

THE SUPREME CONSTITUTIONAL COURT OF EGYPT

ON FREEDOM OF EXPRESSION AND OF ASSOCIATION

by

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The creation of the Supreme Constitutional Court (al-Mahkama al-Dusturiyya al-cUlya) (SCC) in 1979 and its subsequent rulings that sought to define rights and liberties for all Egyptians in the course of interpreting the Constitution did not appear from nowhere. Egypt has a long history of an independent judiciary and judicial liberalism, more than a hundred years. The power of judicial review of constitutionality was definitively recognized in 1948 in a Majlis al-Dawla (Administrative Court) case, which established it not only for the Majlis al-Dawla but also for the Egyptian judiciary as a whole.

Then, in 1969 a predecessor High Court (al-Mahkama al-cUlya) was set up with judicial review of the constitutionality of legislation among its jurisdictions. It was a 'political' court, however, with appointments made directly by the executive. Lacking the technicalities of independence it did not foster the respect of many in the law professions. Nonetheless, it was a step towards the present Constitutional Court since it was vested with exclusive jurisdiction to rule on the constitutionality of legislation, a power it actually exercised rarely. Not so the present Supreme Constitutional Court.

The next step had been the promulgation of a new 'permanent' Constitution in 1971. Chapter V of that document specifies a Supreme Constitutional Court as "an independent judiciary" directed "to undertake the judicial control in respect of the constitutionality of the laws and regulations" and "the interpretation of the legislative texts in the manner prescribed by law."

Eight years later such a court was established.

The 1971 Constitution was prepared and promulgated at a time when Egypt was still officially 'socialist'. Some provisions have been amended, such as reference to the single party Arab Socialist Union, which was replaced with reference to a multi-party political system.

However, socialist language remains. Although private ownership is mentioned as protected, the Public Sector is specified as 'the vanguard of progress in all spheres' (Art. 29) and 'the mainstay of the strength of the homeland, a basis for the socialist system and a source of prosperity for the people' (Art. 33). Since socialism in theory and practice elsewhere usually claims to be in the forefront of support for the rights and liberties, and equality of the people, it should come as no surprise that the Egyptian

‘socialist’ constitution contains significant specification of rights and liberties, and guarantees equal treatment. Indeed there is a separate section covering ‘Public Freedoms, Rights and Duties’ (articles 40 through 63).

Since amendments in 1980 the Egyptian Constitution has had a heightened Islamic significance insofar as Article 2 was changed from stipulating that the Islamic Sharica was a principle source to being the principle course of legislation. To my knowledge, the Court has not based a decision of unconstitutionality solely on Article 2 but it does, not infrequently, refer to principles of Islamic law as being consistent with its decisions.

The central concern of this paper is rulings by the Court that concern freedom of expression. Two articles of the Constitution are specifically relevant:

Article 47. Freedom of opinion shall be guaranteed. Every individual shall have the right to express his opinion and to publicize it verbally, in writing, by photography, or by other means of expression within the limits of the law. Self-criticism and constructive criticism shall guarantee the safety of the national structure.

Article 48. Liberty of the press, printing, publication and mass media shall be guaranteed. Censorship on newspapers shall be forbidden as well as notifying, suspending, or canceling them by administrative methods. ...

Article 48 continues by saying that during a state of emergency (presently in force in Egypt) a “limited censorship may be imposed on newspapers, publications, and mass media in matters related to public safety, or for purposes of national security in accordance with the law.”

The Court has linked the freedom of expression to the freedom of association in cases that concern the latter. Reference will therefore be made to decisions concerning freedom of association where the Court has specifically linked it with freedom of expression. Constitutional guarantees of rights of citizens “to peaceful and unarmed private assembly” and to hold “public meetings and gatherings ... within the limits of the law” are specified in Article 54. A “right to form societies as defined by law” is given in Article 55 and “the creation of syndicates and unions on a democratic basis shall be guaranteed by law” (Art. 56).

It was through this guarantee of “syndicate democracy” that the Court linked freedom of association with freedom of expression in the first case below.

1. Syndicates must be Established on a Democratic Basis.

“Freedom of thought and choice are public liberties and rights, and the foundation of every sound democratic establishment.”

Case 47 of the Third SCC Judicial Year.
Decided 11 June 1983.

At issue in this case was Law No. 125 of 1981 that terminated the elected Council of the Bar Association and directed the Minister of Justice to form a temporary appointed Council. Members of the dismissed Council raised a case challenging this action and presented a plea of unconstitutionality.

By the time the Constitutional Court considered the case in 1983, the 1981 law had been cancelled (by Law 17 for 1983). Since the 1983 law was not made retroactive, the legal effects on the plaintiffs, namely their dismissal from their elected posts, remained, and the Court accepted the case and held the 1981 law unconstitutional in its entirety.

The Court emphasized that the constitutional requirement was for syndicates to be established “on a democratic basis” and that this is a right to be guaranteed by law” per Article 56 of the Constitution, meaning that members of a syndicate “have the right to choose their own syndicate leaders according to their will.” The Court noted that the present Constitution had gone further than both 1956 and 1964 constitutions by not only guaranteeing the right to form syndicates but “exceeded that by stipulating the principle of syndicate democracy.”

It is through the “democratic principle” that the Court found reason to underscore the “rules and principles of the democratic concept” reiterated by the Constitution in many of its articles, including guarantees of public liberties and rights, and to quote them. In doing so, the Court specifies the linkage of freedom of expression and association, as both being intertwined within democratic principle. “Freedom of thought and choice are public liberties and rights and the foundation of every sound democratic establishment. The Court continued to quote Article 47 guaranteeing freedom of thought and expression of opinion and Article 56 making the establishment of syndicates and unions “on a democratic basis” a right that is “guaranteed by law.” Article 62 was also found relevant. It gives citizens the right of election and nomination and “the right to express his opinion in referendums according to law.” The Constitution, said the Court, “was keen to enable citizens to practice their public rights, including choosing their leadership or whoever represents them” at national or local levels.

As the former Chief Justice, Awad El-Morr, explains: “The principle of democratic syndicalism which is the natural consequence of any democratic regime” is the “cornerstone of other constitutional safeguards that ensure the people’s supremacy, secure their participation in the exercise of power, and recognize their enjoyment of fundamental rights and freedoms, including the freedom of expression....”

However, history has repeated itself, with the Bar Association presently under a caretaker regime again.

The next case to expressly involve freedom of expression was decided five years later and concerned the establishment of a political party within the “multi party system” specified in the Constitution, since amendment in 1980.

2. Freedom of Expression Subsumes the Right to Form Political Parties.

“The right to form political parties stems from the freedom of expression, which in turn is the foundation of the freedom of association.”

Case No. 44 of the Seventh SCC Judicial Year.

Decided 7 May 1988.

At issue was Law No. 40 of 1977, the Law of Political Parties, which set up a committee empowered to act on applications of anyone seeking to establish a new political party. An amendment in 1979 added the requirements for acceptance of a new party that none of the proposed party's founders or leaders had advocated, encouraged, instigated or advanced principles or practices inconsistent with the Peace Treaty between Egypt and Israel. Since the founder of the Nasserist Party, applicant for official status for his party, had signed a statement against the Peace Treaty with Israel, his bid to form a new party had been flatly rejected. His case before the Constitutional Court challenged the constitutionality of Law 40 as amended.

The Court held part seven of Article 4 of Law No. 40 unconstitutional as regards the specification of actions taken to oppose the Peace Treaty between Israel and Egypt that would disqualify an applicant to form a new political party. The Court noted that the people had agreed to the Peace Treaty in a referendum, and according to Article 1 of the Constitution “all powers proceed from the people.” “Freedom and the formation of the will of the people are inextricably bound together,” said the Court. However, the issue turned not so much the will of the people as freedom.

“A new political regime” with new dimensions emanating from its “emocratic multi-party nature” had been established, said the Court.. “Inherent in the very nature of the democratic regime, and paramount, is freedom of expression.” Rights and liberties originate in and flow from the freedom of expression. Various freedoms are enumerated, including freedom of the press and of criticism, to print and to publish, to peacefully assemble and exchange of views. The Court ascribed the preservation of all these freedoms to the “protection of the freedom of expression, whose values are the nucleus of all political rights and particularly so far as the right to elect and to be elected and to join and to form political parties.” The freedom of expression “has been enshrined by all Egyptian Constitutions including the current one” in Article 47. “Freedom extends to all forms of expression, and encompasses all opinions of whatever nature, with special emphasis on the exchange political views.” The latter in particular is “directly linked” to a “meaningful political life” and the “development of a democratic regime.”

As regards the matter at issue, “an international treaty concluded, ratified and in compliance with other procedural requirements for its enforcement under rules of public international law, shall bind all contracting parties.” However, treaty provisions are “in no way and under no circumstances” to restrict the constitutional right to discuss the implications of such treaties and to reveal and expound divergent points of view. “To conclude otherwise would render obsolete, or ridicule, the right of criticism embraced by the freedom of expression.”

That was how the Nasserist Party became an officially formed party.

Two cases challenging the Election Law were decided in 1987 and 1990. The first case spoke of expression of opinion in relation to elections to the People's Assembly. The second case was more effusive about freedom of expression and specifically linked it to "party pluralism."

3. The Right not to Join a Political Party, and to have Equal Opportunity to be to Nominate Oneself and to be Elected as an Independent.

"Forcing a citizen to join a political party in order to nominate himself to the People's Assembly is a violation of personal views and opinion, a principal freedom in free democratic regimes guaranteed by the Egyptian Constitution." (Case No. 37, 1990)

Case No. 131 for the Sixth SCC Judicial Year.

Decided 16 May 1987

and

Case No. 37 of the Ninth SCC Judicial Year.

Decided 19 May 1990.

At issue in these two cases was the People's Assembly (Majlis al-Shab) Election Law No 38 of 1972. As originally issued the law specified small election districts from which two members were elected.

It had been amended in 1983 and again in 1986. The 1983 amendment had reduced the number of electoral districts to 48, concomitantly enlarging them and introducing a system of proportional representation whereby all candidates had to be on a 'party list'. This meant that independent candidates could no longer run for election. A would-be independent candidate who was denied the possibility of nominating himself raised a case that was ultimately heard by the Constitutional Court (Case No. 131 for the Sixth Year). In this case the Court pointed first to Article 62 of the Constitution:

Article 62. Citizens shall have the right to vote, nominate themselves and express their opinions in referenda according to the provisions of the law. Their participation in public life is a national duty.

This means that "the political rights stipulated in this article, including the nomination right mentioned explicitly together with voting and expression of opinion in referenda," said the Court. These are "rights guaranteed to all citizens" which "secure their contribution in the choice of their leaders and representation in ruling and managing the affairs of the community." But the Constitution did not stop by guaranteeing these rights, said the Court. It made "contribution to public life through their practice a national duty." Therefore, laws organizing these rights "should not lead to their confiscation." The Court also considered the guarantees of equal opportunities and equalities before the law (in Articles 8 and 40 of the Constitution, as having been violated.

Before the Court had issued its decision, Law 38 of 1972 was again amended, the President of the Republic dissolved the Assembly, and new elections were called according to the revised provisions of the new law. The party list system of proportional representation was kept but one seat in each constituency was reserved for an independent candidate. However, this did not solve the constitutional problem and another case was raised challenging Law 38 for 1972 as amended in 1986.

In Case No. 37 for the Ninth Year the freedom of nomination and the principles of equal opportunities and equality, in articles 62, 40 and 8, were considered by the Court to have been violated in that the law granted independent candidates a total of 48 seats (one per election district) while the party list nominees were given the rest of the seats amounting to 400. The Court found this mixture of systems of election and representation highly imbalanced and spoke at length about the violation of equality and equal opportunity in such an electoral arrangement

Article 62 was also again quoted with similar language used in the 1985 case explaining what they meant. But in the second case it expanded on its understanding of the interconnections of freedom of expression, rights of political participation, and electoral processes in a democracy.

In speaking of the ‘multi-party system’ that Article 5 of the Constitution established, the Court spoke of ‘party pluralism’ permitting “the agreement or clash of opinions” that provides “a sound means for national work through democratic dialogue where various opinions compete.” Political parties should “connect to the will of the electorate,” a will that is “crystallized through the free choice of representatives in parliamentary councils.” In allowing equal rights to citizens “regardless of their political affiliations and opinions” the Constitution guarantees “that national work is a collective endeavor” where “political parties work with non partisan figures to strengthen national work.” This, said the Court, “is the real implementation of Article 3.” Article 3 vests sovereignty “in the people alone” and directs them to “practice and protect this sovereignty and safeguard national unity in the manner specified by the Constitution.” Article 3 “does not give popular sovereignty to one category of people at the expense of another.” This party pluralism occurs within “a constitutional orientation of strengthening the concept of democracy.”

Article 5 “does not oblige citizens to join political parties” nor does it restrict the practice of political rights by forcing citizens to join political parties or restrict the practice of political rights stipulated in article 62 of the Constitution.” The Constitution “gives the individual the freedom to join or not to join political parties.” To do otherwise would violate “personal views and opinions, a principal freedom in free democratic regimes guaranteed by the Egyptian Constitution.”

4. The Right to Criticize Public Officials.

“Criticism of public work through the press or other means of expression is a right granted to every citizen ... and a freedom dictated by the system, not as mere self

expression.”

Case No. 37 for the Eleventh SCC Judicial Year.

Decided 6 February 1993.

This case was the first to concern the freedom to criticize actions of government employees and functionaries openly and publicly. It originated as a criminal libel action brought by a former ‘socialist prosecutor’ against the author of a book entitled “Abdul Nasser and Sadat’s Men.” The person who claimed libel asked for the application of punishment in accordance with the Penal Code and compensation in the amount of LE 500,000.

At issue was paragraph 2 of Article 123 of the Criminal Procedures Code, which required the person accused of libel (“slandering through publication”-- qadhaf bi tariq al-nashr) in a newspaper or any printed material to prove his assertions within a maximum of five days from the time when he is first interrogated or summoned before a court. Otherwise he loses the right to offer proof. This provision was added to the Code by a decree-law (No. 113 for 1957). The limitation of five days to produce proof of the alleged libel, said the explanatory memorandum of this decree-law, presumed that the accused “would have proofs for what he claims and that such proofs were ready prior to publication.” The accused author challenged the constitutionality of Decree Law 113 on the basis of it being an amendment to the Code and “it is impermissible to organize or constrain public liberties except by a [properly enacted] law.”

The Court supported the constitutional authority of the President of the Republic to issue decrees with the force of law in order “to organize those issues that can be organized by law according to the Constitution.” However, if a decree-law “entailed a restriction over a right or public liberty, the decree contradicts the Constitution” as it has “trespassed the limitations drawn by the Constitution for organizing rights and liberties.”

Generally speaking, said the Court, ‘slandering’ signifies “violating a persons’ respect and dignity” and if done “on purpose and publicly” is considered a crime and “the slanderer should be punished in all cases whether he had proofs or not.” However, the situation is different when the ‘slandering’ concerns “public employees, civil servants, or parliamentarians.” The activities of such persons are “public affairs that should be supervised by all citizens for the sake of the public good and to ensure that public employees undertake such works in the best possible way and according to law.” If public criticism or accusations of a public employee that, “if true could lead to his punishment or being despised,” and if the accusation was done with good will and proofs were offered, it is considered ‘legal slandering’. This ‘permissible slandering’ is meant to achieve a social interest; hence it must be related to such an interest and is not allowed in all cases.”

Having delimited the context of allowable criticism the Court then found the challenged paragraph to be “contrary to the spirit and goals of the Constitution.” The restriction imposed on offering proof, in fact, “offers a faked protection of the governing elite” inasmuch as they can “bury opposing opinions at their origin.” The challenged

legislation “consecrates fascism and violates the principles of the Islamic Sharica.” Thus this paragraph violates Article 2 of the Constitution. The Islamic Sharica “secures the freedom of opinion and the subjects’ right to hold their rulers accountable without fearing their authority,” said the Court.

Giving the accused a very short time to submit his proofs and thus defend himself also violated several specific constitutional guarantees, said the Court. Article 47 guarantees the right of every citizen to “self criticism and constructive criticism” and the right “to express and publicize his opinion by writing, verbally, through photography and other means.” Article 49 guarantees freedom of scientific research, literary, artistic and cultural creativity. Article 69 guarantees the right of defense. Articles 8 and 40 guarantee equal treatment.

The “real aim” of criticism of public work “is to reach the truth through the flow of information from various sources” and “it is unlikely that criticizing conditions related to public work ... would harm any legitimate interest.” It is not permissible that the law would become “a tool impeding the freedom to disclose ... the shirking of duties, or corruption of those in public employment.” The reform of such employees “becomes an integral component of the democratic concept under which come government accountability and its duty to respect the regulations imposed by the Constitution.”

“Open dialogue on public issues” is “a guarantee for the exchange of different views and for citizens to communicate their ideas publicly—even those opposed by the authority—for the sake of peaceful change.” The Court injects a notion reminiscent of John Stuart Mill: “Accurate results come out of weighing multiple opinions in total freedom rather than by arbitrary choice of the authority.”

Another line of reasoning: Punishment as a deterrence for those who violate the system “does not offer a sufficient guarantee for its preservation.” Therefore, said the Court, “the Constitution chose freedom of expression and discussion concerning all public issues to make available solutions emanating from the public will, even if this debate entailed sharp criticism of public employees.” Criticism of public employees thus “enjoys the constitutional protection of freedom of expression within its proper framework.”

Freedom of expression is guaranteed by Article 47. “The Constitution aimed at assuring that criticism, a branch of freedom of expression, is the original freedom.” Constructive criticism is “essential for national work.” Political critique “contributes directly to preserving reciprocal supervision between legislative and executive authorities.” Freedom of expression emanates from the constitutional protection of citizens’ access to facts concerning public affairs and information.” The fear of defamation “should not justify the obstruction of the free flow of information.” Criticizing public figures and evaluating their behavior results from supervision by conscientious citizens. Imposition by the criminal law of “heavy restrictions on proofs to negate the charge of defamation in published criticism”—such as is found in the challenged text of the criminal law--serves to prevent submission of proofs and restrain

citizens from active criticism. Therefore since Article 123 of the Criminal Procedures Code—which compelled a person accused of making defamatory statements to submit proof for every action attributed to the public employee, representative, or public servant within five days, is unconstitutional.

Another case concerning the right to criticize public officials was considered and decided by the Court two years later. This second case had originated as an action brought by the public prosecutor on behalf of a “public servant” who complained of having been libeled in a series of newspaper articles. (The first case, above, had been brought by the person himself who claimed libel by the author of a book alleging misdeeds at a time in the past when he had been a public official, and he asked for damages.) The second case (below) concerns recent newspaper coverage of an acting public servant, brought by the public prosecutor, and it involves corruption on the part of persons holding positions of responsibility in the public sector. It clearly has a much more immediate significance for citizens’ rights to criticize public employees in order to call them to account for “illegal gains” and other kinds of corruption.

5. The Right of Citizens to Criticize Persons Working in Public Employment.

“Criticizing public work through the press or other means of expression is a right granted to every citizen... since public affairs are closely related to the direct interests of the community.”

Case No. 42 for the Sixteenth SCC Judicial Year.

Decided 20 May 1995.

The claimant in this case had raised a plea of unconstitutionality in a case brought against him and others in a Cairo misdemeanor court where he was charged with “defaming and insulting” (qadhaf wa sabb) a certain doctor and others by providing incorrect information “with bad intentions.” The publications in question accused the doctor, his brother-in-law, and others of making illegal profits, squandering public money and theft in connection with tenders for installations at the Kasr al-Aini Medical Faculty.

At issue was again Article 123, paragraph 2 of the Code of Criminal Procedures which allowed five days maximum for a person accused of libel to supply proof of acts attributed to public employees, otherwise they lose the right to offer proof of the allegations. Such restriction severely qualifies the exception specified in Article 302 of the Penal code whose second paragraph exempts challenges to the works of public employees, representatives, or those performing public work from being libelous, “if done in good faith” and “on condition that the alleged act is proven.”

The Constitution “imposes certain restrictions of the legislative and executive authorities to preserve the different public rights and freedoms” explained the Court, “in order to prevent them from touching certain other rights.” However, there are continuous efforts “among civilized states” to “affirm the value of such rights” and there is “increased interest in public affairs” providing a context for support for constitutional protection of criticism of public employees. The right of every citizen to criticize public work “is in

accordance with the tenets of a democratic system,” said the Court. Such opinions “reach the truth in the end” because “the collision of opinions is capable of revealing what is accurate and what is false, what is risky or what accrues to a particular interest.” said the Court.

“It is not permitted for the law to turn into a tool obstructing the revelation of aspects of dishonesty or deficiency in public work, representation, or service,” said the Court. Open dialogue about public issues is a way of guaranteeing the exchange of different view and enables citizens to transfer their ideas, even if opposed by the government, into peaceful means for change.” Thus, “it is dangerous to impose limitations that discourage citizens from practicing their freedom of expression.” Indeed, it is conducive to “national security” that there should be “open dialogue confronting hardships and suggesting suitable solutions stemming from the public will.” That is the logic of the Constitution’s bias for “freedom of discussion concerning all public matters,” said the Court, “even if it involves a critique of public employees.”

For no one has the right to silence the other, even if the law was on his side. The dialogue of force is definitely a waste of the sovereignty of the mind, of freedom of innovation, imagination and hope. It produces a fear hindering the citizen from expressing his views. It consecrates the public authority’s aggression against these views and, finally, threatens the nation’s security and stability.

It is thus “not permitted to suppose the falsity of every incident attributed to a public employee and to assume that it was mentioned from bad will.” And thus critique of public employees, “though bitter,” enjoys constitutional protection to the extent that “it does not overstep its aims of being in the public interest.”

The court expounded at some length on the values of the freedom of expression of opinion as guaranteed by the Constitution in Article 47 in “political, social, and economic fields” and emphasized the need for “self criticism and constructive criticism.”

Criticism—though a form of freedom of expression—is the original freedom. And criticism is distinguished as being concomitant with national work, if it is truly constructive. This is because critique—especially in political matters—directly contributes to preserving the system of mutual checks between the executive and legislative authorities. It is also a necessary prerequisite for disciplined behavior in democratic states. It protects the citizen’s right to “know” and capability of reaching the complete truths [about matters of public importance] despite the highly complex structure of governmental work. .

“Constructive criticism,” emphasized by the Constitution in Article 47, does not give the executive authority the freedom to decide what may be opened to criticism. If this were so, “the authority would have acquired the right to prohibit public dialogue, a right that should be guaranteed for all citizens equally.” But “criticism devoid of social value” is unconstitutional and may be restricted. There should also be tolerance of exaggeration. “Defenders of opinions tend to exaggerate” but “if we want freedom of expression to

flourish ... one cannot obstruct views because of some exaggeration.”

“Free and open dialogue becomes obstructed by the criminal law” when it puts a lot of restrictions on providing proofs that refute the accusation of libel “to the extent of losing the right to present such evidence.” That is, said the Court, “what the challenged legislative text did.” The type of restriction that refusing to allow proof except within a very short time period, “discourages those interested in revealing the deficiency in public performance” from presenting criticisms “even if they believe their accuracy, and even if they were actually true, for fear of losing the right to present proof.”

Then there is the issue of fairness in judicial processes. The challenged text also violates guarantees for the accused to present a defense. “This is not confined to the trial stage but extends to the pre trial stage.” The Constitution guarantees that the state will provide the suitable means to provide what is necessary for those accused to preserve their freedoms and rights. Moreover, “losing the right to present a proof contradicts the proper and efficient administration of criminal justice.” These things are so fundamental that “without them a fair trial does not exist.” Thus this restriction on offering a defense “also contradicts the constitutional rules of fair trial, especially in a criminal accusation.”

6. The Head of a Political Party is not Criminally Liable by Analogy with his Editor in Chief.

“The Constitution elevated the value of personal freedom, considering it a natural right latent in the human spirit that cannot be separated from it.”

Case No. 25 for the Sixteenth SCC Judicial Year.

Decided on 3 July 1995.

This case began as a criminal action against journalists and the editor-in-chief of al-Shaab newspaper, organ of the opposition political party, Hizb al-cAmal, together with the head of the Party, for “insulting and defaming a public employee in a public way because he was fulfilling the requirements of his job.” The matters written about concerned crimes of bribery, illegal profit, and loss of public money which, if true, the ex minister of oil and mineral wealth “should be punished according to the Penal Code.”

The unconstitutionality plea in this case concerned Article 15, paragraph 2 of the Political Parties Law No. 40 for 1997, amended by Decree-Law No. 36 for 1979 which made publication of libelous material a criminal offense, punishable in accordance with provisions in the Penal Code. The challenged article made “the head of the party equally responsible with the editor-in-chief of the newspaper for what is published in it.” Article 195 of the Penal Code stipulates: “While preserving the criminal responsibility of the author of the writing or cartoon, or other types of representation, the editor-in-chief of the newspaper ... is to be punished as the original actor for the crimes committed by his newspaper.” The editor-in-chief is absolved from criminal responsibility if “he proves that the publication took place without his knowledge,” or “if he guided investigators to

the criminal,” or “had he abstained from publishing he would have lost his post in the newspaper or suffered other serious harm.”

Much of the argumentation in this case concerned the requirements for a crime to exist, for action to be incriminating, and the nature of criminal intent. It was pointed out that the criminal responsibility of the editor-in-chief is the basis from which the criminal responsibility of the claimant (head of the party) derives. This violates the Constitution because, firstly, penal texts must be “narrowly tailored” in defining the acts condemned so that “rights guaranteed by the Constitution, such as freedom of expression” will not be violated. Secondly, “an individual is not responsible for a crime and not subject to a penalty except as an actor or partner in the crime.” Accordingly, the Court needs to determine “whether the legally condemned act falls within the framework of crimes of publications” and also whether it “touches on freedom of expression.”

The Constitution “guarantees freedom of the press.”

This means, said the Court, that it “prevents interference in its domain” or placing burdens on it that “hinder its message or weaken its role in building and developing society.” The Constitution allows “a limited supervision of the press” but “only in exceptional circumstances to confront dangers determined by Article 48.”

Article 67 states that “a defendant is innocent until proven guilty before a legal court” where he is to have the right to defend himself and provided with counsel for his defense.” This and following articles grant “basic rights which guarantee a concept of justice that coincides with contemporary standards of advanced states.” In criminal accusations these guarantees are “closely related to personal freedom and a natural right” which is guaranteed in Article 41 of the Constitution.

A fair trial is most important in a criminal case because “a criminal accusation subjects the person to the most dangerous restrictions on personal freedom and the right to life.” The constitutional guarantees of a fair trial are practical protections and “a primary guarantee against the violation of personal freedom.” The measures stipulated for a fair trial in the Constitution comprise a system that “prevents the misuse of penalties for it rests on the belief of the advanced nations in the sanctity of private life” together with an awareness of “the restrictions that hinder personal freedom.”

The Court discussed the basis of the presumption or more properly, it suggested, the assumption of innocence, part of man’s nature and assumed “to remain latent in him throughout his life and accompanying his actions, until a court refutes it by a conclusive, unchallengeable judgment in the light of proof of criminal intent.” The assumption of innocence “is a pillar required by the Constitution for the preservation of private liberty,”

The challenged text (Article 15, paragraph 2 of the Parties Law) joins the claimant head of the party owning the newspaper to the responsibility of the editor-in-chief for crimes connected to publication. Thus the text deprived the head of the party from defending himself against accusations. The text also exempted the public prosecution from proving the crimes of which he was accused but confined itself to proving the

responsibility of the editor-in-chief, as the criminal responsibility of the party head followed it. Thus the party head became “dependant on someone else concerning his personal freedom.” Such freedom “should not be restricted by actions of others nor should his destiny depend on them.”

The Court found the challenged text in the Political Parties Law unconstitutional as “contradicting the principle of equality before the law and the required protection for personal freedom.” And it violated “defense guarantees and the personalization of criminal responsibility” as well as essential elements of a fair trial “including the assumption of innocence.”

7. The Editor in Chief of a Party Newspaper is not Criminally Liable by Virtue of his Position.

“In ensuring the freedom of the press, the constitution released its abilities in the domain of expression and forbade arbitrary restrictions on it that might mitigate the message.”

Case No. 59 for the Eighteenth SCC Judicial Year.

Decided on 1 February 1997.

In Case No. 59 it became the turn of the editor-in-chief of a party newspaper to have incrimination by virtue of his position held unconstitutional

This case involved a civil liberties issue that had been present but not dealt with in the constitutional plea of the above Case 25/16, namely the provision in Article 195 of the Penal Code that presupposed the editor-in-chief (or editor of the section where publication took place if there is no editor-in-chief) to be criminally liable for crimes committed by his newspaper. The editor-in-chief in this case was from al-Ahrar, the paper of Hizb al-Ahrar, the Liberal Party.

According to Article 195 of the Penal Code, an editor-in-chief is exempted from criminal responsibility if publication took place without his knowledge” and “if he guided the prosecution to the perpetrator of the crime during the investigation and offered all information and papers to prove the latter’s responsibility and proved that had he not published the material in question, he would have lost his job or suffered great harm.”

The unconstitutionality plea claimed violation of articles 66 and 67 of the Constitution.

Article 66. Penalty shall be personal. There shall be no crime or penalty except by virtue of the law. No penalty shall be inflicted except by a judicial sentence. Penalty shall be inflicted only for acts committed subsequent to the promulgation of the law prescribing them..

Article 67. Any defendant is innocent until he is proved guilty before a legal court, in which he is granted the right to defend himself.

Every person accused of a crime must be provided with counsel for his defense.

The Court's ruling of unconstitutionality was to add two more: Article 86 which required the People's Assembly to exercise the legislative power and Article 165 which specified that the Judicial Authority should be independent and should issue its decision in accordance with the law.

Outlawed acts in penal codes must be "narrowly tailored" so that "ignorance of texts would not lead to violation of citizens' constitutional rights such as freedom to present views from different sources" Personalization of retribution guaranteed by Article 66 "presupposes personalization of criminal responsibility." A person cannot be held responsible for a crime "unless he was an actor or a partner in committing it." This, said the Court, "expresses true criminal justice and is connected to the Islamic creed".

However, the case concerned a crime of publication, thus the Court had something to say about freedom of the press.

"Outlawing of acts by the press "raises suspicions about their constitutionality" since it is the role of the Supreme Constitutional Court "to decide if the outlawed act is necessary for the freedom of expression or is required for the organization of this freedom."

Freedom of the press is guaranteed by the Constitution, which means "cancellation by administrative means, interference in its affairs, obstruction or impeding its role in the foundation of society and its development" all are forbidden. The Constitution protects the press as a place of "free exchange of views instead of oppression and control" and as "a source of information and objective evaluator of any authority." The press should "guarantee the citizen an effective role through 'individual self expression' for 'self realization'" and be able to pursue its aim of "preventing citizens' apathy or fear from authority."

The Court recognizes that "the individual's right to freedom requires a balance with the group's right to defend its vital interests." However, "the defendant should enjoy a minimum number of rights," and a criminal charge should presume innocence and prevent the misuse of punishment. Nor should a crime be affirmed without proof. The legislator should not presume the existence of a crime without proofs.

The challenged text presumed that the publication issued by the editor-in-chief of the newspaper in itself indicates his knowledge of the substance of the article in all its details, including its being a crime. Thus the challenged text establishes a "legal conjunction" between the "license to publish" and "the intent of the editor in chief to commit a crime." Criminal intent "is an ingredient of voluntary crime without which it does not exist." The legislator must not violate such principles as presumption of innocence and preservation of personal liberty (two constitutional fundamentals guaranteed in articles 67 and 41) "by appropriating the competence entrusted to the judicial authority concerning investigating the presence of all aspects of the crime, including criminal intent.

In addition, the law requires that “whatever excuses the editor-in-chief of the newspaper offers, his criminal responsibility does not end unless he guides investigation to those responsible for it.” Such a requirement, said the Court, “contradicts the personalization of criminal responsibility.”

8. Syndicates must be established on a Democratic Basis, with Rights of Assembly and Freedom of Expression.

“Freedom of Association rests on Freedom of Expression and would become obsolete if participants were denied the right to freely express their opinions.”

Case No. 6 of the Fifteenth SCC Judicial Year.

Decided 15 April 1995.

This case concerned elections to the Board of Directors of the Syndicate Committee of Workers in Wireless Communications. Article 38 of that law prohibited membership on syndicate managerial boards of more than 20 percent of the members who were also members of professional syndicates. This stipulation had been added by the legislature, to allow members of professional syndicates to be represented in labor organizations in which they were members but limited their number in order that professionals would not dominate the workers. There had been a dispute about the extent to which the working members in a professional syndicate could be members of managing boards of labor syndicate organizations, and opinions varied.

The claimant had received more votes than another individual who had been accepted to the Board and challenged the constitutionality of paragraph 1 of Article 38. as denying her equal opportunity and subverting the principle of equality before the law. Also, she claimed the challenged text restricted syndicate freedom and formation of syndicate organizations on a democratic basis, violated freedom of expression, and restricted electoral freedom and rights of nomination.

The Court found that the challenged text violated rights guaranteed by the Constitution in the domain of syndicate organization “on democratic grounds, as well as freedom of expression and aggregation” and it violates “the principle of equality before the law.” The articles of the Constitution contradicted were 40, 47, 55 56, and 62.

The Court referred to a principle established by the International Labor Organization that. ”freedom of expression and syndicate freedom are considered essential for advancement.” The 1950 agreement concerning syndicate freedom “allows workers to form the organizations they select without permission and without any type of discrimination and without any restriction other than those stipulated in their constitutions and systems.” A 1951 agreement of the General Conference of the ILO “guarantees the protection of each worker against all acts meant to discriminate between workers in their fields of employment, in violation of their syndicate freedom.” Egypt has become a partner in the agreement, said the Court, inasmuch as Article 56 of the Constitution “guarantees the rulings of these two international agreements” and stipulates

“the creation of unions and syndicates on a democratic basis to be a right guaranteed by

The Court explained further: “The creation of any assemblage—whether for political, syndicate or professional aims—is a voluntary act” whose aim is “to unite a certain group of people where they can express their positions and orientations.” Therefore “This right overlaps with the freedom of expression” and “loses its value if the legislator violates the right of those who seek it in ordered assemblage.”

“Isolation from others leads to the arbitrariness of individualistic views, and to ‘narrowness and one-sidedness’.” But also, “destroying freedom of association negates the bases of a ruling system based on popular will.” Restricting freedom of association should not be done “except on the basis of the law and within the limits permitted in the democratic systems and which are in accordance with its views.:

In the context of the facts of the case challenging the constitutionality of Article 38 of the Labor Syndicates Law the same considerations apply. This text prevents the electorate from choosing among a larger number of candidates. It restricts choice and imposes “constitutionally speaking, a form of tutelage over labor” in that it “forces labor to put its confidence in persons other than those originally selected.” Such a situation compels workers “to adopt new criteria for selecting candidates for the managing board” and could “negatively affect their ability to express their views through assembly.” Thus, besides violating articles of the Constitution concerned with freedom of expression and assembly, Article 38 violates nomination and electoral rights. And it violates the principle of equality before the law:

Article 40. All citizens are equal before the law. They have equal public rights and duties without discrimination

In this case as in a number of others, the kinds of discrimination enumerated by the Constitution if this article are declared by the Court to be illustrative only and not meant to preclude other forms of discrimination.

There are two other cases that directly concern issues of freedom of association in syndicates. Case 22 for the Seventeenth SCC Judicial Year (decided 3 February 1996) concerned Article 49 of Law 67 for 1974 which established the Applied Arts Syndicate. The article in question provided recourse against the validity of decisions of the general assembly of any subordinate branch of this syndicate only by petition of “at least fifty of the attending members” but only if their signatures were “ratified by the competent administrative authority.” The issue here was the right of litigation, guaranteed by Article 68, the right of all people “to resort to their natural judge.” In this, “no one has priority over the other or can be obstructed from this right by procedural or financial obstacles. The Constitution granted all ... the right to raise a claim” which is in line with “sovereignty of law and a mode of subjecting the state to higher legal restrictions.” Also at issue was equality before the law (Article 40) and Article 56 which stipulates that syndicates and unions are to be created “on a democratic basis.” This Article “is a constitutional acknowledgement of the important interests represented in the syndicate and their relations to the legally stipulated rights of their members.” Syndicate work

should not be biased or factional, but its “political stance” should be “acceptable to the group and liable to change in the light of its will.”

The Court found that the restrictions on challenging actions of a syndicate’s general assembly violated the rule of law and prevented members from raising independent legal suits “to rectify any deviation from rights on the part of the organization.” In the course of its decision, the Court reiterated in this case that syndicate organization has its origin in “freedom of association, based on dialogue and conviction in all controversial issues, as well as ‘diversity and plurality of opinions’.” Civil society “is every syndicate’s framework” and “open to all opinions.” Democracy must be assured “on all levels.” And responsibility should be exercised by legal means, regulated by law or Constitution.

A third case involving syndicates was Case No. 77 for the Nineteenth SCC Judicial Year (decided 7 February 1998). At issue was the Law on Professional Association No. 35 for 1976, part ‘G’ of Article 36. Two individuals sought to nominate themselves for the elections to the associational committee of the Art Academy. But when they went to the general association to which they belong requesting certification of membership, their request was refused. They brought a case in the courts and entered a constitutional plea. They challenged the restrictions on associational freedom guaranteed by Article 56, the freedom of express insured by Article 47, “a rule that is present in every democratic system” and that the freedom of the Constitution insures. “Without it no open discourse can take place.” Without freedom of discourse “freedom of assembly fades away,” said the Court.

Conclusion

The Constitution of 1971 has shown itself quite adequate to the task of providing libertarian-democratic principles against which to measure various laws challenged before the Court. One interesting feature is that except for the offending articles of the Penal Code and the Code of Criminal Procedure, all of the other laws held unconstitutional in full or in part, in these cases, date from the 1970s or early 1980s. This was a period of ‘transition’ when a new legal structure for the new era of capitalism and democracy began to be forged. The new Constitution was composed at the very beginning of the decade before the new era had even been launched. It could have remained a paper Constitution had not the Supreme Constitutional Court been created and then took upon itself the role of breathing life into the copious rights and freedoms the constitutional language claimed to guarantee.

The 1970s had been a time of trying to substitute ‘law’ for ‘command’ and a more nuanced ‘regulation’ in place of closed authority structures. But above all, significantly, it was a time of the resurgence of the judiciary. The founding of the Supreme Constitutional Court at the end of the decade is in a sense symbolic. A freer order had definitely developed, including the demise of the one party system and the creation of several opposition parties.

However, lawmaking in the 1970s had not quite understood the ‘rule of law’—that is, that only those legislated rules that were in accordance with more fundamental legal principles qualified. The present Supreme Constitutional Court has been engaged in sorting this out.

The cases concerning freedom of expression included here represent only a small segment of the issues that the Court had taken on itself to find congruence—or not—with Egypt’s Constitution. A large number of cases of the 1980s, continuing into the 1990s have been sorting out property relations in the wake of desquestration and new landlord-tenant laws. There have been cases concerning rights of fair trial and involving equality. The Court’s choice of issues is of course restricted to the cases that are sent to it, and failure to rule on some legal rules that to all intents and purposes would seem contrary to guarantees in the Constitution is that such issues have not as yet been raised as constitutional challenges in lower courts.

These few cases referred to in this paper are of great significant as they contain wide-ranging commentary on matters of freedom of expression and association, as well as derivative rights and associated issues, basic to a free society. The libertarian language used by the Court in these cases presumes a framework of democratic government; indeed, the Court has said so explicitly more than once. Ideas expressed by the Supreme Constitutional Court and some of the language in which these ideas are couched, suggest the raw material of a theory of justice for Egypt that pertains to freedom of expression and association.

This 1948 decision is discussed in my ‘Majlis al-Dawla: The Administrative Courts of Egypt and Administrative Law’ in *Islam and Public Law*, edited by Chibli Mallat (London: Graham & Trotman, 1993 and ‘Establishing the Doctrine of Judicial Review in Egypt and the United States’ in *The Role of the Judiciary in the Protection of Human Rights*, edited by Eugene Cotran and Adel Omar Sherif (London: Kluwer Law International, 1997).

Articles 174 and 175.

By Law No. 48 of 1979. An English translation of this law by Dr. Awad Mohammed El-Morr, recently retired chief justice of the Supreme Constitutional Court, appears in *Human Rights and Democracy: The Role of the Supreme Constitutional Court of Egypt*, edited by Kevin Boyle and Adel Omar Sherif.

Article 5, amended by plebiscite May 22, 1980.

Case 47, Year 3, Supreme Constitutional Court (SCC) Decisions 2:144.

SCC Decisions 2:137-147.

Cases come before the Constitutional Court either by the judge of a lower court himself deciding there is a constitutional issue and sending it, or as a result of one of the litigants raising a pleas of unconstitutionality. If the judge of the lower court considers the unconstitutionality challenge to have merit, he suspends the case and sends the case to the Constitutional Court for determination of the constitutional issue before continuing to try the case on its merits.

Awad El Morr, “Human Rights as Perceived by the Supreme Constitutional Court,”

SCC 7:11 English Supplement.

Ibid. 11.

SCC Decisions 4:98-114.

SCC Decisions 4:31- 45.

SCC Decisions 4:256- 293.

That they were two-member districts rather than single member districts was because the Constitution and the Election Law requires that at least 50 percent of the Assembly would be “workers and farmers”. Thus one seat in each district was reserved for a candidate who was either a worker or a farmer.

Law No. 114 of 1983.

By Law No 188 of 1986.

SCC Decisions 5(2):183-205.

Article 302 reads:

“Libel is committed by the attribution to the accused, by one of the means mentioned in Article 171 of this law, statements which if proved correct will merit punishment of the person to whom they were ascribed, with the appropriate legal penalties, or if they should necessitate his contempt by his co-citizens.

“Nevertheless, attacking the deeds of a public official, or a person enjoying the status of a public representative, or charged with a public service, is not subject to this article, if done in good faith, and does not exceed the scope of the function or the nature of the public service, on condition that the truth of every deed ascribed to him is proved.”

This translation is that of Adel Omar Sherif. See “Freedom of Expression” in Human Rights and Democracy, op cit. p. 130. The relevant part of Article 123 of the Code of Criminal Procedure is also translated in the same place.

Reviewing the unconstitutionality of decisions according to a distinguishable situation has occurred several times with cases contesting applicability of the Landlord Tenant laws. See my “ The Supreme Constitutional Court of Egypt on Property,” *Egypte-Monde Arabe* 2 (new series), forthcoming.

SCC Decisions 6:740- 760.

SCC Decisions 7:45- 94

See above page 2.

Paragraph 2 of Article 48: “In a state of emergency or in time of war, a limited censorship may be imposed on the newspapers, publications and mass media in matters related to public safety, or for purposes of national security in accordance with the law.

Article 41: “Individual freedom is a natural right not subject to violation except in cases of flagrante delicto....”

Al-Jarida al-rasmiyya No. 7, 13 February 1997.

SCC Decisions 7:446- 469.

Al-Jarida al-rasmiyya, No. 8. 19 February 1998.