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The 2014 Egyptian Constitution: Without Accountability, Checks or Balances

Since the announcement of the Constituent Assembly that they had completed a new draft constitution, there has been a celebratory atmosphere in Egypt and faith in the ability of the constitution to establish democracy and to protect the sovereignty of the Egyptian state. In the highly complex context in which the Constituent Assembly has been working, the government has determined that the constitution is the necessary basis from which to launch the democratic transition phase, in which there will be greater respect for pluralism and the rule of law. The discussion around the constituent elements of the new constitution has been one of total polarization: either with the constitution or against it and with mobilization in favour of a yes vote proposed for the protection of the nation and in support of stability.

With the near absence of rational constitutional debate, these two articles attempt to focus on a common perspective from which to evaluate the proposed text. The articles thus focus on “accountability mechanisms,” measuring the extent to which the 2014 constitution realizes the people’s desire for checks on power and enforced accountability of state actors, whether through elected legislative representatives, through the principle of mutual checks among state institutions or through public gatherings of the people. The first article deals with the points that are missing from the constitutional text in terms of accountability and checks on the armed forces and the Egyptian police. The second article discusses the constitution’s focus on the concept of “independence” of the judiciary as a substitute for concern with its “neutrality”, the transparency of its appointments, and its effectiveness as a basic system for establishing and implementing justice for all citizens.

The paper seeks to address an essential question that has been absent from debates about the new constitution: to what extent and by what mechanisms can the constitution pave the way for a democratic future that safeguards the right of citizens, their representatives and their organizations to accountability in government and checks on power?
Ahmed Abd Rabou: “The saying ‘civilian government’ is unpalatable in the literature of the political sciences as it is a narrowing of the principle of a state with a civilian nature or even civilian rule, since ‘government’ is narrower than ‘state’ or ‘rule’.”

Ahmed Abd Rabou: “The 2014 constitution contains some of the policies and procedures that the revolutionaries had rejected, including the suspension of civil rights and freedoms, detention without trial, and restrictions on the right to demonstrate, including demonstrations concerning civil rights and freedoms or opposition to the security policies of the state.”

Karim El Chazli: “The section of the 2014 constitution that deals with judicial authority does not establish a democratic state and does not deal with the challenges facing the Egyptian judiciary. These texts may have been acceptable had they been put forward in the constitutions of 1954 or 1971 but they are not appropriate for Egypt in 2014. The most precious thing that the judiciary has is the trust of the people. Their faith in the Egyptian judiciary has been shaken after the revolution.”
Civilian-military relations and the position of security institutions in the 2014 constitution

Ahmed Abd Rabou

This article seeks to outline the development of civilian-military relations in the 2014 constitution because of the importance of this relationship in any state that aspires towards democracy. Most studies of democratic transition make connections between the ability to create civilian control over the decision-making process for the recruitment of military elites, policy setting for internal and external security, the placement of military institutions under civilian control, and the ability to make a democratic transition. Civilian-military relations and the position of the military have been the subjects of heated debate since the fall of Mubarak on 11 February 2011 when the takeover of the country’s affairs by the Supreme Council of the Armed Forces led to a period of political violence and mutual accusations of betraying or reversing the revolution. The paper also discusses the position of security institutions (the police) in the constitution to evaluate the extent of its triumph over civil rights and over the freedom to oppose the Egyptian internal apparatus, which has been connected with immense violations of human rights since the revolution began on 25 January 2011.

The first part of the paper undertakes a short discussion of the nature of the civil state in Egypt through analysis of civil-military relations and political life. Four principal issues will be reviewed: 1) appointments of the defence minister, military leaders and military employees 2) laws specific to the military and its budget 3) military courts and their responsibilities 4) the announcement of a state of war.

The second part the paper discusses the security apparatus with regards to civil rights and freedoms, especially the right to protest. The paper compares the 2014 and 1971 constitutions to reveal the development of this relationship over time and to investigate the civilian state in Egypt.

Section 1: Civil-military relations

A) The civilianisation of the Egyptian state (a glance at the preamble)

It is noteworthy that the preamble of the 2014 constitution saw an important change in terms of the civilian state. The preamble to the 2012 constitution did not indicate the phrase civilian state other than where it put forward the very important principle of non-intervention by the military institution into political affairs, with the preamble stipulating in its eighth principle: ‘Defence of the nation is an honour and an obligation. Our armed forces are a neutral, professional national institution that does not interfere in the political process. It is the country’s protective armour’. The text of the 2014 constitution, meanwhile, not only omits this important principle establishing a civilian state, but puts forward a strange and unpalatable phrase on the fifth page of the official text: “We are now drafting a Constitution that completes the building of a modern democratic state with a civilian government”. The phrase ‘civilian government’ is unpalatable in the literature of the political sciences as it is a narrowing of the principle of a state of a civilian nature or even civilian rule, since ‘government’ is narrower than ‘state’ or ‘rule’. Although this change worried some who

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anticipated that it might be in the interests of Islamic political groups, this provision opens the
door to control by the military over political and civilian affairs, especially if we look at the
current position of strength for the military relative to the Islamic political movements on the
ground.

B) The development of the military

1) Appointments of the defence minister, military leaders and military employees
The 2014 constitution assign the elected civilian authorities (the government and the
President) the role of appointing the minister of defence. In contrast, Article 143 in the 1971
constitution stipulated that the president undertakes the appointment and removal of military
and civilian employees. The 2012 constitution produced under the Morsi government
restricted this absolute right of the 1971 constitution by leaving Article 143 in the same
formulation (though re-numbered as Article 145) but re-defining and limiting it in Article 195
which stipulates that ‘the minister of defence is the Supreme Guide of the Armed Forces and
is appointed from among its officers.’ This meant that although authority has been granted to
the president to appoint the minister of defence, the president is obliged to choose this
minister from among the officers of the armed forces.

In the 2014 constitution, Article 153 preserves the right of the president to appoint military
and civilian employees, but is redefined and limited in two other articles. Article 201
maintains the restriction that the minister of defence must come from among the officers,
while Article 234 stipulates that the appointment of the minister of defence should be with the
agreement of the Supreme Council of the Armed Forces and that the appointment will be
valid for two complete presidential terms. This translates as complete independence for the
military in the appointment of its leader without any interference or authority from the
government or president.

2) The military budget and special military legislation
The constitution of 1971 was entirely silent about the budget for the armed forces or on the
discussion of draft laws specific to the military. In the 2014 constitution, however, Article 203
maintained the gains that the military obtained in the 2012 constitution (Article 197),
stipulating the establishment of a Council of National Defence. The Council is headed by the
president and is responsible for (among other things) discussion of the military budget, and
must be consulted about any legislative bill concerned with the armed forces. The 2014
constitution put forward three changes to the 2012 constitution concerning the formation of
this council and the discussion of the military budget:

1) The Council of National Defence in the 2012 constitution is composed of eight
civilians and seven military officers (with the assumption that the minister of the
interior and the head of general intelligence are civilians), while in the 2014
constitution, the council is composed of seven civilians and seven military persons.
With the elimination of the Shura Council in the constitution (leaving the House of
Representatives as Egypt’s sole legislative body), the position on the Council of
National Defence previously held by a Shura Council representative has been
removed.

2) Article 203 in the 2014 constitution stipulates the insertion of the army’s general
budget as one section of the general state budget. This is an additional stipulation not
found in the 2012 constitution.
3) The 2014 constitution also requires that the head of financial affairs for the armed forces be present at discussions of the military budget, along with the heads of the Budget and Planning Committee and the Defence and National Security Committee.

In general, the 2014 constitution has maintained the jurisdiction of the Council of National Defence, which is dominated by members of the military, over the discussion of matters pertaining to the army budget or to any legislation pertaining to the military.

3) Military courts

Although the constitutions of 1971 and 2012 established military courts, the 1971 constitution gave only a brief description of this judiciary body, leaving it to legislators to define its competencies (Article 173). The 2012 constitution established military trials for civilians through Article 197, which stipulated the independence of military courts and gave them the right to try civilians for crimes that “harm the armed forces”. The 2012 constitution also left it to legislators to define those crimes, while ensuring that members of the military judiciary could not be removed.

However, the 2014 constitution, by way of Article 204, does not stop at the previous assurance, but puts forward three additional points representing new additional powers for the military judiciary:

1) The addition of the phrase “and whoever is subject to them” in the jurisdiction of the military judiciary where it categorises crimes connected with the armed forces, their officers and whoever is subject to them, which widens the sphere of the jurisdiction of the judiciary. This stipulation was not in the 2012 constitution.

2) The inclusion of crimes committed by individuals in the general security services during and on account of their service. This is an additional stipulation, which extends the authority of the military judiciary where it did not exist previously.

3) The inclusion of trial for citizens for attacks on one of the following groups: military facilities, barracks or whatever falls under their authority, stipulated military or border zones, military equipment, vehicles, weapons, ammunition, documents, military secrets, public funds or military factories, crimes relate to conscription, or crimes that represent a direct assault against military officers or personnel because of the performance of their duties.

The article therefore represents an expansion, unprecedented in the history of Egyptian constitutions, of the possibilities for trials of civilians by the military judiciary. General expressions such as “whatever is under their authority” may be used ambiguously to punish political opposition and activists.

4) Announcement of a state of war

While in the 1971 constitution this was limited to Article 150, which stipulated the necessity of gaining the approval of the People’s Assembly before the president could announce a state of war, the 2012 constitution put forward two important amendments: the first was that it became unlawful to declare a state of war without consulting the Council of National Defence, the Council created in this constitution; second, agreement of the Council became obligatory for the declaration of a state of emergency or to send forces abroad.

Article 152 of the 2014 constitution put forward two important additions:

1) That a declaration of a state of war requires that the House of Representatives approve by a two thirds majority, rather than the absolute majority (50%+1) required in the constitutions of 1971 and 2012.
2) In case of dissolution of the House of Representatives, the approval of the Supreme Council of the Armed Forces is required, along with the Council of National Defence and the Council of Ministers.

The 2014 constitution thus expanded control of the military over the citizenry and over political life. Although this trend began with the 2012 constitution, the 2014 constitution both affirmed the trend and assisted in creating the tyranny of the military over the citizens. The 2014 constitution gives the military complete independence, to the extent of positioning them as an authority independent from the executive, rather than being subject to it, as would be the case in a stable democracy.

Section 2: Security institutions in the 2014 constitution

One of the most important demands of the revolution of 25 January, 2011 was to restructure ministry of the interior and hold it to account for past actions. Revolutionaries called for the remaking of security policies so that the concept of security would be redefined to mean security of the citizens rather than security of the regime. Despite the second revolutionary movement of 30 June 2013, seen as a rejection of the security policies during the rule of the deposed President Morsi, the 2014 constitution contains severe and conservative articles concerning security policies and the rights and freedoms of citizens. The 2014 constitution contains some of the policies and procedures that the revolutionaries had rejected, including the suspension of civil rights and freedoms, detention without trial, and restrictions on rights to demonstrate, including demonstrations concerning civil rights and freedoms or opposition to the security policies of the state. The constitution includes severe general stipulations that do not give any rights guarantees with reference to the law. Listed below are the most important observations regarding the rights and freedoms of individuals facing the security policies of the state:

First: Article 54 of the constitution allows detention without trial despite the fact that this is considered odious in democratic countries and has played a negative role in Egyptian history. The constitution places no restraints on this procedure.

Second: In spite of Article 57, which stipulated that a dignified life should be given to prisoners, the regulation of this dignified life was referred to the legislature.

Third: Article 57 assigns to legislators the role of organising and guaranteeing the right of media freedom.

Fourth: Similarly, procedures and guarantees regarding the inviolability of homes have been assigned to the legislature by Article 58. The legislature may thus act as it sees necessary in organizing the protection of this right, which in the Egyptian experience has repeatedly meant the right becoming meaningless.

Fifth: The 2014 constitution was haphazard in its amendment of laws concerning rights and freedoms. It makes amendment of these laws conditional on a two thirds majority in parliament. This makes it impossible to amend the laws concerning rights and freedoms, despite clear gaps, making the culture of political and civil rights and freedoms meaningless.

Sixth: In Article 73, the 2014 constitution restricts the right to demonstrate by insisting on notification, to be regulated by the law. The Egyptian experience of the current law reveals the scale of the oppression in the exercise of this right. Notification does not so much mean informing the authorities, but rather, in the Egyptian context, the law imposes the requirement
of “prior permission” rather than “notification” because it gives the interior ministry the right to authorize demonstrations or not.

Seventh: In Article 241, the House of Representatives commits to issuing a transitional justice law without defining the substance of this law or its meaning. Despite the fact that the formulation of the article appears to support a law of transitional justice, the possibility that the political actors controlling the legislative process may have interests that conflict with the law completely empties this article of its content.

The 2014 constitution does not champion civil rights and freedoms in confronting the police. While Articles 206 and 207 lay out the structure of the police and their high council, with the usual reference to the law, the remainder of the articles concerned with civil rights and freedoms are either emptied of meaning by being referred to the legislature for definition, or are simply devoid of any real basic guarantees to organize these rights.
The judiciary in the constitution: lost opportunities for reform and enshrinement of the judiciary’s impenetrability

Karim El Chazli

The provisions regarding judicial power in the 2014 Egyptian constitution are the best embodiment of the collective vision of the judiciary itself, of its role in the country, of its relationship with other institutions, and of its relations with the Egyptian people. This is unsurprising given that the Constituent Assembly that drafted the constitution submitted to the wishes of judicial leaders and left it to them to draft the articles related to the judiciary as though these were only concerning judges rather than part of a constitution for all the Egyptians that should reflect their wishes and interests. The role of the Constituent Assembly was mainly intervening to ease tensions between judicial bodies when the interests of those bodies were conflicting.

These procedural shortcomings in the drafting of the constitution resulted in substantial shortcomings. The text on the judiciary consecrates the notion of the independence of the judiciary from the state because on one hand it gives numerous and unprecedented privileges to the judiciary and on the other hand it does not establish any mechanism enshrining the idea of accountability or control by the people, or balance of powers. The most prominent example of this tendency is Article 193, which gives absolute power to the Supreme Constitutional Court in choosing its members, making it the first constitutional court in the world, which has this kind of authority. The nature of the work of a constitutional court implies that it has a political role, necessitating the participation of other authorities in the process of choosing its members. This is because its basic function is the control of the constitutionality of laws, which are the outcome of a political activity. Some might say that this control is carried out through the application of the constitution and not according to the personal opinions of members of the judiciary, but anyone who has experience of constitutional adjudication knows that constitutional texts are vague texts and may have multiple interpretations. The role of the court is not to reveal one meaning embedded in the constitutional text but to choose between multiple possible interpretations. Therefore, in every state, the other state powers with democratic legitimacy participate in the process of choosing the members of the constitutional court. It is unimaginable in any country that describes itself as a democracy that the fate of the country could be left to a group of unelected people, however high their abilities and however pure their intentions, without any fixed guarantee in the interests of the elected authorities. The same observations are applicable to the choice of the Public Prosecutor and the formation of the Supreme Judiciary Council (SJC). In most countries, parliament and other authorities participate in the formation of councils of the judiciary and the choice of Public Prosecutor.

In addition, Article 121 of the constitution makes it necessary that two thirds of the parliament should give their agreement to any amendment of the laws regulating the judicial authority at a time when the Egyptian judiciary is in need of radical reform. Equally, the constitution does not require the judicial structures to give any reports or statements to parliament so that the representatives of the people may be assured that the service of justice is well done and that the judges are not abusing their wide powers.

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After the constitution immunized the judiciary from any reformist input from parliament, it has relinquished the wise suggestion that was proposed in the earlier draft (prepared by the committee of ten) according to which parliament may not be dissolved directly if the law of its election was judged unconstitutional. This makes us question whether the goal of the constitution is to subjugate parliament, the representative of the will of the people, entirely to the power of the judiciary. Is the philosophy of the constitution to ensure the protection of the unelected institutions of the state from any kind of external control and to make any reform impossible? The judiciary and other state institutions may fear any transgressions that elected bodies might undertake, but these fears are no justification for these kinds of provisions. Absolute power for any authority is entirely corrupting. The constitution gives numerous powers to the judiciary without giving any guarantee of the good use of these powers.

On the other hand, the constitution does not confront the most important problem of the Egyptian judiciary, which is the lack of clear standards for choosing the judges, which leads in reality to nepotism. The newspaper ‘Al Shorouq’ published on 7 December 2013 horrifying news that a quarter of those who were appointed judges in 2013 were sons of judges, and that this high proportion does not include relatives of judges such as nephews and relations by marriage. Worryingly, the authorities did not deny this information or offer any explanation or justification for what was mentioned in the newspaper article. It was up to the constitution to stipulate clearly that the selection of judges should be only through a contest overseen by a committee composed of judges and non-judges. But the constitution did not do that and merely stipulated ‘guarantees’ for the judiciary. The continuation of these kinds of transgressions has the effect of transforming the judiciary from one of the state institutions to merely a group of individuals with shared interests.

The conception of the judiciary as reflected in the constitution not only expresses the vision of the judiciary but also what could be called “the Egyptian conception of the independence of the judiciary”. The notion of the independence of the judiciary, as defended by the movement for independence of the judiciary, crystallized in the 1960s in the context of the authoritarian regime, in which elections were rigged. It was therefore logical to demand that the executive and legislative authorities should be distanced from the judiciary, even if this led to the judiciary being independent from the state itself. Independence of the judiciary in an authoritarian state is certainly better than its transformation into a tool in the hand of the state. The movement for the independence of the judiciary continued to defend this conception until the revolution of January 2011 when civil society and a section of the opposition also moved to accept it, and, eventually, everybody believed it as the only way of conceiving judicial independence. The majority of lawmakers, politicians and the public still believe in this conception, unaware that the time has come to review the Egyptian conception of the independence of the judiciary, which crystallised in particular circumstances. Egypt in 2014 is supposed to guarantee fair elections in a way that sets institutions which has sufficient legitimacy to have some say with regards to justice, as is the case in all the countries of the world. In Egypt of 2014, corruption had extended to all institutions without exception and in the absence of standards for choosing the judges, the door was opened to positions being passed on relatives. It is no longer possible to be content with saying that the judiciary will reform itself. The philosophy of the Egyptian conception of the independence of the judiciary supposes that the danger can only come from outside, from the executive, but the reality has proven that the danger that threatens the judiciary could also come from within. Therefore, a

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focus on blocking attack from outside reflects a defensive and group logic more than the championing of justice as a principle.

It has become urgent to return to international standards of the independence of the judiciary\(^4\) and to develop the Egyptian conception of judiciary independence, taking into consideration the changes discussed here. Independence is not an end in itself. International standards inform us that the independence of the judiciary is merely a means to guarantee its impartiality, guaranteeing the independence of the judiciary from any influence so that the judge applies the law alone without any personal bias for or against one of the parties, and without fear. Independence is a necessary condition to allow impartiality but it is not a sufficient condition. From this arises the paradox: the independence of the judiciary in the Egyptian conception leads to the judiciary becoming impenetrable. This impenetrability leads to the judiciary becoming a sect with its own social and political interests and leanings, weakening its impartiality and impacting its ability to represent the different groups of people in the name of whom the laws and judgements are issued. Equally, the impartiality of judges requires that they be trained and learn how to put aside political and religious convictions at the time of judgement so that decisions are subject only to the law. There is no need to point out the extent of the shortcomings which characterize the training of judges. What is fundamental is that there is no benefit in having an independent judiciary if it is not impartial since impartiality is the main value for the idea of justice. The constitution does not contain any guarantee for this kind of impartiality among the judges.

Equally, the constitution ignores the necessary conciliation between the independence of the judiciary with its efficiency, as is the case in other countries. It is not opportune for the justice affais to be solely addressed by a few men in their seventies who arrived in their positions by virtue of their seniority and remain there for one year only. The consequence of this situation is that those judges are unable to reform judiciary even if they had the intention or idea of it. What happens is that the members of the Supreme Judiciary Council (SJC) leave their posts at the end of June every year and hand over the judiciary to their successors in a worse state than the previous year. The constitution tries to maintain the situation as it is by stipulating the agreement of two thirds of the parliament to amend any article in the law on the judiciary, making sacrosanct the seniority rule and immunizing the SJC from any checks and balances or accountability concerning the effectiveness of the judicial system.

The danger of the immunization and impenetrability of the judiciary is its transformation into a sect with group interests that do not coincide necessarily with those of the general public. The result could be that the judge acts as belonging to “judges’ sect”, rather than as a public servant rendering decisions in the name of the people. This is something seen periodically when there is friction between a judge and lawyers or policeman, and a crisis between two people turns into a crisis between a group of judges and a group of lawyers or policemen. These kinds of frictions remind us a tribal logic and a rejection of the rule of law. During the constitutional debates, it has become clear that the judiciary is not one group and that every judicial body is a distinct group which finds great difficulty in communicating calmly and having rational debate with the other judicial bodies.

The only way to avoid the danger of State balkanization\(^5\) and its collapse is the creation of bridges and shared spaces between the different state institutions so that their interests are not completely in opposition to each other, opening of these institutions to society, and embracing of standards of adequacy in choosing its members, rather than standards of loyalty and social class.

In short, the section of the 2014 constitution that deals with judicial authority does not establish a democratic state, and does not deal with the challenges facing the Egyptian judiciary. These texts might have been acceptable had they been put forward in the constitutions of 1954 or 1971 but they are not appropriate for Egypt in 2014. The most precious thing that the judiciary has is the trust of the people. Their faith in the Egyptian judiciary has been shaken after the revolution in view of the great challenges that it has faced and for which it has not been prepared professionally or politically. Therefore, the Egyptian judiciary needs to build a new legitimacy founded on impartiality, transparency, effectiveness and adequacy. These days have taught us that rejection or delay of reform could lead to revolution.