

The New Egyptian Constitution: An Outcome of a Complex Political Process

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ABSTRACT *Although constitutions are intended to represent and confirm the spirit of coexistence between classes, sects and various components of society, the campaign and the referendum revealed an entirely different picture. Further complicating the political arena, the referendum effectively caused strife among revolutionary compatriots and opposition forces and engendered a state of polarization across Egyptian society. This turbulent situation requires Egyptians to rapidly initiate genuine nationwide dialogue to deal with the demands and aspirations of different parties and to develop an agenda to achieve the revolutionary goals: bread, freedom, and human dignity.*

There is no question that the new constitution, in establishing rules that regulate the ruler's relationship with the ruled, represents a fundamental starting point in Egypt's effort to build a democratic polity that grants the maximum rights and freedoms to its citizens and ensures the rule of law. Many dreamed that the drafting of the new Egyptian constitution would represent a step towards building the new Egyptian state following the peaceful revolution. Therefore, the drafting process was supposed to manifest a spirit of consensus across the political spectrum following the demise of the authoritarian regime that took away the population's freedoms and denied

them their rights for decades—a regime that intended to continue its corrupt rule by introducing hereditary rule (to Mubarak's son) through rigged constitutional amendments and false legal procedures.

But almost two years after the Egyptian revolution, referendum day revealed an entirely different picture than what was originally imagined in that it demonstrated the problems in determining political attitudes. The process of drafting a new constitution that started on March 19, 2011 and continued with the amendments to the 1971 Constitution led to a strongly polarized political landscape that was divided into two fundamentally op-

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A elderly woman sits as she queues outside a polling center to vote during a referendum on Egypt's new constitution in Cairo.

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Khaled Abdullah Ali
Al Mahdi

posed visions where each party clung to its own priorities, ambitions and understanding of national interests.

This raises a number of questions about the current environment in Egypt. What are the causes and factors behind these sharp divisions and polarization? Do these stem from internal factors related to the dire post-revolutionary environment, factors that were main reasons for the start of the revolution? Are they also related to the trends and interests of each party in the current political situation? Or are they perhaps related to the remnants of the old regime that refuse to recognize the revolution and view it as a grim moment in Egypt's history? Do external factors, some of which are

rooted in regional powers whose role and interests are sidelined by Egypt's rise to prominence? Or are they related to international forces that view the rise of the Islamists in Egypt as a threat to their interests in the region? What are the implications of this polarization on the future of Egypt's revolution? What are some likely scenarios if this polarization continues? Will Egypt slide towards the Pakistani or Somalian model as some suggest? Or should we consider recent developments as an inherent part of the transitional period that all countries undergo after internal conflicts and national revolutions? And to what extent can the new constitution contribute to bridging the gap and ushering in an era of national stability?

This study attempts to answer these questions—which are difficult to tackle once and for all due to enduring uncertainties in the future, although there have been attempts to establish a broad outlines and initial steps have been taken, such as the

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new Egyptian constitution—at two levels: the political forces and in the constitution itself.

The Political Forces: Mutual Errors

Some like to believe that Egypt's recent mistakes have stemmed from the ruling politicians. However, these mistakes have been rather a product of all Egyptian politicians, not just those in power, who have evidently failed to heed the words of Tunisian President Al-Moncef Al-Marzouki, who said at a conference held in Cairo in July 2012 that the most important task for politicians during transitional periods "is to minimize the cost of change and to achieve this

change with the least amount of sacrifice and blood."

This leads to the conclusion that all the political actors in Egypt must bear the responsibility for some errors that had been made even before the country's election of its first civilian president. There is no denying that the Supreme Council of the Armed Forces (SCAF) worked together with some factions to ensure that some initial mistakes led to a succession of errors. Still, I believe that the SCAF played a major role in safeguarding the revolution and preserving its non-violent nature by siding with the people on February 11, 2011. The early mistakes made stemmed from the March 19, 2011 ratification of the constitutional amendments and the subsequent Constitutional Declaration with its 64-article roadmap that tried to preserve the 1971 Constitution with new amendments that were promulgated by the referendum.

The errors continued with what was then known as the "El-Selmi document" of November 2011 in which articles nine and ten allowed for a peculiar constitutional arrangement that provided the military immunity from civilian oversight and intended to establish a National Defense Council as the only body entitled to discuss military-related matters. The document sparked a million-man march on November 18 with dozens of activists protesting to demand the document's revoking, a protest that allowed the forces on the street to regain the upper hand in managing the political process. The streets of

Cairo erupted in flames again when security forces attacked protesters after they called for thousands of others to join the protests, the clashes ended up leading to dozens of dead and hundreds wounded. Over the next few months, clashes in the Ministerial Council area, Port Said and Mohamed Mahmoud led to a doubling in the death toll under military rule while military courts continued to pursue civilian protesters.

The situation remained tense as clashes continued between various parties even after the elections for Egypt's bicameral legislative (the People's Assembly, the lower house, and the Shura Council, the upper house). Society-wide divisions man-

In the presidential elections Muhammad Morsi, the candidate for the Muslim Brotherhood and its political wing, the Freedom and Justice Party, won a marginal victory against his rival, Ahmed Shafiq, who represented the previous regime due to his role as the last Mubarak-era prime minister of Egypt and his clinging onto his post until heavy pressure from the streets forced his resignation. The defeat of Shafiq was a sigh of relief to the country's revolutionary forces who were unwilling to see Shafiq in the Presidential Palace shortly after a revolution against a regime in which he played a major role.

Morsi then sacked the two top SCAF leaders and revoked the Constitutional Declaration (which he described as the "obstructing declaration") that was issued before the presidential elections. Taking a major step to ending Egypt's long-standing military rule, he reshuffled the SCAF, receiving praise for his actions from both supporters and rivals, and thus he initiated a new era in the country's revolutionary process that included a new constitution to restructure government institutions, reform Egypt's political system, and regulate the relationship between government authorities. Most significantly, the new constitution was to serve as a document that enshrined rights and freedoms.

However, a constitution's supremacy not only depends on commitment from all members of society and respect from state authorities, but it also requires the superiority of a con-

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ifested themselves following the establishment of an Islamist majority in both chambers. To pour more fuel on the fire, the Constitutional Court declared the People's Assembly unconstitutional, leading to the dissolution of the parliament immediately before the presidential elections, an act which led to a widening gap between the two camps—one of whom raised the banner of religion while the other carried the banner of the civil state.

stitution to the state establishment in that it guarantees civil and political rights and freedoms and preserves economic, social and cultural rights, among other universally recognized rights, and obliges the state to be the guarantor and protector of these rights. However, what followed the military's departure from the political arena revealed a lack of trust and vision on both sides as the public increasingly recognized the struggles between the two.

The battle over Egypt's new constitution marked *the* most prominent episode of this conflict. The religious mainstream with its different wings (the Muslim Brotherhood and its political wing, the Salafists and their political representatives, the Al-Wasat Party, as well as other forces) viewed the constitution's drafting as a matter of survival. The constitution represented the first major step in rebuilding the state and its institutions as well as in materializing the goals and slogans of the revolution. This approach entailed the preservation of Egypt's main political institutions such as the presidency, the Constituent Assembly and the Shura Council. As such, President Morsi issued his November 2012 Constitutional Decree that granted immunity to his decisions and to constitutional decrees from legal oversight—a rule that extended to the Constituent Assembly and the Shura Council. This presidential decree also replaced the Attorney General and made it possible for members of the old regime to face trial should new evidence surface.

The opposition condemned Morsi's decree and regarded his actions as an over-extension of presidential authorities, while Morsi supporters claimed that they were intended to overcome the "threats to national unity and the state" from anti-regime plots inside the country (tacitly accusing the dissolved National Democratic Party) and from certain Gulf states that hosted Ahmed Shafiq, Morsi's opponent in the presidential election. Other groups joined the opposition ranks that were under the leadership of Mohamed ElBaradei, Amr Mousa and Hamdeen Sabahi in a struggle against President Morsi. The opposition also included various levels of the judiciary (such as the ordinary courts, the State Council, the Constitutional Court, the Administrative Prosecution courts and the State Litigation Authority) as well as the various revolutionary youth groups that had supported Morsi's presidential campaign. Increasing the opposition's societal influence against the President and his policies, this new situation forced Morsi to call for a nationwide dialogue that the opposition rebuffed, with the exception of some religious movements with alleged ties to the government and some figures from the civil movement. This intense confrontation resulted in a new decree that revoked the original text while preserving its intentions, including replacing the Attorney General and the creation of new mechanisms to form a Constituent Assembly in light of its predecessor's dissolution following the 2011 court ruling that declared the body unconstitutional.



An electoral worker
counts ballots after
polls closed in
Zagazig.
REUTERS/Stringer
Egypt

To make matters even more complicated, the Constituent Assembly completed the constitutional draft before its deadline—a situation that showed a crisis within the assembly and an undue haste to include certain articles in the transitional provisions. The crisis worsened as President Morsi called for a referendum within 15 days of receiving the draft constitution, as stipulated in the March 2011 Constitutional Declaration. This made it impossible for the draft to be discussed at the national level, removing the possibility of scrutiny from different elements and social groups in Egypt, thereby contributing to an already deep trust deficit and division among the people.

This complex political landscape and ongoing intellectual confusion and divisions among Egyptians lead to two important observations. The first relates to the ruling elites, especially after Mohammed Morsi's victory in the presidential election. The government made a number of mistakes in managing the transitional period which expanded on other errors that the SCAF committed, and exacerbated the mistakes that affected the country's entire political scene and its management. Most notable was the government's hesitation to issue and revoke its decisions, as in case of the resolution to restore the parliament, the former Attorney General's appointment as ambassador to

the Vatican, the issuing of a Constitutional Decree that violated both the principles of government and its institutions as well as citizens' rights and freedoms (among them the right to litigation), and the passing of tax laws on goods and their eventual suspension. There are two factors that explain the government's hesitation to change their decisions. First, the government may lack the necessary level of maturity in decision making, and as a result they not carefully consider external factors, their implications, and the ways to ensure that a decision will survive. The resignation of some of the President's advisors after the recent issuing of the Constitutional Decree supports this assessment. The situation calls for a rearrangement of the inner working of the presidential administration to correct this problem. Furthermore, the government must also be aware that enabling and consolidating democracy in Egyptian society does not only depend on majority rule. Even though constituting a majority in the ballot box is an indication of democracy, other factors, such as the rule of law, remain inalienable to the spirit of democratic rule.

The second important observation is that there were secret plots to manipulate the new government from within and that even aimed at thwarting the nascent experiment of Egypt's first civilian presidency. These raise the following questions: To what extent did the new administration know about these arrangements? Have these plots, as mentioned in the President's public addresses on more

than one occasion, been revealed and thus foiled? Who were the perpetrators? Who were their accomplices? What were their goals? If these plots did indeed take place, the country's ruling elite must clarify the facts to prevent their silence from discrediting them in the eyes of the Egyptian people.

The opposition, which proved to be divided into many factions, is not a monolithic social group that is organized to develop collective stances and attitudes. Instead, it comprises a complex network of individual interests and personal ambitions. That

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these opposition forces, which describe themselves as civil and revolutionary, were unable to form a coalition or a unified umbrella organization in the parliamentary and presidential elections proves their disunity. The broad dispersal and fragmentation in the opposition ranks became evident in more than one electoral competition.

Furthermore, adopting a civil or revolutionary identity, being regarded a source of wisdom and enjoying national control requires more than raising a civil or revolutionary ban-

ner. The opposition includes some parties that have worked against the public interest in order to pursue narrow personal interests. The worst example of this was the recent call to form a coalition with the former elite from the now-dissolved NDP in order to confront the religious group. Even though some NDP members have distanced themselves from the old regime's practices and corruption, it is also true that forming an alliance with actors against whom the revolution took place is an unacceptable and unreasonable strategy especially in the initial and important stages in the post-revolution reconstruction of the country.

That should lead the opposition to realize three things: First, the promotion of revolutionary slogans requires bringing in well-known young public figures as the leaders of the revolution as opposed to relying on leaders from traditional opposition parties that had served as a mere props to the old regime. Secondly, the ownership of media outlets and using these to criticize the opposite political camp's mistakes must not mean that the opposition itself should be immune from media criticism and that their mistakes and misdeeds should not be revealed to the public.

Finally, building a successful democracy is not about speaking on satellite channels and participating in seminars, conferences and lectures, but it is about taking to the streets and interacting with citizens about their concerns and problems—not only on political issues, as these often are not

the primary items of their agenda, but also on economic and social problem that require considerable attention to allow them to participate effectively in political life, instead of being part of a voter bloc that moves randomly between the two camps without necessarily knowing which one is better or preferable.

The New Constitution: An Objective Reading

The constitutional referendum was an important event in achieving a future of stability, democracy and peace. But it is unacceptable that the democratic revolution, which produced unity among all classes and sects of the people, has led us to a mere technocratic process that is a riddle and highly problematic for ordinary people. The biggest challenge during transitional periods is to enable the people to effectively participate in a new constitution's drafting process. In this sense, ordinary citizens' right to a minimum level of participation in the management of public affairs as stipulated in the International Covenant on Civil and Political Status must apply to constitutional drafting processes. In line with this principle, each citizen retains a right to participate in the drafting of their constitution, either directly or through elected representatives, provided that conditions for such participation are not unreasonable or do not lead to exclusion.

The importance of participation is not only rooted in legal reasoning but also offers political and practical advan-

tages, such as boosting national unity, improving the public's understanding of the constitution, solidifying its legitimacy and approval rate, expanding the knowledge of the drafters, contributing to the search for innovative solutions, and promoting a sense of ownership among citizens regarding the new constitution. These factors have increased importance during transitional periods, as society-wide participation helps establish democratic institutions based on the rule of law and respect for human rights.

This, in turn, contributes to political stability by encouraging the community to accept the legal system as a whole and therefore reduces the likelihood of credible accusations that certain groups were neglected, a perception that might lead members of these groups to boycott the referendum or participate in a vicious cycle of protest that may lead to a collapse of the government and societal fragmentation. For these reasons, society's effective participation in drafting a new constitution is an important factor in establishing long-lasting solutions.

Popular participation in drafting a constitution, if well managed, is therefore a key factor for ensuring stability, national unity and the legitimacy of the constitution. The Constituent Assembly took this into consideration in the early stages of its work by appointing a committee for discussions and proposals that communicated with all components of Egyptian society, and tried to create a space of mutual understanding that would allow for a constitution

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that would meet the Egyptian people's shared aspirations. However, the above-mentioned events stopped that experience in its early days. Secular groups withdrew from the assembly, alleging that the draft constitution contradicted the terms agreed upon in the specialized committees. This led to increasing confusion in Egypt's fragile political landscape as well as a split between the two main currents on the streets, leading them to catastrophically assume new positions as supporters and opponents. As such, each party offered arguments and evidence to validate their respective position on the constitution—a development that reflected the lack of vision on both sides.

Supporters argued that the constitution would bring stability, and therefore enable the development and foreign investment that was required to achieve the ambitions and aspirations of the Egyptian people. They also claimed that Article 2 and Article 219 would work to moderate Islamic Sharia rule. On the other hand, the opponents claimed that the constitution would bring about a new tyranny by equipping the president with absolute authority and broad powers while leaving no room for account-

ability and oversight. It was thought to reduce citizens' rights and impose restrictions on freedoms to such an extent that opponents demanded a reinstatement of the 1971 Constitution along with a new Constituent Assembly.

However, an objective reading of the constitution leads to certain important conclusions. First, it is untrue that the constitution's ratification would lead to productivity and stability as these could only be achieved if the constitution was politically legitimate—as manifested in its popular approval and societal compatibility—and enjoyed the perception of legality during the entire process, from its formulation to its approval. As such, there is need to reconsider such statements.

Furthermore, claims that the 1971 Constitution represents a better alternative to the new constitution do not reflect the truth. A comparison of the 1971 Constitution with other constitutions shows that the former is unfit to guarantee citizen's rights and freedoms. Moreover, the 1971 text lacks adequate acknowledgement of economic, social and cultural rights while failing to provide genuine guarantees regarding judiciary independence, a key factor in safeguarding rights and freedoms. Also, the president's wide-ranging powers and authority in the 1971 Constitution paved the way to autocratic rule in the country.

The following list offers correct and substantial observations about Egypt's new constitution:

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1.) Regarding the military's mandate, the new constitution introduced a new article (Article 195) that explicitly states that the Minister of Defense must be appointed from among military officers. This contradicted the expectation that the constitution would instead require a civilian to be appointed as Minister of Defense in order to ensure civilian oversight of the military. Also, Article 197 mandated the establishment of a National Defense Council, where military officers constitute a majority, to monitor the military budget, even though the parliament was expected to acquire this right in order to make sure that taxpayer money would sponsor the Egyptian military's training and equipment instead of financing non-military projects such as the building of factories and facilities.

2.) Article 198 authorizes military courts to try civilians. The desired constitution was to prevent civilians from facing trial before military courts in order to put an end to unfair court rulings that have affected hundreds of civilians who were ac-

cused of resisting the military police deployed in streets and alleys.

3.) The constitution includes a clause (Article 229) that creates a quota for the representation of workers and peasants in the next parliament. However, the lack of an accurate and comprehensive definition of these terms allows various groups, such as government ministers and university professors, to seek election in this category. What makes it more complicated is that Article 207, which is related to the formation of the Economic and Social Council, functions as a guarantee that this condition will be met despite the lack of any definition of the term “worker.” In addition to the justifications provided for this exception (“protecting workers’ rights”), it remains unclear whether the protection of these rights will be limited to the first legislative term or will cover future terms.

4.) Articles 127 and 139 have a clear contradiction in their wording. While Article 127 stipulates that the people’s consent (as it manifests itself in the form of a referendum) is necessary to dissolve the People’s Assembly, Article 139 makes no mention of a referendum for the legislative body’s dissolution.

5.) Regarding independent bodies of the press and the media, the constitution makes certain arrangements. As such, the National Commission on Press and Media is mandated to manage state-owned press and media, and it is expected to run these enterprises while developing their assets and en-

suring their compliance with professional criteria and fair administrative and economic management guidelines (Article 216). However, this arrangement raises certain questions: If the Commission is responsible for these institutions’ administration and economic management, and therefore assumes the Shura Council’s role prior to the constitution’s approval, is it logical to expect the same body to monitor their professional performance? Keeping in mind that the National Media Council will replace the Supreme Council of the Press (Article 215), is this body not better equipped to oversee the state media’s professional performance? As such, the constitution seems to create confusion about the respective roles of the Council and the Commission vis-à-vis state-owned press and media outlets, which include 76 state television channels and 33 state radio stations.

6.) Article 232 bans the leadership of the dissolved NDP from practicing politics for 10 years. Although this remains agreeable on principle, extending the ban to members of the People’s Assembly and the Shura Council with reference to pre-revolution legislative terms raises legal questions, such as the following: While the political ban is known to be a legal penalty imposed on those found guilty, is it fair to have such a penalty without a legal text and in the absence of a court ruling that supports the perpetrators’ conviction?

Furthermore, although the lower house of the parliament is organized by terms into five legislative sessions,

the Shura Council functions in single sessions. This makes it confusing to calculate the duration of the ban on politics for pre-revolution Shura Council members. If every half-term renewal is taken into account, then the Shura Council had two terms in 2004-2007 and 2007-2010, while the terms of the People's Assembly went from 2000-2005 and 2005-2010. This situation makes it impossible for the duration of the ban to be calculated for members of the two bodies on an equal footing. Moreover, it remains disputed whether the most recent legislative term that began with the 2010 elections held immediately before the revolution applies. This calls for a reconsideration of the article's second paragraph to make necessary adjustments to its wording.

Briefly, the adoption of the new constitution could serve as a foundation upon which we can continue building only if there is good will and clear ob-

jectives from each party to enshrine the public interest and protect the security and stability of Egyptian society. The ruling establishment must realize that they have a great responsibility in the face of the high hopes and ambitions of the people. They will not be able to achieve any success unless it extends a hand of reconciliation to all actors and societal forces.

At the same time, the opposition should be aware that the new constitution's adoption is not the end of the road. The imminent election requires preparation to win the battle for the Egyptian people's support to amend the constitution to compensate for its shortcomings and problems. We must remember that Egyptian society, which constitutes roughly a quarter of the entire Arab population, successfully went through grave political and social crises with a spirit of collective responsibility that characterized its popular mobility.