

**CONSTITUTIONAL COURTS IN TRANSITION
JUDICIAL REVIEW IN THE WAKE OF THE ARAB SPRING**

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Introduction

Reforms of constitutional courts after the Arab Spring have been part of a larger project of consolidating constitutional democracy in a region that have been plagued with authoritarianism for a long time. The institutionalization of political change through constitution-making, setting presidential term limits, running periodic elections, and others, was predestined to impact judicial review institutions. Apart from the three well-known waves of judicial review¹, reforms of Constitutional Courts did not bring judicial review to the region, since it was there at least for the case of Egypt since the 1950s nor did it designated an apex court with judicial review functions because from the 1970s at least, several courts in the region began to exercise judicial review. Reforms to Constitutional Courts in the comparative constitutional law literature often connotes court packing and jurisdiction stripping attempts by the political branches to courts. The specificity of the Arab Spring case is the drastic reforms that affected the institutional design, judicial review model, appointment mechanisms, and others of Courts in order to furbish and empower the new institution in the new order.

In this thesis, through a functionalist approach, I examine three Courts that were reformed/created after the Arab Spring, namely, Egypt's Supreme Constitutional Court, Tunisia's Constitutional Court and Morocco's Constitutional Court. Both Egypt and Tunisia have undergone revolutions in 2011 as the first two states to initiate the Arab Spring, and both have also experienced post-revolutionary constitution-making. Morocco, which did not experience any revolution but a limited uprising in the wake of the Arab Spring, had also changed its constitution with a new one in July 2011. In all the three countries, certain forms of judicial review existed, yet courts struggled to establish itself as a constitutional power let alone to limit the government or to move towards constitutionalism. The reason why I choose to compare these three courts is the different patterns

¹ See Julio Ríos-Figueroa, "Judicial review and democratic resilience: Afterword to the Foreword by Doreen Lustig and J. H. H. Weiler", *International Journal of Constitutional Law*, Volume 17, Issue 1, January 2019, Pages 17–23

and converging realities they represent². Before the Arab Spring, Tunisia and Morocco's Constitutional Council model was very similar to and more influenced by the French model. Egypt on the other side, always since the 1960s had an apex Court in charge of constitutional control. Egypt and Tunisia both experienced revolutionary momentum and later changes to the Court was a product of popular demands and political concessions, Morocco on the other hand, has experienced top-down reform and royal concessions. Both Egypt and Morocco, have signalled their interest in judicial review in their respective first drafts of independence constitutions, unlike Tunisia. All the three countries, as will be shown, have carefully addressed many constitutional design flaws and institutional choice problems of their respective Court, at least on the black letter level, after the Arab Spring.

The thesis comes in three chapters. The first chapter addresses the evolution of judicial review in each of the three countries and how each system responded to and institutionalized this power and for what purpose. I also highlight substantial design problems either in the function or the structure of the Courts in relation to the provisions of the constitution and the caselaw of the Courts. In the second chapter, I briefly look at the constitution-making processes in the three countries, then I show how Courts were designed to respond to drawbacks of its forerunners, and finally examine the jurisprudence of the transitional phase. By this concept I mean, judgments issued by the Court after its reform concerning powers of public authorities, political participation, and elections, among others which have direct effect on the democratic transition. At this part, I will focus predominantly on Egypt and Tunisia with only relevant and few references to Morocco, since the latter in my view did not undergo full-scale revolution, thus, it is unexpected from the Court to play a significant role in the so-called transition. In the third and final chapter, I revisit previous arguments, and answer the research question of this capstone: how did the constitutional beginnings of the Courts informed its transitional role and transitional jurisprudence?

² The Arab Spring has, from the other side of the story, created civil unrest and political instability. Egypt, Tunisia and Morocco are one of the few remaining stable states – which I deem as a prerequisite for the study of constitutionalism in a post-revolutionary and democratic transition settings. Hence, I declined to study reformed courts in other failed states.

Chapter 1

Constitutional Courts prior to the Arab Spring

I. The evolution and institutionalization of judicial review

The question of constitutionality within the Egyptian legal system has been older than establishment of the Supreme Court itself in 1969. In a criminal trial in 1924, the defendants who were convicted of spreading revolutionary ideas argued in their appeal that article 151 of the criminal code which is the basis of the their conviction is unconstitutional and further violates their right to freedom of expression as expressed in article 14 of the constitution of 1923³. Since 1940s, Courts began to formally signal their interest to exercise judicial review. A court in Cairo in 1941 has relied on the principle of constitutional supremacy to argue that since courts are guided by two laws i.e. the constitutional law and the statutory law, the court has the right to exercise constitutional review in case of any conflict between them. In a *Marbury v. Madison* fashion, the Supreme Administrative Court issued a landmark decision in 1948 affirming the right to judicial review, arguing for it on the premise of separation of power. The strength of the judgment is that it not only was issued by the highest administrative court in Egypt, but it also puts Egypt amongst the few countries that developed a notion of judicial review by a judicial exercise and not only by a constitutional amendment or statute.⁴

The first attempt to institutionalize judicial review in Egypt came in a tragic time to the Egyptian judiciary⁵. President Nasser who was an army officer who led a coup in 1952 against the king and abolished the monarchy, attempted to unify and centralize all judicial decisions by issuing in 1969 decree no. 81 to establish the Supreme Court. The President at the same day creating the Supreme Court has also created the Supreme Council of Judicial bodies which allowed him to exert more influence on judges in terms of disciplinary measures and appointments. The creation of the Supreme Court has allowed the Regime to replace the abstention review

³ (Alkady, *A Constitutional Judiciary for 50 years in protection of human rights*)

⁴ Brown, *Constitutions in a nonconstitutional world*

⁵ On what has come to be known as the “judges’ massacre”, Nasser dismissed more than 200 judges including the president of the court of Cassations and all the board of the judges’ club – Egypt’s prominent professional association of judges.

system whereas courts could independently refrain from applying certain laws that are deemed to be unconstitutional, with an executive-dominated, centralized, Supreme Court.⁶ The Court during its 10-year tenure has issued more than 300 judgments, none of them was concerned with the growing power of the Regime. During the presidency of Nasser's successor President Sadat and for the first time, the exercise of judicial review found a constitutional ground in the constitution of 1971⁷. The primary understanding of why an authoritarian regime would establish a Supreme Constitutional Court is attributed to the role played by the Court in providing institutional guarantees for investors during Egypt's shift from command to market economy during the 1970s.⁸

Unlike Egypt, judicial review in Maghreb countries did not develop organically in court rooms. In Morocco, judicial review has had however a resonance in the pre-independence imagination. Draft constitution 1908 which was the first attempt of constitution-making in Morocco prepared by a group of local elites and religious scholars has showed an early interest in judicial review, by demanding from the king, inter alia, to establish a bicameral legislature by which the second chamber *le Conseil des Notables* would exercise an obligatory and a priori review of constitutionality of any act of parliament.⁹ The failed constitutional attempt of 1908 to institutionalize judicial review was then followed by others successful attempts starting with the independence constitution of 1962 and later constitutions of 1970 and 1972. These constitutional experiences however did not establish an independent institution, rather the constitution of 1962 spelled out a constitutional chamber to be established within the Supreme Court tasked mainly with constitutional control of organic laws and parliamentary procedures and adjudicating election and referendum disputes. Since 1992, the constitutional rank and jurisdiction of the old chamber has been changed in the new constitution of 1992 and of 1996. The new constitution replaced the constitutional chamber with a new institution *conseil constitutionnel* that have been

⁶ Malleson & Peter. *Appointing judges in an Age of Judicial Power*.

⁷ It must be noted however that the Court did not operate until its organizing law was issued in 1979.

⁸ Moustafa. *Law versus the state*

⁹ Mohammed Hashas. "Moroccan Exceptionalism Examined: Constitutional Insights pre- and post-2011". Istituto Affari Internazionali. December 2013. <http://constitutionnet.org/sites/default/files/iaiw1334.pdf>

established as an independent institution of its own, tasked with constitutional control of ordinary statutes as well as organic laws.¹⁰

Tunisia far from Egypt and Morocco had not shown any signs of interest in judicial review until very recently. In fact, the Tunisian Court of Cassation in 1988 has expressed its incompetence to exercise such control, stating that the role of the judiciary is to apply the law but not to review its merits and that without explicit constitutional authorization there is no room for judicial review¹¹. This lack of desire to judicial review can be attributed to the French tradition towards judicial review and can also be understood as a constitutional-design problem. The framers of the Tunisian Constitution of 1959 not by abandoning judicial review option, but by constructing the president as the “guarantor of ... the respect of the constitution” have restrained the evolution of judicial review by courts independently, by a constitutional text.

This understanding of the president as guarantor of the respect of the constitution contradicts the early Egyptian understanding in 1948 by the Egyptian Supreme Administrative Court that the judiciary is entrusted with guaranteeing the respect of the constitution – hence developing the notion and exercise of judicial review in Egypt. Unlike its Moroccan counterpart, the Tunisian *Conseil Constitutionnel* was introduced and was meant to serve as an advisory body by the President. Until the Tunisian constitutional amendment of 1995, the Tunisian Constitutional Council did not enjoy any constitutional status as it was established by Presidential decree No. 1414 of December 16, 1987 unlike its Moroccan counterpart.

II. The functioning and organization of constitutional courts

Constitutionally, all three countries: Egypt, Tunisia and Morocco have designated the President/King to choose the Chief Justice/Chairman of the Court/Council. The Egyptian experience however stand out as the Supreme

¹⁰ Rashid AlModawar. “The evolution of constitutional review in Morocco: Constitutional chamber, constitutional council, and constitutional court.”. *Journal of Constitutional Studies of the Constitutional Court of Kingdom of Bahrain*. Volume 3, issue 6, 2016.

¹¹ Sultany, Nimar. "Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring" Oxford: Oxford University Press, 2017

Constitutional Court of Egypt, since its operation in 1979, has developed several judicial norms that allowed it to preserve its relative independence and self-perpetuation position¹². Under the 1971 Constitution of Egypt, the President of the republic has the formal authority to appoint the Chief Justice of The Supreme Constitutional Court. For the first two decades of the establishment of the Court, Presidents used to appoint the most senior serving member of the court to become the next Chief Justice. In case of a vacancy in the court, the law requires that the president chooses from two candidates one nominated by the Chief Justice and the other by the General Assembly of the Court i.e. the Chief Justice and other serving justices. The Supreme Constitutional Court is very self-perpetuating to the fact that both the Chief Justice and the General Assembly in most of the times nominate the same person leaving no room for the president to choose¹³. In 2001 however, President Mubarak retained his constitutional power to appoint the Chief Justice when Chief Justice Galal – one of the most activist and prominent judges – died. Instead of appointing the most senior serving justice, Mubarak appointed a high-ranking official in the Ministry of Justice who was notoriously known for drafting several draconian government bills of that times¹⁴. Although the Chief justice in the Egyptian system is *Primus inter pares*, the judicial traditions and informal practices provide tremendous authority to the postholder. The Chief Justice is not a mere presiding officer vis a vis his colleagues as seen in the US Supreme Court for example, on the opposite, he has a huge influence over the agenda and the composition of the court i.e. by appointing the head of the commissioners body and nominating justices to the SCC. Procedurally, The Chief Justice controls sessions dates, and regardless of his position in the minority or the majority, he will either write the opinion of the court or assign it to another justice.

Neither the Egyptian Constitution nor the SCC law have identified a number of justices in the composition of the Court. This constitutional choice has allowed Chief Justice Naguib who succeeded Chief Justice Galal to

¹² Moustafa, *The Struggle for Constitutional Power*

¹³ Brown, *Constitutions in a nonconstitutional world*

¹⁴ Malleson & Peter. *Appointing judges in an Age of Judicial Power*.

use his prerogative to admit five more justices in effort to change the ideological leaning of the Court.¹⁵ On the other side, Both the Moroccan and Tunisian Constitutions have identified a certain number of members to serve on the board of their constitutional councils. According to the Moroccan Constitution of 1996, the Constitutional Council is composed of 12 members all appointed for a non-renewable, nine-year term. The king appoints six members amongst which he chooses the Chairman of the Council, and the rest of members are appointed evenly between the Speaker of the House of Representatives and the President of the House of Councilors after consulting political parties of each house.¹⁶ In Tunisia, the President since the establishment of the court has retained the power to appoint members to the Council. The 2002 constitutional amendment in Tunisia has changed drastically the appointment procedure and composition of the Council. Six out of the nine members were to be appointed. Four of those appointees including the Chairman of the Council are selected by the President of the Republic, the remaining two are selected by the President of the House of Deputies. The other three are ex-officio members: Presidents of the court of Cassation, and of the Administrative court and of the Audit office.

III. The jurisdiction and caselaw of constitutional courts

The Egyptian Supreme Constitutional Court (1979-2011)¹⁷ has two constitutionally defined roles aside from judicial review. The first one is to interpret the law when there are different readings of it, the second is to resolve conflicts of competence between different judicial bodies. The practice of judicial review in Egypt is influenced by the U.S understanding of the former whereas Supreme Courts can only consider questions of constitutionality in a course of judgment of a concrete case. According to the Egyptian SCC Law, either litigants or lower courts can refer the question of constitutionality to the Supreme Constitutional Court. On the other hand, The Moroccan Constitutional Council (1992-2011) conduct ex-ante preiew in the European sense

¹⁵ These justices were from ordinary judiciary not administrative

¹⁶ (Mohamed Hamdon, "Constitutional Control in Morocco: The Moroccan constitutional court - the composition of the court according to the constitution of 2011". The Moroccan journal for Economy and Comparative Law. Issue 5, 2018, pages 117-139.)

¹⁷ While the Court remained to operate during and after the revolution, year 2011 refers to the time of the second part of the thesis

whereby certain and designated political groups can file a question of constitutionality with no pending concrete case taking place. In Morocco, the king, the Prime Minister, the Speaker of the House of Representatives, the President of the House of Councilors, or one-quarter of Members in either chambers in Parliament can according to the Constitution of 1996 submit any bill to the Constitutional Council for review before the promulgation. In Tunisia, only the president is allowed to send certain bills to the Constitutional Council to review their conformity of the constitution. It is mandatory however to send bills regarding organic law, any bill of vital national interest that will be set for referendum as stipulated in article 47, treaties that shall modify the constitution, and bills regarding the application of the constitution, definition of crimes, nationality, personal status, education, public health, and others. While in the three states decisions of the Court/Council are final and non-appealable. In Tunisia however, the constitution expresses that Council's decision shall be sustained and respected by all authorities, except for decisions issued regarding a question related to the functioning or organization of a State Institution.

For many years, the Egyptian SCC has developed a strong caselaw in electoral, human rights, socio-economic rights, and media freedom jurisprudence.¹⁸ The Court has also produced and adjudicated a high-profile, politically charged judgments regarding political rights. In 1986, the SCC struck down a law that banned opposition activists from participating in the political life, thus enabling hundreds of party leaders and political activist to restore their political rights.¹⁹ Similarly, the Court in 1988 forced the state to legally recognize the Nasserist Party which was denied legalization by the government.²⁰ The Court also struck down many electoral laws as unconstitutional. In 1987 and in 1990, the Court found the electoral laws by which the parliamentary elections were held to be unconstitutional which led to premature dissolution of parliament in both cases.²¹

¹⁸ Choudhry, Sujit, and Katherine Glenn Bass. "Constitutional Courts after the Arab Spring: Appointment mechanisms and relative judicial independence". International IDEA & Center for Constitutional Transitions, 2014

¹⁹ "The Supreme Constitutional Court: Defending human rights or the Mubarak regime?" Cairo Institute for Human Rights Studies, January 2013. <https://cihrs.org/the-supreme-constitutional-court-defending-human-rights-or-the-mubarak-regime/?lang=en>

²⁰ Session of May 7, 1988, appeal no. 44/7JY.

²¹ Kasem, *Egyptian Politics*

When the Government party in the latter case tried to invoke the political question doctrine, the SCC has interestingly affirmed its duty to step in whenever a right to run for public office which is a fundamental political right is affected – a decision that will later have a huge impact on post-2011 SCC judgments. In the same judgment, the SCC was strategic to presume the constitutionality of all laws produced by the dissolved parliament unless challenged before them, in order not to create a legal void. In 2000, the SCC in a landmark decision ruling that a certain provision of law 73 of year 1956 is unconstitutional as it allowed nonjudicial officials to supervise the election contrary to the constitutional command of full judicial supervision.²² The government argued that the constitutional requirement refers to a formalistic supervision that does not require physical attendance of judges at the ballot stations, the Court however, ruled that judicial supervision is substantive not formal, and in response to the government defence that the number of judges does not match the number of ballot stations, the SCC has assertively refused any excuse on the grounds that political considerations stand against constitutional provisions.²³

In the domain of press freedom and human rights, in 1993, The SCC found that a provision in the criminal code which requires the defendant in a libel case to present proof of published statement within five days, to be unconstitutional on the basis that it interferes with the ability of the press to monitor the government.²⁴ Moreover, the Court struck down many provisions of the Press law which puts criminal liability for party leaders on materials published in their party newspapers²⁵, and on editors on materials published in their papers²⁶. In 2000, and at other occasions the SCC struck down many laws and legal provisions which affected the functioning of NGOs, and the freedom of association. The Court has also promoted women's right, by affirming women's rights to divorce their husbands against their will.²⁷ The court has also adjudicated cases

²² Session of July 8, 2000, appeal no. 11/13JY.

²³ (Alkady, *A Constitutional Judiciary for 50 years in protection of human rights*)

²⁴ Session of May 5, 2001, appeal no. 25/22JY.

²⁵ Session of July 3, 1995, appeal no. 25/16JY.

²⁶ Moustafa, *the struggle for constitutional power*

²⁷ Session of July 5, 1997, appeal no. 82/17JY

relevant to the debate on school uniform and religious freedom, by adapting a relaxed understanding of article two of the constitution and engaging in a theologian account of how Niqab is not a core component of Islam, the Court ruled that denying admission to Niqabi high school students is not unconstitutional.²⁸

The Supreme Constitutional Court was careful enough not to render judgments that could risk either the social or political underpinnings of the regime. The SCC, for example, upheld the constitutionality of the state security court created by the virtue of the emergency law. These courts do not offer a due process protection and the president have huge influence over its decisions, for example, he can request retrials and can overturn the court ruling. The Court also strategically delayed important rulings on the trial of civilian before military courts for example, in order to avoid any potential political embarrassment.²⁹ The Court also did recognize the rights of Bahais in seeking their recognition as a religion.³⁰

Courts in Morocco and Tunisia have historically been behind their Egyptian Counterpart in developing a jurisprudence of human rights protection. This disparity can be attributed to the type of judicial review and access to court provided in both countries. In Tunisia, neither citizens (with or without a standing requirement) nor political groups can refer a case to the Constitutional Council, where it is a presidential prerogative. Let alone the idea of the president as the guardian of the respect to the constitution which hindered the development of judicial review organically by court and the founding idea of the Constitutional Council in Tunisia as an advisory council with no binding force which explains why it took many years for the Conseil to publish its opinion, as at first, all its opinions were confidential and delivered only to the president. Despite their poor institutional capital and slow development, this did not halt the Council whenever it was in a position, to issue judgments that sustain and expand Individual rights, separation of power and the constitutional order. In 2005

²⁸ Session of May18, 1996, appeal no. 8/17JY.

²⁹ Nathan Brown. "Egypt: A constitutional Court in an unconstitutional setting", Constitutional Transitions and global and comparative law colloquium, New York University, 2013

³⁰ Session of March 1, 1975, appeal no.7/2JY

for example, touching upon the idea of *bloc de constitutionnalité*, the Constitutional Council has developed an understanding that the preamble of the constitution should be considered in its constitutional review process.³¹

Although its relative institutional empowerment, the Constitutional Council in Morocco did not develop a significant caselaw in the field of human rights or limiting the government. While top official parliamentary and government actors alongside with the king can access the court, the general sense and politics of consensus in Morocco, has made it very hard to challenge the constitutionality of statutes. In fact, at some cases where the Constitutional Council had the opportunity to define its scope of fundamental rights, the Council restrained itself and ruled only on procedural grounds.³² Some scholars argue that the limited access to the court has allowed the political branches to pass certain laws that are arguably unconstitutional without any constitutional examination e.g. amendment to the law on freedom of press and association (2002), and the law on the fight against terrorism (2003).³³ And while a one-quarter of members of either houses of parliament can ask the court to review any bill is an empowering mechanism for parliamentary minorities, it remains a high threshold and a difficult task within the political system and politics of Morocco. Thus, explaining why this mechanism has been only used for seven times during the whole duration of the Council.

Another drawback in the Moroccan constitution, is the unconstitutionality to challenge any *dahir* (decree) by the Moroccan King. In contrast to Morocco and Tunisia, the concrete review system in Egypt allowed citizens to find a new space to contest the state and challenge its legal domination. Islamists used the Court to challenge the secularity of the State, Parties used the Court to challenge electoral restrictions, Human rights groups used the Court to foster individual rights, The Press used the Court to lift suppressive restrictions, and so on.³⁴

³¹ Grote & Röder, *Constitutionalism, Human Rights, and Islam after the Arab Spring*.

³² Grote and Röder, *Constitutionalism in Islamic Countries*:

³³ Ibid

³⁴ Moustafa, *the struggle for constitutional power*

IV. Conclusion

This chapter has showed how the idea of constitutional review has developed differently in the three countries. In Tunisia, courts self-restrained itself from exercising constitutional review. In Morocco and Egypt however, Courts and the framer of independence constitution were interested in this process. Moreover, the chapter showed the development of constitutional courts/councils in the three Countries. Both Tunisia and Morocco have followed the French model of constitutional review by establishing their own conseils constitutionnes which reflect the nonjudicial nature of the body. In Egypt while Nasser and Sadat's courts reflect two different projects, one which centralize judicial rulings and the other which signal commitment for rule of law to the investors, both Courts were apex court not non judicial councils.

Finally, the Chapter showed how the concrete review model adapted by the Court in Egypt has enabled peaceful contestation to the legal hegemony of the state by many societal actors, unlike the abstract review in Al Maghrib countries which in the case of Tunisia by limiting the access to Court to the President for a long time, or in the case of Morocco's politics of consensus and high procedural requirements, have limited the Court's ability to produce sound jurisprudence of limiting the Government and protecting rights.

Chapter 2

Constitutional Courts of the Arab Spring

I. Constitutional history of the Arab Spring

From the period of 2011 to the period of 2014, Egypt has been ruled under a fast-developing constitutional framework of fourteen constitutional texts. Two of them are the post-revolution constitutions of 2012 and of 2014. And others are amendments to nine articles in the prerevolution 1971 constitution in 2011, and ten constitutional declarations between years 2011 to 2014 issued by the Supreme Council of the Armed Forces, and a recent 2019 constitutional amendment to the constitution of 2014. These webs of constitutional texts represent three waves of constitution making in Egypt. The first wave is from the start of the revolution until the constitution of 2012. In this period, the Supreme Council of Armed Forces was dominant force. In the second wave which lasts between the promulgation of the Constitution of 2012 to its suspension in July 2013. The third wave which constitute a reversion to the old regime in Egypt starts from the July 2013 Constitutional Declaration to the promulgation of the constitution of 2014 and its amendments in 2019. The drafting process of the constitution of Tunisia has commenced in early 2012 but was promulgated however as late as 2014 due to serious tensions between Islamists and secularists in the Constituent Assembly. In Morocco, the constitutional revision that resulted in the new constitution was the smoothest since it was commissioned by the king and did not witness vital disagreements either during the drafting or after as the case in Tunisia and Egypt.

II. Constitutional designs of constitutional courts

Changes in the nature of the Court and the relationship between it and the Judiciary in Egypt did not occur contrary to Tunisia and Morocco who for the first time had a court that exercise the functions of judicial review after the Arab Spring. For the first time since its establishment, the status of the Moroccan Constitutional Council has been elevated by the new Constitution of 2011 to become a Constitutional Court. While the Constitution does not explain the relationship between the judiciary and the Constitutional Court, the framers of

the Constitution has written a separate chapter on the Constitutional Court apart from that of the Judiciary. Although this new design signals the independence of the Court from all three branches, it fails to explain if the Constitutional Court is a judicial authority or not³⁵, especially with the Constitution referring to members of the Court as Members but not as Justices. Tunisia unlike Morocco has cleared up the confusion regarding the relationship between its newly established Constitutional Court and the Judiciary. According to the Tunisian Constitution of 2014, the Constitutional Court is ordained to be part of the Judicial authority while it remains as an independent Court. The Egyptian SCC since its establishment is the apex court of the country

In 2011, the Supreme Council of Armed Forces – which ruled Egypt between the removal of Mubarak and the first post-revolution democratic election, issued a decree changing the appointment procedure of the Court. Instead of a presidential appointment, the decree further developed the self-perpetuation nature of the court during its first two decades, by making the Court itself to choose its chief justice amongst the three most senior serving justices.³⁶ The Constitution of 2012 left it for the law to decide on the appointment procedure of the Court members, the Constitution of 2014 however, affirmed the earlier decree by the SCAF allowing the Court to choose its justices, and commission body members, and most importantly choosing the chief justice himself from the three most senior serving justices in the court. Finally, The Constitutional amendments of 2019 to the Constitution of 2014 has changed the appointment procedure to the Supreme Constitutional Court. Currently, the Court does not choose the Chief Justice anymore, the president chooses the Chief Justice amongst five most senior serving members – a huge number which gives the president a room to choose his appointee on political grounds. Similar to the Constitution of 1971, the President can now also choose other justices amongst two candidates one nominated by the Chief Justice and the other by the General Assembly of the Court. The number of Justices in the Supreme Constitutional Court throughout the Constitutional history of Egypt has been undefined. The Constitution of 2012 which was drafted after the ouster of Mubarak and under an Islamist

³⁵ (Mohamed Hamdon, "Constitutional Control in Morocco: The Moroccan constitutional court - the composition of the court according to the constitution of 2011". The Moroccan journal for Economy and Comparative Law. Issue 5, 2018, pages 117-139.)

³⁶ Maria Haimer. " The Supreme Constitutional Court of Egypt (SCC) Rethinking the role of an established court in an unconstitutional setting". EPR General Conference, Glasgow, 2014

majority, has however defined the numbers of justices to be eleven including the Chief Justice. Thus, reducing the number of the Court from eighteen at that time to eleven members, a move that was deemed to be designed to dismiss certain judges that are polemical to the Muslim Brotherhood, including Egypt's only Female Justice Tahani Al-Jebali.³⁷ The Constitution of 2014 – drafted after the ouster of the Muslim Brotherhood by the Egyptian Military – has restored the constitutional tradition of not defining a number of SCC justices.

The appointment procedure has also been different after the reforms of 2011 in Morocco. While the Constitutional Council was composed of twelve members before the Constitution of 2011, half of them are appointed by the king and the other half is appointed evenly selected between the Speaker of the House of Representatives and the President of House of Councilors the composition of the Courts in the constitution of 2011 was more democratic and inclusive.³⁸ The Court still has twelve members in its composition; however, the appointment procedure has changed. Although the King still chooses six appointees, the President and the Speaker of both chambers of Parliament do not play a role anymore in appointing the other six members, instead, the six members are elected evenly by each chamber of Parliament in a secret-ballot election. Moreover, Article ten which addresses the rights of parliamentary opposition recognizes a right for the opposition to contribute in proposing candidates for and elections of members of the constitutional court. The King according to the new constitution retain his appointment power over the President of the Court however he now chooses him amongst all members not only his appointees. Furthermore, one of the King's six appointees has to be chosen by the Superior Council of the Ulema – the highest Islamic religious institution in Morocco.

In Tunisia, the President used to dominate the Constitutional Council appointments. Before the Arab Spring, the Council consisted of nine members, the President used to appoint four of them including the chief Justice, and

³⁷ Nathan Brown. "Egypt: A constitutional Court in an unconstitutional setting", Constitutional Transitions and global and comparative law colloquium, New York University, 2013

³⁸ (Rashid AlModawar, "The evolution of constitutional review in Morocco: Constitutional chamber, constitutional council, and constitutional court.". Journal of Constitutional Studies of the Constitutional Court of Kingdom of Bahrain. Volume 3, issue 6, 2016.)

the Speaker used to appoint the other two elected members, while the remaining three members are ex-officio top Judicial authority heads. The Constitution of 2014 has adapted a variation of a multi-constituency approach to judicial appointing by which multiple independent political institutions take a role in appointing judges. According to Article 118, the Constitutional Court is composed of twelve members. Each of the President of the Republic, the Assembly of the Representatives of the People (hereinafter "ARP"), and the Supreme Judicial Council appoint four members. Unlike the Constitution of Egypt's Judiciary-Executive model of appointment which purposefully exclude the legislature and Unlike the Moroccan Constitution which exclude the judiciary, the Constitutional formula of appointing members to the Constitutional Court of Tunisia does include all of the three branches thus investing in the institutional and political capital of the newly established Court.³⁹

Justices of the Supreme Constitutional Court in Egypt, even before the revolution, are appointed for life until the mandatory retirement age of seventy. Members of the Courts in both Tunisia and Morocco serve for nine, non-renewable years. In both Tunisia and Morocco, one-third of members of the Courts have to be renewed each three years. Both the Constitutions of Tunisia and Morocco have qualification provisions for the appointment to Constitutional Court members unlike the Egyptian Constitution which is silent and leave this matter for the law. Tunisia for example, three-quarters of its twelve-member Court have to be legal experts with twenty years of experience. Morocco requires that members of the Court should be chosen amongst those who have notable judicial knowledge and competence, in addition to fifteen years of experience.

III. Judicial review

The jurisdiction of the Court in Egypt has not been changed a lot in terms of constitutional review. The 2012 constitution however, in effort to avoid another parliamentary or constituent assembly dissolution on the

³⁹ Choudhry, Sujit, and & Katherine Glenn Bass. "Constitutional Courts after the Arab Spring: Appointment mechanisms and relative judicial independence". International IDEA & Center for Constitutional Transitions, 2014

grounds of election laws invalidation by courts⁴⁰, has introduced article 177 which specifically requires the Constitutional Court to conduct abstract review for any election law prior to its promulgation. If the Court failed to reach a decision within the time frame of 45 days, the law is automatically considered approved. This competence has been removed in the Constitution of 2014. The Jurisdiction of the Court was stated as an exclusive competence over constitutionality of laws and regulations, interpretation of legislative texts, adjudication in jurisdictional disputes between judicial bodies, and others.

The Court in Morocco has gained more jurisdiction and widened its scope of judicial review by the virtue of the reform brought by the constitution of 2011. The Court is mandated to exercise mandatory abstract review to both organic laws and procedures of the Parliament. According to Article 55 and article 132, Political actors can refer an international obligation or statutory law before promulgation to the Constitutional Court for examination. The Constitution has also reformed the access to court in two ways. Firstly, alongside with the King, Prime Minister and Speakers of both chambers, one-fifth of the Members of the House of Representatives instead of one-fourth, or forty members instead of one-fourth can bring a case for abstract review to the Constitutional Council⁴¹. Thus, overcoming the problem of high threshold that was sustained for a long time and that hindered parliamentary minority from accessing the Court.⁴² Secondly, the Court has opened an avenue for concrete judicial review litigation whereas a party in the course of his case can raise a pleading of constitutionality whenever the law that his litigation is based on it thought to infringe on his rights and freedoms guaranteed by the Constitution as stipulated by Article 133.

In the case of the Tunisian Constitutional Council before the Arab Spring, only the president could refer a law to the Court. In the new constitution, Either the president, the head of the government, or thirty members of the

⁴⁰ Nathan Brown. "Egypt: A constitutional Court in an unconstitutional setting", Constitutional Transitions and global and comparative law colloquium, New York University, 2013

⁴¹ (Mohamed Hamdon, "Constitutional Control in Morocco: The Moroccan constitutional court - the composition of the court according to the constitution of 2011". The Moroccan journal for Economy and Comparative Law. Issue 5, 2018, pages 117-139.)

⁴² (Rashid AlModawar, "The evolution of constitutional review in Morocco: Constitutional chamber, constitutional council, and constitutional court.". Journal of Constitutional Studies of the Constitutional Court of Kingdom of Bahrain. Volume 3, issue 6, 2016.)

Parliament can refer a draft law to the Constitutional Court for examination. The Constitutional Council is also competent to review Constitutional amendment propositions and parliamentary rules of procedures submitted to it by the President of the Parliament and draft treaties submitted to it by the President of the Republic before promulgation. Article 120 provides that the Court is competent to adjudicate cases of concrete review raised by lower courts on behalf of one of the parties in a pending case. By now, all three countries have provided mechanisms for concrete review.

IV. Constitutional Courts and the jurisprudence of transition

The Egyptian Supreme Constitutional Court has played a significant role in Egypt's transitional phase either as a political player or as an adjudicator. As a political player, the SCC secured many concessions from the ruling Military Council, for example, they remained intact unlike Mubarak's House of Representatives and Tunisia's Constitutional Council which were both dissolved right after the ouster of their country's respective dictator. Moreover, the Court for nine years has succeeded in perpetuating its informal self-appointment judicial norm constitutionally, starting with the first SCAF constitutional declarations in 2011 until the recent 2019 amendment which reinstated presidential appointment again.⁴³

As an adjudicator, the Court has arguably been accused of undermining the democratic transition by its over-determination to establish itself as a constitutional power and rule on the constitutionality of highly-charged and divisive cases which included Egypt's first democratic assemblies on the basis of a constitutional declaration which was issued exhaustively and solely by the Military Council who self-awarded itself the mere constituent and law-making powers for a long time⁴⁴. In June 2012, the Supreme Constitutional Court found that the election law by which the first parliamentary election after the revolution was based on – in which the Muslim Brotherhood had 47.2 of the seats – to be unconstitutional, thus, leading to the dissolution of the

⁴³ Mohamed Fadel, "The sounds of silence: The Supreme Constitutional Court of Egypt, constitutional crisis, and constitutional silence". *International Journal of Constitutional Law*, Volume 16, Issue 3, July 2018, Pages 936–951

⁴⁴ *ibid*

People's Assembly by the interim ruling body, the Supreme Council of Armed Forces (SCAF).⁴⁵ The law has allowed a mixed system of party list and individual seats, parties however could have filled candidates to both the individual list and party list, thus limiting the chances of actual independents. In a concrete review process, the SCC found that the Election Law violates principles of equality as enshrined in Article 7 of the Constitutional Declaration, hence ruling for the unconstitutionality of the Assembly.⁴⁶

The process of making the constitution of 2012 was rashly speeded after this judgment, and the constitution passed the referendum in December 2012. In fear of any potential dissolution, the new constitution had a provision that requires the SCC to conduct a priori review to any election law before promulgation. When the upper chamber, the Shurra Council drafted another Election Law, the SCC stated its unconstitutionality and sent it back to the Shurra Council to revise it. But when the Shurra Council revisited the comments of the SCC but declined to send it back to the court instead to the President for promulgation, the SCC insisted that it should review it first, resulting in blocking many attempts to elect a new People's Assembly.⁴⁷ The upper chamber of the parliament and the constituent assembly were also subject to rulings of unconstitutionality. In June 2013, the SCC annulled the election law of the Shurra Council on the same premise of the People's Assembly dissolution Judgment⁴⁸. But since the Constitution of 2012 which was drafted under the SCC-People's assembly controversy, has designated the Shurra Council to exercise the legislative function until a new lower house is seated as per article 230, the Court could not dissolve the Shurra Council. At the same month, the SCC had issued two important rulings. The first one resulted in invalidating the law by which the Constituent Assembly

⁴⁵ Maria Haimer. " The Supreme Constitutional Court of Egypt (SCC) Rethinking the role of an established court in an unconstitutional setting". ESPR General Conference, Glasgow, 2014

⁴⁶ (Alkady, *A Constitutional Judiciary for 50 years in protection of human rights*)

⁴⁷ Maria Haimer. " The Supreme Constitutional Court of Egypt (SCC) Rethinking the role of an established court in an unconstitutional setting". ESPR General Conference, Glasgow, 2014

⁴⁸ (Gamal Essam El-Din, "Egypt's Shura Council to continue exercising legislative powers", Ahram Online, June 2013. english.ahram.org.eg/NewsContent/1/64/72969/Egypt/Politics-/Egypts-Shura-Council-to-continue-exercising-legisl.aspx)

which prepared the Constitution of 2012 was elected. The Court however separated in the judgment between the law in which it invalidated and the operation of the constitution.⁴⁹

While the Court in the transitional phase regarding these judgments has echoed its long jurisprudence and have been compatible with its previous decisions on election laws by which it nullified many election laws in the 1980s and 1990s, the Court for the first time in 2013 has adjudicated a case concerning the notorious Emergency Law. The Court in pre-Arab Spring phase has strategically delayed rulings concerning trials of civilians before military courts and emergency law.⁵⁰ After twenty years of submitting a case before the Court, the SCC has issued its verdict in July 2013 regarding a case dating back to 1993.⁵¹ The SCC struck down certain provision of the Law as unconstitutional as it allowed the president in a state of emergency to authorize arrests and detentions without being bound to the Criminal Procedures Code, the SCC deemed this provision as violative to the rule of law as enshrined in the preamble of the Constitution⁵². It must be noted that the judgment, while it establishes the Court as a Constitutional Power and a player, it further proves the strategic delay choice of the Court, since there was no State of Emergency at that time, hence, no core regime interest was at risk.

Similar to its historical ruling in 1986 which restored the political rights of hundreds of opposition members back then, in April 2012 the SCC annulled an Amendment to law No. 73 of 1956 of the Political Participation Rights which was installed after the 2011 revolution in order to exclude certain senior political position holders

⁴⁹ By April 2012, the First Constituent Assembly was dissolved by an Administrative Court decision because it included Members of Parliament in the composition of the Assembly which was viewed by the Court as a conflict of interest. In the second case of July 2013, the SCC ruled that the Law by which the Second Constituent Assembly was elected was unconstitutional on similar grounds as the first case

⁵⁰ Tamir Mostafa. "Law versus the State: The Judicialization of Politics in Egypt." *Law & Social Inquiry*, Volume 28, issue 4, 2003, Pages. 883–930

⁵¹ Ibrahim Kara'a, "SCC on Emergency Law: violates the rule of law", *Al Masry Al Yom*, June 2016. <https://www.almasryalyoum.com/news/details/214634>)

⁵² Session of June 2, 2013, appeal no. 17/15JY.

who served under the ancien *regime* from holding public offices for 10 years.⁵³ The case was brought by Mubarak's last Prime Minister Ahmed Shafik who was denied the right to run for election in the first presidential election after the revolution by the Presidential Election Committee. The Exclusion Amendment case was argued before the Court to review its constitutionality under the SCAF March 30 Constitutional Declaration, since the operation of the prerevolution 1971 constitution was suspended from 13th of February 2011 and the Constitution of 2012 was not yet installed. In its judgment, the Court cited Article 19 of the Declaration which states that "no crime and no punishment without a law, and no penalty can be administered without a judicial ruling". On these grounds, the SCC viewed that the amendment was irrationally discriminatory in many senses. First, the amendment excluded the Prime Minister and others from holding public offices but did not include the Deputy PM or cabinet ministers, which the court found as baseless and irrational and against the principles of equality and equal opportunity. Moreover, the Court argued that the Amendment applies a criminal liability retroactively which is not constitutional and additionally, the amendment according to the court established a judicial ruling on certain persons without giving them the right to due process⁵⁴. Finally, the Court attacked the Amendment because it did not establish or prove a link between holding these listed positions and any criminal liability or political corruption.⁵⁵ The SCC at the end of the judgment has accused the parliament of legislative deviation because it passed the law although the parliamentary records shows according to the SCC that they were aware of its constitutional flaws.⁵⁶

The rich jurisprudence of the Egyptian Court and its continuity to operate in the middle of the transitional phase has allowed the court to produce landmark decisions regardless of its impact on the transition to democracy. Unlike Tunisia and Morocco, it can be argued that the Egyptian Court has produced and designed the transition in one sense, but it was not a product of this phase like both Courts. In Tunisia, the new Constitutional Court

⁵³ Mohamed Fadel, "The sounds of silence: The Supreme Constitutional Court of Egypt, constitutional crisis, and constitutional silence". International Journal of Constitutional Law, Volume 16, Issue 3, July 2018, Pages 936–951

⁵⁴ Fadel, H. (2018) The sounds of silence: The Supreme Constitutional Court of Egypt, constitutional crisis, and constitutional silence. International Journal of Constitutional Law

⁵⁵ Session of June 14, 2012, appeal no. 57/34JY.

⁵⁶ (Alkady, *A Constitutional Judiciary for 50 years in protection of human rights*)

which was supposed to be created within a maximum of one year from the elections as stipulated in Article 148(5) of the Constitution of 2014, has not seen the light thus far. Although Organic Law no. 50 of 2015 on the establishment of the Constitutional Court is issued and all other legal formalities are met, the promising institution has not yet been created due to a composition setback. According to the Constitution, three bodies are responsible for the selection of the twelve-member body: The President of the Republic, the Assembly of Representatives of the People (hereinafter, “ARP”/Parliament), and the Supreme Judicial Council. The failure to convene the Court comes from the side of the Parliament. According to the Law of the Constitutional Court, Parliamentary blocs present their candidates to the Parliament for two-third vote to win a seat. For the ARB, in order to elect one member of the Court, one candidate must acquire 145 votes out of 217 votes of the members of parliament. In March 2018, the ARP ran three election session whereas only one candidate was chosen after receiving 150 votes, Judge Rawda al Wersigni who belongs to the list of the secular Nidaa Tunis Party. In 2019, and for the fifth time, the Tunisian Parliament failed to elect the other members of the Court.

It must be noted that the Constitutional Court of Morocco similar to Tunisia does incorporate judicial appointees elected by the Parliament into the composition of the Constitutional Court. The Moroccan constitution however was more aware and alerted with the risk that the legislative supermajority appointment model bears. Article 130(2) of the Moroccan Constitution stipulates that in case of a failure by either or both chambers of Parliament to elect members within the required time frame, the Court operate to exercise its power and render its decisions with a quorum that does not count the other members that were not yet elected. For instance, if both chambers failed to elect their members, the six appointees by the king could constitute a quorum according to the Constitution⁵⁷

Because of the absence of the constitutional court, Tunisian lawmakers resorted to article 148(7) which authorizes the National Constituent Assembly to create “by an organic law, a Provisional Authority in charge of

⁵⁷ See Organic Law 066.13 of the 13th of August 2014 on the Organization of the Constitutional Court

determining the Constitutionality of laws". The composition of this authority includes the senior presidents of courts of Cassation, Administrative, Audit with three other members – appointed but not named – specialized in law.⁵⁸ This Authority is authorized, out of thirteen original competences of the Constitutional Council, to exercise abstract constitutional control. The absence of the Court has created several constitutional and political conundrums in Tunisia. One of the core functions of the Constitutional Court is to decide on the vacancy of the President office.⁵⁹ If the vacancy is temporary i.e. less than sixty days, the Head of the Government perform the duties of the President. However, if the vacancy exceeded sixty days or if the vacancy was not temporary due to death, resignation or an incapacity to resume presidential duties, the Speaker of the Parliament becomes the acting President. The type of vacancy is decided according to the Constitution by the Constitutional Council. When former president Essebsi was hospitalized in June 2019, this matter remained unsolved because of the absence of the Constitutional Court until his death one month later. In May 2020, Al-Nahda proposed an amendment to the rules of procedures of the Parliament that would prevent party switching by stripping Member of Parliaments who change their party affiliation from their duties. The President Kais Saied and other constitutional law experts have expressed their opposition to the law with the Constitution protecting the right to join and resign from parties. However, with the absence of a Constitutional Court to review the rules of procedures of the Parliament, the controversial amendment might pass the parliament.⁶⁰

In fact, the Parliament is not the only institution in Tunisia that appoints members of the Court by means of election. According to the Constitutional Court organic law, the General Assembly of the Supreme Judicial Council also elect its members from candidate lists presented by each of the four judicial councils in Tunisia i.e. Judicial Council, Administrative Judicial Council, Financial Judicial Council. The high threshold however and

⁵⁸ See organic law 14 of year 2014 regulating the Provisional Authority to Monitor the Constitutionality of the Draft Laws

⁵⁹ See Article 84 of the Constitution of 2014

⁶⁰ (Al Jarida Al Tunisia, " The Parliament: no party switching after today", May 2020. <https://www.aljarida.com.tn/articles/-/مجلس-النواب-يصادق-لا-سياحة-حزبية-بعد-اليوم>) In Morocco, a similar debate about party switching has taken place. The Constitution of Morocco states that any member who renounces his political affiliation by which he won the election should be discharged from his mandate. When the Constitutional Court was faced with this debate, it ruled that denouncing political, party or union affiliation should be a reason for stripping the member of his duties. See 21. Legal Agenda, " The Constitutional Court decides on the unconstitutionality of the amending the rules of the procedures of the second chamber of the parliament in Morocco", July 2019. <https://legal-agenda.com/article.php?id=5746>)

the partisan nature and ideological divide inside the Tunisian Parliament is the reason why consensus is hard to achieve. The Islamist Al-Nahda party which constitutes the parliamentary majority have been accused by secularists in the ARP of blocking efforts to elect the rest of the members. During the hospitalization of former President Essebsi, Al-Nahda party has expressed its intention to amend the law that governs the Provisional Authority to allow it to exercise all the constitutional authorities of the Constitutional Court, including deciding on the vacancy of the office of the president⁶¹, which if proved to be permanently vacant the leader of Al Nahda who is the Speaker of the Parliament would become the acting President. This of course stirred a constitutional debate on whether the Parliament can delegate some of the original competences of the Court to the Provisional Authority. In March 2020, after months of a political deadlock between the Al Nahda and President Kais Saied regarding the formation of the new government, Al Nahda fearing of a parliamentary dissolution, has approved the government of Prime Minister Fakhfakh. As a response, Al Nahda has accelerated the call for all party blocs to submit their nominees for electing the rest of the Constitutional Court members⁶², in effort to push for their nominees inside the Court and to re-balance the power. These two incidents highlight how the Constitutional Court is used as an institution of political insurance against other political branches and against any change in the power dynamics.

v. Conclusion

This chapter begins with a brief description of the constitution-making processes in the three countries. After that, it addresses the grand reforms that affected the Constitutional Court in Tunisia and Morocco in specific with a comparison to the limited yet changing reforms that occurred in Egypt. The chapter showed how the appointment mechanism to the court was a major area for reform to all countries.

⁶¹ Middle East Monitor, "Tunisia: Ennahda movement calls for Constitutional Court amendment", July 2019.
<https://www.middleeastmonitor.com/20190702-tunisia-ennahda-movement-calls-for-constitutional-court-amendment/>

⁶² Agency Tunis Afrique Press, "Parliament: June 12 deadline for filling nominations for constitutional courts", May 2020.
<https://www.msn.com/en-ae/news/other/parliament-june-12-deadline-for-filing-nominations-for-constitutional-court/ar-BB145MEk>

In Egypt, while the first constitutional declaration and the Constitution of 2014 have asserted the long-established judicial norm of self-appointment, the latter constitutional amendment of 2019 has presented a serious setback to the course of empowering the court as it reinstated presidential appointment. In Tunisia and Morocco, the framers attempted to design an inclusive and democratic model of judicial appointment. In Morocco for example, both the king and the Parliament appoint even number of members to the Court. The Constitution also recognized the right of parliamentary minority to nominate and elect members to the Court.

The chapter looked at the post-Arab Spring judicial review reforms in the three countries, and how it manifested in the case of Egypt principally. It was shown how the positivist approach employed by the Court albeit advocating for liberal principles like the rule of law, citizenship rights, and equality in its judgments, it has practically disadvantaged the democratic transition. The conditions and context of the transitional phase from the abundance and ambiguity of constitutional texts to having the SCAF as the ultimate law giver, have all put the Court's activism in question. Instead of employing long used techniques of strategic delay or constitutional silence, the overdetermination of the Court to assert its constitutional power has undermined the transition.

The move in Tunisia and Morocco from the nonjudicial constitutional council to constitutional courts, entailed a movement towards adapting concrete review, which both courts incorporated in their constitutions. The Tunisian Court while it was the most promising and long-awaited because of the uniqueness of its multi-constituency judicial appointment model, had failed sadly to convene yet due to a constitutional design problem which was solved by the Constitution of Morocco. One takeaway from this chapter which will further be discussed and emphasized in the next chapter is that the role and judgments of Courts in this period was a product of the long history and jurisprudence of the court, but not of the reform.

Chapter 3

Concluding remarks

In times of grand transitions e.g. revolution, independence, or a unification, judicial review as a mechanism and constitutional courts as an institution are always thought of and sought to by political actors, either for democratic consolidation like the attempt of local elites in Morocco (draft constitution 1908) and Egypt (draft constitution 1953) to sow the seeds of judicial review in their independence constitution, or for political insurance, like the incremental reforms adapted since the 1990s in Morocco to the Constitutional Council whenever the Monarch is under pressure from the people, parties or the international community.⁶³ While the constitutional moment of the Arab Spring has revived the idea of judicial review in the Arab region resulting in a genuine commitment to reform the courts from the side of three countries to refine and address previous constitutional design problems, the poor jurisprudence and commitment to democratization from the side of the Court and other political actors, underscores several structural problems.

The relationship between democratic transitions and constitutional courts is very problematic, and the case of constitutional courts with the Arab Spring highlights different patterns. The experience of Egypt shows how the activist approach employed by the Court, while instituting the latter as a constitutional power and securing several concessions for the court, had the effect of undermining democratic transitions which by extension affected the Court when the 2019 constitutional amendments has brought back presidential appointment for court members. On the contrary, the failure of the Moroccan Constitutional Court to embrace the change zeitgeist the same way as the German and Italian Constitutional Court at their beginnings self-established themselves as advocates of the new democratic order⁶⁴, has denied the liberation of the former from its traditional and marginal roles. No evident on that than the types of cases that the Constitutional Court used to

⁶³ Biagi, Francesco. " The 2011 Constitutional reform in Morocco: more flaws than merits". Jean Monnet Occasional Papers, no.7, Institute for European Studies, Malta, 2014.

⁶⁴ Maria Haimer. " The Supreme Constitutional Court of Egypt (SCC) Rethinking the role of an established court in an unconstitutional setting". EPR General Conference, Glasgow, 2014

and is reviewing before and after the reform. In 2010, the Constitutional Council of Morocco out of 780 decisions handed, more than 650 judgments were concerned with election disputes and the legal status of parliamentarians⁶⁵. Current statistics on the Constitutional Court shows that, after the Arab Spring out of 81 decisions, the Court has only dealt with constitutional control in two cases in comparison to 64 elections disputes cases.⁶⁶ Constitutional Courts are reactive institutions, they can only influence political decisions if cases were brought to them and if political actors implemented their decisions, this shows how the operation of the Moroccan Court either by itself or by political actors is deemed and influenced by the limited power of the old institution.

Between an activist court that preserve the hegemony of itself and the regime, and an empowered institution that fails to break with the past and to display its new institutional strength, the Tunisian Court failed even to emerge as other political actors are benefiting from this position for their political insurance. This absence from the transition phase does in fact hinder the full transition of Tunisia towards democracy. In a post-revolutionary transition phase, citizens are expected to file concrete case reviews to challenge repressive laws of the old regime. In Tunisia however, since there the provisional authority only reviews draft laws that are submitted to it, these laws are still intact.⁶⁷

Reforms to constitutional courts amid the Arab Spring was meant to institutionalize political change. Each court has however highlighted a specific and different pattern of behavior when facing the question of constitutional transition. The different responses to the transition varied to a great extent according to the constitutional beginnings, but not to the reforms of 2011.

⁶⁵ Grote, Rainer, and Tilmann J. Röder, eds. "Constitutionalism, Human Rights, and Islam after the Arab Spring". London; Oxford University Press, 2016

⁶⁶ See <https://cour-constitutionnelle.ma/sites/default/files/p02.pdf>

⁶⁷ "Tunisia: Repressive Laws Cloud Rights Gains", Human Rights Watch. [hrw.org/news/2020/01/14/tunisia-repressive-laws-cloud-rights-gains](https://www.hrw.org/news/2020/01/14/tunisia-repressive-laws-cloud-rights-gains)

Bibliography

A. Books and Journals

(AlModawar, Rashid. "The evolution of constitutional review in Morocco: Constitutional chamber, constitutional council, and constitutional court."'. *Journal of Constitutional Studies* of the Constitutional Court of Kingdom of Bahrain. Volume 3, issue 6, 2016.)

(Alkady, Khaled. *A Constitutional Judiciary for 50 years in protection of human rights and due process*. Cairo: Egyptian Public Book Authority, 2019)

Brown, Nathan. " *Constitutions in a nonconstitutional world: Arab basic laws and the prospect for accountable government*". New York: Suny Press, 2002.

Brown, Nathan. " *Egypt: A constitutional Court in an unconstitutional setting*", Constitutional Transitions and global and comparative law colloquium, New York University, 2013

Biagi, Francesco. " *The 2011 Constitutional reform in Morocco: more flaws than merits*". Jean Monnet Occasional Papers, no.7, Institute for European Studies, Malta, 2014.

Choudhry, Sujit, and & Katherine Glenn Bass. "Constitutional Courts after the Arab Spring: Appointment mechanisms and relative judicial independence". International IDEA & Center for Constitutional Transitions, 2014

Fadel, Mohammed. "The sounds of silence: The Supreme Constitutional Court of Egypt, constitutional crisis, and constitutional silence". *International Journal of Constitutional Law*, Volume 16, Issue 3, July 2018, Pages 936–951

Grote, Rainer, and Tilmann Röder " *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*". London; Oxford University Press, 2012

Grote, Rainer, and Tilmann J. Röder, eds. " *Constitutionalism, Human Rights, and Islam after the Arab Spring*". London; Oxford University Press, 2016

(Hashas, Mohammed. " *Moroccan Exceptionalism Examined: Constitutional Insights pre- and post-2011*". Istituto Affari Internazionali. December 2013.
<http://constitutionnet.org/sites/default/files/iaiw1334.pdf>)

Haimer, Maria. " *The Supreme Constitutional Court of Egypt (SCC) Rethinking the role of an established court in an unconstitutional setting*". ESPR General Conference, Glasgow, 2014

(Hamdon, Mohamed, "Constitutional Control in Morocco: The Moroccan constitutional court - the composition of the court according to the constitution of 2011". *The Moroccan journal for Economy and Comparative Law*. Issue 5, 2018, pages 117-139.)

Kasem, May. " *Egyptian politics: the dynamics of authoritarian rule*". Colorado; Lynne Reinner press, 2004

Moustafa, Tamir. "Law versus the State: The Judicialization of Politics in Egypt." *Law & Social Inquiry*, Volume 28, issue 4, 2003, Pages. 883–930

Moustafa, Tamir. "The Struggle for Constitutional Power, Law, Politics, and Economic Development in Egypt". London; Cambridge University Press, 2009

Malleson, Kate, and Peter H. Russell, eds. "*Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World*". Toronto; University of Toronto Press, 2006.

Ríos-Figueroa, Julio. "Judicial review and democratic resilience: Afterword to the Foreword by Doreen Lustig and J. H. H. Weiler", *International Journal of Constitutional Law*, Volume 17, Issue 1, 2019, Pages 17–23

Sultany, Nimar. "*Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring*" Oxford: Oxford University Press, 2017

B. Online newspaper articles and websites

Agency Tunis Afrique Press, "Parliament: June 12 deadline for filling nominations for constitutional courts", May 2020. <https://www.msn.com/en-ae/news/other/parliament-june-12-deadline-for-filing-nominations-for-constitutional-court/ar-BB145MEk>

(Al Jarida Al Tunisia, "The Parliament: no party switching after today", May 2020. <https://www.aljarida.com.tn/articles/مجلس-النواب-يصادق-لا-سياحة-حزبية-بعد-اليوم>)

Essam El-Din, Gamal, "Egypt's Shura Council to continue exercising legislative powers", Ahram Online, June 2013. <http://english.ahram.org.eg/NewsContent/1/64/72969/Egypt/Politics-/Egypts-Shura-Council-to-continue-exercising-legisl.aspx>

Legal Agenda, "The Constitutional Court decides on the unconstitutionality of the amending the rules of the procedures of the second chamber of the parliament in Morocco", July 2019. <https://legal-agenda.com/article.php?id=5746>)

Middle East Monitor, "Tunisia: Ennahda movement calls for Constitutional Court amendment", July 2019. <https://www.middleeastmonitor.com/20190702-tunisia-ennahda-movement-calls-for-constitutional-court-amendment/>

"The Supreme Constitutional Court: Defending human rights or the Mubarak regime?" Cairo Institute for Human Rights Studies, January 2013. <https://cihrs.org/the-supreme-constitutional-court-defending-human-rights-or-the-mubarak-regime/?lang=en>

(Kara'a, Ibrahim, "SCC on Emergency Law: violates the rule of law", Al Masry Al Yom, June 2016. <https://www.almasryalyoum.com/news/details/214634>)

c. Constitutions and constitutional court decisions

Constitutions of: Egypt (1932, 1971 with amendments, 2012, 2014 with amendments), Tunisia (1959 with amendments, 2014), Morocco (draft constitution 1908, 1962, 1970, 1972, 1992, 1996, 2011) accessed through: constituteproject.org/ and constitutionnet.org/

Constitutional Court decisions: Egypt (sccourt.gov.eg/ , hrlibrary.umn.edu/arabic/Egypt-SCC-SC/ and manshurat.org), Morocco (cour-constitutionnelle.ma/)