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Egypt's Supreme Constitutional Court: Managing Constitutional Conflict in an Authoritarian, Aspirationally Islamic State

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Constitutional review in the Egyptian legal system is today carried out by a special constitutional court.[1] This court is the Supreme Constitutional Court of Egypt, often referred to by its acronym, the SCC. It is an important example of a puzzling phenomenon—a liberal court that is permitted to operate, at least for a time, in an authoritarian regime. Studying this Court helps us understand why such courts are created. It also helps to demonstrate the fragility of such institutions, once they emerge.

The SCC is Egypt's first effective institution of judicial review. Ironically enough, it owes its existence to an authoritarian regime's fear of independent judicial review. After the judiciary in Egypt asserted the right to exercise judicial review, the government of Jamal Abd al-Nasir feared it would exercise review in a manner uncongenial to the regime. The Nasir regime thus decided to take judicial review out of the hands of the judiciary and put it, instead, in the hands of a special constitutional court that he intended to control. The decision to create a constitutional court, however, had unexpected consequences.

Nasir's successor, Anwar al-Sadat, modified the structure of the new constitutional court—retaining control over appointments, but giving it more independence. He also renamed it the Supreme Constitutional Court. Sadat's reform of the constitutional court coincided with a period of activism among the Egyptian bar and judiciary. The spirit of the age affected the new court. After a quiet first decade of operation, the SCC in the 1990s defied the wishes of the Egyptian president and became a liberal activist institution that was often in open confrontation with the executive. More surprising still, during

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[1] Transliterations follow the International Journal of Middle East Studies (IJMES)—without macrons for long vowels or dots under letters such as the aspirated 'h'.

this period, the Court's liberal majority, which was entirely composed of secular-trained judges, actively reached out to the Islamic opposition. They used Islamic legal arguments in support of their liberal vision and issued decisions that had the effect of empowering the Islamist opposition—thereby building support among Islamists for the court and its liberal commitments.

In the face of these unexpected challenges, the executive sought successfully to undermine the liberal majority on the Court. From 2001 to the present day, the SCC has arguably ceased to exercise any meaningful check on the executive. It remains to be seen whether the liberal SCC has been forever subdued or whether it is in hibernation, ready to awaken in the future.

HISTORICAL BACKGROUND

The Modern Egyptian Legal System

The modern Egyptian legal system took shape during the late nineteenth century.[2] Under considerable pressure from colonial powers, Egypt adopted in 1883 a civil code modeled on the French Civil Code and later adopted other codes based on continental European models. To apply these codes, the government established a new court system modeled on the French system. That system serves as the skeleton of Egypt's current system. In contemporary Egypt, the National Courts continue to be the courts of general jurisdiction for private actions and criminal law.[3] An entirely separate system of administrative courts (*mahakim al-idariyya*) operates within the Council of State (*Majlis al-Dawla*).[4] One also finds a number of courts with more specialized jurisdictions which problematically overlap with the jurisdiction of the national and administrative courts.[5]

Judicial Review in Egypt and the Creation of Constitutional Courts

For much of the twentieth century, it was unclear whether any Egyptian courts had the power to perform judicial review. After Egypt gained full independence over judicial matters in 1937, elite lawyers urged that courts be given the power of judicial review. In 1948, the High Administrative Court in the Council of State issued an opinion in which it definitively claimed for the judiciary the right to engage in a limited form of constitutional

[2] For a history of the Egyptian legal system, see Brown, Nathan J. (1997) *The Rule of Law in the Arab World* at 26-31. For a comprehensive introduction to the contemporary system, see generally Dupret, Baudouin and Bernard-Maugiron, Nathalie (eds) (2002) *Egypt and its Laws*. For a discussion of constitutional litigation in Egypt, see also Lombardi, Clark B. (2006) *State Law as Islamic Law in Modern Egypt* at 141-158.

[3] See Dupret, Baudouin and Bernard-Maugiron, Nathalie (2002) 'Introduction: A General Presentation of Law and Judicial Bodies' in *Egypt and its Laws* supra note 2 at xxviii-xxxi.

[4] See Dupret and Bernard-Maugiron, 'Introduction' supra note 3 at xxxi-xxxiii; Hill, Enid (1993) 'The Administrative Courts of Egypt and Administrative Law' in Mallat, Chibli (ed) *Islam and Public Law* at 207-28; Sherif, Adel Omar (1998-99) 'An Overview of the Egyptian Court System' in (5) *Yearbook of Islamic and Middle Eastern Law*.

[5] On these courts, see generally el-Islam, Seif 'Exceptional Laws and Exceptional Courts' in *Egypt and its Laws*, supra note 3 at 359ff; Farhang, Michael (1994) 'Terrorism and Military Trials in Egypt: Presidential Decree No. 375 and the Consequences for Judicial Autonomy' (35) *Harvard International Law Journal* at 235-236.

review,[6] and its position was supported by important legal academics.[7] However, Egyptian courts never got the opportunity to exercise freely their self-proclaimed powers of judicial review. After Jamal Abd al-Nasir took power in a military coup, the judiciary thought it unwise to exercise aggressively its newly-claimed right of judicial review.[8] Worried, though, that the judiciary's self-restraint might cease, Nasir stripped the courts of their jurisdiction to engage in constitutional review and lodged the power of review in a new institution firmly under the control of the executive. Law No. 81 of 1969 stripped the existing courts of any right to determine which laws were unconstitutional. Law No. 66 of 1970 placed the right of constitutional review in a new Supreme Court (*al-Mahkama al-`Ulia*) with little independence.[9] Thus, ironically, a constitutional court was established to ensure that no meaningful constitutional review took place.

Egypt never felt the full impact of Nasir's Machiavellian strategy to create a non-independent and, ultimately, illiberal constitutional court. Nasir died in 1970, one year after establishing Egypt's first constitutional court, and Nasir's successor, Anwar al-Sadat, began a series of reforms that would lead to changes in the structure, staffing and, ultimately, the behavior of Egypt's constitutional court. Upon taking office, Sadat decided cautiously to liberalize the economy and to re-establish the state's formal ideology on a less rigidly socialist model. To help manage the new (and controversial) market economy and to help establish the dwindling popular legitimacy of the government, Sadat began to reform and liberalize the legal system. In the process, Nasir's constitutional court underwent subtle but significant changes.

Sadat's 1971 Constitution provided for the establishment of a new constitutional court, called the SCC. The Constitution did not provide, however, many details about the new court.[10] Ultimately, the process of drafting the legislation took the better part of ten years, during which time the old Supreme Court continued to operate on an interim basis. In 1979, a law was finally enacted that reflected the Sadat's government's cautious embrace both of economic liberalization and of some degree of judicial empowerment. It established the SCC as a constitutional court whose justices, once they had been appointed, would have considerable independence.[11]

[6] Case 65, Judicial Year 1 (Feb 10, 1948). See also Hill, Enid (1997) 'Establishing the Doctrine of Judicial Review in Egypt and the United States' in Cotran, E. and Sherif, A. O. (eds) (1997) *The Role of the Judiciary in the Protection of Human Rights* at 323, 324-330.

[7] Hill, 'Establishing the Doctrine' supra note 6 at 328-329. For the perspective of three SCC judges, see El-Morr, `Awad et al (1996) 'The Supreme Constitutional Court and Its Role in the Egyptian Judicial System' in Boyle, Kevin and Sherif, Adel Omar (eds) (1996) *Human Rights and Democracy: The Role of the Supreme Constitutional Court of Egypt* at 38-39.

[8] See Brown, *The Rule of Law* supra note 2 at 69-92.

[9] See Sherif, Adel Omar (1995) *Al-Qada' al-Dusturi fi Misr [Constitutional Justice in Egypt]* at 80-88; Brown, *The Rule of Law*, supra note 2 at 91-92; Moustafa, Tamir (2007) *The Struggle for Constitutional Power: Law, Politics and Economic Development in Egypt* at 65-67.

[10] *Egypt Const.*, art. 174-178 (1971). Translations here follow that of Egypt's State Information Authority, available at www.Egypt.gov.eg/english/laws/Constitution/index.asp.

[11] Law No. 48 (1979). A translation by Awad el-Morr (former Chief Justice of the SCC) was published in Boyle and Sherif (eds) *Human Rights and Democracy* supra note 7. Translations here will follow this translation. During those eight years, the existing Supreme Court continued to be a transitional organ.

Reasons for the creation of an independent constitutional court

A number of political scientists have asked in recent years why governments in countries without a tradition of judicial review would ever create independent institutions with the power of judicial review. Some favor evolutionary explanations, which propose that for ideological or administrative reasons states find it impossible to survive without institutions of judicial review.[12] In a challenge to such evolutionary theories, several scholars have argued that there is nothing mechanical about the spread of judicial review. Looking at a range of countries that have recently introduced judicial review, for example, Tom Ginsburg, Ran Hirschl and Tamir Moustafa have each argued that elites will only empower judges with the power of judicial review when very specific circumstances exist.

Based on a study of Asian countries that created courts during the transition from authoritarian rule to democracy, Ginsburg argues that judicial review is often created by elites who feel they may imminently lose power in a democratic transition. By creating institutions composed of sympathetic unelected officials with the power of judicial review, these elites feel they will be able to influence policy long after they are removed from office.[13] Hirschl has developed a slightly different thesis, which he argues can account for the recent establishment of judicial review not only in transitional democracies but also in more mature democracies such as South Africa, New Zealand, Israel and Canada. Hirschl proposes that judicial review is granted as a form of 'hegemonic preservation' by elites committed to unpopular policies.[14] According to this theory, independent constitutional courts are created when hegemonic elites realize that (1) even if they retain power, democratic pressures will make it hard for them to impose cherished policies and (2) they find economic and judicial elites who can be appointed to courts and can be trusted to impose the blocked policies judicially.[15] Ginsburg and Hirschl's arguments provide an explanation for why elites *in democracies* will sometimes choose to vest judges with the power of judicial review and will sometimes not. Studying the creation of the SCC allows us to ask whether these theories can also help explain the rise of judicial review at particular times in authoritarian countries. It seems that if we modify these arguments slightly, they can indeed help.

As noted already, Jamal `Abd al-Nasir died in 1970, only a year after the creation of the toothless Supreme Court. When Anwar al-Sadat succeeded him as head of the ruling party and President, he inherited an authoritarian state in crisis. Nasirist policies had left Egypt in a ruinous economic condition.[16] Furthermore, a humiliating military defeat suffered at the hands of Israel in 1967 had led many to question Arab socialism of the Nasirist

[12] For a review and criticism of arguments that modern states are delegitimized if they do not permit judicial enforcement of human rights, see Hirschl, Ran (2004) 'The Political Origins of the New Constitutionalism' (11) *Ind. J. Global Legal Stud.* at 71, 74-79. For a summary of arguments that modern regulatory states need independent courts to effectively set policy or police the bureaucracy, see, e.g., Moustafa, *The Struggle* supra note 9 at 198-201.

[13] See generally Ginsburg, Tom (2003) *Judicial Review in New Democracies: Constitutional Courts in Asian Cases.*

[14] See generally Hirschl, Ran *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* or the abbreviated form of the argument published as Hirschl, 'Political Origins' supra note 12. See particularly 90-105.

[15] Hirschl, 'Political Origins' supra note 12 at 91.

[16] On Egypt's economic policies and performance under Nasir and Sadat, see generally Wahba, Mourad (1994) *The Role of the State in the Egyptian Economy;* Waterbury, John (1983) *The Egypt of Nasir and Sadat.*

variety and the Egyptian government was facing ideological challenges from both secular liberals and Islamists—each of whom demanded liberalization of the political and social sphere. Sadat proposed to revitalize the authoritarian Egyptian state by embarking upon an ambitious policy of economic liberalization and economic growth funded by foreign investment.[17] This was to be accompanied by a change in the ideological justification for the regime from one of Arab socialism to a controlled liberalism and Islamism.[18] The government's decision to give the SCC an increased amount of independence must be seen against this backdrop.

In an important monograph on the SCC, Tamir Moustafa has argued at length that at the time the SCC was created, Sadat's inner circle assumed private investment would not grow in the absence of judicial review.[19] This was not idiosyncratic. Prevailing wisdom held at that time that economic liberalization would fail to attract investment unless a strong independent court was available to hear property rights disputes. Noting this, Moustafa explains the creation of the SCC as a largely mechanical response to this perceived need: investors wanted a court that would define property rights expansively and protect them vigorously; therefore, the Egyptian government created a strong constitutional court whose judges, coming from a historically liberal profession, could be expected to do this.

Moustafa's careful argument is important and, to an extent, convincing. Nevertheless, it has not provided a complete explanation for Sadat's decision to create the type of constitutional court that he did. The SCC was paradoxically stronger and weaker than one would expect if the Court had been created simply to provide a forum for the vindication of investor's property rights. The SCC's jurisdiction encompassed more than property rights cases. Thus, the new Court was more powerful than it needed to be. Furthermore, it was a creation of the executive and, as we shall see, could be reined in by the executive. Thus it was too weak, by itself, to guarantee protection of property from an executive bent on expropriation. One can combine Moustafa's insights about Egypt, however, with Hirschl's insights about constitutional judicialization in other contexts. By doing so, one can develop a more complete and persuasive explanation for the court's creation.

As Moustafa has amply demonstrated, an ascendant faction in Egypt felt that they would lose power if controversial economic reforms were not undertaken. Such reforms were, however, deeply unpopular. They were very hard to push through the legislature, in which skeptics were powerful.[20] The supporters of economic liberalism knew that any attempt to take consistent steps towards radical economic and political liberalization (and possibly Islamization) might lead to a revolt by important party factions and might cause reformers to lose control over the whole party. In this environment, the creation of an

[17] On the Islamist challenge and Sadat's response, see Beattie, Kirk (2000) *Egypt during the Sadat Years* at 200-210.

[18] The administration turned for assistance to Sufi Abu Talib, who published an ideological tract in 1978 in *al-Iqtisadi*, July 16, 1978 and then served as speaker of the captive legislature entrusted with the task of developing legislation that would realize the new ideology. See Beattie, *Egypt during the Sadat Years* at 168-171 and Reinich, Jacques (1977-78) 'The Arab Republic of Egypt' in (2) *Middle East Contemporary Survey* at 391-92.

[19] See generally Moustafa, *The Struggle* supra note 9.

[20] Sadat's difficulties 'selling' his plan are evident in inconsistencies one finds in the 1971 Constitution enacted by a legislature completely dominated by the ruling party. On the legislature's schizophrenic policies towards private property, see Hill, Enid (1999) 'The Supreme Constitutional Court of Egypt on Property' in Bernard-Maugiron, Nathalie and Dupret, Baudouin (eds) (1999) *Le Prince et son juge: droit et politique dans l'Égypte contemporaine* at 55-92.

independent constitutional court had attractions beyond its role in comforting private investors. By empowering the constitutional court to hear claims under provisions of the constitution protecting civil rights and by guaranteeing Islamization, economic liberals tried to attract to their cause a number of disparate factions, some of which inclined towards political liberalism and some of which inclined to a moderate form of Islamism. In other words, the economic liberals who controlled the Sadat regime believed they could transfer responsibility for its unpopular economic liberalization plan to a court enjoying popular legitimacy because it was a guarantor not just of economic rights but also of political rights and of the right to live under a regime that respected Islamic norms. In short, the Court would not only facilitate economic liberalization, but it would immunize the decision to liberalize from reversal by anti-reform factions of the party.

Moustafa's explanation for the empowerment of the Egyptian constitutional court thus seems to become stronger if we consider that it may also reflect what Hirschl has called the 'judicialization' of controversial policy decisions. Looking at non-autocratic case studies, Hirschl predicts judicialization of the economic and political policies will occur when 'the judiciary's public reputation for professionalism, political impartiality and rectitude is relatively high'; judicial appointments are (or at least can be) controlled to a large extent by hegemonic political elites; and, arguably, judges 'mirrored the cultural propensities and policy preferences of these hegemonic elites'.[21] In autocratic Egypt, these conditions were generally met. In the face of intra-party debate about the wisdom of economic reforms, an ascendant faction of economic liberals wanted to design popular judicial institutions that would be inclined to carry out economic reforms in a way that the existing political institutions resisted.

Having empowered a constitutional court for largely instrumental reasons, Sadat and his allies tried to ensure that the Court did what it was supposed to—but no more. Concerned, apparently, that judges who protected private property might acquire broader liberal agendas, the SCC was eventually structured so that it could be reined in if it became too aggressive in promoting a political liberalization that would threaten the elite's hold on power. Sadat's successor eventually felt compelled to use these checks.

THE STRUCTURE, STAFFING AND PROCEDURES OF THE SCC

Law 48 of 1979 replaced the much derided Supreme Court with a new SCC which had broad jurisdiction and whose justices were, in comparison to the judges on the Nasir's original constitutional court, remarkably powerful and independent.[22] The executive, however, retained nearly total control over appointments to the court.

Jurisdiction

Article 25 of Law 48 of 1979 entrusts the SCC with three main duties. First, it is to serve as the final authority in case of a jurisdictional dispute between two Egyptian courts. Second, it has the power to issue authoritative interpretations of legislative texts if different

[21] See Hirschl, 'Political Origins' supra note 12 at 91. The ideological shift from socialism had the added advantage of being attractive to both Western and Gulf Arab nations—each a source of foreign aid.
[22] Law No. 48 (1979), supra note 11.

judicial institutions (for example, the national courts and the administrative courts) have disagreed about their proper interpretation and 'they have an importance that necessitates their uniform interpretation'. Finally, Article 25 grants the SCC the right to perform constitutional review in certain cases, including ones where lower courts determine that a legitimate constitutional question needs to be resolved.

According to Article 29 of the Court's statute, if a court hearing a case has concerns about the constitutionality of legislation that is at issue in the case, it may *sua sponte* refer the case to the SCC. Alternatively, if a litigant in the course of litigation challenges the constitutionality of legislation, pertinent to his or her case, the court hearing the case must determine whether the claim is 'plausible' and, if so, must either refer the case to the SCC on its own or, in the alternative, authorize the challenger to raise the constitutional issue before the SCC. In managing constitutional cases, then, a symbiotic relationship exists between the regular courts (or administrative courts) and the SCC. The SCC relies largely on judges in these other courts to refer cases to it; and the judges in these other courts themselves rely on the SCC to strike down legislation that they believe unconstitutional.[23] Theoretically, through this system, the public might be prevented from raising legitimate constitutional claims before the courts. With a few exceptions, however, the courts have been quite willing to refer constitutional claims to the SCC.[24] The discussion of cases in the next section will make clear that citizens have been able to bring an enormous number of constitutional claims, both minor and momentous, to the attention of the SCC. As a practical matter, then, courts have so far permitted citizens ample access to the SCC. Furthermore, the co-operative mode arguably adds to the legitimacy of the SCC's decisions and increases the odds of compliance.

Once a case has been properly referred, the SCC must hear it. That said, once a case is on the SCC's docket, the Court has the power to hear and decide the case quickly or to delay the process of hearing or deciding the case. Occasionally, the Court seems strategically to have chosen how quickly to decide cases—withholding decisions on some important cases in the hopes, thereby, of gaining leverage over the executive.

Procedures

Once a case has been referred to the SCC, it is examined by a special 'Commissioners Body', composed of highly respected jurists assigned to assist the Court.[25] The commissioners assist the justices in preparing for cases. After the case has been prepared, it will be reviewed by some number of justices. Law 48 does not set the exact number of justices sitting on the SCC, nor the exact number who must hear a case. Article 3 of Law 48 merely

[23] For an analysis of the process, see Sherif, Adel Omar (2002) 'Constitutional Adjudication, in Dupret and Bernard- Maugiron, (eds) (2002) *Egypt and its Laws*, supra note 2 at 329-38.

[24] Some examples include the national courts' refusal to refer to the SCC the constitutional issues arising in the apostasy trial of Nasir Hamid Abu Zayd and the administrative court's (including the High Administrative Court's) refusal to refer to the SCC the constitutional issues arising in the constitutional challenge to a Ministry of Health order banning female genital mutilation. My thanks to Justice Adel Omar Sherif for drawing my attention to these cases.

[25] Articles 21-24 of Law 48 establish that these assistants must have the qualifications necessary to be justices on the SCC, and they get life tenure and salary protection. The preparation of the case by such jurists adds to court prestige and quality. Commissioners have often been appointed to be Justices, and some of the Court's best known judges have been former commissioners.

requires that a quorum of at least seven members must decide each case. The ambiguity in the law regarding the number of justices seems to be deliberate, and its importance will become apparent below.

Article 49 of Law 48 provides that, once a majority has reached a decision, the Court must produce an opinion. If in the majority, the Chief Justice will write the opinion, and if not in the majority, he or she will assign it to a judge of his or her choosing.[26] Once seven justices certify that an opinion represents the views of a majority on the Court, the opinion becomes final. Pursuant to Article 49, it must then be published in Egypt's *Official Gazette* and any decision to void a law automatically becomes effective the day after publication. With respect to opinions, it is important to note that dissenting judges do not have a right to have their dissents recorded.[27] The power to write or assign opinions combined with the absence of dissents gives the Chief Justice extraordinary power to shape the Court's jurisprudence—particularly if the Chief Justice is in the majority.

Qualifications and protections for justices

Law 48 contains provisions designed to guarantee that the Court's justices are respected both for their qualifications and independence. Article 4 provides that, to be eligible for a position on the Supreme Constitutional Court, a justice must have extremely high qualifications. This helps to guarantee the prestige of the Court, the Court's position relative to other courts and, to a certain degree, its position relative to the executive. Articles 5 and 11-20 also provide the justices of the Court with significant guarantees of independence. Once appointed, justices cannot be removed prior to the mandatory retirement age except by consent. Judges also have salary protections. All disciplinary issues are to be handled by the SCC itself.

Appointment and Number of Justices

Given the wide jurisdiction of the Court, the considerable access that citizens have to date had to the Court,[28] and the prestige and independence of the SCC's justices, the executive has a strong interest in selecting who can ascend to the bench. Not surprisingly, therefore, Law 48 leaves the executive very tight control over appointments to the bench. Article 5 provides that the president appoints a Chief Justice by presidential decree. Outside of the requirement that the Chief Justice have the qualifications necessary to serve as a justice on the SCC, the President has absolute discretion in his choice. Article 5 provides that associate justices are also appointed by presidential decree. In appointing associate justices, however, the president must select from between two nominees: one nominated by the Chief Justice and one nominated by the general assembly of the Court. The provision apparently anticipates that the Chief Justice and the majority of his court may disagree

[26] If the justices cannot agree on a rationale, the majority will settle on one opinion. No dissent will be published. See Sherif, Adel Omar 'The Freedom of Judicial Expression: The Right to Concur and Dissent' in Boyle and Sherif (eds) *Human Rights and Democracy* supra note 7 at 137-58.

[27] On this practice, see Sherif 'The Freedom of Judicial Expression' supra note 26 at 144-45.

[28] Given the ongoing willingness of lower courts to refer constitutional cases to the SCC.

about who is appropriate to serve on the Court, and it allows the President to favor the preferences of the Chief Justice.

As noted above, Law 48 of 1979 does not specify the number of justices on the Court. Arguably, if the Chief Justice and Court choose to nominate candidates and the President chooses to appoint them, there can be an infinite number of justices. The importance of this fact has recently become clear. If a Chief Justice and President both dislike the decisions of majority on the Court, they can collude to pack the court with justices sympathetic to their views. This is not merely a hypothetical power. As we shall see, in the early 2000s, the executive did seek to control the Court by packing it with friendly justices.

THE SCC AS A POLITICAL AND LEGAL ACTOR

Having seen the Court's independence, and its potential vulnerability to court-packing, we can turn to a discussion of the Court's behavior and its jurisprudence to date. During its first twenty years, the SCC evolved in significant ways. Beginning as a court with limited ambitions and policy preferences very much in keeping with that of the Egyptian president, the SCC developed into a court committed to reforming and liberalizing the entire Egyptian legal and political system, a policy entirely at odds with the wishes of the President.

1980 - 2000: From Economic Rights to Social and Political Rights

Sadat's willingness to create an independent constitutional court seems to have rested on his belief that, if appointments were made carefully, the Court could be trusted to provide credible guarantees of property rights—something that members of the legislature and bureaucracy were unwilling and, arguably, unable to do. Similarly, he believed that careful appointment of judges could ensure that the Court did not become a force for aggressive political liberalization. Sadat's confidence seemed at first to be well placed. In 1981, shortly after the SCC started operations, Sadat was assassinated and a subordinate, Husni Mubarak, took power in Egypt. As a policy matter, Mubarak was similar to Sadat in his commitment to economic liberalization and aversion to political liberalization. Thanks to Sadat's careful appointments, little in the Court's early jurisprudence gave Mubarak much cause for worry.

When the SCC was first set up, the Egyptian President had, for the most part, allowed judges who had already served on the Supreme Court to staff the SCC. These judges were appointed to the SCC precisely because their jurisprudential proclivities were known. Not surprisingly, the SCC began its life acting more or less as Sadat had expected. When the SCC began to hear cases in 1980, its jurisprudence showed a commitment first to establishing aggressively the Court's own broad powers and independence.[29] Having done so, the Court focused considerable attention on challenges to economic legislation,

[29] See, e.g., Case No. 28, Judicial Year 2 (May 4, 1985), 3 SCC 195-208. (The Court's official reporter is officially named *Al Mahkama al-Dusturiyya al-`Ulia,* Abbreviated henceforth as "SCC.") On the SCC's increasingly ambitious assertions of judicial independence and power, see Sherif 'Constitutional Adjudication' supra note 23 at 339-40.

clarifying the meaning of the ambiguous constitutional guarantees of private property.[30] In a series of cases, the SCC identified in Articles 29-36 conflicting principles requiring the protection for private property but also a duty on the part of the executive to guarantee equitable distribution of wealth and government services. Asserting for itself the right to strike the proper balance, the Court quickly established a consistent and credible policy of protection for property rights. Thus, as Enid Hill and Tamir Moustafa have demonstrated, the Court provided invaluable support to the ruling party, in its attempts to move the nation away from a statist economy and towards economic liberalization.[31]

The Court did not remain content, however, to act as a champion of economic liberalism alone. In the late 1980s, the Court's old guard began to retire, and a new generation of judges came to be appointed. To the consternation of the President, these justices embraced a more expansive vision of the liberal state, one in which people enjoyed not only substantial economic rights but civil and political rights as well. Scholarship to date has not focused on explaining how these justices were selected, and thus it is not clear how the President ended up appointing justices (particularly Chief Justices) with views that were so threatening to his authority. The fact remains that such appointments were made.

By the mid-1980's the SCC was demonstrating a willingness to check the executive when it seemed unambiguously to violate explicit constitutional limitations on executive power—even if their decision touched upon sensitive issues. The SCC confronted the executive as early as 1985, when it issued a starting ruling setting limits on the executive's emergency powers.[32]

By 1985, Egypt had long been governed (and indeed is to this day is governed) by a seemingly interminable state of emergency, pursuant to which the executive has claimed extraordinary powers. Confident that his emergency powers could be invoked for whatever purpose he, in his discretion, thought wise, President Sadat in 1979 decided to enact controversial family law reforms by emergency decree. The reforms in question granted women a number of important new rights. Initially these reforms were supposed to be enacted through normal legislation. However, they were vigorously opposed by the religious establishment and, ultimately, by many Egyptians. The proposed reforms proved to be so controversial that Sadat's captive legislature was reluctant to enact them through the regular legislative process. Reluctant to court revolt within the ranks of the ruling party, Sadat enacted them as an Emergency Decree.

In 1985, the Supreme Constitutional Court stunned the new President, Husni Mubarak, by holding that his predecessor's 1979 actions had been unconstitutional, and by voiding the 1979 reforms.[33] The Court held that when legislating pursuant to his emergency powers, the President must demonstrate a reasonable nexus between the emergency decree and the security of the state. As the President had not demonstrated this, the family

[30] See, e.g., the summary of cases by Chief Justice Awad El-Morr, published as 'The Status and Protection of Property in the Constitution' in *Human Rights and Democracy*, supra note 7 at 115-27; see also, Hill 'The Supreme Constitutional Court of Egypt on Property' supra note 20.

[31] See generally Hill 'The Supreme Constitutional Court of Egypt on Property' supra note 21 (see particularly the comments at 88); see also Moustafa *The Struggle* supra note 9 at 119-136 (particularly the comments at 136).

[32] Case No. 28 Judicial Year 2 (May 4, 1985), printed in SCC, Vol. 3, 195-208.

[33] Case No.28 of Judicial Year 2 (May 4, 1985), 3 SCC, 195-208. For an analysis of the case, an analysis that was co-authored by two justice of the SCC, see El-Morr, Awad and Sherif, Adel Omar (1996) 'Separation of Powers and Limits on Presidential Powers', in *Human Rights and Democracy* supra note 7 at 68-71. See also Lombardi *State Law* supra note 2 at 169-171.

law reforms were void and would have to be re-enacted by regular legislative process. After this embarrassing rebuke, a reform bill was subsequently introduced and passed by the legislature, but the reforms therein were less ambitious. The new executive had also been warned that, at least in some cases, the SCC was willing to stand up to him.

In the late 1980s, the SCC made clear that its 1985 decision was not an aberration. It engaged in a series of striking opinions that tried to limit the executive's control over the political system. In a notable series of decisions (ones extremely embarrassing for the executive) the Court repeatedly struck down the laws under which local and national elections were held.[34] The last of these led to the dissolution of Egypt's national legislature and forced new elections.[35] In the 1990s, the SCC expanded its focus and began to protect an ever expanding range of individual rights. To do this, it had to come up with constitutional doctrines that would allow it to protect implied rights.

Incorporating International Human Rights Norms into Egyptian Constitutional Law

The Court's ability to uphold citizens' rights outside the area of property and political participation seemed at first to be limited by the nature of the Egyptian Constitution, which did not provide many unambiguous checks on government power. The extensive rights provisions of the Constitution are phrased in vague or contradictory ways. The Court thus found it difficult actively to restrain the President or his captive legislature without either interpreting the existing rights provisions expansively or developing a doctrine of implied rights.[36] In the mid-1990s, the Court began to do both.

In the early 1990s, the SCC identified within the text of the 1971 Constitution two overarching, somewhat ambiguous, constitutional principles that the majority argued should inform all others. The first principle consisted of a guarantee of 'the rule of law'. Article 64 of the Constitution makes the rule of law 'the basis of state rule'. Article 65 provides unequivocally that the state is 'subject to [the rule of] law', and declares that judicial independence is a necessary safeguard of liberties. The Court argued that these provisions permit and indeed require the Court to incorporate international human rights principles into Egyptian constitutional law. The second overarching principle was that all law should conform to Islamic legal principles. In the Court's opinion, the two principles were mutually reinforcing because, in a series of much discussed opinions, the Court interpreted Islamic legal principles in a creative manner to support its liberal rulings in the area of economic rights, civil and political rights and equal protection.[37]

At the start of the 1990s in the preface to volume IV of the SCC's official reporter, the sixth Chief Justice of the Court, Mamduh Mustafa Hasan, hinted that the Court intended to adopt an expansive interpretation of citizens' civil and political rights—one that was shaped by evolving international human rights law. Today, he said, individual rights 'take

[34] Case No.131, Judicial Year 6 (May 16, 1987), Case No.23, Judicial Year 8 (April 15, 1989) printed in 4 SCC 205-217; Case No.14, Judicial Year 8 (April 15, 1989) printed in 4 SCC 191-204, Case No.37, Judicial Year 9 (May 19, 1990) printed in 4 SCC 256-293 . The cases are discussed by a justice of the SCC in Sherif, Adel Omar 'Constitutional Adjudication' in Bernard-Maugiron and Dupret *Egypt and its Laws* supra note 2 at 342-43 and in Moustafa supra note 9 at 98-100.

[35] Case No. 37 Judicial Year 9 (May 19, 1990), reprinted in 4 SCC 256-93.

[36] Nathan Brown has made this point perceptively in Brown *The Rule of Law* supra note 2 at 118-120.

[37] See discussion below.

an international character which transcends the various regional limits. Their tendencies find their clear expression in a number of international documents and in the institutions of the international judiciary which is in charge of these rights'.[38] Shortly thereafter, in a seminal 1992 case, Hasan's Court interpreted the Constitution's 'rule of law' provisions to establish the principle that the Egyptian government was constitutionally bound to obey emerging international human rights standards—even when these were not specifically referenced in the Egyptian Constitution.[39]

From this point on, the SCC's judges actively tried to bring Egyptian law into line with emerging human rights norms. Justices and members of the Court's Commissioners Body promoted scholarship in the areas of comparative constitutional law and human rights law, and they sponsored conferences that promoted such scholarship by others.[40] In public speeches and published writings they argued that constitutional judges were required to draw upon this scholarship and incorporate into Egyptian constitutional law human rights principles that are widely shared among constitutional democracies.[41] These writings were sometimes published in appendices to the Court's own Reporter, giving them a peculiar status between academic commentary and an attempt at official clarification of the Court's decisions.[42]

A survey of Court opinions makes clear that the Court's discussions about the incorporation by Egypt of international norms represented more than empty theorizing. In the 1990s, the SCC regularly cited international human rights documents or the opinions of other constitutional courts in order to shed light on the rights that the Egyptian Constitution guarantees to Egyptians.[43] The SCC then applied their ever more expansive list of rights to restrain the executive and to expand in unprecedented ways a wide range of freedoms, including, *inter alia*, the freedom of the press, freedom of association, the sanctity of the home, and the right to marry. In so doing, the SCC's justices directly confronted the executive, which was not only opposed to expanding rights but was actually in the mid-1990s trying to take away previously recognized rights.[44]

[38] 4 SCC, 4-5. Translation follows Johansen, Baber 'Supra-legislative Norms and Constitutional Courts: The Case of France and Egypt' in Cotran & Sherif (eds) *The Role of the Judiciary* supra note 6 at 37-38 (1997) at 367.

[39] Case No. 22, Judicial Year 8 (January 4, 1992), 5 SCC (Part I) 89. See also the analyses in Sherif, Adel Omar 'Unshakeable Tendency in the Protection of Human Rights: Adherence to International Instruments by the Supreme Constitutional Court of Egypt' in Cotran and Sherif (eds) *The Role of the Judiciary* supra note 6 at 37-38; Boyle, Kevin 'Human Rights in Egypt: International Commitments' in Boyle and Sherif (eds) *Human Rights and Democracy* supra note 7 at 89-90; Johansen 'Supra-legislative Norms' supra note 38 at 367-68.

[40] The Court sponsored in the 1990s a series of important international conferences in Cairo on international human rights and the judicial protection thereof. See Moustafa supra note 10 at 168-69. Papers were published in: Boyle and Sherif (eds) *Human Rights and Democracy* supra note 8 and Cotran and Sherif (eds) *The Role of the Judiciary* supra note 7.

[41] See, for example, the extraordinary discussion in El-Morr, Awad (1997) 'Judicial Sources for Supporting the Protection of Human Rights' in Cotran and Sherif (eds) *The Role of the Judiciary* supra note 6 at 5-10.

[42] See, e.g., El-Morr, Awad 'Human Rights as Perceived by the Supreme Constitutional Court of Egypt' 7 SCC at 2-121.

[43] Anyone who reads the SCC Reporter in the 1990s will find numerous references to foreign and international law. One scholar found "Through the mid-1990s between one-quarter and one-half of all SCC rulings incorporated specific aspects of international legal or foreign rulings. Even more referred to 'accepted international standards,' broadly stated, and to the comparable judicial principles of other 'civilized nations.'" Moustafa *The Struggle* supra note 9 at 168.

[44] For an analysis of the Court's decisions in this area and the degree to which they interfered with newly restrictive state policies, see Moustafa *The Struggle* supra note 9 at 140-164.

The Justification of Liberal Jurisprudence in Islamic Terms

One intriguing development that occurred during the court's liberal heyday is that as the Court began to move into confrontation with the executive, it began to use Islamic legal arguments in support of its liberal vision.

Islamic law was very much part of Egyptian political legal and discourse in the 1980s and 90s. Responding to pressure from Islamists, Article 2 of the Egyptian constitution had been amended in 1980 to say that 'the principles of the Islamic *Shari`a*[45] are the chief source of Egyptian legislation'. Islamists and, indeed, most Egyptians believed that the 1980 amendments created a new constitutional requirement that all laws conform to 'the principles of the Islamic *Shari`a*'. Although secular liberals contested this interpretation, the SCC in 1985 agreed with the Islamists—at least in part. In Case 20, Judicial Year 1 (May 4, 1985), the Court held that Article 2 created a justiciable requirement that legislation enacted after the amendment of Article 2 in 1980 conform to the principles of the Islamic *Shari`a*.[46] Thereafter, the Court began with growing regularity and confidence to measure Egyptian laws not only for consistency with explicit constitutional rights guarantees and unwritten human rights norms, but *also* with the principles of the Islamic *Shari`a*, as interpreted by the SCC. The results were not, however, what secular liberals had feared.

After the Court's 1985 decision, some secularists fretted that the constitutionalization of *Shari`a* principles represented a capitulation to conservative Islamic forces in Egypt and suggested that it would prevent judges from endorsing a liberal interpretation of the Egyptian constitution.[47] These fears proved unfounded. Building creatively on classical and modernist theories of Islamic law, the SCC argued that the 'principles of the Islamic *Shari`a*' to which Article 2 refers are highly general principles that leave the political branches considerable legislative latitude. These principles do not require the government to enact into law many specific rules that classical Muslim jurists considered to be part of the *Shari`a*. Rather, according to the Court, Article 2 required the government, in most areas of legislation, to respect only a handful of specific Islamic rules. It would, however, have to respect general moral principles that reflected the overarching 'goals' of Islamic law.[48]

The Court's Article 2 jurisprudence realizes, in certain ways, the aspirations of a number of modern liberal Islamic thinkers—not only in Egypt but in countries like Pakistan as

[45] The term '*Shari`a*' here means 'God's law' as revealed in the Qur'an, and reflected in the Prophet's behavior.

[46] Case 20, Judicial Year 1 (May 4, 1985), printed in 3 SCC 209-224. For an analysis, see Lombardi *State Law* supra note 2 at 159-73.

[47] See, e.g., comments in Mary Ann Weaver (informed by talks with Egyptian intellectuals) in (June 8, 1998) 'Letter from Cairo: Revolution by Stealth' *The New Yorker* at 38.

[48] For a monograph on Article 2, see Lombardi *State Law* supra note 2. See also Lombardi, Clark and Brown, Nathan 'Do Constitutions Requiring Adherence to Shari`a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law' (21) *Am. U. Int'l L. Rev.* For other perspectives, see Bernard-Maugiron, Nathalie 'La Haute Cour Constitutionelle Egyptienne et la Shari`a Islamique' (19) *Awrâq* 103; Bernard-Maugiron, Nathalie 'Les Principes de la sharia sont la source de la législation' in *Le Prince et son Juge*, supra note 21 at 107; Dupret, Baudoin (1995) ''La Chari`a est la source de la législation': interpretations jurisprudentielles et theories juridiques' (34) *Annuaire de l'Afrique Nord* at 261; Johansen, Baber 'The Relationship between the Constitution, the Shari'a and the Fiqh: The Jurisprudence of Egypt's Supreme Constitutional Court' in (64) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* at 881; Vogel, Frank (1999) 'Conformity with Islamic Shari`a and Constitutionality under Article 2: Some Issues of Theory, Practice and Comparison' in Cotran and Sherif (eds) *Democracy, The Rule of Law and Islam* at 525.

well. To understand this, it helps to consider classical Islamic legal theory, the challenge that modern Islamic legal thinkers levied at classical theory and the way in which the SCC incorporates modern Islamic legal theory in the service of a liberal vision of law.

Classical Islamic legal theory assumed that a special class of trained Islamic scholars was uniquely qualified to interpret God's law.[49] When reasoning out law from the scriptures, these scholars identified two types of rule. The first type was those rules that were 'certain' to represent divine commands. These 'definitive' rules were found explicitly stated in texts that the scholars had determined to be definitively authentic. The second type was ones that a scholar had determined were probably (but not surely) divine commands. These non-definitive rules were found in texts of uncertain authenticity or else were presented in language that the scholars thought contained some subtle ambiguity. While classical Muslim scholars expected by and large to agree on the definitive rules, they understood that they would disagree on the probable rules of *Shari`a*.

In the modern era, several trends appeared that, together, led many Muslims to question the assumptions of classical Islamic legal theory.[50] First, many Muslims came to accept that Islamic legal interpretation could be carried out by people who had not received classical Islamic legal training. Second, many Muslims came to believe that those who interpreted Islamic law should use new methods of interpretation. Among the new methods were utilitarian methods of reasoning. Among them too were methods that saw traditional Islamic rules as merely the application in a particular time and place of underlying divine principles—principles that represented the timeless aspect of the divine command. These principles were the only norms that bound modern Muslims. One could identify these underlying principles by induction—inducing them from a study of the many different rules that had been laid down at different times and places. Working from their new methods of interpretation, lay interpreters around the world, including Egypt, came to question laws that had long been considered definitive and to develop novel interpretations of Islamic law. Some of these new interpretations were reactionary on some issues, being more restrictive than classical Islamic law, for example, on questions of women's rights. Other untraditional modern interpretations of Islamic law were extremely progressive.

Naturally, in twentieth century Egypt, 'Islamist' political groups were not monolithic. Some Islamists urged the government to 'Islamize' the law in accordance with the largely conservative views of the classically trained scholars; some urged the government to 'Islamize' the law according to liberal views espoused by liberal lay Islamic thinkers; and others urged the government to hew to the reactionary views of fundamentalist thinkers.[51] By the time Egypt agreed to Islamize its laws, the Muslim community had become deeply divided about what Islamization would entail.

Given the change in notions of religious authority in Egypt, the explosion of diverse new interpretations, and the balkanized nature of the Islamist political movement, judges on the SCC found themselves able in Article 2 cases to construct a theory of Islamic legal

[49] See Lombardi *State Law* supra note 2 at 13-17. Monographs discussing this phenomenon, include Hallaq, Wael (2005) *The Origins and Evolution of Islamic Law*, Stewart, Devin (1998) *Islamic Legal Orthodoxy: Shi'ite Responses to the Sunni Legal System.*

[50] See Lombardi *State Law* supra note 2 at 59-77; see also, Kurzman, Charles (ed) (2002) *Modernist Islam: 1840-1940* at 3-30.

[51] See Lombardi *State Law* supra note 2 at 101-119.

interpretation that was considered plausible by many Islamists and which permitted (indeed, it arguably required), the government to respect the liberal rights that the Court had committed itself to protecting.

The Court's theory evolved slowly. By the late 1980s, the Court had asserted without much explanation that Islamic law supported its rulings protecting property rights.[52] In the early 1990s, shortly after the SCC announced its ambitious effort to incorporate international human rights norms into Egyptian constitutional law, the judges on the Court elaborated upon their understanding of Islamic law. The method that the SCC eventually developed was subtle.[53] For the purpose of this article, the important points are the following: First, according to the Court, it was constitutionally required only to ensure that its rules did not violate (a) the definitive rules of *Shari`a* or (b) the 'goals' of the *Shari`a*. Like classical jurists, the SCC distinguished between definitive and non-definitive rules of *Shari`a*. However, using a modified form of modernist methodology, the Court concluded that there were very few definitive rules of *Shari`a*. And what definitive rules they found tended to be extremely general principles that could be interpreted and applied in a manner that was consistent with the justices' liberal assumptions about individual human rights. Similarly, when the Court identified a series of social 'goals' that the *Shari`a* tended to promote, it found a series of goals that were quite general and were capable of being understood to favor a liberal, rights-friendly society in which men and women enjoyed largely equal rights.

As a result, the constitutional requirement that Egypt respect Islamic norms did *not* preclude the government from enacting laws that were inconsistent with classical Islam, but which improved the rights of women in questions of family law. For example, to the distress of conservative Islamists, the Court permitted the government to depart from traditional Islamic laws governing family relations. The Court held that an 'Islamic' legal system could (a) require a man who divorced his wife without cause to support the divorced wife, and (b) award the wife special custody of older children from the marriage.[54] Such a government could also allow a woman to sue for dissolution of her marriage if her husband took a second wife,[55] and it could allow a court to issue retroactive orders of child support.[56] Most dramatic of all, the Court held that the Egyptian government does not transgress the principles of the Islamic *Shari`a* when it adopts regulations banning school girls from veiling themselves. In each of these cases, the government rule was inconsistent with classical interpretations of *Shari`a* and was highly unpopular among conservative Islamists in Egypt.[57]

[52] See id. at 175-78.

[53] See id. at 174-200. For other analyses, see generally Johansen 'The Relationship between the Constitution, the Shari'a and the Fiqh' supra note 48; Vogel 'Conformity with Islamic Shari`a' supra note 48.

[54] Case No. 7, Judicial Year 8 (May 15, 1993), printed in 5 SCC (part 2) 265-90; analysis in Lombardi *State Law* supra note 2 at 202-18.

[55] Case No. 35, Judicial Year 9 (August 14, 1994) printed in 6 SCC 351-8; analysis in Lombardi *State Law* supra note 2 at 224-36.

[56] Case No. 29, Judicial Year 11 (March 26, 1994), printed in 6 SCC 231-56. French translation by Baudouin Dupret (4) *Islamic Law and Society* 91-113 (1997). Analysis in Lombardi *State Law* supra note 2 at 218-224.

[57] Case No. 8, Judicial Year 17 (May 18, 1996), 8 SCC 344-367. For an English translation, see Brown, Nathan J. and Lombardi, Clark 'The Supreme Constitutional Court of Egypt on Islamic Law, Veiling and Human Rights: An Annotated Translation of Supreme Constitutional Court Case No 8 of Judicial Year 17 (May 18, 1996)' (21) *Am. U. Int'l. L Rev.* at 437.

More intriguing still, the Court suggested, the constitutional command to respect Islam reinforced the recently announced constitutional requirement that the Egyptian Government must respect international legal norms—providing alternate grounds for rulings that protected international human rights. Thus, laws were occasionally struck down not only because they violated the property rights provisions of the constitution or the international human rights that had been incorporated into the Egyptian Constitution, but *also* because they violated, at the same time, the constitutional provisions requiring the state to respect Islamic norms. Thus, for example, a number of restrictions on private property were struck down on the grounds that they were inconsistent both with the Constitution's specific private property rights provisions *and* with Article 2's general requirement that the state respect Islamic norms.[58] Similarly, a restriction on certain government officials' right to marry foreign women was struck down on the grounds that it violated both international human rights norms guaranteed under the Constitution's general requirement that the government respect the rule of law *and* Article 2's command to respect Islamic norms.[59] Not only did Islamization fail to restrain the liberal Court, then, but Islamic arguments were occasionally used to support some of the Court's controversial human rights decisions.

1980-2000: The Court's Attempt to Insulate Itself from Executive Backlash

The justices on the SCC were not naïve. It was clear that their active protection of civil and political rights in the 1990s was as unwelcome to President Mubarak as their protection of economic rights had been welcome. Mubarak had total control over the legislature and bureaucracy and thus could revise laws or, if necessary, amend the Constitution, so as to destroy the Court. As they began to set out upon an activist liberal trajectory in the 1990s, the justices used a number of tools to try and insulate themselves from anticipated executive interference.

In his monograph on the Court, Tamir Moustafa has carefully explored the tools that the Court employed to protect itself and has explained why they were inadequate.[60] Among the tools was the tool of calculated self-restraint. As aggressive as the Court was in striking down laws in sensitive areas, it was not as aggressive as it could have been. For example, it conspicuously chose to uphold the regime's highly controversial use of Emergency State Security Courts to try politically sensitive cases.[61] Similarly, it never ruled on the constitutionality of President Mubarak's decision to declare and never renounce,

[58] See, e.g., Case No. 68, Judicial Year 3 (March 4, 1989), 4 SCC 148-64 (striking down a government order expropriating not only the real property of a wealthy landowner subject to the law, but also the real property of all his adult children); Case No. 65, Judicial Year 4 (May 16, 1992) (striking down a law governing the de-sequestration of land); Case No. 25 of Judicial Year 11 (May 27, 1992), 5 SCC 408-428 (striking down laws regulating seizure of property); Case No. 6 of Judicial Year 9 (March 18, 1995), 6 SCC 542-566 (striking down restrictions on a landlord's right to choose his tenants). For an analysis, see Lombardi *State Law* supra note 2 at 175-178, 236-240 (2006).

[59] See. e.g., Case No. 23, Judicial Year 16 (Decided March 18, 1995) 6 SCC 567-96; Case No. 31, Judicial Year 16 (may 20, 1995) printed in 6 SCC 716-39 and Case No. 25, Judicial year 16, July 3, 1995, printed in 7 SCC 45-94. For analyses of all these cases, see Lombardi *State Law* supra note 2 at 255; Bernard Maugiron 'La Haute Cour' supra note 48 at 127-28.

[60] Moustafa *The Struggle* supra note 9.

[61] Case 55, Judicial Year 5 (June 16, 1984) printed in 3 SCC, 80-89.

for almost thirty years, a 'State of Emergency' that left him with extraordinary powers.[62] Some evidence suggests that the Court deliberately delayed issuing opinions on some cases that were potentially damaging to the executive—sometimes for up to ten years—with the implicit threat that, if the executive ignored SCC rulings or interfered with the Court's liberal majority, a damaging opinion would be issued.[63]

The justices also sought to empower and build alliances with a number of institutions in civil society—both in Egypt and abroad.[64] They did this in part by the mechanism of judicial review itself—striking down laws restricting speech and assembly and thus allowing civil society groups to operate. When not on the bench, liberal justices also wrote and spoke regularly on the importance both of civil society and of judicial independence. As Moustafa has described, the alliance with NGOs and other civil society institutions served a number of important functions. For one, NGOs generated, funded and prosecuted the cases challenging state authority that were, at the end of the day, the SCC's reason for existence and the source of its power. The alliance also helped to increase the visibility and popularity of the SCC, both domestically and abroad—something that might raise the costs for Mubarak if he ignored the Court's rulings or used the power of appointment to break their majority.

Finally, as we have described already, the SCC came increasingly in the 1990's to rely on Islamic arguments. In numerous cases where a law was struck down on the basis of enumerated or un-enumerated constitutional rights, the SCC would explain why, based on its liberal interpretation of Islamic law, this law *also* violated Article 2's requirement that all law be consistent with the Islamic *Shari`a*. While the judges seem to have believed in good faith that they were interpreting the *Shari`a* properly, the willingness to hear Islamic cases and to attempt regularly to articulate an alternate 'Islamic' ground for aggressive liberal rulings can be seen as an effort to build support among the powerful Islamic opposition. The goal was, in part, to create broader support for its liberal understanding of the Constitution's individual rights provisions and to create a diverse constituency that would resist any attempt by the executive to interfere aggressively with the increasingly pesky liberal majority on the Court. The Court's aggressive moves to preserve its liberal majority and liberal outlook were not, ultimately, as successful as they had hoped.

2000-Present: The Taming of the SCC

In the late 1990's President Mubarak and his inner circle prepared an attack on the Court. They began by suppressing the institutions in civil society that were supportive of the Court. When the Court's Chief Justice died in 2001, the regime was confident it had neutralized the institutions that could mobilize effective domestic and international support for the Court. Using his carefully reserved powers of appointment, [65] the President appointed as Chief Justice an unapologetic political ally of the executive and an outspoken critic of the Court's earlier attempts to interfere with repressive executive action. This Chief Justice proceeded

[62] In interviews with several justices in 2001, this was described to me as one of the Court's greatest pieces of unfinished business.

[63] See Moustafa *The Struggle* supra note 9 at 181-82.

[64] See generally Moustafa *The Struggle* supra note 9 at 136-54, 169-72, 178-92. The discussion below draws on his analysis.

[65] On this event including telling interviews, see Moustafa *The Struggle* supra note 9 at 198-201.

immediately to nominate (and the President proceeded to appoint) five new justices to the court. In a stroke, he eliminated the liberal majority. Not surprisingly, thereafter, the SCC revealed little of its previous appetite for confrontation with the executive. More troubling to some observers, in several cases the SCC invoked its rarely-used power to interpret statutes that had received inconsistent interpretations in the lower courts and overturned rights-protective opinions in the regular court system.[66]

To outsiders, at least, the Court had come full circle. Writing in the 1990s, Nathan Brown was struck by the ways in which the SCC had departed from its roots in Nasir's anti-liberal Supreme Court. He echoed the views of many when he said that the SCC had transformed itself 'from a check on the judiciary into the boldest judicial actor in the country'.[67] Brown, however, sounded a note of caution, wondering if it could continue to act so boldly.[68] This caution proved wise. Writing in 2007, Moustafa described in detail how the SCC had become once again, a tool to suppress activist liberal jurisprudence in the Egyptian courts.

With President Mubarak in his 80s, Egypt will soon change its head of state and potentially will undergo some deeper political reform. The memory of the SCC's liberalism has not disappeared. Some distinguished liberal constitutionalists remain on the court and others could theoretically be appointed. It remains to be seen what new shapes and roles, if any, the Court will take on in the future.

LESSONS FROM THE HISTORY OF THE SCC

Studying the SCC is interesting for a number of reasons. For students of comparative constitutional law, the history of the SCC provides a provocative example of judicial review being established in an authoritarian regime. One question is whether it occurs for the same reasons that it occurs in democratizing or established democratic countries. Moustafa has argued that in developing countries like Egypt, the explanation for the creation of the SCC is largely to be found in the executive's belief that independent courts will help the nation attract capital. Supplementing this, I have argued above that we should recalibrate theories of hegemonic preservation to account for intra-elite fighting in a one-party state. If we do, theories of hegemonic preservation may help to further explain why the Sadat regime created the SCC at the time that it did and with the structure that it did.

Studying the SCC also reminds us that autocrats are wise to fear constitutional courts and to retain emergency brakes over the process of judicialization. Courts are selected because their judges are likely to support the executive's most important policy objectives and probably will share them for a time. Yet, as the SCC demonstrated, independent judges, though they can help an autocratic executive in some ways, also tend over time to start acting in ways that are distressing to the executive. Such behavior is not unforeseeable.

This brings us to another point. Given the oedipal tendency of courts to rebel against the expectations of their founders, autocratic executives try to give judges enough independence to carry out the objectives for which they were created. But the executives also try to retain some ability to take control of the court if the court's behavior becomes

[66] See generally, Moustafa *The Struggle* supra note 9 at 136-54, 169-72, 178-92.
[67] See Brown *The Rule of Law* supra note 2 at 104.
[68] Id. at 126-128.

too threatening to the executive. The history of the SCC is revealing on this point, showing the fragility of any judicial rebellion in an autocratic system. Although judicial review does at times arise in an authoritarian context, the power of independent judicial review in authoritarian countries often remains extremely weak and cannot be exercised in a robust manner without support from informal networks in politics and civil society that are themselves vulnerable.

Ultimately, the SCC, which had transformed itself from an illiberal institution to an active liberal one, was transformed by the executive back into a less active, and apparently less liberal, one. This suggests that the most significant challenge to evolutionary theories about the inevitable spread of judicial review may not lie in the stories of countries that have chosen to withhold independent judicial review. It may instead lie in the stories of authoritarian countries like Egypt that have been able indirectly to control how it is used and what its effect will be. There are still more chapters to be written in the history of the SCC. Nevertheless, the history of this institution to date leaves open the possibility that the SCC's tale will prove to be a cautionary one. If judicial review can be turned on or off when convenient, judicial review is liable to spread, but it is also liable to have few of the salutary effects that its champions suggest. What signs of hope are there? One ambiguous sign appears in an unlikely place.

One possible lesson from the history of the SCC involves the role of Islam in the constitutional jurisprudence of Muslim states. The experience of the SCC suggests that Muslim views about Islamic legal interpretation are far less rigid than people may realize. In nations that constitutionalize Islamic law, courts can assert the power to interpret Islamic law and, indeed, to interpret it creatively and liberally. In some cases, the Court chose to cite Islamization provisions as a justification for liberal decisions in the area of property rights and even human rights. We have mentioned above that liberal constitutional courts in authoritarian countries can gain power and freedom if they can build support networks in civil society. In light of this, the SCC's use of Islamic law for liberal purposes is provocative, and its ability to do so with minimal protest from the Muslim opposition (and indeed with some support) is intriguing.[69]

Muslim autocrats have long been successful at playing their Islamic opposition off against their secular liberal opposition, arguing that their respective interests are fundamentally misaligned. The SCC's Article 2 jurisprudence argues implicitly that the perceived misalignment is a chimera. The SCC was never able to forge a really effective secular/Islamist support network—or at least one that was effective enough to prevent the executive from destroying the SCC's liberal majority through its power over court staffing. Nevertheless, the SCC's overtures to Islamists were not entirely rebuffed. One wonders whether, in another country, a more effective alliance could be built. And indeed, one wonders whether in Egypt, a new alliance might arise that unites moderate Islamists and

[69] For the lack of criticism, see the discussion in Lombardi *State Law* supra note 2 at 259-264. Nathan Brown and Amr Hamzawy report that when a handful of younger members of the powerful Muslim Brotherhood in Egypt championed stripping the SCC's jurisdiction over Article 2 cases (and instead giving them to a new institution), they were harshly criticized by leading Brothers—with the explicit comment that the SCC was the appropriate body to continue interpreting Article 2. See Brown and Hamzawy (2008) 'The Draft Party Platform of the Egyptian Muslim Brotherhood: Foray Into Political Integration or Retreat Into Old Positions?' (89) *Carnegie Papers, Middle East Series* at 7-8.

liberal judges—an alliance that might provide judges with popular support and enable a re-emergence of liberal judicial power and liberal constitutionalism in Egypt.