

Rather than enshrine the democratic aspirations of the Egyptian revolution, the draft Constitution to be put to referendum in mid Dec. is faulty in execution, lacking in legitimacy and a set-back in terms of rights and liberties

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Reading the Draft Constitution of Egypt: Setbacks in substance, process, and legitimacy

Thousands of Egyptian citizens have been pouring in the street to ask for 'a constitution for all Egyptians'. Thousands others are marching for 'legitimacy and Islamic law'. In the profound political and constitutional crisis in which revolutionary Egypt finds itself, one matter is certain: the constitutional process was rushed in the week of 22-30 November, and the Draft Constitution that emerged on Friday is highly divisive. The presidential announcement setting the referendum on December 15 is bound to make the crisis worse.

How does the Draft Constitution compare with the Amended 1971 Constitution it is meant to replace?

Process

The process for the adoption of the Draft Constitution (hereinafter DC) is important for the coherence and appeal of the text that the citizen is asked to adopt as his main contract with the state.

A cardinal principle in constitution-making is being ignored in Egypt. Passing a law is unlike passing a constitution. While a majority generally suffices to pass a law, it does not become effective without a thorough and complex process to ensure that is carefully discussed. A constitution is far more demanding in terms of legitimacy and comprehensive appeal than a simple law.

When a fundamental text is rushed through the night (literally the night of 29-30 December) with no particular reason for such urgency, constituents being replaced at the last moment, and representatives of the youth who made the revolution as well as members of historically victimised groups like women and Christians all but absent from the process, the constitution becomes intrinsically divisive and fails its calling to speak for all the country's citizens.

The constitutional draft itself underlines the basic contradiction in the process. To be ratified, the 237 articles adopted by the Constituent Assembly require a simple majority of voters voting in the referendum on the document as a whole (Art. 225 DC). For one article to be amended under any constitution, including the current Draft Constitution, the process is far more complicated, with votes going through presidential and parliamentary deliberations, qualified majorities, and a robust civil society involvement. Article 225 is one line-long. In contrast, the Amendment procedure adopted by the Draft Constitution is ten lines long, with a complex procedure that regulate debates, deadlines, majorities before any referendum is considered. (Arts. 217, 218 DC)

The Supreme Constitutional Court (SCC) of Egypt invalidated an electoral law which distinguished between 'representatives of party members that number 3 million, and independents representing 50 million' (SCC decision of 14 June 2012). A constituent assembly with an ever shrinking number of representatives of 'the many groups that form Egypt', which is then rushed into a referendum that is passed by a simple majority of the voters under Article 225 DC, cannot deliver a constitution for all Egyptians. In light of the SCC precedent, Egyptian courts should hardly find it difficult to invalidate the unprecedented divisive process in the rush to adopt the Draft, and in the rush to ratify it.

Substance

The rush has affected the quality of constitutional language. Some articles in the Draft Constitution are awkwardly phrased, such as Article 117 on the budget. Art. 131 illustrates the problem: 'If these laws are not brought [to the houses after they reconvene], or if they are brought to them and are not confirmed, they lose retroactively the effectiveness of law that they had, except if the house [singular, it is unclear which of the two houses] decides it was effective for the previous period, or regulates its consequences in another way'. Nor is the need for both a National Security Council (Art.193 DC) and a National Defense Council (Art.197 DC) fathomable, while the fog persists

around the role of the military, which President Morsi and the revolution were united to force out of the political process once and for all.

There are a few innovative measures, for instance the request for members of the two houses (the lower house, council of deputies or representatives, *majlis al-nuwwab* and the upper house, *majlis al-shura*) to provide a list of their assets at the beginning and end of their term, as well as annually, to their respective chambers (Art. 88); this is also required for the president and for the ministers, who present their respective financial status to the lower house (Art.138 and Art.158) Another useful advance is the requirement for associations to simply notify (*ikhhtar*, Art.51) the authorities to become legal, as opposed to the state of limbo in which they were left because they were previously deemed legal only after the approval of the authorities, usually the Ministry of Interior. Otherwise, the basic rights list does not improve much on the current Constitution, and even includes some unnecessary repetitions, for example both Article 35 and Article 77 provide the right of the accused to an attorney.

More worryingly, one counts at least twenty qualifications of basic rights by a deferral clause to 'the law'. Since thousands of laws and various legislative and executive instruments are bound to be passed in any case, such reference is inherently dangerous. The use by Mubarak and SCAF of laws to stifle constitutional rights attests to the easy manipulation of the Constitution by way of deferral clauses. Overall, there are more than 50 instances of clauses of the type 'this will be later decided by law.' These deferral clauses are typical of disagreement and rush, as the constituents abdicate their role in important constitutional matters they have not been able to frame correctly.

On balance, it is hard to see a democratic improvement in the Draft Constitution of what is presently the Constitution of Egypt.

There are also serious setbacks which undermine the integrity of constitutional substance one expects in a founding document.

Where the DC fails most the calling of a revolution that united over the end of a self-perpetuating dictator and the protection of the citizen's basic rights, is apparent in two central areas of constitution-making. The Draft Constitution (1) undermines the Egyptian judiciary, and (2) brings back the specter of religious sectarianism against the citizen's fundamental right to equality.

The judiciary undermined. The judiciary is undermined in several ways. The Draft Constitution fragments it into different subaltern roles (Arts 168-182 DC). While this was true of the Mubarak regime, courts are further compartmentalised, with each having its own rules and its own budget (Art. 169 DC), leading to inevitable conflicts that disorient the citizen and weaken the rule of law. The constitution drafters also failed to correct a major flaw inherited from French practice. All legislation is supposed to be reviewed by the top administrative court (*Majlis al-dawla*) before it is passed, even though the court retains a judicial review power in a dispute between the citizen and the administration (Art. 174 DC). The military courts remain (Art.198 DC), despite their central role in the repressive security apparatus under the former regime and under SCAF – SCAF had reportedly tried over 13,000 people before it folded. President Morsi has been actively putting an end to these trials, so retaining military courts in the Draft Constitution appears as a step back from revolutionary demands to do away with all special courts.

The main nemesis of the constitution drafters seems to be the Supreme Constitutional Court. Art.235 was added in a midnight deliberation on November 30 to reduce the number of SCC judges, a court packing in reverse. In addition, the SCC is now forced into a meaningless constitutional review of voting and electoral laws which it is forbidden to consider subsequently if a case is brought by a harmed citizen (Art.177). This is a major setback for voting rights.

In sum, instead of advancing the rule of law by consolidating it in a coherent judicial system, the Draft Constitution undermines the state institution that has been the most important voice of peaceful, thoughtful, and active resistance to Egypt's authoritarian rulers, from Naser to Mubarak.

Sectarian discrimination. There is no mention in the Draft Constitution of any mechanism for the protection of historically victimised and marginalised groups in Egypt, especially women and religious minorities. Article 2 of the

1971 Constitution (as amended in 1980) is kept as is ('the principles of the shari'a are the main sources for legislation'). This text had been enhanced by thirty years of SCC case-law demonstrating that Islamic law can live well in a modern constitution, and indeed enrich the constitutional life of citizens. With the SCC in jeopardy, this legacy is under threat. Despite the welcome inclusion in Article 3 of Jewish Egyptians, the article limits the legal traditions of Jewish and Christian Egyptians to the organization of 'their personal status' and 'the choice of their community leaders'. Buddhist, Hindu, and non-believers find no place in the Draft Constitution. Instead, Article 2 declares that 'Islam is the official religion' (literally, the religion of the state, *din al-dawla*). Millions of Egyptians are not Muslim, and the Draft Constitution continues to discriminate against them openly.

An addition and an omission raise further concerns of increased sectarianism.

The drafters added Article 219, which stipulates that 'the principles of Islamic law comprise its general rules and jurisprudential method as understood in the Sunni schools'. Egypt was never so sectarian as to openly express Sunnism as the exclusive source of its Islamic tradition. This Article is clearly set against Shi'is, despite their constituting an insignificant minority in Egypt, but also against Copts and any denomination that is not Sunni. Instead of honoring all legal traditions in Egypt across the board, sectarianism comes stronger from this unexpected addition.

The omission is revealed by the disregard for the *substance* of Islamic and other laws in the rich Egyptian legal corpus. Despite the call to for the shari'a to be the main source of legislation in the country, the drafters can hardly point to any serious trace of Islamic law in the text they passed. No legacy of individual rights dear to the Islamic legal tradition can be found in the Draft Constitution. An example would have been the adoption of the clear Qur'anic injunction prohibiting duress in religion ('No compulsion in religion, *la ikrah fil-din*). Examples can be multiplied, including various injunctions on the equality of men and women, the protection of life, limb and property, or the privileged role of the impartial judge. The drafters made no effort to revive the best and most enlightened aspects of the Islamic legal corpus.

Egyptians deserve better. In the last few months, a free presidential election brought hope to all those who supported the Nile Revolution for more freedom and equality under a new constitution. In just one week, the process was dramatically reversed, augmenting the risks of civil war and reviving the prospects of military intervention. The SCC and the courts should stand up for the preservation of the Egyptian Constitution, which the Draft Constitution sets back. Only the judges remain between Egypt and the abyss.

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