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# The Role of Parliament in the Egyptian Constitution

# Parliament and the New Egyptian Constitution

## Papers

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*Prof. Adam Cygan*

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## Executive Summary

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

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

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

The need for accountability is an overarching theme that is touched upon by all the papers. Ali Fath Elbab addressed political accountability and what role there should be for the Shura Council as a second Chamber of the Egyptian Parliament. He argues very strongly that political control and the need for a second revising Chamber is essential and that this Chamber can offer a forum for improved representation of minority ethnic or religious groups

and other sectors of Egyptian society, such as women, who may be under represented within the Parliament. Mohammed Al Agati continues this theme by calling for improved provisions within the Constitution which guarantee participation in the political process by civil society and local councils. Georges Fahmy highlights that the draft Constitution is still very weak with regard to guaranteeing judicial independence from the Legislature and providing a system of judicial review. Judicial protection of constitutional rights is a key feature of all democratic constitutions and this can only be achieved through judicial independence. Finally, Karim Sarhan and Professor John McEldowney both argue that significant improvements in the draft Constitutional provisions are still need in order to secure accountability through processes of financial and administrative audit. Crucially, both papers highlight that Egypt needs, as a matter of urgency, to elect an effective Parliament to undertake these functions.

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

## **Background**

### **Parliament and Previous Constitutions**

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

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

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

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

adoption, similar to the case of the 1923 and 1971 Constitutions, as Parliament convenes at a later time either to adopt what was issued by the President of the Republic or annul it in case of Parliament being dissolved in such exceptional cases.

This is in addition to the declaration of a State of Emergency or Martial Law, which is the right of the Head of State. He announces it; then, presents it to the Parliament for approval or rejection; similar to what took place in the 1923 and 1971 Constitutions. However, the phrasing of the 1954 Draft Constitution differed as the State of Emergency was drafted in a way similar to a Parliamentary authorization that demands the Parliament to authorise the government to use specific powers to trigger this state. Meanwhile, what distinguishes the 1954 and 1971 Constitutions is that they emphasize that these states shall have a time frame specified by the Parliament; however, the 1954 Constitution stressed the necessity of specifying the geographical location to enable the government to exercise these powers authorized by Parliament.

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

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

There are also powers held by both sides against the other; the three constitutional structures adopted the authorization of the Head of State for the right to dissolve the House of Representatives, which became the People's Assembly under the 1971 Constitution. In return, the 1954 Draft Constitution gave Parliament the right to accuse the President of the Republic, present him to trial and therefore the possibility of removal from office if convicted; meanwhile, the 1971 granted the People's Assembly this right. The 1954 Draft Constitution did not specify an accusation or a felony in order to charge the President of the Republic. But the 1971 Constitution was more precise in this; it specified two accusations: treason and criminal offenses. However, the 1954 Draft Constitution gave more procedural details required for the trial of the President; it stipulated that Parliament plays a role in the formulation and selection of a number of members of the body that will present the President to trial, in case he is charged and transferred to court.

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

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

In the context of the debate around mutual powers of the Head of State and Parliament in the three Egyptian Constitutions, another issue is worthy of note, namely the three constitutional structures granting the Head of State, as part of his role, the power to select a number of members in the Senate, according to the 1923 Constitution and 1954 Draft Constitution, equivalent to the Shura Council in the 1971 Constitution. Hence, he has a hand in the formulation of Parliament. However, in return, the 1954 Draft Constitution and 1971 Constitution give the Legislature, for the first time, a role in selecting the Head of State, who was selected, according to the 1954 Draft Constitution, by a body made up essentially from Parliament members in addition to a number of members from other agencies. This is similar to the 1971 Constitution which required that for someone to be nominated to Presidency he should have a number of approvals from members of the People's Assembly and Shura Council to be able to run in elections.

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

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

## **II. Parliament and Government:**

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

In addition, each Member of Parliament (MP) has the right to question Ministers, the PM or their Deputies. Discussion regarding each inquiry takes place in a time frame specified by each constitution and if there is will to debate in less time, an agreement of the relevant Minister should be obtained.

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

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

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

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

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

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

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

### **III. Parliament and the Judiciary:**

As regards the Judiciary, being an institution that is independent in its work from all other Branches, the three constitutions did not differ in general. Hence, looking into the three constitutions there was no reference to a direct relationship between the Judiciary and

Parliament; the more accurate description for their relationship is that it is indirect. The two institutions might only come together in the provision which stipulates that the affairs of the Judiciary and all that is relevant to it and its members is left to the law to organize, which is issued naturally by the Legislature. However, the 1971 Constitution could be interpreted differently as the President of the Republic has the right to enact laws, which opens the scope for the possibility of the law being issued by the President of the Republic and not the Legislature; that is the relationship between Parliament and the Judiciary is a relationship of organization carried out by the Parliament or the Legislature, considering the Judiciary as one of the State institutions.

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

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

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

#### **IV. Parliament and local councils:**

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

The 1954 Draft Constitution can be considered more detailed in relation to local councils and local governance agencies in comparison to both the 1923 and 1971 Constitutions. Even though there is no direct relationship between Parliament and local councils in performing their functions; except when it comes to the laws promulgated by the Parliament to organize these latter councils, as one of the State institutions, which the

Legislature is responsible for enacting the laws that organize their work; the 1954 Draft Constitution included among its provisions a paragraph that represents a guarantee that commits the Parliament to ensure the independence of these local entities to carry out their functions in education, health, utilities affairs, etc. This is in the form of legislation that the Parliament is permitted to enact that empowers local councils in these areas.

#### **V. Parliament and the Central Audit Organization (CAO)**

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

# **Parliament and the President**

## **Prof. Amr El Shobaki**

### **Former Parliamentarian and Political Expert**

#### **Introduction**

There is renewed debate around the future of the political system in Egypt, and the nature of the relationship between Parliament and the President that will be determined by the form of the proposed political system, being Presidential or Parliamentary.

In fact, to consider that there is a link between democracy and the Parliamentary system is a fatal error, and to consider that confrontation of tyranny can only take place through adopting the latter is a more fatal one. This is because we forget that the Presidential system in most world States is a democratic one, except for the previous experiences of the Arab world. Most third world countries, which came to democracy late, adopted the latter system; on top of these are all Latin American countries which adopted a democratic Presidential system.

A democratic Presidential system is built upon granting broad powers, even though not absolute, to the President of the Republic. The presidency falls under the oversight of and accountability in front of the Parliament and the people. It is also specified in two non-renewable terms. In addition, there are Presidential systems that give powers to the Prime Minister (PM); such as France, these are known as semi-Presidential systems or mixed/dual systems, even though they are originally Presidential republics that are closer to the case of Egypt.

#### **The problems of the Parliamentary system**

The political culture in Egypt before the July Revolution did not accept having an elected PM who will dispute the powers of “his Majesty the King”. . It tended to depend on a strong trustworthy person who is above all narrow partisan differences and defends the prestige of the State. Meanwhile, when the King lost all these powers and PMs failed to fill in his place, the July revolution erupted and Gamal Abdel Nasser established a non-democratic Presidential system. This system established a large bureaucracy for the Egyptian State; exceeding six million workers and employees in the different State institutions and a military institution, with many retired officers employed in the State institutions.

In fact, finding a good relationship between Parliament and the Presidency demands the formulation of a democratic Presidential system that could help in taking Egypt away from the danger of becoming a Failed State; “democracy alone cannot save Failed States”, the title of an article for a researcher published in Al Masry Al Youm before the revolution. This means that there are States that appear to be democratic, allowing the circulation of power; such as Iraq, Mexico, Afghanistan, as well as others in which governing the country becomes a talk show where politicians fight live on air while the citizen does not notice any change in his social and economic reality.

The greatest irony is related to the nature of the ruling system in Egypt and the insistence of some on sticking to the mixed system in order to establish an ineffective political system in which each party practices surveillance/monitoring against the other and each authority faces the other in fear of a new Mubarak who will not return, while ignoring another real danger which is building a failed system, a helpless President, a divided Parliament and a government that everybody is working to overthrow.

If there were a Parliamentary government deriving its legitimacy from Parliament and it had less effective minister(s), the ability of the head of the government to change them would be limited, due to his keenness to maintain power in a way that transforms the Parliamentary system, in a State such as Egypt, into a system of adaptations in which no progress is made; instead of this all matters stay as they are to ensure his continuation in power.

The Parliamentary republic fits Sweden as it did in a number of Eastern European States. However, it does not suit Egypt as it did not in all Latin American States, France and America; as all adopted a Presidential system. Egypt needs a democratic Presidential system, in which the President is liberated from the daily calculations of Parliamentary blocs, and is empowered to take bold decisions and definite reforms regardless of the person of the President or his party.

### **A Presidential System and a Strong Parliament**

The way some deal with a semi-Presidential regime, in its French nature, in the discussions of the Constituent Assembly (CA) is by persisting in besieging the elected President with a legislative system that restricts his movements, assuming that every decision he will take must necessarily be against the people, because Mubarak did this for thirty years; as if Parliament was ideal before, and after the revolution giving it powers to accuse the President of treason or abuse of power to be removed from office through mechanisms that do not exist in any other political system, whether Presidential or Parliamentary.

It is enough, practically, that till now there are complaints, even though not serious ones, which were submitted to the Prosecutor General accusing the President of the Republic of enrichment, although he only reached power three months ago. We can imagine what would happen if the new constitution gave Parliament the right to withdraw confidence from the President under the pretext of “abuse of power”; as added in the constitution by some members of the CA; which is a loose expression, especially in a country in which the number of malicious complaints, incitement to murder and libel and slander exceeds the number of the population in some of its big cities.

Is it logical, in light of the climate of political competition and the failure of the political elite to reach consensus on political and constitutional rules to govern the country, that withdrawal of confidence from the President is based on a pretext such as abuse of power, which does not exist in any other Presidential or Parliamentary system? And can Parliament be given this right, in light of its previous structure and most probably the coming one too, to put get the country into a state of paralysis and absurd chaos where the conditions of citizens stay as they are in the interests of politicians and their manoeuvres?

These types of suggestions give the impression that Egypt has the luxury of changing its elected President every month as some insist to produce a “scarecrow” President so that we can say we have a democratic regime. In fact, this is the way to produce an excellent failed system in which every faction will stand against the other and we will be happy to have a President moving from one place to another doing nothing, MPs screaming and currents and coalitions increasing to cement failure, while the citizen is miserable and his conditions have not changed.

Egypt is more exposed to becoming a real model for a Failed State than an authoritative one; a State that is suffering from chaos, absence of laws, freedom to violate all values and traditions more than being a strong authoritative tyrannical State.

A developing country, such as Egypt, suffering from problems of poverty and unemployment and one that witnessed corruption and real collapses in health, education and public services, needs a Presidential system that is capable of confronting these issues radically in a way that does not reproduce the previous regime through steering the country, with a system of reforms to satisfy everyone because those whom the President will upset will pursue him till the end and even sometimes accuse him of abuse of power and other times accuse him of treason.

Egypt witnessed Presidential election campaigns which were all outside parties and remained stronger than them all, except for Morsi who won due to belonging to the Muslim Brotherhood. However, neither the President nor anyone else will do any meaningful thing in light of the insistence on restricting any political or economic initiative, with a thousand legal and political boundaries as a result of obsessions and complexities more than real fears.

It is true that the President has restricted powers in all democratic States; however, this restriction is to prevent monopoly of power or remaining in it forever, and not to take meaningless procedures for change and reform.

Our failure will be deepened by choosing a Parliament through election lists; as we will select a deformed system for the Executive, we will choose a more deformed one for the legislature. In fact, the idea of adopting the system of relative lists, which gives parties and independent candidates the chance to formulate lists to nominate in the next legislative elections, will be a real crisis for the next Parliament as well as the political process. It will make the process of arrangement and selection of lists dependent on the current condition of parties and the corruption existing in some of them, which will result in formulating lists of candidates who represent a model of failure and poor choice. It will also give some people the right to be the guardians on the Egyptian people by arrangement of candidates according to personal and financial whims.

We should not forget that in the previous election lists Egypt saw hundreds of candidates who negotiated with other party lists in case they were not included on top of their party list; hence, where is party loyalty, defending programs and opposing ideologies with which some justified their defence of the list system, which was governed at the end by

individual and financial interests as well as the calculations of who was trustworthy and kinships.

### **The next Parliament and the current President**

It is certain that there is difficulty in identifying the nature and form of the relationship between the coming Parliament and the current President, in light of the experience of the previous relationship between the Supreme Council of Armed Forces (SCAF) and the dissolved Parliament. It is certain that if Egypt adopts the mixed/dual system there will be real danger in the existence of a condition of mutual surveillance/monitoring between Parliament and the Presidential institution, leading to paralysis in the performance of both.

In fact, the relation between the next Parliament and the President will be governed by three major dimensions:

- I. The first is related to the political system upon which the Egyptian elite will agree. If it is a Presidential System, this will mean that Parliament will not have the ability to withdraw confidence from the President or interrogate him, except by suspending the Constitution. Hence, Parliament will question the President through his Ministers and through approval or rejection of his bills and some of his decrees which the Presidential system allows him to take. This will push members of Parliament (MPs) to exert effort in the discussion of the content of bills, instead of the media parade and grandiose actions such as withdrawal of confidence from the President even if unnecessarily.
- II. In case of the adoption of the mixed system, which we consider the worst in the relationship between Parliament and the President. It will embed a relationship of mutual surveillance/monitoring and suspicion that could lead to a paralysis in the political system as a whole, especially if it ended up with a Presidential decree to dissolve the Parliament and another Parliamentary motion to remove the President from office, that is reaching the phase of real crisis in the political system as a whole and repeating the Failed State.
- III. The form of Parliamentary majority will affect the relationship between the next Parliament and the President. If the majority is for the Muslim Brotherhood and the Islamic current, confrontation will be limited to the performance of the government and Ministers without getting too close to the President, regardless of the adopted political system. However, in the unlikely event that the Parliamentary majority belongs to civil/secular currents, confrontations with the President would be sharper and could lead in case of the mixed system into a paralysis in the political process as a whole. Meanwhile, in the Presidential system, practically, confrontation will be limited to the government; even if the majority refuses the bills presented by the President, it will be far from withdrawal of confidence from the President and from causing paralysis in the political system as a whole, due to the nature of the chosen political system, namely the Presidential one in this case.

## **Comments by Prof. Adam Cygan, School of Law, University of Leicester**

The observation made by Professor El Shobaki that, in any new constitutional settlement, the Egyptian Constitution must have at its core a democratic Presidential system of government is undoubtedly correct. The democratic values which the Constitution must exhibit are first and foremost a clear separation of powers between the various branches of government as well as securing an efficient system of checks and balances between the Parliament and the President. The overriding concern should be that when the new Constitution is finally drafted there is no concentration of power in the hands of the President and that, in addition, Parliament cannot bypass the President. In the light of President Morsi's decree of November 22nd 2012, serious concerns must be raised with regard to extent of control that any future elected Parliament will be able to exert over the President.

The position of the President should be that of an independent Head of State and Professor El Shobaki correctly identifies that in the case of Egypt the Constitution should be drafted so that, 'the President is liberated from the daily calculations of Parliamentary blocs'. While Professor El Shobaki is right to argue that Constitutions must reflect socio-economic, political and cultural traditions of a nation state, and that constitutional structures cannot be transplanted from one country to another, there is, however, a requirement that a democratic constitution fulfils certain basic criteria. This includes a clear system of political responsibility and accountability, the need to ensure that, in a Presidential system, Parliament as the elected representative of the people remains a relevant institution, and that the Constitution is recognised by the Citizens as providing a system of governance which reflects their aspirations.

On the latter point Professor El Shobaki suggests that, as a developing country, which is facing significant social, economic and administrative challenges a strong President is required to take decisive and, in his words, 'radical' action. This analysis offers one possible interpretation for the reason of President Mursi's decree of November 22nd and the justification given that it is intended to safeguard the revolution. In his view this is essential to demonstrate the clear leadership required to tackle the problems facing the Egyptian people. There is undoubtedly some truth in this, but, his rejection of a semi-Presidential system such as that in France does leave a number of outstanding questions concerning the extent of Presidential power and whether any elected Parliament will be able to exert sufficient control over the President. Strong Presidents arising out political upheaval in a society which faces the sort of challenges seen in Egypt may seek to behave in a populist way to the detriment of a (sizeable) minority. The President as the Head of State should embrace all political and religious views and should be above party politics, but not removed from the democratic requirements of political accountability. To that end the President must, in some form, be answerable to Parliament in the exercise of executive power and Parliament should have some formal role in the review of the exercise of this executive power. Furthermore, Parliament should be able to block Presidential action through the exercise of a special majority of one or both chambers of the Parliament which the current Constitutional draft

does not provide for. For this reason of ensuring accountability and preventing the concentration of power in the hands of the President a semi-Presidential system should not be altogether discounted.

It is clear from the paper of Professor El Shobaki that there is a high degree of urgency to resolve the constitutional impasse that presently exists and to prevent the current power vacuum giving rise to further civic unrest or even military rule. It may, however, be suggested that in the search for expediency, and so that Egypt can 'move on' from the Mubarak years, the current draft of the Constitution fails to adequately adhere to some basic constitutional principles which prevent a new concentration of power in the hands of the President. One specific example concerns Article 147 of the draft Constitution which gives the power of the Promulgation of Laws solely to the President. Though the power only becomes exercisable once the law has been signed by both chambers of Parliament there is a strong argument, based on grounds of accountability and legitimacy that all laws should be signed by both the President and the Prime Minister. This will create a chain of accountability between the President and the Parliament, and it will also help to foster a public perception that political institutions are working together for the common good of the Egyptian. This will be crucial in circumstances where the President and the parliamentary majority come from different political parties.

To this end it is crucial that the Constitution includes processes for dispute resolution. An important forum for political dialogue and resolving disputes between parliament and the President could be the Council of Ministers. In the current draft of the Constitution the status of this Council is vague, but it has the capacity to act as forum through which legislative compromise could be attained. In particular, if the Council was extended to become some form of 'Council of State' which included the Parliament, and met at times of political stagnation, this may provide a forum in which a compromise may be reached on legislative proposals which in its original form is considered to impact disproportionately upon one religious or ethnic group. At present, question marks remain whether the existing draft of the Constitution provides such adequate protection and safeguards against the possibility of a 'tyranny of democracy'.

To achieve a coherent and effective model of accountability between the President and Parliament Professor El Shobaki correctly highlights that the political system and especially the use of electoral lists at election time must be reviewed. The use of such lists undermines democracy and both acts as a deterrent and prevents the most able candidates from standing for election to Parliament. Thus the final constitutional settlement must also lead to a fundamental overhaul of the political system. Any form of Presidential system, as Professor El Shobaki points out, must have a strong and independent Parliament with active parliamentary committees, but one which behaves responsibly and fulfils its constitutional functions with sincerity and in the national interest. In the same way that uncooperative Parliaments should not just be dismissed by Presidents, so should Presidents not be dismissed by Parliaments who are claiming to act in the best interests of the Egyptian people. In both instances the Constitution must have clearer procedures for either dissolving Parliament or for the impeachment of the President.

Professor El Shobaki's paper reflects the urgency sought by Egyptians to move away from the tyranny of the Mubarak years where the institutions of the State were unable to control the excesses of executive power. This offers at least a partial explanation of the November 22nd Decree but one which has failed to convince either opposing political parties or large parts of the public. What is currently lacking in the draft of the Constitution is a coherent and complete system of checks and balances that controls the exercise of executive and parliamentary powers but without necessarily leading to a constitutional crisis or political discord as a consequence of the exercise of these powers. In particular, the question should be asked whether such powers as those which permitted the Decree of November 22nd 2012 should be subject to rigorous political as well as judicial supervision and whether they have any place in the final draft of the Constitution. To this end the Constitution must have mechanisms for dispute resolution between the various actors and institutions of government which prevent Egyptian political life from being dominated by conflict and disagreement.

## **Parliamentary oversight over Government**

### **Prof. Mohamed Qandil**

Parliament's oversight role is comprised of parliament's ability to question the government, in order to obtain information that enables it to practice the oversight role effectively, and hold it accountable for its political responsibility in case of failure to perform its role. In order to empower parliament to perform its oversight function, a constitutional and legal framework should be guaranteed in addition to Parliament right to access information and to call upon the government to appear before Parliament to answer questions and inquiries.

Currently, Egypt is passing through a crucial transition after decades of a tyrannical regime in which the principle of separation of powers was destroyed, and rules and traditions of Parliamentary oversight over the government vanished. In addition to this, the faltering transition resulted in Parliament's functions being suspended and accordingly a lack of Parliamentary oversight over government. Parliament was not expecting this and it was against all its wishes whether regarding its formulation or the practice of its roles. In addition, soon afterwards, Parliament was undermined by challenges the constitutionality of the law regulating its elections, which resulted in the court verdict dissolving it.

#### **Constitutional legitimacy in Egypt: between obstructing Parliament's function and absence of a Parliamentary oversight role over the government:**

- I. After the revolution of 25th January 2011, the first Constitutional Declaration was issued, it stipulated in article one "suspending the provisions of the Constitution". Article two stipulated that the Supreme Council of Armed Forces (SCAF) takes responsibility for the administration of the affairs of the country; and subsequently, in the same declaration, SCAF decided to dissolve the People's Assembly and Shura Council, and hence the authority to make laws during the transition devolved to the SCAF.
- II. On 30th March 2011, The Constitutional Declaration "temporary constitution" was issued, in which article 33 stipulated the powers of the People's Assembly (PA) immediately upon election:
  1. Legislative authority.
  2. Adopting State public policy and the general plan for economic and social development.
  3. Setting the State public budget.
  4. Oversight over the work of the Executive.

#### **Article (56) stipulated the powers of SCAF which assumed all powers of the State as follows:**

1. Legislation.
2. Issuing State public policy and public budget and oversight over their implementation.
3. Appointing the PA appointed members.

4. Calling the PA and Shura Councils to enter into normal session and adjourn, and calling an extraordinary session.
5. The right to promulgate laws or object to them.
6. Representing the State domestically and abroad, signing international treaties and agreements, and being considered a part of the legal system of the State.
7. Appointing the Prime Minister (PM) and his deputies, ministers and their deputies, as well as relieving them of their duties.
8. Appointing civilian and military employees and political representatives, as well as dismissing them according to the law; and accrediting foreign political representatives.
9. Pardoning or reducing punishment; however, blanket amnesty is granted only by law.
10. Other powers and responsibilities as determined by the President of the Republic according to laws and regulations.
11. The Council shall delegate its Speaker or one of its members to bear any of its responsibilities.

**Article (57) stipulates the responsibilities of the Cabinet; sharing the development of State public policy with SCAF and supervising its implementation, according to the laws and Presidential decrees.**

- III. In the second year of the revolution, following the formulation of the PA, while its sessions were being conducted and due to the constitutional flaws in the law regulating Parliamentary elections, on 14th June 2012 the Supreme Constitutional Court ruled that the law governing parliamentary elections was unconstitutional in appeal no.20/34 Judicial/Constitutional.
- IV. On 15th June 2012, SCAF issued decree no.350/2012 stipulating in its article 1 that “The verdict delivered by the Supreme Constitutional Court in the appeal no.20/2012J/C is into effect and the PA is declared null and void as of Friday 15th June 2012. This decree was published in the Official Gazette on 18th July 2012.
- V. On 17th June 2012, SCAF issued a Constitutional Declaration “Supplementing Constitutional Declaration”, article “56 repeated” was added, stipulating that SCAF will assume the powers set out in Article 56 as written in the 30th March 2011 Constitutional Declaration until a new parliament is elected to take over its responsibilities.
- VI. On 12th August 2012, President Mohamed Morsi issued a new Constitutional Declaration in which the Supplementing Constitutional Declaration was revoked and the President assumed all powers set out in Article 56 as per 30th March 2011 Constitutional Declaration.

**The sources of legislative authority and parliamentary oversight over the government are still ambiguous between a dissolved PA, the Judiciary and the President who assumes the powers of the PA. Equally, they are also ambiguous between disputing parties of the administrative judiciary in judicial controversy and debate around the reactivation of the dissolved Parliament. This issue has not been settled at the time of writing this paper.**

## **Legal status of Parliamentary oversight over the government**

After the 25th January 2011 revolution and in the current constitutional situation where the 1971 constitution has been suspended while the constituent assembly has not yet finished drafting a new constitution, the relationship between Parliament and the government has become vague, as there is no constitutional provision to define and set the boundaries of the principle of separation of powers, and the sole referent has become only law no. 38/1972 concerning the PA and the PA rules of procedures issued in 1979 with its subsequent amendments, the last of which was issued in 2010.

Moreover, according to the PA law and the rules of procedure, parliamentary oversight roles over the government are defined through the PA parliamentary apparatus and methods and procedures of parliamentary oversight. For further information please see parliament apparatus and oversight mechanisms in annex no (1).

The following factors influence the success of parliamentary oversight. They are arranged in order of priority for inclusion in the constitution to guarantee the success of parliamentary oversight, and what parliament can do later:

1. Building the capacity of Parliament's secretariat in order to be able to support committees and MPs in performing their legislative and oversight roles.
2. Creating a database for the Parliament with information and data.
3. Shortening the period given to the government to react to oversight tools and obligating it to respond rapidly to questions and inquiries raised by MPs.
4. Activating the procedure for Oral and Immediate Questions raised by MPs to the government.
5. Publishing the minutes of Parliamentary sessions and the work of committees for public access and empowering civil society to participate in the work of Parliamentary committees.
6. Activating the role of fact finding committees and granting them the right to delegate members from the general prosecution to support committee members.
7. Providing MPs with legal and constitutional powers to ensure the effectiveness of Parliamentary oversight mechanisms.
8. Government commitment to provide all data and information to MPs.
9. The political and electoral system that defines the separation of powers (Legislature, Judiciary and Executive), should allow devolution of power; enshrine Parliamentary independence from the Executive and activate its oversight role.
10. Distribution of powers within Parliament, the existence of Parliamentary opposition and adoption of proportionality in the composition of Parliamentary committees, its apparatus and its oversight tools.
11. The will of MPs to practice their oversight responsibilities and to increase the use of oversight means and procedures.
12. Promotion of the culture of democracy and values of transparency and accountability within society and among MPs.
13. Developing legal frameworks to define the relationship between Parliament and the Executive, easing restrictions stipulated in the PA rules of procedures; especially removing the restrictions on interrogation of Ministers relating to

time limits and the need for majority approval, in addition to procedures for the PM to be responsible before Parliament and for the accusation of Ministers.

14. Supporting MPs with assistant researchers and specialists in parliamentary research and studies and analysis of the State budget.
15. Enhancing the work of Parliamentary committees to emphasize their role in Parliamentary oversight through developing the skills of their members and decreasing their number; in order to create a better atmosphere for serious discussions of issues under investigation.
16. Developing Parliament's library by providing modern resources that go with the development of political systems and Parliamentary functions both at the regional and international levels.
17. Obligating government officials to attend Parliamentary committees.
18. Field visits for committee members to event sites and to the administrative and executive apparatus of the State.
19. Public hearings for MPs with different media agencies and public figures in attendance.
20. Eradicating the risk of corruption and its destructive effects on democracy and human rights, obstruction of development programs, and destruction of State apparatus and agencies.
21. Prioritizing fighting corruption at all levels, based on the United Nations Convention against Corruption; adopting policies that encourage managing the public sector with methods characterized by transparency, accountability and corporate responsibility, in addition to restituting public property misused during the corrupt system. Moreover, it is necessary to empower parliamentarians to perform their oversight and legislative roles in fighting corruption.
22. Increasing the time parliament and its committees dedicate to scrutinizing and debating the draft State Public Budget through extending the budget discussion period to three months instead of two months.
23. Endorsing Parliament's right to amend the budget submitted by the government, allowing it to reprioritize provisions of expenditure with no effect on budget deficit.
24. Reducing the time allowed to submit the final account of the budget to Parliament from one year to six months; this increases the level of actual oversight of the parliament over the final account.
25. Adopting a parliamentary code of conduct for MPs aiming at avoiding conflicts of interest through monitoring the funds of political parties and guaranteeing transparency of election campaigns.

## **Comments by Professor Adam Cygan, School of Law, University of Leicester**

In any parliamentary system of government it is crucial that effective procedures and mechanisms are in place to ensure that the government remains accountable to the Parliament. Securing effective accountability of the government is challenging in all parliamentary systems, not least because the governing party is likely to have a majority in the Parliament. This requires Parliament to act independently and put aside political affiliation to ensure that the executive is responsible to the institution which has been elected by the Citizens and from which the government is itself drawn.

Professor Qandil perceptively identifies that in the case of Egypt, years of one-party, and in his words ‘tyrannical rule’ have seriously undermined parliament and that it currently fails to function as an institution which has either the ability or capacity to effectively hold the government to account. In short there is no real culture of parliamentary democracy in Egypt. The disabling of Parliament during the Mubarak years has meant that there is a general lack of understanding of what constitutes effective parliamentary accountability of the executive or how it is to be achieved. While this absence of effective oversight constitutes a democratic deficit, it does provide the Egyptian Parliament and the drafters of the Constitution with an opportunity to create a parliamentary scrutiny system which meets the needs of the new political and institutional framework which will be created by the new Constitution.

In his paper Professor Qandil correctly places the need for effective parliamentary oversight of the executive in the context of securing legitimacy of the legislative process. Since the Revolution of 25th January 2011 Egyptian constitutional and parliamentary practice has been in a state of flux which has meant that some decisions, which may have a profound constitutional impact, are being taken in the form of Constitutional Declarations, which raise significant questions concerning their legitimacy in the medium to long term. In the absence of a functioning parliament after the Revolution such Constitutional Declarations, though perhaps a necessary form of decision-making to amend powers granted under the Mubarak regime, cannot be seen as even semi-permanent solutions or viable alternatives to parliamentary decision-making. In particular, Professor Qandil highlights the first Constitutional Declaration after the Revolution which in Article 1 disabled the provisions of the old Constitution and in Article 2 stipulated that the Supreme Council of the Armed Forces takes responsibility for the administration of the country. He considers that the manner in which these were made had a profound impact upon the final version of the new Egyptian Constitution especially in the absence of a functioning Parliament to oversee the exercise of the powers that have been granted by the Constitutional Declarations.

What is most clearly evident from the paper of Professor Qandil is that until such time as the new Constitution is drafted and includes a prominent position for the role of Parliament to exercise oversight over executive powers then the Egyptian Constitution will fail to fulfil the basic requirement of any constitutional democracy – namely to guarantee the separation of powers. The longer that this accountability vacuum and democratic deficit persists the more difficult it will become for any future Parliament to exert control over the government

and check the exercise of its powers. When placed in the context of the power vacuum that also exists in the relationship between Parliament and the President, and which the draft Constitution does not, at present, satisfactorily address, the lack of accountability of the government to the Parliament reinforces the perception that the process of drafting the new Egyptian Constitution is failing to secure the basic principles of constitutional government.

The current version of the draft Constitution is weak with regard to how accountability and legitimacy of the government can be 'constitutionalised'. In particular, there must be some clearer status of the principles upon which Parliament functions and, perhaps more importantly, some constitutional recognition of the need for parliamentary committees to be at the forefront of this accountability process. Professor Qandil recognises the need for parliamentary committees to be more prominent and better resourced in order for them to fulfil their objectives. This is essential to secure their independence of government. Furthermore, the oversight of the armed forces could be delegated to a constitutionally guaranteed committee along the lines of Article 45 of the German Constitution. The elevation of certain key parliamentary committees, such as that reviewing the armed forces, to a constitutional status would send out a signal that parliamentary oversight is both taken seriously and that, in the case of the Armed Forces, it is subject to civic and democratic control.

The crucial point for effective committees is that they will undertake their oversight activities on behalf of the Parliament. To have credibility, committees must be representative of the Parliament from which they are drawn and in particular, the position of opposition MPs is crucial. Parliamentary committees consisting of predominantly or exclusively MPs from the governing party will lack legitimacy. Moreover, because parliamentary committees should be acting on behalf of the Parliament when seeking oversight of the government they must try to operate independently, apolitically and adopt a consensual and inquisitorial modus operandi rather than being based upon adversarial lines where party affiliation may hinder the inquiry. Experience from many parliaments around the world shows that Committees split on party/religious lines will be weak and ineffective. Committees should meet in public with only limited exceptions, for example national security, which may cause for meetings to be held behind closed doors. For reasons of transparency all reports should be published.

To ensure their independence of government and maximise their effectiveness Committees should have access to specialist legal and policy advisers which they are permitted to appoint and be free to determine their own inquiries. Furthermore, it should be Parliament and not the government which determines the terms of reference for the committees to guarantee their independence of the government. At the conclusion of an inquiry the Committee should, as far as possible, attempt to produce a single report to ensure that accountability is maximised and effectiveness of the scrutiny process is maintained. Finally, as Professor Qandil correctly points out Parliamentary oversight of the government can only be effective if government officials and ministers are obliged to attend and this must be backed up by sanctions which can be imposed by parliament against ministers for non-compliance. There is no doubt that in the absence of a new Constitution and a functioning

Parliament it is difficult for Egypt to conceive how parliamentary committees may function. But, it is integral to ensure their future effectiveness that the need for committees to perform oversight activities and their position within the Egyptian system of governance that they are more directly included in the final draft of the Constitution.

# **The Parliament and the Judiciary: Between the principles of Accountability and Independence**

## **George Fahmy**

This paper aims to analyze the recent crises that have tainted the relationship between the Legislature and the Judiciary. It aims to provide a number of recommendations around the best form of relationship between the two branches, ensuring the establishment of a real democratic regime, representing the will of the people and at the same time respecting the principles of the rule of law, independence of the Judiciary and separation of powers.

The issue of the relationship between the Legislature and the Judiciary is considered one of the most important challenges facing political regimes that have suffered from authoritarian regimes for decades; especially that it must create a critical balance between both powers without leaning either towards the Judiciary so that it does not become above the will of the people it is representing or towards the Legislature so it does not dominate over the Judiciary to establish the dictatorship of the majority. In addition, the relationship between the principle of the independence of the Judiciary and its accountability has become a widely debated issue not only in Egypt but also in states that are still struggling in the direction of democratic transformation. The debate can also be found in States that have long-standing democratic and stable regimes such as the United Kingdom and India; a similar debate erupted during the last months, following the announcement of the Indian Legislature of its intention to promulgate some laws relevant to the Judiciary; in August 2012, some Judges demanded that the government listen to the opinions of senior Judges prior to enacting any law taking into consideration the balance between the principles of independence of the Judiciary and its accountability.

### **The Conflict between the Legislature and the Judiciary in Egypt following the Revolution:**

The relationship between the Judiciary, especially the Supreme Constitutional Court in Egypt, and the Legislature, suffered from great tension during May and June 2012. This followed a bill submitted by a Member of Parliament for the reformulation of the board of the judges of the Constitutional Court and the reduction of its constitutional and judicial powers of oversight over laws, which are powers enjoyed by the Court since its establishment in 1979. The Judges of the Constitutional Court opposed this bill and described it as an act of aggression from the Legislature on the Court and “a new massacre for the Judiciary”, according to Judge Hatem Bagato (Al-Ahram Al-Masa’y, 15th May 2012). The General Assembly of the Constitutional Court convened to discuss the latest developments in the situation regarding the bill, which, according to them, threatens their independence through major interference from the Legislature in the affairs of the Judiciary. The General Assembly announced that it would remain in a permanent session for a period of three days to follow up developments in debate on the law in Parliament. Meanwhile, the Committee of Proposals and Complaints approved the submitted bill as an initial step towards discussing it in the Legislative Committee and in plenary in Parliament following this. In addition, some judges

of the Constitutional Court accused the Legislature of attempting to restrict the power of the Constitutional Court before the latter looks into the legitimacy of the Law on Elections, on which basis the current Parliament was formulated, and of attempting to violate the principle of separation of powers, aiming at the preservation of the People's Assembly with its current structure, which increased the magnitude of the crisis.

This was not the only crisis between Parliament and the Judiciary; as the relationship between the Parliament and the Egyptian Judges' Club witnessed great tension following Parliamentary criticism of the verdicts released against President Mubarak and the figures of his regime, which included criticism of the Judiciary which was accused of promoting a purge. The Judges' Club responded to Parliamentary accusations in a press conference in June 2012 in which Ahmed Al Zend, head of the Judges' Club, announced that Egyptian judges will not accept any procedures taken to amend the law of the Judiciary, by the current People's Assembly, accusing it of ambushing the Judiciary and the Judges by presenting 7 bills relevant to the Judiciary before the release of the verdict in the legal case concerning the former President, which reveals, according to him, "the condition of lack of neutrality, ambushing and aggression against the Judiciary" (Al-Ahram Al-Masa'y, 8th June 2012). In addition, Al-Zend accused the Legislature of interfering in the affairs of the Judiciary and violating the principle of separation of powers. He also demanded the withdrawal of the bills pertaining to the Judiciary presented to the People's Assembly.

### **The Principle of Separation of Powers: the Experiences of the United States and France**

The principle of separation of powers is one of the most important constitutional principles that characterize modern nation states. While authoritative regimes, such as the Soviet Union have adopted the same principle, this was generally just empty words. Democratic regimes have sought to develop real balance between the three powers, so that none treads on the toes of the other. The basis for this principle goes back to the writings of Aristotle; however, the most important contributions towards realising the principle of separation of powers related to modern times are those of John Locke and Montesquieu, author of the most famous book in this regard: the Spirit of the Laws, which was published in 1748. The principle of separation between the Executive, Legislature and the Judiciary is considered a guarantee that none of them will take sole power and protects against the emergence of tyranny. Even in States with periodical elections, there is no substitute for the principle of separation of powers to ensure that the majority of Parliament does not violate the rights and liberties guaranteed in law for the minority.

Most constitutions in democratic States emphasize the division of powers; although the nature of this separation and its forms differ from one regime to another, especially as regards the relationship between the Legislature and the Judiciary, the focus of this paper. Both the American and French regimes are clear examples of the difference in understanding and application of this principle; even though the French have headed more towards the American model recently, as we will see later on.

The American regime emphasized the rule of the constitution and law over and above the elected Legislature. According to Jefferson, one of the founding fathers of the U.S, the Legislature should not enact any bill that contradicts the Bill of Rights. Hence, the American regime established the role for the Judiciary, particularly the role of the Constitutional Court, to review bills in order to protect basic rights and guarantee the principle of separation of powers. Meanwhile, the French regime adopted the principle of division of powers; however, it granted the priority to the Legislature rather than the Judiciary; based on the fact that the Parliament represents the will of the people; hence, no power shall be higher than this will. This approach goes back to the negative image which attached to judges before the French Revolution in 1789.

While the American regime supported the principle of rights that are protected by the Judiciary with its verdicts, France supported rights guaranteed by the Legislature with the laws it develops. However, the French regime suffered a deep crisis during World War II; therefore, the 1958 Constitution ended the domination of the Legislative Branch within the French political regime and the Judiciary held the power to review laws during the period between Parliament voting on the bill and the President adopting it; if the law is adopted, its constitutionality may not be challenged. However, France made a constitutional amendment recently, which was considered by some a constitutional revolution; it allows the Judiciary more powers in oversight over laws promulgated by the Legislature. While the Judiciary previously had the right only to practice oversight over laws before adoption, the constitutional amendment grants it the right to look into the constitutionality of laws even following their adoption. It granted judges, in cases where the constitutionality of a law is challenged, the ability to transfer the law to the Constitutional Council in order to look into its compatibility with constitutional rights and liberties. However, the amendment limited this power to the Judges of the Council of State (Conseil d'Etat) and the Court of Cassation (Cour de Cassation). This Constitutional amendment was adopted in 2008 and was implemented in 2010.

### **Recommendations:**

1. The Principle of Separation of Powers is one of the most important characteristics of democratic regimes, so that no person or political organization dominates the different power institutions. This principle basically aims at the protection of the rights and liberties of citizens through the creation of balance between the three powers; none alone can dominate rights and liberties.
2. Division of powers should not lead to a divorce or detachment between the different powers, similar to what was witnessed in Egypt recently; that is a stand-off between the Judiciary and the Legislature. Mechanisms that allow for consultation between the two powers should be devised in case of disagreement or crisis; such as invitation of judicial figures to hearings in Parliament, in order to know their opinions, especially if Parliament is to consider legislation addressing the role of the Judiciary, similar to what happened in the session that considered the verdict in the legal case of former President Mubarak.

3. The necessity of embedding the principle of independence of the Judiciary, apart from the Executive and the Legislature, through limitation of interference of both Branches in the affairs of the Judiciary through grants or punishment. Judge Mahmoud Mekki, Justice Minister, took an important step towards the principle of the independence of the Judiciary when he sent a letter to the Supreme Judicial Council informing it of the effective transfer of judicial supervision powers from the Ministry of Justice (the Executive) to the Council (The Judiciary) (Al Masry Al Youm, 14th August 2012), pending a new bill for the Judiciary. The current law on the Judiciary, in article 78, stipulates the formulation of the Judicial Inspection Department inside the Ministry of Justice and that the Minister makes regulations with the approval of the Supreme Judicial Council, which represents the interference of the Executive in the internal affairs of the Judiciary.
4. The issue of the responsibility of judges is very pivotal in this regard: based on the principle of the independence of the Judiciary, judges should not be held accountable in front of either the Executive or the Legislature; it must be in front of an independent judicial body that enjoys transparency. The Legislature should not be able to comment on the verdicts of the Judiciary or the behavior of judges. However, the independence of the Judiciary does not mean that it is not to be held accountable for clarification and understanding of verdicts, but this should be implemented without giving the Executive or the Legislature the right to interfere in the affairs of the Judiciary. The creation of this balance between independence and accountability is one of the most important issues that face old democratic regimes such as the United Kingdom and India. Vernon Bogdanor, the constitutional expert, differentiates between two types of accountability, as Bogdanor calls them: “Explanatory Accountability” in which there are procedures to explain what went wrong and another type, “Sacrificial accountability”, which might lead to punishment if the investigating body thinks there are shortcomings.
5. The power to review laws issued by the Legislature if their constitutionality is challenged has become almost a constant in most democratic States. Even France, which opposed this principle for decades, has made a constitutional amendment that allows the Constitutional Council to review laws, if they are alleged to be unconstitutional. The Constitutional Court was provided with this principle in Egypt during the previous era for the purpose of preserving public and private rights and liberties of Egyptians from Executive encroachments. Judge ‘Awad Al Murr played an important role in this regard, during his term of presidency for the Constitutional Court, during the period from 1991 till 1998. Hence, there should not be a withdrawal from this important legal and constitutional progress which could represent an important defence line for rights and liberties if anyone tries to re-establish an authoritative regime.

## **Comments by Professor Adam Cygan, School of Law, University of Leicester**

Georges Fahmy correctly points out that the issue of the relationship of the Legislature and the Judiciary is one of the most challenging relationships that exist within most systems of government. In democratic systems the separation of powers suggests that the three branches of government (legislative, executive, judicial) exist largely independent of each other, with their own prerogatives, domains of activity, and exercises of control over each other. The primary difficulty within this relationship is that the Judiciary must, to ensure the strict separation of powers, remain wholly independent of the Legislature at all times. Moreover, the independence must, perhaps more importantly, mean the independence of the judiciary from the executive.

Within a Constitution in transition, such as that in post-revolution Egypt there is significant scope for tension to exist between the executive and the Judiciary and the borders can at times be blurred. In his paper Georges Fahmy details the dispute that arose in May 2012 concerning the appointment of the Judiciary following a bill presented by a Member of Parliament. For the Judiciary such a bill presents clear challenges to their independence and their ability to fulfil the constitutional function of guaranteeing the rule of law as well as protecting constitutional rights. Moreover, such legislation is very likely to politicise judicial appointments. There will inevitably be disputes concerning the parameters of the extent to which the Legislature can exert influence over the Judiciary, especially with regard to their appointment, but it is a fundamental requirement of any democratic Constitution that the principle of the separation of powers is embodied in an independent and politically neutral Judiciary. To this end the final draft of the Egyptian Constitution must fully uphold the principle of judicial independence and guarantee that the Judiciary should not become politicised. At present, this is not the case.

The issues raised by Georges Fahmy in his paper address the broader question of the need for Egypt to develop a system of administrative law which includes, amongst other things, a process of independent judicial review of the various organs and institutions of government and whether in the exercise of their powers the government has exceeded its powers. President Morsi's Decree of November 22nd 2012 illustrates that the relationship between political actors and the judiciary remains one that is filled with tension and a degree of mistrust, but the irrefutable nature of the President's Decree does itself seriously undermine the separation of powers in Egypt. As already indicated the separation of powers is essential to the functioning of a constitutional democracy and the Constitution must, itself, demonstrate a structural organisation of the separation of powers. For example, a highly developed system of the separation of powers can be seen within the German Constitution which in Article 20 states that 'The Legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice'. This defines a specific role for the Judiciary as the gatekeeper of constitutional rights and the reference to 'justice' in Article 20 confirms the Judiciary's primary duty is to uphold the Constitution in favour of the citizens and to provide a final check upon the use of arbitrary power. Moreover, Article 93 spells out that the Federal Constitutional Court rules on all disputes concerning the application of the Constitution removing the interpretation of the Constitution from the political process. Under

the German Constitution the exercise of all political and legislative power is subject to the review of the Constitutional Court to ensure that it is compatible with the Constitution. This may be criticised for handing over too much power to unelected and unaccountable judges and there is the undoubted possibility that in any judgment the Constitutional Court will be making a political statement. Thus the Judiciary can always be said to act, to a greater or lesser extent, in a political manner. In a similar way, the Egyptian Constitution must include some express judicial guarantees that citizens will be protected against the arbitrary exercise of power. At present the provisions of Article 182 of the Draft Constitution are too vague and should be reconsidered.

In his paper Georges Fahmy strongly argues that an independent judiciary is fundamental to the separation of powers, though he correctly states that judicial independence does not mean that the judiciary should not be accountable. Within the Draft Constitution provisions have been included the purpose of which is to secure the independence of the judiciary but these provisions are vague. Though Articles 175 and 176 of the Draft Constitution purport to guarantee judicial independence and Article 182 reiterates this independence for the Supreme Constitutional Court there are still some questions concerning how precisely this can be secured. In particular, the Draft Constitution does not make any reference to rules of judicial procedure and who these will be drafted by. The Constitution should, to allay concerns over executive interference in judicial affairs, include a statement to this effect which categorically spells out that it is the judges who will determine their own jurisdiction and that this is judicial independence. This would be in line with the letter sent by the Justice Minister Mahmoud Mekki on August 14th 2012. As already indicated independent judges should not mean unaccountable judges, but the Draft Constitution does not include clear rules concerning judicial standards of behaviour other than references to corruption. This needs to be addressed within the final version to instil greater confidence in the judiciary amongst the citizens.

Reviewing acts of the Legislature by the Judiciary is a constitutional necessity. It provides a final check upon the exercise of legislative power and the Judiciary must have the capacity to declare legislation unconstitutional. Georges Fahmy concludes his paper by pointing out that this right to seek judicial review existed between 1991 and 1998 and so the principle is not new to Egyptian constitutional norms. Back then it had the purpose of preserving public and private rights and liberties of Egyptians from Executive encroachments. In post revolution Egypt the purpose will be to, amongst other things, protect the welter of socio-economic and political rights that are likely to be included within the new Constitution. This will be a challenge for the Constitutional Court but some lessons may be learned from the experience of post-apartheid South Africa where the Constitutional Court has been proactive in protecting and the rights contained within the South African Constitution. In this sense, through the separation of powers and preventing the exercise of arbitrary power the Judiciary will also have undertaken a fundamental role of giving effect to the legitimate expectations of the citizens that Constitutional rights cannot be restricted.

# **Parliament and Community Organizations: Local Councils & Civil Society**

## **By Mohamed Al Agati**

### **Executive Director of the Arab Forum for Alternatives**

Previous Egyptian constitutions did not address the relationship between the Legislature and community organizations; particularly local councils or civil society organizations (CSOs). Here, by addressing the most important problems related to the system of local councils and civil society in Egypt, we attempt to provide a vision for the development of the relationship between Parliament and such organizations for the development of a political system towards a more democratic regime.

#### **The problem of local councils:**

Historically, the conditions were not always available for a system of administration and local governance in Egypt; as it was usually linked with the idea of the centralized State. The system of local administration was first implemented in Egypt in 1883, with the Local Administration Law enacted on 1st May 1883 stipulating the establishment of councils in all provinces. However, this law withheld legal personality from these councils. Then, provincial councils were reorganized according to law no. 22/1909, which acknowledged the legal personality of these councils and gave them the final decision over and management of local matters and utilities. The law also stipulated the requirement of taking their decisions in issues relevant to local affairs within their scope. Later on, these councils were reorganized according to law no. 29/1913, before World War I.

When the 1923 Constitution was promulgated, it stipulated in articles 132 and 133 that: provinces, cities and villages shall, with respect to exercising the rights thereof, be considered public legal persons and shall be represented by different provincial and municipal councils(1). It also stipulated that the selection of the members of these different councils was through election unless in exceptional conditions where the law provides for the appointment of some unelected members(2).

The period between 1883 and before the July Revolution in 1952 was characterized by Egypt being under the British occupation which, in one way or another, controlled the Palace, influenced the choice of Ministers and imposed certain policies on them; it was well aware that the full implementation of local governance would move the country towards self-governance and weaken the role of the central authority, which it controlled. Hence, it was characterized by subordination to the central authority, even after the 1923 Constitution, which stipulated electing members of local administration and delegating to them a certain remit. Often, local administration was composed through election of senior landlords and

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(1) [http://www.constitutionnet.org/files/1923 - egyptian constitution english 1.pdf](http://www.constitutionnet.org/files/1923_-_egyptian_constitution_english_1.pdf)

(2) [http://www.constitutionnet.org/files/1923 - egyptian constitution english 1.pdf](http://www.constitutionnet.org/files/1923_-_egyptian_constitution_english_1.pdf)

appointment of senior clerks; which led to a deformed and weak body dominated by the central regime (3).

Three years after the eruption of the 1952 revolution, law no. 66/1955, which ended the segregation between provincial and village councils, came into being and lasted until the 1956 Constitution which set down the regulations organizing local administration in articles 157 to 166(4).

The Constitution included the most important principles regulating the system of local administration, which was later regulated by law no.124/1960. Since that law and until recently, four main laws had been enacted concerning local administration; noting that the 1958 Constitution did not include provisions pertaining to it and the March 1964 Constitution only allocated two articles to it, as it was issued following law no.124/1960 on Local Administration. The two articles included the principle of division of the State into administrative units, allowing some or all of them to be legal personalities according to the law (article 150), and provided that local councils should specialize in all matters relevant to the units they represent, contribute to the implementation of the State public plan and enjoy the right to establish and manage health and socio-economic utilities and projects according to the provisions of the law (article 151).

Engagement in local councils was affected by political and legal changes in Egypt; this period was characterized by political parties being frozen, absence of pluralism and political life being based on single party organization; hence, all candidates for local councils were members of this party.

Then, the 1971 Constitution was promulgated allocating three articles to the condition of local administration, namely articles 161, 162 and 163, which focus on the necessity of transferring authority to local community councils gradually and their formulation through direct elections. However, there was no reference to these councils representing their administrative units, giving the opportunity to legislators, following this, to make some amendments which weakened their roles (5).

It is worth noting, here, that since the July revolution and up to the present, considering all constitutions enacted during this period, the system of local administration has been stipulated in the constitution as part of the Executive Branch, contrary to the 1923 Constitution. This has had a great impact on weakening the role of local councils and increasing the role of centralized authority at the expense of local councils, which has decreased their effectiveness and importance and led to the reluctance of people to participate.

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(3)Sameer Abdelwahab, "Constitutional and legal Framework of the Local Administration in Egypt between theory and application", "Local Councils and Elections", Amr Hashim Rabea, Ahram Center for Political and Strategic Studies, Cairo, April 2008, P.17

(4)Mohamed Salah Abdelbadei, Local Administration System in Egypt: Between Theories and Applications", Dar Al-Nahda Al-Arabeya, Cairo, 1996

(5)Ibid, "Constitutional and legal Framework of the Local Administration in Egypt between theory and application", "Local Councils and Elections", Amr Hashim Rabea, Ahram Center for Political and Strategic Studies, Cairo, April 2008, P.21

During the time of the 1971 Constitution, law no. 57/1971 on local governance was enacted, according to which the so called (appointed) Executive Council was formulated for the first time, alongside the community council, and took some of the powers of the (elected) latter. Moreover, in 1975, law no.52 on the system of local governance, according to which laws no. 124/1960 and no. 57/1971 were annulled, was enacted. This law provided the general regulations for local administration units in Egypt, their terms of reference, formulation of their councils and their resources; it was issued by a presidential decree. This law used the term local governance instead of local administration (6).

In addition, in 1979, law no. 43/1979 on local governance system, currently effective in Egypt, was enacted. Some amendments were integrated in this law to reach its current final form; most important of which was replacing the terms of “local governance” and “local governance Minister” with “local administration” and “local administration Minister”, in article 1 of law no. 145/1988 based on the fact that the latter phrases are the correct ones used by the last Constitution. This is in addition to considering local governance a system that imposes political decentralization in a Federal State, a system that is not effective in Egypt.

**Arising from the issues described above, there are several problems that hinder the process of engagement in or the development of local action to become a tool for the participation of citizens in public life; namely, the structural and organizational level, the political level and the practical level on the ground.**

#### **I. Structural and organizational level:**

- **Control of executive councils over community councils:** weakness of the role of local community councils before executive councils. Local community councils only have the right to present questions or notification requests for Chairs and members of executive councils; they are not entitled to interrogate them and therefore cannot remove them from office/posts or even recommend this to the central government<sup>(7)</sup>; similar to the phenomenon of control of the Executive over local councils system, mentioned previously.
- **Imbalance in funding resources:** the decrease of financial empowerment for **local councils**. As the financial resources approved by the law covers only 20 % from their budget, while the other 80% depend on the Governmental aid.; which affects their independence in addition to their, almost complete, subservience to the Executive. This is addition to some other practical restrictions on the funding sources specified in the law as the condition of central government approval. In addition to this is the role for local units (both executive and community) in the development of local budgets, which directly affects the ordinary person in the district. This influences the perceptions of citizens of the importance and effectiveness of local councils and units for them and the role they are supposed to play compared to approaching MPs to play

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(6) Source: <http://www.mosharka.org/>

(7) Sameer Abdelwahab, “Constitutional and legal Framework of the Local Administration in Egypt between theory and application”, “Local Councils and Elections”, Amr Hashim Rabea, Ahram Center for Political and Strategic Studies, Cairo, April 2008

this service role. Moving from the phase of budget development to its implementation, the weakness of actual powers of local leaders in implementing these budgets and handling them with flexibility; that is transferring from one item to another from the allocations without referring back to the central government<sup>(8)</sup>.

## II. Political level:

- **Dominance of the concept of centralization:** More centralization weakens the role of local units. Even though laws stipulate the transfer of power to local units, practice contradicts this. For example, all provinces in governorates follow their ministries in the region and not the governorate, which contradicts the law, and similarly public utilities. There are many examples and lots of evidence for this, such as the fact that the agricultural directorate refers back to the Ministry to take its final opinion, despite the approval of the governor; and the appointment of Deputy Ministers in governorates which is usually done without taking the opinion of or consultation with governors, which also contradicts the law<sup>(9)</sup>. This reflects the up-side-down structure of the local system.
- **Security interference and administrative obstacles:** there have been several irregularities in Security and administrative apparatus, which have worked against some candidates; whether through rejecting their candidacy papers, electioneering and contacting voters and conducting wide security campaigns against some activists, specifically from the Muslim Brotherhood (MB), as the largest opposition faction and the main rival of the ruling party, whether by detention, transfer to military tribunals or confiscation of funds, as an attempt to influence their funding resources. All these practices led to a generally decreased trust in elections<sup>(10)</sup>. In addition to this, the term of these councils ended on 15<sup>th</sup> April 2006, but the Shura Council approved the adjournment of local council elections for two years starting from 16<sup>th</sup> April 2006, in February 2006. Safwat Al Sharif, the Council Speaker, justified the adjournment on the grounds of work on a new bill for local administration and indicated that widening the decentralization of administration would be a main pillar of constitutional and legislative amendments in the coming phase. The MB opposed this decision considering it to be aimed at hindering their progress and weakening their political power in Egypt.
- **Weak participation of Parties:** weak competition as a result of the low numbers of Parties taking part in the elections (from a total of 24 parties only 9 parties participated), in addition to the low numbers of candidates from these parties, in comparison with the total number of seats open for candidacy, the number of candidates from the 9 parties did not exceed 1,200 from a total of 52,000 seats, that is only 2.3%.

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(8) Sameer Abdelwahab, "Constitutional and legal Framework of the Local Administration in Egypt between theory and application", "Local Councils and Elections", Amr Hashim Rabea, Ahrum Center for Political and Strategic Studies, Cairo, April 2008.

(9) Ibid.

، ص 98 (10) ibid برامج الأحزاب والقوى السياسية، "المحليات وانتخابات المجالس المحلية أبريل 2008"

### III. Practical level:

- **Unclear electoral system:** constant change in the electoral system for local councils and complications of the elections system in general. The system has been through many changes since its establishment; the impact of this on voters, who include a relatively high percentage of illiterate citizens, can be seen in the changes that took place in the system after the revolution, particularly law no. 124/1960 which stipulated the composition of councils of publically elected members with some members appointed by the central government and the socialist union. Then, in the seventies, particularly in 1971, law no. 57 was enacted to separate between elected and appointed members and specify their percentages. In addition, in 1975, law no. 52 was promulgated which stipulated the formulation of local councils through direct elections alongside the establishment of appointed executive councils besides community ones. Then, in 1981, law no. 50 stipulated that elections shall be through absolute list instead of individual elections. Then, after only five years, a new law was promulgated, namely law no. 145/1988, to add one individual seat beside the seats of the list, which continued for eight years. Importantly, in the year 1996, law no. 84 stipulated dissolving local councils, to return to the system of direct individual elections, through which the 1997, 2002 and 2008 elections were held (the latter was dated for 2006 and was adjourned as a result of the plan for an amendment of the law on elections, which never took place<sup>(11)</sup>).
- **Increase of the percentage of candidates winning by acclamation:** reflecting people's lack of interest, as the results are already settled. In the 2002 elections, 60% of the seats were occupied by acclamation, in 2008, 83% of the seats were also by acclamation from the ruling National Democratic Party<sup>(12)</sup>.
- **Overlap between the role of the local council member and the MP:** according to the mandate of MPs stipulated in the 1971 Constitution, the Egyptian Parliament was called the "People's Assembly". It is the legislative authority and adopts the State Public Policy, general plan of socio-economic development and State public budget. It also practices oversight over the activities of the Executive<sup>(13)</sup>. In addition, the 2007 constitutional amendments granted Parliament the right to adopt the new government after its formulation and presentation of its program; as it has the right to either approve or reject it. This is in addition to the right to approve the State public budget<sup>(14)</sup>. Hence, the MP's role is essentially a legislative one, while the role of the local council member, according to the previous laws relevant to local councils, includes being in charge of services in the district. However, for reasons of increasing popularity and mobilization of votes, the MP is seen as more influential because of their high post and as a result of some traditions which became ingrained, such as

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(11) Sameer Abdelwahab, "Constitutional and legal Framework of the Local Administration in Egypt between theory and application", "Local Councils and Elections", Amr Hashim Rabea, Ahram Center for Political and Strategic Studies, Cairo, April 2008, P.71-72.

12 Ibid, p. 171.

(13) <http://www.parliament.gov.eg/Arabic/AboutTheParlmanet/Role>

(14) article 133 of the Egyptian Constitution, following the 2007 amendment.

orders for health treatment on the expense of the State, installation of services in the district, employment of constituency residents. All this was done through Ministerial decrees granted to the MP in the so called “phenomenon of Service MPs”<sup>(15)</sup> which represents an encroachment on a genuine role for the local council member and leads to a decrease of powers and undermines the latter’s importance from the perspective of the citizens. Hence, many citizens are reluctant to participate on the local level. In fact, the fault is not on the part of the MP but on political parties, especially the ruling one which uses this mechanism in order to embed and strengthen the position of its candidates in Parliament in their constituencies at the expense of local ones; as Parliament gives its members much more importance than local councils for which the results are already more settled than those of the Peoples’ Assembly.

### **The Problem of Civil Society**

Egyptian constitutions emphasize the right to association, including the latest effective Constitutional Declaration, in which article 4 stipulates that: “Citizens have the right to form associations, unions, syndicates, and parties, according to the law. It is forbidden to form associations whose activities are opposed to the order of society or secret or militaristic in nature. It is not permitted to directly engaged in political activity or form political parties on the basis of religion, race or origin”<sup>(16)</sup>.

However, regulating laws restrict this right, as the legislative philosophy of the current law 84/2002, that still governs the work of civil society is based on the principle of subservience of civil society to the Executive through administrative agencies. This issue is significantly connected to all the characteristics of the fallen Egyptian political regime; as "this regime produced restricted multi-party system as well as organization in the field of civil society". This takes place through controlling of licensing, restriction or banning activities as a governing principle in the law that reflects the bureaucratic and security tendency of the legislator<sup>(17)</sup> which contradicts liberties stipulated in the Egyptian 1971 Constitution, articles (55) and (56), and international human rights treaties and conventions which ensure the right to formulate non-governmental organizations (NGOs) to defend and express the democratic, social, economic, and cultural interests. **This is represented in 3 main facets:**

1. Granting the administration semi-absolute rights (18): the administration has the right either to agree on the establishment of associations or terminate their activities (article 6, 8 and 41) and also the right to approve foreign funding (article 70) and join international coalitions and networks (article 76-IIIB). Foreign funding is by far the most important funding source for civil society whether in the field of human rights or development due to the absence of the Egyptian capital in this field.

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(15) [http://www.islamonline.net/servlet/Satellite?c=ArticleA\\_C&pagename=Zone-Arabic-Namah/NMALayout&cid=1177156189060](http://www.islamonline.net/servlet/Satellite?c=ArticleA_C&pagename=Zone-Arabic-Namah/NMALayout&cid=1177156189060)

(16) <http://www.egypt.gov.eg/english/laws/constitution/default.aspx>

(17) Workshop around the NGO Law, a file... the future of civil society in Egypt, *ibid*, p. 101.

(18) Farred Zahran, “Civil Society New Law and the Current Political Moment”, *Al-Ahram*, 23 July, 2002

2. Stiffening penalties: The law imposes disproportionate penalties and criminalization of the activities of NGOs in various articles (articles 43 to 47) even though the activities of NGOs are basically voluntary. In addition, the law imposes collective punishment for all NGO members by dissolving an organization for irregularities committed by persons who can be accurately identified. This means that the law includes articles to collectively punish personal or individual mistakes (19). Such punishment discourages citizens from participation in the activities of civil society. It is similar to other laws; such as the Law on Political Parties in Egypt. The main philosophy around these laws is to exclude people from the social and political circle of action.
3. Ambiguous terms and loose phrases: The law includes many inaccurate terms such as banning organizations from practicing any "political activities" (article 11/3) and public order (article 11/2). Interestingly, the bylaws attempt to clarify this by adding more ambiguous explanation, listing various activities and concluding the paragraph with words such as: "or similar to these" and "or in the same categories", or by leaving the issues unspoken; such as the article related to foreign funding: "the organization shall submit a request and the administrative agency shall approve it within 45 days"; in this case, the bylaws do not clarify what happens when the administrative agency does not respond to the request in time, which is usual. Moreover, articles 10,14,73,81,110 and 136 of the bylaws include some updated provisions that have no referent in the law. This position creates a status of ambiguity enabling the government to apply the law whenever it wants on whoever it targets; meanwhile the government disregards some NGOs, that might commit irregularities, as long as they do not disturb it; as administrative and security agencies disregard those irregularities and keep them as a weapon for the future.

As regards applications for funding, there is no significant difference in implementation of the current law, which is considerably more open than the previous one (no. 23/1964), through disregarding the requirements of the law for approval of a funding request or equality between NGOs that do not receive a response and those for which the funding is rejected; as both have to refer to the Judiciary. This emphasizes that the law is not a tool for organization but a tool for imposing the dominance of the Executive over civil society. In addition, the enforcement of the law in specific cases and against specific organizations and not others shows that it is an oversight tool utilized only when necessary.

### **Recommendations:**

A citizen's role in a participatory democracy is not limited to the selection of his representatives; it is completed by the creation of grass-root entities that participate with those representatives in the legislative and oversight process. To realise this, a shift from a local administrative system to a local governance system, in which different governorates enjoy a broad level of independence over their powers and resources, is required. In addition, appointments to this system, such as governors and mayors should be through elections or through open competitions in which executive officers can be selected by elected local

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(19) Report of the Egyptian Organization for Human Rights, 2003.

institutions. This promotes the role of elected bodies over executive ones. Due to the fact that the system is structured from bottom to top, relationships are based on information and needs emerging from bottom to top, while feedback is from top to bottom. This structure is built upon civil initiatives, whether community committees or CSOs, that formulate, together, a pillar for community work that raises legislative requests to the locally elected councils and also performs an oversight role on higher bodies (from local community councils to the People's Assembly). This occurs by granting those initiatives a mechanism to question their representatives on both local and national levels. The central authority should encourage such structures by organizing them into collective bodies that have powers and mechanisms to motivate participation (20). As regards civil society, the amendment of the law should focus on freedom as a governing concept, while powers to ban or prohibit NGOs should be an exception.

This is reflected in the relationship between those organizations and the parliament through the articles addressing:

- Explicit recognition of the concept of popular sovereignty by acknowledging the community's role in the process of legislation, whether through the direct voting process or by forming community committees in addition to acknowledging the role of civil society in the making of local and social policies.
- Parliament should be responsible for the coordination of the work of different local councils and should develop plans for their enhancement. In other words, it is essential for Parliament to continuously consult with local councils in order to identify the needs of each of them according to their local priorities, and also to ensure the decentralization of decision-making. For example, the Parliament will develop the general framework for development plans and then consult with the local council on the budget; hence, leaving the opportunity for local councils to identify their priorities and spend money on public services and development projects according to their urgent needs and what they view as priority and within the agreed budget. Thus, the Parliament might intervene to agree on a format, that should be generally stipulated in the constitution and Parliament can enact relevant laws that can be amended according to need, to redistribute resources and wealth among the richest and poorest local councils in an equitable and balanced way<sup>(21)</sup>.
- This is in addition to acknowledging the monitoring role of society through the right of community committees and civil society organizations to follow up and perform oversight over elected agencies on all levels, in addition to their right through those elected agencies to practice oversight over executive bodies.
- Encouraging community initiatives as a pillar for community action that raises legislative demands to elected local councils and practices oversight over higher

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(20) Mohamed El-Agati, Clauvis de Suza, "From a Representative Democracy to a Participatory Democracy", Arab Forum for Alternatives and Arab Forum Initiative, 2012, P.10

(21) Habiba Mohsen, Rania Zada, Localities in the Egyptian Constitution, Centralization Problems and Suggestions for Reforms", Arab Forum for Alternatives and the Arab Reform Initiative, 2012, P.7

bodies and local councils, up to the People's Assembly, by granting those initiatives a mechanism to question their representatives on both local and national levels and motivating such bodies to participate through collective entities with clear mechanisms and powers.

**Comments by Prof. John McEldowney, School of Law, University of Warwick**

In different countries, differing models of accountability pervade the working of parliament and the role of participation. One model sees accountability as largely rule-based, operating through bureaucratic controls under the tutelage of professionals, mainly lawyers and politicians acting on behalf of the people. The second model relies on practices that take forward mandates aimed at strengthening the links between citizen and the state. This requires active participation in political life that is well informed and complies with ethical standards and degrees of transparency. Transparency is a priority for achieving good governance. Government accountability is itself composed of two forms of accountability, vertical and horizontal. Vertical accountability is mainly achieved through elections and allows the government and its agencies to provide explanations and justification to the public. The example of local government is useful as a means of achieving local and community participation. It provides an important decentralisation of powers and may act as a restraint on any authoritarian tendencies. Horizontal accountability flows from one or other organ of government at an intra-governmental level each holds another to account. Institutions such as the Egyptian Audit Institutions provide an example of this form of accountability.<sup>22</sup>

Mohamed Al Agati correctly identifies some of the weaknesses and challenges in the progress of local government communities. These include representativeness and the electoral mandate; finance and the allocation of powers and responsibilities; the relationship between local and central authorities; and the autonomy of local communities. The foreign experience points to various models of local government that often reflect historical, cultural and economic factors. In unitary states, the UK and France provide examples of different forms of local government. The UK's system of devolved government in Scotland, Wales, Northern Ireland and London provide strong legal and administrative forms of delegation. France is a good example of a large variety of local government entities that provide wide choices in and forms of representative democracy. The German example is of a two-tier federal system that comprises 16 'Lander' or states, three city states (Berlin, Hamburg and Bremen) and a Federal Government. Lander vary in size and population from the largest population of 5.2 million, North Rhine-Westphalia, to the smallest of 550,000 in Bremen. Federal legislation in Germany under the Grundgesetz (German Constitution) provides a mandate under Article 72II to ensure equal living conditions across the territory of the Republic. So although Germany is a Federal country, it operates under a unitary system of public services provision. This is not always easy to appreciate as Federal powers have had both horizontal and vertical effects. Germany also has had a two-tier local government system since 2006. This gives rise to quite complex two-tier municipalities and complicated single tier county boroughs in some regions. Often local government takes responsibilities

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<sup>(22)</sup>See the paper by Karim Sarhan.

from the Lander as well as devolved responsibilities at local government level. In Germany local government personnel constitute about 35% of the total public sector workforce. There are inevitable financial stresses between local and central government that are driven by a mixture of policy differences that underpin political and cultural diversity.

There are important lessons from an international perspective. Representation is at the heart of devolved and regional administrations. The strengths of the UK example of devolution are to be found in the variety of arrangements that are in place in Scotland, Wales, Northern Ireland and London. Another feature is the evolutionary process of change and the accommodation of different needs and requirements within a flexible arrangement. In many jurisdictions, particularly in several African countries, the over-centralization of power has been accompanied by steps in the direction of building community strengths. It is also instructive to consider the lessons from other legal systems. France, Germany and Italy provide differing examples of local authority autonomy. The essence of enabling local communities is essential in the design of appropriate institutions. This is a task that requires careful analysis and elaboration of the foreign experience to fit the needs of the Egyptian state.<sup>23</sup>

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<sup>23</sup> Julio Faundez, Mary E. Footer and Joseph J. Norton, *Governance, Development and Globalisation* Blackstone Press, 2000. C. Fombad, C. Murray, eds., *Fostering Constitutionalism in Africa* Pretoria: Pretoria University Law Press, 2010. R.D. Behn, *Rethinking Democratic Accountability* Washington DC Brookings Institution. Oonagh Gay, "Time for Coherence: Parliament and the Constitutional Watchdogs" in P. Giddings ed., *The Future of Parliament* London: Palgrave Macmillan, pp.149-164. C. Scott, "Accountability in the Regulatory State" (2000) 27(1) *Journal of Law and Society* 38 at p.39. See: Erskine May, *Parliamentary Practice* (22<sup>nd</sup> edn., 1997 by D.W.Limon and W.R. McKay). Hansard Society, Commission on Parliamentary Scrutiny, *The Challenge for Parliament: Making Government Accountable*, 2001. F.White and K. Hollingsworth, *Audit, Accountability and Government* Oxford: Clarendon Press, 1999.

# **Parliament and oversight agencies: the Central Auditing Organization & the Administrative Control Authority as Models**

**By Karim Sarhan  
Lawyer and Legal Researcher**

The main role played by oversight agencies is confrontation of all forms of government corruption and ensuring the performance of public agencies and institutions and their commitment to the laws and regulations governing their work.

In addition to developing legislation, the functions of the People's Assembly include oversight over the performance of the Executive,<sup>24</sup> including oversight over the performance of public bodies and institutions, as there is overlap between the functions of the People's Assembly and the functions of oversight agencies.

This paper addresses two oversight agencies; namely the Central Auditing Organization (CAO) and the Administrative Control Authority (ACA); in an attempt to identify their roles and the nature of the relationship between them on one hand and the People's Assembly on the other, in the context of the current legal system, and presents some relevant ideas and initial suggestions.

## **I. The Central Auditing Organization (CAO)**

The 1971 constitution did not include any independent articles on the CAO specifying its roles and powers, even though the CAO's relationship with the People's Assembly was referred to in article 118. This latter article provides for submission of the final account of the State Budget to the People's Assembly. It stipulates that the annual report of the CAO and its observations shall be submitted to the People's Assembly and that the People's Assembly has the right to request any data or other pertinent reports from the CAO.

The Constitutional Declaration, issued in 30th March 2011 did not include provisions equivalent to article 118 in the 1971 Constitution; there was no mention of the CAO.

The CAO's functions are regulated by law no. 144/1988 concerning the CAO, it was published in official papers on 9th June 1988<sup>25</sup>, and was amended under law no. 157/1998 (law no. 144/1988 which was amended under law no. 157/1998<sup>26</sup> is referred hereafter as "the CAO law").

The main role for the CAO is oversight over the funds of the State, public figures and agencies, and its functions also include cooperation with the People's Assembly in oversight over public funds (article 1, the CAO law).

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<sup>24</sup> Article 33 of the Constitutional Declaration issued on 30<sup>th</sup> March 2011, parallel to article 86 of the 1971 Constitution.

<sup>25</sup> Official paper, issue no. 23 (continued) – 9<sup>th</sup> June, 1988.

<sup>26</sup> Official paper, issue no. 24 (continued) (a) – 11<sup>th</sup> June 1998.

In its functions, the CAO carries out three types of oversight: the first is financial oversight, both auditing and accounting, the second is oversight over performance and following up the implementation of the State Plan and the third is legal oversight over the decisions issued in case of financial irregularities (article 2, the CAO law).

The State administrative units and local governance units, public bodies, public sector companies and cooperative organizations within the public sector are under the supervision of the CAO.

In addition, companies that are not public sector, but for which the public sector contributes 25% or more of the capital, syndicates, professional and trade unions, political parties, national press institutions, party newspapers and agencies subsidized by the State or the funds of which are considered by the law as State funds fall under the supervision of the CAO (article 3, the CAO law).

### **The relationship between the CAO and the People's Assembly:**

In the context of law no. 144/1988, prior to its amendments, the CAO was attached to the People's Assembly. The first article of this law stipulated that: "the Central Auditing Organization is an independent organization with a public legal personality and is affiliated to the People's Assembly", which was then amended in law no. 157/1998 to transfer its affiliation to the President stipulating that: "the Central Auditing Organization is an independent organization with a public legal personality and it is affiliated to the President of the Republic".

The transfer of its affiliation to the President of the Republic reflected the power to appoint the CAO president to his post and relieve him from it. Under law no. 144/1988, the President of the Republic nominates the CAO president, which is subject to the approval of the People's Assembly, and could be relieved of it through a Presidential decree, but this was also conditional on the approval of the majority of MPs in the People's Assembly. Moreover, the same law stipulates that when the CAO president submits his resignation, it is presented to the People's Assembly (article 20, law no. 144/1988).

However, under law no. 157/1998, article 20 of law no. 144/1988 was amended and the People's Assembly had no role in the appointment of the CAO president or relieving him of his post. His appointment became through a Presidential decree for a four year renewable term, whether once or for several similar terms. In addition, the same law stipulates that the CAO President shall not be relieved of his post and his resignation is approved by a Presidential decree.

### **Here, a number of observations and comments can be made, summarised in the following three points:**

1. Article 1 in the CAO law (following its amendment according to law no. 157/1998) stipulates that the CAO is an "independent" organization with a public legal personality; however, the article added "affiliated to the President of the Republic". There is no doubt that describing the agency as independent

and then adding its subordination to another body presents a clear contradiction in the drafting of the article and in describing the nature of the organization.

2. Although article 20 of the CAO law stipulates that the CAO president shall not be dismissed from his post, which gives the impression that the agency is given some independence, the same article stipulates that the term of service for the CAO president is a four year term renewable by a Presidential decree. This actually means that the President of the Republic has the right to relieve the CAO president of his post every four years or renew his term according to the administration of the President of the Republic.
3. The main role of the CAO, as mentioned, is oversight over State funds, which includes the funds of the units of State administration, public agencies and institutions and public companies. All of these are affiliated to the Executive, which is headed by the President of the Republic<sup>27</sup>. Therefore, there is a contradiction between the CAO performing its role in oversight over agencies that are affiliated to the President of the Republic and its subordination to the President of the Republic.

It appears that awareness of the previous problems is what persuaded the current CAO president, who recently assumed office,<sup>28</sup> to demand that the Constitutional Assembly, which is writing the new constitution, stipulate the independence of the CAO from subordination to the President of the Republic or the People's Assembly<sup>29</sup>.

According to the website of the CAO, representatives from the CAO presented their vision of the position of the CAO in the new constitution which includes stipulating its independence, absence of subservience to any authority and the inability to relieve its president of his post<sup>30</sup>.

## **II. Administrative Control Authority (ACA)**

Neither the Constitutional Declaration, issued on 30<sup>th</sup> March 2011, nor the 1971 Constitution include any articles related to the ACA or its powers.

Law no. 45/1964 and its amendments regarding the reorganization of administrative control currently regulate the work of the ACA (referred hereafter as the “**ACA Law**”)<sup>31</sup>. It is worth mentioning that according to the explanatory note of the ACA law, the ACA was part of the administrative prosecution; however, for purposes related to public interest, it was decided that it should be separated due to the increased workload arising from the expansion in the activity of the public sector at that time.

ACA is in charge of exposing administrative and financial irregularities and criminal offences committed during the performance of public functions. It is also in charge of

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<sup>27</sup> The Constitutional Declaration issued on 30<sup>th</sup> March 2011.

<sup>28</sup> As per the Presidential decree no. 172/2012, enacted on 6<sup>th</sup> September 2012.

<sup>29</sup> Al Shorouq Newspaper, issue no. 1320, p. 6, 12<sup>th</sup> September 2012.

<sup>30</sup> [http://www.cao.gov.eg/index\\_files/cao\\_news\\_1.htm](http://www.cao.gov.eg/index_files/cao_news_1.htm)

<sup>31</sup> Law 54 for the year 1964 on the reorganization of Administrative Oversight , Al-Hayaa Al-Ama Lematabea Alameereya, 1999.

investigating and looking into the reasons for work or production deficiencies including identifying defects in administrative systems and proposing methods to avoid them. It also checks complaints submitted by citizens on violation of laws or regulations in performing a public duty (article 2, the ACA law).

The ACA's mandate covers the government, its branches, public agencies, public institutions, public companies and all bodies in which the government contributes in any way (article 4, the ACA law).

In order to discharge its functions, ACA undertakes investigation and oversight to disclose any irregularity or crime. If investigations or oversight uncover issues that require questioning, their documents are referred to the administrative prosecution or general prosecution, according to their specialization (article 8, the ACA law).

The ACA President is appointed by a Presidential decree.

### **The ACA and the parliament:**

The ACA law does not clearly mention the relation between the ACA and the People's Assembly; there are no clear provisions in the law indicating ACA cooperation with the People's Assembly in performing its oversight roles.

This could be because of the nature of the ACA work that is basically based on investigations and oversight to disclose violations and crimes, if this results in issues that require questioning; the matter is then referred to the administrative prosecution or general prosecution to take its course in investigation.

### **III. Recommendations:**

According to the CAO law, the CAO supports the People's Assembly in performing its oversight role. The law stipulates that the People's Assembly can assign the CAO to scrutinize the activities of a certain public agency, institution or project shared by the State or any public utility project. In such a case, the CAO shall prepare special reports on the tasks assigned to it by the People's Assembly addressing the situation of economic and financial facts that triggered the process (article 4, CAO law).

In addition, article 18; item IV of the same law stipulates that CAO shall submit its observations on the final accounts of the general State budget to the People's Assembly and the President of the Republic. Item V stipulates that the CAO shall submit annual reports on the general results of its oversight to the President of the Republic, the People's Assembly and the Prime Minister (PM); in addition to submitting any reports to the People's Assembly upon the request of the latter.

It is recommended that in order to ensure the efficiency of the People's Assembly's oversight function and considering the specialized technical expertise of the CAO that does not exist in the People's Assembly, the CAO should maintain its support to the People's Assembly in performing its oversight role even if it is decided in the new constitution that the

CAO will be independent from any other authority. This can take place through the following steps:

- 1- Stipulating that the CAO is independent from affiliation to the President of the Republic either in the Constitution or the CAO law.
- 2- Stipulating that CAO President shall not be relieved from his post unless he reaches retirement age or after taking any prosecution measures against him in which there is proof that he committed a violation or a crime that requires his removal from office.
- 3- In order to increase the efficiency of the People's Assembly's oversight role, and to employ the specialized technical expertise of the CAO that does not exist in the People's Assembly, the CAO should maintain its support to the People's Assembly in performing its oversight role even if it is decided that the CAO should be independent from any other authority.
- 4- Clear stipulation in the ACA law on the forms of cooperation between ACA and People's Assembly including but not limited to ACA submitting periodic reports to the People's Assembly on the performance of the administrative apparatus of the State.

Concerning the ACA, due to the importance of its role and its connection with disclosure of violations and corruption within the government sector and considering the oversight role of the People's Assembly over the government and public institutions, it is recommended that it is more appropriate to clearly specify in the ACA law forms of cooperation between ACA and the People's Assembly including but not limited to ACA submitting periodic reports to the People's Assembly on the performance of the administrative apparatus of the State and any findings of deficiencies or shortcomings in the administrative system in addition to reports on violations and crimes committed by public servants.

**Commentary on Karim Sarhan's paper by John McEldowney, School of Law,  
University of Warwick**

The example of audit authorities provides both ex ante and ex post forms of financial accountability that are important in developing and progressing different methods and techniques of “holding to account”.<sup>32</sup> Constitutions provide a framework for defining the relationship between the legislature, executive and judiciary. Systems of accountability, to be effective, require constitutional protection and independence in their function. This means that audit bodies have to hold government and public bodies to account and are themselves accountable. It is also important to canvass the potential for international actors in developing external forms of accountability in dialogue and collaboration with domestic arrangements. Developing strategic approaches to accountability methods and techniques is accommodated through education and training programmes with international assistance to democracy building. The essential aim is to strengthen and not diminish democracy building and institutions within the country.

Karim Sarham correctly identifies a number of challenges that have to be addressed in the process of democracy building and makes a number of specific recommendations. These include strengthening the independence of the CAO specifically from affiliation with the President. Providing a process of legitimation of the CAO and the authority of the office requires constitutional and legal protection. Executive control or influence over independent bodies such as the CAO impedes democratic accountability and has potential to encourage corruption. International audit bodies are likely to offer technical assistance and encourage capacity building in the development of audit responsibilities that strengthen parliament by offering checks and balances on authoritative government through controls on public spending. External donors are subject to checks on the value for money of their spending and this sets an important hallmark for the expenditure of money within the country.

Strengthening financial support for Egypt is a possible catalyst for ensuring robust and independent financial scrutiny. Lessons from the UK and commonwealth offer some possible ideas and solutions. There are also many protections that may be given to the CAO, as well as measures to ensure its independence. The international experience points to important structural support arrangements intended to provide transparency through annual reports and reporting mechanisms to Parliament. The alignment of party political interests and factions is often challenging but can be encouraged through parliamentary select committees and the requisite conventions and codes of conduct. Independent functions require transparency and regular reporting through media outlets. One of the most important elements is TV transmissions of Parliament and the work of committees. The form of a Public Accounts Committee may prove useful as it combines expertise with the political forms of accountability. There is also much to be achieved by the role of external visits abroad to gain from international experience on the forms of effective accountability. The lynchpin of all forms of parliamentary oversight is the pre-eminence of financial control and its overarching

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<sup>32</sup> Websites of interest: [www.parliament.uk](http://www.parliament.uk); <http://www.hm-treasury.gov.uk>; <http://www.parliament.uk/commons/lib>; <http://www.nao.gov.uk>; <http://www.audit-commission.gov.uk>; <http://www.statistics.gov.uk>; <http://www.public-audit-forum.gov.uk>

“power of the purse” to inhibit corruption, prevent waste and gain public confidence in democratic government.

Accountable governance and constitutional implementation in developing democracies<sup>33</sup> provides a useful platform on which to survey the role of government accounting and in particular the value of parliamentary oversight. In terms of international institutions, such as the World Bank, there is a growing consensus that providing systems that combat corruption and engage in anti-corruption strategies requires detailed implementation by internal systems of accountability<sup>34</sup> that are transparent and sufficiently robust to be effective. A recent NAO Report, *Providing Budget Support to Developing Countries*<sup>35</sup> underlined the need for good budget support including helping “partner governments to strengthen their financial management systems” and to encourage donors to support such reforms.

Constitutional lawyers have accepted that controls over public expenditure lie at the heart of Parliament's control over government. The plethora of controls such as internal Treasury rules, audit systems, parliamentary reports, and management systems are fashioned to serve the dual purpose of the economic needs of the government of the day and the needs of Parliament. Inside the system of financial control the internal workings of government can be detected, often less visible and transparent than the workings of the external systems of parliamentary accountability in select committees and in the role of the courts.

Financial control systems share many characteristics familiar in the development of the common law—continuity and certainty in developing rules with the potential for incremental change. But equally, incrementally, financial controls appear to have developed many of the qualities of a codified system—written manuals containing fundamental principles that have been improved, updated, and strengthened through many years' experience. Despite many improvements in financial control there remains a general systemic weakness at the heart of public expenditure control. Greater emphasis must be given in Parliamentary debate to the policies and decisions that inform, manage, and control public expenditure. The structures of financial regulation should create more “joined up” systems of control to further enhance the strategic basis for accountability and good governance. Financial controls lie at the heart of government decision-making. This should give rise to a culture of risk assessment and transparency in public accounting. Good budget support is an essential element in building effective democratic institutions. Setting clear objectives and monitoring arrangements to ensure that projects are on target and that budgets are being effectively spent creates a good risk assessment strategy for the development of good governance.

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<sup>33</sup>See: Peter Burnell's foundational paper: “Accountable Governance and Constitutional Implementation in Developing Democracy in Africa”. The paper provides a useful canvass on the role of accountability and the framework building provided by a constitutional framework. There are a number of key “constitutional actors” and the work of the PAC is a crucial one in developing and extending systems of accountability.

<sup>34</sup>The Economist 22<sup>nd</sup> March 2008, p.79 discusses how the World Bank has launched investigations into \$500 m worth of contracts.

<sup>35</sup> NAO, London, 2008

## **A New Vision for the Shura Council**

**By Ali Fath-Elbab  
Member of Shura Council**

By Egyptian vision here we mean three Aspects:

The first is taking national absolutes into account: evaluating the past, analysing the present and identifying the direction of the future, and not vice versa. It does not start from hypothetical ideals or things that should be done that are not known by Egypt or even from ruling patterns that are “common” around the world, that are not considered prior templates or models for ruling powers. The structure of several models is considered, each with its own national context. It is an “Egyptian” vision in our historical context of the Shura Council; since its establishment, or its return to the Parliamentary structure more than thirty years ago and also the changes in the council since then. However, there have not been many changes, which has led to a heavy shadow from the past, from which Egypt should be liberated as it has been liberated from the “regime” that imposed it.

The second is that it is an “Egyptian” vision; that is it derives its objectives from the Egyptian national ambition and does not seek to merely copy or imitate other experiences, even those which are considered great and entirely admirable. This is because the “new” Egyptian political system is being created in front of the people (and the world) and is not a prefabricated structure. In other words, the political system takes time to be completed and the new Constitution itself is not the end of the road; it is, however, the general, governing rationale, which requires several subsequent procedures; legislative, organizational and administrative, until the pillars of the new system are stable. Hence, this “Egyptian” vision for the position of the Shura Council should be flexible, divided into phases and should take into account the present givens and what might follow from them in the future. For instance, when one says there are a percentage of appointed members in the Shura Council, it could be best, at first, for them to be nominated by their institutions and the President of the Republic selects from them; then, they are elected internally later on, that is by the “general assemblies” of their institutions. Then, the principle of appointing members could be totally dismissed afterwards, and so on for the other elements of this vision which could be amended to accommodate the prevailing conditions and could gradually form the political system.

Therefore, our vision for the future of the Shura Council is derived from our vision for a whole political system and not isolated from it; it comes together with it. It is clear that we are establishing a Parliament that holds legislative power independently and does not share it with the Head of State, nor it is dominated by the Head of Government. Hence, the existence of the Shura Council should be effective in legislation and its role in it should be “comprehensive” and fit with the legislative role of the People’s Assembly (PA). In addition, if we move to considering Parliamentary organization mechanisms, where the Government emerges from Parliament, the Shura Council should be “balanced” with the PA; as the latter

will be the one which will form the Government and not the Shura Council, if the Parliamentary system is adopted. Thus, our vision for the Shura Council is linked with our vision for the form of political system and the nature of the relationship between ruling powers.

The third is that the “Egyptian” nature for this vision requires us to address the acute deficiencies perceived by the public in our experience with the two-chamber system in general, and the performance of the Shura Council specifically, in order for the new political system to send a clear message to the public to reassure them about the heavy legacy surrounding the Shura Council. Amongst these messages is, for example, that nomination conditions for the Shura Council are more “senior” than those of the PA (in education, age, etc.), the Shura Council is “effective” in the legislative route and its debates are freer from partisan politics than the PA. This is in addition to the issue of immunity and privileges of membership, the size of the Council itself and so on and other features of institutional structure which the “Egyptian” public opinion should see as an introduction to the new vision for the position of the Shura Council in political life.

### **Elements of the Vision**

The following are the main elements for the future vision of the Shura Council and its position within the structure of the Legislature, the other ruling powers and the whole political system.

#### 1- A two-chamber Parliament rather than a two-council system

In modern times, the duality of Parliament could mean the existence of two councils, each playing an independent role and not necessarily conjoined, or a Parliament made of two chambers, with the activities of each chamber compatible with the other to an extent. Neither can work alone or without the existence of the other and they are dissolved through one decree. Therefore, it is unusual to find that one of them is not elected.

Since 1980, Egypt has had a two-council system, which then became closer to the two-chamber system in 2007, then it came to be a two-council system clearly in 2011.

#### 2- Integration rather than duplication of representation

- a) The PA shall be, only, fully elected with no appointed members, while the Shura Council includes a percentage of appointed members in order to expand the scope of political representation and promote the existence of community representation (Christians, women, youth, business community, technocrats, Egyptians living abroad, people with disabilities, etc.).
- b) Appointment is ad hoc and is either for three legislative terms, or fifteen years, whichever is longer, and is not renewed except with the approval of the people in a referendum.
- c) “Relevant” institutions are called upon to present candidates for “recommendation” to the President of the Republic who takes the decision on appointing members to the Shura Council.

#### 3- Two electoral systems and one Parliament

This means that the electoral system for both the PA and the Shura Council does not lead to duplication of political representation of the same categories or areas; and that this is reflected in having two electoral systems for the (elected) members of both councils as follows:

- a) Individual member system and small constituencies in PA elections.
- b) List system and the constituency of the governorate in the Shura Council elections. The individual system does not preclude the existence of party affiliation for candidates, as the intention here is that voting cards include “individuals” and not their party affiliation. The list system is purely party based; however, it does not prevent the formation of party coalitions and it distributes seats according to the percentage acquired by each list.

#### 4- Two chambers in one Parliament

- a) As for size, the number of Shura Council members is recommended to be half the number of PA members, and a quarter of the Shura Council members should be appointed. It is also suggested that the size of PA should be reduced to 400 members, as follows:

- “The People’s Assembly is formed from four hundred members elected through the individual electoral system, so that each constituency is represented by one member. The law defines the boundaries of constituencies taking into account the desirability of having a similar number of registered voters and homogeneity in environmental and societal circumstances”.
- “The Shura Council is formed of two hundred members; the President of the Republic appoints fifty of them after reviewing the nominations of the Cabinet and other relevant institutions. The remaining members are elected according to party lists. The Governorate is considered one constituency. The law defines the allocation of seats for each governorate taking into account the ratio of seats to resident voters in each governorate. It also defines the minimum number of votes needed in the list to take at least one seat and the means of distribution of seats according to the relative majority method”.

- b) As regards the conditions for candidacy, it is recommended that the tradition of variation in the minimum age of candidates in each council is ended, heading towards real empowerment of youth and in order to provide equal opportunities for candidates, through:

- Age unification in both councils (as well as in local councils).
- The minimum age for the candidate in both councils is the legal age of reaching full eligibility, that is 21 years; the list system can prioritise youth candidates for Parliament so that these “activists” do not exist only in unofficial and non-institutional coalitions that are outside the ruling institutions.
- Increasing the minimum educational requirement to medium education level (and maintaining it at basic education for local elections).
- Remove all legal quota requirements whether for women, workers/peasants, or others, and at the same time use a method of incentives and technical support for underrepresented categories and areas, in order to enhance their representation in

Parliament through national institutions (national councils, civil society, technical training and support, media and awareness, etc.).

- c) No candidates with dual nationality at any time, even if the candidate waives the other (non-Egyptian) nationality at the time of candidacy. However, this does not preclude the presence of Egyptians with dual nationality in other positions, but not in Parliament due to the special relationship between the voter and candidate.
  
- d) Participatory legislative competence
  - The President of the Republic and members of both councils have the right to propose bills, and the proposing council sends the bill to the other council to adopt it. In case of difference, the joint committee convenes to reach a compromise to be presented to both councils to adopt it. If this does not happen, both councils convene headed by the PA Speaker to make a decision about this matter with a two-thirds majority of the members of the joint meeting (that is not less than four hundred members).
  - Defining a minimum for the required number of members to present a legislative proposal (10 members).
  - Time-frames are defined for each council to consider a legislative proposal (a month from the date of receipt from the other council), or from the President of the Republic.
  - Remove the earlier tradition related to the necessity of submitting some legislation to the Shura Council first (for so-called ‘laws relating to the Constitution’), which is an unusual tradition with no parallel in democratic systems or modern legislative schools of thought. Thus, any piece of legislation becomes as important as an other and goes through the same procedures towards adoption.
  - A joint meeting is required to consider and adopt the plan, budget, final accounts and constitutional amendment proposals before submitting them for a referendum.
  
- e) Integration of oversight competence
  - The Prime Minister and Ministers are to be politically responsible in front of the PA only, in which the members enjoy the right to interrogate Ministers and to request a vote of confidence in a Minister or the PM. If the PA decides to debate the request, it calls upon both councils to convene and a decree is issued to withdraw confidence with a two-thirds majority of the joint meeting, and the President of the Republic appoints a new Minister or a new government (within two weeks from the decree to withdraw confidence).
  
- f) Procedural immunity and realistic privileges
  - Administrative agencies are prevented from termination or arrest of a PA or Shura Council member unless his council approves or in case of flagrante delicto.
  - Providing “sufficient” privileges in order that the PA or Shura Council member can perform his roles in legislation, oversight, representation of society and taking care of the interests of the constituency, so that he does not have to manipulate or misuse his Parliamentary position for any reason. Thus, it is

necessary to “stop” the issue of “part-time membership of the council”, as it is firstly abnormal in the modern world and it also undermines the ambitions of society to build the democracy of the second republic. This means that once a member is elected, he can decide not to attend the sessions of the council. Why did he decide to be a member in the first place? And does he imagine that membership and the contract which was concluded with voters could justify this with the excuse of working in a “sensitive” position? What is his use as a member of Parliament in the first place, unless the aim behind this membership is his personal interest and making use of his immunity?

- It is necessary, in the democracy of the second republic, to embed a culture of disclosure and to have no conflicts of interest, in order to emphasise the integrity of Parliamentarians in public opinion and to develop laws for this and include it in the rules of procedure.

### **Conclusion: Features of Jurisprudence and constitutional debate in Egypt regarding the Shura Council**

There are two essential sides with opinions on the position of the Shura Council in the current Egyptian political and legislative systems; namely:

*The opinion opposing the Shura Council;* it says that it does not have real powers, that its role is advisory and actually played by other agencies, namely specialized national councils, that its existence increases financial expenses and that its structure is not 100% democratic as one third of its members are appointed.

*The opinion supporting the importance of the Shura Council;* it says:

- Specialized national councils are not similar to the Shura Council, whether in function, formulation or political role; even though they complement one another. The existence of specialized national councils arises from technical considerations, due to the development of the State’s role in social and economic life and its need for specialized technical experience that might not be available among politicians.
- In addition, the Shura Council has constitutional powers that have a role in the legislative and political system, whatever their size, contrary to specialized national councils that are considered part of the Executive (the Constitution defines the Executive starting from the President of the Republic, the PM and the government, and moving to the local administration and then specialized national councils).
- The Shura Council includes rare national expertise and competencies that can provide a lot of support in the rationalization of the legislative process and the development of the political system.
- The Shura Council expands the base of community and political participation in society, its continuation and its revitalization and the exchange of opinions among the representatives of the people, that is the members of both councils.

The **third** opinion regarding this debate is the most logical and has stronger basis; it calls for **supporting the effectiveness of the Shura Council**. Among the most salient suggestions in this regard is that legislative authority is not limited to the PA alone and

emphasis on the Shura Council's legislative role, even if the government continues to bear no responsibility to account to it.

**Lastly**, adopting the two-council system of Parliament in Egypt, in light of the second republic, with development towards the two-chamber system achieves a number of purposes:

- More realistic accommodation for the different public, categorical and geographical interests in Egypt.
- Combining the advantages of both individual and list electoral systems.
- Avoiding the possibilities of extreme legislation or the dominance of a partisan majority in a Parliamentary motion.
- Improving Parliamentary oversight over the government and making it more objective and less partisan.
- Reinforcing the growth of party political life and the culture of electoral programs.
- Increasing the priority of national, rather than local, interests and supporting reaching consensus and compromise among members and their parties.
- Aligning with the modern approach in the formation of the Legislature and the two-council/chamber system in most modern democracies.

## Comments by Professor Adam Cygan, School of Law, University of Leicester

A feature of many, though not at all parliamentary systems is that the Parliament comprises of two chambers. In the case of Egypt the debate surrounds, as Ali Fath Elbab illustrates, the future role of the Shura Council and its relationship with the People's Assembly or Parliament. Strictly speaking the Shura Council and the People's Assembly remain distinct institutions but this does not necessarily impact upon their ability to interact with each other and in the overall context of the new Egyptian constitutional settlement the Shura Council and the People's Assembly both have a key role to play to ensure accountability and legitimacy of both the political and legislative processes.

Ali Fath Elbab perceptively positions his argument within an 'Egyptian context' and in his paper highlights the need for an accommodation to be found between the Shura Council and the People's Assembly with respect to their status as institutional actors under the new Egyptian Constitution. He correctly points out that the relationship must be 'balanced' and argues for the need to ensure that the Shura Council fulfils a horizontal function between the institutions of Parliament, the President and the government and contributes to improving institutional balance and accountability within the Egyptian political system. For that reason the Shura Council has an important role to play because a democratic Shura Council can help to prevent the concentration of power in the hands of, for example, the President.

In his paper Ali Fath Elbab suggests that the Parliament should be elected by universal suffrage but the Shura Council, may be constituted by a certain proportion of unelected or appointed members. This, he suggests, would be justified in order to improve representation of particular sections of society, for example women or Christians, who may be under represented in the directly elected Parliament. Such a proposal has significant merit if correctly implemented and is perhaps necessary if all Egyptian citizens are to embrace the constitutional reforms. For critics of this approach who may consider the appointment of persons to legislative chambers undesirable, the response can be that many constitutions which may consider themselves to be 'democratic' do not necessarily elect all persons who occupy positions which involve the exercise of legislative or executive power. For example, the House of Lords in the United Kingdom is wholly appointed and the President of the Czech Republic is currently chosen by a vote of both chambers of Parliament and not the electorate.<sup>36</sup> In this case there is real scope that the party of government can control the Parliament and the President and this illustrates why in any system of government where there is more than one parliamentary chamber to elect, in addition to a President, there must be different electoral systems as well as different frequencies of elections to promote diversity within the electoral process and give citizens opportunities to directly influence the direction of government. However, the risk with this is that, depending upon how the final draft of the Constitution distributes powers amongst the different institutions of the State, there may be significant scope for political stagnation and disagreement arising from the different elections which inevitably leads to ineffective government.

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<sup>36</sup> The Czech president will for first time be elected directly by the Citizens in January 2013.

Ali Fath Elbab touches upon the key issue of representation in his paper and this discussion concerning the composition of any second chamber is one which is faced by even established democracies. For example, the programme of constitutional reform in the United Kingdom which began in earnest in 1997 has so far failed to deliver a solution to unelected House of Lords and as with Egypt specific problems concerning the method and frequency of election, its constitutional function and whether it should be subordinate to the House of Commons remain real barriers to reform. The proposal of Ali Fath Elbab to improve representation of those sectors of society which may be underrepresented in the Parliament is a positive one and one which should be embraced by the Constitution. Indeed, there may be an argument for taking this further and constitutionally guaranteeing representation for certain religious/ethnic groups and possibly women within the Shura Council. Though some caution must be sounded with using principles of positive discrimination as a means of guaranteeing representation such a move may have the effect of helping to unify the Constitutional process by engaging with those groups of society who perhaps have felt isolated from the process of drafting the Constitution. Examples can be seen in Poland, Czech Republic and Hungary, all of which have Constitutions that have arisen from the upheaval of the collapse of the Berlin wall in 1989. In each of the Constitutions there are specific guarantees concerning the minimum representation of ethnic minorities in Parliament. If the Constitution were to recognise that specific groups should be represented in the Shura Council, it is likely that, as Ali Fath Elbab suggests, electoral lists are the most likely method to be used to select such persons. However, this undoubtedly gives an advantage to organised and well funded parties at the expense of independent candidates but it is the presence of non-affiliated members of the Shura Council which could prove to be its greatest strength. In particular, the inclusion of experts from across the broad spectrum of society within the Shura Council could provide a wealth of experience which is missing in many parts of public service.

The powers of any second chamber will be crucial and there must be a balance between securing improved accountability and enabling the legitimately elected government and parliament to fulfil its mandate. The primary issue is that the second chamber should assume the role of a revising chamber which reviews legislative proposals and has some capacity to propose amendments. The Shura Council could also make a significant contribution to the improvement of parliamentary oversight and it should also have the power to appoint parliamentary oversight committees to review the government and the President. On this basis what would appear to be more important are the functions of the Shura Council rather than its composition. The review of legislation and promoting accountability more generally are important in a parliamentary system and many democracies around the world demonstrate that partially or even non-elected second chambers can make a significant contribution to the legitimacy of government.

As Ali Fath Elbab highlights the adoption of a two chamber parliament under the new Constitution would bring Egypt in to line with many modern democracies. But the current draft of the Constitution does not sufficiently spell out what future role the Shura Council should have in the governance of Egypt and without a clearer statement there is a risk that

Egypt becomes, to all intents and purposes, a unicameral Parliament with legislative power exercised by a parliamentary chamber which may also be dominated by a single political party.

## **Annex (1): Parliamentary oversight of government and the Rules of procedure of the Egyptian People's Assembly (PA)**

According to law no. 38 of 1972 on the PA and its Rules of Procedure published in 1979 and its amendments, the latest of which was issued in 2010, Parliamentary oversight over government activities is defined through the following PA bodies, methods and procedures:

### **I. Parliamentary bodies**

The PA's method of working is to divide the roles and functions of the council among seven parliamentary bodies, each of which undertakes a role in the study and monitoring of issues debated by the council or the General Assembly or issues related to the implementation of the rules of procedure. These bodies are:

1. The Council Speaker
2. The Council Office
3. The Council General Committee
4. The Ethics Committee
5. Specialized Committees
6. Special and Joint Committees
7. Parliamentary Division

These bodies facilitate the work of the council administratively and executively, manage sessions, develop council and committee action plans, supervise the activities of the council and its committees, support its members in performing their parliamentary duties and consider draft laws and important current issues.

**Council bodies, that is the General Committee, Specialized Committees and Special and Joint Committees, are responsible for the relationship between the PA and the government.**

#### **1) The General Committee**

Its members are the Council Speaker, both deputy Speakers, representatives of parliamentary bodies of Political Parties and five members selected by the Council Office.

The general Committee undertakes the following:

1. Discussion of general issues and important matters which the President of the Republic, the Council Speaker or the Prime Minister (PM) wish to discuss with the Committee.
2. Studying periodic reports presented by the Council Committees on the implementation of laws and decisions and important complaints which represent general social, economic or political phenomena or issues referred to them by the Ethics Committee.
3. Studying Central Audit Organization (CAO) reports and the reports of oversight bodies and agencies referred to them by the Council Office.
4. Selection of 7 members at the beginning of every parliament session to represent the PA in a Joint Committee with the Shura Council to discuss any dispute around drafting of constitutional laws.
5. The General Committee may invite the PM, Ministers or the CAO president to hear their views.

#### **2) Specialized Committees**

These committees support the Council in its legislative role and in overseeing government activities. All Specialized committees investigate the effects of implementation of laws that affect the public interest. The PA Speaker is responsible for informing the government of the

recommendations of specialized committees submitted to the government. The PM takes the opinion of specialized committees on issues relevant to drafting policies and the state budget. Ministers may demand a meeting with a specialized committee to consult them on a specific urgent matter. The members of any committee may ask the Council Speaker to call a meeting with any of the Ministers in order to discuss issues relevant to its scope of work. Specialized Committees have several mandates; including legislative, technical and other issues related to the role of the Council in overseeing the government.

There are 19 PA Specialized Committees as follows:

- 1- Constitutional and Legislative Affairs Committee
- 2- Budget and Planning Committee
- 3- Economic Affairs Committee
- 4- Foreign Relations Committee
- 5- Arab Affairs Committee
- 6- Defense, National Security and Mobilization Committee
- 7- Proposals and Complaints Committee
- 8- Manpower Committee
- 9- Industry and Energy Committee
- 10- Agriculture and Irrigation Committee
- 11- Education and Scientific Research Committee
- 12- Transportation and Telecommunications Committee
- 13- Religious, Social and Religious Endowments Affairs Committee
- 14- Youth Committee
- 15- Culture, Information and Tourism Committee
- 16- Health and Environmental Affairs Committee
- 17- Housing, Public Utilities and Reconstruction Committee
- 18- Human Rights Committee
- 19- Local Government and Public Organizations Committee

### **3) Joint and Special Committees**

Special Committees are among the bodies that support the PA in performing its legislative and oversight functions. They are ad hoc committees that expire at the end of the purpose for which they were established by a Council resolution. They are created as the result of a request from the Council Speaker or from the government. A Special Committee is formed of a group of members selected by the Speaker and who are often not members of the same specialized committee; they are members with special qualities and a spread of party affiliations to ensure the representation of parties in these committees.

**Joint Committees** are composed of several committees that meet to study issues referred to them or combine one or more committees with other committees. In order for Joint Committees meetings to be valid; at least one third of the members of each committee must attend and their resolutions are invalid unless they have the approval of the majority of their members.

## **II. Parliamentary Oversight Procedures and Methods:**

In Egypt, parliamentary oversight methods vary and include questioning and briefing requests and requirements for accountability and political responsibility, and may lead to criminal charges against members of government. The PA rules of procedure define 12 oversight tools used by members for the purpose of overseeing government activities, as follows:

- 1- Questions**
- 2- Request for briefing**
- 3- Interrogation**

- 4- **General debate requests**
- 5- **Proposals for motions or resolutions**
- 6- **Fact-finding committees**
- 7- **Survey and scrutiny committees**
- 8- **Petitions and Complaints**
- 9- **Withdrawal of Confidence from the Deputies of the PM and Ministers**
- 10- **Withdrawal of Confidence from the PM**
- 11- **Accusation of Ministers**
- 12- **Council monitoring of local administration**

### 1) **Questions:**

Submitting questions is one method of parliamentary oversight over government activities. Each member of PA (Member of Parliament - MP) directs questions to the PM, any of his deputies or one of his Ministers or any of their deputies regarding any issue in the scope of their mandate. The PM or his deputies or whoever they deputize should answer MPs' questions. The member may withdraw the question at any time, which shall not be transferred into an interrogation in the same session. The question falls if its submitter is no longer in parliament or the Minister to whom it was asked leaves their post.

A question is an inquiry about a matter a member wishes to investigate and can be about the government's previous actions or what the government intends to do about a certain matter.

The answer is written in the following cases:

- i) Member's request,
- ii) If the purpose of the question is to have purely statistical data or information,
- iii) If the local nature of the question requires the answer of the relevant Minister,
- iv) If the question was tabled during the adjournment between council parliamentary sessions, and
- v) Remaining questions with no answer at the end of the council parliamentary session.

These Questions are published with their answers in the annex of the council minutes.

The PA Speaker may refuse the question if it does not meet parliamentary requirements and informs the member who has the right to object within a week. The member should inform the Speaker of his objection, who presents it to the General Committee in the next session.

A member may not have more than one question in one session, or more than three questions in one month. In the case of absence of the member asking the question, the answer is postponed to the next session, if it was not a written question. Then, the question and its answer are registered in the Council minutes.

A Minister may request the postponement of an answer until the next session. This is also the case if the Minister is absent and if another Minister does not wish to answer (as the Cabinet has collective responsibility before the PA).

Only the MP asking the question may request clarification from the Minister, and may comment once briefly. The Speaker may allow the relevant committee or another member to briefly comment on the answer of the Minister, if the issue is of public concern and sufficient importance.

### 2) **Requests for briefing**

Each member may request briefing from the PM or another member of the government about an issue of public and urgent importance that is within their remit.

The Council office may refuse the request, if it is not written, does not include something of public importance or is motivated by personal interest on the part of whoever presented it. A request for briefing is listed in the agenda of the council and takes place immediately before questions. The MP who submitted it presents a statement and the Minister responds briefly. The council, then, decides whether to refer the request to the relevant committee and require an urgent report about it.

The MP, the Chair of one of these committees or the representative of one of the parties' parliamentary bodies may call for the Speaker to agree to schedule a statement on an issue not listed in the agenda if it is an urgent public matter.

### **3) Interrogation**

Interrogations are the most important parliamentary oversight method. Their importance is derived from the fact that they can lead to withdrawal of confidence from the interrogated Minister or even the PM. They can also hold Ministers to account effectively by exposing evidence accumulated by the interrogator which may include proof of wrongdoing.

Each member may direct interrogations to the PM, his Deputies or Ministers to hold them accountable for the affairs relevant to their remit.

Interrogations can cover any behavior related to public affairs and could be related to personal affairs, concerning the behavior of government or one of its members.

The interrogation is debated at least seven days after its submission, unless the Council perceives it as urgent and it has government approval. It is submitted in writing to the PA Speaker with a general description of the subject of the interrogation and is accompanied by an explanatory note including a list of the interrogation issues.

An interrogation may not include matters which are unconstitutional or unlawful, inappropriate phrases or issues that are not within the government's mandate and should not arise from the personal or private interest of the interrogator.

An interrogation on an issue previously discussed and concluded in the council may not be submitted again in the same parliamentary session unless new events occur to justify this. Interrogations about similar issues or several closely linked issues are gathered and are included in the agenda to be debated at the same time. Interrogation has priority over all other subjects in the agenda after briefing requests and questions. In addition, questions and briefing requests related to the interrogation are included in the same session in which the interrogation is debated. The member who submitted the interrogation waives any previously submitted questions or briefing requests on the same subject.

If there are a number of different interrogations, priority is given to the first interrogation submitter; then to the submitter of the next interrogation in the interrogation register and then to the submitters of questions and briefing requests related to the interrogation.

On the day allocated to debate of the interrogation subject, the interrogator starts by explaining the interrogation then the interrogated comments on it. Then, debate on the subject for all members begins; even if the owner of the interrogation withdraws it after it has begun being debated. Related motions are then submitted in writing to the Speaker who presents them at the end of debate. However, if there is a motion to include the interrogation on the agenda, it is given priority. If no motion about the interrogation is submitted, the Speaker announces the end of debate and moves to the agenda.

The interrogator has the right to dismiss the interrogation at any time either by written request presented to the Speaker or verbally in session. In this case, it is removed completely from the agenda and is not debated by the council. Moreover, the absence of the interrogation submitter in the session identified for discussion is considered dismissal of the interrogation, unless this absence is for a reason that is accepted by the council. The council adjourns deliberation of the interrogation for the next session and only once after hearing government

opinion. The interrogation is considered void if the interrogator or the interrogated leave their post or at the end of the parliamentary session in which it was submitted.

#### **4) Requests for general debate**

At least 20 members may request debate of an issue in the council for the purposes of clarification of government policy and exchange of opinion on it. Requests for general debate can only be listed after the presentation of the government program before the council.

Requests are submitted in writing including a description of the issue and the grounds for addressing it in general debate in the council. The council may decide to remove the request from the agenda without debate if the topic is rejected for debate after hearing the opinion of one of the supporters of and another opinion from one of its opponents. The council may decide, based upon a government request, to debate the issue in the same session.

#### **5) Proposals for motions or resolutions**

Each member may table a motion related to an issue of public interest for the council to express its views on to the government or a draft motion that s/he wishes the council to issue. The proposal is submitted in writing supported by an explanatory note. It must be signed by no more than 10 MPs.

The Speaker refers proposals to the Proposals and Complaints Committee or the relevant Committee. This Committee may request the Speaker to refer them to relevant Ministries and agencies before preparing its report and submitting it to the council.

The proposal may not include anything unconstitutional or unlawful, inappropriate phrases, or be about people or agencies outside the council's remit.

#### **6) Fact-finding committees**

The council may form a special committee or assign one of its specialized committees to find facts about a general matter with particular importance or to investigate one of the public authorities or bodies, local administration units, public sector, any executive or administrative body or any of the public projects over which the council has oversight. This is in order to do the following:

- a) To find facts about the general financial, administrative and economic conditions regarding the topic or the agency for which the committee was formed.
- b) To conduct investigations related to any subject relevant to previous work.
- c) To monitor the commitment of any of the previously mentioned agencies to the rule of law or the plan or the State budget.

A fact-finding committee is formulated by a decree from the Speaker based upon a request from the General Committee or any of its other committees or based upon a written proposal submitted to the Speaker from at least 20 members. The number of members in the fact-finding committee should not be less than 7 members or more than 25 members; selected by the council based upon suggestions from the Speaker taking into account the specialization and experience in the issue for which the committee is formed. The representation of opposition parties' parliamentary bodies and members without party affiliation is taken into consideration if their number in the council is not less than 10 members.

#### **Fact-finding committees' working methods:**

- Fact-finding committees use all necessary procedures to access data, information and papers relevant to the topics referred to them.
- The committee may conduct field visits, investigations or interviews to find facts about the subject of its work.

- All relevant agencies shall cooperate with fact-finding committees in performing their role and should enable them to access what they need; reports, data, documents, registers; from any official or public agency.

#### **7) Survey and scrutiny committees**

Based on the suggestion of the Speaker or at least 20 members, the council may decide to establish a poll and scrutiny committee on an important issue within the council's remit or on the occasion of considering a draft bill, a suggestion for a draft bill or investigating a public issue.

The committee is formed of no less than 3 members or more than 10 members taking into account specialization, experience and representation of opposition parties' parliamentary bodies.

The sessions of these committees are public and their timing is announced in all media outlets. Representatives of relevant state bodies, specialists and technical persons, experienced and specialized persons in economic, social and cultural matters are invited. This is in addition to legal bodies and persons from whom the committee decides to hear opinions and make use of their data, information and statements.

#### **The purposes of Survey and scrutiny committees**

- a) Collect data to analyze deficiencies in the presented legislation so that it complies with the basic characteristics of society as defined in the constitution.
- b) Clarification of public political facts in the country in different fields.
- c) Hearing citizens' suggestions in matters and issues of concern to the public opinion.
- d) Listening to Egyptian or international public figures' opinions on public and international issues and problems.
- e) Highlighting facts about a specific issue under the council's mandate.

#### **8) Petitions and Complaints**

Every citizen, representatives of statutory bodies and legal persons may present written petitions with a complaint about specific procedures or behaviors that represent a violation of the constitution or law, their proposal for the amendment of laws and regulations or development of procedures or administrative, financial or economic systems to be adopted by state bodies, local administration or the public sector. The proposals and complaints committee reviews these petitions; it may listen to the submitter of the petition and request the relevant Minister to co-operate to enable it to clarify the facts. It submits a report of the results of this review to the Speaker who may request that the report is referred to the relevant committee or to the government to take measures about its findings.

#### **9) Withdrawal of Confidence from the Deputies of the PM and Ministers or their deputies**

Requests to withdraw confidence are submitted in writing signed by at least 10 members.

The request may not be submitted until after the council completes the discussion of an interrogation directed at the person against whom there is a request for withdrawal of confidence.

The Speaker presents the request to withdraw confidence immediately following its submission after ensuring the presence of its submitters in the session; as absence of one of them is considered a waiver of the request.

Permission to speak is granted to two of the request submitters then debate on the request is conducted if the council deems it appropriate. The council may adjourn the debate on the request until a date that it sets.

The council issues its resolution to withdraw confidence at least three days after the end of debate.

The council issues its resolution to withdraw confidence on the approval of the majority of its members.

#### **10) Withdrawal of confidence from the PM**

- The council may decide to use the withdrawal of confidence procedure for the PM according to the same procedures taken as regards withdrawal of confidence (point (9) above). This requires the approval of the majority of its members.
- If the council approves debate on a resolution to withdraw confidence from the PM, the Council Office Body prepares a report that includes the matters relating to the subject and states its decision and the reasons on which it was based. It then presents this report to the council.
- The Speaker presents the report to the president of the Republic who has the right to reject the decision of the council within 10 days. In this case, the council office presents the situation to the general committee.
- The General Committee prepares a report about its opinion on the subject to the council in a resolution which is approved by the majority of its members. It is presented to the council 10 days after the date of rejection of the President. If the council supports withdrawal of confidence from the PM with a two thirds majority of its members, the President shall accept the government's resignation.
- If the council rejects a motion to withdraw confidence from the PM, and confidence cannot be withdrawn on an issue that has been previously discussed and finalized during the same parliamentary session.

#### **11) Accusation of Ministers**

- A proposal for accusation of a minister is submitted to the Speaker in a written request signed by at least 5 members describing the actions on which the accusation and its reasons were based supported by data and documents.
- The Speaker refers the accusation request to the General Committee to consider and present a report in a maximum period of 1 month from the date of referral.
- The General Committee summons the Minister, through the Speaker, and listens to his/her testimony and the committee takes a majority decision whether to approve the suggestion of accusing the Minister.
- The council issues a decision following debate of the General Committee report in a special session with the approval of at least two thirds majority of its members. The Speaker informs the President of the Republic of the decision to accuse a Minister, supported by a statement of the evidence about him/her, the procedures followed by the council and reasons and grounds upon which the decision was based.
- Finally, the council issues a decree to form two committees for investigation and trial according to the law of trying Ministers no. 79 of 1956.

#### **12) Council monitoring of local administration**

The council debates anything related to local administration bodies and local community councils in order to support democracy and decentralization and achieve coherence and correlation among these bodies and their councils in the pursuit of public policy objectives and the state public plan.

The Minister of local administration affairs must inform the council of decisions related to the following matters:

- a) Dissolution of community councils and formation of temporary councils.

- b) Imposing fees and loans upon which local community councils agreed.
- c) Suggestions from local community councils to amend laws or decrees.
- d) Decrees of a public nature issued by the Council of Governors.

## **Annex (2): The Development of Representative and Parliamentary life in Egypt**

The history of Egyptian representative life began in 1824. Since then, there have been several successive parliamentary systems with different oversight and legislative powers reflecting the history and struggle of the people to achieve a healthy representative life and of the relentless desire of Egyptians to establish a democratic society aiming for justice and equality for more than 180 years of parliamentary history.

### **The High Council (1824 – 1837)**

The beginning of the organization of Egypt's representative life was the High Council, established by Muhammad Ali Pasha on 27<sup>th</sup> November 1824. It is the first parliamentary council with partly elected members and the representation of all classes of people. At first, it was formed of 24 members and then it increased into 48 members as 24 sheikhs and scholars were added. Hence, it consisted of Ministers, heads of Authorities, two scholars selected by the Al-Azhar Sheikh, two merchants chosen by the Chief of the capital, two accountants, and two notables from each province who were elected by the populace.

In January 1825, the High Council issued a basic statute. It defined its function: "to discuss whatever Mohammad Ali suggested or proposed with regard to his domestic policy...". The statute also stipulated session dates and procedures.

### **Consultation council (1829)**

In 1829, Muhammad Ali Pasha established the "Consultation Council". It was composed of 156 members (57 appointed, 99 elected). The presidency of this Council was granted to his son Ibrahim following the success of the High Council as an important initial step in the Shura (consultation) system. It consisted of high-ranking government employees, Ulama (scholars), and dignitaries. This Council was like a general assembly consisting of 156 members, 33 of whom were elected Egyptian dignitaries. The Consultation Council held its sessions to consult in the fields of education, administration, and public works. In 1830, the Council's rules of procedure, including its basic methods of work, were issued. In 1833, the Council enacted a special law to complement its rules of procedure, addressing the way it convened and the procedures for its debates and resolutions.

In 1837, Mohammad Ali enacted the State Basic Law which ended the Consultation Council and replaced it with the Special Legislative Council, to enact laws, and The General Legislative Council, to discuss the matters referred to it by the government. Then, the Cabinet was made up of seven basic Portfolios.

### **Advisory Council of Representatives (1866 – 1882):**

Khedive Ismail issued a decree to Ismail Ragheb Pasha to establish the Advisory Council of Representatives on 25<sup>th</sup> October 1866 and appointed him as Chair. This Council was the real beginning for representative life in Egypt. The Standing Orders of the Advisory Council of Representatives, which established election of its members, election system and candidate eligibility requirements, were issued.

The Council's term was defined as three years, in which it convened for two months in each year. The Advisory Council of Representatives convened for 9 legislative terms during the period from November 1866 and until July 1879. It consisted of 76 members, elected by the Umdas (Village Chiefs), the Sheikhs in the districts and the Dignitaries from Cairo, Alexandria and Damietta. In addition, the Khedive appointed its Speaker (Chair) and his Deputy. The law on the Advisory Council of Representatives regulated its work and the management of its sessions and discussion of the issues presented to it.

In time, the Council's competences gradually expanded, and opposition trends started to appear. This development emanated from the beacon schools spread by a group of leading intellectuals and writers, as well as newspapers, which stressed the need to establish a representative council with wider competences in legislation as much as in oversight.

In 1878, these demands resulted in the establishment of the first cabinet of ministers, and the parliament was reformed and given more powers; although some matters, like financial affairs, remained outside its competences.

In June 1879, the new standing order of the Advisory Council of Representatives was prepared to be presented to the Khedive (Head of State) for issue. It stipulated that the Council consisted of 120 members for Egypt and the Sudan. The most important provision of the standing order was the "accountability of ministers". It gave the council more influence in financial matters. However, Khedive Tawfiq, who was crowned on 26<sup>th</sup> June 1879, derogated the standing order and abolished the Council; even though the Council remained in session until July 1879.

### **Egyptian Representative Council (9<sup>th</sup> September 1881):**

The Orabi Revolution broke out calling for the formation of a Council of Representatives. Elections in the Advisory Council of Representatives were held according to the standing order issued in 1866, pending government preparation of a new basic law to be presented to the council for adoption. The new council, called the Egyptian Council of Representatives, was inaugurated in September 26<sup>th</sup> 1881; whereby the government presented the draft basic law with which a Topkapi Palace decree was issued on 7<sup>th</sup> February 1882. That basic law held the Cabinet accountable to the Representative Council elected by the people, which had the authority to legislate and scrutinize the minister. Its term was five years, and each session was three months.

The Standing Orders, which were approved by the Egyptian Council of Representatives, stipulated who retained the right to vote, who could be elected and how.

Thus, the basis of democratic practices was gradually established. However, this did not last long, as the Egyptian Council of Representatives had held one ordinary session from December 26<sup>th</sup>, 1881 until March 26<sup>th</sup>, 1882 when Britain occupied Egypt and repealed the basic law. In 1883, the so-called Regular Law was issued which constituted a setback to representative life in Egypt.

### **The Advisory Council of Laws (1883 – 1913)**

The Regular Law and the decree from Topkapi Palace stipulated the formulation of (1) Provincial Councils (a council in each province), (2) Advisory Council of Laws, (3) General Assembly and (4) Government Consultative Council. The sessions of the Advisory Council of Laws were convened 6 times a year on the first of February, April, June, August, October and December; this was amended in 1909 to convene on 15<sup>th</sup> of November of each year and September till the end May of the next year. Its main responsibility was to enact laws and request draft bills from the government or decrees from Topkapi Palace related to public matters.

The Advisory Council of Laws consisted of 30 members: 14 permanent members, appointed by the Khedive, including the Speaker and one of his two deputies, as the other was elected.

On the other hand, the General Assembly, which undertook the accountability of government and scrutiny of it and giving its views on projects, convened at least once every two years. The Egyptian Regular Law was followed by the Law on Elections (1<sup>st</sup> May 1883).

### **Legislative Assembly (1913 – 1923)**

Khedive Abbas Hilmi II issued the Regular Law of the Legislative Assembly on 1<sup>st</sup> July 1913 following the abolition of the Advisory Council of Laws and the General Assembly. It consisted of members according to the positions they held; that is Ministers in addition to 17 appointed members and 66 elected ones. The term of membership was for 6 years. The mandate of the Legislative Assembly was summarized in the requirement to take its opinion before the enactment of any law, with no obligation to implement this opinion. In fact, the Legislative Assembly convened for one session from January 22<sup>nd</sup>, 1914 until June 17<sup>th</sup>, 1914 and no more sessions were held as representative life terminated in Egypt due to World War I and until the Legislative Assembly was dissolved on 28<sup>th</sup> April, 1923.

### **Parliamentary and representative councils under the 1923 Constitution:**

A new phase started upon the declaration of the new constitution on 19<sup>th</sup> April 1923 in a climate of party plurality. The constitution granted legislative rights to parliament while the King maintained the right to veto. Meanwhile, the right to oversee the executive was granted to parliament which was at that time, in this constitution, divided into the House of Representatives and the Senate. The House of Representatives was formed of 214 members, and this number increased to 232 and then to 319 members due to population increase. The Senate was formed of 120 members of which 72 were elected and 48 were appointed. This number increased to 147 members of which 88 were elected and 59 were appointed. Then, it increased for the second time to 180 members of which 108 were elected and 72 were appointed. On 15<sup>th</sup> March 1924, the first session of the two councils was held. The reason behind the expansion in members' numbers of both House and Senate was that articles 74 and 83 of the 1923 constitution stipulated that each constituency should be represented by one member of its inhabitants.

However, the 1923 constitution failed in terms of practical application. The House of Representatives was dissolved more than once under it; all the councils formed under this constitution did not complete their constitutional terms. Moreover, the council that started its session on 23<sup>rd</sup> March 1925 was dissolved on the same day, and its parliamentary term was only 9 hours. Thus, this was the shortest parliamentary term ever. In addition, during the time of Mohamed Mahmud Pasha's government and under the 1923 constitution, Royal decree Number 46/1928 was issued to dissolve both Senate and House and suspend articles 15, 89, 155 and 157 of the constitution for 3 renewable years with the King retaining legislative powers through royal decrees that have the power of law. Nevertheless, that royal decree was annulled on 31<sup>st</sup> October 1929 after inviting people to elect members of the House of Representatives and the return of the previous Senate. The parliament was invited to convene on 11<sup>th</sup> January 1930.

### **Parliamentary councils under the 1930 constitution:**

Upon the announcement of the 1930 constitution on 22<sup>nd</sup> October 1930 during the time of Isma'il Sidqi Pasha's government, the 1923 constitution was annulled. This constitution limited the number of House of Representatives to 150 members to be elected on two ways and the number of Senate to 100 members, of which 60 were appointed by the king and 40 were elected. However, the 1930 constitution did not last for long due to growing public pressure and Egypt's rejection of it and the political regime upon which it was built. Hence, royal decree number 67/1934 was issued to invalidate the 1930 constitution and dissolve the two chambers of parliament that were formed under and based upon its provisions.

On 19<sup>th</sup> December 1935, royal decree number 118/1935 was issued to restore the 1923 constitution headed by the sentence: "the nation's will to restore the 1923 constitution was flagrantly apparent".

Even though the parliamentary councils formed under the 1923 constitution were dissolved more than once, it lasted until January 1952 when parliament was dissolved after the Cairo Fire, and Egypt remained without a parliament until the revolution on 23<sup>rd</sup> July 1952. In December 1952, the Egyptian Revolutionary Command Council announced the annulment of the 1923 constitution, and the intention of the government to form a committee to draft a new constitution that should be totally free of the defects of the annulled constitution.

**Parliamentary councils since the revolution of 23<sup>rd</sup> July 1952:**

On 10<sup>th</sup> February 1953, the Egyptian Revolutionary Command Council issued a resolution stipulating the procedures for a three year transition. On 16<sup>th</sup> January 1956, the 1956 constitution was declared, and it was put to referendum on 23<sup>rd</sup> June 1956. Based on this constitution, the first parliamentary council was formed, and the first parliamentary session held on 22<sup>nd</sup> July 1957. This council was entitled the “National Assembly” and consisted of 350 members; and remained in effect till 10<sup>th</sup> February 1958.

After unity with Syria, a temporary constitution was issued and a joint Assembly Council was formed of 400 Egyptians and 200 Syrians. Its first session was held on 21<sup>st</sup> July 1960, and it remained in place till 22<sup>nd</sup> June 1961.

In March 1964, a temporary constitution was issued; under it, a national assembly was formed from 350 elected members in addition to 10 others appointed by the president of the republic.

On 11<sup>th</sup> September 1971, a new constitution was drafted, and based upon it the PA was elected and its first session was held on 11<sup>th</sup> November 1971. It was the first council to complete its five years constitutional term. In 1976, new elections were conducted under the political platforms system that later became political parties based on President Sadat’s announcement at the beginning of parliamentary session on 11<sup>th</sup> November 1976 followed by the law on political parties no. 40/1977 in Egypt.

On 19<sup>th</sup> April 1979, the people agreed to the establishment of the Shura Council, in a referendum; it held its first session on 1<sup>st</sup> November 1980.