

# Egyptian Human Rights Experts Analyze the Draft Constitution

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Articles & Testimony

**Amid fierce debate over Egypt's draft constitution, Fikra Forum editors asked Egyptian human rights experts Hafez Abu Saeda and Magdi Khalil to analyze the draft with respect to human rights, religious freedom, and democratic values. Hafez Abu Saeda is the head of the Egyptian Organization for Human Rights and Magdi Khalil is the executive director of the Middle East Freedom Forum.**

## Toward a Democratic Constitution for Post-Revolution Egypt

**By Hafez Abu Saeda**

**E**gyptians from all walks of life and all corners of the nation rose up in the January 25 Revolution to reclaim their freedom and the civil, political, economic, social, and cultural rights stolen from them for 30 years under Mubarak's 1981 emergency law. Despite the wealth of the legislative system, Mubarak's regime failed to combat systematic torture, and citizens suffered from abuse in detention centers, poor conditions in prisons, and even lost their lives, as occurred in the infamous case of young Khaled Saeed.

Amid deteriorating human rights and the regime's efforts to obscure and prevent all avenues to peaceful change, the revolution emerged. It was founded on the principles of rights and freedom, so that Egypt could write a new constitution, the "constitution of the revolution."

Upon the formation of the Constituent Assembly, social groups and political parties unanimously agreed on its dissolution due to its illegitimate formation. Furthermore, many feel that the composition of the assembly is imbalanced, as the percentage of Freedom and Justice Party and Nour Party members exceeds 50 percent. The Administrative Judicial Court ruled in April 2012 that members of parliament could not serve on the constitutional panel, suspending approximately 100 of its members. The ruling excluded any provision authorizing members of the Shura Council to participate in the assembly as well as the 22 members of the council who were appointed by the president, referring this matter to the Supreme Administrative Court, which in turn referred the case to the Supreme Constitutional Court.

Despite these objections, the council continued to draft a constitution and presented it for public discussion. Upon reading this draft, one finds that it fails to provide even the dimmest hope for the realization of Egyptian society's aspirations. Specifically, there are six main issues with the draft, demonstrating its failure to meet the demands of the Egyptian people:

1. Under the expansive power granted to the president, this draft could in fact contribute to the creation of a new Egyptian pharaoh, allowing the president to appoint the prime minister and dissolve the parliament should he disapprove of government programs. In addition, the new constitution grants the president powers such as appointing members of the Supreme Constitutional Court, implementing a general state policy, and speaking before the parliament without accountability. These powers essentially reduce the government bodies to a "secretary" role for the president. Furthermore, the president has the right to choose the heads of the Egyptian intelligence, in addition to civil servants and military and political representatives.
2. The insistence on maintaining the Shura Council is another serious concern. The draft grants the council legislative power alongside the parliament, despite the fact that the president appointed a quarter of its members.
3. The draft does not draw from international charters of human rights and democratic constitutions on issues of general rights and freedom. Normally, transitioning democratic countries aim to respect human rights in a manner consistent with international charters and treaties, as was the case with Morocco's new 2011 constitution, and Sudan's transitional 2005 constitution. Both constitutions were written to guarantee the rights and freedoms contained in international human rights charters and treaties, and include them within the bill of rights and freedoms, giving these charters a constitutional value.
4. In the draft, rights and freedoms are deferred to the law, as was the case in the 1971 constitution. Therefore, laws can undermine these rights and freedoms, causing them to lose their constitutional value. The phrases "within the confines of the law" and "according to the law" are a direct infringement of the legislative power entrenched in constitutional law and are equivalent to shackles on the constitution and the individual. The draft does not recognize torture as a crime, nor does it mention its criminalization according to international human rights charters and conventions opposing torture. In addition, the draft detracts from women's rights in a way that violates Egypt's pledges to uphold international commitments regarding these issues.
5. The draft is an infringement on the Supreme Constitutional Court (SCC) and the law-abiding state because it gives the president the power to appoint the court's head and its members, abandoning the principle of an independent judiciary. This imposition of power by the executive branch over another state power slights everything that the SCC fought for after the January 25 Revolution, including the right of the general assembly to appoint the head and members of the court.
6. The draft limits the court's role in monitoring election law, demonstrating the partisan bias of the assembly toward the Freedom and Justice Party, who was the only party to approve it. Over 22 parties, among them the Constitution Party, the Popular Current, Egyptian democratic parties, the Free Egyptians party, independent unions, and rights associations announced their opposition to the draft and their intention to void it through popular disapproval.

The constitution should be a social contract that values the basic components of a law-abiding state, respects human rights and freedoms, and reflects this vision in the formation of modern, democratic, state institutions, for the benefit of all Egyptians. With a shared desire to write a democratic Egyptian constitution that enjoys national

support, human rights activists, representatives of political and social groups, professors of law and political science, and other figures have united in order to inaugurate the Egyptian Constitutional Front. This group is the equivalent of a popular constituent assembly, with a mandate to draft a democratic constitution for post-revolution Egypt which responds to the hopes of everyone, and represents a "constitution for all Egyptians." The Egyptian Organization for Human Rights currently houses the headquarters of the Constitutional Front and the first gains were made when the Front put forth a list of rights and freedoms to be guaranteed in the new constitution. In accordance with the International Declaration of Human Rights that Egypt has ratified, the list is composed of two parts: the first concerning civil and political rights, and the second concerning economic, social, and cultural rights.

Drafting a constitution that meets the aspirations of the people requires a struggle on multiple fronts: judicial appeals; organizing those who demand a democratic constitution that meets the demands of the people to achieve goals in human rights and dignity; applying pressure on the president to restore balance in the Constituent Assembly; re-drafting a constitution that is agreed upon by all political groups and incorporates the principles agreed upon during the revolution, the most important being the balance of power by limiting the powers of the president; making all state institutions accountable; strengthening the independence of the courts; and respecting human rights and women's rights.

As we stood together to change the regime, we must remain united in order to produce a constitution that builds a law-abiding state.

## Strong Echoes of a Religious State in Egypt's Draft Constitution

By Magdi Khalil

On October 14, the Egyptian government published a draft of the new constitution that clearly reflects the current state of political affairs in Egypt. A careful look at the Egyptian political landscape reveals that the drawbacks of Mubarak's era are as present as ever, with further disadvantages brought about by religious extremism and the prospects of a religious state. The draft followed suit: not only did it fail to remedy the drawbacks of the 1971 Constitution; it also included the detrimental characteristics of a religious state. With constitutional principles relegated to legal ruling in 59 instances, rendering them essentially useless and highly subject to interpretation, the same critical defect that undermined the 1971 Constitution has found its way into the current draft.

This article examines each of the features and attributes of a religious state, as formulated by the following articles in the draft constitution presented by the Constituent Assembly:

- **Article 1** states that Egypt is part of the Arab and Islamic nations, however, when the draft describes its ties to Africa and the Nile basin, Egypt is only said to be "proud" to belong to both affiliations. The opposite should be true: Egypt is part of Africa and the Nile Basin. It is not an integral part of Pakistan, Afghanistan, Malaysia, Somalia, and Indonesia. This demonstrates its prioritization of religious identity over geographic and economic relationships.
- **Article 2** empowers the notion of a religious state, using the exact text of the 1971 Constitution, clearly stating: "Islam is the state religion, and the Arabic language the official language, and the principles of Islamic sharia are the primary source of legislation." Diverging from the 1971 Constitution, two catastrophic articles have been added: Article 221 considers the entirety of Islamic jurisprudence and tradition to be the source of legislation, while article 4 entrusts the interpretation of this jurisprudence and tradition to the body of senior scholars at al-Azhar, following in the footsteps of Iran and its Council of Guardians (*Shura-ye Negaban*). Thus, the current constitution has managed to feature the

worst of the Iranian constitution, the Pakistani constitution, and the Saudi Wahhabi Bedouin doctrine.

- **Article 3** applies the Islamic concept of "*dhimmitude*" (derived from the word *dhimmi*, it describes the social and legal conditions of "People of the Book"), thus granting Christians and Jews certain rights to marriage, divorce, and the selection of spiritual leadership, while withholding these rights from other faiths.
- **Article 4** describes the role of al-Azhar, granting the institution the right to obtain funding from the state budget in order to spread Islam worldwide. Given that al-Azhar's body of senior scholars are in charge of interpreting all sharia-related matters to the three other government authorities, it is essentially considered a superior authority. Therefore, not only will legislation be restricted by al-Azhar's vision, which is dangerous enough, but the Egyptian Judiciary may morph into a religious judicial system as the judges await al-Azhar's opinion in the majority of cases presented to them.
- **Article 6** hinders the meaning of democracy by limiting it to the Islamic concept of shura (meaning "consultation" in Arabic, the concept calls upon Muslims to gather and form opinions for the betterment of the Islamic nation), in addition to granting legitimacy to religious parties.
- **Article 9** states that religion and moral values are the sound foundation of the family, which is nothing more than empty religious rhetoric.
- **Article 10** describes the state's responsibility to safeguard morality, public decency, and religious and nationalist values. Describing the state as "a guardian of religion" is a trademark of a religious state, and, even worse, the article imposes restrictions on freedoms and rights.
- **Article 37** states that "freedom of belief is protected." To start with, there is a big difference between freedom of belief and freedom of worship. Furthermore, the article states that "the state shall guarantee the freedom of worship to the three monotheistic religions as regulated by law." This strange text restricts the right of belief to what is recognized as the "heavenly religions" by Islam. Under loose interpretation, extremists could even try to take a stab at Judaism and Christianity under the allegation that they have been misrepresented or distorted. Allowing laws to define the freedom to build mosques and churches will only maintain the status quo as no law will ever grant equal treatment to mosques and churches. Therefore, the archaic *Hatt-I Humayun* decree -- which originated in 19th Century Turkey and stipulates that a presidential decree is required for building a church or even for simple repairs and renovations -- and the ten unjust conditions will be maintained, while the rapid construction of mosques remains unhampered.
- **Article 38** warns against any "attack against or insult to the prophets." This is specifically directed at the Copts, since Christianity and Judaism are subject to daily insults that go unpunished, while Coptic citizens are the only ones who are put on trial if they happen to criticize Islam and defend their religion.
- **Article 52** reflects another characteristic of the religious state, making religious education a required main subject in pre-university education. Along those lines, article 67 adds another dimension by mandating the spiritual development of the child.

- **Article 68** destroys gender equality, restricting women's rights to the rulings of Islamic law.
- **Article 209** describes the so-called Economic and Social Council, which is in fact an Islamic shura council, and obliges the executive and legislative authorities to seek the opinion of this council before formulating any laws or policies.
- Finally, **Articles 222** and **223** present an even more foreboding picture as they were deviously formulated to delineate the identity of a religious state. The first Article allows moving the capital from Cairo to an alternative city, most likely to account for a future caliphate state, which would potentially require moving the capital to either Istanbul or Jerusalem, following a suggestion made by Imam Safwat Hegazi. The second Article rids the constitution of the right to determine the state's identity, deferring the responsibility to the parliament, along with the right to determine the national flag, slogans, seal, and national anthem, leaving these state symbols in the hands of the anticipated Islamic parliamentary majority.

Ultimately, the Articles converge to form a clear design for the establishment of a religious state, with an identity, legal code, judiciary, religious censorship, capital, and culture that reflect its nature.

It is most alarming that the entire draft constitution is without any mention of the civil state, and is completely devoid of any reference to UN and/or regional international human rights instruments as the international authority on rights and freedoms. All Articles referring to rights and freedoms have been restricted either by Islamic law, or by resigning constitutional rights to be regulated by law, which likewise subjects them to the restrictions imposed by the same Islamic law.



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