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On the Virtues of Inconclusiveness: The Egyptian Constitution of 2014

by Gianluca Paolo Parolin

In December 2013, a draft of Egypt's new constitution was approved by the members appointed by President Adli Mansour to the committee charged with amending the 2012 constitution (the Committee of the Fifty, or C-50). The referendum on the draft was held on January 14-15, 2014, and presidential and parliamentary elections are to follow. The process has already had important international ramifications, with the United States most likely restoring its annual $1.5 billion military aid to the country. While the pros and cons of the text are widely discussed, what of its inconclusiveness? This may prove less harmful than expected.

Members of the C-50 could not agree on a number of key provisions, and the easiest path was to simply leave those matters undecided. Will the effects of this strategy on the political system necessarily be ruinous? On the contrary, this inconclusiveness — which the examples below substantiate — might actually guarantee the text a longer life and allow for more mature, consensual choices in the not-so-distant future.

Even a cursory look at the text of the 2014 constitution shows that it left many matters for the legislators to decide, not only in the domain of fundamental rights, but also in that of institutional design. As concerns rights, allowing only legislators to define their content and regulate their exercise had already historically shifted from a guarantee against the encroachment of government regulatory powers to a means to curtail those very rights. When first introduced, clauses requiring a certain issue to be regulated only through an act of parliament (*réserve de loi*) prevented regulation (and hence encroachment) by the monarch or the executive (branded as the enemies of rights *par excellence*.) History has shown, however, that parliaments can also curtail fellow citizens' rights, and the executive-legislative continuum has further emptied the guarantee and strengthened the claim that the legislative has a constitutional prerogative to regulate fundamental rights. In the 2014 constitution, the parliament's prerogative to regulate fundamental rights is still exemplified in the provisions on pre-trial detention (art. 54(4)); privacy of correspondence

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(art. 57); home searches (art. 58); limitations to freedom of movement (art. 62), religion (art. 64), assembly (art. 73), and association (art. 75 ff.); etc. Here the text follows the path of previous constitutions, but also introduces a fuse that could avoid the short-circuiting of the system of fundamental rights as a whole: a general provision prohibiting legislation regulating the exercise of fundamental rights and freedoms from affecting the core and essence of such rights (art. 92). Whether this fuse will have enough breaking capacity will be evaluated on its application by the Constitutional Court, thus placing the responsibility for limiting the abusive practices of state authorities on the court.

Drafters also left significant matters of institutional design to be decided by legislators. In a first example, designation of the Sheikh al-Azhar — the head of the most prestigious Sunni religious institution in Egypt (and beyond) — is left to legislators (art. 7(3)). The alternative solutions were either to have the sheikh elected by the Body of Senior Scholars at al-Azhar, or appointed by the president. The former solution would have progressively guaranteed that the sheikh's appointment would be the expression of an independent institution of religious learning, whereas the latter would have guaranteed continuity maintaining state control over the country's main religious institution. A clear choice regarding the separation of church and state was therefore avoided by the drafters. Contrary to popular belief, lack of this separation in Egypt has traditionally meant that state authorities encroach on religious authorities, not the other way around.

Second, the jurisdiction of military courts over civilians is left up to the legislature to expand (art. 204(3)). The provision begins with a general statement that military trials of civilians are prohibited except in a wide range of cases listed in art. 204(2). The paragraph following it, however, further allows the law to regulate the crimes listed in the earlier paragraph, and "other areas" where military courts have jurisdiction. Military trials of civilians have been a bone of contention in Egypt for decades, especially after 2011. The drafters decided to open with a strong statement, but have left the door open for the old practices to either continue or be curtailed.

Third, the number of members of the Constitutional Court is left up to parliament decide (art. 193(1)). The provision simply states that the court is composed of a president and

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a "sufficient" number of members. Court-packing schemes were employed when the court displayed some degree of non-alignment with the presidency in the 1990s, with the president deciding to appoint additional "loyal" members to shift the balance in his favor. The 2013 constitution took a clear stance on court-packing, and set the number at 11 members, but the drafters of the 2014 constitution have decided to leave this vague

Are inconclusive provisions on key aspects of institutional design enough to weaken the entire endeavor? If a final, entrenched decision on all key issues of institutional design (and fundamental rights) is a desideratum, then the 2014 constitution falls short of expectations in a number of areas. One of the main arguments in favor of rigid constitutions put forward by Sunstein is precisely that these texts take certain issues off the agenda of ordinary politics, with the drafters deciding them once and for all.[1] Considering the experience of Eastern Europe, the same author, together with Holmes, concedes that, in the context of a transition, a higher degree of flexibility could benefit the development of ordinary politics.[2] The Egyptian Constitution of 2014 does not opt for flexibility and has a fairly rigid amendment process (art. 226), but the areas in which drafters produced inconclusive provisions allowing legislators to step in might foster the engagement of ordinary politics with these issues. Moreover, the political capital that drafters had at their

1 Cass R. Sunstein, "Constitutionalism and Secession," in *The University of Chicago Law Review*, Vol. 58, No. 2 (Spring, 1991), p. 633-670.

2 Stephen Holmes and Cass Sunstein, "The Politics of Constitutional Revision in Eastern Europe," in Sanford Levinson (ed.), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, Princeton, Princeton University Press, 1995, p. 275-306.

disposal was rather scarce due to the limited legitimacy they could claim.

Allowing contentious issues to be de-entrenched by appointed and homogeneous drafters in favor of elected and (possibly more) diverse legislators could thus allow more representative politics during this turbulent transition to seek temporary arrangements within the framework of a permanent constitution.

About the Author

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