prisoners of Poverty: Local NGO seeks to release and empower Egypt’s innocent women in white*, Elanthemag.com (2014), <https://www.elanthemag.com/prisoners-poverty-local-ngo-seeks-release-empower-egypts-innocent-women-white/> (last visited Apr 17, 2020).

¹⁵⁹ id

¹⁶⁰ id

¹⁶¹ See Mitchell, *supra* note 119, at 455-468

¹⁶² See Nivert El Sherif, *Imprisonment for insolvent debtors in Egypt with specific reference to Al-Gharemon cases*, 2018 at 27

2019 there were around 59,000 released from jail because of debts arising from poverty. Moreover, in just four years between 2014 and 2018; both Al Azhar's NGO¹⁶³ Masr El Kheir and President El Sisi have managed to free 120,000 debtors from low socio-economic backgrounds. The ministry of social solidarity has estimated that *around 25% of the entire prison population* are women debtors.¹⁶⁴ Research had also highlighted that around 65% of women prisoners return to the prison after being set free from the first criminal sentence. It is worth emphasizing that some of the numbers only include the number of women. Moreover, in the last six years around 18 new prisons were built by the government to accommodate an increasing prison population.¹⁶⁵ The new prisons were not just built to accommodate Sisi's political opposition, but also to accommodate those who dare transgress on the "credit" system.

B. Lenses of Analysis and Objectives.

The situation of the Egyptian debtors stands as a symbol for the failure of liberal economic policies. This failure can be witnessed through examining how their situation was exacerbated by liberal reforms that maintained the image of the "savior"; with the purpose of rectifying "partial liberal reform" errors. To elaborate, in order to empower the image of the savior legal rules aimed to enhance the bargaining power of certain segments of society. Instruments of debt were endowed with a higher productive ability to generate capital. This institutional change resembles the difficulty SSEs and SMEs faced in accessing capital. In the sense that debtors were disadvantaged when they needed to access credit.

¹⁶³ This was done using the donated money "Zakah" which highlights a flaw in public and collective spending (expanded upon in relation to the wellbeing in part two).

¹⁶⁴ *60 deputies support a bill to help imprisoned female debtors in Egypt*, Euro-Mediterranean Women's Foundation, Euromedwomen.foundation (2018), <https://www.euromedwomen.foundation/pg/en/news/view/7985/60-deputies-support-bill-to-help-imprisoned-female-debtors-in-egypt> (last visited Apr 17, 2020).

¹⁶⁵ AMY WOODYATT *Egypt's Prisons Are Becoming Recruiting Grounds for the Islamic State* Foreign policy 2018; <https://foreignpolicy.com/2019/04/08/egypts-prisons-are-becoming-recruiting-grounds-for-the-islamic-state/>

Similar to Adly's institutional account; Katharina Pistor provides a detailed account of the role of legal institutions in creating capital through privileges and entitlements. Pistor notes four attributes the legal system endows upon property owners; "priority, durability, convertibility, and universality."¹⁶⁶. Attributes such as priority matter in this specific legal reform as the privilege of creditors took priority over previous claims of extenuating circumstances and arguments of intent that were prevalent prior to the reform. The inclusion of context and intent had provided debtors with room to maneuver. Moreover, attributes such as convertibility and universability have led to consequences in the Egyptian context as the state had sanctioned the trading of debt instruments. This trading had often allowed creditors to abuse their privilege as well be highlighted in the following sections. Those attributes lead to an entanglement between legal rules and the production of capital; whereby the former aid in increasing the productivity of the latter.

This chapter has three objectives, firstly, it examines the legal papers or channels through which Egyptian debtors acquire debt that results in imprisonment sentences. It makes two arguments; firstly, the reform program of the New Commercial Law strengthened the checks as a legal channel that can be used to acquire debt, it had awarded it a higher degree of enforcement and productivity through enlisting the state's action to incarcerate defaulters of debt. Second, it argues that imprisonment through debt asymmetrically affects vulnerable populations vis a vis more financially capable segments or commercial actors.

It introduces certain categories of debtors that are affected by sharpening the tools of credit available to creditors. It argues that the situation of certain categories has deteriorated due to the withdrawal of the state leaving individuals vulnerable to economic shocks. Moreover, this

¹⁶⁶ See Katharina Pistor, *The Code of Capital*, 2019 at 3-4

deterioration was faced by heavy state intervention against the debtors through criminalizing their situation in a bid to privilege the savior figure through the New Commercial Law.

Third, it examines the construction of debtor criminality and how that construction fits within the rationale of the reform strategy proposed to “solve” the debtors’ problems. I argue that the treatment of the debtors centered around neoclassical fantasies that aimed to privilege the “savior” figure by sacrificing the population. The initial changes in the legal system mainly in the New Commercial Law, were an extension of privileges awarded to the savior figure. This asymmetrical distribution of privileges is further maintained within the reform strategy. I argue that the reform examined by the Egyptian parliament also fits within the “partial reform” rhetoric. As usual, it exemplifies the paradoxical reform approaches taken in Egyptian reform. It does so by further placing the debtors in a cycle of debt while maintaining a rhetoric of reform that does not express lived realities.

C. The Alienation of the Debtors’ through the Liberal Rule of Law

The recent research examining the situation of the debtors linked the New Commercial law to the exacerbation of the debtors’ situation.¹⁶⁷ This part pursues three avenues of research related to debtors’ imprisonment with the aim of highlighting how the reform process led to an increase in debtor incarceration. First, it engages in a comparative review of the three most common tools usually undertaken to acquire debt in the Egyptian context. In specific, it relates the use of certain commercial papers (checks) in the imprisonment of the debtors. This relationship examines the rise in financial inclusion and consequently the rise in the use of checks as tools of credit as highlighted in the cases of the previous section.

¹⁶⁷ El Sherif, *supra* note 162

Second, it will engage with the development of the check as one of the commercial instruments related to the imprisonment of debtors. In doing so, it examines its development from pre-reform to post reform through focusing on certain articles and legal rules that bear direct relevance to the situation of the Egyptian prisoners of poverty. This examination aims to illustrate how the New Commercial law has managed to empower creditors through changes in certain legal rules. I argue that the development of law along with the court cases have led to a shift in privileges that disadvantaged debtors using checks or commercial papers for civil uses. Finally, it evaluates the use of security receipts within penal law to highlight how not only security receipts aid to further empower creditors, but they also operate in practice in a manner that has not been envisioned in the law.

1. Channels to Acquire Debt

Access to credit in Egyptian society and law is dependent on income, each segment in society has a legal/financial channel that can be used to access credit. Members of the business community can use either the banks for a line of credit or place installments in their contractual obligations. Similarly, individuals with a stable job, savings and a credit history are able to utilize credit options through either credit cards or loans that are based on salaries to guarantee it. On the other hand, the rise in prisoner of poverty is synonymous with the rise of the predatory state and liberal reform. The use of legal papers to acquire debts either for household and emergencies arose out of worsening living conditions and the retreat of the public sector. For example, household equipment and medical expenses are two items the Egyptian state before its transformation into a predatory state had offered either for free or at subsidized rates.

Vulnerable segments of Egyptian society have to rely on mainly three legal means to acquire credit using both the commercial law and the penal law. Two of those means are considered commercial papers in the New Commercial Law and the third falls within the Penal law. The two legal papers within the New Commercial Law are bills of exchange/draft¹⁶⁸ and checks. The general focus in this section is on checks due to the rise of Egyptians accessing the banking system. Moreover, checks are considered to be more reliable by creditors to guarantee debt over bills of exchange for the following reasons. Firstly, a check has only one date; the date of issue which makes it more efficient than a bill of exchange that would have a due date at a different time than issuance. Secondly, a check places an immediate legal obligation on the debtor vis a vis the bill of exchange whereby the position of the debtor is considered before release of funds (Priority). For example, a creditor does not have to get a final approval from a debtor, while with a check no pre-approval is required. Finally, according to the New Commercial Law the check has a main characteristic of depending on a bank to gain its value as a legal document.

In the New Commercial Law, article 534 allows for imprisonment with a 50,000 EGP fine or either of those two punishments. However, the debtors who often default because of inability to cover small installments, are unlikely to pay the fine which ultimately leads to a prison sentence. Second, they can also face imprisonment through the use of security receipts as envisioned in the Egyptian penal law through article 341. Article 341 falls within the category of theft and Usurpation in the criminal law and it allows for a 100 EGP fine and a maximum prison sentence of 3 years for each security receipt.

¹⁶⁸ (draft referred to in the law as Kembyala)

The Penal law allows for a different avenue aside than New commercial law for debtor imprisonment. Some might argue that Penal law is a more effective avenue because of the lack of financial inclusion in Egypt. However, recent research and news reports highlighted an increase in the use of checks in interactions resulting in imprisonment.¹⁶⁹ This is further supported by the cases highlighted in the next section. It is often the breadwinner of the family or one adult within the single household that has access to credit. Millions of Egyptians before the focus on financial inclusion had bank accounts ranging from 10-12% of the adult populations. In recent years due to financial inclusion being high on the development agenda, around 32% of Egyptian adults have bank accounts and easy access to checks.¹⁷⁰ Any individual is entitled to access a check book of 25 checks upon opening a bank account. The price of the check is 1.8 EGP. Therefore, it becomes easy for individuals whether salaried employees, informal labor and generally any section of the population from low income brackets to extreme poverty to gain access to checks.

Both security receipts and checks allow for avenues of imprisonment; there is no data on whether the bulk of the cases are because of security receipts or checks. However, it must be understood that both are tools available for both creditors and debtors to engage in contractual relations (by contractual relationships; I mean the use of a check or a security receipt as a guarantee of payment for medical expenses or equipment used for personal use). If anything, checks can be considered more reliable by creditors for two reasons; they are official documents issued by a bank; therefore, the debates on whether someone would sign a blank security receipt is limited. They can be a representation of money which allows for easier compensation than

¹⁶⁹ ElSherif, *supra* note 162

¹⁷⁰ Government initiatives help raise financial inclusion in Egypt, Oxford Business Group (2020), <https://oxfordbusinessgroup.com/analysis/digital-drives-host-government-initiatives-are-raising-financial-inclusion> (last visited Apr 20, 2020).

using a security receipt to entrust someone on a depreciable commodity or an amount of money. Furthermore, security receipts as tool of imprisonment falls under scrutiny if witnesses attest that they were produced as a result of debt agreement or an agreement between individuals and not an act of trust. As a result, the proceedings move away from penal law jurisdiction to civil law. Finally, they allow for compensation (50,000) that will often be higher than the amounts borrowed in the majority of debtor cases as well as imprisonment.

2. Development of the Checks in Legal Reform and Case law.

The following sections analyze the several bodies of law governing debt and credit relations. Prior to the New Commercial Law¹⁷¹, articles 60, 337 and 341 were utilized in conjunction with the old commercial law¹⁷². Within the old commercial law articles 2, 141 and 191 were engaged to define the nature of debtor-creditor dealings and to assert the value of debt instruments as replacements of money. To illustrate how the system has operated I have relied on two cases. The first, Appeal 879; Court of Cassation in 1952¹⁷³ highlights the linkages between both penal law and the old commercial law. The second case Appeal 27024; Court of Cassation 1998¹⁷⁴ examines possible exceptions permitted prior to the reform that would preclude prison sentences. Those exceptions allowed at certain times for the check to be used as a tool of credit and for the engagement of civil courts thereby not necessitating an imprisonment sentence.

The shift in the Commercial law included the use of article 8, 65, 105, 473, 500, 501, 502, 503, 534. Those article provided an extended framework that award creditors more

¹⁷¹ Promulgated in the Official Gazette No.17 (bis) on 1st of October 1999 and entered to force the same month 1999.

¹⁷² Old Commercial law accessible at <https://site.eastlaws.com/GeneralSearch/Home/ArticlesTDetails?MasterID=137&related>

¹⁷³ Kareem El Assadi, *Crimes of Fraud and Theft and Their relationship to similar crimes in the law*, ALAAN PUBLISHING CO. (2015), at 203

¹⁷⁴ Appeal 27024, (1998) Court of Cassation
<https://ahmedazimelgamel.blogspot.com/2014/09/27024-63-27-12-1998-49-217-1527.html>

privileges. This was particularly manifested in the following cases :Appeal 62163; Court of Cassation, 2007¹⁷⁵,Appeal 11423; Court of Cassation 2014¹⁷⁶ and Appeal 14451; Court of cassation, 2014.¹⁷⁷. Those cases featured the application of the law without exceptions that provided for differentiation based on the use (for civil or commercial purposes), it also included measures that would accommodate for force majeure.

The first objective of this part is to highlight the previous linkage that had existed within the old commercial law. Second, it examines the exceptions within the laws concerning imprisonment that had existed before the reforms. Those exceptions allowed at certain times for the check to be used as a tool of credit and for the engagement of civil courts thereby not necessitating an imprisonment sentence. Third, it compares the changes within the law and how the new reform responded to previous debates and had abrogated certain previous exceptions that allowed for the engagement of civil law thereby preventing incarceration for debt. In doing so, the reforms awarded more privileges to creditors; those privileges would eventually lead to the exacerbation of the situation of the debtors.

¹⁷⁵ Appeal 62163, Court of Cassation (2007)
<https://ahmedazimelgamel.blogspot.com/2015/03/62163-76-4-1-2007-58-1-11.html>

¹⁷⁶Appeal 11423 (2014), Court of Cassation (2014)
://www.laweg.net/Default.aspx?action=LawEg&Type=16&JID=90744&D8%B4%D9%8A%D9%83-D8%A8%D8%AF%D9%88%D9%86-D8%B1%D8%B5%D9%8A%D8%AF.

¹⁷⁷Appeal 14451 (2014) <https://ahmedazimelgamel.blogspot.com/2019/07/14451-4-3-7-2014-65-67-573.html>

3. Pre-Reform

The check was not explicitly mentioned in the old commercial law which was promulgated in November 1883. The check was explicitly mentioned in the penal law of 1937 in article 337¹⁷⁸. Article 337 states that an individual who has written a check that does not correspond to an amount that is withdrawable with bad intention shall face legal sanctions (i.e prison sentence for each legal paper).

In 1952 the court of cassation linked article 337 in the Penal law to the definition of commercial papers in the old commercial law; in specific article 191.¹⁷⁹ Aside from linking the definition of the check from the penal law and the commercial law the court reaffirmed that checks replace money and they can not be used as tools of credit.¹⁸⁰ In 1952 use of the check as a tool of transactions was not widely popular between the Egyptian population, let alone vulnerable segments.¹⁸¹

Despite the previous linkage in 1952; the penal allowed for certain exceptions to be deployed that prevent imprisonment. Article 60 states that penal law sanctions can not be used against individuals who committed acts with sound intention.¹⁸² Moreover, within article 337; there is also a secondary exception on the intention of the issuer of the check.

Yuhkam bhaḍhi al-‘uqwbāt ‘lā kul man ‘u‘ṭya biso’ nyh šykan lā yuqābiluhu rašyid qā’im wa qābil lil-saḥb aw 178
kān al-rašyid aw ba’ḍahu biḥayṭ yuṣbih al-bāqiy lā yafiy biqymāṭ al-šyk aw ‘amr al-maṣḥwb ‘aliyh al-šyk bi‘dam al-
daf’

(Those penalties apply to whomever had issued a check with the intent of non payment as the check is not met with
a withdrawable amount in the bank”

See Also supra note 193 El Assadi

¹⁷⁹ Awraq al-ḥawālāt al-wāḡibāt al-daf’ bimugrad al-‘iṭlā’ ‘alayhā wa al-‘awraq al-mutaḍamina’ amran bil-daf’
Al-šyk al-ma’rwf ‘anhu fy al-qāwn al-tuḡāry bi’ anhu adā’ daf’ wa wafā’ mustaḥaq al-‘adā’ ladā al-‘iṭlā’ dā’iman
wa yuḡniy ‘an ist’māl al-nuqwd fy al-mu’āmlāt, wa lays adā’ i’ tmān yuṭālab bi-qymatihā fy tāryḥ ḡayr al-dy u‘ṭyat
fyh

(The check in the penal law is the check identified in the commercial law as an obligation and a representation of
money

¹⁸¹ El Assadi, supra note 173, at 192

(penalties in the penal law do not apply to any action that with committed with no bad intention).“ ¹⁸²

Through this linkage the position of the check was undermined vis a vis other commercial papers highlighted in article 191.¹⁸³ Certain contractual relations that are violated because of emergencies and or dire conditions of living would not qualify for a prison sentence under the linkage between penal and commercial pending the introduction of context. However, this linkage also differentiated the check from other commercial papers; specifically article 148. Article 148 highlights that the only exceptions available for non payment of a commercial paper is the paper being lost of the bankruptcy of the issuer.

4. Exceptions Within the Law and Debate Before the Reform

It was not lost on the lawyers nor on the judges that the law had allowed for more exceptions to the payment of the check. For example, the court Cassation in 1998¹⁸⁴ had noted that a debtor who had issued checks with the intention of using them as guarantees; did not intend to relinquish control over them, but had used them as tools to guarantee payment. In doing so, the court distinguished the intent of the debtor in the transaction to issue the check as a guarantee for future payment.¹⁸⁵ In that specific case the court recommended that the case be transferred from the penal court to a civil jurisdiction.¹⁸⁶ In doing so the court created a distinction between two uses of commercial papers; firstly, it's use for trading in commercial matters and as an immediate representation of money. Second, it had distinguished a different use as a guarantee within a contract which would then fall under civil transactions; thus the role of criminal law in incarceration was limited. This is a similar situation to all the cases reported earlier in the previous section.

¹⁸³ Hamdy Khalifa Al- šyk fy ɗaw' aḥkām al-qānwn al-tuğāry al-ğadyd raqam 17 li-sanať 1999"

¹⁸⁴ El Assadi, *supra* note 173

¹⁸⁵ *id.*

¹⁸⁶ *id.*

Furthermore, it was argued that article 2 of the old commercial law did not distinguish between the use of a check for a commercial purpose and a commercial purpose.¹⁸⁷ Specifically article two highlighted that transactions have to fall within a commercial nature to fall within the commercial law sphere. Moreover, article two did not specify checks, while it specify other how other commercial papers would fit and had detailed their properties and mechanisms of enforcement. Thus it was not possible to deduce from the commercial law prior to 1999 whether; the check was entirely within commercial law jurisdiction even when used for civil purposes; i.e for urgent medical operations or buying essential household equipment for personal use or whether it falls within a strict commercial use similar to article 148.

5. Post Reform

The New Commercial Law embodies the legal philosophy of the second moment of Law and Development. In that sense; the law embodies the preferential treatment on all levels to creditors; this assumption is laid out explicitly in the articles of the law, in court cases as well as in the legal commentaries whether by academics or drafters.¹⁸⁸ This new law extended prison liability towards all commercial papers not just checks and clarified a previous ambiguity in the law that differentiated the treatment of debtors who used any commercial paper on the basis of its use.¹⁸⁹ The legal commentary on the New Commercial Law; the law aimed to “ Return back the respect to the check as well as adding to the paper the certainty by making it a permanent legal obligation”(Durability). The following paragraphs will go through the articles highlighted

¹⁸⁷ Ali Younes, *Egyptian Commercial Law* (1998)

¹⁸⁸ For example the commentary on the New Commercial Law when it came to the cheque highlighted that the objective of the law was to An tu' iyyd ilā al-šyik haybatuh wa an tuḍfy wa an tuzḡiya al-ṭīqaṭ fy al-ta'amul bih bi-i'tibārahu adāṭ wafā' in dā'imā

¹⁸⁹ return respect to the commercial papers and checks.

¹⁸⁹ Ali Younes, *Commercial Papers*, (1998) and (2005) at 1-5

in the table and how they aim to privilege creditors or the savior figure through turning a blind eye of vulnerable debtors.

Article 8 responds directly to the exception in article 2 in the old commercial law by highlighting that all the commercial actions of a creditor/trader are commercial acts.¹⁹⁰ In doing so it has eliminated the conditionality imposed on non-traders or debtors in this situation from falling within the bounds of commercial law when they are conducting transactions of civil nature (Priority of claims-privileges manifested in the choice of bodies of law).

Article 65 reiterates parts of the judgments of the court of cassation by highlighting that checks and other commercial papers can replace either money or commodities. In doing so it also establishes the privilege for creditors in this specific case to engage in trading of both checks and commercial papers taken as guarantees from the debtors. Nivert highlights how in certain cases, the debtors after paying a considerable amount of money towards repayment of debt, certain creditors trade the checks and the debtor is forced not only to deal with a new creditor, but also they are also forced to pay the whole amount again.¹⁹¹

I have included article 105¹⁹² in the table although it does not pertain to the debtors situation; I argue that this article highlights the preferential treatment awarded to the “savior” figure, by allowing more avenues aside than imprisonment to traders in their commercial

Mādī (8) (1) al-a‘māl al-līy yaqwm bihā al-tāğr lišu‘wn tata‘laq bi-tāğārtih tu‘ad a‘mālan tuğāriyā. (2) kul ‘mal¹⁹⁰ yaqwm bih al-tāğir yu‘ad muta‘liqan bi-tāğārtih mā lam yuṭbat ġayr ḍalik
 “Matters conducted by the trader relating to his business are commercial matters, any matters conducted by the trader are related to his commerce until proven otherwise”

¹⁹¹ ElSherif, *supra* note 162

Mādaī (105) 1- idā lam yadfa‘ al-muštary aḥd aqsāt al-taman al-mutafq ‘alīh falā yağwz al-ḥukm bi-faṣḥ al-bay‘¹⁹² idā tabyyan anhu qām bi-tanfīd ḥamsatin wa sab‘ ynn fy al-mi‘āh min al-tizāmātih. 2- wa fy ḥālaī al-ḥukm bi-faṣḥ al-bay‘ yağb an yarud al-ba‘i al-aqsāt al-laty qabḍahā ba‘d istnzāl mā yu‘ādil ‘uğraī al-intifā‘ bil-maby‘ bil-idāfaī ilā ta‘wyd ‘an al-talf aldy laḥqhu bisabab al-ist‘māl ġayr al-‘ādy. Wa yaq‘ bātlan kul itfāq ‘lā taḥmyl al-muštara al-tizāmāt aṣḍ min ḍalik. 3- al-itfāq ‘lā ḥulwl al-tamn bi‘akmalih ‘ind ‘adam daf‘ aḥd al-aqsāt fy miy‘ād istḥqāqih lā yakwn nāfiḍan ilā idā taḥlaf al-muštary ‘an daf‘ qīštayn mutataliyayn ‘lā al-aql
 (In the case of non repayment of installments, the contract is not rendered invalid if a trader has paid 75% of the . obligagtions,..

dealings with each other. The article reviews the contractual relationship between two parties that are within the private sector. The law seems more lenient to two traders/creditors dealing in commercial relations vis a vis individuals engaged in the same relationship, but using commercial papers for personal purposes or consumption. Under this rule; one of the two parties who “buys” on credit is allowed leeway; this is not the same case for debtors who use checks for a similar transaction. Once the bank informs the creditor that the check does not have a corresponding value, the debtors are placed at the mercy of both the judicial system and the creditor. There are no extensions nor is there leeway that would protect them in situations of force majeure.

Article 473 provides a definition for the check and its properties. In doing so it aimed to exclude hand written checks; and allow checks to be only issued through the banks. This was conducted with the aim of limiting written checks for circulation. It was understood that checks issued by the bank carry more certainty and are more reliable.

Article 500,501 and 502 extend the same obligations of repayment of checks to warrantors; this extends the obligations and imprisonment to other individuals who often happen to be a family member. The articles highlight how checks have the ability to have warrantor. Those warrantors are as equally liable through the law for payment of the checks. Therefore, an entire family could lose its natural legal guardians whenever the husband or the wife chooses to rely on a check for debt and the partner would sign as a warrantor. This has been highlighted in several cases, it is often the wives of the male breadwinner who assume the capacity of signing as warrantors.¹⁹³

¹⁹³ See ElSherif, *supra* note 162 see also WORLD BANK, Women Economic Empowerment Study (2018) at 40 (for recognition of the same problem)

Article 503 represented the jurisprudence of the court of cassation manifested in 1952; and it conformed with the previous article 148 of the old commercial law. However, it had a distinct difference; this article was specifically designed to deny exceptions of intent and context from being evaluated by the courts. This article addressed specifically the reasoning and defenses deployed in the 1998 case that had withdrawn the jurisdiction of the penal law allowing civil law to replace it and thus place an end to imprisonment. This was specifically highlighted in all the cases highlighted in the post reform period in the table. All were treated under criminal jurisdiction (yes despite being used under commercial law REVIEW CASE BELOW); they were awarded criminal sentences by the court and the court highlighted the reasons and intentions of debtors.¹⁹⁴

Finally article 534¹⁹⁵ represents the mirror image of article 337; it allows for both imprisonment sentences as well as a 50,000 fine to be in conjunction with each other; or each separately. As stressed before the fine option is unrealistic especially because as will be highlighted in the debtors' categories in the next section; they are often unable to pay the fine.

To summarize, in the early 1950s, the court of cassation had linked the penal law to the definition established within the old commercial law. In doing so it had involved the penal law in commercial transactions and had undermined the value and certainty of the check. This effectively led to a debate and rulings that disengaged penal law from applying to the checks. Consequently, this disengagement relegated the checks to the jurisdiction of the civil law

¹⁹⁴ Al-ṭa' n raqam 11423 lisanā 4 al-qdā' iyah (1) šyk bidwn rašiyd. ġariymaṭ "arkānihā". Qašd ġinā'y. Mas'wliyah ġinā' iyah. Bā' t. ġariymaṭ i' ṭā' šyk bidwn rašiyd. Manāṭ tuḥqiqhā? Al-asbāb al-laty da' t šāḥb al-šyk ilā iṣḍārih. Dawāfi' lā aṭr lahā 'lā mas'wliyaṭ al-ġunā' iyah
<http://www.laweg.net/Default.aspx?action=LawEg&Type=16&JID=90744&%D8%B4%D9%8A%D9%83-%D8%A8%D8%AF%D9%88%D9%86-%D8%B1%D8%B5%D9%8A%D8%AF>.

Mādaṭ (534) 1- yu'āqb bil-ḥabs wa biġrāmāh lā tgāwz ḥamsyyn 'alf ġunayh aw bi-iḥdā hāṭayn al-'uqwbātyn kul ¹⁹⁵ man irtakb 'amdan al-af'āl al-atiyah: A- iṣḍār šyk lays lahu muqābil wafā' qābil liṣarf. B- istrdād kul al-rašyyd aw ba' ḍhu aw al-ṭašruf fyh ba' d iṣḍār al-šyk biḥayṭ yuṣbiḥ al-bāqy lā yafy biqymaṭ al-šyk

preventing incarceration. However, as the New Commercial Law was introduced with a rationale to privilege the savior figure over the the majority of the population. The exceptions pertaining to checks that examine the context and intent of debtors were removed from consideration. The court cases after 1999 reflect this rationale in dealing with check and other commercial papers. This rationale moves along the lines of providing continuous privileges to the savior figure through excluding the use of legal documents as credit guarantees or allowing for urgent situations or economic shocks to factor into consideration.¹⁹⁶

6. Security Receipts as a Replacement for Contractual Relations.

Another conduit of debtor imprisonment is through article 341 in the penal law. Through this article, debtors sign a paper admitting that they have taken into their custody a specific monetary amount representing a physical asset or a sum of money. This is often labeled as a security receipt; within the law, this receipt can be conducted through either a two-way relationship or a three-way relationship. For example, individual X *entrusts* individual Y to deliver a package to individual Z. Individual Y fails to deliver the package; therefore, individual X is entitled to sue individual Y under the Egyptian penal law article 341. In this situation; a breach of *trust* occurs due to the nature of the security receipt. In another case X entrusts Y with a specific package for a duration of time, on the condition that it is returned when individual X asks for it. However, as highlighted to me by several judges at the higher levels of adjudication; the witnesses often used to testify on the original interaction often vindicate the debtor by highlighting that the transaction was contractual (as a guarantee for money repayment or repayment on commodities for personal use), not an act of trust.

¹⁹⁶ id

Security receipts offer another layer of privileges to creditors, this occurs because of three distinct features available to security receipts. Firstly, similar to checks and commercial papers they are not used in the manner envisioned in the law. They were envisioned as legal papers that guarantee an act of “trust”; when they are juxtaposed in private relations between individuals they become effectively tools of the market. In this sense, their use has been geared towards the purchase of household equipment and taking loans. This is because a transactional relationship occurs whereby individual Y, purchases equipment or borrows a sum of money. Individual X includes within this transaction an interest rate; and in certain cases uses an increased price to induce payment of debtors.

Second, the use of security receipts allows for several prison sentences to be handed down for a single transaction. Simply put, the law allows for individuals committing the action of “entrusting” to divide the amount in several receipts. In doing so, the creditors can use the numbers of receipts to pursue a higher sentencing in years. This also allows the creditors to coerce debtors that through the legal system through threatening the deployment of the prison system to incarcerate them for a long number of years. several prison sentences can be issued for the same transaction. This is also a similarity also shared between receipts and checks.

Finally, a large number of cases involving the use of security receipts can be conducted in different geographical areas. Often in primary courts, the court issues a judgment based on a breach of “trust” due to lack of input from debtors (Sometimes they are not aware of the case). If the debtor is financially capable of further pursuing the case, the appeals court considers the testimony of possible witnesses who would attest that the receipt was not used as a tool of trust. If and when debtors are capable of proving the nature of the transaction as a contractual

relationship, then the matter gets transferred to civil law similar to previous cases the penal law had dealt with.

To conclude, security receipts offer another privilege along with checks. They serve an auxiliary function whenever the use of checks is non-existent. It is often preferred whenever debtors do not have access to bank checks (as written checks have been recently removed from the market). It also serves as an alternative that can substitute or work concurrently with the use of commercial papers. They are used in a contrary way to how they were envisioned to operate within the law. The likely cause of this would be the change in living standards leading individuals to become vulnerable to coercion from creditors and traders. Moreover, the status of the debtors often disadvantage them when it comes down to the use of the legal system as it requires both time, money, effort and most importantly evidence to prove the nature of the relationship was transactional and not one of trust.

D. Empirical Evidence on the Causes of Debtor Imprisonment and Case Law

The recent research available on the debtors attempted to categorize the types of “poverty prisoners of debt” within Egyptian prisons.¹⁹⁷ This section is concerned with highlighting how Egyptian law interacts with those debtors leading to their incarceration. It is worth emphasizing that due to the deterioration in economic conditions due to liberal reforms; the most vulnerable populations were most affected. This assumption is supported by the ministry of solidarity’s data that women in poverty constitute 25% of the Egyptian prison population.

This section has two objectives; firstly to narrow down the segment of the debtors most vulnerable to the changes in the legal system ;i.e. awarding creditors more privileges. This is conducted through examining the categories of debtors established in recent literature by

¹⁹⁷ElSherif, *supra* note 163

research in the field. The purpose of this exercise is to counter the fallacious narratives constructing poverty debtors as criminals. Second, the section aims to highlight through examining several cases of law the interaction between debtors and the legal system and what relevant legal papers are used in their imprisonment. In doing so I pose two arguments; firstly, the vast majority of the debtors fell into debt through transactions of civil nature or arising from urgency(which is often associated with instability). Second, the debtors lacked enough protection through legal means to guarantee them fair treatment; this is conducted through state inaction towards the privileges of creditors.

1. Categories of Debtors

Recent literature has divided debtor prisoners of poverty into three categories.¹⁹⁸ The first two categories involve the use of debt in specific circumstances. However, the third category highlights the existence of a general collateral damage that ensues from a contractual relationship. This damage includes the imprisonment of additional individuals not belonging to the first two categories. The first category entails a family member often a parent or a legal guardian wishing to fulfill cultural obligation within a marriage.¹⁹⁹ Those obligations include the purchase of household appliances on credit. In order for the creditors/traders to sell on credit; they utilize either checks or security receipts as guarantees for payment. In this sense, the head of the household becomes liable for paying installments and with each installments, he/she receives a check for the amount.²⁰⁰

¹⁹⁸ElSherif, *supra* note 162, at 27-31

¹⁹⁹ *id*

²⁰⁰ *id*

Second category is a direct product of the deteriorating economic conditions especially in the economy characterized by a cycle of poverty and dependency on loans.²⁰¹ This category resorts to debt in order to satisfy urgent immediate needs. Through legal papers available, the debtors take debt either through borrowing money or purchasing equipment and reselling it at a loss. The debtors use legal tools as guarantees for payment in the form of commercial papers, checks and security receipts.²⁰² They go through this process due to dire events such as a death of a family member, or a family member requiring an urgent operation or medication. In a way, they are coerced to partake in that agreement out of desperations and due to the worsening economic conditions.²⁰³

The final category includes warrantors; those individuals have no stake in the transaction, but act as a guarantor for repayment in case the main party in the transaction defaults.²⁰⁴ A large portion of those warrantors are mostly other family members within the household. Those family members sign as a warrantor to the check in order to guarantee repayment. One case that exemplifies the spread of debt within households include the imprisonment of an entire family through a debt taken up by the father. The wife was a guarantor, she had defaulted, her guarantor was her older daughter, who was also guaranteed by her younger daughter.²⁰⁵ Creditors resort to those redundancies in the use of credit papers in order to extort debtors through the legal system. The consequence and the outcome of this is the imprisonment of secondary individuals to the main transaction.

²⁰¹ id

²⁰² id

²⁰³ id

²⁰⁴ id

²⁰⁵ id

2. Debtors in Legal Cases and Causes of Imprisonment.

The six cases highlighted below exemplify certain themes that represent some lived experiences that are often shared between the categories of debtors described above. Firstly, debt is often attributed to the sudden emergence of medical emergencies, food shortages, severe economic downturn, increases in poverty, unstable job access, discrimination based on gender and illiteracy. Some assume that they can pay for dowries or necessary furniture in the household in installments, but due to economic downturns, they default.²⁰⁶ This can also happen through increased interest charged by creditors.²⁰⁷ We know in the case of Egypt that women are the most vulnerable when it comes to economic shocks.²⁰⁸ This is either represented by instability of jobs; in times of crisis and unemployment it is often the men that find jobs easier.²⁰⁹ Furthermore, the increases in food prices as well as the rise in poverty have led a higher proportion of Egyptians into poverty.

I rely on the interviews conducted by NGOs as well as interviews collected by El Sherif in the recent and the only academic work I had found on Egyptian debtors.²¹⁰ The first case involves a mother taking a loan and securing it through checks to conduct an urgent eye surgery for her child. She was unable to pay due to heavy interest this resulted in her imprisonment for 16 years.²¹¹

The second case has a similar aspect whereby the woman buys house appliances and resells it for a lower price in order to pay for the husband's operation. The wife purchases the

²⁰⁶ Nivert El Sherif Interview with Nawal Mostafa lead researcher on debtors

²⁰⁷ Id, also see *supra* note 40

²⁰⁸ Rana Hendy *WOMEN'S PARTICIPATION IN THE EGYPTIAN LABOR MARKET: 1998-2012*, Working Paper 907 (May 2015)

²⁰⁹ id

²¹⁰ El Sherif, *supra* note 162

²¹¹ Walid Badran *Gharemat Masr; Ajazan Wara' el Kotban* BBC report 2017
<http://www.bbc.com/arabic/middleeast-39136712>

appliances through checks that guarantee payment through installments for the appliances. The husband dies later; the house loses the breadwinner and she is unable to pay neither the interest nor the principal payments. She received a sentence of 7 years for a checks amounting to 7,000 EGP, the original amount was 2,000 EGP.²¹² In this specific case; there is a hike in the price of the original amount due to the dire necessity of the debtor in this situation; which ultimately leads to increased coercion by the creditor. This occurs because of state inaction in restricting the creditor's bargaining power or ability to call upon the state to exercise a seven year sentence.

The third and fourth cases share a similarity whereby women were used as collateral for the purchases conducted by their husbands. In the third case, the creditor insists that the wife sign as a principal debtor while the husband will pay for a "Tuktuk". Before the completion of installments the husband is involved in an accident and dies, the wife as the guarantor is obligated to repay the installments checks as warrantor She received a four year prison sentence for inability to pay.

The fifth case features a 63 year old mother of six children using checks to gain credit installments; this is in order to buy appliances for her daughter. Her total receipts after paying a large part of the loan; over the amount; is 5515 EGP.²¹³ She is sentenced to two years in prison. Finally, I will conclude with a case of a man sentenced to 98 years in prison for checks of 2,800 EGP; the check was used for civil purposes; he had in 2002 purchased electrical appliances and had sold them when economic conditions worsened. This last case; the man was pardoned after spending 15 years in prison for a 2,500 EGP loan.²¹⁴ At this point I have to highlight that the government claims to spend around 3,500 monthly on each prisoner.²¹⁵

²¹² El Sherif , *supra note* 162 at 28-29 (actual court cases)

²¹³ *id*

²¹⁴ *id*

²¹⁵ "Al-mustašār Sāmiḥ 'abd Al-Ḥakam: al-saḡiyn yukalif al-dawlah 3500 ḡunayh šahryan wa nadis istibdāl al-ḥabs"

The previous cases highlighted the context of urgency and necessity that lead the debtors to take debt. It had also highlighted how those conditions lead them to unfavorable debt conditions; this includes high interest and higher amounts exceeding the borrowed amount. More importantly it highlights how the vast majority of debtor prisoners fall into debt through transactions that include the use of checks or security receipts as a guarantee for payment in a contractual relationship. It also highlights how the purpose of borrowing has been consistently conducted for civil purposes.

E. Construction of Debtors in Neoliberal Fantasies of Reform.

The situation of the debtors is a product of the legal system, however, there are reasons why their plight is rendered invisible. Their plight is seen as a necessary condition for the functioning of the economic system. Therefore as a result, they had to embody certain attributes of deviancy and purposeful defiance to established rules. One of those attributes which seems familiar claims that *debtors have “sovereignty” or an ability to make a choice without coercion*. Moreover, the economic system has managed to exclude certain aspects of criminality from certain debtors while maintaining the status of others. This has been a recurrent theme in Egyptian reform and it can best be examined through the Egyptian state and World Bank approaches to the debtors’ issue.

In 2017, a delegation composed of NCW members and several state NGOs presented Egypt’s national strategy to empower women in line with the development vision of 2030.²¹⁶ The situation of women in prison and women in poverty was mentioned twice in two bullet points

<https://www.youm7.com/story/2018/6/1/%D8%A7%D9%84%D9%85%D8%B3%D8%AA%D8%B4%D8%A7%D8%B1-%D8%B3%D8%A7%D9%85%D8%AD-%D8%B9%D8%A8%D8%AF-%D8%A7%D9%84%D8%AD%D9%83%D9%85-%D8%A7%D9%84%D8%B3%D8%AC%D9%8A%D9%86-%D9%8A%D9%83%D9%84%D9%81-%D8%A7%D9%84%D8%AF%D9%88%D9%84%D8%A9-3500-%D8%AC%D9%86%D9%8A%D9%87-%D8%B4%D9%87%D8%B1%D9%8A%D8%A7/3816279>

²¹⁶ Egypt Today, *NCW presents Egypt's women empowerment 2030 in Geneva*

amongst a 74 page document.²¹⁷ In that same document; the authors (NCW) were proud to highlight that they have managed to reach 72,000 women to learn about their most basic needs.²¹⁸ According to the image they have constructed of the two bullet points concerning women in prison; it would seem that none of those 72,000 women were members of the debtor prison population.

The first bullet point addressing the situation of women in prison in the government's strategy; highlighted the importance of providing necessary health care for elderly women.²¹⁹ The word "elderly" was emphasized in italics; as if to indicate that all other women in prison receive necessary access to health care. The same point highlighted also the importance of allowing visitation of children; special emphasis was given to a certain group of children "especially those under the age of 15".²²⁰ However, the second bullet point addressed the situation of women prisoners of poverty directly. It did so; *by ignoring the definition of calling them prisoners of poverty*. One of the few sentences in italics in the entire document emphasized that women are in prison because "*unplanned borrowing*".²²¹ The proposed situation was to "raise their awareness about their rights within the Egyptian legal system". It somehow assumed that debtors are not aware that taking on debt is not desirable in general. Furthermore and more importantly it had ignored the fact that debtors take loans or use commercial papers in order to *resolve immediate urgent needs*.²²² Finally, it has established a binary whereby; if they are not ignorant and insist on using the system then they must be criminal.

²¹⁷NCW Grand Strategy

²¹⁸ NCW, *supra* note 216 at 19

²¹⁹ *id*

²²⁰ *id*

²²¹ *id*

²²² This point is reinforced empirically in the last section of part one.

There is an inherent disconnect between how reformers envision deviance and criminality depending on the wealth of the individual; this is highlighted through the selective treatment of debtors. Similar to the use of the taxes asymmetrically highlighted by Soliman, the World Bank as well as Egyptian society decided to privilege certain debtors by exempting them from state action initiated by creditors.

The World Bank in a recent strategy dedicated a large section to address a certain segment of debtors. Moreover, it had attacked several parts of the New Commercial Law that was first established for businessmen, but also extended to include civil matters. The Bank's strategy made two references that address the women debtors; the first relied on exacerbating their situation in accordance with the financial inclusion initiative. For example, the bank praised article 2 of the new investment law that granted equal access to finance to all women. More importantly, the bank addressed certain debtors; *those who own businesses and are worth more than one million EGP*. Similar to the earlier tone of reforms noted by Mitchell in the 1990s when banks only awarded credit to projects that surpassed one million EGP.²²³ However, in this case, this new law targeting this specific segment of debtors should be understood in the development of Egyptian law. Specifically, the law abrogated the entirety of chapter 5 of the New Commercial Law concerning insolvency and bankruptcy.

The new law extended protection from imprisonment to businesses that are worth more than one million EGP. The document highlighted in bold that this protection from prison was to be extended to the consignors and warrantors; whom they recognize are often women (mothers

²²³See IN DEPTH-The New Bankruptcy Law: Easy Exit for SMEs or an Investment Booster?, AmCham (2020), <https://www.amcham.org.eg/publications/business-Monthly/issues/267/march-2018/3701/the-new-bankruptcy-law> (last visited Apr 20, 2020) See also, WORLD BANK, Women Economic Empowerment Study (2018) at 40

and wives). The purpose of the law according to a speech given by Shalakny law firm in AUC; *was to de-stigmatize the situation of the debtors*. To this end; the law adopted chapter 11 of the US bankruptcy code.

At this point; it is worth emphasizing the New Commercial law was established especially for businessmen; yet, when the law was abrogated only the vulnerable socio-economic classes were left with the stigma of debt and the image of the “criminal” or “ignorant”. In fact the new law places significant access on entrepreneurial skills; it also assumes that if you fail to gain from the law; it is because of a lack of business skills.

1. Reform and the Continuous Privileging of the “Savior”

In the last two years; three laws were introduced to parliament with the aim of solving the debtors’ prison crisis. All three laws recognize that prison is not a solution. Instead they propose an alternative “justice” measure that includes forced labor outside of the prison. The most likely law to be adopted has been sponsored by several MPs widely known for their support of the government. The drafter of the new reform is also President Sisi’s brother law; judge Sameh AbdelHakam. The aim of this section is to provide an evaluation of the legal rules embodied in the reform. I argue that they constitute a continuation of privilege of the “savior” figure; they also serve as a further extension of “partial reform” imagination. Moreover, this specific reform relies on an international document as the basis for reform, specifically the “United Nations Standard Minimum Rules for Non-custodial Measures”(Hereinafter the Tokyo rules). I argue that the use of this document is unsuitable in the case of Egyptian debtors. The new reform proposal will symbolize another failure if it ignores the root causes of debtor’s imprisonment.

The new law is composed of twenty five articles that aim to switch the punishment from prison incarceration to alternative justice measures. Article 2 defines the alternative punishments in seven criteria; each of them is available for the judge to exercise; they are as follows²²⁴;

- 1- Community Service (Or roughly translated from Arabic working for public benefit)
- 2- House arrest
- 3- Movement Restrictions
- 4- A limitation on contact to certain entities, persons or institutions
- 5- Being subject to electronic monitoring
- 6- Attendance of rehabilitation and training centers
- 7- Correcting the damage from the crime.

Firstly, although the objective of the law was to abide by the principles laid out in the Tokyo rules; it had selectively excluded certain alternative punishments. For example, the first item on the list of alternative punishments in the Tokyo rules was “Verbal sanctions, such as admonition, reprimand and warning”. Instead this was replaced by a conception of “public service” in the Egyptian law to become the first item on the list of punishments. This constitutes a further indication of the state’s insistence to empower the “savior” by deploying harsher measures than the ones envisioned in the Tokyo rules.

Second, the Tokyo rules allowed for “Economic sanctions and monetary penalties, such as fines and day-fines” and “ Confiscation or an expropriation order”. The exclusion of those articles indicates a recognition of the dire situation of Egyptian debtors. However, that recognition is only limited to the space of alternative punishments. It is not extended to the

²²⁴ Mašrw‘ qānwn bi‘uqwbāt badylah ‘an al-siğn lil-gārimyn wa al-gārimāt wa al-ḥabs qasyr al-mudah | naṣ kāmīl, bawābaʿ al-aḥrām (2020), <http://gate.ahram.org.eg/News/1840701.aspx> (last visited Apr 17, 2020).

definition of deviance associated with debtors; simply because the punishment aims to act as a disciplinary tool towards individuals suffering from conditions beyond their control.

Third, while the law seems to provide a variety of legal punishments; the main focus of the law is on “community service”; moreover, the law in article 14 does not exclude the possibility for two alternative punishments operating in conjunction. The example given included the use of both house arrest with community service. The law defines community service as a work day that is determined by three ministries; the minister of interior, justice and social solidarity. The law does not pose a definite obligation in providing this “community service” in a related field.

Fourth, the proposed alternative punishments in the Tokyo rules state specifically that punishments should not be blindly transplanted; according to article 1.3; punishments must consider “the political, economic, social and cultural conditions of each country”. Consequently, the situation of the Egyptian debtors culminates from an overall fallacious reform strategy. This reform strategy has continually led to increase in both poverty and inequality. This reform program is proposed at a time whereby a third of Egyptian live in extreme poverty and this is only according to the statistics provided by the government. The Tokyo rules were drafted to combat crime, the only crime of the debtors is falling victims to liberal reform. This is not a crime that necessitates the alternative punishments in the Tokyo rules, it certainly does not necessitate imprisonment.

Fifth, in a recent interview featuring Nawal Mostafa; she had expressed her amazement at the sudden and recent increase in legal proposals.²²⁵ She had highlighted that it was not

²²⁵Nawal Mostafa; Interview “Nawāl Muṣṭafā : 3 mašāriy‘ qawānyn muqadamah biš’n al-ġārimāt wa aṭālib bi-tatqāfir al-ġuhwd accessible at https://www.youtube.com/watch?time_continue=90&v=L-7Uwi5YTHc&feature=emb_title

productive to have three laws offered to parliament as it would hinder the delivery of an immediate solution.²²⁶ Mostafa had a similar proposal of reform also submitted to parliament, however, it is unlikely that it will be adopted. AbdelHakam's proposal risks certain abuse of power in comparison to Mostafa's law that relatively places women in safer "community service" environments. To elaborate on my argument on AbdelHakam's law; it leaves too much authority in the hands of administrative bodies that can place debtors(and specifically women) in more hostile environments than orphanages and hospitals.

To summarize, the law has managed to exclude the least possible punishments within the Tokyo rules. Moreover, the reform ignored the possible exemptions within Tokyo rules that place emphasis on the social, political and economic contexts of the debtors. In fact, the Tokyo rules are designed to combat crimes. The situation of the debtors is not because of volitional criminality, but due to economic pitfalls that had originated from depending on "partial reform" and the "savior" figure. The new law by ignoring the mechanisms of civil law and maintaining the privileges of the creditors by guaranteeing state intervention maintains the same fallacious assumptions of reform that had produced the situation the reform aims to remedy.

2. The Predatory State in Debtor Imprisonment and Reform

The predatory state model highlights how the state during crisis attempts to target and disadvantage vulnerable groups in favor of the "savior" figure. The situation of the debtors occurred primarily as a product of the predatory state attempting to privilege creditors. Similarly the reform envisioned is stemming from the predatory state model. The state transforms its control over the debtor populations and maintains the same privileges for creditors. Moreover, the predatory state in both scenarios was motivated by fiscal crisis. Mostafa has been working on

²²⁶ id

the debtors' issue since the 1990s, however, it had only gained traction after Egypt had signed the IMF deal in 2016. This section examines the rationale of the reform and illustrates that not only that reform falls into previous approaches taken by the predatory state, but also seems to be contradicting the objectives adopted by the reform proposals.

Recently the Egyptian government grew weary of supporting its prison population. As highlighted by judge AbdelHakam, the expenditures on debt prisoners after the devaluation of currency amounted to an average of 3,000-3,500. This amount totals to around 192 million EGP per month²²⁷. Furthermore, it would seem from comments by members of parliament and the judge AbdelHakam that prisons are overpopulated with several distinct types of prisoners. The government does not want the interaction between prisoners of poverty with political and Islamist prisoners. As a result, the government is continually building new prisons to accommodate the prisoners of poverty and the political prisoners. The main motivation supporting the amendments is the decrease in government expenditures. Therefore, the legal frameworks proposed seek to obtain a higher government surplus when dealing with prisoners of poverty.

The reform amendments proposed do not tackle how criminal law treats debtors; it tackles how the implementation of punishment is exercised²²⁸. This approach would force debtors into forced labor to repay their debts, they would also be responsible for covering their expenses. This approach is extremely beneficial for the government, it allows for the prisoners to use one third of their given salary to satisfy their basic needs such as transportation and

²²⁷ Review interview with Judge available in Youm 7 in citations (sources are in arabic and long and often without an author's name making it difficult for in text citations.)

²²⁸ Quote from interview with the submitter of the reform bill judge Abd el Hakam "Hunāk fiḥm ḥāṭi' limašrw' qānwān al-'uqwbāt al-badyāh, wa lil-tawḍyḥ, fa-'in al-'uqwbah satstamir kamā hiya wifqan lil-madah bidwn taḡyyr, wa 'inamā sayatim tabdylihā" Interview by Masry El Youm
"There is a misunderstanding regarding the law, the change is with regards to the application of the punishment, it still remains a crime."

sustenance. Considering the previous status of the debtors as victims of extreme poverty, the new law has an implication of placing them in a poverty trap. Debtors working for the “good of the country” would need to borrow in case they are unable to live off the salaries provided by the government jobs. This action would place them in a continuous loop providing services for the government and the private sector. The amendments wish the government to engage in a capitalistic endeavour to profit from the structural inequality affecting the debtors.

Officials seem to link terms like “civil service” or working for the “public good” with “community service”; while in reality the proposed reform attempts to place them in “debt bondage”. Moreover, their situation before the reform constituted debt imprisonment over their inability to fulfil civil contractual obligations. On the other hand, their situation after the reform . What the new reforms propose is a form of “debt bondage”; this practice has been labelled by the UN as a practice of “modern day slavery”.

Moreover, the law does not place any restrictions on creditor practices that lead many to be indebted by higher amounts than the sale value nor does it account for the use of security receipts as tools of trust than tools of credit. Through continually privileging the creditors with inaction, the situation would effectively lead to higher accumulation of labor under the government control as the cycle continues. The government would face logistical difficulties accommodating a high number of forced labor. Furthermore, there is a diversity amongst those who fall in debt, forcing them in specific jobs would require knowledge of experience, age, ability to do work, family status and dependents. Finally, reformers seem to forget that Egypt is a developing country facing high inflation and poverty rates. The law seems to be targeting those who deserve government support; it targets those who suffer from structural injustices and inequalities such as the elderly and women. The ILO published a report highlighting that forced

labor generates around 150 billion USD profits a year²²⁹. It would seem that reformers have focused on two mandates and have rejected any other consideration. They aim to allow the state to profiteer from poverty and keep the prisons cheaply maintained.

V. Conclusion

In conclusion, this thesis attempted to engage with the puzzle of Egyptian underdevelopment. This engagement revolved around the role of law as a tool of economic development. The first chapter had two objectives. First, it aimed to flush out the rationale of using law in the context of development. In doing so it introduced how law is conceptualized as a tool of efficiency in favor of businessmen and investors. Moreover, it had highlighted how that approach emphasizing efficiency is incoherent and contradictory. The second objective aimed to highlight how the conception of law as “efficient” has operated in practice. I have divided the periods of reforms into several periods to avoid totalizing the mechanisms and approaches to reforms. In each period of legal reform there was a reemergence of a popular narrative that has constantly survived the failures of the Egyptian economy. This popular narrative adhered to a false perception of the public and private sphere. In doing so it has attempted to privilege the private sector and have placed it in the position of a “savior” that is capable of increasing the well-being of society. I had argued that law became a constitutive part in Egypt’s plan to develop. However, the role played by law privileges the savior figure have ended up with disastrous results.

The second chapter aimed to counter both the narrative of “partial reform” and the value of the “rule of law” as neoliberally conceived. This was conducted through a three level analysis: the first part of the analysis examined macroeconomic indicators and the role of law in

²²⁹ ILO article “How profitable is the exploitation of people? Sadly, extraordinarily so.”

privileging non-productive sectors. The second part examined how the reform is articulated in local context through repression. This repression occurs through laws/regulations that disadvantage certain groups based on their ability to exert coercion upon the state. The third level of analysis examined how institutional arrangements allowed for different privileges between different actors in the “private sphere”; a phenomena coined by Adly as “cleft capitalism”. This arrangement led certain sectors to have a superior productive ability through preferential legal factors.

In the last chapter, I have examined another aspect of the reform that provided more ammunition to the savior’s arsenal against segments of the population that are in dire need of liquidity. In doing so, this part of reform “The New Commercial Law” included the participation of the state as a tool of incarceration that adds to the value of certain legal papers(checks) that are used in transactions. I have highlighted how most of those transactions could face an exception based on a judge’s understanding of context. This exception would avoid the debtors' prison sentence. However, the new law limited the judges’ ability to examine the contexts of the debtors and removed them from the jurisdiction of the civil law into a body of law that would guarantee their incarceration.

Furthermore, I had also examined the new reform proposals to alleviate the situation of the debtors. The new reforms rely on a false narrative that attempts to criminalize vulnerable populations. In doing so the reform attempts to privilege the savior figure by maintaining the savior status of the law while changing its applications. This rationale of reforms falls within the practices of the predatory state that attempts to disadvantage vulnerable populations while maintains the power of dominant groups and external interests. I have argued that governments' reforms will further exacerbate the issue of the debtors unless measures are taken to either place

the debtors from those circumstances under civil law jurisdiction or limit the privileges of creditors.