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**FORUM**

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## **Drafting the Egyptian Constitution: a comparative analysis between the drafting committees of the 2012 and 2014 Constitutions**

*Elaborando a Constituição egípcia:  
uma análise comparativa entre os  
comitês de redação das Constituições  
de 2012 e 2014*

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**Abstract:** This article analyzes the significant role the constitutional drafting committees of the 2012 and 2014 Egyptian Constitutions played in shaping Egyptian constitutionalism. It investigates how these committees were selected, along with their composition, their members' political backgrounds and legal expertise, their policies and aims as well as the contexts of the drafting of both constitutions. It also examines the written preliminary works of the drafting committees, as well as the video-recorded meetings. This article argues that a multi-level independent constitutional drafting committee composed of technical experts and lay people effectively facilitates the drafting of democratic constitutional provisions.

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**Keywords:** Legislative drafting. Constitutional drafting. Egyptian Constitution. Egyptian legal system. Constitution.

**Resumo:** O artigo analisa o papel significativo que os comitês de redação constitucional das constituições egípcias de 2012 e 2014 desempenharam na formação do constitucionalismo egípcio. Investiga como os comitês foram selecionados, juntamente com sua composição, os antecedentes políticos e os conhecimentos jurídicos de seus membros, suas políticas e objetivos, bem como os contextos de redação de ambas as constituições. Também examina os trabalhos preliminares escritos das comissões de redação, bem como as reuniões gravadas em vídeo. Este artigo argumenta que um comitê de elaboração constitucional independente multinível composto por especialistas técnicos e pessoas leigas facilita efetivamente a elaboração de disposições constitucionais democráticas.

**Palavras-chave:** Redação legislativa. Redação constitucional. Constituição egípcia. Sistema jurídico egípcio. Constituição.

**Summary:** **1** Introduction – **2** The drafting committees – **3** Building a constitutional democracy – **4** Conclusion (lessons learned) – References

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*A legislative drafter is the ultimate ghost writer.*<sup>1</sup>

## 1 Introduction

Egypt has written two constitutions in 2012 and 2014. It was claimed that the 2012 Constitution would reflect the ideology of the Muslim Brotherhood regime, that controlled both the executive and legislative branches in Egypt after the 25th of January 2011 Revolution.<sup>2</sup> A committee had been set up to draft a new constitution by the Egyptian parliament. This committee was struck down by a judicial decision due to the imbalance of its composition, that would lead to an improper representation of the wider Egyptian society.<sup>3</sup> However, a new committee was elected by the same parliament after the court decision, which did not resolve the issue of representation, and was dominated by Islamists (the Hundred Committee).<sup>4</sup>

The Muslim Brotherhood government was later overthrown in 2013, and one of the principal elements of reform after this change of government was to draft a new constitution which protects fundamental rights, prevents possible despotism, and strengthens checks and balances between the different branches of government. Drafting a constitution was the first priority declared by the Interim President, Chief Justice of the Supreme Constitutional Court, Adly Mansour. He ordered the

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<sup>1</sup> Paul Benjamin, a South African lawyer. In: KNIGHT, Philip. *The Role of the Constitutional Drafter: Thoughts on the Art of Expressing Constitutional Visions*. Constitution-making in Focus: Issue Paper. 2010.

<sup>2</sup> HAMZAWY, Amr; FAKIR, Intissar. Drafting Egypt's Constitution. *Carnegie Endowment for International Peace*. Washington, DC, 15 November 2012.

<sup>3</sup> SKY NEWS ARABIA. Egypt. The Judiciary Nullifies the (Constitution's Assembly). 10 April 2012.

<sup>4</sup> KIRKPATRICK, David D. Egyptian Islamists Approve Draft Constitution Despite Objections. *The New York Times*. 29 November 2012.

establishment of two drafting committees to amend the 2012 Constitution. The first committee's object was to focus on the technical aspects of the constitution, and was composed of ten legal experts: six judges, and four law professors (the Ten Committee). The second committee was composed of fifty members representing most sectors of the Egyptian society, to review the amendments of the technical committee, write the final draft, and present it before a public referendum (the Fifty Committee).<sup>5</sup>

The role of the constitutional drafter has a considerable influence on Egyptian legislation. The constitutional drafting committees of both the 2012 and 2014 Constitutions did not only implement certain policies from outside their committees, but they deliberately set policy themselves, and implemented their views and ideologies in the provisions of the constitutions.<sup>6</sup> Therefore, the constitutional drafting process has drawn vast attention, and caused wide controversy between the drafters. The Egyptian case demonstrates that the constitutional drafter is not just a drafter of the constitution's provisions, but is also a crucial player in the making process of these provisions: a player who will shape their core values and principles. Therefore, the drafter of the constitution would be the final maker of its content.

This article argues that a multi-level independent constitutional drafting committee composed of technical experts and lay people effectively facilitates the drafting of democratic constitutional provisions. Thus, this article will analyze the significant role the constitutional drafting committees of the 2012 and 2014 Egyptian Constitutions played in shaping Egyptian constitutionalism. It will investigate how these committees were selected, along with their composition, their members' political backgrounds and legal expertise, their policies and aims as well as the contexts of the drafting of both constitutions. This article will also examine the written preliminary works of the drafting committees, as well as the video-recorded meetings. It will further conduct interviews with members of the drafting committees to include their views on the drafting process.

## 2 The drafting committees

Both the Drafting Committee of Hundred that drafted the 2012 Constitution, and the Drafting Committee of Fifty that drafted the 2014 Constitution raised controversial issues in Egyptian society: the selection process, composition, policies and aims

<sup>5</sup> See: BROWN, Nathan J. Egypt's Daring Constitutional Gang of 50. *Foreign Policy*. Washington, DC, 20 September 2013, and TRAGER, Eric. Egypt's New Constitution: Bleak Prospects. *The Washington Institute for Near East Policy*. Washington, DC, 16 December 2013.

<sup>6</sup> For the role of drafters in policy making, see: STEFANOU, Constantin. Drafters, Drafting and the Policy Process, in STEFANOU, Constantin; XANTHAKI, Helen (eds.). *Drafting Legislation: A Modern Approach*. Ashgate, 2008.

were all widely debated. The following sections will analyze these issues and their effects on facilitating the establishment of a constitutional democracy in Egypt.

## 2.1 Selection

The Egyptian parliament, dominated by an Islamist majority, elected a drafting committee of a hundred members to draft a new constitution for Egypt after the 25<sup>th</sup> of January Revolution. The domination by Islamists of the parliament led to the establishment of a drafting committee which was also dominated by Islamists and therefore the Administrative Judiciary later held that the composition of this committee was void, and dissolved it. Afterwards, the same parliament elected another drafting committee of a hundred members, which was also dominated by Islamists, but this time this committee was supported by the president of the republic – the leader of the Muslim Brotherhood. He simply issued a constitutional declaration that immunized the new drafting committee from judicial review.<sup>7</sup>

Although the Hundred Committee was elected – a method which ensures a democratic process of selection – it was widely considered as unrepresentative. The domination of Islamists in the Hundred Committee, along with their dominance of both the executive and legislature, excluded many citizens' perceptions on the most important issues that would shape their future. Despite this, the Muslim Brotherhood stressed that they would draft a constitution for all Egyptians.<sup>8</sup>

On the other hand, the Interim President, Chief Justice Adly Mansour took another approach to drafting the Egyptian constitution. First, he appointed a technical committee of ten experts to propose amendments to the 2012 Constitution, and secondly, appointed another committee of fifty members selected from various sectors of the Egyptian society to review the experts committee's proposed amendments.<sup>9</sup>

The selection process of both the Ten and Fifty Committees was criticized, because they were appointed, while the Hundred Committee was elected by the parliament. Although, the method of appointment is undemocratic, the Ten Committee was a committee of experts not politicians, and therefore had only a technical job which did not require representation. Also, despite not being democratically elected, the Fifty Committee was representative of most sectors of the Egyptian society. Furthermore, the Interim President who appointed both of the committees, was the Chief Justice of the Supreme Constitutional Court, and did not belong to any political party or group. However, it could be argued that if - at least – the Fifty

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<sup>7</sup> Op. cit.

<sup>8</sup> CHICK, Kristen. Why is Egypt's Draft Constitution so Controversial? *The Christian Science Monitor*. 30 November 2012.

<sup>9</sup> Op. cit.

Committee was elected by a public vote, it would have ensured the independence of the members and the democratic method of their selection.

## 2.2 Composition

In comparing the Hundred and Fifty Committees, it is clear that the first was composed of a majority of Islamists (70%), that did not allow any alternative vision, which led to the resignation of many members of the drafting committee, and allowed them to dominate drafting process. In contrast, the judiciary, the armed forces, Al-Azhar (the formal Islamic institution in Egypt) and the Church, political parties and figures, the young and women, were all represented in the Fifty Committee. “[I]f we compare the representation of the various Egyptian political and social movements in both the 2012 Constituent Assembly and the 2013 draft Constitution’s Committee of 50, we find that the latter had a better representation of Egyptians.”<sup>10</sup> In Addition, “[t]he representation of social forces including women, youth and Copts was better in the Committee of 50. The latter included 10% women (5 out of 50), while the Constituent Assembly of 2012 included 7% of women (7 out of 100). The youth category also had a 10% representation rate in the Committee of 50, and the Copts had a 6% representation rate.”<sup>11</sup>

The circumstances of drafting the 2012 Constitution, led to it being known as the Muslim Brotherhood Constitution, and was one of the reasons this Constitution was amended after the 30<sup>th</sup> of June 2013.<sup>12</sup> The Hundred Committee deepened polarization, and damaged social consensus, by marginalizing civil and liberal voices, as well as religious minorities, and left Egypt more divided than ever before.<sup>13</sup>

On the other hand, the Fifty Committee could be criticized because it did not include Muslim Brotherhood members, and excluded them from the political scene. A counter argument might be that the Fifty Committee included two Islamists: one of them from the Nour Party (the Salafist movement), and the other one (Kamal Al-Helbawy) was a former member of the Muslim Brotherhood. However, this could also be denied, because he was no longer a member of the Muslim Brotherhood, and had broken away from its ranks. Having said that, it can be considered that the Fifty Committee included most sectors of the Egyptian society, except the Muslim Brotherhood.

<sup>10</sup> EL CHAZLI, Fattouh. Egyptian Constitutional Drafting: A Comparative Review. *Legal Agenda*. 31 December 2013.

<sup>11</sup> Ibid.

<sup>12</sup> LANSBERG-RODRÍGUEZ, Daniel. An Obituary for the Egyptian Constitution, Dec. 26, 2012-July 3, 2013. *Foreign Policy*. Washington, DC, 4 July 2013.

<sup>13</sup> HELLYER, H. A. A Better Egyptian Constitution. *Foreign Policy*. Washington, DC, 6 December 2012.

Another criticism of the Fifty Committee is that it represented state institutions not the citizens in its composition, as it included representatives of Al-Azhar, the Coptic Church, the military, the police, the unions, the lawyers, etc. However, it can be argued that the problem that the 2014 Constitution needed to address after the 30<sup>th</sup> of June 2013, was to build powerful state institutions, that would prevent future individual despotism, by creating an effective system of checks and balances, limited government, and independent judiciary. Furthermore, the inclusion of political parties and movements has advanced the protection of liberties and fundamental rights. Evidently, the Fifty Committee was inclusive in its composition, and none of its members withdrew or encountered a hostile drafting process, as occurred with the Hundred Committee of the 2012 Constitution.<sup>14</sup>

## 2.3 Policies and aims

With regard to the Islamist domination of the Hundred Committee, the “Islamic” issue was top of the drafting agenda. Defining the role of Islamic jurisprudence and an Islamic model of politics in the constitutional text, was one of the main aims of the Hundred Committee. Both groups: the Muslim Brotherhood, and the Salafists, had their own concept of Islamic rule, and wanted to mould the constitutional draft to suit their concepts. On the other hand, the liberal movement, alongside the Christian minority – which were minimally represented – sought a civil state, not restricted to the narrow concept of Islam of some Islamic group. The Hundred Committee’s policy was criticized as it could allow the rise of a theocratic state, more suited to the Middle Ages.<sup>15</sup>

The other pressing issue for the Hundred Committee was the reform of the political system, according to the demands of the 25<sup>th</sup> of January 2011 Revolution. Although the drafting committee followed the model of the 1971 Constitution, it did incorporate provisions that limited the power of the executive branch and added further guarantees of fundamental rights.<sup>16</sup>

A state of controversy prevailed over the debates between the drafters of the Hundred Committee, and reaching a consensus became impossible. Many of the arguments inside and outside the drafting process were not directed at the provisions of the draft constitution, but more about criticism of the drafting process that had been hijacked by the Islamists.<sup>17</sup>

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<sup>14</sup> AL-ALI, Zaid. Egypt’s Constitutional Morass. *Foreign Policy*. Washington, DC, 23 August 2013.

<sup>15</sup> HUSSEIN, Abdel-Rahman. Egyptian Assembly Passes Draft Constitution Despite Protests. *The Guardian*. 30 November 2012.

<sup>16</sup> BROWN, Nathan J. Still Hope for Egypt’s Constitution. *Foreign Policy*. Washington, DC, 1 October 2012.

<sup>17</sup> Interview with Yusuf Auf, Constitutional Expert and Board Member of the Arab Association for Constitutional Law ‘Telephone Call’. 1 July 2018.



The appointment of both the Ten and Fifty Drafting Committees by the Chief Justice of the Supreme Constitutional Court, freed the drafters from any prior agenda, except their own values and views, and contributed to forming a more independent committee of drafters. Hence, the main task of the Ten Committee was to propose the preliminary amendments to the 2012 Constitution, and to function as a technical body to fix the constitution's legal defects. The ten experts agreed to draft a short text that provided principles and guidelines, and criticized the 2012 Constitution regarding its ambiguous wording in some sections as well as its disputed provisions, such as the provisions that added an Islamic quality to the political and legal regime.<sup>18</sup> This could be criticized as the political system in Egypt then was not stable after various upheavals and changing of governments, and the need for a long constitution which clarifies the rules was essential. In contrast, this could be opposed by saying that the constitution's object is to propose guidelines, and to leave the details to legislators.<sup>19</sup> By its turn, it can be argued that many of the modern constitutions are very complex, and what Egypt urgently needed was to set up a defined constitutional system.<sup>20</sup>

On the other hand, the Fifty Committee aimed at building powerful institutions and preventing the hegemony of religious groups over the Egyptian state in the future. The fact that there was no elected executive or legislature in Egypt at the time of drafting the constitution allowed the drafters some leeway. This paved the way for constructive debates and allowed for drafting a balanced and democratic text. Therefore, the main aim of the Fifty Committee was accomplished, by reforming the constitutional system and providing for powerful institutions that would protect the Egyptian identity from individual despotism.<sup>21</sup> On the other hand, the drafting process of the 2014 Constitution could be criticized as there was no coordination between both of the committees, whereas the Fifty Committee worked on the draft constitution from scratch, and only used the Ten Committee draft for guidance.<sup>22</sup>

### 3 Building a constitutional democracy

According to the previously mentioned aims of the Fifty Committee. It focused on drafting constitutional provisions that prohibit the establishment of political parties on religious grounds, for the sake of preventing future religious rule.

<sup>18</sup> The Preliminary Works of the Ten Committee. (in Arabic).

<sup>19</sup> When this issue was discussed at the meetings of the Ten Committee, Judge Aly Awad, argued that: "Having a good or a bad constitution, depends on the will of who implements it." That is why, in his view, a long constitution is not needed.

<sup>20</sup> For example, see: the Indian and Brazilian Constitutions.

<sup>21</sup> Interview with Mona Zulficar, Member of the Fifty Committee of Drafting the Egyptian Constitution of 2014 'Telephone Call'. 30 June 2018.

<sup>22</sup> The Preliminary Works of the Fifty Committee. (in Arabic).

Furthermore, the Fifty Committee implemented a genuine model for fundamental rights, by allocating a fixed percentage of the Gross Domestic Product (GDP) for the health, education and research sectors. Due to the lack of women participating in the state institutions, the Fifty Committee drafted constitutional provisions that obliged the state to ensure the representation of women in all institutions, without discrimination. With regard to the previous practices of banning public freedoms, the Fifty Committee drafted provisions that demonstrate the freedoms of media, research, unions and labor syndicates. Accordingly, a novel provision was drafted in the 2014 Constitution for the first time in Egyptian constitutionalism: it facilitates the protection of fundamental rights, and reads as follows: “Rights and freedoms of individual citizens may not be suspended or reduced. No law that regulates the exercise of rights and freedoms may restrict them in such a way as infringes upon their essence and foundation.”<sup>23</sup>

With regard to the Fifty Committee’s vision of building strong state institutions and proposing a political system which ensures the balance between the government branches, the drafting committee provided for a semi-presidential system. The vision of the drafters then was to create a system which grants the parliament oversight powers over the executive to prevent individual despotism, but also grants the executive considerable oversight powers over the parliament to prevent despotism by groups, which was meant to work as a barrier against political Islamic groups. On the other hand, the drafters of the 2014 Constitution provided for a more independent and powerful judiciary. However, these provisions were not inviolable, so that later in 2017 the parliament issued a law which allows the president of the republic to participate in the appointment process of senior judges.<sup>24</sup> This law is currently in front of the Supreme Constitutional Court, on the ground of unconstitutionality, and was opposed by the judicial bodies and institutions, as it represented a threat to judicial independence. On the other hand, the drafting committee provided for a provision which could prevent future despotism by making amendments to the constitution very difficult. This provision states that: “In all cases, texts pertaining to the re-election of the president of the republic or the principles of freedom and equality stipulated in this Constitution may not be amended, unless the amendment brings more guarantees.” Although this newly introduced provision to Egyptian constitutionalism protects democratic rule, it could be criticized as it might be circumvented by artful argument, and that it is not effectively drafted. Despite that this provision limits the president to two terms in office, the provision itself is not

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<sup>23</sup> Article 92.

<sup>24</sup> Law Number 13 for Year 2017, Amending: The Administrative Prosecution Institution Law Number 117 for Year 1958, The State Cases Institution Law Number 75 for Year 1963, The Judicial Authority Law Number 46 for Year 1972 and The State Council Law Number 47 for Year 1972.

immune to change, and could be amended according to the normal procedure of constitutional amendment.<sup>25</sup>

## 4 Conclusion (lessons learned)

This article has analyzed the significant role the constitutional drafters play in shaping Egyptian constitutionalism, and the consequences of the process of their selection and composition, along with their own policies and visions. It could be argued that constitutional drafters in Egypt are not usually chosen for their drafting and constitutional expertise, but rather their ideological affiliations. The exception with the 2014 Constitution, is that it was drafted in a multi-level process, where both technical and popular committees have worked towards its drafting. Finally, there are lessons to be learned from the drafting processes of both the 2012 and 2014 Constitutions, which might aid future constitutional drafting in Egypt.

1. The constitutional drafter in Egypt is a very critical player in formulating the constitution, that is why the election of constitutional drafting committees is a better method for their selection. However, as learned from the 2012 Constitution experience, this election should be open to the public, and not limited to the parliament, as it might be dominated by one party or group.
2. The constitutional drafting process is not seen in the eyes of the public as only a technical issue, but also as an issue of representation. That is why the drafting committee should be inclusive, not dominated by one party, group or institution, and embrace most sectors of the society.
3. Although women were better represented in the Fifty Committee, than the Hundred Committee, and were not at all represented in the Technical Committee of Ten, women need to be better represented in the constitutional drafting process, as some countries allocate fixed quotas for their representation.<sup>26</sup>
4. The coordination between the drafting committees in the multi-level drafting process should be ensured, as the Fifty Committee did not rely on the amendments proposed by the Ten Committee, and embarked upon the drafting process from the very beginning.
5. The three drafting committees of Hundred, Ten, and Fifty, left critical provisions to be decided by ordinary legislation, ending these provisions

<sup>25</sup> ABDELAAL, Mohamed. Entrenchment Illusion: The Curious Case of Egypt's Constitutional Entrenchment Clause. *Chicago-Kent Journal of International and Comparative Law*, 2016.

<sup>26</sup> See: the Eritrean and Iraqi cases, in: INTERNATIONAL IDEA. *Discussion Paper: Selecting the Members of the Constituent Assembly – Comparative Experiences and Learned Lessons*. In Arabic. 2012.

by the wording: “according to the law.” The two theories of either drafting a long constitution which illustrates significant procedures, or drafting a short constitution which only provides principles and guidelines, have raised wide debate between the drafters. With regard to the Fifty Committee, they already opted for a long procedural constitution, however, they abandoned some significant procedures to be regulated by the legislature. Constitutional history in Egypt shows that the legislature has abused its power, regarding such open provisions. Therefore, the drafting of some of these provisions was not effective enough,<sup>27</sup> and there have been various lawsuits in front of the Supreme Constitutional Court, on the ground of unconstitutionality, based on this very issue.

## Table of Legislation

The Constitution of the Arab Republic of Egypt, 1971.

The Constitution of the Arab Republic of Egypt, 2012.

The Amended Constitution of the Arab Republic of Egypt, 2014.

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<sup>27</sup> See: Helen Xanthaki’s concept of effectiveness in: XANTHAKI, Helen. On Transferability of Legislative Solutions: The Functionality Test. In: STEFANO, Constantine; XANTHAKI, Helen (eds.). *Drafting Legislation: A Modern Approach*. Ashgate, 2008.

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## Interviews

Interview with Mona Zulficar. Member of the Fifty Committee of Drafting the Egyptian Constitution of 2014 'Telephone Call'. 30 June 2018.

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