



ACADEMIC COMMENTARY OP-EDS ON LEGAL NEWS BY LAW PROFESSORS AND JURIST

SPECIAL GUESTS

President Morsi: The Dubious Authority of a 'Constitutional Declaration'

Thursday 29 November 2012 at 10:50 AM ET

JURIST Contributing Editor [Chibli Mallat](#) of the Yale Law School says that a recent decree issued by Egyptian President Mohammed Morsi is unconstitutional and must be struck down by the judiciary in order to preserve the country's democratic revolution...

I (Hammurabi, Pharaoh, president, speaker, street cleaner, seventh-year student at your local public school...) issue the following constitutional declaration: "From this day on November 29, 2012, all men with blue eyes will be considered to have brown eyes. All men who thereafter insist that they still have blue eyes will be banned from the land until they recant. This declaration is binding on all, with immediate effect, and no judge or court or any other person or group, governmental or non-governmental, can rescind or review any part of it."

So it is for Egyptian President Mohammed Morsi's [declaration](#), both on procedure and in substance. Under what authority can Morsi issue a "constitutional declaration"? And is there any measure that he can defend in it that is substantially coherent?

The response cannot be found in any texts that pass as constitutional since Hosni Mubarak was [brought down](#) by the people's power. If the [1971 Egyptian Constitution](#) is still valid, including the amendments approved by[referendum](#) on March 19, 2011, then there is no mention of a "constitutional declaration" in the Egyptian constitution. The president must find the authority for his declaration elsewhere. Morsi can argue that his election by the people grants him such authority, and rest it on the power vested in him by popular mandate in presidential elections. But if he were capable of issuing any constitutional declaration just because he has been elected by the people, then he could appoint himself president in perpetuity, anoint his horse as a senator and turn blue-eyed

people into brown-eyed citizens. So, Morsi needs to look elsewhere for legitimacy in his post-revolutionary constitutional practice. He could also rest it on the argument that the Supreme Council of the Armed Forces (SCAF) took the same legal liberties at various junctures, and he would be right on the facts. But the SCAF passed its unilateral declarations without authority, hence the correct battle (also waged by Morsi and his supporters) that made SCAF finally fold.

In short, the Egyptian president cannot simply issue a "constitutional declaration" — especially one which bears little trace of his own cabinet backing it. Citizens are bound to fight it in the street to force a retraction, and challenge it before the courts. A reasoned decision from the Supreme Constitutional Court of Egypt (SCC), or the administrative courts that are reportedly scheduled to be heard on December 4 or, indeed, from any judge sitting on a court whose powers were annihilated by the declaration can dispose of it as *ultra vires* (beyond the powers of a president) on principle. Morsi might then try to dismiss judges or arrest them, but he would not gain any constitutional authority in doing so. He would just be digging in as the new Pharaoh.

What about the contents of the declaration? Is there any measure in the constitutional declaration of November 22 that Morsi could have taken without widely overstretching his presidential powers to a Caligula-like extent?

On substance, Morsi can issue presidential decrees on a number of important matters — such as nominating a prime minister or conducting negotiations over Gaza — but such acts do not have the status of a "constitutional declaration." Of the seven articles in the declaration, which could be matter for presidential decree? Article I orders the reopening of cases of murder committed by the former regime. Many victims would welcome justice for state brutality during Mubarak's reign and since, but the formulation is vague ("according to the Law of the Protection of the Revolution and other laws") and sounds like the sweeping order of a dictator. There is a functional difference between a principled policy and the vengeful, direct tone in the formulation of Article I. The heavy procedural mechanisms, the resources involved and the already-significant trials under way cannot be disposed of in a few lines that could even be interpreted as reopening Mubarak's case — even though he is already serving a life sentence.

Morsi's declaration under Article II that no decision made since he has taken office can be reviewed by the judiciary flies in the face of the basic constitutional principles of separation of powers. It undermines judicial power in ways Mubarak himself did not dare express. Article III on the appointment of a new prosecutor general is also *ultra vires* on its face. A president could

conceivably, through the government and in the wake of an appropriate process, dismiss the prosecutor-general. Morsi [tried and failed](#) to do just that earlier in November 2012, when he called on Abdel-Meguid Mahmoud to step down. However, Morsi cannot do so as a fiat couched in a constitutional declaration.

Articles IV or V were included to protect the constituent assembly and the Shura assembly from being disbanded by the courts, as the Egyptian Parliament was on June 14, 2012, by a [ruling](#) of the SCC (wrongly, in my [opinion](#)). Morsi might be right to protect the integrity of an elected chamber or a constitutional assembly, but this cannot be done without a process involving a much more open, consultative deliberation.

There is a serious problem in constitution-making since the [Egyptian Revolution](#), which leaves the citizenry uncertain what the constitution is. The Egyptian president is simply carrying on the tradition of outrageous, "constitutional declarations" that led to the demise of the SCAF.

It is true that, in revolutionary processes, even constitutional matters are in flux. Common sense is then needed to know one's limitations in power, and sweeping, unilateral "constitutional declarations" will not do. Egyptian democrats, and the people across the world who support the Nile Revolution, are rightly angry. The judiciary must step up its oversight in a well-thought-out, well-argued decision that puts an end to "constitutional declarations" once and for all.

Chibli Mallat is Chairman of Right to Nonviolence, a Middle East based NGO that focuses on nonviolence, constitutionalism and judicial accountability. He is a visiting professor at Yale Law School.

Suggested citation: Chibli Mallat, *President Morsi: The Dubious Authority of a 'Constitutional Declaration'*, JURIST - Forum, Nov. 29, 2012, <http://jurist.org/forum/2012/11/chibli-mallat-constitutional-declaration.php>.