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Position Paper

Egypt's Constitutional Decree Crisis: Extensive Powers and a Crumbling Base

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Egyptian president, Dr Muhammad Mursi, unexpectedly issued a new constitutional decree on Thursday, 22 November 2012. Before that, in an unofficial speech he gave after a Friday congregational prayer, he had hinted at his intention to take exceptional measures to tackle the risks the country was facing. However, no one had expected him to go as far as he did with his new constitutional decree. The stormy responses that followed were as extraordinary as the decree itself, especially those of political parties and the judiciary. This is undoubtedly the most complex situation Mursi has faced since the sacking of the Supreme Council of the Armed Forces (SCAF) on 12 August 2012.

The new constitutional decree includes six clauses and a seventh modal clause which confirms the publication of the decree in the state newspaper. These clauses contain the following constitutional decisions:

1. The person holding the position of prosecutor general will have only a four-year term – with immediate effect. This implies that the current prosecutor general, Abdel Meguid Mahmoud, will be required to step down.
2. Former regime officials accused of killing demonstrators during the revolution will be retried in court.
3. The Constituent Assembly and the Shura Council (upper house of parliament) will be immune from any lawsuit demanding that either be dissolved.
4. The president will have the authority to take further and exceptional action for the protection of the revolution. This constitutional authority paves the way for the issuance of the Revolution Protection Law and the establishment of a special court for the trial of leaders in the former regime, who had previously been acquitted.
5. All the president's decisions since his inauguration on 30 June 2012 will be immune from prosecution. This will prevent anyone from filing a lawsuit against the president's constitutional declarations and decrees, issued by means of his interim legislative capacity. It implies that the judiciary is no longer able to decide on the legality or constitutionality of presidential declarations and decrees.

However, the effectiveness of this constitutional decree, like previous decrees issued after the fall of the Mubarak regime, will expire immediately after the adoption of the new draft constitution in a referendum. Decisions and decrees promulgated by the president as the holder of legislative authority, in the absence of the parliament, may be reviewed by the next parliament, once it has convened.

Questions that arise from this include: What are the reasons behind such a constitutional decree? Who are the supporters and opponents of it and why? And, finally, is there a way out of this crisis?

Pre-emptive strikes

President Mursi had tried to unseat the prosecutor general on 11 October by appointing him ambassador to the Vatican under the reasoning that, at that time, the constitutional situation allowed him to appoint, but not dismiss, the prosecutor general. Thus, Mahmoud's appointment as ambassador was intended to dismiss him indirectly. Despite continued popular demands to depose Mahmoud since the overthrow of the former regime in early 2011, the straw that broke the camel's back was that Mahmoud did not convict any of the accused from the former regime for planning and financing the attack on demonstrators in Tahrir Square on 2 February 2011, known as the Battle of the Camel.

The office of the presidency had leaked information that Mahmoud had initially accepted his new appointment but quickly retreated due to pressure exerted on him from judges and politicians opposed to Mursi. Therefore, the article in the decree determining the prosecutor general's maximum period of service was intended to change the previous constitutional situation. As such, removing Mahmoud and appointing a new prosecutor general, who would order the retrial of former members of the regime, would fulfil the president's pledge to punish those responsible for the killing of more than 800 activists and the injuring of thousands.

However, this was not the only reason for Mursi's constitutional decrees. A second reason concerned a series of reports stating that the constitutional court was about to issue provisions that would lead to the dissolving of the Constituent Assembly. This would call into question the constitutionality of the constitutional decree issued by the president on 11 August 2012, which led to the removal of SCAF leaders and saw the restoration of executive and legislative powers to the president. If these reports were true, it would mean that the constitutional court was planning to give itself powers authorising it to decide not only on the constitutionality of laws – an authority that it already had – but also on issues that are purely constitutional or concern sovereignty, an authority it did not originally have.

Other reports indicated that the prosecutor general had hurried to open an investigation into complaints about fraud in the presidential election. This was believed to be merely the first step before declaring that the presidential position was vacant and calling for new elections. This, along with growing indications of the presence of Arab money being invested in the political and media arenas, gave the impression that Mursi and the Muslim Brotherhood were being targeted.

Regardless of the credibility of these reports, it became obvious after the group led by Amr Moussa, Ayman Nour and Wahid Abdul Majid withdrew from the Constituent Assembly following a number of other such withdrawals – that some political forces in the country have become convinced that they are in the final stages in their efforts to

undermine the Islamists' rise to power. They believe that they have to either successfully overthrow or to undermine the authority of both the president and the Islamic movement – with their power to impose their views on the draft constitution – or the situation will head towards stable Islamist rule for years to come.

Mursi's new constitutional decree was therefore issued at a time of growing political division and distrust between both sides, in addition to a deep feeling by the president that the country's movement towards stability was under threat from the agendas of many forces. The decree was intended to ameliorate the controversy and political conflict and provide sufficient impetus to complete the transitional process. However, the way in which the decree was drawn up and the manner in which it was presented to the people were problematic and have caused further divisions.

Shortcomings due to lack of consultation

During the period of tension caused by the decree, it was discovered that most of Mursi's aides (who are permanent employees in the presidential team) and perhaps all of his advisers (hired on a consultancy basis) had not seen the constitutional decree before it was issued and did not participate in drafting it. Who, then, formulated the decree and who participated in the debate during its preparation? No one knows the answers with certainty.

Furthermore, Mursi has not exerted any great effort before or after the issuance of the decree on the night of 22 November to clarify his position to the people. He did not reveal the circumstances and reasons that pushed him to issue the new decree, particularly the controversial second article. When the president addressed his supporters in an improvised speech during a protest on Friday, 23 November, he spoke in general terms and did not relate the content of his speech to the essence of the constitutional decree or the controversy surrounding its articles.

It also does not seem as if the president held adequate consultations with the various arms of the state, especially the judiciary, before issuing the decree. No prior consultations were held with the Supreme Judicial Council, although a number of the decree's articles, including the one relating to the status of the prosecutor general, relate to the Council's powers. The president of the council said he had learnt about the constitutional decree from the media, like any other citizen. And despite the support that the president enjoys from the minister of justice, Ahmed Makki, the latter's statements indicate his reservations regarding certain articles and show that he had probably not been part of the circle that participated in the drafting of the decree.

Although President Mursi maintains good relations with most heads of the institutions of state, there is no doubt that as a whole, the system of the country – the oldest of the modern states in the Arab-Islamic world – is still under the influence of pre-revolution loyalties and interests which stem from a time when the system's legitimacy was largely dependent on the repression of the Islamists. The president should have ensured, before issuing the decree, that all apparatuses of state and all institutions, including the office of the presidency and the president's advisers, stood behind him and endorsed his new constitutional decree. This did not happen, leaving the stage open to the president's opponents on the days following the declaration, and allowing them to accuse him of being a dictator and of reproducing the former regime of Husni Mubarak.

Street battles

The provocative phrasing of some articles in the constitutional decree and the enormous powers it grants the president, as well as the failure of the president's office to adequately present the decree and communicate with the general public, have led to the mobilisation of many political parties and judicial entities against the new decree. However, the positions of its opponents have varied in terms of their motivation and points of view regarding the articles contained in the decree.

The political opposition includes all liberal and semi-liberal groups, as well as leftist and nationalist parties. This opposition front is led by Mohamed ElBaradei, Amr Moussa and Hamdin Sabbahi. They formed an alliance named the National Front for saving Egypt whose supporters, particularly the People's Alliance led by Sabbahi and the Constitution Party led by ElBaradei, has played a major role in mobilising opposition against the president and his decree and in organising sits-in in Tahrir Square. This has been exploited by some forces, who then attacked the headquarters of the Freedom and Justice Party, the political arm of the Muslim Brotherhood.

The latter groups, adopting radical language and propagandist incitement in their attitude towards the president and his policies, have called for the cancellation of the constitutional decree and the dissolution of the Constituent Assembly.

In addition to Ahmed al-Zind, the chairman of the Judges Club (a judges' union) and a group of judges from around the country, political opposition has been supported by Lawyers Syndicate chairperson Sameh Ashour with a group of lawyers. The Judges Club held a general assembly for its members on the evening of 24 November, which hosted the dismissed prosecutor general and was attended by thousands of judges. It demanded the cancellation of the constitutional decree and the reappointment of Mahmoud to his former position. However, the Judges Club was criticised for inviting political and non-judicial figures to the general assembly. Some critics also raised suspicions about whether all those in attendance were indeed judges or whether many

were only lawyers from the Lawyers Syndicate, which is allied to the chairman of the Judges Club.

The most significant opposition voice has come from the Supreme Council of Justice, the supreme official judicial institution. In a statement on 24 November, the council described the constitutional decree as a serious violation and an undermining of the authority of the judiciary. The statement did not address the matter of the prosecutor general, nor did it call for the cancellation of the constitutional decree as a whole. On the following day, 25 November, the justice minister met with the president of the council. It was noted that the council was quick to issue a second, more moderate statement after the meeting, demanding that 'the immunity granted by the new decree to the decisions and decrees issued by the president of the republic be limited only to matters of sovereignty'. The statement criticised the Judges Club's general assembly and called for the judges of courts throughout the country to commit to their work and not cooperate with calls for a strike.

The opposition has been strengthened by a number of Islamist parties and personalities who joined the campaign against the constitutional decree, such as the Egyptian Movement Party, formed by former Muslim Brotherhood youth elements, the Strong Egypt Party, led by Abdel Moneim Abul-Fotouh and the 6 April Movement. It should be noted, however, that their opposition to the constitutional decree is partial and limited to Article II, which grants immunity to presidential decisions and decrees. What has been surprising is the radical opposition by Chancellor Tariq al-Bishri, a prominent former judge and Islamic thinker. Al-Bishri had previously chaired the committee whose responsibility it was to amend the constitution of 1971, which paved the way for the first constitutional declaration after the revolution in March 2011. In an interview with Al-Shuruk on 24 November, Bishri described the decree as 'unconstitutional' and said the president had 'turned against its legitimacy'.

This does not mean, however, that the opposition camp is in the majority. A new group called 'Judges for Egypt' has emerged, and it actively supports the president and his constitutional decree. The president has also received significant support from the Muslim Brotherhood and its Freedom and Justice Party, from all Salafi parties and leaders and from most other Islamic political forces, such as al-Wasat party. Sharp divisions have also been witnessed inside the attorneys and journalists syndicates between opponents and supporters of the president. Opponents argue that the new constitutional decree detracts from the judiciary's authority and makes the president a new dictator. Those in favour claim that the goal of the decree is to accelerate the building of the state's institutions and protect the country from conspiracies and from the risk of descending into turmoil and instability. They point out that the effectiveness

of the decree is limited and will last only for a short period, expiring once a referendum on the draft constitution and elections for the People's Assembly have been held.

Despite limited divisions in both camps, the current split in the Egyptian political spectrum is mostly a polarisation between Islamists and non-Islamists. Most Islamists support the president while the majority of non-Islamic political forces fall in the opposition camp. During several days of the crisis, streets and cities of Egypt such as Alexandria, Damanhour and Bor Sa'id witnessed riots and violent clashes between Muslim Brotherhood supporters and members of non-Islamic parties who tried to attack the headquarters of the Brotherhood's Freedom and Justice Party. Surprisingly, despite this sharp polarisation on the streets and in the media, almost all polls, including those conducted by media outlets opposing the president, showed that support across the country for the constitutional decree issued by President Mursi exceeded sixty-five per cent.

Ways out of the crisis

The extent to which the crisis has been caused by the constitutional decree should be viewed with caution, as evidence suggests that the roots of the crisis were present prior to the issuing of the decree and that a political movement aiming to overthrow the president in one way or another was also active before. The crisis has partly been caused by the deep divisions in the Egyptian political spectrum and partly by the provocative phrasing of the second article of the decree, as well as the way in which the decree was presented to the people and the lack of communication with different sectors, including the president's advisers and the judiciary.

It is certain that the president, who believes that there, is a threat to the country and to the course of completing institutional reforms will not retreat from the constitutional decree. But he will also not be able to defuse the crisis without a partial retreat or a clarifying statement, particularly concerning the second article, which would indicate a kind of retreat.

In order for the decree to gain acceptance, he needs political consensus to help him override a large segment of the judiciary. This may also convince some of the decree's partial opponents like the April 6 Movement, the Egyptian Current Party and the Strong Egypt Party to change their positions, although it will not be considered sufficient from the viewpoint of radical opponents who demand the abolishment of the constitutional declaration in its entirety. The question now is whether the latter have enough determination and popular support to continue their active opposition on the streets and not only on television talk-shows, and whether the persistence of such opposition will have an impact on the economic conditions of the country and its climate of stability and recovery, which had gradually begun to return before the outbreak of the current crisis.

The other question concerns the president's capacity to face external Arab intervention in the internal political affairs of Egypt, if reports referring to such interventions are true.

It can be argued that the passage of the constitutional decree, despite the crisis, represents a decisive victory for Mursi and his presidency and constitutes a legal insurance for the remainder of the transitional period. This includes the completion of the Constituent Assembly's work in the drafting of the constitution and the stability of the Shura Council, heading towards the election of the second People's Assembly since the revolution. In other words, the constitutional decree affirms that Mursi has achieved a victory over his opponents and has put an end to the hopes of those seeking to overthrow him.

However, the lesson from the crisis must be equal to the size of the crisis; essentially this lies in the failure to obtain the necessary support for the constitutional decree. It must be kept in mind that the need to obtain popular support is one of the foundations of a modern state in general and is even more critical and of greater necessity in a complex society such as that of Egypt.

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