

# EGYPT: A CONSTITUTIONAL COURT IN AN UNCONSTITUTIONAL SETTING

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In March 2011, a scant month after the forced departure of longtime Egyptian president Hosni Mubarak, I paid a visit to Egypt's Supreme Constitutional Court (SCC), located on the banks of the Nile in the Cairo suburb of Maadi. Two things immediately struck me. First, there was now a tank parked outside of a structure that hardly seemed to be a military site. Second, the Court was a beehive of activity. Since the building always had light security and, at the time of my visit, Egypt had no constitution, I could not figure out what the tank was protecting or why the employees were so busy.

Constitutional courts are primarily adjudicative structures. They present themselves to citizens as bodies that render judgments in which the meaning of constitutional clauses are at issue. As such, they would seem to be irrelevant in cases of constitutional vacuum. If there is no constitution, or if the document is suspended, or if the entire political system appears to be operating outside of constitutional channels, a constitutional court would seem to be irrelevant.

Yet because they have such a role in addressing fundamental questions, constitutional courts and their justices take on an aura that extends beyond the strictly adjudicative: they often serve as ultimate symbols of the state, as institutions that stand so far above or outside of the political process that they are the last resort for those searching for the locus of sovereignty. (A constitutional court's verdict, for instance, can generally not be overturned. Its effect may be negated by constitutional amendment, but only a few countries allow the rulings to be set aside. Some constitutional courts have ancillary responsibilities, such as some involving election certification, precisely because of this role as ultimate arbiter.) Paradoxically, they sometimes act not only above politics but also become enmeshed in political contests. Indeed, some courts and their justices are also very significant political actors in their own right. In some transition settings—such as Hungary's or Russia's—the constitutional court was a critical actor even as every other element of politics was in flux—or rather because every other element of politics was in flux.

In this essay, I wish to explore the role of a particularly prominent constitutional court—the Supreme Constitutional Court of Egypt. The SCC has earned a reputation of being the most powerful court in the Arab world and at times has stood out on a global level for the audacity of its ruling (it has forced the dissolution of parliament on three separate occasions). The SCC is also a body that has been routinely described as staffed entirely by “Mubarak appointed judges” in an era after Mubarak had been overthrown. And it has operated since early 2011 under a series of constitutional suspensions, interim (and skeletal) constitutions, and highly disputed

constitutional texts. But no country better illustrated the potential role of a constitutional court in an unconstitutional setting than Egypt during the tumultuous events—and constitutional chaos—of the past two and one-half years.

On February 11, 2011, in announcing Mubarak's departure, Egypt's Supreme Council of the Armed Forces (SCAF) suspended the country's 1971 constitution and assumed full authority in Egypt. From that point until August 12 2012, the SCAF continued to assert an oversight role, essentially insisting that Egypt's governing constitutional framework was whatever the SCAF said it was. The SCAF spoke constitutionally through "constitutional declarations" in February 2011 (suspending the old constitution), March 2011 (providing an interim constitutional framework), and afterwards through series of amendments to the March 2011 framework. From August 15, 2012 until the proclamation of a new constitution on December 25, 2012, President Muhammad Morsi essentially claimed the same authority, issuing two critical "constitutional declarations" as well as some minor ones. The new constitution of December 2012 had some articles that clearly took aim at the country's constitutional court, seemingly undermining the position of the body still further. And on July 3, 2013, the commander of the armed forces dismissed Morsi from office and suspended the constitution, ordering that it be amended before it be reinstated.

It is difficult to think of a situation in which a constitutional court would have less to have it occupy its time. But instead, there is likely no similar revolutionary setting in which judges and courts proved just as significant players as generals, politicians, or leaders of security forces. In Egypt after 2011 constitutional court judges in particular played a role that was especially remarkable given the extra-constitutional nature of the changes. Most dramatically, in June 2012, the SCC dissolved the first post-revolutionary parliament. In November 2012, anticipation of an unfavorable judgment from the SCC led President Morsi to take an extraordinary set of measures immunizing the process of writing a new constitution from judicial oversight—and to push ahead to get the constitution ratified the following month. In June 2013 the SCC issued a string of verdicts that effectively ended the debate over whether the December 2012 was the document governing Egypt. Thus the constitution was suspended (pending amendment) on July 3, 2013—rather than cancelled. And it was the SCC's chief justice, Adli Mansur, who was installed as acting president to oversee that process. The irony of suspending the constitution while appointing the chief justice of the constitutional court as acting president seems to have been lost on all actors. But it illustrated that it was not merely in an institutional sense that the SCC was an important actor. Justices from the Court played a prominent role in political life and in the electoral process.

Revolutions are not friendly times for courts, constitutions, and the rule of law. Indeed, it is far from certain that Egypt's judicial framework will emerge from the revolutionary tumult unscathed. But it is still remarkable how much a judicial actor was able to play a pivotal role in such an unfriendly environment.

In this essay, I will focus my attention on the post-2011 Egyptian SCC. I do not only to explore that body's role in a revolutionary setting but also to cast some light on the broader nature of constitutional courts both as adjudicative structures, purportedly supra-political ones, and deeply political actors.

## THE EMERGENCE OF EGYPT'S SUPREME CONSTITUTIONAL COURT

Egypt's Supreme Constitutional Court began in fairly modest circumstances. In 1969, in a series of steps remembered by Egyptians as the "massacre of the judiciary," then President Gamal 'Abd al-Nasir dismissed a large number of sitting judges and established by decree a new "Supreme Court" at the apex of the Egyptian judicial system. The Supreme Court—staffed with presidential appointments—was assigned the task of the judicial review to the new, politically reliable body.

The irony of establishing such a body by a simple presidential edict was not lost on Egypt's more punctilious legal minds, and when Anwar al-Sadat (who succeeded 'Abd al-Nasir in 1970) began to reverse some of the most egregious moves of his predecessor, they managed to write a constitutional provision instituting a "Supreme Constitutional Court" in the 1971 constitution, with the details to be determined by legislation. The SCC law was finally passed in 1979 and it provided for the basis of a surprisingly autonomous court. Presidents were to select justices that had been either a candidate nominated either by the Court itself or by its chief justice (a post which remained a pure presidential appointment). In practice, al-Sadat and more notably his successor allowed the SCC to pick its own justices; the chief justice did not exercise his legal right to pick an alternative candidate. And the chief justice position went to the most senior sitting justice.

The combination of a favorable law with presidential deference resulted in a steadily more autonomous and bold court. By the 1990s, the SCC had attracted international attention for an assertive jurisprudence that pushed the vague liberal language and promises of the 1971 constitution to their limit. The chief justice of those years, 'Awad al-Murr, took enormous pride on developing an ambitious jurisprudence that departed from the narrow textualism characteristic of the Egyptian judiciary and based itself on expansive reading of rights provisions, using developing international standards to anchor the SCC's rulings in as broad a reading of the liberal elements of the text as possible.<sup>1</sup>

In the 2000s, the SCC found that it had pushed past the limits of Egypt's presidential and authoritarian system. The president abandoned the practice of appointing the most senior justice and instead brought in a series of figures (of varying stature) who gradually tamed the Court. They persuaded the justices to

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<sup>1</sup> Some of the SCC's jurisprudence during the al-Murr years is examined in two volumes that emerged from conferences sponsored by the Court. See Eugene Cotran and Adel Omer Sherif (editors), *The Role of the Judiciary in the Protection of Human Rights* (Leiden: Brill, 1997); and Kevin Boyle (editor), *Human Rights and Democracy: The Role of the Supreme Constitutional Court of Egypt* (Heidelberg: Springer, 1996).

bring in colleagues who were more diverse but also less inclined to buck the system. The cascade of bold judgments came to a gradual end.<sup>2</sup> In the period after the revolution, it became common to refer to the SCC as composed only of “Mubarak-appointed judges.” That was technically true but completely missed the subtlety of the way the system operated. Of course all judges were formally appointed by the president, but they had not been nominated by him. Instead, it was a key appointment (the chief justice), occasionally hints that the SCC had gone too far, and workarounds of most of its major judgments that had the effect of taming the SCC’s jurisprudence. When the revolution of 2011 came, the SCC showed no inclination to rally around the old regime. Instead, like many other Egyptian institutions, it saw an opportunity to realize its dream of fuller independence.

## AFTER THE REVOLUTION

The SCC itself did not play a significant role as a body in the year after the revolution, though four potentially significant developments occurred that largely escaped notice.

First, after suspending the 1971 constitution, the SCAF appointed a group of legal figures to propose amendments to the document. The committee included three judges from the SCC in its membership (though the Court played no role as a body). The SCAF gave the committee an odd mandate: a legal committee should presumably work under political guidance provided by other actors, but the SCAF gave no such guidance nor did it solicit any from other actors. The committee completed its work out privately and solicited no suggestions. Instead its sole instructions were to work on amending those articles in the 1971 constitution that the deposed president had offered up in his final days in a desperate attempt to salvage his rule. The committee requested from the SCAF—and received—permission to amend other articles if the members thought it necessary, provided that only a few additional articles were involved.<sup>3</sup> The amended articles were eventually incorporated into the SCAF’s March 2011 constitutional declaration and provided the basis for Egypt’s transition plan and timetable. Thus fundamental decisions about timing and sequence were made by legal figures including Court members. From the beginning, those deciding Egypt’s constitutional fate often

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<sup>2</sup> I have written of the Court’s history and development in *The Rule of Law in the Arab World* (Cambridge: Cambridge University Press, 1997); and *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (Albany: SUNY Press, 2001). See also Tamir Mustafa, *The Struggle for Constitutional Power in Egypt* (Cambridge: Cambridge University Press, 2009); Bruce Rutherford, *Egypt after Mubarak: Liberalism, Islam, and Democracy in the Arab World* (Princeton: Princeton University Press, 2008); Mona El-Ghobashy, *Taming the Leviathan: Constitutionalist Contention in Contemporary Egypt* (Ph.D. dissertation, Columbia University, 2006); and Nathalie Bernard-Maugiron (editor), *Judges and Political Reform in Egypt* (Cairo: American University in Cairo Press, 2009).

<sup>3</sup> This information is based on interviews with two of the committee members, Subhi Salih, a former MP from the Muslim Brotherhood, and Hatem Bagato, at that time a member of the SCC’s Commissioner’s Body, a group of judges attached to the Court that helped prepare cases for adjudication, drafting advisory memoranda.

showed an inclination to treat constitutional questions as primarily technical in nature and regularly turned to judges and legal figures while downplaying the need for a political process. That placed SCC judges at times in a powerful position, precisely because they appeared to be non-political actors.

Second, for two years the SCC avoided issuing rulings based primarily on any post-February 11, 2011 constitutional framework (the date on which the 1971 constitution was suspended). In doing so, it abstained from resolving ambiguity about the legitimacy of the constitutional moves taken by the SCAF. And ambiguity there was, since Egypt's interim rulers behaved in a constitutionally incoherent fashion. The SCAF first suspended the constitution, then submitted amendments to the 1971 constitution to a popular referendum, then inserted those amendments not into a fully revived 1971 constitution but instead into the March 2011 constitutional declaration that was based on large portions of that earlier document, and then made minor unilateral changes in that text. And there was sloppiness every step of the way. When inserting the approved amendments into the constitutional declaration, for instance, it made some minor modifications in the wording the people had just voted on, effectively overturning the popular will. When it issued subsequent constitutional declarations involving minor changes in the March 2011 text to make it compatible with a new electoral law negotiated among political, it left a significant gap that made the law incompatible with some past SCC rulings, effectively (and likely unintentionally, though suspicious minds suspected differently) inserting a time bomb into the transition process that exploded the following summer.

Third, in the summer of 2011, the SCAF issued a law by decree governing the SCC's formation. It was a remarkable set of provisions that, in combination, allowed the SCC to select its own chief justice (from among the three most senior members) and appoint members to its own bench. In the 1980s and 1990s, the SCC was self-perpetuating more by custom (the president deferred to the sitting justices on appointments) than by law; in the 2000s, the president had used his authority to appoint the chief justice to bring in a series of figures who reined the Court in. The 2011 decree awarded the SCC a degree of autonomy unmatched by any such court in the world.

Fourth, and far more ominously for the Court, its public position began to come under question. Its chief justice at the time, Faruq Sultan, was seen as a creature of the old regime and as close to the military.<sup>4</sup> As the SCAF lost some of its luster in popular eyes, the Court itself was tarnished. As has been mentioned, the small committee drafting the constitutional amendments in March 2011 included three judges assigned to the SCC. The interim constitution made the chief justice head of

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<sup>4</sup> I explained these suspicions in a short article entitled "Why Did the Egyptian Regime Appoint a New Chief Justice?" *Foreign Policy* 21 July 2009, [http://lynch.foreignpolicy.com/posts/2009/07/21/why\\_did\\_the\\_egyptian\\_regime\\_appoint\\_a\\_new\\_chief\\_justice](http://lynch.foreignpolicy.com/posts/2009/07/21/why_did_the_egyptian_regime_appoint_a_new_chief_justice) (accessed 22 July 2013).

the presidential election commission; the chief justice in turn selected another judge from the body to be the commission's chief administrator. The commission played a critical role, disqualifying several leading candidates on grounds that appeared to have some legal basis but still attracted considerable controversy. Finally, a small number of SCC justices began to speak out boldly on public issues. The most notable figure here was Tahaney El Gebali, the SCC's first and only female justice. Her outspoken words on behalf of continued military tutelage and in opposition to the rising Islamist trend was taken by many (quite inaccurately) to be an indication of the leanings of the entire SCC. Less noisily, some justices played an advisory political role when called—one, for instance, attended meetings where the country's new parliamentary election law was bargained out.

All of these features of the transitional period—the ambiguities, the newly won autonomy, the significant political played by the SCC justices—combined not only to raise the prominence of the Court but also to draw it into political struggles. Rising Islamist forces in particular began to mistrust the SCC, seeing it as a bastion of the old regime and as an obstacle to their legislative agenda. Some salafis also viewed the SCC warily because its jurisprudence on the constitution's second article (carried over into the interim constitution, in which the “principles of the Islamic shari'a” are “the main source of legislation”) seemed overly permissive to their narrow textualist outlook.

When the new parliament met for the first time in January 2012, some deputies in the Islamist camp moved to revise the law on which the SCC was based. This led to what began as a war of words between the SCC and the parliament—a conflict that soon escalated into a protracted constitutional crisis permanently changing the course of Egypt's transition.

## DISSOLVING THE PARLIAMENT AND THE CONSTITUTIONAL CONFRONTATION

In January 2012, the parliament elected under the provisions of the March 2011 constitutional declaration sat for the first time. It had a very crowded list of issues to deal with but the structure was untested and filled with inexperienced parliamentarians. Even diligent members or those with a role in past parliaments found that they had an impossibly long list of legislative proposals to work with. Oddly enough, one of the ideas drawing initial attention in the summer of 2012 was reforming the SCC.

It is unlikely that the parliament would have acted quickly on these proposals involving the SCC, but its members (especially in the Islamist majority) did not mind making a forceful point. The newly-elected parliament was quickly frustrated by its discovery that it had few certain tools under the interim constitutional order: it could not determine or even affect the composition of the cabinet nor could it effect any legislative change without SCAF approval. Islamist leaders did not mind launching a shot across the SCC's bow as a preemptive strike against a body they

regarded as headed by an old-regime holdover. They had already seen an administrative court disband their only real achievement: a Constituent Assembly had been elected under the terms of the interim constitution but that election had been overturned a couple months later. The court had ruled that the body was insufficiently representative; it further claimed that the parliament had improperly elected some of its own members to the body. The ambitious sweep of this logic—and the way that non-Islamist forces greeted the decision—began to instill a feeling among Islamists that they had encountered a “deep state” allied with hostile elites, determined to thwart the will of the majority and their elected representatives.

If the attempt was to fire a warning shot, however, the deputies pursuing a new SCC law missed the mark—or perhaps struck it too directly. Indeed, the SCC reacted as if the Court was now in a mortal duel in which only the first party to draw its weapon would emerge alive. On June 14 2012, the SCC issued a decision dissolving the parliament. The substance of the ruling should not have come as a complete surprise, since it followed on some well-known precedents. The parliamentary election law had been negotiated in the fall of 2011 by leading political forces and then promulgated by decree by the SCAF. It provided for a mixed system—two-thirds of the deputies would be elected by proportional representation and one third in individual races. The first ballot was open to party lists; the second to individual candidates. The SCC found that system constitutionally flawed, arguing that it allowed independents only access to some seats but allowed party members to compete on either ballot, therefore discriminating against the former.

The ruling’s logic can seem strained; all other countries with party list systems of various kinds do not consider them an infringement on the rights of independents who lacked party affiliation. But the ruling in Egypt had a history behind it: on two occasions in the Mubarak era, the SCC had moved to strike down electoral laws on similar grounds. Those who knew the Court well should not have been surprised by the decision.

What was extremely startling in the case even for such observers was the rapidity of the ruling. On the two previous occasions, it had taken several years for a case to find its way to the SCC and for the SCC to decide. On this occasion, the SCC issued its ruling hours after hearing the arguments. (Suspicious Brotherhood members alleged that the SCC had even sent off its ruling to the Official Gazette before finishing hearing the case, but they could not adduce any evidence to convince any skeptic—and found themselves charged with insulting the judiciary, a criminal offense.) Thus, as thoroughly as the ruling might have been grounded in legal precedent, its timing was inexplicable outside of the political context in which it was issued.

Islamists recovered in part by winning the presidency the same month that they had lost the parliament. And newly-elected President Morsi even tried to find a legal formula to bring the parliament back, but he found himself blocked by the SCC, which overturned the effort.

But the attempt to hem in the newly-elected president went further. On the eve of his election, the SCAF surprised the country with a new constitutional declaration that assigned itself legislative authority in the absence of parliament and enshrined the SCAF's current membership (prior to that move, the president chaired the body). It also allowed the SCAF itself to appoint a new constituent assembly if the current one failed (or, as some expected, was dissolved by a court order). Most remarkably, it allowed the SCC a role in reviewing the draft constitution for its accordance with unspecified principles of the revolution or those of previous Egyptian constitutions. It also allowed for a review Giving the constitutional court a binding veto over any constitutional provision with only the vaguest guidance on the standards to use seemed to be a parody of the South African transition of the 1990s, in which a newly created constitutional court was given the task of reviewing the draft constitution in light of a group of principles negotiated by political forces at the start of the process. The South African Court did find some violations and asked for changes. In that case, however, the Court was created as part of the transition, was a far more diverse body, the standards were clear, and those standards had consensus agreement.

While first accepting these legal defeats, Morsi simply bided his time. In August he wrested the very considerable residual authority the SCAF had retained even after the presidential inauguration away from the generals. He issued his own "constitutional declaration," not only retiring the most senior generals but also denying them their oversight role over the political process by revoking the most recent constitutional declaration. The military was hardly subject to civilian oversight within its own (rather considerable) realm, but the president withdrew its directly political tasks and assigned them to himself.

And the focus then turned to writing a permanent constitution. Before its dissolution, the parliament had elected a second constituent assembly (to replace the one sent home by the administrative court) and that assembly began work on a new document. And that led to the next two crises centering in part on the SCC.

## **CROSSING THE RUBICON: MORSI'S AUTO-GOLPE**

While the constituent assembly toiled away at its task, the various opponents of the Islamists began to sense that a Brotherhood juggernaut was beginning to overwhelm the Egyptian political system. The Islamists had gained the presidency and dominated the constituent assembly; they had been prevented from enjoying a strong parliamentary majority only by that body's dismissal (and indeed a little noticed upper house remained in place with membership dominated by Islamists); and Morsi's August moves had sidelined the military as a counterweight. Divided among themselves and without a strong organized constituency, the opposition (which increasingly came to see itself as such) had trouble developing a clear strategy or even focusing on a set of tactics to counter the Islamist rise. Non-Islamists gradually dropped out of the constituent assembly, and some of the activists of the 2011 uprising began to try to revive street mobilization. And a series

of legal challenges were mounted, most notably to the second edition of the constituent assembly, with that dispute transferred to the SCC.

The outspoken Tahaney El-Gibali of the SCC made no secret of her position favoring the opposition political camp—one that now began to favor the term “civil” to distinguish it from the Islamist camp without adopting terms like ““secular”” that had little resonance with the Egyptian public. She also favored a continuing role for the Egyptian military in what she saw as a more protracted transition process.

Watching these developments, the Islamist camp in general and the Brotherhood specifically began to sense a coordinated effort to bring them down. And indeed there was a legal path that would have dealt them a severe blow. If the SCC dissolved the constituent assembly---as some feared it would---that step alone would only have allowed President Morsi (under the terms of the interim constitution as he had amended it in August) to name a new one. But if the SCC also struck down his August amendment to the interim constitution, it would have restored the SCAF to political authority with Field Marshall Tantawi (forced into retirement by President Morsi in August) at its head, allowed the SCAF to name a new constituent assembly, and given an oversight role to the SCC in writing the new constitution.

And the Brotherhood leadership was convinced that such a move was in the works. Their evidence was sketchy and seemed to be based on allegations that a group of civilian politicians had met with El Gibali to discuss how this might be done. In fact, it seems doubtful that such a plan could have progressed far beyond the stage of idle speculation. The Brotherhood was mistaking El Gibali for the entire SCC (my own strong impression is that she was an outlying voice)<sup>5</sup> and also assuming that the relevant institutions (most particularly the military) could be brought on board to support the supposed plot. (As became clear in June 2013, the SCC’s position was a bit more complex in its implications than either side anticipated in November, though a part of its fears were justified).

Acting then perhaps out of a sense of panic, President Morsi issued a startling new constitutional declaration in November 2012, amending the existing text in a manner that had the effect of immunizing the entire constitutional process from judicial review. That step (and some associated ones taken at the same time, such as dismissing the prosecutor general, a move that he had been legally barred from taking up to that point) had the effect of entrenching Egypt’s polarized camps more deeply, profoundly alienating the judiciary, and setting off a round of street protests as severe as any since the January uprising. And the Brotherhood’s actions were heavy handed beyond the legal realm: Islamists launched demonstration outside the Supreme Constitutional Court building, obstructing its work and provoking fear and

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<sup>5</sup> Since the SCC issues opinions as a court without publishing dissents, it is hard to say where individual justices’ inclinations lie. My own sense comes from observing the SCC over time and interviewing some of its justices on numerous occasions. The justices are very careful not to give their opinions in specific cases but one can discern general orientations at times.

outrage among a judiciary that saw itself as above politics but also without allies or protection.

But in a strictly procedural sense the Brotherhood's moves worked for a while: the constitutional draft was completed, submitted to voters, and ratified in a December 2012 referendum.

## RECONSTITUTING EGYPT

And what did the new constitution say regarding the SCC? The justices on the Court had lobbied hard to write as much of their new autonomy into the document. The court focused on both structural (supporting the self-perpetuating nature of the Court) and symbolic (devoting a separate chapter to the SCC rather than including it within the chapter on the judiciary) aspects. The SCC was offered a seat in the assembly, but it declined to fill it, viewing that body as one that was a political in nature one and therefore not suitable for the SCC as a body to help fill. But the Court did communicate its preferences to the assembly in writing.

And it lost most of what it wanted. The November crisis augured a breakdown in trust, and the assembly moved by tailoring a constitutional clause to oust El Gibali from the SCC. Under the existing constitution and law, the number of justices on the SCC had not been fixed. The new constitution provided for a chief justice to be joined by ten others. It allowed those positions to be filled at first by the ten most senior sitting SCC justices. Not coincidentally, El Gibali was the eleventh most senior judge.

The 2012 constitution deferred most of the matters related to the SCC to normal legislation. Anticipating, perhaps, an Islamist parliamentary majority, that gave little comfort to the SCC justices. In the short term, they still had their 2011 SCAF-issued law, making the Court self-perpetuating. But there were strong hints from the Islamist camp that suggested that it might want the parliament to revisit the legal framework governing the Court's formation.

The SCC was assigned one novel task in the new document that later emerged as fateful and perhaps even fatal for the constitution's viability: the Court was to review the constitutionality of draft electoral legislation before any law was promulgated. And such laws were specifically exempted from the SCC's exclusive jurisdiction over constitutional issues. The intent was clear: the SCC would review such laws before elections were held; if it upheld the law then it could not come back and strike it down later. There was to be no repeat of the experience of parliamentary dissolution by judicial decision.

If that was the intent, however, drafting was sloppy. When the upper house of the parliament (which had not been dissolved) drafted an electoral law (under the 2012 constitution, the upper house had emergency legislative authority if the lower house were not in session) draft a law and had President Morsi submit it to the SCC for review, the SCC found a number of constitutional flaws. The upper house tried to address those and then sent its amended version back to Morsi for promulgation.

But in declining to send the revised draft back to the SCC, the upper house left the matter highly confused.<sup>6</sup> The matter was resolved by the courts themselves, which insisted that any draft law would have to be reviewed over and over until the SCC found it devoid of any constitutional flaw. Egyptians found themselves watching a game of ping-pong between the upper house and the SCC, one that delayed elections indefinitely.

With no elections on the horizon, all opposition energies turned to street protest and mobilization, culminating in massive demonstrations throughout the country on June 30, 2013, demanding that Morsi step down. The attempt to protect the electoral law with the SCC's prior review did nothing of the kind; instead, it undermined the Morsi presidency and the 2012 constitution.

At the time that it was dispersed in the wake of the July 2013 coup, the upper house of the parliament had just approved one more draft of the parliamentary election law and the SCC was beginning to study it. Ironically, perhaps, when announcing the coup, the military laid out a transition plan that required the SCC to review that draft as quickly as possible, allowing the draft to outlive the body that produced it.

## SEEKING (BUT NOT QUITE SUCCEEDING) TO RETURN TO NORMALCY?

In the months between the December ratification of the constitution and its June 30 suspension, the SCC actually moved to normalize constitutional life and accept the document. Such an attitude was not taken for granted; many observers, particularly those who saw the Court as an outpost of the old regime, wondered how the SCC would approach the new environment. Would it use its tremendous power to resist the newly elected Islamist leadership? Would it accept the 2012 constitution as a governing document? Would it continue its pattern of bold rulings? And how would other actors respond? Would opponents of its past rulings continue to surround the building with demonstrators, enhancing a sense among the justices that they were literally besieged?

In an almost unnoticed ruling at the end of 2012, the Court gave a strong indication that it was backing away from confrontation. In November—just as the showdown between the Islamist president and the opposition was taking place on the streets, the SCC issued a decision upholding a ban on diplomats marrying foreign citizens that marked a dramatic departure from its past jurisprudence. To

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<sup>6</sup> There was some precedent for the upper house's actions here. Egypt's only other experience with prior review came in early 2012 when the SCAF issued a presidential law by decree. Under the interim constitution, the SCC was required to review that law (but not the parliamentary election law, a gap that turned out to be fatal to the new parliament). The SCC found a large number of flaws, mostly minor, in the presidential election law. The SCAF made amendments and then issued it without submitting the revised draft to the SCC. At the time, nobody complained.

understand the significance of the decision, it helps to review the Court's history, real and imagined.

*NAVIGATING THE RIGHT TO MARRY BEFORE AND AFTER THE  
REVOLUTION*<sup>7</sup>

The SCC has found itself caricatured in a number of contradictory ways over its relatively short lifespan. From 1969 (when it was founded as the Supreme Court) it was seen as a political court subservient to the executive with jurisprudence that largely escaped notice even inside the country; in the 1990s under the leadership of 'Awad al-Murr, it achieved an international reputation for bold activism. In the 2000, it suddenly became seen as subservient again, and after 2011 was been routinely described by journalists as "Mubarak appointed" and by some political activists as dominated by old regime elements.

All of these portraits had some basis but also very significant degree of exaggeration. The series of caricatures is most accurate for the al-Murr years (as well as short periods and after) when the SCC really was a formidable body. Al-Murr himself was a powerful presence, and he will likely be remembered as one of the most powerful judicial figures in a country where judges are acutely aware of their own stature.

While it was at the center of political struggles in the two years after Egypt's January 25 uprising—and was an active participant and not merely a victim in those struggles—Egypt's SCC also continued in its more prosaic work of adjudicating less portentous constitutional disputes. In that respect, it issued a decision in November 2012 upholding a ban on diplomats marrying foreign citizens that attracted almost no attention indicated that the body's attempt to retreat from its exposed political position.

The first time I met 'Awad al-Murr, the legendary chief justice of the 1990s, he launched a conversation by quizzing me: "What did the word "penumbra" mean?" I was barely able to explain, but at least I knew why he was asking: he was referring to the US Supreme Court's 1965 decision finding a right to contraception not directly in the constitutional text but "within the penumbra of specific guarantees of the Bill of Rights." And the question was not merely a linguistic one. Al-Murr was leading the SCC to plunge into penumbra in a manner that few constitutional courts in the world would have the nerve to explore. In some years the SCC overturned more laws than it affirmed, but it was the nature of those laws and the reasoning of the decisions that attracted so much attention. Al-Murr's SCC forced the dissolution of parliament, struck down authoritarian measures, and did so by speaking spoke a language of human rights that was grounded in international norms and documents.

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<sup>7</sup> An earlier version of this section appeared in the Tahrir Squared website as "The Supreme Constitutional Court in Post-Revolution Egypt," January 25, 2013, <http://tahrirsquared.com/node/110> (accessed July 23, 2013).

Oddly, however, the ruling that he spoke most proudly of was one that drew little attention—what he liked to call the “right to marry” case and it drew directly from his interest in penumbra. Egyptian judges were barred from marrying foreign citizens. One ignored the rule and, judicially oriented as he was, brought the case to court. When the SCC reviewed the law, its justices struck it down. They did so not by mechanically applying a specific text, since there was nothing about whom judges could marry in the constitution. Instead they looked at the practices of other countries, jurisprudence of other courts, and international human rights instruments. They used these to construct a broad reading of the country’s vague constitutional guarantees.

The approach did turn the Court into a political nuisance and over its last decade, the Mubarak regime used a variety of techniques to tame the body, and the Court retreated to a more timid jurisprudence. When he fell, and the justices of the Court had managed to persuade the interim military leaders to give them total control of the SCC appointment process, with the result, as we have seen, of making it a self-perpetuating body.

Selectively reading the Court’s history, many assumed the justices were acting boldly in defense of the old order rather than in narrow interpretation of the law. The attention given to the major political battles convinced observers (and the Brotherhood) that the SCC was wielding its new autonomy to hem in the country’s elected Islamist leaders. In fact, something more complex was occurring.

Much of the attention given the Court in the post-revolutionary period focused on major political battles—the dissolution of parliament, popular demonstrations at the SCC building, the challenge to the Constituent Assembly. But those noisy clashes may have distracted attention from a quiet shift in the Court’s jurisprudence. When it disbanded the parliament over the summer in June 2012, its decision hearkened back to the ‘Awad al-Murr years in both style of reasoning and substance. It anchored its decision not in any specific constitutional provision—nor even in the interim constitution—but instead in an Egyptian constitutional tradition, interpreted, it said, in light of international understandings.

But when the Court finally ruled on a long-slumbering case brought by a diplomat seeking to win the same right to marry foreigners that judges had achieved through the earlier ruling, it showed its new face. The ruling was solidly reasoned and argued—but also narrowly textual and cautious. The constitutional declaration then in force said nothing about any right to marry, so the diplomat could not claim his constitutional rights were being infringed.

What explained the caution? The moments of the Court’s boldness in decisions or rhetoric after 2011 came when the institution itself felt threatened—by parliamentary legislation in the summer of 2012 or by demonstrators outside the building at the close of that year. Fundamentally, however, it is a body that is perpetually politically exposed (and perhaps legally as well, since any legislative authority can make great changes in the SCC statute). The Court was also about to

experience significant turnover as many of its most senior members reach the retirement age.

Egyptian judges pride themselves for the independence, but many are extremely cautious as well. The SCC in the 1990s showed much independence and little caution, but the SCC after 2012 seemed inclined to reverse those characteristics.

*GETTING DRAGGED (AND BEING TEMPTED) INTO MORE ACTIVISM:  
THE IMPLICATIONS OF PRIOR REVIEW*

But if the SCC wished to take a less active role, it found itself forced to act otherwise. Part of the problem was the 2012 constitution itself—by introducing prior review for electoral laws, the SCC was compelled to play ping pong, as described above. While Egyptians had debated the correct sequence of the country’s transition process endlessly, the 2012 constitution had come to require that the process could not be completed until a court has ruled that there is no flaw whatsoever in Egypt’s electoral framework. And given the way that Egyptian elections have been run in the past—and the vagueness of much constitutional language the SCC has been asked to apply—that took some time.

None of this was due to any proactive attitude on the part of the SCC. The justices did not request the right of prior review and indeed resisted proposals in the past to give it to them. In a sense, the Court’s boldness came in large part because prior review forced its justices into a corner, required to find any possible constitutional flaw now for fear that if they let it pass it will prevent them from examining the law after it is implemented. In the past, the SCC had found that a mixed system—in which members of parties could run either according to lists or, in separate races, for those seats open to all—discriminated against those who were not members of parties (who could run only for the second kind race). And SCC justices in the ‘Awad al-Murr years confessed to having been influenced by the US Supreme Court’s ruling in *Baker vs. Carr* regarding the size of electoral districts. In these respects, the SCC was marching down well-trodden paths when it found flaws in the electoral law passed by the country’s upper house.

But if the bottom line was no surprise, some aspects of the many pages of constitutional flaws found by the SCC drew attention. Most notable in domestic debates, for instance, was the SCC’s insistence that soldiers and security personnel have the right to vote—a requirement that seemed based on a justifiable application of the constitution’s principles, but one that made some Egyptians nervous that such ballots will not be fully freely and autonomously cast.

And in this regard, the SCC’s approach was bold. One of the flaws found by the Court was the electoral law’s failure to bar religious slogans and propaganda in campaigns. This was remarkable because the SCC went beyond faulting the law for what it did say but struck it down for what it omitted. Put differently, the SCC was directing legislators to ban certain electoral practices, based on an expansive and detailed reading of what references to “citizenship” in the constitution required. If the parliament passed a law that did not specifically name religious campaigning as

a violation of the concept of equal citizenship, the law would be invalid. The legislature was not free to be silent on the issue. No other kind of electoral propaganda must be banned, only religious campaigning.

The issue itself was largely symbolic. It would, of course, be very difficult for a legislative body overwhelmingly populated by Islamists to pass a law that bars religious campaigning. But if they forced themselves to do so, they would likely find the bar easy to circumvent in all sorts of creative ways. The SCC's boldness would therefore not likely deeply affect the nature of Egypt's parliamentary campaigns whenever they occur. But it did deepen the suspicion between judiciary and Islamists.

The SCC's new bashfulness was far short of complete. In another little-noticed ruling, the SCC struck down a provision in Egypt's personal status law governing visitation rights for grandparents—a provision that had been in effect for over eighty years. It found that the provision violated the general principles of the Islamic shari'a (declared since 1980 in all Egypt's governing constitutions as "the principal source of legislation.") While it had issued similar rulings before, what was especially noteworthy about this case was that it came after the 2012 constitution had mandated that the leading institution of Islamic learning in the country, al-Azhar, be consulted in matters of Islamic law. The SCC's ruling in this case made no reference to al-Azhar, indicating that it still saw itself as the arbiter of constitutional issues connected with the Islamic shari'a.

#### *THE FINAL VOICE SETTLING EGYPT'S CONSTITUTION*

But it was not only the electoral framework that was at issue. Because the SCC adjudicated constitutional disputes, it had no choice but to rule on what the constitution actually was. In a sense, the task that the SCAF had tried to assign the SCC in June 2012—allowing it to review the draft constitution before it was submitted to voters—lived on in spirit because after promulgation, the new constitution could only be implemented if the SCC treated it as an authoritative document.

And that was an intensely political task because many within the opposition regarded the constitution as illegitimate. And the SCC also had the legacy of the al-Murr years to carry as well—a series of clear precedents on political matters that had become a core part of the Court's self image and therefore difficult both jurisprudentially and institutionally to repudiate.

The end result was largely in the interest of the country's Islamist rulers at the time. They had their constitution acknowledged, the upper house of the parliament retained (despite the fact that the electoral law for that house had features deemed unconstitutional for the lower house), and some of their constitutional arguments vindicated. But occasionally the SCC showed a far bolder streak and occasionally a tone that might best be described as deeply annoyed.

The most significant set of rulings came on June 2, 2013 when the SCC released three judgments—one overturning the electoral law for the upper house (but

allowing that body to continue in operation until the lower house was seated); one overturning the law governing the constituent assembly, and one overturning a provision of the country's emergency law.

On the constituent assembly, the SCC was faced with a knotty problem indeed. The question before the Court was whether the law by which the assembly had been elected was constitutional. While that seemed straightforward enough, in fact that law had been written after the assembly itself had been elected, so it was not clear what a ruling against the law would do—especially since the constitution produced by the assembly had been approved in a popular referendum. And indeed the SCC struck down the law--but in the process acknowledged the 2012 constitution and implied the matter should never have been before the courts in the first place.

To untangle the knot, it is useful to start with the history of the law in question. In March 2011, the SCAF issued its constitutional declaration which provided for parliamentary elections. The elected members of both chambers of parliament were supposed to elect a constituent assembly. This they did. But the administrative courts dissolved the assembly because they claimed it was not representative and because parliament had named some of its own members to the body. The administrative courts claimed jurisdiction by saying that the parliament was acting in an administrative capacity when it elected the constituent assembly. To comply with the ruling, the parliament elected a second constituent assembly. But the deputies still named a few of their own members to the body. Worried that the administrative courts would dissolve the second Constituent Assembly, the parliament then passed a law justifying what it had done. The purpose of the law was to keep the matter out of the administrative courts because now the parliament was acting in a legislative rather than administrative capacity (a distinction that only years of Egyptian legal training could help one make). It might perhaps be up to the SCC to rule on the constitutionality of the law, but that would take time while the assembly carried out its task.

That draft law was passed by the parliament sent to the SCAF for approval, but the SCAF did not act. In June 2012, shortly after passing the law, the parliament was dissolved. And Muhammad Morsi of the Muslim Brotherhood was elected president. After taking office, Morsi approved the law.

When a lawsuit was filed against the second constituent assembly in administrative court, the judges there decided to send the matter of the law over to the SCC. The question before the Court centered then on the law passed by the parliament to justify what it had done. In its ruling, it was up to the Court to decide whether this was an administrative or a legal matter—or perhaps something different, a “political act.”

The idea of “political acts” is the SCC's preferred term for what had been called “acts of sovereignty.” These are acts that are not ones subject to judicial oversight. While accepting that there are such acts, the SCC insists that it alone has the authority to decide what is a political action. In this case, the SCC reasoned that the

constitutional declaration meant to make the entire procedure of electing the Constituent Assembly something special, outside of regular channels. It was not a normal administrative act. Nor should the parliament be passing laws, restricting or defining the process because the body that elected the Constituent Assembly (that body was not the parliament acting normally but a special assembly of all elected members of the two chambers) was not subject to parliamentary laws; it had been called into being by constitutional text and the voters' will. So the law on the subject was unconstitutional. But that did not remove the legitimacy of the Constituent Assembly, it affirmed it.

The SCC did not specifically declare that the election of the Constituent Assembly was an act of sovereignty, but the Court seemed to be drawing on that mode of thinking. The implication was that no court should be reviewing what the parliamentary deputies did when they elected the second constituent assembly. Rather than throwing the second Constituent Assembly under a cloud, the ruling might easily be taken to imply that the first one never should have been dissolved. On this issue there could be no clearer vindication of the Islamist majority's actions.

But not on all issues. In the ruling, the SCC explicitly defined the "revolutionary period" as one that ended with the elections of the upper and lower houses of parliament and the president. That meant Morsi had no authority to issue constitutional declarations—ever. And the implications of that would be potentially far-reaching—Morsi's constitutional declaration of August had removed the SCAF's political role; his declaration of November had protected the constitutional process. Reversing those declarations would throw the entire constitutional process and structure of Egypt into doubt--if the SCC at the same time were not making crystal clear at the same time that the 2012 constitution is an accomplished fact. In the end, all that the president received was the equivalent of a stern scolding.

There were other ways in which the SCC showed discomfort and resentment at the emerging Islamist leadership and its legal actions. In the earlier rulings, it had simply applied the 2012 text without comment. By June 2013 it was no longer silent. It did respect the 2012 constitution as the one in effect. But the tone of some rulings made clear that justices were unhappy. Their attitude sometimes came off as institutional modesty (judges have to respect the clear will of the voters), sometimes as resignation (the 2012 constitution was a *fait accompli*), and sometimes as barely muffled outrage.

As an example of this attitude, the SCC found the electoral law by which the upper house of parliament elected is unconstitutional. But because the current body was specifically named by the 2012 constitution as having legislative authority in the absence of the lower house of parliament), the SCC had no choice but to allow that body to continue operating—but only until the moment when the new lower house was elected and met for the first time.

And in a final ruling, the SCC took a swipe at the country's emergency law with little short-term effect but potential significance in the future. Indeed, when it

issued the ruling, the law was in abeyance since there was no state of emergency in effect. (There were admittedly some lingering effects of Egypt's past state of emergency, which lapsed in 2012, still in effect, such as trials and imprisonment of individuals charged at that time.) The provision struck down was minor. But this is an area the SCC had not dared to tread in the Mubarak years. It was clear that some judges were resentful of Egypt's emergency regime, but they thought it would be the end of the SCC if they questioned it. But in 2013, the emergency law became fair game for the SCC.

## OUTLOOK FOR THE SCC

Just as the SCC had apparently made its limited peace with the Morsi presidency and its full peace with the 2012 constitution, that presidency collapsed and the 2012 constitution was suspended. The constitutional battles of the preceding two and one-half years had been a major part of the battles that led to Egypt's second popular uprising and military takeover. But constitutional upheavals had led not to the marginalization of the SCC but to its increasingly central role. Even when the Court seemed to wish to withdraw into a narrow, more traditional jurisprudence it found itself summoned forward to play a more ambitious role.

And indeed, the SCC's role did not depend on the text of the constitution or even the existence of one. When announcing that Morsi was no longer president and that the 2012 constitution was suspended, General `Abd al-Fattah al-Sisi proclaimed that SCC Chief Justice `Adli Mansur would be acting president. The SCC chief justice was not in the line of succession under the 2012 constitution, but he had been in the 1972 constitution, at a time when the Court was a presidentially-dominated body. By resurrecting that provision, General al-Sisi was largely relying on the Court's status as a symbol of sovereignty and of the Egyptian state. The general's statement—immediately printed in the country's official gazette as if it were a legal document, was cited by acting President Mansur as the basis for his authority when he issued his own constitutional declaration the following week.

Over the short term, Egypt's SCC seems to have weathered a wave of revolutionary change institutionally intact. But with its formation and jurisdiction determined as much by legislation as by constitutional text, its continued role and viability is now subject to the political process. It seems unlikely that the current law issued by the SCAF will stand indefinitely; the main question is when a parliamentary majority will come to exist that will take on the task of rewriting the statute. Given the tremendous press of other business and the chaotic nature of Egypt's political system, it is possible (though hardly inevitable) that such a step will take some time.

In the mean time, and likely afterwards, the SCC will likely find itself forced to tread more carefully than it did during the tumultuous year of 2012. The underlying anomaly of Egypt's revolution will be sealed: the country's constitutional court

reached the zenith of its influence at a time when nobody seemed to know precisely what the constitution was.