

Keynote Address

Women and Justice in the Egyptian Constitution: A Reading from within

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Do constitutions safeguard the rights of women? What is the importance of constitutions in the context of defending women's rights? These questions are often raised within the framework of gender studies and organizations calling for women's rights. Why is this the case? There are three considerations to bear in mind. First, there is the critique aimed at liberal feminism, on the grounds of the latter's excessive focus on reforming and amending laws to secure women's rights, while ignoring, to a large extent, the prevalent authoritative system and social norms which can obstruct the implementation of just laws that are beneficial to society. This can lead to unanticipated results that may not necessarily be in the interest of women and may not achieve the expected goal. The second consideration is connected to the feminist debate on "the politics of rights", particularly the argument that implicates rights discourses in ideological struggles among conflicting world powers, making these discourses a source of conflict and doubt especially in southern countries. These countries often feel targeted because of the vagueness of world standards that are implemented in this context and because of the double standards applied by the global community. The third consideration is related to a cynical view of the possibility of implementing the laws and constitutional standards in a state of legal anarchy and an explosive situation in the Arab region as a whole.

I was appointed member of the 50-Committee in 2013 which drafted the Egyptian Constitution, endorsed in a referendum in January 2014, after the suspension of the Constitution of 2012, drafted by a constituent committee with an Islamist majority. I will share a few reflections and analysis of my experience in the 50-Committee, where I will attempt to answer some questions posed to feminist researchers and activists on defending women's rights and changing the cultural patterns antagonistic to women in societies. I will also tackle questions on the limits of the legal framework, the relationship between feminism and power, and on effective negotiation techniques.

In general, the majority of the commentaries or studies pertaining to constitutions will focus on the composition of articles and the philosophical framework, i.e. on the text itself. Analytical studies of constitutions always assume the presence of a well-defined approach, a ruling logic and a clear and consistent philosophy, and rarely pay attention to other influential variables, such as the historical development of the constitutional heritage in a given country, the prevailing context at the time of drafting, or incidental and circumstantial factors which might influence the drafting of a certain article

(see Brown, 1997). Here, I will not focus on the constitutional text, but rather on the process that determined the direction of texts, on what lies behind, or beyond the text. I will shed light on the negotiations, and highlight the balance of power which had a significant effect on the final constitutional product. My goal here is to cover two levels: The first is academic where I engage with feminist literature on ways to achieve gender-based justice. The second goal is to contribute to activist literature in the field of women's rights.

This presentation is divided into two parts: first, I will shed light on the contemporary historical context within which the Egyptian Constitution of 2014 has been drafted and offer some brief glimpses of the history of Egyptian women's attempts to amend constitutional texts related to women; second, I will focus on Article 11 of the Constitution, known in the media as the "women's article". I will share my experience regarding its drafting stages, the amendments it was subject to and the factors that intervened and led to the final wording of the article.

The Historical Moment: Challenges and Opportunities

The Egyptian Constitution of 2014 includes a set of fundamental principles governing the relationship between the state and citizens. Similar to other constitutions, it reflects the balance of power in society at a given moment in history. I will allow myself to generalize by saying that, at the time of drafting the Constitution at the end of 2013, there were four main powers on the ground: the Higher Council of the Armed Forces, the various Islamist powers, businessmen networks within the ruling or oligarchic elite, and the revolutionary movements, or the voices for change who were keen on laying the pillars of a justice-based Egyptian State. The constitutional text reflected the balance of powers among these groups in a consensual text, which, inevitably, did not meet all the expectations or desires of all parties involved.

The historical moment during which the Constitution was drafted, starting from September 2013 until December 2013, one year after the rule of the Muslim Brotherhood and in the wake of myriad failures and lost opportunities, was marked with divisions and unprecedented bitter partisanships within Egyptian society. It was characterized by an atmosphere of fear (real or imaginary) of seeing the country slip into mass chaos; a destructive economic deterioration; the rise of a theocracy or another dictatorship in the name of religion, the beginnings of an Islamization of the State and the alteration of its identity; the spread of regional wars in Iraq, Libya and Syria; and an increased sense of frustration and despair amongst large sectors in society. The moment was marred by political conflicts that turned into violence on the ground, including a conflict with extremist groups in Sinai, and a moral stalemate that was counter-balanced by a state of collective hysteria following the tragic carnage that took place in Rabi'a Square on August 14, 2014. The situation grew even more complicated because of the return of many figures from the former regime to the forefront of the political scene after having vanished for a significant period of time. That period was also characterized by the rise in the popularity of the Armed Forces, and the rise to power of then-Minister of Defence and Field Marshal Abdel Fattah El-Sisi, portrayed as the savior and protector of the Egyptian State. This period was also characterized by the launch of a widespread media campaign against the revolution and the voices for change: the "revolution" was made to carry the

burden of responsibility for the deteriorating economy, the poor living conditions and the collapse of security. Gradually, ordinary people came to harbor feelings of anger and resentment towards the idea of revolution, change or protest. "Stability" became the new ideal and was used, among other things, in opposition to ideas of change and revolution.

The year 2013 was radically different from 2011. In 2011, the voice of the revolution and change was louder and stronger; it had a clear goal that rallied most participants within political movements, while the old networks of interests, the corrupt oligarchy, were at their weakest. Had the Constitution been written in 2011, it would have certainly been different.

Notwithstanding, the revolution opened up new spaces in the public sphere for action and for the organization and launch of political, cultural and legal initiatives. Perhaps the greatest achievement of the revolutionary wave in Egypt was the restoration of confidence in the agency of Egyptians and their ability to make change happen and to contribute to political decision-making. The relationship between citizens and the political domain was reformulated and attitudes of apathy, indifference, and alienation, were replaced by a deep interest in political affairs. It is important to mention the entry of a large number of young people into political life and political parties. The political arena also welcomed a large number of young women and numerous platforms were open for them to speak up and express their views. Over and above, new alliances were forged and new powers and associations came into the limelight. One of the main gains of the revolutionary movement was the proliferation of talent and creativity in the shape of numerous theatre performances, songs, comedy shows and graffiti; all these are forms of cultural expression associated with the voices of freedom calling for change and dreaming of a better society.

The Legal Context

In addition to the political context, it is important to take into consideration the legal context. The textual starting point was key in determining the direction and wording of many articles. The 50-Committee was entrusted with modifying the 2012 constitution written by an Islamist majority, elected by the *Shura* Council that was then totally dominated by Islamists. The starting point was a draft document produced by a committee of 10 experts who were commissioned by the 30th of June alliance to rework the 2012 constitution with the purpose of producing a working draft to support the work of the 50-Committee. The expert committee comprised six senior judges appointed by the Supreme Constitutional Court, State Council and Court of Cassation, and four professors of constitutional law appointed by the Supreme Council of Egyptian Universities. The expert committee completed their task in one month and submitted a draft document to the appointed 50-Committee.

Although the formal starting point of the 50-Committee was the working draft written by the committee of 10 experts, the 2012 Islamist constitution was the *de jure* document that was being revised and modified and constituted a key stumbling block. Why? The 2012 Islamist majority constitutional assembly, in its attempt to take control of the state and society resorted to two strategies. First, it introduced articles that worked towards the Islamization of society by making the state the guardian of

morality, both in the public and private spheres. The most famous example of their attempt to ensure control over society was the insertion of the famous/infamous article 219 which opened the door for the enactment of orthodox and radical interpretations of *shari'a* in laws. Second, it allocated privileges and powers, to specific interest groups, to garner their support and allegiance. The 50-Committee was forced to contend with interest groups who battled to retain the benefits gained in the previous constitution. It also struggled to minimize the theocratic character of the previous document.

On another level, the Constitution of 2012 had another unintended, arguably positive impact on the 50-Committee. In 2012, following the lengthy and numerous negotiations and deliberations among civil society organizations working in the field of women's rights, the Constituent Assembly, with its Islamist majority, deleted the article stipulating equality between men and women and did not oblige the State to fight discrimination against women within society and State institutions. This sparked concerns regarding the status of women's rights in general and the gains achieved by Egyptian women in the twentieth century. Furthermore, these fears, real or imagined, for the situation of women in 2012 tipped the balance in favor of women's rights in the 50-Committee when Article 11 was discussed.

The constitution of the 50-Committee attempted a broad and diverse representation of various interest groups in society. Thirty-eight members represented institutions to which they were either appointed or elected: heads of professional syndicates, labor and farmers unions, trade unions, writers and artists unions, student unions (elected by their constituencies); national councils of human rights, women, children and the disabled (appointed); 8 representatives of political parties (elected by their parties); religious institutions, 3 for al-Azhar and 3 representing Egyptian Churches; one representative of the police and one representative of the army; and 10 public figures appointed by the cabinet to ensure expertise as well as the representation of marginalized groups.

Although the task of the 50-Committee was limited to amending the Constitution of 2012, the final product had numerous additions: of the total 247 articles, 105 were not amended and remained unchanged; 96 were amended; and 46 new articles were added, most of which related to civil rights and freedoms. The amendment of the Constitution was achieved in 60 working days as per the Constitutional Declaration. The final draft was submitted to the acting President of the Republic, Adly Mansour, on December 3, 2013, and the new Constitution was adopted by a popular referendum on January 14, 2014: 39 percent of the citizens entitled to vote participated and 98 percent of them approved it.

Women and Legal Reforms in Constitutions: An Ongoing Battle

This section will present some significant examples from history showing the struggle of women to protect their rights within Egypt's constitutions. Legal reform was one of the most distinguished aspects of work by the advocacy groups defending women's rights in the twentieth century. Malak Hafni Nassef, Hoda Shaarawi, Nazira Zain Eddine, May Ziade, Labiba Hachem, all tried, in different ways, to call for a change of laws and constitutions in favour of women's rights. In 1956, Egyptian women gained the right to vote, the right to equality at work and in education, along with numerous

other advantages in the public sphere, which contributed to the improvement of the situation of women in society. However, these reforms did not cover personal status laws that organize women's lives in the private sphere. This led to a strange and contradictory situation where women enjoyed their rights in the public sphere but remained subjugated to their male family members in the private sphere.

The 1970s witnessed several initiatives aiming at amending personal status laws. These initiatives coincided with the first International Conference on Women in Mexico in 1975, sponsored by the United Nations. Dr. A'icha Rateb, Professor of Law at Cairo University and Minister of Social Affairs from 1971 to 1977, launched a reform initiative. The Family Organization Association in Cairo, led by Aziza Hussein, a civil society activist, launched the second initiative. Committees of experts drafted the two initiatives; however, these did not find their way to Parliament, as they faced fierce campaigns claiming to protect family values.

In 1979, the Parliament approved, in an extraordinary session, Law no. 44 with the majority of its clauses based on previously submitted draft laws. This law stipulated that the husband must inform his wife in case he wished to marry another woman, and gives the wife the right to ask for a divorce within a year after being so informed, without the need to prove damages. The law gave the mother who has custody of her children the right to stay in her marital house and solved the massive social problems caused by the housing crisis Egypt was witnessing. In 1984, the Higher Constitutional Court declared Law no. 44 of 1979 unconstitutional on procedural not substantial grounds. When the news about the revocation of Law no. 44 spread, a group of women formed the Committee to Defend Women and Families, which convened at the headquarters of the Hoda Shaarawi Association. The Committee announced its meetings in the newspapers and mobilized women from different classes and orientations to call for the passing of a new law that preserves the interest of women and families. Many attacks and accusations were levelled against the Committee, but it succeeded in shedding light on discrimination against women within the law. Additionally, the Committee submitted multiple practical and specific suggestions to the Council of Ministers. The Committee also benefited from the approaching second International Conference on Women in Nairobi in 1985 and the bad publicity surrounding the decision of the Higher Constitutional Court.

A new law was issued in 1985, but it contained some concessions to the benefit of conservatives as it stipulated that the first wife must prove damage in order to get divorce in case her husband marries another woman. Feminist activists criticized these concessions. However, this struggle gave the women's liberation movement a new impetus and paved the way for the emergence of new feminist rights associations in the second half of the 1980s. Activism in the field of constitutional law had, and continues to have, an important effect in calling for change. For example, activism in this field continued, into the last decade of the twentieth century, and led to important amendments in 2000 – the most important of which is known in the media as the *khula'* law (wife-initiated divorce under Islamic law).

In March 2011, in the aftermath of the Egyptian revolution, a coalition of feminist organizations was established, *Majmu'at an-nisa' wal dustur* i.e. the Group of Women

and the Constitution, and feminist and human rights organizations coordinated efforts for an effective participation in drafting the new Constitution of Egypt. The emerging coalition exploited the revolutionary momentum and the high expectations to raise awareness concerning women's issues and the discrimination they are subjected to. It started working seriously on drafting specific articles of the Constitution, in addition to adding remarks on the form and the methodology of the Constitution as a whole in preparation for the actual Constitution drafting process. The Group issued a working paper presented by the Constitution Committee demanding a fair political quota for women. The Group interacted with the Constituent Assembly in charge of drafting the Constitution of 2012, submitted suggestions, and attended hearing sessions.

It is to be noted that female members of the Group wrote opinion articles, organized discussions and workshops, and cooperated with other groups in order to draft the Constitution, such as the “*yalla nektib dusturna*” group (“Let’s Draft Our Constitution”) group. These efforts did not lead to positive results for numerous reasons, the most important of which were the bias of the Islamist Constituent Assembly against women's issues and the prevalence of a religious political discourse promoting ideas that were hostile to the presence of women in the public sphere. Following the adoption of the Constitution of 2012, the Group performed a critical reading of the Constitution from a gender perspective. In 2013, in cooperation with other feminist groups and organizations, all these feminist groups interacted with the 50-Committee, either through direct ties with its members or by sending suggestions and texts.

The Story of Article 11

To shed light on the complexities of gender policies in Egypt, I recount here the story of Article 11. Article 11 in the Constitution of 2014 states:

The state commits to achieving equality between women and men in all civil, political, economic, social, and cultural rights in accordance with the provisions of this Constitution.

The state commits to taking the necessary measures to ensure fair representation of women in the houses of parliament, as set forth by law. It grants women the right to hold public posts and positions in the higher administration in the state, and to appointment in judicial bodies and entities without discrimination.

The state commits to the protection of women against all forms of violence, and guarantees a woman's ability to reconcile her duties toward her family with her work requirements”.

Article 11 saw a fair share of debate and negotiations as it was caught up in ideological and power conflicts. Battles were fought, alliances were forged, and compromises were made to reach consensus on a text that promotes justice and guarantees women's rights.

The first version of the article deleted the expression “in a manner that does not go against the provisions of the Islamic *shari‘a*”, which appeared in the article on gender equality in the Constitution of 1971. The representative of the *Salafi* Nur Party opposed that deletion, as did the conservative group within the Committee and some members of the Committee of ten experts. A compromise was reached by inserting “as set forth by this Constitution”. This expression allows for different interpretations.

A conservative interpretation will refer to Article 2 of the Constitution, i.e. that the Islamic *shari'a* is the main source of legislation, while a liberal interpretation will refer to articles on rights and freedoms, as well as to Article 53, which bars discrimination on any ground and which specifically mentions gender-based discrimination.

The first version bound the state to guaranteeing “fair” representation in Parliament. Once again, the word “fair” was met with objection from the conservative group because it may be interpreted to mean that the state is bound to guarantee 50 percent of the seats for women. Within the drafting committee, the word “fair” was replaced with the terms “appropriate” and “balanced”. Even so, this amendment was not accepted, and the conservative wing, which included both Islamists and non-Islamists, insisted again on removing the term “balanced”. The middle ground here consisted of maintaining the term “appropriate” and removing “balanced.” Although the article does not guarantee concrete positive discrimination measures to ensure women’s political participation, the word “appropriate” remains the first step towards achieving a quota for women in Parliament.

The issue of stating a specific gender quota was a source of debate and tense conflicts within the 50-Committee. The Committee adopted a quota of 25 percent of seats within local councils for women, and 25 percent for young people (while guaranteeing 50 percent representation for workers and farmers). Agreeing on a quota for women and young people in local councils was much easier than agreeing on one for the Parliament, on the grounds that local councils are venues for training and capacity building for future generations of politicians and social activists. As for the battle for representation within the Parliament, the centre of power and authority, it was much more difficult. A group within the 50-Committee tried to allocate 30 percent of the Parliamentary seats to women. This suggestion failed to garner the approval of the majority of the committee members for different reasons.

It is worth noting that objections to specifying a quota for women in parliament were not based only on prejudice against women. There was, of course, a level of bias against women, as some members raised questions about women’s readiness and capacity to take on higher positions. One reason for the refusal of the quota was linked to the misuse of the quota in the pre-revolution times, and the fact that it was employed to tighten the grip of the ruling regime over Parliament. The unfortunate legacy of quotas in Egypt created a hostile atmosphere to the whole issue – a hostility that easily resonated amongst large sections of society. Another reason that lay behind objections was a sort of misunderstanding or a lack of knowledge of the meaning of positive discrimination; some insisted that it was a form of discrimination that went against the principles of equal opportunities and equality. This position ignored the important function of positive discrimination measures, which are invariably aimed at compensating marginalized groups for historical discrimination suffered by them, as a necessary step towards achieving equality. However, the most important reason that impeded an agreement on a gender quota was the idea that quotas for women and other social groups would have specific implications for the electoral system, especially for the first electoral round after June 30th.

To explain, the 50-Committee was entrusted with the task of designating the electoral system for the first round of parliamentary elections following the adoption of

the Constitution. The choices were as follows: proportional list systems, individual candidacy systems, or a mixed system that combined the two. Most parties (especially the main political parties founded after January 25, 2011) agreed that the proportional list system was the best way forward in helping to create a political climate in which parties can compete based on an announced program and orientations that allow voters to choose as they see fit, especially given that the new Constitution increased the powers of the head of the Parliament. In parallel, the trend within the state and its institutions leaned towards the individual system, claiming that the list system, and what it entailed in terms of vast electoral circumscriptions, would allow Islamists to take over the Parliament, due to their organizational and financial strengths, particularly in light of the relative financial and organizational weaknesses of the new parties. It was a complicated issue that led to serious conflict. But the important thing here is that it negatively affected the possibility of introducing particular percentages for women in the Constitution. Some members, who were not necessarily against a quota for women, but were advocates of the individual system instead, joined their voices to this opinion.

Finally, one of the key obstacles that hindered the introduction of positive discrimination measures in favor of women in the Constitution, was the disagreement about whether to keep allocating a 50 percent quota to workers and farmers within the Egyptian Parliament. The quota for workers and farmers first came into force in 1964, and aimed at widening the political participation of society's weakest categories. However, there is consensus that it did not meet its goal over the last fifty years; however, for political reasons, no government dared to cancel it. The 50-Committee voted to cancel the 50 percent quota for workers and farmers during a boisterous and highly contentious session. Nevertheless, for political and ideological reasons, some members insisted on including a transitional article in the Constitution, preserving the 50 percent quota for one round, in order to guarantee the support of these groups during the referendum, especially amidst multiple objections raised by the representatives of workers and farmers, joined by Nasserist members. This political position considered the quota to be an inalienable historical right. Therefore, those members opposed the allocation of a quota for women, or any other category, claiming that the 50 percent quota of workers and farmers could not be maintained if other quotas were to be allocated to other groups.

Groups that supported women's rights within the Committee tried to reach a consensual decision to allocate a reasonable quota for women, taking into account other marginalized categories of Egypt's political life. They suggested the following: that 20 percent of the seats would go to workers and farmers, that 20 percent to women, and 10 percent to Copts. This suggestion was met with some approval, but also with some staunch opposition. It was further discussed, voted upon, approved, and then withdrawn. Eventually, the final result was that no quotas were assigned to women or to any other category.

It is worthy of note that the section of the article requiring the state to fight against violence against women did not generate strong opposition. Feminist groups fought long and hard for years on end for the introduction of a law that criminalizes violence against women in the public and private spheres. Our endeavors were always met

with fierce opposition, in which arguments of religion, tradition, and other flimsy reasons were brandished. In 2013, and thanks to the efforts and activism of women's rights groups working on violence against women, in addition to the revolutionary movement that opened up new political spaces for discussing social issues that were taboo for a very long time, members of the 50-Committee agreed to commit the state to combating gender-based violence.

The final text of Article 11 includes the right of women to hold high positions and be appointed to judicial bodies. The insistence on excluding women from appointments to all judicial bodies was due to a persistent prejudice among members of the judiciary who rejected off hand accepting women's applications to join. The 50-Committee succeeded in making the state commit to ensuring women's access to judicial bodies.

Final Remarks

Going back to the debate around the usefulness of constitutions in achieving justice for women, there is no doubt that constitutions in themselves do not achieve justice; rather, they set the political climate that would foster the process of bringing about justice. As a test for the new Egyptian Constitution, a number of female graduates of the faculty of law applied for the position of Assistant Delegate at the State Council, a first step on the employment ladder of judicial bodies. The Council employees refused to receive their documents, claiming that the applications were restricted to male candidates. This refusal instigated condemnation by all women's rights organizations, and a confrontation took place between the President of the National Council for Women and the President of the Judicial Council. The female candidates' applications were finally accepted, but the confrontation was not resolved. Introducing new laws requires societies, advocates, and activists to monitor state institutions in order to guarantee that these laws are implemented.

Despite the difficulties that can impede the implementation of constitutional principles, the conflicts and debates revolving around the implementation of laws actively contribute to the spread of awareness and mobilization, and the need to lobby decision-makers to respect the rule of law. Many issues were raised during the drafting process of the Egyptian Constitution of 2014. These were related to civil liberties, the rule of law, and the independence of institutions from the executive power. Perhaps these causes were not resolved as desired in order to reach a truly democratic society, but discussing them led to the expansion of public debate, creating awareness about important issues that were not seriously dealt with in the past. There is consensus amongst women's rights activists that the 2014 Constitution is a step in the right direction.

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