THE SUPREME CONSTITUTIONAL COURT OF EGYPT (SCC)

AFTER MUBARAK

Rethinking the role of an established court in an unconstitutional setting

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First draft – please do not quote – comments welcome

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Abstract

Newly established constitutional courts are often perceived as important actors in democratization processes. The Supreme Constitutional Court (SCC) of Egypt differs from these newly established courts, as it was created under authoritarian rule in 1971 and has played an important, albeit ambivalent role in Egypt’s political system. After the toppling of President Mubarak, the court has not been abolished despite the suspension of the 1971 Constitution. Analyzing and contextualizing two crucial decisions issued in June 2012, the paper retraces the court’s effort to assert itself in the politically difficult, “unconstitutional” setting of Egypt’s transition. It shows that the SCC’s former jurisdiction and practice and its justices’ conceptions of office in particular are crucial in order to understand the SCC’s role in Egypt after Mubarak.

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1. INTRODUCTION

In February 2011, after days of mass protests in Cairo and other Egyptian cities, Egyptian Vice President Omar Suleiman announced Husni Mubarak’s resignation from office. Mubarak had ruled over Egypt for more than 30 years. The Supreme Council of the Armed Forces (SCAF) assumed authority and suspended the 1971 Constitution. After the toppling of Mubarak, Egypt has been torn by powerful divisions and conflicts about the emerging political and societal order. These struggles have been reflected in the process of constitution-making. After the ousting of Mohamed Morsi in July 2013 they have ended in a strengthened role of the “forces of restauration” (military, security apparatus, religious establishment, etc. cf. Harders 2013: 30). This privileged status is now reflected in the 2014 Constitution (Brown/Dunne 2014).

In the contentious months between 11 February 2011 and 3 July 2013 a constitutional body established with the 1971 Constitution, the Supreme Constitutional Court of Egypt (SCC), has been a decisive actor. Unlike the two parliamentary chambers, the SCAF did not dissolve the SCC. Despite the suspension of the 1971 Constitution in February 2011, the SCC has exercised judicial review during these two and a half years.

The Supreme Constitutional Court (SCC) was created under Anwar al-Sadat and started working in 1979.¹ At all times it was loyal to the regime, showing “reluctance to challenge the core interests of the regime” (Moustafa 2009: 106). At the same time, the SCC and its justices developed a pronounced self-consciousness: during the 1990s, frequently referred to as the “golden age” of the SCC (Bernard-Maugiron 2013: 197; Moustafa 2009: 192), it declared a great number of laws unconstitutional, frequently counterbalancing the strong executive. Aiming at restricting the SCC’s increasing activism, President Mubarak “packed” the Court from 2001 onwards. In its new composition, together with constitutional and legal changes introduced by the regime, the SCC became an institution, mainly legitimizing the regime’s actions (Lombardi 2009: 238-239).

This ambivalent institutional history differentiates the SCC from many constitutional courts instituted in the years and decades after World War II in Europe and elsewhere in the course of democratization processes. A very positive role is often attributed to these newly established constitutional courts (Ginsburg 2008: 85-88).

Given the SCC’s long, ambivalent institutional history and the “unconstitutional setting” (Brown 2013a) in which the court has operated after Mubarak, this paper seeks to trace and explain the

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¹ The SCC was instituted with the 1971 Constitution with the details to be determined by legislation. The SCC commenced operations after the SCC law had finally been passed in 1979 (Moustafa 2009: 77).
role² the SCC has played since the toppling of Husni Mubarak in February 2011 until the ousting of Mohamed Morsi in July 2013.

Analyzing and contextualizing two crucial decisions issued in June 2012 i.e. declaring the amended parliamentary election law (on the People’s Assembly) and the “disfranchisement law” unconstitutional, I delineate the Court’s effort to assert itself in a politically difficult and unconstitutional setting. I claim that one cannot explain the SCC’s role by referring to the justices’ appointment by Mubarak and picturing them as “feloul” (remnants of the ousted regime), an explanation many commentators and analysts have given (Aboul Enein 2012; Taher 2013). As I show in this paper, it is essential to take into account the SCC’s former jurisdiction, practice and especially its justices’ conceptions of office in times of a “constitutional vacuum” (Brown 2013a: 1) in order to understand the SCC’s role after Mubarak.

Chapter 2 discusses the role of constitutional courts in processes of transformation⁵, developing a conceptual framework for the examination of the Egyptian case. Chapter 3 clarifies the methodology. Chapter 4 outlines the SCC’s role and jurisdiction until 2011. Subsequently, chapter 5 analyzes the political and legal background of the transition process, the composition of the court as well as the June 2012 SCC judgments in their political context. The last section draws conclusions on the SCC’s role.

2. CONSTITUTIONAL COURTS IN PROCESSES OF TRANSFORMATION

2.1. Constitutional review between law and politics

In the 20th century, especially after World War II, constitutional courts have mushroomed all over the world. Initially established in the course of the democratization processes in Western and Southern Europe, new constitutional courts were set up in Central and Eastern European Countries in the 1990s as well as in some Latin American, Asian and West-African countries (Harding et al. 2009: 5; Ginsburg 2003: 7-8). The existence of a strong and independent constitutional court is often considered to be one of the most significant attributes of functional rule of law systems (Choudry et al. 2014: 9).

However, the exact definition of the role of constitutional courts remains contested. Constitutions have to be interpreted, concretized and implemented i.e. they are ineffective when they don’t instruct an institution which can ensure their applicability and implementation in cases of constitutional conflict. Constitutional review by constitutional courts therefore

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² According to Boulanger a constitutional court’s institutional role consists of role expectations by certain audiences and the court’s role behaviour (Boulanger 2013: 29). In this paper, I focus on the second dimension, the court’s perspective, describing and explaining how and why the Court has acted the way it has.

³ Law No. 17/2012 adding a 4th paragraph to Article 3 of the Law on Regulating the Exercise of Political Rights No. 73/1956.

⁴ The first decision resulted in the dissolution of the People’s Assembly by a SCAF decree, the second one in the participation of Ahmed Shafik, last Prime Minister under Mubarak, in the presidential elections.

⁵ The term transformation describes the process of change of state and society and is applied as an umbrella term for all forms, structures and aspects of systemic change. It includes regime change, systemic change and transition (Merkel 2010: 66).
constitutes a political control of political powers by the means of laws. Due to this position “between law and politics”, the conflict between legislative, executive and constitutional court is always possible, even if a conflict do not always become apparent (Vorländer 2006: 14). The boundaries between constitutional law and politics become blurred. Politics can become “judicialized”, while constitutional justice is endangered by “ politicization”. In constitutional democracy an immanent tension between constitutionalism and democracy, between law and politics exists (ibid).

Whether and in how far a “judicialization” (or “ politicization”) takes place, depends on institutional factors, but especially on political actors and the justices themselves (and their interaction) (Hirschl 2008: 129-138). In jurisprudence, the justices´ task of finding the “right balance” in their jurisdiction is discussed under the terms of “ judicial self-restraint” vs. “ judicial activism”. Due to the blurred boundaries “ judicial self-restraint” can rather be defined as an “ attitude” by justices (Limbach 1996: 2). Besides institutional factors ( selection procedures, internal rules and procedures, etc.), the justices´ attitudes and the court´s jurisdiction in general are influenced by the justices’ conception of their role, years of legal formation and socialization (including its former jurisdiction): “ on the whole, judges try to be good judges, or, at least, constitutional judges try to do the job of creating constitutional jurisprudence according to their understanding of their role” (Robertson 2010: 20).

Simultaneously, courts have to consider other political actors, who are also dependent on them. Constitutional courts are “reactive institutions”: they can only influence political decisions if cases are brought before them and if political actors implement their decisions (Steinsdorff 2010: 492-493). Acceptance of a constitutional court and its decisions can be influenced by the selection procedure of its justices (ibid). However, more important is the court´s argumentation used to support its decision. Every decision by a court can be understood as its “primary channel of communication” (Kranenpohl 2011: 500) and an “ offer of interpretation” (“ Deutungsangebot”). By presenting its reasoning the court seeks acceptance by the parties and applicants as well as political and societal compliance with its decision (Vorländer 2006: 15). The justices have to act strategically, finding the “right” balance of “ judicial self-restraint” in different situations in order to overcome their structural weakness; in this manner they can transform it into authority, which may especially derive from the lack of “ hard” power resources (Steinsdorff 2010: 494). Thereby, a court can win political actors’ and society’s confidence. Hans Vorländer defines this kind of power as “ interpretative authority” (“ Deutungsmacht”). By means of producing accepted decisions, the court can establish confidence in itself as an institution. Thereby, their acceptance and authority mainly depends on the perception of the justices as being neutral and their judicial competence (Blankenagel 1999: 261). Once this confidence in the institution is established, its acceptance and authority no longer depends on a

6 These considerations are associated with the sociological branch of “new institutionalism”, assuming that justices behavior is structured by a “logic of appropriateness” (cf. March/Olsen 2006: 8)
single decision. However, this does not mean that “judicial argumentation” only serves the “means of presentation”, as some critics of judicial methodology claim (cf. Röhl 2013). Of course, the presentation of a court’s reasoning does not describe the social and psychological process involved in reaching the decision. The reasoning is stringent, and conceals doubts, insecurities and political motivations, as well as thoughts about possible consequences. Yet, one cannot assume that the reasoning only serves to hide the “true reasons” for a decision (ibid). The need of, inter alia, an “idealized presentation” of a decision, constitutional norms and former jurisdiction also influence the process of producing a decision (Röhl, citing Schlieffenn 2011: 115).

In conclusion, justices “determine themselves whether something is constitutional or not, but are only free to make this determination inside a complex web of legal and political restrictions” (Robertson 2010: 34). Issuing decisions which are in line with their professional understanding of their role and which are accepted and implemented by other political actors poses a great challenge for courts and is the decisive characteristic of the constitutional courts’ “special logic of functioning” (Steinsdorff 2010: 480).

2.2. Constitutional courts in processes of transformation

These challenges are even greater in processes of transformation. Constitutional courts are seen as important actors in processes of transformation, especially in countries where they have been established after a system of democratic institutions has been established. For example, in Germany and Italy the justices understood themselves as “advocates for a new, democratic system” (Steinsdorff 2010: 483) and the courts established “interpretative authority” over time (Vorländer 2006: 10-11; cf. Vanberg 2005).

In contrast to the German Constitutional Court, the Turkish Constitutional Court is frequently cited as an example of a court playing a “dysfunctional role” (Boulanger 2013: 47; Belge 2006), protecting the influence and interests of a special group: the so-called “Republican Alliance”. Its creation and its role are often explained by the so-called theory of “hegemonic preservation”, developed by Ran Hirschl (2007). According to this controversial theory, judicial review can also be a tool applied by once dominant political elites to protect their threatened status in times of transition against hostile elected majorities. In this case, the constitutional justices are not so much supposed to protect democratic principles as to preserve as much of the status quo ante as constitutionally possible in order to serve the interests of the old elites (2007: 11-12). The foundation of the Turkish Constitutional Court after the military coup of 1960 can be explained as an attempt to preserve the hegemony of the ruling elites over a presumably hostile parliamentary majority (Belge 2006, Can 2011). It is less obvious however to interpret the autonomous institutional development and the continued influence of the Court on the rapidly changing Turkish political system in light of Hirschl’s theory (Göztepe/Steinsdorff forthcoming), being an indicator for the importance of other explanatory factors (as mentioned above).
A similar argument can be made for courts established under authoritarian regimes: while they are established in order to serve the rulers’ interests (i.e. legitimizing their regime) this does not mean that they only serve as “pawns of the regime” (cf. Moustafa 2009: 21-40). The success of the constitutional court’s legitimating function depends on some measure of real judicial autonomy. If some autonomy is granted, courts may issue decisions that stand in contrast to the interests of the regime. These decisions can be explained by, inter alia, the justices’ professional understanding of their role and their institutional interest to expand their role in the system. However, courts generally don’t interfere with a regime’s core interests. Regimes have a great variety of means at hand for limiting the court’s influence, including changing the type of judicial review and engineering constraints on the institutional structure and legal standing requirements (Ginsburg/Moustafa 2008: 14-21).

The dialectic of functional vs. dysfunctional court, as outlined for the German and Turkish constitutional courts, can also be demonstrated for the cases of Russia and South Africa. In contrast to Turkey and Germany these two courts have played an important role during the immediate phase of systemic change, while every other element of politics has been in flux. Revolutionary times are not friendly times for courts and are particularly difficult for constitutional courts: the acceptance of their decisions demands a great amount of democratic maturity and tolerance. The resistance against the court’s decisions is often great and political actors have a great variety of possibilities to limit the court’s jurisdiction: they can ignore the court’s decisions, overrule them, remove cases from the court’s jurisdiction, restrain its budget etc. (Ginsburg 2003: 77-81). Here it is even more important for constitutional courts to take other actors’ options into consideration. They should avoid noncompliance with their decisions. In such circumstances it can be useful to apply a “strategy of case selection” (ibid: 86-89). If decisions are not implemented it may transpire that a court cannot fulfill its functions anymore due to actors lacking incentive to bring cases before the court or because they do not see any reason to implement the court’s decision: “This can be fatal for courts by leading to counterattacks or marginalization. (…) The perception of noncompliance becomes self-fulfilling” (ibid: 73-74). Besides, there are other factors which can impede the work of constitutional courts in times of transition: if there is no constitution or the constitution is a contradictory document, the judicial review of laws and decisions as the main task of constitutional courts becomes very difficult – especially with regard to the “presentation” of its reasoning, referring to former jurisdiction or other judicial sources. Under these circumstances it is difficult for a constitutional court to be perceived as a “neutral” institution, to gain acceptance and develop authority as an institution.

The Constitutional Court of the Russian Federation and the Constitutional Court of South Africa exemplify these considerations. In South Africa the Constitutional Court played a very important role, even before a new constitution was established. During the democratic transition away from Apartheid in the early 1990s the negotiating parties agreed that the democratic transition
would be achieved through a two-stage process of constitutional change. A Constitutional Court would serve the unique function of certifying whether the “final” constitution produced by the Constitutional Assembly was in conformity with the parameters set out by the Constitutional Principles, the negotiating parties had agreed on. Thus, the Constitutional Court had no constitution, but constitutional principles at hand, which served as measure and reference for its argumentation. It first refused to certify the final Constitution, even after its adoption by 86 per cent of the democratically elected Constitutional Assembly. Nevertheless, it managed to assert its authority. With “healthy judicial restraint” (Bryde 1999: 207), cautiously, but assertively, it was careful to point out that the Constitutional Assembly had a large degree of latitude in its interpretation of the principles, emphasizing that its own role was a judicial and not a political one (Klug 2000: 154-158; Klug 2009: 276). In its second certification judgment, accepting the new constitution, the Court rejected wishes to extend the Court’s review beyond those aspects identified in the first certification judgment and relied “on a classical judicial strategy of deference to past decisions” (Klug 2009: 277). Despite this very tricky task, the Court managed to assert itself in this difficult situation, building up its authority as the new constitutional court in South Africa’s political system.

In Russia, the Constitutional Court faced a similarly difficult task: The constitution in force was the “much amended 1978 RSFSR [Russian Soviet Federative Socialist Republic] Constitution, a clone of the 1977 USSR [Union of Soviet Socialist Republics] Constitution” (Henderson 2009: 152), representing a “patchwork” of the proliferation of the political and constitutional ideas of the last years of Soviet rule (Mommsen/Nußberger 2007: 118). The Constitutional Court under its charismatic Chief Justice Zor’kin “became embroiled in disputes between Yel’tsin and the Supreme Soviet” (Henderson 2009: 152). Zor’kin’s attempts to mediate between Yel’tsin and the Supreme Soviet in April 1993 backfired; the court declared various presidential decrees unconstitutional, without examining them in detail (Mommsen/Nußberger 2007:120). Yel’tsin doubted the Court’s neutrality and in October 1993 he suspended its activity (Nußberger 2007: 217). Thus, in a very politicized situation, the Russian Constitutional Court under its politically very active Chief Justice Zor´kin was not perceived as a “neutral actor” and failed to establish itself as a new, accepted institution in the emerging political system.7

The SCC has also played an important role during the transitional process before the establishment of a new constitutional order as the newly established courts of Russia and South Africa. Yet, it has been established under an authoritarian regime centuries ago. Thus, the SCC’s “initial position” differs: the SCC does not have to establish itself in the emerging system, rather it has to ensure its sustained existence as the constitutional court in Egypt’s political system. Established courts have developed a “praxis” and a conception of office the justices resort to, when producing and presenting their decision (Boulanger 2013: 24). The

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7 Also Hungary’s Constitutional Court was a decisive actor during the transformation process in Hungary, but will not be considered here due to space restrictions (cf. Sajo 1995; Sajo 1999).
justices have developed a judicial understanding of their role in the system and they have developed norms and routines in their jurisdiction. It can be assumed that the constitutional court will try to uphold its position in the system and that the justices will perform their function of judicial review according to their understanding of their role. As a constitution is not available to the court, it has to refer to other judicial resources in its reasoning to develop authority and acceptance as the constitutional court. Due to the lack of “hard” power resources, this authority is of great importance, representing the most important source of institutional power for the court. Because this source of authority is only weakly developed, it has to exert additional influence on the political process in order to ensure its existence. This requires resorting to non-judicial means. A politicization seems inevitable causing a dilemma for the court.

3. METHODOLOGY
Court decisions are rarely analyzed in social sciences. Many scientific works only examine the “outcome” of decisions, but not the court’s reasoning i.e. what constitutional courts actually do. Considering the “special logic of functioning” of constitutional courts I follow Robertson in his understanding of judicial argumentation as “the core of judges’ activity, and central to understanding the role courts play in complex societies” (2010: 21). Therefore, the document analysis conducted focuses on two crucial decisions Egypt’s SCC issued in June 2012. Thereby only the decision itself – presenting the court’s reasoning – can be analyzed. The internal process of decision-making (the production of a decision) cannot be reconstructed, as it is taking place behind closed doors. This requires an examination of the context in which the decisions were issued: the events before the decisions, proceedings, political and legal consequences and further developments are examined by analyzing other legal and non-legal sources (e.g. laws, decrees, constitutional declarations, newspaper articles). In this analysis the context covers the composition of the court, (planned) legal changes regarding the court’s competences and proceedings of the court, the legislative process (of the two contested laws) and developments after the two decisions. Further, as I regard judicial self-perception as crucial, the court’s history, its jurisdiction and the justices’ self-perception and conceptions of office are traced by referring to literature available on the court and the judiciary in Egypt. However, that a court’s jurisdiction depends inter alia on the justices’ understanding their role, does not mean that individual justices are examined. As the decision-making process is taking place behind closed doors the institutional level constitutes the level of analysis.

Following Bowen (2009), Reh 1995: 212-218 and Noetzel et al. 2009: 327-332, the document analysis proceeds in three steps: exploration of the research field and the selection of documents, a critical examination of sources (“external critique”) and interpretation (“inner critique”) of the analyzed documents.⁸ During the exploratory phase I gained an overview of the

⁸ For the analysis English translations have been used. As these translations are not officially authorized translations (SCC 2012a; 2012b), they have been matched with the Arabic original together with a translator. Some minor
various decisions the Court had issued in the period after the toppling of Mubarak: in January 2012 the SCC struck down parts of the presidential election law the SCAF was about to issue by decree (Brown/Revkin 2012), in June 2012 it declared the parliamentary election law and the disfranchisement law unconstitutional (Soliman 2012; Brown 2012), in January 2013 it issued a decision upholding a ban on diplomats marrying foreign citizens (Brown 2013c). In June 2013 it declared the Shura Council election law, the constitutional assembly law and the emergency law unconstitutional (Brown 2013d).9

The selection of the two decisions on the parliamentary election law and the disfranchisement law is justified by the fact that both have influenced the political process in Egypt to a great extent and have been intensively discussed in Egyptian media and scientific comments, as well as in legal circles (Naeem 2012b). The two decisions deal with essential transition issues – the relations between and interaction among political institutions and the political participation of certain groups and former regime members. Due to the consequences of these decisions it can be assumed that the justices, even when they had to work under time pressure etc. cautiously set their argumentation. By analyzing the argumentation in these judgments one can find out how the Court interprets period, and how it tries to develop authority and acceptance as a constitutional court in an “unconstitutional setting”. After reconstructing the judgment’s structure, the content of different sections was summarized. Finally the argumentation in the sections was analyzed, guided by central questions derived from the conceptual considerations (Ch. 2): How does the court deal with the “constitutional document”? When and how does it refer to other legal resources? Can one recognize a self-perception and understanding of their role in the current transitional process?

4. THE SCC IN EGYPT’S POLITICAL SYSTEM (1979-2011)

4.1. Establishment, competences and procedures

The Egyptian legal system is built on the combination of Islamic (Shariah) law and Napoleonic Code, which was first introduced during Napoleon Bonaparte’s occupation of Egypt and the subsequent education and training of Egyptian jurists in France. The judiciary is considered to be a very self-conscious, proud profession (as in many countries). Its status is upheld by internal recruitment and promotion procedures, as well as the judiciary’s education and socialization: “this distinct identity is reinforced by the fact that judges are trained in the same law schools, socialize in the same circles, and often marry within the same families” (Rutherford 2008: 50).

mistakes have been noted, regarding the appropriate use of English terms, yet, the translations can be considered as literal.

9 There is no overview about the court’s decisions available (statistics only exist until 2006) and the decisions are not published on the SCC’s website (which is currently not available). The Official Gazette has not been examined due to a limited command of Arabic.
The Egyptian legal system is a civil law system, based upon a well-established system of codified laws. Despite the non-existence of an established system of legally (de jure) binding precedents, previous judicial decisions do have persuasive authority (Wahab 2012).

The SCC sits at the apex of the Egyptian court structure, having exclusive jurisdiction to decide questions regarding the constitutionality of laws and regulations (El-Morr/Nossier/Sherif 1996: 37). The SCC was established with the 1971 Constitution and commenced operations after the SCC law No. 48/1979 had finally been passed in 1979. It replaced the Supreme Court, which had been established by Gamal Abd al-Nasir in 1969 “to ensure that no meaningful constitutional review took place” (Lombardi 2009: 219).

According to Tamir Moustafa, Anwar al-Sadat, al-Nasir’s successor, established the SCC mainly in order to attract foreign investment as well as investment from Egyptian nationals holding tens of billions of dollars in assets abroad. Given the regime’s history of nationalizing the vast majority of the private sector, it was difficult to convince investors that their assets would be safe from state seizure or adverse legislation. Thus, the regime created a constitutional court, designed to assuage investor concerns and guarantee institutional constraints on executive actions (Moustafa 2009: 4-5; 77). Together with a reform of the administrative court system, the establishment of the SCC was the centerpiece of a new legitimating ideology focusing on the importance of “sayadat al-qanun” (the rule of law) and Egypt as “dawlet mo´asasat” (a state of institutions). Institutional reforms and rule-of-law rhetoric were used by Sadat to build a new legitimating narrative that was distinct from the populist foundations of the state (ibid: 6).10

Even though Sadat wanted to advance judicial independence, he still sought to remain ultimate control over the Court by controlling the appointment procedure. A “judiciary-executive model” was established, in which the appointment was legally dominated by the executive, but informally left largely under the control of the Egyptian judiciary. The President had the formal authority to appoint the chief justice who satisfied the minimum qualifications11 (Choudry et al. 2014: 56-59). Yet, despite this formal authority over SCC appointments, in the first two decades of its existence, the President always promoted the most senior justice serving on the SCC to the position of chief justice. Moustafa notes “a strong norm developed around this procedure, although the president always retained the formal legal ability to choose anyone meeting the minimum qualifications” (Moustafa 2009: 78). New justices on the Court were appointed by the president from among two candidates, one chose by the General Assembly of the Court and the other by the chief justice (Article 5). In practice, these nominations of the chief justice and the General Assembly were always the same until 2001. Thus, “[i]n effect, the SCC operated

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10 Additional explanatory factors for the establishment of the SCC are discussed in Lombardi 2009: 223-224.
11 According to Article 4 of Law No. 47/1979 members must be not less than forty-five years of age, they may be chosen among current or former members of the judicial bodies holding the rank of a counsellor or its equivalent, current or former law professors or Attorneys-at-law who have practiced before the court of cassation, the High Administrative Court for at least ten consecutive years.
for over twenty years as a self-contained and self-renewing institution in a way that few other courts in the world operate” (Moustafa 2009: 78-79).

The SCC is the only court with the task of constitutional review. According to Law No. 48/197912 (Article 25) the SCC has three main tasks: (1) issue binding interpretations of existing legislation when divergent views emerge; (2) resolve conflicts of jurisdiction between different judicial bodies; and (3) perform judicial review of legislation (ibid: 79-80). The powers of judicial review are the most important of these duties. The law specifies that the SCC is only empowered to perform judicial review, 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 proceedings and forward the case to the SCC for review. In most cases, the petition is made at the request of litigants. In a nutshell, judicial review in Egypt is centralized, the timing of judicial review is a posteriori, the SCC practices concrete review (rather than abstract review), and legal standing is restricted to litigants engaged in a real legal controversy with a stake in the outcome (ibid: 80).

Once a case is filed by a court of merit, it is reviewed by the commissioners´ body which prepares the matter (Article 39) and “files a report to the court that analyses the constitutional and legal issues in the matter, its opinion concerning them, and the rationale underlying it” (Law 48/1979, Article 40). Within one week of submitting of the report, the chief justice assigns the date of the session on proceedings on the case or application will commence (Article 41). The number of justices is not specified, neither is the number of justices hearing a case. However, there is a quorum of seven justices (Article 3). As soon as a majority is established, the opinion is written by the chief justice. If they are not among the majority, they assign it to any one of the associate justices (Sherif 1996:145). The SCC decides by majority principle, there are no dissenting opinions. These legal regulations and practices indicate that the respective chief justice – appointed by the executive (!) – strongly shapes the SCC´s jurisdiction. This feature has become apparent in the course of the SCC´s institutional history.

4.2. **The SCC between instrumentalization and self-empowerment**

The combination of a favorable law with presidential deference resulted in a steadily more autonomous and bold court. Throughout the 1980s and especially in the 1990s (“golden age”), the SCC developed an assertive jurisdiction in the areas of press freedom, operations of non-government organizations (NGOs) and electoral laws at the local and national level (Boyle/Sherif 1996: 231-280).13 In 1987 and 1990 its decisions lead to the dissolution of the People´s Assembly, decisions which have been extensively discussed and referred to by the justices themselves (El-Morr/Sherif 1996; Sherif 2000). The Chief Justice of those years, Awad El-Morr, took major pride in developing an ambitious jurisprudence based on a broad reading of

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13 Many aspects of its jurisdiction, among others Article 2 defining Shari´a as “principle source of legislation” cannot be discussed within the scope of this paper; cf. Bölz 1999, Lombardi 2006, Johansen 2004.
rights and frequently referred to international instruments on human rights (Brown 2013a: 3; Sherif 1997).

According to Moustafa, the court’s judicial power expanded over a two-decade period because of synergistic interactions among the SCC, the administrative courts, legal professional associations, opposition parties, and human rights organizations. The SCC facilitated the re-emergence of this “judicial support network”, provided its supporters with ongoing legal protection, and afforded institutional opening for activists to challenge the regime. In return, the SCC was dependent on the network to initiate constitutional litigation, and come to its defense when it was under attack: “a tacit partnership was built on the common interest of both defending and expanding the mandate of the SCC” (Moustafa 2009: 6).

While the SCC certainly curtailed executive power to some extent, it always showed reluctance to challenge the “core interests” of the regime, upholding key elements of the autocratic state and politically repressive practices. For example, the SCC upheld the constitutionality of Egypt’s State Security Courts, in which all cases prosecuted under the emergency law were handled (Moustafa 2009: 106). Bruce Rutherford, who examined the SCC’s and the administrative courts’ jurisdiction over time, explained the judicial deference to the executive not only as an “instrumental tactic of survival” (2008: 57) due to the political environment of an autocratic regime. Rather he interprets these decisions as expression of a reasoned judicial philosophy and the justices’ conception of the state: “In this view, a powerful state plays the pivotal role in creating liberty. (…) rights do not exist outside the framework of the state” (ibid). Egypt’s high justices have a very conscious understanding of their role:

“Egypt’s judges do not see themselves as simply enforcers of state-drafted law. Rather they consider themselves the guardians of the public interest. They seek to ensure that the state uses its formidable resources to serve this interest” (ibid: 60).

This understanding is also the main reason why they reject any infringement of their independence. Calls to defend judicial independence and integrity are not just a reflection of a proud profession guarding its “stomping ground”. Rather, “[t]hey are the product of a deeply held sense of mission” (ibid: 64) and an understanding as “the conscience of the nation” (ibid) and “the only institution with the public’s interests at heart” (ibid).

In the mid-1990s, despite the Court ruling in the regime’s favor in many areas (inter alia with regards to privatization, cf. Dupret 2003), there were signs that the government was increasingly uncomfortable with the SCC activism under then Chief Justice, El-Morr. In addition to direct threats to the SCC through private channels, there were public attacks in the mid-1990s, by accusing the SCC of imposing deviant interpretations of the Constitution, diverging

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14 A view also held by Chibli Mallat. In an analysis of the decision of the dissolution of the People’s Assembly in 1990 he concludes: “This long passage, with its touch of epic repetition, says enough of the sense of historic mission which the SCC feels, and such opinions do recur (…) in the several dozen decisions of the Court since it started its work” (1994: 105).
from the interests of the nation, and destabilizing the legal framework of the state. The initiator of the attack, Fathi Sorur, Speaker of the People´s Assembly, therefore suggested the introduction of *a priori* review of legislation (Sherif 2001). El-Morr responded forcefully to these attacks and vigorously addressed the danger of *a priori* review at nearly every public lecture, during and after his tenure as Chief Justice. When asked about the *a priori* review proposal during a lecture at Cairo University he answered: "if you want to destroy the Constitutional Court, let’s shift to *a priori* review" (El-Morr, cited in Moustafa 2009: 171). In the end, *a priori* review was not introduced due to public protest by the SCC and its judicial support network (Moustafa 2009: 171).

In 2000, the SCC issued two other decisions, opposed to the executive´s interests: it found the NGO-law unconstitutional and demanded judicial supervision of elections (ibid: 186-192). In reaction to this, the informal judiciary-controlled appointment process was broken down by Mubarak. He reasserted his formal authority and instead of appointing the most senior SCC justice Mubarak selected an external Chief Justice known for his loyalty towards the regime. As the number of justices was neither specified in the SCC law nor in the Constitution, this Chief Justice packed the Court with five additional, very regime-loyal justices. The SCC was increasingly instrumentalized: in the course of constitutional amendments in 2005, a Presidential Election Commission (PEC) was established, which had to supervise the electoral process. The chief justice, another member of the SCC, as well as of the commissioners´ body, were PEC-members. Despite manipulation on a massive scale, this commission labeled the 2005 presidential elections as "free and fair“. The day after the elections, the regime’s newspaper al-Ahram ran a front-page headline quoting the new Chief Justice Mamduh Marawi’s confirmation that ‘The Elections Ran under Complete Judicial Supervision’ (ibid: 214). Thus, in public the SCC was associated with fraud elections. Additionally, the SCC took over *a priori review* for the presidential election law, a competence the SCC and former Chief Justice El-Morr in particular had always rejected: “the Supreme Constitutional Court once the most promising hope for political reform in Egypt, was now being used as a rubber stamp in the manipulation of elections“ (ibid).

This picture of the SCC was also drawn after the revolt in 2011. It became common to refer to the SCC as composed only of “Mubarak appointed judges”, a statement which is technically true, but misses the fact that many justices weren’t nominated by Mubarak, given they had been on the court since the SCC’s “golden age” (Ch. 5.2.).

5. THE SCC AFTER MUBARAK (2011-2013)

5.1. Constitution-making between reform and revolution

According to Tamir Moustafa “[f]rom day one of the [2011] protests, a new Constitution was front and centre in political debates, not simply among political elites, but also among `everyday Egyptians’”(2011: 181). Two days after Mubarak’s resignation, the SCAF suspended the 1971
Constitution on February 13, 2011 assuming full authority in Egypt and dissolving the two parliamentary chambers. Subsequently, SCAF set up an eight-member committee headed by Tariq al-Bishri\(^\text{15}\) (and including two SCC justices, Naeem 2012a: 651, FN 18) with the task of amending the 1971 Constitution. This committee suggested to amend some of the most illiberal provisions of the Constitution\(^\text{16}\) and opened an avenue for a 100-member Constituent Assembly to draft an entirely new Constitution after the presidential and parliamentary elections. The committee was criticized for being exclusive\(^\text{17}\) and for providing the “minimum steps” necessary to initiate a viable program of political reform. On March 19, 2011 the amendments were accepted in a referendum by 77 per cent (with a turnout of 44 per cent) (Moustafa 2011: 189).

However, on March 30, 2011, the SCAF changed its agenda and published a “Constitutional Declaration” that was designed to replace the 1971 Constitution and act as an interim legal framework before a new constitution would be drafted (cf. Egypt State Information Service 2011a). This step of abandoning the 1971 Constitution came as a surprise for all political forces. It can be explained by inexperience and unpreparedness of the armed forces to run politics as well as changing strategic interests, as the SCAF regarded its political status in the amended 1971 Constitution as not sufficiently protected (Albrecht/Bishara 2011: 19-23): “(…) it was presented as a sort of gift by a patriotic military leadership dedicated to protecting Egypt and the principles of the revolution” (Brown/Stilt 2011). The Declaration, whose authors were unknown, substantively borrowed from Egypt´s 1971 Constitution. Yet, it also made a number of additions to articles beyond the ones the constitutional amendment committee was asked to review and that had been put up for a public referendum on March 19, 2011, thus effectively overturning the popular will (Albrecht/Bishara 2011: 19). The result was procedurally and substantively confusing and the declaration served as a means to strengthen both the role of the military in politics and its autonomy from civilian institutions (Stilt 2012: 48).

From February 2011 until August 2012, the SCAF continued to assert its oversight role. It abolished the system of constitutionalism in Egypt - which had at least formally existed - and, according to Naseef Naeem, replaced it by a system of “military constitutionalism” essentially insisting that Egypt’s governing constitutional framework was whatever the SCAF said it was (2012a: 659; 2012b: 106). After Morsi had taken over power in July 2012, he also issued equally top-down constitutional declarations, granting himself unlimited powers and the power to legislate without judicial oversight or review (cf. Ch. 4.7.). Both actors claimed to present the “popular will”, acting “in the name of the revolution” (Arato/Tombuş 2013: 10). During these

\(^{15}\) Tariq al-Bishri is a prominent intellectual figure and jurist known for his outspoken criticism of the regime (Moustafa 2011: 187).

\(^{16}\) Inter alia to relax the tight restrictions for candidacy in presidential elections (Article 76), restore full judicial supervision of elections (Article 88), and to cancel Article 179, which had entrenched aspects of the emergency law into the Constitution itself (Moustafa 2011: 187-188).

\(^{17}\) The military excluded representation from the groups that organized the January 25th Movement - indeed from almost all political parties and trends (save one member from the Muslim Brotherhood) - and not a single woman sat on the committee (Moustafa 2011: 187).
months the different actors were not able to agree on the model of constitution-making, arguing about the sequencing of the transitional process and on the composition of the constitutional assembly. After a first non-consensual constituent assembly (dominated by conservative forces of the Freedom and Justice Party, FJP, and the Salafi Al-Nour Party) had been dissolved by an administrative court in April 2012, the second one remained in session even as its parent, the elected People’s Assembly, was dissolved. This assembly, following a principle of majoritarian populist revolutionary constitution-making in the supposed name of the Egyptian people, rushed through the voting process instead of facilitating consensus and finished a new constitution in November 2012 (Arato/Tombuş 2013: 10). After the 2012 Constitution was accepted in a referendum - with low turnout - in December 2012, polarization and violence increased in the following months escalating over time into a protracted constitutional crisis. After mass protests in June 2013, Mohamed Morsi was ousted in July 2013 and the 2012 Constitution, regarded as illegitimate by many political forces, was suspended by the military.

In conclusion, what the Egyptians got instead of a constitutional framework commanding legitimacy as demanded from day one of the protests18, were actors assuming and claiming to represent the “popular will”, not reaching any consensus and instead each one at a time imposing “constitutional declarations” by force; resulting in an increasing polarization ending in a second military coup. Thus, after the revolt in January and February 2011 the SCC has operated under a series of constitutional frameworks, constituting a very challenging setting19. Adel Omar Sherif, the only justice on the bench during both decisions and editor of different books on the SCC (Boyle/Sherif 1996; Cotran/Sherif 1997; Cotran/Sherif 1999) concluded: “For the constitutionalists, what Egypt is going through today is a constitutional catastrophic situation” (2012: 3).

5.2. Composition of the Court

The chief justice is directly appointed by the executive and is a very influential member of the SCC (by controlling the SCC’s docket and overseeing the process of writing the Court’s decisions, cf. Ch. 4). Therefore, after the overthrow of Mubarak it was expected by many, also parts of the judiciary, that the SCC’s Chief Justice, Faruq Sultan, would be removed from office (Kouddous 2012). Sultan was perceived as a remnant of the old regime, he had been appointed as Chief Justice and as head of the PEC (introduced in 2005, cf. Ch. 4) to help his son, Gamal, to come to power in the next presidential elections20 (Kouddous 2012). However,

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18 Andrew Arato for example proposes a model of “post-sovereign constitution making”, namely, “(…) a multi-stage, democratic model with round table or multi-party negotiations as its centre piece, involving two constitutions with free elections in between, and overall enforcement through a Constitutional Court (Arato 2010: 19; cf. also Arato/Tombuş 2013).

19 “Ausnahmezustand” (Carl Schmitt 1922).

20 In 2009 he had presided the supervision of syndicate elections, legitimizing electoral fraud in these elections. He had no constitutional law background and had served on military and state security courts (Kouddous 2012).
Sultan was not removed as Chief Justice and thereby also stayed in the position of the head of the PEC.21

Next to Chief Justice Naguib there were 17 further members on the court (until the 2012 Constitution entered into force). Half of the justices have been on the court since the “golden age” of the 1990s – either in the court or the commissioners’ body of the court. The justices have been recruited from the commissioners’ body by their peer justices and have only been appointed by Mubarak. The other half of the justices have been appointed in the course of the “court-packing” since 2001 (and could be described as “feloul”). During the decisions, different justices have been on the bench, both “groups of justices” equally represented. Only one justice, the aforementioned justice Adel Omar Sherif, has been on the bench during both decisions (cf. Appendix). Tahani al-Gebali, who has been very outspoken on behalf of the continued military tutelage in opposition to the Muslim Brotherhood and is perceived as old regime remnant, has not participated in the decisions (SCC 2012a; SCC 2012b). However, her behavior in public was taken by many to be an indicator of the leaning of the whole SCC (Brown 2013a). Thus, even though all justices have been loyal to the regime, one cannot speak of “Mubarak appointees”. Rather the composition of the court during the examined decisions resembles the ambivalent, institutional heritage of the court.

### 5.3. Legal changes of the SCC law

After Mubarak had stepped down from office, the SCC won an important concession from SCAF issuing a decree on its appointments. According to the decree, the Chief Justice was to be selected by the General Assembly of the Court from among the Court’s three most senior members, with the President only formally appointing the Chief Justice (Aziz 2013: 54). For the other appointments, the decree required the President to give precedence to justices of the Court’s Commissioners’ body. While the SCC had worked as a self-perpetuating body more by custom in the 1980s and 1990s than by law (until 2001), this norm was now legally formalized, awarding the Court with a great degree of autonomy: “The effect was to insulate the SCC from all other actors though also perhaps to inculcate however subtly a sense that the SCAF (…) was the best protector of the judiciary” (Brown 2012).

Hirschl’s Hegemonic Preservation Thesis outlined in chapter 2, helps to understand why the SCAF did not dissolve the SCC and why it changed the appointment procedure by decree. The military perceived the SCC (or the judiciary as a whole) as a suitable institution to preserve its economic22 and political position in the new order and to lend some legal legitimacy to its rule after the suspension of the 1971 Constitution (Naeem 2012b).

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21 This institution was not dissolved by the SCAF and its status, which only had been regulated by law under Mubarak, was now stipulated in the Constitutional Declaration of March 2011 (cf. Ch. 5.5.)

22 There are no existing figures on the percentage of the economy owned by the military, but some estimates place it as high as 40 percent. As theories of authoritarianism suggest, protecting the financial interests of the armed forces is one of the main endogenous factors behind increased military intervention in politics (Joudeh 2014).
The conservative People’s Assembly perceived the SCC – among others due to the public statements by Tahani al-Gebali and Chief Justice Faruq Sultan – as a “bastion of the old regime and as an obstacle to their legislative agenda” (Brown 2013a: 6). In May 2012, SCC law amendments were discussed: first, the Chief Justice would be appointed without the General Assembly’s admission. Second, the a posteriori review would be replaced by a general a priori review (Egypt Independent 2012a; Brown 2012a). Brown interprets the discussions about changing the SCC law as a “warning shot” towards the SCC. At the beginning of May 2012, the SCC had announced that the Commissioners’ Body of the SCC would give its recommendation on the parliamentary election law. An intimidated SCC should be prevented from holding the parliamentary law unconstitutional (Brown 2013a: 7). Reacting on these discussions, the SCC held an emergency meeting to reply to the People’s Assembly draft bills (El-Nahhas 2012). Hatem Bagato, head of the SCC Commissioners’ Body, named the discussions on changes a new “massacre of the judges”. In an official statement of the SCC he said: “Parliament is trying to terrorize the court to serve its private interests and is seeking to void the court’s judicial oversight on legislation and render its decisions nonbinding” (Hatem Bagato, cited in Egypt Independent 2012a).

To put it in a nutshell, the SCAF positioned itself as best protector of the judiciary by insulating the SCC. In contrast, the People’s Assembly sought to change the SCC’s composition and competences, introducing an a priori review – a competence the SCC, and especially its famous Chief Justice El-Morr, had always resisted during Mubarak’s reign and which stood in sharp contradiction to the SCC justices´ conception of office as members of an important, established institution. Against the background of these developments, the SCC issued its decisions of the parliamentary election law and the disfranchisement law in June 2012.

5.4. Decision on the Parliamentary Election Law

After the overthrow of Mubarak, all political forces demanded a change to the electoral laws. These laws had been instrumental under Mubarak in influencing the electoral results in the interest of the ruling National Democratic Party (NDP) (cf. Ahmed 2011). The law on parliamentary elections 38/1972 was consequently changed three times by SCAF (Decree 108/2011, 120/2011, 123/2011), who had awarded itself legislative authority in the Constitutional Declaration of March 2011 (Aziz 2013: 11; SCC 2012a: 3).

At the outset, the election law provided for a mixed system with two-thirds of the seats reserved for independent candidates. Under Mubarak, this regulation had been used by the Muslim

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23 In addition to that, in April 2012 the first constitutional assembly dominated by islamist forces, had been dissolved after the ruling of an administrative court, on the ground that it saw the assembly insufficiently representative and that the parliament had improperly elected some of its own members of the body. This strengthened the impression on side of the Muslim Brotherhood of the judiciary being remnants of the old regime.

24 In 1967 Gamal Abd al-Nasir had dismissed 200 judicial officials in various parts of the judicial system, after the Judges’ Association and the Lawyers’ Syndicate had increasingly called for political and judicial reform. Moreover the board of the Judges’ associations was dissolved and new members appointed by the regime. Since this day, the judiciary refers to this event as “massacre of the judiciary” (Moustafa 2009: 65).
Brotherhood which had been quite successful in winning these seats for independent candidates (Aziz 2013: 33; Moustafa 2009: 197-198). However, now this regulation met resistance by most political forces, who argued that it would enable former NDP remnants to take part in the elections (Tavana 2011: 559). Reacting on these complaints, the number was reduced to half of the seats in July and in September to one-third of the seats. At the same time, the SCAF changed Article 38 of the Constitutional Declaration by decree. This article stipulated that law should regulate the electoral system. Following this the SCAF instituted the mixed system in the Declaration in order to make it compatible with the new electoral law negotiated among political forces.

In the following weeks, the two grand coalitions – the Egyptian Bloc25 and the Democratic Alliance for Egypt26 - threatened to boycott the elections due to Article 5 of the electoral law which stipulated that only independents were allowed to run for seats reserved for individual voting.27 The political parties disregarded considerations of fairness and equality under the pretext that Article 5 would allow for the NDP to return to parliament. Thereupon, SCAF annulled Article 5 by Decree 123/2011. As a result parties were allowed to field candidates both on the party lists and through the individual voting system thus limiting the chances of independents. This step left a significant legal gap that made the law incompatible with some past SCC rulings. In the 1980s and 1990s the SCC had declared unconstitutional a number of electoral laws, always emphasizing that the right of individual candidates had to be protected (Moustafa 2009: 94-102). One can assume that political forces and the SCAF knew about these precedents in the SCC’s jurisdiction, or that the SCAF even anticipated the SCC’s decision (Soliman 2012). Either way, the annulment of Article 5 had severe consequences, providing the basis of the SCC´s decision on the unconstitutionality of the parliamentary election law.

Content of the decision

In the case at hand, an applicant had asked an administrative court to halt the publication of the results in a certain district of the governate of Qalubia by the Supreme Electoral Commission. The applicant was an independent candidate in this district. As two candidates of the FJP and the Al-Nour party had gained majority in the first round of voting, the applicant had been excluded in the run-off vote between the two candidates. The plaintiff argued that several articles of the electoral law were unconstitutional for disregarding Article 7 of the Constitutional Declaration (Principle of Equality) and contradicted former decisions by the SCC (SCC 2012a:

27 “It is a precondition for whoever applies for nomination for membership of the People’s Assembly or the Shura Council by the individual-candidate system not to be a member of any political party and is required for the continuation of membership to remain non-affiliate to any political party. In the event of losing such a status, membership shall be dropped by a majority of two thirds of the members” (Egypt State Information Service 2011b).
The court rejected his claim in January 2012, so he appealed to the Supreme Administrative Court (SAC). In February 2012, the case was halted and referred to the SCC to review the provisions at issue.

On the 14th of June 2012 the SCC issued its ruling claiming that the formation of the assembly had been unconstitutional, violating Article 7 and 38 of the Constitution, as the system allows independents only access to some seats but allows party members to compete on either ballot, therefore discriminating against the former. In its conclusion (operative part of the judgment) it only finds the provisions at issue unconstitutional without demanding the dissolution of parliament.

Analysis

In its preliminary examination the SCC discusses the objections by the State Cases Authority (SCA). The latter one argues that a decision in this case would basically constitute a review of Article 38 of the Constitutional Declaration and that the design of electoral laws is a “political”, not a “constitutional” question. The SCC rejects the SCA’s claim by elucidating its own stance over “political questions”. It argues, that constitutional courts are indeed not in a suitable position to deal with “political questions”:

“(…) due to the nature of such actions and their close linkage to the political order of the state or its domestic or international sovereignty – [they] must be kept outside the scope of judicial supervision in order to preserve the state, defend its sovereignty, and uphold its higher interests” (SCC 2012a: 5).

Neither the necessary information nor the “scales of assessment” to decide such questions are available to the judiciary. Thus, the court shows awareness of a potential politicization in its reasoning. Yet, the SCC defines whether such a “political question” exists in the case at issue or not, considering itself to be in the position to decide on the nature of these questions. As the law regulates the electoral process, it is not among the political issues that fall outside the judicial supervision of constitutionality (ibid). Also in the 1990s the court rejected claims that questions on the unconstitutionality of electoral laws are “political questions”. In a publication, edited by Justice Adel Omar Sherif, Adel A. Khalilargues: “The court took a bold act of judicial activism when it rejected the government defence of ‘political question’” (Khalil 1999: 306). In line with its former jurisdiction and praxis, the court considers itself to be authorized to hear the case, rejecting the SCA’s arguments.

The merits begin with the court’s key argument on which it bases its conclusion - defining the electoral law as unconstitutional. By repealing Article 5, the legislator enabled parties to send their candidates to compete on either ballot, the closed party-list system as well as under the individual candidate system. The SCC argues that this had effects on the parties’ considerations and their electoral strategies:

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28 Professor on public law at Ain-Shams University in Cairo (Online available: http://www.asu.edu.eg/staff/profile.php?action=show&pid=10450, last access 14.08.2014).
There is no doubt that establishing this competition had a definite impact and reciprocal effect on the two-thirds allocated for closed party lists, since if political parties were not competing with independents over that other portion, then a rearrangement would have taken place within the party lists, taking into account the priorities within each party (SCC 2012a: 8; own emphasis added).

Naseef Naeem defines this reasoning as “political”, arguing that the Court did not provide any evidence that the possibility of running on the individual system would have changed the party lists. He claims that the Court based its decision on an assumption rather than on “facts”, thereby becoming enmeshed in politics (Naeem 2012b: 105).

In the subsequent sections, the SCC emphasizes the importance of political rights, namely the right to candidacy and suffrage and the importance of the principle of equality, discussing the legislative limitations regarding the infringement of rights. In its previous jurisdiction, the principle of equality (Article 7) has “neither [been] a dictating, static principle denying practical need, nor a hard rule that discards all forms of discrimination” (SCC 2012a: 9). The legislator could limit rights but only when following ‘logical standards’, provided that the differences made among citizens were “authentic and not artificial or imaginary” (ibid: 10). Here the Court applies a typical means by constitutional courts (mostly by the use of a concept like proportionality) defining the conditions under which a right must make way for legislation (cf. Robertson 2010: 282).

Both rights form the basis of the multi-party system, established with the 1971 Constitution and being “confirmed by Article 4 of the Constitutional Declaration” (SCC 2012a: 10). This system has not been established as “a mean adopted by the constitutional legislature to replace one dominance with another” (ibid: 10). Rather, the Constitutional Declaration aims at great variety in the People’s Assembly. Only if everyone enjoyed these political rights (independent of belonging to a political party or not), the “true meaning” of Article 3 of the Constitutional Declaration (sovereignty of the people) could be realized. The principles of equality and equal opportunity (ibid: 10), “necessitate one legal treatment for all candidates, on the basis of equal opportunities for all, with no discriminating based on party affiliation” (ibid: 11).

Apart from underlining the argument of unconstitutionality, these sections also serve another function: by referring to the political rights, as provided in the Declaration, the military’s Declaration receives an “upgrading”. Thereby the Court also provides a link to the old 1971 Constitution. These remarks culminate in the Court’s claim that the Declaration’s Articles should be considered “a unit, each complementing the other”, a typical maxim in constitutional interpretation (Honikel 2012). In the whole decision, the SCC avoids defining the status of the Declaration or making explicit which document it considers the highest norm. Due to the formation of the Constitutional Declaration by the SCAF (a “constitutional catastrophic situation”, as Justice Sherif describes it, 2012: 3), this cautious reasoning is understandable. The SCC refers to the Declaration as if it was a Constitution, yet it is anxious to avoid a clear
positioning as the current “military constitutionalism” conflicts with the professional understanding of their role of many SCC justices.

Subsequently, the SCC argues that the provisions at issue contradict Article 38 (electoral system) and the right to equality.29 The constitutional legislature (the SCAF, editor´s note) has defined the electoral system in Article 38 of the Declaration in order to guarantee an “intellectual and political diversity within the People´s Assembly” (SCC 2012a: 12). By repealing Article 5, the electoral law contradicts the constitutional legislator´s will. Therefore, and as it is established in its previous jurisdiction “the formation of the whole Assembly is null and void since it was elected, with the its [sic] resulting dissolution by the power of the law as of the indicated date, and without the need for any other measure, as a result of ruling the aforementioned provision unconstitutional” (ibid: 14). This however does not imply that the laws and decisions by the Assembly are void but on the contrary should retain their validity (ibid).

In the operative part of the judgment, the Court rules the provisions at issue unconstitutional, without ordering a dissolution of the People´s Assembly.

Conclusion

In this decision, one can clearly detect the dilemma the SCC is confronted with (as outlined in Ch. 2). On the one hand, the SCC justices try to do their job of constitutional jurisprudence according to their understanding of their role and in line with the necessity of being perceived as “neutral, judicial actors”. Appropriately, they discuss the danger of politicization when dealing with “political questions”, refer to their previous jurisdiction, apply classical means like proportionality or the “unity of the Constitution” and avoid making it explicit that the Constitutional Declaration serves currently as the “highest norm”.

On the other hand, the SCC shows a clear intention to justify its assessment, that the formation of the whole assembly is “null and void”, as it perceives its position and status to be endangered by proposed legal changes regarding its competences. Its criticism of unfair treatment of individual candidates is justifiable. In other countries with party lists systems, constitutional courts generally do not consider them an infringement on the rights of independents who lack party affiliation (Brown 2013a: 7). Yet, on similar grounds the SCC has ruled twice in its history that electoral laws were unconstitutional (cf. El-Morr/Sherif 1996). Nevertheless, the SCC´s claim that the annulment of Article 5 of the electoral law impacted on the parties´ considerations, electoral strategies and therefore the whole assembly, can be defined as an argument based on an assumption. Further, even though the court only rules that the provisions and thus the formation of the assembly is unconstitutional in the operative part of

29 Instead of referring to Article 7 the court refers to Article 5 of the Constitutional Declaration (in both, the English and the Arabic version). It can be assumed that this is a mistake by the SCC – an indicator for the different context in which the SCC is operating.
the judgment, in the previous section it argues that the unconstitutional formation results in the PA´s dissolution.

5.5. Decision on the Disfranchisement Law

During the presidential elections and in the context of the decision on the Disfranchisement Law, the PEC established under Mubarak in 2005 (Ch. 3.2.) has played a decisive role. It has not only decided on the admission and disqualification of presidential candidates but has also been the institution responsible for forwarding the case to the SCC. As mentioned above, Chief Justice Sultan and another justice of the SCC (al-Beheiry) are former PEC members.

In line with Article 28 of the Constitutional Declaration, stipulating an a priori review of the presidential election law, the SCAF submitted the presidential election law to the SCC which deemed parts of the law unconstitutional (for details cf. Revkin/Brown 2012). The formation of the PEC, which had been regulated by law until 2011 and which had been criticized for its composition (cf. El-Ghobashy 2006), was now instituted in the Constitutional Declaration. Its composition was modified: next to the SCC’s Chief Justice as chair of the PEC, and one other SCC justice, three further members of High Courts (Cairo Court of Appeals; Court of Cassation; State Council) were members of this institution (Egypt State Information Service 2011a; Taylor 2012). Sultan’s position as Chair was considered a burden for the credibility of the presidential elections (Koddous 2012).

Ten out of 23 candidates standing for presidential elections were disqualified right after their application. Some candidates appealed but their appeals were rejected by the PEC. Only the appeal of Ahmed Shafik, who had served as Minister of Civil Aviation from 2002 to 2011 and from January 31, 2011 until March 31, 2011 as Prime Minister, was accepted.

On the 12th of April 2012, when all candidates had already announced their candidacy, an amendment of the Law on Regulating the Exercise of Political Rights No. 73/1956 was adopted, dealing with the disfranchisement of former members of the regime. The SCAF submitted the law to the SCC without putting it into force, demanding a constitutional review of the law. The SCC rejected this appeal, arguing that it was only allowed to review the presidential election law a priori (Article 28, Constitutional Declaration), not any other law (Egypt Independent 2012c). Article 3 of the Law on Regulating the Exercise of Political Rights No. 73 of 1956 should be amended by a 4th paragraph:

“For a period of ten years, starting on this date, any person who in the ten years prior to 11 February 2011 served as President of the Republic, Vice President of the Republic, Prime Minister, Head or Secretary General of the dissolved National Democratic Party, or a member of its policies bureau or its General Secretariat” (IFES 2012; SCC 2012b: 20).

The law was highly contested and the importance of removing former members of the regime from office was acknowledged. However, the law was criticized for targeting certain candidates (u.a. Omar Suleiman) and thereby representing a political practice that had been used by
Mubarak (Brown 2012b; Egypt Independent 2012c; El-Din 2012a). On the 24 April, 2012 the amended law was put into force by the SCAF (Egypt Independent 2012d).

**Content of the decision**

After the law was put into force, the PEC, which had accepted Shafik’s candidacy on the 13th of April 2012, annulled its application and he was excluded from the presidential elections. Shafik appealed against the suspension of his candidacy and demanded a transfer to the SCC on the grounds that his political rights had been infringed (SCC 2012b: 17). The PEC accepted his appeal, which enabled him to take part in the first round of presidential elections on the 23rd and 24th of May 2012. No candidate was able to gain an absolute majority so a run-off was set for the 16th and 17th of June 2012.

In the meantime, the discussion about Shafik’s candidacy proceeded in the courts. The PEC had decided to transfer the case to the SCC. In Article 29 of the Law on the Constitutional Court No. 48/1979 it is stated, that “a court, or any other judicial forum” (Law No. 48/1979, cited in Moustafa 2009: 281, own emphasis added) is allowed to forward a case to the SCC. The definition of a “judicial forum” was a political and judicial controversy during Mubarak’s reign (cf. El Ghobashy 2006). Therefore different courts disagreed on whether the PEC was allowed to transfer the law to the SCC or not. A Member of Parliament appealed to an administrative court against the PEC’s decision to transfer the case. This court annulled the PEC’s decision, arguing that the PEC had to be defined as an “administrative body” not a “judicial forum”. This decision was again appealed by the State Cases Authority and Shafik’s lawyer in front of the Supreme Administrative Court. The SAC defined the PEC as a “judicial forum”, having the competence to refer the question to the SCC (El-Nahhas 2012; SCC 2012b: 16). In contrast, the SCC’s commissioners’ body agreed with the lower administrative court arguing that the PEC was not competent to forward the case and recommending a rejection of the application (El-Din/El-Nahhas 2012).

The SCC did not follow the commissioner body’s recommendation and decided to accept the case. On the same day as the parliamentary election law it declared the disfranchisement law unconstitutional. Due to its decision, Shafik participated in the run-up election on June 16 and 17, 2012. The two PEC members, Faruk Sultan and Maher al-Beheiry, were not taking part in this decision. The composition of the court was, as mentioned above, a completely different one as in the first decision, except for one justice (Adel Omar Sherif, cf. appendix).

**Analysis**

In its preliminary examination of the case the SCC discusses in great detail which institutions are allowed to forward a case to the SCC, resolving the conflict among the other courts. It finally interprets the PEC as a “judicial forum” which is authorized to transfer a case to the
The SCC examines the characteristics that institutions and their members have to fulfill in order to be classified “judicial bodies”. The “judicial background” of its members must be ensured with regard to their competences, neutrality and independence. This is the reason, why the Constitutional Declaration defines the PEC´s composition in Article 28, thereby “limiting it to judicial elements, in contrast to the situation of Article (76) of the Constitution of 1971 which is no longer in force” (2012b: 18). Next to its composition there are other characteristics, which make the PEC a “judicial body”, e.g. an own budget, sufficient opportunities for candidates to appeal etc. (ibid: 19).

The SCC could have rejected the case (as suggested by the commissioners´ body) by defining the SCC as “administrative body”, not authorized to forward a case to the SCC, applying a “strategy of case selection” as described by Ginsburg (2003: 86-89; cf. Ch. 2.2.). Yet, the SCC decides to rule on the case, a step that can be interpreted as deliberate interference into the political conflict in the run-up to the elections. On the other hand, this decision is understandable, given that two SCC members (Chief Justice Sultan as well as Maher Al-Beheiry) are members of the PEC. By discussing this question of admissibility in great detail (three pages) the SCC shows awareness of the great ambiguity of its decision and the need to explain precisely why the PEC can be defined as a “judicial forum”.

In this part of the decision the SCC does not only see an improvement with regard to the PEC´s composition in the Constitutional Declaration in comparison to the 1971 Constitution (by “limiting it to judicial elements”); it also explicitly states, that the 1971 Constitution is not in force anymore, making explicit, that the Constitutional Declaration is the highest norm the SCC refers to. This is a commitment the SCC has avoided in its decision on the parliamentary election law.

In the merits of the case the SCC continues to define the Constitutional Declaration as highest norm:

"Accordingly, this court performed its judicial oversight of this text in light of the contents of the provisions of the Constitutional Declaration issued on 30th of March 2011, considering this the constitutional document governing the affairs of the country during the transitional period through which the country is currently passing after the suspension of the provisions of the Constitution of 1971, by virtue of the first Constitutional Declaration issued on 13th February 2011“ (SCC 2012b: 21).

One reason for defining the Declaration as highest norm could be that the court does not have any legal source it can refer to. While there are legal precedents in the first case, the SCC can resort to, there is no established jurisdiction with regard to disfranchisement. Therefore the SCC refers to the only “legal basis” available - the Constitutional Declaration.

In the subsequent section, the SCC asserts that the provisions at issue violate the principle of the separation of powers: according to the SCC, a constitution guarantees basic rights and regulates state organization, especially the separation of powers. Therefore, the Declaration...
clearly regulates the powers of the legislative (Article 33) as well as of the judiciary (Article 46). According to these Articles, the legislative is not authorized to interfere in the field of competence of the judiciary. In Article 19 (2) of the Declaration it is stipulated: “All crimes and all penalties shall be based on the law; penalties shall only be imposed by virtue of a legal verdict…”. (ibid: 2). Therefore, a penalty can only be imposed by virtue of a legal verdict – which is the task of the judiciary. The SCC states, that this does not only cover criminal penalties but also other penalties, such as the deprivation of particular rights and freedoms. This is the reason, why the deprivation of the exercise of political rights, as stipulated in provisions at issue, constitutes a penalty without verdict, resulting in “a violation by the legislative authority of the power of the judicial authority, and an undue assumption of those powers from the legislation [sic]” (ibid), constituting a violation of Articles 19 and 46 of the Constitutional Declaration.

While Ahmed Shafik argued in its application that his political rights had been infringed, the SCC first reviews the provisions at issue with regard to Articles 19 and 46 of the Declaration. As examined above, Egypt’s high justices form a very proud profession. They reject any infringement of their independence, not only guarding their “stomping ground”, but rather seeing this against the background that they are “the only institution with the public’s interests at heart” (Rutherford 2008: 64). This can explain why the SCC rejects the amended law: it considers it to be an intrusion into the judiciary’s competence of criminal prosecution; and eventually symbolically standing for the general disregard of their position through the People’s Assembly, dominated by Islamist forces, as exemplified in the discussions in the SCC law.

In subsequent sections the SCC refers to the importance of political rights that are protected in the Declaration, as they have been protected by all former Egyptian Constitutions. In the case at hand, the suspension of political rights occurs “without an expediency or justification accepted by the provisions of the Constitutional Declaration” (SCC 2012b: 23). The SCC admits that the principle of equality, as established in Article 7, can be limited under certain circumstances and according to “logical standards” (ibid: 24), as it has also argued in its first decision. However, this possibility shall not be misused:

“The state’s implementation of the principle of equality may not be used as a cover for its desires, or a platform for its convictions on unjust situations which arouse ill will or hatred which transpose the controls on its behaviour, or which arouse significant animosity to the power of its authority. Rather, its position when dealing with citizens must be just and it must not discriminate through imposition or despotism” (ibid).

Considering the case at hand, the court finds that the provisions at issue contain an “arbitrary discrimination”, a division among citizens “which is not based on logical principles” (ibid), contradicting Articles 7 and 8 of the Declaration. Further, they also violate the concept of the “state of law”, as they do not indicate a necessity to prove that the person who has held any of the positions mentioned has taken any actions that could justify this penalty, and represents an imposition of a retrospective penalty (ibid: 25).
Therefore, the provisions at issue clearly violate the Constitutional Declaration according to the SCC. Subsequently, the Court explicitly criticizes the parliamentary proceedings in the run-up to drafting the amendments of the law:

“If each constitutional violation distorted this text as shown, this in itself would be sufficient for it to be annulled, even without considering the total of all these constitutional defects and without the matter being concealed from the members of the legislative council, as revealed in the relevant minutes of the people’s Assembly, and the inclination of the majority of the council to ignore the issue and its adoption of the draft law which deliberately shuns the purposes which the legislation must intend, a matter which loses in its public character and neutrality, and which tarnishes it with the disgrace of legislative distortion” (ibid, own emphasis added).

In the eyes of the SCC the deliberate decision to ignore the law’s constitutional “defects” was considered a faux pas and blatant misuse of competences by the legislative.

In the operative part of the judgment, the Court rules Article 1 of Law No. 17/2012 adding a 4th paragraph to Article 3 of the Law on Regulating the Exercise of Political Rights No. 73/1956, unconstitutional, and subsequently annuls Article 2 of the same Law (SCC 2012b: 26).

Conclusion
The dilemma the SCC is confronted with is even more apparent now than in the first decision (outlined in Ch. 2). Again, the SCC justices try to demonstrate constitutional jurisprudence in accordance with their understanding of their role and in line with the necessity of being perceived as a “neutral, judicial actor”. In light of two SCC members sitting on the PEC, they pay particular attention to the discussion of the PEC’s status given that this decision is a politically and legally contradictory issue and represents a great danger to its authority. Similar to the first decision they apply classical means in their argumentation. However, in this decision they make it explicit that the Constitutional Declaration serves currently as the “highest norm”. This is done because the SCC does not have any precedent it can refer to. The only legal source it can resort to is the Constitutional Declaration governing the country. Only by referring to this Declaration can it justify why the provisions at issue represent a violation of the separation of powers: an infringement of the rights of the judiciary as well as a violation of the principle of equality and the right of personal freedom.

With this in mind, it is clear why the SCC was keen to accept the case (by defining the PEC as a “judicial forum”) and the outraged phrase at the end of the decision: the People Assembly’s activities are regarded as an illegal infringement of the competences of the judiciary. Interpreting the SCC’s decision as a “channel of communication” (Kranenpohl 2010: 500) in a wider sense, one can also read this decision as a message from the SCC that it regards the legislative behavior of the parliament as unacceptable – not only with regard to the law at issue, but with regard to the intended changes of the law on the SCC. The consequence of its
decision - Shafik’s participation at the elections - is accepted or even intended by the SCC given that he is the only candidate left to run against Mohamed Morsi.

5.6. **Comparative Analysis**

The court’s objections in both decisions are justified: the parliamentary election law enables candidates to take part in the elections but then discriminates against them (Naeem 2012b: 104). The disfranchisement law can be criticized for targeting certain candidates and for the timing of the law. Further, the retrospective nature of disfranchisement laws and the violation of the principle “*nulla poena sine lege*” indeed represents a great challenge for legal systems in processes of transformation.

The SCC sees its capacity to act (or even its existence) seriously endangered by the parliament’s behavior and other political events (i.e. Morsi as presidential candidate and the second constituent assembly dominated by islamist forces). As a constitution is not available to the court, it has to refer to other judicial resources in its reasoning to develop authority and acceptance as a constitutional court. Due to the lack of “hard” power resources, this authority is of great importance, representing the most important source of institutional power for the court. Because this source of authority is only weakly developed, it has to exert additional influence on the political process in order to ensure its existence. This requires resorting to non-judicial means. The dilemma that arises out of this can be traced in both decisions. Both decisions differ in their argumentation, in the dealing with the Declaration and the positioning of the court itself. This can be explained by the different composition of the court. However, following the assumptions outlined in chapter 2 I argue that the differences can be mainly explained by the fact that the SCC can resort to its former jurisdiction in the first decision, while this legal source is not available to the court in the second one. This becomes obvious when analyzing how the SCC deals with the Constitutional Declaration. In its first decision, the SCC avoids defining the status of the Declaration as highest norm. In the second decision the court positions itself more explicitly and unequivocally defines the Constitutional Declaration as highest norm.

In the first decision, the SCC seems to be more secure about its own role. Its dilemma can be solved by referring to its own precedents. However, even though it manages to argue “legally”, at the central part of its decision its reasoning is based on an assumption. In the second decision precedents are unavailable and the court resorts to the only “legal basis” available to it: the Constitutional Declaration. It can only denounce the legislative’s behavior an infringement in the area of authority of the judiciary when referring to the Declaration. In this decision the court’s perception of the transitional situation becomes obvious, especially in the last part of the decision it shows clear outrage about the People Assembly’s actions.

According to Brown, what was extremely startling in the cases was the rapidity of the rulings. In the two other cases on the dissolution of parliament it had taken several years for a case to find its way to the SCC and for the SCC to decide. On this occasion, the SCC issued its ruling hours
after hearing the arguments. Thus, “its timing was inexplicable outside of the political context in which it was issued” (2013a: 7). There is not much known about the internal proceedings of the SCC. However, the SCC Law states that the Court’s Chief Justice is competent to decide on the date of the Court’s session (Article 41). It can be assumed, that Faruk Sultan decided on having the sessions immediately before the run-off of Presidential Elections.

5.7. Events after the decisions

As a result of the decision on the disenfranchisement law, Shafik’s candidacy stayed valid. Pursuant to the decision on the parliamentary election law, the SCAF issued a new decree dissolving the whole parliament. Consequently, the SCC decisions left Egypt without a People’s Assembly but with the possibility of a remnant of the ancient regime becoming President. The future President’s competences were neither specified in a constitution, nor was the President controlled by a parliament. Due to the dissolution of the People’s Assembly the 2nd constituent assembly’s future was uncertain as it had been established by the now dissolved People’s Assembly. Further, it was not clear who would write the new parliamentary election law (Brown 2012b). In the presidential run-off taking place on the 16th and 17th of June 2012, Mohamed Morsi won the election, gaining 51.7 per cent of the votes. On 18th of June, 2012, SCAF issued another Constitutional Declaration. In the absence of the People’s Assembly it assigned itself legislative authority and allowed itself to appoint a new constituent assembly if the current one failed. Most remarkably, it allowed the SCC a role in reviewing the draft constitution in accordance with unspecified principles of the revolution or previous Egyptian constitutions.31 So, the SCAF used the window of opportunity offered by the two SCC decisions to ascribe itself (as well as the SCC) a role in the constitution-making process.

After Mohamed Morsi became president32, the tension between presidency and SCC increased: first he tried to find a legal formula to bring the parliament back. However, he found himself blocked by the SCC which overturned the effort by declaring the decree invalid (Egypt State Information Service 2012; Aziz 2013: 5). From August 15, 2012 onwards until the proclamation of the new constitution, Morsi basically claimed the same authority the SCAF had claimed, granting himself unlimited powers and the power to legislate without judicial oversight or review.

In October a first constitutional draft was published. In Article 184 of the draft constitution an a priori review for all election laws was intended (Democracy Reporting International 2012). A reduction of the number of SCC justices was also foreseen. In response to these deliberations, the SCC held a press conference. Chief Justice Maher al-Beheiry, Faruq Sultan’s successor

31 This seemed to be a parody of the South African transition. However, in that case, the Court created was as part of the transition and the constitutional principles were clear and had consensus agreement (cf. Klug 2009).

32 In its constitutional declaration the SCAF changed Article 30 according to which the president had to hold its oath of office before the People’s Assembly. After the dissolution the president had to hold its oath in from of the GA of the SCC. Morsi first refused to do that, then he wanted to avoid that this was shown in the media (Taha 2012). In the end he held his oath of office before the SCC’s General Assembly in 30 June, 2012 (Egypt Independent 2012e).
(Egypt Independent 2012b), labeled the articles pertaining to the court’s status “a step backwards and a flagrant intervention in the court’s affairs”, adding that “the court will remain in permanent session until amendments are made to the provisions which endanger the court’s independence” (al-Beheiry, quoted in Egypt Independent 2012g). As the Court had done in former times and in May 2012, it tried to gain influence by using other “communicative channels” than its decisions.

In November 2012, expecting an unfavourable SCC judgment President Morsi issued another Constitutional Declaration protecting the process of writing a new constitution from judicial oversight (Naeem 2012b). That step coupled with a push to get the new constitution ratified the following month (and associated ones like the dismissal of the prosecutor general) increased polarization, alienated the judiciary and set off street protests as severe as any since the January 2011 uprising (Brown 2013a: 2). The SCC had announced to decide on the Law on the Constituent Assembly as well as the Shura Election Law in the beginning of December 2012. On 2 December 2012, the justices came together. However, supporters of the Muslim Brotherhood demonstrated in front of the SCC and prevented the justices from entering the building. In reaction, the court spoke of “the blackest day in the history of Egyptian judiciary” (BBC 2012b) and issued an official statement, announcing an indefinite suspension:

“[The judges] announce the suspension of the court sessions until the time when they can continue their message and rulings in cases without any psychological and material pressures. (…) The court registers its deep regret and pain at the methods of psychological assassination of its judges” (SCC 2012, cited in BBC 2012b).

The justices saw this “political act” as their only chance to survive as an institution. The decree, the siege of the court building and the noncompliance with their judgments had rendered the Court unable to fulfill their function of judicial review. This was a development that fundamentally threatened the existence of a court as it presents the danger of marginalization and functional loss of the court (Ginsburg 2003: 73-74).

In response to Morsi’s decree large protests erupted, other courts went on strike and the judges’ club announced that it would boycott the supervision of the constitutional referendum set for 15 and 22 December 2012. Despite the protests and instead of facilitating consensus, the constituent assembly decided to rush through the voting process (Arato/Tombuş 2013: 10). With a very low turnout of only 32.9 per cent, the 2012 Constitution was accepted (63.8 per cent) and went into force on 26 December 2012.

As provided for in the 2012 Constitution, an a priori review for electoral laws was introduced. The number of justices was reduced from 18 to 11. Only the 11 most senior justices could stay in the court. The removal of the other justices was approved by decree (Salah 2013). In

33 The judge’s club is a social club for judges, which considers itself to be the de facto representative of Egypt’s judges (Said 2008: 112-113).
January, after one month of striking, the Court reconvened in its new composition (Kortam 2013).34

In the months after the ratification of the 2012 Constitution the SCC actually “moved to normalize constitutional life and accept the document” (Brown 2013a: 11). Yet, with the introduction of a priori review of election laws, the SCC was forced into a position whereby it had to find any possible constitutional flaw, given that it was prevented from reviewing the law once it was implemented. When the upper house of the parliament (the Shura Council, which had not been dissolved), drafted an electoral law, it had to submit it to the SCC for review, and the SCC found a number of constitutional flaws (for more details cf. Brown 2013a: 14). The upper house tried to address them and send an amended version to Morsi. But in declining to send the revised draft back to the SCC, the Court insisted that any draft law would have to be reviewed over and over until the SCC found it devoid of any constitutional flaw: “Egyptians found themselves watching a game of ping-pong between the upper house and the SCC, one that delayed elections indefinitely” (ibid: 11).

In 2 June 2013 the SCC issued three other verdicts: it overturned the electoral law for the Upper House, essentially referring to its argumentation in the parliamentary election law decision, but allowed the House to continue in operation until the Lower House was seated. Here the Court argued, that the effect of that invalidity had been halted by the 2012 Constitution as Article 230 of the new Constitution specifies that the Shura Council takes over legislative powers until a new Lower House is elected at which point the legislative powers are transferred to the latter. Further, it overturned the law governing the constituent assembly.35 Yet, in its decision the Court acknowledged the 2012 Constitution and implied that the matter should never have been before the courts in the first place. The constitutional declaration sought to make the procedure of electing the Constituent Assembly something special outside of regular channels. It was not a normal administrative act. Nor should the parliament be passing laws, restricting or defining the process because the body that elected the Constituent Assembly (that body was not the parliament acting normally but a special assembly of all elected members of the two chambers) was not subject to parliamentary laws; it had been called into being by

34 Other than stating that the President appointed SCC judges by decree, the 2012 Constitution did not specify the procedure for appointments to the SCC, deferring that question and many others to future implementing legislation (Article 176).

35 Background of the decision: the administrative courts had dissolved the first constituent assembly because they claimed it was not representative and because parliament had named some of its own members to the body. The administrative courts claimed jurisdiction by saying that the parliament was acting in an administrative capacity when it elected the constituent assembly. To comply with the ruling, the parliament elected a second constituent assembly. But the deputies still named a few of their own members to the body. Worried that the administrative courts would dissolve the second Constituent Assembly, the parliament then passed a law justifying what it had done. The purpose of the law was to keep the matter out of the administrative courts because now the parliament was acting in a legislative rather than administrative capacity. It might perhaps be up to the SCC to rule on the constitutionality of the law, but that would take time while the assembly carried out its task. That draft law was passed by the parliament sent to the SCAF for approval, but the SCAF did not act. In June 2012, shortly after passing the law, the parliament was dissolved. And Muhammad Morsi of the Muslim Brotherhood was elected president. After taking office, Morsi approved the law (Brown 2013a: 16-17).
constitutional text and the voters’ will. Thus, the law on the subject was unconstitutional. But that did not remove the legitimacy of the Constituent Assembly, it affirmed it. Finally, it overturned a provision of the country’s emergency law, which had little short-term effect but potential significance in the future (Brown 2013a: 17). While there was no state of emergency during this period this was an interesting decision as during the Mubarak years the SCC had not dared to question emergency laws (Moustafa 2009: 8).

With these decisions, the SCC effectively ended the debate over whether the 2012 Constitution was the document governing Egypt. According to Nathan Brown, this was a highly political task, as many within the opposition regarded the Constitution as illegitimate. However, it seemed, that the SCC had arranged itself with the 2012 Constitution (Brown 2013a; Brown 2013d).

Either way, there was not much time for the SCC to develop its jurisdiction based on the 2012 Constitution. After mass protests throughout the country, the commander of the armed forces – Abdel Fattah as-Sisi dismissed Morsi from office and - rather than cancelling it after the SCC decision of June 2013, suspended the 2012 Constitution on 3 July 2013. SCC Chief Justice Adly Mansur, a justice from the “golden age”, was installed as acting president. The chief justice was not in line of succession under the 2012 Constitution but he had been in the 1971 Constitution (Article 84). Thus, two and a half years after the ousting of Mubarak, a member of an old institution of the suspended 1971 Constitution obtained the essential political role to oversee the process of amending the Constitution, before it would be reinstated (cf. Egypt State Information Service 2013a; Egypt State Information Service 2013b).

6. CONCLUSION

After having been instrumentalized “as a rubber stamp in the manipulation of elections“ (Moustafa 2009: 214) for more than ten years, the overthrow of Mubarak seemed to offer a renewed chance of a more important role or another phase of self-empowerment for the SCC. The SCAF installed a system of “military constitutionalism” essentially insisting that Egypt’s governing constitutional framework was whatever the SCAF said it was (Naeem 2012a: 659; 2012b: 106). Many SCC justices were possibly displeased by these developments, as illustrated by SCC justice Sherif, naming the transition a “constitutional catastrophic situation“ (2012: 3). Yet, in the course of the increasing political polarized transitional process, the SCAF did present itself as “protector of the judiciary” and the SCC in particular. In contrast, the FJP considered changes to the SCC law, among others replacing the *posteriori* review by a general *a priori* review – a procedural change the SCC justices, especially under its famous Chief Justice El-Morr, had always rejected. These discussions in the conservative parliament, in

36 “In case of the vacancy of the Presidential Office or the permanent disability of the President of the Republic, the President of the People’s Assembly or, if at that time the People’s Assembly is dissolved, the President of the Supreme Constitutional Court shall take over the Presidency, on the condition that neither shall stand as a candidate for the Presidency, and abiding by the provisions of the second paragraph of Article 82” (Egypt State Information Service 2009),
combination with the Islamist dominance in the first and second constituent assembly stood in contrast to the SCC’s institutional self-interest and the justices’ self-perception as members of an important institution; as well as their conception of the state, the political and social order. In an order dominated by the Muslim Brotherhood they saw themselves and their position endangered.

Being asked to review the constitutionality of two political, very controversial laws in this unconstitutional and polarized setting, one can trace the great challenges the SCC was confronted with: on the one hand, the SCC’s interest in the validity of law, referring to the legal resources available to them (their former jurisdiction and practice as well as the military’s constitutional declaration and former Constitutions to build their argument), which can be understood against their professional self-understanding as well as against the importance against the background of the special logic of constitutional authority. On the other hand the justices’ wish to hinder the Muslim Brotherhood’s increasing seizure of power, which can be traced by referring to *inter alia* the argument based on an assumption and the outraged tonality at the end of the 2nd decision.

Due to the severe consequences of the SCC’s decisions, the conflict between the SCC and the legislative and executive, between “old” and “new” elites, escalated over time into a protracted constitutional crisis ending in the ousting of President Morsi and the Interim Presidency of Adly Mansur. Thus, a justice of the SCC’s “golden age” took office, bestowing a “civil-legal cloak” upon the military’s rule.

The SCC’s role cannot be explained by the fact that the justices are “feloul”, all nominated by Mubarak, and therefore supporting the “forces of restauration” (Harders 2013: 31). Rather, the contextual analysis of the decisions shows, that the SCC’s former jurisdiction and practice and its justices’ conceptions of office in this difficult, unconstitutional setting, are crucial in order to understand the SCC’s role in Egypt’s transition.

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37 Which role the SCC will play after the ousting of Morsi remains to be seen. In Article 193 of the 2014 Constitution a very autonomous role of the SCC is established: The SCC itself determines how many justices it deems to be “sufficient”, basically constituting a return to the 1971 Constitution. Further, the justices appoint themselves, without any other parties’ involvement. Although the appointment decision is issued by the president, he/she does not have the power to reject the decision made by the general assembly of the court, which means that the president’s role is simply a formality. Thus, the SCAF’s changes from 2011 and the “informal rule” valid until 2001 have now been legally enshrined. Moustafa’s characterization of the Court until 2001 - “the SCC operated for over twenty years as a self-contained and a self-renewing institution” (2009: 78-79) - is today even more valid than it has been ever before. The SCC is institutionally independent, but lacks “relative judicial independence” - a balance between structural independence and political accountability (cf. Choudry et al. 2014; on this also Bali 2012).
2012/01/24: court decision on presidential election—law road-block or minor speed bump for the military, last access 3.9.2013.


38 The translations have been provided by Industry Arabic Translation Service (http://www.industryarabic.com/), which has provided the translations for "The Arabist" (http://arabist.net/), a blog by Issandr El Amrani, a freelance journalist and commentator.
## APPENDIX

### Timeline (2011-2013)

<table>
<thead>
<tr>
<th>Event</th>
<th>Date</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court rejects reviewing draft law on exercise of political rights</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DECISIONS ON THE PARLIAMENTARY ELECTION LAW AND THE DISFRANCHISEMENT LAW</td>
<td></td>
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</tr>
<tr>
<td>SCC revokes Morsi’s decree ordering the People’s Assembly to reconvene</td>
<td>July 2012</td>
<td></td>
</tr>
<tr>
<td>Siege of the SCC by MB supporters</td>
<td>November/December 2012</td>
<td>SCC halting all work indefinitely in protest at the siege</td>
</tr>
<tr>
<td>SCC criticizing the Constituent Assembly’s constitutional draft</td>
<td>January-June 2013</td>
<td></td>
</tr>
<tr>
<td>SCC returns election draft law to Shura Council</td>
<td>July 2013</td>
<td>Adly Mansur becomes interim president</td>
</tr>
<tr>
<td>Decree by SCAF on SCC appointment procedures</td>
<td>April/May 2012</td>
<td>Discussion in People’s Assembly—changes of the SCC law</td>
</tr>
<tr>
<td>=&gt; dissolution of the People’s Assembly by decree and Shafik’s participation in elections</td>
<td>June 2012</td>
<td>Declaration by Morsi, granting himself far-reaching powers and immunity from legal oversight</td>
</tr>
<tr>
<td>2012 Constitution</td>
<td></td>
<td>2012 Constitution, reduction of the number of justices; a prior review for electoral laws</td>
</tr>
</tbody>
</table>
**Composition of the Court**

= still at the court after the 2012 Constitution

<table>
<thead>
<tr>
<th>Parliamentary Election Law</th>
<th>Law on the Exercise of Political Rights (disfranchisement law)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Farouk Ahmed Sultan</td>
<td>Abdul Wahab Abdul Razaq</td>
</tr>
<tr>
<td>- Chief Justice (until end of June 2011)</td>
<td>- since 1988 in the commissioners’ body, justice since 2001</td>
</tr>
<tr>
<td>- 2009 appointed by Mubarak</td>
<td></td>
</tr>
<tr>
<td>- Head of the PEC</td>
<td></td>
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<tr>
<td>Maher Ali Ahmed al-Beheiry</td>
<td>Abdul Moneim Hashish</td>
</tr>
<tr>
<td>- since 1991</td>
<td>- since 2001 (Court-Packing)</td>
</tr>
<tr>
<td>- member of the PEC</td>
<td></td>
</tr>
<tr>
<td>- July 2012 – end of June 2012 Chief Justice</td>
<td></td>
</tr>
<tr>
<td>Dr. Hanafy Ali Gabaly</td>
<td>Rajab Abdul Hakim Salim</td>
</tr>
<tr>
<td>- commissioner since 1988, justice since 2001</td>
<td>- commissioner since 1993, justice since 2001</td>
</tr>
<tr>
<td>- since 2001 (Court-Packing)</td>
<td>- back to the commissioners’ body after coming into force of the 2012 Constitution</td>
</tr>
<tr>
<td>- back in the court since 17.2013</td>
<td>- back in the court since 17.2013</td>
</tr>
<tr>
<td>Mohamed Abdel Aziz al-Shenawi</td>
<td>Boulos Fahmi Iskaner</td>
</tr>
<tr>
<td>- since 2001 (Court-Packing)</td>
<td>- commissioner since 1993, justices since 2001</td>
</tr>
<tr>
<td>- back to the Court of Appeal after coming into force of the 2012 Constitution</td>
<td></td>
</tr>
<tr>
<td>Maher Sami Youssef</td>
<td>Mahmoud Muhammad Ghanaim</td>
</tr>
<tr>
<td>- since 2001 (Court-Packing)</td>
<td>- commissioner since 2002</td>
</tr>
<tr>
<td>- member of the first constitutional amendment commission</td>
<td>- back to the commissioners’ body after coming into force of the 2012 Constitution</td>
</tr>
<tr>
<td>Mohamed Khaler Khairy Taha</td>
<td>Dr. Hassan Abdul Moneim al Badrawi</td>
</tr>
<tr>
<td>- commissioner since 1989, justice since 2001</td>
<td>- date of appointment between 2006-2011 (no data available)</td>
</tr>
<tr>
<td>- back to the Court of Cassation after coming into force of the 2012 Constitution</td>
<td>- member of the first constitutional amendment commission</td>
</tr>
<tr>
<td>Dr. Adel Omar Sherif</td>
<td></td>
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<tr>
<td>- commissioner since 1993</td>
<td></td>
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<tr>
<td>- justice since 2002</td>
<td></td>
</tr>
<tr>
<td>- editor of different publications on the SCC (cf. bibliography)</td>
<td></td>
</tr>
</tbody>
</table>

Sources: Moustafa 2009; Daily News Egypt 2012; Salah 2013; Supreme Constitutional Court 2013; Aboul Enein 2013b

**Other justices, who were not on the bench:**
- Tahani al-Gebali: first woman on the court since 2003, clear stance against Muslim brotherhood (Ezzat 2013; Aboul Enein 2013c)
- Hamdan Fahmi: back to the commissioners’ body after coming into force of the 2012 constitution (Daily News Egypt 2012, Salah 2013)
- Hatem Bagato: Member of the first constitutional amendment commission, since may head of the commissioners’ body; since July 2012 justice at the court, back to the commissioner’s body after coming into force of the 2012 Constitution, from May 2013 onwards Minister for parliamentary affairs under Mohamed Morsi (Egypt Independent 2012a; Salah 2013; Awad/Brown 2013)
- Sa’id Mara’i Muhammad Gad ’Amr: (member of the commissioners’ body since 1990, justice since 2002) (Moustafa 2009; SCC 2013).