
The sounds of silence: The Supreme Constitutional Court of Egypt, constitutional crisis, and constitutional silence

Mohammad H. Fadel*

The Egyptian Supreme Constitutional Court (SCC) issued a series of decisive decisions during the transition period following Hosni Mubarak's resignation and the military coup of July 3, 2013. During the transition the SCC treated various "constitutional declarations" of the military as binding commands of a "constitutional lawgiver" which pre-empted the commands of all inferior lawgivers, including the military, when acting as a legislator. This hierarchical conception of law as a series of commands issuing from a hierarchy of superior and inferior lawgivers means that legality is determined solely by reference to a particular law's place in this hierarchy, without regard to the content of the command. In this conception of law, there is no place for constitutional silence inasmuch as the legislature and courts are seen simply as carrying out instructions of the constitutional lawgiver. The denial of constitutional silence in turns leads to judicial rhetoric that overdetermines the outcome of particular cases, and fails to tie outcomes of cases to any shared conception of legality between the sovereign and the citizens. This approach to deciding cases negates the possibility that "silence" may be filled by other lawgivers through a deliberative political process. By refusing to accept a place for constitutional silence, the SCC's jurisprudence enshrines a kind of "constitutional despotism" which exacerbates constitutional conflict, rather than mitigating it, by creating incentives for constitutional drafters to write ever more specific constitutional rules to enshrine particular outcomes rather than creating a framework for shared governance.

* University of Toronto Faculty of Law. Email: mohammad.fadel@utoronto.ca. I would like to thank Professor Nathan Brown of George Washington University and Zaid Al-Ali, Senior Adviser on Constitution Building for the Arab Region at International IDEA (International Institute for Democracy and Electoral Assistance), for their immense generosity in providing me copies of relevant Egyptian legal texts.

1. Introduction: “Constitutional silence” and “constitutional despotism” in the Egyptian context

The Supreme Constitutional Court of Egypt (the SCC) played a crucial role in the failed democratic transition that followed Hosni Mubarak’s resignation as president of Egypt in the wake of the January 25th Revolution. Despite its reputation as a relatively independent and liberalizing actor, the SCC, in a series of cases decided between 2012 and 2014, helped forestall Egypt’s democratic transition, easing the way for the successful military coup that took place on July 3, 2013, thus bringing an end to Egypt’s brief experiment with electoral democracy.

One way to understand the SCC’s behavior during this period is to take it as a political actor that sought to protect its institutional interests.¹ A political interpretation of the SCC’s behavior during the transition, however, cannot provide a full account of its behavior. As a constitutional court, the SCC wrote and published opinions explaining the *legal* basis for its various decisions, none of which cited political reasons to be the grounds of its decisions. Even if political considerations extrinsic to the law were the cause in fact of the SCC’s behavior, it would still be crucial to understand the legal justifications that it offered to the world. Courts, while political actors, are political actors of a certain sort, namely, actors who must offer justifications that are meaningful within the constraints of the formal legal system in which the court operates.

The SCC operates within a highly developed and highly institutionalized legal system with its own sense of professionalism and continuity. Accordingly, its decisions were couched in language that would be intelligible, or at least would appear to be intelligible, to Egyptian legal professionals. The SCC in this respect offers an important contrast to judiciaries in other authoritarian settings, such as Chile and Serbia. In those two cases, “constitutional silence” created a judicial culture which was explicitly *apolitical* and *deferential* to their respective political regimes.² By contrast, the SCC, prior to the January 25th Revolution, had already adopted an activist posture, albeit one that never seriously challenged the authoritarian nature of the Egyptian state.³

¹ See, e.g., Nathan Brown & Julian Waller, *Constitutional Courts and Political Uncertainty: Constitutional Ruptures and the Rule of Judges*, 14(1) INT’L J. CONST. L. 817 (2016) (attempting to explain the SCC’s alternating behavior between bold defiance of the executive branch and passive submission to it during various stages of the transition).

² See Lisa Hilbink, *Agents of Anti-Politics: Courts in Pinochet’s Chile*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 102–131, 103–104 (Tom Ginsburg & Tamir Moustafa eds., 2008) (describing Chilean courts during the Pinochet era as having an institutional ideology of “apoliticism” that prevented them from serving as a site of resistance to the Chilean authoritarian state); Violeta Beširević, “*Governing Without Judges*”: *The Politics of the Constitutional Court in Serbia*, 12(4) INT’L J. CONST. L. 954 (2014) (attributing passivity of Serbian Constitutional Court to its stance as a “non-political” actor that characterizes itself as a “neutral ‘slave[] of the law;” that refuses to consider the substantive legitimacy of the laws it applies).

³ See Tamir Moustafa, *Law and Resistance in Authoritarian States: The Judicialization of Politics in Egypt*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 132 (Tom Ginsburg & Tamir Moustafa eds., 2008) (arguing that the SCC’s activism, grounded in a “rule of law” ideology, was useful to Mubarak’s authoritarian regime insofar as it could be used to justify politically unpalatable, but necessary policy changes, while at the same time not challenging the regime’s fundamental political interests by recognizing the executive’s control over the political process).

The SCC used its legacy of judicial activism during the transition, however, to intervene overtly in political disputes in a manner that would have been unthinkable prior to the Revolution.⁴ This activism, however, produced the same effects as its pre-Revolutionary activism did: securing the authoritarian regime's monopoly over politics. To accomplish this goal, the SCC abandoned its prior tradition of deference to "political questions," and instead behaved as though every major political decision during the transition was governed by a clear constitutional norm, effectively giving it a veto power over the transition. The quintessentially political questions that Egyptians faced during this period—questions such as the extent to which figures from the old regime would be permitted to run for public office, how parliamentary elections would be organized, and the organizing principle of the constituent assembly that would draft a new final constitution—became transformed into legal questions that gave little to no weight to the outcomes of the democratic political process. Contrary to what an external observer might have expected, the SCC's transitional opinions spoke as though well-established constitutional principles existed that spoke clearly with respect to the very questions that Egyptians were asked to debate during the transition.

The SCC's posture during this period can be characterized as a radical *denial* of "constitutional silence." "Constitutional silence," conceptually, might be understood as a unique subset of the problem of legal indeterminacy, but one that is especially salient in connection with constitutional documents, and especially pressing in a condition of constitutional transition. There are very good reasons for constitutional drafters to adopt "silence" as a mode of drafting: the high cost of securing the agreement of all relevant constituencies, time constraints in drafting a constitution, limits on information available to constitutional drafters, and uncertainty about how institutions will function post-adoption of the constitution.⁵

A court's recognition of the legitimacy of constitutional silence in turn ought to be reflected in its approach to understanding constitutional text: while constitutional silence would not disable it from policing clear violations of constitutional text and principle, recognition of constitutional silence would presumably lead a court to adopt a deferential attitude toward the political process, and lead it to view the other branches of government as playing an equally important role in giving effect to constitutional norms through their own, autonomous lawmaking activities. A fortiori, normative recognition of constitutional silence might lead a court to be particularly deferential to democratic politics during a constitutional transition.

When a court refuses to recognize constitutional silence, one can, in certain cases, describe its behavior as embodying constitutional despotism. This would be the case when it views law purely as an artifact of the arbitrary will of the supreme lawgiver. Insofar as the law is the product of an arbitrary will, only the country's apex court is

⁴ It is significant in this regard that the Egyptian government's Office of the Advocates' General (*hay'at qaḍāyā al-dawla*) advised the SCC to decline jurisdiction over each of the three cases discussed in this article on the grounds that they presented non-justiciable political questions.

⁵ Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9(3–4) INT'L J. CONST. L. 636, 638 (2011).

in a position to understand that will and give it effect. It can empower itself to exercise despotic power over politics simply by claiming that it is doing no more than “interpreting” the constitution. Describing a court’s behavior as despotic seems paradoxical insofar as despotism—often understood as rule of the will—is usually contrasted with the rule of law,⁶ but when a constitutional court believes that the nature of law is itself despotic (in the sense that the content of law is not limited by reference to a higher standard), it can behave despotically insofar as it claims to be doing no more than faithfully representing the will of the lawgiver. Constitutional despotism may manifest itself either in excessive deference to the executive, for example, when a court radically reads down, or reads out entirely, substantive provisions of the law that appear to restrict the executive, or in excessive judicial activism, by radically *overreading* constitutional provisions with the intent of disabling the possibility of democratic politics.⁷ It is this latter strategy that the SCC pursued in the various cases it decided during the Egyptian transition.

Constitutional despotism requires a court to exclude ambiguity from the universe of constitutional questions and instead read the constitution *as though* its meaning is always clear and incontrovertible. Constitutional despotism abandons the goal of seeking “inter-subjective agreement about the meaning of a text,”⁸ and seeks to impose a singular meaning on the text solely by appeal to its superior position in the judicial system as an apex court. It shares with classical despotism its reliance on will instead of law, but it masks its exercise of will through an arbitrary interpretation of constitutional law. The court’s reading of the text, which in itself may be a permissible reading of the text, is transformed, by virtue of interpretative despotism, into the *only* conceivable reading of the text.

Instead of leading to a posture of restraint and deference which views the other, political branches of the government as partners in a joint constitutional project, a constitutionally despotic court views itself as a censor of politics. It substitutes its unilateral will regarding the meaning of constitutional text for a reasoned, intersubjective understanding of that text. Finally, it views itself as playing the role of the stern disciplinarian with respect to politics, whose task is to discipline politics, not to learn from it.

Constitutional despotism carries with it at least two negative consequences. The first is related to constitutional drafting. Because despotic interpretation masks its exercise of naked power as an act of neutral interpretation, constitutional drafters are compelled to draft constitutional provisions with ever-increasing detail in an attempt

⁶ See Mark Tushnet, *Authoritarian Constitutionalism: Some Conceptual Issues*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES 36, 36 (Tom Ginsburg & Alberto Simpser eds., 2014) (quoting Charles McIlwain as distinguishing constitutional government from despotic government on the basis that the former is limited by law while in the latter, will substitutes for law).

⁷ Insofar as Chilean courts had numerous legal resources available to them to resist the Pinochet dictatorship, but rendered them toothless, one can also describe their behavior during this period as also reflective of a kind of “constitutional despotism.” Hilbink, *supra* note 2, at 102.

⁸ James Melton et al., *On the Interpretability of the Law: Lessons from the Decoding of National Constitutions*, 43 BRIT. J. POL. SCI. 399, 400 (2013).

to control future decisions of the court. This not only makes it more difficult to reach constitutional agreement, at least if constitutional drafters genuinely represent the diverse constituencies of the public, but it also has the undesirable result, if carried out successfully, of depriving the constitutional text of any prospective flexibility in application.⁹ Second, it has undesirable political consequences of exacerbating political conflict because it creates an incentive for competing political factions to use the constitution to inscribe their policy preferences into the constitutional text, or even use it to banish their opponents from the political domain in its entirety.

This article explores the SCC's legal reasoning during Egypt's 2011–2013 constitutional crisis using three constitutional cases decided during that period to demonstrate how the SCC, despite the objectively indeterminate nature of the Egyptian Constitution during the transition period, recast it as though it were a seamless document which provided definitive answers for the fundamental structural questions of governance that were in dispute during the ill-fated transition. To achieve this result, it transformed the patchwork legal framework that regulated the transitional moment into a clear hierarchy of laws. At the top of this hierarchy were clear constitutional commands issued by a “constitutional lawgiver” (*al-musharri' al-dustūri*). The SCC patched together the content of these commands from documents that were merely military decrees, issued from time to time during the transition, by the Supreme Council of the Armed Forces (SCAF), and were “constitutional” solely by virtue of SCAF's arbitrary fiat. The SCC supplemented the language of these published decrees with principles taken from its prior case law which were issued under the authoritarian regime of Hosni Mubarak, but which it nevertheless took to be determinative of the meanings of interim constitutional documents issued in the wake of the January 25th Revolution.

Beneath the constitutional text lay the hierarchically “inferior” implementing legislation that, among other things, organized the elections, determined who could and could not run for public office, and the structure of the constituent assembly,¹⁰ each of which the SCC eventually came to impugn as unconstitutional, even though they were promulgated by the very same SCAF that promulgated the “constitutional” documents.

Ironically, the SCC gave greater deference to the constitutional lawgiver's commands (as interpreted by the SCC) than it did to the ordinary lawgiver's, even though the latter, because of participation from various political actors, enjoyed greater democratic

⁹ Of course, an authoritarian regime that is in full control of the constitutional drafting and amendment process can use a judicial ideology of “constitutional despotism” to draft constitutional provisions in a manner that precisely secures the regime's narrow political goals, while offering the window-dressing of adherence to formal legality. See Kristin Stilt, *Constitutions in Authoritarian Regimes: The Egyptian Constitution of 1971*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES 111, 124–125 (Tom Ginsburg & Alberto Simpser eds., 2014) (describing the 2005 amendments to article 76 of the 1971 Egyptian Constitution regulating presidential elections as “a detailed instruction manual” intended to replicate the outcomes of the explicitly undemocratic procedure of the old system while providing the regime democratic legitimacy in the eyes of the international community).

¹⁰ The SCC never had an opportunity to determine the constitutionality of the composition of the constituent assembly insofar as subsequent events rendered that case effectively moot.

legitimacy. The only formal difference between the two sets of rules that the SCC would determine were inconsistent, however, was that one had been labeled “constitutional” while the others had been labeled “laws” (*qānūn*) or “ordinances” (*marṣūm*).

The rest of this article proceeds in three sections. Section 2 provides a timeline of the most important constitutional and legislative events that took place during Egypt’s transitional period, beginning with the resignation of Mubarak on February 11, 2011, and ending with the military coup of July 3, 2013. Section 3 discusses three politically sensitive cases considered by the SCC during the transitional period—in which it decided to (i) dissolve the lower house of Egypt’s parliament, (ii) strike down the political exclusion law and thereby permit Ahmed Shafiq, Mubarak’s last prime minister, to run for president in the first post-Mubarak presidential elections, and (iii) reject a challenge to the legitimacy of the upper house of Egypt’s parliament. It also summarizes briefly the reasons the SCC gave in support of those decisions. Section 4 concludes by arguing that the SCC, had it embraced constitutional silence, could have successfully mediated the political crisis and assisted in producing a successful democratic transition. Instead, its decisions contributed to the creation of a series of ever-escalating constitutional crises that paved the way for the return of authoritarian rule.

2. Conflicts during the Egyptian transition

There were three principal conflicts surrounding the Egyptian transition: (i) the “transitional road map”; (ii) the rules governing parliamentary elections; and (iii) the powers of parliament in influencing the transition, whether by appointing members to the constituent assembly tasked with drafting a new constitution or by passing a political exclusion law prohibiting certain members of the previous regime from standing for election following the January 25th Revolution. I discuss briefly the nature of each of these conflicts below.

2.1. The road map

Despite the calls made to Mubarak to delegate his power to his vice president to afford an opportunity to negotiate a transition that would have respected the formalities of the Egyptian constitution which was then in force (the “1971 Constitution”), when Mubarak announced his resignation, he delegated his power not to Omar Suleiman, who had been appointed vice president, but rather to a previously unknown group of senior military officers, collectively known as the Supreme Council of the Armed Forces (SCAF). He then charged them with the responsibility of administering the country in the wake of his resignation. SCAF had no formal status under the 1971 Constitution, and so their assumption of power made clear that the 1971 Constitution had become a dead letter, but it was not yet clear how it would be buried, and what would replace it.

Initially, SCAF favored an approach that would have mimicked the plan proposed in the final days of the January 25th Revolution. Accordingly, SCAF announced on

February 13, two days after Mubarak resigned, a transition plan in which it committed itself to handing power to an elected civilian government within six months. To achieve this goal, it appointed a committee charged with amending the 1971 Constitution to permit free and fair presidential elections and parliamentary elections. Upon election of the president and parliament, the newly elected parliament would select 100 persons to serve as members of the “constituent assembly.” The constituent assembly would be responsible for drafting a new constitution to replace the 1971 Constitution. The February 13 announcement also suspended (but did not repudiate) the 1971 Constitution, and dissolved both chambers of Egypt’s parliament, both of which had been elected the previous year in an election widely condemned as being tainted with widespread, government-sponsored fraud. SCAF also announced a plan to hold a referendum on March 19, 2011, to garner the approval of the Egyptian people for the proposed constitutional amendments.

Despite the similarities between the transition plan announced by SCAF and that suggested by various liberal intellectuals before Mubarak resigned, the plan became contentious insofar as it deferred agreement on a new constitutional text until after the elections. Many of Egypt’s liberal activists believed that the 1971 Constitution was beyond repair and that Egyptians should insist on a new constitution before engaging in elections. This position became known as “the Constitution First” (*al-dustūr awwalan*). The referendum, which was conducted on March 19, 2011, however, carried the day by an overwhelming majority of voters. SCAF, however, in what should have been a shocking move, effectively repudiated the results of its own referendum, and instead announced a new plan on March 30, 2011, labeling its proclamation a “Constitutional Declaration” (*i lān dustūrī*).¹¹ This text would function as the effective constitution until a new constitution could be adopted.

Even though many of the provisions in the March 30 Constitutional Declaration incorporated the constitutional amendments which had been approved in the March 19 referendum, and even though it allowed greater organized political competition relative to what the 1971 Constitution had contemplated, it made a mockery of the procedural integrity of the transitional process insofar as it seemed to recognize SCAF as not only exercising a kind of emergency custodial power in the wake of Mubarak’s resignation but also possessing inherent constitutive power to act on behalf of the Egyptian people, even after it had sought to determine their will through a popular referendum. SCAF may have departed from its prior plans as a reaction to pressure from those Egyptians advocating the “Constitution First” position. The alacrity with which Egyptians submitted to the March 30 Constitutional Declaration was to have negative consequences on the future of the transition insofar as it established the implicit principle that SCAF was the ultimate source of constituent authority, with the Egyptian people merely playing an acclamatory role to decisions SCAF made independently. Second, it established the dangerous precedent that losers in an election could potentially overturn electoral results by going directly to SCAF, thereby undermining

¹¹ Stilt, *supra* note 9, at 112, 132 (describing the March 30 Constitutional Declaration as “an explicit affront to the democratic process”).

the incentive of Egyptian political actors to negotiate with their political competitors in good faith.

2.2. The electoral law

The March 30 Constitutional Declaration did not specify the rules under which the new parliament would be elected, delegating the details to statutory law.¹² SCAF's first attempt at an electoral law would have split the seats of Egypt's two chambers of Parliament—the People's Chamber (*majlis al-sha'b*) and the Consultative Chamber (*majlis al-shūrā*)—50-50 between members of political parties and independents. After the leaders of various Egyptian political parties expressed their opposition to this proposal, believing that it would allow too many representatives of the old regime to resurface in the new parliament as "independents," SCAF amended its original proposal so that two-thirds of the seats in both chambers would be reserved to members of political parties, and only one-third would be open for candidates unaffiliated with political parties. Under the final version of the electoral law, independents could contest only one-third of the future parliament's seats, but even for those seats, candidates affiliated with political parties could nevertheless run, provided they did so as individuals and not under their party's banner.¹³ While these statutory changes seemed to have been consistent with the provisions of the March 30 Constitutional Declaration, SCAF then issued a new constitutional declaration on September 25, 2011, amending article 38 of the March 30 Constitutional Declaration so that it now provided as follows: "The law shall organize the right to be elected to the People's Chamber and the Consultative Chamber in accordance with an electoral system that combines the closed-party list system and the individual candidate system in the proportion of two-thirds for the first and one-third for the second."

2.3. Selection of the Constituent Assembly and the political exclusion law

Article 60 of the March 30 Constitutional Declaration set out the process by which Egypt would draft a new, permanent constitution. It stated that the elected members of the two chambers of Egypt's parliament, upon SCAF's invitation, would hold a joint meeting within 60 days of their election, to elect a 100-person Constituent Assembly. The Constituent Assembly would be responsible for drafting a new constitution and was asked to complete its assigned task within six months of its appointment. Fifteen

¹² "The law shall determine the right to run for membership in the People's Chamber and the Consultative Chamber in accordance with any electoral system which the law determines. It is lawful for the law to specify a minimum number of women in each Chamber" (*yunazzim al-qānūn haqq al-tarshīh li-majlisay al-sha'b wa'l-shūrā wifqan li-ayyi nizām intikhābī yuhaddidulu wa yajūz an yataḍammāna ḥaddan adnā li-mushārat al-mar'a f'l-majlisayn*). March 30 Constitutional Declaration art. 38.

¹³ SCAF did not promulgate a new law but rather amended pre-existing legislation, Law (*qānūn*) No. 38 of 1972 (governing selection of parliamentarians to the People's Chamber) and Law No. 120 of 1980 (governing selection of members of the Consultative Chamber) using two ordinances, Ordinance (*marṣūm*) No. 120 of Year 2011, and Ordinance No. 123 of Year 2011. Article 5 of Ordinance No. 120 provided that only persons unaffiliated with political parties could contest the seats reserved for independents. Decree No. 123, however, repealed article 5 of Ordinance No. 120, thereby opening the door for persons affiliated with political parties to compete for the seats reserved to independents.

days after the Constituent Assembly completed its work, the text of the new constitution would be submitted to the Egyptian people for their approval (or rejection) in a referendum.

Article 60, however, did not specify how the parliamentarians should select the members of the Constituent Assembly, nor did it specify the qualifications (or disqualifications) of the members of the Constituent Assembly. Elections for the People's Chamber took place in November 2011, and the Consultative Chamber in February 2011, with the Muslim Brotherhood and the Salafist Nūr Party combining to win 70 percent of the seats in the People's Chamber and 83 percent of the seats in the Consultative Chamber.¹⁴ When the parliamentarians met to elect the members of the Constituent Assembly, Islamists in parliament, given their domination of the parliament, were able to appoint a Constituent Assembly dominated by Islamists. A substantial number of parliamentarians, moreover, were also elected to serve as members of the Constituent Assembly. For this latter reason, the Supreme Administrative Court dissolved the Constituent Assembly, reasoning that while the March 30 Constitutional Declaration gave parliament the power to select the members of the Constituent Assembly, it did not permit them to elect themselves to the Constituent Assembly.¹⁵ A second Constituent Assembly was then formed with fewer Islamist members, but which still included some parliamentarians, prompting another lawsuit challenging the legality of the second Constituent Assembly.¹⁶

Parliament, prior to the presidential elections, adopted a political exclusion law, Law No. 17 of 2012, amending Law No. 73 of 1956, adding a provision suspending the political rights of “anyone who, in the ten years preceding February 11, 2011, served as President of the Republic, Vice-President of the Republic, or Prime Minister of the Republic, or served as Chair of the National Democratic Party, one of its General Governors, was a member of its Policy Office or its General Governance Board, for a period of ten years from the date specified herein.”¹⁷ This law was intended to prevent senior figures from the old regime from occupying positions of power and influence in the new order. Ahmed Shafiq, the last person to serve as prime minister for Hosni Mubarak, and who accepted the post only after the January 25th Revolution

¹⁴ INTERNATIONAL FOUNDATION FOR ELECTORAL SYSTEMS, ELECTIONS IN EGYPT: IMPLICATIONS OF RECENT COURT DECISIONS ON THE ELECTORAL FRAMEWORK 4 (Aug. 9, 2012).

¹⁵ The Supreme Administrative Court justified its decision on the ground that parliamentarians who also served in the Constituent Assembly would face a conflict of interest that precluded them from serving as objective members of the Constituent Assembly. On various theories regarding the optimal constitution of a constituent assembly, and whether it should be composed of independent actors, or parliamentarians, see JOHN ELSTER, SECURITIES AGAINST MISRULE: JURIES, ASSEMBLIES, ELECTIONS 206–215 (2013); Tom Ginsburg, *How to Study Constitution-Making: Hirschl, Elster, and The Seventh Inning Problem*, 96 B.U. L. REV. 1347, 1355–1356 (2016).

¹⁶ Nada Hussein Rashwan, *Egypt's Constituent Assembly Convenes Tuesday with Future Still in Doubt*, AHRAMONLINE (June 27, 2012), <http://english.ahram.org.eg/NewsContent/1/64/46274/Egypt/Politics-/Egyptys-constituent-assembly-convenes-tuesday-with-.aspx>. (last visited August 27, 2018).

¹⁷ *Kullu man 'amila khilāl al-'ashr sanawāt al-sābiqa 'alā* February 11, 2011 *ra'isan li'l-jumhūriyya aw nā'iban li-ra'īs al-jumhūriyya aw ra'isan li'l-wuzarā'* aw *ra'isan li'l-ḥizb al-waṭanī al-dimūqrāṭī al-munḥall aw amīnan 'amman lahu aw kāna 'uḍwan bi-maktabihi al-siyāsī aw amānatihi al-amma wa dhālika li-muddat 'ashr sanawāt ibtidā'an min al-tārikh al-mushār ilayhi*. Law No. 17 of 2012.

began, sought to enter the upcoming 2012 presidential contest, and brought a suit challenging the validity of the political exclusion law. He would win that suit, and in the end, come perilously close to winning the presidential election, narrowly losing to Mohammed Morsi in a runoff election.¹⁸

During a span of less than 12 months, the SCC issued a series of rulings that had the result of substantially undermining the transition to a new regime, and thereby had the effect of restoring authoritarian rule to Egypt when the military removed Egypt's first (and only) democratically elected president, Mohammed Morsi, on July 3, 2013. While the SCC's opinions invoked liberal principles, such as the rule of law, equality of citizenship, and separation of powers, to justify its decisions, careful analysis reveals that the SCC's invocation of these values was devoid of any real content, and that these decisions were instead completely subservient to a positivist conception of law grounded in what is, ultimately, unlimited deference to what is identified as the will of the sovereign lawgiver. This commitment to legal positivism also meant the SCC was in a position to attribute to the sovereign lawgiver specific commands, despite ambiguity in the interim constitutional texts. The SCC overcame the problem of constitutional silence by producing overdetermined opinions which read the interim constitutional documents as though they spoke loudly and clearly to every possible constitutional question. The next section will unpack the SCC's reasoning in resolving the cases that came before it regarding the contentious questions of the transition.

3. The SCC's transitional cases

Of the several SCC rulings issued during the Egyptian transition, this article focuses only on three of them. The first involved a challenge to a law permitting party-affiliated candidates to run in seats designated for "independents" in Egypt's People's Chamber.¹⁹ The second challenged a law suspending the political rights of senior figures from the previous regime.²⁰ The third challenged a law permitting party-affiliated candidates to run in seats designated for "independents" in Egypt's Consultative Chamber.²¹

It seems paradoxical that a constitutional court could claim jurisdiction to determine the constitutional validity of legislation promulgated during a transitional period, especially in cases where the impugned legislation established the procedures for formulating a new constitution. From a formal perspective, the SCC solved this

¹⁸ The first round of the presidential elections took place on May 23 and 24. Morsi and Shafiq were the two top vote-getters, receiving 25 percent and 24 percent of the votes, respectively. The runoff election took place on June 16 and 17. Morsi prevailed, receiving 51.7 percent of the votes to Shafiq's 48.3 percent. Morsi was sworn in as president on June 30.

¹⁹ Anwar Şubĥ Darwish Muşţafā v. Chairman of the Supreme Council of the Armed Forces, et al., Constitutional Decision No. 20 of Year 34, *al-Jarīda al-Rasmiyya*, June 14, 2012, No. 24, pp. 3–17.

²⁰ Aĥmad Muĥammad Şafiq Zakī v. Presidential Election Committee, Constitutional Decision No. 57 of Year 34, *al-Jarīda al-Rasmiyya*, June 14, 2012, No. 24, pp. 18–31.

²¹ 'Adnān Mukhtār 'Uthmān Muĥammad v. The Chair of High Committee for Elections, et al., Constitutional Decision No. 112 of Year 34, *al-Jarīda al-Rasmiyya*, June 3, 2013, No. 22, pp. 3–22.

potential dilemma, not by asserting that a higher, unwritten law governed Egypt's transition but rather by asserting that the SCAF's March 30 Constitutional Declaration was Egypt's constitution, and that its provisions granted it the power to determine the constitutionality of all Egyptian laws during the transition period. Instead of the transition period being a time of constitutional silence, the SCC operated as though it were a normal constitutional court operating in a constitutionally stable regime, interpreting a text that was both complete and clear.

The common element in all of these cases was the SCC's assertion that at all times it was exercising ordinary jurisdiction expressly granted to it under a written constitution that was fully legitimate and operative. Its decision dissolving Egypt's first democratically elected People's Chamber expressly referenced the March 30 Constitutional Declaration as the source of the SCC's jurisdiction.²² The SCC relied on various substantive provisions of the March 30 Constitutional Declaration to conclude that the political exclusion law violated the March 30 Constitutional Declaration and was therefore "unconstitutional." Using the same reasoning, it explained that it would have struck down the law challenged in the third case, but because the 2012 Constitution, which had been approved by popular referendum in December 2012, had replaced the March 30 Constitutional Declaration by the time of its decision, it had no choice but to dismiss the challenge to the Consultative Chamber's election. The irony, of course, is that the body responsible for the March 30 Constitutional Declaration was the very body responsible for the laws which the SCC concluded violated, or would have violated, the March 30 Constitutional Declaration. The SCC, however, failed to account for how the drafters of the interim constitution could have so badly misunderstood the intent of their own document.

The inescapable conclusion is that the label "constitutional" has a magical effect in the reasoning of the SCC. Insofar as the SCC's decision in the third case endorses the notion that the illegality of the Consultative Chamber's election was irrelevant because the 2012 Constitution effectively ratified the result, it suggests that any rule, regardless of its content, if labeled "constitutional," acts as a supra-norm, even effectively ratifying previously illegal conduct. The consequence of such an approach to constitutional law is that *any* norm can function as a supra-norm as long as it is given the magical label "constitutional."

The magical effects of the word "constitutional" in Egyptian legal discourse may help explain why, in debates surrounding the 2012 Constitution, many critics insisted on an ever-lengthier list of provisions replete with ever-increasing detail: when a constitution is interpreted entirely as an artifact of the arbitrary will of the sovereign, bright-line rules are the only plausible means available for limiting the arbitrary use of state power.²³ An affirmation of constitutional silence, on the other hand, combined with an explicit reference to extra-constitutional norms, even if they are controversial,

²² The SCC expressly cited article 49 of the March 30 Constitutional Declaration for the basis of its jurisdiction over the case in its decision dissolving the People's Chamber.

²³ See, e.g., Khaled Fahmy's "32 Reasons to Vote No" for the Draft Constitution, available at <http://shanfaraa.com/2012/12/khaled-fahmys-32-reasons-to-vote-no-for-the-draft-constitution/>.

would at least have the virtue of making clear the constitutional values that a constitutional court believes are central to a legitimate constitution. When a court makes those “silent” norms explicit, it makes it possible to have public debates around the state’s constituent values.

When a court pretends, however, that it is simply following the commands of a sovereign, it instead encourages conflicting parties in society to take over the state, and write a constitution that enshrines their own preferences explicitly into the constitutional text. In such a case, instead of mediating political conflict, a constitution enshrines it.

3.1. Anwar Ṣubḥ Darwīsh Muṣṭafā v. Chairman of the Supreme Council of the Armed Forces, et al.

This case questioned the validity of the electoral law permitting candidates affiliated with organized political parties to contest seats that had been set aside for independent candidates. As explained above, the extent to which parliamentary elections should be organized around party lists or open to individuals unaffiliated with organized political parties was contentious. Because the recognized opposition political parties during the Mubarak regime were extremely weak and ineffectual, and because of the practical difficulties in forming new political parties during Mubarak’s reign, Mubarak’s National Democratic Party (NDP) effectively ruled Egypt as a single-party state throughout Mubarak’s 30 years in office. Unsurprisingly, in the wake of the January 25th Revolution, the NDP was dissolved. Revolutionary forces, however, were suspicious that representatives of the old regime could nevertheless return to power through elections by leveraging their extensive patronage networks if they were permitted to run outside party lists as independents. Accordingly, when SCAF originally proposed permitting persons unaffiliated with political parties to contest one-half of the parliament’s seats, revolutionary political forces reacted with indignation. SCAF, in response, retracted its original proposal and substituted a law that reserved two-thirds of parliament’s seats to candidates in closed-party lists, permitting independents to contest only one-third of the seats in parliament. The first version of SCAF’s revised law explicitly excluded any person affiliated with a political party from contesting the “independent” seats, but under pressure from political parties, SCAF agreed to a further revision of the law that omitted the requirement that individual candidates be unaffiliated with political parties.²⁴

The plaintiff in this case had contested an independent seat, but he failed to receive enough votes to make it to the runoff, which took place between two candidates affiliated with political parties. His suit challenged the constitutionality of the amended electoral law pursuant to which candidates affiliated with political parties were permitted to run against candidates unaffiliated with political parties. After concluding that electoral laws organizing elections were fully justiciable, the SCC claimed that the

²⁴ Whether intended or not, this revision in the electoral law redounded sharply to the benefit of the Muslim Brotherhood and the Salafis. *ELECTIONS IN EGYPT*, *supra* note 14, at 18.

validity of the impugned legislation needed to be understood in the fuller context of Law No. 38 of 1972, which SCAF amended, in order to determine that statute's meaning, framework, and purposes. After considering the statute's language, the SCC concluded that the ordinary lawgiver intended to allow candidates affiliated with political parties the opportunity to compete for individual seats.

This concession to political parties, it concluded, influenced the outcome of not just particular seats in the individual system, but also in the closed-list system insofar as it allowed political parties to pursue a strategy that would maximize their ability to win seats by nominating its members to contest both closed-list seats and individual seats, and thus allow them to win more seats than they otherwise would. The SCC accused the amended electoral law, among other things, of violating the constitutional values of equality and popular sovereignty, and of constituting viewpoint discrimination by privileging candidates affiliated with political parties over those with no such affiliation. This contradicted the aim of the constitutional lawgiver because it undermined the pluralism of Egyptian society by arbitrarily preferring candidates from political parties in the political process over candidates without party affiliation. The SCC concluded that the amended electoral law was unconstitutional in its totality, and therefore ordered the dissolution of the People's Chamber in its entirety.²⁵

3.2. *Aḥmad Muḥammad Shafīq Zakī v. Presidential Election Committee*

Prior to the May presidential elections, parliament passed, and SCAF adopted, Law No. 17 of 2012, amending Law No. 73 of 1956, which excluded certain senior members of the old regime from the right to hold public office for a period of 10 years. Ahmed Shafiq, the last person to serve as prime minister for Hosni Mubarak, and who accepted the post only after the January 25th Revolution began, sought to enter the upcoming 2012 presidential contest, and brought a suit challenging the law's validity.

There was no dispute regarding the meaning of the relevant portion of the law. The only issue was whether the law was "constitutional." The SCC concluded that it was not. It argued that the principle of separation of powers recognized in the Constitutional Declaration meant that parliament cannot use its lawmaking power to interfere in matters vested in other branches of government, particularly, the judiciary. In this case, the second paragraph of article 19 of the March 30 Constitutional Declaration provided that "There is neither a crime nor a punishment except in accordance with a law (*qānūn*), and no punishment may be administered except as a result of a judicial ruling." The SCC then gave an extremely expansive reading of the term "punishment," concluding that exclusion from the right to run for political office is a "punishment" that requires a prior judicial decision.

Because the law in question establishes a legal consequence without a judicial ruling, it violated the constitutional principle of separation of powers and judicial

²⁵ The SCC claimed that the amended election law violated, in whole or in part, articles 1, 3, and 32–41 of the March 30 Constitutional Declaration. The original March 30 Constitutional Declaration only included 63 articles in total.

independence. It also concluded that this law violated the most basic political rights of the community by depriving voters of the opportunity to elect whatever candidates they deem best represent them and so it also exists in tension, if not outright contradiction, with numerous other constitutional provisions.²⁶ It also violated the constitution's commitment to equality by depriving one group of Egyptians of their political rights without adequate justification. Finally, the law represented ex post fact punishment for behavior that was lawful at the time, and so it also violated article 8 of the Constitutional Declaration.

3.3. 'Adnān Mukhtār 'Uthmān Muḥammad v. The Chair of High Committee for Elections, et al.

This case raised essentially the same legal issues as were raised in the *Muṣṭafā* case discussed above, except that it involved an election to the Consultative Chambers. More significantly, the SCC only ruled on it *after* the controversial December 2012 Constitution had been approved by popular referendum. Even under the provisions of the December 2012 Constitution, however, the SCC concluded that the electoral rule which preferred candidates affiliated with organized political parties over non-affiliated candidates was unconstitutional. What was odd about the claim in this context, however, was that the December 2012 Constitution included a specific clause, article 230, which provided that the Constitutive Assembly, as constituted as of the date of the constitution's approval, would not only continue its previous functions, but would assume all legislative powers until such time as the new House of Representatives (*Majlis al-Nuwwāb*) could be elected and seated, at which point all legislative powers would be transferred to it. Only after a new Consultative Chamber was elected, would the legislative power be exercised jointly by both chambers of the parliament in accord with the legislative provisions of the December 2012 Constitution.

The SCC reconciled these different provisions by affirming the unconstitutional nature of the electoral law pursuant to which the sitting Consultative Chamber was elected, but holding that article 230 prevented the ordinary legal effect of such a ruling—dissolution of the Consultative Chamber—from taking place. Article 230 is not the only case of an “unconstitutional” constitutional provision in the December 2012 Constitution: article 232 of the December 2012 Constitution included a “political exclusion” provision which was similar in its broad essentials to the very statute that the SCC struck down in the *Shafiq* case discussed above. The SCC, however, did not have an opportunity to discuss the impact of this provision of the December 2012

²⁶ It specifically stated that the law in question conflicted with the texts of article 1 (proclaiming that Egypt has a democratic system of government); article 26 (specifying the qualifications of the president); article 27 (specifying that the president be elected by secret ballot); article 31 (imposing on the president the obligation to appoint one or more vice presidents within 60 days of his election); article 32 (defining composition of the People's Chamber, including, the right of the president to appoint some members); article 35 (defining composition of the Consultative Chamber, including, the right of the president to appoint some members); article 38 (assigning to the law the responsibility for organizing the right to compete for parliament); and article 39 (assigning to the law responsibility for determining the qualifications of members of parliament, the electoral law, and the law of the referendum).

Constitution on its understanding of the political rights enjoyed by all citizens set forth in its prior *Shafiq* decision.

4. Conclusion: “Constitutional silence” as a solution to constitutional despotism

One obvious response to these decisions is to shrug one’s shoulders and repair to the insights of legal realism: all law, ultimately, is about the exercise of power, and so it should not surprise us that in circumstances where the battle for power is most exposed—as it is in transitional periods—that the façade of the law’s neutrality is most exposed. I would not disagree with those who believe that the SCC acted as a blatantly self-interested political actor during the transitional power, using the moral power it exercised as a constitutional court to fight a rearguard action against a democratic transition until such time as a new authoritarian coalition could emerge. On the other hand, its status as a court imposed constraints on how it could pursue those interests. As the third of these cases demonstrates, when faced with an express rule that is formally constitutional, even the SCC had no choice but to submit to it.

The SCC conceives of the constitution as a set of rules given by a constitutional lawgiver to the people, the terms of which are categorically binding on the state and the people. The SCC makes no effort to tie the positive norms provided by the constitutional lawgiver to any normative substantial conception of justice, whether liberal, democratic, or Islamic. The norms provided by the constitutional lawgiver may, in fact, contain substantive norms which are in themselves, liberal, democratic, or Islamic (or all three), but their existence in the constitution is by virtue of the arbitrary will and grace of the constitutional lawgiver, not the independently binding character of those norms themselves. The SCC’s constitutional jurisprudence lends itself to constitutional despotism insofar as it is prepared to accord legitimacy to arbitrary rule so long as it has sufficiently formal credentials.

Constitutional despotism, however, is ultimately destabilizing insofar as it reduces constitutional law to merely a set of *ultimate* commands whose only function is to resolve conflicting commands within the law. The fact that it was the same individuals who adopted the interim March 30 Constitutional Declaration and promulgated the ordinary laws that the SCC found unconstitutional perhaps suggests bad faith on the part of the SCC; however, it is also consistent with constitutional despotism’s indifference to reaching a common understanding of the law. Because “constitutional” commands are detached from any substantive conception of justice, the SCC’s theory of “constitutional despotism” gives political actors every incentive to constitutionalize what ought to be contestable political issues in any healthy polity. The result is that all politics becomes, or potentially becomes, constitutional, insofar as the winner of any political battle has a powerful incentive to inscribe its political preferences expressly in the constitutional text. Constitutional despotism therefore transforms what could be contested, but peaceable political competition, into existential politics insofar as it tempts political rivals to use the power inherent in a constitutional norm to eliminate

its rivals, something which, in fact, took place in Egypt subsequent to the July 3, 2013, military coup and the 2014 amendments of the December 2012 Constitution.

Another curious feature of constitutional despotism is the overdetermination of constitutional cases. General and ambiguous statements of constitutional texts that ought to be a site of reasoned interpretation as applied to particular facts become clear commands. In each of these cases the SCC attributed to the various provisions of a transitional constitution text a single clear meaning that produced an indisputably correct answer. The overdetermination of constitutional cases which results from the assumption of the constitution's clarity and completeness creates another poor incentive for constitution-makers: because constitution-makers know that the constitutional court has arbitrary power to determine the meaning of the constitutional text, the only way to control its interpretative powers *ex ante* is to include a longer list of ever-more specific instructions.

The embrace of constitutional silence is one strategy that can be adopted to resist constitutional despotism. Instead of understanding the constitution as a series of pre-emptory commands from an ultimate lawgiver to inferior ones, it would rather be understood as a manifestation of a set of commonly held political ideals binding both citizens and public officials. Rather than creating a crisis, as the SCC seemed to believe, constitutional silence invites common deliberation. The role of the constitutional court in these circumstances would simply be to determine whether the result of public deliberations as objectively manifested in a law are not obviously outside the fundamental boundaries of the written constitution and the unwritten political norms which produced the written text. Recognition that a constitution will inevitably be silent on even important issues would position the court to recognize that a constitution works best as a master rule that creates a process for a people to settle its disputes, including disputes about the ultimate meaning of their shared political values, using legal means rather than naked force.

While it would be unfair to pin the failure of the January 25th Revolution on the SCC and its jurisprudence, its unbridled legal positivism, instead of reducing political tensions, simply exacerbated them. It therefore contributed to the poisonous climate that concluded in the July 3, 2013, military coup. An embrace of constitutional silence, by contrast, might have led to a different outcome.