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The use of foreign law in constitutional adjudication remains a deeply contested issue in global constitutionalism. Existing scholarship has predominantly focused on examining this issue in common law jurisdictions, comparatively paying little attention to how constitutional courts operating within civil law jurisdictions indeed engage with foreign law in constitutional interpretation, decisions, and reasoning. In filling in this gap, this Article examines the use of foreign law in the jurisprudence of Egypt's Supreme Constitutional Court (SCC). That is, this Article challenges the assumption that constitutional courts in civil law jurisdictions resist the idea of transnational constitutional borrowing.

In doing so, it reveals how the SCC has engaged in implicit and selective constitutional borrowing, whereby foreign judicial precedents and comparative legal analysis are incorporated into the Court's reasoning without being explicitly acknowledged as authoritative legal sources. In this context, the Article identifies two significant issues. First, the principle of positivism in civil law jurisdictions restrains constitutional courts from explicitly engaging in comparative-foreign interpretation and reasoning. The Article argues how this principle has forced the SCC to cautiously engage with foreign law.

The second issue sheds light on a notable period in the SCC's history during which it showed openness to the use of foreign law in constitutional interpretation and reasoning. Drawing upon the SCC's experience, the Article emphasizes that principles and foundations of civil law jurisdiction never hindered the Court from experiencing the phenomenon of global constitutionalism.

Keywords: Global Constitutionalism - Civil Law Constitutionalism - Implicit Constitutional Borrowing - Constitutional Interpretation - Egyptian Supreme Constitutional Court

INTRODUCTION

The steady flow of the phenomenon of global constitutionalism can be observed in various occurrences. Most notably, such phenomenon is evident in the fact that most contemporary constitutions, despite being diverse, share a commitment resemblance to enshrining a set of rights and freedoms of a universal nature, as well as some of the constitutional principles regarding rule of law. This commonality among contemporary constitutions regarding the commitment to certain rights and freedoms, as well as

principles related to rule of law makes the idea that constitutional courts across different countries may share similar interpretations of these rights and principles foreseeable. I refer to terms like resemblance, commonality, and similarity to mean borrowing, adoption, or harmonization, but not to homogeneity, unity, or uniformity. As I will argue later, while the phenomenon of constitutional globalization cautiously and occasionally shyly made its way to the jurisprudence of the Egypt's Supreme Constitutional Court (SCC), this latter was somewhat keen on ensuring that borrowed and adopted foreign interpretations were consistent with its own judicial precedents as well as the Egyptian constitutional framework.

Mark Tushnet's perception of the inevitability of global constitutionalism calls for setting the stage to discuss the globalization of domestic constitutional law in a way that implies that traditions of exceptionalism are likely to diminish over time.¹ However, global constitutionalism, according to Tushnet, does not address the distinct issue or debate regarding whether something that can be accurately described as "a constitution for the international system, or a global constitution," actually exists.² In this article, I refer to global constitutionalism from the perspective of the gradual fading of the national character of constitutional law in some aspects. Herein I discuss the national constitutional courts' reliance on foreign legal sources. Even the manifestations of such reliance are multiple, and foreign legal sources are widely varied and diverse, but so too differences in specifics also exist, which means that my view of this reliance and such resources is limited to foreign judicial precedents and comparative legal literature.³

Although the phenomenon of global constitutionalism is always at the center of the debate of legal scholars and political scientists,⁴ scholarship has largely focused on addressing this phenomenon in supreme and constitutional courts that operate within common law systems more than those belonging to civil law systems. Perhaps this seems justified by the fact that courts of common law systems appear to be more authoritative and more judicially active.⁵ In fact, the argument regarding the authoritarianism and judicial activism of supreme and constitutional courts in common law systems is simply straightforward. Doctrinally, in a common law tradition, the power and esteemed position of the supreme and constitutional courts are usually derived from the fact that judges have the capacity to develop the corpus of law through the exercise of their rule-making power.⁶ Lord Hodge, the Deputy President of the UK Supreme Court, once said "Judge-made law is an independent source of law in common law systems ... The law of obligations is essentially judge-made. The law of contract remains in large measure judge-made. The law of tort (delict) is, with a few statutory adjuncts, also judge-made."⁷ Another contributing factor is

¹ Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49(4) VA. J. INT'L L. 985, 987 (2009).

² *Id.* at note 6.

³ It should be noted, however, that in what follows, I will sometimes include within the meaning of foreign legal sources the comparative interpretations of certain rights and principles found in international conventions and treaties, as reflected in foreign courts decisions or comparative writings of scholars.

⁴ Anne Peters and Klaus Armingeon, *Introduction: Global Constitutionalism from an Interdisciplinary Perspective*, 16(2) IND. J. GLOB. LEG. STUD. 385, 386 (2009).

⁵ Richard L. Marcus, *A Common Law Perspective on the Supreme Court and its Functions*, 81 STUDIA IURDICA 15, 18 (2019); See BRICE DICKSON (ED.), JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS (2009).

⁶ Marcus, *id.*, at 20

⁷ Lord Hodge, *The Scope of Judicial Law-Making in the Common Law Tradition*, 84(2) RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT / THE RABEL J. OF COMP. & INT'L PRIV. L. 211, 212 (2020). Lord Hodge also quoted Lord Nicholls, a distinguished member of the House of Lords, stating "The common law is judge-made law. For centuries judges have been charged with the responsibility of keeping this law abreast of current social conditions and expectations. That is still the position. Continuing

the selection process, which results in judges with substantial experience and a diverse legal background with only a limited sense of attachment to institutionalized judicial bureaucracy.⁸ In describing this factor, Joy Milligan once argued that the American legal system “is already structured so as to take advantage of variations in judges’ thinking about the law ... Different legal rulings serve as a fodder for deliberation that occurs at multiple levels ... Consideration of a broad range of political-moral views is likely to lead to better answers ...”⁹

In contrast to the writings of most legal scholars and political scientists, I choose to discuss the phenomenon of global constitutionalism in constitutional courts operating within civil law systems. Seen through the spectacles of civil law tradition, examining how constitutional courts engage with constitutional globalization merits observation and scrutiny. I refer here to the considerable difficulty that an idea like a constitution beyond borders may encounter to find its way to the decision of a constitutional court in a civil law system than another in a common law one.

In fact, the uneven reception of constitutional globalization – particularly in the context of using foreign judicial precedents and comparative constitutional literature – between civil law and common law courts reflects deeper structural and epistemological discrepancies. This disparity may be attributed to a variety of institutional factors.¹⁰ These include, *inter alia*, the pathway to judicial office,¹¹ modes of judicial appointment,¹² and the extent of judges’ integration into bureaucratic judicial structures and career incentives.¹³ However, for the purposes of this article, I will confine my discussion to two analytically significant variables, the second of which is a direct consequence of the first. The first pertains to the positivist orientation of civil law systems, which constrains the universe of legitimate legal sources and marginalizes foreign jurisprudence available to judges when adjudicating cases.¹⁴ The second concerns the institutional judicial function conception embedded within civil law traditions, which tends to narrow the role of judges who serve in a civil law tradition court.¹⁵ Empirically, these features correlate with the

but limited development of the common law in this fashion is an integral part of the constitutional function of the judiciary.” *Id.*, at 213 (quoting Lord Nicholls, *In re Spectrum Plus Ltd* [2005] 2 AC 680, para. 32.)

⁸ Marcus, *supra* note 5, at 20.

⁹ Joy Milligan, *Pluralism in America: Why Judicial Diversity Improves Legal Decisions About Political Morality*, 81 N.Y.U. L. REV. 1211, 1212 (1998). In studying the influence of the interest groups and new media on the selection process of the U.S. Federal Judges, and whether attention should be shifted away from judges’ political ideology back to their legal merit and qualifications, Gerard Fitzpatrick once said that “while we value judicial independence we also want judges to be politically accountable. We therefore insist that candidates for the courts be chosen for their legal qualifications rather than for their political ideology, yet we want assurance that court nominees will be sensitive to-and, to some degree, representative of-the diverse interests of our pluralistic society.” Gerard J. Fitzpatrick, *Appointing Federal Judges: Law, Politics, and Democracy*, 40(3) POLITY 394, 395 (2008).

¹⁰ Nuno Garoupa & Tom Ginsburg, *Hybrid Judicial Career Structures: Reputation versus Legal Tradition*, 3 J. LEGAL ANALYSIS 411, 412 (2011).

¹¹ Marcus, *supra* note 5, at 17.

¹² *Id.*; Harlon Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L. J. 62 (1985).

¹³ Garoupa & Ginsburg, *supra* note 10, at 413.

¹⁴ See MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 13 (1971) (arguing that in a civil law system, the aim is to keep judicial bodies from encroaching upon the legislative domain and to ensure that their function was confine to the strict application of codified legal norms).

¹⁵ See, e.g., *Abstract Constitutional Review and Policy Making*, in DONALD W. JACKSON, C. NEAL TATE (EDS.), COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY 41, 42 (1992) (arguing that in civil law systems, the judiciary’s role is narrowly defined and highly constrained, where judges are expected to act in a subordinate and bureaucratic capacity with a primary task to confirm whether relevance existing laws and statutory provisions applied to a particular case. Within this legal framework, the notion of judge-made law is regarded as a deviation from normative order and an indicative of systemic dysfunction).

observable reluctance of many civil law supreme and constitutional courts to engage with transnational constitutional discourse.

In examining these two variables, my principal point of reference is the Egyptian Supreme Constitutional Court (SCC), which serves in a civil law tradition, and whose jurisprudence has significantly contributed in shaping Egypt's political life and individual rights and freedoms. My argument is that the affiliation of the SCC with the civil law system presents a distinctive framework for understanding its approach to constitutional adjudication. Rooted in the civil law tradition, the Court's legal reasoning has historically been characterized by a strong emphasis on written statutes and the principle of judicial restraint, which tends to limit the scope for judicial activism and the reliance of foreign precedents.¹⁶ This tradition, with its focus on national legal norms, presents challenges to the broader embrace of constitutional globalization. However, my argument in this article extends beyond that to touch on a notable period in the SCC's history which reveals a noteworthy shift towards greater openness to international legal perspectives, as the Court began engaging more actively with comparative law and foreign judicial precedents. This evolution represented a significant departure from the insular tendencies typically associated with civil law traditions, yet it remains constrained by the foundational principles of the Egyptian legal order, which prioritize domestic legal authority over external influences. Focusing on the SCC's experience, I argue that the Court has developed a distinct model of implicit and selective model of engagement with foreign law by incorporating comparative constitutional reasoning through indirect interpretive techniques.

This article explores the concept of foreign law as a source that national courts may cite, examining the underlying reasons that may prompt supreme and constitutional courts to incorporate it in their decision in part I. Part II analyzes the variation in the reliance of supreme and constitutional courts on foreign law in accordance with the specific demands of different legal systems, before I ask whether there are any legal or institutional barriers that hinder the Egypt's SCC ability to rely on foreign law in its decision. Herein, my argument is described as one in which the SCC, given its institutional position in Egypt's judiciary, has voluntarily chosen to distance itself, for a long period of time, from engaging in comparative judicial dialogue. Part III turns to the Court's jurisprudence, focusing on landmark decisions that illustrate its evolving engagement with foreign law, particularly during its period of heightened exposure to global constitutional influences.

I. FOREIGN LAW IN THE JURISPRUDENCE OF NATIONAL CONSTITUTIONAL COURTS – SETTING THE BORDERS

Apart from its traditional use in conflict of laws scenarios, most scholarly work on global constitutionalism adopts a broader understanding of foreign law—encompassing international treaties, foreign arbitral awards, customary international norms, as well as statutory provisions of other states.¹⁷ One striking theme of this is likely Wayne Sandholtz's work on how national courts engage with international legal materials in their decisions.¹⁸ Another example could be found in the work of Margaret Hartka on how the decision of the U.S. District Court of the Northern District of California in *American Baptist*

¹⁶ As noted in the text, several key factors contributing to the difficulty of fully embracing the phenomenon of global constitutionalism have been outlined.

¹⁷ Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98(1) AM. J. INT'L L. 82, 82 (2004).

¹⁸ Wayne Sandholtz, *How Domestic Courts Use International Law*, 38(2) FORDHAM INT'L L. J. 595 (2015).

Churches in the U.S.A. v. Meeseithe,¹⁹ identifies a significant shift from traditional judicial reluctance to a more proactive incorporation of international law into domestic legal frameworks.²⁰

When recognizing the broader meaning of foreign law to acknowledge the relevance of international legal norms, particularly in the interpretative practices of national constitutional courts, one can argue that constitutions, in this context, perform a distinctive role that transcends the internal regulation of political institutions, governance structures, and the protection of fundamental rights and freedoms within the state. They also serve as instruments for mediating the relationship between the domestic legal order and the international legal sphere. This external dimension of constitutional function may be realized through the inclusion of mechanisms that facilitate the incorporation of international legal norms into the national legal system. In fulfilling this function, as Vicki Jackson's asserts, national constitutions tend to follow one of two models.²¹ The first, exemplified by the United States and Canada, requires that international treaties be integrated into the national legal framework through legislative enactment; treaties do not acquire national legal force unless transformed into national legislation by the competent legislative authority.²² The second model, as seen in France and the Netherlands, accords treaties the force of national law automatically upon ratification and official publication, without the need for further legislative intervention.²³

Although the term foreign law in its broad sense, as previously noted, encompasses the entirety of non-domestic legal sources that a constitutional judge may invoke for guidance in the interpretation of legislative provisions arising within the scope of their jurisdiction, this article, for analytical clarity, adopts a more limited definition. Specifically, this article confines the term, foreign law, to refer to foreign judicial precedents and comparative legal scholarship that address the particular legal issue in dispute.²⁴ Foreign or comparative law, as employed by constitutional and supreme courts, may thus be understood as a form of transnational legal reasoning—legal norms that transcend national boundaries and contribute an added dimension to constitutional and statutory interpretation. Such use can enhance the fairness, coherence, and responsiveness of legal interpretation in light of evolving global standards and developments.²⁵ Accordingly, the relevant conception of foreign or comparative law refers to legal sources whose influence is discernible in the jurisprudence of constitutional and supreme courts, particularly when these courts seek to render decisions that resonate with democratic principles and contemporary legal values.²⁶

¹⁹ 712 F.Supp. 756 (N.D. Cal. 1989).

²⁰ Margaret Hartka, *The Role of International Law in Domestic Courts: Will the Legal Procrastination End?*, 14 MD. J. INT'L L. 99 (1990).

²¹ V. C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 5, 6 (2009).

²² See *id.* at 6, 7.

²³ See *id.* at 8. For a more detailed view of the integration of international law in domestic laws, and the judicial interpretive incorporation of international law, see Melissa A. Waters, *Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628-705 (2007).

²⁴ See, e.g., T. GROPPi AND M.-C. PONTTHOREAU (EDS.), *THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES* (2013) (providing empirical analyses across various jurisdictions, demonstrating the extent to which foreign case law informs constitutional adjudication).

²⁵ See, e.g., Eszter Bodnár, *The use of comparative law in the practice of the Hungarian Constitutional Court: An empirical analysis (1990–2019)*, 61 HUNG. J. LEG. STUD., 1–22 (2020) (providing an empirical analysis on how the Hungarian Constitutional Court has engaged with foreign legal sources over a thirty-year period, and revealing that, between 1990 and 2019, the Court issued 9,766 decisions, of which 246 contained at least one reference to foreign law, indicating that comparative law played a role in approximately 205% of the cases).

²⁶ See, e.g., M. Arshakyan, J. Paffarini, and M. R. Staffen, *Constitutional Interpretation and Foreign Law: A Comparative Analysis between the U.S. Supreme Court and the German Federal Constitutional Court*, 16 REVISTA DE DIREITO ADMINISTRATIVO & CONSTITUCIONAL 85–129 (2017) (highlighting the role of foreign law in

In doing so, they frequently draw upon both procedural and substantive insights derived from established non-domestic legal systems.

Against the backdrop of this conceptual clarification, the narrow understanding of foreign and comparative law may be aptly applied to the jurisprudence of the SCC. This article examines the SCC's engagement with foreign law within this limited scope—namely, its selective invocation of decisions rendered by foreign supreme courts and insights drawn from comparative legal scholarship. Such references are employed not as authoritative sources, but rather as persuasive materials that assist the Court in elaborating its constitutional reasoning. The Court's cautious engagement with foreign legal sources is underpinned by several institutional and doctrinal considerations that warrant close attention. Most notable, the Court operated within a civil law tradition, wherein the primacy of codified legislation and the doctrine of judicial restraint significantly delimit the judicial function.²⁷ In this context, the utilization of foreign law is necessarily constrained by the formalist character of the legal system, the prevailing interpretative methodologies, and the explicit prohibition against judicial law-making power. These structural and normative parameters impose a degree of methodological conservatism, compelling the Court to approach foreign legal sources with prudence and circumspection. Accordingly, the Court's recourse to foreign jurisprudence and comparative doctrine reflects a nuanced and context-sensitive exercise—one that seeks to enrich constitutional interpretation without transgressing the boundaries of judicial competence as defined by the domestic legal order.

II. THE UNDERLYING REASONS FOR NATIONAL CONSTITUTIONAL AND SUPREME COURT'S RECOURSE TO FOREIGN LAW

The contemporary judicial practice regarding the recourse to foreign law by national court's is best understood within the broader framework of what has come to be identified in Western legal scholarship as *legal globalization*, and more specifically, *constitutional globalization* or *global constitutionalism*.²⁸ While the advent of modern communication and conflict-resolution technologies has played a pivotal role in shaping the phenomenon of globalization—broadly defined as the increasing interdependence, interaction, and integration of cultural, ideological, and normative systems—equally instrumental has been the transnational diffusion of legal, political, and economic norms.²⁹ This process has fostered not only the cross-border exchange of ideas but also the gradual convergence of constitutional principles across diverse jurisdictions.³⁰ Anne-Marie Slaughter attributes the phenomenon of globalization to the collapse of geographic boundaries and the rapid flow of information.³¹ She argues that law, especially judicially created law, remains largely

shaping judicial reasoning by exploring the methodologies of constitutional interpretation in the U.S. and Germany).

²⁷ As noted by John Henry Merryman and Rogelio Pérez-Perdomo, "In the civil law tradition, legal certainty is a supreme value, which gives a certain rigidity to the legal systems within this tradition." JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 49 (3d ed. 2007).

²⁸ Tushnet, *supra* note 1, at 997, 988.

²⁹ See WILLIAM TWINING, *GLOBALISATION AND LEGAL THEORY* (2000).

³⁰ See SUJIT CHOUDHRY (ED.), *THE MIGRATION OF CONSTITUTIONAL IDEAS* (2006) (exploring how constitutional systems influence one another through processes such as, judicial borrowing, adaption, and transplantation).

³¹ See Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103–1124 (2000).

confined within national borders; however, judges themselves are increasingly participating in the processes of judicial globalization.³²

It is not an overstatement to suggest that constitutional globalization has contributed to the emergence of a shared normative core among constitutional systems, particularly with respect to fundamental rights and freedoms deemed intrinsic to human dignity. Rights such as freedom of opinion and expression, the right to life, the right to privacy, and the inviolability of one's person and property increasingly enjoy recognition as possessing a universal normative status. Against this backdrop, it is both theoretically plausible and empirically observable that national courts may legitimately invoke foreign judicial decisions and legislative models in the interpretation of these rights, the delineation of their normative contours, and the articulation of legitimate limitations upon their exercise. As will be discussed in greater detail below, this transjudicial dialogue reflects not merely pragmatic borrowing but a deeper normative engagement with the evolving architecture of global constitutionalism.³³

Accordingly, the phenomenon of legal globalization, generally, and constitutional globalization, more specifically, emerges as one of the principal driving forces behind the increasing recourse of national courts to foreign laws and judicial decisions in the course of exercising their jurisdiction. In attempting to connect between this globalizing dynamic and growing practice of citing foreign jurisprudence, Gábor Halmai observes that the intensified interaction among constitutional systems, manifested in the reliance by national constitutional and supreme courts on the judgments of their foreign counterparts, signals a fundamental shift.³⁴ This practice, he argues, is no longer merely a tool to enhance the coherence and quality of judicial reasoning in accordance with sound legal logic, democratic values, and international norms and customs; rather, it is contributing to the emergence of what may be described as a *global constitutional order*.³⁵ In the same context, Bruce Ackerman echoes this sentiment, noting that the globalization of constitutional law implies that constitutional questions are no longer the exclusive preserve of the domestic legal order, but instead have come to embody universal concepts and standards.³⁶

While legal and constitutional globalization has undoubtedly served as a foundational rationale for the engagement of national courts with foreign legal sources, it does not constitute the sole jurisdiction for this evolving practice. On the contrary, a constellation of additional factors has converged to pave the way for the increasing judicial openness to foreign laws and decisions. To this point I emphasize that these factors have played a direct and significant role in reshaping the attitudes of national courts, diminishing the reluctance—and in some instances, the perceived impropriety—associated with invoking foreign sources.

I suggest the reasons that my urge national and supreme courts to refer to foreign law and judicial precedents in the course of rendering domestic judgments can be broadly summarized under four main categories. These include: considerations related to the principles and standards of democracy and civilized societies; constitutional interpretive theories; the characteristics and attributes of the legal system; and factors pertaining to the quality and precision of judicial decisions.

³² See *id.* at 1103. Slaughter argues that although globalization is typically associated with integration and corporate expansion rather than with judicial institutions, its impact on courts should not be overlooked. She views the process of judicial globalization to carry significant consequences for the development and interaction of foreign, comparative, and international legal norms.

³³ Jackson, *supra* note 21, at 99.

³⁴ Gábor Halmai, *The Use of Foreign Law in Constitutional Interpretation*, in MICHEL ROSENFELD & ANDRÁS SAJÓ (EDS.), *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 1328, 1346 (2012).

³⁵ *Id.*, at 1328.

³⁶ Bruce Ackerman, *The Rise of World Constitutionalism*, 87 VA. L. REV. 771, 793, 794, 795 (1997).

II.1 *Considerations Related to the Principles and Standards of Democracy and Civilized Societies*

In comparative constitutional jurisprudence, a prevailing scholarly perspective underscores the significance of permitting national constitutional and supreme courts to consult and be guided by foreign legal norms and judicial precedents.³⁷ This approach is posited to bolster the courts' capacity to fulfil their constitutional mandates with greater efficacy and alignment to democratic principles.³⁸ By integrating well-established principles and standards derived from foreign legal systems and jurisprudence, national courts can render decisions that resonate with the foundational norms upheld by democratic societies.³⁹ Such integration not only enriches the interpretative scope of constitutional adjudication but also fortifies the legitimacy of judicial decisions.⁴⁰ When constitutional rulings align with universally recognized democratic values, they transcend parochial legal traditions, thereby enhancing their acceptance and authority both domestically and internationally.⁴¹

The binding nature of constitutional court decisions necessitates adherence by all state organs, including the executive and legislative branches.⁴² Therefore, when these decisions are congruent with democratic principles and international legal standards, they not only reinforce the rule of law but also facilitate broader societal acceptance and compliance. This alignment underscores the judiciary's pivotal role in safeguarding democratic governance and human rights within the constitutional framework.⁴³

Perhaps one of the most compelling articulations of the ideals of democracy and the standards of civilized societies, as a justification for the recourse by national courts to foreign laws and judicial decisions, can be found in a landmark decision rendered by the U.S. Supreme Court in 1988. In reasoning its decision to overturn a death sentence imposed on a fifteen-year-old minor, the Court held that such a sentence constituted "cruel and unusual punishment" under the Eighth Amendment to the U.S. Constitution.⁴⁴ Significantly, the Court observed that the laws and judicial practices of other nations may serve as a persuasive reference in the formation of its decisions.⁴⁵ The influence of foreign

³⁷ See Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005).

³⁸ Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 HARV. J. L. & PUB. POL'Y 653, 658–664 (2009).

³⁹ RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 135–150 (2014).

⁴⁰ Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, in TOM GINSBURG & ROSALIND DIXON (EDS.), *COMPARATIVE CONSTITUTIONAL LAW* 97–102 (2011).

⁴¹ Vicki C. Jackson, *Paradigms of public law: transnational constitutional values and democratic challenges*, 8 I•CON 517, 539, (2010) (emphasizing transnational constitutionalism as a set of guiding values, rather than treating it as the default framework for resolving conflicts between international and national law, could better balance the needs for local input, legitimacy, and effectiveness with the broader appeal to universal principles and reasoning that are integral to functioning constitutional democracies. The author argues that the pursuit of universal ideals is just as central to domestic constitutionalism as its roots in democratic consent and its ongoing support for self-governance. Without striving toward sound principles, a constitution is unlikely to inspire the loyalty and commitment of its citizens).

⁴² Matthias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and Beyond the State*, in PETRA DOBNER & MARTIN LOUGHLIN (EDS.), *THE TWILIGHT OF CONSTITUTIONALISM?* 258, 264 (2010).

⁴³ Jackson, *supra* note 41, at 557; Anna Yeatman, *The Idea of the Constitutional State and Global Society*, 8 LAW TEXT CULTURE 1, 11 (2004).

⁴⁴ *Thompson v. Oklahoma*, 487 U.S. 815, 830 & nn.31, 34 (1988).

⁴⁵ *Id.*

legal sources is particularly evident in the Court's consideration of evolving standards of decency and the jurisprudential insights developed in other jurisdictions.

Once again, the U.S. Supreme Court reaffirmed its position regarding the same issue. Most notably in its decision on the unconstitutionality of imposing the death penalty on individuals who were under the age of eighteen at the time of committing the offense.⁴⁶

The Court held that under evolving standards of decency that mark the progress of a maturing society, the imposition of the death penalty on offenders who were under the age of eighteen at the time of their crimes constitutes cruel and unusual punishment within the meaning of the Eighth Amendment to the U.S. Constitution.⁴⁷ In justifying its decision, the Court explicitly considered the practices of foreign nations, acknowledging their relevance as indicative of boarder moral and legal consensus.⁴⁸ The Court noted that, between 1992 and the year it rendered its decision in 2005, only seven countries aside from the United States—namely Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of the Congo, and China—had executed juvenile offenders. It further observed that since 1992, several of these nations had either abolished the juvenile death penalty or had officially disavowed the practice.⁴⁹ In contrast, the United States, according to the Court, stood alone in continuing to permit the execution of juvenile offenders, a position increasingly inconsistent with global legal and moral development.⁵⁰

In linking the principles of democracy with the settled standards of civilized societies, and the increasing recourse of national courts to foreign laws and judicial decisions, where the former serve as the foundation for the latter, some scholars have argued that democracy and the norms of civilized societies are fundamentally rooted in a framework of basic rights and freedoms granted to individuals under national constitutions.⁵¹ These rights and freedoms are characterized as “fundamental” because they are inherently attached to the human person, such that individuals are entitled to them regardless of any formal bond of citizenship with the state. Among such rights are the right to life, the right to human dignity, the right to education and healthcare, the right to freedom of opinion and expression, the right to privacy, and the inviolability of private property.

Under this view, it is unsurprising that most of these rights and freedoms appear with notable consistency across various national constitutions, a phenomenon that has imbued them with a universal character.⁵² As such, these fundamental rights and freedoms transcend national borders, allowing their interpretation, application, and limitation to be informed by the experiences of foreign legal systems and comparative judicial practices. This cross-border dimension legitimizes the reference by national courts, especially constitutional and supreme courts, to foreign jurisprudence in the process of constitutional adjudication.⁵³ It is this very notion that Justice Anthony Kennedy, one of the most prominent former Justices of the U.S. Supreme Court, appeared to evoke when he argued that “[T]here's some underlying common mutual interest, some underlying

⁴⁶ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1975, 2006 (2004).

⁵² DAVID S. PATTERSON, CONSTITUTIONAL RIGHTS IN A GLOBAL CONTEXT 78 (2014).

⁵³ Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L. J. 819, 833-835 (1999); MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW: A GLOBAL PERSPECTIVE 200 (2018).

common shared ideas, some underlying common shared aspiration, underlying unified concept of what human dignity means.”⁵⁴

It follows that reference to the experiences of nations and judicial practices within them leads to a convergence on a shared understanding of fundamental rights and freedoms, as well as the manner in which these rights should be interpreted and the limitations placed upon them, depending on the cases being adjudicated.⁵⁵ Further, drawing on the experiences of nations and foreign judicial practices concerning fundamental rights and freedoms serves the purpose of ensuring flexibility in judicial interpretation and reasoning and vitality in the application of constitutional principles.⁵⁶ The convergence of nations on a specific meaning of fundamental rights and freedoms reflects their consensus at a particular time, in relation to specific facts and circumstances. However, such consensus should not restrict national courts when interpreting these right and freedoms in a different temporal context, with its own new developments and changing realities.

In the same context, as Ganesh Sitaraman claims, invoking the ideals of democracy and the prevailing principles and standards of civilized societies advances a justification for the recourse by national court to foreign laws and judicial decisions. He argues that the significance of such recourse transcends the mere pursuit of a shared understanding or common interpretation of fundamental rights and freedoms.⁵⁷ Rather, the reliance by national courts on foreign legal sources assumes heightened importance when viewed in light of the reality that states do not exist in isolation, but rather as members of an international community whose recognition and normative acceptance they seek.⁵⁸ Viewed through this lens, the legitimacy afforded by the international community is, in part, reinforced by the willingness of national courts to engage with foreign and international jurisprudence. Such engagement is perceived as a mechanism for facilitating the integration of the state into the broader international legal order.⁵⁹ Alternatively, the invocation of foreign legal materials may be understood as contributing to the formation of a transnational legitimacy surrounding certain legal standards, interpretative approaches, judicial practices, and customary norms⁶⁰—an endeavor that ultimately serves to bolster a universal system of justice.⁶¹

⁵⁴ Jeffrey Toobin, *Swing Shift How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, NEW YORKER (Sept. 12, 2005), at 50 (quoting Justice Anthony Kennedy).

⁵⁵ Jackson, *supra* note 21, at 45-50 (discussing the interpretive value of transnational judicial dialogue on rights adjudication); See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

⁵⁶ STEPHEN GARDBAUM, *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE* 131, 134 (2013) (arguing that borrowing from foreign rights jurisprudence enhances interpretive flexibility and responsiveness in domestic constitutional law).

⁵⁷ Sitaraman, *supra* note 38, at 661; Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L. J. 191, 196-200 (2003) (emphasizes that cross-referencing is not merely rhetorical but forms part of a broader normative project aimed at articulating and sustaining a global rule of law culture, as well as it contributes to the development of an epistemic community of judges, bound by a mutual interest in upholding fundamental rights and the legitimacy of legal institutions).

⁵⁸ Sitaraman, *Id.*

⁵⁹ Choudhry, *supra* note 53, at 825, 832; Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 154-155 (2005).

⁶⁰ Jackson, *supra* note 37, at 122; Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 47 (2004).

⁶¹ Koh, *Id.*, at 53, 54; Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 662-65 (2008) (arguing that inter-jurisdictional engagement helps in the construction of a “universal grammar” of rights discourse, which promotes the gradual emergence of a transnational legal culture grounded in common principles, thus advancing the normative coherence and credibility of a global justice system).

While democracy and the entrenched principles and standard prevailing in civilized societies have, for some scholars, provided a compelling basis for the use of foreign law and judicial decisions by national courts, others view those very democratic foundations as barriers that render such use untenable.⁶² According to this opposing perspective, what may be termed the “national criterion” is invoked to argue that reliance on foreign legal sources is fundamentally incompatible with the principles of democracy.⁶³ This national criterion is grounded in the presumption that national constitutions represent the fundamental law of the state, deriving their legitimacy from the popular will.⁶⁴ Consequently, the legitimacy and binding force of a constitution rest not on its alignment with international or foreign standards, but on its expression of the unique values, legal traditions, and political aspirations of the nation it governs.⁶⁵ National constitutions are thus understood to embody the core principles of democratic self-determination and popular sovereignty, and any incorporation of external legal materials is viewed by proponents of this view as potential erosion of that foundational democratic identity.⁶⁶ The critique of judicial reliance on foreign legal sources in constitutional adjudication reveals a deeper commitment among nationalist scholars to the idea of the constitution as an expression of the sovereign will of the people.⁶⁷ In voicing their opposition to the use of foreign laws and judicial decisions by national courts in the interpretation of constitutional provisions and the adjudication of constitutional matters, have approached national constitutions as the fundamental legal instruments of the state – documents intrinsically bound to nationalism and popular will.⁶⁸ This inseparability, they argue, is dictated by the nature of the issues governed by constitutions, such as the identity of the state, its form, system of governance, and the framework of fundamental rights and freedoms.⁶⁹

Nonetheless, it is important to note that some advocates of constitutional nationalism have articulated reasons for their rejection of foreign legal and judicial sources that go beyond the substantive content of national constitutions. These reasons are grounded in an organic conception of those entrusted with interpreting the constitution and resolving

⁶² See, e.g., STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* 124–129 (2015) (US. Supreme Court Justice Stephen Breyer argues that in an increasingly interconnected world, courts cannot afford to ignore foreign legal developments, particularly when interpreting constitutional principles that reflect shared democratic commitments such as liberty, equality, and due process. He views comparative engagement as not only legitimate but sometimes necessary to understand the broader legal context in which these shared values evolve).

⁶³ See, e.g., Jeremy Waldron, *Foreign Law and the Modern *Ius Gentium**, 119 HARV. L. REV. 129, 134–138 (2005) (critiquing the judicial use of foreign law as potentially undermining the democratic mandate of national legal systems); Young, *supra* note 59, at 152, 153 (arguing that the uncertainty that may surround the understanding of the extent to national court’s weight of foreign legal practices can lead to misinterpretations and potentially undermine the legitimacy of judicial decisions).

⁶⁴ Young, *Id.*

⁶⁵ Rubinfeld, *supra* note 51, at 1975.

⁶⁶ See Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L. J. 1225, 1260–1266 (1999) (warning against overreliance on foreign jurisprudence in ways that may compromise domestic constitutional autonomy); Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 INT’L J. CONST. L. 269, 284–285 (2003) (emphasizing some potential drawbacks of national courts’ borrowing from foreign law including undermining constitutional autonomy).

⁶⁷ See Tushnet, *Id.*, at 1230, 1231 (discussing the ideological resistance to foreign precedent in U.S. constitutional law as tied to national identity and democratic legitimacy); Sitaraman, *supra* note 38, at 659.

⁶⁸ Michel Rosenfeld, *Constitutional Identity*, in MICHEL ROSENFELD AND ANDRÁS SAJÓ (EDS.), *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 756, 758 (2012).

⁶⁹ See Jackson, *supra* note 21, at 37–41.

constitutional disputes.⁷⁰ Although judges are ordinarily charged with the interpretation of legislative texts, whether constitutional, statutory, or regulatory, and although, in most legal systems, judges derive their authority from appointment rather than election, critics contend that this institutional reality renders the judiciary, in certain respects, the least suitable body to undertake constitutional interpretation.⁷¹ From this vantage point, judges may be perceived as lacking the democratic legitimacy necessary to define constitutional values and resolve fundamental constitutional questions.⁷²

II.2 *Considerations Related to Theories of Constitutional Interpretation*

Comparative constitutional jurisprudence has long recognized that the inherently open-textured and indeterminate nature of constitutional provisions, capable of sustaining multiple meanings beyond their literal expression, necessitates the development of interpretive theories to guide judicial reasoning.⁷³ These interpretive frameworks, often forged through the systematic analysis of constitutional court decisions, serve as intellectual tools intended to assist constitutional judges in delivering coherent, equitable readings of constitutional texts.⁷⁴ Notably, the adoption of such theories is frequently influenced by subjective judicial considerations, including a judge's personal convictions, legal background, intellectual influences, and faith in the efficacy of the chosen approach.⁷⁵ Despite this individual discretion, certain constitutional courts such as, the Egyptian SCC have institutionalized a unified interpretive methodology across their constitutional adjudication.⁷⁶ Within the broader landscape of comparative constitutional scholarship, interpretive theories are generally classified under three dominant models: originalism, intentionalism, and pragmatism.⁷⁷ Although other theories, such as those grounded in natural law or principles of substantive justice, also exist, these three have garnered the most significant scholarly attention and practical application, thereby forming the core of interpretive doctrine in constitutional theory.

Consider then the question of how theories of constitutional interpretation may justify the use of foreign laws and judicial decisions in domestic constitutional adjudication. In fact, a careful examination of any interpretive approach that can be adopted by a judge can albeit to varying extents depending on the specific theory invoked. Originalist

⁷⁰ See Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 408-410 (2008).

⁷¹ RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 135-137 (2004) (arguing that constitutional interpretation by unelected judges can be seen as a departure from popular control).

⁷² Sitaraman, *supra* note 38, at 659; Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L. J. 1346, 1360-1365 (2006) (emphasizing the tension between democratic theory and judicial supremacy in constitutional interpretation, arguing that in societies where the institutions of representative democracy function adequately, legislatures are more legitimate and better suited than courts to resolve disagreements about rights, particularly because courts lack the same level of democratic legitimacy, which renders judges unaccountable to the public).

⁷³ See Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 101-104 (2010).

⁷⁴ See Jackson, *supra* note 21, at 22-25.

⁷⁵ See Michel Rosenfeld, *Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court*, 4 INT'L J. CONST. L. 618, 624, 625 (2006) (noting the influence of personal and contextual factors on judges' interpretive choices).

⁷⁶ Mohamed Adel Omar, *The Role of the Egyptian Supreme Constitutional Court in the Development of Constitutional Interpretation*, in RAINER GROTE & TILMANN RÖDER (EDS.), CONSTITUTIONAL COURTS IN MUSLIM-MAJORITY COUNTRIES 145, 150 (2016).

⁷⁷ See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1204-1210 (1987).

interpretation, for instance, maintains that constitutional provisions should be construed in accordance with the meaning understood at the time of their drafting and ratification.⁷⁸ Within this framework, the use of foreign legal sources is not inherently excluded; rather, it may be justified where such sources demonstrably informed the framers' understanding of specific constitutional concepts at the historical moment of constitution-making.⁷⁹ By contrast, intentionalist and pragmatic theories offer broader latitude to constitutional judges.⁸⁰ These approaches allow national judges to reference foreign jurisprudence not solely to reconstruct original meaning, but to discern the underlying purposes and evolving implications of constitutional norms.⁸¹ They support the view that foreign laws and decisions may assist in ascertaining the intent of the constitutional drafters, as well as in evaluating the practical consequences of adopting a particular interpretive outcome—particularly in light of contemporary shifts in societal values, constitutional rights, and democratic expectations. Thus, under these interpretive models, engagement with foreign legal materials becomes a legitimate and potentially enriching component of constitutional reasoning.⁸²

II.3 *Considerations Related to the Structural Features of the Legal System*

As constitutional scholars frequently observe, the constitutional judge, in adjudicating constitutional questions, operates within a framework shaped by both procedural and substantive principles.⁸³ Chief among these are the nature of the judicial review mechanism employed – whether abstract, concrete, centralized, or diffuse – and the interpretive methodology adopted by the court, both of which exert a significant influence on how constitutional texts are understood and applied in any given case.⁸⁴ While the type of constitutional review and the dominant mode of interpretation undoubtedly function as foundational elements guiding judicial reasoning, foreign laws and judicial decisions have with increasing regularity, emerged as influential interpretive resources in their own right.⁸⁵ Since the latter half of the twentieth century, constitutional and supreme courts across jurisdictions have demonstrated a growing willingness to draw upon comparative legal experiences, incorporating foreign statutes and case law into their reasoning.⁸⁶ This trend reflects an acknowledgment of the potential utility of transnational jurisprudence in enriching constitutional interpretation. However, this practice has not been without

⁷⁸ ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38-40 (1997); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989).

⁷⁹ See Jackson, *supra* note 21, at 45-47 (acknowledging the potential relevance of foreign sources to original constitutional meaning, particularly in systems with transnational influences at the time of drafting); Sitaraman, *supra* note 38, at 658.

⁸⁰ See Fallon Jr., *supra* note 77, at 1204-1210 (emphasizing intentionalist and pragmatist approaches' openness to contextual and purposive reasoning).

⁸¹ See David Landau, *Legal Pragmatism and Comparative Constitutional Law*, in GARY JACOBSON & MIGUEL SCHOR (EDS.), *COMPARATIVE CONSTITUTIONAL THEORY* 208, 213-215 (2018) (discussing the pragmatist openness to foreign sources in light of consequences and institutional legitimacy).

⁸² Rubinfeld, *supra* note 51, at 1975; Tushnet, *supra* note 66, at 1232-1234 (arguing that comparative constitutional law provides valuable perspectives that may inform domestic constitutional adjudication).

⁸³ See ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 28-30 (2000).

⁸⁴ Vicki C. Jackson & Mark Tushnet, *Comparative Constitutional Law* 75-78 (3d ed. 2014) (outlining the forms of judicial review and interpretive approaches adopted by constitutional courts worldwide); Cheryl Saunders, *Judicial Engagement with Comparative Law*, in TOM GINSBURG & ROSALIND DIXON (EDS.), *COMPARATIVE CONSTITUTIONAL LAW* 575 (2011).

⁸⁵ See Hirschl, *supra* note 39, at 138-142 (analyzing the increased judicial use of foreign law as part of constitutional reasoning).

⁸⁶ See Choudhry, *supra* note 53, at 820-823 (exploring the trend toward comparative reference in constitutional adjudication post-World War II).

controversy. It has provoked substantial scholarly debate concerning the legitimacy of relying on foreign sources and the proper methodology for integrating them into domestic constitutional adjudication.⁸⁷

From this perspective, it appears that the intrinsic characteristics and features of a State's legal system may positively or negatively influence the extent to which constitutional or supreme courts can rely on foreign laws and judicial decisions.⁸⁸ Accordingly, one may legitimately inquire: how do the divergent legal traditions within States enable or circumscribe constitutional courts' engagement with foreign legal materials?⁸⁹ Recognizing the well-established dichotomy between common law and civil law traditions, the answer to this question lies in certain fundamental attributes that distinguish these systems from one another.⁹⁰ Such attributes not only shape constitutional adjudication but also either facilitate or preclude courts' recourse to foreign statutes and jurisprudence.⁹¹ Against this backdrop, despite the plurality of factors governing legal systems, I suggest that four principal characteristics predominantly determine the feasibility of domestic courts' engagement with foreign laws and judicial decisions. These are: (i) the methodology employed in judicial reasoning; (ii) the nature of the constitutional questions presented and the structure of the State's constitutional judiciary; (iii) the formal structure and authority of judicial decisions; and (iv) the procedural norms and practices governing constitutional litigation.⁹²

One of the most salient distinctions between legal traditions lies in the methodology of judicial reasoning, particularly in the justification of judicial decisions. Within the common law tradition, the adjudication of both constitutional and non-constitutional disputes is deeply anchored in the doctrine of precedent.⁹³ Judicial reasoning in this tradition is heavily guided by the application of legal principles derived from prior decisions in analogous cases, through processes of analogy and inductive reasoning.⁹⁴ This principle of stare decisis obliges judges to ground their decisions in previously established legal rules articulated in earlier judgement, which are typically framed in broad, flexible terms to ensure adaptability to future disputes.⁹⁵ As a result, the process of judicial reasoning, regardless of the subject matter, relies fundamentally on extracting and applying core and ancillary reasons from an evolving body of case law.⁹⁶ This interpretive framework both expands and constrains judicial discretion: while it affords judges considerable latitude in

⁸⁷ Saunders, *supra* note 84, at 575; See Waldron, *supra* note 63, at 132-137; See Mark Tushnet, *When is Knowing Less Better than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-US Law*, 90 MINN. L. REV. 1275 (2006).

⁸⁸ See MARU CAPPELLETTI & BRYANT GARTH, ACCESS TO JUSTICE: THE WORLDWIDE MOVEMENT TO MAKE RIGHTS EFFECTIVE 54-57 (1978) (discussing how legal system structures affect judicial behavior and decision-making processes).

⁸⁹ See BERNARD SCHWARTZ, THE LAW AND THE LEGAL PROCESS 211-215 (1981) (analyzing the impact of legal traditions on judicial receptivity to foreign sources).

⁹⁰ For a detailed comparative overview of civil law and common law systems and their procedural and substantive distinctions, See RENÉ DAVID, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 52-59 (3d ed. 1985).

⁹¹ Hirschl, *supra* note 39, at 67-70.

⁹² Jackson & Tushnet, *supra* note, at 120-125 (outlining key institutional and procedural factors influencing constitutional courts' use of comparative jurisprudence).

⁹³ See H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 216, 217 (5th ed. 2014).

⁹⁴ For more information, See Gerald J. Postema, *A Similibus ad Similia: Analogical Thinking in Law*, in DOUGLAS E. EDLIN (ED.), COMMON LAW THEORY 102, 116 (2007).

⁹⁵ Saunders, *supra* note 84, at 575.

⁹⁶ *Id.*; GEOFFREY C. HAZARD JR. & MICHELE TARUFFO, AMERICAN CIVIL PROCEDURE: AN INTRODUCTION 37-39 (1993).

identifying and formulating applicable legal principles, it simultaneously limits their freedom by binding them to the logic and outcomes of prior rulings.⁹⁷ Consequently, the doctrine of *stare decisis* has been viewed by many as elevating judges to the status of *de facto* lawmakers, contributing significantly to the perception of the judiciary as a source of positive law.⁹⁸

By contrast, in civil law systems, often referred to as the Latin or codified legal tradition, the process of judicial reasoning tends to be more firmly rooted in codified legislative provisions. Although variations exist among civil law jurisdictions in how judgments are reasoned, a unifying characteristic is the centrality of statutory law as the primary source of authority. In this context, unlike in common law systems where judges draw extensively on past rulings, civil law judges predominantly derive their reasoning from the application and interpretation of written legal codes. Judicial decisions are thus justified through direct reference to statutory provisions, and the legal principles underlying those provisions, rather than through the elaboration of case-based doctrine.⁹⁹ Accordingly, the absence of a binding doctrine of precedent in most civil law systems reinforces the predictability and formal clarity of legal norms, thereby enhancing the principle of legal certainty. The clearly delineated sources of law and the more circumscribed role of the judiciary in law-making underscore a more restrained conception of judicial authority in the civil law tradition when compared to its common law counterpart.¹⁰⁰

From a comparative constitutional law perspective, some scholars have sought to distinguish between legal systems based on two principal considerations: the nature of the constitutional questions raised and the structural configuration of the constitutional adjudicatory body in each jurisdiction.¹⁰¹ In advancing this distinction, some constitutional theorists have relied, albeit somewhat cursorily, on generalized assertions, most notably the distinct characteristics of national constitutions.¹⁰² They argue that such characteristics, in their view, meaningfully affect constitutional adjudication practices. Chief among these is the perceived generality and open-endedness of constitutional texts.¹⁰³ On this account, national constitutions, by virtue of their normative role and hierarchical superiority, typically refrain from delving into legislative particulars, opting instead for the articulation of broad principles and abstract standards. This stylistic and structural feature, it is argued, renders constitutional provisions inherently flexible, capable of accommodating a wide array of interpretive possibilities extending beyond the express language of the text.¹⁰⁴ Nevertheless, while this argument is not devoid of internal logic, it becomes less persuasive when employed as a basis for distinguishing among legal systems. This generality of constitutional language is, in fact, a shared feature across written constitutions, regardless of whether a legal system belongs to the Anglo-American or Continental European

⁹⁷ Saunders, *Id.*, at 575; NEIL DUXBURY, *THE NATURE AND AUTHORITY OF PRECEDENT* 35-40 (2008).

⁹⁸ For more information regarding the role of the judge as a positive legislator, See, e.g., Jack G. Day, *Why Judges Must Make Law*, 26 CASE W. RES. L. REV. 563 (1976); Wolfgang Friedmann, *Limits of Judicial Lawmaking and Prospective Overruling*, 29 MOD. L. REV. 593-607 (1966); John Chipman Gray, *Judicial Precedents. A Short Study in Comparative Jurisprudence*, 9 HARV. L. REV. 27-41 (1895).

⁹⁹ Guy Canivet, *The Practice of Comparative Law by the Supreme Courts: Brief Reflections on the Dialogue between the Judges in French and European Experience*, in SIR BASIL MARKESINIS & JORG FEDTKE (EDS.), *JUDICIAL RECOURSE TO FOREIGN LAW* 315-316 (2006).

¹⁰⁰ KONRAD ZWEIGERT & HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 160-162 (Tony Weir trans., 3d ed. 1998).

¹⁰¹ Saunders, *supra* note 84, at 575; Vicki C. Jackson, *Comparative Constitutional Law: Methodologies*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 54 (2012).

¹⁰² See Hirschl, *supra* note 39, at 137-139.

¹⁰³ Saunders, *supra* note 84, at 575.

¹⁰⁴ See Mark Tushnet, *Some Reflections on Method in Comparative Constitutional Law*, in SUJIT CHOUDHRY (ED.), *THE MIGRATION OF CONSTITUTIONAL IDEAS* 67 (2006).

traditions.¹⁰⁵ It arises not from jurisdictional specificity but from the inherent function of constitutions as foundational instruments that organize political power, define the structure of governance, and mediate the relationship between the state and the governed.¹⁰⁶

Accordingly, the generality of constitutional language cannot, by itself, serve as a meaningful criterion for differentiating legal systems. However, when viewed through the lens of constitutional interpretation, this generality may facilitate recourse to foreign jurisprudence and comparative legal sources.¹⁰⁷ Given that many constitutional provisions are open-textured and conceptually absorptive, they may necessitate recourse to a range of interpretive approaches—textualist, intentionalist, or pragmatic—each of which could justify engagement with comparative materials to elucidate the meaning and application of a constitutional norm.¹⁰⁸ Thus, the absorptive nature of constitutional texts, far from being a feature of legal differentiation, may serve as a gateway to comparative reasoning in adjudication.¹⁰⁹ In contrast, structural features of constitutional adjudication—particularly the centralized versus decentralized organization of constitutional courts—may more plausibly influence the extent to which foreign legal sources are consulted.¹¹⁰ While decentralized systems, such as that historically associated with the United States following *Marbury v. Madison* (1803), allow all courts to exercise constitutional review,¹¹¹ centralized systems confine such review to a designated constitutional tribunal.¹¹² Nonetheless, neither structure is exclusive to any one legal tradition: some Anglo-American jurisdictions have adopted centralized review, just as some civil law jurisdictions operate decentralized models.¹¹³ That said, in decentralized systems, the dispersion of constitutional adjudicatory authority across a broader judicial spectrum increases the likelihood that judges—drawing on diverse legal backgrounds and interpretive philosophies—may consult foreign law to inform their constitutional reasoning, thereby fostering greater permeability to external jurisprudential influences.¹¹⁴

While the structural of constitutional courts may offer a sound basis for differentiating between legal systems, particularly as it bears upon the capacity of national courts, specifically supreme and constitutional courts, to engage with foreign law, another equally significant dimension emerges upon close examination: the style and form of judicial reasoning and how verdicts are rendered.¹¹⁵ In the common law tradition, particularly within Anglo-American jurisdictions, judicial decisions are typically rendered in a detailed, discursive format.¹¹⁶ These decisions include a comprehensive narrative of the factual matrix, a meticulous framing of the legal questions in dispute, and an explicit articulation of the legal reasoning underpinning the outcome. Although courts in civil law systems

¹⁰⁵ See Michel Rosenfeld, *Comparing Constitutional Review and Judicial Review*, 4 INT'L J. CONST. L. 618 (2006).

¹⁰⁶ Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 HAST. L. REV. 707, 716 (2011); David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 669 (2005).

¹⁰⁷ See Choudhry, *supra* note 53, at 819.

¹⁰⁸ RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 86-88 (2001).

¹⁰⁹ Cheryl Saunders, *The Use and Misuse of Comparative Constitutional Law*, 13 IND. J. GLOBAL LEGAL STUD. 37, 41 (2006).

¹¹⁰ See Sweet, *supra* note 83, at 55-56 (2000).

¹¹¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

¹¹² Víctor Ferreres Comella, *The Rise of Specialized Constitutional Courts*, in TOM GINSBURG & ROSALIND DIXON (EDS.), COMPARATIVE CONSTITUTIONAL LAW 265 (2011).

¹¹³ Mauro Cappelletti, *The 'Mighty Problem' of Judicial Review and the Contribution of Comparative Analysis*, 53 S. CAL. L. REV. 409, 416 (1980).

¹¹⁴ ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 64-67 (2004).

¹¹⁵ Jackson, *supra* note 21, at 59-61.

¹¹⁶ NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 123-126 (2008).

similarly provide reasons for their decisions, a notable divergence surfaces in the tone, structure, and assumptions that underpin judicial reasoning.¹¹⁷ In many Latin-based legal systems, such as those of France and Italy, judicial decisions often project a tone of institutional authority and finality, frequently couched in formalized language and premised on the presumption that a singular, current legal solution exists for each dispute.¹¹⁸ These decisions are typically brief, delivered collectively in the name of the court, and rarely identify the judge responsible for authoring the opinion.¹¹⁹ Even constitutional courts within these systems, such as the French Constitutional Council and the Italian Constitutional Court, largely adhere to this practice, issuing decisions that emphasize the legal outcome over the argumentative process, while referencing prior decisions only insofar as they assist in reaffirming settled principles—though such precedents are not accorded binding force.¹²⁰

By contrast, courts in Anglo-American systems adopt a more elaborate, pluralistic, and dialogical approach to judicial reasoning.¹²¹ Here, judicial decisions tend to be extensive and heavily reasoned, often citing a broad array of binding and persuasive precedents, doctrinal commentary, and comparative jurisprudence.¹²² This discursive style reflects the centrality of precedent within the common law tradition and serves several doctrinal and democratic functions.¹²³ First, judicial decisions commonly feature multiple opinions: alongside the majority opinion, dissenting and concurring opinions are standard, and each is typically attributed to individual judges.¹²⁴ This plurality not only enriches the legal reasoning available for future adjudication but also enhances the transparency and deliberative legitimacy of judicial decision-making.¹²⁵ The presence of dissenting and concurring views allows for future reinterpretation or even doctrinal reversal, in accordance with the evolving landscape of precedent.¹²⁶ Second, such pluralism affirms core democratic values by acknowledging judicial disagreement and facilitating public scrutiny of judicial reasoning.¹²⁷ The practice permits each judge to articulate their individual interpretive stance, offering litigants and the public insight into the range of plausible legal understandings.¹²⁸ Thus, the form and structure of judicial opinions are not merely procedural conventions but serve as a window into the epistemological and

¹¹⁷ Mitchel Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 YALE L. J. 1325, 1332-1339 (1995).

¹¹⁸ JOHN BELL, JUDICIARIES WITHIN EUROPE: A COMPARATIVE REVIEW 38-42 (2006).

¹¹⁹ MITCHEL LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 74-75 (2004).

¹²⁰ Alec Stone Sweet, *Why Europe Rejected American Judicial Review—and Why It May Not Matter*, 101 MICH. L. REV. 2744, 2760-2762 (2003).

¹²¹ Saunders, *supra* note 109, at 42, 43.

¹²² Tushnet, *supra* note 66, at 1229, 1230; Saunders, *supra* note 84, at 576.

¹²³ Fallon, *supra* note 108, at 86-91.

¹²⁴ See M.D. Kirby, *Judicial Dissent—Common Law and Civil Law Traditions*, 123 L. Q. REV. 382, 395 (2007).

¹²⁵ Choudhry, *supra* note 53, at 823, 825; H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 230 (5th ed., 2014).

¹²⁶ John Alder, *Dissents in Courts of Last Resort: Tragic Choices?*, 20 OXF. J. LEG. STUD. 221, 237 (2000); Lawrence B. Solum, *The Unity of Interpretation*, 90 BOSTON UNIV. L. REV. 551, 563-565 (2010).

¹²⁷ ROBERT A. KATZMANN, JUDGING STATUTES 18-21 (2014).

¹²⁸ T.R.S. Allan, *Common Law Reasoning and Constitutional Rights*, in DOUGLAS E. EDLIN (ED.), COMMON LAW THEORY 187, 200 (2007).

normative commitments of the legal system itself,¹²⁹ and they significantly shape the judiciary's openness to comparative legal engagement and the reception of foreign law.¹³⁰ Finally, one may persuasively argue that the procedural norms and practices governing constitutional litigation offer a compelling lens through which to distinguish between the common law and civil law traditions, and indeed influencing the ability of constitutional and supreme courts to engage with foreign laws and judgments.¹³¹ In practice, the procedural framework embedded in the common law tradition is predominantly adversarial in nature, whereby the conduct of constitutional litigation is primarily driven by the parties themselves, with the judge assuming a relatively passive role, intervening only in exceptional circumstances.¹³² Typically, constitutional issues are presented before the court within the context of an existing legal dispute. The parties bear the burden of advancing legal arguments in support of their respective claims, in accordance with the

¹²⁹ To illustrate, I refer to a notable decision of the United States Supreme Court rendered in 1886. The case concerned an American citizen who had fled justice and taken refuge in the Republic of Peru. He challenged the constitutionality of his arrest and subsequent criminal prosecution in the United States, arguing that he had been forcibly abducted by American authorities from Peruvian territory and brought back to the United States in violation of the extradition treaty in force between the two countries. He further contended that the procedures of his arrest and prosecution contravened the Sixth Amendment to the U.S. Constitution, which guarantees that an accused shall be informed of the nature and cause of the accusation and tried before a court with proper jurisdiction. Despite these claims, the U.S. Supreme Court held that American courts retained jurisdiction to prosecute the defendant, even though he had been unlawfully seized from a foreign country in clear breach of the applicable extradition treaty. The Court reasoned that the protections invoked by the petitioner found no support in the treaty itself. Moreover, the Court concluded that the constitutional guarantees under the Sixth Amendment had not been violated, since the accused had, in fact, been informed of the nature and cause of the charges against him and had not been deprived of his right to mount a defense, as prescribed by the constitutional provision he alleged had been infringed. In an effort to reinforce the logical coherence of its judgment and the reasoning upon which it was based, the U.S. Supreme Court invoked two well-known precedents from English case law (*Ex parte Scott*, 109 Eng. Rep. 166 (1829) and *R. v. Lopez*, 169 Eng. Rep. 1105 (1858)), both of which affirmed the principle that forcible abduction, in and of itself, does not constitute a sufficient ground to deprive domestic courts of jurisdiction, these English decisions emphasized that the illegality of defendant's apprehension—specifically, the fact of forced abduction—is neither a valid legal ground nor a proper objection that would entitle the defendant to challenge the jurisdiction of a court that is otherwise properly seized of the matter. Moreover, the lawfulness of the defendant's detention was held not to be among the issues that could be raised to contest the jurisdiction of the trial court before which the proceedings were brought. *Ker v. Illinois*, 119 U.S. 436 (1886); see also *O'Malley v. Woodrough*, 307 U.S. 277 (1939).

¹³⁰ Slaughter, *supra* note 114, at 65–69. A close reading of certain decisions issued by constitutional and supreme courts reveals that these courts, when invoking foreign statutes or precedents, do so not with the aim of deriving their rulings therefrom, but rather to demonstrate that the legal reasoning and interpretive conclusions they have reached are neither anomalous nor legally unfounded, by showing that similar approaches have been endorsed in other jurisdictions. It is important to emphasize, however, that such references to foreign statutes and precedents not be misunderstood as evidence that constitutional courts rely upon foreign legal sources as a basis for their decisions. In such instances, foreign statutes and precedents are not invoked as interpretive authorities or as determinative sources of law. Rather, the national judge grounds the judgment in domestic legal sources, both textual and doctrinal, and interprets them through a methodologically sound and rational legal analysis. Once the judge has reached a particular conclusion—one which, in their view, constitutes the most appropriate resolution of the legal question at issue—they may then cite foreign precedents that address analogous legal problems and adopt similar reasoning. This is done to bolster the internal coherence of the judgment and to affirm its logical plausibility within a broader transnational legal context. See Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005); Sitaraman, *supra* note 38, at 666.

¹³¹ See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW*, (2nd ed. 2019).

¹³² Saunders, *supra* note 84, at 577–576; A. Guerra, M. Maraki & B. Massenot, *Deterrence, settlement, and litigation under adversarial versus inquisitorial systems*, 196 PUBLIC CHOICE 331–356 (2023).

fundamental procedural requirements governing litigation before the court.¹³³ One of the most important obligations imposed on litigants in advancing their legal claims is the duty to disclose all relevant domestic laws that bear upon the matter at issue.¹³⁴ The court's identification and resolution of legal questions are, to a significant extent, contingent upon the submissions and arguments raised by the parties, as well as on *amici curiae* briefs or motions for intervention submitted by third parties seeking to provide supporting documentation or legal evidence relevant to the contested legal issues at the heart of the dispute.¹³⁵

In contrast, within most civil law jurisdictions, particularly those adhering to the Romano-Germanic tradition, constitutional adjudication is typically entrusted to a specialized judicial body, such as a constitutional court or a supreme court with constitutional jurisdiction. Accordingly, the determination of constitutional questions falls within the exclusive competence of that body, and constitutional claims must be brought directly before it. Moreover, the constitutions and laws of most civil law jurisdictions do not permit individuals to initiate direct original lawsuit before constitutional court.¹³⁶ Rather, the right to initiate constitutional proceedings is generally limited to designated public authorities or entities.¹³⁷ Alternatively, a constitutional court may become properly seized of a constitutional issue through a preliminary question referred by an ordinary court, or upon a party's challenge raised during ordinary proceedings.¹³⁸ Importantly, in such cases,

¹³³ Justice D.A. Ipp, *Lawyers' Duties to the Court*, 144 L. QUART. REV. 63, 67 (1998).

¹³⁴ *Id.*, at 67.

¹³⁵ It worth noting that the concept of a "third party to the proceedings" (i.e., a non-party intervenor) assumes a meaning in Anglo-American legal systems that differs, to a significant extent, from its counterpart in civil law jurisdictions, particularly those adhering to the Latin legal tradition. In the latter, the term "third party" generally refers to an individual who intervenes in the proceedings, either through *joinder intervention*—in support of one of the original parties—or through adversarial intervention, whereby the intervenor asserts an independent right in the subject matter of the dispute. By contrast, in Anglo-American legal systems—especially within the American legal framework—the notion of third-party involvement in litigation is more closely associated with the Latin term *amicus curiae*, meaning "friend of the court." Under this model, the category of "third party" encompasses not only intervenors in the sense traditionally recognized in Latin-based procedural systems, but also includes institutional submissions and advisory opinions offered to the court, either upon its request or voluntarily by interested persons or entities. In the Canadian legal system; however, the term "friend of the court" may bear a different procedural function. It may refer to a lawyer appointed by the court to represent an unrepresented or improperly represented party, for the purpose of ensuring the presentation of adequate legal arguments and the fair administration of justice. In such cases, the *amicus curiae* assumes a quasi-representational role rather than merely offering external legal insight or advocacy. For more information, See JUDITHANNE SCOURFIELD McLAUCHLAN, CONGRESSIONAL PARTICIPATION AS AMICUS CURIAE BEFORE THE U.S. COURT (2005); Rachel C. Lee, *The Legal Ethics of Supreme Court Advocacy in the Internet Era*, 61 STAN. L. REV. 1535-1571 (2009).

¹³⁶ For structural limitations in civil law systems, see M. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1986).

¹³⁷ For instance, pursuant to Article 61 of the current French Constitution of 1958, and apart from cases in which the Constitutional Council is mandatorily seized to review organic laws, the President of the Republic, the President of the Senate, the President of the National Assembly, the Prime Minister, or sixty-two members of either the National Assembly or the Senate may petition the Constitutional Council to conduct a review of a statute's constitutionality prior to its promulgation by the President of the Republic.

¹³⁸ For example, Article 29 of Law No. 48 of 1979 on the Supreme Constitutional Court of Egypt provides for judicial review of the constitutionality of statutes and regulations in the following manner:

(a) If a court or judicial body vested with adjudicative authority, while hearing a case, considers that a provision in a law or regulation necessary for resolving the dispute may be unconstitutional, it shall stay the proceedings and refer the matter, without the imposition of any fees, to the Supreme Constitutional Court for a ruling on the constitutional issue. (b) If a party raises a constitutional objection to a legal or regulatory provision during the course of proceedings before any court or competent judicial authority, and the court deems the objection to be serious, it shall adjourn the case and grant the party raising the objection a time period—of no more than three months—to file a constitutional challenge before the Supreme

the constitutional court plays no role in adjudicating the primary dispute out of which the constitutional questions arose.

In the first scenario, where the right to seek constitutional review is confined to certain actors, the court engages in an abstract review of legislation.¹³⁹ In such proceedings, the petitioners request the court to render a judgment or interpretation concerning a statutory provision that has not yet been applied in a concrete case but is suspected of being constitutionally infirm.¹⁴⁰ In these instances, there is no live controversy or fully formed legal dispute. Conversely, when the legal system provides a pathway for the constitutional court to hear a constitutional issue through a concrete challenge raised by a party or via a referral from an ordinary court, the request for review is deemed admissible only where the legal provision under scrutiny is currently in force and its application is anticipated in the context of an existing legal dispute.¹⁴¹

III. THE USE OF FOREIGN LAW BY THE SUPREME CONSTITUTIONAL COURT OF EGYPT: ASSESSING THE PERMISSIBILITY AND LIMITS OF COMPARATIVE JUDICIAL REFERENCE

It is hardly necessary to restate that one of the primary features of constitutional courts, particularly in civil law tradition, lies in their essential character as judicial adjudicatory bodies—functionally comparable to other courts within the institutional framework of a given legal system. Nevertheless, it is particularly noteworthy that constitutional courts, in most legal systems, are often conceived as bodies tasked with rendering definitive judgments in cases involving disputes over the interpretation of constitutional provisions.¹⁴² From this perspective, the relevance of constitutional courts may diminish in contexts of constitutional breakdown—such as the absence or suspension of a constitution, or where the political regime systematically disregards constitutional norms. While their core function lies in exercising constitutional jurisdiction, most notably through judicial review as a mechanism for safeguarding constitutional supremacy and the rule of law,¹⁴³ another institutional dimension has emerged: constitutional courts are frequently regarded as emblematic of the state, transcending political foment to serve as the ultimate guardians of constitutional authority and the protection of individual rights and freedoms.¹⁴⁴ However, this symbolic mantle does not preclude their inevitable engagement with political conflicts. Indeed, their jurisdiction, specifically in matters of

Constitutional Court. Should the party fail to initiate proceedings within the prescribed time limit, the objection shall be deemed null and void.

¹³⁹ Saunders, *supra* note 84, at 579.

¹⁴⁰ Tom Ginsburg, *Comparative Constitutional Review*, UNITED STATE INSTITUTE OF PEACE, available online on https://www.usip.org/sites/default/files/ROL/TG_Memo_on_Constitutional_Review%20for%202011_v4.pdf

¹⁴¹ *Id.* It is worth noting that several factors may serve as criteria for evaluating the relative merits of abstract constitutional review as opposed to review arising from a concrete legal dispute. Among the most salient of these factors are: the degree of decentralization within a given constitutional judiciary in addressing claims of unconstitutionality; the recognition of an individual's right to initiate direct constitutional proceedings before the constitutional court; and the extent to which the concept of constitutional rights litigation has become entrenched—namely, whether individuals are empowered to allege violations of rights conferred upon them by national constitutions. See Benito Alaez Corral and Abel Arias Castano, *The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation*, 15 EURO. PUB. L. 597, 609 (2009).

¹⁴² Sayed Zubair Shah, Jamshaid Rasheed, Awais Abid, *Constitutional Courts as Political Institutions: Legitimacy, Power, and Judicial Statesmanship*, 6 JMH 666–678 (2025).

¹⁴³ MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 58–61 (1989).

¹⁴⁴ George Duke, *Constitutional Symbolism in the Shadow of the Common Good*, GER. LAW J. 368–385 (2024).

constitutional review, is deeply intertwined with the political life of the state,¹⁴⁵ since rulings invalidating legislation not only annul the legal force of the impugned law but also bind all courts to refrain from its application, thus revealing the inherently political consequence of their authority.¹⁴⁶

III.1 *The Permissibility and Scope of the Supreme Constitutional Court's Reliance on Foreign Law*

It is often argued that constitutional or supreme courts, when adjudicating constitutional disputes—whether they ultimately declare a challenged provision unconstitutional or uphold its constitutionality—take into account, in addition to legal and constitutional considerations, certain political expediencies. This, it is claimed, undermines the judicial nature of their rulings. However, such a position lacks a sound logical foundation.¹⁴⁷ Like all judges, constitutional judges are themselves products of the broader socio-political environment, from which they cannot be fully insulated—even after ascending to the bench.¹⁴⁸ Likewise, legislative acts are, by their nature, inherently political, as they are drafted and enacted in light of political considerations designed to address particular social circumstances.¹⁴⁹ The jurisprudence of the Egyptian SCC has affirmed the judicial character of its rulings by reference to the institutional nature of the body issuing them. In this regard, the Court has held:

“It is established in the jurisprudence of this Court that classifying the acts of any body entrusted by the legislature with resolving a given dispute as judicial in nature requires that the jurisdiction of such body be defined by law, that its composition be predominantly judicial—with members meeting the guarantees of competence, impartiality, and independence—and that it possess the authority to resolve disputes through binding decisions, all without compromising core judicial guarantees. These guarantees fundamentally require that the parties be afforded equal opportunities to present and defend their claims, and that their arguments be examined in light of pre-existing legal norms enacted by the legislature. The decision rendered must then confirm the legal truth and crystallize its content in relation to the rights at issue or in dispute.”¹⁵⁰

I contend that the Egyptian SCC is no exception to the general principle outlined above, namely, that it is an independent judicial authority which embodies the centralization of constitutional adjudication in Egypt. It is the sole body entrusted with the exercise of constitutional jurisdiction—specifically, the exclusive competence to determine the constitutionality of laws and regulations. This exclusivity precludes all other courts from engaging in any form of constitutional review. Moreover, although the Court, pursuant to the Constitution and its enabling statute, is vested with multiple competences¹⁵¹ —

¹⁴⁵ Hirschl, *supra* note 71, at 112–118.

¹⁴⁶ TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 23–27 (2003).

¹⁴⁷ See Shah, *supra* note 142, at 666–678.

¹⁴⁸ See MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 3–25 (1981).

¹⁴⁹ See Hirschl, *supra* note 39, at 17–42.

¹⁵⁰ SCC, Case No. 10, Judicial Year 26 (April 9, 2006); see also SCC, Case No. 129, Judicial Year 22 (January 12, 2003).

¹⁵¹ Article 192 of the current Egyptian Constitution of 2014 reads “The Supreme Constitutional Court shall be solely competent to decide on the constitutionality of laws and regulations, to interpret legislative provisions, and to adjudicate on disputes pertaining to the affairs of its members, on jurisdictional disputes between judicial bodies and entities that have judicial jurisdiction, on disputes pertaining to the implementation of two final contradictory judgments, one of which is rendered by a judicial body or an authority with judicial jurisdiction and the other is rendered by another, and on disputes pertaining to the

including: (i) the judicial review of the constitutionality of laws and regulations; (ii) the resolution of jurisdictional conflicts among judicial bodies or quasi-judicial entities; (iii) the settlement of contradictory final judgments; and (iv) the authoritative interpretation of legislative provisions—it is evident that such functions necessarily involve a complex interplay between legal and political considerations. Accordingly, it is not inappropriate for the Court, in the discharge of its duties and in issuing its rulings, to consider certain political realities or considerations, provided that this does not undermine the inherently judicial nature of its decisions or cast doubt upon its institutional independence or impartiality.

It is further recognized that the Court's jurisdiction over constitutional review and legislative interpretation is closely linked to prevailing theories of constitutional interpretation, as previously discussed. In addition, the SCC, like other constitutional and supreme courts, often requires various supportive tools and mechanisms to effectively carry out its mandate—particularly in relation to constitutional review. Among the most significant of these tools, as already noted, is the use of foreign laws and judicial decisions as comparative resources.¹⁵² On this basis, a fundamental question arises: Is there any legal or judicial prohibition, whether statutory or customary, that precludes the Court from relying on foreign laws or precedents in its constitutional reasoning?

III.1.1 *Variations in the Use of Foreign Law According to the Normative Demands of Distinct Legal Systems*

As for the foregoing question, its answer requires acknowledgment that each legal system possesses distinctive characteristics that reflect its intrinsic nature and delineate the features that differentiate it from other legal systems. As legal scholars have observed, each legal system has its own terminology, which aligns with the prevailing concepts and values of its society, as well as its own methods for interpreting constitutional and legal texts.¹⁵³ It must not be overlooked that the Egyptian legal system belongs to the civil law tradition, which finds its foundation in codified statutes enacted by legislative bodies.¹⁵⁴ Accordingly, in jurisdictions adhering to the civil law model, although courts may rely on judicial precedents to reach a sound legal resolution applicable to the case at hand, the authoritative weight of such precedents is not commensurate with that which they enjoy in common law systems.¹⁵⁵ In civil law jurisdictions, the influence of precedent is subordinated to the primacy of codified legislation.¹⁵⁶

execution of its judgments and decisions. The law shall determine the Court's other competences and regulate the procedures that are to be followed before the Court."

¹⁵² Nourhan Fahmy, *Ebb of Justice: Egypt's Constitutional Court as Veto Player in International Disputes, Law & Accountability*, TAHRIR INSTITUTE FOR MIDDLE EAST POLICY, February 23, 2022 (analyzing how amendments such as Law No. 137 of 2021 enable the SCC to review the constitutionality of international and foreign decisions affecting the State.)

¹⁵³ See James Gordley, *Myths of the French Civil Code*, 42 AM. J. COMP. L. 459 (1994); see also KONRAD ZWIEGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 34–35 (Tony Weir trans., 3d ed. 1998) ("Each legal system develops its own legal vocabulary and structures, closely tied to its cultural, political, and social context.").

¹⁵⁴ See JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 3–4 (4th ed. 2018) (discussing codification as the defining characteristic of civil law systems).

¹⁵⁵ See Zweigert & Kötz, *supra* note 153, at 265–266 (noting the limited role of precedent in civil law systems compared to common law).

¹⁵⁶ See Merryman & Pérez-Perdomo, *supra* note 154, at 51–52 (explaining that judicial decisions in civil law systems do not have binding precedential authority but may have persuasive influence).

Law, therefore, is presumed to constitute more than the enactments of the legislature. Legislation, while formally issued by the legislative authority of the state, is understood to represent the logical and principled solution to any legal issue brought before the courts—transcending its formal source to function as the primary embodiment of legal reasoning within the civil law paradigm.¹⁵⁷

According to this understanding, one might reasonably expect that foreign laws and judicial precedents would not exert significant influence before the courts of civil law jurisdictions, in contrast to their well-established role within the courts of common law systems.¹⁵⁸ On this basis, the consistent judicial practices observed in French courts appear both coherent and foreseeable. As a general rule, these courts refrain from citing judgements issued by foreign tribunals or even referring to national or foreign doctrinal writings.¹⁵⁹ In fact, invoking foreign legislation, judicial decisions, or scholarly opinions as part of the reasoning upon which a court relies to reach its decision may, in and of itself, constitute a legal ground for challenging the validity of the judgment rendered.¹⁶⁰ It is therefore unsurprising that decisions issued by French administrative courts—foremost among them the Conseil d'État—as well as the ordinary judiciary, culminating in the Cour de cassation, are characterized by conciseness, precision of language, and tightly reasoned formulation, typically without any reference to foreign legal sources or academic commentary.¹⁶¹

In elucidating this judicial style, a former judge of the French Cour de cassation once argued that the traditional style used in drafting and reasoning French judicial decisions has historically precluded the Cour de cassation and other judicial authorities from referencing foreign laws or citing foreign precedents within their rulings.¹⁶² As a matter of principle, French courts are not permitted to cite such materials in the reasoning of their judgments. Moreover, this same logic applies to references to domestic or foreign academic doctrine.¹⁶³ French high court judgments are thus issued in a concise and summary fashion, grounded in analogy and strict inference, which leaves little room for disclosing the true motivations behind the ruling—whether those be foreign precedents or scholarly opinions.¹⁶⁴

While the prohibition on citing foreign statutes, judicial precedents, or even doctrinal writings in French judicial decisions originates from longstanding and settled jurisprudential practice, as previously discussed, the corresponding prohibition in Italy—a civil law jurisdiction which, like France, adheres to the Romano-Germanic legal tradition—finds its basis in positive law. Specifically, Article 118 of the Italian Code of Civil Procedures (*Disposizioni di attuazione del Codice di Procedura Civile*), enacted by Royal Decree No. 1368 of December 18, 1941, mandates that all Italian courts refrain from incorporating references or quotations in judicial decisions. The provision expressly states

¹⁵⁷ See *id.*, at 48 (stating that legislation is the primary source of law in civil law systems and that courts are expected to apply it logically and systematically).

¹⁵⁸ See BASIL MARKESINIS & JOHN DEAKIN, JUDICIAL RECOURSE TO FOREIGN LAW: A NEW SOURCE OF INSPIRATION? (2006).

¹⁵⁹ See Michael Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 YALE L. J. 104 1325–1390 (1995).

¹⁶⁰ Raymond Legeais, *L'utilisation du droit comparé par les tribunaux*, REVUE INTERNATIONALE DE DROIT COMPARÉ, 1994/46 (n° 2), pp. 347–358; Didier Maus, *Le recours aux précédents étrangers et le dialogue des cours constitutionnelles*, REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL, 2009/4 (n° 80), pp. 675 à 696.

¹⁶¹ Catherine Valcke, *Comparing Legal Styles*, 15 INT. J. LAW CONTEXT 274–296 (2019).

¹⁶² Markesinis, *supra* note 158, at 317–322.

¹⁶³ *Id.*

¹⁶⁴ *Id.*; See Duncan Fairgrieve, Samuel Dahan & Aurélie Bretonneau, *Use of Comparative Law before the French Administrative Law Courts: Or the Triumph of Castles over Pyramids*, in HARIS TAGARAS (ED.), COURTS AND COMPARATIVE LAW, (2013).

that “references and quotations shall be omitted in judicial decisions.”¹⁶⁵ A careful examination of Article 118 reveals the breadth of the prohibition it imposes. This generality may be understood as operating along two principal dimensions.

First, the prohibition applies comprehensively to all judicial bodies. Given the unambiguous language of the statute, one must conclude that the legislative ban on judicial references and citations extends to all Italian courts, including the three highest judicial authorities: the Constitutional Court (*Corte Costituzionale*), the Council of State (*Consiglio di Stato*), and the Court of Cassation (*Corte di Cassazione*).¹⁶⁶ Second, the prohibition is general in terms of its subject matter. The formulation of Article 118 is notably broad, as it refers generically to the exclusions of “references and quotations” within judicial decisions. This linguistic generality invites an interpretive conclusion that the prohibition encompasses references to, and quotations from, foreign legal norms, foreign judicial decisions, and scholarly legal doctrine alike.¹⁶⁷

Notwithstanding this, the prevailing judicial practices in France—particularly the form and manner in which judicial decisions are reasoned—have not precluded French courts from drawing upon foreign laws and judicial precedents. For instance, reference to and citations of foreign legal rules and judicial decisions frequently appear in the reports submitted by the Commissaire du Gouvernement (Government Commissioner) in cases brought before the French Conseil d'État. In support of this observation, Roger Errera, a former judge of the Conseil d'État, notes that the opinions issued by Commissaires du Gouvernement reflect a growing interest in the comparative engagement with foreign legal systems, particularly in the domains of administrative liability, extradition, and civil liberties.¹⁶⁸

¹⁶⁵ Art. 118, *Disposizioni di attuazione del Codice di Procedura Civile* (R.D. 18 December 1941, No. 1368): “In ogni caso deve essere omessa ogni citazione di autori giuridici.”

¹⁶⁶ See Francesco Paolo Patti, *Penalty Clauses in Italian Law*, 23 EUR. REV. PRIV. L. 309, 310–311 (2015) (arguing that Italian jurisprudence tends toward strict statutory formalism, and doctrinal persuasion, especially foreign authorities, is conspicuously absent from judicial reasoning.)

¹⁶⁷ Guido Alpa, *The Italian Interpretation of the Code Civil and French Proposals for Recodification*, 17 EUR. BUS. L. REV. 1505, 1510 (2006) (noting that “Italian judges typically avoid referring to non-domestic or extrajudicial legal materials, reflecting a legislative preference for statutory clarity over comparative citation.”) It should be noted that there is a deep-rooted legal principle within Italian jurisprudence that judges are bound solely by the law, and cannot derive legal reasoning from non-legislative sources. For doctrinal support of the principle that Italian magistrates are bound exclusively by statute, see Caterina Scaccianoce, *The principle of mandatory criminal prosecution and the independence of public prosecutors in the Italian criminal justice system*, REVUE ÉLECTRONIQUE DE L'ASSOCIATION INTERNATIONALE DE DROIT PÉNAL 1-10 (2010).

¹⁶⁸ See Roger Errera, *The Use of Comparative Law Before the French Administrative Courts*, in GUY CANIVET ET AL., *COMPARATIVE LAW BEFORE THE COURTS* 156 (2004).

For example, in two cases concerning the medical liability of public hospitals, the Commissaire du Gouvernement drew upon foreign legal sources in the preparation of his advisory opinion. The facts of the first case concerned a pregnant woman who informed her physicians that she would prefer to terminate her pregnancy rather than give birth to a child with congenital abnormalities. The physicians, however, following the performance of an amniocentesis to extract excess fluid during gestation, assured her that the fetus was free of any such defects. Upon delivery, the child was born with Down syndrome. The mother subsequently initiated legal proceedings against the public hospital, seeking compensation for the harm she had suffered. The Conseil d'État ultimately held that the public hospital had committed a fault by failing to inform the mother of the significant risk margin associated with the procedure. This omission deprived her of the opportunity to make an informed decision, which might have led her to elect termination of the pregnancy. In support of its reasoning, the report submitted by the Commissaire du Gouvernement cited multiple American and British judicial precedents addressing the rights to life and to abortion. See C.E., Section, du 14 février 1997, N° 133238, publié au recueil Lebon.

In the second case, the Conseil d'État, sitting in its General Assembly, held that no fault could be imputed to the Paris Hospital Authority following its decision to administer a blood transfusion to a Jewish patient in contravention of his religious beliefs and without obtaining his prior consent. This intervention was

Moreover, a closer examination of the jurisprudence of the Conseil d'État reveals that it has not hesitated, on occasion, to expressly cite foreign legislation and case law in its judgements. For instance, in 2003, the Conseil d'État cited a decision of the English High Court of Justice concerning the use of informative labeling on products. This citation occurred in the context of the court's ruling to suspend the implementation of a French decree intended to incorporate the provisions of Directive 2002/2/EC of the European Union—pertaining to the declaration of certain feed ingredient percentages—into domestic law, pending a determination by the European Court of Justice as to the validity of the Directive.¹⁶⁹

In Italy, as in other Latin legal systems grounded in the French model, the legal framework does not recognize a distinction between binding precedent and non-binding persuasive precedent. Moreover, it is well established that foreign laws and judicial decisions, as a general rule, do not carry the force of binding precedent before national courts. Consequently, when the Italian Constitutional Court draws upon foreign law in deciding a case, such reference is made for purposes of comparative insight and interpretive guidance rather than as a source of legal obligation,¹⁷⁰ particularly given that the Court's own decisions are not, in themselves, regarded as binding precedent for future cases.¹⁷¹ For example, the Constitutional Court has, on multiple occasions, departed from its own rulings in order to align its jurisprudence with decisions issued by the European Court of Human Rights and the International Court of Justice.

Notwithstanding the prohibition set forth in Article 118 of the Italian Code of Civil Procedures against citing or referring to foreign laws and decisions, as previously noted, this prohibition does not negate the reality that the Italian Constitutional Court, unlike other domestic courts, may at times find it necessary to refer to foreign legal sources, such as decisions of the European Court of Human Rights or the

undertaken due to the patient's critical medical condition. As a result, the administration was found not to bear legal liability. In his advisory report, the Commissaire du Gouvernement cited a series of judicial precedents from the United States, the United Kingdom, and Canada to support the position of the hospital administration. These citations served to justify the departure from the general requirement of obtaining the patient's informed consent—or, where applicable, that of their legal representative—under circumstances of urgent medical necessity. See C.E., Assemblée, du 26 octobre 2001, N° 198546, publié au recueil Lebon. With respect to extradition, the Conseil d'État adjudicated a case challenging the legality of the decree issued on 18 January 1993 ordering the surrender of a fugitive to the United States authorities. The challenge was grounded on concerns that the fugitive might face prosecution and be subjected to the death penalty, particularly significant given that capital punishment was formally abolished in France by the statute of October 9, 1981. The Conseil d'État ultimately dismissed the appeal, holding that the contested extradition decree contained an express condition stipulating that, should the accused be tried and sentenced to death, the United States authorities undertook not to enforce the capital sentence. In his advisory opinion submitted in the case, the Commissaire du Gouvernement cited the laws and established practices of Germany, Italy, Austria, Denmark, Switzerland, and the United Kingdom, all of which have developed legal frameworks and consistent jurisprudence concerning the refusal to extradite individuals to states that continue to impose the death penalty as a criminal sanction. See C.E., Assemblée, du 15 octobre 1993, N° 144590, publié au recueil Lebon.

Likewise, in a case adjudicated by the Conseil d'État in 1990, the report submitted by the Commissaire du Gouvernement included a detailed examination of constitutional jurisprudence from Germany, Spain, the United States, Austria, Italy, Norway, Portugal, and Canada. This comparative analysis aimed to assess whether the French legal Framework governing abortion was consistent with the right to life as enshrined in Article 6 of the International Covenant on Civil and Political Rights and Article 2 of the European Convention on Human Rights. See C.E., Assemblée, du 21 décembre 1990, N° 111417, inédit au recueil Lebon.

¹⁶⁹ C.E., du 29 octobre 2003, Societe Techna S.A. et autres, N° 260768.

¹⁷⁰ R. POSNER, HOW JUDGES THINK 348 (2008).

¹⁷¹ Giuseppe Franco Ferrari and Antonio Gambaro, *The Italian Constitutional Court and Comparative Law: A Premise*, 1 COM. L. REV. 1, 3 (2010).

International Court of Justice. That said, such instances remain exceptional and tightly circumscribed. For instance, as Giuseppe Ferrari and Antonio Gambaro have noted that studies conducted on the jurisprudence of the Italian Constitutional Court from 1980 to 1987 revealed an average of no more than five references to foreign law per year.¹⁷² In subsequent years, up to 1998, this frequency declined significantly.¹⁷³

III.1.2 *The Absence of Legal Impediments to the Supreme Constitutional Court's Engagement with Foreign Law*

Revisiting the question of whether any legislative prohibition or entrenched judicial custom precludes the SCC of Egypt from engaging with foreign legal sources in the course of its constitutional adjudication, it may be asserted, without exaggeration, that the position in Egypt broadly parallels that observed in jurisdictions such as France and Italy, subject to a minor but noteworthy qualification. While there exists neither a statutory bar nor a firmly established jurisprudential norm that would inhibit Egyptian courts from referencing foreign legislation or judicial decisions, such references remain infrequent in practice. This apparent judicial reticence may be attributed to the enduring influence of the civil law tradition, to which the Egyptian legal system is historically and structurally aligned. As in other civil law jurisdictions, Egyptian courts tend to render decision in a concise format, adhering to specific conventions regarding the structure and articulation of legal reasoning and operative rulings. In this context, it is generally accepted that foreign laws, judicial precedents, and doctrinal writings do not possess binding authority within the Egyptian legal order. Nonetheless, the SCC—and, by extension, other judicial bodies—may, on occasion, find it both appropriate and necessary to invoke such sources. However, this engagement occurs solely for purposes of comparative analysis or interpretive clarification, rather than as a source of authoritative legal norms.

It must be acknowledged, as a matter of institutional practice, that Egypt's SCC has not diverged from the broader stylistic and procedural conventions that characterize the judgments of other Egyptian courts. Its decisions continue to reflect a tradition of brevity and conciseness, adhering to an established structure that progresses from the procedural background, to the articulation of the legal issue, through the reasoning, and culminating in the operative part. Likewise, its rulings are rendered collectively, reflecting the majority opinion of the bench, without disclosing dissenting or concurring views. Nonetheless, a careful examination of the SCC's jurisprudence reveals that it is, among all Egyptian judicial bodies, the most inclined to engage with foreign legislation, judicial decisions, and comparative doctrinal sources.¹⁷⁴ This tendency may be attributed to the unique and elevated nature of the Court's jurisdiction, particularly its mandate to exercise constitutional review. In performing this function, the Court is frequently required to interpret legislative provisions of a diverse nature, including not only ordinary statutory provisions but also constitutional norms that are alleged to have been contravened.

Constitutional provisions, by their very nature, are qualitatively distinct from ordinary legislation: they are typically framed in broad, open-textured language, enunciating general principles and standards while eschewing detailed regulatory content. Consequently, the SCC often finds itself compelled to engage in normative elaboration to fill the gaps left by

¹⁷² *Id.*

¹⁷³ *Id.*, at 4.

¹⁷⁴ See Clark B. Lombardi, *Egypt's Supreme Constitutional Court: Managing Constitutional Conflict in an Authoritarian, Aspirationally Islamic State*, 3 J. COMP. L. 234 (2008) (examining the SCC's role in constitutional adjudication within a comparative law framework and situates its jurisprudence in broader legal and international contexts.)

the constitutional text, specifically in defining the scope and typology of fundamental rights and freedoms, distinguishing between positive and negative rights, and identifying the legitimate limitations that may be imposed upon them.¹⁷⁵ Against this backdrop, the SCC's resort to foreign legal sources becomes not only conceivable but, at times, necessary to arrive to a coherent and equitable interpretation of constitutional rights, particularly given the substantial similarities that often exist among constitutional provisions concerning fundamental rights across different legal systems.¹⁷⁶

Moreover, it cannot be overlooked that the SCC's jurisdiction over constitutional review, particularly in matters involving fundamental rights and freedoms, frequently intersects with the State's obligations under binding international treaties and conventions. This intersection may well justify, or even necessitate, the Court's reference to foreign laws and judicial decisions interpreting those same international instruments.

Accordingly, it may be asserted the Egyptian legislation, including Law No. 48 of 1979 on the SCC, as well as Law No. 66 of 1970 regarding procedures and fees before the SCC, does not contain any provision that would preclude the Court from referencing or invoking foreign laws and judicial decisions within the context of its national rulings. Further, one should not argue that judicial practices or conventions have evolved in such a manner as to impeded Egyptian courts, particularly the SCC, from drawing upon foreign legal sources. On the contrary, several of the Court's decisions have expressly cited foreign jurisprudence and doctrinal writings, as will be demonstrated in due course.

Given the absence of any legislative or customary judicial prohibition on the recourse to foreign legal and judicial materials, it becomes appropriate to proceed to answer the question previously posed—namely, the position of the SCC on the use of foreign laws and judicial decisions. However, in my view, any attempt to address this question must begin with a clarification of two fundamental issues: first, the identification of the established interpretative approach adopted by the SCC; and second, an examination of selected judgments in which the Court has, in fact, engaged with foreign legal sources, in order to illustrate the manner and context in which such references have been made.

III.1.3 *The Supreme Constitutional Court's Approach to the Use of Foreign Law*

It has already been mentioned that the question of whether national courts, specifically constitutional courts, may rely on foreign laws and judicial decisions is closely intertwined with prevailing theories of constitutional interpretation.¹⁷⁷ The interpretive methodology adopted by a court in construing constitutional provisions directly influences the extent to which it may, permissibly or appropriately, engage with foreign legal sources.¹⁷⁸ For instance, originalist theories of interpretation, which oblige the constitutional judge to ascertain the meaning of a constitutional provision strictly in accordance with the ordinary meaning of its text—without venturing beyond the literal wording—leave little or no room for recourse to foreign law or jurisprudence.¹⁷⁹ Under such an approach, the judge's

¹⁷⁵ CLARK B. LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT 147–152 (2006).

¹⁷⁶ Hirschl, *supra* note 39, at 83–105.

¹⁷⁷ Mher Arshakyan, Jacopo Paffarini & Márcio Ricardo Staffen, *Constitutional Interpretation and Foreign Law: A Comparative Analysis between the U.S. Supreme Court and the German Federal Constitutional Court*, 16 REVISTA DE DIREITO ADMINISTRATIVO & CONSTITUCIONAL 5, 7–9 (2025).

¹⁷⁸ Lee J. Strang, *A Brief History of Originalism in American Constitutional Interpretation*, in ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION 14–17 (2019).

¹⁷⁹ ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 35, 36 (2012).

interpretive function is largely confined to consulting linguistic tools, such as dictionaries, to elucidate the plain meaning of the text.¹⁸⁰

By contrast, purposive and pragmatic theories of interpretation afford constitutional courts a broader margin of discretion.¹⁸¹ The purposive approach obliges the judge to go beyond the surface meaning of the text in order to uncover the intent and objectives of the framers or legislature.¹⁸² Similarly, the pragmatic approach requires consideration of the broader societal consequences and practical implications that may result from adopting a particular interpretation.¹⁸³ Both approaches, therefore, tend to justify or even necessitate a greater openness to foreign laws and judicial decisions, insofar as these may shed light on underlying purposes or offer insight into potential effects of constitutional interpretation.¹⁸⁴

Before addressing the interpretive methodology consistently adopted by the Egyptian SCC, it is important to note that, pursuant to Article 26 of Law No. 48 of 1979 regarding the establishment of the Court, one of its competences is the interpretation of statutory provisions issued by the legislative authority, as well as presidential decrees having the force of law, where such provisions have given rise to a conflict in application and where their importance warrants a uniform interpretation.¹⁸⁵ Accordingly, it is evident from the text of Article 26 that the legislature has conferred upon the SCC the jurisdiction to interpret ordinary legal provisions, whether enacted by the legislature or promulgated by the executive acting under constitutionally delegated legislative authority, provided that such provisions have generated divergent applications.¹⁸⁶

However, the legislature has not vested the Court with exclusive jurisdiction to interpret constitutional provisions or to issue binding rulings solely for the purpose of constitutional interpretation.¹⁸⁷ In fact, constitutional interpretation does not fall within the exclusive competence of any single court. Rather, both ordinary and constitutional courts are empowered to interpret the Constitution insofar as such interpretation is necessary for the resolution of disputes brought before them.¹⁸⁸ Nevertheless, this observation does not detract from the widely accepted reality that constitutional courts, by virtue of their mandate and specialization, are most frequently engaged in the task of interpreting

¹⁸⁰ Steven G. Calabresi, *On Originalism in Constitutional Interpretation*, CONSTITUTION CENTER WHITE PAPER 4, 5–6 (2017).

¹⁸¹ LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 105–110 (1991).

¹⁸² Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 62–65 (2004).

¹⁸³ Arshakyan et al., *supra* note 177, at 8, 9.

¹⁸⁴ Noam Kolt, *Cosmopolitan Originalism: Revisiting the Role of International Law in Constitutional Interpretation*, 41 MELB. U. L. REV. 182, 200–205 (2017).

¹⁸⁵ See Mohamed Abdelaal, *Constitutionality of Constitutional Acts in Egypt: Can The Egyptian Supreme Constitutional Court Extend its Jurisdiction?*, JURIST ACADEMIC (Oct. 9, 2014) (summarizing Article 26 of Law No. 48/1979 as empowering the Court to interpret laws and presidential decrees in cases of divergent application.)

¹⁸⁶ Awad Mohammad El-Morr, Abd El-Rahman Nossier & Adel Omar Sherif, *The Supreme Constitutional Court and its Role in the Egyptian Judicial System*, in HUMAN RIGHTS AND DEMOCRACY 45–48 (1996).

¹⁸⁷ SCC, Case No. 1, Judicial Year 17 (July 3, 1995); See Abdelaal, *supra* note 184 (emphasizing that neither the Constitution nor Law No. 48/1979 grants exclusive jurisdiction to the SCC over constitutional interpretation.)

¹⁸⁸ Adel Omar Sherif, *An Overview of the Egyptian Judicial System and Its History*, in KEVIN BOYLE & ADEL OMAR SHERIF (EDS), HUMAN RIGHTS AND DEMOCRACY: THE ROLE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT 19, 20 (1997) (noting that when a constitutional issue arises during ordinary litigation, litigants or the trial court may refer the matter to the Supreme Constitutional Court, indicating that ordinary courts participate in constitutional interpretation as part of the judicial process.)

constitutional provisions, particularly in the context of assessing the conformity of legislative acts with constitutional principles and norms.¹⁸⁹

Accordingly, it is important to emphasize that I have been primarily concerned with highlighting the various ways in which the SCC has drawn upon specific interpretative approaches. It must not escape the reader's attention that, in addressing the jurisprudence of the SCC concerning its adopted methodology of interpretation, I mainly refer to the Court's methodology in interpreting constitutional provisions. Nevertheless, I contend that the legislature's position in conferring upon the Court the exclusive jurisdiction to interpret ordinary statutory provisions inevitably casts a shadow over the methodology the Court adopts in interpreting constitutional texts. To put it more clearly, although the legislature has granted the Court the exclusive power to interpret ordinary legislation, rendering its interpretative rulings binding on all, without extending a similar mandate in respect of constitutional provisions, as has been previously established, I argue that the interpretative methodology employed by the Court in construing ordinary statutory texts is, in effect, extended to its interpretation of constitutional provisions as well. This leads to the broader proposition that the SCC appears to equally treat both the constitutional and ordinary legislator with respect to the drafting techniques employed in legislative texts, as well as the underlying policy objectives such texts are intended to serve.

A further reflection on the scholarly discourse surrounding the interpretative methodology adopted by the SCC—or, as some prefer to name it, its interpretative mechanisms—reveals, quite justifiably, that the Court's approach oscillates between two principal methodologies: the first of which is an internal mechanism, while the second represents an external one.¹⁹⁰ The first methodology refers to those techniques that assist the Court in interpreting constitutional provisions by adhering strictly to the text's wording and structure, as formulated by the constitutional legislator.¹⁹¹ There is little controversy in acknowledging that this approach corresponds to what is traditionally known as textual or formalist interpretation,¹⁹² as previously discussed. In applying this method, the SCC seeks to ascertain the meaning of a constitutional provision within the confines of the language employed by the constitutional legislator.¹⁹³ However, where the language proves ambiguous or leads to an anomalous outcome, the Court may depart from a purely literal reading and resort instead to discerning the intent and purpose of the legislator—an approach commonly referred to as purposive interpretation.¹⁹⁴

To elucidate this point, the SCC, in its adoption of the textual interpretative methodology, states that:

“It is well established that, in discerning the purposes which the legislator intended to achieve through the enactment of a particular provision, the expression employed by the legislator in drafting the legislative text,

¹⁸⁹ TAMIR MOUSTAFA, *THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT* 275–279 (2007) (discussing the SCC's pre-eminence in constitutional interpretation and ensuring legislative conformity with constitutional norms.)

¹⁹⁰ See RAMZI ALSHA'ER, ALNIZAM ALDOSTORY ALMASRY [THE EGYPTIAN CONSTITUTIONAL SYSTEMS] 386 (1999); Islam Shiha, *Altafsir Aldostory llohoouq w Alboryat Aldostoryya fi do'i qva'id Alqanoun Aldawly llohoouq Alinsan* [Constitutional Interpretation of Constitutional Rights and Freedoms considering Humanitarian International Law], 1 MAĞALLAĖ AL-ĤUQŪQ LIL-BUĤŪT AL-QĀNŪNIYYĀT WA AL-IQTİŞĀDIYYĀT [J. LEGAL & ECONOMIC RESEARCH] 119 (2016).

¹⁹¹ See KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 3–6 (1999) (emphasizing adherence to discoverable legislative intent and textual fidelity).

¹⁹² See *Id.*, at 22–27.

¹⁹³ See *Id.*, at 35–29 (explaining circumstances under which textual clarity breaks down and alternative interpretative methods may be invoked).

¹⁹⁴ Shiha, *supra* note 190, at 121.

considered within its context and defined in light of the nature of the subject matter regulated and objectives pursued, must be primarily relied upon. Departing from such expression in favor of another interpretation is impermissible unless strict adherence to its literal wording would contradict clear and legitimate aims sought by the legislator.”¹⁹⁵

Regarding the Court's departure from interpreting constitutional provisions strictly according to their literal wording and its recourse instead of interpretation based on the meanings and purposes of the terms employed, commentators note that the Court relies on what is termed *integrative interpretation*. Under this approach, constitutional provisions are interpreted on the assumption that they constitute a coherent whole, complementing one another with the aim of revealing their true intentions and objectives, and ensuring the consistency of the highest constitutional values.¹⁹⁶ This approach is arguably justified by the SCC's jurisprudence, which holds that the absence of preparatory works or the existence of ambiguity in legislative texts does not “preclude this Court from exercising its mandate in applying constitutional provisions, since its role through interpretation is to connect these provisions considering the true purpose intended by the Constitution and to dispel ambiguity. The upshot is that constitutional provisions are not inherently incapable of determination on the one hand, and on the other, each provision must be given an operative scope that functions integratively with other provisions.”¹⁹⁷

While the internal mechanisms of interpretation, as consistently affirmed in the jurisprudence of the SCC, remain bound by the wording employed by the constitutional legislator—words that disclose specific meanings—external mechanisms of interpretation operate in stark contrast. These external mechanisms compel the Court to move beyond the surface meaning of constitutional text. There is no doubt that such interpretative tools find their application in the Court's jurisprudence whenever it becomes evident that a literal reading of the constitutional provision would lead to anomalous or illogical outcomes. In such instances, interpretative methods that liberate the Court from a strict adherence to the express language of the constitutional text enable it to interpret the provision according to the legislator's intended purpose and the ultimate objective underlying its enactment. In departing from a purely literal interpretative approach, the SCC has not hesitated to dispel ambiguity or clarify obscurity within constitutional provisions by construing them through the lens of the legislator's aim and the rationale that underpins the provision.¹⁹⁸

¹⁹⁵ SCC, Case No. 34, Judicial Year 13 (June 20, 1994). Further the SCC once ruled that the fundamental principle in interpreting legislative texts is that they must be understood in accordance with their intended purposes, without distorting their meaning or detaching them from their context. The true meaning, according to the Court, reflects that legislator's intent and the social interests the law aims to protect. Legislative provisions should be interpreted holistically to maintain coherence, avoid contradictions, and ensure that all parts work together to fulfill the legislature's overarching objectives. See SCC, Case No. 1, Judicial Year 15 (January 30, 1993).

¹⁹⁶ MOHAMED FAWZI NWEJJI, *ALTAFSIR ALMONSHI' LL QADI ALDOSTORY: DYRASSA MOQARNA [CONSTITUTIVE INTERPRETATION BY THE CONSTITUTIONAL JUDGE: A COMPARATIVE STUDY]* 59 (2018).

¹⁹⁷ SCC, Case No. 7, Judicial Year 8 (May 15, 1993). The SCC also held that “the fundamental principle concerning constitutional provisions, consistent with this Court's rulings, is that they must be regarded as an integrated whole, and the meanings derived therefrom ought to be coherent and harmonious, thereby excluding contradiction or discord. Having established in Article 3 that the sovereignty belongs solely to the people, it follows necessarily that its exercise and protection must be conducted in the manner prescribed by the Constitution, meaning that the Constitution's provisions define the rules governing its exercise and delineate its limits.” SCC, Case No. 22, Judicial Year 8 (January 4, 1991).

¹⁹⁸ See Shiha, *supra* note 190, at 129-132.

For instance, in addressing the right to access information, the SCC examined the permissible limitations that may be imposed on freedom of opinion and expression. In doing so, the Court sought to construe the relevant constitutional provisions concerning freedom of expression considering the purpose intended by the constitutional legislator. In this regard, the Court held that

“[T]he constitutional protection of freedom of expression—insofar as it relates to the critique of public officials—is intended to ensure that all individuals have access to facts concerning public affairs, and to the essential information that reveals them. Such access must remain unobstructed and must not be curtailed merely on the pretext of protecting reputational interests.”¹⁹⁹

Similarly, in its jurisprudence deeming penal provisions unconstitutional where they are tainted by ambiguity or vagueness, the SCC has grounded its reasoning in the constitutional purposes inferred from the penal texts themselves. In doing so, the Court observed

“[T]he objective pursued by the Constitution is to ensure that every citizen is afforded full opportunity to exercise their freedoms within the framework of the constraints imposed upon them. It follows, therefore, that any restrictions on liberty imposed through penal legislation must be defined with certainty, as such laws call upon those subject to them to comply to safeguard their right to life and their personal freedoms from the threats posed by criminal sanctions. Historically, the ambiguity of penal laws has been closely associated with the abuse of power. Accordingly, it became imperative for the legislator to adopt modern drafting techniques that avoid vague, flexible, or indeterminate expressions, those capable of bearing multiple meanings and thereby expanding the scope of criminalization. Such expressions risk placing the trial court in precarious positions, potentially leading it to constructing offences the legislature never intended to create, and to transgress the boundaries which the Constitution considers a vital domain for the exercise of rights and

¹⁹⁹ SCC, Case No. 42, Judicial Year 16 (May 20, 1995). Additionally, in departing from a strictly textualist interpretive methodology, the Court may invoke what is referred to as the preparatory works of the constitutional text—such as official records of parliamentary sessions, debates, and deliberations that accompanied the proposal, discussion, drafting, and eventual enactment of the provision. Although the content of such preparatory materials does not carry binding authority upon the constitutional judge, it may nonetheless assist in uncovering the true meaning of the constitutional provision when interpreted considering the framers’ intent. On this basis, while interpreting the constitutional provision on judicial supervision of elections, the Supreme Constitutional Court relied upon the preparatory works of the Constitution. The Court clarified that such supervision is not to be understood as implying direct control or managerial authority over the electoral process, but rather as a form of oversight aimed at ensuring neutrality and integrity. In its ruling, the Court stated that “[S]upervision must be understood as observation of the voting process from above, and not as management or execution thereof. It is the voter—not the judicial supervisor—who possesses the authority to carry out the act of voting. Nor is it appropriate to interpret supervision as implying control or dominance, since this is impractical given the fact that the number of sub-electoral committees far exceeds the number of members of the judiciary. Furthermore, the preparatory works of the Constitution clarified that judicial supervision over subcommittees is to occur only ‘to the extent possible.’ This implies that the extension of judicial oversight to such committees is a matter of legislative expediency, falling squarely within the legislature’s discretionary authority and not subject to judicial review. The government’s legal counsel further submitted that the presumption of constitutionality—accorded to legislative acts—necessitates construing statutory provisions in the manner that preserves their validity, provided such an interpretation is reasonably supported by the text.” SCC, Case No. 11, Judicial Year 13 (January 8, 2000).

freedoms it guarantees. Ultimately, this undermines the essential safeguards on which the right to a fair trial is based.”²⁰⁰

Moreover, scholarly writings have pointed to what has come to be known as contemporary interpretation in the jurisprudence of the SCC. Under this approach, the Court disengages from a purely literal reading of the constitutional text and instead interprets it given the prevailing social and factual circumstances.²⁰¹ In justifying this methodology, scholars classify it as part of the external interpretative mechanisms, which enable the Court to move beyond the plain meaning of the constitutional language and to attribute to the text a living, dynamic meaning. This approach avoids rigidity and stagnation and ensures that constitutional provisions remain aligned with ongoing societal transformations.²⁰² In support of this interpretive approach, the SCC, in its decision rejecting the constitutional challenge brought against Article 24 of the Law on the Exercise of Political Rights, held that:

“[T]he fundamental premise of constitutional provisions is that they operate within an organic unity that renders their rules a coherent and interwoven whole. This implies that each provision carries a distinct and autonomous meaning, yet not one that isolates it from the rest. Rather, the provisions collectively from a structural framework reflect what the popular will has deemed most suitable for advancing the public interest in political, economic, and social spheres. Accordingly, constitutional provisions must not be interpreted in a manner that diverges from their intended ultimate purpose, nor should they be viewed as floating in abstraction or as idealistic values detached from their social context.”²⁰³

Further reflection on the jurisdiction conferred upon the SCC to engage in legislative interpretation casts a discernible shadow upon the methodology adopted by the Court in its interpretation of constitutional provisions. It would not be an exaggeration to assert that legislative interpretation and constitutional interpretation constitute two sides of the same coin in the jurisprudence of the Egyptian SCC. More precisely, while the SCC, much like its counterparts in other jurisdictions, primarily engages in the interpretation of constitutional texts by virtue of its exclusive mandate to exercise constitutional review, it is also vested with the authority to interpret ordinary statutory provisions whenever ambiguity arises that renders their application problematic. Consequently, it becomes increasingly difficult to disentangle the Court's methodological approach to legislative interpretation from that which it employs in constitutional interpretation.

That being said, one must consider the fact that this intersection does not preclude the possibility of divergent methods and interpretive tools being applied to ordinary legislation as opposed to constitutional norms. Indeed, the distinctive nature of constitutional texts, typically characterized by their brevity, open texture, and indeterminate phrasing, demands particular attention. These texts are often drafted in broad strokes, articulating general principles and normative standards while deliberately avoiding the elaboration of concrete

²⁰⁰ SCC, Case No. 3, Judicial Year 10 (January 2, 1993).

²⁰¹ See Lombardi, *supra* note 174, at 242.

²⁰² See Nweiji, *supra* note 196, at 123–130; See also Khaled Abou El Fadl, *The Centrality of Shari'ah to Government and Constitutionalism in Islam*, in RAINER GROTE & TILMANN J. RÖDER (EDS.), *CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY* 35–62 (2012) (discussing non-literal and dynamic modes of constitutional interpretation; and scholarly analyses of the jurisprudence of the Egyptian Supreme Constitutional Court emphasizing evolutionary and context-based interpretation.)

²⁰³ SCC, Case No. 76, Judicial Year 28 (October 1, 2007); see also SCC, Case No. 56, Judicial Year 27 (April 11, 2015).

detail. As such, they are inherently polysemous and capacious in meaning, allowing for a range of interpretive possibilities far beyond the surface of their linguistic form. Accordingly, it should come as no surprise that the interpretation of constitutional provisions may necessitate interpretive frameworks and techniques that differ markedly from those employed in construing ordinary legislative texts, which seldom exhibit such semantic openness or indeterminacy.

Assuming, *arguendo*, that the Egyptian SCC was not unaware of the foregoing conceptual distinction concerning the distinctive nature the phrasing and language of constitutional texts, which sets them apart from ordinary legislative provisions, this awareness has in no way undermined the fundamental reality of the uniformity in the Court's interpretive methodology, irrespective of the nature of the text under review, whether constitutional or ordinary statutory. A closer examination of the jurisprudence of the SCC reveals that the Court has consistently adhered to an interpretive approach that seeks to ascertain the legislator's intent, whether the provision in question is constitutional or ordinary legislation. Indeed, a careful and impartial analysis of the Court's rulings demonstrates that, notwithstanding the oscillation between various interpretive tools be they textualist or purposive, the Court's interpretive practice invariably aims at the singular objective of elucidating the legislator's will and intent underlying the legislative texts under scrutiny.²⁰⁴

III.2 *Jurisprudential Applications: The Egyptian Supreme Constitutional Court in Practice*

It is well established that there exists no legislative provision or judicial custom that It is well established that there exists no legislative provision or judicial custom that prohibits the SCC from drawing upon foreign laws and judicial decisions in the reasoning of its national rulings.²⁰⁵ Moreover, as previously noted, the internationalist interpretive

²⁰⁴ To clarify, in its endeavor to ascertain the intent and purpose of the legislature when exercising its competence in legislative interpretation, the Egyptian SCC has explicitly affirmed that the limits of its authority are confined to determining the substantive content of the legal provision in question in accordance with the will of the legislator. In this regard, the SCC has stated that "[I]n exercising its jurisdiction with respect to legislative interpretation, the Court's power is confined to determining the meaning of the statutory provision under interpretation according to the legislator's intent, seeking to uncover the purposes underlying the provision and the objectives it was designed to achieve. In order to discern and reveal this legislative intent, so as to arrive at its true substance and direction, the Court does not isolate itself from the historical evolution of the legal texts it interprets, nor from the preparatory works that preceded or accompanied their enactment, given that all such materials assist the Court in identifying the legislative purposes presumed to be embodied in, and conveyed by, the provision under interpretation." SCC, Case No. 2, Judicial Year 8 (May 7, 1988).

A similar interpretive approach is evident in the SCC's treatment of constitutional provisions. Careful analysis of its jurisprudence demonstrates that, regardless of the specific interpretive methodology employed, be it textual, semantic, purposive, or historical, the Court consistently aims to uncover the intent and purpose of the constitutional legislator. Whether invoking the plain meaning of the text, exploring its broader semantic implications, or drawing on preparatory works and legislative history, the Courts decisions reveal a settled commitment to intentionalist interpretation. Even when adopting what it terms a "contemporary interpretation," focused on present-day social interests, the Court frames this approach as a means of identifying the constitutional legislator's underlying objectives. This consistent focus on legislative intent applies across both statutory and constitutional interpretation. Despite the Court's use of diverse interpretive tools, their unifying function is the same; that is to elucidate the legislator's true will. This entrenched intentionalist methodology also renders the Court's engagement with foreign laws and judicial decisions both conceivable and legitimate. By seeking to uncover the legislator's purpose, rather than limiting itself to the literal text, the Court opens space for comparative reference as an aid to interpretation. Notably, no statutory or customary barrier precludes such reference, further supporting its doctrinal validity within the Court's interpretive framework.

²⁰⁵ Islam Ibrahim Chiha, *Constitutionalisation of International Human Rights Law in the Jurisprudence of the Egyptian Supreme Constitutional Court*, 32 ALQ 242–262 (2018) (analyzing how the SCC incorporates international and foreign law into its constitutional interpretation, especially on fundamental rights issues.)

methodology firmly entrenched in the Court's jurisprudence arguably facilitates such recourse to foreign legal materials. This approach aims to uncover the true intent and purpose of the legislator, a goal that may be advanced through reference to the interpretative frameworks and readings adopted by foreign constitutional courts, especially where the constitutional provisions concerned bear similarity across different national constitutions, particularly in the domain of fundamental rights and freedoms.²⁰⁶

It is worth noting that, beginning in the 1990s, the Egyptian SCC undertook a deliberate project of judicial development, seeking to transcend the previously narrow interpretive confines of constitutional texts.²⁰⁷ This evolution has been marked by the adoption of an expansive reading of fundamental rights and freedoms. In pursuit of this objective, the Court has relied upon international standards enshrined in treaties and international covenants, as well as foreign constitutional and supreme court jurisprudence and foreign constitutional law scholarship, employing these sources as guiding principles and foundational pillars for a liberal and contemporary interpretation of constitutional provisions.²⁰⁸

However, it is important to emphasize that, unlike many constitutional supreme courts in common law jurisdictions—which publish judgments that include both majority opinions and dissenting views—the rulings of the Egyptian Supreme Constitutional Court typically disclose only the majority opinion, without any indication of dissent.²⁰⁹ This practice arguably renders it difficult to discern the individual interpretive orientations of the Court's judges at any given time or to identify the specific interpretive school to which each judge subscribes. Consequently, the most a careful analyst can do is to discern the Court's overall stance on a particular legal issue or to identify the prevailing interpretive methodology employed by the Court as an institution.

On this basis, it appears that the SCC's recourse to foreign laws and judicial decisions is manifest in an examination of a body of its rulings, particularly those addressing fundamental rights and freedoms,²¹⁰ precautionary measures, rules governing the treatment of foreigners, and matters of criminalization and punishment.

III.2.1 *The Use of Foreign Law and Judicial Decisions in Matters of Rights and Freedoms*

It is well recognized that national courts, particularly constitutional and supreme courts, are most likely to draw upon foreign laws and judicial decisions in cases involving fundamental rights and freedoms. This trend can be attributed to the fact that constitutional provisions concerning such rights are often drafted in broad, open-ended terms, typically without providing precise definitions, limitations, or classifications. This legislative openness necessarily invites judicial intervention to define the scope of these rights, distinguish between positive and negative rights, and delineate permissible restrictions. In this regard, the Egyptian SCC is no exception. Accordingly, any attempt to

²⁰⁶ *Id.*

²⁰⁷ Lombardi, *supra* note 174, at 242-245.

²⁰⁸ See *Id.*; Wiebke Greeff, *Religious Law in the Service of Human Rights? Developments in the Jurisdiction on Human Rights by Egypt's Supreme Constitutional Court in the 1990s*, 7 INTERDISCIP. J. RELIG. TRANSFORM (2021) (discussing the SCC's use of international treaties, comparative jurisprudence, and scholarly sources to advance a broad interpretation of fundamental rights).

²⁰⁹ Chibli Mallat, *Saving Egypt's Supreme Constitutional Court from Itself*, AHARAM ONLINE, June 15, 2012, available at <https://english.ahram.org.eg/NewsContentP/4/45009/Opinion/Saving-Egypt%E2%80%99s-Supreme-Constitutional-Court-from-i.aspx> (discussing the SCC's practice of issuing judgments without publishing dissenting opinions, highlighting concerns about transparency and accountability in the Court's decision-making process.)

²¹⁰ See Chiha, *supra* note 205, at 245-259.

ascertain the methodology adopted by the Court in its reliance on foreign legal sources must proceed through a careful analysis of selected rulings in the area of fundamental rights and freedoms.

For example, in 1995 the SCC held unconstitutional paragraph six of Article 73 of Law No. 47 of 1972 concerning the State Council. The provision in question barred the appointment of any individual to the State Council who was married to a foreign national.²¹¹ The Court grounded its decision in the finding that the impugned provision violated a number of constitutional rights, including personal liberty, the sanctity of private life, the right to choose one's spouse, the right to marry, the right to equality and equal opportunity, and the right to hold public office.²¹²

In defining the nature and scope of these rights, as well as the limitations that may be imposed upon them, the Court expressly drew upon international human rights instruments, foreign constitutional jurisprudence, and comparative academic scholarship.²¹³ This comparative engagement was particularly evident in two respects. First regarding the right to marry and to choose one's spouse, the Court emphasized that the absence of an explicit reference to these rights in certain constitutions does not negate their existence.²¹⁴ Rather, the Court characterized them as fundamental personal rights inherently tied to individual autonomy.²¹⁵ Second, the Court reasoned that the explicit constitutional guarantee of the right to privacy under Article 45 of the 1971 Egyptian Constitution sufficiently encompasses both the right to marry and the freedom to choose one's partner.²¹⁶ As the Court stated:

“[T]he omission of any explicit reference to marriage or the choice of one's spouse in some constitutional instruments does not undermine the recognition of these rights, nor does it suggest that such instruments disregard their substance or leave legislators free to impose arbitrary restrictions upon their exercise. These rights fall within the realm of privacy protected by Article 45 of the Constitution of the Arab Republic of Egypt, which affirms that the private lives of citizens are inviolable and protected by law.”²¹⁷

In its reliance on foreign laws and judicial decisions, the SCC's reasoning reveals a clear openness to comparative legal concepts. A close examination of the decision indicates that the SCC, in its effort to affirm that the right to marry and the right to choose one's spouse

²¹¹ SCC, Case No. 23, Judicial Year 16 (March 18, 1995).

²¹² *Id.*

²¹³ See Chiha, *supra* note 205, at 242–262; Greeff, *supra* note 208, at 160–165.

²¹⁴ See the SCC's decision, *supra* note 211.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* The Court has explicitly affirmed its adoption of an intentionalist interpretive methodology, whereby it seeks to ascertain the purpose and intent of the constitutional legislator in interpreting constitutional provisions. This approach was clearly articulated when the Court justified its inclusion of the rights to marry and to choose one's spouse within the broader framework of the constitutional right to privacy. In doing so, the Court emphasized that any meaningful delineation of the relationship between various constitutional provisions, and the coherent integration of these provisions as components of a unified constitutional fabric, can only be achieved through a deep understanding of their underlying purposes and objectives, as well as a clarification of the often-obscure value and higher ideals embodied in the Constitution. In this respect, the SCC said “[T]he interrelationship between constitutional provisions and their interpretation considering one another often gives rise to rights not expressly enumerated, yet their existence is implied by the rights the Constitution has guaranteed rights that serve as an entry point to, or necessary corollary of, such unenumerated rights. Frequently, subsidiary elements of constitutional provisions lead to the recognition of a general principle or right that binds them together and gives structure to their application. This cannot be achieved without a deeper comprehension of the Constitution's aims and a distillation of the foundational values and higher ideals it embodies.”

are inseparable from the essential attributes of family life and the demands of personal privacy, incorporated legal terminology from foreign jurisprudence. In doing so, the Court reasoned that:

“[T]he right to choose one’s spouse cannot be considered detached from the core attributes of family life, nor as existing beyond its boundaries, for it is intrinsically linked to the very formation of that life. It is also one of the constituent elements essential to the development of human personality, serving as an expression of the individual’s autonomous will in matters fundamentally tied to their personal identity—Private Choice of Autonomy. It reflects the individual’s personal convictions and life orientation, over which they retain full independence. Denying this right would constitute a violation of the foundational values underlying the notion of Ordered Liberty, and it would contradict the requirement of fair legal processes, which aim to safeguard personal freedom against procedural mechanisms or substantive rules that are inconsistent with constitutional principles. Such principles extend constitutional protection to rights inherently connected to personal liberty and derived from its core, in order to prevent encroachment upon the intimate sphere in which life and liberty manifest in their most harmonious and compassionate form.”²¹⁸

It is, in fact, both conceivable and reasonable for the SCC to classify the individual’s right to choose a spouse as an inherent and inalienable personal right—one deeply rooted in a constellation of constitutional principles, most notably personal liberty and the inviolability of private life. However, what merits closer look is the Court’s adoption of the foreign terminology *Private Autonomy of Choice* to describe this intrinsically personal right. In my view, it is not an overstatement to assert that the Court’s employment of such terminology reflects the influence of well-established jurisprudence of foreign supreme courts, which have consistently regarded the right to choose one’s partner as a fundamental personal liberty intimately connected with private autonomy in decision-making.

This interpretation is further supported by the fact that term *Private Autonomy of Choice* originates in the jurisprudence of the United States Supreme Court concerning fundamental rights and liberties. The phrase first emerged in the Court’s landmark 1965 decision in *Griswold v. Connecticut*,²¹⁹ wherein the Court recognized what it termed the “right to marital privacy” as closely linked to the broader principle of private autonomy in personal decision-making.²²⁰ The facts of the case involved a challenge to a Connecticut statute under which two physicians were convicted for providing contraceptive advice to a married couple.²²¹ The U.S. Supreme Court invalidated the convictions, holding that the statute was unconstitutional as it infringed upon the right to marital privacy.²²² Although the U.S. Constitution does not explicitly protect a general right to privacy, the Court grounded its decision in the doctrine that certain implicit rights, emanating from the guarantees set forth in the Bill of Rights, include the right to privacy within marital

²¹⁸ *Id.*

²¹⁹ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

²²⁰ JOHN W. JOHNSON, *GRISWOLD V. CONNECTICUT: BIRTH CONTROL AND THE CONSTITUTIONAL RIGHT OF PRIVACY* 127 (2005).

²²¹ See *Id.*, at 131-132; *Griswold v. Connecticut*, *supra* note 218.

²²² *Id.*

relations (*Right to Marital Privacy*) and the right to private decision-making (*Private Autonomy of Choice*).²²³

Secondly, the Egyptian SCC's reliance on foreign statutes and judicial decisions is clearly evident in its aforementioned decision of 1995, where the Court described personal liberty, including its derivative rights such as the right to choose a spouse and the right to marital privacy, as a form of *ordered liberty*. Notably, the Court incorporated the foreign term "*Ordered Liberty*" directly into the text of its decision. In this regard, the Court held that

"The right to choose one's spouse cannot be separated from the essential features of family life, nor can it be regarded as falling outside its bounds, for it is directly linked to the very formation of that life... To deny this right is to undermine the values upon which ordered liberty is founded. Such a denial is also inconsistent with the requirement of due process and the safeguards it entails to protect personal liberty from being restricted by procedural mechanisms or substantive rules that are incompatible with the constitutional provisions extending protection to those rights intrinsically connected to personal liberty. These protections are designed to shield the realm in which personal life appears in its most intimate and compassionate form."²²⁴

It is apparent that the Egyptian SCC's use of the foreign expression *Ordered Liberty* goes beyond mere linguistic translation or terminological convenience. The invocation of this particular designation cannot be regarded as a purely semantic choice; rather, it reflects a substantive engagement with foreign constitutional jurisprudence. The Court's adoption of the Arabic equivalent of *Ordered Liberty* was not, in my view, the product of original judicial innovation. It appears far more likely that the Court employed the term only after engaging with foreign law, particularly the scattered yet influential precedents of the U.S. Supreme Court, concerning the right to marry and the right to marital privacy.

A careful analysis reveals that the attribution of the label "ordered" to rights, liberties, or even certain state powers is closely tied to long-established doctrines in U.S. constitutional jurisprudence. In particular, the term *Ordered Liberty* has come to signify those fundamental rights and freedoms that, while not expressly enumerated in constitutional text, are nonetheless recognized through judicial interpretation as implicit guarantees. Similarly, the term may be applied to certain privileges or powers implicitly conferred upon governmental authorities under the Constitution.

More precisely, when the U.S. Supreme Court identifies a fundamental individual right, one not expressly articulated in the federal Constitution, through interpretive engagement with a constitutional provision concerning personal liberty, it often categorizes that right

²²³ *Id.* Likewise, in 1973, the concept of the *Right to Personal Autonomy of Choice* reappeared in the jurisprudence of the U.S. Supreme Court in the landmark case of *Roe v. Wade*. In that decision, the Court held that the right to abortion rises to the level of a constitutionally protected right inherently linked to a woman's personal identity. The Court's grounded its reasoning in the notion that the right to abortion emanates from the broader right to privacy, as protected under the Fourteenth Amendment to the U.S. Constitution. In articulating its judgment, the Court noted that the right to abortion is, at times, properly understood as an aspect of *Personal Autonomy of Choice*. See *Roe v. Wade*, 410 U.S. 113 (1973).

Further, in the 1992 landmark decision of *Planned Parenthood v. Casey*, the United States Supreme Court reaffirmed its earlier holding regarding a woman's right to terminate her pregnancy. The Court declared unconstitutional a provision requiring spousal notification prior to undergoing an abortion. In reasoning its decision, the Court held that if the purpose or effect of an abortion regulation is to impose an "undue burden"—defined as a substantial obstacle in the path of a woman seeking an abortion before fetal viability—such a regulation must be deemed unconstitutional. Accordingly, the Court concluded that the spousal notification requirement imposed an undue burden incompatible with both the right to abortion and the *Right to Personal Autonomy of Choice*. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

²²⁴ See the SCC's decision, *supra* note 211.

under the concept of *Ordered Liberty*. The same analytical framework is employed when the Court identifies implicit powers granted to Congress by interpreting provisions that explicitly enumerate legislative powers, likewise characterizing such powers as *ordered* or *structured* within the constitutional framework.²²⁵

According to this conceptual backdrop, a careful examination of the methodology of the U.S. Supreme Court reveals a consistent jurisprudence approach in matters concerning fundamental rights and liberties. The Court has long maintained that certain rights and freedoms are explicitly enumerated in the text of the U.S. Constitution. These expressly stated rights are properly characterized as *Ordered Liberties*. The Court's designation of such liberties as "ordered" signifies that they are subject to legislative regulation by virtue of their express constitutional recognition. By contrast, rights and liberties not expressly mentioned in the Constitution but instead inferred through judicial interpretation of its provisions are referred to as *implied liberties*.²²⁶ These are derived from the Constitution's broader guarantees and are understood to carry constitutional weight despite their absence from the constitutional text.²²⁷

Thirdly, perhaps one is not exaggerating when asserting the Egyptian SCC's reliance on foreign judicial decisions, pursuant to its aforementioned decision, is evident. This is particularly so where the Court explicitly expressed its approval of the approach adopted by the constitutional courts of certain jurisdictions in deriving constitutional rights implicitly from constitutional provisions—especially in relation to rights of fundamental importance and those intrinsically linked to personal identity, such as the right to personal autonomy, the right to marital privacy, and the right to choose a spouse.

To illustrate this, the Court stated that it is not surprising—given the significance of certain rights relating to personal matters, private life, and the sphere of individual autonomy—that the judiciary in some countries has derived the right to privacy and the inviolability of personal life from various constitutional provisions whose content is indicative of such rights. This derivation is achieved by interpreting these provisions in conjunction with one another to uncover the broader relational context in which such rights arise. The Court further held that

“[T]he U.S. Constitution does not explicitly mention the right to privacy. However, the judiciary has interpreted various provisions of that Constitution as possessing penumbras—shadows not easily overlooked—

²²⁵ *Palko v. State of Connecticut*, 302 U.S. 319 (1937), opinion of Justice Benjamin N. Cardozo, 302 U.S. at 325-26 (“immunities ... found to be implicit in the concept of ordered liberty ... through the Fourteenth Amendment ... valid as against the States”).

²²⁶ A similar approach is evident in the jurisprudence of the U.S. Supreme Court with respect to the *implied powers* of the United States Congress. The Court has consistently held that the powers granted to Congress under Article I of the U.S. Constitution pertain primarily to those authorities expressly enumerated in the constitutional text—referred to as ordered powers. In interpreting these enumerated powers, however, the Court has frequently identified additional powers derived by implication, which it has designated as *Implied Powers*. See e.g. W. F. Dodd, *Implied Powers and Implied Limitations in Constitutional Law*, 29 YALE L. J. 138-162 (1919); Robert J. Reinstein, *The Aggregate and Implied Powers of the United States*, 69 AM. UNIV. L. REV. 3-104 (2019); David M. Driesen and William C. Banks, *Implied Presidential and Congressional Powers*, 41 CARDOZO L. REV. 1301-1365 (2020).

²²⁷ See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 45 (2004) (arguing that constitutional interpretation should begin with a presumption of liberty and that express rights are those the framers meant to protect expressly, while others are implied); LEE J. EPSTEIN, KEVIN T. MCGUIRE, THOMAS G. WALKER, *CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES, AND JUSTICE* 120-122 (11th ed., 2021) (discussing how the Supreme Court has distinguished between expressly enumerated rights and those rights it has required to be “fundamental” via doctrine of substantive due process and selective incorporation).

out of which emanate zones of personal life that flow from and are affirmed by those provisions. Among these are the right of individuals to assemble, the right to be secure in their persons, communications, houses, and effects against unreasonable searches and seizures, the right of the accused not to be compelled to testify against themselves so as to avoid self-incrimination, and the Ninth Amendment's affirmation that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people."²²⁸

A careful analysis of the SCC's decision reveals a clear receptiveness to the role played by foreign constitutional jurisprudence in deriving constitutional rights implicitly from the substance of constitutional provisions. This openness reflects the Court's conviction that there is tangible value in consulting foreign judicial precedents, particularly in the interpretation of fundamental rights and liberties, such that national courts may be guided by the interpretive methodologies established in those foreign precedents, thereby enhancing the protection of individual rights and freedoms. Moreover, the Court's continued use of foreign legal terminology in articulating certain constitutional concepts further demonstrates not only its appreciation of the practice of engaging with foreign jurisprudence in support of domestic judgments, but also its willingness, without hesitation, to incorporate such precedents into its own constitutional reasoning.

In justifying its position that the right to privacy is a source from which a constellation of other constitutional rights emanate, most notably the right to personal autonomy and the right to choose one's spouse, the SCC relied upon two principal foundations. The first consists in what has already been noted regarding comparative constitutional jurisprudence; namely, the practice of certain foreign courts in inferring a range of constitutional rights implicitly from the general tenor and normative content of constitutional provisions, even where such rights are not explicitly enumerated. The second foundation lies in the SCC's express adoption of the very terminology adopted by the U.S. Supreme Court when articulating the doctrine of implied constitutional rights. Indeed, the SCC cited these terms in their original English form. In characterizing constitutional provisions that explicitly set forth individual rights and liberties. The Court refrained from using conventional descriptors commonly found in domestic jurisprudence, such as describing such provisions as broad, open-textured, vague, or as capable of encompassing more than what their plain wording may suggest. Instead, the Court introduced a novel descriptor, not developed through its own interpretive reasoning, but rather drawn verbatim from established jurisprudence of the U.S. Supreme Court and the broader body of American constitutional theory.

Precisely, the SCC characterized such provisions as possessing "penumbras," employing the English term itself. Likewise, in describing those constitutional rights that are inferred implicitly from within these penumbral provisions, the Court adopted the very same terminology used by the U.S. Supreme Court, referring to such rights as "emanations." In line with established U.S. constitutional doctrine, the SCC characterized these implied rights as flowing from, or as being derived from, the penumbral zones of enumerated rights—again invoking the English term *emanations* to underscore the conceptual affinity with American jurisprudence.²²⁹

²²⁸ See the SCC's decision, *supra* note 211.

²²⁹ To elucidate this further, the jurisprudence of the U.S. Supreme Court is replete with references to what the Court has termed *constitutional provisions with penumbras*. For example, in one notable case, the Supreme Court held that the First Amendment, guaranteeing freedom of speech and expression, constitutes a penumbral constitutional provision under which several other constitutional rights are subsumed, beyond the right to free expression itself. These include, *inter alia*, the right of assembly and the right to form

Finally, another notable manifestation of the Egyptian SCC's reliance on foreign jurisprudence appears in the previously mentioned decision. In justifying its position on deriving the right to choose one's spouse implicitly from the constitutional provision safeguarding the right to privacy, the Court asserted that the Egyptian constitutional legislator's omission to explicitly enshrine the right to marry cannot be interpreted as a denial of its existence. The Court reasoned that the right to marry is necessarily encompassed within the expressly protected right to privacy, as it includes the individual's autonomy in choosing a spouse. The Court further elaborated that the right to choose one's spouse is a complementary component of both the right to personal liberty and the right to privacy. It emphasized that this interpretive approach is grounded in the understanding that any constitutional framework designed to safeguard personal freedoms and privacy must proceed according to a *rational continuum*—a coherent and evolving approach capable of accommodating the new dimensions imposed by the values established by the community and accepted as normative constraints on its collective conduct.²³⁰ This rationale, the Court held, stems from “the fundamental principle that constitutional provisions must not be interpreted through the lens of a bygone era, but rather must be seen as living texts—capable of development and adaptable to *the supposed tune of times*.”²³¹

A careful examination of the reasoning adopted by the SCC reveals two principal features. The first pertains to the Court's interpretive methodology. In its discussion on the necessity of a coherent and integrated constitutional framework for the protection of personal freedoms and the right to privacy, the Court asserted that such coherence could only be achieved by inferring certain constitutional rights and liberties that were not explicitly enumerated by the constitutional legislator. According to the Court, this approach is essential to ensure that the constitutionally guaranteed rights expressly set forth remain responsive to evolving social needs and values that the community has adopted as normative benchmarks for its collective conduct.

An objective reading of the Court's position—specifically, its incorporation of the right to marry and the derivative right to choose one's spouse within the broader ambit of the constitutional right to privacy—reveals a fusion of two interpretive methodologies:

associations and labor unions. See *NAACP v. Button*, 371 US 415 (1963); *Schwabe v. Board of Bar Examiners*, 353 U. S. 232 (1957). Moreover, in numerous decisions, the Supreme Court has characterized the Fourth and Fifth Amendments to the Federal Constitution, particularly in relation to the right to personal liberty, as affording protection against all forms of governmental intrusion into the sanctity of one's home and private life. The Court justified this interpretation on the basis that both the Fourth and Fifth Amendments are among those constitutional provisions with penumbras, which not only guarantee the right to personal liberty, but also give rise to derivative rights, including the right to privacy and the inviolability of private life. See *Boyd v. United States*, 116 U. S. 616 (1886); *Breard v. Alexandria*, 341 U. S. 622, 341 (1951); *Public Utilities Comm'n v. Pollak*, 343 U. S. 451 (1952); *Lanza v. New York*, 370 U. S. 139 (1962); *Frank v. Maryland*, 359 U. S. 360 (1959); *Skinner v. Oklahoma*, 316 U. S. 535 (1942).

As previously noted, although the SCC characterized certain implicitly derived constitutional rights as *emanations* of expressly enumerated rights, this terminology was not of the Court's own making. Rather, it reflects language long embedded in the jurisprudence of the U.S. Supreme Court. For instance, in one of its landmark decisions, the U.S. Supreme Court expressly stated that the right to personal liberty is among those rights that emanate from a range of constitutional guarantees explicitly enshrined in the text of the Federal Constitution. See *NAACP v. Alabama*, 357 U. S. 449 (1958); *Poe v. Ullman*, 367 U.S. 497 (1961). In a series of other decisions, the Court similarly held that numerous protections contained within the Bill of Rights—such as the right to peaceful assembly, the right to privacy, and the inviolability of the home—are in fact guarantees that implicitly emanate from express constitutional provisions. See *Powell v. Alabama*, 287 U. S. 45 (1932); *Olmstead v. United States*, 277 U. S. 438 (1928); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

²³⁰ See the SCC's decision, *supra* note 211.

²³¹ *Id.*

intentionalism and pragmatism. On the one hand, by invoking notions of “new horizons” and the “changing requirements of society,” the Court adopted abroad, purposive reading of the right to privacy—one that moved beyond the plain text and into the realm of constitutional intent and underlying normative objectives. It was, in the Court’s view, inconceivable that the intent of the Egyptian constitutional framers was limited to protecting only the sanctity of one’s private residence or private life. On the contrary, the Court was persuaded that the true purpose of the constitutional provision was to encompass a broader spectrum of rights, including the inviolability of correspondence, the right to marry, the right to choose one’s spouse, and, more broadly, the right to personal autonomy. This interpretive stance was further reinforced by the Court’s observation that the rationale for recognizing the right to marry and to choose one’s spouse as implicit components of the right to privacy lies in the dynamic nature of constitutional provisions. In the Court’s words, constitutional texts cannot be understood solely in light of the historical context in which they were drafted; rather, they must be seen as evolving instruments capable of accommodating the continually changing realities of modern life. Moreover, the Court also adopted a pragmatic methodology in its interpretation of the right to privacy, grounding its reasoning in the idea that constitutional meaning must remain consonant with the values and priorities embraced by society over time. Put differently, the Court’s pragmatism was reflected in its acknowledgement that a narrow construction of the right to privacy would fail to align with the collective will of the community, which has since come to recognize and affirm values and social arrangements that may not have enjoyed popular consensus at the time of the Constitution’s drafting and ratification. As such, the Court concludes that adhering to a restrictive reading of the right to privacy, one that excludes the rights to marry and to choose one’s spouse, would no longer command legitimacy or acceptance within the society the Constitution is intended to serve.

One the other hand, a second key inference that may be drawn from the Court’s prior decision is its reliance on established principles of foreign constitutional adjudication, particularly those developed by the U.S. Supreme Court, regarding the interpretive importance of coherence and integration among constitutional provisions concerning rights and liberties. In this context, the SCC emphasized the necessity of interpreting constitutional rights and freedoms through what it referred to as a *rational continuum*, expressly adopting the terminology long entrenched in U.S. constitutional jurisprudence.²³² By invoking this concept, the SSC aligned itself with the methodological approach of the U.S. Supreme Court, which has consistently underscored the need for interpretive continuity and conceptual integration across fundamental rights provisions.

The SCC thus affirmed that such interpretive integration can only be meaningfully achieved by recognizing that certain unenumerated rights are implicit within, and derive

²³² For example, in a case decided by the U.S. Supreme Court in 1961, the Court held that the plaintiffs lacked standing to challenge a Connecticut statute criminalizing the use of contraceptives and prohibiting physicians from advising patients on their use. The Court reasoned that the statute had not yet been enforced, and thus, any challenge to its constitutionality was premature, as there existed no actual or imminent threat of harm to any individual who might violate the law. However, it is noteworthy that the Court’s decision included a dissenting opinion in which one of the Justices advocated for a broader interpretation of the concept of “personal liberty” as protected under the Due Process Clause of the Fourteenth Amendment. According to this dissent, the liberty protected by the Constitution should not be confined solely to safeguarding individuals against state violations of the specific rights enumerated in the first eight amendments—those which have been deemed “incorporated” into the Fourteenth Amendment—but should also extend to invalidate any legislative enactment that unjustifiably infringes upon personal liberty. In this context, “the right to personal liberty” protected by the U.S. Constitution was described as comprising a *rational continuum*, encompassing, in general terms, freedom from all arbitrary governmental restraints. See *Poe v. Ullman*, 367 U.S. 497 (1961).

normative force from, the expressly enumerated constitutional rights. Accordingly, in the Court's view, a broad construction of fundamental rights provisions—one that allows for the recognition of other, unwritten rights embraced by the collective conscience—is consistent with a rational interpretive methodology that responds to the evolving needs of the community and the exigencies of contemporary life.

III.2.2 *The Right to a Fair Trial and the Presumption of Innocence*

Once again, the SCC of Egypt has drawn upon foreign legal sources in adjudicating matters pertaining to fundamental rights—particularly those concerning the right of access to justice and the procedural rights of the accused. For instance, in 1995, the Court ruled that Article 18 of Law No. 10 of 1966 regulating food control and circulation is unconstitutional, insofar as it imposed a penalty for violating Article 2 of that same law, even in cases where the offender had acted in good faith.²³³ In articulating its reasoning for the unconstitutionality of the impugned provision, the Court expounded upon several fundamental constitutional rights and principles, foremost among them the right to a fair trial and the presumption of innocence.²³⁴ It is noteworthy that in its elaboration of these constitutional guarantees, the Court incorporated a number of legal references derived from foreign jurisprudence and doctrinal writings, quoting directly in English from both academic and judicial sources.²³⁵

What reinforces this observation, for instance, is the Court's holding regarding the necessity of establishing both the material (*actus reus*) and mental (*mens rea*) elements of any criminal offence subject to penalty. This dual requirement, in the Court's view, is essential for ensuring a fair trial and safeguarding the rights of the accused. In application of this principle, the Court explained that the constitutional provision which mandates that there shall be no crime and no punishment except by virtue of law, and that no penalty may be imposed except for acts committed subsequent to the promulgation of the law that prescribes it, reflects the foundational notion that "every offence must have a material element without which it cannot legally subsist. This element consists, in essence, of any act or omission carried out in contravention of a penal provision, thereby affirming that what criminal law fundamentally relies upon, whether in its prohibitions or mandates, is the physical commission of the act in question, whether positive or negative in nature."²³⁶ The Court further clarified that,

"[E]ven when assessing the existence of criminal intent (*mens rea*), the trial court must not abstract itself from the facts of the case supported by clear and conclusive evidence. Rather, the court is required to scrutinize the constituent elements of the act in order to ascertain the actual intent of the perpetrator. These elements constitute an external and material expression of a conscious will. Accordingly, it is constitutionally inconceivable to assert the existence of a criminal offence in the absence of its material component, or to establish causality between the proscribed act and its consequences in isolation from the actual nature and content of the act itself."²³⁷

It is particularly noteworthy that, in its exposition of the material and mental elements of a criminal offence, the SCC elected to reference select foreign judicial decisions,

²³³ SCC, Case No. 28, Judicial Year 17 (December 2, 1995).

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

specifically judgments issued by the Supreme Court of the State of Connecticut in the United States. Within its reasoning, the Court incorporated the following paragraph in English:

“A person's intention in any regard is to be inferred from his conduct and ordinarily can be proven only by circumstantial evidence. Regardless of whether this intent is general or specific, intent is proven to the trier of facts by the conduct of the actor which represents an objective, tangible manifestation of behavior assumed to be reflection of his or her mental.”²³⁸

By including this passage in its decision, the SCC sought to underscore the principle that, in the realm of criminalization and punishment, a person's intent is typically inferred from their conduct—a determination that, in most cases, can only be made through circumstantial evidence. Irrespective of whether the individual's intent is general or specific in nature, its proof is commonly derived from a constellation of factual circumstances that reveal the actor's behavior—behavior that serves as an objective and tangible manifestation, necessarily presumed to reflect the individual's mental state.

In fact, the English-language paragraph cited by the Court was itself composed of references to several foreign judicial precedents. Specifically, the Court drew upon the following: first, with respect to the proposition that intent may be inferred from an individual's conduct, the SCC quoted established jurisprudence from the Supreme Court of Connecticut, as articulated in a 1956 decision, wherein the following was stated: “A person's intention in any regard is to be inferred from his conduct.”²³⁹

Second, with respect to the SCC's assertion that an individual's criminal conduct ordinarily cannot be discerned except through circumstantial evidence, the Court drew upon the jurisprudence of the Supreme Court of the State of Connecticut, specifically a decision rendered in 1958. The phrase cited in the judgment of the SCC—“*ordinarily can be proven only by circumstantial evidence*”—was reproduced verbatim from the aforementioned 1958 ruling of the Connecticut Supreme Court.

Third, regarding the proposition that the establishment of an individual's criminal intent primarily rests upon a set of concrete and tangible factual circumstances that reflect the individual's mental state, the Egyptian SCC's reasoning finds clear resonance in earlier judgments rendered by the Supreme Court of Connecticut in the years 1953, 1954, and 1966. In those cases, the Connecticut court employed identical or substantively equivalent language to that adopted by the Egyptian Court, affirming that the determination of criminal intent must be grounded in observable realities which serve as external manifestations of an accused person's internal state of mind, wherein the following was stated

“The basic facts regarding the alleged crimes were not in issue. It was the intention of the parties or their state of mind as they performed these acts which are contested ... A question of intent is a question of fact, the determination of which is not reviewable unless the conclusion drawn by the trier is one which cannot reasonably be reached.”²⁴⁰ “Intention is a mental process, and of necessity it must be proved by the statement or acts of the person whose act is being scrutinized.”²⁴¹

On the other hand, it is worth noting that the SCC of Egypt adopted a divergent approach, within another aspect of the same judgment previously discussed, in its treatment of foreign legal citations. While the Court, as noted above, did invoke certain precedents

²³⁸ *Kiernan v. Borst*, 144 Conn. 1, 6, 126 A.2d 569 (1956).

²³⁹ *Id.*

²⁴⁰ *International Brotherhood v. Commission on Civil Rights*, 140 Conn. 537, 543, 102 A.2d 366 (1953).

²⁴¹ *State v. Mazzadra*, 141 Conn. 731, 735, 109 A.2d 873 (1954).

from foreign supreme courts in support of the proposition that establishing both the material and mental elements of a criminal act is an essential component of a fair trial, it departed from this reliance on foreign case law in other parts of its reasoning. In that alternative approach, the Court turned away from judicial precedent and instead grounded its analysis in doctrinal (scholarly) commentary.

To illustrate this shift, one may refer to the Court's treatment of the principle of innocence, which, according to the Court, rises to the level of a fundamental legal presumption that attaches to the individual and is not displaced merely by the initiation of criminal charges. In support of its reasoning that the presumption of innocence is a foundational tenet of the legal order, the Court expressly rejected any characterization of this presumption as a mere legal inference or evidentiary presumption.²⁴²

More specifically, in affirming the constitutional basis for the presumption of innocence, the Court emphasized that it does not operate as a legal presumption (*qarina qānūniyya*) that would shift the existence of the original fact may be legally inferred. On the contrary, the Court characterized innocence as a self-evident postulate and a constitutional legal principle, grounded directly in the text of the Constitution, and forming a cornerstone of the right to a fair and impartial trial recognized as a fundamental constitutional right. In support of this conclusion, the Court stated:

"Whereas the presumption of innocence does not constitute a legal presumption (*qarina qānūniyya*), nor is it a subset thereof, since a legal presumption operates by transferring the object of proof from the original fact that constitutes the source of the claimed right to another fact that is closely related to it, and the establishment of this alternative fact is deemed, by operation of law, to be proof of the original fact. This is not the case with the presumption of innocence enshrined in the Constitution. There is no substitute fact that the Constitution has designated in place of another. As articulated in foreign jurisprudence, innocence is more properly called an assumption as opposed to a presumption. It does not rest on any other proved facts; it is assumed. Rather, the presumption of innocence is founded upon human nature itself and stands as one of the essential pillars supporting the concept of a fair trial as guaranteed by the Constitution."²⁴³

It is particularly noteworthy that, apart from the English-language phrase included by the SCC within its decision "*innocence is more properly called an assumption as opposed to a presumption. It does not rest on any other proved facts; it is assumed*", a phrase which will be analyzed in detail below, the Court's position that the presumption of innocence does not constitute a legal

²⁴² In this regard, the Court held that "The presumption of innocence extends to every individual—whether merely suspected or formally accused—as a fundamental principle of the accusatorial system. This presumption has been affirmed across legal systems not as a shield for the guilty, but as a safeguard to prevent the imposition of criminal sanctions upon individuals where the charge against them is shrouded in doubt, thereby precluding certainty as to whether the accused actually committed the act in question. A criminal accusation, in and of itself, does not displace the presumption of innocence, which remains attached to the individual at all times and under all circumstances. This presumption persists not only prior to trial, but throughout its entirety, regardless of the duration or complexity of the proceedings. Accordingly, the presumption of innocence cannot be rebutted except by evidence of such probative force as to establish guilt with certainty—evidence that leaves no room for reasonable doubt as to the commission of the alleged offence. Moreover, the conclusive character of such evidence must be affirmed by a final judicial decision, one that has exhausted all avenues of appeal and has thereby acquired *res judicata* status." See the SCC's decision, *supra* note 233.

²⁴³ *Id.*

assumption (*qarīna qānūniyya*), but rather a fundamental legal principle and a primary assumption, had in fact already been articulated in identical terms in a prior decision rendered by the Court in 1992—that is, two full years prior to the issuance of the decision currently under discussion.

This recurrence is, in truth, neither anomalous nor unexpected. The reiteration by the Court of principles and doctrines previously established in its own jurisprudence is entirely consistent with accepted judicial practice. Like other constitutional and supreme courts, the SCC frequently relies on its own precedents when addressing new cases that raise issues analogous to those previously adjudicated.

Against this backdrop, I contend that there are two specific aspects of the Court's reasoning on the presumption of innocence that merit closer scholarly scrutiny and critical examination. The first of which lies in the observation that, although the SCC's 1995 decision characterized the presumption of innocence as a fundamental legal principle forming one of the cornerstones of a fair trial, language that had previously appeared verbatim in a decision rendered by the Court in 1992, the earlier decision made no reference whatsoever to any foreign language phrase or excerpt. This absence applied not only to the section addressing the presumption of innocence as a legal principle, but extended to the decision in its entirety. The second point of interest lies in the fact that, in its 1995 decision, the SCC elected to include a phrase in English—specifically in the context of rejecting the notion that the presumption of innocence constitutes a legal presumption capable of being inferred from other established facts. Given this, for the purposes of study, a careful examination of this choice, along with a critical inquiry into its utility and the underlying rationale the Court sought to advance through such inclusion is inevitable.

It is important to note, in this regard, that the Court did not incorporate the English-language phrase by the way of citation or quotation from foreign judicial precedent. Although the English-language phrase included in the Court's 1995 decision was intended to clarify and elaborate on the proposition that the presumption of innocence does not constitute a judicial presumption, and despite the fact that the substance of the Court's 1995 reasoning merely reiterates what had already been articulated in its 1992 decision, it remains the case that the earlier decision made no use of any foreign-language phrasing. This stands in contrast to the 1995 decision, which, as previously detailed, did incorporate such a phrase.

It is noteworthy that, in its reasoning, the SCC, when referring to doctrinal writings, did not rely upon or cite foreign jurisprudence, but rather drew from Egyptian legal scholarship. The English phrase employed in the Court's decisions — "*innocence is more properly called an assumption as opposed to a presumption. It does not rest on any other proved facts; it is assumed*" — was, in fact, quoted verbatim from a foreign -language legal publication. However, the original source of this phrase is particularly significant. It appeared in a chapter authored by Justice Awad Mohamed El-Morr, one of the most prominent former Presidents of the SCC, within a collected volume of legal essays edited by Justice Adel Omar Sherif, also a leading figure and former Vice President of the SCC. More precisely, the English phrase cited by the Court, as noted above, was drawn from a legal volume entitled *Democracy: The Rule of Law and Islam*, which compiled a series of scholarly articles on constitutional and comparative law. This volume was co-edited by Justice Adel Omar Sherif and Judge Eugene Cotran, a former judge of the Courts of England and Wales. Notably, the particular phrase cited by the Court appeared in Chapter Three of the book, entitled *Recent Landmark Decisions of the Supreme Constitutional Court of*

Egypt, authored by Justice Awad Mohamed El-Morr.²⁴⁴ Moreover, the English phrase in question had been included by Justice Awad Mohamed El-Morr in Chapter Three of the aforementioned volume, in the context of his analysis of the 1992 decision rendered by the SCC.²⁴⁵ In that decision, the Court articulated its view that the presumption of innocence constitutes a fundamental legal principle and a constitutional right, rather than a mere legal presumption, as previously explained.

That being said, I contend that the SCC deliberately cited the English-language phrase authored by its former President in one of his published works as a mean of presenting itself to the international legal community in a modern and progressive light. By incorporating foreign-language excerpts into its decisions, the Court appears to be articulating its methodological approach to specific legal issues, particularly those concerning fundamental rights and liberties, in a manner accessible to a global audience. Specifically, when the Court held that the presumption of innocence does not constitute a mere legal presumption but rather forms a foundational legal principle and a constitutional right, it seemingly sought to communicate this commitment to individual rights and liberties to the broader legal community, by expressing the idea in a widely spoken and influential language such as English.

III.2.3 *Rule of Law and the Principle of Freedom of Contract*

As previously noted, issues concerning fundamental rights and liberties have constituted a central pillar in the SCC's reasoning when invoking foreign jurisprudence and legal scholarship in its domestic rulings. The Court has relied on the framework of fundamental rights and freedoms to justify its engagement with foreign laws and precedents, a framework that rests upon two key elements, both of which can be discerned from the Court's previously discussed decisions. The first element concerns the interpretation of constitutional provisions related to fundamental rights and liberties. In this context, the Court often turns to the settled jurisprudence of foreign courts regarding certain rights that are inherently linked to personal autonomy and directly relevant to the matter before it. As demonstrated earlier, the SCC frequently finds value in foreign judicial interpretations that expand the meaning and scope of a particular constitutional right expressly enshrined in the national constitution. Such interpretive approaches render more palatable the idea of recognizing additional constitutional rights by implication—that is, as unenumerated but implicit constitutional guarantees.

The second element lies in the Court's effort to present itself to the international legal community as a judiciary that is open to the jurisprudence of other constitutional courts and receptive to modern interpretive methodologies that strengthen individual rights and freedoms. This is often achieved through the inclusion of key concepts related to fundamental rights and liberties in a widely spoken foreign language, most commonly English, within the body of the Court's decisions, as previously discussed in detail.

However, a careful examination of the body of jurisprudence issued by the SCC reveals, quite justifiably, that the Court does not confine its reliance on foreign judicial precedents solely to matters concerning fundamental rights and liberties. Rather, the Court has, on occasion, invoked foreign judicial decisions in contexts beyond those domains. In this regard, a particularly illustrative example can be found in the Court's decision in Case No. 35 of Judicial Year 17, issued in 1997, which addressed the foundational elements of the

²⁴⁴ See Awad Mohammed El-Morr, *Recent Landmark Decisions of the Supreme Constitutional Court of Egypt*, in EUGENE COTRAN AND ADEL OMAR SHERIF (EDS.), *DEMOCRACY: THE RULE OF LAW AND ISLAM* 239, 244 (1999).

²⁴⁵ *Id.*, at 242-244.

rule of law state and the principle of freedom of contract. The SCC declared the unconstitutionality of the first paragraph of Article 35 of the Civil Aviation Fees and Charges Law, as well as the fees for exploiting air transport rights and the occupation and use of buildings and lands at airports, promulgated by Law No. 119 of 1983. The Court specifically invalidated the provision stating that “EgyptAir Corporation shall assume the agency or guarantee in this case.” This ruling arose in the context of a case wherein the plaintiff, Gulf Air Company, challenged the constitutionality of the aforementioned provision insofar as it mandated that EgyptAir Corporation act as the agent or guarantor on behalf of foreign air carriers operating branches within the Arab Republic of Egypt, where the state of the foreign carrier’s nationality required the appointment of an agent or guarantor.²⁴⁶ In reasoning its decision, the Court addressed several constitutional principles, foremost among them being the essential elements of the rule of law state, the principle of reciprocity, and the minimum standards applicable to the treatment of foreign nationals. In doing so, the Court deemed it appropriate to draw upon foreign judicial precedents in support of its conclusions. While the Court, in presenting the arguments advanced by the plaintiff airline in its written submissions, included French translations of certain legal terms,²⁴⁷ what merits particular attention is the Court’s express reliance on selected rulings issued by foreign courts as a means of reinforcing its determination that the contested provision was unconstitutional.

On this basis, I draw upon the jurisprudence of the SCC concerning its articulation of the principle of reciprocity and the minimum standards for the treatment of foreign nationals, with the aim of conceptualizing it as one of the essential components of the rules of law. The Court held that, although the principle of the sovereignty and equality of states in international law entitles each state to regulate the conditions governing the entry of foreigners into its territory and to determine the rules under which they may engage in various activities, in accordance with its national interests and foreign policy, this authority is not absolute. Rather, it is constrained by peremptory norms accepted by the international community of states as guiding conduct among its members—norms that reflect well-established customary practices.

Accordingly, the rules by which a state governs the status of non-citizens who enter or reside within its territory—while not necessarily equal to those applicable to its own citizens—must nonetheless respect the minimum standards of treatment that cannot be disregarded, as these constitute the basic guarantees necessary for a dignified existence. As

²⁴⁶ See SCC, Case No. 35, Judicial Year 17 (August 2, 1997).

²⁴⁷ In this regard, the Court stated “Whereas the plaintiff also submitted a memorandum in its defense, in which it argued that the contested provision contravenes Articles 34, 40, and 41 of the Constitution, on the grounds that the provision designates EgyptAir as the sole and compulsory agent for foreign airlines operating within the Arab Republic of Egypt. In doing so, it effectively deprives such companies of key incidents of ownership and establishes the legal status of foreign nationals in Egypt on a foundation of presumptive deprivation of rights—even when those rights fall within the minimum standards of treatment afforded to foreign nationals in the countries in which they reside. This, the plaintiff contended, stands in clear contradiction to the principle of ‘mutual reliance’ (or reciprocity), which is safeguarded by the Constitution, and undermines the fundamental principle of equality between foreigners and citizens—a principle that may be restricted only by way of exception. Furthermore, the provision was said to institute an arbitrary distinction among Egyptian nationals who are otherwise qualified to act as agents or guarantors for foreign airlines in connection with the exercise of certain commercial activities in Egypt. Beyond that, the provision was also alleged to reflect a *détournement de procédure*—a procedural abuse whereby the formal appearance of legality is invoked to conceal the true nature of the measure (*couvert de législation*). Indeed, the plaintiff submitted that the restriction imposed on a foreign company’s freedom to select its own agent amounted to a form of *fraude à la constitution*—a constitutional fraud—by undermining the core principle of freedom of contract, which is itself an essential component of personal liberty. Personal liberty, in this regard, is grounded in the idea that contracts constitute the law between the parties.” See *Id.*

the Court explained: “[A]ny state action that undermines the rights guaranteed by these international standards, that restricts their scope or effects, that reveals an intent to circumvent or deliberately violate them, or that, more broadly, reduces the treatment of foreign nationals to a level below those non-derogable international norms, must—within the framework of constitutional legitimacy review exercised by this Court—be declared invalid.” Notably the Court expressed this concept by incorporating the following paragraph in English within its decision:

“[T]he propriety of governmental acts should be put to the test of international standards the treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.”²⁴⁸

In fact, a proper Arabic translation of the English-language paragraph included by the SCC in its aforementioned decision reveals that the Court intended to underscore the necessity of subjecting governmental actions to scrutiny considering the established international standards governing the treatment of foreign nationals. The implication is clear: where such governmental conduct amounts to a breach of international obligations—rising to the level of misconduct, bad faith, or willful neglect—it falls significantly below those international standards, to the extent that any reasonable and impartial observer would readily recognize its inadequacy and unacceptability.

It is worth noting that the English paragraph cited by the Court was not the result of its own judicial reasoning, but rather was quoted, by way of reference, from a decision of the United States–Mexico Claims Commission issued on 15 October 1926. In the landmark case of *United States v. Mexico (Neer Claim)*, the United States government sought compensation in the amount of \$100,000 from the government of Mexico for the fatal shooting of American citizen Paul Neer by a group of armed Mexican nationals.²⁴⁹

In its decision, the Commission articulated the now-classic standard concerning the minimum level of treatment to be afforded to foreign nationals and the requirement that executive conduct be restrained and evaluated in accordance with internationally accepted norms. The very paragraph quoted by the SCC in English is drawn directly from the Commission’s ruling in that case, reflecting its enduring influence on the development of customary international law regarding the treatment of aliens.²⁵⁰

Moreover, in reaffirming that adherence to the minimum standards for the treatment of foreign nationals, established under settled international norms, constitutes one of the essential foundations of the rule of law, the SCC cited the decision of the U.S. Supreme Court in *Hines v. Davidourez* stating that “[T]here has grown up in the field of international relations, a body of customs defining with more or less certainty the duties owing by all nations to alien residents.”²⁵¹

A careful examination of the SCC’s reasoning reveals that it did more than merely incorporate one or more foreign-language excerpts drawn from the jurisprudence of foreign courts. Rather, the Court went further by explicitly disclosing the source from which the cited language was derived, identifying by name the case that contained the English paragraph referenced in its decision. Accordingly, the distinctiveness of the SCC’s decision in Case No. 35 of Judicial Year 17 lies in the Court’s departure from its typical

²⁴⁸ See *Id.*

²⁴⁹ *Neer v. United Mexican States*, 15 October 1926, 4 UNRIAA 60.

²⁵⁰ *Id.*

²⁵¹ *Hines v. Davidourez*, 213 U. S. 25 per Justice Black, at. P. 65, 1941.

methodological approach to invoking foreign jurisprudence. Traditionally, the Court has limited itself to incorporating one or more foreign-language excerpts from foreign decisions without disclosing the source. However, in this case, the Court departed from that practice by expressly identifying the judicial decision from which the cited passage was taken. Beyond the aims of academic attribution, reference transparency, and enhancing accessibility to the cited material—while also presenting the Court as a modern and open judicial institution—this move may reflect the Court’s implicit affirmation that no legal or doctrinal barrier, whether statutory or jurisprudential, precludes it from relying on foreign judicial precedents in the course of rendering its national judgments.

IV. THE PRINCIPLE OF LEGALITY AND LEX MITIOR AS DOCTRINAL GUARANTEES OF PERSONAL FREEDOM

In fact, a close examination of the Constitutional Court’s jurisprudence, together with a careful analysis of the constitutional principles and rules it has established, reveals that the Court, while often invoking foreign precedents in the context of fundamental rights and freedoms, has also, at times, turned to such precedents when addressing constitutional rules or principles of particular significance, especially where these are closely tied to the principle of constitutional supremacy and the imperatives of personal liberty.

To illustrate this point, I refer to the decision of the SCC in Case No. 85 of Judicial Year 17, issued in 1997. In that decision, the Court ruled the constitutional challenge inadmissible, which had been brought against several provisions of Law No. 49 of 1977 on the Leasing and Sale of Premises and the Regulation of the Relationship between Lessors and Lessees, as well as Law No. 136 of 1981 concerning Certain Provisions on Leasing and Selling Premises and Regulating the Relationship between Lessors and Lessees. The challenge was premised on the alleged infringement of the principle of freedom of contract, specifically, the maxim that a contract constitutes the law between the contracting parties, and, by extension, the constitutionally protected right to private property.²⁵² The claimant in the constitutional case had been a criminal defendant, accused of receiving payments outside the scope of the lease agreement (commonly referred to as a “key money” arrangement). Both Article 77 of Law No. 49 of 1977 and Article 24 of Law No. 136 of 1981 criminalized such conduct by prohibiting the collection of key money and prescribing penal sanctions for violations of that prohibition.

The Court based its ruling of inadmissibility on the ground that a more lenient law for the accused had been enacted—namely, Law No. 4 of 1996, which subjects to the provisions of the Civil Code those premises that had not previously been leased, as well as those for which lease agreements had expired or would expire without any party having a statutory right to remain in possession.²⁵³ According to the Court, this law constitutes subsequent legislation through which the legislature sought to restore lease relations to their original foundation, governed solely by the principle of freedom of contract. The law was thus understood to have decriminalized conduct previously penalized under the earlier, now-superseded legislation.²⁵⁴

In its reasoning for dismissing the constitutional challenge, the Court explicated the meaning and scope of the principles of legality in crimes and punishments and the application of the more lenient law to the accused, recognizing them as fundamental components of the principle of the rule of law and as essential pillars of personal liberty. In addressing these two principles, the Court drew upon two legal doctrines previously

²⁵² See SCC, Case No. 85, Judicial Year 17 (March 22, 1997).

²⁵³ *Id.*

²⁵⁴ *Id.*

articulated by the French Constitutional Council in its jurisprudence. The first principle concerns the constitutional legitimacy of penal provisions as settled in the jurisprudence of advanced legal systems. According to this principle, where a new law prescribes a lesser penalty than that provided under an earlier law, the judge is obligated to disregard the penalty established by the old law and instead apply the penalty prescribed by the new law. This obligation rests on the premise that imposing the former penalty would amount to enforcing a sanction that the legislature no longer deems necessary.

Precisely, the SCC held that

"This jurisprudence—being a standard for the constitutional legitimacy of penal provisions—is likewise reiterated among advanced nations, including France, whose Constitutional Council has established two principles in this regard. The first principle holds that whenever a new law prescribes a penalty less severe than that provided by the previous law, the legal provisions seeking to limit the application of the new law in relation to crimes committed before its enactment, for which no final judgment has yet been rendered, must be treated as contravening the rule enshrined in Article 8 of the 1789 Declaration of the Rights of Man and of the Citizen. Under this rule, the legislature may not impose, for acts it criminalizes, penalties other than those strictly and clearly necessary as determined by necessity—'La loi ne doit établir que des peines strictement et évidemment nécessaires.' The failure to apply the new law to crimes committed by perpetrators under the old law implies that the judge would impose penalties prescribed by the former law, which no longer retains, in the legislature's assessment, any necessity. (Décision 80-127 DC – 20 janvier 1981, cons. 75, Rec.)."²⁵⁵

As for the second principle, it also pertains to the constitutional legitimacy of penal provisions. The SCC, relying on the well-established jurisprudence of the French Constitutional Council, held that the principle of legality in crimes and punishments entails that the legislature's criminalization of specific acts should not be severed from the penalties prescribed for those acts. Accordingly, it is imperative to prohibit the retroactive application of penal provisions whenever their content is more severe. To substantiate this, the Constitutional Court incorporated into its previous ruling a passage in French, excerpted from a decision of the French Constitutional Council, as follows:

"Une peine ne peut être infligée qu'à la condition que soient respectés le principe de légalité des délits et des peines, le principe de nécessité des peines, le principe de non-rétroactivité de la loi pénale d'incrimination plus sévère ainsi que le respect du principe des droits de la défense. Ces exigences concernent non seulement les peines prononcées par les juridictions répressives mais aussi toute sanction ayant le caractère d'une punition même si le législateur a laissé le soin de la prononcer à une autorité de nature non judiciaire. Décision 88-248 DC - 17 janvier 1989, cons. 35, p. 18."²⁵⁶

The decision of the SCC reveals two significant insights. The first pertains to the Court's judicial philosophy concerning the use of foreign case law. This philosophy is clearly articulated in the Court's affirmation that, in matters of constitutional legitimacy, it is permitted to draw upon the settled jurisprudence of civilized nations. It thus becomes

²⁵⁵ *Id.*

²⁵⁶ *Id.*

apparent to the researcher that the Court, in its engagement with foreign precedents, has voluntarily confined itself to relying only on what has become well-established in the jurisprudence of such nations. In doing so, the Court adopts a nuanced standard for assessing the notion of "civilized nations"—one that extends beyond the maturity of their democratic institutions or the robustness of the rule of law, to encompass also the antiquity, institutional depth, and authoritative weight of their judicial bodies and decisions.

This interpretive posture is clearly evidenced in the Court's own decisions. While the Court has frequently drawn upon the jurisprudence and doctrinal interpretations of the U.S. Supreme Court, particularly in matters involving fundamental rights and liberties, as previously detailed, it has also shown no hesitation in turning to the French Constitutional Council. In doing so, it has drawn upon the Council's established principles and interpretations concerning the doctrine of legality in criminal law, the prohibition of retroactive penal legislation, and the application of the more lenient criminal law to the accused.

Consequently, one may argue that the SCC has recognized France alongside the United States of America as belonging to the category of civilized nations. Moreover, the decisions issued by French courts and its Constitutional Council are held in high esteem and regarded with respect, thereby rendering them appropriate sources for reference and citation within the context of the Court's domestic rulings.

The second insight relates to the methodological approach previously discussed concerning the SCC's practice of invoking and citing foreign judicial precedents in support of its domestic rulings. As noted earlier, the Court initially adopted a restrained method of engagement with foreign jurisprudence, whereby it would include one or more quotations, typically in their original language, from a foreign judgment, without expressly identifying the source of the citation. In such instances, the Court refrained from disclosing the name of the foreign court whose ruling it referenced or from specifying the case in which the cited legal principle had been articulated. However, the Court subsequently revised this methodology, adopting a more transparent approach in which it explicitly acknowledged the foreign source being cited, including the name of the foreign court, the title of the case, and its docket number. The Court's aforementioned decision in Case No. 85 of Judicial Year 17 is no exception to this evolution in practice. In that ruling, the Court made clear that the French-language passages it included were drawn directly from the jurisprudence of the French Constitutional Council and further identified the specific case and its reference number, as previously noted.

CONCLUSION

Most of the constitutional developments I have examined can be readily situated within existing frameworks of domestic legal reasoning. For the most part, the engagement with foreign jurisprudence, comparative scholarship, and transnational constitutional norms does not displace domestic constitutional principles but operates alongside them, enriching the interpretive landscape rather than supplanting it. In the case of Egypt's Supreme Constitutional Court, engagement with foreign law has been based on an implicit and selective model of constitutional borrowing. In that regard, conventional concerns over legal sovereignty or judicial overreach appear, at least in formal doctrinal terms, to be largely misplaced.²⁵⁷

²⁵⁷ See Slaughter, *supra* note 57, at 194-195; Jackson, *supra* note 21, at 47-49.

Rather, what often animates resistance to comparative constitutional engagement is a diffuse anxiety—a perception that convergence among constitutional systems somehow dilutes national distinctiveness or diminishes democratic legitimacy.²⁵⁸ Yet this sentiment, though persistent, is rarely articulated in concrete legal terms, and as such, it struggles to withstand scrutiny under prevailing interpretive methodologies.²⁵⁹ In practice, where foreign ideas are incorporated through established modes of constitutional interpretation, the resulting outcomes are typically consistent with, if not expressly sanctioned by, the domestic constitutional order.²⁶⁰ That is, the phenomenon of global constitutionalism, as reflected in the jurisprudence of Egypt's Supreme Constitutional Court, generates a heterogeneous and institutional context form of engagement with foreign law.

In many ways, the phenomenon resembles earlier transformations in constitutional law, such as the incorporation of administrative agencies into separation of powers theory.²⁶¹ Just as scholars once grappled with how the modern administrative state could coexist with traditional tripartite government,²⁶² current debates on constitutional globalization reflect an initial conceptual discomfort more than a doctrinal crisis. Ultimately, the incorporation of comparative and transnational perspectives into domestic constitutional reasoning may come to be seen not as a challenge to constitutional orthodoxy, but as a natural, even inevitable, evolution—one that constitutional systems will accommodate not by abandoning their foundations, but by adapting their interpretive practices to a changing legal landscape.²⁶³

As with earlier shifts in constitutional structure, what now appears as a challenge to orthodoxy may, in time, come to be viewed as its extension.²⁶⁴ Once courts, scholars, and institutions become accustomed to the presence of transnational influence in constitutional reasoning, the theoretical unease surrounding it may recede. And if, as I suggest, such influence is both methodologically legitimate and normatively enriching, its integration into domestic constitutional law may eventually cease to be a subject of controversy—and become, instead, an unremarkable feature of twenty-first century constitutionalism.²⁶⁵

²⁵⁸ See Waldron, *supra* note 63, at 132-135.

²⁵⁹ See Choudhry, *supra* note 53, at 827-830.

²⁶⁰ See Gardbaum, *supra* note 70, at 407-408.

²⁶¹ JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 1-4 (1938).

²⁶² See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 691-695 (2000).

²⁶³ See ALEC STONE SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE* 2-6 (2004); Hirschl, *supra* note 39, at 112-116.

²⁶⁴ Tushnet, *supra* note 66, at 1230-1234.

²⁶⁵ Vicki C. Jackson, *Transnational Constitutional Dialogue*, 30 HARV. J. L. & PUB. POL'Y 499, 502-505 (2007).

