

Egypt's New Constitution: A Mixed Bag

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ALY EL SHALAKANY, MAR 6 2014

In January 2014, Egyptians approved Egypt's new constitution by an overwhelming majority of 98.1%^[1]. Voter turnout, however, shows another side to what is a very complex story; only 38.6%^[2] of the eligible voting population participated in the constitutional referendum, with the gross majority of those not in attendance comprised of the youth demographic and supporters of the Muslim Brotherhood who were ousted from power on in the summer of 2013. There are several reasons for this mixed set of results, including primarily the marginalization of the Muslim Brotherhood and the revolutionary youth that took to the streets on 25 January 2011. But even this marginalization does not explain the full story.

In order to fully understand why the constitution ended up the way it did, it is important to put matters in context. In response to what many, if not most, Egyptians saw as a power grab by the Muslim Brotherhood to dominate all facets of political life at any cost (including in many cases the use of violence by their supporters), a number of political groups formed an informal coalition that staged an uprising that eventually led to the downfall of the Muslim Brotherhood regime in the summer of 2013. The constitution itself reflects the uneasy compromise between these diverse political groups. Consequently, the constitution has received criticism from conservatives, progressives, revolutionaries and Islamists alike and in almost equal measure. Some would argue that this is a common theme for all constitutions that result from periods when a society is in a state of tumultuous transition. Arguably, however, Egypt's constitution has adopted these contradictions more profoundly than in any other constitution in recent history. It is very much a social contract that is caught between two worlds; the comfort, safety and security of the status quo promised by the deep state (the bureaucratic elite mainly composed of retired army officers) and, on the other hand, *some* of the progressive freedoms demanded by the millions of Egyptians who took to the streets in demonstration over the past three years. This stark contrast is most obvious when the new rights and freedoms available in the new constitution are juxtapositioned with the constitutional entrenchment of the two most powerful and conservative institutions in Egypt, the military and the judiciary.

Rights and Freedoms

With the exception of ultra-conservative Islamist groups, who nevertheless supported the approval of the constitution, there is a general consensus that positive progress has taken place in the new constitution when it comes to the rights and freedoms afforded to Egyptian citizens.

Unlike the 2012 constitution that was dominated by Islamists who succeeded in using Sharia to dominate the 2012 constitution to the detriment of minority rights, the new Egyptian constitution obligates the state to promote and guarantee equality between men and women in all civil, political, economic, social and cultural rights and provides protection to women from any form of violence^[3]. Moreover, the state must take steps to ensure an appropriate level of representation of women in parliament, the executive and the judiciary^[4].

For several decades now, Egypt has suffered from increased discrimination against women and religious minorities. The new Egyptian constitution has introduced anti-discriminatory protections that prohibits discrimination based on religion, belief, gender, race, creed, color, language, disability or social class^[5]; the scope of these protections are in accordance with the minimum standards set by international law and are unprecedented as far as Egypt's previous constitutions are concerned. Further, the constitution obligates the state to take appropriate measures to combat all

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forms of discrimination and establish an independent government agency for this very purpose[6]. Finally, the constitution has also prohibited hate speech, which is not common even for more mature democracies, but runs the risk of being abused to muzzle legitimate freedom of expression[7].

Police brutality has been a cornerstone of the authoritarian regimes that have ruled Egypt for as long as anyone can remember and the use of torture is integral to this framework of oppression; it is no coincidence that Western governments had Egypt at the top of their wish list of destinations for their rendition programs for this very reason. The new Egyptian constitution not only bans all forms of torture (not just during detention), but also exempts the crime from any statute of limitation[8]. If this new right is applied correctly to achieve maximum effect, not only could torturers of the past be prosecuted, but new forms of protection could develop through case law as the definition of "torture" evolves as it has in other jurisdictions. For example, severe domestic violence, which is rampant in Egypt, could potentially fall under the definition of torture in the future.

A raft of new workers' rights have now been included in the new Egyptian constitution that generally conform to international standards set by the International Labor Organization. The state is now obligated to protect workers' rights, to nourish more balanced relations between the different parties to production, to protect workers from hazardous working conditions, to make available appropriate conditions for the health, safety and security of workers in the workplace and arbitrary dismissal is prohibited[9]. Although many of these rights are already available in legislation, there have been many documented cases of a lack of implementation of these laws to the detriment of workers. By enshrining these rights in the constitution, the constitutional court may tackle these issues head on and require reform of legislation in order to ensure these rights are enforced in practice.

Last, but not least, there are two further developments that are potentially ground breaking in relation to the rights and freedoms available in the new Egyptian constitution. Firstly, Article 82[10] prevents the passing of any laws relating to rights and freedoms from infringing or limiting its essence or origin. Although this right was first introduced in the 2012 constitution, it was subjugated by the chapter on the basic elements of the state, which essentially contained a qualification that all laws must adhere to Sharia law. By removing this qualification, it is much clearer now that rights and freedoms supersede legislation. Secondly, Article 93[11] obligates the state to abide by any international conventions on human rights that Egypt has ratified and gives these treaties the power of law as soon as they are published. It remains to be seen what changes will take place in legislation in consequence of these two articles, especially if strategic litigation is used retrospectively, but the potential is certainly there and the constitutional court may very well exert its powers to force a number of legislative amendments that further protect rights and freedoms.

Institutional Entrenchment

The Islamist-led 2012 constitution ensured that the military establishment, which has been one of the largest and most influential institutions in Egypt since the ousting of the monarchy in 1952, received all the powers and protections they desired. These unprecedented powers and protections were offered in order to appease the military in return for their non-interference with the power grab the Muslim Brotherhood had already set in motion and wanted to see out to its full fruition. After the ousting of the Muslim Brotherhood on 30 June 2013 and the ever-increasing popularity of the military for its role in these events, the possibility of limiting any of these powers and protections in the 2014 constitution proved politically very difficult and, in fact, they were maintained with very little meaningful change.

Thus, despite hundreds, if not thousands, of citizens demanding abolition of military trials for civilians for the past three years, the power of the military judiciary to subject civilians to military trials has remained largely unchanged. This regime has led to thousands of civilians being tried by the military judiciary in the past with very little due process and is expected to continue in future, despite the introduction of some superficial and ambiguous limitations[12].

More worrying yet is the lack of oversight in relation to the military budget. Under the new Egyptian constitution, the detailed military budget will only be discussed by the National Defense Council, which is primarily composed of members of the military establishment. Once the detailed budget is agreed by the National Defense Council, only the

Egypt's New Constitution: A Mixed Bag

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gross budget (a non-itemized singular figure) will be submitted for review by parliament as part of the overall budget[13]. Clearly, this infringes on the power of the legislator in its oversight powers of the national budget and leaves no room for public discussion or parliamentary debate on any detailed military expenditure.

The judiciary, another extremely influential institution in Egypt, also played a leading role in the ousting of the Muslim Brotherhood on 30 June 2013. Consequently, it also felt entitled to convert its popularity into additional constitutional powers and protections. For example, despite parliament having the "right" to have full oversight of the constitutional court's budget, the final published budget will only contain the gross budget, which will not be itemized and will contain only a singular figure[14]. This clearly deprives millions of Egyptians from overseeing how their judiciary allocates their expenditure, a deviation from international norms, especially for an emerging democracy with combating corruption supposedly high on the agenda of reform.

Amendments have also been made to the selection process of the members of the constitutional court to ensure that the selection process is now fully within the power of the constitutional court itself, which has the power to elect its own chairman, deputy chairmen, members and clerks[15]. This change is unprecedented and means that there will be no oversight whatsoever on the selection of the members of the constitutional court, leaving little hope of any reform efforts from outside of the constitutional court itself.

Final Thoughts

The new Egyptian constitution can be considered a mixed bag of progressive and regressive elements that reflect the conundrum Egypt finds itself in after three years of searching for identity after decades of oppression. Many believe that his search for identity is very much a continuing process and, consequently, further amendments to the constitution can be expected in the future. On the one hand, Egyptians may accept the unprecedented powers afforded to the most influential institutions in the political space, namely the military and the judiciary, providing they can deliver on their promises. If not, it is highly likely that Egypt will once again fall into a state of tumult and instability. On the other hand, the new rights and freedoms could very well be leveraged to improve the everyday lives of Egyptians, but this depends on whether or not the judiciary and executive will support these reforms in practice and ensure enforcement.

[1]<http://english.ahram.org.eg/NewsContent/1/155/91957/Egypt/Constitution-/Table-Official-results-of-Egypt's-constitutional-r.aspx>

[2] Ibid.

[3] Article 11 of the Egyptian Constitution of 2014.

[4] Ibid.

[5] Article 53 of the Egyptian Constitution of 2014.

[6] Ibid.

[7] Ibid.

[8] Article 52 of the Egyptian Constitution of 2014.

[9] Article 13 of the Egyptian Constitution of 2014.

[10] Article 82 of the Egyptian Constitution of 2014.

[11] Article 93 of the Egyptian Constitution of 2014.

[12] Article 204 of the Egyptian Constitution of 2014.

Egypt's New Constitution: A Mixed Bag

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[13] Article 203 of the Egyptian Constitution of 2014.

[14] Article 191 of the Egyptian Constitution 2014.

[15] Article 193 of the Egyptian Constitution 2014.

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Aly El Shalakany is a founding member of Sheraa, a non-governmental organization bringing together attorneys and researchers interested in public affairs, development and the democratization process in Egypt, and a partner at Shalakany Law Office, one of the largest and most established corporate law firms in Egypt. Aly has worked on a number of legislative and policy papers relating to economic and social rights, including constitutional reform, consumer protection, sukuk, conflict of interest regulations for civil servants and the regulation of campaign funding for those running for public office. He has advised members of the 2013 Committee of Fifty, political parties, civil society and political activists on various issues, including matters of constitutional reform.