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The Constitution of the Arab Republic of Egypt, 2012: Assessing Horizontal Power Sharing Within a Semi-presidential Framework

Sujit Choudhry[*] and Richard Stacey[†]

1. Introduction

The 2012 Constitution of the Arab Republic of Egypt came into force on 26 December 2012. The Constitution was recently suspended. Early indications are that there will be amendments made to the 2012 Constitution. This memorandum aims to offer a brief analysis of those provisions of the 2012 Constitution that established the horizontal distribution of powers between the legislature, president and prime minister.

2. Principles of constitutional design

In the pre-Arab Spring era, countries in the Middle East and North Africa (MENA) region were dominated by a strong president who centralized political power, dominated political processes, and established a one-party state in which the president's political allies controlled the state bureaucracy and security services. Constitutional rules facilitated these constitutional failures by failing to limit presidential power, undermining the capacity of the legislature to act as a check on presidential power, and eliminating institutional procedures and safeguards. Constitutional design for the MENA region after the Arab Spring must therefore be driven by principles that guard against a repeat of these constitutional failures, while at the same time ensuring that government can proceed effectively and efficiently. There are four principles of constitutional design relevant to these goals. We outline these four principles in the remainder of § 2, and in § 3 below we assess the 2012 Constitution in light of these four principles.

(i) Guarding against presidential autocracy

The need to guard against a return to presidential autocracy is a driving imperative of the constitutional transitions in the MENA region. The semi-presidential system of government offers a promising route to preventing similar abuses in the future, precisely because it establishes two sites of executive power: a directly elected president and a prime minister who heads the government with the support or "confidence" of a democratically elected legislature. To be sure, semi-presidentialism is insufficient to prevent presidential autocracy, as the semi-presidential systems in pre-Arab Spring Egypt and Tunisia demonstrate. Rather, specific elements of the semi-presidential system must be carefully designed so as to ensure that the principle of limited presidential power is upheld.

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(ii) Legislative oversight of the executive

The legislatures of the pre-Arab Spring were not able to act as effective checks on the executive, in part because constitutional rules did not establish any meaningful powers of executive oversight or censure, and in part because the legislature itself was open to manipulation by the dominant party or dissolution by the president. A semi-presidential system must enable the legislature to exercise oversight over the activities of both the president and government, and act against them if it finds their conduct unacceptable. More precisely, a semi-presidential constitution must: (a) set out procedures for questioning in the legislature of the members of the government and for dismissing a government if it loses the confidence of the legislature, and (b) authorize the legislature to act against a president who overreaches, either by removing the president from office directly or by impeaching the president and beginning trial-like proceedings through which the president's conduct can be scrutinized. Where a dominant party loyal to the executive controls the legislature, it is easier for the president and the president's party to ensure that even a constitutionally powerful legislature does not limit the executive. This underlines the important role that electoral outcomes play in shaping the legislature's role as a brake on executive power, a matter which falls outside the scope of this report.

(iii) Power sharing

Semi-presidentialism fulfills the need for power sharing among the political parties, interests and groups that fill the public space in a post-authoritarian setting. The need to ensure that a diversity of political views and groups is represented within the executive branch is a response to the experiences of single-party dominance and the consequences of a one-party state. The executive dyarchy of semi-presidentialism offers an attractive framework for executive power sharing. If semi-presidentialism is properly designed, neither the prime minister nor the president, nor the political parties of either, will be able to deploy executive power in a way that facilitates the capture of the state.

(iv) Executive leadership

In post-authoritarian countries, a dearth of viable political parties raises concerns that parliaments will be fractured and divided and consequently unable to provide a platform for stable government. The legislature may find it difficult to agree on a government to exercise executive power, and governments may struggle to lead effectively in the absence of a clear and unambiguous policy mandate from a divided legislature. A president who is an independent executive authority and holds an electoral mandate separate from the legislature can act as a symbol of national unity and as an "autonomous crisis manager" in times of parliamentary chaos and emergency.

We now turn to a brief assessment of a series of specific issues in the 2012 Constitution in light of these principles.

3. Government formation (Art. 139)

Government formation consists in the appointment of both a prime minister and the rest of the cabinet. The principle of power sharing requires that opportunities for cooperation between the

president and the legislature be built into the process of government formation. Further, limiting the president's influence in selecting and appointing the prime minister and cabinet increases the likelihood that the prime minister and cabinet will be independent of the president and willing to check presidential overreach.

The principles of power sharing and limited presidential power support an arrangement whereby the president is not empowered to unilaterally appoint the prime minister. The legislature must play a central role in either appointing, or confirming the president's appointment of, the prime minister. We recommend:

(1) The legislature appoints the prime minister, or must immediately confirm the president's appointment of the prime minister through a vote of investiture, and
(2) The prime minister appoints a cabinet that the legislature must confirm.

(i) Appointment of the Prime Minister

The provisions for the appointment of the Prime Minister in the 2012 Constitution combine our two recommendations above – that the legislature appoints the Prime Minister, or must immediately confirm the President's appointment of the Prime Minister – in a multi-step process. It should be retained:

- Art. 139 creates a multi-step process that helps to resolve deadlocks over the Prime Minister's appointment while encouraging cooperation. It proceeds in three steps:
  - Step 1: the President nominates the Prime Minister, who must receive the confidence of the Council of Representatives.
  - Step 2: If the first nominee is not granted confidence, the President must nominate another Prime Minister from the party that holds a plurality of seats in the Council of Representatives. The Prime Minister must receive the confidence of the Council of Representatives.
  - Step 3: If the second nominee does not obtain confidence, the Council of Representatives nominates a Prime Minister to form a government, which must then obtain the confidence of the Council of Representatives. If the third nominee's government does not obtain confidence, the President must dissolve the Council of Representatives and fresh elections must be held.
- Art. 139 ensures a central role for the Council of Representatives, while creating opportunities for the input of the President. Art. 139 encourages cooperation between the President and the legislature in the formation of the government, in turn promoting cooperation and power sharing between the President and the Prime Minister. In particular, the Council of Representative's role in the selection of the Prime Minister expands progressively through successive instances of deadlock.
- Because Art. 139 provides that the legislature may appoint the Prime Minister without the involvement of the President if the President refuses to appoint a Prime Minister agreeable to the legislature, it ensures both that the President cannot capture the government formation process and secure the appointment of a Prime Minister loyal to the President, and that the President cannot block the appointment of a Prime Minister and government and create a power vacuum in which the President's power increases. These provisions are a valuable check against the centralization of power by the President.

- The mandatory requirement that a legislature unable to appoint a Prime Minister be dissolved and elections held soon thereafter is a necessary mechanism to ensure political deadlock can be resolved by launching a process that should culminate in the appointment of a Prime Minister and cabinet. It also acts as a check on presidential autocracy, since in the absence of a Prime Minister, the President may attempt to govern by decree (see further § 5).

(ii) Appointment of the rest of the cabinet

Art. 139 of the 2012 Constitution authorizes the Prime Minister to appoint the members of the cabinet. The President plays no role in these appointments. This approach strengthens the office of the prime minister vis-à-vis the president, thereby promoting power sharing. It is an appropriate appointment mechanism which should be retained.

4. Dismissal of Prime Minister and Cabinet (Art. 126)

Two main design options exist for crafting the power to dismiss the prime minister and cabinet: (1) president-parliamentary and (2) premier-presidential. In president-parliamentary regimes, either the legislature or the president can dismiss the cabinet. In premier-presidential regimes, only the legislature can dismiss the cabinet. As a result, the president is comparatively weaker in premier-presidential regimes. The premier-presidential design option represents the better choice for the MENA region because it guards against presidential autocracy and promotes power sharing. In addition, a constitution may limit votes of no confidence to require the legislature to approve a new prime minister before dismissing the current government. This procedure is called a "constructive vote of no confidence." The constructive vote of no confidence guards against a power vacuum in the wake of the dismissal of the government and encourages the legislature to carefully weigh its decision to dismiss the government.

We recommend:

(1) Only the legislature be empowered to dismiss the prime minister and/or members of the cabinet.
(2) The dismissal of the prime minister by the legislature should be by way of "constructive" vote of no confidence.

Art. 126 of the 2012 Constitution governs the dismissal of the Prime Minister and the Cabinet. It reflects recommendation (1) but not recommendation (2):

- Art 126. adopts the premier-presidential model (i.e. only the legislature can dismiss the government). This model should be retained, because it curbs the power of the President.
- The Constitution imposes no heightened threshold requirements on the legislature's power to dismiss the government (i.e. a simple majority is all that is required to pass the motion of no confidence). This ordinary threshold promotes power sharing by encouraging the President to take the legislature's policy preferences into account in nominating a Prime Minister, and to refrain from attempting to pursue a policy program through the government that is disagreeable to the political interests represented in the legislature. This arrangement should be retained, subject to recommendation (2).

- The 2012 Constitution does not provide for a "constructive" vote of no confidence. For the reasons above, it should do so.

5. Presidential dissolution of the legislature (Arts. 127, 139, 148)

A presidential power to dissolve the legislature is a drastic power with far-reaching implications, including the dismissal of the prime minister and government. However, it is a necessary power in a semi-presidential system which is designed to serve as a basis for power sharing, because it offers an opportunity to dissolve a deadlocked or fractious parliament, call for fresh elections, and rebuild power sharing relationships in the executive (for example, the threat of mandatory dissolution encourages the legislature to agree on a prime minister). The power must be closely regulated to prevent its abuse by the president to remove an obstreperous legislature, as well as an oppositional prime minister and government, and open the way for presidential consolidation of power and autocracy. We recommend:

(1) Discretionary dissolution: The president's discretion to dissolve the legislature is triggered only in specific circumstances, which must be laid out in the Constitution. These substantive triggers include:
  (a) Failure to pass a budget law after two successive votes; and
  (b) Dismissal of the government.

(2) Discretionary dissolution must be subject to limitations:
  (a) No dissolution during a state of emergency;
  (b) No dissolution after impeachment or removal proceedings against the president have been initiated;
  (c) No dissolution within a set period (at least six months) after the election of the legislature;
  (d) Dissolution is allowed only once within a twelve-month period; and
  (e) No successive dissolution for the same reason.

(3) Mandatory dissolution: The president must dissolve the legislature, or the legislature is automatically dissolved by operation of law, if the legislature is unable to approve a prime minister and government within a set period from the date of legislative elections. The limitations on discretionary dissolutions set out in (2)(b), (c), (d) and (e) do not apply to mandatory dissolutions.

(4) No changes to the electoral law or the Constitution may be made during a period in which the legislature is dissolved.

(i) Provisions to be retained

- Art. 139 of the 2012 Constitution provides for mandatory dissolution in the event of a failure to approve a Prime Minister. Mandatory dissolution in this situation reduces the risk of the power vacuum that results from the legislature's failure to appoint a Prime Minister. The threat of mandatory dissolution encourages the legislature to agree on a Prime Minister, and ensures the election of a new legislature where it cannot. This provision should be retained.
- Art. 127 of the 2012 Constitution prohibits dissolution during the first annual session of the legislature, prohibits multiple dissolutions for the same reason, and Art. 148 prohibits dissolution during a state of emergency. These restrictions should be retained.

- The provision that the dissolved legislature is automatically reconstituted if fresh elections are not held within the specified time period should be retained.

(ii) Problematic provisions

- Art. 127 of the 2012 Constitution confers a discretion on the President to dissolve the legislature on the substantive trigger of a "causative decision." This language is vague, and gives too much power to the President to dissolve the legislature. The President's discretionary power to dissolve the legislature should be triggered only by clearly and more narrowly defined substantive conditions, such as:
  (1) The legislature's failure to pass a budget law after two successive votes; and
  (2) The legislature's dismissal of the government.
- The procedures for dissolution under Art. 127 are troubling: the dissolution must be approved by referendum, failing which the President must resign. This poses three problems:
  (1) A complex dissolution process prolongs the substantive conditions (the "causative decision") that trigger the dissolution power. The purpose of dissolution is to end an intolerable situation. The requirement for a referendum to approve a dissolution prolongs the intolerable situation, and should be rejected.
  (2) The requirement that the President resign if the decision to dissolve the legislature is not approved at referendum will discourage the President from exercising this power in cases where it is necessary for him to do so. This provision is too restrictive.
  (3) It is not clear whether the Art. 127 procedures for dissolution – namely a referendum and the requirement that the President resign should the referendum fail to approve the dissolution – apply to dissolution under Art 139. The procedures for discretionary dissolution (i.e. Art. 127) and mandatory dissolution (i.e. Art. 139) should be clearly set out for each.
- The 2012 Constitution provides that elections must take place within 30 days (Art. 127) or 60 days (Art. 139) of the dissolution. The reason for this discrepancy is not clear, and the procedures for fresh elections following discretionary and mandatory dissolutions, including this time period, should be reconciled.

(iii) Additional provisions to be included

- Changes to the electoral law must be prohibited during a period of legislative dissolution;
- Dissolution permitted only once within a twelve-month period; and
- Dissolution prohibited during pending impeachment proceedings against the president.

6. Presidential term limits and removal of the President (Arts. 133, 152)

The limitation on the number of terms that a president can serve is a simple but effective way of limiting opportunities for a president to centralize power. In addition, term limits create opportunities for presidential candidates to compete meaningfully for the presidency where an incumbent president must leave office after a term limit has been reached. Effective procedures for the democratic and constitutional removal of the president are important because they

create a meaningful check on the president's power, and allow for the removal of a president without resort to violence or the intervention of the military.

We recommend:

(1) Presidential term of four or five years;
(2) Term limit of two terms as president, whether those terms are served consecutively or not; and
(3) Removal of the president following either:
    (a) impeachment by an ordinary majority in both chambers of the legislature or a supermajority in one chamber, and a finding of guilty after a trial in a superior court or specially constituted tribunal; or
    (b) a vote supported by a supermajority of at least two thirds of the members of both chambers of the legislature.

(i) Term limits

- Art. 133 of the 2012 Constitution should be retained. The Egyptian President serves four-year terms and cannot serve more than two terms. The constitutional rule that the President "may only be reelected once" suggests that the two-term limit applies whether the President's terms are consecutive or not.

(ii) Removal

- Art. 152 of the 2012 Constitution, governing impeachment, should encourage executive accountability. The grounds for impeachment – any felony or any finding of treason – are fairly broad. The procedure for impeachment, moreover, is fairly simple. A two-thirds legislative majority is required, followed by a trial. These provisions should be retained.

7. Decree powers (Arts. 131, 141, 159, 162-164)

Extensive and unrestrained executive decree powers, whether held by the president or the prime minister, can be abused to undermine power sharing or centralize political power in a single executive official. We recommend that decree powers be carefully restrained and limited in the following ways:

(1) Expressly enumerate the areas in which both the president and the prime minister can issue decrees.
(2) Require the prime minister's countersignature on all presidential decrees.
(3) Require the president's countersignature on all prime-ministerial regulations.
(4) Prohibit changes to the electoral law through presidential or prime-ministerial decrees following dissolution of the legislature and before a new legislature is elected.

(i) Provisions to be retained

- The 2012 Constitution does not empower the Prime Minister or the President to make law by decree in the ordinary course of business. This is consistent with the principle of limited power and power sharing. No changes to this position should be made.

- Art. 162 grants the Prime Minister the subordinate power to issue regulations necessary for the enforcement of laws. This is an appropriate subordinate lawmaking function and can be retained.
- Arts. 163 and 164 authorize the Prime Minister to make regulations relating to the organization of the public service and to make disciplinary regulations, respectively. These powers must be exercised in consultation with the cabinet; in addition, regulations issued under Art. 163 must be approved by the legislature when they impose expenditures on the state budget. These procedural restrictions on the exercise of this power should be retained.

(ii) Problematic provisions

- Art. 131 authorizes the President to make decrees with the force of law when both chambers of the legislature stand dissolved. Any decrees that the President issues under these circumstances must be presented to the legislature within 15 days of the start of the legislative session. Presidential decrees lose the force of law if they are not presented to the legislature or if they are not confirmed by the legislature. There are three concerns with this provision:
  (1) Presidential decrees remain in force until confirmed by the legislature; but the President may only make decrees "in the absence of both chambers" of the legislature. Thus, presidential decrees may remain in force for longer than the 15 days contemplated in Art. 131, before the legislature is reconstituted.
  (2) Since the President has the power to dissolve the legislature (see above, § 5), he has the incentive to exercise this power in order to trigger this ability to exercise decree powers.
  (3) The 2012 Constitution does not provide for the dissolution of the Shura Council. It is thus not clear how both chambers of the legislature can be "absent" for the purposes of Art. 131, making it unclear when the President's decree power arises.
- Art. 141 of the 2012 Constitution, providing that the President "exercises presidential authority via the Prime Minister," has been held by the Administrative Court to require that a decree calling for elections be signed by the Prime Minister first and then countersigned by the President because elections fall outside Art. 141's enumerated matters of exclusive presidential competence. This decision imposed a welcome limitation on the President's power, but illustrates that the 2012 Constitution does not impose extensive or clear restrictions on the President's power. We propose two changes to this position:
  (1) Art. 141 should be amended to provide that all presidential authority is exercised in consultation with the Prime Minister and Cabinet. Specific procedures for consultation must be set out, for example: countersignature by the Prime Minister and/or relevant cabinet minister, and presidential authority must be exercised through decisions approved by the entire cabinet, with the President entitled to convene and chair cabinet meetings.
  (2) While we recommend that all presidential power be exercised in consultation with the prime minister and cabinet, if specific presidential powers are excluded from this requirement, then the Constitution should list these powers explicitly by enumerating the constitutional provisions establishing those powers. By contrast, the provision in Art. 141 that presidential powers "related to defence, national security and foreign policy" are

excluded from requirements of consultation is vague and over-inclusive, conferring too much power on the President.

8. Power to appoint officials to the bureaucracy (Arts. 147, 165)

Domination of bureaucratic appointments by the president or the prime minister can result in the "capture" of the bureaucracy, reinstating a single-party state and undermining power sharing. Appointment processes should thus be carefully designed to reduce this risk. Three approaches exist for distributing appointment powers among the president and prime minister:

Option 1: The constitution explicitly identifies the officials the prime minister has the power to appoint, with the president retaining residual power to appoint and dismiss all other officials. This option carries the risk that a president will be able to make extensive appointments to the bureaucracy and ensure that the administrative structures of the state are loyal to the president.

Option 2: The constitution explicitly identifies the officials the president is empowered to appoint, with the prime minister holding residual power to appoint and dismiss all other officials. An additional mechanism sometimes used alongside this approach is prime ministerial countersignature for the president's appointments. A combination of enumerated, and limited, presidential powers of appointment and countersignature requirements are likely to encourage power sharing.

Option 3: The constitution leaves the appointment and dismissal power undefined, conferring on neither the president nor the prime minister an express power to appoint or dismiss bureaucratic officials.

We recommend that Option 2 be followed. Constitutional provisions should provide that:

(1) The president is empowered to appoint a list of explicitly identified officials. These appointments must be made subject to the prime minister's countersignature or confirmation by the legislature.
(2) The prime minister hold residual power to appoint all officials whom the president is not explicitly empowered to appoint. These residual appointments should be made in the cabinet, i.e. by resolution of the cabinet as a whole.

Arts. 147 and 165 of the 2012 Constitution follow a mixture of Option 1 and Option 3, giving the President wide powers of appointment and leaving the regulation of appointment power to the determination of ordinary law. In addition, Art. 147 is ambiguous: it can be read to mean either that the President has a residual power to appoint all civil and military personnel and diplomatic representatives, with the procedures for such appointments organized by law; or that the specific appointments that the President is empowered to make will be determined by law.

These provisions should be amended to reduce the President's powers of appointment and to ensure clarity in the distribution of appointment powers and procedures for appointment:

- The Constitution must state clearly which officials the President is empowered to appoint. This should not be left to the determination of ordinary law.
- Ordinary law can set out the procedures for specific appointments.
- The Constitution should require that the President's appointment of officials be countersigned by the Prime Minister or confirmed by the legislature.
- The Constitution should provide that all appointments other than those made by the President will be made by the Prime Minister, acting in cabinet (i.e. the Prime Minister's proposals for appointments will be confirmed by resolution of the cabinet as a whole).

9. Chairmanship of the cabinet (Arts. 143, 155)

Control over the cabinet is an important mechanism by which state policy and political decisions can be influenced. How the right to convene and chair cabinet meetings is allocated between the president and prime minister can help shape how power is shared. The power to chair cabinet meetings is an important mechanism by which the president can participate in policy making and government. Our recommendations reflect the need to limit presidential power, however, and to limit the president's ability to dominate policy making. For example, we recommend that the president have limited decree powers (§ 4) and cannot dismiss the prime minister (§ 7). In situations where the Constitution contains both of these restraints on presidential power and therefore his influence on policy making is otherwise limited, it is appropriate to give the president the power to chair cabinet meetings. This allows the president a voice in policy making without conferring too much power on the president, because government decisions must nevertheless be taken by the cabinet as a whole.

In light of our recommendations in the rest of this report, we recommend that the president must be entitled to convene and chair cabinet meetings.

(i) Problematic provisions

The 2012 Constitution is, at best, ambiguous on the question of whether the President is empowered to convene and chair cabinet meetings. Art. 143 provides that the President may call and chair cabinet meetings. However, Art. 155 provides that the Prime Minister heads, oversees and directs the government, which may also imply a power to call cabinet meetings. Read with Art. 155, Art. 143 suggests that the President cannot chair cabinet meetings where those meetings are regularly scheduled or called by the Prime Minister. The President's power to chair cabinet meetings seems to be restricted to cabinet meetings that the President himself calls. This limited power of the President to chair cabinet meetings may, in fact, reduce the opportunities for power sharing in government.

This interpretation is complicated by a contextual reading of the Constitution, which provides in Art. 159 that the government shall "Collaborate with the President of the Republic in laying down the public policy of the state and overseeing its implementation." At the very least, then, the collaborative approach taken in the Constitution suggests that the President must have a right to attend all cabinet meetings, even though the President's right to chair cabinet meetings is limited to the meetings the President calls. This interpretation is only weakly supported by the

text. It is preferable for constitutional provisions to set out clearly and unambiguously whether the president or prime minister is empowered to chair cabinet meetings.

10. Veto powers (Art. 104)

A presidential right to refuse to promulgate, or veto, legislation duly passed by the legislature acts as a counterbalance to the prime minister and government's power to set policy and initiate legislation. If designed so that the president cannot completely undermine the legislative process, it can promote power sharing.

There are two questions relevant to designing a veto power:

- First, can the president veto legislation in its entirety only ("straight up-or-down" veto), or can the president in addition veto discrete provisions within legislation ("line-item" veto)? Further, can the president propose specific amendments to vetoed legislation, which the legislature is bound to consider ("amendatory veto")?
- Second, what legislative majorities are required for the legislature to override the president's veto and adopt the legislation over the president's objections? Either an ordinary majority (or the same majority the legislation was originally required to meet) or an elevated supermajority can be required.

The answers to these two questions yield four options for designing a veto power. We recommend against the first three of these options, and recommend the adoption of Option 4:

- Option 1: line-item or amendatory veto subject to supermajority override: A supermajority override requirement, especially in cases of a divided and fragmented legislature, may allow the president to dominate the legislature and ensure that bills disfavorable to the president or the president's party never become law. A line-item or amendatory veto that is difficult to override affords a president too much power vis-à-vis the prime minister and undermines the prospects for a healthy and effective legislature. Option 1 should be rejected.

- Option 2: straight up-or-down veto subject to supermajority override: Where fractured and divided parliaments are a possibility, the imposition of supermajority override requirements may produce a situation where very little legislation is ever passed and the president assumes greater power and influence vis-à-vis the prime minister and the legislature. Option 2 should be rejected.

- Option 3: straight up-or-down veto subject to override by the originally required legislative majority (also known as a "suspensive veto"): A veto easily overridden by an ordinary legislative majority may ensure that a president is largely excluded from the policy-making and legislative process, especially if the president's veto power is a straight up-or-down veto. It therefore strengthens the hand of the prime minister vis-à-vis the president. Option 3 should be rejected.

- Option 4: line-item or amendatory veto subject to override by the originally required legislative majority: Allowing the president to veto draft laws while proposing amendments

or exercising a line-item veto, while also allowing legislative override by the original majority, ensures both that that the president's views are taken into account and the president cannot stymie the legislative process. Further, allowing the president to propose amendments or veto discrete provisions of draft legislation fosters debate and negotiation between the parties respectively represented by the president and the prime minister.

The 2012 Constitution reflects Option 2. Art. 104 authorizes the President to veto an entire bill (straight up-or-down veto) and requires a two-thirds supermajority to override the veto. Future Egyptian legislatures may be fractured and divided, and thus unable to meet this threshold. This increases risks that the President may block all legislation of which he disapproves, allowing the President to sideline the legislature and significantly influence the legislative agenda, reduce legislative checks on presidential power and assume greater political power.

Art. 104 should be amended to reflect Option 4, as set out above.

11. Powers over defence and security forces (Arts. 146-147, 193-198)

There are two primary areas in which the president's power over the armed forces should be considered: powers to make appointments to senior positions in the security forces (military, police and intelligence agencies); and powers the president exercises as commander-in-chief of the armed forces. Other areas raised by the 2012 Constitution include the role of the National Councils and military courts.

(i) Appointments

We recommend:

(1) The prime minister appoint all cabinet members, including those responsible for defence, military and security forces;
(2) The appointment of senior defence, military and security officials must be made through co-decision procedures centrally involving the prime minister. Two options exist, although we strongly recommend option (a) over option (b):
  (a) The prime minister is empowered to appoint senior military and security officials, with the countersignature of the relevant cabinet minister (i.e. ministers responsible for defence, intelligence or security/police); or
  (b) The president is empowered to appoint senior military and security officials, with the countersignature of the prime minister and subject to confirmation by the legislature.

The 2012 Constitution does not reflect these recommendations:

- Art. 139 provides that the Prime Minister appoints the cabinet, but Art. 195 provides that the Minister of Defence must be a military officer and Art. 147 provides that the President is responsible for appointing military "personnel." This allows the President indirect control over the identity of the Minister of Defence. This should be remedied by removing the requirement that the Minister of Defence must be a military officer.
- Art. 147 gives the President wide and unconstrained powers to appoint military personnel. This poses a risk that the President can capture the military by appointing political allies, and deploy the military to further his political objectives. This provision should be amended

to reflect recommendation (2)(a) above, ideally, or as an alternative, to reflect recommendation (2)(b).

(ii) Commander-in-chief powers

We recommend that:

(1) The president act as commander-in-chief of the armed forces, and that ultimate authority over, and responsibility for the actions of, the armed forces remain with the president;
(2) The constitution clearly set out the procedures for and limits to the president's powers as commander-in-chief, including provisions relating to the deployment of the armed forces within the nation's borders.

Problematic provisions

- Art. 146 provides that the President is the "Supreme Commander of the Armed Forces," while Art. 195 provides that the Minister of Defence is the Commander-in-Chief of the Armed Forces. This creates a risk of conflict and factionalism within the military: the provisions leave it unclear whether the President or the Minister exercises ultimate authority over the military. The President should be designated Commander-in-Chief of the Armed Forces, and the designation of the Minister of Defence as Commander-in-Chief should be deleted.
- The provisions for declaring war and deploying the armed forces abroad in Art. 146 are well drafted and clear. These should be retained.
- The 2012 Constitution is silent on procedures for the deployment of the armed forces within Egypt. This silence creates the risk that the President, or another political official, could deploy the armed forces for political purposes within the country, such as the suppression of opposition or the restriction of rights of movement, assembly, and expression. The Constitution must be amended to provide for clear procedures and substantive triggers for the domestic deployment of the armed forces.

(iii) National Defence and Security Councils

Some changes should be made to the 2012 Constitution's provisions on the National Defence Council and the National Security Council:

- Arts. 193 and 197 do not provide terms of reference or describe the powers and functions of the National Defence Council or the National Security Council. The Constitution should provide, in clear and express terms, for:
  (1) The purposes of both Councils; and
  (2) The powers, functions and responsibilities of both Councils.
- The provision in Art. 197 that the National Defence Council "discusses the armed forces' budget" is vague and ambiguous, and could be read to intrude on the legislature's prerogative to dispense funds. Art. 197 should be amended, either by deleting this clause or by providing clearly and unambiguously for the Council's role in the legislative determination of budget allocations to the armed forces.

(iv) Military courts

We recommend that military trial of civilians be completely prohibited. The 2012 Constitution departs from this recommendation:

- Art. 198 bans military trials for civilians, although it creates an exception for "crimes that harm the armed forces." This exception carries the risk that media or non-governmental exposure of corruption or political abuses of the armed forces might be prosecuted in military courts as "crimes that harm the armed forces." This poses risks to the right to a fair trial and to freedom of expression, and could have a chilling effect on the reporting and exposure of politically motivated abuse of the security sector, reducing the accountability of security forces personnel.

12. Emergency powers (Art. 148)

The president's power to declare an emergency and assume emergency powers carries great risks to the principles of power sharing, limited presidential government, and legislative oversight of the executive. A state of emergency allows the president to exit the constitutional framework and expand the president's share of power. Presidents in the MENA region have historically triggered states of emergency in order to rule by decree, to target the political opposition, and to consolidate executive power. Any constitution in the MENA region that wishes to avoid the presidential autocracy of the pre-Arab Spring era must impose real limitations on the president's ability to declare a state of emergency, on the scope of executive lawmaking during a state of emergency, and on the president's capacity to assume unilateral command of the security sector during a state of emergency and target political opponents or partners in a power sharing government.

Attention must be paid to both procedural and substantive limitations to the declaration of the state of emergency and the exercise of emergency powers. We recommend:

(1) Limitations on the initiation of a state of emergency:
  (a) Constitutions should place the following limits on the state of emergency:
    (i) an absolute limit on the duration of the state of emergency (for example six months);
    (ii) a requirement that the president submit the declaration of the state of emergency to the legislature for approval within 48 hours, alongside a limit of seven days that a state of emergency as declared by the president can exist without legislative confirmation;
    (iii) a requirement that the legislature confirm the state of emergency within seven days from when the president submits it to the legislature, failing which the state of emergency lapses;
    (iv) a limit on the length of the period for which the legislature can extend a state of emergency as declared by the president (for example 30 days);
    (v) a requirement that legislative renewal of the state of emergency after each 30 day-period requires a two-thirds majority of the members of the legislature.
  (b) The president should be able to declare emergencies only with the formal consultation of the government and countersignature by the prime minister.

(c) Substantive circumstances that trigger the president's discretion to declare a state of emergency should be enumerated. These can include, for example: actual or imminent aggression by foreign forces; serious threat to or disturbance of the democratic constitutional order; where the functioning of public authorities is interrupted; where the fulfillment of international obligations is impeded; or natural disaster.

(2) Substantive limitations during a state of emergency:

(a) Dissolution of the legislature during the emergency must be prohibited.

(b) Alteration of laws affecting the powers of the president, the prime minister, and alteration of electoral laws and the constitution itself, must be prohibited.

(c) Emergency decrees must not derogate from fundamental rights, including those designated by the International Covenant on Civil and Political Rights as non-derogable.

(d) Emergency decrees should be subject to parliamentary approval, or at least must be confirmed by the legislature within a certain time period or they lose the force of law.

(i) Procedural restrictions

The 2012 Constitution contains some procedural limitations in the declaration of the state of emergency, but vagueness and ambiguity open these provisions up to presidential abuse. Changes should be made:

- Art. 148 provides that the President may declare a state of emergency after consultation with the government. The phrase "after consultation with" is vague and does not impose a significant check on the President's power to declare a state of emergency. Instead, the President should be able to declare emergencies only with countersignature by the Prime Minister.
- Art. 148 fails to stipulate the circumstances under which the President can declare a state of emergency. The Constitution anticipates that a statute might define some of the terms of emergency powers. This does not impose sufficient limitations on the President's power to declare a state of emergency, especially if a legislature sympathetic to the President passes a law conferring power on the President to declare a state of emergency under broadly defined circumstances. Instead, the substantive circumstances that trigger the President's discretion to declare a state of emergency should be enumerated.
- Art. 148 is ambiguous both as to the procedures for the declaration of the state of emergency and the consequences of the declaration:

  (1) It is not clear whether the President must submit the declaration of the state of emergency to the legislature within seven days, after which the legislature must approve it, or whether the legislature must approve the state of emergency within seven days from the President's declaration. It is thus not clear how long a state of emergency can remain in effect without legislative approval.

  (2) It is not clear what the consequences of a failure to approve the declaration of the state of emergency are.

  The Constitution should therefore be amended to require that the President submit the declaration of the state of emergency to the legislature for approval within 48 hours, that a state of emergency can exist without legislative confirmation for only seven days, and that

the legislature confirm the state of emergency within seven days from when the president submits it to the legislature, and that the state of emergency lapses if any of these conditions are not met.

- The provision that the state of emergency will remain in place for six months if approved by the legislature should be amended. Six months is too long to allow the President to exercise emergency powers without subsequent legislative oversight. This period should be shortened, for example to 30 days.
- However, the provision that the duration of the state of emergency be absolutely limited to six months, despite legislative renewals, reduces the risk that the President will abuse emergency powers and should be retained as per recommendation (1)(a)(i) above.
- The provision for the renewal of the state of emergency by referendum should be rejected because it will prove difficult to organize a referendum under emergency conditions. The Constitution should provide instead that the state of emergency can be renewed for another 30 day period only by a supermajority of two thirds of the members of the Council of Representatives, as per recommendation (1)(a)(v) above.

(ii) Substantive restrictions

- The 2012 Constitution imposes only one limitation on the substantive use of emergency powers, prohibiting the dissolution of the legislature. This prohibition must be retained, as per recommendation (2)(a) above.
- Beyond, this, however, the 2012 Constitution does not define, or impose limitations on, the powers that can be exercised during a state of emergency. This is an egregious shortcoming which must be remedied by the addition of at least the limitations reflected in recommendations (2)(b), (c) and (d) above.