

**HOLGER ALBRECHT**

E-mail: halbrecht@usip.org

Egypt's 2012 Constitution Devil in the Details, Not in Religion

Summary

- Amid intense political contestation and deep rifts between Islamists and liberal political forces, Egypt's new constitution was adopted on December 22, 2012.
- Several articles include stronger emphasis on religion than the 1971 constitution, yet its character is largely secular.
- The constitutional text departs from Egypt's authoritarian path, but also from a previous consensus among political forces to curb presidential powers.
- The state assumes a prominent role as a guardian of liberties and provider of human development, perceiving citizens as objects of that state rather than its ultimate authority.

“The focus on the religious background and perceived mindset of the constitutions' authors ignores the fact that the vast majority of the 236 articles deals with the rights and liberties of citizens, the state's accountability, and modern political institutions. The devil lies in the details of those technicalities rather than in religious statements.”

Through a decree on November 22, 2012, President Mohammed Morsi allowed himself sweeping executive and legislative powers. Only few days later, a constituent assembly, consisting almost entirely of the Muslim Brotherhood and different Salafi trends, issued a draft constitution which was moved to a popular referendum on December 15 and 22, 2012. Egypt's new constitution was approved by 63.8 percent of the vote. Morsi's acceleration of the constitution-writing process reflects the increasing impatience of the President's office and the Muslim Brotherhood with the faltering transition process in post-Mubarak Egypt. Yet, the immediate consequence was an escalation in the struggle between Islamists—emphasizing the legitimacy of their moves through previous electoral victories—and a heterogeneous camp of liberal and secular forces that came to re-unite in what they saw as a real danger of authoritarian renaissance. The short time period prior to the popular vote and the seemingly intractable stand-off between Islamists and seculars did not allow much room for discussions of the draft. Yet, a closer look at the text suggests that the devil lies in the details of politics rather than religion.

Islamization through the Ballot Box, not the Constitution

The constitution envelopes a stronger emphasis on religion than previous constitutions; but its religious content remains vague and does not qualify for a blue-print of a theocratic state. Only seven of 236 articles contain an explicit reference to religion; a mere three refer to Islam. Articles 3, 43, and 44 establish the universal freedom of belief and religious minority rights. Article 60 calls for 'religious education,' yet with no further specification of religious faith. Of some concern are those articles upholding Islamic Sharia as the 'principal source of legislation.' Article 2 remains vague and proposes only a minor change of that very article in the 1971 constitution. Article 219 comes as

part of an amendment to the constitution's main text and reflects—in a more specific, yet idiosyncratic manner—on those 'principles of Islamic Sharia.'¹

Perhaps the most controversial article is Article 4 which boosts al-Azhar as an autonomous institution observing the application of Islamic law. Al-Azhar is Egypt's oldest university and arguably the most eminent religious institution in Sunni Islam. The article's formulation invites speculations about a substantial impact of al-Azhar in future law-making and censorship. Yet, it also indicates the authors' priority in empowering al-Azhar as an institution autonomous from state control. In future politics, it may well serve as a mechanism to check Islamist parties in power through an independent body of religious scholars. Islamization might increase in future politics, yet it will ultimately depend on the relative mobilization capacities of political forces rather than the constitution's text. If secular forces fail to sharpen their political profile and political programs, they will likely witness the Islamists' protracted success at the ballot box. Islamists will then implement their ideas irrespective of the formulation of those vague, still largely symbolic articles. On the other hand, liberal politicians—once in power—could work well under the current constitution.

The Constitution is Conservative, Not Theocratic

The limited reference to religion is surprising because the constitutional assembly was almost entirely composed of Islamists (Muslim Brothers, Salafis, and independent Islamists) after the resignation of up to 22 liberals and leftists out of a total of 100 members. The Muslim Brotherhood obviously anticipated a hawk-eyed probe of the draft and convinced the Salafi trend to accept a document which came as a bitter pill to some Salafis because sovereignty was granted to the people rather than God. The constitution mirrors a patriarchal and conservative worldview, mainly in the subordinate role ascribed to women as 'sisters of men' (preamble), but also in the nebulous ideal of public morality (Articles 8, 11, 12, and 71) and the pronounced role of the family as core unit of social organization (Article 10). While social conservatism is in concordance with Islamist thinking, it does not constitute an exclusive realm for Islamists. Presumably a majority of the Coptic population and the greater part of seculars would be sympathetic to these principles, making those an indicator for the value system of modern Egyptian society rather than an Islamist power grab.

The focus on the religious background and perceived mind-set of the constitutions' authors ignores the fact that the vast majority of the 236 articles deals with the rights and liberties of citizens, the state's accountability, and modern political institutions. The devil lies in the details of those technicalities rather than in religious statements. These flaws are significant and will likely create a burden for policy makers of whatever ideological color or party background. The constitution is amateurish; not immoderately religious. It reflects the authors' departure from an earlier consensus among political forces in two major aspects: that the writing process is based on a broad, inclusive agenda; and that presidential powers are curbed. Yet, despite some problematic and contradicting articles, the text does not allow for a judgment on presumed authoritarian intentions among its authors.

One of the major points of contention concerns the document's vagueness. Yet, the idea of a constitution as a rough outline of the fundamental values, separation of powers, and institutional framework has a strong advantage. It allows for competition among distinct programs without forcing politicians to renegotiate the constitution, that is, the fundamentals of state and society, every time they come to power. The weakness of the Egyptian constitution does not lie in its vagueness, but rather in the juxtaposition of extremely detailed provisions and, on the other hand, vague announcements. Obviously the authors of the document had a clear understanding of some aspects of political life while not interested in, or competent of, others. This predetermines

the nature of unhealthy future political struggles. While contention among those provisions addressed in great detail will require a substantial engagement of political players with the body of the constitution itself, other topics will initiate engagement in the halls of government, parliament, and certainly the political street.

Emphasis on the State

Dozens of articles address individual rights and liberties of Egyptian citizens. The fact that six articles alone (35-40)—double the number of articles mentioning Islam—reference the protection of prisoners and individuals prosecuted by the state mirrors the personal experience of the majority of the constitution's authors as Mubarak's political prisoners. Yet, individual rights are accompanied with strong emphasis of the state to deliver to its citizens who are portrayed as tedious objects of a caring, patronizing state rather than its ultimate authority. Again, some of the assignments for the state administration are quite specific, rendering a possible failure of political officials to make good on the constitutional pledge not an act of inefficiency, but anti-constitutional. Examples include Article 61 which demands to eradicate illiteracy within ten years; Article 66 requires the state to provide opportunities for sports and physical exercise; and Article 184 instructs the state to assimilate living standards across the country. In its greater part, the constitutional draft promises to reinforce a social contract, reminiscent of the Nasserist period and subsequent governments. No crystal ball is required to predict that future policymakers, whether Islamist or secular, will fail that mission, which will most likely result in their profound delegitimation rather than a judgment of fair accountability.

In comparison to the detailed provisions concerning individual rights and statist obligations, the constitution contains significant ambiguity regarding major institutional components of the state. There is a whole number of articles specifying membership and internal organizational features of the legislature (Articles 82-115), but the constitution remains surprisingly narrow in outlining its mandate. Article 116 states that the first chamber of parliament has legislative powers, but the bulk of the subsequent articles reflect on the chamber's prerogatives to control the state budget and the cabinet. Given that law-making powers are also granted to the executive branch of government, the role of parliament in the legislative process remains somewhat dubious. The mandate of the second chamber of parliament is particularly unclear and the necessity of a bicameral parliamentary system cannot be inferred from the constitution. Articles 193, 197, and 194 call for the creation of several national security councils, with different membership formats (pitting civilian government officials and military personnel) but obviously overlapping and diffuse mandates.

It is obvious that the constitutional assembly emphasized a strong executive, represented in the presidency. Established presidential democracies indicate that this does not necessarily have a negative impact on the value of democracy; and the constitution contains some interesting ideas to control the abuse of power. The most important provisions here are in Article 152, regulating the impeachment of the president, but also in Articles 126 (control of the prime minister through parliament) and 127. The latter allows the president to dissolve parliament through a popular referendum; yet, a negative result of the referendum requires the automatic resignation of the president which provides valuable protection for parliament. Of greater concern are Articles 148 and 150 providing opportunities for a would-be populist president to rule by decree and popular referenda, effectively sidelining parliament. An intriguing example of the negligent way in which the constitution was drafted is in the articles regulating the amendment of the constitution. Articles 217 and 218 establish high hurdles for amendments including two-thirds majority votes in both chambers of parliament and a public referendum. While this helps to bar the abuse of the

ABOUT THIS BRIEF

Dr. Holger Albrecht is an assistant professor of political science at the American University in Cairo and Jennings Randolph senior fellow (2012-2013). His main research focus is on political opposition in the authoritarian regimes, transition to democracy, and civil-military relations in the Middle East and North Africa. His new book, "Raging Against the Machine: Political Opposition under Authoritarianism in Egypt," is forthcoming with Syracuse University Press.

constitution, its authors neglected to add a passage on the irremovability of those articles. A party commanding the necessary parliamentary majority might be tempted to amend Articles 217 and 218, rather than engaging in an arduous pick-and-choose of singular articles.

The lack of clarity in some articles stands in stark contrast with the specific provisions concerning other institutional bodies of the state. Some of the more detailed provisions clearly mirror the strategic considerations of the constitutions' authors, rather than their ambition to craft functioning institutions. The substantial emphasis on the National Electoral Commission (Articles 208-211) mirrors the Muslim Brotherhood's attempt at sidelining their opponents in the judiciary, e.g. in the Supreme Constitutional Court (SCC) and the Judges Club. The SCC in particular was targeted by the constitution's authors. Recruitment in that court was reduced to the ten most senior judges, which resulted in the exclusion of Tahaney El-Gebali—the 11th most senior judge, only female member of the SCC, and staunch opponent of Islamists.

Outlook

The 2012 Egyptian constitution is not a blueprint for an Islamic state. Nor is there enough evidence to assume the intention of its authors to re-erect an authoritarian regime. That may very well happen as a consequence of the struggle between Egypt's new rulers and its challengers. If the authors of the constitution move to establish themselves in power in a non-democratic fashion, substantial efforts are necessary to adapt their own constitution. While putting an increased emphasis on human rights, the rule of law, and the state's accountability, the greater part of the constitution remains a poorly drafted adoption of previous provisions in the 1971 constitution mixed with several articles inspired by strategic and tactical consideration of those political forces that came to dominate the writing of the document. This does not automatically render the constitution's substance anti-democratic, but it transports some of the ills of the authoritarian past and the current transition process to Egypt's future. The constitution in its current form will most likely cause more trouble than guidelines for the political process, in part because of the way in which it was proposed but also because of its idiosyncratic character.

Notes

1. On article 219, see Clark Lombardi and Nathan Brown, "Islam in Egypt's New Constitution" (Foreign Policy, 13 December 2012).



UNITED STATES
INSTITUTE OF PEACE

2301 Constitution Ave., NW
Washington, D.C. 20037

www.usip.org

USIP provides the analysis, training and tools that prevent and end conflicts, promotes stability and professionalizes the field of peacebuilding.

For media inquiries, contact the office of Public Affairs and Communications, 202.429.4725