

Parliament and the New Egyptian Constitution

Executive Summary and Background

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Executive Summary

The challenge facing post-revolution Egypt is to draft a new Constitution which meets the aspirations of all Egyptian citizens and which provides a firm foundation to secure democratic and accountable government in Egypt. Following the fall of the Mubarak regime in January 2011, the process of Constitutional reform provides Egypt with an opportunity to make a break with past and address the inequalities and authoritarian behaviour which characterised the Mubarak regime. Yet despite these being the fundamental stated aims of the revolution, there exist, in the light of President Mursi's Decree of 22nd November 2012, justified concerns that power is once again being concentrated in the hands of the President without any accompanying checks and balances.

The papers in this publication make a significant contribution to the constitutional reform debate in Egypt and represent a diverse range of views from a variety of stakeholders who have participated in the process of drafting the new Constitution. This publication is also extremely timely because it comes at a moment in the drafting process when both internal and external pressures pose certain challenges to securing a final agreement on a Constitution that defines the democratic values and principles which have are essential in post-revolution Egypt. Moreover, President Morsi's Decree of November 22nd 2012 brings in to sharp focus the political and religious tensions which exist in post-revolution Egypt.

Two key themes can be identified within all the papers and which the present version of the draft Constitution has yet to fully address. Firstly, all the authors recognise the need for the new Constitution to be an inclusive document. In particular, this requires that the Constitution embrace the principles of religious tolerance and

religious freedom and that minority rights are guaranteed. Secondly, there remain issues with regard to the role of the new Institutions of Government and guaranteeing the rule of law and the separation of powers under the new Constitution. One area of concern which was highlighted by several authors concerns the role of the President and his relationship with the Parliament. The papers of Professor Qandil and Professor Shobaki recognise, but for different reasons, that at present the draft Constitution fails to adequately create an effective system of political accountability between these two institutions. In particular, there remains significant disagreement with regard to the role of the President and Professor Adam Cygan argues that ensuring that power is not concentrated in the hands of either institution must be a fundamental objective of the new Constitution. However, the absence of a functioning parliament since the revolution has not helped in maintaining the balance in the relationship between the President and the Parliament and this offers an institutional explanation, at least in part, for President Morsi's actions of November 22nd 2012

The need for accountability is an overarching theme that is touched upon by all the papers. Ali FathElbab addressed political accountability and what role there should be for the Shura Council as a second Chamber of the Egyptian Parliament. He argues very strongly that political control and the need for a second revising Chamber is essential and that this Chamber can offer a forum for improved representation of minority ethnic or religious groups and other sectors of Egyptian society, such as women, who may be under represented within the Parliament. Mohammed Al Agati continues this theme by calling for improved provisions within the Constitution which guarantee participation in the political process by civil society and local councils. Georges Fahmy highlights that the draft Constitution is still very weak with regard to guaranteeing judicial independence from the Legislature and providing a system of judicial review. Judicial protection of constitutional rights is a key feature of

all democratic constitutions and this can only be achieved through judicial independence. Finally, Karim Sarhan and Professor John McEldowney both argue that significant improvements in the draft Constitutional provisions are still needed in order to secure accountability through processes of financial and administrative audit. Crucially, both papers highlight that Egypt needs, as a matter of urgency, to elect an effective Parliament to undertake these functions.

In nearly two years since the revolution Egypt has moved significantly from a de facto one-party State to creating a new Constitutional framework which is based upon principles of democracy and promotes political, social and religious tolerance and plurality. However, all the papers illustrate that the process of drafting a new Constitution is yet to be completed and the actions of President Morsi on November 22nd 2012 illustrate that progress with agreeing the new Constitution must be considered as an imperative. The positive development of securing the current draft, notwithstanding its deficiencies, should not be underestimated and the range of views included in this publication illustrate that political debate in Egypt is very healthy, but political will must now be shown by all stakeholders to take the process forward to its conclusion. This publication, which includes contributions from key actors who have participated in the drafting process, makes a valuable and timely contribution to the debate and helps to provide a focus for the Constitution-writing Committee with regard to addressing key issues which remain outstanding at the 'endgame' of the drafting process.

Background

Parliament and Previous Constitutions

The revolution of 25th January at the beginning of 2011 marked the beginning of a new phase of political development in Egypt as part of a long series of struggles in which Egyptians fought for and sought to achieve progress towards democracy. This contributed to increasing public controversy and debates around the future of the Egyptian political regime following these events and the model which will be adopted by Egypt in its new era. This led to debates between academics and many of those interested in public affairs around the most salient historical political phases that Egyptians experienced in the last one hundred years, as an attempt to read and analyse Egyptian history to identify what could be of use in the attempt to launch a new Egyptian model of civilization, addressing Egyptian political life, the relevant phases of national struggle and the constitutional structure which emerged in each of these phases. In light of the confusion that has affected Egyptian institutions during the last thirty years, as relations between them did not follow clear rules, their weakness and authoritarianism, and in the context of an attempt at a general reading of Egyptian political history, we address our constitutional experience in the last one hundred years and how it emerges from the relationship between important authorities and institutions in the State. This paper selects a number of institutions and analyses their relation with the Parliament as stipulated in three constitutional documents, namely the 1923 Constitution, the 1954 Draft Constitution and the 1971 Constitution.

I. The relationship between Parliament and the Head of State:

The Egyptian political regime, throughout history, was characterized by being a regime in which the Head of State (being a

Sultan, King, President, etc.) plays a very pivotal role. He can be seen as the heart of the Egyptian political regime as well as of political interactions. Hence, this was reflected in the fact that he gathered all authorities and powers in the State in his hands. However, with the development of political conditions and engagement with modern experiences and political regimes in which State institutions and the relations between them are characterized by complexity and fragmentation of power and its distribution among institutions, there was a new transformation towards more dispersal of power and removing some of the powers and remits from the hands of the Head of the State to the interest of newly modern political institutions (Parliament, Government, etc.)

Looking at the three constitutional structures, that is the 1923 Constitution, 1954 Draft Constitution and the 1971 Constitution, it is clear that there are Egyptian constitutional traditions that continued to exist throughout these three constitutions. These include what was contained in all three regarding both sides sharing many powers of the decision making process in the Egyptian State. The Head of State and both Parliament Councils are entitled to suggest bills; the first has the right to take measures as powerful as that of the law, conditional on the Legislature adopting them. This adoption might be prior-adoption, represented in granting an authorization from Parliament to the Head of State to enable him to issue a bill, similar to the case of the 1954 Draft Constitution. It might also be post-adoption, similar to the case of the 1923 and 1971 Constitutions, as Parliament convenes at a later time either to adopt what was issued by the President of the Republic or annul it in case of Parliament being dissolved in such exceptional cases.

This is in addition to the declaration of a State of Emergency or Martial Law, which is the right of the Head of State. He announces it; then, presents it to the Parliament for approval or rejection; similar to what took place in the 1923 and 1971 Constitutions. However, the

phrasing of the 1954 Draft Constitution differed as the State of Emergency was drafted in a way similar to a Parliamentary authorization that demands the Parliament to authorise the government to use specific powers to trigger this state. Meanwhile, what distinguishes the 1954 and 1971 Constitutions is that they emphasize that these states shall have a time frame specified by the Parliament; however, the 1954 Constitution stressed the necessity of specifying the geographical location to enable the government to exercise these powers authorized by Parliament.

In addition, also concerning the relationship between the Head of State and the Parliament, the three Constitutions all granted the first the right to conclude treaties provided that the latter is informed. The three Constitutions gave increasing levels of detail on this issue; they specified some types of treaties that shall only be conducted conditional on the ratification of Parliament; such as, foreign trade, foreign treaties, navigation, peace and war, whatever is relevant to sovereignty on Egyptian lands,...); similar to the case of both the 1923 Constitution and 1954 Draft Constitution and the approval of the People's Assembly as mentioned in the 1971 Constitution.

In addition, a declaration of war was entrusted to the Head of State conditional on the approval of Parliament in the 1923 Constitution and 1954 Draft Constitution, while the 1971 Constitution stipulated the approval of the People's Assembly.

There are also powers held by both sides against the other; the three constitutional structures adopted the authorization of the Head of State for the right to dissolve the House of Representatives, which became the People's Assembly under the 1971 Constitution. In return, the 1954 Draft Constitution gave Parliament the right to accuse the President of the Republic, present him to trial and therefore the possibility of removal from office if convicted; meanwhile, the 1971 granted the People's Assembly this right. The 1954 Draft Constitution

did not specify an accusation or a felony in order to charge the President of the Republic. But the 1971 Constitution was more precise in this; it specified two accusations: treason and criminal offenses. However, the 1954 Draft Constitution gave more procedural details required for the trial of the President; it stipulated that Parliament plays a role in the formulation and selection of a number of members of the body that will present the President to trial, in case he is charged and transferred to court.

Naturally, such power did not exist in the 1923 Constitution to challenge the King who had the right to dissolve the House of Representatives which was understandable in light of the existence of a King on top of the pyramid of power in Egypt and a royal institution that enjoyed a great deal of immunity at the time.

This is in addition to the right to amend the Constitution, which was a shared right between the Head of State and Parliament, according to the 1923 Constitution and 1954 Draft Constitution. Meanwhile, the 1971 Constitution is characterized by quite a good deal of ambiguity around the process of constitutional amendments and the agencies that have such a right; even though there are actual examples of this that took place in the previous Mubarak regime and constitutional amendments were integrated accordingly.

In the context of the debate around mutual powers of the Head of State and Parliament in the three Egyptian Constitutions, another issue is worthy of note, namely the three constitutional structures granting the Head of State, as part of his role, the power to select a number of members in the Senate, according to the 1923 Constitution and 1954 Draft Constitution, equivalent to the Shura Council in the 1971 Constitution. Hence, he has a hand in the formulation of Parliament. However, in return, the 1954 Draft Constitution and 1971 Constitution give the Legislature, for the first time, a role in selecting the Head of State, who was selected, according to the 1954 Draft

Constitution, by a body made up essentially from Parliament members in addition to a number of members from other agencies. This is similar to the 1971 Constitution which required that for someone to be nominated to Presidency he should have a number of approvals from members of the People's Assembly and Shura Council to be able to run in elections.

However, it should be highlighted that the 1971 Constitutions granted powers that are core to the remits of the Legislature for the first time to the Head of State, which was unprecedented in the two other constitutional Structures to which the 1971 Constitution is compared. The President of the Republic, according to the 1971 Constitution is given the right to appoint a number of People's Assembly and Shura Council members besides his right to issue and veto bills.

In general, as regards the relation between the Head of State and the Parliament, it should be emphasized that the three Constitutions do not have provide for any political responsibility to be borne by the Head of State before Parliament. In addition, despite the emphasis on the fact that Ministers bear responsibility to Parliament for the work of their Ministries, the decision and approval of their resignation lies ultimately in the hands of the Head of State.

II. Parliament and Government:

The three constitutions shared many similarities; for instance, all three of them decided that Ministers, the Prime Minister (PM) and their Deputies are held responsible before the House of Representatives, which came to be known as the People's Assembly, for their Ministries collectively besides the individual responsibility of each Minister regarding his/her own Ministry.

In addition, each Member of Parliament (MP) has the right to question Ministers, the PM or their Deputies. Discussion regarding

each inquiry takes place in a time frame specified by each constitution and if there is will to debate in less time, an agreement of the relevant Minister should be obtained.

In return, the three constitutional structures granted Ministers the right to attend sessions of any of the councils in which they are interested, in addition to their right to be listened to whenever they request a speech. They, also, have the right to send any of their delegates to respond to questions and inquiries.

Regarding procedures of withdrawal of confidence from Ministries and the government, naturally, the three constitutions granted this right to the Parliament; when confidence has been withdrawn from a Minister, his resignation becomes inevitable. While, the 1971 constitution added to this that resignation should be submitted to the President of the Republic, the 1923 Constitution and 1954 Draft Constitution did not identify the agency to which the Ministers' resignations have to be submitted.

Moreover, the three constitutional structures granted the House of Representatives, which came to be known lately as the People's Assembly in the 1971 Constitution, the right to accuse Ministers, while the 1971 constitution granted this right to the President of the Republic as well. Meanwhile, the 1954 Draft Constitution granted the Prosecutor General the power to submit a request to Parliament to accuse one of the Ministers.

Both the 1923 Constitution and 1954 Draft Constitution required the approval of Parliament (both Parliament councils as per the 1954 Draft Constitution and the House of Representatives as per the 1923 Constitution) in order to pardon the accused Minister, while the 1971 Constitution does not include such a power and there is no clear reference to it.

In addition, the three constitutional structures determined that all complaints referred to Parliament should be referred to the relevant Ministers to look into them and Parliament should wait for their clarification, as per the 1923 Constitution and 1954 Draft Constitution, while this is not clearly mentioned in the 1971 Constitution.

In the three constitutional documents, the approval of the House of Representatives or the People's Assembly is required for borrowing loans or committing to projects that result in spending money from the State treasury. The 1971 Constitution allows the People's Assembly to establish special committees or assign any of its committees to scrutinise any executive apparatus of the State and its activities to investigate a certain issue. It also obligates those executive agencies to respond and cooperate with them. The same matter is referred to in the 1954 Draft Constitution.

In addition, the PM and the Ministers are granted the right to deliver a statement to the People's Assembly or its committees on an issue under its mandate, and the council or the committee has the right either to debate this statement or express any related comments.

III. Parliament and the Judiciary:

As regards the Judiciary, being an institution that is independent in its work from all other Branches, the three constitutions did not differ in general. Hence, looking into the three constitutions there was no reference to a direct relationship between the Judiciary and Parliament; the more accurate description for their relationship is that it is indirect. The two institutions might only come together in the provision which stipulates that the affairs of the Judiciary and all that is relevant to it and its members is left to the law to organize, which is issued naturally by the Legislature. However, the 1971 Constitution

could be interpreted differently as the President of the Republic has the right to enact laws, which opens the scope for the possibility of the law being issued by the President of the Republic and not the Legislature; that is the relationship between Parliament and the Judiciary is a relationship of organization carried out by the Parliament or the Legislature, considering the Judiciary as one of the State institutions.

However, both the 1923 and 1971 Constitutions included clear reference not only to civil justice but also mention military justice explicitly. The 1923 Constitution stipulated the requirement to develop a specific and comprehensive law to organize military justice, which was similar to what was mentioned in the 1971 Constitution which emphasized that there should be a special and comprehensive law to organize the work, mandate and staff members of State Security Courts, which was not mentioned in the 1954 Draft Constitution.

But it is worth noting that the 1954 Draft Constitution was the first to mention a new type of Judiciary, namely administrative judiciary: “State Council” which was mentioned as well in the 1971 Constitution. Even though the 1954 Draft Constitution was clearer and more detailed regarding this, it stipulates that it is affiliated to the Legislature through its role in giving opinion around laws and preparation and drafting of laws referred to it by the Parliament or one of its councils.

Meanwhile, the 1971 Constitution came up with something new; the President of the Republic chairs a judicial authority consisting of the presidents of all judicial agencies, even though the matter of its organization and formulation is left to the law.

IV. Parliament and local councils:

As regards the relation between Parliament and local and municipal councils, there are similarities in the three constitutional documents, especially between the 1923 and 1971 Constitutions. Both left the formulation and organization of the affairs of these councils to the law; however, the 1923 Constitution granted Parliament the possibility of interference in the work of local and municipal councils, whenever there is need for it, in case the latter deviated from performing their functions and remits or harmed public interest or to object to any decision they issue based on this need. This does not exist in the 1971 Constitution which only refers to the fact that the relationship between community councils and the People's Assembly in one of its provisions is left to the law to organize, without clarification or illustration of the form of this relationship.

The 1954 Draft Constitution can be considered more detailed in relation to local councils and local governance agencies in comparison to both the 1923 and 1971 Constitutions. Even though there is no direct relationship between Parliament and local councils in performing their functions; except when it comes to the laws promulgated by the Parliament to organize these latter councils, as one of the State institutions, which the Legislature is responsible for enacting the laws that organize their work; the 1954 Draft Constitution included among its provisions a paragraph that represents a guarantee that commits the Parliament to ensure the independence of these local entities to carry out their functions in education, health, utilities affairs, etc. This is in the form of legislation that the Parliament is permitted to enact that empowers local councils in these areas.

V. Parliament and the Central Audit Organization (CAO)

There is no mention of the CAO in the 1923 Constitution; however, the 1954 Draft Constitution referred to it as the Audit Bureau which is established to help Parliament in monitoring the income and expenses of the State. The fact that this Constitution made the government responsible and committed to submit final accounts to both Parliament and the CAO is noteworthy. In addition to this, the President of the Republic has the right to select the CAO president conditional on the approval of Parliament. He could also be removed from office by a decree from Parliament or one of its Councils. Hence, the CAO President reports to Parliament.