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REPORT

ASSESSMENT OF THE 2012 CONSTITUTION OF EGYPT



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ASSESSMENT

2012 CONSTITUTION OF EGYPT

1. INTRODUCTION

The following analysis is based on the Egyptian Constitution adopted on 30 November 2012 by the Constituent Assembly, approved by referendum from 15-22 December 2012 and signed into law by the President on 26 December 2012. This review is based on a translation by Democracy Reporting International (hereafter, “DRI”). All articles cited are those of the Constitution if not indicated otherwise.

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2. SEPARATION AND BALANCE OF POWERS

The separation and balance of powers means that “the three branches of democratic government – the legislative, executive and judiciary – should not be concentrated in one branch, but should be distributed such that each branch can independently carry out its own respective functions”.¹

In order to bring this principle to life, the Constitution of a country should include provisions that would institute a system of checks and balances between each of the powers and provisions, securing their independence. The manner in which this is done depends *inter alia* on whether the system chosen is parliamentary or presidential in nature.

¹ DRI report, *International Consensus: Essential Elements of Democracy* (October 2011). It can be downloaded at: http://www.democracy-reporting.org/files/essential_elements_of_democracy_2.pdf

2.1 POWERS OF THE PRESIDENT

The Constitution contains many provisions which suggest the intention to keep the powers of the President strong. According to Article 136, the President is elected directly by the people for a term of four years. Reelection is possible only once (Art. 133). The provision could have been bolstered by stipulating that the same person can never return to office after the expiration of the second consecutive term.

The President has legislative initiative and may propose bills (Art. 101). In terms of balancing powers it would have been useful to require the Prime Minister's signature ('countersignature') to validate legislative initiatives made by the president. Counter-signature is important from the point of view of executive accountability because, according to Article 109 of the Constitution, only the Prime Minister and/or the Cabinet may be called upon to answer questions before the Chamber, while no such provisions are envisaged for the office of the presidency.²

According to Article 127, the President may dissolve parliament as a result of a "causative decision". It is not clear what is meant by "causative decision". Furthermore, a referendum on the dissolution of parliament as a mechanism for endorsing the dissolution may disturb the essence of representative democracy – as it may facilitate a clash between a directly elected President, the directly elected House of Representatives and the institution of referendum, which is also a direct expression of citizen will used for expression on an issue, rather than an alternative to elections. Clarification and eventual limitation of this power against discretionary presidential use would contribute to reinforcing the rule of law.

The President has the power to call a state of emergency. The current Constitution leaves much room for improvement. In fact, a loophole exists, when the House of Representatives has been dissolved, that allows the President to call a state of emergency upon approval by the Shura Council, one-tenth of whom are appointed by the President (Art. 128). And while the President may not dissolve the lower chamber during a state of emergency, he may do so for other reasons, such as stipulated vaguely in Article 127, and Article 139 when there is an inability to come to agreement on the prime minister and government. The combination of dissolution powers and declaration of states of emergency provide a strong basis for exceptional rule. While such powers are often within the prerogative of the executive, it is nonetheless recommended to consider requiring that states of emergency only be approved by the lower chamber, without exception, which

would limit Presidential discretionary power and enhance rule of law.

Additionally, the current Article 148 states that a simple majority is needed to approve a state of emergency as proposed by the President. Given the often far-reaching limitations on rights and freedoms that a state of emergency may entail, a higher threshold would improve the democratic quality of such a serious decision. A quorum (participation of a minimum number of MPs) should also be required in such cases. Further recommendations concerning the state of emergency are provided below.

The President has the power of a "suspensive" veto over laws (Art. 104), meaning that he or she may object to a draft law and refer it back to the House of Representatives. While this is a common power conferred on a president in many constitutions, what makes the Constitution less balanced is that in order to override the veto of the President, the House of Representatives must achieve a majority of two-thirds in order to pass such a draft into law. Such a provision is contained in the US Constitution, but it has a different impact there given the otherwise very powerful US Congress. A two-thirds majority may be hard to achieve and may hamper the work of the legislature unnecessarily. Alternatives, such as an absolute majority of all members, provide a more balanced way of allocating powers.

Article 131 provides the President with decree-making powers, which is not uncommon in some constitutions. However, the article is not clear on the fate of such decrees in cases where they were not presented to the chambers, or not approved by the chambers, stating that they may be in such cases revoked, or their effects "settled in some other manner". This provides the opportunity for Presidential decrees to circumvent the system of checks and balances put in place by the Constitution, thus providing a window for rule by decree.

Finally, Article 150 states that the President may call referendums on important issues relating to the supreme interests of the state. While such a power is commonly conferred on the office of a president in some constitutions, the Constitution should nevertheless provide clear delimitation on what may be the subject of such referendums – in order not to circumvent the constitutional process of decision-making.

2.2 THE LEGISLATURE AND LEGISLATIVE-EXECUTIVE RELATIONS

Article 2 of the Constitution states that the principles of Islamic Sharia are the main source of legislation, while Article 4 indicates that *Al-Azhar* should be consulted on Islamic law. Article 219 indicates that: "The principles of Islamic Sharia include its general evidence, its foundational rules, its rules of jurisprudence, and its credible sources accepted in Sunni doctrines and by the larger community." While Article 2 is not new, these three provisions have raised concerns that the legislative role of parliament, which expresses the people's sovereignty, may be unduly restricted through Islamic law.

² "A countersignature is a constitutional requirement requesting the Prime Minister or a Minister to sign an official act already signed by a head of state, who by signing it assumes a political and legal responsibility for this act. The institution of countersigning was adopted, *inter alia*, by Constitutions in Poland, Latvia, Hungary, Bulgaria (in the negative form enumerating exclusions), as well as the Czech Republic, Romania, Ukraine and Lithuania (positive countersigning)" taken from, Olechno, Artur: University of Białystok, Report on "The Constitutional Aspects of Countersignature in Central and Eastern European Countries".

While the Constitution introduces some positive measures regarding immunities for deputies (Articles 89 and 90), Article 111 is vague and open to abuse; it notes that deputies may be dismissed when they have “lost trust, status of violated membership requirements that were prerequisites for their election or violated duties of their membership”. This wording leaves much room for interpretation of how deputies may lose their seat and, further, may permit parties requesting some form of “imperative mandate” (i.e. parties may request deputies to leave their seat if they vote against the party line). As a rule, democratically elected representatives should be removed only in cases of criminal proceedings being initiated against them. Removal of a deputy from their seat, even if by two-thirds majority as stipulated by Article 111, should be governed by strict and clear provisions for exceptional circumstances.

2.3 THE JUDICIARY

Provisions on the judiciary are found in Chapter Three of the Constitution. The provisions are generally appropriate, but they could be strengthened in a number of ways. Article 170 could be supplemented by stating that judges should not belong to any political parties, trade union or perform any public activities incompatible with the principle of independence of the courts and judges³.

Importantly, the Constitution could be more specific as to the non-removability⁴ of judges and introduce provisions providing them with functional immunity⁵ from detention, arrest, criminal liability and deprivation of liberty.

The provisions could guarantee that court proceedings would have at least two stages – in accordance with Article 14 paragraph 5 of the ICCPR,⁶ which states that: “Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”

2.4 INDEPENDENT INSTITUTIONS

The Constitution foresees a number of independent institutions (Part IV) and states some important principles to

underpin their independence, such as technical, administrative and financial autonomy. In the list of independent institutions, the Constitution does not include an independent human rights institution. Such a body, the National Council for Human Rights, is only incidentally mentioned in Article 81. The mandate and independence of such a body would be better enshrined in the Constitution.

3. POLITICAL PARTIES AND ORGANISATIONS

Political parties play an essential role in ensuring political pluralism and the proper functioning of democracy. Their existence is based on the exercise of the right to free association⁷, and right to free expression⁸, in particular. Political parties are organisations which seek to participate in the management of public affairs, including the presentation of candidates to free and democratic elections. For this reason, their role in pluralistic systems and national power sharing is special and warrants particular attention.

Freedom of thought and opinion are guaranteed in Article 45 of the Constitution, and the freedom of association in Article 51. While this is welcomed, and theoretically suffices to ensure the operation of political parties, it could have been useful nonetheless to include a special constitutional provisions on political parties, in order to highlight their importance and their role. Currently only Article 6 specifically mentions parties, banning the formation of parties who discriminate based on gender, origin or religion.

4. THE RULE OF LAW

The principle of Rule of Law may be interpreted both narrowly, to mean an efficient and effective system of justice and law enforcement (see page 12 of the 2011 DRI Report), or more widely, to include the processes of law-making and policy formation, reflecting the will of the people. Rule of law is essential to democratic order.

4.1 STATE OF EMERGENCY

As discussed above, it appears that the Constitution confers the President powers which are far-reaching on the state of emergency. It also does not go far enough in setting out the limitations and grounds for introducing a state of emergency.

³ See, for example, Article 178 of the Constitution of the Republic of Poland, which states that: “Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes. Judges shall be provided with appropriate conditions for work and granted remuneration consistent with the dignity of their office and the scope of their duties. A judge shall not belong to a political party, a trade union or perform public activities incompatible with the principles of independence of the courts and judges”.

⁴ Basic Principles on the Independence of the Judiciary endorsed by the United Nations General Assembly in 1985

⁵ For background it is useful to consider paragraph 61 of the Venice Commission Report on the Independence of the Judicial System, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12–13 March 2010), which states that: “It is indisputable that *judges* have to be protected against undue external influence. To this end they *should enjoy functional – but only functional – immunity* (immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crimes, e.g. taking bribes)”.

⁶ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

⁷ Article 22, International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976

⁸ Article 19, International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976

This issue has particular relevance in Egypt, as from 1967, with a short break in 1980-1981⁹, the country was run under a state of emergency, circumventing all constitutional mechanisms in place. The state of emergency has far-reaching implications for the exercise of human rights and fundamental freedoms and for these reasons warrants strict regulation in the Constitution, in accordance with the ICCPR¹⁰, and the Arab Charter on Human Rights¹¹. The European Convention on Human Rights and Fundamental Freedoms, as well as commitments of the OSCE may also be used to guide (and not legally bind) drafters in this process.

As already suggested above, in the case of the President calling a state of emergency, Article 148 of the Constitution may be amended to read that only the House of Representative can approve such a state of emergency and by way of absolute and not simple majority.

The grounds for the state of emergency should be strictly outlined in the Constitution and the manner in which fundamental rights and freedoms may be restricted within the limits of international law – and the appeal for review of such restrictions by citizens should be stipulated.

Related to this issue, Article 147 of the Constitution remains a concern, as it provides the President with unfettered and unchecked powers to appoint and dismiss civil and military personnel as well as diplomatic representatives and confirm the acceptance of diplomatic representation in Egypt. It is not clear how this provision would co-exist with Article 165, which speaks of an authority in charge of these issues. It is recommended that these provisions be clarified and the powers of the President counter-balanced or at least qualified.

4.2 LAWS AND REGULATIONS

Article 164 raises serious concerns, as it stipulates that “the Prime Minister shall issue regulations of discipline [decrees which issue penalties on citizens and not part of any law] upon the Cabinet’s approval”. Such powers defy the principle of rule of law, as they permit the punishment and penalizing of citizens based on decree and not as prescribed by law adopted by the House of Representatives and not subject to control by the judiciary. This provision circumvents all the checks and controls established by the Constitution, which

ensure that the right to liberty and fair trial are respected as required by international law¹².

Article 222 stipulates that all provisions in force prior to the proclamation of the Constitution shall remain in force and valid. This provision is difficult to reconcile with the necessity for all laws to be in line with the Constitution and as such, they should at least be subject to constitutional control, if not repealed.

5. ACCOUNTABILITY AND TRANSPARENCY

5.1 ACCOUNTABILITY

The Constitution contains many positive provisions on the executive’s accountability to the legislature. These are found in Articles 105, 106 and 109. Article 115 further stipulates that the House of Representatives is tasked with monitoring the work of the executive authority. Article 108 provides citizens with the right to submit complaints to either chamber of parliament, which then should be transferred on their behalf to the appropriate ministers.

This however does not replace the institution of a Human Rights Commissioner or Ombudsperson, who, as described above, constitutes a system of oversight and control of the government and legislative branch, and can respond to an individual citizen’s complaints on the violation of fundamental rights and freedoms.

Furthermore, Article 204 establishes the National Anti-Corruption Commission which, while positive, would benefit from basic elaboration on the term of office and method of election of the head of such an office, as well as the independence of its budget, amongst others.

Articles 122, 123 and 124 introduce robust powers for the House of Representatives to address and question the government, also through special commissions and fact-finding committees.

Another important aspect of accountability-related powers is the no-confidence motion provided in Article 126 of the Constitution. However, this article would benefit from clarification as to whether such a motion requires a majority vote of all House members, or a majority of members present in the house at the time of voting. The difference may be very significant.

The Constitution also makes the executive accountable to the judiciary by laying down impeachment procedures in Article 152 and criminal responsibility of the Cabinet in Article 166. However, what is not certain is the interrelationship with Article 149 of the Constitution, providing the President with the right to pardon or mitigate a sentence and whether indeed this would be applicable to processes in place for liability of members of the government under Article 166. In such cases,

⁹ International Consensus: Essential elements of Democracy- Report by Democracy Reporting International, 2011.

¹⁰ Article 4 of the ICCPR states as follows: “1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.”

¹¹ League of Arab States, Arab Charter on Human Rights, May 22, 2004, *reprinted in* 12 Int’l Hum. Rts. Rep. 893 (2005), *entered into force* March 15, 2008.

¹² Article 9 and Article 14 of the , International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976

it would be useful if the pardon or mitigation of a sentence would not apply.¹³

5.2 TRANSPARENCY

Article 93 of the Constitution, which permits the sessions of the House of Representatives or the Shura Council to be closed, is too broad. The provision does not indicate the reasons for which such sessions may be closed; instead, it leaves the decision to one or the other of the Houses, and finally, it is not clear about what kind of majority such a decision requires. Hence, further clarification would enhance transparency and diminish arbitrary usage of the provisions.

The Constitution also does not provide for a requirement to record and publish the debates of the House of Representatives. It is recommended that this be introduced as a basic element of transparency.

6. FREEDOM OF THE MEDIA

The freedom of the media is based on the fundamental right of free expression and freedom of information; it contributes to the transparency and accountability of government. This includes the obligation to ensure that excessive media concentration is prevented.¹⁴

Article 48 of the Constitution stipulates that the media shall be free and independent. It also states that the closure or confiscation of media assets may not be done without judicial order. These are positive provisions. However, it may be reconsidered whether the nationality requirement inferred in Article 49 is necessary in a democratic society.

7. POLITICAL RIGHTS

7.1 FREEDOM OF ASSEMBLY

Article 50 states that: "Citizens have the right to organize public meetings, processions and peaceful demonstrations, unarmed and based on the notification regulated by law. The right to private assembly is guaranteed without the need for prior notice."

The notification requirement could be understood by authorities to represent a need for permission. However, to be in line with international human rights obligations, notification should serve the purpose of helping authorities facilitate assemblies rather than prohibiting them. If a system of notification is detailed in primary law, this should be clarified and exception should be made for spontaneous assemblies. Given that there are exceptional circumstances

for which authorities may indeed prohibit a demonstration (or suggest another time or location for it), such limitations should be clearly regulated as well. Unfortunately the provision does not include any narrow and specific reasons that would justify limiting the right.¹⁵ "Indeed, in an open society, many types of assembly do not warrant any form of official regulation. Prior notification should, therefore, only be required where its purpose is to enable the state to put in place necessary arrangements to facilitate freedom of assembly and to protect public order, public safety and the rights and freedoms of others. Any such legal provision should require the organizer of an assembly to submit a notice of intent rather than a request for permission".¹⁶

7.2 FREEDOM OF ASSOCIATION

Article 46 states that "citizens have the right to form associations and parties by only notification, and they shall have a legal personality and said entities or their boards of directors shall not be dissolved except by a judicial order."

Article 22 of the ICCPR indicates that all people should have the right to freedom of association with others. It is generally understood that this right also extends to *de facto* associations, i.e. less formalised groupings of people. The Egyptian text reduces the notion of an association to formal arrangements that enjoy legal personality. While this may be meant as a protection ("do not deny legal personality to an association") it could limit the scope of the right unduly ("no protection for an informal association").

The limitations of the right are not clear. The article merely states that associations can only be dissolved by judicial order. While it is positive that associations cannot be dissolved by the administration, there are no reasons listed for which a Court could dissolve an association. This creates a risk that Courts could arbitrarily decide the reasons for which an association can be dissolved.

Legitimate reasons, according to the ICCPR, include: "prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others."¹⁷

7.3 THE RIGHT TO VOTE

The constitutional provisions on voting bring the country's electoral arrangements closer in line with international standards. Article 55 includes positive guarantees for the fairness, impartiality and the integrity of elections. A few key shortcomings remain, notably regarding the representation of women and challenges to the validity of the presidential

¹³ See, for instance, Article 139 of the Constitution of the Republic of Poland, which states that: "The President of the Republic shall have the power of pardon. The power of pardon may not be extended to individuals convicted by the Tribunal of State."

¹⁴ International Consensus: Essential elements of Democracy- Report by Democracy Reporting International, 2011

¹⁵ According to the ICCPR, such limitations can only occur which are "in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others".

¹⁶ Par 4.1, OSCE/ODIHR- Venice Commission Guidelines on the Freedom of Peaceful Assembly (Second Edition) 2010, page 18.

¹⁷ Article 22(2) International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976

election. DRI has reviewed the electoral arrangements in detail in another publication.¹⁸

7.4 LIMITATIONS TO POLITICAL RIGHTS

Article 81 provides some guidance on the limitations of human rights, noting that the “essence and origin” of a right shall not be constrained. While it is positive that the essence of a right shall not be violated, other important criteria such as proportionality are missing. Article 81 also includes vague language that could be abused to restrict political rights unduly (“Such rights and freedoms shall be practiced in a manner not conflicting with the principles pertaining to State and society included in Part I of this Constitution.”)

¹⁸ DRI Briefing Paper 36: *Egypt's Elections: More Legal Roadblocks – An Assessment of Egypt's Framework for Parliamentary Elections under the New Constitution* (March 2013). It can be downloaded at http://www.democracy-reporting.org/files/bp_36_more_roadblocks_1.pdf

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