Selective Revolution from the Bench

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By definition, the executive power and the legislative power are granted on a limited-term basis; by contrast, the judiciary power is generally granted on an indefinite term basis. Hence, in periods of political transition, when the executive and legislative branches experience power vacuums, the judiciary branch provides much needed continuity. At a time when political forces compete for power, the existence of the judiciary helps to recast the conflicting interests in terms of legal cases that can be resolved peacefully by law. Also, the power vacuum that arises in times of political transitions is perceived by the judiciary as an opportunity to reassert itself in the emerging political landscape.

In the MENA region, and during the transitional period of the Arab Spring, judicial power played a key role in the fate of the revolution. The Supreme Constitutional Court of Egypt has forced the dissolution of parliament on three separate occasions throughout the Egyptian revolution. In Brown, (2013), Nathan Brown argues that no country better illustrates the potential role of a constitutional court in an unconstitutional setting than Egypt during the tumultuous events and constitutional chaos of the last two years (2011-2013). In June 2012 the SCC dissolved the first post-revolutionary parliament. In November 2012, anticipating an unfavorable ruling by the SCC, President Morsi took measures to remove the process of writing the constitution from judicial oversight; in July 2013 the SCC moved to suspend the constitution that was enacted in December 2012, thereby overriding Morsi’s decision. It is fair to say that the fate of the Egyptian revolution was to a large extent decided by the Supreme Constitutional Court.

In Tunisia, the fate of the revolution was to a large extend influenced if not fully determined by the judicial power. The Administrative Tribunal of Tunisia acted as a guardian of the rule of law by defending the supremacy of the constitution, by ruling on cases pertaining to the conduct of elections, and by protecting civil rights and freedoms. Also, the Administrative Tribunal intervened with the constitutional assembly to prevent the enactment of laws that were intended to curtail judicial independence. The Administrative Tribunal of Tunis was able to act as a guarantor of the ideals of the revolution pushing towards a political change even when needed.

Despite a history of authoritarian regimes in the region, there have been several instances where the judicial power engaged in a tug of war with the executive branch and tried to uphold the rule of law in politically sensitive cases. However, while judges engage in judicial activism to carve more space for citizens to fulfill their political rights, we find the same judges playing a conservative role when it comes to family matters and gender roles. Hence, the new gains achieved by women in the constitutions of the Arab spring are being offset in practice by reactionary judicial practice, as we illustrate by means of a set of landmark court cases that we review in turn.
The goal of this article is to explore the dichotomy between the role of the judiciary in social matters versus its role in political matters and explain its causes. By contrasting cases that pertain to political matters against cases that pertain to gender matter, we explore the pattern of behavior where judges have to balance their role as impartial arbiters of political divisions against their role as partisan concerned citizens, and we assess gender constitutional gains in deeply divided societies.