Rule of Law in Egypt

The year 2005 marked a turning point for the rule of law and democratization promotion in Egypt (Wolff 2009: 110-111). Against the backdrop of unrelenting breaches of the rule of law while under pressure from the US government, President Muhammad Husn Mubarak announced his attention to hold the first multiparty elections in 2005, a landmark decision in 24 years of his presidency (International Crisis Group 2005). The influence of the United States of America over the course of the 2005 presidential (Silt 2006: 335; Lange 2005b: 2-4, Perthes 2005; Durac 2009: 80) and parliamentary elections (Lange 2005c,d,e), combined with the prospect of political transition a possible succession by the President's son Gamal Mubarak, led the regime and taking into consideration a change, if only cosmetically (Abdelrahman 2007: 266). During the election, however, newspapers around the world widely reported on the "judges' revolt" (Naim 2006; Mekki / Bastawisi 2006; Abdel Azim 2006). The judiciary, supported by civil society, confronted the executive by denouncing the fraudulent results of the constitutional referendum, as well as the presidential and legislative elections. The "judges' revolt" was a test case for external promoters of the rule of law in Egypt: Some judges voiced a desire to supervise the entire electoral process and took the opportunity of the presidential campaign to request full Independence from the (prepotent) executive within the overall national structures. For the presidential elections, a new electoral commission composed of magistrates (50 per cent) and other public figures close to the government, was established to supervise the ballot. Although part of the judiciary agreed to such an institutional novelty, some judges pointed to the fact that their "integrity [was] being used to lend credibility to process over which they have only a limited control" (Brown / Nasr 2005: 4). In Egypt's post independence overall discourse on the rule of law, the developments around the 2005 elections constituted another episode in the long-running conflict between the executive and the judiciary (Wolff 2009: 101, 105; Ab Bahr 2007: 2). The Egyptian system, with its French inspired hierarchical courts, positivist orientation, and reliance on state-codified law has fairly and faithfully enforced executive will for over a century. With the legislative authority clearly (if at times unofficially) under executive domination, it would be surprising if matters have been otherwise (Brown 1997: 118).

I. Rule of Law in Egypt's Context

The selective delegation of policymaking to judicial institutions points a broader concern of authoritarian leaders - the maintenance of political legitimacy in lieu of credible mechanisms of public accountability. In many cases, authoritarian regimes switch to the rule of law as a legitimizing narrative only after the failure of their initial policy objectives or after popular support for the regime has faded. Egypt's second President, Gamal Abd an-Nair (1954-1970), pinned his legitimacy on the revolutionary principles of national independence, the redistribution of wealth, economic development, and Arab nationalism. Judicial institutions were tolerated only to the extent that they facilitated the regime's achievement of these substantive goals. In contrast, the third President of Egypt, Muhammad Anwar as-Sad (1970-1981) explicitly pinned his regime's legitimacy to syydat al-qnn (rule of law) and used rule-of-law rhetoric at various times throughout his eleven years of presidency (Moustafa 2008: 146; Brown 1997: 122), to distance his regime from the substantive failure of the Gamil 'Abd an-Nair regime and authoritarian state in crisis, and to build a new legitimate narrative, distinct from the populist foundations of the state (Lombardi 2008: 234-273, Moustafa 2007: 6, 39).

Rule of law in the Egyptian context is, however, more than just lip-service. The term syydat al-qnn has been incorporated into the Constitution: One is able to locate it in two prominent positions of the Constitution, namely in the Preamble and in Article 64 ("syydat al-qnn 'ass al-hukum f ad-dawla", i.e. the State is subject to the rule of law). Due to its prominent position in the normative part of the Constitution, the latter marks, a legally binding basis, whereas the preamble itself does not share this legally binding character. However, since the Preamble is considered to be a compilation of motives rather than concrete rights or obligations, it nevertheless offers guidance for the interpretation of the text of Egypt's current Constitution. That said, one should bear in mind that the rule-of-law concept implies and seeks the prevention of arbitrary exercise of the executive power - still a controversial issue in Egypt, even though the country has recently gone through two successive reforms of "modernization" in 2005 (Lange 2005a: 2-8) and 2007 (Al-Ga'y 'Isam Kaml 2006; Al Mky 2006; Al-Ahram 2007; Al-Mashat 2009: 31-34). One of the main criticism directed at the 1971 Constitution (and its amendments in 1980) by its opponents is its extreme centralization of powers with the President of the Republic. In his request for constitutional amendments dated 26 December 2006 (Al-Ahram 2007: 1, 2 et seq.) the President of the Republic maintained that the amendments would consolidate the balance of powers between the branches of the government through a redistribution of the competences within the executive authority, and increasing the powers of the parliament. He added that the independence of the judiciary would also be enhanced. (Abd al-Hal 2005).

II. Constitutional Separation of Powers

Some of the 2007 amendments aimed at creating a better allocation of powers within the executive authority, "by expanding the competencies of the Council of Ministers and the extent to which it participates with the President in the exercise of the executive authority" (Letter addressed to Parliament by H.E. President Muhammad Husn Mubarak requesting amendments to the Constitution of Egypt: Rislat ar-Ra's Mubarak, 26 December 2006).

Thus, a paragraph was added to Article 138 stipulating that the President of the Republic shall exercise some of his competencies, as allocated by the constitution (Art. 137 of the Constitution), after the approval of the government, and others after taking its opinion. As from now, the Head of State, will have to get the assent of the government upon adopting regulations on the enforcement of laws (al-law'ih il-tanzim) Article 146 of the Constitution) and police control (law'ih adabi Article 145 of the Constitution), and on decisions necessary for the creation and organization of public services and interests (qarrt quwwat al-qnn 'ass al-hukum f ad-dawla, i.e. the State is subject to the rule of law). Due to its prominent position in the normative part of the Constitution, the latter marks, a legally binding basis, whereas the preamble itself does not share this legally binding character. However, since the Preamble is considered to be a compilation of motives rather than concrete rights or obligations, it nevertheless offers guidance for the interpretation of the text of Egypt's current Constitution. That said, one should bear in mind that the rule-of-law concept implies and seeks the prevention of arbitrary exercise of the executive power - still a controversial issue in Egypt, even though the country has recently gone through two successive reforms of "modernization" in 2005 (Lange 2005a: 2-8) and 2007 (Al-Ga'y 'Isam Kaml 2006; Al Mky 2006; Al-Ahram 2007; Al-Mashat 2009: 31-34). One of the main criticism directed at the 1971 Constitution (and its amendments in 1980) by its opponents is its extreme centralization of powers with the President of the Republic. In his request for constitutional amendments dated 26 December 2006 (Al-Ahram 2007: 1, 2 et seq.) the President of the Republic maintained that the amendments would consolidate the balance of powers between the branches of the government through a redistribution of the competences within the executive authority, and increasing the powers of the parliament. He added that the independence of the judiciary would also be enhanced. (Abd al-Hal 2005).
Moreover, according to President Muhammad Husn Mubarak, one of the objectives to be achieved through the constitutional reforms was "reorganizing the relationship between both the legislative and executive powers in order to achieve greater balance between them." (Rislat ar-Ra's Mubrak, 26 December 2006).

In this regard, e.g. the 2007 amendments have strengthened the powers of the second parliamentary assembly, the Majlis ash-Shra (Consultative Council). Until then it was consulted for certain issues, but its opinion was non-binding. With the amendments of Articles 194 and 195 in 2007, the approval and not only the opinion, of the Consultative Council is now required in three cases: (1) requests of constitutional amendments, (2) draft laws complementary to the Constitution stipulated in about thirty articles (Articles 5, 6, 48, 62, 76, 85, 87, 88, 89, 91, 160, 163, 167, 168, 170, 171, 172, 173, 175, 176, 177, 178, 179, 183, 196, 197, 198, 206, 207, 208, 209, 210 and 211 of the Constitution); (3) and peace and alliance treaties, and all treaties conducive to a modification in the state territory or related sovereignty rights. A joint committee is formed to resolve any disagreement arising between the two parliamentary chambers on issues where the Consultative Council has the right of assent (Bernard-Maugiron 2008: 404).

New Article 194 of the Constitution has given a list of the "laws complementary to the Constitution" (al-qawnn al-mukammila ad-dustr), that have to be submitted to the Consultative Council. Before then, the Constitution had not given any definition or list of such laws, and the Supreme Constitutional Court had identified them on a case-by-case basis (The Supreme Constitutional Court had identified two criteria for law to be considered complementary to the Constitution; see al-Mahkama ad-Dustriyya al-'Uly 1993: 290; Bernard-Maugiron 2003). For instance, in 2000, the Supreme Constitutional Court had decided that the new association law, adopted in application of Article 56 of the Constitution, had to be considered as complementary to the Constitution, and that it should have been submitted to the Majlis ash-Shra (Consultative Council) for its opinion in the first place. Since this had not been the case, the law was declared unconstitutional for procedural error (Al-Mahkama ad-Dustriyya al-'Uly 2000: 582; Bernard-Maugiron 2008: 404).

The President of the Republic had also committed himself, during his electoral campaign in 2005, to strengthen the independence of the judiciary and, in his request of 26 December 2006, promised to enhance "the independence of the judiciary through the dissolution of the Majlis al-Uly li-l-Hayt al-Qad'iyya (Supreme Council of Judicial Bodies)" (Rislat ar-Ra's Mubrak, 26 December 2006).

Strengthening the judicial independence not simply de jure but also de facto, is, indeed, essential for an effective application of separation of powers.

Separation of powers requires separation with coordination, as opposed to absolute separation. It is a principle that requires constant review (Omar Sherif 1999: 34). According to the amended Article 173, the former Supreme Council of Judicial Bodies, created in 1969 by Presidential Decree No. 82, should be replaced by a new Council, made of the presidents of all judicial bodies, and chaired by the President of the Republic. It shall protect the common interest of all judicial bodies.

In November 2007, the Minister of Justice prepared a draft law to implement this constitutional provision, defining the composition, competencies, and rule of procedure of that council. That law would have questioned the immunity of judges, and decreased the powers of the Supreme Council of Judicial Bodies. (For the text of the draft law see al-Misr al-Yawm, Cairo, 20 November 2007.) In front of the unanimous criticisms addressed to this draft law by almost all judicial bodies, the Minister of Justice decided to amend the proposal, before the President of the Republic finally requested its withdrawal (Bernard-Maugiron 2008: 406).

III. Judicial Review

Generally, the Egyptian judicial system is based on French legal concepts and methods. Judges are familiar with civil law systems’ concepts, and despite the huge case backlog and time-consuming proceedings, the principles of the due process and judicial review are inherently cherished and respected (Abdel Wahab 2008). In Egypt's current legal system constitutional review is carried out by a special constitutional court (Lombardi 2000: 234). The so-called al-Mahkama ad-Dustriyya al-'Uly (Supreme Constitutional Court), the successor institution of the Supreme Court established by Law No. 81 of 1969, was launched in 1971 by the adoption of Egypt's new Constitution (Stilt 2006: 341; Omar Sherif 2002b: 323; Omar Sherif 2000: 1; Elwan 1990: 314; Mulak 1972: 187-194). The Constitution did not provide, however, many details about the new court in its respective Articles 174-178. In implementation thereof, Law No. 48 (1979) (published in the Mahkama ad-Dustriyya al-'Uly 1981) was issued, organizing the status and competence of the Supreme Constitutional Court (Lombardi 2008: 236; Lombardi 2006: 144; Fahmi 2000: 214). Law No. 48 (1979) (see al-Jarda ar-Rasmiyya [Official Gazette], No. 36, Cairo, June 1979, pp. 520-538) entrusted the court with judicial review (Omar Sherif 2000: 1; Elwan 1990: 314). Not surprisingly, the Supreme Constitutional Court acted to protect the courts' power to check legal and administrative abuses and its own specialized power to exercise constitutional review over most government action (Omar Sherif 2002a: 339-400). In short, during the 1980s and 1990s the courts and the Supreme Constitutional Court in particular tried to ensure what North American colleagues would think of as procedural due process. That is to say, they tried to protect individuals from executive and legislative abuse by (1) requiring the political branches to act only through the mechanisms permitted them by the constitution, and (2) ensuring that the branches remain subject to criticism for offensive actions (Lombardi 2006: 148). Historically in Egypt, the "rule of law" was defined in judicial decisions of the last decades of the period under review as "the principle of not making any law without consultation" (Brown 1997: 119). The court ruled e.g. that the scope of the power of judicial review "applies to law in its wider objective sense, that of legislative texts creating general and abstract legal status, whether such texts are enshrined in the status adopted by the legislative power, or in subsidiary status adopted by the executive power within its competence as defined by the Constitution. All such texts are characterized by their vast scope of application and the unlimited number of those subject to them. Consequently, if they were to be declared null and void by the Supreme Constitutional Court, the effects would be also far-reaching [...]. That is why it was necessary for such a judicial review to be entrusted to one single court." (Al-Mahkama ad-Dustriyya al-'Uly 1995).

Moreover, like some recently created European constitutional courts, the Supreme Constitutional Court has consistently held that the constitution must be interpreted as an organic whole (Johansen 1997: 365). In this regard, the third President of the al-Mahkama ad-Dustriyya al-'Uly, Muhammad 'A Baigh, stated that "the straight completion of the constitutional building will rise through this organic unity which characterizes the order of constitutional norms. This unity will realize the congruity of the texts of the constitution and it will remove the obscurity that may be mixed with it and the contradiction with which people may think it to be affiliated. Moreover, this court has this organic unity in mind whenever a case put before it is connected with an internal contradiction, which the contestant portends to see between the legal texts he contests and the norms of the constitution. Rather, one has to appeal [fi-l-'ishkum il ahkm ad-dustr jarn ill] to all the constitutional norms so that the Court may make sure that the contested texts do not contradict each other." (Al-Ahkm al-lait asdarath al-Mahkama min yanyir 1984 hatt dsambar sanat 1986, Dr al-Hann li-l-Tba'a, Cairo 1994, 4). In the process of an organic interpretation, the Court has identified a handful of meta-principles that implicitly provide the unifying thread for all constitutional principles. Among these the Court has singled out four that are of particular importance, e.g. an overarching principle requiring Egypt to remain "democratic" (see e.g. Al-Ahkm al-lait asdarath al-Mahkama min Uktbar 1981 hatt Dsambar sanat 1983, Dr al-Hann li-l-Tba'a, Cairo, no date, 131/ 144; Al-Ahkm al-lait asdarath al-Mahkama min yanyir 1984 hatt dsambar sanat 1986, Dr al-Hann li-l-Tba'a, Cairo, no date, 131/ 144; Al-Ahkm al-lait asdarath al-Mahkama min yanyir 1987 hatt/hr yury sanat 1991, Matbi' Dr Akhkr al-Yawm, Cairo, no date, 98 et seq.) and to respect the separation of powers, and a commitment to ensure that Egyptian law respects the "rule of law" (see e.g. Supreme Constitutional Court's Deputy Chief Justice's article Omar Sherif 2002: 318-319).
IV. State Security Courts

Although the Supreme Constitutional Court took surprisingly bold stands on most political issues, there were important limits to the Court’s activism. At odds with its strong record of rights activism, the Supreme Constitutional Court ruled Egypt’s emergency courts (al-mahkim al-taw’i) constitutional (cf. al-Mahkama ad-Dustriyya al-Uly: 1984: 80), and it has conspicuously delayed issuing a ruling on the constitutionality of civilian transfers to military courts. The qnn at-taw’i (Emergency Law) allows for referrals to those exceptional courts, and the military ruler - i.e., the President of the Republic or his designate - can refer civilians to military courts (al-mahkim al-’askariyya). The judges in such trials are officers appointed by the Minister of Defence who have no independence but are rather subordinate to the top-down authority structure of the military establishment (Hassan 2010; Moustafa 2008: 153).

However, the Supreme Constitutional Court reasoned e.g. that since Article 171 of the Constitution provided for the al-mahkim at-taw’i,“it must be considered a legitimate and regular component of the judicial authority. Moreover, it also reasoned that the provision of Law 50/1982, giving the al-mahkim at-taw’i the sole competency to adjudicate their own appeals and complaints, was not in conflict with Article 172 of the Constitution. Given that Egypt has remained in a perpetual state of emergency for all but six months since 1967, the al-mahkim at-taw’i; and more recently, especially after the upsurge of Islamist violence in 1992, the al-mahkim al-’askariyya have effectively formed a parallel legal system with fewer procedural safeguards, serving as the ultimate regime check on challenges to its power (Moustafa 2008: 151 et seq.; Saleh 2004: 81; Brown 1997: 114).

V. Conclusion

Lifting the state of emergency, which would abolish the emergency court system, as well as ending the trial of civilians before al-mahkim al-’askariyya, would be a further important step upgrading the rule of law and balancing the imbalanced separation of power concept in Egypt (Dunne 2006: 12). A clear separation between the judiciary and the executive has still not been achieved. Both the Minister of Defence - as mentioned above - and the Minister of Justice continue to exercise considerable authority over the judiciary (Omar Sherif 1999: 35, 38 et seq.). If the powers of the President have decreased following the amendments, he still keeps the most important ones, be it in the executive (see Article 137, Article 148 and Article 150 of the Constitution), legislative (See Article 108, Article 109, Article 112, Article 113 of the Constitution) or even judicial fields where he is the one who nominates the general prosecutor, the presidents of the Court of Cassation and of the Supreme Constitutional Court, and is the head of the council of judicial bodies. Moreover, although the powers of the parliament have increased, it has to be seen whether the two assemblies dominated by the ruling party will put substantial modifications in the draft budget to table. Though they were introduced as strengthening the balance of powers (Rislat ar-Ra’s Mubarak, 26 December 2006). The constitutional amendments have not procured major changes in the distribution of powers within the executive authority itself and between the executive and legislative ones. Nevertheless, the reform package could constitute the basis of further revisions in the future.


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