

Art. 93. An account of every kind of the expenditure and income of the provinces and departments shall be printed and published by the provincial and departmental councils.

#### Concerning the Finances

Art. 94. No tax shall be established save in accordance with the law.

Art. 95. The law will specify the cases in which exemption from the payment of taxes can be claimed.

Art. 96. The National Consultative Assembly shall each year by a majority of votes fix and approve the taxes.

Art. 97. In the matter of taxes, there shall be no difference or distinction among the individuals of the nation.

Art. 98. Reduction of or exemption from taxes is regulated by a special law.

Art. 99. Save in such cases as are explicitly excluded by law, nothing shall on any pretext be demanded from the people save under the categories of state, provincial, departmental, and municipal taxes.

Art. 100. No order for the payment of any allowance or gratuity shall be made on the Treasury save in accordance with the law.

Art. 101. The National Consultative Assembly shall appoint the members of the Audit Tribunal for such period as may be determined by the law.

Art. 102. The Audit Tribunal is appointed to inspect and analyze the accounts of the Department of Finance and to liquidate the accounts of all book keepers of the Treasury. It is especially watched to see that no item of expenditure fixed in the budget exceeds the amount specified, or is changed or altered, and that each item is expended in the proper manner. It shall likewise inspect and analyze the different accounts of all the departments of state, collect the documentary proofs of the expenditure indicated in such accounts, and submit to the National Consultative Assembly a complete statement of the accounts of the kingdom, accompanied by its own observations.

Art. 103. The establishment, organization and administration of, this Tribunal shall be in accordance with the law.

#### The Army

Art. 104. The law determines the manner of recruiting the troops, and the duties and rights of the military, as well as their promotion, are regulated by the law.

Art. 105. The military expenditure shall be approved every year by the National Consultative Assembly.

Art. 106. No foreign troops may be employed in the service of the state, nor may they remain in or pass through any part of the kingdom save in accordance with the law.

Art. 107. The military cannot be deprived of their rights, ranks or functions save in accordance with the law.

#### Copy of the August Imperial Rescript

In the Name of God, blessed and exalted is He.

The Amendment of The Fundamental Law has been perused and is correct.

Please God, our Royal Person will observe and regard all of them. Our sons and successors also will, please God, confirm these sacred laws and principles.

29th *Sha'ban* A.H. 1325, in the Year of the Sheep [October 7, 1907] in the Royal Palace of Tahrân.

4.2

## Strong Presidentialism

### The Model of Mubarak's Egypt

NATHALIE BERNARD-MAUGIRON

#### I. INTRODUCTION

In January and February 2011, demonstrators resorted to the streets in Egypt to call for the departure of President Ḥusnī Mubārak and for the end of his autocratic rule. The 1971 Constitution, in particular, was blamed for having been a main instrument in the consolidation of his authoritarian regime. Two days after assuming power from Muḥammad Ḥusnī Mubārak on February 11, 2011, the first decision of the Supreme Council of the Armed Forces was to suspend the constitution and appoint a committee to amend some of its provisions. The constitution was never reinstated and on March 30, 2011, it was replaced by a constitutional declaration that was to act as an interim Charter until a new permanent constitution would be drafted after the parliamentary elections scheduled for November 2011.

The Egyptian Constitution of 1971, indeed, was establishing a hybrid of parliamentary and presidential forms of government where the head of state dominated the entire scope of political activity. One of the main criticisms directed to that constitution by its opponents was its extreme centralization of powers with the President of the Republic, increased by subsequent constitutional amendments, laws, and practice.

The constitution provided the President with a wide variety of executive and legislative powers. It had been amended in 2005 and 2007 with the declared purpose of increasing the balance of power within the executive power and between the executive and the legislative branches. This promise of change had been an implicit recognition of the fact that political reform was necessary and that the current regime was not democratic.

If some revisions, aiming at diminishing the presidential nature of the regime and increasing its parliamentary dimension, had been generally well-received, other amendments had been widely perceived as reinforcing its presidential character. The fact that the President was now directly elected had increased his legitimacy and therefore his personal authority. He cumulated his various constitutional competences with far-reaching legislative and de facto powers. The failure of the parliamentary checks and balances mechanisms had further increased the presidential or one might even say authoritarian nature of the Egyptian regime, and finally led to its collapse.

## II. ELECTION OF THE PRESIDENT

Art. 76 of the Constitution regarding the nomination process of the President had been amended in 2005 to establish presidential elections by direct ballot. Until then, that provision was providing for the following procedure of nomination of the President: one-third of the People's Assembly nominated a candidate. After winning two-thirds of the votes of the Assembly, the candidate was presented to confirmation by a referendum where he had to obtain an absolute majority of the votes cast. The President was therefore chosen by the parliament, rather than by the people itself.

The amendment of 2005 had provided for presidential elections but imposed strict conditions on the candidacy for presidency, establishing a distinction between political party and independent candidates. Independent candidates, i.e., persons not affiliated with any recognized political party, needed the support of at least 250 elected members from among the People's Assembly, the Consultative Assembly, or regional councils in the governorates. Besides, this support had to include at least sixty-five members of the People's Assembly, twenty-five of the Consultative Assembly, and ten of regional councils in at least fourteen governorates. In the presidential elections of 2005, not a single independent candidate had been able to fulfill such conditions and enroll for the elections.

Special conditions existed for political parties to register candidates. On the request of the President of the Republic, these conditions had been eased by the amendments of 2007 in order to "take into consideration the realities of these parties and their likely future, and their role as the foundation and engine of our political life."<sup>1</sup> Political parties having effectively exercised their activities for five consecutive years before the opening for candidacy could submit a candidate chosen from among the members of their supreme council, in conformity with their internal regulations, provided that such a candidate had been seating at the council for at least one year. The party, in addition, was required to have obtained at least 3 percent of the parliamentary seats at the People's and Consultative Assemblies, or the equivalent number of seats in one of these two chambers in the latest elections to be able to field a candidate.<sup>2</sup>

If amended, Art. 76 had been applied to the presidential elections, scheduled for 2011, only the National Democratic Party (NDP) would have been able to nominate a candidate fulfilling the constitutional requirements.<sup>3</sup> This is the reason why the provision had been amended again in 2007 to provide that exceptionally, "in as much as political parties require a further time to meet the permanent conditions for presidential candidates,"<sup>4</sup> parties that had obtained at least one seat at the People's Assembly or Consultative Assembly in the last

elections would have been allowed to designate a candidate for all presidential elections taking place between 2006 and 2016. A similar exception had already been introduced in amended Art. 76 in 2005, to allow any political party to designate a candidate from its Supreme Council to run for the presidential elections of 2005, even if the party did not fulfill the 5 percent condition. As a consequence, the presidents of ten political parties had been able to run in the 2005 presidential elections.<sup>5</sup> While the conditions for candidates of political parties had been eased in 2007, the strict conditions imposed on independent candidates had not been amended a fact that had been criticized by the Muslim Brothers, who could only run independent candidates to the presidential elections, since they were not recognized as a political party.

The President had to be born to Egyptian parents and be at least forty years of age. Following the constitutional amendment of 1980, he was reeligible for unlimited successive terms. The current term-period was six years, renewable indefinitely.<sup>6</sup> The opposition and civil society had struggled to restrict the terms to two, as was the case in the 1971 Constitution before the 1980 constitutional amendments, as well as to limit the presidential mandate to five years instead of six. However, they had not succeeded in having this provision amended.

In case of permanent vacancy or permanent disability of the President of the Republic, the Speaker of the People's Assembly was to assume temporarily the presidency. If at that time, the People's Assembly was dissolved, the President of the Supreme Constitutional Court was to take over the presidency, on condition that neither of them would nominate himself for the presidency (Art. 84). Since 2007, if the President of the Republic was temporarily unable to carry out his functions and if no Vice President could take over the presidential functions—either because no Vice President had been nominated or because the Vice President was himself temporarily incapacitated—the President was to delegate his powers to the President of the Council of Ministers (Art. 82). The powers of the latter were, however, to be limited: in particular, he was not allowed to initiate constitutional amendments, to dissolve the People's and the Consultative Assemblies, or to dismiss the cabinet during the interim period. Until 2007, the Constitution had provided only for the transfer of power to the Vice President. The new provisions constituted the response to a situation that occurred in 2004, when President Ḥusnī Mubārak had been hospitalized for several weeks in Germany. The head of state, not having nominated any vice president, had asked his prime minister to replace him. The 2007 amendment had constitutionalized that practice.

The presidential elections were supervised by an electoral commission, headed by the President of the Supreme Constitutional Court, who was himself appointed by the President of the Republic. It was expressly stipulated in new Art. 76 that the decisions of that commission were immune from any judicial control, which was incompatible with Art. 68 of the Constitution, according to which no administrative act was to be exempt from judicial review.<sup>7</sup> This showed how important it was for the President to control the whole electoral process, to avoid any unexpected result.

<sup>1</sup> Request for constitutional amendments addressed to the Parliament by President Ḥusnī Mubārak (hereunder "Request for constitutional amendments"). For an official English translation, see <http://www.sis.gov.eg/VR/conts/en/bul01.htm>, accessed August 14, 2009.

<sup>2</sup> Instead of 5 percent of parliamentary seats at both People's and Consultative Assemblies, as originally stated in 2005.

<sup>3</sup> During the NDP Congress in September 2007, the internal rules of procedure of the party had been amended, to create a new body called the "Supreme Council" (*ḥay'at 'ulyā*). The NDP candidate to the presidential elections would have been chosen among the members of that new body, in conformity with Art. 76 of the Constitution. This body was composed of about fifty high-ranking leaders of the NDP, including Ḥamāl Mubārak, the son of then ruling president Ḥusnī Mubārak. This had been often seen as an indication of the scenario of the hereditary transmission of power, a plan which came to nought due to the popular uprising in February 2011.

<sup>4</sup> Request for constitutional amendments (n 1).

<sup>5</sup> Out of more than twenty political parties.

<sup>6</sup> President Mubārak was holding his fifth term when he stepped down on February 11, 2011.

<sup>7</sup> In a decision of September 6, 2005 the Supreme Administrative Court vigorously criticized new Art. 76, which it deemed in contradiction to Art. 68 and 172 of the constitution and strongly urged the constitutional legislator to reexamine this provision in order to bring it into conformity with the established

### III. THE BROAD POWERS OF THE PRESIDENT

The President was granted a wide range of powers. In his request for constitutional amendments dated December 26, 2006, President Mubārak had maintained that the amendments would consolidate the balance of powers between the branches of the government through a redistribution of the competences within the executive authority and by increasing the powers of the parliament. He had added that the independence of the judiciary would also be enhanced. However, the President still concentrated executive, legislative, and even judicial powers.

#### A. Executive Powers of the President

The President of the Republic was assuming the executive power (Art. 137 of the Constitution) and formulated and supervised the implementation of the general state policy (Art. 138).

On the international level, he appointed and dismissed diplomatic representatives and accredited diplomatic representatives of foreign states (Art. 143). He declared war, with the approval of the People's Assembly (Art. 150). He concluded treaties (Art. 151).

On the domestic level, he made all military and civil appointments (Art. 143) and was the Supreme Commander of the Armed Forces (Art. 150). Because of the iron grip of the army on the whole political system, the position of the President of the Republic as head of the armed forces allowed him to control the country in all circumstances. He also had the right to grant amnesty or to commute a sentence (Art. 149). He could issue executive decrees for organizing public services and interests (Art. 146) or to regulate administrative police (Art. 145). His regulatory powers extended to the promulgation of laws (Art. 112) and the adoption of executive decrees for the enforcement of the laws (Art. 144). The President also controlled the local administration through the appointment of the governors in the governorates.

He appointed and dismissed the Prime Minister and the ministers (Art. 141) and could therefore reshuffle the Council as he wished. New Art. 141, as amended in 2007, obliged the President of the Republic to consult the president of the Council of Ministers upon nominating or dismissing members of his government. However, the head of government would simply give a non-binding opinion. The president convoked the cabinet and presided over its meetings (Art. 142).

The head of state exercised most of these powers independently from the Council of Ministers. In 2007, however, a provision had been added to the constitution, stipulating that the President of the Republic was to exercise some of his competencies with the approval or upon the advice of the government (Art. 138 para. 2). This amendment had been presented as aiming at a better allocation of powers within the executive authority "... by expanding the competencies of the Council of Ministers and the extent to which it shares with the President in the exercise of the executive authority."<sup>8</sup>

Thus, the head of state was now to get the approval of the government before adopting executive decrees for the enforcement of the laws (Art. 144), administrative police regulations (Art. 145), decisions necessary for the creation and organization of public services (Art. 146), as well as for promulgating decree-laws in exceptional circumstances, in

principles pertaining to the prohibition of excluding administrative decisions from the control of the administrative judge.

<sup>8</sup> Request for constitutional amendments (n 1).

case the People's Assembly was not in session or was dissolved (Art. 147). The government was simply consulted and its opinion was not binding in the following cases: before the President adopted decree-laws upon delegation by the People's Assembly (Art. 108), declared a state of emergency (Art. 148) or ratified important treaties (Art. 151 para. 2). In the current political context, it was doubtful that the Prime Minister, who was appointed and dismissed by the President of the Republic, would ever dare to refuse his support to the President's decisions.

In addition to these ordinary executive powers, the President also enjoyed exceptional ones. First, he could proclaim a state of emergency with the only requirement to notify the People's Assembly (within fifteen days) and, since 2007, to inform the government (Art. 148) "... whenever security or public order in the territories of the Republic or one of its regions are endangered, whether by an outbreak of war or by the threat of such an outbreak, or by internal disturbances, or by natural disasters or by the outbreak of an epidemic."<sup>9</sup> Law 162/1958 on the State of Emergency granted the President broad emergency powers to maintain public security and order. He could place restrictions on the freedom of persons to assemble and outlaw any public gathering, impose limits on freedom of movement, restrict freedom of opinion and expression, or permit the search of persons and places without recourse to the normal procedures. The law even allowed the President or his representative to arrest and detain suspected persons or those dangerous to security and public order. No judicial authority had any role in authorizing arrests or in controlling the issuing of such detention orders. Besides, detainees would not be allowed to petition a court to challenge their detention until thirty days after arrest.

A state of emergency had been proclaimed in 1981 after the assassination of President Anwār al-Sādāt and had been continuously renewed ever since by President Mubārak. The decision to declare (or extend) the state of emergency had been considered by the State Council as an act of sovereignty, exercised by the President in his capacity as ruling authority and not as an administrative authority. It was deemed to be a measure taken in defense of security, public order and the existence of the state, which was not subject to judicial control.

In case of a threat to national unity or state security, or if the state institutions were prevented from fulfilling their constitutional roles, the President also enjoyed exceptional powers. Art. 74 of the Constitution, as amended in 2007, required the danger to be serious and eminent. The measures were to be submitted to the people and a referendum was to be organized on the measures taken within sixty days of their adoption. Following the adoption of the constitutional amendments of 2007, the President of the Republic now had to consult the President of the Council of Ministers as well as the Presidents of the People's and Consultative Assemblies before adopting any such emergency measures. Art. 74 had been used twice by President Sādāt, in 1977 to restrict strikes and demonstrations during the "bread riots" and in 1981 when clashes broke out between Islamists and Christians, to arrest opponents, ban opposition newspapers, and restrict the exercise of political rights. In both cases, the assessment of the danger involved, the expediency of the use of Art. 74, and the content of the measures to be taken had been entirely left to the discretionary power of the President.

The President's decision to invite the electors to a referendum on decisions taken pursuant to Art. 74 of the Constitution had been considered by the State Council a political decision since its aim was the participation of the people in the decisions of the President

<sup>9</sup> Art. 1 of Law 162/1958, on the State of Emergency 1958.

and their evaluation of the appropriateness of such decisions.<sup>10</sup> By contrast, the decisions of the President taken on the basis of Art. 74 had been qualified as administrative acts and were subject to judicial review.

The President was, therefore, the main body for the launching and implementation of national policies. These executive powers were not shared with the government, which was reduced to a mere organ of coordination.

## B. Legislative Powers of the President

The President of the Republic was enjoying both ordinary and exceptional legislative powers.

### 1. Powers in Normal Circumstances

The President enjoyed a wide variety of powers in relation to the parliament. He could propose laws (Art. 109). He promulgated the law (Art. 112) and had the right to veto a bill adopted by the People's Assembly (Art. 112). In that case, the bill would be referred back to the Assembly within thirty days (Art. 113). If a two-thirds majority of the members approved it once again, the President had to promulgate it.

The President convoked the Assembly for its ordinary annual session (Art. 101). However, if not convoked, the Assembly met as of right (Art. 101). The President declared the ordinary session closed (Art. 101). He could call the Assembly to an extraordinary meeting in case of necessity or upon a request signed by a majority of the Assembly members (Art. 102).<sup>11</sup>

The President could dissolve the People's Assembly (Art. 136) in case of necessity. Following the adoption of the constitutional amendments of 2007, he did not have to organize a referendum anymore. In practice, the People's Assembly had been dissolved four times since 1971: after the adoption of the Constitution in November 1971, after the referendum on the Peace Treaty in April 1979, and after two decisions of the Supreme Constitutional Court declaring the unconstitutionality of the parliamentary elections law in 1986 and 1990.

The President of the Republic could call a referendum on important matters related to the supreme interests of the country (Art. 152). This provision, which allowed the President to bypass the legislature, had been used four times since 1971: in July 1971, to approve the Program of National Action; in May 1974, to approve an ambitious economic reform program; in May 1978, to ban certain personalities from political life and to prevent the establishment of certain political parties; and in April 1979, to approve the Peace Treaty with Israel. The decision to submit a law to a referendum had been considered by the State Council and the Supreme Constitutional Court as an act of sovereignty, meaning it could not be subject to judicial review.<sup>12</sup>

The President could also submit a request for the amendment of the constitution. According to Art. 189, the constitution could be amended on the initiative of the People's Assembly or on the President's proposal. The three constitutional amendments that had

<sup>10</sup> M.M. Abouelenen, "Judges and Acts of Sovereignty" in N. Bernard-Maugiron (ed), *Judges and Political Reform in Egypt* (AUC Press, Cairo 2008) 186.

<sup>11</sup> For instance, the Assembly was convoked for an extraordinary session in July 2000, after the Supreme Constitutional Court declared the parliamentary electoral law unconstitutional.

<sup>12</sup> Supreme Constitutional Court (SCC), Case No. 4/ Judicial Year 12 (October 9, 1990).

taken place in 1980, 2005, and 2007 had all been initiated by the President. Those of 2007 had been carried out in fulfillment of the electoral promises given by President Mubarak during the 2005 presidential campaign.

The President also chose one-third of the members of the Consultative Assembly, the higher chamber of the parliament.<sup>13</sup> These powers were exercised independently of the Council of Ministers.

### 2. Legislative Powers in Exceptional Circumstances

In principle, the power to enact laws was vested in the People's and Consultative Assemblies (Arts. 85 and 86). However, in exceptional circumstances that required urgent action, the Constitution was allowing the President of the Republic to pass legislation by decree-law to meet these pressing circumstances and avoid parliamentary battles. The President could issue two kinds of decree-laws.

He could, first, adopt decree-laws upon delegation of legislative powers. According to Art. 108, the President had the right "in case of necessity or in exceptional cases" to issue decrees having the force of law, on the condition of obtaining an authorization to this effect by two-thirds of the members of the People's Assembly. This authorization had to be given for a limited period of time and to point out the subjects of such decisions and the grounds upon which they were based. The decree-laws had then to be submitted and approved by the People's Assembly, during the first meeting after the end of the authorization period. If they were not submitted, or if they were submitted but not approved, they would cease to have the force of law.

In practice, this procedure was frequently used. The Assembly never refused to vote a delegation of powers to the President, and never refused to approve the decree-laws he adopted. For instance, the parliament regularly voted a delegation of legislative powers in the fields of arms procurement and all what was related to the armed forces. The Supreme Constitutional Court had decided that these decree-laws were subject to its review. In a decision of 1992 it had struck down a presidential decree-law because it had interfered in matters beyond the scope of the delegated powers.<sup>14</sup>

The President could also adopt decree-laws in case the Assembly was not sitting, by virtue of "constitutional delegation." According to Art. 147, during the absence of the People's Assembly and in case of necessity, if a situation occurred requiring the taking of swift action which could not be delayed, the President could issue decisions having the force of law. To deal quickly with critical situations, the President was therefore allowed to take decisions that would enjoy the status of decree-laws. These decree-laws were to be submitted to the People's Assembly, within fifteen days from the date of issuance if the Assembly was standing and at its first meeting if the Assembly was dissolved or in recess. If they were not submitted, or if they were submitted but not approved by the Assembly, they would lose their force of law with retroactive effect, unless the Assembly ratified their validity for the previous period.<sup>15</sup>

It was relatively easy for the President to abuse this power by waiting for the summer recess to adopt decree-laws not justified by pressing circumstances but motivated by his wish to bypass the parliament. However, the Supreme Constitutional Court had decided

<sup>13</sup> Art. 196 of the Constitution. The other two-thirds were elected.

<sup>14</sup> SCC, Case No. 25/Judicial Year 8 (May 16, 1992).

<sup>15</sup> This provision stated clearly that they would lose the force of law with retroactive effects, when this was not mentioned by Art. 108.

in 1985 that these decree-laws were subject to its judicial review too. The constitutional issue submitted to the Court in that case concerned the validity of Decree-Law No. 44 of 1979 amending Law 25 of 1920 and Law 25 of 1929 on personal status, which had been adopted by Sādāt on the basis of Art. 147 during parliament's recess. The Court decided that it was competent to review the constitutionality of that decree-law and to appreciate whether there were real emergency reasons justifying recourse to Art. 147. It held the decree-law to be void, considering the reasons advanced by the government to justify its adoption far from conclusive with regard to the existence of urgent circumstances and of a state of necessity. The Court decided that there was no emergency and that the President could have waited until the next parliamentary session for the People's Assembly to adopt that text by a normal law.<sup>16</sup>

### C. Presidential Powers Relating to the Judiciary

The President also enjoyed important powers in the judicial field. He was the one who nominated the general prosecutor as well as the Presidents of the Court of Cassation and of the Supreme Constitutional Court. He was also the head of the Council of Judicial Bodies. According to new Art. 173 of the Constitution, the former Supreme Council of Judicial Bodies, created in 1969 by Sādāt,<sup>17</sup> was to be replaced by a new Council, composed of the presidents of all judicial bodies and chaired by the President of the Republic. In November 2007, a draft law had been prepared by the Minister of Justice, defining the composition, competences and rules of procedure of that Council. When the document had met with unanimous criticism, the President of the Republic requested its withdrawal in November 2007. A new draft had been prepared and adopted in June 2008.<sup>18</sup> As had been the case in the first draft, the Council was presided over by the President of the Republic, and the Minister of Justice sat as the Deputy President of the Council, meaning he would preside in the absence of the President of the Republic.<sup>19</sup>

The President could decide to refer a case to a state security or a military court. According to Art. 9 of Law No. 162 of 1958 on the State of Emergency, he could refer to state security courts any crime liable for prosecution under the general law, be it mentioned in the Penal Code or in any other law. It followed that the President could refer at his discretion to these courts any criminal act, without having to give reasons for his decision. Besides, the judgments of these courts were not considered final until ratified by the President of the Republic, who could decide to revoke the judgment and order a retrial by another state security court. The President had the power to lighten sentences, and to annul or suspend their execution.

The Military Law No. 25 of 1966 established military courts and stipulated in Art. 6 that during a state of emergency, the President of the Republic could refer any crime provided for in the Penal Code or any other law to the military jurisdiction. It meant that the President

<sup>16</sup> SCC, Case No. 28/ Judicial Year 2 (May 4, 1985).

<sup>17</sup> The Supreme Council for Judicial Bodies was created in 1969 by Presidential Decree No. 82, as a retaliatory measure against judges who had been highly critical toward Nasser's anti-liberal governmental policy and reluctant to adhere to its one-party Arab Socialist Union. It was chaired by the President of the Republic and composed of the Minister of Justice and of the presidents of all judicial bodies.

<sup>18</sup> Law 192 adopted on June 22, 2008.

<sup>19</sup> See, for instance, Arab Center for the Independence of the Judiciary and the Legal Profession, "Egypt: the Draft Law on the Council of Judicial Bodies is a New Violation of Judicial Independence" (Cairo, June 11, 2008).

could decide to transfer jurisdiction over a crime to the military courts, even if the crime was committed by a civilian. Since 1992, President Mubārak had been using this power to transfer cases involving Islamists to the military judge. The Supreme Constitutional Court had decided that under this provision, certain categories of crimes as well as specific cases could be referred to the military courts.<sup>20</sup> The President could therefore decide on a case by case basis if a suspect was to be referred to ordinary, military, or state security courts.

According to new Art. 179 of the Constitution that allowed the parliament to adopt an anti-terrorist law, the President of the Republic was to be able to choose the court before which a suspect would be tried, as long as that court was mentioned in the constitution or in the law. It could be an ordinary court but it would most probably be an exceptional one. The regime would thus continue to be able to try civilians before exceptional courts as had been the case under the state of emergency.<sup>21</sup> In addition, this provision, by authorizing the President of the Republic to choose the court before which an individual suspected of engaging in terrorist acts would be tried, stood in contradiction to Art. 68 of the Constitution, according to which "the right to litigation is inalienable and guaranteed for all, and every citizen has the right to have access to his natural judge."

Finally, upon a decision of the President of the Republic, with the advisory opinion of the general assembly of the court to which the judge belonged or of the general prosecutor and with the agreement of the Supreme Council of the Judiciary, judges could be seconded to a foreign government or international organization. Work in a foreign country, in particular Gulf countries, was very lucrative for Egyptian judges whose salaries are low. A judge in the Emirates, for instance, would earn in one month the equivalent of the salary he would get in one year in Egypt. This power of assignment, therefore, allowed wide freedom to the President in rewarding loyal judges by appointing them to financially lucrative foreign postings.

### IV. FAILURE OF THE CHECKS AND BALANCES MECHANISMS

On paper, the Egyptian constitutional framework presented some characteristics of a parliamentary regime, including a system of checks and balances. The parliament was monitoring the work of the government through several means. Every member of the People's Assembly was entitled to address questions to the Prime Minister or any of his deputies and ministers concerning matters within their jurisdiction (Art. 124). Twenty members of the People's Assembly could ask for the discussion of a public question to ascertain the government's policy on a specific issue (Art. 129). Every member of the People's Assembly was entitled to address interpellations to the Prime Minister or the ministers concerning matters within their jurisdiction. A debate could take place at least seven days after its submission, except in case of urgency as decided by the Assembly and with governmental consent (Art. 125). However, the internal regulations of the parliament had limited the number of questions and interpellations that could be raised monthly.

Each minister was responsible for the affairs of his ministry. The People's Assembly could decide to withdraw its confidence from any of the members of the cabinet by a

<sup>20</sup> SCC, Case No. 1/ Judicial Year 15 (January 30, 1993) (interpretation).

<sup>21</sup> The President of the Republic was sending not only extremist and violent Islamist groups before military courts, but also members of the Muslim Brotherhood accused of participating in the activities of a prohibited organization.

motion of no confidence after an interpellation and upon a motion proposed by one tenth of the members of the Assembly. The Assembly would wait for at least three days from the date of the presentation of the motion. The withdrawal of confidence had to be pronounced by a majority of its members, leading to the resignation of the minister (Art. 128.1).

The Assembly could also adopt a motion of no confidence toward the government. Until 2007, if the People's Assembly wished to withdraw its confidence from the government, the President of the Republic had to consult with the people through a referendum. Following the constitutional amendments, the Assembly was able to adopt a motion of no confidence without submitting the conflict to the people.<sup>22</sup> However, the President of the Republic retained his right not to accept the government's resignation. In such a case, the People's Assembly could vote again, with a two-thirds majority, for the withdrawal of confidence, and the President had then have to accept the government's resignation.

According to Art. 136, the People's Assembly could be dissolved by the President of the Republic in case of necessity. Until 2007, the people had to be consulted by referendum; this was not the case anymore.

The Egyptian system displayed, at least in theory, certain features of the parliamentary system, including the "soft" separation of powers and the system of checks and balances. These mechanisms had never functioned in practice, though. The parliament was not the source of legislation and was not the supervisor of the government. It reinforced rather than controlled the executive authority. The Prime Minister was not the leader of the majority party, he did not choose his ministers, who were not drawn from among members of the parliament. As to the President of the Republic, there was no real checks on his far-reaching powers. Although he was both the head of the state and the head of the government, he was unaccountable politically. The ministers were the ones who were collectively and individually responsible for the general policy of the state, though they were not the ones who decided on these policies.

According to Art. 85 of the Constitution, the President was criminally responsible in case of high treason or crime. Any such charge against him could be made upon a proposal by at least one-third of the members of the People's Assembly. No impeachment could be brought, except upon the approval of a majority of two-thirds of the Assembly members. The President could be suspended from the exercise of his duties as from the issuance of the impeachment. The Vice President would take over the presidency temporarily, until the decision concerning the impeachment would be taken. The President of the Republic would be tried by a special tribunal set up by law. The law was also to establish the trial procedure and define the penalty. If the President was found guilty, he would be relieved of his post, without prejudice to other penalties. No law had ever been adopted to establish the court, though.<sup>23</sup>

In practice, no motion of no confidence had ever been voted, no government had ever resigned for having lost the support of the Assembly, and no Chamber had ever been dissolved in order to give the people the opportunity to resolve a deadlock between the executive and the legislature. It was difficult to imagine that in the current political context the two Assemblies dominated by the ruling NDP would ever have withdrawn confidence from the government. Besides, the regime had the means to control the parliamentary elections and therefore the composition of the Assembly. In a traditional parliamentary system, the head of state has an honorific function only, he is supposed to be an arbiter to secure the

proper functioning of the public powers, as stated in the Constitution of 1971 (Art. 73), which provided that he was in charge of maintaining the proper balance of powers.

The Egyptian system had also borrowed certain features of the presidential government. For instance, members of the parliament and the President were elected independently of each other, which gave to each of them its own legitimacy. The President was the one who determined the fundamental issues facing the nation, formulated and supervised the implementation of the general state policy, and was the instigator of the main public policies.

In practice, the President was always considered as the final authority, to whom a final recourse could be submitted in hopeless cases. For instance, in the course of its conflict with the Minister of Justice, the Judges' Club had often called on the President of the Republic to intervene, in his capacity as guardian of the balance of powers and as President of the Supreme Council of Judicial Bodies.<sup>24</sup> In 2006, for instance, they had called on the President to drop the charges brought against two reformist judges before the disciplinary council.<sup>25</sup> The President had refused to intervene, saying he could not interfere with judicial independence and internal matters of the judiciary.<sup>26</sup> In March 2007, however, he had responded positively to a call of the President of the Judges' Club to intervene in favor of a judge referred to the disciplinary council by the Ministry of Justice on charges of libeling the President.<sup>27</sup> On the request of the President of the Judges' Club of the State Council, the President of the Republic had accepted to intervene in another case, regarding a counselor of the State Council who was suffering from a brain tumor and had to undergo an expensive medical intervention in Germany. In March 2007, the President had ordered the Ministry of Justice to bear the costs of the treatment after he had refused to do so.<sup>28</sup> In November 2007, under pressure from all judicial bodies, the President had requested the Minister of Justice to withdraw the draft law he had prepared on the new Council of Judicial Bodies. In July 2009, under even stronger pressure from judicial bodies and judges' clubs, he had requested the Minister of Justice to withdraw his draft law amending the composition of the Supreme Council of the Judiciary.

## V. CONCLUSION

Opposition and civil society groups had long demanded a constitutional reform in order to reestablish a balance between government branches.<sup>29</sup> They had been unanimous in denouncing the cosmetic character of the 2007 amendments and protested, in particular,

<sup>24</sup>For an analysis of the crisis that opposed the Judges' Club to the Minister of Justice from 2005 to 2007, see N. Bernard-Maugiron, "Judges as Reform Advocates: A Lost Battle?" *Cairo Papers in Social Sciences* (American University in Cairo Press, Cairo 2009).

<sup>25</sup>Ibrāhīm 'Īsā, chief editor of *Ṣawt al-Ummah*, wrote he was astonished by the fact that some judges turned to President Mubārak for intervention to find a solution to the crisis, "as if he was not the one who was responsible for the referral of these judges to investigations"; "his intervention has taken place already," *al-Dustūr* (April 26, 2006).

<sup>26</sup>*Al-Jumhūriyyah* (April 23, 2006); see also *al-Ahrām* (April 24, 2006).

<sup>27</sup>*Al-Miṣri al-Yawm* (February 25, 2007); see also *Nahḍat Miṣr* (February 25, 2007) and *al-Ahrām* (February 25, 2007).

<sup>28</sup>*Al-Miṣri al-Yawm* (April 2, 2007).

<sup>29</sup>For the text of the counter proposals of al-Wafd, al-Tajammu' and the Muslim Brothers, see Cairo Institute for Human Rights Studies (CIHRS), *Waṭan bi-lā muwāṭinīn! Al-ta'dilāt al-dustūriyyah fi al-mizān* (Cairo 2007) 241 ff.

<sup>22</sup>New Art. 127 of the 1971 Constitution, as amended.

<sup>23</sup>However, Law 247 of 1956, adopted under a previous constitution, may have applied.

against the amendments of Art. 88 (end of judicial supervision of the elections) and Art. 179 (which expressly authorized the legislator to deviate from certain constitutional articles when enacting anti-terrorist legislation).<sup>30</sup> The official objectives of the reform, which was "to achieve a greater balance of power between the branches of government, to enhance the rights of citizens and public freedoms, to strengthen the role of parties, to increase women's empowerment and to improve local administration"<sup>31</sup> had not yet been achieved.

The overpowering authority of the President, in practice, was almost unlimited. There were very few checks on his far-reaching powers; the most important of which would be massive demonstrations against the regime or the rise of radical political forces.

The 2007 constitutional amendments had further strengthened the strong presidential or even authoritarian character of the regime. The reforms had allowed the regime to block the emergence of new centers of power which had become a potential threat to the regime, by marginalizing the influence of the Muslim Brothers and the judiciary. Instead of reestablishing a balance between the state powers, some amendments had strengthened the authoritarianism of the regime, by getting rid of judicial supervision of the elections, authorizing the adoption of a repressive anti-terrorist law, establishing new conditions for establishing political parties, changing the rules for the legislative elections and modifying the conditions for running in presidential elections.

Judges and Muslim Brothers had not been the only victims of the constitutional amendments, as the amendment of the Press Law had confirmed the right to jail journalists for press offenses. The NGO Law, adopted in 2002, would probably have been next to be amended in order to increase state control even further. The Law on Professional Syndicates did not need to be amended since the amendments that had taken place in 1993 and 1995 had already allowed quite a rigid control of these competing centers of power.<sup>32</sup> In the current transition of power period, the government wanted to close all avenues for the emergence of new centers of powers.

These laws and others of a repressive nature were not necessarily implemented, and similar cases were not necessarily treated similarly. Some journalists could cross the red lines without being prosecuted. Others could cross it several times until suddenly charges were brought against them. Human rights NGOs could write strong reports denouncing violations of human rights in Egypt, until some of them were suddenly closed. Some judges could be referred to the disciplinary council for having criticized the government in newspapers and on satellite channels, while no disciplinary procedure would be brought against others. This policy of tolerance followed by sudden application of the law also represented a great threat to civil society, which never knew what to expect.

Since Egypt's system of government was characterized by a centralization of power in the hands of the President of the Republic, it could be more accurate to talk about an authoritarian regime rather than about a strong presidential one. The organization of the transition of power between the President and his successor had even increased the need to

control all sources of power, since the new president was to confront a period of instability during which his legitimacy would have been seriously challenged.

The January 25 Revolution swept away the president and destroyed its constitution. Egyptians succeeded in getting from the streets what had been impossible to achieve through elections, political pressure and dialogue. Egypt however now faces a new challenge: achieving constitutional reform and constructing the transition process from an authoritarian to a democratic rule. There is still much uncertainty around the character of the new political order. If the substance of the coming constitution is debated, there is, however, a strong consensus in favor of a less presidential and more pluralistic system. For the time being, the Supreme Council of the Armed Forces, who is running the country during the transitional period, exercises the same authorities as the President and the parliament, only sharing executive power with the Council of Ministers. Most liberal forces and young leaders of the January 25 Revolution feel increasingly frustrated by the confusing political process and fear that the revolution may be stolen from them.

<sup>30</sup> See the joint press release published by the coalition of opposition parties and Muslim Brothers, dated March 12, 2007, and the joint press release published on March 22, 2007 by a dozen of NGOs requesting the withdrawal of the amendments to Arts. 88 and 179.

<sup>31</sup> Request for constitutional amendments (n 1).

<sup>32</sup> After the Muslim Brothers had won the elections in many professional syndicates at the beginning of the 1990s, the Law on Professional Syndicates had been amended to require a minimum participation of half of the members in the elections. Most of the syndicates had since then been paralyzed.

67. *Nahdat Misr*, April 4, 2007.

68. *Ruz al-Yusif*, April 26, 2007.

69. *Nahdat Misr*, April 18, 2007.

70. According to Article 93 of the 1971 Constitution.

71. The current term-period was six years, renewable indefinitely (President Mubarak was holding his fifth term). The opposition and civil society demanded to restrict the terms to two, as was the case before the 1980 amendment, as well as to limit the period to five years instead of six.

72. It was proposed that the jurisdiction be attributed to the State Council or the Supreme Constitutional Court, or even left to the Court of Cassation, but that its decisions be final and enforceable.

73. After the Muslim Brotherhood won the elections in many professional syndicates at the beginning of the '90s, the Law on Professional Syndicates was amended in 1993 and 1995 to require a minimum participation of one-half of the members to the elections. Most of the syndicates had since then been frozen.

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## Selections from the 2007 Amendments to the 1971 Constitution

*Compiled and translated by Dina Bishara*

Article 1: The Arab Republic of Egypt is a state with a democratic system that is based on citizenship (. . .).

Article 5 [a third additional clause]: Citizens have the right to form political parties in accordance with law. It is not permitted to pursue any political activity or establish any political parties within any religious frame of reference (*marja' iyya*) or on any religious basis or on the basis of gender or origin.

Article 62: (. . .) The law may organize the right of political participation for the People's Assembly and Shura Council according to any electoral system that it specifies. It is permitted for the law to adopt a system that combines the individual district and party list systems in any ratio that it specifies. The law may also specify a quota for the participation of women in both chambers.

Article 76 [replacing last two paragraphs]: Each political party for which at least five consecutive years have passed since its establishment before the opening of candidacy, and which has been active the entire period, and whose members obtained in the last elections at least 3 percent of the seats in the People's Assembly and Shura Council, or an equivalent number of seats in one chamber, has the right to nominate for the presidency a candidate who has been a member of the supreme leadership in accordance with its internal regulations for at least one uninterrupted year.

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