

Egypt's constitutional cul-de-sac: Enabling military oversight and a security state in a nominally democratic order

Egyptians began 2014 being summoned back to the polls for the third time in three years on a constitutional matter. This time, as in the past two polls (and indeed, all such balloting in Egyptian history), the people gave their assent to what was asked of them. But the democratic mechanisms of obtaining popular assent for a new constitutional order does not seem to lead in a democratic direction in anything but the formal sense. This Insight reviews the history of the constitutional developments in Egypt, the current situation and discusses whether the 2014 constitution ultimately will evolve in a more democratic direction.

Nathan J. Brown

Professor of Political
Science and International
Affairs, George Washington
University

Nonresident Senior
Associate, Carnegie
Endowment for
International Peace

CMI CHR.
MICHELSEN
INSTITUTE

Egypt's 2014 constitution — and indeed all of its post-2011 constitutional processes — failed to deliver on the promise of the 2011 uprising. It also ignored emerging international standard practice on constitution writing. Instead, it has resulted in a political order in which important state institutions have insulated themselves from the political process, placing themselves in a supervisory position over the entire political system. The system has deep roots in Egyptian political history, but it is odd in a comparative perspective. It is not unparalleled, however. Viewing Egypt's 2014 constitution in comparison with similar experiments elsewhere, might give some clues as to its long-term viability.

First, I will review the history of constitutional development in Egypt, showing that in the past, documents have served existing regimes rather than shaped them highlighting not only substantive but also procedural issues that have augmented

this feature of Egyptian political history. I will then show how the opportunity for a very different process and outcome was born in 2011, but quickly lost. The country's current constitution, promulgated in January 2014, provides for a security state with a democratic face. The Egyptian experience might be seen to mirror that of a select group of other post-coup political trajectories (Portugal, Chile, Turkey, and Myanmar). Could the 2014 constitution ultimately evolve in a more democratic direction?

THE STATE CONSTITUTING ITSELF

Egypt's constitutional heritage is one that prepared the country poorly for the critical moment in 2011 when the old regime tottered. But that was not necessarily bad: there was an opportunity in 2011 to write a constitution in a new way—participatory and consensual rather than top down. Such a process would have been the precise opposite of Egypt's past experiments with constitution drafting.

Constitutions are generally written in the midst of (or in the immediate wake of) severe political crises or dramatic transitions. But in the Arab world in general, and in Egypt in particular, those crises and transitions did not give birth to democratic constitution making; instead, those who sat in positions of political authority used the constitutional text as a way of enshrining their current position and, especially after the mid-20th century, their ideological orientation as well. Constitutions were written to fend off foreign penetration, proclaim sovereignty, and giving voice to ruling ideas; they often provided for elections but ones that rarely resulted in real contestation or popular oversight; they were often ratified in formally democratic ways but rarely reflected anything more than the wishes of the ruling regime.

Egypt's first constitution, for instance, was written in 1882, as the country was in a state of bankruptcy and foreign financial control that culminated in the country's occupation by Britain. An elected assembly passed a basic law in order to ensure that there was a measure of oversight over the cabinet and the treasury, but the sorts of elements that later generations came to expect in a constitution—democratic elections, basic rights, descriptions of fundamental values and identity, and even much of the state apparatus—was simply undefined. The document was about the state rearranging fiscal and administrative affairs at a time of crisis, not about democracy, liberalism, or the rule of law.

The country's next constitution, written in 1923 in the aftermath of the country's formal independence, was a fuller document that did include an elected parliament and a full (if by later standards short) set of rights. It also included a king, and the documents drafters looked in part to the European experience to balance royal prerogatives against the parliament's role. But the document was drafted by an appointed committee, and it was denounced by the largest political party at the time, the Wafd. The Wafd later came to embrace the constitution precisely because it gave the party a foothold in government through parliamentary elections.

That constitution was abrogated by a group of military officers who took power in 1952 and brought with them a series of constitutional documents, each one abandoned in a few years when the regime wished to readjust its structure and ideology. In 1971 a "permanent" constitution was adopted—and it did actually last (though it was amended) until its suspension in the 2011 uprising. The 1971 constitution did see some ideological diversity in its drafting but its primary purpose seemed to be to strengthen some state institutions while maintaining the powerful overarching role of the presidency. And it basically worked as designed.

In the process, however, it opened up some gaps. Some of the institutions it empowered—such as the courts (especially the administrative courts and the Supreme Constitutional Courts) took on limited autonomy. And the constitution also transferred authority from the sole political party that had been created to state bodies, eventually allowing for the emergence of a nominally multiparty system. The overall effect was to bring neither full liberalism nor democracy but to open up the door slightly to both—the rights provisions hardly met international standards as they were implemented, but they were not meaningless; the democratic procedures did not allow real contestation, but the opposition was given limited space to operate openly.

Much less remarked was the way that state institutions themselves were strengthened—generally in a way that would have made it impossible to challenge the president but at least in way that avoided presidential micromanagement.

By 2011, Egypt had a constitutional tradition that enshrined state power more than it held it accountable, despite some glimmers of different possibilities that opened at various times. And emerging ideas about consensus and consultation in constitution drafting had struck few roots in Egyptian practice.

A NEW OPPORTUNITY FOR EGYPT—LOST

In February 2011, that constitutional system appeared to collapse and possibilities opened for a very different constitutional future. No longer would it be possible to write a constitution the old way; the unity of the state apparatus was shattered; the office at the top was vacant (with the military high command only acting as president on an interim basis and operating under popular pressure the entire time); and those parts of the state that still functioned seemed disoriented.

A wealth of political actors showed a surprising ability to mobilize supporters; moreover, they had no trouble agreeing on a general set of constitutional changes that they wanted: a weaker presidency, an end to emergency rule and military trials of civilians, a stronger parliament, a more independent judiciary, stronger human rights protections, a more reliable press, and greater fiscal transparency. Not all of the demands of the 2011 uprising could be rendered in constitutional form, but for a mass movement with many participants and leaders, it was surprisingly possible to develop a fairly coherent vision of what a new constitution should look like.

State actors themselves seemed confused: some were beset by reform pressures within their own ranks and from the streets; others saw the moment as propitious for throwing off the yoke of a domineering presidency.

Substantive consensus—shallow, perhaps, but surprisingly broad—was married to procedural confusion. And the process that was followed, such as it was, drove the various actors apart as each sought desperately to hold on to its vision and determined not to let the tools it possessed to fall from its grip. Islamists had organization and ability to mobilize followers in an orderly way. Their constitutional vision was not all that dissimilar from that of other forces but they did want to impart a strong religious flavor to the state and to public life; they sensed that their strength lay in the electoral realm and embraced the various rounds of polling with enthusiasm. Various revolutionary forces who sought various versions of a more open (and sometimes a more egalitarian) political, and social order could capture the street and media attention, but their leaders often seem divided only between those who were unwilling and those who were unable to pursue electoral politics. And state institutions sought to ride the wave, securing not only their own functioning but also their own institutional interests. The military was the most powerful institution and seized control of the political order; the vast array of security services felt under attack (and they were, because of their record of decades of abuse) and therefore sought to lay low in public but manipulate and strike where they could.

The political process involved elections on constitutional amendments, followed by parliamentary and then presidential elections. The two houses of parliament were to elect one hundred people to write a constitution. It is impossible to recount briefly the procedural confusions and contortions that accompanied this plan (which was actually largely followed), but the broad impact is easy to summarize. It drove the various actors deeper into their own camps, fostering polarization, and left decision making in two sets of hands—whoever could control an electoral majority (the Islamists) and whoever controlled the guns (and, in a legalistic society, the judicial gavels). The result was a constitution that was written in a procedurally and legally correct manner and one that received, in a December 2012 referendum, majority support. But the product was also a constitutional text that could not bear the weight placed upon it—as soon as the first crisis hit, the opposition refused to follow the constitutional path or wait for parliamentary elections. After a massive demonstration, the military stepped in and suspended the constitution that had been written by a process that the military itself had helped design.

After a massive demonstration, the military stepped in and suspended the constitution that had been written by a process that the military itself had helped design.

It then set up a second constitutional process, once again according to a flawed formula from the perspective of the criterion of inclusiveness. A committee of ten jurists was charged to draft amendments to the 2012 constitution; they wound up revising the entire document before handing it over to a committee of fifty people appointed to represent the breadth of Egyptian society. In reality, they represented the breadth of the Egyptian state as well as state-licensed bodies; they also included a smattering of public intellectuals, social movement leaders, and politicians—though with only one Islamist in the group, the relationship between election results and the body's composition was nil. Once again, the Egyptian electorate dutifully approved the draft (with campaigning against the constitution treated as a threat to public order, the outcome was no surprise—and it may have actually reflected the popular will).

But Egypt's experience with three rounds of public voting (on constitutional amendments in March 2011 and constitutional texts in December 2012 and January 2014) hardly reflected a sound process. Tens of millions voted on three occasions, but the result each time left bitter and determined enemies. By contrast, in neighboring Tunisia scarcely two hundred members of the constituent assembly were allowed to vote on the constitution; it was never submitted directly to the electorate. (The general electorate did choose the members of the constituent assembly and would have been called to a vote if the assembly could not produce a sufficient majority for the final draft.) In the end, the international wisdom that consensus is more important than ratification in a ritualistic referendum may prove to be a lesson the Arab upheavals of 2011 will strongly affirm.

A SECURITY STATE WITH A DEMOCRATIC FACE

The 2014 constitution reads like it was written by a collection of state bodies seeking to protect themselves—and, as we have seen, that is precisely how it was written. Four institutions stand out:

- **Police:** The police and security forces are granted subtle but very powerful tools for insulating themselves from the political process and even other state actors. First, they are told that their loyalty is “to the people” (Article 206), and pointedly not to any officials or oversight body. Similar symbolic language was cited by the military when it seized control of the political system in 2011 and 2013. Article 207

establishes a Supreme Police Council that consists of senior police and one judicial official. Not only does the Council have oversight powers over the police; it is to “assist” the Minister of Interior and must be consulted in any law affecting the police. Article 237 binds the state to “confront” terrorism in all its forms.

- **Judiciary:** The regular judiciary, administrative courts, public prosecution, administrative prosecution, state cases authority, Supreme Constitutional Courts, military courts, judicial experts, other court personnel and even the legal profession all receive explicit mention in the constitution. The insistence on each judicial and legal body on being mentioned by name is remarkable, but perhaps more significant is the degree of autonomy granted to the judiciary.

Most countries attempt to guarantee judicial independence not only by vague promises but also by institutional arrangements: judges are given long tenure, they have considerable oversight over their own affairs, and there is a multiplicity of appointing bodies and procedures to ensure that the judiciary reflects broad social consensus rather than partisan interests. In Egypt, by contrast, the judiciary has sought not so much consensus as independence; different judicial bodies insist that they should have full control over their own budget and personnel matters.

In Egypt, by contrast, the judiciary has sought to anchor its independence not so much in general political and social consensus as in professionalism and complete autonomy. The 2014 constitution grants us most of what it wishes, promising it autonomy over budgetary and personnel matters. The public prosecutor is to be headed by an official appointed by the judicial council—giving the executive little apparent say in the matter. The Supreme Constitutional Court becomes a self-perpetuating body that selects its own head.

- **Al-Azhar** is the chief seat of Islamic learning in the country; it houses a university, a nationwide network of primary, intermediate, and secondary schools, and a host of research and advisory offices. It has taken on a role in censoring material deemed offensive to religion and public morals and exercise tremendous (if often informal) authority over issues connected in religion in public life. The head of al-Azhar is the most significant religious official in the country.

The 2014 constitution does not simply draw some of its legitimacy from al-Azhar (by citing the institution’s support for Morsi’s overthrow) but also guarantees it oversight over its own affairs. It is declared in Article 7 to be “the basic reference point for religious sciences and Islamic affairs;” its

head cannot be dismissed. He is to be appointed by a Body of Senior Scholars in a manner specified by law; that law (earlier rushed through by the military in January 2012) makes the initial composition of the Body wholly appointed by the current head of al-Azhar with any upcoming vacancies to be filled by the Body itself. More than even the police, and like the Supreme Constitutional Court, al-Azhar becomes a self-perpetuating body under its senior leadership, accountable only to itself.

- **The military** is granted even more. The most controversial element of the constitution was to grant military courts the rights to try civilians. Advocates for the constitution countered that the grounds for doing so were now specified in the constitution (and could also be detailed further in law). This is true, and indeed it is very common for military courts to have jurisdiction over civilians in cases that clearly involve military affairs (if a civilian were to commit a crime on a military base, for instance, in many countries a military court would have jurisdiction. (Article 97 of the 2014 Egyptian constitution does insist that “a person may not be tried except in front of his natural judge,” an obscure phrase that first appeared in the country’s 1971 constitution and has been interpreted by many Egyptian legal authorities to require that civilians be tried by civilian judges—an interpretation now undermined by article 201 of the 2014 constitution on military courts.) However, while the provision for military courts does specify the grounds for trying civilians, those grounds are very vague and potentially enormously expansive; moreover, it appears to fall to military officials to interpret where those can be applied. In other words, what is presented as a restrictive clause is actually likely to be an alarmingly enabling one.

But it is three other sets of provisions that mark the true extent of the military’s autonomy. One set relates to the minister of defense—who serves (instead of the president of the republic) as the commander in chief of the armed forces (article 201). A set of provisions for forming the cabinet effectively diminishes any parliamentary role over selecting the candidate on a permanent basis. And for the first two presidential terms, the military high command must approve any candidate for the post. (Indeed, since the constitution begins full operation later this year with a minister of defense likely selected by the military already in place, it would be politically extremely unlikely for the incumbent not to be the one selected.

Second, the military budget is effectively insulated from the political process. Article 203 establishes a National Defense Council, headed by the president but including an even blend of military/security and civilian officials that is to have competence in all

matters connected to the safety of the country. It is to approve the military budget as a single figure, essentially robbing the civilian political structure of any capability of exercising an effective oversight role. (When it discusses budgetary issues, one additional military official and two additional parliamentarians are invited.)

Third, the constitution hems in the effectiveness of civilian politics in other critical areas. Under article 152, the president cannot declare war or commit armed forces to external combat without consulting the National Defense Council. And the constitution establishes yet another body, the National Security Council (article 205), to oversee security and take necessary actions to protect it. While the Council is headed by the president and includes civilian cabinet ministers and parliamentary leaders, it also includes the ministers of defense and interior as well as the heads of general intelligence. The effect is to remove security issues to an unclearly defined extent from the normal political process.

These new constitutional provisions were not merely promises to be fulfilled in the future; within a month of the constitution's ratification in a referendum, the acting president began issuing laws by decree in order to implement the new arrangements for the military.

The overall effect of these provisions is not to eliminate democratic procedures but to circumscribe them in matters that top judicial, religious, security, intelligence, and military officials see as within their purview. It allows institutions within those areas considerable internal autonomy; in a sense, they oversee the civilian political order far more than they are overseen by it. By reversing the relationship of accountability in this way—and in light of the harsh, even abusive record of some of these institutions, there is every danger of them not merely limiting but also effectively undermining a nominally democratic process.

THE EXISTENCE AND FATE OF SUCH PROVISIONS IN COMPARATIVE PERSPECTIVE

The Egyptian provisions are unusual but they are not unique. Instead, they are specific manifestations of a particular kind of constitutional settlement—one common in which a military- and security-dominated political order either decides or is pressured into restoring some measure of civilian politics but does so

only after working to inscribe its continued authority and oversight capabilities in constitutional form. Viewing the Egyptian constitution this way makes it seem a bit less idiosyncratic but still characteristic of a species of political system that operates in a post-coup environment in which a military seeks to regularize more than abolish its political role.

The telltale characteristics of such a constitution fall in the provisions for military mission (they tend to be quite extensive and extend to domestic functions and political oversight, often avoiding any suggestion that the military's loyalty should be to anything other than its own sense of mission), the appointment of top officers and the determination of the military budget (they tend to make the military autonomous and immune from political oversight; they sometimes designate the head of the armed forces rather than the president as commander in chief), and they often establish councils responsible for defense or security that give the military and security apparatus a powerful role overseeing day-to-day governing and an ability to veto the participation or actions of key civilian actors. Loosely-identified emergency powers also pepper some of these texts, although what is more remarkable is the way that practices viewed as exceptional measures elsewhere (such as limitations on rights) are thoroughly insinuated

into daily governing as well as the legal and constitutional framework. Sometimes other state structures, such as judicial bodies, are brought into the arrangements.

In Portugal, a military coup in 1974 set off a complicated struggle among a variety of civilian and military political actors. After consolidating control and staving off radical challengers, the military leadership of the country pushed through a new constitution in 1976 that gave a dominant constitutional position to the "Council of the Revolution," the body that had formed itself to oversee the revolutionary tumult

in the country a year earlier. The Council was granted a powerful oversight role over the civilian political process, including a strong veto power over legislation, a set of authorities that might normally be the role of a strong president, and oversight of the military. Because the military high command dominated the Council the effect was to set up a civilian political order under the watchful supervisory eye of an unaccountable military. And the military itself was granted an astonishingly broad mission of safeguarding the revolution as well as democratic and socialist transformation.

The overall effect of these provisions is not to eliminate democratic procedures but to circumscribe them in matters that top judicial, religious, security, intelligence, and military officials see as within their purview.

These arrangements survived only until 1982 when a series of overreaches by the Council, combined with a more robust civilian political arena, provoked a series of constitutional amendments and an abolition of the Council.

In Chile, a military-led regime sought to regularize its rule in 1980 and did so through a constitution that created a strong, military-dominated National Security Council, restricted any oversight over the appointment of senior military officers, and ensured that all critical state institutions had a measure of oversight from the president or the Council. The Chilean judiciary, a body that had quite willingly fit in with the military-dominated order had its autonomy enshrined in the constitution; it was joined by a new constitutional court. The National Security Council was also given a strong role in shaping the new body. Some of the constitution's most authoritarian provisions were explicitly transitional, designed to last only ten years.

In 1988, an opposition coalition managed to pull off an upset victory, defeating a bid by coup leader Augusto Pinochet for a second eight-year term under the constitution. It followed this victory with a slow revival of civilian politics and gradually modified the 1980 constitution in a slow and incomplete process.

In Turkey in 1982, a new constitution was promulgated two years after a military coup that granted considerable autonomy to the military and signed powerful authority over to a military-dominated National Security Council. The general who led the coup was granted the position of first president (and thus chair of the Council). A constitutional court was granted very significant authority—including over the constitutional amendment process itself—and formed largely on the basis of nominees from the judiciary itself. And Turkey—like Egypt three decades later—took the unusual step of naming a large number of judicial bodies directly in the constitution.

That constitutional order led to a series of struggles in the 1990s and 2000s between what some Turks came to call the “deep state” empowered by this system and was slowly remade as the AK Parti came to dominate elections and successfully, if gradually and contentiously, managed to secure a series of constitutional reforms.

In all three cases, we see a similar pattern: A military and security-minded leadership seeks and finds a series of constitutional devices to regularize its oversight role. It does so effectively at first, but opposition grows as civilian politics gains its footing. It should also be noted that in all three cases, international actors played a significant role. In Portugal and Turkey, NATO membership may have at least acquainted the military leadership with different models of civil-military

relations (though NATO accommodated itself to the coups and important actors like the United States were probably more concerned about maintaining a security relationship and fending off radical leftist challenges than about democratization). Far more significantly, the prospect of joining European economic and political bodies seem to have conditioned political actors in both countries to accept a process of gradual diminution of the military role. And in Chile, the international reputation of the Pinochet regime (as well as the collapse of its cold-war *raison d'être*) also tilted the scales against military domination in the long run.

Is such a process inevitable? Must international pressure and revived civilian politics gradually but inevitably reverse such a post-coup constitutional order? Myanmar is currently testing that proposition.

In 2008, the rulers of that country issued the constitution that may be the friendliest to military rule ever written. It not only dipped heavily into the standard toolkit developed in Portugal, Chile, and Turkey—making the military virtually autonomous in personnel and budget, establishing a military-dominated National Defense and Security Council with extensive oversight powers, separating the presidency from the position of commander in chief—but it also gave the military representatives in parliament and a voice in selecting the president.

It is unclear what path Myanmar is taking, especially because the military has effectively given itself a veto over constitutional amendments (amendments can only pass by a vote of three-quarters of members of parliament; with one-quarter of the deputies appointed by the military, this is a very effective way of preventing change). The most powerful opposition movement has indicated some willingness to join rather than boycott the political process; its exact role and electoral prospects are the subject of a protracted political contest that has been underway since the new constitution was adopted.

EGYPT'S CONSTITUTIONAL FUTURE

Initial indications are that even if Egypt does eventually reverse elements of the 2014 constitutional settlement, it will be a difficult and protracted process. The country remains badly divided, and important political actors (the Muslim Brotherhood and its allies), while likely a minority, seem to be driven further into political alienation and isolation rather than inclusion. That has set the stage for what seems to be an incipient insurgency from far more radical forces.

Civilian political actors are inchoate, divided, and weak; those who are critical of the emerging order are politically ostracized and sometimes repressed.

International pressure thus far has been ineffectual, and in some ways gentle Western suggestions about the necessity for reconciliation (currently a dirty word in Egyptian politics) has been counterbalanced by heavy funding from rulers in the Arabian peninsula willing thus far to bankroll the new order.

The new constitution has only been in effect for a month, so it is difficult to determine how it will operate. With the president likely to come from the military and a security apparatus currently operating with complete impunity and recklessness, it is difficult to see any meaningful democratic evolution any time soon. Yet those developments might eventually provoke a backlash. The other strong pockets of autonomy in the Egyptian state — such as the religious establishment and the judiciary

— are fully supportive of the new order for now, but they may gradually strike out in their own directions, perhaps opening space for civilian political actors to articulate and even pursue opposition political visions.

But the history of constitutional evolution in the analogous cases suggest that even under favorable circumstances — such as an international environment encouraging democratic transformation, some institutional roots and the historical memory of democratic practices, and diminished ideological conflict — such evolution can be glacial indeed.

[The author gratefully acknowledges the assistance on Oren Samet-Marram, especially in the comparative section.]

CMI (Chr. Michelsen Institute)

Phone: +47 47 93 80 00

Fax: +47 55 31 03 13

E-mail: cmi@cmi.no

CMI is an independent development research institute in Bergen, Norway. CMI generates and communicates research-based knowledge relevant for fighting poverty, advancing human rights, and promoting sustainable social development. CMI's research focuses on local and global challenges and opportunities facing low and middle income countries and their citizens. Our geographic orientation is towards Africa, Asia, the Middle East and Latin America.