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Baudouin Dupret

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**THE LIBERAL INTERPRETATION OF A SOCIALIST CONSTITUTION**  
**The Egyptian Supreme Constitutional Court and the privatisation of the public sector**

Baudouin dupret  
 CNRS/CEDEJ

## **Introduction**

The present article is concerned with the interpretative work of the judge of the Egyptian Supreme Constitutional Court. This judicial institution is taken as witness of a logic of judicial action in an institutional and textual framework and an economic and political context. The textual frame is constituted by the Egyptian Constitution of 1971, amended in 1980, the formulation of which was largely inspired by the principles of Nasserian socialism. As for the institutional framework, it is the creation of a court competent to examine challenges as to the constitutional validity of the law which are brought before it by way of appeal. The economic context is the *infitāh* and the Egyptian adjustment to liberalisation programmes and, consequently, to privatisation. This study is carried out in two times. It is first a matter of retracing the stages of the elaboration of the 1971 Constitution and of its amendments, then of situating the Supreme Constitutional Court by offering a historical account of its creation and by underscoring the main lines of its jurisprudence, particularly as regards questions of ownership and privatisation. In a second step, we shall consider a specific judgment by the Court, that of 1 February 1997, and we shall undertake to meticulously examine the action of this jurisdiction, an action which is theoretically interpretative of the constitutional provisions and which, in practice, creates new rules. This action of the constitutional judge is strictly circumscribed by the textual framework. The judge, however, avails of two major and closely interconnected instruments to prepare an interpretation. Judge of the meaning of the text, he in effect refers to legal standards and enlists authoritative arguments. It would be advisable to more clearly circumscribe the nature of these instruments and to show to which extent they reveal that the normativity of the legal rule is not determined so much by its written formulation as by its interpretative pronouncement.

### **1. The text and its authorized reader: the Constitution of 1971, between Islamo-socialism and constitutional liberalism**

I shall first consider the basic elements in the understanding of the complex interplay which can take shape between a constitution inspired by Nasserian socialism, a jurisdiction of liberal nature established in the context of this constitution, and a set of precedents of a liberal reformist tendency.

#### *1.1. Textual framework: constitutional Islamo-socialism<sup>1</sup>*

The first Egyptian Constitution was promulgated in 1923 (if that of 1882, the duration of which was very brief, is excepted). Its drafting must be clearly situated in line with the 1919 revolution conducted against the British occupant and the recognition by the latter of the independence of the State of Egypt. It is a matter of a constitution granted by the king. The Constitution of 1930 which, like the foregoing, was the occasion of numerous crises between the sovereign and the representative government which it had established, reinforced the

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<sup>1</sup> On Egyptian constitutional history, cf. Khalil, 1996: 91-115.

power of the king by granting him ascendancy over the government, the competence to name the principal religious authorities and the authority to name three-fifths of the members of the Senate (*majlis al-shuyûkh*). Political agitation led in 1935 to the re-establishment of the 1923 Constitution.

The Revolution of 26 July 1952 entailed the abolition of the 1923 Constitution and the institution of a committee charged with the preparation of a project for a new constitution. On 10 February 1953 a Constitutional Declaration was promulgated. A provisional period of three years was then decreed, as well as the formation of a republican government. The Constitutional Declaration vested supreme authority in the Council of the Revolution and established a Joint Council formed of members of the Council of the Revolution and the Council of Ministers charged to define the general policy of the State and to evaluate the work of the ministers. The ministers were appointed (and removed from office) by the head of the Council of the Revolution and they were to be responsible for implementing the policy defined by the Council of the Revolution and Joint Council. The Declaration did not institute legislative authority, the latter reverting from that time on to the Council of Ministers. It is thus possible to speak of a government vested with concentrated powers, along with the corollary restriction of individual rights and liberties.

The Constitution of 1956, drawn up by the Technical Office of the President and then submitted to the Council of the Revolution and the Council of Ministers, was approved by referendum and came into force on 23 June 1956. Note is to be taken of the importance of the preamble, evoking the guiding principles of the Revolution which certain articles of the actual Constitution served to implement. Two provisional constitutions were subsequently adopted, in 1958 and 1964 respectively. The first corresponds to the formation of the United Arab Republic and its adoption annulled the Constitution of 1956. The 1958 provisional constitution had only seventy-three articles and passed over in silence numerous questions which according to jurisprudence should be referred to the text of 1956. This latter text was the main source of inspiration for the provisional Constitution of 1958, partially amended by the Constitutional Declaration (*al-I'lân al-dustûrî*) of 1962 subsequent to the disruption of Syro-Egyptian unity. The Declaration reorganized the supreme powers of the Egyptian State in three instances: the President, the Council of the Presidency (instituted for the first time) and the Executive Council. In 1964, a new provisional Constitution was adopted, replacing the texts of 1958 and 1962. Notwithstanding its temporary character, the new text contains 169 articles detailing the principles upon which the government is established. The 1964 Constitution was the first to have officially instituted the socialist government in Egypt (Article 1)<sup>2</sup>. In the same way, socialism is constituted as the founding principle of economy (Article 9), the people controlling all the means of production and the utilisation of the surplus in conformity with the development plan established by the State (Article 12).

Adopted under the title "Permanent Constitution of the Arab Republic of Egypt" (*al-dustûr al-dâ'imî li-jumhûriyya Misr al-'arabiyya*), the 1971 Constitution, drafted by a parliamentary commission composed of eighty members, was approved by consultation of the people and promulgated by the President. The new constitution evoked, or indeed reinforced, the nature of the socialist government in all its domains. In the political domain, the first article, amended in 1980, stipulated that the Arab Republic of Egypt was a socialist State. Article 59 made the defence of socialist gains, their consolidation and their preservation a national duty. A new institution was created, the Socialist Public Prosecutor (*al-mudda'î al-'âmm al-ishrirâkî*; Article 179). The latter is responsible for taking all steps necessary for safeguarding

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2 On the nature of the socialist Constitutions of 1964 and 1971, cf. Khalîl, 1996: 203-206.

the political régime, the preservation of socialist achievements and the upholding of the socialist path, a responsibility also vested in the Consultative Assembly (*Majlis al-shûrâ*) in Article 194 which was added in 1980. In accordance with this socialist orientation, at least half of the parliamentary representation had to consist of workers and peasants (Article 87; the same principle was stipulated for the Consultative Assembly in Article 196, added in 1980; Article 26 specified that at least half the members of the administrative councils of public sector units must consist of workers). In the domain of economics, Article 4, amended in 1980, restated Article 9 of the 1964 Constitution and constituted socialism as the founding principle of economy. By virtue of which, Article 24 stipulated that the people were to control all means of production and the utilisation of surplus in accordance with the development plan established by the State (restatement of the above-mentioned Article 12 of the 1964 Constitution). Article 33 declared the inviolability of public property and made its defence and its consolidation a national duty inasmuch as it contributed to the strengthening of the country. In Article 30, the public sector was given the task of managing the development of all sectors, as well as being made chiefly responsible for the definition and realisation of the development plan. Finally, in the social domain, Article 12 stipulated that Egyptian society was committed to the path of socialism.

### *1.2 Institutional frame: the Supreme Constitutional Court<sup>3</sup>*

The control over the constitutionality of laws is not contemporary, in Egypt, with the Supreme Constitutional Court. None of the constitutions prior to 1971 contained provisions introducing such control and, consequently, a jurisdiction of this type. Nevertheless the debate on the possibility of establishing a constitutional review of laws has troubled Egyptian legal circles (Khalîl, 1996: 459-460). Moreover, the Council of State, created in 1946 and presided over by Sanhoury until 1954, pronounced, from its second judicial year, a judgment in favour of limited jurisdictional control over the constitutionality of the laws.

“Whereas the royal rescript No. 42 of 1923 establishing the constitutional government of the Egyptian State is one of the laws which the courts have the duty to apply, but is however distinguished by reason of its character as a superior law, guarantor of liberties (...); that consequently, in the case of conflict between an ordinary law and the Constitution over a litigation submitted to the courts (...), the latter must give precedence to the Constitution over the ordinary law as the higher norm. The judge, in thus acting (...) does nothing but settle a conflict of laws by giving precedence to the one most worthy of application (...).” (Council of State, 10 February 1948, quoted in Ghattas, 1981).

This control, however, was limited insofar as, apart from its being established only by the way of a precedent, it did not entail the annulment of the provision considered to be unconstitutional and it was not imposed on judges before whom a similar litigation was subsequently referred. Regarding practice, however, it must be said that, after 1954, the Council of State never raised questions as to the constitutionality of Nasserian laws (Jacquemond, 1988: 273).

The conflict which opposed magistrates to the political power, which attempted to integrate the former in the single party (Arab Socialist Union), culminated in the promulgation of four law-decrees, on 31 August 1969, the first of which brought about the creation of the Supreme Court. The latter was recognized to have the exclusive competence to interpret the laws, to control their constitutionality and to settle conflicts of competence

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<sup>3</sup> On the Supreme Constitutional Court, cf. for example Boyle and Sherif, 1996. The most comprehensive study on the S.C.C. is Nathalie Bernard-Maugiron’s thesis on the court and the protection of fundamental freedoms (Bernard-Maugiron, 1999).

between jurisdictions. “This Court, all members of which are nominated by the President of the Republic for three repeatable years – abrogating thereby the irremovability otherwise granted them – is clearly intended to be a loyal and submissive instrument of the executive, and this is what it will effectively be” (*id.*: 274). Created to bring the magistrates in line concomitantly with a veritable purging of the latter<sup>4</sup>, the new institution was from the beginning deprived of any legitimacy and it never succeeded in imposing itself on other jurisdictions. The Supreme Court broadened its competence to include all legal provisions (and not solely laws; judgment of 3 July 1971, first judicial year, No.3), but at the same time precluded any possibility of taking action at law against contentious State administrations, in which it recognized jurisdictional and not statutory competence (cf. for example, Supreme Court, 6 March 1976, sixth judicial year, No. 20). It led Richard Jacquemond to conclude that, “generally speaking, each time the political issue was of some importance, the Supreme Court sided with the executive” (Jacquemond, *op. cit.*: 276). Thus, in the case of Kamâl al-Dîn Husayn, a Free Officer opposed to the utilisation of full powers by President Sadat, the Supreme Court conformed to the wishes of the government in not granting the deposed deputy the right to stand for election designed to provide for his supplying (Supreme Court, 15 March 1977, eighth judicial year, No. 3). Having received the ex-deputy’s action, the Council of State then accused the Supreme Court of “holding the judge dealing with the merits of the case in contempt” and asked that the authorities “abstain from requesting interpretations from the Supreme Court, as long as it had not been replaced by the Supreme Constitutional Court” (Council of State, 6 April 1977, thirty-second judicial year, No. 340), as established by the Constitution of 1971. As paradox would have it, the jurisdiction established by a law in 1969 survived by ten years the constitutional establishment of its replacement. However, one must differentiate the severe judgment which was directed towards the Supreme Court by underscoring that a number of principles presented by the Supreme Constitutional Court have their origin in the precedents of the former.

The Constitution of 1971 was adopted after the death of Nasser in the wake of the “Rectifying Revolution” led by Sadat against his rivals in the pro-Soviet hard-line socialist faction of the Arab Socialist Union. Faced with the president of the only party and with those in charge of the security organs, Sadat presented himself as the legalist chief of a State endowed with institutions threatened by parallel centres of power. Although numerous provisions were oriented towards a reinforcement of earlier tendencies, the new president gave a content to his discourse by proposing the re-establishment in their positions of the magistrates who had been victims of the purge in 1969, by reaffirming, on the one hand, “the sovereignty of the law (as) the base of the State government” (Article 64), the independence of the judicial powers (Article 65) and the right to be assisted in legal proceedings (Article 67), and, on the other hand, by proclaiming the presumption of innocence (Article 67) and the principle of the legality and the non-retroactive nature of penalties (Article 66), as well as the submission of all administrative acts and decisions to the control of the courts and tribunals (Article 68). It is along these lines that the creation of the Supreme Constitutional Court must be resituated (Articles 174-178), although one does not know whether it was conceived to obey the injunctions of the established power or, on the contrary, to control its legislative activity (Brown, 1997: 93-94). In this ambiguous context of the accentuation of the socialist mooring of the government and of liberal shift, the question as to whether the Supreme Constitutional Court was but “a mere re-dressing” (Jacquemond, 1988: 275) of the Supreme Court or the institution of a new jurisdiction was the object of latent conflict between the executive, concerned to preserve a servile instrument, and the judiciary, desirous of

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4 Cf. Botiveau, 1997.

establishing its independence<sup>5</sup>. Law No. 48 of 1979, establishing the Supreme Constitutional Court, seems to express the victory of the magistrates who saw in it the guarantor of the irremovability of their members until the age of retirement and the recognition of the Court's quality as judicial organ, two guarantees which the initial bill had not stated. These few major changes brought to the system of the Supreme Court instituted in 1969 (which only foresaw irremovability for the duration of the three-year mandate of the judges) sufficed, however, to make of it an ineluctable institution in Egyptian political and judicial life in the last twenty years.

### *1.3 The liberal interpretation of an Islamo-socialist constitution*

The competence of the Supreme Constitutional Court extends to control over the constitutionality of laws and regulations, to the settlement of conflicts regarding jurisdictional competence and to the interpretation of laws and regulations having legislative value. It is the first of these three responsibilities which is of primary interest to us in this article.

The precedents established by the Supreme Constitutional Court have most particularly confirmed its liberal tendency in three spheres: property, public liberties and Islam as a source of legislation.

#### *- Liberal reformism in religious matters*

The question has arisen as to the content and scope to be conferred on Article 2 of the Constitution, which stipulates since its amendment in 1980 that "the principles of the *sharî'a* are the main source of legislation". An examination of the Supreme Constitutional Court's case-law reveals that, in the beginning, this jurisdiction had a tendency, when a challenge as to constitutional validity was laid before it, to not tread the territory of interpretation of the *sharî'a* and to confine itself to strict legal technicality. Thus in its judgment of 4 May 1985, the Egyptian Constitutional Court annulled law-decree 44/1979, known as Jihân's Law (from the name of the wife of the President of the Republic at that time, Anwar al-Sadat, who was its instigator), introducing reform to the matter of personal status. It was not on the grounds of a contravention of the newly amended Article 2 that the Court annulled the presidential decree, but rather on the purely technical grounds that there was no reason in the case of a text dating from 1929, which had not been modified since then, to follow the course of a law-decree peculiar to the exceptional powers conferred by the Constitution on the President of the Republic. In another judgment made on the same day, the Supreme Constitutional Court formulated the principle of non-retroactivity of Article 2, which created a precedent.

"The obligation imposed on the legislator to take the principles of the *sharî'a* as the main source of legislation, such as set out above, pertains only to legal texts promulgated after the date of its coming into force [1980, the date of the constitutional amendment], and any text of law which in this case would be contrary to the principles of the *sharî'a* would occur in violation of the Constitution. As for laws prior to this date, they cannot for this very reason be made subject to this obligation, and are thus outside the reach of the control of constitutionality which follows therefrom".

It can, therefore, be thought that the Supreme Constitutional Court at first attempted to avoid the danger of interpreting the *sharî'a*, preferring to confine the apparatus of its rulings to "arguments of pure positive law" (Jacquemond, 1994). Its jurisprudence nevertheless evolved for the simple and good reason that, whereas some years ago only few legislative texts post-dated the reform of 1980, material has since then accumulated and, consequently,

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<sup>5</sup> An opposition which is perfectly symbolized by the case of Kamâl al-Dîn Husayn (cf. *supra*).

possibilities of disputing the constitutional validity of texts subsequent to this reform have increased. Thus, in a judgment of 15 May 1993, the Court was compelled to explicitly take a position on the ground of the *sharî'a* and its interpretation. It established on this occasion the distinction between rules of absolute certainty and meaning and relative rules open to individual reasoning.

"A legislative text cannot contradict the formal rules of the *sharî'a*, the certainty and meaning of which are absolute (*qat'iyya al-thubût wa al-dalâla*). These rules and their definitions cannot be the object of an interpretative effort (*ijtihâd*). It is a question, in the *sharî'a*, of superior principles and fixed foundations which accept no interpretation or alteration whatsoever. (...) Contrary to this, one finds rules authorizing individual reasoning (*ahkâm zanniyya*), relative in their certainty or in their meaning, or in both".

Although this principle has been repeated several times, it will be noted that a new stage was recently crossed in the process of interpretation of Article 2 of the Constitution with the judgment of the Supreme Constitutional Court, on 18 May 1996, concerning the wearing of the headscarf at school. For the Court, the logic of the school uniform is to ensure respect for the modesty of young girls and of the uses and customs of the society. The legislator can thus legitimately impose certain restrictions in the matter of clothing, without contradicting the principle of the respect of individual liberty, if he does this to the purpose of the preservation of identity. Although Islam has improved the lot of women, which explains that it has encouraged them to ensure their modesty and has ordered them to wear the headscarf, it has not subjected the form of women's clothing to absolute Koranic texts and thus has left the door open to interpretation. The legislator can therefore regulate vestimentary custom insofar as, on the one hand, this respects the uses and customs of Egyptian society and, on the other hand, inasmuch as this translates the requirements of a modern society in which communication is essential.

Respective of the *sharî'a* as the source of legislation, one can say, with N. Bernard-Maugiron (1999), that the interpretation of the Court, far from establishing a hierarchy among the articles of the Constitution, expresses rather a restrictive conception. Non-retroactivity, the limitation to absolute principles (themselves undefined), and the promotion of a modernist and social conception of religious obligations show the will of the constitutional judge to encompass the Islamic heritage of Sadat in a well-defined framework giving Islam a real but circumscribed space. One will speak here of a liberal reformist attitude along the lines of a Muhammad 'Abduh, whose influence on the thought of the Court as pertains to religious matters must be emphasized.

#### - Political liberalism in the matter of public liberties<sup>6</sup>

Notwithstanding its relatively young age, the Supreme Constitutional Court has greatly marked the sphere of protection of democratic principles and of public liberties in Egypt.

Thus, in the strictly political domain, it has expressed itself regarding the principle of the separation of powers by establishing that the powers conferred on the President of the Republic to legislate by means of decrees having the force of law in the absence of Parliament cannot be exercised except in cases of genuine emergency (May 1985). It elsewhere declared as unconstitutional provisions violating rights to vote and eligibility, which led to the annulling of the parliamentary elections held under the aegis of Law 38/1972, such as

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<sup>6</sup> Regarding this question, cf. El-Morr, 1997; Nosseir, 1997; Gabr, 1997; Aboul-Enein, 1997.

amended in 1983, which forbid independent candidature (May 1987, May 1990)<sup>7</sup>. The Court also declared unconstitutional Law 33/1978 forbidding citizens having been involved in political activity prior to 1952 from being members of political parties or of founding parties (June 1986).

In respect of fundamental rights and liberties, the Supreme Constitutional Court has on several occasions reaffirmed freedom of expression, declaring as unconstitutional the provision refusing the right of adherence to a political party to those who expressed opinions contrary to the peace treaty with Israel (May 1988). The protection of the principles of equality before the law and of equality of opportunities has also often been proclaimed, leading the Court to refuse any unjustified privilege for admission to universities (February 1992). The Court also evoked the right of protection of the home, declaring as unconstitutional Article 47 of the Code of Criminal Procedure authorizing searches without legal warrant in case of flagrante delicto (June 1984). The Court furthermore considered that the legislator was not entitled by the Constitution to compel an individual to work against his will (January 1992), no more than to deprive an individual of his right to a pension after his retirement (January 1992). It evoked the right of each person to be judged by the jurisdiction competent for the case which concerns him (June 1988, February 1993, May 1993), as well as the right to be assisted by an advocate of his choice in penal procedures (May 1992), the presumption of innocence (February 1992), the principle of the personality of criminal punishment (July 1995), and the non-retroactivity of disciplinary penalties (January 1992)<sup>8</sup>.

#### - Freedom of the market and private property

We follow in this section the main lines of the article by Enid Hill concerning the position of the Supreme Constitutional Court as regards property (Hill, 1999). That author observes that “since its establishment in 1979, Egypt’s Supreme Constitutional Court (SCC) has exemplified its willingness to protect rights of private ownership whenever relevant cases have come before it.” (Hill, 1999: 55) This attitude of the Court has been manifested in three directions: sequestrations, public business sector law, and leases.

The Court laid down, in May 1981, rulings on the unconstitutionality of Law 150/1964 on sequestration, describing the law as an “aggression against private property and confiscation of the latter”. In 1983, the Court affirmed the right of owners who were victims of sequestration measures to contest the evaluation which was made of their sequestered assets. In the same year, it established the right to receive compensation for lands confiscated during the agrarian reform, recalling that the Constitution protects private property and forbids expropriation, “except for public use and in return for compensation”. Also here, the Court evoked the absence of hierarchy among the articles of the Constitution, which forbids the invocation of a constitutional principle (the socialist democratic system, Article 4, and social solidarity, Article 7) to avoid another (the protection of private property, Article 34). In March 1985, the Court ruled that the establishment of limits to compensation of nationalized properties constituted an “aggression against private property and [a] confiscation of it” contrary to Articles 34 and 36 of the Constitution and, in June 1986, it denied the possibility to restrict restitutions in kind. In this regard, as in others, the Constitutional Court thus

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<sup>7</sup> In 2000 the electoral law was once more declared unconstitutional because of its violation of article 88 of the Constitution which provides for the judicial supervision of the polls.

<sup>8</sup> For an inventory of the principal rulings of the jurisprudence of the Supreme Constitutional Court on fundamental rights, cf. Boyle and Sherif, 1996: 231-280, and Bernard-Maugiron, 1999.

showed itself very active in implementing Egypt's capitalist political economy (Hill, 1999: 88).

The Supreme Constitutional Court delivered several judgements on Law 203/1991 which established mechanisms allowing of the privatisation of the public sector. The judgment settling a point in law, delivered in 1997, is the subject of the second part of this study. Let us note that henceforth it considers as constitutional the law on public business sector. The Court furthermore twice gave rulings, in January 1995 and in April 1996, on the principle of the equality of treatment of managerial staff and members of boards of directors.

The Egyptian Constitutional Court has also on several occasions given its attention to leases, whether commercial or residential. It thus established that tenants who have become owners of a building of at least three units were required to abandon their rented accommodation (March 1992), but it later returned to this ruling and affirmed that there was no restriction on the number of dwellings which a person could rent or own (November 1997). It also established that the incumbents of a legal profession did not have the benefit of any exemption from transfer tenancy rights (1992 and 1994); that a brother-in-law did not benefit from the right to inherit a lease (March 1995); that the other relatives by marriage did not benefit from the right to inherit the lease of a flat (January 1997); that commercial partners had no right to replace the heirs of a rented property (July 1996); that the inheritance of commercial leases was unconstitutional (February 1997); that an owner had the right to claim his premises if the original tenant abandoned it and if other persons occupied it against the will of the owner (August 1997); that tenants could not exchange their respective flats (October 1997); that the sub-letting of furnished flats transgressed the rights of the owners (November 1997). With a few reservations, the Supreme Constitutional Court thus clearly manifested its will to entirely liberate the property rental market.

## **2. The judge and the “transubstantiation” of the constitutional body**

Having given the textual and institutional frames of action of the constitutional judge, I would like to return to a particular ruling, the judgment of 1 February 1997, which declared that the privatisation of public sector business is constitutional. It is there a question of a paradigmatic instance of the modes of action of the constitutional judge who, guarantor of the fundamental text, accords himself the means to profoundly transform its meaning. After having summarized the case and the argumentation of the Court, I shall undertake to describe the ways through which the Supreme Constitutional Court refers to standards of interpretation. The latter, whether a matter of formal statements or general principles, are endowed with a flexible structure which the judge vests with meaning. This meaning will be all the more cogent and, consequently, more restricting, as it will have acquired the status of an alleged factual truth.

### *2.1. The Supreme Constitutional Court and the judgement of 1 February 1997*

The facts are as follows. The petitioner to the Supreme Constitutional Court introduced complaint 372/1993 before the court of first instance in Alexandria, against the President of the Council of Ministers, in his capacity of Minister of the Public Sector, and the Minister of Supplies, requesting the regularisation of sums due to him as incentives and production bonuses. Working as a technician in printing at the Egyptian Company for Paper and Stationery, he remained there until its merger with the Egyptian Company for Electrical Appliances. Then, the Holding for Consumption, Engineering, and Chemistry Supplies undertook to sell the merged company, which led to the partial bankruptcy of the merging

company and to the interruption in the payment of wages and incentives for which it was liable. The complaint is based on their claim. Before the court dealing with the merits of the case, the applicant put forward the plea of unconstitutionality of Law 203/1991 on public sector companies and requested that the matter be placed before the Supreme Constitutional Court.

The grievance of the petitioner was first that this law had not been first submitted to the Consultative Assembly, whereas Articles 194 and 195 §2 of the Constitution stipulate that this Assembly is competent to study and propose what it considers necessary for the protection of the principles of the revolution of July 1952, and that the opinion of the Assembly must be solicited for bills complementing the Constitution, including public sector business, the organisation of which comes under the sphere of law as per Article 33 of the Constitution. The Court rejected the argument on the grounds that, having previously given rulings on the subject of Law 203/1991, it had already considered its possible formal legal flaws. If the form of the law had been deficient, it would have become virtually non-existent and the Court would have been unable to consider the substance of a case pertaining to a law which did not exist. As the question was implicitly resolved by the two previous rulings, the Court subsequently did not have to return to it.

The applicant also challenged the aims of this law as being contrary to Article 30 of the Constitution, according to which the public sector shall be the vanguard of progress and shall assume the main responsibility in development plans, while Article 20 of the law authorizes the transfer of public sector units to the private sector, which entails a decrease in popular control over the first and the appearance of a form of mixed economy blurring the absolute limits which the Constitution has drawn between types of property, first of all public property, the inviolability of which it guarantees while its consolidation is established as a national duty (Article 33). The Court also rejected this argument by affirming that constitutional principles can only be interpreted in the light of their ultimate objective of “political and economic liberation of the country and its citizens”, and not according to a particular philosophy which would impede adaptation to a new world. This assumes for the Court the investment of material and human capital, the dividends of which will be reinvested as the authorities decide. Moreover, the State, to ensure its essential duties in “the defence, security, justice, health, education and in the protection of the environment and of resources”, must be relieved of other responsibilities which would hinder its activity. The Supreme Constitutional Court then laid stress on the complementarity of public and private investments. If the former runs out of steam, the latter must be mobilized, and this is not only not in contradiction to the Constitution, but, quite on the contrary, constitutes the establishment of that for which the Constitution calls.

The Court decided to limit its control to the constitutionality of Articles 5, 33 and 43 of the law. Article 5 stipulates that “the rules concerning public sector employees, promulgated by Law 48/1978, are without effect on the companies subject to the rules of the new law”. Article 33 pertains to the share of the employees in the profits of the company, a share which cannot be less than ten per cent. Article 43 pertains to the organisational structure of the company and the connection between the financial compensations and privileges to the company’s total production, the turnover and profits. The petitioner accused these provisions of contravening Article 59 of the Constitution which deals with the preservation, consolidation and the protection of socialist gains. For him, this included the guarantees against dismissal and transfer, the organisation of employees’ vacations, as well as minimum wages. The Court rejected the argument by denying any strict definition of the notion of “socialist gains”, which precluded consideration of the employees’ benefits as relevant to the latter. The benefits

which the Constitution attached to work are limited to its value, “without which their burden would be overwhelming and they would constitute a significant detriment for the national wealth”. The preamble to the Constitution makes work the condition of development and Article 25 guarantees each citizen a share of the national product according to his work and his non-exploitative property. Article 23 of the Constitution defines the orientations of development, which include the increasing of work opportunities and the establishment of a minimum and a maximum wage limit which makes it possible to guarantee the balance of incomes and the reduction of differences between incomes. In the Court’s view, this article favoured the establishment of a close link between wages and production. This principle is supported by Article 26 of the Constitution which guarantees employees a share in the management of their enterprises and in their profits by linking them to production, to its instruments and to the economic programme, which means that the rights have their causes, their means and their conditions. The Court then laid stress on the fact that work, insofar as it would be devoid of any exploitation, constitutes a path for the liberation of the country and its citizens, which assumes that privileges and work are logically bound. A progressive document, the Constitution must be interpreted in an evolutionary manner. Moreover, the Court considered that it was perfectly normal for the transfer of activities to holding companies to be accompanied by new regulations to which the administration of public sector agents does not extend. Finally, should there have been a mistake in the interpretation and application of legal texts (if they have been wrongly interpreted), this does not signify unconstitutionality. The Court added that it was necessary to continually interpret Article 26 of the Constitution in the framework of the objectives it sets for itself, objectives which, in order to be guaranteed, require that the right of employees to share in the revenue from their work would not contradict the right of the enterprise to continue its existence and be active.

The Supreme Constitutional Court dismissed the last argument of the applicant (the contradiction between Article 43 of the law and Article 23 of the Constitution) by considering that the interest of the applicant was only theoretical and had no relation to the objective litigation. Furthermore, the text respects the principle of the connection between wages and other financial advantages which are granted to the employees with production, turnover and realized profits.

On the basis of all of these arguments, the Supreme Constitutional Court rejected the petition and, for that reason, refused to declare the privatisation of the public sector as unconstitutional.

## 2.2 *“Socialist gains” and “the spirit of the age”: the recourse to legal standards*

If the doctrine of the clear meaning of the legislative texts was effectively asserted, it would be necessary to raise the question, as does Muhsin Khalîl, concerning the impossibility of a liberal interpretation of a socialist constitution. According to this author:

“The Constitution, as we have seen, is an ensemble of legal rules which specify the régime of the State. These are the rules which express the ideology followed by the régime of the State. For this reason, the Constitution is the veritable photograph of society and of its essential political, economic and social elements. In this way, the Constitution must correspond to those elements, at least so that the theory of the texts which follow from them would not be remote from reality. The texts thus follow one path and reality another (...).

It is justifiable to raise the question as to whether the living conditions of Egyptian society have in this respect recently evolved such that the socialist régime of the Constitution no longer corresponds to them. Have the fundamental elements of the Egyptian régime changed under the influence of the emergence of a new ideology which is contrary to the rules stipulated in the Constitution?

It must be recognized that the socialist ideology is today short of breath (The old socialist régimes) have passed from totalitarianism to liberalism. (They have also passed) from a single political régime and from the state ownership of all the means of production to a pluralist political régime and to individual private property.

Our Egyptian society has also changed like that (...). We have undertaken to adhere to social democracy and to what that necessarily implies: to encourage and consolidate the private sector, to such an extent that it has been decided to abolish numerous public sector units, the function of which contradicts the real nature of the economic activity of a liberal State (...).

“(...) The Constitution has consequently ceased to be the photograph of the current society and of the radical transformations through which it is passing. The constitutional rules contradict the actual reality and the theory has become remote from it, which leads to the assertion of the necessity to amend the text while abandoning socialism and replacing it with the principles of liberalism, so that the text corresponds to the reality.

There is no discussion of the fact that the constitutional government which one proposes entails the reinforcement of confidence in the Egyptian economy and the attraction of numerous investments. On the other hand, to speak of the necessity of private investment while the socialist texts remain introduces uncertainty (...). Moreover, new laws will without any doubt organize this new orientation of society. These laws will thus be open to proceedings against their unconstitutionality being brought before the Supreme Constitutional Court.

The Court will examine these laws as to their conformity with or their contravention of the Constitution. As soon as their contravention of the rules of the Constitution appears, the Court will declare their unconstitutionality, that is, the nullity of the law and the interdiction of their application dating from the day following the publication of the judgment (...)” (Khalil, 1996: 205-206).

One observes upon reading these excerpts the vigour of the theory which would have adjudication consist essentially in an application of the legal rule to facts which are presented to the judicial instance. This thesis rests upon three representations. The first consists in considering that the judge applies the law to the fact manifested in its “reality”. We shall note simply “the idea that a veritable dialectic is established between the fact and the rule, reality being managed ‘with a view to the applicable law’ by each of the actors in the legal field” (Lenoble and Ost, 1980: 104). The second classic representation of judicial interpretation pertains to the appropriateness of the legal language to the reality which is subject to it as well as to its intelligibility. One sees here the deployment of the doctrine of “clear meaning” and of “common sense”, where it would no doubt be necessary “to note the action of the semantic work of the legal language, each term being defined and redefined by virtue of its place and its function in the comprehensive system” (*id.*: 107). Finally, the third representation postulates that the operation which connects the fact to the law is carried out without distortion. On the contrary, the legal grasp of reality performs a transformation of the latter, just as the terms of legal language undergo semantic shifts. The law thus operates in a tautological manner, the rule only dealing with what it has previously assimilated and the interpretation ultimately pertaining only to a substance predetermined by legal language (*id.*: 114).

In this complex play of interpretation, the judge avails of a privileged tool which, under cover of permanence, allows him maximum flexibility. It is a question of the recourse to legal standards. The notion of legal standard can be defined, specifically, as “term or locution inserted in a legal rule or any legal act in reference to an established fact or a quality, the identification of which requires an evaluation or judgment” and, more generally, as a “notion of legal language with indefinite or variable content” (Oriane, 1993: 581). Borrowed from ordinary language, the notion of standard, which contains the idea of a “model that conforms with the normal”, seems to correspond in legal language to the “need to isolate a certain category of normative expressions characterized by the absence of any predetermination and the impossibility of applying them without proceeding beforehand to a judgment or an evaluation, that is, by placing the fact to which they relate on a scale of values” (*ibid.*). The model doubtlessly becomes, as far as legal matters are concerned, hypothetical in its construction, although in terms of representations of those who have recourse to it, it would appear to already have been constituted. The fact remains that the utility of the standard is to

open in the normative field “space of indetermination” permitting the person who must apply the rule greater latitude in judging the situation and its qualities or a behaviour.

In its judgment of 1 February 1997, the Supreme Constitutional Court had recourse to a standard *par excellence*: time.

“(The argument of the applicant) is rejected, in the second place, for the reason that it is not permitted to interpret constitutional texts by considering them to be a definitive and perpetual solution for economic questions, the reality of which is overtaken by time. It would be tantamount to “tilling the sea” to elaborate and maintain and then impose them blindly. Their comprehension emerges, on the contrary, in the light of the values of their ultimate objectives of political and economic liberation of the country and its citizens.

“It is rejected, in the third place, for the reason that forcing the constitutional texts to be subject to a particular philosophy prevents their engagement towards new horizons which the collectivity wishes to reach”.

This argument became complete when the Court stated that:

“(The argument of the applicant) is rejected, in the fifth place, for the reason that the Constitution is a progressive document (*wathîq taqaddumiyya*), the vast horizons of which do not impede evolution. Its framework can only be in harmony with the spirit of the age (*rûh al-`asr*). That which guaranteed development at a particular stage intercedes freely in the pursuit of what does not contradict the rules comprised by the Constitution”.

Contrary to his interpretation of Article 2, in which he engages in a rather restrictive confirmation of the normativity of Islam, the constitutional judge tends to interpret the constitutional norm as broadly as possible as soon as it is a matter of economic or political liberalism. In both cases, he takes recourse to legal standards – “the principles of *shari`a*”, on the one hand, “the spirit of the age” on the other – and he asserts the insufficient literalism of the norm of positive law to justify his interpretative action.

One can, as it were, consider that the recourse to the legal standard allows the judge to associate the legality of the constitutional text with the legitimacy of an ideological orientation constituting authority and the effectiveness of widely recognized economic practices. The recourse to the liberal legal repertoire thus represents an attempted “conformisation” of positive law with dominant currents of thought. However, there is an underlying shift of the concept of “legality” to a concept of “normality”, from reference to the norm of law as such to reference to the norm considered as socially and morally legitimate.

### *2.3 Complementarity and profitability of the private sector: the force of the argument in terms of normality*

The words “norm”, “normal” and “normality” have entered everyday language, with all their polysemy. The norm is the “abstract formulation of what ought to be” as well as “the usual condition, corresponding to the majority of cases” (as defined in *Le Robert* dictionary, cited by Lochak 1993: 393). These two meanings, the one more legal and ethical, the other more statistical, far from simply coexisting, have a tendency to become confused, which may explain an ambiguity which reflects on the terms “normal” and “normality”. If it is said of something that it is normal because it conforms to the most frequent type, the reference to values, to an idea that something ought to be, nevertheless lingers implicitly or explicitly. “If the notion of normality is equivocal, this is because it constantly adds the normative to the descriptive” (Lochak 1993: 393).

In legal vocabulary, norm is understood as a synonym of “rule”. On the other hand, normality does not enter into this conceptual field. Thus, “from a strictly positivist point of

view, the law indicates what is legal, and not what is normal” (*ibid.*). This being so, it is quite impossible to be unaware of the surreptitious re-introduction of the concept in jurisprudential work. The normal thus becomes a legal category, under cover of, among others, the notion of standard (explicit reference to an implicit idea of normality). The law, as it were, “endorses and propagates a certain idea of normality and contributes to the effective normalisation of behaviour” (*ibid.*). On the descriptive level, the law claims to account for the prevailing social norms and to give them legal force, whereas on the normative level, the law indicates the social norms which it intends to sanction. This inevitably produces a recursive effect, as the norms judged to be normal according to law, which are consequently safeguarded, have, in their turn, a tendency to determine social normality. This is the effect of universalisation or normalisation described by Bourdieu (1986:16). One thus observes the systematic tendency of the legal actors<sup>9</sup> towards the “conformisation” of the normal to the legal and inversely, towards the “coinciding” of social and legal normativity.

When the constitutional judge takes recourse to the standard of “the spirit of the age” to establish the fact that the Constitution must be interpreted in an evolutive perspective, he attaches importance precisely to the conformisation of the constitutional text with what he postulates as the currently prevailing economic and political normality. A number of considerations as to the complementarity of public and private sectors and to the connection between wages and work come under evidence for the Court and consequently do not necessitate detailed explication. Their social acceptance (“new horizons which the collectivity wishes to reach”) is, as it were, postulated in the name of their status as evidence.

“Whereas this grievance (of the applicant) is rejected, in the second place, for the reason that it is not permitted to interpret constitutional texts, as if they were definitive and perpetual solutions to economic questions, whose reality time has overtaken (...).

It is rejected, in the third place, for the reason that forcing constitutional texts to be subjected to a particular philosophy prevents their engagement towards new horizons which the collectivity wishes to reach. The Constitution is not guarantor of this philosophy, for which on the contrary it refuses to act as guarantee.

It is rejected, in the fourth place, for the reason that the objective of the economic and social development for which the Constitution calls is to change the ways of life by a complementary organisation of its structural principles (*rawâfid*). (...) Development, the domains of which are multiple, is consequently realized in the investment of capital, whether material or human. It will thus be followed by an increase in revenue which the public authority will decide at a given point, so as to preclude the risks entailed, to dedicate its resources to its production and with its profits make scientific progress, strengthened through investments and linking the growth rate to their augmentation, their permanence and the increase in their productivity, which guarantees the benefit accruing to the citizens, even though this would be of varying degrees.

It is rejected, in the fifth place, for the reason that investment in its different forms, public and private, is nothing other than an influx of financial means. Whether it is the State which would have mobilized these means or whether it would be the private sector which would have constituted them, they complement each other mutually. It is considered that their merging is necessary to ensure a broader and more profound production basis (...). What Article 29 of the Constitution stipulates as to forms of ownership, which public ownership would precede in importance, and beside which would be found cooperative ownership and private ownership, constitutes nothing other than a distribution of roles among those who neither prevent these forms from entering into relationship nor their being together subjected to the control of the people. By virtue of this, public investment is nothing other than the pilot of progress paving the way which leads there. This is not confined to limited domains, but on the contrary extends to the principal areas of the activity of the State in the execution of its political and social functions. (...)

It is rejected, in the sixth place, for the reason that the pursuit of development and the benefit of its results only constitutes, by virtue of what is stipulated in Article 30 of the Constitution, a fundamental principle which public investment crystallizes. (...) This means that each of the two forms of investment, public and private, plays a role in development. (...) One may say that public investment strengthens the power of the citizens, their

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<sup>9</sup> It is thus always a matter of a normality defined, postulated and sought by the legal actor, in this case the judge.

awakening and their discernment, most particularly through the transfer, adoption and generalisation of technology.

It is rejected, in the seventh place, for the reason that what is stipulated by Article 20 of the law pertaining to public sector companies as regards the authorisation of transfer of parts of holdings, even should this transfer lead to their being sold to the private sector, does not constitute a rejection of the pioneer role of public investment, but on the contrary the protection of resources which cannot be misappropriated or squandered, thus guaranteeing the pursuit of development and the interconnection of its links in the framework of the cooperation of those who participate therein.”

The complementary role of the private sector, its effectiveness and its dynamism, are presented by the Supreme Constitutional Court as truths belonging to the register of the unquestionable. The nature of this type of norm is to be postulated without being debatable. The status of unquestionability is applicable to, among others, the norms of an ideological order. They constitute a system of conventional beliefs, the definition of which the people endorse because they belong to what is held as obvious. What interests us here is to note that this category of the normal, both natural and commonly accepted, is thereby legitimate and thus morally desirable, and that the law rests upon this twofold dimension of legitimacy and morality, while constructing it. It is only socially that the categories to which beings and objects are assigned or assignable are universal and necessary. These categories “are only imperative for all by virtue of an inter-subjective constitution of their validity and of their both desirable and obligatory character (and not because they are anchored in society defined as “a system of effective forces” or in the language). This constitution is realized through formations and reciprocal attributions of mutual expectancies, as well as through a naturalisation and moralisation of the schemas and beliefs incorporated in these categories” (Quéré, 1994: 35). In the words of Jean-Noël Ferrié, “normality is deduced, not from conformity, but from publicity itself. From the fact that something is visible, people think that people think it is normal. The repetition of the statement of belief only means that the people have not themselves to think the normality of the matter; it is sufficient for them to think that others think that it is normal for them to behave, whatever they may themselves think about it, as if it were” (Ferrié, 1997: 135).

### **Conclusion: Textual permanence and change of norm**

It is known that the law, to use the words of Gérard Timsit, is both speech, writing and silence. “Speech: the law is the act of conveying the will and intentions of its author” who predetermines its meaning. Writing: “text offered to the reader and its addressees” who, by reading it, “contribute to the determination – co-determination – of its meaning through the interpretation and performance they make of it”. The law is thus independent of the consideration of its author, as of its initial public and of the circumstances of its production. Silence: “the addressee of the norm thus uses the blank spaces or the vagueness of the text to introduce, at least partially, his own interpretations”. The latter arises out of the reading of the text which the addressee of the norm performs and this reading is closely linked to the context in which it operates (Timsit, 1993: 11-12).

This reading of the text belongs above all to the judge. The judge is neither the mouthpiece of the law nor the loyal interpreter of its spirit, but rather the artisan of its meaning at each recurrence. The only restricting frame in which this reading is integrated is that of the textual formality. “The law is the meaning of legal statements which the community produces and does not cease to reproduce” (Lenoble and Bertin, 1990: 55). It is thus a matter of linguistic operation of which the guarantees of accuracy and justice are, to say the least, difficult to grasp. It remains that the judge must justify himself in the eyes of the public, which means that he must give a ruling in the order of the acceptable. The judicial determination of what is

acceptable does not however consist in the discovery of a pre-established meaning, but in the process of construction (possibly collective) of a meaning perceived as contextually shared. The question arises then of the consideration of the ways of constituting this meaning within the judicial space. One must therefore underscore here the fact that the legal construction of meaning arises out of an objectivisation of the social which is based on a world shared with common sense.

“The epistemological caesura between practical knowledge and scholarly knowledge is not of the same nature as that which is usually accepted by sociologists” (Coulon, 1987: 50). The professional does not occupy a commanding position enabling him to decipher the rules with which the individual, considered as a “judgemental dope”, could only comply. Both typify and categorize the world, briefly, both produce a visibility of the social making it possible to act on it. In this process, both adopt a documentary method of interpretation. They seek the underlying homologous model which is designated by the instance and which at the same time designates it. They proceed, moreover, in an indexical and reflexive manner. The indexicality expresses the fact that for each individual the signification of language which he employs depends on the context in which this language appears, thus on the conditions of its use and articulation. This is what Cicourel has called the “retrospective-prospective character of events” (Cicourel, 1979: 69-71). Reflexivity expresses, for its part, the property which activities have of presupposing something at the same time as making that thing observable. It constitutes the performative act which, in the description of the social which it carries out, produces the social through the motivated consent of persons who already have these expectancies (Garfinkel, 1967). It is practice which makes the rule, interaction which expresses the code, and not the rule which conditions the practice or the code which determines the interaction; only constant actualisation enables the rule or the code to exist.

Seeing that he is not situated in the purely technical space of his activity, the judge functions by adopting the “thesis of the reciprocity of perspectives” (Schütz, 1971). Unable to objectively know the social point of view of a problem, he employs two fundamental idealisations: on the one hand, the interchangeability of standpoints (one can change places and thus have the same point of view as that previously occupied by the other) and, on the other hand, the congruency of the system of relevances (all the witnesses of the same performance suppose that the others have come to see it for the same reasons as themselves, that they take with them an identical empirical interest, notwithstanding their different biographies). Doing this, the judge objectivises, with regard to the question he is requested to resolve, what he considers to be a social point of view, and this point of view reflexively becomes the reality, owing to the very fact that one can appeal to the ruling of the judge to attest its existence. Thus, by asserting to interpret the social, the judge creates it and lends it a substance which is all the greater than this creation because it passes under cover of translation, appears in the light of a vivid normality: “So thinks the society”.

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