

Viewpoints
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The Egyptian Constitution: Mapping Where Power Lies

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The draft of the Egyptian constitution, which will shortly be submitted to a referendum, is largely an aspirational document painting a picture of Egypt as a modern, progressive welfare state – an unattainable goal for the bankrupt country. But the constitution also provides an accurate map of power distribution in the country.

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There are two ways to read the draft of the new Egyptian constitution, which will be soon submitted to a referendum and most likely approved without much public discussion. The first is to compare it to previous Egyptian charters, particularly the one issued in 2012 under the leadership of the Muslim Brotherhood. The second is to analyze it for what it reveals about the present distribution of power in Egypt. The first approach is the one the current Egyptian rulers are pushing; the second is far more useful to understand the state of the country. Much of the constitution's content is at best aspirational, at worst outright hypocritical. The power relations are real and not likely to change soon.

Despite the contention by members of the drafting committee that the constitution would be a completely new document, in reality it is remarkably similar to previous Egyptian charters in its most important features, although it contains a greater number of detailed aspirational articles. The aspirations are impeccably liberal and excruciatingly politically correct, touching on everything from equality between men and women and protection of the environment to the rights of the handicapped and the regulation of organ donation. The constitution lays out a vision of Egypt as a modern, liberal, industrial society, committed to educating all its children, providing universal healthcare, retirement benefits, and safety nets of all kinds for the entire population. Unfortunately, Egypt is at present a bankrupt country, with enormous budget deficits, heavily dependent on the largesse of Gulf countries, and it is extremely unlikely to be able to act any time soon on the lofty aspirations the constitution outlines.

Moving from aspirations to specific rules, the constitution reflects continuity rooted in the Egyptian reality, beginning with the religiosity of its population. Although the 50-member drafting committee included only one member of the Salafi al-Nour Party and no Muslim Brothers, the constitution still proclaims Islam to be the religion of the state and the principles of Islamic *shari'a* to be the main source of legislation (article 2). A similar formulation in the 2012 constitution was condemned by the people in power now — suggesting that in the end what counts in Egypt is not what the constitution says but who wrote it. The difficulty, as in the past, will be to establish what the principles of *shari'a* mean in respect to 21st century laws, because *shari'a* is not a legal code but 13 centuries of jurisprudence by a number of different schools. The 2012 constitution stipulated that the religious scholars at al-Azhar University would judge the compliance of laws with the principles of *shari'a*. The 2013 document gives the task to the Supreme Constitutional Court, whose members are judges and not necessarily Islamic scholars (article 192). Thus the new constitution introduces a modestly larger degree of separation between state and religion, but creates the paradox of putting laymen in charge of interpreting religious principles.

In the realm of religion, the constitution also takes another modest step in a liberal direction by proclaiming that the freedom of belief is absolute (article 64), but then retracts it by limiting the freedom of religious practice and of establishing places of worship to the followers of the “heavenly religions,” meaning Muslims, Christians, and Jews, as was the case under the much criticized 2012 constitution.

Finally, the new constitution contains stronger language than previous ones on the subject of women’s rights, proclaiming equality, barring discrimination, and underlining the importance of ensuring full representation of women in the public sphere, but it stops short of mandating quotas (article 11). But the constitution also creates a degree of ambiguity by stating that the religious laws of the three major religious communities are the main sources of legislation governing personal status for each (article 3).

The list of rights mentioned in the constitution is long, comprehensive, and commendable. Inevitably, like all constitutions, the draft also points to the need for legislation to regulate the exercise of those rights. The present situation in Egypt invites skepticism about those laws, because the political elite that will be in charge of implementing the new constitution is the one already managing the transitional period in an illiberal manner. A few examples will suffice. The constitution proclaims that “citizens have the right to organize public meetings, processions and demonstrations, and all forms of peaceful protests” (article 73). But only a few days before the draft constitution was issued, the government approved, and President Adly Mansour signed, an extremely restrictive law on protest that requires permits for any public gathering of more than ten people. And the government has demonstrated that it will enforce the law strictly, imprisoning and imposing harsh sentences on those who organized unauthorized demonstrations to protest the law. Freedom of thought and opinion are also guaranteed by the constitution (article 65) and “everyone has the right to express his opinion by saying, or writing, or photography, or other means of expressions,” but a soccer player was suspended recently for flashing the hand sign used by pro-Morsi demonstrators after scoring a goal.

Several articles of the constitution also proclaim the importance of free media that represent all viewpoints, but satirist Bassem Youssef has had a run-in with the authorities, and eventually had his show suspended by the private TV station that aired it, for making fun of his compatriots’ sudden surge of pro-army feelings. More generally, since the July 2013 coup d’état all Egyptian media have fallen in step with the government language that has made “Muslim Brothers” synonymous with “terrorists.”

To be sure, the new constitution was not in effect when the law restricting demonstrations was adopted and other acts that would be violations of the new charter occurred. Nevertheless, it is clear that the dominant political climate in the country, with growing repression not only of Islamists but increasingly also of secular protesters, suggests that Egypt will not live up to what the constitution envisions.

This conclusion is confirmed by an analysis of the clauses of the constitution that reflect where power lies in the country, thus who will be in charge of protecting, or better regulating, the rights of Egyptian citizens. Three issues require scrutiny: the position of the military, the position of the judiciary, and the attempt to exclude Islamists from competing in elections. The military will function without civilian oversight; the judiciary will not be subjected to any checks and balances, which is good in theory, but gives pause in practice because the judiciary has become a political actor; and Islamist parties will be banned, ensuring the continued domination of the military and the Mubarak political establishment, which has staged a comeback after the July 3 military coup.

Any possible doubt about the central position the military has openly reclaimed in Egypt has been put to rest by this constitution. Formally, the constitution exempts the military budget from the scrutiny of the elected parliament. Instead, the military budget will be discussed behind closed doors by the National Defense Council, which is composed of the president; prime minister; and the ministers of defense, interior, foreign affairs, and finances; plus a large number of top officers in the various branches of the military and intelligence apparatus. Since the defense minister must be a military officer (article 201), only five civilians will participate in the discussion of the military budget, which is then inserted in the general budget as a lump sum, with no discussion by the parliament. But the prerogatives of the military go further. Not only the minister of defense must be a military officer; during the first two presidential terms he must be chosen by the Supreme Council of the Armed Forces. And the controversial military courts, widely used under Mubarak to try civilians for political offenses, will maintain extremely broad jurisdiction. A statement in article 204 to the effect that the military courts cannot try civilians is immediately followed by a long list of exceptions that suggests military trials of civilians will continue to be widely used. The Morsi administration was greatly criticized for allowing the military to avoid civilian oversight and maintain a privileged position, but Morsi's successors have done the same. This is hardly surprising since the country's ad interim president and prime minister, as well as the 50 members of the committee that wrote the constitution, owe their position to the military.

In practice, the role of the military is likely to be even more important. A transitional clause in the constitution allows the president to decide the sequencing of presidential and parliamentary elections – modifying the transition roadmap established after the coup that prescribed the holding of parliamentary elections first. The transitional clause seems to have been designed to favor General Abdel Fattah al-Sisi, the army chief-of-staff who carried out the coup d'état and now serves as vice president and defense minister. Al-Sisi is under pressure to run for president and would undoubtedly win if he decided to do so. If presidential elections were held first, al-Sisi would have unparalleled power at first and be in a position to influence the outcome of the parliamentary elections as well. Holding presidential elections first might well anoint al-Sisi as a new Gamal Abdel Nasser.

The second major beneficiary of the constitution is the judiciary, that emerges in the constitution not only as an independent body whose members are not beholden to the executive or the legislature — as should be the case in a democratic system — but also as a body not subjected to any form of oversight or accountability. The judiciary and all its specialized branches are autonomous bodies, which receive their budget in a lump sum and are completely self-regulated. Indeed, this ensures the independence of the judiciary, but it does not, and cannot, ensure that the judiciary will also be apolitical. And the Egyptian judiciary at present is extremely politicized, and the complete autonomy the constitution grants it amounts to giving complete freedom from checks and balances to a major political player. In 2012 the judiciary disbanded the first parliament elected after the overthrow of Mubarak, dismissed one constituent assembly, and held the second one hostage to the threat of immediate disbanding. It prevented the holding of parliamentary elections first scheduled by President Morsi for April 2013 on the ground that the election law was unconstitutional and proceeded to also block a revised draft — it would probably have prevented elections from being held even if the coup d'état had not taken place. And since the coup the judiciary appears to be doing the bidding of the government, disbanding the Muslim Brotherhood, and in general becoming a willing participant in the witch-hunt currently being waged against Islamists and, increasingly, the few liberals still willing to raise independent voices. Judicial independence is a fundamental component of a democratic system. An independent, politicized, and out of control judiciary is a threat.

Finally, the constitution rewards the old Egyptian political elite — what is often mislabeled as the “liberals and leftists” or the “secularists” — by removing from the fray its main competitors. After proclaiming that “citizens have the right to form political parties,” (article 74) the constitution subjects that right to regulation by the law, specifying that parties based on religion are prohibited. A similar clause existed in the 1971 constitution and no political party with a religious frame of reference was ever allowed to register under Mubarak, no matter how it modified its program. The abrogation of the 1971 constitution in 2011 allowed the Muslim Brotherhood's Freedom and Justice Party (FJP), the Salafi Al-Nour Party, and some smaller Islamist parties to register and compete in elections, with the FJP and Al-Nour gaining about 70 percent of the vote. The secular parties' fear that they would again be badly outvoted led them to back the military coup and what they received in return is the elimination of their competitors from the elections.

And this, in the end, is the most realistic reading of the new Egyptian constitution: a document that outlines an ambitious vision of a democratic, liberal welfare state, a Sweden on the Nile, but confirms the dominant position of the military, a highly political judiciary, and the old political establishment that never hesitated in curbing rights and liberties in order to preserve its power.

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