

Mahmoud Hamad

RAFIK HARIRI CENTER FOR THE MIDDLE EAST

# Egypt's Litigious Transition: Judicial Intervention and the Muddled Road to Democracy

Egypt's judiciary has played a central role in the country's transition since the ouster of President Hosni Mubarak in February 2011. The political forces that led the uprising agreed on almost nothing except their profound rejection of dictatorship, corruption, and injustice. The military generals who took over from Mubarak lacked the imagination or the will to set out a clear roadmap to democracy. Ultimately, it fell to the judiciary to shape many aspects of the transition. In the legally murky climate of the past two years, judges drew fire from forces across the political spectrum, issuing decisions affecting the public perception of their objectivity.

Recent developments—particularly the March 2013 ruling that effectively cancelled parliamentary elections and the subsequent struggle over the Judicial Authority Law—have highlighted the animosity between the judicial branch, and the executive and legislative branches. The lack of trust between the judiciary and the government has contributed to the stalled transition and exacerbated political dysfunction within the government and between political parties.

Although there is a tendency to place most of the blame for this animosity on Islamists, overzealous justices helped to create the problem by straying from their legal mandate and delving into the political realm. Over the past two years, the judiciary has increasingly veered away from its commonly understood role under international legal

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norms as an impartial guarantor of due process, which would provide a level playing field for all political forces involved in the transition. Rulings from the highest Supreme Constitutional Court (SCC) to the lower administrative and criminal courts have dramatically altered Egypt's course at pivotal moments, undercut public perceptions of the judiciary as an impartial actor, and undermined its prestige.

The three components of the transition most affected by the judiciary include dismantling the Mubarak regime's political infrastructure, restructuring democratic institutions, and negotiating a new constitutional order. In dismantling the old institutions and trying former high-profile political figures, judges who interpreted the law to suit public opinion and their own political agendas encouraged a climate in which the courts became a political battleground. The effort to restructure state institutions pitted the highest levels of the judiciary against the elected post-Mubarak Islamist government in a bureaucratic turf war. Finally, the contest over the new constitution highlights the

**Mahmoud Hamad** is assistant professor of politics and international relations at Drake University in Des Moines, Iowa.

government's efforts to constrain the judiciary, creating a damaging dynamic that will prioritize political grudges over the legal and structural changes necessary for a successful post-revolutionary democracy.

## **Dismantling the Old Regime**

The National Democratic Party (NDP), Egypt's ruling party for decades, played an integral role in manufacturing the Mubarak regime's electoral majorities. Although rioters torched the party headquarters on Cairo's Tahrir Square during the revolution, its membership and electoral infrastructure remained intact. Appeals to the military generals of the Supreme Council of the Armed Forces (SCAF), the self-appointed stewards of the transitional period, to dissolve the NDP and ban its leaders from political participation fell on deaf ears. However, fearing that its leaders were merely waiting out the unrest to plot a comeback, activists petitioned the courts to dissolve the party. On April 16, 2011, only sixty-five days after Mubarak's departure, the High Administrative Court (which hears cases against the government) dissolved the NDP and ordered its funds and property to be handed over to the state. The ruling maintained, "The NDP since 1978 played a principal role in selecting corrupt governments, decreeing unconstitutional legislation, obstructing judicial rulings, and implementing policies incompatible with national interests. The party also damaged political life and ravaged national unity." Under Egyptian law, such reasoning was backed by little concrete precedent and did not clearly satisfy the criteria under which judges could use to dissolve the party; instead the enormously popular verdict relied on political rather than legal arguments.

Those who welcomed the ruling, however, did not foresee what it portended: an increasingly politicized judiciary. Competing factions soon realized that political victories could be scored in courtrooms. In a transitional period during which the rules of the game were still being negotiated, this meant that all disputes could be subjected to the political leanings of individual judges.

The ruling to dissolve the NDP encouraged judicial remedies for the SCAF's unwillingness to undo the NDP's grip on municipal councils throughout the country.

The NDP controlled 98 percent of the 1,750 councils, through which it maintained an implicit patronage system to exert control over the country. Legal activists filed a case before the court requesting the dissolution of these municipal councils, and on June 28, 2011, the Supreme Administrative Court compelled the government to dissolve all municipal councils across the country. The court based its verdict on the premise that these councils only acted on behalf of the old regime and had no value after its demise. It also ruled for the mandatory dissolution of municipal councils due to rampant corruption and lack of accountability, which caused the quality of healthcare, education, and other government services to deteriorate. Again, as with the NDP case (in the heat of revolutionary fervor), the court relied on political reasoning rather than a legal argument.

As the administrative courts dismantled some of the institutional foundations of the old political order, criminal courts took on cases against former Mubarak regime personalities. Given the SCAF's refusal to establish special revolutionary courts, criminal courts tried the most prominent members of the old regime, including Mubarak and his two sons, the speakers of both houses of parliament, two former prime ministers, several other ministers, and members of the business elite. Mubarak's trial on charges of ordering the use of violence against peaceful protesters, dubbed 'the trial of the century,' was undoubtedly the most significant criminal case in the nation's judicial history. The trial was marked by drama inside the courtroom and violent clashes outside. The highly anticipated verdict announced on June 2, 2012, days before the crucial second round of the presidential elections, handed down life sentences for Mubarak and his last-serving minister of interior. A panel of judges, however, exonerated Mubarak's sons and several senior security officials—a verdict consistent with almost all cases involving police brutality and the excessive use of force. Of one hundred seventy-two police officers tried for attacks on civilians, the courts convicted only two between February 2011 and April 2013.<sup>1</sup> In many cases, insufficient evidence under criminal procedure laws led to

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<sup>1</sup> Harper's Index, Harpers Magazine, April 2013. <http://harpers.org/archive/2013/04/harpers-index-349/>

these verdicts, but it encouraged the view that the judiciary contributed to a counter-revolution in the face of an Islamist government. Other politically charged cases, most notably the ongoing criminal trial of employees of democracy promotion organizations spearheaded by Mubarak-era minister Faiza Abul Naga, eroded public confidence in an objective legal system.

The public prosecutor also represented another pillar of the old regime. Abdel Meguid Mahmoud was appointed by Mubarak in 2006 after a long tenure in the State Security Prosecution Department. The public prosecutor oversees the work of the Public Prosecution Department and is responsible for prosecuting (or in some cases, refraining from prosecuting) all criminal offenses. He commands uninhibited authority over all prosecutors and can use the position to provide political cover for the regime in sensitive cases. Since 1952 successive governments habitually appointed political allies to this post and Mubarak went to great lengths to select highly trusted protégées. It is unsurprising that Islamist and revolutionary forces demanded Mahmoud's removal since Mubarak's departure, which the SCAF dismissed.

Morsi would eventually remove the public prosecutor; after all, Mahmoud's office convicted thousands of Muslim Brotherhood activists, including Morsi himself. Initially, Morsi tried to remove Mahmoud by offering him an ambassadorship; however, finding support among the Judges Club and liberal parties, Mahmoud refused. Morsi's November 2012 constitutional declaration forcibly removed him, but met intense public backlash from the Judges Club and within the judicial corps. Given the Judicial Authority Law protecting the prosecutor from removal by presidential order, they saw the decision as a clear infringement on judicial independence. Mahmoud filed a lawsuit before the Cairo Appeals Court and supporting judges launched a media campaign against the newly appointed prosecutor, Talaat Ibrahim Abdullah, who was considered close to the Muslim Brotherhood. Abdullah's claims that police arrested 'thugs' in the violent clashes near the presidential palace and his inability to provide evidence of coercion by Brotherhood henchmen who attacked protestors further tarnished his image.

In March 2013 the appeals court invalidated the removal of Mahmoud and the appointment of Abdullah. Once again, the verdict reinforced the perception that the judiciary strove to preserve the status quo ante, providing a major boost to anti-Morsi factions. As Mahmoud and his allies demanded his immediate return to the post, the presidency appeared to be torn between keeping a trusted ally and defying the judiciary, or complying with the verdict and losing control of the prosecution office. The ongoing battle over the office of the public prosecutor represents an important litmus test over relative strengths of the presidency and the judiciary in Egypt's political contest.

### **Restructuring Political Institutions**

Egypt's unique system of judicial supervision of elections (mandated in the 1971 constitution) brought judges into the political process decades ago but its implications have become sharper and more controversial in the post-revolution era. Although the first post-revolution parliamentary elections saw relatively few violations, the presidential election in June 2012 faced immense legal challenges. The Presidential Elections Commission (PEC), led by senior judges, disqualified three high-profile candidates based on the legal prerequisites for candidacy: Mubarak's spy chief and former vice president Omar Suleiman for failing to obtain the required number of signatures, Muslim Brotherhood strategist Khairat al-Shater for a previous conviction, and Salafi candidate Hazem Salah Abu Ismail over his mother's dual citizenship. Despite a legal basis for each disqualification, the overriding public view was that PEC judges collaborated with the SCAF to engineer a predetermined outcome.

Then, only two days before the crucial final round of presidential elections in June, the Supreme Constitutional Court (SCC) issued a pair of rulings that many viewed as tilting the political landscape in favor of the former regime. One verdict ruled against a political exclusion law passed by the Islamist-dominated parliament, thereby allowing Ahmed Shafiq (a former air force general and Mubarak's last-serving prime minister) to run for president. The court also ruled against the constitutionality of the parliamentary elections law, ordering the dissolution of the Islamist-dominated People's Assembly (the lower house

of parliament) elected a few months earlier. In both cases, the SCC based its rulings on the violation of the principle of equal opportunity in political participation, but all too coincidentally placed a major obstacle in the path of the Islamists' ascent to power. The court's decision came as a shock to both Islamist and anti-Mubarak revolutionary forces.

Delivered on June 14, 2012, the ruling coincided with the public perception that Morsi would win the presidency (he represented the only alternative to a military regime) and that the SCAF and judiciary conspired to prevent Islamists from controlling both the executive and legislative branches. Despite the legal reasoning that accompanied the decision, the timing strengthened the perception that the SCC behaved as a political actor that favored the old regime, particularly in light of the highly unusual speed by which the court delivered its verdict. In 1984 and 1987, the two previous instances in which the court ruled to dissolve the parliament, the court took an average of three years to issue a verdict. This time, the SCC deliberated for only a single session of oral arguments. Some saw the decision as the SCC's quid pro quo to the SCAF, which a year earlier changed the selection procedures to give the court complete control over the selection of its new judges, a right no other court in the world maintains.

The SCC ruling took place amid escalating tensions between the judiciary and the parliament elected in early 2012, and the dissolution might have been an attempt to preempt expected legislation that would have limited the court's jurisdiction and its institutional independence. Then-prime minister Kamal Ganzouri (also viewed as a Mubarak-era remnant) had hinted as much in March 2012, saying, "The verdict regarding the dissolution of the parliament is in the drawer of the SCC and can come out at any time."<sup>2</sup>

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2 Ahram, October 19, 2012, <http://digital.ahram.org.eg/articles.aspx?Serial=1067762&eid=9713> Youm 7, June 14, 2012 <http://www.youm7.com/News.asp?NewsID=705590>. Others claimed that the ruling was a judicial preemptive strike against the legislature. Former political adviser to the Prime Minister Motaz Abdel-Fattah put it nicely in an analogy from the Wild West "the Parliament and the SCC both have guns and the side who can draw his gun first would win. The SCC drew its gun and fired first." El-Watan, September 12, 2012. <http://www.elwatannews.com/news/details/48095>

Notably, Tehani al-Gebali (the former vice president of the SCC) openly expressed anti-Islamist and pro-military sentiments during this tense period. Former deputy prime minister Ali al-Selmi worked with al-Gebali in late 2011 to draft a controversial set of supra-constitutional principles that would have given the SCAF lasting political powers.<sup>3</sup> Gebali, Egypt's first woman judge, was a frequent guest on television talk shows openly criticizing political Islam and she reportedly "advised the generals not to cede authority to civilians until a constitution was written."<sup>4</sup> Gebali believed, then, that the SCAF would retain considerable control over the provisions of the new document, preserving its secular character. Although Gebali was the most visible partisan justice, she was not the only judge who engaged in the political process. In a televised speech days before the second round of the presidential election, Judges Club's President Ahmed al-Zend, an unapologetic and vocal anti-Islamist, spared no effort in censuring the Islamist-dominated People's Assembly, publicly declaring that judges would not enforce any legislation enacted by the parliament.

The SCC's confrontation with the legislature resumed after new parliamentary elections were called in early 2013, as the court rejected the initial electoral law drafted by the Shura Council (the upper house of parliament that had not been dissolved). The SCC ordered changes to the law including the redrawing of electoral districts, hardening the eligibility conditions for candidates to effectively exclude Islamist political detainees, and relaxing the exclusion of former NDP members of parliament. The blatantly anti-Islamist political slant to the recommendations were, nonetheless, perfectly legal within the purview of the SCC's role under the new constitution, even if the judges took advantage of the legal ambiguity surrounding the principle of equal opportunity. The Islamist-dominated Shura Council, however, refused to make all the mandated changes or to return the amended law to the court to ensure compliance. Although the constitution is silent on this matter, the administrative court then ruled that the law be sent back to the SCC, effectively suspending the elections that were

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3 El-Watan, September 11, 2012, <http://www.elwatannews.com/news/details/47589>

4 New York Times, July 3, 2012.

due to begin in April and extending the transition process by at least another six months. Beyond its immediate ramifications, the ruling positioned the SCC as the final arbiter on legislation related to any electoral contest and the judiciary will likely remain a vital player in Egypt's electoral contests for years to come.

## Shaping the Constitutional Order

The courts also intervened in political tussles over the writing of a new constitution. In a March 2011 referendum Egyptians approved constitutional amendments that set the course for the transitional period. The referendum provided for a political transition that would begin with legislative elections and lead to the selection of a constituent assembly (CA) by both houses of parliament to draft a new constitution. All of this was to take place under SCAF rule, before the election of a new president. The SCAF generals expected a divided parliament in which they could control the ideological balance, but the January 2012 election results saw Islamists take a majority in both houses of parliament, which then appointed an Islamist-dominated CA.<sup>5</sup>

An administrative court suspended the first CA selected in April 2012 on the basis that it included sitting parliamentarians. The ruling took advantage of the ambiguity surrounding the selection process as put forth in the March 2011 constitutional declaration (article 60), claiming it to be unconstitutional for members of parliament to elect themselves. In its place, a slightly more diverse (yet still heavily Islamist) assembly was selected on June 12, 2012, and immediately faced legal challenges. The SCC then dissolved the parliament (see above) and the SCAF issued a constitutional declaration claiming legislative power and the authority to form a new assembly if the current CA failed to carry out its mission.

These legal developments carried profound political ramifications, and touched off a series of tit-for-tat measures between incoming president Morsi on one side and the SCAF and senior judges of the SCC on the other. Morsi's first significant executive decision was to recall

parliament in contravention of the court's dissolution. The SCC immediately nullified his decree, but not before the assembly convened just long enough to refer a new law on the selection process for the CA to Morsi. He promptly signed it, protecting the CA from another suspension.

Convinced that the SCAF and the SCC would work together to strip his presidency of most of its powers, Morsi issued a constitutional declaration on August 12, 2012, changing the defense minister and chief of staff, effectively removing the SCAF from its formal role in politics. The declaration also empowered the president to select another assembly if the CA could not complete its work.

The draft constitution produced by the CA in autumn 2013 severely cut SCC autonomy, leading to accusations of meddling with judicial independence. It reduced the court's presiding judges from eighteen to eleven, curtailed its prerogative to select its own members, and removed the judiciary's authority to investigate misconduct by its own members. Other provisions limited the SCC's political powers, such as stripping its power to dissolve the parliament or municipal councils, limiting its scrutiny of election-related legislations to the period before a law is enacted, and negating its exclusive mandate to provide binding interpretations of the constitution's text. The constitution also stripped the SCC of its role in overseeing the implementation of presidential elections or presiding over impeachment procedures.

To ensure the passage of the constitution, and fearing that the judiciary might try to annul his August decree and bring the military back into power, Morsi issued a constitutional declaration on November 22, 2012, preventing judicial oversight of any and all constitutional declarations, laws, and presidential decrees; prohibiting any judicial body (read: the SCC) from dissolving the Shura Council or the CA; and forcing the Mubarak-era public prosecutor from office.

Morsi's actions effectively unified anti-Brotherhood forces, sparking massive rallies in Cairo's Tahrir Square and in other major cities. Judges took advantage of the public sentiment to galvanize support against a blatant attack on

<sup>5</sup> El-Watan, September 12, 2012, <http://www.elwatannews.com/news/details/48095>



their independence, and most courts (including the Court of Cassation) suspended their proceedings. In turn, the CA held an overnight meeting to railroad the approval of the draft constitution to preempt any retaliatory action against the body. Morsi promptly scheduled the referendum to take place just three weeks later on December 15, 2012.

In a last ditch attempt to block the referendum, judicial associations announced they would boycott monitoring the vote, and Morsi soon withdrew his initial constitutional declaration to coax enough judges into participating and to calm public opinion. He issued another declaration that removed several restrictions on the judiciary. Despite the concession, and due to a shortage of judicial monitors, the High Judicial Elections Commission was forced to hold the referendum in two rounds. The constitution was ultimately approved on December 25, 2012, but Morsi and his allies would not easily forget the role judges played against them.

## Conclusion

The Egyptian public does not expect the judicial machinations that beset Egypt's political environment in the last two years to recede any time soon. Although the constitution limits the SCC's power, battles over the scope of judicial authority continue. The question of constitutional amendments after the election of a new parliament will also keep the role of the judiciary at issue. Strained relations between the presidency and the courts will persist for the foreseeable future, and tensions could resurface as a result of the crisis over the public prosecutor, legislative elections, legislation regulating the courts (ordinary and constitutional), and the election of judicial unions (particularly the Judges Club). Legal activists and secular political parties are likely to appeal to the judiciary to block or at least slow the momentum of change.

This dynamic holds significant implications for any Islamist-dominated parliament and the presidency. Judges can still use the bench and their supervision of the elections to make their voices heard; after all, judges threatened to boycott election supervision in their confrontation with Mubarak (2005-06) and many judges did not participate in supervising the constitutional referendum in 2012. The members of the Judges Club have proven they are willing

to defy the presidency and the legislature to maintain their dominance and independence in the legal sphere. As in any system with an independent judiciary, judges will naturally be more bold as presidential public approval diminishes and less likely to challenge a popular president.

Morsi, for his part, is expected to borrow from Mubarak's playbook by seeking to exert political influence over the courts, and the Judges Club will likely be his prime target. Morsi will use state resources and state-owned media to vilify the Club's leadership and facilitate changes to it. Mubarak used this tactic following a similar judicial upheaval in 2005-06, placing his sympathizers at the helm of the Judges Clubs in Cairo and Alexandria. Morsi's mission, however, is more complicated: the president does not have Mubarak's unquestioned control over the state bureaucracy and the media, and many influential newspapers and TV stations are openly hostile to his Islamist program. Moreover, the constitution inhibits executive influence over the courts, so Morsi cannot use financial incentives to coax judges as Mubarak did. The constitution also clearly prohibits sitting judges from assuming nonjudicial functions, a practice which Mubarak utilized with immense success.

Nonetheless, Morsi and his allies are not devoid of political capital. The regime may use its expected legislative majority to enact laws that would lower the mandatory retirement age and rid the court of hostile judges, including the presidents of many judicial unions and scores of senior judges sympathetic to the old regime. With many justices approaching the mandatory retirement age, Morsi can make his mark on the SCC. During his first term in office, and without reducing the retirement age, Morsi will make four appointments to the SCC (including its chief justice). If he wins a second term, Morsi can appoint four more justices, which would dramatically alter the ideological composition of the constitutional court for years to come. If the retirement age is lowered, Morsi can theoretically reappoint the entire court in his first term.

The balance of power in the new parliament also will affect the level of judicial influence; scholars of comparative judicial politics observe that judges rarely defy a unified

government in which one party controls the presidency and the legislature. Although judges can do very little to shape the composition of the legislature, they do strive to cultivate public patronage. It will be important for the Egyptian judiciary to resist the temptation to let political leanings drive decisions, but equally important to persist in the fight for an independent judiciary. The coming trajectory to Egypt's transition will rely greatly on the emerging relationship between the government and the judiciary.

*MAY 2013*

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