

AN ASSESSMENT OF THE JURISPRUDENCE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT

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The constitutional form of government is only a recent phenomenon in the Middle East and its development has been slow and punctuated with many backward steps. Of those states which have adopted constitutional government it is not perhaps surprising to find that Egypt, which is so innovative and forward looking in so many areas of law, is also at the forefront of the development of constitutional law. Very few Middle East states have chosen to set up a Constitutional Court to guard the application of the Constitution and to protect it from encroachment by powerful executives, but the experience of Egypt over the last twenty years suggests that such a development is possible. There is evidence that the Egyptian model may well affect constitutional developments in Jordan and that it might even breathe life into the Constitutional Courts of traumatized post-invasion Kuwait. The future of constitutional law in the Middle East looks interesting and the developing jurisprudence of the Constitutional Court of Egypt will have a pivotal role to play. It is the aim of this brief article to look at that jurisprudence and to attempt to identify the legal influences upon it.

Early Constitutional History

Egypt's first Constitution dates back to 1923. It was based upon the only Middle Eastern model available at that time, that of the Ottoman Constitution of 1876 which was in turn a translation of the Belgian Constitution of 1831. The Constitutional framework was basic. It provided for two houses in Parliament elected by universal (male) suffrage, but it followed closely the authoritarian provisions of the Ottoman model¹. There was no exposition of basic rights and freedoms of citizens and the King was given extensive powers to govern by appointment and dismissal. Parliament was suspended by the King in 1930 but re-established in 1935 and the Constitution continued to operate until the Free Officers Revolution in 1952.

As the Constitution made no provision for a court or council to uphold its provisions the question of its relevance to the general legislative function of King and Parliament was left to the consideration of the ordinary courts and they were generally unwilling to accept the constitutional norms as being directly applicable to cases before them. An example of this argument is a case before the Court of Appeal in Cairo in 1934 which concerned a law which purported to abolish the lawyers Bar Association for the National (*ahliyya*) courts and to impose in its place a government association with a new statute and personnel. The power to do this was challenged in

¹ See Vankioicis 'History of Egypt'. Weidenfeld and Nicholson. 2nd Edition p. 276.

the courts but the Court of Appeal in Cairo ruled that it was not competent to determine the question of the underlying validity of laws. The question of whether a law was in conflict with the fundamental rights laid down in the Constitution was held not to be an issue that was justiciable before the courts. The case is an interesting one because it illustrates the distancing of the courts from the use of the constitutional norms and because, in an exactly similar case almost half a century later a court in Egypt came to exactly the opposite conclusion².

Although there was no judicial machinery for the application of constitutional legal norms and the courts were not willing to use them in the absence of any express power, there was an intense intellectual debate about the courts' power of judicial review, that is the power of courts to review legislation against the framework of fundamental rights and duties laid down in a superior law document: generally a Constitution.

The debate in Egypt mirrored the debate in France. Two great French Professors of Constitutional Law, Professor Hauriou and Professor Duguit, (both fierce advocates for the adoption of a French Constitutional Court with powers of judicial review of legislation), visited and lectured in Egypt in the early 1920s and they clearly had an important influence on a new young generation of Egyptian lawyers. This is particularly the case with Professor Duguit. He was the first professor of Public Law at the newly inaugurated Law School of Cairo University in the 1920s and in 1926 he published his 'leçons de droit public faite à la faculté de droit de l'université égyptienne en 1926'. In it he admitted the similarity of the Constitutional regimes in France and Egypt: both had Constitutions but neither had a Constitutional Court with powers of judicial review (unlike the United States which had its Supreme Court almost from the beginning), and in both countries the ordinary courts had rejected an activist and interventionist approach of using the Constitution as a superior law³. He advocated the adoption in both France and Egypt of a Constitutional Court with powers of judicial review (akin to the US Supreme Court) or failing that he recommended that the power of judicial review be accorded to the ordinary courts.

These views had little immediate effect in either France or Egypt, but influenced a number of rising lawyers in Egypt particularly the later Constitutional experts Sayed Sabri, Osman Khalil and of course Abd Al-Razzaq Al-Sanhuri.

² Supreme Constitutional Court Case in 1981; see supra p. 45. Admittedly this was a case before a very different court exercising new and enhanced powers of judicial review.

³ See generally Von Mehren and Gordley 'The Civil Law System', Little Brown, 2nd ed. 1977 and particularly Ch. 5. In France a Cour de Cassation decision of 1797 had rejected the possibility of its criminal division intervening with respect to the validity of criminal legislation; whereas in 1936 in *L'affaire Arrighi* the Conseil d'Etat held non-justiciable the question of the conformity of a law providing for the compulsory retirement of civil servants with the Constitution. See Von Mehren pp. 250-7.

Egyptian Council of State

The first major step towards judicial review was taken in Egypt in 1946 when Sanhuri drafted a law setting up a French style Conseil d'Etat (*Majlis al-dawla*).

The first *majlis al-dawla* was, unlike its French original, an independent court manned by independent judges and it was given well defined powers of review of administrative action, although initially in more specific and limited areas than the French Conseil. In 1948 Sanhuri became the President of the Court and he set his stamp of judicial activism on the courts jurisprudence during his short tenure of office.

Very soon after his appointment a case came before the court on fact similar to those in *Arrighi*. A government civil servant complained about a law which provided for compulsory retirement and curtailing of pension-rights. In an uncharacteristically long judgement the court held that it did indeed possess the power to intervene and that because the Constitution was a supreme law legislation had to be measured against its provisions. However, the court's powers were circumscribed as to the remedies it could adopt. It had no power to actually annul an offending law for nonconformity with the Constitution but it could (and did) annul the administrative decision based upon what they had characterised as an unconstitutional law. Thus, the law itself remained on the statute book but its effectiveness was curtailed - it being assumed that the court would refuse to apply it in any future cases before it. The judgement, although it cites no previous jurisprudence in support of its position exhibits clear signs that Sanhuri was indebted to both the French debate exemplified by Professor Duguit and also to the arguments of the US Chief Justice Marshall in the celebrated US constitutional case of *Marbury v Madison*⁴.

This case was the first of many whereby, until the Free Officers' Revolution of 1952, the *Majlis al-dawla* attempted to adopt (albeit in a limited fashion) the power of judicial review of legislation. This development was delivered a rude blow by the 1952 Revolution. A new Constitution was promulgated which gave the President wider powers, and generally provided for a powerful central executive at the expense of general rights and freedoms. Little by little a panoply of laws was established which encroached upon these rights and freedoms, including the right of courts to hear certain cases. Sanhuri himself was the subject of considerable personal abuse (he was physically attacked by a Nasserist mob in the Council of State) and was replaced by a willing stooge of the executive. The history of the power of judicial review of the *majlis al-dawla* in this period is of a succession of cases where the court, although continuing to admit the existence of its power, very rarely uses it and restricts its application. The court decided not to intervene in cases involving political acts or where acts of government or acts of state were involved and these were given a very wide definition.

⁴ (1803) 5 US (1 Cranch) 137; (1880) 2L. Ed 60.

Nevertheless the *majlis al-dawla* did continue to hear cases of complaint against the government and Nasser in the weeks before he died attempted to deal with what he saw as a troublesome judiciary by removing them all from their posts and only reinstating those he felt would be supportive. This event is often known in Egypt as the 'massacre of the judiciary' and marks the nadir of the modern Egyptian judicial system.

It was one of Sadat's first acts as President to counter this decree and to reappoint all the judiciary⁵.

However, as a result of this attempted subversion of the judiciary, there were broadly based calls for protections to be accorded to the judiciary, who would be able to exercise some constraints on the exercise of executive power. As to the latter this was to be achieved by the creation of a new court which was to take over the power of judicial review that the *majlis al-dawla* had assumed to itself. It was to be called the Supreme Court (*al-mahkamah al-ulya*).

The Supreme Court (*al-mahkamah al-ulya*)

The Supreme Court was set up by Sadat as a specialized court to exercise the powers of judicial review that the *majlis al-dawla* had assumed since 1946. It was therefore the first true constitutional court in Egypt.

The *majlis al-dawla* retained its main powers of review of administrative decisions as to whether they complied with the law and were *intra vires* (within the power of the relevant administrative authority), but it no longer had any power to annul an administrative decision by reason of its having been made under a legal provision of the Constitution: that power was given to the *mahkamah ulya* and was an exclusive and a monopolistic power. If the issue of the compatibility of any legal provision with the Constitution arose in a case before the *majlis al-dawla* then the court could refer the issue to the *mahkamah ulya* for determination. The parties had no *locus standi* by themselves to make any such claim nor could a claim of unconstitutionality be brought directly to the *mahkamah ulya* without first proceedings in the *majlis al-dawla*.

The make up of the *mahkamah ulya* leads one to the inescapable conclusion that Sadat hoped by removing this power to a body that was only quasi-independent that he would be in a better position to control its decision-making. The members of the court were appointed by the President for a fixed term of five years but were dismissible by the President at will. It is therefore not a little surprising that the Court did begin to hear constitutional issues challenging the validity of a large number of

⁵ Claims by the sacked judges in the *Majlis al-dawla* for damages and for declaration that Nasser's action was unconstitutional were settled by the new executive. See, for similar problems in France, the after effects of the *Conseil d'Etat* case in 1962 when De Gaulle considered (but backed away from) the replacement of the judges of the *Conseil d'Etat* who had challenged his decree setting up a military court without appeal in Algeria: Brown and Garner, 'French Administrative Law,' 1983, Butterworths *passim*.

laws passed under Nasser, particularly those connected to sequestration and nationalization of property.

There was, however, a great deal of criticism (mainly it must be said from within the legal profession) of the Supreme Court's lack of independence which was why, when Sadat promulgated a new Constitution in 1971, it made provision for a truly independent Constitutional Court protected by constitutional fiat to be set up⁶. It took eight years to draft a constituent law for the new court which was finally presented as Law 48 of 1979 on the Supreme Constitutional Court (*al-mahkamah al-dusturiyya al-ulya*) and which replaced the Supreme Court as from that time.

The Supreme Constitutional Court (*al-mahkamah al-dusturiyya al-ulya*)

With the creation of the Supreme Constitutional Court (hereafter the SCC) in 1979 then Egyptian constitutional law came of age. A Supreme Judicial Council had been set up a few years earlier composed of only senior members of the judiciary and who alone had the task of filling judicial appointments. Judges were appointed for life and held office on good behaviour. Their position was therefore politically unassailable. By Law 48 of 1979 the members of the SCC are appointed by the President acting on the advice of the Supreme Judicial Council. In practice what has happened is that the General Assembly of the the SCC nominates a named person for the filling of a vacated seat in the SCC and the Supreme Judicial Council submits that name to the President. There is therefore only ever one name submitted to the President for appointment. The one remaining vestige of Presidential power over SCC appointments is the position of President of the Court. This is a purely political appointment by the President, but again in practice the President has so far always appointed as President the most senior judge of the court.

The court consists of eleven judges who are appointed for life (the normal age of judicial retirement in Egypt is 60) and who are completely independent and impartial. Their judgements - like most of the judgements of the highest courts in Egypt - are published. They appear contemporaneously in the Official Gazette from which time they have legal effect and biannually in a set of reports with commentary.

The jurisdiction of the SCC is laid down in detail in law 48 of 1979. Its main powers are those of judicial review of legislation. It is the only Egyptian body which has the power to determine questions of constitutionality of legislation and it has the express power to annul laws and decrees which do not conform to constitutional provisions. However there is no right of individual petition to the SCC. The court can only be seized of the issue of unconstitutionality if there is a referral by a judge in any court. A judge may refer an issue to the SCC of his own volition or he may accede to a request for such a referral from one of the parties in a case. If the judge refuses there is little that a party can do. Although some academics and judges in Egypt see this as one of the main weaknesses of the court it has not so far proved to be a problem as

⁶ Unlike the US Supreme court which is not so protected.

judges of the lower courts have been very willing to refer requests to the SCC and to leave it to the SCC to decide which cases to hear fully.

The jurisprudence of the SCC

The Court moved slowly at first but recently has begun to flex its judicial muscles and has attained a pivotal role in the political life of Egypt by its willingness to protect the rights and freedoms laid down in the Constitution. Arguments based on the extensive defences of political act and act of State or government which found favour with the majlis al-dawla have been accepted only to a limited extent and the Court unlike some of its predecessors has used its powers to annul legislative provisions that are unconstitutional.

This process reached its highest point in 1990 when the court was in a head on collision with the government over its legitimacy. The consequences of this case, which held that the electoral law under which the government was elected was unconstitutional were that the government was dissolved and new elections took place under a new electoral law. The court came under a lot of media scrutiny but has come out of the situation strengthened and is seen by many as an important control on what could be the unfettered power of the executive.

The SCC has produced a number of decisions of less dramatic importance, but important nonetheless in serving to create a corpus of constitutional cases and it is to these that I will turn first before looking at the issues in the election case.

In 1980 (soon after the court was in fact constituted) the constitution was amended by referendum. Article 2 was altered to make the Shari'a *'the'* principal source of law instead of merely *'a'* principal source of law. The effect of this was an avalanche of cases claiming that legislation that contradicted the Shari'a was unconstitutional. The SCC has been very slow to accede to this argument and has generally sidestepped the substantive issue either procedurally or by saying that the change was directed at the legislators (ie the People's Assembly) rather than the courts.

Two cases in 1985 referred to this point.

The Naggar Case 1985

Naggar divorced his wife by talaq and under the new personal status provisions in the personal status law of 1979 was ordered to pay extra maintenance to his wife, which was beyond the traditional amount the Shari'a would have provided. In an action before a civil court he claimed that the provision in the 1979 law was unconstitutional because of the amended article 2 of the Constitution and the civil court referred this issue to the SCC. The provision in the new law is very controversial: it is clearly contrary to traditional Shari'a but it had the support of numerous ulema as having its origin in a valid reinterpretation of a quranic text. The SCC clearly did not want to consider the competing claims of modern Islamic jurists but was able to condemn the

provision not on this substantive ground but for an equally important procedural failing.

Decree-Law 44 of 1979 had been enacted by a Presidential decree in the summer of 1979 at a time when Parliament was in its summer recess. Article 147 of the Constitution makes express provision for this viz:-

"In cases where it becomes necessary during the recess between the session of the People's Assembly to take measures which cannot suffer delay, the President of the Republic shall issue decisions in their respect, which shall have the force of law.

Such decisions must be submitted to the People's Assembly....in case of dissolution of the Assembly, they shall be submitted at its first meeting..."

The said law had in fact been so ratified by the People's Assembly after the summer recess.

It was argued that the subject matter of the law was not such as to bring it within the valid use of the Article and the SCC agreed. The Court said that the amendments to family law that the decree made had been under discussion for at least fifty years and that they could not therefore be measures which were so urgent as to brook no delay (as required by Article 147). Furthermore as the decree itself was beyond the President's powers it was in effect a nullity so that the later ratification of the People's Assembly could not and did not affect or validate it.

The result of the court's decision was not just the unconstitutionality of the article complained of but the whole law. This case marks an important step in the jurisprudence of the court because before this time the exercise of the President's powers to rule by decree in the recesses of the People's Assembly had generally gone unchallenged. The immediate consequence however was that the government rushed through a similar law which was properly enacted by the People's Assembly as law 100 of 1985. Unhappily some important changes were made in the law in this process of reintroduction and a number of the more liberal aspects of the law (particularly those which favoured women and which had received lots of criticism) were diluted⁷.

The Al-Azhar Case 1985

The second case to arise at this time in which the relevance of article 2 was argued was the Al-Azhar case. Al-Azhar university had purchased some medical instruments for one of its faculties for the small sum of £ Egyptian 40. The University then refused to pay for the said instruments. As the amount claimed was so small it can only be conjectured that this was done deliberately in order to produce a claim in which they could attempt to use article 2 to challenge the law on interest.

⁷ See Cilardo, "The evolution of muslim family law in Egypt." *Oriente Moderno* (1985) vol 65 pp. 67-124.

The creditor sued Al-Azhar for his debt including a sum by way of interest for the delay in payment, which is provided for in article 226 of the Egyptian Civil Code 1949. The rector of Al-Azhar asked that the question of the constitutionality of article 226 be referred to the SCC, where he argued that interest was contrary to the shari'a principle of riba and hence article 226 had been made unconstitutional by the amendment to article 2 of the Constitution.

The SCC again avoided this substantive issue, which is one of considerable controversy and on which modern Islamic jurists are much divided in their opinion. Instead the SCC said that the amendment to article 2, if it had any force at all, could only apply prospectively to legislation passed after the amendment and could not apply retrospectively. To hold otherwise would be to create judicial and legislative chaos. Moreover they indicated that they were supported in their decision by their view that it was important to maintain and protect business confidence. A case is now pending before the court concerning interest provisions in legislation passed after 1980 and it will be interesting to see what the court does when its decision is produced.

These two cases exemplify the position of the SCC as regards the amendment to Article 2 of the Constitution, but they have also dealt with and are dealing with cases concerning the death penalty, murder and drugs legislation.

Inevitably perhaps a large number of cases have involved the exercise of political rights because these are exactly those rights and freedoms which have been detracted from most by the Executive. The SCC, however, has not failed to grasp the nettle and has shown an increasing willingness to intervene on the side of the individual against the state.

One of the first cases before the court in 1981 raised the issue of right of an individual to join a trade union or professional syndicate. Sadat in 1981 issued a decree terminating the validly elected Council of the Bar Association and delegating to the Minister of Justice the power to appoint a new Council in its place. The sacked members of the council challenged the Minister's power before the majlis al-dawla which referred the question of constitutionality of the law to the SCC. The SCC robustly held the law invalid as being contrary to article 56 of the constitution which purports to guarantee the democratic foundation of Trade Unions and Professional Syndicates. Further the court said that it was part of the democratic process expounded by the Constitution as a whole that individuals have a freedom of association.

The Court has moreover, involved itself directly in the political process in Egypt. The Court's most important case was the *Election Case* decided in June 1990.

The electoral law of 1982 (amended in 1987) provided for there to be 448 seats in the People's Assembly. 400 of these were to be competed for between the opposing political parties (those accepted by government) on the basis of party lists, while 48 seats could be competed for by the opposing political parties and also by independent candidates. Independent candidates were therefore excluded from running for election

to the great majority of seats in the People's Assembly. In the election of 1987 the results were produced by way of ministerial decision of the Minister of the Interior from the Ministry's computer results. The result was a massive majority for the ruling National Democratic Party (NDP). A number of independent candidates and smaller political parties challenged the electoral results by way of challenging the decision of the Interior Minister before the *majlis al-dawla*. The *majlis al-dawla* held that the results had been wrongly determined and said that 39 candidates should instead have seats in the People's Assembly. The Speaker of the People's Assembly and the Prime Minister refused to accede to this judicial decision which was a very serious act of government disregard of the judicial function and almost unheard of in Egypt.

As a consequence of that refusal the candidates asked the court to request a ruling from the SCC on the constitutionality of the electoral law itself. The main arguments before the SCC were two-fold. First, that there was no equality between candidates seeking appointment because the independents and opposition parties were limited in the number of seats they could compete for and therefore the competition for those seats was greater than for the rest. Second, that there was no equality between voters because the constituencies were not equitably drawn up. Some constituencies were larger than others and generally these were the constituencies that the independents had to fight for. The government's main argument in defence was that the SCC was not competent to determine questions relating to elections because that was either a political question or an act of government and hence not justiciable.

Although there is no reference to any earlier case the language of the court's decision is redolent of *Marbury v Madison*. The court stresses the supremacy of the Constitution; the importance of maintaining a system operating a separation of the powers of the legislature, the executive and the judiciary, and it reiterates that the duty of the SCC is to act as a safety valve over a powerful executive and unlawful state action.

It referred to a number of provisions in the Constitution that stressed democracy and equality: viz articles 5 (democratic multiparty state), 8 (equality of appointments for citizens), 40 (all citizens equal) and 62 (the right of citizens to vote freely). By any standard they said what the government had done in the electoral law was irrational and unworkable and there was a legitimate and substantial public interest in the court intervening in the political process in this way.

The court was much exercised by the consequences of its action. If its ruling was retrospective to the date of the election then all legislation and acts (including the nomination of Hosni Mubarak as President) stood annulled. The court in the end therefore came to the conclusion that their decision was only prospective in effect from the date of its publication in the Official Gazette on 6 June 1990.

During the short period of a week after the court had delivered judgement and before it was published in the Official Gazette, the government attempted a rearguard action to remove it. The Speaker of the Assembly tried to introduce a bill that would have made the decisions of the court subject to confirmation by the People's Assembly. Of

course, this would have negated the importance of the court completely and thankfully was not passed.

The immediate result of the courts decision was that the People's Assembly, although not dissolved by the court, stood impotent of power to legislate for the future. Thus, the President had to step in, exercising powers under article 176 of the Constitution, to dissolve the People's Assembly after referendum. In a sense the country was able to vote on whether they agreed with the Court's handling of the matter. It was a resounding affirmation.

A new electoral law was then drafted and new elections held in 1990. This resulted in more independent candidates, and opposition parties being represented in the People's Assembly, but still was by no means totally democratic. A case is now pending before both the *majlis al-dawla* and the SCC on the validity of this law.

Conclusion

This brief summary of the history of the notion of judicial review in Egypt has shown that there has been considerable dynamism shown by the Egyptians in this legal sphere.

The Supreme Constitutional Court is merely the apogee of a long process of constitutional development, but it is writing an extremely important chapter in constitutionalism in Egypt.

The Court is a unique institution in the Middle East with unique powers and it is proving to be very willing to exercise those powers and is not afraid of facing down a powerful ruling executive.

The jurisprudence of the court displays what I would term a 'radical caution'. They have been careful to tackle some issues rather than others. Their most important legal tasks have perhaps been the dismantling of a great deal of the legacy of Nasserism, (eg nationalization decrees and sequestrations) but they have as yet kept off important but controversial areas such as the validity of the emergency legislation dating from 1959.

The court has I think shown a willingness to use comparative law. It takes the decisions of the US Supreme Court in its library and is soon to receive the decisions of the European Court of Human Rights. The *Election Case* was clearly influenced by two US Supreme Court cases on electoral law although they were not acknowledged as such.

Finally the court has been accepted by the executive and the people as an essential component of the state. This is perhaps its greatest achievement and carries with it the certainty that it will remain and continue its work. The Court has become in a very short time a vitally important legal institution for the future of democracy in Egypt and indeed as model for the whole of the Middle East.