

# The Development of Egypt's Constitution: Analysis, Assessment, and Sorting through the Rhetoric

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### **Note on Transliteration**

We have used the transliteration system for Arabic names as used in *Arab-West Report*, which is based on the Library of Congress. Some Arabic authors, however, do not like their names to be transliterated since they publish under a different spelling. In those cases, when the names are mentioned the first time we have put the transliteration of the Library of Congress system in parentheses: Amr Darrag (‘Amr Darrāj). Arabic terms or quotations of Arabic sentences are always quoted according to the system of the Library of Congress.  
(cf. <http://www.loc.gov/catdir/cpsa/romanization/arabic.pdf> )

## Reviewers' Comments

"I reviewed the entire text. Excellent work, looking for more."

-Dr. George Messiha, former member of the Constituent Assembly and former Member of Parliament (2012) for the liberal Wafd Party

This study is well-documented; however, it is worth noting a few points:

- 1) The Islamic political movements are composed of several branches, thus it should not be judged as one group;
- 2) The constitution of any country might put in consideration the social and cultural environment without searching a theoretically ideal constitution;
- 3) The study of the new Egyptian Constitution should not be carried out under a wide suspect of the intentions of a special group of political Islamic movement, but only on the basic principles and tools of democracy.

-Dr. Ahmad Talaat, Counselor at the Supreme Court (1980-present) and specialist in public law; elected member of the National Assembly for constituting the Egyptian Charter in 1961; Vice President of the Al Ahrar Party, 1970-1985; member of the Supreme Council of the Wafd Party, 1990-1995

The phenomenal development of mass media, still more extensive than ever given reliance in the age of electronic media, is that with the flood of information there is increasing discontinuity of particular facts or opinions responding to those facts, without continuity of reporting and a sense on ongoing context. Certainly this has been the case in the reporting of the Egyptian chapter in the Arab Spring Saga, which almost inescapably consists of the reporting of a partisan charge and a partisan counter-charge relating to one of many ongoing political dramas that have developed.

The development of Egypt's Constitution is a very timely and greatly needed corrective to misunderstanding and above all, to over-simplification. As someone who must deal with this ongoing drama professionally I find this work of great value as will others -- be they journalists or historians, students or scholars in Middle East studies, or simply concerned readers missing that sense of complexity that any great crisis must contain -- and I highly recommend it.

-Abdallah Schleifer, Professor Emeritus of Journalism & Mass Communication, The American University in Cairo and columnist for *Al-Arabiya*.

"This report deserves a sincere praise for its balance and focus on content beyond normative ideological categories."

"Thanks to all involved!"

-Dr. Christiane Paulus, Faculty for Languages and Translation, Islamic Studies in German language, Al Azhar University, Cairo

Dr. Amr Darrag (Secretary-General of the Constituent Assembly, 2012) has been extremely helpful in providing information and explaining the process of forming a new constitution. He, however, has not been able to review the final text before going to print but wrote: "I trust you reflected an objective picture of the process."

## **Introduction**

Cornelis Hulsman

One of the most crucial developments in post-Revolution Egypt is the development of the new constitution. A constitution determines the fundamental principles according to which a state is governed. It regulates the powers of the key institutions of the state including the president, parliament, and the courts. It also determines the identity of the state. For Islamists, it was of key importance to make this document Islamic.

The January 25, 2011 Revolution was followed by chaos and a struggle between the remnants of the old regime, both Islamists and non-Islamists of different trends, to either maintain or maximize their influence on society. Neither Islamists nor non-Islamists form one block and are among themselves deeply divided. Yet, Muslim Brothers formed the Freedom and Justice Party that is by far the best organized political party on both the grassroots and national level. Representatives of different parties and movements were primarily involved in addressing their own constituencies, which has resulted in an insufficient cross-ideological consensus. This contest for maximum influence has greatly impacted the formation of the new constitution.

The Constitution was tainted from its inception; 32 members of the Constituent Assembly withdrew at different stages of the process, including some replacements members for members who had previously withdrawn. Before the final voting on November 30, 2012, President Mohamed Morsi (Muhammad Mursī) issued a decree on November 22 giving him extra-constitutional powers to prevent the Constitutional Court from dissolving the Constituent Assembly before completing the constitution which would have set the constitutional process back to square one. The referendum in two rounds on 15 and 22 December 2012 was preceded by violence.

The Constitution ended Egypt's omnipotent military-led presidency, instituted a stronger parliament, and contained provisions against torture or detention without trial. It also gave the Armed Forces much of the same power and privileges they had in the period of 1952-2011, during which time senior officers had been presidents of Egypt. Such an arrangement necessitates cooperation between civilians and the



Armed Forces, which was largely unnecessary under President Hosni Mubarak (Husnī Mubārak), a former army officer himself.

Opponents to this Constitution have alleged deep influence from Islamists and refer to articles with Islamic references that they believe to be discriminatory to non-Muslims, in particular Christians, who make up around 6% of population<sup>1</sup> as well as small groups of non-Muslims in society, such as Bahā'īs.

There is no doubt that Egypt is deeply divided and polarized. The consequence is that media articles about the Constitution and events happening in Egypt often tend to be very biased. We have looked at the arguments of both Islamists and non-Islamists and incorporated both in this text.

The authors are affiliated with *Arab-West Report*, an electronic publication with a history of nonpartisan reporting on Muslim-Christian and Arab-West relations since 1997. This includes previous reporting on the Egyptian Constitution including, *The Sharī'ah as the Main Source of Legislation: The Egyptian Debate on Article II of the Egyptian Constitution*, Tectum Verlag, Marburg, 2012.

We consulted available reporting and interviewed Dr. Amr Darrag (‘Amr Darrāj), Secretary General of the Constituent Assembly and Chairman of the Foreign Relations’ Committee of the Freedom and Justice Party; Dr. George Messiha (George Missīhah) of the liberal Wafd Party; Counselor Dr. Ahmad Talaat (Ahmad Tal’at); and political scientist, Dr. Nadia Mustafa (Nādīyah Mustafá). Interviews were recorded and full transcripts of each interview are available in *Arab-West Report* for researchers to see the context in which statements were made.

The final text was reviewed by Dr. Amr Darrag, Dr. George Messiha, Dr. Ahmad Talaat, and also Dr. Christiane Paulus, Azhar University; Prof. Abdallah Schleifer, Professor Emeritus at the American University in Cairo, Egypt and author of the introductions to the yearly Muslim 500; and Ragy Soliman (Rājī Sulaymān) of the

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<sup>1</sup> Coptic Christians and several Western authors often provide higher percentages without being able to provide verifiable evidence for their claims. See Cornelis Hulsman, “Discrepancies between Coptic Statistics in the Egyptian Census and Estimates provided by the Coptic Orthodox Church,” MIDEO 29, 2012, 419-482.

liberal, Free Egyptians Party. Due to time pressure, since his comments were received very late, these were placed by Jayson Casper in *Arab-West Report*.<sup>2</sup>

Key articles in this report deal with political dynamics following the Revolution, an analysis of the electoral results, the formation and dissolution of the first Constituent Assembly, and the formation and functioning of the second Constituent Assembly. Separate chapters give attention to the role of religion in the new constitution, the political system, and basic rights, such as freedom of speech and implications for various social groups.

Major political changes in Egypt's past have resulted in new constitutions and major constitutional amendments, starting with the 1923 Constitution, the first constitution after Egypt's formal independence from Britain. In all constitutions since 1923, references were made to the *sharī'ah* (Islamic law), but the references to *sharī'ah* have gradually become more prominent and distinct up until the Constitution of 2012.

In debates around previous constitutions and constitutional amendments, most recently in 2005, the debate was often about the authority given to the president. The current 2012 Constitution has greatly reduced the power of the president and increased that of the House of Representatives. Egypt has experienced many changes in its constitutions in the past 100 years. So many changes are not conducive to legal stability and the development of law in Egypt. Changes from the 1971 Constitution were obviously needed, but it appears that the formulation of the 2012 Constitution was rushed due to conflicting interests.

Islamists wanted to see parliamentary elections, presidential elections, and the conclusion of a constitution as quickly as possible in order to cement the results of the Revolution and prevent a return to pre-revolutionary days. Many feared that the former status quo would be restored when retired Air Force General, Ahmad Shafīq, nearly won the presidency in June, 2012. The formation of a new constitution was a key demand of the revolutionaries and signifies a break from Egypt's long - standing autocracies.

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<sup>2</sup> Jayson Casper, "An Unnecessary Constitution: Rajī Sulaymān of the Free Egyptians Party," *Arab-West Report*, Week 17, Article 46, April 29, 2013, <http://www.arabwestreport.info/year-2013/week-17/46-unnecessary-constitution-raji-sulayman-free-egyptians-pa>.

On March 19, 2011, only five weeks after President Mubarak was deposed, Egyptians voted in a referendum in favor of amendments to the 1971 Constitution, which was linked to parliamentary elections, prior to forming a Constituent Assembly. That was widely seen as favoring Islamists since they were better organized and more prepared for the first parliamentary elections than non-Islamists.

Several new Islamist political parties emerged in 2011 and The Muslim Brotherhood was, for the first time in its history, able to form a political party, the Freedom and Justice Party. Abdallah Schleifer, author of the introductions to the yearly Muslim 500, calls the Freedom and Justice Party, “an ideologically defined political movement with a time - tested cadre throughout the country and with a structure reminiscent of an effective Leninist party but using Islamic formulas to describe that structure”.<sup>3</sup> Some have compared the Freedom and Justice Party to Christian Democratic parties in Europe, but European Christian Democratic parties do not have a strong guidance office that is able to give instructions to the cadre in lower hierarchies and grassroots members. This structure makes it extremely effective in mobilizing its members which we have seen in 2011 and 2012. The Muslim Brotherhood also mixes confrontation with political pragmatism.

The second largest political party in 2012 was the Salafī Nour (al-Nūr) Party. Salafī Muslims can be called puritanical and fundamentalist, following a Shaykh with each having their own groups. Prior to the Revolution, they did not challenge Mubarak’s political authority because they were more focused on religion than politics. They hardly participated in the 2011 Revolution, but once Mubarak was deposed and preparations were made for elections, they formed their own parties of which the Nour was the largest.<sup>4</sup> On January 1, 2013, the leader of the Nour Party left the party with more than 100 party members in protest of the domination of the party decision by Salafī Shaykh, Yāsir Burhāmī.

Most observers had not expected that the Nour Party would do so well in the first free parliamentary elections in December 2011-January 2012. The Freedom and Justice Party and the Nour Party together obtained 65.3% of the votes and 69.9% of the seats.

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<sup>3</sup> Abdallah Schleifer, “Introduction, The Muslim 500; the World’s Most Influential Muslims,” The Royal Islamic Strategic Studies Centre (MABDA (الإسلامية الدراسات و للبحوث الملكي المركز), <http://themuslim500.com/e2012/introduction>.

<sup>4</sup> Ibid.

The electoral successes made Islamists, through the parliament they now dominated, form a Constituent Assembly that reflected the outcome of the parliamentary elections with an estimated 70% Islamist members of the 100 member Constituent Assembly. This caused an outcry of protests of non-Islamists who felt sidelined. The Supreme Administrative Court dissolved this assembly in April 2012 for including members of parliament in its membership. Negotiations started for the formation of a new Constituent Assembly which included representatives from major institutions. Dr. George Messiha of the Wafd Party provided us with an overview of the membership of the second Constituent Assembly, which shows an initial 55% of Islamist members and 45% independents and non-Islamists.<sup>5</sup>

During the voting on November 30, 2012, 85 members participated, among whom 65 were Islamists of different backgrounds. Non-Islamists gave a strong signal of opposition by walking out of the Constituent Assembly, but also weakened their influence in the ultimate formulation of the Constitutional text.<sup>6</sup>

Walking out of the Constitutional Assembly was only one sign that Egypt had become deeply divided between Islamists and non-Islamists despite the efforts by President Morsi to seek a *modus vivendi* with non-Islamists.

Morsi did consult non-Islamist leaders before forming a cabinet, but they refused to serve under Morsi, some stating that thus the burden for the failure to form a broad coalition would appear to fall on the Muslim Brotherhood.<sup>7</sup> Morsi, nevertheless, formed a cabinet with five Muslim Brotherhood ministers, no Salafī minister, and further technocrat ministers, apparently in an effort to be conciliatory to the opposition.

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<sup>5</sup> Jayson Casper, "How Islamist was the Constituent Assembly? Analysis of former Assembly member George Masīhah," *Arab-West Report*, Week 12, Art. 29, March 24, 2013, <http://www.arabwestreport.info/year-2013/week-12/29-how-islamist-was-constituent-assembly-analysis-former-assembly-member-george>.

<sup>6</sup> During the visit of the Dutch SG Party in December 2012 we met with several former members of the Constituent Assembly who explained why they had stepped out. The feeling that numerical advantages were used to overrule minority positions caused much mistrust. Cornelis Hulsman, *Arab-West Report* organizing visit of the Dutch political party SGP to Egypt, *Arab-West Report*, Week 3, Art. 23, January 17, 2013, <http://www.arabwestreport.info/year-2013/week-3/23-arab-west-report-organizing-visit-dutch-political-party-sgp-egypt>.

<sup>7</sup> Ibid.

In August 2012, Morsi attempted to form a broad specter of presidential assistants and advisors from different political backgrounds, including the Coptic liberal, Samir Marcos (Samīr Marqus),<sup>8</sup> who, with many advisors left the president when he issued his November 22 decree that lifted his actions above any judicial review.

The non-Islamist opposition did not trust Morsi and the Muslim Brothers. Media reporting was largely negative, at times printing ugly and unfair statements about the Muslim Brothers. *Arab-West Report* provides several examples of this.<sup>9</sup> On the other hand, one also finds Islamist reporting showing uncompromising attitudes and guilty of disfiguring their opposition.

In October 2012 we were involved in organizing an Egyptian multiparty delegation to the Netherlands for talks about the Constitution and Egyptian Parliament.<sup>10</sup> The visit brought representatives from both Islamist, liberal, and socialist parties closer, which motivated George Messiha to join the Constituent Assembly as replacement for someone who had left. His optimism, however, did not remain long and Messiha later also left the assembly.

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<sup>8</sup> Cornelis Hulsmán, "Welcomes President Mursi's Appointment of Assistant Presidents," *Arab-West Report* Newsletter, August 28, 2012, <http://www.arabwestreport.info/awr-welcomes-president-mursis-appointment-assistant-presidents>.

<sup>9</sup> During the second round of the presidential elections a film was presented showing the beheading of a Tunisian man as warning for what was to come if a Muslim Brother would become president. See Cornelis Hulsmán, "Misusing horror of slaughter of Tunesian man for political gain," *Arab-West Report*, Week 24, Art. 28, June 13, 2012, <http://www.arabwestreport.info/year-2012/week-24/28-misusing-horror-slaughter-tunesian-man-political-gain>.

On September 11, 2012 Wa'il Ibrashy presented a TV interview with Coptic radical Maurice Sadiq who made inflammatory claims, including asking for Israeli intervention to "protect" the Copts. Sadiq lives in the U.S. and has practically no support in the Coptic community but going to the US to interview him for TV in Egypt was only intended to inflame tensions in Egypt. See *Arab-West Report*, "AWR Responds to Protests at US Embassy in Cairo," *Arab-West Report* Newsletter, September 12, 2012, <http://www.arabwestreport.info/awr-responds-protests-us-embassy-cairo>. The newsletter also reports misreporting about the demonstrations at the U.S. Embassy in Cairo. It was not Salafis as many media claimed who climbed the walls of the Embassy and took down the flag but football hooligans who had done so.

<sup>10</sup> Cornelis Hulsmán, "Visit Egyptian Multiparty Delegation," *Arab-West Report*, Week 42, Art. 29, October 16, 2012, <http://www.arabwestreport.info/year-2012/week-42/29-visit-egyptian-multiparty-delegation>. For responses of delegation members see Amr Darrag, George Messiha, Tarek Shalaan, Mahmoud Samy: "Responses from delegation members," *Arab-West Report*, Week 42, Art. 40, October 17, 2012, <http://www.arabwestreport.info/year-2012/week-42/40-responses-delegation-members>.

In November, the Constitutional Court, dominated by judges appointed in the Mubarak era,<sup>11</sup> was close to ruling the second Constituent Assembly and the Shūrā Council (Senate) unconstitutional. This is what the Muslim Brothers wanted to avoid to almost any price. Their fear for such a ruling was not unjustified. George Messiha had told me earlier that he knew that such a ruling was pending. They had earlier made a similar ruling about the first Constituent Assembly and later Parliament, both suspected to be politically motivated though based on previous legal precedents. Such a ruling would have brought the work to form a new constitution back to square one and would have greatly delayed the formation of new Egyptian institutions. Islamists responded with demonstrations before the Supreme Constitutional Court and judges refusing to enter the building in these circumstances, and President Morsi issued his infamous November 22 decree that sidelined the court. At the same time, all effort was made to complete the Constitution as fast as possible, causing more members drop out. On November 30, the sixteen-hour voting marathon took place. At the conclusion, the Constituent Assembly had accepted the draft text, which was presented to the electorate in a referendum which was boycotted by a large number of judges.

The referendum took place amidst much violence on December 15 and 22, 2012 and resulted in around 33% of the electorate voting, a much lower turnout than in the parliamentary and presidential elections, with an approval of around 64% for the Constitution, just below the 2/3 majority that Muslim Brothers had hoped for despite heavy campaigning on their side.

Dr. Amr Darrag told us in an interview for this report that the formation process of the Constitution was influenced by political struggles, which did not help the essential consensus-building process.<sup>12</sup> The political fights between Islamists and non-Islamists in especially November and December have resulted in a Constitution that was rushed in the last weeks it was functioning and a support base for the Constitution that was much less than if parties would have worked towards a consensus.

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<sup>11</sup> It was certainly a Mubarak-era court. He played a real role in shaping the judiciary into what it became. But the court system also exercises a great deal of independence, and Mubarak had to maneuver in order to manipulate it. See Jayson Casper, "Independence of the Egyptian Judiciary," *Arab-West Report*, Week 13, Art. 20, March 30, 2013, <http://arabwestreport.info/year-2013/week-13/20-independence-egyptian-judiciary>.

<sup>12</sup> Diana Serôdio, "Interview with Dr. Amr Darrag on the new Egyptian Constitution," *Arab-West Report*, Week 16, Art. 20, April 18, 2013, <http://www.arabwestreport.info/year-2013/week-16/20-interview-dr-amr-darrag-new-egyptian-constitution>.

The political interests of Islamists and non-Islamists were obviously widely disparate; Islamists fought for early elections and a hastened process, believing this to be in their best interest. They also accused non-Islamists of manipulating for delay, claiming they needed this to get their own parties better organized. Perhaps they were doing so, but many simply wanted more time to write the constitution and reach a consensus, believing the Islamist rush was to serve their own political interests.

Among the non-Islamist opposition there is not only a fractioned National Salvation Front with representatives of liberal and socialist parties, but also the remains of the old regime in the judiciary, the police, and the army. These are distinct forces but with blurry lines, at times seeming to cooperate and at other times liberals/leftist show deep distrust of people associated with the old regime. The division between Islamists and non-Islamists was deepened, with Islamists trying to speed up the constitution building process and non-Islamists resisting this.

The complexities of this constitution building-process are apparent in the following chapters. The chapters show the current Constitution is the outcome of an almost two-year process since Mubarak had been deposed in which Islamists obviously have had the upper hand.

# 1 Post-Revolutionary Power Struggle

## 1.1 Analysis of Electoral Results since the Revolution

Diana Seródio

If 25th of January Revolution showed the remarkable capacity of Egyptians to unite and stand up against the Mubarak regime, the aftermath of such a turning point revealed deep rifts dividing those who had occupied the emblematic Tahrir Square during the 18 days of protests.

Once President Mubarak stepped down, the Supreme Council of the Armed Forces (SCAF) took on the responsibility of leading the democratic process that had started in Egypt and had the support of the people who believed the army was the most qualified entity to carry out such a task. But it did not take long before many people started questioning the army's democratic intentions.

### 1.1.2 March 19<sup>th</sup> 2011 Referendum – Amendments to the 1971 Constitution

After the fall of the old regime, first priority was given to changing the Constitution as the idea that the 1971 Constitution could not continue serving as the legislative pillar if this new Egypt was to be wholly representative. The decision to draft a new constitution was the last unanimously agreed upon point. Some, mainly among the civil-state supporters, pressed for simple amendments to be made to the most controversial articles until parliamentary and presidential elections would take place and a new constitutional document was drafted and put to referendum. Others, mainly Islamists, however, defended the complete annulment of the 1971 Constitution, which they considered illegitimate and unfit to fulfill the demands of the people and protect the Revolution's goals. They called instead for composing a Declaration of Constitutional Principles, affirming basic rights that would serve during the interim period as the guiding document. This declaration was put to vote on March 19, 2011<sup>13</sup> and was to remain in force until the new constitution was drafted.

To decide on the best course to take, the SCAF put together a council of eight people: Tareq El-Bishry (Tāriq al-Bishrī), an Egyptian public figure and a moderate Islamist,

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<sup>13</sup> Soha Bayoumy, "Why I will vote 'No'," Egypt Independent, March 15, 2011, accessed February 23, 2013, <http://www.egyptindependent.com/opinion/why-i-will-vote-%E2%80%98no%E2%80%99>.



who is widely respected by different socioeconomic and religious sectors of the society, was the head of the committee; Subhī Sālih, a lawyer, member of the Muslim Brotherhood, and a former member of Parliament; Māhir Sāmī Yūsuf, a Christian and counselor of the Supreme Constitutional Court's President; Hasan al-Badrāwī, Vice President of the Constitutional Court; Hātim Bijātū, President of the Consultative Commission of the Supreme Constitutional Court; Muhammad Hasanayn 'Abd al-'Al, former Dean of Cairo University's Law School; Mahmūd 'Atif al-Bannā, constitutional law professor at Cairo University; Muhammad Bāhī Abū Yūnis, College of Law at Alexandria University. Although many consider this to be a very balanced and fair group of technocrats, the reasons for selecting these men over others for a council charged with such a central task as suggesting a path to democracy, was never made clear to the public. Thus, to this day, many (especially among the civil movements and parties) criticize the lack of engagement of the people at such a critical turning point, in particular those actively involved in the revolutionary process.

After much deliberation, the eight-man council decided the 1971 Constitution should still serve as a reference, but would not be followed thoroughly as it was largely outdated. Further, they recommended amendments to those which they considered to be the most compromising articles of that constitution and outlined an agenda that they believed would lead the country successfully into democracy.

The proposed amendments included:

- A reduction of the president's term from 6 to 4 years with the possibility of only one re-election;
- a restriction of the possibility of declaring a state of emergency;
- a requisition of judicial supervision at polling stations during elections;
- the appointment by the president of at least one vice president;
- relieving the prerequisites to run for parliament seats' candidacy, making it easier for any Egyptian to become a candidate;
- the establishment of a constitutional commission to draft a new constitution after parliamentary elections.

The strongest supporters of the amendments were the Muslim Brotherhood and the Salafīs, who believed it to be the fastest way to restore civilian rule and the best path to achieving stability as the political framework was still very blurred, making it

impossible to draft a new constitution at that point.<sup>14</sup> Having the people elect their representatives in the parliament and then having those chosen write the new constitution was, to them, the most logical and practical way of forming a fair and legitimate Constituent Assembly. Without elections, they claimed, how could anyone know what the new social map looked like, and what the people wanted? Former members of Mubarak's National Democratic Party also stated they approved the proposed amendments. Given the absence of long-established liberal and leftist parties, the proponents of the amendments (mostly Islamists) were also confident that early elections would favor them, something that the civil-state supporters criticized as being a deliberate move to obstruct the ascendancy of new political movements.

The non-Islamists, among them Mohamed al-Baradei (Muhammad al-Barādī), were fiercely campaigning for a "No" vote to the referendum. They believed the amendments were insufficient, did not ensure a reliable system of checks and balances, some were impractical and their wording was often unclear, leaving too much space for a range of interpretations.<sup>15</sup> In addition, if a new constitution was to be drafted soon, they argued, it did not make sense to establish, for example, the limit of terms a president could serve as this constitutional document would no longer be valid at that time. Instead, the opposition proposed, in the words of Tahani al-Gebali (Tahānī al-Jibālī),<sup>16</sup> Vice President of the Supreme Constitutional Court, forming a Presidential Council with a civilian majority<sup>17</sup> and establishing a temporary constitutional declaration that was to be drafted after some national dialogue sessions and with the approval and advice of the Supreme Constitutional Court. Once this declaration was established, presidential elections should be held within six months upon which the president would have to call for the election by the people of a national association which would be in charge of drafting a new Constitution within the following six months. This way, the opposition claimed, the Egyptian state would be ensured a solid and coherent legal basis – originated

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<sup>14</sup> El Issandr Amrani, "Beyond Yes or No: What Egypt's Referendum Means," *Time*, March 22, 2011, accessed February 24, 2013, <http://www.time.com/time/world/article/0,8599,2060692,00.html>.

<sup>15</sup> Bayoumy, "Why I will vote 'No'".

<sup>16</sup> Tahani al Gebali, "Q&A with Tahani al-Gebali: Say 'No' to Constitutional Amendments," *Egypt Independent*, March 10, 2011, accessed March 3, 2013, <http://www.egyptindependent.com/news/qa-tahani-al-gebali-say-no-constitutional-amendments>.

<sup>17</sup> Nathan J. Brown, "Why nobody noticed what Egypt's opposition has Won?," *Foreign Policy*, March 28, 2011, accessed March 2, 2013, [http://mideast.foreignpolicy.com/posts/2011/03/28/why\\_nobody\\_noticed\\_what\\_egypt\\_s\\_opposition\\_has\\_won](http://mideast.foreignpolicy.com/posts/2011/03/28/why_nobody_noticed_what_egypt_s_opposition_has_won).

through open discussions in a democratic way – during the transition period and under the supervision of the SCAF. At the same time, such an option provides enough time for the political scene to take shape and for parties to organize themselves. This, in turn, would decrease significantly the risk of having the parliament and the Shūrā Council dissolved soon after their formation on claims of unconstitutionality, given the proposed constitutional document's faulty text.

Despite the efforts of high profile public figures such as Amr Moussa ('Amr Mūsá) and al-Baradei to throw out the proposed amendments, the outcome of the March 19<sup>th</sup> referendum, which had a turnout of 41%, was 77.3%, "Yes" against 22.7%, "No".<sup>18</sup> The polling went well, with no major fraud reported, and as many had to wait in line for over three hours, this referendum came to show a true willingness to engage in the new democratic era. As non-Islamist movements criticize, the results were just a reflection of Egyptians' willingness to achieve stability and return to normalcy as soon as possible without giving much thought to the consequences.<sup>19</sup> The Islamists praised the percentage of voter turnout and, confidently, began to prepare for the upcoming elections for the People's Assembly. One thing is certain: the Constitutional debate marked the beginning of a serious polarization between Islamists and liberal and secularist trends, as both assumed political stands on the democratization process that favored their position.

### 1.1.3 Parliamentary Elections 2011/2012

During the months following the March 2011 referendum, the streets were by no means calmer. If in February the SCAF's intervention was welcomed and the people chanted "the army and the people are one hand," by mid-May this harmonic relationship was blackened. Following the acceptance of the amendments to the 1971 Constitution, on the 30<sup>th</sup> of March, the SCAF issued an "interim Constitutional Declaration" that was imposed unilaterally and annulled the 1971 Constitution completely. This initiative was applauded by some among the non-Islamist movements who had been pressing to cease the use of the 1971 Constitution

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<sup>18</sup> Supreme Elections Council website, accessed March 21, 2013, <http://referendum2011.elections.eg/84-slideshow/155-result.html>.

<sup>19</sup> Kristen Stilt, "Assessing Tahrir's First Ballot Box," *Foreign Policy*, March 21, 2011, accessed March 1, 2013, [http://mideast.foreignpolicy.com/posts/2011/03/21/assessing\\_tahrir\\_s\\_first\\_ballot\\_box](http://mideast.foreignpolicy.com/posts/2011/03/21/assessing_tahrir_s_first_ballot_box).

altogether.<sup>20</sup> The SCAF stated in this declaration that Egypt is a democratic state and included the constitutional amendments and the clauses referring to the democratic process along with 63 other articles. Failure The document defined the executive, judicial, and legislative powers (reducing the roles of the Shūrā Council, the higher legislative house); referred to the electoral law, maintaining the 50% parliamentary seats for farmers and workers as had been the case since the days of President Gamal Abdel Nasser (Jamāl 'Abd al-Nāsir); stipulated essential freedoms, such as freedom of speech, assembly, belief and practice of religion, and press; and set that the political system was to be semi - presidential, with party plurality, restricting, however, any party to be formed on a sectarian basis such as that of religion, sex, or race. The Constitutional Declaration infuriated many among both Islamist and non-Islamist affiliations who considered the SCAF's initiative to be beyond its authority.

Amidst much criticism against the SCAF and protests about how the political transition was being led, the Muslim Brotherhood inaugurated its political wing, the Freedom and Justice Party and the Salafīs instituted the Nour Party. Among the non-Islamists, new parties began cropping up as well; for, despite hopes from the opposition to change the course of how the agenda was set by the referendum, parliamentary elections were to take place next and the importance of such an election could not be underestimated. The next parliament, according to the Constitutional Declaration, would be set which 100 people would constitute the Constituent Assembly which would draft the new constitution. This would then be subject to a referendum no more than six months after its first session.

Initially the parliamentary elections were slated for September; however, it was not until the end of that same month that the military council made an official announcement on the electoral agenda and rulings,<sup>21</sup> under pressure of the revolutionary forces.<sup>22</sup> In the end, it was finally decided that the elections would take place at the end of November. The SCAF in the pre-election period was accused of

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<sup>20</sup> Gamal Essam El-Din, "Egypt's Constitution: a Controversial Declaration," *Ahram Online*, March 30, 2011, accessed February 28, 2013, <http://english.ahram.org.eg/NewsContent/1/64/8960/Egypt/Politics-/Egypt's-constitution-A-controversial-declaration.aspx>.

<sup>21</sup> Zeinab el Gundy, "SCAF finally reveals parliamentary elections and roadmap," *Ahram Online*, September 27, 2011, accessed March 5, 2013, <http://english.ahram.org.eg/NewsContent/1/64/22697/Egypt/Politics-/SCAF-finally-reveals-parliamentary-elections-dates.aspx>.

<sup>22</sup> Marc Lynch, "Saving Egypt's elections," *Foreign Policy*, October 2, 2011, accessed March 6, 2013, [http://lynch.foreignpolicy.com/posts/2011/10/02/egypt\\_struggles\\_to\\_change\\_course](http://lynch.foreignpolicy.com/posts/2011/10/02/egypt_struggles_to_change_course).

lacking transparency in decision making and a willingness to bring in the many political factions to draw a clear sociopolitical agenda. They were even labeled as “the counter-revolution” due to their brutality in dissipating protests and for holding unfair hearings at military courts for participants.<sup>23</sup>

Scared that the Islamists, seen as the great benefactors of the referendum, would take advantage of their empowered position and the fragility of the nascent civil parties, the opposition began to mobilize for the People’s Assembly’s elections. They did so reluctantly and amid many threats of boycotting on grounds of the electoral law they believed to be unfair and the need for a reliable new constitution that would clearly state the rules of the government prior to parliamentary elections. Islamists, on the other hand, saw this attempt at postponing elections as a selfish initiative; an attempt to simply gain more time to prepare for the elections, with disregard for the people’s will made clear in the referendum and also on the streets as they demanded the SCAF to leave. Either way, the Muslim Brothers stated that the Freedom and Justice Party would not be seeking more than 30% of the Parliamentary seats,<sup>24</sup> although by the end of March “no final decision ha[d] been made”.<sup>25</sup>

At the end of November, the legislation on the People’s Assembly election was officially published in the state-owned newspaper *al-Ahram*,<sup>26</sup> ruling that 2/3 of the People’s Assembly seats were to be elected from candidates within a party list system, while the remaining 1/3 would be contested by independents. Once again Islamists and non-Islamists were on opposite sides: the latter accusing the former of saving seats for independents that would be largely under their wing, and, at the same time, decreasing the possibilities of having small parties represented in the parliament, which would increase if the electoral law would have stipulated 100% party lists.

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<sup>23</sup> Mohamed el Dashan, “Egypt’s Revolution 2.0,” *Foreign Policy*, May 25, 2011, accessed March 5, 2013, [http://www.foreignpolicy.com/articles/2011/05/25/egypts\\_revolution\\_20?page=0,1](http://www.foreignpolicy.com/articles/2011/05/25/egypts_revolution_20?page=0,1).

<sup>24</sup> Marc Lynch, “Uncertainty and Optimism in Egypt,” *Foreign Policy*, June 12, 2011, accessed March 5, 2013, [http://lynch.foreignpolicy.com/posts/2011/06/12/tense\\_times\\_in\\_egypt](http://lynch.foreignpolicy.com/posts/2011/06/12/tense_times_in_egypt).

<sup>25</sup> Nathan J. Brown, “The Muslim Brotherhood as a helicopter parent,” *Foreign Policy*, May 27, 2011, accessed March 4, 2013, [http://mideast.foreignpolicy.com/posts/2011/05/27/the\\_muslim\\_brotherhood\\_as\\_helicopter\\_parent](http://mideast.foreignpolicy.com/posts/2011/05/27/the_muslim_brotherhood_as_helicopter_parent).

<sup>26</sup> “The Concise Idiot’s Guide to Egypt’s Elections,” *Ahram Online*, Sunday, November 27, 2011, accessed February 28, 2013, <http://english.ahram.org.eg/NewsContent/33/101/26943/Elections-/Laws-and-Processes/The-Concise-Idiot%E2%80%99s-Guide-to-the-Egyptian-Election.aspx>.

The election, held in three stages, took place between the 28<sup>th</sup> of November 2011 and the 11<sup>th</sup> of January 2012 and was largely peaceful, with a voter turnout of almost 54%, which translates to about 34 million people.<sup>27</sup>

As expected, the Islamists gained the majority, but with a surprisingly significant portion of the seats – about 70% of the People’s Assembly. The Muslim Brotherhood’s Freedom and Justice Party coalition – with 22 allies – secured almost 235 out of the 508 seats (46%); the Salafi Nour Party’s coalition – with its 16 allies – gained 123 (24%); and the more centrist Islamist party al-Wasat obtained 11 (3.7%).

Among the non-Islamists, the New Wafd Party secured 38 seats (9.2%) and the Egyptian Bloc, a cooperation of the socialist Tagammu (al-Tajammu’), the Egyptian Social Democrat Party, and the liberal Free Egyptians Party, managed to obtain 33 seats (8.9%). Finally, the remnants of the Mubarak regime, the so called “feloul”, from the National Democratic Party and other parties of similar orientation, gathered around 32 seats (6.4%).<sup>28</sup>

The opposition, in the Parliament and on the streets, blamed the outcome of the elections on the way the process was led and on what they believed to be a defective electoral law. The new Parliament met for its first session on the 23 of January, 2012. The most pressing issue on the agenda was, of course, how the Constituent Assembly was to be formed and to prepare the elections for the Shūrā Council (the upper house). However, as a formal complaint to the Supreme Court on the electoral process was already underway, this Parliament would not last long.<sup>29</sup>

#### 1.1.4 Shūrā Council Elections 2012

The Shūrā Council election was held not long after the parliamentary elections in two stages, from the 7<sup>th</sup> to the 22<sup>nd</sup> of January, 2012, and under the same electoral

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<sup>27</sup> “Egyptian Elections: Preliminary Results [UPDATED],” *Jadaliyya*, January 9, 2012, accessed March 2, 2013, [http://www.jadaliyya.com/pages/index/3331/egyptian-elections-preliminary-results\\_updated-](http://www.jadaliyya.com/pages/index/3331/egyptian-elections-preliminary-results_updated-).

<sup>28</sup> Ibid.

<sup>29</sup> “Chronicals of day 1 of the Egypt’s historic post-Mubarak People’s Assembly,” *Ahram Online*, January 23, 2012, accessed March 3, 2013, <http://english.ahram.org.eg/NewsContent/33/100/32412/Elections-/News/Chronicles-of-day--of-Egyptys-historic-postMubarak-.aspx>.

law.<sup>30</sup> This council has a total of 270 members, of which two thirds (180) are elected in direct elections. The remainder (90) is appointed by the president. In Egypt, the Shūrā Council has been known for its relative impotence, which had been further diminished by the SCAF's March 30<sup>th</sup> Constitutional Declaration, where it is defined as a purely advisory and consultative body.<sup>31</sup> Thus, the voter turnout was significantly low, mounting up to only 12.2% of the voting population<sup>32</sup> which some also think reflected the lack of faith of the people in the SCAF-led polling process.<sup>33</sup>

Just like the People's Assembly, this other legislative body was also dominated by an Islamic majority, with the Freedom and Justice Party taking 58% of the seats, the Nour 25%, the New Wafd Party 7.7% and the Egyptian Bloc only 4.4%, which clearly reflects a discrepancy in both houses, if not in terms of popularity, at least in terms of the non-Islamists' capacity to mobilize voters to the polls.<sup>34</sup>

### 1.1.5 Presidential Elections – Round One

Once the legislative bodies were established, it was time to elect the President who would then appoint the government and remaining members of the executive branch, cabinet and governors. After the conditions to any Presidential candidate were imposed by the 19<sup>th</sup> of March referendum and later inserted in the SCAF's 30<sup>th</sup> of March Constitutional Declaration under Article 26 and 27,<sup>35</sup> a total of 12 candidates were approved by the Supreme Constitutional Court as eligible to run. The electoral commission, staffed by judges appointed in the Mubarak era,

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<sup>30</sup> "Egypt's Shura Council's elections kick-off," *Ahram Online*, January 29, 2012, accessed March 4, 2013, <http://english.ahram.org.eg/NewsContent/33/100/33120/Elections-/News/Egypt's-Shura-Council-elections-kick-off.aspx>.

<sup>31</sup> Diana Serôdio, "Interview with jurist Dr. Ahmed Talaat on the new Egyptian Constitution," *Arab-West Report*, Week 16, Art. 21, April 18, 2013, <http://www.arabwestreport.info/year-2013/week-16/21-interview-jurist-dr-ahmed-talaat-new-egyptian-constitution>.

<sup>32</sup> "Turnout in 2<sup>nd</sup> stage of Shura elections 12,2," *Pharaohs Today*, February 18, 2012, accessed March 15, 2013, <http://www.pharaohstoday.com/Eng/2012/02/18/turnout-in-2nd-stage-of-shura-elections-12-2/>.

<sup>33</sup> Salem Mostafa Kamel, "Shura Council Elections See Low Turnout and Voter Apathy," *Atlantic Council's Egypt Source*, February 2, 2012, accessed March 8, 2013, <http://www.acus.org/egyptsource/shura-council-elections-see-low-turnout-and-voter-apaty>.

<sup>34</sup> "Results of Shura Council elections," *Carnegie Endowment*, accessed on February 27, 2013, <http://egyptelections.carnegieendowment.org/2012/02/29/results-of-shura-council-elections>.

<sup>35</sup> "Constitutional Declaration 2011," *Egypt's Government Official Website*, accessed February 27, 2013, <http://www.egypt.gov.eg/english/laws/constitution/default.aspx>.

disqualified three candidates for president, including the incredibly popular Salafī preacher, Hāfiz Abū Ismā'īl.<sup>36</sup>

The five favorite candidates were the following:

- Abdel Moneim Aboul Fotouh ('Abd al-Mun'im Abū al-Futūh)—moderate-liberal Islamist; a former member of the Guidance Office of the Muslim Brotherhood, who left because he decided to run for elections at a time when the Muslim Brotherhood was still denying they would put forward a candidate, but who remains very popular especially among the organization's youth.<sup>37</sup> Despite his moderate Islamist views, he was the candidate the Nour Party officially supported after their candidate Hāfiz Abū Ismā'īl, a popular Salafī preacher, was not allowed to run;
- Amr Moussa, former Secretary General of the Arab League, former Minister of Foreign Affairs and a very well-known political figure among Egyptians;
- Mohamed Morsi, Chairman of the Freedom and Justice Party and Parliament member for four years, 2001 to 2005;
- Hamdeen Sabahy (Hamdīn Sabbāhī), leader of the Nasserist Dignity Party, also a well-known political personality;
- Ahmad Shafīq, former air force general, last prime minister to serve under Mubarak and the alleged favorite of the SCAF. Due to his former post under the old regime, Shafīq was at first disqualified to run, but went to court and the decision was revoked.<sup>38</sup>

For an Egyptian candidate to win, he will have to either win the majority (50%+) in the first round – running against all candidates – and be an immediate victor or, in case that does not occur, be among the two most voted candidates and win in a second round. As it was highly unlikely that any candidate would win in a first

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<sup>36</sup> Abdallah Schleifer, "Introduction, The Muslim 500; the World's Most Influential Muslims," The Royal Islamic Strategic Studies Centre, accessed April 15, 2013, <http://themuslim500.com/e2012/introduction>.

<sup>37</sup> Cornelis Hulsman, "Interview with 'Abd al-Mun'im Abū al-Futūh, Presidential hopeful," *Arab-West Report*, Week 8, Art. 48, February 19, 2012, <http://www.arabwestreport.info/year-2012/week-8/48-interview-abd-al-munim-abu-al-futuh-presidential-hopeful>.

<sup>38</sup> "Disqualified Candidate Shafiq Continues Egypt Presidential Run," *Al Monitor*, May 9, 2012, accessed March 2, 2013, <http://www.al-monitor.com/pulse/politics/2012/05/moneim-aboul-fotouh-and-amr-mous.html>.



round given the amount of candidates and the political polarization at the moment, the discussion at the time was on who would be the two candidates running in the second round.

Amr Moussa has been leading the polls with Aboul Fotouh in a strong second position.<sup>39</sup> A week before the first round of the elections – held on the 23 and 24 of May – opinion polls showed varied results, all with a large percentage of undecided voters, and most predicting a race between Moussa and Ahmad Shafiq in the second round. Aboul Fotouh was most commonly the third favorite, and Morsi the fourth.<sup>40</sup> Hamdeen Sabahi climbed drastically in the polls in the days before the second round of the elections.<sup>41</sup>

Some saw Morsi as a strong candidate because of his strong Muslim Brotherhood support base. Others believed Aboul Fotouh to have a better chance because they saw him as a broad - minded candidate who would probably be best suited for the role of president given his ability to please, or at least not to displease, people from different points of the political spectrum. Moussa was a strong candidate due to his professional career and being internationally well-known. However, some saw him as a holdover from the old regime and he had little appeal to the younger generations whose votes were collected mostly by Fotouh and Hamdeen Sabahi.<sup>42</sup> Sabahi was initially expected to have little prospects at the time, as his Nasserist/socialist views were not believed to be appreciated by many. Finally, Shafiq was expected to collect votes from the remnants of the old regime, the middle class fearing a Muslim Brotherhood president would result in an economic decline,<sup>43</sup> and others feared the support of the military, as he is a former air force general.

With a voter turnout of 46%, the first round of the presidential elections revealed relatively narrow margins between the five main candidates. Muhammad Morsi obtained the most votes: 24.78%; followed by Shafiq, with 23.66%; then Sabahi, with

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<sup>39</sup> Cornelis Hulsman, Meeting with Dr. Hatem Al-Kadi, Head of Information and Decision Support Center, May 31, 2012.

<sup>40</sup> Jon Leyne, "Opinion polls give few clues on Egypt Presidential election," *BBC News*, May 18, 2012, accessed March 1, 2013, <http://www.bbc.co.uk/news/world-middle-east-18110194>.

<sup>41</sup> Hulsman, Meeting with Dr. Hatem Al-Kadi.

<sup>42</sup> Diana Serôdio, "Meeting with George Messiha on the Constitution writing process and the 2012 Constitution's content," *Arab-West Report*, Week 8, Art. 41, February 23, 2013, <http://www.arabwestreport.info/node/46310>.

<sup>43</sup> Schleifer, "Introduction, The Muslim 500; the World's Most Influential Muslims".

20.72%; then Aboul Fotouh, who obtained 17.47% of the votes; and, finally, Moussa who saw his expectations shattered, having only collected 11.13% of the votes.

Some analysts saw this outcome reflecting a drop in sympathy for Islamist policies. In the parliamentary elections, the combined Islamist parties obtained 73.7% of the vote, with the voter turnout of almost 54% reflecting in around 25 million voters voting Islamist.

During the first round of the presidential elections, 42.25% of the voters voted Islamist, which translated to around 26 million voters (if we presume a total electorate of 62 million – see comments above). The results for non-Islamist candidates translates to 57.75%, or around 15,015,000 voters.

Thus, the outcome of these elections gave Egyptians a choice between the two candidates representing the two main opposing factions in Egypt for decades: a representative of the old regime and the Muslim Brotherhood. Some explain the turnout to be representing the cleavages in the Egyptian society: the lower classes, who voted for the Muslim Brotherhood's candidate as the organization was closer to them through charities and in terms of religious affiliation; against the higher classes, who profited during Mubarak's year and had more secular tendencies who voted for Ahmad Shafiq in hopes of avoiding a harsh shift in the status quo. The military was allegedly also on Shafiq's side, expecting their autonomy to be respected as it was during the Mubarak years. Sabahi's exceedingly good results are thought to have come from those who stood with neither of the two sides and who believed all other four main candidates were all compromised to some extent.<sup>44</sup>

#### 1.1.5 Presidential Elections – Round Two

The results of the first round left many among the non-Islamist political and social movement desolated. On one hand, they saw Shafiq trying to reinstate the old regime's system; on the other, they had no trust in the Muslim Brotherhood and no

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<sup>44</sup> Diana Serôdio, "Meeting with George Messiha on the Constitution writing process and the 2012 Constitution's content," *Arab-West Report*.

inclination to have their candidate elected as they already dominated the parliament and, most likely, the Constituent Assembly.<sup>45</sup>

In the meantime, Morsi and the Muslim Brotherhood and Shafiq and his supporters started mobilizing voters. Polarization was clearer than ever and tensions were escalating. Most of those who had voted for Aboul Fotouh stated their support for Morsi in the second round whereas those who stood by Moussa declared Shafiq would be their preference. The latter stated they would prefer to deal with a “known” opponent (Shafiq) than to face an unpredictable one (Morsi and the Brotherhood).<sup>46</sup>

On the 14<sup>th</sup> of June, circumstances shifted dramatically as the Constitutional Court declared the People’s Assembly elected only six months before to be unconstitutional, which led the SCAF to dissolve the Parliament only two days before polling for the second round of the presidential elections. The court justified its decision claiming that, since there had been list candidates running for seats that had been “saved” for individuals within their 1/3 of party seats, 1/3 of the Parliament members were, thus, illegitimate. This decision gave way to major contestations, especially by the Islamists (who dominated the Parliament), who considered it unfair.<sup>47</sup>

According to Dr. Amr Darrag, the chance for parties to run for seats within the individuals’ quota was given so that smaller parties, with no possibilities of forming lists, had a chance in the elections. Darrag claims that, as the electoral law had been referred to the Constitutional Court before the elections and nothing was pointed out at the time, the fairness of the court’s decision is contestable. Furthermore, he added, “if there was a technical issue related to the election of less than 1/3 of the Parliament, then the whole body should not have been questioned.”<sup>48</sup>

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<sup>45</sup> Ian Black, “Egyptian Election results present ‘nightmare Scenario’,” *The Guardian*, May 25, 2012, accessed March 7, 2013, <http://www.guardian.co.uk/world/2012/may/25/egyptian-election-results-nightmare-scenario>.

<sup>46</sup> Diana Serôdio, “Meeting with George Messiha on the Constitution writing process and the 2012 Constitution’s content,” *Arab-West Report*.

<sup>47</sup> Diana Serôdio, “Meeting with Nadiyah Mustafá on the writing process and content of the 2012 Egyptian Constitution,” *Arab-West Report*, Week 9, Art. 68, March 3, 2013, <http://www.arabwestreport.info/node/46317>.

<sup>48</sup> Diana Serôdio, “Interview with Dr. Amr Darrag on the new Egyptian Constitution,” *Arab-West Report*, Week 16, Art. 20, April 18, 2013, <http://www.arabwestreport.info/year-2013/week-16/20-interview-dr-amr-darrag-new-egyptian-constitution>.

The court's decision and the SCAF's approval – made only two days before the second round on the 16<sup>th</sup> and 17<sup>th</sup> of June – are said to have severely impacted the electoral outcome. Since the Parliament had been dissolved, the Muslim Brotherhood was no longer believed to be as much of a threat as the SCAF, who would then be holding legislative power once again. Given the rumors that the SCAF and the police were unofficially supporting Shafiq and the candidate's role as General and Prime Minister under Mubarak, there was an increasing disquiet that, if Shafiq were to win, something similar to the old regime's system would likely be reinstated and compromise the Revolution and its goals completely.<sup>49</sup> This swayed a number of non-Islamists to vote for Morsi in the second round.

Regardless of what happened in this one week, both candidates undoubtedly finished very close. It is also certain that the electoral support for Morsi was substantially less than for the combined Islamist parties in the parliamentary elections

The announcement of the electoral results was delayed for one week while both parties accused each other of ballot box fraud, which was not the case in the parliamentary elections or even the first round of this election. *Al-Ahram Online* and *al-Masry al-Youm* (al-Misrī al-Yawm) had both declared Morsi victorious after the polling stations had closed and neither of them are pro-Morsi. To this day Shafiq and his camp contest the results, and they argue, Abdallah Schleifer writes, “with a degree of plausibility that the U.S. government with its extraordinary influence upon the armed forces prevailed upon the army to prevail upon the electoral commission to find for Morsi”.<sup>50</sup>

Before the results were known, but at a time when Morsi was already predicted as the winner, the SCAF made one final highly controversial move by imposing some amendments to the Constitutional Declaration of March 30<sup>th</sup> which served mainly to secure some power for the military, granting it influence over the Presidency. According to this new set of amendments, instead of being “the property of the people”, the armed forces have now “the incumbent SCAF members [...] responsible for deciding on all issues related to the armed forces including appointing its leaders

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<sup>49</sup> Sarah el Deeb and Hamza Hendawi, “Egypt's Parliament Dissolved by court; Election Ruled Unconstitutional,” *Huffington Post*, June 14, 2012, accessed March 2, 2013, [http://www.huffingtonpost.com/2012/06/14/egypts-parliament-dissolv\\_n\\_1596609.html](http://www.huffingtonpost.com/2012/06/14/egypts-parliament-dissolv_n_1596609.html).

<sup>50</sup> Schleifer, “Introduction, The Muslim 500; the World's Most Influential Muslims”.

and extending the terms in office of the aforementioned leaders. The current head of the SCAF is to act as commander-in-chief of the armed forces and minister of defense until a new constitution is drafted” (Article 53). The President was now also not allowed to declare war or to commission the armed forces to maintain security or preserve public property without the SCAF’s approval (Article 53/1 and 53/2). Finally, the SCAF attributed itself through these amendments legislative power until a new parliament was elected (Article 56/B).<sup>51</sup>

In the end the victor was indeed Morsi, with 51.73% against Shafiq’s 48.27% in an election where 51.85% of eligible Egyptian voters went to the polls. Egyptian society was highly divided and anxious about their future after having a parliament dissolved, the SCAF’s amendments showing its willingness to grab on to power and seeing a president that in a way symbolized the very rift of the society assuming office.

## **1.2 – A Failed First Attempt at a Constituent Assembly**

Diana Serôdio

### 1.2.1 The First Constituent Assembly

The process of constitution writing in Egypt has not been an easy one. With the post-revolutionary period revealing a deeply polarized society, reaching consensus in formulating a path towards democracy was hard, if not impossible, from day one. Despite the continued pressure put by the civil, non-Islamist parties and social movements to change the course of action, once the process was defined through a referendum, the discussion revolved around who was to write the new Egyptian Constitution.

According to the SCAF’s Constitutional Declaration of March 30<sup>th</sup> 2011 (which included the Constitutional Amendments put to referendum on March 19<sup>th</sup>), the new Constituent Assembly in charge of drafting the Constitution should have a total of 100 members and was to be appointed by the elected members of the People’s Assembly and the Shūrā Council. The Constituent Assembly, once formed, was obliged to present a final draft within six months which would then have to be

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<sup>51</sup> “English text of SCAF amended Egypt Constitutional Declaration,” *Ahram Online*, June 18, 2012, accessed February 28, 2013, <http://english.ahram.org.eg/NewsContent/1/64/45350/Egypt/Politics-/URGENT-English-text-of-SCAF-amended-Egypt-Constitu.aspx>.

subjected to a referendum within the 15 days that will follow its submission (Article 60).<sup>52</sup>

Once the parliament and the Shūrā Council had been elected, the discussion turned to the process of selection of the Constituent Assembly members. The main issue was related to Article 60 of the Constitutional Declaration of March 30, 2011, which many considered to be unclear. It was not clearly stated whether the Parliament and Shūrā Council was to select members from within their own houses or from the electorate.

The polarization was, once more, obvious: the non-Islamic parties argued it did not make sense to select from within the Parliament and the Shūrā Council because it would promote favoritism. In addition, they argued, members of the legislative chambers have a political affiliation that, if excessive, would turn the Constituent Assembly into a politicized rather than a consensus-seeking organ looking to draft a pluralistic and widely accepted Constitution. Islamists, on the other hand, saw no reason why a Parliament or Shūrā Council member should not be able to participate, as they were the elected representatives of the people and often equally qualified.

In the end, it was decided among the legislative body that 50% of the assembly members (50 members) would be from within the Parliament and Shūrā Council and the rest from outside and, on the 25<sup>th</sup> of March, 2012, from the 2,078 candidates, 100 were selected.<sup>53</sup>

As predicted, the majority of the members – around 70% – were Islamists, reflecting the Parliament's majority, which upset the opposition and resulted in massive protests in the streets. Many from mostly liberal and leftist parties boycotted the Constituent Assembly, either by not showing up or by resigning after a few sessions and even the Churches and al-Azhar representatives withdrew. Their argument was that minorities and women were not sufficiently represented and that such an assembly would ultimately lead to a constitution that was politicized and unrepresentative of the sociopolitical map of Egyptian society.

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<sup>52</sup> The Cabinet of Ministers, "Constitutional Declaration of March 30<sup>th</sup> 2012," accessed March 8, 2013, [http://www.cabinet.gov.eg/AboutEgypt/ConstitutionalDeclaration\\_e.pdf](http://www.cabinet.gov.eg/AboutEgypt/ConstitutionalDeclaration_e.pdf).

<sup>53</sup> Gamal Essam El-Din, "Islamists dominate Egypt's Constituent Assembly," *Ahram Online*, March 25, 2012, accessed March 11, 2013, <http://english.ahram.org.eg/News/37606.aspx>.

Dr. Nadia Mustafa, an independent Islamist and Founding Director of the Center for Civilizational Studies and Dialogue of Cultures at Cairo University, was part of that assembly. She recognized the chaotic environment within this first Constituent Assembly and criticized the haste of its formation.<sup>54</sup> However, as jurist Ahmad Talaat, a non-Islamist, argued, the majority of Islamists in the Parliament and Shūrā Council reflect the will of the people given that they were elected, so proportionally a majority of Islamists should select the Constituent Assembly. Dr. Talaat also claimed he saw no reason why the members of such an assembly should not come from within the legislative bodies, as, for example, syndicates also elect leaders among themselves with the possibility to select oneself. “It is not the number of representatives that matters. What is important is to have a representative from all tendencies – if it is one, two or three people it does not matter. Even if there is just one lady, she will defend her viewpoint and the rights of all women. Otherwise you are just trying to influence the vote”.<sup>55</sup>

Ultimately, on April 10<sup>th</sup> 2012, the Supreme Administrative Court decided to block the first Constituent Assembly based on the grounds that it was not a legitimate assembly due to the fact that there were Parliament and Shūrā Council members in it who had had the possibility to select themselves. The court thus suspended the work of the assembly and delayed the drafting of the new constitution, stipulating the next assembly ought not to be formed by the Parliament or Shūrā Council members and that the configuration of the next assembly shall be discussed in Parliament.

Some Islamists considered the judgment to be politically biased; a “misapplication of law” as it had not violated “the separation of Egypt’s judicial and executive powers,” but also a breach of the constitutional principles approved by the referendum on the 19<sup>th</sup> of March, 2011, which asserted the Parliament “enjoys the right to function without supervision”.<sup>56</sup> Their opposition, however, claimed the assembly was not seen as parliamentary activity but rather administrative, being thus eligible to remain under the judiciary’s control and that having Parliament members elect themselves went against a 1994 Supreme Constitutional Court ruling.

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<sup>54</sup> Serôdio, “Meeting with Nadiyah Mustafá,” *Arab-West Report*.

<sup>55</sup> Diana Serôdio, “Interview with jurist Dr. Ahmed Talaat on the new Egyptian Constitution,” *Arab-West Report*, Week 16, Art. 21, April 18, 2013, <http://www.arabwestreport.info/year-2013/week-16/21-interview-jurist-dr-ahmed-talaat-new-egyptian-constitution>.

<sup>56</sup> “FJP to appeal a verdict against Egypt’s Constituent Assembly,” *Ahram Online*, April 10, 2012, accessed March 15, 2013, <http://english.ahram.org.eg/NewsContent/1/64/38974/Egypt/Politics-/FJP-to-appeal-verdict-against-Egypt-constituent-.aspx>.

Their members and supporters thus stood by the court's decision, going out to the streets in large numbers to show their concord.<sup>57</sup>

### 1.2.2 New Assembly, New Criteria

Once the first Constituent Assembly had been dismantled, negotiations started between the ruling military council and the political parties represented in Parliament in order to agree on a new member-selection process for the next constituent assembly. The most debated point at the time was concerning the percentage of parliament members: either none, or just one representative of each of the political parties in parliament.<sup>58</sup>

After the court's verdict, the Freedom and Justice Party had considered an appeal and on the 18<sup>th</sup> of April the party's Parliament spokesman, Hussein Ibrahim, declared that while the party respected the Administrative Court's decision, he urged institutions to respect Article 60 of the Constitution, which defines as the parliament's right to decide on how to form the constituent assembly.<sup>59</sup> The party thus rejected the SCAF's suggestion to have the Azhar and the Democratic Coalition's documents as guidelines for the drafting of the new constitution, and, in addition, dismissed both the SCAF's and al-Azhar's offers to act as mediators in political parties' joint meetings on constituent assembly matters. Instead, Parliament speaker, Mohamed Saad al-Katatni (Muhammad Sa'd al-Katātī), a prominent FJP member, entrusted the Parliament's Constitutional and Legislative Affairs Committee with the role of setting the new rules for the constituent assembly. This would ensure that such a committee held hearing sessions that would allow all those interested to offer their own suggestions.<sup>60</sup>

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<sup>57</sup> Mohamed Fadel Fahmy, "Court disbands Egypt's constitutional group," *CNN*, April 11, 2012, accessed March 13, 2013, <http://edition.cnn.com/2012/04/11/world/africa/egypt-constitution>.

<sup>58</sup> Zeinab el Gundy, "Constituent assembly membership saga continues," *Ahram Online*, April 19, 2012, accessed March 12, 2013, <http://english.ahram.org.eg/NewsContent/1/64/39593/Egypt/Politics-/Constituent-assembly-membership-saga-continues.aspx>.

<sup>59</sup> Gamal Essam El-Din, "Islamist MPs challenge SCAF and Al-Azhar on constituent assembly," *Ahram Online*, April 19, 2012, accessed March 14, 2013, <http://english.ahram.org.eg/NewsContent/1/64/39620/Egypt/Politics-/Islamist-MPs-challenge-SCAF-and-ALAzhar-on-constit.aspx>.

<sup>60</sup> El Gundy, "Constituent assembly membership saga continues".



This decision was received, once again, with mixed reactions, reflecting the polarization within the Egyptian political scene. The Islamists, including Nour Party members, agreed with al-Katatni's decision, as charging the committee with this responsibility would reaffirm the Parliament's right to make its own decision on matters related to the constituent body. The liberal, leftist, and civil parties, on the other hand, expressed concerns that the rules would be defined again in a politicized manner in an attempt to ensure the Islamists' prevalence in the new assembly.

Despite criticisms of the SCAF's interference in the Constituent Assembly's formation process, the Freedom and Justice and Nour Parties, along with other political parties represented in the Parliament, agreed to attend the meeting held by ruling military council members on the 28<sup>th</sup> of April, which was an attempt to incentivize consensus on the formulation of the new assembly. At the end of that day, they reached a consensus on six points:

- 1) The proportions attributed to each social group;
- 2) Every article of the Constitution, which, if impossible, then should be approved from at least two - thirds of the assembly (If 2/3 are still hard to reach within 24 hours, then a simple majority will be seen as enough.);
- 3) Each party will be free to choose its own representatives. The religious institutions could also choose their own representative. Al-Azhar obtained four seats and the Churches (including Coptic Catholic Church, Coptic Evangelical, and Coptic Orthodox), six. There had to be ten seats reserved for legal and constitutional experts, two saved for farmers and two for workers. Finally, seats were assigned for women, the disabled and students;
- 4) It was agreed to make efforts to finish drafting the constitution before the presidential election;
- 5) The SCAF's leader, Field Marshal Hussein Tantawi (Husayn Tantāwī), would call on both the People's Assembly and the Shūrā Council to stage a meeting to vote for the members of the new constituent assembly;
- 6) A supervisory committee would be formed and was to include representatives from the Wafd, the FJP, the Egyptian Bloc, al-Hadārah, and the Ghad al-Thawrah parties.<sup>61</sup>

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<sup>61</sup> "SCAF, political parties agree to 6 criteria for forming constituent assembly," *Ahram Online*, April 28, 2012, accessed March 16, 2013, <http://english.ahram.org.eg/News/40374.aspx>.

With the formation of the constituent assembly still at a stalemate by the 5<sup>th</sup> of June, 2012, the SCAF threatened the political parties, and especially the FJP, with whom the SCAF had been at a standoff, to unilaterally draw up a constitution-drafting body. In a meeting that lasted six hours, which was boycotted by both the Freedom and Justice and Wasat parties, the SCAF declared that unless the new constituent assembly was formed by the 7<sup>th</sup> of June, they would take matters into their own hands and amend Article 60 of the March 30<sup>th</sup> Constitutional Declaration, which gave the People's Assembly and the Shūrā Council the sole responsibility of assembling the body. The amendment would instead give the SCAF the right to form the assembly, in accordance with the April 28<sup>th</sup> meeting, without submitting it to either the Parliament's approval or to a public referendum.<sup>62</sup>

In accordance with such a meeting, the six points above would apply and the constituent assembly would include 37 party representatives and 63 public figures (four from al-Azhar, six from the Churches, four representatives of the main judicial authorities, ten professors of constitutional law, two representatives of workers, two for farmers, and an unspecified number of representatives for women, students, and the disabled.) It was also to be expected that, in addition to these prerogatives, the SCAF would also make amendments concerning the president's role and duties until the new constitution was passed.<sup>63</sup>

Once again, the reactions to this ultimatum pitted liberal parties, leftist parties, and constitutional law professors against Islamists. The first received it well, seeing it not only as a legitimate move, but as a necessary one as well, considering the impasse of the situation. They believed that the Islamists and the Freedom and Justice party in particular, were waiting for the results of the presidential elections, according to which they would give more or less power to the executive. It was hence clear that they lacked trust in the Islamist factions to form the constituent body.<sup>64</sup>

The Islamists, who had attempted to counter the SCAF's interference by making the Parliament's Constitutional and Legislative Affairs Committee, saw their efforts shattered, as most political forces boycotted the committee's meetings, causing a deadlock. Justifying their absence on the June 5<sup>th</sup> meeting because they believed it to

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<sup>62</sup> Gamal Essam El-Din, "Brotherhood faces SCAF ultimatum," *Ahram Online*, June 6, 2012, access March 10, 2013, <http://english.ahram.org.eg/NewsContent/1/64/44089/Egypt/Politics-/Brotherhood-faces-SCAF-ultimatum.aspx>.

<sup>63</sup> Essam El-Din, "Brotherhood faces SCAF ultimatum".

<sup>64</sup> Ibid.

be improperly timed, made the FJP's opponents even more exasperated and mistrusting. In response to the SCAF's ultimatum, al-Katatni, on behalf of the Parliament Islamist majority, considered it a usurpation of the Parliament's exclusive legislative rights.<sup>65</sup>

Despite the reluctance shown by Islamists to abide by the SCAF's rules, all parties met the following day (June 6<sup>th</sup>) for several hours to determine once and for all what the formulation of the new Constituent Assembly was going to be.

It was established that 39 of the 100 seats would be occupied by political party representatives: 16 from the Freedom and Justice Party; eight from the Nour Party; five from the Wafd Party; two from the Free Egyptians Party; two from the Egyptian Social Democratic Party; and one each from the Wasat Party, the Nasserist Karama Party, the Socialist Popular Alliance Party, the Reform and Development Party, and the Islamist Building and Development Party. As for the remaining seats: judges would take over 15 of the assembly's seats; al-Azhar would take five; the Churches would take four; public figures would occupy ten seats; revolutionary youth representatives (men and women) would take ten as well; workers and farmers' unions would take seven; professional syndicates, seven; and the police, the army, and the Ministry of Justice one each.<sup>66</sup> It was also agreed that each constitutional article was to be approved by consensus or accepted by 67 of the assembly's members, and in case this does not occur, the voting was to be delayed for 48 hours, at the end of which a 57 member approval will suffice.<sup>67</sup> Finally, a 50/50 Islamist/non-Islamist ratio in the assembly was agreed upon in consideration of the nearly three-fourths majority Islamists had secured in Parliament through elections.<sup>68</sup>

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<sup>65</sup> Essam El-Din, "Brotherhood faces SCAF ultimatum".

<sup>66</sup> "Political forces reach uneasy agreement on Egypt's constituent assembly," *Ahram Online*, June 7, 2012, accessed March 12, 2013, <http://english.ahram.org.eg/NewsContent/1/64/44134/Egypt/Politics-/Political-forces-reach-uneasy-agreement-on-Egypt-.aspx>.

<sup>67</sup> "Egypt's army ends deadlock on constituent assembly," *Ahram Online*, June 8, 2012, accessed March 18, 2013, <http://english.ahram.org.eg/NewsContentP/1/44212/Egypt/Egypt-army-ends-deadlock-on-constituent-assembly.aspx>.

<sup>68</sup> "Broad satisfaction over Egypt's Constituent Assembly deal," *Ahram Online*, June 10, 2012, accessed March 23, 2013, <http://english.ahram.org.eg/NewsContent/1/64/44342/Egypt/Politics-/Broad-satisfaction-over-Egypt-constituent-assembly.aspx>.

The meeting was, however, without a consensus. The Free Egyptians Party representatives all withdrew along with the head of the Egyptian Social Democrat Party and one of its MPs, and one MP from the Egyptian Bloc, all of which because they considered the Freedom and Justice parliamentarians to be taking over.

In the words of Muhammad Ahmad Mun'im al-Sāwī, al-Hadārah Party member and head of Media and Culture Committee and the People's Assembly,

The Islamist parties insisted on getting a majority of the seats in the whole assembly. The fact that they [the Nour and Freedom and Justice Party members] will be getting, alone, more than 20% of the seats was not enough for them. They want to secure independent seats as well. This is not acceptable. We agreed with the other parties that no political force would dominate the Assembly as the coming Constitution should be representing the interests of all Egyptians.<sup>69</sup>

The FJP's statement issued the day after the meeting contradicted such views though. In it, it could be read that "everyone is keen to put Egypt's interest above their own" and that "the patriotic political groups in Egypt are capable of reaching a consensus and overcoming any disagreement".<sup>70</sup> As jurist, Dr. Ahmad Talaat, argues, the Islamists are the de facto majority, they were voted in as such, and thus there is nothing wrong about having them as a majority in a constituent assembly, so long as other political parties are represented and allowed to express their opinion.<sup>71</sup>

Despite some differences, during the few days following the meeting many parties from various points on the political spectrum praised the agreement, including the Freedom and Justice Party, al-Wasat Party, the Egyptian Social Democratic Party, presidential candidate, Amr Moussa, and the liberal Free Egyptians Party.<sup>72</sup>

However, only one day before the Parliament and Shūrā Council were set to vote on the new Constituent Assembly's Law (held on June 12<sup>th</sup>), liberal and leftist parties accused their Islamic counterparts of breaking the deal that had been set. According

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<sup>69</sup> "Political forces reach uneasy agreement on Egypt's constituent assembly," *Ahram Online*.

<sup>70</sup> "SCAF, political parties discuss constituent assembly," *Ahram Online*.

<sup>71</sup> Serôdio, "Interview with jurist Dr. Ahmed Talaat on the new Egyptian Constitution," *Arab-West Report*.

<sup>72</sup> "Broad satisfaction over Egypt's Constituent Assembly deal," *Ahram Online*.

to them, as it had been agreed that the assembly would be split 50%, Islamists and 50%, non-Islamists, so the 22 seats saved for non-political entities should have been divided between the two. Yet, on the 11<sup>th</sup> of June, several party representatives received phone calls from Islamist Parliament Members informing them that those 22 seats including the seats of the centrist-Islamist Wasat Party, the Gama'a al-Islamiya Party, and al-Azhar,<sup>73</sup> were all to be included in the 50% share of non-Islamists in the assembly, depreciating their representation.<sup>74</sup>

In light of these events, the Egyptian Bloc, constituted by the Free Egyptians, the Tagammu, and the Egyptian Social Democratic parties, along with the Karama, the Socialist Popular Alliance, and the Democratic Front parties all withdrew from the assembly in objection to what they described as "the Islamist monopoly on the constitutional-drafting process," claiming their withdrawal was to give way from more youth, women, and Christians to participate in drafting their constitution.

In condemnation of such withdrawals, Wasat Party member, Muhammad Mahsūb, declared: "We're facing a minority that wants to control the assembly and determine which party is Islamist and which is not. [Al Wasat] seeks a civil state and equal rights for all Egyptians;" and he added: "We agreed that half of the seats in the assembly would be for the Islamic majority in Parliament, while the other half would be for other parties, Al-Azhar, Christian churches, and judicial figures". Sayyīd al-Badawī, leader of the liberal Wafd Party also granted that the "non-Islamist parties had agreed to allocate half the assembly's seats to Freedom and Justice and Nour parties."<sup>75</sup>

On the eve of the voting day, the draft law for the new Constituent Assembly was reduced from 13 to only 11 articles, among which the most important stated the assembly was to be an independent legal entity (Article 2) and that it should be representative of all segments of Egyptian society to the fullest extent possible (Article 3). In Article 5 it was stipulated that the draft constitution should be written

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<sup>73</sup> Gamal Essam El-Din, "Liberals, leftists stage 2<sup>nd</sup> walkout from Egypt's Constituent Assembly," *Ahram Online*, June 11, 2012, accessed March 15, 2013, <http://english.ahram.org.eg/NewsContent/1/64/44590/Egypt/Politics-/Liberals,-leftists-stage-nd-walkout-from-Egypt-Co.aspx>.

<sup>74</sup> "On verge of consensus, rifts reemerge over Egypt's Constituent Assembly," *Ahram Online*, June 11, 2012, accessed March 12, 2013, <http://english.ahram.org.eg/NewsContent/1/64/44501/Egypt/Politics-/On-verge-of-consensus,-rifts-reemerge-over-Egypt-Co.aspx>.

<sup>75</sup> Essam El-Din, "Liberals, leftists stage 2<sup>nd</sup> walkout from Egypt's Constituent Assembly".

by a consensus among assembly members, being put to vote if such consensus is not possible to reach. The Constituent Assembly was also to be assisted by “technical commission” made up of experts alone, with no voting rights (Article 7).<sup>76</sup>

Many non-Islamist MPs rejected such a draft law. Centrist al-'Adl Party MP, Mustafá al-Najjār, was among them. “I reject the draft law because it drags the Parliament into a political fight between Islamists and non-Islamists.” He voiced his concerns also for the absence of criteria for choosing assembly members, which he feared would make the assembly’s decisions immune from appeal.”<sup>77</sup>

On June 12<sup>th</sup>, despite the controversy, the People’s Assembly and the Shūrā Council still held their joint meeting to vote on the Constituent Assembly’s membership. Out of the 1,300 candidates, they were to choose 100.<sup>78</sup> Of the 688 Parliamentarians voting, a total of 57 MPs reportedly withdrew from Tuesday’s session, including representatives of the Egyptian Bloc, the Revolution Continues Bloc, the Hurriyah Party, the Socialist Popular Alliance Party, the Egyptian-Arabic Union Party, the Egyptian Citizen Party, and the Wafd Party, as well as several independent candidates.<sup>79</sup> The High Constitutional Court also decided to withdraw from the assembly, justifying its decision on grounds that there were too many conflicts within the constituent body and thus it did not want to be forced to take sides.<sup>80</sup>

Mohamed al-Baradei also voiced his concerns about the new Constituent Assembly’s body considering it dangerously unrepresentative of the Egyptian population which could come to “bury the revolution” and lead to “a confiscation of the future”. Al-

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<sup>76</sup> Zeinab El-Gundy, “Egypt Parliament issues law regulating constitution-drafting body,” *Ahram Online*, June 11, 2012, accessed March 15, 2013, <http://english.ahram.org.eg/NewsContent/1/64/44573/Egypt/Politics-/Egypt-Parliament-issues-law-regulating-constitutio.aspx>.

<sup>77</sup> Essam El-Din, “Liberals, leftists stage 2<sup>nd</sup> walkout from Egypt’s Constituent Assembly”.

<sup>78</sup> “Egypt’s Parliament votes on Constituent Assembly membership,” *Ahram Online*, June 12, 2012, accessed March 20, 2013, <http://english.ahram.org.eg/NewsContent/1/64/44642/Egypt/Politics-/Egypt-Parliament-votes-on-constituent-assembly-mem.aspx>.

<sup>79</sup> “Wafd suspends 6 MPs who dissent in Constituent Assembly,” *Ahram Online*, June 12, 2012, accessed March 16, 2013, <http://english.ahram.org.eg/NewsContent/1/64/44691/Egypt/Politics-/Wafd-suspends--MPs-who-dissent-in-Constituent-Asse.aspx>.

<sup>80</sup> “High Constitutional Court withdraws from constituent assembly,” *Ahram Online*, June 12, 2012, accessed March 17, 2013, <http://english.ahram.org.eg/NewsContent/1/64/44669/Egypt/Politics-/High-Constitutional-Court-withdraws-from-constitue.aspx>.

Baradei further accused the Islamists of wanting to monopolize the constitution-drafting process.<sup>81</sup>

In the end, however, the Constituent Assembly gathered the necessary members to start its work and, on the 18th of June, held its first session.

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<sup>81</sup> "Egypt's Baradei blasts 'unrepresentative' constitutional assembly," *Ahram Online*, June 12, 2012, accessed March 13, 2013, <http://english.ahram.org.eg/NewsContent/1/64/44661/Egypt/Politics-/Egypts-ElBaradei-blasts-unrepresentative-constitut.aspx>.

## 2 The Formation of Egypt's 2012 Constitution

### 2.1 Islamist Tendencies in the Constituent Assembly

Jayson Casper

Amid Egypt's cantankerous politics has fallen a document that, in theory, should be above partisan squabbling. A constitution is a national charter, the social contract which binds all sectors of society together. It establishes the nature of the political system and the rules of the political game. It should represent common cause. Alas, in Egypt, it does not.

Whatever the merits of Egypt's post-Revolution roadmap – placing the drafting of the constitution after the election of parliament – this process embroiled Islamists and non-Islamists in a contest over the definition of Egypt's identity. This national discussion was unavoidable; perhaps it was essential. Yet as the Islamists dominated all elections in the transition, they translated this success into control over the constitutional writing process, arguing that their gains demonstrated their popular representation. Non-Islamists, however, reject the final text as unrepresentative of Egyptian society in its entirety. Instead, they see it as the victory of a narrow political interest best suited to maximize gains in electoral politics at that unique moment in Egypt's history.

Evaluating the representativeness of the constitution and the process which created it is treated in other chapters of this study. Here, the question is more basic: Who wrote the constitution? Liberals and leftists claim the process was “dominated” by Islamists, who packed the Constituent Assembly with party members and philosophical sympathizers. Islamists, in response, claim they agreed to forsake the right of their parliament majority to appoint the 100-member assembly for the sake of greater consensus. Indeed, through the mediation of the ruling military council, political parties agreed to create a 50/50 Islamist–non-Islamist split, with specified numbers of representatives for parties, civil society, and the institutions of the state.

From the very beginning, many liberals and leftists claim Islamists cheated and broke this agreement. Therefore, this chapter aims to identify each member of the original 100-member assembly according to their orientation on the question of Islamism. It will then proceed to analyze further the final 85 members, original and replacement, who cast the approval vote.



Sources referenced include the *Ahram Online* article of June 12, 2012, identifying the 100 members with a brief description of their professional status. It also considers the al-Fajr article of December 2, 2012, identifying the final 85 members, grouping them according to their basic affiliation. These articles are supplemented with the commentary of George Messiha, a liberal politician belonging to the Wafd Party, and a replacement member of the Constituent Assembly. Finally, Dr. Nadia Mustafa<sup>82</sup> adds her opinions, informed not only as a close observer, but also briefly as a member of the first Constituent Assembly, before its dissolution.

Though he did not contribute to the classification of names, ‘Amr Darrag lodged a useful criticism on the premise of this report. He gave three reasons why an attempt to divide members into categories based on Islamism obscures the work of the assembly. First, Islamism is not category of absolute definition. Darrag considers himself an Islamist, but also holds views many would categorize as liberal. Second, 50% of the assembly was given to the Freedom and Justice and Nour Parties, but they did not exclusively nominate Islamists. Wahīd ‘Abd al-Majīd is a liberal, he says, but was selected by Darrag’s party. Third, Darrag stated that the members of the assembly were chosen and agreed upon by all by name, not simply by categorization.<sup>83</sup> This is an assessment Messiha disputes.

Though these arguments are noted and appreciated, this article will continue with the classification. Regardless of how the Constituent Assembly was formed, its work, at the least, became polarized along a non-Islamist–Islamist spectrum. For further identification of all names which follow, please refer to *Arab-West Report* and the links to referenced news sources therein.<sup>84</sup>

The following 20 individuals are formal members of the Muslim Brotherhood and/or its political arm, the Freedom and Justice Party: ‘Isām al-‘Iryān, Farīd Isma‘īl, Khālīd al-Azharī, Subhī Sālīh, Hudá Ghūniyah, Muhammad al-Biltajī, Ahmad ‘Umar, Ikrāmī Sa‘ad, Husayn Ibrahīm, Mahmūd Ghūzlan, ‘Abd al-Rahman al-Barr, Usāmah Yasīn,

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<sup>82</sup> As several Islamists are easy to categorize by their political affiliations, Mustafa’s contribution was to identify independent Islamists, like herself, who stand apart from these trends but support the greater integration of Islam into society and the political system.

<sup>83</sup> Seródio, “Interview with Dr. Amr Darrag,” *Arab-West Report*.

<sup>84</sup> Casper, “How Islamist was the Constituent Assembly? Analysis of former Assembly member George Masīhah,” *Arab-West Report*.

‘Amr Darrag, Ayman ‘Alī, Ahmad Diyāb, Umaymah Kāmil, Ahmad al-Halawānī, ‘Abd al-Rahman Shukrī, Tāhir ‘Abd al-Muhsin, and ‘Alī Fath al-Bāb.

The following 15 individuals are members of the Salafī Call and/or its political arm, the Nour Party,<sup>85</sup> or else otherwise known as Salafī in orientation: ‘Imād ‘Abd al-Ghafūr, Ashraf Thābit, Walīd ‘Abd al-Awal, Sha‘bān Darwīsh, Muhammad Jawīsh, Salah ‘Abd al-Ma‘būd, Talaat Marzūq, Nader Bakkār, Yūnis Makhiyūn, Bāssam Zarqa, Sha‘bān ‘Abd al-‘Alīm, Muhammad Yūsri Ibrahīm, Yāssir Burhāmī, Sa‘īd ‘Abd al-Azīm ‘Alī, and Muhammad ‘Amārah.

The following 7 individuals are well known independent Islamists, including members of the Wasat Party, which separated from the Muslim Brotherhood in the 1990s: Husām al-Ghiryāni, Muhammad Mahsūb, ‘Isām Sultān, Abū ‘Alā al-Mādī, Salīm al-‘Awā, Muhammad ‘Amārah, and Muhammad Hassān.

The following 11 individuals were labeled as independent Islamists by Nadia Mustafa: Usāmah al-‘Abd, Jamāl Jibra‘īl, Hussain al-Shafa‘ī, Husayn Hāmid, ‘Atif al-Bannā, ‘Abd al-Dā‘im Nusayr, Muhammad Jād Allah, Muhammad ‘Abd al-Salām, Mu‘taz ‘Abd al-Fattāh, Muhammad al-Sāwī, and Nasr Farīd Wāsil.

The following 7 individuals were labeled as clearly Islamist in orientation by George Messiha: Muhammad ‘Alī Bishr, Atīyyah Fayyād, Muhammad Sharīf, Mājīd Shibaytah, Muhammad Khayrī, Muhammad ‘Abd al-Jawād, and Mājīd Khulūsī.<sup>86</sup>

The following 4 individuals Messiha believed were not Islamists, but willingly cooperated with them on the constitutional project: Dāwūd al-Bāz, Mamdūh al-Wālī, Muhammad al-Fiqqī, and Muhammad Muhī al-Dīn.

The following 9 individuals belong to the institutions of the state, and did not represent a particular orientation, though in this they could qualify as non-Islamists: Taymūr Mustafá, Muhammad Darbalah, Ahmad Khalīfah, ‘Imād Husayn Hasan, Mamdūh Shahīn, Mājīd Barakat, Māhir al-Bahayrī, ‘Adīl ‘Abd al-Hamīd ‘Abd Allah, and ‘Abd Allah Sa‘īd Abū al-‘Izz.

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<sup>85</sup> At the time of appointment. Some of these listed have since resigned from the Nour Party to join other Salafī political parties.

<sup>86</sup> The final three names he listed as members of the Muslim Brotherhood.

Finally, the following 27 individuals are non-Islamists, representing political parties, syndicates, independent currents, and the church: Amānī Abū Fadl, ‘Abd al-Fattāh Khattāb, Bahā al-Dīn Abū al-Shawkah, Shahīrah Halīm Dūs, Fū‘ad Badrāwī, Muhammad Ibrahīm Kāmil, Muhammad Ahmad ‘Abd al-Qādir, Ayman Nūr, ‘Abd al-Jalīl Mustafa, ‘Abd al-Sand Yamāmah, Ahmad Māhir, ‘Amr Mūsa, Muhammad Anwar al-Sādāt, Bishop Boula, Safwat al-Baiyadī, Edward Ghālab, Munsif Najīb Sulīymān, Bishop Yuhanna Qultah, Ashraf ‘Abd al-Ghafūr, Sāmih Ashūr, Jābir Jād Nassār, Su‘ad Kāmil Rizq, Samīr Marcos, Farūq Juwaydah, Manāl al-Tībī, Wahīd ‘Abd al-Majīd, and Manār al-Shurbajī.

Therefore, to summarize, 35 of 100 members belonged directly to a Muslim Brotherhood or Salafī trend, an additional 18 are Islamists independent of these groups, and an additional 7 are identified as Islamists through the experience of Messīha. If Messīha’s testimony is excluded as partisan, Islamist makeup of the Constituent Assembly is 53%; if his assessment is conceded they represent 60%. Non-Islamists, apart from the state representatives, make up only 27%.<sup>87</sup>

Islamists may argue these percentages are less than their proportion in parliament, and thus a concession. They may further argue some of similar orientation represents non-political slices of society, of which Islamists should not be excluded. This, in particular, is the opinion of Nadia Mustafa. The legitimacy of these points is allowed, but does not contest the fact the majority of the original Constituent Assembly was Islamist. Calling it Islamist “domination”, however, appears to be a stretch.

Nevertheless, either in protest of internal Islamist domination of assembly workings, or in effort to sabotage the work of the assembly, many non-Islamist members began to withdraw. A few others withdrew for various other reasons, which required the selection of replacement members in order to maintain the quota of the assembly.

The following 3 individuals from the Islamist trend withdrew: Muhammad Hassān, Tāhir ‘Abd al-Muhsin, and ‘Alī Fath al-Bāb.

The following 28 individuals from state institutions and the non-Islamist trend withdrew: Māhir al-Bahayrī, ‘Adil ‘Abd al-Hamīd ‘Abd Allah, ‘Abd Allah Sa‘īd Abū

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<sup>87</sup> See Jayson Casper, “How Islamist was the Constituent Assembly? Analysis of former Assembly member George Masīhah,” *Arab-West Report*.

al-'Izz, Bahā al-Dīn Abū al-Shawkah, Shahīrah Halīm Dūs, Fū'ad Badrāwī, Muhammad Ibrahīm Kāmil, Muhammad Ahmad 'Abd al-Qādir, Ayman Nūr, 'Abd al-Jalīl Mustafa, 'Abd al-Sand Yamamah, Ahmad Māhir, 'Amr Mūsa, Muhammad Anwar al-Sādāt, Bishop Boula, Safwat al-Bayadī, Edward Ghālab, Munsif Najīb Sulīmān, Bishop Yuhanna Qultah, Ashraf 'Abd al-Ghafūr, Sāmih Ashūr, Jābir Jād Nassār, Su'ad Kāmil Rizq, Samīr Marcos, Farūq Juwaydah, Manāl al-Tībī, Wahīd 'Abd al-Majīd, and Manār al-Shurbajī.

The 9 replacement members from the Muslim Brotherhood and Salafī trend included: 'Izzat al-Jarf, Ahmad al-Bayalī, Hilmī al-Jazzār, Wajīh al-Shīmī, Muhammad Mansūr, Ahmad Khalīl, Muhammad al-Kurdī, Nūr al-Dīn 'Alī, and Sa'īd 'Abd al-Azīm.

The 5 replacement members identified as independent Islamists included: Ayman Qandīl, Ma'bad al-Jarhī, Hātim 'Azzām, Ramadan Batīkh, and Zakī Zaydān.

The 5 replacement members identified as non-Islamists included: 'Umar 'Abd al-Hādī, 'Abd al-Mun'im al-Tūnisī, George Messiha, Rif'at Liqūshah, and Sūzī Nāshid.

The final 3 names subsequently withdrew from the constituent assembly.

This yields a total of 85 members, meeting the quota necessary to approve the constitutional draft. Unlike the original 100, though, this composition is overwhelmingly Islamist. 71 individuals belong to the trend representing 84% of the final assembly. Islamists did not produce the text in its entirety, but they were almost all who remained to finalize it.<sup>88</sup>

Does the constitution, therefore, represent Egypt? Islamists will say yes, accuse liberals and leftists of manipulation for political ends, and point to the ratification of the text by the Egyptian voters during the referendum. Non-Islamists will say no, accuse instead of hijacking the assembly and its drafting process, and point to the low turnout and divided response of the referendum. Sorting between the two is largely a matter of opinion.

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<sup>88</sup> See Casper, "How Islamist was the Constituent Assembly?".

Facts, however, demonstrate the original assembly was solidly though not overwhelmingly composed of Islamists, which non-Islamists left to their rivals in protest, signaling a failure at consensus.

Who to blame is another matter, but Egyptians as a whole are bearing the consequences.

## **2.2 Internal Dynamics of the Second Constituent Assembly**

Diana Serôdio

Constitution writing is a process that is relatively standardized, using the example of many Constitutional texts' structuring written throughout modern history.<sup>89</sup> Thus, it is not in the structuring of the various different constitutional chapters that the 2012 Egyptian Constitution is innovating. The process itself – how the drafting of each chapter was carried out by different committees, each containing twenty members – is also not something original. Yet, in this chapter, we will be able to see how, if some of the assembly's members were proud of how it was organized and led; others – mostly non-Islamists – criticized it for its lack of transparency and confusing structuring, claiming the process was rushed up and there was no real willingness to reach consensus as the Islamist majority was accused to politicize the whole procedure. In the end, in face of major disagreements and controversies, the latter decided to withdraw.

### 2.2.1 Constitution Assembly's Drafting System

After the Constituent Assembly had been formed it was time to decide on how it would work – how the final text would come into being. It was thus decided that the 100 members were going to be divided in five committees. One for each chapter: State and Society, Rights and Freedoms, Public Authorities (state institutions' roles, including the system of checks and balances), and Independent Authorities; and a fifth one that was not responsible for drafting, but instead of conveying the people's demands and aspirations through a special website that was created for this purpose or through the various hearing sessions held during the assembly's working months and transmit them to the appropriate committees according to their specific content. Each of these five committees had a variable number of members in it who

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<sup>89</sup> Serôdio, "Interview with jurist Dr. Ahmed Talaat on the new Egyptian Constitution," *Arab-West Report*.

voluntarily became a member of the committee of their preference – so long as a numerical balance was kept. Members within a committee were the only ones with voting rights in it; however, all others were welcomed to attend the sessions and present their proposals in writing.

The four drafting committees worked extensively during the first months of the assembly to put forward a draft that was then submitted to a fifth committee, a body constituted solely by legal experts – the “Editing Committee” – that made sure the drafting committees followed the legal requirements in each article and ensured there was no repetition, juxtaposition or contradiction between the various articles of the various committees, something likely to happen as the committees worked separately. Once edited, the drafts would be given back to the original committee until the presented document completely conformed to all legal requirements in both content and wording. The Editing Committee also made sure that suggestions of the people as conveyed by the Fifth Committee were reflected in the draft wherever possible. When all drafts from all committees were ready, they were put together and distributed through all members within the assembly for preliminary discussion within the plenary session. From there, the Editing Committee would go over it again and, lastly, it was delivered to the Drafting Committee – a smaller version of the Editing Committee, with only four members (all of them experts, one of them from outside the assembly) – who prepared the final compiled version of the draft. The draft was then put on the website for complete transparency and presented in hearing sessions in various governorates, as well as outside the country for Egyptians living abroad, to seek the people’s input and feedback and, in the meantime, each article was discussed in depth in the plenary session. Once all discussions were complete and amendments made, a final draft was prepared and issued for final voting in one long plenary session of the assembly.<sup>90</sup>

The second Constituent Assembly for the 2012 Constitution was in session for six months. Until the end of September, each committee worked to perform its duties and form a comprehensive draft that was agreeable to its members. Some of them were faster presenting a final draft than others. The Public Authorities Committee, for example, due to the complexity of its subject matter, took longer to present a first proposal. Yet, at last, by the beginning of October, the editing committee was able to introduce a more or less solidified first draft to be discussed in plenary sessions.

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<sup>90</sup> Serôdio, “Interview with Dr. Amr Darrag on the new Egyptian Constitution,” *Arab-West Report*.

On October 3, a document was signed by representatives of different entities stating most articles were agreed upon.<sup>91</sup> Only eight of them were put down as “controversial” and were discussed, informally, by the same political parties and civil society representatives (around 25) to try to come to an agreement on each of them. After many deliberations, all controversial articles were redrafted except for two of them which were deferred due to lack of time to discuss them properly (they were agreed to be deleted, at a later stage, by consensus). According to Dr. Amr Darrag, among the articles agreed upon were, for example, Article 2 and 219 (the most Islamic-oriented article in the Constitutional text), which are now in the Constitution with the same exact wording with which they were written on that date.

Once a first draft of the whole document was formed, plenary sessions started. In these sessions, all members had the right to deliberate on any and every clause. When needed, informal voting motions were put in place in order to perceive what the overall acceptance of any given contested article was. In the event that a clause was not consensual, there would be further discussions to try to reach a common understanding on how to go about it. In such occasions, the committee responsible for it would reassemble to reformulate it considering what had been said. Thus the initial drafting committees continued their work in conjunction with the plenary sessions either to rewrite clauses upon request or to consider new proposals put forward by assembly members or by the people in the hearing sessions or through the website. The Editing Committee would also often play a role in trying to shape articles in order to make them more widely accepted, always attending to what had been discussed in plenary sessions.

The process was lengthy and complex with a wave of withdrawals from Church representatives, non-Islamists, and some syndicate members. Yet almost two months after a first draft had been presented, the final voting session took place on November 29<sup>th</sup>, resulting in the approval of the final draft of the Egyptian Constitution put to a referendum two weeks later.

### 2.2.2 Criticisms and Controversy

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<sup>91</sup> Diana Serôdio, “Signatures of key members of the Constituent Assembly agreeing to the text of key articles in the Constitution,” *Arab-West Report*, Week 16, Art. 40, April 18, 2013, <http://www.arabwestreport.info/node/46309>.

In a situation of extreme polarization, the Constituent Assembly was heavily criticized, mostly by anti-Islamists. As previously mentioned in this report, it all started with the formation of the body itself. Whereas the Freedom and Justice Party, Muslim Brotherhood supporters, and Salafīs considered the membership to be balanced and fair, the opposition considered it to be too similar to the previous Constituent Assembly. That assembly had been dismantled on the grounds that it had an unjustified majority of Islamists, was too politicized, and had far too many members of the People’s Assembly, which was seen as unconstitutional.

The new assembly was, for many, still ideologically and politically biased in favor of Islamists and, even before its first session, on June 11<sup>th</sup>, some civil parties and movements staged a walk-out in protest of the newly-constituted body. Islamists, on the other hand, deny that such a bias existed, as the assembly only represented the will of a society who had elected, in fact, a much larger majority of Islamists as their representatives in the Parliament – which they abstained from having reflected in the second Constituent Assembly – and because the membership and central voting norms of the new assembly had been agreed upon beforehand at the Wafd Party’s headquarters. According to Amr Darrag, the quotas of each political party did not necessarily mean they would nominate people from their own political affiliation.<sup>92</sup> For example, within the quota of the FJP, there were liberal politicians such as Wahīd ‘Abd al-Majīd – a prominent professional politician who has criticized the Muslim Brotherhood on many occasions.<sup>93</sup>

Throughout the whole constitution-writing process, and particularly towards the end, non-Islamists have criticized the assembly’s majority for not working hard enough towards consensus, having put specific emphasis on the religious aspects of the document, especially on the place of religion in the state’s affairs.

The withdrawals began on November 17, 2012. The five Church representatives withdrew from the assembly with Bishop Pachomios stating that “the ongoing

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<sup>92</sup> Serôdio, “Interview with Dr. Amr Darrag on the new Egyptian Constitution,” *Arab-West Report*.

<sup>93</sup> Waleed Abdel Majid, “Has the Muslim Brotherhood Learned its lesson?,” *Al-Monitor*, June 1, 2012 accessed March 20, 2013., <http://www.al-monitor.com/pulse/politics/2012/06/will-the-muslim-brotherhood-lear.html>.



process within the Constituent Assembly will not guarantee a constitution that will provide national consensus or that reflects the identity of Egypt".<sup>94</sup>

They were followed by non-Islamist members who, in a press conference at the Wafd Party on the 18<sup>th</sup> of November, justified their withdrawal to the fact that the assembly's Islamist majority was clearly hastening the process. As a result, they deliberately avoided engaging in serious debates on articles with the intent of having the final draft ready before the Constitutional Court deliberated on the assembly's constitutionality, which was being questioned given that it was formed by a People's Assembly which ended up being dissolved in mid-June of 2012.

The opposition claimed trying to speed the process was unacceptable, especially as the document contained, in their opinion, some poor clauses and contradictory articles. Hamdī Qandīl – a very well-known media personality, who withdrew from the assembly – emphasized that despite the various amendments presented by non-Islamists for over a half of the document's content was not taken into consideration. In what came to social justice related clauses, for example, the opposition considered there were crucial additions to be made that were not even put to discussion. Wahid Abdel Mejid further declared having pushed for labor rights to be included, as well as pensioners' concerns, but to no avail "we have reached a dead end, and consultations did not come to any conclusion," he said.<sup>95</sup> Amr Moussa stated that the members withdrawing from the assembly "did not disagree with this party or that group. We disagree with the formulations of the constitution that we cannot change." The head of the Wafd Party, Sayyīd al-Badawī, was also an active critic of the assembly, declaring some articles to be "catastrophic".<sup>96</sup>

In addition to the five Church representatives and the twelve civil parties' members, eight delegates of an advisory committee providing technical assistance to the assembly also resigned, arguing that their suggestions had been ignored and that

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<sup>94</sup> "Egypt's Churches withdraw from Constituent Assembly," *Ahram Online*, November 17, 2012, accessed March 19, 2013, <http://english.ahram.org.eg/NewsContent/1/64/58411/Egypt/Politics-/Egypts-churches-withdraw-from-Constituent-Assembly.aspx>.

<sup>95</sup> "Secular figures withdraw from Constituent Assembly, call draft Egypt's 'downfall'," *Egypt Independent*, November 18, 2012, accessed March 20, 2013, <http://www.egyptindependent.com/news/secular-figures-withdraw-constituent-assembly-call-draft-egypt-s-downfall>.

<sup>96</sup> "A group of lawmakers withdraw from Egypt's Constituent Assembly," *Press TV*, November 19, 2012, accessed March 24, 2013, <http://www.presstv.ir/detail/2012/11/19/273209/egypt-mps-quit-constituent-assembly/>.

there was not enough space or time to discuss the articles properly. The lawmakers in the body failed to reach an agreement on the deadline, which was set for December.<sup>97</sup>

Shortly after this wave of withdrawals, on November 22, 2012, President Morsi issued a decree stating his decisions were to be “final and unchallengeable by any individual or body until a new constitution has been ratified and a new parliament has been elected”. The declaration also stated that the Shūrā Council and the Constituent Assembly could not be dissolved by any judicial body, giving the possibility for the latter to extend its work for a maximum of eight months. This meant the assembly was allowed to continue working on the document for an extra couple of months and not finish after six months as was stipulated in the referendum of March 19, 2011.<sup>98</sup>

In contestation of this decree, thousands of Egyptians took the streets claiming the President had gone far beyond his powers. Within the assembly, it led to the withdrawal of Wafd Party leaders, Muhammad Kāmil and ‘Abd al-Dawūd, as well as Ghad Al-Thawra Party representatives. “The constitutional declaration confirms that there is no such thing as a state for us to draft a constitution for,” claimed Mohamed Kamel. In the end, there were only four parties represented in the assembly: The Freedom and Justice Party, the Nour Party, the Al-Wasat Party, and the only non-Islamist party left, the Civilization Party.<sup>99</sup>

Islamists see things very differently. The assembly had been formed after a comprehensive meeting with members of all parties represented in the People’s Assembly where they established, together, not only the quotas and voting requirements for any article to be passed (which required a majority that would demand significant consensus, beyond the Islamist quota), but even the names of the members that were to be nominated. That agreement was signed by all with the exception of the Egyptian Bloc, the Karama, the Socialist Popular Alliance, and the Democratic Front parties, who withdrew right from the start. Thus, in their view,

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<sup>97</sup> “A group of lawmakers withdraw from Egypt’s Constituent Assembly,” *Press TV*.

<sup>98</sup> “English text of Mursi’s Constitutional Declaration,” *Ahram Online*, November 22, 2012, accessed March 23, 2013, <http://english.ahram.org.eg/News/58947.aspx>.

<sup>99</sup> Ibrahim Al-Masry “Non-Islamist members withdraw from the Constitutional Assembly,” *Daily News*, November 24, 2012, accessed March 20, 2013, <http://www.dailynewsegypt.com/2012/11/24/all-civilian-parties-withdraw-from-constitutional-assembly/>.

given that such an accord was signed, there are no grounds to declare the assembly illegitimate or “Islamized” because, even if the Nour Party and the FJP were given the right to select the 50% of the members, they did not all belong to their parties, nor were they necessarily ideologically-aligned.

In what comes to the “Islamization” of the constitutional document, in other words, the accusation that this new Constitution provided for a significant increase of the interference of religious matters in state affairs, Amr Darrag pointed out<sup>100</sup> that some of the main contesters of Article 219 (like prominent civil party politicians Sayyīd al-Badawī and Ayman Nour) had, in fact, agreed to it on October 3 by agreeing to sign a document where other clauses such as Article 2 and Article 4 were also included (with only the latter article being slightly modified later on, which make it now different in the Constitution from the way it was drafted).<sup>101</sup> Islamists thus argue that their opponents’ criticism is not based on the content of the Constitution, but rather on political motivations. In Dr. Darrag’s opinion, when the non-Islamists realized that the success of the Constituent Assembly and the passing of the Constitution would lead to parliamentary elections within the two months following its approval, they did all they could to delegitimize the new constitution in the eyes of the people. “People who withdrew were doing something completely against democracy: they wanted to impose their opinion as a minority,” the assembly’s Secretary General said.

In response to the accusations that there was a clear attempt on the Islamists’ side to speed up the drafting process to have it approved and put to referendum before the Constitutional Court’s ruling, the Islamists deny that such an effort was made. To sustain their argument, they claim that, even after the Constituent Assembly had been granted protection under the November 22, 2012 Presidential Declaration and the possibility to extend its work for another two months, they saw no need to delay the issuing of the final draft. Despite the 16 hour-long voting marathon on November 29<sup>th</sup>, the remaining members of the assembly claim that they were prepared, from day one, to be done by December, as established in the March 19, 2011 referendum. They had actually thought they would finish earlier, but, by December, after six months of drafting and deliberation and three entire weeks discussing the final draft, they were more than ready to get to the voting, as granted

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<sup>100</sup> Serôdio, “Interview with Dr. Amr Darrag on the new Egyptian Constitution,” *Arab-West Report*.

<sup>101</sup> Diana Serôdio, “Signatures of key members of the Constituent Assembly agreeing to the text of key articles in the Constitution,” *Arab-West Report*.

by Dr. Darrag. In addition, he said “there is always the possibility of modifying the Constitution. When we have a Parliament we can discuss those articles [...] and discuss them further.”<sup>102</sup>

As for the Presidential Declaration of November 22, Islamists stood by it. In their view, it was meant to protect the democratic institutions – the Shūrā Council and the Constituent Assembly – from the Constitutional Court, which is considered by Dr. Darrag as “one of the main tools resisting the new order”<sup>103</sup> as its members have all been appointed during the Mubarak era. The dissolution of the entire Parliament and not just the one-third of the seats that were, according to the court, unconstitutionally conducted was, to them, a proof of the politicization of the court and an intentional delay of the transition “in order to give a chance for the old regime to come back”.<sup>104</sup>

According to Dr. Darrag, the President had to issue this decree in November 2012 when he was faced with a sociopolitical crisis, in order to prevent the transition to go back to square one – risking the return of the military to politics and holding key legislative and executive powers again. It was thus, by all means, necessary to prevent this from happening. Sha’bān ‘Abd al-‘Alīm, Nour Party and assembly member, affirmed the declaration to be a positive step as it achieved “a minimum of the revolution’s demands.”<sup>105</sup> Other Islamists pointed out that, if the President was, indeed, a dictator – as many claimed in street protests following the decree – he would not want the democratic process to continue and would not attempt at protecting these institutions. It must be said, however, that due to the fact that Morsi is an Islamist himself, a former member of the Muslim Brotherhood and a former leader of its political branch, the FJP, it is seen as likely that he would have protected these bodies to ensure they would continue under Islamists’ control, most especially since it was claimed that the Constitutional Court also intended to cancel Morsi’s August 12, 2012 decree, that reduced political powers of the SCAF and returned those to the presidency.

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<sup>102</sup> Serôdio, “Interview with Dr. Amr Darrag on the new Egyptian Constitution,” *Arab-West Report*.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> “Secular figures withdraw from Constituent Assembly, call draft Egypt’s ‘downfall,’” *Egypt Independent*.

Islamists further argue that this declaration also envisioned giving another chance for the withdrawing members of the Constituent Assembly to return on their decision and try, for the extended period of two months the body was attributed through this decree, to reopen the discussion on the clauses and matters they opposed to. Dr. Darrag thus concludes that, after the remaining members of the assembly had waited for the liberals and Christians to come back for a period two weeks, it comes to show that “they [the opposition] were not looking to change certain articles and solve the problem: they were looking for the overall process to fail”. Darrag further stated that some of the withdrawn members imposed as a condition for their return the guarantee that new presidential elections would take place after the Constitution had been issued, which the assembly members refused to accept.<sup>106</sup>

### 2.2.3 Referendum Results

Despite the boycott of the non-Islamist members of the assembly, the voting proceeded, even without a total of 100 members in the final session, as also from the substitutes’ list many refused to appear. The draft was approved by the assembly and sent to the President, who called for a referendum.

In response, on December 5, tens of thousands of demonstrators took the streets of Cairo and headed to the Presidential Palace, demanding Morsi to postpone the referendum, leave office and accusing him of acting as a “Pharaoh”. On that day, deadly clashes took place after, allegedly, Muslim Brotherhood supporters confronted the protesters. On December 8, the President did rescind most of his powers, but did not postpone the referendum on grounds that, because having a referendum presented to the people after 15 days upon the submission of the final draft of the Constitution was one of the clauses in the March 19, 2011 referendum, which was approved by the people, going beyond those two weeks would be unconstitutional.

After President Morsi’s refusal to meet with the members of the Constitutional Court on December 2 when they were to present their verdict on the legality of the Constituent Assembly, most courts across the country suspended their activity. The

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<sup>106</sup> Serôdio, “Interview with Dr. Amr Darrag on the new Egyptian Constitution,” *Arab-West Report*.

Judges Club leaders threatened not to supervise the referendum, adding concerns on how to make the voting legitimate.

The referendum finally took place in two rounds on the 15 and 22 of December and was approved by 63.8% of the voters. With a high number of voting violations' reports and a low turnout of just over 32.9%, it did not consist of a resounding victory for its proponents. Possible consequences are that its legitimacy may be challenged for years to come, adding up to the many problems Egypt is facing nowadays.<sup>107</sup>

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<sup>107</sup> Zaid Al-Ali, "The new Egyptian Constitution: an initial assessment of its merits and flaws," Open Democracy, December 26, 2012, accessed March 23, 2013, <http://www.opendemocracy.net/zaid-al-ali/new-egyptian-constitution-initial-assessment-of-its-merits-and-flaws>.

## 3 Analyzing the Content of the Constitution

### 3.1 Religion in the Egyptian Constitution

Jayson Casper

“We the people...” opens the preamble to the Egyptian Constitution, establishing its legitimacy on a popular foundation reminiscent of similar phrasing in the constitution of the United States. That constitution, however, contains almost no reference to religion. What does exist prevents any religious test for public office, forbids laws establishing religion, but guarantees its free exercise for every citizen. By contrast, the Egyptian Constitution is full of religion and religious implication, grounded in the very preamble.

“...of Egypt, in the name of God, the Merciful, and with his assistance, state: This is our constitution” concludes the first line. The preamble proceeds to make mention of Egypt launching the monotheistic faith, establishing knowledge of the Creator, and embracing God’s prophets and messengers. The fourth principle outlined establishes listed freedoms in the handiwork of God’s creation. The tenth principle calls for unity of the Arab people and cooperation with the Islamic. And the eleventh principle lauds the nation’s intellectual and cultural leadership in many sectors, including the national church and the Azhar, the latter of which shaped the homeland’s identity, promotes the eternal Arabic language, as well as the glorious *shari’ah* as a beacon of moderate, enlightened thought.<sup>108</sup>

Only then does the preamble conclude, leading into the articles of the constitution with the declaration, “We the people of Egypt, believing in God and his messengers...”. If it can be said the United States constitution assumes a religious people, the Egyptian Constitution asserts it. Thereafter, the constitution proceeds at length to establish it.

#### 3.1.2 The Foundational Articles

Article 1 opens the constitution declaring the Egyptian people to be part of both the Arab and Islamic *ummah*. Africa and Asia are mentioned as well, but not the

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<sup>108</sup> Nariman Youssef, “Egypt’s draft constitution translated,” *Egypt Independent*, December 2, 2012, <http://www.egyptindependent.com/news/egypt-s-draft-constitution-translated>.

Mediterranean world. This article is less legal than a statement of identity, with nods toward pan-Arabism and pan-Islamism, but a snub to the notion of sharing in the civilization of Europe and West.

Article 2 opens the legal formulations between Islam and the state. It is the official religion, and the principals of *sharī'ah* form the main source of legislation.<sup>109</sup>

This article is preserved word-for-word from the 1971 Constitution, representing a victory of sorts for non-Islamists. Since the resignation of Mubarak, Islamists, and Salafis in particular, have argued that liberal and secular Egyptians were aiming to remove the article entirely. However much this may have been a desire, there was never a campaign or public effort to do so. Very quickly they assured the population Article 2 would remain, but it was then the Salafis began to push. Many of their shaykhs argued very publically *sharī'ah* alone should be the source of legislation.

The point of contention was the prevalent interpretation of the word “principles”. The Supreme Constitutional Court was established as the arbiter in all such disputes, and chose a broad meaning which focused on the vague ideals of justice. Salafis believed this interpretation avoided the *sharī'ah* almost entirely, not without reason. In the end they were unable to force a consensus on this issue, but did secure victory in an explanatory “compromise” article, to be mentioned below.

Article 3 takes a principle from the *sharī'ah* and extracts it as a constitutional guarantee. Jews and Christians are given the right to govern their personal and religious affairs from their own religious laws, including the selection of leadership. This article was proposed very early by Islamists, and never met with significant controversy, except from secular Copts, who opposed grounding these laws in the authority of the church, especially in the contentious matters of marriage and divorce. The Orthodox Church maintains very a conservative family policy, especially on the issue of divorce.

As these stipulations governed church-state relations before entering the constitution, Article 3 served the purpose of “balancing” its increasingly religious shape. Indeed, when faced with widespread Coptic opposition to the constitution,

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<sup>109</sup> Article 2 in the Constitution has been much debated in Egypt since President Sadat amended the Constitution in 1980, see Cornelis Hulsman (ed), *The Sharia as the Main Source of Legislation; The Egyptian Debate on Article II of the Egyptian Constitution*, Tectum Verlag, Marburg, 2012.



many Islamists complained, saying, we gave them this article, why do they oppose greater room for *sharī'ah* among ourselves?

Article 4 represents a major change in the Egyptian religio-political system. It declares the Azhar to be an independent institution financed by the state, but able to select its own leaders and whose opinion is required to be taken on all legislation pertaining to *sharī'ah*.

In the past the Azhar was an educational and jurisprudence institution often co-opted by the state. The president hand-picked the Grand Shaykh, and though he had no formal role in legislation, he was often accused of giving religious justification for administration policies. This article removes that power from the president, establishing a council of senior scholars from whom the Grand Shaykh must be selected.

It also provides an end-run around the Supreme Constitutional Court. Though that body maintains its sole role as an arbiter in Article 175, it will be difficult to argue unconstitutionality of any legislation of which the Azhar approves. This is even truer for the parliament; though the opinion of the Azhar may seemingly be ignored, such a public relations affront is hard to imagine.

Finally, this article stipulates the Grand Shaykh of the Azhar may not be removed from his position. This clause is in protection of the widespread assumption that Islamists would depose the current holder of the post, known for his non-Islamist leanings. Certain Salafī leaders in the constituent assembly bragged this clause was bartered in exchange for the article deemed a 'compromise' above, though Azhar leaders denied this.

Article 5 is not a religious text, but was the ground of a severe religious argument. It declares sovereignty to be for the people, while Salafīs desired sovereignty to be for God alone. They were unable to make any headway to change it, angering many of their more extreme members.

Article 6 adds a religious term to an otherwise political text. It declares the political system to be based on democracy, citizenship, pluralism, rotation and balance of power, rule of law, respect for rights and freedoms, and also on *shūrā*. *Shūrā* is an

Islamic term meaning “consultation”, motioning toward the traditional understanding of Islamic governance. Its practical implications are unclear.

### 3.1.3 The Family Articles

After laying down the foundational principles for the political system, the constitution proceeds to articulate social and moral principles for the Egyptian state. A number of these also have religious reference, particularly in relation to the family.

Article 10 declares the family to be the foundation of society. The family itself has three foundations: religion, morality, and patriotism. This is a descriptive text, but then proceeds to establish a legal principle. State and society are tasked to preserve the family’s inherent nature.

This principle is left undefined, and legislation in all nations pertains to morality. In assigning family guardianship to the state, however, the freedom of a family to be non-religious is threatened to be curtailed. That a custodial role is also given to society may be semantic, but it may also open the door to unofficial “morality police”, who assume for themselves this social role. Any such development must be subject to law, but the constitutional cover is provided.

Article 11 extends the custodial role of the state to society in general, to promote morality, decency, and religious values, among other aims. The comment is similar, but it is noteworthy there is no mention of society’s role in this promotion. As the Constitution was being prepared, the concept of a religious police was rarely promulgated specifically or publically, but it was feared by non-Islamists. They were successful in removing such phrasing in this article.

Article 60 comes within a series of articles pertaining to education; here, it declares religious education to be an essential subject in all levels preceding university. The university, meanwhile, must be committed to provide the ethical foundation of all educational disciplines. General religious education in Egypt divides Muslims and Christians into separate classes, but this receives no mention in the Constitution.

Article 70 states that a child is entitled to a suitable name and religious development, in addition to other aspects of necessary care. Perhaps the religious development is

assumed within the school curriculum, but again, there are limitations on the right of a family to be nonreligious.

Some Copts have expressed worry that in declaring a child must have a “suitable” name, there is a legal basis to exclude Coptic names should Muslim authorities deem them otherwise.

Article 71 is an extension of the previous, ensuring the state provides for a child’s spiritual and moral development, along with other aims. As with the fear of a suitable name, there is no essential reason this text should limit Christian family freedom; on the contrary, Article 3 should protect it. At the same time, should extremist thought enter the administration and Muslim authorities decide to define and apply “spiritual” development on an Islamic pattern, there is constitutional justification.

#### 3.1.4 The Freedom Articles

The Egyptian Constitution is born not simply from religious trends, but is also the product of a revolution calling for freedom. That these are fully compatible with Islam is defended vigorously by most Islamists, resulting in a number of guarantees liberal and secular Egyptians will celebrate. The extent to which these may be curtailed will be discussed here, but also in a subsequent article listed in the next section.

Article 43 declares freedom of belief to be inviolable. The state guarantees the right to practice religious rites and build houses of worship for the “heavenly” religions, that is, Judaism, Christianity, and Islam. Note the delineation between the two phrases. The Egyptian citizen is permitted to believe what he wishes, but public practice is limited only to the Abrahamic faiths.

This article, similar to many in the constitution, says details of the above are to be specified by law. Christians have long complained the law and the security apparatus frequently prevent them from obtaining legal license to build churches. This article ostensibly speaks to their rights in this regard; their fear is that once detailed, the law may prove as cumbersome as before, or more likely, local realities may lead to the disregarding of law. Even so, such a constitutional provision is a

major pillar of support for Coptic rights, just not for the adherents of any other religion, such as Bahā'īs.

Article 44 preempts a freedom given subsequently in Article 45. The latter establishes the right to freedom of thought, opinion, and expression. The former, however, prevents any insulting of prophets and messengers. Blasphemy legislation is thereby given a constitutional basis.

Article 50 is nonreligious, but perhaps takes on a religious meaning due to Article 43's limitation of religious practice. The right to private gatherings is guaranteed. In defense of the text authorizing only Abrahamic public worship, Islamists have explained that adherents of other faiths are free to worship privately in their homes. It may be that this article would protect this second-class degree of freedom.

### 3.1.5 The *Fiqh* Articles

*Fiqh* is the Arabic word for jurisprudence, and will here summarize a number of articles that have particular legal consequence for Egypt. These articles assure that Islamic norms of *sharī'ah* enter directly into the political, economic, and judicial systems.

Articles 21, 25, and 212 regulate and promote the system of *waqf*, or religious endowment. This is not a new provision in Egypt, as there has been a cabinet level ministry for these endowments under previous administrations. President Nasser, however, nationalized many endowments and extended state control over the religious sphere. In principle, these articles reassert the right to establish private endowments, and also assign the state a role in popularizing this form of religio-economic piety. Every endowment must conform to the stipulations of the donor, a principle from *sharī'ah* here defined in the Constitution.

Articles 86, 137, and 157 define the oath of office for parliamentarians, the president, and the prime minister. Each must swear "by God Almighty" to protect the republican system, the constitution, the law, the people's interest, and the integrity of the nation. The Arabic for "almighty" does not have a particular religious coloring, but there is no alternate oath mentioned for the nonreligious.

Finally, three articles are of particular importance in defining the religious character of the Egyptian Constitution. Mentioned above was an article which could serve to limit the scope of guaranteed rights. This is Article 81, which first of all declares that no law may narrow the intent and essence of the freedoms delineated above it.

The next sentence, however, declares the practice of these freedoms may not conflict with the provisions of Part One of the Constitution. Nothing in the phrasing is religious at all, but Part One includes Article 2, defining the principles of *sharī'ah* to be the main source of legislation. If the interpretation of "principles" remains concerned with the vague notion of justice, as before, there would be limited cause for concern.

Article 219, however, is the aforementioned "compromise" article concerning these principles. It defines them specifically as including the general evidence and foundational principles of Islamic jurisprudence, and the reliable sources from among the Sunnī schools of thought. While the Supreme Constitutional Court still maintains final interpretive authority on legislation, its reasoning must now be consistent with traditional Sunnī jurisprudence and methods of argumentation. It is noteworthy that in mentioning the "Sunnī" schools of law, Shī'ah interpretation is formally excluded.

The *sharī'ah* is an expansive collection of juridical rulings, collected especially in the early centuries of Islam. As a collection it does not demand the necessary limitation of freedoms outlined in the constitution, but it includes within its corpus much which could conflict with generally accepted international norms.

Article 76 is an otherwise nonreligious text which takes on great religious significance in light of the above. It states, consistent with constitutions around the world, that there may be no crime and no sentence unless there is a legal text. The purpose is to protect the citizen from arbitrary arrest by the state. Laws can only be broken if they are established.

The Egyptian Constitution, however, adds the clause "or a constitutional text". As Article 2 establishes the basis of legislation to be the principles of *sharī'ah*, and Article 219 defines these principles inclusive of the four traditional Sunnī schools of law, it is possible to now find a crime and a sentence outside the written civil code of law. The path is opened for recourse to ancient religious law.

### 3.1.6 Conclusion

Nations around the world navigate differently the relation between their national culture, religion, and state. The United States' practice of sidelining religious authority from formal political authority has shaped American culture, more than having been a product of it. America was still a new nation; though it grappled with centuries-long issues of church and state prevalent in Europe, the break from England on a new continent afforded an opportunity for a new experiment. Most Americans, a profoundly religious people, are more than satisfied, they are proud.

Egypt, by contrast, is operating on a reverse pattern. Islamists, who have democratically assumed the mantle of leadership following the Revolution, believe previous constitutions denied Egypt's religious heritage in awkward aping of Western values. Now, with a new opportunity afforded, they wish to shape the constitution consistent not only with principles of human rights, but also with the Muslim religion.

There is no necessary contradiction, but there may be. Islamists find the moral laxity of Western nations due not only to the declining religiosity of their people, but also to the excess of freedom established apart from religion. They wish to see the state play an active role in maintaining a conservative Islamic interpretation of ethics. Within the scope of law, all nations must balance these issues. The people are sovereign.

In the Egyptian Constitution, they remain so, but just barely. When a religion is lifted above the people, its laws and statutes cannot be challenged, having been established by God. This is the ground for theocracy. Article 2, however, continues to assert only the "principles" of *sharī'ah* are the primary source for legislation, even if they are now more precisely defined. Furthermore, the Azhar's role is one of giving opinion. Its religious power over the political system is greatly increased, but is far from absolute. It can, it appears, be ignored.

So while the constitution opens the door for a full-fledged Islamic state, it does not necessitate it. The restrictions which exist have already been noted; greater restrictions are possible but not inevitable. All relies on the will of the people to chart their course as a sovereign nation, determining their relationship with Islam,

Christianity, secularism, and human rights. However religiously flawed an outsider observer may find their national charter; little more can be asked of a revolution.

### 3.2 Egypt's New Political System

Diana Serôdio

The ousting of Mubarak set high expectations among Egyptians for a democratic state based on a fair and evenhanded constitution. The referendum held on March 19, 2011 marked the beginning of a debate on what the best path to democracy was. At the heart of such a debate was the new constitution: who was to write it, when, and how.

Throughout the Revolution, people demanded “Bread, Freedom and Social Justice”; requested local administration to more decentralized, more effective and people-oriented; insisted on the need to tackle corruption; and, of course, required their new leaders to be selected through free and fair elections, with limited mandates so as to avoid another dictatorship. For a true democracy to be put in place, it was essential for the new Constitution to ensure a balanced distribution of power, where the president would no longer hold all authority, but, instead, be just another part of a more complex system of checks and balances along with the parliament and the judiciary.

The constitution-writing process was the target of much criticism from non-Islamist counterparts. Liberal and leftist parties accuse Islamists of taking advantage of the clearly fragmented post-revolution political landscape to settle a path to democracy in a way that would benefit them above all others for years to come. According to the opposition, both constituent assemblies reflect that willingness of taking upon themselves the task of building the very pillars of this “new” Egypt in order to ensure their permanence in power for decades to come.<sup>110</sup> Islamists, on the other hand, claim they are not to be blamed for the lack of organization of liberal and leftist parties who, in light of their poor electoral performances, have been violating basic democratic premises such as the importance of respecting elections and the will of the majority party.<sup>111</sup> In their view, the majority, which was legitimized through elections, is obliged to let the minority express its thoughts and participate constructively in the democratic process, but, ultimately, it is also still entitled to the biggest share of the decision-making authority.<sup>112</sup>

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<sup>110</sup> Serôdio, “Meeting with George Messiha on the Constitution writing process and the 2012 Constitution’s content,” *Arab-West Report*.

<sup>111</sup> See interview with Dr. Nadia Mustafa.

<sup>112</sup> Serôdio, “Interview with jurist Dr. Ahmed Talaat on the new Egyptian Constitution” *Arab-West Report*.



As we have seen in chapter two, the second Constituent Assembly – the one effectively responsible for the final constitutional draft signed into law by President Morsi on December 26, of 2012 – did indeed have a majority of Islamist members. However, even if the most publicly controversial sections of the constitution dealt with the role of religion in government, the most legally contested sections dealt with policy provisions and, above all, the division of powers among the various branches of government as many articles were worded in a dangerously vague and highly interpretable manner.<sup>113</sup> This has led many legal analysts to question the professionalism of the assembly and to suspect time constraints imposed on its members might have played a major role in pressuring them to put forward such a draft to referendum.<sup>114</sup>

The 2012 Egyptian Constitution includes indeed some peculiar articles which refer to very specific policy goals and which, in case the state cannot fulfill, it not be only a reflection of its inefficiency but also anti-constitutional. Examples of such articles are Article 61 which requires the state to ban illiteracy in the country within the next ten years; Article 68 where athletes are promised full support by the state, which is to encourage physical exercise; and Article 184 where it is stipulated that “the state shall ensure equitable distribution of facilities, services and resources and shall work to bring development levels and living standards to a common standard”.

Even though there was a general “consensus” that the system of government should be mixed presidential and parliamentary (or semi-presidential),<sup>115</sup> is in the sections referring to the main institutional components of the Constitution that we can find the most ambiguity and confusion.

### 3.2.1 The Legislative Branch

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<sup>113</sup> Holger Albrecht, “Unbalancing power in Egypt’s Constitution” *Foreign Policy* online, January 31, 2013, accessed April 5, 2013,

[http://mideast.foreignpolicy.com/posts/2013/01/31/unbalancing\\_power\\_in\\_egypt\\_s\\_constitution](http://mideast.foreignpolicy.com/posts/2013/01/31/unbalancing_power_in_egypt_s_constitution).

<sup>114</sup> David D. Kirkpatrick, “Egyptian Islamists Approve Draft Constitution Despite Objections,” *New York Times*, November 29, 2012, accessed March 29, 2013,

[http://www.nytimes.com/2012/11/30/world/middleeast/panel-drafting-egypts-constitution-prepares-quick-vote.html?ref=world&pagewanted=all&\\_r=1&](http://www.nytimes.com/2012/11/30/world/middleeast/panel-drafting-egypts-constitution-prepares-quick-vote.html?ref=world&pagewanted=all&_r=1&).

<sup>115</sup> Youssef Auf, “The System of Government in Egypt’s Draft Constitution,” Atlantic Council, September 13, 2012, accessed March 30, 2013, <http://www.acus.org/egyptsource/system-government-egypt-s-draft-constitution>.

In alignment with the 1971 Constitution, within the new constitutional document the legislative branch remains divided in two councils: the House of Representatives (the lower house) and the Shūrā Council (the upper house), having both – according to Article 102 – “the right to apply amendments and break down existing clauses or suggested amendments”. In the same article it is also stated that “each bill passed by one of the councils shall be passed on to the other”.

If in Article 102 it seems to be made clear both Councils are entrusted with the right to issue laws, this certainty can be easily lost by reading certain articles such as Article 116 where it can be read, “The House of Representatives shall hold the legislative power and be responsible for approving the general policy of the State, the public plan for economic and social development and the overall budget of the state.” The lower house is also singled out in articles such as Article 117 and 118 in controlling the budget; in Article 123 examining the activities of any administrative department or institution or public enterprise; and in Article 126 to decide to withdraw the confidence from the prime minister.

The Shūrā Council’s role, however, is not evident which has led to some questioning on the reasons behind the division of the legislative branch in two Houses. The upper house differs from the House of Representatives in its membership criteria: the former having a maximum of one-tenth of its members nominated by the president (decreased in relation to the 1971 Constitution which let the president nominate up to 1/3) and of at least 35 years old, while the latter has a 100% elected members with a minimum age of only 25 years; the upper house’s membership term is of six years, whereas the lower house has a term of five. Nothing more is added under the section devoted to the Shūrā Council except for Article 131 where it is established that, if the House of Representatives is dissolved, the Shūrā Council is to “carry out its joint legislative responsibilities”, which induces the idea that, unless the lower house is dismissed, the Shūrā Council is not to engage in the law-issuing process. The formulation of this article obviously has been influenced by the Constitutional Court dissolving Parliament on June 14, 2012. This has prompted president Morsi to give the Shūrā Council legislative responsibilities which now have a place in the new constitution.

### 3.2.2 The Executive Branch

The executive branch and, in particular, the role of the president, have been the very core of the whole debate around the new constitution. After many decades under authoritarian regime, the word “president” gained an autocratic sense to it that needed being changed. Thus, curbing the powers of such a post was an agreed upon measure by all the political flanks.

Within Chapter Two, Section One (section defining the president’s role), we may find, however, that the first article – Article 132 – already goes against that idea. After defining president as the head of the state and declaring him/her to be chief of the executive authority, the article goes on to say he/she “observes the separation between powers”. This comes to show how, despite the intentions of having the president’s powers reduced and prevent anyone who was to occupy the post from taking on too much authority, it is still seen as the dominant political figure, fearing he might place himself above the checks and balances system instead of being a part of such a system.

Going into the pre-requisites for any presidential candidate, he or she must be an Egyptian citizen born to Egyptian parents, hold no other nationality and cannot be married to a non-Egyptian nor under 40 years-old (Article 134). In addition, he or she must be endorsed by a minimum of 20,000 citizens with voting rights in at least ten governorates, with a minimum of 1,000 endorsements per governorate or recommended by at least 20 Parliament Members (of both houses), which is an incentive for parliament coalitions for a common candidate (Article 135). As was firstly established in the March 19 referendum in 2011, the presidential terms are limited to two, of four years each, in order to prevent anyone from perpetuating their authority (Article 133).

The president is entitled to nominate the prime minister who will then be assigned the responsibility of choosing cabinet members and presented to the House of Representatives who should grant him/her their confidence. If that does not happen, the president will have to choose another candidate from among the majority party within the House of Representatives. If the second Prime Minister to be and his cabinet still do not gain the lower house’s confidence, then the members of that council are to appoint an alternative. If in disagreement with the candidate and his cabinet, the president can dissolve the House of Representatives and call for early elections for its replacement (Article 139).

Under the president's jurisdiction is also the layout of the state's public policy and the oversight of its implementation (Article 140), all matters related to defense, national security and foreign policy (Article 141), as well as the conclusion and ratification of treaties, once approved by both legislative houses with a two-thirds majority (Article 145). Like the parliament, the president of the Republic is also to present draft laws concerning presidential, legislative, and local elections (Article 177). Still according to Article 141, all other matters within the presidential authority can be exercised through the prime minister and the ministers.

Civil and military personnel, diplomatic representatives, and political representatives of foreign countries and organizations are also to be appointed and dismissed by the president of the Republic (Article 147) as well as the heads of independent bodies (i.e. the Supreme Authority for Endowment Affairs, the Supreme Authority for Heritage Conservation, the National Council for Education and Scientific Research, and the Independent Press and Media Organizations) and of Regulatory Agencies (i.e. the National Anti-Corruption Commission, the Central Auditing Organization and the Central Bank), in accordance with Article 202.

The president is also the Supreme Chief of the police force (Article 199) and is also attributed the right of pardon (Article 149).

All the articles above attribute significant power to the president without compromising the democratic nature of the Constitution. Yet there are three main concerns that other articles raise:

1. Strong influence of the current president over the presidential law

Article 136: The President of the Republic is elected by direct secret ballot, with an absolute majority of valid votes. The procedures for electing the President of the Republic shall be regulated by law.

As Article 136 leaves the procedures for the presidential election to be regulated by law, if the president chooses to, he might use his veto power to shape the electoral law to his advantage if he attempts at being re-elected or at having a candidate of his preference win in 2016. This would certainly infuriate the opposition and aggravate the political polarization that can be seen in Egypt nowadays.

The problem becomes even more serious when, in Article 177, it is stipulated that the Supreme Constitutional Court has to be consulted in matters of elections – being the presidential, legislative or local administration. This clause was added with the purpose of preventing the court from declaring the elected organs unconstitutional based on the electoral law, forcing it to approve it prior to the electoral act.<sup>116</sup> Yet if the current political climate persists, this law making process is likely to become somewhat contentious.

## 2. Recurrence to popular referendum

Article 150: The President of the Republic may call for a referendum on important issues relating to the supreme interests of the State. The result of a referendum shall be binding to all state authorities and the general public in all cases.

Article 150 is decisively one of the most controversial ones in the whole constitutional document as its wording is highly interpretable. Almost everything can be considered a “supreme interest of the State” depending on the emphasis given to the issues being discussed. This can allow for a popular president to legally sideline the legislative branch and rule on his/her own. If one of the central changes to be made in the new constitution was to curb the president’s authority, this is certainly one of the most flagrant violations of such a consensus.

## 3. The outsourcing of core policies from the state’s civil institutions

The 2012 Constitution provides for three ambiguous councils, with overlapping competencies, to be in charge of central issues such as security, defense and foreign policy: the SCAF, the National Security Council, and the National Defense Council as stipulated in articles 193, 194, and 197, all three having the president as a member (which gives him/her significant leverage over the over foreign policy), with the latter two having civilian and military members combined. The issue is aggravated by the fact that the military is completely free from civilian supervision in what comes to recruitment, organizational structuring, and decision-making in the army (Articles 194, 195, and 196).

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<sup>116</sup> Serôdio, “Interview with jurist Dr. Ahmed Talaat on the new Egyptian Constitution,” *Arab-West Report*.

Despite these controversial clauses, the Constitution provides for important checks and balances that indeed curb the president's power.

1. Article 127 allows for the president to dissolve the parliament through popular referendum. Yet if the vote goes against the president's decision he/she shall resign;
2. Article 146 prevents the president, also the Supreme Commander of the Armed Forces, from declaring war or mobilizing troops abroad unilaterally, requiring consultation with the National Defense Council and the approval of the majority in the House of Representatives;
3. Article 148 states that both legislative chambers need to approve, by a majority in each House, the president's declaration of state of emergency. It also states the declaration will only be valid for a period of six months, after which it shall require the people's approval through referendum to remain in vigor. During the period the state of emergency is in effect, the dissolution of the lower house is explicitly prohibited.

There are two additional articles aiming at ensuring a balance between the executive and the legislative branch which, due to their inherent ambiguity, might come to cause a mutual blockade instead of an effective mutual control.

1. Article 139 (already referred to in under the Legislative Branch section) requires parliamentary confidence to be granted to the president's choice of Prime Minister and his/her cabinet. If the majority in parliament and the president are at odds, however, this might lead to a deadlock between the two branches, which would only be broken by having the president dissolving the parliament, undoubtedly worsening what would already be an unhealthy political atmosphere;
2. Article 152 is of great importance as it establishes the grounds for the House of Representatives to impeach the president. The weakness of such an article, however, relies on the fact that, while to have the president effectively impeached a majority of 2/3 in the lower house is mandatory, to trigger the impeachment case there too low of a barrier of one third of the People's Assembly. It is thus possible for a desperate opposition to use this article to try and discredit the president, aggravating the already existing tendency of

achieving political gains by attempting at undermining the opponent's legitimacy.

### 3.2.3 The Judicial Branch

In the new constitution, the independence of the Judicial Branch is largely well protected under articles 168 and 170. The judiciary will continue checking executive and legislative abuses of authority and the Supreme Constitutional Court remains exclusively competent to review the constitutionality of laws. In addition, the mechanism to appoint the public prosecutor is very well defined and in a manner that safeguards the independence of the judicial branch.<sup>117</sup>

Despite the success of such clauses, some of the flaws of the 1971 Constitution have passed on to the new one. The text contains no information on how the judges are to be appointed or dismissed, nor on how their salaries are to be determined, both consisting of essential foundations to ensure judicial independence. Furthermore, the Supreme Judicial Council – a body referred to in three different provisions of the constitution, and made responsible for overseeing the functioning of the entire judicial council – is not defined anywhere in the text. Finally, there are principles such as that a judge can only be dismissed in exceptional cases of misconduct, that should be clearly stated in the constitution and never subjected to changes in order to ensure the autonomy and well-functioning of the judicial branch.<sup>118</sup>

Some legal analysts have considered some sections to “clearly mirror the strategic considerations of the Muslim Brotherhood’s attempt at sidelining their opponents in the Judiciary”,<sup>119</sup> using as an example Article 232 which reduced the number of judges in the Supreme Constitutional Court to only the “President and the ten longest-serving judges among its members” in order to exclude the eleventh judge, Tahaney el-Gebali, who has been strongly criticizing Morsi’s policies, from the body. The emphasis on the section referring to the National Electoral Committee (Articles 208 to 211) is also considered to be a reflection of the animosity between the Islamist organization and the Judiciary after the Parliament’s dissolution in 2012. Article 211,

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<sup>117</sup> Al-Ali, “The new Egyptian Constitution: an initial assessment of its merits and flaws”.

<sup>118</sup> Ibid.

<sup>119</sup> Holger Albrecht, “Egypt’s 2012 Constitution – Devil in the Details, Not its Religion,” United States Institute of Peace – Peace Brief, January 25, 2013, accessed April 8, 2013, <http://www.usip.org/publications/egypt-s-2012-constitution>.

for example, states that the procedure for appeals against the decisions of the National Electoral Committee and the timeline for adjudication cannot be carried out in a way that “disrupts the electoral process or the annulment of final results”. In addition, it declares that final results of referendums and presidential elections cannot be challenged after their announcement – which is to be made within a period not exceeding eight days after the ballot date.

#### 3.2.4 Local Administration

One of the most clear post-revolutionary aspirations of Egyptians was to have a more decentralized system of government which was expected to 1) be a more effective way to tackle the great infrastructural discrepancies that exist between the biggest cities – mainly Cairo and Alexandria – and the rural areas, and; 2) allow for local governance to be more people-oriented instead of continuing under the grip of the central government.<sup>120</sup> However, the new constitution has not broken with the Egyptian tradition maintaining a highly centralized system of government.

Article 188 of the 2012 Egyptian Constitution stipulates that local councils are to be elected. Yet, Article 190 allows for the central government to overturn any of their decisions as a way to prevent “damage to the public interest”. In Article 187, the mechanisms of selection governors and heads of other local administration units (either by nomination or election) are left to be defined by law and it makes no attempt at defining their roles and duties, following thus the provisions of the preceding constitution.

#### 3.2.5 Conclusion

Amendments to the document, established in Articles 217 and 218, are possible, and both the president and members House of Representatives (so long as five members of the People’s Assembly sign the proposal) can propose changes. Yet, as an amendment would require a two thirds majority from both Legislative Councils, to be followed by a popular referendum, given the current political landscape in the country, it is likely this constitution will remain in effect for a long time.

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<sup>120</sup> Serôdio, “Interview with jurist Dr. Ahmed Talaat on the new Egyptian Constitution,” *Arab-West Report*.



When it comes to divisions of powers and the system of checks and balances, the new Egyptian Constitution is far from being undemocratic. Even if the presidency holds much of the power rendering the parliament relatively weak, it contains serious provisions that prevent any political faction to take an authoritarian stand. Nonetheless, there are some major flaws in it, mostly consisting of vague wording, idiosyncratic articles and ambiguous measures of checks and balances.

### 3.3 The Protection of Rights

Diana Serôdio

Egypt's 2012 Constitution contains several articles that clearly show a significant improvement when compared to the country's previous Constitutional Charts in protecting essential individual rights and liberties. In numerical terms, while in the 1971 Constitution the Rights and Freedoms' chapter included no more than 24 clauses, in this new chart there is a total of 51 articles under the same chapter.<sup>121</sup> However, due to their vague interpretable wording and confusing outline, some of such articles have been seen as problematic and, at times, even contradictory to basic human rights, which led critics, mainly from civil society organizations, to voice harsh condemnations against them.

#### 3.3.1 Gender Equality

In matters pertaining to social rights, the 2012 Egyptian Constitution is not as progressive as many western constitutions – nor was it ever intended for it to be so. Some articles unveil a conservative view of the society and, in particular, of the woman's role in it. In Article 10, for example, it is written that it is the state's responsibility to “enable the reconciliation between the duties of a woman towards her family and her work,” giving a somewhat clear message that it ought to be the women's responsibility to care for their families and not the men's. Human Rights Watch fears that such an article allows the state to go beyond the role of ensuring equality and non-discrimination within the society, interfering through such an article with the women's choice of life-style in what comes to family and work.<sup>122</sup>

Even though Article 33 refers to the prohibition of discriminating against all citizens, stating that all “are equal before the law [...] with equal public rights and duties without discrimination” there is no clause in the constitution specifically prohibiting sex-based discrimination.<sup>123</sup> The establishment of equality between men and women

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<sup>121</sup> “Comparison of Egypt's suspended and draft Constitutions,” *BBC News*, November 30, 2012, accessed April 9, 2013, <http://www.bbc.co.uk/news/world-middle-east-20555478>.

<sup>122</sup> “Egypt: New Constitution Mixed on Support of Rights,” Human Rights Watch, November 30, 2012, accessed April 5, 2013, <http://www.hrw.org/news/2012/11/29/egypt-new-constitution-mixed-support-rights>.

<sup>123</sup> Serôdio, “Interview with Dr. Amr Darrag on the new Egyptian Constitution,” *Arab-West Report*.

was purposely omitted in order to avoid a clash with the Islamists (for the most part Salafis) who interpret the *sharī'ah* as stating that women and men are not to be equal according to Islam.<sup>124</sup>

### 3.3.2 Freedom of Thought and Opinion

If Article 45 alone was the sole clause referring to freedom of thought and opinion, these would be guaranteed in absolute terms and without limitations. Yet, two other articles in the text could threaten these freedoms: Article 31, which, by defending each individual's dignity, prohibits "insulting and showing contempt toward any human being"; and Article 44 which forbids the insult of all religious messengers and prophets.

These provisions together come to demonstrate two of the most flagrant flaws of this constitutional text: one is that this constitution is not drafted in a well-structured, comprehensive way that would allow for any citizen to grasp its content easily. To be able to understand the substance of such a text, it is necessary for one to read it carefully and as a whole and decipher many of its unclear clauses to realize where limitations lie. For the average citizen, it will be thus very difficult to fully understand what his/her rights are just by reading the constitution – something which is never too easy for any citizen, but which is significantly easier to grasp in other constitutional texts with clearer wording and a more comprehensible structure. The second major flaw lies on the nature and wording of some of the articles, which is extremely vague and may allow for very extreme and limitative interpretations of what can and cannot be said or done.

To be sure, it is legitimate to limit freedom of expression for the sake of preserving the reputation of individuals (something that is provisioned even within the European Convention of Human Rights). Yet, due to the lack of clear definition of what "insult and showing contempt" is, an individual might be charged in light of Article 31 for putting up against his/her senior official for mismanagement, for example; or, in light of Article 44, for engaging in theological debates.

### 3.3.3 Freedom of Press and Association

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<sup>124</sup> "Egypt: New Constitution Mixed on Support of Rights," Human Rights Watch.

Although both Articles 48 and 49 guarantee freedom of press, printing, publication, mass media and the right to publish and own newspapers of all kinds – an innovative step from the previous constitution which contained no such provisions – the wording of these articles can be seen as problematic:

In Article 48, it says that “the media shall be free and independent” but sets guidelines for it to aim at serving the community and work in accordance to the “basic principles of the State and Society”, which, again can set ground for censoring media products on the basis of principles which are not well defined and, thus, can be extended to include almost anything. The article goes on to say that control over the media is prohibited with the exception of specific censorship that may be imposed in times of “war or public mobilization”.

Articles 50 and 51 are of significance importance given they stand for the rights “to organize public meeting, processions and peaceful demonstrations (Article 50) and “establish associations and civil institutions” (Article 51), all of the above requiring previous notification.

#### 3.3.4 Labor Rights

In Article 14 it is stated that a minimum salary “that would guarantee decent living standards for all citizens” is to be established, but the amount is left to be established by law. A maximum wage in civil service is also to be set “with exemptions regulated by law”. As set by Article 27, workers shall have a share of the management and profits of the enterprise, but also be committed to the development of production, which is to be linked to their wages.

The freedom to form syndicates, unions and cooperatives is guaranteed under Article 52, even though no guidelines are given as to how such associations can be registered. Professional syndicates are also protected under Article 53, although under this latter article professional syndicates are limited to one per profession. Quotas for farmers and workers on administrative boards of companies and in both legislative houses are granted respectively in Articles 27 and 229.

Healthcare services and insurance provided by the State “in accordance to just and high standards” are stipulated under Article 62. Social insurance services to “all citizens unable to support themselves and their families in cases of incapacity,

unemployment and old age” are mentioned in Article 65; and a pension for small-scale farmers, agricultural workers and casual workers who do not have access to the social insurance system is granted under Article 66. Furthermore, the right to peaceful strike is ensured by Article 63 which also gives guarantees such as the right to a fair pay, vacation, retirement, social security, healthcare, protection against occupational hazards and the application of occupational safety conditions in the workplace.

Article 73 states that “Enforced employment, slavery and sex trade are deemed acts punishable by law”. Forced labor is also prohibited under Article 63 but with the much criticized addition “except in accordance to the law”. In what comes to child labor, Article 70 prohibits it “before the child passes the age of compulsory education in jobs that are not fit for a child’s age or that prevent the child from continuing education”, thus implicitly allowing for some forms of child labor.

### 3.3.5 Arrest and Detention Rights

Due to the participation in the Constituent Assembly of many members who were victims of torture, inhuman treatment, arbitrary arrest and violation of privacy under Mubarak’s regime as his political prisoners,<sup>125</sup> the new Constitution includes articles 35, 36, 37 and 38 which severely restraint the recurrence to such practices.

One of the most contested articles in the new Egyptian Constitution is Article 198. In it the Military is given important powers, including the right to have civilians stand before its’ court “for crimes that harm the Armed Forces”, not making it, once again, explicit, which acts could be considered a “harm” to the Armed Forces. This clause fails, thus, to abide by one of the most important demands of the Revolution of ending military trials of civilians, a demand that grew stronger as the military’s influence on the state grew throughout 2011 and 2012.

In the past Constitution of 1971, the trial of civilians in military courts was a product of legislation which could easily be overruled by a new law. Having military trials for civilians allowed constitutionally will now make it much harder to outlaw such a practice.<sup>126</sup>

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<sup>125</sup> Albrecht, “Egypt’s 2012 Constitution – Devil in the Details, Not it Religion”.

<sup>126</sup> Al-Ali, “The new Egyptian Constitution: an initial assessment of its merits and flaws”.

### 3.3.6 Conformity with International Treaties

To ensure the protection of all Egyptians' human rights and contour the vague wording of some of the constitution's articles, Human Rights' Watch suggested having the Constitutional Assembly include a clause directly incorporating International Treaties already ratified by the country within the Constitution. However, despite their persistence, no such clause was incorporated in the final draft.<sup>127</sup>

Despite the significant improvements integrated in this new Constitution in terms of individual rights and freedoms when in comparison to the country's previous charts, the insertion of Article 81 in the chapter of Rights and Freedoms can be seen as very problematic. The article reads: "rights and freedoms pertaining to the individual citizen shall not be subject to disruption or detraction" and thus prohibits any law regulating or constraining the content of the Rights and Freedoms chapter. Yet it goes on to say in its third paragraph that "such rights and freedoms shall not be practiced in a manner conflicting to the principles pertaining to State and Society", hence referring back to Articles 10 and 11, two central, but highly interpretable articles.

Article 10 is a source of problems due to its reference to the family as "the basis of the society [...] founded on religion, morality and patriotism". Article 11 follows its same vagueness, stating that the State is to "safeguard ethics, public morality and public order [...] Arab culture, and the historical and cultural heritage of the people", not specifying any of the premises any further.

In response to concerns jurists have shown on how these two articles could be interpreted and used to interfere with the people's private affairs,<sup>128</sup> Amr Darrag says that the article is only vague for those who are not Egyptians. "If we are writing a Constitution for Egypt, we have to reflect the aspirations of our own society. Otherwise we would have a Universal Constitution. [...] For us Egyptians it is very

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<sup>127</sup> "Egypt: New Constitution Mixed on Support of Rights," Human Rights Watch, November 30, 2012, accessed April 9, 2013, <http://www.hrw.org/news/2012/11/29/egypt-new-constitution-mixed-support-rights>.

<sup>128</sup> Al-Ali, "The new Egyptian Constitution: an initial assessment of its merits and flaws".

clear.”<sup>129</sup> Yet even considering articles 10 and 11 probably do reflect the views of the majority of Egyptians, the promotion of a conservative view of the society in the Constitution encroaches arguably too much with the citizens own personal choices.

Within the State and Society’s chapter is also Article 2, which sets the principles of Islamic *sharī’ah* as the main source of legislation. When it comes to gender issues, for example, the *sharī’ah* does not consider men and women to be equals. Instead, in the words of Dr. Amr Darrag, “the Islamic *sharī’ah* does not talk about equality: it talks about justice”.<sup>130</sup>

Although, as Amr Darrag stated, Article 81 can be seen as redundant article given that every constitution pertains at being read as a whole and taken into account as such, its insertion in this chapter cannot be seen as purely procedural. Instead, it aims at clarifying that, even if the rights and freedoms of the individual citizen are ensured, they have to be applied in a way that is in accordance to the principles of *sharī’ah* and the values and moral of the Egyptian society as stated in Articles 10 and 11.

### 3.3.7 Conclusion

The current Egyptian Constitution does have a lot of room of improvement when it comes to rights and freedoms. It is apparent that Islamist and non-Islamists’ views on society were central in the writing of the Constitution, which, of course made its drafting extremely controversial right from the start. As it turns out, the Islamist majority was able to implement their more conservative vision which is patent in the document, mainly through Articles 10 and 11. The fact that Article 81, within the “Rights and Freedoms” chapter, serves as a reference to the “State and Society” section (where Articles 10 and 11 are included) is problematic because it comes to set the state’s safeguarding of the vaguely defined cornerstones of the Egyptian society as references for the application of rights and freedoms.

Hazy wording when defining freedoms, the allowance for military trials for civilians, the lack of clear clauses establishing gender equality and the abidance by international treaties already ratified are some of flaws in the document that

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<sup>129</sup> Serôdio, “Interview with Dr. Amr Darrag on the new Egyptian Constitution,” *Arab-West Report*.

<sup>130</sup> Ibid.

compromise its compliance to universal human rights and some important democratic principles. Yet it is clear that the 2012 Constitution provides significantly more protection to the individuals than the former one, especially in the articles referring to arrest and detention rights and some of the key individual freedoms.



## 4 Final Assessment

Cornelis Hulsman and Diana Serôdio

Democratic transitions are almost never smooth and the one that has been taking place in Egypt after the January 25<sup>th</sup> Revolution 2011 has been no exception.

To overthrow the regime of Hosni Mubarak, Egyptians from all across the country and from different religious and sociopolitical backgrounds came together in the country's main squares. For 18 days, there was a common goal, a common fight that united the country against the dictator and his supporters, erasing the diversity and bringing an incredibly powerful sense of cohesion that eventually led to the overthrow of the authoritarian rule.

Soon after Mubarak's resignation, however, divergences reappeared and became more and more blatant as decisions on how to bring about democracy in the country started taking place. Those who had been sidelined and banned by Mubarak were finally able to freely express their views and actively participate in the governing of the country, and so Muslim Brothers, liberals, leftists, and even Salafis (who normally did not engage in such affairs) all sought to make the most of this opportunity. Their opposing views, however, quickly materialized in deep polarization, with the deepest gap dividing Islamists from non-Islamists.

During the various electoral moments that followed the Revolution, the cleavage between Islamists (mainly the Muslim Brotherhood and its political branch, the Freedom and Justice Party and the Salafi Nour Party) and the numerous civil, non-Islamist parties became increasingly apparent, including burning Brotherhood offices, blocking public transportation, use of thugs and street fights. The first attempted at making the most of their impressive electoral gains to shape the democratic process and the society at their image; the second struggled to organize themselves and, at the same time, both non-Islamists and Islamists tried to delegitimize their opponents for their own political benefit.

Hostilities kept growing when the first Constituent Assembly was dismantled by the Constitutional Court being accused of not being representative of the Egyptian social map given with its overwhelming Islamist majority, which satisfied liberal and leftist parties. Then, as the second Constituent Assembly was being formed, the Islamist-dominated House of Representatives was also dissolved for having been

elected through an unconstitutional electoral law, which convinced Islamists that the courts were politicized against them. Parallel to all this, the SCAF maintained a close grip to power, which was only loosened when Muhammad Morsi, former member of the Muslim Brotherhood, was elected president. It seemed as though polarization had come to stay, having flared up again in November after Morsi's November 22 decree which gave him extrajudicial powers and during the referendum in December, 2012.

After the dismantlement of the first Constituent Assembly, the formation of the second one was done differently, as Islamists were more diligent to bring about consensus between political opponents on the membership of the new body and its regulations. The opposition stressed that the assembly should reflect all aspects of the Egyptian society instead of parliamentary majorities, which are but transitional. Islamists, however, were not willing to completely give up on what they saw as their right of nominating half of the assembly's members – even if not from among their own political stands – given the overwhelming majority they had obtained in the previous parliamentary election. In the end, consensus was only partially achieved with a few civil parties withdrawing from the start in contestation of the permanence of an Islamist majority.

The Constituent Assembly held its first session on June 18<sup>th</sup> and its deadline was already set as six months by the March 19<sup>th</sup> referendum of 2011. The assembly started in a period of deep political cleavages; on June 14 the court dissolved the Egyptian Parliament. The second round of the presidential elections resulted in an almost equal electoral result for former general Ahmad Shafīq and Muslim Brotherhood Muhammad Morsi which was followed by a week of mutual accusations of polling fraud and negotiations with the electoral committee declaring Morsi to be the first democratically elected president of Egypt on June 24, 2012.

For the first few months, the process seemed to be running relatively smoothly, yet, as the deadline approached, grievances from both sides started to arise. The non-Islamists complained that the assembly's Islamist majority gave no space for discussion and did not take their contributions in account. Furthermore, they accused Islamists of attempting at shaping the document to their liking and at rushing up the process in order to put the final draft to referendum before the ruling of the Constitutional Court on the Shūrā Council and the Constituent Assembly's constitutionality. The Islamists, on the other hand, claimed their opposition was

deliberately attempting at delegitimizing the assembly's work in the eyes of the people in order to prevent parliamentary elections to take place soon after, in which case they would have no real chances of winning.

Finally, virtually all non-Islamist members of the assembly withdrew, leaving the final voting on the Constitution's draft mainly to the Islamists. The voting took place under Morsi's controversial November 22<sup>nd</sup> decree which protected the assembly and the Shūrā Council from being subjected to any court's verdict. The President also granted the assembly two more months to finalize its work, yet they renounced them and, after a voting marathon of 18 hours at the end of November, they submitted the final draft to referendum. The Constitution passed with a 64% approval, despite the low voter turnout of only 33% of the electorate which meant that around 21% of the Egyptian electorate approved the current constitution which one cannot call an overwhelming consensus.

The current Constitution is definitely much less authoritarian than any of the previous constitutions since the Constitution of 1923, the first after Egypt's independence. The SCAF forming the interim leadership of the country between Hosni Mubarak's deposition and the election of President Morsi remains an important force in the country and has been able to secure its position in the new constitution.

The Constitution's most fervent critics have been scouring the text for evidence that the Islamists are trying to implement some sort of a theocracy. Articles 4 and 219 are indeed new articles with Islamic referencing, with the latter being more contested for allowing a variety of traditional Sunnī Islamic jurisprudence to be used by legislators and courts in their verdicts. Given the broadness of Islamic jurisprudence, however, there will be many interpretations of the *sharī'ah* for the jurist to refer to – some more severe, others more moderate – giving him or her quite a bit of space of maneuver (for better or for worse). Religion will now be more present, being a sort of inspiration for the state's functions, but it remains inaccurate to say Egypt is now a religious state as the political power remains firmly in the hands of civilians.

In what comes to the political system, the new constitution contains important clauses curbing the powers of the presidency and giving the parliament considerably more leverage than it had in the 1971 Constitution. The judiciary is also ensured its independence and a good checks and balances system is enforced in order to

prevent power outreaching from any of the three main branches of government. Yet, in this section, the way some powers are ill-defined, some functions overlap, a few important clauses are lacking and the wording in several articles is unclear, make it particularly pertinent to wonder if the process was not indeed rushed up, despite the Islamists' denial that such was the case.

Finally, in terms of the protection of rights, this Constitution shows considerable improvements in comparison to the previous one, with better provisions for arrest and detention rights and key individual freedoms. Yet, as these are to be in accordance to unclear clauses such as Articles 10 and 11 (defining the cornerstones of the Egyptian family and society and their values and morals), Article 31 (prohibiting insulting or showing contempt towards any human being) and 44 (interdicting insult or abuse of all religious messengers and prophets), it remains to be seen how legislators will interpret violations to freedoms such as freedom of expression.

There is no doubt that the new constitution of Egypt is imperfect, but given the post-revolutionary sociopolitical polarization and its established drafting timeframe of six months only, there is also no surprise that such is the case. Egypt is going through a very unstable and complex transitional period while facing enormous economic and infrastructural difficulties. If constitutional drafting is already difficult on its own, in such a context it becomes particularly complex. Due to the high segregation of the Egyptian political arena, intensive and extensive internal consultations within each party were required. Following that, negotiations with the many political factions were even lengthier. Six months were thus, from the beginning, a tough deadline to comply with.

The 2012 Egyptian Constitution is lacking a comprehensive structure and leaves too much space for interpretation in key clauses, making it hard to grasp the meaning and the outreach of certain articles. Juxtaposition is also recurrent in the text, transpiring some lack of quality in the drafting process. But if it is not as faultless as its proponents make believe, it is also not the disaster that some of its detractors claim it to be, having significant improvements in what comes to the provision of rights and the system of government. Yet its legitimacy has undoubtedly been affected by lack of cross ideological consensus, the withdrawals and the low voter turnout in the referendum that led to its approval. As its flaws start becoming apparent to the public, it is quite safe to say that Egypt's constitutional reform is not over yet.

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## **About the Center for Intercultural Dialogue and Translation (CIDT), Center for Arab-West Understanding (CAWU) and Arab-West Foundation (AWF)**

CIDT, an Egyptian not-for profit company, CAWU, an Egyptian NGO and the AWF, a Dutch NGO, were all established around the Egyptian electronic magazine *Arab-West Report* (AWR). AWR was established with the purpose of correcting misinformation that could result in aggravating Muslim-Christian and Arab-West relations. In over fifteen years of work we have seen and documented many instances where biased reporting actively contributed to an escalation of tensions.

We are working with multiple organizations in order to meet Egyptian legal requirements on companies and NGOs; CIDT produces AWR, CAWU is responsible for intern activities and organizing dialogue meetings, AWF publishes AWR and provides strategic advice to CIDT and CAWU.<sup>131</sup>

The focus of all three organizations is on contemporary Muslim-Christian and Arab-West relations because in this area in particular there is much ideological misreporting. AWR is also reporting on Muslim-Christian tensions since they tend to cause Egyptian Christians to leave the villages they have inhabited for centuries, reducing pluralism in areas where Muslims and Christians have shared mutual sorrows and joys in once pluralistic regions. Christian demography is rapidly changing, which surprisingly has drawn only modest interest among researchers. Our attention to Muslim-Christian relations is also important because ideologically-based reporting misrepresents one party or the other, be he or she either Muslim or Christian, which adds to tensions and creates a self-fulfilling prophecy.

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<sup>131</sup> See also the explanation with two organigrams on the website of the Arab-West Foundation, [http://www.arabwestfoundation.com/?About\\_AWF:Cooperation\\_AWF%2C\\_CIDT\\_and\\_CAWU](http://www.arabwestfoundation.com/?About_AWF:Cooperation_AWF%2C_CIDT_and_CAWU).

This reporting should be understood in the widest sense of the word; not only media reporting, but also the reporting of interest groups and activists or statements made by politicians. Too much reporting (but not all!) and claims are motivated by political interests and ideologies. Our purpose is to be as accurate as possible in reporting what we find on the ground and based on this try to understand why events have occurred as they did. Only then others will be able to use this information for the sake of making improvements.

Good critique of current reporting requires much investigative work and this in turn is only possible with support for our work.

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