



Constitutional Reform

**November
2013**

Writing the Constitution of the Egyptian Revolution: Between Social Contract and Political contracting (March 2011-July 2013)

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“The battle for the constitution”. This was the most accurate and most frequently used expression to describe the approach of key stakeholders to the constitution making process in post-Mubarak Egypt. The “battle” began when the leading political parties failed to define the rules that govern the constitution making process. Such rules should reflect stakeholders’ conception of the process as well as of the general contours of the substance of the constitution. The perception of the constitution as a social contract, and as the reference for governing state and society, stems not only from consensus over its content but also over the participation-representation principle that governs the whole process. This is why there was little hope that the content of Egypt’s 2012 Constitution would overcome the deficiencies of the process that produced it. The constitution making mechanisms lacked clear criteria and did not ensure equal participation through equal representation of all stakeholders. This made it difficult for those who did not take part in writing the constitution to join the process at a later stage, a situation that could not but affect their assessment of the constitution’s content. This in turn made it impossible for the constitution to act as a reference point for all

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political stakeholders and for the political institutions . From that moment onwards, the existing political process became in itself the reference for the drafting and assessment of the Egyptian constitution.

The Egyptian situation reflects the conflict between two schools of thought over the process of writing constitutions. The first is the classical school that sees the constitution making process as a distinct field that rises above the ever-changing day-to-day politics. This means that all those involved should help protect the constitution's lofty status and preserve its value as a reference for both the government and the governed. At the revolutionary idealist moment that existed after Mubarak's overthrow, this school's opinion was closer to that of the unorganized Egyptian masses who thought it possible to separate the constitution making process from the unfolding struggle for political power. The second school is closer to political realism in believing that the constitution making process cannot be separated from the political balance of power in which constitution making takes place. This school stresses that this is usually the case during democratic transition. Stakeholders have thus to come up with strategies that would empower them to trigger a regime change within this particular context.¹ In Egypt, the parties in control of the constitution making process went too far in adopting the second school's view, while those who were excluded from the process went too far in adhering to the idealist perception of constitution making. The gap between the two groups continued to deepen until the Supreme Council of Armed Forces (SCAF) and well-organised political groups – namely Islamist parties and remnants of the Mubarak regime – imposed a view that sees the constitutional process as a short-term political deal rather than a long-lasting social contract. This is how the stakes that govern the day-to-day political process became the reference for governing the constitution making process. Thus, since the rules of “majority” and “mass-mobilization” became the criteria that govern the political process, the same rules were applied to constitution making.

To the time of writing (November 2013), the constitutional process in Egypt has witnessed three different waves since the ouster of Mubarak in February 2011. The first was from the Constitutional Declaration of February 2011 to the first referendum of March 2011; the

¹ David Evan Landau, “Constitution Making Gone Wrong,” Florida State University, Public Law Research Paper: no. 587, 01/04/2012, pp. 1-54.

second lasted from June until December 2012, during which the Declarations of 17 June, 12 August, 21 November and 9 December were issued; and the third and current constitutional wave began with the Constitutional Declaration of 8 July 2013. During each of these waves, political stakeholders perceived the constitution as a means for immediate political empowerment via political victory over their opponents. The participation-representation norm continued to be disregarded while the military establishment became the main arbiter defining the mechanisms and participants of constitution writing. Oddly enough, although the SCAF's partners in 2011 and 2013 were different, they all accepted that the "military" decides, with whomever it chooses, the manner in which the "revolution's constitution" should be written.

This paper explains how the constitution was created as a document that reflects the conflict of interests and short-term political alliances at the time of its writing, instead of being the common reference for the political, economic and social systems in post-Mubarak Egypt. The first part of the paper explains how yielding the constitution making – not just constitution writing – process to the dictates of the political balance of power affected the mechanisms of constitution making. The second part explains how the Constituent Assembly's composition led to the adoption of a constitution that "locks in" the existing political balance of power and to the reproduction of the old political regime. The third part addresses the Constituent Assembly's attempts to control civil society participation in the constitution making process, and how the excluded stakeholders resisted and managed to challenge and contest the legitimacy of the constitutional process, thus paving the way for the suspension of the 2012 Constitution only six months after its adoption. The conclusion revisits the most important lessons learnt from the 2012 constitutional process in a manner that sheds the light on a number of shortcomings in the 2013 process.

1. Constitution making as *realpolitik*

A- The political variables

One main reason for the battle over the constitution was stakeholders' perception of the constitution as the first step towards securing their respective territory in the public sphere. Two types of political coalitions dominated the process: on the one hand, there was a *rapprochement* among different Islamist forces against non-Islamist forces and, on the other hand, an arrangement was concluded between the Muslim Brotherhood and the military establishment. It became clear that these influential stakeholders perceived the constitutional process as a short-term political bargain that involved only the most powerful players. Several factors played important roles in shaping such a view of the constitutional process:

1. The SCAF assumed power immediately after Mubarak's downfall and remained there until the election of Mohammad Morsi to the presidency in June 2012. The military hence selected the members of the legal committee tasked with defining the mechanism according to which the Constituent Assembly would be formed. This first selection of members took place within a context of limited non-transparent consultations with "trustworthy" legal experts. This mechanism was the subject of Article 60 of the Constitutional Declaration approved by 14 million Egyptians (or 72% of the voters) on 13 March 2011.² The SCAF also intervened in the composition of the first and second Constituent Assemblies through regular meetings with leaders of different political parties represented in the People's Assembly (lower chamber) and Shura Council (upper chamber). These meetings resulted in a general agreement on a number of generic principles to guide the formation of the Constituent Assembly. The latter was made public at the end of April 2012. At that time, the SCAF's popularity had waned and the number of demonstrations against it had increased, causing it to focus more on speeding up the constitution writing process than on applying pressure to achieve consensus. The main aim of speeding up the process was to allay the military establishment's fears regarding provisions in the constitution that enshrine its privileged status – or *supra-status* – within the Egyptian political system. The SCAF was in fact preparing to return to its original role of

² "Egypt referendum results: 77.2 per cent say "Yes" to the amendments," Ahram Online: <http://english.ahram.org.eg/News/8125.aspx>, visited on: 18 March 2013.

arbiter among different political players. The masters of the military establishment were even ready to take over the entire constitutional process in order to achieve a safe exit from the political process. This became amply evident on 17 June 2012 when SCAF issued a new Constitutional Declaration that threatened, in Article 60b, to shift the process of forming the Constituent Assembly to the SCAF “if the [present] constituent assembly encounters an obstacle that prevents it from completing its work.” The same declaration threatens, in Article 60b1, the potential interruption of the constitution writing process upon any suspicion that “the new constitution contains an article or more which conflict with the revolution's goals and its main principles or which conflict with any principle agreed upon in all of Egypt's former constitutions.”³

2. On 14 June 2012, a court order was issued to dissolve the People's Assembly, one day after announcing the formation of the second Constituent Assembly charged with writing the constitution. The lower chamber's dissolution turned the Constituent Assembly into an alternative space for parliamentary politics. The Constituent Assembly thus became an arena for *realpolitik* among different political currents, reflecting the balance of power captured by previous parliamentary elections. This was especially the case for Islamist parties which won the majority of seats in the dissolved parliament. Those parties officially submitted to the dissolution decision yet deep down they did not recognise it and found it biased and politicized.⁴ The dissolution of the Lower Chamber made Mohamed Morsi's Freedom and Justice Party (FJP) reconsider its stated preference for a parliamentary system and opt instead, in the chapter on public authorities, for a mixed system that gives wider prerogatives to the President of the Republic. The dissolution also strengthened the powers of the Shura Council, which was not disbanded, in the chapter on transitional provisions. The planned parliamentary elections therefore became the main focus of all political actors, not only those from outside the Constituent Assembly but also those from within. Consequently, the performance of political parties in the constitutional process was seen as part of their parliamentary election campaigns. The ability of political parties and independent political actors to make concessions became limited out of fear of losing votes in the upcoming elections. Such

³ The Constitutional Declaration was published in the Official Gazette on 17 June 2012.

⁴ Interview with a member of the Constituent Assembly, belonging to the FJP; November 2012

political behaviour in the Constituent Assembly distracted the attention of the public opinion away from core constitutional issues and towards marginal issues such as the minimum age of marriage for girls.

3. Presidential elections took place amid discord around the composition of the Constituent Assembly. The winner was the FJP's own chairman, Mohamed Morsi. FJP became henceforth the ruling party through its majority in the Shura Council and the presidency of the Republic. Mohamed Morsi then appointed a new Prime Minister on the 24th of July 2012.

Morsi's victory provided the Brotherhood with a self-confidence boost that other Islamist parties shared. The result was a shift in the manner in which these Islamist parties – especially the FJP – dealt with other political and social forces in the country, displaying an arrogance to which even some members of the Islamist political camp willingly admitted. This shift was manifested in the way the Islamist majority in the Constituent Assembly reacted to successive resignations from the Assembly. Resignations began at the onset of the negotiations to form the second Constituent Assembly. Fifty-three members had withdrawn from the Assembly by the time the vote on the final draft of the constitution took place.⁵ On that Thursday 29 November 2012, the Constituent Assembly voted on the draft constitution in the presence of 85 members, including 11 members who were upgraded from the backup members to replace those who resigned.⁶ The importance of these replacements stems not only from their number and political orientation, but also from the institutions and bodies they represented. The list of resignations included representatives of the famous 6 April Movement, different leftist and liberal parties, and the main religious institutions – Al-Azhar and the Orthodox, Catholic and Evangelical Churches. Moreover, the Bedouins and Nubians were not represented at all. Among the resignations were also members recently upgraded from the backup list. The vote on the final draft constitution consequently took place in the absence of all non-Islamist political currents except for Ghad al-Thawra, the only remaining liberal party.⁷

⁵ “The Ahram portal publishes the names of 53 withdrawals and resignations from the Constituent Assembly,” <http://gate.ahram.org.eg/News/278155.aspx>, last date to visit the site 4 April 2013.

⁶ “Al Ahram publishes the results of the vote on the new constitution, in the presence of 85 members,” Al Ahram, 29 November 2012; <http://www.ahram.org.eg/archive/Al-Mshhad-Al-Siyassy/News/185758.aspx>, site visited on 10 May 2013.

⁷ Al-Hayat newspaper, 30 November 2012: <http://alhayat.com/Details/457588>, visited on 10 May 2013.

4. Since Morsi took office in June 2012, the President's role in the constitution writing process went through four different stages. The first was the "non-interference" stage in response to repeated calls from non-Islamist parties for him, in his capacity as president of all Egyptians, to ensure that consensus is achieved. The President thus issued several statements affirming that constitution writing was the responsibility solely of the Constituent Assembly members over whom the President of the Republic has no authority. The second stage, the "intervention" stage, began with the publication of the Constitutional Declaration of 12 August 2012. This declaration stated in Article 3 that "if the Constituent Assembly [tasked with drafting a new constitution] is prevented from doing its duties, the president can draw up a new assembly representing the full spectrum of Egyptian society mandated with drafting a new national charter within three months of the assembly's formation."⁸ As usual, the text gave the President the power to create a new Assembly without defining its founding criteria or how other political organizations would contribute to it. The third stage was the "partiality" stage, during which the President issued Constitutional Declarations on 8 and 21 November 2012. The first declaration stated that "no judicial authority shall have the power to dissolve the Constituent Assembly or Shura Council."⁹ (Ever since this declaration was issued, the presidency never reconsidered its clear position in support of the Constituent Assembly, despite issuing a second presidential declaration on 8 December 2012 – i.e., one week before the referendum on the draft constitution.) The 21 November declaration stressed that citizens shall not elect a new Constituent Assembly unless "the people vote against the draft constitution in the referendum scheduled on Saturday, 15 December 2012..."¹⁰ The fourth stage in the President's role in constitution making began after the new constitution was approved. Morsi then invited the country's political organizations to a national dialogue on various controversial provisions in the constitution adopted only one month earlier. The

⁸ Text of the Constitutional Declaration issued on 12 August 2012, as it appeared the portal of the General Information Department: <http://www.sis.gov.eg/Ar/Story.aspx?sid=64697> visited on 13 April 2013.

⁹ Text of the Constitutional Declaration published in the Official Gazette "Al-Ahram", 22 November 2012; the Declaration stated that "Previous constitutional declarations, laws, and decrees made by the president since he took office on 30 June 2012, until the constitution is approved and a new People's Assembly [lower house of parliament] is elected, are final and binding and cannot be appealed by any way or to any entity. Nor shall they be suspended or canceled and all lawsuits related to them and brought before any judicial body against these decisions are annulled." *ibid.*

¹⁰ Text of the Constitutional Declaration of December 8, 2012 published on the website of the General Information Department: http://www.sis.gov.eg/ar/LastPage.aspx?Category_ID=2268, visited on 12 April 2013.

political opposition, in addition to prominent non-Islamist civil society actors, boycotted this sterile dialogue until the very moment President Morsi was deposed and the constitution suspended on the 3rd of July 2013.

5. The process of writing the constitution was not entirely free of foreign influence, with this interference sometimes amounting to foreign intervention in domestic affairs. Despite the rejection by the majority in the Constituent Assembly of any non-Islamist reference or intervention in the constitution, several foreign parties joined the political battle raging around it. These interventions, however, sometimes happened upon the invitation of domestic stakeholders. For instance, a number of Egyptian political and human rights organisations openly called on the international community (states, governmental and non-governmental structures) to step up pressure on national authorities regarding human rights provisions in the draft constitution. Such calls concerned mainly civil and political rights, as well as women and minority rights.¹¹ A good example of the impact of foreign pressure relates to women's status in successive drafts. The famous Article 68, which was removed from the final draft, was subject to the most intense internal and external condemnation by civil society organisations as it recognized women's rights "provided they do not contravene Islamic Sharia." The establishment of successful coalitions among various feminist organisations contributed to the success of the campaign launched by women's rights advocates against the above article. Yet, the pressure exercised by foreign stakeholders on the President of the Republic, members of parliament and on the SCAF through closed-door meetings and media statements was a key factor in the decision to remove the article. In general, lobbying and pressure from foreign governmental and non-governmental stakeholders focussed mainly on the need for consensus building, especially on matters related to civil and political rights and freedoms. Moreover, international organisations – like the United Nations Development Programme, the European Union, expert groups and foreign research centres – held conferences and workshops inside and outside Egypt to lend Egyptian officials technical and legal support in constitution making.

¹¹ Intervention by one of the women leaders during a discussion over the constitution, held by the Social Contract Centre in September 2012; article by Amr Hamzawi, "*Al-Dustour Laysa Faqat Qadiya Dakhiliya*," (The Constitution is not Only an Internal Matter), Al-Watan, 27 September 2012.

B- Yielding the Constituent Assembly to the prevailing political balance

The governing mechanisms of the Constituent Assembly shed light on the deficiencies of the process. Such deficiencies eventually hampered consensus building on the content of the constitution. Such divisive and controversial mechanisms included the initial selection process of Assembly members, the release of numerous drafts (sometimes on a daily basis), the management of hearing sessions and the voting process on the final draft. Major deficiencies in the process itself are basically the consequence of Article 60 of the constitutional amendment that the majority of Egyptian voters accepted in the referendum of 19 March 2011. This article assigns the composition of the Constituent Assembly to “The members of the first People's Assembly and Shura Councils (except the appointed members)” who “shall meet in a joint session following an invitation from the Supreme Council of Armed Forces within 6 months of their election to elect a provisional Assembly composed of 100 members who will draft a new constitution for the country within 6 months of the formation of this Assembly.”¹² As a result of the Constitutional Declaration and majority rule, the Islamist political current that controlled around 70% of the seats in the People’s Assembly and 85% of the seats in the Shura Council was to dominate the first Constituent Assembly’s formation process and membership. Such a result occurred although the official mechanism provides for the People’s Assembly and Shura Council to elect only 50% of Constituent Assembly members from among themselves, and for the other 50% to be non-parliamentarians.¹³ Thus, sixty-six out of one hundred Assembly members belonged to the Islamist political current according to the official list published on 24 March 2012.¹⁴ In a quick reaction, 24 members announced their resignation from the Assembly, some of whom withdrew even before the Assembly began its proceedings, in objection to the deficiencies in the formation process and hence

¹² Test of the Constitutional Declaration on the Egyptian Government’s website: <http://www.egypt.gov.eg/english/laws/constitution>

¹³ The FJP won over 38% of the seats in the People’s Assembly, the Salafist current came in second place with around 29 seats, followed by Al-Wasat Islamic Party who won around 30% of the People’s Assembly seats. Elections to the Shura Council only increased the Islamist Current’s control on the legislative authority after the FJP won the equivalent of 58.5% of its seats, followed by the Salafist al-Noor Party with 25.5% of the seats. “Islamists win 70% of Egypt People’s Assembly’s Party List Seats,” Ahram online, <http://english.ahram.org.eg/NewContent/33/100/32287/Elections-/News/Islamists-win-of-Egypt-grip-on-Egypt-Shura-Council.aspx-party-lis.aspx>, last checked: 5 May 2013; “Islamists Tighten Grips on Egypt’s Shoura Council,” Ahram online, 25 December 2012: <http://english.ahram.org.eg/NewsContent/1/64/61266/Egypt/Politics-/Islamsits-tighten-grip-on-Egypt-Shura-Council.aspx>, checked on 5 April 2013.

¹⁴ William Parlett, “Constitution Making by We the Majority,” Brookings Institution, 30 December 2012: <http://www.brookings.edu/blogs/up-front/posts/2012/11/30-constitution-egypt-parlett>, checked on 5 April 2013.

the final composition. Among the latter were representatives of Al-Azhar, the Christian churches, the Supreme Constitutional Court and several non-Islamist political parties. However, another deficiency soon appeared. This time it was about the mechanism of mediation between members who resigned and the Constituent Assembly. The shortcoming laid in the fact that the main mediator – the FJP – was itself a rival. Moreover, not only did this mediator-rival refuse to reconsider the Assembly’s composition, but the SCAF also intervened after its meeting on 29 March with the leaders of the “big” political parties in Egypt by issuing a statement calling for consensus on the Assembly’s composition.¹⁵

Nevertheless, on 10 April 2012, the Supreme Administrative Court declared the Assembly null and void on the premise that the presence of parliamentarians amongst its members violated Article 60 of the Constitutional Declaration that limited their role to electing Assembly members without taking part in writing the constitution.¹⁶ On the political level, the non-Islamist opposition, known as the “secularists,” believed that the Court had decided in their favour by implicitly admitting that the Constituent Assembly had not fulfilled the condition of representativeness of all sectors of the Egyptian society.

On 11 June 2012, a joint meeting of the two chambers of Parliament enacted Law no. 79 for 2012 relevant to the formation of the second Constituent Assembly. The law received the support of several non-Islamist parties.¹⁷ Article 3 of the law simply states that “the Assembly’s composition shall represent – as much as possible – all sectors of the Egyptian society.”¹⁸ However, the composition of the second Assembly was plagued by the same shortcomings that led the court to dissolve the first one. Parliamentarians were once again elected members of the Constituent Assembly! The Assembly also included members who held positions in the government such as Adel Abdul-Hamid, the Justice Minister at the time, Imad Hussein Hassan, the Deputy Interior Minister and Mohammad Mahsoub, who later became Minister of State for Legal and Parliamentary Affairs. Unfortunately, the criteria defined for the composition of the second Assembly did not resolve the problem of ensuring that all sectors of Egyptian society were equally and fairly

¹⁵ Wahid Abdul-Majid, “The Complete Story of the Battle over the Constituent Assembly,” (Arabic), Al-Shurouq, 20, 21 June 2012.

¹⁶ “Egypt: Administrative Judicial Court Suspends the Constitutional Panel,” Global Legal Monitor, Law Library of the Congress, 16 April 2012: http://www.loc.gov/lawweb/servlet/Iloc_news?disp3_1205403099_text, last checked 5 April 2013.

¹⁷ Wahid Abdul-Majid, *ibid*

¹⁸ Text of the Law on the formation of the Constituent Assembly, Al-Ahram, 12 July 2012

represented without discrimination. The allocation of a percentage in the Assembly to “public and legal figures” further enhanced Islamist domination over the Assembly thanks to the murky criteria according to which these figures were selected. Additionally, the disagreement over the voting system inside the Constituent Assembly drove a number of non-Islamist parties to resign while negotiations on its composition were still on-going. The FJP and Al-Noor Parties insisted that a simple majority (50% +1) system must be followed when voting on the draft constitution, while other parties, mainly the Egyptian Social Democratic Party (left) and Free Egyptians Party (liberal), insisted on a two-thirds majority.¹⁹

2. The political allocation of constitutional provisions

A- Achievements of the new regime

Based on the distribution of membership in the Constituent Assembly discussed above, forces in control of the constitutional process began negotiating on their specific “shares” in the constitution. The goal was for each to secure a territory in the ensuing political process. On the one hand, the lobbying of the more conservative Islamist political parties, like the Salafists and Jama’a Islamiya, focussed on the provisions related to the foundations of state and society which they saw as defining Egypt’s identity. These parties also mobilized around provisions relevant to civil rights and freedoms that, according to their perception, shape the society. On the other hand, the Muslim Brotherhood intensified their lobbying around provisions related to the nature of the political system, in addition to those defining political rights and freedoms. Given these priorities, provisions organizing economic and social rights were absent from major political deals. This cluster of rights was not the object of appropriation. In fact, they provided a pool for all actors to outbid one another in media outlets. In addition, the growing political struggle among different actors both in and outside the Constituent Assembly prevented any consensus around basic social and economic rights, even in instances where a simple change in wording would have sufficed, such as substituting “sustainable development” to “comprehensive development,” in Article 14.

In the same vein, certain terminologies were associated with one current or another and thus some were deleted and others used just to reflect the balance of power inside the Assembly. One example

¹⁹ Wahid Abdul-Majid, *ibid*

is keeping the term “shura” in Article 6 to highlight the Islamist identity of the political system without explaining what the word “shura” would actually add to the term “democracy” preceding it. Likewise, the constitution no longer contained a clear recognition of the idea of “pluralism”, be it in the provisions related to the organization of state and society or those relevant to rights and freedoms. The only mention of pluralism in the constitution was related to political pluralism in the framework of political parties. There was also no mention of “diversity” as a value whereas its recognition was a vital issue for minorities like Nubians and Bedouins. However, since these communities did not use ethnic and cultural identity as a reference for political mobilisation, they were unable to impact the *realpolitik* of constitution making. On the other hand, reservations of Al-Azhar and the Coptic Church on constitutional provisions were given due attention both in and outside the Constituent Assembly. Such cases proved that what was at stake was not the substance of constitutional provisions *per se* but the political significance/weight of those voicing it.

Numerous civil society organizations also demanded the inclusion of law-like technical details in the constitution, especially as the crisis of confidence deepened between the Constituent Assembly and sectors not represented in the Assembly. One example is the demand to openly state in the constitution that the term “citizen” refers to both men and women. Similarly, there was a demand to change Article 47 on the right of access to information to specify a time span that would be imposed on the state to reveal official documents. Several feminist organizations demanded an open statement in Article 32 that an Egyptian mother can transmit her citizenship to her children. It is within this framework that the chapter on freedoms and rights became a fertile niche for political deal-making in the context of the balance of power between Islamist political parties, on one side, and the non-Islamist opposition, civil society organizations and international stakeholders on the other. Meanwhile, negotiations over state institutions and public authorities only involved stakeholders who were already in control of state institutions at the moment of constitution writing: remnants of the Mubarak regime, the military establishment and the Muslim Brotherhood.

B- Resistance by the agencies of the old regime

Early indicators of the eventual collapse of the entire political process could be found in the political bargaining over state institutions. It became clear after the publication of the chapter on “Public authorities”, and the reactions to it, that the organization of state institutions was not based on the principles of separation of powers and the balance between them. Instead, the organization of

public authorities in the constitution reflected, once more, the political balance of power at the time of constitution writing.

The two major political partners, the Muslim Brotherhood and the military establishment, agreed to preserve the military establishment's pre-2011 prerogatives in the Egyptian political system through articles 195, 197 and 198 of the 2012 Constitution. The process of constitution making thus signalled a period of political reconciliation between the military establishment and the political elite in power following their clash over the "Basic Principles of the Constitution of the Egyptian State", better known in the media as the "Silmi bill", first published in August and then in November 2011. At that time, the Muslim Brotherhood had described this bill as an attempt by the SCAF to impose its political will, to interfere in the constitution making process and to place itself above it²⁰. One of the main indicators of this reconciliation was the fact that the provisions of Articles 9 and 10 of the Silmi bill, that the Brotherhood previously condemned, were almost identical to the military-related provisions in the 2012 Constitution, especially those that exempt military tribunals and the military budget from civilian oversight. It was also clear that some of the liberal parties' objections to the military-related provisions, both in and outside the Constituent Assembly, were limited in scope. This was a reflection of the military's enduring image as the ultimate arbiter among political rivals despite the deteriorating civilian-military relations.

At another level, some sectors of the judiciary entered into an open confrontation with the Constituent Assembly over relevant constitutional provisions. Their objections were specifically related to the provisions that allowed the current prosecutor general to remain in his position despite the deficiency of the process through which president Mohamed Morsi appointed him. Another highly controversial issue was the reconfiguration of the Supreme Constitutional Court and the suppression of the secondment of judges. In this context, the case of the Supreme Constitutional Court is the clearest example of how state institutions were submitted to the fortunes of the political balance of power, especially when the mechanism of the Court's formation became the object of political bargaining. Many judges and law professors saw in Articles 175, 176, 177 and 233 an attempt to cut the Supreme Constitutional Court down to size for ordering the dissolution of the first post-Mubarak parliament and because one of its female judges led a legal opposition against Mohamed Morsi's successive presidential decrees. The Supreme Constitutional Court was thus

²⁰ Al-Masry al-Yaom, 14 August 2011, Al-Ahram's evening edition, 40/11/2011.

relieved from reviewing laws and verdicts that touched upon Islamic Sharia. Article 177 of the 2012 Constitution then gave the Constitutional Court the right to review draft laws organizing political rights (the most important being the Legislative Elections Law) prior to, and not after, the draft law is approved by parliament. Once the draft law is adopted, no citizen or court can challenge a law's constitutionality before the Constitutional Court even if the members of parliament did not take the Constitutional Court's *ex ante* reservations into account.

On the other hand, Article 176 of the constitution cuts down the number of Supreme Constitutional Court members from 16 to 11 judges. The same article sets a different appointment system than the one that the Constitutional Court's General Assembly had recommended in a series of memorandums addressed to the Constituent Assembly.²¹ These provisions coincided with the Islamist parties' off-and-on siege of the Supreme Constitutional Court's headquarters, which lasted from 2 December 2012 until mid-January 2013 in a protest against the potential dissolution of the Shura Council and the second Constituent Assembly itself.

The Judges Clubs of Egypt²², administrative prosecutors, the State Litigation Authority (*hay'at qadaya al-Dawla*) and the Supreme Judicial Council had been in contact with the Constituent Assembly through a number of memorandums in which they expressed their views on the provisions organizing the judiciary in the constitution. In addition, the then minister of justice, Judge Ahmad Mekki, sent a memorandum to the Constituent Assembly voicing some concerns of the judiciary over relevant constitutional provisions.²³ However, all memorandum contents were not similar; politics had infiltrated the judiciary, whose members had become divided among themselves along the lines of the unfolding political struggle. The crises between different judicial agencies and the Constituent Assembly, as well as the presidency, reached its peak when members of different judicial bodies disagreed among themselves on supervising the referendum on the constitution, to the extent that some judges offered to replace those who had decided not to take part.

²¹ "The Supreme Constitutional Court rejects the Constituent Assembly's proposals," al-Ahram's evening edition, 6 October 2012.

²² The first judges' club was established in 1939 as an elected body to represent Judges' rights and interests especially against the Executive authority, i.e.: the ministry of justice

²³ Al-Ahram's digital portal: <http://digital.ahram.org.eg?articles.aspx?Serial=1093675&eid=1962>, date visited: 30 April 2013; Al-Watan newspaper, 30 September 2012.

3. Boundaries to social participation in constitution making

A- Institutional channels

To allow for society's participation in constitution making, the Constituent Assembly chose an approach that essentially depends on listening as an alternative to dialogue. The first mechanism it adopted was the establishment of a "Social Dialogue and Communication Committee" to undertake three basic tasks: 1) organise public sessions and take part in special seminars to raise awareness about the constitution, 2) receive the public's amendments and 3) hold hearing sessions with a number of civil society organisations, public figures and experts and other non-members of the Constituent Assembly. The committee's work methodology could be summarised as follows:

1. The sessions that the Committee for Social Dialogue held at the Constituent Assembly were indeed "hearing" sessions; interactive dialogue on various articles was almost absent. Many hearing sessions did not actually bring visitors face to face with Assembly members directly in charge of writing the draft constitution. The Committee for Social Dialogue was the main interlocutor for visitors and was solely in charge of carrying proposed amendments to the specialised sub-committees. Such a mechanism allowed the Committee for Social Dialogue to transform its role from that of coordinator/mediator between the public and members of the Constituent Assembly into that of a party to the dialogue and sometimes an advocate of the draft constitution. Furthermore, it was sometimes unclear why some members of the Constituent Assembly who were neither members of the Social Dialogue nor of the relevant specialised sub-committee took part in some of the hearing sessions.²⁴
2. The Committee for Social Dialogue organised public talks and hearing sessions outside the Constituent Assembly's headquarters across the country. However, the work methodology was not transparent enough. It was not easy for the public to know the timing of these events, not even by consulting the Assembly's website, which suffered some technical problems. Moreover, these activities were very poorly publicised; one of the communication mechanisms used in the governorates was to contact the Governor and ask him to choose those who will participate in the upcoming public session. Various opposition members, independent unions

²⁴ Meeting with members of an NGO which stayed in constant contact with the Constituent Assembly, and met twice with members of the Committee for Social Dialogue, in November 2012

and political and human rights activists accused different governors of only inviting Islamist militants or supporters of Islamist parties. For its part, the Committee for Social Dialogue videotaped these public sessions and uploaded them on the Constituent Assembly's website.

3. The FJP totally dominated the Committee for Social Dialogue and, for that matter, all official contacts between the Constituent Assembly and the public. Those who headed the Committee for Social Dialogue were Mohammad Al-Beltagi, a Muslim Brotherhood leader and Secretary General of the FJP, and Omaima Kamel, also a leader in both the Brotherhood and the FJP and a member of the President's advisory council. The Committee's Secretary General was also an FJP member, and the minutes of the hearing sessions held at the Constituent Assembly's were registered and typed by FJP youth on computers that bear the party's logo.
4. The Committee for Social Dialogue was therefore responsible for receiving the public's amendments and requests, sorting them out and then dispatching them to the various specialised sub-committees of the Constituent Assembly. This mechanism made it difficult for those who actually submitted suggestions to the Constituent Assembly to know whether their submission found its way to the relevant sub-committee. There was also no clear mechanism to deliver submissions addressed to individual Assembly members. All public submissions landed at a certain office at the Assembly's headquarters and it was the individual members' responsibility to check regularly for their mail at that office. This is why personal relations with members of the Constituent Assembly, along with the media, played a major role in ensuring that submissions reached the relevant member and for participation in some of the public sessions organized by the Committee for Social Dialogue.

The second institutional channel to participate in constitution writing was personally initiated by Hossam El-Ghariani, the President of the Constituent Assembly. It was established for the purpose of receiving amendments on various provisions of the constitution from outside the Constituent Assembly. In September 2012, El-Ghariani formed an advisory committee to review successive drafts in order for its members to voice their opinion on the content and eventually hold hearing sessions with Assembly members. The ultimate goal behind the committee's formation was to "work together in order to produce a single amended draft that would ensure a wider social

consensus.”²⁵ The advisory committee was made up of 10 members who were experts on constitutional law and university professors, some of whom the opposition wanted as original members of the Constituent Assembly. As usual, however, ambiguity never ceased to surround the criteria according to which their selection for the advisory committee was made. Soon however, on 17 November 2012, less than two months after they were appointed, the committee members resigned. Members of the Constituent Assembly saw this committee’s opinion as purely advisory and should therefore be given only when requested, especially since the Assembly had appointed its own advisors to different specialised committees. At no time during its lifetime was the advisory committee²⁶ thus consulted by any Constituent Assembly member²⁷.

B- Civil society and grass-roots initiatives

The Constituent Assembly’s approach to consulting experts and civil society organisations revealed that its perception of them was not as partners in writing the constitution but rather as groups that might or might not be consulted. This fostered a sense among civil society organisations that the constituent assembly didn’t perceive their contribution to constitution making as complementary to the Constituent Assembly’s work but rather challenging or substituting it. This helped launch a series of civil society initiatives whose instigators actually managed to use participatory mechanisms, thus providing an alternative to a partnership with the Constituent Assembly. The Social Contract Centre, a government think tank, pinpointed over 26 different initiatives to participate in constitution making, most of which succeeded in publishing documents that won the endorsement of specific groups in its respective area of expertise. Other initiatives successfully produced a complete draft constitution that enjoyed consensus among specific sectors of civil society. Most often, those behind these initiatives played the role of coordinator and mediator, collecting the public’s demands and then drafting them with the help of specialists. This exercise was rather successful in many cases, as shown by the draft constitutions that the Egyptian Centre for Economic and Social Rights, the Egyptian Coalition for the Rights of the Child, the Egyptian

²⁵ Testimony of Hiba Raouf Izzat on her resignation from the consultative committee of the Constituent Assembly, published in *Akhbar al-Yaom* on 17 November 2012,

²⁶ Al-Ghiryani announces the withdrawal of the Technical Advisory Committee from the Constituent Assembly, *Akhbar al-Yaom* website, 17 November 2012.

Initiative for Personal and Social Rights, the Social Contract Centre and the National Council for Women and the United Group have published. Added to these was a number of previously prepared then revisited drafts, such as the draft constitution that the Egyptian Organisation for Human Rights reproduced. In other initiatives, like that of the professors of Cairo University, the proposed draft represented a technical approach to different constitutional provisions, reflecting the scientific opinion of experts in economics, political systems, law and sociology, among other. A number of semi-governmental organisations, like the Union of Egyptian Industries, also proposed constitutional provisions specific to the economic sector.²⁸

This period also witnessed a plethora of constitution writing initiatives by youth groups who did not belong to existing organised civil society. Such initiatives included the “Write Your Constitution” campaign, “Let’s Write Our Constitution” and “Egyptian, It Is Your Constitution.” These went hand-in-hand with a series of awareness-raising campaigns around different provisions of the constitution through short videos uploaded on the internet or social networking websites. Among these were the campaigns of the “Mosireen” Cooperative, entitled “Know their Constitution”, “The Citizen’s Guide in Understanding the Constitution,” by the Social Contract Centre in cooperation with the “Qabila” group, and the campaign entitled “A Constitution for All Egyptians”. Few, however, were campaigns that involved field trips and public seminars, particularly outside Cairo. The reason of this shortcoming was mainly that these initiatives relied on volunteers and the personal financial contributions of the participants. Social mobilization in fact went as far staging sit-ins and demonstrations in front of the Constituent Assembly at the Shura Council’s headquarters where the participants were mainly workers, peasants, women and children. Even after the date of the constitutional referendum was announced, the initiatives launched on social networking websites, such as Facebook and Twitter, continued through door-to-door awareness-raising campaigns that sometimes clearly indicated whether to vote yes or no.

In addition to those campaigns launched by non-governmental structures, political parties not represented in the Constituent Assembly launched their own constitution writing and awareness-raising campaigns. Among the latter were those launched by the “Strong Egypt Party”, “Free Egyptians Party”, “Egyptian Social Democratic Party” and “Popular Current Party”. Young

²⁸ “The Citizen’s Guide in Understanding the Constitution,” website of the Social Contract Centre, http://www.socialcontract.gov.eg/front/ar/scnew/details.aspx?sc_id=1672, visited on 19 May 2013.

activists belonging to these parties later formed a joint committee to come up with a draft constitution that reflects a national consensus on major issues and use it to confront that of the majority. That was even before the National Salvation Front was formed as an act of unity against the parliamentary majority that took over the Constituent Assembly²⁹.

In general, members in some of these initiatives did try to establish direct contact with members of the Constituent Assembly in an attempt to share and discuss with them the outcome of civil society campaigns. Yet members of other initiatives simply made the outcome public and left to the Assembly the choice of whether to use them or not.

Although these independent initiatives were based on participation, representation and consensus, they provide a number of lessons-learned:

1. Human rights organisations focussed on awareness-raising and on producing constitutional texts limited to the area of expertise of each organization. A more useful exercise would have been to provide a rights-based conception of the chapter on rights and freedoms as a whole or even of the constitution as a comprehensive document.³⁰ Instead, the only comprehensive position that various human rights organizations took was to issue joint statements rejecting the constitution as a whole. It is also worth noting that similar groups or organisations also formed coalitions within each area of expertise. For example, feminist organisations focussed on proposed constitutional articles and issued statements on women's rights. Similarly, organizations defending child rights focussed only on the rights of children and organisations that defend civil and political rights focussed only on these rights. In the final analysis, none of these groups mobilized for the rights and freedoms falling outside of its scope of interest or in the other parts of the constitution.
2. Civil society organisations did not adopt a unified strategy vis-à-vis the Constituent Assembly. They neither collectively agreed to boycott the Assembly's activities nor to respond to its "invitation" to hearing sessions or to initiate requests for hearing sessions around specific articles in the constitution. Moreover, each organisation went alone in the hearing sessions rather than in the framework of a coalition that expressed the single or collective position of a particular group. The only exceptions were feminist and child rights organizations that

²⁹ Interview with three youths from parties involved in the initiative, between January and March 2013

³⁰ Interview with a member of the Social Contract Center's team, February 2013

sometimes dealt with the Assembly within a coalition, and sometimes on an individual basis. Overall, however, the ultimate collective position of human rights organisations and labour unions was first to oppose the Constituent Assembly and then to boycott it.

3. Human rights organisations helped stoke disputes over particular constitutional provisions at the expense of reaching consensus with the Constituent Assembly over other articles on which consensus depended on a mere change in the wording. In doing so, these organisations played a major role in sidelining economic and social rights in the constitution and in disregarding flaws in other chapters.
4. Civil society organisations focussed mostly on criticizing and deconstructing different drafts of the constitution without offering alternatives to the disputed article that would express a compromise.
5. Media outlets didn't help shed the light on some initiatives that succeeded in reaching certain provinces in the Delta, Upper and Lower Egypt as well as the informal settlements in Cairo suburbs³¹.

The current constitutional process

Following the removal of Morsi, Interim President Adly Mansour issued a Constitutional Declaration that provides framework for a new constitutional process on 8 July 2013. Article 28 states that “A legal committee of experts shall be formed by a presidential decree in a period not exceeding fifteen days from the date of the issuance of this declaration, composed of two members of the Supreme Constitutional Court and its commissioners' office, two judges, two judges from State Council and four constitutional law professors from Cairo University. The Supreme Council of Judicial Bodies chooses its representatives and the Supreme Council of Universities chooses constitutional law professors. The committee shall propose amendments to the suspended 2012 Constitution within a period of thirty days from the date of its formation”¹. Article 29 then specifies that “The committee stipulated for in the previous article shall submit proposals of constitutional amendments to a 50- member committee representing all sectors of society and

³¹ For more information see: http://www.socialcontract.gov.eg/front/ar/scnew/details.aspx?sc_id=1672, visited on 30 April 2013.

reflecting its diversity, especially political parties, intellectuals, workers, peasants, members of trade unions and professional federations, national councils, Al Azhar, churches, the Armed Forces, the Police and public figures including at least ten members from the youth and women. Each entity nominates its representatives and the cabinet nominates public figures. The committee shall finalize the final draft of the constitutional amendments within sixty days at most from the date it receives the proposal during which it is committed to submitting it to societal dialogue. The President of the Republic shall issue decrees required for the formation and venue of the committee. The committee shall define rules and procedures guaranteeing societal dialogue on the amendments”³².

This declaration vaguely defines the actors to involve and mechanisms through which the constitution is to be amended. In addition, the military establishment authoritatively issued the declaration after limited consultations with “people of trust”, as was the case in March 2011. The new political and civilian allies of the military establishment in 2013 accepted these mechanisms in the framework of their *realpolitik* tactics to defeat the Muslim Brotherhood. The interim president then issued a decision on the composition of the 50 member committee/Constituent Assembly on 1 September 2013. As expected, the composition of the Constituent Assembly reflects the balance of power between the Muslim Brotherhood and their Islamist allies versus the military establishment and its allies from the non-Islamist political camp, the Mubarak regime and the Salafists. Hence, those who represent the “Islamist current” in the committee are only two: Bassam Al Zarqa from the Al-Nour Salafi party and Kamal Al-Helbawy, a former Brotherhood member who falls under the category of “Islamist current”. Both of them, of course, supported the 3rd of July coup d’état. The FJP refused to participate in the Constituent Assembly. It is indeed hard to conceive of its participation in the aftermath of a coup d’état that removed it from power and within a context of severe repression where Brotherhood leaders and militants are arrested across the country. In addition to Al-Zarqa and Helbawy, three other members of Al-Azhar could be considered as “representing Islam” inside the Assembly. All in all, only the first two out of the fifty members represent political Islam, whereas the other three actually represent the religious establishment.

³² Source: The official translation of the constitutional declaration is available on: <http://www.sis.gov.eg/En/Templates/Articles/tmpArticles.aspx?CatID=2666>; last checked: 20/10/2013

The first committee of ten legal experts amended the 2012 Constitution, as clearly stated in the 8th of July constitutional declaration. However, the 50-member Constituent Assembly allowed itself to re-write the whole text while adding new provisions and removing others. The committee announced that it all be done re-writing the constitution on 3 December 2013.

Conclusion

The downfall of the 2012 Constitution did not begin with its suspension on 3 July 2013. It began when the new polity perceived the constitutional process as a power sharing mechanism that would allow it an immediate place within the same old regime. In the Egyptian case, writing a constitution according to the realist perception, i.e. constitution making within the limits of the current balance of power, cannot build a framework that would gradually transform the state of revolution into a state of transition to democracy.

It is alarming that the 2013 Constituent Assembly accepted to amend the 2012 Constitution within the framework of the 8 July 2013 Constitutional Declaration. So far, the current wave of the constitutional process that started in July 2013 is not about writing the constitution of the Egyptian revolution, but rather about subduing the Muslim Brotherhood through the elimination of “their” constitution. While doing so, the 2013 polity is adopting the same 2012 perception of the constitution as a power sharing mechanism and not as an overarching reference for the entire political system that regulates state-society relations. In fact, while the 2013 Constituent Assembly is drafting the constitution, the Mubarak-era ministries of justice and interior are drafting laws regardless of how the constitution will organize their subject matters. The published draft laws on protests and on terrorism imply that the constitution is far from being regarded as the foundation of the rule of law where justice is politically and socially neutral. These draft laws target the political opposition: any political opposition at any time.

The 2012 and 2013 constitutional experiences confirm that the only safe exit for a constitutional process locked in a logic of short-term balance of power is the participation and equal representation of all political and social forces. Only representation and participation on equal footing and regardless of who won, through elections or violence, can guarantee the “social contract” function of the constitution. This is especially the case given the mounting political

polarization, political violence and resistance of the old regime. What is at stake here is indeed whether regime change is the goal of the 2013 polity.

In such times of acute political and social conflict, the messenger becomes more important than the message. Despite their undeniable progress on the issues of rights and freedoms, large sectors of society reject the 2012 and 2013 constitutions because of the process and not because of the substance. Whether in 2012 or 2013, those who vote for or against the constitution don't vote on the text but on the process: who was involved in writing it, who was excluded and how³³. Until this moment, the constitution in Egypt is still a zero sum game, a "battle" for political domination.

³³ For further readings on this point of view: Laurel E. Miller (ed.), *Framing the State in Times of Transition: Case Studies in Constitution Making*, Washington, United States Institute of Peace, 2010.