

Tiran and Sanafir: A Historical and Constitutional Argument Opposing the Territorial Cession of the Tiran and Sanafir Islands to Saudi Arabia

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I. Introduction

On April 8, 2016, King Salman bin Abdel-Aziz Al Sa'ud of Saudi Arabia and Egyptian Prime Minister Sherif Ismail met at Egyptian President Abdel Fattah el-Sisi's palatial home in Cairo in order to sign a maritime-boundary-limitation agreement concerning the sovereignty of two small islands at the mouth of the Gulf of Aqaba—Tiran and Sanafir.¹ The two barren and uninhabited islands lie in a narrow expanse of water separating the Sinai Peninsula from the Saudi mainland. Once put into effect, the maritime-boundary-limitation agreement will transfer sovereignty over the islands from Egypt to Saudi Arabia.

Despite the fact that the islands are small and uninhabited, they are of great strategic importance to the region. In ceding the islands to Saudi Arabia, Egypt is essentially relinquishing its strategic presence over the Strait of Tiran, and, by extension, its geopolitical control over access through the Gulf

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1. TAHRIR INST. FOR MIDDLE EAST POLICY, TIRAN AND SANAFIR: DEVELOPMENTS, DYNAMICS, AND IMPLICATIONS 8 (2017), <https://timep.org/wp-content/uploads/2017/08/Tiran-and-Sanafir-Developments-Dynamics-and-Implications-web.pdf> [<https://perma.cc/772T-XBWP>].

of Aqaba to Israel and Jordan.² Not only will Saudi Arabia gain geopolitical control over the Gulf of Aqaba, but Israel also stands to gain enormous strategic benefits as well.³ Egypt's blockade of the Strait of Tiran was the *casus belli* that led to the outbreak of the 1967 Arab–Israeli War.⁴ Saudi dominion over the islands will likely fortify diplomatic relationships between Israel and Saudi Arabia, especially in light of their common hostility towards Iran.⁵

According to the agreement, Egypt is to cede sovereignty of the two islands to Saudi Arabia in exchange for \$22 billion in oil and development aid to Egypt over a five-year period.⁶ However, the exact contents of this economic package are ambiguous, and no information has been made public as to whether the Saudi aid will come in the form of a loan, a short-term bank deposit, or a future investment.⁷ Since 2013, Saudi Arabia has been supporting Egypt's failing economy by providing over \$12 billion in economic aid.⁸ Although the relinquishment of two small uninhabited islands in exchange for billions of dollars in economic aid may seem to be a bargain from the Egyptian perspective, the cession of the Tiran and Sanafir Islands creates serious constitutional questions concerning the separation of powers and the bounds of executive power in the current political regime.

The maritime-boundary-limitation agreement signed by Egypt and Saudi Arabia stressed that the ratification of the agreement must be “ratified according to the legal and constitutional procedures in both countries.”⁹ Despite the explicit constitutional requirement embedded in the agreement itself, the cession of any territorial land to another sovereign is a flagrant violation of the Egyptian Constitution of 2014. Both Article 1¹⁰ and

2. Jonathan Cook, *How Israel Gains from Egypt-Saudi Red Sea Islands Deal*, AL JAZEERA (June 24, 2017), <https://www.aljazeera.com/indepth/features/2017/06/israel-gains-egypt-saudi-red-sea-islands-deal-170624101932517.html> [https://perma.cc/WSS6-LPZP].

3. *Id.*

4. *Id.*

5. *Id.*

6. Declan Walsh, *Egypt Gives Saudi Arabia 2 Islands in a Show of Gratitude*, N.Y. TIMES (Apr. 10, 2016), <https://www.nytimes.com/2016/04/11/world/middleeast/egypt-gives-saudi-arabia-2-islands-in-a-show-of-gratitude.html> [https://perma.cc/TJY7-JJW8].

7. M. CHERIF BASSIOUNI, CHRONICLES OF THE EGYPTIAN REVOLUTION AND ITS AFTERMATH: 2011–2016, at 592 (2017).

8. Walsh, *supra* note 6.

9. Hazem Adel, *The Text of the Treaty on the Demarcation of the Maritime Border Between Egypt and Saudi Arabia*, AL-YOUM AL-SABA' (June 25, 2016), <http://www.youm7.com/2775222> [https://perma.cc/AF6N-99DF].

10. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 1 (“The Arab Republic of Egypt is a sovereign, united, indivisible State, where no part may be given up, having a democratic republican system that is based on citizenship and rule of law.”).

Article 151¹¹ of the Egyptian Constitution of 2014 expressly prohibit the “ceding [of] any part of state territories.”¹²

The maritime-boundary-limitation agreement was quickly followed by massive opposition by both lawyers and the general public. On April 10, 2016, two days following King Salman’s visit to Egypt and the signing of the maritime-boundary-limitation agreement between Egypt and Saudi Arabia, a group of Egyptian lawyers filed a lawsuit in the lower administrative court opposing the agreement.¹³ The agreement sparked waves of protests throughout the country for much of April and May, resulting in the detention of hundreds of protesters.¹⁴ On June 21, the First Circuit Court for Administrative Justice issued an injunction halting the implementation of the maritime-boundary-limitation agreement.¹⁵ On September 28, the injunction was reversed by the Court of Urgent Matters.¹⁶ Three months later, on December 29, the ministerial cabinet of Prime Minister Sherif Ismail approved the agreement and sent it to the Parliament for ratification.¹⁷

On January 16, 2017, the Supreme Administrative Court upheld the original ruling of the First Circuit Court for Administrative Justice and reinstated the injunction against the implementation of the agreement.¹⁸ On April 2, the Court of Urgent Matters issued a ruling to negate the decision of the Supreme Administrative Court in order to allow the agreement to proceed.¹⁹ On April 10, the Speaker for the House of Representatives sent the agreement to the Constitutional Affairs Committee for debate.²⁰ The Constitutional Affairs Committee subsequently passed the agreement on June 13 after three days of presentations by government experts.²¹ The following day, the Parliament voted to officially pass the agreement.²² Anyone who contradicted the state’s narrative that the islands had originally belonged to Saudi Arabia was blacklisted or detained.²³ In the midst of conflicting judgments between the lower courts, the Supreme Constitutional Court, on June 21, 2017, suspended all lower court decisions on the

11. *Id.* art. 151 (“In all cases, no treaty may be concluded which is contrary to the provisions of the Constitution or which results in ceding any part of state territories.”).

12. *Id.*

13. TAHRIR INST. FOR MIDDLE EAST POLICY, *supra* note 1, at 7.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 9.

agreement pending the Supreme Constitutional Court's final decision.²⁴ Three days later, on June 24, President Sisi signed the agreement into effect.²⁵

Finally, on March 3, 2018, the Supreme Constitutional Court nullified the contradictory rulings of the Supreme Administrative Court, which opposed transferring control of the islands to Saudi Arabia, and the Court of Urgent Matters, which approved the transfer.²⁶ In invalidating the lower court rulings, the Supreme Constitutional Court held that the Treaty to cede the islands to Saudi Arabia was constitutional and that it was solely within the purview of the Legislative and Executive Branches to make the final decision on the maritime-boundary-limitation agreement.²⁷

The purpose of this Note will be to explore the historical and constitutional illegitimacy of the recent Supreme Constitutional Court decision authorizing the cession of the Tiran and Sanafir Islands to Saudi Arabia. In Part II, I will begin my discussion by exploring the historical and political significance of the two islands in order to establish that the Tiran and Sanafir Islands have always belonged to Egypt. In Part III, I will discuss the separation of powers and the role of judicial review of the Executive Branch. In Part IV, I will turn to the Egyptian Constitution of 2014 and discuss the constitutional implications of the recent Supreme Court decision in March 2018 refusing to enjoin the cession of the two islands. Finally, I will conclude this Note with the argument that the March 2018 Supreme Constitutional Court decision to refrain from enjoining the territorial cession of the Tiran and Sanafir Islands represents a significant regression in the separation of powers of the Egyptian government and in the sovereignty of the Egyptian people in a post-Revolution Egypt.

II. The History of Egyptian Sovereignty Over Tiran and Sanafir

The Gulf of Aqaba is a long, narrow inlet forming the northeastern prong of the Red Sea between the Sinai Peninsula, to the West, and Saudi Arabia, to the East.²⁸ The Gulf stretches ninety-six miles from the coastal Port of Aqaba in Jordan down to the southernmost tip of the Sinai Peninsula where the Gulf of Aqaba opens up to the Red Sea.²⁹ At this intersection between the Gulf and the Red Sea is the Strait of Tiran.³⁰ The Strait of Tiran has enormous geopolitical importance for the region since it controls

24. *Id.* at 7.

25. *Id.*

26. *Egypt Court Upholds Tiran, Sanafir Transfer to Saudi Arabia*, AL JAZEERA (Mar. 3, 2018), <https://www.aljazeera.com/news/2018/03/egypt-court-upholds-tiran-sanafir-transfer-saudi-arabia-180303185036714.html> [https://perma.cc/JPB2-F95P].

27. *Id.*

28. ALI A. EL-HAKIM, *THE MIDDLE EASTERN STATES AND THE LAW OF THE SEA* 133 (1979); see *infra* Figure 1.

29. *Id.*

30. *Id.*

maritime access to the Israeli Port of Eilat and the Jordanian Port of Aqaba.³¹ Jutting out from this narrow stretch of coral-laden waters are the two lone sentinels of the Gulf of Aqaba—Tiran and Sanafir.³²

Tiran is a desolate and uninhabited island, about seven miles long and five miles wide.³³ It is located approximately 1,300 yards from the Sinai Peninsula³⁴ and four-and-a-half miles south from Ras Fartak on the Saudi coast.³⁵ Sanafir Island lies about one and a half miles east of Tiran, separated by a coral reef.³⁶ The northwestern, northern, and eastern coasts of both islands consist of drying coral reefs.³⁷ Consequently, the waters between Tiran and Sanafir, as well as the waters between Sanafir and the Saudi coast, are unnavigable due to the perilous labyrinth of coral and rock, leaving the narrow passage of water west of Tiran—the Enterprise Passage—as the only accessible thoroughfare.³⁸

31. EWAN W. ANDERSON, GLOBAL GEOPOLITICAL FLASHPOINTS: AN ATLAS OF CONFLICT 333 (2000).

32. *See infra* Figure 1.

33. STEVEN CAROL, UNDERSTANDING THE VOLATILE AND DANGEROUS MIDDLE EAST: A COMPREHENSIVE ANALYSIS (2015).

34. *Id.*

35. ANDERSON, *supra* note 31, at 334.

36. RUTH LAPIDOTH-ESCHELBACHER, INTERNATIONAL STRAITS OF THE WORLD: THE RED SEA AND THE GULF OF ADEN 172 (1982).

37. *Id.*

38. EL-HAKIM, *supra* note 28, at 133; *see infra* Figure 1.

Figure 1

A map depicting the Tiran and Sanafir Islands and their location at the mouth of the Gulf of Aqaba.³⁹



Before addressing the constitutional question regarding the cession of the two islands, it is important to establish the question of original sovereignty over Tiran and Sanafir. The crux of President Sisi's argument is that the islands never belonged to Egypt, meaning that they have always been under the territorial sovereignty of Saudi Arabia.⁴⁰ On April 13, 2016, President Sisi gave a speech claiming: "We have not relinquished or ceded one grain of Egyptian sand to Saudi Arabia. There were security and political

39. LAPIDOTH-ESCHELBACHER, *supra* note 36, at 173.

40. ASKAR H. ENAZY, THE LEGAL STATUS OF TIRAN AND SANAFIR ISLANDS 65 (2017).

considerations that led Egypt to keep the islands, and now we have given them back to their rightful owner who has asked for their return.”⁴¹

If the islands have always belonged to Saudi Arabia, as President Sisi claims, then there cannot be a constitutional violation for ceding land that never belonged to Egypt to begin with. The basis for this argument is the 1950 Saudi–Egyptian Accord, in which Saudi Arabia asked Egypt, the dominant military force in the Middle East at the time, to temporarily occupy the islands in order to prevent their annexation by Israel.⁴² Saudis have interpreted the acceptance of this request as suggesting Egypt’s implied recognition of Saudi ownership over the islands.⁴³ However, the Saudi–Egyptian Accord does not nullify decades of historical and political evidence of Egyptian sovereignty over Tiran and Sanafir.

The question of original sovereignty over the islands may seem to be a difficult one because it was not until 1922 that various European powers established the imaginary lines that define the Middle East as we know it today.⁴⁴ Unlike most Middle Eastern states, however, Saudi Arabia was never under the control of any European colonial power.⁴⁵ The modern Kingdom of Saudi Arabia was not established until 1932 by King Ibn Sa’ud.⁴⁶ Prior to 1932, the region was composed of disparate nomadic tribes with no unified state.⁴⁷ The fact that Saudi Arabia, as a sovereign entity, did not exist until 1932 confirms that Saudi Arabia could not have claimed ownership over Tiran and Sanafir prior to the formation of the Saudi state in 1932.

In contrast to the Arab nation-states that emerged from the remnants of the Ottoman Empire following World War I, Egypt is unique in that it “has maintained a continuous and stable territorial identity over its long and dynamic history.”⁴⁸ Egypt has had an expansive territory throughout the ages,

41. *Id.*

42. *Id.* at 20.

43. *See id.* (“Based on the Saudi request, if not permission . . . the Egyptian Ministry of War and the Navy moved to occupy Tiran and Sanafir.”).

44. “At the time, the political landscape of the Middle East looked different from that of today. Israel, Jordan, Syria, Iraq, and Saudi Arabia did not exist then. Most of the Middle East still rested . . . under the . . . sway of the Ottoman Empire . . .” DAVID FROMKIN, *A PEACE TO END ALL PEACE: THE FALL OF THE OTTOMAN EMPIRE AND THE CREATION OF THE MODERN MIDDLE EAST* 25 (2009). Most Middle Eastern countries and their respective borders were fabricated by European colonial powers. For example, Iraq and Jordan were British political inventions in the aftermath of the First World War, as were Saudi Arabia, Kuwait, and Iraq—all three of which had their boundaries established by a British civil servant in 1922. *Id.* at 9.

45. CHIBLI MALLAT, *INTRODUCTION TO MIDDLE EASTERN LAW* 242 (2007).

46. MADAWI AL-RASHEED, *A HISTORY OF SAUDI ARABIA* 69 (2d ed. 2002).

47. Not all Middle Eastern countries experienced European colonization or consistent Ottoman rule. “This is essentially the case for central Arabia, where apart from some Ottoman forays in the eighteenth and nineteenth centuries, the region was in the hands of nomadic tribes which would be unified into the Saudi state by King ‘Abdul ‘Aziz ibn Sa’ud only in the mid-1920s.” MALLAT, *supra* note 45, at 242.

48. MATTHEW H. ELLIS, *DESERT BORDERLAND: THE MAKING OF MODERN EGYPT AND LIBYA* 1 (2018).

with records going back to the fifteenth century B.C., during Queen Hatshepsut's reign, of Egyptians occupying and navigating the Red Sea.⁴⁹

The Port of Aqaba itself had been used by Egyptians since ancient times; however, the Port fell into decay during the Middle Ages and was revived during the early nineteenth century under the dominion of the Ottoman Empire.⁵⁰ The Gulf of Aqaba was brought under Ottoman control in the year 1517 and remained under Ottoman dominion until the end of World War I.⁵¹ It was not until the creation of the 1841 Ottoman map of Egypt that the modern Egyptian nation-state was first defined according to the "ancient" and "territorial" limits of the country.⁵² In 1841, the government of the Ottoman Empire recognized that both the Sinai Peninsula and the Gulf of Aqaba belonged to Egypt because of the regular use of the region by Egyptian pilgrims traveling to Saudi Arabia to complete the Hajj.⁵³ By 1892, Egyptian pilgrims were regularly using the sea route to reach Mecca and Medina in Saudi Arabia, and the Ottoman Empire resumed control over the Gulf of Aqaba.⁵⁴

Formal political recognition of Egyptian sovereignty over the Sinai and the Gulf came in 1906 as part of the delimitation of the Egypt–Palestine border imposed on the Ottoman Empire by the British.⁵⁵ This border, which eventually became known as the "Rafah–Aqaba line," began at the coastal city of Rafah on the shores of the Mediterranean, ten kilometers west of Aqaba, and continued south along the Gulf of Aqaba with the inclusion of the islands of Tiran and Sanafir.⁵⁶ It was this 1906 treaty that established Egypt's formal control of the two islands, twenty-six years before the founding of the Saudi nation-state.⁵⁷

Opponents to Egyptian sovereignty over the islands have argued that the mere fact that Egypt was under British colonial rule from 1882 to 1922 undermines any claims to sovereignty that Egypt might have over the islands

49. See DANIEL J. DZUREK, *Parting the Red Sea: Boundaries, Offshore Resources and Transit*, 3 MARITIME BRIEFING, no. 2, 2001, at 1 ("The Egyptians navigated [the length of the Red Sea] in the 15th century B.C. under Queen Hatshepsut. Since that time, the waterway has served for the transport of goods to distant lands.").

50. Charles B. Selak, Jr., *A Consideration of the Legal Status of the Gulf of Aqaba*, 52 AM. J. INT'L L. 660, 662–63 (1958).

51. *Id.* at 662.

52. ELLIS, *supra* note 48, at 1–2.

53. See Selak, Jr., *supra* note 50, at 663 (stating that the Ottoman government recognized the Sinai Peninsula and the Gulf of Aqaba as belonging to Egypt "because of its regular use by Egyptian pilgrims proceeding overland to Mecca and Medina").

54. *Id.*

55. NURIT KLIOT, *The Evolution of the Egypt-Israel Boundary: From Colonial Foundations to Peaceful Borders*, 1 BOUNDARY & TERRITORIAL BRIEFING, no. 8, 1995, at 3–4.

56. *Id.* at 7–8.

57. BASSIOUNI, *supra* note 7, at 592.

during this period of European colonization.⁵⁸ However, after Egypt achieved its formal independence from the British in 1922, Egypt “clearly” resumed full sovereignty of the western shore of the Gulf of Aqaba from Ras Tabah southward⁵⁹ ten years before the creation of the Saudi state.

It was not until 1948 that the islands of Tiran and Sanafir gained international attention as a focal point of tension between Egypt and Israel at the outset of the Arab–Israeli War. The following year, in December 1949, Egypt erected military installations on the islands and along the coast of the Sinai.⁶⁰ By 1950, Egypt had taken full military control of the islands.⁶¹

The crux of President Sisi’s argument is that Egypt’s control over the islands was only possible with the permission of Saudi Arabia. On January 17, 1950, King Ibn Sa’ud of Saudi Arabia sent a telegram to Egypt granting permission to occupy the islands in order to prevent Israeli occupation:

At the entrance of the Gulf of Aqaba, there exist[s] two islands about which there had been negotiations between us of old. It’s not important now if the two islands belong to us or to Egypt. What’s important now is to take quick action to prevent the Jewish advance towards those two islands.⁶²

Eleven days later, on January 28, 1950, the Egyptian Foreign Ministry sent an aide-mémoire to the U.S. Embassy in Cairo stating that “the Government of Egypt, acting in full accord with the Government of Saudi Arabia, has given orders to occupy effectively these two islands.”⁶³

Saudi Arabia and Israel have argued that Egypt, in acknowledging Saudi sovereignty over the islands, had waived by implication any sovereignty over Tiran and Sanafir in the 1950 note to the U.S. State Department.⁶⁴ However, on February 15, 1954, the Egyptian Delegate expressly informed the Security Council that the islands of Tiran and Sanafir had constituted Egyptian territory since the delimitation of the frontier between Egypt and Palestine:

Those islands were not suddenly occupied; they were occupied . . . in 1906. At that time it had been found necessary to delimit the frontiers

58. See ENAZY, *supra* note 40, at 13 (implying that British colonial control over Egypt meant that Egypt’s control over the region did not “imply sovereignty” over it).

59. Selak, Jr., *supra* note 50, at 663–64 (“Since Egypt achieved its formal independence in 1922, it *clearly* has been sovereign of the western shore (Sinai Peninsula coast) of the Gulf of Aqaba from Ras Tabah southwards.” (emphasis added)).

60. CAROL, *supra* note 33.

61. LAPIDOTH-ESCHELBACHER, *supra* note 36, at 173.

62. ENAZY, *supra* note 40, at 19–20.

63. *Id.* at 23.

64. See MICHAEL B. OREN, ORIGINS OF THE SECOND ARAB-ISRAEL WAR: EGYPT, ISRAEL AND THE GREAT POWERS, 1952–56, at 45 (1992) (“Israel retorted that the 1906 Treaty made no mention of the Straits and that, in any case, Egypt had expressly waived any claim to sovereignty over Tiran in a 1950 note to the US State Department.”).

between Egypt and the Ottoman Empire. . . . The occupation was the subject of discussions, exchanges of views and even letters between the Ottoman Empire and the Khedival Government of Egypt. Consequently, there was no surprise. The islands have in fact been occupied since 1906, and it is an established fact that from that time on they have been under Egyptian administration.⁶⁵

On October 29, 1956, Israeli forces launched an attack on the Sinai Peninsula and forced the Egyptian military out of the Tiran and Sanafir Islands.⁶⁶ It was not until March 8, 1957, that Israeli forces withdrew from the islands and Egypt resumed its control over Tiran and Sanafir.⁶⁷

Saudi Arabia's first official claim to the islands was made in 1957 when Saudi Arabia sent over several diplomatic missions to the United Nations to dispute Egypt's ownership of Tiran and Sanafir.⁶⁸ A memorandum attached to a letter from the Permanent Representatives of Saudi Arabia addressed to the Secretary-General of the United Nations stated that "these two islands are Saudi Arabian."⁶⁹ Nevertheless, even in the face of international pressure to relinquish control over the islands, Egypt maintained its sovereignty over Tiran and Sanafir. In a 1967 press conference with the international and Arab press in Heliopolis, Cairo, President Gamal Abdel Nasser reaffirmed Egyptian sovereignty and control over the islands and Egypt's territorial waters:

The Gulf of Aqaba is Egyptian. The entire width of the Gulf is less than three miles and it is located between the coast of Sinai and Tiran Island. The island of Tiran is Egyptian and the Sinai is Egyptian, and if we say that the local territorial waters are three miles, then all of this is Egyptian maritime territory, and if we say that it is six miles, then again it is Egyptian, and if we say that it is twelve miles, then again it is Egyptian. And the water passage where the ships travel through is only a distance less than one mile from the Egyptian coast of Sinai. On this basis, in the past before '56, we did not allow Israeli ships to use the Strait of Tiran and we did not allow even for these ships to use the Gulf of Aqaba, and we inspected any passenger who passed through this strait, even American passengers, we inspected them, and English passengers, we inspected them, and French passengers, we inspected them, and we practiced this before the year '56. . . . Passage through the Gulf of Aqaba in our territorial waters is a breach

65. U.N. SCOR, 9th Sess., 659th mtg. at ¶ 132, U.N. Doc. S/P.V. 659 (Feb. 15, 1954).

66. Selak, Jr., *supra* note 50, at 671.

67. *Id.* at 676.

68. Hend El-Behary, *Island Controversy: A History of Tiran and Sanafir*, EGYPT INDEPENDENT (Apr. 12, 2016), <http://www.egyptindependent.com/island-controversy-history-tiran-and-sanafir/> [<https://perma.cc/CT4H-89H7>].

69. Selak, Jr., *supra* note 50, at 666.

of our sovereignty and we consider this a hostility towards us and we will resist it with all force.⁷⁰

As affirmed by President Nasser, Egypt's maritime sovereignty extended throughout history over the Strait of Tiran and the surrounding waters. Tiran Island is separated from the Sinai Peninsula by the Enterprise Passage, which is only 1,300 yards wide.⁷¹ If Tiran Island is only separated from the Sinai by less than one mile of water,⁷² even if Egypt's territorial waters extend for a minimum of three miles, Tiran would have to be included within Egyptian territorial waters due to its proximity to the Egyptian mainland. But Egypt does not claim only three miles of the territorial seas; Egypt claims twelve miles.⁷³ The fact that the Enterprise Passage between Tiran Island and the Sinai Peninsula is the only navigable channel from the Red Sea to the Gulf of Aqaba inevitably means that any ship that passes through the Strait of Tiran "must of necessity transit the territorial sea of Egypt."⁷⁴

The day following Nasser's speech reaffirming Egyptian sovereignty over the islands, Egypt closed the Strait of Tiran, effectively impeding Israeli access to the Red Sea.⁷⁵ Israeli leaders viewed the closing of the Gulf of Aqaba as the *casus belli* of the Arab-Israeli War.⁷⁶ Shortly afterward, Israel captured the islands in 1967 and ousted Egyptian military forces from the islands for over a decade.⁷⁷ In 1979, the two countries signed an armistice, bringing an end to the Arab-Israeli War, returning the two islands to Egypt.⁷⁸

Even with everything that has already been discussed, the most indisputable proof of Egyptian sovereignty over Tiran and Sanafir comes from the 1979 Peace Treaty between Egypt and Israel. The Peace Treaty of 1979 establishes Egyptian sovereignty over the islands in two ways: first, Egypt was granted full sovereignty over all demilitarized zones, and second,

70. Gamal Abdel Nasser, President of the Arab Republic of Egypt, Press Conference to Representatives of the International and Arab Media at the Zahra Hall in Heliopolis, Cairo (May 28, 1967), <http://nasser.bibalex.org/Speeches/browser.aspx?SID=1217&lang=ar> [https://perma.cc/K7PD-LBU8].

71. See CAROL, *supra* note 33 ("The only navigable channel leading from the Red Sea to the Gulf of Aqaba passes between Tiran Island and the coast of the Sinai Peninsula. It is the narrow Enterprise Passage, a shipping channel only 1,300 yards wide and running parallel to the shore.").

72. When I refer to "miles" in the context of territorial waters, I am specifically referring to "nautical miles." One nautical mile is the equivalent of 1,852 meters, which is equal to 2,025.37 yards or 1.15 standard miles. INT'L BUREAU WEIGHTS & MEASURES, THE INTERNATIONAL SYSTEM OF UNITS (SI) 127 (8th ed. 2006).

73. EL-HAKIM, *supra* note 28, at 135.

74. Selak, Jr., *supra* note 50, at 667.

75. Laura M. James, *Egypt: Dangerous Illusions*, in THE 1967 ARAB-ISRAELI WAR: ORIGINS AND CONSEQUENCES 56, 64 (Wm. Roger Louis & Avi Shlaim eds., 2012).

76. *Id.*

77. TAHRIR INST. FOR MIDDLE EAST POLICY, *supra* note 1, at 8.

78. *Id.*

Article II(1)(c)(2) of Annex I of the Treaty of Peace explicitly limits Tiran and Sanafir to Egypt and UN forces.

First, in exchange for free passage through the Strait of Tiran to the Gulf of Aqaba,⁷⁹ Israel agreed to withdraw from the occupied Sinai, and Egypt was granted full sovereignty over the demilitarized zones of the region “with regard to each area upon Israel’s withdrawal from that area.”⁸⁰ Tiran and Sanafir Islands were included as being within the demilitarized territory that was returned to Egyptian sovereignty.⁸¹ Specifically, Zone “C” was designated in the Treaty to encompass the Egyptian coast of the Gulf of Aqaba, the Strait of Tiran, and the islands of Tiran and Sanafir.⁸² Closer inspection of “Map 1 – International Boundary and the Lines of the Zones” of the Treaty of Peace reveals that the islands of Tiran and Sanafir are explicitly labeled as “Part of Zone ‘C’.”⁸³

79. See Treaty of Peace, Egypt-Israel, art. 5, Mar. 26, 1979, 1138 U.N.T.S. 17813 118 (“The Parties consider the Strait of Tiran and the Gulf of Aqaba to be international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight. The Parties will respect each other’s right to navigation and overflight for access to either country through the Strait of Tiran and the Gulf of Aqaba.”).

80. See *id.* at art. 1 (“Israel will withdraw all its armed forces and civilians from the Sinai behind the international boundary between Egypt and mandated Palestine . . . and Egypt will resume the exercise of its full sovereignty over the Sinai.”); *id.* at *Agreed Minutes to Articles I, IV, V and VI and Annexes I and III of Treaty of Peace*, art. 1 (“Egypt’s resumption of the exercise of full sovereignty over the Sinai . . . shall occur with regard to each area upon Israel’s withdrawal from that area.”).

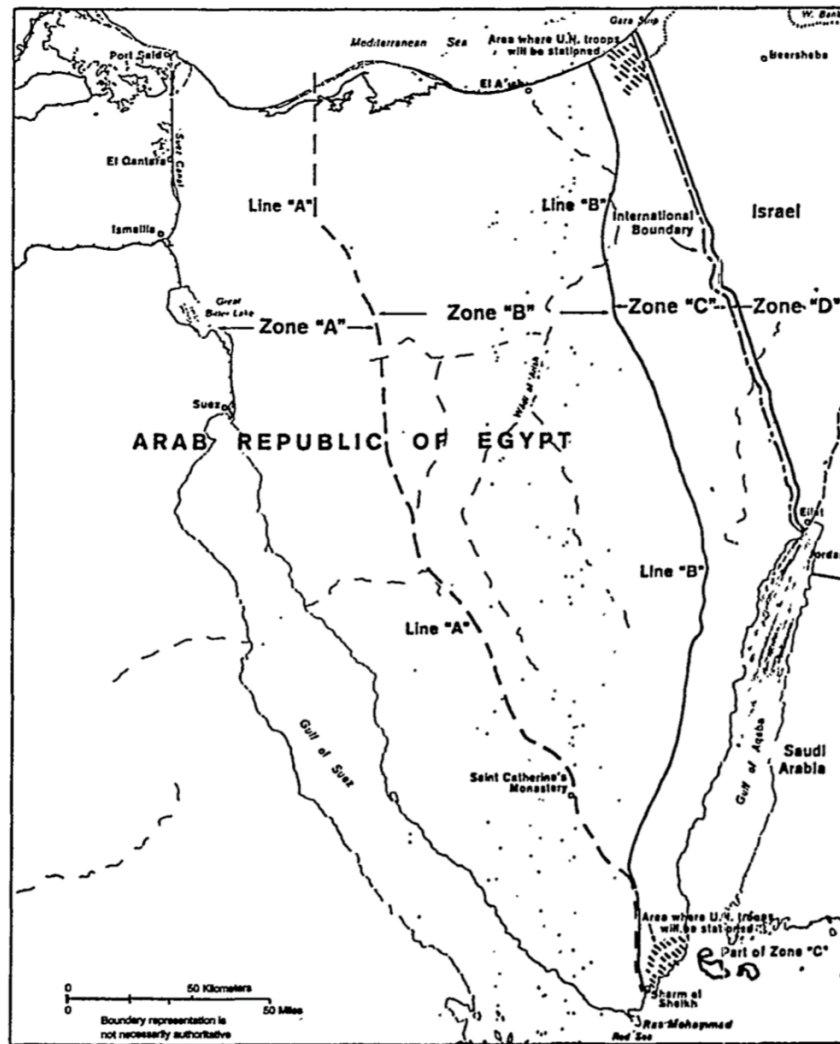
81. BASSIOUNI, *supra* note 7, at 593 (“The peace treaty between Israel and Egypt mentioned Tiran and Sanafir as part of the demilitarized Egyptian territory.”).

82. Ruth Lapidoth, *The Strait of Tiran, the Gulf of Aqaba, and the 1979 Treaty of Peace Between Egypt and Israel*, 77 AM. J. INT’L L. 84, 98 (1983); see *infra* Figure 2.

83. See *infra* Figure 2.

Figure 2

“Map 1 – International Boundary and the Lines of the Zones” from the 1979 Egyptian–Israeli Treaty of Peace. The Map divides the region into four zones with Egypt partitioned into Zones “A,” “B,” and “C” and with Israel constituting the entirety of Zone “D.” The Gulf of Aqaba is encompassed by Zone “C,” and the islands of Tiran and Sanafir are labeled as “Part of Zone ‘C’.”⁸⁴



84. Treaty of Peace, *supra* note 79, at 178. Map 1 – International Boundary and the Lines of the Zones.

Second, Article II(1)(c)(2) of Annex I of the Treaty of Peace states that “[o]nly United Nations forces and Egyptian civil police will be stationed in Zone C.”⁸⁵ This Zone was subjected to three different sets of rules which specified that the Sinai coast and the islands of Tiran and Sanafir are restricted from any Israeli activity and that only light Egyptian and multinational police forces are permitted to occupy the area.⁸⁶ Not only is Saudi Arabia not mentioned anywhere in the Treaty, but the Treaty clearly designates Egypt as the sole sovereign permitted to occupy the Tiran and Sanafir Islands.

Furthermore, ever since the 1979 Peace Treaty between Egypt and Israel, Egypt has been responsible for upholding the treaty provisions pertaining to shipments through the Strait of Tiran.⁸⁷ Saudi Arabia has never signed any treaty with Israel and has never been responsible for regulating passage through the Strait of Tiran.⁸⁸ To transfer ownership of the islands to Saudi Arabia would be a breach of the explicit text of the 1979 Peace Treaty.

Despite the purported ambiguity of sovereignty over Tiran and Sanafir, there is clear political and historical evidence that Egypt has been the true sovereign of the islands of Tiran and Sanafir since before the nascence of the Saudi nation-state in 1932. First, the 1906 border delimitation agreement between the Ottoman Empire and Britain formally established Egyptian sovereignty over the islands. Second, due to their proximity to the Sinai Peninsula, the Tiran and Sanafir Islands clearly fall within the twelve miles of territorial seas within Egypt’s maritime sovereignty. Finally, even if there is any doubt as to whether the 1906 border delimitation agreement between the Ottoman Empire and the British Empire extended sovereignty to Egypt, or as to whether the islands are within the bounds of Egypt’s maritime territory, Egyptian sovereignty over Tiran and Sanafir was clearly established by the 1979 Egyptian–Israeli Peace Treaty, which granted full sovereignty over all demilitarized zones and specified that only the military forces of Egypt and the United Nations are permitted to occupy the islands of Tiran and Sanafir.

Now that the question of Egyptian territorial sovereignty over the islands has been answered, in Part III, I will explore the concept of the separation of powers in Egypt and the role of judicial review of the Executive Branch.

85. *Id.* at 170.

86. Lapidoth, *supra* note 82, at 99.

87. See Cook, *supra* note 2 (stating that Saudi Arabia, which “has never signed a peace agreement with Israel,” “will now become responsible for upholding the treaty’s clauses relating to Israeli shipping through the Straits”).

88. *Id.*

III. Separation of Powers and Judicial Review of the Executive Branch

The doctrine of the separation of powers has been an unattainable goal for much of Egypt's history. President Nasser, himself, unabashedly admitted that any notion of separation of powers was nothing more than a mirage:

I'm against the principle of the separation of powers, and I consider the carrying out of this separation an enormous illusion. Why? Because in reality there is no such thing as the separation of powers; because whoever has the majority in parliament takes over the executive and legislative powers. Thus the political leadership that has the majority also has two things: executive power and legislative power, and, consequently, judicial power. For, no matter what they say about its independence, the judicial power is subordinate to the legislative power.⁸⁹

For Nasser, not only was the entire concept of the separation of powers an idealistic fiction, but the Judicial Branch, which was responsible for maintaining the separation of powers, was considered to be the weakest and most subordinate of all the branches of government.

In the aftermath of the 2011 Revolution, many Egyptians envisioned an idealized form of government where independent courts would police the separation of powers between the three branches of government.⁹⁰ It was anticipated that there would be a weaker Executive Branch, a stronger Parliament, and a greater emphasis on the separation of powers.⁹¹

Following the 2011 Egyptian Revolution, Egypt adopted two constitutions that differed significantly with regard to the separation of powers and the breadth of executive power.⁹² The first was enacted in December 2012 under President Mohamed Morsi.⁹³ According to the 2012 Constitution, the powers of the President were to be reduced while the authority of the Parliament was to be substantially augmented.⁹⁴ For example, the Egyptian Parliament "was given significant oversight powers and authority in government formation and dismissal processes" and was also protected from arbitrary dissolution.⁹⁵

After President Morsi's forced removal from office in July 2013, Egypt, under the direction of President Abdel Fattah el-Sisi, adopted a second constitution in January 2014, which swung "the pendulum decisively back in

89. JOHN WATERBURY, *THE EGYPT OF NASSER AND SADAT: THE POLITICAL ECONOMY OF TWO REGIMES* 343 (1983).

90. THANASSIS CAMBANIS, *ONCE UPON A REVOLUTION: AN EGYPTIAN STORY* 82 (2015).

91. *Id.* at 70.

92. Francesco Biagi, *The Separation and Distribution of Powers Under the New Moroccan Constitution*, in *CONSTITUTIONALISM, HUMAN RIGHTS, AND ISLAM AFTER THE ARAB SPRING* 495, 496 (Rainer Grote, Tilmann J. Röder, and Ali M. El-Haj eds., 2016).

93. *Id.*

94. *Id.*

95. *Id.*

favor of the president.”⁹⁶ In January 2016, following the first session of the new Parliament, President Sisi released a statement where he claimed reverence to the separation of powers in Egypt’s nascent government: “We totally respect the separation of powers and I wish to show all support and help for the newly elected parliament.”⁹⁷ However, under the 2014 Constitution, a disproportionate amount of power was allocated to the Executive Branch, which has severely jeopardized the separation of powers in Egypt. For example, the 2014 Constitution gives the Egyptian President vast appointment powers over the Prime Minister, the Ministry of Justice, the Ministry of Interior, the Ministry of Defense, and five percent of the Parliament.⁹⁸

The Judicial Branch, which has historically stood as the main opposing force to the Executive Branch, has been significantly weakened in recent years by the Executive. The Executive Branch has restricted the power of the judiciary in two principal ways: first, by directly intervening in the judiciary, and second, by divesting the judiciary of jurisdiction over cases involving political acts or acts of sovereignty.

The primary method that the Executive Branch has infringed on the judiciary is through direct intervention. Throughout Egypt’s history, the Egyptian judiciary has been severely limited by direct intervention of the Executive Branch, which has often considered any form of judicial autonomy as a threat to its own authority.⁹⁹ The Executive Branch can intervene in the judiciary through several means that are authorized by Law 46/1972, such as through judicial inspection affiliation, through the composition of the Supreme Judicial Council, through the codification of the rules of transfer, and through sanctions and supervision by the Minister of Justice over the courts.¹⁰⁰ Executive intervention into the judiciary has been especially prominent in recent years under Sisi’s regime.

For example, in response to the Supreme Administrative Court upholding the injunction blocking Sisi’s attempt to cede Tiran and Sanafir to Saudi Arabia, Sisi began to find ways to undermine Egypt’s historically independent judiciary.¹⁰¹ Shortly following the Supreme Administrative

96. Zaid Al-Ali, *Egypt’s Third Constitution in Three Years: A Critical Analysis*, CONSTITUTIONNET (Dec. 20, 2013), <http://www.constitutionnet.org/news/egypts-third-constitution-three-years-critical-analysis> [https://perma.cc/S5JM-4CQ7].

97. *Egypt’s Sisi Says ‘Respects Separation of Powers’ as New Parliament Convenes*, AHARAM ONLINE (Jan. 11, 2016), <http://english.ahram.org.eg/NewsContent/1/64/180691/Egypt/Politics-/Egypt-Sisi-says-respects-separation-of-powers-as.aspx> [https://perma.cc/7SQR-DAFT].

98. Biagi, *supra* note 92.

99. Mahmud al-Khudayri, *The Law on Judicial Authority and Judicial Independence*, in JUDGES AND POLITICAL REFORM IN EGYPT 45, 45 (Nathalie Bernard-Maugiron ed., 2008).

100. *Id.* at 47.

101. *Sisi Takes On Egypt’s Judiciary*, ECONOMIST (May 6, 2017), <https://www.economist.com/news/middle-east-and-africa/21721657-latest-effort-muzzle-independent-bodies-sisi-takes-egypts-judiciary> [https://perma.cc/KP5R-MZB7].

Court's decision in April 2017, President Sisi passed a law that granted him the power to directly select the heads of judicial bodies, including the Court of Cassation, the State Council, the Administrative Prosecution Authority, and the State Lawsuits Authority.¹⁰² Many viewed this new law as a maneuver by Sisi "to neuter the courts, with the help of a pliant parliament."¹⁰³

Apart from direct intervention by the President, another significant limitation on judicial power has manifested through judicial abstention of inherently "executive" acts. The Egyptian legislature has designated certain areas of the law to be outside of judicial control when the issue at hand involves political acts or acts of sovereignty.¹⁰⁴ The legislature divested the courts of jurisdiction over political acts and acts of sovereignty because ruling on such issues would infringe on the duties of the Executive Branch.¹⁰⁵ The purpose of this jurisdiction-stripping is to preserve the balance of the separation of powers by protecting the state's internal stability, defending its sovereignty abroad, and protecting its national interests.¹⁰⁶ But in recent years the balance has tilted largely in favor of the Executive Branch. And the broad discretionary powers of the Executive Branch, combined with the fact that there is limited judicial review for executive actions, has jeopardized issues concerning human rights and public interest in Egypt.¹⁰⁷

Judicial scrutiny of the Executive Branch by the courts has been in flux throughout Egypt's history; however, the trend has been towards limiting the power of judicial review over the actions of the Executive Branch. For example, the Mixed Courts, in the late 1800s and the early 1900s, could not review any acts of sovereignty or any actions taken by the government to enforce laws or administrative regulations.¹⁰⁸ The National Courts, conversely, were permitted to review acts of sovereignty due to the fact that the 1883 Regulations of the National Courts did not immunize acts of sovereignty from judicial review.¹⁰⁹ But in 1937, Article 15 of the 1883 Regulations of the National Courts was amended with the provision stating:

102. *New Legislation Threatens Judicial Independence in Egypt*, AMNESTY INT'L (Apr. 27, 2017), <https://www.amnesty.org/en/latest/news/2017/04/new-legislation-threatens-judicial-independence-in-egypt/> [<https://perma.cc/7RSB-A44P>].

103. *ECONOMIST*, *supra* note 101.

104. Mohamed Maher Abouelenen, *Judges and Acts of Sovereignty*, in *JUDGES AND POLITICAL REFORM IN EGYPT* 181, 181 (Nathalie Bernard-Maugiron ed., 2008).

105. *See id.* ("[Political acts and acts of sovereignty] mean that certain actions are not subject to judicial control not only because it would be difficult for the judiciary to deal with such issues but also in order to allow the executive authority to exercise a broader discretionary power.").

106. *Id.* at 192.

107. *Id.* at 181.

108. *Id.* at 182.

109. *Id.*

“National courts are not entitled to rule, directly or indirectly, on acts of sovereignty.”¹¹⁰

The administrative courts initially had very limited jurisdiction over executive actions. This all changed in a 1951 decision where the Supreme Administrative Court concluded that it had jurisdiction to review administrative acts of the Executive, while acts of sovereignty continued to remain outside of its jurisdiction.¹¹¹ Whether an executive action was of an administrative or sovereign nature was to be decided through a supposedly objective standard where the nature of the action itself was to be judged rather than the surrounding circumstances.¹¹² This amorphous standard gave the administrative judge significant flexibility in determining the nature of the acts brought before the court and, by extension, in deciding whether or not the administrative court could review the action.¹¹³ For example, relations between the executive and the legislative authorities were considered to be acts of sovereignty, whereas decisions to censor, suspend, or suppress speech in a newspaper were considered to be administrative actions rather than acts of sovereignty.¹¹⁴ Evidently, the Supreme Administrative Court was able to exercise a significant degree of autonomy in reviewing executive actions by characterizing the nature of those actions.

The 1969 Supreme Court was unique in that the Supreme Court Law 81/1969 did not include any provision excluding acts of sovereignty from the jurisdiction of the Supreme Court at any point in its history.¹¹⁵ However, the 1969 Supreme Court of Egypt decided on its own accord to exercise abstention control and refrain from hearing acts of sovereignty or political acts.¹¹⁶ One exception to this rule came in a November 1971 constitutional case where the Supreme Court held that final administrative decisions issued by the Executive were subject to judicial review because of principles of legitimacy and rule of law.¹¹⁷ The Supreme Court’s rationale was that the Executive has two main functions: as a ruling authority (implicating questions of sovereignty) and as an administrative authority.¹¹⁸ Whereas questions of sovereignty were considered to be outside the purview of the Court, questions of administration were held to be within its jurisdiction.¹¹⁹

The Supreme Constitutional Court was created by Articles 174–178 of

110. *Id.* at 182–83.

111. *Id.* at 184.

112. *Id.*

113. *Id.*

114. *Id.* at 185–86.

115. *Id.* at 188.

116. *Id.*

117. *Id.*

118. *Id.* at 189.

119. *Id.*

the 1971 Constitution to replace the Supreme Court of 1969.¹²⁰ The most revolutionary feature of the Supreme Constitutional Court of 1979 was its power to engage in judicial review.¹²¹ The Supreme Constitutional Court initially adopted the same approach as the Supreme Court but quickly abandoned it.¹²² Like the preceding Supreme Court, the 1979 Law on the Supreme Constitutional Court did not include any provisions divesting the Court of jurisdiction over acts of sovereignty or political acts from its jurisdiction.¹²³ In the first few years after its formation, the Supreme Constitutional Court followed the policy of the 1969 Supreme Court and abstained from hearing questions concerning acts of sovereignty or political acts.¹²⁴ However, the Supreme Constitutional Court eventually forsook this approach by narrowing the definition of what actually constituted an act of sovereignty.¹²⁵

The turning point for the Supreme Constitutional Court came in 1986 in a case concerning Article 152 of the Egyptian Constitution of 1971, where the Court indicated for the first time its abandonment of the abstention policy.¹²⁶ In Case No. 56 of the Sixth Judicial Year (June 21, 1986), citizens brought a claim concerning the constitutionality of Article 4 of Law No. 33 (1978).¹²⁷ The government attempted to dismiss the claim on the basis that the constitutional question at issue was allegedly a political question that fell within the discretion of the Executive Branch.¹²⁸ The Supreme Constitutional Court, however, rejected the government's political question argument and held that "[a]ll statutes which are not constitutional provisions are subordinate to the Constitution, and subject to judicial review."¹²⁹

In abandoning its abstention policy towards political acts of the Executive Branch, the Supreme Constitutional Court became the most important avenue for political activism challenging autocratic regimes in Egypt for two decades.¹³⁰ Under the authoritarian regimes of both Sadat and Mubarak, Egyptian judges were able to exercise a significant degree of independent authority.¹³¹ Despite the surge in independence of the Supreme

120. Adel Omar Sherif, *The Rule of Law in Egypt from a Judicial Perspective: A Digest of the Landmark Decisions of the Supreme Constitutional Court*, in *THE RULE OF LAW IN THE MIDDLE EAST AND THE ISLAMIC WORLD: HUMAN RIGHTS AND THE JUDICIAL PROCESS* 1, 1 (Eugene Cotran & Mai Yamani eds., 2000).

121. *Id.*

122. Abouelenen, *supra* note 104, at 188.

123. *Id.* at 191.

124. *Id.*

125. *Id.* at 192.

126. *Id.* at 195–96.

127. Sherif, *supra* note 120, at 5–6.

128. *Id.* at 6.

129. *Id.*

130. TAMIR MOUSTAFA, *THE STRUGGLE FOR CONSTITUTIONAL POWER* 178 (2007).

131. James Fowkes, *Relationships with Power: Re-imagining Judicial Roles in Africa*, in

Constitutional Court into the late 1990s, the Supreme Constitutional Court has lost much of its independence in recent years, allowing a strong executive power to usurp the oversight power of the Egyptian judiciary.¹³²

Having explored the evolution of the historic relationship between the Judicial and Executive Branches, I will now move to Part IV where I will discuss the Supreme Constitutional Court decision passed on March 3, 2018, concerning the cession of the Tiran and Sanafir Islands to Saudi Arabia.

IV. The Constitutionality of the March 2018 Supreme Constitutional Court Decision

In response to the contradictory rulings of the Supreme Administrative Court upholding the injunction on the agreement, and the Court of Urgent Matters subsequently nullifying the injunction, the Supreme Constitutional Court, on June 21, 2017, suspended all proceedings concerning the agreement to await a final resolution by the Court.¹³³ Article 192 of the Egyptian Constitution of 2014 confers exclusive jurisdiction to the Supreme Constitutional Court to resolve any questions concerning the constitutionality of laws and to resolve any disputes between two conflicting final rulings:

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 execution of its judgments and decisions.¹³⁴

The Supreme Constitutional Court asserted in its decision of March 3, 2018,¹³⁵ that it is the court “exclusively competent to adjudicate” the maritime-boundary-limitation treaty between Egypt and Saudi Arabia.¹³⁶ However, rather than adjudicate the issue on the merits, the Supreme Constitutional Court used its absolute authority simply to negate the rulings made by the Supreme Administrative Court and the Court of Urgent Matters, which it considered as obstacles hindering the implementation of the Court’s decision:

SEPARATION OF POWERS IN AFRICAN CONSTITUTIONALISM 205, 208 (Charles M. Fombad ed., 2016).

132. MOUSTAFA, *supra* note 130.

133. TAHRIR INST. FOR MIDDLE EAST POLICY, *supra* note 1, at 7.

134. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 192.

135. al-Mahkamah al-Dustūriyah al-’Ulyā [Supreme Constitutional Court], case no. 37 & 49, session of 3 Mar. 2018, year 38, p. 3.

136. *Id.* at 13.

[T]he Court [has] the right to remove any obstacles to the execution of the judgment issued, whether such obstacle was legislation or a court judgment . . . [the two lower court cases] will not be taken into consideration. This is because – even if it is a final court judgment – it is not more than a material obstacle which is equivalent to its non-existence. . . . and it must be dismissed.¹³⁷

In essence, the Court avoided addressing the issue of territorial cession by redirecting its focus to the impermissible infringement of the lower courts on executive power. Nowhere in the decision does the Court ever actually address the inherent unconstitutionality of the maritime-boundary-limitation treaty itself.

The Supreme Constitutional Court based its decision not to intervene on the principle of separation of powers, concluding that the Egyptian Constitution “does not extend judicial oversight of the judicial authority and its branches and courts of the state council over sovereign acts, especially political actions and international conventions and agreements relating to the sovereignty of the state”¹³⁸ According to the opinion of the Court, such acts of sovereignty are “held by the executive and legislative authorities and not by the judicial authority.”¹³⁹ The Court distinguished the executive actions that were exclusively within the purview of the Executive Branch from the executive actions that were administrative in nature, which permissibly fell within the purview of the administrative courts.¹⁴⁰ The decision defined executive acts of sovereignty as those relating to the Executive’s role to achieve the interests of the entire political regime and to ensure respect for the Constitution and the supervision of its relations with other states.¹⁴¹ Conversely, the administrative functions of the Executive Branch, which are concerned with overseeing the daily interests of the public and its public facilities, have traditionally been considered reviewable by the administrative courts.¹⁴² Considering the nature of the agreement as one concerning political relations with a foreign state, the Supreme Constitutional Court deemed the agreement to fall within the jurisdiction of the former rather than that of the latter.

Ultimately, the Court concluded that because of the infringement of the separation of powers by the Supreme Administrative Court and the Court of Urgent Matters, there was no issue on the merits remaining for the Supreme Constitutional Court to adjudicate: “Accordingly, this Court has decided not

137. *Id.* at 13–14.

138. *Id.* at 12.

139. *Id.*

140. *Id.*

141. *Id.*

142. See Abouelenen, *supra* note 104, at 184–85 (providing examples of acts by the Executive that are considered to be administrative in nature).

to accept the dispute, since the decision to request a stay of execution of the ruling has become irrelevant.”¹⁴³

Here we see the Supreme Constitutional Court take a significant step backward from its stance on judicial review in the 1978 case, where the Court essentially held that it could review any law short of amending the Constitution.¹⁴⁴ Nevertheless, the most problematic aspect of the Court’s opinion is its characterization of the issue as one that implicates the separation of powers. The transfer of the Tiran and Sanafir Islands to Saudi Arabia is not a question of separation of powers, but, rather, it is a question of constitutionality. There can be no infringement on the Executive if the Executive Branch is exercising a power outside the scope of its constitutional authority.

The cession of the islands to Saudi Arabia violates three distinct provisions of executive power defined in the Egyptian Constitution of 2014. Article 139 of the Constitution establishes the role of the President as the head of executive power: “He shall care for the interests of the people, safeguard the independence of the nation and the territorial integrity and safety of its lands, abide by the provisions of the Constitution, and assume his authorities as prescribed therein.”¹⁴⁵

First, in his capacity as President, Sisi is required to “care for the interests of the people.”¹⁴⁶ The agreement to cede the islands to Saudi Arabia was met with widespread disapproval from the Egyptian populace. Within a week after the meeting on April 8, 2016, between President Sisi and King Salman, massive protests erupted throughout the country.¹⁴⁷ During the June 2017 protests following Parliament’s vote approving the agreement, police officers assaulted and detained hundreds of protestors and raided the homes of journalists and various political party members who opposed the agreement.¹⁴⁸ Prior to the parliamentary debate on the Treaty, sixty-two news sites were blocked, with the number exceeding over one hundred websites and media outlets in the aftermath of the vote.¹⁴⁹ As President, it is Sisi’s constitutional duty to act on the behalf of the people. However, rather than heed the voices of the public, Sisi responded with violence and draconian censorship towards any opposition to the agreement.

Second, the President must “safeguard the independence of the nation

143. al-Mahkamah al-Dustūriyah al-’Ulyā [Supreme Constitutional Court], case nos. 37 & 49, session of 3 Mar. 2018, year 38, p. 20.

144. See Sherif, *supra* note 120, at 6 (“All statutes which are not constitutional provisions are subordinate to the Constitution, and subject to judicial review.”).

145. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 139.

146. *Id.*

147. TAHRIR INST. FOR MIDDLE EAST POLICY, *supra* note 1, at 10.

148. *Id.*

149. *Id.*

and the territorial integrity and safety of its lands.”¹⁵⁰ By selling the islands to Saudi Arabia in exchange for \$22 billion in economic aid, the agreement threatens both the integrity of the nation’s territory, as well as the political autonomy of the country.¹⁵¹ The Treaty leaves Egypt financially dependent on another sovereign state, and by extension, renders Egypt politically subordinate to Saudi Arabia.

Third, as President, Sisi must “abide by the provisions of the Constitution, and assume his authorities as prescribed therein.”¹⁵² However, in signing the maritime-boundary-limitation agreement ceding Tiran and Sanafir to Saudi Arabia, Sisi has expressly violated Article 151 of the Constitution, which states that “no treaty may be concluded which is contrary to the provisions of the Constitution or which results in ceding any part of state territories.”¹⁵³ As was established in Part II of this Note, the Tiran and Sanafir Islands clearly constitute Egyptian sovereign land. Article 151 of the Constitution expressly invalidates any treaty that cedes any portion of the Egyptian territory. In signing the maritime-boundary-limitation treaty with Saudi Arabia, Sisi has exceeded the scope of his executive authority and has expressly violated the Constitution.

Considering that the Treaty itself and the actions of the President are constitutional violations, the Supreme Constitutional Court has explicit jurisdiction to review these actions under the Constitution. Article 192 of the Constitution expressly grants the Supreme Constitutional Court exclusive jurisdiction “to decide on the constitutionality of laws and regulations.”¹⁵⁴ To refrain from addressing these constitutional questions would be to disregard the fundamental purpose of the Supreme Constitutional Court: “Certainly, the control of constitutionality has an undeniable legal dimension, which means that the original duty of the judge is to verify the constitutionality of the law required to be applied to the dispute filed before him.”¹⁵⁵ In choosing to abstain from adjudicating the merits of the agreement, the Supreme Constitutional Court has shirked its constitutional duties, regardless of whether the Executive and the Legislative Branches have approved the Treaty. “If the judge discovers that the decision contradicts the constitution, his natural duty is to apply the constitutional provision, the *higher law*, and to ignore the legislative provision.”¹⁵⁶ In light of the flagrant

150. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 139.

151. See Walsh, *supra* note 6 (“Egyptian and Saudi officials signed at least 15 agreements during the king’s visit, including a development package for Sinai and an oil deal worth \$22 billion to Egypt over five years . . .”).

152. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 139.

153. *Id.* art. 151.

154. *Id.* art. 192.

155. Abouelenen, *supra* note 104, at 190.

156. *Id.* (emphasis added).

unconstitutionality of the cession, it was the Supreme Constitutional Court's constitutional duty to enjoin the maritime-boundary-limitation agreement.

V. Conclusion

The recent agreement to cede the Tiran and Sanafir Islands to Saudi Arabia and the Supreme Constitutional Court's refusal to address the merits of the issue reflect the growing usurpation of judicial power by an increasingly powerful Executive Branch. Although the Supreme Constitutional Court was once a champion of people's rights in Egypt in the face of a succession of autocratic and draconian regimes, the Egyptian judiciary has lost much of its autonomy under Sisi's presidency. Not only is the loss of the islands a tragic blow to the national sovereignty of the country, but it also marks a significant regression in the sovereignty of the Egyptian people in a post-Revolution Egypt.