

# EGYPT'S TRANSITION: PROSPECTS FOR CONSTITUTIONAL REFORMS

## EXECUTIVE SUMMARY

With the election to the Shura Council soon completed, Egypt will enter the next stage in its transition. Yet, the roadmap from here is not clear and remains controversial. There is broad agreement that the Supreme Council of the Armed Forces (SCAF) should soon cede power and that presidential elections should take place, but the implications of that scenario for constitutional reforms are not clear.

A comprehensive reform of the constitution should be a cornerstone in the construction of a new Egypt. However, many political forces now argue for a short and limited reform process with the main aim of providing a clear basis for presidential powers before elections take place. In this logic, a quick departure of the SCAF necessitates quick presidential elections, which in turn require a quick adoption of constitutional reforms. This argument can be questioned: for example, the SCAF's executive power could also be filled by a parliament-appointed government.

More importantly, holding quick presidential elections does not necessarily mean that only limited constitutional reforms can take place. Indeed quick changes to the constitutional framework could be adopted by parliament to provide an interim basis for the exercise of state power and the election of a president. Systemic reforms could then take place within a sufficient timeframe.

Tunisia has chosen a similar route. It is governed on the basis of an interim law on public authorities, which provides the legal basis during the current transition until Tunisia's National Constituent Assembly adopts a new constitution, which is expected within one year.

Certainly there are other valid reasons for limiting the scope of reforms in Egypt— not least to avoid the divisive question of the role of Sharia law. In view of the country's dire economic straits, policy makers may feel that political energies should be invested in effecting an economic recovery rather than be oriented to wide-ranging constitutional debate.

However, a hasty constitutional reform process would be problematic for a number of reasons. Without comprehensive reforms the transition process would have focused more on exchanging political personnel than on re-inventing institutions. The old constitution is full of loopholes and vague provisions that could allow a parliamentary majority to re-make the state by parliamentary majority decisions instead of through a systematic and comprehensive constitutional reform process.

A fast process based on a political deal would also be a missed opportunity for Egypt to engage in a national dialogue about how to build a democratic state. A number of issues require careful attention, which a short process cannot provide, including the creation of strong independent institutions to address human rights abuses and corruption. These objectives should not be problematic. A systematic reform process, involving broad public consultations, would also oblige political forces to think about sustainable compromises on divisive issues like state and religion rather than making this an ever-brewing controversy.

## 1. INTRODUCTION

Egypt's transition has been fraught with uncertainty ever since Mubarak fell from power one year ago. From February to March 2011, the Supreme Council of the Armed Forces (SCAF) effected limited amendments to the constitution through a referendum that paved the way for parliamentary and presidential elections. On 30 March 2011, the SCAF issued a Constitutional Declaration that superseded the existing constitution.<sup>1</sup>

During the interim period since the revolution the SCAF has ruled supreme, concentrating executive and legislative power in its own hands, with a SCAF-appointed civil cabinet playing a very limited role. The formation of the People's Assembly on 23 January 2012 has returned legislative power to an elected body.<sup>2</sup> In the logic of the Constitutional Declaration, the SCAF still represents the executive powers of a president.

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<sup>1</sup> For the text of the Constitutional Declaration, see: [http://www.cabinet.gov.eg/AboutEgypt/ConstitutionalDeclaration\\_e.pdf](http://www.cabinet.gov.eg/AboutEgypt/ConstitutionalDeclaration_e.pdf). Subsequent references to this declaration are drawn from this source.

<sup>2</sup> Two issues remain unresolved at the time of writing. First, article 56 of the Constitutional Declaration seems to give the SCAF a veto right ('can promulgate laws or object to them'), but it is unspecific. The Declaration also leaves open what should happen if the SCAF wields a veto. Politically, it may be difficult for the unelected SCAF to veto the legislation of the elected parliament. Second, there is a conflict about whether legislation that has already been initiated by the cabinet now has to be adopted by parliament, or if the SCAF can do so.

According to the Constitutional Declaration, the next steps in the transition will be the election and formation of the Shura Council and the election by both houses of parliament of a Constituent Assembly that will elaborate a new constitution, followed by presidential elections. Under pressure from a restive public, the SCAF agreed on 22 November 2011 with political parties that power should be handed over to an elected president no later than 30 June 2012. For many political players this means that constitutional reforms should be completed beforehand<sup>3</sup> in order to provide a clear constitutional role to a newly-elected president.

There are however question marks on whether such swift constitutional reforms— at best there would be a few months available, at worst only a few weeks— are feasible or even desirable. To make fast reform feasible, some political forces are only considering amendments to part V of the constitution, which deals with the political system. Others wonder if constitutional reforms should initially just provide a transitional framework to create the time necessary for a systematic and far-reaching re-write of the constitution.

## 2. IS A FAST-TRACK SCENARIO DESIRABLE?

Currently there is a strong opinion, along with extensive media debate, about the need to carry out a limited and fast constitutional reform process followed by presidential elections in June 2012, or even earlier. There is widespread desire for the SCAF to withdraw from civilian power and the SCAF itself has indicated a timeframe for elections.

Proponents of the fast-track scenario argue that presidential elections only make sense if a newly-elected president has a clear mandate based on a reformed constitution. This linkage between presidential elections and completed constitutional reforms creates the rush for a compressed constitutional reform process. Before looking at the implications of this scenario, it is worth considering the possible content and feasibility of such rapid reforms.

### THE CONTENT OF FAST-TRACK REFORMS

Clearly a comprehensive overhaul of constitutional arrangements would not be possible in a matter of a few months or even weeks. Thus, it is widely believed that fast-track reforms would only touch a few aspects of the constitution, in particular part V, which deals with the country's political system. There is consensus that the arrangements underpinning Mubarak's hyper-presidentialism must be abolished. Most analysts believe that some form of semi-presidentialism will be agreed on. In that case, the debate would mainly focus on questions like the role of the prime minister and his or her cabinet vis-à-vis the president

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<sup>3</sup> Some argue that constitutional reforms should be completed before the candidate registration starts, which would compress the timeframe for reforms even further.

and parliament, presidential veto powers and the list of competencies of the various institutions.

However the assumption that part V of the constitution is the easy part may be wrong. Part V contains more than half of the constitution's articles, including complex questions like the role of the Shura Council, local administration and an independent judiciary, as well as controversial topics such as the role of the military, the police, combating terrorism and the role of the media.

These issues do not lend themselves to quick resolution and some of them are at the core of the demands for a new Egypt. It is possible that reform of part V is shorthand for a reform of the political system at national level only, rather than encompassing all aspects of part V of the constitution.

### ARE FAST CONSTITUTIONAL REFORMS FEASIBLE?

With the completion of the Shura Council elections on 22 February 2012, the upper house is scheduled to convene on 28 February. A joint sitting of both houses could take place in the first week of March to elect the Constituent Assembly (CA). At this stage there is potential for delays, because the Constitutional Declaration is vague on the ways in which parliament should form the CA. Article 60 indicates that the joint parliamentary assembly should choose (*yentakheb*) the members of the CA. This could mean an election or some form of selection. Parliament itself would need to decide on this procedural question, which is a potentially thorny one given that all of the political parties have an interest to have as many representatives in the CA as possible. There are many forms in which such an election could take place.<sup>4</sup>

Likewise the actual mandate of the CA could become controversial. The Constitutional Declaration states that the CA will prepare a draft constitution, which will then be put to a referendum. There appears to be an opinion within the Muslim Brotherhood that the CA should rather play the role of a parliamentary expert committee, which should refer its work back to parliament for adoption before a referendum is held. However there is no basis in the Constitutional Declaration for such a process.

Once the CA is formed it will have to adopt rules of procedure for its own work, a potentially controversial undertaking. In Tunisia, for example, three months after the National Constituent Assembly was formed, some articles of the rules of procedure are still under discussion.

All of these issues can become controversial because many procedural rules are essentially about the exercise of political power. Alone, the question of majority requirements for

forming a CA and adopting a text are far-reaching.<sup>5</sup> This is but one among a range of politically sensitive questions. All of these questions can indeed be resolved, but in a democracy they need discussion and deliberation, which militates against a swift reform process.

Then there are practical concerns to be resolved. The work must be divided, relevant committees formed and draft texts prepared for discussion. A secretariat must be established to support the work of the CA.

A fast reform process may be feasible, but it would likely be very limited (i.e., only focused on the political system rather than part V of the constitution in its entirety), require quick political deals and come at the expense of a thorough, deliberative process involving broad public consultation.

### THE APPEAL OF A FAST-TRACK TRANSITION

The main argument brought forward for fast-track constitutional reform is the need for the newly-elected president to have a clear mandate. For many actors, this issue has become linked to the idea of restoring government by civilians. There may be other motivations at play, however, which in turn suggests the potential value of disentangling these two issues.

According to various opinion polls,<sup>6</sup> there is a great public demand for stability. A quick resolution of the transition may seem like a promising path towards that stability. Eagerness on the part of policymakers to deliver on public demand for stability may be motivated by an interest to reassure markets and concentrate efforts on addressing economic deterioration in the country. From this perspective, a drawn-out constitutional process may seem like an unnecessary diversion of political energies.

Alongside this, a comprehensive constitutional reform process, which would take more time, would have to address deeply contentious issues, notably the role of Islam and Sharia law within the state. Any such debate would certainly have major public resonance and risk a culture war on complex issues of identity, history and ideology.<sup>7</sup> The Muslim Brotherhood, positioned between liberal parties on the one

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<sup>4</sup> For an elaboration of these various election options, see: "Foster Consensus to Build the New Egypt", by Michael Meyer-Resende, *Egypt Independent*, 09 October 2011; <http://www.egyptindependent.com/node/503194?43850378=1>.

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<sup>5</sup> This point has been argued in previous DRI publications. For example, see: *Promoting Consensus: Constitution-making in Egypt, Tunisia and Libya*, briefing paper no. 19, 30 November 2011 ([http://www.democracy-reporting.org/files/dri\\_supermajorities\\_bp\\_19\\_formatted\\_final.pdf](http://www.democracy-reporting.org/files/dri_supermajorities_bp_19_formatted_final.pdf)); *Egypt's Elections: Greater Transparency to Strengthen Confidence*, briefing paper no. 19, 17 November 2011 ([http://www.democracy-reporting.org/files/briefing\\_paper\\_18\\_transparency\\_november\\_2011.pdf](http://www.democracy-reporting.org/files/briefing_paper_18_transparency_november_2011.pdf)); and "Rules for Transition" by Michael Meyer-Resende, *New York Times*, 25 November 2011 ([http://www.nytimes.com/2011/11/26/opinion/rules-for-transition.html?\\_r=1&partner=rss&emc=rss](http://www.nytimes.com/2011/11/26/opinion/rules-for-transition.html?_r=1&partner=rss&emc=rss)).

<sup>6</sup> For example, see the results of a Gallup opinion poll from 24 January 2012: <http://www.gallup.com/poll/152168/Egyptians-Shifted-Islamist-Parties-Elections-Neared.aspx>.

<sup>7</sup> Indeed a country like Israel never managed to adopt a constitution because religious and secular forces have never found common ground on their state's identity.

hand and Salafists on the other hand may want to avoid that debate altogether.

### 3. THE IMPLICATIONS OF FAST-TRACK REFORMS

A rapid end to the transition has a number of pitfalls. Most importantly, it may not deliver the needed stability because an anti-climatic, swift end to the transition may significantly disappoint those who call for deep and far-reaching change. Yes, those who hold power will have been democratically elected, but there may only be scant institutional change—different faces, same institutions.

A fast-track reform process means that the constitution by and large would be the same old 1971 document, including the amendments that Mubarak effected over more than three decades.<sup>8</sup> The Muslim Brotherhood and liberal activists alike suffered from political prosecution. Police brutality and torture was endemic. The constitution provides little legal protection against such abuses, if not even providing cover for them: permissible limitations of human rights are unclear, the state of emergency and anti-terrorism provisions open the door for all kinds of abuses. Moreover, there is no guarantee for powerful, truly independent institutions that could address the problems of torture and corruption.

Furthermore, a fast process based on a political deal could be a missed opportunity for Egypt to engage in a national dialogue about the shape of a democratic state. In South Africa, the two-year constitution-making process is considered by many to have been a healing process after decades of Apartheid. Certainly Egypt's divisions are not as deep as this. But from British colonialism to Mubarak, the people have rarely found their voice: both political change and stagnation were imposed from above.

It is the case that a serious constitutional debate would be divisive, particularly with regard to the state–religion question. Yet, the issue cannot be avoided. It will emerge whenever the state makes decisions on education, family law, personal status, freedom of speech or public morality. Rather than risking the inevitability of repeated outbreaks of controversy whenever this issue is touched upon, it may be more appropriate to discuss these principles where principles belong: in a constitutional debate.

There is a related argument to be made. If Egypt continues to function under the Mubarak constitution, legal change will

instead be effected at the level of parliamentary legislation. Governments of the day may be tempted to try transforming the country at sub-constitutional level through parliamentary laws adopted by simple majorities.

Such a transformation would also be divisive, operating without the consensus that should be sought in constitution-making. In contrast, a comprehensive constitution-making process that includes genuine and widespread consultations could contribute to sustainable, democratic stability.

Since the beginning of the revolution, a restive public has engaged in mobilising *against* the system and the manner in which the transition has been managed. An open constitution-making process could provide a channel for a constructive engagement of the politically interested public. Instead of demanding democracy, citizens would take part in defining it.

### 4. COMPREHENSIVE CONSTITUTION-MAKING: FEASIBLE?

The arguments in favour of a quick, minimalistic constitutional reform process— establishing stability, focusing on reviving the economy— are reasonable. However the stability resulting from a hasty process may, in time, prove to be superficial, while a comprehensive process of reform has the potential to create deep roots for democratic stability. But how could systematic constitution-making be effected in the current context of Egypt?

Most political groups agree on the need for swift presidential elections to relieve the SCAF from performing this role, even though there may be other options, such as forming a government of national unity or a parliament-appointed government. However, without reforming the constitution beforehand, there would indeed be a question of presidential prerogatives. Worse, an elected president could try to influence the constitutional reforms to his or her benefit. Simply re-enacting the old constitution would not be an option either because nobody wants a new president to be invested with pharaonic powers.

Therefore, the option appears to be to effect a limited quick fix of the old constitution, which is currently being contemplated. The purpose would then be to create a more balanced political system. However, such amendments would not be the end of reforms, but only the beginning— a stopgap measure to create a stable framework for a more extensive period for constitution-making.

Alternatively, parliament or the CA could extend the validity of the Constitutional Declaration while amending a few of its provisions related to the political system and possibly also addressing more rigorous provisions on non-contentious issues like prevention of torture. The advantage to this approach may be that by its nature the Constitutional Declaration is an interim document, clearly signalling the provisional nature of these arrangements, as well as a break from the old constitution.

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<sup>8</sup> Since in first came into force in 1971, the Egyptian constitution has been amended on three separate occasions: in 1980, to strengthen Sharia Law as the main source for legislation, remove presidential term limits and introduce the Shura Council, among other things; in 2005, to establish competitive presidential elections, albeit in a highly restrictive manner; and in 2007, 34 amendments were introduced over a range of topics related to the constitutional architecture. For further detail, see: [http://www.democracy-reporting.org/files/dri\\_egypt.pdf](http://www.democracy-reporting.org/files/dri_egypt.pdf).

Tunisia could provide some inspiration here. Its National Constituent Assembly adopted an interim law on public powers, laying out a political system for the period until it adopts the new constitution, a process that is planned to take around one year. President Marzouki has only been elected for this transitional period. In Tunisia, the National Constituent Assembly doubles as a parliament and has a very busy agenda. The Egyptian arrangement of creating a separate CA could be beneficial in terms of allowing parliament to do its normal work.

#### TUNISIA'S TRANSITION: 2011

- Election of the National Constituent Assembly on 23 October.
- Adoption of the Law on Interim Organization of Public Authorities on 10 December (published in the official gazette on 16 December).
- Election of interim president on 12 December and approval of the interim government by the National Constituent Assembly on 23 December.
- Adoption of the future constitution by a two third majority. Although not fixed in law, there is a political consensus that this should be within 12-18 months of the 23 October elections.
- Elections to offices foreseen in the constitution— after its adoption.

Although Egyptians went to the streets to demand democracy, opinion polls show that they also yearn for stability, security and economic opportunities. A two-phased reform process could serve both demands. Dictators can be overthrown in 17 days, but building a democracy takes longer. If a transitional framework is clearly established and allows the state to function, including the election of a president, an extended reform process provides more opportunities than risks.

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DRI has received an 18-month grant from the European Union to support Egyptian civil society organisations during the country's current transition. The programme aims at fostering linkages between civil society groups and supporting their capacity to respond to the transition.

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