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**The Legislature under the Egyptian Constitution of 2012**

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## Consolidating the Arab Spring: Constitutional Transition in Egypt and Tunisia

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### “The Legislature under the Egyptian Constitution of 2012”

#### Abstract

*Egypt’s political architecture under Hosni Mubarak’s authoritarian leadership and the 1971 Constitution was characterized by weak legislatures and a strong executive. The restoration of an effective, independent and efficient legislature capable of acting both as a check on executive government and as a vehicle for representative democracy, and the establishment of a more appropriate balance between the three branches of government, are thus key institutional elements of Egypt’s transition to constitutional democracy. This paper considers the constitutional arrangement for the form, powers and functions of Egypt’s legislature in the broader context of the framework of government established by the 2012 Constitution. The paper focuses on the provisions of the Constitution with regard to the legislature and its relationship with other organs of government; and its evaluation of these provisions is based on norms of democratic constitutionalism that are expressly included in the new Constitution or are implicit in its text. Overall, the paper concludes that the 2012 Constitution is markedly more in line with international best practice and trends in global constitutionalism than the 1971 Constitution; but that the 2012 Constitution suffers a number of shortcomings such as considerable areas of textual imprecision, disorganized arrangement, a failure to closely consider the relationships between different parts and provisions of the Constitution, and a willingness to leave a significant number of matters that ought to be dealt with in the Constitution to ordinary legislation.*

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# The Legislature under the Egyptian Constitution of 2012

Asanga Welikala

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## 1. Introduction

Following the overthrow of the Mubarak regime in the popular uprising now known as the 25<sup>th</sup> of January Revolution, arrangements were put in place to draft, enact and operate a new democratic constitution in Egypt. Neither the subsequent transitional period nor the constitution-making process was free of difficulties or controversy, but a final constitution was approved by the Egyptian Constituent Assembly on 30 November 2012 and ratified at referendum on 15 and 22 December 2012. That Constitution is now in force as the Constitution of the Arab Republic of Egypt.<sup>1</sup>

The previous 1923 and 1971 Constitutions of Egypt were, at the level of constitutional text, fairly typical constitutions of the era in the Arab world. However, their implementation and effectiveness were a more complex political phenomenon, especially in the case of the 1971 Constitution, in which the extra-constitutional exercise of presidential power and the pervasive, if opaque, role of the military in large areas of civilian life dictated an actual system of government that departed significantly in practice from the provisions of the formal Constitution. Following the success of the 25<sup>th</sup> of January Revolution and former President Hosni Mubarak's surrender of power to the military on 11 February 2011, that Constitution was put in abeyance, and the transitional period was governed by a quasi-legal framework that was *ad hoc* and incoherent, and which needed to be replaced by a proper and democratically legitimate constitution. While there are some areas of ambiguity in the 2012 Constitution that could result in institutional conflicts and potentially illiberal outcomes, it can be said that the new Constitution is a substantial improvement on its predecessor as a basic framework for democratic government. Despite the failure to introduce a number of historic reforms (e.g., in relation to the representation of women, or stronger provisions in relation to minorities and the bill of rights), the presence of considerable textual ambiguity in some provisions, and the absence of order in the way certain sections are organized, it compares favorably with other Middle Eastern constitutions in terms of the values enshrined in it and the rudimentary coherence of its structures.

This paper considers the new constitutional provisions concerning the form, powers and functions of Egypt's legislature, in the broader context of the framework of government established by the 2012 Constitution. Its focus is on the provisions of the Constitution with regard to the legislature and its relationship with other organs of government; and its evaluation of these provisions is based on norms of democratic constitutionalism that are expressly included in the new Constitution or are implicit from its text. It does not offer explanations for specific constitutional choices of the Constituent Assembly and other actors by reference to the broader politics of the Egyptian transitional and constitution-making process. In other words, the commentary is hermeneutical rather than contextual (and for this purpose it relies on the unofficial English translation of the Constitution produced by International IDEA). Where relevant, comparisons will be made between the 1971 and 2012 Constitutions.

Weak legislatures and strong executives are historical features of Egypt's constitutional tradition. The restoration of the legislature as a central institutional element of a new democratic state, and the establishment of a more appropriate balance between the three branches of government, were therefore key priorities for Egyptian constitutional drafters. The text of the new Constitution reflects a system of government that forms a generally credible basis for the realization of these objectives, even though the Constituent Assembly's ratification of the Constitution on 30 November 2012 was beset by opposition misgivings and judicial challenges, and only 33 per cent of the electorate turned out to vote in the 15 and 22 December 2012 Referendum (64 per cent voted to approve the draft). As important as the institutions of government the new Constitution establishes, however, is the Constitution's capacity to institutionalize a culture of democracy, and encourage or ensure that political office-bearers and social and political leaders behave in a way that sets normatively sound precedents as Egypt completes its journey towards functional democracy. To the extent that precedent-setting behavior by Egyptian officials has been seen

as problematic in the short time since the Constitution came into effect (e.g., in relation to the freedom of expression<sup>2</sup>), this has more to do with disregarding or distorting the meaning of constitutional principles, rather than the new Constitution's failure to reflect those principles. In the context of Egypt's democratic transition following a long period of military-bureaucratic authoritarianism, therefore, these authorities have the primary responsibility to ensure that any operational defects that become apparent in the working of the new Constitution are remedied constructively and by reference to the overarching values and principles laid down in the Preamble and foundational provisions of the Constitution itself.

## **2. The foundational principles and the basic structure of government under the new Constitution**

Before embarking on an analysis of the substantive provisions concerning the powers and functions of the new bicameral legislature, it seems appropriate to consider the broader normative and structural framework within which it is intended to operate. The following sections discuss the separation of powers as a constitutional principle, the implications of the semi-presidential model of executive power for the legislative function, the relationship between the legislature and executive in terms of government formation and the dissolution of the legislature, the provision for constitutional review of legislation, and the constitutional provisions common to both chambers.

### ***2.1 The separation of powers as a constitutional principle***

Appropriately for a constitution that is meant to facilitate a transition to democracy, the 2012 Constitution commences with an elaboration of the core principles that must inform the foundation of the state and the practice of government in the new Egypt. These include reaffirmations of popular sovereignty, democracy, political pluralism, republicanism, human dignity and freedom, equality, the rule of law and the separation of powers. While all these principles constitute the normative foundation upon which the new Egyptian legislature is intended to function and exercise its powers, the separation of powers has a special significance in the context of Egypt's past experience of the relegation of the legislature into irrelevance under the previous regime. The 1971 Constitution clearly reflected a separation of powers, even though it had no explicit reference to such a principle. However, in common with many authoritarian systems in the region and elsewhere, the practices and culture of government reflected a wholly different political reality than that found in the text of that Constitution. This experience no doubt influenced the Constituent Assembly in expressly establishing the separation of powers as a central normative principle of the new constitutional order. Thus the principle is enshrined in the foundational provisions (Art. 6), and the President is both enjoined to protect the separation of powers and respect the separation of powers in carrying out his responsibilities as prescribed in the Constitution (Art. 132). The structural articulation of the separation of powers, that is, the specific division of functions and powers as between the executive, the legislature and the judiciary in the 2012 Constitution must be understood in the light of this express constitutional principle, and it will provide significant guidance for the judicial interpretation of the Constitution in disputes that naturally arise in the operation of a democratic system.

## **2.2 Structural separation of powers: semi-presidentialism and judicial review**

Structurally, one of the major features of the new Constitution that is critical to an understanding of the way in which the new legislature is intended to function is the semi-presidential system of executive power it establishes (Part III, Chapter 2). While there are many different ways in which semi-presidential systems can be designed,<sup>3</sup> in essence, the model involves the sharing of executive power between a directly elected head of state (the president) and a prime minister and government accountable to an elected legislature. It thus combines features of both the pure presidential and pure parliamentary types of government. The role of the legislature in semi-presidential systems, especially in terms of the relationship between the executive and legislature, is distinctive, and this is one of the first things that must be borne in mind when approaching the powers and functions of the legislature under the 2012 Constitution. The semi-presidential structure has implications for the way in which several of the legislature's key roles are exercised, in particular in the formation of governments, and the powers of oversight, scrutiny, and executive accountability, both on a day-to-day basis as well as in exceptional circumstances involving the dismissal of the government, or the impeachment of the president, or during states of emergency.

### **2.2.1 The formation of the government and the dissolution of the legislature**

Under Egypt's new semi-presidential system, the President and the legislature are elected separately, in two separate elections. Within the overarching separation of powers and semi-presidential structure, the institutional form of legislative power is that of a bicameral legislature. The lower chamber, the 350-member Council of Representatives, is elected in direct elections (Art. 113), while the upper-chamber Shura Council has at least 150 directly-elected members and no more than one-tenth of its members appointed by the President (Art. 128). This is a major institutional change from the unicameral People's Assembly under the 1971 Constitution. The introduction of a Shura Council seems to be derived from the Arab / Islamic constitutional tradition, rather than the rationales for bicameralism found in Western constitutionalism (see further below, § 3.1). The provisions concerning the legislative power of the state are found in the new Constitution in Part III, Chapter 1, and are organized in three sections: Section 1 sets out powers and functions common to both chambers, and Sections 2 and 3 deal respectively with provisions that are specific to the Council of Representatives and the Shura Council.

The legislature has no direct role in executive functions, (except in cases when a vacancy in the presidency is to be filled by the speaker of either the Council of Representatives or the Shura Council (Art. 153)). But the legislature does play a critical role in the formation of the government, and moreover, the Prime Minister and the government are dependent on the confidence of the Council of Representatives both at their investiture and throughout their term of office (Arts. 126 and 139). Similarly, while the government has a close relationship with the legislature and especially the Council of Representatives, and may be summoned to sittings of either chamber (Art. 109), the members of the government are not members of the legislature and cannot vote in either chamber. Members of the legislature must resign their legislative seats if appointed to serve in the government (Art. 156).

The procedure for the formation of the government is established in Art. 139. Only the Council of Representatives, and not the Shura Council, has a role in this process. The process is as follows: the President nominates a candidate for Prime Minister, who must form a government, present a program of government to the Council of Representatives, and secure the confidence of the Council (no mention is made of a stipulated majority, but it can be assumed it is a simple majority vote). These provisions confer

a wide discretion on the President to nominate whomever he or she likes as Prime Minister; but if the President's nominee is unable to secure the confidence of the Council of Representatives within 30 days, the President must nominate another person, this time from within the majority party or plurality in the Council. This nominee must secure the confidence of the Council for his or her government program within a further 30 days, failing which the Council itself appoints a Prime Minister, to whom the President must assign the task of forming a government. The Council's nominee must nevertheless obtain the Council's approval for his or her government within 30 days. In total, the three rounds of nomination and approval must not exceed 90 days. If the Council of Representatives is unable to grant confidence to any of the three nominees for Prime Minister within these 90 days, then the parliamentary process is exhausted and the President dissolves the Council of Representatives. Fresh elections must be held within 60 days of the dissolution.

The Council of Representatives may decide to withdraw its confidence in the Prime Minister or the government at any time (Art. 126), effectively dismissing the government. These provisions, and the provisions for the legislative impeachment of the President, are addressed in the discussion on the legislature's oversight role (§ 3.3.1 below). The inverse of the legislature's power to dismiss the executive, however, is the President's power to dissolve the Council of Representatives (the Constitution makes no provision for the dissolution of the Shura Council). Unlike government formation, in which the new Constitution follows the practice of broadly comparable semi-presidential constitutions, the provision on dissolution (Art. 127) has two unusual features. First, the Council of Representatives may not be dissolved in the first year of its term, and second, successive Councils may not be dissolved for the same reason. The first restriction is common in many modern constitutions, but the second may be overly restrictive. Indeed, only present-day Austria and the failed Weimar Republic, among semi-presidential systems, include a restriction of this second kind.

Article 127 provides that in dissolving the Council of Representatives, the President issues a decision to suspend sittings, and then holds a referendum to seek public approval for the dissolution, which must take place within 20 days. If the referendum is carried (by an undefined "valid majority" of the electorate), then the chamber is dissolved and the President calls for fresh elections, which must take place within 30 days of the date of dissolution (with the new Council convening within ten days of the election). If the proposal to dissolve is defeated in the referendum, the President must resign. The requirement of referendum approval, and even more so that of presidential resignation, are highly unusual. They seem to be designed to strongly discourage mid-term dissolutions, and deter any temptation on the part of the President to dissolve an uncooperative legislature. More common devices used to secure this objective in other constitutions include the constitutional articulation of the conditions in which dissolution may occur (e.g., at the request of the Council of Representatives itself) or to subject a presidential power to dissolve to legislative approval.

## 2.2.2 Judicial review of legislative action

The separation of powers under a system of constitutional democracy also requires that the legislature itself is checked and subject to controls, most commonly through judicial review of legislation to ensure all ordinary laws enacted by it are consistent with the Constitution. While the 2012 Constitution does not expressly incorporate the principle of the supremacy of the Constitution in its foundational provisions or elsewhere, it is implicit in the provision for the judicial review of legislation by the Supreme Constitutional Court (Art. 175), that the legislature is subject to the Constitution. Judicial review of both the executive and the legislature is a particularly important mechanism for emerging democracies like Egypt, in that it is the principal means by which it is ensured that even elected authorities behave according to the

fundamental rules set out in the Constitution. In this respect, in addition to the power of constitutional review vested in the Supreme Constitutional Court by Art. 175, the adjudicatory powers of the State Council in relation to administrative disputes could be an important mechanism for ensuring the rule of law (Art. 174). It is unfortunate, however, that Arts. 175 and 177 draw a distinction between the Supreme Constitutional Court's powers of review over electoral legislation and all other legislation. The President may refer only draft laws governing "presidential, legislative or local elections" to the Court for a decision on their constitutionality (Art. 177), and although the Supreme Constitutional Court is competent in terms of Art. 175 "to decide on the constitutionality of laws and regulations", electoral laws "are not subject to the subsequent control stipulated in Art. 175". In other words, "abstract review" of draft legislation is limited to electoral laws, while electoral laws are themselves shielded from constitutional scrutiny once they have taken effect as legislation duly passed by the legislature and ratified by the President. It is also unsatisfactory that the legal effects of a declaration of unconstitutionality of a law are left to ordinary legislation (Art. 178).

### ***2.3 The institutional form of legislative power: common provisions for a bicameral legislature***

The basic legislative power of the state is set out in Art. 82 as belonging to the two chambers, with each exercising its powers in terms of the Constitution. In the absence of any co-ordinate law-making bodies (e.g., federal units or other devolved authorities), the legislative power is unitary in nature and plenary in extent, subject only to review by the Supreme Constitutional Court (Art. 175, see above under § 2.2.2), and two specific limitations listed in Art. 223. The first of these limitations is the bar against retroactive legislation. This is merely a procedural limitation in that the Council of Representatives may by two-thirds majority enact laws with retroactive effect. It is noteworthy that there is no mention of the role of the Shura Council in relation to such laws. The second limitation is that this power to enact retroactive legislation by special majority cannot be used to impose retroactive criminal or tax liability. Aside from this, there is no further elaboration within Art. 82 of the nature and extent of legislative power, and it is only upon consideration of the operational provisions that follow in Sections 1, 2 and 3 of Part III, Chapter 1 that an understanding can be gained of the relationship between the two chambers and the powers of each in the legislative function.

The provisions common to both chambers in Section 1 contain several important structural provisions which have a bearing on the relationship between the legislature and the executive. Article 93 provides that proceedings of the chambers must be held in public, except where either chamber decides, based on a request from the President, Prime Minister, or at least 20 members, to meet in closed session. Under Art. 94, the President convokes and adjourns the annual sessions of each chamber, but both acts are symbolic in nature. If the President fails to convoke the legislature on the stipulated date, the legislature commences sessions by operation of law on that date. The presidential termination of an annual session is subject to the approval of either chamber. Both the President and Prime Minister, as well as at least ten members of the relevant chamber, may call an extraordinary session of either chamber (Art. 95). Articles 101-104 in this section are important provisions concerning the procedure for the enactment of legislation, which will be discussed in more detail below (§ 3.2.2).

The common provisions set out a number of powers, privileges and standards that are imperative to the effective discharge of the legislative function. They include the privileges of free speech and legal immunity (Arts. 89 and 90), the freedom to establish their own internal procedures and responsibility for internal order (Arts. 99 and 100), quorum and basic voting procedure (Art. 96), the procedure for the election of Speakers of each chamber (Arts. 97 and 98), and a special prohibition on the presence of

armed forces personnel (Art. 100). The common provisions likewise establish a number of standards required of members of each house, including a prohibition on concurrent membership (Art. 83), a prohibition on extra-parliamentary employment (Art. 84), some specific restrictions on receiving gifts, and restrictions on members' rights to purchase or rent state property and conclude contracts with the state as supplier, vendor or contactor (Art. 88, to be further elaborated in law). Members' remuneration is to be regulated by law (Art. 91). These are all necessary rules to ensure the independence and efficiency of the legislature. However, members' rights to obtain information (Art. 107) and provisions detailing the circumstances in which members can seek discussion of a public issue or clarification of government policy (Arts. 105 and 106) are formulated in unusually restrictive terms. These common provisions apply to members of both chambers of the legislature, but at least in respect of the Council of Representatives, the Constitution expresses members' rights to request information, briefings and statements from the government and to interrogate the government on matters of public importance in more expansive terms (Arts. 123-125 – see further below at § 3.3). It is not clear why this is so, or why such rights are only available to members of the Council of Representatives but not to members of the Shura Council.

The common provisions also set out the basic rules with regard to challenges to the validity of membership (Art. 87), resignation (Art. 110), revocation of membership (Art. 111) and vacancies (Art. 112). These provisions are some of the weakest in Section 1 because they are vague, attenuated and fail to reflect important principles that require constitutional enunciation. For example, the grounds that could lead to the serious consequence of an elected legislator's membership of either chamber being revoked are set out in extremely vague form, and with the only safeguard against a misuse of this power being the requirement of a two-thirds majority in the relevant chamber. There is no provision for a proper process of inquiry into alleged misconduct, nor is it clear if courts retain jurisdiction over such decisions. Even if these matters are to be regulated by law (there is no express requirement for a law in this respect) or parliamentary regulations, it is necessary that the Constitution set out the basic applicable principles of both procedure and substantive grounds when a representative elected by the people is to be deprived of membership by another authority.

### **3. The powers and functions of the legislature**

The three main constitutional functions of a legislature in a democratic system are: (a) representation; (b) law-making; and (c) oversight. We will discuss these three functions and the powers necessary to their discharge in terms of the 2012 Constitution in more detail below.

#### **3.1 Representation**

Free and fair representation in the institutions of government is the defining feature of a democracy and the legislature is the most representative of all elected institutions. In ideal terms, the legislature is the institution that reflects all – or at least all the significant elements – of a society's spectrum of political opinion, including the voices of ethnic and religious minorities and women. It is the country's primary forum of political debate, critique, contestation and decision-making, and at its best, the legislature ought to be a close representative microcosm of the polity at large. In this regard, an interesting provision of the new Constitution is Art. 85, which establishes the principle that members of both chambers are representatives of the Egyptian population as a whole. Article 224 provides, however, that elections to the two chambers of the legislature are held "in accordance with the system of individual candidacy, a list-based system, a combination of the two, *or any other electoral system defined by law*", and Arts. 113, 129

and 208 contemplate representative constituencies as an element of the electoral system. It is not clear how these two apparently competing representative mandates are to be reconciled.

In any case, the effectiveness of a legislature's representative function may be assessed by reference to three aspects: the electoral system, internal decision-making procedures, and its form and structure. Beyond the representative democracy delivered by the legislature, the new Constitution makes provision for direct democracy in the form of the referendum. Each of these mechanisms of representative and direct democracy is discussed below.

### 3.1.1 The electoral system and the referendum

The design of the electoral system is the principal means by which the representativeness of the legislature is achieved. This includes special measures to ensure the representation of minorities and women, and the integrity of the electoral process. In the 1971 Constitution, Arts. 87 and 88 established the constitutional framework of representation and election to the People's Assembly, including the provision for an independent electoral administrative body to oversee elections. There were some anachronistic provisions in Art. 87 about the division of the electorate, and these have been discontinued in the new Constitution. The major weakness of the old provisions was that they were vague and ambiguous and left many matters that ought to be set out in the constitution for ordinary legislation. Unfortunately, the 2012 Constitution does not reflect much improvement in any of these regards.

The electoral system for all the major elected institutions of the state including the presidency and the legislature is to be established and regulated almost entirely by ordinary law, with only the most imprecise constitutional guidance in Art. 224 as to the parameters of the putative statutory framework. The matters mentioned in Art. 208 in relation to the mandate of the National Electoral Commission (and to be elaborated by ordinary law), such as delimitation and the regulation of campaign finance, are also issues that ought to have been elaborated in a separate section of the Constitution devoted to the electoral system. Incidentally, Art. 224 is found in the last Part V of the Constitution on transitional provisions, perhaps accurately reflecting the lack of importance accorded to this issue by the drafters. This provision merely states that the method of elections to the two legislative chambers may be based on a constituency-based system, a list-based system, or a combination of the two, or any other system, rendering it virtually devoid of any meaning or constitutional value. Likewise in relation to the independent National Electoral Commission, the provisions of Part IV, Chapter 4 (especially in relation to its composition) are extraordinarily convoluted and complicated, and leave much to be determined by ordinary legislation with little constitutional guidance. It is unfortunate that this should be so. An efficient, effective and transparent electoral administration is not only one of the most important institutions for ensuring the stability and legitimacy of the transition to functional democracy, but it is also an area in which a rich body of comparative experience and universal standards could have been used in establishing a much stronger framework for Egypt.

Again from comparative experience, a similar criticism may be made about the provision for referendums. While the two legislative chambers are the principal instruments of representative democracy, the referendum is the sole mechanism of direct democracy that is recognized by the Constitution. In other words, this is the most significant mechanism for the exercise of legislative power beyond the elected legislature, and for the exercise of popular sovereignty beyond elections to representative institutions. There are numerous places in the constitutional text in which mention is made of the referendum: Arts. 55, 127, 148, 150, 154, 211 and 218. Article 55 mentions the referendum as one of the means of citizens' political participation, and Art. 150 provides for a presidential power of holding a general referendum. Articles 127, 148 and 218, dealing respectively with the requirement of a referendum for the dissolution of

the Council of Representatives, the extension of states of emergency, and constitutional amendments, contemplate referendums for special or specific purposes. Aside from this, however, there is little elaboration of the nature and purpose of the referendum as a constitutional mechanism, and its relationship to the concept and principles of democracy on which the Constitution itself rests. There is no coherent regulation of the trigger power, no framework guiding the framing of questions and more generally managing the process, no guidance at all on the voting system and required majorities, and only an incomplete indication of the legal effects of a referendum decision (in the case of a general referendum, Art. 150 states that the result is binding on public authorities).

While of course it is appropriate and necessary that the detail of election (and referendum) rules and procedures should be governed by ordinary legislation, a constitution should describe with sufficient precision and clarity the principles on which such legislation can be based. Thus for example, the type of electoral system envisaged by a constitution, the main principles of that system, and the democratic values on which it is based, should find expression within the constitution itself rather than being left to ordinary legislation.

Similarly, and inexplicably in the light of the broad and sweeping statements of inclusiveness and recognition with regard to women that are found in the Preamble, the new Constitution reflects no substantive mechanisms to empower and encourage the participation of women in the legislative and broader political process. Likewise with regard to minorities, aside from the recognition of Christian and Jewish personal law (Art. 3), the Constitution offers nothing by way of special institutional representation. The provisions governing parliamentary representation in the 1971 Constitution contained no reference to any of these matters, and the 2012 Constitution has missed an historic opportunity to remedy these omissions, in line with the democratic ethos of the revolution and with contemporary constitution-making practice.

### 3.1.2 Internal decision-making procedures

The second set of issues concerns procedures for decision-making within the legislature. These procedures are important because they give the interests represented in the legislature meaningful opportunities to participate in the legislative process. For example, certain minority groups might require special protections, which could be ensured by procedurally requiring the consent of their representatives to legislation affecting their interests, in addition to bare majorities in either or both chambers. Similarly, virtually all policy and legislative matters entail implications for the rights and interests of women, and parliamentary procedures must be designed in such a way that these considerations are properly taken into account by ensuring a meaningful voice for female members of the legislature in the formulation of laws. The reservation of a women's quota in the legislature has led to dramatic increases in women's representation in several countries in the recent past. As with Chapter Two of the 1971 Constitution which concerned matters of parliamentary procedure, none of the provisions Part III, Chapter 1 of the 2012 Constitution address these issues.

Article 96 of the new Constitution contains rules for the passage of resolutions in both chambers. It provides that resolutions by either chamber are not valid unless the legislative session is attended by a relatively high quorum of a majority of members; and that in cases "other than those requiring a special majority, resolutions are adopted based on an absolute majority of the members present." Cases requiring a special majority of two thirds of the chambers are provided for in Arts. 103 (legislative disputes between the chambers), 104 (presidential veto), 223 (retroactive legislation), 217 (constitutional amendment), 111 (revocation of membership in a chamber), 145 (approval of certain foreign relations decisions), and 152 (impeachment). None of these "special majorities", however, accommodate minority or special interests

in any way. Further, each chamber is empowered to determine its own rules of procedure and maintain its internal order (Arts. 99 and 100).

As with the failure to promote the representation of minority interests in the legislature, the new Constitution fails to establish any mechanisms for the protection of minority interests in the ordinary business of the legislature.

### 3.1.3 The role of the second chamber

The third set of issues in relation to the representativeness of the legislature arises in the design of its form and structure. Chapter Two of the 1971 Constitution provided for a unicameral legislature, whereas the 1923 Constitution provided for a bicameral legislature. The 2012 Constitution returns to a bicameral model, but as already noted, with a consultative chamber in the Arab / Islamic tradition (*majlis ash-shura*), rather than the Western model of the 1923 Constitution which featured a Senate. However, departing from strict tradition, the Egyptian Shura Council is both elected and a second chamber. It might have been expected that the form and functions of this institution would be designed to address several other democratic imperatives relevant to a post-authoritarian transitional society, but the drafters of the new Constitution seem to have overlooked these imperatives.

In contemporary constitution-making practice, there are several established rationales for a dual chamber legislature, but the key justification for a second chamber is to serve as a counter-majoritarian device. That is, by ensuring a two-step process for the passage of legislation, a second chamber acts as a partial “brake” on precipitate actions of the first chamber. For the second chamber to perform this function, however, its powers and the manner of its election and composition must be designed in such a way that it is not a mere replication of the first chamber. Decision-making and the enactment of legislation in the first chamber may be designed to reflect the basic democratic principle of majority rule, but the second chamber should be designed to protect an equally important democratic principle, that of the protection of minority interests. Minority interests in this sense do not merely imply ethnic or religious minorities, but also minority political opinions. Thus in the Egyptian context, a well-designed second chamber is a way of affording representation in the legislative process to religious minorities like the Coptic Christians, as well as to minority political viewpoints like liberals and leftists.

Constitutional provision for the recognition and representation of minorities is not only a major normative requirement of the democratic form of government, but also a sound strategic consideration in ensuring that potential causes of instability are addressed by guaranteeing a voice to such groups in the mainstream political process of the state. One of the central causes of the previous regime’s downfall was its unwillingness and inability to allow democratic representation in the state. It is important to remember that it is not only authoritarian regimes that are vulnerable to extra-institutional overthrow when proper representation is systemically denied. Democracies have a tendency to institutionalize the “tyranny of the majority” in which some groups might find themselves as perpetual “losers” in the majoritarian political process, even though governments and parliaments are routinely constituted democratically. It is critically important therefore for the new democratic order to ensure that, while the consent of the majority constitutes the basis of government, measures are also taken to ensure the inclusive representation of minorities. In addition to an inclusive electoral system, a second chamber in the national legislature is one of the mechanisms by which constitutional designers secure this objective, and comparative practice shows a wide variety of design options that the Constituent Assembly could have drawn from in order to realize these aims. None of these objectives are necessarily inconsistent with traditional rationales for a Shura Council, but the 2012 Constitution has failed to incorporate any of these features in the design of the new second chamber. From the text of the Constitution, moreover, it is

difficult to discern what the rationale and general role of the Shura Council are, apart from the specific instances in which it is called upon to act as a substitute for the Council of Representatives when the latter stands dissolved.

### **3.2 *Law-making and constitutional amendment***

The making of law is the role assigned conceptually to the legislature under the doctrine of the separation of powers, and it is indeed the task that visibly defines for many what a legislature is and does. While Art. 86 of the 1971 Constitution also assigned the primary legislative role to the People's Assembly, there were at least two sets of problems in the realization of that function under the previous regime. Firstly, the People's Assembly operated not as a legitimate and credible parliament, but in the main as a rubber-stamping institution for legislative measures decided elsewhere. Secondly, the constitutional separation of powers itself was blurred in practice to a large extent because legislative powers were usurped by other institutions under either questionable laws or by autocratic political practices. In the light of this experience, there was a need for the new constitutional order to express in appropriately robust terms both the separation of powers as a constitutional principle (Art. 6, buttressed by Art. 132 which expressly imposes a duty on the President to protect the principle) and the legislative function as primarily belonging to the legislature (Art. 82).

#### **3.2.1 Subordinate legislation and the executive's law-making powers**

Before proceeding to a discussion about the law-making process under the new Constitution, a comment about subordinate legislation seems necessary. The new Constitution is unusually restrictive of these powers in comparison to most other democratic constitutions. Article 162, which confers on the Prime Minister the power to make general regulations, contains a number of substantive and formal limits on this power. The article explicitly empowers only the Prime Minister to issue "necessary regulations for the enforcement of laws". The article goes on to provide that the Prime Minister may delegate this regulation-making authority to others "unless the law designates who should issue the necessary regulations for its ... implementation". This could be interpreted to mean that legislation may confer rule-making authority on ministers and officials other than the Prime Minister, but it could also be read in line with the article's restrictively-phrased first clause to mean that laws may designate only the Prime Minister as the person "who should issue the necessary regulations". This would be a more restrictive approach than in many democratic constitutions, and it is a matter that will require judicial clarification in the future. In a related area, "decisions" of local government authorities are protected from central executive interference (although the exceptions to this rule are framed widely in Art. 190).

A similarly restrictive approach is found in Art. 148's regulation of states of emergency. One of the article's striking features is that it provides no express emergency law-making power to the executive. Although such a power might be implied – and once again this would require judicial clarification – it must be presumed that the drafters intended to exclude this power. Even in established constitutional democracies, a state of emergency is the exceptional circumstance in which the executive is allowed special legislative powers (albeit subject to rigorous temporal, procedural and substantive limitations), and its absence is perhaps one of the unique features of the new Constitution. This restrictive approach may be born of the past experience of interminable emergency rule, and a desire to ensure against abuse of power and the usurpation of the legislative function by the executive. However, it might be asked if such a restrictive approach is realistic in the operation of government, and whether the better approach

might have been for the Constitution to openly acknowledge the need for an executive power over emergency law-making and to regulate its conferral on that basis.

An exception to the new Constitution's otherwise restrictive approach to the conferral of legislative power on the executive is in Art. 131, where, in the "absence of both chambers", the President may issue decrees that have the force of law for urgent measures that cannot be delayed. In the case of the Council of Representatives, "absence" can be understood to mean a period in which it stands dissolved, but this makes little sense in relation to the Shura Council, for the dissolution of which no provision is made. While there are a number of safeguards against the misuse of this power by the requirement of *post facto* approval by the legislature (and retroactive nullity if not approved), what constitutes an urgent measure is undefined, and this may be a potential cause of conflict between the two branches. But the broader – and from the perspective of the coherence of the Constitution, more serious – question that arises is that, except for this provision, there is no indication in the rest of the text that the Constitution contemplates a situation in which both chambers stand dissolved at the same time. The terms of the two chambers are not the same (the term of the Council of Representatives is five years, whereas the Shura Council's term is six years: Arts. 114 and 130), which implies that elections to the two chambers would not normally coincide. Indeed, the dates of commencement of the two chambers after the coming into force of the 2012 Constitution would also not coincide in view of the transitional arrangements in Art. 230. Moreover, unlike the Council of Representatives, the Shura Council is a chamber of continuing membership, with half of its membership being re-elected (or re-appointed, as the case may be) every three years for six-year terms, which also is why presumably, the Constitution makes no provision for its dissolution (Part III, Chapter 2, Section 3). It is thus clear that the Constitution does not envisage a factual situation in which both chambers stand dissolved, raising the unanswered question as to why Art. 131 confers a law-making power on the President when the condition precedent to the exercise of that power could never arise in terms of the Constitution.

### 3.2.2 The legislative process

The basic procedure for the enactment of legislation is laid down in Arts. 101, 102 and 104, with Art. 103 establishing a procedure for the resolution of disagreements between the chambers. According to Art. 223, laws must be published in the Official Gazette within 15 days of issuance, and they come into force on the 30<sup>th</sup> day following the date of publication, unless the law specifies a different date. The main weakness of these provisions is that the sequential steps of the legislative process are not articulated in clear and straightforward terms. There is an absence of necessary detail, and therefore a potential for conflict, about how a draft law proceeds within each chamber, between the two chambers, and the role of the President in the legislative process. It may be inferred from these provisions that draft legislation (which may be initiated by the President, the government, or any member of the Council of Representatives) commences in the Council of Representatives, then proceeds to the Shura Council, and if passed in both, is sent to the President for issuance. There is some guidance about the initiation of draft legislation and the legislative process in the Council of Representatives in Art. 101, and some indication of the President's role in Art. 104. However, there is no constitutional guidance whatsoever about the process within the Shura Council, which is an omission that assumes great significance in view of Shura Council's power to pass laws during periods in which the Council of Representatives is dissolved – subject to the Council's consideration of any such laws upon its reconstitution (Art. 131; see also Art. 153 regarding the role of the Shura Council in relation to a vacation of presidential office when the Council of Representatives is dissolved).

Another element of confusion is introduced by the provision in Art. 102 that each draft law passed by either of the chambers should be scrutinized by the other. This may at first glance seem a sound principle of check and balance within the legislature but for the serious question it raises about the sequence of the legislative process. That is, it implies, but does not expressly provide for, a third stage of scrutiny and possibly voting in the Council of Representatives once the Shura Council has passed a draft law. While in the second stage the Shura Council is given the opportunity to scrutinize the draft passed by the Council of Representatives in the first stage, unless there is a third stage the latter would not have an opportunity to examine the amendments of the Shura Council. This in turn would be a procedural breach of Art. 102. This problem about the exact sequence of the basic procedure for the enactment of legislation emerges before, and independently of, the circumstances in which the dispute resolution mechanism in Art. 103 may be engaged. This could be the result of careless drafting, which at least notionally entails an endless to-and-fro between the two chambers scrutinizing each other. More concretely, it is unnecessary to have a further stage of approval by the Council of Representatives in view of the fact that the Shura Council is itself an elected chamber: at most, only one-tenth of its members are appointed (Art. 128). If on the other hand, the provision is deliberate, then it has the effect of diminishing the democratic legitimacy of the Shura Council and weakening its role as a checking mechanism on the otherwise pre-eminent Council of Representatives. This serves to emphasize the point that it would have been desirable to include an express provision clearly setting out the sequence that must be followed in enacting valid legislation.

In these provisions we see the influence of the semi-presidential system in the various, if limited, roles of the executive in relation to the initiation and approval of legislation, although overriding authority is quite correctly vested in the legislature (or more specifically, the Council of Representatives). Article 101 recognizes the right of the President and/or the government to initiate legislation, in addition to any member of the Council of Representatives. The provision of separate rights of legislative initiation to the President and the government appear to be in contemplation of a possible “cohabitation” arrangement, i.e., where the President and the Prime Minister and his ministers belong to different political parties. Except under the provisions of Art. 131 where the Council of Representatives stands dissolved, legislation cannot be initiated in or by the Shura Council. Article 102 stipulates the power of each house to scrutinize, debate and propose amendments to draft legislation.

The provisions of Art. 104, dealing with the promulgation of draft legislation which has passed both chambers, envisage a marginally stronger role for the President in the legislative process. Once a draft law has passed through the enactment process in the two chambers, it is presented to the President to be issued within 15 days. The President does not seem to enjoy discretion in this respect. However, should the President object to the draft law, the President must remit it to the Council of Representatives within 30 days for reconsideration. If such a referral does not take place within 30 days, then the law is considered enacted and issued. The President therefore enjoys a qualified veto in the legislative process to delay legislation for a period of up to 30 days, and to submit the measure for reconsideration. There is no explicit procedure akin to Art. 103 (see below) that sets out how the disagreement may be resolved, and presumably the Prime Minister would represent the President in the Council of Representatives in the reconsideration proceedings. The veto is thus qualified because if the Council of Representatives rejects the President’s objections, it is empowered to override the President, albeit by a two-thirds majority. In cases where the disagreement cannot be resolved and a two-thirds majority cannot be obtained in the Council of Representatives to override the President, the draft law fails and it cannot be reintroduced until four months have elapsed. It is not clear what the purpose is behind giving the President a symbolic role of “issuing” legislation with which he is in agreement; it would have been sufficient to provide for presidential intervention only in circumstances in which the President wishes legislative reconsideration of a draft law. It is also important to note that the Shura Council again has no role in this respect.

Article 103 makes important provision for the procedure to be adopted in cases where there is no agreement between the two chambers of the legislature about a draft law. The key mechanism through which consensus is negotiated in these cases is a special joint committee of both houses. If agreement remains impossible following this procedure, then the Council of Representatives has the power to unilaterally pass the law by a two-thirds majority.

With this overarching framework for the legislative process in mind, we might consider the provisions relating to how a draft law progresses within each chamber. As noted above, under Art. 101, legislation may be initiated in the Council of Representatives by the President, or the government, or by any member of the Council of Representatives. Every legislative proposal must be considered by a special committee of the Council of Representatives, which reports to the chamber thereon. In the case of draft laws proposed by individual members of the Council of Representatives, they must as a preliminary step be approved by a “proposals committee” before they are submitted to the special committee mentioned above. The purpose of this additional step seems to be to check vexatious or frivolous proposals. What happens next is not set out, and it must be assumed that the procedure for debate, amendment and voting on the draft is to be set out in rules published under Art. 99.

Other than the instances in which the Constitution requires a special majority (Arts. 103, 111, 145, 152, 166, 218, and 223), Art. 96 provides that “resolutions” in each chamber are adopted by an absolute majority. It is not clear if the term “resolution” in this context also includes votes on draft laws (in many other legislatures, there is a distinction between votes on “resolutions” and “bills”, the former having no binding effect). Assuming that it applies also to voting on draft laws, this is a relatively high requirement for the enactment of ordinary legislation. Most other democratic constitutions would deem a simple majority sufficient for this purpose. This is compounded by the extraordinarily high quorum requirement (which applies to both chambers) of a majority of members having to be present at both debates and votes, without which not only votes but also meetings are deemed invalid. Perhaps the intention here is to strongly encourage the presence and participation of members in their central task, or to foster a culture of consensual decision-making in the legislature. Whatever the rationale, practical or idealist, the implications of these provisions for the efficiency of the legislative process will only become clear over time, and in particular, the effect of the electoral system and the types of representative configuration it produces. For example, such a high majority requirement for the day-to-day business of the legislature would be virtually unworkable if the electoral system is based on proportional representation. As noted before, therefore, these issues reinforce the point that it would have better if the Constitution had settled the main principles of the electoral system rather than leaving them to ordinary law.

While there is some elaboration of the legislative procedure within the Council of Representatives, the Constitution makes no provision at all with regard to the procedure within the Shura Council. Again it must be assumed that these matters will be addressed in that chamber by rules made under Art. 99. Needless to say, this is unsatisfactory.

Like in the case of Arts. 104, 107 and 110 of the 1971 Constitution, these provisions therefore suffer from ambiguity, and from the perspective of current international practice, an absence of necessary detail in respect of the principles and framework within which each chamber is empowered to make its internal arrangements regarding procedures, proceedings and the committee system. The new Constitution does not ensure that parliamentary rules of procedure made under Art. 99 promote such values as transparency, pluralism, inclusiveness and participation. It should also have contained specific provisions facilitating public access to the legislature as a public body including its management and expenditure, its proceedings and its members, and established a public right to access information held by the legislature (Art. 107 is too restrictive for this purpose). These objectives may be achieved, however, by virtue of the general citizens’ right to access public information enshrined in Art. 47, provided that it is implemented in

good faith (although it should be noted that the meaningful implementation of a comprehensive freedom of information regime is easier said than done, especially in a culture of government that is long-accustomed to secrecy and inaccessibility).

### 3.2.3 The committee system

Most seriously, apart from indirect references to various committees of the Council of Representatives, and a specific, necessary and important provision for special investigative committees of the Council of Representatives in Art. 122, the new Constitution makes no provision for a comprehensive committee system for each chamber, an omission that places it at odds with international good practice in the design of democratic legislatures. It is implicit that the Constitution contemplates a functioning committee system in at least the Council of Representatives, if not the Shura Council. However, the committee system is such an important device in the legislative roles of both law-making and oversight nowadays that it would have been highly appropriate for the new Constitution to not only recognize their constitutional significance, but also lay down the principles (e.g., transparency, independence and accountability) by which their formation and operation would be governed.

### 3.2.4 Constitutional amendments

So far we have had in contemplation the process for ordinary legislation, but one of the special functions of the legislature relates to constitutional amendments. Generally, in conformity with the principle of constitutional supremacy (see above), a constitution should not be amenable to amendment or repeal as easily as ordinary legislation, and this is ensured by a variety of procedural and substantive restrictions on legislative power. Thus for example, Art. 189 of the 1971 Constitution laid down the procedural requirements of a two-thirds majority and the approval of the people at a referendum as procedural requirements for the amendment of that Constitution. In addition to this, some constitutions classify provisions that are subject to different types of amendment procedures, and in some rare cases such as Japan and Germany, even establish certain provisions as being absolutely unamendable by any method whatsoever in perpetuity.

While, therefore, in general constitutional amendments require higher thresholds of consensus, or several stages of approval, as opposed to ordinary legislation, the relative rigidity or flexibility of the amendment procedure is a matter for constitutional drafters to decide. In addition to the principle of constitutional supremacy, rigid constitutions are usually based on the assumption that the constitution contains certain political values and principles which should not be changed or altered easily and without extended social debate. A difficult amendment procedure is intended to promote such reflection and debate before change is undertaken. A difficult amendment procedure is intended to promote such reflection and debate before change is undertaken (the classic example of a rigid constitution is that of the United States of America). On the other hand, flexible constitutions, while still requiring a higher level of consensus than ordinary legislation, establish procedures that are easier to meet (e.g., Italy, India). The main assumption in these cases is the notion that even constitutions should not define a society's basic rules in perpetuity or enshrine forever a particular of view of its nature. Flexible constitutional amendment procedures are therefore intended to enable succeeding generations to change the constitution in order to meet the realities of future times. The disadvantage of flexible constitutional amendment procedures, however, is that they are susceptible to abuse, especially in countries in which democratic traditions are weak, and governments with large majorities cannot be contained or controlled by the constitution because it can itself be changed at will. From the perspective of comparative constitutional design, an

amendment procedure should include features such as greater public consultation and participation (which could be facilitated by publication requirements; and constitutionally pre-established, extended time periods for debate and discussion), an express role for a superior court with constitutional jurisdiction to adjudicate any dispute arising from the process (both in regard to procedure and substance), and limitations on the executive's scope for interference in the process. While the president may be permitted to initiate constitutional amendments, virtually under no circumstances should any form of veto or delaying power be conferred on the president in respect of constitutional amendments.

Articles 217 and 218 of the 2012 Constitution establish the basic procedure for its amendment, which envisages a four-step process. Although by no means free of ambiguity, the relative clarity of this procedure can be contrasted with the inconsistency-ridden general law-making procedure discussed above. In the first step, a "request" for a constitutional amendment must be made, specifying the provisions sought to be amended and the reasons therefor, either by the President or by the Council of Representatives. A request emanating from the Council of Representatives must be signed by at least five of its members. In the second step, a thirty-day period is allowed for both chambers to debate the request for constitutional change. For the amendment to proceed any further, both chambers must accept the request by a two-thirds majority. If the amendment passes this stage, in the third step, for which a period of 60 days is allowed, each chamber debates the text of the amendment and each must pass it by a two-thirds majority. In the final fourth step, the agreed text is put to the people in a referendum, which must occur within 30 days of final legislative approval. If approved by the people, the amendment comes into effect on the date on which the result of the referendum is announced.

This is patently an improvement from the previous Constitution. The procedure is relatively clear, vests the legislature with primary deliberative responsibility with little scope for the executive to interfere in the process, requires a high threshold of agreement in requiring special majorities at two stages of the process and a referendum, and reflects an adequate element of rigidity needed to protect the Constitution from hasty or ill-motivated amendment attempts. There are no constitutional provisions that are absolutely protected from amendment, which is probably a legitimate choice, given that absolute entrenchment is a rare occurrence in comparative constitution-making. However, several points may require further attention.

In terms of Art. 217, a request for a constitutional amendment originating in the Council of Representatives must be signed by at least five members. This seems not only an unusually low threshold of agreement to trigger a process as important as constitutional amendment, but it is also incongruous with other provisions which stipulate basic requirements of agreement before a procedure can be initiated. Almost all of these other procedures are arguably of lesser significance than constitutional amendment, but in all of them, the required level of baseline agreement is higher than the five members mentioned in Art. 217. Article 95, concerning requests for extraordinary sessions of either chamber, requires ten members. Article 126, concerning the withdrawal of confidence from the government, requires one tenth of the Council of Representatives. Article 166, concerning criminal proceedings against members of the government, requires one third of the Council of Representatives. Article 152, concerning felony or treason charges against the President, and which comes closest to constitutional amendment in terms of constitutional significance, also requires one third of the Council of Representatives. In the light of these provisions, the rational basis on which the five-member stipulation was made is not clear (indeed, the rationale of any of the several different minimum numbers mentioned at various points in the text is unclear).

Also in terms of Art. 217, in the second step, it is not clear what happens in the eventuality that one or other of the chambers does not approve the request by a two-thirds majority, although inferentially, it would seem that the amendment would fail in this scenario. Likewise, while not expressly stated, Art. 103

would likely apply if in the third step, the two chambers are unable to agree on a joint text for the constitutional amendment. More difficult to resolve would be a dispute arising out of the provision in Art. 217 that each chamber may accept a request in part. If one chamber accepts the request in whole and the other only in part, the procedure in Art. 103 cannot be used, because that concerns disagreements over text only. In other words, Art. 103 could be used in relation to Art. 218, but not Art. 217. Finally, the most serious omission of the procedure in Arts. 217 and 218 is the glaring absence of an expressly established jurisdiction for the Supreme Constitutional Court over either the process or the substance of constitutional amendments. It is critical for a democratic constitution to provide judicial supervision of constitutional amendments. Thus while it must be presumed that the Court's jurisdiction in Art. 175 would apply in this respect, the failure of the Constitution to expressly recognize the judicial role in the constitutional amendment procedure means it is of paramount importance that the regulatory legislation contemplated in Art. 175 rectify this shortcoming.

### **3.3 Oversight**

Scrutinizing and holding the executive to account is one of the critical functions of the legislature, and any democratic constitution must ensure that it is adequately empowered to perform this task competently, constantly and robustly. Under the previous military-bureaucratic regime in Egypt, parliamentary supervision over the executive and military was severely enervated, although ironically, it is in relation to these matters that the text of the 1971 Constitution set out some of its most elaborate provisions (see Arts. 114-133).

There are several discrete aspects to the legislature's oversight role, of which the first dimension concerns its constitutional role in holding the executive to account on a continuing, day-to-day basis. Constitutional democracy requires this from the perspective of the separation of powers, and the attendant principle of checks and balances. The new Constitution therefore rightly establishes the oversight role in express terms in Art. 115. While an elected executive may be ultimately responsible to the electorate through periodic elections, the legislature is the main institution through which the exercise of executive power is held politically accountable in between elections. The courts have the constitutional function of ensuring the legality of executive and administrative action through the application of legal principles, but it is in the legislature that the wider policy considerations of executive action may be fully discussed and debated. It is also the legislature that holds the executive to account, through a number of devices including debates, ministerial questions, and more detailed scrutiny through the committee system which focuses on both the operational aspects of ministries and government departments as well as the policy implications of the executive's legislative proposals. Finally, it is the legislature which usually decides if the mid-term behavior of a government or the President has exceeded constitutional boundaries so egregiously that either needs to be dismissed and fresh elections held.

As with the provisions concerning law-making, in respect of oversight also the new Constitution is entirely silent on the role of the Shura Council. However, some of more elaborate provisions of Part III, Chapter 1 concern the oversight powers of the Council of Representatives, and especially its powers over the control of public finance (discussed below).

In respect of day-to-day oversight of the executive, these provisions contemplate three devices: ministerial questions, ministerial statements and the procedure known as interrogation. Under Art. 123, any member of the Council of Representatives has the right to submit a question to the Prime Minister or other minister in relation to any matter within their purview. Ministers have a constitutional duty to respond to such questions. Under Art. 124, any member of the Council of Representative may request a briefing or statement from the Prime Minister or minister on urgent matters of public interest. Once again, ministers

are under a constitutional duty to respond. Article 125 sets out the procedure for interrogations, which again may be addressed by any member of the Council of Representatives to the Prime Minister or any minister on a matter of public importance. The difference of this procedure seems to be that interrogations lead to a debate in the chamber, which takes place seven days after its submission, unless the chamber decides, with the consent of the government, to take it up earlier. As a basic framework for the legislative oversight of the conduct of the executive on a continuing basis, these three devices could perform a significant role. Their success depends, however, not only on the executive faithfully discharging its constitutional obligations in respect of answerability, but also on the extent to which members of the Council of Representatives take their oversight role seriously. In many emerging democracies, otherwise vigorous legal frameworks of oversight fail because legislators lack the experience or the interest to make use of them. But the 2012 Constitution lays down the necessary framework, which, with political will, could establish a strong culture of political accountability.

On the other hand, as with law-making, the conspicuous omission in this section is with regard to the committee system, except for Art. 122, which provides for special investigative committees. These committees are formed to examine the conduct of any public body, and the chamber decides their mandate including as fact-finding bodies for report back to the chamber, to investigate financial impropriety or maladministration, or to report on some past event. Quite correctly, these committees are empowered to collect evidence and summon individuals, and all public bodies are under a constitutional obligation to co-operate with the committee's demands (but not, it seems, private individuals or entities). Despite their manifest importance, however, the committees constituted under Art. 122 are *ad hoc* bodies, whereas in most modern legislatures, there is a system of committees in continuous operation which engage in detailed and sustained scrutiny of ministries and public bodies. It is implicit even in Art. 122 that the Constitution assumes a broader committee system within the Council of Representatives (the strongest indication of such an assumption is in Art. 161), but for the reasons already discussed in relation to the law-making function above, it would have been better if the Constitution provided expressly and in general terms for oversight committees. This would have been more in conformity with comparative practice in democratic legislatures in which very high importance is accorded to the committee system as a device of more detailed executive accountability.

### 3.3.1 Dismissal and impeachment

Beyond these day-to-day functions, the most dramatic demonstration of the legislature's oversight role occurs when it exercises its powers over the dismissal and/or impeachment of the executive. As the 2012 Constitution shows, in semi-presidential systems the legislature has the power to withdraw confidence from the government as in a parliamentary system, and it also assumes, as in a presidential system, a special quasi-judicial role in respect of impeachment, the ultimate form of accountability when presidential actions or omissions exceed constitutionally established grounds of legal or morally acceptable behavior.

Article 126 governs the circumstances in which the Council of Representatives might withdraw its confidence from the Prime Minister or ministers, and the legal consequences of this act. In the main, the provision establishes a system of individual ministerial responsibility, in that it is framed in relation to the chamber's confidence in the Prime Minister, his deputies and other ministers, rather than the government collectively. An attenuated principle of collective responsibility is also recognized, however, where the government has pledged its prior support to a minister against whom a motion of no confidence succeeds. In this situation, the government is obliged to resign collectively (Art. 126). The wording is unclear as to whether this condition is immaterial in the case of the Prime Minister, and that, if the Prime Minister is

defeated in a no confidence vote, then the government as a whole must resign. It must be presumed that this is the case, on the basis of comparative practice in similar semi-presidential constitutions. If the government did not support an individual minister in no confidence proceedings, then only he must resign upon defeat on the motion. The procedure for no confidence motions is also set out in Art. 126: they can only be submitted after an interrogation (Art. 125), and the motion must be signed by at least one tenth of the membership of the Council of Representatives. The vote should take place within seven days of the debate on the motion, which may be passed by a simple majority.

Article 152 concerns the removal from office of the President for serious offences such as felony and treason. Neither felony nor treason is constitutionally defined and actionable felonies are not enumerated. A motion containing such charges must be supported by at least one third of the Council of Representatives, and an impeachment may be issued only with a two-thirds majority of the Council of Representatives. Aside from this, no further constitutional guidance is available about the parliamentary stage of the process, including the method of enquiry into charges made and any special rules of debate that might apply. The Shura Council has no role, although in bicameral systems, it might be expected that the second chamber would have a role in presidential impeachments. If an impeachment decision is reached by the Council of Representatives, the President ceases all work until such time as the next stage of the procedure is concluded, which is a trial before a special court consisting of senior judges. It is left to ordinary law to establish the details of the investigation and trial process. If the President is convicted, the President is relieved of his or her post (and may face other penalties). Despite the weaknesses already noted, there are several strengths to this procedure, including the temporary removal of the President from office pending trial (thus reducing the scope for improper influence) and the robust role for an independent, impartial, judicial process in addition to the political process within the Council of Representatives. These provisions are therefore a demonstrable improvement from the previous Constitution.

### 3.3.2 Control over public finance

One of the most important dimensions of oversight relates to the legislature's control over public finance. While of course it is the executive that spends public money, the legislature retains the power to provide ultimate authorization for the government budget. Conversely put, this means that the executive has no legal authority to expend public funds unless it has prior parliamentary approval in the form of an authorized budget and an annual appropriation law. This stems from the long-established constitutional principle that the government is neither entitled to spend public money, nor raise revenues for financing public expenditure, unless the people, through their elected representatives, have given prior consent to spending and taxation proposals that have been fully justified and debated. These salutary principles were recognized even in the 1971 Constitution (Arts. 119 and 121).

The provisions of the 2012 Constitution in this respect are some of its most detailed, which expressly assert the principle of parliamentary control over public finance and provide the basic framework for the exercise of this power (Arts. 115 to 122). While ordinary legislation or internal rules of the legislature may provide the detail of the procedure for the annual budget and appropriations law (Art. 116) and for any other law that has public expenditure implications (e.g., the public plan for economic and social development: Art. 115), the Constitution clearly establishes the principles on which such rules are to be made. Detailed procedures are established for the approval of the annual budget (Art. 116), and for specific requirements of approval by the Council of Representatives for a range of executive decisions with public financial implications (Arts. 117-120). Separately from the budget, the Constitution also requires legislative approval of final audited accounts (Art. 121). There might even be an excess of zeal in these

provisions and in the reference to a balanced budget in Art. 116. Elsewhere, the Constitution sets out principles on which the state's broader public finance framework is built, including the values of transparency, fairness and accountability, in the form of economic principles (Part I, Chapter 3) and socio-economic rights (Part II, Chapter 3).

The Constitution provides the basic framework for the establishment of an independent Central Bank (Part IV, Chapter 3), and critically in the light of Egypt's past as well as contemporary best practice, provision for a framework of public financial accountability, including the Central Auditing Organisation (Part IV, Chapter 2), that can supplement and support the legislature's financial oversight role. The key omissions in this area are that there is no mention of the main state revenue funds (it must be presumed that references to the "state treasury" implies a single fund), and the role of the committee system (except the special investigative committees envisaged in Art. 122).

### 3.3.3 States of Emergency

The final aspect of parliamentary oversight relates to exceptional situations such as declarations of war and peace and states of emergency. The legal and constitutional framework governing states of emergency is a matter of self-evident importance in the Egyptian context, given the culture of prolonged emergency rule that prevailed under the previous regime and its destructive impact on democracy. It was therefore an area to which the drafters of the 2012 Constitution were expected to devote very close attention. The key analytical principle that governs the design of emergency powers in a democratic constitution is that an emergency (and therefore the extraordinary powers given to the executive to deal with it) is an exceptional situation departing from normalcy. It follows from this that the entire emergency powers framework must be presupposed towards returning to normality as soon as possible, and with as little permanent effect on the ordinary democratic rights and freedoms as is possible. While this may seem a statement of the obvious, Egypt's past experience, and indeed the experience of many authoritarian or conflict-afflicted countries across the Middle East, Asia, Africa and Latin America bears testimony to the fact that the "exception" can quickly become the "norm", with seriously adverse consequences for human rights and democracy. In this context, the theoretical separation of normality and emergency should govern the new Constitution's substantive provisions with regard to emergency powers.

The design of the constitutional framework of emergency powers should address four sets of issues: (a) the constitutional definition of a state of emergency (i.e., to ensure that only emergencies that threaten the life of the nation warrant recourse to emergency powers); (b) the provisions regarding declaration, operation, extension and termination of a state of emergency; (c) the permitted legal effects of a state of emergency (i.e., the scope of limitations on fundamental rights that may be legally imposed during an emergency, including an enumeration of rights that cannot be abridged under any circumstances); and (d) an iteration of appropriate checks and balances for the exercise of emergency powers within the broader constitutional framework of the separation of powers.

Assessed against these design criteria, the 2012 Constitution, which deals with states of emergency in the solitary Art. 148, reflects a mixed result at best. Its focus is on procedural regulation of the exercise of emergency powers, to the exclusion of substantive limitations that are now widely recognized as part of international law and best practice. The definition of a state of emergency is left to ordinary legislation and this is plainly inconsistent with contemporary best practice. There is no meaningful constitutional regulation whatsoever of the nature and extent of the limitations on fundamental rights that may be imposed during a state of emergency, nor an enumeration of non-derogable rights. In this respect, the general limitation clause that forms part of the Bill of Rights, Art. 81, is possibly one of the most primitive

and ill-considered of the new Constitution's provisions, and it is unlikely to provide any protection for fundamental rights during a state of emergency.

On the other hand, the procedural provisions are slightly more consistent with best practice. The President is empowered, in consultation with the government, to declare a state of emergency. This proclamation is required to be laid before the Council of Representatives within seven days, which must approve it by a simple majority. If the Council of Representatives is not in session, then it must immediately be summoned upon the declaration of an emergency. If it stands dissolved, then the Shura Council performs its functions. The Council of Representatives cannot be dissolved during the currency of a state of emergency. Thus the rules in respect of declaration are generally consistent with best practice, with requirements not only of legislative approval, but also continuous oversight.

The rules with regard to extension (and by implication, termination) are more unusual. The initial declaration must be for a specified period not exceeding six months. This is a remarkably long period, and while it notionally anticipates shorter periods of emergency, it is likely that the executive would seek the full permissible period in the context of the unavoidable uncertainty that characterizes an emergency situation. An emergency may be extended once for another six months only by a referendum. This seems to be an overzealous provision that would be potentially unworkable in practice (it is extremely unlikely in the context of a continuing emergency situation, requiring an extension of emergency powers, that conditions amenable to the holding of a referendum would exist), and would also have the unintended effect of encouraging longer states of emergency at first instance. That is, the President is unlikely to take the risk of requesting a short period of emergency powers within the first six months, when extending the state of emergency is such a difficult process. This would only be reinforced by the peculiarity discussed above, that the President under the new Constitution enjoys no emergency law-making powers.

In general it can be said of the emergency provision that its formulation seems to have been motivated by a desire to ensure that the past experience of protracted emergencies and the abuse of emergency powers are not repeated in the future. In doing so, however, the drafters have not only disregarded countervailing considerations of executive effectiveness during an emergency, but also, strangely, failed to establish a number of important control mechanisms on emergency powers that are abundantly reflected in both international law and best practice. In addition to the matters already mentioned, this includes the absence of an elaboration of the crucial judicial role in controlling the exercise of emergency powers.

#### **4. Conclusion**

As observed at the outset, the provisions of the 2012 Constitution governing the legislative branch reflect a number of improvements from its predecessor. These include the foundational provisions setting out the normative basis of legislative power and some structural changes that restore a better balance between the three branches as a whole. In particular, the provision for comprehensive judicial review, strong (in certain respects perhaps overenthusiastic) controls on the presidency and the executive more generally, the procedure for constitutional amendment and the provisions on financial oversight are all significant improvements. On the other hand, the Constitution also reveals a number of shortcomings of drafting, reflected in considerable areas of textual imprecision, disorganized arrangement, a failure to closely consider the relationships between different parts and provisions of the Constitution, and a willingness to leave a significant number of matters that ought to be dealt with in the Constitution to ordinary legislation, all of which impact on the overall coherence of the system of government established by it. Major areas of concern identified in the preceding discussion included the role and relevance of the Shura Council, the absence of adequate constitutional guidance with regard to the electoral system and the referendum, the disjointed nature of the general law-making process due to the absence of a stand-alone

provision clearly setting out its procedural sequence, the unnecessarily constrictive approach to executive law-making, and the lack of importance accorded to the parliamentary committee system in the legislative process. Historic changes that have been totally overlooked include stronger provisions with regard to women and minorities.

Some of these deficiencies may be rectified through the secondary legislation that is contemplated by the Constitution, and the adverse consequences of others may be ameliorated through the creation of conventions as the Constitution matures in practice. More fundamental structural remedies would have to await a constitutional review and revision process in the future. It is important to remember, however, that a paper constitution is only one of the many elements that will consolidate Egypt's democratic transition. The capacity and the willingness of all political actors to operate the Constitution consistently with the democratic aspirations that lay at the heart of the revolution from which it springs are crucial to its success. In this regard, nothing could better represent the break with the authoritarian past than an effective, efficient and vibrant legislature. Its success will be the measure of the revolution's accomplishment.

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## Notes

<sup>1</sup> Constitution of the Arab Republic of Egypt, 2012, unofficial English translation prepared by International IDEA, available online at <http://constitutionaltransitions.org/wp-content/uploads/2013/05/Egypt-Constitution-26-December-2012.pdf>.

<sup>2</sup> See, for example, “More face charges in Egypt’s escalating free speech and dissent crackdown”, Amnesty International, 3 April 2013, available online at <http://www.amnesty.org/en/news/more-facing-charges-egypts-escalating-crackdown-free-speech-and-dissent-2013-04-03>.

<sup>3</sup> See the contribution in this Working Paper Series, Sujit Choudhry and Richard Stacey, “Semi-presidentialism as a Form of Government: Lessons for Tunisia”, in in Zaid Al-Ali and Richard Stacey (eds) *Consolidating the Arab Spring: Constitutional Transition in Egypt and Tunisia*, Working Paper Series presented by International IDEA and the Center for Constitutional Transitions at NYU Law, June 2013, available online at <http://constitutionaltransitions.org/consolidating-arab-spring/>.

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