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Law versus the State: The Judicialization of Politics in Egypt

Tamir Moustafa

This study seeks to explain the paradoxical expansion of constitutional power in Egypt over the past two decades, despite that country's authoritarian political system. I find that the Egyptian regime established an independent constitutional court, capable of providing institutional guarantees on the security of property rights, in order to attract desperately needed private investment after the failure of its socialist-oriented development strategy. The court continued to expand its authority, fundamentally transforming the mode of interaction between state and society by supporting regime efforts to liberalize the economy while simultaneously providing new avenues for opposition activists and human rights groups to challenge the state. The Egyptian case challenges some of our basic assumptions about the conditions under which we are likely to see a judicialization of politics, and it invites scholars to explore the dynamics of judicial politics in other authoritarian political systems.

Why would an entrenched authoritarian regime establish an independent constitutional court empowered to perform judicial review? This is one of the most intriguing questions for students of contemporary Egyptian politics. In a country where the ruling regime exerts its influence on all facets of political and associational life, it granted one of the most important legal/political institutions substantial autonomy from executive control. The paradox is all the more intriguing when one reviews the incredibly bold rulings that the Supreme Constitutional Court (SCC) has delivered on a variety

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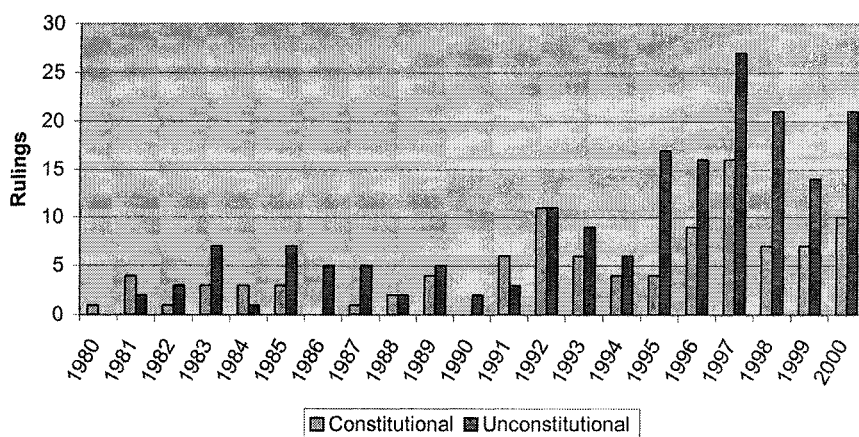


FIGURE 1. Rulings of the Egyptian Supreme Constitutional Court, 1980–2000. These figures represent the number of expanded rulings of constitutionality and unconstitutionality issued by the SCC.

of issues over the past two decades. The court has consistently worked to promote electoral reform, expand the freedom of expression, and shield groups active in civil society from state domination (Boyle and Sherif 1996; Cotran and Sherif 1999; Rutherford 1999; Mallat 1993; al-Morr 1993). Moreover, the new court provided the single most important avenue for opposition parties, human rights groups, and political activists of every stripe to credibly challenge the Egyptian regime for the first time since the 1952 military coup; opposition parties used the SCC to challenge electoral laws and strict constraints on political activity, human rights groups used the SCC to strengthen civil and human rights safeguards, leftists initiated litigation aimed at blocking the regime's privatization program, and even Islamists mobilized through the SCC to challenge the secular underpinnings of the Egyptian state. In the process, the Supreme Constitutional Court stood at the center of the most heated debates concerning the political direction and even the fundamental identity of the Egyptian state (see fig. 1).

Given the lack of significant political pressure for judicial reform, why did Egypt's authoritarian regime establish a new Supreme Constitutional Court with almost complete independence from executive control in 1979? Moreover, why did the regime not immediately reverse its reforms once the court began to challenge the executive branch in high-profile cases?

Conventional understandings of authoritarian politics provide few satisfying explanations. The vast majority of political scientists and public law scholars assume that democracy is a prerequisite for the judicialization of politics, and this assumption has resulted in an almost total neglect of the study of judicial politics in authoritarian settings. Take, for instance, the

following statement by one of the most frequently referenced works in the new scholarship on the judicialization of politics:

It seems very unlikely that one will encounter the judicialization of politics outside of democratic polities. It is hard to imagine a dictator, regardless of his or her uniform or ideological stripe, (1) inviting or allowing even nominally independent judges to increase their participation in the making of major public policies, or (2) tolerating decision-making processes that place adherence to legalistic procedural rules and rights above the rapid achievement of desired substantive outcomes. The presence of democratic government thus appears to be a necessary, though certainly not a sufficient, condition for the judicialization of politics. (Tate 1995, 28)

This study brings courts center stage as an arena of political contention in an authoritarian polity where we would not intuitively expect to observe the judicialization of politics. It is imperative that comparative law scholars begin to examine how courts function and shape policy outcomes not only in transitioning or consolidated democracies but also in nondemocratic environments. What motivates authoritarian rulers to grant nominal or even substantial independence to judicial institutions? What strategies do judges adopt to expand their mandate and increase their autonomy? Are there discernible patterns of conflict, accommodation, and cooperation between judicial actors and state leaders over time? How do courts in authoritarian systems structure political conflict and state-society interaction? To what extent do courts in authoritarian systems provide avenues for political activists to challenge the state, and what role might judicial institutions play in supporting and/or consolidating democratic transitions? These are questions that, until now, public law scholars and comparativists have seldom asked.

In this study, I examine the economic and political forces driving the judicialization of politics in Egypt, despite its authoritarian political structure. First, I contend that the establishment of an independent constitutional court was primarily motivated by the regime's pressing need to attract private investment during Egypt's shift from a closed, command economy to a market-driven economy in desperate need of global capital. Faced with economic stagnation, political instability, and escalating pressure from international lenders, the regime increasingly pinned its political survival on attracting foreign direct investment. However, given the Egyptian regime's record of nationalizing the majority of the private sector in the 1950s and early 1960s, it was difficult to provide credible commitment to private investors that their assets would not be subject to adverse legislation after they entered the Egyptian market. The creation of a Supreme Constitutional Court, independent of government manipulation and capable of providing institutional constraints on executive action, was an unambiguous commitment to investors that property rights would be protected through an independent process of judicial review.

Next, I examine how constitutional power continued to expand over a two-decade period due to the synergistic interactions between the Supreme Constitutional Court and three groups active in civil society—legal professional associations, opposition parties, and human rights organizations. I find that the SCC facilitated the reemergence of these “judicial support structures” and provided institutional openings for political activists to challenge the state in ways that fundamentally transformed patterns of interaction between the state and social forces. In return, the Supreme Constitutional Court depended upon judicial support structures to monitor and document human and civil rights violations, initiate constitutional litigation, and come to the defense of the court when it was under attack by the regime. A tacit partnership was built on the common interest of both defending and expanding the mandate of the SCC.

Finally, I find that the Supreme Constitutional Court was able to pursue its progressive political agenda for over two decades by selectively accommodating the regime’s core political and economic interests. In the political sphere, the SCC ruled Egypt’s Emergency State Security Courts constitutional, and it has permanently delayed issuing a ruling on the constitutionality of civilian transfers to military courts. The Supreme Constitutional Court was able to push an agenda of “insulated liberalism” and maintain its institutional autonomy from the executive largely because the regime was confident that it retained ultimate control over its political opponents through the exceptional courts. Similarly, the SCC supported the regime’s core economic interests by striking down socialist-era legislation standing in the way of the regime’s new structural adjustment program. SCC rulings enabled the executive to carry out its new economic agenda and claim that it was simply respecting an autonomous rule-of-law system rather than implement sensitive reforms through more overt political channels. These regime-friendly rulings in the economic sphere gave the SCC more leverage to push a moderate political reform agenda and to provide avenues of participation to progressive social activists.

In the last section of the paper, I examine how the regime was torn between the costs and benefits of Supreme Constitutional Court rulings as it found itself increasingly constrained by SCC judgments. The SCC continued to facilitate the executive agenda of dismantling Egypt’s socialist-oriented economy and to provide credible commitment that property rights would be protected. However, the SCC increasingly acted as a “dual-use” institution through which opposition parties, human rights groups, and political activists could challenge the regime’s political control. I examine how the regime largely reversed the fortunes of Egypt’s SCC–civil society partnership through a variety of legal and extralegal methods. I close the essay by returning to the broad question of the judicialization of politics in authoritarian polities.

CREDIBLE COMMITMENTS AND THE ESTABLISHMENT OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT

Political economists have observed that rulers wielding unrestrained power suffer from an inability to provide credible commitments that property rights will be respected by the state (Olson 1993; Weingast 1993). Potential investors are acutely aware that the unrestrained state may alter property rights arrangements in order to confront short-term fiscal crises or, in the case of the most dysfunctional, predatory states, simply for personal gain. The most egregious form of property rights violations may be the outright seizure of private assets, but short of nationalization there are more subtle ways for the unrestrained state to unilaterally alter property rights, such as changing the tax structure, imposing new restrictions on foreign exchange or the repatriation of profits, or altering a variety of other regulatory mechanisms. Insecure property rights vis-à-vis the state discourages domestic and foreign investment (Borner, Brunetti, and Weder 1995). Firms continuing to operate in such an environment of policy uncertainty "tend to have short time horizons and little fixed capital, and will tend to be small scale" in an effort to minimize risk (North 1990, 67).

Working within this framework, Mancur Olson makes a distinction between authoritarian rulers with short time horizons and those with long time horizons. According to Olson, rulers with an insecure hold on power have short time horizons and a greater incentive to expropriate assets. On the other hand, authoritarian rulers with a secure hold on power have longer time horizons and therefore prefer to invest in institutions that promote economic activity because, over the long term, an expanded tax base will result in a larger fiscal stream to the state. Such rulers have a greater incentive to establish institutions that promote the security of property rights, both among contracting parties in society and vis-à-vis the state itself.

An autocrat who is taking a long view will try to convince his subjects that their assets will be permanently protected not only from theft by others but also from expropriation by the autocrat himself. If his subjects fear expropriation, they will invest less, and in the long run his tax collections will be reduced. (Olson 1993, 571)¹

Independent judicial institutions empowered to review executive and legislative actions can help strengthen the security of property rights vis-à-

1. North and Weingast similarly contend that, "the more likely it is that the sovereign will alter property rights for his or her own benefit, the lower the expected returns from investment and the lower in turn the incentive to invest. For economic growth to occur, the sovereign or government must not merely establish the relevant set of rights, but must make a credible commitment to them" (1989, 803).

vis the state.² Courts not only enable citizens to challenge infringements on property rights, but their rulings also act as important barometers of the state's respect of property rights more generally, in both qualitative and quantitative terms.³ Although independent judicial institutions are not the only types of institutions that can help provide credible commitments to property rights, they are among the most important. This literature on credible commitments provides useful insights into the pathologies of the Egyptian political economy during its socialist transition as well as the regime's motives for initiating judicial reform in the late 1970s.

After the 1952 Free Officer's coup that brought Gamal 'Abd al-Nasser to power, Egypt's new rulers made a decided shift away from the established political system and showed no intention of restoring liberal-democratic political institutions.⁴ The constitution was annulled by executive decree in December 1952, and another executive decree the following month disbanded all political parties. Egyptian legal institutions were also weakened significantly. Abdel Raziq al-Sanhuri, one of Egypt's greatest legal scholars and the architect of the Egyptian civil code, was physically beaten by pro-regime thugs and forced to resign in 1954. Another 20 prominent members of the *Maglis al-Dawla* (Egypt's supreme administrative court) were forcibly retired or transferred to nonjudicial positions. The regime further consolidated its control by circumventing the regular court system and establishing a series of exceptional courts throughout the early 1950s including *Mahkamat al-Ghadr* (the Court of Treason) in 1952, *Mahkmat al-Thawra* (the Court of the Revolution) in 1953, and *Mahakim al-Sha'b* (the People's Courts) in 1954. These courts had sweeping mandates, few procedural guidelines, no appeals process, and were staffed by loyal supporters of the regime, typically from the military (Brown 1997; Ubayd 1991). Simultaneously, Nasser began to steer the country in a new economic direction, unilaterally seizing 460,000 feddans of land for redistribution and nationalizing hundreds of British and French companies in the wake of the 1956 Suez War.

With no check on the political power of the new regime either through political parties or through credible legal institutions, private investors understandably hesitated to make major new investments in the economy. Instead, foreign and Egyptian capitalists actively divested their assets and capital flight deprived the Egyptian economy of large sums of capital. According to Fuad Sultan, one of the chief architects of the economic liberal-

2. The importance of a stable and predictable legal system for economic growth is, of course, not a new line of contention. Much of the reasoning of the new institutional economics echoes the work of Max Weber, Adam Smith, David Ricardo, and, more recently, scholars from the law and development school of the 1970s.

3. Qualitatively, most infringements of property rights by the state are relatively ambiguous, except in the most egregious cases of state interference. Quantitatively, it is nearly impossible for any one firm to effectively monitor all state agencies and assess the general level of respect for property rights by the state.

4. For a more detailed discussion of this period, see Moustafa (2002, 45–73).

ization program, an estimated \$20 billion (£E 8 billion) was held abroad by Egyptian citizens in the 1960s, and another \$20 billion was transferred abroad in the 1970s (Beattie 2000, 150).⁵ When the regime found that private sector industrialists were hesitant about the political and economic direction of the country, it decided that the state would have to seize what assets remained in order to mobilize capital for investment. Between 1960 and 1964 the regime initiated one of the most extensive nationalization programs in the noncommunist world. By the mid-1960s the state had nationalized virtually the entire private sector, with only small workshops and shopkeepers still in control of their property (Waterbury 1983).

Nasser's preference for an expansion of executive powers at the expense of autonomous rule-of-law institutions continued into the late 1960s, despite its crippling effect on the economy. The final and most significant blow to Egyptian judicial institutions came in the 1969 "massacre of the judiciary." In the wake of the humiliating defeat in the 1967 war and with increasing calls from both the Judges' Association and the Lawyers' Syndicate for political and judicial reform, Nasser decided that judicial autonomy was too great a threat to the regime. In an executive decree, Nasser dismissed more than 200 judicial officials, including the board of the Judges' Association, a number of judges on the Court of Cassation, and other key judges and prosecutors in various parts of the judicial system. Moreover, the board of the Judges' Association was dissolved, and new members were appointed by the regime. To ensure that resistance to executive power would not easily reemerge, Nasser created the Supreme Council of Judicial Organizations, which gave the regime greater control over judicial appointments, promotions, and disciplinary action.

By the time of Nasser's death in September 1970, the Egyptian economy was in extreme disrepair. The public sector was acutely inefficient and required constant infusions of capital, the physical infrastructure of the country was crumbling, and military spending consumed a full 20 percent of the gross national product as the war of attrition dragged on along the Suez Canal (Waterbury 1983). Nasser's successor, Vice-President Anwar Sadat, turned almost immediately to foreign sources of capital to make up for the domestic shortfall. Law 34/1971, issued less than one year after the Nasser's death, was Sadat's first attempt to assure investors that Egypt was turning a new corner and that private property would now be respected by the state. The law repealed the government's ability to seize property, stating, "It is illegal to put private property owned by real persons under sequestration except with a legal order." Sadat also approved the World Bank frame-

5. By comparison, in the 10-year period between 1965 and 1974, domestic sources of investment in the economy totaled £E 2,319,400,000 (\$5,800,000,000). In other words, the private savings of Egyptian citizens that were transferred abroad amounted to nearly three and a half times the total amount of domestic sources of investment in the Egyptian economy during the same period.

work for the settlement of foreign investment disputes through international arbitration by way of presidential decree 90/1971. But the single most important assurance of the early 1970s that the regime was committed to respecting private property rights was contained in the new Egyptian Constitution of 1971. While still reserving a central role for the public sector in the development process, the constitution sought to reestablish the sanctity of private property:

Private property shall be protected and may not be put under sequestration except in the cases specified in the law and with a judicial decision. It may not be expropriated except for a public purpose and against a fair compensation in accordance with the law. The right of inheritance is guaranteed in it. (Article 34)

Nationalization shall not be allowed except for considerations of public interest, by means of law and with compensation. (Article 35)

General confiscation of property shall be prohibited. Special and limited confiscation shall not be allowed except with a judicial decision. (Article 36)

The proposed constitution was put to a national referendum and approved by a supposed 99.98% of voters. The irony of the situation was surely not lost on potential private investors. The regime was intent on attracting private investment, and it was employing the language of "property rights" to do so. But what kind of real guarantees were being extended, particularly in light of the fact that the national referendum, like every referendum since the Free Officers coup in 1952, was rigged by the government? The "99.98% voter approval" was an absurd illustration of the power of the regime to unilaterally expand and contract legal rights to suit its needs at the time.

Moreover, even the assurances provided both in law 34/1971 and in the constitution were not absolute. Rather, they were to be interpreted by other laws on the books. For example, in the case of law 34 of 1971, property could still be seized by court order in the event that "criminal offenses" were involved. But with a whole array of loosely worded criminal offenses on the books, including financial crimes damaging the "public interest," real guarantees to private property were questionable at best. Similarly, the constitution stated that private property would be protected, "*except in the cases specified in the law*" and "*in accordance with the law.*" Not only did this language open the door to the interpretation of constitutional guarantees based on illiberal laws already on the books, but also it left unresolved the issue of the regime's ability to unilaterally issue new legislation to suit its current needs. Nor did law 34/1971 or the new constitution address the lack of independent legal institutions with the power to protect private property.⁶

6. The 1971 constitution provided for a new Supreme Constitutional Court in articles 174–78, but the regime did not issue the enabling legislation until the summer of 1979. Moreover, the eight new draft laws circulated by the government between 1971 and 1978 hardly

In short, repeated assurances by the regime that it would respect property rights fell far short of providing concrete safeguards against state expropriation.

The disappointing response from private investors from 1971 to 1974 prompted the regime to make a more forceful and comprehensive statement about its commitment to its new open door policy. The regime created an "October paper" outlining the state's new development strategy and put it to a national referendum on May 15, 1974. Like the referendum on the 1971 constitution, the new economic policy received nearly 100% voter approval thanks to electoral fraud orchestrated by the Ministry of Interior. The paper laid the groundwork for law 43/1974, which provided a new, more detailed framework for foreign capital to operate in Egypt. Law 43 provided a number of guarantees and incentives to foreign investors, including tax exemptions, the ability to import new technology and machinery for production, partial exemptions from currency regulations, exemptions from Egypt's stringent labor laws, exemptions on limits to annual salaries, and, once again, guarantees against nationalization and sequestration. In this last regard, article 7 repeated the government's commitment that "[t]he assets of such projects cannot be seized, blocked, confiscated or sequestered except by judicial procedures."

Egyptian newspapers and government officials anticipated a flurry of economic activity and the prompt injection of much needed foreign capital into the economy after the passage of law 43/1974. They were sorely disappointed. By the late 1970s, it became increasingly clear that investors were not willing to simply take the word of the government when the same regime and the same personalities had only 15 years earlier engaged in one of the most sweeping nationalization programs in the developing world. Studies conducted in the late 1970s by consulting firms and by the Egyptian government itself confirmed that investors "remained reluctant to invest in long-term projects due to uncertainty about the future of the Egyptian economy" (Nathan Associates 1979, 216). Investor concerns about expropriation were also reflected more concretely in the volume of foreign operations. The capital allocated to foreign investment projects between 1971 and late 1980 totaled only £E 902,335,000 (\$1,263,269,000). The paucity of these figures is even more sobering when we consider that 65% of investments were from Egyptian sources in the form of joint ventures, and much of this Egyptian financing came from the public sector itself. In the form of joint ventures. True foreign direct investment amounted to only \$442,144,000 over the decade.

envisioned a Supreme Constitutional Court with real independence from the regime. Each bill proposed a new way for the executive to exercise direct control over the court. For example, most drafts proposed an SCC in which justices would serve renewable terms of five to seven years. One draft law went so far as to recommend that the Supreme Constitutional Court be a consultative body with absolutely no binding power over the government (Rutherford 1999).

Even more revealing than the low volume of investment were the sectors of the economy where investments were made. Only 19% of total investments were made to the industrial sector, which entailed high initial outlays of capital, long-term return on investment, and therefore the necessity of long-term security in the economy. Eighty-one percent of total investments were directed to non-industrial sectors such as services and tourism. These sectors of the economy conversely required low initial outlays of capital, provided short-term return on investment, and risked less in the event of nationalization. Egypt was attracting neither the volume nor the type of capital that it needed to sustain long-term economic development.

The reluctance of foreign investors to enter the Egyptian market for fear of expropriation was also reflected in the fact that most American businesses in Egypt undertook capital-intensive operations only when they received medium and long-term financing for projects from the United States Agency for International Development under their "Private Investment Encouragement Fund." Moreover, nearly every American firm investing in Egypt during this period did so only after securing costly insurance from the Overseas Private Investment Corporation, substantially reducing profit margins (U.S. Department of Commerce 1981).⁷

The low volume of total investments and the emphasis on low-risk investments with promises of quick returns did little to help the ailing economy. More than seven years after the passage of law 43/1974 and a full decade after the first moves to attract foreign capital through law 65/1971, these projects provided a total of only 74,946 jobs (Arab Republic of Egypt 1982, 54, 68). From the total Egyptian workforce of nearly 11 million, law 43 projects accounted for only .7% of total employment in the country. With the Egyptian population growing at a rate of approximately one million per year by the end of the 1970s, law 43 projects were not generating nearly enough new employment to address Egypt's population explosion. By 1979, total external debt had reached \$15.4 billion, and debt servicing consumed a full 51% of all export earnings. It was in this context that Sadat finally decided to strengthen institutional guarantees on private property rights through the establishment of an independent constitutional court with powers of judicial review.

Mahmoud Fahmy, one of the main architects of the economic opening and a member of the committee that drew up the first draft of the Supreme Constitutional Court law, recalled that

the establishment of the Supreme Constitutional Court was really the result of internal and external pressure. From inside, the legal profession was pushing and they were very upset about the old Supreme Court

7. This insurance was specifically arranged to cover for three types of risk: inconvertibility of profits, expropriation, and war loss.

because it was really a tool to legitimize the government's acts and views and it was not an independent body. But more importantly, from the outside there was pressure from foreign investors and even the foreign embassies. They all said, "you are crying for investments to come but under what circumstances and with what protections?"

Fahmy concluded that "the establishment of the Supreme Constitutional Court was part of a bundle of legislative reform at the time. It [the establishment of the SCC] was intended by Sadat to keep the foreign investor at ease. The foreign investor needed to be sure that he could come and go as he pleased."⁸

This connection between the need to attract foreign capital and the establishment of an independent SCC as recalled by Mahmoud Fahmy is confirmed by Mustafa Khalil, who held the position of prime minister during the passage of the SCC law. According to Khalil:

There were efforts to encourage foreign investment in Egypt at the time because we were dealing with a fiscal crisis. One major factor that was impeding investment was the lack of political stability— both foreign and domestic. We issued a number of laws aimed at guaranteeing private investment such as law 43. But a major problem was that the NDP [the ruling party], having the majority in the People's Assembly, could push through any legislation it wanted and change the previous laws. This was at the forefront of Sadat's thinking when he created the Supreme Constitutional Court. He primarily wanted to make guarantees [to investors] that laws would be procedurally and substantively sound.⁹

THE EGYPTIAN SUPREME CONSTITUTIONAL COURT— INSTITUTIONAL FEATURES

The new Supreme Constitutional Court enjoyed considerable independence from regime interference. The chief justice of the SCC was formally appointed by the president of the republic, but for the first two decades following its establishment, the president always selected the most senior justice serving on the SCC to the position of chief justice. A strong norm developed around this procedure, although the president always retained the formal legal ability to appoint anyone to the position of chief justice who met the minimum qualifications as defined by the law establishing the court.¹⁰ New justices on the court were appointed by the president from two candidates, one nominated by the general assembly of the court and the

8. Mahmoud Fahmy, interview by author, 31 October 2000, Cairo.

9. Mustapha Khalil, interview by author, 14 June 2000, Cairo.

10. This informal norm ensuring SCC autonomy broke down in 2001, an event that is described below.

other by the chief justice, but in practice the nominations of the chief justice and the general assembly of the SCC were always the same. In effect, for more than two decades, the SCC operated as a self-contained and a self-renewing institution in a way that no other court in the world operates.

Extensive protections were also provided to SCC justices to guard against government interference. Justices cannot be removed, and the general assembly of the SCC is the only body empowered to discipline members of the court, insulating SCC justices from the threat of government pressure and reprisals.¹¹ Moreover, article 13 states that "members of the court may be delegated and seconded *only* for the performance of legal duties associated with international organizations or foreign states, or for the accomplishment of scientific missions." This provision deprives the government of one of the subtle techniques that it uses to corrupt personnel in other parts of the judiciary. Lucrative legal consulting positions are regularly distributed to judges in critical positions in return for tacit compliance with government interests in sensitive court cases. Paid consulting positions to various ministries of the government often exceed the meager base salary of most judges, making cooperation with the government hard to resist. Finally, provisions in law 48/1979 also give the SCC full control of its own financial and administrative matters.

The Supreme Constitutional Court has the exclusive authority to perform three important roles: (1) to issue binding interpretations of existing legislation when divergent views emerge; (2) to resolve conflicts of jurisdiction between different judicial bodies; and (3) to perform judicial review of legislation. Without a doubt, SCC powers of judicial review are the most important of these duties. Article 29 of law 48/1979 specifies that the SCC is empowered to perform judicial review only when it receives cases transferred from courts of merit. If any court, in the course of deciding a concrete case, finds that a law being applied may be unconstitutional, it can suspend the proceedings and transfer the case to the Supreme Constitutional Court for review. In most cases, a petition for judicial review in front of the SCC is initiated at the request of litigants themselves. However, judges also have the right to initiate a petition in front of the SCC if they find the constitutionality of a particular law they are applying questionable. After a ruling is issued by the SCC on the constitutionality or unconstitutionality of a law in question, it is returned to the court of merits, and the case proceeds with the new clarification provided by the SCC.

With protections against government interference, the Supreme Constitutional Court set to work reviewing socialist-era nationalization laws. In the process, the SCC established a new legal framework for the protection of private property rights. SCC rulings enabled thousands of citizens to receive

11. Once appointed, SCC justices enjoy secure tenure until they reach mandatory retirement at age 66, as is the case with all other civil servants.

compensation for property seized by the state and, in many cases, the SCC went much farther than even Sadat envisioned when it struck down laws limiting the extent to which compensation claims could be made against the government (Moustafa 2002, 95–98, 137–40). The impressive activism of the new Supreme Constitutional Court helped the regime assure both Egyptian and foreign private investors that property rights were now secure in Egypt and that formal institutional protections existed above and beyond mere promises by the regime.

SCC–CIVIL SOCIETY SYNERGY AND THE EMERGENCE OF JUDICIAL SUPPORT STRUCTURES

Opposition Parties

Despite the fact that the Supreme Constitutional Court played the important function of protecting property rights and encouraging investment, the court did not shy away from challenging the regime on other politically charged issues. Instead, it proved to be a double-edged sword vis-à-vis regime interests within a few short years. In one of its earliest rulings, the SCC enabled hundreds of prominent opposition activists, such as Wafd Party leader Fuad Serag Eddin, to return to political life.¹² Another ruling in 1988 forced the legalization of the opposition Nasserist Party against government objections.¹³ The SCC even ruled national election laws unconstitutional in 1987 and 1990, forcing the dissolution of the People's Assembly, a new electoral system, and early elections.¹⁴ Two similar rulings forced comparable reforms to the system of elections for both the upper house (*Maglis al-Shura*) and local council elections nationwide.¹⁵ Although the rulings on election laws hardly undermined the regime's grip on power, they did significantly undermine the regime's corporatist system of opposition control (Moustafa 2002, 98–111).¹⁶ Simultaneously, judicial activism in both the SCC and the

12. SCC, 26 June 1986, *al-Mahkama al-Mahkama al-Dusturiyya al-'Ulia* [casebooks; hereinafter cited as *al-Mahkama*], vol. 3, 353.

13. SCC, 7 May 1988, *al-Mahkama*, vol. 4, 98.

14. SCC, 16 May 1987, *al-Mahkama*, vol. 4, 31; SCC, 19 May 1990, *al-Mahkama*, vol. 4, 256.

15. SCC, 15 April 1989, *al-Mahkama*, vol. 4, 205; SCC, 15 April 1989, *al-Mahkama*, vol. 4, 191.

16. Prior to the SCC reforms, the regime managed the political field by granting only a handful of opposition parties exclusive representation of opposition to the regime. In a classic corporatist arrangement, the parties themselves were left to exercise *internal* controls on activists who dared to challenge the government outside the bounds that were implicitly negotiated between the regime and opposition parties. After the SCC induced electoral reforms, however, opposition activists were no longer beholden to opposition party leadership, which controlled party platforms, party membership, and the position of candidates on party lists. Moreover, political trends that were not allowed legal party status by the regime, most notably the Islamist trend, were able to compete by running independent candidates. This had serious implications for the type of opposition trends that would be represented in the

TABLE 1
Egyptian Political Parties in 1995

Party	Date of Establishment	Avenue for Attaining Legal Status
National Democratic Party (ruling party)	1976	Presidential decree
Tagemmu'	1976	Presidential Decree
Liberal Party (Ahrar)	1976	Presidential Decree
Socialist Labor Party	1977	Approved by Political Parties Committee
Wafd	1978	Administrative Court Ruling
'Umma	1983	Administrative Court Ruling
Green Party	1990	Administrative Court Ruling
Misr al-Fatah Party	1990	Administrative Court Ruling
Union Democratic Party	1990	Administrative Court Ruling
Nasserist Party	1992	Supreme Constitutional Court Ruling
Populist Democratic Party	1992	Administrative Court Ruling
Egypt Arab Socialist Party	1992	Administrative Court Ruling
Social Justice Party	1993	Administrative Court Ruling
al-Takaful	1995	Administrative Court Ruling

administrative courts allowed opposition activists to successfully challenge decisions of the regime-dominated Political Parties Committee and to gain formal opposition party status. By 1995, 10 of Egypt's 13 opposition parties owed their very existence to court rulings (see table 1).¹⁷

Even after the regime initiated a campaign of political retrenchment designed to consolidate the government's political control during implementation of the new economic liberalization program throughout most of the 1990s, the Supreme Constitutional Court remained one of the only formal sites of meaningful political resistance.¹⁸ Opposition activists continued to

People's Assembly in future elections. Finally, SCC rulings and the resulting electoral reforms also forced the regime to shift its method of maintaining political control from one of *pseudo-legality*, where the regime depended on skewed electoral rules and a corporatist system to dominate the political field, to a method of political control that would become far more *extralegal* in orientation—depending much more heavily upon physical coercion, intimidation, and electoral fraud.

17. Ironically, the regime facilitated administrative court activism by restoring much of their independence through judicial reforms in 1984 in an effort to address its own crisis of internal discipline (Rosberg 1995). When it became clear that centralized monitoring strategies were failing to produce reliable information on the activities of the state's own institutions, the regime enhanced the independence and capacity of administrative courts to serve as a neutral forum for citizens to voice their grievances and to expose corruption in the state bureaucracy. Rosberg's work on Egypt's administrative courts points, once again, to the double bind that authoritarian states face vis-à-vis judiciaries. Independent courts can act as efficient institutions for centralized regimes to monitor and punish state agencies violating regime-proscribed mandates, but simultaneously, these judicial institutions can also sometimes be used to challenge the regime itself.

18. For an excellent account of political retrenchment through the 1990s and its relationship to the structural adjustment program, see Kienle 2000.

score victories in the Supreme Constitutional Court throughout the decade, most notably in the area of press liberties.¹⁹ In February 1993, the SCC struck down a provision in the code of criminal procedures that required defendants in libel cases to present proof validating their published statements within a five-day period of notification by the prosecutor.²⁰ Following on the heels of this legal victory, the Labor Party successfully challenged a provision of law 40/1977 concerning the opposition press and vicarious criminal liability in front of the Supreme Constitutional Court.²¹ The court initially took a cautious approach in its 1995 decision by limiting the ruling of unconstitutionality to the heads of political parties. However, just two years later, the SCC extended its ruling to ban the application of vicarious criminal liability to libel cases involving the editors-in-chief of newspapers.²²

With each ruling, it became more apparent to opposition activists that constitutional litigation was the most promising avenue to challenge National Democratic Party (NDP) legislation and to induce further political reform. By opening the political arena and empowering opposition activists, the SCC cultivated a support structure that began to vigorously support judicial independence. This pattern of SCC–civil society synergy was simultaneously under way with two other groups engaging the court: legal professional associations and the human rights movement.

Legal Professional Associations

The Lawyers' Syndicate, the Judges' Association, and the legal profession in general have a long history of political activism in Egypt characterized by a deep commitment to liberal political institutions and the strengthening of the rule of law (Reid 1981; Ziadeh 1968; Baker 1990).

19. The SCC also issued a number of rulings protecting other important civil liberties throughout this period, but due to space constraints I will discuss only those pertaining to press liberties. For an expanded summary of Supreme Constitutional Court activity during this period, see Moustafa (2002, 134–256).

20. SCC, 6 Feb. 1993, *al-Mahkama*, vol. 5, pt. 2, 183. For a useful analysis of vicarious criminal liability in the Egyptian legal system, see Sherif (1999).

21. SCC, 3 July 1995, *al-Mahkama*, vol. 7, 45. Labor Party chairman Ibrahim Shukri and editor-in-chief of the Labor Party newspaper Adel Hussein filed the petition for constitutional review during the proceedings of their criminal trial in March of 1994. Shukri and Hussein were standing trial under allegations of libel against a public official for accusations that were published in the Labor Party newspaper, *al-Sha'ab*. The SCC ruling argued that law 40 violated articles 41, 67, 69, and 165 of the constitution, which collectively guarantee the presumption of innocence, the right of legal defense, and the right of the courts alone to adjudicate guilt and innocence. This was also one of the first cases in which the SCC explicitly invoked international human rights frameworks and treaties to lend legal and moral weight to its rulings. The SCC ruled that law 40 contradicted articles 10 and 11 of the Universal Declaration of Human Rights and the principles of justice "shared by all civilized nations." For more on the "internationalization" of SCC legal doctrine, see Boyle and Sherif (1997) and Moustafa (2002, 204–9).

22. SCC, 1 Feb. 1997, *al-Mahkama*, vol. 8, 286.

After Nasser's sweeping nationalization program in the late 1950s and 1960s, however, private sector activity came to a near standstill. Lawyers were left to work on civil or criminal cases that generated only a fraction of the revenue of commercial cases, and commercial lawyers were folded into the state's burgeoning public sector. As a result, the legal profession fell from being perhaps the most attractive, lucrative, and respected professional career path in prerevolutionary Egypt to one of the least desirable.

The return to a free market economy and the increasing need for legal services strengthened segments of the legal profession that were best positioned to take advantage of the regime's economic reform program. Moreover, the Supreme Constitutional Court actively facilitated the rebirth of the Lawyers' Syndicate when it ruled law 125/1981, terminating the elected council of the Lawyers' Syndicate, unconstitutional.²³ Throughout the 1980s the syndicate was at the forefront of calls for political and judicial reform. The journal of the Lawyer's Syndicate, *al-Mohamaa* (Advocacy), became an important forum for intellectuals and activists in the legal profession for publicizing their calls for further judicial and political reforms. Numerous conferences were also held under the auspices of the Lawyers' Syndicate, drawing intellectuals, academics, and opposition activists to discuss the important issues of the day including avenues for political reform. Moreover, the syndicate began to provide free legal representation to the poor as a way to lodge cases against the regime. Similarly, the Judges' Association continued to play an assertive role throughout the 1980s. In its 1986 National Justice Conference, the Judges' Association issued a formal call for a comprehensive reform of Egyptian judicial and political institutions. *al-Qada'*, the official publication of the Judges' Association, became an important forum for judges and academics alike for addressing issues concerning the administration of the courts as well as the rule of law and political reform in general. Administrative court judges sounded out their own proposals for reform in their publication, *magalat maglis al-dawla*.

Human Rights Groups

Perhaps the most promising judicial support structure to emerge was a new breed of human rights organization that went beyond simply documenting human rights abuses to confronting the government in the court room. The most aggressive group engaged in public interest litigation was the Center for Human Rights Legal Aid (CHRLA), established by the young and

23. SCC, 11 June 1983, *al-Mahkama*, vol. 2, 127. Although Mubarak's regime had already lifted the sequestration order by the time the SCC issued the ruling, the decision is still viewed as an important precedent concerning the freedom of association and the independence of the judiciary.

forceful human rights activist, Hisham Mubarak, in 1994. CHRLA quickly became the most dynamic human rights organization, initiating 500 cases in its first full year of operation, 1,323 cases in 1996, and 1,616 by 1997. CHRLA documented human rights abuses and used the cases that it sponsored to publicize the human rights situation. As with every other human rights group in Egypt, CHRLA depended almost completely on foreign funding, but throughout the mid-1990s foreign funding sources proved plentiful, and CHRLA quickly expanded its operations, opening two regional offices in Alexandria and Aswan.

In hopes of emulating the model provided by CHRLA, human rights activists launched additional legal aid organizations with different missions. The Center for Women's Legal Aid was established in 1995 to provide free legal aid to women dealing with a range of issues including divorce, child custody, and various forms of discrimination.²⁴ The Land Center for Human Rights joined the ranks of legal aid organizations in 1996 and dedicated its energies to providing free legal aid to peasants.²⁵ The Human Rights Center for the Assistance of Prisoners (HRCAP) similarly provided legal aid to prisoners and their families by investigating allegations of torture, monitoring prison conditions, and using litigation to fight the phenomenon of recurrent detention and torture.²⁶ Opposition parties began to offer free legal aid as well, with the Wafd Party's Committee for Legal Aid providing free representation in more than 400 cases per year beginning in 1997.²⁷ Similarly, the Lawyers' Syndicate was active in providing legal aid, and it greatly expanded its legal aid department until the regime froze its functions in 1996 (see table 2).

By 1997, legal mobilization had unquestionably become the dominant strategy for human rights defenders not only because of the opportunities that public interest litigation began to afford but also because of the myriad obstacles to mobilizing a broad social movement under the Egyptian regime. Gasser 'Abdel Raziq, director of the Center for Human Rights Legal Aid firmly contended that "in Egypt, where you have a relatively independent

24. The center initiated 71 cases in its first year, 142 in 1996, and 146 in 1997 in addition to providing legal advice to 1,400 women in its first three years of activity.

25. With the land reform law 96 of 1992 coming into full effect in October 1997, hundreds of thousands of peasants faced potential eviction in the late 1990s, and lawsuits between landlords and tenants began to enter into the courts by the thousands. Between 1996 and 2000 the Land Center for Human Rights represented peasants in more than 4,000 cases and provided legal advice to thousands more (Mahmoud Gabr, director of Legal Unit, Land Center for Human Rights, interview by author, 18 November 2000, Cairo).

26. In each of its first five years of operation, the Human Rights Center for the Assistance of Prisoners launched more than 200 court cases and gave free assistance (legal and otherwise) to 7,000–8,000 victims per year (author letter to Mohamed Zarei, director of the Human Rights Center for the Assistance of Prisoners, 24 January 2002).

27. Mohamed Goma', vice-chairman of the Wafd Committee for Legal Aid, interview by author, 17 February 2001, Cairo.

TABLE 2
Leading Human Rights Organizations by Year of Establishment

1985	Egyptian Organization for Human Rights
1988	Ibn Khaldoun Center
1992	Legal Research and Resource Center for Human Rights
1993	Nadim Center for the Management and Rehabilitation of Victims of Violence ^a
1994	Cairo Institute for Human Rights Studies
1994	Center for Human Rights Legal Aid ^a
1995	Center for Women's Legal Aid ^a
1996	Group for Democratic Development
1996	Land Center for Human Rights ^a
1997	Human Rights Center for the Assistance of Prisoners ^a
1997	Arab Center for the Independence of the Judiciary and the Legal Profession
1999	Hisham Mubarak Center for Legal Aid ^a
1999	Association for Human Rights Legal Aid ^a

^aHuman rights organizations engaged in public interest litigation.

judiciary, the only way to promote reform is to have legal battles all the time. It's the only way that we can act as a force for change."²⁸ A strong and independent judiciary was so central to the strategy of the human rights movement that activists institutionalized their support for judicial independence by founding the Arab Center for the Independence of the Judiciary and the Legal Profession (ACIJLP). The ACIJLP set to work organizing conferences and workshops that brought together legal scholars, opposition party members, human rights activists, important figures from the Lawyers' Syndicate and Judges' Association, and even justices from the Supreme Constitutional Court itself. The ACIJLP also began to issue annual reports on the state of the judiciary and legal profession, extensively documenting government harassment of lawyers and exposing the regime's interference in the normal functions of judicial institutions. Like other human rights groups, the ACIJLP established ties with international human rights organizations, including the Lawyers' Committee for Human Rights, in order to leverage international pressure on the Egyptian government.

Human rights activists engaged in public interest litigation also began to understand that *constitutional* litigation in the Supreme Constitutional Court was potentially the most effective avenue to challenge the regime. CHRLA's executive-director, Gasser 'Abdel Raziq recalled that:

[W]e were encouraged by [Chief Justice] 'Awad al-Morr's human rights language in both his formal rulings and in public statements. This encouraged us to have a dialogue with the Supreme Constitutional Court.

28. Gasser 'Abdel Raziq, director of the Hisham Mubarak Legal Aid Center (formerly the Center for Human Rights Legal Aid), interview by author, 16 April 2000, Cairo.

CHRLA woke up to the idea that litigation in the SCC could allow us to actually change the laws and not just achieve justice in the immediate case at hand. (Interview)

The change in legal tactics paid off handsomely when CHRLA successfully challenged article 195 of the penal code in cooperation with Egypt's main opposition parties.²⁹ Pleased with their swift success, CHRLA attorneys initiated a campaign to systematically challenge repressive legislation in the SCC starting in late 1997. Their first target was law 35 of 1976, governing trade union elections. CHRLA initiated 50 cases in the administrative and civil courts, all with petitions to challenge the constitutionality of law 35/1976 in the Supreme Constitutional Court. Ten of the 50 cases were successfully transferred and within months the SCC issued its first verdict of unconstitutionality against article 36 of the law.³⁰ CHRLA also successfully advanced three cases to the SCC challenging sections of the penal code concerning newspaper publication offenses and three additional cases dealing with the social insurance law.³¹ The rulings of unconstitutionality and the additional 14 pending decisions in a three-year period represented a tremendous achievement given the slow speed of litigation in Egyptian courts and the relatively meager resources at the disposal of the human rights movement. Until this campaign, activists, opposition parties, and individuals initiated cases in an ad hoc fashion, but CHRLA's successful strategy of coordinated constitutional litigation prompted the rest of the human rights community to initiate similar litigation campaigns directed towards the SCC.³²

This brief review of opposition and human rights activism illustrates how the new Supreme Constitutional Court provided institutional openings for political activists to challenge the state in ways that fundamentally transformed patterns of interaction between the state and society. For the first time since the 1952 military coup, political activists could credibly challenge the regime by simply initiating constitutional litigation, a process that required few financial resources and allowed activists to circumvent the highly restrictive, corporatist political framework. Most important, constitutional litigation enabled activists to challenge the regime without having to initi-

29. SCC, 1 February 1997, *al-Mahkama*, vol. 8, 286. CHRLA filed appeals with the SCC in five additional cases it had been representing for journalists prosecuted under article 195.

30. SCC, *al-Mahkama*, vol. 8, 1165.

31. CHRLA was further encouraged by activist judges in the regular judiciary who publicly encouraged groups in civil society to challenge the constitutionality of regime legislation. Some activist judges went so far as to publicize their opinion of laws in opposition newspapers and vowed that if particular laws were challenged in their court, they would transfer the relevant constitutional question to the SCC without delay.

32. Several other human rights groups, such as the Land Center for Human Rights, successfully transferred cases to the SCC for consideration but the court had still not issued rulings at the time this research was conducted (Moustafa 2002, 182–83).

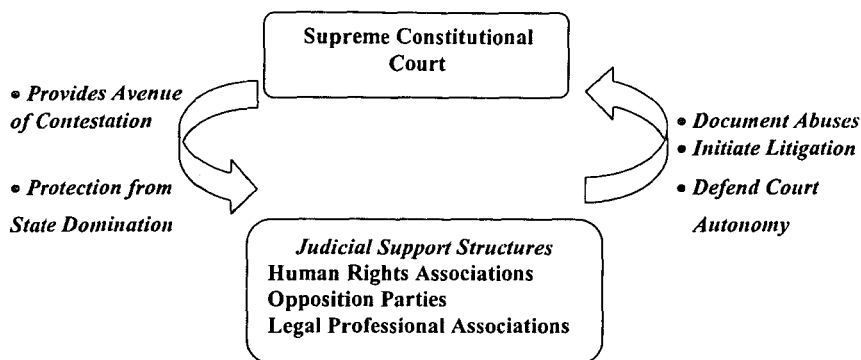


FIGURE 2. Supreme Constitutional Court—Judicial Support Structure Synergy.

ate a broad social movement, a task that is all but impossible in Egypt's highly restrictive political environment.³³ Through its rulings, the SCC facilitated the reemergence of opposition parties, human rights groups, and legal professional associations. Moreover, the SCC continued to shield opposition parties and human rights groups when under attack by the state, essentially becoming their main guardian (see fig. 2).³⁴

By cultivating support structures, the SCC facilitated the emergence of groups with the ability to monitor and document human and civil rights violations. Moreover, the SCC made itself the focal point of reform efforts, thus attracting constitutional petitions that enabled the court to expand its exercise of judicial review. Finally, in return for providing protection and access to political participation, the SCC forged a vocal support structure that would defend SCC independence if its mandate were threatened by the regime. Opposition parties, human rights groups, and legal professional associations vigorously supported SCC independence because it was the most promising vehicle for the reform of electoral laws, because the court

33. The ability to circumvent collective action problems is one of the most significant benefits of legal mobilization even in consolidated democracies where civil liberties are relatively secure (Zemans 1983), but the possibility of initiating litigation in lieu of a broad social movement is even more crucial for opposition activists in authoritarian systems where the state forcefully interferes with political organizing.

34. This suggests that in authoritarian settings, rights revolutions are not likely to emerge merely as the result of robust "support structures" that bring litigation to the courts, as recently proposed by Charles Epp (1998) in his comparative study of rights litigation in four democracies. Rather, in authoritarian settings, rights revolutions are likely to emerge only if judicial institutions are able to play the crucial role of facilitating the emergence and continued viability of those support structures. I therefore broaden Epp's definition of support structure in this study to include, *institutions and associations, both domestic and transnational, that facilitate the expansion of judicial powers by actively bringing litigation to the courts and/or supporting the independence of judicial institutions if they come under attack.*

actively defended them from government interference, and because it was one of the few avenues available to challenge government legislation. A tacit partnership was built on the common interest of both defending and expanding the mandate of the SCC. This symbiotic relationship between the Supreme Constitutional Court and those groups that raised litigation is crucial for understanding the continued expansion of constitutional power after the SCC began operations in the early 1980s.

THE LIMITS OF SCC ACTIVISM—STATE SECURITY COURTS AND “INSULATED LIBERALISM”

Although the Supreme Constitutional Court took startlingly bold stands on most political issues, there were important limits to SCC activism. These limitations, I contend, are critically important to understanding why the regime did not act more forcefully to suppress the SCC sooner. At odds with its strong record of rights activism, the SCC ruled Egypt's Emergency State Security Courts constitutional and it has conspicuously delayed issuing a ruling on the constitutionality of civilian transfers to military courts. Given that Egypt has remained in a perpetual state of emergency for all but six months since 1967, the Emergency State Security Courts and, more recently, the military courts, have effectively formed a parallel legal system with fewer procedural safeguards, serving as the ultimate regime check on challenges to its power.³⁵

By 1983, dozens of cases had already been transferred to the Supreme Constitutional Court contesting a legal provision denying defendants the right to appeal rulings of Emergency State Security Courts in the regular judiciary. Plaintiffs contended that the provision violated the right of due process and the competency of the administrative courts, as defined in articles 68 and 172 of the constitution.³⁶ But the following year the Supreme Constitutional Court ruled the security courts constitutional.³⁷ The SCC reasoned that since article 171 of the constitution provided for the establishment of the State Security Courts, they must be considered a legitimate and

35. For more on the structure, composition, and procedures of the Emergency State Security Courts and the Military Courts see Brown (1997), Ubayd (1991), and the Center for Human Rights Legal Aid (1995).

36. Article 68 reads “The right to litigation is inalienable for all. Every citizen has the right to refer to his competent judge. The state shall guarantee the accessibility of the judicial organs to litigants, and the rapidity of rendering decisions on cases. Any provision in the law stipulating the immunity of any act or administrative decision from the control of the judiciary shall be prohibited.” Article 172 of the constitution reads that “[t]he State Council shall be an independent judicial organ competent to take decisions in administrative disputes and disciplinary cases. The law shall determine its other competences.”

37. SCC, 16 June 1984, *al-Mahkama*, vol. 3, 80.

regular component of the judicial authority.³⁸ Based upon this reasoning, the SCC rejected the plaintiff's claim concerning article 68 protections guaranteeing the right to litigation and the right of every citizen to refer to his competent judge. The SCC also reasoned that the provision of law 50/1982, giving the State Security Courts the sole competency to adjudicate their own appeals and complaints, was not in conflict with article 172 of the constitution. Finally, the SCC contended that the procedures governing State Security Court cases were in conformity with the due process standards available in other Egyptian judicial bodies, such as the right of suspects to be informed of the reasons for their detention and their right to legal representation.

Although this ruling was based on legal reasoning that many constitutional scholars and human rights activists found questionable at best, the Supreme Constitutional Court never looked back and refused to revisit the question of State Security Court competency. Six months after this landmark decision, the SCC summarily dismissed 41 additional cases contesting the jurisdiction of the State Security Courts.³⁹ The SCC dismissed another 30 cases petitioning the same provision over the course of the following year.⁴⁰ The flood of cases contesting the competency of the State Security Courts in such a short period of time reveals the extent to which the regime depends upon this parallel legal track as a tool to sideline political opponents. The large volume of cases transferred to the SCC from the administrative courts also underlines the determination of administrative court judges to assert their institutional interests and to fend off encroachment from the State Security Courts. Finally, the Supreme Constitutional Court's reluctance to strike down provisions denying citizens the right of appeal to regular judicial institutions, despite the dozens of opportunities to do so, illustrates the SCC's reluctance to challenge the core interests of the regime.

In the 1990s, the SCC faced a similar dilemma with even more profound implications when it received petitions requesting judicial review of the regime's increasing use of military courts to try civilians. Despite the extensive controls that the president holds over the Emergency State Security Courts, there were isolated cases in which the emergency courts handed down rulings that were quite embarrassing for the regime in the late 1980s and early 1990s.⁴¹ These occasional inconveniences in the Emergency State

38. Article 171 of the constitution reads, "the law shall regulate the organization of the State Security Courts and shall prescribe their competences and the conditions to be fulfilled by those who occupy the office of judge in them."

39. See *al-Mahkama*, vol. 3, 90–95.

40. See *al-Mahkama*, vol. 3, 108–13, 152–57, 189–94.

41. For example, in 1990 an emergency court acquitted Sheikh Omar Abdel Rahman and 48 of his followers when it was revealed in court that confessions were extracted through torture. The government was able to overturn the verdict on "procedural grounds" and retry the defendants, but only after an uncomfortable exposition of the regime's disregard for human

Security Courts prompted the regime to begin using the military courts (*ma-hakim al-askariyya*) to try terrorism cases throughout the 1990s.⁴² Military courts provided an airtight venue in which the regime could try its opponents: All judges are military officers appointed directly by the minister of defense and the president for two-year renewable terms, and there are almost no procedural safeguards, with trials held in secret and no right to appeal.

The first cases transferred to the military courts concerned defendants accused in specific acts of terrorism. However, within just a few years the regime began to try civilians for mere affiliation with moderate Islamist groups such as the Muslim Brotherhood.⁴³ The regime's use of military courts to try civilians was hotly contested and opponents of the regime attempted to wage a legal battle over the procedure in the early 1990s. Both liberal reformers and Islamist activists argued that, at best, military law 25/1966 gave the president the authority to transfer whole categories of crimes to the military judiciary, but it did not permit the president to handpick individual cases for transfer (Brown 1997, 115). A ruling from a lower administrative court on 10 December 1992 supported these critics' contentions.

In response, the regime launched its own legal offensive. First, state attorneys appealed the lower administrative court decision to the Supreme Administrative Court. On 23 May 1993, the Supreme Administrative Court issued an authoritative ruling overturning the lower court and affirming the right of the president to transfer any crime to the military courts during the state of emergency. The Supreme Administrative Court based its decision on articles 73 and 74 of the constitution and an earlier ruling by the executive-dominated supreme court, which had operated from 1969 to 1979.⁴⁴ Next, the regime attempted to establish an air of legal legitimacy around the transfer of cases to the military judiciary by requesting the Supreme Constitu-

rights. In another trial of 24 Islamists charged with assassinating parliamentary speaker Rifa'at al-Mahgoub in the early 1990s, the panel of judges again dismissed the case when they found that confessions were extracted through torture. Judge Wahid Mahmoud Ibrahim did not spare any details, announcing that medical reports proved the defendants had been severely beaten, hung upside down, and subjected to electric shocks to their genitals. Additional acquittals based upon allegations of torture are provided in Brown (1997, 98–99).

42. The first such case was transferred to a military court by Mubarak by presidential decree 375/1992. From December 1992 through April 1995 alone a total of 483 civilians were transferred to military courts for trial. Sixty-four were sentenced to death. According to the 1998 Arab Center for the Independence of the Judiciary and the Legal Profession annual report, civilian transfers to military courts reached as high as 317 in 1997 alone.

43. Presidential decree 297/1995 transferred the cases of 49 members of the Muslim Brotherhood from Lawsuit 8 Military No. 136/1995 in the Higher State Security Court to the military judiciary (Center for Human Rights Legal Aid 1995). In 1996 the government again transferred 12 members of the emerging Wasat Party to the Military Court.

44. Article 74 of the constitution reads, "If any danger threatens the national unity or the safety of the motherland, or obstructs the constitutional role of the State institutions, the President of the Republic shall take urgent measures to face this danger, direct a statement to the people, and conduct a referendum on those measures within sixty days of their adoption."

tional Court to exercise its power of legislative interpretation and give a definitive reading of law 25/1966.⁴⁵ The SCC obliged, and in January of 1993 it confirmed the broadest interpretation of the law.⁴⁶

Unsuccessful in the administrative courts, opposition activists attempted to challenge the constitutionality of military law 25/1966 in the Supreme Constitutional Court. The defense panel for a Muslim Brotherhood case being tried before a military court requested the right to challenge the constitutionality of the military law before an administrative court and on 7 November 1995 their request was granted.⁴⁷ The petition of unconstitutionality was filed with the Supreme Constitutional Court within a month, but as of the writing of this study, the SCC had not issued its ruling. Given the extreme political sensitivity of the case, the SCC will probably never rule against these core interests of the regime. Moreover, since the earlier supreme court issued a ruling affirming the constitutionality of law 25/1966, the SCC is bound to respect its judgment unless it can find a creative way to circumvent the reasoning of the supreme court.

The Supreme Administrative Court ruling, the SCC interpretation of law 25/1966, and the failure of the SCC to produce a timely ruling on the constitutionality of civilian trials in military courts clearly illustrate the limits of political reform through judicial channels. Administrative court judges typically defend civil liberties and human rights whenever they can, but they are ultimately constrained by the web of illiberal legislation issued by the regime. As a civil law institution charged with administering the law and not practicing *stare decisis*, the administrative courts have limited room for maneuver. Given these constraints, it is quite impressive how far they have been able to check state institutions. The SCC, on the other hand, is not bound by illiberal legislation (though some articles of the constitution itself can be considered illiberal), but SCC justices must nonetheless look after their long-term interests vis-à-vis the regime and pick their battles appropriately.⁴⁸ Although the Supreme Constitutional Court had ample opportunities to strike down the provisions denying citizens the right of appeal to regular judicial institutions, the SCC almost certainly exercised constraint because impeding the function of the exceptional courts would likely have resulted in a futile confrontation with the regime.

45. Article 6/2 of the Law on the Military Judiciary 25/1966, states that "during a state of emergency, the President of the Republic has the right to refer to the military judiciary any crime which is punishable under the Penal Code or under any other law."

46. Some mistakenly understood this ruling to be the SCC's confirmation of the constitutionality of the law, but interpretation of legislation is another function of the SCC completely independent of judicial review.

47. The constitutional challenge was raised by Selim al-'Awa, a prominent Islamist lawyer, and Atef al-Banna, a Wafd party activist and professor at Cairo University.

48. Former chief justice Awad al-Morr described the Egyptian political system as a "red-line system," where there are implicit understandings between the regime and the opposition over how far political activism will be tolerated. Awad al-Morr, interview by author, 11 June 2000, Cairo.

Moreover, even outside of the military courts, the regime effectively detains its political opponents for long periods of time through a procedure known as "recurrent detention." Under article 3 of the emergency law, prosecutors can detain any citizen for up to 30 days without charges. Once a subject of administrative detention is released within the required 30-day period, he is sometimes simply transferred to another prison or holding facility and then registered once again for another 30-day period, essentially allowing state security forces to lock up anyone it wishes for months or even years at a time. Human rights organizations first brought the phenomenon of recurrent detention to light through extensive documentation in the 1990s. The Egyptian Organization for Human Rights (EOHR) noted that the problem became particularly prevalent after 1992, when the regime began to wage a protracted campaign against militant Islamists.⁴⁹ Between 1991 and 1996 the EOHR documented 7,891 cases of recurrent detention and the number of actual cases is almost certainly much higher (EOHR 1996). Ninety percent of EOHR investigations revealed that detained subjects suffered from torture and most were denied the right to legal representation or family visits.

Article 3 of the emergency law permits the president of the republic, or anyone representing him, to "detain persons posing a threat to security and public order." However, the emergency law does not define the terms *threat*, *security*, and *public order*, leaving it to prosecutors to apply the provision with its broadest possible interpretation. Administrative courts issued a number of rulings attempting to define and limit the application of article 3, but their rulings were ignored.⁵⁰

Ironically, the regime's ability to transfer select cases to exceptional courts and even to detain political opponents indefinitely through the practice of recurrent detention unquestionably facilitated the emergence of judicial power in the regular judiciary. The Supreme Constitutional Court and the administrative courts were able to push a progressive agenda and maintain their institutional autonomy from the executive largely because the regime was confident that it ultimately retained full control over its political opponents.⁵¹ Supreme Constitutional Court activism may therefore be characterized as "insulated liberalism." To be sure, SCC rulings had a deep impact upon state policy, but the SCC was ultimately bounded by a profoundly illiberal political system.

49. The problem of recurrent detention was further aggravated by the "anti-terrorism" law 97/1992, which expanded the authority of the public prosecutor's office and weakened the oversight of the administrative courts.

50. For examples of administrative court rulings concerning administrative detention and recurrent detention, see EOHR (1996, 41–45).

51. Brown makes this excellent observation: "Having successfully maintained channels of moving outside the normal judiciary, the regime has insured that the reemergence of liberal legality need not affect the most sensitive political cases. . . . The harshness of the military courts, in this sense, has made possible the independence of the rest of the judiciary" (1997, 116).

SCC RULINGS IN THE ECONOMIC SPHERE—DELEGATION BY AUTHORITARIAN INSTITUTIONS

A common reason for the judicialization of politics in democratic settings is "delegation by majoritarian institutions," wherein democratically elected leaders delegate decision-making authority to judicial institutions in order to avoid divisive and politically costly issues (Shapiro 1995; Tate 1995). Classic examples from U.S. politics include abortion rights, the Dred-Scott decision, and the *Brown v. Board of Education* decision, where the courts not only found themselves in the role of deciding on the unconstitutionality of segregation, but also judges ended up having to implement the ruling through hundreds of lower court decisions, essentially setting policy that many would see as the role of legislative and administrative bodies.⁵²

Although the dominant assumption in the literature is that authoritarian rulers do not have to deal with such considerations since they are unaccountable to the public through free and fair elections, they are still vulnerable to public pressures and they similarly circumvent issues identified as too politically costly, even when such avoidance comes at great expense to the economy or the long-term viability of the regime. Just as in democratic systems, rulings from independent courts enable political leaders to claim that they are simply respecting an autonomous rule-of-law system rather than implementing sensitive reforms through more overt political channels. In the process, judicial institutions assume a more prominent role in political life by taking the initiative in policy areas where the government is simply not willing to enter.

In Egypt, some of the most contentious political issues concern state economic policy. The structural adjustment program, initiated in 1991, has been bitterly resisted by disadvantaged socioeconomic groups and those ideologically committed to Nasser-era institutions of economic redistribution. The Supreme Constitutional Court played a prominent role in overturning Nasser-era economic laws, thereby assisting the regime to implement its new structural adjustment program at a reduced political cost.⁵³ I draw the following examples from SCC-driven reforms of Egyptian rent control laws, although the SCC played a similar role in the arbitrating and implementing reforms in the areas of privatization and labor law reform.

Since independence, one of the most pressing economic problems in Egypt has been a chronic housing shortage. At first glance, it appears that the housing crisis is the direct result of the population explosion and chronic

52. This factor in the judicialization of politics is of a more temporary nature. Shapiro (1995) suggests that judicial power may expand and contract depending on the issue at hand and the inclination of the other bodies of governance.

53. In this way, the Supreme Constitutional Court has shaped Egypt's economic development, just as the American Supreme Court shaped the course of economic development in the United States through similar, less conspicuous methods, over the past century (Horowitz 1977, Hattam 1997, Westin 1953).

poverty that is typical of a country at Egypt's level of development. With an annual population growth rate of 2.2%–3% for several decades, Egypt has approximately one million new citizens to house every *eight* months (Arab Republic of Egypt, Central Agency for Public Mobilization and Statistics 1960–98). When combined with rural to urban migration, urban centers like Cairo have experienced a staggering annual population growth rate of nearly 4% per year for several decades. On closer examination, however, it is apparent that Egypt's housing crisis is as much the result of socialist-era rent control laws as it is the result of poverty and demographic dynamics.

In an effort to control the skyrocketing cost of housing and win political support among the urban poor, Nasser repeatedly extended rent control laws. Landlord-tenant provisions made it nearly impossible for owners to expel their tenants. Moreover, these rent control laws provided that rental contracts would live on even *after* the death of the original tenant. Spouses, children, and other relatives to the third degree of relation had the right to continue the rental contract at the *same rate* on the single condition that they had resided with the original tenant for one year prior to his or her death. Similar provisions in the rent control laws extended the same privileges to tenants using rental units for commercial or professional purposes. This included hundreds of thousands of rental contracts for small grocery markets, doctors' offices, lawyers' offices, and the like. After decades of double-digit inflation, tenants were still only obliged to pay the amount that was determined at the time that rent control went into effect—a sum typically as low as three dollars per month for a good apartment in central Cairo. High rates of inflation coupled with the right of the tenant to maintain the rental contract indefinitely (and even pass it on to relatives after death) resulted, essentially, in the complete transfer of property rights from building owners to their tenants.

Although the socialist-era rent control laws were intended to provide housing relief for Egypt's urban masses, the actual effect of the laws was quite the opposite. Rent control created a number of perverse economic incentives that greatly aggravated Egypt's housing crisis. First, the rent control regime resulted in a sharp decrease in private sector investment in the formal housing sector. Once considered among the most lucrative sectors for investment in Egypt, investors shied away from new rental construction projects. Second, under the rent control laws, building owners no longer had the incentive or the financial means to maintain their rental properties. As a result, buildings suffered from premature decay and even collapse. Finally, landlords renting apartments in the formal sector would sign new rental contracts only if they received large, illegal side payments known as "key money" (*khilw rigl*) in advance, because it was the only way to offset the depreciation in the value of rent payments after inflation took its toll.

The only alternative to renting was to purchase a new unit outright, but this required a tremendous sum of money that had to be paid in advance. With a poorly functioning banking system and a legal system that was and

still is unable to efficiently and effectively enforce contracts, Egypt has not been able to develop a properly functioning home mortgage system. Even modest housing in the formal sector was (and continues to be) out of reach for most Egyptians. Unable to afford even basic housing in the formal sector, lower-income Egyptians have been forced into a burgeoning informal sector. The informal sector is composed of squatter settlements, which mostly circle major urban centers but also spring up within urban centers themselves. They are unplanned and unregulated, typically with no running water, no waste disposal, or other basic services. It is estimated that between 1973 and 1983, a period of rapid inflation with the initiation of the open-door economic policy, 60%–80% of all new housing construction was in the informal sector (McCall 1988).

The development of informal housing has had a number of negative implications for both residents and the state beyond the obvious deficiencies in infrastructure and planning. Since *ashwa'i* housing operates outside of the formal legal system, residents are unable to use their property as a form of collateral, even for small loans. Moreover, since their properties are not formally recorded in the state's land registry system, their property rights are far less secure; when legal disputes inevitably emerge, residents do not have recourse to the state's court system. For the state, on the other hand, the proliferation of informal housing and the increase of illegal side payments in the formal sector crippled the state's ability to tax property owners and generate development revenue, just as it has in other developing countries (De Soto 1990).

By the 1970s there were clear indications that the rent control regime was generating tremendous economic and social problems, particularly for couples wishing to marry and begin new households. In an attempt to deal with the housing crisis, the government issued a series of minor reforms in 1976, 1977, and 1981 allowing for slightly higher rental rates. However, in the process, the government continued to expand the coverage of the rent control regime to include all new buildings in the formal sector instead of allowing new rental contracts to be priced by market forces. In a move that is typical of the Egyptian government in so many areas, the regime chose to continue with a failed policy for fear that attempts to rationalize the system would lead to political rupture. The risks were very real—full liberalization of rent control laws would have meant a dramatic increase in rental rates, resulting in evictions and major social dislocations. In the meantime, every year that the government postponed reform, Egypt's housing crisis became more severe and the political implications of housing reform became more perilous. Tentative government moves to consider the amendment of rent control laws were met by furious opposition in the popular press.⁵⁴

54. One such initiative came in November 1994, when Housing Minister Salah Hasabal-lah announced that he would submit a draft bill to remove restrictions on rental values of

By the 1990s, the Supreme Constitutional Court began to take on the politically sensitive task of disassembling the rent control regime by itself. Already in its decision on April 29, 1989, the SCC had ruled that rental units used for religious or cultural purposes should not be exempt from paying the small increases in rent provided for in law 136/1981.⁵⁵ In 1992 and 1994, the SCC issued two more rulings invalidating extraordinary rental rights provided to legal professionals at the expense of owners.⁵⁶ A similar ruling invalidating privileged rental provisions for the medical profession followed shortly thereafter.⁵⁷

In 1995 the SCC went beyond tinkering at the edges and began to make much more aggressive rulings. In a decision in March of that year, the SCC ruled that article 29 of law 49/1977 was unconstitutional.⁵⁸ This provision extended rental contracts to relatives by blood or marriage to the third degree, if they had occupied the unit with the original tenant for at least one year prior to the tenant's death. The SCC ruled that the provision extending the rental contract to relations of the third degree by marriage constituted an infringement on the property rights of the landlord. However, the court did not strike down the same provision for blood relatives. A number of legal scholars and leftists immediately criticized the SCC for functioning more like a legislative body than a judicial organ. How, leftists asked, could the court determine that property rights are infringed if the rental contract is extended to the third degree of relation through marriage but not through blood? Leftists argued that this arbitrary distinction was not a constitutional issue but rather a policy issue that the government was too timid to take on through the People's Assembly.

In early February 1996, the government issued new legislation liberalizing all new leasing contracts. Although this was an important step in the effort to liberalize rent control laws and to alleviate Egypt's housing crisis, the regime still did not dare to liberalize the millions of rental contracts that were binding from the previous several decades. This task was left to the Supreme Constitutional Court.

The next two SCC decisions in the area of owner-tenant relations dealt with commercial tenancy. In July 1996, the court ruled that upon the death of a commercial tenant, business partners did not have the right to continue the rental contract. Instead, they were required to enter into a new contract with the property owner.⁵⁹ Although this was an important ruling, it was

older properties. When this produced a storm of protest in the papers, the government put off introducing the bill. It is likely that Hasaballah's announcement was a way for the regime to test the level of public opposition to housing reform.

55. SCC, 29 April 1989, *al-Mahkama*, vol. 4, 218.

56. SCC, 27 May 1992, *al-Mahkama*, vol. 5, 364; SCC, 3 Dec. 1994, *al-Mahkama*, vol. 6, 386.

57. SCC, 3 July 1995, *al-Mahkama*, vol. 7, 19.

58. SCC, 18 March 1995, *al-Mahkama*, vol. 6, 542.

59. SCC, 6 July 1996, *al-Mahkama*, vol. 8, 39.

only a taste of what was to come the following year in one of the SCC's most important rulings in the economic sphere. On February 22, 1997, the Supreme Constitutional Court struck down a provision of law 49/1977 that froze rental prices at their 1977 level and that, upon the tenant's death, automatically passed rental contracts for commercial properties to his or her family members.⁶⁰ The law essentially allowed commercial tenants to occupy small shops and businesses and to pay the same rent that they paid in 1977, after decades of inflation. The SCC ruled that this was an unacceptable infringement on the property rights of landlords. The impact of the SCC ruling was far-reaching, affecting more than 800,000 commercial tenants by conservative figures and up to several million tenants by other figures.

Fearful that the ruling could result in hundreds of thousands of evictions and massive social and economic dislocation, the government quickly introduced new legislation to regulate landlord-tenant relations for commercial properties. The government passed legislation that would allow for the continuation of rental contracts after the death of the tenant under two conditions: (1) if the inheritor were a first- or second-degree relative of the original tenant; and (2) if the rental unit were to be used for the same kind of commercial activity that the original tenant engaged in. At the same time, the legislation increased rents by various rates depending on when buildings were constructed, in addition to providing for an annual increase in the rental price by up to 10%.

The SCC ruling coupled with the new legislation produced a formula that was extremely satisfying for the regime. The ruling of unconstitutionality allowed the government to modify law 49/1977 without facing direct opposition from millions of tenants. At the same time, the new provisions allowed for the continuation of most rental contracts at higher, but not completely free market rates, which would have entailed massive social and economic disruption. The government was able to capitalize on its moderate position; tenants were not evicted, as they feared, yet landlords were able to collect far more revenue than they had been able to for years. The new legislation allowed prices to reach market equilibrium over time, with 10% increases per year. Moreover, the fact that the new legislation was just as unconstitutional as law 49/1977 meant that the regime would have another opportunity to modify landlord-tenant relations for commercial spaces in the future when landlords would inevitably challenge the constitutionality of the new legislation.⁶¹

The ruling on commercial tenancy in early 1997 was followed by a string of fresh SCC rulings on owner-tenant relations for residential leases

60. SCC, 22 February 1997, *al-Mahkama*, vol. 8, 394.

61. Dozens of legal scholars argued that the new legislation would find its way to the SCC once again since it provided for the continuation of the rental contract after the death of the original tenant, thus failing to address the core reasoning outlined in the SCC ruling.

throughout the year. In August 1997, the SCC ruled that tenants cannot transfer their contract rights to others and that owners have the right to break the lease if another individual replaces the original tenant.⁶² The SCC made concurrent rulings in 10 other cases challenging the same provision of law 49/1977 on the same grounds, indicating that the transfer of contract rights was a common problem. A similar decision came in October 1997, when the SCC ruled article 7 of law 49/1977 unconstitutional, thereby prohibiting tenants from exchanging apartments.⁶³ The following month, the SCC struck down another provision of the same law, which allowed tenants to sublet their apartments under certain circumstances.⁶⁴

In sum, Supreme Constitutional Court rulings on owner-tenant relations over the course of the decade were consistently free market in orientation, enabling the regime to overturn socialist-oriented policies without having to face direct opposition from social groups that were threatened by economic liberalization. Liberal SCC rulings enabled the executive leadership to claim that it was simply respecting an autonomous rule-of-law system rather than implementing politically controversial reforms through more overt political channels. Similar rulings assisted the government to implement politically charged reforms in the areas of labor law and privatization (Moustafa 2002, 156–60).⁶⁵

Attention to these economic rulings reveals that the politics of executive-SCC relations are more complicated than a simple struggle with the regime on one side and the SCC and Egypt's civil society coalition on the other. The government continued to tolerate the SCC throughout much of the 1990s because of the crucial support that the court gave to the regime through its liberal rulings on economic matters. These rulings in the economic sphere gave the SCC more leverage to push a political reform agenda and to provide avenues of participation to progressive social activists.

EXECUTIVE RETRENCHMENT AND AN UNCERTAIN FUTURE, 1998–2000

Despite the ultimate limitations on SCC activism, human rights groups and opposition parties continued to score impressive political victories

62. SCC, 2 August 1997, *al-Mahkama*, vol. 8, 789.

63. SCC, 4 October 1997, *al-Mahkama*, vol. 8, 876.

64. SCC, 15 November 1997, *al-Mahkama*, vol. 8, 949.

65. It should be noted that SCC justices were as politically committed to the success of the economic reform program as they were conscious of the role that they were playing in its implementation. Justice Nossier commented, "The justices have been very interested in changing the economic system in Egypt. Of course we are looking at the legal principles and circumstances in each case but there is an awareness that we have an important role to play in renewing our country and our economy." Abdel Rahman Nossier, interview by author 21 February 2001, Cairo.

through the Supreme Constitutional Court, and the regime was uneasy about the potential for more serious political challenges through the court in the future. Groups active in civil society began to formalize their strategies of constitutional litigation, and by 1998 human rights groups in particular were raising dozens of petitions for constitutional review every year. The regime was increasingly torn between the benefits of SCC rulings in the economic sphere and the boldness of SCC rulings in the area of political rights.

At the same time that the political cost of the independent Supreme Constitutional Court was on the rise, the promising economic growth that Egypt had enjoyed for the first years of the structural adjustment program began to stall, and the government's commitment to the rapid and complete implementation of the structural adjustment program was in question by the late 1990s. The slowing pace of the economic reform program rendered the regime less dependent upon the SCC's proliberalization rulings in the economic sphere.

The combination of the rising political cost of an independent SCC and the declining benefit of its rulings set the stage for a major confrontation between the SCC and its supporters on one side and the regime on the other. The regime began to tighten its grip, and the general trend of political retrenchment underway throughout the 1990s, primarily designed to consolidate the regime's control during implementation of the structural adjustment program, was intensified. Although the regime would ultimately prevail, the SCC and its supporters would not go down without a fight.

The Supreme Constitutional Court under Attack

The first direct challenge to the Supreme Constitutional Court came in late 1997, when Hamed al-Shinawi, a member of the regime's National Democratic Party, submitted a bill to the Complaints and Proposals Committee of the People's Assembly designed to strip the SCC of its powers of judicial review and to make its decisions nonbinding. The bill was transferred to the Shura Council's Constitutional Committee, which is the last stop before debate in the People's Assembly, when a draft was leaked to the press. Opposition newspapers slammed the bill for days and human rights organizations unanimously condemned the draft law. The NDP leadership denied responsibility for the bill and explained that Shinawi had proposed the legislation on his own, without consulting NDP leadership. However, a popular consensus emerged among reformers that the bill, and the press leak itself, were thinly veiled warnings to both the SCC and opposition activists that the powers of the court could be curtailed if it continued to push its reform agenda. But whereas the regime made only veiled threats to the SCC through early 1998, it would soon change course and place concrete constraints on court powers.

The first concrete assault on the SCC came just months after the uproar over Shinawi's bill. In July 1998, Mubarak issued a presidential decree amending the law of the Supreme Constitutional Court, effectively limiting compensation claims in taxation cases to plaintiffs with cases in front of the SCC and denying compensation to all future plaintiffs seeking retroactive compensation for the same unconstitutional legislation.

Past SCC rulings on taxation (not to mention compensation rulings for Nasser-era sequestration and nationalization laws) had drained state coffers of billions of pounds, and pending cases on the SCC's dockets had the potential to make these early rulings pale in comparison. Most significant, 92 petitions on the Supreme Constitutional Court dockets contested a variety of provisions of the sales tax law. Minister of Justice Seif al-Nasr estimated that rulings of unconstitutionality on this law alone could cost the state up to £E 7.7 billion (\$2.3 billion).⁶⁶ The regime was quite bold in stating that its objective was to shield itself from these and future claims.

As with the previous threat to the SCC, the regime faced a storm of protest. Opposition newspapers were filled with editorials insisting that the decree was unconstitutional on both procedural and substantive grounds.⁶⁷ NGOs, such as the new Arab Center for the Independence of the Judiciary and the Legal Profession, also joined the fray, printing extensive critiques in opposition papers.⁶⁸ Prominent members of the legal profession, such as the head of the Cairo branch of the Lawyers' Syndicate, also criticized the decree.⁶⁹ Minister of Justice Seif al-Nasr and other regime supporters attempted to justify the legitimacy and legality of the amendment.⁷⁰ The ensuing debate, which lasted in both the state press and opposition papers for months, indicated that the SCC had become a focal point of contention,

66. *Al-Ahram Weekly*, 10–16 December 1998.

67. The procedural argument for the unconstitutionality of the law was that it was unnecessary for Mubarak to circumvent the People's Assembly and issue an executive decree. The substantive arguments were based on constitutional provisions protecting property rights and protecting access to justice. For example, see by Noman Goma', 'The Legislation Is Contradictory to the Constitution and an Aggression on the Function of the Court', *al-Wafd*, 12 July 1998, and 'Amending the Law of the SCC Is an Aggression on the Rights of Citizens', *al-Ahali*, 15 July 1998; Mohamed Hilal, 'Three Reasons behind the Attack on the Supreme Constitutional Court', *al-Sha'ab*, 4 August 1998; Mohamed Shukri Abdel Fatah, 'Remove Your Hands from the Constitutional Court', *al-Haqiqa*, 8 August 1998.

68. See the extensive report by the Arab Center for the Independence of the Judiciary and the Legal Profession printed in *al-Wafd*, 14 July 1998. Also see the extensive critique provided by the Legal Research and Resource Center for Human Rights, printed in *al-Wafd*, 17 July 1998. The Center for Human Rights Legal Aid issued its own report a few days later in *al-Wafd*, 20 July 1998.

69. See the article by Abdel Aziz Mohamed, 'Treasonous Amendment to the Constitution and to the Law!' in *al-Wafd*, 16 July 1998.

70. Seif al-Nasr, 'Three Reasons behind Amending the Law of the SCC', *al-ahram al-misa'i*, 13 July 1988; Mohamed Morsi [Chair of the Legislative Committee in the People's Assembly], 'I Agree with the Law of the Government to Amend the Law of the Rulings [sic] of the Constitutional Court and Here are My Reasons!' *akhbar al-yom*, 18 July 1998; Mohamed Badran, 'The Decree Is a Step in the Right Direction', *al-Ahram*, 27 July 1997.

simultaneously adjudicating and structuring state-society interaction. Moreover, the debate in the press underlined the extent to which the SCC had altered the rhetoric that both the regime and social actors employed, with both sides building the legitimacy of their positions upon constitutional arguments. Finally, the vigorous responses from opposition parties, the human rights community, and legal professional associations were sure signs that Egypt's political landscape had been transformed significantly from the late 1970s when the Supreme Constitutional Court was established. This new political landscape was no mere coincidence; all the groups that rushed to support the SCC during its successive encounters with the regime had been rehabilitated and empowered largely as a direct result of SCC rulings. The Supreme Constitutional Court had successfully cultivated and courted its own support structures over its first two decades of operation and it was now reaping the benefits.

But to imagine the Supreme Constitutional Court as an institution that is completely dependent upon social actors to repel the regime's threats also underestimates the court's own ability to launch retaliatory rulings against the wishes of the executive. Credible sources indicate that during periods of heightened friction between the SCC and the regime, the court has used informal channels to warn the regime that, if court independence were curtailed, it would immediately issue retaliatory rulings in cases waiting on the SCC dockets. Viewed from this perspective, the court's protracted "deliberations" for more than a decade on highly sensitive political issues (such as the legality of civilian transfers to military courts or full judicial supervision of elections) are not simply the result of unstated understandings among SCC justices on how far it would be prudent to push the regime; the SCC has an interest in keeping highly sensitive political cases available on its dockets, because they can be used as a counterthreat against regime attacks on the court. Although it would be naive to believe that there is an institutional balance of power between the SCC and the regime, so too would it be a misrepresentation to portray the court as a powerless actor unable to provide positive and negative incentives (primarily the provision or denial of legal legitimacy) of its own to the regime.⁷¹

71. Ironically, it is the Supreme Constitutional Court that will ultimately decide the fate of presidential decree 168/1998, modifying the powers of the SCC. Within the first six months of the amendment, 5 separate cases had already arrived at the SCC challenging the constitutionality of the presidential decree, and by February of 2001 the total number of challenges waiting on the SCC dockets had reached 18. With the number of petitions adding up, the SCC faces increasing pressure to issue a ruling on the presidential decree, putting the court in the uncomfortable position of either legitimizing constraints imposed on it or coming into direct conflict with the regime. Moreover, the court's room for maneuver is constrained by its own jurisprudence, developed over the past 20 years, on comparable questions of due process, equal protection, and the right to retroactive compensation for property rights violations. Along with the constitutional challenges of civilian transfers to military

Returning the Favor—the SCC Defends the Human Rights Movement

By 1998, the regime's discomfort with the human rights movement also reached new levels. In just over a decade, the movement had grown to more than a dozen organizations, many of which had established strong links with the international human rights community as well as achieving observer status in a number of international human rights regimes, such as the United Nations Economic and Social Council. The human rights movement was increasingly able to leverage international pressure on the Egyptian regime through these channels. Domestically, human rights organizations had begun to cooperate more closely with opposition parties and professional syndicates, as demonstrated most effectively in their monitoring campaign in the 1995 People's Assembly elections. Moreover, the most dynamic human rights organizations increasingly used the courts as an effective avenue to challenge the regime.

In response, the regime began to turn the screws on the human rights movement as early as 1995 through intimidation, smear campaigns in the state press, and discouraging donor organizations from contributing to local human rights NGOs. Beginning in 1998, after the Egyptian Organization for Human Rights (EOHR) published an extensive report on a particularly shocking episode of sectarian violence in the village of al-Kosheh in August 1998, the regime engaged in a full-fledged campaign to undermine the human rights movement.⁷² Hafez Abu Sa'ada, secretary general of the EOHR, was charged by state security prosecutors with "receiving money from a foreign country in order to damage the national interest, spreading rumors which affect the country's interests, and violating the decree against collecting donations without obtaining permission from the appropriate authorities." Abu Sa'ada was detained for six days of questioning and then released on bail. The trial was postponed indefinitely, but the charges remained on the books. Abu Sa'ada's interrogation was a warning to the human rights community that strong dissent and foreign funding would no longer be tolerated by the regime. In the aftermath of Abou Sa'ada's interrogation, the EOHR acquiesced to government pressure and stopped accepting foreign funding.

The following year, the regime issued a new law governing NGO activity that tightened the already severe constraints imposed by law 32/1964. Law 153/1999 forbade civil associations from engaging in any political activ-

courts, the petitions challenging presidential decree 168 provide the ultimate test of the Supreme Constitutional Court's ability to check executive abuses of power.

72. The EOHR report uncovered not only the details of one of Egypt's worst bouts of sectarian violence, a politically taboo subject in itself, but also that hundreds of citizens were tortured at the hands of state security forces for weeks following the incident.

ity and gave MOSA the right to dissolve any association "threatening national unity or violating public order or morals."⁷³ The new law also struck at the Achilles heel of the human rights movement by further constraining its ability to receive foreign funding without prior government approval. It also prevented nongovernmental organizations from communicating with foreign associations without first informing the government. These new regulations were clear attempts by the regime to place new constraints on human rights groups that were effectively leveraging international pressure on the Egyptian regime through transnational human rights networks. The greatest asset of the human rights movement now became its greatest vulnerability.

The human rights movement mobilized considerable opposition in a short period of time. Within a week, human rights groups organized a press conference where they contended that law 153/1999 violated the constitution and they vowed to fight it in the Supreme Constitutional Court if it was not repealed. At the same time, human rights groups met with the major opposition parties and professional syndicates and secured their support. Days later, a national NGO coalition was convened, bringing together more than 100 associations from across the country. NGOs committed to mobilize domestic and international pressure on the regime through a demonstration in front of the People's Assembly, a week-long hunger strike, and litigation in the courts. International pressure came quickly with statements from Human Rights Watch, Amnesty International, the International Federation of Human Rights, the Lawyers Committee for Human Rights, and the U.S. State Department.

But the regime proved its resolve to rein in human rights NGOs when the state security prosecutor announced in February 2000 that the ongoing case against human rights defender Hafez Abu Sa'ada would be reopened and that he would be tried before the Emergency State Security Court under military decree 4/1992 for accepting money from foreign donors without governmental approval. The charges cast a shadow not only over Abu Sa'ada and his Egyptian Organization for Human Rights, but over the entire human rights movement, which depended almost entirely upon foreign funding.

With the future of the human rights movement looking more and more bleak by the day, a ray of hope emerged in April 2000 when the commissioner's body of the Supreme Constitutional Court issued its preliminary report on a constitutional challenge to the new associations law 153/1999. The case involved an NGO from Tanta by the name of *al-gam'iyya al-shar'iyya*, which was fighting an order by the Ministry of Social Affairs that barred

73. As with other laws restricting political rights, law 153/1999 does not define what constitutes a threat to national unity or a violation of public order, giving the regime maximum leverage to apply the law liberally and to deny activists the ability to seek protection from the law.

several of the NGOs members from running in elections for the group's board of directors. The advisory body of the SCC recommended that law 153 be ruled unconstitutional, and by June 3, 2000, the Supreme Constitutional Court issued its final ruling in the case, striking down the single most important piece of legislation governing associational life in decades.⁷⁴

The bold ruling by the SCC did not simply defend the freedom of association for its own sake; it also saved the most loyal supporters of SCC independence as well as one of the most critical support structures initiating the litigation that fueled the SCC's drive to expand its mandate. Moreover, the ruling came at a critical time for human rights activists and prodemocracy reformers, because national elections for the People's Assembly were just months away. Human rights activists planned to document electoral fraud across the country, which would enable opposition candidates to fight election results in the courts, as they had done following the 1995 elections.

The SCC Forces Full Judicial Monitoring of Elections

In the lead-up to the 2000 elections, the topic of electoral reform emerged once again, and the convergence of interests among opposition parties, nongovernmental organizations, and judicial personnel was never more clear. Khaled Mohieddin, leader of the leftist Tagammu' Party, submitted a bill to the People's Assembly for election reforms on behalf of the main opposition parties. The bill called for elections to be supervised and administered by a "Supreme Election Committee" composed of nine high-ranking judges from the Court of Appeals and Court of Cassation, rather than the Ministry of Interior. The bill also called for a number of procedural changes in the voting process, such as the reform of existing voter lists, safeguards designed to cut electoral fraud, and full judicial supervision of polling stations. Egyptian judges and NGOs backed opposition reform proposals in a number of public venues. In a "Justice Conference" sponsored by the Judges' Association, a resolution was issued with unanimous consent urging the amendment of the law on the exercise of political rights prior to the 2000 People's Assembly elections. The Arab Center for the Independence of the Judiciary and the Legal Profession also held a forum on the topic of judicial supervision for the upcoming elections, bringing together prominent judges and representatives from the various opposition parties and NGOs.

The regime sought to take the wind out of the sails of the opposition-NGO alliance by granting a partial extension of judicial supervision to auxiliary voting stations. Under the new amendment, a single member of the judiciary would supervise six to eight auxiliary polling stations. The new

74. Case 163 judicial year 21, issued 3 June 2000.

arrangement was a meaningless gesture, because there was clearly no way that any judge could simultaneously prevent electoral fraud at that many separate polling stations spread throughout a district.

Dissatisfied with the government response, Sa'ad Eddin Ibrahim and other human rights activists initiated work to build a network of human rights organizations to monitor the 2000 elections, as they had done with great success in 1995.⁷⁵ But the regime proved its determination to derail the effort and to rein in the human rights movement with or without the associations law that the Supreme Constitutional Court had struck down just weeks earlier. On June 30, 2000, Ibrahim was arrested on charges of "accepting funds from a foreign party with the purpose of carrying out work harmful to Egypt's national interest and disseminating provocative propaganda that could cause damage to the public interest."⁷⁶

Just days after Ibrahim and his colleagues were taken into detention, the Supreme Constitutional Court retaliated once again with another bombshell ruling, this time demanding full judicial supervision of elections for the first time in Egyptian history. The SCC ruling stated unequivocally that article 24 of law 73/1956 was unconstitutional because it allowed for public sector employees to supervise polling stations despite the fact that article 88 of the constitution guaranteed that "the ballot shall be conducted under the supervision of members of the judiciary organ."⁷⁷ Once again, what opposition parties were unable to achieve through the People's Assembly over the previous three decades, they were eventually able to bring about through constitutional litigation. The Wafd Party's Ayman Nour commented that the Supreme Constitutional Court had virtually replaced the role of opposition parties in driving the reform agenda when he stated that "this ruling and the previous others will unquestionably affect the future of domestic politics. . . . [T]he judiciary has nearly taken over the role of the political

75. Ibrahim was the driving force behind the civil society election monitoring campaign that in 1995 exposed the methods and the sweeping extent of electoral fraud, both to Egyptians and to the international community, for the first time. This documentation provided the basis for opposition candidates to challenge electoral fraud in the administrative courts, casting a constant shadow on the legitimacy of the People's Assembly for its entire five-year term.

76. The Egyptian human rights community again mobilized international pressure. Within days, nine international human rights organizations including Amnesty International and Human Rights Watch issued a joint statement condemning Ibrahim's detention and calling for his immediate release. Pressure also came from the U.S. embassy once again, when it reportedly raised concerns at "the highest levels" with the Egyptian government. The international pressure proved effective, as Ibrahim was released after two months of detention. As with the detention of Hafiz Abou Sa'ada, however, the charges against Ibrahim were not dismissed. Instead, they were simply suspended, which allowed for the resumption of a trial at any time.

77. The case was raised 10 years earlier by Kamal Khaled and Gamal al-Nisharti, both candidates who ran for seats in the People's Assembly elections of 1990, in coordination with opposition parties, which recognized the full importance of constitutional litigation as an avenue to challenge the regime after the dissolution of the People's Assembly in 1987 and 1990.

parties in forcing the government to take action in the direction of greater democracy.”⁷⁸ The focus of state-society contention quickly turned to implementation of the SCC ruling.

The Limits of SCC Activism: Implementation of the Supreme Constitutional Court Ruling on Judicial Monitoring

Within a week of the Supreme Constitutional Court ruling, Mubarak issued a presidential decree to comply with the SCC ruling requiring full judicial monitoring of all voting stations. Elections were to be held in three successive stages, covering different regions of the country, and auxiliary voting stations would be merged in order to reduce their number. But it soon became clear that the regime was determined to maintain whatever control it could over the electoral process to minimize the impact of the SCC ruling. Rather than give oversight control to the Judges' Association, the Supreme Judicial Council, or an ad hoc committee of judges, oversight remained with the Ministry of the Interior and the Ministry of Justice, both under the direct control of the executive. Interior Minister Habib al-Adli was promptly charged with appointing judges to polling stations, Prosecutor General Abd al-Wahed was appointed to chair a judicial committee within the Ministry of Justice charged with administering judicial supervision, and many of the judicial personnel selected to cover polling stations were drawn from the prosecutor's office (*niyaba*), an institution under the direct control of the executive branch. Moreover, the government announced that judicial personnel participating in election monitoring would receive a £E 6,600 bonus (\$1,700) at the end of the elections, a tremendous sum of money for judges on state salaries. Reformers were immediately concerned that the bonus would be used to encourage “cooperation” with the regime's interests. In addition to subjecting judges and prosecutors to the direct management of the executive authority, it also became clear that the regime would compensate for decreased control *inside* the voting stations by increasing repression *outside* the voting stations. As in previous years, the election cycle brought about the predictable repression of opposition activists in general and the Islamist movement in particular. The emergency law gave the regime the legal cover to launch a new campaign of arrests and detentions of Muslim Brotherhood members.⁷⁹

78. *Al-Ahram Weekly*, 3–9 August 2000.

79. Throughout the summer of 2000, as many as 750 suspected Brotherhood members were arrested and 250 more were detained. By the time of the People's Assembly elections, another 1,600 Islamists had been taken into custody. Not surprisingly, most of those arrested were prospective candidates or campaign organizers for the upcoming elections. Moreover, the regime's repression of dissent went far beyond the arrest and detention of Islamist activists operating outside of the formal political system. The Political Parties Committee had already issued a decision to freeze the activities of the Islamist-oriented Labor Party, including the suspension of the only legal Islamist-oriented newspaper, *al-Sha'ab*. The Labor Party went to

Earning his release from detention in August 2000, Saad Eddin Ibrahim returned to the work of organizing the monitoring campaign for the People's Assembly elections. Although the government had expected that the detention would silence Ibrahim, he promptly returned to the American University in Cairo to deliver a public lecture humorously titled "How I Spent My Summer: Diary of a Prisoner of Conscience." Ibrahim slammed the regime for holding back political reforms and used his public speech to call for volunteers to help in monitoring elections. For the next several weeks, Ibrahim and his colleagues worked feverishly to organize the monitoring campaign. Ibrahim was already compiling initial reports focusing on the obstacles that opposition candidates faced when he was taken back into custody. The prosecutor's office announced that Ibrahim and his 27 colleagues would stand trial in an Emergency State Security Court. Ibrahim was formally charged with "disseminating rumors with the purpose of undermining Egypt's reputation" and accepting unauthorized funding from a foreign source in violation of military decree no. 4 of 1992. Despite a campaign by international human rights groups, a vigorous legal defense, and testimony from some of Egypt's most respected figures, including the vice-president of the World Bank, Ibrahim was found guilty and sentenced to seven years in prison.

Ibrahim's detention, trial, and sentencing sent a chill through the human rights community. As a respected professor with extensive connections in Egypt and abroad and dual Egyptian-U.S. citizenship, Ibrahim's trial proved the regime's determination to prevent the emergence of a civil society coalition resembling the National Commission for Monitoring the 1995 Parliamentary Elections. The majority of human rights activists decided to play it safe and abandon an extensive campaign to monitor the 2000 elections. Moreover, because of the suffocation of the human rights movement through restrictions on foreign funding, human rights groups did not have the resources to mount an adequate monitoring campaign. By the eve of the 2000 elections, the Group for Democratic Development had been dissolved, the entire staff of the Ibn Khaldoun Center was on trial, the Egyptian Organization for Human Rights was forced to close four of its regional offices and reduce its staff in Cairo by 60%, and the remainder of the human rights groups decided not to participate in election monitoring activities for fear of being shut down by the government. Only the Egyptian Organization for Human Rights dared to monitor the elections, but, due to its precarious financial and legal condition, the EOHR staff was only able to monitor less than 20% of constituencies.⁸⁰

an administrative court to contest the decision of the Political Parties Committee and had the ban on the newspaper lifted on September 9.

80. Hafez Abou Sada, secretary-general of EOHR, interview by author, 22 February 2001, Cairo.

Despite the diminished capacity of the human rights movement to monitor electoral fraud, the full judicial supervision brought about by the SCC ruling had a clear impact on the ability of opposition candidates to win. By all accounts, the 2000 People's Assembly elections were finally clean *inside* the polling stations, but the degree of coercion outside polling stations reached unprecedented levels. Perhaps the most surprising outcome in the first two rounds was the strong showing of Muslim Brotherhood candidates. The Brotherhood took 15 seats in the first two rounds, more than any other opposition trend, and this despite the arrest and detention of thousands of Brotherhood activists.⁸¹ Judicial monitoring was also credited as the likely reason why prominent and long-standing NDP figures suffered early losses.

By the end of the second stage, Egyptian human rights groups were already celebrating that "judicial supervision has ended the period of filling ballots with fake names, which was prevalent in previous elections" (EOHR 2000a, 1). At the same time, however, opposition parties and human rights groups highlighted the fact that what the regime could not produce inside the voting stations, it tried to induce outside of the stations.⁸² Arrests of hundreds of Brotherhood members continued throughout the three stages, and state security forces prevented voters from entering polling stations. According to the EOHR, "In the third stage, security blockades were not limited to a few number of polling stations, but were extended to block whole roads leading to polling stations, and sometimes up to 2 to 3 kilometers from the stations" (EOHR 2000b.4). Maamoun el-Hodeibi, the leader of the Muslim Brotherhood, lamented that "elections are not about ballot boxes only. Inside the polling stations nobody can tamper with the process, but outside it is like a war."⁸³ Increased coercion in the third round contained opposition advances, but the total number of seats won by opposition forces was still greater than they had enjoyed since 1990.⁸⁴

As with previous rulings on the electoral law, the Supreme Constitutional Court ruling on judicial monitoring did not dislodge the regime from power, but it did have a significant effect on the means by which the regime maintained its power. Once again, the regime was forced to resort to ever more extreme forms of extralegal coercion to ensure that the SCC ruling would not undermine the NDP's grip on power. Yet, despite the increased reliance on extralegal coercion, the regime took every opportunity to capitalize on the SCC ruling. President Mubarak addressed the opening session of the new People's Assembly and hailed both the SCC ruling and full judi-

81. The Muslim Brotherhood was so weakened by the beginning of the first round of the elections that it was able to field only 77 candidates nationwide.

82. Abdel Aziz Mohamed, interview by author, 2 May 2001, Cairo; EOHR (2000a).

83. *al-Ahram Weekly*, 16 November 2000.

84. By the end of the third round, formal opposition parties had won 16 seats, independent candidates affiliated with the Muslim Brotherhood won a further 17 seats, independent Nasserist candidates won 5, and unaffiliated independent candidates won 14 seats.

cial monitoring as a great step forward in the march of democracy. The televised speech was intended to showcase the legitimacy of the voting process in the 2000 People's Assembly elections and to assure the public that the widespread electoral fraud, which had reached unprecedented levels for the 1995 People's Assembly, was a thing of the past. But the continued shift from pseudolegal to extralegal control increasingly exposed the hypocrisy of the regime; the growing disparity between the regime's constitutionalist rhetoric and its repressive measures was untenable. While Mubarak publicly praised the Supreme Constitutional Court for its service to democracy, the regime was arranging to deal a blow to SCC independence behind closed doors.

Reining in the Supreme Constitutional Court

With the retirement of Chief Justice Asfour in late 2001, the regime would have its opportunity to rein in the SCC. To everyone's surprise, including SCC justices, the government announced that Mubarak's choice for new chief justice would be none other than Fathi Naguib, the man who held the second most powerful post in the Ministry of Justice. Opposition parties, the human rights community, and legal scholars were stunned by the announcement. Not only had Fathi Naguib proved his loyalty to the regime over the years, but also he was the very same person who had drafted the vast majority of the regime's illiberal legislation throughout the previous decade, including the oppressive NGO law that the SCC had struck down only months earlier. Moreover, by selecting a chief justice from outside the Supreme Constitutional Court, Mubarak broke a strong norm that had developed over the previous two decades. Although the president always retained the formal ability to appoint whomever he wished for the position of chief justice, constitutional law scholars, political activists, and justices on the court themselves had come to believe that the president would never assert this kind of control over the court and that he would continue to abide by the informal norm of simply appointing the most senior justice on the SCC.⁸⁵ Mubarak proved them wrong.

The threat to SCC independence was compounded when Fathi Naguib announced that he would expand the number of justices on the SCC by 50% by recruiting five judges, four from the Court of Cassation and another from the Cairo Court of Appeals.⁸⁶ Even more troubling were rumors that

85. The only formal restrictions on presidential appointments of chief justice concern the age, the formal legal training, and experience of candidates.

86. The constitutional provisions for the SCC (embodied in articles 174–78) do not specify the number of justices who will sit on the court. Nor does law 48/1979, governing the functions of the court, prescribe a set number of justices. It is unclear whether or not there was resistance to Naguib's recruitment efforts from other SCC justices because deliberations over new appointments are closed to the public.

upon reaching the SCC, Naguib proposed that justices on the court be divided into three benches, one continuing to handle petitions for constitutional review and the other two benches concentrating on questions of jurisdiction between courts and interpretation of legislation, the other formal roles of the SCC. The prospect of a divided bench coupled with the regime's demonstrated willingness to pack the court raised the possibility that activist judges would be isolated on the benches concerned with jurisdictional disputes and legislative interpretation, leaving the far more important role of constitutional review to the new appointees. Although Naguib's initial attempt to implement this reform was rebuffed by other SCC justices, some believe that this issue remains unresolved and a renewed attempt to introduce a divided bench may still be in store.

Although it is too early to assess the impact of Fathi Naguib's appointment on the ability and willingness of the Supreme Constitutional Court to confront executive abuses of power, it is clear that his appointment poses a significant threat to the independence of the court. Over and above whatever substantive effect Naguib has on SCC rulings over the next several years, Mubarak's willingness to assert his power to appoint the chief justice after more than 20 years of ratifying the SCC's own internal selection process is yet another indication that the regime is increasingly intent on aborting its experiment with an independent constitutional court. The fact that the court's supporters in civil society were unable to prevent Naguib's appointment through political, judicial, or informal channels, underlines the continued resiliency of Egypt's authoritarian regime.

The Egyptian regime's aggressive response to both the Supreme Constitutional Court and judicial support structures in the 1998–2001 period is proof that constitutional litigation and SCC activism posed a credible threat to the regime's tools for maintaining control. The SCC provided an effective new avenue for critics of the regime to challenge the state through one of its own institutions. Success in battling the regime's restrictive NGO law as well as successful litigation forcing full judicial supervision of elections illustrate how human rights groups and opposition parties had become increasingly adept at using judicial institutions to successfully challenge the regime and defend their interests. Moreover, the SCC's willingness to confront the regime with the landmark rulings on NGOs and full judicial monitoring of elections proved once again the commitment of SCC justices to a political reform agenda. It also demonstrated their determination to protect the judicial support structures that initiate litigation (thereby enabling the court to expand its mandate) and come to the defense of the SCC when it is under attack.

However, the collapse of the human rights movement, the continued weakness of opposition parties, and the institutional assault on the SCC demonstrates how litigation by itself, without support from broad sectors of society, was insufficient to protect the SCC–civil society coalition from

collapse. Just as the SCC and Egypt's civil society coalition built a movement based upon the converging interests of the court, opposition parties, human rights organizations, and the legal profession, so too was the regime able to incapacitate this cooperative effort by successively undermining each element of the movement through legal and extralegal tactics. Rather than follow through on its threats to neutralize the Supreme Constitutional Court outright in the mid-1990s, the regime instead adopted the subtler strategy of simply moving against the SCC's judicial support structures. The Lawyers' Syndicate was neutralized by 1996, human rights associations faced near total collapse by 1999 due to intimidation and restrictions on foreign funding, and opposition parties were progressively weakened throughout the period, despite progressive SCC rulings on political rights. By undercutting each support structure, the regime effectively killed two birds with one stone; undermining support groups impaired their ability to monitor the regime's increasingly aggressive violations of civil and human rights while at the same time disabling their capacity to raise litigation and mount an effective defense of the SCC when it came under attack.

THE JUDICIALIZATION OF AUTHORITARIAN POLITICS

The Egyptian case indicates that democratic governance should not be considered a prerequisite for the "judicialization of politics." The Supreme Constitutional Court became an important political actor, simultaneously adjudicating and shaping the structure of state-society contention while advancing its own institutional interests, despite Egypt's authoritarian system. Interestingly, it appears that many of the forces that contributed to the judicialization of politics in Egypt may also be at work in other authoritarian and transitioning states.

The global trend toward economic liberalization and the increasing competition over foreign direct investment places mounting pressure on developing countries to provide credible commitments to property rights. Judicial reform has been celebrated and pushed by both international financial institutions (Levine 1997; Rowat, Malik, and Dakolias 1985; Tschofen and Parra 1995) and academics (Borner, Brunetti, and Weder 1995; Flint, Pritchard, and Chiu 1996; Knack and Keefer 1995, 1997; La Porta 1997) as a panacea for the developing world's economic predicament.⁸⁷ However, the adoption of independent judicial institutions are by no means inevitable and irreversible processes, because it entails political costs and risks that many leaders are not prepared to accept. Some authoritarian regimes place

87. Indeed, the reform of many judicial institutions throughout the former East Block countries, Latin America, and Asia is explicitly targeted toward protecting property rights and improving the investment environment (Finkel 2001; Rowat, Malik, and Dakolias 1985).

a higher premium on political control and opt to forgo the possible economic benefits of a credible property rights regime.⁸⁸ Other regimes with longer time horizons may experiment with independent constitutional courts and accept the political risk they might entail in return for the promise of increased investment and long-term economic (and hence, political) viability.⁸⁹ But where judicial reforms are not the product of political compromise among contending political forces, judicial independence will remain insecure (Moustafa 2002). The question then becomes, how does a newly independent constitutional court navigate the political currents and attempt to strengthen its autonomy from the same regime that grants it independence and continues to dominate the political playing field?

As in democratic environments where political leaders delegate decision-making authority to the courts in order to avoid divisive or politically costly issues, judicial institutions embedded within authoritarian systems similarly enjoy an expanded political role when authoritarian rulers are confronted by difficult policy choices that they wish to avoid. The Supreme Constitutional Court's assertive expansion into the economic policymaking sphere is an example of this phenomenon. The judicialization of politics through willful delegation by other political actors is variable over time, but during periods of increased participation in policymaking, courts in authoritarian systems gain additional leverage with which they can press their interests in other policymaking spheres. Ultimately, however, courts arrive at implicit bargains with authoritarian rules over how far they can push a political reform agenda. Critical human rights questions, like the constitutionality of exception courts, are typically off the table unless the courts are backed by significant and broad-based reform movements. Judicial activism in authoritarian states is therefore almost certainly bound to be a case of "insulated liberalism," where activist courts are permitted to participate in the political system because they are bounded by illiberal institutions.

The Egyptian case also demonstrates that courts can cultivate relations with actors in civil society and build judicial support structures by making themselves the focal point of reform efforts, just as they sometimes do in democratic polities (Epp 1998; Woods 2001). By availing themselves to opposition activists, courts attract the litigation that fuels their expansion of judicial review, and they foster a constituency that comes to recognize its own political fate as tied to the fate of judicial institutions. SCC–civil society synergy was one of the primary reasons for the rapid expansion of constitutional power until the late 1990s, but the Egyptian case also illustrates

88. This choice typically entails short-term political advantages at the expense of long-term developmental results.

89. This process has flourished in countries that, like Egypt, have civil law systems despite the fact that the civil law tradition historically discouraged judicial review or judicial interpretation of legislation (Merryman 1985).

how such cooperative efforts are vulnerable to authoritarian backlash when the regime maintains a preponderance of power.

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