



# New Constitutions for Turkey and Egypt: Conflict and Consensus in Two Constitutional Traditions

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# **New Constitutions for Turkey and Egypt: Conflict and Consensus in Two Constitutional Traditions**

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As different as the two countries are, Turkey and Egypt both find themselves undergoing a fundamental reassessment of their political systems. Most importantly, both countries confront the formidable task of re-writing their constitutions, even in the face of deep political divisions and distrust. The two countries have a history of successive constitutions, all of which thus far have had a legitimacy deficit. Today's constitutional reform processes seek to remedy this deficit, although recent constitutional alterations made for this purpose have not, however, brought about the desired stability or legitimacy. This year, two constitutional committees have been at work devising fully new constitutions for each country, with the stated goal of solidifying basic rights, pluralism, and parliamentary democracy while relying on constitutional precedents in both countries.

In Egypt, a majority Islamist Constitutional Assembly (*al-Jam'iyya al-ta'sisiyya*) formed in June after the dissolution the first assembly. In November 2012, it submitted a draft constitution for a referendum to be held in December. In Turkey, a Constitutional Reconciliation Committee (Anayasa Uzlaşma Komisyonu) was formed in September 2011 following parliamentary elections.<sup>1</sup> The committee has completed the early articles of the new constitution, but the document is not expected to be complete until at least the end of the year. The question is, why do two of the most long-standing nation-states in the Middle East now face the task of re-writing their most basic political documents? For answers, we must turn to the historical development of these two long constitutional traditions.

### **Historical Background of Egypt and Turkey's Constitutional Politics**

Following celebrated nationalist constitutions written in the early 1920's, constitutional law in Turkey and Egypt has failed to live up to expectations set during that heady period. A series of constitutions followed in the wake of the Second World War on both sides of the Mediterranean. In the case of Turkey, military interventions against the perceived excesses of parliamentary democracy brought repeated constitutional drafts, at a rate of almost one per decade. The first post-war constitution followed a military coup in 1960 against the ruling Demokrat Partisi (DP), which the Turkish military viewed as hostile to its interests and to the interests of its close ally, the Cumhuriyet Halk Partisi (CHP, the Republican People's Party). The CHP had been established in 1923 by Mustafa Kemal Atatürk, the founder of the Turkish Republic, only to be removed from power by the Turkish electorate following World War II. The 1960 coup and the constitution that followed sought to end DP control of the state and its institutions.

Meanwhile, in Egypt, another military coup in 1952 by the Free Officers led to the drafting of a new constitution, the first republican constitution of

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<sup>1</sup> Evrin Güvendik. "Uzlaşma komisyonu uzlaşması". *Sabah*. 30 September 2011.

Egypt. As a result of a recent discovery at the Arab League, it is now known that liberal draft constitution was written in 1954 by a team of prominent politicians, military officers, and intellectuals, and it has received a good deal of press recently as a model for democratic liberalism in Egypt. Of course, this constitution never had force of law, and Gamal Abdel Nasser's constitutions in the succeeding years (including one written for the short-lived United Arab Republic) were not liberal in nature.

In contrast, the document that resulted from the 1960 coup in Turkey was known as the "liberal constitution" and was completed in 1961. This constitution sought to transform society along progressive lines favored by the CHP, who made up most of the constitution's authors. It also promoted the autonomy of many state institutions, such as the judiciary and the universities, in reaction to the perceived excesses of the DP parliamentary governments.<sup>2</sup> To the surprise of the Turkish military, though, its rivals continued to dominate parliamentary politics, despite the dissolution of the DP. Another military intervention in 1971, albeit not a coup, brought about new constitutional amendments that, among other things, strengthened the autonomy of the military and purged the army of dissident officers.<sup>3</sup> Turkish politics became polarized between the far left and the far right until violent incidents erupted in Istanbul at the end of the 1970's.

Finally, the Turkish military – or rather the military-led National Security Council – suspended the parliament and voided the 1961 constitution. The military had by this point grown distant from its erstwhile CHP allies, and in contrast to the previous constitution, political party members were banned altogether from the bicameral assembly that wrote the new constitution in 1982.<sup>4</sup> Military officers and the bureaucratic elite took the lead in writing a new and more restrictive constitution, designed to shield the Turkish state from the turbulence of democratic politics between 1960 and 1980. In this constitution, the emphasis is placed on defining the state's role and privileges rather than the citizen's rights. Thus, many articles begin with the phrase, "The state shall...." In its initial formulation, the state was referred to as "sublime" (*yüce*) and "sacred" (*kutsal*); this language has not survived to the present day, however. Individual rights are defined, but they are accompanied by exceptions that are so broad that they can mean almost anything. For example, the freedom of assembly can be "limited" by the state for the sake of "national security, public order, the prevention of crime, public health, public

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<sup>2</sup> Shayambati, Hootan and Kirdiş, Esen. "In Pursuit of "Contemporary Civilization": Judicial Empowerment in Turkey," *Political Research Quarterly*, Vol. 62, No. 4 (Dec., 2009), p. 775.

<sup>3</sup> Özbudun, Ergun and Gençkaya, Ömer F. *Democratization and the Politics of Constitution-Making in Turkey*. New York: Central European University Press, 2009, p. 18.

<sup>4</sup> Özbudun and Gençkaya.. *Democratization and the Politics of Constitution-Making in Turkey*. p. 19-20.

morality, and the protection of others' rights and freedoms."<sup>5</sup> This is a constitution that emphasizes restrictions upon rights granted by the state.

More specific measures were also taken in order to stabilize Turkey's unruly parliamentary politics. A ten-percent hurdle was created before parties could enter the parliament. Political parties were given strict conditions under the constitution which, if not met, would threaten them with closure by the courts. The role of presidency was strengthened, and so when the constitution itself was put to a referendum in 1982, a "yes" vote for the constitution was also a vote for the presidential candidacy of Kenan Evren – the leader of the coup and Turkey's top general. Evren held the presidency until 1987, and the Turkish constitutional order has felt his influence ever since. Despite amendments affecting the majority of the 1982 constitution's articles, this constitution is still the basis of Turkey's current constitution. In the last election cycle, however, all the parties represented in parliament agreed that the current constitution's military pedigree is fatal to its legitimacy, and that a new constitution should be written for this reason.

The Egyptian constitution was somewhat more stable in the years following the death of Nasser in 1970. Upon taking power, Anwar al-Sadat had a committee draw up a new constitution, with the stated intent of showing greater respect for the rule of law and human rights. What emerged was the Egyptian constitution of 1971, and it is this constitution which endured substantially until 2011. In this era, the nature of the "socialist" state as well as private property rights vis-à-vis the bureaucracy counted among the most important controversies of the time.<sup>6</sup> While the supremacy of the presidency and the Arab Socialist Union was not at issue, there were nonetheless real impulses toward constitutionalism and limits on state power, which became more and more evident in the succeeding decades.

Egypt's Supreme Constitutional Court, founded in 1979, is of particular importance for post-revolutionary Egypt's constitutional politics. As Tamir Moustafa wrote in 2007, "In a country where the ruling regime exerts its influence on all facets of political and associational life, it granted the Supreme Constitutional Court (SCC) substantial autonomy from executive control."<sup>7</sup> In the decades after its founding, the SCC provided a "judicial support network" to those who wanted to defend themselves against state power. To be sure, the Court often worked in tandem with the state, and it was in fact created in the context of economic liberalization known as the *infitah*.<sup>8</sup> Nonetheless, the

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<sup>5</sup> *Türkiye Cumhuriyeti Anayasası*. Article 34. <http://www.tbmm.gov.tr/anayasa.htm>

<sup>6</sup> Brown, Nathan J. *Constitutions in a nonconstitutional world: Arab basic laws and the prospects for accountable government*. Albany, NY: State University of New York Press, 2002. p. 68.

<sup>7</sup> Moustafa, Tamir. *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt*.

<sup>8</sup> Moustafa, Tamir. *The Struggle for Constitutional Power*. p. 77-78.

SCC has demonstrated its independence on numerous occasions. Throughout the 1990's, the SCC defended press liberties and the autonomous of such professional organizations as the Lawyers' Syndicate.<sup>9</sup> It is partly for this reason that President Morsi's recent constitutional declaration of November 22, which gave judicial immunity to the President's decisions, was so worrying to many observers. This declaration has been largely rescinded in recent days, but the tension between the SCC and President will remain.

While Egypt's Supreme Constitutional Court may yet play a crucial role in Egypt's post-revolutionary politics, its Turkish counterpart has been even more controversial in recent years. Founded under the "liberal constitution" of 1961, the Turkish Constitutional Court (Anayasa Mahkemesi) initially did play a role perhaps analogous to the Egyptian SCC. It promoted political liberalization and sought to defend the rights of autonomous institutions, notably the universities, which were the site of a wave of political activism in the 1960's and 1970's. For many in the military, though, judicial independence from the state was one of the causes of the political instability which plagued Turkey in the late 1970's. Therefore, the leaders of the 1980 coup envisioned a very different role for the Turkish Constitution Court (TCC).

The new court was founded as a pillar of the "deep state," which sought to promote Kemalist values in government, i.e. the state-centered secularism of Mustafa Kemal Atatürk. Under the 1982 constitution, the members of the court were appointed not by the parliament, but by the President. The first post-coup President was of course, none other than Gen. Kenan Evren, leader of the coup. In addition, the military itself was charged with nominating some of the justices. As a result, far from promoting liberalization and civil rights, the new Turkish Constitutional Court "managed the political arena" on behalf of the Turkish military.<sup>10</sup> Most notably, the Court was active in shutting down Kurdish and Islamist parties that were seen as threatening to the state's secular and nationalist principles. Perhaps this may be seen as foreshadowing the future role of Egypt's SCC, as a guardian of the deep state's values and interests against the encroachment of Islamist political forces in particular.

In contrast to Egypt, Turkey has been on a path of fundamental constitutional reform almost continuously since the 1990's. Most importantly, the possibility of membership in the European Union has been a crucial impetus for the passage of constitutional reforms. In 1999, for example, the military-dominated State Security Courts, which tried a range of political crimes, were placed under civilian control. Then, the pace of reform accelerated. An All-Party Parliamentary Accord Committee was put together,

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<sup>9</sup> Moustafa, Tamir. *The Struggle for Constitutional Power*. p. 137-145.

<sup>10</sup> Shayambati and Kirdiş. "In Pursuit of "Contemporary Civilization": Judicial Empowerment in Turkey." p. 775-777.

with each political party having equal representation at 2 members apiece.<sup>11</sup> (The current Constitutional Reconciliation Committee is structured quite similarly.) These amendments were a sweeping series of reforms intended to win the support of the European Union. Where the 1982 constitution had once emphasized restrictions, citizens' rights started to become more expansive in 2001. Freedom of speech was strengthened, gender equality became a stated goal, and it became more difficult for the Constitutional Court to close political parties.<sup>12</sup> While it seemed a degree of consensus had been reached in Turkish politics, this was soon to be torn asunder by the rise of a new political force, the moderate Islamist Justice and Development Party (AKP, Adalet ve Kalkınma Partisi), which won the 2002 parliamentary elections.

### **Recent Developments: From Turkish EU Candidacy to the 25 January Revolution**

The AKP's victory at the polls presented a constitutional problem in itself, since the party's leader Recep Tayyip Erdoğan was disqualified from holding office because of a previous political conviction, for which he had served jail time. The parliament then passed a constitutional amendment specifically for Erdoğan. Turkish president Necdet Sezer (a former justice on the Constitutional Court) vetoed this amendment, but his veto was overridden. This amendment also had the support of the CHP, the only opposition party. In 2004, more amendments were passed with the support of both parties: the full abolition of the death penalty, the abolition of state security courts, and the opening of the military budget to administrative review. These amendments showed the AKP not only working with the European Union, but also with its main opposition, the CHP. To be sure, while Turkish politics has become increasingly polarized, the AKP has often made good faith efforts to forge a broad political consensus on constitutional reform.

Unfortunately, this cooperation broke down as the AKP advanced its agenda further. One issue was the ongoing "Ergenekon" investigations against the alleged anti-democratic activities of certain military officers. But constitutional reform itself became just as controversial. The Turkish political system includes both a president and a prime minister, and under the 1982 constitution, the president is elected by the parliament. When Necdet Sezer's term ended in 2007, parliamentary technicalities made it difficult for the AKP to replace him with its own candidate. As a result, a new election was held, and an amendment calling for the popular election of the presidency was passed by referendum. Abdüllah Gül of the AKP later took office as president, much to the horror of many Turkish secularists.

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<sup>11</sup> Özbudun and Gençkaya.. *Democratization and the Politics of Constitution-Making in Turkey*. p. 49-62.

<sup>12</sup> "82 Anayasası'ndan yapılan değişiklikler." *Cumhuriyet*. 30 March 2010.

While the AKP was combatting the military officers of the “deep state” through its controversial prosecutions, other institutions of the Turkish state began to assert themselves. The ban on headscarves at universities and other state institutions had long been a sticking point for Islamists and conservatives generally. Erdoğan attempted to lift the ban on headscarves by passing a constitution amendment in 2008. He was unable to gain the support of the CHP, but he did get the support of the Nationalist Action Party (MHP, Milliyetçi Hareket Partisi), a conservative nationalist party which had recently returned to parliament.<sup>13</sup> Despite the passage of the amendment in parliament, the Turkish Constitutional Court rejected the amendment as contrary to the principle of secularism (*laiklik*) and ruled out any further amendments.<sup>14</sup> In practice, while the ban remains technically in place, the universities have wide latitude to solve the issue on their own, and most universities now allow headscarves, with the exception of a few parts on Turkey’s western coast.<sup>15</sup> Soon thereafter, the TCC also deliberated on the possible closure of the AKP as a party for its alleged opposition to secularism. While the party was let off with a warning and a fine, the court again showed its strength. A practical solution may have been found for the headscarf dispute, but the AKP realized that only a new constitution will be able to bypass the judiciary. By the same token, it is certainly possible that Egypt’s Supreme Constitutional Court paid attention to these episodes.

The most recent set of constitutional reforms were passed in a referendum in 2010. The reforms were passed in parliament with the support of the AKP alone. The range of amendments was as diverse as earlier reform packages, but the political debate by this time had become much more partisan. Some amendments continued the liberalizing reforms of previous years. The power of military courts, for example, was limited strictly to soldiers who committed “crimes of military service and duties only,” and military personnel decisions came under judicial review.<sup>16</sup> On the other hand, some amendments were criticized as empty gestures or worse, strictly partisan.<sup>17</sup> Most notably, the AKP sought to expand parts of the judiciary in order to appoint more conservative judges. Both the Constitutional Court and the Supreme Board of Prosecutors and Judges (HYSK, Hâkimler ve Savcılar Yüksek Kurulu) were expanded to increase AKP influence. The package overall bundled amendments with broad appeal alongside more partisan elements. This aspect of the amendments dominated the debate, and support

<sup>13</sup> “AKP, MHP agree on headscarf amendment.” *Hürriyet Daily News*. 25 January 2008.

<sup>14</sup> Özbudun and Gençkaya. *Democratization and the Politics of Constitution-Making in Turkey*. p. 49-62.

<sup>15</sup> Tanış, Neslihan. “İşte üniversitelerin başörtüsü haritası.” *Radikal*. 5 October 2010.

<sup>16</sup> “AKP'nin Anayasa Değişiklik Taslağı - Karşılaştırmalı Tam Metin.” <http://bianet.org/bianet/bianet/120816-akpnin-anayasa-degisiklik-taslagi--karsilastirmali-tam-metin>

<sup>17</sup> Kalaycıoğlu, Ersin. “Kulturkampf in Turkey: The Constitutional Referendum of 12 September 2010.” *South European Society and Politics*, 17:1, 1-22.



for the package fractured along party lines. The MHP actually opposed the amendments not for their content specifically, but rather because of the AKP's recent overtures to the Kurds. The AKP's electoral base carried the amendments to victory in the referendum. In the run-up to the parliamentary election of 2011, which the AKP won with its largest majority ever, the debate shifted to the possibility of a new constitution.

In Egypt, while civil society and other actors expanded Egyptians' sense of their own rights, the constitution itself remained almost unchanged since 1971. Only in 2007 did President Hosni Mubarak introduce a package of constitutional amendments. While claiming to liberalize the system, this package shuffled power among the branches of government without opening up the political system in any real sense.<sup>18</sup> Parliament gained more powers, but elections did not improve in terms of fairness.

Of course, these concerns were soon bypassed by the success of the January 25 revolution in Egypt, which led to the drafting of a new provisional constitution by the Supreme Council of the Armed Forces (SCAF). Arguing that writing a new constitution should not be done by the army, this provisional constitution was based mostly on the 1971 constitution. However, this provisional constitution did define the powers of the military, which were extensive. The SCAF gave itself power over legislation, the state budget, the parliament, and any future constituent assembly.<sup>19</sup> The provisional constitution was approved by referendum, and it was backed not only by supporters of the military, but also by groups like the Muslim Brotherhood. Liberal and other non-Islamist opponents of the military were more skeptical. Their worst fears were confirmed when the "El-Selmi Document" was released. This declaration tried to assert the complete independence of the military in any future regime, including full control over its budget.<sup>20</sup> This led to massive protests, and the SCAF was forced to retreat. Parliamentary elections were held in December and January of 2011-2012 and resulted in triumphs for the Muslim Brothers' Freedom and Justice Party and Salafi Nour Party. This majority Islamist parliament then began to ready itself for the task of appointing a new constitutional assembly.

These two newly-elected parliaments in Turkey and Egypt found themselves faced with quite similar tasks at almost the same time. Both parliaments were led by young Islamist parties with a passionate base of support. In Egypt and in Turkey, the militaries which wrote the existing constitutions have exhausted their legitimacies. However, the similarities do

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<sup>18</sup> Brown, Nathan J. , Dunne, Michael, and Hamzawy, Amr. "Egypt's Controversial Constitutional Amendments." Carnegie Endowment for International Peace. March 23, 2007.

<sup>19</sup> Danyal 'Uthman. "Al-Masry al-Youm tanshur nass al-i'lan al-dusturi... wa intikhabat al-ri'asa qabla nihayat al-'amm al-jari." *al-Masry al-Youm*. 30 March 2011.

<sup>20</sup> Ramy Nuwwar. "Nanshur nass kamil li-wathiqat al-Salmi al-niha'iyya." *Youm7*. 16 November 2012.

not go much further than that. As the preceding analysis should make clear, today's Turkish constitutional reform is part of a much longer process that had been going on for more than a decade. In Egypt, change has come much more suddenly, so the political process has not reached a similar level of legitimacy.

### **A New Beginning for Constitutional Politics in Egypt and Turkey?**

If there was one thing that the parties agreed upon in the 2011 Turkish general election, it was the necessity of a new constitution and that this constitution should have democratic legitimacy, in contrast to the 1982 constitution written by the Turkish military. In its campaign literature, the AKP employs a rhetoric centered around Turkey "becoming a normal democracy" (*normalleşmek*). A constitution written decades ago by military rulers is not worthy of an "advanced democracy," and the new constitution is discussed mainly in terms of the rights.<sup>21</sup> This is not far removed from the CHP's framing of constitutional reform. Like the AKP, the CHP uses the term *hukuk devleti* (Ger. *Rechtstaat*), meaning a state governed by the rule of law. Traditionally close to the military, the CHP's campaign platform promises "civilianization" (*sivilleşme*) and proposes the abolition of military courts that make the military's legal autonomy possible.<sup>22</sup> The current leader of the CHP, Kemal Kılıçdaroğlu, has attempted to move the party away from its traditional image as an elite statist and secularist party. Neither party emphasizes religion particularly strongly in its campaign literature. While disagreements remain, Kemalist official secularism may be giving ground to passive secularism – state neutrality toward religion.

The other two parties in parliament, however, have highly divergent worldviews. The MHP, for its part, sees itself as the guardian of Turkish nationalism and is extremely sensitive to the suggestion that the unity of the Turkish state should be undermined in any way. The MHP, therefore, vows not to accept any constitution which allows for Kurdish autonomy. The Peace and Democracy Party (BDP, *Bariş ve Demokrasi Partisi*), on the other hand, claims to represent the Kurdish nationalist movement. While neither party has outlined specifically what steps they believe need to be taken, it is clear that these two parties have divergent interests.<sup>23</sup>

Shortly after the 2011 Turkish general election, a Constitutional Reconciliation Committee (*Anayasa Uzlaşma Komisyonu*) was formed with three members of each of the four major parties, so that the total membership of the committee is twelve. This arrangement, based on the consensus of all

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<sup>21</sup> AKP Genel Seçim Beyannameşi. <http://www.akparti.org.tr/upload/documents/beyanname2011.pdf>

<sup>22</sup> CHP Seçim Bildirgesi. [http://www.chp.org.tr/wp-content/uploads/Se%C3%A7im\\_Bildirgesi-.pdf](http://www.chp.org.tr/wp-content/uploads/Se%C3%A7im_Bildirgesi-.pdf)

<sup>23</sup> Burak Bilgehan Özpek (2012): "Constitution-Making in Turkey After the 2011 Elections," *Turkish Studies*, 13:2, 162-164.

parties, resembles that of previous constitutional amendment committees (as noted above). However, the AKP's majority in parliament is large enough that the party does not need the cooperation of all four parties. Erdoğan won a historic third term as prime minister, and the AKP actually increased its percentage of the electorate to about 50%. The AKP does not have the two-thirds majority necessary to pass constitutional amendments by itself, so some cooperation from other parties will be necessary. However, the AKP is close to the three-fifths majority needed to bring constitutional amendments to a popular referendum.<sup>24</sup> For this reason, the AKP has a range of options to explore if necessary.

It is still unclear to what degree consensus is seen as necessary for the passage of a new constitution. The committee's website indicates that the committee operates by consensus, and it states that if one political party withdraws, the committee's work will be considered over.<sup>25</sup> Very few people in Turkey expect full agreement across a spectrum of controversial issues. However, attempts are being made. The CHP's leader Kılıçdaroğlu not only supports the drafting of the new constitution, but has come forward with a 10-point plan to solve the nation's Kurdish issue. The MHP angrily rejected the plan.<sup>26</sup> Aside from the perpetually difficult Kurdish issue, the role of the judiciary and the presidency will also present serious hurdles to consensus among the parties. Erdoğan has challenged the committee to finish a draft by the end of the year, but this looks unlikely.

In today's Egypt, of course, consensus among Egyptians can only be a dream at this point. Both of the constituent assemblies formed in 2012 have been plagued by criticisms that they are not representative enough, especially of "civil" or non-Islamist political groups. The first constitutional assembly was dissolved in April 2012 by Cairo's Administrative Court, which claimed that the body was unrepresentative and therefore violated the provisional constitution.<sup>27</sup> Led by speaker of parliament Saad al-Katatny of the Freedom and Justice Party, the parliament formed another 100-person committee. This body was again accused of favoring the Islamist elements in control of parliament. When the parliament itself was dissolved by court order in mid-June by the Supreme Constitutional Court,<sup>28</sup> the status of the second constituent assembly looked more even more uncertain. However, while a

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<sup>24</sup> Burak Bilgehan Özpek, "Constitution-Making in Turkey After the 2011 Elections," 160.

<sup>25</sup> TBMM Yeni Anayasa <https://yeniayanayasa.tbmm.gov.tr/calismaesaslari.aspx>

<sup>26</sup> Kılıç, Ali. "AK Party cautious on CHP's Kurdish proposal while MHP rejects it." *Today's Zaman*. 5 June 2012.

<sup>27</sup> Shaymaa' al-Qarnsawi. "Al-Qada' al-Idari tawqif qarar tashkil al-jam'iyya al-ta'sisiyya li-siyaghat al-dustur." *Al-Masry al-Youm*. 10 April 2012.

<sup>28</sup> Farouk al-Dasuqi. "Haythiyyat hukm al-Dusturiyya: Hall Majlis al-Sha'b." *Al-Masry al-Youm*. 14 June 2012.

case against the second constitutional assembly has been sent to the Supreme Constitutional Court, this case has not yet been heard.

In a bid to guarantee the passage of the draft constitution, President Mohamed Morsi released a constitutional declaration on November 21, which claimed judicial immunity for all of the president's decisions as well as the constitutional assembly until the passage of the constitution and the election of a new parliament.<sup>29</sup> This decision unleashed massive protests throughout Egypt. Morsi was forced to backtrack, but he continues to insist that the constitutional assembly cannot be affected by court decisions.<sup>30</sup> In contrast, for all his conflicts with the state, Erdoğan has never tried to ban the judiciary's interventions in the political process.

The Egyptian constitutional assembly worked under the shadow of possible dissolution by the courts, so a draft was produced quickly. Many saw the process as rushed, and the document that emerged in October 2012 had much in common with the 1971 constitution. Salafis called for sharia to replace "the principles of sharia" as the "main source of legislation" in Article 2, but the assembly chose to keep Article 2 unchanged, as the shaykh al-Azhar proposed. Backers of the draft claim that the new constitution expands Egyptians' constitutional rights, and there is some evidence for this claim. For example, Egyptians may now form organizations and political parties by simply notifying the authorities, rather than waiting for permission.<sup>31</sup> Likewise, simple notification is all that is necessary to launch a newspaper, and freedom of the press is expanded.<sup>32</sup>

However, for many critics of the draft, these changes have not gone nearly far enough. Numerous clauses put off defining basic liberties so that parliament can write more specific legislation later. Despite certain gains in press freedoms, the Journalists Syndicate actually withdrew from the assembly in protest of limitations on freedom of speech in the document.<sup>33</sup> The draft has also been criticized failing to ban military trials of civilians, even though previous versions of the document had done so.<sup>34</sup> By November 18, most of the non-Islamist members of the assembly had withdrawn, including the leading liberal parties and the Coptic Church. The withdrawal of these figures from the assembly has allowed for the opposition to build a broad coalition against the passage of this constitutional draft. The Strong Egypt

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<sup>29</sup> "Nanshur mawadd al-i'lan al-dusturi al-jadid lil-ra'is Mursi." *Youm7*. 22 November 2012.

<sup>30</sup> "Constituent Assembly immune from court verdicts: Presidential spokesperson." *Ahram Online*. 1 December 2012.

<sup>31</sup> *Dustur Misr*. "Mashou' Jumhuriyyat Misr al-'Arabiyya." Article 51. <http://sharek.dostour.eg/sharek/>

<sup>32</sup> *Dustur Misr*. "Mashou' Jumhuriyyat Misr al-'Arabiyya." Articles 48, 49.

<sup>33</sup> "Niqabat al-sahafiyin ta'lan insihabiha min al-jam'iyya al-ta'sisiyya lil-dustur." *Al-Ahram*. 20 November 2012.

<sup>34</sup> "Egypt: New Constitution Mixed on Support of Rights." Human Rights Watch. <http://www.hrw.org/news/2012/11/29/egypt-new-constitution-mixed-support-rights>

Party, led by the popular former Brotherhood member Abu'l-Futuh, has also come out against the document, fearing that it would lead to a "dictatorship."<sup>35</sup>

Turkish politics is also famous for polarization, and in some ways, the cultural disagreements in Turkey's politics go much deeper than in Egypt, with regard to secularism and the Kurdish issue in particular. Few major political figures disagree with the place of Islam as "state religion" of Egypt in both the current draft and the old constitution. In Turkey, however, the militant secularism of certain Kemalists goes beyond even what is found in much of Europe, and these secularists are opposed by Islamists well to the right of Erdoğan.

However, despite these disagreements, the drafting of the early articles of the new constitution has gone much more smoothly than in Egypt. As their campaign literature indicates, there is a lot of agreement in Turkey about basic liberties and the contours of the political system. For that reason, the early articles concerning basic rights have been drafted with consensus; torture, for example, will be explicitly banned by the new constitution.<sup>36</sup> However, while the new document will be much less restrictive, some of the more restrictive rights clauses from the 1982 constitution may survive in the new one as well. The Turkish state continues to prosecute certain journalists, and some believe that limitations on press freedom based on "national security" and "public morals" will make it into the new draft.<sup>37</sup> Civil protections for gays and lesbians were rejected by the constitutional committee, although homosexuality itself is not illegal. Burhan Kuzu, head of the committee and a member of the AKP, has said that the public is "not ready" for such protections.<sup>38</sup> The committee has agreed on a proposal which would ban hate crimes against non-Muslim minorities as well as Islamophobic hate crimes.<sup>39</sup> Of course, the fact that such protections are even part of the debate shows how far apart Turkish and Egyptian constitutional politics are.

### **The Role of the Executive: Erdoğan's Ambitions for the Presidency**

Increasingly, the focal point of Turkish constitutional politics has turned from basic rights to a debate over the nature of the presidential system. The 1982 constitution strengthened the role of the presidency as a counterweight to the instability of parliamentary politics, but the Turkish parliament still has the upper hand in governing. Prime Minister Erdoğan is expected to run for the presidency in 2014, but in order for Erdoğan to remain the most powerful

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<sup>35</sup> Ahmad Mahrus. "Misr al-qawwiyya: Musawwada al-dustur al-jadid la tabli thawrat al-Misriyyin." *Al-Shorouk*. 10 December 2012.

<sup>36</sup> "Yeni Anayasa'ya 3 madde daha." *Radikal*. 31 May 2012.

<sup>37</sup> Turkey's ruling party moves to limit press freedom." *Hürriyet Daily News*. 13 July 2012.

<sup>38</sup> Salih Çolak, Abdullah Karakuş. "Eşcinseller de eşitlik istiyor, verecek miyiz?" *Milliyet*.

<sup>39</sup> Bozkurt, Göksel. "Constitutional measure to prevent hate crimes." *Hürriyet Daily News*. 19 September 2012.

man in government, the powers of the presidency would have to be strengthened. Of course, the specter of Erdoğan as a powerful president is worrying to the main opposition parties, and winning any support outside the AKP for changes to the presidential system will be difficult.

In making the case for a presidential system, Burhan Kuzu has referred to the aspirations of a conservative Turkish prime minister and president of the 1980's, Turgut Özal, who had advanced the idea of a presidential system. Kuzu claims that the Turkish prime minister currently has more power than the US president, and that his powers should be divided among different levels of the government, including the local level.<sup>40</sup> The AKP usually refers to France and the United States as possible models, and one member of parliament has even called the AKP a “a Turkified version of the US executive system.”<sup>41</sup> However, a presidential system would also mean more control by the executive over the parliament and the judiciary. Erdoğan's interventions in the judiciary especially have been a rallying point for the opposition in the past, as the controversial 2010 constitutional amendments showed.

At this point, any attempt to push through a presidential system would shatter whatever atmosphere of consensus that has existed thus far in the Constitutional Reconciliation Committee. Therefore, for the moment, the plan has been shelved. However, it is possible that the AKP will attempt to finish writing the constitution with the support of only one of the opposition parties, not all three. One possible candidate for cooperation with the AKP is the Kurdish BDP, which may accede to the AKP's proposals for a presidential system, in return for greater regional autonomy.<sup>42</sup> Erdoğan's goal of finishing a draft by the end of the year is rapidly approaching, so matters will come to a head soon. Of course, it is unlikely that his goal will be met.

The Egyptian draft constitution has been criticized for a variety of reasons, and the specter of an all-powerful presidency triggers many Egyptians' fears of a “new pharaoh” after Mubarak. Writing in the independent newspaper *al-Masry al-Youm*, Amr Elshobaki argues that the most worrying aspect of the constitution is its failure to limit presidential power.<sup>43</sup> In some ways, the draft constitution adds new powers to an already dominant presidency. The president is given the right to appoint the head of the Supreme Constitutional Court as well as other judicial leaders. This echoes, of course, Erdoğan's attempts to maintain political control of the judiciary. The Egyptian president is also charged with taking on other responsibilities previously assigned to the prime minister. In both the Egyptian and Turkish

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<sup>40</sup> “Başkanlık sisteminin özel detayları.” *Sabah*. 8 May 2012.

<sup>41</sup> Bozkurt, Göksel. “AKP proposes its version of presidential system.” *Hürriyet Daily News*. 22 November 2012.

<sup>42</sup> Bozkurt, Göksel. “Negotiations for the New Constitution.” *Hürriyet Daily News*. 10 December 2012.

<sup>43</sup> Amr Elshobaki. “Musawwadat al-dustur.” *Al-Masry al-Youm*. 23 October 2012.



cases, critics fear the creation of an excessively powerful presidency, which could then dominate state institutions.

### **The Future of the Judiciary: Independence or Neutrality?**

Differing visions of the role of the judiciary under a new constitution were among the most important differences between the political parties in the Turkish general election of 2011. For the AKP, the political neutrality of the judiciary – and not only its independence from political control – is very important to democratization in Turkey.<sup>44</sup> The AKP sees the Turkish Constitutional Court in particular as a hostile and anti-democratic state institution which must end its obstruction of the political process. Most notoriously, the Special Prosecutor of the Supreme Court of Appeals requested the closure of the AKP itself. The opposition CHP, however, takes a markedly different view. It emphasizes the independence of the judiciary from the control of political parties and sees political intervention in the judiciary as anti-democratic. In order to prevent any one party from controlling appointments, the CHP proposed that a “qualified majority” of the parliament elect judges to the Constitutional Court.<sup>45</sup> It is not yet known which of these differing visions of the judiciary will prevail in the new constitution.

If Egypt’s draft constitution becomes law, there will be a major shake-up of the judiciary. As indicated previously, the president would gain expanded powers of appointment over the courts. The Supreme Constitutional Court itself would be reduced in membership from 19 to 11 judges.<sup>46</sup> It is unclear, then, what would be the fate of the current court, which was created by the old regime. This detail is of pressing importance because the SCC is one of the most powerful remaining institutions of the old regime, and it could have the power to invalidate the draft constitution. Islamists therefore criticize courts like the SCC in ways that resemble the AKP’s critique of the judiciary’s political biases. Al-Gama’a al-Islamiyya, for example, put out a statement recently condemning the SCC’s criticisms of President Morsi and warning it against violating the will of the people.<sup>47</sup>

Another case in front of the Administrative Court concerns the dissolution of the Muslim Brothers and the closure of its offices in Egypt, but it has been repeatedly delayed.<sup>48</sup> This case resembles closure cases brought against Islamist parties in Turkey. Though the AKP was only given a fine in

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<sup>44</sup> Burak Bilgehan Özpek, “Constitution-Making in Turkey After the 2011 Elections,” 161.

<sup>45</sup> CHP Seçim Bildirgesi. [http://www.chp.org.tr/wp-content/uploads/Se%C3%A7im\\_Bildirgesi-.pdf](http://www.chp.org.tr/wp-content/uploads/Se%C3%A7im_Bildirgesi-.pdf)

<sup>46</sup> Dustur Misr. “Mashou’ Jumhuriyyat Misr al-‘Arabiyya.” Article 176.

<sup>47</sup> “Al-Jama’a al-Islamiyya: al-Mahkama al-Dusturiyya al-‘Aliyya la yanbaghi ’an tafriid shayy ‘ala al-sha‘b.” *Al-Shorouk*. 29 November 2012.

<sup>48</sup> “Al-Qada’ al-Idari yu’ajil da’awi hall al-Ikhwan al-Muslimin ila awwal Yanayir al-muqbil.” *Al-Shorouk*. 20 November 2012.

2008, previous Islamist parties like the Refah Partisi and Fazilet Partisi were in fact shut down by the Turkish Constitutional Court as recently as 2001.

## **Conclusion**

The history of Egypt and Turkey's constitutional politics present both remarkable similarities and clear differences, and for that reason, any assertion about what these countries do or do not have in common is hazardous. Turkey has been a generally stable democracy in recent years, while Egypt is in a state of revolutionary change, but both countries have had to confront their constitutions' lack of democratic legitimacy. Egypt's 1971 constitution and Turkey's 1982 constitution were written by military rulers who then enjoyed some credibility, but by the present time, military tutelage has exhausted its legitimacy in Middle Eastern politics. For all their differences, the AKP and the Muslim Brotherhood are similar in that they are broad-based Islamist movements which are leading the process of writing what they assert will be genuinely democratic constitutions. Their opponents in this process are not only rival political parties, but also the constitutional courts of their respective countries, which seek to manage the political arena on behalf of the state's historic values and interests.

So far, early optimism has been undermined by political conflict in both countries, but Egypt in particular. In Turkey, constitutional reform has traditionally emphasized consensus among the major political parties, and the structure of the current Constitutional Reconciliation Committee reflects this. Despite conflicts over official secularism, there is broad agreement about basic liberties in Turkey, but the nature of the presidential system and the role of the judiciary are looming conflicts as the committee begins to discuss the more controversial aspects of the constitution. Prime Minister Erdoğan's ambitions for the presidency in particular may make consensus among all four parties impossible. In Egypt, there has not been a similar attempt to generate consensus among the main political actors. The political process itself lacks the legitimacy that exists in Turkey, so the resulting political system in Egypt will probably be much less stable.