Introduction

The constitutional debates are central to understanding the political public sphere in the post-Mubarak era. Because the revolution\(^1\) in January 2011 called primarily for human and social rights, citizenship and accountability, and only escalated to demand the fall of the regime in response to Mubarak’s repressive tactics, the first constitution after the revolution was expected to reflect the public aspirations towards a new social contract. The 2012 constitution was thus expected to serve as the legal foundation for transforming Egypt into a democracy. During a period of political transition, the mechanisms of the decision-making process and the drafting of laws are often more crucial to the future and stability of the political processes than the actual decisions. A constitution is not merely a legal document, but reflects the characteristics of the society’s past and present, its political culture and public sphere. Against this background, the constitutional debates in Egypt can be understood as a central negotiating arena for reform of the social contract. They symbolize the changing of an unbalanced political system by the most crucial and binding legal document in the country. This paper discusses the perspectives of various political and social powers in Egyptian society during the drafting of the constitution in 2012. By discussing the contentious issues in the constitution drafting process it discusses the central question if there was legal quality in the debates, or whether they merely showed political wrestling. This chapter provides the basis for understanding the online discourses of four social movements in the period 2011—2013, which are presented in Badr and Ghali’s empirical chapter in this OIS issue.

While scholars repeatedly underline the importance of consensus and inclusion to establish legitimacy for a constitution and the future political system it establishes, the transition period in Egypt focused only on the legislative processes and elections, without any significant attempts at national reconciliation or efforts to achieve transitional justice. Thus, the constitutional changes reflected “autocratic manoeuvres”\(^2\) to absorb the mobilization of Egyptians, rather than channelling their valid needs and demands into legal frameworks.

---

\(^{1}\) The authors are aware that the use of the term "revolution" to describe the events of January and February 2011 is often debated in scholarly and political circles. The term is used in this publication because a majority of Egyptians had attributed the term to those events at that time.

Since the first referendum on the constitution in March 2011, the pace, goals and structure of the transition process were set by the real power holder, which was the Supreme Council of the Armed Forces (SCAF) and to a lesser extent the Supreme Constitutional Court (SCC) at that time. This functioned as a constraint on the deliberations, because set deadlines prevented the debates from evolving organically and transforming into legal frameworks through an orderly and thorough process. This paper starts by outlining the relevance of the constitution drafting process from a theoretical perspective, before briefly describing the history of constitution writing in Egypt. It will shed light on the conflicts surrounding the drafting process and discuss some contentious content in detail. The societal and political debates that took place ranged from the role of religion in the public sphere, to the identity of the future state, the separation of executive, legislative and judicial powers, questions of fair representation and participation, and the protection of civil liberties and personal rights. In line with the empirical analysis in this volume, this chapter will focus on the main debates in the time frame 2011 to 2013, without neglecting subsequent major changes such as the protests against President Morsi and his ouster in June/July 2013; the issuing of a political road map and the redrafting of the 2012 constitution; as well as the 98 per cent approval of the amended constitution by a referendum in January 2014.

Although the debates revolve around a constitution that is no longer operative since the drafting and approval of the new 2014 constitution, there are valid reasons to scrutinize the constitutional debates of 2011 to 2013. They reflect the radical polarized political culture that has characterized the Egyptian context in the last few years. Furthermore, understanding the constitutional debates around the 2012 constitution explains and documents an important part of Egypt's history in the post-Mubarak era as a legal-political power play. Because this project concentrates on the period 2011 to 2013, the in-depth analysis is limited to the debates around the 2012 constitution, although some comparisons with the 2014 constitution will be made on particular points. Finally, the paper addresses the question of how the constitutional political debates took shape and whether the political elites were able to find a way past their ideological divisions and aspirations to control the political transition. The conclusion will link the debates to current developments and offer a perspective on them.

**Constitutional debates and the transformation process**

Drafting a constitution is a highly symbolic and dynamic process. The constitution of any nation is supposed to be the foundation of a civil, functioning state, distributing power among its institutions and safeguarding the rights of its citizens. It is the "cornerstone for the rule of law".² If the constitution reflects a "collective

national identity” through inclusive deliberative processes, then it enhances strong state-building qualities. Although it is paramount to involve participants from all social strata in the drafting process, to allow a broad-based debate on the future constitution, in reality constitutional texts rarely meet all idealistic expectations. Constitutional debates are not merely interpretative, but rather a site of political contention, where different political actors engage in a contest over power and influence. This contentious activity does not threaten social and political progress, but rather provides for the legitimacy of the future state and its institutions and reflects a vivid political landscape. Because the political leaders during a time of transition are usually from former social, legal, political and other elites, their interests differ at times significantly from the goals of the people who participated in the revolution. Therefore, the starting point needs to be reconciliation processes, which include confidence-building measures to resolve issues of the past. In contrast, the domination of the drafting process by a single party might jeopardize the future state’s stability and lay the foundations for further unrest and social strife.

Legal scholars differentiate between instrumental and substantive constitutional provisions. Instrumental provisions lay down the contours of a state’s institutions and their mandates, while substantive provisions describe high aspirations and values such as social progress and justice. To enshrine substantive provisions in a constitution needs to be carefully weighed against the attainability of such goals. To include high aspirations such as a minimum wage, free health care and free education might be deemed necessary to attract support from citizens, but it might also cause problems if the state fails to provide these services in practice. Failing to guarantee such rights poses serious questions to the document’s credibility, thus undermining the very promise of constitutionalism. Here a distinction between horizontal and vertical legitimacy is helpful. Vertical legitimacy “establishes the connection (the ‘right to rule’) between society and

---


7 Lang: “From Revolutions to Constitutions”, (see FN 6), 350.

8 Lang: “From Revolutions to Constitutions”, (see FN 6), 347.

9 Liolos: “Erecting New Constitutional Cultures”, (see FN 4), 236.

10 Bächler: *Conflict Transformation*, (see FN 3), 8.


political institutions and regimes".\textsuperscript{14} Horizontal legitimacy relates to the social glue that holds people together – the agreement within a society as to what constitutes the politically defined community that underlies the state, the "criteria for membership in the community to be ruled". It establishes a link between the population and territory of a state.\textsuperscript{15} The lack of vertical legitimacy was a key factor in public mobilization in Egypt, and would have been essential not only to re-establish trust and meaning to the state’s institutions vertically, but also to protect horizontal legitimacy from harm by developing a positive notion of political community and national identity.\textsuperscript{16} Divisions in a political culture result in fractured identities and make consensus more difficult.

<6>

The Egyptian constitution had been an object of contention between autocratic and democratic powers long before Mubarak was forced out of office. When comparing the constitutions of 1923, 1952 and 1971 and their amendments, two continuities can be traced; first, an exclusivity in the drafting procedures, and second, the restricted content put by the political incumbents. This is in spite of the different ideological approaches to these constitutions,\textsuperscript{17} which shows that the constitution served more as a document to perpetuate power than to distribute and monitor it in a balanced way. Instead of effectively organizing state structures and protecting citizens, the drafters referred to religious legitimacy and the use of force as sources of political legitimacy.\textsuperscript{18} This leads to the conclusion that “Egypt had perfected the art of writing anti-constitutionalist constitutions”.\textsuperscript{19} Mubarak’s repeated attempts to secure his rule led to three amendments of the 1971 constitution in the years 1980, 2005 and 2007. Hence, the constitution was described as an "extremely unstable document".\textsuperscript{20} Because of the internal flaws of the suspended 2011 constitution, it seemed only natural to draft a new one that would recognize and include the revolutionary aspirations that drove the mass uprising in that year.\textsuperscript{21}

<7>

The Egyptian public sphere is radically polarized, so that the process of writing the new Egyptian constitution took place in a highly contested political arena. Political and social actors displayed limited willingness to compromise or achieve the necessary consensus.\textsuperscript{22} Therefore, instead of producing a bedrock foundation for

\textsuperscript{14} Holsti, Kalevi, The State, War, and the State of War (Cambridge, UK, 1996), 97.
\textsuperscript{15} Holsti: The State, War, and the State of War, (see FN 14), 97.
\textsuperscript{16} Bächler: "Conflict Transformation", (see FN 3), 3.
\textsuperscript{17} Lang, “From Revolutions to Constitutions” (see FN 6), 348.
\textsuperscript{19} Lang: “From Revolutions to Constitutions”, (see FN 6), 353.
\textsuperscript{20} Eldakak: “Approaching the rule of law in post-revolution Egypt”, (see FN 12), 275.
\textsuperscript{21} Liolos: “Erecting New Constitutional Cultures”, (see FN 4), 221.
\textsuperscript{22} Mady, Abdelfattah, "Popular Discontent, Revolution and Democratization in Egypt in a Globalizing World", in Indiana
a future political system, politicians and public figures became caught up in a battle about dominance and power. In such a political culture, the new constitution needed not only to provide effective parliamentary control and protection against domination by the executive, but also to prevent political deadlock in or between the state's institutions.

The contentious issues were complex. Those that were publicly deliberated and are discussed here include major questions on the drafting process itself, the identity of the state in terms of a religious state versus a civil state, the separation of executive, legislative and judicial powers, issues of fair representation and participation, a state of emergency, exceptional courts (courts that try political opponents of the regime without guarantees of a fair trial) and the role of the military, and finally, the protection of civil liberties and personal rights. Each of these points will be elaborated below and related to the debates that took place in the public sphere between 2011 and 2013.

The contest over whether to amend or not to amend the constitution

The contention over the constitution started early on. Only a few days after the suspension of the constitution of 1971 and the issuing of a constitutional declaration in February 2011 (see the Timeline in this volume), the then ruling SCAF opened up the debate about the new Egyptian constitution. In the course of 23 months, political actors contended over their right to be involved in the drafting of the constitution. Each player aimed to dominate the decisions about specific principles of the future state – mainly, the ideological foundations of state and society, the nature of the political system and the relation between the state's institutions representing the executive, the legislative and the judiciary. The roles of individual actors changed during the political transition, in particular after the elections for the parliament and the presidency in 2012 (see Timeline). This is especially true for the Muslim Brotherhood and its political wing, the Freedom and Justice Party. The elections for the People's Assembly (the lower house) and the Shura Council (upper house) in January and February 2012 resulted in a majority of members of parliament who represented Islamist parties, such as the Freedom and Justice Party and the conservative Salafist Al-Nour Party. In June 2012, the presidential elections were won by Mohammed Morsi, a member of the Muslim Brotherhood. As a result, the coalition of political powers that had cooperated against the attempts of SCAF to dominate the political transition broke apart. The political arena was split into a governing Islamist majority and a fragmented opposition that consisted of the more moderate Islamist parties, together with secular and liberal parties and members of the old political elite. After the elections, SCAF attempted to reoccupy a position behind the scenes. This was in contrast to the first months of transition when the military ruled the country and had to act in the spotlight. Further players in the constitutional debates were human rights advocates, religious institutions such as Al-Azhar University, and the judiciary in the form of the SCC. Remnants of the former
regime, the so-called feloul, used their positions in institutions like the state media to preserve or enhance their own status.23

The growing polarization in Egyptian politics and society resulted in part from a push by conservative Islamists who aimed to enshrine Islamic law in the constitution's clauses.24 The forces opposed to extending the role of religion in the new state's identity demanded better provisions for human rights and democratic principles in the document. These positions hardened further, when the then opposition camp found itself accused of heresy and treason by politicians from Islamist currents and public figures.25 Because of the attention being given to the opposition's demands by international diplomacy and the support expressed for them, the governing majority was not able to ignore the opposition, although its small numbers among the constitution's drafters rendered it almost irrelevant.26

The first constituent assembly was itself an object of heated debate and contention. It was dissolved in April 2012 (see Timeline) by the SCC as a result of the dominance of the ruling majority among its members. It was not supposed to include parliamentarians, whose job was to select members of the constituent assembly but not to be members themselves. Observers assessed that the second constituent assembly, which was elected in June 2012 (see Timeline), was more representative.27 Nevertheless, it did not provide a platform for inclusive debate,28 and the approach of some of its members was rather autocratic and narrow. The Freedom and Justice Party dominated most of the public discussions, and the experts from NGOs and legal scholars were met with disdain from most of the constitution's drafters.29

The debates reached a state of hysteria, with accusations flying back and forth,30 to the point where the SCC

24 Arafah, "President Mursi's [sic] Egypt Arab Spring" (see FN 18), 1; Tadros, Samuel, "What is a constitution anyway?", in Current Trends in Islamist Ideology 14 (2013), 5–26, 6.
27 Lang: "From Revolutions to Constitutions", (see FN 6), 358.
28 Farouk: "Writing the constitution of the Egyptian revolution", (see FN 23), 10.
29 Farouk: "Writing the constitution of the Egyptian revolution", (see FN 23), 15.
ruled that the People's Assembly had to be suspended, and in the same ruling threatened the very existence of the second constituent assembly (see Timeline). By November 2012 President Morsi was "entirely convinced that a web of deep conspiracy was being spun around him",31 while the opposition accused the governing majority of exploiting their dominant political position. The relatively high number of withdrawals from the constituent assembly until November 2012 (see Timeline) and the calls to boycott the referendum on the new constitution demonstrated the lack of consensus. Although a broad inclusive process of drafting a new constitution might have slowed down these developments,32 a more orderly participatory process and the representation of all social and political groups in the constituent assembly were indispensable to prevent the drafting of a biased constitution.33 In the absence of these, the constitution that was approved in a national referendum in December 2012 merely reflected the political balance of powers at the time of drafting, and neglected important issues such as basic social and economic rights, as well as measures to rebuild the trust of Egyptian citizens in their state institutions and in constitutionalism itself.34

Other concerns, in addition to the representativeness and legitimacy of the assembly that was commissioned to write the new constitution, were related to the quality of the drafting process, its transparency and openness, and the time pressures that it was subjected to. The timeframe set by SCAF and approved by the referendum on the Constitutional Declaration in March 2011 commissioned members of parliament to elect the constituent assembly within six months of their own election, and the members of this assembly were required to finish drafting the new constitution within another six months.35 This timeframe was seen as problematic by scholars and political observers alike, particularly in view of the complexities of constitution drafting, and the need for meaningful and sustainable democratic change, in a post-revolutionary setting that involved multiparty negotiations and might complicate consensual proceedings.36 The setting of such a deadline might have been caused by SCAF's underestimation of the difficulties that such a project would
face, but might also have reflected a strategic interest to "reduce the chances of major changes to the pre-existing constitutional framework". Given the rising public pressure in response to the constitutional declaration by President Morsi in November 2012 and to the threat by the military to take over the drafting process, the overriding goal of the constitution's drafters became to meet this deadline.

While some experts criticized the procedures and content of the constitution, others welcomed the improvements it made in protecting certain rights, as well as in the proposed separation of executive, legislative and judicial powers. Nevertheless, numerous flaws in the document were discussed by the public and in scholarly circles: The draft was often criticized for its vagueness, because the harmonization of liberal points and Sharia law was "intentionally left unsettled", while other paragraphs left most state institutions with an unclear mandate and might have allowed restrictive legislation in the future. Furthermore, sensitive issues such as decentralization and civil–military relations were not part of a broad debate, nor were they touched on in the constitution itself. Political scientist Holger Albrecht therefore argues that the Egyptian 2012 constitution "clearly mirrored the strategic considerations of the constitution's authors". He refers to the limit on the term of the public prosecutor (173/2012) (see Timeline, December 2012), and the lack of definition of the sources of Sharia law (219/2012) as examples.

Generally, it is neither uncommon nor a disadvantage when a constitutional text formulates its fundamental values in a rather generalized manner. But based on the experiences of constitution drafting in Europe and Latin America in the late twentieth century, Anja Schöller-Schletter, an expert in international constitutional law, argues that post-authoritarian constitutions intentionally left only a little latitude for interpretation concerning the core competences of state institutions. By explicitly determining the functions and limits of state institutions, the constitution drafters attempted to prevent an erosion of constitutional provisions by

---

37 IFES: "Elections in Egypt", (see FN 36), 8.
38 Al Ali: "The new Egyptian constitution", (see FN 30); Tadros: "What is a constitution anyway?", (see FN 24), 21.
39 Al Ali, "The new Egyptian constitution": (see FN 30); Albrecht, "Egypt's 2012 Constitution": (see FN 36), 2.
41 Künkler, "Religion-State Relations and Democracy in Egypt and Tunisia", (see FN 40), 4.
43 Albrecht: "Egypt's 2012 Constitution", (see FN 36), 4.
future legislation. Thus, Egypt's 2012 constitution was not only "an admittedly imperfect text", but jeopardized the stability of future political processes by leaving important contentious issues unresolved.

Among other points of concern was the adoption of the flawed structure and language of the old amended constitution. This might be attributed to the time pressures under which the members of the constituent assembly had to work, as well as to the lack of political and legal experience of most of them. On the other hand, assigning the constitution drafting process to legal experts alone might have led to a sterile document lacking reference to social and political realities.

The contest over the identity of the state

Conflicting views over the identity of Egypt as a religious state versus a civil state reflected a long-standing struggle. The controversy was part of a broad clash of world-views between Islamists and secular forces in Egyptian society. But its relevance to the constitution emerged when Islam was declared to be the state religion in the 1923 constitution. In the first step towards establishing a state independent from the British Mandate and the weakened Ottoman Caliphate, article 149 stated that the religion of the state was Islam and Arabic was the official language (149/1923). Yet, 50 years later, the struggle over Egypt's identity was still unresolved. When the 1971 constitution was being drafted, President Sadat wanted to appease the forces of political Islam and use them against the socialist and Nasserist currents. He therefore added the phrase, "principles of Islamic sharia are a primary source of legislation", and moved the article into a prominent place as the second article in the constitution. For the first time in history, Egypt's constitution included the terms "principles of Sharia" and linked them to the legislative process. This change was deemed to be a victory by the Islamist camp, since it was perceived as a step closer to a religious state. From here on, this vague phrase became the famous debated article 2 (2/1971). Yet "principles of Islamic Sharia" is an extremely controversial wording. It suggests that all legislation should be consistent with the principles of Islamic Sharia, but there were no details on precisely what these principles were, or how they would be applied as the primary source of legislation, or how they affected the legislative processes after 1971. In addition, the constitution made no reference to the existing controversy on Sharia interpretations among religious

44 Schöller-Schletter, "Die ägyptische Verfassung von Dezember 2012", (see FN 42), 24
45 Lang: "From Revolutions to Constitutions", (see FN 5), 362.
46 Al Ali: "The new Egyptian constitution", (see FN 30).
48 Lang: "From Revolutions to Constitutions", (see FN 6), 358.
49 Farhat, Mohamed, Nour and Farhat, Omar, The Egyptian constitutional history (Beirut, 2011), 77.
In the second amendment of the constitution in 1980, the wording of article 2 was further strengthened. Amid a political climate characterized by a growing crisis, waning popular support for Sadat after his peace treaty with Israel, and with his second presidency drawing to a close, the president needed to secure his rule. So, article 77 was amended; while it originally stipulated that the six-year presidency was limited to two consecutive terms, the amendment stated that the president could be re-elected for further successive terms. In a deal intended to gather support for this change, the wording of article 2 was strengthened to affirm the principles of Islamic Sharia as the primary source of legislation. Changing the phrase from "a source" to "the source" narrowed the margin of interpretation and gave the phrase a higher role in defining legislation. Sadat was accused of manipulating the religious sentiments of the public and also of appeasing the Islamists – who by this time had become strongly opposed to him – in order to pass article 77 with the least possible opposition. Any opposition to article 77 would have meant also opposing article 2. Needless to say, this phrase caused tensions between Sadat and the Coptic Church and other secular political forces, all of whom were suspicious of these changes.

Because article 2 did not precisely define what was meant by principles of Islamic Sharia, it was not clear which of the religious schools would be used to interpret the principles to which the legislation had to conform. The SCC, which was responsible for reviewing the constitutionality of the laws, therefore required the state to put forward only the laws that met two criteria: 1) they should not violate the authentic rules of Sharia that are explicitly commanded in the Quran and in a small number of hadiths whose authenticity is undisputed; and 2) they should be examined against the principles that could be induced from a study of the scriptures, consistent with the traditional Sunni scholar's understanding and *ijtihad* or independent reasoning, which is based on a thorough knowledge of the texts. The SCC followed a general approach that required the legislation to be consistent with the purposes of Sharia, which is to promote human justice and welfare. Accordingly, any legislation that undermined human welfare would be rendered unconstitutional, because it would not conform to the principles of Islamic Sharia law.

---


---
After the 2011 revolution the fate of article 2 was once again debated. The various political powers involved in drafting the 2012 constitution tried to find a middle ground concerning the issue of Sharia. The secular forces agreed to keep article 2 as it was in the 1971 constitution, in addition to complying with the SCC's interpretation of it. Some Salafist groups, however, like Jama’a Islamia, called for a stricter version. Later they retreated from this insistence and agreed to accept the wording of article 2 from the 1971 constitution.

To avoid further divisions, the second constituent assembly eventually adopted the old wording of article 2 in the 2012 constitution. But two new articles were added that defined the term, “the principles of Islamic Sharia”, and the authorities behind its interpretation. Article 219 widened the scope of the phrase beyond the SCC’s definition. It stated that “the principles of Islamic Sharia include general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines and by the larger community” (219/2012). This meant that all legislation should be measured against the entire body of Islamic jurisprudence. This was welcomed as a victory by the Islamists, who had rejected the SCC’s interpretation of Sharia. Previously, the SCC had applied an understanding of Sharia that relied on the authenticity of the text and the consistency with principles of human welfare. Also, article 4 in the 2012 constitution, which listed the functions of Al-Azhar as the institution that best represented the state version of Islam, explicitly stated that Al-Azhar's senior scholars are to be consulted in all questions related to Sharia (4/2012). Accordingly, the consultation with Al-Azhar scholars became mandatory. However, it was not clear how binding Al-Azhar’s opinion would be, especially as the SCC remained responsible for deciding on the constitutionality of any future legislation. The end result of these three articles – articles 2, 4 and 219 – is almost a deadlock over issuing legislation, because applying Islamic Sharia principles in the legal struggle would be contested by at least three actors: the SCC and Al-Azhar as stated in the constitution, and eventually the wider base of religious scholars, including Salafist sheikhs, who see themselves as responsible for interpreting the principles of Sharia according to article 219. Adding the articles 4 and 219 caused intensive criticism of the constituent assembly, as it had previously publicly committed itself to leave article 2 unchanged. The decision to add those contested articles was seen as succumbing to the Islamist hegemony in the constituent assembly.

Yet another debated article addressed the issue of religion in the 2012 constitution. Article 3 gave Christians and Jews the right to refer to their own religious principles in personal and religious affairs (3/2012). While

---

54 Al Ali: “The new Egyptian constitution”, (see FN 30), 4-5.
not actually stating a new law, this was the first time such a principle had been explicitly stated in the constitution. Its proponents welcomed this new article as including and protecting religious minorities in the state's highest official document, but liberal and secular actors criticized the article for limiting these rights to Christians and Jews, and thus excluding minorities belonging to the non-Abrahamic religions, such as Egyptians in the Bahai community.

The Muslim Brotherhood was accused of paving the way to dominate all the decision-making bodies using the articles of the constitution, in order to fulfil their political ambition. In particular the new article giving the president of the state the responsibility for appointing the president of the SCC was criticized, since the SCC is the institution designated to decide on the constitutionality of the laws. In addition, the combination of articles 2, 4 and 219 was regarded as a proof of the Islamists' intentions to set up a religiously inspired state. The secular forces accused them of violating their commitment to maintain the proclaimed "civil state".

So the public deliberations on the identity of the state showed two camps: the Islamists called for the implementation of Sharia and accused the others of atheism, while the secular group tried to limit the effect of Sharia on the ground and accused the first camp of extremism and abusing religion for their own political gains. Debates on the Islamic Sharia and the constitution did not focus on the complicated and technical aspects of the topic.

The political system: legislative, judicial and executive powers

The nature of the political system was contested in terms of the legislature (Shura Council), the judiciary (its independence and functions) and the executive (the presidential powers). The existence of a second chamber in the Egyptian parliament and its functions was controversial even before the 2011 revolution, and the debates were renewed during the constitution drafting process between 2011 and 2012, as aspirations grew to establish a new second republic. When the Shura Council, the upper chamber of parliament, was originally created by Sadat in the constitutional amendments of 1980, the council was not given any legislative role; it was a consultative body intended to represent the whole "Egyptian family", a term the patriarchal president used when referring to Egyptian society. The Shura Council would include elders from the society who would debate and consult with the executive arm on the laws issued by the People's

---


56 In the Egyptian context, "civil state" is used as opposed to the term "religious state". Because of the negative connotation of the word "secular" in Arab usage, the term "civil state" stresses the civilian character of the ruler, as opposed to a religious cleric or a military leader.

Assembly, but at the same time the Shura Council had no real power. The 1971 constitution gave the executive authority, namely the president, excessive power over the Shura Council. The president could appoint one-third of its members (196/1971), but there were no set criteria for these appointments, and the president could dissolve the Shura Council if he deemed it necessary (204/1971). Moreover, the constitution stated that the government was not to be held responsible to the Shura Council (201/1971). Even when President Mubarak's constitutional amendments in 2007 gave the Shura Council a mandatory role in the legislative process, the council's legislative influence remained limited.58 Thus the Shura Council, lacking power to formulate laws or to monitor the executive, was regarded as an open door for exercising patronage and co-opting influential politicians and intellectuals in the political public sphere.59

The existence of the Shura Council divided legal and political scholars. While some agreed that in theory a second chamber could benefit the political process, others harshly criticized how this was done in practice, in the Egyptian setting. The first group of supporters regarded the existence of a bicameral legislature as a necessity, and argued that most democratic countries had adopted this. The Shura Council could be developed as an important body in the legislative process, as it had the potential to bring in greater balance by spreading legislative decision-making across two bodies. In addition, it could ensure representation of the diverse and pluralist actors in Egyptian society through a designated quota for under-represented groups such as women, youth and Copts. Since the lower house elections were populist and competitive by nature, these groups typically found it more difficult to get elected. Retaining the Shura Council could have empowered these under-represented groups to have a say in the legislative process, as the political analyst Ahmed Abd-Rabou proposed.60

The opponents of keeping the Shura Council argued that Egypt did not need a bicameral legislative body because it was not a federal state. The legislative power should be held exclusively by the lower house. Accordingly the Shura Council was seen as an unnecessary ceremonial body that lacked the power to perform efficiently and was a waste of resources.61 The harshest critics referred to it as a "pest", as legal scholar Ibrahim Darwish had described it.62 This argument was strengthened by the low turnout in the Shura Council elections in 2012 (only 7 per cent of voters) compared to the constitutional referendum in March 2011 (41 per cent) and the People's Assembly elections in November 2011 – January 2012 (62 per cent).

58 Helal, Aly Eldin, The Egyptian Political System (Cairo, 2010), 173–76.
59 Darwish and Darwish: Constitutional law, (see FN 57), 418.
62 Darwish and Darwish: Constitutional law, (see FN 57), 418.
Eventually, the outcome of the debate was to keep the Shura Council in the 2012 constitution, but it remained legislatively powerless (103–107, 128–131/2012). However, the clauses pertaining to a political transition stated that the current Shura Council should assume full legislative power until a new lower house had been formed (230/2012). At that time, the lower house had been dissolved by the SCC in June 2012 as unconstitutional due to a flawed electoral law. So, the Shura Council was the only legislative body that remained, back then with an Islamist majority. Therefore the 2012 constitution preferred to keep the Shura Council as the only remaining legislative body, at least until a new People’s Assembly was elected.

<28>

Regarding the powers of the judiciary in the political system, the independence of judges and prosecutors was demanded to reinforce the rule of law. Before 2011, the Egyptian judiciary had played a role in the legal-political struggle by partially protecting human rights and democratic values, although they had never challenged the core of Mubarak's authoritarian regime. Scholars concluded that a degree of "illiberal legality" existed, which meant that the judicial system has been systematically used by authoritarian regimes in their attempts to secure their rule, even if free conclaves of decisions existed. A façade of the rule of law was constructed, but in essence, legal processes were used to secure the foundations of the autocratic regime.

<29>

In the wake of the 2011 revolution, demands to reform the judiciary were openly discussed. The powers and functions of the highest judicial actor, the SCC, were part of the debate on the powers of the judiciary. Founded by President Nasser in 1969 to attract foreign investors by guaranteeing property rights, the regime had intended the SCC to be a subservient institution that would strike down socialist legislation. But gradually the SCC developed some degree of institutional independence. Thus, the constitution of 1971 (174–178/1971) and the law of 1979 had been the "basis of a surprisingly autonomous court". The SCC itself was often staffed by pro-regime loyalists appointed by Mubarak and therefore considered part of the deep state, but in the 1990s, long before the revolution, the judiciary became internationally renowned for some bold rulings in favour of human rights. Even after the revolution the Egyptian judicial system showed an increasing trend towards the rule of law. This was seen in some cases, including the landmark trials of former president Mubarak and other National Democratic Party members. The SCC's rulings also prohibited the police from entering university campuses; gave Egyptians abroad the right to vote; and promoted the

---

64 Sater: "Egypt: Problems of Constitutionalism", (see FN 5), 2.
65 Brown: "Egypt. A Constitutional Court", (see FN 36), 3.
66 Brown: "Egypt. A Constitutional Court", (see FN 36), 5.
67 Brown: "Egypt. A Constitutional Court", (see FN 36), 12; Lang, "From Revolutions to Constitutions" (see FN 6), 356; Moustafa: "Law versus the state", (see FN 63), 885.
68 Eldakak: "Approaching the rule of law", (see FN 12), 261.
separation of powers between different courts. At the same time, some practices of the judicial system showed nepotism. Additionally because of insufficient material provision for judges in Egypt, most were overworked and under-trained.

In the post-revolutionary struggle a political conflict gradually escalated between the Islamists on the one side and the judiciary on the other in 2012. The SCC and the Islamist majority parliament were major players. While the SCC had already ruled that the first constituent assembly was to be dissolved because of its unconstitutional character, the pro-Muslim Brotherhood parliamentarians, in a failed "pre-emptive strike ", attempted to revise the law that founded and regulated the SCC. Afterwards, the second constituent assembly introduced new provisions in the 2012 constitution limiting the powers of the SCC, which forced its most senior judges to resign. At the same time article 4 of the 2012 constitution granted clerical jurists greater influence on legislative procedures through a new role given to Al-Azhar scholars. However, most of these provisions were withdrawn from the 2014 constitution.

In parallel to the constitution drafting process another political struggle evolved when amendments to the existing Judicial Authority Law were openly debated by conservative parties in the parliament as well as the Judge's Club. Generally, Egyptian judges were responsible for the appointment of other judges which granted a relative internal autonomy, but the president of the state and the minister of justice appointed the higher judiciary positions such as the chief of justice of the SCC, the presidents of the high court and the public prosecutor. This ensured executive control over the key positions in the judicial system. While the question of the prosecutor general's appointment had been left open in the 1971 constitution (179/1971), the 2012 constitution provided that the "appointment is made upon recommendation from the Supreme Judicial Council" (173/2012), thus reducing the role of the president of the state to a formality.
These events show that the political role of the SCC to ensure its institutional autonomy in the years of transition cannot be neglected. The supervisory role of the judiciary in the election procedures was strengthened. In addition, not only did its rulings and actions forge the electoral laws, shape electoral outcomes, and dissolve the lower house and the first constituent assembly, but it also openly clashed with the executive authority held by president Morsi in 2012. So the SCC was an active actor shaping the political processes from within the system.

When Morsi came to power, the clash of the executive and judicial powers escalated into a fierce tug-of-war. Calls from loyalists to the former regime for a purge of the judicial institutions stirred up intense debates. In their aspirations to assert power over the judiciary, the Muslim Brotherhood suggested lowering the retirement age of judges, a move that resulted in the dismissal of up to 3,500 sitting judges.\footnote{IBAHRI: "Separating law and politics", (see FN 70), 36.} This had the effect of excluding older judges affiliated with the Mubarak regime, and of propelling younger judges possibly affiliated with the Muslim Brotherhood up the legal hierarchy, providing the Muslim Brotherhood with a potentially stronger support base. In addition, Morsi’s removal of the public prosecutor in November 2012, accompanied by his controversial constitutional declaration, caused political turmoil. These moves were interpreted as an attempt to islamize the judiciary and were perceived not only as an attack on its independence, but also as indicating "perhaps a sense of panic"\footnote{Brown: "Egypt. A Constitutional Court", (see FN 36), 9.} on the part of the Muslim Brotherhood, which was keenly aware of the rulings of the SCC that shaped the post-revolutionary election laws. Eventually, the newly appointed public prosecutor Talaat Abdallah had to resign because of judicial mobilization against his appointment, and the rift between the Egyptian judiciary and the then ruling Islamist currents deepened.\footnote{IBAHRI: "Separating law and politics", (see FN 70), 44; Brown: "Egypt. A Constitutional Court", (see FN 36), 9.}

When the SCC joined the broad coalition against the Muslim Brotherhood and president Morsi, the latter was eventually removed by the military on 3 July 2013 and the chief of justice of the SCC, Adly Mansour, was immediately named interim president. The SCC had actively facilitated Morsi’s ouster and signalled its approval of the new road map. However, without a political commitment to enforcing the rule of law, the judiciary remained vulnerable to authoritarian backlash.\footnote{Moustafa: "Law versus the state", (see FN 63), 928.} Indeed, since July 2013 the courts have issued a number of death and prison sentences against Muslim Brotherhood and human rights activists, which hint at
vindicative judgements. In addition, allowing the existence of exceptional courts in spite of the constitutional provision that no person should be tried except before a regular judge, and the continued prohibition of exceptional courts, reveals a politicization of the existing legislation. The entanglement of judges in the political process harmed the judiciary's credibility as a balanced and neutral institution.

What followed was increased hostility among the different ideological camps, and a complete lack of the desperately needed, multi-level reconciliation efforts that build a common foundation for the future. In fact, the deterioration in the security situation and the growing terrorism attacks on public institutions in 2014 and 2015 made dialogue almost impossible. The assassination of the prosecutor general on 29 June 2015 extinguished any hope of national reconciliation in the short term, because it alienated the judiciary and the Islamist currents even further.

As mentioned before, the role of the three authorities of the state was heavily contested during the drafting process of the 2012 constitution. The executive authority and the president has always enjoyed a special position. El Shoubaky pointed out that over the history, the head of the Egyptian state has played a central role in the political system which allowed him to have excessive powers in relation to the legislative and the judiciary authorities. Many voices called for checking the powers of the president, and insuring the independence of the parliament and the courts. The debate was highly affected by the political events that took place during writing the constitution. The (secular) opposition accused the Muslim Brotherhood – who had the majority in the constitution assembly – of designing the constitution in a way that would allow the president – at that time a member of the Muslim Brotherhood – to dominate the political process, in particular after dissolving of the People’s Assembly.

Many argued that the president, according to the 2012 constitution, holds extensive powers in relation to the

---

83 This principle is found in article 75 in the 2012 constitution and article 95 in the 2014 constitution.
85 Liolos: “Erecting New Constitutional Cultures”, (see FN 4).
legislative and the judicial branches, the independent bodies, as well as the government. The president had the power to dissolve the parliament by holding a popular referendum, and to appoint at most one-tenth of the members of the Upper House (128/2012). At the same time the parliament did not have any authority to withdraw confidence from the president. The parliament only had the authority to dismiss the prime minister or any individual minister. This raised the president's influence over the legislative process. The president also was responsible for appointing the prosecutor general after being selected by the Supreme Judicial Council. It was not clear whether the president's power of appointment is ceremonial or considered as a mandatory approval of the nominations of these judicial bodies. The opponents repeatedly claimed that the president has unduly assigned authorities which would allow him/her to interfere in areas that he/she should not be involved in.\textsuperscript{88}

\begin{footnotesize}<38>
According to the 2012 constitution, the president was also responsible for appointing the heads of the independent agencies – the central bank and the regulatory bodies – (202/2012) that are responsible for assessing the accountability of the state's officials. Yet the approval of the Shura council was a must. However, this did not guarantee that the heads of the independent bodies are really independent, as the president appoints one-tenth of the members of the Upper House.
\end{footnotesize}

\begin{footnotesize}<39>
In regards to the president's relation to the government, the 2012 constitution was also criticized for not being clear enough about the role of each of them in the formulation of the policies. This blurry relationship would cause problems in case the president and the prime minister do not belong to the same political party.\textsuperscript{89}
\end{footnotesize}

\begin{footnotesize}<40>
The advocates of the 2012 constitution, especially from the Muslim Brotherhood, argued that the powers of the president in the 2012 constitution have been limited compared to the 1971 constitution. For example, the 2012 constitution clearly imposed term limits (133/2012) and limited the president's power to declare the state of emergency (148/2012). In addition, the 2012 constitution, unlike the 1971 constitution, forced the president to collaborate with the parliament to form the government, and required the government to get the parliament's approval for its proposed program. At the same time, the parliament was not only protected from the arbitrary dissolution that it was exposed to under the 1971 constitution, it also had the authority to withdraw confidence from the prime minister or any individual minister by a simple majority (126/2012).
\end{footnotesize}


\textsuperscript{89} Al Ali: "The new Egyptian constitution", (see FN 30), 3.
According to the 2012 constitution the cabinet members were not allowed to be simultaneously members of parliament (156/2012), which was possible under the 1971 constitution. Under Mubarak, Sameh Fahmy the minister of oil was at the same time member of the People's Assembly in 2010. Moreover, the 2012 constitution allowed the president to appoint only one-tenth of the members of the Shura Council, the Upper House; unlike the 1971 constitution which used to give the president the authority to appoint third of the members. What is more important, the House of Representatives, the Lower House, was completely free from appointed members by the 2012 constitution.90

Questions of representation and participation

Egypt's electoral laws were among the most divisive political issues in the constitutional debates.91 The laws to regulate elections had already been a matter of contention during Mubarak's rule, when only a "managed liberalization"92 was permitted by the regime, which made sure that the electoral system favoured the ruling party.93 The major changes that took place in 1984/1986 and 1990/1995 concerned such issues as the switch from proportional representation to an absolute majority system, and the shift of seats from smaller parties to the ruling National Democratic Party.94

In 2012, the debate about the election rules continued for several rounds with participation from local and international politicians, scholars and legal experts. The most contentious points, which involved the public, the SCAF, the Shura Council and the SCC, were fairly similar. Which electoral system to apply, how to define voting districts, whether to apply a quota, who would be allowed to vote and to stand as a candidate, and how to monitor polling and vote counting. Much public debate was stirred up by amendments to the existing election laws in parallel to the constitution drafting process. Between May and December 2011, SCAF, which was the ruling authority at that time, issued several decrees on electoral procedures in response to public criticism. Between January 2012 and May 2013 a series of drafts of different election laws went back and forth, as they were amended by the Islamist-dominated Shura Council and also by rulings issued by the SCC.95 The conflict sharpened in June 2012, when the SCC ruled that the first parliamentary  

90 Al Ali: "The new Egyptian constitution", (see FN 30), 5-6.  
92 Lust-Okar, Ellen and Ahmad Jamal, Amaney, "Rulers and rules: Reassessing the influence of regime type on electoral law formation", in Comparative Political Studies 35/3 (2002), 337–66, 342.  
93 Lust-Okar, Jamal: "Rulers and rules", (see FN 92), 338, 345.  
94 Lust-Okar, Jamal: "Rulers and rules", (see FN 92), 347, 359.  
95 For a detailed description see IFES: "Elections in Egypt", (see FN 36), Brown: "Egypt. A Constitutional Court", (see FN 36), and also the Egyptian Constitution Timeline in this issue.
elections after the ouster of Mubarak were unconstitutional, because of an article that prohibited individuals from running in party lists while members from the same party were allowed to run as individuals. The 2012 constitution clearly mirrored this conflict, as it provided that a court could only rule on the constitutionality of an electoral law before it came into force. In this way, the drafters in the second constituent assembly hoped to prevent the dissolution of a sitting parliament by a court ever happening again. Scholars argued that this provision might bring some stability to future election processes, but it also delayed law-making and the organisation of new parliamentary elections until all electoral laws had been scrutinized.

During the debates about the design of the electoral system and the voting districts, SCAF and the Shura Council referred to regulations from the Mubarak era. But the electoral constituencies at that time had been notoriously unequal because the seats allocated among the 11 governorates by no means reflected their number of voters equally. Egypt's opposition failed to enforce its demand for a single nationwide district and a pure proportional system, with candidates running only on party lists. Instead, a mixed electoral system was applied. The drafters of the 2012 constitution incorporated the concept of representative democracy based on competition between political parties (6/2012), which needed only to notify their existence to the authorities (51/2012). Elections should be carried out by "universal, secret, and direct ballot", but how the election process should be organized (224/2012) was largely left open for incoming legislators to decide. Nevertheless, the independent, Berlin-based organization Democracy Reporting concluded that the Egyptian constitution of 2012 was closer to international standards, and it pointed out that most constitutions worldwide leave the regulation of election procedures to the legislature. Nevertheless, problems might occur as a result of the "myriad election laws" and the amendments to them during the...
transition period, because an overlap was created between some provisions and these legal inconsistencies.  

The new election laws provided that one-third of the seats in parliament are reserved for candidates who run as individuals in single-member districts, while two-thirds of the seats are to be allocated by a proportional party list system in multi-member districts. Scholars and the Egyptian opposition unanimously criticized the constituency design for favouring rural areas over urban ones. The ruling majority was accused of using its hegemonic position in the Shura Council to discriminate against political opponents through the changes to the district boundaries, instead of resolving the inherited imbalances in the electoral system. International scholars, however, judged the adoption of a mixed system as appropriate for the Egypt's political setting. Studies of electoral laws worldwide show that while pure majoritarian systems limit the success of smaller parties, pure proportional systems create a legislature that tends to neglect local political issues.

Another contested issue was the representation of peasants and workers in 50 per cent in the parliament, the so-called 50 per cent quota. This quota was contested because it was a tool of the former regime to manipulate results. Mubarak used it to ensure the presence of loyal members in the parliament and to improve the position of the National Democratic Party. It was a measure passed down from the Nasser era, which was first included in the 1964 constitution (49/1964) in order to appease public opinion. To strengthen his rule over the young post-colonial republic, Nasser adopted socialist economic policies that included changes to the legal ownership of agricultural land and its distribution to farmers, and the nationalization of factories together with providing workers with a share in the profits of their factories. The support of these two groups, farmers and workers, who had been marginalized for a long time under feudalist colonial structures, was crucial to securing Nasser's rule. At a time where Egypt's post-colonial

---

106 IFES: "Elections in Egypt", (see FN 36), 18.
107 Democracy Reporting: "Egypt's elections", (see FN 91), 4; IFES: "Elections in Egypt", (see FN 36), 230.
108 IFES: "Elections in Egypt", (see FN 36), 28; Faris: "Constitution institutions", (see FN 101), 142.
110 Faris: "Constitution institutions", (see FN 101), 143–144.
111 Lust-Okar, Jamal: "Rulers and rules", (see FN 92), 346; Faris: "Constitution institutions", (see FN 101), 144–45.
112 Democracy Reporting: "Egypt's elections", (see FN 91), 3.
113 Faris: "Constitution institutions", (see FN 101), 141-144.
economy relied heavily on revenues from agriculture and industry, the workers and farmers were considered an important pillar of that regime, and by promising them justice and equality, the regime expected their support in return.\textsuperscript{116} Even when President Sadat, Nasser's successor, distanced himself from these socialist principles, he maintained the 50 per cent quota.\textsuperscript{117} Nor was it changed under President Mubarak. Removing the quota would have carried a huge political cost for the regime, whose primary objective in using it was to consolidate its rule.\textsuperscript{118}

The public debates in 2011 and 2012 on the 50 per cent quota revolved around two contesting positions. The supporters of the quota maintained that it guaranteed fair representation for the workers and farmers who otherwise would not be properly represented in the legislative bodies. The quota qualified as a "re-distributive quota" that spread power among different social groups in order to allow underprivileged strata access into the formal political process, which would not happen without the quota.\textsuperscript{119} But the Egyptian case showed a flawed application of this principle. Opponents of the 50 per cent quota questioned the professional qualifications of workers and farmers to adequately fulfil their legislative and monitoring role, as well as the effectiveness of the quota to protect the interests of workers and farmers in the first place. Furthermore, the quota favoured two specific professions or trades in the sectors of agriculture and industry over other professions in Egyptian society. In order to protect their rights, professional groups should not be members of parliament per se, but should use their right of assembly to form independent syndicates and unions to represent their interests. In addition, all constitutions that preceded the 2012 constitution lacked any precise definition of who was to be considered a worker or a farmer.\textsuperscript{120} This opened the door to individuals who were neither workers nor farmers to obtain a parliamentary seat under this quota.

Over time, however, the quota had become "an acquired right",\textsuperscript{121} and abolishing it would be unthinkable without risking considerable dissent. But in the wake of the 2011 revolution, maximalist demands were made to reform the political and electoral system. The SCAF issued a constitutional declaration preserving the 50 per cent quota for workers and farmers,\textsuperscript{122} which served as the basis for the 2011 parliamentary elections. But the 2012 constitution took some steps towards getting rid of the quota when it stated in its transitional

\begin{footnotesize}
116 Farhat, Farhat: Egyptian constitutional history, (see FN 49), 122-25.
117 Farhat, Farhat: Egyptian constitutional history, (see FN 49), 132.
118 Brand: Official Stories: Politics and National Narratives, (see FN 115), 63.
119 Faris: "Constitution institutions", (see FN 101), 149.
120 The 2012 constitution tried to be more precise and defined a worker as anyone who is hired by another and a farmer as anyone who has practised agriculture as a profession for a minimum of ten years (229/2012). The article left further details to be determined by the law.
121 Helal: The Egyptian Political System, (see FN 58), 176.
122 Articles 32, 35/2011. Two candidates were elected in each constituency, one of whom had to be a worker/farmer and the other represented other sections of the society.
\end{footnotesize}
provisions that the quota would be only imposed in the forthcoming lower house elections. In the 2014 constitution the 50 per cent quota was completely abolished, despite the initial threats of the Egyptian Trade Union Federation to mobilize labour movements against the constitution if the assembly should go ahead with removing the quota.

An additional contested constitutional article was the banning of political parties. The constitutional debate discussed the inclusion of two political groups: members of the former ruling elite, that is, of Mubarak’s National Democratic Party, and parties that adopted religious doctrines and engaged in religious campaigns. The constitution banned political parties that discriminated against citizens according to their gender, origin or religion (6/2012). When the electoral laws were being amended, the Shura Council tried to exclude the banning of religious campaigning, a law that had been used by the Mubarak regime to keep Islamist currents under control. However, the Shura Council’s attempt was stopped by a court ruling that upheld the prohibition of religious or doctrinal slogans. Revolutionary political forces also demanded the banning of former members of the already banned National Democratic Party from active political participation. The legislators discussed this issue while amending the electoral laws and as a result passed the Political Isolation Law (see Timeline). This banning of the former ruling elite found its way into the transitional provisions of the constitution (232/2012).

Nevertheless, improvements to the provisions of the 1971 constitution and the election laws were evident. Inclusion was increased by several changes. The threshold above which a party could be allocated seats in the parliament was reduced to 2 per cent, in contrast to 10 per cent before the revolution. A major innovation was that every Egyptian citizen had the right to vote and to run for election – even while abroad – and was now registered automatically, instead of being issued with an election card. Some requirements for candidates were loosened, with the minimum age lowered and the requirement that candidates had to have completed military service dropped – although the SCC later overturned this. Successful candidates

123 Article 129/2012.
124 Instead, the constitution stated that it would see that the farmers and workers were adequately represented.
125 Ahram Online, "Labour rep: We reject constitution if worker-farmer quota is cancelled", 11 November 2012, Ahram Online, http://english.ahram.org.eg/NewsContent/1/64/57833/Egypt/Politics­/Labour­rep­We­reject­constitution­if­ workerfarmer.aspx (Accessed 10 November 2015).
126 Similar to the provision of the 1971 constitution (5/1971). In the aftermath of the revolution, the drafters of the 2014 constitution banned “political parties formed on the basis of religion” (73/2013), thus depriving the most successful parties of their legitimacy.
127 IFES: "Elections in Egypt", (see FN 36), 23.
128 Democracy Reporting: "Egypt's elections", (see FN 91), 6.
129 Democracy Reporting: "Egypt's elections", (see FN 91), 3.
130 Democracy Reporting: "Egypt's elections", (see FN 91), 6.
were forbidden to change their party affiliation after elections, a tactic often used during Mubarak's presidency.\footnote{Faris: "Constitution institutions", (see FN 101), 142.} The oversight of elections was given to the new National Elections Commission (NEC) (208-211/2012), which was staffed by judicial personnel and mandated to organize and supervise all elections and referenda. Before 2011, separate institutions such as the High Election Commission, the Presidential Election Commission and the Ministry of Interior were tasked with organizing and supervising elections.\footnote{Democracy Reporting: "Egypt's Elections", (see FN 91), 4.} In addition, the National Elections Commission would now determine voter districts, a task that was previously given only to the parliament.\footnote{In regard to the 2014 Constitution, see IFES: "Elections in Egypt", (see FN 36), 17, 29, 35; Democracy Reporting, "Egypt's elections" (see FN 91), 3-6; Faris: "Constitution institutions", (see FN 101), 150; Brown: "Egypt. A Constitutional Court", (see FN 36), 14} If the National Elections Commission will be able to develop into a genuinely independent regulatory body is a matter of speculation, especially in the light of recent restrictions on the political public sphere.

**Role of the military, the state of emergency, and the exceptional courts**

The president's exceptional powers were a "prominent feature of everyday rule ... and a tool for the consolidation and maintenance of political power"\footnote{Reza, Sadiq, "Endless Emergency. The Case of Egypt", in New Criminal Law Review. An International and Interdisciplinary Journal 10/4 (2007), 532–53, \url{http://www.jstor.org/stable/10.1525/nclr.2007.10.4.532}, (Accessed 10 November 2015).} in Egypt before the uprising of 2011. Therefore the debates about amending the laws governing the state of emergency, exceptional courts and the security apparatus must be considered highly relevant to the formation of a new and effective civil society in Egypt. The very introduction of emergency rule by Mubarak in 1981, as well as the perpetual state of emergency and its extension, for example to fight narcotic trafficking, are considered illegal and invalid by some scholars.\footnote{Eldakak: "Approaching the rule of law", (see FN 12), 285; Stork, Joe, "Egypt: Human Rights in Transition", in Social Research: An International Quarterly 79/2 (2012), 463–86, 466. \url{http://muse.jhu.edu/journals/social_research/v079/79.2.stork.pdf}, (Accessed 10 November 2015).} Although in general all emergency laws were deemed off-limits for the Egyptian judiciary,\footnote{Brown: "Egypt. A Constitutional Court", (see FN 36), 18.} some scholars believe that the trial of political opponents before specialized security courts, such as the emergency state security courts, might have indirectly helped to enhance judicial independence. Legal expert Sadiq Reza suggests that the responsibility to try political opponents might have shifted from the judiciary to the security apparatus and thus alleviated political pressure on the judiciary.\footnote{Reza: "Endless emergency", (see FN 134), 3.} In spite of repeated protests and campaigning by liberal forces such as human rights groups for the limiting of these exceptional measures and regardless of the official end of the state of emergency in May 2012, the continued deployment of exceptional powers still "undermines Egypt's ordinary judicial system and fails to
meet international standards". In fact, the state of emergency that was continuously extended from 1981 onwards was not actively lifted by SCAF in 2012, but happened to expire. It was not extended at that time because of the threat of a renewed flare-up of street protests. However, extreme security measures were introduced after the Muslim Brotherhood was declared a terrorist group. Thus, while the state of emergency no longer officially exists, the de facto ongoing war against terror in the name of protecting the homeland security was regarded as justifying extra-judicial measures.

Civilians continued to be tried before military courts, which since 1992 had mainly been used to convict Islamist opponents of the regime. In the first half of 2011 military courts tried some 12,000 civilians, most of whom were convicted. Although as a result of public pressure there was a decline in such trials, the emergency state security courts and military courts kept on working. Political consultant Al Ali stated that "a large number of the members [of the constituent assembly] identified the need to end the practice of civilians standing trial before military courts during the constitution drafting process in 2012, but instead of prohibiting such exceptional courts, the drafters decide to enshrine them in the constitution. The phrase, "crimes that harm the Armed Forces" (198/2012), was criticized because it left the task of defining relevant crimes to future legislation that could be used to include a broad array of misdemeanours. In public debates the abolition of other exceptional courts was not a priority, and more judges were appointed by the Morsi government to state security courts in September 2012.

Given its entanglement with the former regime, the future role of the military and reforms of the security apparatus as a whole were sensitive issues, rarely deliberated. Traditionally, military personnel occupied high administrative and economic positions, although President Sadat had attempted to demilitarize the

138 IBAHRI: "Separating law and politics", (see FN 70), 33.
140 Eldakak: "Approaching the rule of law", (see FN 12), 305; Stork: "Human rights in transition", (see FN 135), 472; for figures from 2012 and 2013, see IBAHRI: "Separating law and politics", (see FN 70), 34.
141 Stork: "Human rights in transition", (see FN 135), 473.
142 Al Ali: "Drafting Egypt's Constitution", (see FN 30).
143 Before 2012, exceptional courts did not have a constitutional basis, but were a product of legislation and based on the Military Judiciary Law of 1966. See Eldakak: "Approaching the rule of law", (see FN 12), 305. In its article 204, the 2014 constitution applied a clause similar to that contained in article 198 in the 2012 constitution. See Al Ali: "Egypt's third constitution in three years", (see FN 26); IBAHRI: "Separating law and politics", (see FN 70), 33.
During Mubarak's reign, a panoply of security forces proliferated with strong links to the administrative, economic and political elites. The military was co-opted by regularly appointing high-ranking or retired officers to influential political and civil positions, such as governors, administrative heads in the state media or in other state companies like the Suez Canal or the oil industry. In addition, the military apparatus was allowed to expand its activities into non-military manufacturing, farming and tertiary industries, thus producing a wide range of goods and services without public auditing or market competition. Regardless of the high level of institutionalization inside the Egyptian military resulting from its expansion and existing patrimonial links to the regime, the military's economic interests and fiscal health greatly contributed to the robustness of the authoritarian regime.

With SCAF ruling the country during the first stage of the political transition, the military was no longer off-limits for public debate, but it managed to preserve its status as an autonomous institution not subject to public oversight. Some attempts to increase the military's competences, such as the decree 4991/2012 that would have allowed military officers to arrest civilians, were blocked because of public and judicial protest. Nevertheless, the Morsi government applied the old financial appeasement politics to secure the army's loyalty while those drafting the constitution guaranteed its future immunity by providing that the Minister of Defence would be a military man (195/2012) and by establishing the National Defence Council (NDC) (197/2012). This council was criticized by liberal politicians, human rights activists and some journalists for two reasons. First, because it was to be comprised of 14 representatives of the executive and legislative branches of government appointed by the president, of whom at least eight would be military leaders. Second, because it would have the exclusive right to discuss the military's budget, while details of this budget would remain secret to the public. Furthermore, the language of the relevant paragraphs was so


149 Bellin, Eva, "Reconsidering the robustness of authoritarianism in the Middle East", Comparative Politics 44/2 (2012), 128.


151 Abul-Magd, "The Egyptian military in politics and the economy", (see FN 146), 3; Hammond and Wan, "Egypt's Military Economy": (see FN 148).

vague that they could be used to enhance the military's power in future legislation. In sum, an inclusive and open public deliberation about reforms to determine the future role and accountability of Egypt's diverse security institutions, including the military, the police, the Central Security Forces or the State Security Investigations, remains to be conducted.

**Protection of civil liberties and personal rights**

The battle over the anchoring of civil liberties and human rights into the Egyptian constitutional and legal framework is a "saga of rights achieved, rights revoked, and rights suspended". Although the word freedom itself appears 31 times in the paragraphs of the 2012 constitution, critics complain that the language is not as affirmative as it could be, but rather aims to negate the very essence of those rights. In fact, the constitution of 1971 had generously, but only nominally, provided for a long list of rights. None of them was ever adequately enforced, but they were instead restricted by a large body of laws built up over decades. The verbal battles from 2011 onwards involve freedoms of belief, opinion, thought and speech, of assembly and association, of information, as well as individual, artistic and scientific freedoms. The battles over these were accompanied by human rights violations by the security apparatus and the latter's ongoing interference in the work of theoretically independent public bodies such as media institutions or universities, trade unions and civil society organizations. The debates received considerable attention from national and international media and scholars, and the focus here will be on the freedom of the press, the right to assemble and to establish associations, and gender equality.

The situation of the media seemed to have improved considerably after Mubarak's ouster, an event that was followed by a surge of new publications and the opening up of the media agenda to include taboo subjects and otherwise marginalized actors. But soon enough, outspoken journalists were once again intimidated by security forces and conservative currents. Besides violent attacks on individual journalists and on the offices of newspapers and television stations, licenses were suspended, TV stations closed, journalists were tried before military courts or sued by private persons for defaming and insulting the president, the judiciary or Islam. In addition, the new Islamist rulers interfered in the appointments of state media personnel in an

---

153 Stork: "Egypt: Human rights in transition", (see FN 135), 463.
154 Stork: "Egypt: Human rights in transition", (see FN 135), 483.
155 Al Ali: "The new Egyptian constitution", (see FN 30).
156 Stork: "Egypt: Human rights in transition", (see FN 135), 467.
attempt to secure their control over Egypt's most important communication channels. Although the 2012 constitution theoretically guaranteed the "freedom of journalism, the press, the publishing industry, broadcasting, and other media", these guarantees were limited by the "framework of the essential elements of state and society, the preservation of rights, freedoms, and societal duties, respect for the sanctity of citizens' private lives, and the requirements of national security" (48/2012). The constitution thus introduced a significantly higher number of explicit restrictions than were contained in the 1971 constitution (48/1971). Other articles were similarly criticized as potentially dangerous loopholes, in particular the newly introduced paragraphs prohibiting the insulting of individuals (31/2012), religious messengers and prophets (44/2012). Given the lack of trust in journalistic professionalism prevalent in Egyptian society, politicians could easily present journalists as irresponsible and biased, and thus justify the need to restrict them. In spite of campaigns by journalists and human rights activists to introduce a Freedom of Information law and to amend the multitude of Egyptian laws that restricted the freedom of the press, the approach taken by the majorities in the constituent assembly and the Shura Council alike was restrictive rather than liberating. From 2013 onwards, one could observe a "bringing into line" of the Egyptian media regardless of their type of ownership, and an enforced crackdown on dissent voices by internal editorial sanctions as well as by security forces. The most prominent Egyptian media figures, risen in the aftermath of the revolution, like Dina Abdel Rahman, Yosri Fouda, Reem Magued or Bassem Youssef retreated from Egyptian television screens, while other journalists were detained and some had to stand trial like the most prominent example of the three Al Jazeera journalists Mohammed Fahmy, Peter Greste, and Baher Mohamed. In 2015 a new law governing online publications was discussed and harshly criticized for its repressive approach.

The freedom of assembly and association was guaranteed by the 2012 constitution, but critics claimed that the provisions did not sufficiently improve on the language of the 1971 constitution, and verbal loopholes could allow restrictions in the future. "[P]ublic meetings, processions and peaceful demonstrations" (50/2012), as well as the creation of "associations, institutions, and parties" (51/2012) have to be notified in advance to the authorities. Apart from the provisions that limit the establishment of political parties (6 and


232/2012), the amendment and enforcement of existing restrictive laws overshadowed the debates. One example can be seen in the highly contested crackdown on several national and international non-governmental organizations (NGO) in December 2011. Security forces raided the offices of 17 NGOs under the pretext of investigating foreign funding, which is prohibited under the 2002 Associations Law. Stork describes the "manufactured controversy" as xenophobic and demagogic. Amendments by the People’s Assembly did not come into force because of its dissolution. The draft permitted far less interference by the state in the registration process, while at the same time it was more restrictive in regard to foreign donations. By the end of 2013, the military backed interim government signed a new protest law that effectively banned any spontaneous assembly and was used to justify a further crack-down on dissent voices as supporters of the ousted president Morsi as well as liberal forces who had played a crucial role during the protests of 2011 and 2012. Several organisations were ruled to be terrorist organisations and banned from participation as the Muslim Brotherhood as well as the 6 April youth movement. The database Wikithawra estimated that about 40,000 people had been arrested for political participation in Egypt between July 2013 and May 2014 alone. The protest law of 2014 is just another example of the potential to weaken constitutional provisions through subsequent restrictive legislation.

Under the 2012 constitution, no notification was needed to establish "syndicates, unions, and cooperatives" (52/2012), but it stated that "[t]here can be only one professional syndicate per profession" (53/2012). This last provision in particular prompted an outcry from trade union activists, who were struggling to free the workers’ movement from the influence of the Egyptian Federation of Trade Unions (ETUF), which was closely aligned with the former regime, and to establish independent unions. Legal amendments by the government that would formalize a minimum wage or the freedom of trade union activity were stalled by SCAF in November 2011; the policy of the Morsi government and the Shura Council in 2012 demonstrated a similar anti-labour orientation. Although there was an increase in labour unrest and strikes mounted by different professions nationwide, workers did not play a major role in the political arena. Instead, union activists faced increased physical and legal attacks and, with few exceptions, a general disregard by the political echelon for social justice and the protection of workers’ rights. Any critique of the inadequate

162 Stork: "Egypt: Human rights in transition", (see FN 135), 479.
167 Beinin: "Workers, Trade Unions and Egypt's Political Future", (see FN 161); Hamzawy, Fakir "Drafting Egypt's
prohibition of forced labour (64/2012) and child labour (70/2012) never reached a wider audience.

For the first time, an Egyptian constitution explicitly states that "[e]quality of opportunity is there for all, both for male and female citizens" (the fifth principle of the preamble, 2012). Some women's rights had already been achieved before 2011, but improvements in divorce laws or the introduction of a women's quota for parliament were often labelled "Suzanne [Mubarak]'s laws" and therefore discredited. The debate about gender equality during the constitution-drafting process was emotional in many ways. While the Islamist currents stressed the need to protect traditional values and society, the liberal forces feared a conservative backlash at women’s expense. The position of Islamist representatives on women’s political rights, such as their capability to run for president, enraged liberals both inside and outside Egypt. Most contentious were the restrictions that a conservative interpretation of Sharia might place on women's rights. Activists successfully prevented the inclusion of an explicit Sharia reference to gender equality, but could not enforce a better political representation of women by way of quotas.

Conclusion

A number of contentious issues were raised during the constitutional debates between 2011 and 2013 that were intended to finalize the 2012 constitution under the rule of the Muslim Brotherhood. The main lines of conflict evolved around several questions concerning the process of drafting the constitution and the constitution’s content. The Egyptian decision makers of that time decided to amend the existing constitution instead of writing it from scratch, and missed the opportunity to include a broad variety of voices and to create popular consent for the document. Despite some at times vicious debates about the reform of existing power structures, the future balance between the different state institutions or civic rights, observers had attested the 2012 constitution to gradually have improved the separation of executive, legislative and judicial powers as well as the protection of certain human rights. Nevertheless, while some issues were publicly debated, the decision-making process was marked by deliberative mechanisms linked to particular political positions in addition to an open power game instead of negotiating a compromising solution.

The process showed that the various political actors used the legal-political process as a struggle to

---


169 Arafa: "President Mursi's Egypt Arab Spring", (see FN 18), 17; Abu-Odeh: "Egypt's new constitution", (see FN 23), 20; Nakissa, Aria, "Islamist Understandings of Sharia", (see FN 74), 5.

170 Mahmood: "Women’s Rights in Post-Revolutionary Egypt", (see FN 168), 16.

171 Democracy Reporting: "Egypt's elections", (see FN 91), 2; Faris: "Constitution institutions", (see FN 101), 149.
guarantee more rights and powers for their own power base. In drafting the articles governing the relationships between the executive, legislative and judicial authorities each institution sought to secure its own autonomy. Polarized and autocratic practices by the power holders and legal drafters continued. The constitutional debates 2012 reflected the perception of the political actors that it was really a document for holding power, and not for distributing it in a balanced way. In reality, the contested issues in the public sphere reproduced the radical polarized political culture that existed in Egypt. Ideological positions not only served as a basis for these contests, but represented vested interests and contests over power between various political groups and institutions. This chapter raised the question as to whether the debates were ever really consensus-orientated, or simply polarizing in a zero-sum game. Until now, public debates with consensual and self-correcting mechanisms have yet to take place in Egypt, if an inclusive and stable constitution leading to fair political processes is truly desired.

<62>

Analysing these debates serves as a foundation for understanding how the social movements constructed them on their official Facebook pages, which is discussed in the next chapter by Badr and Ghali. They show how the social movements reflected these contested issues in their online deliberations through the social media.

About the Authors:
Nadia Leihs is a PhD candidate at the Seminar of Communication Studies at the University of Erfurt and the Center for Middle Eastern and North African Politics at the Freie Universität Berlin. She has obtained her M.A. degree in 2008 at the Faculty of History at Ruhr-University Bochum. In addition she has long-standing professional experience as freelance journalist for various German media outlets. Her current research addresses the influence of institutional structures on journalistic content and the media's role for social and political transformation processes. Other fields of interest are gender studies and the history of journalism. Currently, she is coordinating a project on media self-accountability in Tunisia for the Erich-Brost-Institut for International Journalism at the Technical University Dortmund.

Hend Aly was the research and administrative assistant for the Orient Institut Beirut project "Media Culture Transformation" from 2013 till mid-2014. Currently she is a M.A. Student in the CMEPS programme; a joint programme between the American University in Cairo and the University of Tübingen. Currently she is writing her master's thesis on urban planning and citizenship in Cairo. Prior, she received her bachelor degree in political science from Cairo University in 2012. In addition, Hend is a co-founder of the 2014 constitution related project "Dustur al-Shaab" as well as a project on the 2014 presidential elections "Rais2014".

The project on which this publication is based was sponsored by the German Federal Ministry of Education and Research (BMBF) under the reference number 01UG1204. The author(s) take full responsibility for the content of this publication.