

Reham El Morally

Is the Egyptian Constitution for Us or for Them? A Comparative Analysis of Egypt's 1971, 2012, and 2013 Constitutions

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Is the Egyptian Constitution for Us or for Them?

A comparative analysis of Egypt's 1971, 2012, and 2013 Constitutions

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Abstract: *This paper is directed to investigating and understanding the contextuality and reason behind the 1971, 2012, and 2013 constitutions formulated for the Arab Republic of Egypt. The following research will illustrate similarities, differences, and points of disagreement, while thoroughly investigating possible hypotheses to understanding why the articles were amended, altered, or removed entirely within all three constitutions. The paper is divided into three parts; part one will elaborate on the events that preceded the establishment of a constitution by the Egyptian Government. Part two will investigate the articles within the 1971 and the 2012 constitutions and compare them to the articles of the 2013 constitution. Part three will elaborate and compare each constitution, 1971 and 2012, with the 2013 constitution. Lastly, this paper will conclude by giving a brief summary of what has been discussed in the paper and provide some recommendations to what should be amended in the latest constitution, 2013 and the institutions to make the constitution stronger and more durable.*

Keywords: *Egypt, Constitutions, Military, Constitutional Amendments, Egyptian Government*

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I. INTRODUCTION

“We the people are the rightful masters of both Congress and the courts, not to overthrow the constitution but to overthrow the men who prevent the constitution”

~ Abraham Lincoln¹

“Do not separate text from historical background. If you do, you will have prevented and subverted the Constitution, which can only end in a distorted, bastardized form of illegitimate government.”

~ James Madison²

Constitutions vary in their composition, their objectives, their aim, their timing, and their type (oral constitution/written constitution). The quotes above illustrate what I would like to discuss in the following paper. A constitution is meant to protect the rights of the people, and not to protect the ones who are already in power. The objective of a constitution should be to remove those from power, who abuse their socio-economic and political position for self-interest, however this is not usually the case. Furthermore, a constitution should not be taken out of its historical context. The idea behind contextuality is to have some sense of what significant events have occurred before the constitution was drafted and passed, in order to be able to better analyze why certain articles of the constitution are formulated verbally and contextually in some way, and why some articles have been amended to state something different. The power of individual words within a sentence should not be underestimated, for example, a word like “principle” connotes that there is a vague understanding of a concept, however if we put the word principle in a sentence, it differs dramatically from a word like “law”. A word like “law” connotes that the article/sentence has some legal grounds, henceforward, would this article/sentence be violated there are legal consequences, and not just moral consequences like with the word “principle.

According to Robert Badinter the function of a constitution should serve as a guideline to the government on how to govern, set limitations of the government, ensure checks and balances so no power would exploit its powers, protect the rights and state the obligations of the civilians,

¹ Abraham Lincoln was the 16th United States president and served from 1861-1865.

² James Madison was the 4th United States president and served from 1806-1817. He was considered to be the “father of the [American] Constitution” due to his many contributions in formalizing and codifying the American Constitution.

and lastly set the laws and assigns functions to different organs of governmental and non-governmental organizations.³ Furthermore, he states, that if a constitution is not followed by comments and interpretations on how to apply the law, to avoid ambiguities, the constitution is as good as useless, because the principle of equity could be applied in almost any situation with no regards to the constitutional laws or the formal governmental interpretations.

This paper is therefore directed to investigating and understanding the contextuality and reason behind the 1971, 2012, and 2013 constitutions formulated for the Arab Republic of Egypt. The following research will illustrate similarities, differences, and points of disagreement, while thoroughly investigating possible hypotheses to understanding why the articles were amended, altered, or removed entirely within all three constitutions.

The paper will be divided into three parts; part one will elaborate on the events that preceded the establishment of a constitution by the Egyptian Government. Part two will investigate the articles within the 1971 and the 2012 constitutions and compare them to the articles of the 2013 constitution. Part three will elaborate and compare each constitution, 1971 and 2012, with the 2013 constitution. Lastly, this paper will conclude by giving a brief summary of what has been discussed in the paper and provide some recommendations to what should be amended in the latest constitution, 2013 and the institutions to make the constitution stronger and more durable.

³ Robert Badinter, "Chapter 1", in *The nature and Function of Judicial Review*, (Princeton: Princeton University Press, 1985): 1-39.

II. EVENTS PRECEDING THE 1971, 2012, AND 2013 CONSTITUTIONS

In 1971 president Anwar El Sadat came to power, after the death of the socialist leader, Jamal Abdel Nasser, and drafted a new constitution and established new institutions.⁴ Anwar El Sadat was the vice president of Jamal Abdel Nasser; they both were part of the Free Officers Military Movement in 1952, which brought about the end of British colonial rule over Egypt.⁵ The succession of Jamal with Anwar was unforeseen and unpredictable. When Anwar came to power, there was a lot of civil unrest in Egypt, due to many factors some of which are: his commencement of a “corrective revolution” by which he meant to reverse the economic, political and social plans that Jamal Abdel Nasser has set, the “open door” economic policy, shifting his political orientation from the East to the West, and lastly his uncharismatic attitude which the Egyptian population had become accustomed to under the rule of Nasser.⁶ However, sources differ about the popularity of Sadat. An author of the English Ahram stated, “Anwar lived for Peace, and Died for Principle”. Later in the article the author stated that Anwar’s death shattered the nation and brought severe grief amongst the populations. His need to satisfy the nation’s need made him become of Egypt’s most beloved and respected presidents.⁷

In 2012 the Muslim Brotherhood member, Mohamed Morsi, came to power through the secret electoral ballot box. Mohamed Morsi was the first elected civilian president Egypt has ever had.⁸ He led Egypt for almost one year, only to be ousted in 2013 by what some believe to be a “military coup” aimed to return back Egypt to the military rule.⁹ Some believe that the alleged coup was due to Morsi’s attempts to cut the military budgets, demand more transparency and inclusion of the president in military affairs, and to integrate the military into the political system rather than having them as an independent body from the government.¹⁰ Furthermore, the anti-foreign intervention in domestic affairs ideology the Muslim Brotherhood possessed raised a lot of eyebrows regarding the international community, especially the West, who have interest in

⁴ Ahmed Maher El Sayed and John B. Alterman, eds., “Anwar Sadat and His Vision”, in *Sadat and His Legacy: Egypt and the World 1977-1997*, (Washington: The Washington Institute for Near East Policy, 1998): 1-7.

⁵ Raymound Maalouf, “Egypt: A Case Study” *The Military Handbook* 2, no. 18, (2001): 351-356.

⁶ Sayed and Alterman, *Sadat and the Transformation of Egyptian National Security*, 43-73.

⁷ Darrel Arthur McCulley, “Anwar Sadat: Lived for Peace Died for Principle”, *Al Ahram English*, (October 9, 1981): 1-2.

⁸ Jannis Grimm and Stephan Roll, “Egyptian Foreign Policy under Mohamed Morsi”, *Stiftung Wissenschaft und Politik (SWP)* 35(2012): 2-4.

⁹ Martin Beck and Simone Hüser, *Political Change in the Middle East. An Attempt to Analyze the Arab Spring*, (Hamburg: GIGA Working Paper 203, 2012): 4.

¹⁰ Oliver Roy, “There will be no Islamist Revolution”, *Journal of Democracy* 24, no. 1 (2013): 14-19.

Egypt and the maintenance of its stability for the insurance of their economic trading routes.¹¹ Moreover, the regional powers, which supported the stabilization of the Egyptian internal affairs, like Saudi Arabia and the United Arab Emirates, possess strong anti-Muslim Brotherhood ideologies, which made them motivated to fund the stabilization of Egypt yet oppose the Brotherhood's ideology.¹²

After the 30th of June 2013 Revolution, which called for the removal of the Muslim Brotherhood regime, after only one year of its installation, brought about the military regime in Egypt. The Revolution could be interpreted as a result of the almost equal division of the society during the 2012 presidential elections, which the Muslim Brotherhood member Mohamed Morsi won by 51% of the votes; meaning that 49% of the society were dissatisfied and uncomfortable with having this political group in power.¹³ The newly elected president Abdel Fattah El Sisi, succeeded in the elections in late October 2013 and did not hesitate to rewrite and amend the constitution of 2012 to be more suitable for the socio-political and economic status of Egypt.

Each of the three presidents and each of their constitutions have different terms and different articles addressing the same issues. In this paper an analysis of the motives behind the changes made to each constitution will be emphasized in order to be able to critically conclude whether the constitutions have been amended and set up to serve the interest of the public or serve the interest of the ones currently in power.

¹¹ Hillel Fradkin, "Arab Democracy or Islamist Revolution?", *Journal of Democracy* 24, no. 1, (2013): 5-6.

¹² Oliver Roy, "The Transformation of the Arab World", *Journal of Democracy* 23, no. 3, (2012): 17-18.

¹³ Tom Ginsburg 2012: "The Real Winner in the Egyptian Constitution? The Military", *The Huffingtonpost* July 12, 2012; available at: http://www.huffingtonpost.com/tom-ginsburg/egypt-draft-constitution-military_b_2259798.html (accessed Nov. 26, 2015).

III. A COMPARATIVE ANALYSIS

a) 1971 and 2012 versus 2013

In this part, a comparative analysis between the mutual articles in the 1971 constitution and the 2012 constitution will be laid down and the differences between them and the articles of the 2013 constitution will be highlighted and interpreted.

Article 1 of the constitutions of 1971 and 2012 stated “The Arab Republic of Egypt is a sovereign, united, indivisible State, where no part may be given up, having a democratic republican system that is based on citizenship and rule of law.

The Egyptian people are part of the Arab nation seeking to enhance its integration and unity.” While in the 2013 constitution it was amended to include “(...) Egypt is part of the Islamic world, belongs to the African continent, cherishes its Asian dimension, and contributes to building human civilization.” This amendment has been made to make sure that the economic and political relationships Egypt has with its Eastern allies are emphasized, while also making sure that the unity with the Islamic states in Africa and Asia are reiterated.

Articles 139 and 42 address the electoral quotas and the assignments of each government. Article 139 remained as is in all three constitutions, while article 42 was remained the same in the 1971 and 2012 constitutions, and was amended in the 2013 one.

Article 139, which stated “The President of the Republic is the head of State and the head of executive power. He shall care for the interests of the people, safeguard the independence of the nation and the territorial integrity and safety of its lands, abide by the provisions of the Constitution, and assume his authorities as prescribed therein” remained as is in all three constitutions. This emphasizes the intention of all three governments to have power remain with the president by making sure that all executive measures are presided over by him. This article ensures the president unlimited power over what laws are to be protected, when they serve the interest of the president, and when to be dismissed, when they don’t serve the interest of the president and his entourage.¹⁴

Article 42, on the other hand was amended. In 1971 and 2012 it stated, “Workers shall be represented by 50% of the elected members of the boards of directors of public sector units. Their representation in the boards of directors of public enterprise sector companies shall be subject to the Law. The Law shall regulate the representation of small farmers and craftsmen with a

¹⁴ Amel Ahmed, “Revolutionary Blind-Spots: The Politics of Electoral System Choice and the Egyptian Transition”, *Middle East Law and Governance* 3, no. 2, (2013): 3-5.

minimum representation percentage of 80% in the boards of directors of agricultural, industrial and handicraft cooperatives.” While in 2013 this quota was removed and article 42 stated “The state grants workers and farmers appropriate representation in the first House of Representatives to be elected after Constitution is adopted, in the manner specified by law.” The amendment to article 42 in 2013 emphasizes the realization of the government that farmers and workers are no longer available for patronage, which led the government to believe that it is necessary to remove the quote in order to ensure that only supporters of the military government are in the parliament.¹⁵

Article 80, which is directed to human trafficking, the definition of underage and adult members of the society, the right to vote, and the legal consequences of the violation of human rights, also remained the same in all three constitutions and it stated, “Any encroachment on any of the rights and freedoms guaranteed by the constitution shall be criminalized by law. The national Council for Human Rights shall inform the Public Prosecution of any violation of these rights, may join the injured party in a civil action, and may appeal on their behalf.” However, in the 2013 constitution an addition to article 80 has been made to include “(...) All forms of slavery, oppression, forced exploitation of human beings, sex trade, and other forms of human trafficking are prohibited and criminalized by Law.” It is believed that this addition has been made due to the wide increase in the informal sector of the economy, which affected the formal economy dramatically.¹⁶ Anything that affects the “reputation” of the economy is considered to be a threat by foreign investors, which the government could not tolerate, and was pressured to eliminate, to guarantee stability in Egypt.¹⁷

b) 1971 versus 2013

In this part, a comparison between the 1971 constitution and the constitution of 2013 will be drawn. This part aims at figuring out why certain articles, which addressed the same issue, were phrased differently and what the new and old phrasings connoted. Both constitutions were set under a military regime. Although the Egyptian Government claimed that the president were independent from the ideologies of the military the facts speak against this notion.

¹⁵ Brown, Nathan J./ Dunne, Michele (2014): “Egypt’s Draft Constitution Rewards the Military and Judiciary”, *Carnegie Endowment for International Peace*, December 14, 2013; available at : <http://carnegieendowment.org/2013/12/04/egypt-s-draft-constitution-rewards-military-and-judiciary>, (accessed Nov. 22, 2015).

¹⁶ Taha Kassem, “Formalizing The Informal Economy: Are required state Regulatory And Institutional approach Egypt As A Case Study”, *International Academy of Science, Engineering and Technology* 6, no.2, (2014): 28.

¹⁷ Taha Kassem, “Formalizing The Informal Economy: Are required state Regulatory And Institutional approach Egypt As A Case Study”, 30.

Articles 153 and 201, which discussed the role and appointment of the defense minister stated the same thing in both the 1971 and the 2013 constitutions. Article 153 stated “The President of the Republic shall appoint and dismiss civil and military employees and political representatives and accredit political representatives of foreign States and bodies in accordance with the Law” Article 201 stated, “The Minister of Defense is the Commander in Chief of the Armed Forces, and shall be appointed from among its officers.” Article 201 however has been subjugated to additions in the 2013 constitution to include “(...) The Minister of Defense is appointed upon approval of the Supreme Council of the Armed Forces (SCAF).” The addition made to article 201 reiterates the involvement of the military in all domestic affairs of the country, regardless of the public statements made by the military to ensure to the Egyptian population that a separation between the judiciary of Egypt and the military is ensured.¹⁸

Article 204 of the 1971 and 2013 constitutions, address military trials; when a military trial could occur, who is subjugated to a military trial and the possible reasons for a civilian being subject to a military trial. In 1971 the article stated “No civilian shall face trial before the Military Court, except for crimes that constitute a direct assault against military facilities or camps of the Armed Forces, or their equivalents, against military zones or border zones determined as military zones, against the Armed Forces’ equipment, vehicles, weapons, ammunition, documents, military secrets, or its public funds, or against military factories.” In 2013 on the other hand there was an addition made to this article to make it state “(...) crimes that constitute a direct assault against the officers or personnel of the Armed Forces by reason of performing their duties. The law shall define such crimes, and specify the other competences of the Military Court. Members of the Military Court shall be independent and shall be immune to dismissal. They shall have all the guarantees, rights and duties stipulated for the members of other judicial bodies.” This addition has given immunity to the military judiciary from civil prosecution, thereby giving military judges the liberty to rule in whichever way they see most suitable.¹⁹ It has also given the right to the military to define, without further elaboration, on what they constitute to be an offense to the Armed Forces based on situational and circumstantial evidence. The reason why this is so problematic is because article 204 gives the armed forces unlimited and undefined power over the civilian population, and no further article within the 2013 constitution preserves

¹⁸ Sarah F. Aziz, “Revolution Without Reform: A Critique of Egypt’s Electoral Laws”, *George Washington International Law Review* 45, no. 1, (2013): 5-23.

¹⁹ Nathan J. Brown, “Egypt: A Constitutional Court in an Unconstitutional Setting”, Paper prepared for *The Constitutional Transitions and Global Comparative Law Colloquium*, New York University, school of Law, 2013.

or protects the rights of civilians to take actions when the military prosecution seems to be unjust.²⁰

Article 245, which divided the House of Representatives into an upper house, the Shoura council, and a lower house, the House of Representatives/National Assembly, has dramatically changed from the 1971 constitution to the 2013 constitution. In 1971 the article addressing this issue was article 194, which stated, “The Shoura Assembly shall be composed of a number of members defined by the law, not less than 132 members. Two thirds of the members shall be elected by direct secret public balloting, half of whom at least must be workers and farmers. The President of the Republic shall appoint the other third. The law shall determine the electoral constituencies of the Shoura Assembly, the number of members in every constituency, and the necessary conditions stipulated in the elected or appointed members of the Shoura Assembly.” While in the 2013 constitution article 245 addressed the Shoura council and stated, “The employees of the Shoura Council who are still in service on the date that this Constitution comes into force shall be transferred to the House of Representatives with the same job levels and seniority on that date. Their salaries, allowances, bonuses, and their other financial entitlements granted to them on an individual basis shall be maintained. All funds of the Shoura Council shall be transferred to the House of Representatives.” The 2013 constitution completely abolished the upper house from the political system and integrated it into the lower house. This amendment to the constitution was directed to ensuring that there is no differentiation between both houses, making the process of having supporters in the lower house, and lesser opposition to coopt an easier one.²¹ Furthermore, the elimination of the Shoura Council has been criticized for eliminating the process of judicial checks-and-balances, by making the decisions of the judiciary up for check by the lower house, which takes more time than usual. Further, would the lower house not reach an agreement, it is left up to the president to check on the judiciary, which gives the president even more power to the extent that it almost seems as if it were unlimited power.²²

c) 2012 versus 2013

In this part, a comparison between the two latest constitutions of Egypt will be tackled. The aim of this part is to investigate the differences that a civilian regime and a military regime have had

²⁰ Nathan J. Brown, “Tracking the “Arab Spring”: Egypt’s Failed Transition”, *Journal of Democracy* 24, no. 4, (2013): 45-46.

²¹ Ahmed Taher, “The New Egyptian Constitution: An Outcome of a Complex Political Process”, *Insight Turkey*, 15, no. 1, (2013): 25-26.

²² Ahmed Taher, “The New Egyptian Constitution: An Outcome of a Complex Political Process”, 28.

over certain articles of the constitution. The differences are very obvious between those two constitutions. In the comparison between the 1971 and the 2013 constitutions, the differences were mild, seeing that both constitutions were drafted under military regimes, which meant that the constitution was, for the large part, constituted to serve the interest of the military. The contrast between the 2012 and the 2013 constitutions is therefore much more recognizable, seeing that the regimes were different and hence had different objectives. The 2012 constitution was drafted under the Muslim Brotherhood member Mohamed Morsi, while the 2013 constitution was drafted under the Military officer Abdel Fattah El Sisi.

Articles 2 and 219 are the most debated, due to the fact that they strongly emphasize the ideologies of each regime. Article 2 in the 2012 constitution stated “Islam is the religion of the State and Arabic is its official language. The laws of Islamic Sharia are the main source of legislation” while in the 2013 constitution it stated, “Islam is the religion of the State and Arabic is its official language. The principles of Islamic Sharia are the main source of legislation”. This discrepancy emphasizes the conservative regime of the Muslim Brotherhood, and their attempt to make the laws of Shari ‘a Islam abiding on all citizens. In 2013 the secularity of the regime was emphasized when the word “law” was replaced by “principles” to connote that the majority of the population may be members of the Islamic faith, yet rights and freedoms of minorities belonging to different faiths are to be respected by the constitution.

Article 219 was even more controversial and further emphasized the ideologies of both regimes. In the 2012 constitution the article stated “The principles of Islamic Sharia include general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines and by the larger community.” this article was aimed at institutionalizing Shari ‘a law, to make it definitive, and to make the violation of it a criminal offense. This article was removed from the 2013 constitution. This was mainly due to the fact that it imposes the visions of one belief to minorities, invades the private lives of individuals within the community, gives the legislation power to determine and punish the basic freedoms of citizens, and is it itself discriminatory.²³

Article 4 sought to institutionalize the Azhar institution, and give it a legislative power. The article in the 2012 constitution stated “Al-Azhar is an encompassing independent Islamic institution, with exclusive competence over its own affairs. It is responsible for preaching Islam,

²³ Anthony F. Lang Jr., “From Revolution to Constitution: the case of Egypt”, *International Affairs* 89, no. 2, (2013): 345-364.

theology and the Arabic language in Egypt and throughout the world. Al-Azhar's Council of Senior Scholars is to be consulted in matters relating to Islamic Sharia. The state ensures sufficient funds for Al-Azhar to achieve its objectives. The president can dismiss al-Azhar's Grand Sheikh. The method of appointing the Grand Sheikh from among members of the Council of Senior Scholars is to be determined by law." This article was amended in the 2013 constitution and stated, "Al-Azhar is an independent Islamic scientific institution, with exclusive competence over its own affairs. It is the main reference for religious sciences and Islamic affairs. It is responsible for calling to Islam, as well as, disseminating religious sciences and the Arabic language in Egypt and all over the world. The State shall provide sufficient financial allocations thereto so that it can achieve its purposes. Al-Azhar's Grand Sheikh is independent and may not be dismissed. The Law shall regulate the method of appointing the Grand Sheikh from amongst the members of Council of Senior Scholars." The amendment highlights that Al-Azhar is an independent religious institution, and that it shall not intervene in political affairs. Therewith, the 2013 constitution sought to secularize Egypt and to abolish any space for the constitution to appeal to the emotions of members of the Islamic faith, or punish those of the non-Islamic faiths; i.e. the religions recognized by the state.

IV. CONCLUSION AND RECOMMENDATIONS

Governments derive their powers from the social contract, also referred to as the constitution, which sets the ground rules for the functions, rights, and obligations of institutions, groups and individuals. However, a question every civilian should ask is: who gets to set the constitution? and who are the constitutions for, us or the ones already in power?

Throughout this paper an investigation about these questions was set in motion. The paper followed a comparative analysis between the constitutions of 1971, 2012 and 2013 was carried out. The fact is that many tend to neglect the historical context in which a constitution is drafted. If we look at the historical context of these constitutions; the 1971 constitution was drafted and amended after the death of Egypt's socialist leader Jamal Abdel Nasser, under the liberal military officer Anwar Sadat. The 2012 constitution was drafted after the 2011 Egyptian revolution, where the Muslim Brotherhood member Mohamed Morsi, won the elections and became Egypt's first non-military president. The 2013 constitution was drafted after the ousting of Mohamed Morsi and the installation of president Abdel Fattah El Sisi, a military officer, who claimed neutrality towards political and institutional parties.

The analysis of this paper emphasizes that each constitution was drafted and amended to suit the current government rather than the civilian population. A comparative analysis between the similarities of specific articles in the 1971 and 2012 constitutions and contrasted the differences with the 2013 constitution. Further the 1971 constitution was contrasted with the 2013, and the 2012 constitution was compared to the 2013.

The findings of the research emphasized that the Egyptian constitutions are amended and appropriated to fit anyone in power. The 2012 and 2013 constitutions highlight the major differences by showing how the Muslim Brotherhood has amended the constitution to fit the party's ideology. The 1971 and the 2013 constitutions are very similar, due to the fact that both were drafted under military regimes.

I recommend that the civilian population of Egypt revisit the draft resolution of 2013, because, although it is very similar to the 1971 constitution it gives the military power never seen before in the history of Egyptian civilization. Furthermore, I would recommend that the constitution should address the civilians more than it addresses the ruling apparatus, for the simple fact that the articles defining the rights and obligations of civilians are very vague, attributing a door for circumstantial and situational interpretation. This is dangerous, because it does not protect the civilians from the security apparatus, nor does it define proper sanctioning processes for those violating the rights of others. Lastly, I would recommend that further research should be directed to the comparative analysis between constitutions and interpretations should follow by scholars to understand *why* amendments have been made, allowing the public to evaluate the amendments and take proper actions.

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