

EGYPT'S ELECTIONS: MORE LEGAL ROADBLOCKS

AN ASSESSMENT OF EGYPT'S FRAMEWORK FOR PARLIAMENTARY ELECTIONS UNDER THE NEW CONSTITUTION

EXECUTIVE SUMMARY

Egypt's post-revolutionary transition has been anything but straightforward. Since the first constitutional drafting committee was appointed back in February 2011, every step has been politically or legally challenged by one group or another. Egypt's courts have made numerous rulings on issues affecting the course of the transition. Some, notably the Supreme Constitutional Court's (SCC) ruling of June 2012 on the unconstitutionality of the electoral legislation which led to the dissolution of the People's Assembly, the lower house of parliament, have had a profound influence on the course of the transition.

The new Constitution of December 2012 provides that preparations for elections to the House of Representatives, the People's Assembly's successor, will begin within 60 days of its adoption. In January 2013, the Shura Council, the upper house of Parliament, which has interim authority to legislate, drafted a law amending two of Egypt's myriad election laws.

The new constitutional provisions on elections imply that some far reaching changes to the electoral legislation be adopted, notably as regards electoral districts. In an apparent attempt to lessen the risk that the next parliament is once again dissolved, the new constitution requires the SCC to review the constitutionality of draft election laws. These factors militate against the hasty adoption of revised legislation.

In mid-February, the SCC ruled that five of the articles in the draft law were unconstitutional and requested changes to a further eight articles. The SCC's ruling did not comment on any of the un-amended articles in the laws, meaning that the constitutionality of these provisions, which pre-date the constitution, is not assured.

The Shura Council revised the draft law, but decided not to resubmit the text to the SCC for approval. Instead, the text was published in the Official Gazette, thereby giving it legal force. This raised concerns that if the amended law might not be fully compatible with the SCC's ruling and that therefore the next elections could be declared unconstitutional.

On 21 February, President Morsi announced that the elections would be held in four phases starting on 27 April and ending on 27 June. However, on 6 March 2013, a Cairo Administrative Court ruled that the text of the revised amendments to the election laws must be returned to the SCC to enable the court to review compatibility with the Constitution, and suspended the holding of elections. Subsequently, the State Litigation Authority appealed the court's decision to suspend the elections. The Appeal Court's verdict is expected to be issued on 24 March.

This paper examines the electoral provisions of Egypt's new Constitution, assesses the amendments to the legislation adopted by the Shura Council and examines the role of the SCC. It concludes that:

- The Constitutional provisions bring the country's electoral arrangements closer in line with international standards, although a few key shortcomings remain, notably regarding women's representation and challenging the validity of the presidential election;
- Article 113 of the constitution which requires that the election districts take into consideration "fair representation of population and governorates", while a good provision, it is likely to necessitate a fundamental review of the country's notoriously unequal constituencies to ensure a fair ratio of seats to areas based on resident population, or the adoption of a modified electoral system;
- The submission of the amendments to the legislation to the SCC before the holding of elections may not be sufficient to guarantee the constitutionality of elections, and
- The Shura Council mostly – but not exclusively – changed provisions affected by the adoption of the new constitution. Many changes were of a purely 'technical' nature, but some were significant, including provisions on: the method of allocating seats under the largest remainder system, which could lessen the chances of smaller parties receiving seats; permitting civil society organisations a clearer role in observing elections, and introducing specific provisions on out of country voting.

POLITICAL CONTEXT

Egypt's post-revolutionary transition has been anything but straightforward. Since the first constitutional drafting committee was appointed back in February 2011, every step has been politically or legally challenged by one group or another. Controversially, the first post-revolutionary People's Assembly, elected in late 2011 and early 2012 was dissolved on the eve of the June 2012 presidential election. The Shura Council, Egypt's Upper House, is still at risk of dissolution.¹ The Constituent Assembly, appointed by the People's Assembly, was dissolved once, then reappointed with new members but only survived other legal challenges to its validity when, in late November 2012, shortly before the Supreme Constitutional Court (SCC) was due to issue its ruling, President Morsi unilaterally changed the country's interim constitutional arrangements.² The only institution which has survived without legal challenge is the Presidency. This is probably only due to the fact the 2011 Constitutional Declaration, adopted by the then ruling military council, specifically prohibited the fling of any legal challenges to the presidential election after the result had been declared.

The referendum of December 2012 approved the text of Egypt's new Constitution. However, the opposition, notably the National Salvation Front (NSF), a grouping of leftist, liberal and nationalist parties, has never accepted the legitimacy of the process by which the constitution was drafted and adopted. They claim that President Morsi's decree blocking the courts from issuing a ruling which might have dissolved the Constituent Assembly (CA), the body which drafted the document, was not legal and that the text was forced through by the CA's majority without proper consultation or adherence to procedures. The NSF also has strong objections to the document on substantive grounds. The new constitution is likely to remain the country's most divisive political issue for some time, unless a rapprochement between the major political groups is achieved.

On 26 February, the NSF announced that it would boycott the elections claiming that it is not possible to hold free and fair elections in the current conditions. Specifically, the Front has called for the dismissal of Prime Minister Hesham Qandil's cabinet and the appointment of a national unity government; the dismissal of Prosecutor General Tal'at Abdallah who President Morsi appointed in a controversial and arguably

¹ Anan Al Shwaky, a candidate in the 2012 Shura Council elections of 2011, filed a case calling for the dissolution of the Shura Council claiming the unconstitutionality of some articles of the legislation used to elect the Council. On 3 March 2013, the Supreme Constitutional Court's (SCC) Commissioners began drafting their technical report on the case, in light of the new constitution. The SCC will rule on the case after the Commissioners conclude drafting their report and refer it to the court.

² Article 5 of President Morsi's Constitutional Declaration of 21 November 2012 states: "It is not permissible for any judicial body to dissolve the Shura Council or the Constituent Assembly for drafting the constitution."

unlawful manner in November 2012 and, the appointment of a committee to review the constitution. While the NSF has also called for the revision of the election districts and ensuring adequate independent observation of the polls, its decision to boycott the elections appears more to do with its general opposition to the constitution and government.

ELECTIONS IN THE NEW CONSTITUTION

Following the 25 January 2011 revolution, one of the first actions of the Supreme Council of the Armed Forces (SCAF) was to suspend Egypt's 1971 Constitution. In late March 2011, following the 19 March referendum which approved changes to 11 articles of the 1971 Constitution,³ the SCAF drafted and promulgated a 'Constitutional Declaration', which became Egypt's interim constitution until December 2012.⁴

In late 2012, the Constituent Assembly (CA) faced a race against the clock to complete the draft within the allotted time.⁵ A number of CA members boycotted proceedings at various points inter alia claiming that the Islamist majority not addressing their concerns with specific sections of the draft constitution or following the agreed procedures to draft and debate the draft clauses. The CA also faced numerous impending legal challenges to the validity of its appointment and composition which could have led to its dissolution. However, on 21 November, a constitutional decree issued by President Morsi blocked any court from dissolving either the CA or the Shura Council.⁶ On 30 November the CA completed the text of the draft constitution and deposited it with the President, who, on 1 December, decreed that it would be put to referendum on 15 December.⁷ According to the official results of the referendum the constitutional text was approved by some 64% of voters.⁸ The Constitution was promulgated on 26 December 2012.

This paper does not attempt to assess whether the new constitution in its entirety complies with the country's obligations under international human rights treaties.

However, insofar as elections are concerned, it does provide a better framework for genuine elections than either the 1971 Constitution or the March 2011 Constitutional Declaration. The most significant improvements include provisions regarding:

The right to vote and to stand for election, by:

- Establishing the right of every Egyptian citizen⁹ to stand for election as well as to vote (article 55);¹⁰
- Requiring that every Egyptian citizen is automatically registered to vote (article 55);¹¹
- Allowing for the electoral participation of Egyptians living abroad (article 56);
- Establishing more equal (and generally reasonable) nomination requirements all prospective presidential candidates (article 135);¹²

The equality of suffrage, by:

- Requiring that the division of Egypt's territory into election districts in House of representative elections take into consideration "fair representation of population and governorates" (article 113);

Further enhancing the electoral process by:

- Requiring that the State ensures the safety, impartiality and integrity of electoral processes and that any interference by State institutions in these issues is a criminal offense (article 55);

The independence of Parliament and separation of powers by:

- Dispensing with the right of the President to appoint 10 MPs of the House of Representatives (formerly the People's Assembly) and reducing from one third to ten percent the number of

³ Based on the recommendations of a committee of legal experts formed by the SCAF in February 2011

⁴ The Constitutional Declaration does not include a clause setting out the arrangement to amend its provisions. Nevertheless the SCAF amended two articles in late 2011 and on the eve of the presidential election in June 2012 attempted to introduce far-reaching changes, which were subsequently overturned by President Morsi, who himself adopted three decrees which altered the interim constitutional arrangements.

⁵ The second Constituent Assembly was formed on 13 June, after its short-lived predecessor was dissolved on 10 April 2012 and under the terms of the Constitutional declaration had six months to complete the task of presenting a draft constitution to the President who in turn would put it to referendum.

⁶ On [...] President Morsi issued another constitutional decree on 8 December, after the CA had presented its text to the President, which annulled his decree of 21 November, but provided "Constitutional declarations, including this one, shall not be appealed against before any judicial body. All legal lawsuits on this regard before all courts shall be void" (article 4).

⁷ Subsequently the referendum was held in two phases on 15 22 December 2013.

⁸ Turnout was 33%

⁹ Previously candidates had to have been born of an Egyptian father. However, the requirement for candidates to have a certificate of basic education is potentially at odds with the International Covenant on Civil and Political Rights (ICCPR); see paragraph 15 of General Comment 25 of the ICCPR which states: "Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education [...]".

¹⁰ The 1971 Constitution only established the right to vote.

¹¹ In the recent past this was based on the ID card system (and for out of country electors also on the passport system). However, *automatically* registering *all* citizens using these databases may present practical difficulties as it is estimated that some 2 million otherwise eligible citizens do not have an ID card.

¹² Article 76 of the 1971 Constitution established notoriously unfair presidential candidacy requirements which made it almost impossible for non-party candidates to run for the presidency. The March 2011 constitutional amendments, were a great improvement on article 76, but still established unequal nomination criteria in that it allowed a candidate to be nominated by a party with a single MP, but required non-party candidates or those nominated by a non-parliamentary party to secure the support of 30 MPs or collect signatures from 30,000 citizens. According to article 135 of the new constitution, presidential candidates must have support from at least 20 elected MPs (House of Representatives and/or Shura Council), or endorsements from at least 20,000 citizens, in at least 10 governorates, with a minimum of 1,000 endorsements from each governorate.

members of the Shura Council that he may appoint (Article 128);¹³

Improving the opportunity of all Egyptians to stand for elected office on equal terms, by:

- Defining the term ‘workers’ in a much less proscriptive manner than it was previously defined (in law), thereby making it easier for all citizens to stand as a candidate with the designation of a ‘worker’ under the 50% quota for ‘workers and farmers’.¹⁴
- Specifying that for the first legislative elections to be held following the adoption of the Constitution “Two-thirds of the seats are to be won by a list-based electoral system and one-third by individual candidacy, *with parties and independent candidates allowed to run in each.*”¹⁵ The previous law did not allow independent candidates to run in the PR-list component, which can be considered as a restriction of their political rights¹⁶ and was the main reason that the parliament was dissolved. Hence, although it is not common to include the election system in a country’s constitution, in this case it is prudent, at least as an interim arrangement.¹⁷

Some positive changes will however only be implemented after the next parliamentary elections:

- The establishment of a single,¹⁸ full-time¹⁹ National Electoral Commission (NEC)²⁰ with exclusive responsibility²¹ for managing²² all types of elections and removing the *ex officio* appointment of specific judges to the NEC while retaining a

¹³ However, it is debatable whether the President should appoint any members of the Shura Council given that the new Constitution provides legislative role for the Council when the House of Representatives is dissolved.

¹⁴ The Constitution defines a worker as “whoever works for an employee in exchange of a pay or salary.”

¹⁵ The new constitution avoids the term ‘party’ list as this could have restricted participation in the list system to political parties, which was one of the main reasons that in June 2012 the SCC ruled the previous election law to be unconstitutional.

¹⁶ See: “What Electoral System for Egypt”, which elaborates on the SCC’s ruling to dissolve the People’s Assembly, http://www.democracy-reporting.org/files/bp_32_egypt_electoral_systems.pdf

¹⁷ Article 224 of the new constitution retains the provision giving the legislator the latitude to decide on whether to institute an electoral system based on individual candidates or electoral lists a combination of the two or any other electoral system in subsequent elections.

¹⁸ Previously two bodies were formed with separate mandates to ‘supervise’ parliamentary elections/referenda and presidential elections.

¹⁹ According to article 209 of the Constitution, commission members work exclusively for the commission for a period of one to six years.

²⁰ The establishment of the NEC may require the adoption of a new law or adopting further amendments to the Law on the Exercise of Political Rights (LEPR). The former is preferable.

²¹ Previous legislation granted the Ministry of Interior some responsibilities in electoral matters.

²² The term ‘manage’ to describe the function of the NEC better reflects the accepted role of an electoral commission than the previous term ‘supervise’.

judicial composition for the NEC (article 209).²³ It is also positive that the NEC has “input into the division of constituencies” (article 208);²⁴

- Dispensing with the workers and farmer quota – which created unequal suffrage for persons not of these categories. The cancelling of the quota will make it easier to allocate seats to governorates on a fairer basis.
- Allowing decisions of the NEC for all types of elections²⁵ except local elections to be challenged at the Supreme Administrative Court, a provision which should enhance access to effective legal remedy in the case that a citizen’s rights have been violated (article 211);²⁶

Nevertheless the constitution contains some shortcomings in the electoral arrangements, of which some are serious, most notably:

- Prohibiting the filing of any challenge against the final results of a referendum or a presidential election after they have been announced and requiring that such results are announced within a period not exceeding eight days²⁷ from the balloting date (article 211);
- Dispensing with a provision of the 1971 Constitution that the election system may “include a minimum limit for women’s participation in both houses of parliament”. Without a constitutional basis, any legislative measures to enhance women’s parliamentary representation could be considered by the SCC as unconstitutional,²⁸ and
- Requiring that a presidential candidate must be an Egyptian citizen *born to Egyptian parents*, and cannot be married to a non-Egyptian (article 134);²⁹

Some of the constitution’s provisions on elections are not easy to categorise in ‘positive’ or ‘negative’ terms because they could have both a beneficial and/or a detrimental effect. For example:

²³ The *ex officio* appointment of members of the old Presidential Election Commission (PEC) and HEC could cause political considerations to influence the appointment of judges to specific posts.

²⁴ The current arrangement, whereby the parliament decides on election districting, means that decisions could be taken on political rather than objective grounds.

²⁵ Appeals against NEC decisions on local elections are filed with the Administrative Court.

²⁶ The previous legal framework was not clear whether the decisions of the High Election Commission (HEC) could be challenged and specifically did not permit any challenges to the decisions of the Presidential Election Commission.

²⁷ Meaning the NEC may have insufficient time to properly review all challenges before it declares the results.

²⁸ In 1986, the SCC found the provision of the law that all party lists contained at least one women candidate to be in conflict with the principle of equality between men and women and therefore unconstitutional. However, since that time Egypt has ratified the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), which allows for the use of temporary special measures, including quotas for women MPs.

²⁹ It is possible that these requirements could, under the International Covenant on Civil and Political Rights (ICCPR) to which Egypt is a party, be considered as ‘unreasonable’ restrictions on the right to stand for election.

- The provision that the NEC shall delegate overseeing of polling to members of the judiciary and judicial bodies for at least 10 years from the date the Constitution is ratified (article 210) reflects Egyptians' lack of confidence in other state institutions to administer elections. However, as in previous elections since 2000³⁰ it creates a problem because there are not enough judges to staff polling stations and hold the elections on a single day (or in a single phase).³¹ Another potential flaw is that while the Constitution requires polling to be conducted under judicial supervision, there is no provision specifically obliging judges to participate as polling supervisors. Therefore, in effect, judges can *de facto* obstruct the holding an election or a referendum, by not 'volunteering';
- Article 177 requires that draft laws regulating the exercise of political rights and presidential,³² legislative or local elections be deposited with the Supreme Constitutional Court (SCC), to determine their compliance with the Constitution prior to dissemination (see commentary below). The aim of this article appears to be to prevent a situation where the SCC declares an election unconstitutional on the grounds of the legislation. However, requiring constitutional review may not be sufficient to prevent the Court declaring 'an election' unconstitutional because election commissions adopt regulations to apply the law. In effect, the regulations establish specific procedures which could impact on citizens' electoral rights. The constitutionality of these documents will not be reviewed by the SCC.³³ Moreover, the provision does not necessarily assure that future elections will not be declared unconstitutional because other laws have a bearing on elections e.g. Media Laws or Laws on Assembly, as do regulations of the election commission. Lastly, it is possible that the SCC could deem it admissible to file a constitutional challenge to the conduct of an election (rather than the constitutionality of the law);
- A further problem is that the constitution only requires that '*draft laws*' be deposited with the Court rather than the full legal text. As the previous election laws have been recycled many times³⁴ it is

possible that there are articles of these 'old' laws that were not amended in the last cycle of amendments that are in conflict with the new constitution.

Other articles relevant to elections include:

Article 228 which states: "The High Elections Commission, existing at the time this Constitution comes into effect, shall undertake the full supervision of the first parliamentary elections." From reading the article in conjunction with article 210, it is not entirely clear whether judicial supervision is required for the next parliamentary elections.³⁵

Article 232 which bans 'leaders' of the dissolved National Democratic Party, Egypt's former ruling party, from engaging in 'political work' and specifically prohibits them from running in presidential or legislative elections for 10 years from the date the Constitution was adopted (26 December 2012).³⁶ Conducting processes to hold accountable members of former authoritarian regimes following their ouster are fairly common but are criticised where they do not conform to the legal principles of due process, non-retroactivity, and individual as opposed to collective responsibility.

AMENDMENTS TO THE LEGAL FRAMEWORK

The Constitution does not per se require the adoption of a *new* election legal framework prior to holding the elections, but it is implicit that the *old* legislation used should be compliant with the constitution. The Shura Council decided to adopt a law amending the two old laws relevant for parliamentary elections: The Law on the Peoples' Assembly (LOPA) of 1972 and the Law on the Exercise of Political Rights (LEPR) of 1956. The Shura Council mostly – but not exclusively – changed provisions affected by the adoption of the new constitution. Many changes were of a purely 'technical' nature, but some were significant, including:

- Dispensing with the need to adopt a special law on election districts (the districts are now set out in a schedule annexed to the LOPA). It is worth noting that had a separate law on districts been adopted, it would also have required a review of its constitutionality;
- Removal of the 0.5% national threshold and replacing it with a provision that in order to be eligible to participate in the allocation of mandates a list (i.e. a list of candidates) must receive votes amounting to 1/3 of the number of votes required to win one seat³⁷ (the quotient is the number of

³⁰ The 2010 parliamentary elections were not subject to judicial supervision, and were widely regarded to have been among Egypt's most flawed electoral processes. Presidential elections, other than the 2012 contest was not subject to judicial supervision.

³¹ For the 2012 presidential election polling was held over two consecutive days but the numbers of registered voters per voting centre rose significantly and serious congestion was reported.

³² The 1971 Constitution and the Constitutional Declaration required the SCC to determine the compliance of the presidential election law with the Constitution but did not require this for other election laws.

³³ After the NEC is formed its decisions can be appealed to the Administrative Court, which could refer the matter to the SCC. However, the SCC rarely issues its rulings expeditiously.

³⁴ The Law on the Exercise of Political Rights (LEPR) was first adopted in 1956.

³⁵ Because article 210 relates to the NEC and states: "[...] the Commission shall delegate [...]"

³⁶ The Constitution defines leadership as including "everyone who was a member of the Secretariat of the Party, the Policies Committee or the Political Bureau, or was a member of the People's Assembly or the Shura Council during the two legislative terms preceding the 25 January revolution."

³⁷ According to the LOPA, seats are allocated on the basis of the largest remainder system after whole mandates have been allocated.

votes required to win one whole seat).³⁸ This would amount to approximately 8.33% of the votes in a 4 seat district. Essentially this change creates a new allocation system as the logic of the “largest remainder system”, the system hitherto used in Egypt, is that seats are allocated under the method regardless of the size of the remainder. The HEC is responsible for calculating the allocation of seats to the lists with ‘largest remainders’, but the law provides no guidance how the allocation of mandates will be re-calculated in the event that a list with less than 0.33% of a quotient has one of the largest remainders i.e. which parties will be allocated the seat (or seats) instead.

- Allowing representatives of “Civil Society Organisations” to monitor the elections.³⁹
- Adopting a specific provision on out of country voting (previously this was provided for in a *lex specialis* 130/2011). Now, all Egyptians living abroad with an ID card⁴⁰ or valid passport have the right to vote. Polling stations abroad may have no more than 1,000 registered voters. Polling committees would be formed from among diplomatic staff.
- Relieving the Mol of any role in approving candidate applications and introducing a role for the Supreme Judicial Council (SJC) in the nomination and appointment procedure for members of governorate level electoral committees;
- Deleting all references to “party list” and replacing it with “list” to reflect that lists can be composed in part or in full by non-party (independent) candidates;
- Amending the requirement (article 5.5) that candidates had to have completed their military service such that those who had not complete it due to political detention or had not been prosecuted for not having completed it, are not barred from running;
- Removing text which required the forfeiture of a MPs mandate in the event that he/she “changed his party affiliation or became independent”.⁴¹
- Providing that in the event that a sole list is registered, it must receive a number of votes equivalent to 2% of the number of registered voters

in the districts to be elected. Previously this figure was 10%.⁴²

- Stipulating that polling takes place over 2 days and extending polling hours on each day by one hour;
- Providing that vote counting takes place in polling stations (previously it was at the level of the General Committee)⁴³ and that the head of the polling station must announce the total number of votes, the number of invalid votes, and the number of votes for each list / candidate after the count is completed.⁴⁴
- Specifying that the results are announced by the HEC after the conclusion of each phase.⁴⁵
- Alters the provisions regarding candidate representatives, creating uncertainty as to whether they can be deployed at both polling station level and general committee level.⁴⁶
- Providing that (almost) all elected MPs must be full-time members of the House.⁴⁷

An amendment that an election list must name at least one woman in the top half of its list was scrapped before the text was submitted to the SCC.⁴⁸

The amendments also reflect the future redundancy of some provisions due to stipulations of the constitution e.g. as regards the election system, district boundaries, the HEC and the workers and farmers quota. Other clauses make provision for future innovation of some aspects of elections in future e.g. the “gradual introduction of *automated* or electronic voting technology”.⁴⁹

It is likely that the whole electoral framework will again be revised after the elections, and in view of the breadth of the changes required, it could be that the legislation is finally replaced with a new law covering all types of elections. The Shura Council Law will also require amending (and could contain a new election system) and there is likely to be a new law on the NEC (currently the provisions on the HEC are set out in the LEPR).

³⁸ In the 2011-12 elections, ten seats were awarded to parties with remainders of less than 0.33. Although 4 seats concerned parties whose remainder was less than 0.33 of a mandate, but which received at least one mandate in the district e.g. Noor received 5 mandates in Sohag but was entitled to 4.269 seats. Thus it won its fifth mandate with a remainder of 0.269.

³⁹ Previously there was a ‘door’ to observation (LEPR art 3 bis F), but it was not ‘guaranteed’

⁴⁰ Providing that he had an ID card issued previously i.e. was included on the register ‘in country’

⁴¹ It is potentially significant that the new constitution states “A Member of a Legislative House is unconditionally representative of the population as a whole” (art 85). One could infer from this that it would not be permissible for an elected MP to lose his / her mandate because she is a representative of the people, i.e. not a party.

⁴² Thus, a widespread election boycott is less likely to actually have an effect on the election outcome.

⁴³ The legislation for Shura Council elections and for presidential elections already provided for vote counting at polling station level.

⁴⁴ The same article, LOPA article 18 bis, only requires the head of the General Committee, which have responsibility for the multi-member districts and two-member individual candidate districts, to announce the votes for each candidate and list rather than announce the total number of votes and invalid votes.

⁴⁵ This clause also means that now the law clearly foresees the possibility of phased elections.

⁴⁶ Article 24, paragraph 5 states: “in the case of House of Representatives or Shura Council elections, each individual candidate and list representative shall have the right to deploy an agent, registered in the voters’ register at the General Committee’s register, to represent him in the polling centre or the general committee.”

⁴⁷ Previously a range of exceptions were made, allowing MPs to carry on their previous occupation in addition to being an MP.

⁴⁸ The LOPA, as previously, still requires that there is one woman on each election list.

⁴⁹ Article 3 bis

EQUALITY REVIEW OF THE AMENDMENTS BY THE SUPREME CONSTITUTIONAL COURT (SCC)

The Constitution (article 177) provides that:

“The President of the Republic or the Speaker of the House of Representatives shall present draft laws regulating the exercise of political rights and presidential, legislative or local elections before the Supreme Constitutional Court, *to determine their compliance with the Constitution* prior to dissemination. The Court shall reach a decision in this regard within 45 days from the date the matter is presented before it; otherwise, if the Court does not issue a decision, the proposed law shall be considered approved.

If the Court deems one or more parts of the text non-compliant with the provisions of the Constitution, *its decision shall be implemented*.

The laws referred to in the first paragraph are not subject to the subsequent revision stipulated in Article 175 of the Constitution” (*emphasis added*).⁵⁰

The aim of the article appears to be to avoid (or at least lessen the risk) that the SCC declares part of the election legislation unconstitutional after an election has been held. This has occurred on four previous occasions (1987, 1990, 2000 and 2012) and on three occasions led to the dissolution of the People’s Assembly (1987, 1990 and 2012).

While aim of the provision is positive, the process could cause a delay in adopting the legislation. In particular, article 177 creates a tension with article 229 which requires that the procedures for the elections to the upcoming House of Representatives shall begin within 60 days of the new Constitution coming into effect;⁵¹ although the phrase “the procedures for the election” is somewhat ambiguous.⁵²

The draft text was submitted by the Shura Council to the SCC on 20 January and the Court issued its ruling on 17 February. It found that the following provisions were inconsistent with the constitution:

- The definitions of ‘worker’ and ‘farmer’;⁵³
- The deletion of the provision that MPs lose their mandate if he/she changes his party affiliation or becomes independent i.e. now MPs will (once

⁵⁰ Article 175 provides that “The Supreme Constitutional Court is an independent judicial body, seated in Cairo, which exclusively undertakes the judicial control of the constitutionality of the laws and regulations. The law defines other competencies and regulates the procedures to be followed before the court.”

⁵¹ As the constitution was adopted on 26 December, “the procedures” should have begun by 24 February.

⁵² In any case the timing of all election phases is not set out clearly in the law.

⁵³ The draft law stated that a worker “relies mainly on income from his physical or mental work in agriculture, industry or services”, whereas the constitution makes no such requirement.

again) lose their mandate if they change parties etc;⁵⁴

- The districting and allocation of seats based on the table submitted by the Shura Council;⁵⁵
- The provision that MPs of the disbanded NDP are ineligible to stand for election for 10 years if they had been elected in *either of the last two elections*. The Court ruled that only those elected *in both* the last two elections (2005 and 2010) were ineligible; and,
- That diplomats rather than members of judicial bodies can supervise polling abroad.⁵⁶

The court also instructed the Shura Council to make changes to eight other articles, including:⁵⁷

- Specify that the status of a candidate (party nominated or independent) is written next to his/her name (on the ballot);
- Abrogate the clause in the draft law that allowed candidates “exempted for from performing their military service according to the provisions of the law” to stand for election.
- In the context of election observation, define ‘civil society organisation’, to avoid non-authorized organisations having a right to monitor polling, and conditioning the right to monitor the election on prior authorisation by the HEC;
- Introduce limits to the number of organisations that can observe at polling stations (to protect constitutional rights to candidacy and to vote);
- Revise the requirement that the indelible ink used to mark voters’ fingers should last 24 hours to take account of the change allowing for 2 days of polling. Specifically, the SCC required the insertion of text authorising the HEC to “design appropriate measures to achieve the purpose of enforcing the constitutional right to equal voting (one man one vote)”, i.e. to prevent multiple voting.

The SCC’s ruling did not comment on any of the un-amended articles in the laws, meaning that the constitutionality of these provisions, which pre-date the constitution, is not assured.

⁵⁴ There is no clear guidance on this issue in international electoral standards. However, in general it is taken that an elected candidate is accountable to the voters for his/her actions, to a greater degree than the party in whose name he / she was elected. To an extent the election system is a factor in that it is far easier in a majoritarian based system, particularly where one candidate is elected to say that the elected candidate ‘owns’ the seat. It is slightly less clear in list based systems.

⁵⁵ The table listed the districts used for the 2011-12 People’s Assembly elections.

⁵⁶ This is linked to article 210 which requires judicial supervision of all elections for ten years after the adoption of the constitution.

⁵⁷ The other changes requires were relatively minor and concerned: allowing the Administrative Court to refer election cases filed with the court to its Commissioners; adding the text that to be eligible to stand for election, candidates must be an Egyptian citizen “enjoying his/her civil and political rights”, and stipulating that polling data announced by polling and General committees were not ‘results’ but rather ‘preliminary statistical data’.

While almost all of the changes required by the SCC were relatively easy to address, some were controversial e.g. the provision requiring male candidates to have completed his military service, due to the practice under the previous regime of excluding Islamists from performing this service.⁵⁸ The exception is the issue of districting which is not easy to deal with in the short term.

DISTRICTING AND ALLOCATION OF SEATS (MANDATES)

The constitution stipulates that: “the division of districts with the *consideration of fair representation of population and governorates* shall be defined by law”, (article 113). The text of article 113 is somewhat ambiguous regarding whether “population and governorates” constitutes one or two criteria i.e. does a ‘fair representation’ apply just to the governorate level seat allocation or also to the two types of district (multi-member constituencies for the list system and two-member districts for the individual candidate system) that are established within governorates? The SCC ruling clarifies that population and governorates are “two criteria” i.e. a fair representation of the governorates *and* a fair representation of population:

“A fair representation of the population means that an MP *in any district* shall represent the same number of voters equal to other districts. This principle does not mean that the number of those represented by each member should be mathematically absolutely equal, because of the impossibility of practically achieving that, but it is sufficient for this principle that the difference between the numbers and the averages of the numbers be of those represented by the member on the scale of the country to be within ‘reasonable limits’.”⁵⁹

However, in its original submission to the SCC, the Shura Council simply deposited a table showing the number of seats allocated to the 27 governorates. The text of the law did not set out criteria to determine the allocation of seats to governorate level or criteria which would guide the delineation of governorates into multi-member districts and two member districts. Nor did it establish a permitted deviation from the mathematical average in the ratio of a multi-member district’s population size to the number of seats it is allocated or set criteria to determine how to deal with the governorates with small populations. Without establishing criteria it would be hard for the SCC to if any deviations from the averages are ‘reasonable’.

THE GOVERNORATES

Regarding the governorates, the SCC stated that: “fair representation [...] requires that each governorate in the state

is represented in the House of Representatives regardless of the number of its population”. Its ruling, pointed to two anomalies in the table of seat allocation to governorates submitted by the Shura Council:

- Damietta has less population but had twice as many seats as Aswan;
- South Sinai (with a population of 160,647) was allocated 6 seats while Luxor (with a population of 1,079,219) was also allocated six seats.

The first anomaly is relatively easy to address: e.g. allocated additional seats to Aswan (or reduce the number of seats allocated to Damietta). However the second anomaly is very hard to remedy because:

- i. The legislator decided to respect the 50% quota of workers and farmers by establishing two-seat districts for the individual candidate system (with workers and farmers guaranteed to win at least one of the seats).
- ii. The LOPA requires that seats are allocated to *each governorate* on the basis the two-thirds, one-third ratio i.e. not only at the national level.⁶⁰

These arrangements mean seats are allocated to governorates in multiples of six (because the minimum number is one ‘two member district’ and one multi-member district of four seats). This makes it very hard to achieve a mathematically fair seat allocation at governorate level and practically impossible for small governorates such as South Sinai, which, based on its population criteria, is ‘entitled’ to less than one seat.⁶¹ However, the constitution⁶² does not specifically require that the PR-list system component be based on multi-member districts at governorate level – this was simply the system chosen in 2011-12 and subsequently replicated by the Shura Council in 2013.⁶³

The Shura Council, addressed the SCC’s instruction regarding districting simply by adding 48 extra seats to ‘under-represented’ governorates: Giza (12 extra), Cairo (12 extra), Alexandria (6 extra), Qaliubiya (6 extra), Sharkia (6 extra) and Aswan (6 extra). One problem faced in allocating seats is the reliability of current population data. The official voter registration data from the December 2012 constitutional referendum suggests that a number of governorates are still over or underrepresented even after the Shura Council’s

⁶⁰ LOPA, Article 3

⁶¹ In addition to South Sinai, there are six other governorates with a relatively small population size El Wadid el Gadid, Matrouh, North Sinai, Red Sea, Suez and Port Said. A mathematically ‘fair’ allocation would calculate a governorate’s entitlement and round up or down to the nearest number divisible by six. To achieve such an allocation, the parliament would have to have several thousand members.

⁶² Article 231 states “The first legislative elections following the adoption of this Constitution shall be held in the following manner: Two-thirds of the seats are to be won by a list-based electoral system and one-third by individual candidacy, with parties and independent candidates allowed to run in each.”

⁶³ There appears to be nothing precluding the adoption of a nationwide constituency. This would address the question of ‘equal voting weight’, but would present serious logistical challenges regarding the size of the ballot paper if a large number of lists were to be registered, which could arise as lists of non-party candidates are now eligible.

⁵⁸ The Constitution does not mention military service, and there is no constitutional requirement linking completion of military service to eligibility to stand for election.

⁵⁹ Translation of the third part of the Supreme Constitutional Court’s ruling.

reallocation.⁶⁴ A table with the revised allocation of seats to governorates made by the Shura Council can be found at Annex A.

The addition of the new seats raised the size of parliament from 498 to 546. It based its decision on 11 allocation criteria developed by the Ministry of Justice,⁶⁵ the first five of which are derived directly from constitutional articles⁶⁶ and others based on the SCC's ruling e.g. contiguity of territory forming an electoral district.⁶⁷ However, the legal basis and rationale for some criteria are less clear, e.g. that:

1. No governorate should lose any seat previously obtained in the recent parliamentary elections;
2. Every electoral district should contain one or more unit of full administrative status such as a "police division" without splitting;⁶⁸
3. The number of the allowed members for the lists constituencies is 4, 8 and 12 members,⁶⁹ and
4. The districting shall take into account family and tribal conflicts.

While the addition of seats to five districts required the redrawing of district boundaries in the six governorates which received additional seats, it appears that the Shura Council retained the internal governorate districting used in the 2011-12 elections for 21 governorates. This left the significant imbalances in the population to seat ratios in many of the multi-member and two-member districts.⁷⁰

TWO-MEMBER DISTRICTS

For the 2011-12 elections, the legislator formed multi-member districts by combining two-member districts (TMDs) to form multi-member districts (MMDs) of 4, 6, 8, 10 and 12 seats. This is an important methodological point because it means that the TMDs are a potential limiting factor in ensuring MMDs have broadly equal populations.

⁶⁴ Based on voter registration data for the 2012 referendum, for example, Cairo, Alexandria, Giza, Beheira, Daqahliya, Menia and Qaliubiya are under-represented (by 4-6 seats) and Suhag is over-represented by 5 seats.

⁶⁵ See: <http://www.almasryalyoum.com/node/1486786>

⁶⁶ The Constitution, articles 113, 231, 229

⁶⁷ The SCC required that: "the division of districts should be adjusted so as to be appropriate to the number of the population in each district into which the country is divided bearing in mind the [need for] territorial contiguity [of districts]. Division of the districts should not be drawn in an arbitrary manner without taking into account the public interest".

⁶⁸ In Europe, the Venice Commission of the Council of Europe has stated when defining election district boundaries, "The geographical criterion and administrative, or possibly even historical, boundaries may be taken into consideration", Code of Good Practice in Electoral Matters, CDL-AD (2002) 23

⁶⁹ The justification for the third criterion is not known but appears unnecessary; allocating multi-member districts 6, 10, 14 etc. seats in the governorates with more than multi-member district could help achieve a fairer allocation of seats and need not be in conflict with the law.

⁷⁰ While the revised seat allocation to the multi-member districts (PR list) and the two-member districts has been publicly released, it did not include the number of citizens (or registered voters in each district). Therefore the following analysis is based on the number of registered voters in the election districts during the 2011-12 People's Assembly elections.

There are some governorates where, based on the 2011-12 voter registration data,⁷¹ the voter populations of TMDs within a governorate vary considerably:⁷²

- Assiut district No. 4 had 318,564 registered voters whereas district No. 2 had 726,942 registered voters;
- Gharbia district No. 4 had 402,962 registered voters whereas district No. 1 had 714,534 registered voters, and
- Menoufiya district 4 had 416,562 registered voters whereas district No. 1 had 640,225 registered voters.

A fairly large number of TMDs within the same governorate vary in size by +/- 15% from the average size of TMDs within a governorate. A table showing selected governorates can be found at Annex B.

MULTI-MEMBER DISTRICTS

The allocation of seats to some of the 2011-12 MMDs was anomalous, including cases where (based on voter registration data for the 2011-12 elections), a MMD with a higher number of registered voters than another MMD in the same governorate was allocated less seats e.g. Alexandria first district had 1,664,657 registered voters (and following the recent change now has 8 seats) whereas Alexandria second district had 1,639,259 registered voters but is allocated 12 seats.⁷³

There are also some cases where, within a governorate, MMDs of very different voting population sizes are allocated the same number of seats, or MMDs with similar numbers of registered voters are allocated different seat totals e.g. Assiut first district has 1,226,591 registered voters while Assiut second district has 845,288, while both are allocated 8 seats and Qena first district has 741,731 registered voters and was allocated four seats while Qena second district had 843,460 registered voters but was allocated 8 seats.

DEVELOPMENTS AFTER THE RULING OF THE SUPREME COURT

The Constitution requires that once the SCC has issued a ruling on the constitutionality of the draft law "its decision shall be implemented". The Shura Council modified all articles of the draft law to which the SCC ruling referred, but decided not to re-deposit the revisions with the SCC. This meant that there was no formal confirmation by the SCC that the final text complied with its ruling.

⁷¹ The analysis is not based on population totals as this data for the election districts is not available.

⁷² This data excludes the six governorates which received additional mandates in February 2013 as the TMDs and MMDs boundaries were modified and population data for them has not been publicly released.

⁷³ In this case, it may be been preferable and possible even within the limits set by the LOPA to allocate each MMD ten seats.

ABOUT DEMOCRACY REPORTING INTERNATIONAL

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This Shura Council's decision to bypass the SCC was controversial, and different opinions were expressed as to whether the Shura Council was legally obliged to resubmit the text.⁷⁴ A member of the SCC stated that, notwithstanding article 177, if the texts of the draft laws are not re-deposited then the Court would consider an appeal against the law on constitutional grounds as admissible.⁷⁵

The text of the Law amending the LOPA and LEPR was published in the Official Gazette on 21 February 2013,⁷⁶ thereby giving it legal force. Shortly thereafter On 21 February, President Morsi announced that the elections would be held in four phases starting on 27 April.

On 6 March 2013, the Administrative Court ruled that the text of the revised amendments to the election laws must be returned to the SCC to enable the court to review compatibility with the Constitution and suspended the President's Decree scheduling the elections. Initially, it appeared that the President would not appeal the court's ruling but subsequently the State Litigation Authority (SLA) filed an appeal against the court's ruling to suspend the elections.⁷⁷ The Appeal Court is due to give its ruling on the appeal on 24 March.

In parallel developments, the National Salvation Front (NSF), a political grouping of opposition, announced on 26 February that it would boycott the elections claiming that it is not possible to hold free and fair elections in the current conditions. Specifically, the NSF has called for the dismissal of Prime Minister Hesham Qandil's cabinet and the appointment of a national unity government; the dismissal of Prosecutor General Tal'at Abdallah who President Morsi appointed in a controversial and arguably unlawful manner in November 2012 and, the appointment of a committee to review the constitution. While the NSF has also called for the revision of the election districts and ensuring adequate independent observation of the polls, its decision to boycott the elections appears more to do with its general opposition to the constitution and government. The NSF welcomed the court's decision.

At the time of writing, it is not clear when the SCC will issue its opinion on the decision of the Administrative Court to refer the law back to the SCC, if and when the SCC will review the law and ultimately when the parliamentary elections will be held.

⁷⁴ There is a degree of ambiguity regarding the legal implications of the last paragraph of article 177, which states, "the laws referred to in the first paragraph [i.e. the election laws] are not subject to the subsequent revision stipulated in Article 175 of the Constitution" in terms of its relation to the requirement in the second paragraph to deposit election laws with the SCC. However, in the event that the SCC finds that the Shura Council did not comply with its initial instructions regarding amending the provisions of draft law then paragraph 3 of article 175 could well be regarded as redundant.

⁷⁵ See: <http://www.el-balad.com/405432>

⁷⁶ The text of the Law amending the LOPA and LEPR were reissued on 26 February to correct a typographical error.

⁷⁷ But the SLA did not challenge the court's decision to refer the laws back to the SCC.

ANNEX 1 - ALLOCATION OF SEATS TO EGYPT'S GOVERNORATES BASED ON THE NUMBER OF REGISTERED VOTERS IN THE DECEMBER 2012 CONSTITUTIONAL REFERENDUM

Rank (by Population)	Governorate	Registered Voter Population	No. of MMDs	No. of TMDs	No. of MMD seats	No. of TMC seats	Total	Voter Population per seat	'Ideal' No. seats per population	More or less seats than 'ideal'	Percentage of 'Ideal'
1	Cairo	6,563,752	4	11	44	22	66	99,451	71	-5	93%
2	Giza	4,262,272	3	7	28	14	42	101,483	46	-4	91%
3	Daqahliya	3,691,143	3	6	24	12	36	102,532	40	-4	90%
4	Sharqiya	3,483,914	2	6	24	12	36	96,775	38	-2	95%
5	Alexandria	3,303,916	2	5	20	10	30	110,131	36	-6	84%
6	Behera	3,198,626	2	5	20	10	30	106,621	35	-5	87%
7	Gharbiya	2,918,551	3	5	20	10	30	97,285	32	-2	95%
8	Menia	2,644,830	2	4	16	8	24	110,201	29	-5	84%
9	Qaliubiya	2,583,418	2	4	16	8	24	107,642	28	-4	86%
10	Suhag	2,323,098	2	5	20	10	30	77,437	25	5	119%
11	Menoufiya	2,215,544	2	4	16	8	24	92,314	24	0	100%
12	Assuit	2,071,879	2	4	16	8	24	86,328	22	2	107%
13	Kafr el-sheikh	1,863,834	2	3	12	6	18	103,546	20	-2	89%
14	Qena	1,585,191	2	3	12	6	18	88,066	17	1	105%
15	Fayoum	1,545,556	2	3	12	6	18	85,864	17	1	107%
16	Beni Suef	1,415,226	2	3	12	6	18	78,624	15	3	117%
17	Aswan	850,648	1	2	8	4	12	70,887	9	3	130%
18	Damietta	849,235	1	2	8	4	12	70,770	9	3	130%
19	Ismailia	696,351	1	1	4	2	6	116,059	8	-2	79%
20	Luxor	666,254	1	1	4	2	6	111,042	7	-1	83%
21	Port-Said	437,134	1	1	4	2	6	72,856	5	1	127%
22	Suez	378,917	1	1	4	2	6	63,153	4	2	146%
23	Red Sea	221,011	1	1	4	2	6	36,835	2	4	250%
24	North Sinai	203,346	1	1	4	2	6	33,891	2	4	272%
25	Matrouh	199,607	1	1	4	2	6	33,268	2	4	277%
26	El Wadi el Gadeed	140,527	1	1	4	2	6	23,421	2	4	394%
27	South Sinai	60,496	1	1	4	2	6	10,083	1	5	915%
Total		50,374,276	48	91	364	182	546		546	0	100%

Average number of registered voters per seat: 92,261

ANNEX 2 - OVERVIEW OF THE TMDs IN SELECTED GOVERNORATES

Governorate	MMD No.	Voting Population (2011-12) '000s	% of total voting population	Governorate over / under represented (%)	TMD No.	No. of Registered Voters	TMD as a % of the national average	Voting Weight of the TMD as a % of the Governorate average
Assiut 1	MMD 1	1,226,591	2.43%		TMD 1	499,649	82%	96%
					TMD 2	726,942	120%	140%
Assiut 2	MMD 2	845,288	1.68%		TMD 3	526,724	87%	102%
					TMD 4	318,564	52%	62%
Total Assiut		2,071,879	4.11%	117%		2,071,879		
Beheira 1	MMD 1	2,074,330	4.12%	95%	TMD 1	668,074	110%	104%
Beheira 2					TMD 2	776,278	128%	121%
Beheira 2					TMD 3	629,978	104%	98%
Beheira 2	MMD 2	1,124,296	2.23%	95%	TMD 4	609,171	100%	95%
					TMD 5	515,125	85%	81%
Total Beheira		3,198,626	6.35%	95%		3,198,626		
Dakhalia 1	MMD 1	1,396,381	2.77%	99%	TMD 1	701,487	116%	114%
					TMD 2	694,894	114%	113%
Dakhalia 2	MMD 2	1,050,946	2.09%	99%	TMD 3	497,167	82%	81%
					TMD 4	553,779	91%	90%
Dakhalia 3	MMD 3	1,243,816	2.47%	99%	TMD 5	741,320	122%	121%
					TMD 6	502,496	83%	82%
Dakhalia Total		3,691,143	7.33%	99%		3,691,143		
Gharbia 1	MMD 1	1,371,027	2.72%	104%	TMD 1	714,534	118%	122%
					TMD 2	656,493	108%	112%
Gharbia 2	MMD 2	1,547,524	3.07%	104%	TMD 3	583,299	96%	100%
					TMD 4	402,962	66%	69%
					TMD 5	561,263	92%	96%
Gharbia Total		2,918,551	5.79%	104%		2,918,551		
Menoufiya 1	MMD 1	1,192,036	2.37%	110%	TMD 1	640,225	105%	116%
					TMD 2	551,811	91%	100%
Menoufiya 2	MMD 2	1,023,508	2.03%	110%	TMD 3	606,946	100%	110%
					TMD 4	416,562	69%	75%
Menoufiya Total		2,215,544	4.40%	110%		2,215,544		
Suhag 1	MMD 1	1,393,141	2.77%	131%	TMD 1	574,259	95%	124%
					TMD 2	403,042	66%	87%
Suhag 2	MMD 2	929,957	1.85%	131%	TMD 3	415,840	69%	90%
					TMD 4	509,363	84%	110%
					TMD 5	420,594	69%	91%
Suhag Total		2,323,098	4.61%	131%		2,323,098		

Total Voting Population for 2011/12 People's Assembly Elections:

50, 374,276

Average voter population size of a TMD:

606,919