



DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
POLICY DEPARTMENT



**EGYPT:
IN-DEPTH ANALYSIS
OF THE MAIN ELEMENTS
OF THE NEW
CONSTITUTION**

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2014





DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION

DIRECTORATE B

POLICY DEPARTMENT

IN-DEPTH ANALYSIS

EGYPT: IN-DEPTH ANALYSIS OF THE MAIN ELEMENTS OF THE NEW CONSTITUTION

Abstract

Despite cautious liberalisation in a few limited areas, Egypt's new constitution of January 2014 does not represent a new democratic departure. The process of its adoption was not inclusive. Public consultations leading to the referendum were selective and weak. According to observation missions the referendum campaign was entirely skewed in favour of a 'yes' vote.

Key elements of Egypt's constitution are at odds with international legal obligations and standards. Human rights provisions are not specific in many aspects, leaving crucial aspects to be determined by laws. The military has a significant role; it is not only beyond democratic control, it has a say in civilian matters – an inverse relationship to democratic set-up. On a more positive note, the far-reaching Sharia provisions of the 2012 law have been abandoned and the article on equality of men and women has been strengthened.

On balance the constitution offers little hope for eventual democratisation. Amending its provisions will be extremely difficult, requiring 2/3 majority in the House of Representatives and a referendum.

This In-depth analysis was requested by the European Parliament's Committee on Foreign Affairs.

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EXECUTIVE SUMMARY

Despite cautious liberalisation in a few limited areas, Egypt's new constitution of January 2014 does not represent a new democratic departure. The process of its adoption was not inclusive and the text is based on constitutional traditions since 1971, which have partly enabled the development of authoritarian rule.

After the overthrow of President Mursi on 3 July, the interim President Mansour issued on 7 July a Constitutional Declaration laying out a new process of constitution-making. On this basis a committee of 10 legal experts prepared recommendations for constitutional change to prepare the ground for an appointed 50-member Constituent Assembly. The Constituent Assembly excluded the Muslim Brotherhood, the party, which had won the biggest share of votes in all elections since 2011 and has been repressed since July 2013. Public consultations on the new draft were selective and weak. According to observation missions by Transparency International and Democracy International the referendum campaign was entirely skewed in favour of a 'yes' vote. Any campaign for a 'no' was repressed.

Key elements of Egypt's constitution are at odds with international legal obligations and standards. The system of government mixes elements of various constitutional traditions in a way that results in an excessively strong presidency, upsetting the separation and balance of powers. Furthermore there is no clear accountability of the executive due to an unclear division of roles between president and prime minister. Human rights provisions are not specific in many aspects, leaving crucial aspects to be determined by laws. The military has a significant role; it is not only beyond democratic control, it has a say in civilian matters – an inverse relationship to democratic set-up. Sharia remains as the principle source of legislation as has been the case since 1980.

On a more positive note, the far-reaching Sharia provisions of the 2012 law have been abandoned and the article on equality of men and women has been strengthened. A limit of two consecutive terms for president has been established. The Shura Council (upper house of parliament), which had no constitutional logic, was abolished

On balance the constitution offers little hope for eventual democratisation. Amending its provisions will be extremely difficult, requiring 2/3 majority in the House of Representatives and a referendum.

1. INTRODUCTION

This study has been prepared by Democracy Reporting International (DRI) for the European Parliament in January 2014. DRI provided support to Egypt's transition from April 2011 to April 2013 through a grant from the European Union.

2. RELEVANT INTERNATIONAL STANDARDS

Egypt ratified the International Covenant on Civil and Political Rights (ICCPR) in 1982. The respect of ICCPR obligations is monitored by the UN's Human Rights Committee (henceforth HRC). The ICCPR and the authoritative interpretations provided by the HRC's general comments and concluding observations to country reports are the main references of this assessment. The ICCPR not only impacts on the *content* of a constitution, which should be consistent with ICCPR obligations but the HRC made clear that it also creates obligations for the *process* of making a constitution.¹ In its General Comment 25 and in the case of *Marshall v. Canada*, the HRC indicated that constitutional reforms constitute the 'conduct of public affairs' in the spirit of article 25 (a) of the ICCPR, thereby falling under Article 25 obligations². This was confirmed in the concluding observations to the 2005 state report on Bosnia and Herzegovina, where the UN Human Rights Committee recommended that Bosnia 'should reopen talks on the constitutional reform in a transparent process and on a wide participatory basis'³. Thus citizens have a right to participation in constitution-making, but states have wide discretion to determine how such participation is organised.

Other treaty obligations follow from the Convention on the Elimination of all forms of Discrimination against Women (CEDAW, 1979) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Egypt acceded in 1986) and General Recommendation 23 on Political and Public Life (CEDAW) and the Convention on the Political Rights of Women (CPRW, 1952). Relevant regional treaty-standards include the African Charter on Human and Peoples' Rights (ACHPR, 1984). Non-treaty regional commitments include the AU Declaration on the Principles Governing Democratic Elections in Africa (2002).

The new constitution indicates that treaties to which Egypt is a state party have the force of law 'in accordance with determined conditions' (article 93). The inclusion of an international law reference is positive, but the reference to 'determined conditions' could be used to limit the application of international law, for example by applying reservations that Egypt lodged when ratifying various instruments, some of which are considered to be incompatible with these treaties.

3. THE CONSTITUTIONAL REFORM PROCESS IN 2011 AND 2012

Following the overthrow of President Hosni Mubarak on 11 February 2011, there were widespread calls to change the 1971 Constitution, viewed by many as providing the architecture for the country's authoritarian regime. In these last three years, Egypt witnessed three constitutional referenda and

¹ General Comment 25 (1996), paragraph 6.

² *Donald Marshall v. Canada*, Communication No. 205/1986, UN Doc. CCPR/C/43/D/205/1986 (1991), paragraph 5.3

³ CCCPR/C/BIH/CO/1 paragraph 1.

two constitutions, which to a varying degree, maintained fundamentals of the 1971 Constitution, notably a strong presidency and institutionalised religion.

The question whether the 1971 Constitution should be reformed or an entirely new constitution written became a major dispute in the aftermath of January 2011. The Supreme Council of the Armed Forces (SCAF) which assumed power in February 2011, issued on 13 February a constitutional declaration suspending the 1971 Constitution⁴ it also appointed an eight-member committee of legal experts to amend eight articles of the 1971 Constitution, notably relaxing the conditions for presidential candidacy, introducing a fixed two terms for presidents, and abolishing the state of emergency which was in effect since 1981. On 19 March 2011, around 77 % of voters approved these constitutional amendments. However, under pressure from revolutionary forces, the SCAF adopted on 30 March 2011 a 63-article 'Constitutional Declaration' which postponed the fate of the country's constitution, indicating that after fresh elections the two houses of parliament should elect a 100 member Constituent Assembly to write a new constitution.

A year later, the Islamist-dominated Parliament elected a 100-member Constituent Assembly (CA), which was perceived to be dominated by the majority party, the Freedom and Justice Party and its Salafi allies. On 10 April 2012, the Supreme Administrative Court in Cairo dissolved the first CA on the ground that it included 50 members of parliament in its membership, contrary to a 1994 ruling by the Supreme Constitutional Court that parliamentarians cannot elect themselves.

A second CA, broader in its representation of political currents, was elected on 7 June 2012; it was agreed that any article would only be approved by a majority of at least 57 out of 100 votes. The second CA faced numerous challenges: With dozens of lawsuits against it and the Damocles sword of another dissolution hanging over it, the Islamist majority was in a hurry to complete the process; the more liberal members as well as church representatives withdrew over time, being concerned that the majority was rushing through a document that only reflected their preferences⁴. This time, however, the Islamists managed to adopt the constitution in a highly polarised context marred by violence⁵. The Muslim Brotherhood-dominated government portrayed the new constitution as democratic breakthrough from the country's dictatorial past, although it was largely build on the 1971 model⁶.

The 2012 Constitution was short-lived. The growing economic crisis and concerns about a power concentration by the President triggered significant discontent leading the army to step in. On 3 July 2013, the SCAF removed the first democratically elected President of Egypt, Mohammed Morsi, and suspended the Constitution, establishing a new government headed by Interim President Adly Mansour, the chairman of the Supreme Constitutional Court.

4. NEW CONSTITUTION-MAKING IN 2013

On 8 July 2013, the interim president issued a 33-article Constitutional Declaration (CD) providing a roadmap for 'amending' the 2012 Constitution. According to Article 28 of the CD, a 10-member legal

⁴ See for example Egypt Independent's article, 'Egyptian churches withdrew from Constituent Assembly,' 17 November 2012 (<http://www.egyptindependent.com/news/egyptian-churches-withdraw-constituent-assembly>).

⁵ In December 2012, the Constitution was passed in a popular vote with an approval rate of %63.8 and a turnout of %32.9 out of Egypt's 51,918,866 voters.

⁶ For a detailed analysis of the 2012 Constitution: Democracy Reporting International, 'Assessment of the 2012 Constitution of Egypt,' (http://www.democracy-reporting.org/files/assessment_of_the_2012_constitution_of_egypt.pdf)

committee of senior judges and constitutional law professors was to be formed by a presidential decree to propose amendments to the suspended constitution of 2012 within a maximum period of 30 days since its formation. The proposed amendments of the technical committee would then be presented to a 50-member Constituent Assembly 'representing all categories of society and demographic diversities especially parties, intellectuals, workers, peasants, members of trade unions and qualitative unions, national councils, al-Azhar, churches, the Armed Forces, the Police and public figures including ten members from the youth and women at least. Each entity nominates its representatives and the cabinet nominates public figures.'⁷ Only later the mechanism for 'selecting' the 50 members was introduced. The appointed committee was provided 60 days to complete the new amendments and 30 days for the draft constitution to be 'debated' in public before it is put into a public referendum.

On 20 July 2013, Mansour issued a presidential decree to form the 10-member legal committee, which was required to present its amendments within 30 days. Without any public consultation, the technical committee finalized the 198-article document on 20 August 2013. The committee's draft, many believed, had somehow reflected the behind-closed-door compromises between the SCAF and the political forces which joined the so-called 30 June coalition to topple Mursi, notably the Secular-led National Salvation Front and the Salafist Nour Party. The proposed amendments introduced some changes to the suspended Constitution of 2012, the most important of them were annulling Article 219 which provides for a conservative definition of Islamic Sharia, redefining the role of Azhar by stripping its capacity to veto legislation it deems contradictory to Islam, abolishing the Upper House of Parliament (Shura Council), and stating that parliamentary elections shall be conducted entirely according to the majoritarian system, drifting away from the mixed majoritarian-proportional representation system, which was seen as one of the achievements of the 2011 revolution.⁸

As for the composition of the 50-member Constituent Assembly, the interim president issued a presidential decree on 8 August 2013 setting up the criteria for 'selecting' its members. The logic for the selection was essentially corporatist, pulling together members from the country's religious institutions (Azhar and Egypt's three main churches), professional syndicates, labour and trade unions, industrial and culture associations, the security forces, and minority groups.⁹ In addition, the CA completely excluded the Muslim Brotherhood, the political group, which won five consecutive elections since 2011.

The interim President on 1 September issued presidential decree number 570 identifying the 50 members, 10 of whom were chosen by Mansour himself under the category 'public figures'.¹⁰ On 8 September, the 50-member CA convened and elected Amr Moussa, former presidential candidate as its chairman. The exclusion of the Muslim Brotherhood and its Islamist allies and the relative homogeneity of the CA members meant serious disagreements would be unlikely, which was later seen when the overwhelming majority of the 247-article draft constitution was approved inside the plenary by more than 88% of the total votes. Although Article 10 of the Rules of Procedure allowed

⁷ Article 29 of the CD. See <http://www.sis.gov.eg/En/Templates/Articles/tmpArticles.aspx?CatID=2666>.

⁸ The full unofficial translation of the technical committee's draft can be accessed here (<http://www.constitutionnet.org/vl/item/egypt-proposed-amendments-constitution-2012>)

⁹ Out of the 50 members, only eight can be said to belong to 'political parties and organizations'. They include two Islamist members, two liberal members, one leftist, one nationalist as well as two members from the youth group, Tamaroud. See <http://english.ahram.org.eg/NewsContent/1/64/78590/Egypt/Politics-/Presidency-outlines-selection-criteria-for-member-.aspx>

¹⁰ For the full unofficial translated text of the decree, please refer to <http://www.constitutionnet.org/vl/item/egypt-presidential-decree-no-570-year-2013-compose-committee-responsible-developing-final>

for the live televised broadcast of the plenary sessions, on certain occasions, the CA's chairman banned live broadcast; especially when members were debating the military-related provisions.

An additional shortcoming of the rules of procedure was the ambiguity of filtering, categorizing and integrating proposals submitted by non-CA members and/or groups. Although the rules established the 'Committee for Social Dialogue and Communication,' it lacked any detail on how those proposals would be considered and viewed inside the CA. Moreover, the CA's website, unlike the 2012 one, was not frequently updated and did not provide a proper electronic feedback mechanism from the CA's members.

On 2 December, the CA approved the draft constitution in less than 48 hours of deliberations inside the plenary. Although the 8 July CD theoretically provided for a period of one month of 'societal debate,' neither the CD, nor the rules of procedures included any mechanism for feedback if some draft articles were perceived as 'controversial' or unpopular during that period, making the referendum the only popular venue to accept or reject the draft document.

On 14 and 15 January, Egyptians voted in the referendum in an atmosphere marred by street fighting, terrorist attacks, political apathy, and a large Islamist constituency boycotting the vote altogether. Media reported that few campaigners for a 'no' vote were arrested or intimidated by security forces, jeopardizing any meaningful public discussion about the draft constitution and the process.¹¹ An international election observer group noted: 'The referendum took place against a backdrop of arrests and detention of dissenting voices. There was no real opportunity for those opposed to the government's roadmap or the proposed constitution to dissent.'¹² On 18 January, the High Election Commission announced that the draft constitution was approved by a landslide 98.1% with a turnout of 38.6% out of Egypt's 53 million registered voters.

With no systematic consultations during the drafting stage and a referendum that did not provide an environment for a genuine choice, the constitutional process did not conform with international obligations for political participation in indirect or direct forms.

5. THE TEXT OF THE CONSTITUTION

5.1 Separation and Balance of Powers/ Checks and Balances

The separation and balance of powers means that 'the three branches of democratic government – the legislative, executive and judiciary – should not be concentrated in one branch, but should be distributed such that each branch can independently carry out its own respective functions'¹³.

5.1.1 The System of Government

The constitution follows the model of the 1971 and 2012 constitutions. The directly elected President appoints a Prime Minister, whose government will need the backing by the House of Representatives. If the House does not back the government, the President will appoint a new Prime Minister based on a nomination by the majority party or coalition.

¹¹ Statement by Human Rights Watch on 13 January 2014 (<http://www.hrw.org/news/2014/01/13/egypt-activists-arrested-no-campaign>)

¹² Democracy International, Findings of DI Egyptian Referendum Observation Mission, 17 January 2014.

¹³ Page 8, Democracy Reporting International, International Consensus: Essential Elements of Democracy, 2011

The **president** is the head of state and the head of the executive branch, directly elected for a four-year term (Article 139). He is the Supreme Commander of the Armed Forces (Article 152). The President of the Republic may call for a referendum on issues relating to the supreme interests of the country (Articles 157). The House of Representatives can impeach the president with a 2/3 majority. If approved by referendum it leads to new Presidential elections. The reasons for an impeachment motion have been expanded and now include the charge of violating the constitution.

Such procedures could „disturb the essence of representative democracy –as it may facilitate a clash between a directly elected President, the directly elected House of Representatives and the institution of referendum, which is also a direct expression of citizen will used for expression on an issue, rather than an alternative to elections¹⁴.

The **prime minister** directs the **government** and oversees its work (Article 163). The government determines public policy 'in collaboration' with the President and prepares draft legislation and decrees (Article 167). The President of the Republic may call the government to meeting to discuss important matters, and presides over the meetings that he decides to attend.

The **legislature** (House of Representatives, henceforth 'the house') is unicameral. On a positive note, the appointed Shura Council (upper chamber) has been abolished. The Shura Council had no clear constitutional logic and appeared to be designed as a potential check on the directly elected lower house. However, another undemocratic constitutional tradition has been maintained. The President can appoint up to five per cent of the members of the house. Such a reach by an executive president into the legislature is not consistent with the separation of powers and electoral accountability. In case of close election results, five per cent can make a critical difference.

The house has a degree of autonomy. While the President calls its annual session, this appears to be ceremonial. If he does not call a session, the House must meet at the specified date anyway. Ten members of the House can initiate an extraordinary session.

Bills can be presented by members of the House, as well as the government and the president. The speaker of the house and his/her deputies are elected by the members.

As earlier Egyptian constitutions, the system of government takes inspiration from the French constitution, but its variations from the French model cause two significant concerns: First, while superficially the strong presidency appears comparable to the French model, presidential power is strengthened in two crucial ways in the Egyptian text: The president can veto legislation and his veto can only be over-ruled by a 2/3 majority of members. Here the constitution borrows an element of the US model without however including the corresponding checks and balances of a very powerful legislature. And it lacks a critical element of the French constitution, where acts by the President need the countersignature by the Prime Minister. In Egypt the President can act without such limitations. The role of the President is further reinforced by the fact that he can call for referenda without limits, opening the possibility for a 'plebiscitary presidency' if ever the President encountered serious resistance from the House of Representatives.

The second significant concern is related to overlapping or unclear levels of accountability: The President can chair the cabinet whenever he so chooses and he can act without prime-ministerial countersignature. Yet President and Prime Minister represent the executive and should set policy jointly. The Prime Minister could be asked to respond in the House of Representatives to executive action for which he bears no responsibility. The President has a role in the formation of the legislature

¹⁴ Page 5, Democracy Reporting International, Assessment of the 2012 Constitution of Egypt (the new constitution retained the relevant provisions of 2012).

through appointing five per cent of its members at the same time the house can impeach the president. If a referendum to confirm an impeachment, the president's term ends. By interlocking institutions in this manner and overlapping their responsibilities, the risk of constitutional conflicts is high. The appointment of the defence minister by the military adds to a lack of clear accountability.

5.1.2 Independence of the Judiciary

Traditionally Egypt's constitutions affirmed judicial independence, but provided little concrete guarantees for independence. The new constitution follows this tradition. It declares the independence of the judiciary (Article 184) and mentions its budgetary independence. The constitution also mentions elements of personal independence of judges but declares that these shall be regulated by law. The current Judicial Authority Law, No.46/1972 is considered to be highly deficient, allowing significant executive influence over the judiciary.¹⁵ The constitution does not provide indications on how independence is achieved and is silent on self-governing bodies of the judiciary. It will thus mainly be left to the legislator to articulate judicial independence through ordinary legislation.

5.1.3 Independent Institutions

An element of modern constitution-making is the establishment of independent institution, sometimes referred to as the fourth branch of power. The new constitution includes a number of such institutions, such as the National Election Commission, the National Media Council and a range of 'National Councils': For human rights, which existed before, as well as three new Councils for women, for motherhood and childhood and for persons with disability. There is also the Central Bank and the Central Audit Office and the Central Administrative Control Authority. The constitution mentions that these are independent institutions but in some cases does not include guarantees of independence (as is the case of the Central Audit Office, the Central Bank and the Financial Supervisory Authority) or no concrete elaboration of how their independence is ensured (as is the case of the four councils for human rights, women, motherhood and childhood and persons with disabilities).

5.1.4 The Role of the Military

The military enjoys extraordinary protections under the new constitution, cementing in law the powers and privileges that it already enjoys de facto, which are often described as a state in the state.

The Minister of Defence serves as the commander in chief. For two terms the Minister of Defence must be approved by the Supreme Council of the Armed Forces. He must be a military officer (Article 200). The National Defence Council (NDC) brings together the president, the prime minister, key ministers and senior military personnel, the latter being the majority. The NDC 'is responsible for looking into matters pertaining to the methods of ensuring the safety and security of the country.' The vague wording opens the door for military interference in many issues of domestic politics. The NDC also discusses the armed forces' budget, 'which is incorporated as a single figure in the state budget.' The House of Representatives has no authority over the military's budget. The military is thus not accountable to any civilian authority. Instead it has a significant say in civilian matters. It can try civilians for crimes that represent an assault against military facilities or its personnel. Furthermore, the NDC's opinion must be sought in relation to draft laws on the armed forces.'

¹⁵For more details see: International Commission of Jurists (ICJ), Egypt - Upholding the Rule of Law and Human Rights Following the Ouster of President Morsi, undated.

If the House of Representatives is to be dissolved, the SCAF needs to be consulted and the NDC must approve (article 152). These provisions are not consistent with international law. The HRC case law has consistently stressed the need for civilian oversight of the military.¹⁶ The UN Human rights Council has stressed as recently as 2012 that states should ensure that 'the military remains accountable to relevant national civilian authorities.'¹⁷

In a democracy there should not be powerful state actors, which are beyond democratic control, or even more critical, which have an impact on civilian decision-making.

5.1.5 Overall Appraisal

The most obvious democratic deficit of Egypt's political institutions is the protected role of the military, which not only operates outside civilian oversight, but even plays a significant role in civilian matters. In a democracy the relationship needs to be reversed.

The system of government follows Egyptian constitutional traditions, which on the surface has resemblances to the French semi-presidential system, but through a number of variations creates a presidency significantly more powerful than that of France or the US for that matter. Otherwise the relations between the branches of powers are overlapping, risking unclear unaccountability and potential political conflict.

5.2 Human Rights Protections

Human rights provisions are included in Chapter II (Basic Components of Society) and Chapter III of the constitution is dedicated to Public Rights, Freedoms and Duties. These chapters contain a long list of articles, some covering internationally recognised human rights, others dealing with unrelated issues.

Torture is declared a crime for which no statute of limitation applies (Article 52). The exclusion of limitations is welcome but the article does not include the formula 'other forms of ill-treatment' and may therefore be more narrowly interpreted than the Convention against Torture. Art. 52 (due process) specifies that detained persons should not be 'mentally or physically harmed', while the Anti-Torture convention uses a wider definition, referring to 'suffering' rather than harm (Article 1 CAT). Torture and ill-treatment perpetrated by the army and the police is a major concern in Egypt; a more elaborate protection would have been appropriate.

Positively the new law includes **equality of men and women**. The article is written in aspirational terms ('the state commits to achieve equality'). It also commits the state to take measure to assure the 'adequate representation' of women. It will be up to the legislator to define what is 'adequate', but at least the constitution appears to oblige the legislator to act. The constitution's Article 53 also includes a general article prohibiting discrimination on the grounds of 'religion, belief, sex, origin, race, colour, language, disability, social class, political or geographical affiliation, or for any other reason.'

The constitution includes **freedom of belief** (Article 64) but not freedom of religion.

¹⁶ For example in the case of Romania it noted: 'the lack of a clear legal framework, defining and limiting the role of the security forces and providing for effective civilian control over them,' and stated that '[t]he State party should promptly provide for such limitations and control by legislation and appropriate regulations.', HRC, Concluding Observations: Romania (1999) para.9.

¹⁷ Human Rights Council, Resolution on Human rights, democracy and the rule of law, 19 April 2012, A/HRC/RES/19/36, para. 16(j)(vi)

The article merely states that 'the freedom of practicing religion' of the heavenly religions, meaning the three Abrahamic faiths, shall be organised by law. This leaves large scope for the legislator. Adherents of faiths other than the three Abrahamic faiths, such as the Baha'is, are left outside constitutional protections.

Article 65 guarantees the freedom of **thought, opinion and expression** without specifying limits. However, such limits are found in other articles: Article 31 on the security space may be used to restrict digital freedom of expression; Articles 67 on artistic expression which includes vague grounds for criminal sanctions, such as 'discrimination between citizens, or impugning the honour of individuals'; the same vague grounds are listed as a basis for criminal sanctions against media in Article 71.

Freedom of assembly is permitted upon notification of the authorities, according to law (Article 73). However, the current law on assembly (Law 107 of 2013 adopted on 24 November 2013) allows the authorities to prohibit or restrict assemblies and requires a three day notice. In absence of any indication of legitimate reasons for restricting freedom of assembly, all kind of restrictions can be introduced through law.

Freedom of association is regulated in Article 75. Associations do not need to be approved, as was the case in the past; positively, they only need to notify the authorities.

Unfortunately, the text reduces the notion of an association to formal arrangements that enjoy legal personality. While this may be meant as a protection ('do not deny legal personality to an association') it could limit the scope of the right unduly ('no protection for an informal association'). The freedom of establishing trade unions is not guaranteed in the constitution, which merely indicates that trade unions should be regulated by law. Political parties can be established by notification, but they cannot be 'formed on the basis of religion, or discrimination based on sex, origin, sect or geographic location, nor may any activity be practiced that is hostile to democracy, secretive (...)' The prohibition for parties based on religion is in tension with the fact that the entire constitution has a strong religious reference in Article 2.

Participation in public life (Article 87) is a 'national duty'. The implication of this remains unclear. While Article 87 includes the right to vote and to be a candidate and calls on the state to ensure the safety, fairness and neutrality of elections, it does not mention other obligations under the ICCPR, namely that there should be genuine, periodic elections based on universal and equal suffrage, secret ballot, and free expression of the will of the electors. In view of Egypt's long history of flawed elections, it would have been useful to include these principles in the constitution.

Overall the constitution has no clear concept of how far **human rights can be limited**. In the past many constitutional guarantees were undermined through clawback clauses ('to be regulated by law') that opened the door for repressive legislation and administrative practice. The new constitution does little to prevent that from happening again. Most articles referring to implementation by law do not provide enumerated, narrow reasons that would justify limitations. Likewise no provision suggests that any limitation should be as narrow as possible and proportional to the objectives. The only positive article in this regard is Article 92, which indicates that no law should restrict human rights in a way that 'infringes upon their essence or foundation'.

Egypt's 1971 constitution already included many **economic and social rights**, which did not however have a significant impact. The new constitution expands the list further and provides more detail on issues like health or education.

A number of human rights protections that shall under international law be provided for anybody, are only mentioned for 'citizens' in a number of articles (for example article 53)

While the new constitution has been inflated with a large number of new **social and economic rights** with uncertain impact, at the core the constitution is in the tradition of Egyptian constitutions, which have provided no guarantees against systematic and widespread violations of human rights. Most importantly the use of clawback clauses ('to be regulated by law') continues with little clarification of limitations to the use of such clauses. Thus ordinary laws can void constitutional guarantees of substance

5.3 The Rule of Law

The constitution declares that the rule of law is the basis of governance in the state (Article 94). The rule of law chapter mainly covers criminal justice guarantees such as due process. The fact that the President can call referenda without any limitation raises concerns for the rule of law, as a President could try to upset the constitutional system through a referendum.

Another rule of law concern is the way in which the state of emergency is regulated. According to Article 154 the President declares a state of emergency after consulting the Cabinet. It should then be submitted to the House of Representatives within seven days. The House of Representatives must approve the declaration with a majority of members. A state of emergency should only be called for three months and can only be extended by another three months in cases parliament approves with a two-third majority of members. The involvement of parliament and the time limitation is positive but in other aspects the article lacks detail and is not consistent with international law. It does not specify in any way the consequences of a state of emergency, i.e. which rights could be limited in which manner. The constitution does not mention that some rights may not be derogable even in a state of emergency as required by the ICCPR. The article likewise provides no reasons for which a state of emergency could be called. These provisions are insufficient, taking into account in particular that Egypt has been ruled under a state of emergency for decades.

5.4 State and Islam

In the new Constitution some of the most controversial articles of the 2012 constitution, which advanced the role of institutionalised Islam, were removed. The former article 219 in particular gave rise to concerns as it could be understood to install a broad definition of Shari'a that could undermine the catalogue of human rights. The new constitution reverts to the formula from 1980 according to which 'principles of Islamic Shari'a are the main sources of legislation'. The preamble now fixes and constitutionalises the scope of Shari'a according to a series of rulings issued by the Supreme Constitutional Court in the 1980s and 1990s. These rulings are relatively 'liberal' in the sense that they limit the legislature's capacity to pick from the more conservative traditions of Islamic jurisprudence by narrowing their reference to those 'definitive rules in the Qur'an and prophetic sayings' which are traditionally very few. Nevertheless, fixing that definition could mean that a even a very liberal parliament would not be able to challenge or amend certain laws, especially those on personal status, such as inheritance provisions which discriminate against women. The current constitution also limits the role of Al-Azhar University by removing its previous power to veto legislation if it deems it un-Islamic, which would have undermined parliamentary prerogative and the role of the courts.

Article 3 notes that the 'principles of the laws of the Egyptian Christians and Jews are the main source of laws regulating their personal status, religious affairs and selection of spiritual leaders.'

5.5 Inclusiveness of the Constitution

5.5.1 Electoral System

The choice of an electoral systems can have a significant impact on how inclusive political representation is. The new constitution leaves the determination of the electoral system to the legislator: 'Other requirements of nomination, the electoral system, and the division of electoral districts are defined by law, taking into account fair representation of population and governorates and equal representation' (Article 102). The provisions related to equality could be positive for inclusion, but the article's meaning is unclear. Article 25 ICCPR guarantees the equality of the vote, i.e. a seat must represent a comparable electorate or part of the population. The references in Article 102 to 'fair' representation of governorates or population muddle the reference to equality.

5.5.2 De-Centralisation

The constitution calls for a 'new system' of local administration to be established over the next five years, but the system described is not fundamentally new. It is based on local units with legal personality namely governorates, cities and villages. There shall be direct elections for local councils, but it is left to the law to regulate how governors and heads of local units are to be selected (Article 179). While the constitution tasks the state to support administrative, financial and economic de-centralisation (Article 176), the provisions are not specific, instead reference is made to a law to determine the system of local administration in more detail.

The local election system includes such an array of representation requirements (25% young, 25% women, 50% workers and farmers, for Christians and for people with disability) that the most formidable election experts will be challenged to turn this into a workable, democratic electoral system.

5.5.3 Rights of the Opposition

The constitution contains no article specifically dealing with the rights of parliamentary opposition. In light of the experiences with institutional marginalisation of political parties in Egypt and the region, it would have been desirable to include such an article, as has been done in Tunisia and Morocco. The provisions on the House of Representatives make no provisions for any pluralism. Nothing in the constitution would prevent that parliamentary rules of procedures, which would allow near-complete dominance of the largest party. This was the case under the Mubarak-era rules of procedure.

5.5.4 Minority Protection

The constitution includes some references to the Coptic minority (see above Article 3).

Article 244 indicates that there should be adequate representation of Christians in the House of Representatives but leaves it to legislators to spell this out further. Article 180 contains a similar provision in relation to local councils.

The constitution contains more articles related to protecting the Coptic minority and the Coptic church supported the adoption of this constitution, while critics doubt that long-standing discrimination will be addressed through the new provisions.¹⁸

¹⁸ Old Wine in New Skin, Markus Tozman, 16 January 2014: <http://www.charismanews.com/opinion/42439-old-wine-new-skin-an-analysis-of-egypt-s-new-constitution>

5.6 Safeguards against Increased Authoritarian Rule

5.6.1 Presidential Term limits

The Constitution stipulates that a president can only serve for two consecutive four-terms, but it does not restrict the overall number of terms of one person. Thus the Russian option, whereby a president interrupts his terms, is possible. Furthermore the term limit does not enjoy an 'eternity' guarantee, in other words it could be changed through constitutional amendment.

5.6.2 Constitutional Amendment

Constitutional amendments can only be passed if approved by two thirds of the House of Representative and a referendum. Article 226 of the Constitution safeguards the chapters on freedoms and rights by preventing their amendment unless it provides for more far-reaching guarantees. These provisions make it difficult to temper with the text. They are highly inflexible to make adjustments, which may be of more technical nature or required by changed circumstances. Given the authoritarian tendency of the constitution they create barriers to democratisation.

5.6.3 Provisions on referenda

Article 157 of the Constitution grants the President the right to call for a referendum 'on issues relating to the supreme interests of the country without prejudice to the provisions of the Constitution.' The drafters, however, did not define the scope of the 'supreme interests' nor require that the call for referendum be co-signed by either the Prime Minister or a specified parliamentary quorum. Such a clause may open the door for the President to by-pass the Parliament or the cabinet if disagreements become unresolved.

5.6.4 Appraisal

The Constitution would make it difficult to tamper with it in order to make it more authoritarian. Limiting the presidency by two consecutive terms is welcome in a country where presidents ruled for life. On the other hand, the provisions allowing presidents to call referenda without restriction and the loose provisions on the state of emergency create risks for further concentration of power. Most importantly, with the presidency already very strong and power enclaves for the military the constitution already provides a framework for authoritarian governance.

6. MAIN CONCLUSIONS

Process:

- Public consultations on the new draft were selective and weak.
- There was no pluralistic referendum campaign.

Text:

- The system of government mixes elements of various constitutional traditions in a way that results in an excessively strong presidency, upsetting the separation and balance of powers.
- There is no clear accountability of the executive due to an unclear division of roles between president and prime minister.

- Human rights provisions are not specific in many aspects, leaving crucial aspects to be determined by laws.
- The military has a significant role; it is not only beyond democratic control, it has a say in civilian matters – an inverse relationship to democratic set-up.
- Sharia remains as the principle source of legislation as has been the case since 1980.
- The far-reaching Sharia provisions of the 2012 law have been abandoned and the article on equality of men and women has been strengthened.
- A limit of two consecutive terms for president has been established.
- The Shura Council (upper house of parliament), which had no constitutional logic, was abolished

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