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The Judicialization of Mega-Politics in Egypt's Administrative Courts: Insight into The Rulings of the Egyptian State Council (2000-2020)

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A Thesis Submitted by

Ahmed Kamal Bastawisy

To the Department of Law

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DEDICATION

I dedicate my thesis work to the souls of my mother and elder brother who died together and left our souls torn forever. May you rest in peace. I pray that we meet in Heaven and live happily ever after, as promised by the words of the Almighty:
"And those who believed and whose descendants followed them in faith - We will join with them their descendants, and We will not deprive them of anything of their deeds" (*Surah At-Tûr-Verse 21*)

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ABSTRACT

The interrelationship between law, courts and politics has always been complex and multidimensional. The role and political significance of courts are prominent dimensions of this interrelationship. Over the past decades, there has been global expansion of judicial power, in parallel with the proliferation of modern constitutionalism principles. One of the fundamental manifestations of this trend is the judicialization of politics- the reliance on courts for addressing pivotal social, economic, moral and political controversies and public policy questions. This phenomenon manifests profound transfer of power from representative institutions, mainly legislatures and executives, to judiciaries. Political importance of courts expanded, in scope, to comprise "mega-politics"- the most crucial social, economic predicaments as well as controversies of utmost political prominence that influence the entire society. This research portrays the definitions and explanations of the judicialization of mega-politics globally. Then, analyzes judgments of the Egyptian State Council in the past two decades (2000-2020) to inspect the occurrence, forms and reasons of this phenomenon. The judicialization of pure politics is manifested in three forms, when courts: 1) Narrow the doctrine of sovereignty acts, that are immune of judicial review. 2) Perform explicit judicial law-making 3) Establish/abolish a major public policy. The phenomenon is attributed to institutional factors, mainly the constitutional framework that facilitates judicial activism, besides legal mobilization practiced by activists seeking for social change via strategic litigation. Furthermore, the main driving force behind the phenomenon is the judges' professional perception of their role as guarantor of rights and liberties and a fundamental constitutional check on the executive authority. This perception is the result of accumulated progressive judicial practice- what I describe as "progressive judicial legacy."

KEY WORDS: State Council, administrative courts, judicialization of politics, judicialization of mega-politics, pure politics, judicial politics, law and courts, acts of sovereignty, judicial role perception.

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Introduction

The interrelationship between law, courts and politics has always been complex and multidimensional. The role and significance of courts as a political actor are prominent dimensions of this interrelationship. In this regard, the world has witnessed a profound transfer of power from representative institutions to judiciaries over the last decades.[1] Courts all over the world are making significant policy decisions that were previously perceived as the purview of politicians.[2] The judiciary increasingly gains more authority as an influential institution interacting with other political actors in a society. The range of activities over which courts exercise considerable authority has immensely expanded quantitatively and qualitatively. The increasing political significance of courts has expanded in scope to comprise the most core political, moral, social and economic controversies.

Theoretically, the Separation of Powers doctrine connotes that judges are competent with resolving disputes. Their fundamental function is to apply law. On the other hand, politicians, mainly the elected representative of the people, are responsible for making law. Accordingly, the process of policy-making is essentially entitled to politicians. Establishment of public policies is the outcome of political interactions that take place within the representative institutions of a society. Politicians are supposedly the ones responsible for providing solutions to social, economic and political quandaries through democratic means.

Over the past decades, judicial power has expanded all over the world.[3] In the context of separation of powers, while practicing their main function i.e. judicial review, courts gradually expand their authority and constantly issue rulings pertaining to the most

[1] Ran Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, 75 FORDHAM L. REV. 721 (2006).
[2] Tom Ginsburg, *The judicialization of administrative governance: Causes, consequences and limits*, 2008 at 1
[3] Tom Ginsburg, *The Global Spread of Constitutional Review*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS 81, 82-87

pivotal social, economic and political predicaments in many countries. Hence, the process of policy-making has been deeply integrated with the core function of judges to interpret and apply the law. This led to the emergence of what may be termed the "judicialization of politics". The locus of political activity and making public policies, regarding fundamental matters in almost all aspects, has been transferred to courtrooms. The judicialization of politics has expanded its ambit to comprise what is termed "mega-politics"- matters of ultimate political significance in a society. The ever-increasing judicialization of politics and mega-politics is considered one of the most striking phenomena in late-20th and early-21st century government.[4] It is argued that:

> Core political controversies are framed as predominantly constitutional ones, with the concomitant assumption that courts are the suitable forum to deal with them. The list of examples seems endless: the fate of the American presidency or national health care plan; what is the exact meaning of Israel's self-definition as a Jewish and democratic state; the legitimacy of the German bailout deal or the status of German sovereignty in the larger EU; the validity of Russia's war in Chechnya or accession to the WTO; the dollarization plan in Argentina; disqualification of political parties in Turkey, Belgium and Spain; the scope of Islamic law as a source of legislation in Egypt or Malaysia; whether sending Korean troops to Iraq is allowed; whether violation of term limits by incumbent leaders in Colombia, Uganda, or Venezuela is constitutional.[5]

There have been constant endeavors to explore and assess the tendency towards the judicialization of politics. These attempts mainly focus on the situation in established democracies like the US and European countries,[6] and in nascent democracies.[7] What is usually at stake is the democratic credentials of judicial review. Tremendous controversies are raised about the expansion of judicial review and whether it is a

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[4] Ran Hirschil, *The Fuzzy Boundaries of (Un)Constitutionality: Two Tales of Political Jurisprudence*, 31 U. Queensland L.J. 319 (2012).
[5] *Id.*
[6] *See, e.g.*, Martin Shapiro, *Juridicalization of Politics in the United States*, 15 INT'L POL. SCI. REV. 101 (1994); Cristine Landfried, *The Judicialization of Politics in Germany*, International Political Science Review, 1994; Russell A. Miller, Lords of Democracy: *The Judicialization of Pure Politics in the United States and Germany*, 61 Wash. & LEE L. REV. 587 (2004); Barry Holmstrom, *The Judicialization of Politics in Sweden.* International Political Science Review, 1994.
[7] *See, e.g.*, JUDICIALIZATION OF POLITICS IN LATIN AMERICA (Rachel Sieder et al., eds. 2005); Chien-Chih Lin, *The Judicialization of Politics in Taiwan*, 3 AsianJLS 299 (2016); CHIEN-CHIH LIN, THE JUDICIALIZATION OF POLITICS IN NEW DEMOCRACIES.

counter-democratic practice or it can be reconcilable with democracy. The fact that courts have been promoted and gained more authoritative power than before has precipitated fierce debates on whether this power increase at the expense of the representative institutions. On the other hand, unfortunately, the judicialization of politics in authoritarian regimes rarely receives plausible attention in the academic work and if so, focus is mainly directed to constitutional courts.[8]

This work endeavors to analyze cases of the Egyptian State Council's involvement in mega-politics i.e. core political, social and economic controversies. The purpose if this work is of tripartite significance. First, it seeks to enrich the literature on the judicialization of mega-politics through examination of the phenomenon in Egypt as a part of the understudied region of the Arab World. In the meanwhile, it fills in a pivotal gab by studying administrative courts instead of concentrating only on the Supreme Constitutional Court (hereinafter referred to as the SCC). Second, this work explores the interrelationship between administrative courts, law and politics to determine whether the engagement by courts in the policy-making process reflects the occurrence of the judicialization of mega-politics in a comparable way to the situation in consolidated democracies. Third, this work attempts to trace the development of the judicialization of mega-politics not only through examining the final declaration of courts' rulings, but also via thorough legal examination of the verdicts substance to point out the mindset of judges and their legal and judicial means to judicialize pure politics. Such dual examination provides a more comprehensive and profound understanding of the proliferation of judicialized mega-politics and help to specify the factors which fundamentally affects its emergence and progress. Furthermore, this work proposes that the occurrence of the judicialization of mega-politics in the State Council courtrooms has been constantly observed all over the past twenty years from 2000 to 2020. Administrative judges have clearly exhibited robust engagement in matters of utmost social, economic and political significance.

[8] *See, e.g.*, Duncan McCargo, *Competing Notions of Judicialization in Thailand*, Contemporary Southeast Asia Vol. 36, 2014; Alexei Trochev, *Less Democracy, More Courts: A Puzzle of Judicial Review in Russia*, 2004.

This thesis proceeds in three parts. Part 1 illustrates the definition of the phenomena of judicialization of politics and mega-politics and their proliferation as global trends and then move to the situation in Egypt to demonstrate the jurisdiction and functions of the State Council (administrative judiciary) in Egypt. Part 2 indicates the forms of judicialization of mega-politics in administrative justice through analysis of some major judgments that represent the engagement of administrative courts in major social, economic and political quandaries. Part 3 articulates the factors contributing to the administrative courts' judicialization of mega-politics.

Chapter I. The phenomenon of the judicialization of mega-politics.

This chapter seeks to illustrate the global tendency towards the judicialization of politics and mega-politics and depict the common literature's main theories for explaining this phenomenon. Besides, it elaborates the emergence of the judicialization of politics in Egypt in the past two decades especially in the judgments of the Supreme Constitutional Court (SCC). Then it explores the judicial competence and functions of the State Council in Egypt as an endeavor to explain why a nondemocratic regime may empower administrative courts to the extent that they are capable of judicializing mega-politics.

A. The judicialization of politics and mega-politics as global trends.

To "judicialize" is to "treat judicially, make judicial in character, to subject to judicial process or decision."[9] In this regard, "judicially" refers to "capacity of judge, in relation to the administration of justice by legal process, by sentence of a court. "[10] Accordingly, judicialization simply refers to the expansion of treating a wide range of aspects judicially. On the other hand, undoubtedly there is no universal or legally accepted definition of "politics. In other words, it has a numerous number of definitions according to the lens through which it is perceived.[11]

In the context of this research, I address the term "politics" as the art of government. The word "politics" originates from the Greek word "*polis*", which means city-state. Therefore, politics mainly relate to what concerns the state; its aims, purposes and institutions. A narrow definition of politics in this regard is the study of the government- a collection of officers who make, interpret and enforce rules for the whole community.[12]

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[9] Lexico Dictionary, Powered by Oxford, available at https://www.lexico.com/definition/judicialize (last visited Jan. 14, 2022).
[10] Torbjorn Vallinder, *The judicialization of politics- A worldwide phenomenon*, International Political Science Review 1994.
[11] Eugene F. Miller, *What Does "Political" Mean?* 42 The Review of Politics. 56 (1980).
[12] Valeri Modebadze, *The term politics reconsidered in the light of recent theoretical developments,* IBSU Scientific Journal (IBSUSJ), 2010 at 41.

According to this definition, politics occur only within the government departments, cabinet rooms and legislative chambers. Hence, only civil servants, politicians and lobbyists are involved in politics and the vast majority of the people are not engaged. All the institutions that are not "running the country" are considered as "non-political."[13] At the top of these institutions is the judiciary.

Judicialization of politics is a multifaceted concept that has not been inclusively defined. There are two main approaches attempting to define this phenomenon. The first One depicts the phenomenon by concentrating on the proliferation of judicial decision-making methods and legal discourse in every aspect of modern life. Accordingly, the judicialization of politics refers to "the spread of legal discourse, jargon, rules, and procedures into the political sphere and policy-making forums and processes."[14] It reflects the situation in which law, litigation, and legal discourse have permeated every corner of society as a feature of the complexity of modern societies.[15] It is manifested by the subordination of almost all decision-making forums in modern societies, especially those adhering to the rule of law, to quasi-judicial procedures and rules. It is genuinely related to law's expropriation of social conflicts and its control of social relations, and accordingly is sometimes described as "judicialization of social relations."[16]

The other approach of defining the judicialization of politics focuses on the expansion of the judiciary's role and the increasing significance of courts as an actor in the political field compared to other main actors i.e. the legislatures and executives. In this regard, the judicialization of politics is defined as "the process by which courts and judges come to make or increasingly dominate the making of public policies that had been previously made by other governmental agencies, especially legislatures and executives."[17] It characterizes "the reliance on courts and judicial means for addressing core moral

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[13] *See* HeywoodAndrew, *Politics*, Macmillan Press LTD, London, (1997).
14 Ran Hirschl, *Supra* note 1, at 723.
[15] Rachel Sieder, *Introduction to The Judicialization of Politics in Latin America*, at 5.
[16] Ran Hirchil *Supra* note 1, at 724-725.
[17] TAMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT, CAMBRIDGE UNIVERSITY PRESS, 2007 at 26.

predicaments, public policy questions, and political controversies.[18]" Accordingly. the judicialization of politics represents the expansion of the judiciary's power at the expense of the legislatives and executives. Decision-making authority regarding crucial social, economic, moral or political controversies is transferred to courts from politicians and/or administrators.[19]

In my perspective, the second approach provides more proper definition of the tendency towards the judicialization of politics as it focuses on the expansion of judicial review at the expense the executives and legislatures, which results in courts determination of the outcomes of major social, economic and political quandaries and public policy questions. Amplification of judicial review is the focal point of the phenomenon of the judicialization of politics. In terms of separation of powers, judicial review is entitled to courts mainly to preserve this separation. However, judges' jurisdiction has been largely expanded. Although judges have to base their decisions on pre-existing constitutional and statutory texts, their discretion and interpretative authority of these texts are so huge that they get embroiled in making public policy decisions as well as establishing judge-made laws. Hence, they are essentially legislating, not adjudicating.[20]

On the other hand, the first approach of defining the judicialization of politics does not depict the genuine elements of the phenomenon. Rather, it provides for a contributory factor of judicialized politics. The proliferation of law and legal discourse in all aspects of the society is not the core of the global trend towards the judicialization of politics. Instead, it substantially leads to providing more opportunities to courts to deeply involve in public policy questions, and political controversies, and consequently judicialize politics. The current situation in which law, litigation and legal discourse prevails in modern societies represents a favorable political environment enabling judges to get embroiled in core social, economic and political dilemmas.

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[18] Ran Hirschil, *The judicialization of politics*, THE OXFORD HANDBOOK OF POLITICAL SCIENCE, 2011, at 1.
[19] Torbjorn Vallinder, *Supra* note 10, at 1.
[20] STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 1 (2000).* at 61.

Ran Hirschil introduces a distinct category of the judicialization of politics, which he terms "the judicialization of mega-politics." It refers to "the reliance on courts and judges for dealing with core political controversies that define (and often divide) whole polities."[21] He indicates that it comprises a few subcategories such as judicialization of electoral processes; judicial review of executives' prerogatives in the fields of macroeconomic planning or national security; core restorative justice controversies; judicial corroboration of regime transformation; and, most importantly, the judicialization of formative collective identity, nation-building processes, and struggles over the very definition of the polity as such.[22]

Hirschil differentiates between the judicialization of mega-politics on the one side, and on the other side, the judicialization of "ordinary" public policy making. The latter refers to the involvement of judges in determining public policy outcomes, mainly through "ordinary" constitutional rights jurisprudence and the judicial redrawing of boundaries between state organs.[23] It is sometimes also described as "judicialization from below" as it is often initiated by rights plaintiffs who challenge the public policy decisions or practices of the executives or legislatures. The judicialization of "ordinary" public policy making is usually related to expanding the ambit of constitutional rights protection, if threatened by encroachment of the executives and/or legislatures. Therefore, its common examples are the cases related to civil liberties and procedural justice in decision-making.[24]

The substantial difference between the two categories of judicialization is political salience. The judicialization of "ordinary" public policy may appear in cases related to determination of the right to a speedy trial or to a fair hearing in criminal justice, but they are not considered as politically prominent as the cases in which courts determine the

[21] Ran Hirschil, *supra* note 18, at 4-5.
[22] *Id.*
[23] Ran Hirschil, *supra* note 1.
[24] *Id.*

legitimacy of a certain polity or a nation's collective identity, which manifest the judicialization of mega politics (sometimes termed judicialization of pure politics). It has to be put into consideration that the political salience may relatively vary in different circumstances. What is conceived as a controversial matter of a political significance in a given regime (like the right to abortion) may be considered a nonissue in another polity. As a result, the criterion of political salience for distinguishing what is considered a judicialization of mega-politics is "elusive yet intuitive."[25]

Works that attempt to give explanation of the global tendency towards the judicialization of politics can be divided into four main approaches. The first approach explains the phenomenon through the lens of rights jurisprudence. According to this rights-centred perspective, the judicialization of politics stems mainly from the ever-growing awareness of rights issues and constitutional protection of these rights. Courts are perceived by civil society groups and political activists as effective and nonpartisan authority for claiming their rights and freedoms.[26] The ascendancy of civil rights and liberties contributes to the judicialization of politics. Such ascendancy is attributed not only to active judges but to the existence of "support structure" consisted of the influence of advocacy groups, the establishment of governmental enforcement agencies, the growth of financial and legal resources for ordinary citizens, and the strategic planning of grass roots organizations.[27] This support structure boosts the access of individuals and interest groups to courts, which provide them with tremendous privileges. For instance, they are not in need of forming broad coalitions and seeking for strong political parties to defend and boost their demands and interests in political field. Courts provide an easier, more rapid and effective opportunity for them to raise their voice and share in the governance of their society. Consequently, the growing reliance on courts by individuals and social movements leads to the involvement of the judiciary in making public policy decisions and hence judicializing politics.

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[25] *Id.* at 728.
[26] C. NEAL TATE AND TORBJORN VALLINDER (eds). 1995. *The Global Expansion of Judicial Power*. New York Univ. Press, 1995.
[27] Charles Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective,* Chicago: Univ. Chicago Press 1998.

A second approach, which is a functionalist one, attributes the judicialization of politics to the increasing complexity of modern societies. States comprises increasingly many administrative agencies with policy making authorities. For proper government, they necessitate standardized legal norms and active judiciary as policy makers not just arbiter.[28] On the supranational level, the same tendency towards the judicialization of politics results, for example in the European Union, from the need for unified legal and administrative norms across all member states which encounter major coordination problems.[29]

A third approach, which is a court-centered one, argues that courts are the main pillar of the tendency towards judicialization of politics. They expand their scope of judicial review at the expense of other organs raising controversies about the traditional principles of separation of power. In some cases, courts and judges are the ones who largely amplify the ambit their judicial competence and adjudicate on major public policy questions and then the same courts may opt to impose self-made judicial restraints on their judicial review.[30] These judicial restraints may be grounded on limited capacity of courts to decide on some pure political controversies and preserving the courts public image.

A forth approach, which is a realist one, contends that the judicialization of politics is, first and foremost, a political not a juridical phenomenon.[31] Courts are political institutions which work within the same social, political, and economic spheres, like other political institutions, in a given society. Based on this perception, political support is a prerequisite for the judicialization of politics, especially that of mega-politics.[32] The phenomenon is largely the outcome of the intentional delegation of policy making authority to courts by politicians. There are a number of reasons for this delegation by the

[28] MARTIN SHAPIRO & ALEC STONE SWEET, *On Law, Politics, and Judicialization*. New York: Oxford Univ. Press 2002.
[29] Stone-Sweet. *Governing with Judges: Constitutional Politics in Europe*, Oxford Univ. Press A. 2000.
[30] Jasdeep Randhawa, *Understanding The Judicialization of Mega-Politics: The Basic Structure Doctrine and Minimum Core*, 2011.
[31] Ran Hirschil, *supra* note 1 at 753
[32] Ran Hirschil, *supra* note 18 at 17.

political stakeholders including minimizing risk by transferring political responsibility to courts, avoiding difficult and thorny decisions. On the other hand, political opposition may seek for judicializing politics via resorting to courts in order to obstruct government and challenge its policies. The absence of a political environment that is conducive to the judicialization of politics, especially that of mega-politics, would result in a legislative and/or executive backlashes against courts. They comprise legislative overrides of controversial verdicts, encroachment on judicial appointment procedures to ensure the appointment of "compliant" judges, in addition to establishment of constraints on the scope of judicial review.

In my view, courts are the main driving force leading to the judicialization of politics. A convergence of social, legal and political factors is necessary for the existence and continuity of judicialized politics. However, all variables are the same, judges are the cornerstone of the tendency towards the judicialization of politics. The scope of judicial review is, first and foremost, determined by judges. In both civil-law and common-law states, judges are entitled the competence of judicial interpretation of constitutional and statutory rules. The amplification of the ambit of judicial review and engagement of judges in crucial social, moral and political controversies are basically contingent on the strategic choice by judges to explicitly or implicitly declare their judicial competence over the subject-matter of the dispute and adjudicate on the outcome of the controversies.[33]

Undoubtedly, the explosive growth of government power at every level, which necessitates the escalation of judicial review over various agencies and institutions of the government, as well as the proliferation of rights discourse all over the society contribute to the judicialization of politics. However, they do not solely account as the main grounds for the emergence of this phenomenon. On the other hand, the need of political support as a prerequisite for the judicialization of politics and the intentional delegation of public

[33] In chapter 3 of the thesis, I will provide further elaboration and consolidation of the argument that courts are the main driving force leading to the judicialization of politics.

policy making authority to judges by politicians do not explain the appearance of judicialization of politics, let alone that of mega-politics, in authoritarian polities like Egypt,[34] Russia,[35] an Thailand,[36] where "political support" is unlikely to be provided to courts by politicians in power.

In Egypt, the judicialization of politics has been constantly and evidently manifested in the SCC's decisions. The SCC has managed to expand it powers and decide on the outcomes of numerous social, economic and political controversies. It is argued that the SCC was, at first, empowered by the controlling regime mainly for economic considerations related to the objective of attracting foreign direct investment by providing credible commitment that property rights would be protected through an independent process of judicial review.[37] However, the Court gained additional leverage with which it intervened in other policymaking spheres, including civil and political rights and human-rights-related controversies. Analysing the SCC's decisions indicates that it served as a "dual-use" institution. On the one hand, it has corroborated the regime's fundamental economic objectives and accommodated its political interests.[38] On the other hand, it served as the most significant resort for human rights groups, opposition parties and political activists to boost civil and human rights safeguards.[39] Furthermore, the scope of involvement in crucial moral and political controversies extended to the collective-identity contentions like the core question of the status of *Shari'a* rules as the primary source of legislation in addition to various prominent questions related to religion.[40] The

[34] *See* Tamir Moustafa, *Supra* note 17.
[35] See Armen Mazmanyan, *Judicialization of Politics: The Post-Soviet Way,* Oxford University Press, 2015.
[36] See Duncan McCargo, *supra* note 8.
[37] Tamir Moustafa, *Law versus the State: The Judicialization of Politics in Egypt*. LAW & SOCIAL INQUIRY, vol. 28, no. 4 at 885.
[38] As for the economic interest of the regime, the Court, for example, supported the regime's transition from socialist-oriented economy to capitalism by striking down socialist-era legislation. As for the political arena, the Court, for example, ruled that the Egyptian Security Courts constitutional and permanently delayed issuing a ruling on the constitutionality of civilian transfers to military courts.
[39] Tamir Moustafa, *supra* note 37.
[40] Ran Hirschil, *The Judicialization of Mega-Politics and the Rise of Political Courts*, The Annual Review of Political Science, 2008, at 104; Examples of these cases are the following: al-Mah. kamah al-Dustūrīyah al-'Ulyā [Supreme Constitutional Court], case no. 20, session of 4 May 1985, year 1; al-Mah. kamah al-Dustūrīyah al-'Ulyā [Supreme Constitutional Court], case no. 8, session of 18 May 1996, year 17.

apparent tendency towards the judicialization of politics in Egypt is consistent with, and actually provides an empirical evidence in support of, the proclamation that in the "non-constitutional" Arab World, written constitutions can provide a ground work for possible limited constitutional government.[41] Although these constitutions are perceived to have a relatively limited effect in regard to imposing restraints on the exercise of the government power, they may effectively contribute, with other mechanisms, to the establishment of some sort of accountable government.

The embroilment of the SCC in fundamental political quandaries through a series of decisive verdicts was also prominent in the transition period after the revolution of 2011. The court is criticized for its plain intervention in pure political controversies "in a manner that would have been unthinkable prior to the Revolution."[42] The SCC empowered itself and supported judicial despotism over core political questions simply through stating that it is practicing no more than its judicial competence of the constitution interpretation. The judicialization of pure politics by the SCC took part in a series of ever-escalating constitutional crisis that could have been avoided if the Court embraced constitutional silence, by which constitutional courts in other authoritarian regimes like Chile and Serbia managed to create apolitical judicial culture to their respective regimes.[43]

B- Jurisdiction and Functions of administrative courts in Egypt

Prior to engaging with the cases manifesting the judicialization of mega-politics in administrative courts, it is of paramount importance to briefly elucidate, first, the State Council's judicial competence according to its statute (law no. 47/1972) and the constitution. Second, I depict roles and functions of administrative courts as influential institutions interactive with other components of the society.

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[41] See NATHAN J. BROWN. THE RULE OF LAW IN THE ARAB WORLD: COURTS IN EGYPT AND THE GULF, CAMBRIDGE UNIVERSITY PRESS 1997.
[42] Mohammad H. Fadel, *The sounds of silence: The Supreme Constitutional Court of Egypt, constitutional crisis, and constitutional silence*, OXFORD UNIVERSITY PRESS, 2018, at 938.
[43] *Id.* at 937.

Egypt is a civil-law state that follows the Latin model of the judiciary structure; composed of three main judicial bodies: ordinary courts, administrative courts, and at the top, one constitutional court (the SCC). On the other hand, the Egyptian legal system embraces a tripartite hierarchy of legal rules. First, the Constitution, which all other rules have to be in conformity with. Second, legislative (statutory) rules: which are those enacted by the legislature. Third, bylaws (regulations): which are detailed rules issued by the executive branch's ministries, agencies and departments. They have to comply with the two superior categories of legal rules (constitutional and statutory ones).

Constitutional Review is exclusively entitled to the SCC by virtue of consecutive Egyptian constitutions. Striking down statutory rules falls exclusively within the scope of the SCC's judicial review rather than any other judicial institution. The only ground for invalidating a legislation is to be declared unconstitutional by the SCC. Accordingly, administrative courts have no judicial review of any action of the legislature and not authorized to strike down a legislation.

In 1946, the State Council (administrative judiciary) was established and entitled to limited jurisdiction over certain administrative disputes.[44] In 1972, The State Council's jurisdiction was expanded to encompass all administrative disputes.[45] It has comprehensive judicial review over actions and decisions of the executive's agents and departments. It was, at first, affiliated to the executive branch, but in 1984, it acquired institutional independence by virtue of a legislative amendment and was declared an "independent judicial authority" pursuant to the provisions of the 1971 constitution.[46]

As for the functions of administrative courts, there used to be a widely accepted assumption in comparative law literatures that democracy is a prerequisite for the

[44] Law no.112/1946 on the establishment of the State Council.
[45] Article 10 of Law no.47/1972 states that "The State Council has jurisdiction over … and all administrative disputes.
[46] Article 2 of Law no. 136/1984.

emergence of judicial power.[47] This is attributed to the hypothesis that courts in authoritarian polities are perceived to be puppets, and often claws, in the hands of the controlling regimes that are not likely to possess reasonable independence. Some scholars advocated this perception claiming that "It is hard to imagine a dictator, regardless of his or her uniform or ideological stripe, inviting or allowing even nominally independent judges to increase their participation in the making of major public policies."[48] Recently, there has been a recognition that even in highly-restricted political regimes, courts increasingly gain judicial authority. The empirical study in such polities indicate that courts are not irrelevant to political life. Rather, they perform various roles that are influential and interactive with other political institutions of an autocratic state.[49] In this regard, courts are perceived to help regimes pursue significant objectives such as maintaining social control, attracting capital, maintaining bureaucratic discipline, adopting unpopular policies, and enhancing regime legitimacy.[50]

In this regard, I argue that Egyptian administrative courts have been entitled relatively extensive scope of judicial review in order to perform three fundamental roles: managerial, economic and political. First, they provide significant means to boost discipline in the immense bureaucratic machinery. Although a restrictive regime is likely to pay little attention to safeguards of individual rights and basic freedoms, its need of an efficient functioning of the entire administrative apparatus is apparent. Administrative courts provide effective channels for reinforcing bureaucratic compliance and monitoring the executive's officials. In the 1970s, administrative courts' competence was expanded to "restore discipline to a rapidly expanding and increasingly unwieldy bureaucracy."[51]

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[47] Tamir Moustafa, *supra* note 37 at 885.
[48] Tate, C. Neal. 1995. *Why the Expansion of Judicial Power* in THE GLOBAL EXPANSION OF JUDICIAL POWER. New York Univ. Press, 1995at 28.
[49] Tamir Moustafa and Tom Ginsburg, *Introduction: The Functions of Courts in Authoritarian Politics*, 2012, in LAW AND COURTS IN AUTHORITARIAN REGIMES, Annual Review of Law and Social Science**,** 2004 at 2.
[50] *See* generally i*d.*
[51] Tamir Moustafa, *Law and Courts in Authoritarian Regimes*, 10 Annu. Rev. Law Soc. Sci. 2014. 281–99, at 284.

Second, in 1972, administrative courts were entitled, pursuant to legislative amendment of their statute, to comprehensive review over the executive branch's agencies and departments. Empowerment of administrative courts was in consistency with a more overall strategic judicial empowerment tendency of the regime. It was deployed as an economic motivation to entice foreign investors to establish their private investments. After Nasser era, the Egyptian regime was transformed from a state-monopolized economy to a liberal one. Accordingly, there was genuine need of direct investments especially that of a large scale. Administrative judiciary provided, along with the SCC, authentic legal security for both national and international investors, who were totally aware of the oppressive process of capital nationalization that took place during Nasser's era. Alongside with other constitutional and legal guarantees, administrative courts have been serving as a substantial check on the executive's potential encroachment on property rights.[52]

Third, consecutive Egyptian regimes have often deployed administrative courts to bolster their political legitimacy. In Egypt, some scholars contend that law primarily serves as an efficient and disciplined exercise of state power- a feature described as "rule by law."[53] One of the main characteristics of this feature is to constantly maintain the appearance of a "liberal" and "democratic" state, in which the judiciary is, in legal terms, capable of reining in the executive authority via practicing judicial review. Administrative courts were granted comprehensive review of the executive's actions to boost and enhance the image of effective checks and balances to sustain the regimes' political legitimacy.

[52] Tamir Moustafa, *supra* note 37 at 885.
[53] Tamir Moustafa, *supra* note 51, at 282.

Chapter II. Forms of the judicialization of mega-politics in the Egyptian State Council:

This Chapter analyses a number of remarkable administrative courts' judgments that apparently involve judicialization of mega-politics. Given the fact that these courts issue thousands of verdicts all over the state, it is important to define certain criteria to distinguish judgments that manifest judicialized mega-politics. In my view, a given verdict highlights the judicialization of mega-politics when it possesses one or more of the following characteristics: 1) narrows the doctrine of sovereignty acts, considered as one of the cornerstone prerogatives of the executives because it falls outside the realm of judicial review. 2) encompasses explicit judicial law-making concerning pivotal matters, as an intervention of the judiciary in the substantial prerogative of the legislatures i.e. enacting law. 3) involves adoption or abolition of a public policy related to substantial social, economic, or political questions. All these situations represent the transfer to the judiciary of the public policy-making authority, previously held by legislatures and executives.

It should be emphasized that the following three forms of judicialization of mega-politics should not be subject to binary-model of assessment; either representing constantly excessive expansion of judicial review or permanently falling within the legitimate scope of judicial competence. Rather, all forms of judicialization of mega-politics ought to be assessed on a case-by-case basis according to the facts of the case, the nature of the actions in question, and the relevant constitutional and statutory framework. Accordingly, in the following chapter I analyze each verdict separately to indicate the legal grounds and judicial techniques deployed by administrative judges to expand the conventional realm of judicial control over the executive's actions whether relevant to crucial social, economic or political matters. Besides, I evaluate the judgment in order to indicate whether the court trespassed borders of judicial control and encroached on the jurisdiction of the executive and/or the legislature, or the court exercised its competence

in consistency with the constitution without infringement of another authority's jurisdiction.

It should be pointed out that the suggested criteria for determination of forms of the judicialization of mega-politics are basically related to the legal substance of the following judgments rather than their actual political implications. These criteria are contingent upon the constitutional and legal bases of these verdicts engaging in core social, economic and political matters. Hence, it is outside the scope of this research to trace social and political outcomes of these judgments. Besides, it is beyond its scope to evaluate values, social backgrounds, ideological approaches of judges. Research scope is limited to engaging with the legal grounds, judicial techniques and legal reasoning of judges in establishing their jurisdiction over various disputes and consequently judicializing mega-politics.

A- Narrowing the doctrine of sovereignty acts:

The "Acts of Sovereignty" doctrine refers to a set of actions performed by the executive branch that are exempted from judicial review. The doctrine has been explicitly stated in all the statutes regulating the State Council. Law no.112/1946 that established the Egyptian State Council provided for the exclusion of sovereignty acts from administrative courts' judicial review.[54] The same doctrine is embraced by all consecutive statutes regarding the State Council including the current law in force no. 47/1972 which regulates the structure, organization and competence of the State Council.[55] However, none of these laws provides a definition of the acts of sovereignty.

A number of approaches attempt to set a criterion for determination of what is meant by the acts of sovereignty in order to differentiate them from ordinary administrative acts subject to judicial control. One approach adopts the "political motive" criterion, which

[54] Article 6 of law no.112/1946.
[55] Article 7 of law no. 9/1949, article 12 of law no. 165/1955, article 12 of law no. 55/1959.

relies on the motive behind the executives' actions. The action is considered an act of sovereignty when the motive that induced executive authority to take it is "political" and hence falls outside judicial control. Otherwise, it is an administrative action when the motive behind it is administrative, and consequently it is subject to judicial review. This approach was first introduced by the French judiciary which chose not to engage in matters of political nature and implications in order to maintain its authority of judicial review over other governmental acts.[56] This approach was heavily criticized for being inaccurate in determining the acts of sovereignty, especially as there are plenty of governmental actions that have both political and administrative motives. Second, this criterion enables the executive branch to exclude judicial review over administrative actions by declaring there is a political motive for performing these actions when in fact there is not.[57]

A second approach argues for the "nature of act" criterion. Since both administrative and sovereignty actions are taken by the executive branch, an objective criterion contingent upon the nature of the act itself is helpful in distinguishing acts of sovereignty.[58] According to this criterion, the executive authority performs two main functions, governmental and administrative. The actions taken by the executive branch as "a government" authority are considered acts of sovereignty. The "governmental" function is apparent in all major actions taken by the state as a political unified entity as well as decisions protecting its supreme national interests.[59] On the other hand, When the executive authority acts as an "administrative" authority, its actions are therefore administrative and subject to judicial review. The administrative function of the executives is what relates to the daily application of law and the relations between

[56] *See* MOHAMMED R. ABDELWAHAB, *Al-Kada' Al-Idari* (ADMINISTRATIVE JUDICIARY), Arabic, Dar El-gamaa El-gadida, 2011 at 233 (Explaining the approach and elucidating its aspects of criticism).
[57] *See id.*
[58] *See* Justice KHALED HAMMAD, *Hodud al-reqaba al-qada'ea ala soltat al-idara al-taqdiria*, (BOUNDARIES OF JUDICIAL REVIEW OF THE ADMINISTRATION'S DISCRETIONARY POWER), Arabic, 2nd Edition, 2013, at 427 ((providing plenty of cases as examples of the approach and indicating its aspects of criticism).
[59] MOHAMMED R. ABDELWAHAB, *supra* note 56 at 236.

individuals and local and central departments of the executive authority.[60] This approach is criticized for ambiguity. It is incapable of providing a clear and decisive tool of differentiating between the two main functions of the executive as they are overlapping in many actions.

A third approach argues for a "judicial list criterion" for determination of sovereignty acts. As the doctrine of sovereignty acts was basically created by the judiciary, resorting to judgments would clearly reveal the nature and forms of these acts. Jurists analyze verdicts related to acts of sovereignty to classify them according to the judges' perspectives into one inclusive list. According to this approach, acts of sovereignty are those performed by the executive power and not subject to if judicial power control if the court so decides.[61]

Based on reviewing judgments of the State Council, Law scholars classified sovereign acts into four main groups: 1) acts related to foreign affairs and international relations with other countries 2) acts related to war actions 3) acts related to safety and internal security of the state 4) acts related to the relationship between executive and legislative authorities.[62] Jurisprudence provides some examples of the State Council case-law since its establishment for each of the four categories as following.

1) Acts related to foreign affairs:

Actions of the executives related to foreign affairs are considered acts of sovereignty. This include all actions pertaining to negotiations with other states, concluding and signing international treaties and conventions. Also, actions related to international relations with other states or international organizations falls in the realm of sovereignty

[60] WAHEED RAAFAT, *Reqabat al kada' lea'mal al-dawla* (JUDICIAL REVIEW OF THE STATE'S ACTIONS), Arabic, at 142.
[61] SOLIMAN TAMAWI, *Al-Kada' Al-Idari* (ADMINISTRATIVE JUDICIARY), Arabic, 1967, at 421.
[62] Justice RAMADAN S.NEGM, *Dur al-kadaa al-idari fi reqabat al-sulta al-taqdiria lel-idara*, (ROLE OF ADMINISTRATIVE JUDICIARY IN REVIEW OF THE ADMINISTRATION'S DISCRETIONARY POWER), Arabic, Dar Al-Nahda Al-arabia, 2016, at 118 ((providing plenty of cases as examples of the approach)

acts. Establishment or cutting diplomatic relations with a state or an international organization and joining, withdrawal from an international entity are examples of actions performed by the executive branch as a "government" authority and accordingly are exempted from judicial review.

The Egyptian State Council declared non-competence over the presidential decree to conclude the 1979 Peace Treaty with Israel for being an act of sovereignty.[63] In addition, administrative courts declared that they lack jurisdiction over the application for cutting diplomatic relation with Germany.[64] The State Council adopted the same approach and held that it has no jurisdiction to order the executive branch to close the Israeli embassy and expel the ambassador[65] and the same for Turkish embassy and ambassador and considered all these actions as sovereignty acts.[66]

2) Acts related to war actions:

Actions pertaining to war are considered acts of sovereignty that are immune from judicial control. Declaration of war, decisions related to military operations, and seizure of ships by force in the time of war are examples of these actions. The Egyptian State Council ruled that inspection of ships in war time falls in the realm of sovereignty acts as it is connected to military procedures taken by the state for its security.[67] Similarly, it ruled that it has no jurisdiction over the order by the Minister of Interior to police officers to fight the British troops which attacked police stations after revoking the 1936 Treaty.[68] Following the same approach, the State Council ruled that the decree of acquisition of a

[63] Mah-kamah al-Qadda' al-Idāry [Administrative Judicial Court], case no. 287, session of 1 May. 1979, year 33 (Egypt).
[64] Mah-kamah al-Qadda' al-Idāry [Administrative Judicial Court], case no. 1202, session of 29 May. 2007, year 61 (Egypt).
[65] Mah-kamah al-Qadda' al-Idāry [Administrative Judicial Court], case no. 78330, session of 26 Oct. 2019, year 69 (Egypt).
[66] Mah-kamah al-Qadda' al-Idāry [Administrative Judicial Court], case no. 17701, session of 26 Oct. 2019, year 69 (Egypt).
[67] MOHAMMED R..ABDELWAHAB, Supra note 56 at 247.
[68] Mah-kamah al-Qadda' al-Idāry [Administrative Judicial Court], case no. 13, session of 19 Jan. 1956, year 7 (Egypt).

piece of land, belonging to the Egyptian territory, by the Army Commander is not considered an act of sovereignty because it is neither related to war actions nor a defending the territory of the state. As the challenged decree is issued in regard to a regular administration of the Egyptian armed forces, it is considered an administrative act that is subject to the review of administrative courts.[69]

3) Acts related to safety and internal security of the state:

The third group of actions considered as acts of sovereignty are those related to safety and internal security of the state. Declaration of martial law and declaration of the "emergency state" are one of the most evident examples of these actions. Nevertheless, as this group of actions are more directly related to protection of individual rights and freedoms, courts have attempted to limit the scope of sovereignty acts related to internal security of the state.

The Egyptian State Council ruled that the presidential decree of declaration of the "emergency state "is immune form judicial control for being an act of sovereignty as it is taken by the executive as a government authority for internal security of the state. However, the decisions and measures taken by the executive to implementation of the state of emergency are not considered acts of sovereignty and shall be subject to review of administrative courts to determine its compliance with law.[70] These measures include detention, seizure and confiscation of property, and revoking the license of newspapers.[71]

[69] Al-Mah. kamah al-Id. ārīyah al-'Ulyā [Supreme Administrative Court], case no. 1942, session of 25 Dec. 1982, year 27 (Egypt).
[70] Al-Mah. kamah al-Id. ārīyah al-'Ulyā [Supreme Administrative Court], case no. 1438, session of 6 Mar. 1983, year 31 (Egypt).
[71] Mah-kamah al-Qadda' al-Idāry [Administrative Judicial Court], case no. 3123, session of 22 Dec. 1981, year 35 (Egypt)

4) Acts related to the relationship between executive and legislative authorities:

Actions of the executives in connection with the legislative authority, especially measures and decisions prescribed by the constitution and election statutes are considered acts of sovereignty. They comprise the decisions calling for holding or adjourning parliamentary elections as well as dissolution of the parliament. Draft laws submitted by the executive to the legislature in addition to the promulgation of law are also beyond judicial review.

The State Council ruled that the presidential decision calling for holding the parliamentary elections is an act of sovereignty that falls outside judicial control.[72] It also held that the presidential decision calling for referendum on constitutional amendments is an act of sovereignty.[73]

The previously illustrated list of sovereignty acts, classified and categorized by jurists, has been constantly embraced by administrative courts for decades. The court of Administrative Justice (CAJ) ruled in many cases that

> Sovereignty acts are those actions taken by the government as a governing authority, not an administrative one. They include actions of the government in relationship with the two houses of the Parliament, foreign affairs with other countries, defending public security from internal disturbance or an external enemy. The criterion of sovereignty acts is an objective one contingent upon the nature of the actions themselves not the incidental circumstances surrounding them.[74]

In my view, I agree with the judicial list criterion of sovereignty acts. However, two points have to be put into consideration. First, the Egyptian constitutions prohibit

[72] Al-Mah. kamah al-Id. ārīyah al-'Ulyā [Supreme Administrative Court], case no. 1939, session of 12 Dec. 1987, year 30 (Egypt).
[73] Mah-kamah al-Qadda' al-Idāry [Administrative Judicial Court], case no. 26206, session of 23 May. 2005, year 59 (Egypt)
[74] Mah-kamah al-Qadda' al-Idāry [Administrative Judicial Court], case no. 587, session of 26 Sep. 1951, year 5 (Egypt)

exempting any administrative action or decision from judicial control.[75] As acts of sovereignty are exercised by the executive, they have to be perceived as an exception of the constitutional prohibition to exclude administrative acts from judicial control. Therefore, the scope of sovereignty acts has to be largely narrowed to comprise only the pure political actions that are not justiciable according to their nature. They are so considered if the judiciary has no credible tools to legally assess these acts and decide on whether they are in conformity with the constitutional and legal rules. For instance, governmental decisions of international recognition of a new state, cutting diplomatic relations with another state, or declaration of war are considered non-justiciable actions because judiciary does not acquire comprehensive and reliable knowledge and tools to assess their legality or constitutionality. Conventional legal grounds of assessment of administrative actions like reasonableness, legitimacy, necessity, or proportionality would be considered invalid and inappropriate if utilized by courts in order to consider these actions. Second, the judicial list of sovereignty acts develops through time and varies according to the constitutional framework on one side and the degree of political freedom on the other side. The more constitutional rights are guaranteed and genuinely protected, the less acts are perceived to be sovereignty acts.

As previously elaborated, acts of sovereignty are a set of actions performed by the executive branch that are exempted from judicial review.[76] In the past two decades from 2000 to 2020, administrative courts have narrowed the doctrine of sovereignty acts, especially regarding the two categories of 1) acts related to foreign affairs and 2) acts related to the relationship between the executive and the legislature. Some prominent governmental actions that used to be considered as sovereignty acts according to the conventional judicial list are subject to judicial review and perceived as administrative actions. The cases in which administrative courts narrow the scope of sovereignty acts manifest a form of judicialization of mega-politics because sovereignty acts are

[75] *See* Article 68 of the Egyptian Constitution of 1971 and article 97 of the 2014 constitution.
[76] As stated earlier, law scholars classified sovereign acts into four main groups: 1) acts related to foreign affairs and international relations with other countries 2) acts related to war actions 3) acts related to safety and internal security of the state 4) acts related to the relationship between executive and legislative authorities.

considered one of the cornerstone prerogatives of the executives and are very often of outright political appearance. In these cases, although the governmental actions in question obviously belonged to Egyptian foreign affairs and international relations with other countries, and in other instances to the relation with the legislative branch, the State Council courts deviated from the conventional characterization of these actions as sovereignty acts and subjected them to judicial review. This represents a noticeable redrawing by administrative courts of the boundaries between the judiciary and the executives through expanding the scope of judicial review. As I stated earlier, judicialization of mega-politics ought to be assessed on a case-by-case basis according to the facts of the case, the nature of the actions in question, and the relevant constitutional and statutory framework.

I examine below four cases manifesting the judicialization of mega-politics through expansion of judicial review to include some acts formerly perceived as sovereignty acts. The four cases are examined in a chronological order. However, it should be noted that cases no. 1, 2 and 4 are related to narrowing the doctrine of acts of sovereignty pertaining to some acts related to foreign affairs. Case no. 3 indicates limiting the doctrine of sovereignty acts in regard to the relationship between the executive and the legislature.

Case 1. Natural Gas Export to Israel (2008):[77]

Ibrahim Yousry, a former Egyptian ambassador, filed a lawsuit before the Court of Administrative Justice (hereinafter referred to as the CAJ) seeking to declare null and void the Minister of Petroleum and Mineral Resources Decree No.100/2004 and all the affiliated international agreements and memorandums of understanding. He claimed that Egypt and Israel signed a memorandum of understanding, by which Egyptian authorities promised to export natural gas to Israel at an extremely lower price (that does not exceed 1.25 USD per million British Thermal Units) than its real market value (exceeding 9

[77] Mah-kamah al-Qadda' al-Idāry [Administrative Judicial Court], case no. 33418, session of 18 Nov. 2008, year 62 (Egypt).

USD per million British Thermal Units). The plaintiff added that according to this memorandum, the Council of Ministers delegated the Minister of Petroleum and Mineral Resources to negotiate and conclude natural gas supply contracts with a private company called "East Mediterranean Gas Company," which in turn would export natural gas to Israel.

The CAJ revoked the aforementioned decree of the Minister of Petroleum and Mineral Resources and all the affiliated acts of the government related to the export of natural gas to Israel. First, the Court declared that the challenged decrees and actions of exporting natural gas to Israel by the government are related to the regulation and exploitation of a significant national resource: natural gas. Accordingly, these actions are not deemed a matter of international relations, and consequently an act of sovereignty, over which the court may lack jurisdiction.

The Court then established its decision on two main pillars. On the one hand, the challenged decrees and actions of the government were not initially submitted to parliament for ratification. This abstention constitutes a gross infringement of the constitutional obligation imposed over the executive authority whose actions related to the natural resources are subject to the parliamentary scrutiny by virtue of article 123 of the Egyptian Constitution.[78] On the other hand, the Court stated that the judiciary had always possessed the right to review the "objective" of the government's actions to verify that they pursued the public interest of the people. The court noticed that executive authorities did not publish the challenged ministerial decree in the Official Gazette, although bound to do. In addition, the secrecy and simultaneous unjustified velocity that wrapped all the measures and procedures of the executive authority contradict transparency and hence raise doubts about the real objective of the government.

[78] Article 123 of the Egyptian Constitution states that "The rules and procedures for granting concessions relating to the investment in the sources of natural wealth and in public utilities shall be determined by law"

The aforementioned judgment was challenged before the Supreme Administrative Court (hereinafter referred to as the SAC) which upheld it in its substance.[79] However, it split the subject matter of the lawsuit into two main constituent parts. On the one hand, it stated that engagement in international and diplomatic relations with Israel is, in itself, an act of sovereignty that goes beyond the scope of judicial review. On the other hand, the quantity, prices and other conditions of natural gas export contracts are subject to the scrutiny of administrative judiciary. The SAC held that the executive authority is obligated to set a particular mechanism for periodic revision of the conditions of the export transaction especially those related to the quantities and prices of the natural gas. It is also forbidden for the executive to agree with the other contracting party on a maximum price for export.

The judicialization of mega-politics is apparently manifested in this lawsuit as on the one hand, the judiciary narrowed the realm of sovereignty acts, declaring that the only matter that goes beyond judicial review is the executive authority's approval to export natural gas to Israel i.e. the decision to have international commercial relations with Israel. On the other hand, the State Council deeply engaged in setting the general conditions, requirements and framework of the Egyptian public policy regarding exploiting one of its scarce natural resources: natural gas. The judiciary substantially contributed in making a crucial public policy, which reveals the judicialization of mega-politics in this case.

In my perspective, administrative courts have been always creating their own judicial techniques in order to immensely expand judicial review of the executive's actions and decrees. These instruments facilitate the courts' intrusion in making public policy decisions and the judicializing of mega-politics. One of these techniques is what we may term "dispute fragmentation." While hearing a case that may be claimed to fall outside the scope of judicial review, the court divides the subject matter of the dispute into two or more main parts and declare its competence over the most significant part. This technique

[79] Al-Mah. kamah al-Id. ārīyah al-'Ulyā [Supreme Administrative Court], cases no. 5546, 6013, 7975, session of 27 Feb. 2010, year 55 (Egypt).

is based on the theory of "detachable decisions," initially invented by the French State Council and then adopted by the Egyptian administrative judiciary. The theory addresses any complex action of the executive that comprises multiplicity of integrated and intertwined decisions, some of which fall within the ambit of judicial review and the other decisions do not.

In this case, the State Council split the subject matter of the dispute i.e. the complex actions of the executive, and declare its judicial review over the separable decisions subject to its scrutiny. The SAC explicitly adopted this technique in its ruling on the natural gas export to Israel. It ruled that it has no competence to review the sovereignty act of the Egyptian government to establish international commercial relations with Israel but it has jurisdiction to review the details and conditions of the concluded contracts. The legal reasoning of the SAC is praiseworthy because although this case deals with an international agreement between Egypt and Israel, the SAC delicately differentiated between the "international" political aspect of the agreement- the decision to establish ordinary relations with Israel on one side and, on the other side, the "commercial" nature of the agreement- its relevance to natural gas as a scarce natural resource. Accordingly, the Court considered the former aspect as an act of sovereignty and the extended its scrutiny to the latter. It considered that the constitutional obligation of the executives to make the best use of the state's national economic resources is what really counts and hence, the degree to which the executives fulfil this obligation has to be subject to judicial control.

This judgment indicates that the technique of dispute fragmentation is a very fruitful tool of judicial review. First, it enables the judiciary to extend its scope of review to disputes whose international element is not the core of the subject-matter. Second, amplification of the ambit of judicial review to such disputes via this technique serves as an effective mechanism to reveal information about crucial public policies that lack transparency in all its aspects.

Case 2. Retaliation for Egyptian victims of 1967 War Crimes (2008):[80]

A group of political activists including Wahid Fakhry, the Secretary-General of the "Socialist Arab Egypt Party", filed a lawsuit asking the court to issue a verdict obligating Egyptian authorities, especially the Ministry of Foreign Affairs, to ask the Israeli government to extradite its citizens accused of war crimes, during 1956 and 1967 wars, to be adjudicated before the Egyptian Criminal Courts. In addition, the court was asked to obligate Egyptian government to recourse to the UN organs, especially the Security Council, to issue a resolution convicting the Israeli perpetrators of war crimes during the aforementioned wars and establishing a special international criminal tribunal for their adjudication.

The CAJ accepted the case and ruled that Egyptian government may fully accomplish all the required actions to guarantee retribution, against Israeli military officers, for war crimes committed against Egyptian civilians and prisoners of wars. The Court assured that both human rights to life and bodily integrity are embedded in the consecutive Egyptian constitutions and international agreements. Once these rights are violated, the state shall provide legal protection for its citizens not only within its municipal judicial system, but also at the international level. Moreover, the court stated that Israeli troops committed various forms of war crimes including mass killing of war prisoners, inhumane acts of torture and murder of Egyptian civilians in Sinai Peninsula. These actions are considered imprescriptible offences that constitute gross violations of Geneva Conventions. Accordingly, all branches of the Egyptian government, especially the Ministry of Foreign Affairs, are obliged to take legal and administrative procedures for determination of the committed war crimes, their perpetrators, and victims. Then, they have to recourse to the international community in order to exhibit these crimes as violations of international law and attain global condemnation. The verdict asserted that Egyptian authorities are legally bound to enable Egyptian victims of war crimes to sue

[80] Mah-kamah al-Qadda' al-Idāry [Administrative Judicial Court], case no. 7691, session of 4 Mar. 2008, year 55 (Egypt).

the Israeli war criminals before national criminal courts and to pave the way of their adjudications before international courts. The Court asserted that:

> The Egyptian authorities are responsible for citizens' protection whether municipally or in case of infringement of their personal freedoms and bodily integrity rights by an aggressor state. Abstention from seeking implementation of the Geneva Conventions and other international agreements to such infringement is considered illegal. In addition, such abstention hurts the Egyptian public sentiment that appreciates the prominent role of wartime prisoners as well as the entire armed forces in performing the sacred obligation of defending their country. Cooperation among executives and all relevant institutions to obtain the rights of wartime prisoners nationally and internationally is legally required.[81]

The CAJ in this case extensively narrowed the scope of sovereignty acts although the dispute was genuinely connected to the Egyptian international relations with Israel, the UN and international tribunals. As previously illustrated, judicial precedents demonstrate that acts related to foreign affairs with other states and international organizations are inherited in the judicial list of acts of sovereignty. However, the CAJ adopted a very restrictive approach of determination of acts of sovereignty related to the State's foreign affairs. The Court perceived that the constitutional duty of Egyptian authorities to guarantee the two human rights to life and bodily integrity of the Egyptian people imposes a constitutional obligation to take all the required actions to guarantee retribution, against Israeli military officers, for war crimes committed against Egyptian civilians and prisoners of 1954 and 1967 wars.

Analyzing the legal grounds of this verdict and that of the coming two cases (cases no.3 and 4) clearly indicates that the constitutional framework is one of the main pillars on which administrative courts expand their jurisdiction over executive actions that was traditionally perceived as sovereignty acts. Successive Egyptian constitutions has

[81] The original reads in Arabic: امتناع جهة الإدارة عن إعمال أحكام اتفاقيات جنيف والاتفاقيات الدولية بما تملكه من سلطات باعتبارها القوامة على حماية المواطنين، سواء في الداخل أو حال حدوث اعتداء من دولة أجنبية على حقوقهم خاصة تلك المتعلقة بحقوقهم الشخصية والجسدية، يكون مسلكها والحال كذلك مخالفا للمشروعية، فضلا عن مساسه المباشر بالشعور العام للمصريين، الذي يقدر هؤلاء الأسرى ومعهم القوات المسلحة والمدنيين العاملين بها دورهم البارز في الدفاع عن الوطن الذي يمثل التزاما مقدسا يستدعي من الجهات الإدارية والمؤسسات ذات الصلة التعاون لاقتضاء حقوق الأسرى وذويهم دوليا وداخليا

included robust written provisions on safeguarding basic rights and freedoms in addition to articles specifically prescribing the jurisdiction and functions of the main state organs. These two categories of articles have been perceived and employed by administrative courts as the focal point of extending scope of judicial review. The objective of strengthening and consolidating the governmental compliance with constitutional protection of rights enables administrative courts to stand as a vigorous safeguard of these rights. Based on these constitutional provisions, administrative courts define, on the one hand, the constitutionally protected ambit for individuals to enjoy and practice their rights and, on the other hand, the obligations of the executive in order to guarantee these rights. During this process, the State Council involves in pure crucial political controversies and hence the judicialization of mega-politics is highly manifested.

In my view, this judgment entails encroachment on the executives' prerogative of sovereignty acts. The CAJ excessively interpreted the constitutional obligation of the executive to protect human rights to life and bodily integrity and turned a blind eye to the fact that the dispute is genuinely related to foreign affairs although the latter is the core substance of the dispute not the former. Taking legal actions to guarantee retribution, against Israeli military officers, for war crimes committed against Egyptian civilians and prisoners of wars is, first and foremost, contingent upon certain political international considerations. The executive branch, not the judiciary, is the only authority aware and capable of weighing these considerations in order to determine which measures ought to be taken and their proper timing for maximizing effectivity both internationally and domestically.

Case 3. Revoking presidential decision calling for holding the parliamentary elections (2013): [82]

As previously illustrated, administrative courts case-law consider the presidential decision calling for holding the parliamentary elections as an act of sovereignty.[83] It falls, according to the conventional judicial list of sovereignty acts, outside judicial control because it is related to the relationship between the executive and the legislature. Nevertheless, in 2013 the CAJ struck down the presidential decree of initiating the parliamentary elections and inviting the voters to cast their votes. The judgment implication was so immense that it suspended the entire electoral process all over the country. In this case, the State Council got embroiled in a significant political controversy previously perceived to be immune from judicial review, and went as far as to judicialize acts at the core of the political process.

The CAJ founded its verdict on the fact that the challenged decree lacks a formal requirement stipulated by the constitution of 2012, in force at the time of the judgment. The new constitution, after the revolution of 2011, provided that the President must obtain the approval of the Cabinet before issuance of such decision. The court illustrated that the 2012 Constitutional framework established a mixed system of government (presidential and parliamentary) on the contrary of the previous constitution of 1971 which embraced a presidential one. According to the Constitution of 2012, the President became constitutionally bound, with few exceptions, to possess the approval of the Cabinet before taking numerous measures as part of his constitutional authority. The presidential decision calling for holding the parliamentary elections is one of these actions in which the President shares its authority with the Cabinet.[84]

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[82] Mah-kamah al-Qadda' al-Idāry [Court of Administrative Justice], case no. 28560, session of 6 Mar. 2013, year 67 (Egypt).
[83] *See e.g.,* Al-Mah. kamah al-Id. ārīyah al-'Ulyā [Supreme Administrative Court], case no. 1939, session of 12 Dec. 1987, year 30 (Egypt).
[84] It is worth mentioning that the implementation process of this judgment started immediately on 7 March 2013, one day after its issuance. The Higher Committee of Elections issued its decision no.20/2013 declaring the suspension of the parliamentary election procedures all over the state[84].

In my perspective, conceiving the outcome of the verdict would falsely lead to think that the State Council ignores precedents which consider the acts related to the relationship between the executive and the legislature as sovereignty acts. Nevertheless, this verdict represents a new approach of administrative courts pertaining to sovereignty acts. This legal approach claims that the constitutional framework in force is vital in determining which acts to be considered sovereignty acts. According to this approach, the judiciary possess jurisdiction over executive actions, although formerly perceived as sovereignty acts, if the constitution provides for formal or substantive requirements of these actions. The role of the judiciary is to verify the compliance of the executive to these conditions whether in the form of procedural stipulation for taking such acts or substantive requirements pertaining to the subject-matter of the actions.

In my view, this approach is laudable because first, it attempts to narrow the doctrine of sovereignty acts based on valid constitutional grounds. As a civil-law state, the provisions of constitution that specifically determines the jurisdiction and functions of the main state organs, including those on the jurisdiction of the President, must be given imperative connotation when interpreted. They are not stated in the constitution in vain, Consequently, when the constitution impose certain constrains on the executive in taking an action, they must be adhered to. The judiciary is the main organ entitled to assure that constitutional constraints and limitations are obeyed by the executive. Second, the State Council approach remarkably boost the rule of law which stipulates that the government as well as individuals are accountable under the law. The compliance of the executive branch to constitutional requirements is fundamental to promote accountability of the government to law. Exempting such actions from judicial review despite the constitutional framework which stipulates procedural or substantive conditions would enable the executive branch to evade substantial form of accountability i.e. judicial control.

Case 4. The Egyptian Saudi Maritime Border Demarcation Treaty (2016):[85]

The State Council verdict on the Egyptian-Saudi maritime border demarcation treaty, known as the case of "Tiran" and "Sanafir" islands, is perceived as a historic sentence that represents the extent to which the State Council has been expanding its jurisdiction in the realm of Egyptian foreign affairs. On April 10th 2016, Each of Ali Ayoub and Khaled Ali, two lawyers and political activists, separately filed two lawsuits before the CAJ demanding annulment of the delimitation of maritime boundaries agreement between Egypt and Saudi Arabia. Both lawyers claimed that this agreement implied a waiver of the two islands to Saudi Arabia in violation of article 151 of the Egyptian Constitution of 2014 which prohibits ceding any part of state territories. They also claimed that the challenged agreement infringes all previous conventions that considered the two islands as part of the Egyptian territory. They emphasized that Egypt has always explicitly exhibited its sovereignty over the two islands for decades through dispersing military troops and police officers as well as administering the islands via various decrees and executive decisions.

After combining the two cases to be settled by one sentence, the CAJ declared null and void the governmental act of signing the delimitation of maritime boundaries agreement between Egypt and Saudi Arabia in 2016, which includes ceding of "Tiran" and "Sanafir" islands to the latter. The Court traced the change in constitutional framework regarding concluding international agreements in the consecutive constitutions of 1971, 2012 and 2014. Then, it established its ruling on the new constitutional framework provided by the 2014 constitution. It includes explicit prohibition of ceding any part of Egyptian territories by virtue of article 151 of the Egyptian Constitution of 2014.[86] The Court

[85]Mah-kamah al-Qadda' al-Idāry [Court of Administrative Justice], case no. 43866, session of 21 Jun. 2016, year 70 (Egypt).

[86] Article 151 of the Egyptian Constitution of 2014 states that

> The President of the Republic shall represent the State in its foreign relations and conclude treaties and ratify them after the approval of the House of

affirmed that the constitution defined the scope of the executive branch's "prohibited jurisdiction" in the international agreements domain. The constitutional prohibition of executive authority to cede any part of the territory is absolute and thus cannot be eluded under any circumstances or justifications. This forbiddance emanates from the territory's sanctity, which necessitates legal and judicial protection.

The Court refuted the allegation that the challenged governmental action is an "act of sovereignty" as it belongs to the international relations domain and thus falls outside the scope of judicial review. The verdict emphasized that the prerequisite for any international affairs action to be considered an "act of sovereignty" is compatibility with the Egyptian constitution. Infringing constitutional provisions entitles the judiciary to revoke any unconstitutional governmental action or decision. Accordingly, the main basis on which the court declared its jurisdiction over the dispute, despite being related to an international agreement with another state, is the constitutional prohibition imposed on the executives to cede any part of the territory.[87]

> Representatives. Such treaties shall acquire the force of law following their publication in accordance with the provisions of the Constitution.
> Voters must be called for referendum on the treaties related to making peace and alliance, and those related to the rights of sovereignty. Such treaties shall only be ratified after the announcement of their approval in the referendum.

In all cases, no treaty may be concluded which is contrary to the provisions of the Constitution or which results in ceding any part of state territories.

[87] It is important to point out that the Supreme Administrative court upheld the judgment of the Court of Administrative Justice and refuted the appeal of the Egyptian government in its judgment on the case no. 74236, session of 16 Jan. 2017, year 62 (Egypt). The SAC re-emphasized the same legal grounds of the CAJ and added additional ones. For further elaboration of the grounds of this verdict, *see*, Abouelfetouh ElSammak. *To politicize or depoliticize, is that really the question of administrative adjudication?: A study of the state council judicial interpretation in Egypt*. 2019. American University in Cairo, Master's Thesis. AUC Knowledge Fountain, (He elucidate one of the main grounds of the verdict by stating that:

> The court asserted that …. the traditional interpretation of the acts of sovereignty as a theory should be replaced by a new one, one that reflects a consistent understanding of the recent constitutional amendments and its effect on the legal system as a whole. The judgment reasoning asserted on the transcendental value of the people's revolutions of January 25th and June 30th, that implied new constitutional reforms leading to a new legal system that changed the preconception of the Separation of Powers concept, manifested in the great value restored to the people in exercising their right to participate in the political, social and economic life in Egypt. Henceforward, the legal interpretation has to respond to this understanding, which is introduced by the recent constitutional amendment affecting the foundations of the Egyptian legal system.

The Court asserted that Egypt has always manifested its sovereignty over the two islands and effectively implemented its municipal statutes and executive regulations. Moreover, Egyptian police troops have always existed on the land of the two islands. The two islands have been part of "Strategic Areas of Military Significance" as declared by virtue of the Egyptian Minister of Defense Decree No. 367/1986. The court concluded that:

> Undoubtedly, the two islands of "Tiran" and "Sanafir" are Egyptian lands and part of the Egyptian territory, that lies within the Egyptian State frontiers. Egypt has always practiced constant sovereignty over the two islands. They have always been subject to the Egyptian statutes and regulations. The Egyptian sovereignty over the two islands is completely attained according to the international judiciary and jurisprudence criteria. Consequently, ceding these islands is constitutionally forbidden by virtue of the last paragraph of article 151 of the constitution. As a result, the governmental act of signing the delimitation of maritime boundaries agreement between Egypt and Saudi Arabia in April 2016, which includes ceding of the two islands to the latter on the allegation that they lie in the Saudi territorial waters, constitutes a gross violation of the Egyptian Constitution and thus shall be declared null and void. Concealment of the unconstitutional waiver of the two islands in the form of an international agreement for maritime boundaries delimitation does not render it legitimate.[88]

In my opinion, the Court of Administrative Justice adopted the same approach as the previous sentence on the declaration for holding parliamentary elections (case no.3). Whenever there are constitutional conditions for practicing certain executive competence, administrative courts possess jurisdiction to review the adherence to these conditions and the plea of sovereignty acts would not be acceptable. As previously stated, this approach

[88] The original reads in Arabic من المقطوع به أن كلا من جزيرة تيران وجزيرة صنافير أرض مصرية من ضمن الإقليم البري لمصر، وتقعان ضمن حدود الدولة المصرية، وقد مارست مصر السيادة على الجزيرتين بصفة دائمة ومستمرة، وتخضع الجزيرتان للقوانين واللوائح المصرية، كما أن سيادة مصر عليها متحققة طبقا للمعايير المستقرة في الفقه والقضاء الدوليين، وتبعا لذلك يحظر التزاما بحكم المادة (151) من الدستور الحالي التنازل عنهما، ومن ثم يكون ما قام به ممثل الحكومة المصرية من التوقيع على اتفاقية ترسيم الحدود البحرية بين مصر والمملكة العربية السعودية في أبريل 2016 والتي تضمنت تنازل مصر عن الجزيرتين للملكة العربية السعودية بحجة أنهما تقعان داخل المياه الإقليمية السعودية قد انطوى على مخالفة جسيمة للدستور تبطله، وذلك بالرغم من محاولة ستر هذا التنازل المحظور خلف اتفاق على ترسيم الحدود البحرية.

is commendable because it maximizes the adherence of the executives to constitutional requirements and consequently promote accountability of the government to law. It should be emphasized that the main difference between the two judgments is that in the case of initiating parliamentary elections (case no.3), the constitutional stipulation for issuance the presidential decree was a "formal" or a "procedural" one: the approval of the cabinet. Therefore, the judgement reviewed only the compliance with this condition. On the other hand, in Tiran and Sanafir case, the constitutional requirement for concluding any international agreement was a "substantive" one: forbiddance of ceding a part of the territory. Accordingly, the Court had to scrutinize the subject-matter of the case in order to decide on whether the constitutional requirement was obeyed by the executive branch or not. The Court traced the historical evidence of practicing the Egyptian territory over the two islands especially through police and military forces as well as the previous international agreements that dealt with the situation of the two islands. As the Court found that the constitutional prohibition was infringed by the challenged agreement, it declared it null and void based on this constitutional ground. Therefore, the scrutiny of the enormous pieces of evidence by the court, with the objective of determining whether the two islands belonged to the Egyptian territory, falls within its judicial competence. Checking the commitment of the executives to the constitutional forbiddance to cede any part of the territory lies intrinsically on the judiciary.[89]

[89] It should be emphasized that there were two fundamental responses of the legislative authority to the two judgements of the State Council on the Egyptian-Saudi maritime border demarcation treaty. First, the legislature (House of Representative) ratified the treaty including the transfer of the two islands to the sovereignty of Saudi Arabia on June 14th 2017 and totally overlooked the two judgments of the State Council. Second, On April 18th.2017, the law no. 13/2017 on the appointment of the heads of judicial bodies was enacted by the Legislature to grant the Egyptian President discretionary power to select the Chief Justice of each of the four judicial entities, including the State Council. The president has to choose one of the three nominees of General Assembly. In the case that no candidates or fewer than three candidates were nominated, the President possesses the right to select the Chief Justice from among the seven eldest deputies[89]. This law completely sets aside the obvious criterion of seniority that was constantly adopted in the four judicial bodies for decades. It is beyond doubt that this statute constitutes a serious encroachment on the judiciary independence, including that of the State Council judges.

B) Explicit Judicial Law-making:

Judicialization of mega-politics is apparent when courts explicitly "make" laws concerning pivotal social, economic or political matters. Explicit judicial law-making constitutes an intervention of the judiciary into the substantial prerogative of the legislatures i.e. enacting law. Conventionally, the State Council's judicial review is limited to applying legal rules, whether constitutional or statutory, to disputes. Judicial review entitles administrative courts to the function of interpreting law. Judicialization of mega-politics is often manifested when courts are not confined to interpreting and applying law. Instead, they explicitly "create" laws pertaining to core political, social or economic matters. It is well-known that while practicing judicial review, judges may narrowly or extensively interpret specific legal rules. In this case, the question that may arise is whether courts interpret or make law. This is not what this research focus on. In fact, judicialization of mega-politics is more likely to occur when the court explicitly creates rules without engaging into interpretation of existing legislative ones. This is why this form of judicialization of politics may be termed "explicit" judicial law-making as an indication of the outright intervention into the fundamental prerogatives of the legislature.

Explicit Judicial law making may occur when there is legal vacuum in regard to a certain matter. In this case, the State Council plays the role of a legislator and elaborate a detailed nature, scope and conditions of this matter. In this case, courts do not decide on a particular dispute, but they create a full elaborated rules to be applied in this case and any similar cases related to the same subject-matter. In other scenarios, there may be no legal vacuum. Rather, there are statutory rules applicable to the dispute but administrative courts explicitly create a specific legal rule and add it to the existing applicable statutory rules. When the State Council practices explicit judicial law-making in regard to a very crucial matter like elections, it often entails judicialization of mega-politics as it performs substantial role in determining who is eligible to run for office and consequently affects the outcome of the entire electoral process.

It should be emphasized that proper assessment of explicit judicial law-making by administrative courts, like other forms of judicialization of mega-politics, necessitates moving beyond the binary perspective of permanently advocating for or arguing against the involvement of the judiciary into realm of "legislating" or "establishment of legal rules." Rather, it should be assessed on a case-by-case basis according to the facts of the case, the existence of statutory rules applicable to the facts, and the relevant constitutional framework. Accordingly, in the following part, I analyze three judgments that encompass explicit judicial law-making in pivotal matters and manifest judicialization of mega-politics. I evaluate each judgment in order to indicate whether the court trespassed borders of judicial control and encroached on the jurisdiction of the legislature, or its creation of new rules fall within the legitimate scope of judicial competence.

Case 5. The Civil Servant's Right to Strike (2016):[90]

A civil servant working for a Court in Ismailia was tried before the Disciplinary Court in Ismailia[91] because she participated in strike for three days and therefore was subjected to a disciplinary sanction. The objective of the strike was to raise the employees' salaries to be equivalent to their rivals in other departments belonging to the same entity they are working for i.e. the Ministry of Justice.

The Disciplinary Court in Ismailia revoked the disciplinary sanction establishing its verdict on the fact that the aforementioned strike did not constitute infringement of laws. Afterwards, the Administrative Prosecution challenged this judgment asking for upholding the sanction imposed on the civil servant.

[90]Al-Mah. kamah al-Id. ārīyah al-'Ulyā [Supreme Administrative Court], case no. 22314, session of 12 Mar. 2016, year 59 (Egypt). See generally similar verdicts such as Al-Mah. kamah al-Id. ārīyah al-'Ulyā [Supreme Administrative Court], case no. 21992, session of 9 Jan. 2016, year 59 (Egypt) and Al-Mah. kamah al-Id. ārīyah al-'Ulyā [Supreme Administrative Court], case no. 27047, session of 17 Jun. 2017, year 61 (Egypt)

[91] Disciplinary courts are an integral part of the State Council courts. They are competent with the disciplinary trials of civil servants once they are indicted for committing disciplinary offences. Their verdicts are challengeable before the Supreme Administrative Court.

The SAC upheld the verdict of the first instance court. It established its sentence on three pillars. First, the Egyptian constitution has recognized the right to strike, and considered it one of the constitutional rights of the Egyptian worker, and mandated the law to regulate it[92]. The Constitution obviously states that the right to strike is entitled to all employees whether those working for the government and its authorities i.e. public officials or those working in the private sector. In addition, the International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by the Egyptian authority in 1981, provides for the right to strike. The constitution grants international conventions the same binding force as municipal laws if ratified by Egyptian authorities. Therefore, the right to strike must be perceived as a legitimate right entitled to all employees as an aspect of freedom of expression.

Second, the Court stated that the strike recognized by the constitution is the peaceful one to which the employee resorts in order to express legitimate rights and demands. When employees are on strike, they have to refrain from affecting their work regularity and continuity, resorting to violence in any way, and forcing nonparticipant employees to refrain from work. A non-peaceful strike constitutes violation of laws, for which participant employee must be held disciplinarily and criminally accountable.

Third, the legislative authority should enact law that regulates the right to practice peaceful strike, seeking for achieving two parallel objectives: the public interest and the employees' legitimate rights. The law should organize certain aspects. On the one hand, it has to define the obligations of the striking employees via determination of the strike's scope. Employees have to recourse to strike to claim legitimate rights and demands related to their work. It is not permissible to go on strike claiming unlawful demands or claims not related to the employee's job. Moreover, legislative statutes may determine the prerequisites to be followed before going on strike such as submission of requests to

[92] Article 15 of the Egyptian Constitution of 2014 states that "Peaceful strike is a right regulated by Law."

superior executives, without getting response, notifying the managing authority of conducting a peaceful strike early enough before Initiating it.

On the other hand, the law has to define the administrative authority obligations. These duties include respecting the employees' right to strike and not to confront this peaceful strike with violence. In addition, the administration has to gradually discuss the striking employees' demands and negotiate with them, within certain time specified according to the nature of work. Also, it is bound not to arbitrarily leave striking employees without a response and not to deny them any of their rights and benefits as a punishment for their resort to peaceful strikes.

The SAC concluded that as long as the legislative authority does not enact the law regulating the right to peaceful strike, the court will constantly apply the aforementioned rules, considered as general principles, attempting to achieve balance between the public interest and the employee's rights. It assured that

> Until this legislation is issued by the legislative authority, what was previously mentioned falls within the general rules and principles imposed by common sense, taking into account the two parties to the relationship and trying to achieve balance between the public interest of the state, the right of society and the rights and duties of the employee. Hence, if the worker abides by these general conditions and principles when exercising his right to peaceful strike in order to express his legitimate demands, then he notifies the competent authorities in the way indicated, did not resort to violence in order to present these demands, and did not affect the progress of work and its regularity in the public facility or the workplace, he would have exercised this right within the framework of constitutional legitimacy and shall be legally protected, and thus may not be held accountable for his exercise of this legitimate right.[93]

[93] The original reads in Arabic: ولحين صدور هذا التشريع عن السلطة التشريعية، فإن ما سبق ذكره يندرج ضمن القواعد والأصول العامة التي يفرضها المنطق السليم القائم على مراعاة طرفي العلاقة والموازنة بين المصلحة العامة للدولة وحق المجتمع، وحقوق العامل وواجباته، ومن ثم فإذا التزم العامل بهذه الضوابط والأصول العامة عند ممارسته حقه في الإضراب السلمي للتعبير عن مطالبه المشروعة، فقام بإخطار الجهات المختصة على النحو المشار إليه، ولم يلجأ إلى العنف في سبيل عرض هذه المطالب، ولم يؤثر في سير العمل وانتظامه بالمرفق العام أو بمكان العمل، فإنه يكون قد مارس هذا الحق في إطار من الشرعية الدستورية، ويكون جديرا بالحماية، ومن ثم لا تجوز مساءلته تأديبيا عن ممارسته لهذا الحق المشروع.

This case manifests the judicialization of mega-politics in the form of explicit judicial law-making concerning pivotal matters. The Court obviously illustrated that it creates and applies its own set of rules that regulate the civil servants right to strike due to abstention of the legislative authority to enact statutory rules on this constitutional right. The Court defined the meaning, objective and conditions of the right to strike. It elaborated the duties and obligations of the two parties to the relationship: the striking civil servants and the public authorities they are working for.

Verdicts on the civil servant right to strike indicate that administrative courts have been creating their own judicial techniques in order to immensely expand judicial review of the executive's actions and decrees. These instruments facilitate the courts' intrusion into the prerogatives of the legislature in crucial controversies and judicialization of mega-politics. One of these tools is filling the legislative vacuum. Conventionally, when administrative judges encounter a legislative lacuna regarding the subject-matter of the dispute, their judicial review is restricted to deciding on the actual facts of the case. However, when the legislative authority refrains from enacting statutes on thorny matters, like in the field of individual rights that may raise immense political controversies and contentions, the State Council courts make the best use of the resulting legal vacuum in order to get deeply involved in making public policy decisions and judicializing mega-politics. Courts provide their own perception of the subject matter of the dispute in a comprehensive, detailed and probably itemized way, very similar to what the legislative authority may do. Judges, due to the legal vacuum, are not restricted to concentrate their decisions on the precise substance of the dispute in question. They tend to express their exhaustive comprehension of the entire subject matter of the individual right. The rulings on the civil servant right to strike encompassed extensively detailed conditions and procedures in a very similar way a complete legislation on regulation of this right would appear.

This judgment also indicates that administrative judges rely on the tools provided by the Egyptian constitutional framework to judicialize mega-politics, especially in the realm of

individual rights and freedoms and the demarcation of boundaries between the judiciary and the legislature. The constitutional framework provides two main tools for the State Council to engage in core social or political controversies: the written provisions on public rights and freedoms and the "implantation" process of international conventions and multilateral treaties in the municipal legal system. The verdicts on the right to strike reveal that the court grounded judgments on the constitutional provision that states the right to strike. Besides, they relied on the International Covenant on Economic, Social and Cultural Rights (ICESCR), which provides for the right to strike.

The State Council courts rely on international conventions and charters ratified by the Egyptian authorities, especially those on human rights, to review the adherence of the executives to public rights and freedoms. Egyptian consecutive constitutions provide that the provisions of international treaties have the same legal force as national statutory laws once they are signed by the President and ratified by the legislative authority, and hence are applicable to national disputes.[94] Administrative courts use the provisions of international conventions as intrinsic tools to address rights disputes and set the boundaries within which, on the one hand. individuals enjoy and practice their rights and, on the other hand, the executive may act without infringing these rights.

In my view, when administrative courts encounter legislative lacuna concerning a crucial matter, especially individual rights, and create their own set of rules that regulate that matter, they are not considered as trespassing their jurisdiction for two reasons. First, judicial conduct of explicit law-making in this case is no more than an attempt to redress the legislative vacuum resulting from abstention of the legislative authority to enact statutory rules regulating the contentious matter. The intrusion of the judiciary into the prerogatives of legislature is temporary, in the sense that it is valid and applicable until the legislative authority practices its main jurisdiction and enact statutory rules regulating

[94] Article 151 of the Egyptian Constitution of 2014 states that "The President of the Republic shall represent the State in its foreign relations and conclude treaties and ratify them after the approval of the House of Representatives. Such treaties shall acquire the force of law following their publication in accordance with the provisions of the Constitution."

the same matter. Courts do not permanently substitute their own perspectives instead of that of the legislature. Accordingly, their conduct may not be perceived as encroachment on the legislature. Second, the objective of the judiciary in creating its own set of rules is achieving balance between the public interest and the individual rights. The abstention of courts to create rules for this purpose is likely to result in the violation of the executive of individual rights as it is often more powerful. The courts involvement is an effective instrument to rein in the executive power from infringing basic rights and freedoms.

Case 6. Good Repute of Candidates for the Parliament (2015):[95]

Samir Sabry, a lawyer, filed a lawsuit before the Court of Administrative Justice asking for rejection of Samia Ahmed Attia (known as Sama El-Masry)'s application for the House of Representatives elections of 2015. He claimed that the Higher Committee for Parliamentary Elections accepted her registration application in violation of elections laws as she does not fulfil the requirement of "good repute." The plaintiff also alleged that she is known for dancing and singing in night clubs in addition to insulting her constituency people.

The CAJ dismissed the case, stating that the defendant is not proved to lack any conditions of running for office as she has not been convicted by virtue of any final criminal judgements. News and online reports tarnishing any citizen's reputation are not considered definitive evidence of lacking the conditions required to stand for elections.[96]

The claimant challenged the court sentence before the SAC. He reassured his allegations that the defendant is not of "a good repute." He claimed that the court of first instance overlooked all the submitted documents that prove his claims.

[95] Al-Mah. kamah al-Id. ārīyah al-'Ulyā [Supreme Administrative Court], case no. 105519, session of 7 Oct. 2015, year 61 (Egypt).
[96] Mah-kamah al-Qadda' al-Idāry [Court of Administrative Justice], case no. 78410, session of 19 Sep. 2015, year 69 (Egypt).

The Supreme Administrative Court (SAC) revoked the first instance court judgment and rejected the defendant's registration application for the House of Representatives elections of 2015. The judgment stated that the right to stand for elections is a constitutional right that lies in the core of a democratic process. However, the burdens and responsibilities of any member of the House of Representatives necessitate the possession of a reasonable degree of trust, credibility and integrity. "Good repute" is possessing valuable traits and morals that entitle the candidate plausible degree of credibility in community. The Court found that the defendant in numerous interviews had lacked good manners and shyness and thus lack the necessitated "good repute".

Moreover, the Court affirmed that although "good repute" is not stipulated in the elections statutes as a requirement for running for office, it is considered a general condition for holding any representative or executive post:

> The provisions of both the Political Rights and House of Representative Acts do not stipulate "good repute" as a condition of running for office. Nevertheless, it is considered a general requirement for holding any representative or executive post. Any representative of the people, in order to be eligible for such prestigious responsibility of the executive branch supervision, is required to be of "good repute" beyond any suspicions and also not to be famous for misbehavior. Accordingly, there is no need for the stipulation of "good repute" in a legislative provision.[97]

This verdict represents judicialization of mega-politics by administrative courts in the field of elections. It involves intrusion of the judiciary into the realm of law-making jurisdiction of the legislative authority. As previously illustrated, the judiciary intrusion is apparent in this case because the Court does not interpret a particular legal rule trying to advocate that its interpretation is valid. Rather, the Court evidently states that it "creates"

[97] The original reads in Arabic: ولئن كانت كل من نصوص قانون مباشرة الحقوق السياسية , وقانون مجلس النواب لم تشترط السيرة الحميدة وطيب الخصال ضمن الشروط اللازمة للترشيح , إلا أنه يعد شرطا عاما متطلبا فى كل من يتقلد موقعاً تنفيذياً أو نيابياً باعتباره من الشروط العامة المفترضة فى كل شخص , ومن باب أولى من يتصدى للعمل النيابى ممثلاً عن الشعب مراقباً لأداء الحكومة ومراجعاً لتصرفاتها , إذ يجب أن يكون هذا الشخص – حتى يكون أهلاً لتمثيل الأمة – محاطاً بسياج من السمعة الحسنة وبعيد عن موطن السوء والشبهات وألا يكون قد اشتهر عنه قالة السوء أو التردى فى سلوكه وتصرفاته , دون حاجة إلى نص صريح يقرر ذلك الشرط لتولى مثل هذا الموقع .

an additional condition for running for office other than those stipulated by the relevant statutory rules. Given the significance of the dispute as it is related to a crucial political question and shall have impacts on determination of the outcome of the entire electoral process, judicialization of pure politics is manifested in this sentence.

In my view, this verdict is criticized for trespassing the boundaries of judicial review by the SAC and encroachment on the legislature authority. The judgment did not entail valid legal grounds on which the court established its jurisdiction to "add" a condition of running for parliamentary elections and explicitly perform the role of the legislator. It stated that the condition of "good repute" is a general requirement for holding any representative or executive post without indicating the source from which the Court derived this condition. Besides, the court ignored the State Council precedents which require conviction of a crime by virtue of criminal judgements to rule that the person lacks the required "good repute." Surprisingly, the Court found that the challenged applicant does not fulfill the requirement of good repute based on some of her statements in TV interviews. The Court did not elucidate the validity of the foundations on which it overlooked administrative case law and adopted a completely different approach regarding the evidence on lacking a "good repute"

Case 7. Physical and Mental Clearance of Candidates for the Parliament (2015):[98]

A lawsuit was filed asking the Court of Administrative Justice (CAJ) to issue a decision ordering the Higher Committee for Parliamentary Elections to require a medical certificate proving that the applicant is alcohol-and drug-free and not suffering from physical or mental illness which adversely affect his performance as a member of the Parliament. It was claimed that the constitution and statutes have always recognized the significance of the representative post which presupposes the candidate eligibility to

[98] Mah-kamah al-Qadda' al-Idāry [Court of Administrative Justice], case no. 20868, session of 20 Jan. 2015, year 69 (Egypt).

efficiently perform its tasks. In addition, although both conditions of medical clearance and being alcohol-and drug-free are not stipulated in the House of Representatives Act as requirements for applicant registration, they are necessitated for holding any position in the executive and judicial branches.

The CAJ accepted the case. As for the physical and mental clearance condition, the judgment adopted a deductive analogy methodology and was established on two main pillars. On the one hand, the Exercise of Political Rights Act stipulates that voters with mental or psychological illness who are held in psychiatric centers are temporarily deprived of their right to vote. This condition of mental and psychological clearance applies *a fortiori* to parliamentary applicants whose constitutional duties, after being a parliament member, are extremely harsher than a voter. Moreover, the House of Representatives Act requires the disabled applicants to submit a medical certificate proving that the current disability may not hinder capacity to practice political rights. Stipulation of physical fitness should be extended to all the applicants not only the handicapped. The Court assured a general statement that the condition of physical, mental and psychological fitness is required for holding any position or job:

> Based on common sense, whoever applies to occupy a specific position or job, especially public service, or is selected for that, must fulfill the condition of physical, mental and psychological fitness that enables him to perform the duties of this position or job or do that work, as the case may be, whether the law stipulates for this condition or is silent on that. This condition is required by public principles without the need for a legislative provision to state it.[99]

On the other hand, as for the alcohol-and drug-free condition, the court assured that although the condition of "good repute" is not stipulated in elections statutes as a requirement for running for office, it is considered a general condition for holding any representative post. Alcohol and drug abuse derogates "good repute" and diminishes the

[99] The original reads in Arabic: من المقرر نزولاً على ما تمليه طبائع الأمور ، أن من يتقدم بطلب لتقلد منصب أو وظيفة معينة أو الاضطلاع بعمل من الأعمال ، وبصفة خاصة العمل العام ، أو يقع عليه الاختيار لذلك ، يجب أن يكون مستوفياً لشرط اللياقة البدنية والذهنية والنفسية التى تمكنه من أداء واجبات هذا المنصب أو الوظيفة أو القيام بذلك العمل ، بحسب الأحوال ، سواء نص القانون على تطلب هذا الشرط أم سكت عن لذلك ، إذ أن هذا الشرط يُعد من الشروط التى توجبها الأصول العامة بغير حاجة إلى نص خاص يقرره ،

applicant's credibility. It also infringes his/her constitutional oath to "respect the Law."[100] Egyptian laws and regulations have always criminalized drug possession, abuse and trafficking.

In my view, the same aspects of criticism of the previous verdict on "good repute" condition (case no. 6) may be directed to this judgment. Although the statutory law on parliamentary elections provides for detailed conditions for running for office, the Court "created" two additional conditions on its own initiative. The judgment lacks robust legal grounds for trespassing the boundaries of judicial review by the Court. Given the importance of the representative post, it is not sufficient for establishing extra requirements for running for office to state that the condition of physical, mental and psychological fitness is based on "common sense" or "public principles" as mentioned in the verdict. The Court obviously replaces itself instead of the legislator and imposes its own perspectives in a core political matter that tremendously affects the results of the electoral process as it determines who is eligible to apply to run for office.

It is noteworthy in this regard to indicate one of the self-made judicial technique used by administrative courts to excessively expand their scope of judicial review, which is review of the executive's omission, legally termed as "passive administrative decision." Article 10 of the State Council Act provides for its judicial review of the executive's omission to take an action required by virtue of law. Such omission is termed in the legal terminology of administrative courts' rulings a "passive administrative decision." This provision is considered necessary for guaranteeing a comprehensive scrutiny of the executive in both cases of taking and refraining from taking legally required actions. Administrative courts have excessively been engaging in making public policies and creating legal rules on the basis of review of passive administrative decisions even when there is no explicit legal rule requiring the executive to take a certain action. In other

[100] Article 104 of the Egyptian Constitution state that "As a condition for undertaking his/her duties, a House of Representatives member shall take the following oath: "I swear by The Almighty God to loyally uphold the republican system, respect the Constitution and the Law, fully uphold the interests of the People, and to safeguard the independence of the nation and the integrity and safety of."

words, what is problematic is the source of obligation by virtue of which the court determines whether the executive is obligated to act in a certain way or adopt a certain public policy. The case is probably simple if the source of the executive's obligation to adopt a certain policy is an evident legislative rule. Nevertheless, it becomes intrinsic when there is no such a provision. When the Court explicitly creates a legal rule, it often states in its ruling that the executive's omission to adhere to it constitutes an illegitimate "passive decision" and hence the court orders it to comply with this rule stipulated by virtue of "law." The verdict on physical and mental clearance of candidates for the Parliament presents a clear example of excessive use by administrative courts of the review of "passive administrative decision" as the Court ordered the Higher Committee for Parliamentary Elections to require a medical certificate proving that the applicant is alcohol-and drug-free and not suffering from physical or mental illness, stating that these two conditions are necessitated by "law," although there was no legal rule in this regard.

C) adoption/abolition of a substantial public policy:

A third form of judicialization of mega-politics is apparent when administrative courts decide on making, suspension or abolition of a public policy related to substantial social, economic, or political questions. A confluence of factors and institutions take part in the process of public policy making. It is a very complicated process through which various political actors influence each other. Conventionally, executive and legislature, as representative institutions, are entitled to making public policies which have to be formulated in consistency with the existing constitutional framework and legal provisions. The administrative apparatus of the state substantially contributes to implementation of public policies. The role of administrative courts is to review the actions of the executive during the implementation process of these policies and properly apply the law pertaining to them. While doing so, they render judgments that provide suggestions for effective implementation of these policies and achievement of their

objectives. This is more likely to occur in judgments that highlight the defects and shortcomings of a particular public policy after it is actually put into force.

At times, the State Council renders judgments that make or substantially contribute to making a public policy for achieving a specific purpose. Similarly, its judgments suspend or completely revoke a public policy concerning crucial social. economic or political matters. In these cases, the locus of political activity is transferred to courtrooms. The authority of policy making, formerly perceived to be entitled to politicians, is relocated from executives and legislature to the judiciary. The judicialization of mega-politics is accordingly manifested when administrative courts make or abolish a pivotal public policy rather than sticking to their conventional role of making sure that public policies and relevant legal provisions are properly applied by the agencies and organs of the administrative apparatus.

It should be pointed out that, in legal terms, when administrative courts decide on making, suspension or abolition of a public policy, it would be misleading to allege that they constantly surpass their limits of jurisdiction. Although in these cases, the authority of public policy-making seems to be transferred to the judiciary, assessment of this form of judicialization of mega-politics, in regard to excessive expansion of jurisdiction, should move beyond the binary model of evaluation: either involves encroachment of the State Council on the jurisdiction of other main organs of the state or lies within administrative judiciary's scope of competence. Like the previous two forms of judicialization of mega-politics, this form should be assessed on a case-by-case basis according to the facts of the case, the nature and legal characteristics of the public policy in question, and the relevant constitutional and regulatory framework. I depict below three cases manifesting the occurrence of judicialization of mega-politics regarding fundamental social and economic public policies. In each case, I briefly illustrate the facts and grounds of the judgement. Then, I analyze the verdict to indicate whether it constitutes an excessive expansion of administrative judiciary's jurisdiction or it falls within the scope of judicial review.

Case 8. Minimum Wage for workers (2010):[101]

Nagi Rashad, a worker at the South Cairo Milling Company, filed a lawsuit before the CAJ asking for the establishment of a minimum wage for workers in the private sector. He claimed that all private sector employees are suffering from very low wages that are not proportionate to the constant prices increase. The abstention of the government to determine a minimum wage violates the constitutional rights of employees.

The CAJ accepted the case and established its verdict on two pillars. First, the constitutional provisions that recognize and protect certain rights cannot be considered non-binding guidelines. Instead, they are legally obligatory provisions. The Egyptian constitution has recognized the value of work and considered it simultaneously as a right and a duty. It has also stipulated for the workers' rights, *inter alia*, to ensure a fair remuneration for their work, guarantee a minimum wage and linking the wage to productivity.[102] Accordingly, these provisions have to been put into force through the adoption and implementation of actual policies and programs.

Second, the Court affirmed that the government is bound to play an active and functioning role for a minimum wage determination. Hence, it is not legally permissible to leave the determination of workers' wages to the employers who take advantage of the workers' need to work and force them to receive unfair wages, that are not commensurate neither with their work nor the increase in living expenses. The Court indicated that a fair wage for the worker, regardless of the financial determination of its exact value, has to guarantee a dignified life for the worker and his family. The Court concluded that the minimum wage establishment is a preliminary and substantial step to achieve a fair wage

[101] Mah-kamah al-Qadda' al-Idāry [Court of Administrative Justice], case no. 21606, session of 30 Mar. 2010, year 63 (Egypt).

[102] Article 23 of the Egyptian Constitution of 1971, that was in force at the time of the Verdict, states that "The national economy shall be organized in accordance with a comprehensive development plan which ensures the growth of the national income, fair distribution, higher living standards, elimination of unemployment, the increase of job opportunities, the linking of wages to productivity and the determination of minimum and maximum wages in a manner which guarantees the reduction of disparities between incomes."

for workers because they are the weak party in the work relationship and hence their protection is obligatory.

This judgment manifests the judicialization of mega-politics in the form of obligating the executives to embrace a certain public policy and take the required procedures for its actual implementation. It highlights the involvement of administrative judiciary in a substantial social predicament related to social justice and fair distribution of wealth. Conventionally, the decision to establish a substantial public policy like fixing a minimum wage for workers is entitled to the legislature and executives in conformity with the existing constitutional framework. In this case, the State Council moved beyond its traditional role of reviewing the implementation of a given public policy by the administrative machinery and ordered the executives to establish a minimum wage for workers in the private sector.

In my view, this judgment is criticized because it represents trespassing of the frontiers of judicial review by administrative courts and excessive utilization of the tool of "passive administrative decision." As formerly elaborated, the State Council's judicial review includes the executive's omission to take an action required by virtue of law. When the executives refrain from taking a specific action although there is a constitutional or statutory rule that obliges them to do so, administrative courts are entitled to revoke such omission (which constitutes the passive administrative decision) by issuing a judgment ordering the executives to perform its obligation. In the case of workers' minimum wage, the Court established its judgment mainly on the re-interpretation of the binding force of the constitutional provisions on the objectives of the national economy plan. Article 23 of the Egyptian Constitution of 1971, that was in force at the time of the verdict, provides for the general objectives of the national economy plan which are the growth of the national income, fair distribution, higher living standards, elimination of unemployment, the increase of job opportunities, the linking of wages to productivity and the determination of minimum and maximum wages in a manner which guarantees the reduction of disparities between incomes. In my perspective, these objectives are nothing

but general guidelines for both the legislature and executives to put into consideration while formulating and implementing the national economy development plan. The Court misinterpreted the constitutional provision when it conferred these objectives a binding force, alleging that the objective of establishment of a minimum wage for workers is an obligatory one which the executive branch is constitutionally bound to fulfil. Accordingly, the Court "invented" a source of obligation, derived from the constitutional guidelines, to order the executives to establish a minimum wage for workers. This is considered an excessive expansion of judicial review because the judgment lacks a valid constitutional and legal ground to obligate the executive to embrace the major public policy of workers' minimum wage.

It should be pointed out that the previous aspect of criticism is similar to what was directed to the judgment on the physical and mental clearance of candidates for the Parliament (case no.7) in which the court ordered the Higher Committee for Parliamentary Elections to require a medical certificate proving that the applicant is alcohol-and drug-free and not suffering from physical or mental illness, while stating that these two conditions are necessitated by "law." Although the conditions of physical, mental and psychological fitness are not stipulated by the statutory rules on the parliamentary elections, the court "invented" the legal source of these conditions by stating that they are stipulated based on "common sense" or "public principles" as I mentioned earlier.

Case 9. Healthcare Privatization (2008):[103]

Starting from late 1990s, the Egyptian government initiated a privatization process as a means to enhance the efficiency of the economy that encountered massive financial and economic predicaments. This process extended to numerous sectors of the state. As for the healthcare sector, the Court of Administrative Judiciary (CAJ) annulled the entire

[103] Mah-kamah al-Qadda' al-Idāry [Court of Administrative Justice], cases no. 21550, 21665, 2212, 22752, 25857, session of 4 Sep. 2008, year 61 (Egypt).

privatization process of the National Authority of Health Insurance. The Court asserted that providing health insurance service is a constitutional obligation on the state in order to preserve and promote the individual rights to life and health. In compliance with the Constitution, the legislator has entrusted the National Authority for Health Insurance with two main functions, financing and providing the healthcare service, Accordingly, it is not permissible for this authority to refrain from carrying out any of these two functions or to transfer it to any other entity. These two functions are constituent components of its social duty assigned by the legislator in compliance with the provisions of the Constitution.

The CAJ also declined the justifications of the privatization process that alleged its necessity for the healthcare sector development and overcoming revenues insufficiency. It affirmed that privatization process would undermine the social function of the state to ensure health and safety of individuals as it grants the entire control over healthcare service to private sector whose ultimate objective is maximizing profits regardless of any social or collective considerations.

This judgment highlights the judicialization of mega-politics in the form of total abolishment of a crucial public policy adopted by the executives. The court got embroiled in healthcare privatization process as an intrinsic macro-economic public policy. It should be noted that the Court did not scrutinize the detailed implementation of this public policy by the administrative apparatus of the state. Instead, it engaged with the legality of the principal option of the executives to adopt the privatization policy in this prominent sector. The decision to make or abolish fundamental public policies is no longer exclusively entitled to the legislature and the executives. This judgment indicates that the judiciary involves in determining the validity and justifiability of a public policy that has major consequences on the entire society, and accordingly judicializes mega-politics.

In my view, this judgment did not involve an excessive expansion of the State Council's judicial review because it was founded on valid legal grounds that proved the

infringement of the constitution by the healthcare privatization policy. The Court did not claim that it provided their own preferred version of public policy in relation to healthcare system instead of the privatization policy embraced by the executives. Rather, the court indicated that the privatization policy is not in conformity with the constitutional and statutory framework relevant to the healthcare system and therefore may be revoked. Therefore, in this case, administrative judiciary did not trespass limits of judicial review although it involved into the public policy-making process, conventionally belonging to the legislature and/or executives. The Court declared the grounds on which the healthcare privatization policy contradicted with the constitutional social objective of providing the healthcare to all beneficiaries and violated the basic rules of the social and healthcare insurance stipulated by the constitution, multiple social insurance legislations, and international conventions.

Case 10. Omar Effendi Sale Contract (Privatization of Public Sector Companies) (2011):[104]

On December 21st 2010, nearly a month before the Egyptian Revolution of 2011, Hamdi El-Fakharani brought a lawsuit before the CAJ asking for declaring null and void the administrative contract concluded between the Ministry of Investment (represented as The Holding Company for Construction and Development) and the "Anwal Trading Company"[105] for the selling of "Omar Efendi Company" at the total price of 590 million Egyptian Pounds. The plaintiff argued that the determined price is much lower than the market value of the sold company which exceeds 2.5 billion Egyptian Pounds. Also, the contract was not supervised by the competent Department of Legal Advice in the State Council in violation of law. In addition, the purchasing company did not comply with the contract provisions as it laid off a large number of workers that exceeds the agreed number in the contract.

[104]Mah-kamah al-Qadda' al-Idāry [Court of Administrative Justice], case no. 11492, session of 7 May. 2011, year 65 (Egypt).
[105] This company is completely owned by a Saudi investor called Mr. Gameel Abdul Rahman El-Kenbeet.

On May 7th 2011, the CAJ accepted the case and nullified the contract as it encompassed extremely gross violations of laws and regulations related to the privatization of public assets, that amount to constitute serious squandering of public money. These infringements entailed selling the shares of Omar Effendi Company at a price that is completely disproportionate to the rights and privileges obtained by the purchaser. In addition, the latter had been delivered certain movables free of charge and allowed to sell assets of historical and cultural characters that are legally prohibited be disposed of. The Court also declared that the purchasing foreign investor had been enabled to sell the company's assets at the market value despite being evaluated in the nullified contract on other bases that resulted in lesser values.[106] Besides, the purchaser was enabled to evade taxes.

The CAJ concluded its verdict with declaring that its findings reveal malicious squander of public property which unprecedentedly took place under the leadership of many ministries. The Court described this as "the largest sabotage operations of the Egyptian economy", which constitute crimes, if proven after investigations, as well as administrative corruption that requires accountability. The Court stated that:

> The court considers its judicial ruling as a notification to all investigative bodies in the state: to the Public Prosecution, the Public Funds Prosecution, the Illicit Gain Administration, and the Administrative Prosecution, so that each entity carries out its duties as required by law to protect the country from the evil of corruption.[107]

The State Council, in other cases, also nullified a great deal of privatization contracts that included sale of public sector companies, owned by the state, to foreign investors such as

[106]The court declared that the Omar Efendi Company's assets were evaluated on the basis of discounted cash flows and hence were extremely less than their market value. In addition, the court stated that the process of these assets evaluation has entailed eleven aspects of gross violation of laws and regulations related to the organization of privatization as illustrated in the verdict in detail.

[107]The original reads in Arabic: إن المحكمة تعتبر حكمها القضائي هذا بلاغاً لكل جهات التحقيق بالدولة، للنيابة العامة، ونيابة الأموال العامة، وإدارة الكسب غير المشروع، والنيابة الإدارية، لتتخذ كل جهة حيال هذا الأمر ما أوجبه عليها القانون وما يقي البلاد شر الفساد.

the sale contracts of Shebin El-Kom Textile Company, the Tanta Company for Linen and Derivatives, the Steam Boilers Company and the Nile Cotton Ginning Company.[108]

Cases of nullifying the sale contracts of major public sector companies, including Omer Effendi, demonstrate the judicialization of mega-politics in the form of abolishment, or at least substantial suspension, of a public policy in the domain of macro-economic planning. Unlike the judgment on the healthcare privatization policy (case no.9), these verdicts on privatization of public sector companies did not revoke the principal decision of the executive branch to adopt the public policy of privatization. In almost all these cases, the court affirmed that the privatization of public sector companies, in itself, aims that improving economic efficiency by relying on market mechanisms and competition, alleviating financial burdens on countries that suffer from large losses in public sector companies, and expanding the size of the private sector.[109]However, the court reviewed all the elements, decisions, conditions and implementation details of the companies' sale contracts and, in all cases, eventually declared these contracts null and void for violation of law. It is undeniable that every judgment in this regard may not be manifest, in itself, judicialization of mega-politics. Nevertheless, the fact that all the sale contracts of public sector companies were nullified by the State Council signifies the total suspension of this major public policy by administrative judiciary, which reflects a form of judicialization of mega-politics.

It should be emphasized that the scrutiny of the sale contracts of public sector companies falls within the scope of the State Council's Judicial review. Article 10 of law no.47/1972 on the State Council provides for the competence of administrative courts to review all administrative contracts. Sale contracts of public sector companies, owned by the State, to private investors, are considered administrative contracts which the State Council

[108] *See* generally Justice HAMDI YASIN OKASH, *Dur magles al-dawla fi kash al-khaskhasa al-fasida w mukhatatat bai' misr* (THE ROLE OF STATE COUNCIL IN REVEALING CORRUPTION IN PRIVATIZATION PROCESS AND PLANS FOR EGYPT VENDING. (Arabic) 2014; Omar el Menshawy, *Egyptian Public Law Judge: Reviewing Public Economic Policies from Nationalization to Privatization*. 2021. American University in Cairo, Master's Thesis. AUC Knowledge Fountain.

[109] In Omer Effendi Case, the Court stated that "Privatization in itself is not an absolute evil that must be resisted, nor is it an absolute good"

possess jurisdiction to review. Accordingly, these judgments do not entail excessive expansion of jurisdiction of administrative courts. They represented a legitimate practice of judicial review by the State Council, but they eventually led to a total suspension of the privatization process as the court revealed numerous gross violations of laws and regulations that amounted to massive corruption by the executive authority while concluding and enforcing the sale contracts and consequently nullified them all.

A judicial technique which facilitate judicialization of mega-politics, in its three forms, is the expansion of standing requirement before administrative courts i.e. the concept of "litigant's interest." For the lawsuit to be admitted by administrative courts, it is legally stipulated that the plaintiff possesses an "interest" in the litigation. This "interest" condition is fulfilled when the plaintiff's factual or legal status is directly affected by the challenged action or decision of the executive. Administrative courts have widened the definition of the litigant's interest as a condition of the case admissibility. The expansion of the definition of the "litigant's interest" is a general rule permanently assured by administrative judiciary in various types of cases. Whenever the challenged action or decree of the government is related to the whole Egyptian society, courts declare that it is sufficient for the plaintiff to be an "Egyptian citizen" to admit the case. Being a citizen implies that the plaintiff is directly affected by the challenged decision and therefore the case is admitted. This expansion of the "interest" definition has yielded a tremendous increase in the accessibility of individuals to administrative courts. As a result, the frequency of lawsuits pertaining to challenging major public policies embraced by the executive has been largely growing. All the verdicts on privatization of healthcare and public sector companies provide evident examples of the ever-increasing expansion of the litigant's "interest". The State Council declared the admissibility of these case on the basis that all plaintiffs are Egyptian citizens and therefore they would be affected by the negative results of such major social and economic public policies that affect the entire society. In my view, this approach is laudable because it expands the scope of judicial review over the executives in pivotal matters that have impacts on the whole society to ensure their adherence to constitutional and statutory rules. This would promote

accountability of the government to law. Narrowing the definition of "litigant's interest" in such cases would enable the executive branch to elude a fundamental form of accountability i.e. judicial control.

It is worth mentioning that after administrative courts invalidated plentiful sales of assets and companies owned by the state, like in Omar Effendi Case, the legislative authority enacted law no. 32/2014 which prohibits any party other than the contracting parties from challenging sales or investment contracts signed by the Egyptian state with any entity. Moreover, the law provides immunity for the judicially-challenged contracts at the time of its promulgation as it compels courts to declare all the ongoing relative lawsuits "inadmissible." Therefore, the State Council competence over the state contracts has been largely diminished[110].

[110] The law no. 32/2014 is currently challenged before the Supreme Constitutional Court which has not issued a judgment until the time of writing this thesis.

Chapter III. Factors contributing to the judicialization of politics in the Egyptian administrative judiciary:

The tendency of the State Council courts towards the judicialization of mega-politics is a sociopolitical and legal phenomenon which can be attributed to the convergence of an array of factors. These factors can be divided into three main categories: institutional elements, legal mobilization and judicial role perception. This chapter endeavors to elucidate these factors and explain which one may be considered as the main driving force behind the judicialization of mega-politics.

A. Institutional elements:

The emergence of the trend towards the judicialization of politics in Egyptian administrative courts is backed by the presence of three basic institutional factors. First, the existence of a constitutional framework that facilitates judicial activism is a critical factor of judicialization of mega-politics. As Hirschil contends:

> The existence of a constitutional catalogue of rights and judicial review mechanisms not only provides the necessary institutional framework for courts to become more vigilant in their efforts to protect the fundamental rights and liberties of a given polity's residents; it also enables them to expand their jurisdiction to address vital moral dilemmas and political controversies of crucial significance to that polity.[111]

Administrative judges fundamentally rely on the constitutional framework to decide on crucial social, economic, and political controversies. The constitutional framework provides two main tools for the State Council to make crucial public policy decisions: the written provisions on rights and freedoms as well as the texts that determine the jurisdiction and authoritative powers of the executives.

Since 1971, Consecutive Egyptian constitutions have provided for detailed provisions on individual rights and liberties. In addition, they grant international conventions and

[111] Ran Hirschil, *supra* note 18, at 11.

multilateral treaties the binding force of municipal laws once ratified by Egyptian authorities. Hence, the provisions of all ratified human rights conventions and treaties are constituent part of the legal rules applied before courts. While adjudicating disputes, administrative courts consider specific rights texts, of the constitution or a human rights convention, as the focal point of the verdict, and simultaneously prescribe the definition, scope, limitations and parameters of the intended right or liberty, which eventually manifest judicialization of politics in this regard.[112]

Administrative judges have apparent propensity to go beyond the text of applicable law, if there is any, and rely more on their personal ideological preferences, cultural tilts, and social backgrounds. This is described as judicial activism.[113] Judges may not interpret the provisions of legal rules in a mechanistic way. Rather, they address more considerations other than the written words of the applicable law such as the real intent of the creator of these rules, whether constitutional or international, with the objective of attaining their compatibility with the relevant social, political and economic environments. When the text of the constitution or a human rights convention is ambiguous, or not well-defined, judges provide their own set of rules governing the dispute, based on their own perception of what the "proper" interpretation of the text is, or what the law ought to be. Consequently, judicial activism of administrative judiciary, through interaction with the auspicious constitutional framework, is more likely to pave the way towards the judicialization of mega-politics.

[112] It is noteworthy to indicate that in few instances, but I do not allege to be a general approach, the Court of Administrative Justice reached far beyond what the constitution stipulates regarding the legal force of international treaties. It held that human rights international conventions that were not ratified by the Egyptian authorities may be applicable to national disputes. Recently, in 2017 the Court stated that the Egyptian international obligations emanating from the International Convention for the Protection of All Persons from Enforced Disappearance have "international moral binding force" that gives its provisions the same legal force as municipal laws despite the fact that the convention is not ratified by the Egyptian authorities. See Al-Mah. kamah al-Id. ārīyah al-'Ulyā [Supreme Administrative Court], case no. 78415, session of 2 Jul. 2017, year 62 (Egypt).

[113] See Ibrahim Soliman, *Judicial Activism in the Egyptian State Council: A Case Law Study*, AUC thesis, 2016, American University in Cairo, Master's Thesis. AUC Knowledge Fountain.

The previously elaborated judgment on the civil servant right to strike (case no.5) is an apparent example when the court established its judgments on the provisions of the constitution and of the ICESCR[114] that provide for the right to strike and explicitly provided their own set of rules governing the issue. Moreover, the verdict that established the minimum wage of workers (case no. 8) clearly indicates how courts deviate from non-binding interpretation of some constitutional texts; and rather rely on their ideologies and policy preferences to present a novel and more authoritative interpretation of constitutional provisions to accord them a binding force.

Another prominent indication of the constitutional framework as a crucial element of judicialization is a number of judgements that prohibited police officers, affiliated to the Ministry of Interior, from entering the universities campuses and practicing any activities affecting the university independence. Although there were no legal rules regulating the police officers' existence and role in universities, verdicts of administrative courts banned such existence, on the basis that it constituted infringement of the constitutional right to education.[115]

Another tool provided by the constitutional framework is constitutional texts that enumerate authoritative powers of the executives. As illustrated in Chapter 2, administrative judiciary declares jurisdiction over executive actions, although formerly perceived as sovereignty acts, when the constitutional framework changes and the new constitution provides for formal or substantive requirements of these actions. The role of the judiciary is to verify the compliance of the executive to these conditions whether in the form of procedural stipulation for taking such acts (as in the case of nullifying the presidential decree calling for holding the parliamentary elections due to lack of the

[114] The International Covenant on Economic, Social and Cultural Rights.

[115] *See e.g.,* Mah-kamah al-Qadda' al-Idāry [Court of Administrative Justice], case no. 17607, session of 25 Nov. 2008, year 62 (Egypt). In this case, The Court grounded its judgment on the basis of the constitutional text on the universities independence. It asserted that this independence is achieved when the university manages its own affairs, and when all its departments and units, including the Campus Security Unit, are subordinate to the university president whose orders and decisions have to be implemented, without any interference from any other entity. So, it is not permissible to impose any restrictions on the university's practice of its affairs under any justifications as this diminishes the university independence, stipulated in the constitution.

Cabinet approval as a procedural condition) or substantive requirements pertaining to the subject-matter of the actions (as in the case of the Egyptian Saudi maritime border demarcation treaty, in which the court reviewed the adherence of the executive to the constitutional forbiddance to cede any part of the territory)

Second, the development of a modern complex state with large bureaucratic machinery is a considerable factor of the judicialization of mega-politics.[116] Expansion of judicial review of administrative courts is an inevitable outcome of the sophistication and complexity of the Egyptian society through time. The State Council scrutinizes the actions of enormous amount of public authorities and agents of the executive branch responsible for making and enforcing a myriad of policies pertaining to education, healthcare, transportation, environmental protection, investment and the like. This immense administrative apparatus with wide spectrum of fields raises the opportunities of administrative courts to deeply engage in these domains. As I previously elucidated, the involvement of the State Council in public policies arenas goes beyond guaranteeing proper implementation and achievement of their objectives and extends to establishment or abolishment of public policies. The more immense and diverse bureaucratic machinery is, the more possible occasions for the State Council to judicialize mega-politics through substantially making, suspending or revoking a major public policy.

Third, the accessibility of the State Council courts, compared to the Supreme Constitutional Court (SCC), is an important aspect that has implications for judicialization of politics. Egypt employs a centralized model of constitutional review characterized by one single court i.e. the SCC, entrusted with deciding constitutionality of legal rules. The SCC is not directly accessible through the ordinary litigation procedures before ordinary and administrative courts. According to Law no. 48/1979 governing the operations of the SCC, a lawsuit may be filed before the SCC only when a court, during litigation, decides the referral of a case to the SCC to declare the constitutionality of particular legal provisions related to the dispute, either on its own

[116] MARTIN SHAPIRO & ALEC STONE SWEET, *supra* note 28.

initiative or upon the request of a party to the litigation.[117] Accordingly, direct resort of litigants to the SCC claiming the unconstitutionality of a legal provision is inadmissible by virtue of law. On the contrary, administrative courts are directly accessible by litigants through ordinary procedures. The institutional element of courts accessibility is a contributory factor to the constant increase in administrative cases, especially those related to the infringement of the individual rights by the executive. This facilitates the embroilment of judges in core political and social predicaments and the occurrence of judicialization of mega-politics.

B. Legal Mobilization:

Legal mobilization of effective social and political actors seeking for social change via strategic litigation before the State Council is considered a substantial factor leading to the judicialization of mega-politics. NGOs, political activists and interest groups resort to litigation to invoke the protection of individual right and freedoms. This process, called "Legal mobilization from below," has rapidly increased because administrative courts, side by side with the SCC, are perceived to be active courts, that constitute a fair, impartial and more respected forum to pursue major change in the economic, political or social environments.[118] In an undemocratic regime, as there is little possibility and capability of the people to attain a given societal change or invoke rights via

[117] Article 29 of Law no. 48/1979 states that

> The Court assumes judicial control over the constitutionality of laws and regulations in the following manner: (A) If, during the consideration of a case, one of the courts or bodies with judicial jurisdiction finds that a provision in a law or regulation that is necessary for settling the dispute is unconstitutional, the case shall be suspended and the papers shall be referred without fees to the Supreme Constitutional Court to decide on the constitutional issue. (B) If one of the litigants, during the consideration of a case before one of the courts or bodies with judicial jurisdiction, claims that a provision in a law or regulation is unconstitutional, and the court or body finds that the plea is serious, it adjourns the consideration of the case and sets a date for the one who aroused the defense to file a case in a period not exceeding three months before the Constitutional Court. If the case is not filed on time, the plea shall be considered null and void.

[118] Tamir Moustafa, *supra* note 37 at 886.

representative authorities, judicial avenues are considered rapid and effective means to pursue such objectives.[119] In Egypt, some scholars contend that law primarily serves as an efficient and disciplined exercise of state power- a feature described as "rule by law,"[120] It is characterized by using law as a tool of social control while allowing marginalized groups to seek redress. It is argued that legal mobilization so widespread in Egypt is an outcome of the activists' attempts to achieve a transformation of rule by law to the rule of law. Due to the state's reliance on rule by law, it is expected that law would become the main expression of societal contention, given the fact that it is embedded in state's fabric and practices.[121]

In consolidated democracies, the rights discourse has been deployed. Raising rights awareness relies not only on the existence of written rights bills and charters, but also on the existence of support structure for legal mobilization. This structure is composed of four main integrated grounds: rights-advocacy organizations, pro-rights lawyers, financial aid, and governmental rights-enforcement agencies.[122] On the contrary, in restrictive polities, there are numerous obstacles that hinder this support structure from effective functioning such as restrictive legislation targeting civil society organizations and fast-changing statutes regulating pivotal matters.[123] As a result, few civil society organizations and political activists can be efficiently active and capable of mobilizing litigation. Despite encountering tangible obstacles to legal mobilization, NGOs and political activists in Egypt performed a noticeable role in providing the demand-side of the judicialization of mega-politics though initiating plenty of lawsuits in various contentious fields in the State Council courtrooms. For instance, the case of the workers' minimum wage establishment (case no.8) was filed by a human rights organization called the Egyptian Center for Economic and Social Rights (ECESR) on behalf of a worker in a

[119] Lynette J. Chua, *Legal Mobilization and Authoritarianism,* Annu. Rev. Law Soc. Sci. 2019, at 356.
[120] Tamir Moustafa, *supra* note 51 at 284.
[121] Mona El-Ghobashy, *Constitutionalist Contention in Contemporary Egypt*, AMERICAN BEHAVIORAL SCIENTIST, Volume 51 Number 11, July 2008, at 1606.
[122] Charles Epp, *supra* note 27 at 19.
[123] Freek van der Vet, *When They Come for You": Legal Mobilization in New Authoritarian Russia*, LAW & SOCIETY REVIEW, Volume 52, Number 2 (2018) at 303. The author explains two other obstacles to legal mobilization: high personal risk for participating in activism and unfair trials, but it is outside the scope of this research to address factors beyond the realm of administrative judiciary and law.

public sector company. Privatization cases of Omar Effendi and other public sector companies (case no. 10) were all filed by activists. The lawsuit of natural gas export to Israel (case no. 1) was filed by a former ambassador. The case of public health privatization (case no. 9) was initiated by a human rights organization called the Egyptian Initiative for personal rights (EIPR).[124]

In all these cases, administrative courts assured that if the plaintiff challenges a national public policy or a governmental action that affects the whole society, it is sufficient for the case to be admissible that he/she is an "Egyptian citizen" without any further requirement of the standing right (*locus standi*).[125] This emphasizes the expansion of the definition of the "litigant's interest" as a condition of the case admissibility by administrative courts. As elaborated in Chapter 2, this is a judicial technique utilized by the State Council for expansion of judicial review. NGOs, political activists, and civil society organizations largely make the best use of this advantage, furnished by administrative courts, when they opt to resort to judicial avenues to challenge a governmental action or a public policy.

C. Judicial Role Perception:

In consolidated democracies, expansion of judicial review is sometimes assessed as opponent to democratic governing principles. Therefore, widening the realm of judicial review is often criticized for the counter-majoritarian impact of resorting to courts that seize power from democratically elected representatives in violation of the constitutional separation of powers.[126] In restrictive regimes, the counter-majoritarian accusation of courts would be meaningless because they lack majoritarian democracy.

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[124] For further illustration of the EIPR practical efforts in this case to protect and guarantee the realization of the right to health to all Egyptians, *see* generally Ayman Sabae, *Four Strategic Pathways for the Realization of the Right to Health Through Civil Society Actions; Challenges and Practical Lessons Learned in the Egyptian Context, Health and Human Rights*, Vol. 16, No. 2, Health Rights Litigation (December 2014), pp. 104-115.
[125] Justice HAMDI YASIN OKASH, *supra* note 108, at 329.
[126] Ran Hirschil, *supra* note 40, at 81.

In my view, the previously stated institutional elements as well as legal mobilization are not sufficient to explain the trend of judicialization of politics in Egypt. In restrictive polities, when courts are not situated in their "ideal" context i.e. a liberal constitutional democracy, the position and role of courts are more apparent than other elements that determine judicial decision-making.[127] Accordingly, examination of the judicial ideational propensity of administrative judges to critically involve in policy-making process is a fundamental approach for analyzing and explaining judicialized mega-politics.

Scholarly work on comparative judicial politics have illuminated the prominence of ideational factors that affects courts' engagement in public policy decisions and scrutiny of unruly actions of elected representatives. In the US context, the *attitudinal model*[128] of judicial decision-making contends that attitudes, values, ideologies and policy preferences substantially formulate judicial decisions.[129] Outside the US context, some scholars extend the ideational approach to judicial politics, based on the argument that judicial attitudes are more complicated and hence go beyond simple party identification and left-right political ideology as prescribed in the American attitudinal model. Hilbink emphasizes that there are other critical determinants of how judges address particular issues, especially those related to judicial review of executives and legislature, such as "*judicial role perception.*"[130] She argues that examination of cases that involve politically powerful actors in which judges seek to nullify, limit or alter the actions of these actors indicates that judicial role perceptions are crucial in shaping judges' interest in engaging

[127] Shannon Roesler, *Permutations of Judicial Power: The New Constitutionalism and the Expansion of Judicial Authority*, LAW & SOCIAL INQUIRY, Vol. 32, No. 2 (Spring, 2007), at 568.
[128] In the US context, there are mainly three models of judicial decision making. Other than the *attitudinal model*, the *legal model* perceives judges as apolitical actors who apply the law in compliance with the written statutes, case law and other formal sources. The *strategic model* assumes that judges take into account the views of other actors and may choose to depart from a preferable outcome in order to pursue these accounts, in some sort of trade-off. For further elaboration of the three models, see Björn Dressel, Raul Sanchez-Urribarri, Alexander Stroh, *Courts and informal networks: Towards a relational perspective on judicial politics outside Western democracies*, International Political Science Review 2018, Vol. 39(5) at 574.
[129] *See* for example, Segal, Je_rey, and Harold Spaeth. *The Supreme Court and the Attitudinal Model Revisited*. NEW YORK, NY: CAMBRIDGE UNIVERSITY PRESS. 2002
[130] Lisa Hilbink, *The Origins of Positive Judicial Independence*, CAMBRIDGE UNIVERSITY PRESS, Vol 64. No. 4, 2012, at 588.

in such cases. She advocates that judges become willing to, and capable of, engaging in cases challenging other political powerful actors due to their professional self-understanding of their role as guarantor of fundamental legal principles. Such sincere judicial attitudes "are not inert background characteristics, awaiting the right strategic conditions to be released or activated; rather, they are themselves crucial to explaining proclivity to assert their authority against powerful actors."[131]

In line with this view, some scholars argue that in many African states, judges were the cornerstone of establishing institutions and legal cultures able to boost constitutional conceptions of judicial independence and review.[132] Individual leadership of some judges played a crucial role in institutional development of the judiciary. Those judges were committed to the values of constitutional democracy including curbing the executive authority, bolstering individual rights, and building a strong judiciary. Other scholars adopt the same approach, asserting that whether or not judges expand their authority and get embroiled in policy making decisions especially regarding individual rights, is mainly contingent upon their specific attitudes towards rights.[133] Acknowledging that there are other factors facilitating judicial involvement in rights issues, the initial push for this judicialization of politics in this field would originate with a group of judges who share the view that constitutions and bills of rights entail responsibilities for the government and judges ought to utilize their power to guarantee its compliance with these constitutional duties. If judges are not internally predisposed to enforce constitutional provision on individual rights, it is unlikely that other factors would result in judicialization of politics in rights issues.

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[131] *Id.* at 589. Hilbink provides a comparative analysis of Spain and Chile to assert the significance of judicial role perception in judicial decision-making. In Spain, some judges began taking a stand against Franco regime well before a transition to democracy was under way, engaging in a form of high risk activism. In Chile, by contrast, judges refused to assert their authority through long periods of very competitive politics (before and after Pinochet era).

[132] Jennifer Widner, *Building the Rule of Law: Francis Nyalali and the Road to Judicial Independence in Africa*. 2001. Widner focuses on the Tanzanian context, but she makes comparisons with other southern and eastern African countries, including Kenya, Uganda, Malawi, Zambia, Zimbabwe, Botswana, South Africa, and Namibia.

[133] Rodrigo M. Nunes, *Ideational Origins of Progressive Judicial activism: The Columbian Constitutional Court and the Right to Health*, LATIN AMERICA POLITICS AND SOCIETY Vol. 52 No. 3, Fall 2010 at 70.

This research argues that professional role perception of administrative judges, through interactions with constitutional texts and legal inputs, is the major factor of judicialization of mega-politics This judicial perception of their role as guarantor of rights and liberties and a fundamental constitutional check on the executive authority is the result of accumulated progressive judicial practice for the past decades- what I describe as "progressive judicial legacy." In other words, ideational characteristics of administrative judges concerning their professional role have been institutionally and historically formulated. The State Council judges hold the belief that they should be actively involved in protection of individual rights and freedoms and guaranteeing the adherence of the executives to the rule of law; and they shape their judgments accordingly. Therefore, they express outright propensity, via their rulings, to engage in public policy-making in various social, economic, moral and political issues.

In my opinion, the collective judicial role perception is the outcome of the judicial progressive legacy formed via countless State Council rulings all over its history that have meant to impose limitations on the executive's hegemony over the society. Administrative judiciary has a legacy of judgments, from the very beginning of the State Council history, that imposes genuine restrictions on the executive, ensures that it works within the constitutional and legal framework, and provides guarantees of public rights.

Since its establishment in 1946, the State Council has exercised review of the executives' actions and decisions and issued numerous decisions demonstrating its active position of protecting individual rights. Many of these cases were considered of political significance as they were relevant to the political hegemony of powerful politicians over opposition. For example, although Egypt underwent martial law for a very long period, the State Council has constantly ruled that the decisions and measures taken by the executive to implementation of martial law are not considered acts of sovereignty and shall be subject to review of administrative courts to determine its compliance with law. In 1948, the Court of Administrative Justice (CAJ) ordered the Minister of Defense to pay, from his

own patrimony, two thousand Egyptian pounds as a compensation to a military officer for not implementing a judicial verdict in his favor.[134] In 1951, the State Council revoked the governmental forbiddance of opposition newspapers distribution[135] and in 1952 it reviewed deportation decisions as administrative ones not sovereign acts.[136]

During Nasser era, some statutes were enacted to exempt specific governmental decisions from judicial review.[137] However, the CAJ was so bold that it declared these provisions are unconstitutional[138] and therefore the court would not apply them,[139] although there was no constitutional provision forbidding exempting administrative decision from judicial review.[140] Furthermore, upon Sadat conclusion of the 1979 Peace Treaty with Israel and in response to paramount opposition to this treaty, Sadat took numerous repressive decisions against opposition including transfer of some journalists, transfer of some faculty professors, seizure of some organizations' funds and revoking authorization of some newspapers. The State Council declared its competence over all these decisions on the basis that they are all administrative decisions despite the apparent political motive behind them.[141]

The previous cases are few, albeit indicative, examples of the progressive judicial legacy of the State Council. Since establishment, administrative courts have asserted their legal authority vis-à-vis politicians in power, positioning the State Council as the shield of rights and freedoms. Judges have expressed their willingness and capability of standing

[134] Mah-kamah al-Qadda' al-Idāry [Court of Administrative Justice], case no. 165, session of 5 May. 1948, year 1 (Egypt).
[135] Mah-kamah al-Qadda' al-Idāry [Court of Administrative Justice], case no. 587, session of 26 Jun. 1951, year 5 (Egypt).
[136] Mah-kamah al-Qadda' al-Idāry [Court of Administrative Justice], case no. 282, session of 8 Apr. 1952, year 4 (Egypt).
[137] For example, Law 184/1958 on the universities regulation and Law no. 31/1963 on the dismissal of civil servants other than by means of disciplinary measures.
[138] These judgments were rendered before the establishment of the Egyptian Constitutional Court in 1969 which was exclusively entitled the constitutional review of legislative statutes.
[139] Mohammed AbdelWahab, Administrative Judiciary, 2011 (Arabic) at 61.
[140] Starting from the 1971 Constitution, consecutive Egyptian constitutions provides for forbiddance of exempting any administrative decision or action from judicial review
[141] Mah-kamah al-Qadda' al-Idāry [Court of Administrative Justice], case no. 3123, session of 22 Dec. 1981, year 35 (Egypt).

against the political regime, within the ambits of constitutional and legal provisions, on behalf of protection of rights and boosting the rule of law. As Hilbink contends, judicial attitudes are "not necessarily private/individual and exogenous but are often socially and/or institutionally constituted."[142] In my view, administrative judges' self-understanding of their role as guarantor of rights and freedoms against executives is basically shaped and formulated by institutional legacy of progressive judicial activism, manifested a myriad of rulings that limit the power of executives and guarantee fundamental rights.

Members of the State Council are undoubtedly diverse in their individual ideologies, political orientations, and social backgrounds; however, they are committed to a unified normative perception of their mission or duty as guarantor of rights and liberties and a fundamental constitutional check on the executive authority. These normative ideas of their role is constantly expressed in the State Council precedents. In numerous cases,[143] the State Council ruled that

> The State Council courts are entrusted with administration of justice, protection of the principle of legality, the rule of law, and public and private rights and liberties of Egyptians within the framework of constitutional and statutory principles that govern the state and society and determine the objectives of the public interest.[144]

This professional perception of the State Council role is in consistency with what jurists describe as the substantial social function of administrative judiciary- guarantee of the executives' respect for individual rights and liberties stated by law[145]. The State Council is a major check on the executive authority's actions and decisions to ensure its

[142] Lisa Hilbink, *supra* note 97, at 596.
[143] *See e.g.,* Al-Mah. kamah al-Id. ārīyah al-'Ulyā [Supreme Administrative Court], cases no. 1875 ,1914, session of 9 Mar. 1991, year 30 (Egypt). See generally similar verdicts such as Al-Mah. kamah al-Id. ārīyah al-'Ulyā [Supreme Administrative Court], case no. 5730, 6585 session of 6 Feb. 2010, year 55 (Egypt) and Mah-kamah al-Qadda' al-Idāry [Court of Administrative Justice], case no. 33272, session of 7 Jul. 2012, year 55 (Egypt).
[144] The original reads in Arabic محاكم مجلس الدولة معهود لها إقامة العدالة وحماية الشرعية والمشروعية وسيادة القانون وحماية الحقوق والحريات العامة والخاصة للمصريين في إطار ما أوردته نصوص الدستور والقانون من أصول ومبادئ حاكمة لنظام الدولة والمجتمع وغايات المصلحة العامة.
[145] MOHAMMED R. ABDELWAHAB, *supra* note 56, at 7.

adherence to the principles of the rule of law. It is considered a fundamental pillar of a civilized democratic state that guarantees basic rights. The evaluation of the administrative judiciary's functioning and effectivity should be based on the extent to which it performs its social oversight role of the executives' respect for individual rights and freedoms within the constitutional and regulatory framework.[146]

The progressive judicial legacy lies in the core of administrative judges' beliefs and embolden them to declare null and void any action or resolution of the executive however significant and whoever its issuer may be. Administrative judges bear in their collective mind that the judicial entity to which they belong i.e. the State Council, was mainly founded to provide checks on the executive. This inherited boldness increases the probability of administrative judges to massively involve in the policy-making process either by declaring the illegitimacy of a governmental public policy in force, or by ordering the executive to adopt a certain one, emanating from their interpretation of the constitution and ordinary statutes.

[146] *Id*. at 8.

Conclusion.

Over the past decades, judicial power has expanded all over the world.[147] Courts all over the world make significant policy decisions that were previously perceived as the purview of politicians. Judges gradually expand their authority and constantly issue rulings pertaining to the most pivotal social, economic and political predicaments in many countries. The process of policy-making has been deeply integrated with the core function of judges to interpret and apply the law. This led to the emergence of what may be termed the "judicialization of politics". The judicialization of politics has expanded its ambit to comprise what is termed "mega-politics"- matters of ultimate political significance in a society.

Analysis of administrative courts' judgments clearly indicates the occurrence of the judicialization of mega-politics. There are three forms of such judicialization. First, it appears when the judiciary narrowly defines the doctrine of sovereignty acts as one of the cornerstone prerogatives of the executives. Second, it is apparent when administrative courts perform explicit judicial law-making concerning pivotal matters, as an involvement of the judiciary into the substantial prerogative of the legislatures. Third, the phenomenon is observed when the judiciary get embroiled in adoption or abolition of a public policy related to substantial social, economic, or political questions.

The tendency of the State Council towards the judicialization of mega-politics may be attributed to the convergence of an array of factors including institutional elements, legal mobilization and judicial attitudes. First, there are three basic institutional factors that contribute to the judicialization of mega-politics. They are the existence of a constitutional framework that facilitates judicial activism, the development of a modern complex state with large bureaucratic machinery and the accessibility of the State Council courts, compared to the Supreme Constitutional Court (SCC). Second, legal mobilization by effective social and political actors seeking for social change via strategic

[147] Tom Ginsburg, *supra* note 3 at 81.

litigation before the State Council is considered a substantial factor leading to the judicialization of mega-politics. Third, professional role perception of administrative judges, through interactions with constitutional texts and legal inputs, is the major factor and the main driving force behind the judicialization of mega-politics The judicial perception of their role as guarantor of rights and liberties and a fundamental constitutional check on the executive authority is the result of accumulated progressive judicial practice for the past decades- what I describe as "progressive judicial legacy."