

After the Revolution: Sovereign Respect and the Rule of Law in Egypt

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1 INTRODUCTION

During the first six months of 2011 many of the institutions of the Egyptian republic collapsed under the pressure of massive street demonstrations and along with them the authority of the state disappeared. In many areas there was a widespread sense that, along with the institutions of the state, public order had collapsed. As of this writing there remain acute fears in the country that, without the police power of the state, public order remains threatened. As Egyptians struggle with the process of creating a second republic, stark challenges confront the legal system in the coming year as institutions and authority are reconstituted. A paradox is that the judicial system appears to be the branch of Egyptian government the public least wants to experience significant institutional change even as profound questions about the rule of law, the role of the courts, and the nature of government authority emerge. In this article we argue that two distinct concepts of government and its relationship to law now are in play in contemporary Egypt—the rule of law and state authority or sovereignty. We further argue that the politics of the country over the next decade will be shaped by the importance various actors—the military, political parties, and ordinary citizens—scribe to these concepts in the reconstruction of the state.

Given the prominence of new political forces including the Nour (a Salafi) party and the Muslim Brothers' Freedom and Justice party that will play some role in the writing the constitution of the new state these questions are unresolved, consequential and likely to be subject to significant conflict. In the past, small groups of intellectuals and experts drafted constitutions. This was true of the Committee of Thirty that wrote the 1923 constitution and of the Committee of 50 that proposed the 1954 constitution as well as the group that wrote the 1971 constitution which the armed forces replaced in 2011 with their constitutional declaration whose provenance is unknown. This time will be different. A committee of 100 to be chosen, if the constitutional declaration is followed, by a freely elected parliament will undertake the task of drafting the new constitutional document which will then be presented to a national referendum.

Acute as these issues are in Egypt in 2011 and 2012, they are not novel. Egyptians have discussed them since the beginning of the 20th century and partial resolutions can be seen in different institutional configurations from the late monarchical era to the present. To understand the ongoing conflict in Egyptian political life between authoritarian and democratic approaches to the role of the state, we begin with

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earlier debates about the rule of law. These debates also help us to tease out concerns with rights that are not captured in dichotomy of authoritarian and democratic states that have been widely deployed in the academic literature for the past decade.

Of the two concepts we deploy, one is a staple of contemporary political and political scientific discourse and one is a particularly Arabic and even Egyptian phrase which we believe treats a familiar idea in a usefully distinct way: rule of law” and *haibat al-dawlah*. “Rule of law” is not a household phrase, but Egyptian legal scholars have, over the past century, developed some very sophisticated understandings of its meaning. The meaning of “rule of law” is contested and used in contradictory ways. It entered Egyptian legal discourse with a meaning that remains relevant and that casts light on some of the complex institutional practices of the contemporary legal system. We also believe it has become to be a deeply embedded part of the Egyptian legal system. It may not be an exaggeration to say that if parliamentary democracy, free elections, and guarantees of civil liberties remain theoretical concerns for most Egyptians who have had little experience with them in the past 60 years, the rule of law has, in its original meaning, become a deeply embedded practice of Egyptian political life. Of the many meanings attached to “rule of law” we propose to limit ourselves to the meaning when it first entered Egyptian judicial discourse: the use of the court system by citizens to lodge suits against officials in other branches of government. This is a more restricted meaning than is common today but we believe the limitation will prove useful.

Haibat al-dawlah is obviously not a common phrase to English-speaking students of law or comparative politics but we believe the concept is recognizable. It arises as an insight into an important but frequently unmentioned aspect of the authority of the state: unrestricted sovereignty and the fear that organized coercion creates. The modern state organizes coercion so as to provide public order in a world otherwise conceived as Hobbesian. Since Hobbes, the fundamental claim of the modern state is that without independent coercive authority it cannot protect citizens against internal or external threats. The concept of *haibah* is not unlike Carl Schmitt’s concept of sovereignty: the right to suspend the law so as to respond to whatever threat it determines exists as it sees fit.¹

The state cannot accomplish its goals purely by coercive power; it must also have some method of acquiring authority without actually deploying force. *Haibah* can mean authority but the use we prefer here is closer to awe.² It connotes a political authority that is unrestrained by law and it is certainly connected, in historical European practice, to criminalizing behavior under the heading of *lèse-majesté*. The state has a terrifying or awe-inducing aspect that is a necessary part of its authority.³ This arises from its threat to employ coercion and is manifest in the dignity of its officers.

1 Carl Schmitt, *Political Theology* trans. George Schwab (Cambridge, Mass.: MIT Press 1985) 12–14. Schmitt first published this essay in 1922.

2 See, for example, Badr al-Din Shanana, “*Al-muwatanah wa haibat al-dawlah wa'l-ra'b*” (“Citizenship, Respect for the State, and Terror”) in *Al-Hewar* 2182 (5/2/2008) at <http://www.ahewar.org/debat/show.art.asp?aid=123937>, accessed 7/1/2012. Especially his argument that in Ba’thi Syria state authority had come to rest on coercion rather than on a sense of consent or representation.

3 Arabic has another word that is frequently used to translate “sovereignty”—*siyadah*. This particular word does not comprise the extra-legal understanding of sovereignty that we refer to here.