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Egypt's Theocratic Future: The Constitutional Crisis and U.S. Policy

[Robert Satloff](#) and [Eric Trager](#)

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Egypt's hastily drafted constitution, which will likely pass an upcoming referendum, facilitates Islamist domination by co-opting the military.

Egypt's newly drafted constitution, which will be put to a referendum on December 15, represents a tremendous step backward for the country's democratic prospects. President Muhammad Morsi's decision to rush the document through a constitution-writing assembly that non-Islamists abandoned, coupled with the many articles that Islamists in power can easily exploit, virtually ensures a theocratic Egyptian future. The charter also cements the Muslim Brotherhood's deal with the military, granting the generals relative autonomy in exchange for accommodating the Brotherhood's political ambitions.

BACKGROUND

Egypt's Constituent Assembly has faced two key challenges since the Brotherhood-controlled parliament appointed it to draft the new constitution in June. First, its domination by Islamists upset its non-Islamist members, and by mid-November almost all of the latter had abandoned the assembly in protest. Second, following the Supreme Constitutional Court's mid-June ruling that parliament had been elected unconstitutionally, the assembly became a target for litigation. After multiple postponements, a ruling on its legality was expected this week.

To preempt this ruling, however, Morsi issued a November 22 constitutional declaration that, in addition to asserting virtually unchecked power for himself, insulated the assembly from being dissolved by the court. When non-Islamists launched mass protests against the decree, Morsi responded by calling for completion of a draft constitution within twenty-four hours; the assembly in turn replaced many of the non-Islamists who had abandoned it with Islamists. On Saturday, Morsi approved the resulting draft and called for a national referendum on December 15. It is widely expected to pass: Islamists (who remain the country's best-mobilized political forces) support it, and "yes" has won every plebiscite in contemporary Egyptian history.

The draft has some promising components. It maintains that "sovereignty is for the people alone," not God; includes clauses on nondiscrimination and personal freedom; affords impressive privacy rights, including in electronic communications; and mandates a two-term presidential term limit. But it also offers a political system that is ripe for Islamist domination, and provides unprecedented constitutional protections for the military as part of an apparent deal to ensure its passage.

NONPLURALISTIC PROCESS YIELDS NONPLURALISTIC DOCUMENT

The draft constitution's articles on the relationship between Islam and politics reflect the virtual absence of non-Islamists and religious minorities from the assembly that drafted it. While much depends on how future Egyptian governments interpret the constitution, a number of key passages provide Islamists with a substantial foothold for instituting their authority and advancing their agenda.

The draft's approach to sharia (Islamic law) is one such example. Although it preserves the 1971 constitution's second article, under which "Islam is the religion of the state" and "Principles of Islamic sharia are the principal source of legislation," the new constitution is far stricter in specifying how legislators should examine sharia. Article 219 thus defines "principles of Islamic sharia" as including "general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines and by the larger community," thereby narrowing the range of interpretations on which legislators can draw by excluding Shiite doctrines, which were used for legislating under the 1971 constitution. And while the draft does not necessarily exclude the passage of laws that have no sharia basis, the combined effect of Articles 2 and 219 privileges religious doctrines in political debate, and therefore Islamists. Article 6 further bolsters this privilege by basing the political system on "the principles of democracy and shura," the latter of which implies consultation restricted to qualified Islamic scholars.

The constitution also carves out a potentially large role for the state in enforcing religious doctrine. In this vein,

Article 11 authorizes the state to "safeguard ethics, public morality, and public order, and foster a high level of education and of religious and patriotic values." Meanwhile, Article 44 prohibits the "insult or abuse of all religious messengers and prophets," thereby empowering the government to use religious justifications for curtailing free speech.

Finally, the constitution embraces a limited view of minority rights. While Article 3 permits Christians and Jews to be governed by their respective laws regarding personal status issues, the text is silent on the rights of other minorities such as Bahais and Shiites, who frequently suffer discrimination. According to Brotherhood leader Helmi al-Gazzar, this was intentional because "Bahais are a very eccentric group that is far from Islam," while Shiites "worship Allah in a very strange way." Article 43 similarly ignores these groups when it upholds the "freedom to practice religious rites and to establish places of worship for the divine religions," which is typically interpreted as including only Sunnis, Christians, and Jews. Even these three groups are only guaranteed religious freedom "as regulated by law," thereby enabling the continuation of discriminatory laws that complicate Christian attempts to build or renovate churches; such provisions are frequently used to justify sectarian violence.

THE BROTHERHOOD'S DEAL WITH THE MILITARY

The constitution does not privilege Islamist ideology and ambitions exclusively. It also satisfies two key military demands, thereby winning the generals' cooperation in facilitating the draft's passage. Indeed, the first articles that the assembly approved as it hurried to complete its draft on Thursday were those that pertained to the military.

First, the new constitution grants the military relative autonomy over its own affairs. Article 195 holds that the defense minister must be a member of the armed forces "appointed from among its officers," thereby sparing the military from civilian oversight. Article 197 similarly establishes a National Defense Council to oversee the military's budgets; at least eight of the council's fifteen seats must be held by high-ranking military officials, avoiding the parliamentary oversight that the generals feared. Meanwhile, Article 198 maintains the military judiciary as "an independent judiciary" and allows civilians to be tried before military courts for "crimes that harm the armed forces."

Second, the constitution grants the military substantial influence -- and perhaps even veto power -- over the conduct of war. Article 146 states that the president cannot "declare war, or send the armed forces outside state territory, except after consultation with the National Defense Council and the approval of the House of Representatives with a majority of its members." The text also seemingly equalizes the defense minister and the president during wartime: Article 146 calls the president the "supreme commander of the armed forces," while Article 195 declares the defense minister the "commander-in-chief of the armed forces."

Although the Brotherhood previously rejected such concessions, the new draft charter represents the group's realization that it needs the military to advance its agenda in the current environment. Given that Egyptian judges are protesting Morsi's actions, with many refusing to monitor the December 15 referendum, the Brotherhood must rely on the military authorities to open polling places and administer the vote, as they have done successfully five times since last year's revolution.

POLICY RECOMMENDATIONS

So far, the Obama administration has effectively sided with Morsi against his non-Islamist opponents. Since the current crisis erupted two days after the Gaza ceasefire, which itself ended with effusive American praise for Egypt, the State Department has issued two key statements -- the first after Morsi's power-grabbing decree, the second after the hasty approval of the draft constitution and announcement of a referendum. Both statements muted any criticism and essentially echoed Morsi's statement that opponents should express their view in a "no" vote.

Now, with Egypt's judiciary divided over whether to supervise the referendum and other groups, such as the mosque preachers syndicate, offering to do the job, Washington faces another test of whether its honeymoon with Morsi trumps its support for universal principles of constitutionalism. The Obama administration's position will have powerful implications for the content of U.S.-Egyptian relations and the direction of constitutional development in other Arab transitional democracies.

Robert Satloff is executive director of The Washington Institute. Eric Trager is the Institute's Next Generation fellow.