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***Trends in Egyptian Constitutional Law After 1952.  
Maintaining Strong Presidential Power in the Reality of Middle East Affairs.***

**Streszczenie:**

Arabska Republika Egiptu jest jednym z najbardziej wpływowych krajów świata. Pełni na Bliskim Wschodzie wyjątkową rolę zwłaszcza, gdy połączy się ją z relacjami z Izraelem, współpracą ze Stanami Zjednoczonymi czy historią kolonialną kraju. Jest to również główne centrum kulturalne i religijne świata muzułmańskiego. To, co jednak jest najbardziej fascynujące to historia konstytucyjna i prawna Egiptu. Artykuł ten skupia się na ewolucji egipskiego systemu ustrojowego po 1952 r., tj. po zamachu stanu Wolnych Oficerów, który całkowicie zmienił Egipt, przynosząc mu po okresie rządów monarchii konstytucyjnej rządy republikańskie. Te zmiany i ewolucja systemu nie mogą być jednak w pełni uświadomione bez pewnej podstawy historycznej. Rządy kolonialne i to, co ze sobą przyniosły, zwłaszcza powstanie państwa Izrael ukształtowały Egipt, jego obywateli, rząd, i politykę – zwłaszcza relacje ze Związkiem Radzieckim, a po 1971 r. ze Stanami Zjednoczonymi. Miały również wpływ na system prawny Egiptu, począwszy od najbardziej fundamentalnych ustaw – jego konstytucji, które odzwierciedlały zmiany polityczne w kraju.

**Słowa kluczowe:** Egipt; prawo konstytucyjne; Konstytucja; prezydent; Bliski Wschód

***1. Introduction***

The Arab Republic of Egypt is one of the most influential countries in the world. It plays a unique role in the Middle East, especially when we combine it with its relation to Israel, partnership with the United States and its colonial history. It is also one of the major cultural and

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religious centers in Islamic world, with the oldest Islamic university – Al Azhar, which has its headquarters in Egypt’s capital city, Cairo. But what really is fascinating and susceptible to analysis for scholars is Egypt’s constitutional and legal history. This article will not analyze Egyptian emergency state law which has been in force for over thirty years and allowed the government to rule the country with no explicit boundaries of its legitimate powers. Instead, it will focus on the evolution of Egypt’s constitutional system after 1952, i.e. the Free Officer’s Revolution that entirely changed Egypt and introduced republican (or rather – authoritarian, especially during the reign of Hosni Mubarak) government in place of constitutional monarchy. Those changes and the evolution of the system cannot be understood properly without some historical background. The colonial rule and what came after it, i.e. the emergence of the State of Israel has shaped Egypt, its people, the government, the politics, especially the foreign affairs with Soviet Russia and with the United States. It also had its impact on the Egyptian legal system, starting with basic laws – its constitutions, which reflected political changes in the country.

## **2. Egyptian constitutional history before 1952**

In 1922 Egypt gained its independence<sup>1</sup>. For over three decades it had been ruled by the British colonial government. But what seemed to be a victory over colonial rule only started a new struggle towards self-determination and building national consciousness. It also started a long process in creating a legal background for a new country. European colonialism, and before it Ottoman rule, brought alien laws and legal methods to the Middle East. The traditional legal system was based on Islamic law as well as on traditional law that existed in the region<sup>2</sup>. Colonialism changed the situation in such a way that still creates problems. Foreign interference has started a revival of Islamic traditionalism which amongst other things led to the creation of the Muslim Brotherhood<sup>3</sup> – the most influential religious organization in Egypt. However, from the

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<sup>1</sup> On the history of Egyptian campaign for independence, see: S.A. Cook, *The Struggle for Egypt. From Nasser to Tahrir Square*, Cairo 2012

<sup>2</sup> See: J. Danecki, *Podstawowe wiadomości o islamie*, Warszawa 2007; S.W. Witkowski, *Wprowadzenie do prawa muzułmańskiego*, Warszawa 2009

<sup>3</sup> The Society of Muslim Brothers, or as it is commonly known - the Muslim Brotherhood (ar. *al-Ikhwān al-Muslimūn*) is a Sunni Islamic organization, founded in 1928 in Egypt by Islamic scholar Hasan al-Banna. Its main goal was to spread Islamic education and help people in need. Later on the Brothers started a political activity. They were regularly banned from conducting their activities on the basis of links to terrorism. In the presidential election in 2012 the member of the Muslim Brotherhood, Mohamed Morsi, became the president of the Arab Republic of Egypt but was overthrown a year later, in July 2013.

legal perspective the most interesting thing was the process of building the country and its government on constitutional basis. The first modern Egyptian constitution was created in 1882, shortly before the British entered Egypt. It lasted less than a year<sup>4</sup>. Until 1923 Egypt was deprived of the constitution of any kind. The British rule in Egypt<sup>5</sup> created a puppet government of Egyptian ministers. As a result the nationalist movement emerged as the main force that was able to overthrow the British government in Egypt. It partly succeeded in 1922 when the United Kingdom declared Egypt the independent country, but the last British troops withdrew from Egypt only in 1956<sup>6</sup>.

After Egypt gained its independence the main goal for the Egyptian government was to create a Constitution which would help unite the people and bring the sense of self-determination<sup>7</sup>. Established in 1922, the Constitutional Commission was designed to create an appropriate constitution for Egypt. During its work contradictory opinions emerged concerning state authorities. The initial draft limited royal prerogatives to executive only and the right to veto parliamentary bills<sup>8</sup>. But by the King's decision those provisions were changed and royal prerogatives became much wider<sup>9</sup>.

Started in 1923, the Egyptian system of government was characterized by the strong power held by the King. It has changed in 1928 when the Constitution was suspended due to the domestic unrest. Later, in 1930 the authorities introduced a state of emergency and again the Constitution was suspended<sup>10</sup>. King Fuad and Prime Minister Ismail Sidki seized the opportunity and signed the new Constitution which granted the King even more power than the former one; it also introduced indirect elections. As one might have predicted, this led to the strong resistance –

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<sup>4</sup> N.J. Brown, *Constitutions in a Nonconstitutional World. Arab Basic Laws and the Prospects for Accountable Government*, New York 2002, p. 26-34

<sup>5</sup> Until 1914 the British rule in Egypt was known as „the veiled protectorate”. After 1914 it officially became the British protectorate over Egypt due to the declaration of war with the Ottoman Empire, of which Egypt was nominally a part.

<sup>6</sup> J. Zdanowski, *Historia Bliskiego Wschodu w XX wieku*, Wrocław 2010, p. 184

<sup>7</sup> Despite formal independence Egypt was still under the British control. The Declaration of Independence set conditions which Egypt had to fulfill in order to become independent. Four issues were to be regulated by treaties: the British control over Egyptian finances and foreign policy, the safety of navigation in the Suez Canal, the form of the government in Sudan and the future of the system of surrender; source: J. Zdanowski, *op. cit.*, p. 76

<sup>8</sup> B. Stępniewska-Holzer, J. Holzer, *Egipt. Stulecie przemian*, Warszawa 2008, p. 33

<sup>9</sup> For instance, the King had the right to issue royal decrees even when the Parliament operated normally. He also exercised executive and legislative authorities and could dissolve the Parliament.

<sup>10</sup> B. Stępniewska-Holzer, J. Holzer, *op. cit.*, p. 48-49; J. Zdanowski, *op. cit.*, p. 103

opposition demanded the former Constitution to be restored<sup>11</sup>. In 1934 the 1930 Constitution was abolished<sup>12</sup> and Egypt remained the country with no basic law which would limit the government for almost two years; the 1923 Constitution was restored in 1936 and remained in force until the 1952 and the Free Officers' Revolution.

## ***2. 1952 - The Free Officers' Revolution and its implications for Egyptian politics***

Restoration of the 1923 Constitution in 1936 had coincided with the signing of the Anglo-Egyptian Treaty, which had allowed the British forces to stay in Egypt (the Suez Canal area) until 1956<sup>13</sup>. Above all however, it had allowed the Egyptian army to rebound and get the real national character. Thanks to the government's decision to modernize the army and increase its potential, armed forces had become more Egyptian in nature. After fifteen years in 1952 the Egyptian army were finally able to reach for real independence. The Free Officers' Movement, the organization composed of young Egyptian officers mostly from the lower classes of the Egyptian society, took its chance and seized power during the bloodless Revolution which set a new path in country's history. It brought military rule that continue with a short pause from July 2012 to July 2013<sup>14</sup>, to this day.

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<sup>11</sup> The main opposition party - the Wafd Party - saw the 1930 Constitution as a tool with which the King could have destroy the opposition. The new law introduced several limits for the political parties, such as the property census and the education census which significantly lowered the electoral base for the Wafd Party. During the 1931 elections opposition parties speeches were prohibited and their leaders were victimized. As a result the Wafd Party boycotted the elections which ended up with the ruling party's victory.

<sup>12</sup> J. Zdanowski, *op. cit.*, p. 103

<sup>13</sup> The Treaty signed 26th August 1936 transferred the command over Egyptian army to the Egyptians. At that time the main problem which the new command must have faced was the weakness of the Egyptian army, poor equipment and operational capabilities and above all – it's social structure. Most of the officers originated from Turkish-Caucasian soldiers or from the Egyptian upper class. Egyptian command decided to change this trend and during the first year the number of Egyptian officers increased dramatically, from 398 in 1936 to 982 in 1937; data from: A.S. Hashim, *The Egyptian Military, Part One: From the Ottomans through Sadat*, „Middle East Policy”, 3/2011

<sup>14</sup> After the January 25th Revolution (or the Arab Spring) and overthrowing of Hosni Mubarak, Mohamed Morsi, the member of the Muslim Brotherhood, became the new President of the Republic in July 2012. However, he managed to maintain his position only for one year. In the first days of July 2013 Egyptian army once again led to the fall of the incumbent President. The current President, general Abd al-Fattah al-Sisi is former commander-in-chief and Minister of Defence and Military Production. As a commander-in-chief of the armed forces he launched the coup d'état against President Mursi in July 2013.

Before 1952 the Egyptian army was weak and the command - unsuccessful. The best proof for that was a tremendous defeat in the first Arab-Israeli war (1948-1949) with newly established Israel, when the combined armies of several Arab countries, including Egypt and Jordan, were unable to protect their borders and Palestine from Jewish interference. What is more, the Egyptian government was corrupt and unstable. The Officers decided that the best way to clean the political sphere in the country was to change the government and the entire political system. Therefore they've started the Revolution, or rather a coup d'état, which according to Ozan O. Varol had, however, democratic features<sup>15</sup>. The question is: how is it possible to assign democratic features to actions that violate the law. Democracy consists of the rule of law that requires subordination to the law. But one must identify the rule of law not only with formal features that apply to the rules but also with the element of ethics. The regime that rules in accordance to the law, but law that is unfair and which violates a sense of social justice and human rights – cannot be identified as a regime that governs its people in accordance with the principles of the rule of law. When such a situation occurs, people or institutions that reflect the will of the Nation should have the right to stand against its rulers. This is why Ozan O. Varol permits the definition of democratic coup d'état. He argues that the “democratic coup d'état” is not an oxymoron; on the contrary, he claims that some coups d'état are more democratic than the others because the army answers the popular demand for the ruling regime to resign<sup>16</sup>. In this particular situation the army overthrows the regime and holds free elections but as a result of the regime change it protects its own interests by implanting its vision of the new regime in the constitution<sup>17</sup>.

That was exactly what happened in Egypt. The army carried out the coup d'état, took power, held the free elections and maintained its rule because there were no other force which would at that time be able to govern the country. Partly due to compulsion and partly because of the Officer's interests, the army maintained the power instead of giving it to another player in the political arena; furthermore – it established the regime based on civil-military connections, where army played the role of the protector of the regime and the regime repaid military by

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<sup>15</sup> O.O. Varol, *The Democratic Coup d'Etat*, „Harvard International Law Journal”, 2/2012

<sup>16</sup> He provides necessary features of democratic coup d'état: the military coup d'état is conducted against the authoritarian or totalitarian regime as a answer to the popular demand to overthrow the regime; the authoritarian leader refuses to resign; the coup is held by the army that have the popular support; the army holds in a short period of time the free and fair elections; and finally the power is transmitted to the legally elected government.

<sup>17</sup> *Ibidem*

establishing the laws and regulation which favor the military. The system of government created by the Free Officers survived because of the popular support and the esteem armed forces has among the Egyptian people. The military rule, initiated by the coup helped Egypt become the leader in the region, especially after Arab countries were forced to face the major threat from Israel as well as start to play politics with the new leader – the United States.

The Cold War between the United States and the Soviet Union played out not only in East era Europe – probably the most significant for the world’s history was the front situated in the Middle East. During the 1950s the United States began to enter the Middle East. What caused this interest? First of all – oil revenues, especially in Iraq which gained its independence in 1932. But in the context of Egypt more significant was the role the Soviet Union started to play in the region. The United States wanted to confront the Soviets in the Middle East because the strong Soviet Union was a threat for the international political order, from the American perspective. The United States wanted to create the Middle East Defense Organization (MEDO) as a supplement for NATO operations in the region which would, if necessary, support defensive actions against the Soviet Union<sup>18</sup>. Egypt was meant to be one of its pillars, with the alliance’s military bases in the Suez zone. For Egypt the emergence of this new organization, in which the United Kingdom meant to play a significant role, was unacceptable and was perceived as a continuation of colonialism in Egypt and the Middle East. Gamal Abdel Nasser, the second president of the Republic of Egypt, decided that Egypt would not take part in MEDO operations; instead he started a political mission called “Pan-Arabism” – its aim was to unite the Arab countries against one enemy – Israel, and build a strong Arab coalition which would serve the region as a peacekeeper and ensure a stable development for newly independent countries. Pan-Arabism was based on the ideology which called all Arabs one nation; therefore they were supposed to act together, not against each other, and create the coherent politics for the good of all Arabs, not particular countries.

But policy aimed at the unification of regional countries and defense of the borders required a strong, well-equipped and modernized army. This was indeed a problem especially when we take into consideration the embargo on arms supplies that was imposed by the tripartite declaration signed in 1950 by the United States, France and Great Britain. Therefore Egypt asked the Soviets for help and signed arms deals with Czechoslovakia. The Close relationship with the Soviet Union was against the US’ politics in the region<sup>19</sup>. However, during the Sadat era (1970-

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<sup>18</sup> P. Calvocoressi, *Polityka międzynarodowa po 1945 roku*, Warszawa 2010, p. 367

<sup>19</sup> See: H. Kissinger, *Dyplomacja*, Warszawa 2009, p. 570 and next

1981) and after the Six Days War with Israel in 1967 it has changed<sup>20</sup>. Sadat's policy was based on *infitah* – “the opening”. He wanted Egypt to become more open to the world, to foreign investments, foreign capital etc. He also transformed Egypt from the socialist country, with the socialist constitution to the capitalist one, with private ownership. He also saw the United States as the only solution to the regional crisis and the pillar of peace<sup>21</sup>. With the signing of the Peace Treaty with Israel in 1979 Egypt became dependent on the US development and military aid<sup>22</sup> and became a military partner for the United States government, taking care for stability in the region and providing help for American military operations in the Gulf<sup>23</sup>.

### ***3. Egyptian Constitutions – legal form for maintaining strong, presidential power***

Some say, that Egypt became a country, where modern pharaohs rule<sup>24</sup>; no need for deep, thorough analysis to prove this statement. With the history of ancient Egypt the analogy seems natural. However, what is vital for understanding why such a situation occurred is providing a basic background of the country's history – which I did in previous paragraphs. Now it is the time for legal analysis of Egyptian constitutional order with the emphasis on the presidential prerogatives and how in time his position in the system of government has changed.

#### *3.1 From Constitutional Monarchy to the Democratic Republic – president as the king with no crown?*

The 20<sup>th</sup> century for Egypt was the era of strong government headed by the monarch or the president. The system has changed, but characteristics remained – Egypt was to be ruled by the individual, with real power, wide prerogatives and support from the parliament and the army<sup>25</sup>. During almost six decades, from 1952 until the Arab Spring in 2011, Egypt's presidents ruled with the support of parliament, where the majority came from the presidential political party and the military. Egyptian constitutions of 1956 and 1971<sup>26</sup> were both more or less democratic

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<sup>20</sup> See: S.A. Cook, *op. cit.*

<sup>21</sup> *Ibidem*, p. 135

<sup>22</sup> S.A. Cook, *op. cit.*, p. 219

<sup>23</sup> *Ibidem*, p. 161

<sup>24</sup> *Ibidem*, p. 167

<sup>25</sup> In fact this is still in force, with the current president Abd al-Fattah al-Sisi who originated, as his predecessors on this office, from the Egyptian Armed Forces.

<sup>26</sup> I do not count the 1964 Constitution nor the Constitution of the United Arab Republic from 1958.

in their overall characteristics. But they have created, especially the one from 1971, a legal ground for emergence of the authoritarian rule. What strikes at first glance is the frequency with which the legislator made references to ordinary legal acts, leaving the parliament and the president space for creating the legal reality as they wish to with no real and effective legal boundaries<sup>27</sup>. It has been reflected for example in continuously maintaining the state of emergency – this is however not the right place or time to determine whether it was really a necessary and the best possible solution for Egypt to be ruled by using the provisions of the 1958 Emergency Law<sup>28</sup>. It is enough to say here that the state of emergency for the whole country was not lifted until 2013<sup>29</sup>. Egypt has been ruled by the emergency provisions for over thirty years; years of continuous strengthening of the presidential powers at the expense of basic human rights. The regime justified it by referring to the threat of terrorism, religious fundamentalism or constant unrest in the border regions – especially the Palestinian issue which is still in force. One may ask whether the state of emergency was absolutely necessary in order to ensure peace. In the Egyptian case colonial history taught the republican government (the President) that ruling the country by using the emergency provisions may be useful<sup>30</sup>. The 1958 Emergency Law was issued to provide the government means for acting against the constitutional provisions, which were in general democratic in their nature, but within the boundaries of law.

The other area of law that was to be regulated by the ordinary laws was electoral law. Both constitutions, of 1956 and 1971 had left the duty of regulating it to the legislator. Both only briefly mentioned the rules of electoral law. While the 1956 Constitution stated that the National Assembly was to consist of members elected during the secret ballot, it left every other regulation to the legislator, stating only that he should decide upon the number of members, the conditions that must be met in order to be elected and the electoral law itself<sup>31</sup>. The following articles defined the powers of the legislative, but what was really dangerous was the presidential

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<sup>27</sup> In 1979 however the Supreme Constitutional Court was established, with its main goal to control the constitutionality of laws and to provide the binding interpretation of law. Often the SCC decided upon violations of human rights, i.e. freedom of expression, right of associations, freedom of peaceful assembly or gender equality.

<sup>28</sup> Law No. 162/1958 on the Emergency State; <http://www.aljazeera.net/specialfiles/pages/46609207-599c-4f9d-ad6e-618fec866c14>, 05.05.2016

<sup>29</sup> It is however still in force in some areas, i.e. the Sinai Peninsula, due to the threat of the so called Islamic State.

<sup>30</sup> See S. Reza, *Endless Emergency: The Case of Egypt*, “New Criminal Law Review”, 10/2007, p. 535-537; N.J. Brown, *Law and Imperialism: Egypt in Comparative Perspective*, “Law & Society Review”, 29/1995, p. 111

<sup>31</sup> Article 67 of the 1956 Constitution.



prerogative to resolve the entire parliament (Article 111)<sup>32</sup>. On the contrary, the 1971 Constitution *expressis verbis* stated that the National Assembly consisted of at least 350 members of which at least fifty percent were to be workers and farmers<sup>33</sup>. They were to be elected in public, direct elections in secret ballot. It also gave the president the right to choose at most ten members of the Assembly. The 1971 Constitution left the electoral law to be adopted by the legislator, but in the Article 88 it stated that the elections shall be conducted under the supervision of judicial bodies. In 2007 the aforementioned Article was changed in such a way that practically jeopardized the judicial supervision. It set the principle of conducting the elections during one day only throughout the country. It was impossible for judicial bodies to control the elections and every polling station or office in the country. What was the reason for the regime to amend Article 88? In 2000 the Supreme Constitutional Court ruled that in order to implement the provision of Article 88 to supervise the elections by the judicial bodies it is necessary to put at least one member of the judiciary in every polling station<sup>34</sup>. During the 2000 elections, which were conducted under the judicial supervision – as a realization of the SCC ruling – a number of abnormalities were detected. The regime could not risk losing control over the elections and changed the provisions of Article 88 making the judicial supervision impossible to fulfill.

The initial question – did the President of the Republic became the King with no crown – is not as surprising as it might appear. When in December 1952 the Revolutionary Command Council (RCC)<sup>35</sup> abolished the 1923 Constitution and later – the King himself, the issue of future presidential prerogatives emerged. The new 1956 Constitution granted the president wide prerogatives, including ability to issue decrees with the force of law. But in comparison to the former regime, the Egyptian new Republic was much more centered around the President. This is because the parliament consisted of the politicians loyal to the president<sup>36</sup>. During the reign of kings Fuad (1922-1936) and Farouk (1936-1952) parliament was the counterweight to the monarch. While the royal government cooperated with the British representatives in Egypt, the parliamentary opposition endeavored to become truly independent, acting against the will of the monarch. In the new republican reality this was not be possible. The RCC dissolved all political

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<sup>32</sup> Egyptian parliament in 1956 consisted only of one chamber – the National Assembly. Second chamber, the Shoura Council, have been added by the 1980 amendment to the 1971 Constitution.

<sup>33</sup> Article 87 of the 1971 Constitution.

<sup>34</sup> See T. Moustafa, *Law versus the State: The Judicialization of Politics in Egypt*, “Law & Social Inquiry”, 28/2003, p. 919- 924

<sup>35</sup> The temporary government consisting of the members of the Free Officers.

<sup>36</sup> N.J. Brown, *Constitutions ....* , p. 79

parties after it took power in 1952; the new Constitution established one-party system<sup>37</sup> which granted the president huge power combined with the luxury of stable political background and parliament fully subjected to the president's will. What is more, the system of human rights protection was ineffective. Most of the constitutional guarantees and freedoms were to be regulated by the ordinary law<sup>38</sup> – situation that enabled the regime to act against the basic democratic rules.

Nowhere in the 1956 Constitution appears the formal separation of powers. For the regime in Cairo the lack of explicit division of competences was one of the useful manipulations that allowed the government, especially the president, to interfere with the competences of others, be it legislative or even judiciary<sup>39</sup>. There were however articles that related to this issue. For example article 93 banned members of the National Assembly from interfering in the matters given by the Constitution to the exclusive jurisdiction of the executive or legislative power. Lack of formal separation of powers, combined with huge presidential prerogatives resulted in the system of the government that was fully subordinate to the highest authority. Under the rule of the 1971 Constitution this trend only increased.

### 3.2 The end of Nasser. How the next presidents protected their position – the 1971 Constitution, constitutional amendments and Islam

When Anwar Sadat took power in 1970 his presidency was seen as a temporary by his opponents. He appeared to be a weak candidate, although he was Nasser's vice president which was enough for him to become a new president after Nasser's death in 1970. But what eventually made him a real political figure was his leadership during the October War with Israel in 1973. His daring order to attack Israel during its most important day in the year – Yom Kippur<sup>40</sup>, or

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<sup>37</sup> It did so by granting all the previous resolutions adopted by the RCC the binding force under the new Constitution – see article 191 of the 1956 Constitution.

<sup>38</sup> In fact, most of these freedoms were to be regulated by the law. For example freedom of associations, freedom of peaceful gatherings, freedom of opinion and scientific research, freedom and inviolability of correspondence, inviolability of private homes etc. See part III of the 1956 Constitution.

<sup>39</sup> Hosni Mubarak, acting under the emergency law, often interfere in the judiciary competencies by transferring individual cases to be decided before the military or emergency courts; H. Abu Seada, *Exceptional Courts and the Natural Judge* [in:] N. Bernard-Maugiron (red.), *Judges and Political Reform in Egypt*, Cairo 2008

<sup>40</sup> The 1973 war (the Yom Kippur war) was the fourth war Egypt fought with Israel - after the 1948-1949 war (the Independence War), the Suez Crisis in 1956 and the 1967 war (or the Six Days War). The most significant result of the conflict was the beginning of the peace process between Egypt and Israel, with the US assistance. It ended up with the signing of the Peace Treaty in 1979 which led

the Day of Atonement, was so surprising for Israel that Egyptian forces almost defeated their most dangerous enemy<sup>41</sup>. It also paved the way for the peace process that ended up with signing the Peace Treaty between Egypt and Israel in 1979, with the assistance of United State's representatives, i.e. the President of the United States Jimmy Carter<sup>42</sup>.

Before that however the new Constitution had been established in 1971, strengthening the presidential rule in Egypt, especially after 1980 amendments where the possibility of unlimited re-election was granted. This move however leads us to the issue of Islamic influences in Egyptian constitutions, starting with the 1971 Constitution. When Sadat became the President his major concern was the legitimization of his rule. Being former vice-president was apparently not enough to maintain the stability and gain the support. As a practicing Muslim he wanted the support of the religious groups. The first concession to Islamic groups was the Article 2 of the new Constitution, which called the principles of *Shari'a*<sup>43</sup> "a major source of legislation"<sup>44</sup>. It was the first time in Egyptian modern history when Islamic law gained such a status in the state's law. In 1980 further changes to the laws concerning the President forced Sadat to amend Article 2 as well. This was also due to the religious groups objections toward the Peace Treaty with Israel. For Islamists the recognition of the Jewish State was unacceptable. Sadat had to cooperate with religious groups, especially the Muslim Brotherhood, in order to push through his amendments which enabled unlimited re-election<sup>45</sup>. He therefore accepted the proposal to amend Article 2 which would act since then as a basis for creation of a religious state. This connection between the civil government and religious scholars is one of the characteristics that is common for Muslim countries. But in Egypt it is a potentially dangerous combination. Egypt is not religiously unified country; the biggest religious minority in Egypt – Copts, members of the Coptic Orthodox Church and the Coptic Catholic Church – represent around 10 percent of

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eventually to the series of attacks - one of them was the assassination of president Sadat himself in 1981.

<sup>41</sup> The initial attack was carried out by the artillery, not by the Air Forces which are the main and most renowned forces in the Egyptian Army.

<sup>42</sup> About the peace process, see: S.A. Cook, *op. cit.*, p. 141-154

<sup>43</sup> Islamic law, based on the Quran and in addition to that *sunnah* and other sources of law, i.e. the tradition – *urf*, the general consensus of scholars – *ijma*, or the analogy – *qijas*. On Islamic law, see: S.W. Witkowski, *op. cit.*; M.H. Kamali, *Shari'ah Law: An Introduction*, Oxford 2008

<sup>44</sup> See article 2 of 1971 Constitution.

<sup>45</sup> Sadat never benefited from this amendment, though. He was assassinated in 1980, not long after the amendment came to force.

the country's population<sup>46</sup>. The Islamization of politics might have led to discrimination or acts of aggression towards non-Muslims.

The new wording of Article 2: "(...) the principles of Islamic *Shari'a* are the major source of legislation" enhanced the position of Islamic law in the country, making it the basic law and positioning it even above the Constitution itself. The question is did this make Egypt the Islamic republic? If we define the Islamic republic as a state where Islamic law is, even only on paper, a major source of legislation and it determines all the laws to be coherent with itself – then the answer may be positive. But if one require the Islamic law to be really in force, not only on paper, and the state's organs to follow the dictates of the religion in the first place – then the answer must be negative. First of all the Egyptian penal code was incompatible with *Shari'a*<sup>47</sup>. Also the Supreme Constitutional Court only after fourteen years decided what was the meaning of " the principles of Islamic *Shari'a*"<sup>48</sup> and gave the executive and legislative authority to decide upon its binding interpretations<sup>49</sup>. As N.J. Brown wrote: "Granting such authority makes it very unlikely that Article 2 can serve as the basis for an Islamic constitutionalism in Egypt."<sup>50</sup> The essence of Islam is that no government has the right to interpret the Divine law. The closing of the gates of *ijtihad* in mid 9<sup>th</sup> century completed the process of legal interpretation in sunni Islam<sup>51</sup>. Since then no one had been able to create or interpret the law – the only activity possible was applying the provisions of existing law. Therefore it was not in government's power to decide whether the new law was consistent or not with Islam. Neither was it in the power of the Supreme Constitutional Court, which was finally established in 1979. The Law on the Supreme Constitutional Court<sup>52</sup> explicitly states that the SCC has the power to decide upon the constitutionality of laws, make the binding interpretations of laws and to settle jurisdiction disputes between courts. Nowhere in the law or the Constitution has the SCC gained the right to interpret Islamic law or to decide on the legality of statutory law in compliance with Islam. Neither was this right granted to Islamic scholars. Islam has therefore been used as a veil for the politicians. It served as the element that unites the society against the common enemy: Israel. But most of

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<sup>46</sup> It is estimated number as for 2012; source: <https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html>, 12.05.2016

<sup>47</sup> M.Abdelaal, *Religious Constitutionalism in Egypt: A Case Study*, "Fletcher Forum of World Affairs", 37/2013, p. 42 [http://www.fletcherforum.org/wp-content/uploads/2013/01/Abdelaal\\_37-1.pdf](http://www.fletcherforum.org/wp-content/uploads/2013/01/Abdelaal_37-1.pdf), 10.05.2016

<sup>48</sup> *Ibidem*, p. 39

<sup>49</sup> Brown, N.J., *Constitutions....*, p. 182

<sup>50</sup> *Ibidem*, p. 182

<sup>51</sup> In Shiism this never happened. Shiites are able to interpret the religious law and as a result even create new regulations that has no equivalent in Quran. See: J. Danecki, *op.cit.*, p. 217

<sup>52</sup> In Arabic: <http://old.qadaya.net/node/214>, 12.05.2016

all the introduction of *Shari'a* to the 1971 Constitution was the effect of political game and it constituted a political compromise which enabled Sadat to amend the Articles he wanted to be amended and that could not be successfully changed without the support from the religious groups. The loss of this support would possibly cost Sadat his presidency, especially during the unstable political situation after signing the Peace Treaty with Israel.

Sadat needed this support also for another reason. After 1979 fundamentalist Muslim militias started operating in Egypt as an opposition to the state's policy. Later, during Mubarak reign it has resulted in terrorist activities around the country, in which also foreign tourists were victims<sup>53</sup>. It has dominated Egyptian internal politics giving the regime the background for maintaining the state of emergency. It also helped the regime to unite people against a new, local and much more common threat than the one of Israel. The justification for extending the state of emergency, combined with the military support for the regime resulted in years of growing authoritarian rule, based on law. The Constitution which was created on the basis of the European law could not play the same role in Egypt as it has played in the West. The problem lies in different political culture, and culture in general<sup>54</sup>. It is not possible to copy Western rules and institutions to the different cultural background without proper modifications that would allow achieving intended objectives. The question occurs, whether Western law is resistant to the extraordinary situations, be it the threat of terrorism? The answer for this question I leave for the reader's consideration.

In the 1980's amendments Sadat established the Shoura Council (or the Consultative Assembly)<sup>55</sup> making the Egyptian parliament bicameral. It may seem that it was a pro-democratic move, for the Council was to be the consultative body. But what weakened those provisions was the presidential prerogative to nominate one third of the Shoura members, the right which

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<sup>53</sup> The most severe attack happened in 1997 when Al-Gama'at al-Islamiyya killed 58 foreign tourists and 10 Egyptians in Hatshepsut Temple (Luxor).

<sup>54</sup> While in Europe the legal and religious systems have been separated, in the Middle East, where Islam played the vital role in politics and society, it has never happened. In the first half on the 20th century in Turkey, Mustafa Kemal Atatürk introduced, among other things, secularism to politics. But in Arabic countries, such as Egypt or Iraq the religion faced a revival. It was related to the battle for independence and the weakness of the local governments. For Islam written constitution would play a minor role in everyday life because it would always be subordinated to the Quran. Liberal constitutionalism - as it is in the Western world - treats constitution as the most important legal act, whether it is written or not. In Islam that part is played by the Quran, not the constitution. During the colonial era Arabic societies could not have develop their political and legal tradition and adapt it to the new conditions. Also the Ottoman Empire, which during the centuries of its existence was the most influential political organism in the region, has lead to the political and legal stagnation.

<sup>55</sup> Articles 194-205 of the 1971 Constitution.

in Egyptian reality gave the president double power in legislative process. He also had the right to dissolve the Shoura Council when the emergency situation required it. Giving that Egypt has been under the state of emergency for thirty years it was, as an addition the prerogatives relating to the National Assembly, a dramatic change which alongside other things eventually led to emergence of authoritarian rule and to maintain it on stable ground.

#### ***4. Conclusion***

Egyptian constitutional and political reality has been determined by the history and tradition. History – because of the colonialism, struggle for independence and geopolitics. Tradition – because of the overwhelming nature of Islam which does not see the difference between religion and politics. It all had a huge impact on building the modern Egyptian state, which is also today clearly visible in the reality of Middle Eastern politics. The constitutional history of Egypt aimed in a specific direction – creating a strong state with a reliable leader whose powers were not strictly limited by the law. For years it was Nasser who created the political and social reality in the state. His charisma and inner strength, combined with him being the personification of the military that brought Egypt to real independence helped him achieve his goals. The 1956 Constitution might not have been ideal but it was the first constitution that was created without the foreign supervision. And even that it had lasted only for less than two years<sup>56</sup> it shaped the general image of Egyptian future. The 1971 Constitution was a real achievement giving that it have survived for forty years in a country, where duration of the previous constitutions was short. It also improved the means for strong presidential powers. Constitutional provisions combined with the emergency law gave president Mubarak almost unlimited power to decide even upon lives of his citizens.

Egypt's the example of how the government and the president may use the law for their particular interest. With the support from the United States who wanted to maintain stability and peace in the region after the Peace Treaty between Egypt and Israel, Egyptian leaders did not have to be afraid of foreign interference in their internal affairs as long as they were able to keep the status quo in the region. At least until 2011.

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<sup>56</sup> It was abolished in 1958 when Egypt and Syria established the United Arab Republic, which lasted only until 1961. In 1964 Egypt get the constitution – it was eventually replaced by the one of 1971.

## **Trends in Egyptian Constitutional Law After 1952.**

### **Maintaining Strong Presidential Power in the Reality of Middle East Affairs.**

**Summary:** *The Arab Republic of Egypt is one of the most influential countries in the world. It plays a unique role in the Middle East, especially when we combine it with its relation to Israel, partnership with the United States and its colonial history. It is also one of the major cultural and religious centers in Islamic world. However what really is fascinating is Egypt's constitutional and legal history. This article will focus on evolution of Egypt's constitutional system after 1952, i.e. the Free Officers' Revolution that entirely changed Egypt bringing the republican government instead of the constitutional monarchy. Those changes and evolution of the political system cannot be understood properly without some historical background. The colonial rule and what came after it, i.e. the emergence of the State of Israel shaped Egypt, its people, the government, the politics, especially the foreign affairs with the Soviet Russia and after 1971 with the United States. It also had its impact on the Egyptian legal system, starting with the basic laws – its constitutions, which reflected political changes in the country.*

**Keywords:** Egypt; Constitutional Law; Constitution; President; Middle East