Saving Egypt's Supreme Constitutional Court from itself

Ahram - Chibli Mallat, Friday 15 Jun 2012

A first comment on the decisions of Egypt's highest court on 14 June 2012

On June 14, the Supreme Constitutional Court of Egypt issued two rulings in two separate chambers: one decision examines the lustration law, dubbed in the media as 'the law of political exclusion'. It was considered unconstitutional. The second ruling holds that the electoral law under which the new Parliament was elected in March 2012 was flawed constitutionally. By so deciding, the SCC forces full de novo parliamentary elections.

By midnight Egypt time on June 14, the texts of the decision do not seem to have been released officially, even though they need to appear in print in the Official Gazette to be effective. There is no trace of the decisions on the official siteof the Supreme Constitutional Court (SCC). The best source seemingly available appears in the daily al-Watan, and consists of around 1000 words in one case and less than 1,500 words for the other. This is unusually short for a SCC decision, though sufficient for a first comment.

As expressed across Egypt, the rulings have far reaching consequences, and raise issues that will not be clarified outside two imponderables: the presidential election, to be completed this weekend, and the reaction of the street.

In the decision dissolving parliament, the SCC holds that the newly elected parliament is henceforth inexistent, as it cannot legislate anymore.This is consistent with a famous decision of the SCC, which had ruled on 19 May 1990 that Law 188 of 1986 regulating Parliamentary elections was unconstitutional, and forced new parliamentary elections for reasons identical to the present ruling: Independent candidates had been disadvantaged by a clause restraining them to a quota that does not apply to members of political parties.(SCC decisions, 19 May 1990, vol. 4 of the official collection, at 286-7; see my Introduction to Middle Eastern Law, OUP 2007, 205-7).The reason given by the SCC today is similarly based on the constitutional inequality obtaining from an electoral law that distinguishes two tiers in Parliament: 2/3 members are to be chosen from political parties, 1/3 from independents.For the Court, constitutional inequality results from the fact that independents are not allowed to run on political parties' list, but that members of political parties are allowed to run on lists and as independents. Contrary to the early reports, this means that the whole Parliament is illegal, and not just the 1/3 portion of independent members.

The other ruling, on the political exclusion law, was issued in the midst of the ongoing presidential election. A reader unfamiliar with the arcana of SCC jurisprudence would think that the SCC undermines the political exclusion law by considering void ALL acts of the current Parliament. In fact, this is not the case, and the SCC repeats its rationale of 1990 (SCC decisions

vol. 4, at 292-3). Acts passed by Parliament before the SCC decisions are not illegal. This is why a separate decision on the law was issued (albeit on dubious jurisdictional grounds, since there was no 'case or controversy'). In that second decision, the SCC faulted the political exclusion Law 17 of 2012on several grounds of arbitrariness in time (why ten years?), in breadth (why some specifically mentioned former officials and not others), and in procedure (no redress for those excluded, and prima facie retroactive penal law.)

One has to reserve a full appreciation when the entiredecisionsare officially released by the SCC or published in the Official Gazette. Meanwhile, the decisions are troublesome for not observing minimal standards of democracy in three ways at least.

First, the SCC relies openly on the Constitutional Declarations of the military rulers, and not once to the original Constitution as amended by referendum last year. It is therefore unclear whether the SCC may have simply jettisoned the whole text of the 1971 Constitution. A basic question is not fully answered: what is the Constitution of Egypt today?

Second is the troubling aspect of the quality in argumentation. The strength of the SCC in three decades of decision-making has been the utmost care given to precedents, and to a sophistication and fairness that had drawn the admiration of jurists East and West. In the heyday of Awad al-Morr's presidency in the 1990s, the SCC was considered the most enlightened court in the Arab world. The quality of its decisions today, let alone their timing, is disappointing. Only jurists familiar with the history of the court can see a convincing trail of precedents in the dissolution of Parliament, though little in the verdict of the political exclusion law. In a highly charged situation like the one prevailing in Egypt, the citizen is subject to an inevitable flurry of contradictory interpretations.

The final yet no less troubling aspect of the decisionsis that the SCC looks as if it has done the full political bidding of the Ancien Régime. It finds its references in the military rulers 'constitutional declarations', it dissolves a seemingly adverse Parliament on grounds of inequality that miss the forest for the trees, and it allows a former pillar of the Mubarak regime to run unchallenged. In effect, the SCC whitewashed a presidential candidate who had benefited already from the disqualification by the High Electoral Committee from the competition of leading Egyptian democrats like Ayman Nour from running for the presidency. Nour had spent three years in jail under Mubarak for running against him in the last presidential 'elections'. A disturbing coincidence, the High Electoral Committee was headed by the president of the SCC who issued today's other decision.

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