



An official counts "Disagree" ballots after polls closed in Bani Sweif, about 115 km (71 miles) south of Cairo December 22, 2012 | Reuters

THE VIEW FROM A DISTANCE: EGYPT'S CONTENTIOUS NEW CONSTITUTION

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Last month, a long line of women snaked out of the Workers' University in Nasr City, Cairo. The women standing in the winter sunshine were waiting to cast their ballot on a referendum, voting on whether to approve or disapprove Egypt's new, much beleaguered constitution. The line looked roughly representative of Egypt: of approximately 50 women closest to the gate, roughly 80 percent were veiled and there were around two Coptic women. Judging by the conversations, overwhelmingly, they were there to vote "no" to the document.

This is relevant because it contradicts two pervasive ideas that have been much circulated by many western analysts. The first is that opposition to the constitution, and, by extension, to President Morsi, who hails from the Muslim Brotherhood (MB), is composed overwhelmingly of secular liberals—worried about infringements on their personal liberties—and Christians.

The second argument is that the constitution is a perfectly good document—a little flawed, perhaps, but certainly nothing to worry about.

Those ideas are both dangerous fallacies.

To start with, Egypt's vocal but unorganized opposition is in no way homogenous. In fact, while the failings of its so-called leaders are multiple, they are not solely to blame for its hiccups. One of the reasons why the opposition is so unwieldy is that it is composed of a spectrum of political ideologies and heavily influenced by popular opinion. The ranks of those who have taken to the streets to demonstrate against the president, and, more significantly, against the MB, have included secular liberals, Christians, leftists, moderate Islamists and countless ordinary Egyptians with no ideological or partisan affiliation who are outraged at what they perceive as the Brotherhood's attempts to co-opt the revolution and run Egypt according to the group's mores, and to its benefit. This anger has been building over the last six months in the face of increasing economic hardship and a lack of domestic security and political stability. On November 22, 2012, Morsi sprang a new decree on his fellow citizens, immunizing all his decisions from any judicial objections and essentially adding judicial authority to his existing legislative and executive authority.¹ The moment Morsi did that, he managed to finally pull off a feat that countless politicians and two years of post-revolutionary uncertainty had failed to do: he dragged Egypt's silent majority to its feet and united many of his countrymen.

The crowds that protested against the constitutional declaration outside the president's palace in December contained representatives from most of Egypt's classes. Most significantly, they swelled with the ranks of Egypt's middle classes, which had traditionally provided a reliable support base for the Brotherhood. The ensuing violence shocked ordinary Egyptians, and raised the threat of violent civil strife.

In early December, hundreds of demonstrators had marched down to the palace, saying they were there to protest against the declaration and what they termed a new dictatorship. By the afternoon of the fifth, members and supporters

of the Brotherhood allegedly heeded their leaders' calls to protest in support of Morsi and the declaration. In light of the violence that followed, those calls by MB leaders were later used as a basis for a formal complaint of incitement to violence.² The demonstrators were set upon by large gangs of men, often armed. Those gangs later captured and tortured around 49 demonstrators, for up to two days before turning them over to the police. Over 150 people were formally arrested later. Despite the Brotherhood's denials, eyewitnesses claim that those who first attacked and then tortured the demonstrators were all MB members or supporters. One journalist working for a local newspaper gave a harrowing first-hand account of the torture and described beatings of kidnapped protestors in an attempt by their torturers to coerce them into confessing to being 'paid thugs.' This account left no room for doubt that the perpetrators had indeed been MB members and, even more disturbingly, explicitly stated that there were police personnel present.³

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It didn't soothe the domestic situation when Morsi specifically referred to the confessions of captured, paid thugs in a speech on December 6, 2012.⁴ Or when, in a truly startling development, the attorney general released 137 of those arrested and claimed, along with the head of the prosecution for the district of Heliopolis, that they had been subjected to "pressure from the [Morsi-appointed] general prosecutor and the president's office to extend the suspects' detention despite what they said was a complete lack of evidence."⁵ In retaliation, offices of the MB were attacked and torched in several governorates. Increasingly, politics became a matter of pro or anti-Brotherhood. In practical terms, that meant that while those who had intended to vote for the constitution in any case (whether because they approved or because they were heartily sick and tired of the political and economic upheaval and saw a "yes" vote as a step towards stability) would still vote "yes" anyway, while those who disapproved would vote "no." However, the swathes in between were more likely to take a step toward a "no" vote in protest, leading to losses of voting blocs which had formerly voted MB. (Cairo, in fact, voted "no" outright, along with two Delta governorates, Menoufiya and Gharbeya.)

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Part of the blame must be laid at the feet of the Supreme Council of the Armed Forces, which, in the March 2011 interim constitution, allotted six months for the drafting process, a ridiculously short amount of time, particularly in light of



domestic political squabbles. When the first Islamist-dominated Constituent Assembly was dissolved by court order, the second (equally Islamist-dominated) appeared to want to make the same mistakes. According to those members of the assembly who eventually walked out, those mistakes mostly consisted of attempting to railroad the opposition by using the weight of their majority to force decisions through. The eventual draft is contentious not simply in terms of content but in terms of process. For a document that was supposed to represent a united, post-revolutionary Egypt, it came to epitomize the lack of national consensus which is hounding the fledgling democratization process. Eventually, almost every one of the non-Islamist members walked out in protest at what they insisted was an overt attempt at domination of the process by the Islamists. When Morsi made the declaration, he insisted that the Assembly have another two months to finish their work. In the resulting furor, he apparently decided he didn't want to risk another court order and a possible derailment of the democratization process. The draft was passed in a marathon, overnight session that has to rank as one of the most bizarre, and certainly one of the saddest, days in Egypt's legislative history.

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Matters were complicated by the Brotherhood's complex and increasingly acrimonious relationship with the judiciary. Following the dissolution of Egypt's first democratically elected parliament by court order last June, the Brotherhood insisted that the decision was more personal than professional since the members of the Constitutional Court had all been appointed by former President Hosni Mubarak and were therefore of dubious integrity. In fact, parliament was dissolved on an electoral process technicality that its members had been warned about well before the elections. Article 5 of the electoral law had banned parties from running their candidates on independent lists. The parties threatened to boycott if that were the case, despite warnings that it would be unconstitutional. Months later, when the court did its job (in a ruling that was later upheld by the High Administrative Court, incidentally, and that had two earlier precedents, in 1987 and 1990), the parliament was outraged.

The relationship further soured when Morsi went up against the judiciary twice: first, in an attempt to reinstate the parliament in July, and second, in an effort to sack the prosecutor general in October. Both fell flat.



The claim that the court was a Mubarak-era holdover has been bandied about liberally by the MB and critics of the court. Since the revolution, there have been cases of rulings that seem more politicized than purely judicial, among them, for example, the dissolving of the former ruling National Democratic Party on the grounds that it had corrupted Egyptian political life: true in essence but of dubious judicial value. And it would be easy to argue that the judiciary has no love for the MB. However, the Constitutional Court is an independent institution and its members appear to have acted with the institution in mind. As Nathan Brown puts it, “The SCC is diverse enough in its composition that it is not anybody’s tool.”⁶ While there was a court ruling pending on the Constituent Assembly and the upper house (Shura Council), there is no way of knowing what the decision might have been. As it was, Morsi preempted the decision and declared that his decisions were immune from any judicial ruling.

The battle with Egypt’s judiciary blighted the referendum. Ahmed Al-Zind, the head of the Judges’ Club (an informal syndicate) had already announced by December 11 that over 90 percent of its members would boycott the judicial oversight process. The numbers might have been debatable, but what is undisputable is that for the first since 1956, Egypt had a referendum that had to be held over two days. While the Higher Electoral Commission said that almost 7,000 judges had agreed to take part, Al-Zind pointed out that the first day of polling required 13,000 judges while only 5,775 had agreed, meaning that only 40 percent of the polling stations would have judicial supervision.⁷

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To further complicate matters, Egypt’s messy and heterogeneous opposition couldn’t decide on an appropriate course of action until almost 48 hours before the referendum. There were few who doubted that the referendum would pass, if only because much of the population was sick and tired and a “yes” vote was perceived as a step towards stability.

The constitution did pass, with just under 64 percent, although its passage was hardly uncontested. To the vocal—if ultimately impotent—dismay of the opposition, the Higher Elections Council ignored 15,000 reported violations it deemed irrelevant. And the fact that the HEC declared that just under 33 percent of eligible voters cast their ballots—the lowest number since the transition began—meant that the constitution hardly had the national support such a document would need for popular legitimacy. Additionally, the 64 percent figure is relevant because it indicates that despite the Brotherhood’s famed mobilization skills and a



concerted and focused effort (unlike that of the opposition) it was able to mobilize barely 15 percent of voters. It hardly indicates a simple Islamist/ secular divide.

The other fallacy is that the new constitution is, as it has been repeatedly referred to by analysts, a “good document.” Those Egyptians who voted against it would beg to differ.

There are several issues at stake. The first is that the constitution drafters used the 1971 constitution as a starting point and, while there have been marked improvements on that document, some of its problems remain. Chief among them is the fact that the document does nothing to correct the emphasis on central government. Egypt is highly centralized, with Cairo being the center of its universe. Article 188 of the new constitution allows for the election of local councils but, two articles later, promptly says that their decisions may be overturned by the central government if it is in “the public interest.” It is unclear on the election or selection of governors and their powers. Most disturbingly, a very good article in an earlier draft, which attempted to redress the gross financial disparity between governorates, disappeared from the final. This ensures that poverty will continue to be most widespread outside Cairo.⁸

There have been improvements in regards to executive power and the president is no longer all-powerful. He gets only two four-year terms. More importantly, the president’s authority to declare a state of emergency has been hobbled; it has to be approved by a majority in both houses. In a win for accountability, Article 139 mandates that any government must present its program to parliament. Executives are no longer sacred cows; parliament may dismiss ministers, the prime minister, or even the government through a simple majority according to Article 126. However, the president still has the right to appoint the prime minister, the country’s governors and a tenth of the Shura Council, giving himself unfair advantage in legislation. More distressingly he gets to appoint the heads of almost every “independent” authority in Egypt, including the Central Bank, making true accountability extremely difficult.

The second issue is that, in light of fears of a theocracy, cursory readings of the resulting document have led some to remark that there has been much fuss over nothing. However, any issue is best viewed in context and in this case, it is not so much about the “what” as the “whom.”

There is no change in Article 2, which states that the principles of Shari’a are the basis for legislation. Previously, the judiciary had been at liberty to interpret those principles and did so liberally. However, indulging in liberal interpretations might become more of a challenge in light of a new order which allows a minister of education to state that Bahai children have no right to public education since the constitution only recognizes Judaism, Christianity and Islam.

Article 4 says that Al-Azhar will be consulted on matters of Islamic law pertaining to legislation. This sets up two problems: first, an unelected body gets to have a say over legislation. Second, it will embroil Al-Azhar in no end of dangerous political machinations. It is especially discouraging in light of the fact

that after decades of political strangulation and attempts at political co-option starting with Gamal Abd El-Nasser , after the January 25th revolution, the institution was just starting to fulfill its main purpose as a seat of learning for moderate Sunni Islam.

The third problem is that the document is shaky on the protection of freedoms and rights. Egypt is a socially conservative country and therefore rights and freedoms cannot be judged by the same criteria as those of most Western nations. However, as Zaid Al-Ali points out, one of the purposes of a constitution is to rise to the hopes and aspirations of its people and to give them something to aspire to. In this, the document falls short.

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The most highly publicized furor has been over women’s rights and a particularly disputed article was dropped. Article 30 now mentions equality without mention of gender. However, Article 10 specifically mentions that the state “shall balance between a woman’s obligations towards family and public work.” It is unclear why, or how, the state should lay out what a woman’s obligations are, particularly when it does not do so for men. It may bode ill for women in professional disputes against men, since the state clearly feels women have to balance their obligations while men do not. Legal experts say that since the constitution specifically notes the state’s commitment to balancing women’s professional and family obligations, then labor disputes (over promotions, for example) must take into account this balance. In other words, a woman wanting be promoted will be penalized if the judge believes that her professional obligations will adversely affect her family. Since the constitution does not require men to consider any such obligations, legal experts say that the article may be used as a tool to prevent the professional advancement of women, at judicial discretion. While this might have been only theoretically problematic before the election of an Islamist-dominated legislature, rights activist worry that it will become a very real impediment in present circumstances. Additionally, a clause outlawing the trafficking of women has been deleted.

The rights of minors are also on shaky ground. The clause dealing with child labor in Article 70 says that “child labor is prohibited before passing the age of compulsory education, in jobs that are not fit for a child’s age, or that prevent the child from continuing education.” In other words, the new constitution specifically permits child labor after school-leaving age, or 14. This is not necessarily a bad thing in an economy where many children will most certainly have to work and therefore should at least have the protection of regulation. However, labor is only

prohibited for children younger than school-leaving age if the work is not “suitable for them.” Neither the constitution, nor its drafters, nor indeed those who have proclaimed it a “good document” have indicated what employment might be suitable for a six-year-old.

Freedom of religious worship has also taken a knock. Previous drafts had called for freedom to worship for all religions but limited building houses of worship to the three Abrahamic religions. In other words, people were free to worship, or not, as long as those who weren’t Jewish, Christian or Muslim didn’t actually expect to build places of worship. The final version recognizes only those three, leaving minorities, like Egypt’s Bahais (estimated at anywhere between 2,000 – 5,000 individuals), on very uncertain ground, strictly speaking, unable even to even be recognized as a religious affiliation at all. The education dilemma of Bahai children is the first bump in the road. Considering that, as Egyptian citizens, Bahais pay taxes it is unclear why they would be denied public services.

Freedom of expression is a victim of another of the document’s failings: its inconsistency. To read this document properly, one must be prepared to leap among the articles and align them with one another. While Article 45 guarantees the freedom of thought and opinion, the preceding article prohibits insulting messengers and prophets, without defining what constitutes an insult. Merely questioning them might very well be construed as such. And Article 31 prohibits insulting anyone. Again, there is no definition of insult. Would it be an insult, for example, to cast aspersions on a public figure’s honesty and demand accountability? Journalists will be uncomfortably familiar with this dilemma – the country’s draconian 2006 Press Law doubled the fine and imprisonment term in cases of libel if the plaintiff was a public figure.

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Those who had hoped for military accountability in this constitution will be disappointed. Previous drafts had forbidden military trials for civilians but the objections of the military won out. Article 198 permits civilians being tried before the military in cases that “harm the armed forces,” with no further clarification. And contrary to the claims of the MB prior to the referendum, the army does get preferential treatment: its budget is overseen by a “national defense council” comprised of eight military members and seven civilian, ensuring military victory on any vote.

The final, confusing blow comes with Article 81, the clause regarding the limitation of rights. The article says that “rights and freedoms shall be exercised insofar as they do not contradict the principles set out in the Chapter on State and



Society in this constitution.” That chapter is one that contains the much disputed terminology on the state “preserving the true nature of the Egyptian family,” and “protecting ethics and morals and public order.” Again, this is largely a holdover from the previous constitution and it was essentially redundant for decades. However, in light of the present circumstances, it might present an opportunity to place public and social obligation above personal freedom.

Viewed at distance, Egypt’s politics might look simpler and cleaner than they are. An Islamist – secular divide is an easy and not entirely incorrect reading of the facts, but it is not an entirely accurate or, indeed, a complete one. Egypt’s new constitution is a *fait accompli*; its citizens will have to deal with it. But for those who took part in the revolution and hoped for better, it is a disappointment. Refusing to recognize this indicates perhaps an outsider’s ability to place pragmatism over hope. For those who watched Egypt struggle under one dictatorship after another over six decades, the new constitution could easily be perceived as a step forward. But for those Egyptians who suffered under all those same dictators, half measures are a bitter pill to swallow. A document which affords possible turmoil down the road instead of clarity is not one to be celebrated, but one to be feared.



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