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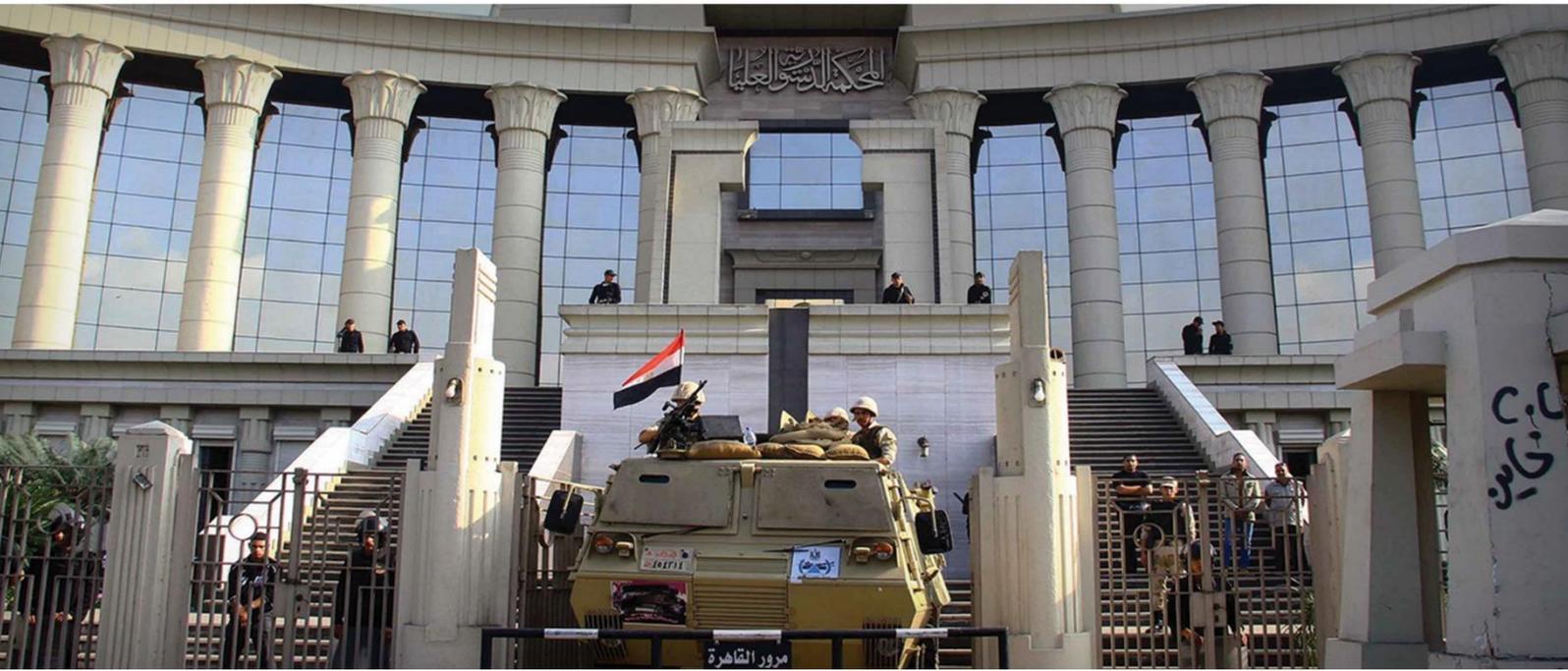
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# Egypt's Constitutional Court Half a Century of Transformations

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## Egypt's Constitutional Court: Half a Century of Transformations

Abbas Qabbari

In September 2021, Egypt's Supreme Constitutional Court (SCC) marked its golden jubilee (the 50th anniversary of its inception), as it was established under the 1971 Constitution to succeed the High Court, which had been established by Gamal Abdel Nasser in 1969<sup>1</sup>. Throughout its history, the Supreme Constitutional Court has played a significant political role in public life. However, this role has increased during the last ten years that followed the January Revolution (2011). During this period, the SCC adopted a counter-revolutionary track, as it sided with the military's authority and helped them eliminate Egypt's nascent democratic experiment.

This paper addresses the political scene in which the SCC intensified its presence, especially during the reign of late President Mohamed Morsi, and how it used its reputation, judicial accumulation and experiences of its members in the midst of a political battle par excellence that pulled it out of its due judicial neutrality and impartiality.

The January Revolution (2011) was temporarily victorious, as it was able to end the reign of former President Hosni Mubarak and remove him from his position as the head of the state, before the military regime resumed usurpation of power and overturned the votes of the Egyptian electorate. However, the question here is: Where was the Supreme Constitutional Court at the time, and how was its relationship with the regime?

The relationship had been strained between Hosni Mubarak and the judges of the Supreme Constitutional Court following the appointment of Counselor Farouk Sultan as head of the SCC in July 2009, where the judges considered this decision an aggression against the independence of the judiciary and a transgression from the President of the Republic against them, given that Sultan came from outside the SCC judges<sup>2</sup>, which violates the customs of the court, which at the time relied on absolute seniority in appointment of its leaders.

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<sup>1</sup> Established by Law 81 of 1969 published in the Official Gazette No. 35 bis on August 31, 1969

<sup>2</sup> Counselor Farouk Sultan assumed presidency of the South Cairo Court in 2006, then was appointed as First Assistant to the Minister of Justice for the Specialized Courts, before moving to the Supreme Constitutional Court.

The statements of Counselor Tahani Al-Gebali, a member of the court, at the time was to a large extent expressive of the state of rage among the court judges, as she indicated that "what has recently happened to the Supreme Constitutional Court bleeds the heart, being a violation of all norms and laws and a circumvention of the methods used within this deep-rooted constitutional institution,"<sup>3</sup> she said.

Also, the so-called "independence judges" were at the forefront of solidarity with the counselors of the Supreme Constitutional Court in rejecting the appointment of counselor Farouk Sultan as the court head<sup>4</sup>.

This state of objection was boosted by judicial procedures backing the position of the Supreme Constitutional Court, where the Administrative Court accepted a lawsuit challenging Mubarak's decision to appoint Counselor Sultan as head of the SCC, and referred the case to the Supreme Constitutional Court to decide on the constitutionality of Article 5 of the SCC Law<sup>5</sup>. However, in line with the status and method of appointment that has been established in the aftermath of the military coup (2013), the Supreme Constitutional Court rejected the case in 2016, under the pretext that the Administrative Court is a judicial body that has no jurisdiction in filing or referring such cases. It is noteworthy that the aforementioned ruling was issued under the presidency of Counselor Adly Mansour (who was appointed as transitional president of the republic after the military's overthrow of the late President Mohamed Morsi) and the membership of Counselor Abdel Wahab Abdel Razek (who was later appointed Speaker of the Senate) and Counselor Hanafi Al-Gebali (who was later appointed Speaker of the House of Representatives)!

During the early days of the January 2011 revolution, a state of anticipation prevailed in all Egyptian official circles, amidst the sudden popular movement and the confused decisions of the Egyptian presidency and government to besiege it, then attempts to appease it, before Mubarak's decision to step down in February 2011.

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<sup>3</sup> Farouk Sultan the judge who was appointed by Mubarak as head of the Supreme Constitutional Court and was boycotted by the court counselors, Al-Masry Al-Youm, [link](#)

<sup>4</sup> Ibid.

<sup>5</sup> The appeal against appointment of Sultan as head of the Supreme Constitutional Court postponed, Youm7, [link](#)

Like other traditional state institutions, the Supreme Constitutional Court did not show an early attitude towards the revolution, other than the remarkable appearance of the ordinary courts that handled the trials of the symbols of the Mubarak regime, as well as the State Council courts that accompanied the glowing political movement after the revolution, through the rulings they then issued. Anyway, the SCC did not have a real role regarding electoral benefits in the presidency and parliament, except at a later stage.

### Tahany Al-Gebali

However, Counselor Tahani Al-Gebali, deputy of the Supreme Constitutional Court, played a pivotal role in the events at the time, as she served as a media spokesperson for the Constitutional Court! She released dozens of statements that revealed the position of the SCC judges on the new era, which contradicts the role of the judge and his/her need to refrain from expressing his views on public and political issues, in addition to the fact that Al-Gebali belonged to the Supreme Constitutional Court, the country's highest court, that may undertake the task of separation of powers.

In a conference organized by the Nasserite Party on the constitutional amendments in March 2011, Al-Gebali expressed her opinion on the necessity of starting with constitutional reform first, criticizing Article 189 of those amendments, which stipulates that the elected members of the People's Assembly (upper chamber) and the Shura Council (lower chamber) shall meet within six months of election to choose a constituent assembly that shall work on drafting the constitution within six months of its election<sup>6</sup>. On another occasion, Tahani al-Gebali warned against participation of the members of parliament in the Constituent Assembly, due to the existence of challenges before the SCC of the unconstitutionality of some provisions of their election, which represents an indication that there is a deliberate intention to dissolve the People's Assembly afterwards<sup>7</sup>.

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<sup>6</sup> Tahani Al-Gebali: Constitutional reform is necessary before the presidential elections, Al-Masry Al-Youm, [link](#)

<sup>7</sup> Tahani Al-Gebali: I warn of the danger of the participation of members of the People's Assembly in the Constituent Assembly, Al-Masry Al-Youm, [link](#)

Later, Al-Gebali released her well-known statement that President Mohamed Morsi had lost his legitimacy as President of the Republic, and that the Supreme Constitutional Court did not seek a clash with the President of the Republic, but Morsi was the one who sought that<sup>8</sup>.

These statements were not just part of a media activity in which Al-Gebali disclosed the views and opinions of the SCC judges and their concerns. Rather, they were indicative of existence of a media bombing machine through which the SCC was expressing a tireless support of the Supreme Council of the Armed Forces (SCAF) in the face of the revolutionary forces. The testimony of the New York Times' David Patrick and the journalist May Al-Sheikh, which they gave as part of a complaint submitted by MP Mohamed Al-Omda to the Prosecutor-General against Tahani Al-Gebali<sup>9</sup> confirms the existence of what constitutes a purely political act that amounts to legal crimes that are altogether incompatible with the work of the judge. The two witnesses confirmed that Counselor Tahani al-Gebali had received them in her office at the Supreme Constitutional Court, and told them that she had advised the SCAF not to hand over power to civilians before drafting the country's new constitution, that she was cooperating with the SCAF since May 2011, and that she had helped the military council produce the so-called El-Selmi Document, including a supra-constitutional principles in favor of the military, giving it a deterrent power to interfere in political affairs.

All these statements and positions indicate a deliberate intention from the Supreme Constitutional Court to eliminate the January Revolution and to assist the SCAF in destabilizing the new democratic track and then overthrowing it later.

## Judicial bullets

The successive rulings issued by the Supreme Constitutional Court ultimately led to eliminating the democratic track, and helped to a large extent in consolidation of the coup successive steps that culminated in the statement announced by Sisi on 3 July 2013.

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<sup>8</sup> Tahani Al-Gebali: Morsi lost legitimacy as President of the Republic, Al-Watan Gate, [link](#)

<sup>9</sup> The testimony of the New York Times director in Cairo against Al-Gebali, Youm7, [link](#)

## Political isolation law and dissolution of People's Assembly

The Supreme Constitutional Court issued In its session held on June 14, 2012 two extremely important rulings; the first, regarding the unconstitutionality of the political Isolation law (affecting the remnants of the Mubarak regime); the second, regarding the dissolution of the People's Assembly. These two rulings were political par excellence, and they were correlated in the timing, aim and context, representing clear evidence of the partnership between the Supreme Constitutional Court and the Supreme Council for the Armed Forces in disrupting the democratic process. Counselor Farouk Sultan, head of the Elections Committee, which suspended the political isolation law and referred it to SCC, was at the same time head of the SCC! He was also the same person who issued a ruling dissolving the People's Assembly in the same session!

The matter did not stop at this formal suspicion, which is easy to refute. In addition, the two rulings were contradictory in the result as well as in the main reason on which they relied. The ruling on the invalidity of the political isolation law was mainly based on the rule of separation of powers, and that the parliament had arranged a penalty without a court ruling depriving Mubarak regime's remnants of the exercise of political rights, which represents an encroachment on the judiciary by the legislative power. At the same time, the Supreme Constitutional Court's ruling to dissolve the People's Assembly was an encroachment on the executive power in making the decision to dissolve, which is the exclusive authority of the President of the Republic or whoever acts on his behalf.

## The SCAF trouble

In light of a confused political path, the Supreme Council of the Armed Forces (SCAF) wanted to dissolve the People's Assembly and restore the legislative power once again to besiege the newly elected president and tighten the noose on him before he takes over his duties. This desire was met with a legal obstacle represented in the inability of SCAF, which represented the country's presidential authority at the time, to issue a decision to dissolve the parliament, as the constitutional declarations it had issued lacked this jurisdiction. Here, the Supreme Constitutional Court (SCC) granted the Military Council two gifts within the framework of its ruling of the unconstitutionality of the laws of the People's Assembly election. The first was to stipulate that the parliament was dissolved by the force of the law, to address the absence of constitutional declarations from provisions that would allow the SCAF to issue a decision to dissolve People's Assembly. The second gift was to block the

road to the new president's likeliness to call for a popular referendum on dissolution of the parliament. The SCC ruling stipulates (... with the consequence that it ceases to exist by force of law as of the day of its election without the need to take any other action).

Later, when President Mohamed Morsi issued a decision to restore parliament, the SCC played the same supportive role for the military junta, by issuing a political statement this time stating that, "the court will urgently consider the appeals submitted to it, and demand a halt to the implementation of the president's decision", a statement that coincided with the convening of the SCAF (without presence of the President of the Republic), defending the decision to dissolve the People's Assembly and that it was in response to the SCC ruling. SCAF also justified the issuance of the complementary constitutional declaration through which it seized legislation, on the grounds of necessity and the political, legal and constitutional conditions that the country was going through.

Thus, the harmony was apparently present between the SCC and the SCAF in a shuttle response that the Supreme Constitutional Court had never experienced in considering the case and issuing judgments.

This was followed by the SCC issuance of a ruling to stop the President of the Republic's decision to reinstate the parliament, which was the first precedent where the SCC followed up implementation of its rulings by itself, canceling a sovereign decrees of the Presidency of the Republic without the administrative judiciary's request to adjudicate them as an administrative decision, which contradicts the approach that the Supreme Constitutional Court adopted when it later addressed the issue of the two Egyptian islands of Tiran and Sanafir, which will be discussed here later.

## 2012 CA and the 2013 C50

Days before the military coup, the Supreme Constitutional Court issued a ruling invalidating the law on the criteria for electing members of the Constituent Assembly for drafting the 2012 Constitution. The ruling relied on the 2012 Constitution itself to invalidate the law according to which the 2012 Constituent Assembly (CA) was formed!

The basis for challenging the CA unconstitutionality was participation of members of the People's Assembly and the Shura Council in its membership, alleging that it is not one of their rights, the same

pretext that was reiterated by Counselor Tahani Al-Gebali a long time before the issuance of the ruling, as stated above.

The strange thing is that Counselor Adly Mansour, a member of the Constitutional Court that issued a ruling on the unconstitutionality of the Constituent Assembly law, issued a law/decreed when he became the transitional president after the coup, to form a 50-member committee (C50) to draft a new constitution by direct appointment, based on a constitutional declaration issued following the military coup. The even more surprising was that counselors Mohamed Abdel Aziz Al-Shennawi and Mohamed Khairy Taha Al-Naggar, members of the body that had issued a ruling that the Constituent Assembly law was unconstitutional, participated a few days later in the membership of the Committee of 10 formed by Adly Mansour to draft a proposal to amend the 2012 Constitution! This behavior shows the state of double standards and contradiction between the rulings on the judiciary platform at the Supreme Constitutional Court and the steps of the democratic path that had a great popular ground, where the SCC judges were supportive of the coup steps that lacked legality and legitimacy, and were devoid of any national political consensus that the court claimed was absent when it decided to withdraw from the Constituent Assembly in 2012 - as the SCC then issued a political statement in which it announced its political position to withdraw from the constituent assembly allegedly due to "the changes that occurred in the national consensus on the criteria on which it was established, only two days before the issuance of its ruling to dissolve the People's Assembly.

### SCC and immunization of the coup

The greatest service that the Supreme Constitutional Court provided to the coup was the decision of Counselor Adly Mansour, the head of the Supreme Constitutional Court at the time, who had only taken office forty-eight hours before<sup>10</sup>, to accept and bless all the steps of the road map decided by the coup leader, which revealed features of a promising partnership that have become clear little by little later.

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<sup>10</sup> President Mohamed Morsi issued Decree No. 346 of 2013 appointing Adly Mansour as head of the SCC as of July 1, 2013, Official Gazette No. 23 bis on June 6, 2013

## Immunization of presidential and parliamentary elections

Contrary to its strict stance on the results of the elections that took place after the revolution, and its standing in the way of a smooth transition of the elected institutions, the Supreme Constitutional Court showed infinite flexibility with the July 3 road map, where Counselor Adly Mansour issued a strange decree/law<sup>11</sup> on amending the SCC system of litigation dates and procedures when considering the law that organizes the presidential or parliamentary elections, by shortening duration of procedures, as an exception to normal conditions, to only three days, provided that rulings are issued within only five days from the date of the first session. Surprisingly, the SCC accepted the decree/law without the slightest objection. Later, Al-Sisi canceled this decree/law after holding the presidential and parliamentary elections under his rule<sup>12</sup>, which represents a clear-cut agreement to fortify these measures of the coup authority.

On the other hand, the Supreme Constitutional Court acquired an exemplary position in the 2014 Constitution, where observers considered it a reward for its role in supporting the military coup. For example, the Constitution adopted a purely seniority mechanism in selecting the president, deputies and members of the SCC. Also, the court's general assembly became the one concerned with choosing these positions, while the role of the President of the Republic was limited to issuing the appointment decision, which, however, was changed in the 2019 constitutional amendments<sup>13</sup>.

## Constitutional cadres and political rulings

The Supreme Constitutional Court has provided the military coup administration with many cadres and attitudes, as things did not stop at the position of Counselor Adly Mansour, who was appointed as the transitional president after the overthrow of the elected president, where Counselor Abdel

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<sup>11</sup> In addition to the abolition of previous restrictions established by the 2012 constitution on the same laws, Law No. 26 of 2014 was issued to amend some provisions of the Law of the SCC, the Official Gazette, No. 13 bis (d), 1 April 2014

<sup>12</sup> Decree/Law 91 of 2015, Official Gazette, No. 30, continued (A) July 25, 2015

<sup>13</sup> This changed in the 2019 Constitution, which completely reversed the appointment situation, where the President of the Republic has become the only one who appoints the head of the SCC from among the five oldest deputies without any role for the SCC General Assembly. The President of the Republic also appoints the SCC deputy from among two candidates, one of whom is nominated by the General Assembly of the Court and the other nominated by the head of the court. The head of commissioners committee is also appointed by a presidential decree based on the nomination of the head of the SCC after consulting the court's general assembly

Wahab Abdel Razek<sup>14</sup>, the current Senate Speaker, and Counselor Hanafi Al-Gebali<sup>15</sup>, the current House of Representatives Speaker, are the last two presidents of the Supreme Constitutional Court, in a clear indication of the continuity of the partnership between the court and the military, that had been initiated by Adly Mansour.

Many observers see in these selections a clear reward for what each of them presented in the landmark cases that paved the way for the coup, as Counselor Abdel Razek chaired the court which ruled that the articles of political isolation law were unconstitutional, which enabled Lt. General Ahmed Shafiq to return to the presidential race<sup>16</sup>, and he was also a member of the court which ruled that the Constituent Assembly law was unconstitutional. Counselor Hanafi Al-Gebali was a member of the court body that ruled the dissolution of the People's Assembly in 2012.

Abdel-Wahab and Al-Gebali also provided the clearest example of the partnership between the SCC and the coup authority, with their rulings on the Tiran and Sanafir case, cancelling the ruling on the nullification of the agreement on waiver of the two islands issued by the Administrative Court, approved by the Supreme Administrative Court, the top State Council court, and thus allowing the completion of Abdel Fattah Al-Sisi's cessation of the two islands to Saudi Arabia.

### Finally,

The role of Egypt's Supreme Constitutional Court over the last ten years has been largely biased towards the military authority; at the expense of the homeland, the revolution and the people. The SCC members have played a decisive role in sabotaging the democratic path produced by the January revolution, while fortifying the illegal path produced by the military coup.

The following table may show the extent of the SCC efforts in tracking the political steps taken during this period and destroying them one after the other in an accelerated way, against the slow and patient nature of the SCC litigation procedures.

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<sup>14</sup> He was appointed as deputy of the SCC in 2001 and then as its head in 2016 by Decree No. 252 of 2016 published in the Official Gazette No. 21 bis A on June 1, 2016

<sup>15</sup> He was appointed as deputy of the SCC in 2001 and then as its head in 2018 by Decree No. 339 of 2018 published in the Official Gazette No. 29 bis C on July 21, 2018

<sup>16</sup> A ruling was issued on unconstitutionality of Article 1 of Law 17 of 2012 amending some provisions of Law 73 of 1956 regulating the exercise of political rights. It was published in the Official Gazette No. 16 bis A on April 23, 2012

The table addresses the inflamed period that followed the election of the People's Assembly and the Shura Council, as well as during the 2012 presidential election and the work of the Constituent Assembly to produce the 2012 constitution, as follows:

Date	Procedure	Statement
April 23, 2012	Issuance of Political Isolation Law No. 17 of 2012	The law aims to prevent the remnants of the Mubarak regime from running for the presidential election
April 25, 2012	The Election Committee accepted Lt. General Shafiq's grievance against the isolation law and referred the grievance to the SCC	The Elections Committee was headed by Counselor Farouk Sultan, who was at the same time the head of the SCC
April 26, 2012	Announcing the final list of candidates	Shafiq is back to the presidential election race
May 23, 2012	First round of elections	Resulted in a second round between Morsi and Shafiq
June 12, 2012	The SCC General Assembly withdraws from the Constituent Assembly	The SCC General Assembly announced this in a political statement in which it justified its withdrawal from the CA by changes that occurred in the national consensus on the founding criteria
June 14, 2012	The ruling on the unconstitutionality of the isolation law	which enables Shafiq to run for the second round
June 14, 2012	The SCC ruling on dissolution of the People's Assembly due to the unconstitutionality of the laws under which its elections were held	The SCC here played the role of the President of the Republic in dissolving the People's Assembly and was not satisfied with issuing a ruling of the unconstitutionality of the law as it did in the parliaments of 1984, 1987 and 1990
June 15, 2012	The SCAF issued a decree to dissolve the People's Assembly	Without calling for a popular referendum

June 16, 2012	The second round of the presidential election	-
June 17, 2012	The SCAF issued the supplementary constitutional declaration	It included obligating the President of the Republic to be sworn before the Supreme Constitutional Court
June 24, 2012	Announcing President Morsi's victory in the presidential election	-
June 30, 2012	President Morsi is sworn in before the Supreme Constitutional Court	-
July 08, 2012	President Morsi's decision to restore the People's Assembly	By removing the SCAF decree that considered the People's Assembly dissolved by force of law
July 09, 2012	The SCC issues a statement declaring that it will consider lawsuits challenging the implementation of the president's decision to restore the People's Assembly	Following up its judgments is not part of its role
July 10, 2012	The first session of the People's Assembly after restoration	It was decided to hold it at ten a.m. instead of twelve at noon to keep pace with the SCC consideration of the appeals against its restoration
July 10, 2012	The SCC ruled that President Morsi's decision to restore the People's Assembly was unconstitutional	-
Nov. 21 2012	Issuance of a constitutional declaration to immunize the Shura Council and the Constituent Assembly against dissolution	It included establishment of the Revolution Prosecution and the re-trials of the Mubarak regime symbols
Dec. 02, 2012	The SCC considers two cases for dissolving the Shura Council and the Constituent Assembly	Despite the constitutional declaration that prohibits this

Dec. 02, 2012	The SCC siege by supporters of President Morsi and the SCC suspends its work	It issued a statement to this effect
June 02, 2013	The ruling on unconstitutionality of the Constituent Assembly Law	Based on the 2012 Constitution, which was approved by the same assembly and was put to a referendum
June 06, 2013	Morsi's decision to appoint Adly Mansour as head of the SCC	As of July 1, 2013
July 01, 2013	Adly Mansour assuming his post as head of the SCC	-
July 03, 2013	The military coup statement	It was decided that the head of the Supreme Constitutional Court shall manage the affairs of the country as a transitional president until a new president is elected
July 05, 2013	The Shura Council was dissolved by a constitutional declaration issued by the interim President of the Republic	-
July 21, 2013	The SCC participates with two members in the Committee of Ten that drew up a proposal to amend the 2012 Constitution	-